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Debt Collection 'versus' Consumer Protection: The FDCPA's Prohibition on False Representations of the Legal Status of Debt

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Introduction

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, has dramatically changed the landscape of debt collection for both consumers and debt collectors.[1] Prior to the enactment of the FDCPA, state common law governed informal debt collection, and abusive collection practices were pervasive.[2] Debt collectors were incentivized to engage in abusive collection tactics and consumers had little recourse.[3] As a result, the FDCPA was enacted in order to regulate consumer debt collection and to remedy abuse.[4] The express purpose of the FDCPA is to "protect consumers against debt collection abuses" and to ensure that debt collectors who refrain from abuse are not competitively disadvantaged.[5] Specifically, 15 U.S.C.

[1] *See Russell v. Equifax A.R.S.,* 74 F.3d 30, 32 (2nd Cir. 1996); 15 U.S.C. § 1692.
[2] *Russell*, 74 F.3d at 33.
[3] 15 U.S.C. § 1692(b).
[4] *See Russell,* 74 F.3d at 32.
[5] 15 U.S.C. § 1692(e).

§ 1692e prohibits the "false, deceptive, or misleading representation or means in connection with the collection of any debt."[6]

Recently, misleading debt collection practices have been the subject of significant litigation. In particular, the *In re Murray* litigation raised the issue of whether "versus language" in a debt collection letter violated the FDCPA. In assessing FDCPA claims, courts construe the statute liberally in favor of consumers, subjecting debt collectors to greater potential liability. Therefore, understanding the bounds of the FDCPA, and situations that lead to its violation, is crucial to preventing liability. Moreover, such an understanding is essential to redressing abuse.[7] Thus, the central issue that must be addressed is: when are debt collection practices "false, deceptive, or misleading" in violation of the FDCPA and what are the requisite legal standards to assess such violations.[8]

This article will explore the present question in three parts. Part I examines the legal standards that federal courts utilize to determine FDCPA violations. Part II addresses the permissibility of versus language in a debt collection letter under 15 U.S.C. § 1692e(2)(A). Part III analyzes collection tactics that violate 15 U.S.C. § 1692e(13) and whether versus language in the debt collection letter triggers a violation.

I. "Least Sophisticated Consumer" Standard and Violations of 15 U.S.C. § 1692e may be Ruled Upon as a Matter of Law

(A) Application of the "Least Sophisticated" or "Unsophisticated" Consumer Standard

To prevail on a cause of action under the FDCPA the plaintiff must prove that (1) he was the object of collection activity arising from "consumer debt," (2) defendants are "debt collectors" as defined by the FDCPA, and (3) defendants have "engaged in an act or omission

[6] 15 U.S.C. § 1692e.
[7] *See Russell,* 74 F.3d at 32.
[8] 15 U.S.C. § 1692e; In re Murray, 552 B.R. 1, 3 (Bankr. D. Mass. 2016).

prohibited by the FDCPA."[9] In applying these elements to determine whether a communication is false, deceptive, or misleading, the courts use the "least sophisticated" or "unsophisticated consumer" standard.[10]

The federal courts have not been uniform in applying this standard; several circuits have adopted the "least sophisticated consumer" standard while others employ the "unsophisticated consumer" standard.[11] However, there is "little practical difference between the two formulations except that the use of the term 'unsophisticated' to describe the consumer 'avoids any appearance of wedding the standard to the very last rung on the sophistication ladder.'"[12]

Courts use this standard to evaluate proscribed collection communications.[13] The standard protects all consumers including the "inexperienced, the untrained, and the credulous." The phrase "unsophisticated" or "least sophisticated" consumer describes "the hypothetical consumer whose reasonable perceptions will be used to determine if collection messages are deceptive or misleading" in determining FDCPA violations. The standard is objective and preserves "a quotient of reasonableness" by preventing liability for "bizarre," "idiosyncratic," or "peculiar" interpretations of collection letters.[14] Moreover, even the "least sophisticated" or "unsophisticated" consumer is expected to possess a "rudimentary amount of information…and a willingness to read a collection notice with some care."[15]

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[9] *In re Murray,* 552 B.R. at 3*; Claudio v. LVNV Funding, LLC*, 463 B.R. 190, 193 (Bankr. D.Mass. 2012).
[10] *Murray*, 552 B.R. at 4.
[11] *Id.* at 4.
[12] *Id.*
[13] *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 911 F. Supp. 2d 117 (D. Mass. 2012); *see McMurray v. ProCollect, Inc.*, 687 F.3d 665, 669 (5th Cir. 2012).
[14] *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1060–61 (9th Cir. 2011).
[15] *Clomon v. Jackson,* 988 F.2d 1314 (2d Cir. 1993); *Gammon v. GC Services Ltd. Partnership,* 27 F.3d 1254 (7th Cir. 1994)*; see also Lesher v. Law Offices Of Mitchell N. Kay, PC*, 650 F.3d 993, 997 (3d Cir. 2011).

