CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 14 SPRING–SUMMER 2015 NUMBER 2

Is the Application of a Materiality Standard Misleading?

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I. INTRODUCTION

In 2011, nearly 69% of United States households had some form of debt.[1] Meanwhile the debt collection industry in 2011 was a 12.2 billion dollar industry.[2] The resource imbalance between consumers and debt collectors makes defending debt collection activities all the more difficult, especially if debt collectors use unfair means to collect. In 1977, Congress reacted to the growth of the debt collection industry and unfair debt collection practices by enacting the Fair Debt Collection Practices Act (FDCPA).[3]

For the purpose of this note, three sections of the FDCPA are particularly relevant and will be referenced throughout: § 1692, § 1692e, and § 1692k.[4]

The first is the findings and purpose section of the act, § 1692.[5] Congress noted in its findings that "there is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt

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[1] Marina Vornovytskyy et. al., *Household Debt in the U.S.: 2000 to 2011*, CENSUS http://www.census.gov/people/wealth/files/Debt%20Highlights%202011.pdf (last visited Nov. 17, 2013).

[2] John LaRosa, *U.S. Debt Collections Industry Worth $12.2 Billion*, PRWEB (April 10, 2012), http://www.prweb.com/releases/2012/4/prweb9383739.htm.

[3] 15 U.S.C. § 1692 (2012).

[4] *Id.*

[5] *Id.*

collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[6] The FDCPA has a stated three part purpose, "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[7]

In §1692e, Congress sought to effectuate the Act's purposes by creating a sweeping prohibition of abusive collection practices, including the use of any "false, deceptive, or misleading representations" made in connection with a debt collection effort.[8]

Lastly, this note will discuss the Civil Liability section, § 1692k[9] This section allows a court to award a successful plaintiff three types of damages: (1) any actual damages sustained as a result of the violation, (2) additional damages up to one thousand dollars, at the discretion of the court, and (3) the costs of bringing the suit, including attorney's fees, at the court's discretion.[10] Also included in this section are two defenses: (1) the bona fide error defense and (2) the advisory opinion defense.[11] The court may not hold a debt collector liable if the debt collector shows by a preponderance of the evidence that the violation was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[12] Additionally, a debt collector will not be held liable if they acted in conformity with an advisory opinion of the Bureau of Consumer Financial Protection.[13]

FDCPA claims brought under §1692e are brought by consumers who receive communications from debt collectors and believe that the representations are false, misleading, or deceptive. In evaluating § 1692e claims the court utilizes the least sophisticated consumer standard, which originated in FTC cases prior to the enactment of the FDCPA.[14] The least sophisticated consumer standard requires that the court view the representations through the eyes of the least sophisticated, rather than the reasonable, consumer in order to protect the gullible, as well as the critical.[15] In addition, courts have held that the statute does not require a showing of intentional or knowing conduct.[16]

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[6] *Id.*
[7] *Id.*
[8] 15 U.S.C. § 1692e (2012).
[9] 15 U.S.C. § 1692k (2012).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Jeter v. Credit Bureau, 760 F.2d 1168, 1175 (11th Cir. 1985).
[15] *Id.* at 1172.
[16] Russell v. Equifax A.R.S., 74 F.3d 30, 33–34 (2d Cir. 1996).

Recently, however, several circuit courts have added another requirement to § 1692e claims, a requirement that the representation be material. A statement or representation is material if knowledge of the item would affect a person's decision-making.[17] This standard appears to have been developed out of concern over excessive litigation of FDCPA claims, described as a "cottage industry".[18] Despite the broad language, it no longer suffices that conduct be false, deceptive or misleading, but must be material as well, despite materiality not being mentioned in the statute. To make matters worse the courts' framework for analyzing materiality conflates the elements contained in the statutes requiring false and misleading or deceptive and misleading, rather than false, deceptive, *or* misleading. In altering the structure in which FDCPA claims are analyzed the court fails consider the impact of false representations on honest debt collectors, the ability of ineffective representations to harass consumers, and the moral and ethical dilemma of allowing intentional falsehoods. I contend that to better reflect the purposes of the statute the courts should consider removing the materiality analysis or amending their definition of materiality.

This article examines various issues surrounding § 1692e claims. Part II examines the origins and impetus of the materiality standard. Part III surveys and critiques a number of cases implementing the materiality analysis. Part IV argues that the current application of the materiality standard fails to reflect the goals of the statute because it does not look at the impact of false representations on honest debt collectors, the ability of non-misleading representations to harass consumers, and the moral and ethical dilemma of allowing lies. And Part V proposes a solution to the courts' dilemma that would be more amenable to consumers while not subjecting debt collectors to undeserving and costly litigation.

II. ORIGINS AND IMPETUS FOR THE MATERIALITY STANDARD

As will become clear, the court is straining to follow the materiality analysis it has created. In order to understand why the court would insist upon following this standard we need to examine the origins and impetus for the materiality standard.

Since the creation of the FDCPA in 1977 courts have generally interpreted the FDCPA broadly.[19] For starters, the statute is remedial and it is a canon of statutory interpretation to liberally construe remedial

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[17] BLACK'S LAW DICTIONARY 1124 (10th ed. 2014).

[18] Jacobson v. Healthcare Financial Services, 434 F.Supp.2d 133, 138 (E.D.N.Y. 2006).

[19] *See* Frey v. Gangwish, 970 F.2d 1516, 1521 (6th Cir. 1992); Bridge v. Ocwen Federal Bank, 681 F.3d 355, 362 (6th Cir. 2012); Caprio v. Healthcare Revenue Recovery Group, 709 F.3d 142, 148 (3d Cir. 2013).

measures.[20] In 1986, the FDCPA was amended to remove the blanket exemption for attorneys.[21] In 1995, the Supreme Court interpreted the actions taken in the 1986 amendment and the plain language and held that an attorney engaged in debt collection litigation could be held liable for a violation of the FDCPA.[22] And in 2010 the Supreme Court held that bona fide error defense did not extend to mistakes of law.[23]

As the protections afforded to consumers under the FDCPA expanded, a concern developed that individuals with debt would bring frivolous lawsuits against debt collectors solely to garner a windfall from the debt collectors or in the hope of having the debt collection proceeding halted. Justice Kennedy expressed his concerns when he dissented in *Jerman v. Carlisle*, he feared that the FDCPA had created a "cottage industry" for litigation.[24] Kennedy noted that the costs of litigation and discovery forced settlements for innocent mistakes and the use of class actions turned technical legal violations into windfalls for debtors.[25] Kennedy was not the first to refer to FDCPA litigation as a "cottage industry". In 2006, Judge Glasser, of the District Court for the Eastern District of New York, stated that the strict liability component of the statute has led to a "proliferation of litigation" and the creation of a cottage industry.[26] This language was echoed by the Sixth Circuit in *Fed. Home Loan Mortgage Corp. v. Lamar*.[27] Courts were beginning to fear that the protections of the FDCPA had become too great, and were not being used to eradicate abusive practices, as initially designed, but rather to produce a windfall for debtors.

Not coincidentally a trend developed in circuit courts that raised the requirements for bringing an FDCPA claim. Circuit courts across the country began to find that § 1692e of the FDCPA also requires the representation be material and used the standard to strike down a number of lawsuits at the pre-trial stage.[28]

Most cases applying the materiality standard will state at some point that "several other circuit courts, as well as a number of district courts. . .

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[20] *See* Peyton v. Rowe, 391 U.S. 54, 65 (1968) (holding that it is a canon of construction to interpret remedial statutes liberally); Harrison v. NBD Inc., 968 F. Supp. 837, 844 (E.D.N.Y. 1997) ("The Court recognizes that the FDCPA is a remedial statute which should be liberally construed.); Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002); Clark v. Capital Credit & Collection Servs., 460 F.3d 1162, 1176 (9th Cir. 2006).

[21] Fair Debt Collection Practices Act, Pub. L. No. 99-361, 100 Stat. 768 (1986) (codified as amended at 15 U.S.C. §1692).

[22] Heintz v. Jenkins, 514 U.S. 291, 294-95 (1995).

[23] *See* Jerman v. Carlisle, 559 U.S. 573, 576-77 (2010).

[24] *Id.* at 617 (Kennedy, J., dissenting).

[25] *Id.*

[26] Jacobson v. Healthcare Fin. Servs., 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006), *aff'd in part, vacated in part, reversed in part*, 516 F.3d 85 (2d Cir. 2008).

[27] Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504, 513-14 (6th Cir. 2007).

[28] *See* Hahn v. Triumph P'ship, 557 F.3d 755, 757 (7th Cir. 2009); Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 596 (6th Cir. 2009); Donohue v. Quick Collect, 592 F.3d 1027, 1033 (9th Cir. 2010); Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 374 (4th Cir. 2012); Gabriele v. Am. Home Mortg. Servs. 503 Fed. Appx. 89, 94 (2d Cir. 2012).

read a materiality requirement into the FDCPA's prohibition of false, deceptive, or misleading practices in the collection of a debt" or something akin to it.[29] The statement usually precedes a laundry list of citations of cases which have held similarly.[30] This could lead a reader to believe that the statute contains or at least mentions materiality, but, nowhere in the statute does the word appear.[31] Section 1692e of the FDCPA states that, "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."[32] A plain meaning reading of the statute would render any false, misleading, or deceptive statement prohibited conduct.

