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Closing the Cracks and the Courts: A Comparative Analysis of Debt Collection Regulation in the United Kingdom and the United States

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Notes:

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ABSTRACT

Consumers who borrow from a lender today cannot count on dealing with that same lender later if they default on their debt. In today's world of debt collection, the lender will outsource collection to a thirdparty debt collector, or those consumers' defaulted debt will be bought and sold numerous times for pennies on the dollar until eventually a debt buyer decides to pursue payment. Either way, under the current US debt collection laws and regulations, both third-party debt collectors and debt buyers can act outside the scope of debt collection regulation in the United States, and many will take that opportunity to engage in abusive debt collection practices, including abusing the courts as an enforcement mechanism. Through a comparative analysis of the central statutes and regulations governing debt collectors in the United States and the United Kingdom, this Note finds that the accountability gap for debt collectors in the United States stems from the US statute's narrow scope and sparse restrictions on judicial action by debt collectors. In order to close this accountability gap, the United States should adopt the United Kingdom's broad definition of "debt collector" and a version of the UK Debt Respite Scheme which allows consumers to delay judicial action by debt collectors.

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I. INTRODUCTION

In 2019, Ronnisha worked three jobs with the hopes of attaining financial stability.[1] When she landed a job working for her local gov-

1. *See Story Bank: New Yorkers Speak Out*, NEW ECON. PROJECT, https://www.neweconomynyc.org/debt-collection-stories/ (last visited Nov. 1, 2022) [https://perma.cc/3QXP-RMN4] (archived Sept. 19, 2022).

ernment, she thought she might finally be on her way.[2] That was until she received a notice stating that a court judgment had been entered against her by a debt collector.[3] "I didn't recognize the debt collector, so I thought it was a scam," Ronnisha explained.[4] After further investigation, she found that there were not just one, but several judgments against her, "all from debt collectors [she did not] know."[5] She now fears that her hard-earned wages will be garnished because of these default judgments.[6] Similarly, Robert, a substitute teacher, had his bank accounts frozen by a debt collector he had never heard of in March 2020.[7] "I need that money for urgent necessities like rent [and] food . . . [t]his situation has put a terrible pressure on me and on my family," Robert explained.[8] Unfortunately, Ronnisha and Robert are not the first—and certainly not the last—American consumers to feel the impact of a debt collection system comprised of many unfamiliar actors and few restraints on these actors' use of judicial enforcement as a collection mechanism. In the United States, it is now standard for consumers with unpaid debt to be contacted by debt collectors they do not recognize,[9] and it is common for those debt collectors to use the courts as a shortcut to collection.[10]

The debt collection system that exists in the United States today traces its roots to a nineteenth-century Massachusetts lending company called the Massachusetts Hospital Life Insurance Company (MHLIC).[11] Although the MHLIC did not create the concept of lending, it is credited with the genesis of a debt collection system that is both impersonal and reliant on legal action as an important enforcement tool.[12] Whereas prior to the MHLIC's arrival to the debt collection industry, borrowers typically knew their lenders and lenders were unlikely to sue when borrowers missed payments, the MHLIC ushered in a new era of debt collection.[13] Lenders of the MHLIC were not

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2. *See id.*
3. *See id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 1 (Jan. 2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf [https://perma.cc/V7F2-74AA] (archived Sept. 20, 2022).
10. *See How Debt Collectors Are Transforming the Business of State Courts*, PEW CHARITABLE TRS. (May 6, 2020), https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts [https://perma.cc/U756-YVQ5] (archived Sept. 20, 2022).
11. *See* Tamara Plakins Thornton, *"A Great Machine" or a "Beast of Prey": A Boston Corporation and Its Rural Debtors in an Age of Capitalist Transformation*, 27 J. EARLY REPUBLIC 567, 575–79 (2007).
12. *See id.*
13. *See id.*

familiar with their borrowers and thus exercised no restraint in issuing notices that payment late by even one day would trigger a lawsuit.[14]

It would appear that the more things change, the more they stay the same. Admittedly, the current debt collection system in the United States operates in a much different landscape than existed in 1893 when the MHLIC was founded. With the advent of new types of consumer credit, such as credit cards, and the innovations in technology that allow debt collectors to contact consumers by phone or even social media,[15] debt and debt collection as it exists in the United States today would be unrecognizable to the MHLIC. It would be unrecognizable in almost all respects, that is, except the alienation between borrowers and those collecting debt and the collectors' aggressive use of the judicial process.[16]

Most consumers today, like Ronnisha and Robert, do not recognize the companies contacting them to make payments on their debt.[17] This is largely because of the rapid rate at which the debt collection industry has grown. From 2017 to 2022, the market size of the industry has grown by an average of 0.4 percent per year.[18] Though this number may seem small, with the debt collection market estimated to be worth $17.9 billion dollars, these percentage increases add up.[19] In this market, there are hundreds, if not thousands, of debt buyers who have purchased debts from original creditors and many third-party contractors who either collect debts for debt buyers or original creditors.[20] Moreover, in today's debt collection industry, consumer debts are bought and sold multiple times, often as part of large debt portfolios.[21] Thus, over time, a consumer may be contacted by several different companies seeking payment on debt, and only one of those companies might be the one that the consumer originally borrowed from.[22]

Not only has the detached nature of debt collection originated by the MHLIC persisted, but the brute use of legal action has as well.[23] In

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14. *See id.*

15. *See* John Egan, *New Debt Collection Rule Allows Contact on Social Media*, EXPERIAN (Feb. 4, 2021), https://www.experian.com/blogs/ask-experian/can-a-debt-collector-contact-me-through-facebook/ [https://perma.cc/D7WQ-XF6A] (archived Sept. 22, 2022).

16. *See* Thornton, *supra* note 11; *Story Bank: New Yorkers Speak Out*, *supra* note 1.

17. *See Story Bank: New Yorkers Speak Out*, *supra* note 1.

18. *See Debt Collection Agencies in the US – Market Size 2005–2028*, IBISWORLD, https://www.ibisworld.com/industry-statistics/market-size/debt-collection-agencies-united-states/ (last updated June 27, 2022) [https://perma.cc/B7NR-5ABJ] (archived Sept. 22, 2022).

19. *See id.*

20. *See* FED. TRADE COMM'N, *supra* note 9, at 14.

21. *See* JAKE HALPERN, BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD 4–5 (2014); FED. TRADE COMM'N, *supra* note 9, at 14.

22. *See* FED. TRADE COMM'N, *supra* note 9.

23. *See* Thornton, *supra* note 11.

a national survey from 2017, the Consumer Financial Protection Bureau (CFPB) found that one in seven consumers who had been contacted about a debt for collection were sued.[24] State courts across the country have also experienced a drastic increase in cases filed by collection attorneys.[25] In 2004 civil suits in state courts were roughly evenly split between debt collectors, financial service companies, and other private plaintiffs, but more recently, debt collectors have clearly taken center stage.[26] By 2020, debt collection suits accounted for a staggering 63 percent of civil suits in state courts.[27] Moreover, in these cases, debt collectors often obtain default judgments without presenting sufficient evidence that the debt exists or that the consumer-defendant is the one who owes the debt.[28] The prevalence of default judgments suggests that today's debt collectors, like their MHLIC predecessors, are turning to the courts for quick and cheap collection.[29]

Although the United States' regulatory framework for debt collection started to take shape more than forty years ago with the enactment of the Federal Debt Collection Practices Act (FDCPA), the US framework as it currently exists has a significant accountability gap for many actors in the debt collection industry and their use, or rather misuse, of the judicial process. The FDCPA suffers from an overly restrictive definition of what it means to be a debt collector, thus allowing debt buyers, who are newcomers to the industry, to escape legal action by consumers adversely impacted by their abusive debt collection practices. Conversely, when these non-traditional debt collectors turn to the courts to collect payments from consumers, the only limitation on their legal action is a venue requirement. Between the

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24. *See* CONSUMER FIN. PROT. BUREAU, CONSUMER EXPERIENCES WITH DEBT COLLECTION: FINDINGS FROM THE CFPB'S SURVEY OF CONSUMER VIEWS ON DEBT 5 (2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf [https://perma.cc/RK7C-2K25] (archived Sept. 23, 2022).

25. *See* NAT'L CONSUMER L. CTR., CONSUMER DEBT COLLECTION FACTS (2018), https://www.nclc.org/images/pdf/debt_collection/Debt-Collection-Facts-2016.pdf [https://perma.cc/8WQZ-JJHV] (archived Sept. 23, 2022); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1708–09 (2022); *see also* Yamil Berard, *Loads of Debt: Texas Courts Are Slammed with Debt Collection Lawsuits, with Devastating Consequences*, HOUS. CHRON. (Apr. 28, 2022), https://www.houstonchronicle.com/news/investigations/article/texas-surge-debt-collection-lawsuits-courts-17119821.php [https://perma.cc/A7WM-6NFA] (archived July 14, 2022) ("Debt collection lawsuits filed statewide have exploded by 73 percent from 2012 to 2021 . . .").

26. *See* Wilf-Townsend, *supra* note 25, at 1735.

27. *See id.*

28. *See* NAT'L CONSUMER L. CTR., *supra* note 25; *see also* JULIA BARNARD, KIRAN SIDHU, PETER SMITH & LISA STIFLER, CTR. RESPONSIBLE LENDING, COURT SYSTEM OVERLOAD: THE STATE OF DEBT COLLECTION IN CALIFORNIA AFTER THE FAIR DEBT BUYER PROTECTION ACT 30–31 (Oct. 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-california-debt-oct2020.pdf [https://perma.cc/7SYN-7F6D] (archived Sept. 25, 2022) (finding that, in California, a majority of cases (61 percent) were filed without the documentation required by law).

29. *See* Thornton, *supra* note 11.

FDCPA's limited scope and sparse guardrails on judicial enforcement as a debt collection tool, consumers—especially poor consumers and consumers of color—are left with little legal remedy or defense.

Fortunately, debt and debt collection are not unique to the United States, and countries across the world take different approaches to preventing abusive debt collection. While consumers like Ronnisha and Robert were dealing with the consequences of debt collectors acting outside the scope of regulation in the United States, across the Atlantic, the United Kingdom's Financial Conduct Authority (FCA) sent a letter to debt buyers, debt collectors, and debt administrators alike warning them that the FCA intended to hold them all to the same standard.[30] The FCA stated that it expected debt buyers to seek to mitigate harm to vulnerable consumers as much as possible, just like other debt collectors in the United Kingdom.[31] Citing to the law governing all debt collection firms, the FCA expected debt buying firms to "consider how fair it is to pursue litigation [against consumers] without fully exploring other more proportionate options."[32]

Concerned with the future of debt collection in the United States and the protection of consumers, this Note conducts a comparative analysis of the regulatory frameworks for debt collection in the United States and the United Kingdom. Focusing on how each country defines "debt collector" and the extent to which judicial enforcement by debt collectors is restricted, this Note seeks to understand how the gaps allowing for abusive debt collection in the United States might be closed. There are important similarities and differences that make this comparison particularly instructive. Both countries have a fairly established framework for regulating debt collection, and the framework in both countries was instituted with a lean towards consumer protection. Additionally, and perhaps most importantly, the regulations in each country and the methods of enforcement differ in ways that are relevant to the loopholes in the United States framework. For example, while the United States combines a private right of action with a narrow definition of "debt collector," the United Kingdom trades a private right of action for an expansive take on what it means to be a debt collector.

