NOTE

IMPROVING RELIEF FROM ABUSIVE DEBT COLLECTION PRACTICES

I. INTRODUCTION

Debt collection[1] is endemic in the United States: as of March 2012, approximately thirty million people held debt that had been subject to collection processes.[2] The Fair Debt Collection Practices Act[3] (FDCPA) protects individuals who might otherwise be the target of predatory debt collection tactics by establishing civil liability for such behavior. Courts may also vacate unlawfully obtained judgments as a means of providing additional relief to consumers. However, the structure and practices of the consumer debt industry interact with state and federal legal institutions to significantly limit the availability of effective relief for individuals who have been the target of predatory litigation tactics in state courts. Such practices have in recent years been deployed against millions of Americans, resulting in significant and widespread harms to consumers. These harms come in two basic types: direct financial harm in the form of money judgments entered against consumers who should not by law be required to pay them, and collateral harm through the effects of a default judgment on a consumer's credit report.[4]

First, a proposition about effective relief: While a total remedy from predatory litigation practices may theoretically be possible through a piecemeal combination of individual or class actions in state and federal courts, such a fragmented approach faces barriers in terms of complexity and transaction costs that are likely to reduce the relief (be it monetary or equitable) awarded to consumers and to decrease the deterrent effect of liability on the entities that make use of unlawful litigation tactics. Effectiveness, this Note argues, requires a system

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[1] First-party debts are those owed to the entity that initially extended credit to the consumer. When a consumer falls behind on paying a debt, first-party creditors frequently charge off the debt (that is, account for the debt as being unrecoverable) and sell the rights to the delinquent debt to debt buyers and collection agencies who specialize in the collection of delinquent debts. *See* CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2013, at 8–9 (2013).

[2] *See id.* at 8; *see also* FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 15 (Nov. 2012).

[3] 15 U.S.C. §§ 1692–1692p (2012).

[4] Consumers may also be harmed through the emotional distress that results from violations of the FDCPA, *see, e.g.*, McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 957–58 (9th Cir. 2011) (upholding actual-damages award based on emotional distress), though such harms do not fall within the focus of this discussion.

in which adequate relief can be obtained in a straightforward manner, without resort to a piecemeal and incomplete approach.

This Note explores a particular set of interactions operating in this area and illustrates their impact on the victims of predatory debt collection actions and on the private enforcement of the FDCPA. Part II of this Note presents a general description of the key statutory and institutional elements that give rise to the problem: the American debt collection industry, state small claims courts, and the provisions of the FDCPA intended to prevent predatory lawsuit-filing practices. Part III illustrates a set of practical and doctrinal forces that raise barriers to effective relief under the FDCPA, including the challenge of individually proving FDCPA claims on the merits, judicial federalism concerns, procedural barriers, and difficulties associated with calculating appropriate damages. These forces combine with the institutional and statutory framework to foreclose the likelihood of adequate and effective relief under the FDCPA for victims of predatory practices in state courts, thus weakening the deterrent effect of the FDCPA. Part IV presents a number of potential reform measures that may increase the effectiveness of the FDCPA at protecting consumers from predatory debt collection litigation practices. Part V concludes.

II. DEBT COLLECTION AND THE FDCPA

The issue begins with the debt-purchasing market. The debt-purchasing process typically starts with the bundling of debts into portfolios by the issuer.[5] These portfolios are then purchased by debt buyers through a bidding process, usually at a steep discount to the face value of the debts.[6] Occasionally, debt buyers will repackage and resell debt portfolios to other debt buyers, subdividing or aggregating debts from various portfolios according to additional classification criteria.[7] Through this process of classification, aggregation, sale, repackaging, and further sale, information identifying consumers and the amount of debt owed frequently becomes separated from the underlying documentation about the debt, including the agreements that established the debt (containing information about applicable interest rates, fees, availability of fee shifting, choice of law, and other critical terms) as well as information on the consumer's history of payments against the debt.

Third-party debt collection may play a significant positive role in preserving the health of the consumer debt industry by reducing the

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[5] FTC, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 17 (2013).

[6] In one Federal Trade Commission (FTC) study, debt buyers paid an average of four cents per dollar of face value. *See id.* at 23.

[7] Secondary debt sale activity most commonly occurs with credit card debts. *See id.* at 19.

costs to primary lenders of extending consumer debt and by allowing for negotiated settlements where consumers in financial distress may agree to pay amounts less than the total amount owed on the debt.[8] However, the debt collection industry has long been plagued by allegations of fraudulent, misleading, and unethical collection practices.[9]

The consumer debt collection industry is premised on a high-volume business model. Debt buyers holding portfolios of debts with a low ratio of book value to face value seek to collect on a sufficient number of debts to generate a profit, through direct collection efforts as well as lawsuits.[10] Empirical evidence shows that many debt buyers using a high volume of lawsuits as a component of their recovery strategy rely heavily on the assumption that consumers often fail to show up to contest the case; this assumption is largely valid.[11] There may be several reasons for such a failure to respond. Some of these reasons may themselves be related to FDCPA violations, including defective notice, or may stem from a (mistaken) consumer belief that no response is required if the debt being sued upon is not actually hers. Most simply, many consumers may not respond due to a misunderstanding of the legal procedures required to avoid default. In addition, some debt collectors rely on the assumption of default to pursue what has been called a "scattershot" approach, whereby they file many lawsuits with the hope of securing default judgments, but without the intent to actually litigate them should the opposing parties respond.[12]

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[8] *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 9.

[9] Though abusive debt collection practices are not the exclusive province of third-party collectors, these collectors tend to generate significantly more consumer complaints than first-party collectors. In 2012, the FTC received 102,783 complaints regarding third-party collectors and 22,353 complaints about first-party collectors. *Id.* at 15.

[10] The popularity of lawsuits as a collection mechanism for debt collectors appears to have increased substantially in recent years. A 2007 study of cases filed in the Civil Court of the City of New York found that the total number of cases filed in that court almost tripled between 1997 and 2007, with a large portion of that increase attributable to consumer debt collection filings. MFY LEGAL SERVS., INC., JUSTICE DISSERVED 3 (2008).

[11] Again using New York City courts as an example, nine major debt collectors filed a total of 122,166 lawsuits in the Civil Court of the City of New York in 2007. Defendants appeared to contest the suit in 9295 cases, for an appearance rate of 7.6%. *Id.* at 4; *see also* Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 288 (2011) (reporting finding from an empirical study of debt collection suits in Dallas County that defendants appeared in only 23% of cases where they were served); Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. TIMES, July 13, 2010, at B1 (noting that one particularly active firm in New York City files approximately 80,000 lawsuits per year with a staff of 14 lawyers — "more than 5,700 cases per lawyer").

