Title
DIRTY DEBTS SOLD DIRT CHEAP

Journal
HARVARD JOURNAL ON LEGISLATION, 52(1)

ISSN
0017-808X

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Publication Date
2015

ARTICLE

DIRTY DEBTS SOLD DIRT CHEAP

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More than seventy-seven million Americans have a debt in collections. Many of these debts will be sold to debt buyers for pennies, or fractions of pennies, on the dollar. This article details the perilous path that debts travel as they move through the collection ecosystem. Using a unique dataset of eighty-four consumer debt purchase and sale agreements, it examines the manner in which debts are sold, oftentimes as simple data on a spreadsheet, devoid of any documentary evidence. It finds that in many contracts, sellers disclaim all warranties about the underlying debts sold or the information transferred. Sellers also sometimes refuse to stand by "the accuracy or completeness of any information provided." After discussing potential explanations for these issues, the article suggests that lax regulation and a collective action problem prevents the market from self-correcting. It concludes by recommending that the Consumer Financial Protection Bureau declare the collection of consumer debts sold in this way as an unfair or deceptive act or practice.

I. INTRODUCTION

Imagine you get a call from a debt collector. She tells you she is calling about your $1,000 balance on a GE Capital credit card. You had no idea the company that makes your refrigerator also issued credit cards, but you are certain you never had one with it. The collector explains that she is calling regarding a GAP credit card.[1] You cannot remember the last time you stepped into a GAP store, but you vaguely recall getting a card a few years back, when you were in college. It was a long time ago, but you feel pretty certain you would have paid your bill.

You have no idea who ABC Debt Collection is, and that's where the collector tells you she is calling from. She also tells you she is collecting on

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[1] This is an entirely fictional scenario, but GAP Cards are issued by Synchrony Bank (formerly GE Capital). *See* Charmaine Ng, *It's Official: GE Capital Retail Bank Is Now Synchrony Bank*, CREDIT KARMA (June 11, 2014), http://blog.creditkarma.com/news-trends/its-official-ge-capital-retail-bank-is-now-synchrony-bank/, *archived at* http://perma.cc/T7EW-KF6F.

behalf of XYZ Debt Buyer. This alphabet soup gives you a headache; you are certain you have had dealings with only *one* of those four companies—GAP. You want to know whether you really owe this money and who you should pay, but you worry about those scams you hear about on the news. A few days later, a letter arrives from ABC requesting payment. The letter says you can request a validation of the debt within 30 days, so you write a letter back asking for proof that this is your debt. It never comes. You still get calls and letters about this debt, but it is not ABC calling anymore. It seems like every few months the calls come from a different company altogether.

This sketch represents one of the many ways the more than 77 million Americans who have a debt in collection experience the collection system.[2] When consumers fail to repay their financial obligations—credit cards, auto loans, medical bills, or even gym memberships—creditors seek to collect on the debts. They can try to collect themselves, or they can retain a third party firm (collection agency) to collect. Often, they sell the debts to firms who specialize in collections (debt buyers). These firms, including four publically traded companies, buy these debts for pennies—or fractions of pennies—on the dollar.[3] For example, the $1,000 balance on a GAP-branded, GE Capital credit card might have been sold to XYZ Debt Buyer for $40. It is also likely that when XYZ purchased the debt, they only bought the assignment of the right to collect and a spreadsheet with some information about you and the debt. XYZ Debt Buyer is unlikely to have purchased underlying documents like account statements. XYZ Debt Buyer might have then hired ABC Debt Collection to collect the $1,000 plus interest and fees from you, sometimes as much as a decade or more after the obligation was incurred.[4] After some time, XYZ Debt Buyer may also decide to sell the debt to QRS Debt Buyer who may try to collect the debt itself or hire DEF Collection Agency. In

[2] Caroline Ratcliffe & John Chalekian, Urban Institute, Delinquent Debt in America 7 (July 30, 2014), *available at* http://www.urban.org/UploadedPDF/413191-Delinquent-Debt-in-America.pdf, *archived at* http://perma.cc/F48P-SWMJ. This number is based on individuals who have a credit file with TransUnion. *See id.* at 8. The average debt was $5,178 and the median debt was $1,349. *Id.* at 9, 11.

[3] While the debt purchasing market can include the purchase of non-delinquent consumer or commercial receivables, the discussion in this Article is limited to the purchase of delinquent or defaulted consumer accounts. The CFPB estimates that debt buyers and debt collectors, combined, totaled approximately 4,500 firms in 2007. Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592, 9599 (proposed Feb. 17, 2012) (citing U.S. Census Bureau, Economic Census (2007)).

[4] Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry 23 (2013) [hereinafter FTC Debt Buyer Report], *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf, *archived at* http://perma.cc/XSN6-XXSD ("On average, debt buyers paid 4.0 cents for each dollar of debt."); *id.* at T-8 (regression model includes debts between 6-15 years and 15+ years); Encore Capital Group Inc., Annual Report (Form 10-K) 36 (Feb. 13, 2013), *available at* https://www.sec.gov/Archives/edgar/data/1084961/00011931251 3055397/d443977d10k.htm, *archived at* http://perma.cc/JJ2M-QAXP (stating that in 2012, Encore invested $562.3 million in portfolios to acquire 562 million defaulted consumer accounts with face value of $18.5 billion, at average cost of 3.0 cents per dollar of face value).

some cases, the debt may be placed with a collection law firm at some point, who can collect via calls or dunning letters or file a lawsuit against you.

The low cost at which XYZ Debt Buyer purchased the debt from GE Capital reflects the risk the buyer is taking that the debt will ultimately be uncollectible.[5] The price also reflects the documentation and information (or lack thereof) about the debt that the seller provides to the buyer. Finally, the cost of the debt reflects the underlying contract language: in particular, the representations and warranties made by the seller regarding the accounts sold. The less the seller is willing to "stand by" the accounts it sells—for example, if the seller disclaims all warranties of title or accuracy of the information provided—the cheaper the debt. Debt buyers purchase billions of dollars of delinquent debts annually, sometimes from creditors, oftentimes from other debt buyers.[6] The existence of this secondary market for consumer debts lowers the overall cost of credit and, some argue, is critical to our credit economy.[7]

In recent years, however, the debt collection industry has been the subject of much criticism.[8] The Federal Trade Commission ("FTC" or "Com-

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[5] Professor Mann hypothesized in 2007 that the "developing market [in the sale and purchase of consumer debt] appears to suggest that the debt is more valuable in the hands of the smaller companies that can collect more aggressively than reputable large companies." Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 391 (2007) [hereinafter *Sweat Box*].

[6] *See, e.g.*, ENCORE CAPITAL GROUP INC., ANNUAL REPORT (FORM 10-K) (Feb. 13, 2013), *supra* note 4, at 36 (describing that during 2012, Encore invested $562.3 million in portfolios to acquire 562 million defaulted consumer accounts with a face value of $18.5 billion, at an average cost of 3 cents per dollar of face value, which represented a 45.3% increase over the previous year's investment); SQUARETWO FIN. CORP., ANNUAL REPORT (FORM 10-K) 35 (Mar. 1, 2013), *available at* https://www.sec.gov/Archives/edgar/data/1505966/000150596613000008/squaretwo-2012123110k.htm, *archived at* http://perma.cc/8JB2-TXC9 ("From 1999, our first full year of purchasing debt, to December 31, 2012, we have invested approximately $2.2 billion in the acquisition of charged-off receivables, representing over $33.9 billion in face value of accounts. The combination of our historical and future recovery efforts is expected to result in cumulative gross cash proceeds of approximately 2.2x our invested capital. From 1999 to December 31, 2012, we have grown our business from $8.7 million to $608.0 million of annual cash proceeds on owned charged-off receivables, representing a compound annual growth rate of approximately 35%.").

[7] The CFPB notes that "[c]ollection of consumer debts serves an important role in the functioning of consumer credit markets by reducing the costs that creditors incur through their lending activities. Collection efforts directly recover some amounts owed to owners of debts and may indirectly support responsible borrowing by underscoring the obligation of consumers to repay their debts and by incenting consumers to do so. The resulting reductions in creditor's losses, in turn, may allow them to provide more credit to consumers at lower prices." Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67849 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006) [hereinafter CFPB ANPR] (footnotes omitted); Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 NW. U. L. REV. 807, 907 (1986) (arguing that "common-law debt collection fostered the development of capitalism" and "the rise of the English credit economy").

[8] *See CFPB Files Suit Against Debt Collection Lawsuit Mill*, CONSUMER FIN. PROT. BUREAU (July 14, 2014), http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-debt-collection-lawsuit-mill/, *archived at* http://perma.cc/5EDR-NZ8E (describing CFPB lawsuit alleging that collection law firm filed lawsuits based on faulty evidence); *At FTC's Request, Court Orders Halt to Collector's Illegal Practices, Freezes Assets*, FED. TRADE COMM'N

mission"), historically the chief federal regulator of debt collectors, has referred to debt buying and debt collection as a "broken system."[9] A number of commentators have argued that attorneys suing to collect on a debt often do not have the necessary documentation to prove to the court that they own the debt or the amount owed.[10] As this article goes to press, a new mass-

(Aug. 1, 2013), http://www.ftc.gov/news-events/press-releases/2013/08/ftcs-request-court-orders-halt-debt-collectors-illegal-practices, *archived at* http://perma.cc/7AFD-DUE4 (alleging that debt collector extorted payments out of consumers by using false threats and communicating with family members, friends, and co-workers of consumers); *Attorney General Kamala D. Harris Announces Suit Against JPMorgan Chase for Fraudulent and Unlawful Debt Collection Practices*, State of Cal. Dep't of Justice, Office of the Att'y Gen. (May 9, 2013), http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-suit-against-jpmorgan-chase, *archived at* http://perma.cc/E8B6-5WBP ("The suit alleges that Chase engaged in widespread, illegal robo-signing, among other unlawful practices, to commit debt-collection abuses against approximately 100,000 California credit card borrowers over at least a three-year period."); *Attorney General Lori Swanson Obtains Consent Judgment in "Robo-Signing" Lawsuit Against One of the Country's Largest Debt Buyers*, Office of the Minn. Att'y Gen. (Dec. 12, 2012), http://www.ag.state.mn.us/Consumer/PressRelease/121212DebtBuyers.asp, *archived at* http://perma.cc/4R8N-9G5Z (describing consent order with Midland Funding meant to address issues with robo-signed affidavits); *Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million For Alleged Consumer Deception*, Fed. Trade Comm'n (Jan. 30, 2012), http://www.ftc.gov/news-events/press-releases/2012/01/under-ftc-settlement-debt-buyer-agrees-pay-25-million-alleged, *archived at* http://perma.cc/7JCL-59BL (describing consent order with Asset Acceptance settling charges that the debt buyer made "misrepresentations when trying to collect old debts"); Jamie Smith Hopkins, *Md. Court Freezes 900 Debt-Collection Lawsuits*, Baltimore Sun (July 20, 2011), http://articles.baltimoresun.com/2011-07-20/business/bs-bz-debt-collection-suits-20110720_1_cases-against-maryland-consumers-mann-bracken-debt-collection-lawsuits, *archived at* http://perma.cc/J4JT-SSWF ("Last year, [Judge] Clyburn dismissed more than 27,000 Maryland cases handled by Mann Bracken after the Rockville debt-collection law firm collapsed. In March, debt buyer Midland Funding [a subsidiary of Encore Capital] agreed to drop just over 10,000 cases against Maryland consumers to settle a class-action lawsuit, though it admitted no wrongdoing."); Beth Healy et al., *Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt to Collectors*, Bos. Globe, July 31, 2006, at A1, *available at* http://www.boston.com/news/specials/debt/part2_main/, *archived at* http://perma.cc/7AC3-9B9K (describing examples of individuals coming to court and finding collection attorneys unprepared); Complaint, Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assoc., P.C., No. 14-02211 (N.D. Ga. July 7, 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_complaint_hanna.pdf, *archived at* http://perma.cc/MU7K-XAU6; Emanuel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 Vt. L. Rev. 339 (2013) [hereinafter *Account Stated Resurrected*]; Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 Loy. Consumer L. Rev. 355 (2012) (describing preliminary results of a small study of debt collection cases in Indiana) [hereinafter *Do We Have a Debt Collection Crisis?*]; Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 258 (2011) [hereinafter *Debts, Defaults, and Details*]; Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights?*, 35 Wm. Mitchell L. Rev. 1116 (2009) [hereinafter *Flood of Debt Collection*]; *cf.* Fed. Trade Comm'n, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration 5 (2009) [hereinafter Repairing a Broken System], *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf, *archived at* http://perma.cc/5WG4-QLB3.

[9] Repairing a Broken System, *supra* note 8, at 5.

[10] *See, e.g.*, Complaint, *supra* note 8, at 9; *Debts, Defaults, and Details*, *supra* note 8, at 269; *Flood of Debt Collection*, *supra* note 8, at 1118; *Account Stated Resurrected*, *supra* note 8, at 343–44; *Do We Have a Debt Collection Crisis?*, *supra* note 8, at 361. "[I]t is equally

market non-fiction book has just been released delving into the world of debt collectors.[11] The Consumer Financial Protection Bureau ("CFPB" or "Bureau"), a federal agency with freshly-minted authorities to regulate the entire debt collection ecosystem, is poised to propose debt collection rules in early 2015.[12] This article details the alarming and systemic issues that affect the information in the current debt collection and debt buying system. In doing so, it exposes the difficulties consumers face in verifying that they are paying the right amount to the right party when contacted by a collector, as well as the hurdles debt buyers face in collecting. The article ultimately argues that without regulatory intervention, these issues will continue because no one player in the debt collection ecosystem—not creditors, debt buyers, or even consumers—has the incentive to change their behavior and internalize the costs of these changes.

A debt sale, at its essence, is an assignment from a seller to a buyer of "any legal interest" the seller has against the account holder. In most commercial sales, what is conveyed is more than a quitclaim deed from the seller.[13] Many commercial contracts include warranties from the seller "be-

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clear that in the debt buyer context, 'small claims courts' have in reality become 'creditor's courts,' devoid of the hallmark characteristics of an adversary system." 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, 272 (2011) [hereinafter *The One Hundred Billion Dollar Problem*]; *see also* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179, 186 (2014) [hereinafter *Junk Justice*].

[11] *See* Jake Halpern, Bad Paper: Chasing Debt from Wall Street to the Underworld (2014).

[12] The CFPB sought comments through an Advanced Notice of Proposed Rulemaking on the topic of debt collection in late 2013. The comment period closed in February 2014. *See* CFPB ANPR, *supra* note 7. Along with Patricia McCoy, the author filed a comment urging the CFPB to impose greater documentation and information requirements. Patricia A. McCoy and Dalié Jiménez, Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F), Docket No. CFPB-2013-0033, Regulatory Identification Number (RIN) 3170-AA41 (Feb. 28, 2014), *available at* http://www.creditslips.org/files/jimenez-mccoy-comment-in-response-to-cfpb-anpr-on-debt-collection-final-1.pdf, *archived at* http://perma.cc/3T7J-ZDED.

[13] *See* K. A. Drechsler, *Rights or Interests Covered by Quitclaim Deed*, 162 A.L.R. 556 (1946) ("[A] quitclaim deed passes all the right, title, and interest which the grantor has at the time of making the deed and which is capable of being transferred by deed, unless a contrary intent appears, and it transfers nothing more."). Quitclaim language is frequently used in real estate transactions. *See* Black's Law Dictionary 712 (9th ed. 2009) (defining "quitclaim deed" as "[a] deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid"); American Law Institute—American Bar Association Continuing Legal Education, *Modern Real Estate Transactions: Sample Purchase and Sale Agreement*, SU006 ALI-ABA 83, July 18–20, 2012. In real estate transactions, however, quitclaim deeds are most often used by people who know each other. *See generally* Sean Wilken & Theresa Villiers, The Law of Waiver, Variation and Estoppel (2d ed. 2002). Conveyance of property by a quitclaim deed in a real estate transaction "means that the person who signs the deed is conveying whatever interest—if any—he or she has in the property . . . . If the person doesn't own an interest in the property, the recipient gets nothing" and has no recourse against the seller. Mary Randolph, Deeds for California Real Estate 72 (8th ed. 2010).

cause they are often in the interests of both the buyer and the seller."[14] In the context of a sale of consumer debts, a rational buyer at a minimum would want the seller to warrant that (1) it has title to the accounts it is selling, (2) it has complied with applicable consumer protection laws, and that (3) the information it is acquiring about the debt and debtor is accurate.[15] Finally, separate from warranties, a rational buyer would want to obtain some documentation regarding the debt to show the debtor and induce payment.

If the seller does not have unencumbered title to the accounts she bought, the buyer has paid money for nothing. What's more, if the seller manages to sell the accounts but did not comply with the Fair Debt Collection Practices Act ("FDCPA") and other relevant laws, the buyer may be held liable when she attempts to collect. Moreover, without accurate information about the identity of the account holders, the amount owed, and relevant dates regarding the account, the buyer may have trouble collecting or may face FDCPA liability. Not having documents such as account statements, contracts between the consumer and the creditor, or other documentary evidence of the debt puts the debt buyer in a difficult position: she may not be able to convince a consumer with the ability to pay that the consumer owes the debt and that the debt buyer is the right party to pay. Worse, she may not be able to sue consumers who refuse to pay, for if she sues without documentary evidence of the debt, she risks losing the suit and subjecting herself to FDCPA liability. That these features are crucial to a consumer debt sale transaction is fairly sensible; this article details the surprising finding of how often sale transactions lack one or more of these.

Part II of this article describes the mechanics of debt collection and debt buying by detailing how creditors attempt to collect when accounts go delinquent. It uses a sample of eighty-four purchase and sale agreements between large banks and debt buyers, along with data from the FTC to examine the prototypical consumer debt sale transaction.[16] This is the first time such a collection has been made public and analyzed; these agreements are

[14] Kabir Masson, *Paradox of Presumptions: Seller Warranties and Reliance Waivers in Commercial Contracts*, 109 COLUM. L. REV. 503, 507 (2009) (arguing that this solves "the adverse selection problem" sometimes known as "lemons problem" because "[f]or buyers, a seller warranty lends credibility to a product and reduces the risks related to a possible product defect. For sellers, a warranty can help distinguish the object of sale from others on the market that might look as good, but not function as well (so called 'lemons')").

[15] That is not to say that warranties are a master cure. As Bruce Mann has noted in the context of automobile sales, "[d]efects will exist even in vehicles sold with warranties." Bruce Mann & Thomas J. Holdych, *When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 YALE L. & POL'Y REV. 1, 3 n.11 (1996) (describing the "lemons" problem).

[16] The contracts are all available at http://dalie.org/contracts, *archived at* http://perma.cc/6Y96-3B8N.

closely-guarded by the industry and are only made public under a court order.[17]

These contracts reveal that an alarming number of transactions lack many of the basic elements a rational debt buyer should want. Instead of warranties, most contracts contain "reliance waivers," a declaration from the buyer that it has not relied on any statements or representations the seller may have made at any point.[18] Instead of affirmative representations, the contracts specifically disclaim material aspects of the transaction and provide little to no evidence of the underlying accounts. For example, sellers (1) do not warrant that they have title to the accounts they sell, (2) disclaim that the amounts listed as owed by account holders are correct, (3) sometimes disclaim compliance with applicable laws, and (4) provide little to no documentation during a sale. Finally, in an apparent attempt to ensure that the "reliance waivers" stick, most of the contracts contain "Big Boy" clauses akin to those used in securities transactions.[19] This Part also examines the very limited information available to debt buyers regarding the delinquent accounts and discusses the (in many cases) near impossibility of obtaining documentation about the accounts after a sale.[20]

Part III catalogues the problems that arise for both debt buyers and consumers as a result of this ecosystem. It begins with the possibility that errors are introduced in the system because of the way that information about debts is transferred among multiple systems during collections. It then

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[17] *See, e.g.*, Gold v. Midland Credit Mgmt. Inc., No. 13-cv-02019-WHO, 2014 WL 767732, at *1 (N.D. Cal. Feb. 20, 2014) (ordering defendants to produce purchase and sale agreement).

[18] Masson, *supra* note 14, at 512.

[19] "Big boy letters are agreements between parties to a securities transaction where one party, typically the seller, has material, nonpublic information that it does not want to disclose, but both parties want to complete the transaction and preclude any claims based on the nondisclosure." Edwin D. Eshmoili, *Big Boy Letters: Trading on Inside Information*, 94 Cornell L. Rev. 133, 135 (2008) (footnotes omitted). The clauses here are similar to those found in securities transactions, where standard provisions include representations by the signatory that: it is financially sophisticated; it is aware that the counterparty may have material, nonpublic information that may affect the value of the traded securities; it realizes that it is not privy to any such information, if there is any; it is not relying on any of its counterparty's nondisclosures, if there are any; it is not relying on any representations not expressly set forth in the big boy letter; it is waiving all claims against its counterparty arising out of the nondisclosure; and finally, it realizes the effect of this waiver and elects to proceed with the transaction, essentially stating, "I am a big boy." *Id.*

[20] An example clause from several of the debt purchasing agreements is instructive: "Buyer expressly acknowledges that . . . documentation may not exist with respect to the Loans purchased by Buyer." Loan Sale Agreement between FIA Card Servs., N.A. and Cavalry SPV I, L.L.C. (Oct. 29, 2008), at 31, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.10.29-FIA-Card-Services-to-Cavalry-SPV-I-LLC.pdf, *archived at* http://perma.cc/6TZE-X7CN; Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (Apr. 14, 2010), at 31, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.04.14-FIA-to-CACH-LLC.pdf, *archived at* http://perma.cc/993G-8EN8; Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (Aug. 11, 2009), at 29, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.08.11-FIA-Card-Services-to-CACH-LLC.pdf, *archived at* http://perma.cc/GQ6U-9NVT.

details specific problems consumers and debt buyers can encounter as a result of missing information and a lack of documentation regarding the debts. Spillover effects from these problems harm consumer confidence in the banking and judicial systems.

Part IV suggests potential explanations for the puzzling manner in which these transactions are structured. Part V discusses two types of potential solutions. It begins with thoughts on the roles industry can play in self-regulation, including steps that some players have started to take in this direction. The article closes by proposing that the CFPB use its powers to regulate both creditors and debt buyers by declaring the sale and collection of consumer debts without documentation and material warranties unfair or deceptive under both the FDCPA and the Consumer Financial Protection Act ("CFPA").

II. Lifecycle of a Debt: A Primer

Creditors use a variety of approaches to recover on delinquent accounts. This Part details the movement of a typical delinquent account from delinquency until it is purchased. It describes the "how" of a debt assignment as well as the "what"—what contract language governs the assignment as well as what information or documentation regarding the debt moves with the assignment. The discussion focuses primarily on credit card debts because they comprise the largest portion (by dollar amount) of consumer debt purchased by debt buyers.[21] A great deal of the issues identified in this article involve the software and systems that store account-level information. These are critical systems, to be sure, but as the next sub-part details, they are not the same systems that house transaction-level information when an account is current. When non-performing accounts are segregated into separate sys-

[21] While anthropological research has shown that credit predates even money itself, and that debt buying and debt trading has been around since antiquity, *see* David Graeber, Debt: The First 5,000 Years 18 (2012), the modern iteration of the bulk debt purchasing business model developed over thirty years ago, as a result of the savings and loans crisis, *see* Fed. Deposit Ins. Corp., Managing the Crisis: The FDIC and RTC Experience 433 (1998) [hereinafter FDIC, Managing the Crisis]. *See generally* Lee Davison, *Politics and Policy: The Creation of the Resolution Trust Corporation*, 17 FDIC Banking Rev. 17 (2005), *available at* http://www.fdic.gov/bank/analytical/banking/2005jul/article2.pdf, *archived at* http://perma.cc/N26B-KXKC. The Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC) "became custodians of an unprecedented number of assets from failed banks and thrifts" following the crisis. FDIC, Managing the Crisis 433. The FDIC established the Judgments, Deficiencies, and Charge-offs (JDC) equity partnership program in 1993 whereby select private entities were conveyed unsecured assets and proceeds were split with the RTC. *Id.* After the RTC assets dried up, the JDC entities found other sources of defaulted accounts from credit card companies, which were ready to sell their delinquent assets given how successful they had seen the practice would be. FTC Debt Buyer Report, *supra* note 4, at 12 (citing Robert J. Andrews, Debt Collection Agencies in the US, IBIS-World Indus. Rep. 56144 14 (2010)).

tems, the incentives to make sure those systems perform in top shape dramatically decrease.[22]

A. Flow and Integrity of Information

When a bank-issued credit card account goes unpaid for the first time, rendering it "delinquent," the card company will typically attempt "soft" methods to attempt to collect. This generally involves an email, letter, or phone call from internal collection staff reminding the consumer that the payment is late. The outreach steps up as time passes and the account becomes severely delinquent (more than thirty days past due) and more so after ninety days past due, when it becomes categorized as severely derogatory.

Before the account is severely derogatory, the bank has been storing all of the information pertaining to the person's account—payments, charges, biographical information—in their "system of record" ("SOR").[23] An SOR "is an information storage system . . . which is the authoritative data source for a given data element or piece of information."[24] "The system of record for the banking environment states that you have your balance for your account in exactly one place."[25] Sometimes dubbed a "golden copy," the idea is that in a world in which "data is extracted, merged, massaged, replatformed, and reported many times over[,] [i]dentifying a 'system of record' establishes which source is official for each element (or chunk) of data."[26] In a banking environment, information about the customer's conversations with customer representatives, disputes and complaints, and the like

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[22] Although some have argued that even when we might think software is mission-critical, the incentives to produce quality software are lacking. James Kwak, *Software Runs the World: How Scared Should We Be That So Much of It Is So Bad?*, THE ATLANTIC (Aug. 8, 2012), *available at* http://www.theatlantic.com/business/archive/2012/08/software-runs-the-world-how-scared-should-we-be-that-so-much-of-it-is-so-bad/260846/?single_page=true, *archived at* http://perma.cc/K6W8-DLF6 ("[A]s computer programs become more important to the financial system and hence the economy, there is insufficient incentive for trading firms to make sure their software works properly . . . . [T]he question is how much you're willing to sacrifice in the name of quality.").

[23] John Tonetti, Collections Program Manager, Consumer Fin. Prot. Bureau, Presentation at FTC/CFPB Life of a Debt Conference: How Information Flows Throughout the Collection Process (June 6, 2013) (transcript available at http://www.ftc.gov/sites/default/files/documents/videos/life-debt-data-integrity-debt-collection-part-1/130606debtcollection1.pdf, *archived at* http://perma.cc/52W-CSAZ).

[24] *System of Record*, DECISION SUPPORT GLOSSARY, UNIVERSITY OF WASHINGTON, http://www.washington.edu/uwit/im/ds/glossary.html (last visited Aug. 16, 2014), *archived at* http://perma.cc/4J5Y-Z44H.

[25] Bill Inmon, *The System of Record in the Global Data Warehouse*, INFORMATION MGT. (May 1, 2003), http://www.information-management.com/issues/20030501/6645-1.html.

[26] Ronald G. Ross, *'Rules of Record'—Why 'System of Record' Isn't Enough*, 9 BUS. RULES J. 1 (2008) (internal quotation marks omitted), *available at* http://www.BRCommunity.com/a2008/b385.html, *archived at* http://perma.cc/964Y-FC6N.

is maintained in the bank's customer relationship management ("CRM") system, separate from the SOR.[27]

At some point after the account becomes severely derogatory, the bank will likely move the account information from its SOR to its collection system. Typically, the bank's SOR will not receive much information about anything that happens in the collection system.[28] Depending on the card issuer, the debt may be placed with one or more collection agencies that will work on contingency to try and recover what is owed.[29] Once a consumer's debt is placed with a collection agency, she will begin receiving phone calls or letters from an entity with which she has no prior relationship, seeking to collect on her credit card debt.[30]

If the consumer does not pay after an agency has "worked" the account, it is likely that the account will be recalled and placed with a second collection agency. Information that may have been gathered by one collection agency—such as notes describing why the consumer is not paying—is not generally transmitted to the subsequent collection agency nor is it incorporated in the bank's SOR.[31] What is sent to collection agencies is the bare minimum to enable the collector to seek payment on the bank's behalf: "demographic and financial information so the consumer can be contacted, the balance on the account, and perhaps some information on the collection process such as a recovery score."[32] Information gathered in the lender's CRM—dispute information, notes about what conversations with customer service representatives, etc.—will not be shared with the collection agency.[33] This means that the consumer will be contacted by a second previously un-

[27] *See* Tonetti, *supra* note 23, at 34. ("Most often there may be some limited fee[d] between the system of record and the CRM, but if you want the full story, you'll likely have to review the CRM.").

[28] *See id.*

[29] Collection agencies work on contingency collecting debts on behalf of both creditors and debt buyers. They generally engage in the same type of collection efforts that the original creditor would have engaged in, but collect using their own name. *See* General Accounting Office, Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology 29 (2009) [hereinafter GAO Debt Collection Report], *available at* http://www.gao.gov/assets/300/295588.pdf, *archived at* http://perma.cc/XBN8-NQW8; Robert Hunt, *Collecting Consumer Debt in America*, Q2 2007 Fed. Reserve Bank of Philadelphia Bus. Rev. 11, 12 (2007).

[30] Sometimes this collection agency also reports to one or more credit reporting bureaus, which might confuse consumers and certain users of credit reports, such as landlords. "Some consumers seemed to have difficulty in understanding the reporting of collections because items that were reported as tradelines of collection agencies did not generally identify the specific creditor or delinquent account that was involved." Fed. Trade Comm'n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 121 (2012) [hereinafter FTC Credit Report Accuracy], *available at* http://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf, *archived at* http://perma.cc/6N78-GR5V.