Part II of this Note provides background information on the regulatory framework for debt collection and important developments in the framework over time in each country. Part III conducts a comparative analysis of each framework and discusses policy implications. Part IV proposes: (1) redefining "debt collector" under the FDCPA in the image of the FCA Handbook's Consumer Credit Sourcebook (CONC

30. *See* CAROLINE GARDNER, FIN. CONDUCT AUTH., PORTFOLIO LETTER (Jan. 18, 2021), https://www.fca.org.uk/publication/correspondence/debt-purchasers-collectors-administrators-portfolio-letter.pdf [https://perma.cc/P7UA-XDW9] (archived Sept. 25, 2022).

31. *See id.*

32. *Id.*

7) to include original creditors and all debt buyers, (2) fortifying consumer protections against exploitative judicial enforcement in the United States by expanding on the venue requirement with options for consumers to delay judicial action, and (3) creating a private right of action for consumers in the United Kingdom facing abusive debt collection.

II. THE REGULATION OF DEBT COLLECTION IN THE UNITED STATES AND IN THE UNITED KINGDOM

A. *Overview*

In order to ascertain the blind spots in the US debt collection regulatory framework that make it so precarious for consumers, this Note starts by tracing the development of debt collection regulation in both the United States and the United Kingdom. This background on each country's foundational motivations behind regulating debt collection, the scope of their regulations, and the mechanisms of enforcement will set a firm foundation for a comparative analysis aimed at improving debt collection regulation in the United States.

B. *Debt Collection in the United States*

Despite having one of the more established debt collection regulatory frameworks in the world, the United States has not kept up with the changing industry and still leaves many consumers vulnerable to abusive debt collection. In 2020, the CFPB received 82,700 complaints about debt collection, up 10 percent from 2019, "making [consumer] debt collection one of the most prevalent consumer complaint topics."[33] Under the FDCPA, which serves as the bedrock for debt collection regulation, the narrow scope of the term "debt collector," and the limited coverage of judicial enforcement allows many actors in the modern debt collection industry to evade regulation.

1. The Federal Debt Collection Practices Act

The primary source of debt collection regulation in the United States is the FDCPA. Enacted in 1978 with a clear consumer protectionist purpose, the FDCPA pledges to prevent abusive and deceptive debt collection processes.[34] The FDCPA also seeks to protect debt col-

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33. BUREAU OF CONSUMER FIN. PROT., FAIR DEBT COLLECTION PRACTICES ACT, CFPB ANNUAL REPORT 2021 3 (2021).

34. Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692(e) (West 2021) ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.").

lectors who do not engage in deceptive or abusive practices from unfair competition and to encourage states to enact laws that protect consumers from such abusive practices.[35]

Though many lawmakers and commentators today agree that abusive and unfair debt collection practices should not be allowed, at the time that the FDCPA was enacted, the idea that such practices should be prohibited, or that they should be regulated, was not widely accepted. The only regulation at the time came from the Federal Trade Commission Act, which only protected consumers from debt collection practices with the tendency or capacity to deceive.[36] However, as demonstrated by the Federal Trade Commission's continued refinement of the concept of deception, the initial iteration of the Federal Trade Commission Act did not effectively regulate debt collectors.[37] Additionally, statements from debt collectors at congressional hearings prior to the FDCPA's enactment reflected a firm conviction that they were justified in using any means necessary to recover from consumers because those who did not pay did so intentionally.[38] In response to the proposed legislation, one debt collector witness stated, "the only class that will benefit from this nobly intended legislation will be the 'deadbeat'—the person who refuses to pay his bills."[39] Not only did debt collectors consider their actions warranted, but almost half the states provided little or no protection at all against abusive debt collection.[40] However, at the same time that debt collectors and several states were willing to leave debt collection practices unregulated, Congress was faced with many troubling concerns for consumer welfare.[41] Finding abusive debt collection to be a "widespread and serious national problem," Congress enacted the FDCPA.[42]

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35. *Id.*

36. *See* Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 1 (1999).

37. *See* J. THOMAS ROSCH, COMM'R, FED. TRADE COMM'N, DECEPTIVE AND UNFAIR ACTS AND PRACTICES PRINCIPLES: EVOLUTION AND CONVERGENCE (May 18, 2007).

38. *Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130, and H.R. 5294 Before the Subcomm. on Consumer Affs. of the Senate Comm. on Banking, Housing, and Urban Affs.*, 95th Cong. 218, 226, 229 (1977) (statement of Philip Rosenthal, Past President of the Virginia Collectors Association).

39. *Id.* at 229.

40. *See* S. REP. NO. 95-382, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 ("While debt collection agencies have existed for decades, there are 13 States, with 40 million citizens, that have no debt collection laws . . . Another 11 States . . . with another 40 million citizens, have laws which in the committee's opinion provide little or no effective protection.").

41. *See id.* at 2 (The Senate committee found "[c]ollection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to [third parties], obtaining information . . . through false pretense, impersonating public officials and attorneys, and simulating legal process").

42. *See id.*

The scope of debt covered by the FDCPA includes consumer debt accumulated for personal or household purposes, including credit card debt, student and auto loans, medical bills, and mortgages—but not business debts.[43] Given the rapid growth of consumer debt in the United States since World War II, this scope is quite expansive, notwithstanding its exclusion of business debts.[44] The practices covered by the FDCPA are similarly expansive. The FDCPA contains specific guidelines on when, where, and with whom debt collectors may communicate about collecting debt.[45] True to its consumer protectionist purpose, the FDCPA prohibits communicating with consumers at unusual hours, at their place of work, or with their family members.[46] The FDCPA further stipulates that a debt collector must stop communicating with a consumer directly when the collector knows the consumer has retained an attorney.[47] The FDCPA also created three categories of abusive practices that are prohibited: (1) harassment or abuse, (2) false or misleading representations, and (3) unfair practices.[48] Ultimately, debt collectors who violate provisions of the FDCPA can face civil liability because the act provides consumers a private right of action.[49] Debt collectors in violation of the FDCPA are also subject to administrative enforcement from both the Federal Trade Commission and the CFPB.[50]

2. The Meaning of Debt Collector under the FDCPA

Unlike the types of debt and practices covered, which Congress made fairly inclusive, the scope of the debt collector definition is quite narrow. Under the FDCPA, there are two ways to be a "debt collector": (1) a person is a debt collector if he or she "uses any instrumentality of interstate commerce or the mails in any business the *principal purpose* of which is the collection of any debts"; or (2) a person is debt collector if he or she "regularly collects or attempts to collect, directly or

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43. *See* 15 U.S.C.A. § 1692a(5) (West 2021) (defining the term "debt" as "any obligation . . . to pay money arising out of a transaction . . . primarily for personal, family, or household purposes . . ."); *Debt Collection FAQs*, FED. TRADE COMM'N, https://www.consumer.ftc.gov/articles/debt-collection-faqs (last visited Nov. 1, 2022) [https://perma.cc/E6JJ-4GCN] (archived Sept. 28, 2022).

44. *See* Genevieve Melford, *Solving the Consumer Debt Crisis*, ASPEN INST. (Jan. 11, 2019), https://www.aspeninstitute.org/blog-posts/solving-the-consumer-debt-crisis/ [https://perma.cc/N4LX-TAFQ] (archived Sept. 28, 2022); Jeff Cox, *Consumer Debt Hits New Record of $14.3 Trillion*, CNBC (May 5, 2020), https://www.cnbc.com/2020/05/05/consumer-debt-hits-new-record-of-14point3-trillion.html [https://perma.cc/8FYG-6J9S] (archived Sept. 28, 2022).

45. *See* 15 U.S.C.A. § 1692c.

46. *See id.*

47. *Id.*

48. *See id.* § 1692d–f.

49. *See id.* § 1693k.

50. *See id.* § 1692l–m.

indirectly, debts owed or due or asserted to be *owed or due another*."[51] Notably, the FDCPA defines creditors under a separate subsection, ostensibly excluding them from the "debt collector" category.[52] Given the resistance to regulating the industry at all, the enacting Congress determined that it would be best to regulate original creditors seeking payment as little as possible, also believing that original creditors would exercise restraint in dealing with their own customers.

The ambiguity of the meaning of "debt collector" is complicated by the rapid growth of the debt collection industry which has been fueled by two factors. First is the ability of creditors to quickly monetize delinquent debt, particularly credit card debt. When consumer credit card debt goes unpaid for an extended period of time, banks must "charge off" those unpaid debts pursuant to federal banking regulations.[53] After a charge off, banks can no longer count the debts as part of their assets, but they can continue to seek collection by either making use of a third-party debt collector or by selling the debt to a debt buyer.[54] An examination of the structure of the debt buying industry found that credit card debt regularly produced about 75 percent of the debt sold to debt buyers,[55] making charge offs crucial to the presence of debt buyers in debt collection.

However, bank charge offs are not the only factor contributing to a larger and more diverse debt collection industry. Only the biggest debt buyers can afford to purchase debt that has recently been charged off.[56] In addition to the handful of large debt buying firms, there are hundreds of small and mid-sized debt-buying firms.[57] These smaller firms rely on debt that has been bought and sold multiple times because resold debt is cheaper to purchase for collection or resale.[58] Thus, the debt collection industry has grown not only because banks can easily monetize delinquent debt by employing third-party collectors or selling to large debt buying firms, but also because debt-buying (and selling) itself lowers the barrier to entry and sustains a numerosity of debt-buyers.