[12] *See, e.g.*, Kuria v. Palisades Acquisition XVI, LLC, 752 F. Supp. 2d 1293, 1302 (N.D. Ga. 2010); Royal Fin. Grp., LLC v. Perkins, 414 S.W.3d 501 (Mo. Ct. App. 2013); *see also* Spector, *supra* note 11, at 295. Professor Mary Spector observed an overall voluntary dismissal rate in debt collection suits of 51.25%, with a significant increase in dismissals where defendants appeared (61.77%), and an even larger increase in dismissals where the defendant appeared with legal rep-

Some debt collection agencies support mass litigation by engaging in "robosigning," a practice by which debt collectors generate large numbers of affidavits swearing to personal knowledge of the details of the debt underlying a lawsuit, where no such personal knowledge exists.[13] Robosigning represents a particularly significant threat to consumers in light of the fact that debt collectors frequently receive incomplete information from original creditors as part of the debt-buying process.[14] In such cases, robosigned affidavits may reflect not only an insufficient review of the debt record to ensure the accuracy of the complaint, but also affirmative misrepresentations as to the knowledge of the debt collector.

When debt collectors obtain a default judgment, consumers must contend with more than the direct consequences of that judgment. When a judgment is entered against a consumer, it becomes a matter of public record that may then be incorporated into a consumer's credit report. The Fair Credit Reporting Act[15] (FCRA) regulates both the process of compiling credit reports and their contents. Credit reports are compiled by credit reporting agencies[16] (CRAs) and incorporate information from a variety of sources, including "trade lines" — specific accounts held in a consumer's name and their associated credit limit, payment history, delinquency status, and other details[17] — and public record information. Adverse judgments in debt collection lawsuits

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resentation (75%), *id.*, strongly suggesting that the plaintiffs in those cases were filing suit with the specific intent of securing a default judgment rather than contesting a real lawsuit.

[13] *See, e.g.*, Vassalle v. Midland Funding LLC, 708 F.3d 747, 752 (6th Cir. 2013), *reh'g and reh'g en banc denied*, Nos. 11-3814, 11-3961, 11-4016, 11-4019 & 11-4021, 2013 U.S. App. LEXIS 7988 (6th Cir. Apr. 19, 2013); Midland Funding LLC v. Brent, 644 F. Supp. 2d 961, 966–67 (N.D. Ohio 2009); *see also* David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES, Nov. 1, 2010, at A1.

[14] FTC, *supra* note 5, at 29. One FTC study found considerable variation in which debt details were typically provided to debt buyers, as well as whether any supporting documentation, such as the original credit agreements, were provided as part of the sale. *Id.* at 34–37. The FTC noted that while the information provided to third-party collectors is generally sufficient to meet the documentation requirements of the FDCPA, *id.* at 36, it may not be sufficient to prevent the filing of nonmeritorious lawsuits. *See* FTC, REPAIRING A BROKEN SYSTEM, at ii (2010).

[15] 15 U.S.C. §§ 1681–1681x (2012). For a thorough discussion of the credit reporting system, its regulation under the FCRA, and its interaction with unfair debt collection practices, see generally Mary Spector, *Where the FCRA Meets the FDCPA: The Impact of Unfair Collection Practices on the Credit Report*, 20 GEO. J. ON POVERTY L. & POL'Y 479 (2013).

[16] The three major nationwide credit reporting agencies in the United States are Equifax, TransUnion, and Experian. *See* FTC, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at i (2012).

[17] CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM 8 (2012) (defining trade lines and listing examples, including auto loans, mortgages, and credit cards).

represent one of the most important, and highly damaging,[18] types of public record information.[19]

Once a default judgment is recorded in a consumer's credit report, it may then cause additional damage to her economic well-being. Creditors and insurers routinely check the credit reports of new applicants,[20] employers often review credit reports when evaluating new hiring candidates,[21] and landlords may review credit reports when deciding whether to lease to a prospective tenant.[22]

In 1977, Congress responded to growing concerns about predatory collection practices by passing the FDCPA,[23] a statute intended, in part, to "eliminate abusive debt collection practices"[24] that Congress found "contribute[d] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[25] The FDCPA specifically covers the actions of "debt collectors," a term that covers third-party collectors as well as attorneys who regularly engage in debt collection activities,[26] but excludes original creditors collecting under their own name.[27] The FDCPA imposes a number of requirements on covered collectors,[28] but this Note is concerned specifically with those provisions of the Act that govern the conduct of debt collectors in filing and pursuing lawsuits for the collection of debts. The Supreme Court has read the Act to cover litigation activity

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[18] *See id.* at 12 (noting significant impact of debt delinquency on consumer credit scores).

[19] CRAs outsource the vast majority of the retrieval of public records to LexisNexis Risk Data Retrieval Services LLC, a private vendor that records judgment information from ten to twelve thousand courts and government offices across the country and transmits that information to CRAs. *See id.* at 17. Of the approximately ten to twenty million public record events recorded by this vendor each year, approximately seventy percent are recorded by independent contractors who manually review and compile documents from government sources. *Id.*

[20] *See id.* at 5.

[21] *See* SOC'Y FOR HUMAN RES. MGMT., SHRM RESEARCH SPOTLIGHT: CREDIT BACKGROUND CHECKS (2010), *available at* http://www.shrm.org/Research/SurveyFindings/Articles/Documents/CCFlier_FINAL.pdf; *see also* 15 U.S.C. § 1681b(a)(3)(B) (2012).

[22] *See* CONSUMER FIN. PROT. BUREAU, *supra* note 17, at 5.

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

[24] 15 U.S.C. § 1692(e).

[25] *Id.* § 1692(a).

[26] *See* Heintz v. Jenkins, 514 U.S. 291, 298–99 (1995) (confirming that plain language of the FDCPA requires that its provisions cover "attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation," *id.* at 299).

[27] 15 U.S.C. § 1692a(6). First-party creditors are prohibited from engaging in "unfair, deceptive or abusive practices in their own collection activity" through several provisions in the Federal Trade Commission Act, state laws, and the Dodd-Frank Act. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 8–9.

[28] For example, the FDCPA governs the time and manner in which collectors are permitted to communicate with debtors and other people from whom information about the debtor is sought, *see* 15 U.S.C. §§ 1692b–1692c, bars harassment, fraud, and unfair practices, *see id.* §§ 1692d–1692f, and governs the manner in which debts are validated, *see id.* § 1692g.

as one form of debt collection action.[29] More specifically, courts have held that the Act's prohibitions on false, deceptive, or misleading representation cover representations made in connection with the filing and prosecution of a lawsuit.[30] Congress included both administrative[31] and private[32] mechanisms for enforcement of the FDCPA. This Note focuses on the Act's private enforcement mechanism, under which debt collectors who engage in activities barred by the FDCPA risk civil liability.[33] Despite decades of FDCPA enforcement by both administrative and private action, the FTC noted in 2010 that "[t]he system for resolving disputes about consumer debts is broken."[34] In particular, the FTC highlighted high rates of default judgments and the general lack of detailed debt information in debt collection complaints as contributing to unfair outcomes for consumers.[35] These types of systemic flaws should raise significant concern, as such behavior is functionally shielded from challenge in several ways.