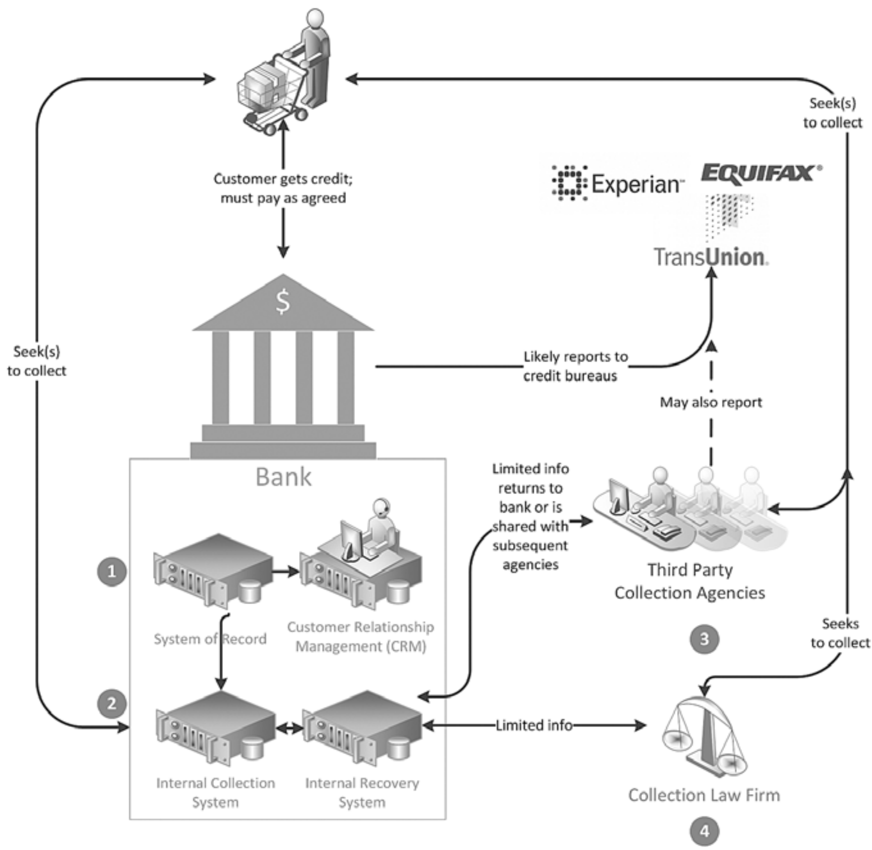
[31] *See* Tonetti, *supra* note 23, at 34–36.

[32] *Id.* at 36.

[33] *See id.*

known entity that will have no record of information the consumer gave to the first agency.

FIGURE 1: DATA FLOWS WHILE DEBT IS OWNED BY CREDITOR.[34]



At point (1) the information regarding the consumer and her account is maintained in two systems at the bank; the system of record (which contains transaction information) and the customer relationship management system, which contains notes on the customer's interactions with customer service representatives. As shown in (2), sometime after 30+ days of delinquency, banks will typically move the account to their internal collection system, and if the account continues past due for a few months, to their internal recovery system. At some point, one or more collection agencies may be used, as in

[34] This diagram is adapted from the presentation given by the CFPB's John Tonetti at the FTC/CFPB Life of a Debt event. *See* Tonetti, *supra* note 23. The diagram was designed using Microsoft Visio. Mr. Tonetti's PowerPoint is on file with the author.

(3). Finally, some creditors choose to sue on their own delinquent accounts and in those cases hire a collections law firm, as in (4).

If the consumer does not repay, eventually the card issuer is required by banking regulations to "charge-off" the account—declare it as unlikely to be collected. For credit cards, the Office of the Comptroller of the Currency ("OCC") generally requires that the charge-off occur within 180 days of the account being past due.[35] A charge-off has no effect on the validity or enforceability of the debt; it is simply an accounting procedure. Credit card contracts allow issuers to continue charging interest and fees after a charge-off, although most banks do not do so.[36] This practice avoids the cost of sending periodic statements, a requirement under the Truth in Lending Act, if the account continued to accrue interest or fees.[37]

At the point of charge-off, many lenders move the borrowers to a recovery system.[38] The recovery system does not always receive all of the information from the collection system.[39] This is the second place where information about the account may fall through the cracks: first, when the debt is placed with a collection agency and second, when it is moved to the recovery system. It is typically soon after charge-off—although this varies a great deal by issuer—that the account will be sold.[40] Debt is sold by credit card issuers in pools of accounts (portfolios) that are described as having particular characteristics important for valuation—e.g., average amount outstanding, date of last payment.[41] Most debts are sold through a bidding process, and bidders may be restricted by the seller depending on the size of the potential purchaser and its financials.[42]

Debt buyers also act as resellers of accounts to other debt buyers.[43] A debt may be sold again and again, as can be seen in Figure 2 and described

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[35] *See* OCC Bull. No. 2000-20, Policy Implementation, Uniform Retail Credit Classification and Account Management Policy, Office of the Comptroller of the Currency (2000), *available at* http://www.occ.gov/news-issuances/bulletins/2000/bulletin-2000-20.html, *archived at* http://perma.cc/ZU2P-LZVR; Uniform Retail Classification and Account Management Policy, 65 Fed. Reg. 36903, 36904 (June 12, 2000).

[36] *See, e.g.*, McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513, 525 (E.D. Mich. 2013) (describing deposition testimony from bank witnesses asserting that as a matter of business practices most banks do not charge interest or fees after charge-off).

[37] The current regulation requiring periodic statements is 12 C.F.R. § 1026.5(b)(2) (2012).

[38] *See* Tonetti, *supra* note 23, at 35.

[39] *See id.*

[40] The information sold with the debt will generally come from the recovery system. An account may be sold as "fresh" debt if it had never been placed with a collection agency or as primary, secondary, or tertiary debt if it has been "worked" by a collection agency before sale. "Fresh" debt carries a higher price. *See generally* GAO Debt Collection Report, *supra* note 29, at 18–30.

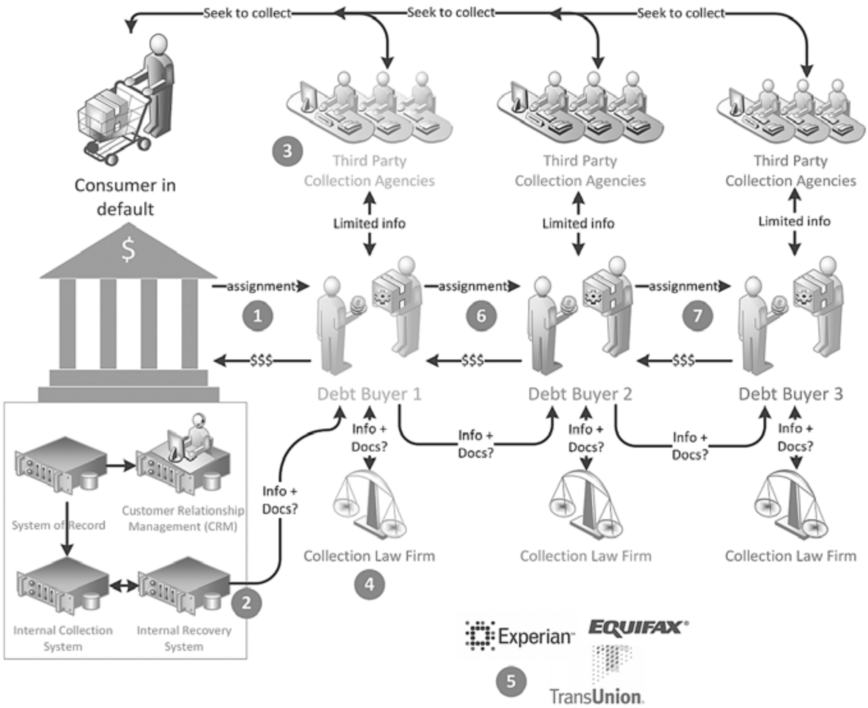
[41] FTC Debt Buyer Report, *supra* note 4, at 17–19.

[42] "Debt buyer industry representatives report that some large sellers (e.g., major credit card issuers) sell debts only to purchasers with well-established reputations and demonstrated financial strength. Large sellers apparently employ these selection criteria to decrease their risk of reputational harm as a result of the conduct of the debt buyers in collecting on debts as well as to decrease the sellers' credit risk." *Id.* at 20; *see also* Tonetti, *supra* note 23, at 34–36.

[43] *See* FTC Debt Buyer Report, *supra* note 4, at 19–20.

further below. Debt buyers (here acting as resellers) may sell an entire portfolio they have just purchased from a creditor, repackage previously purchased portfolios, or attempt to collect on purchased debts and sell the ones that they could not collect.[44] Subsequent debt buyers of an account have no relationship to the original creditor.

FIGURE 2: DATA FLOWS ONCE DEBT IS PURCHASED.[45]



A debt purchase is an assignment of rights under the original contract (e.g., credit card) between the consumer and the bank. At point (1), the bank assigns the first debt buyer the right to collect on a pool of accounts, for which the debt buyer pays money. Information about the accounts, typically in the form of an Excel spreadsheet is given to the debt buyer as in (2). This diagram does not include the situation in which documentation is not sold with the debt and instead is requested later by the first or a subsequent debt buyer. *See* Figure 3. The debt buyer will typically hire a third party debt collection agency, as in (3) to collect from the consumer. It may also seek to collect directly from the consumer (not shown). The first debt buyer (or one of its

[44] *See id.* at 19.
[45] This diagram was designed by the author. It depicts the same data flow as the one presented by Mr. Tonetti at the Life of a Debt event. *See* Tonetti, *supra* note 23.

collection agencies) may report to the credit reporting agencies in (5). At some point, a collection law firm may get involved, (4), whether it is to act as a collector or to initiate a lawsuit in state court. At some point, the consumer's obligation may be repackaged and sold to another debt buyer, as in (6). This may happen even after a judgment has been entered against a consumer. The same cycle will repeat again in very much the same way for any subsequent buyer.

Accounts are sold based on "face value," the amount of the debt due at time of charge-off, minus any payments that have been credited. After purchasing a charged-off debt, debt buyers may seek to collect interest on the charged-off amount.[46] When a debt buyer resells accounts, the second debt buyer will "roll back" the accumulated interest and may add it anew. If the debt buyers calculated the interest differently, a consumer may receive dunning letters requesting different amounts from different debt buyers about the same debt.

When purchasing consumer debts, buyers look for portfolios that meet their business model criteria (some debt buyers specialize in accounts in bankruptcy, for example).[47] Before bidding, the buyer will analyze the portfolio using credit reporting information[48] and may use analytical models to calculate expected recovery rates.[49] The first debt buyer may further parcel out pieces of the portfolios they have acquired and place the parceled-out accounts for sale with other, more specialized debt buyers who may be willing to pay more for them—for example, debt buyers who only collect in a particular state or region. It is not uncommon for subsequent debt buyers to purchase accounts originated by multiple creditors in one transaction.

For the accounts they keep, debt buyers may use their own collectors or place them with collection agencies that will contact the debtors via phone

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[46] *See* McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513, 517 (E.D. Mich. 2013). Conversations with consumer lawyers and debt collectors, as well as a review of court files, suggest that when debt collectors charge interest, they do so at the prevailing pre-judgment interest rate in the state, typically compounded annually. This is puzzling because there is no credit card agreement that compounds interest annually (as opposed to daily). In a number of instances, consumer lawyers have reported that debt buyers charged interest when seeking to collect from the consumer via letter—pre-litigation—and did not seek interest when they filed a lawsuit.

[47] FTC Debt Buyer Report, *supra* note 4, at 18.

[48] The Fair Credit Reporting Act specifically permits pulls of credit reports for debt buyers who have not yet purchased a consumer's debt. *See* Pub. L. No. 91-508 (2004); 15 U.S.C. § 1681b(a)(1)(E) (stating that a consumer reporting agency may furnish a consumer report to someone who "intends to use the information, as a potential investor or servicer . . . in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation").

[49] *See, e.g.*, *Evaluate A Debt Portfolio Before You Buy Or Sell*, Experian, http://www.experian.com/consumer-information/portfolio-evaluator.html (last visited Feb. 24, 2014), *archived at* http://perma.cc/LZJ7-WERC; Enhancing delinquent debt collection using statistical models of debt historical information and account events, U.S. Patent No. 7,191,150 B1 (filed June 30, 2000); Software solution for debt recovery, U.S. Patent No. 20,060,143,104 A1 (filed Dec. 23, 2005).

or mail and try to obtain payment.[50] Some debt buyers place accounts with law firm debt collectors who may first try to collect by sending letters or making phone calls, but who may eventually file a lawsuit. All of these collection entities—the debt buyer, its internal collection group, the collection agency, and the collection law firm—are regulated under the FDCPA as debt collectors and banned from engaging in the prohibited practices described earlier.

B. The Debt Sale Transaction: The Language of Purchase and Sale Agreements

Delinquent accounts are sold through purchase agreements that specify the relationships between the parties. Thousands of debt collection lawsuits are filed every day, most of them by debt buyers. Debt buyers carry the burden of proof in these lawsuits, so one might expect that that there would be a broad range of debt sale contracts to examine. But that has not been the case. There was very little indication of the content of these contracts until 2013, when the FTC issued a report on the debt buying industry.[51]

There are probably a few reasons for this. First, most of this litigation happens in small claims or other state courts which generally do not make their dockets available electronically. Second, no evidence of ownership is required in the vast majority of cases: between 70–90% of cases filed result in default judgments and when consumers come to court, they do so without an attorney, not knowing that they can ask for proof of ownership. Third, and anecdotally, in many circumstances debt buyers contest any motions to compel the contracts and will often dismiss a lawsuit if it looks like they may have to release the contract. Before the FTC report was released, only a handful of debt sale contracts had been publically released.[52]

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[50] The sale and collection on an account may continue, depending on the debt buyer's business model, either until the debt is paid or the cost of collection exceeds its expected value.

[51] In December 2009, the FTC issued orders to the nine largest debt buyers in the United States requesting a variety of information. *See* FTC Debt Buyer Report, *supra* note 4, at 7. The orders "required that the recipients produce extensive data about their business practices and how they receive, acquire, and transfer information about consumer debts." *Id.* at 8.

[52] Some contracts were made available as part of news stories. *See* Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, Am. Banker (Mar. 29, 2012), http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html, *archived at* http://perma.cc/U6NX-9U9X; *see also* Receivable Purchase Agreement between HSBC Card Services (III), Inc. and Main Street Acquisition Corp. (Feb. 20, 2009), at 9–10, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.02.20-HSBC-Card-to-Main-Street-Acq.pdf, *archived at* http://perma.cc/D57F-HMBC (redacting, *inter alia*, information about the cost and availability of documents); Flow Agreement for Purchase and Sale between Wells Fargo Bank, N.A. and Purchasers Advantage, L.L.C. (June 21, 2011), at 7–8, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.06.21-Wells-Fargo-to-Purchasers-Advantage-Flow-Agreement-as-is-type-language-but-limited-reps.pdf, *archived at* http://perma.cc/8JA3-B3B7 (redacting, *inter alia*, the percentage of accounts for which Wells Fargo was representing it could provide documentation under the agreement); Purchase and Sale Agreement between Citibank, N.A. and CACH, L.L.C. (Aug.

The remainder of this section adds one more data set to the discussion: it identifies the structure and terms in eighty-four consumer debt sale and purchase agreements collected over the past two years. This compilation is referred to as the "Litigation Sample," since all of the contracts were released in litigation. The following section compares the language in the Litigation Sample to that in the FTC sample. There are many similarities: most contracts disclaim all warranties and representations, many disclaim the accuracy of the information provided, and a few disclaim that the accounts comply with relevant consumer laws. In addition, most transactions do not include any documentation on the debts at the time of sale and severely limit its availability post-sale.

Before proceeding, it is helpful to compare some characteristics of the samples. In its report, the FTC obtained a collection of 350 contracts involving six large debt buyers.[53] In contrast, the Litigation Sample is comprised of contracts between seventy-eight different entities—listed in Table 3 in the Appendix—at least half of which are smaller debt buyers.[54] The FTC sample included primarily credit card portfolios (62%) but also involved a great deal of medical debts (17%).[55] The vast majority of contracts in the Litigation Sample deal with the sale of credit card debts. The time span of the samples also differs dramatically. The contracts the FTC examined were signed during a three-year period between July 2006 and June 2009. The contracts in the Litigation Sample span over a decade, from July 2001 to August 2013, as shown in Figure 3.[56] In contrast to the Litigation Sample,[57] the debt buyers themselves chose the contracts that the FTC examined.[58]

17, 2011), at 8–10, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.08.17-Citibank-to-CACH.pdf, *archived at* http://perma.cc/L5RG-Y93W (redacting two and a half pages).

[53] While the original request for information went to the nine largest debt buyers, the contracts only came from six. This was because one debt buyer exited the market in the middle of the collection period and two others specialized in the purchase of bankruptcy debt. *See* FTC Debt Buyer Report, *supra* note 4, at 8–9.

[54] The FTC noted in its report that "smaller debt buyers are a frequent source of consumer protection complaints." FTC Debt Buyer Report, *supra* note 4, at i. A list of all the entities involved in the contracts sample is at *Table 2 – Exemplar Contract Language from Litigation Sample*, and at *Table 3 – Companies Represented in Litigation Sample* in the Appendix. All contracts are available at www.dalie.org/contracts.

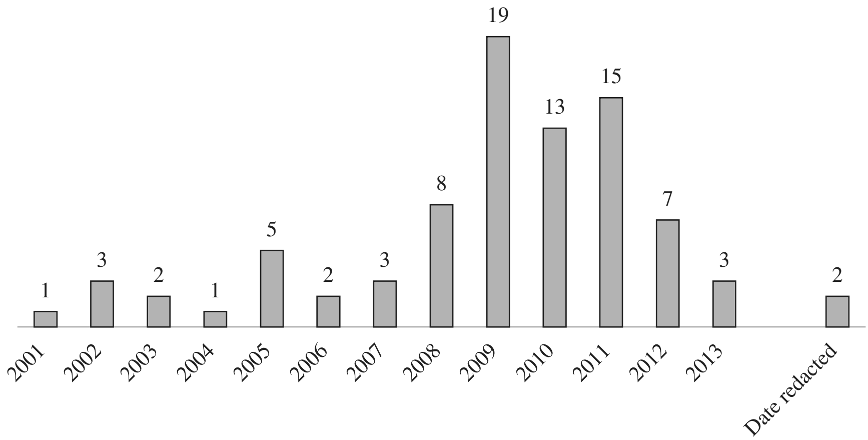
[55] *See* FTC Debt Buyer Report, *supra* note 4, at D-4.

[56] Not all contracts are signed, and some may not have been involved in a deal.

[57] *See, e.g.*, Purchase and Sale Agreement between Sagres Co. and Gemini Capital Group, L.L.C. (Apr. 9, 2009), *available at* http://dalie.org/wp-content/uploads/2014/10/2009.04.09-Sagres-Co-to-Gemini-Capital-Group-LLC.pdf, *archived at* http://perma.cc/37CU-7PA4.

[58] The FTC's request was that debt buyers provide "one example of each type or variety" of contracts they entered into between July 2006 and June 2009. FTC Debt Buyer Report, *supra* note 4, at C-1. Nonetheless, this directive was "interpreted in a variety of ways, such that many of the sellers from whom debt buyers purchased portfolios were not represented among the contracts submitted." *Id.*

FIGURE 3: THE 84 CONTRACTS IN THE LITIGATION SAMPLE SPAN FROM 2001 TO 2013.



The final significant difference between the samples relates to the availability of contracts. The FTC quoted the language of some of the contracts in their sample, but it did not release the identities of the parties involved in the contracts. It also did not tally the number of contracts that contained particular language. The contracts in the Litigation Sample, in contrast, are publicly available, which makes it possible to analyze their terms.[59]

It is important to remember that neither sample discussed here was randomly selected; leaving uncertain the extent to which these transactions are representative.[60] Nonetheless, given how they were chosen, one might expect the FTC contracts to be favorably inclined towards the industry. The contracts in the Litigation Sample were typically released under a court order, so one might expect any bias to run in the opposite direction—that is, towards including contracts that would give rise to greater concerns. Even so, in most cases a debt buyer would have been free to dismiss a case rather than produce the contract, lessening the concern that the contracts in the Litigation Sample are particularly problematic. As discussed below, with one exception, the language in the FTC and the Litigation Sample is strikingly similar.

The evidence indicates that credit issuers typically set the terms and conditions of contracts. The contract language and formatting of documents are remarkably similar across banks and their subsidiaries, across many

[59] They are available at www.dalie.org/contracts.

[60] Nonetheless, at least one bank executive opined that the contract language the FTC study discussed "represents the industry as a whole." Larry Tewell, Senior Vice President, Consumer Credit Solutions Division, Wells Fargo, comments at *Life of a Debt: Information Available to Debt Collectors at Time of Assignment of Sale – Panel I*, FED. TRADE COMM'N & CONSUMER FIN. PROT. BUREAU (June 6, 2013), http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-collection-part-2, *archived at* http://perma.cc/T7YK-LYUA.

years.[61] This is consistent with the FTC's finding that "many of the terms and conditions governing the sale of consumer debts may largely be set by credit issuers."[62]

This analysis focuses on four types of terms recurring in most contracts. TABLE 1 in the Appendix gives an exemplar of the variety of combinations of terms in the contracts in the Litigation Sample. The first term in the table, and the first term analyzed, describes the nature of the sale.

Three contracts in the Litigation Sample state that the sale is made "without recourse,"[63] meaning the seller disclaims any liability if the accounts sold do not yield any returns.[64] The rest of the contracts (81) go beyond this qualification. They disclaim not just liability in case the debtors never repay (recourse), but go on to waive any and all warranties, implied or otherwise, unless something is specifically warranted elsewhere in the agreement.[65] For example:

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[61] *Compare* Loan Sale Agreement between MBNA America Bank, N.A. and Hilco Receivables II, L.L.C. (Sept. 30, 2004), *available at* http://dalie.org/wp-content/uploads/2014/10/2004.09.30-MBNA-America-Bank-NA-to-Hilco-Receivables-II-LLC-.pdf, *archived at* http://perma.cc/W7S3-4ZUW, *with* Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (Apr. 14, 2010), *available at* http://dalie.org/wp-content/uploads/2014/10/2010.04.14-FIA-to-CACH-LLC.pdf, *archived at* http://perma.cc/G4FH-5E9F, *and* Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (May 15, 2013), *available at* http://dalie.org/wp-content/uploads/2014/10/2013.05.15-FIA-Card-Svcs-to-CACH-LLC.pdf, *archived at* http://perma.cc/S2UA-NR4N. MBNA merged with Bank of America in 2006 and subsequently changed its name to FIA Card Servs. FIA Card Servs., N.A. 8-K (Oct. 20, 2006), *available at* https://web.archive.org/web/20070716133759/http://biz.yahoo.com/e/061020/8384408-k.html, *archived at* http://perma.cc/4QN5-3TGL. The contracts have a standard structure with sections that describe: (1) definition and terms, (2) a description of the transaction and types of accounts being sold, (3) information about the purchase price (almost always redacted in the contracts in the Litigation Sample), (4) representations and warranties of seller, (5) indemnification provisions, (6) representations and warranties of buyer, and (7) confidentiality requirements.

[62] FTC DEBT BUYER REPORT, *supra* note 4, at C-2.

[63] Second Amended and Restated Receivables Purchase Agreement between Household Bank and Household Receivables Acquisition Co. II (July 1, 2002), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2002.07.XX-Household-Bank-to-Household-Receivables-Acquisition-Company-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/57X7-ALQC; Receivables Purchase Agreement between Household Receivables Acquisitions Co. II and Metris Receivables, Inc. (Dec. 1, 2005), at 9, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.12.01-Household-Receivables-Acquisition-Company-to-Metris-Receivables-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/X5ES-X2PS; Receivables Purchase Agreement between CompuCredit International Acquisition Co. and Partridge Funding Co. (Apr. 4, 2007), at 10, *available at* http://dalie.org/wp-content/uploads/2014/10/2007.04.04-Compucredit-to-Partridge-Forward-Flow-few-reps-no-as-is.pdf, *archived at* http://perma.cc/8CL3-3FY7.

[64] LifeWise Master Funding v. Telebank, 374 F.3d 917, 925 (10th Cir. 2004) (quoting Thomas E. Plank, *The True Sale of Loans and the Role of Recourse*, 14 GEO. MASON L. REV. 287, 289 (1991)). "The term 'no recourse' or 'without recourse' in an assignment does not, without more, evidence an intent to disclaim the implied warranty of genuineness and validity, but is meant only to make clear that the assignor does not guarantee the debtor's solvency or that the debtor will fulfill the obligation." 6 AM. JUR. 2D *Assignments* § 126 (2014).

[65] Ordinarily, a non-recourse assignment still contains implied warranties. These implied warranties include, *inter alia*, that (1) the accounts are valid and the true obligations of the consumer debtors, (2) there are no known defenses unless they are stated or known at the time

> Except as provided in this section, the charged-off accounts are being sold "as is" and "with all faults," without any representation or warranty whatsoever as to either condition, fitness for any particular purpose, merchantability or any other warranty, express or implied, and seller specifically disclaims any warranty, representation, oral or written, past or present, express or implied, concerning the charged-off accounts . . . .[66]

All eighty-one contracts with similar language did include some affirmative representations and warranties. Below, the focus is on three types of representations that go to material elements of the purchase: (1) an affirmative representation that the seller has unencumbered title to the accounts, (2) affirmative representations that the seller and anyone who owned the account previously has complied with the relevant consumer laws, and (3) affirmative representations as to the accuracy and completeness of the information the debt buyer is purchasing.

1. Title Warranties

Representations about title are material because the buyer can only buy what the seller owns. If the accounts have been sold to another buyer or they are subject to a security interest and the buyer is purchasing them "as is" and "with all faults," she may be purchasing nothing.[67] It is unclear how many contracts in the FTC sample had this language, because the FTC did not discuss this type of representation in their report.

Most sellers (82%) in the Litigation Sample affirmatively represented that they had unencumbered title to the accounts they were selling. Puzzlingly, two contracts in the sample affirmatively represented that they had title to the accounts while at the same time disclaiming any "warranties pertaining to title."[68] The remaining contracts (18%) state that they transfer "all

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of the assignment, and (3) any documents or other evidence about the accounts provided by the seller is true and correct. 6 AM. JUR. 2D *Assignments* § 125 (2014).

[66] *See, e.g.*, Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Midland Funding, L.L.C. (Nov. 30, 2010), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.11.30-Chase-Bank-USA-NA-to-Midland-Funding-LLC-.pdf, *archived at* http://perma.cc/LE2K-JZEF. In many contracts, the waiver of warranties is written in all capital letters so as to contrast with the rest of the document. For readability, this example is not in the original capital letters.

[67] The U.C.C. "regards 'as is' . . . and 'with all faults' as synonymous invocations signaling that the buyer takes the entire risk as to the quality of the goods." Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 282 n.58 (1985) (citing U.C.C. § 2-316(3)(a) & comment 7 (1978)). These transactions are not covered by Article 2 of the U.C.C but the language is nonetheless instructive.

[68] Forward Flow Receivables Purchase Agreement between GE Capital Retail Bank, General Electric Capital Corp., GEMB Lending, Inc., Monogram Lending Servs., L.L.C., RFS Holding, L.L.C., & GEM Holding, L.C.C. and Portfolio Recovery Assocs., L.L.C. (Dec. 20, 2011), at 5, 8, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/GE-Capital-Retail-Bank-to-Portfolio-Recovery-Associates-LLC-12-20-2011.pdf, *archived at* http:/

of Seller's right, title and interest to the Loans" but make no affirmative representations as to whether the seller has any title to transfer or whether the accounts are unencumbered.[69]

2. *Compliance with Laws*

About a third of the contracts in the Litigation Sample are contracts in which a bank or other originator of accounts explicitly represents that it complied with applicable consumer laws in the creation and servicing of the accounts it is selling.[70] Another 10% are resale contracts where the debt buyer reseller represents that someone (sometimes the reseller, sometimes the original creditor) complied with applicable laws.[71] These representations are material because when the accounts are sold without recourse (as many of these are), the buyer may be liable for previous noncompliance. About another third of the contracts, include positive representations that the seller (either a debt buyer or the original creditor) complied with consumer laws but qualify the statement with a "to the best of seller's knowledge" caveat. This kind of representation "is significantly less meaningful than a representation as to the existence of a fact."[72]

Shockingly, six contracts explicitly disclaim compliance with one or more laws. A few disclaim compliance with "usury laws," but there are three contracts that disclaim "all representations, warranties, and guarantees of any type or nature, express or implied [with respect to] the *compliance of the Accounts with any state or federal rules, statutes, and regulations*."[73]

/perma.cc/B66-HQR2. It would seem that the "mystical . . . essence known as Title, which is hung over the buyer's head *or* the seller's like a halo . . . ." about which Karl Llewellyn wrote may be even more difficult to locate in this case. *See* Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. Q. Rev. 159, 165 (1938) (noting that "[h]alos are . . . indivisible[ ] [a]nd there is only one halo for buyer and seller to make out with").

[69] *See, e.g.*, Loan Sale Agreement (May 15, 2013), *supra* note 61, at 11.

[70] *See, e.g.*, Account Purchase Agreement between Chase Bank USA, N.A. and Global Acceptance Credit Co., LP (Dec. 22, 2010), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.12.22-Chase-to-Global-Acceptance-Credit-Company-Agmt-RAB-Simmens-as-is-and-reps-about-maintenance-and-service.pdf, *archived at* http://perma.cc/UB6K-2EBR. ("Each of the Charged-off Accounts has been maintained and serviced by Seller in compliance with all applicable state and federal consumer credit laws, including, without limitation, the Truth-in-Lending Act, the Equal Credit Opportunity Act, and the Fair Credit Billing Act."). It is important to note, however, that even when banks are selling their own accounts, a representation that the "seller" has complied with all applicable laws may not cover every entity in the chain. This is especially true if the accounts were originated by an acquired entity but may also be true if they were placed for collection with collection agencies. The language is very explicit in most of these contracts and applies only to the seller.

[71] *See, e.g.*, Receivables Purchase Agreement (Apr. 4, 2007), *supra* note 63, at 22.

[72] Michael A. Epstein & Frank L. Politano, Drafting License Agreements § 15.04 (4th ed. Supp. 2014). *See also* Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 Colum. L. Rev. 699, 724 n.79 (1936) (citing *Wood v. Smith*, 5 M. & R. 124 (K.B. 1829), where seller sold a horse under the representation that it was "sound, to the best of my knowledge" but otherwise did not provide any warranties, and seller was held liable because he knew horse was not sound).

[73] *See, e.g.*, Purchase and Sale Agreement between Credigy Receivables, Inc. and Newport Capital Recovery Grp. II, L.L.C. (May 29, 2009), at 4, *available at* http://debtbuyeragree-

Despite this unqualified renunciation, these same contracts include language requiring the buyer to comply "with all state and federal laws, rules, statutes, and regulations applicable to debt and credit collection . . . ."[74] This is a second major difference between the Litigation Sample and the FTC's: there was no indication in the FTC's report that the contracts it examined included language disclaiming compliance with the law.

The rest of the contracts (about one-fifth) do not mention compliance one way or the other but do some times repudiate all representations that are not made expressly. In effect, they implicitly disclaim compliance with applicable laws.

