

# A Forgotten Past Creates a Fractured Present: Why Courts Should Utilize Historical Context when Interpreting Ambiguous Provisions of the 1977 Fair Debt Collection Practices Act

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*ABSTRACT: This Note examines the history of the 1977 Fair Debt Collection Practices Act and discusses how courts should use this history to interpret an ambiguity in one of the Act's provisions that has fractured courts for 40 years. Congress passed the Fair Debt Collection Practices Act in 1977 to address abusive debt collection practices utilized at the time. One of the Act's consumer protection provisions prohibits a debt collector from communicating with a third party about the consumer's debt, but provides a very narrow exception to allow the debt collector to contact third parties in good faith for the express reason of locating the consumer, if the consumer is otherwise unavailable. Courts have inconsistently applied this provision since Congress passed the Act. Some courts treat the exception as an affirmative defense, requiring the debt collector to prove it acted in good faith and complied with the relevant provisions. Other courts have required the consumer to prove that the debt collector acted in bad faith and violated the statute. When applying this exception, courts have utilized an almost purely textual analysis, which, due to the Act's ambiguity on which party has the burden of proof, has led to these inconsistent applications. This Note argues that a purely textual interpretation of the Act is inadequate and will continue to lead to fractured decisions. Instead, this Note argues that an analysis incorporating the history of the Act and emphasizing the context in which Congress passed it reveals a much clearer answer to the burden of proof question and will lead to more consistent application.*

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I.	INTRODUCTION.....	1790
II.	FIGHTING OFF VULTURES: THE STRUCTURE, HISTORY AND PURPOSE OF THE 1977 FAIR DEBT COLLECTION PRACTICES ACT.....	1793
A.	<i>THE 1977 FAIR DEBT COLLECTION PRACTICES ACT</i> .....	1793
B.	<i>ABUSIVE COLLECTION PRACTICES IN THE 1960S AND 1970S AND THE NEED FOR LEGISLATION</i> .....	1795
III.	A BURDENED SOUL CANNOT BEAR THE BURDEN OF ANOTHER: THE AMBIGUOUS LOCATION INFORMATION SAFE HARBOR .....	1801
A.	<i>AFFIRMATIVE DEFENSE OR A GRANTED RIGHT?</i> .....	1801
B.	<i>CASE HISTORY</i> .....	1803
C.	<i>THE UNINTENDED CONSEQUENCES AND WEAKNESSES OF THE EVANKAVITCH ANALYSIS</i> .....	1806
IV.	LOOKING TO THE PAST TO UNDERSTAND THE PRESENT: FINDING A SOLUTION THROUGH HISTORICAL ANALYSIS .....	1807
A.	<i>ASSIGNING THE BURDEN OF PROOF TO CONSUMERS</i> .....	1807
B.	<i>ASSIGNING THE BURDEN OF PROOF TO DEBT COLLECTORS</i> .....	1809
V.	CONCLUSION .....	1811

*“My debts were many. My options were few.”*

—Booker DeWitt, explaining an act of desperation.<sup>1</sup>

## I. INTRODUCTION

It is unlikely that Naomi Cushman gave any thought to the 1977 Fair Debt Collection Practices Act (“FDCPA”)—or even knew the Act existed—when she signed up for an American Express credit card.<sup>2</sup> And why would she? As with most consumers, there is no evidence to suggest she accumulated the debt with the intention of defaulting, and so questions as to the rules of collection likely never entered her mind. That all changed in March 2008 when Ms. Cushman, unable to pay her credit card bills, first began receiving phone calls from a debt collector hired by American Express.<sup>3</sup> Cushman claimed that after calling her multiple times, the collector “threatened to contact her employer and family to settle the debt.”<sup>4</sup>

1. BIOSHOCK INFINITE (2K Games 2013) (telling the story of a debtor who must go to great lengths to redeem himself). An ominous note summarizes his plight: “DeWitt—Bring us the girl and wipe away the debt. This is your last chance.” *Id.*

2. *Cushman v. GC Servs., L.P.*, 397 F. App’x 24, 24 (5th Cir. 2010).

3. *Id.* American Express hired GC Services, L.P. to collect the debt Ms. Cushman owed. *Id.* Created in 1957, GC Services is a call center company that remains active to this day. *GC Services*, GC SERVICES., <https://www.gcserv.com> (last visited Mar. 22, 2017). It has since grown to “nearly 9,000 employees and over 30 call center sites.” *History*, GC SERVICES.,

After over a month went by, the debt collector contacted two of her previous employers.<sup>5</sup> In response, Ms. Cushman filed suit against the collection agency, claiming that the collector had violated the 1977 Fair Debt Collection Practices Act by communicating with a third party about her debt.<sup>6</sup> The collector argued that it contacted Ms. Cushman's past employers for the sole purpose of locating her after she had not answered its calls, a permissible course of action under the Act.<sup>7</sup> Whether Ms. Cushman's claim survived thus turned on one question: What was the debt collector's intent?

In order to determine that intent, the court first had to determine who needed to prove it. The court, interpreting the text of the Fair Debt Collection Practices Act, placed the burden of proof on Ms. Cushman to show that the debt collector was calling her former employers for some reason other than locating her.<sup>8</sup> Unable to reach inside the mind of the debt collector, Ms. Cushman could not prove to the court the debt collector's purpose for reaching out to her former employers.<sup>9</sup> Because she was unable to prove the debt collector's intentions, she lost on summary judgment.<sup>10</sup>

However, Ms. Cushman's burden of proof is far from uniform. In 2005, Patricia Evankavitch took out a \$43,000 mortgage in order to lend money to her son, but she defaulted on the loan.<sup>11</sup> In May 2011, the mortgagee assigned the debt to a collection agency, which began repeatedly calling both Ms. Evankavitch and her daughter.<sup>12</sup> The Evankavitches told the collector to stop calling them and refused to speak with it.<sup>13</sup> In August 2012, unable to reach Ms. Evankavitch, the collector made a series of calls to her neighbors, looking for some way to get a hold of her.<sup>14</sup>

Following these efforts, Ms. Evankavitch filed suit against the debt collector, arguing, like Ms. Cushman, that the collector had violated the Fair Debt Collection Practices Act by contacting a third party about her debt.<sup>15</sup> The court in Ms. Evankavitch's case, even though it was interpreting the same provision as the *Cushman* court, placed the burden of proof on the

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<https://www.gcserve.com/AboutUs/History.aspx> (last visited Mar. 22, 2017).

4. *Cushman*, 397 F. App'x, at 24.

5. *Id.*

6. *Id.*

7. *Id.* at 28–29.

8. *Id.* 28–29.

9. *Id.*

10. *Id.* at 29–30.

11. *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 358 (3d Cir. 2015).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 359.

debt collector—the polar opposite of what the *Cushman* court did.<sup>16</sup> Without the burden of proof requirement, Ms. Evankavitch prevailed where Ms. Cushman had not: All Ms. Evankavitch had to do was allege that the debt collector contacted a third party. The collector was unable to provide proof that it did so in good faith.<sup>17</sup> Thus, two courts interpreting the same text came to completely opposite conclusions as to whether the debtor or debt collector had the burden of proving the debt collector's intent.

