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Approaching Debt Collector–Judge Communications Under the Fair Debt Collection Practices Act

Samantha A. Daniels†

INTRODUCTION

Congress enacted the Fair Debt Collection Practices Act (FDCPA or the Act)1 in 1977 "to eliminate abusive debt collection practices... to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."2 Section 1692e of the Act created a private enforcement mechanism3 for consumers by prohibiting debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt."4

Due to the economic downturn,5 consumers are not only awash with debt6 but are also defaulting on their debt at the highest level in recent memory.7 In consequence, the size of the debt collection industry has increased dramatically.8 Indeed, no other industry generates as many complaints to the Federal

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1 15 USC § 1692.
2 15 USC § 1692(e).
3 See 15 USC § 1692k.
4 See 15 USC § 1692e.
5 See Terry Carter, Payback: Lawyers on Both Sides of Collection are Feeling Debt’s Sting, 60 ABA Journal 40 (Dec 2010) ("The Federal Reserve pegs ‘consumer credit outstanding’ at more than $2.4 trillion.").
6 See id.
7 See Michelle Singletary, Calling the Debt Collectors on Abuse, Wash Post A14 (Oct 29, 2009).
8 See id.
Trade Commission (FTC), and FDCPA litigation is on the rise. Unfortunately for defaulting consumers, many debt collectors have responded to the crisis by wielding more aggressive collection tactics. Too often, the success of such tactics can depend on the consumer debtors' gullibility and powerlessness—essentially, their propensity for intimidation.

Against this backdrop, the way courts interpret the FDCPA's scope has become an increasingly salient issue to debt collectors and consumers. While the FDCPA primarily targets communications between debt collectors and consumer debtors in order to protect consumers from abusive collection practices, several FDCPA provisions impose restrictions on communications between debt collectors and nonconsumer third parties. Section 1692e does not expressly mention third parties, but the language of the statute could arguably apply to some third parties by implication, which creates ambiguity. Not surprisingly, when a debt collector directs a communication at a third party, courts have diverged over whether § 1692e covers the alleged misrepresentation. Recently circuit courts have struggled to define the extent to which a debt collector's representations to a state court judge during the course of debt collection litigation can violate § 1692e.

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9 See Carter, 60 ABA Journal 40 (cited in note 5).
11 See Carter, 60 ABA Journal 40 (cited in note 5). These tactics include excessive telephone calls, collectors misrepresenting the amount or legal status of a debt, and the addition of unauthorized fees and interest to accounts. Id.
13 See Carter, 60 ABA Journal 40 (cited in note 5).
14 See 15 USC § 1692e.
15 See Bruce N. Menkes, Communications with Persons Other Than the Debtor Under the FDCPA, 65 Consumer Fin LQ Rep 328 (2011).
16 See 15 USC § 1692e.
17 See Menkes, 65 Consumer Fin LQ Rep at 328 (cited in note 15).
18 There is also a current split over whether a debtor's communications to an attorney are actionable. See id at 328 (discussing three-way circuit split on the issue). See also Elwin Griffith, The Search for Better Communication Between the Debt Collector and the Consumer Under the Fair Debt Collection Practices Act, 61 U Kan L Rev 179, 219–20 (2012) (making plain language argument regarding attorney communications); Part III.D (comparing debt collector–judge split with debt collector–attorney split).
19 The Comment will use "state court judge" and "judge" interchangeably.
20 See Hemmingsen v Messerli & Kramer, PA, 674 F3d 814, 818 (8th Cir 2012)
Consequently, the circuits are split over whether FDCPA protections cover a debt collector's communications to a judge. On one side of the divide, the Seventh Circuit recently held the FDCPA and its protections do not extend to a debt collector's communications with a state court judge. On the other hand, the Sixth and Eighth Circuits have applied § 1692e to a collector's representations made to a judge.

Whether § 1692e applies to a debt collector's communications to a judge can have a decisive impact on debt collection suits. The issue implicates the scope of a consumer debtor's ability under the FDCPA to combat misleading representations in documents filed in court. Debt collectors increasingly rely on state courts to collect debts, particularly default judgments. As a strict liability statute, the FDCPA provides consumers with a powerful tool to deter false, deceptive, or misleading collector practices, so courts that exclude a debtor's communications to a judge immunize a broad swath of behavior.
Part I of this Comment will survey the FDCPA, providing the relevant background on the Act’s purposes and scope. Next, Part II describes the important role of debt collector–judge communications in the debt collection process, including the communication’s ability to secure default judgment. Part III will describe the circuit split, discussing and comparing the Seventh, Eighth, and Sixth Circuits’ approaches, and compare the split with the similar split over whether the FDCPA applies to debt collector–attorney communications. Part IV rejects the Seventh Circuit’s approach, arguing that the FDCPA applies to debt collector–judge communications. Finally, after concluding that the FDCPA should apply to such communications, Part V will survey the various standards courts have used to determine whether a communication is false or misleading and propose that courts should assess FDCPA communications from the perspective of a reasonable recipient with an eye towards materiality.

I. THE FAIR DEBT COLLECTION PRACTICES ACT

This Part will provide the FDCPA’s relevant background. First, this Part will survey the purposes and objectives that animated the 95th Congress to pass the Act. Next, this Part will describe the Act’s scope, with particular attention to §1692e.

A. Purposes and Objectives

Members of the enacting Congress indicated that they passed the FDCPA to remedy a growing national problem. Before 1977, many states had no laws governing consumer debt collection practices, and the laws that did exist provided piecemeal protection against national debt collection agencies. Consequently, abusive debt collection practices pervaded the country, contributing to a “number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”

29 See 15 USC §1692(a) (“Congressional findings and declaration of purpose.”).
30 See Consumer Credit Protection Act, S Rep No 95-382, 95th Cong, 2d Sess 382 (1977), reprinted in 1977 USCCAN 1695, 1696 (“The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level.”).
31 15 USC §1692(a).
Reacting to the urging of various consumer groups, Congress adopted the FDCPA on September 20, 1977 to address the “abundant evidence” of abusive, deceptive, and unfair debt collection practices used by many debt collectors. Under the Act’s purposes stated in § 1692a, members of the enacting Congress sought “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”

Congressmen wanted to strike a balance that would eliminate abusive practices against the consumer while also not unduly constraining ethical debt collectors. Consumers in debt, far from being “deadbeats,” often legitimately default on their loans due to unforeseen circumstances, and “[m]eans other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.” Recognizing this, the statute created a powerful remedy that consumers would privately enforce, while also preserving debt collectors’ legitimate judicial remedies against the consumer to collect the debt.

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32 15 USC § 1692a.
33 15 USC § 1692(e).
34 As one Congressman posed the issue: “[h]ow do we [Congress] stop abusive practices without at the same time impairing the ability of honest, professional debt collectors to just collect debts?” The Debt Collection Practices Act, Subcommittee on Consumer Affairs of the Commerce on Banking, Finance and Urban Affairs, 95th Congress, 2d Sess 21 (1977) (statement of Chalmers Wylie).
35 S Rep No 95-382 at 3 (cited in note 30) (noting only 4 percent of all defaulting debtors fit the description of “deadbeat” and “the vast majority of consumers who obtain credit fully intend to repay their debts” such that “[w]hen default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce”).
36 15 USC § 1692(c).
37 15 USC § 1692k.
38 15 USC § 1692c (excepting from actionable communications those that “notify the consumer that the debt collector or creditor may invoke” or “intends to invoke” a “specified remedy” of a kind “ordinarily invoked by [the] debt collector or creditor”); Hemmingsen v Messerli & Kramer, PA, 674 F3d 814, 818 (8th Cir 2012), citing Heintz v Jenkins, 514 US 296 (1995) (noting concern for preserving creditors’ judicial remedies compels a cautious balancing of actionable FDCPA claims).
B. Scope of the FDCPA

The Act restricts a range of debt collector conduct. It prohibits debt collectors from using practices that are abusive, harassing,\(^3\) or unfair\(^4\) and regulates how a debt collector can communicate when seeking to recover a debt. The Act defines “debt collector” as: “[A]ny 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.”\(^4\)\(^1\) Congress also defined “communication” broadly, as “the conveying of information regarding a debt directly or indirectly to any person through any medium.”\(^4\)\(^2\) While the statute primarily focuses on communications between the debt collector and the consumer, several provisions of the FDCPA also impose restrictions on communications between debt collectors and third parties.\(^4\)\(^3\)

Section 1692e, the subject of this Comment, simply prohibits a debt collector from using “any false, deceptive, or misleading representation or means in connection with the collection of any debt,”\(^4\)\(^4\) without expressly mentioning third parties recipients.\(^4\)\(^5\) Section 1692e further includes list of §1692e violations\(^4\)\(^6\) but expressly notes that the list is not intended to “limit[ ] the general application” of the overarching first sentence. As the section’s heading does not expressly mention which recipients would implicate a debt collector’s

\(^{3}\) See 15 USC §1692d(1)–(6) (listing six violations considered to constitute harassment or abuse under the Act and noting the list is not exhaustive).

\(^{4}\) See 15 USC §1692f(1)–(8) (listing eight types of conduct considered a violation of this section and noting the list is not exhaustive).

