

An Argument for Regulating Debt Buyers Under the Fair Debt Collection Practices Act

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I. INTRODUCTION	407
II. THE FAIR DEBT COLLECTION PRACTICES ACT	409
III. THE EMERGENCE AND STRUCTURE OF THE DEBT BUYING INDUSTRY	411
IV. THE SUPREME COURT’S DECISION IN <i>HENSON V. SANTANDER CONSUMER USA INC.</i>	412
V. DEBT BUYERS HAVE ENGAGED, AND ARE LIKELY TO CONTINUE TO ENGAGE, IN UNFAIR DEBT COLLECTION PRACTICES	415
<i>A. Debt Buyers May Engage in Deception and Harassment</i>	415
<i>B. The Structure of the Debt Buying Industry is Conducive to Unethical Debt Collection Practices</i>	417
VI. AMENDING THE FDCPA COULD DETER UNETHICAL DEBT COLLECTION BEHAVIOR	419
VII. PROPOSED AMENDMENT	420
VIII. ALTERNATIVES TO THE FDCPA WILL FAIL TO SUFFICIENTLY POLICE DEBT BUYER ABUSES	420
<i>A. Common Law</i>	421
<i>B. State Statutes</i>	422
<i>C. Industry Self-Regulation</i>	423
<i>D. Federal Agency Action Using Unfair and Deceptive Practices Statutes</i>	423
IX. CONCLUSION	424

I. INTRODUCTION

In 1977, Congress made major strides towards stronger consumer protection by passing the Fair Debt Collection Practices Act (FDCPA).¹ Prior to passage of

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1. See Robert M. Hunt, *Collecting Consumer Debt in America*, Q2 FED. RES. BANK OF PHILA. BUS. REV. 11, 17 (2007).

the Act, debt collectors had been threatening consumers with death and bodily harm, impersonating attorneys and policemen, sending false documents, and harassing consumers at home and at work.² The law protects consumers from such unfair, deceptive, and abusive debt collection practices.³ The Federal Trade Commission, Consumer Financial Protection Bureau, and consumers have brought cases against companies that engage in these prohibited practices.⁴ The FDCPA benefits millions of consumers—the 77 million who have a debt in collections, as well as people who are mistakenly contacted about a debt.⁵ However, the Supreme Court recently created a gap in this protection. In *Henson v. Santander Consumer USA Inc.*, the Court held that a debt buyer was not subject to the restrictions of the statute.⁶ A debt buyer is a company that purchases debt, and then attempts to collect it for its own profit.⁷ This decision leaves consumers vulnerable to the same abusive debt collection practices that Congress sought to prohibit. Accordingly, this Note argues that Congress should amend the FDCPA to cover debt buyers, to prevent future harm to consumers.

There is evidence that debt buyers have engaged in deceptive and abusive debt collection practices in the past. The structure of the debt buying industry also is conducive to future misconduct. For instance, studies by the Federal Trade Commission and Professor Dalié Jiménez show that debt buyers receive limited information about the underlying debts they purchase.⁸ This lack of information could lead to attempts to collect inflated amounts. Many consumers with debts are living in poverty, and these exaggerated costs could “impact their ability to pay bills and support their children.”⁹ In addition, debt buyers’ profits depend on the amounts they are able to obtain from debtors, incentivizing them to use unethical methods to increase collection.¹⁰ Moreover, debt buyers likely do not maintain ongoing relationships with the individuals they attempt to collect from. Therefore, their behavior is not constrained by a desire to maintain good will.

This Note builds upon existing literature describing the debt buying industry¹¹ by discussing the Supreme Court’s *Henson* decision, and advocating for legislation that will require debt buyers to comply with the FDCPA. Part I discusses Congress’ goals in passing the FDCPA and provides an overview of the statute’s provisions. Part II looks at the emergence of debt buying after the passage of the FDCPA. This section includes a description of the debt buying industry, and an overview of a typical debt sale. Part III describes the Supreme Court’s *Henson* decision, which held that the debt buyer Santander was not subject to the restrictions in the statute.

2. H.R. REP. NO. 95-131, at 2 (1977).

3. See Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2012).

4. See CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT CFPB ANNUAL REPORT 20172 (2017) (hereinafter CFPB ANNUAL REPORT 2017); Hunt, *supra* note 1, at 19.

5. See Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 42 (2015).

6. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1719 (2017).

7. FED. TRADE COMM’N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY i (2013) (hereinafter STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY).

8. *Id.* at 35; Jiménez, *supra* note 5, at 63–64.

9. CHRIS ALBIN-LACKEY, HUMAN RIGHTS WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR (2016), <https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor>.

10. See Fed. Trade Comm’n v. Check Inv’rs, Inc., 502 F.3d 159, 174 (3d Cir. 2007).

11. See, e.g., STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, *supra* note 7; Jiménez, *supra* note 5.

Part IV argues that Congress should amend the FDCPA to cover debt buyers in order to protect consumers. Part V analyzes why Congressional action to amend the FDCPA is beneficial. Specifically, class action lawsuits brought under the FDCPA could help deter unethical behavior across the debt buying industry. Part VI provides proposed language that Congress could use when amending the statute. Part VII describes why alternatives to amending the FDCPA are inadequate to protect consumers. Alternatives include litigation under common law, lawsuits alleging violations of state statutes, industry self-regulation, and federal agency enforcement under unfair and deceptive practices statutes. These alternatives do not provide the same protections as the FDCPA and have either limited remedies or limited resources for enforcement.

II. THE FAIR DEBT COLLECTION PRACTICES ACT

When Congress passed the FDCPA in 1977, there were two main players in the debt collection industry: creditors and debt collectors.¹² A creditor, such as a bank, offered loans to consumers.¹³ If a consumer failed to pay a loan, the creditor often hired a debt collector to try to collect the debt from the consumer.¹⁴ This third-party debt collector attempted to collect the debt on behalf of the creditor. A successful debt collector would receive part of the debt it collected as payment.¹⁵ The more money a debt collector collected from a consumer, the more money it made. This profit structure created incentives for debt collectors to collect “by any means.”¹⁶

The legislative history of the FDCPA reveals that debt collectors were inflicting substantial suffering and anguish on consumers.¹⁷ In particular, collectors were threatening violence, using obscene language, making telephone calls at unreasonable hours, disclosing debts to consumers’ employers, making false statements to consumers, and impersonating attorneys and policemen.¹⁸ Furthermore, there was a lack of meaningful state legislation regulating debt collection practices.¹⁹ Thirteen states had no debt collection laws, and other states had laws providing little protection.²⁰ Congress decided federal legislative action was needed to protect consumers.²¹ Congress stated that consumers must not “lose their civil rights and be terrorized and abused by unethical debt collectors.”²²

The FDCPA puts limitations on debt collectors’ conduct. It generally does not apply to creditors.²³ Congress believed that creditors would not harass or lie to

12. See S. REP. NO. 95-382, at 2 (1977).

13. See H.R. REP. NO. 95-131, at 4 (1977).

14. See S. REP. NO. 95-382, at 2.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* (“The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level.”)