The central purpose of this Note is to discuss the way courts have interpreted sections of the 1977 Fair Debt Collection Practices Act and propose an alternative method of analysis. Section 1692c generally prohibits a debt collector from communicating with third parties in connection with the debt.<sup>18</sup> Section 1692b is an exception to Section 1692c, allowing debt collectors to contact third parties in a good-faith attempt to reach the consumer.<sup>19</sup> Taken in tandem, these two provisions create a safe harbor for debt collectors to communicate with third parties in order to locate consumers they cannot otherwise contact.<sup>20</sup> Currently, courts utilize an almost purely textual analysis when interpreting the Act, which has resulted in various different applications and outcomes.<sup>21</sup>

This Note argues that the textual analysis courts are currently utilizing when applying the Sections 1692b and 1692c is inadequate. It results in inconsistent and unpredictable outcomes between courts, to the detriment of both consumers and debt collectors. The Act's history and purpose provides a much stronger framework for analysis. An analysis that takes into account the legislative history of the Act and the problem Congress set out to solve when it passed the Act leads to a much clearer answer to who bears the burden of proof. Furthermore, using such an analysis will lead to far more consistency between courts.<sup>22</sup>

Part II of this Note begins by discussing the 1977 Fair Debt Collection Practices Act generally, followed by an examination of its historical context and purpose. Part III explains the burden of proof issue in detail and describes why the way courts currently address the issue is inadequate. Finally, Part IV illustrates that an analysis of the Act utilizing both textual

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16. *Id.* at 367. Contrast this decision with *Cushman v. GC Servs., L.P.*, 397 F. App'x 24, 24 (5th Cir. 2010), discussed above, wherein the court placed the burden of proof on the plaintiff debtor.

17. *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 367–68 (3d Cir. 2015).

18. Fair Debt Collection Practices Act, 15 U.S.C. § 1692c (2012).

19. *Id.* § 1692b.

20. *See generally id.* §§ 1692b–1692c (containing the provisions). For a detailed description of how these sections relate to one another, see *infra* Part III.A–B.

21. *See infra* Part III.B–C (detailing different courts' varied interpretations of the location information safe harbor and explaining why the procedures these courts use when interpreting the Act lead to inconsistencies).

22. For an illustration of this analytical framework and why it is more effective than a textual analysis, see *infra* Parts III–IV.

and historical evidence results in a clearer, more consistent application than a purely textual analysis.

## II. FIGHTING OFF VULTURES: THE STRUCTURE, HISTORY AND PURPOSE OF THE 1977 FAIR DEBT COLLECTION PRACTICES ACT

This Part discusses the structure of the 1977 Fair Debt Collection Practices Act and its historical context and purpose. The first Subpart of this Part introduces the Act generally, then focuses on debt collectors' limited ability to contact third parties to ascertain the whereabouts of debtors. The first Subpart concludes by identifying an ambiguity in the Act and argues the best way for a court to address it is through historical analysis.

The latter Subpart of this Part discusses the historical context and purpose of the Act, detailing important background information necessary for the historical analysis suggested in Part IV of this Note. This Subpart focuses primarily on abusive practices debt collectors utilized in the late 1960s and early 1970s and the inadequate social and legal remedies available to debtors at the time, topics that provide important context to Congress's passing of the Act.

### A. *THE 1977 FAIR DEBT COLLECTION PRACTICES ACT.*

In 1977, Congress enacted the Fair Debt Collection Practices Act, codified as 15 U.S.C. §§ 1692–1692p, creating detailed rules for how debt collectors can interact with consumers and third parties in relation to consumers' debt.<sup>23</sup> Congress, finding that “[t]here [was] abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,”<sup>24</sup> passed the Act with the goals “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.”<sup>25</sup> The Act seeks to accomplish these goals by prohibiting certain collection practices and enforces these prohibitions by granting a private cause of action to consumers who are affected by debt collectors violating the Act.<sup>26</sup>

The 1977 Fair Debt Collection Practices Act puts strict limitations on the manner in which debt collectors can interact with debtors and third parties. For example, debt collectors cannot: “harass, oppress, or abuse any

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23. See generally 15 U.S.C. §§ 1692–1692p.

24. Fair Debt Collection Practices Act, 15 U.S.C. § 1692(a) (2012).

25. *Id.* § 1692(e); see also S. REP. NO. 95-382, at 1 (1977) (“[The Act’s] purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors.”).

26. 15 U.S.C. § 1692k (giving consumers the right to sue debt collectors who violate the Act). For a recitation of the key provisions of this section, see *infra* notes 30–33 and accompanying text.

person in connection with the collection of a debt";<sup>27</sup> "design, compile, [or] furnish any [deceptive] form[s]" to debtors;<sup>28</sup> or communicate with third parties in connection with the debt unless the consumer first gives consent, except for very limited circumstances.<sup>29</sup> This last prohibition is found in Section 1692c and is the focus of this Note. Section 1692c(b) states:

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, . . . a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.<sup>30</sup>

As indicated by the language quoted above, there are a small number of exceptions to the general prohibition against a debt collector communicating with third parties. Primarily, Section 1692b creates a safe harbor for "[a]ny debt collector communicating with any person other than the [debtor] for the purpose of acquiring location information about the consumer."<sup>31</sup> A debt collector contacting a third party to ascertain the location of a debtor under this section must "not communicate with any such person more than once unless requested to do so by such person or unless the debt collector *reasonably believes* that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information."<sup>32</sup>

The primary method of enforcing this is Section 1692k, which describes the debt collector's civil liability for violating the Act.<sup>33</sup> Under this section, a debtor harmed by the debt collector's wrongful action can bring an action against the debt collector for "any actual damage sustained," and receive both "such additional damages as the court may allow, but not exceeding \$1,000" and "reasonable attorney's fee[s]."<sup>34</sup>

In assessing whether a debt collector is liable under this section, courts must consider "the frequency and persistence" of the violation, "the nature" of the violation, "and the extent to which such noncompliance was

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27. 15 U.S.C. § 1692d.

28. *Id.* § 1692j(a).

29. *Id.* § 1692c(b).

30. *Id.* § 1692c(b).

31. *Id.* § 1692b.

32. *Id.* § 1692b(3) (emphasis added). This "reasonable belief" requirement can be difficult to prove, given much of a debt collector's communication with both the debtor and third parties occurs over the phone, where there is often no record of what was said.

33. *Id.* § 1692k. For a full list of all prohibited practices in detail, see generally *id.* §§ 1692-1692p.

34. *Id.* § 1692k(a).

intentional.”<sup>35</sup> However, the debt collector may escape liability if he or she lacks the necessary wrongful intent. A collector in violation of the Act “may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”<sup>36</sup>

To show a debt collector is liable under Section 1692, one of the parties must show that the debt collector intended to contact a third party for reasons other than locating the debtor. Unfortunately, there is a great deal of ambiguity in the Act as to how courts should interpret Section 1692b’s relationship with 1692c, which has led to inconsistent conclusions on who has the burden of proving intent. The inconsistency has not been resolved in the 40 years since Congress passed the Act.<sup>37</sup> This Note will argue that this longstanding inconsistency is due to an overreliance on textual interpretation without considering the problems Congress sought to solve when it passed the Act, and that an alternative analysis focusing on the historical context of the Act and its legislative history leads to a clearer and more consistent application.<sup>38</sup> In order to lay the groundwork for this argument, it is necessary to examine the state of the debt collection industry leading up to the Act’s passage, and the reasons why Congress thought the then-existing remedies were insufficient to protect consumers.