The result is that in addition to original creditors and conventional third-party debt collectors, today's debt collection industry includes big debt-buying firms—like Encore Capital Group which pays millions of dollars for newly charged off debt[59]—as well as numerous

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51. *Id.* § 1692a(6) (emphasis added).
52. *See id.* § 1692a(4).
53. *See* FED. TRADE COMM'N, *supra* note 9, at 13.
54. *See id.* at 13 n.58.
55. *See id.* at 13.
56. *See* HALPERN, *supra* note 21, at 26–27.
57. *See* FED. TRADE COMM'N, *supra* note 9, at 13–14.
58. *See* HALPERN, *supra* note 21, at 26–27.
59. *See* HUM. RTS. WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 12 (2016) (analyzing large debt buying firms and their harm to debtors, and recommending changes to protect debtors).

smaller debt buyers, who "pay less for older, grungier [debt],"[60] but who can participate in the debt collection industry just the same. With original creditors, third parties, and debt buyers of varying sizes all collecting debt, the FDCPA's definition poses the following questions:

(1) What does it mean for a business's "principal purpose" to be debt collection?

(2) What does it mean to collect debt "owed another"? And

(3) In today's market, where do debt buyers who outsource debt collection procedures fit in?

3. Legal Action under the FDCPA

Though the FDCPA explicitly grants aggrieved consumers with a private right of action, it says little of judicial enforcement by debt collectors, except for its venue provision. Under this provision, debt collectors who file suit to collect payment from consumers are restricted to judicial districts where the consumer signed the contract giving rise to the action or where the consumer resides when the action is initiated.[61] Aside from the venue provision, the FDCPA indirectly refers to legal action by debt collectors under its prohibition of false and misleading representations. There, the FDCPA exempts legal action from the requirement that debt collectors disclose, in initial and subsequent communications with consumers, that the debt collector is attempting to collect a debt and that any information will be used for the purpose of collection.[62]

Although the venue provision contains a disclaimer that "nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors," nothing in the subchapter does the opposite by prohibiting or circumscribing legal action. This silence has created a significant question about what recourse consumers have when debt collectors' reliance on the courts crosses the line into abusive debt collection territory.

4. Regulation F

In 2020, the CFPB finalized the Debt Collection Final Rules revising Regulation F, which implements the FDCPA. Acknowledging that certain "interpretative questions" have arisen since the initial enactment of the FDCPA, the finalized rules aim to address communications in connection with debt collection and clarify requirements for

60. *See* HALPERN, *supra* note 21, at 27.
61. *See* 15 U.S.C.A. § 1692i (West 2021).
62. *See id.* § 1692e.

consumer-facing debt collection disclosures.[63] The revised Regulation F creates new and important rights for consumers. Consumers are now able to stop collection calls by request.[64] Additionally, debt collectors have to wait at least a week after speaking to a consumer before placing another call about that particular account, and debt collectors will also be required to provide more information to consumers when they provide a notice validating the debt.[65] Lastly, debt collectors are required to speak to a consumer or send a letter about an alleged debt before reporting the debt to a credit bureau.[66]

As the first set of regulations interpreting the FDCPA since its enactment in 1977, Regulation F helps to bring the FDCPA closer to its consumer protectionist purpose in the twenty-first century.[67] However, it still does not address the particular ambiguities posed by the FDCPA's definition of "debt collector" and the lack of regulation of legal action by debt collectors in the face of steadily increasing use of the courts for collection purposes. Without any changes to modernize what it means to be a debt collector or to reduce debt collectors' misuse of the court system, consumers in the United States remain vulnerable.

C. *Debt Collection in the United Kingdom*

With a regulatory framework slightly older than that of the United States, the United Kingdom conducts debt collection regulation through the Consumer Credit Act of 1974 and several accompanying regulations. Though both the United States and the United Kingdom take a consumer protectionist approach, the UK's regulatory definition of "debt collector" encompasses more actors in the debt collection industry but limits legal action both by consumers and debt collectors.

1. The Consumer Credit Act of 1974

Like the United States, the United Kingdom began taking steps towards comprehensive debt collection regulation in the 1970s through the Consumer Credit Act of 1974 (CCA). Described by scholars as "probably the most advanced and certainly the most comprehensive code ever to be enacted in any country in the sphere of consumer

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63. Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (proposed May 21, 2019) (to be codified at 12 C.F.R. pt. 1006).

64. *See id.*

65. *See id.*

66. *See id.*

67. However, consumer advocates argue that these new rights still raise concerns. For example, although debt collectors must provide more information in their validation notices, because they may also use electronic services, this increases the risk that consumers will not receive this information. *See* April Kuehnhoff, *Comprehensive New FDCPA Regulation F Takes Effect November 30*, NAT'L CONSUMER L. CTR. (Sept. 24, 2021), https://library.nclc.org/comprehensive-new-fdcpa-regulation-f-takes-effect-november-30 [https://perma.cc/8NWA-6736] (archived Oct. 5, 2022).

credit,"[68] the CCA represented a shift in a market that was both under- and over-regulated. Many UK jurisdictions lacked regulation, and the prior national framework was too specific and sporadic to provide real consumer protection in the consumer credit market.[69] Prior to the enactment of the CCA in 1968, the British Labor Government created a committee led by Lord Crowther to review the existing law governing consumer credit and to make recommendations.[70] The resulting report, *Consumer Credit*, was presented two years later in March 1971, and in 1973 a bill was introduced that incorporated much of the report's recommendations.[71] Debt collection was thus regulated as an "ancillary credit business" in the CCA.[72]

Initially, debt collection regulation under the CCA was accomplished through a licensing regime, as the statute required those conducting consumer credit business or consumer hire business to hold a license.[73] The licensing requirements held that applicants must pass a "fitness" test, where "fitness" depended on several factors including any offenses of fraud, dishonesty, or violence; evasion of other provisions of the CCA; discrimination on the basis of sex, color, race, or ethnic or national origin; or unfair business practices the director of the Office of Fair Trading (OFT) considered deceitful, oppressive, or improper.[74] Eventually, however, in 2003, the OFT, the agency formerly responsible for executing the CCA, released guidance specifically geared towards debt collectors. In the Guidance for Businesses Engaged in the Recovery of Consumer Credit Debts, the OFT invoked its licensing regime as justification for releasing the guidance and proceeded to clarify the meaning of "unfair business practices" for the purpose of fitness assessments and licensing.[75] Significantly, the Guidance for Businesses Engaged in the Recovery of Consumer Credit Debts provided that debt collectors who contract with third parties would have "their own fitness . . . called into question."[76] The OFT qualified this provision by assuring license holders that they would not be punished for the conduct of third parties if they took reasonable steps to investigate any unfair conduct.

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68. *See* Kevin E. Lindgren, *The Consumer Credit Act 1974: Its Scope*, 40 MOD. L. REV. 159, 159 (1977).

69. *See* FIN. CONDUCT AUTH., REVIEW OF RETAINED PROVISIONS OF THE CONSUMER CREDIT ACT: FINAL REPORT 13 (2019).

70. *See* Lindgren, *supra* note 68, at 159.

71. *See id.*

72. *See* CATALIN GABRIEL STANESCU, SELF-HELP, PRIVATE DEBT COLLECTION AND THE CONCOMITANT RISKS 220–21 (2015) (arguing that self-help remedies and private debt collection are more than just features of common law jurisdictions).

73. *See* Consumer Credit Act 1974, c. 39, § 21(1) (Eng.), *amended by* Consumer Credit Act 2006, c. 14 (Eng.).

74. *See id.* § 25(2).

75. OFF. OF FAIR TRADING, DEBT COLLECTION GUIDANCE 2 (2003).

76. *See id.*

Following the 2008 economic crisis, the United Kingdom restructured its financial regulatory system. The OFT was replaced by the Financial Conduct Authority (FCA) and with that replacement, the FCA assumed the OFT's consumer credit regulation responsibilities.[77] Though many provisions of the CCA transferred over, the FCA replaced the licensing framework with the Financial Services and Markets Act of 2012. The act gave the FCA the power to supervise the consumer credit industry and create rules for regulating the industry. With this new power, in 2014, the FCA created the FCA Handbook, which now serves as the basis for the regulation of debt collectors in the United Kingdom today.

2. The Meaning of Debt Collector under the CCA

Within the broader FCA Handbook, CONC 7 regulates arrears, default, and recovery, and therefore regulates debt collection.[78] CONC 7 defines the scope of regulated entities as inclusive of firms with respect to (1) consumer credit lending, (2) consumer hiring, (3) operating an electronic system in relation to lending, and (4) debt collecting.[79] The OFT's willingness to consider firms vicariously liable for the actions of third parties carried over into the FCA Handbook in CONC 7.[80] The FCA provides that firms "must ensure that their employees *and agents* comply with CONC and must take reasonable steps to ensure that *other persons acting on the firm's behalf* act in accordance with CONC."[81] Both the reference to a firm's agents and the persons acting on the firm's behalf suggest a full adoption of the broad scope the OFT put forth in the Guidance for Businesses Engaged in the Recovery of Consumer Credit Debts in 2003.[82] In today's multi-faceted debt collection industry, this definition may leave fewer questions as to who counts as a "debt collector," but given the size of the industry, such a broad definition prompts questions about its efficacy and feasibility.

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77. *See* Daniel Jasinski, *The FCA: Protecting Consumers of the Consumer Credit Market in the Wake of the Global Financial Crisis, in* THE FINANCIAL CRISIS AND WHITE COLLAR CRIME – LEGISLATIVE AND POLICY RESPONSES 129, 129–77 (Nicholas Ryder et al. eds., 2017) (discussing the transition from the OFT regime to the enactment of the FSMA and the creation of the FCA).

78. *See* FIN. CONDUCT AUTH., FCA HANDBOOK: CONSUMER CREDIT SOURCEBOOK, CONC 7 (2021), www.handbook.fca.org.uk [https://perma.cc/NKZ2-N2PV] (archived Oct. 5, 2022).

79. *See id.*

80. *See id.*

81. *Id.* (emphasis added).

82. OFF. OF FAIR TRADING, *supra* note 75.

3. Legal Action under the CCA and the Debt Respite Scheme (Breathing Space)

Legal action under the CCA, as implemented by the FCA, limits judicial action by consumers and debt collectors alike. Under the CCA, consumers have no private right of action.[83] Instead, consumers who have been subject to abusive debt collection, or other practices in violation of the FCA's regulations, must engage in a complaints process that requires them to first report the incident to the firm in violation of the CCA.[84] If, after following the FCA's rules for handling complaints, the firm is not able to resolve the complaint against them, the consumer may submit a complaint to either the FCA or the FCA's Financial Ombudsman Service (FOS). While the FCA is responsible for larger-scale agency investigations, the FOS manages individual investigations.

The complaint process for both the FCA and its FOS consists of many steps, and at any of these steps, a complaint could be dismissed before any sort of resolution is reached. An FCA complaint may undergo up to eight stages before a substantive decision is made.[85] Even then, the FCA maintains that it may close an investigation at any time it sees fit.[86] In the complaint process for the FOS, there are seventeen grounds for dismissing a complaint without consideration.[87] If a complaint survives the procedural offramps set by the FCA, an investigation may result in a monetary award against the firm or a direction to the firm requiring that it take specific steps as a result of the complaint.[88] While the complaints process shares some similarities to the judicial process, the United Kingdom has been criticized for its lack of an unqualified private right of action for consumers facing abusive debt collection.[89]

Though the CCA does not provide consumers with a private right of action, legal action by debt collectors is also somewhat restricted.

