

## **ABUSE, HARASSMENT, AND DECEPTION: HOW THE FDCPA IS FAILING AMERICA'S ELDERLY DEBTORS**

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*The consumer-credit industry is booming in the United States. Due to the deregulation of the consumer-credit market, it has become easier for Americans to obtain credit, and thus, accumulate debt. Along with this debt often comes abusive, harassing, and deceptive practices by debt collectors. The nation's elderly are particularly vulnerable to such practices. Although the Fair Debt Collection Practices Act (FDCPA) was enacted in 1977 to protect consumers from abusive debt-collection practices, the elderly continue to receive unjust treatment from debt collectors.*

*In this Note, Mr. Matthew Ludwig analyzes the current state of the debt-collection industry as it relates to the nation's elderly. In doing so, Mr. Ludwig examines its history and the abusive practices that led to the passage of the FDCPA. Finally, Mr. Ludwig offers several suggestions to decrease the amount of abuse experienced by the elderly at the hands of debt collectors, including congressional amendment of the FDCPA to require greater consumer awareness of their debtor rights, increased regulation of collection-agency practices, greater penalties for violations, and increased financial education of the elderly.*

### **I. Introduction**

In November 2005, a debt-collection agency obtained a seemingly ordinary court order freezing the assets of

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Judith Guillet.<sup>1</sup> Ms. Guillet was a fifty-seven-year-old retired nurse on full disability due to fibromyalgia (a disorder including muscle pain and fatigue).<sup>2</sup> The debt collectors could not, and were not required to, prove the underlying debt was valid.<sup>3</sup> In fact, the underlying debt of \$2,300 had not been incurred by Ms. Guillet.<sup>4</sup> Because her assets were frozen, she could not “pay [her] rent, buy food or pay [her] electricity bills.”<sup>5</sup> It was not until January 2006, after Ms. Guillet had contacted a nonprofit legal clinic, that she was able to unfreeze her bank account and reach a settlement with the collection agency.<sup>6</sup>

Incidents of debt-collection agencies subjecting elderly Americans to harassing and abusive practices have the potential to occur at an alarming rate. Elderly Americans, like Americans in general, enjoy increasing access to the consumer-credit market.<sup>7</sup> The deregulation of the consumer-credit market has increased access to credit for those members of society historically deemed too risky by commercial lenders.<sup>8</sup> Lenders have likewise been eager to enter this subprime market because of the high interest rates charged to compensate for the increased risk of nonpayment.<sup>9</sup>

However, as the story of Ms. Guillet illustrates, the consumer-credit industry in America has been plagued with abusive practices throughout its history. Many of these practices either explicitly target the elderly or exploit their lack of awareness concerning their rights. As more elderly Americans are forced to deal with credit-industry lenders and collectors, the potential for abuse only increases.

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1. Sewell Chan, *An Outcry Rises as Debt Collectors Play Rough*, N.Y. TIMES, July 5, 2006, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See, e.g., TAMARA DRAUT & JAVIER SILVA, DEMOS, BORROWING TO MAKE ENDS MEET: THE GROWTH OF CREDIT CARD DEBT IN THE '90S 25 (2003), available at [http://www.demos.org/pubs/borrowing\\_to\\_make\\_ends\\_meet.pdf](http://www.demos.org/pubs/borrowing_to_make_ends_meet.pdf). The report notes the growth of credit card access and debt among the elderly. *Id.* It also describes some industry practices, such as increased marketing and credit-line extensions, that have made consumer credit available to more, and more risky, consumers. *Id.* at 37.

8. *Id.* at 34; see also David A. Moss & Johnson A. Gibbs, *The Rise of Consumer Bankruptcy: Evolution, Revolution or Both?*, 73 AM. BANKR. L.J. 311, 333-37 (1999).

9. DRAUT & SILVA, *supra* note 7, at 34; see also ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 12-13 (Vanessa Mobley ed., 2000).

This Note analyzes the current state of the debt-collection industry as it affects the elderly Americans who must deal with it on a daily basis and suggests changes to the current legislative, enforcement, and educational schemes to better protect the elderly from abusive debt-collection practices. Part II examines the consumer-credit industry, the debt-collection industry, and the Fair Debt Collection Practices Act (FDCPA).<sup>10</sup> Part III analyzes the current debt crisis facing both the elderly and the soon-to-be elderly, as well as the history of the deceptive and abusive practices utilized by the debt-collection industry, which ultimately led to the passage of the FDCPA in 1977. Additionally, this Part analyzes abusive practices that target vulnerable elderly debtors and suggests changes to better protect them. Part IV argues that any proposed solution must recognize the urgency of the situation, as well as the importance of greater consumer education.

## II. Background

### A. The Consumer-Credit Industry

In dealing with consumer-credit issues, it is helpful to think of three different nodes, or stages, in the credit life cycle. Progression through the consumer-credit cycle affects fewer borrowers at each step. Thus, actions affecting the first node will affect more borrowers than actions affecting the second. Each node is a necessary element to the proper functioning of the consumer-credit market and the availability of credit to subprime borrowers, including the elderly. However, each node is also fraught with the potential for abuse, deception, and unfairness.

The first node can be thought of as the lending node. This is the stage in which a lender decides to extend credit to a borrower. The deregulation of the credit industry has enabled subprime borrowers, traditionally spurned by the credit markets, to easily obtain credit to buy homes, make home improvements, or make other purchases.<sup>11</sup> However, the rise of predatory lending demonstrates that access to

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10. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692-1692o (2000)). The FDCPA regulates the debt-collection industry.

11. Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1311 (2006).

credit comes with a heavy price.<sup>12</sup> Higher-risk borrowers are often subjected to a number of restrictive terms (including much higher interest rates and fees), as well as lending based solely on home equity (as opposed to the ability of the borrower to repay).<sup>13</sup> Most troubling, high-risk borrowers are often the targets of deceptive practices and fraud.<sup>14</sup>

Predatory lenders are known to target minorities, the rural poor, and the elderly.<sup>15</sup> The elderly are particularly vulnerable to predatory lending practices because “they typically have a great deal of equity in homes that they have owned for many years and because they likely operate on fixed incomes.”<sup>16</sup> While this is an important area for further discussion, it is relevant to this Note only to the extent it explains one reason why the elderly might find themselves in debt.

Assuming the borrower is able to fully and timely repay her debts, she will have no need to progress to the second node, or the collection node. In this step, the borrower has failed to fully repay her debts in a timely matter. Sometimes the creditor will attempt to collect the debt itself;<sup>17</sup> oftentimes the creditor will outsource the collection to an independent collection agency.<sup>18</sup> Independent collectors are

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12. *Id.* at 1310–16. Predatory lending is characterized by high interest rates and points that exceed the amount necessary to cover the lender’s risk, excessive fees and closing costs that are usually financed as part of the loan, frequent refinancing or ‘loan flipping’ with additional points and fees, lending based on home equity without regard to the borrower’s ability to repay, and outright fraud.

*Id.* at 1312.

13. *Id.* at 1312. Lending based solely on home equity, as opposed to ability to repay, can cause borrowers to lose their homes. *Id.* at 1315. The elderly generally have substantial equity in their homes, but live on a fixed, and often modest, income. *Id.* at 1314. If debts outstrip the ability to repay, the elderly debtor may be forced to sell his or her home for the liquidity necessary to pay off the debt. *Id.*

14. *Id.* at 1312–13.

15. *Id.* at 1313–14.

16. *Id.* at 1314; see also *Predatory Mortgage Lending: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 296–97 (2001) (statement of Esther Canja, President, American Association of Retired Persons); U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 72 (2000), available at <http://www.huduser.org/Publications/pdf/treasrpt.pdf>; ROBERT J. HOBBS ET AL., AM. ASS’N RETIRED PERS. PUB. POLICY INST., CONSUMER PROBLEMS WITH HOME EQUITY SCAMS, SECOND MORTGAGES, AND HOME EQUITY LINES OF CREDIT 9 (1989).

17. Such in-house debt collectors are not covered by the FDCPA. 15 U.S.C. § 1692a(6)(A) (2000).

18. Financial Web, Debt Collection Tactics, <http://www.finweb.com/banking-credit/debt-collection-tactics.html> (last visited Jan. 13, 2008) (noting that “[o]ne of the most common procedures employed by creditors is to turn the delinquent account over to a collection agency”).

usually only paid a portion of the debts they are able to collect.<sup>19</sup> Thus, collectors have strong incentives to collect as many debts as possible and to collect as much of each debt as possible.<sup>20</sup>

The collection process is an important step in the consumer-credit cycle. Borrowers have an obligation to fulfill their contractual requirements,<sup>21</sup> and lenders should have access to legitimate recourse when borrowers fail to pay them back. Securing access to credit would be more difficult if lenders believed they would be unable to recoup their loan, either in whole or in part.<sup>22</sup> However, this process can also be subject to abuse.