\(^{41}\) 15 USC §1692a. The Supreme Court has held that “debt collector” includes attorneys litigating on behalf of debt collectors. *Heintz*, 514 US at 292. See Part IV.B.

\(^{42}\) 15 USC §1692a.

\(^{43}\) Some provisions mention third parties expressly. See, for example, 15 USC §1692b (regulating how debt collectors acquire location information from “any person other than the consumer”); 15 USC §1692e(b) (prohibiting, with certain exceptions, debt collectors from communicating with persons other than the debtor, the debtor’s lawyer, the creditor or certain others).

\(^{44}\) 15 USC §1692e.

\(^{45}\) See 15 USC §1692e.

\(^{46}\) 15 USC §1692e.
liability, the statute’s reach over a communication from a debt collector to a judge is ambiguous.

II. DEBT COLLECTOR JUDGE COMMUNICATIONS IN THE DEBT COLLECTION PROCESS

An overview of common debt collection realities demonstrates that judges are constant and often inescapable recipients of a debt collector’s communications in a debt collection proceeding. Consequently, applying § 1692e to reach such communications significantly affects both debt collectors and consumers. This Part will first survey the debt collection process and next highlight how the process makes the FDCPA’s scope an important inquiry.

The debt collection process begins when consumers become seriously delinquent, and their original creditors give up trying to collect the debt. The creditors may then sell the debt to “bulk buying” collection agencies as a way to recoup some money on the accounts, and in return, the debt collection agency receives a fixed percentage of the recovered debt. If an agency cannot get payment through phone calls and letters, it typically brings suit to recover the debt. The vast majority of these suits end in default judgments in which the judge accepts the validity of the debt collector’s complaint and attachments at face value without requiring proof of the representations’ validity. A judge may ask the debt collector to verify the statements in a court document; however, nothing compels the judge to exercise this discretion, and judges overwhelmingly do not. For the affected individual consumer, a default judgment can allow a debt collector to create a judgment lien on the consumer’s real estate, freeze the consumer’s bank account, or garnish the consumer’s wages.

The debt collection industry relies on continual default judgments to remain in business, so debt collectors in particular

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48 See O'Rourke v Palisades Acquisition, XVI, LLC, 635 F3d 938, 941 (7th Cir 2011).
49 See Carter, 60 ABA Journal at 40 (cited in note 5).
50 See O'Rourke, 635 F3d at 941; see also Carter, 60 ABA Journal at 40 (cited in note 5) (citing study in a New York City civil court showing debt collectors got default judgments in 87 percent of the matters and prevailed more than 94 percent of the time).
51 Carter, 60 ABA Journal at 40 (cited in note 5).
52 O'Rourke, 635 F3d at 941.
must craft their court communications to obtain favorable judgments.\textsuperscript{53} Because debt collectors purchase repackaged debt, they often do not have access to documents verifying that a debt is owed. Consequently, it is difficult for debt collection agencies to certify key facts in their affidavits, including the debt's owner or amount.\textsuperscript{54} Moreover, as the cost to actually litigate such suits usually outweighs the amount the consumer owes, debt collectors will terminate their claim if the consumer appears in court to challenge the suit.\textsuperscript{55} The verification problems and the inability to economically litigate compel debt collectors to fully establish all the facts with the complaint and attached exhibits.\textsuperscript{56}

These debt collection realities make § 1692e's reach to the judge particularly important. Nothing forces a debt collector to directly communicate to the consumer debtor the evidence in a complaint before sending notice of the suit.\textsuperscript{57} In fact, a debt collector has incentives to ensure a consumer debtor does not know a suit is underway\textsuperscript{58} by using tactics like failing to serve the consumer or improperly serving the consumer.\textsuperscript{59} Moreover, default judgment rewards collectors not only for bringing suit supported by insufficient evidence but for supporting their claims with misleading or deceptive evidence.\textsuperscript{60} A debt collector's affidavit could contain a host of information that a judge—trusting it to be authentic and already overburdened with debt collection suits—would rule in favor of the debt collector without requiring the collector to show additional proof of the debt.\textsuperscript{62}

\textsuperscript{53} See id at 939–40.
\textsuperscript{54} See id.
\textsuperscript{55} Id.
\textsuperscript{56} O'Rourke, 635 F3d at 940.
\textsuperscript{57} This occurred in O'Rourke v Palisades Acquisition, XVI, LLC. See id at 939; see also Part III.A (surveying O'Rourke's facts).
\textsuperscript{58} See Carter, 60 ABA Journal at 40 (cited in note 5) ("The problem is they [debt collectors] have no incentive to get it right. Their business model is based on defaults. They only have that incentive after getting the default, when they want to collect. Then they are fantastic at finding a good address.").
\textsuperscript{59} See id (citing study showing 71 percent of the alleged debtors were not served or served improperly).
\textsuperscript{60} See id.
\textsuperscript{61} See id.
\textsuperscript{62} See O'Rourke, 635 F3d at 939–41.
III. THE CIRCUIT SPLIT

As shown above, lack of communication (or receipt of communication) between debt collectors and consumers makes § 1692e’s prohibitions against a debt collector’s misrepresentations to a judge a particularly salient inquiry. Yet a circuit split exists over whether § 1692e extends to a debt collector’s communications with a judge. On one side of the split, the Seventh Circuit’s approach held that the Act does not apply to communications made to a judge. The court created a bright-line limiting principle, restraining § 1692e’s reach only to those who “stand in the shoes of the consumer.” Conversely, the Eighth and Sixth Circuits have applied the FDCPA to such representations. The Eighth Circuit has applied § 1692e to debt collector–judge communications on a case-by-case basis, while the Sixth Circuit gives blanket FDCPA protection to all debt collector–judge communications.

First, this Part will survey the debt collector–judge communication circuit split. Next, this Part will compare the circuit split with the additional split over whether § 1692e covers debt collector–attorney communications.

A. The Seventh Circuit’s Approach: O’Rourke v Palisades Acquisition

In O’Rourke v Palisades Acquisition, the Seventh Circuit held that the FDCPA does not cover debt collector–judge communications but only those communications directed to either the consumer or those that “stand in the shoes” of the consumer. In O’Rourke, a debt collector filed a collection suit

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63 Hemmingsen v Messerli & Kramer, PA, 674 F3d 814, 818 (8th Cir 2012) (noting the question is unresolved); Sykes v Mel Harris & Associates, LLC, 2012 WL 3834802, *n 9 (SDNY) (same); Bruce N. Menkes, 65 Consumer Fin LQ Rep at 328 (cited in note 15) (noting split of authority).
64 Compare O’Rourke v Palisades Acquisition, XVI, LLC, 635 F3d 938, 941 (7th Cir 2011) (holding FDCPA does not apply), with Hartman v Great Seneca Financial Corp, 569 F3d 606, 609 (6th Cir 2009) (applying the FDCPA), and Hemmingsen, 674 F3d at 818 (reasoning FDCPA can apply).
65 See O’Rourke, 635 F3d at 940.
66 Id at 943.
67 See Hemmingsen, 674 F3d at 819; Hartman, 569 F3d at 610.
68 635 F3d 938 (7th Cir 2011).
69 Id at 943. The court noted previous decisions that extended FDCPA liability to communications made to those who stand in the shoes of the consumer. See, for example,
and attached a statement to the complaint that looked like a credit card bill. The document included a "statement closing date" six months before the date the complaint was filed and listed the consumer as the issuing party, even though the consumer was not the original creditor. However, the debt collector never sent the statement to the consumer. The court found that the debt collector wanted to give the judge the impression that [the consumer] had received the statement and never objected. Thus, [any] judge who examines the complaint and the attached statement trusting it to be authentic would believe that there is no reason to exercise his discretion and require additional proof of the debt.

Believing such representation to be actionable, the consumer sued in federal court under § 1692e of the FDCPA, asserting that the attachment of the statement would mislead a judge handling his case.

Rejecting the consumer's contention, the court created its own "limiting principle" to curb the FDCPA's reach. The court began by conceding that the text of the "broadly written" § 1692 "says nothing of to whom the representation has to be made for it to be actionable." However, without some limit to § 1692e, its text would "be so open-ended as to include, for example, a misleading letter sent to the wrong address." In light of the Act's "purpose and numerous provisions" that "focus on the consumer," the court concluded that "the prohibitions are clearly limited to communications directed to the consumer and do not apply to state judges." The court's principle would extend the

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Evory v RJM Acquisitions Funding LLC, 505 F3d 769, 773 (7th Cir 2007) (extending to consumer's attorney); Wright v Financial Service of Norwalk, Inc, 22 F3d 647, 650 (6th Cir 1994) (extending to consumer's executrix).

O'Rourke, 635 F3d at 939.

Id.

Id.

Id.

O'Rourke, 635 F3d at 939.

Id at 943.

Id at 941-42.

Id at 943.

O'Rourke, 635 F3d at 943. In concluding this, the court asserted "the Act is meant to protect consumers against debt collection abuses" and reasoned "[m]any of the
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FDCPA’s protection only “to consumers and those who stand in the consumer’s shoes.” In other words, “the Act is limited to protecting consumers and those who have a special relationship with the consumer—such that the Act is still protecting the consumer—from statements that would mislead these consumers.”