#### *B. ABUSIVE COLLECTION PRACTICES IN THE 1960S AND 1970S AND THE NEED FOR LEGISLATION*

Debt collection practices of professional agencies in the 1960s and 1970s were extremely aggressive. The aggressive behavior stemmed from a sharp increase in debt that occurred in post-World War II America: “[F]arm loans, home mortgage loans, and corporate debt increased sixfold (far more than the rate of inflation), and consumer loans expanded by a factor of

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35. *Id.* § 1692k(b)(1).

36. *Id.* § 1692k(c).

37. Compare *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 366 (3d Cir. 2015) (“[W]e . . . will place the burden [of proof] where it belongs: on the debt collector.”); *Worsham v. Accounts Receivable Mgmt., Inc.*, 497 F. App’x 274, 277 (4th Cir. 2012) (“The use of the word ‘reasonably’ indicates that this is an objective standard that the debt collector must meet to avoid liability under the [Act].”), and *Kasalo v. Monco Law Offices, S.C.*, No. 09C2567, 2009 WL 4639720, at \*6 (N.D. Ill. Dec. 7, 2013) (“[W]e treat the exception in Section 1692b(3) on which defendant relies as an affirmative defense, which defendant has the burden of proving.”), with *Cushman v. GC Servs., L.P.*, No. 397 F. App’x 24, 29 (5th Cir. 2010) (requiring “that plaintiffs produce some evidence of the third party conversations other than their own assertions in order to prove that the call was for purposes other than obtaining location information”).

38. See *infra* Parts III–IV (discussing the legislative history of the Act and how taking that into account leads to a different mode of analysis).

16.”<sup>39</sup> Meanwhile, between the years of 1955 and 1960, the number of business failures in the United States rose by 40%.<sup>40</sup> According to one study,

the delinquency rate for consumer loans increased by at least 50 percent, beginning in the late 1960s, [from 1.5 percent] to 2.2 percent in 1973 and 2.6 percent in 1974. The gross dollar volume of new business reported by debt collection agencies to their trade association grew from \$40 million in 1965 to \$93 million in 1974.<sup>41</sup>

Predictably, the increase in both debt and failing businesses in the 1960s and 1970s led to an increase in debt collection agency activity.<sup>42</sup> Unfortunately for debtors, many of these agencies were far from cordial in their collection practices. In a hearing on debt collection practices before the National Commission on Consumer Finance, attorney Maribeth Halloran described collection agencies of the time as practicing “arrogant thug collection tactics” that invaded debtors’ human rights.<sup>43</sup> Alleged collection tactics ranged from the relatively mild, such as repeatedly contacting consumers<sup>44</sup> or contacting them at inconvenient hours of the day,<sup>45</sup> to the invasive, such as contacting debtors’ neighbors, family

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39. Robert A. Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 L. & SOC’Y REV. 323, 329 (1984) (footnote omitted).

40. *Id.* at 327. The number of business failures in America rose from 10,969 in 1955 to 15,445 in 1960, and would not reach pre-1955 levels until 1970. *Id.* It is important to note that business failures returning to pre-1955 levels by 1970 does not necessarily indicate that the public was better off from a debt standpoint, especially when considering debt can stay with people for years after it attaches. For example, the debt accumulated by the plaintiff in *Evankavitch v. Green Tree Servicing, LLC* accumulated in 2008 and accompanied the plaintiff for several years. *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 358 (3d Cir. 2015). Thus, it would be a mistake to assume a decrease in business failures by the 1970s meant the debt situation in America was at all improving, particularly when delinquency rates continued to rise. Kagan, *supra* note 39, at 329–30.

41. Kagan, *supra* note 39, at 330 (citation omitted); *see also* S. REP. NO. 95-382, at 2 (1977) (“There are more than 5,000 collection agencies across the country, each averaging 8 employees. Last year, more than \$5 billion in debts were turned over to collection agencies. One trade association which represents approximately half of the Nation’s independent collectors state that in 1976 its members contacted 8 million consumers.”).

42. Kagan, *supra* note 39, at 330.

43. *Summary of Hearings on Debt Collection Practices, National Commission on Consumer Finance*, 88 BANKING L.J. 291, 292 (1971). Halloran stated these actions attacked “the right to be left alone; the right to be treated with dignity; the right to earn a wage; the right to preserve the sanctity of . . . [their] home; [and] the right to maintain their integrity with . . . family, friends, neighbors, and employer.” *Id.*

44. *See Sacco v. Eagle Fin. Corp. of N. Miami Beach*, 234 So.2d 406, 407 (Fla. Dist. Ct. App. 1970) (stating that the debtor alleged that an agent called her, and after she became upset and hung up on him, the agent continued to repeatedly call her home phone for over two hours).

45. *See Houston-Am. Life Ins. Co. v. Tate*, 358 S.W.2d 645, 649–50 (Tex. Civ. App. 1962) (stating that the plaintiff alleged that a debt collector called her and her husband multiple times a day and as late as 10:30 at night, using “very rough” and “hateful” language).

members, and employers,<sup>46</sup> to the downright malicious, such as attempting to get the debtor fired,<sup>47</sup> threatening to have the debtor arrested,<sup>48</sup> and even threats of violence.<sup>49</sup> Many debtors claimed these harsh practices led to extreme stress—at times reaching the point of physical and mental injury.<sup>50</sup> In at least one instance, criminal charges were brought against a debt

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46. *Duty v. Gen. Fin. Co.*, 273 S.W.2d 64, 64–65 (Tex. 1954). The plaintiffs alleged that a collector, in addition to a number of other invasive tactics

call[ed] each of the plaintiffs at the respective places of their employment several times daily; . . . berat[ed] plaintiffs to their fellow employees; request[ed] their employers to require them to pay; . . . call[ed] a neighbor in the disguise of a sick brother of one of the plaintiffs, and on another occasion as a stepson; call[ed] the plaintiff's mother at her place of employment . . . call[ed] the plaintiff's brother . . . at his residence at a cost to him in the excess of \$11, and haranguing him about the alleged balance owed by plaintiffs.

*Id.* at 65; *see also* *Bureau of Credit Control v. Scott*, 345 N.E.2d 37, 38 (Ill. App. Ct. 1976) (“[C]alls were made to each of [the debtor's] parents about the debt, and in addition, calls were made to [her] at her place of employment.”).

47. *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857, 860 (Tex. Civ. App. 1957). The plaintiff alleged

that [a collector] threatened to cause him to be discharged from his employment; . . . spoke to [his] supervisors at his place of employment; that his supervisors warned appellee that if this continued he would probably be discharged; [and that this had] the direct and proximate result that [his] ability to work declined and he was discharged from his job . . . .

*Id.*; *see also* *Duty*, 273 S.W.2d at 65 (Collectors “threaten[ed] to cause both plaintiffs to lose their jobs unless they made the payments demanded” and repeatedly called their workplace.).

48. *Ware v. Paxton*, 359 S.W.2d 897, 901 (Tex. 1962) (The plaintiff alleged that a collector told her he could put her husband in jail if he did not pay his debts.). For more examples of aggressive debt collection practices, *see* Paul H. Hubbard, *Recovery for Creditor Harassment*, 46 TEX. L. REV. 950, 959–60 (1968) (citing a multitude of cases of abusive behavior from the late 1950s to the mid 1960s).