Finally, if the debtor is unable to repay her debts after having gone through the collection process, she would progress to the next and final node—bankruptcy. Bankruptcies rose through the 1980s and 1990s, prompting Congress to pass comprehensive bankruptcy reform in 2005.<sup>23</sup> While the new bankruptcy regulations will affect elderly debtors, it is unlikely to be at rates disproportionate to the general population.<sup>24</sup>

## B. The Debt-Collection Industry

It is also helpful to examine how the debt-collection industry works and why harassment and unfairness are both common and likely to continue. Collection services are beneficial to both businesses and consumers, and have the potential to “return billions of dollars to

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19. *Id.* (Debt collectors “usually receive accounts by one of two ways: the creditor forwards the debt to the collection agency and agrees to pay a percentage of any amounts successfully collected; or the creditor sells the debt with the right to collect on it to the agency, who can then keep all that they’re able to collect”).

20. *Id.* (“The agents that work for the collection company generally do so on a commission basis, which makes them highly motivated to get the debtor to pay what’s owed”).

21. *See id.* (“There are a number of tactics that creditors can legally use to collect money owed to them”).

22. *See* Financial Web, Credit-Building and Management, <http://finweb.com/banking-credit/credit-building> (last visited Jan. 13, 2008) (“Having good credit is one of the most important financial components that you can possess”).

23. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005); Todd J. Zywiski, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2021 (2003).

24. The means test under the new bankruptcy code only takes into account income, which among the elderly is usually quite modest. Ken McDonnell, *Income of the Elderly Population, Age 65 and Over, 2004*, 27 ERBI NOTES 9, 9 (2006). Because most elderly debtors will not pass the means test, it is unlikely they will be significantly affected by the recent bankruptcy reforms. *See id.*; MARK JICKLING, CONGRESSIONAL RESEARCH SERV., BANKRUPTCY REFORM: THE MEANS TEST 1 (2005).

the U.S. economy annually.”<sup>25</sup> But the nature of the industry also makes it prone to overreaching and abusive practices, especially for vulnerable elderly debtors.

Historically, the debt-collection industry has been plagued by widespread abuse through “a host of unfair, harassing, and deceptive debt collection practices.”<sup>26</sup> The Senate Banking, Housing, and Urban Affairs Committee, from which the FDCPA originated, found that “debt collection abuse by third party debt collectors is a widespread and national problem.”<sup>27</sup> Forms of abuse include the use of “obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentations of a consumer’s legal rights, disclosing a consumer’s personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.”<sup>28</sup> Although Congress noted “unscrupulous debt collectors comprise only a small segment of the industry,” it went on to state “the suffering and anguish which [sic] they regularly inflict is substantial.”<sup>29</sup> Among the worst offenders were independent debt-collection agencies because they were unlikely to have future contact with the debtor and were thus unconcerned with the debtor’s opinion of them—unlike creditors who depended on consumers’ goodwill for their business.<sup>30</sup> Congress found that independent agencies operated on a 50% commission—giving them strong incentive to collect their debts by any means necessary.<sup>31</sup>

According to one debt collector, the debt business is “one of the sexiest, one of the most financially lucrative businesses you can get into.”<sup>32</sup> That sentiment is by no means widespread in the industry. Working as a debt collector can be a frustrating, mind-numbing way

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25. Lynn A.S. Araki, Comment, *Rx for Abusive Debt Collection Practices: Amend the FDCPA*, 17 U. HAW. L. REV. 69, 72 (1995); see also *The Fair Debt Collection Practices Act, 1992: Hearings on P.L. 95-109 Before the Subcomm. on Consumer Affairs & Coinage*, 102d Cong. 46 (1992) (statement of Carleton W. Fish, Director of Public Affairs, American Collectors Association).

26. S. REP. NO. 95-382, at 1 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1695.

27. *Id.* at 2.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Walter V. Robinson & Beth Healy, *Regulators, Policy Makers Seldom Intervene*, BOSTON GLOBE, Aug. 2, 2006, at A1.

to make a living, and even the relatively high pay<sup>33</sup> often does not make up for the frustration of the job.<sup>34</sup> Constant rejection is part of daily life. As a result, collection agencies are chronically plagued with high turnover and high burnout rates among their collectors.<sup>35</sup>

Debt collection, however, is a big business. In 1976, the year before the FDCPA was passed, there were over five thousand independent collection agencies.<sup>36</sup> Although each collection agency averaged only eight employees, the industry as a whole contacted over eight million Americans regarding five billion dollars in outstanding debt.<sup>37</sup> In 2005 alone, the 6500 collection agencies operating in the United States returned \$39.3 billion dollars to businesses.<sup>38</sup> The industry currently employs over 456,000 collectors.<sup>39</sup>

After receiving assignment of a debt, collection agencies are entitled to seek legal collection remedies, including wage garnishment and liens on property.<sup>40</sup> However, a formal legal judgment is often necessary before a debt collector can garnish wages or obtain an interest in the disputed property.<sup>41</sup> Even so, this can be a preferred route, as debtors are more willing to pay their debts when a judgment, default or contested, has been obtained against them.<sup>42</sup> For a number of reasons, however, debt collectors pursue formal legal remedies only as a last resort.

The FDCPA limits the venue in which a debt collector can sue a debtor to one of three jurisdictions: (1) where the consumer resides at the commencement of the action; (2) where the real property securing the obligation is located; and (3) where the consumer signed the con-

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33. Annual compensation (including base salary and commissions) for an entry-level collector averages \$29,524. ACA International, Collections Information, <http://www.acainternational.org/KnowledgeBase/?cid=5431> (last visited Jan. 13, 2008). According to a *BusinessWeek* article, "Collecting debts may be lucrative—but it's still not a whole lot of fun." Christopher Palmeri, *Debt Collection Puts on a Suit*, *BUS. WK.*, Nov. 14, 2005, at 86.

34. Palmeri, *supra* note 33. One large, publicly traded collection agency reported an 85% turnover rate during a recent year. *Id.*

35. *Id.*

36. S. REP. NO. 95-382, at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1695.

37. *Id.*

38. ACA International, *supra* note 33.

39. *Id.* Each agency now employs an average of nineteen collectors. Palmeri, *supra* note 33.

40. Araki, *supra* note 25, at 72.

41. *Id.*

42. *Id.* at 72 n.23; *see also* Knowles v. Credit Bureau of Rochester, No. 91-CV-14S, 1992 WL 131107, at \*2 (W.D.N.Y. 1992).

tract sued upon.<sup>43</sup> If the debt-collection agency is not a nationwide company, it can be inconvenient for the collector to litigate in a distant and unfamiliar forum. Additionally, the debt collector must bear the significant expense and delay associated with litigation.<sup>44</sup> As a result, debt collectors often begin their attempted collection through extrajudicial methods, using formal legal processes only as a last resort when other methods have failed.

Labeling a collection method extrajudicial does not imply such methods are illegal, or even to be frowned upon. When done properly, extrajudicial collection methods can spare the parties involved a significant amount of time, money, and stress.<sup>45</sup> Often, it takes little more than a simple letter or telephone call to exhort a recalcitrant debtor to finally make good on his obligation.<sup>46</sup> Sometimes debtors do not even realize they owe money, and simply making them aware of the debt is enough to encourage repayment.<sup>47</sup> Many debt collectors effectively collect debts in a noncoercive, extrajudicial manner.<sup>48</sup> Unfortunately, other collectors harass consumers and otherwise engage in deceptive, fraudulent, and unfair business practices.<sup>49</sup>

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43. 15 U.S.C. § 1692i(a) (2000). Prior to passage of the FDCPA, collection companies would sue debtors in inconvenient venues, forcing the debtor to either suffer a default judgment or pay the expenses and bear the difficulties associated with litigating in a distant forum. S. REP. NO. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

44. *See* Araki, *supra* note 25, at 73 n.27 (finding that it can take up to one month on the island of Maui to process a complaint in small claims court and an additional month for the sheriff to serve the complaint and actually obtain the judgment).

45. *See generally* DAVID G. EPSTEIN, *DEBTOR-CREDITOR LAW IN A NUTSHELL* 7 (4th ed. 1991) ("Because of the delay and expense involved in litigation, the creditor is likely initially to employ extra-judicial tactics to obtain payment.").

