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Cover Page Footnote
J.D. Candidate, 2011, Fordham University School of Law; B.S., 2008, Bucknell University. I want to thank Professor Susan Block-Lieb for her guidance. I would also like to thank my family and friends for all of their support throughout this process.

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JUDGE OR JURY? DETERMINING DECEPTION OR MISREPRESENTATION UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

Christian Stueben*

This Note explores the conflict among the federal circuit courts as to whether a judge or jury should decide if the language contained in a collection letter is false, misleading, or deceptive to the least sophisticated consumer under the Fair Debt Collection Practices Act (FDCPA). Some circuits, such as the Second and Ninth Circuits, hold that this issue is a question of law, appropriate for the judge to decide. In contrast, the Seventh Circuit finds this to be a question of fact, and requires the plaintiff to submit extrinsic evidence in the form of professional surveys in order to reach the jury. Other circuits, such as the Sixth Circuit, submit close cases under 15 U.S.C. § 1692e of the FDCPA to the jury (without requiring extrinsic evidence), while holding that § 1692g cases are an issue of law. This Note examines the legislative history of and case law relating to the FDCPA and argues that all circuits should treat § 1692g and § 1692e actions consistently, at least when the § 1692e claim is limited to the text of the letter and no other facts are disputed (i.e., the collection letter "speaks for itself"). This Note then argues that policy considerations favor the Second and Ninth Circuits' approach of treating the issue as a question of law because the need for uniform application of a federal statute is paramount. This is especially true in the area of debt collection, because many debt collectors utilize the same collection letters in multiple states. Finally, this Note argues that the Seventh Circuit's requirement that a debtor present extrinsic evidence to survive summary judgment contradicts the purpose of the FDCPA. Because the FDCPA was designed to provide a remedy for citizens of all means, the requirement of producing expensive and time-consuming extrinsic evidence is a needless barrier that thwarts the legislative intent behind the FDCPA.

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INTRODUCTION

Simpson & Goldstein (the Firm) is a small New York City law firm that represents two major retailers—FIT Fashion and Bonanza Department Stores (the Clients)—in the area of debt collection.1 When the Clients’ customers (the Debtors) fail to pay their bills on time, the Clients attempt to collect the debts directly by sending simple requests for payment to the Debtors once a month for a period of six months. When these efforts fail, the Clients engage the services of the Firm.

Every month, the Clients send the Firm a list containing the names, addresses, and balances of the Debtors who are six months delinquent on their bills. Firm staff members utilize a computer program to generate a form letter to each Debtor. This letter informs the Debtors that the Firm represents the Clients in the area of debt collection. The letter lists the total amount that is overdue, but contains a disclaimer stating that no attorney from the Firm has personally reviewed the details of the Debtors’ personal accounts. Notably, the disclaimer is printed on the back of the letter. The mailing address and telephone number of the Firm are provided, with a warning that the Clients could consider further action if the Debtor does not contact the Firm. The letter is printed on firm letterhead and contains a facsimile signature of Avery Simpson, the managing partner. Approximately 5000 of these letters are mailed out every week to debtors residing in every state in the United States.

In New York, if the facts concerning attorney involvement are not in question,2 a judge would likely determine whether the language in this collection letter—specifically the placement and language of the disclaimer of attorney involvement—is misleading or deceptive in violation of the Fair Debt Collection Practices Act (FDCPA).3 In Florida and Texas, this issue

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1. This introductory hypothetical is based on the facts from Gonzalez v. Kay, 577 F.3d 600 (5th Cir. 2009), cert. denied, 130 S. Ct. 1505 (2010).
2. If attorney involvement itself is in question, it is generally a question of fact. See, e.g., Goins v. Brandon, 367 F. Supp. 2d 240, 244 (D. Conn. 2005) (“What constitutes ‘meaningful attorney involvement’ is largely a question of fact . . . .”) (quoting Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 301 (2d Cir. 2003)); Sonmore v. Checkrite Recovery Servs. Inc., 187 F. Supp. 2d 1128, 1134 (D. Minn. 2001) (“Whether or not attorney involvement is meaningful so as to comport with the FDCPA is a question of fact.”); see also Navarro v. Eskanos & Adler, No. C 06-02231 WHA, 2007 WL 549904, at *9 (N.D. Cal. Feb. 20, 2007) (sending a dispute about meaningful attorney involvement under § 1692e(3) and (10) to the jury).
would go to a jury. In Michigan, this case would also likely go to a jury, but a claim arising under § 1692g—which requires the debt collector to disclose certain rights to the debtor—would go to the judge. This is true even though both claims would involve the same issue: whether the language of a collection letter would mislead or deceive the least sophisticated consumer. Finally, in Illinois, the plaintiff would have to introduce potentially expensive survey evidence establishing that the collection letter contained language that actually confused its intended recipients just to defeat a motion for summary judgment. Such is the state of disarray over the application of the FDCPA in cases in which the only issue is whether the language of a collection letter is false, misleading, or deceptive in violation of FDCPA §§ 1692e and g.

The debt collection industry is enormous, with third-party debt collectors collecting over $50 billion in 2007 alone. The third-party debt collection industry employs over 200,000 people, while over 400,000 are employed as “bill and account collectors.” Approximately seventy-seven percent of U.S. families hold some type of debt. Further, the total U.S. consumer debt was $2.483 trillion as of October 2009.

In recent years, litigation alleging violations of the FDCPA has exploded in the country. The U.S. District Court for the Eastern District of New York saw an increase from four cases alleging violations of the FDCPA in 2002, to ninety-two in 2005, and eighty-five in just the first five months of 2006. WebRecon LLC—a Michigan-based research firm that provides collection agencies with a list of debtors who have previously engaged in consumer protection litigation, including FDCPA cases—reported that 3813

4. See generally Gonzalez, 577 F.3d 600 (sending interpretation of a substantially similar letter to a jury); Brazier v. Law Offices of Mitchell N. Kay, No. 8:08-cv-156-t-17MAP, 2009 WL 764161 (M.D. Fla. Mar. 19, 2009) (sending interpretation of the same letter to a jury).

5. See infra Part II.A, B.2; see also 15 U.S.C. § 1692g (2006) (describing a series of rights that the debt collector must convey to the debtor).

6. See infra Part III.A.

7. See infra Part III.C (discussing the U.S. Court of Appeals for the Seventh Circuit’s extrinsic evidence requirement).


9. Id. at 3.


14. Id.
FDCPA cases were filed nationwide in 2007, 5188 cases were filed in 2008 (a thirty-six percent increase), and 8287 cases were filed in 2009 (a sixty percent increase).

Some commentators speculate that changes in technology such as the rise in mass mailing and development of automated calling systems have enabled debt collectors to reach millions of consumers at a time, increasing the pool of potential litigants. Several factors appear to have contributed to this rise in litigation, including the nuanced nature of many FDCPA requirements, application of the least sophisticated or unsophisticated consumer standard, and strict liability for violations of the Act.

The recent collapse in the housing industry and the current economic recession have only increased the numbers of Americans who are subject to debt collection practices. Because of the recent explosion in consumer defaults, creditors have been forced to initiate debt collection actions for amounts they "would have gladly written-off a couple of years ago." Creditors have also lowered the debt level needed to trigger recovery efforts. Additionally, creditors are hiring third-party debt collectors more than ever before. Since third-party debt collectors are subject to the FDCPA—but original creditors are not—the potential scope of FDCPA litigation has steadily increased in recent years.

Other issues make this specific conflict ripe for resolution. Citizens in some circuits are denied the right to a jury trial, at least on the issue of whether the language of a collection letter itself is false or misleading under the FDCPA. The right to a jury trial in civil cases is guaranteed by the Seventh Amendment of the U.S. Constitution, so this conflict impacts the constitutional liberties of certain citizens. Importantly, the U.S. Court of Appeals for the Fifth Circuit recently reversed its position on this issue without discussion, sparking a lively dissent and furthering the divide.


17. These standards are fully discussed infra in Part I.C.


20. Id.

21. Id.


23. Id. § 1692a(6)(A).


Part I of this Note provides a brief overview of the debt collection industry in the United States and the background, language, and consequences of violating the FDCPA. It also discusses the policies involved in determining whether there is a question of law or fact and the practical implications of this decision. Part I also examines the standard of review used to evaluate whether a collection letter contains deceptive or misleading language. Part II explores the circuit split regarding the appropriate procedure an FDCPA claim must follow when alleging false, misleading, or deceptive language in the collection letter. It also looks at the Fifth Circuit's recent unexplained reversal on this issue. Part III argues that courts should assess whether the language contained in a collection letter is misleading to a consumer as a question of law because of the need to achieve a uniform application of a federal statute, both throughout the country and within the federal circuits themselves. Part III also argues that the extrinsic evidence requirement adopted by the U.S. Court of Appeals for the Seventh Circuit is counter to the original intention of the FDCPA and should be abolished.

I. AN OVERVIEW OF THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA) AND ITS APPLICATION

The Introduction detailed a split among the federal circuit courts as to the means of determining whether the language of a collection letter is misleading under the FDCPA: Should it be disposed of as a matter of law by the judge, submitted with extrinsic evidence to the jury, or sent to a jury in close cases (without a requirement of extrinsic evidence)? Part I presents the background necessary to understand this conflict. Part I.A explores the legislative intent behind the FDCPA and the statutory language relevant to this conflict, and discusses an important amendment to the FDCPA that requires attorneys to comply with the Act. Part I.B lays out the difficulty courts face when classifying an issue as a question of law or fact and the policy factors that are used to make the appropriate decision. Finally, Part I.C outlines the standard of review that the decision maker employs to determine whether a collection letter (or any communication) from a debt collector violates §§ 1692e or g of the FDCPA.

A. Background of the FDCPA

1. Purpose of Legislation

Congress enacted the FDCPA\textsuperscript{27} in 1977 after learning of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."\textsuperscript{28} Unlike creditors, who had an

\begin{itemize}
\item \textsuperscript{28} 15 U.S.C. § 1692(a).
\end{itemize}
incentive to protect their goodwill with customers because of the possibility of future business, independent debt collectors were unconcerned about a debtor's opinion and operated by any means necessary.29 Consumers were confronted with conduct ranging from "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."30 One former collection agency employee testified,

If a debtor asked if he would be imprisoned, the collector would reply either that he did not know or that the debtor should let his imagination run wild. It was not unusual to hear a collector inform the debtor that unless the bill was paid, they would be unable to receive medical services at any hospital, or that they had better nail their possessions to the floor before the law came and removed everything they owned.31

Another witness testified that in order to collect debts, some collection agencies' efforts "range[d] from profanity and obscenity in phone calls to efforts to shame a consumer by contacting relatives, employers, neighbors to falsely threatening to seek harsh legal sanctions."32 An additional witness reported the abuse suffered by one of her clients whose husband had recently passed away.33 He left her with a pile of bills, and she only had her social security income available to pay them.34 She received a call from a collection company, threatening to obtain "a court order to dig up [her husband's] body and repossess the casket" if she did not pay his bills promptly.35 She was so disturbed by these threats that she needed medical treatment afterwards.36

Prior to the FDCPA, debtors subjected to abusive practices were limited to tort claims as their only means of recourse.37 Such claims included libel and slander, intentional infliction of emotional distress, invasion of privacy,

30. Id.
32. Id. at 85 (statement of Robert J. Hobbs, Staff Attorney, National Consumer Law Center).
33. Id. at 58–59 (statement of Karen Berger, Queens Legal Services Corp., New York City).
34. Id.
35. Id.
36. Id.
and abuse of process. These claims were difficult to establish, and because each side was required to pay for its own attorney’s fees, even plaintiffs who won their cases had little to show for it. In one particularly egregious example, Public Finance Corp. v. Davis, the debt collectors for Public Finance called Davis’s home daily, visited her home weekly, called her at the hospital while she was visiting her sick daughter, and phoned her friend to inform her that Davis was writing bad checks. On one “house call,” a debt collector asked Davis if he could use her phone to call a colleague. The debt collector used this phone call to give his colleague a list of Davis’s household possessions—so that his company could repossess them in order to pay off her debt—and refused to leave the house until Davis’s son intervened. Despite these facts, the court concluded that the debt collector’s actions did not satisfy the requirements for intentional or reckless infliction of emotional distress and affirmed a dismissal of the case.

Additionally, the Senate found that the vast majority of debtors were unable to pay their debts for financial reasons, not willfully refusing to pay. Most debtors who defaulted did so because of circumstances such as unemployment, severe illness, or divorce. Compounding the problem was the fact that twenty-four states had weak, if any, debt collection laws.

The intent of the Act was to abolish these abusive practices while also ensuring that debt collectors who did not engage in these tactics were not disadvantaged.

2. Relevant Statutory Language

This subsection describes FDCPA §§ 1692e and g in detail and provides essential background information. The Act only covers consumer debt and applies to all communications sent to a debtor. These communications include the common collection letter, or “dunning letter,” (which contains “insistent or repeated demands for payment”) as well as

38. Id.
39. Id.
40. 360 N.E.2d 765, 768 (Ill. 1976).
41. Id.
42. See id.; Burnham, supra note 37, at 182.
43. Davis, 360 N.E.2d at 768–69; Burnham, supra note 37, at 182.
45. Id.
48. See id. § 1692a(5). The FDCPA only applies to debts that “are primarily for personal, family, or household purposes.” Id.
49. Id. § 1692g(a).
settlement offers. Importantly, the term “debt collector” does not include the original creditor.

The definition of “debt collector” is fairly broad and is broken up into two parts. The first part includes anyone “who uses any instrumentality of interstate commerce” in a business whose main objective is to collect debts. The second part applies to “any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” Since the purpose of the FDCPA is to protect consumers, courts may construe “regularly” broadly in order to maximize the scope of the Act.

Section 1692e prohibits debt collectors from using “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” It contains a nonexclusive list of sixteen categories of misleading representations. Examples include prohibitions of the “false representation or implication that any individual is an attorney or that any communication is from an attorney,” “the threat to take any action that cannot legally be taken or that is not intended to be taken,” and “the use of any false representation or deceptive means to collect or attempt to collect any debt.” Generally, violation occurs where a collection letter is susceptible to “more than one reasonable interpretation, at least one of which is inaccurate.” Section 1692e is also violated if the least

50. See Campuzano-Burgos v. Midland Credit Mgmt., Inc., 550 F.3d 294, 300 (3d Cir. 2008). The court in Campuzano-Burgos v. Midland Credit Management, Inc. noted that many courts imprecisely use the terms “dunning letters” and “settlement offers” (which offer the debtor a chance to settle for a lower amount but do not insist on payment) interchangeably. Id. at 300 n.4 (citing Gully v. Van Ru Credit Corp., 381 F. Supp. 2d 766, 768 (N.D. Ill. 2005)).

51. Id. § 1692a(6)(A); S. REP. NO. 95-382, at 3, reprinted in 1977 U.S.C.C.A.N. at 1697–98; Elizabeth M. Bohn & Ari H. Gerstin, Consumer Debt Collection: FDCPA Traps for the Unwary Nationwide Lender, Loan Servicer and Debt Collector: Part I, Am. BANKR. INST. J., Apr. 2005, at 36. A creditor is defined as any person who “offers or extends credit creating a debt or to whom a debt is owed.” 15 U.S.C. § 1692a(4); Bohn & Gerstin, supra note 51, at 36. However, creditors that attempt to collect their debts under other names are considered debt collectors and are subject to the FDCPA. 15 U.S.C. § 1692a(6); Bohn & Gerstin, supra note 51, at 36. Entities that purchase debts with the sole purpose of collecting are not considered creditors and are also covered by the FDCPA. 15 U.S.C. § 1692a(4); Bohn & Gerstin, supra note 51, at 36.

52. See 15 U.S.C. § 1692a(6); Burnham, supra note 37, at 185–86.

53. 15 U.S.C. § 1692a(6); Burnham, supra note 37, at 185–86.

54. 15 U.S.C. § 1692a(6); Burnham, supra note 37, at 186.