3. *Accuracy and Completeness*

About a quarter of the contracts in the Litigation Sample explicitly warrant that the information the seller is providing is accurate or complete. One-fifth warrant the information was accurate "to the best of Seller's knowledge," which as described earlier, is a problematic representation.[75]

Over a third of the contracts in the Litigation Sample go further than disclaiming all warranties generally; they explicitly disclaim any representations as to the accuracy or completeness of the information provided.[76] For example, one contract states that:

ments.com/wp-content/uploads/2014/03/Credigy-Receivables-Inc-to-Newport-Capital-Recovery-Group-II-LLC-05-29-2009.pdf, *archived at* http://perma.cc/C9JX-TRBZ (emphasis added). One of the sales was made by a receiver in a bankruptcy proceeding. *See* Purchase Agreement between Nat'l Credit Acceptance, Inc. and Sacor Fin., Inc. (Oct. 14, 2010), at 6, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/National-Credit-Acceptance-Inc-to-Sacor-Financial-Inc-10-14-2010.pdf, *archived at* http://perma.cc/5G84-BG95 (disclaiming the seller's or originator's "compliance with applicable law including, without limitation, the Fair Debt Collection Practices Act").

[74] Purchase and Sale Agreement (May 29, 2009), *supra* note 73, at 10 (specifically listing "the Consumer Credit Protection Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act and the Gramm-Leach-Bliley Act").

[75] *See* Dennis L. Greenwald, Steven A. Bank, & Carol M. Clements, Real Property Transactions (The Rutter Group California Practice Guide) Ch. 4-E (2014) (recommending that, in context of "best of knowledge" provisions, contract drafters negotiate definition of "knowledge" in each context because it "may refer to 'actual' and 'constructive' knowledge—i.e., both that which a party actually knows *and should have known* under the circumstances").

[76] A contract that both disclaimed accuracy of the information and later warranted it is not included above. *See, e.g.*, Lot Fresh Charged-Off Account Resale between Platinum Capital Invs., Ltd. and Redacted Buyer (2011), at 4, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/Template-V2-Purchase-and-Sale-Agreement-Platinum-Capital-Investments-Ltd-2011.pdf, *archived at* http://perma.cc/9UCH-GF4F ("[S]eller warrants and represents[:] . . . [t]he integrity and accuracy of the balances on the [a]ccounts supplied to [the] [b]uyer is true and accurate and has not been intentionally altered in any way [and also that] [t]his purchase is made without recourse. No representation as to the character, accuracy or sufficiency of the information furnished to [the] [b]uyer has been made by [the] [s]eller, either expressed or implied, except that [the] [s]eller warrants that the [p]ool shall not include Unqualified Accounts."). For another instance in which sophisticated parties (this time in the private equity context) wrote contracts with two important conflicting provisions see Stephen M. Davidoff, *The Failure of Private Equity*, 82 S. Cal. L. Rev. 481, 503 (2009).

> [The sale is made] without any representation or warranty whatsoever as to enforceability, collectability, *accuracy or sufficiency of data* . . . . Seller specifically disclaims any warranty, guaranty or representation, oral or written, past or present, express or implied, *concerning the Charged-off Accounts and the Account Documents*.[77]

Or more typically,

> Bank has not and does not represent, warrant or covenant the nature, *accuracy, completeness*, enforceability or validity *of any of the Accounts and supporting documentation* provided by Bank to Buyer . . .[78]

Four agreements involving Bank of America entities contain the same language specifically disclaiming the current balance on the accounts, referring to the amounts that the debt buyer will ask consumers to repay:

> [S]eller has not made . . . any representations . . . as to . . . the *accuracy or completeness of any information* provided by the seller to the buyer, *including* without limitation, the *accuracy of any sums shown as current balance or accrued interest* amounts due under the loans [or] any other matters pertaining to the loans.[79]

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[77] Purchase and Sale Agreement Sherman Acquisition, L.L.C. and Gemini Capital Grp., L.L.C. (Mar. 3, 2009), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.03.03-Sherman-Acquisition-LLC-to-Gemini-Capital-Group-LLC.pdf, *archived at* http://perma.cc/YA5U-ZG2F (emphasis added); *see also* Forward Flow Receivables Purchase Agreement among Arrow Fin. Servs, L.L.C., Arrow Receivables Master Trust 2000-1 and CACH, L.L.C. (Nov. 9, 2007), at 4, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/Arrow-Financial-Services-LLC-to-CACH-LLC-11-09-2007.pdf, *archived at* http://perma.cc/T27X-BM5X (same language).

[78] Purchase and Sale Agreement between Riverwalk Holdings, Ltd., and Wayric Srvs. (Mar. 24, 2009), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.03.24-Riverwalk-Holdings-Ltd-to-Wayric-Services-Inc-as-is-but-affirmative-reps.pdf, *archived at* http://perma.cc/ETU6-XXPF (emphasis added); *see also* Purchase and Sale Agreement between Citibank, N.A. and Unifund CCR Partners (Feb. 28, 2005), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.02.28-Citibank-to-Unifund-CCR-some-affirmative-reps-but-FCRA-issue-without-recourse-no-warranty.pdf, *archived at* http://perma.cc/PA67-6GPJ; Account Purchase Agreement between Routhmeier Sterling Inc. and Royal Fin. Grp., L.L.C. (July 1, 2008), at § 7.8, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.07.01-Routhmeir-Sterling-Inc-to-Royal-Financial-Group-LLC.pdf, *archived at* http://perma.cc/HHD6-T5YA. Note that the FTC report also cited this language and noted that the language was found in "numerous spot sales of bank receivables; numerous spot resales of various consumer debts, including private label credit card accounts." FTC DEBT BUYER REPORT, *supra* note 4, at C-14.

[79] Loan Sale Agreement between MBNA Bank of America, N.A. and Hilco Receivables II, L.L.C. (Sept. 30, 2004), at § 9.4, *available at* http://dalie.org/wp-content/uploads/2014/10/2004.09.30-MBNA-America-Bank-NA-to-Hilco-Receivables-II-L.L.C.-.pdf, *archived at* http://perma.cc/KRF4-YXMB (emphasis added); *see also* Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at § 9.4.

This is not to claim that the ratios observed in this sample are representative of the industry as a whole; there is no way to know that. However, there is much to indicate that these contracts are not entirely aberrational. Much of the language in the Litigation Sample contracts is the same as (or very similar to) language from the FTC sample. The striking similarities among the contracts in these very different samples lend credence to the notion that these are not anomalous characteristics.

C. *Information and Documentation Regarding Debts Purchased*

This section discusses the information and documentation regarding the debts purchased that are available to debt buyers. The FTC's report went beyond contracts; the Commission also obtained account-level information for a multitude of deals and described it all at an aggregate level. This subpart describes the information and documentation that a debt buyer receives when she buys a pool of accounts from a creditor (or another debt buyer), as well as what documents might be available after the purchase. Because of the limitations of the Litigation Sample, this subpart relies heavily on the Commission's findings.

1. *Information Obtained by Buyers at the Time of Sale*

The FTC examined data for over five million consumer credit accounts and found that at the time of sale, most buyers received a data file (typically in spreadsheet form) that contained information about the accounts the buyer was purchasing. The vast majority of accounts they examined included the:

(1) name, street address, and social security of the debtor (found in 98% of accounts);
(2) creditor's account number (found in 100% of accounts);
(3) outstanding balance (found in 100% of accounts);
(4) date the debtor opened the account (found in 97% of accounts);
(5) date the debtor made his or her last payment (found in 90% of accounts);[80]
(6) date the original creditor charged-off the debt (found in 83% of accounts);
(7) amount the debtor owed at charge-off (found in 72% of accounts); and
(8) debtor's home phone number (found in 70% of accounts).[81]

Many accounts were sold without some critical information—in particular, the

[80] Some dates may be missing because a payment was never made in an account.
[81] FTC DEBT BUYER REPORT, *supra* note 4, at 34–35.

(1) principal amount was missing (from 89% of accounts);
(2) finance charges and fees were missing (from 63% of accounts);
(3) interest rate charged on the account was missing (from 70% of accounts);
(4) date of first default was missing (from 65% of accounts); and
(5) name of the original creditor was missing (from 54% of accounts).[82]

These five commonly absent pieces of information may be important to the debt buyer's ability to legally collect, as described further in Part III.

The Litigation Sample of purchase and sale agreements is just that—the contracts themselves. As such, it is impossible to know precisely what documentation may have been provided at the time of sale.[83] There is evidence, however, that some of the same information the FTC found was missing in their contracts was also missing from the Litigation Sample transactions. For example, a series of three contracts stemming from the same original sale of debts by Chase Bank state that a number of data fields will not be provided on the date of the sale and instead "will be provided when and if available."[84] The missing data fields included: the co-debtor's social security number, the debtor's phone number, the date of last payment, the amount of the last payment, the contract date, and the first date of delinquency.[85]

[82] *Id.* at 35. The FTC believes that buyers will generally know the name of the original creditor because "buyers were likely to receive this information in other ways as well." *Id.*

[83] Some contracts provide that within a specified period of time of the closing, available documents will be transferred to the buyer, but these contracts do not typically promise any particular set of documents. *See, e.g.*, Purchase and Sale Agreement between Juniper Bank and LHR, Inc. (Feb. 28, 2006), at § 6.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2006.02.28-Juniper-Bank-to-LHR-Inc-.pdf, *archived at* http://perma.cc/LHU3-4HBF ("Within three (3) business days from the Closing Date, Seller shall deliver to Buyer only such information specifically set forth in *Exhibit B* if available for each Account in the form and format as set forth in *Exhibit B* in the form of PGP encrypted media.").

[84] Credit Card Account Purchase Agreement between Chase Bank, USA, N.A. and Turtle Creek Assets, Ltd., by and through its general partner Forward Properties Int'l, Inc. (May 7, 2009), at 21, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf, *archived at* http://perma.cc/3TA-YU57. This language appears in three contracts in the Litigation Sample. From the dates and language, it appears that Chase Bank sold a number of accounts (face value of at least $71,271,881) to Turtle Creek Assets, Ltd., a debt buyer from Texas, in 2009. About two months later, Turtle Creek sold some of those accounts to at least two other debt buyers. The language in all three contracts is the same. *Id.*; Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Pasadena Receivables (July 16, 2009), at 20, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf, *archived at* http://perma.cc/R3SJ-XL4J; Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Matrix Acquisitions, L.L.C. (July 29, 2009), at 20, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.07.29-Turtle-Creek-Assets-Ltd-to-Matrix-Acquisitions-L.L.C..pdf, *archived at* http://perma.cc/B44M-VC4K.

[85] *See* Credit Card Account Purchase Agreement (May 7, 2009), *supra* note 84, at 21; Credit Card Account Purchase Agreement (July 16, 2009), *supra* note 84, at 20; Credit Card Account Purchase Agreement (July 29, 2009), *supra* note 84, at 20.

2. *Availability of Account Documents*

The information provided to the debt buyer detailed above is distinguished from the documentation about the account that the debt buyer acquires as part of the sale transaction. The industry refers to account documentation—i.e., monthly statements, contracts, and the account application—as "media." This media could be transferred at the time of the sale or could be available to access post-sale. In the overwhelming majority of cases, there is no media to be found at all—whether at the sale or after.

Most contracts in the Litigation Sample discuss the availability (or lack thereof) of media on the accounts sold. The language in these contracts comports with the FTC's finding that "account documents typically remained the property of the issuing creditor after the accounts were sold."[86]

When examining a subset of 3.9 million accounts, the FTC estimated that only between 6–12% of accounts were sold with any kind of media at all at the time of sale.[87] When documents were provided as part of the sale, it was typically in the form of account statements (in the FTC sample, 6% of accounts), "terms and conditions" documents (6%),[88] and account applications (less than 1%).[89] In other words, in the vast majority of cases, all the debt buyer obtained at the time of purchase was an assignment of overdue accounts, some information about the accounts (with the caveats of subpart 1 above), and nothing else.

If not transferred at the time of the sale, account documents are sometimes available from the original creditor. However, a number of issues severely limit their availability. First, the purchase and sale contracts between original creditors and debt buyers govern whether media can ever be transferred, how much of it can be sent, and the cost to the debt buyer. Second, depending on where in the "assignment chain" a debt buyer is, the current owner of the debt may not have the right to obtain media from the original creditor, as seen in Figure 4. Finally, even if the current debt owner has the

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[86] FTC Debt Buyer Report, *supra* note 4, at C-9.

[87] *Id.* at 35 n.150 and accompanying text. One should note that this sample is even less likely to be representative. The FTC requested information from the then nine largest debt buyers for accounts purchased between March and August 2009. For purposes of calculating this percentage, the majority of the information (87%) came from two debt buyers. *Id.* at 35 n.149.

[88] This term refers to documents evidencing the contract terms between the issuer and account holder.

[89] FTC Debt Buyer Report, *supra* note 4, at 35. Applications may be especially difficult to obtain, as it appears that most creditors do not keep credit card applications originated electronically or via phone. As might be expected, whether documentation is provided depends on the particular portfolio of accounts sold. The FTC found that "[o]nly 13% of the portfolios contained any account documents, but overall within this set of portfolios, documents were received for 90% of the accounts." *Id.* at 35–36. At least one debt buyer admitted to the FTC that the majority of her documentation is obtained by "requesting them from the reseller after the time of purchase." *Id.* at 37 n.156.

right to obtain media, it may have been destroyed or inaccessible by the time she requests it. These issues are discussed in more detail below.

As described in Part A above, a debt buyer may choose to sell portions of its portfolio, sometimes combining portions of portfolios from different creditors. Most contracts in the Litigation Sample permitted resale, typically with the express permission of the original seller.[90] Resale contracts tended to account for the fact that the debt buyer would have to seek documents from the original creditor and include caveats to that effect, but there is similar language in contracts between original creditors and debt buyers.[91] Many contracts even forbid a subsequent purchaser from contacting the original creditor to obtain documents without the reseller's express written permission.[92]

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[90] The FTC found similarly. *See* FTC Debt Buyer Report, *supra* note 4, at C-24. A few contracts prohibited resale to specific companies, generally listed under an exhibit to the contract that was not included. *See, e.g.*, Purchase and Sale Agreement between Providian Nat'l Bank and Asset Acceptance, L.L.C. (Jan. 28, 2003), at § 5.10(b), *available at* http://dalie.org/wp-content/uploads/2014/10/2003.01.28-Providian-National-Bank-to-Asset-Acceptance-L.L.C.-.pdf, *archived at* http://perma.cc/Q2SG-3PUB; Flow Purchase and Sale Agreement between Citibank USA, Nat'l Ass'n and Sherman Originator, L.L.C. (May 24, 2005), at § 9.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.05.24-Citibank-USA-NA-to-Sherman-Originator-L.L.C.-.pdf, *archived at* http://perma.cc/S2L5-FAD6 ("Buyer shall not resell, transfer, convey or assign the ownership of any Account to Providian Financial Corporation, First Select Corporation (a Providian Financial Company) or Capital One Financial Corporation, for a period of one (l) year from the applicable Closing Date.").

[91] For example, some of the contracts between two debt buyers contain the following:

> Seller makes no guaranty that account applications, account statements, affidavits of debt, or any other documents ('Account Documents') shall be able to be provided . . . . Generally, once requested, delivery of Account Documents can take 120 days or more, if available. In many instances, the original issuer does not respond if it is unable to provide the requested Account Document. Therefore, it is Buyer's responsibility to track requests for and receipt of Account Documents. The failure of Seller to obtain in any Account Documents requested by Buyer will not be a breach of this Agreement.

Avid Accounts Receivable Purchase Agreement between Unifund CCR Partners and CUDA & Ass'n (Apr. 18, 2008), at 5, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.04.18-Unifund-to-Cuda-Assoc-as-is-no-rep-of-compl-with-laws.pdf, *archived at* http://perma.cc/Z3UA-E63V (regarding sale of 70 accounts totaling $702,172.54 in face value of debt owed by residents in Connecticut). The last sentence in particular was also common in other contracts. *See, e.g.*, Confidential Agreement for Sale and Purchase of Receivable between Dodeka, L.L.C. and Convergence Receivables, L.L.C. (May 16, 2008), at § 5.7, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.05.16_-Dodeka-L.L.C.-to-Convergence-Receivables-L.L.C.-.pdf, *archived at* http://perma.cc/T8UQ-W3MJ ("The failure of the Sellers to provide Account Documents for any given account will not constitute a breach of this Agreement."); Credit Card Account Purchase Agreement between Platinum Capital Invs., Ltd. and Unknown (July 2012), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2012.07-Platinum-Capital-Investments-to-unknown-as-is.pdf, *archived at* http://perma.cc/X9E2-DCQ7; Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Global Acceptance Company, LP (Dec. 22, 2010), at 9, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.02.22-Chase-Bank-USA-NA-to-Global-Acceptance-Credit-Company-LP-.pdf, *archived at* http://perma.cc/WE9S-99NB.

[92] *See, e.g.*, Avid Accounts Receivable Purchase Agreement between Unifund CCR Partners and CUDA & Assocs. (Apr. 18, 2008), at 3, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.04.18-Unifund-to-Cuda-Assoc-as-is-no-rep-of-compl-with-laws.pdf,

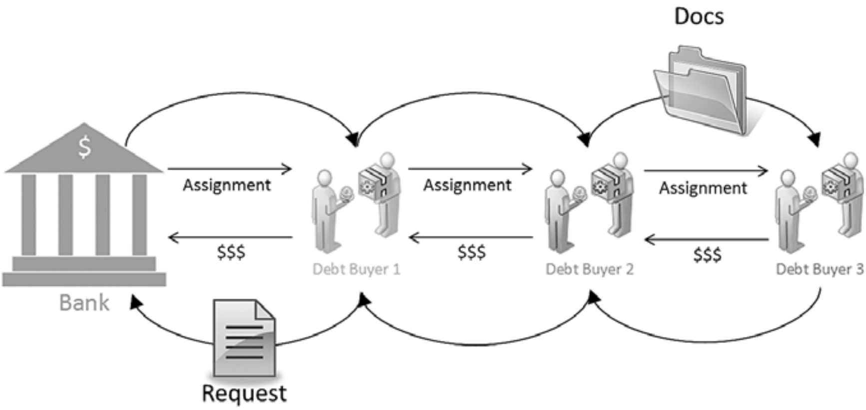
Debt buyers purchasing from reseller buyers face an additional hurdle to obtaining account documents post-sale. Figure 3 is a graphical representation of the "chain of assignment" when a debt is resold. The issue here is that subsequent purchasers have no contractual relationship with the original creditor, and thus cannot require the original creditor to provide them with account documents.[93] Subsequent purchasers must request that the debt buyer or reseller they purchased from go back to the entity from whom they purchased until the request reaches the original creditor.[94]

archived at http://perma.cc/UM8Z-Y5HM ("Under no circumstances shall Buyer be permitted to contact the originator or prior owner of any Receivable without first receiving Seller's express written consent, which consent may be withheld in its sole discretion."). Perniciously, similar to the FTC's findings, one contract "expressly prohibited a debt buyer from reselling any documents previously acquired from a creditor when reselling debts." FTC DEBT BUYER REPORT, *supra* note 4, at C-25 n.53; Loan Sale Agreement between FIA Card Servs. and Asset Acceptance, L.L.C. (Aug. 26, 2011), at § 3.1(g)–(h), *available at* http://dalie.org/wp-content/uploads/2014/10/2011.08.26-FIA-Card-Svcs-to-Asset-Acceptance.pdf, *archived at* http://perma.cc/LUZ6-E7TA (requiring that before buyer transfers or resells an account, buyer is "required to destroy, and shall cause others under its control to destroy, all acquired account documents within its possession, custody or control . . . . [and] Buyer shall not provide . . . any account document (whether or not for monetary consideration) . . . to any subsequent purchaser or owner of the account").

[93] *See, e.g.*, Account Purchase Agreement between Chase Bank USA, N.A. and Global Acceptance Company, LP (Dec. 22, 2010), at 16, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.02.22-Chase-Bank-USA-NA-to-Global-Acceptance-Credit-Company-LP-.pdf, *archived at* http://perma.cc/WE9S-99NB (no third-party beneficiaries); Purchase Agreement between Wells Fargo and Unknown (Jan. 6, 2010), at 28, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.01.06-Wells-Fargo-to-blank-buyer-as-is-to-best-of-seller-knowledge-disclaims-accuracy-and-completeness.pdf, *archived at* http://perma.cc/JRT2-EGHM ("Nothing in this Agreement, express or implied, is intended to confer upon any person or entity other than the Parties hereto or their respective successors any rights or remedies under or by reason of this Agreement."); Receivable Purchase Agreement between HSBC and Main Street Acquisition (Feb. 20, 2009), at 20, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.02.20-HSBC-Card-to-Main-Street-Acq.pdf, *archived at* http://perma.cc/5BXM-7PBT ("Nothing in this Section 20 shall be interpreted as limiting Purchaser's ability to . . . sell the Purchased Receivables, and in such case Seller shall have no obligation to such person or entity under this Agreement.").

[94] *See, e.g.*, Credit Card Account Purchase Agreement between Chase Bank, NA and Palisades Collection, L.L.C. (Feb. 15, 2008), at 13, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.02.15-Chase-to-Palisades.pdf, *archived at* http://perma.cc/6GS4-5AYM ("Notwithstanding the foregoing, Seller shall have no obligation to retrieve or provide any documents to any assignee of the Purchaser without Seller's prior written consent.").

FIGURE 4: HOW ACCOUNT DOCUMENTS ARE OBTAINED BY SUBSEQUENT DEBT BUYERS.[95]



Whether this can be done at all depends first on the agreements between the original creditor and the reseller as well as between the reseller and the subsequent purchaser. The more links in the chain that documents must cross, the higher the transaction costs.[96] The contracts in the Litigation Sample describe how in almost every case the document requester (Debt Buyer 3 in Figure 4) will have to pay a fee to the previous debt buyer (Debt Buyer 2) in order to request documents. In most of the contracts in the Litigation Sample, most reseller debt buyers charged subsequent debt buyers the same fee as the creditor charged them to obtain documents. The FTC found in their sample that "[s]ome debt resellers added fees to cover their administrative costs when passing documents up and down the ownership chain."[97]

The relay that must occur between debt buyers in the chain and the original creditor in order to obtain documents is complex. The consequence of all of this is that it will likely be extremely difficult—not to mention time-consuming and costly—for a debt buyer to obtain account documentation if they did not receive it at the time of the purchase. It will become even more difficult as the debt is sold and resold.[98] Moreover, since only buyers and

[95] Figure adapted from GAO DEBT COLLECTION REP., *supra* note 29, at 45.

[96] *See* Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730, 735 n.13 (1989) ("Any contractual remedy that requires a transfer of assets from one party to another will cause the loss of value, since the transaction costs of effecting the transfer always will be positive.").

[97] FTC DEBT BUYER REPORT, *supra* note 4, at C-25 n.53.

[98] It is also unclear whether a bank that is sharing documentation with a purchaser of its accounts violates privacy laws if the bank knows the affiliate is obtaining the information in order to forward it to a subsequent buyer. Virtually all banks' privacy policies detail that they will share information with affiliates—the purchaser—but it is not clear whether the downstream sharing could be a violation of the Graham-Leach Bliley Act. *See* BUREAU OF CONSUMER PROT. BUS. CTR., IN BRIEF: THE FINANCIAL PRIVACY REQUIREMENTS OF THE GRAMM-

sellers have a relationship, if one debt buyer in the chain goes out of business, the chain will be broken and the document request will go unfulfilled.

Over three quarters of contracts in the Litigation Sample discuss the topic of account documents.[99] The language varies widely in whether or how much account documents are available, when, and at what cost. One contract between Capital One and a commodities trading firm specifically stated that Capital One would not provide buyers with "documentation relating to any Account, including without limitation any application, agreement, [or] billing statement . . . regardless of whether such documents are in Seller's possession or could be obtained from a third party."[100] In a number of cases, the contracts included language making clear that it may not be possible for debt buyers to obtain account documents[101] or simply that "documentation may not exist with respect to the Loans purchased by Buyer."[102]

Many contracts do contemplate the possibility that account documents may be provided to the buyer after the sale. However, in these cases, most

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LEACH-BLILEY ACT (2002), *available at* http://business.ftc.gov/documents/bus53-brief-financial-privacy-requirements-gramm-leach-bliley-act, *archived at* http://perma.cc/9MP4-VXWX.

[99] *But see* Second Amended and Restated Receivables Purchase Agreement between Household Bank, Nat'l Ass'n and Household Receivables Acquisition Co. II (July 1, 2002), *available at* http://dalie.org/wp-content/uploads/2014/10/2002.07.XX-Household-Bank-to-Household-Receivables-Acquisition-Company-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/S4QE-WFUD (omitting discussion of account documents); Receivable Purchase Agreement between Household Receivables Acquisitions Co. II and Metris Receivables, Inc. (Dec. 1, 2005), *available at* http://dalie.org/wp-content/uploads/2014/10/2005.12.01-Household-Receivables-Acquisition-Company-to-Metris-Receivables-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/6F94-C3CU (same); Receivables Purchase Agreement between CompuCredit Int'l Acquisition Corp. and Partridge Funding Co. (Apr. 4, 2007), *available at* http://dalie.org/wp-content/uploads/2014/10/2007.04.04-Compucredit-to-Partridge-Forward-Flow-few-reps-no-as-is.pdf, *archived at* http://perma.cc/8YP9-FEGW (same).

[100] The same contract did "not represent, warrant or insure the accuracy or completeness of any information provided to Buyer or in the Sale File or any other Account Files." Account Sale Agreement between Capital One F.S.B. and Centurion Capital Corp. (Dec. 8, 2005), at §§ 4.3, 6.4, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.12.08-Capital-One-FSB-to-Centurion-Capital-Corporation-.pdf, *archived at* http://perma.cc/4EGX-9J8A.

[101] "The Buyer acknowledges Seller was not the original credit grantor for the accounts, and may not have in its possession account documents that may be requested by the Buyer." Purchase and Sale Agreement between Global Acceptance Credit Co. and RAB Performance Recoveries, L.L.C. (Feb. 18, 2011), at § 10(k), *available at* http://dalie.org/wp-content/uploads/2014/10/2011.02.18-Global-Acceptance-Credit-Company-to-RAB-Account-Purchase-Agmt-as-is-limited-representations.pdf, *archived at* http://perma.cc/Y3KF-6HNM; Template Purchase and Sale Agreement of Global Acceptance Credit Co. (undated), at § 10(m), *available at* http://dalie.org/wp-content/uploads/2014/10/Date-Unknown-Global-Acceptance-Credit-Company-Purchase-Agreement.pdf, *archived at* http://perma.cc/QTY9-539B.

[102] Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at Ex. E; Loan Sale Agreement (Aug. 11, 2009), *supra* note 20, at Ex. E; Loan Sale Agreement (Apr. 14, 2010), *supra* note 20, at Ex. E; *see also* Purchase and Sale Agreement (Mar. 3, 2009), *supra* note 77, at § 10(a) ("[M]any of the Charged-off Accounts do not have Account Documents available and that some Charged-off Accounts have only partial Account Documents available . . . . Seller only has such Account Documents as were provided to it by the Originating Creditors and access to additional Account Documents . . . may be limited or prohibited pursuant to the terms of Seller's contracts with such parties."); FTC DEBT BUYER REPORT, *supra* note 4, at C-13.

contracts severely limit the number of documents a buyer can obtain.[103] The terms varied widely here. A number of contracts only allowed buyers to request documents on between 2.5 to 20% of all accounts purchased per month and charged a fee after documents had been provided on more than 10% of the accounts.[104] The fees ranged from $5-$50 per document and sometimes included additional "search fees."[105] Many contracts also limited the number of documents that could be provided at any given time.[106] Most included a window during which the documents would be provided—from as few as fifteen to as many as ninety-five days to deliver the documents, if found.[107] Aside from these stipulations, most contracts contained language to the effect that "Seller shall have no obligation to retrieve or provide any

[103] *But see* Flow Purchase Agreement between Wells Fargo Bank, N.A. and Autovest, L.L.C. (Jan. 6, 2011), at § 12, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.01.06-Wells-Fargo-to-Autovest-L.L.C.-as-is-also-says-unsecured-even-tho-secured.pdf, *archived at* http://perma.cc/S365-A2N9 ("[Seller] shall provide Buyer with an electronic format of imaged Receivables Documents related to no less than seventy-five percent (75%) of the Receivables accounts being purchased by Buyer hereunder within thirty (30) calendar days following the applicable Closing Date, with the remainder (but not less than eighty-five percent (85%) of available Receivable Documents) to be provided to Buyer within ninety (90) calendar days of each Closing Date.").

[104] *See, e.g.*, Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a); Template Credit Card Account Purchase Agreement of Platinum Capital Invs., *supra* note 91, at § 6(a); Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Midland Funding, L.L.C. (Nov. 30, 2010), at § 6(a), *available at* http://dalie.org/wp-content/uploads/2014/10/2010.11.30-Chase-Bank-USA-NA-to-Midland-Funding-L.L.C.-.pdf, *archived at* http://perma.cc/MV7D-VVBR; Closing Statement between Platinum Capital Invs. and Redacted Buyer (2011), *supra* note 76, at § 12 (providing for documentation on up to 15% of accounts without a fee, and $10/document and $10 search fee after); Flow Agreement for Purchase and Sale between Wells Fargo, N.A. and Security Credit Servs. L.L.C. (Apr. 15, 2011), at Ex. 3, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.04.15-Wells-Fargo-Bank-NA-to-Security-Credit-Services-L.L.C..pdf, *archived at* http://perma.cc/K3KK-5PX7 (providing for 20% of documents without fee, and a $5 fee for more than 20%). In their review of debt purchasing contracts, the FTC found that the contracts generally allowed debt buyers to request between 10 to 25% of documentation in a given portfolio for free, with a time limit on the request between six months and a year. FTC Debt Buyer Report, *supra* note 4, at 39.

[105] *See, e.g.*, Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a) (providing for $10 per month for any requests for documents between 10 to 25% of accounts, $50 per document thereafter). The FTC reported findings of $10 to $15 per document. FTC Debt Buyer Report, *supra* note 4, at 40.

[106] *See, e.g.*, Purchase and Sale Agreement (Mar. 3, 2009), *supra* note 77, at § 10(b) ("Purchaser shall make requests for Account Documents no more than once per month.").