46. *Id.*

47. *Id.*

48. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1051. The vast majority of debts are collected through consensual agreements between the debtor and the collector. *Id.*

49. *See* Araki, *supra* note 25, at 73 n.30. Abusive practices cited by Ms. Araki include making deceptive and misleading statements, making false statements that the creditor had begun legal proceedings against the debtor, and implying that the consumer was unable to handle commonsense financial matters. *Id.* (citing *Paulemon v. Tobin*, 30 F.3d 307 (2d Cir. 1994); *Bently v. Great Lakes Collection Bureau*, 6 F.3d 60 (2d Cir. 1993); *Harvey v. United Adjusters*, 509 F. Supp. 1218 (D. Or. 1981)).

### C. The FDCPA

In order to understand how the FDCPA can be better tailored to protect the elderly, it is important, as a threshold issue, to understand how the statute currently works. The FDCPA was passed by Congress in 1977 as an amendment to the Consumer Credit Protection Act<sup>50</sup> to “eliminate abusive debt collection practices by debt collectors.”<sup>51</sup>

#### 1. CONGRESSIONAL FINDINGS

Congress found the debt-collection industry used “abusive, deceptive, and unfair debt collection practices,” which contributed “to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”<sup>52</sup> Further, Congress determined existing state laws were “inadequate to protect consumers,”<sup>53</sup> and legitimate practices “other than misrepresentation or other abusive debt collection practices [were] available for the effective collection of debts.”<sup>54</sup>

Congress specifically found most debtors intend to repay their debts and do not intend to become delinquent when they obtain credit.<sup>55</sup> Courts have consistently held “[a] basic tenet of the [FDCPA] is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve ‘the right to be treated in a reasonable and civil manner.’”<sup>56</sup> The FDCPA was thus in-

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50. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1601 (2000)).

51. 15 U.S.C. § 1692e (2000).

52. *Id.* § 1692a.

53. *Id.* § 1692b.

54. *Id.* § 1692c.

55. S. REP. NO. 95-382, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697

One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are “deadbeats.” In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is minuscule . . . the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.

*Id.*

56. *McMillan v. Collection Prof'ls, Inc.*, 455 F.3d 754, 762 n.10 (7th Cir. 2006) (citing *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir. 1997)).

tended to protect innocent debtors by creating a uniform baseline of treatment throughout all fifty states.

## 2. STATUTORY FRAMEWORK OF THE FDCPA

The FDCPA applies only to “debts contracted by consumers for personal, family, or household purposes; it has no application to the collection of commercial accounts.”<sup>57</sup> Though courts have had some difficulty interpreting what exactly constitutes a “debt” within the meaning of the statute,<sup>58</sup> it clearly includes debt that is the result of an extension of credit.<sup>59</sup> Debt collectors covered by the statute are “all third persons who regularly collect debts for others.”<sup>60</sup> The Senate committee report states the “primary persons intended to be covered are independent debt collectors,” and that “in-house” collectors for creditors were not intended to be covered.<sup>61</sup>

In addition to generally prohibiting harassing, unfair, and deceptive collection practices, specific acts prohibited by FDCPA include “threats of violence; obscene language; the publishing of ‘shame lists;’ harassing or anonymous telephone calls; impersonating a government official or attorney; misrepresenting the consumer’s legal rights; simulating court process; obtaining information under false pretenses; collecting more than is legally owing; and misusing postdated checks.”<sup>62</sup>

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57. S. REP. NO. 95-382, at 3, reprinted in 1977 U.S.C.C.A.N. at 1697.

58. Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 765–75 (2005).

59. 15 U.S.C. § 1692a(5) (2000) (defining “debt” as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment”); see also Griffith, *supra* note 58, at 765–75.

60. S. REP. NO. 95-382, at 3, reprinted in 1977 U.S.C.C.A.N. at 1697. The requirement that debts be collected “regularly” excludes people who collect debts for another in an isolated instance but rather includes those who collect for others in the regular course of business. *Id.*

61. *Id.* The risk of in-house collectors using abusive and harassing techniques is low because creditors depend on consumer goodwill for their business. *Id.* at 2. Independent, third-party collectors are unlikely to care what a particular individual debtor thinks about their business because the collector will likely never have to interact with the debtor after the debt has been collected. *Id.* This also explains the prohibition on “flat-rating,” a practice in which a collection agency sells to creditors a set of dunning letters bearing the letter head of the collection agency and exhorting the debtor to pay their creditors at once, in order to deceive the debtor into believing their debt is being collected by a third party. *Id.* at 5; see also 15 U.S.C. § 1692j.

62. S. REP. NO. 95-382, at 4, reprinted in 1977 U.S.C.C.A.N. at 1698; see also 15 U.S.C. §§ 1692d–1692f.

The statute also prohibits disclosing any information about the debt or the debtor to a third party unless the disclosure is intended to obtain information about the location of the debtor.<sup>63</sup> Another important section concerns the validation of debts. Collection agencies must provide written notice to the debtor stating the name of the creditor and the amount owed.<sup>64</sup> The debtor must also be provided with notice that he has thirty days to dispute the validity of the debt, and if the consumer does so, the collection agency must obtain and provide verification of the debt to the debtor.<sup>65</sup> If the debtor requests verification, the collection agency is prohibited from further contact with the debtor until the agency provides it.<sup>66</sup>

### 3. ENFORCEMENT PROVISIONS

The statute is enforced through civil liability for violations and administrative enforcement by the Federal Trade Commission (FTC).<sup>67</sup> On the civil liability side, collection agencies are liable for the actual damages they cause and up to one thousand dollars in additional damages.<sup>68</sup> Because the FDCPA is a remedial statute,<sup>69</sup> its provisions are construed broadly in order to effectuate its purpose.<sup>70</sup> For example, some courts of appeals analyze communications to debtors under the “least sophisticated debtor” standard in order to effectuate the “basic-consumer protection principles” of the FDCPA.<sup>71</sup>

The least sophisticated debtor standard is lower than the reasonable debtor standard—a communication that would not deceive a rea-

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63. 15 U.S.C. § 1692b. In addition to limiting contact with third parties solely to requests for location information, this section of the statute places significant restrictions on the manner in which a collection agency can contact a third party. *Id.*

64. *Id.* § 1692g(a).

65. *Id.* § 1692g(a)(3–4).

66. *Id.* § 1692g(b).

67. *Id.* §§ 1692k–1692l.

68. *Id.* § 1692k(a). Successful plaintiffs are also entitled to recover their costs and reasonable attorney’s fees, while defendants can recover their costs and attorneys fees if the court determines the suit was brought in bad faith and for the purpose of harassment. *Id.* § 1692k(3).

69. *Hamilton v. United Healthcare of La. Inc.*, 310 F.3d 385, 392 (5th Cir. 2002).

70. *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453 (3d Cir. 2006); *see also Stroh v. Dir., Office of Worker’s Comp. Programs*, 810 F.2d 61, 63 (3d Cir. 1987).

71. *Card Serv. Ctr.*, 464 F.3d at 453 (citing *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354 (3d Cir. 2000); *United States v. Nat’l Fin. Servs.*, 98 F.3d 131, 136 (4th Cir. 1996)).

sonable debtor may deceive the least sophisticated debtor.<sup>72</sup> The lower standard is justified because the purpose of the FDCPA is “to protect all consumers, the gullible as well as the shrewd, the trusting as well as the suspicious, from abusive debt collection practices.”<sup>73</sup> However, while the least sophisticated debtor standard protects “naïve consumers,” it also protects collectors from “bizarre or idiosyncratic interpretations of collection notices” by requiring “a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care.”<sup>74</sup>

In addition to imposing civil liability, the FDCPA authorizes the FTC “to treat violations of the [FDCPA] as violations of a trade regulation rule.”<sup>75</sup> Treating an FDCPA violation as a violation of a trade regulation “empowers the Commission to obtain restraining orders and seek fines in federal district court.”<sup>76</sup> However, because the legislation was designed to comprehensively address the problem of collection abuses, the FTC is prohibited from issuing any additional rules or regulations.<sup>77</sup>

The FTC has recently been active in using its administrative enforcement powers under the FDCPA. In late January 2007, the FTC filed suit against a number of Florida and Georgia based debt collectors in the U.S. District Court for the Middle District of Florida.<sup>78</sup> According to the FTC, the defendant entities “used misleading and threatening letters and telephone calls while collecting debts for beauty schools, truck driving schools, bail bondsmen, fitness centers, and other small businesses.”<sup>79</sup> Allegedly, the defendants “falsely threatened that they were about to file lawsuits against consumers, that consumers’ property would be seized and sold, that their wages

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72. *Id.* at 454 (citing *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354 (3d Cir. 2000)).