49. S. REP. NO. 95-382, at 2 (1977) (“Collection 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 friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.”). The senate report went on to state “independent debt collectors are the prime source of egregious collection practices. While unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial.” *Id.*

50. *See, e.g., Bureau of Credit Control*, 345 N.E.2d at 38 (saying that the debtor had “suffered severe emotional distress, was forced to seek medical attention to relieve severe and constant headaches, loss of appetite and sleep”); *Duty*, 273 S.W.2d at 65 (Plaintiffs Mr. and Mrs. Duty claimed “they each developed severe headaches; Mrs. Duty's stomach was upset with nervous indigestion; they lost numerous hours of sleep; . . . and [Mrs. Duty] lost weight which she could not afford to lose.”); *Houston-Am. Life Ins. Co.*, 358 S.W.2d at 650 (stating that plaintiff claimed that the aggressiveness of the debt collector's tactics “caused [him] to be very upset; that he could not eat nor sleep, and that he suffered with headaches, loss of memory . . . . and would get up all hours and walk the floors and complain about his heart.”). While it is important to keep in mind that these plaintiffs had little recourse other than to make these claims in order to state a cause of action against their debt collectors, it is worth considering that they were willing to proceed through the legal processes to make their claims.

collection agency in New York for utilizing over-aggressive collection practices.<sup>51</sup>

One of the contributing factors for collection agencies' profound aggressiveness is that, in many cases, their actions were difficult to regulate through either social or legal means. Unlike the creditors who often relied upon their reputation in the marketplace to maintain their businesses, debt collection agencies could act without fear of such social repercussions.<sup>52</sup> Meanwhile, creditors would be far more likely to naturally temper their collection practices, rather than risk losing customers by being over-aggressive.<sup>53</sup>

For a number of economic reasons, the behavioral limitations more likely to be exhibited by creditors generally did not apply to professional collection agencies.<sup>54</sup> Because debt collectors obtained the entirety of their income purely through securing the payment of outstanding debts, rather than extending credit to interested customers, a poor moral standing in the community had far less of a negative impact on their day-to-day business.<sup>55</sup> On the contrary, it paid to be as aggressive as possible.<sup>56</sup> Because debt collectors did not have to concern themselves with social repercussions, they were free to discard their morals and utilize aggressive tactics in order to better secure payment. Hardly detrimental, the resulting increase in effectiveness could help attract business from creditors who wanted payment quickly. After all, a debt collector is no good to a creditor if the collector cannot secure payment within a favorable timeframe. Indeed, "[t]o the extent the collector gets the reputation of being a son-of-a-bitch[,] it is a good reputation, useful with the victims and with those who might hire his services."<sup>57</sup> Thus in many ways, debt collectors' harshness benefitted, rather than harmed them.<sup>58</sup>

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51. *Schero v. Merrola*, No. 74 Civ. 1361, 1974 WL 904, at \*1 (S.D.N.Y. July 2, 1974) ("[A] grand jury directed that a prosecutor's information be filed against [the collection agency] in the New York City Criminal Court for petty larceny and aggravated harassment. These charges are currently pending before the Criminal Court.").

52. Arthur Allen Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 35 (1970); see also S. REP. NO. 95-382, at 2 ("Unlike creditors, who are generally restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them.").

53. Leff, *supra* note 52, at 35.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* It appears to have been a well-understood fact that aggressiveness came with the trade. See S. REP. NO. 95-382, at 2 (1977) ("Collection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means.").

Complicating the issue was a lack of uniformity in legal remedies among the states for consumers affected by aggressive debt collection practices.<sup>59</sup> Some states, such as Florida, created a statutory cause of action for specific instances of unfair debt collection practices.<sup>60</sup> Other states allowed debtors to utilize existing common-law torts involving harassment or emotional distress against collectors.<sup>61</sup> However, the tort method could offer protection against only the most invasive of practices, as the debtor often had to show a substantial physical injury resulting from the collector's conduct.<sup>62</sup> This proved to be an inconsistent and unpredictable standard,<sup>63</sup> leading to a demand for national legislation.<sup>64</sup>

In 1971, the National Commission on Consumer Finance held a hearing on debt collection practices where several of those testifying recommended stronger statutory protections for debtors.<sup>65</sup> At the hearing, a

59. S. REP. NO. 95-382, at 2 ("The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level. . . . 80 million Americans, nearly 40 percent of our population, have no meaningful protection from debt collection abuse."). Furthermore, local police are often unable to address the issue even when state laws would allow for it: "[L]aw enforcement officials have pointed to this development as a prime reason why federal legislation is necessary, because State officials are unable to act against unscrupulous debt collectors who harass consumers from another State." *Id.*

60. See FLA. STAT. ANN. § 559.72, 559.77 (West 2012) (granting a debtor a civil action against collectors who "simulate . . . a law enforcement officer," "use or threaten force or violence," threatening to or actually communicating the existence of the debt to third parties, or utilize other prohibited collection practices).

61. See, e.g., *Bowden v. Spiegel, Inc.*, 216 P.2d 571, 573 (Cal. Dist. Ct. App. 1950) ("We entertain no doubt that the intentional use of such an unreasonable method of attempting to collect a debt which proximately results in physical illness is actionable."); *Patterson v. Prof'l Adjustment Serv., Inc.*, 544 S.W.2d 617, 621 (Tenn. Ct. App. 1976) (stating that the debtor had brought suit against a collection agency for "mental anguish, embarrassment and humiliation."); *Duty v. Gen. Fin. Co.*, 273 S.W.2d 64, 64 (Tex. 1954) (plaintiffs attempted to recover damages for "mental anguish"); *Houston-Am. Life Ins. Co. v. Tate*, 358 S.W.2d 645, 645 (Tex. Ct. App. 1962) (plaintiffs brought an action for "wrongful conduct" based on emotional pain). See generally Hubbard, *supra* note 48 (describing methods in which a debtor could utilize defamation, and violation of privacy, and emotional distress claims against overzealous collectors).

62. Hubbard, *supra* note 48, at 950-53 ("The types of physical ailments generally alleged and considered sufficient are nervousness, headaches, nausea, vomiting, indigestion, loss of appetite, loss of sleep, fatigue, loss of weight, blackouts, numbness, abnormal blood pressure, chest pains, stomach pains, 'rundown,' loss of memory, and crying spells." (footnotes omitted)); see also *Czap v. Credit Bureau of Santa Clara Valley*, 86 Cal. Rptr. 417, 420 (Cal. Ct. App. 1973) (Collection methods must go "'beyond all reasonable bounds of decency' . . . to support an award of damages for intentional infliction of emotional distress." (quoting RESTATEMENT OF TORTS § 46 cmt. g (AM. LAW. INST. 1948))).

63. Hubbard, *supra* note 48, at 960-61 (While "it is impossible to determine how much will be required before the actions will be found to be unreasonable. . . . [i]solated incidents of harassment would not likely be found unreasonable.").