[107] *See, e.g.*, Flow Purchase Agreement (Jan. 6, 2011), *supra* note 103, at § 12, (15 days); Purchase Agreement among HSBC Bank Nevada, N.A. & HSBC Receivables Acquisition Corp. and CACH, L.L.C. (May 18, 2011), at § 9.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.05.18-HSBC-to-CACH-as-is-positive-material-representations-11-cents-on-dollar.pdf, *archived at* http://perma.cc/H6FM-3GX5 (20 days); Purchase and Sale Agreement (Feb. 28, 2005), *supra* note 78, at § 6.2 (60 days); Purchase and Sale Agreement between First Select, Inc. and Credigy Receivables, Inc. (Dec. 27, 2002), at § 5.5(a), *available at* http://dalie.org/wp-content/uploads/2014/10/2002.12.27-First-Select-Inc-to-Credigy-Receivables-Inc-.pdf, *archived at* http://perma.cc/U7BF-PEKM (95 days for information in the possession of "Original Seller;" 25 days for information in the possession of seller in this transaction). *But see* Flow Purchase and Sale Agreement (May 24, 2005), *supra* note 90, at § 6.2 (redacting the number of days).

documents to any assignee of the Purchaser without Seller's prior written consent."[108]

One problem that may arise for debt buyers seeking documentation on an account is whether the original creditor maintains the documentation for a sufficient amount of time after it sells the account. The majority of the contracts in the Litigation Sample "specified a date beyond which the credit issuer was no longer obligated to provide any account documents to the debt buyer," often two to three years after the accounts were sold.[109] After that time, the agreements contemplate that there would be no documents available.[110] Almost all of the contracts explicitly absolved the seller of liability in the event that they failed to provide documents.[111]

Given all of these obstacles to obtaining documentation both at the time of sale and after, it is not surprising that the FTC found that debt buyers in its sample never received documents for the vast majority of the accounts they purchased. The FTC examined a subset of almost 1.5 million accounts and found that post-sale "[d]ebt buyers obtained account statements . . . for 6% of accounts, account applications for 6% of accounts, and terms and conditions documents for 8% of accounts. Payment history documents and affidavits each were obtained for less than 1% of accounts, as were all other types of documents combined."[112]

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[108] Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a).

[109] *See, e.g.*, Purchase and Sale Agreement (Mar. 3, 2009), *supra* note 77, at 9 ("Seller shall use reasonable efforts to deliver documentation to Purchaser for a period of one year following the applicable Closing Date."); FTC DEBT BUYER REPORT, *supra* note 4, at C-13 ("Nothing . . . shall create an obligation on the part of Seller to maintain any current servicing relationships or system of record . . . . Buyer understands that at any time following three years after each Closing Date Seller may cease having the ability to obtain any Account Document using commercially reasonable efforts.").

[110] "[I]t is Seller's policy not to retain all Account Documents . . . . [S]ome of the Accounts do not have an original application or a copy thereof . . . . To what extent applications are or are not available, is not known by the Seller nor represented to Buyer." Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at 6.

[111] *See, e.g.*, Purchase and Sale Agreement (Mar. 24, 2009), *supra* note 78, at § 6.3 ("The failure of the Seller to provide an Account Document requested by Buyer will not be a breach of this Agreement."); Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a) ("Seller shall, to the extent such documents are reasonably available, provide Purchaser with copies of . . . media . . . . Seller may in its sole discretion honor such request and charge Purchaser fifty dollars ($50.00) for each document provided."); Credit Card Account Purchase Agreement (Dec. 22, 2010), *supra* note 91, at § 6(a); Flow Agreement for Purchase and Sale (June 21, 2011), *supra* note 52, at § 6.2(b) (limiting request of documents to 100 accounts per month).

[112] FTC DEBT BUYER REPORT, *supra* note 4, at 40. Although not typically included in the industry's definition of media, the FTC included affidavits from the creditor attesting to material aspects of the debt (<1% in the FTC sample) as "account documents." *Id.* The FTC found that the contracts they examined "routinely indicated that sellers would provide affidavits when account documents were unavailable, and indicated that those affidavits would generally attest to the existence of a consumer debt account, its chain of ownership, and the balance on those accounts in the seller's records on the date of sale." *Id.* at C-14. The contracts in the Litigation Sample are fully congruent with that statement; a number of the contracts contain blank affidavits that the buyer is supposed to fill out and send to the seller to sign. *See* Purchase and Sale Agreement (Feb. 28, 2005), *supra* note 78, at § 6.2 ("Buyer may, in addi-

The FTC study has many limitations. Nonetheless, its findings allow an estimate of the upper bound of the percentage of accounts for which debt buyers in the study ever obtained any "account documents." For argument's sake, assume that every time the FTC counted a document as "obtained" post-purchase, it was the only type of document obtained for that account. For example, if debt buyers obtained account statements and account applications for 6% of accounts each, assume that buyers never obtained both an account statement and an application for any one account. The FTC also estimated that at the time of purchase, debt buyers obtained account documents for between 6% to 12% of all accounts.[113] Further assume that a debt buyer would never request additional documents for one of those accounts. Adding these numbers together gives us an estimate of the maximum number of accounts for which debt buyers received any documentation either at the time of sale or after. This calculus reveals that the maximum number of accounts for which debt buyers obtained documentation at any time was between 29% to 35% of the accounts examined by the Commission.[114] In other words, debt buyers in the FTC study lacked documents of any kind (including affidavits) for at least 65% to 71% of the accounts they purchased.

III. Concerns with the Debt Sale Transaction

It is not surprising to see contract language that includes a waiver of warranties; it seems perfectly natural for sellers to want to protect themselves from liability.[115] In fact, this type of language likely provides a high level of liquidity that would not be possible without it. As Professor Edward Janger has noted, "[l]iquidity enhancement through negotiability is a key device for facilitating the trading of debt."[116] Liquidity in the market keeps

tion to its request for Account Documents, request an Affidavit from Bank, in the form shown in Exhibit 3, *indicating the date the Account was opened, the Account number and the balance existing as of a specified date*. The Bank will provide a total number of affidavits equal to two percent (2%) of the total accounts purchased. The Buyer shall be limited to one request for affidavits per week with a maximum of 200 accounts per request." (emphasis added)); Purchase and Sale Agreement (Mar. 24, 2009), *supra* note 78, at § 6.3 (same).

[113] FTC Debt Buyer Report, *supra* note 4, at 35 n.150.

[114] By adding all the percentages the report lists as including "Documents Obtained After Sale" and rounding up, this yields a maximum 23% of accounts for which debt buyers in the study could have received documentation post-sale. Other estimates from the Commission were that buyers obtained account documents for between 6% to 12% of accounts at the time of sale. These together yield 29% to 35%. *See id.* at T-15.

[115] The "no recourse" language is eminently reasonable. The entire purpose of these agreements is that the buyer is taking a chance on the collectability of the accounts.

[116] Edward J. Janger, *The Costs of Liquidity Enhancement: Transparency, Risk Alteration and Coordination Problems*, 4 Brook. J. Corp. Fin. & Com. L. 39, 39–40 (2009) (noting that a number of techniques have been developed, such as holder in due course, buyer in the ordinary course of business, and good faith purchaser, which "enhance the liquidity of, and hence create a market for, a particular type of asset").

the cost of credit down and ensures availability of—in particular—subprime credit.

There are plausible reasons why these contracts might waive warranties that have little to do with the confidence the seller has in the underlying information and more to do with the lawyers who drafted the contracts.[117] Perhaps such language is merely the result of prudent drafting and variations amongst creditors' attorneys. Disparities in attorney advice might also explain the range of explicit disclaimers in the contracts. The debts in most of these contracts were originated by banks. There is an existing and complex regulatory scheme that might foster trust in the information provided by banks, even if the banks themselves deny that they are trustworthy on these matters.[118] At least one judge believes that "bank records are inherently reliable 'because banks depend on keeping accurate records.'"[119] Further, as the FTC notes, language disclaiming warranties does not "necessarily mean that information inaccuracies were prevalent."[120] There is very little information about the incidence of mistakes.

By themselves, the lack of representations might seem harmless. But it is not simply the disclaimers of representations and warranties in these contracts that trigger concern. The probability of harm increases when one combines the lack of representations—and indeed the explicit disclaimers—with the structure of a consumer debt sale. Of particular concern is the way that account information typically flows through several systems of record, the fact that many debt buyers are only provided a spreadsheet with limited account information, the lack of critical documentation to verify accuracy of the information, and the uncertainty about title as accounts repackaged and sold multiple times. This Part describes issues that may arise for consumers and debt buyers as a result of the way information is transferred when a debt goes to collections. It also attempts to quantify—to the extent data is available—the potential contours of the problem.

A. Synchronization, Systems of Record, and Accuracy

Figure 1 describes what happens to information about an account once it becomes severely delinquent: the information the creditor has about that

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[117] *See, e.g.*, Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L. Q. 347, 366 (1996) (suggesting that institutional norms such as lawyer-designed contract terms can themselves reflect the cognitive biases of practicing lawyers).

[118] Note that the FTC found similar language in contracts for the sale of car loans, not necessarily originated by banks, and telecom accounts. *See* FTC DEBT BUYER REPORT, *supra* note 4, at C-8.

[119] United States v. Bertoli, 854 F. Supp. 975, 1031 (D.N.J. 1994) (quoting United States v. Miller, 830 F.2d 1073, 1077 (9th Cir. 1987)), *rev'd on other grounds,* 40 F.3d 1384 (3d Cir. 1994).

[120] FTC DEBT BUYER REPORT, *supra* note 4, at iii. The FTC goes on to note, "it does raise concerns about how debt buyers handled purchased debts when such inaccuracies became apparent, and for which they had no recourse available from the seller." *Id.*

account moves from the collection system to the recovery system and eventually to collection agencies. Because there are now two systems of record (the collection agency's and the bank's), and these systems do not talk to each other in real time, it becomes difficult to ascertain which system contains the "authoritative" record regarding the amount owed and any other information gathered about the account.[121]

The CFPB has noted that "when there are two systems of record, the timeliness and financial and demographic updates is [sic] often dependent on how sophisticated the players are. The more sophisticated the lenders and agencies, the more likely these updates are timely and accurate."[122] The timing of these updates can be an issue, especially if debts are placed with a second collection agency but the first one to work the account receives a payment.[123] This requires reconciliation among all three parties so that "the lender gets paid and [Collector 2] gets paid and the information reported to the reporting agencies and the balance [Collector 2] is trying to collect is accurate."[124]

The time an account is placed with a collection agency varies, but can be as little as a month. This means that the number of SORs keeping track of a delinquent account balance grows as more collection agencies become involved. As described below, dispute information and other notes may also not be passed from collector to collector. Given the system, one CFPB official noted, "[i]t is easy to see the potential for errors and certainly the difficulty collectors, attorneys, and debt buyers can have in obtaining information and documentation to ensure that the consumer can identify the debt as being theirs."[125] These errors can be costly to collectors and debt buyers. The FDCPA makes them strictly liable for falsely representing the "character, amount, or legal status of any debt."[126]

Figure 5 highlights five categories of consumer complaints submitted to the CFPB in the one-year period beginning July 1, 2013.[127] These five cate-

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[121] *See supra* note 24 and accompanying text. *See also* Tonetti, *supra* note 23, at 37 ("[I]n most cases it is [sic] the system of record is now that of the collection agency as well as the creditor. Synchronization and updating of these two systems of record is important and may be subject to time lags.").

[122] Tonetti, *supra* note 23, at 38.

[123] *See id.* at 38–39.

[124] *Id.*

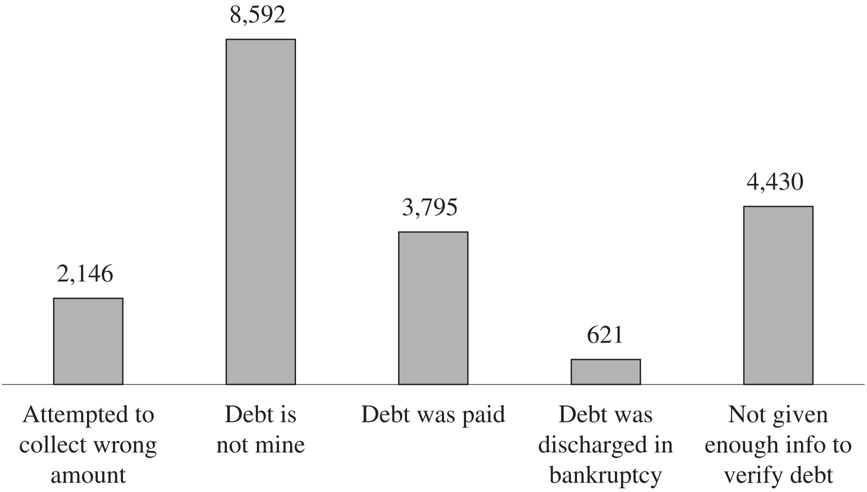
[125] *Id.* at 43.

[126] 15 U.S.C. § 1692e(2)(A) (2012).

[127] For the database of consumer complaints, see *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/complaintdatabase/ (last visited Oct. 18, 2014), *archived at* http://perma.cc/4Z2Z-RLCF. Note that the CFPB began to officially take complaints on debt collection on July 10, 2013. Nonetheless, the Bureau did record complaints it received on the topic before then. *See* CONSUMER FIN. PROT. BUREAU, CONSUMER RESPONSE: A SNAPSHOT OF COMPLAINTS RECEIVED JULY 21, 2011 THROUGH JUNE 30, 2014 (2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_report_consumer-complaint-snapshot.pdf, *archived at* http://perma.cc/M7EX-QPJV [hereinafter CFPB CONSUMER COMPLAINTS].

gories relate to the quality and availability of information the collector or debt buyer has to collect from the consumer.

FIGURE 5: CONSUMER COMPLAINTS SUBMITTED TO THE CFPB.[128]



Most complaints concerned collectors' "continued attempts to collect a debt that is not owed."[129] Complaints to the CFPB are not an ideal estimate of how often these issues arise: not all consumers complain and for those who do, the CFPB does not ascertain the validity of the complaints.[130] The consumer reporting that the collector is attempting to collect the wrong amount or that the debt was paid may be mistaken, or worse.[131] Nonetheless, the number of complaints is an indicator of the potential scope of the problems identified. It is significant that these five categories made up 56% of all debt collection complaints submitted about debt collection during this time period.[132]

[128] These five categories made up 56% of all complaints submitted during the period. The source of this graph is data downloaded from the CFPB Complaint Database on August 19, 2014. *See* CFPB CONSUMER COMPLAINTS, *supra* note 127.

[129] CFPB CONSUMER COMPLAINTS, *supra* note 127, at 15.

[130] For a critique about the complaint system from the financial services industry, see *CFPB Rumors*, FIN. SERVS. ROUNDTABLE, http://fsroundtable.org/cfpbrumors/ (last visited Aug. 18, 2014) , *archived at* http://perma.cc/3G6M-FXNE .

[131] The CFPB does not "verify all the facts alleged in [consumer] complaints," but they attempt to confirm a commercial relationship between the consumer and company." *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, *supra* note 127.

[132] Other complaint categories include: "improper contact or sharing of information," issues with "communication tics," or "taking/threatening illegal action." *Id.*

B. Missing Information and Documentation

Part II.B.2 detailed a number of pieces of information that the FTC found were missing for the accounts they examined. This missing information may be material to consumers and can also hamper the ability of a debt buyer to legally collect. In particular, as explained below, a consumer (and in many cases a debt buyer) would want to know some of this information, including: the dates needed to calculate both the period during which a debt buyer may report to a credit reporting agency as well as the limitations period; information the consumer may have shared with the creditor or a collection agency; documentation of standing and changes in ownership of the account; and other documentation sufficient to prove the material elements of their claim in court.

1. Dates Needed to Calculate Limitations and Credit Reporting Periods

The FTC found that some "key dates relating to the debts" were missing from the accounts it examined, including when the original creditor charged off the debt (missing in 17% of accounts) and when the consumer went delinquent (missing in 65% of accounts).[133] These dates are significant for purposes of calculating when a debt buyer must stop reporting a debt to the credit bureaus as well as the statute of limitations period. Not having these dates exposes the debt buyer to liability under the FDCPA if she violates the Fair Credit Report Act ("FCRA") by reporting outside the correct period or if she files a lawsuit outside of the limitations period.[134]

The FCRA requires that most negative information be removed from a consumer's credit report after seven years.[135] For purposes of collection items, the seven years begins to run 180 days after the delinquency that sent the consumer to collections or that resulted in the account being charged-off.[136] Debt buyers and anyone else who furnishes information to a credit bureau must report the date of delinquency so that the credit bureau may delete the negative information from the consumer's account at the appropriate time. This can prove difficult for the debt buyer who purchased an account without information about the date of delinquency. One possibility, available only if the seller included the date of charge-off for the account, is to treat the charge-off date as if it were the date of delinquency and count 180 days from charge-off for purposes of reporting to the FCRA. This re-

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[133] The FTC terms this the "date of first default." FTC Debt Buyer Report, *supra* note 4, at 35.

[134] The FCRA prohibits furnishers like debt buyers from providing "any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2 (a)(1)(A) (2012).

[135] 15 U.S.C. § 1681c(a)(4) (2012).

[136] 15 U.S.C. §§ 1681c(c)(1), (a)(4) (2012).

porting would not violate the FCRA, but it would reduce the amount of time that the debt be reported beyond what is required by the FCRA. The other alternative is not to report to the credit bureaus at all.[137]

These missing dates are also problematic for purposes of calculating the limitations. Statutes of limitation vary by state, but typically, the period to collect on a debt begins to run from the date on which the consumer breached the credit card agreement.[138] The date of breach is what the FTC calls the "date of first default," which was missing in 65% of accounts in the FTC Sample. The statute of limitations is typically an affirmative defense.[139] However, in the consumer debt collection context, the overwhelming majority of courts have found that the act of filing a time-barred lawsuit is a violation of the FDCPA, regardless of whether the consumer asserts the defense.[140] Some courts have found that even threatening to file a lawsuit is a violation.[141] Further complicating matters for collectors, the FTC has taken

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[137] Recall that OCC guidelines require national banks to charge-off revolving accounts within 180 days after the account is past due. *See Uniform Retail Credit Classification and Account Management Policy*, *supra* note 35 and accompanying text. The OCC policy, however, "does not preclude an institution from adopting a more conservative internal policy," which means that the charge-off time could be shorter than 180 days. Uniform Retail Credit Classification, 65 Fed. Reg. 36903, 36905 (June 12, 2000). Because of this, a debt buyer cannot simply rely on the date of charge-off and count back 180 days to calculate the date of delinquency needed for FCRA purposes.

[138] *See, e.g.*, Citibank S.D., NA v. Sawant, 2012 Mass. App. Div. 79, at *2 (Dist. Ct. 2012); Knighten v. Palisades Collections, L.L.C., 721 F. Supp. 2d 1261, 1269 (S.D. Fla. 2010); Dodeka, L.L.C. v. Campos, 377 S.W.3d 726, 731 (Tex. App. 2012); Anderson v. Neal, 428 A.2d 1189, 1191 (Me. 1981); Kasu Corp. v. Blake, Hall & Sprague, Inc., 582 A.2d 978, 980 (Me. 1990) (noting that a contract cause of action accrues at the time of breach); Isaacson, Stolper & Co. v. Artisan's Sav. Bank, 330 A.2d 130, 132 (Del. 1974).

[139] *See* Day v. McDonough, 547 U.S. 198, 199 (2006); Gonzalez v. Hasty, 651 F.3d 318, 322 (2d Cir. 2011); Rodriguez-Perez v. Clark, 423 F. App'x 118, 120 (3d Cir. 2011); DeTata v. Rollprint Packaging Products Inc., 632 F.3d 962, 970 (7th Cir. 2011); Export-Import Bank of U.S. v. Advanced Polymer Sci. Inc., 604 F.3d 242, 248 (6th Cir. 2010); Santana-Castro v. Toledo-Davila, 579 F.3d 109, 133 (1st Cir. 2009).

[140] *See, e.g.*, Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076, 1083 (7th Cir. 2013); Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 33 (3d Cir. 2011); Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870, 875–76 (N.D. Ill. 2009); Larsen v. JBC Legal Group, P.C., 533 F. Supp. 2d 290, 302 (E.D.N.Y. 2008); Goins v. JBC & Assoc., 352 F. Supp. 2d 262, 266, 276 (D. Conn. 2005); Freyermuth v. Credit Bureau Servs., Inc., 248 F.3d 767, 771 (8th Cir. 2001); Stepney v. Outsourcing Solutions, Inc., No. 97 C 5288, 1997 WL 722972, at *4 (N.D. Ill. Nov. 13, 1997); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 393 (D. Del. 1991); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

[141] *See, e.g.*, *Kimber*, 668 F. Supp. at 1488 ("By threatening to sue Kimber on her alleged debt, FFC violated § 1692e(2)(A) & (10)."); *Freyermuth*, 248 F.3d at 771 (finding that it is a violation of the Act to threaten to take "any action that cannot legally be taken"); *Herkert*, 655 F. Supp. at 875–76 ("Numerous courts, both inside and outside this District, have held that filing or threatening to file suit to collect a time-barred debt violates the FDCPA."); *Larsen*, 533 F. Supp. at 302; *Beattie*, 754 F. Supp. at 393 ("[T]he threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate."). A number of courts have declined to extend the *Kimber* reasoning to letters sent by the debt collector, although the holdings largely depend on the content of the letters. *Huertas*, 641 F.3d at 33 ("Even the least sophisticated consumer would not understand [plaintiff's] letter to explicitly or implicitly threaten litigation."); Brown v. Card Serv. Ctr., 464 F.3d

the position that for any debts which the debt collector "knows or should know may be beyond the applicable statute of limitations," it is unfair for a collector to attempt to collect without notifying the consumer that the debt is time-barred and the debt collector has no legal remedy.[142] Without this date, collectors and debt buyers risk violating the FDCPA if they collect close to or past the statute of limitations.[143] Absent this date to calculate the statute of limitations period, the debt buyer may perhaps choose to use another date that may be available for that account, perhaps by choosing the date that the creditor charged-off the account, available in 83% of accounts the FTC examined. Depending on how risk-averse the debt buyer is—the FTC's statement regarding out of statute debts is not a rule—it may have to forego some of the time it might have been able to collect on an account.

2. *Itemization of Interest and Fees*

The FTC found that most debt buyers did not obtain information regarding the amount of the debt that was made up of principal versus interest. A breakdown between the amount of principal (missing from 89% of accounts) and the total amount of finance charges and fees (missing from 63% of accounts) could help the consumer determine whether the debt is hers. It could also help consumers whose debts were sold under contracts that spe-

450, 453 (3d Cir. 2006) ("Whether a debt collector's communications threaten litigation in a manner that violates the FDCPA depends on the language of the letter, which should be analyzed from the perspective of the 'least sophisticated debtor.'"); Shorty v. Capital One Bank, 90 F. Supp. 2d 1330, 1331–33 (D.N.M. 2000) (finding that sending a debt validation notice regarding a time-barred debt, without notifying the consumer that the debt was time-barred did not violate the FDCPA).

[142] Consent Decree at 11, United States v. Asset Acceptance, L.L.C., No. 8:12-cv-00182-JDW-EAJ (M. D. Fla. Jan. 31, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/01/120131assetconsent.pdf, *archived at* http://perma.cc/U3S4-2XFS; *see also id.* at 13 (providing specific disclosure language). In addition, in at least three states, when a debt falls out of statute, it is extinguished. *See* MISS. CODE ANN. § 15-1-3 (extinguishing all debts after statute expires); WIS. STAT. ANN. § 893.05 (mirroring the Mississippi statute); N.C.G.S. § 58-70-115(4), 155(B)(7) (prohibiting debt buyers from attempting to collect past the statute of limitations and requiring evidence establishing the date of last payment in order to calculate the date the statute would expire). In those states, any attempt to collect on a debt outside of the limitations period would likely violate the FDCPA. *See* 15 U.S.C. §§ 1692e(2)(B)(5) (prohibiting the collector from threatening "to take any action that cannot legally be taken or that is not intended to be taken") and 1692f(1) (prohibiting the collection of any amounts unless it is permitted by law); Dodeka, L.L.C. v. Cobb, No. 09 CvD 94, 2011 WL 10549927 (N.C. Dist. Mar. 8, 2011) ("[F]iling a lawsuit on a debt that is barred by the applicable statute of limitations further constitutes a misrepresentation of the legal status of such debt and violates 15 U.S.C. § 1692e and § 1692f when suit is threatened or initiated on a time-barred debt."). The "likely" caveat refers to the fact that depending on the contract there is still the question of which statute applies.

[143] How long a state allows collection on a debt depends on state statutes, on what law is applied to the issue, and on whether the plaintiff is suing on a contract theory or some other basis. Pennsylvania has the shortest limitations period at two years, 42 PA. CONS. STAT. § 5524, but limitations periods can range from the more typical three years to fifteen years, *see, e.g.*, ARIZ. REV. STAT. ANN. § 12-543(2) (3 years); D.C. CODE § 12-301(8) (3 years); W. VA. CODE § 55-2-6 (10 years); KY. REV. STAT. ANN. § 413.090(2) (15 years); OHIO REV. CODE ANN. § 2305.06 (15 years).

cifically disclaimed, *inter alia*, "the accuracy of . . . accrued interest amounts due under the loans."[144] Given that language, a consumer would want to know what exactly was being claimed as interest in the amount allegedly due. It is almost impossible for a consumer to separate interest and fees herself on a revolving account, even if she has her entire history of account statements. Credit issuers are in the best position to separate interest and fees. Separately itemizing these would help consumers as well as debt buyers.[145]

3. *Sharing of Dispute History and Other Information*

The FTC study found that sellers did not typically include any specifics about the collection history of accounts sold, so this potentially valuable information about interactions of previous collectors with the consumer, written disputes, or attempts at verification of a debt were not forwarded to the debt buyer.[146] The majority of accounts were also sold without any information about whether the purported account holder disputed the amount, validity, or anything else about the account.[147]

The lack of dispute history information is problematic for both consumers and debt buyers. Consumers may have to provide the same information more than once and may become frustrated in explaining their situation multiple times. As the FTC noted, "[k]nowing the dispute history of debts could be very relevant to debt buyers in assessing whether consumers in fact owe the debts and whether the amounts of the debts are correct."[148]

Interactions with previous collectors would also be helpful to the debt buyer because they may contain information that can save both time and potential FDCPA liability. For example, it would be helpful for both consumers and collectors if notes indicating the consumer is represented by an attorney were passed to subsequent debt buyers or their collectors. Debt buy-

[144] *See* Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at § 9.4; Loan Sale Agreement (Apr. 14, 2010), *supra* note 20, at § 9.4; Loan Sale Agreement Aug. 11, 2009), *supra* note 20, at § 9.4.

[145] "The FTC has said that debt collectors should be required to include this information in validation notices to assist consumers in determining whether the amount owed is correct." FTC Debt Buyer Report, *supra* note 4, at 36. For an example of how this might be done, see Nat'l Consumer L. Ctr., Comments to the Bureau of Consumer Financial Protection (Feb. 28, 2014), at 63, *available at* http://www.nclc.org/images/pdf/debt_collection/comments-cfpb-debt-collection-anprm-2-28-14.pdf, *archived at* http://perma.cc/6TJQ-CKHE.

[146] FTC Debt Buyer Report, *supra* note 4, at 36. The FTC believes that when selling to a subsequent debt buyer, "initial debt buyers generally do not discard any information they receive from the original creditor, but also that they typically do not supplement the information they provide to secondary debt buyers to reflect their experience in collecting on debts." *Id.* at 37 (citations omitted).

[147] Note that only four out of nine debt buyers were able to provide data on disputes. *Id.* at 37.

[148] *Id.*

ers who communicate with represented consumers after the consumer has notified a collector of the representation risk violating the FDCPA.[149]

In addition, these notes may also help ensure that the collector has made what the industry calls a "right party contact." As a debt ages, collectors turn to "skip-tracing" methods to help locate consumers who have moved or changed phone numbers.[150] Many skip-tracing methods rely on public information to associate phone numbers or other contact information with consumers. Individuals with common names or family members who have similar names may be confused for debtors and be contacted by debt collectors.[151] Once a collector finds that a skip-traced phone number or address does not belong to the person who defaulted on their account, notating that information and forwarding it to the next collector or debt buyer would help those consumers whose contact information had been wrongly associated with a debt. It would also help the next collector in ensuring she is speaking to the right party.

4. *Standing, Title, and Affidavits*

The issues around title and assignment are significant for both debt buyers and consumers. Proving ownership of a debt or standing in a lawsuit can be a challenge for debt buyers. A number of courts have found that debt buyers could not prove their standing to sue.[152] One issue is that the consumer debt transaction does not include proof of assignment at the account-level; this gets more complicated as the debt gets sold and resold. Another issue relates to the admissibility of affidavits.

Recall that during a typical debt sale, most of the time the buyer only gets some information about the debtor and the debt, as detailed in Part II.C.A. As part of the contract, the buyer and seller also sign a one-page Bill

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[149] 15 U.S.C. § 1692c(a)(2) (2012).

[150] FTC DEBT BUYER REPORT, *supra* note 4, at 36.

[151] "In our case, a gentleman named Willie Graham, had his phone number scored as a high score letter, as a possible target. He has no connection with the three different people that the—I'll say rogue's gallery of established debt collection companies have assigned obligation for the debt. But he has received calls from, I'd say, at least half of the top ten debt buyers, all because there's an inaccurate Accurint file on him." FED. TRADE COMM., DEBT COLLECTION 2.0—DRAFT—PROTECTING CONSUMERS AS TECHNOLOGIES CHANGES [sic] 47–48 (2011), *available at* http://www.ftc.gov/sites/default/files/documents/public_events/debt-collection-2.0-%E2%80%93-protecting-consumers-technologies-change/transcript.pdf, *archived at* http://perma.cc/R6JE-5C65.

