

# ONE TIME TO SUE: THE CASE FOR A UNIFORM STATUTE OF LIMITATIONS FOR CONSUMERS TO SUE UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

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*In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA) in an effort to provide injured consumers with uniform protection against the systematically abusive practices of the debt collection industry. The FDCPA created a private right of action for victims to sue; however, an individual who wishes to bring a private suit under the FDCPA must do so “within one year from the date on which the violation occurs.” The effectiveness of this private right of action has been unsettled due to the circuit split over the meaning of this provision.*

*For many FDCPA violations, the debt collector might engage in the violative conduct several days, weeks, months, or even years before that conduct actually harms the consumer. Thus, the principal disagreement focuses on when the “violation occurs”: Does it occur when the debt collector engages in the proscribed conduct, or does it occur when that conduct actually harms the consumer? Moreover, if the violation occurs when the debt collector engages in the proscribed act, can a “discovery rule” apply to delay the running of the statute of limitations until the consumer finds out about the violation? This Note explores the various analyses circuit courts apply to determine the date on which an FDCPA violation occurs.*

*Unless federal courts adopt a uniform analysis to determine when an FDCPA violation occurs for the purpose of triggering the running of the statute of limitations, injured consumers will continue to receive inconsistent protection under the statute. This Note argues that in order to promote the FDCPA’s remedial nature, federal courts should adopt the following guidelines to determine the date on which an FDCPA violation occurs: (1) a violation occurs, and a cause of action accrues, when a consumer suffers the kind of harm for which Congress intended to provide a private damages remedy; and (2) where a debt collector fraudulently conceals his or her violative conduct from an injured consumer, the*

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*equitable tolling doctrine should apply to toll the running of the FDCPA's statute of limitations for the duration of the concealment.*

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## INTRODUCTION

In 1977, Congress passed the Fair Debt Collection Practices Act<sup>1</sup> (FDCPA) to remedy the injuries of consumers besieged by aggressive and extortive practices of debt collection agencies.<sup>2</sup> The federal statute addresses a broad range of abusive debt collection practices,<sup>3</sup> including: the use of obscene language or violent threats in dunning letters;<sup>4</sup> the misrepresentation of a consumer's legal rights;<sup>5</sup> the disclosure of a consumer's debts to his or her friends, neighbors, or employer;<sup>6</sup> the simulation of court process;<sup>7</sup> and the impersonation of a government official<sup>8</sup> or attorney.<sup>9</sup> In addition to prohibiting specific conduct, the FDCPA also contains a general provision that prohibits the use of *any* false or deceptive means in the collection of a debt.<sup>10</sup>

Such abusive and deceptive practices exist in the debt collection industry because third-party debt collectors typically work on commission and are likely to have no future contact with a consumer after collecting a particular debt.<sup>11</sup> As a result, debt collectors are often unconcerned with their reputations.<sup>12</sup> With such incentives, debt collectors often try any means possible to pressure consumers into paying off old debts.<sup>13</sup> For example,

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1. Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692p (2012)).

2. See S. REP. NO. 95-382, at 1–2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1695–96.

3. The FDCPA expressly prohibits more than fifty specific types of conduct. See 15 U.S.C. §§ 1692b–j.

4. “Dun” means “to demand a payment from (a delinquent debtor).” See *Dun*, BLACK’S LAW DICTIONARY (10th ed. 2014). Therefore, collection letters are often referred to as “dunning letters.” See *Owens v. Hellmuth & Johnson, PLLC*, 550 F. Supp. 2d 1060, 1063–64 n.1 (D. Minn. 2008). The FDCPA regulates dunning letters by prohibiting debt collectors from engaging in “conduct the natural consequence of which is to harass, oppress, or abuse [the consumer],” including the “use of obscene or profane language.” 15 U.S.C. § 1692d.

5. The FDCPA prohibits debt collectors from falsely representing “the character, amount, or legal status of any debt.” 15 U.S.C. § 1692e(2)(A).

6. A debt collector may not communicate “with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.” *Id.* § 1692c(b).

7. The FDCPA prohibits debt collectors from making a false representation that documents are legal process. See *id.* § 1692e(13). Similarly, the statute prohibits the false representation “that documents are not legal process forms or do not require action by the consumer.” *Id.* § 1692e(15).

8. A debt collector violates the FDCPA by falsely representing or implying that he or she is “vouched for, bonded by, or affiliated with the United States or any State.” *Id.* § 1692e(1).

9. The FDCPA prohibits debt collectors from falsely representing or implying that he or she “is an attorney or that any communication is from any attorney.” *Id.* § 1692e(3).

10. See *id.* § 1692e(10).

11. See S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. This means that an original creditor will pay a debt collector a percentage of the amount he or she collects from the consumer.

12. See *id.*

13. See *id.*

the Federal Trade Commission (FTC) shut down Goldman Schwartz, a Texas-based debt collector, for incessantly calling debtors and using scare tactics to force them into paying their debts.<sup>14</sup> The company routinely threatened to take targeted debtors to jail and to cause child protective services to take their minor children into government custody.<sup>15</sup>

For individuals who are struggling to make ends meet, the harms that often result from such abusive practices are far from trivial: the wrongful freezing of one's bank account;<sup>16</sup> the receipt of a default judgment despite never receiving service of process;<sup>17</sup> the obligation to spend time and money litigating frivolous suits;<sup>18</sup> or harm to one's professional or social reputation,<sup>19</sup> among other types of injuries.<sup>20</sup> More broadly, the FDCPA nonexclusively lists personal bankruptcy, marital instability, the loss of one's job, and the invasion of individual privacy as other examples of injuries caused by debt collection abuse.<sup>21</sup>

To remedy such injuries caused by extreme harassment, the FDCPA provides a private right of action for consumers to sue debt collectors.<sup>22</sup> An individual who wishes to bring a private suit under the FDCPA, however, must do so within the statute's relatively short one-year statute of limitations<sup>23</sup> (SOL), which states:

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the *violation occurs*.<sup>24</sup>

The federal courts of appeals have disagreed on the interpretation and application of this provision, however, leaving the effectiveness of this private right of action unsettled.<sup>25</sup> The principal disagreement focuses on when the "violation occurs."<sup>26</sup> For many types of FDCPA violations, a debt collector engages in the proscribed conduct on an earlier date than

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14. See Blake Ellis, *Debt Collection Horror Stories*, CNN (Feb. 6, 2013, 10:53 AM), <http://money.cnn.com/2013/02/06/pf/debt-collection/> [perma.cc/2XZZ-9UJ6].

15. See *id.*

16. See, e.g., *Benzemann v. Citibank N.A.*, 806 F.3d 98, 100 (2d Cir. 2015).

17. Cf. *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 441–42 (5th Cir. 2013) (stating that the debt collector obtained a default judgment against the consumer even though he filed the suit in an improper and distant venue).

18. See, e.g., *Lembach v. Bierman*, 528 F. App'x 298, 300–01 (4th Cir. 2013); *Johnson v. Riddle*, 305 F.3d 1107, 1111–12 (10th Cir. 2002).

19. See, e.g., *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 937–38 (9th Cir. 2009).

20. See, e.g., *Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 260 (8th Cir. 1992) (stating that the debt collector's letters made false representations that the consumer will face imprisonment).

21. See 15 U.S.C. § 1692(a) (2012).

22. See *id.* § 1692k(d).

23. See *id.*

24. *Id.* (emphasis added).

25. See *infra* Part II.

26. See 15 U.S.C. § 1692k(d).

when that conduct actually harms the consumer.<sup>27</sup> Thus, circuit courts are split over the following issue: Does the violation occur when the debt collector engages in the proscribed conduct, or does it occur when the debt collector's conduct actually harms the consumer?<sup>28</sup> Moreover, can a "discovery rule"<sup>29</sup> apply to the FDCPA's SOL provision in order to delay the start of the running of the SOL until a consumer finds out, or reasonably should find out, about the violation?<sup>30</sup>

A court's position on when the violation occurs and whether the discovery rule applies could have significant consequences on a consumer. For example, debt collectors sometimes provide false debt information about consumers to credit-reporting agencies.<sup>31</sup> An affected consumer, however, might not find out about the debt collector's false report until several years later upon being denied a bank loan or facing other consequences due to the impact of this false information on his or her credit score.<sup>32</sup> While the FDCPA purports to remedy these types of injuries,<sup>33</sup> if this were to happen in a circuit where the SOL starts to run when the debt collector engages in the proscribed conduct, the consumer there would effectively be denied the opportunity to bring an FDCPA claim.<sup>34</sup> Alternatively, a consumer facing the exact same facts in a sister circuit where the SOL starts to run when the debt collector's conduct actually harms the consumer would be able to sue.<sup>35</sup>

This Note examines federal circuit courts' inconsistent interpretations and applications of the FDCPA's SOL provision. Part I provides background information necessary to understand the circuit split and to grasp the split's detrimental impact on both the protection of injured

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27. See *infra* note 61 (illustrating a situation in which a debt collector engages in violative conduct several days before that conduct actually harms the consumer).

28. Compare *Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992) (holding that the violation occurred when the debt collector mailed a deceptive collection letter to the consumer), with *Benzemann v. Citibank N.A.*, 806 F.3d 98, 103 (2d Cir. 2015) (holding that the violation did *not* occur when the debt collector mailed an unlawful restraining notice to the bank, but rather when the bank froze the debtor's account).

29. The "discovery rule" delays the running of the SOL until the consumer knows, or reasonably should know, about the cause of action. See *infra* Part I.C.1.

30. See, e.g., *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 941 (9th Cir. 2009) (holding that although the violation occurred when the debt collector revealed the consumer's information to a third party, the discovery rule delayed the commencement of the running of the FDCPA's SOL until the consumer learned of the debt collector's act).

31. For example, in *Martin v. United Collections Bureau, Inc.*, the consumer alleged that the debt collector attempted to collect a debt by causing a collections account to be placed on the consumer's credit report. No. 4:14-CV-804-JAR, 2015 WL 4255405, at \*4 (E.D. Mo. July 14, 2015). The debt, however, did not actually belong to the targeted consumer; rather, the debt belonged to a different consumer with the exact same name. See *id.* at \*3. The targeted consumer did not discover the debt until five years later upon being denied a loan. See *id.*

32. See *id.*

33. See 15 U.S.C. § 1692(e) (2012).

34. In this hypothetical, the debt collector engages in the proscribed conduct when he or she reports the false information to the credit-reporting agency.

35. The debt collector's conduct harms the consumer when the consumer is denied the loan.

consumers and on the statute's effectiveness. Part II examines in detail how the relevant circuit courts approach the dual questions of when the violation occurs and if the discovery rule is applicable. Part III analyzes the strengths and weaknesses of these conflicting positions and proposes a solution grounded in the idea that uniformity of interpretation and predictability of application are essential to the FDCPA's effectiveness.

This Note argues that in order to promote the FDCPA's remedial nature, federal courts should adopt the following guidelines to determine the date on which an FDCPA violation occurs: (1) a violation occurs, and a cause of action accrues, when a consumer suffers the kind of harm for which Congress intended to provide a private damages remedy; and (2) where a debt collector fraudulently conceals his or her violative conduct from an injured consumer, the equitable tolling doctrine should apply to toll the running of the FDCPA's SOL.

### I. AN OVERVIEW OF THE FDCPA: THE DETRIMENTAL NATURE OF THE CIRCUIT SPLIT IN LIGHT OF ITS HISTORY AND OBJECTIVES

To grasp the circuit split at issue in this Note, it is necessary to understand the general importance of the FDCPA. Part I.A presents the FDCPA's legislative history, purpose, and consequences. Then, Part I.B provides an overview of the FDCPA's SOL provision and the issues with its interpretation. Next, Part I.C describes the legal doctrines of the discovery rule and of equitable tolling. Part I.D then focuses on the general importance of uniformity with regard to interpreting federal statutes and their SOLs. Finally, Part I.E explores courts' and legal scholars' numerous attempts to uniformly interpret certain provisions of the FDCPA and explains why these attempts have failed to result in a consistent application of the statute.

#### A. *The FDCPA's Legislative History, Scope, and Purpose*

Congress enacted the FDCPA in 1977 under its Commerce Clause power.<sup>36</sup> Congress included three specific purposes in the statute: (1) to eliminate abusive debt collection practices by debt collectors; (2) to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and (3) to promote *consistent state action* to protect consumers against debt collection abuses.<sup>37</sup> This

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36. See 2 ALFRED M. POLLARD & JOSEPH P. DALY, *BANKING LAW IN THE UNITED STATES* § 15.11 (4th ed. 2015) ("Congress acted under its commerce clause authority to regulate debt collection practices."). The Commerce Clause of the U.S. Constitution gives Congress the power to enact laws that restrict state power over activity affecting interstate commerce. See U.S. CONST. art. I, § 8, cl. 3. Debt collection often occurs interstate, see 15 U.S.C. § 1692(d), making it difficult for states to act effectively against abusive debt collectors who harass consumers from other states. See S. REP. NO. 95-382, at 2-3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697. As a result, an effective federal statute is necessary to protect consumers against abusive debt collection practices that occur interstate.