20. *Id.*

21. *Id.* at 3.

22. H.R. REP. NO. 95-131, at 3 (1977).

23. The FDCPA only applies to a creditor if it uses a name other than its own which would indicate that a third person is collecting or attempting to collect the debts. 15 U.S.C. § 1692a(6) (2012).

consumers when collecting a debt because creditors needed to maintain their good will.²⁴ Creditors have an incentive to maintain a good relationship with customers, so that the customers will seek out additional loan products from them in the future. In contrast, debt collectors are free to engage in unscrupulous practices because they have no further interaction with consumers after they collect a debt.²⁵ A 2015 study by Viktor Fedaseyev and Robert Hunt at the Federal Reserve Bank of Philadelphia that analyzed consumer complaints about debt collection provides evidence that creditors' concerns about their reputations lead them to use less harsh debt collection techniques than third-party debt collectors.²⁶

The FDCPA defines a debt collector as "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."²⁷ Once a company is deemed a debt collector, it cannot harass consumers, make deceptive statements when collecting a debt, or engage in unfair means to collect a debt.²⁸ For example, debt collectors cannot contact consumers before eight a.m. or after nine p.m.²⁹ They also cannot repeatedly call a consumer on the telephone with the intent to abuse or harass the consumer.³⁰ Moreover, debt collectors cannot make deceptive statements to consumers. They cannot falsely represent the amount of debt, make a false threat to arrest a consumer, or falsely represent that a communication is from an attorney.³¹ The consumer also has the right to receive information from the debt collector.³² The debt collector must send the consumer a written notice containing the amount of the debt and a statement about the consumer's right to dispute the debt.³³ If a consumer disputes the debt, the debt collector must mail the consumer a verification of the debt before it can resume collection.³⁴

There are two methods for policing violations of the FDCPA. First, the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) can bring lawsuits against debt collectors.³⁵ Second, consumers have a private right of action.³⁶ Congress viewed the FDCPA as primarily self-enforcing.³⁷ Individual consumers subject to abuses by debt collectors could enforce compliance with the law by bringing lawsuits.³⁸ Many state laws at the time of the FDCPA's passage did not allow for a private right of action, and the FTC did not

24. S. REP. NO. 95-382, at 2.

25. *Id.*

26. Viktor Fedaseyev & Robert Hunt, *The Economics of Debt Collection: Enforcement of Consumer Credit Contracts* 8 (Fed. Reserve Bank of Phila., Working Paper No. 15-43, 2015).

27. 15 U.S.C. § 1692a(6).

28. 15 U.S.C. §§ 1692d–1692f (2012).

29. 15 U.S.C. § 1692c(a)(1) (2012).

30. 15 U.S.C. § 1692d(5) (2012).

31. 15 U.S.C. §§ 1692e(2)(A), (3), (4) (2012).

32. 15 U.S.C. § 1692g (2012).

33. 15 U.S.C. §§ 1692g(a)(1), (a)(3).

34. 15 U.S.C. § 1692g(a)(4).

35. CFPB ANNUAL REPORT 2017, *supra* note 4, at 2.

36. 15 U.S.C. § 1692k (2012).

37. S. REP. NO. 95-382, at 5 (1977).

38. *Id.*

bring lawsuits on behalf of individual consumers.³⁹ Moreover, the FTC was only able to bring a limited number of lawsuits, which were unlikely to change practices across the debt collection industry.⁴⁰ In contrast, the FDCPA allows consumers to bring lawsuits individually or as a class.⁴¹

The FDCPA also provides for damages and attorney's fees. Each individual consumer can recover a maximum of actual damages plus additional damages of up to \$1,000.⁴² Class action damages are capped at actual damages, as well as the lesser of \$500,000 or one percent of the net worth of the debt collector.⁴³ In addition, if a consumer, or class of consumers, brings a successful lawsuit, the court will award costs and attorney's fees to the lawyer for the consumer or the class.⁴⁴ In contrast, if the court determines that an attorney has brought a FDCPA case in bad faith and for the purposes of harassment, it may award attorney's fees to the defendant debt collector.⁴⁵

III. THE EMERGENCE AND STRUCTURE OF THE DEBT BUYING INDUSTRY

After the FDCPA passed in 1977, the debt buying industry began. Debt buyers are companies that purchase debt and then attempt to collect it.⁴⁶ In 2009, an estimated 450 debt buyers purchased \$100 billion in distressed loans.⁴⁷ The sale of debts started in the late 1980s and early 1990s during the savings and loan crisis.⁴⁸ Many thrifts, financial institutions that take deposits and make home mortgage loans, failed and their assets were transferred to the FDIC.⁴⁹ These assets included consumer loans, which the FDIC sold to private buyers.⁵⁰ The debt buying industry was further spurred by the increase in credit card debt at the beginning of the twenty-first century.⁵¹ In 2007, Americans had more than \$838 billion in credit card debt.⁵² Credit card debt constituted more than seventy-five percent of the debt sold to debt buyers.⁵³

Debt buying can be a lucrative business. Industry analysts estimated that revenues in the debt buying industry totaled about \$6.2 billion in 2011.⁵⁴ A *New York Times* article on the debt buying industry also showed that large profits can

39. H.R. REP. NO. 95-131, at 3 (1977).

40. *Id.* at 7.

41. 15 U.S.C. § 1692k(a).

42. *Id.*

43. *Id.*

44. 15 U.S.C. § 1692k(a)(3).

45. *Id.*

46. Hunt, *supra* note 1, at 14.

47. STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, *supra* note 7, at 14 n.70.

48. *Id.* at 12.

49. See Hunt, *supra* note 1, at 14; Kenneth J. Robinson, *Savings and Loan Crisis*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/savings_and_loan_crisis.

50. See Hunt, *supra* note 1, at 14.

51. STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, *supra* note 7, at 12–13.

52. U.S. GOV'T ACCOUNTABILITY OFFICE, FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 1 (2009).

53. *Id.* at 7.

54. FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 14 (2009) (hereinafter COLLECTING CONSUMER DEBTS).

come from debt buying.⁵⁵ One debt buyer featured in the article purchased a portfolio of debt for \$28,000, and collected \$90,000 in six weeks, which is more than a two hundred percent profit.⁵⁶

The typical debt sale works in the following way. When a consumer first fails to pay a credit card balance, the creditor attempts to collect the debt itself. It usually engages in “soft” methods of collection, such as an email, letter, or phone call to the consumer reminding him that the payment is late.⁵⁷ After six months, the creditor will charge-off the account.⁵⁸ A charge-off is an accounting procedure where the creditor declares the debt unlikely to be collected.⁵⁹ Then the creditor bundles numerous unpaid debts into portfolios, and offers them for sale.⁶⁰ Debt buyers determine whether and what price to bid on the portfolio.⁶¹ Debt buyers compete for the opportunity to buy debt.⁶² The creditor generally accepts the highest bid and enters into a contract to complete the sale of debt.⁶³ Debt buyers pay an average of four cents per dollar of debt.⁶⁴ The price for debt is low because debt buyers do not successfully recover on every account, do not typically recover the full face value of an account, and incur substantial costs in collecting debts.⁶⁵ A debt buyer may later resell the debt to another debt buyer.⁶⁶

IV. THE SUPREME COURT’S DECISION IN *HENSON V. SANTANDER CONSUMER USA INC.*

In *Henson*, the Supreme Court determined that Santander, a debt buyer, was not subject to the requirements of the FDCPA.⁶⁷ In the case, four consumers, including Ricky Henson, sought to bring a class action lawsuit against Santander for violations of the FDCPA.⁶⁸ According to their complaint, they received automobile loans from CitiFinancial Auto.⁶⁹ They failed to meet their loan obligations, and defaulted on the debts.⁷⁰ Santander bought their debts and other car loan debts from CitiFinancial for \$3.55 billion.⁷¹ Subsequently, CitiFinancial waived the loan balances for the four plaintiffs as part of a settlement in a separate case.⁷² Accordingly, the plaintiffs no longer owed any debt. However, Santander

55. See Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES (Aug. 19, 2014), <https://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html>.

56. *Id.*

57. Jimenez, *supra* note 5, at 49.

58. *Id.* at 52.

59. *Id.*

60. STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, *supra* note 7, at 17.

61. *Id.* at 21.

62. *See id.* at 22.

63. *Id.*

64. *Id.* at 23.

65. *Id.*

66. *Id.* at 27.

67. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).

68. Complaint at 2, *Henson*, 137 S. Ct. 1718 (No. 16-349).

69. *Id.* at 6.

70. *Id.*

71. *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 134 (4th Cir. 2016).

72. Complaint at 8, *Henson*, 137 S. Ct. 1718 (No. 16-349).

continued to contact the consumers in an attempt to collect money.⁷³ Santander contacted consumers and falsely represented the amounts they owed.⁷⁴ Santander's misrepresentations led one of the plaintiffs to make multiple payments to Santander even though he owed nothing.⁷⁵ The FDCPA prohibits debt collectors from making false statements about the amounts owed.⁷⁶

The issue in the case was whether Santander was a "debt collector" as defined by the FDCPA, and thus could be liable for engaging in activities prohibited by the statute.⁷⁷ There was a split among the federal Courts of Appeals over whether debt buyers were "debt collectors."⁷⁸

The FDCPA has two definitions for a debt collector. First, a debt collector in the FDCPA is a person that regularly collects debts owed or due another.⁷⁹ Second, a person is a debt collector when the principal purpose of its business is the collection of debts.⁸⁰ However, the parties did not litigate the "principal purpose" definition, so the Court did not address whether Santander fit under this definition.⁸¹

The Court considered whether Santander was a debt collector because it regularly collected debts owed another.⁸² The plaintiffs argued that Santander was a debt collector because it collected debts that were previously owed to another company, CitiFinancial.⁸³ However, the Supreme Court disagreed and instead concluded that a company is only a debt collector if it collects debts that are *currently* owed to another entity.⁸⁴ To reach this conclusion, the Court first looked at the grammar of the word "owed," and determined that it can refer to a present state of affairs.⁸⁵ Next, the Court looked at other language in the FDCPA. "Due another," part of the debt collector definition, was written in the present tense.⁸⁶ In addition, in other parts of the FDCPA, Congress used the word "owed" to refer to current debt relationships.⁸⁷ The Supreme Court decided Santander was not a debt collector because it did not collect debts that were presently owed to another.⁸⁸ The Court reasoned that because Santander bought the debts, it was collecting debts that were owed to itself.⁸⁹ Therefore, the Supreme Court held that Santander

73. *Id.* at 9.

74. *Id.*

75. *Id.* at 10.

76. 15 U.S.C. § 1692e(2)(A).

77. *Henson*, 137 S. Ct. at 1720.

78. Compare *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 138 (4th Cir. 2016) (finding that Santander was not a debt collector because it was not collecting debts owed to another), with *Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d 159, 171, 173 (3d Cir. 2007) (finding that a debt buyer was a debt collector based on legislative history).

79. 15 U.S.C. § 1692a(6).

80. *Id.*

81. *Henson*, 137 S. Ct. at 1721.

82. *Id.*

83. *Id.* at 1722.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.*

89. *Id.*

was not covered under the FDCPA and affirmed the lower court's dismissal of the case.⁹⁰

The plaintiffs also argued that debt buyers should be covered under the FDCPA because this result was consistent with Congress' intent to deter "untoward debt collection practices."⁹¹ The debt buying industry was not addressed by the FDCPA because the business did not emerge until after Congress had passed the law.⁹² However, if Congress had known about the industry, it would have wanted to cover debt buyers in the FDCPA, or so plaintiffs argued.⁹³ In response, Santander argued that Congress would not have wanted to cover debt buyers within the statute.⁹⁴ Santander and other debt buyers did not need to be covered by the FDCPA because they already had an economic incentive to engage in ethical debt collection. Santander wants to maintain a good relationship with customers who owe debts, so they will obtain additional car loans from Santander in the future.⁹⁵ The Supreme Court, however, decided not to guess at Congressional intent and instead relied on the plain meaning of the text. The Court said Congress could amend the FDCPA if it wanted to cover debt buyers.⁹⁶

In sum, after the *Henson* decision, debt buyers are likely not covered by the FDCPA's definition of a debt collector because they do not collect debts presently owed another. Plaintiffs could try to argue that a debt buyer is a debt collector under the second part of the definition: the principal purpose of its business is debt collection.⁹⁷ However, this argument is unlikely to succeed. For example, the debt buyer Santander argued its primary business was loan origination, not debt collection.⁹⁸ The plaintiffs never disputed that Santander's principal purpose was not debt collection.⁹⁹ Additionally, one Court of Appeals found that a company's principal purpose was debt collection when its sole business was debt collection.¹⁰⁰ Most debt buyers do not solely engage in debt collection. For instance, Portfolio Recovery Associates, one of the largest debt buyers, also processes tax payments for local governments.¹⁰¹ Therefore, it is unlikely that a court will find that debt buyers fit under this second definition of a debt collector. If debt buyers are not considered debt collectors, they are not subject to the FDCPA's restrictions on deceptive, unfair, and abusive debt collection practices.