[152] *See* MBNA Am. Bank, N.A. v. Nelson, No. 13777/06, 2007 WL 1704618, at *5 (N.Y. Civ. Ct. May 24, 2007) ("It is imperative that an assignee establish its standing before a court . . . an assignee must tender proof of assignment of a particular account . . . . Such assignment must clearly establish that Respondent's account was included in the assignment. A general assignment of accounts will not satisfy this standard and the full chain of valid assignments must be provided, beginning with the assignor where the debt originated and concluding with the Petitioner.") (citations omitted); In re Leverett, 378 B.R. 793, 800 (Bankr. E.D. Tex. 2007); Unifund CCR Assignee of Providian v. Ayhan, No. 36151-5-II, 2008 Wash. App. LEXIS 1922, at *21 (Ct. App. Aug. 5, 2008); Nyankojo v. North Star Capital Acquisition, 679 S.E.2d 57, 58 (Ga. Ct. App. 2009); Wirth v. Cach, L.L.C., 685 S.E.2d 433, 435 (Ga. Ct. App. 2009).

of Sale which makes recitals to the effect that: Seller, for value received and pursuant to the terms and conditions of the Purchase and Sale Agreement, hereby assigns all rights, title and interest of Seller to those receivables identified in the Sale File.[153] This one-page document is what is typically produced when proof of standing is requested. However, the Bill of Sale never references the individual account being sued on; at most, it references a spreadsheet or electronic exhibit that is almost never produced.[154]

If the plaintiff debt buyer did not purchase the account directly from the creditor, she may have to produce multiple Bills of Sale as evidence of the chain-of-title. Producing and authenticating these can present a problem. More often, what is produced instead is an affidavit from an agent of the debt buyer (or of the original creditor) stating that the consumer's account was bought from the Seller referenced in the Bill of Sale. But an affidavit is not enough in most jurisdictions, especially when it was prepared in anticipation of litigation.[155] Many state court rules of civil procedure require some evidence of the facts alleged in the affidavit be included.[156] In cases where debt buyers do not have account documents, this requirement can be difficult to meet.[157] This is perhaps one of the reasons regulators and consumer law-

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[153] This phrasing is a composite of various Bills of Sale *available at* www.dalie.org/contracts, *archived at* http://perma.cc/74LP-VJHN.

[154] Some debt buyers have produced redacted printouts of spreadsheet documents: essentially one line on a sheet of paper that otherwise looks blank and spans multiple rows. *But see* Dahl v. Bain Capital Partners, L.L.C., 655 F. Supp. 2d 146, 150 (D. Mass. 2009) (finding that parties should produce Excel documents in their "native" format, that is where search and formulae capabilities are left intact). *See also* Fed.R.Civ.P. 34(b)(2)(E)(i).

[155] "[W]hen a document is created for a particular use that lies outside the business's usual operations—especially when that use involves litigation—neither of [Federal Rule 803(6)'s] justifications for admission holds . . . . [W]e adhere to the well-established rule that documents made in anticipation of litigation are inadmissible under the business records exception." Ortega v. Cach, L.L.C., 396 S.W.3d 622, 630 (Tex. Ct. App. 2013) (quoting United States v. Blackburn, 992 F.2d 666, 670 (7th Cir. 1993)) (internal quotation marks omitted).

[156] *See*, *e.g.*, N.D. R. Civ. P. 56(e) ("If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit."); Neb. Rev. Stat. § 25-1334 ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."); Me. R. Civ. P. 56(e) (same); Cach, L.L.C. v. Kulas, 21 A.3d 1015, 1019 (Me. 2011) ("To comply with Rule 56(e), however, it is not enough to merely rely on the affidavit: 'Sworn or certified copies of all papers or parts thereof referred to in an affidavit *shall be attached* thereto or served therewith.' Me. R. Civ. P. 56(e) (emphasis added)."); Arrow Financial Services, L.L.C. v. Guiliani, 32 A.3d 1055, 1058 (Me. 2011) (noting that the debt buyer did not provide (1) any evidence as proof that the original creditor owned an account in the consumer's name, such as the original contract between the original creditor and the consumer or (2) the account records and information supplied by the original creditor to the debt buyer as proof that the consumer entered into a contract for a credit card, as referenced in the affidavit).

[157] *See, e.g.*, Asset Acceptance v. Lodge, 325 S.W.3d 525, 528 (Mo. Ct. App. 2010) (reversing decision by trial court to accept testimony of debt buyer's representative to establish details of the original loan agreement because debt buyer did not originate the loan); Mfrs. & Traders Trust Co. v. Medina, No. 01C768, 2001 WL 1558278, at *1 (N.D. Ill. Dec. 5, 2001) (finding affidavits by attorneys and others lacking personal knowledge insufficient); Topps v. Unicorn Ins. Co., 648 N.E.2d 214, 217 n.1 (Ill. App. Ct. 1995) ("[U]nder the business record exception to the hearsay rule, only the business record itself is admissible into evidence rather than the testimony of the witness who makes reference to the record."); N. Ill. Gas Co. v.

yers claim that so many lawsuits are dismissed if the consumer shows up to court.[158] The lack of availability of documents is a top priority for the collections industry; so much so that the main trade associations for collection agencies listed this issue among the top four things they would like to see Congress or regulatory agencies tackle.[159] The inability to prove ownership in court has negative ramifications for consumers as well. Standing is an element of the plaintiff's *prima facie* case, but the overwhelming majority of collection cases are won by default—the consumer just never shows up.[160] In most default situations, the debt buyer will win a lawsuit without having to present documents evidencing their ownership of the debt. Even when consumers come to court, most do so without an attorney and fail to request

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Vincent DiVito Constr., 573 N.E.2d 243, 252 (Ill. App. Ct. 1991) ("The business records exception to the hearsay rule (. . .) makes it apparent that it is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record.") (citations omitted); Grant v. Forgash, 1995 Ohio App. LEXIS 5900, at *13 (Ohio Ct. App. Dec. 26, 1995) ("There is no hearsay exception . . . that allows a witness to give hearsay testimony of the content of business records based only upon a review of the records.").

[158] *See Junk Justice*, *supra* note 10, at 208 (noting that 90% of consumers don't show up to court and, of those who showed, 2% had an attorney); *Debts, Defaults, and Details*, *supra* note 10, at 296 (noting that 50% of cases were dismissed without prejudice). The Maryland Rules Committee stated in its report that the proposed rule changes (now enacted) were made because

> [p]roblems with the cases filed by [consumer debt purchasers, or CDPs] have arisen, including: failure of the CDP to be licensed, the wrong party being named as plaintiff, filing after the statute of limitations period has run, lack of personal knowledge by the affiant, lack of supporting documentation containing sufficient detail as to liability and damages, failure of the CDP to prove it owns the debt, and incorrect identification of the amount claimed.

Standing Committee on Rules of Practice and Procedure, Ct. of Appeals of Md., Notice of Proposed Rules Changes 41 (2011), *available at* http://www.courts.state.md.us/rules/reports/171stReport.pdf, *archived at* http://perma.cc/AJ77-C9MC.

[159] The availability of documents alone will not solve this problem, however. The problem stems from lack of account-level evidence of ownership. *See* ACA Int'l, The Path Forward: ACA International's Blueprint for Modernizing America's Consumer Debt Collection System 7 (2011), *available at* http://www.acainternational.org/files.aspx?p=/images/18898/finalblueprint-designedversion.pdf, *archived at* http://perma.cc/N858-AS7W (stating that "collectors can have a difficult time providing documentation responsive to the consumer's dispute because creditors may not maintain the appropriate documentation to verify the debt during the collection process").

[160] *See Debts, Defaults, and Details*, *supra* note 8, at 296 (finding 68% no appearance rate, 8.68% attorney representation rate among those who showed, and 40% default rate); *Do We Have a Debt Collection Crisis?*, *supra* note 8, at 377, 381 (finding 83% no appearance rate, 73% default judgment rate, 4% attorney representation rate, and no cases resulting in trial); Consumers Union & East Bay Community Law Center, Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now 1 (2011) (describing stories of individuals who did not show up to court), *available at* http://defendyourdollars.org/pdf/Past_Due_Report_2011.pdf, *archived at* http://perma.cc/KD4K-F5NA; National Consumer Law Center, The Debt Machine: How the Collections Industry Hounds Consumers and Overwhelms Courts 4 (2010), *available at* http://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf, *archived at* http://perma.cc/33BU-U4UB; New York Appleseed & Jones Day, Due Process and Consumer Debt: Eliminating Barriers to Access to Justice in Consumer Credit Cases 2 (2010), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf, *archived at* http://perma.cc/FWB7-6LY8.

proof of ownership.[161] This can also have a deleterious effect on consumers if they end up with a judgment from the wrong debt buyer.[162]

It is unclear how often this happens, but there are at least a handful of examples.[163] In one case in 2009, a court found that debt buyer Goldberg & Associates, L.L.C. entered into a contract to purchase debts from another debt buyer but never paid for them.[164] Despite that, Goldberg used the information it acquired during the transaction to collect debts that it did not own from consumers.[165] Recently, the FTC obtained a preliminary injunction against a debt broker that the FTC alleges "posted the sensitive personal information of more than 70,000 consumers online . . . in the course of trying to sell portfolios of past-due payday loan, credit card, and other purported debt."[166] The defendants had posted the debt portfolios in the form of Excel spreadsheets on a publically available website without any protection.[167] Any visitor to the website could download "consumers' bank account and credit card numbers, birth dates, contact information, employers' names, and information about debts the consumers allegedly owed."[168] Here is where the language of the debt sale agreements becomes significant: recall that 18% of the contracts in the Litigation Sample that disclaimed all warranties and representations failed to represent that the seller had title to the accounts. In a world in which it is next to impossible to verify whether a debt buyer has title to an account, a contract that disclaims title is a red flag.

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[161] The author, along with Jim Greiner and Lois Lupica, is working on a study that attempts to understand, *inter alia*, the reasons consumers default. *See* Dalié Jiménez, D. James Greiner, Lois R. Lupica, Rebecca Sandefur, *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY & L. POL'Y 449 (2013) (describing the study).

[162] There are many instances where the admissibility of affidavits could be successfully challenged. *See, e.g.*, Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961 (N.D. Ohio 2009), *infra* note 225.

[163] *See, e.g.*, Miller v. Wolpoff & Abramson, L.L.P., No. 1:06-CV-207-TS, 2008 U.S. Dist. LEXIS 12283, at *5 (N.D. Ind. Feb. 19, 2008) (describing consumer's allegation that two debt buyers sued him on the same debt); Wood v. M & J Recovery L.L.C., No. CV 05-5564, 2007 U.S. Dist. LEXIS 24157, at *4 (E.D.N.Y. Apr. 2, 2007) (describing a dispute over who owned the fifth of a portfolio that included the debtor's account).

[164] Hudson & Keyse, L.L.C. v. Goldberg & Associates, L.L.C., No. 9:2007-81047-CIV, 2009 WL 790115, at *2 (S.D. Fla. Mar. 24, 2009) (finding that Goldberg breached the contract by not paying for the debts).

[165] *See id.* Goldberg was also sued by a third debt buyer who bought debts that Goldberg sold but to which it did not have title. American Acceptance Co. v. Goldberg, No. 2:08-CV-9 JVB, 2008 U.S. Dist. LEXIS 39418, at 1 (N.D. Ind. May 14, 2008) (alleging that Goldberg sold accounts to which it did not have title).

[166] *FTC Alleges Debt Brokers Illegally Exposed Personal Information of Tens of Thousands of Consumers on the Internet*, FED. TRADE COMM'N (Nov. 12, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/11/ftc-alleges-debt-brokers-illegally-exposed-personal-information, *archived at* http://perma.cc/7A3B-6D3H.

[167] *Id.*

[168] *Id.*

C. Uncertainty, Legitimacy, and Trust

This Part has so far described a litany of problems with the way consumer debts are sold in America. These issues are problematic for collectors and consumers alike, not just in and of themselves, but collectively. The lack of information collectors receive about alleged debtors, the lack of documents that can be used to find the consumer or prove in court how much she owes, the failure to share information with subsequent buyers or collectors, the difficulty proving to consumers and the courts who has title to an account; these are systemic problems. Together, they make collection more difficult for honest collectors and prevent consumers from being able to trust they are paying the right person the right amount. It is very likely that they also raise the cost of credit.

Consumers can find it difficult to identify the right person to pay, whether or not they have been sued. This article opened with a hypothetical setting: you receive a collection call. Many questions arise. How can you know whether XYZ Debt Buyer is really the owner of your debt, or that ABC Debt Collection, the company the collector tells you she is calling from, is an agent of XYZ? You remember having a GAP account, but how do you know this is *your* GAP account? How do you know $1,000 is the correct amount? Can you tell whether this debt is past the statute of limitations? Perhaps you have a common name and are being confused for someone else who also had a GAP card. Or maybe the woman calling you is a bogus collector, a scam-artist who has gotten a hold of you information through stolen data or other means.[169] The FTC has sued or shut down many debt collectors in the last few years; it may be difficult to know whether you can trust a disembodied voice on the phone.[170]

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[169] *See, e.g.*, Jake Halpern, *Paper Boys: Inside the Dark Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. Times (Aug. 15, 2014), http://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html, *archived at* http://perma.cc/FW3G-TMD5.

[170] The FTC has produced so many press releases on this topic in the last couple of years that a number of them have the exact same headline. *See, e.g.*, *Debt Collectors in Memphis and New York State Settle with FTC Concerning Multiple Federal Law Violations*, Fed. Trade Comm'n (Aug. 7, 2014), http://www.ftc.gov/news-events/press-releases/2014/08/debt-collectors-memphis-new-york-state-settle-ftc-concerning, *archived at* http://perma.cc/CB79-VLNC; *At the FTC's Request, Court Halts Collection of Allegedly Fake Payday Debts*, Fed. Trade Comm'n (July 1, 2014), http://www.ftc.gov/news-events/press-releases/2014/07/ftcs-request-court-halts-collection-allegedly-fake-payday-debts, *archived at* http://perma.cc/39Y6-3HNR; *FTC Continues Crack Down on Deceptive Debt Collection; Houston-based Defendants Agree to Stop Deceptive Fees and Practices*, Fed. Trade Comm'n (June 25, 2014), http://www.ftc.gov/news-events/press-releases/2014/06/ftc-continues-crack-down-deceptive-debt-collection-houston-based, *archived at* http://perma.cc/SZL4-E2AC; *FTC Puts Texas-based Operation Permanently Out of the Debt Collection Business After It Allegedly Used Deception, Insults, and False Threats against Consumers*, Fed. Trade Comm'n (May 19, 2014), http://www.ftc.gov/news-events/press-releases/2014/05/ftc-puts-texas-based-operation-permanently-out-debt-collection, *archived at* http://perma.cc/95CX-CU7R; *At FTC's Request, Court Halts Debt Collector's Allegedly Deceptive and Abusive Practices, Freezes Assets*, Fed. Trade Comm'n (Mar. 13, 2014), http://www.ftc.gov/news-events/press-releases/2014/03/ftcs-request-court-

In addition, the combination of the "no warranties about accuracy" and unavailability of documentation in some of these transactions poses an almost existential crisis: how is it possible to know that the amount quoted as owed is the correct amount? If the buyer never obtains documentation—worse yet, if the documentation does not exist—there is nothing with which to verify the spreadsheet information.[171] Spreadsheets are problematic for other reasons. They are easy to alter, even accidentally, as economists Carmen Reinhart and Kenneth Rogoff[172] and JP Morgan Chase found last year.[173] In James Kwak's words: "While all software breaks occasionally, Excel spreadsheets break all the time. But they don't tell you when they break: they just give you the wrong number."[174]

Without documentary evidence, all a debt buyer can do is create an affidavit that quotes the amount on the spreadsheet. If the account was sold with disclaimers of accuracy, however, the consumer (and regulators) may reasonably want verification that the amount is correct. But the debt buyer,

halts-debt-collectors-allegedly-deceptive, *archived at* http://perma.cc/Z6PP-CY82; *At the FTC's Request, Court Halts Collection of Allegedly Fake Payday Debts*, Fed. Trade Comm'n (Oct. 24, 2013), http://www.ftc.gov/news-events/press-releases/2013/10/ftcs-request-court-halts-collection-allegedly-fake-payday-debts, *archived at* http://perma.cc/N5DN-JXZQ; *FTC Settlement Bans Defendants from Engaging in Debt Collection and Interest Rate Reduction Schemes*, Fed. Trade Comm'n (Sept. 10, 2013), http://www.ftc.gov/news-events/press-releases/2013/09/ftc-settlement-bans-defendants-engaging-debt-collection-and, *archived at* http://perma.cc/6YBY-GRGZ; *U.S. Defendants Who Allegedly Abetted Fake Debt Collector Calls from India Agree to Settle FTC Charges*, Fed. Trade Comm'n (Oct. 23, 2012), http://www.ftc.gov/news-events/press-releases/2012/10/us-defendants-who-allegedly-abetted-fake-debt-collector-calls, *archived at* http://perma.cc/5KMQ-X2Q5; *Court Halts Alleged Fake Debt Collector Calls from India, Grants FTC Request to Stop Defendants Who Posed as Law Enforcers*, Fed. Trade Comm'n (Apr. 11, 2012), http://www.ftc.gov/news-events/press-releases/2012/04/court-halts-alleged-fake-debt-collector-calls-india-grants-ftc, *archived at* http://perma.cc/FYD3-LK4V.

[171] At most there may be some data in the creditor's records (perhaps a copy of the spreadsheet they sent the buyer), but this is the same data that the creditor disclaimed would be correct.

[172] Reinhart and Rogoff's paper had been used by politicians and policy makers to support the austerity measures that were implemented world-wide in the wake of the Great Recession. John Cassidy, *The Reinhart and Rogoff Controversy: A Summing Up*, The New Yorker (Apr. 26, 2013), *available at* http://www.newyorker.com/news/john-cassidy/the-reinhart-and-rogoff-controversy-a-summing-up, *archived at* http://perma.cc/M464-RZ24. Attempting to replicate their work, other researchers found that the spreadsheet contained an error which led Reinhart and Rogoff to conclude that the average real GDP growth rate for certain countries was -0.1% instead of the 2.2% one finds when the error is corrected. This difference calls into question the conclusions of the earlier paper. Mike Konczal, *Researchers Finally Replicated Reinhart-Rogoff, and There Are Serious Problems*, The New Deal: The Blog of the Roosevelt Institute (Apr. 16, 2013), *available at* http://www.nextnewdeal.net/rortybomb/researchers-finally-replicated-reinhart-rogoff-and-there-are-serious-problems, *archived at* http://perma.cc/S3RN-9FBK. *See also* James Kwak, *More Bad Excel*, The Baseline Scenario (Apr. 18, 2013), *available at* http://baselinescenario.com/2013/04/18/more-bad-excel/, *archived at* http://perma.cc/9ANY-5MS6.

[173] JP Morgan Chase's investigation revealed that part of the issue with the so-called "London Whale" trades was as a result of mistakes with Excel spreadsheets. *See* James Kwak, *The Importance of Excel*, The Baseline Scenario (Feb. 9, 2013), *available at* http://baselinescenario.com/2013/02/09/the-importance-of-excel/, *archived at* http://perma.cc/K5HW-SRXW.

[174] *Id.*

without documents for the account, only has the spreadsheet she obtained at the sale to go by. This presents a problem because it is not clear how one could ever know whether the spreadsheet was changed between the time it was created and when a debt buyer wants to use it in court.[175] The consumer may have the last statement mailed to her by the creditor (the charge-off statement in the case of a credit card), which would yield an ideal comparison.[176] However, the debt buyer (and not the consumer) carries the burden of proof in these cases, and consumers in financial distress are arguably not well positioned to keep records of a debt that may be many years old. Further, as banks continue to promote paperless billing, it will become more difficult for consumers who have been charged-off to obtain their statements.[177] This all means that the correct amount owed may be unknowable. Without documentary evidence, there is uncertainty as to the amount owed—uncertainty which may not be possible to resolve if account documents no longer exist. How big of a problem is this lack of documentation? The calculations from Part II.C.2 yield a rough estimate: debt buyers never obtained documentation on 65% to 71% of the accounts examined by the FTC, whether at the time of sale or subsequently. There is reason to think that this estimate may be low. The FTC Sample only included accounts for a specific time period from the nine largest debt buyers. Further, the buyers in the study "purchased many of their debts from original creditors," so that they were closest in the chain of title to the source of documents—the original.[178] As mentioned earlier, subsequent debt buyers face additional challenges in obtaining account documentation, making it likely that the percentage of accounts for which subsequent debt buyers lack account documentation is even greater. All of this leads to the hypothesis that the 65% to 71% estimate is a lower bound for the percentage of accounts that lack documentation industry-wide, especially in the case of resales.

Because of the contractual agreements between creditors and debt buyers, the more times a debt is sold, the greater the difficulties obtaining documentation (even if it exists). Multiple sales of the same debt (purchased

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[175] For an argument that evidentiary standards should require that "[w]here computer information is offered for its truth, some showing of testable reliability should be required in order to minimize the likelihood of easy admissibility of potentially undetectable, manipulated, or fabricated digital evidence," see Stephen W. Teppler, *Testable Reliability: A Modernized Approach to ESI Admissibility*, 12 Ave Maria L. Rev. 213, 256 (2014).

[176] Note that while this would help verify the correct charge-off amount, this would not resolve the issue of proving standing in court.

[177] *See, e.g.*, LaToya Irby, *Pros and Cons of Paperless Billing Statements*, AboutMoney.com, *available at* http://credit.about.com/od/creditcardbasics/qt/Pros-And-Cons-Of-Paperless-Billing-Statements.htm (last visited Nov. 15, 2014), *archived at* http://perma.cc/C2H3-D5U7 (listing as a "con" of paperless statements and noting that "you may have to go through a few extra steps (and could even have to pay a fee) to access older statements"); Hank Coleman, *Why I Hate Paperless Credit Card Statements*, AllBusiness.com, *available at* http://www.allbusiness.com/print/15445167-1-9a0bs.html (last visited Nov. 15, 2014), *archived at* http://perma.cc/VGM2-SBB9 (noting that it is easy to forget about paperless statements).

[178] FTC Debt Buyer Report, *supra* note 4, at 38.

without documentation) also increase the length of time it will take for a debt buyer to obtain that documentation, as detailed in Part II.C.2. Multiple sales also mean multiple transfers of the same account information—perhaps updated to include contact information and partial payments. These transfers introduce further complexity and increased possibility of errors.[179]

The FDCPA was enacted because Congress recognized that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[180] One of the stated purposes of the statute was "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[181] These disclaimers (and the lack of documentation) may drive down the cost of credit in the form of increased liquidity (and cheaper costs), but they do so at a cost. Consumer confusion and mistrust in the system may ultimately reduce collections and thereby increase the cost of credit.

IV. Explaining Irrational Contracting Behavior

A. *Prudent Drafting or Back-Office Failures*

Before proposing solutions, it is helpful to try to think through the reasons why transactions for the sale of consumer debts might have evolved to contain the contractual features described in Part III. This subpart posits a few interconnected potential explanations.

The FTC and Litigation Samples both suggest that creditors set the majority of contract terms. To a large extent, creditors control the transaction because they create and possess the information and documentation regarding the underlying debts.[182] One potential explanation for the contract language in particular—the reliance waivers, specific disclaimers of representations, and "big boy" clauses—is that this is perhaps a few zealous attorneys wanting to minimize their client's exposure to litigation from debt buyers.

This is likely true to some extent; as others have noted, there are multiple reasons why a seller may want to include these clauses.[183] The seller may want to minimize the chance that "innocent representations made ex ante could be turned against her ex post."[184] Another possibility is that the seller

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[179] In the context of financial innovation and system risk, others have noted the increased potential for costs and errors to be introduced as the ownership chain increases. Kathryn Judge, *Fragmentation Nodes*, Stanford L. Rev. 685 (quoting Henry T.C. Hu & Bernard Black, *Debt, Equity and Hybrid Decoupling: Governance and Systemic Risk Implications*, 14 Eur. Fin. Mgmt. 663, 691 (2008)).

[180] 15 U.S.C. § 1692 (2012).

[181] *Id.*

[182] *See generally supra* note 62 and accompanying text.

[183] *See* Masson, *supra* note 14, at 513.

[184] *Id.*

is concerned about a potential agency problem—being "held accountable for a misrepresentation or misinterpretation by one of her agents during the course of the negotiation."[185]

But these explanations are not satisfying in this context. The contracts in the Litigation Sample are roughly uniform; very little changes from deal to deal. They do not only include reliance waivers but also specifically include positive disclaimers—going into specifics about the things that the seller is not representing to the buyer and on which the buyer is not relying. This specificity would not seem necessary if the worry were merely about "innocent representations." The agency problem would also not seem as pronounced where the contract language remains almost the same from deal to deal. As described below, where the Litigation Sample includes multiple contracts from the same seller, oftentimes the language and formatting is exactly the same. The primary way in which the language changes is in minor individual clauses that disclaim representations as to a material aspect of the debt. For example, as between two almost identical Citibank contracts signed in 2005 with two different buyers, only one of the contracts contains additional language regarding the fact that Citibank did not provide the date of first delinquency to the buyer in that contract.[186] The contract with this additional language was signed three months before the contract that did not include it.[187]

Another hypothesis is that sellers use "waiver of warranties" clauses when they are not confident in the "paper" (accounts) they are selling. As described above in Part I, each individual bank may have one or more systems where information regarding delinquent consumers is stored—i.e., the original SOR used before delinquencies and the internal collection or recovery system used later.[188] The rapid expansion of credit combined with the equally speedy consolidation of card originators (banks and nonbanks) could have led to poor handling of data and information on accounts, especially as that data might have been stored in different custom-made systems by different banks.[189] Depending on the sophistication of the bank (and perhaps the sophistication of the bank that originated the account if that bank was pur-

[185] *Id.* at 514.

[186] *Compare* Purchase and Sale Agreement between Citibank, N.A. and Unifund CCR Partners (Feb. 28, 2005), at § 2.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.02.28-Citibank-to-Unifund-CCR-some-affirmative-reps-but-FCRA-issue-without-recourse-no-warranty.pdf, *archived at* http://perma.cc/PA67-6GPJ *with* Flow Purchase and Sale Agreement between Citibank USA, Nat'l Ass'n and Sherman Originator, L.L.C. (May 24, 2005), at § 2.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.05.24-Citibank-USA-NA-to-Sherman-Originator-L.L.C.-.pdf, *archived at* http://perma.cc/S2L5-FAD6.

[187] *Id.*

[188] *See generally supra* note 24 and accompanying text (discussing systems of record (SOR)).

[189] For an account of how custom-made systems can limit a bank's ability to grow, see MICHAEL LEWIS, FLASH BOYS 135–37 (W.W. Norton & Company 2014) (describing the little documentation that developers had left for Goldman Sachs' trading systems, which were acquired from a previous firm).

chased), the different systems may or may not be able to communicate with each other. Merging these SORs successfully likely posed some challenges.[190]

There is at least one concrete example of these accuracy issues at the bank-level. Multiple federal and state regulators have looked or are looking at JP Morgan Chase's internal collections as well as its practices selling delinquent accounts. Lawsuits and investigations are pending from the CFPB and the Attorneys General of California, Mississippi, and Massachusetts.[191] The allegations include robo-signing, bad record-keeping, and fraudulent court filings. As of 2013, some believed that Chase had stopped selling consumer debts[192] and, at around the same time, the company closed an internal unit tasked with suing consumers over credit card debts.[193] In its own internal investigation, Chase determined that nearly one in ten of its collection accounts had errors.[194] "The errors ranged from inaccurate interest and fees applied by outside law firms to a 'small number of instances' in which lawsuits listed higher balances than the amounts owed by borrowers."[195] At least a few dozen cases allege that debt buyers sought to collect on debts that the

[190] Many travelers are all-too-familiar with these problems, most recently if they traveled during the months in which United Airlines was merging with Continental, or American Airlines with US Airways.

[191] *See* Jesse Hamilton, *JPMorgan Agrees to Repay Customers in Credit-Card Settlement*, BLOOMBERG (Sept. 19, 2013), http://www.bloomberg.com/news/2013-09-19/jpmorgan-agrees-to-repay-customers-in-occ-credit-card-settlement.html, *archived at* http://perma.cc/8EJ4-7DT2; Jessica Silver-Greenberg & Edward Wyatt, *U.S. Vows to Battle Abusive Debt Collectors*, N. Y. TIMES, July 10, 2013, at B1, *available at* http://dealbook.nytimes.com/2013/07/10/u-s-vows-to-battle-abusive-debt-collectors/, *archived at* http://perma.cc/6Z2X-GUCU; Stephanie Levy, *California Lawsuit over Chase's Debt Collection Practices is Still On*, INSIDEARM (Jan. 8, 2014), http://www.insidearm.com/daily/debt-collection-news/accounts-receivables-management/california-lawsuit-over-chases-debt-collection-practices-is-still-on/, *archived at* http://perma.cc/NW4F-QCH5 ; Jonathan Stempel, *JPMorgan sued by Mississippi AG over credit card misconduct*, REUTERS (Dec. 17, 2013), http://www.reuters.com/article/2013/12/17/us-jpmorgan-lawsuit-creditcards-mississi-idUSBRE9BG1EO20131217, *archived at* http://perma.cc/TA8T-9H4J; Andrew R. Johnson, *Massachusetts Probes J.P. Morgan's Debt-Collection Practices*, WALL ST. J. (Sept. 20, 2013), http://online.wsj.com/news/articles/SB10001424127887323808204579087643404839638, *archived at* http://perma.cc/QK7S-85NU.

[192] *See* Maria Aspan & Jeff Horwitz, *Chase Halts Card Debt Sales Ahead of Crackdown*, AM. BANKER (July 1, 2013), http://www.americanbanker.com/issues/178_126/chase-halts-card-debt-sales-ahead-of-crackdown-1060326-1.html, *archived at* http://perma.cc/B75C-KW38.

[193] *See* Chris Cumming, *JPM to Shutter Litigation Group for Consumer Debt Collection*, AM. BANKER (Oct. 17, 2013), http://www.americanbanker.com/issues/178_201/jpm-to-shutter-litigation-group-for-consumer-debt-collection-1062882-1.html, *archived at* http://perma.cc/7AXW-RMHW.

[194] *See Nearly 1 in 10 JPMorgan debt collection lawsuits had errors*, REUTERS (July 10, 2013), http://articles.chicagotribune.com/2013-07-10/business/chi-nearly-1-in-10-jpmorgan-debt-collection-lawsuits-had-errors-20130710_1_credit-card-debt-collection-jpmorgan-chase-co, *archived at* http://perma.cc/AW7L-U8X4.

[195] Dan Fitzpatrick, *J.P. Morgan Review Finds Errors in Debt-Collection Lawsuits: Errors Occurred as the Bank Sued Its Credit-Card Users*, WALL ST. J. (July 9, 2013), http://online.wsj.com/articles/SB10001424127887324867904578595963522586162, *archived at* http://perma.cc/DP76-UGAY.

consumer had already paid; in some instances, the court found as much.[196] A few months later, the bank entered into a consent order with the OCC in which it "neither admit[ed] nor denie[d]" that "it filed false affidavits, filed false documents that resulted in financial errors in favor of the bank, and failed to have in place processes and systems to ensure the accuracy and integrity of accounts sold to debt buyers."[197]

Against this background, it is useful to examine the seven Chase contracts in the Litigation Sample and note the wide variety of representations. The seven contracts include one contract with an unknown (redacted) date; the rest are from 2008, 2009, and 2010. The overall language and formatting of the agreements is strikingly similar. Looking at them together, they all seem to originate from the same template. All seven use the same exact ALL-CAPS language to disclaim warranties and representations and also explicitly represent that Chase has unencumbered title to the accounts. All seven were signed by the same Chase executive.[198] But that is where the similarities end.