57. Id.

58. Id. § 1692e(3).

59. Id. § 1692e(5).

60. Id. § 1692e(10).

sophisticated debtor[^62] would "likely be misled" from a communication by a debt collector.[^63]

Section 1692g provides that the initial collection letter must contain a "validation notice" that informs debtors of the actions they must take in order to assert and preserve their rights.[^64] This section is a frequent source of litigation under the FDCPA and one commentator estimates that ninety percent of all FDCPA claims involve § 1692g.[^65] The initial letter (or a follow-up communication sent within five days) must include information such as (1) the total amount owed,[^66] (2) the creditor to whom the debt is owed,[^67] (3) a notice giving the debtor thirty days to dispute the validity of the debt,[^68] and (4) a statement notifying the debtor that if the debtor sends a written dispute of the debt within thirty days, the debt collector will obtain verification of the debt and will send it to the debtor.[^69]

Additionally, under § 1692e(11), the debt collector must inform the debtor that "(1) each communication is for the purpose of collecting a debt, and (2) 'any information obtained will be used for that purpose.'"[^70] This is known as a "Miranda Warning,"[^71] a corollary to the Miranda warnings that are given to criminal suspects.[^72] Just as arrested criminal suspects must be informed of their legal rights, the Miranda warning required by § 1692e(11) informs the debtor of who she is talking to and the effect of the debtor's conversation.[^73] Further, in all subsequent communications, the collector

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[^62]: This is the hypothetical recipient of collection letters, and is discussed infra in Part I.C.1.

[^63]: Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 934 (9th Cir. 2007) (quoting Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1989)).


[^65]: Jerry D. Brown, Painting a Mustache on the Mona Lisa—How Tinkering with the Validation Notice Will Get You Every Time, 53 CONSUMER FIN. L.Q. REP. 42, 42 (1999) (estimating that ninety percent of all FDCPA claims involve § 1692g); Laurie A. Lucas & Alvin C. Harrell, 2000 Update on the Federal Fair Debt Collection Practices Act, 55 BUS. LAW. 1453, 1454 (2000) (noting that § 1692g is one of the most litigated sections of the FDCPA).


[^67]: Id. § 1692g(a)(2).

[^68]: Id. § 1692g(a)(3).

[^69]: Id. § 1692g(a)(4).

[^70]: Burrell, supra note 64, at 24; see also 15 U.S.C. § 1692e(11); Holahan, supra note 19, at 268.

[^71]: Holahan, supra note 19, at 268.

[^72]: Burnham, supra note 37, at 189.

[^73]: Id.
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must clearly state that the communication is from a debt collector, known as a "mini-Miranda warning." 74

It is important to note that mere "technical compliance" with this statute is not enough. 75 The validation notice must be conveyed effectively to the debtor and not "overshadowed or contradicted by other messages or notices appearing in the initial communication from the collection agency." 76 A collection letter must convey this information "clearly and effectively" so that the least sophisticated debtor will not be "uncertain as to her rights." 77 A letter that contains typefaces or font sizes that obscure the validation notice is at risk of violating § 1692g, despite a verbatim reproduction of the validation notice. 78

If the debtor disputes the debt in writing within thirty days, the debt collector must stop all collection efforts until verification is obtained and sent to the debtor. 79 However, verification simply involves the debt collector confirming in writing that the debtor owes the demanded debt to the stated creditor. 80 As stated in the legislative history, verification is merely intended to ensure that the letter was delivered to the right person and that the debt is still delinquent. 81 It does not require the debt collector to provide the debtor with bills or other evidence of the debt. 82

The Act imposes strict liability for any violation. 83 Therefore a debtor can collect statutory damages if a violation exists even if he suffered no actual damages 84 and was not actually deceived by the letter. 85 In fact, statutory damages can be awarded even if the debtor does not actually read the letter. 86 Violations include actions or language by debt collectors

74. Holahan, supra note 19, at 268; see also 15 U.S.C. § 1692e(11).
76. Id. at 484 (quoting Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1989)).
77. Savino v. Computer Credit, Inc., 164 F.3d 81, 85 (2d Cir. 1998); see also DeSantis v. Computer Credit, Inc., 269 F.3d 159, 161 (2d Cir. 2001).
78. See Swanson, 869 F.2d at 1225 (stating that a required debt validation notice must be "large enough to be easily read and sufficiently prominent to be noticed—even by the least sophisticated debtor").
79. 15 U.S.C. § 1692g(b); Eric M. Berman, Why Changes Must Be Made to the Standard of Review Used To Determine Meaningful Attorney Involvement Under the Fair Debt Collection Practices Act, 2 DEPAUL BUS. & COM. L.J. 1, 22–23 (2003); Bohn & Gerstin, supra note 51, at 49.
80. Chaudhry v. Gallerizzo, 174 F.3d 394, 406 (4th Cir. 1999); Berman, supra note 79, at 23.
82. Chaudhry, 174 F.3d at 406; Berman, supra note 79, at 23.
86. See Bartlett, 128 F.3d at 499.
considered to be "false, deceptive, or misleading"; 87 "harassment or abuse"; 88 or an "unfair practice." 89 This means that the intention of the debt collector is irrelevant for purposes of determining liability under the Act—any conduct that runs afoul of the FDCPA’s requirements is sufficient to establish a successful case against a debt collector. 90 However, once a violation is established, the debt collector’s intent and history of noncompliance can be considered when determining the extent of damages. 91 The only allowed exception to liability occurs in the case of "bona fide error." 92 A clerical error, such as sending a debt collection letter to the wrong recipient, is an example of a bona fide error. 93

Maximum damages are any actual damages 94 (which usually are not substantial), up to $1000 in statutory damages for "additional damages," 95 reasonable attorney’s fees, 96 and the lesser of $500,000 or one percent of the debt collector’s net worth for a class action lawsuit. 98 The subsection providing for reasonable attorney’s fees serves as an incentive for attorneys to initially take an FDCPA case. 99 The purpose for this provision was to encourage attorneys to take ordinarily undesirable cases (due to the modest nature of the monetary penalties), thereby benefiting the public. 100

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87. 15 U.S.C. § 1692e; Lucas & Harrell, supra note 16, at 233. Section 1692e contains a nonexhaustive list of sixteen prohibited false or misleading misrepresentations. 15 U.S.C. § 1692e(1)–(16). For example, false implication that the debt collector is affiliated with the U.S. government, or any state governmental entity, is forbidden. Id. § 1692e(1).

88. 15 U.S.C. § 1692d; Lucas & Harrell, supra note 16, at 233. Section 1692d contains a nonexhaustive list of six actions constituting harassment or abuse. 15 U.S.C. § 1692d(1)–(6). For example, a threat or use of violence or other criminal activity to harm the debtor, his reputation, or property is forbidden. Id. § 1692d(1).

89. 15 U.S.C. § 1692f; Lucas & Harrell, supra note 16, at 233. Section 1692f contains a nonexhaustive list of eight unfair practices. 15 U.S.C. § 1692f(1)–(8). For instance, the collection of any amount of money that was not specifically authorized by the contract that created the debt, or otherwise permitted by law, is forbidden. Id. § 1692f(1).

90. 15 U.S.C. § 1692k(a); Ruth v. Triumph P'ships, 577 F.3d 790, 805–06 (7th Cir. 2009); Bohn & Gerstin, supra note 51, at 47; see also Sims v. GC Servs., L.P., 445 F.3d 959, 964 (7th Cir. 2006) (noting that "intent plays no role in determining whether a particular letter violates the FDCPA").

91. 15 U.S.C. § 1692k(b)(1)–(2); Burnham, supra note 37, at 201–04.

92. 15 U.S.C. § 1692k(c). Though the bona fide error defense is beyond the scope of this Note, the U.S. Supreme Court recently held that a mistake of law is outside of the bona fide error defense. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, No. 08-1200, 2010 WL 1558977, at *4 (U.S. Apr. 21, 2010).

93. See generally Smith v. Transworld Sys., Inc., 953 F.2d 1025 (6th Cir. 1992) (holding that a collection letter constituted a bona fide error when it was mistakenly mailed to the wrong recipient due to a clerical error, despite a series of procedures designed to avoid such a scenario).


95. Burnham, supra note 37, at 201.


97. Id. § 1692k(a)(3).

98. Id. § 1692k(a)(B).


100. Burnham, supra note 37, at 201.
Notably, the Act also allows for debt collectors to recover reasonable attorney’s fees and costs for lawsuits brought in bad faith against them.101

3. Amendment of the FDCPA To Include Attorneys

The original version of the FDCPA, passed in 1977,102 specifically exempted attorneys from the definition of “debt collector.”103 However, in 1986, the FDCPA was amended to revoke the exemption and specifically provide that attorneys who collect debts on behalf of clients are subject to the FDCPA.104

There were a variety of reasons behind Congress’s decision to subject lawyers to the FDCPA. To start, attorneys were committing many of the abuses that the FDCPA was designed to prohibit.105 Compounding this problem was the fact that written abuses were contained on attorney letterhead and sent by attorneys, a group that is generally seen as more credible and intimidating than collection agencies.106 The amendment was seen as a way to close this loophole.107

After the passage of the FDCPA in 1977, attorneys flooded the debt collection market in order to take advantage of their exemption from the Act.108 At the time of the amendment’s passage in 1986, the number of attorney debt collectors outnumbered the amount of professional debt collection agencies.109 Indeed, many attorney debt collection firms championed their exemption from the FDCPA when advertising to creditors, implying that, since they could use collection tactics that professional collection agencies were barred from using, attorney collections were more effective and shielded the creditor from liability

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106. See id. at 4, reprinted in 1986 U.S.C.C.A.N. at 1755; see also Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996) (noting that consumers are inclined to respond more quickly to a collection letter coming from an attorney as opposed to a collection agency).
108. Id. at 1–2, reprinted in 1986 U.S.C.C.A.N. at 1752; Burnham, supra note 37, at 185.
109. H.R. REP. NO. 99-405, at 2, reprinted in 1986 U.S.C.C.A.N. at 1752. There were approximately 5000 attorneys who performed debt collection work compared to 4500 professional debt collection firms. Id.
under the FDCPA. Congress, however, intended for all firms involved in debt collection to follow the same rules.

One of the reasons behind the initial attorney exemption was the belief that state bar associations would adequately enforce attorney violations of the Act. Instead, bar associations routinely failed to sanction abusive attorney practices that would have violated the FDCPA, and no meaningful punishment was doled out, even in situations where bar associations engaged in disciplinary action against attorneys. In the legislative history under the 1986 amendment to the FDCPA, Congress declared that bar associations “failed to fulfill their obligations” that were behind the original attorney exemption, the situation showed no signs of changing, and, because of this, “attorneys cannot complain about being brought under the Act.”

4. Scope and Consequences of Attorney Involvement

While the 1986 amendment to the FDCPA removed the attorney exemption, in Heintz v. Jenkins, the U.S. Supreme Court unanimously held that the 1986 amendment extended to attorneys who regularly tried to collect consumer debts through litigation. An example is when an attorney, representing a debt collector, does not bother communicating with the debtor and simply files a lawsuit. The Heintz court held that the FDCPA applies to attorneys who “regularly” perform debt collection activity.

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110. Id. at 5–6, reprinted in 1986 U.S.C.C.A.N. at 1756; see also Burnham, supra note 37, at 185 (stating that some lawyers attempted to attract customers by “boasting” that they were not bound by the FDCPA); John Leubsdorf, Legal Ethics Falls Apart, 57 BUFF. L. REV. 959, 1006 (2009) (noting that lawyers were using their exemption from the FDCPA to advertise that they were not bound by its restrictions and to broaden their market share).


112. Id. at 6, reprinted in 1986 U.S.C.C.A.N. at 1757.

113. Id. An FTC survey found that half of attorney disciplinary agencies never punished conduct that would have violated the FDCPA; the other half of agencies never imposed more than a private censure, essentially a slap on the wrist. Id.; see also Leubsdorf, supra note 110, at 1006 (noting that some attorney debt collectors used abusive practices and did not receive professional discipline).


117. See Green v. Hocking, 9 F.3d 18, 19–20 (6th Cir. 1993), abrogated by Heintz, 514 U.S. 291. In Green v. Hocking, the attorney debt collector did not contact the debtor before filing suit. Id. Under Heintz v. Jenkins, the attorney is subject to the FDCPA. See generally Heintz, 514 U.S. 291.

In the aftermath of Heintz, subsequent cases have formulated standards to judge “regular” debt collection activity by attorneys sufficient to subject them to FDCPA liability. Generally, courts look at the percentage of the attorney’s (or law firm’s) practice consisting of debt collection to determine whether the attorney is a debt collector as defined by the FDCPA. Regular debt collection occurs when the attorney “collects debts as a substantial, but not principal, part of his or its general law practice.” However, if the volume of an attorney’s debt collection work is high enough, courts can subject the attorney to FDCPA liability even if this work is a tiny fraction of the attorney’s total business activity. Because the purpose of the FDCPA is to protect consumers, courts are more likely to interpret the phrase “debt collection” broadly, maximizing the scope of the FDCPA.

When an attorney gets involved with a debtor’s file, the courts have traditionally required that attorneys have some meaningful involvement with the debtor’s account. In Avila v. Rubin, the Seventh Circuit noted that when an attorney gets involved with a debtor’s account, “the price of poker has just gone up.”

The Avila court considered a collection letter sent by an attorney who was not “professionally involved” in the debtor’s file to be a false or misleading representation under § 1692e(3). In its decision, the Avila court frequently cited Clomon v. Jackson (discussed below), one of the leading cases on this issue.

121. Schroyer v. Frankel, 197 F.3d 1170, 1176 (6th Cir. 1999).
122. See Garrett v. Derbes, 110 F.3d 317, 318 (5th Cir. 1997) (holding that a law firm that devoted 0.5% of its practice to debt collection was subject to the FDCPA because it mailed out 639 collection letters to individuals in a nine-month time frame).
123. See Burnham, supra note 37, at 186.
124. 84 F.3d 222 (7th Cir. 1996).
125. Id. at 229.
126. Id.
127. Id.
128. 988 F.2d 1314 (2d Cir. 1993).
129. This case is discussed infra at notes 187–207.
Many cases have cited to Clomon and Avila to establish the general rule that collection letters signed by an attorney imply that the attorney had professional involvement with the case. In order for a letter to be “from” an attorney under § 1692e(3), the lawyer must exhibit “the ultimate professional judgment concerning the existence of a valid debt.” Despite this treatment, courts have not imposed a minimum standard for attorney involvement, claiming that the inquiry is too fact specific. Therefore, whether attorney involvement is meaningful enough to comply with the FDCPA is a question of fact.

B. Deciding Between Judge and Jury

Part I.A of this Note discussed the history and statutory language of the FDCPA and covered the scope and purpose of the 1986 amendment to subject attorneys to FDCPA liability. Because federal circuits are split on whether a judge or jury should decide the legality of the language contained in a collection letter, Part I.B.1 discusses the process of distinguishing between a question of law and a question of fact, and the practical implications of the choice. Part I.B.2 discusses the policy interests that must be weighed when making this choice.

1. Distinguishing a Question of Law from a Question of Fact

In general, courts have great difficulty in classifying an issue as a question of law or a question of fact. The Supreme Court has noted, “the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive,” and “the Court has yet to arrive at ‘a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.’” One reason for this is that Federal Rule of Civil Procedure 52(a)—which deals with the division of findings of fact and

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132. Id. at 647; Berman, supra note 79, at 1.
133. See Navarro v. Eskanos & Adler, No. C 06-2231 WHA, 2007 WL 549904, at *9 (N.D. Cal. Feb. 20, 2007) (sending a dispute about meaningful attorney involvement under § 1692e(3), (10) to the jury); Sonmore v. Checkrite Recovery Servs., Inc., 187 F. Supp. 2d 1128, 1134 (D. Minn. 2001) (“Whether or not attorney involvement is meaningful so as to comport with the FDCPA is a question of fact.”).
135. Miller, 474 U.S. at 113 (quoting Swint, 456 U.S. at 288).
conclusions of law—does not provide any guidance on how to distinguish a question of law from a question of fact. This issue has caused problems in many areas of the law, including contracts, torts, and administrative law.