Despite the court’s emphasis on the consumer, the Seventh Circuit had previously held in Evory v RJM Acquisitions Funding LLC that the Act’s broad language covers a debt collector’s communications to the consumer’s attorney. The O’Rourke court distinguished Evory on agency grounds, reasoning that statements from debt collectors to a consumer’s attorneys are actionable because lawyers, unlike judges, stand in the shoes of the consumer.

In a concurring opinion, Judge John Tinder argued the court should not interpret the FDCPA to exclude all debt collector–judge communications. Judge Tinder noted that the purpose and language of the FDCPA are quite broad and “[do] not exclude any class of persons from the Act’s protection.” Although judges might not stand in the shoes of the consumer, courts are a still a “medium through which debt collection information is conveyed to consumers” and judges can play “an

specific instances of conduct that violate this Section are protections for consumers.”

Id (emphasis in original).

Id at 943–44. The court has also stated that its limiting principle requires the misleading statement at issue to “have the ability to influence a consumer’s decision.” Id at 941–42 (emphasis in original).

Id at 943.

505 F3d 769 (7th Cir 2007).

Id at 774.

As the court elaborated:

Judges do not have a special relationship with consumers. They stand as impartial decision-makers in the discharge of their office. . . . They are neither a consumer’s advocate nor his adversary; their role is to ensure that the process is followed. They have no special relationship with the consumer; thus, the Act’s protections do not extend to communications that could mislead them.

O’Rourke, 635 F3d at 941.

While Judge Tinder did not agree with the majority’s broad reasoning, he concurred in the result because the consumer plaintiff had not brought enough evidence to show the communication at issue would mislead the unsophisticated consumer. Id at 948 (Tinder concurring).

Id (Tinder concurring).

Id (quotation marks omitted) (Tinder concurring).
extremely consequential role in the debt collection process”87 and
thus “are unquestionably ‘connect[ed]’ to debt collectors’
collection efforts.”88

Instead of the majority’s limiting approach, Judge Tinder
would resolve the case by applying the FDCPA to the
communication “with reference to the unsophisticated consumer
standard,” but suggested that a higher standard should apply to
communications made to judges.89

B. The Eighth Circuit’s Approach: Hemmingsen v Messerli &
Kramer

In contrast to O’Rourke, the Eighth Circuit has proposed a
pragmatic and cautionary approach to determine viable FDCPA
claims. In Hemmingsen v Messerli & Kramer,90 the Eighth
Circuit reasoned that the FDCPA could apply to a debt
collector’s representations to a court, noting that “the diverse
situations in which potential FDCPA claims may arise during
the course of litigation . . . counsel against anything other than a
case-by-case approach.”91

Applying its case-by-case approach to the action in
Hemmingsen, the court concluded the consumer debtor lacked a
meritorious FDCPA claim.92 Here, the consumer debtor alleged
that the debt collector filed a motion for summary judgment
with an attached affidavit that was false and misleading.93 The
court began by noting that while representations in court filings
are rarely made directly to the consumer, it is true that “such
representations routinely come to the consumer’s attention and
may affect his or her defense of a collection claim.”94 In contrast,
the court emphasized that here none of the parties involved (the
consumer, her attorney, or the judge) was actually misled by
the representation, that the consumer’s attorney already knew
about the representation, and that neither the consumer nor the
attorney took any action relying on the accuracy of the

87 O’Rourke, 635 F3d at 949 (Tinder concurring).
88 Id at 948 n 2, citing 15 USC § 1692e (Tinder concurring).
89 O’Rourke, 635 F3d at 947 (Tinder concurring).
90 674 F3d 814 (8th Cir 2012).
91 Id at 819.
92 Id.
93 Id at 816.
94 Hemmingsen, 674 F3d at 816.
representation. The court, however, did not expressly indicate an enumerated list of factors courts should consider when applying the case-by-case approach, and did not state what factors would be most important to determine the viability of a FDCPA claim.

Countervailing concerns compelled the Eighth Circuit to reject the consumer's proposed rule that a court should hold a debt collector's allegations as false and misleading when the court rejects such allegations "as not adequately supported in the collection suit." Because § 1692e expressly exempts certain debt collector communications notifying the consumer the debt collector intends to initiate a court remedy, such as a lawsuit, an overly harsh FDCPA application could chill such conduct. Such a result would be "contrary to the FDCPA's apparent objective of preserving creditors' judicial remedies," and would implicate the collector's "right of access to the courts," an aspect "of the First Amendment right to petition the Government for redress of grievances."

Unlike the Seventh Circuit's bright-line rule affording protection to attorney communications but not judge communications, the Eighth Circuit requires a careful balancing in each case to determine if the FDCPA claim can continue. In this way, the court's case-by-case approach has a gate-keeping function by denying § 1692e protection to all but those cases that proceed past the inquiry. If an action survives, the court would then apparently apply the unsophisticated consumer standard to determine if the representation is misleading or false.

95 Id at 816–18.
96 See id.
97 Id at 818, citing Heintz v Jenkins, 514 US 296, 296 (1995).
98 15 USC § 1692e(c).
99 See Heintz, 514 US at 296; Hemmingsen, 674 F3d at 818.
100 Hemmingsen, 674 F3d at 818, citing Heintz, 514 US at 296.
101 Hemmingsen, 674 F3d at 819.
102 O'Rourke, 635 F3d at 941.
103 See Hemmingsen, 674 F3d at 819.
104 See id.
105 The court did not expressly state what standard would apply, but the Eighth Circuit generally applies the unsophisticated consumer standard to FDCPA claims. See Strand v Diversified Collection Service, Inc, 380 F3d 316 (8th Cir 2004) (applying unsophisticated consumer standard). At least one district court in the Eighth Circuit has done so since the recent Hemmingsen decision. Henggeler v Brumbaugh & Quandahl,
C. The Sixth Circuit’s Approach: *Hartman v Great Seneca Financial Corporation*  

In *Hartman v Great Seneca Financial Corporation*, the Sixth Circuit held that the consumer had raised a genuine issue of material fact over whether the debt collector’s attached statement to the complaint was misleading. In a fact pattern similar to *O'Rourke*, the collector filed a complaint with an attached document resembling a credit card statement. The consumer alleged the collector sought to misrepresent the document as an actual statement of the consumer’s account. Unlike the *O'Rourke* court, the Sixth Circuit applied § 1692e to the communication without discussion. To assess whether the representation was false or misleading, the court then applied the least sophisticated consumer test.

Unbound by the Seventh Circuit’s limiting principle or the Eighth Circuit’s more nuanced case-by-case approach, the Sixth Circuit’s approach would apply § 1692e to the broadest swath of communications. According to this analysis, the Sixth Circuit would always apply § 1692e to a debt collector’s communications with a judge; the only inquiry would ask

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*PC, LLO, 2012 WL 762103 (D Neb).* See also Part V.A.1 (surveying varying circuit standards).

106 569 F3d 606 (6th Cir 2009).

107 Id at 612.

108 See Part III.A (surveying *O'Rourke*’s facts).

109 *Hartman*, 569 F3d at 610.

110 Id.

111 Id at 612. The Sixth Circuit has also reversed another district court decision that granted summary judgment for the defendant debt collectors where the federal complaints alleged deceptive statements in the complaints filed in state court and did not question the application of § 1692e to state court communications. See *Grden v Leikin Ingber & Winters PC*, 643 F3d 169, 172 (6th Cir 2011) (reversing a district court’s decision to grant the defendant’s motion for summary judgment and finding that a jury could find that a document filed in a state court debt collection action was misleading). Additionally, the Sixth Circuit found that the attorneys for a law firm who submitted an affidavit in a state court debt collection action were not entitled, in a federal suit under the FDCPA, to absolute immunity as complaining witnesses. *Todd v Weltman, Weinberg & Reis Co, LPA*, 434 F3d 432, 439-47 (6th Cir 2006).

112 *Hartman*, 569 F3d at 613. This Comment will describe the least sophisticated consumer test in Part V.A.

113 *O'Rourke*, 635 F3d at 943.

114 *Hemmingsen*, 674 F3d at 818-19.

115 See *Hartman*, 569 F3d at 613.
whether the representation was likely to mislead the least sophisticated consumer.\textsuperscript{116}

D. Circuit Split Over Debt Collector–Attorney Communications

The circuits have also split over whether the FDCPA covers a debt collector’s communications to a consumer’s attorney.\textsuperscript{117} As the Seventh Circuit distinguished \textit{O’Rourke} from \textit{Evory} on agency grounds by holding in \textit{O’Rourke} that only those who stand in the shoes of the consumer receive FDCPA protection,\textsuperscript{118} it is worth comparing how other courts have treated debt collector–attorney communications with the Seventh, Eighth, and Sixth Circuits to see how courts treat attorney recipients.