Five of the seven contracts (including contracts signed in 2008, 2009, and 2010) affirmatively represent that Chase complied with all applicable laws when originating or servicing the accounts. A sixth, signed in 2009, represents compliance with laws but adds a caveat that the representation is made "to the best of seller's knowledge."[199] The seventh contract, a 2009 sale of judgments Chase had obtained against delinquent customers, does not make any representations about whether Chase complied with the law.[200] The only contract from 2008 specifically warrants the accuracy of the information; one contract from 2010 warrants the accuracy "to the best of seller's books and records."[201] The remaining five contracts (from 2009, 2010, and an unknown date) do not discuss accuracy at all.

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[196] *See The One Hundred Billion Dollar Problem*, *supra* note 10, at 270 nn. 75–76, 78–79 (collecting eleven cases); Cooper Fin., L.L.C. v. Frost Nat'l Bank, No. 1:12-cv-00295-HJW, 2012 WL 5902909, at *1 (S.D. Ohio Nov. 26, 2012) (alleging that debt buyer sold accounts to another debt buyer without disclosing it did not have title to accounts, which have since been collected upon by the debt buyer without title and resold multiple times); MBNA Am. Bank, N.A. v. Nelson, No. 13777/06, 2007 WL 1704618, at *5 (N.Y. City Civ. Ct. May 24, 2007); Overcash v. United Abstract Group., Inc., 549 F. Supp. 2d 193, 196 (N.D.N.Y. 2008) (attempting to collect in excess of the balance of a previously settled debt); Miller v. Wolpoff & Abramson, L.L.P., No. 1:06-CV-207, 2008 U.S. Dist. LEXIS 12283, at *5 (N.D. Ind. Feb. 19, 2008) (recounting consumer's allegations that two debt buyers sued him on same debt); Wood v. M & J Recovery L.L.C., No. CV 05-5564, at 4 (E.D.N.Y. Apr. 2, 2007).

[197] *Junk Science*, *supra* note 10, at 185.

[198] All seven contracts were signed by Chris Schuck as President of Chase Bank.

[199] *E.g.*, Credit Card Account Purchase Agreement between Chase Bank, N.A. and Turtle Creek Assets (May 7, 2009), at 25, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf, *archived at* http://perma.cc/V4MH-LCZ6.

[200] *See* Judgments Purchase Agreement between Chase Bank, N.A. and Debt One L.L.C (Dec. 10, 2009), *available at* http://dalie.org/wp-content/uploads/2014/10/2009.12.10-Chase-Bank-USA-NA-to-DebtOne-LLC-.pdf, *archived at* http://perma.cc/66Z8-H4JZ.

[201] Credit Card Account Purchase Agreement between Chase Bank, N.A. and Palisades Collection, L.L.C. (Feb. 15, 2008), at 8, *available at* http://dalie.org/wp-content/uploads/2014/

The similarity in the overall terms, structure, and "look" of the contracts all suggest that these differences in material terms (accuracy and compliance) may have had something to do with the specific portfolios being sold. The variability in contract terms used within a year also supports the theory that the contract language varied with the portfolio. In 2009, for example, Chase signed contracts that (1) affirmatively represented that the bank complied with applicable laws, (2) represented the same "to the best of seller's knowledge," and (3) did not make any affirmative representations about compliance with laws (thereby implicitly disclaiming compliance). This argument, that contract terms took into account the underlying accounts sold, is in line with the FTC's statement that in their sample "both sellers and buyers knew that some accounts included within a portfolio might have incomplete or inaccurate data, including data on important information such as the then-current balances on accounts."[202]

Why might banks not be confident about the accuracy of specific portfolios? Waivers of warranties and disclaimers about material aspects of the sale may have gained popularity for two reasons: the great number of bank mergers leading to the crisis which accelerated during the Great Recession, and the large wave of charge-offs and subsequent debt sales during the recession.

Integrating information systems can be a herculean task taking many months (think of airline mergers). It is similar when large banks acquire others, except that rapid acquisitions is much more common in the banking sector. For example, between 1997 and 2007, Bank of America and its predecessor (Nations Bank) acquired or merged with seven large banks.[203] The financial crisis accelerated the already ongoing, rapid consolidation in the financial services industry. Large banks like Washington Mutual and Wachovia were bought on the cheap by even larger banks (JP Morgan Chase and Wells Fargo, respectively).[204] As these banks were acquired, all of their SORs had to be brought in alignment. Data is not available to truly discern

10/2008.02.15-Chase-to-Palisades.pdf, *archived at* http://perma.cc/8ZR3-ACH4; Chase, N.A. to Midland Funding, L.L.C. (Nov. 30, 2010), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.11.30-Chase-Bank-USA-NA-to-Midland-Funding-LLC-.pdf, *archived at* http://perma.cc/UNV6-MZTR.

[202] FTC Debt Buyer Report, *supra* note 4, at C-7-8.

[203] *See Merger History*, Bank of America, http://message.bankofamerica.com/heritage/#/merger-history/ (last visited Nov. 3, 2014), *archived at* http://perma.cc/4WSM-6SVY (noting that: in 1997 Nations Bank merged with Barnett Bank and Boatmen's Bank; in 1998 it acquired Bank of America ("BoA") and took its name; in 2004 BoA purchased Fleet Boston; in 2006 BoA purchased MBNA, making BoA the largest credit card issuer in the country; and in 2007 BoA acquired U.S. Trust and La Salle Bank Corp). BoA is represented in the litigation sample as FIA Card Servs., its credit card subsidiary.

[204] Eric Dash & Andrew Ross Sorkin, *Government Seizes WaMu and Sells Some Assets*, N.Y. Times, Sept. 26, 2008, at A1, *available at* http://www.nytimes.com/2008/09/26/business/26wamu.html?_r=0, *archived at* http://perma.cc/84G9-B4N6; *Wells Fargo Completes Wachovia Purchase*, Thomson Reuters (Jan. 1, 2009, 1:13 PM), http://uk.reuters.com/article/2009/01/01/wellsfargo-wachovia-idUKN0133136720090101, *archived at* http://perma.cc/992E-JPHV.

what happened as smaller banks with legacy systems were swallowed up by larger ones, but conversations with industry insiders suggest that getting the systems to talk to each other was not an easy task.

To add to this story, the liquidity crisis at the end of 2008 caused banks to severely curtail credit lines for their customers to limit their risk as the crisis wore on.[205] A year later, charge-offs began to skyrocket.[206] In 2007, $40 billion in credit card debt was charged-off by banks; that number had risen to $75 billion by 2009.[207] These massive charge-offs in the midst of a liquidity crisis meant that banks sought to convert their portfolio of delinquent or charged-off cards into ready cash that could be put to work quickly. Sales of consumer debt portfolios skyrocketed and prices dropped as delinquent debts flooded the market.[208]

This story is reminiscent of the back-office failures that brought down a number of broker-dealers in the 1960s.[209] The rapid growth of credit before the crisis, the large mergers before and during, and the subsequent meltdown and fast pace of new delinquencies may have overwhelmed some banks.[210] One aspect of the Litigation Sample lends some credence to this story: the "worst" agreements (those disclaiming accuracy and compliance with the FDCPA) were signed in 2009 and 2010, during the financial crisis.[211] But

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[205] "The majority of credit card pricing is determined by factors unrelated to an individual borrower's risk profile and is instead based on factors such as cost of funds, cost of operations, and the aggregated risk profile of the card issuer's borrower pool." Adam J. Levitin, *Rate-Jacking: Risk-Based & Opportunistic Pricing in Credit Cards*, 2011 Utah L. Rev. 339, 343 (2011).

[206] For credit cards, charge-offs must occur within 180 days of the date of the last major delinquency. *See supra* note 35 and accompanying text.

[207] FICO, Boost Collections and Recovery Results with Analytics 1 (Feb. 2010), http://brblog.typepad.com/files/31_boost_collections_recovery_analytics_2644wp.pdf, *archived at* http://perma.cc/LC3Z-DH64.

[208] In 2008, "fresh debt" costs for some accounts dropped from "approximately 9 to 16 cents on the dollar to below 4 cents." *See Our Industry*, Sunlan Corp., http://www.sunlancorporation.com/industry-facts.php (last visited Nov. 4, 2014), *archived at* http://perma.cc/4BY3-PXXE.

[209] *See generally* U.S. Sec. & Exch. Comm'n, Study of Unsafe and Unsound Practices of Brokers and Dealers: Report and Recommendations of the Securities and Exchange Commission (1971). The 1960s was "a period of tremendous growth in the securities industry." Barry P. Barbash, Dir., Div. of Inv. Mgmt., U.S. Sec. and Exch. Comm'n, Remembering the Past: Mutual Funds and the Lessons of the Wonder Years at the ICI Securities Law Procedures Conference (Dec. 4, 1997), *available at* www.sec.gov/news/speech/speecharchive/1997/spch199.txt, *archived at* http://perma.cc/P2N3-9JM5.

[210] As analysts at the Bank for International Settlements have written, "the paper crunch of the 1960s serves as a reminder that weak back office procedures could have serious implications not only for market efficiency but also for the financial health of firms active in the market." Elisabeth Ledrut & Christian Upper, *The US Paper Crunch, 1967–1970*, Bank for Int'l Settlements (Sept. 1, 2008), *available at* http://www.bis.org/publ/qtrpdf/r_qt0712z.htm, *archived at* http://perma.cc/T84C-BSP3.

[211] *See, e.g.*, Purchase and Sale Agreement between Credigy Receivables, Inc. and Newport Capital Recovery Group II, L.L.C. (May 29, 2009), at § 2.1(c)–(d), *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.29-Credigy-Receivables-Inc-to-Newport-Capital-Recovery-Group-II-LLC-.pdf, *archived at* http://perma.cc/5ZDF-DL9F. One of the sales was made by a receiver in a bankruptcy proceeding. Purchase Agreement between Nat'l Credit Acceptance, Inc. and Sacor Financial, Inc. (Oct. 14, 2010), at § 3(b), *available at* http://dalie

while the glut of charge-offs that entered the market after the crisis may have led to more errors, it doesn't explain why many pre-crisis contracts also include the "waiver of all warranties" language. Take, for example, a 2004 contract between MBNA and a debt buyer which disclaims everything not specifically represented, says nothing about title, and disclaims both "the accuracy of any sums shown as current balance or accrued interest amounts due under the loans" as well as the compliance of the loans with state or federal usury laws.[212] In 2004, MBNA was a large bank, second only to Citibank in issuances of credit cards, but it had not merged with any entities of significant size.[213]

Rapid consolidation and the search to liquidate charge-offs may have been a contributing factor, but they do not satisfactorily explain the 2002-2007 agreements in the Litigation Sample that include disclaimers of accuracy of information and title.[214] A separate explanation, perhaps complementary to the merger and charge-offs stories, is that regulatory failure allowed creditors and debt buyers to externalize the costs of illegal collection.

B. Laissez-Faire Failure

The problems with lack of documentation and warrantless contracts begin with the banks who originate the debts. Until recently, bank regulators paid little attention to the manner in which banks were selling debts.[215] This laissez-faire attitude has left the market to decide how much effort banks should take in conducting debt sales. For a variety of reasons, the way in which a bank handles collections is neither very visible to consumers nor very salient for choosing a product. Debt buyers or collectors may be able to exert pressure on banks to improve their practices (since this should increase returns), but they would have had little incentive to do so if they were still profitable without changes. The fragmentation in the collections industry makes it even less likely. Without regulatory or other external pressure, individual banks lack the incentives to "throw good money after bad" and invest in systems required to make sure that they can comfortably warrant title, legal compliance, and accuracy. In a nutshell, bank regulators' permissive attitude toward how the banks conducted these sales coupled with a lack of

.org/wp-content/uploads/2014/10/2010.10.14-National-Credit-Acceptance-Inc-to-Sacor-Financial-Inc-.pdf, *archived at* http://perma.cc/DAV7-8PRJ.

[212] Loan Sale Agreement (Sept. 30, 2004), *supra* note 61.

[213] Charles Austin Stone & Anne Zissu, The Securitization Markets Handbook: Structures and Dynamics of Mortgage- and Asset-backed Securities 2165 (2d ed. 2012).

[214] *See, e.g.,* Loan Sale Agreement (Sept. 30, 2004), *supra* note 61.

[215] This started to change in 2010 with the OCC's investigation into Chase. *See generally* Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, Am. Banker (Mar. 12, 2012, 9:24 PM), http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html?zkPrintable=1&nopagination=1, *archived at* http://perma.cc/W46Y-TKQC.

market incentives for credit issuers to change exacerbated any issues that consolidations and charge-offs may have created.

When shopping for credit products, consumers have no incentive to care about a bank's collection practices.[216] Optimism bias leads individual consumers to believe that they will not have to deal with a collector; default only happens to other people.[217] Stated differently, "[p]eople prefer to believe that their risk is below average and are reluctant to believe anything else."[218] A bank will not gain customers by touting its punctilious collection practices because consumers are not selecting their bank based on these practices. Once they are delinquent, consumers do not have a choice in who their collector is or who their debt is sold to. It is the bank that chooses what collection agencies to use and who to sell their debt to. As a result, consumers do not exert pressure to clean up questionable practices.[219] In fact, the pressure may actually go in the opposite direction: in favor of cutting costs, to the extent that the bank is competing for customers. Once the customer is delinquent, the incentives are even more perverse. The bank has little reason to throw out "good money after bad" in keeping up their collections or recovery systems; after all, the accounts in these systems belong to non-paying customers.[220]

When a bank decides to sell their debt, they enter a different market. The bank has to find willing buyers for their defaulted debts. When billions of dollars in face-value of defaulted accounts are available on the market, they have to compete with other banks for the sale of those debts. Correcting the problematic practices described previously is costly, and the market pressure in this case is relentlessly to drive costs down. Nonetheless, one might expect that debt buyers, as the bank's customers, have an incentive to de-

[216] Bill Whitford made a similar argument in the context of first party collections in 1979. He framed it as an "imbalance of knowledge" between creditors and collectors. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1074 (1979) ("Because consumers only occasionally enter into credit contracts, and only a very few of those result in a delinquency, debtors are typically uninformed about the risks and harms associated with various types of coercive execution. Consequently, they cannot bargain knowledgeably about these matters, particularly at the time of contract formation."). *See also* CFPB ANPR, *supra* note 7, at 67849 (positing that competitive forces will not necessarily correct the collections market because consumers do not choose creditors based on collection activities).

[217] Whitford, *supra* note 216, at 1074 (noting that "consumers have a propensity to underweigh long term risks, such as the risk of delinquency, when making credit or other decisions").

[218] Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, 14 HEALTH PSYCHOL. 132, 139 (1995).

[219] Consumer insurance markets have similar features in that they are "ultra-competitive with respect to price" but "remarkably noncompetitive with respect to claims handling quality." Daniel Schwarcz, *Differential Compensation and the "Race to the Bottom" in Consumer Insurance Markets*, 15 CONN. INS. L.J. 723, 726 (2008). Both claims handling and debt sales are low incidence events that typically occur much later than the moment at which the consumer purchases insurance or obtains a credit card.

[220] As Stephen Davidoff has noted, "reputation is a 'less active influence' constraining behavior when a nefarious deed is done by many." Davidoff, *supra* note 76 (quoting THE FEDERALIST NO. 15, at 72 (Alexander Hamilton)).

mand more documentation, evidence, and positive warranties from banks. This would enhance recoveries because consumers are more likely to pay if they can trust that the person calling or writing about the debt—someone they did not initiate a relationship with—is the correct party. Enhanced evidence of the underlying debt would also enhance the debt buyer's ability to collect via the court system.

But in order for debt buyers to have the incentive to push for more documentation and warrants from sellers, these items must be needed to make debt buying profitable.[221] Instead, the public filings of debt buyers demonstrate that no matter how broken the current system may be, it still allows them to obtain a very healthy profit.[222] Despite all the bad press, debt buyers have been able to collect enough to accrue substantial profits from consumers directly as well as through the courts. In 2008, debts were quite cheap: four cents on the dollar on average according to the FTC, and in some cases "virtually zero."[223] If buyers can collect with the current level of information and documentation and without requiring that the creditor stand by the material aspects of the debts they are selling, they have no incentive to ask for anything more. Indeed, they have a disincentive to ask for more since this would increase the purchase price immediately with only a theoretical possibility that it would also mean increased recoveries in the future. Receiving more documentation would also mean needing to put a system in place to deal with the documents. This is costly and—so far—unnecessary.

Thus, any improvement in procedures a bank undertakes will result in added costs to the bank, with little upside. This presents a collective action problem: if a bank increases prices to cover the increase in costs, it risks losing customers. Since consumers do not choose their bank based on their collection or debt sale practices, the bank that does not implement these costly upgrades is better positioned to offer lower-priced products to consumers and poised to increase its customer base.

But consumers are not the banks' only customers. Debt buyers are also customers, and they may also be able to absorb the increased costs. However, as discussed earlier, debt buyers and collectors who are making good returns under the current system would naturally be reluctant to accept the additional costs. In a fragmented market like this one—an estimated 4,500 firms buy and collect debts in the United States—and with insufficient regulatory oversight, there should always be debt buyers willing to buy bargain-

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[221] Or that, on the margin, the costs of documentation and warrants increase overall profits.

[222] *See, e.g.*, SquareTwo Financial, Financial Results: Year End 2011 12 (2012), *available at* http://www.squaretwofinancial.com/wp-content/uploads/2012/06/SquareTwo-Financial-Q4YE-2011-Financial-Results-Presentation.pdf, *archived at* http://perma.cc/4Y29-NWSK (reporting that "[r]eturns on 2009, 2010, and 2011 purchase years average 2.4x compared to 1.5x for purchase years 2007 and 2008, an increase of over 60%"). Public debt buyers generally are not very diversified; their entire business model usually consists of purchasing and collecting on different kinds of debts.

[223] FTC Debt Buyer Report, *supra* note 4, at ii.

priced debts.[224] This is especially true if despite the issues identified in this article sufficient consumers pay so as to make the pennies or fractions of pennies paid for the debts worth the investment.

Another potential source of market pressure, outside of regulators, are consumer lawsuits. While a few class actions have attempted to address some of these issues, it is important to note that the FDCPA's remedies are very limited.[225] The Act provides attorney's fees for prevailing plaintiffs and recovery of actual damages, but the total statutory damages for a class action are capped at "the lesser of $500,000 or 1 per centum of the net worth of the debt collector [or debt buyer]."[226] Even if this small amount could serve as a deterrent, it can only be used against debt buyers or collectors. It cannot be used to deter banks since originating creditors are not subject to the FDCPA.[227] Consumer lawyers have increased the number of individual and class actions filed under the FDCPA,[228] much to the industry's chagrin, but they are necessarily knocking on the wrong door.

An equilibrium seems to have developed around the problematic practices described in Parts II and III. Without outside pressure, any given bank has a disincentive to spend money to improve its practices. An intervention is needed to spur change and solve this collective action problem. Both the bank and debt buyer industries recognize this. At a workshop held by the FTC and the CFPB, industry panelists repeatedly requested regulation and

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[224] *See* Bureau of Consumer Financial Protection Rule, 12 C.F.R. § 1090.105 (2012), *infra* note 253; Joe Mont, *CFPB Considers Debt Collection Rules, Releases Complaint Data*, Compliance Week (Nov. 6, 2013), http://www.complianceweek.com/blogs/the-filing-cabinet/cfpb-considers-debt-collection-rules-releases-complaint-data#.VEDjUha9bCA, *archived at* http://perma.cc/PM3N-VGTM.

[225] *See, e.g.*, Class Action Complaint at 3-8, Vassalle v. Midland Funding L.L.C., No. 3:11-CV-00096, 2011 WL 231969 (N.D. Ohio Jan. 17, 2011) (challenging practice of "robo-signing" affidavits used in debt collection lawsuits); Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961, 966–69 (N.D. Ohio 2009) (describing the challenged affidavit production practice). The FTC filed an amicus brief in the Midland lawsuit opposing a proposed settlement because it provided only a small payment to consumers (capped at $10), and consumers would surrender their rights under the FDCPA and state laws to challenge Midland's actions related to the company's use of affidavits in debt collection lawsuits. FTC's Brief as Amicus Curiae, Vassalle v. Midland Funding L.L.C., No: 3:11-CV-00096, at 1 (N.D. Ohio June 21, 2011), *available at* http://www.ftc.gov/os/2011/06/110621midlandfunding.pdf, *archived at* http://perma.cc/B8KF-NJRY . The court ultimately approved the settlement agreement in Midland without making changes to the agreement. Vassalle v. Midland Funding L.L.C., No: 3:11-CV-00096, 2011 WL 3557045, at *1 (N.D. Ohio Aug. 12, 2011).

[226] 15 U.S.C. § 1692k(a)(2)(B) (2012).

[227] 15 U.S.C. § 1692(a)(6)(F) (2012) ("The term 'debt collector' . . . does not include any person collecting or attempting to collect any debt . . . to the extent such activity concerns a debt which was originated by such person."). Note, however, that a handful of states have enacted state versions of the FDCPA, which include original creditors within their coverage. *See, e.g.*, Ca. Civ. Code § 1788.

[228] In 2012, consumers filed 10,320 lawsuits alleging violations of the FDCPA. This was slightly lower than the number in each of the previous three years. Jack Gordon, *Debt Collection Litigation & CFPB Complaint Statistics, December 2013 & Year in Review*, Interactive Credit: The Debt collection Industry's Defense Blog (Jan. 22, 2014), http://interactivecredit.com/?p=2101, *archived at* http://perma.cc/Q22B-4U9M.

clarity in documentation requirements.[229] An attorney for the collections industry echoed this sentiment "[i]f there's a mandate, a national standard, you sell an account, these are the things you will transmit. I think it helps everybody. That's a quality improvement standard and it'd be a very good thing."[230] In recent comments to the CFPB, JP Morgan Chase stated that the bank "would be interested in guidance from the Bureau on what information and documentation should be required to transfer with a charged-off debt when it is assigned to a collection agency or sold to a debt buyer."[231]

V. Cleaning the Dirt: Towards an Improved Collection Ecosystem

This Part considers possible solutions to the problems outlined in this article. It discusses potential industry-led solutions and potential market options, before ending with a regulatory solution which could help effectuate Ronald Mann's "distressed debt tax" to help lenders internalize the true cost of collecting (that which includes the cost of complying with the law).

A. *Industry Self-Regulation*

Lacking incentives from their consumer or debt buyer customers, banks might still respond to pressure from their regulators to increase the amount and quality of information they sell. That pressure began with the passage of the 2010 Dodd-Frank Wall Street Consumer Protection Act ("Dodd-Frank") and the inception of the CFPB.[232] While still in its infancy, the CFPB made it

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[229] For instance, Larry Tewell, Senior Vice President at Wells Fargo stated, "if we could have uniform national standards relative to data and media, that would go a long way toward fixing this." Tewell, *supra* note 60, at 119.

[230] *Life of a Debt: Data Integrity and Debt Collection – Part 3*, Fed. Trade Comm'n (June 6, 2013), http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-collection-part-3, *archived at* http://perma.cc/8WKF-Z6M6. At this roundtable discussion regarding debt collection and data integrity, Manuel Newberger, Partner, Barron & Newberger, P.C., who represents creditors and debt buyers, said, "the more information that we can have relative to charge-off dates, balances, last payments . . . would be extremely relevant . . . . [T]he idea that information can be passed from agency to agency . . . that this account was disputed . . . that would be helpful." The TransUnion representative agreed: "[M]ore standardized data reporting on the front end will reduce the errors and reduce the questions consumers get. We won't be putting accounts on the wrong file or matching information correctly."

[231] J.P. Morgan Chase & Co., Response to Advance Notice of Proposed Rulemaking at 3, Debt Collection, Docket No. CFPB-2013-0033, RIN 3170-AA41 (Feb. 28, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0304, *archived at* http://perma.cc/3GAP-QHYZ.

[232] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Soon after Dodd-Frank was passed, the FTC sought public comments on a proposed policy statement for how debt collectors should handle consumer debts. *FTC Proposes Policy Statement Clarifying How to Collect Decedents' Debts*, Fed. Trade Comm'n (Oct. 4, 2010), http://www.ftc.gov/news-events/press-releases/2010/10/ftc-proposes-policy-statement-clarifying-how-collect-decedents, *archived at* http://perma.cc/EV68-CKUM; Statement of the Office of the Comptroller of the Currency, Provided to the Subcomm. on Fin. Inst. and Consumer Protection, Senate Comm. on Banking, Hous. and Ur-

publically known that debt collection issues were among its top priorities. Naturally, this spurred some action on the part of industry. As this article goes to print, the Bureau is expected to propose draft debt collection rules in early 2015.[233] This section proposes that banks begin sending "goodbye packets" to their customers when they sell their debts, a simple (partial) solution that banks could implement fairly quickly. It also discusses a longer-term potential solution in the form of a debt registry.

1. Moves in the Right Direction

Amidst mounting pressure from federal and state regulators, various players in the industry have realized they have an opportunity to design self-imposed obligations that might solve some of the problems described earlier and reduce liability as well as regulator intermeddling. For instance, there is anecdotal evidence that large banks have started to change their record-keeping and debt sales practices. At the joint FTC/CFPB "Life of a Debt" event, a regulator discussed reports that banks were exerting greater control over collection agencies, sometimes allowing them to interphase with the bank's SOR. There is also evidence that creditors are being more selective with to whom they sell accounts.[234] New contract language purportedly includes resale and potentially outsourcing restrictions. These are all steps in the right direction, but as of yet, the extent of these changes is not known.

Debt buyers have also begun to move toward reform. DBA International, the largest trade association for debt buyers, recently enacted a na-

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ban Affairs: "Shining a Light on the Consumer Debt Industry," at 13 (July 17, 2013), *available at* http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf, *archived at* http://perma.cc/U6BY-WLJ8; Jeff Horwitz & Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, AM. BANKER (July 2, 2013), *available at* http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html, *archived at* http://perma.cc/8CFD-NYCA; John L. Culhane, Jr., *No backseat for FTC in FDCPA enforcement*, CFPB MONITOR (Mar. 6, 2014), http://www.cfpbmonitor.com/2014/03/06/no-backseat-for-ftc-in-fdcpa-enforcement, *archived at* http://perma.cc/P6RY-7AG2; *Federal Trade Commission Increases Enforcement Of FDCPA*, AGRUSS LAW FIRM L.L.C. (Feb. 27, 2013), http://www.agrussconsumerlaw.com/federal-trade-commission-increases-enforcement-of-fdcpa/, *archived at* http://perma.cc/997E-AL8A.

[233] Jake Halpern, *The big, debt-collection shakedown: The need to reform an industry that recovered $55.2 billion from Americans last year*, BOSTON GLOBE (Oct. 12, 2014), http://www.bostonglobe.com/magazine/2014/10/11/the-big-debt-collection-shakedown/REmoHeNzXm2d2tK7m42dzI/story.html, *archived at* http://perma.cc/H6VQ-QV27 ("Starting in 2015, the Consumer Financial Protection Bureau is expected to unveil fairly comprehensive rules governing how debt can be collected."); Debt Collection Rule, RIN 3170-AA41 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006), *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=3170-AA41, *archived at* http://perma.cc/UE9M-Z466.

[234] Wolters Kluwer Fin. Services, Response to Advance Notice of Proposed Rulemaking, Debt Collection, Docket No. CFPB-2013-0033-0001, RIN 3170-AA41 (Feb. 27, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0239, *archived at* http://perma.cc/GA2Q-734J; *The New Norm in Debt Buying*, KAULKIN GINSBERG (Feb. 14, 2014), http://www.kaulkin.com/connect/2013/02/the-new-norm-in-debt-buying/, *archived at* http://perma.cc/98KK-34WX.

tional "Certification Program."[235] All DBA International members will have to become certified under the program by March 2016 or lose their membership. Part of the certification requires that "on all new debt portfolios purchased after becoming certified, the Certified Debt Buyer shall require in the purchase agreement (i.e. the contract) those data elements required to sufficiently identify the consumers on the associated accounts."[236]

According to the certification requirements, this means the debt buyer must "use commercially reasonable efforts to negotiate the inclusion" of things such as name, last known address, last payment date, charge-off balance, and the current balance.[237] The certification standards do not require anything else in the language of contracts. After becoming certified, debt buyers are also required to "maintain an accurate listing for chain of title on debts purchased after certification." The standards make clear that this is not a retroactive requirement and only applies to debts purchased after certification.[238]

This is a positive move, but the program will necessarily have a limited effect. First, it does not address many of the issues discussed in Parts II and III. For example, the program does not require certified debt buyers to purchase account documents when they purchase a portfolio; or even to make sure that the seller has the media available.[239] It would be implausible to think that such a program could fix all of these problems, however, because so many of them begin with the creditor. Second, debt buyers are certainly not required to become DBA members, so the program will not reach those debt buyers who do not want to play by the rules. This may turn out to be a blessing in disguise: it could be a relatively costless way for regulators to separate those buyers who are taking active steps towards compliance and those who are not, and to spend their resources appropriately.

What these two sets of industry-led reforms have in common is that they will likely lead to a consolidation of players in the debt buying and collection agency industry. This is already happening, as increased regulatory scrutiny brings increased compliance costs and not all players can absorb them. This is not necessarily a bad thing; a smaller number of collection

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[235] The DBA Int'l Board adopted the program in February 2012. *DBA Debt Buyer Certification Update*, DBA INT'L (July 25, 2012), http://www.dbainternational.org/members_only/DBADebtBuyerCertificationUpdate.pdf, *archived at* http://perma.cc/69LU-HUA8. The first DBA member was certified under the program on May 14, 2013. *First DBA Member Completes Debt Buyer Certification Program*, DBA INT'L (May 14, 2013), http://www.dbainternational.org/memberalerts/Alert-FirstCertification_051413.pdf, *archived at* http://perma.cc/4LZQ-RV5K.

[236] DBA INT'L, DEBT BUYER CERTIFICATION PROGRAM, APPENDIX A: CERTIFICATION STANDARDS MANUAL 7 (Feb. 2, 2013), *available at* http://www.dbainternational.org/certification/certificationstandards.pdf, *archived at* http://perma.cc/82NC-WZW5.

[237] *Id.* at 6.