73. *Id.* (internal quotations omitted).

74. *Id.*

75. 15 U.S.C. § 1692l(a) (2000); *see also* S. REP. NO. 95-382, at 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1701.

76. 15 U.S.C. § 53(b) (2000); *see also* S. REP. NO. 95-382, at 6, *reprinted in* 1977 U.S.C.C.A.N. at 1701.

77. S. REP. NO. 95-382, at 6, *reprinted in* 1977 U.S.C.C.A.N. at 1701.

78. Press Release, Fed. Trade Comm’n, FTC Asks Court to Stop Abusive Debt Collectors (Feb. 2, 2007), *available at* <http://www.ftc.gov/opa/2007/02/rri.shtm>; *see also* Fed. Trade Comm’n v. Rawlins & Rivera, Inc., No. 6:07-CV-146-ORL (M.D. Fla. Jan. 31, 2007), *available at* <http://www.ftc.gov/os/caselist/0623139/070202cmp0623139.pdf>.

79. Press Release, Fed. Trade Comm’n, *supra* note 78.

would be garnished, and that they would be liable for legal costs.”<sup>80</sup> The defendants also allegedly “threatened consumers with arrest in some cases, and often used profanity and shouting during telephone calls.”<sup>81</sup>

In addition to its enforcement requirements, the FTC has an annual reporting obligation to Congress.<sup>82</sup> The annual report to Congress “concern[s] the administration of [the FTC’s] functions under [the FDCPA], including such recommendations as the Commission deems necessary or appropriate.”<sup>83</sup> The report must also include an “assessment of the extent to which compliance with [the FDCPA] is being achieved and a summary of the enforcement actions taken by the Commission.”<sup>84</sup>

### III. Analysis

The elderly are among the fastest growing debtor populations in the United States.<sup>85</sup> Additionally, structural societal trends make it unlikely future retirees will fare any better with regard to their levels of debt when they retire. At the same time elderly Americans are increasing their debt levels, some members of the historically abusive debt-collection industry are beginning to specifically target this vulnerable group.

#### A. Elders and Debt

Credit card debt among older Americans is rapidly increasing, “leaving many seniors overextended and vulnerable to financial collapse.”<sup>86</sup> The numbers are startling: in 2001, 73.7% of Americans over the age of sixty-five held a credit card,<sup>87</sup> and 31.2%, or almost a third of that card-holding population, carried some credit card related debt.<sup>88</sup> While the percentage of seniors who carry some balance on

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80. *Id.*

81. *Id.*

82. 15 U.S.C. § 1692m(a) (2000).

83. *Id.*

84. *Id.*

85. See HEATHER C. MCGHEE & TAMARA DRAUT, DÉMOS, RETIRING IN THE RED: THE GROWTH OF DEBT AMONG OLDER AMERICANS 2 (2004), available at [http://www.demos.org/pubs/Retiring\\_2ed.pdf](http://www.demos.org/pubs/Retiring_2ed.pdf) (noting that older Americans are the fastest growing segment in bankruptcy courts).

86. *Id.* at 1.

87. *Id.* at 2 fig.1.

88. *Id.*

their credit card changed relatively little over the years 1992–2001,<sup>89</sup> the *amount* of credit card debt carried by seniors increased by 89% to an average of \$4,041.<sup>90</sup> This increase was most pronounced among seniors aged sixty-five to sixty-nine—presumably the newly retired—who saw their average balances increase by a whopping 217% to \$5,844.<sup>91</sup>

The deleterious effects of debt borne by the elderly are shown in the amount of household income that must be spent paying off the debt. A family that must spend more than 40% of its income servicing debt is said to be in a state of debt hardship.<sup>92</sup> While seniors as an overall group spend less than 10% of their income on debt payments,<sup>93</sup> low-income seniors are especially hard hit by their debt payments. For the 70% of seniors with yearly incomes under \$50,000, roughly one in five households with credit card debt is also in a state of debt hardship.<sup>94</sup>

Driving this increase in debt are three main factors: industry practices, economic insecurity among the elderly, and rising costs for seniors' basic needs.<sup>95</sup> The deregulation of the credit card industry—caused in part by two Supreme Court cases<sup>96</sup> nullifying state usury laws aimed at limiting interest rates and fees—drastically changed the way in which credit cards were marketed and priced.<sup>97</sup> While deregulation

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89. *Id.* In 1992, 34.9% of card-holding elders had some form of credit debt. *Id.* In 1995, the rate declined to 31.2%. *Id.* In 1998, the rate again declined to 28.3%, and in 2001 it rose back to 31.2%. *Id.*

90. *Id.* at 3.

91. *Id.* Seniors between the ages of sixty-five to sixty-nine have seen a relatively steady increase in their average credit card debt from \$2,143 in 1992 to \$5,844 in 2001. *Id.* For all seniors, the increase is largely confined to the period between 1995 and 1998, when average credit card debt increased from \$1,859 to \$3,919. *Id.* at 3 fig.2.

92. *Id.* at 3.

93. *Id.*

94. *Id.* at 3 fig.4.

95. See generally *id.* at 6–10 (discussing factors that have led to an increase in debt for the elderly).

96. The first opinion, *Marquette Nat'l. Bank of Minneapolis v. First Omaha Service Corp.*, 439 U.S. 299 (1978), allowed a national bank to charge credit card consumers the highest interest rate permitted in the bank's home state. DRAUT & SILVA, *supra* note 7, at 33. The second opinion, *Smiley v. Citibank*, 517 U.S. 735 (1996), allowed banks to treat fees as "interest," meaning that all aspects of regulation were controlled by the state law of the bank's home state. DRAUT & SILVA, *supra* note 7, at 33.

97. The effect of these two rulings was that larger banks moved to states with high, or no, cap on interest rates. DRAUT & SILVA, *supra* note 7, at 33. In order to keep banks within their borders, other states were forced to raise, or remove altogether, the interest rate cap they allowed to be charged. *Id.* As a result of this in-

lation has made credit more accessible to traditionally spurned groups, including the elderly, it has also increased interest rates and fees, and lowered the required monthly payments.<sup>98</sup> Lower monthly payments may allow some debtors to both repay debts and meet monthly living needs, but they also increase the total amount of interest paid over time.<sup>99</sup> Coupled with aggressive marketing campaigns and easily obtained credit extensions, these factors have “enable[ed] financially vulnerable seniors to take on record levels of credit card debt.”<sup>100</sup>

Seniors are particularly vulnerable financially because of their low incomes and declining retirement wealth. Almost 40% of seniors are classified as “low income,” and the yearly median household income among seniors is only \$23,118.<sup>101</sup> Wealth at retirement has been declining over the last decade as well.<sup>102</sup> For seniors retiring at or near the median level of net worth,<sup>103</sup> retirement wealth has decreased 10.4%.<sup>104</sup> For seniors below the median,<sup>105</sup> the decline was even more drastic—a 35.6% loss in retirement wealth.<sup>106</sup>

At the same time seniors’ levels of income and wealth have been decreasing, costs associated with their basic needs have been dramatically increasing. The two main culprits behind rising costs for seniors are, unsurprisingly, health care and housing.<sup>107</sup> While some seniors

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dustry-wide deregulation, there are currently twenty-nine states without limits on credit card interest rates. Lucy Lazarony, *States with Credit Card Caps*, BANKRATE.COM, Mar. 20, 2002, <http://www.bankrate.com/brm/news/cc/20020320b.asp>.

98. DRAUT & SILVA, *supra* note 7, at 35.

99. See generally *id.* at 37 (discussing the cost of avoiding paying off a debt). Simple math can illustrate this phenomenon. Consider two repayment plans on a similar debt of \$10,000 (assume no further purchases are made to increase the underlying amount of the debt) with an 18% annual interest rate. The first repayment plan requires a monthly payment equal to 3% of the outstanding balance; the second requires a payment equal to 5% of the outstanding balance. It will take the first debtor 272 months to pay off the debt and he will pay a total of \$9,798.81 in interest. By contrast, it will take the second debtor 134 months, and he will pay \$4,239.58 in interest. The initial \$200 difference in monthly payments totals, over time, to 138 additional months of debt and \$5,559.23 in additional interest payments.

100. MCGHEE & DRAUT, *supra* note 85, at 4.

101. *Id.*

102. *Id.* at 4, 4 fig.5.

103. The median level of net worth was \$108,885 in 1998 dollars. *Id.* at 4.

104. *Id.* at 4, 4 fig.5.