The Seventh Circuit’s agency rationale has driven other circuits to reach the opposite conclusion, instead using agency as a reason to deny FDCPA protection for a debt collector’s communications to an attorney.\textsuperscript{119} For example, in \textit{Guerrero v RJM Acquisition LLC},\textsuperscript{120} the Ninth Circuit held the FDCPA does not cover a debtor’s communications to an attorney because Congress viewed attorneys as learned “intermediaries able to bear the brunt of overreaching debt collection practices.”\textsuperscript{121} Similarly in \textit{Kropelnicki v Siegel},\textsuperscript{122} reasoning that the FDCPA does not apply to attorney communication,\textsuperscript{123} the Second Circuit emphasized how an attorney “is interposed as an intermediary between a debt collector and a consumer,” such that a court “assumes the attorney, rather than the FDCPA, will protect the consumer from a debt collector’s fraudulent or harassing behavior.”\textsuperscript{124}

\textsuperscript{116} See id.
\textsuperscript{117} Compare \textit{Guerrero v RJM Acquisition LLC}, 499 F3d 926, 926 (9th Cir 2007) (holding the FDCPA does not apply to debt collector–attorney communications); \textit{Kropelnicki v Siegel}, 290 F3d 118, 127 (2d Cir 2002) (reasoning in dicta the FDCPA does not apply to debt collector–attorney communications), with \textit{Sayyed v Wolpoff & Abramsom}, 485 F3d 226, 232–33 (4th Cir 2007) (holding the FDCPA can apply to attorney-debt collector communications); \textit{Allen ex rel Martin v LaSalle Bank, NA}, 629 F3d 364, 366 (3d Cir 2011) (cert denied) (same).
\textsuperscript{118} See \textit{O’Rourke}, 635 F3d at 943.
\textsuperscript{119} See \textit{Guerrero}, 499 F3d at 926; \textit{Kropelnicki}, 290 F3d at 127.
\textsuperscript{120} 499 F3d 926 (9th Cir 2007).
\textsuperscript{121} Id at 935.
\textsuperscript{122} 290 F3d 118 (2d Cir 2002).
\textsuperscript{123} Id at 127.
\textsuperscript{124} Id at 128.
According to this reasoning, both circuits emphasize the lawyer's role as an intermediary that adequately protects the consumer from debt collection abuse, and this suggests a debt collector's communication to an impartial arbiter unable to protect the consumer could alter the outcome. However, as the holding of the Ninth Circuit and the reasoning of the Second Circuit were limited to attorney-debt collector communications, it is not clear that extending this analysis would prohibit judge-debt collector actions.

In contrast, both the Eighth and the Sixth Circuits do not make any distinctions between the consumer, the attorney, or the judge. Thus, both courts' analyses would also extend FDCPA liability to communications a debtor makes to a consumer's attorney. For example, the Eighth Circuit's sweeping case-by-case approach compels a court to consider all situations that could arise "in the course of litigation." The court would instead focus on the misrepresentation's effect on the litigation process.

This reasoning is consistent with other circuits that have held the FDCPA applies to attorney-debt collector communications. To come to this conclusion, the Third Circuit in Allen ex rel Martin v LaSalle Bank relied on a thorough statutory analysis, emphasizing that the repeated use of the word "any" in both §1629e and §1692f establish that it is the conduct—not the recipient—that the statute seeks to address. The Allen court concluded that because there is nothing in the FDCPA that "explicitly exempts communications to an attorney," the FDCPA could apply. Similarly, the Fourth Circuit also applied the FDCPA to attorney-debt collector communications, holding that communications to the debtor's counsel are "indirect" communications to debtors and are

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125 In fact, the Ninth Circuit has allowed an FDCPA action to continue when the communication at issue was in the debt collector's pleadings. See Donohue v Quick Collect, Inc, 592 F3d 1027, 1030 (9th Cir 2010).
126 See Guerrero, 499 F3d at 926; Kropelnicki, 290 F3d at 127.
127 Hemmingsen, 674 F3d at 818.
128 See id at 818–19.
129 Allen, 629 F3d at 366; Sayyed, 485 F3d at 232.
130 629 F3d 364, 366 (3d Cir 2011).
131 Id at 368 ("The focus of § 1692f is on the conduct of the debt collector.").
132 Id.
therefore covered by the FDCPA. Recognizing that the FDCPA's strict liability has a strong deterrent effect, "[i]f an otherwise improper communication would escape FDCPA liability simply because that communication was directed to a consumer's attorney, it would undermine the deterrent effect of strict liability." Overall, both courts emphasized that the FDCPA does not distinguish among audiences and also refused to make limiting distinctions.

IV. APPLYING § 1692E TO DEBT COLLECTOR JUDGE COMMUNICATIONS

The Seventh Circuit created a limiting principle to curb the FDCPA's scope. This approach, however, is inconsistent with the FDCPA and Supreme Court precedent. This Part will first examine the FDCPA's plain language, purposes, and legislative history. Next, this Part will discuss Supreme Court precedent interpreting the FDCPA. These considerations, taken in turn, all direct a court to adopt an expansive interpretation that covers communications to judges.

A. The FDCPA and Debt Collector–Judge Communications

The Seventh Circuit's bright-line limiting principle is inconsistent with the FDCPA. Indeed, a look to the FDCPA's plain language, purposes, and legislative history compel courts to apply § 1692e's protection to all debt collector–judge communications.

Most simply, the plain language of § 1692e covers misrepresentations made to third parties, including judges. No language in § 1692e excludes a debt collector's communications with a judge; instead Congress wrote the section broadly, prohibiting "false, deceptive or misleading representations or means in connection with the collection of any debt," with no mention that the judge cannot be the receiver. Furthermore, the enacting Congress expressly noted

133 Sayyed, 485 F3d at 232.
134 Allen, 629 F3d at 368.
136 15 USC § 1692e.
the enumerated list of prohibited actions was nonexhaustive, demonstrating their intent to cover a broad range of conduct. As courts interpreting the FDCPA to cover third party communications have noted, where the statutory language is clear, the court will not "rewrite the statute so that it covers only what [it] think[s] is necessary to achieve what [it] think[s] Congress really intended." That the judge is the direct audience of the communication instead of the consumer or attorney should not "transform the contact between the collector and the attorney into some independent liaison having nothing to do with the collection of an outstanding debt." Rather Congress defined communication under the FDCPA broadly as "the conveying of information regarding a debt directly or indirectly to any person through any medium." As the *O'Rourke* concurrence noted,

It is true that judges do not stand in consumers' shoes, but aren't state courts a medium through which debt collection information is conveyed to consumers? . . . Again, recall that [the consumer] received the document at issue only after it was provided to the court. And it came to him as a part of the packet of materials associated with a lawsuit that could result in a judgment against him.

Indeed, while representations in court filings are rarely made directly to the consumer, "such representations routinely come to the consumer's attention and may affect his or her defense of a collection claim." This concern is particularly salient given that most consumers might never receive either a document directly from the debt collector (as in *O'Rourke*) or

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137 See 15 USC § 1692e.
138 *Lewis v City of Chicago*, 130 S Ct 2191, 2200 (2010); *Sayyed v Wolpoff & Abramson*, 485 F3d 226, 234 (4th Cir 2007) ("In the ordinary case, absent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it."); *Mertens v Hewitt Association*, 508 US 248, 261 (1993) ("[Vague notions of a statute's 'basic purpose' are inadequate to overcome the words of its text regarding the specific issue under consideration.").
139 *O'Rourke*, 635 F3d at 949 (Tinder concurring).
140 *Hemmingsen v Messerli & Kramer*, PA, 674 F3d 814, 818 (8th Cir 2012).
141 See *O'Rourke*, 635 F3d at 942.
even the complaint.144 The Seventh Circuit’s approach would fail to cover such documents that are not directed to the consumer or the consumer’s attorney.

As courts have noted, when Congress sought to limit the application of the FDCPA, it did so expressly.145 For example, § 1692c designates the consumer as the audience of actionable communication.146 Due to this express text, when analyzing the scope of that provision a court could rightly emphasize “the conceptual, definitional, and practical importance of distinguishing ‘consumers’ from ‘attorneys’ and other third parties” because § 1692c “regulates debt collectors’ communications with ‘consumers,’ period.”147 In contrast, § 1692e “is not so limited.”148 Similarly, the enumerated list in § 1692e itself contains both provisions with specific targets and those without reference to any audience.149 Thus, the FDCPA’s text suggests that all debt collector–judge communications are subject to the FDCPA, except to the limited extent that Congress has expressly exempted the communications.150

These textual distinctions imply that members of Congress knew how to limit the FDCPA’s reach and did so when those legislators deemed it necessary. As the Fourth Circuit interpreting the express limits within the FDCPA reasoned, “courts should disfavor interpretations of statutes that render language superfluous.”151 Congress would not have needed to include recipients in some of § 1692e’s list and not others if it intended to limit the Act’s broader provisions. Furthermore, interpreting these various congressional limits in the FDCPA demonstrates the text can “implicitly resolve” such absurd consequences.152 So the Seventh Circuit’s limiting principle,

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144 See Part IV.
145 See 15 USC §§ 1692e, 1692c (containing enumerated exceptions); O’Rourke, 635 F3d at 947 (Tinder concurring); Sayyed, 485 F3d at 234.
146 See 15 USC § 1692c.
147 O’Rourke, 635 F3d at 949 (Tinder concurring).
148 Id.
149 15 USC § 1692e (containing enumerated provisions mentioning the consumer as the recipient).
150 See id.
151 Sayyed, 485 F3d at 231.
152 For example, the Supreme Court in Heintz used § 1692c(c)’s implicit exceptions to avoid a result that would not allow the attorney debt collector to file a lawsuit. Heintz v Jenkins, 514 US 291, 294 (1995) (reconciling allowing litigating attorneys to be a debt collector with the exceptions in § 1692c(c)). See §§ 1692c(c)(2)–(3) (excepting from
created in part to eliminate absurdities that could result from having a debt collection letter sent to the wrong address, is a judicial cure for a problem that Congress has already solved.