[238] *See id.* at 7.

[239] *See* DBA INT'L, DBA INTERNATIONAL DEBT BUYER CERTIFICATION PROGRAM, APPENDIX D – AUDIT REVIEW MANUAL 13 (Feb. 7, 2013), *available at* http://www.dbainternational.org/certification/auditreview.pdf, *archived at* http://perma.cc/XFS3-7762.

agencies and debt buyers—rather than the thousands currently in operation—would make it easier for consumers to identify a real company from a fly-by-night bogus debts operation.

The next section suggests another potential step creditors can take to improve the flow of information and trust in the collection system.

2. *Goodbye Packets*

One of the issues that arise when debts are sold multiple times is that consumers may not know or be able to determine who currently owns their debt. A related problem is that Bills of Sale are not individualized at the account or debt level, they merely state that "[Seller] sold Accounts to [Buyer]" on a specified debt. This causes problems when a buyer seeks to collect through courts, as discussed in Part III.B.4. It also means that consumers have no way to verify that the person calling or writing is the legitimate owner of their debt. One partial solution to this would be for sellers (creditors or debt buyers) to send a "goodbye packet" to the consumer whenever her account is sold.[240]

The packet should include a letter from the creditor (when the debt is first sold) summarizing what happened to the consumer's account: the creditor sold it to XZY Debt Buyer. The letter should include contact information for the debt buyer and any account or reference number needed for the debt buyer to find the consumer's account. Besides the letter, the packet should also include the charge-off statement—the last statement ever mailed from the bank to the consumer—and attach a ledger accounting of the last twelve months of purchases, payments, and interest or fee charges, or a way for the consumer to access the ledger or statements online for period of time.[241] The letter need only be one page; the charge-off statement typically is as well, since it does not include any new purchases. Depending on how long ago the consumer stopped incurring charges or making payments on the credit card, the ledger may be very brief. The entire packet could be as little as four pages, though more likely an average of five to seven.

This packet could "travel with the debt;" every seller would provide to subsequent buyers the documents sent to consumers, as well as when they were sent and to what address. Every subsequent buyer could also send a version of this letter, taking care to add whatever credits and charges were added to the account in the previous twelve months. This conceptually simple (though no doubt logistically difficult) solution would go a long way

[240] Full credit for this idea goes to Samantha Koster, while she was a student in the author's Consumer Law / Debt Collection seminar.

[241] Nothing like this is currently required by regulations. However, some current state laws and some proposed ones require evidence that the consumer used the card before a court may enter a judgment. *See, e.g.*, Debt Buying, S.B. 233, 2013-2014 Leg., 2013-2014 Sess. (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB233, *archived at* http://perma.cc/CTU6-H9PH. *See* NCLC comments to the CFPB's debt collection ANPR, *supra* note 145.

toward ameliorating the chain-of-title and standing problems in state court.[242] It would also be helpful to consumers who might wish to pay their obligations, or who wish to learn who currently owns their debt and how to get in touch with them.[243]

The industry recognizes the role notification of a sale could play in both improving collections and alleviating many of the problems described in Part III. Many of the contracts in the FTC sample required debt buyers to notify consumers that their accounts had been sold, typically within 30-60 days after the sale. However, the contracts specified that the notification would come in the form of a letter from the debt buyer, an entity the consumer does not know. Some contracts provided that at the debt buyer's request, and at a cost of $10 per individual letter, the bank would "provide a form letter on an individual basis . . . that Buyer may send to a Cardholder to confirm that the Bank sold the Cardholder's Account to Buyer."[244] However, those letters would still be sent on the debt buyer's letterhead and envelope.[245] One possible reason the contracts are structured this way is that banks have an incentive to have the buyer be the one to tell the consumer about the sale because it may reduce the bank's reputational concerns.

3. *Debt Registry*

Some of the problems described in this article might sound eerily similar to the documentation and robo-signing issues in the mortgage markets. A great deal of those problems concern the mortgage industry's registry, the Mortgage Electronic Registration System, or MERS, which came under significant attack for its actions during the foreclosure crisis.[246] By inserting

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[242] That is because each subsequent buyer would acquire a record of an individualized letter sent by the creditor to the consumer reporting that the account had been sold and would acquire it *at the moment of sale*. In states that recognize the incorporation doctrine, a debt buyer's record custodian could satisfy the business records exception to the hearsay rule. If the original debt buyer sold the account again, then the subsequent buyer would have multiple letters evincing the chain of title.

[243] Instead of a goodbye letter, however, most debt sale contracts explicitly prohibit debt buyers from providing information about the original credit issuer. FTC DEBT BUYER REPORT, *supra* note 4, at C-20. The reason for this is presumably to avoid communications with the consumer since the seller no longer owns the account, however, this policy might make it harder for consumers to figure out whether the debt buyer contacting them legitimately owns their debt. The fact that some sale contracts "expressly prohibited debt buyers from using the credit issuer's name in the subject line of notification . . . and limited usage of the seller's name to the body of such letters" further adds to the possibility of consumer confusion. *Id.*

[244] *Id.*

[245] *Id.*

[246] MERS is a computer database, established by the residential mortgage industry, which is designed to track the servicing rights on the majority of U.S. home loans. It has approximately 5,000 members—consisting of mortgage originators and secondary market participants including Fannie Mae, Freddie Mac, and Ginnie Mae—who pay MERS membership fees and fees on specific transactions in order to use the information filed with MERS. *See An Introduction to the MERS® System, MERSCORP Holdings, Inc., and Mortgage Electronic Registration Systems, Inc.*, MERS®WORKS (Sept. 2014), http://www.mersinc.org/media-room/press-kit, *archived at* http://perma.cc/5PSS-Y932?type=pdf.

itself as the owner of record or owner's nominee in foreclosure actions, MERS foreclosed on homes under its own name, even though it was not entitled to any of the proceeds because it did not own the mortgage or the note.[247] Because recordation of assignments in MERS was voluntary, oftentimes consumers could not ascertain who owned their mortgages. This exposed some consumers to double foreclosure actions—and their attendant fees—because they could not determine exactly who owned their loans. In the most egregious cases, fraudsters became authorized officers of MERS and initiated foreclosure. In other cases, consumers could not find out whom to contact to settle the foreclosure case when MERS was the one that initiated the proceedings.

Given all of these issues, it may seem surprising that, for example, the CFPB recently highlighted the idea of a debt registry in its advanced notice of proposed rulemaking by asking a series of questions to the public about its potential benefits and drawbacks.[248] At least two companies have been endeavoring for a few years to interest a critical mass of creditors and debt buyers to adopt their registry solution for unsecured consumer debts.[249] Both aim to do this by serving as a "middle man registry," a way for documentation and chain of title information regarding an individual debt to live with a third party (the registry) and remain there regardless of current ownership of the debt. What would change would be the registered owner.
As one of these companies frames the issue in a whitepaper:

> Businesses and individuals would not dream of buying real property, automobiles, or anything else of value without first having its ownership status verified by a third party. If one would not buy a car or house without title confirmation, why would one spend thousands or millions buying debt without the same protection?[250]

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[247] *See* Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 Duke L.J. 637, 713–15 (2013); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 114–125 (2011); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1370–71 (2010). *See also* Mortg. Elec. Registration Sys., Inc. v. Chong, Order, Nos. 2:09-CV-00661-KJD-LRL, BK-S-07-16645-LBR, 2009 WL 6524286, at *2 (D. Nev. Dec. 4, 2009); Mortg. Elec. Registration Sys., Inc. v. Graham, 247 P.3d 223, 228–29 (Kan. Ct. App. 2010); In re Agard, 444 B.R. 231, 235 (Bankr. E.D.N.Y. 2011) ("This Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law.").

[248] *See* CFPB ANPR, *supra* note 7, at question 12. Some of the discussion here was included in the author's joint comment letter with Patricia A. McCoy, *supra* note 12.

[249] *See Who We Are*, GlobalDebtRegistry.com, http://www.globaldebtregistry.com/who-we-are (last visited Oct. 23, 2014), *archived at* http://perma.cc/5R3K-CZ2L; *About Convoke*, ConvokeSystems.com, http://www.convokesystems.com/company (last visited Oct. 23, 2014), *archived at* http://perma.cc/NE76-UQ8Z.

[250] Daniel J. Langin, *Introducing Certainty to Debt Buying: Account Chain of Title Verification for Debt*, Global Debt Registry (Jan. 5, 2011), *available at* http://ftc.gov/os/comments/debtcollecttechworkshop/00027-60064.pdf, *archived at* http://perma.cc/9YPA-7J6V.

Why indeed? While the MERS scars are still recent, there are some differences between the unsecured consumer debt context and the mortgage registry system. Unlike unsecured consumer debts, mortgages have had a registry system for hundreds of years. The county recording has been a very successful system of establishing title and recording changes in the ownership of real property. MERS was developed to supplant this already-existing registry system. Part of the reason it caused problems was because the local land records were no longer the authoritative source of title ownership. In effect, MERS added a separate SOR to the structure. In the unsecured debt context, there is nothing to supplant, and indeed, there is a need for consumers to be able to verify who owns their debts so that they may pay the right party.

This "chain of title" record-keeping and account document storage could be the most helpful features in a repository. Unless it is serving as the real-time SOR for every collector or debt owner, however, a repository would not be an appropriate place to keep the current amount owed on a debt, or the itemization between interest and fees past charge-off. This is because any information stored in the repository about the amount owed or the payments made will necessarily be out of date and in no way verifiable since they were created by a third party.

Nonetheless, a "chain of title registry" could offer advantages to both consumers and industry participants. Consumers targeted for debt collection would have a place to turn to examine the facts alleged regarding their debts.[251] If reporting to a repository were required, consumers could easily verify that the party contacting them actually owns the debt, or alternatively, that they have been called by a scammer.

To alleviate the issues around the lack of documentation, at the time that a delinquent account is entered into a repository, underlying debt contracts, the last account statement, the amount owed at charge-off, and the date of first default could be obtained from the original creditor. While only the original creditor could speak to the truth and reliability of those documents in court, outside of court, storing this documentation and information could help consumers ascertain whether the alleged principal, interest, and fees being charged were excessive and evaluate any defenses to collection. A repository could also protect against potential double recovery and fraudulent collection by helping consumers to identify the rightful owner of their debts and the debt collector or servicer who is authorized to collect on them.

To the extent that courts have held back from strictly applying evidentiary and standing rules to debt buyers out of a concern that this may increase the cost of credit, the ready availability of this information might inspire them to insist that debt holders and collectors prove a *prima facie* case before obtaining a default judgment. Although here it is important to note that a repository is not a panacea. While it can serve a very useful

[251] This positive, however, disappears if there are too many registries.

purpose in identifying the owner of the debt and the entity authorized to collect on it, data stored in a repository should be used to substantiate the amounts owed on a debt. This is because the repository is not itself the source of business records regarding the debt. The only thing an agent of a repository could testify to in court is that documents were placed with it at a particular time by a particular entity. The repository cannot speak to the validity or contents of those documents or even about how they were created. It can only speak to the integrity of those documents—that is, that they were not changed—after they were stored with the repository. An agent of a debt registry could not testify in court as to whether the amounts on account statements were correct, as they would not have personal knowledge of the creation of those amounts.[252]

Many of the advantages that a centralized repository (or a handful of repositories) could offer to consumers flow from the fact that it would be relatively easy to publicize its existence and that it could be closely supervised by the CFPB.[253] In addition, as an entity in a "business the principal purpose of which is the collection of any debts," a repository would come within the ambit of the FDCPA and be accountable to consumers who were hurt by their practices.

However, there remain unresolved issues of how a repository would fit with current law. Depending on the exact way the company operates, a centralized repository might be considered a "consumer reporting agency" under the Fair Credit Reporting Act ("FCRA").[254] This might involve some additional consumer protections such as the requirement of "maximum pos-

[252] For a discussion of hearsay issues in debt buyer cases see Holland, *supra* note 10, at 272–80.

[253] Repositories would be subject to CFPB supervision if they met the Bureau's definition of a "larger participant" in the market for consumer reporting or debt collection. *See* Bureau of Consumer Financial Protection Rule, 12 C.F.R. § 1090.103 (2014); Bureau of Consumer Financial Protection Rule, 12 C.F.R. § 1090.105 (2014). They may also qualify for supervision as service providers of depository institutions. *See* 12 U.S.C. § 5515 (2012).

[254] 15 U.S.C. § 1681a(f) (2012) states that a "'consumer reporting agency' means any person who for monetary fees . . . regularly engages in whole or in part in the practice of assembling . . . consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." A "consumer report" in turn is defined in § 1681a(d)(1) as including any type of communication that bears on a consumer's credit-worthiness or credit capacity which is used or expected to be used with any of the permissible purposes of consumer reports in § 1681b(a). Under § 1681b(a), there are three ways in which a centralized repository would furnish reports that would bring it within the ambit of the FCRA. To the extent that the repository makes information available to potential collectors or debt purchasers, it would be furnishing it under § 1681b(a)(3)(E) since the repository would be sharing the information with someone who "intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation." Similarly, the repository could trigger the FCRA by furnishing the information to someone (a debt buyer or collector) who "has a legitimate business need for the information [] in connection with a business transaction that is initiated by the consumer [the original credit agreement]." 15 U.S.C. § 1681b(a)(3)(F) (2012). And finally, the repository would come under FCRA for furnishing the information "[t]o a person which [the repository] has reason to believe . . . intends to use the information in connection with a credit transaction involving the consumer on

sible accuracy,"[255] correction or deletion of disputed information,[256] and free consumer disclosures every twelve months,[257] as well as potential direct supervision by the CFPB.[258] But it would also cause additional concerns. The FCRA is ill fitted to the notion of a repository, and as currently written, it could do nothing to stop a repository from sharing this newly collected information with third parties, a development that has many potential negative consequences for consumers' privacy.

In addition, the FCRA's seven-year limit on reporting would also present a problem, as one of the most useful features of a repository would be its ability to report whether a debt has been paid or extinguished much longer than seven years since charge-off.[259] While the FCRA's provisions provide some threshold consumer safeguards, it has a mixed track record of empowering consumers to correct inaccurate credit reports. The consumer safeguards for any repository should be even stronger than those afforded by FCRA to safeguard the accuracy of and access to the information contained therein.

Given the MERS experience, there is also a real concern that agents of the repository would be called to testify in court about things of which they do not have personal knowledge—for example, the amount of the debt or the underlying terms of the agreement between the creditor and debtor. It would be crucial for the CFPB and other regulators to clarify that all a repository could verify is the assignment chain—that is, that creditor and XYZ Debt Buyer entered into an agreement that was deposited with the depository involving a particular set of consumer debts. The repository does not have personal knowledge of whether those debts are valid or correct, just that the creditor turned over documents about them to the repository for safe-keeping and that, for example, Buyer 1 sold a particular account to Buyer 2 who is now its only owner. In other words, a centralized debt repository could not satisfy (by itself) a debt owner's *prima facie* case in court.

All of this begs the question—is a repository necessary? While not strictly necessary, the idea of repositories is likely to grow in popularity in the future if regulators begin to require more from creditors, as the next subpart suggests they should. First, as to necessity: if the analysis is constrained to banks, the same beneficial functions outlined above could be accomplished if the creditor simply retained all of the information and

whom the information is to be furnished [for the] collection of an account of the consumer." 15 U.S.C. § 1681b(a)(3)(A) (2012) (emphasis added).

[255] 15 U.S.C. § 1681e(b) (2012).

[256] 15 U.S.C. § 1681i (2012).

[257] 15 U.S.C. § 1681j (2012).

[258] Repositories would be subject to CFPB supervision if they met the Bureau's definition of a "larger participant" in the market for consumer reporting. *See* 12 C.F.R. § 1090.103. They may also qualify for supervision as service providers of depository institutions. 12 U.S.C. § 5515 (2012).

[259] *See* 15 U.S.C. § 1681c(a)(4) (2012).

documentation needed.[260] The creditor itself could keep a record of ownership, and only allow proper parties (current owners of the debt or their authorized servicers) to access this data. This starts to sound an awful lot like just placing a debt with a collection agency. If you retain liability and record-keeping, there would be little reason not to retain the upside (any eventual payment). Thus, some banks may react to stricter documentation and information rules from the CFPB by ceasing to sell debt. Nonetheless, others may find that even with the new regulatory attention, debt sales continue to make sense. Despite increased regulation, a secondary market for consumer debts will continue to exist if debt buyers are willing to purchase debts at a cost where it is better for the bank to sell rather than attempting to collect itself or placing the debt with a collection agency.[261] In these cases, a debt registry may facilitate debt sales by allowing banks to focus their due diligence and audits on the debt registry provider rather than on all subsequent debt buyers who may own the debts.[262] In other words, forcing banks to increase their diligence around charged-off accounts may in turn drive some banks to use a debt registry.[263]

C. Regulatory Action

Until recently, regulation of the entire collection ecosystem (creditors, debt buyers, collection agencies, and collection law firms) was distributed among multiple regulators who had many other priorities.[264] No single regulator had authority over both debt originators (creditors, in many cases banks) and debt collectors. The FTC gained primary enforcement power over the FDCPA in 1977, but it was (and is) prohibited from writing rules to interpret the Act, and so none have been written since.[265] The FDCPA prohibits debt collectors from, *inter alia*, using "unfair or unconscionable

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[260] If we expand to non-bank delinquent debts, such as medical debts, a repository becomes a more useful concept because, among other things, it would allow consumers to check their outstanding debts with one of a handful or repositories as opposed to all potential creditors.

[261] This in turn, depends on the return to capital from collection recoveries. As the economy recovers it is more likely that collectors will see increased returns.

[262] *See Bulletin No. 2014-37, Consumer Debt Sales/Risk Management Guidance*, Office of the Comptroller of the Currency (Aug. 4, 2014), *available at* http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html, *archived at* http://perma.cc/8EBH-WUVD [hereinafter OCC Bulletin].

[263] It may also change the *ex ante* calculus of offering accounts to certain customers, reducing the supply of credit. As discussed in Part V.B., it may also have the effect of ameliorating the "sweat box" problem Ronald Mann has identified. *See infra* note 324 and accompanying text.

[264] *See* 15 U.S.C. § 1692l (2012) (describing how the Federal Trade Commission, Federal Deposit Insurance Corporation, Federal Reserve, National Credit Union Administration, Secretary of Transportation, and the Secretary of Agriculture all share enforcement responsibility over the FDCPA). After Dodd-Frank, the CFPB was added to the list of agencies with enforcement authority over the FDCPA. *See id.* The CFPB also gained rule-writing authority. 15 U.S.C. § 1692l(d) (2012).

[265] *See* 15 U.S.C. § 1692l (2012).

means" or making "false, deceptive, or misleading representation[s]" in connection with the collection of a debt.[266] It applies to "debt collectors," which include debt buyers, collection agencies, and collection law firms, but crucially *not* creditors who collect on their own debt.[267] The FTC can also prevent unfair and deceptive practices through the FTC Act, but banks and many other types of creditors collecting on their own debt are not covered by the Act.[268]

This fragmented authority changed in 2011 with the Dodd-Frank Act, which gave the CFPB a broad mandate over all players in the debt collection ecosystem—banks and other creditors, debt buyers, debt collectors, and collection law firms.[269] The Bureau can enforce both the FDCPA as well as the Consumer Financial Protection Act ("CFPA").[270] Similar to the FDCPA, the CFPA prohibits "unfair, deceptive, or abusive acts and practices" ("UDAAPs"); it applies to all players in the debt collection ecosystem.[271]

The Bureau's authority over both of these statutes is far-reaching: it is the first and only agency with authority to enact rules implementing both statutes.[272] It can supervise creditors as well as the largest debt buyers, collection agencies, and collection law firms; and it can enforce the FDCPA against collectors and the CFPA against creditors and collectors.[273] The Bu-

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[266] 15 U.S.C. § 1692e (2012).

[267] The FDCPA generally prohibits "debt collectors" from engaging in abusive practices. *See generally* 15 U.S.C. §§ 1601–1692o (2012); 15 U.S.C. § 1692a(6) (2012) ("The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."). The FDCPA does not apply to "original creditors" collecting their own debt—e.g., CapitalOne calling a consumer about her overdue credit card bill—but for purposes of the Act, debt buyers are regulated as debt collectors. *See*, *e.g.*, Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003) (holding that the FDCPA "treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not").

[268] *See* 15 U.S.C. § 45 (2012).

[269] Dodd-Frank was enacted on July 21, 2010, but the authorities granted to the CFPB did not take effect until 2011. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

[270] The FTC retains its enforcement powers under the FDCPA, *see* 15 U.S.C. § 1692l(a) (2012), and has significantly increased its activities in this area in the last few years. "In its two civil penalty cases [in 2012] . . . the FTC obtained $2.8 million and $2.5 million, respectively, the two largest civil penalty amounts the agency has ever obtained in cases alleging violations of the FDCPA." CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT ANNUAL REPORT 2012, at 14 (2012), *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf, *archived at* http://perma.cc/KX4B-GY5N. *See also In Settlement with FTC, Debt Collectors Agree to Stop Deceiving Consumers and Pay Nearly $800,000*, FED. TRADE. COMM'N (Mar. 23, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/03/settlement-ftc-debt-collectors-agree-stop-deceiving-consumers-pay, *archived at* http://perma.cc/576V-RLLV.

[271] *See* 15 U.S.C. § 1692 (2012); 12 U.S.C. § 5531 (2012).

[272] 15 U.S.C. § 1692l(a) (2012).

[273] The CFPB has authority to supervise the "larger participants" in the debt collection markets. It defined the term in a rule in 2012, deciding that debt buyers, collection agencies, and collection attorneys whose revenue as a result of debt collection of a consumer financial product or service exceeds $10 million in annual receipts would be covered. The Bureau esti-

reau is expected to publish the first set of draft rules covering the entire debt collection market in early 2015.[274] This comprehensive authority is long overdue, and as this subpart argues, the CFPB's has the authority to declare the problematic practices described earlier as unfair or deceptive and to implement new rules to ameliorate most if not all of the issues identified in this article.

As described in the previous section, the industry has taken some steps towards correcting these problems; steps spurred perhaps by the almost inevitability of regulation in this area. However, without added regulatory pressure, it is unlikely that these reforms will go far enough since the incentives to "'race to the bottom' corrupting standards for everyone else remain."[275] Regulatory pressure to improve the processes around debt sales is increasing, and it is not coming just from the usual suspects. After an investigation into the practices around debt collection and debt sales of its regulated banks, the OCC recently elevated bank debt sales to a safety and soundness issue.[276] The regulator first issued a list of "Best Practices" around debt sales, followed closely by a Bulletin.[277] The Bulletin warns banks that they "face increased operational risk when they sell debt to debt buyers."[278] In particular, the regulator is worried about "[i]nadequate systems and controls [that] can place the bank at risk for providing inaccurate information regarding the characteristics of accounts, including balances and length of time that the balance has been overdue."[279]

mates that this will cover 175 out of approximately 4,500 debt collection entities nationwide. Bureau of Consumer Financial Protection Rule (Oct. 31, 2012), *supra* note 253. In the interest of full disclosure, the author worked on this rulemaking as a CFPB staffer.

[274] *See supra* text accompanying note 12.

[275] *See* John D. Ayer, *The Role of Finance Theory in Shaping Bankruptcy Policy*, 3 Am. Bankr. Inst. L. Rev. 53, 58 (1995) (attributing the term to Louis Brandeis).

[276] *See* OCC Bulletin, *supra* note 262. "Two major focuses of banking supervision and regulation are the safety and soundness of financial institutions." *Banking Supervision & Regulation*, FederalReserveEducation.org, http://www.federalreserveeducation.org/about-the-fed/structure-and-functions/banking-supervision/ (last visited Oct. 18, 2014), *archived at* http://perma.cc/TJ3C-NU3N. "To measure the safety and soundness of a bank, an examiner performs an on-site examination review of the bank's performance based on its management and financial condition, and its compliance with regulations." *Id.*

[277] *See* OCC Bulletin, *supra* note 262; *Debt Sales/Best Practices*, Office of the Comptroller of the Currency 3–4, *available at* http://www.americanbanker.com/pdfs/occ-debt sales-bestpractices.pdf (last visited Nov. 9, 2014), *archived at* http://perma.cc/9ZYB-3X2T [hereinafter *OCC Best Practices*]. The OCC first got involved in these issues in 2011 after a whistleblower complaint against J.P. Morgan Chase alleging that Chase "used faulty account records in suing tens of thousands of delinquent credit card borrowers for at least two years." *See* Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, Am. Banker (Mar. 12, 2012, 9:24 PM), http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html, *archived at* http://perma.cc/5C28-F5LX; David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. Times, Nov. 1, 2010, at A1, *available at* http://www.nytimes.com/2010/11/01/business/01debt.html, *archived at* http://perma.cc/9YRC-RSKV.

[278] OCC Bulletin, *supra* note 262.

[279] *Id.*; *see also Shining a Light on the Consumer Debt Industry: Hearing Before the S. Subcomm. on Fin. Inst. and Consumer Prot.*, 113th Cong. 36 (2013) (statement of the Office of

Among the new supervisory expectations listed in the Bulletin is a requirement that banks provide "detailed and accurate information to debt buyers at the time of sale (to enable them to pursue collections in compliance with applicable laws and consumer protection requirements)."[280] The regulator also requires that "for each account, the bank should provide the debt buyer with copies of underlying account documents, and the related account information."[281] It then outlines eight points of specific information (and documents) that must be provided at the time of sale:

- A copy of the signed contract or other documents that provide evidence of the relevant consumer's liability for the debt in question.
- All account numbers used by the bank (and, if appropriate, its predecessors) to identify the debt at issue.
- Copies of all, or the last 12 (whichever is fewer), account statements.
- An itemized account of all amounts claimed to be owed in connection with the debt to be sold, including loan principal, interest, and all fees.
- The name of the issuing bank and, if appropriate, the store or brand name.
- The date, source, and amount of the debtor's last payment and the dates of default and amount owed.
- Information about all unresolved disputes and fraud claims made by the debtor. Information about collection efforts (both internal and [collection agency] efforts, such as by law firms) made through the date of sale.
- The debtor's name, address, and Social Security number.[282]

Complying with these and other provisions in the Bulletin should go a long way towards correcting the problems identified in this article, at least at the creditor level.[283] But it will not necessarily solve the downstream problems as debts get sold and resold. As a regulator of both banks and debt collectors, the CFPB has the opportunity to affect all players in this area.[284] The rest of this section argues that a rule requiring a minimum level of information, documentation, and contractual representations is a natural best-fit solution for these problems since it has the potential to fix the collective action problem identified earlier.

Dodd-Frank gives the CFPB the authority to prohibit covered entities from engaging in unfair, deceptive, or abusive acts or practices. It also authorizes states' Attorneys General to bring civil actions enforcing the prohibition against UDAAPs on behalf of their state "with respect to any entity

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the Comptroller of the Currency), *available at* http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf, *archived at* http://perma.cc/U6BY-WLJ8.

[280] OCC Bulletin, *supra* note 262.

[281] *Id.*

[282] *See id.*

[283] *See id.*

[284] *See supra* text accompanying note 12.

that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law."[285] The CFPB should clarify that the practice of selling debts with little information, no warranties, and no account documents as a violation of the prohibitions against unfairness and deception.[286]

Both the FDCPA and the CFPA prohibit unfair and deceptive practices. The FDCPA does so generally, stating that a debt collector "may not use unfair or unconscionable means to collect or attempt to collect any debt."[287] It then lists eight non-exhaustive examples of an unfair practice. The FDCPA also prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt" generally, then lists sixteen specific situations that fall within the prohibition.[288] The rest of this subpart focuses on the CFPA analysis, since it is more restrictive than the FDCPA's.[289] As a result, much of this analysis can be imported into the FDCPA, which can be used by consumers as well as Attorneys General.

1. *Unfairness*

Unfairness is defined in Dodd-Frank as an act or practice that:

(1) Causes or is likely to cause substantial injury to consumers;
(2) The injury is not reasonably avoidable by consumers; and
(3) The injury is not outweighed by countervailing benefits to consumers or to competition.[290]

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[285] 12 U.S.C. § 5552 (2012); *see also* Alan Kaplinsky, *Illinois AG Files Lawsuit Asserting Dodd-Frank UDAAP Enforcement Authority*, CFPB MONITOR (Mar. 27, 2014), http://www.cfpbmonitor.com/2014/03/27/illinois-ag-files-lawsuit-asserting-dodd-frank-udaap-enforcement-authority/, *archived at* http://perma.cc/AR65-BKDT. National banks are excluded from this provision, except to the extent that the Attorney General is "enforcing a regulation prescribed by the Bureau." *See* 12 U.S.C. § 5552 (2012).

[286] In the interest of brevity, this Article focuses on unfairness and deception because these are sufficient grounds for a CFPB action and are not as controversial as the "abusive" authority held by the CFPB. *See, e.g.*, George F. Will, *Consumer Financial Protection Bureau Abusive in its Mission to Stop Abuse*, POSTBULLETIN.COM (Nov. 19, 2012, 7:03 AM), http://www.postbulletin.com/opinion/consumer-financial-protection-bureau-abusive-in-its-mission-to-stop/article_e70969a5-e43e-5ddf-a874-7229d6492616.html, *archived at* http://perma.cc/B6BA-7TW6; *House Republicans Struggle to Control CFPB*, HOUSING WIRE (May 21, 2014, 4:20 PM), http://www.housingwire.com/articles/30081-house-republicans-struggle-to-control-cfpb, *archived at* http://perma.cc/8Q9X-P7PZ. *But see* Jean Braucher, *CFPB's Anti-Abuse Authority: A Promising Development in Substantive Consumer Protection*, CREDIT SLIPS (Nov. 21, 2012, 2:06 AM), http://www.creditslips.org/creditslips/2012/11/cfpbs-anti-abuse-authority-a-promising-development-in-substantive-consumer-protection.html, *archived at* http://perma.cc/5C2R-QE8X.

[287] 15 U.S.C. § 1692f (2012).

[288] 15 U.S.C. § 1692e (2012).

[289] For example, the definition of "deception" under the CFPA requires that the act or practice have a material effect on the consumer. This is not required by the FDCPA. *See* 15 U.S.C. § 1692e (2012).