III. BARRIERS TO RELIEF

When a debt collection suit is filed, usually in state court and typically as a small claims action,[36] defendants may, in most states, coun-

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[29] *See Heintz*, 514 U.S. at 297. The Court noted that neither the text nor the legislative history of the FDCPA provided a strong basis on which to draw a line "between 'legal' activities and 'debt collection' activities . . . , for litigating, at first blush, seems simply one way of collecting a debt." *Id.*

[30] *See, e.g.*, McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 949–50 (9th Cir. 2011) (baseless request for attorney's fees violated FDCPA); Kuria v. Palisades Acquisition XVI, LLC, 752 F. Supp. 2d 1293, 1302–03 (N.D. Ga. 2010) (complaint alleging that debt collector filed suit in hopes of obtaining default judgment, with no intent of actually taking claims to trial, raised actionable claim under FDCPA); Midland Funding LLC v. Brent, 644 F. Supp. 2d 961, 963 (N.D. Ohio 2009) (signing of affidavits without personal knowledge violated FDCPA). By contrast, in *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011), the Seventh Circuit interpreted the FDCPA not to apply to communications that might mislead a judge, apparently limiting the FDCPA's applicability to only those statements made directly to a consumer, as opposed to statements addressed to a court. *Id.* at 944. However, *O'Rourke* has not been widely cited for this proposition, and appears to represent a minority view among the federal courts. *See* Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814, 818 (8th Cir. 2012) (noting *O'Rourke*, but declining to follow its approach).

[31] Administrative enforcement of the Act was originally entrusted to the FTC. *See* Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 814, 91 Stat. 874, 881 (1977). In 2010, as part of the Dodd-Frank Act, Congress amended the FDCPA to divide administrative responsibility for the FDCPA between the FTC and the Consumer Financial Protection Bureau (CFPB). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1089, 124 Stat. 1376, 2092–93 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

[32] 15 U.S.C. § 1692k.

[33] *Id.*

[34] FTC, *supra* note 14, at i.

[35] *See id.* at iii.

[36] The average amount in controversy in debt collection suits in 2012 was $1500. FED. RESERVE BANK OF N.Y., *supra* note 2, at 15. This amount falls significantly short of the $75,000 amount-in-controversy threshold required for federal courts to obtain diversity jurisdiction. 28

terclaim that the filing of the suit does not comply with the FDCPA.[37] When such a counterclaim is raised in the initial debt proceeding, the state court can properly consider the validity of the plaintiff's action under the relevant provisions of the FDCPA, and can rule in the defendant's favor on the FDCPA counterclaim (potentially awarding actual or statutory damages) if the plaintiff has acted unlawfully.

While this mechanism allows consumers to defend against predatory suits in theory, a large fraction of all debt collection actions filed in state court are resolved as default judgments against the defendant. Where these judgments stem from a lawsuit filed or pursued in violation of the FDCPA, individuals may rightly wish to obtain relief that will make them whole: the vacatur of the state default judgment, relief provided for by the FDCPA, and the expungement of the judgment from their credit report.[38] Even consumers who may in fact owe the underlying debt may have good reason to seek such relief. Vacating the state court judgment provides these consumers with the opportunity to contest any disputed details of the underlying debt (for example, whether the amount sought reflects all prior payments and the contractually agreed-upon interest rate), and also to pursue settlement negotiations that may satisfy the debt collector's interests while avoiding any collateral harms.

U.S.C. § 1332 (2012). Amount-in-controversy caps for small claims courts vary by state, with low caps on the order of $2500, *see* KY. REV. STAT. ANN. § 24A.230 (West 2006 & Supp. 2013), and high caps on the order of $15,000, *see* DEL. CODE ANN. tit. 10, § 9301 (West 1999 & Supp. 2012).

[37] Idaho and Maine do not permit counterclaims in small claims court. *See* IDAHO R. CIV. P. 81(b); *Guide to Small Claims Proceedings in the District Court — Claims by Defendant Against Plaintiff*, ST. OF MAINE JUD. BRANCH, http://www.courts.state.me.us/maine_courts/small_claims/smallclaimsguide/counterclaim.html (last visited Feb. 2, 2014).

[38] This Note focuses on the difficulties surrounding vacatur of default judgments and damages under the FDCPA. For a discussion of the difficulties associated with challenging the appearance of default judgments on credit reports, see generally Spector, *supra* note 15.

The procedures surrounding vacatur vary significantly among the courts. In federal court, the Federal Rules of Civil Procedure establish the availability of vacatur through independent action (as opposed to through a post-judgment motion in the initial suit) and were intended to continue the historic existence of such an action in the courts of equity. *See* FED. R. CIV. P. 60(b) advisory committee's note to 1946 amendment. State courts differ, however, in the permissible procedures for pursuing vacatur. For example, Massachusetts provides for the availability of vacatur through either motion or independent action. MASS. R. CIV. P. 60(b) (stating that courts may "entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court"). New York, by contrast, allows for motions to vacate judgments on the basis of fraud, misrepresentation, or misconduct of the opposing party where such motions are made within the context of the original suit, N.Y. C.P.L.R. 5015(a) (McKinney 2007), but this language has been held by courts to eliminate by omission the availability of independent actions traditionally available in equity. *See* Calabrese Bakeries, Inc. v. Rockland Bakery, Inc., 923 N.Y.S.2D 556, 557 (2011) ("A motion for relief from a default judgment must be brought in the original action or proceeding. A plenary action or proceeding for such relief will not lie."). New York does, however, allow independent actions for mass vacatur where individuals have been the target of widespread fraud and where "default judgments have been obtained in a number deemed sufficient" to justify mass vacatur. N.Y. C.P.L.R. 5015(c).

However, numerous barriers frustrate the granting of such relief, whether sought in state or federal court. First, even if a consumer responds to the original lawsuit with FDCPA counterclaims, and even if small claims courts are structurally able to accommodate all such consumer responses, the nature of the debt collector's unlawful behavior itself may be difficult to establish, and difficult to halt, at the individual level. Second, should the consumer then decide to file a separate suit alleging FDCPA violations and seeking vacatur of the state court judgment, the *Rooker-Feldman* doctrine interacts with the rules governing removal to significantly limit the possibility of vacatur of the state court judgment in the same suit as the FDCPA claims. Finally, should a consumer eventually prevail on the FDCPA claims, the damages actually available under the FDCPA may not provide sufficient compensation or deterrence. Sections III.A through III.E will consider each of these barriers in greater depth.

A. The Limits of Small Claims Courts

By filing a counterclaim under the FDCPA, a sophisticated consumer who responds to a debt collection lawsuit in state court may be able to avoid the damage that would otherwise be caused by an unlawful default judgment. Should the consumer prevail on such a counterclaim, a judgment will not be entered against her in that proceeding, and she will avoid both direct and collateral harms.[39] However, state small claims courts may not have the capacity to accommodate the surge of litigation that would result if all, or even a substantial percentage of, consumers showed up to defend. For example, it is not clear how the Civil Court of the City of New York would cope if, instead of accommodating the 9295 defendants who appeared to defend suits against nine major debt collectors in 2007, it instead had to try all 122,166 cases filed by those creditors.[40] Thus, state court systems may contain serious barriers to the most obvious remedy to this problem: having individual defendants respond to lawsuits.

Assuming the consumer did not initially appear, state small claims courts generally provide a mechanism for an individual consumer to challenge the validity of an unlawfully secured default judgment. If the consumer can show a valid reason for her nonappearance, a judge may compel the plaintiff debt collector to appear and show cause as to

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[39] If the consumer actually owes the underlying debt, filing and prevailing on FDCPA counterclaims would not *permanently* forestall direct and collateral harms, but it would allow the consumer to avoid incurring such harms in the context of an unlawfully prosecuted lawsuit.