105. Below the median is defined as having moderate net worth between \$50,000 and \$99,999. *Id.*

106. *Id.*

107. *Id.* at 6.

may benefit from the recently launched Medicare Prescription Drug, Improvement, and Modernization Act of 2003,<sup>108</sup> health care remains a costly necessity for seniors.<sup>109</sup> For example, Medicare beneficiaries' out-of-pocket medical expenses have risen faster over the past decade than their income.<sup>110</sup> In 2000, seniors spent on average \$3,526 to cover their out-of-pocket health care costs,<sup>111</sup> accounting for an average of 22% of their income.<sup>112</sup>

Rising housing costs present another problem for elderly Americans. The average senior renter spent 41% of their income on housing in 2001, up from 38% in 1993.<sup>113</sup> This is 11% higher than the HUD threshold for affordable housing.<sup>114</sup> Among seniors who own their own home, 35% spend more than a quarter of their income on expenses related to housing, including utilities, real-estate taxes, mortgages, and other fees.<sup>115</sup> Of greater concern is the increasing number of senior homeowners who have borrowed against their homes: 28.3% in 2000, up from 20.7% in 1990 and 18.9% in 1980.<sup>116</sup>

The financial health of many of America's seniors is precarious at best. For a number of reasons seniors are increasing the amount of debt they carry into their retirement years. Further, the financial health of the soon-to-be retired indicates the next generation of older Americans will carry similar, or in some cases more extensive, levels of debt into their retirement years.

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108. Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (codified at 42 U.S.C. §§ 1301-1395).

109. AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, FACT SHEET: HEALTH CARE COSTS 1 (2002), <http://www.ahrq.gov/news/costsfact.pdf>.

110. See MEDICARE PAYMENT ADVISORY COMM'N, REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY 5 (2003). Average expenses rose by 5.4% from 1998-2003, while average incomes rose only 3.8% over the same period. *Id.* at 5 tbl.1-1.

111. MCGHEE & DRAUT, *supra* note 85, at 6.

112. STEPHANIE MAXWELL ET AL., THE URBAN INST., MODERNIZING MEDICARE COST-SHARING: POLICY OPTIONS AND IMPACTS ON BENEFICIARY AND PROGRAM EXPENDITURES 9 (2002). Obviously, the percentage of income spent on out-of-pocket health care costs is largest for low-income seniors and seniors with more health problems. *Id.* Seniors earning less than \$10,000 a year spent roughly a third of their income on out-of-pocket health care costs. *Id.*

113. MCGHEE & DRAUT, *supra* note 85, at 6.

114. *See id.*

115. *Id.* at 7.

116. *Id.*

## B. Transitioners

The financial health of transitioners, preretirees aged fifty-five to sixty-four, is also of concern. The actions of this group reveal important trends of soon-to-be seniors and their chances for retirement success, and here too, the economic indications are not positive. As Americans delay having children, they also push back corresponding debt-related expenses—such as college tuition, family housing, and dependent health care—closer to their retirement age.<sup>117</sup> This structural change has had a tremendous affect on their financial health. In 1981, American families, on average, saved 11% of their income and spent 4% on credit card debt.<sup>118</sup> By 2000, the numbers were more than reversed: families averaged a negative 1% savings rate and spent 12% of their income on credit card debt.<sup>119</sup>

Additional statistics confirm the moribund prospects of many soon-to-be retirees. Fourteen percent of sixty-four-year-olds face retirement with negative net worth.<sup>120</sup> Transitioners have increased the amount of credit card debt they carry by 47%—up to an average of \$4,088 in 2001.<sup>121</sup> Among households with credit card debt in this age group, the average family spends 31% of its income on debt payments.<sup>122</sup> Unsurprisingly, low-income families and families that must bear their own health insurance costs have seen the most dramatic rise in the debt level carried by their households.<sup>123</sup>

Thus, the problem of elderly debtors is not one that will be solved by the next generation of elderly Americans. Debt is increasingly becoming an American way of life at all ages—up to and including the retirement years. At the same time, the debt-collection industry has begun to target the elderly with abusive practices.

## C. Debt-Collection Practices that Target the Elderly

The debt-collection industry is increasingly targeting specific groups of individuals that are statistically more likely to pay in order

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117. *Id.*

118. ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE 112–13 (2003).

119. *Id.*

120. MCGHEE & DRAUT, *supra* note 85, at 7.

121. *Id.*

122. *Id.*

123. *Id.*

to increase the amount of collected debt.<sup>124</sup> The elderly are one such targeted group.<sup>125</sup> The elderly are targeted “based on assumptions that these debtors are easily confused about whether the debt existed, that they fear a collector garnishing their [S]ocial [S]ecurity income, and that they are hesitant to engage in legal skirmishes.”<sup>126</sup> According to one newspaper investigation, the elderly (along with the disabled and working poor) are often “talked into repaying their debts from their monthly government checks, which by law are protected from legal judgments.”<sup>127</sup>

#### 1. MISLEADING COMMUNICATIONS

Section 807 of the FDCPA prohibits “false, deceptive, or misleading representation or means in connection with the collection of any debt.”<sup>128</sup> False and misleading communications include, among other practices: the false representation of the character, amount, or legal status of any debt;<sup>129</sup> false representation or implication that any individual is an attorney or that any communication is from an attorney;<sup>130</sup> the threat to take any action that cannot legally be taken or that is not intended to be taken;<sup>131</sup> communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed;<sup>132</sup> the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer;<sup>133</sup> and the false representation or implication that documents are not legal process forms or do not require action by the consumer.<sup>134</sup>

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124. Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 736 (2006).

125. *Id.* at 737.

126. *Id.*; see also Sarah Roberts, *Tale of an Outlaw Company*, ROCKFORD REG. STAR, Dec. 12, 2004, at 5G.

127. Michael Rezendes & Francine Latour, *No Mercy for Consumers: Firms' Tactics Are One Mark of a System That Penalizes Those Who Owe*, BOSTON GLOBE, July 30, 2006, at A1.

128. 15 U.S.C. § 1692e (2000).

129. *Id.* § 1692e(2)(A).

130. *Id.* § 1692e(3).

131. *Id.* § 1692e(5).

132. *Id.* § 1692e(8).

133. *Id.* § 1692e(10).

134. *Id.* § 1692e(15).

Examples of collectors targeting and harassing the elderly through misleading communications are common.<sup>135</sup> One retired Wellesley College teacher had her car seized by debt collectors in three consecutive years, turning her experience into an “annual nightmare.”<sup>136</sup> Her experience occurred even though she had received notice from the debt collectors and had negotiated a payment plan with them.<sup>137</sup> She was sent a letter by the debt collectors that stated “[o]ur representatives are willing to work with you on this matter so that your appearance in court may not be necessary.”<sup>138</sup> However, when she did not appear in court, the debt collectors won a default judgment and used the court order to seize her car after she missed a payment.<sup>139</sup> Once her car was seized, the retiree, whose income was based largely on Social Security benefits, could not afford to immediately pay her debt and was forced to enter into two payment plans—one to the original debt collector and one to the constable service that actually seized her car.<sup>140</sup> Her car was seized a second time, but she was able to scrape together another payment and enter into another monthly payment plan with the debt collector.<sup>141</sup> However, after she missed yet another payment, her car was seized a third time—this time along with her asthma, diabetes, and high blood pressure medication that was left in the car.<sup>142</sup> By the end of her ordeal, the retiree had not only paid \$2,741 in an attempt to service an initial debt of \$2,019, she had lost her car and sense of independence and had been humiliated in the eyes of her friends and family.<sup>143</sup>

## 2. THREATENING AND HARASSING COMMUNICATIONS

Section 806 of the FDCPA prohibits a debt collector from “enag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.”<sup>144</sup> Harassing and abusive practices include, among other

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135. Joe Surkiewicz, *Legal Hotlines Serve Clients Statewide*, DAILY RECORD (Baltimore, Md.), July 21, 2006, at A1; see also Sewell Chan, *Debt Collection Agencies Under Scrutiny at Hearing*, N.Y. TIMES, June 13, 2006, at B5.