The majority of the circuit courts apply the "least sophisticated consumer" standard.[16] In *Clomon*, the Second Circuit emphasized that the "least sophisticated consumer" standard aims to effectuate the goals of consumer protection laws by protecting "consumers of below-average sophistication or intelligence" who are "especially vulnerable to fraudulent schemes."[17] Moreover, the court in *Wyler v. Computer Credit, Inc.,* noted that the "plaintiff's actions in response to [a] collection letter are not determinative of the question of whether there has been a violation of the FDCPA. Rather, the issue is an objective one: namely, whether the language of the letter would mislead the least sophisticated consumer."[18]

In contrast, the Seventh Circuit found that the term "unsophisticated" provides for greater literal congruence.[19] In *Gammon*, the Seventh Circuit reasoned that "literally, the 'least sophisticated' consumer is not merely 'below average,' he is the very last rung on the sophistication ladder."[20] In other words, "he is the single most unsophisticated consumer who exists…such a consumer would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion."[21] Thus, the *Gammon* court concluded that using the

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[16] *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 100 (1st Cir. 2014); *see, e.g., Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 509 (6th Cir. 2007); *Terran v. Kaplan*, 109 F.3d 1428, 1431–32 (9th Cir.1997); *Russell*, 74 F.3d 30, 34; *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1195 (11th Cir. 2010); *see also Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993) (in determining whether a practice violates the FDCPA, "[t]he most widely accepted test ... is an objective standard based on the 'least sophisticated consumer.' This standard has been widely adopted by district courts in [the Second] [C]ircuit.").
[17] *Clomon,* 988 F.2d at 1314*; see also, Russell* 74 F.3d at 34.
[18] *Wyler v. Computer Credit, Inc.*, No. 04CV2762 CLP, 2006 WL 2299413, at *11 (E.D.N.Y. Mar. 3, 2006).
[19] *Gammon,* 27 F.3d at 1254.
[20] *Id.*
[21] *Id.*

term "unsophisticated" "relieve[s] the incongruity between what the [least sophisticated consumer] standard would entail if read literally, and the way courts have interpreted [it]."[22]

As a practical matter, however, the "least sophisticated" and the "unsophisticated consumer" standards are functionally equivalent.[23] The two standards provide an objective way to determine whether a debt collection letter is "deceptive or misleading" as proscribed by § 1692e.[24]

(B) Whether Violations of 15 U.S.C. § 1692e may be Determined as a Matter of Law

The courts are divided as to whether application of the "least sophisticated" or "unsophisticated" consumer standard requires a fact finding process, or whether it can be decided as a matter of law.[25]

A number of courts have held that violation of the FDCPA is a question of fact for the jury to decide.[26] In *LeBlanc*, the Eleventh Circuit considered whether a collection letter could be perceived as a "threat to take legal action" under the least sophisticated consumer standard.[27] The Eleventh Circuit treated the inquiry as a question of fact. The *LeBlanc* court found that reasonable jurors applying the "least-sophisticated consumer" standard could disagree as to the inferences to be drawn from the collection letter. Further, the court noted that "where the parties reasonably disagree on the proper inferences that can be drawn from the debt collector's letter,

[22] *Id.*
[23] *Murray*, 552 B.R. at 3.
[24] 15 U.S.C. § 1692e; *Murray*, 552 B.R. at 3.
[25] *Murray*, 552 B.R. at 5.
[26] *See LeBlanc,* 601 F.3d at 1195; *McMillian v. Collection Professionals Inc.,* 455 F.3d 754 (7th Cir. 2006).
[27] *LeBlanc,* 601 F.3d at 1195.

resolution is for the trier of fact—not for the court on summary judgment."[28] Therefore, the *LeBlanc* court concluded that this was a decision best left to the jury.[29]