The term material first appears in an FDCPA case in a Seventh Circuit opinion by the Judge Easterbrook in 2009.[33] In *Hahn*, Judge Easterbrook states, "materiality is an ordinary element of any federal claim based on a false or misleading statement."[34] In support of his statement he offers two Supreme Court cases, *Carter v. U.S.* and *Neder v. U.S.*.[35] However, Easterbrook does not consider the words of the statue, the legislative history, or similar statutes.[36]

As the basis for the materiality standard, one would expect that either *Carter* or *Neder* explicitly find that a materiality standard exists in all cases involving false representations, but this is not the case. Instead, *Carter* and *Neder* stand for a canon of statutory interpretation, namely:

> [W]here Congress borrows *terms* of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed *word* in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.[37]

Not only do the cases not expressly state that materiality is a requirement of FDCPA claims, the factual bases of the two cases are distinguishable as well. In *Carter*, the Supreme Court considered whether the words "robbery" and "larceny" had acquired common law meaning,

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[29] *See Gabriele*, 503 Fed. Appx. at 94.

[30] *See id.*

[31] *See* 15 U.S.C. § 1692 (2012).

[32] 15 U.S.C. § 1692e (2012).

[33] Hahn, 557 F.3d at 757.

[34] *Id.*

[35] *Id.*

[36] *See generally id.*

[37] Carter v. United States, 530 U.S. 255, 264 (2000) (emphasis in original) (quoting Morissette v.United States, 342 U.S. 246, 263 (1952)).

but for unrelated reasons refused to apply the common law meaning.[38] Meanwhile, in *Neder*, the Supreme Court held that a "scheme or artifice to defraud" included the accumulated common law elements of "fraud" and therefore included a materiality standard.[39] "Fraud" is a very specific crime with established common law meaning.[40] The elements of fraud include a false statement, along with materiality, knowledge, reliance, and damages.[41]

Some argue that false representation is a common law term of art that carries a materiality requirement and therefore according to *Neder* and *Carter* § 1692e should contain a materiality requirement.[42] It seems unlikely that "false representations" is a term of art containing a materiality requirement because Congress has used the phrase in many other statutes in conjunction with a requirement that it be material.[43] In every statute in which Congress requires the representation be both false and material it would be redundant and duplicative, and the court is supposed to avoid rendering words duplicative.[44] Alternatively from the court opinion it appears Easterbrook believes that because fraud contains a materiality requirement, and false statements are a part of fraud, that all statutes containing false statements should include a materiality statement. However, false statements and materiality are separate and distinct elements. Further, the FDCPA does not use the term of art fraud nor does it require knowledge, reliance, or damages.[45]

The materiality paradigm has become the predominant mode of analysis for FDCPA claims since *Hahn*.[46] In connection with the previously described least sophisticated consumer standard § 1692e claims are effectively evaluated according to whether the debt collector made a representation that was false, deceptive, or misleading, and material to the least sophisticated consumer. The following section examines a series of

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[38] *Id.*; the Court in *Carter* refused to apply the common law meaning because the only time "robbery" appeared was in the title and the title should only be used when the language in the text of the statute is ambiguous, which was not the case in this instance.

[39] Neder v. United States, 527 U.S. 1, 21–22 (1999).

[40] RESTATEMENT (SECOND) OF TORTS § 538 (1977).

[41] BLACK'S LAW DICTIONARY 775 (10th ed. 2014).

[42] Neder v. United States, 527 U.S. 1, 22–23 (1999); Carter v. United States, 530 U.S. 255, 264 (2000).

[43] *See* 51 U.S.C. § 20135 (2012) ("contained a false representation of a material fact,"); 17 U.S.C. § 506 (2012) ("knowingly makes a false representation of a material fact"); 18 U.S.C. § 1020 (2012) ("knowingly makes. . .[a] false representation as to a material fact") 38 U.S.C. § 1910 (2012) ("made a false representation in reference to a material fact"); 15 U.S.C. § 55 (2012) ("contains no false representation of a material fact.")

[44] LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 132–33 (2008).

[45] BLACK'S LAW DICTIONARY 775(10th ed. 2014).

[46] *See* Warren v. Sessoms & Rogers P.A., 676 F.3d 365, 374 (4th Cir. 2012);Donohue v. Quick Collect, 592 F.3d 1027, 1034 (9th Cir. 2010);Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 596 (6th Cr. 2009); Lane v. Fein, Such & Crane, LLP, 767 F.Supp.3d 382, 389–90 (E.D.N.Y. 2011); Walsh v. Law Offices of Howard Lee Schiff, No. 3:11-cv-1111 SRU, 2012 WL 4372251, at *3–6 (D. Conn. 2012).

cases applying the least sophisticated consumer standard seeking to categorize them according to the three express prohibitions: false, deceptive, and misleading. Note how the courts' materiality standard has led to numerous logical dilemmas and conflated the three prohibited acts into a single one, misleading.

III. CASE SURVEY AND CRITIQUE

In this portion of the paper I survey a series of cases applying the materiality standard. In each case I looked for a determination of whether the court held that the statement was false, deceptive, or misleading and on what basis. After surveying the cases I critique the courts application and attempt to discern the courts rationale for utilizing the materiality standard in each instance.

A. Case Survey

The cases are split into four categories: (1) Successful Claims for Consumers: Misleading Representations, (2) Unsuccessful Claims for Consumers: False but not Misleading, (3) Unsuccessful Claims for Consumers: Deceptive but not Misleading, and (4) Unsuccessful Claims for Consumers: Not False, Deceptive, or Misleading because the Interpretation is Unreasonable.

One thing of note before examining the cases is the courts' consistent usage of the term "technical" violations or falsehoods.[47] It's unclear exactly how a representation can be technically false, deceptive, or misleading but when the court used the language, it was to describe conduct it held was not a violation of § 1692e. In some cases, like *Muha* and *Miller* the court used the term technically false to refer to representations that were not false within the statute because the consumers' interpretation of the representation was not a reasonable interpretation for the least sophisticated consumer.[48] But in other cases, like *Wahl* and *Hahn*, the court claims representations are technically false when they are more appropriately characterized as deceptive.[49] Interestingly, Kennedy's dissent cautions that expansion of the FDCPA will lead to litigation of technical violations; the use of Kennedy's

[47] Wahl v. Midland Credit Mgmt., 556 F.3d 643, 646 (7th Cir. 2009); Hahn v. Triumph P'ships, 557 F.3d 755, 758 (7th Cir. 2009); Muha v. Encore Receivable Mgmt., 558 F.3d 623, 627 (7th Cir. 2009); Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 596 (6th Cr. 2009); Donohue v. Quick Collect, 592 F.3d 1027, 1034 (9th Cir. 2010); Gabriele v. Am. Home Mortg. Serv., 503 Fed. Appx. 89, 94 (2d Cir. 2012).

[48] Muha v. Encore Receivable Mgmt., 558 F.3d 623, 630 (7th Cir. 2009); Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 596–97 (6th Cr. 2009).

[49] Wahl v. Midland Credit Mgmt., 556 F.3d 643, 646 (7th Cir. 2009); Hahn v. Triumph P'ships, 557 F.3d 755, 758 (7th Cir. 2009).

language in these later cases suggests they share similar concerns over excessive FDCPA litigation.[50]

1. Successful Claims for Consumers: Misleading Representations

This set of cases feature cases in which the court held that the conduct violated § 1692e of the FDCPA. The common characteristic of these cases is that the court held that the least sophisticated consumer could be misled by the representation regardless of whether they were also deceptive or false.