The interpretation of a collection letter’s language falls into the category of law application; therefore, policy concerns dictate which decision maker should be allowed to decide the case. Law application lies in between a pure question of law or fact. It relates to application of the “legal standard of conduct to the facts established by the evidence.” It commonly involves an effort to elaborate the governing legal standard, but is case specific. When classifying an issue of law application as a question of law or fact, courts must use policy considerations to ask whether the judge or jury should hear the issue. In fact, one commentator has said that debating over whether law application is fact-finding or lawmaking is meaningless, and analyzing the underlying policy considerations is the manner in which to advance understanding of this issue.

When interpreting the language of a collection letter, courts apply the facts of the case to a legal standard of conduct, a typical example of law application. For example, a collection letter is in violation of § 1692e if it contains a “false, deceptive, or misleading representation.”

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137. See 9C WRIGHT & MILLER, supra note 25, § 2571.
139. Monaghan, supra note 134, at 232.
140. See Gonzalez v. Kay, 577 F.3d 600, 610 (5th Cir. 2009) (Jolly, J., dissenting) (citing Monaghan, supra note 134, at 237), cert. denied, 130 S. Ct. 1505 (2010). In Miller v. Fenton, the U.S. Supreme Court noted that when courts attempt to classify issues of law application, “the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.” Miller, 474 U.S. at 114.
141. Adamson, supra note 134, at 1048; Monaghan, supra note 134, at 234, 236 (citing H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 374–76 (tent. ed. 1958)). A pure question of law, or “law declaration” produces general, broad propositions that affect all future cases that fall within their terms, involves purely legal questions, and can be decided on a motion for summary judgment. Fed. R. Civ. P. 56; Monaghan, supra note 134, at 235. By contrast, fact identification is case specific, is created in response to basic inquiries such as who performed a specific action or where an event took place, and can be performed by someone without the knowledge of the applicable law. Monaghan, supra note 134, at 235.
142. Monaghan, supra note 134, at 236.
143. Id.; Weiner, supra note 138, at 1875.
146. See supra note 142 and accompanying text.
applicable legal standard for § 1692e cases. Section 1692g mandates that
the debt collector include a “validation notice,” which contains all of the
debtor’s legal rights.\footnote{148} It is violated if the letter contains language that
“contradicts” or “overshadows” the validation notice.\footnote{149} Language
contradicts or overshadows “if it would make the least sophisticated
consumer uncertain as to her rights.”\footnote{150} Courts determine if a specific case
violates the FDCPA by looking at the specific facts of the case, usually the
language of the letter itself.\footnote{151} Therefore, the process of interpreting the
language of a collection letter involves a blend of facts and legal standards,
and requires an application of law to case-specific facts.

2. Policy Factors That Enable Courts To Classify an Application of Law

There are many policy factors that should be considered when a court
decides to classify a specific application of law to facts as legal or factual.
Examples include the force of federal constitutional provisions preserving
the right to a jury trial in a civil suit,\footnote{152} the relative competence of the judge
or jury to decide a specific application of law,\footnote{153} and the uniformity and
predictability of the result that occurs when a judge applies the law—and
the lack thereof when a jury is entrusted with law application.\footnote{154}
Considerations of stare decisis—adhering to the prior precedent regarding
the correct law/fact distinction on a particular application of law—are also
compelling.\footnote{155}

In civil cases, the right to a jury trial is central to the U.S. legal system,
guaranteed by the Seventh Amendment of the Constitution and “of ancient
origin.”\footnote{156} The Seventh Amendment provides that the right to a jury trial
shall be preserved “[i]n Suits at common law, where the value in
controversy shall exceed twenty dollars.”\footnote{157}

\footnote{148. 15 U.S.C. § 1692g; see also supra notes 64–82 and accompanying text.}
\footnote{149. Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993) (quoting Graziano v.
Harrison, 950 F.2d 107, 111 (3d Cir. 1991)); see also Wilson v. Quadramed Corp., 225 F.3d
350, 353 (3d Cir. 2000) (noting language that overshadows or contradicts a validation notice
that informs debtors of their rights would mislead the least sophisticated debtor).}
\footnote{150. Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996).}
\footnote{151. See Dupuy v. Weltman, Wienberg & Reis Co., 442 F. Supp. 2d 822, 826 (N.D. Cal.
2006). Note that the FDCPA covers all communications, including verbal ones such as
phone calls, but verbal communications are beyond the scope of this Note. See 15 U.S.C.
§ 1692a(2).}
\footnote{152. U.S. CONST. amend. VII; Weiner, supra note 138, at 1876.}
\footnote{153. Miller v. Fenton, 474 U.S. 104, 114 (1985); Weiner, supra note 138, at 1876;
Alogna, supra note 144, at 1160.}
\footnote{154. Weiner, supra note 138, at 1876.}
\footnote{155. Miller, 474 U.S. at 115; Alogna, supra note 144, at 1159.}
\footnote{156. 9C WRIGHT & MILLER, supra note 25, § 2301; Arthur R. Miller, The Pretrial Rush to
(2003); Weiner, supra note 138, at 1919.}
\footnote{157. U.S. CONST. amend. VII.}
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Procedure 38 simply states that “the right of trial by jury as declared by the Seventh Amendment . . . is preserved to the parties.”158 Thus, there is a general federal policy favoring jury trials.159

Despite the historical roots of the right to a jury trial, there is a debate over the usefulness of the jury in civil cases.160 Some commentators think the right to a jury trial should be contracted, limited, or abolished altogether due to the increased expense, time, and overall burden on the judicial system created by jury trials.161 In their view, a jury trial in a civil case is a luxury that can no longer be afforded.162 Other commentators contend that jury trials preserve American conceptions about the nature of justice and result in high quality verdicts.163 Citizen participation in the civil justice system is both healthy and important for the process of justice.164

In an action under a statute such as the FDCPA, there are two possible sources for a right to a jury trial: (1) Congress specifically enunciating this intent in the language of the Act or (2) if the claim concerns remedies and legal rights historically enforced in an action at law, through the Seventh Amendment.165

In Sibley v. Fulton DeKalb Collection Service,166 the U.S. Court of Appeals for the Eleventh Circuit held that a plaintiff is entitled to a jury trial in an action for damages under the FDCPA, using two arguments to support its reasoning.167 The first concerned § 1692k(a)–(b), which provides that “the court” can determine the amount of damages.168 The court interpreted the word “court” to encompass both judge and jury.169 Second, the court noted that the Seventh Amendment requires a jury trial upon request if the statute produces legal claims and remedies that can be enforced for

158. FED R. CIV. P. 38(a).
159. See Simler v. Conner, 372 U.S. 221, 222 (1963) (“The federal policy favoring jury trials is of historic and continuing strength.”); Weiner, supra note 138, at 1919. Notably, the Seventh Amendment has not been made binding on the states via the Fourteenth Amendment, so there is no constitutional right to a civil jury trial in state court. Chicago, R.I. & P.R. Co. v. Cole, 251 U.S. 54, 56 (1919); 9C WRIGHT & MILLER, supra note 25, § 2301.
160. Id.; Fleming James, Jr., Trial by Jury and the New Federal Rules of Procedure, 45 YALE L.J. 1022, 1026 (1936) (noting that jury trials are “expensive and dilatory—perhaps anachronistic” and that the number of jury trials should be reduced); David W. Peck, Do Juries Delay Justice?, 18 F.R.D. 455 (1956) (arguing that the right to a jury trial should be eliminated in civil cases).
161. 9C WRIGHT & MILLER, supra note 25, § 2301.
163. 9C WRIGHT & MILLER, supra note 25, § 2301; Arnold, supra note 163, at 31–32.
164. U.S. CONST. amend. VII; Sibley v. Fulton DeKalb Collection Serv., 677 F.2d 830, 832 (11th Cir. 1982); Storer Cable Commc’ns v. Joe’s Place Bar & Rest., 819 F. Supp. 593, 595 (W.D. Ky. 1993); 9C WRIGHT & MILLER, supra note 25, § 2302.
165. 677 F.2d 830.
166. See id at 832–34.
167. 15 U.S.C. § 1692k(a)–(b) (2006); Sibley, 677 F.2d at 832–33.
168. Sibley, 677 F.2d at 832–33.
damages in the courts of law. Because the FDCPA allows for monetary damages—and was similar to a traditional tort because of its intent to prevent harassment, abuse, or false and misleading practices—the court allowed a jury trial on the issue of damages. Sibley's reasoning has been adopted by the Seventh Circuit, but rejected by the U.S. Court of Appeals for the Second Circuit. Thus, the circuit split on the issue of who should decide whether the language in a collection letter is misleading extends to the issue of determining statutory damages as well.

There are also major precedential differences between allowing a judge or jury to perform the task of law application. If the issue is tasked to the jury, the decision will have no precedential value. In contrast, if the judge performs law application, his decisions will have precedential value on all future cases involving similar facts. If a set of facts is likely to reoccur, law application by a jury will lead to inconsistent results in successive cases. Indeed, a jury will not be allowed to learn what previous juries have concluded on the same facts. Legal consistency is a goal "worthy of serious attention" as two different results for identical facts violate our basic notions of fairness. However, some inconsistency is tolerated in the law, notably in negligence cases.

C. Legal Standard for Deceptive or Misleading Language

This part describes the standard of review courts use to determine whether a collection letter contains misleading language in violation of §§ 1692e and g. Part I.C.1 introduces the least sophisticated consumer (or debtor) standard. Part I.C.2 discusses the unsophisticated consumer standard, currently applied by the U.S. Courts of Appeals for the Seventh and Eighth Circuits. Part I.C.3 discusses the practices of the Fifth Circuit, which has declined to choose between the two options, asserting that there is little practical difference between them.

170. Id. at 833–34 (citing Curtis v. Loether, 415 U.S. 189, 194 (1974)).
171. Id. at 834.
172. See generally Kobs v. Arrow Serv. Bureau, Inc., 134 F.3d 893 (7th Cir. 1998) (holding that a jury may determine the statutory damages provision of the FDCPA).
173. Savino v. Computer Credit, Inc., 164 F.3d 81, 86 (2d Cir. 1998) ("The decision whether to award statutory damages under the FDCPA and the size of the award are matters committed to the sound discretion of the district court." (citing Clomon v. Jackson, 988 F.2d 1314, 1322 (2d Cir. 1993))).
175. Id. at 1875 n.37, 1924.
176. Id.
177. Id. at 1924.
178. Id.
179. Id.
180. Id. at 1924–25.
181. Id. at 1925.
1. Least Sophisticated Consumer—Clomon v. Jackson

To ensure a letter passes muster under the FDCPA, most circuits evaluate the language of a collection letter under the “least sophisticated consumer standard.” This test is primarily used to determine whether a letter violates § 1692e, which forbids a letter from using any “false, deceptive, or misleading representation or means in connection with the collection of any debt.” It is an objective test designed to “protect ‘all consumers, the gullible as well as the shrewd.’”

Despite the lowly implication of the term “least sophisticated consumer,” the test presumes a basic level of competence among debtors and incorporates a certain degree of reasonableness by protecting debt collectors from liability for unreasonable interpretations of collection letters.

Clomon v. Jackson, a Second Circuit case, illustrates the least sophisticated consumer standard. In Clomon, the appellant, Phillip Jackson, worked part-time as general counsel for a debt collection agency, NCB Collection Services (NCB), that collected debts on behalf of American Family Publishers (AFP). NCB sent out collection letters to approximately one million debtors per year through a mass mailing system. Through this system, AFP provided NCB with computer tapes that contained the name, address, account number, and delinquent balance of all debtors who were behind in their account payments. NCB then transferred this information into its own computer system, which not only inserted the data into a form letter, but also printed, folded, and placed each

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183. 15 U.S.C. § 1692e (2006); Clomon, 988 F.2d at 1318; see also supra notes 56–60, 87 and accompanying text.


185. Clomon, 988 F.2d at 1319.

186. See id. (noting that even the least sophisticated consumer is assumed to have “a willingness to read a collection notice with some care”).

187. Id. at 1316.

188. Id.

189. Id.
letter into an envelope.\footnote{Id.} If a debtor did not respond to this letter, NCB mailed out additional letters on a preset schedule.\footnote{Id.} No employee of NCB reviewed any debtor’s account unless the debtor responded to the collection letter.\footnote{Id.}

The Appellee, Christ Clomon, received six form letters from NCB concerning a $9.42 debt owed to AFP.\footnote{Id.} The first letter was on NCB’s letterhead, and signed by “Althea Thomas, Account Supervisor,” but the remaining five letters were on Jackson’s attorney letterhead and signed (through a machine) by “P.D. JACKSON, ATTORNEY AT LAW, GENERAL COUNSEL, NCB COLLECTION SERVICES.”\footnote{Id.} The letters stated, among other threats, that Jackson authorized NCB to undertake legal action to collect Clomon’s debt and that “we” will take appropriate action under the law to collect Clomon’s “seriously past due account.”\footnote{Id.} While approving the initial form letter and procedures by which it was sent, Jackson conceded that he had no personal involvement in Clomon’s (or anyone else’s) account.\footnote{Id.}

On September 23, 1991, Clomon filed a complaint and alleged that Jackson violated the FDCPA by authorizing NCB to mail the collection letters that she received.\footnote{Id.} The district court granted summary judgment for Clomon—holding that Jackson violated § 1692e(3)\footnote{Clomon, 988 F.2d at 1317.}—and awarded her the maximum statutory damages of $1000.\footnote{Id.}

In determining whether a collection letter violated § 1692e, the court announced that the most widely used test was the “least sophisticated consumer” standard—and adopted its use in the Second Circuit.\footnote{Id.} The court noted that the intent of this test (to protect all members of the public, not just the shrewd) was consistent with traditional principles of consumer protection law.\footnote{Id.} Despite the assertion that the least sophisticated

\begin{itemize}
  \item \footnote{Id.} Specifics, Jackson did not review Clomon’s file or letters that were sent to her, provide any advice to AFP about the circumstances surrounding Clomon’s case, nor did he receive any instructions from AFP about how to proceed against Clomon. \textit{Id.}
  \item \footnote{Id.} Specifically, Jackson did not review Clomon’s file or letters that were sent to her, provide any advice to AFP about the circumstances surrounding Clomon’s case, nor did he receive any instructions from AFP about how to proceed against Clomon. \textit{Id.}
  \item \footnote{Id.} at 1316–17. The letters were sent over a four month period, from March 1991 to June 1991. \textit{Id.} at 1317.
  \item \footnote{Id.} at 1317.
  \item \footnote{Id.} at 1320. This subsection prohibits “[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney.” 15 U.S.C. § 1692e(3) (2006).
  \item \textit{Clomon}, 988 F.2d at 1317.
  \item \footnote{Id.} at 1318.
  \item \footnote{Id.} at 1318–19. In particular, consumer protection cases held that the Federal Trade Commission Act (FTC Act), which established the Federal Trade Commission (FTC), was made for the protection of the public, including the ignorant and unthinking. 15 U.S.C. §§ 41–58; \textit{Clomon}, 988 F.2d at 1318–19 (quoting Charles of the Ritz Distrbs. Corp. v. Fed. Trade Comm’n, 143 F.2d 676, 679 (2d Cir. 1944)). Later cases held that when “evaluating
consumer test is designed to protect all members of the public, Clomon emphasized that courts have applied the least sophisticated consumer test while utilizing the concept of reasonableness. Specifically, courts applying the test have routinely protected debt collectors from unreasonable interpretations of collection letters. The court stated that the existence of a substantial body of case law established the two purposes of the least sophisticated consumer test: “it (1) ensure[d] the protection of all consumers, even the naive and the trusting, against deceptive debt collection practices, and (2) protect[ed] debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices.”

The court held that Jackson’s use of attorney letterhead and his signature constituted a false and misleading impression under § 1692e(3) that an attorney had sent out the collection letters, given that he had virtually no “day-to-day” involvement in the debt collection process. The court also found that the language and threats contained in the letters would cause the least sophisticated consumer to believe that Jackson had conducted a review of individual debtors’ files and had decided the best approach to collect on their debts. The court affirmed the district court’s ruling, and noted that the facts also established a violation of § 1692e(10).

