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Ending Litigation and Financial Windfalls on Time-Barred Debts

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Ending Litigation and Financial Windfalls on Time-Barred Debts

Marc C. McAllister*

Abstract

A trap for unsophisticated debtors, debt collectors often attempt to collect time-barred debts through written offers to settle those debts for a fraction of what is owed. Debtors typically respond to such offers in one of four ways. First, some debtors simply pay the offered settlement amount, usually 10%–40% of the total outstanding debt, thereby satisfying the debt in full. Second, those who wish to eliminate the debt but cannot pay the entire offered settlement amount will instead make a small payment, unwittingly reviving the statute of limitations on collections and making the entire debt judicially enforceable for several years to follow. Third, some debtors simply disregard the matter, which often leads to a suit to collect the debt, where results range from the debtor owing nothing (if he defends and asserts the statute of limitations defense) to a judgment far exceeding the amount of the debt (if the debtor does not defend and the matter is resolved by default judgment). Finally, some debtors sue the collector for unlawful collection efforts, where results vary based on the precise wording of the collector's offer letter and whether such an offer is deemed unlawful in the debtor's jurisdiction.

When a debtor exercises either of the first two options, the result is a windfall to collectors, who might otherwise be unable to collect on the debt due to the statute of limitations. When a debtor exercises either of the final two options, already-overburdened courts are swamped with difficult and unnecessary cases.

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This Article proposes a series of reforms designed to ease the burden on courts while generating financial outcomes that are roughly the same for all time-barred debts. For written attempts to collect time-barred debts, this Article proposes warnings informing the debtor that the statute of limitations has run on the debt and that any payment will reset the limitations period for its entire amount, as well as an opportunity for the debtor to pay the proposed settlement amount, and no more, in installments.

As an additional layer of protection, this Article proposes an amendment to the Fair Debt Collection Practices Act (FDCPA) plainly declaring that suing to collect on a time-barred debt violates the FDCPA, along with another amendment clarifying that it is lawful for a collector to seek repayment on a time-barred debt outside of court, but only if the notices and promises proposed above are included in the collector's written settlement offer.

As a final layer of protection, this Article proposes changes to existing rules that deem the statute of limitations defense waived unless asserted. Under this proposal, a plaintiff attempting to collect an old debt would be required to prove, with evidence, that a debt is not time-barred in order to obtain a judgment, default or otherwise, in the case. As a backstop to this proposal, this Article further proposes that courts screen all motions for default judgments in consumer debt suits and dismiss those cases where the plaintiff fails to prove the suit is timely.

In combination, these proposals will resolve the present circuit split on the lawfulness of collection efforts on time-barred debts, make financial outcomes more uniform across similarly-situated debtors, and ensure that most collection activity on time-barred debts occurs outside the judicial process, alleviating courts of this burdensome litigation.

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I. Introduction

Americans have a lot of debt,¹ and often experience difficulties paying their debts.² These circumstances have given rise to the 13.7 billion dollar debt collection industry, which includes approximately 6,000 collection agencies,³ affects nearly 77 million Americans,⁴ and is one of the fastest growing industries today.⁵

Much debt collector revenue derives from medical debt, student loans, credit cards, student loans, and mortgages.⁶ When consumers are unable to pay their debts, debt owners typically deem the consumer in default, and eventually “charge off” the debt and place it in collection.⁷ Collection efforts may then be made by

1. As of November 2016, the Federal Reserve reported that Americans have \$3.75 trillion in consumer debt. *See Federal Reserve*, BOARD GOVERNORS FED. RES. SYS., <https://www.federalreserve.gov/releases/g19/current/default.htm#fn1a> (last updated Oct. 6, 2017) (last visited Feb. 17, 2018) (detailing outstanding consumer credit from 2012 to present) (on file with the Washington and Lee Law Review). This data covers most credit extended to individuals, excluding loans secured by real estate. *Id.* Of this amount, \$2.76 trillion consists of non-revolving debt, such as student and vehicle loans, whereas \$992.4 billion consists of revolving debt, which includes credit card debt. *Id.* In addition, as of September 30, 2012, about \$1.01 trillion of consumer debt was delinquent and \$740 billion was seriously delinquent (at least 90 days late). *See* Conor P. Duffy, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments in Consumer Debt Buyer Lawsuits in New York*, 40 *FORDHAM URB. L.J.* 1147, 1152 n.15 (2013) (reporting Federal Reserve data).

2. *See, e.g.*, Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 *LOY. CONSUMER L. REV.* 355, 355 (2012) (describing one debtor’s experience regarding a credit card debt she was unable to pay after having become ill and unable to work).

3. BUREAU OF CONSUMER FIN. PROT., FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 8 (2016) [hereinafter 2016 FDCA ANNUAL REPORT], http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

4. *See id.* (noting a recent study finding that 35% of Americans, more than 77 million people, had a trade line on their credit reports indicating some type of debt in collections).

5. *See* Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 *N.M. L. REV.* 327, 333–38 (2014) (examining the rapid growth in the debt collection industry); Fox, *supra* note 2, at 357 (noting that “[t]he debt industry is one of the few booming industries left in America”).

6. 2016 FDCA ANNUAL REPORT, *supra* note 3, at 8–9.

7. *See* Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 *MO. L. REV.* 707, 713–14 (2008) (noting that 6% of all personal credit

the original creditor or present owner of the debt (called first-party debt collectors), or by third-party debt collectors consisting of both debt collection firms and law firms that specialize in such collection efforts.⁸

More than half of third-party collector revenue, \$7.5 billion, is generated by collectors contracting with creditors to collect their debts on a contingency fee basis under which any amount collected is split between the creditor and collector.⁹ Under such arrangements, collectors' fees may increase based on the age of the accounts.¹⁰ In general, older accounts offer larger fees, creating incentives to use more aggressive collection tactics.¹¹ Because third-party debt collectors seek to collect as much money as they can on old debts for themselves and their creditor clients, their interests are adverse to consumers.¹² In addition, as compared to creditors, who compete for consumer business, third-party debt collectors may be relatively unconcerned with their reputation amongst consumers.¹³ For these reasons, third-party debt collectors have little market incentive to attempt to collect debts in

card accounts are charged off annually); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 52 (2015) (explaining that “[a] charge-off has no effect on the validity or enforceability of the debt; it is simply an accounting procedure”).

8. Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67489 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006).

9. See 2016 FDCA ANNUAL REPORT, *supra* note 3, at 9 (“About one third of debt collection revenue, \$4.4 billion, comes from debt buyers, who purchase accounts from the original creditor or other debt buyers and then generally seek to collect on that debt, either themselves or through third-party debt collector.”).

10. See Duffy, *supra* note 1, at 1159 (citing FRED WILLIAMS, FIGHT BACK AGAINST UNFAIR DEBT COLLECTION PRACTICES: KNOW YOUR RIGHTS AND PROTECT YOURSELF FROM THREATS, LIES AND INTIMIDATION 74 (2011)) (stating that the longer fees go uncollected, the greater chance your fees will increase).

11. See *id.* at 1159 (discussing the consequences of growing fees).

12. See CONSUMER FIN. PROT. BUREAU, SMALL BUSINESS REVIEW PANEL FOR DEBT COLLECTOR AND DEBT BUYING RULEMAKING: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED, 1 (2016) [hereinafter CFPB OUTLINE OF PROPOSALS], http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf (showing that debt collection remains a major source of consumer complaints, lawsuits, and enforcement actions).

13. See Debt Collection (Regulation F), 78 Fed. Reg. at 67849.

a non-aggressive manner, generating a need to regulate their practices.¹⁴

In 1977, in light of the “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,”¹⁵ Congress enacted the Fair Debt Collections Practices Act (FDCPA) to govern the collection efforts of third-party debt collectors.¹⁶ When the FDCPA was enacted, one of Congress’s stated purposes was to “eliminate abusive debt collection practices by debt collectors.”¹⁷ Despite this ambitious goal, significant debt collection problems have persisted.¹⁸ One such problem is the attempted collection of debts that cannot be judicially enforced due to expiration of the statute of limitations on the debt (“time-barred debts”),¹⁹ an issue that has created a recent circuit split²⁰ and is the focus of this Article.

A trap for unsophisticated consumers, debt collectors often attempt to collect time-barred debts by offering debtors the opportunity to “settle” such debts for a fraction of the amount owed.²¹ In such offers, debt collectors usually fail to convey that the

14. *See id.* (“Firms . . . have a limited incentive to engage in less aggressive tactics if those tactics lead to increased recovery of debts.”).

15. 15 U.S.C.A. § 1692(a) (Westlaw through Pub. L. No. 115-61).

16. *See* Heintz v. Jenkins, 514 U.S. 291, 292 (1995) (explaining that the FDCPA prohibits “debt collector[s]” from engaging in various collection practices); 15 U.S.C.A. § 1692a(6) (Westlaw) (defining the term “debt collector” to mean “any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another”); *id.* § 1692a(5) (limiting “debt” to consumer debt, i.e., debts “arising out of . . . transaction[s]” that “are primarily for personal, family, or household purposes”).

17. 15 U.S.C. § 1692(e) (2012).

18. *See* Debt Collection (Regulation F), 78 Fed. Reg. at 67851 (“Consumers have submitted more complaints to the FTC about debt collectors than any other single industry.”).

19. A time-barred debt is one that is older than the applicable statute of limitations. *Id.* at 67875. Such debt is also known as “stale” debt, or “out of statute” debt. FED. TRADE COMM’N, THE STRUCTURE AND PRACTICE OF THE DEBT BUYING INDUSTRY 42 n.174 (2013) [hereinafter FTC REPORT ON DEBT BUYING INDUSTRY], <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf>.

20. *See infra* Part V.C (discussing whether an offer to settle a time-barred debt may violate the FDCPA).

21. *See, e.g.,* Buchanan v. Northland Grp., Inc., 776 F.3d 393, 395–96 (6th Cir. 2015) (examining a debt collector’s offer to settle a time-barred debt for

debt is no longer enforceable in court; that it likely violates the FDCPA for the collector to sue to collect the debt if the debtor does not respond to the collector's offer;²² and that a debtor who makes a partial payment on the debt, however small, will revive the statute of limitations on the debt and permit judicial recovery of the *entire* balance for many years to follow.²³

When a debtor receives an offer to settle a time-barred debt, the debtor will usually exercise one of four options. First, some debtors will simply pay the stated settlement amount in full, thereby eliminating the debt. Second, debtors who are unable to pay the full settlement amount, but wish to pay off the debt, will instead pay a portion of the offered settlement, unwittingly reviving the statute of limitations on the debt and obligating themselves to pay the entire amount owed, which can now be judicially enforced.²⁴ A third group of debtors simply disregard all collection efforts, even those made in litigation, setting up a potential default judgment that will obligate the debtor to pay a sum far in excess of the entire debt.²⁵ Finally, some debtors will take an aggressive approach by filing suit against the collector for unlawful collection practices, often under the FDCPA.²⁶ When such debtor suits fail, debtors generally must pay litigation costs and

approximately 35% of the past due account balance on the debt).

22. See *infra* Part V.C (discussing the relevant case law and potential circuit split).

23. See *infra* Part III.A (discussing the partial payment rule).

24. See, e.g., *Yeiter v. Knights of St. Casimir Aid Soc'y*, 607 N.W.2d 68, 71 (Mich. 2000) (explaining that, at least since 1885, "a partial payment [on a debt] restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation").

25. See *Duffy*, *supra* note 1, at 1165–66 (explaining that judgment amounts on consumer debts often exceed the original amount of the debt due to interest, fees, and legal costs; and noting that in New York, a judgment holder is entitled to 9% annual statutory interest of the judgment pursuant to N.Y. C.P.L.R. LAW § 5004 (McKinney 2017)); *Haneman*, *supra* note 7, at 717 (reporting that, due to added interest, litigation costs, and attorney's fees, such cases can result in a judgment amount of more than 300% of the amount originally owed).

26. See, e.g., *Buchanan*, 776 F.3d at 395–96 (describing a case where debtor sued a collector under the FDCPA after debtor received a collection letter that offered to settle her time-barred debt but did not notify her that Michigan's six-year statute of limitations had run or that partial payment would restart the applicable statute of limitations).

their own attorney fees.²⁷ When such suits prevail, debtors recover money themselves, sometimes hundreds of thousands of dollars.²⁸ Due to a current circuit split involving such debtor suits, the success of a debtor's FDCPA claim will largely depend on the jurisdiction where litigation ensues.²⁹

Depending on a debtor's knowledge of the complex and interwoven laws governing time-barred debts, their willingness to engage with a debt collector or participate in litigation over an old debt,³⁰ and other variables, such as whether the debtor believes the debt is even valid,³¹ all four of the above options may seem perfectly reasonable.³² Yet, some of these options, when exercised, result in a financial windfall to the collector, who might otherwise be prevented from collecting any portion of the debt due to the statute of limitations. Others result in a windfall to the debtor, who almost always incurred, yet failed to pay, a debt.³³ Current laws

27. See *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1179 (2013) (concluding that a district court may award costs to prevailing defendants in FDCPA cases without finding that the plaintiff brought the case in bad faith and to harass).

28. See *infra* notes 142–161 and accompanying text (discussing law firms suing debtors for time-barred debts).

29. See *infra* Part VI.C (discussing whether an offer to settle a time-barred debt may violate the FDCPA); *cf.* 15 U.S.C.A. § 1692i (Westlaw through Pub. L. No. 115-61) (obligating debt collectors to file collection suits against consumers either in the judicial district “in which such consumer signed the contract sued upon” or “in which such consumer resides at the commencement of the action”).

30. See Bernice Yeung, *Some Lawyers Want to Keep Debt Collection Out of the Courts*, N.Y. TIMES (Apr. 22, 2010), <http://www.nytimes.com/2010/04/23/us/23sfdebt.html> (last visited Feb. 17, 2018) (reporting that debtors often don't respond to collection efforts “because they don't know how, and that's how the debt buyers make their money”) (on file with the Washington and Lee Law Review).

31. See 2016 FDCPA ANNUAL REPORT, *supra* note 3, at 18–19 (reporting that the most common debt collection complaint received by the CFPB involves continued attempts to collect a debt the consumer reports is not owed). Most of those particular complaints report that the debt is not their debt (63%), while others report that the debt was already paid (26%), resulted from identity theft (6%), or was discharged in bankruptcy (4%). *Id.*

32. See *generally* *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 400 (6th Cir. 2015) (Kethledge, J., dissenting) (recognizing that “a conscientious debtor” who receives an offer to accept about 35 cents on the dollar of what she owed would either accept this offer, simply ignore it, or even sue the collector for making it).

33. There are some circumstances where the debt at issue is not valid, as in

and judicial practices permit this range of results. With windfalls around every corner, this patchwork of legal standards needs repair.

Examining the debtor's options in the order presented above, Part II of this Article examines the lawfulness of non-judicial collection efforts on time-barred debts and examines the initial scenario where a debtor elects to pay a collector's settlement offer in full.³⁴ Part III examines the second scenario where a debtor makes a partial payment on the debt, including its impact on the statute of limitations.³⁵ Part IV reviews the third scenario where a debtor fails to respond to collection efforts, including default judgments being awarded against such debtors by over-burdened courts.³⁶ Part V examines the final scenario where a debtor sues for unfair collection practices on time-barred debts, and summarizes the current circuit split regarding suits against collectors under the FDCPA.³⁷ Finally, Part VI sets forth a series of reforms for time-barred debts that will generate more uniform outcomes on all such debts with minimal impact on courts.³⁸ Part VII concludes.³⁹

II. Option 1: Paying the Full Offered Settlement Amount

The debt collection industry includes first-party collectors, third-party collectors, and debt buyers.⁴⁰ Debt buyers purchase defaulted debt from original creditors or other debt owners, and thereby take title to the debt.⁴¹ The older the debt, the less a debt buyer will pay for it. According to an FTC Report from 2013:

the case of mistaken identity.

34. *Infra* Part II.

35. *Infra* Part III.

36. *Infra* Part IV.

37. *Infra* Part V.

38. *Infra* Part VI.

39. *Infra* Part VII.

40. Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67489 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006).