37. See 15 U.S.C. § 1692(e).

Note focuses primarily on the FDCPA's third stated purpose of achieving "consistent State action."<sup>38</sup>

Congress passed the FDCPA in response to a finding by the Committee on Banking, Housing, and Urban Affairs ("the Committee")—which was charged with amending the Consumer Credit Protection Act<sup>39</sup> (CCPA)—that the then-existing state laws and procedures for redressing injuries caused by debt collectors were inadequate to protect consumers.<sup>40</sup> Indeed, thirteen states had no debt collection laws whatsoever.<sup>41</sup> Thus, prior to the enactment of the FDCPA, "[eighty] million Americans, nearly [40] percent of our population, ha[d] no meaningful protection from debt collection abuse."<sup>42</sup> While the number of states with consumer protection laws has substantially increased since the enactment of the FDCPA,<sup>43</sup> an effective federal debt collection statute remains necessary to ensure the adequate protection of all consumers.

Moreover, the Committee referred to debt collection abuse as a "widespread and serious *national* problem,"<sup>44</sup> placing the economic well-being of individuals and the nation at risk. On the individual level, the Committee found that the vast majority of debt collection abuse victims were consumers who fully intended to repay their debts, but who defaulted on their debts due to unforeseen circumstances such as unemployment, serious illness, marital difficulties, or divorce.<sup>45</sup> It remains the case today that such unexpected financial difficulties can push an individual with healthy financial habits into a "vicious debt cycle."<sup>46</sup> When unforeseen financial difficulties cause an individual's debts to go into collection, the individual's credit history and credit score are adversely affected.<sup>47</sup>

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38. *Id.*

39. The CCPA is an act composed of six subchapters, all of which regulate consumer transactions. *See* Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693. In addition to the FDCPA, the CCPA currently includes the Truth in Lending Act, the Restrictions on Garnishment Act, the Credit Repair Organizations Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and the Electronic Fund Transfers Act. *See id.* Congress amended the CCPA in 1977 to add the FDCPA as Title VIII. *See* Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692p).

40. *See* 15 U.S.C. § 1692(b).

41. *See* S. REP. NO. 95-382, at 2.

42. *Id.* Another eleven states, comprising an additional forty million citizens, had debt collection laws that the Committee found to provide little or no effective protection. *See id.*

43. *See, e.g.,* KAN. STAT. ANN. §§ 50-623 to -643 (2013); OHIO REV. CODE ANN. §§ 1345.01–.13 (LexisNexis 2012); 19 R.I. GEN. LAWS ANN. §§ 19-14.9-1 to .9-14 (2007).

44. S. REP. NO. 95-382, at 2 (emphasis added).

45. *See id.* at 3. While there was, and likely still is, a common misconception that those who fail to pay their debts—and are thus the targets of debt collection abuse—are "deadbeats," the Committee stressed that this perception was false. *Id.* In fact, at the time of the FDCPA's enactment, scholars, law enforcement officials, and even debt collectors agreed that the number of debtors who willfully refused to pay legitimate debts was miniscule. *See id.*

46. *See* CAROLINE RATCLIFFE ET AL., URBAN INST., DELINQUENT DEBT IN AMERICA 1 (2014), [http://www.urban.org/research/publication/delinquent-debt-america/view/full\\_report](http://www.urban.org/research/publication/delinquent-debt-america/view/full_report) [perma.cc/6S8E-5KYW].

47. *See id.*

Consequently, the individual becomes ineligible for many jobs and unable to access rental housing, mortgages, and credit in general.<sup>48</sup> At that point, it becomes nearly impossible for the debtor to return to a healthy asset-accumulation cycle.<sup>49</sup> Thus, the individual's debts perpetuate, as does the possibility of abuse by debt collectors.

The amount of debt in the United States suggests that millions of individuals are stuck in vicious debt cycles and, thus, at risk of abuse by debt collectors.<sup>50</sup> At the time of the FDCPA's enactment, more than five thousand debt collection agencies existed in the United States.<sup>51</sup> In 1976, debt collectors recovered more than \$5 billion in debts.<sup>52</sup> That same year, one trade association—representing approximately half of the debt collectors in the United States—reported that its members contacted more than eight million consumers.<sup>53</sup> Congress saw these statistics as persuasive evidence of a need to provide consumers with uniform protection against potential debt collection abuse.<sup>54</sup>

Since the 1970s, these statistics have significantly increased. In 2013 alone, debt collection agencies recovered approximately \$55.2 billion in total debt<sup>55</sup>—more than eleven times the amount collected in 1976.<sup>56</sup> In addition, as of 2014, seventy-seven million Americans had a debt in collection; in other words, seventy-seven million Americans were at risk of interacting with deceptive debt collectors.<sup>57</sup> As the number of debtors and the amount of debt continue to increase,<sup>58</sup> so does the need to provide consumers with uniform national protection.

*B. The FDCPA's Statute of Limitations Provision  
and the Issues with Its Interpretation*

This Note focuses on the subsection of the FDCPA that contains the SOL provision, 15 U.S.C. § 1692k(d). This provision states that any claim

48. *See id.* at 7.

49. *See id.* at 2 (“For adults with other debts already in collections, the problem may be snowballing. Among people with debt past due, the average amount they need to pay to become current on that debt is \$2,258.”).

50. *See id.* at 7 (“Financial distress is a daily challenge for millions of American consumers.”).

51. S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

52. *Id.*

53. *Id.*

54. The Committee specifically listed the vast size of the debt collection industry as a reason for the “need for this legislation.” *Id.*

55. ERNST & YOUNG, THE IMPACT OF THIRD-PARTY DEBT COLLECTION ON THE U.S. NATIONAL AND STATE ECONOMIES IN 2013, at 3 (2014), [http://www.wacollectors.org/Media/Default/PDFs/\\_images\\_21594\\_impacteconomies2014.pdf](http://www.wacollectors.org/Media/Default/PDFs/_images_21594_impacteconomies2014.pdf) [perma.cc/PT4N-BNGC].

56. *See* S. REP. NO. 95-382, at 2.

57. *See* RATCLIFFE ET AL., *supra* note 46, at 7.

58. The total debt of all U.S. households increased by \$212 billion in just three months, reaching \$12.07 trillion in September 2015. FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 3 (2015), [https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC\\_2015Q3.pdf](https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2015Q3.pdf) [perma.cc/X8C6-JMMR].



brought under the FDCPA must be filed “within one year from the date on which the *violation occurs*.”<sup>59</sup>

This one-year SOL applies to all claims that can be brought under the FDCPA, regardless of the violation.<sup>60</sup> For many FDCPA violations, however, the date on which the debt collector engages in the prohibited conduct could be days, weeks, months, or even years before the date on which that conduct actually harms the consumer.<sup>61</sup> Therefore, courts must determine whether the FDCPA violation occurs when a debt collector engages in the proscribed conduct, or instead when that proscribed conduct actually harms the consumer. Circuit courts, however, are split not only as to their conclusions on this issue, but also as to the appropriate analyses for reaching their respective conclusions.<sup>62</sup>

### *C. The Relevant Legal Doctrines and Their Applicability to the FDCPA’s Statute of Limitations Provision*

According to the general rule of accrual of a cause of action,<sup>63</sup> the SOL begins to run as soon as a cause of action accrues, and a cause of action accrues when a litigant has a right to sue.<sup>64</sup> Moreover, a litigant has a right to sue once all of the elements of his or her claim exist.<sup>65</sup>

59. 15 U.S.C. § 1692k(d) (2012) (emphasis added).

60. The FDCPA lists more than fifty actions or types of conduct that violate the statute, *see id.* §§ 1692b–j, as well as a “catch-all” provision for certain types of conduct that are not specifically listed, *see id.* § 1692e(10). If a debt collector engages in any of these acts, a debtor can bring a private action against the debt collector to enforce liability. *See id.* § 1692k(d). The FDCPA, however, only contains one SOL provision, and this provision states that it applies to all actions “to enforce any liability created by [the FDCPA].” *Id.* Therefore, an injured consumer must file his or her suit within one year of the violation, regardless of whether the debt collector mailed a threatening letter, *see id.* § 1692d(1)–(2); reported inaccurate debt information about the consumer to a credit-reporting agency, *see id.* § 1692e(8); filed a collection suit against the consumer seeking to collect an unlawful amount, *see id.* § 1692e(2); or engaged in any other acts prohibited under the FDCPA, *see id.* §§ 1692b–j.

61. Consider a situation in which a debt collector mails a restraining notice to a bank requesting the bank freeze a consumer’s account, even though the debt does not belong to that consumer. *See, e.g., Benzemann v. Citibank N.A.*, 806 F.3d 98, 100 (2d Cir. 2015). The debt collector mails the restraining notice at Time 1, but the consumer is not harmed by that act until the bank freezes his or her account at Time 2. Moreover, the consumer is harmed even if he or she does not have any knowledge of the harm or of the debt collector’s action. Thus, suppose the consumer does not find out that his or her bank account is frozen until a few days later (at Time 3). Even though the consumer does not find out about the freeze until Time 3, the consumer is still harmed at Time 2. Circuit courts are split on whether Time 1, Time 2, or Time 3 constitutes the violation that triggers the running of the FDCPA’s SOL. *Compare Mattson v. U.S. W. Commc’ns, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992) (determining that an FDCPA violation occurs when the debt collector engages in the proscribed conduct), *with Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 445–47 (5th Cir. 2013) (holding that an FDCPA violation occurs when a consumer has a “complete and present cause of action,” which cannot occur until the consumer is actually harmed by the debt collector’s conduct).

62. *See infra* Part II.A–B.

63. *See* 54 C.J.S. *Limitations of Actions* § 129 (2010).

64. *See id.*

65. *See id.*

In the context of the FDCPA, the SOL begins to run when the cause of action accrues; the cause of action accrues when the violation occurs; and the violation occurs once all of the FDCPA claim's elements exist.<sup>66</sup> Thus, if a court applies the general accrual rule to the FDCPA's SOL, then that court's position on when the violation occurs determines when the SOL begins to run.<sup>67</sup>

A court, however, is not always required to apply the general accrual rule. There are two exceptions to the general accrual rule that are relevant to this Note: (1) the discovery rule,<sup>68</sup> and (2) the equitable tolling doctrine.<sup>69</sup> Part I.C.1 presents the discovery rule and describes its relevance to the FDCPA's SOL. Although the equitable tolling doctrine's applicability to the FDCPA's SOL is not a critical aspect of the circuit split discussed in Part II of this Note,<sup>70</sup> the doctrine is relevant to Part III's proposed resolution. Therefore, Part I.C.2 presents an overview of the equitable tolling doctrine.

### 1. The Discovery Rule

The discovery rule is a common law doctrine that acts as an exception to the general accrual rule.<sup>71</sup> When a court applies the discovery rule, the SOL does not begin to run until a plaintiff discovers, or reasonably should have discovered, all of the elements of the claim.<sup>72</sup> In fact, the discovery rule delays the cause of action's accrual itself.<sup>73</sup> Therefore, the discovery rule's application to the FDCPA's SOL would delay the running of the SOL until the consumer discovers, or reasonably should have discovered, either the debt collector's proscribed conduct or the harm caused by the debt collector's conduct, depending on a court's position on when the violation occurs.<sup>74</sup>

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66. Section 1692k(d) states that the one-year SOL starts to run once the violation occurs. 15 U.S.C. § 1692k(d) (2012). Because the SOL starts to run once the cause of action accrues, it must be the case that a cause of action accrues once the violation occurs. *See* 54 C.J.S. *Limitations of Actions* § 129.

67. *See, e.g.,* *Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992) (applying the general accrual rule and holding that the violation occurred when the debt collector engaged in the prohibited action, commencing the running of the SOL).

68. *See infra* Part I.C.1.

69. *See infra* Part I.C.2.

70. The equitable tolling doctrine is only relevant when the debt collector fraudulently conceals his or her actions; therefore, its application is not particularly relevant to the general interpretation of the FDCPA's SOL provision. *See infra* Part I.C.2; *see also* *Arthur v. Allen*, 452 F.3d 1234, 1252 (11th Cir. 2006) ("As an extraordinary remedy, equitable tolling 'is typically applied sparingly.'" (quoting *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000))).

71. *See* 51 AM. JUR. 2D *Limitation of Actions* § 158 (2012).

72. *See id.*

73. *See id.*

74. *See id.* The only circuits to apply the discovery rule, however, are ones holding that the violation occurs when the debt collector engages in some proscribed conduct. *See, e.g.,* *Lembach v. Bierman*, 528 F. App'x 298, 302 (4th Cir. 2013); *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 940–41 (9th Cir. 2009).