While the Seventh Circuit's rationale for denying FDCPA protection to judges focused on the Act's stated purpose of protecting consumers, applying § 1692e to judges better fulfills all the FDCPA's express purposes and objectives. For example, members of the enacting Congress sought not only to eliminate abusive debt collection practices but also to ensure that ethical debt collectors are not competitively disadvantaged. In this way, the statute's drafters sought to influence the debt collection market as a whole by focusing on the debt collector's conduct or "use" of abusive practices. Thus, the Seventh Circuit interpreted the FDCPA's purposes too narrowly by only focusing on protecting the consumer from misleading communications. By viewing the purposes in the aggregate, attaching liability to debt collectors' communications to judges would better fulfill the enacting Congress's goal of limiting debt collector conduct.

The Act's legislative history also demonstrates that members of Congress intended to cover a broad range of debt collector behavior regardless of audience. Both the Senate and House Reports repeatedly noted that they passed the Act intending to end such abusive debt practices in general, regardless of the debt collector's target. For example, the House committee found that "debt collection abuse by third party debt collection is a widespread and pervasive problem."

liability communication to the consumer that invoke a judicial remedy). Applying the Court's reasoning to § 1692e, sections within § 1692e could implicitly resolve absurd results. For example, listed violations that expressly target the consumer limit § 1692e's reach. See 15 USC § 1692e.

153 O'Rourke, 635 F3d at 943.

The Eighth Circuit's approach in Hemmingsen, apparently only applying FDCPA protection to cases that pass its "case-by-case" approach, would also create an unnecessary judicial inquiry. See Hemmingsen, 674 F3d at 818. See also Part III.B.

155 O'Rourke, 635 F3d at 941 ("The Act is meant 'to protect consumers against debt collection abuses.'") (emphasis added).

156 See 15 USC § 1692(a)–(o).

157 15 USC § 1692(d).


159 See O'Rourke, 635 F3d at 941–42.


161 15 USC § 1692(a).
inflicting substantial "suffering and anguish" not only on the consumer, but on "anyone" who has been intimidated by abusive practices.\textsuperscript{162}

Similarly, the FDCPA's amendment history suggests that members of Congress intended for courts to apply §1692e to judge communications. Congressional committees have considered amending the FDCPA's definition of "communications" to expressly exempt legal pleadings.\textsuperscript{163} However, Congress only made a relatively minor change to §1692e(11) by exempting formal pleadings from the requirement that all communications state that they come from a debt collector.\textsuperscript{164} If pleadings were entirely exempt from the FDCPA, §1692e(11)'s express exemption of formal pleadings would be unnecessary.\textsuperscript{165} Moreover, by keeping pleadings within the FDCPA's scope, the congressmen arguably intended to cover the obvious recipient of those documents: the judge.

B. Supreme Court Precedent

In addition to the statute and its history, the sparse Supreme Court precedent\textsuperscript{166} interpreting the FDCPA also lends support to an expansive reading of the FDCPA that includes communications sent to a judge.\textsuperscript{167}

In the first case the Court considered, \textit{Heintz v Jenkins},\textsuperscript{168} the Court interpreted the FDCPA's according to its plain meaning.\textsuperscript{169} The Court addressed whether the FDCPA's definition of "debt collector," or "any person... who regularly

\textsuperscript{162} Fair Debt Collection Practices Act, HR 10137, 95th Cong, 1st Sess, in Cong Rec H 10240 (April 5, 1977).


\textsuperscript{164} 15 USC §1692e(11) (prohibiting communications that fail to disclose that they are from a debt collector, to state that the provision "shall not apply to a formal pleading made in connection with a legal action"); The Fourth Circuit also used this argument as support for its reasoning that the FDCPA applies to pleadings. Sayyed, 485 F3d at 231.

\textsuperscript{165} See Sayyed, 485 F3d at 231.

\textsuperscript{166} The Court has only released two FDCPA related opinions in the last thirty years. See \textit{Heintz v Jenkins}, 514 US 291 (1995); \textit{Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich LPA}, 130 S Ct 1605, 1611–12 (2010).

\textsuperscript{167} See \textit{Heintz}, 514 US at 294; \textit{Jerman} 130 S Ct at 1611; see also \textit{Hemmingsen}, 674 F3d at 818 (relying on "the Supreme Court's caution in \textit{Heintz}" when it noted it would apply §1692e to judges).


\textsuperscript{169} Id at 294.
collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another could encompass a lawyer litigating on behalf of one collecting a debt. Reasoning that "[i]n ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts," the Court concluded that the definition of "debt collector" includes lawyers.

Applying the Court’s reasoning to § 1692e would likely afford protection to communications with state court judges. Debt collectors communicate with judges to secure judgments against the consumer to recover the delinquent debt. So giving “in connection with any debt” its ordinary English meaning, such communications would fall under § 1692e. The opinion implies that courts should not shy away from applying the statute’s ordinary meaning even when it would broaden FDCPA liability beyond the consumer but also that conduct in the process of litigation (such as affidavits or complaints made to a judge) also falls under the Act’s protection.

In the more recent case Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich LPA, the Supreme Court refused to interpret the Act in a way that would immunize a broad range of debt collector conduct. The Court held that a debt collector cannot escape FDCPA liability by arguing that he relied on mistaken legal advice about the Act’s requirements. According to the Court, such “blanket immunity” for mistakes would be inconsistent with both the FDCPA's text prohibiting debt collector misconduct and with Congress’s stated purpose of eliminating abusive debt collection practices.

Here, as one court has noted, the Supreme Court’s decision not only “reaffirmed the FDCPA's broadly worded prohibitions

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170 15 USC § 1692a(6).
171 Heintz, 514 US at 294.
172 In fact—in contrast to O'Rourke's blunt limiting principle—the Eighth Circuit believed the Supreme Court's “caution” here compelled a more nuanced approach to assessing court communications. Hemmingsen, 674 F3d at 818.
173 See Part II.
174 15 USC § 1692e.
175 130 S Ct 1605 (2010).
176 Id at 1611.
177 See id.
178 Id; 15 USC § 1692a.
on debt collector misconduct" but also implicitly favored an interpretation that would not immunize a wide range of misconduct. Judges are a constant, inescapable feature of a debt collection proceeding; while most suits end in default judgment, the overwhelming majority of consumers never hire a lawyer to deal with debt collection suits. Consequently, immunizing debt collectors from communications made directly to a judge would arguably cover a greater swath of behavior than would communications made to an attorney. And yet, the Seventh Circuit's rule would do just that by allowing debt collectors to push the boundaries of abusive debt collection practices merely because they targeted their communications to judges.

V. STANDARD FOR ASSESSING ACTIONABLE DEBT COLLECTOR–JUDGE COMMUNICATIONS

If a court decides to read the FDCPA to cover communications to a state court judge, the question of what standard to apply to those communications remains. First, this Part will survey courts' current standards for actionable FDCPA communications directed at consumers and judges. Next, this Part will propose that courts should assess FDCPA communications from the perspective of a reasonable recipient with an eye towards materiality. Finally, this Part will explain why this standard, which departs from the approaches used by the Seventh, Eighth, and Sixth Circuits, is preferable.

A. Current Standards for Assessing False or Misleading Communications

In addition to the conflict over § 1692e's scope, courts have disagreed over the appropriate standard to assess whether a

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179 Polinsky v Community Health Partners Regional Health Systems, 858 F Supp 2d 891, 898 (ND Ohio 2012).

180 Jerman, 130 S Ct at 1611. See Polinsky, 858 F Supp 2d at 897–98 (using this reasoning to apply FDCPA to attorney communications).

181 See Schechter, 2011 Comm Fin News at 50 (cited in note 12) ("I do not think that this fact pattern (a misleading letter sent to a debtor's lawyer) arises frequently enough to justify certiorari, since so few consumers ever retain counsel to defend these small debt collection matters.").

182 See Jerman, 130 S Ct at 1611.
communication is false or misleading. While the Act's text suggests the FDCPA applies to a broad range of communications, it is utterly silent about how courts should consider the deception or falsity of a communication. Consequently, all standards courts have applied to § 1692e—including the dominant least sophisticated consumer standard—are entirely judge-made, and each standard purports to respond to the Act's objectives. As neither the FTC nor the Consumer Financial Protection Bureau (CFPB) has taken any regulatory action that would inform what standard courts should apply in the thirty years since Congress enacted the FDCPA, the question of what standard to use will likely remain one for the courts to decide.

1. Standards for debt collector–consumer communications.

There are two competing standards courts use to assess false or misleading communications between the debt collector and the consumer. Most courts, including the Sixth Circuit, apply the "least sophisticated consumer standard," which asks whether the representation would have misled the least

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183 See Part V.A.1.