41. FTC REPORT ON DEBT BUYING INDUSTRY, *supra* note 19, at 1, 47. To conduct its study, the FTC obtained information about debts and debt buying practices from nine of the largest debt buyers that collectively bought 76.1% of

Debt buyers paid on average 3.1 cents per dollar of debt for debts that were 3 to 6 years old and 2.2 cents per dollar of debt for debts that were 6 to 15 years old compared to 7.9 cents per dollar for debts less than 3 years old. Finally, debt buyers paid effectively nothing for accounts that were older than fifteen years.⁴²

Once purchased, debt buyers will often either attempt to collect the purchased debts themselves or employ third-party collectors to collect the debts.⁴³ Once collection efforts begin on time-barred debts, which are typically more than three to six years old,⁴⁴ collectors will typically offer to settle those debts for 10%–40% of the total amount owed.⁴⁵

Although courts are split regarding the precise tactics a collector may employ to collect a time-barred debt,⁴⁶ most courts agree that a statute of limitations bar does not actually extinguish the debt itself.⁴⁷ According to most courts, the debtor still owes the

the debt sold in 2008. *Id.* at i. As part of this study, these debt buyers submitted data on more than 5,000 portfolios containing nearly 90 million consumer accounts with a face value of \$143 billion and which were acquired by debt buyers for \$6.5 billion. *Id.* at ii. Most portfolios for which debt buyers submitted data were credit card debts, which accounted for 71% of the total amount that the buyers spent to acquire debts. *Id.* at ii. The FTC also considered its prior enforcement and policy work related to debt collection, as well as available research concerning debt buying. *Id.* The study focused on large debt buyers because they account for most of the debt purchased; it did not address the practices of smaller debt buyers. *Id.* at i.

42. *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1022 (7th Cir. 2014); see also Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 43 (2015) (explaining that the low cost at which debt buyers purchase debt reflects the risk the buyer is taking that the debt will ultimately be uncollectible).

43. Debt Collection (Regulation F), 78 Fed. Reg. at 67850.

44. See FTC REPORT ON DEBT BUYING INDUSTRY, *supra* note 1941, at 11–29 (discussing the debt buying market and the process in which one can participate in it).

45. In *McMahon*, for example, which consolidated two cases for appeal, one collector offered to settle the debtor's account for 40% of the total outstanding balance. 744 F.3d at 1013. In the other case, the collector offered to settle the debtor's account for 30% of the amount due. *Id.* at 1014; see also *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 395–96 (6th Cir. 2015) (examining an offer to settle a time-barred debt for approximately 35% of the past due account balance on the debt).

46. See *infra* Part VI.C (discussing whether an offer to settle a time-barred debt may violate the FDCPA).

47. See *Buchanan*, 776 F.3d at 396–97 (noting that, under most states' laws,

debt; however, he has a complete legal defense against having to pay it, which, when asserted, would simply prevent a debt owner or collector from enforcing the debt in court.⁴⁸

Because the debtor still owes a time-barred debt, most courts agree that the statute of limitations does not prevent a debt owner or collector from seeking to collect even the entire amount of the debt outside of court, and that it is appropriate to do so.⁴⁹ As the

“a debt remains a debt even after the statute of limitations has run on enforcing it in court”).

48. See, e.g., *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32 (3d Cir. 2011) (stating, under New Jersey law, that a debtor’s debt obligation “is not extinguished by the expiration of the statute of limitations, even though the debt is ultimately unenforceable in a court of law”); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) (“[A] statute of limitations does not eliminate the debt; it merely limits the judicial remedies available.”); *Buchanan*, 776 F.3d at 396–97 (“Under Michigan law, as under the law of most states, a debt remains a debt even after the statute of limitations has run on enforcing it in court.”); *De Vries v. Alger*, 44 N.W.2d 872, 876 (Mich. 1950) (“The running of the statute of limitations does not cancel the debt, it merely prevents a creditor from enforcing his claim.”); *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 616 (N.D. Ill. 2001) (recognizing that “Illinois law [provides that] the statute of limitations bars a specific remedy; it does not extinguish the indebtedness”); *Ingram v. Earthman*, 993 S.W.2d 611, 634 n.19 (Tenn. Ct. App. 1998), *abrogated on other grounds by Fahrner v. SW Mfg., Inc.*, 48 S.W.3d 141 (Tenn. 2001), *as recognized by Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 461 n.25 (Tenn. 2012) (“A statute of limitations bars the remedy only; it does not undermine the substance of the plaintiff’s claim or cause of action.”); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000) (recognizing that “New Mexico courts have held that statutes of limitations are procedural in nature and merely bar judicial remedies by which a party seeks to enforce his or her substantive rights”); *Webster v. Kowal*, 476 N.E.2d 205, 209 (Mass. 1985) (recognizing that “[d]ebts barred by the statute of limitations . . . are not void but are merely unenforceable”).

49. See, e.g., *Huertas*, 641 F.3d at 32–33 (noting that “it is appropriate for a debt collector to request voluntary repayment of a time-barred debt”); *Freyermuth*, 248 F.3d at 771 (finding an attempt to collect on a time-barred debt permissible under the FDCPA because “a statute of limitations does not eliminate the debt”); *McMahon*, 744 F.3d at 1020 (clarifying that it is not “automatically improper for a debt collector to seek re-payment of time-barred debts,” as long as it conforms with the FDCPA, and noting that “some people might consider full debt re-payment a moral obligation, even though the legal remedy for the debt has been extinguished”); *Gervais v. Riddle & Assocs., P.C.*, 479 F. Supp. 2d 270, 273 (D. Conn. 2007) (“Since the running of the statute of limitations does not extinguish a debt, courts have permitted debt collectors to send collection letters for time-barred debt where the letters do not threaten collection action.” (quoting *Wallace v. Capital One Bank*, No. CIV. JFM–00–2290, 2001 WL 357301, at *2 (D. Md. Apr. 6, 2001))); *Johnson v. Capital One Bank*, No. CIV. A. SA00CA315EP,

Sixth Circuit Court of Appeals explained in *Buchanan v. Northland Group, Inc.*⁵⁰:

Legal defenses [such as a statute of limitations defense] are not moral defenses . . . [a]nd a creditor remains free, in the absence of a bankruptcy order or something comparable preventing it from trying to collect the debt, to let the debtor know what the debt is and to ask her to pay it. There thus is nothing wrong with informing debtors that a debt remains unpaid or for that matter allowing them to satisfy the debt at a discount.⁵¹

According to Sixth Circuit Judge Raymond Kethledge, who dissented in *Buchanan*, a debtor who receives an offer to settle a time-barred debt has no legitimate basis to complain of unfair collection practices, for the simple reason that the debtor continues to have “a legal obligation to pay her debt, even though the obligation is no longer enforceable in court.”⁵² In Judge Kethledge’s view, the debtor “did, after all, receive goods or services that she did not pay for,” such that the collector “undisputedly would have been within its rights simply to demand that she pay all the money she owes.”⁵³ As such, attempting to collect an old debt outside of court is not inherently unlawful.

In the typical case, a collector will attempt to collect a time-barred debt through written communications, which will often include a formal offer to settle the debt.⁵⁴ When a debtor

2000 WL 1279661, at *2 (W.D. Tex. May 19, 2000) (“[A] statute of limitations bar applies only to judicial remedies; it does not eliminate the debt. Creditors are entitled to attempt to pursue even time-barred debts, so long as they comply with the rules of the FDCPA.”); *Johns v. Northland Grp., Inc.*, 76 F. Supp. 3d 590, 595 (E.D. Pa. 2014) (recognizing that a collector is “still permitted to seek voluntary repayment of [a time-barred] debt”).

50. 776 F.3d 393 (6th Cir. 2015).

51. *Id.* at 397; *see also id.* at 400 (Kethledge, J., dissenting) (noting that the plaintiff, appellate courts judges, district court, and amici agencies, all agree that the debt collector in the case would have been within its lawful rights to send the debtor a letter that simply recited the amount of her debt and demanded payment in full).

52. *Buchanan*, 776 F.3d at 401 (Kethledge, J., dissenting).

53. *Id.*

54. Written communications, but not settlement offers, are required by the FDCPA. *See* 15 U.S.C.A. § 1692g (Westlaw through Pub. L. No. 115-61) (stating that a debt collector must follow up within five days of the initial communication). In the letter, the collection must include basic information about the debt,

receives an offer to settle a time-barred debt, her first option is to simply fully pay the offered settlement amount, which is typically 10%–40% of the total outstanding debt.⁵⁵ Debtors—particularly unsophisticated ones who are unaware of the complex laws governing this issue—may elect this option, even though the debt at issue is not legally enforceable, simply to avoid harassment, litigation, or adverse credit consequences.⁵⁶

Letters containing such settlement offers typically notify the debtor that paying the offered settlement amount will satisfy the debt and close the account. In *Buchanan*, for example, debtor Esther Buchanan received a collections letter from third-party collector Northland Group, Inc., on a time-barred debt owned by debt buyer, LVNV.⁵⁷ Northland’s letter to Buchanan indicated a “past due account balance” of \$4,768.43, and offered to settle her debt for \$1,668.96.⁵⁸ The letter stated that LVNV “is willing to reduce your balance by offering you a settlement,” adding that upon receipt of \$1,668.96, “your account will be satisfied and closed and a settlement letter will be issued.”⁵⁹

including, among other things, the amount of the debt, the name of the creditor, and various notices. *See* 15 U.S.C. § 1692g(1)–(5) (detailing the required contents of the debt collector’s communication). In July 2016, the Consumer Financial Protection Bureau (CFPB) issued an “Outline of Proposal Under Consideration and Alternatives Considered,” which sets forth proposed rules relating to debt collection and debt buying. Among other things, the CFPB Outline proposes that collectors should be obligated to provide additional information, beyond what is currently required by the FDCPA, to assist consumers in identifying the debt at issue. *See* CFPB OUTLINE OF PROPOSALS, *supra* note 12, at app. F; *see also* Eric P. Rosenkoetter & Keith Wier, *The CFPB’s Outline of Debt Collection Proposals: A Look into the Past and Future*, BUS. L. TODAY, https://www.americanbar.org/publications/blt/2016/10/03_wier.html (last visited Feb. 2, 2017) (summarizing the proposals) (on file with the Washington and Lee Law Review).

55. *See supra* text accompanying note 45 (providing examples of a debtor settling for 30% and 40% of the total outstanding debt).

56. *See* *Stepney v. Outsourcing Sols., Inc.*, No. 97 C 5288, 1997 WL 722972, at *1 (N.D. Ill. Nov. 13, 1997) (“Unsophisticated consumers may pay amounts not legally owed to avoid harassment or adverse credit consequences.”); *see also* Sobol, *supra* note 5, at 350–51 (“Similarly, consumers may agree to pay unenforceable debts in order to clean their credit reports.”).

57. *Buchanan*, 776 F.3d at 395.

58. *See id.* (stating that unless the debtor disputed the debt within 30 days of receipt of the letter, the third-party creditor assumed the debt was valid).

59. *Id.* In this scenario where a debtor’s obligation to repay a debt is settled

Upon review of the Buchanan letter, both the trial and appellate courts agreed that there was “nothing wrong” with simply informing Buchanan that her debt remains unpaid and “allowing [her] to satisfy the debt at a discount”⁶⁰—in other words, by asking for and receiving payment of the offered settlement amount in satisfaction of the debt.⁶¹ Far more problematic is the scenario where the debtor pays only a portion of the offered settlement amount and, in the process, unwittingly revives the statute of limitations as to the entire debt, one the collection industry refers to as “duping” the debtor.⁶²

III. Option 2: Partial Payments that Revive the Statute of Limitations

As original creditors sell their debts to other creditors or debt buyers, who often then resell debts to similar entities, the debts inevitably get older.⁶³ Many states have statutes of limitations barring suits to collect on a debt after a certain period, typically between three and six years from the last payment received on a

for less than the amount owed, the debtor may have to include the amount of debt discharged as taxable income. *See generally* *Bross v. C.I.R.*, No. 11959-10S, 2012 WL 6698659 (T.C. Dec. 26, 2012) (involving a taxpayer’s agreement with a credit card company where, in return for a partial payment, the credit card company canceled the unpaid balance of the credit card account).

60. *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397 (6th Cir. 2015); *see also id.* at 400 (Kethledge, J., dissenting) (stating Buchanan was offered a discount of thirty-five cents on the dollar to repay outstanding debt).

61. *See generally* *United States v. Kras*, 409 U.S. 434, 445 (1973) (“A debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors.”).

62. *See* Sobol, *supra* note 5, at 349, n.155 (“Given the impact of the acknowledgement on a time-barred debt, a collector may attempt to get the consumer to recognize the existence of a debt without disclosing that the limitation period has run.”); *see also Buchanan*, 776 F.3d at 401 (Kethledge, J., dissenting) (recognizing the “equitable point” raised by the majority that if debtor sends creditor less than the settlement amount, then under many states’ laws, the limitations period renews and the debt becomes legally enforceable again, and conceding that “[v]irtually no one, save the creditors themselves, would welcome that result”).

63. *See* FTC REPORT ON DEBT BUYING INDUSTRY, *supra* note 19, at 42 (noting that as debts are sold they inevitably get older).

credit card,⁶⁴ which represents a large portion of consumer debt.⁶⁵ However, savvy debt collectors can avoid the statute of limitations through little known and counterintuitive rules regarding debt acknowledgment.⁶⁶

Statutes of limitations originated in 1623 in England.⁶⁷ As courts have long recognized, statutes of limitations are not mere “technicalities,” but instead are “fundamental to a well-ordered judicial system.”⁶⁸ Such statutes serve various purposes. They reflect the “legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that ‘the right to be free of stale claims in time comes to prevail over the right to prosecute them.’”⁶⁹ They are also designed to “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss

64. Statutes of limitations set a maximum time after a cause of action accrues in which a plaintiff may file suit. In the usual case, accrual occurs when the plaintiff can file suit and obtain relief, such as when an injury was incurred or discovered. *See* *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014) (explaining statutes of limitations and when they accrue). For a credit card debt, the debt owner’s cause of action accrues when the debtor made his or her last payment on the account. *See* *Knighten v. Palisades Collections, LLC*, 721 F. Supp. 2d 1261, 1269 (S.D. Fla. 2010) (stating that credit card debt collection actions have a four-year statute of limitations in Florida); *McCullough v. Johnson, Rodenburg & Lauinger*, 587 F. Supp. 2d 1170, 1176 (D. Mont. 2008) (stating that credit card debt collection actions have a five-year statute of limitations in Montana), *aff’d sub nom.* *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2011); *Parkis v. Arrow Fin. Servs., LLS*, No. 07 C 410, 2008 WL 94798, at *6 (N.D. Ill. Jan. 8, 2008) (noting that the statute of limitations period on a credit card debt in Illinois “commences with either the charge off date or the last date of payment,” and finding accrual based on the date of the last payment, which was more recent).

65. *See* FTC REPORT ON DEBT BUYING INDUSTRY, *supra* note 19, at 42 (discussing common statutes of limitations for debt collection actions); *see also* Lauren Goldberg, Note, *Dealing in Debt: The High Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 750 (2006) (noting that debtors face frustration in dealing with creditor attempts to collect time-barred debts).

66. *See* Goldberg, *supra* note 65, at 750–51 (discussing the effect of debt acknowledgment).

67. *See* *Hart v. Deshong*, 8 A.2d 85, 86 (Del. Super. Ct. 1939) (discussing the history of statutes of limitations).

68. *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

69. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)).

of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”⁷⁰

Given the policies underlying statutes of limitations, many courts have held that a debt collector violates the FDCPA by filing suit to collect a debt that appears to be time-barred.⁷¹ Collectors have found at least two ways around this restriction. First, because most debtors do not defend suits on time-barred debts and consequently do not raise the statute of limitations defense, some collectors still file such suits hoping the debtor will not defend, a scenario that almost always leads to a default judgment against the debtor.⁷² Second, and more troubling, a debt collector can sidestep the FDCPA prohibition against suing on a time-barred debt, as well as the possibility of having a collection suit dismissed as untimely, by taking advantage of laws that reset the time to sue on an old debt.⁷³

A. *The Partial Payment Rule*

Even if the statute of limitations on a debt has run, courts generally agree that a debtor’s unqualified acknowledgment of a debt implies a new promise to pay it, even if the debtor does not expressly promise to do so, thereby restarting the statute of limitations on the debt.⁷⁴ This rule rests on the notion that the running of the statute of limitations merely “suspends” the ability to enforce the debt in court and does not discharge the underlying

70. *Id.*; see also *Gillingham v. Brown*, 60 N.E. 122, 123 (Mass. 1901) (explaining the value and history of statutes of limitations).