Federal courts have the discretion to decide whether to recognize the existence of a general federal discovery rule.<sup>75</sup> Although the U.S. Supreme Court has never recognized the existence of such a rule, in *TRW Inc. v. Andrews*<sup>76</sup> the Court acknowledged that lower federal courts “generally apply a discovery accrual rule when a statute is silent on the issue.”<sup>77</sup> In declining to decide the issue in *TRW Inc.*, the Court did not say whether it would adopt a general federal discovery rule in a proper case.<sup>78</sup> The Court did state, however, that it has never endorsed nor adopted the position that a general federal discovery rule exists.<sup>79</sup> Thus, although the decision to recognize a general federal discovery rule remains a discretionary matter for lower federal courts, the Court’s dicta in *TRW Inc.* effectively rendered the viability of such a rule uncertain.<sup>80</sup>

If a federal court does in fact recognize the existence of a general federal discovery rule, that court must assess the discovery rule’s applicability to a given federal statute.<sup>81</sup> In many cases, federal courts begin this analysis by considering whether the relevant federal statute’s time limitation is jurisdictional<sup>82</sup> or nonjurisdictional.<sup>83</sup> If a federal court considers a statute’s time limitation to be jurisdictional, then the court only has jurisdiction over a claim brought under that statute if a plaintiff files the claim within that time limitation.<sup>84</sup> If the plaintiff files the claim after the jurisdictional time limitation has already expired, the federal court lacks

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75. When a court recognizes the existence of a general federal discovery rule, that court presumes that “unless Congress has expressly legislated otherwise, the [discovery rule] ‘is read into every federal statute of limitations.’” *Andrews v. TRW Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000) (quoting *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946)), *rev’d*, 534 U.S. 19 (2001).

76. 534 U.S. 19 (2001).

77. *Id.* at 27 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).

78. *See id.* (stating that the case does not oblige the court to decide whether such a general federal discovery rule exists).

79. *See id.*

80. *See id.* at 27–28.

81. *See id.* at 27 (noting that to the extent that a federal court presumes that all federal SOLs incorporate a general discovery rule, such a general presumption is not applicable across all contexts).

82. A jurisdictional rule is one that can be raised by any party at any time, including for the first time on appeal; it obligates the court to police compliance sua sponte, even after litigation on the merits; and the principles of equity, waiver, forfeiture, consent, or estoppel cannot bend the rule under any circumstances. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 5 (2008).

83. *See, e.g., Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008); *Martin v. United Collections Bureau, Inc.*, No. 4:14-CV-804-JAR, 2015 WL 4255405, at \*5 (E.D. Mo. July 14, 2015). Nonjurisdictional rules are often considered to be the inverse of jurisdictional rules: they can be waived; they are subject to equitable exceptions, such as the discovery rule, equitable tolling, and estoppel; and courts are under no obligation to raise them sua sponte. *See* Dodson, *supra* note 82, at 5 & nn.17–18. For a detailed discussion of the differences between jurisdictional rules and nonjurisdictional rules, see generally Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457 (2006). The jurisdictional versus nonjurisdictional analysis is also used to determine the equitable tolling doctrine’s applicability. *See infra* Part I.C.2.

84. *See, e.g., Archer*, 550 F.3d at 508 (stating that when a time limitation is a jurisdictional bar, federal courts lack the power to extend the time period to allow for late adjudication of claims).

jurisdiction over the claim, and the discovery rule cannot apply.<sup>85</sup> If instead a court considers a statute's time limitation to be nonjurisdictional, the court has jurisdiction over a claim brought under that statute even if a plaintiff files his or her claim after the expiration of the time limitation.<sup>86</sup> Because the federal court has jurisdiction over the claim even after the time limitation expires, it also has the discretion to apply the discovery rule and thus make the suit timely.<sup>87</sup> Importantly, there is a rebuttable presumption that SOL provisions are nonjurisdictional.<sup>88</sup> However, the nonjurisdictional presumption is rebutted if there is some "significant indication to the contrary in the statutory language or in the legislative history."<sup>89</sup>

Even if the court determines that a time limitation is nonjurisdictional, and that nothing in the statutory language or in the legislative history rebuts that conclusion, Congress can still preclude the application of the discovery rule to that statute.<sup>90</sup> Thus, federal courts must also analyze the text and structure of a federal statute to determine whether Congress intended to preclude the general application of a discovery rule to that statute.<sup>91</sup> If nothing in the structure or text of the statute indicates Congress's intent to preclude the discovery rule, then the discovery rule can apply to the statute's time limitation.<sup>92</sup>

## 2. The Equitable Tolling Doctrine

Another exception to the general accrual rule is the equitable tolling doctrine, which pauses or "tolls" the running of an SOL.<sup>93</sup> Courts generally consider it appropriate to apply the equitable tolling doctrine when a

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85. *See id.* Because the time limitation is jurisdictional, it cannot be waived and it is not subject to equitable doctrines, such as the discovery rule. *See Dodson, supra* note 82, at 5 & n.16.

86. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392–93 (1982) (holding that the time limitation for filing a charge with the Equal Employment Opportunity Commission is not a jurisdictional prerequisite, but rather a requirement that a federal court can waive).

87. *See id.*; *Conaway v. Control Data Corp.*, 955 F.2d 358, 361–62 (5th Cir. 1992) (finding that where a time limitation is not a jurisdictional requirement, the statute is subject to tolling).

88. *See Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 939 (9th Cir. 2009). Due to this rebuttable presumption, if a federal court recognizes the existence of the discovery rule, then that court will also make a rebuttable presumption that the discovery rule applies to all federal statutes. *See, e.g., id.* at 940 (stating its presumption that federal SOLs are nonjurisdictional and that the discovery rule applies to all SOLs in federal litigation).

89. *Id.* at 939.

90. *See id.* at 940 (concluding that nothing in the structure or text of the FDCPA rebuts the presumption that its SOL provision is nonjurisdictional, but stating that the court must still analyze whether the discovery rule can apply).

91. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (concluding that the text and structure of the Fair Credit Reporting Act's SOL evince Congress's intent to preclude federal courts from applying a general discovery rule); *McDonough v. Anoka Cty.*, 799 F.3d 931, 942–44 (8th Cir. 2015) (analyzing the text and structure of the Driver's Privacy Protection Act to determine whether the discovery rule applies to the statute's time limitation).

92. *See Mangum*, 575 F.3d at 940–41.

93. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014).

plaintiff files a claim in an untimely manner due to a defendant's fraudulent concealment of his or her conduct.<sup>94</sup>

Unlike the discovery rule, the equitable tolling doctrine does not delay a cause of action's accrual or the commencement of an SOL's running.<sup>95</sup> Rather, the equitable tolling doctrine simply pauses the running of the SOL for the period during which a defendant fraudulently conceals his or her actions.<sup>96</sup> Therefore, in applying the equitable tolling doctrine to the FDCPA, a court's interpretation of when an FDCPA violation occurs still determines the date on which the cause of action accrued and the SOL began to run.<sup>97</sup> The equitable tolling doctrine benefits the injured consumer, however, in that it causes the SOL to run for one year plus the amount of time during which a debt collector fraudulently conceals his or her violative conduct.<sup>98</sup>

While all federal courts recognize the existence of the equitable tolling doctrine, they still have the discretion to determine the doctrine's applicability to a given federal statute.<sup>99</sup> To start, there is a presumption that every federal SOL is subject to equitable tolling.<sup>100</sup> While most time limitations are nonjurisdictional, there is also a presumption that equitable tolling cannot apply to jurisdictional time limitations.<sup>101</sup> Therefore, federal courts determine the equitable tolling doctrine's applicability to a federal statute by applying the jurisdictional versus nonjurisdictional analysis described in Part I.C.1.<sup>102</sup> If a court considers a given time limitation to be jurisdictional, then equitable tolling cannot apply.<sup>103</sup>

#### D. The Importance of Uniform Interpretations of Federal Statutes

Many legal scholars and courts insist on following a policy of uniformity in the application and interpretation of federal statutes.<sup>104</sup> Different federal

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94. See *Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 80 (2d Cir. 2003) (“Equitable tolling is generally considered appropriate where . . . [the] plaintiff was unaware of his or her cause of action due to misleading conduct of [the] defendant.”).

95. See 54 C.J.S. *Limitations of Actions* § 134 (2010).

96. See *id.*

97. See *id.*

98. See *id.*

99. See *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990).

100. See *id.* (establishing a rebuttable presumption that SOLs are subject to equitable tolling).

101. See *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631–32 (2015) (noting that jurisdictional time bars are not subject to equitable tolling because “a litigant's failure to comply with a jurisdictional time bar deprives a court of all authority to hear a case”).

102. See *supra* notes 82–87 and accompanying text.

103. See *Kwai Fun Wong*, 135 S. Ct. at 1632.

104. See, e.g., Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 83–85 (asserting that one of the major functions of federal courts is to assure “uniformity in the interpretation and application of federal law”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1812 n.451 (1991) (stating that uniformity is a prominent aspiration of the federal judicial system); Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. F. 499, 501 (2014), <http://yalelawjournal.org/forum/uniformity-and-integrity-in-immigration-law> (“The aspiration to uniformity in the interpretation and

courts should interpret the same federal statute in a consistent and uniform manner for several reasons. First, it is inherently unfair to treat similarly situated litigants with the same federal right differently simply due to variations in circuit courts' interpretations of a federal law.<sup>105</sup> Second, inconsistent interpretations of the same federal statute cause unpredictability, which raises the costs of litigation and of doing business.<sup>106</sup> Finally, inconsistent interpretations of legal standards within a single federal statute encourage forum shopping.<sup>107</sup> While the goal of uniformity has not gone unchallenged,<sup>108</sup> obtaining uniform interpretations of federal statutes remains one of the primary objectives of the federal judicial system.<sup>109</sup>

Federal SOLs are of unique importance when it comes to achieving uniform application of federal statutes. For over two centuries, federal courts have recognized time limitations for bringing causes of actions as an integral part of the U.S. legal system.<sup>110</sup> The purpose of SOLs is to encourage plaintiffs to pursue their rights diligently.<sup>111</sup> However, a significant issue arises when federal courts interpret or apply the same SOL provision inconsistently: federal courts in one state deprive plaintiffs of the opportunity to assert their claims, while federal courts in another state grant plaintiffs that precise opportunity.<sup>112</sup>

Although courts and legal scholars have widely addressed the risks of nonuniformity and inconsistency that result from different interpretations of

administration of the law . . . advances . . . fairness, transparency, accountability, and efficiency.”) [perma.cc/7WTK-XAKH].

105. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1096–97 (1987) (“[W]e think it more aggravating if citizens of Maine and Florida are threatened with having to live under different understandings of the same federal statute . . . than if citizens of Illinois are faced with a unique, and possibly erroneous, reading of another statute.”).

106. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38 (1994); Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 468 (1984).

107. See FED. COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 124–25 (1990).

108. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1631–39 (2008) (arguing that the Supreme Court should reconsider whether uniformity is a goal worth pursuing).

109. See *supra* notes 104–06 and accompanying text.

110. See *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) (stating that SOLs “have long been respected as fundamental to a well-ordered judicial system”); *Adam v. Woods*, 6 U.S. 336, 342 (1805) (stating that it “would be utterly repugnant to the genius of our laws” to allow claims to be brought without time limitations).

111. See *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (stating that the main thrust of SOLs is to encourage plaintiffs to pursue their rights diligently).

112. Inconsistent interpretations of the FDCPA's SOL provision lead to this exact result. Compare *Maloy v. Phillips*, 64 F.3d 607, 608 (11th Cir. 1995) (holding the FDCPA's SOL began to run when the debt collector mailed a collection letter to the consumer, not when the consumer received the letter), with *Benzemann v. Citibank N.A.*, 806 F.3d 98, 103 (2d Cir. 2015) (holding that the FDCPA's SOL began to run when the bank froze the consumer's bank account, not when the debt collector mailed the restraining notice to the bank).

SOL provisions,<sup>113</sup> the discussion almost always arises in the context of federal statutes for which Congress failed to provide an SOL provision.<sup>114</sup> Few legal scholars have addressed the situation in which Congress *does* provide a specific SOL provision that federal courts interpret in a nonuniform manner, as with the FDCPA's SOL provision.<sup>115</sup> In fact, when Congress provides an SOL provision for a federal statute, the need for uniformity is even more compelling because Congress purposely set out to ensure that every federal court would apply a consistent time limitation.<sup>116</sup>

The policy of uniformity in interpreting federal statutes,<sup>117</sup> as well as the very nature and purpose of the FDCPA, demonstrates the inherent need for consistent interpretations of its provisions.<sup>118</sup> Indeed, by expressly including “consistent State action” as one of the stated purposes of the FDCPA, Congress recognized that the effective application of the statute would require its uniform interpretation.<sup>119</sup> Therefore, a uniform interpretation of the FDCPA's provisions proves necessary not only for the achievement of the goals of the federal judicial system, but also for the achievement of the FDCPA's specifically stated purposes.

#### *E. Attempts to Achieve Uniform Interpretations and Applications of the FDCPA*

Over the past few decades, legal scholars have proposed solutions for inconsistent interpretations of several substantive provisions of the FDCPA.<sup>120</sup> In addition, the Supreme Court has resolved circuit splits over

113. *See* *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 37 (1995) (Scalia, J., concurring) (noting that a uniform period of limitations is always preferable for a federal action simply for the sake of uniformity); David Reisman, Comment, *The Move Toward Uniformity: The Statute of Limitations for Rule 10b-5*, 51 LA. L. REV. 667, 672–73 (1991) (noting that the Supreme Court has indicated that it favors uniform SOLs for federal causes of action); Neil Sobol, Comment, *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 Sw. L.J. 895, 909 (1987) (arguing that different time limitations for the same federal cause of action encourages forum shopping and fosters a feeling of unfairness in the federal system).