64. See S. REP. NO. 95-382, at 2 (noting the fact that state laws were inconsistent and oftentimes nonexistent).

65. See generally, *Summary of Hearings on Debt Collection Practices, National Commission on Consumer Finance*, *supra* note 43. "The hearings which were held on June 22 and 23, 1970,

number of those testifying “noted the dearth of legislation dealing with harassment and said that what laws exist have virtually no effect.”<sup>66</sup> One witness recommended that the “Commission should support reforms which would deal with the problem effectively, not merely nominally.”<sup>67</sup> A representative of the National Consumer Law Center at Boston College advocated for legislation that would make it a federal crime to engage in “excessive communications by telephone and through the mails,” or use “fabricated or simulated legal process.”<sup>68</sup>

Congress soon acknowledged both the severe issues debtors faced due to debt collectors’ actions and the inadequacy of current state legislation.<sup>69</sup> In a Senate report on the subject, the Committee on Banking, Housing, and Urban Affairs stated it “believe[d] that the serious and widespread abuses in this area and the inadequacy of existing State and Federal laws make . . . legislation necessary and appropriate.”<sup>70</sup> Congress took this recommendation under advisement and in 1977 passed the Fair Debt Collection Practices Act.<sup>71</sup> The Act prohibited a number of debt collection practices and created a private cause of action for debtors to bring against debt collectors who violated those prohibitions.<sup>72</sup> Yet despite the age of this Act, questions as to its application remain.

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focused on the aberrant creditor practices that arise during the debt collection process.” *Id.* at 291.

66. *Id.* at 299. Furthermore,

“something is clearly amiss” when creditors can threaten a consumer’s employment, dun him with incessant phone calls at all hours of the day and night, damage the consumer’s reputation in the community or even threaten the consumer with imprisonment. . . . [S]uch harassment techniques “should be beyond what society considers fair” but “are in all too common use.”

*Id.*

67. *Id.* at 301.

68. *Id.* at 328 (“[The representative] cited the absence of effective controls over harassment techniques and urged the Commission to attempt to develop national collection standards. He pointed out that existing private remedies and criminal sanctions were inadequate to deal with the manifold problems of creditor harassment. . . . To supplement the criminal prescriptions [he recommended] the adoption of civil remedies at the federal level.”).

69. S. REP. NO. 95-382, at 2 (“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. Thus, 80 million Americans, nearly 40 percent of our population, have no meaningful protection from debt collection abuse.”).

70. *Id.*

71. See Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692 (2012)).

72. See generally *id.* (laying out the prohibitions and creating a private cause of action).

III. A BURDENED SOUL CANNOT BEAR THE BURDEN OF ANOTHER:<sup>73</sup>  
THE AMBIGUOUS LOCATION INFORMATION SAFE HARBOR

The Fair Debt Collection Practices Act of 1977 is ambiguous as to whether the ability of a debt collector to contact a third party for the purpose of locating a consumer is an affirmative defense or a granted right. The first section of this Part discusses how Section 1692c works in conjunction with the rest of the Act and explains how the provision's ambiguous nature impacts potential textual interpretations. The second section of this Part delves into the provision's case history, highlighting the inconsistent ways courts have been interpreting its text. The final section of this Part explains the dangers of continuing to interpret the Act through a purely textual analysis.

A. AFFIRMATIVE DEFENSE OR A GRANTED RIGHT?

Under The Fair Debt Collection Practices Act of 1977, a consumer negatively affected by a debt collector's abusive practices can bring an action against the debt collector for any actual damages sustained from the collector's behavior.<sup>74</sup> Section 1692c prohibits debt collectors from communicating with third parties in connection with the debtor's debt unless the debtor gives consent.<sup>75</sup> However, "recogniz[ing] the debt collector's legitimate need to seek the whereabouts of missing debtors,"<sup>76</sup> Congress included a safe harbor provision, Section 1692b, to allow debt collectors to communicate with third parties for the express purpose of locating the debtor.<sup>77</sup> Thus, as long as the debt collector acts within the scope of Section 1692b, the collector has no civil liability under Section 1692k for violating the general prohibition on contacting third parties detailed in Section 1692c.<sup>78</sup>

On its face, the compromise between Sections 1692c and 1692b is fairly clear: If a debt collector contacts a third party intending to obtain the location of a debtor the collector cannot locate (i.e. has not overstepped the

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73. THE QURAN *Surah XXXV*:18, 425 (M.H. Shakir trans., Tahrike Tarsile Qur'an Inc. 5th ed. 1993).

74. 15 U.S.C. § 1692k (granting this cause of action to consumers when a debt collector violates the Act).

75. *Id.* § 1692c(b) ("[A] debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor or the attorney of the debt collector.").

76. S. REP. NO. 95-382, at 4 (1977); *see also* 15 U.S.C. § 1692b (placing limits on how a debt collector may ask third parties about a consumer's whereabouts).

77. 15 U.S.C. § 1692b (It is a violation for a debt collector to contact a third party "[e]xcept as provided in section 1692b of this title. "). The statute also provides strict rules for debt collectors to follow to "communicat[e] with any person other than the consumer for the purpose of acquiring location information about the consumer." *Id.*

78. *See infra* Part III.B (discussing how this loophole has led to inconsistent analyses of the Act).

behavior allowed by 1692b), then the debt collector is not liable under Section 1692c. However, the Act is ambiguous as to the nature of the safe harbor provision, specifically regarding whether the provision is a right to act granted to the debt collector or whether it is an affirmative defense the collector has the burden of proving in court.<sup>79</sup> If it is considered a right to act, then the debtor must prove the debt collector's intent. However, if the safe harbor acts as an affirmative defense, the burden of proving the debt collector's intent falls on the debt collector.

Speaking of lawsuits generally, a defendant typically offers a standard defense by arguing that he or she did not commit the violation, whereas "[t]he burdens of pleading and proof with regard to most facts . . . [are] assigned to the plaintiff."<sup>80</sup> An affirmative defense, in contrast, "insulate[s] defendants] from liability even where they [would] have violated the" act in question.<sup>81</sup> The defendant must raise an affirmative defense excusing the defendant's actions during litigation and thereafter the defendant, rather than the plaintiff, carries the burden of proof to show that his or her activity qualifies for the affirmative defense's protection.<sup>82</sup> Thus, once the plaintiff demonstrates the defendant committed a violation, the burden of proof shifts to the defendant to prove the affirmative defense.

In contrast to an affirmative defense, a statutory right to act grants the defendant the ability to engage in certain behaviors without triggering a shift in the burden of proof.<sup>83</sup> Under the right to act view, the defendant is never presumed to have committed the offense and thus the plaintiff must not only prove the defendant's actions, but also prove those actions do not qualify for the safe harbor provision—a much more taxing requirement. Deciding who has the burden of proof sends a strong message as to the

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79. See *infra* note 83 and accompanying text (discussing the difference between an affirmative defense and a right).

80. KENNETH S. BROUN, 2 MCCORMICK ON EVIDENCE § 337 (7th ed. 2013).

81. *Johnson v. Riddle*, 443 F.3d 723, 727 (10th Cir. 2006).

82. *Affirmative Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The defendant bears the burden of proving an affirmative defense."); see also *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 367 (3d Cir. 2015) ("[A] party seeking shelter in an exception to a statute has the burden of proving it.").

83. The Court of Appeals for the Ninth Circuit recently addressed the distinction between an affirmative defense and a granted right to act in another area of law. See *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1133 (9th Cir. 2015) (analyzing affirmative defenses). While this case was deciding a copyright issue, the analysis used by the court is illustrative of the distinction between an affirmative defense and a granted right. In *Lenz*, the court stated:

[L]abeling [fair use] as an affirmative defense that excuses conduct is a misnomer . . . . As a statutory doctrine . . . fair use is not an infringement. Thus . . . it is logical to view fair use as a right. . . . Fair use is therefore distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse, e.g., misuse of a copyright.

*Id.* at 1133 (quoting *Batemen v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996)).

public policy the statute promotes and effectively chooses which party's rights are more worth protecting.