71. See *infra* notes 135–150 and accompanying text (discussing penalties for debt collectors who try to collect time-barred debts).

72. See *Goldberg, supra* note 65, at 745 (“Defendants often default . . . because they fail to understand the complaint or because they concede defeat, unaware of possible defenses.”) (quotation omitted).

73. See *Goldberg, supra* note 65, at 750–51 (noting that some states restart the statute of limitations when a debtor acknowledges a time-barred debt).

74. See 31 *Williston on Contracts* § 79:77 (4th ed.) (noting doctrine is “well settled in most jurisdictions”); see also *Hart*, 8 A.2d at 87 (discussing English common law authorities on the acknowledgment rule and concluding that an acknowledgment of an existing debt “must be ‘unqualified and unconditional’ in order to imply a promise to pay and thus remove the bar of the Statute [of Limitations]”).

debt itself, and reflects the “valid public policy to encourage debtors to make payments on obligations that are due but the collection of which is barred by a limitations period.”⁷⁵ For these reasons, once a debt is acknowledged or a new promise to pay the debt is made, the statute of limitations bar is removed and the ability to enforce the debt is restored.⁷⁶

In most jurisdictions, a debt can be acknowledged either through an express acknowledgment, which should generally be made in writing,⁷⁷ or through a payment on the debt.⁷⁸ Thus, a debtor who makes a \$10 payment on a \$3,000 time-barred debt will revive the statute of limitations as to the entire balance, allowing suit to recover that amount for years to come. As one Delaware court noted, “[t]he acknowledgment, written or oral, is an admission by word; the part payment is an admission by fact.”⁷⁹ Although different in form, in both types of admissions, “the law

75. *O’Malley v. Frazier*, 49 P.3d 438, 444 (Kan. 2002).

76. *See DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 151 F. Supp. 3d 809, 825 (S.D. Ohio 2015) (examining the common law history of the acknowledgment of a debt rule).

77. *See, e.g., Nesbit v. Galleher*, 5 S.E.2d 501, 503 (Va. 1939) (finding debtor’s letter in response to a request for payment of a legal fee she incurred, which stated that she did not have the money at that time to pay the debt, constituted a new promise in writing sufficient to overcome the statute of limitations defense). State statutes sometimes impose the requirement of a written acknowledgment, but such statutory requirements do not alter the partial payment rule. *See, e.g., NEB. REV. STAT. § 25-216* (2017); *N.D. CENT. CODE § 28-01-36* (2017) (stating that debt acknowledgments must be made in writing).

78. *See, e.g., Keota Mills & Elevator v. Gamble*, 243 P.3d 1156, 1159 (Okla. 2010) (recognizing that since 1910, the general rule in Oklahoma is that a partial payment on a debt extends or revives the applicable statute of limitations on the debt) (citing Okla. Stat. tit. 12 § 101); *O’Malley v. Frazier*, 49 P.3d 438, 443–44 (Kan. 2002) (recognizing that under Kansas law, partial payment on a debt serves as a voluntary acknowledgment which implies a new promise to pay the debt); *Hickerson v. Vessels*, 316 P.3d 620, 625 (Colo. 2014) (recognizing that Colorado’s partial payment doctrine “has been part of our common law jurisprudence since at least 1883” and that, “under this doctrine, where a debtor voluntarily makes a payment, the payment constitutes a promise to pay the remaining debt and operates to restart the statute of limitations period”); *Pear v. Grand Forks Motel Assoc.*, 553 N.W.2d 774, 782–83 (N.D. 1996) (recognizing that under North Dakota law, any payment of principal or interest on a debt renews the statute of limitations on the entire debt).

79. *Hart v. Deshong*, 8 A.2d 85, 87 (Del. Super. Ct. 1939).

implies a promise to pay,” thereby lifting the statute of limitations bar.⁸⁰

Importantly, courts have cautioned that a partial payment on a debt does not *automatically* revive the statute of limitations, as the payment must involve circumstances from which the law will imply a clear promise to pay the entire debt.⁸¹ In one such case, *Roth v. Michelson*,⁸² the Court of Appeals of New York considered whether a debtor’s payment in 1973 toward a mortgage he assumed in 1960, and for which he had made only one previous payment twelve years earlier, was sufficient to revive the creditor’s cause of action against the debtor.⁸³ Finding that it was, the court noted that the debtor’s check contained the legend, “payment against mortgage, 14 Hamilton Avenue” (the address of the mortgaged premises), and was accompanied by a note stating that it is “my hope for the future and my determination to make good ALL of my debts, particularly my debt to you two.”⁸⁴ Under these circumstances, the promise to pay the entire debt was inferred, and the plaintiff’s cause of action against the debtor was revived.⁸⁵

In other cases, courts have refused to apply the partial payment rule where a debtor imposes strict conditions on repayment. In *Gillingham v. Brown*,⁸⁶ for example, the Massachusetts Supreme Judicial Court found that where a partial payment is made conditioned on paying the balance by

80. *Id.*

81. *See id.* (“In each case when the acknowledgment or part payment is direct and unconditional and the surrounding circumstances are such that the law implies a promise to pay, then the bar of the Statute [of Limitations] is lifted.”); *see also* *Gillingham v. Brown*, 60 N.E. 122, 123 (Mass. 1901) (examining English authorities and concluding that “if [an alleged] acknowledgment be accompanied by circumstances, or words which repel the idea of an intention to pay, no promise can be implied”); *Hart*, 8 A.2d at 87 (noting acknowledgment of existing debt “must be ‘unqualified and unconditional’ in order to imply a promise to pay,” “an acknowledgment . . . which expressly negatives the promise to pay has no effect,” and “[w]hen a promise to pay cannot be plainly drawn from all the surrounding circumstances the acknowledgment is ineffective”).

82. 55 N.Y.2d 278 (1982).

83. *Id.* at 280.

84. *Id.* at 282 (emphasis in original).

85. *See id.* at 282–83 (explaining that the defendant’s statements and payment were sufficient to renew the statute of limitations).

86. 60 N.E. 122 (Mass. 1901).

installments, the plaintiff's only remedy was to recover the installments as they became due (rather than the full amount of the debt).⁸⁷ In another case, *Markiewicz v. Toton*,⁸⁸ the same court considered whether a \$40 payment the defendant made on his debt of \$1,824.80 was intended to be an unconditional promise to pay the full balance, or whether the defendant had conditioned the payment upon paying only \$5 or \$10 a week, if he had the money.⁸⁹ Finding questions of fact on that issue, the appellate court reversed the trial court's application of the partial payment rule and ordered a new trial in the case.⁹⁰

Gillingham and *Markiewicz* each involved evidence that the debtor's payment did not reflect a clear promise to pay the entire debt. These cases indicate that a waiver of the statute of limitations "must be taken as it is," either "absolute, if absolute," or "conditional, if conditional."⁹¹ However, the debtor's intent is not always easy to decipher.

In cases where there is no evidence regarding the debtor's intent, courts will often apply the partial payment rule in its absolute form.⁹² Thus, a partial payment will be considered an acknowledgment of the entire debt "in the absence . . . of anything to the contrary," thereby implying a promise to pay the entire amount.⁹³ This is particularly true in the case of credit card debt,⁹⁴ allowing collectors to use the rule to easily avoid the statute of limitations bar.

87. *See id.* at 124 (finding that conditional waivers cannot also be absolute).

88. 198 N.E. 659 (Mass. 1935).

89. *See id.* at 659–60 (stating the facts and issue of the case).

90. *See id.* at 660–61 (reversing and ordering a new trial).

91. *Gillingham*, 60 N.E. at 124.

92. *See* *Nutter v. Mroczka*, 21 N.E.2d 979, 983 (Mass. 1939) ("But in the absence, as here, of anything to the contrary such a part payment is an acknowledgment of the obligation and implies a promise of payment thereof which interrupts the running of the statute.").

93. *Id.*

94. *See* *Midland Funding, L.L.C. v. Hottenroth*, 26 N.E.3d 269, 276 (Ohio Ct. App. 2014) ("Typically, the making of a partial payment on [a credit card account] before the statute of limitations expires extends the implied promise to pay the balance owed amount, acting to renew the statute of limitations period." (citing *Himelfarb v. Am. Express Co.*, 484 A.2d 1013 (Md. 1984))).

B. Debt Collector Use of the Partial Payment Rule

When a debtor receives an offer to settle a time-barred debt, a debtor who wishes to pay off the debt, but cannot afford to pay the full settlement amount at that time, often makes a small payment as an installment. In states like Massachusetts, where a partial payment serves as an acknowledgment of the debt given no evidence to the contrary, such a payment revives the statute of limitations on the debt and makes the debtor liable for the *entire* amount.⁹⁵

Because the average debtor is almost certainly unaware of the partial payment rule,⁹⁶ courts have routinely lamented this result.⁹⁷ Making matters worse, in their written settlement offers, collectors usually fail to convey that a debt is time-barred and that a partial payment on the debt, however small, will revive the statute of limitations on the debt and permit recovery of the *entire* balance.⁹⁸ Some collectors go one step further, deliberately

95. See *Nutter*, 21 N.E.2d at 983 (discussing when a partial payment revives the statute of limitations).

96. See CFPB OUTLINE OF PROPOSALS, *supra* note 12, at 19 (“Concepts related to statutes of limitations are challenging for consumers to understand, especially the fact that in some jurisdictions consumers may ‘revive’ a debt and reset the statute of limitations by making a partial payment or acknowledging the debt in writing.”).

97. In *Buchanan*, for example, dissenting Judge Kethledge declared:

There remains, as the majority points out, an equitable point—that if a debtor sends a creditor less than the settlement amount, then under Michigan law (and that of many states) the limitations period runs anew and the debt becomes enforceable again in court. Virtually no one, save the creditors themselves, would welcome that result.

Buchanan v. Northland Grp., Inc., 776 F.3d 393, 395–96 (6th Cir. 2015) (Kethledge, J., dissenting).

98. Proposed Rules, Bureau of Consumer Financial Protection, 78 FR 67876 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006); see, e.g., *Buchanan*, 776 F.3d at 395–96 (examining an offer to settle a time-barred debt where the collection letter failed to mention that the state’s statute of limitations had run on the debt or that a partial payment on a time-barred debt restarts the statute of limitations); *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 510 (5th Cir. 2016) (same); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020–22 (7th Cir. 2014) (considering two cases that involved a collection letter offering to settle a time-barred debt without notifying the debtor that the applicable statute of limitations on the debt had expired or that a partial payment may make the debtor vulnerable to a suit on the full amount of the debt).

attempting to “dupe” consumers into acknowledging a debt through collection techniques such as detachable return stubs in demand letters that offer debtors different payment options on a debt.⁹⁹

To combat these deceptive tactics, some states, including North Carolina, have enacted statutes making it unlawful for a debt collector to seek a written acknowledgment of any time-barred debt without disclosing the consequences of an acknowledgment.¹⁰⁰ Although such warnings are a step in the right direction, statutes like the North Carolina statute simply set forth requirements for written acknowledgments and do not alter the rules relating to acknowledgments accomplished via partial payment.¹⁰¹ As such, even in states that seek to ensure that acknowledgments are intelligently made, greater protections are needed.

IV. Option 3: No Response by Debtor, Leading to Collector Suits Against Debtors

A. The Prevalence of Default Judgments Against Debtors

99. See Sobol, *supra* note 5, at 349 (“One such technique is to include detachable return stubs in demand letters When a consumer returns the stub even without any payment, the consumer may have acknowledged the debt”) (citing Richard Rubin, *FDCA Claims Arising Out of State Court Collection Litigation*, CONSUMER ADVOC., Sept. 2008, at 19).

100. See N.C. GEN. STAT. § 58-70-115(1) (2017) (barring debt collectors from seeking acknowledgments without disclosing the consequences of doing so); see also *Jenkins v. RJM Acquisitions, LLC*, No. 5:10CV27-RLV, 2013 WL 589006, at *5 (W.D.N.C. Feb. 14, 2013) (recognizing that “§ 58–70–115(1) was meant to keep collection agencies from luring unsuspecting consumers into reviving the expired statute of limitations by obtaining written acknowledgments of time-barred debts”).

101. See N.C. GEN. STAT. § 1-26 (“No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest.”); see also *Kilpatrick v. Kilpatrick*, 122 S.E. 377, 378 (N.C. 1924) (recognizing that the North Carolina statute requiring acknowledgments to be in writing “does not restrict or modify in any way the effect of a payment under the general principles prevailing in this jurisdiction when the statute was enacted”).

Most debt collection litigation occurs in state court.¹⁰² Hundreds and sometimes thousands of third-party debt collection cases are filed in any given county every year, representing a significant percentage of a state court's docket.¹⁰³ A 2010 New York Times article, for example, reported that in 2009, about 96,000 consumer debt collection cases were filed in California's Alameda, Contra Costa, and San Francisco Counties alone, a significant increase from the 53,665 cases filed in 2007.¹⁰⁴ This trend is not limited to California. The FTC has concluded, for example, that "[t]he majority of cases on many state court dockets on a given day often are debt collection matters."¹⁰⁵ The sheer number¹⁰⁶ and complexity¹⁰⁷ of debt collection cases has overwhelmed some courts, providing a natural incentive for courts to grant default

102. Proposed Rules, Bureau of Consumer Financial Protection, 78 FR 67848 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006). Some debt collection litigation occurs in federal court and some occurs in small claims court. *See* Fox, *supra* note 2, at 356–57 (reporting that national debt collection firms often engage in forum shopping in Indiana by filing low-dollar debt collection actions in Circuit Court rather than small claims court).

103. *See* William Joseph Bearden, *Employing the Prima Facie Standard in Third Party Debt Collection Default Judgments*, 48 URB. LAW. 365, 366 (2016) ("These cases usually account for a significant percentage of cases within any given jurisdiction . . .").

104. Yeung, *supra* note 30.

105. CFPB OUTLINE OF PROPOSALS, *supra* note 12, at 18.

106. *See* Duffy, *supra* note 1, at 1148 (reporting that, "[s]ince the mid-2000s, the Civil Court of the City of New York has been overwhelmed by debt collection lawsuits," and noting that between 2006 and 2008, debt collectors filed approximately 300,000 lawsuits per year in New York); Yeung, *supra* note 30 (reporting the opinion of Fred W. Schwinn of the Consumer Law Center that "[c]reditors and debt buyers are swamping the California court system with debt-collection cases").

107. When debtors do defend, the burden on the judiciary is compounded, not only by the complexity of some debt collection cases, such as those involving the circuit split described in Part V below, but also by the fact that even run-of-the-mill suits can quickly become complex. As one court stated in a recent debt collection action: "Despite starting from the deceptively simple origins of an action arising from a consumer debt, this case became unduly complicated, in part brought upon by the parties' inability to accurately set forth the facts as presented in the documentary evidence." *Midland Funding, L.L.C. v. Hottenroth*, 26 N.E.3d 269, 274 (Ohio Ct. App. 2014).

judgments when possible simply to clear cases from their dockets.¹⁰⁸

The protection that statutes of limitations provide to consumers is not automatic. Instead, the running of the statute of limitations is an affirmative defense that consumers must raise before courts will dismiss a collection suit.¹⁰⁹ However, 70% to 95% of consumers sued in debt collection actions do not defend such suits, likely because they lack the financial ability to do so, and therefore never assert the statute of limitations defense.¹¹⁰ Moreover, because the defense is waived unless asserted, courts do not require a plaintiff to prove a debt is *not* time-barred where the defendant does not raise the defense. As a result, suits on time-barred debts often result in default judgments being awarded against debtors, perhaps in as many as 90% of such cases, even

108. For the federal courts, the Civil Justice Reform Act requires semiannual reports, available to the public, that disclose for each federal judge “(1) the number of motions on the judge’s docket that have been pending for more than six months; (2) the number of bench trials that have been submitted for more than six months; and (3) the number of cases that have not been terminated within three years after filing.” 28 U.S.C. § 476 (1990). This reporting requirement creates a natural incentive for judges to clear cases from their dockets, particularly those that are easily resolved (as with default judgments). See R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687, 702–03 (1993) (summarizing judicial attitudes indicating how CJRA reporting requirements provide incentives for judges to dispose of cases more quickly).