136. Rezendes & Latour, *supra* note 127.

137. *Id.*

138. *Id.* (emphasis added).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. 15 U.S.C. § 1692d (2000).

things: the use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person;<sup>145</sup> the use of obscene or profane language;<sup>146</sup> the publication of a list of consumers who allegedly refuse to pay debts;<sup>147</sup> the advertisement for sale of any debt to coerce payment of the debt,<sup>148</sup> constantly and incessantly calling a debtor with intent to annoy, abuse, or harass;<sup>149</sup> and calling the debtor without disclosing the caller's identity.<sup>150</sup>

Examples of debt-collection agencies threatening and harassing elderly Americans are as common as examples of using misleading communications.<sup>151</sup> In one odious example, one Pennsylvania attorney, Arnold Lieberman, on behalf of the Fleet Company wrote a collection letter demanding \$297.79 from Mary Crossley, a sixty-eight-year-old widow.<sup>152</sup> Ms. Crossley had not received a prior demand for payment from Fleet and became worried when she received the letter that threatened legal action if the payment was not made within a week.<sup>153</sup> When Ms. Crossley telephoned Mr. Lieberman to tell him that she could not pay the entire bill, he responded by telling her "she should sell her house and become a 'bag lady.'" <sup>154</sup> Thinking she could lose her home, Ms. Crossley panicked and quit her job in order to cash in her modest pension to pay the bill.<sup>155</sup>

### 3. TARGETING THE INNOCENT

The FDCPA requires debt collectors to validate the debt *after* initiating contact with the debtor.<sup>156</sup> Within five days of its initial call to the debtor, the collection agency must send the debtor a written notice containing the amount of the debt,<sup>157</sup> the name of the creditor,<sup>158</sup> and a

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145. *Id.* § 1692d(1).

146. *Id.* § 1692d(2).

147. *Id.* § 1692d(3).

148. *Id.* § 1692d(4).

149. *Id.* § 1692d(5).

150. *Id.* § 1692d(6).

151. Surkiewicz, *supra* note 135.

152. Crossley v. Lieberman, 868 F.2d 566, 567 (3d Cir. 1989).

153. *Id.* at 568. Lieberman's letter warned that nonpayment could result in "the listing of your property, either [r]eal [e]state or [p]ersonal, for forced [s]ale by the Sheriff, after appropriate legal proceedings have been concluded." *Id.* at 567.

154. *Id.* at 568. At the time, Ms. Crossley had lived in her home since 1940, or almost fifty years. *Id.* at 567.

155. *Id.*

156. 15 U.S.C. § 1692g(a) (2000).

157. *Id.* § 1692g(a)(1).

158. *Id.* § 1692g(a)(2).

statement that the debt will be assumed valid unless the debtor disputes it within thirty days.<sup>159</sup> If the collector receives notice from the debtor that she is disputing the debt, the collector must obtain verification of the debt or a copy of the judgment against the consumer, and mail a copy of such verification or judgment to the debtor.<sup>160</sup> The collector must cease all collection efforts until this occurs.<sup>161</sup>

However, some debt collectors are not as vigilant as others in verifying debt. Because of the nature of the debt-collection industry, “hundreds of companies . . . buy old debt, often with outdated, insufficient, or inaccurate information about debtors.”<sup>162</sup> However, debtors, like other members of our increasingly mobile society, frequently change address. This causes collectors to “rely on databases to locate and go after people with the same name in the same general geographic area.”<sup>163</sup> Often these identifications are wrong and lead to innocent individuals being targeted for collection on debts they do not owe.<sup>164</sup>

In one example highlighted by the *Boston Globe*, eighty-nine year-old Anthony F. Ferraro was hounded for six months by a debt collector looking for twenty-six-year-old Anthony E. Ferraro.<sup>165</sup> Luckily for the elder Anthony Ferraro, he lived with his sons and a caretaker, one of whom was able to sort out the mistake after a number of letters and angry telephone conversations.<sup>166</sup> It is entirely possible the situation would not have been resolved in such short order had the elder Mr. Ferraro lived by himself.

In another heinous example, a collection company had a bill for a man with the name “Victor Colozzi.”<sup>167</sup> When it could not locate anyone by that name, the company entered it into a database that supplies names of people across the country.<sup>168</sup> Finding a “Victoria Colozzi,” the company called her, and, upon noticing that “she sounded very old,” changed the name on the bill from “Victor” to “Victoria” and pursued the collection without further ascertaining the

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159. *Id.* § 1692g(a)(3).

160. *Id.* § 1692g(b).

161. *Id.*

162. Robinson & Healy, *supra* note 32.

163. *Id.*

164. *See id.*

165. *Id.*

166. *Id.*

167. Roberts, *supra* note 126.

168. *Id.*

veracity of the debt.<sup>169</sup> As the collector responsible for changing “Victor” to “Victoria” put it:

When you're dealing with older people, especially older people who have a deceased spouse, their memory doesn't work too well with what they had in the past. They get something in the mail and call about it . . . They hear someone saying their Social Security benefits are being looked into, their home is being looked into . . . when you've got all this thrown at you and there's someone talking sly on the phone, you're forced to pay.<sup>170</sup>

Unfortunately, such targeting of seniors is not a recent phenomenon.<sup>171</sup> Testimony from the Senate hearings on the FDCPA paints a similar picture. An attorney testified about one of her elderly client's experiences with a collection agency:

Her husband, Sam, died recently and left her with a stack of bills and she only had her social security money to pay the bills. After Sam's death, she got a call from a collection company. The caller told her that if she didn't come up with the money for Sam's funeral, he would get a court order to dig up Sam's body and repossess the casket. She didn't know the law [and a]fter this she needed medical treatment.<sup>172</sup>

Similar behavior has occurred elsewhere, and with increasing numbers of seniors carrying debt, the targeting of seniors for unfair and deceptive collection practices is likely to continue.

#### IV. Recommendations

Whatever solution society, the legislature, or the executive branch decides upon, it is clear that something needs to happen soon. The population is quickly becoming older, and older Americans are rapidly accumulating record levels of debt. As people become older and greater numbers of older people become more indebted, the risk of abuse by debt-collection agencies targeted at the elderly is likely to increase.

Structural changes in the American economy and way of life suggest that the problem of indebted seniors is going to continue into the foreseeable future. Further, seniors are continuing to take on more

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169. *Id.*

170. *Id.*

171. See *Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130, and H.R. 5924 Before the Subcomm. on Consumer Affairs of the S. Comm. on Banking, Housing, and Urban Affairs, 95th Cong. 58–59 (1977)* (statement of Karen Berger, Senior Attorney, Queens Legal Services Corp., New York City) (citing examples of the elderly who were targeted by debt collectors).

172. *Id.*

consumer debt, making them increasingly large targets for unscrupulous debt collectors. While the FDCPA was effective at curbing yesterday's abuses, it needs to be amended, and amended soon, to keep up with the abuses of today.

Assuming that harassing and abusive practices aimed at elderly debtors are a current problem and are likely to continue indefinitely, what can be done about it? Three possible solutions from three different sectors need to be discussed: one legislative, one executive, and one from the private sector.

#### A. Amending the FDCPA

By and large, the FDCPA has been successful at curbing widespread abuse in the debt-collection industry. The FTC noted a decrease in complaints during the 1980s,<sup>173</sup> likely due to FDCPA compliance. However, recent trends have begun to show the number of complaints creeping upward.<sup>174</sup> The upward trend is unsurprising given the increasing levels of debt carried by consumers of all ages and income levels.<sup>175</sup> Presumably, the more consumers must deal with debt-collection agencies, the more likely they are to encounter a forbidden practice and report it to the FTC.

Because statistics show that more elderly Americans are becoming indebted<sup>176</sup> and complaints to the FTC regarding debt-collection agencies are on the rise, it is time to reexamine the effectiveness of the FDCPA. Specifically, the FDCPA should be amended with provisions designed to specifically protect elderly debtors. The FDCPA is a relatively static statute; its "sole purpose is to correct the harassment problems that haunted the country's debt-collection industry before its enactment."<sup>177</sup> The suggestions outlined below attempt "to address many categories of subtler new forms of debtor mistreatment."<sup>178</sup>

Three specific amendments to the FDCPA would make the debt-collection industry safer for elderly Americans. First, Congress should require debt collectors to disclose a debtor's rights. Second,

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173. See, e.g., Araki, *supra* note 25, at 77–78.

174. FED. TRADE COMM'N, ANNUAL REPORT 2006: FAIR DEBT COLLECTION PRACTICES ACT 2–3 (2006), available at <http://www.ftc.gov/os/2006/04/P0648042006FDCPAReport.pdf>.

175. See *supra* Part III.A.

176. See *supra* Part III.A.

177. Goldberg, *supra* note 124, at 723.

178. *Id.* at 724.

Congress should require debt collectors to supply the FTC with raw data concerning the debtors they contact. Finally, Congress should impose higher penalties for FDCPA violations aimed at elderly debtors.