Six years prior to the inception of "materiality" in *Hahn*, the Seventh Circuit, in *Turner v. J.V.B.D. & Associates*, considered whether sending a collection letter to a debtor whose debt had been discharged was sufficient to state a claim.[51] The debtor, who had just declared bankruptcy, received a collection letter stating he owed money for a pre-paid phone service.[52] The debt referenced in the collection letter had been discharged during bankruptcy and so rather than respond to the letter he brought suit alleging a violation of § 1692e.[53] The Seventh Circuit held that a reasonable jury could conclude as a matter of fact that the statement could reasonably be interpreted to mean that the debt was still owed, which was false, therefore summary judgment, in favor of the debt collector, was inappropriate.[54] The court reasoned that the least sophisticated consumer could be misled into believing he was obligated to pay the debt.[55] The court does not address whether the statement is material.[56] Additionally, because the debt collector claimed he did not know the debt had been discharged the court noted that their holding did not preclude the debt collector from availing themselves of the bona fide error defense at trial.[57]

In 1993 the Second Circuit held in *Clomon v. Jackson* that the use of an attorney's letterhead at the top of a collection letter which he had no part in producing or reviewing rendered statements within the letter false and misleading in violation of § 1692e.[58] First, the court found that the use of the letterhead could cause the least sophisticated consumer to reasonably believe the letter was sent by an attorney. [59] Then, the court reasoned that the least sophisticated consumer could be misled to incorrectly believe that all the statements within the letter were made by an attorney because of the

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[50] Jerman v. Carlisle, 559 U.S. 573, 617 (2010) (Kennedy, J., dissenting).
[51] Turner v. J.V.D.B. & Assoc., 330 F.3d 991, 995 (7th Cir. 2003).
[52] *Id.* at 994.
[53] *Id.*
[54] *Id.* at 995.
[55] *Id.*
[56] *Id.* at 991.
[57] Turner v. J.V.D.B. & Assoc., 330 F.3d 991, 995–96 (7th Cir. 2003).
[58] Clomon v. Jackson, 988 F.2d 1314, 1320 (2d. Cir. 1993).
[59] *Id.* at 1321.

letterhead.[60] Without any further discussion of materiality the court held there were ample grounds for the district court to find a violation.[61]

The same year as the *Gabriele* decision, the Second Circuit held that the statement "Your account is not eligible for bankruptcy discharge" was false and actionable under the FDCPA in *Easterling v. Collecto*.[62] The debtor, a student, had declared bankruptcy but her student loans had not been discharged.[63] Following the bankruptcy proceeding the debt collector sent her a collection letter making the aforementioned statement.[64] At the time the letter was sent there were still procedures available to the debtor to discharge her student loans; she could file a new bankruptcy petition or motion to reopen her prior bankruptcy case to seek a discharge of the student loans.[65] The court did not contemplate the relative level of success she would have in these proceedings, it sufficed that there were avenues available through which she could discharge the debt, thus rendering the statement false.[66] The critical language in the court's reasoning is,

> Instead, the operative inquiry in this case is whether the hypothetical least sophisticated consumer could reasonably interpret the Collection Letter's statement that 'Your account is NOT eligible for bankruptcy discharge,' App. 18, as representing, incorrectly, that the debtor is completely foreclosed from seeking bankruptcy discharge of the debt in question.[67]

Because the least sophisticated consumer could reasonably interpret the statement this way and there existed avenues for the debt to be discharged the court held that the statement was "false on its face."[68] Further the court holds that the statement is misleading because the debtor may think his debt is ineligible for discharge.[69]

2. Unsuccessful Claims for Consumers: False but not Misleading

In the following cases the court contends that despite the falsity of the statements they are not actionable under the FDCPA because they are not material, which according to the courts' definition means they would not mislead the least sophisticated consumer.

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[60] *See id.* at 1320 ("The impression was false and misleading because in fact Jackson did not review each debtor's file...").

[61] *Id.* at 1321.

[62] Easterling v. Collecto, Inc., 692 F.3d 229, 234 (2d Cir. 2012).

[63] *Id.* at 231.

[64] *Id.* at 233.

[65] *Id.*

[66] *Id.* at 234.

[67] *Id.* (emphasis in original).

[68] Easterling v. Collecto, Inc., 692 F.3d 229, 235 (2d Cir. 2012).

[69] *Id.*

In *Donohue v. Quick Collect* the debt collector, Quick Collect, Inc., sent a complaint to the debtor in a debt collection lawsuit.[70] The complaint itemized the "total due", "principal", and "interest calculated at 12%" of the debt owed by the debtor.[71] Really, the interest included pre-assignment finance charges calculated at 1.5% rather than 12%.[72] When the debtor did the math himself he determined that they had charged him a usurious interest rate of 17.1%.[73] In response, the debtor brought two FDCPA claims, one for exceeding the 12% usury interest cap according to state law, and, in the alternative, for lying about the interest rate.[74] On the first claim, the court determined that Quick Collect did not charge over 12% but that the interest item in the complaint contained pre-assignment finance charges calculated at 1.5% and post-assignment interest calculated at 12%.[75] The holding on the first claim necessitated the court conclude that the label "interest calculated at 12%" was false, however the court held the statement was not a violation of § 1692e because the statement was not material.[76] The Ninth Circuit reasoned that the least sophisticated consumer would not be misled by the statement because the total amount was correct and the statements did not undermine the debtor's ability to intelligently choose a response.[77]

In 2012 the Second Circuit decided *Gabriele v. American Home Mortg. Servicing*.[78] In that case, the debt collector initiated a lawsuit against a debtor to foreclose on his home.[79] During the course of litigation the law firm collecting the debt made a total of five statements that were shown to be false.[80] First, the complaint stated that pursuant to the Connecticut Practice Book § 10-29 all exhibits to the complaint would be served upon the defendant debtor.[81] Despite this statement, certain exhibits were never sent or received by the debtor.[82] In addition to the statement in the complaint, the debt collector also filed a Notice of Compliance with this requirement, despite having not complied.[83] Second, following a granting of a thirty day extension of time to the debtor by the court, the

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[70] Donohue v. Quick Collect, Inc., 592 F.3d 1027, 1029 (9th Cir. 2010).

[71] *Id.*

[72] *Id.* at 1031.

[73] *Id.* at 1030.

[74] *Id.* at 1029.

[75] *Id.* at 1031.

[76] Donohue v. Quick Collect, Inc., 592 F.3d 1027, 1034 (9th Cir. 2010).

[77] *Id.*

[78] Gabriele v. Am. Home Mortg. Serv., 503 Fed. Appx. 89, 89 (2d. Cir. 2012).

[79] *Id.* at 91.

[80] *Id.* at 92.

[81] *See* Conn. Practice Book § 10-29 (2014); Complaint at 6, Gabriele v. Am. Home Mortg. Serv., No. 10CV01798, 2010 WL 6546554 (D. Conn. 2010), *aff'd,* 503 Fed. Appx. 89 (2d Cir. 2012).

[82] Complaint at 6, Gabriele v. Am. Home Mortg. Serv., No. 10CV01798, 2010 WL 6546554 (D. Conn. 2010), *aff'd,* 503 Fed. Appx. 89 (2d Cir. 2012).

[83] *Id.*

debt collector filed two motions for default containing false statements.[84] The first motion for default was for failure to appear and the second for failure to plead.[85] The debtor alleged that these are both false because the debtor could not be in default until his thirty day extension had expired, that he had already appeared, and that before filing for default the debt collector must be in compliance with CPB § 10-29, which the debt collector knew he was not.[86] Third, the debt collector filed an affidavit for an updated debt calculation, however, the affidavit was not signed, acknowledged, and was missing portions, as such, the debtor argued that it was inherently inaccurate.[87] Fourth, the debt collector filed another updated debt calculation affidavit in which he made the statement "There are no set-offs or counterclaims known to the undersigned."[88] Yet, the debt collector knew that counterclaims had been filed 3 months prior.[89] And fifth, prior to the case the Connecticut Superior Court had issued a standing order that the debt collector produce an affidavit that attests that the debtor was given an opportunity to be considered for loss mitigation programs before judgment can be entered,[90] the debt collector produced an affidavit that stated that, "the loan secured by the mortgage for which plaintiff seeks foreclosure is not subject to loss mitigation program because the loan is subject to the federal Making Homes Affordable Program but is not eligible because [the] solicitation letter had expired."[91] But, the debt collector, when he made this statement, was aware that the debtor was in mediation regarding consideration for a HAMP federal loss mitigation program, thus rendering the statement false.[92]

The Second Circuit took as true, all claims made by the non-moving party, in this case the debtor, because the claim was dismissed in a summary judgment motion.[93] The court did not dismiss the action because of an unreasonable interpretation, it did not dismiss the action because the statements were not false, instead the court focuses on the materiality of the statements.[94] In applying the materiality standard the court reasoned that the FDCPA does not promise "efficient or thrifty solutions" and therefore would not consider whether the false statements made the defense of the debt more difficult for the debtor.[95] The court reasoned that

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[84] *Id.* at 7.

[85] *Id.*

[86] *Id.* at 7–8..

[87] Complaint at 8, Gabriele v. Am. Home Mortg. Serv., No. 10CV01798, 2010 WL 6546554 (D. Conn. 2010), *aff'd,* 503 Fed. Appx. 89 (2d Cir. 2012).

[88] *Id.* at 9.

[89] *Id.*

[90] *Id.*at 10.

[91] *Id.*

[92] *Id.*

[93] Gabriele v. Am. Home Mortg. Serv., 503 Fed. Appx. 89, 93 (2d. Cir. 2012).

[94] *Id.* at 94.