90. *Id.* at 1726.

91. *Id.* at 1725.

92. *Id.* at 1724-25.

93. *Id.* at 1725.

94. Brief for Respondent at 39, *Henson*, 137 S. Ct. 1718 (No. 16-349).

95. *Id.* at 38.

96. *Henson*, 137 S. Ct. at 1725.

97. 15 U.S.C. § 1692a(6) (2012).

98. *Henson*, 137 S. Ct. at 1725.

99. *Henson v. Santander Consumer USA Inc.*, 817 F.3d 131, 137 (4th Cir. 2016).

100. *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 404 n.27 (3d Cir. 2000); *see also Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1209 (9th Cir. 2013) (finding that Wells Fargo's principal purpose was not debt collection because only "some part" of its business was debt collection).

101. PRA Group, Inc., Annual Report (Form 10-K), SEC. & EXCHANGE COMM'N (Feb. 26, 2016), <https://www.sec.gov/Archives/edgar/data/1185348/000118534816000067/praa-20151231x10k.htm>.

V. DEBT BUYERS HAVE ENGAGED, AND ARE LIKELY TO CONTINUE
TO ENGAGE, IN UNFAIR DEBT COLLECTION PRACTICES

The holding of *Henson* leaves consumers vulnerable to abusive debt collection practices by debt buyers, who are not constrained by the restrictions of the FDCPA. There also is a concern that debt collectors who currently collect on behalf of creditors will instead choose to purchase the debts in order to evade the FDCPA's requirements.¹⁰² There is evidence that debt buyers engage in unethical practices, and the structure of the debt buying industry is conducive to further abuses. Congress should therefore amend the statute to cover debt buyers.

A. Debt Buyers May Engage in Deception and Harassment

Several lawsuits by the FTC and the CFPB show that debt buyers engage in unethical debt collection practices. Before the Supreme Court determined in *Henson* that the FDCPA did not apply to a debt buyer, federal agencies brought lawsuits against debt buyers under the statute. For instance, in *FTC v. Check Investors*, a district court found that a debt buyer harassed consumers by using "intimidating, demeaning and insulting language."¹⁰³ The debt buyer also engaged in deceptive conduct by misrepresenting the amount of debt owed, sending letters that falsely indicated the correspondence was from an attorney, and making false threats to file criminal and civil lawsuits.¹⁰⁴ The FTC brought another lawsuit against a different debt buyer, a company called CAMCO, for violations of several provisions of the FDCPA.¹⁰⁵ The government alleged that CAMCO made false threats to arrest consumers, used obscene language, and called consumers repeatedly on the telephone with the intent to harass the consumers.¹⁰⁶ The court found there was good cause to believe the FTC would ultimately succeed in establishing violations of the FDCPA, and granted a temporary restraining order enjoining future violations of the statute.¹⁰⁷

The FTC has also brought cases alleging that debt buyers seek to collect debts that are not real.¹⁰⁸ This practice is called "phantom debt collection."¹⁰⁹ The FTC alleged that one debt buyer purchased a group of payday loans, which the debt

102. Transcript of Oral Argument at 55, *Henson*, 137 S. Ct. 1718 (No. 16-349).

103. Federal Trade Commission v. Check Enforcement, No. 03-2115 (D.N.J. July 18, 2005), <https://www.ftc.gov/sites/default/files/documents/cases/2005/07/050728opcheckenforcement.pdf>.

104. *Id.*

105. *CAMCO to Pay \$1 million to Settle Unfair, Deceptive Debt Collection Practices*, FED. TRADE COMM'N (Dec. 5, 2006), <https://www.ftc.gov/news-events/press-releases/2006/12/camco-pay-1-million-settle-unfair-deceptive-debt-collection>.

106. *Capital Acquisitions and Management Corp. Complaint*, FED. TRADE COMM'N (Mar. 24, 2004), <https://www.ftc.gov/sites/default/files/documents/cases/2006/05/060524camcodefendantsstipfnl.pdf>.

107. *Capital Acquisitions and Management Corp. Temporary Restraining Order*, FED. TRADE COMM'N (Dec. 3, 2004), <https://www.ftc.gov/sites/default/files/documents/cases/2004/12/041208trocamco.pdf>.

108. *FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown Against Abusive Debt Collectors*, FED. TRADE COMM'N (Nov. 4, 2015), <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement-partners-announce> (hereinafter *FTC and Partners Announce Crackdown*).

109. *A Lesson in Phantom Debt Collection*, FED. TRADE COMM'N (Nov. 4, 2015), <https://www.consumer.ftc.gov/blog/2015/11/lesson-phantom-debt-collection>.

buyer later learned were not valid and should not be collected from consumers.¹¹⁰ However, the debt buyer tried to collect on the fake debts anyway.¹¹¹ Employees of the debt buyer threatened consumers with lawsuits and arrest if they did not make immediate payments.¹¹² They also falsely claimed to be attorneys.¹¹³ The court found there was good cause to believe the debt buyer was engaging in practices that violated the FDCPA, and granted a temporary restraining order.¹¹⁴

In addition, the CFPB entered into consent orders with two debt buyers over alleged violations of the FDCPA.¹¹⁵ The CFPB alleged that one of these debt buyers made false statements to consumers, called consumers more than twenty times in a two-day period, and called consumers before eight a.m. or after nine p.m.¹¹⁶ The other debt buyer allegedly attempted to collect inaccurate amounts of debt.¹¹⁷

Data further proves that problematic practices exist in the debt buying industry. An FTC study indicates that debt buyers seek to collect debts that consumers do not owe, or that are overstated.¹¹⁸ The FTC collected self-reported data from four debt buyers on consumer disputes between 2006 and 2009.¹¹⁹ It found that when debt buyers attempted to collect on consumer accounts, 3.2% of these consumers filed a dispute asserting that no debt was owed, or the amount of debt was not correct.¹²⁰ According to the FTC, if this rate was applied to the entire debt buying industry, it would mean that 1 million consumers each year might assert that debt buyers are attempting to collect the wrong amount of debt.¹²¹ This finding likely understates problems within the debt buying industry. The study only looked at customers filing disputes with debt buyers. Additional customers may believe the debt amount is inaccurate but find it too burdensome to complain.¹²² Consumer complaints to the CFPB provide additional evidence of problems across the debt collection industry. In 2015, consumers made 85,200 complaints about debt buyers, creditors, and other debt collectors.¹²³

110. *Id.*

111. *Id.*

112. *FTC and Partners Announce Crackdown*, *supra* note 107.