[40] *See* MFY LEGAL SERVS., INC., *supra* note 10, at 4.

why the judgment should not be vacated.[41] A successful showing by a consumer results in vacatur of the judgment and reopening of the case, at which point FDCPA counterclaims may be raised.

While such an action may allow a consumer to vacate the original judgment, it does not provide a compelling solution to the issue of unlawful default judgments for three reasons. First, even after a successful vacatur, consumers will still be faced with the inherent challenges of litigating an individual FDCPA claim that may relate to a widespread pattern of behavior for which class action mechanisms are better suited. As such, the vacatur of the initial default judgment is no guarantee, by itself, that the consumer will avoid an unlawfully procured adverse judgment. Second, as discussed above, many consumers may not in fact have a valid reason for failing to appear in the initial suit, even if the suit was prosecuted in an unlawful manner. Third, the availability of this type of action for vacatur is often time-barred. California, for example, requires that applications to vacate default judgments in small claims court be filed within thirty days of the date the judgment is mailed to the consumer.[42] Consumers may take longer than the permitted window to recognize the impact of the judgment and submit a petition for vacatur, given the collateral nature of many of the harms that flow from such a judgment.[43]

B. The Aggregate Nature of Certain FDCPA Violations

If unlawful debt collector actions occur in the context of litigation, they are unlikely to be limited to a single case. Take, for example, the "scattershot" approach described above, wherein debt collectors file a large number of suits, but dismiss any suit contested by the consumer.[44] In any individual case, all a defendant would see is a lawsuit filed against her, followed by a dismissal without prejudice. The defendant would have no reason to suspect that such conduct could be unlawful; indeed, were such conduct limited to a single lawsuit, it is unlikely that it *would* be unlawful. However, courts have found a pattern of file-and-dismiss conduct relevant in assessing FDCPA claims because such conduct may violate the Act's prohibitions on false, deceptive, or misleading representations and unfair and unconscionable collection practices.[45] And critically, the proof required to establish the

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[41] *See, e.g.*, *New York City Civil Court: Vacating a Default Judgment*, N.Y. STATE UNIFIED COURT SYSTEM, http://www.nycourts.gov/courts/nyc/civil/vacatingjudg.shtml (last visited Feb. 2, 2014).

[42] *See Vacate a Default Judgment*, CAL. CTS., http://www.courts.ca.gov/12726.htm (last visited Feb. 2, 2014).

[43] *See supra* pp. 1450–51.

[44] *See supra* pp. 1449–50.

[45] *See, e.g.*, Kuria v. Palisades Acquisition XVI, LLC, 752 F. Supp. 2d 1293, 1303 (N.D. Ga. 2010); Royal Fin. Grp., LLC v. Perkins, 414 S.W.3d 501, 507 (Mo. Ct. App. 2013).

debt collector's unlawful behavior involves patterns spread out across hundreds of filings, which may present a prohibitive evidentiary burden for individual litigants.

Such behavior implicates class action mechanisms. For example, in *Royal Financial Group, LLC v. Perkins*,[46] the Royal Financial Group purchased a bundle of consumer debts from another debt buyer on the secondary market and received no supporting documentation detailing the terms of the agreements giving rise to the debts (which govern interest rates, availability of attorney's fees, choice of law, and limitations periods).[47] Royal then filed suit against Terri Perkins, alleging that Perkins owed a debt to Chase Manhattan Bank, and that Royal was now the bank's assignee.[48] Perkins hired counsel to defend against the suit and filed a counterclaim that Royal had violated the FDCPA. Specifically, Perkins alleged that Royal's business model was premised on filing suit over debts purchased with insufficient supporting documentation to prevail on the merits.[49] Under this model, Perkins alleged, when a consumer responded and pressed the issue, Royal merely dismissed the claim,[50] thus avoiding scrutiny of its business practices. During discovery, Royal admitted that it did not possess any supporting documentation for the alleged debt, and that the debt buyer from whom Royal purchased the debt had made no representations about the accuracy of the amount of the debt.[51] The court in *Royal* found for Perkins, holding that filing a debt collection lawsuit against her without the intent to prosecute it amounted to a violation of the FDCPA as a "threat to take any action that cannot legally be taken or that is not intended to be taken."[52]

Royal was an individual action, but its facts suggest that it may be an exception that proves the rule that this species of FDCPA violation is naturally suited to class action relief. Most significantly, Perkins

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[46] 414 S.W.3d 501.

[47] "[T]he entirety of information implicating Perkins consisted of one line in the exhibit spreadsheet supplying the following particulars: PERKINS TERRI [redacted]85421 CHASE MANHATTAN BANK $1,486.17." *Id.* at 502. This sparse *information* should be distinguished from loan *documentation* (monthly statements, credit contracts and applications, and so on), which is not typically included in debt sale transactions. *See* Dalié Jiménez, Illegality in the Sale and Collection of Consumer Debts 17 (Dec. 5, 2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250784.

[48] *Royal*, 414 S.W.3d at 502.

[49] *Id.* at 503.

[50] *Id.*

[51] *Id.* Indeed, many debt purchase and sale agreements expressly disclaim any representations and warranties on behalf of the seller as to the accuracy of the information provided about the debts being sold. FTC, *supra* note 5, at 25. Professor Dalié Jiménez argues that seeking to collect on debts sold under such "quitclaim" language may be a per se violation of the FDCPA. *See* Jiménez, *supra* note 47, at 5–6.

[52] *Royal*, 414 S.W.3d at 505 (quoting 15 U.S.C. § 1692e(5) (2012)) (internal quotation marks omitted).

was able to hire counsel.[53] Given that many debt collection actions arise in the first place out of consumer financial troubles, the subset of consumers who may have valid FDCPA claims and can afford representation is likely to be small. Contingency-fee arrangements are not likely to provide much assistance in individual debt collection cases, given the relatively small amounts at stake.[54] In addition, Perkins needed to engage in discovery in order to support her claim, an expensive and detailed process that further decreases the likelihood that a self-represented litigant would be able to pursue these counterclaims independently. The FDCPA does provide for recovery of reasonable attorney's fees when consumers prevail,[55] but the prospect of expensive discovery wars and the uncertainty of victory may act as significant disincentives for individuals to pursue these claims with retained counsel, especially in light of courts' potential unwillingness to award actual damages under the FDCPA.[56] Even if an individual litigant were willing and able to pursue FDCPA claims, and could craft a proposed injunction to benefit other similarly situated consumers,[57] such an injunction would not be permitted under the FDCPA.[58] The unavailability of such relief further limits the extent to which individual suits can curb predatory debt collection practices.

This situation thus presents typical individual litigants with a negative expected value of filing suit, precisely the sort of situation that class actions and other aggregation mechanisms are designed to remedy.[59] However, class litigation raises additional barriers to effective relief. First, the FDCPA caps statutory damages in class action suits at $1000 per named plaintiff, plus the lesser of $500,000 or one percent of the debt collector's net worth.[60] Given the real possibility of large classes of consumers,[61] this cap acts as a significant limit on the statu-

[53] *Id.* at 502.

[54] *See supra* note 36.