109. See *Day v. McDonough*, 547 U.S. 198, 202 (2006) (“Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant’s answer or in an amendment thereto.”); see also FED. R. CIV. P. 8(c), 12(b), 15(a) (laying out how defendants must assert the running of a statute of limitations).

110. See FTC REPORT ON DEBT BUYING INDUSTRY, *supra* note 19, at 45 (reporting that “90% or more of consumers sued in [debt collection] actions do not appear in court to defend”); Duffy, *supra* note 1, at 1148 n.2 (reporting that in 2011, 134,423 consumer cases were filed in the Civil Court of the City of New York, and that of these cases, 107,618 went unanswered, 70,371 resulted in default judgments, and attorneys represented consumer defendants in only 3,342 cases); Yeung, *supra* note 30 (“According to debt-collection industry estimates, between 75 and 80 percent of debtors in these cases do not respond to their lawsuits, and 95 percent of these result in default judgments.”); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 288, 296 (2011) (reporting on the low numbers of defendants who appear for debt collection cases; nearly 80% of defendants do not defend suits, and nearly 40% of cases result in a default judgment).

though most debtors could have the case dismissed through minimal litigation efforts.¹¹¹ With the addition of interest, litigation costs, and attorney's fees, the result can be a judgment against the debtor of more than 300% of the amount originally owed.¹¹² Thereafter, "post-judgment remedies may include property seizure, residential liens, and wage garnishment."¹¹³

B. Default Judgments Against Debtors: The Root Causes

According to professor Victoria Haneman, "[b]ringing a lawsuit on [a time-barred] debt is . . . nothing but bluffing," which, although perhaps acceptable between attorneys, is simply "unsporting and coercive" against unrepresented laypersons.¹¹⁴ Nevertheless, such suits regularly occur, and often result in default judgments against debtors.¹¹⁵ There are at least three root causes for this: aggressive litigation practices by debt owners and collectors, overly-relaxed judicial standards in default cases, and professional ethics rules that encourage rather than prevent such suits.¹¹⁶

To take advantage of the prevalence of default judgments on time-barred debts, debt buyers often maintain a network of attorneys through whom default judgments are sought.¹¹⁷ Even

111. See *Roth v. Michelson*, 55 N.Y.2d 278, 280–82 (N.Y. 1982) (explaining that payment on a time-barred debt can restart the statute of limitations); see also Haneman, *supra* note 7, at 722 (reporting that "[d]efault is by far the most common action [in suits involving time-barred debts], occurring in 70% to 90% of all cases").

112. Haneman, *supra* note 7, at 717.

113. *Id.*

114. *Id.* at 709.

115. See *id.* at 709–10 ("The result, most often, is a judgment against the consumer debtor who typically defaults or, less typically, appears pro se but without the knowledge or skill to use the statute effectively within the narrow 'raise it or waive it' time.>").

116. See *id.* at 707 ("The professional ethics of the American bar overtly permit attorneys to knowingly exploit the ignorance and inexperience of unrepresented litigants.>").

117. See *id.* at 716 ("Debt-buyers are relying more heavily upon legal actions than ever before, often maintaining nationwide networks of attorneys to whom accounts are referred and by whom lawsuits are filed and remedies pursued.>").

without the evidence needed to secure judgment, these attorneys bring extremely large numbers of such suits knowing they will only need to provide account records in the few cases, about 10%, where the defendant actually appears.¹¹⁸ Although most cases end in default judgment due to debtors failing to defend, in cases where a defense is mounted, the collector's usual response is to simply dismiss the suit.¹¹⁹

Based on these practices, some law firms have been deemed debt collection "litigation mills," filing tens of thousands of debt collection suits every year with minimal attorney involvement and very little documentation on individual accounts.¹²⁰ One such law firm, for example, filed over 350,000 lawsuits in Georgia from 2009 to 2013 to recover on allegedly defaulted debt.¹²¹ Another law firm filed nearly 3,000 such lawsuits in Montana alone from January 2007 to July 2008.¹²²

Once suit is filed, existing procedural rules governing default judgments make it likely that collector suits on time-barred debts will receive little attention and thus simply fall through the judicial cracks. Having served as a judicial clerk for several years, where I worked on numerous cases resulting in default judgments against defendants who failed to defend, there can be no doubt

118. See Bearden, *supra* note 103, at 372–74 ("Since 90% of defendants in these cases typically do not appear . . . [Plaintiffs' attorneys] know that a large percentage of . . . debtors will default in court."); see also Edward J. Halper & Rachel L. Schaller, *Credit Card Collection Suits: Life Preservers for Illinois Consumers*, 100 ILL. B.J. 360, 386 (2012) ("The debt collection industry does not want to incur substantial time and expense in proving its case—even if it can.").

119. See *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342, 1348–50 (N.D. Ga. 2015) (describing one law firm's debt collection litigation practices).

120. See *id.* at 1366 (describing "litigation mills" as law firms with very little attorney involvement in each case).

121. See *id.* at 1349 (involving a creditors' rights law firm that filed over 350,000 lawsuits in Georgia from 2009 to 2013 to recover on allegedly defaulted debt).

122. See *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 945, 947 (9th Cir. 2011) (noting that the firm filed 2,700 collection actions in Montana from January 2007 to July 2008 and that approximately 90% of the firm's case filings result in default judgment, and describing testimony regarding one Montana law firm's "factory" approach of "mass producing default judgments" in debt collection actions).

that courts take a more relaxed approach when ruling on motions for default judgment (as compared to a contested motion for summary judgment, for example). Indeed, current rules of procedure, such as Rule 55 of the Federal Rules of Civil Procedure, all but require such treatment.¹²³ According to one commentator, judicial practices in debt collection litigation “often result in a practical presumption that the plaintiff has a right to collect, often without even providing any evidence that the debt is valid and the plaintiff is the legitimate holder of the debt.”¹²⁴ Such relaxed judicial standards only exacerbate the bad habits of debt buyers and their attorneys,¹²⁵ such as inadequate account documentation and poor case preparation.¹²⁶

Along with aggressive attorney tactics and relaxed judicial standards, legal ethics rules are partly to blame for collector suits on time-barred debts. In most states, attorneys are governed by rules of ethics that are based on the ABA Model Rules of Professional Conduct.¹²⁷ In a 1994 formal opinion interpreting the ABA Model Rules, the ABA Ethics Committee determined that filing suit on a time-barred debt is generally not unethical. Considering both a lawyer’s duty not to file a “frivolous” lawsuit under Rule 3.1 and the lawyer’s duty of candor toward the tribunal set forth in Rule 3.3, the opinion concludes that “it is generally not

123. See *infra* Part VII.D (proposing that the burden of proof for statutes of limitation be flipped to the plaintiff in debt collection cases); see also FED. R. CIV. P. 55 (providing rules for default judgments).

124. Bearden, *supra* note 103, at 372; see also *In re Assigned Consumer Debt Default Judgment Applications*, Nos. 56-CV-14-1333, 56-CV-14-1439, 56-CV-14-1546, 56-CV-14-1644, 56-CV-14-1742, 56-CV-14-2075, 56-CV-14-2076, 56-CV-14-2663, 2015 WL 1087512, at *3 (Minn. Dist. Ct. Mar. 6, 2015) (stating that, before a Minnesota statute was enacted to tighten the standards for awarding default judgments in consumer debt suits, the Minnesota Attorney General’s Office encountered cases where plaintiffs faced serious injustices).

125. See Bearden, *supra* note 103, at 372 (“This nearly complete absence of any burden of proof on plaintiff[s] has allowed practices to flourish in the debt buying industry that may support a lackadaisical approach to litigation . . .”).

126. See *id.* at 372–73 (explaining why plaintiffs often lack information in debt collection actions).

127. See Haneman, *supra* note 7, at 727 (“Some version of the ABA Model Rules has been adopted by forty-four states and the District of Columbia.”).

a violation of either of these rules to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction.”¹²⁸

Underlying this opinion is the notion that affirmative defenses, such as the running of the statute of limitations, are waived unless asserted,¹²⁹ coupled with the assumption of the American adversarial system that justice will prevail when roughly equal advocates on both sides of a dispute advocate zealously on behalf of their clients.¹³⁰ Because so many debtors fail to defend suits on time-barred debts, however, this assumption simply does not apply here, creating a systemic flaw available to those willing to exploit it.¹³¹

Whether through attorney self-regulation, changes to rules of ethics, or statutory reforms, collectors should not be allowed to use the courts to convert old debts into enforceable judgments that far exceed the amount of the original debt. Accordingly, reforms are necessary to reduce the number of default judgments in suits involving time-barred debts.

128. ABA Comm. on Ethics and Prof'l Responsibility, *Disclosure to Opposing Party and Court that Statute of Limitations Has Run*, ABA Formal Op. 94-387 (1994).

129. *See id.* (recognizing that “[t]he result under Rules 3.1 and 3.3 might well be different if the limitations defect in the claim were jurisdictional, and thus affected the court’s power to adjudicate the suit”).

130. *See Haneman, supra* note 7, at 728 (“To understand the philosophical foundations that support the ABA’s long held position requires looking no further than the influence of the premises of adversarial justice on the codes of professional conduct.”).

131. The possibility of default judgments being awarded against a debtor defendant due to a failure to defend, despite the availability of a winning defense, is not limited to the statute of limitations defense. Professor Mary Spector, for example, has reported that in 38 of 507 cases initiated by debt buyers against consumers to collect delinquent credit card debt in Dallas County, Texas, the plaintiff failed to comply with Texas law requiring debt collectors to file a bond and did not have active bonds on file for the calendar year at issue, which violated Texas state law. Spector, *supra* note 110, at 280. Yet, not one defendant in the 38 cases she examined actually raised those claims, and only two defendants even appeared. *Id.* at 281. Moreover, because her study involved a limited sample of cases, Professor Spector estimates that unbonded debt buyers filed about 1,200 cases during 2007 in Dallas County Courts-at-Law alone. *Id.* at 280–81. Had any of the plaintiffs raised the issue, they might have been able to avoid the suits altogether or even obtain statutory damages for the debt collectors’ conduct. *Id.* at 281.

*V. Option 4: Debtor Suits Against Collectors for FDCPA
Violations*

The FDCPA is enforced through both administrative action and private lawsuits. Although administrative enforcement has been extensive,¹³² with respect to private suits, which is the focus of this Article, the FDCPA makes debt collectors who fail to comply with the statute liable to the individuals affected.¹³³ Successful plaintiffs are entitled to “actual damage[s],” plus costs and “a reasonable attorney’s fee as determined by the court.”¹³⁴ A court may also award “additional damages,” subject to a statutory cap of

132. On the administrative side, violations of the FDCPA are deemed to be unfair or deceptive acts or practices under the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.* (2012), and are enforced by the Federal Trade Commission. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 576 (2010) (stating that a debt collector can avoid liability for violation of the FDCPA if “she can show ‘the violation was not intentional and resulted from a[n] . . . error notwithstanding the maintenance of procedures reasonably adapted to avoid such error’”); 15 U.S.C. § 1692l (authorizing the FTC to enforce violations of the FDCPA). Under this framework, a debt collector may face penalties of up to \$10,000 per day for acting with “actual knowledge or knowledge fairly implied on the basis of objective circumstances” that the collector’s act is prohibited under the FDCPA. *See Jerman*, 559 U.S. at 573 (citing 15 U.S.C. §§ 45(m)(1)(A), (C)); 74 Fed. Reg. 858 (2009) (amending 16 CFR § 1.98(d)). A debt collector is not liable in any action brought under the FDCPA, however, if it “shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” *Jerman*, 559 U.S. at 573 (citing 15 U.S.C. § 1692k(c)). Violations of the FDCPA are also enforced by the CFPB, which shares enforcement responsibility with the FTC. *See* 2016 FDCPA ANNUAL REPORT, *supra* note 3, at 7. Since the CFPB commenced operations in 2011, it has brought more than twenty-five debt collection cases against first- and third-party collectors alleging FDCPA violations or unfair, deceptive, and abusive debt collection acts and practices in violation of the Dodd-Frank Act. In these cases, the Bureau has ordered over \$100 million in civil penalties, over \$300 million in restitution to consumers, and billions of dollars in debt relief to consumers. During this same five-year period, the FTC has brought more than forty debt collection cases alleging FDCPA violations or unfair or deceptive acts and practices in violation of the FTC Act, and states have brought numerous additional actions against debt collectors for violating state debt collection and consumer protection laws. *See* CFPB OUTLINE OF PROPOSALS, *supra* note 12, at 1.

133. *See* 15 U.S.C. § 1692k(a) (providing penalties for violators of the FDCPA, including damages for persons affected by the violation).

134. *Id.* § 1692k(a)(1), (3).

\$1,000 for individual actions, or, for class actions, “the lesser of \$500,000 or 1 per centum of the net worth of the debt collector.”¹³⁵

In recent years, courts have examined whether a debtor may assert an FDCPA claim for (1) actual suits brought by collectors against debtors on time-barred debts, (2) threats to sue on such debts (without actually filing suit), and (3) offers to settle such debts (without any direct threat to sue). Courts generally agree that the first two types of actions are prohibited by the FDCPA, but are split on the lawfulness of a mere offer to settle a time-barred debt in the absence of an explicit threat to sue, with the recent trend being that such an act is indeed unlawful.¹³⁶

A. Suits Against Debtors on Time-Barred Debts as Violations of the FDCPA

The FDCPA prohibits a debt collector from using “any false, deceptive, or misleading representation or means in connection with the collection of any debt.”¹³⁷ The statute contains a non-exclusive list of unlawful practices, including falsely representing “the character, amount, or legal status of any debt,”¹³⁸ “threat[ening] to take any action that cannot legally be taken or that is not intended to be taken,”¹³⁹ and using “any . . . deceptive means to collect or attempt to collect any debt.”¹⁴⁰ In addition, a separate FDCPA provision prohibits collectors from using “unfair or unconscionable means to collect or attempt to collect any

135. *Id.* § 1692k(a)(2). In awarding additional damages, the court must consider “the frequency and persistence of [the collector’s] noncompliance,” “the nature of such noncompliance,” and “the extent to which such noncompliance was intentional.” *Id.* § 1692k(b).

136. See Patrick Lunsford, *A Settlement Offer on Time-Barred Debt May Violate FDCPA Says Split Sixth Circuit*, INSIDE ARM (Jan. 14, 2015, 7:29 AM) <https://www.insidearm.com/news/00040876-a-settlement-offer-on-time-barred-debt-ma/> (last visited Feb. 17, 2018) (discussing the *Buchanan* decision, which found that an offer to settle on time-barred debt may violate the FDCPA, and noting that this finding is in conflict with Third and Eighth Circuit decisions) (on file with the Washington and Lee Law Review).

137. 15 U.S.C. § 1692e.

138. *Id.* § 1692e(2)(a).

139. *Id.* § 1692e(5).

140. *Id.* § 1692e(10).

debt.”¹⁴¹ A consumer only has to prove one violation to trigger liability.¹⁴²

To curtail collectors from suing on time-barred debts (likely hoping to secure default judgments against debtors who fail to defend), many courts have held that a debt collector violates the FDCPA by filing suit on a debt that appears to be time-barred.¹⁴³

141. *Id.* § 1692f.

142. *Davis v. Trans Union, LLC*, 526 F. Supp. 2d 577, 586 (W.D.N.C. 2007) (“The FDCPA is a strict liability statute and a consumer only has to prove one violation to trigger liability.” (citation and quotation omitted)). Because Congress intended the FDCPA to have a “broad remedial scope,” *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 511 (5th Cir. 2016), courts normally interpret the FDCPA broadly and in the consumer’s favor. *Id.* When evaluating whether a collection letter violates the FDCPA, courts view the letter from the perspective of an “unsophisticated or least sophisticated consumer,” and assume the debtor is neither shrewd nor experienced in dealing with creditors. *Id.*; *see also* *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1019 (7th Cir. 2014) (viewing the letter through the lens of “a person of modest education and limited commercial savvy”); *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 396 (6th Cir. 2015) (stating that the FDCPA protects “all consumers,” from the “shrewd” to the “gullible,” “from practices that would mislead the ‘reasonable unsophisticated consumer,’ one with some level of understanding and one willing to read the document with some care”); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985) (examining this issue at length and concluding that the FDCPA is designed to protect the “least sophisticated consumers,” rather than “reasonable consumers” who could more readily protect themselves in the market place).