[95] *Id.* at 95.

the debtor would have known if he had received the exhibits, was in mediation, and that he had filed counterclaims, and therefore could not be misled, regardless of what the debt collector had said.[96]

The District Court of Minnesota in *Neil v. Bullseye Collection Agency* held that a false statement was not material and therefore not actionable under § 1692e.[97] In this case, the debt collector sent a collection letter labeled "second notice" to the debtor.[98] The debtor claimed this was false because this was the third letter the debtor had received.[99] The court recognizes that the statement is false, in truth this was the third notice the debtor had received, however the court finds it was immaterial.[100] There is no discussion of materiality, no consideration of what it means or how it could apply, only that the statement was not material and therefore not a violation.[101]

3. Unsuccessful Claims for Consumers: Deceptive but not Misleading

In the following cases the court holds that the statements are not actionable because they are technical violation or technically false and not material, however their reasoning suggests that the statements are more aptly described as deceptive but not material. The meaning of deceptive within the FDCPA is a statement that can reasonably be read to have two or more meanings, one of which is inaccurate.[102]

In *Wahl v. Midland Credit Management* the Seventh Circuit was faced with an interesting dilemma, the statements were not false but the interpretation of the debtor was not unreasonable either.[103] The debt collector sent a collection letter to the debtor, which broke down the debt into the principal balance and interest accrued.[104] The principal balance contained the total dollar amount, the original debt plus interest and late fees accrued while the debt was owned by the previous creditor.[105] The debtor alleged these characterizations were false because the principal included interest from the previous creditor.[106] The court concluded that

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[96] *Id.*

[97] Neill v. Bullseye Collection Agency, Civil No. 08–580, 2009 WL 1386155, *2 (D. Minn. 2009).

[98] *Id.* at *1.

[99] *Id.* at *2.

[100] *Id.*

[101] *Id.*

[102] Gonzalez v. Arrow Financial Serv., 660 F.3d 1055,1062 (9th Cir. 2011) (noting that, "it is well established that '[a] debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate.'", *quoted in* Brown v. Card Serv. Ctr., 464 F.3d 450, 455 (3d Cir. 2006)).

[103] Wahl v. Midland Credit Mgmt., 556 F.3d 643, 646 (7th Cir. 2009).

[104] *Id.* at 644.

[105] *Id.*; debt is often sold to debt buyers who hire debt collectors to collect the amounts. The information that the debt buyer receives when he buys the debt can vary. Linda Cook, *Consumers Should Understand Debt Buying*, OHIO STATE BAR ASS'N (Feb. 8, 2013), https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse.

[106] *Wahl*, 556 F.3d at 645.

the statement was not false because principal is defined as the "original sum of money owed as a debt, upon which interest is calculated".[107] When the debt collector was assigned the debt the amount listed as principal was the original amount which they calculated interest on.[108] However, despite going through this analysis the court noted that the true test is whether the language would confuse or mislead the least sophisticated consumer.[109] In this case, the court determined that the least sophisticated consumer with a reasonable knowledge of her account history would understand the meaning of the words principal, and not be misled.[110]

Not long after *Wahl* the Seventh Circuit decided *Hahn v. Triumph Partnerships*. In *Hahn*, Judge Easterbrook held that Section 1692e contained a materiality requirement.[111] In this case, the debt collector, Triumph, had bought a debt owned by HSBC bank.[112] The debt collector sent a collection letter to the debtor which divided the debt owed into "AMOUNT DUE", $1,051.91, and "INTEREST DUE", $82.64.[113] The plaintiff complained, and Triumph admitted, that the interest due contained only the interest accrued since Triumph was assigned the debt.[114] It was similarly stipulated that the amount due contained the original principal and any financing charges that were applied before assignment.[115] The debtor alleged that the labels were false because the amount due also included interest.[116] In reality, the amount due was the total amount that Triumph had been assigned by HSBC.[117] The interest category represented the interest that Triumph was charging on the amount they had been assigned.[118] The court reasoned that the statements were not false because amount due, even if it were interpreted as principal due, could contain previous assignees, HSBC's, interest.[119] Additionally, when you compound interest continuously the interest of the present becomes the principal upon which interest is calculated from that point forward therefore it was, in one sense, accurate not to describe the past interest as interest.[120]

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[107] *Id.* at 646.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] Hahn v. Triumph P'ships, LLC, 557 F.3d 755, 757 (7th Cir. 2009).
[112] *Id.* at 756.
[113] *Id.*
[114] *See id.* (It did not include the interest accrued while HSBC owned the debt.).
[115] *Id.*
[116] *Id.*
[117] *Hahn*, 557 F.3d at 756–757.
[118] *Id.* at 756.
[119] *Id.* at 756–757.
[120] *Id.* at 757.

The court in *Hahn* also made a policy argument against concluding that these are false statements.[121] The court noted that the breakdown into amount due and interest due was not required, but rather included to aid the debtor.[122] The debtor's suggested, "true" interest due would have been an amalgamation of interest under HSBC and Triumph, which the court found would "produce unrecognizable figures".[123] It was more helpful to the debtor to see the amount due as all the charges they incurred under HSBC because the number would correspond to the most recent billing statements they had seen from HSBC and they could then ensure that Triumph had properly calculated the interest.[124]

The Seventh Circuit held that the statement was true, and that the case was concluded, yet in dicta they claim that the statement was also not material, and that materiality is a feature of all federal claims based on false statements.[125] As noted earlier, this dictum is the foundation for the materiality standard for all future cases.[126]

4. Unsuccessful Claims for Consumers: Not False, Deceptive, or Misleading because the Interpretation is Unreasonable

The following cases feature statements that the courts held were not violations of § 1692e because the interpretation proposed by the debtor is unreasonable even for the least sophisticated consumer.[127]

The Eighth Circuit in *Peters v. General Service Bureau* was faced with the following facts.[128] The debt collector had sent the debtor a letter requesting the consumer's voluntary appearance in court.[129] In the letter, the collector asserted that if the consumer failed to show up voluntarily then the "only alternative" for the debt collector would be to request service by constable.[130] The debtor contended that the language "only alternative" was a lie because there were other possible alternatives for the collector.[131] The debtor was correct, there were other things the debt collector could do, however service by constable was the only feasible alternative to voluntary presence if the debt collector were going to continue to attempt to collect the debt.[132] The court found the statement would have been literally false only if it stated that service by constable

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[121] *Id.*

[122] *Id.*

[123] *Hahn*, 557 F.3d at 757.

[124] *Id.* at 757.

[125] *Id.*

[126] See Section II: Origins and Impetus for the Materiality Standard.

[127] *See Muha*, 558 F.3d at 628) (finding that the debt collector's interpretation of its statement is "doubtless" the correct one).

[128] *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051 (8th Cir. 2002).

[129] *Id.* at 1053.

[130] *Id.*

[131] *Id.* at 1054.

[132] *Id.* at 1056.

was the "only legal option under Nebraska law".[133] The court claims it would be unreasonable for the debt collector to list every possible method of service and therefore the consumer should not have interpreted "only alternative" that way.[134] The court then states that even if the statement had been literally false, it would not mislead because it effectively conveyed the consequences of not signing and therefore was not misleading.[135]

Muha v. Encore Receivable Management was a similar scenario, in that the court found that the plaintiff was asserting an unreasonable interpretation of the debt collector's statement.[136] The collector sent a dunning letter to the debtor containing the statement, "therefore your original agreement with the above mentioned creditor has been revoked."[137] The debtor claimed that this statement was false because it could be interpreted to mean that the entire contract with the previous creditor was revoked.[138] There were still portions of the agreement in place, at the least the portion of the suit that allowed the debt collector to collect on the note was still in place.[139] The court reasoned that the statement should reasonably be read to mean that the credit card privileges of the debtor were revoked rather than that the entire contract was revoked, because if that had been the case the debt collector would not be trying to collect the debt.[140] In fact the court characterized this interpretation as "doubtless" the intended interpretation.[141] In addition to making the determination that the interpretation was unreasonable, the court examined the ability of the statement to mislead the least sophisticated consumer.[142] During its analysis it stated that if a statement would not mislead or deceive the least sophisticated consumer, it is not a violation even if it's technically false, and therefore, a statement is not false unless it would mislead the least sophisticated consumer.[143]

In the district court case, *Lane v. Fein, Such and Crane*, the Court for the Eastern District of New York found a debtor's interpretation unreasonable and therefore concluded the statement was true.[144] The statement the debtor complained about was "BMC is a banking corporation duly licensed, organized and existing pursuant to the laws of the United

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[133] *Id.*
[134] *Peters*, 277 F.3d at 1056.
[135] *Id.*
[136] *Muha*, 558 F.3d at 630.
[137] *Id.* at 625.
[138] *Id.*
[139] *Id.*
[140] *Id.* at 628.
[141] *Id.*
[142] *Muha*, 558 F.3d at 627.
[143] *Id.*
[144] Lane v. Fein, Such and Crane, LLP, 767 F.2d 382, 389 (E.D.N.Y. 2011).