[55] 15 U.S.C. § 1692k(a)(3).

[56] *See infra* section III.E, pp. 1460–62.

[57] Courts generally may not issue injunctions affecting the rights of nonparties. *See* Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983) (stating that courts must "tailor the injunction to affect only those persons over which [they have] power"). *But see* Price v. City of Stockton, 390 F.3d 1105, 1117–18 (9th Cir. 2004) (per curiam) (granting injunction benefiting nonparties where "the breadth of the injunction was necessary" to provide relief for plaintiffs, *id.* at 1118).

[58] *See, e.g.*, Weiss v. Regal Collections, 385 F.3d 337, 342 (3d Cir. 2004); Vitullo v. Mancini, 684 F. Supp. 2d 760, 763 (E.D. Va. 2010).

[59] *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

[60] 15 U.S.C. § 1692k(a)(3).

[61] *See, e.g.*, Vassalle v. Midland Funding LLC, 708 F.3d 747, 753 (6th Cir. 2013) (considering class of 1.4 million consumers), *reh'g and reh'g en banc denied*, Nos. 11-3814, 11-3961, 11-4016, 11-4019 & 11-4021, 2013 U.S. App. LEXIS 7988 (6th Cir. Apr. 19, 2013); *cf., e.g.*, Gammon v. GC

tory damages class members are likely to receive,[62] though it does not limit actual damages or attorney's fees.[63] Second, class certification opens the possibility of removal of large state class actions to federal court under the Class Action Fairness Act,[64] further increasing the possibility that such actions will face barriers to securing vacatur of state court judgments, as explained in the next section.

C. The Rooker-Feldman *Doctrine*

While procedural barriers may explain some consumers' failure to raise FDCPA claims in the original debt collection suit, it is more likely that FDCPA claims go unasserted in the initial suit because consumers simply fail to respond. In these cases, a consumer may recognize the existence of a valid FDCPA claim only after she has received a default judgment (and only if she is in fact aware of her rights under the FDCPA). Given the collateral consequences a consumer may suffer as a result of the default judgment, complete relief must include not only money damages but also vacatur of the state court judgment[65] along with the attendant remedies that might (or, alas, might not) follow vacatur, such as removal of the illegal judgment from a credit report and repair of a credit score. It is in seeking such a vacatur, however, that significant doctrinal challenges arise.

Initially, a plaintiff alleging FDCPA violations may face difficulty selecting a court to hear her claim. The plaintiff's suit, citing the federal FDCPA for the cause of action, raises questions of federal law. As such, even if the plaintiff files in state court, the defendant may remove the suit to federal district court under that court's federal question jurisdiction.[66]

Once the case is in federal court, however, a plaintiff's efforts to vacate a state court judgment are likely to fail under the *Rooker-Feldman* doctrine. Ninety years ago, in *Rooker v. Fidelity Trust Co.*,[67] the Supreme Court held that, because Congress endowed the district courts solely with original jurisdiction, the district courts were unable

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Servs. Ltd. P'ship, 162 F.R.D. 313, 315 (N.D. Ill. 1995) (considering class of over four million consumers related to prelitigation violations of FDCPA).

[62] Some plaintiffs' attorneys have attempted to circumvent the damages cap in the FDCPA by filing multiple "gerrymandered" class actions, but courts have not been receptive to such tactics. *See* Wenig v. Messerli & Kramer P.A., No. 11-CV-3547(PJS/FLN), 2013 WL 1176062, at *6 (D. Minn. Mar. 21, 2013) (denying class certification to plaintiff in part because he coordinated with other plaintiffs to "gerrymander[] the proposed class to evade the legislative cap").

[63] *See* 15 U.S.C. § 1692k(a)(1) (damages); *id.* § 1692k(a)(3) (fees).

[64] *See* 28 U.S.C. 1332(d)(2) (2012) (allowing removal of class actions where amount in controversy exceeds $5 million and at least one class member is a citizen of a state different from any defendant, subject to certain exceptions).

[65] See *infra* section III.E, pp. 1460–62, for a discussion of the issues surrounding vacatur.

[66] 28 U.S.C. § 1331.

[67] 263 U.S. 413 (1923).

to sit in appellate review of state court judgments.[68] Several decades later, in *District of Columbia Court of Appeals v. Feldman*,[69] the Supreme Court reaffirmed its holding in *Rooker*. While the boundaries of the doctrine may not be perfectly clear, the Supreme Court in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*[70] explicitly stated that the core of the doctrine applies to and blocks "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."[71]

Consumers challenging a default judgment secured through allegedly unlawful acts in a state court proceeding are exactly the kinds of state court losers covered by the *Rooker-Feldman* doctrine. Several courts have affirmed the unavailability of vacatur of state court default judgments as a remedy in district court proceedings,[72] and lawyers in the practice of defending debt collectors from FDCPA claims are well aware of the strategy of asserting *Rooker-Feldman* to defeat such claims.[73] Indeed, courts have applied the doctrine to FDCPA claims more broadly, barring district courts from hearing not only claims seeking vacatur of the state court judgment itself, but also any claims "inextricably intertwined" with the judgment.[74]

The Supreme Court's holding in *Exxon* may have narrowed the functional significance of the "inextricably intertwined" standard,[75] giving consumers greater leeway to seek relief under the FDCPA for harms arising from unlawful debt collector behavior in state court.[76] However, seeking relief from harm caused by a default judgment on a credit report still amounts to "complaining of injuries caused by state-court *judgments*,"[77] and remains barred by *Rooker-Feldman*.

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[68] *Id.* at 416.

[69] 460 U.S. 462 (1983).

[70] 544 U.S. 280 (2005).

[71] *Id.* at 284.

[72] *See, e.g.*, Kelley v. Med-1 Solutions, LLC, 548 F.3d 600, 601 (7th Cir. 2008); Bryant v. Gordon & Wong Law Grp., P.C., 681 F. Supp. 2d 1205, 1206 (E.D. Cal. 2010).

[73] *See, e.g.*, Tomio Narita, *Using the* Rooker-Feldman *Doctrine to Defeat FDCPA Claims*, FDCPA DEFENSE BLOG (May 7, 2010, 6:08 AM), http://fdcpadefense.blogspot.com/2010/05/using-rooker-feldman-doctrine-to-defeat.html.

[74] *Feldman*, 460 U.S. at 483 n.16.

[75] *See* Thomas D. Rowe, Jr. & Edward L. Baskauskas, *"Inextricably Intertwined" Explicable at Last?* Rooker-Feldman *Analysis After the Supreme Court's* Exxon Mobil *Decision*, 1 FED. CTS. L. REV. 367, 374–79 (2006) (explaining that *Exxon* declined to apply an "inextricably intertwined" analysis as a threshold test).

[76] *See, e.g.*, Pittman v. Cuyahoga Cnty. Dep't of Children and Family Servs., 241 F. App'x 285, 288 (6th Cir. 2007) ("Our post-*Exxon* decisions confirm that *Rooker-Feldman* does not bar a federal-court challenge to an individual's improper conduct during a prior state court proceeding."); Solis v. Client Servs., Inc., No. 11-23798-CIV, 2013 WL 28377, at *4 (S.D. Fla. Jan. 2, 2013).