1. **REQUIRED DISCLOSURE OF DEBTOR'S RIGHTS IN THE INITIAL COMMUNICATION SENT BY THE COLLECTOR**

Elderly debtors are often confused about whether the debt actually exists, to what extent they are actually indebted, what steps the debt-collection agency is allowed to take, and what their legal rights are.<sup>179</sup> Further, elderly individuals are less likely to turn to litigation when they feel harassed by unfair debt-collection methods.<sup>180</sup> Under the current terms of the statute, the debt collector is required to include only two disclosures in its initial communication with the debtor. First, the collector must disclose "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose."<sup>181</sup> Additionally, a collector must send the consumer written notice containing the amount of the debt, the name of the creditor, and the procedure for disputing or validating the debt.<sup>182</sup>

A debt collector is under no obligation to "furnish a debtor with information regarding their rights, and, consequently, a great amount of consumer ignorance exists."<sup>183</sup> To combat this consumer ignorance, Congress should require debt collectors to inform debtors of their rights. An initial communication from a debt collector should contain a Debtor's Bill of Rights or similar delineation of the rights and responsibilities of both the debtor and the collector. Such a provision would perform a function similar to a *Miranda* warning;<sup>184</sup> it would advise the debtor of her rights and would signal the gravity of the situation.

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179. *Id.*

180. *Id.* at 737; see Roberts, *supra* note 126.

181. 15 U.S.C. § 1692e(11) (2000).

182. *Id.* § 1692g(a).

183. Goldberg, *supra* note 124, at 723.

184. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) ("[i]n order to combat . . . pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of these rights must be fully honored."). The holding in *Miranda* later evolved into the proposition that all citizens who are interrogated under police custody must be made aware of their rights. This stems from the notion that some people may not have a sophisticated understanding of their rights, and the police have the obligation to diffuse trickery and the intimidating nature of the environment.

Because collectors are already required to make certain limited disclosures in their initial communications to debtors, adding additional language to that communication would not be a large burden. Additional disclosures would be a cost-effective, minimally intrusive, legislative solution to the problem of the ignorance of most debtors, especially elderly debtors, of their rights under the FDCPA.

**2. DEBT COLLECTORS SHOULD SUPPLY THE FTC WITH DATA CONCERNING WHO THEY CONTACT**

The Association of Credit and Collection Professionals (ACA), the trade association that includes debt collectors, has promulgated a Code of Ethics and Responsibility that makes it a breach of professional ethics for a collector to “to harass a person on the basis of race, sex, age, creed, religion, color, national origin, disability, sexual preference or marital status.”<sup>185</sup> The ACA’s Code of Ethics is not legally binding, and collectors do not always live up to their ethical responsibilities.<sup>186</sup>

However, amending the FDCPA to include a legally binding provision based on the ACA nondiscrimination policy would not go far enough to curb discrimination against elderly debtors. Because the FDCPA only authorizes individual suits against particular collectors, individual debtors have no way of knowing whether they are the target of a sophisticated database program designed to single them out because of their age.<sup>187</sup> In order to get that information, a potential plaintiff would have to not only find an attorney willing to file a lawsuit, but also survive a motion to dismiss, navigate the thorny discovery issues inevitably raised, and run the significant risk of losing. Many times, given the relatively small amount of the debt, it is simply not worth it for an individual to undertake such an arduous task.

Congress should instead impose a positive obligation on collection agencies to report to the FTC “relevant statistical information about the debtors they contact.”<sup>188</sup> The FTC could then use the data to search for discriminatory patterns, and if necessary, investigate fur-

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185. CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY § 2.05 (Assoc. of Credit and Collection Professionals Int’l 2004), available at <http://www.acainternational.org/images/88/codeofethics.pdf>.

186. See *supra* Part III.C.

187. Goldberg, *supra* note 124, at 740.

188. *Id.* at 741.

ther and bring a lawsuit against an offending company.<sup>189</sup> While the allocation of scarce government resources is always a concern, the FTC is certainly in a better position to analyze and follow-up on this data than an individual debtor.

The amended system could be a boon for debt-collection companies as well. Under such a system, only the FTC would be able to bring discrimination claims against debt-collection agencies.<sup>190</sup> Thus, debt-collection agencies would be spared the significant expense of defending individual, and possibly frivolous, discrimination lawsuits.<sup>191</sup> Disclosing statistical information would also discourage discriminatory conduct in the first instance, while at the same time providing a shield for collectors to use against groundless claims.<sup>192</sup>

While unscrupulous companies would no doubt find a way to manipulate the data,<sup>193</sup> the added costs of doing so would invariably prevent at least some collectors from determining it is not worth it to discriminate against elderly debtors. Additionally, the added transparency of the system, coupled with the threat of a lawsuit brought by the FTC as opposed to an individual debtor, should make many collectors rethink their discriminatory practices.<sup>194</sup>

### 3. IMPOSE HIGHER PENALTIES FOR FDCPA VIOLATIONS THAT TARGET ELDERLY DEBTORS

One final example of how the FDCPA could be amended to add additional protection for the elderly is provided by an Illinois fraud statute. The Illinois Consumer Fraud and Deceptive Business Practices Act<sup>195</sup> includes a provision that imposes an additional fine of up to \$10,000 if the violation was committed against a person older than sixty-five.<sup>196</sup> In determining whether the additional penalty is warranted, the court must consider:

- (1) Whether the defendant's conduct was in willful disregard of the rights of the person 65 years of age or older.
- (2) Whether the defendant knew or should have known that the defendant's conduct was directed to a person 65 years of age or older.
- (3) Whether the person 65 years of age or older was substantially

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189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. 815 ILL. COMP. STAT. 505/1-12 (2006).

196. *Id.* 505/7(c).

more vulnerable to the defendant's conduct because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability, than other persons. (4) Any other factors the court deems appropriate."<sup>197</sup>

The money collected under this provision goes into a special Elderly Victims Fund administered by the State Treasurer and used by the Department on Aging for grants to senior centers in Illinois.<sup>198</sup>

A similar system could be added to the FDCPA. Debt collectors who purposely use unfair practices on elderly debtors could and should face additional civil, or even criminal, penalties. The extra amounts collected could be placed in a victims fund similar to the one used by Illinois Department on Aging. Money from the fund could be used to further education efforts directed at the elderly, or perhaps to fund additional FTC attorneys who can focus exclusively on debt collectors and debt-collection practices that unfairly target the elderly. Additional penalties, specifically aimed at curbing abusive practices focused on seniors, would be a boon to elderly debtors.

#### **B. Increased Prosecution of Abusive Practices**

Increased administrative enforcement and policing of collection agencies and practices known to target the elderly is another solution. The FTC currently has the statutory ability to enforce the FDCPA. No further legislation is needed,<sup>199</sup> just a shift in focus, or perhaps an additional staff attorney whose sole job is to closely watch collection agencies known to target seniors with abusive and unfair practices would suffice.

Recent developments in this area are encouraging. The FTC continues to litigate against abusive debt-collection agencies.<sup>200</sup> However, none of the FTC's recent annual reports to Congress discuss the impact of unfair and abusive practices on elderly debtors. Because elderly debtors are increasing in number, it would benefit consumers if the FTC undertook a study of the impact of abusive debt-collection practices on elderly debtors.

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197. *Id.*

198. *Id.*

199. Some legislation would be beneficial to the FTC's mission of preventing FDCPA violations aimed at society's most vulnerable members. See discussion *supra* Part III.E.1.

200. Press Release, Fed. Trade Comm'n, National Check Control Relief Defendant Settles FTC Charges (Oct. 7, 2004), available at <http://www.ftc.gov/opa/2004/10/checkinvestors.htm>; Press Release, Fed. Trade Comm'n, *supra* note 78.

Private enforcement of the FDCPA can also be an effective method for stamping out bad behavior among debt collectors. However, there are a number of hurdles a potential plaintiff must overcome before he can even begin a lawsuit. Because potential lawsuits are based on federal statute, if plaintiffs do not file in federal court, defendants will likely remove the lawsuit to that forum.<sup>201</sup> For a number of reasons plaintiffs often find federal court an inconvenient and less favorable forum in which to litigate.<sup>202</sup> Thus, many plaintiffs' attorneys believe defendants have an advantage before a lawsuit is even filed.

Additionally, the amount recovered from any one lawsuit is generally not large.<sup>203</sup> Damages are generally limited to the actual damages sustained by the debtor.<sup>204</sup> In cases where the alleged violation is a misleading communication or harassing phone calls, it can be difficult to prove actual sustained damages.<sup>205</sup> While the court has the authority to award additional damages, they cannot exceed \$1,000.<sup>206</sup> Thus, faced with both the prospect of litigating in federal court (often-times more expensive than state court) and the difficulty of proving damages, plaintiffs can find it hard to obtain counsel willing to litigate on their behalf.