184 See Jeter v Credit Bureau, Inc, 760 F2d 1168, 1175 (11th Cir 1985) (choosing least sophisticated consumer over reasonable consumer standard by inferring Congress's intent from expanding consumer remedies). Scholars have noted that early courts establishing the least sophisticated consumer test have done so on questionable grounds. See Lucas and Harrell, 62 Consumer Fin LQ Rep at 247 (cited in note 10) (noting scholars have criticized the Jeter court's basis for adopting the least sophisticated consumer standard as not supported in the FDCPA's text or purposes).

185 Congress transferred the authority to proscribe rules under the FDCPA from the FTC to the CFPB. 15 USC § 16921(d) (amending the FDCPA to read "the [CFPB] may prescribe rules with respect to the collection of debts by debt collectors, as defined in this title").

186 For an argument advocating a departure from the litigation model, see Lucas and Harrell, 62 Consumer Fin LQ Rep at 247 (cited in note 10) (arguing the differences between the least sophisticated consumer standard and the unsophisticated consumer standard compel regulatory action).

187 See, for example, Brown v Card Service Center, 464 F3d 450, 453 (3d Cir 2006) (applying least sophisticated consumer standard); US v National Financial Service, 98 F3d 131, 136 (4th Cir 1996) (same); Harvey v Great Seneca Financial Corp, 453 F3d 324, 329 (6th Cir 2006) (same); Terran v Kaplan, 109 F3d 1428, 1432 (9th Cir 1997) (same); Russell v Equifax, ARS, 74 F3d 30, 34 (2d Cir 1996) (same); Jeter, 760 F2d at 1175 (same). The First and Tenth Circuits have not specifically ruled on the applicable standard, although precedent from an unpublished opinion from the Tenth Circuit and opinions from the district courts in both circuits appear to indicate the use of the least sophisticated standard. See Ferree v Marianos, 1997 US App LEXIS 30361, *7 (10th Cir); Pettway v Hubbard, 2005 US Dist LEXIS 21341, *5 (D Mass).
sophisticated consumer to protect both "the gullible as well as the shrewd" consumer. On the other hand, the Seventh and Eighth Circuits apply an "unsophisticated consumer" test, assessing "whether a person of modest education and limited commercial savvy would be likely to be deceived." Additionally, the Seventh Circuit has suggested that courts should consider consumer sophistication on a sliding scale based on the consumer population that received the debt collection communication. Using the sliding scale, courts would adjust the standard downward for communications targeted to "particularly vulnerable" consumer groups.

While both standards cover consumers of similarly low sophistications, there are some important differences between the two. First, the Seventh and Eighth Circuits' unsophisticated consumer standard is somewhat higher. For example, while courts require the least sophisticated consumer to have a basic knowledge of the world, courts applying the unsophisticated consumer standard assume that the consumer is reasonably intelligent and has a basic understanding of the world of finance (such as how interest works and how to make logical deductions and inferences). Furthermore, under the least sophisticated consumer standard, consumer confusion is a question of law for the judge. In contrast, confusion in an unsophisticated consumer paradigm is a question of mixed fact and law, and

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188 Clomon v Jackson, 988 F2d 1314, 1320 (2d Cir 1993) (elaborating the test both "ensures the protection of all consumers, even the naive and the trusting, against deceptive debt collection practices, and ... protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices").

189 See Evory v RJM Acquisitions Funding LLC, 505 F3d 769, 774 (7th Cir 2007); Durkin v Equifax Check Service, 406 F3d 410 (7th Cir 2005); Strand v Diversified Collection Service, Inc, 380 F3d 316, 317 (8th Cir 2004).

190 Evory, 505 F3d at 774.

191 The court gave the example of a debt collector communication directed at consumers the collector "knows have a poor command of English." Id.

192 Some courts have reasoned there is not much "practical difference" between the two standards. Avila v Rubin, 84 F3d 222, 227 (7th Cir 1996). This has led the Fifth Circuit to refuse to choose between the two standards. Peter v GC Services LP, 310 F3d 344, 349 (5th Cir 2002) ("Because the difference between the standards is de minimis at most, we again opt not to choose between the standards."). But see Lucas and Harrell, 62 Consumer Fin LQ Rep at 236 (cited in note 10) (exploring "fundamental" differences between the two standards).

193 Pettit v Retrieval Masters Creditor Bureau, Inc, 211 F3d 1057, 1060 (7th Cir 2000) (listing attributes of the unsophisticated consumer).

194 Peter, 310 F3d at 349.

195 The Seventh Circuit has noted that although issues of deception are questions of
some courts have required the consumer to demonstrate actual consumer confusion through survey evidence.\textsuperscript{196} As a "corollary" to the least or unsophisticated consumer standard,\textsuperscript{197} several but not all circuits additionally require that an actionable communication be materially false or misleading.\textsuperscript{198} Generally, a representation is material if it might influence a person’s decision on a matter.\textsuperscript{199} In this way, the court combines the materiality question with the question of what would mislead the least or unsophisticated consumer, and false communications need be material, or more than merely technical.\textsuperscript{200}

2. Standards for debt collector–judge communications.

While the circuits’ standards for communications directed at consumers are similar, there is no consensus over the appropriate standard for a judge. No court has yet expressly applied a different standard to communications made to judges; a few past cases have only suggested another standard might be desirable without elaborating on how a court would apply such a standard.\textsuperscript{201} The circuits addressing judge communications have applied varying standards.

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\textsuperscript{196} Peters v General Service Bureau, Inc, 277 F3d 1051, 1056 (8th Cir 2001). Although the Eighth Circuit uses the unsophisticated consumer standard, the court has not yet required consumers show actual confusion. Peters, 277 F3d at 1056 (discussing the Seventh Circuit’s procedural requirement of actual confusion but noting no need to resolve the issue in the present case).

\textsuperscript{197} Donohue v Quick Collect, Inc, 592 F3d 1027, 1033 (9th Cir 2010).

\textsuperscript{198} See, for example, id; Miller v Javitch, Block & Rathbone, 561 F3d 588, 596 (6th Cir 2009); Hahn v Triumph Partnerships LLC, 557 F3d 755, 757-58 (7th Cir 2009).

\textsuperscript{199} See Black's Law Dictionary 998 (West 8th ed 2004) (defining material as "[h]aving some logical connection with the consequential facts [or] [o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential"); Hahn, 557 F3d at 758 (reasoning that a false statement must be material to come under the § 1692e umbrella because an immaterial falsehood has no impact on the statutory objective to help consumers make intelligent decisions).

\textsuperscript{200} Hahn, 557 F3d at 757-58.

\textsuperscript{201} For example, the O'Rourke concurrence briefly hinted that a "competent judge" standard could be an appropriate measure for communications to judges but did not explain what the standard would involve or how to apply it. O'Rourke, 635 F3d at 947 (Tinder concurring). Similarly, one district court has merely noted the rationale for a "reasonable judge" standard is "not without force" but did not explain the compelling rationale. Penn v Cumberland, 883 F Supp 2d 5813, 590 (ED Va) (dismissing case
Both the Sixth and the Eighth Circuits would apparently apply their respective traditional consumer standards to a debt collector's communications to a judge.\textsuperscript{202} In \textit{Hartman}, the Sixth Circuit did not explore possible alternative standards for such communications but merely applied the traditional approach without elaboration.\textsuperscript{203} As for the Eighth Circuit's approach, assuming the debt collector's communication to a judge passes the court's threshold case-by-case approach,\textsuperscript{204} it appears the court would apply the circuit's traditional unsophisticated consumer test to the communication.\textsuperscript{205} While the court did not expressly state what standard should apply, at least one lower court following the Eighth Circuit's recent decision in \textit{Hemmingsen} has applied the unsophisticated consumer standard.\textsuperscript{206}

The Seventh Circuit, while eschewing FDCPA protection for debt collector-judge communications in \textit{O'Rourke}, is the only circuit court to depart from the traditional consumer standard when dealing with a communication not directed at the consumer. In \textit{Evory}, the court created a "competent attorney" standard\textsuperscript{207} for a debt collector's communications to the consumer's attorney, which would ask whether the debt collector's representation would be likely to deceive a competent, nonspecialist lawyer.\textsuperscript{208} Given this disparate treatment for a nonconsumer third party and the \textit{O'Rourke} concurrence's brief suggestion that a "competent judge" standard might be appropriate for judges,\textsuperscript{209} it is worth exploring the standard's rationale and how courts have applied it.