113. *Id.*

114. *Delaware Solutions Temporary Restraining Order*, FED. TRADE COMM'N (Oct. 6, 2015), <https://www.ftc.gov/system/files/documents/cases/151104delawaresoltro.pdf>.

115. *CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts*, CONSUMER FIN. PROTECTION BUREAU (Sept. 9, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/> (hereinafter *CFPB Takes Action*).

116. *Id.*

117. *Id.*

118. STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, *supra* note 7, at 37.

119. *Id.* at 37.

120. *Id.* at 38.

121. *Id.*

122. *Id.*

123. CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT CFPB ANNUAL REPORT 2016 18 (2016) (hereinafter CFPB ANNUAL REPORT 2016).

B. The Structure of the Debt Buying Industry is Conducive to Unethical Debt Collection Practices

The structure of the debt buying industry lends itself to unethical debt collection practices, of the type that Congress sought to prevent when passing the FDCPA. First, debt buyers receive limited and potentially inaccurate information when purchasing debt, which could lead debt buyers to misrepresent the amount of debt owed. In addition, debt buyers are incentivized to engage in practices that lead to increased collections, because this will increase their profits. Moreover, debt buyers' actions are not constrained by the need to maintain good will among consumers.

Debt buyers receive limited and possibly inaccurate information in debt sales, making it likely that debt buyers will misrepresent the amount of debt owed. Debt buyers generally receive very limited information and documentation when they purchase debt. They may only receive a spreadsheet containing the consumer's name and contact information, the account number, the outstanding balance, and the date of the last payment.¹²⁴ Debt buyers rarely receive backup documentation with their purchase. A study by the FTC found that debt buyers only receive additional documentation for twelve percent of the debts they purchase.¹²⁵ Moreover, debt sellers may refuse to allow debt buyers to request more information after a sale. Other sellers may only provide the documents for an additional fee.¹²⁶

Not only do debt buyers receive minimal information, the information they do receive may not be correct. Many creditors do not ensure the accuracy of the information they provide to debt buyers. In one study of debt sale contracts, only one quarter of debt sale contracts warranted that the information the seller was providing was complete and accurate.¹²⁷ In contrast, over a third of debt sale contracts explicitly stated that the seller did not make any claims as to the accuracy of the information.¹²⁸ For example, a contract involving a Bank of America entity stated that the seller had not made any representations as to the accuracy of any information provided by the seller, including the accuracy of the balance.¹²⁹

Without accurate and complete information, debt buyers may seek to collect an incorrect debt amount and misrepresent the amount that a consumer owes. At an FTC workshop, the agency received comments stating that because the information debt buyers receive is so deficient, debt buyers often seek the wrong amount of debt.¹³⁰ In fact, the complaint in *Henson* alleged that Santander falsely represented the amount of debt that consumers owed.¹³¹ The company stated that the consumers owed loan balances, which it tried to collect.¹³² However, the consumers did not owe any money on the loans because of a previous class action settlement.¹³³

124. STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, *supra* note 7, at 20–21.

125. *Id.* at 35.

126. Jimenez, *supra* note 5, at 70 (review of debt sale contracts).

127. Jimenez, *supra* note 5, at 61.

128. *Id.*

129. *Id.* at 62.

130. COLLECTING CONSUMER DEBTS, *supra* note 55, at 21.

131. Complaint at 9, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) (No. 16-349).

132. *Id.*

133. *Id.* at 8.

The profit structure of the debt buying business could also lead to the type of abusive conduct that the FDCPA prohibits. The debt buyer keeps any amount that the consumer pays.¹³⁴ The more money a debt buyer is able to collect from a consumer, the greater the profit the debt buyer receives. Thus, there is an incentive to use abusive or deceptive techniques to obtain as much payment as possible from consumers. As the Third Circuit noted in *Check Investors*, “[t]he collectors working there resorted to whatever harassment appeared likely to succeed; the only limit appears to have been a given tactic’s likelihood of bearing fruit by yielding a profit.”¹³⁵

Moreover, debt buyers can engage in abusive debt collection because they do not need to maintain a good reputation among the consumers they collect debts from. Unlike creditors, debt buyers do not have economic incentives to treat consumers well. Creditors need to maintain good standing in the community so that customers will choose to obtain loans from them in the future.¹³⁶

In *Henson*, Santander argued that it had an incentive to maintain good relationships with debtors in order to market additional loans to them in view of its two lines of business, debt buying and providing car loans.¹³⁷ However, it is unlikely that most debt buyers will have ongoing relationships with consumers from whom they attempt to collect debts. First, debt buyers often do not sell any products or services to consumers.¹³⁸ Even when debt buyers like Santander do offer loans, it is unlikely that the company would offer loans to the particular consumers it attempts to collect debts from. These consumers have loans in default, which means they stopped paying on the loans.¹³⁹ Debt buyers would not want to provide additional loans to consumers who had already defaulted on their first loans.

In addition, a debt buyer’s reputation would be irrelevant if consumers do not know that they are obtaining loans from a debt buyer. For example, Santander has an agreement with Chrysler, where a consumer can obtain a car loan under the brand name Chrysler Capital.¹⁴⁰ If a customer applies for financing online, the website heading reads “Chrysler Capital.”¹⁴¹ A customer would have to scroll to the bottom of the page to see tiny print showing an association with Santander.¹⁴² Accordingly, a consumer is likely not aware that Santander is providing the loan and Santander has no reason to be concerned over whether consumers maintain a good opinion of the company.

134. See STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, *supra* note 7, at i (describing how debt buyers purchase and collect debt).