2. Unsophisticated Consumer—Gammon v. GC Services Limited Partnership

Both the Seventh and Eighth Circuits apply the unsophisticated consumer standard to evaluate whether the language in a debt collection letter is misleading under § 1692e of the FDCPA. This test retains nearly the tendency of language to deceive, the [FTC] should look not to the most sophisticated readers but rather to the least.” Id. at 1318–19 (quoting Exposition Press, Inc. v. Fed. Trade Comm’n, 295 F.2d 869, 872 (2d Cir. 1961)). Essentially, courts have adopted the least sophisticated consumer standard because they have integrated the principles of the FTC Act into their interpretations of the FDCPA. See id. at 1319.

202. Clomon, 988 F.2d at 1319.


204. Clomon, 988 F.2d at 1320. The second purpose is particularly important because Congress intended to “insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.” Campuzano-Burgos v. Midland Credit Mgmt., Inc., 550 F.3d 294, 299 (3d Cir. 2008) (quoting 15 U.S.C. § 1692(e)); see also supra note 47 and accompanying text.

205. See 15 U.S.C. 1692e(3); Clomon, 988 F.2d at 1320.

206. Clomon, 988 F.2d at 1317, 1320.

207. 15 U.S.C. § 1692e(10) prohibits “[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.” 15 U.S.C. § 1692e(10).

208. Duffy v. Landberg, 215 F.3d 871, 874–75 (8th Cir. 2000) (“[T]he unsophisticated consumer standard protects the uninformed or naive consumer, yet also contains an objective element of reasonableness to protect debt collectors from liability for peculiar
same substance of the least sophisticated consumer standard as it has been utilized by the courts, but uses an arguably less confusing moniker. 209 Like the least sophisticated consumer test, statements that are "merely 'susceptible of an ingenious misreading' do not violate the FDCPA." 210 The unsophisticated consumer test is slightly more stringent than the least sophisticated consumer standard. 211 While the least sophisticated consumer may have a rudimentary understanding of the world, the unsophisticated consumer is "not quite as ignorant or gullible as the least sophisticated consumer" and knows how to make inferences. 212 Despite these minor theoretical deviations, the practical differences between the tests are not substantial. 213

The unsophisticated consumer standard was first introduced in Gammon v. GC Services Limited Partnership. 214 In Gammon, the appellant, Jeffrey Gammon, was mailed a debt collection letter from the appellee, GC Services Limited Partnership, stemming from a debt owed to American Express. 215 The language at issue in the letter stated, "We provided the systems used by a major branch of the federal government and various state governments to collect delinquent taxes. . . . You must surely know the problems you will face later if you do not pay." 216 Gammon filed a complaint with the district court, alleging a violation of FDCPA § 1692e, specifically § 1692e(1). 217 He contended that the language about working for the federal and various state governments implied that GC Services was "vouched for or is affiliated with or is acting on behalf of both federal and state government in connection with collection of this debt." 218 The district court moved sua sponte to dismiss the case for lack of subject matter jurisdiction claiming that it was "an impermissible strain on the English interpretations of collections letters."); Gammon v. GC Servs. Ltd. P'ship, 27 F.3d 1254, 1257 (7th Cir. 1994).

209. Avila v. Rubin, 84 F.3d 222, 227 (7th Cir. 1996); Gammon, 27 F.3d at 1257.
210. Peters v. Gen. Servs. Bureau, Inc., 277 F.3d 1051, 1056 (8th Cir. 2002) (quoting White v. Goodman, 200 F.3d 1016, 1020 (7th Cir. 2000)) (noting that a "description of rights belonging to Colorado residents does not misleadingly imply that residents of other states have no such rights").
211. 2 PRIDGEN & ALDERMAN, supra note 119, § 12:21.
214. 27 F.3d 1254; Lucas & Harrell, supra note 16, at 236.
215. Gammon, 27 F.3d at 1255.
216. Id.
217. Id. at 1256. Subsection 1 prohibits "[t]he false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State . . . ." 15 U.S.C. § 1692e(1) (2006).
218. Gammon, 27 F.3d at 1256.
language” for Gammon to claim that GC’s truthful statement implied that it was affiliated with the federal or state government.\textsuperscript{219}

In making a determination about whether this letter violated \$ 1692e(1) of the FDCPA, the court articulated the “unsophisticated consumer” standard.\textsuperscript{220} While the court agreed with the policy behind the least sophisticated consumer test—to protect the general public, including the gullible and the ignorant—the court felt that if taken literally, the least sophisticated consumer test would be far too expansive.\textsuperscript{221} While courts that use the least sophisticated consumer standard also incorporate the element of reasonableness,\textsuperscript{222} the Gammon court decided that the “unsophisticated consumer” standard lends a more accurate phrasing.\textsuperscript{223} It believed that an unsophisticated consumer test would eliminate the contradiction between what the least sophisticated consumer standard would involve if taken literally and the way it had been interpreted by the courts.\textsuperscript{224} Like the least sophisticated consumer test, the unsophisticated consumer standard protects the uninformed consumer while shielding debt collectors from “unrealistic or peculiar interpretations of collection letters.”\textsuperscript{225}

In its analysis, the court determined that an unsophisticated consumer could reasonably be misled by the language of GC Services’ collection letter.\textsuperscript{226} The Gammon court concluded that the disputed language could give an unsophisticated consumer the impression that GC Services worked closely with the federal and state governments and could use their systems to collect the delinquent debt.\textsuperscript{227} The court vacated the judgment of the district court and remanded the case for further proceedings.\textsuperscript{228}

\textsuperscript{219} Id.
\textsuperscript{220} Id. at 1257.
\textsuperscript{221} Id. The court concluded that it was “virtually impossible” to analyze a case using a least sophisticated consumer standard because the phrase “least sophisticated” presumes that the debtor was “the very last rung on the sophistication ladder” or “the single most unsophisticated consumer who exists.” Id.
\textsuperscript{222} See supra notes 202–04 and accompanying text.
\textsuperscript{223} Gammon, 27 F.3d at 1257.
\textsuperscript{224} Id.
\textsuperscript{225} Id. In a concurring opinion, Judge Frank H. Easterbrook clarified that the Seventh Circuit’s unsophisticated consumer test requires a plaintiff to establish that a “significant fraction” of the intended recipients were deceived by the collection letter. Id. at 1260 (Easterbrook, J., concurring); see also Pettit v. Retrieval Masters Creditors Bureau, Inc., 211 F.3d 1057, 1060 (7th Cir. 2000). Judge Easterbrook’s concurring opinion in Gammon v. GC Services Limited Partnership was the first time that the Seventh Circuit discussed a possible requirement of extrinsic evidence in order for a plaintiff to survive summary judgment in the FDCPA context. Lucas & Harrell, supra note 16, at 237–38. His majority opinion in Johnson v. Revenue Management Corp., five years later, laid the “precedential foundation” for the extrinsic evidence requirement. 169 F.3d 1057, 1059 (7th Cir. 1999); Lucas & Harrell, supra note 16, at 237–38. This requirement is discussed infra in Part II.C.
\textsuperscript{226} Gammon, 27 F.3d at 1257.
\textsuperscript{227} Id. at 1257–58.
\textsuperscript{228} Id. at 1258.
3. Fifth Circuit—Unsophisticated or Least Sophisticated Consumer

The Fifth Circuit considers the least sophisticated consumer standard and the unsophisticated consumer standard to be substantively the same.\footnote{Youngblood v. GC Servs. Ltd. P’ship, 186 F. Supp. 2d 695, 697 (W.D. Tex. 2002); Lucas & Harrell, supra note 16, at 234–35, 246 n.206.} It uses the two terms interchangeably\footnote{Goswami v. Am. Collections Enter., 377 F.3d 488, 495 (5th Cir. 2004) (“We must evaluate any potential deception in the letter under an unsophisticated or least sophisticated consumer standard.” (citing Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1236 (5th Cir. 1997))).} and has explicitly declined to choose between the two.\footnote{Peter v. GC Servs., L.P., 310 F.3d 344, 348 n.1 (5th Cir. 2002) (“Because the difference between the standards is de minimis at most, we again opt not to choose between these standards.”); Richard M. Alderman, Consumer Law, 35 Tex. Tech L. Rev. 655, 665 n.115 (2004) (noting that “[t]he Fifth Circuit has explicitly avoided ruling on which of these standards, if either, to use”).} Consistent with both standards, the Fifth Circuit assumes the debtor is “neither shrewd nor experienced in dealing with creditors,”\footnote{Goswami, 377 F.3d at 495.} but also protects the debt collector from “bizarre or idiosyncratic consumer interpretations of collection materials.”\footnote{Taylor, 103 F.3d at 1236 (citing Clomon v. Jackson, 988 F.2d 1314, 1318–19 (2d Cir. 1993)).} This appears to affirm the belief that there is little practical difference between the two standards.\footnote{See supra note 213 and accompanying text.}

II. EXPLORING THE CIRCUIT SPLIT—WHO SHOULD INTERPRET THE LANGUAGE OF A COLLECTION LETTER: JUDGE OR JURY?

Part I.C provided an overview of the least sophisticated debtor and unsophisticated debtor standards used when assessing whether an FDCPA violation has occurred. This part examines a substantial conflict regarding the appropriate party to decide if the language in a collection letter is misleading or confusing: judge or jury. It focuses on two sections under which this issue frequently arises. The first, § 1692g, requires a debt collector to include a validation notice in the initial communication that informs a debtor of her statutory rights. The second, § 1692e, prohibits a debt collector from making false, misleading, or deceptive representations in the course of debt collection.

Part II.A discusses the Third, Sixth, Eighth, and Ninth Circuits’ approach to § 1692g claims, and also discusses the way that district courts in other circuits approach § 1692g claims. These circuits treat this determination as a question of law. Part II.B.1 discusses the Second and Ninth Circuits’ approach to § 1692e claims. When the collection letter speaks for itself, these circuits treat the interpretation of its language as a question of law and allow the judge to decide if the collection letter would confuse or mislead the least sophisticated debtor. Part II.B.2 discusses the
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Fifth, Sixth, and Eleventh Circuits’ approach to the same issue. These courts have allowed a jury to determine liability, thus treating this issue as a question of fact. In doing so, the Sixth and Eleventh Circuits have introduced inconsistency to their application of §§ 1692e and g of the FDCPA. Part II.C provides a comprehensive overview of the Seventh Circuit’s unique take on the issue of whether a collection letter violates the FDCPA. The Seventh Circuit treats both § 1692e and § 1692g claims as issues of fact, and requires a showing of actual debtor confusion to defeat a debt collector’s motion for summary judgment. This is accomplished through the production of extrinsic evidence (frequently in the form of surveys) and is required in cases where it is not obvious from its face that a letter contains misleading or deceptive language.

A. Section 1692g Cases—The Third, Sixth, Eighth, and Ninth Circuits’ Approach—Question of Law

This Note focuses on the conflict among the circuits in their application of § 1692e. However, some circuits, namely the Sixth and Eleventh Circuits, apply various provisions of the FDCPA somewhat inconsistently. To elucidate the inconsistency, the following section describes briefly the general consensus that a § 1692g determination should be treated as a question of law. Then, Part II.B discusses the circuit split regarding § 1692e and, in doing so, reveals the inconsistency in the Sixth and Eleventh Circuits’ applications of §§ 1692e and g. Part II.C describes the Seventh Circuit’s approach to both §§ 1692e and g claims. The Seventh Circuit treats both as questions of fact, aligning itself with the Fifth, Sixth, and Eleventh Circuits with respect to § 1692e claims and departing from the general consensus regarding § 1692g claims.

In determining whether the language contained in a debt collection letter is misleading to the least sophisticated consumer under FDCPA § 1692g, the U.S. Courts of Appeals for the Third, Sixth, Eighth, and Ninth Circuits conclude that the issue is a question of law. Additionally, district courts in the Second, Fourth, and Eleventh Circuits have found that this issue is a question of law. Despite this treatment, the U.S. Courts of Appeals for

235. Wilson v. Quadramed Corp., 225 F.3d 350, 353 n.2 (3d Cir. 2000) (noting that the majority of courts that considered the question of whether language in a collection letter contradicts or overshadows a required validation notice that informs debtors of their legal rights has determined that whether the least sophisticated consumer would be misled by a collection letter is a question of law); Terran v. Kaplan, 109 F.3d 1428, 1432 (9th Cir. 1997); see also Fed. Home Loan Mortgage Corp. v. Lamar, 503 F.3d 504, 508 n.2 (6th Cir. 2007) (citing Savage v. Hatcher, 109 F. App’x 759, 762 (6th Cir. 2004)). The Seventh Circuit’s approach is discussed infra in Part II.C. The U.S. Court of Appeals for the Eighth Circuit treats this issue as a question of law. See Strand v. Diversified Collection Serv. Inc., 380 F.3d 316, 318–20 (8th Cir. 2004); Peters v. Gen. Serv. Bureau Inc., 277 F.3d 1051, 1055 n.4 & 1057 (8th Cir. 2002) (citing Duffy v. Landberg, 215 F.3d 871, 874–75 (8th Cir. 2000)).

the Sixth and Eleventh Circuits handle § 1692e claims involving this same issue as a question of fact.\textsuperscript{237}

\textit{Terran v. Kaplan}\textsuperscript{238} is illustrative of this general consensus. In \textit{Terran}, the U.S. Court of Appeals for the Ninth Circuit noted that “the caselaw makes clear that the question [of] whether language in a collection letter overshadows or contradicts the validation notice so as to confuse a least sophisticated debtor is a question of law.”\textsuperscript{239} \textit{Terran}’s decision to treat this

\begin{footnotesize}(N.D. Ga. 2003) (noting that the U.S. Court of Appeals for the Eleventh Circuit never took up the issue but concluding it was a question of law). The Second Circuit has also not explicitly ruled on the issue. \textit{Nero v. Law Office of Sam Streeter, P.L.L.C.}, 655 F. Supp. 2d 200, 205 (E.D.N.Y. 2009) (citing \textit{Miller v. Wolpoff & Abramson, L.L.P.}, 321 F.3d 292 (2d Cir. 2003)). Although the Second Circuit has never explicitly articulated a position on this issue, it has treated § 1692g claims that alleging an overshadowing or contradiction of the validation notice as questions of law. See, e.g., \textit{Jacobson v. Healthcare Fin. Servs., Inc.}, 516 F.3d 85, 91–95 (2d Cir. 2008) (holding that a collection letter would not mislead the least sophisticated consumer as to his right to dispute the debt before payment under § 1692g(a)); \textit{Miller}, 321 F.3d at 308–11 (finding that the language in a collection letter would not mislead or deceive the least sophisticated consumer of his rights under § 1692g). Additionally, many district court decisions have cited to Second Circuit cases for the proposition that § 1692g claims are treated as questions of law. \textit{Nero}, 655 F. Supp. 2d at 205 (“The determination of whether a validation notice complies with the FDCPA is an issue of law that can be decided by a court.” (citing \textit{Miller}, 321 F.3d at 310–11)); \textit{Daneshrad v. Cohen & Slamowitz, LLP}, No. 05 CV 2662(SJF)(ETB), 2009 WL 637888, at *7 (E.D.N.Y. Mar. 9, 2009) (“Whether the particular wording of a letter violates the FDCPA is an issue of law that can be decided by a court on a motion for summary judgment.”) (quoting \textit{Harry v. Pentaeroup Fin., LLC}, No. 04 Civ. 4003, 2007 WL 812998, at *2 (E.D.N.Y. Mar. 14, 2007)) (citing \textit{Miller}, 321 F.3d at 310–11)); \textit{Berger v. Suburban Credit Corp.}, No. 04 CV 4006 CLP, 2006 WL 2570915, at *3 (E.D.N.Y. Sept. 5, 2006) (“[T]he Second Circuit has indicated that the determination of how the least sophisticated consumer would view language in a defendant’s collection letter is a question of law. . . .” (citing \textit{Schweizer v. Trans Union Corp.}, 136 F.3d 233, 237–38 (2d Cir. 1998); \textit{Bentley v. Great Lakes Collection Bureau}, 6 F.3d 60, 62–63 (2d Cir. 1993)). \textit{But see In re Risk Mgmt. Alternatives, Inc. Fair Debt Collection Practices Act Litig.}, 208 F.R.D. 493, 501–03 (S.D.N.Y. 2003) (sending a collection letter to the jury to determine if it would mislead the least sophisticated consumer under § 1692g); \textit{Goldberg v. Winston & Morrone, P.C.}, No. 95 Civ. 9282 (LAK), 1997 WL 139526, at *5–7 (S.D.N.Y. Mar. 26 1997) (same). The court in \textit{Goldberg v. Winston & Morrone, P.C.} also sent a § 1692e claim to the jury to determine if the collection letter language was deceptive; however this case was decided before \textit{Schweizer}, which clearly held that the question of deceptiveness was not a factual question for the jury. \textit{Schweizer}, 136 F.3d at 237–38 (“[T]he question of deceptiveness is appropriate for summary judgment.”); \textit{Goldberg}, 1997 WL 139526, at *6–7; \textit{see also infra} notes 248–57 and accompanying text. While never expressly stating its position on the § 1692g issue, the Fifth Circuit had previously treated §§ 1692e and g questions as issues of law before abruptly reversing its position with respect to § 1692e in August 2009. \textit{See Gonzalez v. Kay}, 577 F.3d 600, 610–11 (5th Cir. 2009) (Jolly, J., dissenting), \textit{cert. denied}, 130 S. Ct. 1505 (2010); \textit{Peter v. GC Servs. L.P.}, 310 F.3d 344, 348–50 (5th Cir. 2002) (holding that the language in a collection letter “fully informed” the least sophisticated or unsophisticated consumer as to her § 1692g rights and was not deceptive or misleading); \textit{see also infra} notes 304, 318 and accompanying text. \textit{But see Youngblood v. GC Servs. Ltd. P'ship}, 186 F. Supp. 2d 695, 698–700 (W.D. Tex. 2002) (denying the plaintiff’s motion for summary judgment in a § 1692g case).\textsuperscript{237} \textit{See infra} Part II.B.2.