143. *See, e.g., Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (filing time-barred suit violated the FDCPA, 15 U.S.C. § 1692f (2012)); *Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 632 F. Supp. 2d 842, 845–47 (N.D. Ill. 2009) (noting that “[c]ourts have held that the filing of a time-barred lawsuit violates the FDCPA,” on the merits, finding that debt collector’s suit was time-barred, but that a genuine factual issue existed regarding whether the collector could assert the bona fide error defense); *Knighten v. Palisades Collections, LLC*, 721 F. Supp. 2d 1261, 1271 (S.D. Fla. 2010) (finding that lawyers violated the FDCPA by filing a time-barred suit for a party that lacked standing, and rejecting lawyers’ attempt to invoke bona fide error defense), *clarified on denial of reconsideration*, No. 09-CIV-20051, 2011 WL 835783 (S.D. Fla. Mar. 4, 2011); *Parkis v. Arrow Fin. Servs., LLC*, No. 07 C 410, 2008 WL 94798, at *6–7 (N.D. Ill. Jan. 8, 2008) (finding the FDCPA violated by the filing of a lawsuit on a time-barred debt); *Midland Funding, LLC v. Hottenroth*, 26 N.E.3d 269, 275 (Ohio Ct. App. 2014) (finding a violation of the FDCPA); *see also Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259 (11th Cir. 2014) (“Federal circuit and district courts have uniformly held that a debt collector’s threatening to sue on a time-barred debt and/or filing a time-barred suit in state court to recover that debt violates §§ 1692e and 1692f.”); *Dubois v. Atlas Acquisitions LLC (In re Dubois)*, 834 F.3d 522, 527 (4th Cir. 2016) (“Federal courts have consistently held that a debt collector violates the FDCPA by filing a lawsuit or threatening

In a recent opinion, the Ohio Court of Appeals based this decision on the FDCPA's prohibition against falsely representing the character or legal status of the debt. According to that court:

A debt collector violates [the FDCPA] by . . . falsely representing "the character, amount, or legal status of any debt." Common sense dictates that whether a debt is time-barred is directly related to the legal status of that debt. As a result, a debt collector violates the FDCPA in filing a legal action based on a time-barred debt.¹⁴⁴

An alternative approach derives from *Kimber v. Federal Financial Corporation*,¹⁴⁵ which determined that filing suit on a debt that appears to be time-barred is an unfair and unconscionable means of collecting the debt under 15 U.S.C. § 1692f (2012).¹⁴⁶ According to the *Kimber* court, "[b]ecause few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits."¹⁴⁷ In addition:

[E]ven if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.¹⁴⁸

Rejecting the collector's rather remarkable argument that its attorney was ethically bound to file suit given the possibility that the debtor would waive the statute of limitations defense by failing to defend, the court relied on cases where sanctions have been imposed under Rule 11 for filing suit "where the attorney knew or

to file a lawsuit to collect a time-barred debt.").

144. *Midland Funding, LLC*, at 275 (internal marks and citations omitted).

145. 668 F. Supp. 1480 (M.D. Ala. 1987).

146. *See id.* 1487 ("[A] debt collector's filing of a lawsuit on a debt that appears to be time-barred, without the debt collector having first determined after a reasonable inquiry that that limitations period has been or should be tolled, is an unfair and unconscionable means of collecting the debt.").

147. *Id.*

148. *Id.*

should have known a claim was time-barred.”¹⁴⁹ As another, more recent case put it, to accept such an argument:

[W]ould permit a lawyer to pursue a claim against an unsophisticated consumer on a debt that the consumer no longer has a legal obligation to pay in the hopes that the consumer’s inexperience and lack of expertise will cause him or her to overlook the limitations bar and waive the right to assert it. This is precisely the type of deceptive practice that the FDCPA was designed to prohibit.¹⁵⁰

As these courts recognize, because the viability of a suit on a time-barred debt hinges entirely on suing an unsophisticated debtor, the very type of debtor the FDCPA is designed to protect, there is simply no merit to the argument that it is proper to file such suits.¹⁵¹

In one particularly egregious case involving a law firm’s filing suit against a debtor on a time-barred debt, *McCullough v. Johnson, Rodenburg & Lauinger, LLC*,¹⁵² the plaintiff-debtor was awarded the \$1,000 statutory maximum for an FDCPA violation, \$250,000 for emotional distress, and \$60,000 in punitive damages.¹⁵³ *McCullough* involved a credit card debt owed by Tim McCullough, a former school custodian.¹⁵⁴ McCullough had opened the account in 1990, and stopped making payments after he suffered a brain injury and lost his job.¹⁵⁵ When McCullough made his last payment in 1999, he owed approximately \$3,000.¹⁵⁶ In 2001, after the account was charged off, Collect America, Ltd., and its subsidiary, CACV of Colorado, Ltd. (CACV), purchased

149. See *id.* at 1488 (citing *Steinle v. Warren*, 765 F.2d 95 (7th Cir. 1985)).

150. *Ehsanuddin v. Wolpoff & Abramson*, No. CIV A 06-708, 2007 WL 543052, at *4 (W.D. Pa. Feb. 16, 2007).

151. See *Kimber*, 668 F. Supp. At 1488 (“[Debt Collector’s] argument that its attorney was ethically authorized to pursue the collections in case the debtors failed to raise the statute of limitations defense lacks authority.”).

152. 637 F.3d 939 (9th Cir. 2011).

153. See *id.* at 947, 958 (reporting the jury’s verdict and affirming the district court’s decision not to overturn the jury’s verdict or order a new trial).

154. *Id.* at 944.

155. *Id.*

156. *Id.*

McCollough's account.¹⁵⁷ CACV sued McCollough in 2005 for \$3,816.80 to collect the debt.¹⁵⁸ Representing himself, McCollough replied that the "statute of limitations is up," prompting CACV to dismiss the suit two weeks later.¹⁵⁹

Although CACV had documented the results of its 2005 suit against McCollough in its electronic files, in 2006, Collect America retained Johnson, Rodenburg & Lauinger, LLC (JRL), a law firm specializing in debt collection, to pursue collection of McCollough's debt.¹⁶⁰ McCollough's case was just one of several thousand such cases for the firm.¹⁶¹ From January 2007 through July 2008, JRL filed 2,700 collection lawsuits in Montana alone, representing about five lawsuits filed per day, with about 90% of those suits resulting in default judgment.¹⁶²

After CACV transmitted information about McCollough's account to JRL, the law firm flagged a potential statute of limitations problem with the debt.¹⁶³ Likely referencing the partial payment rule (and illustrating how collectors use it to circumvent the statute of limitations), in January 2007, a JRL attorney wrote to CACV: "It appears that the Statute of Limitations has expired on this file. . . . If you can[,] provide us with an instrument in writing to extend the Statute of Limitations."¹⁶⁴ A few weeks later, CACV responded in an e-mail, entitled "sol extended," that McCollough had made a \$75 partial payment on June 30, 2004, thereby extending the applicable five-year statute of limitations to 2009.¹⁶⁵ No such payment, however, had been made.¹⁶⁶

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 944–45.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 945.

165. *Id.* (citing *Colo. Nat'l Bank of Denver v. Story*, 862 P.2d 1120, 1122 (Mont. 1993) (holding that Montana's five-year statute of limitation on an account stated commences running from the date of the last payment)).

166. According to the court, McCollough had not made a partial payment on June 30, 2004. Rather, as reflected in CACV's electronic file, the event that took place on June 30, 2004, was the return of court costs to CACV for a collection complaint and summons that CACV had prepared in 2003. *Id.*

In April 2007, JRL sued McCollough in Montana state court. The complaint sought judgment for an account balance of \$3,816.80, interest of \$5,536.81, attorney's fees of \$481.68, and court costs of \$120.00.¹⁶⁷ At that point, the file for McCollough's debt indicated the year 2000 charge-off date; a June 30, 2004, entry indicating the return of court costs (rather than a partial payment on the account); and an entry showing that CACV had previously sued McCollough, who had asserted the statute of limitations defense.¹⁶⁸ The attorney who filed the suit admitted that he did not seek to determine whether a partial payment had, in fact, occurred on June 30, 2004.¹⁶⁹

In June 2007, McCollough filed a pro se answer to the complaint, asserting a statute of limitations defense which stated, in part:

FORGIVE MY SPELLING I HAVE A HEAD INJURY AND
WRITING DOSE NOT COME EASY

(1) THE STACUT OF LIMITACION'S IS UP, I HAVE NOT
HAD ANY DEALINGS WITH ANY CREDITED CARD IN
WELL OVER 8 ½ YEARS

(2) I AM DISABLED¹⁷⁰

In July, McCollough also called JRL and left a message indicating that he would be seeking summary judgment based on the statute of limitations.¹⁷¹ The next month, CACV informed the firm that McCollough had not actually made a payment on June 30, 2004.¹⁷² Nevertheless, the firm continued to pursue the case.

In October 2007, the firm served McCollough twenty-two requests for admission that included the following:

11. Prior to initiation of this suit, Defendant Tim M. McCollough has never notified plaintiff or any other party in interest in this action of any disputes regarding said Chase Manhattan Bank credit card.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 945–46.

171. *Id.* at 946.

172. *Id.*

....

14. There are no facts upon which Defendant Tim M. McCollough relies as a basis for defense in this action.

....

17. Every statement or allegation contained in plaintiff's Complaint is true and correct.

....

21. Defendant Tim M. McCollough made a payment on said Chase Manhattan Bank credit card on or about June 30, 2004 in the amount of \$75.00.¹⁷³

The firm did not notify McCollough that its requests would be deemed admitted if he did not respond within thirty days.¹⁷⁴ Luckily for McCollough, he retained counsel and timely denied all of JRL's requests. A few weeks later, CACV instructed JRL to dismiss the suit "asap" because of the "SOL problem."¹⁷⁵ JRL then moved for dismissal with prejudice, which the state court granted.¹⁷⁶

At this point, McCollough went on the offensive. McCollough sued JRL for violations of the FDCPA and the Montana Unfair Trade Practices and Consumer Protection Act, adding state law claims for malicious prosecution and abuse of process.¹⁷⁷ On cross-motions for summary judgment, the district court found that JRL pursued the action against McCollough for over four months after it had obtained information demonstrating that the suit was time-barred.¹⁷⁸ The case then proceeded to jury trial, resulting in a verdict for McCollough and an award exceeding \$300,000.¹⁷⁹

Although McCollough's case represents an extreme example, it illustrates the mindset of many collection firms and the dangers that all debtors face in defending aggressive collection actions. Had

173. *Id.*

174. *Id.*

175. *Id.* at 947.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* The district court granted McCollough partial summary judgment on his FDCPA claims, and the jury found in his favor on all remaining claims.

McCollough not defended JRL's collections suit, the case would have no doubt ended in a default judgment against him. Rather than recovering nearly \$300,000, McCollough would have been saddled with a judgment exceeding \$10,000.

Aside from judicial interpretations of the FDCPA, some states, such as North Carolina, have enacted statutes to prohibit the filing of a consumer collection action on the basis of a debt the plaintiff knows or should know is time-barred.¹⁸⁰ Such statutes and judicial rulings can be powerful tools towards preventing suits on time-barred debts. In its 2013 study of the debt buying industry, the FTC determined that “[d]ebt buyers generally know the ages of debts they are collecting,” noting further that “[i]nformation provided to debt buyers . . . generally included the age of the debt.”¹⁸¹ Accordingly, in states like North Carolina, debt buyers are on notice that initiating suits on time-barred debts is usually unlawful. Similarly, in jurisdictions that have deemed the FDCPA violated by filing suit on a debt that appears to be time-barred, debt collectors who proceed with suits on such debts potentially subject themselves to large financial penalties under the statute.¹⁸²

Going one step further, some courts have held that a debt collector may violate the FDCPA not only by filing suit on a time-barred debt, but by simply threatening to do so.

B. Threats to Sue on Time-Barred Debts as Violations of the FDCPA

The FDCPA makes it unlawful to “threat[en] to take any action that cannot legally be taken or that is not intended to be taken.”¹⁸³ Invoking this provision, courts have held that debt

180. See N.C. GEN. STAT. ANN. § 58-70-115(4) (2017) (“When the collection agency is a debt buyer or is acting on behalf of a debt buyer, bringing suit . . . against the debtor or otherwise attempting to collect on a debt when the collection agency knows, or reasonably should know, that such collection is barred by the applicable statute of limitations.”).

181. FTC REPORT ON DEBT BUYING INDUSTRY, *supra* note 19, at v.

182. Such penalties could be imposed under 15 U.S.C. §§ 45(m)(1)(A), (C) (2012).

183. *Id.* § 1692e(5).

collectors may violate the FDCPA by threatening to sue on time-barred debt.¹⁸⁴

According to the Consumer Financial Protection Bureau (CFPB), threats of unlawful action by collectors are quite common. In 2015, the CFPB handled 85,200 total debt collection complaints pertaining to collectors, which were grouped into categories.¹⁸⁵ The most common complaint the CFPB received in 2015 involved attempts to collect a debt that was reportedly not owed.¹⁸⁶ Taking or threatening an illegal action constituted 11% of the total number of complaints, with 28% of the complaints within that category—more than 2,500—involving threats to sue on a debt that is too old.¹⁸⁷

Because the statute of limitations defense is waived if not asserted, it is possible to file suit on a time-barred debt and simply wait to see whether the opponent raises that defense. As such, merely *threatening* to file suit on a time-barred debt arguably does not trigger the FDCPA's prohibition against threatening to take any action—i.e., filing suit—that “cannot legally be taken.”¹⁸⁸ Nevertheless, as the United States District Court for the District of Delaware aptly stated, “the threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate.”¹⁸⁹ For this reason, the court found that uttering a threat over the telephone to sue the debtor on a time-barred debt might violate the FDCPA.¹⁹⁰

Other courts have found FDCPA violations in cases involving much more subtle threats to sue. For example, the United States District Court for the Northern District of Illinois found a

184. See *supra* Part V.A (exploring examples of FDCPA violations).

185. 2016 FDCPA ANNUAL REPORT, *supra* note 3, at 18.

186. See *id.* (noting that 40% of debt collection attempts were continued attempts to collect a debt not owed).

187. *Id.*

188. 15 U.S.C. § 1692e(5) (2012) (emphasis added).

189. *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393 (D. Del. 1991).

190. See *id.* (denying summary judgment to defendant-collector on the debtor's FDCPA claim due to questions of fact regarding whether the defendant actually uttered a threat over the telephone to sue the debtor).

collection letter's warning of "further collection action" sufficient to state a claim for deceptive practices in violation of the FDCPA.¹⁹¹ Likewise, the United States District Court for the District of Connecticut determined that a law firm's letter alluding to a "client" who has "retained" the "law firm" to "collect" in the context of an "important legal matter" would cause the typical consumer to believe that litigation was imminent.¹⁹² According to the court, such "vague legal references in the context of debt collection," particularly when made by an attorney on law firm letterhead, can strike fear in the least sophisticated consumer and may induce the debtor to make a payment on the account, thereby triggering the partial payment rule.¹⁹³

Courts have also considered whether a collector's simple attempt to collect on a time-barred debt through a collection letter is, in and of itself, a veiled threat to sue. On this issue, the Third Circuit Court of Appeals in *Huertas v. Galaxy Asset Management*¹⁹⁴ determined that "a debt collector [may] seek voluntary repayment of [a] time-barred debt so long as the debt collector does not *initiate or threaten legal action*,"¹⁹⁵ and explained that the question of whether a collection letter threatens legal action is determined by the language of the letter as examined from the perspective of the "least sophisticated debtor."¹⁹⁶

191. *Stepney v. Outsourcing Sols., Inc.*, No. 97 C 5288, 1997 WL 722972, at *5 (N.D. Ill. Nov. 13, 1997). In that case, the defendants argued that because "the [underlying] debt obligation is still valid, then the practice of attempting to collect the debt—short of filing a time-barred lawsuit—must *a fortiori* be legitimate." *Id.* at *4. Citing *Kimber*, the court rejected the argument (at least for purposes of ruling on the defendant's motion to dismiss), even though the collection letter at issue "neither threaten[ed] nor mention[ed] filing a lawsuit." *Id.* at *5.