135. Fed. Trade Comm’n v. Check Inv’rs, Inc., 502 F.3d 159, 174 (3d Cir. 2007).

136. Brief for Respondent at 38, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) (No. 16-349).

137. *Id.*

138. *Item 1. Business*, PRA Group, Inc., Annual Report (Form 10-K), SEC. & EXCHANGE COMM’N (Feb. 26, 2016), <https://www.sec.gov/Archives/edgar/data/1185348/000118534816000067/praa-20151231x10k.htm>.

139. Complaint at 6, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) (No. 16-349).

140. *Start Your Vehicle Financing Application*, CHRYSLER CAPITAL (2018), <https://apply.chryslercapital.com/applylong.aspx>.

141. *Id.*

142. *Id.*

VI. AMENDING THE FDCPA COULD DETER UNETHICAL DEBT COLLECTION BEHAVIOR

An amendment to the FDCPA that extends coverage to debt buyers would be beneficial because private class actions could deter bad practices by the debt buying industry as a whole by imposing significant monetary penalties. Debt buyers would be encouraged to engage in ethical practices to avoid these penalties.

If Congress amends the FDCPA to cover debt buyers, private individuals would be able to bring class actions against debt buyers for FDCPA violations, and if successful could receive actual and statutory damages. Debt buyers will be less likely to engage in unethical debt collection practices if these practices lead to lawsuits that cut into their profits. As Matthew Bremner writes, private lawsuits can “have positive reformatory effects on the debt collection industry by providing a serious financial disincentive for debt collectors to engage in abusive practices. . . . [L]ittle stands to change in a market where abuse is more profitable than compliance with the law.”¹⁴³ Class actions have been successful in deterring other unlawful conduct.¹⁴⁴ For instance, a study showed that the threat of antitrust class action lawsuits, which could impose substantial financial penalties on a company, deterred companies from engaging in price fixing.¹⁴⁵

One potential counterargument to allowing consumers to sue debt buyers is the concern that attorneys will bring an excessive number of FDCPA cases against debt buyers in the hopes of obtaining settlements and collecting attorney’s fees.¹⁴⁶ Some of these cases may allege violations of the statute where no actual harm has occurred.¹⁴⁷ It would be costly for debt buyers to defend against these lawsuits.¹⁴⁸ However, the FDCPA provides protections against meritless lawsuits. If a plaintiff brings a lawsuit in bad faith and for purposes of harassment, a court can award attorney’s fees to the defendant debt buyer.¹⁴⁹ In addition, Congress specifically addressed statutory violations that do not cause actual harm by imposing relatively minor sanctions. If consumers do not suffer actual damages, recovery is capped at \$1,000 per person with a maximum of \$500,000 for the entire class.¹⁵⁰

Amici in the *Henson* case also argue against subjecting debt buyers to class action liability because of the concern that such lawsuits will increase the cost of credit.¹⁵¹ They argue that if debt buyers have to incur the cost of FDCPA class action litigation, they will pay creditors less to purchase debts.¹⁵² Creditors will in

143. Matthew Bremner, Note, *The Fair Debt Collection Practices Act: The Need for Reform in the Age of Financial Chaos*, 76 BROOK. L. REV. 1553, 1574, 1579 (2011).

144. Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* 2 (Vanderbilt Univ. Law Sch., Working Paper No. 17-40, 2017).

145. *Id.* at 16.

146. Brief of Chamber of Commerce et al. as Amici Curiae Supporting Respondent at 24, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) (No. 16-349).

147. *Id.* at 23.

148. Brief of The Clearing House Association L.L.C. et al. as Amici Curiae Supporting Respondent at 29, *Henson*, 137 S. Ct. 1718 (No. 16-349).

149. 15 U.S.C. § 1692k(a)(3) (2012); *see also* *Vogler v. Grier Grp. Mgmt. Co.*, 309 S.W.3d 328, 332 (Mo. Ct. App. 2010) (affirming an award of attorney’s fees to a defendant when the trial court found no justification for a FDCPA lawsuit).

150. 15 U.S.C. § 1692k(a)(2).

151. *See, e.g.*, Brief of Clearing House Association at 29–30, *Henson*, 137 S. Ct. 1718 (No. 16-349).

152. *Id.* at 30.

turn increase the cost of credit for their consumers, in the form of higher interest rates.¹⁵³ However, the concern about the increased cost of credit can be mitigated if debt buyers simply behave ethically, which would lead to less litigation over violations of the FDCPA. In addition, even if plaintiffs bring successful FDCPA class actions against debt buyers, these actions are unlikely to increase the cost of credit because of the competitive bidding process to purchase debt.¹⁵⁴ If a debt buyer has paid a judgment or settlement for FDCPA litigation and offers a creditor less money to buy debt, it risks losing the debt portfolio to a competing buyer. Debt buyers would be motivated to absorb the costs of litigation, rather than risk losing future business.

VII. PROPOSED AMENDMENT

Congress should amend the FDCPA to cover debt buyers. Alternatively, it could pass new federal legislation that subjects debt buyers to the same restrictions as the FDCPA. Currently, the definition of a debt collector in the FDCPA is a person whose principal purpose is debt collection or who regularly collects debts owed another.¹⁵⁵ Congress should amend the definition to also include a person who “purchases debt and attempts to collect for his own account.” This new language would subject debt buyers to the restrictions of the FDCPA, which would allow both federal agency actions and class action lawsuits against debt buyers.

The definition of a creditor should also be amended. A creditor is exempt from the restrictions of the FDCPA. Currently, a creditor is a “person who offers or extends credit . . . or to whom a debt is owed.”¹⁵⁶ Debt buyers could be considered a creditor under the second part of the definition and escape coverage, because they are a person “to whom a debt is owed” after they purchase the debt. Therefore, Congress should eliminate this clause and define a creditor as a “person who offers or extends credit.”

VIII. ALTERNATIVES TO THE FDCPA WILL FAIL TO SUFFICIENTLY POLICE DEBT BUYER ABUSES

The Supreme Court suggests in its *Henson* opinion that there might be legal mechanisms already in place that will deter bad behavior by debt buyers.¹⁵⁷ However, an analysis of these alternatives undermines this suggestion. This section discusses the following alternatives to the FDCPA: common law actions, lawsuits brought pursuant to state statutes, industry self-regulation, and federal agency actions based on unfair and deceptive practices statutes. First, these alternatives may provide less protection for consumers than the FDCPA. Second, limited government enforcement resources are insufficient to incentivize a billion-dollar

153. *Id.*

154. STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, *supra* note 7, at 22.

155. 15 U.S.C. § 1692a(6).

156. 15 U.S.C. § 1692a(4).