\begin{itemize}
\item \textsuperscript{202} Because plaintiff failed to demonstrate falsity under any standard, including the lower least sophisticated consumer test).
\item \textsuperscript{203} \textit{Hartman}, 569 F3d at 608; \textit{Hemmingsen}, 674 F3d at 818.
\item \textsuperscript{204} \textit{Hartman}, 569 F3d at 613. See also Part III.C.
\item \textsuperscript{205} \textit{Hemmingsen}, 674 F3d at 818. See also Part III.B.
\item \textsuperscript{206} As noted before, the unsophisticated consumer test is the accepted standard in the Eighth Circuit. \textit{Peters}, 277 F3d at 1055. See Part V.A.1.
\item \textsuperscript{207} \textit{Henggeler v Brumbaugh & Quandahl}, PC, LLO, 2012 WL 762103, *4 (D Neb) (applying unsophisticated consumer test without question).
\item \textsuperscript{208} \textit{Evory}, 505 F3d at 774. A district court in the Third Circuit found the Seventh Circuit's reasoning persuasive and also adopted the competent attorney standard. On appeal, the Third Circuit did not expressly disagree with the district court's adoption, but the court held the issue of what standard to apply was not dispositive in the case. \textit{Allen ex rel Martin v LaSalle Bank}, NA, 629 F3d 364, 366 (3d Cir 2011).
\item \textsuperscript{209} \textit{O'Rourke}, 635 F3d at 947 (Tinder concurring).
\end{itemize}
When creating the new standard, the Evory court's rationale highlighted the different levels of competence between a consumer and an attorney.\textsuperscript{210} The court reasoned that just as "it is inappropriate to fix a physician's standard of care at the level of that of a medical orderly," the unsophisticated consumer standard is inappropriate because "a lawyer is less likely to be deceived, intimidated, harassed, and so forth" than a consumer.\textsuperscript{211} For the court, applying a higher standard would not impede a consumer's right to competent representation because most lawyers who represent consumers in debt collection cases are either knowledgeable about the law and practices of debt collection or can inform themselves "sufficiently to be able to represent their consumer clients."\textsuperscript{212} Furthermore, such a standard would not require the debt collector to know or rely on the attorney's level of expertise.\textsuperscript{213} However, if the communication were a false representation (as opposed to a deceptive or misleading representation)\textsuperscript{214} the same "unsophisticated consumer" standard would apply because it is just as difficult for a lawyer to see through a false statement as a consumer.\textsuperscript{215}

While the Seventh Circuit did not apply or explain how to apply the competent attorney standard, lower court decisions since Evory provide some idea about what courts would consider deceptive to the competent attorney.\textsuperscript{216} Courts have reasoned,

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\item See Evory, 505 F3d at 774–75.
\item Id at 774.
\item Id.
\item Id at 775.
\item Evory, 505 F3d at 775 ("Misleading' is similar to 'deceptive,' except that it can be innocent; one intends to deceive, but one can mislead through inadvertence. A sophisticated person is less likely to be either deceived or misled than an unsophisticated one. That is less true if a statement is false.").
\item The court reasoned:
A false claim of fact in a dunning letter may be as difficult for a lawyer to see through as a consumer. Suppose the letter misrepresents the unpaid balance of the consumer's debt. The lawyer might be unable to discover the falsity of the representation without an investigation that he might be unable, depending on his client's resources, to undertake. Such a misrepresentation would be actionable whether made to the consumer directly, or indirectly through his lawyer.

Evory, 505 F3d at 775.
\item Many lower courts dealing with communications to an attorney did not need to apply the heightened standard because the representation was false. See, for example, Hagy v Demers & Adams, LLC, 2011 WL 5325486, *9 (SD Ohio) ("[T]his Court need not
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for example, that a competent attorney would not be fooled by representations that the lawyer could verify by a cursory look at the FDCPA's text,\textsuperscript{217} that are offers of settlement,\textsuperscript{218} or that were attempts by a debt collector to "misrepresent herself as if she were a friend" while "fail[ing] to provide a meaningful identification."\textsuperscript{219} Regarding a debt collector's threat of illegal action, however, one lower court reasoned:

Parties often knowingly make threats of illegal action, hoping that the threat will intimidate the opposing party, who may not take comfort from the prospect of years of expensive and uncertain litigation to vindicate her rights. Such threats can have real effects. The FDCPA . . . [is] aimed directly at such tactics in the context of collecting consumer debts, where power and resources are often, let us say, asymmetrical.\textsuperscript{220}

Because the competent attorney cannot always ignore such threats, communications threatening action the lawyer knew to be illegal could still mislead an attorney into thinking the collector would do so regardless of the action's illegality.\textsuperscript{221}

B. Proposed Standard: a Reasonable Recipient with an Eye Towards Materiality

Current standards are insufficient to take into account both the FDCPA's text and competing objectives to protect consumers while not disadvantaging ethical debt collectors. Because the

\begin{footnotes}
\item[218] Villegas v Weinstein & Riley, PS, 723 F Supp 2d 755, 760–61 (MD Pa 2010). See Evory, 505 F3d at 776 ("We are exceedingly doubtful that any lawyer involved in representing debtors would be deceived by the settlement offers made by debt collectors, and doubt therefore that any cases based on such offers could survive summary judgment or even a motion to dismiss were the offer directed to the consumer's lawyer rather than to the consumer.").
\item[220] Captain v ARS National Services, Inc, 636 F Supp 2d 791, 796 (SD Ind 2009).
\item[221] Id. See Evory, 505 F3d at 777–78 (noting in dicta that "a threat to impose a penalty that the threatener knows is improper because unlawful is a good candidate for a violation of sections 1692d and e").
\end{footnotes}
statute is silent about how courts should assess false or misleading communications, courts must choose a standard that comports with the FDCPA's text and fulfills the Act's purposes and objectives. A more appropriate approach would apply § 1692e to all debt collector–judge communications and then ask whether the representation at issue is material to the recipient, here, the reasonable judge. In essence, a court would ask whether the representation would be likely to induce a judge to enter a judgment based on a false, misleading, or deceptive communication.

First, this Part will compare the proposed approach to the Seventh and Eighth Circuits' rule, and argue the proposed standard improves both approaches by maintaining both courts' reasoning while also harmonizing both approaches with the FDCPA. Next, this Comment will advocate for a departure from the Sixth Circuit's least sophisticated consumer approach, arguing the proposed standard is more consistent with the FDCPA's purposes and objectives, sufficiently preserves debt collector's judicial remedies, and would avoid potential pitfalls when applying the least sophisticated consumer approach to judges.

1. Comparing the proposed standard with the Seventh and Eighth Circuits' approaches.

Both the Seventh and the Eighth Circuits have adopted approaches that depart from the typical least or unsophisticated consumer when applied to nonconsumer communications. The Seventh Circuit exempts debt collector–judge communications from protection and uses the competent attorney standard for

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222 See Part IV.
223 This Part will refer to this solution as the “proposed standard” or “proposed approach.”
224 As one court explained:

In general, a complaint and attached affidavit act as both a message to the court and a message to the debtor. While the creditor seeks different action from either audience (payment from the debtor as opposed to judgment from the court), the general assertions are the same: that the debt is valid, that there is a total amount, that it is delinquent, that it is subject to interest, and that it is now due and owing. Therefore, a statement or claim based on an affidavit would be material if it makes one of those listed assertions more or less likely than if that fact were not considered.

_Midland Funding LLC v Brent_, 644 F Supp 2d 961, 969–70 (ND Ohio 2009).
debt collector–attorney communications. The Eighth Circuit uses a case-by-case approach to assess whether § 1692e applies, and then applies the unsophisticated consumer standard. Like the proposed standard, this Part will argue that materiality animates both approaches. However, as the statute demands FDCPA protection for all communications regardless of audience, neither approach is a satisfactory solution. The proposed solution would maintain the apparent materiality rationale behind both approaches while also staying true to the FDCPA’s text.

First, although the Seventh Circuit did not frame its competent attorney standard in terms of materiality, one could question whether the competent attorney standard is really a rough proxy for what representations are likely to be material to the reasonable recipient, the attorney. Following this reasoning, the false/deceptive dichotomy is really an inquiry into what would influence an attorney; in other words, a false statement is much more likely to alter the lawyer’s behavior to the consumer’s detriment. On the other hand, deceptive practices that could intimidate or persuade a vulnerable consumer would not influence a lawyer, one who is obligated to assess or acquire the relevant knowledge to zealously advocate the consumer’s case. Further, materiality arguably animated the court when it held that a deceptive statement violated the standard even though the representation was illegal because the statement could still affect the attorney’s decision to vindicate the consumer's right.

As the Seventh Circuit’s approach now stands, it is inconsistent with the FDCPA’s text. *O'Rourke* attempted to distinguish *Evory* on agency grounds. This distinction, however, is inconsistent with the FDCPA’s text because the statute does not distinguish among communications to different audiences. Moreover, the court’s agency rationale provides an unsatisfying divider because it just as easily led circuits in the

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225 See Part IV.
226 See *Evory*, 505 F3d at 775.
227 The feigned friendliness of the collector in *Marshall* comes to mind. See *Marshall*, F Supp 2d at 775–76.
228 See *Longo*, 2008 WL 4425444, *6 (implying nonspecialist lawyers are already expected to research the FDCPA to see if a representation complies with the law).
229 See *Captain*, 636 F Supp 2d at 796–97.
230 *O'Rourke*, 635 F3d at 941.
opposite direction, using the same reasoning to deny attorneys protections under the FDCPA.\(^{231}\) In contrast, the proposed approach would maintain the materiality logic behind the competent attorney standard, and it would expand the standard's reach to judges in a way that is both consistent with the statute and would not rely on agency.\(^{232}\)

Similarly, a cursory examination of the factors the Eighth Circuit examined in its gate-keeping case-by-case approach in Hemmingsen suggests that the court's key concern is materiality to the reasonable recipient.\(^{233}\) For example, the court considered whether any party took any action "in reliance" upon the accuracy of the communication.\(^{234}\) Moreover, the Eighth Circuit also examined whether the lower court was actually misled or influenced by the debt collector's communication.\(^{235}\) These factors the court highlighted imply that, regardless of audience, the court is really asking if the alleged communication unduly influenced the recipient's course of action.