States."[145] The debtor alleged this statement was false because it suggested a partnership with the federal government, that BMC was their creditor, and that BMC had standing to sue.[146] The interpretation was so unreasonable the court had difficulty understanding where in the statement these interpretations were coming from.[147] Seeing as how the only reasonable interpretation of the statement was the debt collector's interpretation, which was accurate, the court held the statement was not materially false or misleading.[148]

The Sixth Circuit, the same year as *Wahl* and *Hahn*, decided *Miller v. Javitch, Block & Rathbone*.[149] This case stems from a debt collection lawsuit in which the debtor complained the debt collector made false statements.[150] In the complaint of a debt collection lawsuit, the debt collector made four allegedly false statements to the debtor.[151] In the first three, the collector referred to a credit card debt as a loan. In the fourth, the collector stated that it had acquired all rights and interests to the claim.[152] The debtor alleged the first three were false because a credit card debt is a "merchant's account receivable" not a loan.[153] He alleged the fourth statement was false because it implied that the collector is a holder in due course, which the debt collector was not.[154] The court looked at precedent that defined a loan and found that these facts fit the definition of a loan, and so the statements were not false.[155] The fourth statement made by the collector never asserted that it was a holder in due course and so the court found that this was an unreasonable interpretation.[156] The court also made an argument in the alternative that the statements would not mislead the least sophisticated consumer and therefore were not material because Miller admitted that she "'pretty much' understood" the language.[157]

B. Critique of Materiality Analysis' and Hypotheses for Why the Court Ignores These Problems

The courts are fairly consistent in their application of the materiality test. Generally the courts go through the following procedure. First, is the

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[145] *Id.* at 388.
[146] *Id.* at 389.
[147] *Id.*
[148] *Id.* at 390.
[149] Miller v. Javitch, Block & Rathbone, 561 F.3d 588(6th Cir. 2009).
[150] *Id.* at 590.
[151] *Id.* at 591.
[152] *Id.*
[153] *Id.* at 592.
[154] *Id.* at 595.
[155] *Miller*, 561 F.3d at 592–4.
[156] *Id.* at 595–96. (Because three of the four statements were based on an incorrect assumption, this case was included in this category, but this fourth statement was rationalized as not false because it was an unreasonable interpretation.)
[157] *Id.* at 596–97.

statement false?[158] If so, is it technically false or literally false? Then, regardless of whether it is false, would the statement mislead the least sophisticated consumer?[159] A plain and logical reading of the text of the statute seems inconsistent with this procedure. If the analysis chosen is inconsistent with what logically follows from a plain reading of the statute then why does the court use this analysis? The second half of this section hopes to provide some insight into possible reasoning's, keeping in mind that the larger undercurrent is a fear of excessive litigation.

1. Critique of Logical Inconsistencies

The court's analysis presents three particular logical inconsistencies. The particular flaws that emerge in the courts logic are: (1) the courts conflates all three words, false, misleading, and deceptive, into a single word, misleading; (2) if a consumer takes action in response to a statement the courts should not conclude that the statement is not material unless the response was unreasonable; and (3) the courts treat violations within the statute differently in their analysis.

Rather than providing independent definitions for false, misleading, and deceptive, the courts have amalgamated them all into one. The statute plainly read sets out three distinct violations by separating them with an "or".[160] Webster defines false as "not true or accurate" but the courts redefine it to be synonymous with misleading, which Webster defines as "to lead in a wrong direction or into a mistaken action or belief."[161] Some courts contend that a statement is only false if it is confusing, which is close to the meaning of misleading.[162] Others say that a false statement is not actionable unless it is material, and a statement is not material unless it would mislead the least sophisticated consumer.[163] Take the court in Hahn for instance, it explains, "[i]f a statement would not mislead the least sophisticated consumer, it does not violate the [Act]- even if it's false in some technical sense. A statement cannot mislead unless it's material, so a false but not-material statement is not actionable." [164] What this means is that if the statement is false, but not misleading, it is not actionable. Therefore, rather than false *or* misleading, the court is requiring the statement be false *and* misleading.

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[158] *See Wahl*, 556 F.3d at 646.

[159] *See id.*; Hahn v. Triumph P'ship, 557 F.3d 755, 758 (7th Cir. 2009); Muha v. Encore Receivable Mgmt., 558 F.3d 623, 627 (7th Cir. 2009); Miller v. Javitch, 561 F.3d 588, 596 (6th Cir. 2009); Lane v. Fein, Such and Crane, 767 F. Supp. 2d 382, 389 (E.D.N.Y. 2011). (In each of these cases, the court examines (1) whether the statements is false and (2) whether it is misleading.).

[160] 15 U.S.C. § 1692e (2012).

[161] *False*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/false (last visited Mar. 24, 2014); *Mislead*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/mislead (last visited Mar. 24, 2014).

[162] *Muha*, 558 F.3d at 627.

[163] *Hahn*, 557 F.3d at 758.

[164] *Id.*

The court performs a similar analysis with deceptive statements. A deceptive statement is one that "can reasonably be read to have two different meanings, one of which is inaccurate."[165] Webster defines deceptive as, "likely to make someone believe something that is not true."[166] The definitions appear to be in harmony, a statement with multiple reasonable interpretations would likely lead those who reasonably misinterpreted the statement to believe something that is not true. Accepting the Third Circuit's definition from *Rosenau*, if the statement is technically false because it is based on a reasonable but incorrect interpretation, then the statement must be deceptive. In *Peters*, *Wahl*, and *Hahn* the courts held that the statements were not false because there were interpretations of the statements that rendered them true, but there were also interpretations of the statements that rendered them false.[167] The courts for each of these cases held the statements were not actionable because the least sophisticated consumer would not be misled.[168] In this way the courts have limited consumer actions under the statute to deceptive *and* misleading statements contrary to the text of the statute.

Second, the common law definition of material suggests that if a consumer takes action as a result of the statement then either the stamen was material or the consumer's response was, however the courts holdings in *Donohue* and *Gabriele* indicate otherwise. As previously noted the common law definition of material is information "[o]f such a nature that knowledge of the item would affect a person's decision-making."[169] Because of the least sophisticated consumer standard, material for an FDCPA claim would be objective based on whether it would affect the least sophisticated person's decision making. Therefore, it would logically follow that if an individual because of a statement then either the statement was material or the response was unreasonable for the least sophisticated consumer. In *Donohue* the debtor filed a suit against the collector for charging an excessive rate because of the statements contained within his bill, which the Ninth Circuit never found was unreasonable.[170] Logic would dictate that the statement affected his decision making because he took conduct he otherwise would not have. Similarly, in *Gabriele*, the debtor responded to the statements by asserting their falsity in that

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[165] Rosenau v. Unifund Corp., 539 F.3d 218, 223 (3rd Cir. 2008).

[166] *Deceptive*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/deceptive (last visited Mar. 24, 2014).

[167] *See* Peters v. Gen. Serv. Bureau, 277 F.3d 1051, 1056 (8th Cir. 2002); Wahl v. Midland Credit Mgmt., 566 F.3d 643, 646 (7th Cir. 2009); Hahn v. Triumph P'ship, 557 F.3d 755, 757 (7th Cir. 2009).

[168] Peters v. Gen. Serv. Bureau, 277 F.3d 1051, 1056 (8th Cir. 2002) ("Even if it were deemed literally false, however, it would not mislead..."); Wahl v. Midland Credit Mgmt., 566 F.3d 643, 645–46 (7th Cir. 2009) ("If a statement would not mislead the unsophisticated consumer, it does not violate the FDCPA—even if it is false in some technical sense."); Hahn v. Triumph P'ships, 557 F.3d 755, 758 (7th Cir. 2009).

[169] BLACK'S LAW DICTIONARY, *supra* note 17.

[170] Donohue v. Quick Collect, 592 F.3d 1027, 1029 (9th Cir. 2010).

proceeding and filing motions for contempt, in fact, had he not responded, he may have lost his case.[171] In this instance the statements impacted the consumer regardless of whether he knew they were false, the impact resulted from the making of the lie, rather than the belief of it. Because the consumer's decision making was affected by the lies, the only way it would be immaterial is if the Second Circuit had found the affect was unreasonable, namely that it was unreasonable to defend the false accusations in court.

Finally, the court analyzes violations within § 1692e differently. In all of the cases surveyed above the court makes a determination of whether the statement would mislead the least sophisticated consumer. The facts of *Warren* are as follows, the debtor alleged, among many things, that the debt collector failed to identify himself as a debt collector in subsequent communications with her in violation of § 1692e(11).[172] The court concludes as a matter of law that the allegations were sufficient to state a claim.[173] Section 1692e(11) is a specifically enumerated violation of Section 1692e, it requires a debt collector to indicate to the consumer that they are a debt collector trying to collect a debt in initial communications.[174] The specific violations are considered to be a non-exhaustive list of violations of the general principle, that a debt collector may not use any "false, deceptive, or misleading representation or means" in connection with the collection of a debt.[175] The Fourth Circuit does not apply a materiality standard to determine if the failure to disclose would mislead the least sophisticated consumer.[176] The court explains that § 1692e(11) is the only section that considers a failure to disclose and furthermore that it does not require a false representation, and therefore does not include the materiality requirement.[177] Still, the language of the statute, "[w]ithout limiting the general application of the foregoing, the following conduct is a violation of this section", suggests that there should be no difference between enumerated and not enumerated violations.[178]

The court's materiality application reads materiality in and removes false and deceptive. It conflates the three separate violations, contradicts the common law meaning of material, and treats specific violations differently despite text to the contrary.

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[171] Gabriele v. Am. Home Mortg. Serv., 503 Fed. Appx. 89, 92 (2d Cir. 2012).

[172] *Warren*, 676 F.3d at 369.

[173] *Id.* at 374.

[174] 15 U.S.C. § 1692e.