157. *Henson*, 137 S. Ct. at 1725 (discussing how common law duties and statutes may deter debt purchasers from engaging in undesirable collection activities).

industry to change its practices. A legislative amendment to the FDCPA that covers debt buyers is necessary to promote good practices across the debt buying industry.

A. Common Law

Common law cases cannot sufficiently deter debt buyers from undesirable debt collection practices. Many violations of the FDCPA would not be violations of state common law. For example, when passing the FDCPA, Congress sought to prevent midnight calls by debt collectors. The statute prohibits even one call between nine p.m. and eight a.m.¹⁵⁸ However, consumers could not bring successful common law claims to prohibit one of these late-night calls. Common law claims require a more severe impact on the consumer. For instance, under a tort claim for invasion of privacy, a plaintiff must show that the debt collector's conduct was highly offensive to a reasonable person.¹⁵⁹ A debt buyer would be liable if it called a customer so persistently and frequently that it became hounding, and became a substantial burden to the plaintiff's existence.¹⁶⁰ In *Housh v. Peth*, a plaintiff was permitted to go forward on her invasion of privacy claim when a debt collector called her eight or nine times per day, called her at midnight, and caused her mental anguish.¹⁶¹ Similarly, debt collection practices have to severely impact plaintiffs' well-being in cases alleging intentional infliction of emotional distress. In Virginia, a plaintiff may need to show that the debt collection activity caused stress that led to physical injury, or led the person to seek medical attention.¹⁶² In Tennessee, a court allowed a case to go forward when a debt collector sent 42 threatening letters to the plaintiffs, leading them to become "greatly upset, emotionally distressed, and physically nervous and not well."¹⁶³ One call after nine p.m. would likely fail to give rise to a claim under both tort theories, because it is unlikely to cause the plaintiff severe distress.

Moreover, not many plaintiffs will be able to bring tort cases because lawyers will not be interested in taking on lawsuits with small damage awards. For instance, in *Housh v. Peth*, the debt collector's harassment led the plaintiff to lose a renter in her home, and caused her mental anguish.¹⁶⁴ The court awarded her a judgment of \$2,000.¹⁶⁵ This small damage award is not enough to cover the expenses of an attorney working on a contingency fee basis, and thus fewer challenges by private plaintiffs to debt buying industry practices would result if this is the only basis on which abusive conduct can be challenged.

158. 15 U.S.C. § 1692c(a)(1) (2012).

159. *Kuhn v. Account Control Tech.*, 865 F. Supp. 1443, 1448 (D. Nev. 1994).

160. RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 625B (AM. LAW INST. 1977).

161. *Housh v. Peth*, 133 N.E.2d 340, 341 (Ohio 1956).

162. *Russo v. White*, 400 S.E.2d 160, 163 (Va. 1991).

163. *Moorhead v. J.C. Penney Co.*, 555 S.W.2d 713, 716–18 (Tenn. 1977).

164. *Housh*, 133 N.E.2d at 341.

165. *Id.*

B. State Statutes

Congress enacted the FDCPA because there was no meaningful debt collection legislation at the state level.¹⁶⁶ Forty years later, some states still do not have a state law governing debt collection practices.¹⁶⁷ Other state laws impose very limited obligations on the debt collection industry. For example, Alabama only requires debt collectors to pay a license tax of \$100 and the law does not apply to debt buyers.¹⁶⁸ Even in states that do impose regulations on the conduct of debt collectors, there is limited enforcement power. A number of state laws do not allow individuals a private right of action.¹⁶⁹ State attorneys general can bring enforcement actions, but they have limited resources. Between 2006 and 2009, state attorneys general only brought sixty enforcement actions against debt collection companies.¹⁷⁰ The Buffalo bureau of the New York Attorney General's Office has two people devoted to the collections industry, but receives thousands of written complaints about debt collectors each year.¹⁷¹ Moreover, state attorneys general often choose not to use their limited resources to police debt collectors who harass their state residents from across state lines.¹⁷² Debt buyers may choose to work in states with reduced regulation in order to avoid litigation.

It is unlikely that most states will enact legislation with greater restrictions on debt buyers. The FDCPA allows states to pass laws with stronger consumer protections, but debt buyers are engaging in powerful lobbying efforts to prevent these changes.¹⁷³ The Receivables Management Association (RMA) advocates on behalf the debt buying industry.¹⁷⁴ It engages lobbyists in numerous states, and claims it had a positive outcome for the industry on every bill it negotiated at the state level.¹⁷⁵ In the past, industry lobbying efforts have successfully defeated efforts to increase consumer protection. For example, a bill in Oregon that would have imposed greater restrictions on debt collectors failed when it faced industry opposition.¹⁷⁶ Debt buying industry representatives also successfully blocked a law in Florida.¹⁷⁷

166. S. REP. NO. 95-382, at 2 (1977).

167. Brief for Oregon et al. as Amici Curiae Supporting Petitioners at 11, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) (No. 16-349).

168. ALA. CODE § 40-12-80 (2017).

169. Brief for Oregon et al. as Amici Curiae Supporting Petitioners at 12, *Henson*, 137 S. Ct. 1718 (No. 16-349).

170. U.S. GOV'T ACCOUNTABILITY OFFICE, FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 38 (2009).

171. Halpern, *supra* note 56.

172. Todd Zywicki, The Law and Economics of Consumer Debt Collection and Its Regulation 11 (Sept. 2015) (unpublished article) (on file with George Mason University Mercatus Center).

173. 15 U.S.C. § 1692n (2012).

174. *Advocacy*, RECEIVABLE MGMT. ASS'N, <https://rmassociation.org/advocacy> (last visited Mar. 23, 2018).

175. *Id.*

176. Carter Dougherty, *Debt Collectors Lobby to Block Tougher Rules*, BLOOMBERG (Sept. 21, 2011), <https://www.bloomberg.com/news/articles/2011-09-21/debt-collectors-lobby-to-block-tougher-state-rules>.

177. *Id.*

C. Industry Self-Regulation

Industry self-regulation is not strong enough to ensure fair practices in the debt buying industry. The RMA imposes discipline on debt buyers who become members of RMA, and engage in bad conduct.¹⁷⁸ However, the RMA's Code of Ethics, which describes how a debt buyer should behave, is much weaker than the FDCPA. To take just one example, under the FDCPA, a company collecting a debt cannot falsely represent the amount of debt owed.¹⁷⁹ The RMA Code of Ethics lacks this protection. Debt buyers also are subject to minimal discipline for violating the Code of Ethics. RMA discipline is limited to suspension of RMA membership, expulsion from the RMA, and informal or formal reprimands.¹⁸⁰ These penalties are too weak to deter bad behavior by debt collectors. Unlike lawsuits, they do not directly impact a debt buyer's profits. In addition, participation in the RMA is voluntary.¹⁸¹ Debt buyers could choose not to become members and would be free to engage in abusive conduct.