114. *See, e.g.*, Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2012); Equal Rights Under the Law, 42 U.S.C. §§ 1981, 1983 (2012); Rule 10b-5 of the Securities Exchange Act of 1934, 17 C.F.R. § 240.10b-5; *see also* RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 685 (6th ed. 2009).

115. Sobol argues that when a federal statute contains an SOL provision, federal courts simply adopt that time limitation, and this ensures uniformity in federal law; however, Sobol overlooks the inconsistencies that might arise in the SOL's interpretation. *See* Sobol, *supra* note 113, at 899.

116. *Cf.* Reisman, *supra* note 113, at 677–80 (arguing that it is necessary to adopt a uniform federal SOL for Rule 10b-5 because doing so would be consistent with the overall federal scheme of the Securities Act of 1933 and the Securities Exchange Act of 1934).

117. *See supra* note 104 and accompanying text.

118. *See supra* Part I.A. Congress enacted the FDCPA because the inconsistent protections provided under the then-existing state statutes were inadequate in truly protecting consumers. *See* 15 U.S.C. § 1692(e) (2012).

119. 15 U.S.C. § 1692(e).

120. *See, e.g.*, Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762 (2005); William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices*

the proper interpretation of several of the FDCPA's substantive provisions. For example, in *Jerman v. Carlisle*,<sup>121</sup> the Court resolved a circuit split over § 1692k(c) of the FDCPA<sup>122</sup> by interpreting the provision's "bona fide error" defense as inapplicable to a violation that results from a debt collector's mistaken interpretation of the FDCPA's legal requirements.<sup>123</sup> Moreover, in *Heintz v. Jenkins*,<sup>124</sup> the Court addressed the circuit split over whether the FDCPA applies to lawyers.<sup>125</sup> The Court resolved the split by interpreting the term "debt collectors" under § 1692a(6) of the FDCPA to include lawyers who regularly try to collect consumer debts through litigation.<sup>126</sup>

Several circuit courts also have adopted consistent interpretations of certain substantive provisions of the FDCPA. For instance, after the Ninth Circuit established a "least sophisticated consumer" standard to apply to all FDCPA violations,<sup>127</sup> almost every circuit court that subsequently considered the issue adopted that standard.<sup>128</sup> These Supreme Court and circuit court decisions have furthered uniformity with regard to these specific substantive FDCPA provisions.

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*Act*, 29 ST. LOUIS U. PUB. L. REV. 549 (2010); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257 (2011); Richard D. Gage, Note, *A Remedy Foreclosed? Mortgage Foreclosure and the Fair Debt Collection Practices Act*, 81 FORDHAM L. REV. 283 (2012); Christian Stueben, Note, *Judge or Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 FORDHAM L. REV. 3107 (2010); Young Walgenkim, Note, *Killing "Zombie Debt" Through Clarity and Consistency in the Fair Debt Collection Practices Act*, 24 LOY. CONSUMER L. REV. 65 (2011).

121. 559 U.S. 573 (2010).

122. Section 1692k(c) provides debt collectors with a substantive defense to an FDCPA action if he or she can show that the violation was unintentional and resulted from a bona fide error. 15 U.S.C. § 1692k(c).

123. *See Jerman*, 559 U.S. at 604–05.

124. 514 U.S. 291 (1995).

125. *See id.* at 294.

126. *See id.*; *see also* 15 U.S.C. § 1692a(6) (defining the term "debt collector" as it applies to the FDCPA).

127. *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 778 (9th Cir. 1982) (establishing that FDCPA violations should be interpreted from the perspective of the least sophisticated consumer).

128. *See United States v. Nat'l Fin. Serv., Inc.*, 98 F.3d 131, 136–39 (4th Cir. 1996) (applying the "least sophisticated consumer" standard to evaluate a violation of § 1692e(10)); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1028–29 (6th Cir. 1992); *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985). The First, Seventh, and Eighth Circuits all adopted an "unsophisticated consumer" standard instead. *See Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 (1st Cir. 2014); *Peters v. General Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002); *Gammon v. GC Servs. Ltd.*, 27 F.3d 1254, 1257 (7th Cir. 1994). Apart from the label, however, there is no real difference between the "unsophisticated consumer" standard and the "least sophisticated consumer" standard. *See Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996). Therefore, all circuits that have considered the issue have fundamentally adopted the Ninth Circuit standard. *See id.*



Federal courts, however, have failed to address inconsistent interpretations of the statute's more procedural provisions.<sup>129</sup> Specifically, federal courts have applied the FDCPA's SOL provision inconsistently for more than forty years.<sup>130</sup> Not only do federal courts interpret the language of the provision inconsistently, but they also disagree over the appropriate analyses and doctrines that should apply when interpreting the provision. Thus, despite the furtherance of the FDCPA's substantive uniformity, injured consumers continue to receive inconsistent protection under the statute.

## II. THE CIRCUIT SPLIT: WHEN DOES THE VIOLATION OCCUR?

Part II discusses the various analyses federal courts apply to interpret the FDCPA's SOL provision, § 1692k(d). Before delving into the details of these conflicting circuit court opinions, however, an illustration of the split's structure is useful. The two ends of the split are as follows: the courts on one side of the split hold that an FDCPA violation occurs when a debt collector engages in some proscribed conduct,<sup>131</sup> while the courts on the other side of the split hold that the violation occurs when the debt collector's conduct actually harms the consumer.<sup>132</sup> Moreover, two of the four circuit courts holding the former position interpret the FDCPA's SOL provision to allow for the application of the discovery rule.<sup>133</sup>

All cases in which a federal court has interpreted the FDCPA's SOL provision share two main features. First, the facts of each case are such that the date on which the debt collector engaged in some proscribed conduct is earlier than the date on which that conduct actually harmed the consumer.<sup>134</sup> Second, at the time that the consumer filed the FDCPA suit, the debt collector's proscribed *conduct* happened *more* than a year prior, while the consumer was *harmed* by that conduct *less* than a year prior.<sup>135</sup> When both of these aspects are present in a case, the federal court is required to interpret the SOL provision if the debt collector raises it as an affirmative defense.<sup>136</sup>

Part II.A examines the cases holding that the violation occurs when the debt collector engages in some proscribed conduct or action. Part II.B then

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129. See *infra* Part II (presenting the inconsistent interpretations of a more procedural provision of the FDCPA: the SOL provision).

130. See *infra* Part II.

131. The Eighth, Eleventh, Ninth, and Fourth Circuits hold this position. See *infra* Part II.A.

132. The Tenth, Fifth, and Second Circuits hold this view. See *infra* Part II.B.

133. The Ninth and Fourth Circuits hold this view. See *infra* Part II.A.2.

134. See *supra* note 61 and accompanying text.

135. For example, in *Serna v. Law Office of Joseph Onwuteaka P.C.*, the debt collector engaged in the violative conduct on July 6, 2010, the consumer was harmed by that conduct on August 14, 2010, and the consumer filed the FDCPA claim on August 12, 2011. 732 F.3d 440, 441–42 (5th Cir. 2013).

136. Ordinarily, in civil litigation, a defense of SOL is forfeited if the defendant does not raise it in his or her answer (or in an amended answer), even if the party and his or her counsel were unaware of the possible SOL defense. See FED. R. CIV. P. 8(c), 12(b), 15(a).

analyzes the cases holding that the violation occurs when the debt collector's conduct actually harms the consumer. To highlight the ways in which federal circuit courts' analyses have developed over time, the cases are examined in chronological order within each section and within the two subsections of Part II.A.

A. *The Violation Occurs When the Debt Collector Engages  
in Some Proscribed Conduct or Action*

The Eighth, Eleventh, Ninth, and Fourth Circuits all hold that an FDCPA violation occurs as soon as a debt collector engages in some proscribed conduct or action.<sup>137</sup> These four circuit courts, however, have differing views as to when the SOL begins to run. Only the Ninth and Fourth Circuits acknowledge the discovery rule's applicability to the FDCPA's SOL.<sup>138</sup>

Part II.A.1 analyzes the decisions of the Eighth and Eleventh Circuits, both of which apply a two-prong test. Part II.A.2 then discusses the Ninth and Fourth Circuits' applications of the discovery rule.

1. The Eighth and Eleventh Circuits:  
The *Mattson* Test

In its 1992 decision in *Mattson v. U.S. West Communications*,<sup>139</sup> the Eighth Circuit became the first circuit court to determine the violation that triggers the running of the FDCPA's SOL.<sup>140</sup> In *Mattson*, a consumer received a deceptive letter dated November 27, 1989,<sup>141</sup> from a debt collector.<sup>142</sup> The letter falsely implied that the consumer's nonpayment of his debt would result in his arrest.<sup>143</sup> On November 27, 1990, one year after the debt collector mailed the letter,<sup>144</sup> the injured consumer filed a

137. See *infra* text accompanying notes 148, 162, 178, 200.

138. See *infra* notes 194–96 and accompanying text.

139. 967 F.2d 259 (8th Cir. 1992).

140. See *id.* at 261–62.

141. The opinion does not state the exact date on which the consumer received the letter; however, it can be assumed that it was received on a date later than November 27, 1989, otherwise there would be no issue as to when the violation occurred.

142. *Mattson*, 967 F.2d at 260.

143. *Id.*

144. The consumer filed the complaint on the one-year anniversary of the mailing of the letter. *Id.* There is an additional, though less important, circuit split over the interpretation of “within one year.” See 15 U.S.C. § 1692k(d) (2012). Specifically, the issue is whether Federal Rule of Civil Procedure 6(a) applies to the FDCPA's SOL. See FED. R. CIV. P. 6(a)(1)(A) (“When the period is stated in days or a longer unit of time . . . exclude the day of the event that triggers the period.”); *Mattson*, 967 F.2d at 261–62. Courts analyze this issue by determining whether the SOL is jurisdictional or nonjurisdictional—the same analysis as is used for the discovery rule and the equitable tolling doctrine. See *supra* Part I.C. If the provision is nonjurisdictional, Rule 6(a) applies, and the SOL ends on the one-year anniversary of the violation. If the provision is jurisdictional, the SOL ends one day before the one-year anniversary of the violation. See FED. R. CIV. P. 6(a). In *Mattson*, the Eighth Circuit found that the FDCPA's SOL provision is jurisdictional; therefore, Rule 6(a) does not apply, and the SOL ends one day before the one-year anniversary of the violation. See *Mattson*, 967 F.2d at 261–62. But see *infra* notes 164–70 and accompany text.

complaint against the debt collector for violating § 1692e of the FDCPA.<sup>145</sup> The question before the Eighth Circuit was whether a debt collector's mailing of a violative letter, rather than a consumer's receipt of that letter, constitutes the violation that triggers the running of the FDCPA's SOL.<sup>146</sup> The court concluded that an FDCPA violation occurs when a debt collector mails a violative letter (that is to say, when a debt collector engages in the proscribed conduct).<sup>147</sup>

The Eighth Circuit established and applied a two-prong test ("the *Mattson* test") to determine that a cause of action accrues (meaning a violation occurs) under the FDCPA when a debt collector engages in the proscribed conduct.<sup>148</sup> The *Mattson* test asks two questions: First, when was the debt collector's "last opportunity to comply with the FDCPA"? And, second, is that date "fixed by objective and visible standards, . . . easy to determine, [and] ascertainable by both parties"?<sup>149</sup>

The Eighth Circuit acknowledged that Congress's intent in enacting the FDCPA was to protect consumers against harassment by debt collectors; however, the court found that "Congress intended to achieve this purpose by *regulating the conduct* of debt collectors."<sup>150</sup> Thus, to regulate the debt collector's conduct, Congress must have intended for the violation to occur when the debt collector engages in some conduct or action proscribed by the FDCPA.<sup>151</sup> In other words, the violation occurs on the date on which a debt collector has its "last opportunity to comply with the FDCPA."<sup>152</sup> Here, as soon as the debt collector mailed the letter, his conduct with respect to the FDCPA violation was complete.<sup>153</sup> Moreover, the court justified its conclusion by stating that the date on which a deceptive letter is mailed is a date that may be "fixed by objective and visible standards."<sup>154</sup> Thus, the Eighth Circuit held that the injured consumer's FDCPA claim here was time barred.<sup>155</sup>

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145. *Mattson*, 967 F.2d at 260. Section 1692e prohibits the use of false, deceptive, or misleading representations in connection with the collection of a debt. See 15 U.S.C. § 1692e.

146. *Mattson*, 967 F.2d at 261.

147. *Id.*

148. *See id.*

149. *Id.*

150. *Id.* (emphasis added).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* Although the Eighth Circuit did not consider whether the discovery rule or the equitable tolling doctrine could apply to the FDCPA's SOL, the court did find the SOL provision to be jurisdictional. *See id.* at 261–62; *supra* note 144. The jurisdictional versus nonjurisdictional analysis could also be used to determine the applicability of the discovery rule and the equitable tolling doctrine, *see supra* Part I.C; therefore, some district courts cite *Mattson* as support for the proposition that the discovery rule and the equitable tolling doctrine cannot apply to the FDCPA's SOL, because the provision is jurisdictional. *See, e.g.,* *Whittiker v. Deutsche Bank Nat'l Trust Co.*, 605 F. Supp. 2d 914, 944 (N.D. Ohio 2009); *In re Rice-Etherly*, 336 B.R. 308, 313 (Bankr. E.D. Mich. 2006).