[77] Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005) (emphasis added); *see also Solis*, 2013 WL 28377, at *3 (denying consumer request to vacate state court judgment).

D. The Difficulty of Calculating Actual Damages

Assuming a consumer is able to avoid the pitfalls described above and receives judgment in her favor on an FDCPA claim, she may still face a significant barrier to obtaining the type of relief in which she may be most interested. The FDCPA provides for the recovery of actual damages, additional statutory damages, and attorney's fees.[78] While these provisions may provide facial support for the notion that plaintiffs can be made whole under the FDCPA, some courts have hesitated to consider damages arising from unlawful debt collector behavior during litigation as "actual damages."[79] Such hesitation, whether normatively desirable or not, is premised on an intuitively reasonable claim: being the victim of a wrongful suit does not lead to easily quantifiable damages. The monetary amount of the default judgment against the consumer is readily quantified, but as discussed above, the damage from a default judgment goes well beyond the obligation to pay a debt the consumer may not actually owe. What is the value, in dollars, of access to rental housing? Of improved employment prospects? Quantifying the actual damage arising from a debt collector's unlawful behavior in obtaining a default judgment is no doubt difficult. But if such difficulty leads to judicial hesitation to award actual damages, additional weight must then rest on the statutory damages provisions to provide adequate compensation and deterrence.

E. Inadequacy of Existing Alternate Forms of Relief

Despite the fact that vacatur of a state court default judgment will often be the principal goal of consumers pursuing FDCPA claims for unlawful debt collection actions,[80] the systemic elements discussed in Parts II and III effectively bar plaintiffs from obtaining that vacatur. Consumers may seek alternate forms of relief under the FDCPA or through the courts' equitable powers, but these possibilities are generally either insufficient, doctrinally barred, or both.

Rather than seeking vacatur of the state court judgment, a consumer may seek an order from the district court enjoining the debt collector from collecting on the judgment. This remedy is both doctrinal-

[78] 15 U.S.C. § 1692k(a) (2012).

[79] *See, e.g.*, Vassalle v. Midland Funding, LLC, No. 3:11 CV 96, 2011 WL 3557045, at *9 (N.D. Ohio Aug. 12, 2011) (considering consumer's request for actual damages based on debt collector's use of robosigned affidavits and noting that "actual damages resulting from unlawful aspects of Midland's affidavits would be very difficult to prove"), *rev'd in part, vacated in part*, 708 F.3d 747 (6th Cir. 2013).

[80] *See* Vassalle v. Midland Funding LLC, 708 F.3d 747, 759 (6th Cir. 2013), *reh'g and reh'g en banc denied*, Nos. 11-3814, 11-3961, 11-4016, 11-4019 & 11-4021, 2013 U.S. App. LEXIS 7988 (6th Cir. Apr. 19, 2013) ("The unnamed class members' greatest interest is their ability to contest these allegedly fraudulent judgments.").

ly barred and insufficient. The posture of a district court enjoining a party as opposed to enjoining a state court may appear more respectful of comity concerns by not raising federalism questions as squarely as the direct vacatur of a state court judgment. Nevertheless, even after *Exxon*'s clarification of the scope of *Rooker-Feldman*, the doctrine would almost certainly bar such a claim as inextricably intertwined with the state court judgment, since an injunction barring the execution of a judgment is tantamount to an appellate decision vacating that judgment.[81] In addition, an injunction against a debt collector would not provide a consumer with complete relief for the harm done by the default judgment, since the judgment would still exist as a matter of law, thus tarnishing her credit report and accordingly, her access to credit, employment prospects, rental housing, and so on.

The FDCPA itself provides additional bases for relief. Specifically, it provides for both actual and statutory monetary damages.[82] Actual damages could be awarded in an amount equal to the default judgment award, which could avoid the difficulties in assessing the monetary value of collateral harms discussed in section III.D. However, unlawful conduct in pursuing a debt collection suit may exist independently of the validity of the underlying claim. Granting the consumer an award of damages premised on the value of the state court judgment may thus produce incoherent results: a debtor who does in fact owe the underlying debt could receive the financial equivalent of a partial or complete expungement of the debt (which she may not deserve), while relief on the collateral consequences (damage to her credit report, credit score, and so on) could remain insufficient. Such an overcompensatory money damages award may be justified as a deterrence-increasing punitive damages award given the FDCPA's stated purpose to "eliminate abusive debt collection practices by debt collectors."[83] However, allowing awards under the "actual damages" provision that may at times be compensatory and at other times be punitive, when judges may not even know which purpose is being served (because they may not have considered the merits of whether the underlying debt is in fact owed), is unlikely to serve either a compensatory or deterrent purpose in a coherent manner. Whether the actual award was undercompensatory or overcompensatory would be difficult to establish in an individual case, given the difficulty in assessing the scope of actual damages.

The FDCPA also allows for statutory damages, which may be awarded "as the court may allow," to a limit of $1000 for an individual

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[81] *See supra* p. 1459.

[82] *See supra* section III.D, pp. 1459–60.

[83] 15 U.S.C. § 1692(e).

claimant,[84] a cap that has not changed since the FDCPA was originally passed in 1977.[85] Statutory damages may allow courts to avoid the evidentiary issues associated with actual damages, but the importance of collateral harms from a consumer's perspective, in combination with the fact that the $1000 limit for individual claimants is likely to be very small relative to the size of debt collectors' portfolios, suggests that statutory damages in individual suits will both undercompensate and underdeter. This concern may be particularly relevant if courts feel the need to reserve the maximum $1000 award for egregious cases, and hand out smaller awards for more run-of-the-mill FDCPA violations.

IV. POTENTIAL REFORM MEASURES

Given the numerous barriers described above, effective and predictable relief for consumers with valid FDCPA claims for unlawful behavior related to debt collection suits may only be possible through the enactment of a variety of means designed to give weight to the FDCPA's promise of redress for wrongs and deterrence of unlawful behavior. There may be no single silver-bullet reform that will completely solve the problem. Instead, this Part proposes a number of potential measures for reform, targeted at different structures and actors within the legal framework, that may combine to improve the FDCPA's ability to deter wrongful conduct and to provide relief for consumers when such conduct occurs.

A. Doctrinal Reform: "Equitable Remand"

As discussed above, federal courts may find themselves confronted with cases originally filed in state court where consumers seek the vacatur of state court judgments obtained in violation of the FDCPA. In state court, such relief is plausible, while in federal court, it is barred by *Rooker-Feldman*.[86] Though a defendant's efforts to remove to federal court may be statutorily valid, such removal sharply limits the possibility of adequate consumer relief because of the interaction of removal procedure and judicial federalism concerns. To address this concern, the federal courts should consider using their equitable powers to soften the harsh effects of such removal on consumers' chances for adequate relief.

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[84] *Id.* § 1692k(a).

[85] Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 813(a)(2)(A), 91 Stat. 874, 881 (1977) (codified at 15 U.S.C. § 1692k(a)(2)(A)). Similarly, the $500,000 cap on class action statutory damages has not been raised since 1977. *Compare id.* § 813(a)(2)(B), *with* 15 U.S.C. § 1692k(a)(2)(B).

[86] *See supra* section III.C, pp. 1458–59.