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83. *See* STANESCU, *supra* note 72, at 272 n.37 (explaining that while consumers subject to abusive debt collection may sue under a tort claim, the UK regulations and statutes specifically related to consumer protection against unfair debt collection do not provide a private right of action).

84. *See* FIN. CONDUCT. AUTH., *How to Complain*, https://www.fca.org.uk/consumers/how-complain (last visited Nov. 1, 2022) [https://perma.cc/7UQN-VTBZ] (archived Oct. 5, 2022) (instructing consumers who wish to submit a complaint to first contact the firm directly); FIN. OMBUDSMAN SERV., *Resolving a Complaint*, https://www.financial-ombudsman.org.uk/businesses/resolving-complaint/before-get-involved (last visited July 13, 2022) [https://perma.cc/6AFL-NBBS] (archived Oct. 5, 2022) (assuring FCA-regulated businesses that the Financial Ombudsman "won't usually consider a complaint against your business until you've had the opportunity to deal with it first").

85. FIN. CONDUCT AUTH., ENFORCEMENT INFORMATION GUIDE 5–6 (Apr. 2017).

86. *See id.*

87. *See* FIN. CONDUCT AUTH., DISPUTE RESOLUTION: COMPLAINTS 118–21 (2022).

88. *See id.* at 130–33.

89. *See* STANESCU, *supra* note 72, at 297–98.

The FCA Handbook does not outright prohibit debt collectors from legal action, but it does prohibit them from using legal action to pressure consumers into paying more money or making earlier payments than required.[90] Another indirect limitation on legal action by debt collectors is the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) Regulations of 2020 (the Debt Respite Scheme), which permit consumers who reside in England or Wales to start a "breathing space."[91] Breathing spaces can only be initiated by a debt advice provider authorized by the FCA, but, once initiated, consumers are protected from legal action used to collect payment for at least sixty days.[92] There are two types of breathing spaces that can be enacted. The standard breathing space applies to consumers who are unlikely to be able to repay the debt.[93] Alternatively, there is a breathing space for those in mental health crises.[94] Though both breathing spaces provide some protection from legal action; protections under the mental health crisis breathing space last longer and go beyond simply pausing enforcement actions.[95]

Although the concept of a breathing space appears to provide consumers with immense protections against any exploitative legal action, not all consumers qualify for the standard or mental health crisis breathing period. Recent guidance makes clear that even though all consumers are welcome to apply for a breathing period, the debt advisor, who is the only person authorized to initiate the breathing space, may determine that a breathing space should not be granted.[96] If, for example, the debt advisor finds that a consumer can access funds or income to pay the debt, or that the consumer can sell assets to pay the debt, the debt advisor is permitted to deny the consumer's application for a breathing space.[97] For the mental health crisis breathing space, certification of the mental health crisis by an approved mental health professional is required for application to the debt advisor.[98] These requirements, though arguably reasonable, still give debt advisors significant discretion over the initiation of breathing spaces and may thereby impact the program's potential to protect consumers. Because

90. *See* FIN. CONDUCT AUTH., FCA HANDBOOK, *supra* note 78.

91. *See* The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020, SI 2020/1311 (Eng.).

92. *See id.* § 26(2).

93. *See id.* §§ 23–27.

94. *See id.* §§ 28–34.

95. *See id.* § 32.

96. *Debt Respite Scheme (Breathing Space) Guidance for Creditors*, THE INSOLVENCY SERV. (May 31, 2022), https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors#starting-a-breathing-space [https://perma.cc/B8UA-LGYT] (archived Nov. 1, 2022).

97. *See id.*

98. *See id.*

the regulation was so recently implemented, it is not yet clear how many of the consumers seeking help actually receive it.

The approaches that the United States and the United Kingdom take towards regulating debt collection, as demonstrated by their chosen scope and limitations on judicial enforcement, differ in ways that help reveal a path forward to improving the regulatory framework governing debt collection in the United States. Part III of this Note conducts a comparative analysis of these two approaches and considers their policy implications.

III. COMPARATIVE ANALYSIS AND POLICY IMPLICATIONS

A. *What's in a Name? How Differences in Scope Affect Outcomes in the United States and the United Kingdom*

As discussed in Part II, the United States defines the term debt collector much more narrowly than the United Kingdom. Rather than regulate all debt collectors as the United Kingdom does, the United States confines its regulation of debt collectors to entities whose principal purpose is debt collection and entities who regularly collect debt owed to another. There are many factors to consider when assessing the impact of assuming a more limited or more expansive stance on who counts as a debt collector. Judicial outcomes in the United States and investigative results in the United Kingdom are particularly relevant factors because the United States provides consumers with a private right of action and the United Kingdom does not.

The judicial outcomes in the United States that are most instructive on the impact of the FDCPA's scope involve consumers suing debt buyers for prohibited conduct under the FDCPA. Applying the FDCPA's narrow debt collector definition proved to be difficult when the advent of debt buyers complicated the definition's implied exclusion of original creditors.[99] Over time, courts decided that the FDCPA's definitions of a debt collector and an original creditor were not mutually exclusive,[100] but they still struggled to consistently label debt buyers.[101] Debt buyers, not original creditors in the traditional sense since

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99. *See* Schlosser v. Fairbanks Cap. Corp., 323 F.3d 534, 536 (7th Cir. 2003) (making a distinction between debt collectors and creditors based on whether the debt was in default when the debt was acquired).

100. *See* Schlegel v. Wells Fargo Bank, 720 F.3d 1204, 1208, n.2 (9th Cir. 2013) (finding that the plaintiffs failed to sufficiently allege that the defendant was a debt collector).

101. *Compare* Davidson v. Capital One Bank, 797 F.3d 1309, 1315–16 (11th Cir. 2015) (holding that a debt buyer is not a debt collector simply because the debt sought originally belonged to another entity), *with* McKinney v. Cadleway Props., 548 F.3d 496, 501 (7th Cir. 2008) (holding that debt buyers are debt collectors if the debt was in default at the time it was purchased).

they own the debt they seek to collect, dissuaded courts from finding that they sought to collect the debt "owed . . . another."[102]

This was the issue in *Henson v. Santander Consumer USA*. In 2017, the US Supreme Court's decision in *Henson* settled a circuit split over whether all debt buyers were debt collectors under the FDCPA's second definition of debt collector—one who regularly collects debt owed or due another.[103] In *Henson*, plaintiffs had previously settled a class action lawsuit against their lender, CitiFinancial Auto.[104] Pursuant to the settlement agreement, CitiFinancial Auto agreed to waive alleged deficiency balances exceeding $30 million USD for more than three thousand class members, including plaintiffs.[105] Santander, which CitiFinancial Auto initially hired as a debt servicer to collect the deficient balances, purchased the debts from CitiFinancial Auto after the preliminary approval of the settlement agreement.[106] Although plaintiffs alleged that Santander was aware of the litigation and the settlement agreement's terms, Santander attempted to collect the debt by communicating directly with plaintiffs rather than with their attorney.[107] If Santander were a debt collector, as plaintiffs alleged, such communication would have been a violation of the FDCPA.[108] The Court, reasoning that the phrase "owed . . . another" in the FDCPA's second definition of debt collector suggested a focus on third-party debt collectors, not debt buyers who then seek to collect debts they own, found that Santander's conduct was beyond the scope of the FDCPA.[109]

Consumer advocates' response to the *Henson* decision was mixed. Some consumer advocates were critical of the decision, predicting the rise of the "Santander defense."[110] Critics argued that Justice Gorsuch, who authored the opinion, created a loophole for debt buyers that undermined the purpose of the FDCPA.[111] At the core of these criticisms

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102. *See, e.g.*, Davidson, 797 F.3d 1309 (rejecting plaintiff's argument that "another" refers to creditors from whom Capital One Bank purchased the debt it then sought to collect).

103. *See* Henson v. Santander Consumer USA, 137 S.Ct. 1718, 1724 (2017).

104. *See* Meghan Brickner, *Til (Defaulted) Debt Do Us Part: The Need for Regulation of Debt Buyers Collecting on Delinquent Debt in the Aftermath of* Henson v. Santander, 47 CAP. UNIV. L. REV. 101, 108 (2019) (discussing the underlying facts of the case).

105. *Id.*

106. *Id.*

107. *Id.* at 108–09.

108. *See* 15 U.S.C.A. § 1692c(a)(2) (West 2021) (prohibiting a debt collector from communicating with a consumer about debt collection if the collector "knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address").

109. *Henson*, 137 S.Ct. at 1721–22, 1726.

110. *E.g.*, David Dayen, *Gorsuch's First Opinion: Let Debt Collectors Run Amok*, AM. PROSPECT (June 14, 2017), https://prospect.org/justice/gorsuch-s-first-opinion-let-debt-collectors-run-amok/ [https://perma.cc/U7Q8-9EEX] (archived Sept. 28, 2022).

111. *See* Sierra Hatfield, *Gorsuch's First Opinion: Blame Definitions, Not Practice*, NAT'L CONSUMER LEAGUE (July 21, 2017), https://nclnet.org/gorsuch_first_

was the belief that it should not matter that debt buyers own the debts they seek to collect, especially if the debt buyers engage in the same kinds of debt collection practices otherwise prohibited by the FDCPA.[112] However, forming a much larger group were other consumer law advocates and debt collection experts who, despite the enormous loss for the plaintiffs in *Henson*, saw potential in the Court's choice not to determine whether debt buyers came within the scope of the FDCPA's principal purpose definition of debt collector.[113] Shortly after the *Henson* decision, the National Consumer Law Center published an article advising consumer law practitioners that the principal purpose definition was still a viable path to accountability for debt buyers.[114] The center urged that if consumers could clearly allege that debt collection was the principal purpose of a defendant's business, they would likely be able to successfully litigate their claims under the FDCPA.[115]

Initially, the center seemed to be right. Just one year later, in *Tepper v. Amos Financial, LLC*, the Third Circuit found that debt buying company Amos Financial, LLC was within the scope of the FDCPA under the principal purpose definition.[116] Undeterred by the fact that, as a debt buyer, "Amos [Financial] may be one tough gazookus," the Third Circuit relied on *Henson* to uphold the lower court's decision that Amos Financial was a debt collector because its sole business activity was purchasing and then attempting to collect debts.[117] Even more reassuring for consumers seeking redress from debt buyers under the FDCPA's principal purpose definition was *Barbato v. Greystone*

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opinion/ [https://perma.cc/GPH8-UFPR] (archived Sept. 28, 2022); James R. Hood, *Supreme Court Splits Straws over the Definition of a Debt Collector*, CONSUMER AFFS. (June 12, 2017), https://www.consumeraffairs.com/news/supreme-court-splits-hairs-over-the-definition-of-a-debt-collector-061217.html [https://perma.cc/B424-GF6C] (archived Sept. 28, 2022) (saying, in part, "it might sound silly, or even outrageous, to say that someone trying to collect a debt is not a debt collector"); Dayen, *supra* note 110 ("'It's almost a road map to me on how you can avoid the FDCPA,' says noted consumer bankruptcy attorney Max Gardner, who runs a boot camp for lawyers fighting predatory lenders.").