Yet while the ends are similar to those achieved by a court applying § 1692e to judge communications coupled with a materiality inquiry, the Eighth Circuit's means are problematic. First, like the Seventh Circuit's approach, the Eighth Circuit's analysis abrogates the FDCPA's plain text by limiting the FDCPA's scope. Second, instead of providing clear guidelines for the threshold inquiry of whether § 1692e applies, the Eighth Circuit's approach obfuscates the issue by creating an amorphous "case-by-case" inquiry without giving lower courts a roadmap. A clearer standard that looks towards materiality would achieve the court's balancing concerns, and also inject consistency into the court's FDCPA application.

2. Departing from the Sixth Circuit's approach.

The proposed approach, and arguably the Seventh and Eighth Circuits' approaches, all stress materiality to the

\(^{231}\) See Part III.D.

\(^{232}\) This was the concern of the majority in O'Rourke. O'Rourke, 635 F3d at 943 *n 3 (reasoning extending the FDCPA to judges would require the court "to craft a test for whether a communication would confuse or mislead the sophisticated judge, and so on with each group of persons involved in the debt-collection process").

\(^{233}\) See Hemmingsen, 674 F3d at 819.

\(^{234}\) See id.

\(^{235}\) See id.
reasonable recipient. However, one could argue that courts should adopt the Sixth Circuit’s approach and simply assess debt collector–judge communications through the eyes of the least or unsophisticated consumer. The proposed standard, the argument goes, could unduly heighten a court’s inquiry and limit the FDCPA’s application, contravening Congress’s purpose of eliminating abusive debt practices in the abstract regardless of actual harm. However, this Comment argues that the proposed standard will better serve the FDCPA’s purposes, assure that courts adequately preserve creditors’ access to the courts, and avoid potential problems applying the least sophisticated consumer approach to a judge.

There is reason to believe that the proposed standard, one more tailored to the reasonable judge with an eye towards materiality, would better fulfill the Act’s competing purposes. As one Congressman posed the question, “[h]ow do we stop abusive practices without at the same time impairing the ability of honest, professional debt collectors to just collect debts?” Indeed, members of Congress sought to balance the need to eliminate abusive practices without putting ethical debt collectors at a competitive disadvantage, noting both objectives in the FDCPA’s statement of purpose. The FDCPA drafters did seek to eliminate abusive practices, but did not intend to eliminate them at all costs.

This balancing—eliminating abusive practices and not disadvantaging ethical debt collectors—suggests that Congress did not intend for courts to apply the FDCPA in a way that unconditionally covers conduct where the risk of actual abuse is slight. In other words, because no actual abuse is likely to occur,

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236 Hartman, 569 F3d at 613.
237 See 15 USC § 1692(a)–(e).
239 See 15 USC § 1692(a).
240 Stepping back from the FDCPA, consumers on the whole are not helped if the uncertainty of a loose, low standard scares creditors who rely on debt suits, unduly chilling their willingness to loan money. One commentator has noted creditors are increasingly concerned “that the United States is abandoning its traditional legal norms with regard to the enforcement of consumer credit contracts,” which could “exacerbate the current national economic problems by increasing the flight of capital from U.S. consumer credit markets.” Bruce N. Menkes, Recent FDCPA Decisions Impose New Requirements on State Court Collection Litigation, 62 Consumer Fin LQ Rep 248, 255 (2008).
such an application could unduly harm ethical debt collectors without comparably reducing abuse. A practice cannot be "abusive" in a vacuum; abuse implies there is some victim to the abuse. So an artificially low standard for debt collector–judge communications opens the door for meritless claims in which no actual abuse is threatened but still allows the recipient to seize on some technical or perfunctory violation that would confuse the least sophisticated consumer. For example, a debt collector could reasonably assume the judge knows about basic finance, such as how to calculate interest. Indeed, such knowledge is often essential. Yet such a communication might still run afoul of the least sophisticated consumer standard although neither the consumer nor the judge is harmed. As one court noted,

Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by [the FDCPA], not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem" of abuse that the Senate observed in adopting the legislation. . . . Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs . . . .

Consequently, a scheme too deferential to the least sophisticated consumer could greatly disadvantage ethical debt collectors while consistently failing to eliminate any abuse.

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241 See Midland, 644 F Supp 2d at 969–70 (reasoning a court document acts as a message to the judge, asserting "that the debt is valid, that there is a total amount, that it is delinquent, that it is subject to interest, and that it is now due and owing").


243 Courts using the unsophisticated consumer standard's heightened burdens of proof would not satisfactorily curb suits based on harmless debt collector conduct. It is true the standard's higher procedural requirements, including the court's emphasis on survey data, could significantly decrease the volume of cases grounded on highly technical violations because the requirements raise the evidentiary bar significantly for the plaintiff. However, Congress intended consumers to use the FDCPA as a private enforcement mechanism. See 15 USC § 1692k. Arguably requiring consumers to procure cumbersome and expensive data would unduly restrict the average consumer's access to the court system. In contrast, from the perspective of the reasonable judge, as federal courts are "well-suited to determine whether statements submitted to judges in collection cases are likely to mislead or deceive them," a consumer could cheaply bring a
A reasonable judge standard also addresses Congress's concern with preserving debt collectors' legitimate access to the courts. Court documents are frequently a debt collector's sole resource to collect consumer debt. Understanding this, Congress expressly intended to preserve creditors' legitimate judicial remedies in § 1692c, such as filing a lawsuit. In addition, courts have consistently recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. As "going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer," the need to preserve this right compels courts to apply statutes in a way that is sensitive to the right to access the courts. One could imagine without a standard tailored to the reasonable judge courts applying a low threshold for FDCPA liability for court communications might chill a debt collector's willingness to petition the court, harming the creditor's judicial remedies.

Finally, viewing judge communications from the eyes the least sophisticated consumer could expose courts to application pitfalls. It is possible a case could arise where a representation that would be immaterial to the least sophisticated consumer could materially influence a judge's default judgment decision. For example, in Miller v Javitch, Block & Rathbone, the court concluded that the consumer plaintiff had failed to show that a communication regarding "holders in due course," a legal definition, would mislead the least sophisticated consumer because "no reason exists to think that the least sophisticated consumer gives any thought to holders in due course—by

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FDCPA claim. O'Rourke, 635 F3d at 949 (Tinder concurring).

244 See Part II.

246 15 USC § 1692c (excepting from actionable communications those that "notify the consumer that the debt collector or creditor may invoke" or "intends to invoke" a "specified remedy" of a kind "ordinarily invoked by [the] debt collector or creditor"); Hemmingsen, 674 F3d at 818, citing Heintz v Jenkins, 514 US 296 (1995) (noting concern for preserving creditors' judicial remedies compels a cautious balancing of actionable FDCPA claims).


248 See id at 741.

249 See Hemmingsen, 674 F3d at 819.

250 561 F3d 588, 596 (6th Cir 2009).
definition, the least-sophisticated consumer lacks any knowledge of the concept." This reasoning suggests some communications could be so beyond the ken of the least sophisticated consumer so as to render them immaterial. In contrast, in the context of a default judgment when the collector is attempting to change the behavior of a judge, "likely an accomplished attorney before ascending to the bench, and who is presumed knowledgeable of the law due to his position on the bench—in other words, a sophisticated individual," such legal nuances could have a profound effect on the judge's decision. In these cases, the proposed standard would expand rather than contract actionable conduct.

VI. CONCLUSION

In light of the economic downturn and increase in FDCPA litigation, a court's approach to the FDCPA has taken on an added salience. For decades, however, courts have grappled with the FDCPA's text and purposes. As a result, the courts have answered the question of §1692e's scope with almost as many distinct approaches as there are circuit courts. While some courts have embraced §1692e's broad language and applied its protections to a debt collector's communications to a judge, others have sought to develop bright-line rules or fact-specific inquires to limit §1692e's reach. However, the Act's plain language, purposes, and legislative history all unerringly point to an approach that applies §1692e unequivocally to judge communications. Consequently, any court applying its own limiting principle runs afoul of the statute's purposes.

That the Act applies to a debt collector's communication regardless of whether the audience is a judge informs the inquiry into what is the appropriate standard to assess whether a communication is false or misleading. Current approaches fail to either take into account the FDCPA's text or are inappropriate in light of Congress's objectives. However, a standard that directs courts to assess FDCPA communications from the perspective of a reasonable recipient with an eye towards materiality acknowledges that the recipient of a communication could be a consumer, an attorney, or, as this

251 Id at 596 (emphasis in original).
252 O'Rourke, 635 F3d at 949.
Comment explored, a judge. Moreover, the standard addresses the competing values that animated Congress to pass the Act. When faced with apparent ambiguity, courts should adopt an approach that is consistent with both the FDCPA's text and purposes.