192. *Gervais v. Riddle & Assocs., P.C.*, 479 F. Supp. 2d 270, 273–76 (D. Conn. 2007).

193. *Id.* at 276; *see also id.* at 274 (discussing cases declaring that a letter signed by an attorney signals to the unsophisticated consumer that legal action may be imminent); *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1461 (C.D. Cal. 1991) ("The representation that independent counsel has been hired may unjustifiably frighten the unsophisticated debtor into paying a debt that he or she does not owe. The FDCPA must be construed to proscribe this means of collection.").

194. 641 F.3d 28 (3d Cir. 2011).

195. *Id.* at 32–33 (emphasis added).

196. *Id.* at 33.

Examining the particular letter at issue, the Third Circuit found no basis to conclude that the letter explicitly or implicitly threatened litigation.¹⁹⁷ Rather, the letter merely indicated that the debtor’s account had been reassigned; requested the debtor to call “to resolve this issue”; included a privacy notice; and indicated, as the FDCPA requires, that if the debtor did not dispute the debt within thirty days of receiving the letter, the collector would assume the debt is valid.¹⁹⁸ The letter also warned that it was “an attempt to collect a debt,” which the FDCPA requires,¹⁹⁹ and, importantly, did not offer to settle the debt (a tactic courts in similar cases have found unlawful).²⁰⁰ Examining the letter in its entirety, the *Huertas* court declared:

Since it is appropriate for a debt collector to request voluntary repayment of a time-barred debt, it would be unfair if debt collectors were found to violate the FDCPA both if they include the mandated [notices and warnings] (because inclusion would threaten suit) and if they do not (because failure to include a mandatory notice violates the statute). Accordingly, [the debtor] has not stated a claim under the FDCPA based upon [the collector’s] letter²⁰¹

In the Third Circuit’s view, a straightforward attempt to collect a time-barred debt that invites the debtor to “resolve” the debt but is silent as to litigation and merely states that the debt will be assumed valid if not disputed, which the FDCPA mandates, does not violate the FDCPA’s prohibition against threatening to take action that cannot be legally taken.²⁰² Although other courts agree, including the United States Court of Appeals for the Eighth

197. *See id.* (stating that “even the least sophisticated consumer” would not interpret the letter to be threatening litigation).

198. *Id.*

199. *See* 15 U.S.C. § 1692e(11) (2012) (requiring that debt collection letters disclose the fact that they are sent in an effort to collect a debt).

200. *See* *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 399–400 (6th Cir. 2015) (distinguishing *Huertas* on this basis).

201. *Huertas*, 641 F.3d at 33.

202. *See id.* (stating that collection letters seeking to “resolve” debts, and assuming that such debts are valid if not disputed, do not violate the FDCPA).

Circuit and various district courts,²⁰³ once an *offer to settle* the debt is added to the mix, the scales tilt in the debtor's favor.

C. Offers to Settle Time-Barred Debts as Violations of the FDCPA

The cases summarized above—*Beattie v. D.M. Collections, Inc.*,²⁰⁴ *Stepney v. Outsourcing Solutions, Inc.*,²⁰⁵ *Gervais v. Riddle & Associates, P.C.*,²⁰⁶ and *Huertas*—are based on the FDCPA's prohibition against “threat[ening] to take any action that cannot legally be taken.”²⁰⁷ An issue those courts did not address is whether an *offer to settle* a time-barred debt may violate the FDCPA by falsely representing “the character . . . or legal status of any debt.”²⁰⁸

Effectively extending the FDCPA's protection—and possibly creating a circuit split on the issue—the Fifth, Sixth, and Seventh Circuit Courts of Appeal have ruled that the FDCPA can be violated by a collection letter that is silent as to a possible lawsuit, but which offers to settle a time-barred debt without notifying the

203. See *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) (“[I]n the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid.”); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000) (granting defendant collector's motion for judgment on the pleadings as to plaintiff's FDCPA claim based on defendant's sending plaintiff a notice for a debt which defendant knew was time-barred but which did not threaten a lawsuit or further collection action); *Johnson v. Capital One Bank*, No. CIV. A. SA00CA315EP, 2000 WL 1279661, at *2–3 (W.D. Tex. May 19, 2000) (granting defendant's motion to dismiss debtor's FDCPA claim where collection letter sent in regards to debtor's 20-year old debt did not threaten a lawsuit but did threaten future collection action); *Wallace v. Capital One Bank*, 168 F. Supp. 2d 526, 527–29 (D. Md. 2001) (finding no FDCPA violation with respect to collection letters that failed to notify debtor that debts were time-barred but which did not threaten litigation or collection action).

204. 754 F. Supp. 383 (D. Del. 1991).

205. No. 97 C 5288, 1997 WL 722972 (N.D. Ill. Nov. 13, 1997).

206. 479 F. Supp. 2d 270 (D. Conn. 2007).

207. 15 U.S.C. § 1692e(5).

208. *Id.* § 1692e(2)(a). *But see Gervais*, 479 F. Supp. 2d at 277 (basing its decision on § 1692e(5), and also “find[ing] that because [p]laintiff's debt was time-barred, [d]efendant's false threat of litigation in violation of § 1692e(5) also constitutes a misrepresentation of the legal status of [p]laintiff's debt under § 1692e(2)(A)”).

debtor that the debt is judicially unenforceable and that partial payment will revive the statute of limitations as to the entire debt.²⁰⁹

Courts and administrative agencies have given various explanations as to why attempts to settle time-barred debts may falsely represent the character or legal status of the debt.²¹⁰ According to the CFPB, because few consumers know the applicable statute of limitations for any particular debt or whether the limitations period has run, consumers may interpret an attempt to collect a debt as an implied claim that the debt is judicially enforceable if they do not pay—a claim that is false for time-barred debts.²¹¹ The Federal Trade Commission (FTC) has espoused a similar view.²¹²

In *McMahon v. LVNV Funding, LLC*,²¹³ the Seventh Circuit Court of Appeals adopted a similar rationale in a case involving two collectors, highlighting each collector’s offer to settle the debt combined with the lack of notice that the debt was time-barred.²¹⁴ According to the *McMahon* court, the collection letters at issue “misrepresented the legal status of the debts” because “[n]either [collector] gave a hint that the debts that they were trying to collect were vulnerable to an ironclad limitations defense;” as such, “[a]n

209. See *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 513 (5th Cir. 2016) (examining the circuit split and stating that “a collection letter seeking payment on a time-barred debt (without disclosing its unenforceability) but offering a ‘settlement’ and inviting partial payment (without disclosing the possible pitfalls) could constitute a violation of the FDCPA”); *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397–99 (6th Cir. 2015) (reversing dismissal of FDCPA claim where collection letter contained a settlement offer with respect to a time-barred debt and failed to state that statute of limitations had run on the debt or that a partial payment would restart the limitations period, even though letter did not explicitly threaten litigation); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020–22 (7th Cir. 2014) (finding viable FDCPA claims in two cases involving collection letters that did not threaten litigation, but that offered to settle time-barred debts without notifying the debtor that the statute of limitations on the debt had expired or of the effect of a partial payment).

210. 15 U.S.C. § 1692e(2)(a) (2012).

211. CFPB OUTLINE OF PROPOSALS, *supra* note 12, at 20.

212. See FTC Report on Debt Buying Industry, *supra* note 19, at 47 (arguing that consumers may believe time-barred debts are enforceable).

213. 744 F.3d 1010 (7th Cir. 2014).

214. See *id.* at 1020 (stating that debt collectors must not mislead consumers to believe that time-barred debts are enforceable).

unsophisticated consumer . . . could have been led to believe that her debt was legally enforceable,”²¹⁵ or that the collector “could successfully sue on the debt,”²¹⁶ even though such a suit, were it to be filed, could be easily dismissed.²¹⁷ The Sixth Circuit Court of Appeals agrees, declaring that a settlement offer on a time-barred debt that makes no mention of its status might be actionably “misleading” because such an offer “may falsely imply that payment could be compelled through litigation.”²¹⁸

In these opinions, the Sixth and Seventh Circuits emphasized a second major problem with collection letters that fail to disclose the status of a time-barred debt. According to both courts, an unsophisticated debtor who receives such a letter might reasonably assume that some payment is better than no payment, which is untrue due to the partial payment rule.²¹⁹ On this point, the Sixth Circuit Court of Appeals court declared:

Some payment is [in fact] worse than no payment. The general rule in Michigan is that partial payment restarts the statute-of-limitations clock, giving the creditor a new opportunity to sue for the full debt. As a result, paying anything less than the settlement offer exposes a debtor to substantial new risk. This point is almost assuredly not within the ken of most people It thus is not hard to imagine how attempts to collect time-barred debt might mislead consumers trying their best to repay. Without disclosure [regarding the partial

215. *Id.* at 1021.

216. *Id.* at 1022.

217. *Id.* at 1020. According to the *McMahon* court, a specific threat of litigation, as prohibited by 15 U.S.C. § 1692e(5), “is not a necessary element of [an FDCPA] claim” because a separate misrepresentation about “[w]hether a debt is legally enforceable is a central fact about the character and legal status of that debt,” which itself violates the FDCPA. *Id.*

218. *See Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 399 (6th Cir. 2015) (relying on dictionary definitions of the term “settle” to show the “various ways an everyman individual might read the terms”).

219. *See id.* at 399 (“[A]n unsophisticated debtor who cannot afford the settlement offer might nevertheless assume from the letter that some payment is better than no payment.”); *see also McMahon*, 744 F.3d at 1022 (“[A]n offer of settlement makes things worse, not better, since a gullible consumer who made a partial payment would inadvertently have reset the limitations period and made herself vulnerable to a suit on the full amount.”).

payment rule], a well-meaning debtor could inadvertently dig herself into an even deeper hole.²²⁰

In another recent opinion on this issue, the Fifth Circuit Court of Appeals likewise held that “a collection letter seeking payment on a time-barred debt (without disclosing its unenforceability) but offering a ‘settlement’ and inviting partial payment (without disclosing the possible pitfalls) could constitute a violation of the FDCPA.”²²¹

To protect consumers, several state and local jurisdictions—including New Mexico, Massachusetts, and New York City—have passed laws requiring collectors to disclose that consumers cannot be lawfully sued if they do not pay time-barred debts.²²² However, not all courts agree that offers to settle time-barred debts violate the FDCPA,²²³ and greater uniformity is needed regarding the warnings and disclosures collectors should be required to make.

VI. Proposals

Upon examining the current landscape with respect to time-barred debts, it becomes clear that greater uniformity of legal principles and judicial practices is needed to ensure that like debtors are treated alike. Quite simply, because debt collection law strives to protect unsophisticated consumers, a given debtor’s ultimate financial obligation on a time-barred debt should not turn

220. *Buchanan*, 776 F.3d at 399.

221. *See* *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 513–14 (5th Cir. 2016); *see also id.* at 511 (“[A] collection letter that is [1] silent as to litigation, but which [2] offers to ‘settle’ a time-barred debt [3] without acknowledging that such debt is judicially unenforceable, can be sufficiently deceptive or misleading to violate the FDCPA.”)

222. *See* Proposed Rules, Bureau of Consumer Financial Protection, 78 FR 67876 n.246 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006) (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006) (discussing a requirement for collectors to disclose to consumers that the collector cannot sue for a time barred debt (citing N.Y. ADMIN. CODE § 20-493.2 (2018))). *See generally* N.M. CODE R. § 12.2.12 (2018); 940 MASS. CODE REGS. 7.07(24) (2017).

223. *See, e.g.,* *Johns v. Northland Grp., Inc.*, 76 F. Supp. 3d 590, 600 (E.D. Pa. 2014) (rejecting debtor’s argument that collector’s use of the term “settlement offer” misrepresented the legal status of the debt or implied that litigation is imminent).

on his or her knowledge of the complex laws in this area, nor should collectors be permitted to take advantage of the relaxed evidentiary standards that result from the failure of most debtors to defend collection suits.

In addition, any set of reforms should accomplish the following objectives. First, any legal reform should preserve the established rule that it is not inherently unlawful for a debt collector to inform a debtor that a debt remains unpaid and provide the debtor an opportunity to satisfy the debt at a discount.²²⁴ Second, debtors must be informed at the initiation of collection efforts that a debt is time-barred and that any payment will allow the collector to pursue payment on the entire debt under a fresh statute of limitations period.²²⁵ Third, to foster uniformity and codify the general trend among courts,²²⁶ suits to collect time-barred debts should be made explicitly unlawful (in the FDCPA). Fourth, the ability of collectors to obtain default judgments on time-barred debts should be curtailed. Finally, all of this should be accomplished in a manner requiring minimal judicial involvement. In combination, the proposals below achieve these objectives.

A. Proposed Notices Regarding the Age of the Debt and the Partial Payment Rule

Under the FDCPA, debt collection notices are governed by 15 U.S.C. § 1692g, which requires debt collectors to notify debtors of (1) the amount of the debt; (2) the name of the creditor; (3) a statement that the debt's validity will be assumed unless the consumer disputes it, or any portion of it, within 30 days of receiving the notice; (4) a statement that if the consumer timely disputes the debt (or a portion of it), the debt collector will obtain and mail verification or a copy of a judgment to the consumer; and (5) a statement that the consumer may request and receive the name and address of the original creditor, if different from the

224. *Supra* notes 49–53 and accompanying text.

225. *Supra* notes 209–222 and accompanying text.

226. *Supra* notes 127–141 and accompanying text.

current creditor.²²⁷ Additional required notices with respect to debt status are likely on the horizon.

In July 2016, the CFPB issued an outline of proposals it is considering for future debt collection and debt buying rulemaking, which is expected to be finalized in 2019.²²⁸ The CFPB Outline proposes that additional information be included in validation notices to assist consumers in identifying the debt, including, among other things, the consumer's full name and address; the creditor's name at the time of default; the account number with the default creditor; the amount owed on the default date; the creditor to which the debt is currently owed; and the amount currently owed.²²⁹ The CFPB further proposes notices be included regarding consumer rights, such as information on garnishing income.²³⁰ Finally, the CFPB proposes notices regarding the status of time-barred debts and the effect of a partial payment. Such notices should be required.

The partial payment rule is particularly problematic in the debt collection context because a collection letter that fails to notify a debtor that her debt is time-barred or that a partial payment will revive the statute of limitations could easily "trick" the debtor into reviving the right to sue on the debt for several years to come.²³¹ To combat this concern, agencies, scholars, and legislatures have proposed or adopted various notices that would inform debtors of the true status of the debt and of the effect of a partial payment on its collectability. Numerous sample notices exist. For example, as a result of a consent decree between the FTC and Asset

227. See 15 U.S.C. § 1692g(a) (2012) (listing the five requirements stated above); see also *Johnson v. Capital One Bank*, No. SA00CA315EP, 2000 WL 1279661, at *1 (W.D. Tex. May 19, 2000) (discussing the requirements of § 1692g).

228. See Rosenkoetter & Wier, *supra* note 54, at *4 (summarizing the CFPB proposals). See generally CFPB OUTLINE OF PROPOSALS, *supra* note 12.

229. See Sobol, *supra* note 5, at 376–77 (proposing similar requirements). See generally CFPB OUTLINE OF PROPOSALS, *supra* note 12, at app. F.

230. See CFPB OUTLINE OF PROPOSALS, *supra* note 12, at app. F, G.

231. See *Wallace v. Capital One Bank*, 168 F. Supp. 2d 526, 528 (D. Md. 2001) (discussing this concern, but finding that more than mere silence regarding the debt's status is necessary to constitute actionable deception under the FDCPA; rather, the letter must actually do something to affirmatively deceive, trick, or induce an unsophisticated debtor into reviving her debt and thus changing her legal position).