In 1995, the Eleventh Circuit decided *Maloy v. Phillips*,<sup>156</sup> in which the court adopted the Eighth Circuit's *Mattson* holding and two-prong test.<sup>157</sup> The debt collector in *Maloy* mailed a collection letter to the plaintiff on November 13, 1992.<sup>158</sup> The plaintiff received the letter on November 16, 1992,<sup>159</sup> and then filed a complaint against the debt collector almost a year later on November 15, 1993, for violating § 1692e of the FDCPA.<sup>160</sup> In considering whether the violation occurred when the debt collector mailed the deceptive letter (meaning when the debt collector engaged in the proscribed action) or when the consumer received the letter (meaning when the debt collector's conduct actually harmed the consumer), the Eleventh Circuit adopted the Eighth Circuit's exact analysis in *Mattson* without conducting any new analysis of its own on the issue.<sup>161</sup> Thus, the Eleventh Circuit held that the SOL begins to run on the date a debt collector mails a violative letter "because that [is] the debt collector's last opportunity to comply with the FDCPA" and because this holding is a "better and more practical approach [than holding that the violation occurs when the consumer receives a violative letter] because it provide[s] a date that [is] easy to determine, ascertainable by both parties, and easily applied."<sup>162</sup>

Both the Eighth and Eleventh Circuits still maintain their positions adopted in *Mattson* and *Maloy*, respectively.<sup>163</sup> The Eighth Circuit, however, is currently deciding *Hageman v. Barton*,<sup>164</sup> which addresses the issue of the equitable tolling doctrine's applicability to the FDCPA's SOL provision.<sup>165</sup> Specifically, the Eighth Circuit will likely reevaluate its holding in *Mattson* that the FDCPA's SOL provision is jurisdictional,<sup>166</sup> which effectively precludes the circuit from applying the discovery rule<sup>167</sup>

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156. 64 F.3d 607 (11th Cir. 1995).

157. *See id.* at 608.

158. *Id.*

159. *Id.*

160. *See id.* at 607–08. The plaintiff claimed that the debt collector communicated with the consumer without disclosing that he was attempting to collect a debt and that any information obtained would be used for that purpose. *See id.*; 15 U.S.C. § 1692e(11) (2012).

161. *See Maloy*, 64 F.3d at 607.

162. *Id.* (citing *Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992)).

163. *See, e.g., Whittiker v. Deutsche Bank Nat'l Trust Co.*, 605 F. Supp. 2d 914, 944 (N.D. Ohio 2009) (relying on *Mattson* to hold that the SOL begins to run the moment that the debt collector engages in the act, without regard to when the plaintiff gains knowledge of the debt collector's action); *Friedman v. HHL Fin. Servs., Inc.*, No. 93 C 1545, 1993 WL 286487, at \*1–2 (N.D. Ill. July 29, 1993) (relying on *Mattson* as precedent to find that an FDCPA action is timely if it is commenced by the day prior to the anniversary of the date the letter was mailed).

164. No. 4:13-CV-2522 (CEJ), 2014 WL 5320265 (E.D. Mo. Oct. 17, 2014), *appeal docketed*, No. 14-3665 (8th Cir. Nov. 26, 2014).

165. *See id.* at \*3 (relying on the Eighth Circuit's *Mattson* precedent that the FDCPA's SOL is jurisdictional to hold that the equitable tolling doctrine does not apply). The date on which the FDCPA violation occurred is not at issue in *Hageman*, because the consumer concedes that his claim is time barred, unless the equitable tolling doctrine can apply to the FDCPA's SOL. *See id.*

166. *See supra* notes 144, 155.

167. *See supra* note 85 and accompanying text (stating that the discovery rule cannot apply to jurisdictional time limitations).

or the equitable tolling doctrine<sup>168</sup> to the FDCPA's SOL provision. Thus, while the Eighth Circuit's decision in *Hageman* likely will not address the validity of the *Mattson* test or the general scope of the circuit split,<sup>169</sup> it is possible that the court's decision could result in the Eighth Circuit's application of a general federal discovery rule to the FDCPA's SOL.<sup>170</sup>

## 2. The Ninth and Fourth Circuits: The Discovery Rule Is Applicable to the FDCPA's Statute of Limitations

Similar to the Eighth and Eleventh Circuits,<sup>171</sup> the Ninth and Fourth Circuits both recognize that an FDCPA violation occurs when a debt collector engages in the proscribed conduct.<sup>172</sup> However, the Ninth and Fourth Circuits differ from the Eighth and Eleventh Circuits in that they hold that the discovery rule applies to the FDCPA's SOL to delay the running of the one-year period.<sup>173</sup>

In 2009, the Ninth Circuit became the first circuit court to address the discovery rule's applicability to the FDCPA's SOL provision in *Mangum v. Action Collection Service*.<sup>174</sup> In *Mangum*, a debt collector released a consumer's debt information to a third party—her employer—on December 8, 2004.<sup>175</sup> On December 15, 2004, the consumer learned that the debt collector had given her employer this information.<sup>176</sup> Almost one year after learning this, on December 14, 2005, the consumer filed a complaint against the debt collector for violating §§ 1692c and 1692e of the FDCPA.<sup>177</sup>

In assuming that the violation occurs when a debt collector engages in a proscribed action, the court stated that the principal issue was whether the discovery rule could apply to the FDCPA's SOL.<sup>178</sup> However, before considering the discovery rule's applicability, the Ninth Circuit first analyzed whether the FDCPA's SOL provision could be equitably tolled by

168. See *supra* note 101 and accompanying text (noting the presumption that the equitable tolling doctrine cannot apply to jurisdictional time limitations).

169. The issue is not particularly relevant to the general circuit split regarding the FDCPA's SOL provision because the equitable tolling doctrine is only relevant in specific cases involving fraudulent concealment by a debt collector. See *supra* notes 70, 94 and accompanying text.

170. The Eighth Circuit has recognized the existence of a general federal discovery rule in other contexts. See *McDonough v. Anoka Cty.*, 799 F.3d 931, 940 (8th Cir. 2015) (“Traditionally, in federal-question cases, we have applied the discovery rule as the default [SOL] rule in the absence of a contrary directive from Congress.” (citing *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007))). Therefore, if the court determines that the FDCPA's SOL provision is nonjurisdictional, the Eighth Circuit could apply a general federal discovery rule to the FDCPA's SOL provision. See *supra* notes 86–87.

171. See *supra* text accompanying notes 148, 162.

172. See *infra* text accompanying notes 178, 200.

173. See *infra* notes 194–96 and accompanying text.

174. 575 F.3d 935 (9th Cir. 2009).

175. *Id.* at 938.

176. *Id.*

177. *Id.*

178. *Id.* at 939.

applying the jurisdictional versus nonjurisdictional analysis.<sup>179</sup> The court expressly stated that it did not agree with the Eighth Circuit's holding that the language of the provision is jurisdictional.<sup>180</sup> The Ninth Circuit reasoned that there exists a presumption that SOL provisions are nonjurisdictional and that this presumption can only be rebutted if there is "some significant indication to the contrary in the statutory language or in the legislative history."<sup>181</sup> Because no such language or legislative history exists for the FDCPA's SOL, the provision is nonjurisdictional, and thus it can be equitably tolled.<sup>182</sup>

While the equitable tolling doctrine's applicability was not particularly relevant to the facts in *Mangum*,<sup>183</sup> the Ninth Circuit recognized that some courts rely on the jurisdictional versus nonjurisdictional analysis to determine the discovery rule's applicability.<sup>184</sup> Those courts assume that if the equitable tolling doctrine cannot apply, then the discovery rule cannot either.<sup>185</sup> Thus, by confirming the applicability of the equitable tolling doctrine, the Ninth Circuit preempted that counterargument from being raised.<sup>186</sup>

Next, in analyzing the discovery rule's applicability, the Ninth Circuit began by restating the circuit's precedent that a general federal discovery rule exists.<sup>187</sup> According to the Ninth Circuit, the general rule for federal statutes is that the SOL begins to run when the plaintiff knows or has reason to know of the cause of action.<sup>188</sup>

The court recognized, however, that in reconfirming its precedent as to the existence of a general federal discovery rule, it needed to respond to the Supreme Court's holding in *TRW Inc.*<sup>189</sup> The Ninth Circuit stated that *TRW Inc.* did not overrule or seriously undermine its precedent.<sup>190</sup> The court reasoned that *TRW Inc.* applies only to situations in which the SOL provision at issue contains a limited exception for when the discovery rule

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179. *See id.* at 939 n.8; *see also supra* Part I.C.2.

180. *Mangum*, 575 F.3d at 940 n.14; *see Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 262 (8th Cir. 1992).

181. *Mangum*, 575 F.3d at 939–40.

182. *Id.* at 940; *see supra* text accompanying notes 100–02.

183. *Mangum* does not involve any fraudulent concealment by the debt collector of his conduct. *See supra* note 94 and accompanying text.

184. *Mangum*, 575 F.3d at 939 n.8 (citing *Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008), and *Felter v. Norton*, 412 F. Supp. 2d 118, 122 (D.D.C. 2006), for its holding that the discovery rule does not apply where the time limitation is a jurisdictional bar). The Ninth Circuit expressly stated, however, that in analyzing the equitable tolling doctrine's applicability, it was simply assuming, without deciding, that the discovery rule cannot apply to jurisdictional time limitations. *Id.*

185. *See id.* at 939.

186. *See id.*

187. *Id.* at 940; *see also supra* note 75.

188. *See Mangum*, 575 F.3d at 940.

189. *See TRW Inc. v. Andrews*, 534 U.S. 19, 22–23 (2001) (holding that the Ninth Circuit's presumption of a general federal discovery rule cannot apply to the Fair Credit Reporting Act, in which Congress explicitly created a limited exception for the discovery rule's application); *see also supra* Part I.C.1.

190. *See Mangum*, 575 F.3d at 940–41.

should apply.<sup>191</sup> Because no such exception exists in the FDCPA, the court found that *TRW Inc.* is of no consequence to the analysis of the discovery rule's applicability to the FDCPA's SOL.<sup>192</sup> Accordingly, the Ninth Circuit concluded that the discovery rule applies.<sup>193</sup> Thus, although the FDCPA violation occurred on the date that the debt collector released the plaintiff's debt information to a third party, the commencement of the SOL was delayed until the plaintiff discovered, or reasonably should have discovered, that the debt collector disclosed the information.<sup>194</sup>

In the 2013 case of *Lembach v. Bierman*,<sup>195</sup> the Fourth Circuit adopted the Ninth Circuit's position on the discovery rule's applicability to the FDCPA's SOL.<sup>196</sup> The debt collector in *Lembach* initiated foreclosure proceedings against the debtors on September 28, 2009, and, in doing so, filed fraudulent documents containing false signatures of the trustees.<sup>197</sup> The debtors however, were only capable of discovering the falsely signed documents once they were docketed on October 13, 2009.<sup>198</sup> One year later, on October 13, 2010, the debtors filed a complaint against the debt collector for violating §§ 1692e and 1692f of the FDCPA by threatening to take and actually taking actions that they could not rightfully take when they docketed the foreclosures with false affidavits.<sup>199</sup>

The Fourth Circuit recognized that the SOL begins to run when a debt collector sends the violative communication to a consumer; thus, while the Fourth Circuit did not adopt the *Mattson* test, the court did adopt the general view of the Eighth and Eleventh Circuits.<sup>200</sup> However, the Fourth Circuit also adopted the Ninth Circuit's approach in *Mangum*,<sup>201</sup> holding that the discovery rule applies to the FDCPA's SOL.<sup>202</sup> The court supported its decision to adopt the discovery rule by noting that the Supreme Court has acknowledged the fact that lower federal courts generally apply a discovery rule when the federal statute is silent on the

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191. *See id.*

192. *See id.* at 941.

193. *See id.*

194. *See id.*

195. 528 F. App'x 297 (4th Cir. 2013).

196. *See id.* at 302.

197. *Id.* at 300.

198. *Id.* at 301. In Maryland, which is where the foreclosure proceedings in this case took place, the lender initiates a foreclosure proceeding by filing an Order to Docket with the court, which requires the filing of several documents and affidavits. *See Foreclosure Proceedings in Maryland*, MD. ST. BAR ASS'N, <http://www.msba.org/publications/brochures/foreclosure.aspx> (last visited Feb. 26, 2016) [perma.cc/J9VJ-QWEL]. Once the lender proves he or she has the right to foreclosure, the debtor is then given notice of the foreclosure proceedings. *See id.* Thus, the debtor is not aware of the foreclosure proceedings until the Order to Docket is filed. *See id.*

199. *Lembach*, 528 F. App'x at 300–01.

200. *Id.* at 301–03 (citing *Akalwadi v. Risk Mgm't Alts., Inc.*, 336 F. Supp. 2d 492, 501 (D. Md. 2004), in which the District Court for the District of Maryland expressly stated that it follows *Mattson*'s approach: "Ordinarily, the [SOL] begins to run when communication that violates the FDCPA is sent").