To frame this distinction within the concept of each party's rights, under the affirmative defense view is a limitation on the debt collector's right to act. A debt collector utilizing the safe harbor provision has acted wrongfully and infringed the debtor's rights, and may only use a legitimate and acceptable excuse as a defense. In contrast, under the view that 1692b grants debt collectors the right to contact third parties to obtain the location of the debtor, the safe harbor is a limitation on the scope of the debtor's rights. A debt collector acting under this view never infringed the rights of the debtor. Rather, the debtor must bear the burden of proving that the debt collector's conduct was for another purpose, explicitly in violation of 1692b.<sup>84</sup> It's the difference between the debtor having to prove the debt collector broke the law, and the debt collector having to prove he did not.<sup>85</sup> When a court explicitly states which burden of proof it will use it sends a clear message to debtors and creditors about what to expect during litigation. However, the courts that have applied the 1977 Fair Debt Collection Practices Act over the past 40 years have been unclear and inconsistent.

### B. CASE HISTORY

Despite the fact that the 1977 Fair Debt Collection Practices Act was passed 40 years prior to the writing of this Note, the burden of proof ambiguity has yet to receive a definitive resolution. In the time since Congress passed the Act, only one circuit court has ever addressed the issue head-on, and it did not do so until 2015.<sup>86</sup> Instead, courts have tended to treat their chosen interpretation as inherently correct, often with little

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84. See *Dorris v. Accounts Receivable Mgmt., Inc.*, No. GLR-11-3453, 2013 WL 1209629, at \*4 (D. Md. Mar. 22, 2013) (discussing 1692b). The court treated the claims as violations of 1692b, not a violation of 1692c. *Id.* “[T]he success of Counts I–III [violations of 1692b] hinge upon the question of whether [the defendant] contacted [the third party] for the purpose of obtaining location information on [the plaintiff].” *Id.*; see also *Cushman v. GC Servs., L.P.*, 397 F. App’x 24, 28–29 (5th Cir. 2010) (The district court’s decision “was [the] correct judgment as a matter of law in favor of [the debt collector]” because plaintiff “ha[d] not offered any evidence that [debt collector’s] calls . . . were for purposes other than obtaining location information,” which is permitted by section 1692b.); *Williams v. Web Equity Holdings, LLC*, No. 2:13-cv-13723, 2014 WL 3845952, at \*4 (E.D. Mich. Aug. 5, 2014) (“[Section] 1692b(3) creates an exception for debt collectors seeking to locate the debtor to contact persons they reasonably believe have such location information. This . . . imposes a pleading burden on plaintiffs alleging a violation of this section to provide facts to support an inference that the debt collector had no reason to believe that the person knew the whereabouts of the debtor or that they provided an incomplete or erroneous response.”).

85. See *supra* notes 80–83 and accompanying text (discussing the difference between an affirmative defense and a right).

86. *Evankevitch*, 793 F.3d at 360 (“None of our sister Circuits has yet addressed the question whether the consumer has the burden of disproving this exception . . . or whether the debt collector carries the burden of proving the exception as an affirmative defense.”).

justification.<sup>87</sup> This lack of in-depth analysis creates a number of problems for both debt collectors and consumers, as it leads to inconsistent application and uncertainty as to the rights of both parties.

Currently, courts do not uniformly apply the safe harbor provision. Some courts explicitly treat the 1692b safe harbor as a right held by the defendant; others treat it as an affirmative defense the defendant must prove.<sup>88</sup> Worse, many courts simply apply the safe harbor provision without acknowledging the ambiguity, noting their choice, or discussing their reasoning. This results in opinions that muddy the lines between the debt collectors' and consumers' rights.

A court's understanding of the Act can be partially inferred through its treatment of Section 1692b. If courts treat the safe harbor provision as a right to act, then a violation of Section 1692b would be a stand-alone offense and they would need not invoke Section 1692c.<sup>89</sup> In contrast, if courts treat the 1692b safe harbor as an affirmative defense, then a court would have to treat the claim as a violation of Section 1692c, with 1692b setting the terms of the defendant's acceptable excuse.<sup>90</sup>

For example, in *Thomas v. Consumer Adjustment Co.*, the court stated "[n]oncompliance with § 1692b is . . . a violation of § 1692(b), and not an independent violation of the Act."<sup>91</sup> However, while this statement generally points toward an understanding that the Section 1692b safe harbor is an affirmative defense, the court did not speak of it in those terms.<sup>92</sup> This is significant, as the court did explicitly discuss another affirmative defense

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87. Indeed, many courts discussing the relationship between 15 U.S.C. §§ 1692b and 1692c do so with little more than a sentence regarding the burden of proof, if that, and give no consideration of an alternative view. *See, e.g., Cushman*, 397 F. App'x at 28–29 (holding that consumer had not proved that creditor's phone calls were for an unlawful purpose); *Kasalo v. Monco Law Offices, S.C.*, No. 09 C 2567, 2009 WL 4639720, at \*6 (N.D. Ill. Dec. 7, 2009) (treating section 1692b(3) as an affirmative defense); *see generally* *Worsham v. Accounts Receivable Mgmt., Inc.*, 497 F. App'x 274 (4th Cir. 2012) (holding that creditor's repeated phone calls to consumer's brother-in-law did not violate the Act).

88. *See supra* note 37 (listing cases that have treated the section as a safe harbor and cases treating it as an affirmative defense).

89. There are times when this subtle distinction of whether an offense claim can be brought under 15 U.S.C. § 1692b is the only indicator as to which view of the safe harbor the court is choosing to follow. *See Dorris*, 2013 WL 1209629, at \*4–5 (The court treated actions that violated section 1692b as stand-alone offenses and made mention of the bona fide error affirmative defense codified in 15 U.S.C. § 1692k, but did not explicitly discuss whether the location information safe harbor was an affirmative defense.).

90. *See infra* notes 91–96 and accompanying text.

91. *Thomas v. Consumer Adjustment Co.*, 579 F. Supp. 2d 1290, 1298 (E.D. Mo. 2008). However, the court did not go so far as to explicitly call 15 U.S.C. § 1692b an affirmative defense. *Id.*

92. The *Thomas* court did, however, discuss the bona fide error 15 U.S.C. § 1692k affirmative defense: "[The defendant] has not satisfied the requirements for avoiding liability based on the affirmative defense outlined in § 1692k(c), nor asserted this defense in opposition to Plaintiffs' motion." *Id.* at 1296.

codified in Section 1692k.<sup>93</sup> It is difficult to say with complete authority that the court intended to treat the safe harbor provision as an affirmative defense, because it had clearly considered another affirmative defense and chose not to use the term in relation to Section 1692b.<sup>94</sup> Similarly, in *Cushman v. GC Services, L.P.*, the court stated that “contact[ing] third parties for a purpose other than obtaining ‘location’ information as allowed by section 1692b [is] a violation of section 1692c of the FDCPA,” rather than a violation of 1692b itself, indicating an understanding that the provision is a granted right.<sup>95</sup> However, the court in *Cushman* also noted that the plaintiff did “not offer[] any evidence that [the defendant’s] calls to her former employer or tenant were for purposes other than obtaining location information.”<sup>96</sup> This effectively placed the burden on the plaintiff to demonstrate a violation of 1692b, yet seemed to simultaneously treat the provision as a defense, rather than a right. This back-and-forth creates confusion as to how exactly the court characterized the two provisions of the Act. The court made these statements without acknowledging any potential alternate readings of the Act, and has not revisited the issue since.