[290] 12 U.S.C. §§ 5531, 5536 (2012); *see also* U.S. BUREAU OF CONSUMER FIN. PROT., *CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the*

To help understand what qualifies as unfair practices, the CFPB looks to the standards for the same terms under Section 5 of the Federal Trade Commission Act ("FTC Act"), the language of which is very similar.[291]

Injury to the consumer is a central and determinative factor in defining unfairness under modern FTC case law.[292] A substantial injury "typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice" but, importantly, "actual injury is not required; a significant risk of concrete harm is sufficient."[293] Courts have found that an act or practice can cause substantial injury even when only "doing a small harm to a large number of people."[294] As an example, the CFPB has found that "using inadequate compliance monitoring, service provider management, and quality assurance systems that failed to prevent, identify or correct" improper charges to a consumer was an unfair practice.[295]

The practice of selling consumer debts as described in this article poses a significant risk of concrete harm to consumers. To wit, selling debts with little information about the consumer, without documentation, and without representation as to accuracy, title, or compliance with law is troubling. This practice discourages careful and accurate recordkeeping, exposes consumers to inaccurate credit reports (which can harm them in a myriad of ways), may expose them to judgments (and post-judgment remedies) for out-of-statute debts, debts that are not theirs, and multiple lawsuits for the same debt, and may also result in the collection of inaccurate amounts or from the wrong consumer. All of these present significant risks of harm to consumers.

The second prong of the unfairness analysis focuses on whether a consumer could avoid the injury. "An injury is not reasonably avoidable by consumers when an act or practice interferes with or hinders a consumer's

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Collection of Consumer Debts 2 (July 10, 2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf, *archived at* http://perma.cc/8JHG-JV4V.

[291] *See* 15 U.S.C. § 45(n) (2012); *CFPB Bulletin 2013-07*, *supra* note 290, at 1; Consumer Fin. Prot. Bureau, CFPB Supervision and Examination Manual, at UDAAP 1 (2012), http://files.consumerfinance.gov/f/201210_cfpb_debt-collection-examination-procedures.pdf, *archived at* http://perma.cc/K9CU-SW6H [hereinafter CFPB Manual].

[292] Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n, et al., to Senator Wendell H. Ford & Senator John C. Danforth (Dec. 17, 1980), *available at* http://www.ftc.gov/ftc-policy-statement-on-unfairness, *archived at* http://perma.cc/T3G6-LHKQ ("[U]njustified consumer injury is the primary focus of the FTC Act."). According to the FTC, consumer injuries can take a number of forms—monetary, health, safety, or otherwise—and are to be measured by a cost-benefit analysis of their net effects. *See id. But see* Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. Rev. 349, 354 (1988) (criticizing the FTC's definition of unfairness).

[293] *CFPB Bulletin 2013-07*, *supra* note 290, at 2; *see also* In the Matter of International Harvester Company, 104 F.T.C. 949, 1061 (1984) (requiring for a finding of unfairness that there be consumer injury that is "substantial; not outweighed by any offsetting consumer or competitive benefits that the practice produces; and not reasonably avoidable by consumers.").

[294] FTC v. Neovi, Inc., 604 F.3d 1150, 1157 (9th Cir. 2010) (citing Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 972 (D.C. Cir. 1985)).

[295] *See* J.P. Morgan Chase Bank, N.A., 2013 WL 9008326 (Sept. 19, 2013).

ability to make informed decisions or take action to avoid that injury."[296] An injury "caused by transactions that occur without a consumer's knowledge or consent is not reasonably avoidable."[297] The question is "whether an act or practice hinders a consumer's decision-making. For example, not having access to important information could prevent consumers from . . . choosing those that are most desirable to them, and avoiding those that are inadequate or unsatisfactory."[298]

Consumers cannot reasonably avoid the harm caused by the manner in which their accounts are bought and sold. Consumers are not a party to the sale transaction. Consumers also do not choose their debt buyer or their debt collector. Most consumers do not request the agreements between buyers and sellers, and those that do generally have to pay attorneys to obtain them. Consumers are unlikely to realize, for example, that a debt buyer may not know the appropriate date from which to calculate the statute of limitations or the credit reporting period for their debt. They are also unlikely to know that a debt buyer who sues them in court may not have admissible documentary evidence of their debt.[299]

Reasonable consumers can be expected to retain some account documents for some period of time. However, debt collection of an unpaid account can occur practically forever: a debt is only extinguished upon payment, bankruptcy, or the expiration of the statute of limitations in only three states. To discover a discrepancy, consumers would have to keep account records for an equally long period of time.[300] Moreover, consumers who are wrongly collected upon because they have similar names or other features to account-holders cannot reasonably avoid this.

The third prong requires a cost-benefit analysis; it excludes acts or practices that are not "outweighed by its consumer or competitive benefits."[301] Lower prices or increased availability of products may be countervailing benefits.[302] Costs required to prevent the injury are also considered here.[303] These include "an assessment of the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters."[304]

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[296] *CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[297] *Id.*

[298] CFPB MANUAL, *supra* note 291, at UDAAP 2.

[299] In a separate project, the author is documenting the difficulties that consumers who are sued in court have in understanding that the debt collector may not have evidence to prove their debt. *See supra* text accompanying note 161.

[300] *See supra* note 177 and accompanying text for an argument that consumers are not well-placed to bear this burden.

[301] *CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[302] *See* CFPB MANUAL, *supra* note 291, at UDAAP 3.

[303] *See id.*

[304] Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 993 (D.C. Cir. 1985) (quoting Letter from Michael Pertschuk et al., *supra* note 292) (internal quotation marks omitted).

There are many benefits of a rule requiring that debt sales include sufficient information to allow the collector to locate a consumer and follow the law in collecting, sufficient documentation to allow the collector to prove the amount of the debt in court, and warrants about title, accuracy, and compliance with the law. It would increase trust in the collection system, allowing consumers to feel more confident that they are paying the right party. It would also increase collections from the right consumer of the right amount owed. In addition, when a collector filed a lawsuit against a consumer, she would have substantiating evidence to prove in court that the consumer owed that amount. This would ensure debt buyers only obtain judgments against consumers who truly owe the debt, for the right amount.

One potential downside is an increase of the cost of credit or a reduction of its availability to certain (e.g., subprime) consumers.[305] But creditors may not need to pass on the increased costs to consumers; debt buyers are also customers here. The increased collectability of delinquent accounts that are sold with complete information and documentation would offset some of the increased costs. Debt buyers should be willing to pay more for more collectible debts, in particular because they would also come with a decreased risk of exposure to consumer lawsuits for unfair and deceptive acts and practices under the FDCPA. Sloppy recordkeeping does not benefit consumers or competition; on the contrary, it hurts the ability of collectors to do their jobs and minimizes the likelihood that careful records and affirmative representations will become the norm.

Finally, public policy considerations established by any "statute, regulation, judicial decision, or agency determination may be considered," although they are not sufficient to declare an act unfair.[306] Public policy considerations weigh heavily for this rule. The FDCPA, the federal law focused on debt collection, is "designed to protect consumers from abusive debt collection practices and to protect ethical debt collectors from competitive disadvantage."[307] As argued in Part IV.A, ethical debt buyers[308] who want to purchase debts that include sufficient information and documentation and positive warrants as to title, accuracy, and compliance with laws, are disadvantaged by a system in which that is not the rule that regulators enforce.

[305] While economic theory may predict this, it is not always a given in practice. For example, after Congress made private student loans presumptively nondischargeable in bankruptcy, the costs of those loans increased, contrary to economic theory. Xiaoling Ang & Dalié Jiménez, *Private Student Loans and Bankruptcy: Did Students Benefit from the Increased Collectability of Student Loans?*, UPJOHN INST. PRESS (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332284, *archived at* http://perma.cc/D76W-TD7Y.

[306] CFPB MANUAL, *supra* note 291, at UDAAP 3.

[307] Quinn v. Ocwen Fed. Bank FSB, 470 F.3d 1240, 1246 (8th Cir. 2006).

[308] Recall that debt buyers are also considered debt collectors under the FDCPA. *See supra* note 267 and accompanying text.

2. *Deception*

The CFPB can also ban deceptive practices. Deception is not defined in the Dodd-Frank Act, but the CFPB has issued guidance that an act or practice is deceptive when:

(1) The act or practice misleads or is likely to mislead the consumer;
(2) The consumer's interpretation is reasonable under the circumstances; and
(3) The misleading act or practice is material.[309]

Deceptive practices can "take the form of a representation or omission."[310] In a compliance bulletin, the Bureau noted that it "also looks at implied representations, including any implications that statements about the consumer's debt can be supported."[311] "[I]f a representation conveys more than one meaning to reasonable consumers, one of which is false, the speaker may still be liable for the misleading interpretation."[312] In other words, the representation need not be actually false for it to be misleading. "Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service."[313]

The CFPB notes that "[e]nsuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers."[314] In the FDCPA context, there are cases establishing that it is misleading for an attorney to send a dunning letter on attorney letterhead without "having meaningfully reviewed the case."[315] Courts have permitted attorneys to send dunning letters without review if the letters include "a clear disclaimer explaining the limited extent of the law firm's involvement in the collection action."[316] In a recent case, the CFPB has found that when attorney collectors file lawsuits without meaningfully reviewing the case, they represent "directly or indirectly, expressly or by implication, that attorneys were meaningfully in-

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[309] *See CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[310] *Id*. "A practice is considered deceptive if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." FTC Debt Buyer Report, *supra* note 4, at 4 (quoting Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Representative John D. Dingell, Chairman, House Committee on Energy and Commerce (Oct. 14, 1983), *available at* http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception, *archived at* http://perma.cc/VSH7-LWBF) (internal quotation marks omitted).

[311] FDC Debt Buyer Report, *supra* note 4, at 32.

[312] CFPB Manual, *supra* note 291, at UDAAP 5.

[313] *CFPB Bulletin 2013-07*, *supra* note 290, at 4. Perhaps counter-intuitively, debt collection is a "product or service" under Dodd-Frank. *See* 12 U.S.C. § 5481(15)(A)(x) (2012).

[314] *CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[315] *See* Lesher v. Law Offices of Mitchell N. Kay, P.C., 650 F.3d 993, 1001–03 (3d Cir. 2011).

[316] *Id.* at 1001; Greco v. Trauner, Cohen & Thomas, L.L.P., 412 F.3d 360, 364 (2d Cir. 2005).

volved in preparing and filing the complaint."[317] This, the CFPB finds, is deceptive under the CFPA.[318]

The deceptive act takes place when a collector requests that a consumer repay a debt without disclosing that (1) the debt was purchased subject to a contract that disclaimed all warranties, including those of accuracy, title, or compliance with laws and (2) the collector could not verify the amount claimed and other material aspects of the debt with account documents. This act is misleading because the consumer will reasonably believe that the information communicated is accurate and that the debt buyer has sufficient evidence to prove it.

It is reasonable for a consumer to interpret a collector's letter or statement about the debt as a statement that the collector has reasonable confidence in the amount she is representing the consumer owes. It is also reasonable for the consumer to believe that some form of evidence backs this statement. This interpretation is reasonable under the circumstances because the consumer is not privy to the contract and is unlikely to be able to obtain it even if she asks. Without disclosure by the debt collector, the consumer cannot know that the contract language casts doubt on the certainty of the information the collector is conveying to the consumer and the collector does not have documentation to corroborate material information about the debt.

The failure to disclose the underlying contract terms and to verify the amounts claimed is material because a consumer would change her behavior if she learned of the circumstances. For example, with this information the consumer may request verification of the amount sought in the form of account documents or other proof. If the debt buyer cannot provide this proof, the consumer could refuse to pay and seek a declaratory judgment pronouncing that she does not owe the debt. She may also request that the debt buyer prove that it is the owner of the debt by documenting the chain of title and assignment for her account. Debt buyers may have difficulty doing that, as described in Part III.B.4, which may mean the consumer could obtain a declaratory judgment in her favor.

In short, the CFPB has the authority to ban unfair and deceptive acts or practices. One solution to the problems identified in this article would be to declare these acts as unfair or deceptive practices. More specifically, creditors subject to the CFPB's UDAAP authority should be prohibited from selling a consumer debt with contract language that disclaims material aspects of the debt (e.g., title, compliance, accuracy). In addition, creditors should be prohibited from selling consumer debts without providing the buyer documentary evidence regarding the amount, type of debt, and date of last delinquency. The CFPB could detail examples of the kinds of documents and

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[317] Complaint at 33, Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assoc., P.C., No. 14-02211 (N.D. Ga. July 14, 2014).

[318] *See id.* at 10.

information that should be kept by the creditor in order to avoid UDAAP liability.[319] It could also clarify minimal and best practice record retention policies.[320]

For debt buyers or their collectors, it would be a UDAAP (and a violation of the FDCPA) to attempt to collect on a debt without (1) obtaining documentary evidence regarding the amount, type of debt, date of last delinquency, and dispute history *at the time of purchase*, and (2) without obtaining specific and affirmative warrants from the seller regarding the material information and documentation provided about the debts. Concomitantly, debt owners and debt collectors would be required to verify the existence of a debt, its amount, the identity of the debtor, the limitations period status of the debt, the fact that the debt is in default, and the company's chain of title—based on the original information and underlying documentation in the company's own possession and that of the creditor—before any attempt to collect a debt. In the case of a debt sale, the contracts underlying each sale should be retained by the debt buyer and available to the consumer if she requests them. Terms that describe conditions of the receivables/accounts sold should not be redacted since they may provide a defense to the consumer.[321] Finally, the CFPB could require that debt buyers maintain account level proof-of-ownership information when they purchase an account. Debt buyers can only collect upon an account that they own, and having a spreadsheet of information (or even account statements) is not proof of ownership. Chain-of-title information should be kept at the account level.

After such a rule, consumer debts could not be collected upon without this information and consumers would have a right to request it from the purported debt owners. As a practical matter, creditors and collectors could maintain all of this documentary evidence themselves, or choose a third party to house it for them (as described earlier in the discussion on a debt registry). The responsibility would rest on creditors and debt collectors subject to the rule to ensure that this information was kept in a secure manner that minimized unauthorized access and tampering.[322] However, before *any-*

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[319] This could be a sort of safe harbor. For example, the Bureau could require creditors to keep copies of the twelve most recent account statements showing purchases/charges and payments, if any, made by the consumer, including the date, source, and amount of the most recent payment.

[320] *See* DBA Int'l, The Debt Buying Industry 7 (Apr. 11, 2014), *available at* http://masonlec.org/site/rte_uploads/files/DBA%20International%20Paper%202014.pdf, *archived at* http://perma.cc/PEM6-6MXB ("The challenge, however, is that frequently this information is not available. The original creditor is not required by law to itemize a debt when it's written off. Having no obligation to do so, most creditors do not maintain these records beyond legal document retention requirements. It is a legal inconsistency that cannot be reconciled.").

[321] *See* McCoy & Jiménez, *supra* note 12, at 20; Purchase Agreement (Jan. 6, 2010), *supra* note 92, at 5 (stating that "Seller has made no representation, and now makes no representation, with respect to any of the Receivables or with respect to the completeness and accuracy of any Receivables Documents").

[322] This is especially necessary as documents are originated and kept in electronic form and there is never a hard copy "original." Private (and opaque) implementations of data compression algorithms have been found to alter numbers in a document without any way to tell

one could collect on the debt, she would have to possess or have immediate access to this information (such that, for example, the collector can have procedures in place to verify the spreadsheet information with account statements).[323]

As Ronald Mann has observed, "[t]he successful credit card lender profits from the borrowers who become financially distressed."[324] In fact, in some cases lenders themselves may have helped drive consumers over the edge, particularly before the CARD Act.[325] Mann argues that the "standard" way to increase profits after a consumer has obtained a credit card is to "focus on those customers who are unable to take their business elsewhere" (because they are having financial difficulties).[326] "If the customers do not have realistic options, lenders are free to raise the interest rates and fees that they charge to those borrowers."[327] And this "rate-jacking"[328] increases the risk of default by the consumer "as the cardholder is now faced with a higher interest rate and greater monthly payment demands."[329]

Professor Mann's solution to this problem is a move to "allocate the losses between borrowers and lenders in a way that minimizes the net costs of financial distress."[330] His suggestion is to place more risks on lenders, "so that they will have an incentive to use information technology to limit the costs of distress."[331] A CFPB rule as described above could have this effect. Up until now, creditors have been able to charge debts off and obtain additional funds from selling them. But in doing so in the ways described in this

that this had happened from looking at the document itself. *See* David Kriesel, *Xerox Scanners and Photocopiers Randomly Alter Numbers in Scanned Documents*, D. KRIESEL, http://www.dkriesel.com/en/blog/2013/0802_xerox-workcentres_are_switching_written_numbers_when_scanning (last visited Feb. 28, 2014), *archived at* http://perma.cc/4TL6-ELZ5?type=source; TerraHertz, *An Actual Knob (and a rack)*, EVERIST.ORG (Nov. 11, 2013), http://everist.org/NobLog/20131122_an_actual_knob.htm#jbig2, *archived at* http://perma.cc/J36U-G3LF?type=source.

[323] The Bureau could also require that in cases in which the creditor, debt buyer, or debt collector files a lawsuit to collect on the debt, the complaint should incorporate and attach as exhibits copies of the relevant account statements, a copy of the original debt contract and all amendments, and documentary evidence sufficient to establish the putative debt owner's chain of title and the standing of the plaintiff.

[324] *Sweat Box*, *supra* note 5, at 379.

[325] The CARD Act banned rate-jacking as described below. *See* Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (to be codified in scattered sections of 15 U.S.C.).

[326] *Sweat Box*, *supra* note 5, at 388.

[327] *Id.*

[328] "'Rate-jacking' [is] the phenomenon of a credit card issuer suddenly raising the interest rates or fees on an account, often applying the new rate retroactively to existing balances." Levitin, *supra* note 205, at 339.

[329] *Id.* at 364. Professor Levitin argues that "rate-jacking is detrimental to consumers because it allows riskier credit card products (from a consumer perspective) to crowd out less risky credit card products, much as nontraditional mortgages that featured low initial teaser rates (and then later reset to much higher rates) started to crowd out traditional fixed rate mortgages during the housing bubble." *Id.* at 366.

[330] Ronald Mann, *Optimizing Consumer Credit Markets*, 7 THEORETICAL INQUIRIES IN L. 395, 399 (2006).

[331] *Id.*

article, creditors have been externalizing the true costs of collection. Increasing the documentation and information requirements—as well as the regulatory oversight—could have the effect of just the kind of "distressed debt tax" that Professor Mann proposed by forcing creditors and debt buyers to internalize the costs of compliance with the law.

VI. Conclusion

This article examines the life cycle of a delinquent debt as it moves through collection and is purchased by a debt buyer. It describes how little information and documentation debt buyers obtain about the debts they buy and the obstacles to obtaining more. Analyzing a rare collection of consumer debt purchase and sale agreements, it finds that many contracts disclaim warranties and representations that go to the very nature of the debts being bought and sold. Selling consumer debts through contracts that disclaim that the seller had title, that the seller and applicable servicers complied with the law, and that the account information is correct poses a variety of problems, least of which is the amount of uncertainty and lack of legitimacy it introduces into the system.

Some consumers whose debts were sold under these contracts may have had a judgment entered against them by a court of law—a judgment that in many states will follow them for decades.[332] Perhaps the amount these individuals owed was correct, perhaps the interest calculation was as well, and perhaps the statute of limitations had not yet expired. The problem is, however, that it may be impossible to know whether any of these speculations are true. The creditor's warranty disclaimers and numerous examples of malfeasance should make us question these facts, but the systemic lack of information and documentation means that in a large number of cases, more documents or information about debts sold may no longer exist. The system is broken.

After positing a few reasons that might explain the nature of these transactions (without warranties, without documents), this article ultimately concludes that it is primarily a result of a regulatory failure. It argues that the CFPB should declare the practice of selling debts with inadequate information, no documentation, and disclaiming warranties as unfair and deceptive and write new rules requiring creditors and collectors to possess minimum levels of information and documentation before they can collect in compliance with the law. Clarifying these practices as unfair or deceptive will ap-

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[332] *See, e.g.*, N.J. Rev. Stat. § 2A:14-5 (2014) (20 years); N.Y. C.P.L.R. § 211(b) (McKinney 2010) (20 years); R.I. Gen. Laws Ann. § 9-1-17 (West 2014) (20 years); Ala. Code § 6-2-30 (2014) (20 years); Ky. Rev. Stat. Ann. § 413.090 (West 2014) (15 years); Ohio Rev. Code Ann. § 2305.06 (West 2014) (15 years); 735 Ill. Comp. Stat. 5/13-206 (2014) (10 years); La. Civ. Code Ann. art. 3499 (2014) (10 years); W. Va. Code § 55-2-6 (2014) (10 years); Wyo. Stat. Ann. § 1-3-105(a)(i) (West 2014) (10 years).

ply to all players, helping to stem a collective action problem that has prevented the market from self-correcting these issues.

Changing these practices will no doubt involve costs. But those costs will be offset by the increased capability of debt buyers to collect legitimate debts and the right amounts from the right consumers. As Douglas Baird has noted, "[t]here is nothing foreordained about the extent to which creditors should be able to call upon the state to collect their debts, and the rights extended here have always been carefully limited."[333] Improving the information and documentation included in a debt sale and warrantying material aspects of the debts such as warranty and title will not only help consumers, but the market as well.

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333 Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 942 (2006).

Appendix

Table 1: This is an exemplar of the variety of contract terms in the Litigation Sample.[334]

Contract type[335]	1	2	3	4	5	6
Disclaimers						
Accounts are sold without recourse but no waiver x of warranties	👍					
Accounts are sold "as is," "with all faults," without recourse or any warranties unless explicitly stated		👎	👎	👎	👎	👎
Ownership of Accounts						
Seller warrants it has title to the accounts	👍					
Seller states that *to the best of its knowledge* it has title to the accounts it is selling		👎	👎			
Nothing said about whether seller owns accounts				👎	👎	👎
Accuracy of Information						
Nothing said about accuracy					👎	
Seller warrants that (some or all) information is accurate and complete in all material respects	👍					
Warrants that information is accurate *to the best of seller's knowledge*			👎			
Specifically *disclaims* representations as to accuracy of interest, amounts due, or date of first delinquency				👎		

[334] A "thumbs up" indicates positive representations about the debts.

[335] There are exactly three Type 1 contracts in the Litigation Sample: Second Amended and Restated Receivables Purchase Agreement (July 1, 2002), *supra* note 63; Receivables Purchase Agreement (Dec. 1, 2005), *supra* note 63; Receivables Purchase Agreement (Apr. 4, 2007), *supra* note 63. An example of a Type 3 contract is Lot Fresh Charged-Off Account Resale (2011), *supra* note 76. There are exactly four Type 8 contracts, and all four involve the FIA entity (previously MBNA Bank)—a subsidiary of Bank of America. *See generally supra* note 20; *but see* Loan Sale Agreement between FIA Card Servs., N.A. and Asset Acceptance, L.L.C. (Aug. 1, 2011), at §§ 4.2 & 8.3(g), *available at* http://debtbuyeragreements.com/archives/316, *archived at* http://perma.cc/T7DV-Q2C3 (agreeing to an "as is" sale, but representing that the loans were originated and serviced in compliance with all laws).

Specifically *disclaims* representations as to accuracy or completeness of *all* information		👎		👎		👎
Compliance with Laws						
Nothing is said about compliance with laws					👎	
Seller is original creditor and warrants that it has complied with applicable consumer laws	👍	👍				
Debt buyer warrants that *one* owner/ servicer (itself or original creditor) has complied with applicable consumer laws (silent as to other owners)				👎		
Seller (original creditor or debt buyer) states that it has complied *to the best of seller's knowledge* with applicable consumer laws			👎			
Specifically *disclaims* compliance with one or more laws						👎

Table 2: Exemplar Contract Language from Litigation Sample

No recourse sale but does not disclaim warranties and includes affirmative representations	"As is," "No warranties" and . . . positive representations	specific disclaimers
Seller has good and marketable title [to the Receivables] free and clear of all Encumbrances[336]	Seller has good and marketable title to each Charged-off Account to be sold hereunder and each such Charged-off Account shall be transferred free and clear of any lien or encumbrance.[337]	Most contracts make *no* affirmative representations about having title, but some do: [at closing] Seller will have good and marketable title to the

[336] Receivables Purchase Agreement between CompuCredit Int'l Acquisition Corp. and Partridge Funding Corp. (Apr. 4, 2007), at 4, *available at* dalie.org/wp-content/uploads/2014/10/2007.04.04-Compucredit-to-Partridge-Forward-Flow-few-reps-no-as-is.pdf, *archived at* http://perma.cc/8HZD-CHN4.

[337] Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Matrix Acquisitions, L.L.C. (July 29, 2009), at 5, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.07.29-Turtle-Creek-Assets-Ltd-to-Matrix-Acquisitions-LLC.pdf, *archived at* http://perma.cc/LSU9-58TB.

		Accounts, free and clear of all liens, charges, encumbrances or rights of others (other than the Purchaser).
[E]ach Receivable existing as of the Cut-Off Time . . . was created in compliance in all material respects with all Requirements of Law applicable to the institution which owned such Receivable at the time of its creation and pursuant to a Credit Card Agreement which complies in all material respects with all Requirements of Law[338]	Each of the Charged-off Accounts has been maintained and serviced by Seller in compliance with all applicable state and federal consumer credit laws, including, without limitation, the Truth-in-Lending Act, the Equal Credit Opportunity Act, and the Fair Credit Billing Act.	Seller makes <u>no representations</u> as to . . .the *compliance of the Accounts with any state or federal laws, rules, statutes, and regulations* . . .[339]
The Account Schedule list of Excluded Accounts is *accurate and complete in all material respects* . . . .[340]	This sale is made only with the representations and warranties that the balances set forth in Exhibit "A" and reflected as the principal balance of the Loans purchased hereunder *represent an accurate accounting of the actual outstanding balances* as of the Cut-Off Date, and that Seller owns the Loan.[341]	Seller makes <u>no representations</u> as to the *accuracy of any sums shown as current balance or accrued interest* amounts due under the loans [or] any other matters pertaining to the loans . . . .[342]

338 Receivables Purchase Agreement (Apr. 4, 2007), *supra* note 336, at 4.

339 Purchase and Sale Agreement between Credigy Receivables Inc. and Newport Capital Recovery Group II, L.L.C. (May 29, 2009), at 4, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.29-Credigy-Receivables-Inc-to-Newport-Capital-Recovery-Group-II-LLC-.pdf, *archived at* http://perma.cc/XWG2-RYLX.

340 Second Amended and Restated Receivables Purchase Agreement between Household Bank (SB), National Association and Household Receivables Acquisition Company II (July 1, 2002), at 13, *available at* http://dalie.org/wp-content/uploads/2014/10/2002.07.XX-Household-Bank-to-Household-Receivables-Acquisition-Company-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/T36W-2EBU (emphasis added).

341 Purchase and Sale Agreement between CashCall, Inc. and GCFS, Inc. (Mar. 26, 2010), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.03.20-CashCall-Inc-to-GCFS-Inc-.pdf, *archived at* http://perma.cc/A8SA-MM83.

342 *See* 2008, 2009, 2010 FIA Card Servs., N.A. Loan Agreements, *supra* note 20, at § 9.4.

TABLE 3: COMPANIES REPRESENTED IN LITIGATION SAMPLE

No.	Company Name	Number of Contracts	Roles
1	Turtle Creek Assets	10	seller (9), buyer (1)
2	CACH, LLC	8	buyer
3	Chase Bank USA, N.A.	7	seller
4	HSBC Bank / Household	7	seller
5	MBNA America Bank / FIA Card Services	7	seller
6	Wells Fargo	6	seller
7	Global Acceptance Credit Company	5	seller (2), buyer (3)
8	Cash Call, Inc.	4	seller
9	Citibank, N.A.	4	seller
10	Mountain Lion Acquisitions	4	seller (1), buyer (3)
11	Unifund CCR Partners	4	seller (3) and buyer (1)
12	Credigy	3	seller (2), buyer (1)
13	Midland Funding LLC	3	buyer
14	Ozark Financial Group	3	buyer
15	Asset Acceptance	2	buyer
16	Capital One	2	seller (1), buyer (1)
17	Cavalry SVP I, LLC	2	seller (1), buyer (1)
18	Cuda & Associates	2	buyer
19	GCFS, Inc.	2	seller (1), buyer (1)
20	GE Capital Bank/ Money Bank	2	seller
21	Genesis Financial Services/ Recovery Systems	2	seller (1), buyer (1)
22	Main Street Acquisitions	2	buyer
23	Platinum Capital Investments	2	seller
24	Riverwalk Holdings	2	seller
25	Sherman Originator USA/Sherman Acquisition	2	seller (1), buyer (1)
26	US Bank	2	seller
27	Wireless Receivables Acquisition Group	2	buyer
28	Accelerated Financial Solutions	1	buyer
29	Account Resolution Finance	1	buyer
30	Amos Financial	1	buyer
31	Arrow Financial Services	1	seller
32	Autovest LLC	1	buyer
33	BH Financial Services	1	buyer
34	Capital Debt Solutions	1	seller
35	Centurion Capital Corp.	1	buyer
36	CJMA Financial Corporation	1	buyer
37	Collect America	1	seller
38	CompuCredit International	1	seller
39	Covergence Receivables	1	buyer
40	Cuzco Capital Investment	1	seller
41	Debt One LLC	1	buyer
42	Dodeka LLC	1	seller
43	First Financial Portfolio Management	1	seller
44	First Select	1	seller
45	Hilco Receivables	1	buyer
46	Hudson Keyse LLC	1	buyer
47	Jefferson Capital Systems	1	seller

48	Juniper Bank	1	seller
49	LHR, Inc.	1	buyer
50	Livingston Financial	1	buyer
51	LP Investments	1	seller
52	Metris Receivables	1	buyer
53	MRC Receivables Corp.	1	buyer
54	National Credit Acceptance	1	seller
55	National Loan Exchange	1	seller
56	Newport Capital Recovery Group	1	buyer
57	NLEX LLC	1	seller
58	Northstar Capital Acquisitions	1	seller
59	Palisades Collection	1	buyer
60	Partridge Funding Corporation	1	buyer
61	Portfolio Recovery Associates	1	buyer
62	Providian National Bank	1	seller
63	Purchasers Advantage	1	buyer
64	RAB Performance Recoveries	1	buyer
65	Retailer Credit Services	1	buyer
66	Routhmeir Sterling	1	seller
67	Royal Financial Group	1	buyer
68	Sacor Financial	1	buyer
69	Security Credit Services	1	buyer
70	Sovereign Bank	1	seller
71	Sunlan Corp.	1	buyer
72	Target National Bank	1	seller
73	TD Bank USA	1	buyer
74	The 704 Group	1	buyer
75	The Bureaus Investment Group	1	buyer
76	United Credit Recovery	1	buyer
77	US National Bank	1	buyer
78	Zenith Acquisitions	1	buyer