201. *See supra* notes 193–94 and accompanying text.

202. *Lembach*, 528 F. App'x at 301–02.

issue.<sup>203</sup> Thus, the Fourth Circuit holds that the FDCPA's "limitations period does not begin to run until the plaintiff knows or has reason to know of [the cause of action]."<sup>204</sup>

*B. The Violation Occurs When the Debt Collector's Conduct Actually Harms the Consumer*

The Tenth, Fifth, and Second Circuits hold that an FDCPA violation does not occur until a debt collector's conduct actually harms a consumer.<sup>205</sup> In holding this view, these three circuits find it unnecessary to consider whether the discovery rule applies to the FDCPA.<sup>206</sup>

In 2002, the Tenth Circuit decided *Johnson v. Riddle*<sup>207</sup> and became the first circuit to adopt the position that an FDCPA violation does not occur until the consumer is actually harmed by the debt collector's conduct.<sup>208</sup> In *Riddle*, a debt collector filed a collection suit against a consumer on August 14, 1997, seeking to collect a debt plus an unlawful statutory penalty of \$250.<sup>209</sup> Ten days later, on August 24, 1997, the consumer was served with the summons and complaint.<sup>210</sup> On August 24, 1998, exactly one year after being served, the consumer filed a complaint against the debt collector for violating § 1692f(1) of the FDCPA.<sup>211</sup> The question before the Tenth Circuit was whether the FDCPA violation occurred when the debt collector filed the collection suit (in other words, when the debt collector engaged in the proscribed conduct) or when the consumer was served with the summons and complaint (meaning when the consumer was actually harmed by the debt collector's conduct).<sup>212</sup>

The Tenth Circuit's analysis strongly focused on the connection between the cause of action's accrual and the harm.<sup>213</sup> The court noted that in the context of a debt collector's wrongful instigation of a collection suit, a consumer does not have a "complete and present cause of action" until he or she is served.<sup>214</sup> The court presented two policy reasons in support of its finding. First, the debt collector's filing of the unlawful suit is only half of the actionable wrong.<sup>215</sup> If a debt collector decides to abandon the suit *after* filing the complaint but *before* serving the consumer, then it cannot be said that the debt collector truly violated the FDCPA because he or she did not

203. *Id.* at 302 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001)).

204. *Id.* at 301–02 (citing *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 940 (9th Cir. 2009)).

205. *See infra* text accompanying notes 208, 228, 253.

206. *See infra* notes 226, 247, 273 and accompanying text; *see also supra* note 74.

207. 305 F.3d 1107 (10th Cir. 2002).

208. *See id.* at 1115.

209. *Id.* at 1112; *see* 15 U.S.C. § 1692f(1) (2012) (establishing civil liability for debt collectors who attempt to collect amounts not permitted by law).

210. *Riddle*, 305 F.3d at 1112.

211. *Id.*

212. *See id.* at 1113.

213. *See id.*; *supra* note 66 and accompanying text.

214. *Riddle*, 305 F.3d at 1113 (citing *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997)).

215. *Id.* at 1114.



actually collect or attempt to collect the debt.<sup>216</sup> Committing half of an actionable wrong does not suffice to create a “complete and present cause of action.”<sup>217</sup>

Second, the court presented an analysis concerning the risk of creating a perverse incentive.<sup>218</sup> If the SOL begins to run with the debt collector’s filing of the suit as opposed to the service of process, then a debt collector could delay service long enough to block effectively the consumer’s ability to bring an FDCPA claim.<sup>219</sup> By delaying service for a year, the debt collector could keep the consumer unaware of the lawsuit—and thus unaware of his or her FDCPA cause of action—for the entirety of the running of the FDCPA’s SOL.<sup>220</sup> In effect, the SOL for the consumer’s FDCPA claim would expire before the consumer even became aware of it.<sup>221</sup> Thus, to prevent such a perverse incentive, the violation should occur when the consumer is served.<sup>222</sup>

In addition, the Tenth Circuit noted that it could have considered the discovery rule as an alternative method to conclude that the consumer’s claim accrued upon service; however, the court chose not to justify its holding on that basis.<sup>223</sup> In fact, the court refrained from deciding the existence and applicability of a general discovery rule even though it acknowledged that the court normally adheres to the traditional discovery rule in determining when a federal SOL begins to run.<sup>224</sup> The court reasoned that the Supreme Court has rendered the scope of the general federal discovery rule—and, thus, the Tenth Circuit’s adherence to such a rule—uncertain.<sup>225</sup> Additionally, the court stated that an analysis of the discovery rule’s applicability was unnecessary in light of its position that in the context of an improper collection suit, the violation occurs when the consumer is served.<sup>226</sup>

In the 2013 case of *Serna v. Law Office of Joseph Onwuteaka, P.C.*,<sup>227</sup> the Fifth Circuit also held that an FDCPA violation does not occur until a consumer is actually harmed by a debt collector’s conduct.<sup>228</sup> After the

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216. *See id.* at 1113–14. To violate § 1692f(1), the debt collector must collect or attempt to collect an amount to which he or she is not authorized. *See* 15 U.S.C. § 1692f(1) (2012).

217. *Riddle*, 305 F.3d at 1114.

218. *See id.*

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.* at 1113 n.3.

224. *See id.*

225. *Id.* (citing *TRW Inc. v. Andrews*, 534 U.S. 19 (2001)) (“[T]he continuing scope of the traditional federal discovery rule, at least in the kind of claim asserted here, has been rendered uncertain by dicta in *TRW Inc. v. Andrews*.”). Thus, the Tenth and Ninth Circuits are at odds as to their interpretations of *TRW Inc.* *See supra* text accompanying notes 189–94.

226. *See Riddle*, 305 F.3d at 1113 n.3.

227. 732 F.3d 440 (5th Cir. 2013). It should be noted that on October 14, 2015, the debt collector in *Serna* filed a Petition for Writ of Certiorari. *See* Petition for Writ of Certiorari, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, No. 15-511 (Oct. 14, 2015).

228. *See Serna*, 732 F.3d at 446.

consumer in *Serna* defaulted on a loan, a debt collector who had purchased the loan sought to recover on it.<sup>229</sup> The debt collector filed a collection suit against the consumer on July 6, 2010, and served him process on August 14, 2010.<sup>230</sup> On August 12, 2011—less than a year after being served—the consumer filed a complaint against the debt collector for violating § 1692i(a)(2) of the FDCPA.<sup>231</sup> The question before the Fifth Circuit was whether the violation of § 1692i(a)(2) occurred when the debt collector filed a suit against the consumer in an improper district court, or, alternatively, when the consumer was served.<sup>232</sup>

The Fifth Circuit's analysis heavily relied on congressional intent. Specifically, in noting Congress's intent to create a remedial statute,<sup>233</sup> the court concluded that the issue must be analyzed from the perspective of serving that remedial purpose.<sup>234</sup> Similar to the Tenth Circuit's finding in *Riddle*,<sup>235</sup> the court found that the FDCPA's remedial nature is best served by connecting the violation to the harm that Congress sought to remedy by enacting the FDCPA.<sup>236</sup> The court found that in the context of filing a collection suit in a distant and inconvenient forum, the resulting harm is that the consumer is burdened with the obligation to engage in litigation in a distant forum or else risk default.<sup>237</sup> The consumer is only harmed once he or she is served with the summons and complaint; prior to being served, the consumer is not yet required to respond to the suit in a distant forum.<sup>238</sup> Thus, in the context of the wrongful instigation or filing of a collection suit, the FDCPA's remedial nature is best served by tying the violation to the service of process, which is the harm that Congress sought to remedy.<sup>239</sup>

The court's decision was guided by the Fifth Circuit's well-established precedent that when a defendant's wrongful act does not coincide with the plaintiff's harm, the SOL does not begin to run until the plaintiff is harmed.<sup>240</sup> Moreover, the court reasoned that this analysis aligns with the

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229. *Id.* at 441.

230. *Id.* at 441–42.

231. *Id.* at 442. Section 1692i(a)(2) seeks to prevent debt collectors from unfairly pursuing debt collection actions against consumers in distant forums with the goal of receiving default judgments. *See id.* at 447; 15 U.S.C. § 1692i(a)(2) (2012).

232. *See Serna*, 732 F.3d at 442.

233. *Id.* at 445 (“Congress . . . has legislatively expressed a strong public policy disfavoring dishonest, abusive, and unfair consumer debt collection practices, and *clearly intended the FDCPA to have a broad remedial scope.*” (emphasis added) (quoting *Hamilton v. United Healthcare of La.*, 310 F.3d 385, 392 (5th Cir. 2002))).

234. *See id.*

235. *See supra* notes 213–14 and accompanying text.

236. *See Serna*, 732 F.3d at 445.

237. *See id.* Similarly, in the context of the wrongful instigation of a collection suit, the harm is that a consumer is required to waste time and money litigating a frivolous suit to avoid a default judgment. *See Benzemann v. Citibank N.A.*, 806 F.3d 98, 102–03 (2d Cir. 2015).

238. *See Serna*, 732 F.3d at 446.

239. *See id.*

240. *Id.* at 445–46 (citing *Frame v. City of Arlington*, 657 F.3d 215, 238 (5th Cir. 2011)).

Tenth Circuit’s “complete and present cause of action” analysis as applied in *Riddle*.<sup>241</sup>

The Fifth Circuit also reasoned that tying the violation to the service of process (meaning the consumer’s harm) best serves the FDCPA’s remedial nature because it preserves the availability of relief for consumers.<sup>242</sup> The court supported its reasoning by presenting the Tenth Circuit’s perverse incentive<sup>243</sup> analysis: if the filing of the complaint were to trigger the running of the SOL, a debt collector could purposely delay service in order to deprive a debtor of the opportunity to bring an FDCPA claim.<sup>244</sup> To ensure that an injured consumer is given an adequate opportunity to seek relief under the FDCPA, it is necessary to hold that the violation occurs only once the consumer is served.<sup>245</sup>

Similar to the Tenth Circuit’s conclusion in *Riddle*,<sup>246</sup> the Fifth Circuit found that it was not obligated to decide the discovery rule’s applicability to the FDCPA’s SOL because its holding precluded such an analysis.<sup>247</sup> Upon being served, a consumer would discover or reasonably should discover the debt collector’s conduct.<sup>248</sup> Because the Fifth Circuit holds that the violation does not occur until the consumer is served, the discovery rule is inapplicable.<sup>249</sup> Moreover, the Fifth Circuit stated that its holding has no bearing on whether a discovery rule applies to the FDCPA’s SOL and that such an analysis would require the court to first determine whether the FDCPA’s SOL provision is jurisdictional or nonjurisdictional.<sup>250</sup> Therefore, it remains unclear whether the Fifth Circuit would apply the discovery rule in an appropriate case.<sup>251</sup>

Finally, in deciding the 2015 case of *Benzemann v. Citibank N.A.*,<sup>252</sup> the Second Circuit found that an FDCPA violation does not occur until a consumer is harmed.<sup>253</sup> Specifically, where a debt collector sends an unlawful restraining notice to a bank, the FDCPA violation does not occur until the bank freezes the debtor’s account.<sup>254</sup> In *Benzemann*, a debt collector mailed a restraining notice to Citibank on December 6, 2011, to ask the bank to freeze a consumer’s account based on a default judgment against him.<sup>255</sup> The default judgment, however, was actually entered against the consumer’s brother, not the consumer.<sup>256</sup> On December 14,

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241. *Id.* at 448 (quoting *Johnson v. Riddle*, 305 F.3d 1107, 1114 (10th Cir. 2002)).

242. *Id.* at 445.

243. *See supra* text accompanying notes 219–21.

244. *See Serna*, 732 F.3d at 445.

245. *See id.*

246. *See Riddle*, 305 F.3d at 1113 n.3.

247. *See Serna*, 732 F.3d at 446 n.12.

248. *See id.*

249. *See id.*

250. *See id.* at 449 n.18.

251. *See supra* notes 82–89 and accompanying text.

252. 806 F.3d 98 (2d Cir. 2015).

253. *See id.* at 102.

254. *See id.* at 103.

255. *Id.* at 100.

256. *Id.*

2011, Citibank froze the consumer's account.<sup>257</sup> On December 14, 2012, one year after Citibank froze his account, the consumer filed a complaint against the debt collector for violating §§ 1692e and 1692f of the FDCPA.<sup>258</sup> The question before the Second Circuit was whether the violation occurred when the debt collector mailed the restraining notice to the bank (in other words, when the debt collector engaged in the proscribed conduct) or instead when the bank froze the plaintiff's account (meaning when the consumer was harmed).<sup>259</sup>

The Second Circuit found persuasive the Tenth and Fifth Circuits' conclusions in *Riddle*<sup>260</sup> and *Serna*<sup>261</sup> that an FDCPA violation does not occur until a consumer has a "complete and present cause of action."<sup>262</sup> The court cited the Second Circuit precedent that "a cause of action accrues when conduct that invades the rights of another has caused injury."<sup>263</sup> Therefore, a consumer does not have a "complete and present cause of action" until he or she suffers a harm.<sup>264</sup> The debt collector in *Benzemann* conceded that the consumer did not have a right to sue him before Citibank froze his account.<sup>265</sup> Thus, if the court were to hold that the violation occurred when the debt collector mailed the restraining notice to the bank, the SOL would have already been running for several days by the time the plaintiff actually had a right to file the FDCPA suit against the debt collector.<sup>266</sup>

In addition, the Second Circuit applied the Fifth Circuit's "remedial nature" reasoning,<sup>267</sup> combined with a modified version of the "perverse incentive" analysis as introduced by the Tenth Circuit and subsequently adopted by the Fifth Circuit.<sup>268</sup> Specifically, the FDCPA's remedial purpose would not be served by tying the violation to the mailing of the restraining notice because no harm occurred at that point.<sup>269</sup> In addition, if the violation occurs when the debt collector mails the restraining notice, the already limited one-year time period in which FDCPA plaintiffs must file their suits would be narrowed even further.<sup>270</sup> Thus, to ensure that a

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257. *Id.*

258. *Id.*

259. *Id.* at 101.