[175] *Id.*

[176] *See Warren*, 676 F.3d at 374 ("Accordingly, whether a materiality requirement attaches to other violations of § 1692e has no impact on Warren's allegations that the defendants violated § 1692e(11).")

[177] *Id.*

[178] 15 U.S.C. § 1692e.

2. *Hypotheses for Why the Court Chooses the Standard in Spite of its Problems*

Provided that the courts recognize these problems and have chosen to disregard them, the question becomes why? I hypothesize that the court uses the materiality standard because it protects debt collectors from unreasonable interpretations, interpretations based on misconceptions, and provides a pre-discovery mechanism to dismiss claims that appear to be bona fide errors.[179]

a. Protecting Debt Collectors from Unreasonable Interpretations

In creating a model for analyzing § 1692e claims the courts saw a need for an objective standard, to avoid punishing debt collectors for unreasonable interpretations of their statements. In cases like *Muha*, *Miller*, and *Lane* the courts held that the interpretation of the consumer was unreasonable and as a result found that the statement was not false, deceptive, or misleading and also not material.[180]

In *Muha*, *Miller*, and *Lane* the courts consider both whether the interpretation of the statement suggested by the consumer is reasonable and whether the statement was material, however to dismiss the claims in each of these cases the courts need only the least sophisticated consumer standard. The allegations in *Lane* are a clear example of the type of claim it would behoove the court to dismiss at a pretrial proceeding.[181] The court reasoned that the debt collector's communication "does not suggest, even to an unsophisticated consumer, that BMC is acting on *behalf* of the United States", which was the debtor's interpretation.[182] Similarly, in *Muha* the court reasoned that the debt collector's proposed interpretation was, without a doubt, what the statement would mean to the reasonable recipient.[183] The debt collector should not be expected to anticipate "bizarre" or "idiosyncratic" interpretation of their communication[184] and cases where the interpretation is unreasonable should be dismissed at the pretrial stage, because they are not false, deceptive, or misleading, but not because they are not material.

In *Muha*, *Miller*, and *Lane* the courts analysis demonstrated a resistance to punishing debt collectors when the debtor's interpretation of their statements were unreasonable. The materiality analysis allows the

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[179] A debt collector can only avail itself of the bona fide error defense at trial otherwise.

[180] *See* Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 595–96 (6th Cir. 2009); Muha v. Encore Receivable Mgmt., 558 F.3d 623, 628 (7th Cir. 2009); Lane v. Fein, Such & Crane LLP, 767 F.Supp.2d 382, 389 (E.D.N.Y. 2011).

[181] *Lane*, 767 F.Supp.2d at 390.

[182] *Id.* at 389.

[183] *See Muha*, 558 F.3d at 628.

[184] *See Miller*, 561 F.3d at 592.

court to dismiss these claims, however, the least sophisticated consumer test performs the same function without conflating false, deceptive, and misleading.

b. Protecting Debt Collectors from Misconceptions

An inherent problem of the least sophisticated person standard is the issue of misconceptions. While it might be reasonable for a person, especially the least sophisticated consumer, to interpret something one way, that does not mean that their interpretation is correct. It's possible the court sought to protect debt collectors against misconceptions held by the least sophisticated consumer. The *Hahn*, *Wahl*, and *Peters* cases present the aforementioned dilemma, whether an interpretation can be reasonable for the least sophisticated consumer but incorrect because it is a misconception?[185]

In both cases the statements and interpretations were similar. In *Hahn* the debtor alleged that the amount listed under amount due contained interest[186] and in *Wahl* the debtor alleged the amount listed under principal contained interest.[187] Both debtors' rely on the incorrect presumption that principal cannot contain any interest.[188] The court does not find that these interpretations are unreasonable, however, it reasons that based on compounding principles the interest of yesterday becomes the principal of today and that the definition of principal is "original sum of money owed as a debt, upon which interest is calculated". [189] Consider this hypothetical to better understand the issue facing the court: a grocer charges $2 per pound of fruit and $1 per pound of vegetables, you go to the register with a pound of tomatoes, when the grocer charges you $2 you are surprised because you believed that a tomato was a vegetable. It's not unreasonable that you believed that a tomato is a vegetable, but the grocer's statement is certainly not false. Materiality is one way to minimize this problem, if you believed the tomatoes were vegetables you were not hurt by finding out they weren't and you shouldn't get them for the cheaper price. However, materiality provides protection not only in cases like the tomato, but in situations where the debt collector relies on the misconception to deceive the consumer.

These cases demonstrated that inherent in the use of the least sophisticated consumer standard was a problem with misconceptions. The FDCPA was not designed to punish debt collectors or grant consumers a

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[185] *See* Hahn v. Triumph P'ships, 557 F.3d 755, 757–58 (7th Cir. 2009); Wahl v. Midland Credit Mgmt., 556 F.3d 643, 646 (7th Cir. 2009); Peters v. Gen. Serv. Bureau, 277 F.3d 1051, 1055 (8th Cir. 2002).

[186] *Hahn*, 557 F.3d at 756.

[187] *Wahl*, 556 F.3d at 645.

[188] *Id.*; Hahn v. Triumph P'ships, 557 F.3d 755, 757 (7th Cir. 2009).

[189] Wahl v. Midland Credit Mgmt., 556 F.3d 643, 646 (7th Cir. 2009); *see* Hahn v. Triumph P'ships, 557 F.3d 755, 757 (7th Cir. 2009).

windfall for relying on misconceptions, and the materiality standard prevents this. However, in the process of protecting debt collectors from misconceptions the court seems to have removed "deceptive" from the statute.

c. Protecting Debt Collectors from Incurring Litigation Costs from Bona Fide Errors

As noted earlier in this note the civil liability section of the FDCPA creates a defense, called the bona fide error defense, for debt collectors who show by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, despite the use of reasonable procedures to avoid the error.[190] The burden to prove the affirmative defense is on the defendant debt collector.[191] The court in *Neil* did not mention whether they believed that the debt collector could avail itself of the affirmative defense, but circumstances of that case suggest that the false representation was an innocent mistake which Congress could not have intended to prohibit.[192] Similarly, the analysis of *Hahn* shows how a false representation can be so innocent that it could not be within the intended prohibited conduct.[193]

In *Neil*, the debt collector made a mistake in mailing a notice with the representation that it was the "second notice", when in reality it was the third.[194] The court holds it was immaterial and not actionable and explains that it was "de minimis" and "not the type of conduct Congress intended to prohibit".[195] This mistake was, arguably, just a clerical error of sorts and therefore court for judicial efficiency or to aid the debt collector would prefer to dismiss the case at the summary judgment stage on the basis of materiality, rather than allowing this to go to trial and requiring the debt collector to prove it was a bona fide error. Although the court never considers it, the situation may have been different had the debt collector lied in order to advance its position. For instance if the debt collector claimed this was the consumers tenth notice, then one could argue that the debt collector was trying to put pressure on the debtor or harass the debtor into paying, but to say it was only the second notice when it was really the third does not appear to offer any competitive advantage to the debt collector. Under the hypothetical fact scenario above it's not certain what the court's holding would be, however, precedent suggest the court would conclude it's not material because the consumer would not be misled because he would know it was not his tenth notice and the fact that it's not

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[190] 15 U.S.C. § 1692k(c) (2012).

[191] Johnson v. Riddle, 305 F.3d 1107, 1121 (10th Cir. 2002).

[192] *See* Neill v. Bullseye Collection Agency, No. 08–5800 (JNE/FLN), 2009 WL 1386155 (D. Minn. May 14, 2009).

[193] *Hahn*, 557 F.3d at 757.

[194] *Neill*, 2009 WL 1386155, at *1.

[195] *Id.*

the tenth notice does not affect the ability to answer the debt. Therefore while I agree with the court's holding in the specific facts set forth I would caution that the materiality analysis may afford debt collectors the protection needed to take advantage of consumers.

In *Hahn*, Judge Easterbrook presents a hypothetical to demonstrate the value of a materiality standard: "'Remember the tan-colored letter you received from HSBC giving your balance as $1,051.91? From now on you will receive light blue letters from us, and interest will be added to the balance due.' Hahn seems to think that she could collect statutory damages if HSBC's letters had been gray rather than tan in color."[196] Just like the court in *Neill*, Easterbrook could conclude the statement is not a violation of the FDCPA in two ways. First, he could allow the defendant to demonstrate it was a bona fide error. Or, second, he could apply a materiality test and determine the statement would not mislead the least sophisticated consumer. Hypothetically speaking, if Easterbrook had allowed the case to go to trial the defendant debt collector would likely have advanced a bona fide error defense and absent some evidence of an intent to lie about the color of the paper he would win. Instead, Easterbrook chose to apply a materiality test, asserting that the statute was designed to provide information that helps consumers choose intelligently how to respond, and as such the color of the paper does not matter.[197] In Easterbrook's analysis he fails to consider additional purposes of the act, like protecting honest debt collectors, most likely because in the hypothetical it's difficult to imagine a competitive gain from lying about the color of the paper, but nonetheless these purposes must be considered.