Similarly, in *McMillan,* the Seventh Circuit concluded that the requisite inquiries under § 1692e are "necessarily fact-bound."[30] The court reasoned that in most instances, a proper application of the rule "will require that the plaintiff be given an opportunity to demonstrate that his allegations are supported by a factual basis responsive to the statutory standard."[31] Therefore, the Seventh Circuit found that whether or not a letter is "false, deceptive, or misleading" in violation of § 1692e is a question of fact and the "inquiry under § 1692e requires a fact-bound determination of how an unsophisticated consumer would perceive the letter."[32]

In contrast, many circuits have evaluated FDCPA claims as a matter of law.[33] For instance, the Ninth Circuit has ruled that "[i]n this circuit, a debt collector's liability under § 1692e of the FDCPA is an issue of law."[34] Similarly, the Second Circuit has noted that "[a]lthough courts are divided on whether breach of the least sophisticated consumer standard is a question of law or fact, the trend in the Second Circuit is to treat this question as a matter of law that can be resolved on a motion to dismiss."[35] Moreover, the court in *Murray,* citing a First

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[28] *Id.*; *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1176 (11th Cir. 1985).
[29] *LeBlanc*, 601 F.3d at 1195.
[30] *McMillan*, 455 F.3d at 760.
[31] *Id.*; *see also, Johnson*, 169 F.3d 1057 at 1060 *(*finding a FDCPA claim to be a factual determination, reasoning that the intended recipients of dunning letters are not federal judges, and federal judges are not well-suited to determine how an unsophisticated reader will interpret a dunning letter).
[32] *McMillan*, 455 F.3d at 760.
[33] *See, e.g., Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1060–61 (9th Cir. 2011); *Jacobson v. Healthcare Fin. Servs., Inc.,* 516 F.3d 85, 90 (2d Cir. 2008); *Chiang v. Verizon New England Inc.*, 595 F.3d 26, 34 (1st Cir. 2010); *Murray* 552 B.R. at 5.
[34] *Gonzales*, 660 F.3d at 1060–61.
[35] *Beauchamp v. Fin. Recovery Servs., Inc.*, No. 10 CIV. 4864 SAS, 2011 WL 891320, at *2 (S.D.N.Y. Mar. 14, 2011) (citing *Jacobson*, 516 F.3d at 90).

Circuit decision, held that "a dispute as to whether a collection letter is deceptive or misleading in violation of the FDCPA may be ruled on as a matter of law."[36]

As in *Murray*, many courts have applied the least sophisticated consumer standard as a matter of law.[37] However, other courts, in contrast, have found that the application of this standard was a question of fact. Therefore, whether a violation of § 1692e may be ruled upon as a matter of law, is ultimately dependent upon the jurisdiction.

II. Whether Versus Language in a Debt Collection Letter Violates 15 U.S.C. § 1692e(2)(A)'s Prohibition on the False Representation of the Legal Status of a Debt

15 U.S.C. § 1692e(2)(A) provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: The false representation of the character, amount, or legal status of any debt."[38]

In Johnson v. Ardec Credit Servs., the court found that a debt collector violated § 1692e(2)(A) by "sending a collection letter containing versus language when no lawsuit was in fact pending."[39] The *Johnson* court reasoned that "placing an adversary styling at the top of a collection letter would create in the mind of a reasonable consumer a false impression that a judicial action is pending."[40] Therefore, the court held that placing versus language in a collection letter, absent pending litigation, was a false representation of the legal status of the debt in violation of § 1692e(2)(A).

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[36] *Murray*, 552 B.R. at 1 (citing *Chiang v. Verizon New England Inc.*, 595 F.3d 26, 34 (1st Cir. 2010)).
[37] *See, Murray,* 552 B.R. at 1.
[38] 15 U.S.C. § 1692e(2)(A).
[39] *Murray*, 552 B.R. at 6; *Johnson v. Ardec Credit Servs.,* C.A. No. C83–0818A, 1984 U.S. Dist. LEXIS 24889, at *14–16 (N.D.GA March 21, 1984).
[40] *Johnson,* 1984 U.S. Dist. LEXIS 24889, at *14–16.