Acceptance, LLC, the company must now disclose to consumers whether it knows or believes that a debt was incurred outside the limitations period using the following language: “The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it.”²³²

Using similar language, debt collector Northland Group, Inc., now utilizes a collection letter that provides the following warning regarding the statute of limitations:

The law limits how long you can be sued on a debt. Because of the age of your debt, [the creditor/owner of your debt] will not sue you for it, and [the creditor/owner of your debt] will not report it to any credit reporting agency.²³³

Going one step further by mentioning the acknowledgment of a debt rule, although only with respect to a written acknowledgment rather than a partial payment, the following notice is now being used by at least one collector:

Due to the age of your account [the creditor/owner of your debt] is not able to file suit against you but if you take specific action such as making a written promise to pay, the time for filing a suit will be reset.²³⁴

New Mexico and Massachusetts have enacted perhaps the most comprehensive laws to address these concerns.²³⁵ The New Mexico statute declares that the following disclosure is sufficient:

This debt may be too old for you to be sued on it in court. If it is too old, you can't be required to pay it through a lawsuit. You can renew the debt and start the time for the filing of a lawsuit against you to collect the debt if you do any of the following: make any payment of the debt; sign a paper in which you admit that you owe the debt or in which you make a new promise to pay; sign a paper in which you give up ('waive') your right to

232. *McMahon v. LVNV Funding LLC*, 744 F.3d 1010, 1015–16 (7th Cir. 2014) (citing *United States v. Asset Acceptance, LLC*, No. 8:12-cv-182-T-27EAJ (M.D. Fla. 2012)).

233. *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 400 (6th Cir. 2015).

234. *Langley v. Northstar Location Servs., LLC*, No. CV H-16-1351, 2016 WL 4059355, at *1 (S.D. Tex. July 28, 2016).

235. See generally N.M. CODE R. § 12.2.12 (2018); 940 MASS. CODE REGS. 7.07(24) (2017).

stop the debt collector from suing you in court to collect the debt.²³⁶

My proposal would combine aspects of each of the above disclosures. My proposed disclosure, which must occur in the first written communication in which the collector requests payment, would include a short, plain-language statement informing the debtor of the time-barred status of the debt and stating that the collector will not sue to recover it.²³⁷ It would also require the collector to state the effect of a partial payment, and would give the debtor the ability to avoid that rule by allowing the debtor to specify his or her intent to pay only the offered settlement amount, whether in full or in installments. My proposed notice is as follows:

Statute of Limitations: Through statutes of limitations, the law limits how long you can be sued on a debt. Your debt is currently over __ years old [since the date of charge-off by the original creditor]. Because of the age of your debt, [the creditor/owner of your debt] will not sue you for it, and [the creditor/owner of your debt] will not report it to any credit reporting agency.

Option 1: Paying Full Offered Settlement Amount Today: The owner of your debt is offering to settle your debt for [insert offer amount], which this letter refers to as the “offer amount.” You may deem it in your best interest to pay the *entire* offer amount in one payment. To elect this option, you must check the box below and submit your payment of [the offer amount] within the next 30 days. Once we receive your payment, your account will be satisfied in full, resulting in a zero balance, and we will not attempt any further collection efforts on this account, either through informal collection efforts or through litigation.

By checking this box and paying the entire offer amount today, I agree that the balance on my debt should be reduced to zero and understand that I will no longer owe any additional amount on this debt.

Option 2: Making a Payment Towards the Offered Settlement Amount: If, rather than paying the entire offer amount within the next 30 days, you instead elect to pay the

236. N.M. CODE R. § 12.2.12.9.B.

237. This aspect of my proposal is similar to a CFPB proposed rule. See CFPB OUTLINE OF PROPOSALS, *supra* note 12, at 20–21 (requiring a “brief, plain-language statement” informing the consumer that the collector cannot sue).

offer amount in a series of smaller payments, we must inform you that **the law would then allow us to seek payment of the entire amount of your debt.** In the eyes of the law, a partial payment on a debt indicates your willingness to pay the entire debt and thus restarts the statute of limitations on collections for the entire amount owed. You may elect to avoid this result. To do so, however, you must indicate your intent to pay only the offer amount, and no more, by checking the box below and submitting your first payment [of \$100]:

By checking this box and making a partial payment today [of \$100] on this debt, I elect to pay the offer amount in installments and do not acknowledge that I owe any sum greater than the offer amount. After making today's payment, I agree that I will receive monthly statements requesting installment payments in the amount of [5% of the offer amount] until the offer amount has been fully paid. I further agree that if I fail to make a required installment payment, my only obligation will be to pay the missed installment payment at a later date along with a small monetary penalty of [the late payment fee specified herein].

The first, and most important step, towards treating like debtors alike and reducing the number of suits filed on time-barred debts is a contractually enforceable promise not to sue the debtor on the debt. Accordingly, the proposed notice above includes the following language: "Because of the age of your debt, [the creditor/owner of your debt] will not sue you for it, and [the creditor/owner of your debt] will not report it to any credit reporting agency."

Although such a promise is arguably sufficient in and of itself to prevent a subsequent lawsuit under simple principles of offer and acceptance, in the event a debtor makes only a partial payment in response to such an offer letter, a debt owner could reasonably argue that the partial payment revived the statute of limitations on the debt and, consequently, the owner's right to sue for it. Accordingly, the additional layer of protection proposed in the final paragraph of the above notice, which shows a clear intent on the part of both parties to eliminate the partial payment rule from consideration, is needed.

B. Providing Option of Avoiding the Partial Payment Rule

The “Option 2” portion of my proposed notice begins with a statement of the law as it currently stands in most jurisdictions with respect to a partial payment on a time-barred debt. Because my proposals aim to prevent debtors from being duped into reviving the statute of limitations as to an entire debt and seek to ensure that like debtors are treated alike, the final paragraph of my proposed notice allows the debtor to affirmatively indicate his intent to pay only the offered settlement amount. When a debtor elects this option, courts should find that the partial payment rule, which hinges on the debtor’s intent, simply does not apply, thereby preventing the collector from invoking the rule in any subsequent suit filed on the debt.²³⁸

As discussed in Part IV, unless a partial payment is made under circumstances indicating that the debtor *intended* to pay the entire debt,²³⁹ it is improper to treat the partial payment as having that effect. However, the partial payment rule is counterintuitive to most debtors, and a debtor who makes a payment in response to an offer to settle a debt for a fraction of what is owed would almost certainly not intend to revive the *entire* debt. Rather, his intent would be to begin paying only the offered settlement amount.²⁴⁰ Thus, my proposal simply brings modern collection efforts in line with the likely intent of most debtors.

238. *Supra* notes 71–87 and accompanying text.

239. *See* Gillingham v. Brown, 60 N.E. 122, 124 (Mass. 1901) (recognizing that “[t]he nature of the [debtor’s payment] is to be determined by the intention of the debtor as shown by the act, his words, and the circumstances accompanying and explaining it”); *id.* at 123 (examining English authorities and concluding that “if [an alleged] acknowledgment be accompanied by circumstances, or words which repel the idea of an intention to pay, no promise can be implied”); *id.* (noting that for a partial payment to serve as an acknowledgment of a debt, “in the mind of the party paying, such a payment must be ‘a direct acknowledgment and admission of the debt, . . . as if he had written in a letter that he still owed the [entire] sum”).

240. *See* CFPB OUTLINE OF PROPOSALS, *supra* note 12, at 20 (reporting the Bureau’s belief that “most consumers are unaware of the potential legal consequences of making a payment or acknowledging a debt in writing,” and that “many consumers may find it counterintuitive that making a payment . . . may actually have negative consequences”); *cf.* Gillingham, 60 N.E. at 123–24

[S]uppose a debtor says to his creditor: “I acknowledge the debt to be just, that it never has been paid, and that I have no defense except the statute of limitations. [I] am willing to pay, and I do hereby pay to you, one-half of the debt, but I do not intend to waive the statute as to the

In effect, my proposal will ensure that any partial payment by the debtor will not result in the collector seeking payment for the entire debt. In this respect, my proposal is similar to a CFPB proposed rule requiring collectors to waive revival of the statute of limitations with respect to time-barred debt.²⁴¹ My proposal differs, however, by requiring collectors to explain the partial payment rule and allowing debtors to affirmatively reject it. Although the CFPB's proposal has merit, my proposal goes to the heart of the partial payment rule itself, directly negating its effect.²⁴² Unlike the CFPB's proposal, which depends on a collector's promise, my proposal hinges on the debtor's intent, which the partial payment rule specifically considers. Accordingly, when my proposed notice is acted upon by a debtor through an affirmative statement agreeing to pay only the offered settlement amount, and no more, a court subsequently deciding whether to apply the partial payment rule would have no doubt about the debtor's intent, which would remain true whether the debt were sold to other creditors or debt buyers, who might themselves not agree to the type of waiver proposed by the CFPB. For these reasons, my proposal has advantages over the CFPB proposal.

C. Proposed FDCPA Amendments

1. FDCPA Amendment Clarifying that Filing Suit to Collect on a Time-Barred Debt is Unlawful

As an additional layer of protection against any suit seeking to collect an old debt, this Article proposes an amendment to the FDCPA

rest. On the contrary, I insist on my defense as to that, and I never will pay any more." Can it be said that from such a part payment, accompanied by such a distinct affirmation of the debtor's intention not to pay more, but to insist upon his defense under the statute, the law would have implied a promise to pay the remaining half?

241. See CFPB Outline of Proposals, *supra* note 12, at 21 (proposing to prohibit collectors from collecting time-barred debt that can be revived); see also Sobol, *supra* note 5, at 378–79 (advancing a similar proposal).

242. See *Hart v. Deshong*, 8 A.2d 85, 87 (Del. Super. Ct. 1939) (discussing English common law authorities on the acknowledgment rule and noting that "an acknowledgment or recognition which expressly negatives the promise to pay has no effect," adding that "[w]hen a promise to pay cannot be plainly drawn from all the surrounding circumstances the acknowledgment is ineffective").

plainly stating that filing suit to collect on a time-barred debt violates the FDCPA.

As noted, the FDCPA prohibits a debt collector from using “any false, deceptive, or misleading representation or means in connection with the collection of any debt,”²⁴³ including “threat[ening] to take any action that cannot legally be taken or that is not intended to be taken.”²⁴⁴ The FDCPA further prohibits collectors from using “unfair or unconscionable means to collect or attempt to collect any debt.”²⁴⁵ Although the FDCPA provides guidance as to what constitutes an unlawful collection effort, the standards are vague, providing room for collectors to argue—in the few collections suits where a debtor actually mounts a defense or brings her own FDCPA claim—that collection suits on time-barred debts are not unlawful.

Although most courts have held that a debt collector violates the FDCPA by filing suit on a debt that appears to be time-barred,²⁴⁶ the FDCPA does not explicitly contain such prohibition. Thus, Congress should amend the FDCPA to affirmatively make filing suit on a time-barred debt unlawful. My proposal would simply add a provision to the FDCPA, using language similar to the North Carolina statute discussed above, making it unlawful “to file suit or initiate an arbitration proceeding against a debtor when the debt collector or plaintiff knows, or reasonably should know, that such collection is barred by the applicable statute of limitations.”²⁴⁷ Following *Kimber*, my proposed amendment would make filing suit or initiating an arbitration proceeding on a time-barred debt an unfair and unconscionable means of collecting the debt under 15 U.S.C. § 1692f.²⁴⁸ Making the point explicit in the FDCPA will eliminate

243. 15 U.S.C. § 1692e (2012).

244. *Id.* § 1692e(5).

245. *Id.* § 1692f.

246. See *supra* note 142 and accompanying text (stating that courts normally interpret the FDCPA in the consumer’s favor).

247. See N.C. GEN. STAT. ANN. § 58-70-115(4) (2009) (using language similar to the proposed language above).

248. *Supra* notes 139–145 and accompanying text.

the ability of collectors to argue that the matter is unclear, naturally reducing the number of such suits.²⁴⁹

2. FDCPA Amendment Specifying How to Lawfully Collect a Time-Barred Debt

As discussed in Part II, old debts are still valid debts, and courts generally agree that the statute of limitations does not prevent a creditor from seeking to collect the full amount of a time-barred debt outside of court.²⁵⁰ As the Sixth Circuit Court of Appeals recently explained, there is nothing wrong with informing debtors that a time-barred debt remains unpaid or allowing them to satisfy the debt at a discount.²⁵¹ The question is simply how this request can be communicated in a fair manner that does not mislead or deceive the consumer, a matter the FDCPA should more clearly address.²⁵²

Encapsulating the concerns of the federal appeals courts that have considered the lawfulness of non-judicial collection efforts on time-barred debt, the FDCPA should be amended to plainly state that it is not unlawful for a collector to seek repayment on a time-barred debt via a collection letter, *but only if* the types of notices and promises proposed in this Article are included in the collection letter.

The FDCPA generally specifies the actions a collector may *not* take, but there is also value in providing clear guidance for the honest collector as to what may be done. Although the FDCPA was enacted to eliminate abusive debt collection practices, the statute

249. See *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487–88 (M.D. Ala. 1987) (addressing argument that filing suit on time-barred debt was lawful).

250. *Supra* notes 46–53 and accompanying text.

251. *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397 (6th Cir. 2015) (permitting collectors to inform debtors that their debts are unpaid); see also *Buchanan* 776 F.3d at 400 (Kethledge, J., dissenting) (noting that it would have been lawful for the debt collector in the case to send the debtor a letter that simply recited the amount of her debt and demanded payment in full).

252. See 15 U.S.C. § 1692e (2012) (prohibiting a debt collector from using “any false, deceptive, or misleading representation” in a debt collection effort); *id.* § 1692f (prohibiting the “use [of any] unfair or unconscionable means to collect or attempt to collect any debt”).

was also designed to ensure that debt collectors who abstain from such practices are not competitively disadvantaged.²⁵³ From the honest collector's perspective, this proposed amendment will clarify exactly how a collector may seek repayment on a time-barred debt, providing a safe haven for collectors against unwarranted FDCPA suits.

To complement this proposed provision, I further propose an FDCPA amendment expressly prohibiting debtors from suing collectors who attempt to collect time-barred debts in the authorized manner. Given this Article's objectives to clarify the law in this area and reduce the impact of debt collection suits on courts, such a provision will go a long way toward preventing suits by debtors for collection efforts that most courts agree are lawful.

D. Stricter Standards for Default Judgments

As noted, most debtors do not defend debt collection actions, leading to default judgments against them, even in cases involving time-barred debts.²⁵⁴ Although suing to collect a time-barred debt generally violates the FDCPA, such suits still occur and usually prevail given that the statute of limitations defense is waived if not asserted.²⁵⁵

Because traditional waiver rules and default judgment standards are the true cause of default judgments in such cases, amendments to the FDCPA cannot truly fix the problem. Moreover, a debtor who fails to defend a collector's suit on a time-barred debt—perhaps due to insufficient financial resources or a desire to avoid litigation—is probably just as unlikely to file her own suit to challenge the collector's actions under the FDCPA. In addition, although collectors are *affirmatively prohibited* from suing to collect a time-barred debt in some states, this appears to be uncommon, and instead courts simply stand ready to dismiss

253. See *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011) (stating that one purpose of the FDCPA was to prevent competitive disadvantage for honest collectors).

254. See CFPB OUTLINE OF PROPOSALS, *supra* note 12, at 12 (stating that consumers are unlikely to defend themselves against collectors).

255. *Supra* notes 119–120 and accompanying text.

lawsuits if the debtor defends and asserts the statute of limitations defense.²⁵⁶ Accordingly, my earlier proposal of an FDCPA amendment making it clearly unlawful to sue on a time-barred debt will only partly prevent such suits.

To fully fix the problem of collector suits on time-barred debts, I propose flipping the burden of proof on the statute of limitations issue. Quite simply, rather than requiring a debtor to prove a debt is time-barred, those who bring such suits should be required to prove it is not. To that end, the statute I propose would require the plaintiff both to certify in its complaint that the debt is not time-barred and to provide evidence to prove the point before a judgment, default or otherwise, may be awarded.