\textsuperscript{238} 109 F.3d 1428.

\textsuperscript{239} ld. at 1432.
as a question of law was supported by the rationale behind the de novo standard of review for contracts and other written instruments, such as trusts and collective bargaining agreements. The determination of whether language in a collection letter is deceptive, the court reasoned, "does not turn on the credibility of extrinsic evidence." Rather, just as in contract cases, the language of the collection letters themselves is undisputed; therefore the court can analyze the language to determine if it comports with the FDCPA.

While the U.S. Court of Appeals for the Fourth Circuit has not explicitly ruled on this issue, a recent district court decision attempted to deduce which way the Fourth Circuit would come down. In McCormick v. Wells Fargo Bank, the District Court for the Southern District of West Virginia, "convinced" that the Fourth Circuit would find the issue of contradictory language in a collection letter to be a question of law (the Fourth Circuit never explicitly addressed the issue, only dealing with it through summary judgments), cited Terran's contract rationale, and expressly joined the majority. This was because "all of the Fourth Circuit's section 1692g analysis centered on one thing: the dunning letter." It concluded that this issue could be dealt with, and disposed of, on a motion to dismiss.

The above reflects the general consensus that § 1692g claims should be treated as questions of law. This is somewhat in tension with the Sixth and Eleventh Circuits' application of § 1692e. This tension will be revisited in Part III of the Note.

B. Section 1692e Cases When the Letter Speaks for Itself

While Part II.A explored the general consensus that a judge can decide whether a collection letter violates § 1692g as a matter of law (except in the Seventh Circuit), this part explores the circuit split that has arisen about the appropriate party to decide whether a collection letter violates § 1692e.

1. The Second and Ninth Circuits' Approach—Question of Law

Both the Second and Ninth Circuits treat a collection letter's interpretation as a question of law in § 1692e cases. In Schweizer v. Trans

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240. *Id.*
241. *Id.* This is in direct conflict with the Seventh Circuit's requirement of extrinsic evidence discussed *infra* at Part II.C. *See also* Wilson v. Quadramed Corp., 225 F.3d 350, 353 n.2 (3d Cir. 2000).
244. *Id.* at 798–99.
245. *Id.* at 799.
246. *Id.*
247. *See infra* Part II.C.
Union Corp., a Second Circuit case, the debtor raised a claim under § 1692e(10), which prohibits the general use of any “false representation or deceptive means” when collecting a debt. The debtor had received a collection letter—for a debt of $15—in an envelope labeled “ELECTRONICALLY TRANSMITTED BY LASON SYSTEMS, INC. FOR PRIORITY POSTAL DELIVERY” and “Priority-Gram,” despite the fact that the letter was delivered by mail. She alleged that this simulated a telegram and created a false sense of urgency, in violation of § 1692e.

The district court entered summary judgment for the debt collector. On appeal, the FTC submitted an amicus brief arguing that a reasonable jury could find the envelope deceptive, and urged the court to find that deceptiveness was an issue of fact for the jury (or judge if a jury trial was waived) to determine. The brief noted that the FTC itself treats such issues as questions of fact, with the Commission as fact finder. However, the FTC noted an “important divergence” among the courts on this issue and acknowledged that courts were increasingly deciding for themselves how the least sophisticated consumer would interpret a particular debt collection claim. It speculated that this development was initiated by a growing FDCPA caseload and the need for a speedy resolution of this increasing caseload.

The Second Circuit disagreed with the FTC’s argument to send the question of deceptiveness to a jury, declared that the question of deceptiveness was appropriate for summary judgment, and affirmed the district court’s order of summary judgment for the defendant. However, it declined to decide what language—contained on the envelope or in the letter—would create a false sense of urgency when received by the least sophisticated debtor.

Similarly, in Russell v. Equifax A.R.S., when analyzing a § 1692e(10) claim, the Second Circuit noted that the language in a collection letter is deceptive when it “can be reasonably read to have two or more different meanings, one of which is inaccurate.” The court then found that the collection letter in question was “reasonably susceptible to an inaccurate

248. 136 F.3d 233 (2d Cir. 1998).
250. Schweizer, 136 F.3d at 236.
251. Id.
252. Id.
253. Id. at 236–37.
255. Id. at 14.
256. Id. at 5.
257. Schweizer, 136 F.3d at 238.
258. Id.
259. 74 F.3d 30 (2d Cir. 1996).
260. Id. at 35 (citing Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993)). Russell v. Equifax A.R.S. involved §§ 1692e(10) and g claims. Id. at 33.
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reading” and therefore violated § 1692e(10).261 The court in Russell also analyzed a later collection letter, held that the letter was “open to an inaccurate yet reasonable interpretation” by the least sophisticated debtor, and, therefore, also violated § 1692e(10).262 Thus, in the Second Circuit, the judge steps into the shoes of the least sophisticated consumer and determines if a letter is “open” to an inaccurate interpretation.

Accordingly, in a later § 1692e case (involving § 1692e(5) and (10)), the U.S. District Court for the Eastern District of New York ruled based on what the least sophisticated debtor “could” or “may” think.263 Again, the court reviewed the text of a collection letter itself, determined if it was “plausible” that the least sophisticated consumer could interpret the language in a manner that would violate the FDCPA, and found a violation as a matter of law, without the need for a jury to determine actual confusion.264

In the Ninth Circuit, as in the Second Circuit, “the caselaw makes clear that the question whether language in a collection letter . . . [would] confuse a least sophisticated debtor is a question of law.”265 In Gonzales v. Arrow Financial Services LLC266 (also involving claims under § 1692e(5) and (10)) the U.S. District Court for the Southern District of California found a collection letter to be in violation of § 1692e(10) based on what the least sophisticated debtor “could likely believe.”267 According to the Gonzales court, “The court, not the jury, determines whether a collection letter violates the Act by applying this ‘least sophisticated debtor’ standard.”268 It went on to state, “This Court has unearthed no case in which the plaintiff was required to present [extrinsic evidence], to support the Court’s finding in plaintiff’s favor under the ‘least sophisticated debtor’ standard.”269

261. Id. at 35.
262. Id. at 36.
264. Id.
265. Terran v. Kaplan, 109 F.3d 1428, 1432 (9th Cir. 1997); see also Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1224–29 (9th Cir. 1989) (holding that the least sophisticated consumer standard applies to § 1692e(5) and treating liability in a case involving § 1692e(5) and § 1692g claims as a question of law); Hapin v. Arrow Fin. Servs., 428 F. Supp. 2d 1057, 1060 (N.D. Cal. 2006) (noting that “the issue of whether the language of a collection letter violates the FDCPA is a matter of law” (citing Terran, 109 F.3d at 1431–32)); Anderson v. Credit Collection Serv., Inc., 322 F. Supp. 2d 1094, 1097 (S.D. Cal. 2004) (“In the 9th Circuit, the court—and not the jury—determines whether a particular collection letter violates the FDCPA.” (citing Swanson, 869 F.2d at 1225–26)). The collection letter at issue in Swanson presented a very close case and sparked a dissent on the issue of liability under §§ 1692e and g. See Swanson, 869 F.2d at 1229–30 (Wallace, J., dissenting).
266. 489 F. Supp. 2d 1140 (S.D. Cal. 2007).
267. Id. at 1153.
268. Id. at 1146 (citations omitted).
269. Id. at 1149.
Similarly, in *Dupuy v. Weltman, Wienberg & Reis Co.*,²⁷⁰ when interpreting a collection letter, the U.S. District Court for the Northern District of California compared the language in the letter to language found as threatening by other courts in determining whether to grant a motion to dismiss a § 1692e(5) claim rather than send the case to a jury.²⁷¹

Although the Third Circuit appears to treat the issue of a collection letter's interpretation as a question of law, its exact position in § 1692e cases is unclear.²⁷² Though *Wilson v. Quadramed Corp.*,²⁷³ has been cited for the proposition that whether a collection letter is misleading under the FDCPA is a question of law in the Third Circuit,²⁷⁴ *Wilson* was limited to § 1692g claims and did not involve § 1692e claims.²⁷⁵ The *Wilson* court said that the question of “whether language in a collection letter contradicts or overshadows the validation notice is a question of law,” a legal standard generally limited to § 1692g claims.²⁷⁶ As the inquiries under §§ 1692e and g are highly related,²⁷⁷ one can presume that the Third Circuit treats collection letter interpretation cases under § 1692e as matters of law; however it is impossible to be certain of this conclusion.²⁷⁸

This potential for confusion is illustrated by *Rosenau v. Unifund Corp.*,²⁷⁹ which involved a third-party debt collector who sent out collection letters signed by a legal department that did not contain any lawyers.²⁸⁰ The plaintiff brought an action under § 1692e(3), alleging that the letter could reasonably be read to have come from an attorney, when in fact it did not.²⁸¹ The *Rosenau* court treated the issue as whether the least sophisticated consumer could reasonably read the letter “to have two different meanings, one of which is inaccurate.”²⁸² In reversing the district court’s granting of judgment on the pleadings for the debt collector, the

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²⁷⁰. 442 F. Supp. 2d 822 (N.D. Cal. 2006).
²⁷¹. *Id.* at 826. Note that a district court in the Ninth Circuit generally treats all other issues arising under the FDCPA (that do not involve whether the language in a collection letter is deceptive) as questions of fact. See United States v. ACB Sales & Serv., Inc., 590 F. Supp. 561, 570 (D. Ariz. 1984).
²⁷². See *Brown v. Card Servs. Ctr.*, 464 F.3d 450, 452, 455 (3d Cir. 2006) (holding that it could be deceptive under § 1692e(5) for the debt collector to assert that it could take an action that it has no intention of taking or has rarely taken before).
²⁷³. 225 F.3d 350 (3d Cir. 2000).
²⁷⁶. *Id.* at 353 n.2; see also *supra* notes 76–78 and accompanying text.
²⁷⁸. *See supra* notes 76–78, 87 and accompanying text; *infra* note 326 and accompanying text.
²⁷⁹. 539 F.3d 218 (3d Cir. 2008).
²⁸⁰. *Id.* at 220, 222.
²⁸¹. *Id.* at 219–20.
²⁸². *Id.* at 223 (quoting *Wilson*, 225 F.3d at 354).
Rosenau court held that it was possible for such a debtor to "reasonably infer" that the legal department employed attorneys who played a role in sending the letter.\footnote{283}

Despite this finding, the Rosenau court did not grant summary judgment for the plaintiff (as it was not moved for) and the case subsequently settled.\footnote{284} On remand, in an order approving a settlement, the U.S. District Court for the Eastern District of Pennsylvania noted that "the parties agree that both liability and damages are likely to be questions for the jury."\footnote{285} While the parties could have been wrong about this issue, unless the Third Circuit directly addresses whether the judge or jury should interpret the language of collection letters in \$1692e cases, it is difficult to be entirely positive of its position.

2. The Fifth, Sixth, and Eleventh Circuits’ Approach—Question of Fact

When the sole issue in a \$1692e claim concerns whether the language in a collection letter is misleading, the Fifth, Sixth, and Eleventh Circuits have treated it as a question of fact and sent it to the jury.

In \textit{Kistner v. Law Offices of Michael P. Margelefsky, LLC},\footnote{286} the Sixth Circuit first encountered a case involving a collection letter from an attorney on law firm letterhead with no disclaimer.\footnote{287} The attorney involvement was not at issue, as Margelefsky admitted he had no personal involvement; however the letter was signed by an "Account Representative," and at oral argument Margelefsky conceded that the letter was not reviewed by an account representative.\footnote{288} In contrast to the Second and Ninth Circuits, the \textit{Kistner} court reversed a motion of summary judgment for the debt collector and sent the issue of whether the language of the collection letter was false, misleading, or deceptive to the jury.\footnote{289} The sole issue was whether the letter was susceptible to a reasonable interpretation by the least sophisticated consumer that it was from an attorney.\footnote{290} The \textit{Kistner} court stated that a jury should hear the case because "the impression left by the collection letter in this case falls somewhere in between [a clear violation and a clear nonviolation of \$1692e(3)]."\footnote{291}

\footnotesize{\textsuperscript{283}} Id.


\footnotesize{\textsuperscript{285}} Id. at 752.

\footnotesize{\textsuperscript{286}} 518 F.3d 433 (6th Cir. 2008).

\footnotesize{\textsuperscript{287}} Id. at 434–35, 438.

\footnotesize{\textsuperscript{288}} Id. at 435.

\footnotesize{\textsuperscript{289}} Id. at 441 ("[A] jury should determine whether the letter is deceptive and misleading.").

\footnotesize{\textsuperscript{290}} Id.

\footnotesize{\textsuperscript{291}} Id.
The Eleventh Circuit also treats this issue as a question of fact. In *Jeter v. Credit Bureau, Inc.*, the debt collector sent Jeter two collection letters stating that it would recommend legal action unless Jeter paid her debt within five days. After Jeter failed to respond, and no legal action was taken by the debt collector, she sued the debt collector under various provisions of the FDCPA, including § 1692e(5) and (10). In analyzing her claim, the Eleventh Circuit stated, "[W]e are confident that whether the 'least sophisticated consumer' would construe Credit Bureau's letter as deceptive is a question for the jury." The *Jeter* court provided no reasons for this confidence, stating simply that this issue was one of material fact and was inappropriate for summary judgment. The *Jeter* court did mention *Sibley* in a footnote, noting that *Sibley* allowed for jury trials in FDCPA actions.

In 2009, the Eleventh Circuit noted that *Jeter* did not require all FDCPA § 1692e(10) cases to go to the jury; rather, if there were "two sets of reasonable inferences that could be drawn from a dunning letter, and one set of inferences would result in a violation of 15 U.S.C. § 1692e(10), while the other would not, it was appropriate for a jury to decide which set of inferences to draw." Thus, the Eleventh Circuit seems to maintain the position outlined in the *Jeter* decision.

The U.S. District Court for the Southern District of Florida expressly distinguished the Eleventh Circuit's approach from the Second Circuit's, a discussion that brings this circuit split to the forefront. When faced with the plaintiff's § 1692e(5) and (10) claims, the court in *Rivera v. Amalgamated Debt Collection Services* noted that various district courts in the Second Circuit had been presented with many cases involving similar language in collection letters, and all cases had been resolved in favor of the debt collector on summary judgment. Despite this series of similar cases, the *Rivera* court stated that it could not "ignore *Jeter*" and held that the § 1692e(5) and (10) claims must be resolved by the trier of fact.