112. *See* Hatfield, *supra* note 111; Hood, *supra* note 111; Dayen, *supra* note 110.

113. *See Henson*, 137 S.Ct. at 1721 ("[T]he parties briefly allude to another statutory definition of the term 'debt collector'—one that encompasses those engaged 'in any business the principal purpose of which is the collection of any debts.' § 1692a(6). But the parties haven't much litigated that alternative definition and in granting certiorari we didn't agree to address it either.").

114. *See* April Kuehnhoff, *FDCPA Coverage of Debt Buyers: Implications of Supreme Court's June 12 Ruling in Henson*, NAT'L CONSUMER L. CTR. (July 12, 2017), https://library.nclc.org/fdcpa-coverage-debt-buyers-implications-supreme-court%E2%80%99s-june-12-ruling-henson [https://perma.cc/77VJ-Z9VE] (archived Sept. 28, 2022) ("Although the Supreme Court concluded that debt buyers are not debt collectors under the FDCPA's second definition of a debt collector that 'regularly collects . . . debts owed or due . . . another,' debt buyers can still fall under the FDCPA definition of debt collector if their 'principal purpose . . . is the collection of any debts.'").

115. *See id.*

116. 898 F.3d 364, 371 (3d Cir. 2018).

117. *Id.* at 370–71.

Alliance LLC.[118] In *Barbato*, a company called Crown Asset Management maintained a business model where the company purchased charged-off debt from creditors and then outsourced the collection of those debts to a third party.[119] The Third Circuit found that even though Crown outsourced the debt collection process, the company still fell within the scope of the FDCPA because its entire business model was based on debt collection.[120]

But despite the option to hold debt buyers accountable under the principal purpose definition that *Henson* left intact, the limitations of the FDCPA's scope may still leave consumers vulnerable. *Henson*, *Tepper*, and *Barbato* do not account for companies who engage in prohibited conduct, but who may not have debt collection as their principal purpose; these decisions also do not account for companies for which debt collection is their principal purpose, but whose third-party debt collector engages in prohibited practices rather than the company itself.[121] Shortly after the *Barbato* decision, in *Stone v. JP Morgan Chase Bank, N.A.*, the court for the Eastern District of Pennsylvania ruled against a consumer contesting the treatment of his mortgage debt by JP Morgan Chase Bank because, unlike Crown in *Barbato*, JP Morgan Chase did not have debt collection as its principal purpose.[122] Finding JP Morgan Chase's role as a "multinational financial services firm" to be indicative of a principal purpose other than debt collection, the court determined JP Morgan Chase was not a debt collector under the FDCPA.[123] Further, with the ability to sue debt buyers under the FDCPA's "owed another" definition eliminated by the Supreme Court's decision in *Henson*, the consumer did not have any actionable claim against JP Morgan under the FDCPA.[124] In *Rivas v. Midland Funding* in the Eleventh Circuit, another consumer failed to successfully litigate his claim against a debt buyer whose third-party debt collector made false representations while acting on the debt buyer's behalf.[125] Relying on *Henson* to establish that, as a debt buyer, Midland Funding could only be liable under the principal purpose definition, the Eleventh Circuit rejected the consumer's argument that Midland Funding should be held liable for its third party debt collector's misrepresentations under the "owed another" definition of debt collector that contained language allowing debt buyers to be held indirectly liable for third party conduct.[126]

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118. 916 F.3d 260 (3d Cir. 2019).
119. *Id.* at 262.
120. *E.g.*, *id.* at 266–67.
121. *See* Henson v. Santander Consumer USA, 137 S.Ct. 1718 (2017); *Tepper*, 898 F.3d 364; *Barbato*, 916 F.3d 260.
122. 415 F. Supp. 3d 628, 632–33 (E.D. Pa. 2019).
123. *Id.*
124. *Id.* at 633.
125. *See* 842 F. App'x 483 (11th Cir. 2021).
126. *Id.* at 487–88.

In contrast with the judicial outcomes in the United States are the enforcement outcomes of the FCA in the United Kingdom. As discussed previously, though the United Kingdom does not provide a private right of action for consumers, it does have a much broader definition of what it means to be a debt collector.[127] This expanded scope means that consumers can submit complaints to the FCA about any debt collector in violation of the CCA and CONC 7 for the FCA to investigate.[128] This difference in scope has resulted in investigations into entities that would otherwise go unregulated by the FDCPA.

Shortly after the restructuring of the debt collection regulatory framework in the United Kingdom, the FCA concluded a high-profile investigation of Wonga, the biggest payday lender in the country.[129] The investigation revealed that Wonga had sent letters from non-existent law firms to customers who were behind on payments threatening legal action and, in some cases, misrepresenting the amount the customers owed.[130] Pursuant to an agreement with the FCA, Wonga arranged for a refund of charges amounting to approximately £400,000, a flat rate of £50 to each of the forty-five thousand customers who received the misrepresentation letters, and some additional compensation for certain individual circumstances.[131]

In another investigation in 2020, the FCA fined Barclays Bank UK £26 million for failing to follow customer contact policies or to conduct conversations to understand the customers' reasons for falling behind on credit payments.[132] At least 1.5 million Barclays customers fell behind on payments but were not contacted by the bank in a timely fashion, leading some to incur additional fees or further delay making payments.[133] Additionally, the FCA found that because Barclays did not communicate with its customers sufficiently, the bank missed indicators of financial difficulty or vulnerability that should have triggered manageable forbearance solutions.[134] Under its authority to regulate debt collection practices, the FCA levied a heavy fine against the bank to compensate the affected consumers.[135] Absent from both of these investigations was any debate over whether the FCA had the authority to pursue Wonga or Barclays UK for their conduct. Wonga, as

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127. *See* FIN. CONDUCT AUTH., FCA HANDBOOK, *supra* note 78.

128. *Id.*

129. *See* Press Release, Fin. Conduct. Auth., Wonga to Pay Redress for Unfair Debt Collection Practices (June 25, 2014), https://www.fca.org.uk/news/press-releases/wonga-pay-redress-unfair-debt-collection-practices [https://perma.cc/YAU6-FZZU] (archived Dec. 4, 2022).

130. *See id.*

131. *See id.*

132. FIN. CONDUCT AUTH., FINAL NOTICE FROM THE FCA TO BARCLAYS BANK UK PLC (Dec. 15, 2020), https://www.fca.org.uk/publication/final-notices/barclays-2020.pdf [https://perma.cc/V4ED-Q4CB] (archived Sept. 28, 2022).

133. *Id.*

134. *See id.*

135. *See id.*; FIN. CONDUCT AUTH., FCA HANDBOOK, *supra* note 78.

a payday lender seeking past-due payments, would be an original creditor by the terms of the FDCPA in the United States.[136] Thus, no matter how egregious Wonga's conduct was, the company would have been beyond the FDCPA's scope.[137] Similarly, Barclays UK, a bank seeking payment from its own customers, would have also been an original creditor under the FDCPA and, therefore, beyond its ambit.[138]

B. *Differences in Restrictions on Legal Action by Debt Collectors: Comparing the Venue Provision to the Debt Respite Scheme*

The regulation of debt collection in the United States is weakened not only by the FDCPA's scope but also by the FDCPA's lack of restraint on debt collectors' abuse of the courts as a collection mechanism. As discussed in Part II, the only regulation of judicial enforcement by debt collectors is the venue provision, which limits permissible lawsuits by debt collectors to judicial districts where the consumer signed the contract giving rise to the debt or districts where the consumer resides.[139] Thus, the venue provision sets a primarily procedural limitation on abuse of the judicial process by debt collectors.

Where procedure is at issue, the venue provision has been an effective shield for consumers. In *Hess v. Cohen Slamowitz, LLP*, the venue provision protected a consumer from a lawsuit filed in a city that the debt collector argued was the "judicial district" where the consumer resided based on county lines, despite the fact that the city was not contiguous with the city where the consumer lived.[140] Similarly, in *Suesz v. Med-1 Solutions, LLC*, the Seventh Circuit held that a debt collection firm violated the FDCPA through the firm's practice of filing collection lawsuits in townships where consumers did not sign the underlying contract and where consumers did not live.[141] Further, courts have held that when state law would permit a lawsuit to be brought in a particular venue, but the FDCPA would not, the FDCPA prevails.[142]

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136. *See* 15 U.S.C.A. § 1692a(4) (West 2021) ("The term 'creditor' means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.").

137. *See id.* § 1692a(5).

138. *See id.*

139. *See id.* § 1692i(a).

140. 637 F.3d 117 (2d Cir. 2011).

141. 757 F.3d 636, 648 (7th Cir. 2014) ("[I]f the debt collector chooses to file suit in a township small claims court, venue is determined at the township level, thus requiring the debt collector to select a township consistent with the FDCPA's limitations on abusive forum-shopping.").

142. *See, e.g.*, McKnight v. Benitez, 176 F. Supp. 2d 1301, 1309 (M.D. Fla. 2001) ("Because the Court determines that Plaintiff has stated a cause of action for a violation of the FDCPA, the FDCPA venue provision preempts state law venue provisions." (citing Martinez v. Albuquerque Collection Servs., 867 F. Supp. 1495 (D.N.M. 1994))).