260. *See Johnson v. Riddle*, 305 F.3d 1107, 1113–14 (10th Cir. 2002).

261. *See Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 448–49 (5th Cir. 2013).

262. *Benzemann*, 806 F.3d at 101–02 (quoting *Serna*, 732 F.3d at 445–46); *see supra* text accompanying notes 214, 236.

263. *Benzemann*, 806 F.3d at 101 (quoting *Leonhard v. United States*, 633 F.2d 599, 613 (2d Cir. 1980)).

264. *Id.*

265. *Id.*

266. *See id.*

267. *See supra* notes 233–45 and accompanying text.

268. *See supra* notes 218–21, 243–45 and accompanying text.

269. *See Benzemann*, 806 F.3d at 101.

270. *Id.* at 102 ("In this case, for example, Citibank did not freeze Benzemann's account until eight days after receiving the restraining notice from [the debt collector]. It is not difficult to imagine that in future cases, the various internal processes and bureaucracies of banking institutions might create an even longer delay.").

consumer has adequate relief under the FDCPA, the violation must be tied to the consumer's harm, which, in *Benzemann*, was the freezing of the consumer's bank account.<sup>271</sup>

In addition to the Tenth and Fifth Circuits,<sup>272</sup> the Second Circuit also chose not to decide whether the FDCPA's SOL is subject to the discovery rule because its holding that the violation did not occur until the plaintiff's bank account was frozen precluded that analysis.<sup>273</sup> However, the court recognized that on remand, the district court might have to decide the discovery rule's applicability.<sup>274</sup> In deciding *Benzemann*, the Second Circuit assumed that the consumer's bank account was frozen on December 14, 2011; however, there was in fact uncertainty about whether the consumer's bank account was frozen on December 14, 2011, or on December 13, 2011.<sup>275</sup> Two facts that are certain, however, are that the consumer discovered that his account was frozen on December 14, 2011, and that he filed his complaint on December 14, 2012.<sup>276</sup> Therefore, the Second Circuit acknowledged that if on remand the lower court finds that the bank account was actually frozen on December 13, 2011, the suit will be time barred unless the district court decides to apply a discovery rule.<sup>277</sup>

In conducting its analysis, the Second Circuit expressed skepticism toward the *Mattson* test.<sup>278</sup> The court found that certain concerns present in *Mattson*<sup>279</sup> and *Maloy*<sup>280</sup> were absent in *Benzemann*.<sup>281</sup> In particular, the court concluded that the first prong of the *Mattson* test was inapplicable because the debt collector's mailing of the restraining notice to a bank was not his last opportunity to comply with the FDCPA.<sup>282</sup> Rather, the court reasoned that even after mailing the restraining notice to the bank, the debt collector still could have contacted the bank and requested that it not freeze the account.<sup>283</sup> Further, because it is no easier to determine the date of the mailing of the restraining notice than it is to determine the date of the freeze itself, the court also found the second prong of the *Mattson* test inapplicable.<sup>284</sup>

Moreover, the Second Circuit noted that in establishing and applying the *Mattson* test, neither the Eighth Circuit nor the Eleventh Circuit acknowledged the fact that a cause of action does not become "complete and present" for limitations purposes until the plaintiff can file suit and

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271. *Id.*

272. *See supra* notes 225–26, 247–49 and accompanying text.

273. *See Benzemann*, 806 F.3d at 103–04 n.2.

274. *See id.*

275. *See id.*

276. *See id.* at 101.

277. *See id.* at 103–04 n.2.

278. *See id.* at 103.

279. *See Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992).

280. *See Maloy v. Phillips*, 64 F.3d 607, 608 (11th Cir. 1995).

281. *See Benzemann*, 806 F.3d at 103.

282. *See id.*

283. *See id.*

284. *See id.*

obtain relief.<sup>285</sup> Therefore, both circuits overlooked the fundamental issue that their holdings caused the SOL to begin running before the plaintiffs in those cases were lawfully permitted to file their suits.<sup>286</sup>

Finally, it should be noted that while the Tenth, Fifth, and Second Circuits all conclude that it would defy logic to allow an SOL to begin running before a consumer is permitted to file the suit, this conclusion is based on the assumption that a consumer is not permitted to file a suit until he or she suffers an actual injury.<sup>287</sup> The issue, however, is that this assumption is heavily disputed among federal courts.<sup>288</sup> In fact, the Supreme Court recently granted certiorari in *Robins v. Spokeo, Inc.*,<sup>289</sup> in which it will decide whether an individual must directly suffer an actual injury to have standing to file a claim in federal court.<sup>290</sup>

The chronological analysis of these seven circuit court decisions yields the conclusion that a wide variety of conflicting analyses exists for a single issue. Federal courts must resolve these inconsistent analyses in order to provide consumers with uniform outcomes and predictability. Only by achieving such uniformity and predictability will the individual and national economic harms systematically caused by the debt collection industry begin to subside. Thus, Part III attempts to weed out the issues with each analysis and to reconcile the effective aspects of those analyses to produce a single, straightforward approach for federal courts to unanimously adopt.

### III. RESOLVING THE CIRCUIT SPLIT: ANALYZING THE SHORTCOMINGS OF THE CURRENT APPROACHES AND PRESENTING A TWO-STEP COMPROMISE

Unless Congress amends the language of the FDCPA's SOL or the Supreme Court grants a writ of certiorari pertaining to the issue,<sup>291</sup> the federal district and circuit courts will remain responsible for resolving the split. Thus, federal lower courts must work together to adopt a uniform analysis for determining when the violation occurs. In order to render an effective and practical resolution to the split, the analysis must be one that

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285. *Id.* at 103 n.1.

286. *See id.*

287. *See supra* text accompanying notes 214–15, 240, 263–66.

288. *See* David v. Alphin, 704 F.3d 327, 338–39 (4th Cir. 2013) (rejecting the argument that the mere deprivation of a statutory right is sufficient to constitute an injury for Article III standing); Beaudry v. TeleCheck Servs. Inc., 579 F.3d 702, 707 (6th Cir. 2009) (holding that an actual injury is not required for a plaintiff to have standing to bring an FCRA action); Kendall v. Emps. Ret. Plan of Avon Prods., 561 F.3d 112, 121 (2d Cir. 2009) (stating that an injury-in-fact is required to have constitutional standing); Murray v. GMAC Mortg. Corp., 434 F.3d 948, 952–53 (7th Cir. 2006) (holding that statutory damages are available under FCRA without proof of injury).

289. 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 82 U.S.L.W. 3689 (U.S. Apr. 27, 2015) (No. 13-1339).

290. *See id.* at 413–14.

291. *See* Petition for Writ of Certiorari, *supra* note 227.

federal courts would be willing to uniformly adopt on a national level,<sup>292</sup> as well as one that is likely to promote the FDCPA's objectives.<sup>293</sup>

Part III.A analyzes the specific problems with each of the approaches currently used by the circuit courts. Part III.B argues that federal courts should adopt the following guidelines to determine when an FDCPA violation occurs: (1) a violation occurs, and a cause of action accrues, when a consumer suffers the kind of harm for which Congress intended to provide a private damages remedy; and (2) where a debt collector fraudulently conceals his or her violative conduct from an injured consumer, the equitable tolling doctrine should apply to toll the running of the FDCPA's SOL.

#### A. Issues with Each Circuit's Current Approach

Part III.A.1 argues that the *Mattson* test is too vague and flexible to actually satisfy the objectives of the FDCPA. Part III.A.2 focuses on federal courts' reluctance to adopt a general federal discovery rule. Finally, Part III.A.3 discusses how the Tenth, Fifth, and Second Circuits' approaches are too convoluted to produce efficiency and uniformity.

##### 1. The Issues with the *Mattson* Test: The Standard Is Too Vague and It Incorrectly Views the FDCPA As an Anti-Debt Collector Statute

This Note rejects the Eighth and Eleventh Circuits' application of the *Mattson* test<sup>294</sup> to determine the date on which the violation occurs for the purposes of an FDCPA claim. There are two main issues with the *Mattson* approach. First, due to the vague language of the *Mattson* test, the analysis provides courts with very little guidance as to the date on which the violation occurs.<sup>295</sup> This creates a risk that the widespread application of the *Mattson* test could allow courts to reach contradictory conclusions for similar FDCPA violations. As a result, the FDCPA's primary objective,

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292. See *supra* Part I.D (concluding that one of the primary objectives of the federal judicial system is to achieve uniform interpretations and applications of federal statutes).

293. See *supra* Part I.A (stating that one of the FDCPA's main objectives is to provide consumers with adequate nationwide protection against the detrimental injuries caused by debt collection abuse).

294. The *Mattson* test asks: First, when was the debt collector's "last opportunity to comply with the FDCPA"? And, second, is that date "fixed by objective and visible standards, . . . easy to determine, [and] ascertainable by both parties"? *Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992).

295. For example, in *Benzemann*, the Second Circuit concluded that the *Mattson* test was inapplicable in the context of a bank account freeze because the debt collector's mailing of a restraining notice to the bank is not his or her last opportunity to comply with the FDCPA, and it is no easier to determine the date of the mailing of the restraining notice than the date of the freeze itself. See *Benzemann v. Citibank N.A.*, 806 F.3d 98, 103 (2d Cir. 2015). It seems, however, that the Second Circuit could have simply concluded that the debt collector's last opportunity to comply with the FDCPA is the point right before the freezing of the bank account and that the date on which the bank account is frozen is easily ascertainable to both parties. See *id.*; *Mattson*, 967 F.2d at 261.

which is to provide consumers with uniform, nationwide protection against debt collection abuse, would remain unattained.

For example, consider a situation in which a debt collector wrongfully filed a collection suit against a consumer and hired a process server to serve the consumer with the summons and complaint.<sup>296</sup> In applying the *Mattson* test, a court could conclude that the debt collector's last opportunity to comply with the FDCPA was when the debt collector's conduct harmed the consumer (meaning when the consumer was served with the summons and complaint). At any point prior to the consumer being served, the debt collector could have called the process server and cancelled the request to serve the consumer. Alternatively, a court could conclude that the debt collector's last opportunity to comply with the FDCPA was when the debt collector engaged in the violative conduct; however, a court could find that the debt collector engaged in the violative conduct when he or she filed the complaint, hired the process server, or gave the process server the summons and complaint to serve to the consumer—all of which could occur on different dates. Thus, despite applying the same analysis to the exact same situation, courts could reach a variety of conclusions under the *Mattson* test. When the FDCPA violation at issue is not as clean cut as the classic instance of the mailing of a collection letter, a vague and flexible standard such as the *Mattson* test allows inconsistency and unpredictability to persist.

The second issue with the *Mattson* test is that it implicitly views the FDCPA as an anti-debt collector statute. The analysis looks solely to the debt collector's actions without giving any consideration to the consumer's harm.<sup>297</sup> The issue with this view is that the primary purpose of the FDCPA is to protect consumers, not to punish debt collectors.<sup>298</sup> The FDCPA was enacted to provide consumers with a civil remedy for injuries that resulted from debt collectors' acts.<sup>299</sup> Thus, the focus of the *Mattson* test is misplaced. Due to these issues, the unanimous adoption of the *Mattson* test likely would prove unsuccessful in achieving consistent application of the FDCPA and would also fail to promote the FDCPA's objectives.

## 2. The Existence of a General Federal Discovery Rule Is Too Unclear to Be Applied Nationally

This Note argues that, ideally, all federal courts would adopt the view that a general federal discovery rule exists and that it applies to the

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296. Assume that the filing of the suit is wrongful because the debt collector is attempting to collect an amount to which he or she is not entitled. See 15 U.S.C. § 1692f(1) (2012).

297. The first prong of the *Mattson* test is to determine the date of the debt collector's last opportunity to comply with the FDCPA. See *Mattson*, 967 F.2d at 261. Nothing in the analysis focuses on the consumer's harm.

298. S. REP. NO. 95-382, at 1 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696 (“[The FDCPA’s] purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices.”).