Similarly, in *In re Murray*, the court concluded that a collection letter which contained versus language absent pending litigation, violated § 1692e(2)(A). The court reasoned that the use of versus language, without more, "would cause even a relatively sophisticated consumer to assume that a lawsuit had been initiated."[41] Accordingly, the *Murray* court found that the collection letter violated § 1692e(2)(A)'s prohibition on the "false representation of the legal status of the debt" and granted debtor's motion with respect to this issue.[42]

In contrast, the court in *Phillip v. Sardo & Batista, P.C.*, found that a collection letter containing versus language did not violate § 1692e(2)(A) "where additional language in the body of the letter clarified that a suit had not yet been filed."[43] The letter stated that if the collector does not receive a check made payable to it within thirty days after debtor receives the letter, the collector will institute suit against debtor. The court noted that although the versus language in the subject line of the letter was suggestive of a lawsuit, the body of the letter unambiguously clarified that no litigation was pending and a suit had not been filed. The court applied the least sophisticated consumer standard and found that the language "will institute suit" was sufficient to counteract any confusion created by the versus language in the subject line of the letter.[44] Therefore, the court held that the letter did not violate the FDCPA.

Similarly, the court in *Breazeale v. Muller, Muller, Richmond, Harms, Meyers & Sgroli, P.C.* found no violation of § 1692e(2)(A). The collection letter in *Breazale,* contained versus

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[41] *Murray*, 552 B.R. at 7 ("there is nothing whatsoever contained in [the] letter to disabuse the reader of that assumption.").
[42] 15 U.S.C. § 1692e(2)(A); *Murray,* 552 B.R. at 7.
[43] *Murray,* 552 B.R. at 6; *Philip v. Sardo & Batista, P.C.*, No. CIV.A. 11–4773 SRC, 2011 WL 5513201, at *2 (D.N.J. Nov. 10, 2011).
[44] *Philip,* 2011 WL 5513201, at *2; *Feuerstack v. Weiner,* Civ. No. 12–04253 (SRC), 2014 WL 3619675, at *5 (D.N.J. July 22, 2014) (collection letter must be read "in its entirety—including the subject line and text—to determine whether the body of the letter clarifies any suggestion that a lawsuit is pending in other parts of the letter.").

language in the subject line of the letter. The body of the letter contained additional language which stated "we may proceed with suit against you without waiting the 30 days."[45] The debt collectors argued that this additional language negated the misleading effect of the versus language.[46] The court found this argument persuasive, reasoning that the statement "suit may be filed sometime within the next 30 days" was sufficient to notify "even the least sophisticated consumer that no action has been filed."[47]

Therefore, in determining whether a collection letter containing versus language violates FDCPA § 1692e(2)(A), the decisional authority "readily supports a unifying principle."[48] When a collection letter contains versus language, in the absence of pending litigation, it violates 15 U.S.C. § 1692e(2)(A) unless the letter contains additional language sufficient to counteract the false impression created by the versus language.[49]

III. 15 U.S.C. § 1692e(13)'s Prohibition on the False Representation or Implication that Documents are Legal Process

15 U.S.C. § 1692e(13) prohibits a debt collector from creating "[t]he false representation or implication that documents are legal process."[50] "Process" is defined as a "summons or writ, especially to appear or respond in court."[51] The term process has also been defined as "the means whereby a court compels compliance with its demand."[52] The issue raised in *In re Murray* was whether versus language in a collection letter falsely represented or implied that the letter was "legal process," in violation of § 1692e(13).

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[45] *Breazeale v. Muller, Muller, Richmond, Harms, Meyers & Sgroli, P.C.* Case No. 1:97–CV–916, 1998 U.S. Dist. LEXIS 9254, at *10 (W.D.Mich. May 18, 1998).
[46] *Id.*
[47] *Id.*
[48] *Murray,* 552 B.R. at 7.
[49] *Murray,* 552 B.R. at 7.
[50] 15 U.S.C. § 1692e(13); *Bradshaw v. Bank of Am.*, N.A. No. 12–CV–3784, 2013 U.S. Dist. LEXIS 180420 (N.D. GA August 28, 2013).
[51] *Process,* Black's Law Dictionary (10th ed. 2014); *Murray*, 552 B.R. at 7.
[52] 72 C.J.S. Process § 1; *Murray*, 552 B.R. at 7.