However, where equity concerns such as racial or income-based disparities are at issue, the venue requirement falls short. Consumers like those in *Hess* and *Suesz* who are able to sue for violations of the venue requirement (or other FDCPA requirements) are rare.[143] Researchers estimate that less than 10 percent of consumers in debt collection suits have counsel, whereas almost all debt collectors do.[144] Although consumers with legal representation are more likely to prevail, with so few consumers having access to representation, debt collectors are almost guaranteed to secure judgments.[145] Moreover, many consumers do not appear in court, resulting in more than 70 percent of debt collection lawsuits ending in default judgments in debt collectors' favor.[146] These statistics are compounded by the increased prevalence of debt collection suits in state courts and racial and economic disparities. Since 2013, debt collection lawsuits have become the most dominant kind of civil litigation,[147] even as the number of civil court cases experienced an overall decline.[148] Of these increased number of debt collection suits, the majority are against Black consumers.[149]

Alternatively, in the United Kingdom, the clearest limitation on judicial action by debt collectors is the newly enacted Debt Respite Scheme, which consists of the Breathing Space Moratorium and the Mental Health Breathing Space Moratorium.[150] A High Court judgment from August 2021 was the first opportunity to define the extent

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143. *See How Debt Collectors Are Transforming the Business of State Courts*, *supra* note 10. This report notes that while businesses-plaintiffs can typically afford an attorney in debt collection cases, consumer-defendants in these cases are only able to secure representation less than 10 percent of the time. Thus, it is unlikely that these consumers have the resources to bring suit when they experience FDCPA violations, including the venue requirement. *See id.*

144. *Id.* at 13.

145. *Id.* at 14.

146. *Id.* at 16.

147. *See id.* at 8–9 (showing the dominance of debt collection cases in civil dockets).

148. *See id.* at 4 (showing the decline in number of civil court cases).

149. *See* Jessica La Voice & Domonkos F. Vamossy, Racial Disparities in Debt Collection 2 (Sept. 2019), https://dx.doi.org/10.2139/ssrn.3465203 [https://perma.cc/Q988-4VP2] (archived Sept. 28, 2022) ("[E]ven after controlling for [other factors], majority black neighborhoods have approximately 40% more judgments than non-black neighborhoods."); ANNIE WALDMAN & PAUL KIEL, RACIAL DISPARITY IN DEBT COLLECTION LAWSUITS: A STUDY OF THREE METRO AREAS 20–21 (2015), https://static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf [https://perma.cc/XF5L-LQB4] (archived Sept. 28, 2022) ("[P]laintiffs were about 20 percent more likely to seek to execute a garnishment against a debtor living in a majority black area than defendants in white majority areas. . . . [J]udgments from debt collection cases were most concentrated in neighborhoods where residents had household incomes below the median [which] is consistent with the earlier ADP study [finding] that the highest garnishment rate was among employees earning between $25,000 and $40,000.").

150. The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020, *supra* note 91.

of this regulation when several debt collectors, referred to as the Guy Parties, applied for the cancellation of a Mental Health Breathing Space Moratorium initiated by consumers Mr. and Mrs. Brake.[151] The Guy Parties' application to cancel the moratorium was based on two central arguments: (1) the moratorium was unfairly prejudicial against the interests of creditors, and (2) the Brakes were not using the moratorium in good faith because they were not currently engaging with debt advice.[152] The Guy Parties asserted that the moratorium was unfairly prejudicial against them because it allowed the Brakes to continue paying for litigation despite not repaying the Guy Parties, whereas the Guy Parties also continued to pay for litigation while losing out on repayment from the Brakes.[153]

Though the High Court noted that weighing the interests of creditors against those of consumers in debt was similar to comparing "chalk and cheese," after considering the consumer protectionist purpose of the moratorium, the Court held that the Guy Parties were not entitled to cancel the Brakes' moratorium.[154] The moratorium was intended to give consumers like the Brakes more time to address their debt without the added pressure of enforcement actions like litigation, and the moratorium applied to all past debts, including those from creditors other than the Guy Parties. Thus, the court found that though the moratorium was certainly prejudicial against creditors, it was not unfair.[155] Moreover, the court also rejected the Guy Parties' argument that the moratorium should be cancelled because the Brakes were not engaging in debt advice, indicating a bad faith use of the moratorium.[156] Again looking to the purpose of the Debt Respite Scheme, the court found that the mental health moratorium exists precisely because a consumer's mental health is preventing them from addressing their debt in any way, including engaging in debt advice, and thus a lack of engagement could not be grounds for cancelling the moratorium.[157]

This result in the High Court demonstrates both the advantages and disadvantages of policies that circumscribe judicial enforcement by debt collectors more extensively than a venue requirement, as the Debt Respite Scheme does. On the one hand, while the Debt Respite Scheme is also a procedural measure, because it unequivocally prioritizes consumer interests over that of creditors and debt collectors,

151. Axnoller Events Ltd. v. Brake [2021] EWHC (Ch) 2308 (Eng.).
152. *Id.* ¶ 27, 45.
153. *See id.* ¶ 41.
154. *Id.* ¶ 35.
155. *See id.* ¶ 47.
156. *See id.* ¶ 45.
157. *See id.*

it is able to be more responsive to equity concerns.[158] On the other hand, the Debt Respite Scheme is not without disadvantages. By pausing enforcement actions by debt collectors, the regulation could have ripple effects on businesses.[159] Additionally, as the Guy Parties argued before the High Court, albeit unsuccessfully, a moratorium issued through the Debt Respite Scheme can be unfairly prejudicial to the interests of creditors and other debt collectors.[160] This feature of consumer protectionist policies is at the heart of the recurring critique that such policies threaten the continued existence of the consumer credit market.[161] In the context of debt collection regulation, it represents the idea that because the functionality of the consumer credit market depends, in part, on creditors' belief that they will be repaid for lending, policies that reduce the likelihood of repayment will lead to less available credit.[162] Further, some scholars warn that the reduction in available credit will exclude consumers considered high risk because they have limited income.[163] The thrust of this argument becomes more significant in the context of the broader reality that

158. The High Court decision suggests that under the Debt Respite Scheme, consumer interests are presumed to be more important than creditor interests. *See id.* ¶ 45 (rejecting the creditor's argument that the mental health moratorium issued under the Debt Respite Scheme was being used in bad faith because "the whole point of the mental health crisis eligibility for a moratorium is based on the assumption that a person suffering a mental health crisis is either unable or at least less able, by reason of the mental health problem itself, to engage with debt advice"). Thus, the Debt Respite Scheme is able to be more responsive to equity concerns because by prioritizing consumer interests, it prioritizes the factors related to equity that cause an inability to pay, such as mental health or, in other cases, economic hardship.

159. *See* Emily Davis, *National Law Review: Breathing Space for Individuals May Lead to Constricted Cashflow for UK Businesses*, NAT'L L. REV. (Jan. 8, 2021), https://www.natlawreview.com/article/breathing-space-individuals-may-lead-to-constricted-cashflow-uk-businesses [https://perma.cc/7XRP-GXWS] (archived Nov. 1, 2022) ("Whilst technically the debtor is still required to pay their debts during this time, a creditor will be unable to enforce, which for corporates transacting with individuals may impact cashflow if the debtor book is significant.").

160. *See Axnoller Events Ltd.*, [2021] EWHC (Ch) 2308, ¶ 27.

161. This discussion is most prevalent on the issue of interest rate caps for lending. For a detailed discussion and empirical analysis, see Jose Ignacio Cuesta & Alberto Sepulveda, *Price Regulation in Credit Markets: A Trade-off Between Consumer Protection and Credit Access* Abstract (Stan. Inst. Econ. Pol'y Research Working Paper, No. 21-047) ("[W]e find that [interest rate caps] decreased contract interest rates . . . but also reduced the number of loans . . .").

162. *See* Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and its Regulation*, 28 LOY. CONSUMER L. REV. 167, 167 (2016) ("Without the ability to enforce contracts, consumer lending would be scarce and expensive. Everyone would be worse off."); Charles Romeo & Ryan Sandler, *The Effect of Debt Collection on Access to Credit* 22 (CFPB Office of Research Working Paper Series, Working Paper, No. 2018-01, 2018); Julia Fonseca, Katherine Strait & Basit Zafar, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection* 7 (Federal Reserve Bank of New York Staff Reports, Staff Report, No. 814).

163. *See* Zywicki, *supra* note 162 at 189 (explaining that one response to regulations that limit creditor remedies is for lenders to "ration" access to credit, a practice that most impacts "the relatively poor and least credit worthy . . .").

lending has the potential to be an important mechanism for alleviating poverty.[164]

Thus, policies like the Debt Respite Scheme that aim to protect consumers may actually make them more vulnerable.[165] These policies could force consumers to go without basic necessities as they would not be able to find any available lenders, or worse, to seek credit from unregulated entities.[166] While the Debt Respite Scheme does not absolve consumers who have initiated a moratorium or mental health moratorium of the responsibility of paying their debts, the fact that consumers have a tool to postpone payment for a period of time could impact the consumer credit market in unintended ways.

IV. IMPROVING DEBT COLLECTION REGULATION IN THE UNITED STATES AND THE UNITED KINGDOM

Creating a regulatory framework that effectively prevents abusive debt collection practices is a delicate balancing act. As with any regulatory framework, the ability to find the place between over- and under-regulation is a challenge. In the context of debt collection, however, there is the added difficulty of regulating newcomers to the industry who can fall through the cracks if regulation is overly restrictive in scope. Debt collection regulation is also complicated by the fact that those most likely to need to borrow or fall behind on payments, are those who are in, or on the brink of, poverty.[167] Thus, the regulation of debt collection practices cannot be unresponsive to equity concerns, such as economic and racial disparities. At the same time, because credit is a critical tool for economic mobility,[168] it is important that any proposed debt collection regulation not deter creditors from lending. In short, an effective debt collection regulatory framework is one that is inclusive enough to withstand the changes in the composition of the debt collection industry and address equity concerns, but one that is also sufficiently limited such that it does not discourage creditors from entering the consumer credit market at all.

Part III of this Note assessed the regulatory framework for debt collection in the United States and the United Kingdom at two critical junctures: (1) the regulatory scope as outlined by each country's definition of "debt collector," and (2) the limitations on judicial enforcement of debt collection that can be imposed upon entities within each

164. *See, e.g.*, POL'Y LINK, BREAKING THE CYCLE: FROM POVERTY TO FINANCIAL SECURITY FOR ALL 16–18 (2016), https://www.policylink.org/sites/default/files/BreakingTheCycle_0.pdf (last visited Nov. 1, 2022) [https://perma.cc/8QRH-WRGS] (archived Nov. 1, 2022).

165. *See* Fonseca, Strait & Basit, *supra* note 162, at 4.

166. *See id.*

167. *See* WALDMAN & KIEL, *supra* note 149; *see also* MEHRSA BARADARAN, THE COLOR OF MONEY 261–62 (2017) (explaining that economic disparities like the racial wealth gap create a higher risk of indebtedness).