The reasoning of the courts in these decisions suggests that the court is concerned for debt collectors. As a result the court has decided that § 1692e claims needed to be analyzed objectively, with oversight into the reasonable person's interpretation, and that innocent violations, like bona fide errors, should be dismissed, in order to protect debt collectors, courts seem to have concluded that a materiality analysis sufficiently addresses these problems. While materiality resolves these issues it raises others.

IV. WHAT'S WRONG WITH THE CURRENT APPLICATION OF THE MATERIALITY STANDARD

It can certainly be said that a materiality standard effectively remedies certain concerns of the court in protecting debt collectors. However, the statute is also designed to protect consumers and honest debt collectors, and the current application of the materiality standard fails to adequately protect either. By making the operative inquiry whether the least sophisticated consumer would be misled, the courts focused on the harm

[196] *Hahn*, 557 F.3d at 757.
[197] *Id.* at 757–58.

done to consumers and ignored the impact of false representations on honest debt collectors, the capacity of false and deceptive but not misleading statements to harass, and the moral and ethical implications of allowing debt collectors to intentionally lie.

A. The Materiality Standard Fails to Consider the Impact of False Representations on Honest Debt Collectors

As noted at the beginning of this paper, one of the goals of the FDCPA is to eradicate abusive practices in order to protect honest debt collectors who would be competitively disadvantaged if lying was allowed as a means to collect a debt.[198] The sample cases analyzed and the goals of the statute are not in harmony because currently the court is focused solely on the effect of the statement on the consumer and that is not the only way to gain a competitive advantage. Debt collectors can take advantage of third parties or increase the costs of defending the action, like in *Gabriele*, with the hope of increasing their chances of collection. Every unsavory tactic that increases the chance of collection creates a race to the bottom among debt collectors.

Gabriele illustrates the problem with equating materiality with misleading. In *Gabriele*, the attorney made the false representations to aid her in the case against Gabriele. State regulations required that exhibits be served upon the defendant and the attorney knew this and filed a notice of compliance with the regulation even though she knew she had not met the requirements.[199] In support of the case, the attorney filed three affidavits that made false representations.[200] Regardless of whether the false representations were capable of misleading the least sophisticated consumer as to whether the consumer had the exhibits, filed counterclaims, or was qualified for loss mitigation programs, the false representations were intended to advance their debt collection lawsuit.[201] When a debt buyer buys your debt and sends it to collection the pressure is on the collection agencies to collect or be replaced by another collection

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[198] 15 U.S.C. § 1692.

[199] Connecticut Practice Book, *supra* note 81; Complaint at 6, Gabriele v. Am. Home Mortg. Serv., No. 10CV01798, 2010 WL 6546554 (D. Conn. Nov. 15, 2010).

[200] *Gabriele*, 503 Fed. Appx. at 92 .

[201] In a footnote, the Second Circuit contends that Gabriele was represented by an attorney and as such his attorney and the court could ensure he was not misled. *Id.* at n. 95. This argument could be the topic for another article; however, in short, the court contends that attorneys and the court will protect consumers from dishonesty and that therefore there is no harm done to consumers. *Id.* If the sole purpose of the act was to remedy specific harms then this argument would be justified. However, the act does not require damages; it contains a provision for statutory damages, and the second stated purpose is to eradicate abusive practices to protect honest debt collectors. 15 U.S.C. § 1692. Further, Congress has considered the ability of Rule 11 sanctions to protect against dishonest litigation tactics and found they were not sufficient, 131 Cong. Rec. H10534-02 (daily ed. Dec. 2, 1985) (statements of Rep. Wylie and the Speaker), and the Supreme Court in *Heintz v. Jenkins* held that communication during litigation was actionable, despite the protections of the court. *See* 514 U.S. at 294–95.

agency.[202] In addition, debt buyers often have less information about the debt and are less likely to have evidence available if the case goes to trial.[203] Debt buyers file thousands of cases and rely on default judgments to make a profit.[204] It should come as no surprise that the end goal of all the false representations in *Gabriele* was a default judgment, which the attorney sought multiple times prematurely.[205] Gabriele was only able to defend the claim after dispelling several of the lies told by the debt collector, it cost Gabriele time and legal fees to file motions and appeals. *Gabriele* stands for the proposition that lying to the court is within the realm of permitted conduct under § 1692,[206] because the least sophisticated consumer would not be misled. This is not the message the court should be sending because debt collectors who don't falsify court documents would be put at a disadvantage as a result of their honesty.

Consider, also, the remedies for a violation of the FDCPA. The remedies include damages for any actual harm the violation caused, a statutory penalty of up to $1,000, and court costs and reasonable attorney's fees.[207] Note that there is not a requirement that the debtor incur actual damages. The additional statutory penalty, at the discretion of the court, discourages conduct even if it has no effect on the consumer.[208] A consumer may not have actual damages because they were smarter than the least sophisticated consumer and so were not misled despite the tendency of the statement to mislead the least sophisticated consumer. In the alternative I would argue the lack of a requirement for damages demonstrates that Congress contemplated the harm to third parties, like honest debt collectors, who are not parties to the action.

The legality of false representations should not depend on whether the consumer is misled as it's clear from the remedies provided that Congress contemplated other forms of harm. Further, the holding in *Gabriele* demonstrates a disregard for the competitive advantage false representations provide. In order to protect honest debt collectors, any false representation that is made in advancement of the collection effort needs to be prohibited, anything less will invite a race to the bottom as debt collectors seek to use the most unscrupulous tactics legally allowed.

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[202] *See Definition of Debt Buyer*, INVESTOPEDIA, http://www.investopedia.com/terms/d/debt-buyer.asp (last visited Mar. 23, 2014).

[203] Linda Cook, *Consumers Should Understand Debt Buying*, OHIO STATE BAR ASS'N (Feb. 8, 2013), https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse.

[204] *Id.*

[205] *Gabriele*, 503 Fed. Appx. at 92.

[206] *Id.* (There may be remedies under other avenues of the law, for instance state or federal ethical standards, however the debtor did bring sanctions in *Gabriele* as well, and the debtor lost that claim as well.)

[207] 15 U.S.C. § 1692k(a) (2012).

[208] *Id.*

B. The Court's Materiality Standard Fails to Consider the Ability of Non-Misleading Statements to Harass the Consumer

The courts have displayed a concern for ensuring consumers have enough information to combat the debt, but the FDCPA does not only protect consumers from being tricked but also from harassment.[209] The courts materiality standard fails to consider the ability of non-misleading statements to harass the consumer. False representations that are not misleading can harass because they create more work and stress for the consumer to understand the debt owed and act appropriately. At times the court discusses in passing the ability of the statement to harass the consumer,[210] but in *Donohue* and *Gabriele* this factor is wholly ignored.[211]

The Ninth Circuit found that the representation that the sum displayed was the interest calculated at 12% was not material because it was a technical error, analogous to *Hahn*, and the total amount was correct.[212] Despite the court's reference to *Hahn* the cases are distinguishable. Unlike the technical error in *Hahn*, this statement was false.[213] The interpretation was not unreasonable nor was it based on an inaccurate factual premise. The statement was that the number displayed was the interest calculated at 12% when it was actually partly interest calculated at 12% and partly pre-finance charges at 1.5%.[214] The total amount was correct, that does not change the fact that this false representation would affect the reader. In this case the debtor was sufficiently confused by the interest rate to bring a lawsuit against the debt collector alleging the charging of a usurious rate. Lying about the interest rate forced the consumer to go to court to challenge the interest rate and incur legal fees, waste time litigating the matter, and the stress of a lawsuit and the consumer lost on his FDCPA claim. Debt collectors should not be able to raise the cost of defending claims by utilizing false, deceptive, or misleading statements.

Similarly, in *Gabriele*, the court does not consider the ability of the representations to harass the consumer. Each time the debt collector filed a motion for default the consumer had to expend resources to fight the motion.[215] Each time the attorney filed a false affidavit the consumer had to prove to the court that the information was not actually true. And, for the duration of these proceedings the consumer faced the loss of his home.[216] The Second Circuit notes that the FDCPA does not guarantee an

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[209] *Donohue*, 592 F. 3d at 1030 .

[210] *See* Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993); Easterling v. Collecto, 692 F.3d 229 (2d Cir. 2012).

[211] *See* Donohue v. Quick Collect, 592 F.3d 1027, 1034 (9th Cir. 2010); Gabriele v. Am. Home Mortg. Serv., 503 Fed. Appx. 89 (2d Cir. 2012).

[212] *Donohue*, 592 F.3d at 1034.

[213] *Hahn*, 557 F.3d at 758.

[214] *Donohue*, 592 F.3d at 1031.

[215] *Gabriele*, 503 Fed. Appx. at 95.

[216] *Id.* at 91–92.

efficient or thrifty debt collection process;[217] but, it does aim to end abusive and harassing conduct.[218] The cost of representation increases if the consumer's attorney has to perform additional work to prove that the debt collector's representations are inaccurate. There is additional stress on consumers when the future of their home depends on someone else catching the debt collector's lie. And there is an increased time commitment if consumers constantly have to fight the veracity of every statement a debt collector makes. If the debt collector does not have the information necessary to prove ownership of the debt in court, he or she should not be able to make false representations until the consumer can no longer afford to fight the claim or gives up.