The only case in which a circuit court addressed this ambiguity head-on is *Evankavitch*.<sup>97</sup> In determining whether the Section 1692b safe harbor is an affirmative defense or not, the Third Circuit did not give any weight to the legislative history of the Act.<sup>98</sup> While the court did very briefly discuss the policy considerations of its decision, it was far from the center of the court’s examination. Rather, the court’s five-factor analysis focused almost entirely on textual and procedural considerations:

- (1) whether the defense is framed as an exception to a statute’s general prohibition or an element of a prima facie case; (2) whether the statute’s general structure and scheme indicate where the burden should fall; (3) whether a plaintiff will be unfairly surprised by the assertion of a defense; (4) whether a party is in

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93. *Id.*

94. *Id.* at 1296–98.

95. *Cushman v. GC Servs., L.P.*, 397 F. App’x 24, 26 (5th Cir. 2010).

96. *Id.* at 29. The *Cushman* court, acknowledging that it “has had little occasion to interpret section 1692c of the [Fair Debt Collection Practices Act],” held that the plaintiff carried the burden of presenting evidence as to the purpose of the defendant–debt collector’s phone calls to third parties. *Id.* It did so with only two sentences of discussion. *Id.* Furthermore, this decision is exceptionally confusing, as the court’s treatment of section 1692b earlier in the case would seem to support the view that it is an affirmative defense. *Id.* at 26. This contradictory opinion is thus difficult to parse, and offers little in the way of clarity.

97. *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 358, 360 (3d Cir. 2015) (“[W]e consider a matter of first impression among the Courts of Appeals. . . . None of our sister Circuits has yet addressed the question.”).

98. *Id.* at 361 n.7 (“The [Fair Debt Collection Practices Act’s] legislative history, while not completely silent on the subject, offers little insight into Congress’s intent. . . . [W]e do not accord weight to this legislative history.”).

particular control of information necessary to prove or disprove the defense; and (5) other policy or fairness considerations.<sup>99</sup>

The court briefly addressed each of these factors in turn, ultimately deciding “that, absent compelling reasons to the contrary, a party seeking shelter in an exception to a statute has the burden of proving it.”<sup>100</sup> Thus the Third Circuit placed the burden of proof on the defendant, determining that the section 1692b safe harbor is an affirmative defense.<sup>101</sup>

This Note argues that while the court’s outcome is correct, the textual analysis it used to reach this conclusion is far from dispositive and may lead to different outcomes when employed by other courts.<sup>102</sup> Rather than following in the *Evankavitch* court’s footsteps, this Note argues that the safe harbor ambiguity is best resolved through an alternative method of analysis—one that emphasizes the effects of favoring either consumers’ or debt collectors’ rights, and the public policy goals the Act was intended to accomplish.

C. THE UNINTENDED CONSEQUENCES AND WEAKNESSES OF THE EVANKAVITCH ANALYSIS

Though the *Evankavitch* court ultimately arrived at the same conclusion that this Note will, that court’s heavy reliance on textual interpretation to reach that conclusion demonstrates a type of analysis that might not result in uniformity among other courts’ interpretations of the Act. As shown in Subpart III.B of this Note, many other courts have interpreted sections 1692b and 1692c in the 40 years since the Act was put into effect.<sup>103</sup> These courts, seemingly applying the Act based on their own textual interpretations, with little to no discussion of public policy implications or historical context, have done so inconsistently.<sup>104</sup> It seems unlikely, then, that one circuit court’s textual analysis, extensive as it is, will settle the issue. Even if another circuit court adopts the *Evankavitch* method of analysis, the

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99. *Id.* at 361.

100. *Id.* at 367.

101. *Id.* at 367–68.

102. It stands to reason that, while the *Evankavitch* court’s textual analysis was extensive, its method does not return the same result in every case. Many other courts, interpreting the same text on its face, have come out other ways. *See, e.g.*, *Cushman v. GC Servs., L.P.*, 397 F. App’x 24, 29 (5th Cir. 2010) (placing the burden of proof on the plaintiff); *Williams v. Web Equity Holdings, LLC*, No. 2:13-cv-13723, 2014 WL 3845952, at \*4 (E.D. Mich. Aug. 5, 2014) (putting the burden of proof on the plaintiff); *Dorris v. Accounts Receivable Mgmt., Inc.*, No. GLR-11-3453, 2013 WL 1209629, at \*4 (D. Md. Mar. 22, 2013) (discussing activity that does not comply with 15 U.S.C. § 1692b). Thus, while the *Evankavitch* court’s reasoning is certainly valid, it is hardly dispositive.

103. *See supra* Part III.B (analyzing how different cases have interpreted the Act).

104. *See supra* note 37 and accompanying text (listing several court decisions that offer little to no mention of public policy).

ultimate result may come out the other way.<sup>105</sup> The language used in these sections is simply too ambiguous for a purely textual interpretation to offer consistent outcomes.

What the *Evankavitch* court is missing in its analysis is an emphasis on the public policy and historical context. The solution to consistent and predictable application lies in an analysis based on considering the rights of the parties involved and framing these rights within the historical context and purpose of the 1977 Fair Debt Collection Practices Act.

#### IV. LOOKING TO THE PAST TO UNDERSTAND THE PRESENT: FINDING A SOLUTION THROUGH HISTORICAL ANALYSIS

The remainder of this Note will illustrate the benefits of a historical analysis, accounting for the goals the Act was meant to achieve. Analyzing the consequences of favoring either the debt collectors' or debtors' rights in light of the Act's historical context will lead to more consistent application of the safe harbor provision moving forward. This approach will better establish the rights of both parties and set a clear public policy determination for the future.

The first Subpart of this Part discusses the outcome of requiring debtors to take on the burden of proof in section 1692b cases and shows that such an outcome does not comport with the purpose of the Act. The second Subpart of this Part discusses the outcome of placing the burden of proof on debt collectors, which results in a scenario that better fits the history and purpose of the Act.

##### A. ASSIGNING THE BURDEN OF PROOF TO CONSUMERS

If a court assigns the burden of proof in section 1692b to consumers, the court will effectively be granting a limited right to debt collectors to contact third parties.<sup>106</sup> By freeing debt collectors from having to provide proof that they only intended to find where a debtor is located, the court is protecting "the debt collector's legitimate need to seek the whereabouts of missing debtors" at the expense of the consumers who may be impacted by the debt collector's activity.<sup>107</sup> This determination would invariably favor the

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105. See *supra* note 37 and accompanying text. These various outcomes are evidence of the fact that the safe harbor's extreme ambiguity is difficult for courts to consistently parse. Without considering factors beyond textual interpretation and procedural implications, there is no unifying deciding factor that will lead courts to consistently come to the same conclusion. See *supra* Part III.B (assessing judicial interpretations of the safe harbor's language).