My proposal is best accomplished by state statute. Indeed, some jurisdictions have already enacted statutes that contain similar requirements. A North Carolina statute, for example, provides prerequisites for entering a default or summary judgment against a debtor in debt collection suits initiated by debt buyers.²⁵⁷ The North Carolina statute requires the plaintiff to “file evidence with the court to establish the amount and nature of the debt,” provides that only properly authenticated business records are sufficient evidence, and mandates eight specific items that must be included in the business record.²⁵⁸ Minnesota has a similar statute.²⁵⁹ The requirements of a sworn statement and supporting evidence that a debt is not time-barred would be an easy addition to such statutes.

256. See CFPB OUTLINE OF PROPOSALS, *supra* note 12, at 19 (stating that courts commonly dismiss suits filed to recover expired debts).

257. See N.C. GEN. STAT. ANN. § 58-70-155 (2011) (requiring collectors to submit evidence establishing the nature and amount of the debt owed by the debtor).

258. *Id.* § 58-70-155(b). The statute requires the following information be included in such an authenticated business record: (1) the original account number; (2) the original creditor; (3) the amount of the original debt; (4) an itemization of charges and fees claimed to be owed; (5) the original charge-off balance, or, if the balance has not been charged off, an explanation of how the balance was calculated; (6) an itemization of post charge-off additions, where applicable; (7) the date of last payment; and (8) the amount of interest claimed and the basis for the interest charged. *Id.*

259. See MINN. STAT. § 548.101 (2013) (requiring debtors to satisfy prerequisites before collecting debts).

The primary advantage of this proposal is the impact it would have on reducing collector suits on time-barred debts. Moreover, this reform would require minimal judicial effort because collectors, rather than courts, would be required to screen cases in advance of filing suit and would be saddled with the obligation of securing evidence of timeliness. When done right, this will reduce the impact on courts and should not be overly-burdensome for collectors, as some are already engaged in the process.²⁶⁰

As a backstop, courts could develop simple case screening systems for complaints on consumer debts to ensure that default judgments are not awarded inappropriately. The screening process would be primarily performed by non-judicial staff, such as clerk's office personnel, who would be required to ensure that the proposed timeliness certification is present. If such certification is missing from a complaint, clerk's office personnel could then notify judges and their staff of the deficiency via e-mail (a process that is already utilized with many matters in the federal courts), prompting chambers to issue form orders requesting such information. If the plaintiff is then unable to demonstrate that the debt is not time-barred, the case would be dismissed with prejudice.²⁶¹ If, however, the timeliness issue remains unclear, evidentiary hearings could be held on the matter, but only as a last resort.²⁶²

Although one might argue that this proposal is inconsistent with the standards for awarding default judgments, this criticism is unfounded. Rule 55 of the Federal Rules of Civil Procedure, for

260. See, e.g., *Parkis v. Arrow Fin. Servs.*, LLS, No. 07 C 410, 2008 WL 94798, at *1 (N.D. Ill. Jan. 8, 2008) (describing the detailed practices one law firm used to ensure that a suit is not filed on time-barred debt).

261. Such a requirement is not unduly burdensome. Cf. *Day v. McDonough*, 547 U.S. 198, 206 (2006) (permitting district courts to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition).

262. Courts are already empowered to conduct evidentiary hearings in default cases, and they regularly do so when there are questions as to the plaintiff's proof (e.g., in the event damages are uncertain). See, e.g., *In re Assigned Consumer Debt Default Judgment Applications.*, Nos. 56-CV-14-1333, 56-CV-14-1439, 56-CV-14-1546, 56-CV-14-1644, 56-CV-14-1742, 56-CV-14-2075, 56-CV-14-2076, 56-CV-14-2663, 2015 WL 1087512, at *2 (D. Minn. Mar. 6, 2015) (recognizing that when a trial court determines not to administratively grant an application for default judgment made by a debt buyer, it should order a hearing as a matter of course).

example, already enables courts to be more stringent in awarding default judgments in debt collection suits.²⁶³ Under Rule 55, although a defaulting defendant is deemed to have “admit[ted] the plaintiff’s well-pleaded allegations of fact” for purposes of determining liability,²⁶⁴ courts recognize that “a default judgment cannot stand on a complaint that fails to state a claim.”²⁶⁵ Accordingly, even in default scenarios, courts are already in the habit of reviewing complaints to determine that the well-pleaded factual allegations are sufficient to establish each element of the cause of action.²⁶⁶

In consumer debt cases, courts can be as stringent as they like in performing this analysis (particularly under my proposed statute requiring admissible evidence to prove the suit is not time-barred). A stringent analysis is only fair. By analogy, where a plaintiff seeks judgment in a debt collection suit but presents no proof that the defendant is in fact the person who incurred the debt, the court would be justified in refusing to enter judgment for the plaintiff.²⁶⁷ Such rulings reflect the unremarkable premise that

263. In most states, consumer debt litigation is governed by the same state and federal laws and rules of procedure that govern litigation generally. Spector, *supra* note 110, at 261.

264. FED. R. CIV. P. 55.

265. See *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1371 n.41 (11th Cir. 1997) (“A default judgment is unassailable on the merits but only so far as it is supported by well-pleaded allegations, assumed to be true.” (citing *Nishimatsu Constr. Co. v. Houston Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)); see also *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (citing cases recognizing that a defaulting party may, on appeal, contest the legal sufficiency of allegations contained in the complaint, thereby requiring appellate courts to review the complaint’s allegations).

266. See, e.g., *Woods v. Sieger, Ross & Aguire, LLC*, No. 11 CIV. 5698 JFK, 2012 WL 1811628, at *3, *7–8 (S.D.N.Y. May 18, 2012) (stating upon default, “the Court accepts the factual allegations in the complaint as true, except those relating to damages, [drawing] all reasonable inferences in [p]laintiff’s favor,” but retains “discretion . . . to require proof of necessary facts and need not agree that the alleged facts constitute a valid cause of action”). On the merits, the court in *Woods* refused to grant plaintiff’s motion for a default judgment on her claim for intentional infliction of emotional distress under an analysis akin to that used when evaluating a defendant’s motion to dismiss for failure to state a claim. *Id.*

267. See generally *Bearden*, *supra* note 103 (arguing that the court is justified in failing to enter a judgment where the plaintiff fails to present evidence that the defendant is the debtor (citing *Royal Fin. Group, L.L.C. v. George*, No. ED 92972, 2010 WL 1223791, at *3–4 (Mo. Ct. App. Mar. 30, 2010))); see also *In re*

a judgment should not be awarded where the evidence does not support it. Because time-barred debts are by definition no longer legally enforceable, the same stringent analysis should apply.

A recent Minnesota case, which involved twenty-four consolidated actions where plaintiffs sought money judgments on consumer debts, provides an excellent example of the more stringent approach I propose.²⁶⁸ That case, *In re Assigned Consumer Debt Default Judgment Applications*²⁶⁹ (*Default Judgment Applications*), involved Minnesota Statute Section 548.101, which sets forth procedural and evidentiary requirements for a party seeking default judgment in an action on a debt where (1) the debt has been assigned; (2) the debt is a consumer debt; (3) the debt was incurred primarily for personal, family, or household purposes; and (4) the debt was already in default at the time it was assigned.²⁷⁰

According to the District Court of Minnesota, Section 548.101 “was designed to provide protections to Minnesotans sued by commercial debt buyers,”²⁷¹ and “arose from [the Minnesota Attorney General’s Office’s] experience with the injustice that may result when a debt buyer obtains default judgments based on ‘incomplete or inaccurate information’” about the debt.²⁷² The statute “aims to prevent such situations [where judgments are improperly awarded] by establishing a standard array of documents that debt buyers must obtain and bring forward, even in an application for default judgment—a manner of proceeding that does not normally require substantive evidence.”²⁷³ As an example, the court noted that where a plaintiff seeks to recover

Assigned Consumer Debt Default Judgment Applications., 2015 WL 1087512, at *8–9 (same).

268. See *In re Assigned Consumer Debt Default Judgment Applications*, 2015 WL 1087512 (D. Minn. March 6, 2015).

269. Nos. 56-CV-14-1333, 56-CV-14-1439, 56-CV-14-1546, 56-CV-14-1644, 56-CV-14-1742, 56-CV-14-2075, 56-CV-14-2076, 56-CV-14-2663, 2015 WL 1087512, at *2 (D. Minn. March 6, 2015).

270. MINN. STAT. § 548.101(a) (2013). See generally *Assigned Consumer Debt Default Judgment Applications*, 2015 WL 1087512, at *2.

271. *In re Assigned Consumer Debt Default Judgment Applications*, 2015 WL 1087512, at *3.

272. *Id.*

273. *Id.*

finance charges accrued after assignment of the debt by the original creditor, the plaintiff “must provide evidence of the contract terms between the debtor and the original creditor so that the trial court may determine whether these charges were authorized by the contract.”²⁷⁴ In addition, “if some transaction history is necessary to show how the charges were calculated, then an affidavit explaining that transaction history must be submitted.”²⁷⁵

Along with the necessary contract terms and transaction history, the court also mandated additional evidence, such as detailed interest calculations.²⁷⁶ To combat the problem of default judgments being awarded against persons mistakenly identified as the debtor, the court further required “evidence that *it is the defendant* who owes the debt, *rather than someone else*,”²⁷⁷ as the statute requires.²⁷⁸ Here, the court felt that the debt buyer should provide evidence, such as the debtor’s social security number, that it has the right person, as opposed to someone with a similar name.²⁷⁹ After addressing other evidentiary requirements mandated by statute, including the requirement of “admissible evidence establishing a valid and complete chain of assignment of the debt from the original creditor to the party requesting

274. *Id.* at *8.

275. *Id.*

276. For instance, the court noted that “if payment was made on the debt after it was assigned, a claim for interest should be supported by calculations showing the time period that simple interest was accrued on each principal amount,” and “any splitting or merging of accounts which affects the calculation of interest should be explained and shown.” *Id.* at *8.

277. *Id.* at *8–9.

278. See MINN. STAT. § 548.101(a)(2) (2013) (requiring proof that the defendant is the one who owes the debt).

279. See *id.* (requiring proof of the last four numbers of the debtor’s Social Security number, if known); see also *In re Assigned Consumer Debt Default Judgment Applications*, Nos. 56-CV-14-1333, 56-CV-14-1439, 56-CV-14-1546, 56-CV-14-1644, 56-CV-14-1742, 56-CV-14-2075, 56-CV-14-2076, 56-CV-14-2663, 2015 WL 1087512, at *9 (D. Minn. March 6, 2015) (requiring evidence of the debtor’s identity).

judgment,” such as a bill of sale,²⁸⁰ the court then conducted a case-by-case analysis of the twenty-four cases at issue.²⁸¹

As these Minnesota authorities reveal, courts and legislatures are beginning to recognize the importance of ensuring a valid claim exists before a default judgment is awarded in consumer debt cases, and have imposed heightened evidentiary standards to ensure that result. The proposed requirements of a sworn statement and admissible evidence that a debt is not time-barred are consistent with this approach.²⁸² With these changes, the number of suits filed and default judgments awarded on time-barred debts will be reduced, further ensuring like debtors are treated alike.

*E. Rule 11 Sanctions Against Attorneys Who Sue to Collect
Time-Barred Debts*

If my proposals were adopted, filing suit to collect a time-barred debt would be expressly prohibited by the FDCPA. Given that the action would be clearly unlawful, rules of civil procedure could then be used to sanction attorneys for filing suits where an attorney knew or should have known a suit to collect an old debt was time-barred.²⁸³

Rule 11 of the Federal Rules of Civil Procedure, for example, declares that by filing a complaint, a litigant “certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” that, among other things, “the claims . . . and other legal contentions are warranted by existing law,” and that “the factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or

280. *In re Assigned Consumer Debt Default Judgment Applications*, 2015 WL 1087512, at *9–12 (citing MINN. STAT. § 548.101(a)(5)).

281. *See id.* at *12–22 (conducting a case by case analysis).

282. As with the North Carolina and Minnesota statutes, my proposal would be limited to debt collection actions, leaving unsettled the general rules regarding waiver of the statute of limitations defense.

283. *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1488 (M.D. Ala. 1987).

discovery.”²⁸⁴ Rule 11 further allows the court to impose “an appropriate sanction on any attorney, law firm, or party that violate[s]” these provisions.²⁸⁵ Because my proposal would flip the burden of proof on the statute of limitations issue, requiring the plaintiff to present a sworn statement and admissible evidence that a debt is not time-barred, Rule 11 sanctions would be appropriate where an attorney fails to adequately analyze whether a debt is time-barred before filing a collections suit.²⁸⁶ In such scenarios, the attorney could not properly certify that its claims are “warranted by existing law,” or that its factual contentions regarding the status of the debt have evidentiary support.²⁸⁷

Even if my burden-shifting proposal were not adopted, this result should not change. Although Rule 11 sanctions would be more appropriate under my proposal, the fact that a defense is affirmative has not relieved counsel of their Rule 11 responsibilities in other contexts, such as claims that were clearly barred by *res judicata*,²⁸⁸ or where there was a clear lack of personal jurisdiction.²⁸⁹ Also, courts have already imposed Rule 11 sanctions for filing suit asserting a claim for which a statute of limitations has clearly run.²⁹⁰

284. FED. R. CIV. P. 11(b).

285. *Id.* 11(c)(1). In addition, the Rule allows the court, on its own initiative, to order a litigant or attorney to show cause why its conduct has not violated Rule 11. *Id.* 11(c)(3).

286. *See Columbus v. United Pac. Ins. Co.*, 641 F. Supp. 707, 711 (S.D. Miss. 1986) (recognizing that “Rule 11 requires attorneys to make a ‘reasonable inquiry’ into both the law and the facts prior to signing any pleading, motion or other paper”).

287. FED. R. CIV. P. 11(b).

288. *See S. Leasing Partners, Ltd. v. Blutworth*, 109 F.R.D. 643, 645 (S.D. Miss. 1986) (imposing Rule 11 sanctions against plaintiff’s attorneys where reasonable inquiry into the law of *res judicata* should have indicated to plaintiff’s attorneys that all claims were or could have been advanced in a prior action); *Simpson v. AT&T Info. Sys., Inc.*, No. 93-155-CIV-ORL-19, 1993 WL 666603, at *3 (M.D. Fla. May 11, 1993) (same); *Columbus*, 641 F. Supp. at 711 (same).

289. *See Hasty v. Paccar, Inc.*, 583 F. Supp. 1577, 1578 (E.D. Mo. 1984) (imposing Rule 11 sanctions against attorneys who filed suit where personal jurisdiction was lacking).

290. *See Steinle v. Warren*, 765 F.2d 95, 101–02 (7th Cir. 1985) (imposing Rule 11 sanctions for filing a time-barred claim); *Van Berkel v. Fox Farm & Rd. Mach.*, 581 F. Supp. 1248, 1251 (D. Minn. 1984) (imposing Rule 11 sanctions for filing a time-barred claim); *see also Ehsanuddin v. Wolpoff & Abramson*, No. CIV

VII. Conclusion

Filing suit to collect a time-barred debt is unfair and deceptive, particularly when the suit is motivated by the expectation that the debtor will not defend and the hope of obtaining a default judgment in an action that would otherwise be dismissed. Threatening to file suit on a time-barred debt is arguably worse, as such a threat, especially one from an attorney, conveys to a debtor that she better pay the debt immediately or risk making matters worse when, in fact, the opposite is true due to the partial payment rule. The simple solution is to require debt collectors to inform debtors who owe time-barred debts of their true status, including the effect of a partial payment. However, even greater protections are needed. The protections proposed in this Article—*notices regarding the enforceability of a time-barred debt, an opportunity for debtors to avoid the partial payment rule by electing to pay only the offered settlement amount, FDCPA amendments that plainly delineate lawful and unlawful collection methods for time-barred debts, flipping the burden of proof on the statute of limitations, stricter scrutiny by courts in default cases involving consumer debts, and Rule 11 sanctions against attorneys who file suits on time-barred debts*—would result in more consistent financial outcomes on time-barred debts and ensure that most collection activity occurs outside of court, alleviating courts of this burdensome litigation.

A 06-708, 2007 WL 543052, at *3 (W.D. Pa. Feb. 16, 2007) (“Because the statute of limitations, whether raised or not, constitutes a legal bar to the debtor’s obligation to pay, . . . any suit to collect a debt so barred not only flies in the face of Rule 11 but the FDCPA as well.”).