Two provisions somewhat lessen the burden faced by potential plaintiffs. First, the FDCPA includes a fee-shifting provision that allows successful plaintiffs to recover their reasonable attorney's fees from the defendant.<sup>207</sup> Plaintiffs are only required to pay the defendant's fees if the action "was brought in bad faith *and* for the purpose of harassment."<sup>208</sup> Second, if the abusive practice is widespread,

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201. See 28 U.S.C. § 1441(a) (2000).

202. Federal court is generally the more expensive forum in which to litigate. Steven Pitt & Joshua Rogers, *Charting a Course for Federal Removal Through the Abstention Doctrine*, 56 DEPAUL L. REV. 107, 107 (2006). It can also be more formal, have heightened pleading requirements, and have a longer briefing schedule. *Id.* Federal court is not a good choice for plaintiffs looking for a cheap, quick settlement. *Id.* at 108.

203. See Lawrence A. Young & Jeffrey D. Coulter, *Recent Developments in Fair Debt Collection Practices Act, State Collection Law and Debt Collection Class Action Litigation*, PRACTICING L. INST. CONSUMER FIN. SERVICES LITIG., Apr. 1997, at 705.

204. 15 U.S.C. § 1692k(a)(1) (2000).

205. See, e.g., *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985) (holding deceptive conduct did not constitute harassment where letter threatened legal action to collect debt); *Dorsey v. Morgan*, 760 F. Supp. 509 (D. Md. 1991) (holding harassing because threats were legitimate).

206. 15 U.S.C. § 1692k(a)(2)(A) (2000).

207. *Id.* § 1692k(3).

208. *Id.* (emphasis added).

plaintiffs attorneys have the option of bringing a class action.<sup>209</sup> Under class actions, plaintiffs can recover the individual damages of the named plaintiffs and an amount determined by the court, which cannot exceed the lesser of \$500,000 or 1% of the net worth of the debt collector.<sup>210</sup> If, however, the FDCPA is amended to award greater penalties where the abusive practices were targeted at the elderly, one would expect more lawsuits to be brought on behalf of this group. This is especially true if the elderly are concurrently educated about their rights and potential remedies.

In addition to increasing the penalty for targeting the elderly with abusive debt-collection practices, enforcement agencies could step up enforcement of the current law. After a number of years without bringing any enforcement actions, the FTC has recently filed a complaint<sup>211</sup> against a number of debt-collection agencies that “allegedly threatened consumers throughout the nation with lawsuits, seizure of property, and arrest.”<sup>212</sup>

### C. Increasing Financial Education Among the Elderly

While legislative amendment and increased enforcement from federal agencies—governmental solutions—are undoubtedly necessary to make the debt-collection process less threatening to elderly debtors, increased education is the most important step the elderly can take to prevent harassing and abusive treatment in the hands of a debt collector. The elderly need to increase their knowledge not just of their rights under the FDCPA but also of how the consumer-credit industry works. Seniors that make better decisions about their finances are likely to never come in contact with a debt collector. Those that are forced to deal with collection agencies will be able to level the playing field, speak authoritatively, and prevent the harassment that occurs when a collector senses the balance of power has shifted in his favor.

Increased education will not only benefit seniors who are caught in the three nodes of the consumer-credit cycle, but also those who

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209. FED. R. CIV. P. 23.

210. 15 U.S.C. § 1692k(a)(2)(B).

211. Complaint at 2–5, Fed. Trade Comm’n v. Rawlins & Rivera, Inc., No. 6:07-CV-146-ORL (M.D. Fla. Jan. 31, 2007), available at <http://www.ftc.gov/os/caselist/0623139/070202cmp0623139.pdf>.

212. Press Release, Fed. Trade Comm’n, *supra* note 78; see *supra* notes 78–81 and accompanying text.

have not yet acquired access to consumer credit. Certainly, the earlier consumers are educated about the risks and benefits of using consumer credit over other forms of financing, the better choices they will be able to make. Indeed, elderly Americans could benefit from a program specifically targeted at young Americans. The Jump\$start Coalition for Personal Financial Literacy<sup>213</sup>—which promotes financial literacy for students—could and should be expanded to include financial literacy for the elderly.<sup>214</sup> Jump\$start is a “coalition of organizations, which share a commitment to the financial education of youth” through “advocacy, research, standards and educational resources” and “strives to prepare youth for life-long successful financial decision-making.”<sup>215</sup> One of the resources included on its Web site is a list of other potentially helpful Web sites, including “Banking on Our Future,”<sup>216</sup> the “Institute for Financial Literacy,”<sup>217</sup> the Girl Scout’s “Money \$marts” Web site,<sup>218</sup> and “The Money Camp for Kids.”<sup>219</sup> As more elderly Americans become comfortable with the Internet,<sup>220</sup> Web sites similar to the ones targeted at children could be used to inform seniors of their rights and point them to other resources.

However, while increasing the generalized financial knowledge of the elderly is an important goal in its own right, knowledge of the specific rules and regulations governing debt-collection agencies can be particularly important in curbing abuses in the industry. It is especially important the elderly are aware of the potential for litigation. While the elderly are often portrayed and stereotyped as being

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213. Jump \$start Coalition, <http://www.jumpstart.org> (last visited Jan. 13, 2008).

214. *Id.* Obviously, while one option would be for Jump\$start to include the elderly in the services they provide, similar services could be performed by an entirely different group. Jump\$start is simply one example of a program that appears to be effective at increasing financial literacy among a discreet subset of the population, and its goals and practices should be emulated, if not copied exactly when designing a program to increase financial awareness among the elderly.

215. *Id.*

216. Banking on Our Future, <http://www.bankingonourfuture.org/master.cfm/main/home> (last visited Jan. 13, 2008).

217. Institute for Financial Literacy, <http://www.financiallit.org> (last visited Jan. 13, 2008).

218. Girl Scouts, Money \$marts, <http://www.girlscouts.org/moneysmarts> (last visited Jan. 13, 2008).

219. Creative Wealth International, Camp Millionaire is the Unique Financial Literacy Program for Kids and Grown-ups, <http://www.creativewealthintl.org/> (last visited Jan. 13, 2008).

220. Eric L. Carlson, Note, *Phishing for Elderly Victims: As The Elderly Migrate to the Internet Fraudulent Schemes Targeting Them Follow*, 14 *ELDER L.J.* 423, 425–27 (2006).

unlikely to utilize the court system to resolve their disputes, litigation can be an effective vehicle for curbing some of the more abusive behaviors of the debt-collection industry.

An even easier way to resolve the more egregious abuses is to educate the elderly about their rights under the FDCPA. If state statutes are more protective of debtors' rights, it is important to educate the elderly about those laws as well. An elderly American who can quickly and resolutely deal with the debt collector directly is more likely to be treated with respect by the debt collector in the future. Because some members of the industry prey on those who are unaware of their rights or are afraid to speak up in their defense, increasing knowledge removes an important advantage the debt collector has over their elderly victim.

An ideal educational solution would involve an intergenerational transfer of knowledge.<sup>221</sup> Unfortunately, unlike with the Internet, a group does not exist that is more sophisticated than the elderly when it comes to financial literacy. Young and middle-age Americans are just as befuddled by the consumer-credit market as seniors are. There is no specific group that can sit down with the elderly to explain the process of wise financial planning and the limits of their legal rights once they run into an unscrupulous collector. It is imperative that assistance must come from all segments of society that can conceivably help.

Nevertheless, increasing the financial literacy of the elderly is the least costly and least disruptive solution. There are a number of resources already available to people of all ages, including some specifically targeted at seniors, for anyone who is willing to take the time to learn good financial decision making. While it can be a burden for a senior to learn about the esoteric nature of credit markets, it is necessary in order to stamp out the abusive debt-collection practices that target the most vulnerable members of society.

## V. Conclusion

Abusive debt-collection practices targeted at elderly debtors are a large problem that is only going to get larger as more elderly Americans take on increasing levels of consumer debt. Three changes, each in a different segment of society, can help ameliorate this problem.

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221. *See id.* at 451–52.

Legislative changes to the FDCPA would make it more protective of elderly debtors. Additional enforcement of existing state and federal debt-collection laws would cut down on instances of abusive practices targeted at elderly debtors. Increased education among the elderly would increase their awareness of their rights and provide them with additional tools to combat abusive debt collectors.