168. *See* POL'Y LINK, *supra* note 164, at 16–18.

definition's scope. This examination of scope and judicial enforcement reveals that both the United States and the United Kingdom struggle to exhibit all the characteristics of an effective regulatory framework of debt collection. The US framework, primarily governed by the FDCPA, suffers from an overly prescriptive definition of which debt collecting entities it regulates. As demonstrated by *Henson* and its aftermath, this limited scope errs on the side of underregulating newcomers to the debt collection industry.[169] Additionally, the venue requirement in the FDCPA does little to protect consumers against abuses that are not procedural. The UK framework, though far more inclusive in scope, is limited by its lack of a private right of action for consumers who have been subject to abusive debt collection. Additionally, the Debt Respite Scheme, though more responsive to equity concerns than the US venue requirement, is likely to face an uphill battle if attempted in the United States, where markets drive policymaking.

The solution to these problems is the following: the United States should (1) expand the scope of the FDCPA to include all debt collectors and (2) adopt a version of the United Kingdom's Debt Respite Scheme to help prevent abusive debt collection. The United Kingdom should create a private right of action for consumers facing abusive debt collection.

A. *Adjusting Scope in the United States: Redefining the FDCPA's Debt Collector in the Image of the United Kingdom's CONC 7*

Both the judicial outcomes regarding debt buyers in the United States and the enforcement outcomes for original creditors in the United Kingdom discussed in Part III suggest that expanding the FDCPA definition of "debt collector" to reflect the UK's CONC 7 definition could be beneficial to consumers. Consumers would be able to seek redress from debt buyers like Santander in *Henson* without being restricted to the principal purpose definition.[170] Additionally, if original creditors or third-party debt collectors violated the FDCPA, their customers would not lack any recourse simply because the entity doing the collecting was not a debt collector in the traditional sense.[171] This shift in the limits of the FDCPA would better reflect the modern landscape of debt collection that includes not just original creditors but also debt buyers who fall into the category of original creditors by mere

169. *See* discussion *supra* notes 122–26 and accompanying text.

170. *See* Henson v. Santander Consumer USA, 137 S.Ct. 1718, 1724 (2017).

171. *See* Stone v. JP Morgan Chase Bank, N.A., 415 F. Supp. 3d 628, 632–33 (E.D. Pa. 2019). As discussed previously, this case demonstrates that without the ability to show that debt collection is a firm's principal purpose, the consumer currently has no other actionable claim under the FDCPA. *See supra* notes 122–24 and accompanying text.

technicality, and third-party debt collectors who may be acting on behalf of original creditors or debt buyers.

However, broadening the FDCPA's scope would not remove all of the roadblocks consumers face in contesting unfair debt collection in the United States. The uncertainty of litigation is a major factor to contend with.[172] A survey of appellate court decisions on FDCPA lawsuits in 2018 shows consumers succeeding on substantive claims just over 30 percent of the time.[173] The cost of litigation can also be a deterrent force. Victims of unfair debt collection typically do not have the resources to contest those unfair debt collection practices in court.[174] Moreover, the data on complaints received and upheld by the FCA in the United Kingdom show that success is not guaranteed for consumers who seek redress under this broader definition of what it means to be a debt collector.[175]

Aggregate complaint data for January through June 2021 show that of the approximately 2 million complaints consumers made to the FCA, 59 percent of them were upheld.[176] Though this is about twice the success rate of consumers in US courtrooms,[177] it is still a risk for consumers who have limited resources. Also, the implications of this data are limited by the fact that the complaint rate and percentages upheld include all complaints, not those specifically related to debt collection practices.[178]

In addition to considerations of the uncertainty of litigation and the validity of UK data on general consumer agency complaints to US consumer debt collection-specific litigation, some would argue that it is important to avoid the risk of over-regulation that comes with expanding scope. In the wake of the 2008 financial crisis, many scholars warned of the swinging pendulum of regulation oscillating from the under-regulation that created the conditions for the financial crisis to the over-regulation that could result from too much government intervention.[179] In this case, it is possible that expanding the scope of the

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172. *See* April Kuehnhoff, *Birdseye View of All 2018 FDCPA Reported Appellate Decisions*, NAT'L CONSUMER L. CTR. (Jan. 28, 2019), https://library.nclc.org/birdseye-view-all-2018-fdcpa-reported-appellate-decisions [https://perma.cc/L9VY-GGRX] (archived Sept. 23, 2022).

173. *See id.* Consumers prevailed on their substantive claims in eleven of the thirty-four cases. *Id.*

174. Russell Engler, *Connecting Self-Representation and Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 38, 41 (2010).

175. *See Aggregate complaints data: 2021 H1*, FIN. CONDUCT AUTH., https://www.fca.org.uk/data/complaints-data/aggregate-complaints-data-2021-h1 (last updated Apr. 28, 2022) [https://perma.cc/4TFG-PQCU] (archived Sept. 23, 2022).

176. *Id.*

177. *See* Kuehnhoff, *supra* note 172.

178. *See id.*

179. Joshua Aizenman, *Financial Crisis and the Paradox of Under- and Over-Regulation* 17 (Nat'l Bureau of Econ. Rsch., Working Paper No. 15018, 2009); Gerald P.

FDCPA as it relates to debt collectors could chill the broader lending industry or have other undesirable effects on the debt collection industry specifically.[180]

But this position depends on the assumption that debt collection regulation only benefits consumers.[181] As discussed in Part II, the consumer protectionist goals of the FDCPA were coupled with the objective of protecting debt collectors that did not engage in abusive debt collection practices.[182] By rooting out bad actors who engaged in unfair debt collection practices, Congress implemented the FDCPA, in part, to preserve fair competition in the market of debt collection.[183] If third-party debt collectors and debt buyers are engaging in unfair debt collection practices, regulating their conduct would be helpful to both consumers *and* other debt collectors adhering to the FDCPA's standards.[184] Therefore, redefining "debt collector" to include all firms engaging in debt collection would be more accurately characterized as a step towards accomplishing the FDCPA's dual purpose of protecting consumers and competition among debt collectors, rather than as a step towards over-regulation.[185]

Even if this perspective on the market of lending and debt collection is not compelling enough to justify expanding the scope of the FDCPA, one must consider the costs of doing nothing. Current trends suggest that the presence of debt buyers and the use of third-party debt collectors are here to stay.[186] Inaction regarding the scope of the FDCPA thus amounts to a willingness to allow those actors in the debt collection industry to go unregulated, even if they engage in the same conduct for which a traditional original creditor or debt collector would face the consequences.

B. *Judicial Enforcement in the United States: Reconceptualizing the Role of the Courts*

Turning to judicial enforcement in the United States, concerns about regulatory balance and preserving the existence of the consumer

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Dwyer & Paula Tkac, *The Financial Crisis of 2008 in Fixed-Income Markets*, 28 J. INT'L MONEY & FIN. 1293, 1313 (2009) ("The big policy issue going forward is the response to the crisis. A desire for financial stability easily can lead to over-regulation and a moribund financial sector that bears more similarities to a graveyard than a vibrant, growing economy."); Helmut Wagner, *The Causes of the Recent Financial Crisis and the Role of Central Banks in Avoiding the Next One*, 7 INT'L ECON. & ECON. POL'Y 62, 78 ("In such a situation of massive uncertainty, it is likely that we will see some over-regulation, i.e. too many (rigid) rules that could be dangerous or costly.").

180. *See* Zywicki, *supra* note 162, at 189.

181. *See id.*

182. *See supra* notes 34–35 and accompanying text.

183. *See id.*

184. *See id.*

185. *See id.*

186. CONSUMER FIN. PROT. BUREAU, MARKET SNAPSHOT: THIRD-PARTY DEBT COLLECTIONS TRADELINE REPORTING 8–9 (2019).

credit market remain. However, striking the right balance at this juncture is more complex because changes to judicial enforcement by debt collectors will require either a limitation on the current legal recourse debt collectors have access to, or a reinforcement of, the legal representation available to consumers with limited financial resources. Therefore, not only could both courses of action potentially threaten the continued existence of the consumer credit market—at least in its current state—but these solutions also require a reconceptualization of the relationship between debt collectors and the courts and of the duty the judicial system has to ensure fairness for all parties, regardless of their ability to pay for legal representation. The solution this Note proposes engages only with the concept of limiting judicial enforcement by debt collectors, as demonstrated by the UK Debt Respite Scheme.[187]

The FDCPA's venue requirement has proven to be an effective protective measure where it would be procedurally unsound for a debt collection suit to proceed.[188] However, equity, not just procedure, must be a significant contextual factor in assessing judicial enforcement of debt collection. Because of the inequalities that dictate which individuals are most likely to go into debt and those most likely to default on their debts or otherwise find themselves subject to legal action for debt collection, equity concerns warrant special attention.[189] Thus, the United States should consider adopting a version of the UK Debt Respite Scheme into its regulatory framework for preventing the misuse of the judicial system for the purpose of unfair or abusive debt collection practices. The UK Debt Respite Scheme is responsive to equity in a way that the FDCPA should be, given the inequities baked into the debt collection ecosystem in the United States.[190]

Making a version of the UK Debt Respite Scheme available to US consumers can be achieved by amending the FDCPA, promulgating new rules under existing regulations, or creating agency guidance. The challenges of passing legislation render amending the FDCPA almost impossible.[191] However, the CFPB, under its authority to issue rules

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187. The concept of a civil right to counsel is beyond the scope of this Note. For further discussion of its applicability to debt collection suits, see generally Engler, *supra* note 174.

188. *See supra* notes 140–42 and accompanying text.

189. *See* WALDMAN & KIEL, *supra* note 149.

190. *See id.*

191. *See* Ezra Klein, *Almost None of the Bills Introduced Into Congress Ever Becomes Law*, WASH. POST (Jan. 16, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/01/16/almost-none-of-the-bills-introduced-into-congress-ever-becomes-a-law/ [https://perma.cc/R277-V45Y] (archived Sept. 28, 2022) (featuring data compiled by the Sunlight Foundation demonstrating that fewer than 5 percent of bills become law); NORMAN J. ORNSTEIN, THOMAS E. MANN, MICHAEL J. MALBIN, ANDREW RUGG, RAFFAELA WAKEMAN, BROOKINGS INST., VITAL STATISTICS ON CONGRESS, tbl.6-1 (Apr. 18, 2014), https://www.brookings.edu/wp-content/uploads/2016/07/Vital-Statistics-Full-Data-Set.pdf [https://perma.cc/MWV4-KJ3T] (archived Nov. 1, 2022).

and implement the FDCPA,[192] could promulgate rules or create guidance to achieve the same effect as the UK Debt Respite Scheme. The CFPB's most recent revision to Regulation F, discussed in Part II, is the perfect example of this course of action. While the recent Regulation F revisions focused on requirements for communications, disclosures, and misrepresentations to prevent abusive debt collection practices in the context of new communicative technologies,[193] the CFPB should act under its authority to prescribe rules that provide mechanisms for consumers to delay judicial action by debt collectors in the context of the renewed reliance on courts as a method of abusive debt collection.