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292. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1176–78 (11th Cir. 1985); see also *Kuehn v. Cadle Co.*, 335 F. App'x 827, 830 (11th Cir. 2009).
293. 760 F.2d 1168.
294. *Id.* at 1171.
295. *Id.* at 1171–72.
296. *Id.* at 1177–78.
297. *Id.* at 1176.
298. *Id.* at 1176 n.7.
302. *Id.* at 1230–31.
303. *Id.* at 1231. The *Rivera v. Amalgamated Debt Collection Services, Inc.* court decided the plaintiff's § 1692g claims as a matter of law; therefore a jury trial on the §1692e(5), (10) claims was unnecessary, though it could be used to support the plaintiff's damages theory. *Id.* at 1228–31.
While the Fifth Circuit had traditionally viewed the application of the least sophisticated consumer standard to the language of a debt collection letter as a question of law, in 2009 it abruptly reversed its position. In *Gonzalez v. Kay*, the Fifth Circuit was confronted with a collection letter sent by an attorney debt collector that contained an express disclaimer of attorney involvement. While courts had interpreted § 1692e(3) to require that all attorney debt collectors be professionally involved in the decision to send a collection letter to a debtor, four years earlier, in *Greco v. Trauner, Cohen & Thomas, L.L.P.*, when faced with a similar case, the Second Circuit granted a motion for summary judgment in favor of the debt collector. This was because the disclaimer was located on the front of a brief letter and "prominently stated" that no attorney was involved with the account. In *Gonzalez*, there was no dispute as to the attorney's involvement, as the attorney conceded he had no involvement in reviewing the debtor's file or in sending the letter; however, the disclaimer was located on the back of the letter. The sole issue was whether the language in the collection letter would mislead the least sophisticated or unsophisticated (the Fifth Circuit has not officially taken a stance) consumer into thinking the letter was from an attorney. Instead of issuing a ruling as a matter of law, the *Gonzalez* court sent the case to the district court for a jury trial, because "reasonable minds can differ as to whether this letter is deceptive." The *Gonzalez* court followed the result of a district court in the Eleventh Circuit, which in *Brazier v. Law Offices of*

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304. See Goswami v. Am. Collections Enter. Inc., 377 F.3d 488, 494–96 (5th Cir. 2004) (holding that certain representations in a collection letter were false, deceptive, or misleading to the least sophisticated consumer in violation of § 1692e(10), but other representations were not confusing); Peter v. GC Servs. L.P., 310 F.3d 344, 350, 352–53 (5th Cir. 2002) (holding (in part) that certain representations in a collection letter were not false or misleading to the least sophisticated consumer under § 1692e, but the collection letter envelope would mislead an unsophisticated or least sophisticated consumer and therefore violated § 1692e(14)); McKenzie v. E.A. Uffman and Assocs. Inc., 119 F.3d 358, 362 (5th Cir. 1997) (holding that the least sophisticated consumer would infer that the debt collector was employed by a credit reporting agency, in violation of § 1692e(16)). Perhaps relying on the Fifth Circuit's position, in an unpublished opinion, the U.S. District Court for the Southern District of Texas declared, "It is well settled that the issue whether a collection letter violates the FDCPA is a matter of law for the Court to decide." Cash v. Allied Interstate, Inc., No. H-04-0932, 2005 WL 1186189, at *3 (S.D. Tex. May 18, 2005) (citing Garrett v. Derbes, 110 F.3d 317, 318 (5th Cir. 1997)).

305. 577 F.3d 600 (5th Cir. 2009), cert. denied, 130 S. Ct. 1505 (2010).

306. Id. at 601–02.

307. See supra notes 130–31 and accompanying text.

308. 412 F.3d 360 (2d Cir. 2005).

309. Id. at 366.

310. Id. at 361–62.

311. *Gonzalez*, 577 F.3d at 602.

312. Id. at 604–07; see also supra notes 229–34 and accompanying text.

313. *Gonzalez*, 577 F.3d at 607. The majority highlighted the fact that the disclaimer was on the back of the letter as part of its reasoning. Id. at 606–07.
Mitchell N. Kay P.C., considered a letter containing "virtually identical" language. The court in Brazier noted that the issue of whether a collection letter was confusing and contradictory was "a question of interpretation and fact, not a pure legal question."

The dissenting opinion in Gonzalez made it clear that this was a break from circuit precedent when it said, "Never before has this Court suggested that the legal import of the language of a debt collection letter should be ruled on by a jury." Though never explicitly stating its opinion, the Fifth Circuit had previously "assumed" that this issue was a matter of law.

The thorough dissenting opinion in Gonzalez provided four reasons why this issue should be a question of law. First, the unsophisticated consumer standard is an objective, hypothetical one; thus, it is not necessary to determine if anyone was actually deceived. Second, survey evidence recommended by the Seventh Circuit will needlessly increase the time and expense of many FDCPA litigations and will allow both parties to "present a parade of expert witnesses." Third, judges "historically are capable of applying objective standards to undisputed facts." Further, interpreting written instruments such as contracts, letters, and statutes "is the quintessential work of judges—not juries." Finally, since debt collectors often send the same form letter to thousands of people around the country, the court’s decisions provide predictability as to a letter's deceptiveness and legality. Since the FDCPA is a federal statute, it is particularly important to ensure courts are uniformly applying it across the country. Sending

315. Gonzalez, 577 F.3d at 605-06.
317. Gonzalez, 577 F.3d at 610 (Jolly, J., dissenting). "[T]he majority departs from our precedent by referring the case to a jury for the determination of [the collection letter's] legality." Id. at 612.
318. Id. at 610-11. The Fifth Circuit had previously sent the issue of determining damages to a jury (after the judge specifically denied the defendant's arguments to send liability on the § 1692e claim to the jury). See Johnson v. Eaton, 80 F.3d 148, 150 (5th Cir. 1996). However, this Note—and the dissent—focuses on the issue of liability, not damages.
319. See Gonzalez, 577 F.3d at 611 (Jolly, J., dissenting).
320. Id.
321. Id. Judge E. Grady Jolly gives the example of probable cause cases, where a judge must consider whether the circumstances known to a police officer at the time of the offense would have caused a "reasonably prudent person" to believe that an offense had been committed." Id. (quoting Evett v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force, 330 F.3d 681, 688 (5th Cir. 2003)).
323. Gonzalez, 577 F.3d at 611 (Jolly, J., dissenting).
324. Id. at 611-12; see also Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989) ("[F]ederal statutes are generally intended to have uniform nationwide application.").
this issue to a jury, the dissent argued, will yield "ad hoc" results—even in the same circuit—and therefore seriously undermine predictability.\textsuperscript{325}

Finally, according to the dissent, treating § 1692e disputes as factual issues was inconsistent with the Fifth Circuit’s treatment of § 1692g disputes as issues of law. In the view of the dissent, "the inquiry is the same: how will an unsophisticated consumer interpret the language of a debt collection letter."\textsuperscript{326}

C. The Seventh Circuit’s Approach—Generally a Question of Fact with Extrinsic Evidence Required

1. Exploring the Requirement of Extrinsic Evidence

In contrast to the majority of circuits, the Seventh Circuit treats the issue of whether the language contained in a collection letter is deceptive as a question of fact to be decided by the trier of fact, typically the jury, under all subsections of the FDCPA.\textsuperscript{327} The Seventh Circuit distinguishes between contradictory language, which a judge can decide, and confusing language, which juries are more competent to decide.\textsuperscript{328} "[T]he words are not themselves the applicable rule of law; a court must inquire whether the letter is confusing. . . . a letter may confuse even though it is not internally contradictory."\textsuperscript{329}

In order to understand how an unsophisticated reader would react to a collection letter, the Seventh Circuit requires evidence in the form of surveys—or their equivalent—similar to those used to measure confusion in trademark cases.\textsuperscript{330} This is commonly known as "extrinsic evidence."\textsuperscript{331} Also, similar to trademark cases, in order to prevail, a plaintiff must

\textsuperscript{325} Gonzalez, 577 F.3d at 611 (Jolly, J., dissenting).
\textsuperscript{326} Id. at 610 n.4.
\textsuperscript{327} Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1060 (7th Cir. 1999); see also Elwin Griffith, The Peculiarity of Language in the Debt Collection Process: The Impact of the Fair Debt Collection Practices Act, 54 WAYNE L. REV. 673, 685 (2008). However, the court can decide this issue as a matter of law if a letter is clearly misleading or not misleading. See infra Part II.C.2.
\textsuperscript{328} Johnson, 169 F.3d at 1060; Bartlett v. Heibl, 128 F.3d 497, 500–01 (7th Cir. 1997).
\textsuperscript{329} Johnson, 169 F.3d at 1060.
\textsuperscript{330} Id. The principal issue in trademark infringement cases is the "[l]ikelihood of confusion," which is treated as an issue of fact in the Seventh Circuit. Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 911–12 (7th Cir. 1996); Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1428–29 (7th Cir. 1985); 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:12 (4th ed. 2009); James W. Soong, Definite Confusion over Likely Confusion, 19 HASTINGS COMM. & ENT. L.J. 823, 834 & n.85 (1997).
\textsuperscript{331} Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 415, 419 (7th Cir. 2005). Notably, the Eighth Circuit, the only other circuit that uses the unsophisticated consumer standard, does not require the plaintiff to submit extrinsic evidence. Lucas & Harrell, supra note 16, at 234–35; see Peters v. Gen. Serv. Bureau Inc., 277 F.3d 1051, 1057 (8th Cir. 2002) ("Our cases have not required a showing of actual confusion, and this comment [about the survey evidence requirement in the Seventh Circuit] need not be addressed here.") (citation omitted)).
establish that the language of the letters "unacceptably increase[d] the level of confusion"\textsuperscript{332} about a debtor's legal rights, for many unsophisticated consumers might be confused even if the collection letters contained nothing more than a statement of their balance and the required language under the FDCPA.\textsuperscript{333} Just as the unsophisticated consumer standard shields the debt collector from unreasonable interpretations of collection letters, extrinsic evidence "ensures" the prevention of such an outcome.\textsuperscript{334} It also "protects against the repudiated least-sophisticated-debtor standard slipping in through the back door."\textsuperscript{335} After extrinsic evidence that comports with the principles of professional scientific research is admitted, the matter goes to a jury to decide whether the language in the collection letter was misleading.\textsuperscript{336}

In \textit{Evory v. RJM Acquisitions Funding L.L.C.},\textsuperscript{337} Judge Richard A. Posner provided additional support for the Seventh Circuit's position on this issue:

The intended recipients of dunning letters are not federal judges, and judges are not experts in the knowledge and understanding of unsophisticated consumers facing demands by debt collectors. We are no more entitled to rely on our intuitions in this context than we are in deciding issues of consumer confusion in trademark cases, where the use of survey evidence is routine.\textsuperscript{338}

Objective proof is required in trademark cases to establish that consumers were likely to be confused, and survey evidence is often utilized to achieve this goal.\textsuperscript{339} Surveys look at the relevant consumer audience to determine whether there was a likelihood of confusion.\textsuperscript{340} The appropriate target

\begin{itemize}
\item \textsuperscript{332} Durkin, 406 F.3d at 415 (quoting Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1060 (7th Cir. 1999)).
\item \textsuperscript{333} Johnson, 169 F.3d at 1060.
\item \textsuperscript{334} Durkin, 406 F.3d at 423. Specifically, the unsophisticated consumer standard ensures that "unrealistic, peculiar, bizarre, and idiosyncratic interpretations of collection letters do not prevail." \textit{Id}. Note that the least sophisticated consumer standard also shields a debt collector from "bizarre or idiosyncratic interpretations of collection notices." See supra notes 203–04 and accompanying text.
\item \textsuperscript{335} Durkin, 406 F.3d at 423. The Durkin v. Equifax Check Servs., Inc. court cited to Judge Easterbrook's concurrence in \textit{Gammon v. GC Services Limited Partnership}, which stated that if showing a handful of misled debtors were enough, we would as a practical matter be using the "least sophisticated consumer" doctrine. \textit{Id}. (citing Gammon v. GC Servs. Ltd. P'ship, 27 F.3d 1254, 1260 (7th Cir. 1994)). The basis for this statement is not clear, especially considering the fact that the Fifth Circuit expressly refuses to distinguish between the two standards, and the Eighth Circuit (which uses the unsophisticated consumer standard) does not have an extrinsic evidence requirement. See supra Part I.C.3.
\item \textsuperscript{336} See DeKoven v. Plaza Assocs., No. 05 CV 3462, 2009 WL 901369, at *7 (N.D. Ill. Mar. 31, 2009).
\item \textsuperscript{337} 505 F.3d 769 (7th Cir. 2007).
\item \textsuperscript{338} \textit{Id}. at 776.
\item \textsuperscript{339} \textit{Id}.; 4 McCarthy, supra note 330, § 23:2.
\end{itemize}
group ranges from the specific audience of consumers who were exposed to the plaintiff and defendant's trademarks to the consumer population as a whole. To prevail, a plaintiff must establish that an "appreciable number" of reasonable buyers are likely to be confused by the similar trademarks. However, an appreciable number of confused consumers do not have to reach a majority; the measurement for consumer confusion in most trademark cases is "not . . . an exact science, but a calculated estimate."

In a recent case, *Ruth v. Triumph Partnerships*, the Seventh Circuit clarified when plaintiffs were expected to produce extrinsic evidence in order to survive a motion for summary judgment. According to the court, suits that allege misleading or deceptive language "fall into three distinctive categories." The first category involves language or statements that clearly are not misleading or deceptive. In these cases, the court refuses to look at extrinsic evidence. Instead, it will grant summary judgment to the defendant because, as a matter of law, no reasonable unsophisticated debtor would be confused by the language in the collection letter at issue. One such example is *White v. Goodman*, in which a collection letter contained a description of rights enjoyed by Colorado residents. The debtor alleged that this language implied that non-Colorado residents do not enjoy such rights, but the circuit court affirmed an order of summary judgment for the debt collector as a matter of law.

The second category involves language or statements that possibly may mislead the unsophisticated consumer, but are not plainly deceptive. Claims falling into this category must be accompanied by extrinsic evidence that establishes the language misleads a "substantial number" of unsophisticated consumers of their legal rights in order to proceed to trial and avoid a motion for summary judgment. This is because the court requires more than the plaintiff's "self-serving testimony" that he was

341. 5 MCCARTHY, supra note 330, § 32:159–160.
342. Id.
343. 4 MCCARTHY, supra note 330, § 23:2; Beebe, supra note 340, at 2037–38 (noting that courts have found infringement where "as little as 15%, or even 8.5%, of the relevant consumer population [was] confused" (footnotes omitted)).
344. 577 F.3d 790 (7th Cir. 2009).
345. Id. at 800–02.
346. Id. at 800.
347. Id.
348. Id.
349. Id.
350. 200 F.3d 1016 (7th Cir. 2000).
351. Id. at 1020.
352. Id.
353. *Ruth*, 577 F.3d at 800.
354. Id. at 800, 801 & n.4 (quoting Williams v. OSI Educ. Servs., Inc., 505 F.3d 675, 678 (7th Cir. 2007)).
355. Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 422 (7th Cir. 2005).
confused by a letter’s language. "The mere possibility of merit does not create a triable issue."

The third and final category concerns collection letters that clearly contain misleading or deceptive language. In these situations, the court will grant summary judgment as a matter of law for the plaintiff, and no extrinsic evidence will be required. An example is a letter that contains a phone number that the debtor must call in order to receive a “current balance." This is an obvious violation under § 1692g, which states that a collection letter must contain a clear statement of the total amount owed by the debtor.

2. Criticisms of Extrinsic Evidence

The court in Evory emphasized that in order to be admissible, the survey evidence must follow the standards of professional survey research stated in Federal Rule of Evidence 702. While surveys are the “most useful sort” of extrinsic evidence, a plaintiff can get to trial by presenting other forms of extrinsic evidence that are equivalent to a survey.

In practice, survey evidence and its equivalents have been difficult to use to establish whether a given letter was misleading to an unsophisticated consumer. Examples of survey evidence equivalents include expert testimony (usually based on the survey itself) and “general statistical evidence”; however, experts cannot “offer opinions or legal conclusions on issues that will determine the outcome of the case.” Additionally, the Seventh Circuit has not provided any guidance on how a plaintiff could procure general statistical evidence.