Whether it's increased cost, additional stress, or additional time, it should be a violation of the FDCPA for debt collectors to leverage these against a consumer by using false representations.

C. The Court's Materiality Analysis Raises Ethical and Moral Concerns

When the legality of a false representation rests on its ability to mislead the least sophisticated consumer, the message is sent that a certain degree of lying is allowed. Lying is morally reprehensible, and the court needs to consider whether the lies they are protecting, with their materiality analysis, are worth protecting.

In *Incommensurable Good, Rightful Lies, and the Wrongness of Fraud* the author examines the role of lying about reservation points during negotiation.[219] One example from the article is a used car salesmen who tells a naïve buyer that he can't go any lower on the price, when he really can.[220] The author notes that morally this is wrong and exploitive but it is not legally fraud.[221] The article asserts that it is wrong to argue that the law embraces lower standards for honesty because it is too costly to enforce higher standards, because it depends on how you determine the value of enforcing the higher standards.[222] For instance, the cost of prohibiting the car salesmen would include the decrease in the price, but also a loss of autonomy.[223] An applicable takeaway is that there is some balancing that goes into prohibiting immoral behavior that the courts are in a place to determine if the cost of enforcing the higher standard is worth it to society, however difficult the analysis is.

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[217] *Id.* at 95.

[218] 15 U.S.C. § 1692.

[219] Alan Strudler, *Incommensurable Good, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529 (1998).

[220] *Id.* at 1538–39.

[221] *Id.*

[222] *Id.* at 1530.

[223] *Id.* at 1548.

In *Gabriele*, the court protected a series of lies by the attorney but gave no real explanation for why, beyond reasoning that the statements would not mislead.[224] The court does not say how enforcing the prohibition against lying would hurt the debt collector in this instance or debt collectors generally.[225] Hypothetically, if the holding were reversed debt collectors would be required to abstain from presenting false affidavits, intentionally filing premature defaults, and lying about exhibits. The statute notes that there are non-abusive means to collect debts.[226] Arguably the legislature had to have envisioned other available methods.

In *Donohue*, the court says that the statement wouldn't mislead the consumer, but never argues that this type of false representation is valuable to society in any manner. If the court found it was prohibited conduct, debt collectors would be prohibited from intentionally misstating the interest rate they charged.[227] Again, is this the type of conduct the courts need to protect, to preserve the effectiveness of debt collectors?

The inclusion of the word false in conjunction with misleading and deceptive is to encourage courts to look at the illicit conduct rather than the result. Reading out the word false from the act is a violation of the canon against surplusage. The rule against surplusage states that when discerning the meaning of a statute the court should attempt to give each word meaning so as not to render any word unnecessary or surplusage.[228] The presumption is that Congress could have decided not to include the word false, but did for a reason. I propose that the reason is to discourage debt collectors from avoiding liability because there lies were ineffective, to focus on the illicit conduct rather than its effect. In *Kay v. United States*, the Supreme Court reasoned that a materiality standard should not be required for violations of § 8(a) and (e) of the Home Owners' Loan Act because Congress demonstrated its intention to require individuals to provide true information in good faith by imposing a penalty independent of damages.[229] Likewise, the use of "false" in § 1692(e) and the absence of a damages requirement suggests congress intended to require debt collectors to provide true information in good faith.[230]

V. PROPOSED SOLUTION

The courts analysis for § 1692e claims has proven illogical and unworkable. A growing concern over increased FDCPA litigation appears to have motivated the courts to seek out an analysis to reduce litigation and

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[224] *See Gabriele*, 503 Fed. Appx. at 96–97.
[225] *Id.*
[226] 15 U.S.C. § 1692.
[227] *See Donohue*, 592 F.3d at 1029.
[228] JELLUM, *supra* note 44, at 132.
[229] Kay v. United States, 303 U.S. 1, 6 (1938).
[230] 15 U.S.C. § 1692(e) and (k).

costs to the debt collectors. In response to this the courts have created a materiality gloss. However, their test for materiality, whether the least sophisticated consumer would be misled, fails to adequately effectuate the purposes of the statute. I see two potential solutions to the courts problem: First, the court could find that there is no materiality standard, that any false, misleading, or deceptive statement is actionable. Or second, that they could alter their definition of material to address more than the tendency of the information to mislead.

The first solution is to stop insisting that § 1692e claims be material. This solution would be the best way to align the analysis with the plain meaning of the statute. Additionally, it would make the analysis less subjective. The courts' claim that their current materiality analysis is objective, but it leaves room for the courts to tailor the facts and the law to fit their opinion of the case, which, as *Gabriele* and *Donohue* demonstrate, can produce illogical results. The statute contains provisions to reduce the harm to debt collectors, like the bona fide error defense, and statutory damages are in the discretion of the court, so if the violation was relatively harmless the court could grant minimal penalties. Lastly, this removes the ethical problem of allowing a certain degree of dishonesty.

The problem with removing materiality is you face the threat of increased litigation, a cottage industry of FDCPA claims, like Justice Kennedy warned about.[231] For instance, many of the "technically false but not misleading" cases would become actionable as deceptive statements, and arguably this could place a strain on debt collectors if consumers are relying on misconceptions. Additionally, while the debt collectors could use the bona fide error defense in some cases, they would have to incur litigation costs rather than having them dismissed before trial. In a case like *Neill*, where it's clear the false representation was an innocent mistake, the debt collector would have to undergo at least some portion of a trial and incur costs.[232]

The second solution is to redefine materiality as applied to § 1692e claims. Currently, the court defines material as having a tendency to mislead the least sophisticated consumer.[233] But this wholly ignores the ability of non-misleading statements to give a competitive advantage to dishonest debt collectors, the tendency of the statements to harass, and encourage dishonesty. I propose that the court or the legislature define materiality, as it applies to § 1692e claims, as: a statement that has a natural tendency to negatively affect the least sophisticated consumer or competitively advantage other debt collector. In addition to addressing my aforementioned concerns, the benefit of maintaining a materiality standard

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[231] Jerman v. Carlisle, 559 U.S. 573, 617 (2010) (Kennedy, J., dissenting).
[232] *See Neill*, 2009 WL 1386155, at *2.
[233] *Donohue*, 592 F.3d at 1033.

is the court can continue to weed out cases like *Neill* on a pre-trial basis, reducing costs for debt collectors.

In predicting the critiques of this solution the first that comes to mind is that the statute never mentions materiality, so any solution that keeps a materiality standard is an improper reading of the statue. The greatest concern of my own is that this standard still leaves open the possibility that the consumer will lose as a result of end driven decisions by the court. What I mean by that is even if the standard is broader and tries to take into account more of the ways a false representation can impact consumers or debt collectors the standard is still a matter of law and as such subject to the discretion of the court. If the Second Circuit can claim that none of the many false representations in *Gabriele* were material, perhaps they can even justify it under this broader standard.[234]

VI. CONCLUSION

The FDCPA is a fundamental tool in consumer protection. In order to preserve its effectiveness we need to ensure that the court is applying it correctly. As the fear of vexatious litigation of FDCPA claims increased the court reacted with the creation of a materiality standard. No such standard was ever mentioned in the statute, but the circuit courts have adopted it regardless. In their application of this standard they have determined that in order for a statement to be material under the Act it must have a tendency to mislead the least sophisticated consumer. When applying this to cases, the standard proved awkward and illogical. Claims that were based on false representations were conflated with misleading statements. Deceptive statements were being considered true, because they were only technically false. And false representations resulted in legal action by consumers were determined not to be material. Justifiably the court has displayed concern for debt collectors. As such the courts seek to ferret out claims that are based on unreasonable interpretations, misconceptions, and bona fide errors, prior to trial to reduce costs for debt collectors. However, their application has a negative effect as well. In two cases in particular, *Gabriele* and *Donohue*, the materiality standard serves as the basis for dismissal for claims that are clearly within the ambit of congress's intended protections. The claims slip through the courts' standard because the standard focuses solely on the ability of the statement to mislead the consumer. It does not address the ability of the statement to competitively disadvantage honest debt collectors, it does not address the ability of the statements to harass consumers, and it does not adequately

[234] Arguably, even with the new standard the court could reason that the protections of the attorney and the court would prevent any competitive advantage. This interjection of the attorney argument would be another topic worth investigating. Is it necessary? Is it accurate? Is there a place for it within the ambit of the FDCPA? *See Gabriele*, 503 Fed. Appx. at 96, n. 1 .

balance ethical concerns about lying. For all these reasons I proposed that the current analysis paradigm be replaced. The two viable solutions I see are (1) to eliminate the materiality requirement, follow the plain meaning of the statute and make the only determination whether to the least sophisticated consumer the statement is false, misleading, or deceptive; and (2) to modify the materiality requirement, change the definition to: a statement that has a natural tendency to negatively affect the least sophisticated consumer or competitively advantage other debt collectors. Consumers face enough adversity in disputing debt collections; the courts should not hamper their most effective tool with an unworkable analysis.