There are risks associated with this approach to curbing abusive judicial enforcement, but these risks are not determinative. Similar to the concern that expanding the scope of the FDCPA could lead to overregulation that is destructive to the consumer credit market, there is the critique that removing or limiting legal recourse for debt collectors threatens the viability of the consumer credit market. Indeed, limiting legal recourse for debt collectors runs the risk of eliminating the market because a significant motivating factor for lenders to enter the market is the ability to effectively recover their losses.[194] Additionally, imposing a limit on legal action by debt collectors implicates underlying questions of contract law.[195] However, limiting legal action by debt collectors is not the same as foreclosing the courts to debt collectors entirely. The Debt Respite Scheme has several safeguards to prevent against the kind of endless delay of judicial action that would be necessary to eliminate the consumer credit market.[196] Additionally, any rule the CFPB promulgates would need to undergo the notice and comment process, allowing debt collection agencies and other interest groups to provide the agency with information on the potential impacts of such a rule.[197] Thus, these concerns are overstated and do not prevent the United States from taking action to address the misuse of its judicial system as an abusive collection tactic.

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192. *See* 15 U.S.C. § 1692l(d) (West 2021). Prior to the Dodd-Frank Act, the FTC published various guidance on the FDCPA, but the Dodd-Frank Act granted the CFPB the authority to dictate substantive debt collection rules. *See* Debt Collection Practices (Regulation F), 85 Fed. Reg. 76734, 23294 (Nov. 30, 2020) (to be codified at 12 C.F.R. 1006).

193. *See supra* notes 63–66 and accompanying text.

194. CHERYL R. COOPER, CONG. RSCH. SERV., R46477, THE DEBT COLLECTION MARKET AND SELECTED POLICY ISSUES 2 (2021).

195. Debt collection suits initiated by collectors are based on a breach of contract cause of action.

196. *See supra* notes 92, 96–98 and accompanying text.

197. *See* Administrative Procedure Act, 5 U.S.C. § 553.

C. *Considerations for the United Kingdom: Creating a Private Right of Action for Consumers Alleging Unfair Debt Collection Practices*

This Note is primarily concerned with how debt collection regulation in the United States can be improved, and therefore its solution centers on the United States adopting the United Kingdom's approach to scope and judicial enforcement by debt collectors. However, there are lessons for the United Kingdom as well. As discussed in Part II, while UK consumers can sue debt collectors for applicable tort law violations, they lack a private right of action that is specific to debt collection violations.[198] The absence of a private right of action under the CCA could potentially pose many problems for consumers. Choosing to embrace a regulatory approach rather than an individualized one, the United Kingdom requires claims alleging violations of the CCA to go through a complaints process with the FCA.[199] Though the United Kingdom's broad definition of "debt collector" means that most complaints would not fail because a debt collector exists beyond the scope of the CCA, it is possible that some complaints would not survive the discretion of the FCA—despite the fact that consumers might have chosen to pursue them in court under a private right of action.[200]

Apart from the fact that the United Kingdom's current system deprives consumers of the decision-making authority regarding which claims to pursue, the United Kingdom's regulatory-forward system leaves consumers vulnerable where a private right of action could serve as an additional deterrent to illegal debt collection tactics. Though regulatory bodies serve an important role, many lack the resources and capacity to investigate every violation of the laws they were enacted to enforce.[201] Private parties, particularly those directly impacted by a

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198. *See* STANESCU, *supra* note 72, at 272 n.37 (explaining that while consumers subject to abusive debt collection may sue under a tort claim, the UK regulations and statutes specifically related to consumer protection against unfair debt collection do not provide a private right of action). For further discussion on the limitations of common law frameworks, such as tort law, see Iris H-Y Chiu & Alan H. Brener, *Articulating the Gaps in Financial Consumer Protection and Policy Choices for the Financial Conduct Authority: Moving Beyond the Question of Imposing a Duty of Care*, 14 CAP. MKTS. L.J. 217, 239–40 (2019) (criticizing the proposed introduction of a duty of care or fiduciary duty as a means of addressing gaps in the FCA's current regulatory regime).

199. *See* STANESCU, *supra* note 72, at 272 n.37.

200. *See Aggregate complaints data: 2021 H1*, *supra* note 175 (showing that 59 percent of consumer complaints to the FCA were upheld); FIN. CONDUCT AUTH., DISPUTE RESOLUTION: COMPLAINTS 118–21 (Oct. 2022), https://www.handbook.fca.org.uk/handbook/DISP.pdf [https://perma.cc/XPJ6-EFDV] (archived Nov. 1, 2022) (detailing how the individual complaints process is highly dependent on the discretion of the Ombudsman).

201. *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VAND. L. REV. 93, 107–12 (2005). Though Stephenson's central argument is that administrative agencies should assume a larger role in enforcing the law, he discusses the advantages that private enforcement brings, which include individuals' expertise on their own experience and the incentive to enforce the law because they were personally harmed. *See id.*

violation, are often better suited to ensure compliance with the law.[202] The FCA's complaint process demonstrates an awareness of its limitations. From the requirement that consumers complain to the firm they believe to have violated the law before involving the FCA to the numerous procedural hurdles consumers face, each step of the complaint process serves to whittle down the number of complaints that the FCA is required to pursue.[203] This tendency is presumably because the FCA realizes it cannot address every single violation. While it is not a problem for a regulator to recognize its limitations, regulatory limitations become a problem when regulated entities use them as an opportunity to violate the law without consequence.[204] Indeed, despite the fact that all debt collectors are under the FCA's jurisdiction, the number of complaints to the FCA about debt collection has increased in recent years.[205] Cătălin-Gabriel Stănescu, in his analysis of debt collection regulation across Europe, contends that these increased complaints reflect inefficiencies in a system that has bitten off more than it can chew by claiming to regulate all debt collectors, but that has not allowed consumers to pursue claims of abuse in court.[206]

Critics of private rights of action typically assert that they pave the way for frivolous suits, undermine administrative enforcement, and deter good actors from entering or innovating in a given industry.[207] These concerns, however, are less relevant to the debt collection industry, where it is primarily low-income consumers who find themselves subject to abusive debt collection.[208] Frivolous suits require economic resources; moreover, it would take a large number of frivolous suits to sufficiently undermine administrative enforcement by the FCA and stifle entry and innovation across the United Kingdom's debt collection industry.

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202. *See id.*

203. *See* FIN. CONDUCT AUTH., DISPUTE RESOLUTION: COMPLAINTS, *supra* note 200, at 118–21. Though the judicial process has its own mechanism for achieving this sort of efficiency, when these mechanisms are paired with a lack of autonomy that a private right of action affords, these barriers are more pronounced.

204. *See* Jasinski, *supra* note 77, at 153–54 (explaining that under the OFT's licensing regime, which preceded the FCA, consumers were mistreated by lenders because of the OFT's minimal use of its enforcement powers due to limited resources).

205. *See* FIN. OMBUDSMAN SERV., FAIRNESS IN A CHANGING WORLD: ANNUAL REVIEW 2016/2017 49 (2017) (showing that from 2016 to 2017, the FCA's Financial Ombudsman Service noticed almost a 10 percent increase in complaints about consumer credit services, such as debt collection); FIN. OMBUDSMAN SERV., ANNUAL REVIEW 2017/2018 3 (2018) (showing that from 2017 to 2018, there was a 40 percent increase in complaints about consumer credit services).

206. *See* STANESCU, *supra* note 72, at 297–98 ("Despite its comprehensive . . . regulation of banned debt collection practices . . . the system is not working efficiently in the UK and the reason can only be the absence of a proper private enforcement system . . .").

207. *See* Stephenson, *supra* note 201, at 114–19; U.S. CHAMBER INST. FOR LEGAL REFORM, ILL-SUITED: PRIVATE RIGHTS OF ACTION AND PRIVACY CLAIMS 14 (July 2019).

208. *See* Engler, *supra* note 174, at 41.

Joanna C. Schwartz suggests that there are other factors preventing the private right of action from being the deterrent force it is presumed to be.[209] Schwartz's perspective is based on the idea that private rights of action are only effective deterrent tools when potential bad actors have access to information on litigation and make decisions based on this information.[210] However, there is reason to believe that in the debt collection industry, firms pay very close attention to litigation trends. Law firms who represent debt collectors often distill consequential court decisions for their clients.[211] Debt collection firms also organize themselves into associations that, among other things, help to keep their members informed of important changes to the enforcement landscape.[212] Thus, a private right of action for consumers in the United Kingdom would likely help to make its debt collection regulatory scheme more efficient.

V. CONCLUSION

The regulation of debt collection in the United States has undergone immense changes since the early days of the MHLIC. Yet, the defining features of debt collection as detached and heavily reliant on the judicial system have endured. Though the FDCPA was a significant turning point on the way to effective debt collection regulation in the United States, the scope of the FDCPA no longer reflects the variety of actors in the debt collection industry, nor has the FDCPA ever limited judicial enforcement by debt collectors to account for the economic and racial disparities that make it difficult to regulate debt collection in a manner based purely on economic theories. The United Kingdom, having a similar history of the development of debt collection regulation while also assuming a broader scope and more equitable approach to judicial enforcement by debt collectors, is thus instructive to the United States. Based on a comparative analysis of the scope and limitations on judicial enforcement practices in both the United States and the United Kingdom, this Note proposed that the

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209. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1026–30 (2010).

210. *See id.*

211. *See, e.g.*, Barbara S. Mishkin, *Consumer Finance Monitor: Ballard Spahr Launches National Tracking Services for Financial Institutions*, BALLARD SPAHR LLP (Nov. 30, 2020), https://www.consumerfinancemonitor.com/2020/11/30/ballard-spahr-launches-national-tracking-services-for-financial-institutions/ [https://perma.cc/FLK9-CXW5] (archived Sept. 29, 2022) (announcing Ballard Spahr LLP's offering several consumer law trackers, featuring developments in legislation, regulation, and litigation).

212. *See, e.g.*, *ACA Compliance: Resources to Help Members Comply with Federal and State ARM Laws*, ACA INT'L, https://www.acainternational.org/compliance/ (last visited Nov. 1, 2022) [https://perma.cc/9DCR-CG3N] (archived Sept. 29, 2022) ("ACA's compliance team helps members navigate and understand the myriad statutes, regulations, policies, and judicial decisions that shape ARM-relevant business operations by monitoring, researching, and analyzing laws and court decisions that affect the industry.").

United States (1) broaden the scope of the FDCPA to match that scope of the FCA in the United Kingdom and (2) increase limitations on judicial enforcement by debt collectors by adopting a version of the UK Debt Respite Scheme. Additionally, the United Kingdom should create a private right of action for consumers facing abusive debt collection to reinforce its broad regulatory authority.

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