As currently structured, the federal civil removal statutes do not expressly provide for remand on equitable grounds.[87] However, there is precedent in federal law for the practice of equitable remand. Specifically, the Bankruptcy Code provides for exclusive federal jurisdiction over all cases arising under Title 11 (that is, bankruptcy proceedings),[88] as well as original but nonexclusive federal jurisdiction over civil proceedings "related to" bankruptcy proceedings.[89] This jurisdiction is facilitated by the express grant of removal power to the litigating parties in such cases by 28 U.S.C. § 1452(a). Given the nonexclusive nature of the federal courts' jurisdiction over related claims, state courts may frequently have concurrent jurisdiction with federal courts over matters removed to federal court under § 1452(a). In recognition of the fact that there may be compelling interests weighing in favor of litigating certain claims in state court, Congress gave federal courts the power to remand such claims "on any equitable ground."[90] Courts have identified a number of factors that may weigh in favor of equitable remand, including, most relevantly for the context at issue here, "prejudice to the involuntarily removed defendants."[91]

The FDCPA context is undoubtedly different from the bankruptcy context in one important respect: Congress has not affirmatively granted courts the power to remand, on equitable grounds, cases removed under the general removal statutes. However, while remanding a federal claim on equitable grounds appears to be novel, courts have created several forms of nonstatutory jurisdictional doctrine that provide structural precedent for the plausibility of equitable remand. For example, courts developed the doctrine of supplemental jurisdiction in the absence of statutory authorization,[92] allowing federal courts to con-

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[87] *See* 28 U.S.C. § 1441 (2012); *id.* § 1446.

[88] *Id.* § 1334(a).

[89] *Id.* § 1334(b). Courts have construed this language to mean any claim where "the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy." *In re* Wood, 825 F.2d 90, 93 (5th Cir. 1987) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)) (internal quotation mark omitted) (crediting the Third Circuit with the most widely accepted interpretation of § 1334(b) among federal courts).

[90] 28 U.S.C. § 1452(b).

[91] A commonly cited set of factors includes:

> (1) the effect on the efficient administration of the bankruptcy estate; (2) the extent to which issues of state law predominate; (3) the difficulty or unsettled nature of the applicable state law; (4) comity; (5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (6) the existence of the right to a jury trial; and (7) prejudice to the involuntarily removed defendants.

Drexel Burnham Lambert Grp., Inc. v. Vigilant Ins. Co., 130 B.R. 405, 407 (S.D.N.Y. 1991) (synthesizing the seven-factor test from the approaches followed in a number of cases in various federal courts).

[92] *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966) (extending federal court jurisdiction to claims not otherwise within such jurisdiction, provided those claims share a "common nucleus of operative fact" with jurisdictionally valid claims). As initially formulated, this

sider state law claims not otherwise within their jurisdiction where those claims are connected with a valid federal law claim.[93] Similarly, courts have identified a variety of circumstances in which they may decline to exercise otherwise valid jurisdiction: forum non conveniens,[94] the domestic relations[95] and probate[96] exceptions to diversity jurisdiction, and all four branches of abstention doctrine[97] provide examples of such cases. As such, the notion of nonstatutory equitable remand appears to fit comfortably within the tradition of court-created doctrine governing the discretionary exercise of jurisdiction.

Under a doctrine of equitable remand, consumers would have greater control over their ability to litigate FDCPA claims in state court, where *Rooker-Feldman* would not provide a bar to vacatur of state court default judgments in the same action.[98] The process of seeking such vacatur in state court varies by state,[99] which would leave consumers (or, more likely, classes of consumers) in one of three situations when considering a motion to remand. First, in those states where vacatur is available by independent action, consumers would be able to request both damages under the FDCPA as well as vacatur in the same action, and thus would have a strong incentive to seek remand. Second, in states that do not permit independent, individual actions for vacatur but that do provide a cause of action for mass vacatur on the ground of widespread fraud in securing default judgments, it is plausible that such a cause of action could be consolidated with class action FDCPA claims to provide a more efficient path to

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pendent jurisdiction was framed as supporting fundamental concerns of fairness to litigants, and was recognized as a matter of judicial discretion. *Id.* at 726.

[93] This doctrine was eventually codified in statute. *See* 28 U.S.C. § 1367(a); Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991).

[94] *See, e.g.*, Gulf Oil Co. v. Gilbert, 330 U.S. 501, 507 (1947) ("The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.").

[95] *See, e.g.*, *In re* Burrus, 136 U.S. 586, 593–94 (1890).

[96] *See* Shawn R. McCarver, Note, *The "Probate Exception" to Federal Diversity Jurisdiction: Matters Related to Probate*, 48 MO. L. REV. 564 (1983).

[97] *See generally* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (abstention from litigating concurrent state and federal suits); Younger v. Harris, 401 U.S. 37 (1971) (abstention from hearing civil rights tort claims related to pending state prosecution); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (abstention from litigating cases involving complex or important issues of state law); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941) (abstention from litigating constitutionality of state statutes).

[98] This Note assumes that consumers seeking vacatur of a state court judgment obtained in violation of the FDCPA will also seek damages under the FDCPA itself, since both the claim that the default judgment was unlawfully obtained and claims under the FDCPA will share a common set of facts.

[99] *See supra* note 38.

adequate consumer relief.[100] Such a consolidated action could be equitably remanded if removed to federal court, though the procedural details of initiating mass vacatur proceedings may render the actual feasibility of a consolidated action less certain.[101] Third, in states that allow neither independent individual actions nor independent mass actions for vacatur, remand to state court would not allow for the consolidation of claims, and thus consumers would be stuck in federal court, with *Rooker-Feldman* looming to bar any request for vacatur of state court judgments. In these states, additional procedural reform may be required to improve the availability of effective relief.

B. Procedural Change at the State Court Level

State courts may be in a position to enact procedural reforms that limit the ease with which debt collectors are currently able to obtain default judgments. For example, courts may devote extra attention to reviewing default judgment applications for compliance with procedural and evidentiary requirements.[102] Indeed, some courts have incorporated such review into their procedural rules for default judgments, though there is significant room for expansion and refinement of these rules.[103] In addition, states that currently do not allow independent actions for vacatur should consider allowing such actions, as opposed to merely providing for vacatur through motions made in the original case that led to default judgment. Massachusetts provides an example of how procedural rules may be structured to allow for inde-

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[100] Individual litigants in such a scenario would face heightened barriers to relief, as they would have to present evidence of widespread fraud sufficient to support mass vacatur, which may require expensive discovery into the debt collector's pattern and practice of litigation behavior. *See supra* pp. 1456–57.

[101] For the purposes of the proposed doctrine of equitable remand, it is the presence of a request for vacatur of a state court judgment (or judgments) that would give rise to potential prejudice against consumers in federal court. As such, whether claims for vacatur are consolidated with FDCPA claims would not formally affect the equitable remand analysis. However, given the likelihood that consumers will wish to consolidate their claims, it is worth noting the potential uncertainty surrounding consolidation of FDCPA claims with a request for mass vacatur. For example, New York's mass vacatur provision requires that the matter be initiated by application to an administrative judge who then determines whether the action should be referred to a judge for disposition. *See* N.Y. C.P.L.R. 5015(c) (McKinney 2007). It is unclear whether and how New York courts would permit such an action to be consolidated into a lawsuit alleging FDCPA violations on the basis of the same underlying facts.