357. Durkin, 406 F.3d at 422.
358. Ruth, 577 F.3d at 801.
359. Id.
361. 15 U.S.C. § 1692g(a)(1) (2006); see also Chuway, 362 F.3d at 948.
362. Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 776 (7th Cir. 2007); Federal Rule of Evidence 702 provides that an expert can only testify “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” FED. R. EVID. 702.
364. See Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1060 (7th Cir. 1999).
367. Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 415 (7th Cir. 2005). The court suggested that the plaintiffs present statistics of the number of confusion-based calls Equifax received from debtors in response to the collection letters but did not elaborate further. See id.
As the following cases demonstrate, survey evidence is extremely difficult to admit. Because of the implied credibility of an expert’s opinion, judges act as “gatekeepers” and exclude expert evidence when the potential prejudice from the testimony outweighs the benefits contributed to the plaintiff’s case.⁶⁶⁸ Thus, in *McCabe v. Crawford & Co.*,⁶⁶⁹ a case where the plaintiff alleged that the language in a debt collection letter did not adequately inform him of his rights under §1692g, the U.S. District Court for the Northern District of Illinois barred the plaintiff’s expert report because it was filled with “legal conclusions and inappropriate opinions” instead of testimony about consumer confusion.³⁷⁰ In *Hernandez v. Attention, LLC*,³⁷¹ the court excluded plaintiff’s survey evidence as unreliable because it did not use a control group, took questions from the letter out of context, did not test for preexisting attitudes towards debt collectors, and used an inadequate sample size.³⁷²

In *Jackson v. National Action Financial Services, Inc.*,³⁷³ the court completely excluded plaintiff’s survey evidence, in part, because it focused on participants with a high school education or less to try and satisfy the unsophisticated consumer standard.³⁷⁴ The *Jackson* court found that “[t]he survey was not tailored to exclude individuals who are not consumers within the meaning of the FDCPA” because the expert “should have considered the definition of ‘consumer’ under the Act” instead of his “unsupported assumptions” that such people are automatically unsophisticated.³⁷⁵ Finally, in *Muha v. Encore Receivable Management, Inc.*,³⁷⁶ the court deemed plaintiff’s survey evidence to be inadmissible because (1) the plaintiff’s lawyer drafted the questions, rendering them leading, and (2) there was no control group.³⁷⁷

Although it is confusing to compile a list of requirements that survey evidence must meet to be admissible, the various cases in the Seventh Circuit provide some guidance. As previously mentioned, survey evidence must comport with the professional standards broadly stated in Federal Rule

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³⁷⁰ Id. at 740. In *McCabe v. Crawford & Co.*, the plaintiff was allowed to go to trial because certain aspects of the letter were inappropriate as a matter of law. See *McCabe*, 272 F. Supp. 2d at 742–45. This concept is discussed supra at notes 358–61.
³⁷² Id. at 916–17. The survey included approximately forty respondents. Id. at 917 n.6.
³⁷³ 441 F. Supp. 2d 877 (N.D. Ill. 2006).
³⁷⁴ Id. at 880–81.
³⁷⁵ Id. at 880.
³⁷⁶ 558 F.3d 623 (7th Cir. 2009).
³⁷⁷ Id. at 625–26 (noting that it was a “mistake” to allow the plaintiff’s lawyer to draft the survey questions). The court also noted that the survey did not adequately target unsophisticated consumers; instead it chose average consumers, but this was of no consequence because such a mistake only helps the defendant. Id. at 626–27.
of Evidence 702. A survey must not contain any "leading questions," clearly define all terms, and include a control group. Survey evidence cannot be too broad, and the expert must be able to explain the methodology behind the data. The particular debt collection letter at issue in the case must be analyzed; the plaintiff cannot analyze similarly worded letters. The plaintiff must offer objective evidence, not subjective expert "readability and design" testimony. Finally, the survey evidence (or equivalent) must clearly measure the level of consumer confusion caused by the disputed language in the letter, contain a sufficient sample size, and possess other measures designed to ensure objectivity. These requirements have led two commentators to conclude that it is nearly impossible for a plaintiff to provide persuasive, admissible survey evidence. Additionally, two commentators have stated that the survey evidence requirement has led to "little financial incentive" for an attorney to take an FDCPA case.

In a recent case, DeKoven v. Plaza Associates, Judge Posner recognized that lawsuits under the FDCPA "have repeatedly come to grief" because of fatal flaws in the plaintiffs' surveys. After excluding yet another survey (primarily because the control letter was confusing), Judge Posner suggested that district courts "may want to consider exercising the clearly authorized but rarely exercised option of appointing their own expert to conduct a survey in FDCPA cases [under Federal Rule of Evidence

378. See supra note 362 and accompanying text.
379. Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 778 (7th Cir. 2007).
380. See id.
381. See supra note 372 and accompanying text.
382. Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 421 (7th Cir. 2005).
383. Sims v. GC Servs. L.P., 445 F.3d 959, 963 (7th Cir. 2006).
385. Hernandez v. Attention, LLC, 429 F. Supp. 2d 912, 916-18, 917 n.6 (N.D. Ill. 2005). The Hernandez v. Attention, LLC court implied that a sample size of forty was inadequate. Id. at 917 n.6.
386. See Lucas & Harrel, supra note 16, at 246.
387. Id. at 247. Laurie A. Lucas and Alvin C. Harrell note that in trademark litigation, the entity alleging the infringement has the financial incentive to produce extrinsic evidence, presumably because of the possibility of a very high judgment. Id. In a trademark infringement case, the plaintiff can recover (1) the defendant's profits resulting from the infringement; (2) up to three times the actual damages sustained by the plaintiff; and (3) the costs of the action. 15 U.S.C. § 1117(a) (2006). In "exceptional" cases, the court "may award reasonable attorney fees to the prevailing party." Id. Successful plaintiffs stand to recover millions of dollars. See Watec Co., v. Liu, 403 F.3d 645, 654-56 (9th Cir. 2005) (upholding an approximately $2.1 million remittitur in a trademark infringement case).
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The court-appointed expert would conduct the survey, and the neutrality of the expert can be assured if the “parties’ own experts . . . nominate a third expert to be the court-appointed expert.” Judge Posner implied that the cost of the expert would be borne by the plaintiff, under Federal Rule of Evidence 706(b), as “defendants rarely conduct their own surveys.” Judge Posner recognized that this decision is firmly within the district court’s discretion, and suggested this option to “improve judicial understanding of survey methodology” and serve as “a possible alternative to the often unedifying spectacle of a battle of party-appointed experts.”

Finally, the Seventh Circuit itself has shown reluctance to impose a survey evidence (or equivalent) requirement. In a concurring opinion to Johnson, Judge Jesse E. Eschbach disagreed with the court’s recommendation that plaintiffs be required to submit survey evidence. While concurring in the holding, he mentioned that the FDCPA was designed to protect the average debtor, and expressed reservation that the majority’s “strong preference” for survey evidence would “gut the purposes of the FDCPA.” This was because of the extra time and expense a survey evidence hurdle would impose on the common debtor. Even providing for the fact that the FDCPA allows a successful plaintiff to recover attorney’s fees, Judge Eschbach believed that requiring expensive survey evidence would make the cost of filing a suit exorbitant, and would cause a “chill[ing]” effect that would remove the protection of the FDCPA from many consumers.

III. THE COURTS SHOULD ALLOW THE JUDGE TO INTERPRET THE LANGUAGE OF COLLECTION LETTERS

Part III of this Note aims to provide a resolution to this circuit split. Part III.A argues that claims arising under §§ 1692e and g should be treated with consistency—handled uniformly as questions of law or fact. This is because the core issue underlying both sections is the same: would the

389. Id. at *3–5 (citations omitted); see also FED. R. EVID. 706(a) (authorizing a court to appoint expert witnesses of its own selection or on consent of the parties).
391. Id. at *6; see also FED. R. EVID. 706(b) (providing that the parties in civil actions not involving just compensation under the Fifth Amendment bear the cost of the court-appointed expert, with the proportion determined by the court).
394. Id.
395. Id. Judge Jesse E. Eschbach cited two cases to support his claims: Tonka Corp. v. Rose Art Indus., Inc., 836 F. Supp. 200, 210 n.10 (D.N.J. 1993) (stating that a pilot study cost $7850 and a more extensive study would have cost an extra $29,000 to $36,000), and Lon Tai Shing Co. v. Koch & Lowy, No. 90 Civ. 4464(DNE), 1991 WL 170734, at *19 n.15 (S.D.N.Y. June 20, 1991) (estimating that a proper survey in a trademark case would cost up to $65,000).
396. Johnson, 169 F.3d at 1063 (Eschbach, J., concurring).
language contained in the collection letter mislead or deceive the least sophisticated debtor? Part III.B argues that the Second and Ninth Circuits use the correct approach because the policy factors overwhelmingly support treating this issue as a question of law. This part concludes with the argument that the Seventh Circuit’s extrinsic evidence requirement to reach trial is counter to the legislative intention behind the FDCPA and should be abolished.

A. Claims Arising Under §§ 1692e and g Should Be Treated with Consistency

Currently, some circuits treat collection letter interpretation claims differently under §§ 1692e and g, even though both sections involve the same core issue: how would the least sophisticated (or unsophisticated) debtor interpret the language of the letter? When faced with such a question, the Sixth Circuit treats § 1692g claims as matters of law, but § 1692e cases as matters of fact. While the Fifth Circuit has not explicitly taken a position regarding § 1692g claims, and though until recently it seemed to treat § 1692e cases as questions of law, it recently (for the first time) sent a § 1692e claim to the jury. Additionally, while the Eleventh Circuit has not officially taken a position on the treatment of § 1692g claims, district court decisions have treated these claims as questions of law, while binding circuit precedent treats § 1692e claims as questions of fact. Further complicating matters, the circuit courts do not discuss the reasons for the differing treatment, instead simply sending close § 1692e cases to the jury. Although the precise test is different in both cases, as § 1692g cases ask whether the language in a debt collection letter overshadows or contradicts the required disclosures, while the test in § 1692e cases is whether the representations are false or misleading, this distinction is ultimately immaterial.

Sections 1692e and g bestow different rights upon the debtor; however, both ultimately turn on the same issue: whether the least sophisticated (or unsophisticated) debtor would be confused by the language of the letter.

Since § 1692g requires a debt collector to communicate effectively statutorily required rights to the debtor, the essential question is whether the letter conveyed these rights to the least sophisticated (or unsophisticated) consumer (through a validation notice) without confusing him. This

397. See supra note 326 and accompanying text.
398. See supra Part II.A, B.2.
399. See supra notes 236, 304 and accompanying text.
400. See supra notes 304–16 and accompanying text.
401. See supra notes 235, 292, 303 and accompanying text.
402. See supra notes 289, 297–98 and accompanying text.
403. See supra note 87 and accompanying text.
404. See supra notes 64–69 and accompanying text.
question is answered by determining if other language in the letter—or the letter format itself—overshadowed or contradicted the validation notice.405

Because both the least sophisticated and unsophisticated consumer tests are hypothetical, judicially created standards, it follows that if the validation notice is not overshadowed or contradicted by language contained elsewhere in the letter, the least sophisticated or unsophisticated consumer would not be confused about her rights. In Johnson, the Seventh Circuit speculated that an unsophisticated consumer could be confused by nothing more than a statement of the debt and validation notice.406 However, this approach completely ignores the purpose of § 1692g. If a validation notice—that is not overshadowed or contradicted by language contained elsewhere in the letter—could nevertheless confuse the least or unsophisticated consumer, what would be the purpose behind creating § 1692g?

The required validation notice is taken directly from § 1692g, whose words were deliberately chosen by Congress.407 Since one of the primary legislative purposes behind the FDCPA was to protect debtors from abuses of the debt collection process408—and the statement of consumer’s rights was deemed sufficiently important to be included in the FDCPA—it would not make sense to assume that a properly conveyed validation notice can nevertheless confuse the least sophisticated or unsophisticated debtor and subject him to abuse. If there was evidence that debtors were being confused even by the validation notice provided in § 1692g, Congress could amend the statute to clarify the notice, an option it has chosen to avoid. To circumvent this issue, the courts assume that a debtor is not confused by a validation notice that is not overshadowed or contradicted by any other message contained in the letter.409

Similarly, since § 1692e prevents a debtor from dealing with false, deceptive, or misleading representations from a debt collector, the test to find a violation is simply whether the least sophisticated (or unsophisticated) consumer would be confused by a false, deceptive, or misleading representation in the collection letter.410 While not all cases under § 1692e are limited to the four corners of the letter—such as when there is a factual dispute over whether the attorney was minimally involved

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405. See supra notes 76–77 and accompanying text.
406. See supra note 333 and accompanying text.
408. See supra note 47 and accompanying text.
409. The only exception is the Seventh Circuit, the only circuit that treats § 1692g violations as questions of fact and requires evidence of actual consumer confusion. See supra Part II.C.
410. See supra Part I.C.
in sending the collection letter\textsuperscript{411}—in many cases the only issue is whether the language itself contains false or misleading representations.\textsuperscript{412}

Even if a jury determines liability in such a case, it reaches a verdict simply by analyzing the text of the letter itself to see if it contains any false or misleading representations (except in the Seventh Circuit), without extrinsic evidence.\textsuperscript{413} Just as the courts assume that a properly conveyed validation notice will not confuse the least sophisticated (or unsophisticated) consumer, they can assume that a false, misleading, or deceptive representation will confuse the debtor without evidence of actual confusion.\textsuperscript{414} Consequently, the same issue lies behind both §§ 1692e and g cases: whether the language of a debt collection letter itself would confuse the least sophisticated or unsophisticated debtor. Given this, there is no reason for some circuits to treat claims arising under § 1692g as questions of law and § 1692e as questions of fact. When the language of the collection letter itself is at issue, a violation is determined solely on the text of the collection letter. Consequently, the sections should be treated alike.\textsuperscript{415}

**B. A Question of Law Is the Correct Approach**

There are several important policy factors to consider when classifying an issue as a question of law or fact. Examples include the force of federal constitutional provisions preserving the right to a jury trial in a civil suit, the relative competence of the judge or jury to decide a specific application of law, and the uniformity and predictability of the result that occurs when a judge applies the law—and the lack thereof when a jury is entrusted with law application.\textsuperscript{416} This section applies these factors to FDCPA cases in which the decision maker must interpret the language of a collection letter, starting with the most important consideration in such cases: the uniformity and predictability of the outcome.

\textsuperscript{411} See supra notes 130–33 and accompanying text.

\textsuperscript{412} See supra Part II.B.1.

\textsuperscript{413} See supra Part II.B.2. Note that a jury would only become involved in the circuits that have created the split, namely the U.S. Courts of Appeals for the Fifth, Sixth, Seventh, and Eleventh Circuits.

\textsuperscript{414} Part III.B infra will explain why a judge can determine if a representation is false, misleading, or deceptive.

\textsuperscript{415} There is a possible exception in § 1692e(5) that prohibits a debt collector from (in part) threatening to take action that is not intended to be taken, as intent generally cannot be judged from the text of a letter alone. See supra text accompanying note 59. However, in a motion for summary judgment, the plaintiff can present the judge with the necessary evidence that the debt collector never intended to take the threatened action, and for the reasons discussed infra in Part III.B, these cases still should be heard by the judge.

\textsuperscript{416} See supra notes 152–55 and accompanying text.
1. The Need for Uniformity and Predictability in FDCPA Cases Is Paramount

As the FDCPA is a federal statute, it is important that it be applied uniformly. The logistics of the debt collection industry make this point even more compelling. As the cases demonstrate, debt collectors typically send the same form letter to debtors in many different states. Sending these cases to a jury may yield conflicting verdicts on the same letter in the same state. This is because what is deceptive or confusing to one jury might seem exceedingly clear to another.

This problem is exacerbated in close cases, such as Gonzalez v. Kay, where a disclaimer of attorney involvement was printed on the back of a collection letter. One can easily imagine one jury finding that an attorney collection letter violates the FDCPA because the disclaimer is buried in the middle of text or is on the back of the letter (the majority in Gonzalez highlighted this fact). Similarly, a jury might decide that the disclaimer does not vitiate the false representation or impression that an attorney was involved in sending the letter, a violation of § 1692e(3). On the other hand, it is quite feasible for a jury to determine that even the least sophisticated consumer is charged with reading the entire letter. Because the disclaimer itself was clear, it arguably did inform the least sophisticated consumer that an attorney was not involved in the letter selection process. Therefore, another jury might find that there was no false representation of attorney involvement in the case, as a simple reading would alleviate any confusion on the debtor's part.