D. Federal Agency Action Using Unfair and Deceptive Practices Statutes

Federal agency enforcement actions under unfair and deceptive practices statutes cannot police debt buyers to the same extent as class actions under the FDCPA. Federal agencies have limited resources to bring enforcement actions.

The FTC and the CFPB have the authority to bring unfair and deceptive practices (UDAP) lawsuits against debt buyers. The FTC's authority comes from Section 5 of the Federal Trade Commission Act, and the CFPB brings these lawsuits under the Dodd-Frank Act.¹⁸² Under both statutes, a company engages in deception if it makes a representation that is likely to mislead a reasonable consumer.¹⁸³ The representation must also be material, or important to consumers.¹⁸⁴ An unfair act is one that is likely to cause substantial injury, which is not reasonably avoidable by consumers, and where the injury to consumers is not outweighed by the countervailing benefits to consumers or competition.¹⁸⁵ The agencies may seek injunctive relief, so that debt buyers change their business practices.¹⁸⁶ CFPB enforcement actions can also lead to substantial monetary penalties. In 2015, the CFPB took action against two debt buyers, Encore and Portfolio Recovery Associates.¹⁸⁷ Pursuant to the consent orders, the debt buyers had to provide millions of dollars in refunds to consumers and penalties to the

178. *Code of Ethics*, RECEIVABLE MGMT. ASS'N, <https://rmassociation.org/about-rma/code-of-ethics> (last visited Mar. 23, 2018).

179. 15 U.S.C. § 1692e(2)(A) (2012).

180. *Code of Ethics*, RECEIVABLE MGMT. ASS'N, <https://rmassociation.org/about-rma/code-of-ethics> (last visited Mar. 23, 2018).

181. *Id.*

182. Federal Trade Commission Act, 15 U.S.C. § 45 (2012); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

183. CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 2013-07, PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS 3 (2013).

184. *Id.*

185. *Id.* at 2.

186. First Amended Complaint for Injunctive and Other Equitable Relief, *FTC v. Check Inv'rs, Inc.*, 2003 U.S. Dist. LEXIS 26941 (D.N.J. Oct. 4, 2004) (No. 03-2115).

187. *CFPB Takes Action*, *supra* note 116.

CFPB.¹⁸⁸ The total cost for Portfolio Recovery Associates was \$27 million, which was eight percent of its net income that year.¹⁸⁹ The total cost to Encore, \$52 million, exceeded its net income in 2015.¹⁹⁰

The federal government also can bring enforcement actions against creditors who sold debt and provided inaccurate information to debt buyers. The CFPB brought an action alleging that Chase Bank engaged in an unfair practice when it provided inaccurate information to debt buyers.¹⁹¹ In a consent order, Chase agreed to implement processes to provide accurate information to debt buyers and pay a penalty to the CFPB.¹⁹²

Even though federal agency enforcement can impact individual companies, federal agencies have limited resources to bring enforcement actions, and cannot alone deter unethical debt collection practices. Consumers make more complaints to the FTC about debt collection than any other industry.¹⁹³ In 2015, the FTC brought or resolved eighteen enforcement actions under the FDCPA, as compared to the 70,000 debt collection complaints it receives per year.¹⁹⁴ This is the highest number of cases the FTC has brought or resolved under the FDCPA in any single year.¹⁹⁵ Similarly, the CFPB received 85,200 debt collection complaints in 2015, but only brought or resolved seventeen enforcement actions under the FDCPA that year.¹⁹⁶ In contrast, that same year, private litigants filed almost 12,000 lawsuits.¹⁹⁷ The FTC noted that it is “not feasible for federal government law enforcement to be the only or primary means of deterring all possible law violations. Private actions therefore are critical in deterring those who would violate the FDCPA.”¹⁹⁸

IX. CONCLUSION

In its decision in *Henson*, the Supreme Court left a dangerous gap in consumer protection law. The FDCPA no longer restricts the behavior of debt buyers, allowing them to engage in unfair, deceptive, and abusive debt collection practices. Not only is the structure of the debt buying industry likely to encourage unscrupulous debt collection practices, there is also evidence that debt buyers do

188. *Id.*

189. PRA Group, Inc., Annual Report (Form 10-K), SEC. & EXCHANGE COMM’N (Feb. 26, 2016), <https://www.sec.gov/Archives/edgar/data/1185348/000118534816000067/praa-20151231x10k.htm>.

190. Encore Capital Group, Inc., Annual Report (Form 10-K), SEC. & EXCHANGE COMM’N (Feb. 24, 2016), <https://www.sec.gov/Archives/edgar/data/1084961/000108496116000130/ecpg-20151231x10k.htm>.

191. Consent Order, In re Chase Bank, USA N.A., CFPB No. 2015-CFPB-0013 (July 8, 2015), http://files.consumerfinance.gov/f/201507_cfpb_consent-order-chase-bank-usa-na-and-chase-bankcard-services-inc.pdf.

192. *Id.*

193. *Debt Collection*, FED TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/consumer-finance/debt-collection> (last visited Jan. 6, 2018).

194. CFPB ANNUAL REPORT 2016, *supra* note 124, at 70; Herb Weisbaum, *Debt Collectors Getting More Aggressive*, NBC NEWS, http://www.nbcnews.com/id/26178152/ns/business-consumer_news/t/debt-collectors-getting-more-aggressive/#.WIDqcCOZNo4 (last updated Aug. 14, 2008).

195. CFPB ANNUAL REPORT 2016, *supra* note 124, at 70.

196. *Id.* at 19, 27.

197. Brief for Chamber of Commerce et al. as Amici Curiae Supporting Respondent at 22, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) (No. 16-349).

198. COLLECTING CONSUMER DEBTS, *supra* note 55, at 67.

in fact deceive and abuse consumers. Congress should eliminate this gap by amending the FDCPA so that it covers debt buyers. Amending the FDCPA will be the most successful way to deter these harmful practices. The amended statute will allow plaintiffs to bring class actions, which will encourage ethical collection methods in the debt buying industry. Alternatives to legislative reform are not strong enough to provide this deterrent effect. These alternatives provide less protection than the FDCPA and have limited remedies or enforcement capacity. Congress should once again take action to ensure the well-being of consumers.