[102] *See* THE LEGAL AID SOC'Y ET AL., DEBT DECEPTION 17 (2010). Due to the high volume of default judgment applications filed in debt collection suits, these applications are often reviewed by court clerks who do not have sufficient legal training to identify defective applications. These errors could be mitigated by instituting a requirement that default judgments be reviewed by judges, rather than court clerks. *See id.*

[103] *See* Jiménez, *supra* note 47, at 51–52.

pendent actions for vacatur.[104] While individual motions may raise similar court-capacity concerns to those discussed in section III.A if pursued in large numbers, they may provide some incremental measure of deterrence and compensation.

C. Administrative Action

Since its creation in 2011, the Consumer Financial Protection Bureau (CFPB) has made several early efforts to address structural issues in the debt collection industry. These efforts may bear fruit by reducing the total number of lawsuits filed or prosecuted in violation of the FDCPA. Specifically, the CFPB has promulgated examination procedures that cover banks, primary lenders, and "larger participants" in the consumer debt collection market.[105] The CFPB's definition of "larger participants" covers approximately sixty percent of the third-party debt collection industry by revenue.[106] These examination procedures include evaluation of collection agencies' litigation practices by CFPB staff. For example, examiners will determine, for each entity they are examining, "whether its litigation practices involve . . . false, deceptive, or misleading representations or means."[107] While this process may result in the smoking out of illicit practices before they result in the widespread entry of wrongful default judgments, the ultimate success of the program in this respect will be a function of the ability of CFPB examiners to conduct deep analyses of debt collector practices across thousands, and potentially hundreds of thousands, of collection actions.

The CFPB examination program is a significant step in reducing unlawful litigation practices, but it leaves a large portion (approximately forty percent) of the industry beyond the reach of these examinations. It is plausible that these smaller players may be less sophisticated than larger, more well-established collection agencies, and thus may be more likely to commit FDCPA violations, whether knowingly (particularly if they are aware of the limited scrutiny they will receive under the current CFPB examination procedures) or unknowingly.

In addition to defining examination procedures, the CFPB has also declared its intent to create debt collection rules to "protect consumers

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[104] *See supra* note 38. For those few states that do not allow counterclaims in state court, *see supra* note 37, allowing such claims would remove a significant barrier to effective relief under the FDCPA in those states. However, allowing individual counterclaims would not solve the court-capacity or aggregation issues discussed above in cases of widespread unlawful practices.

[105] *See* Defining Larger Participants of Certain Consumer Financial Product and Service Markets, 12 C.F.R. § 1090.105 (2013).

[106] CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 23.

[107] CONSUMER FIN. PROT. BUREAU, EXAMINATION PROCEDURES: DEBT COLLECTION 28 (2012), *available at* http://files.consumerfinance.gov/f/201210_cfpb_debt-collection-examination-procedures.pdf.

without imposing unnecessary burdens on industry."[108] The advance notice of proposed rulemaking identifies a number of subjects for potential rules that may reduce unlawful litigation behavior.[109] While this Note does not attempt a full discussion of the potential content of such rules, an examination of the barriers to relief discussed in Part III suggests areas where federal rules may provide significant added protection for consumers. Specifically, to the extent that the inherent class nature of certain predatory lawsuit practices like the "scattershot" approach renders them less susceptible to private enforcement, rulemaking to identify such strategies explicitly as unlawful may reduce their use ex ante, and may harmonize judicial recognition of such behavior as a violation of the FDCPA ex post.

D. Statutory Reform

To the extent that the current statutory damages award limits in the FDCPA reflect the economic judgment of Congress when the FDCPA was originally passed, these limits should, at a minimum, be updated to reflect inflation since 1977.[110] Similarly, to the extent that courts are hesitant to award actual damages related to the collateral effects of a default judgment on consumers' credit reports, Congress may elect to provide enhanced statutory damages for this class of case, both in individual and class action contexts. These changes to statutory damages would encourage consumer litigation of FDCPA claims by meaningfully improving trial outcomes where consumers prevail and enhancing the bargaining position of consumers (through class counsel) in settlement negotiations.

Congress may also consider crafting a specific removal statute for the FDCPA along the lines of the model presented by the Bankruptcy Code, which could provide courts with the power to remand cases where failure to do so would result in significant prejudice to the nonremoving party. Though such remand may be possible as the result of judicially led doctrinal reform, legislation would provide a much more certain route to equitable remand, and would eliminate concerns over judicial activism that may inhibit doctrinal innovation in this area.

E. Consumer Education

Efforts to streamline the path to consumer relief based on the reforms proposed above may place deterrent pressure on debt collectors

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[108] Debt Collection (Regulation F), 78 Fed. Reg. 67,848, 67,848 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006).

[109] *See id.* at 67,854 (transfer of information upon sale of debt); *id.* at 67,869 (abusive, false, deceptive, and misleading conduct); *id.* at 67,877 (debt collection litigation practices).

[110] *See* FTC, COLLECTING CONSUMER DEBTS 66–67 (2009).

to abstain from unlawful litigation practices, but those efforts are likely to generate the majority of such pressure through attorney-led lawsuits, with the greatest impact likely to arise from suits implicating large classes of consumers (and thus large potential damages awards). Efforts to support individual consumer litigants, such as the production of high-quality self-representation materials or pro bono representation, may generate significant additional deterrent pressure.[111] While, as discussed above, the sheer number of consumers affected suggests that this strategy may not be capable of providing relief to all individuals under the realities of our current court system, it may exert pressure on the viability of the default-seeking model of debt collection such that it decreases the overall prevalence of the primary unlawful behavior.[112]

V. CONCLUSION

The current landscape of doctrine, institutional structure, and industry practice raises considerable barriers to effective relief from unlawful debt collection practices for consumers, and its interlocking nature suggests there may be no single reform that will significantly improve consumer outcomes and deter unlawful debt collection practices. However, the variety of relevant actors and institutions also means there are many targets for reform. Given the substantial importance of credit reports to consumer financial well-being, reforms that may facilitate vacatur of unlawfully procured default judgments, such as the development of an equitable remand doctrine for FDCPA suits removed from state to federal court, may be among the most effective means of providing consumers with satisfactory relief. In parallel, statutory amendment of the FDCPA to bring damages caps in line with the modern economy, agency rulemaking, and interventions designed to decrease the viability of default-assuming litigation strategies may deter unlawful behavior and redirect industry practice toward strategies that allow third-party debt collectors to pursue lawfully owed debts without violating the FDCPA.

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[111] *See* Dalié Jiménez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL'Y 449 (2013). The authors of this article describe a proposed randomized control trial in Maine in which the effects of legal interventions on consumer financial well-being will be studied in the context of debt collection lawsuits. The authors intend to provide unrepresented consumer-defendants with self-help material, counseling, legal representation, or both counseling and representation. *Id.* at 469–70. The authors intend to determine which legal interventions are successful at improving outcomes for consumers, though they note that the very act of intervening in debt collection lawsuits may in fact change the litigation practices of debt collectors. *Id.* at 464.

[112] *See id.*