Such conflicting results are unfair to both debt collectors—who under this approach will have no way of knowing the legality of their collection letters—and debtors, who would similarly not know what to expect if they decided to pursue an FDCPA claim. Compounding this problem is the fact that juries are not allowed to know the results that prior juries have reached with similar facts. Therefore, ad hoc decisions seem inevitable. This is highly undesirable when dealing with a statute that affects so many. The third-party debt collection industry collects over $50 billion a year, and FDCPA claims have skyrocketed 217% in the past three years alone.

Judicial decisions, on the other hand, do create precedent, a necessary element in providing predictability to all parties, which is highly desirable in FDCPA litigation. Many cases alleging that the text of a collection letter violated the FDCPA deal with similar factual situations, and some of them

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417. See supra note 324 and accompanying text.
418. See supra note 306 and accompanying text.
419. See supra note 313.
420. See supra note 178 and accompanying text.
421. See supra notes 8, 15 and accompanying text.
422. See supra note 176 and accompanying text. Jury verdicts have no precedential value. See supra note 175 and accompanying text.
involve the exact same letter mailed out to numerous states.\textsuperscript{423} This creates an enormity of overlap between various claims, and an established body of case law can better provide for an efficient and accurate disposition of many cases. This would benefit debt collectors, who would cease the sending of letters determined to be deceptive, as well as benefit debtors, who would have a better understanding of the chances of an FDCPA suit.

Additionally, because judicial decisions are rendered far more quickly than jury trials, the amount of time a deceptive or unlawful letter is being distributed to debtors would be reduced if the case were decided by a judge.\textsuperscript{424} A debt collector is likely to immediately cease distribution of a letter that has been deemed unlawful under the FDCPA. Sending the issue to a jury needlessly increases the number of debtors exposed to a confusing letter, as well as increases a debt collector’s potential liability if he chooses to continue sending the collection letter to other debtors prior to the resolution of the lawsuit.

Permitting a judge to interpret a collection letter’s language under §§ 1692e and g allows this issue to be resolved at the summary judgment stage, avoiding the need for trial, which is crucial to dealing with the exploding trend in FDCPA litigation.\textsuperscript{425} While there are many factors behind this trend, including the economic recession and the growing ability of debt collectors to reach millions, the explosion in FDCPA litigation appears to be a trend that is here for the foreseeable future.\textsuperscript{426} Given this trend, it makes far more policy sense to enable courts to deal with such issues on summary judgment, because jury trials are far more expensive and time consuming.\textsuperscript{427} Classifying this issue as a question of law will prevent a potentially enormous burden on the judicial system, always an important policy consideration.

2. Judges Are Capable of Applying Objective Standards to Undisputed Facts

The Seventh Circuit holds that judges cannot determine what an unsophisticated consumer would find confusing (if the violation is not clear) because collection letters are intended for debtors, not federal judges.\textsuperscript{428} The Seventh Circuit therefore mandates that extrinsic evidence be introduced to determine actual confusion.\textsuperscript{429}

\begin{footnotes}
\footnote{423. See supra notes 306–15 and accompanying text for an example of two virtually identical letters from the same debt collector.}
\footnote{424. See supra note 161 and accompanying text.}
\footnote{425. See supra note 141.}
\footnote{426. See supra notes 21–23 and accompanying text.}
\footnote{427. See supra notes 161–62 and accompanying text.}
\footnote{428. See supra notes 327–38 and accompanying text.}
\footnote{429. See supra note 330–32 and accompanying text.}
\end{footnotes}
However, judges routinely apply objective standards to undisputed facts, such as in probable cause inquiries. In such cases, judges determine if the circumstances known to a police officer at the time of the offense (the undisputed facts) would have caused a "reasonably prudent person" (the objective standard) to believe an offense had been committed. When determining if the text of a collection letter is confusing, judges can examine the text of the letter (the undisputed facts) to determine if the "least sophisticated or unsophisticated consumer" (the objective standard) would reasonably find it confusing. In § 1692g cases, this entails a finding that certain messages overshadowed or contradicted the validation notice, and in § 1692e cases, it requires a finding that certain representations were false, misleading, or deceptive. Given judges' routine application of objective standards to undisputed facts, the criticism that judges are somehow not capable of stepping into the shoes of an unsophisticated consumer is unpersuasive.

The Fifth, Sixth, and Eleventh Circuits have not disputed that judges are capable of applying objective standards to undisputed facts, even while concluding that whether an unsophisticated consumer would find a collection letter confusing is an issue for the jury. As this issue is a matter of law application, and, according to the Supreme Court, the decision whether to send an issue to judge or jury should be based on policy factors, at a minimum, the Fifth, Sixth, and Eleventh Circuits should articulate a rationale for allowing juries to interpret the language of collection letters.

3. The Determination of a Violation Does Not Turn on the Credibility of Extrinsic Evidence; Therefore, Resolution by a Judge Is Appropriate

The Ninth Circuit is correct in stating that its decision to treat the interpretation of collection letters as a question of law is "buttressed" by the rationale behind the de novo review of contracts and other written instruments. In those examples, when extrinsic evidence is not required, a judge analyzes the contractual language, applies the principles of contract interpretation, and determines the meaning of the written instrument. Similarly, since the text of the collection letter is undisputed in FDCPA cases where the letter speaks for itself, extrinsic evidence is not, and has not been, required (except in the Seventh Circuit) to determine the letter's

430. See supra note 321 and accompanying text.
431. See supra note 321.
432. See supra notes 297–98 and accompanying text.
433. See supra notes 140, 144 and accompanying text.
434. See supra notes 239–42 and accompanying text. Although this position was enunciated in a § 1692g case, subsequent district court decisions have extended this logic § 1692e cases. See supra notes 265–71 and accompanying text.
435. See supra notes 238–42 and accompanying text.
meaning. 436 Although a collection letter is not a contract, interpreting written instruments such as contracts, letters, and statutes is the typical work of judges, not juries. 437 This is yet another factor weighing in favor of allowing the judge to determine the legal import of a collection letter’s language.

Since the classification of the language of a collection letter is a matter of law application, policy factors determine whether it should be a question of law or fact. 438 Admittedly, the policy factors in favor of treating the issue as a question of law have to be balanced against the strong policy favoring the right to a jury trial in civil actions. 439 After all, the right to a jury trial in civil actions is guaranteed in the Seventh Amendment. 440 Citizen participation in the civil justice process is considered to be healthy for the U.S. judicial system. 441 However, the aforementioned factors, especially the need for the consistent application of a frequently litigated federal statute, are sufficiently compelling to allow judges the task of applying the law and outweigh the federal policy in favor of jury trials.

4. The Seventh Circuit’s Requirement of Extrinsic Evidence Contradicts the Intention of the FDCPA

The Seventh Circuit’s requirement of extrinsic evidence to survive a motion for summary judgment contradicts the purpose of the FDCPA, which is (in part) to protect the average consumer from abusive debt collection practices. 442 Surveys are typically very expensive, as is expert testimony, with costs that can run into tens of thousands of dollars. 443 A debtor is left with limited protection against abusive debt collection practices if a successful case can cost tens of thousands of dollars to produce, as many attorneys may be dissuaded from such an undertaking. Further, as the cases demonstrate, it is very difficult for a survey (or expert testimony) to be admitted into evidence, a hurdle which often causes the plaintiff’s case to be dismissed at the summary judgment level, sticking the attorney with the bill. 444

Because of the requirement that admissible extrinsic evidence conform to Federal Rule of Evidence 702 (primarily surveys), there are innumerable barriers to the acceptance of survey evidence. 445 Examples include an inadequate sample size (a group of forty people was considered

436. See supra notes 238–42 and accompanying text.
437. See supra note 322 and accompanying text.
438. See supra notes 140–51 and accompanying text.
439. See supra note 159 and accompanying text.
440. See supra notes 156–58 and accompanying text.
441. See supra note 164 and accompanying text.
442. See supra notes 27–47 and accompanying text.
443. See supra note 395 and accompanying text.
444. See supra notes 368–77 and accompanying text.
445. See supra note 362 and accompanying text.
insufficient), leading questions on the survey, a failure to define clearly all terms, and a failure to hire an objective party to formulate the survey questions. These barriers have led two commentators to state that producing a persuasive and admissible survey is nearly impossible. Even if a survey can satisfy the court for purposes of proceeding past summary judgment, the defendant has the option to hire its own expert to attack the plaintiff's survey, potentially causing the jury to be subjected to a parade of experts. Clearly, the extrinsic evidence requirement dramatically increases the time and expense associated with an FDCPA claim.

While the Seventh Circuit reasons that the extrinsic evidence requirement is necessary to shield the debt collector from unreasonable interpretations of collection letters—part of the unsophisticated consumer standard—this "solution" is unduly harsh on the debtor. A judge is surely capable of spotting an "unrealistic, peculiar, bizarre, [or] idiosyncratic" interpretation of a collection letter and can prevent the plaintiff from prevailing on such a claim. This has already been demonstrated by the numerous circuits that follow the least sophisticated consumer standard, which also protects the debt collector from "bizarre or idiosyncratic interpretations of collection notices." Judges are assigned this task in the majority of federal circuit courts for § 1692g cases, and judges in the Second and Ninth Circuits perform this role in § 1692e cases as well. Requiring extrinsic evidence for this common-sense task simply adds unnecessary time and expense to many FDCPA claims.

Another justification for an extrinsic evidence requirement cited by the Seventh Circuit is that it "protects against the repudiated least-sophisticated-debtor standard slipping in through the back door." The fear of allowing unworthy claims through the "back door" of the least sophisticated consumer standard is a red herring, especially given the fact that the Seventh Circuit has never cited a single example of an unreasonable claim that slipped through the cracks using the least sophisticated consumer standard. Additionally, the Eighth Circuit—which employs the unsophisticated consumer standard—does not have an extrinsic evidence requirement and allows the judge to decide 1692g violations as a matter of law. This line of reasoning does not justify the massive burden an extrinsic evidence requirement imposes on an FDCPA plaintiff.

446. See supra notes 378–85 and accompanying text.
447. See supra note 386 and accompanying text.
448. See supra note 320 and accompanying text.
449. See supra notes 225, 334 and accompanying text.
450. See supra note 334.
451. See supra note 186 and accompanying text.
452. See supra Part II.A.
453. See supra Part II.B.1.
454. See supra note 335 and accompanying text.
455. See supra notes 208, 235, 331 and accompanying text.
The extrinsic evidence requirement turns FDCPA claims into a high-risk, high-reward proposition for attorneys, which is certainly not what Congress intended. It thwarts the purpose behind providing reasonable attorney's fees to a prevailing plaintiff, which is to persuade attorneys to take FDCPA cases. While it is true that egregious conduct will weigh in favor of the plaintiff during summary judgment, the formidable task of producing an expensive survey before trial even starts, the lengthy time commitment associated with hiring an expert to formulate and administer the survey, and, most importantly, the massive expenses that the plaintiff's attorney will incur in the event of a loss are likely to dissuade many attorneys from taking FDCPA cases, which will ultimately deter debtors from filing such claims. Although one could argue that the costs of survey evidence will simply amount to more work for the attorneys—and therefore a higher attorney fee payout—the potential for loss is far greater than it would be without this requirement. This means that attorneys in the Seventh Circuit face a windfall in fees if they succeed, due to the increased time and expense associated with the survey evidence, but the risk of a crippling blow in the event of a loss.

The suggestion by Judge Posner for the trial judge to hire a court-appointed expert to conduct the survey represents a novel attempt to deal with an increasingly unworkable standard, but fails to resolve any of its major flaws. While such an option might actually provide an FDCPA plaintiff with a fighting chance of getting her survey admitted, this expert will be selected through the mutual agreement of the parties' experts. Since the cost of the expert will be borne by the plaintiff, this route will impose yet another financial burden that debtors in any other circuit do not have to bear, and will not alleviate any of the numerous other problems associated with the extrinsic evidence requirement. Since this option is "rarely exercised," in the event a plaintiff forgoes hiring her own expert, district courts likely would be reluctant to appoint an expert sua sponte. If this practice became commonplace, it would likely overwhelm the district courts, as they would have to appoint an expert for every credible FDCPA claim. Under the Seventh Circuit's approach, the plaintiff is not presented with any palatable options: she is either forced to hire a second expert at her own expense, forego hiring her own expert in the hopes that the court will appoint one for her (thus placing a tremendous burden on district courts), or wait to see whether the court will appoint an expert and risk

456. The intent of the FDCPA was to abolish many abusive practices employed by debt collectors while also insuring that the collectors who did not engage in these tactics were not at a disadvantage. See supra note 47 and accompanying text.
457. See supra note 100 and accompanying text.
458. See supra notes 388–92 and accompanying text.
459. See supra note 390 and accompanying text.
460. See supra note 391 and accompanying text.
461. See supra text accompanying note 389.
462. See supra note 391 and accompanying text.
having her case dismissed. Thus, the ability of a district court to appoint an expert sua sponte will not alleviate the already significant flaws with the Seventh Circuit's extrinsic evidence requirement.

Additionally, the financial motivation for trademark infringement cases—the inspiration for the extrinsic evidence requirement—are very different from those in FDCPA cases. In trademark cases, the entity alleging the infringement has the financial incentive to produce extrinsic evidence.\footnote{463. See supra note 387.} This is because a successful plaintiff can recover (1) the defendant's profits resulting from the infringement; (2) up to three times the actual damages sustained by the plaintiff; and (3) the costs of the action.\footnote{464. See supra note 387.} Millions of dollars are at stake.\footnote{465. See supra note 387.} In contrast, FDCPA cases only provide for a maximum $1000 recovery, actual damages (which are rare), and reasonable attorney's fees.\footnote{466. See supra note 387.} Although survey evidence is time-consuming and expensive, attorneys in trademark infringement cases have a significant financial incentive to pay for the surveys. With the exception of class action lawsuits, FDCPA cases do not provide attorneys with a remotely similar financial incentive to procure expensive survey evidence.

This could explain why the Seventh Circuit itself had reservations with this requirement, as noted in Judge Eschbach's concurring opinion in \textit{Johnson}.\footnote{467. See supra note 387.} As Judge Eschbach foretold, the extrinsic evidence requirement will create a "chilling" effect that removes the protection of the FDCPA from many consumers.\footnote{468. See supra note 387.} He believed that requiring expensive survey evidence would make the cost of filing a suit exorbitant and the requirement would "gut the purposes of the FDCPA."\footnote{469. See supra note 387.} Judge Eschbach was correct.

The FDCPA should be interpreted to protect consumers, not erect hurdles to enforcement. The requirement of extrinsic evidence is a needless barrier that contradicts the legislative intent behind the FDCPA, and is simply bad policy.

\textbf{CONCLUSION}

Given the wide application of the FDCPA—and the recent exponential increase in FDCPA litigation—it is essential that the FDCPA be uniformly applied across the country. Since a substantial number of FDCPA cases involve claims that the language in a debt collector's communication violated the Act, the circuit split regarding the appropriate decision maker

\footnote{463. See supra note 387.}
\footnote{464. See supra note 387.}
\footnote{465. See supra note 387.}
\footnote{466. See supra notes 94–98 and accompanying text. However, class action suits permit the attorney to recover the lower of $500,000 or one percent of the debt collector's net worth. See supra note 98 and accompanying text.}
\footnote{467. See supra notes 393–96 and accompanying text.}
\footnote{468. See supra note 396 and accompanying text.}
\footnote{469. See supra notes 393–96 and accompanying text.}
impacts many Americans. As the third-party debt collection industry collected over $50 billion in 2007 alone, and as creditors are increasingly turning to third-party debt collectors, the impact of the choice between judge and jury is substantial. The fair and legitimate resolution of debts will be an important factor in resolving the national economic crisis. Resolving the split by treating the interpretation of confusing or misleading language in a collection letter as a question of law is a crucial step in the right direction.