299. See *id.* at 2. The Committee determined that one reason the legislation was necessary was that only a small number of the then-existing state laws provided consumers with a civil remedy against debt collection abuse. See *id.*



FDCPA's SOL provision.<sup>300</sup> Such an approach is attractive because its application would result in a compromise between the two ends of the split,<sup>301</sup> while also resolving the issue as to when the violation occurs. Specifically, the SOL would begin to run once the plaintiff knows or should reasonably know about the debt collector's actions or conduct.<sup>302</sup>

The issue with this approach, however, is that not all federal circuit courts would be willing to accept the position that a general federal discovery rule exists. For example, when the Southern District of New York decided *Benzemann*, the court held that the discovery rule clearly did not apply to the FDCPA's SOL.<sup>303</sup> In fact, the court found that the language of the FDCPA's SOL provision "stands in contrast to those statutes that either explicitly provide for a discovery rule or at least delay the start of the [SOL] until the plaintiff's claim accrues."<sup>304</sup>

Moreover, the Supreme Court's decision in *TRW Inc.* has made it even more unlikely that federal courts would unanimously recognize the existence of a general federal discovery rule.<sup>305</sup> In fact, the *TRW Inc.* decision seems to have pushed courts away from such acceptance. For instance, even though the Tenth Circuit has normally adhered to the traditional discovery rule in determining when a federal SOL begins to run, the court declined to consider whether a discovery rule applies to the FDCPA SOL in *Johnson v. Riddle* because the "continuing scope of the traditional federal discovery rule . . . has been rendered uncertain by dicta in *TRW Inc. v. Andrews*."<sup>306</sup> Thus, regardless of how attractive the discovery rule approach may be, it is highly unlikely that federal courts would uniformly accept this approach precisely because of the uncertainty created by *TRW Inc.*

### 3. The Tenth, Fifth, and Second Circuits' Approaches Are Too Convoluted to Be Successfully Applied to All FDCPA Violations on a National Level

The Tenth, Fifth, and Second Circuits seem to be moving in the right direction by focusing on consumers' injuries, rather than debt collectors' actions.<sup>307</sup> The issue, however, is that the Tenth, Fifth, and Second Circuits' approaches are too convoluted to act as a straightforward analysis that lower federal courts can easily apply on a national level. These

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300. See *supra* Part I.C.1.

301. This Note argues that a compromise would be the best solution in the context of the FDCPA's SOL, because in order to be effective and practical, the resolution must be one that all federal courts would unanimously be willing to adopt.

302. See *supra* Part I.C.1.

303. *Benzemann v. Citibank N.A.*, No. 12 Civ. 9145(NRB), 2014 WL 2933140, at \*6 (S.D.N.Y. June 27, 2014), *vacated in part*, 806 F.3d 98 (2d Cir. 2015).

304. *Id.*

305. See *TRW Inc. v. Andrews*, 534 U.S. 19, 27–28 (2001); *supra* notes 79–80 and accompanying text.

306. *Johnson v. Riddle*, 305 F.3d 1107, 1113 n.3 (10th Cir. 2002) (citing *TRW Inc.*, 534 U.S. 19).

307. See *supra* notes 298–99.

circuits' various approaches can be summarized as follows: the "complete and present cause of action" approach;<sup>308</sup> the "perverse incentive" analysis;<sup>309</sup> and the "remedial nature" approach.<sup>310</sup> Not only are some of these approaches difficult to define, but it is also difficult to determine where one approach starts and another ends. When there are too many factors to consider at once, the risk of inconsistency and unpredictability in any given case continues to exist. Moreover, consumers themselves would have difficulty determining the timeliness of their claims before beginning the litigation process.<sup>311</sup>

Furthermore, the Tenth, Fifth, and Second Circuits' "perverse incentive" approach presents a specific issue.<sup>312</sup> This approach suggests that it is necessary to hold that the violation occurs when the consumer is harmed, because otherwise the debt collector could delay the consumer's harm until after the SOL has expired.<sup>313</sup> Each circuit, however, fails to address the fact that the discovery rule would resolve this exact issue it presents as a reason for holding that the violation occurs when the consumer is harmed by the debt collector's conduct.<sup>314</sup> Specifically, if the violation occurs when the debt collector files suit (in other words, when the debt collector engages in the proscribed conduct) and the debt collector does not serve the consumer until one year later, then the discovery rule would delay the running of the FDCPA's SOL until the consumer discovers his or her cause of action.<sup>315</sup> Failure to address this weakens the "perverse incentive" analysis.

As the various circuit court decisions indicate, lower federal courts desperately need clear guidance, and the injured consumers desperately need predictability and certainty as to the scope of their protections against abusive and deceptive debt collectors.

*B. Balancing Consistency with Flexibility:  
Resolving the Circuit Split with a Two-Part Analysis*

To resolve the circuit split presented in this Note, federal courts should adopt the following two-part analysis to determine when the violation occurs for the purpose of triggering the FDCPA's SOL: (1) a violation occurs, and a cause of action accrues, when a consumer suffers the kind of harm for which Congress intended to provide a private damages remedy; and (2) where a debt collector fraudulently conceals his or her violative conduct from an injured consumer, the equitable tolling doctrine should apply to toll the running of the FDCPA's SOL. The proposed guidelines

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308. See *supra* text accompanying notes 213–14, 240–41, 262–66.

309. See *supra* text accompanying notes 218–21, 243–45, 268–71.

310. See *supra* text accompanying notes 233–36, 267–71.

311. One purpose of uniformity is to reduce litigation expenses. See Thompson, *supra* note 106, at 480–81.

312. See *supra* text accompanying notes 218, 243, 268.

313. See *supra* text accompanying notes 218–21, 243–45, 268–71.

314. See generally *supra* Part II.B.

315. See *supra* notes 71–74 and accompanying text.

present a straightforward analysis that lower federal courts can easily follow and that injured consumers can easily apply to determine the timeliness of their claims before pursuing litigation.

1. Determine the Date on Which the Consumer Suffered  
the Kind of Harm for Which Congress Intended  
to Provide a Private Damages Remedy

The first prong of the proposed analysis includes a basic premise presented in Part I.C of this Note: an FDCPA violation occurs when a consumer's cause of action accrues.<sup>316</sup> The first step to determining when the violation occurs is to understand that this connection exists. Circuit courts do not dispute that the violation occurs when the cause of action accrues;<sup>317</sup> circuit courts do, however, disagree over when the cause of action accrues.<sup>318</sup> In *Benzemann*, the Second Circuit concluded that the Eighth and Eleventh Circuits overlook the fact that their holdings cause the SOL to begin running before a consumer is even allowed to file the suit.<sup>319</sup> The Second Circuit's conclusion relies on the assumption that a court would reject a consumer's suit prior to him or her suffering an injury because a cause of action cannot accrue until a plaintiff suffers an injury.<sup>320</sup> However, it is not necessarily true that a plaintiff must suffer an actual injury in order to have a cause of action. In fact, this is a heavily contested issue that the Supreme Court is currently deciding in *Robins v. Spokeo, Inc.*<sup>321</sup> Thus, it is not obvious that a court would deny a consumer the ability to file an FDCPA claim prior to being harmed by the debt collector's conduct.

Rather, to reach its conclusion, the Second Circuit needed to rely on something more than a bare assumption that a cause of action could not accrue until a plaintiff suffers an injury. This Note therefore presents a reason that a cause of action under the FDCPA cannot accrue until the consumer suffers an injury. An analysis of the legislative history of the

316. *See supra* Part I.C.

317. In every case analyzed in this Note, the circuit courts have assumed that the SOL begins to run once the violation occurs. *See supra* Part II.A–B.

318. *See supra* Part II.A–B.

319. *See Benzemann v. Citibank N.A.*, 806 F.3d 98, 103 n.1 (2d Cir. 2015); *supra* notes 285–86 and accompanying text.

320. *See Benzemann*, 806 F.3d at 101–02 (finding that it is a general principle of law that a cause of action accrues when conduct causes injury). The Second Circuit relies on Supreme Court precedent to conclude that the cause of action must accrue when the SOL begins to run; however, that issue is not in dispute. *See id.* (citing *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997); *Reiter v. Cooper*, 507 U.S. 258, 267 (1993)). Rather, the issue is whether the cause of action accrues—and the SOL begins to run—only once the plaintiff is injured. In rebutting the Eighth and Eleventh Circuits' conclusions that the cause of action can accrue before the plaintiff is injured, the Second Circuit relied solely on Second Circuit precedent. *See id.* at 101 (citing *Leonhard v. United States*, 633 F.2d 599, 613 (2d Cir. 1980)). In doing so, the Second Circuit ignored the fact that not all circuits agree on that proposition.

321. *See Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 82 U.S.L.W. 3689 (U.S. Apr. 27, 2015) (No. 13-1339).

FDCPA proves that the federal statute's primary "purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices."<sup>322</sup> While such protection results in the punishment of debt collectors, the punishment can be viewed as solely a means to an end. Moreover, the FDCPA's drafters viewed the statute as "primarily self-enforcing,"<sup>323</sup> noting that "consumers who have been subjected to collection abuses will be enforcing compliance."<sup>324</sup> Thus, this Note argues that the federal courts fail to promote the FDCPA's objectives unless they consider the cause of action to accrue when a consumer suffers the kind of harm for which the FDCPA was meant to provide a private damages remedy.

## 2. Determine Whether the Case Is One in Which the Equitable Tolling Doctrine Should Apply

One issue that might arise in certain cases if federal courts only apply the first prong is that a debt collector might commit an act that injures the consumer, but then conceal the injury from the consumer until the one-year time limitation has already ended.<sup>325</sup> Because the widespread acceptance of the discovery rule is unlikely,<sup>326</sup> the second prong of the proposed analysis is to determine whether the equitable tolling doctrine should apply.<sup>327</sup> If federal courts were to uniformly agree that the FDCPA's SOL provision is nonjurisdictional, then equitable tolling would delay the running of the SOL in cases where the debt collector fraudulently conceals his or her FDCPA violation.

The application of the equitable tolling doctrine acts as a compromise for courts that would reject the discovery rule approach. Just because the discovery rule does not apply does not mean that the SOL cannot be equitably tolled.<sup>328</sup> Specifically, the only analysis required to determine whether the SOL can be equitably tolled is whether the time limitation in the FDCPA is jurisdictional.<sup>329</sup> The Eighth Circuit is the only circuit that holds that the FDCPA's SOL is jurisdictional,<sup>330</sup> and over the years other courts have strongly criticized this holding.<sup>331</sup> Therefore, the hope is that in

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322. S. REP. NO. 95-382, at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

323. *Id.* at 5.

324. *Id.*

325. For example, the debt collector could file a collection suit against the consumer, convince the consumer that he or she need not file an answer or show up to court, and then receive a default judgment against the consumer. The debt collector could then delay collecting on the suit for one year or more in order to fraudulently conceal his violation of the FDCPA.

326. *See supra* notes 303–06 and accompanying text.

327. *See supra* note 94 and accompanying text.

328. Unlike the discovery rule, equitable tolling is usually only considered appropriate where a plaintiff was unaware of his or her cause of action due to misleading conduct of the defendant. *See Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 80 (2d Cir. 2003).

329. *See supra* text accompanying notes 100–02.

330. *See supra* note 155.

331. *See, e.g., Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 940 n.14 (9th Cir. 2009) (noting that the statement regarding the jurisdictional nature of the FDCPA's SOL in

deciding *Hageman v. Barton*,<sup>332</sup> the Eighth Circuit will overrule this part of its holding in *Mattson* and find that the FDCPA's SOL provision is nonjurisdictional.

If federal courts continue to apply the analyses presently in place, nonuniform protection for consumers would persist regardless of the substantive uniformity achieved by the courts. Thus, this two-part approach acts as a compromise for the current analyses. The combination of these two analyses would result in a more predictable standard for consumers, as well as uniform outcomes across the nation.

#### CONCLUSION

Lower federal courts have interpreted and applied the FDCPA's SOL provision so inconsistently that the statute's overall effectiveness in providing consumers with uniform protection against deceptive debt collection practices has been significantly impaired. Consumers will continue to receive inconsistent protection under the FDCPA unless federal courts consciously engage in efforts to interpret uniformly the SOL provision. Only by engaging in such efforts will federal courts be able to reach just outcomes consistently on a national level and to provide consumers and debt collectors with predictability.

To facilitate efforts to achieve uniform interpretation, this Note proposes an approach for federal courts to adopt when interpreting the FDCPA's SOL. Acting as a compromise for the various concerns and analyses presented by the circuit courts, this approach is intended to be an attractive solution for all circuits. In adopting this proposed analysis, federal circuit courts can achieve the goal of uniformity and predictability without being forced to overrule their individual circuit precedents.

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*Mattson* was "made without any real analysis," leading the court to conclude that the Eighth Circuit used the term in a colloquial sense); *Johnson v. Riddle*, 305 F.3d 1107, 1115 (10th Cir. 2002) (arguing that *Mattson* is dubious authority as to its conclusion that the provision is jurisdictional); *Harris v. Barton*, No. 4:13CV02516 AGF, 2014 WL 3701037, at \*3 (E.D. Miss. July 25, 2014).

332. See *Hageman v. Barton*, No. 4:13-CV-2522 (CEJ), 2014 WL 5320265 (E.D. Mo. Oct. 17, 2014), *appeal docketed*, No. 14-3665 (BNS) (8th Cir. Nov. 26, 2014).