The court in *Zimmerman v. Portfolio Recovery Associates*, found a violation of § 1692e(13) where a debt collector sent a "pre-suit package" that included documents identical to those used in actual litigation.[53] The pre-suit package included a cover letter and a Summons and Complaint.[54] The cover letter was on letterhead of the debt collector's "Litigation Department," was signed by an attorney, and stated, in part: "Enclosed please find a copy of the lawsuit our local counsel in your state intends to file against you related to the delinquent account referenced above. If you pay the balance due on this account… we will instruct our local counsel not to file the lawsuit against you at this time."[55] The Summons indicated that debtor had "20 or 30 days to answer the complaint," depending on the method of service.[56] The court reasoned that "the least sophisticated consumer might well conclude" that the collector instituted suit against him, due to "the form of the Summons and Complaint, the reference to the court and parties, the requirement to respond within 20 or 30 days, and the fact that an attorney from [debt collector's] 'Litigation Department' had signed the cover letter."[57] Therefore, the court held that the debt collector's actions constituted a false representation that these documents were legal process, in violation of § 1692e(13).[58]

Similarly, in *Weiner*, the court found a violation of § 1692e(13) where the debt collector sent a cover letter and documents captioned "Summons & Complaint" to the debtor.[59] The debt collector argued that the cover letter made it clear that process had not been served.[60] Nevertheless, the court found that "the legal subtleties on which [the debt collector] relie[d]

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[53] *Zimmerman v. Portfolio Recovery Assocs., LLC,* 276 F.R.D. 174, 176 (S.D.N.Y. 2011).
[54] *Id.* at 176.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 179.
[58] *Id.*
[59] *Wiener v. Bloomfield,* 901 F. Supp. 771, 776 (S.D.N.Y.1995).
[60] *Id.* at 776.

likely would be lost on the least sophisticated consumer."[61] The court reasoned that the "least sophisticated consumer" would assume such "formal-looking court documents," with prescribed return dates, were in fact legal process.[62] Further, a "more explicit statement" would be necessary in order to convey to the "least sophisticated consumer" that a lawsuit had not been commenced.[63] Hence, the court held that the sending of such documents violated § 1692e(13).[64]

In contrast, the court in *In re Murray* held that versus language in a collection letter did not falsely represent or imply that the letter was legal process.[65] Although the letter in *Murray* placed versus language between the parties' names, this, without more, did not violate § 1692e(13).[66] The *Murray* court reasoned that "[t]here is nothing about the letter that even remotely suggests it was issued by a court let alone an attempt by a court to induce Mr. Murray to comply with the demand for payment."[67] Further, the court noted that "by including the versus language [the debt collector] makes reference in the letter to a lawsuit but that is not the same thing as legal process."[68] Accordingly, the court found that the letter did not violate § 1692e(13) of the FDCPA.[69]

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.; see also Wald v. Morris, Carlson, & Hoelscher*, P.A., No. 09-CV-2286 MJD RLE, 2010 WL 4736829, at *4 (D. Minn. Nov. 16, 2010) (finding genuine issue of material fact as to whether debt collector violated § 1692e(13) when he sent the debtor a Summons and Complaint by mail but did not include the acknowledgment of service required by state law); *In re Williams*, 232 B.R. 629 (Bankr. E.D. Pa.) (finding violation where collector referred to debtor as a "defendant" and threatened that debt would be reduced to a "judgment").
[65] *Murray*, 552 B.R. at 7.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*

Thus, placing versus language in a debt collection letter, without more, will not be considered legal process in violation of § 1692e(13).[70] Additional implications of legal process, such as attaching a Summons and Complaint, or including explicit references to commencing suit, are necessary for a collection letter to violate §1692e(13).[71]

Conclusion

The FDCPA "comprehensively regulates the conduct of debt collectors, imposing affirmative obligations and broadly prohibiting abusive practices."[72] An understanding of these regulations and obligations is essential for avoiding liability and redressing abuse. For instance, while placing versus language in a debt collection letter, *per se*, does not violate §1692e(13), it is, problematic under § 1692e(2)(A). Courts have held that versus language in a debt collection letter, absent pending litigation, violates §1692e(2)(A), unless there is language sufficient to counteract the false impression. Therefore, debt collectors must be increasingly cognizant of their practices, because for example, even the mere inclusion of "vs." in a collection notice could place them in violation of federal law.

[70] *See Murray*, 552 B.R. at 1, 7.
[71] *Zimmerman,* 276 F.R.D. at 176; *Weiner*, 901 F. Supp. at 776.
[72] *Gonzales*, 660 F.3d at 1060–61.