106. See *supra* Part III.A (describing the distinction between an affirmative defense and a granted right in detail).

107. S. REP. NO. 95-382, at 4 (1977) (acknowledging that while the purpose of the Act is to protect consumers, some balancing of rights is necessary to allow debt collectors to fulfill their duties to the creditors who hire them).

rights of debt collectors over the rights of consumers, because it would make it more difficult for consumers to succeed in cases against debt collectors.<sup>108</sup>

Based solely on textual interpretations of sections 1692b and 1692c, this outcome represents a perfectly valid reading of the Act, as evidenced by the fact that multiple courts appear to have come to the same conclusion.<sup>109</sup> However, a balancing of debt collectors' and consumers' rights in this way, though grounded in a reasonable textual interpretation, is not in line with the Act's ultimate purpose. This is especially clear when this outcome is viewed in relation to the Act's historical context and legislative intent, which offer much more insight into how the safe harbor should be interpreted than a textual reconstruction.<sup>110</sup>

The purpose of the 1977 Fair Debt Collection Practices Act, as stated in 15 U.S.C. § 1692(e) (2012), is "to eliminate abusive debt collection practices by debt collectors" without putting the collectors at a "competitive[] disadvantage[]." This gives the impression that consumers' and debt collectors' rights are to be equally weighed.<sup>111</sup> However, this language does not on its face fully capture the extent of the problems Congress set out to address when it passed the Act. As discussed in Part II.B

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108. See *supra* Part III.A (describing in detail the effects of a distinction between an affirmative defense and a given right); see also *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 367 (3d Cir. 2015) ("[C]ourts should avoid requiring a party to shoulder the more difficult task of proving a negative." (quoting *Nat'l Commc'ns Ass'n v. AT & T Corp.*, 238 F.3d 124, 131 (2d Cir. 2001))).

109. See *supra* Part III.B (discussing such cases).

110. See *supra* Part III.C for a discussion of the merits of a historical analysis versus a purely textual analysis. For historical context of the 1977 Fair Debt Collection Practices Act, see Part II.B. It is also worth reconsidering the demands for legislation exhibited in the 1971 hearings on debt collection practices before the National Commission on Consumer Finance. *Summary of Hearings on Debt Collection Practices, National Commission on Consumer Finance*, *supra* note 43, at 291-92. Those testifying before the Commission spoke passionately against debt collection practices of the time, including "the constant flow of past due notices and the not so subtle references to contemplated legal action," "arrogant thug collection tactics to which the low-income consumer [was] often subjected," "relentlessly pursu[ing] and embarrass[ing] ... debtor[s] at all hours, at home, at the debtor's place of employment, and in the debtor's neighborhood," and more. *Id.* It was against this toxic climate that the public called for legislation, which does not come through from a simple plain-reading of the Fair Debt Collection Act's text.

111. 15 U.S.C. § 1692(e) (2012). The idea that this language, viewed in a vacuum, creates an ambiguity as to how the debt collectors' and consumers' rights are to be weighed is backed by the fact that the *Evankavitch* court was unable to parse it: The court found "little insight into Congress's intent" and discarded all legislative history, resorting to a purely textual analysis. See *supra* note 97 and accompanying text (analyzing the *Evankavitch* approach). This is further supported by the sheer number of cases that simply do not address a balancing of the consumers' and debtors' rights at all. See, e.g., *Cushman v. GC Servs., L.P.*, 397 F. App'x 24, 26-28 (5th Cir. 2010) (failing to address such a balance in the analysis); *Dorris v. Accounts Receivable Mgmt., Inc.*, No. GLR-11-3453, 2013 WL 1209629, at \*4 (D. Md. Mar. 22, 2013) (analyzing the Act); see also *supra* Part III.B (addressing these cases); *Williams v. Web Equity Holdings, LLC*, No. 2:13-cv-13723, 2014 WL 3845952, at \*4 (E.D. Mich. Aug. 5, 2014) (listing the factors that constitute a violation and addressing a balance of rights as a factor).

of this Note, the Act was passed at a time when the United States faced an increase in consumer debt, hazardous and abusive debt collection practices, and little remedy at law for those negatively affected.<sup>112</sup> A Senate Report recommending Congress adopt the Act addressed these concerns.<sup>113</sup> The Report stated “debt collection abuse by third party debt collectors is a widespread and serious national problem” and noted debtors were plagued by “obscene or profane language, threats of violence . . . [and the] disclosing [of their] personal affairs to friends, neighbors, or . . . employer[s],” among other harmful debt collector behavior.<sup>114</sup> The Report goes on to acknowledge that consumers have a severe lack of recourse to cure such “suffering and anguish.”<sup>115</sup>

Though a textual interpretation of sections 1692b and 1692c of the Act could support a finding that the information location safe harbor is a granted right,<sup>116</sup> such a right for debt collectors does not conform to the history and purpose of the Act. Given the harms the Act was designed to cure, it would be exceptionally odd for Congress to acknowledge “the [substantial] suffering and anguish which [unscrupulous debt collectors] regularly inflict” on debtors in the legislative history of the Act, only then to force consumers to carry the burden of proving something as difficult to ascertain as a debt collector’s intent when the collector contacts a third party.<sup>117</sup>

#### B. ASSIGNING THE BURDEN OF PROOF TO DEBT COLLECTORS

A finding that section 1692b is an affirmative defense, which would place the burden of proof on debt collectors, fits very well with the history and purpose of the Act. Congress passed the Act with the explicit purpose of

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112. See *supra* Part II.B (discussing the historical context of the Act). In the time leading up to the Act’s passage, business failures in the United States had risen more than 40% and “the delinquency rate for consumer loans increased by at least 50 percent.” Kagan, *supra* note 39, at 330. Meanwhile, consumer–debtors were forced to deal with abusive practices from debt collectors, such as “obscene or profane language, threats of violence,” and invasion of privacy. See *supra* notes 46–49 and accompanying text. Given the seriousness of these issues, and the amount of time spent discussing them in the senate report, it would be disingenuous to discard their importance simply because the report included one sentence alluding to debt collectors’ interest in locating consumers.

113. S. REP. NO. 95-382, at 2–3 (1977) (“The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level. . . . The committee believes that the serious and widespread abuses in this area and the inadequacy of existing State and Federal laws make this legislation necessary and appropriate.”).

114. *Id.* at 2.

115. *Id.*

116. See *supra* Part III.C (detailing inconsistent application of the Act by different courts).

117. S. REP. NO. 95-382, at 2. Indeed, such a decision would completely go against the committee’s strong desire to protect consumers from what it viewed to be harmful and possibly illegal collection practices. *Id.*

curing abuses that had plagued consumers for years.<sup>118</sup> It did so because “nearly 40 percent of [the] population [had] no meaningful protection from debt collection abuse.”<sup>119</sup> While a textual analysis may allow for multiple readings of the Act, this historical context reveals that the Act is meant to favor debtors’ rights over those of debt collectors.

Treating 15 U.S.C. § 1692b as an affirmative defense allows debtors to more easily bring claims against debt collectors who violate the Act.<sup>120</sup> Debt collectors would be required to prove that, though they may have contacted a third party, they did so only to find the debtor’s location, which encourages debt collectors to take precautions against violating the Act. Furthermore, because debt collectors are in a better position to keep track of relevant data that would prove their innocence and are generally better-informed about the laws governing the debt collection industry,<sup>121</sup> requiring them to carry the burden of proof more than adequately balances consumer protection with “debt collector[s]’ legitimate need[s] to seek the whereabouts of missing debtors.”<sup>122</sup>

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118. 15 U.S.C. § 1692(e) (2012) (“It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors.”); *see also* S. REP. NO. 95-382, at 2 (“The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem.”).

119. S. REP. NO. 95-382, at 2 (stating “[T]here 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.”).

120. Because debtors would not have the burden of proving the debt collector’s state of mind, it would be less likely that the debtor would lose the case early on for not having sufficient evidence of the collector’s intent, as was the case in *Cushman v. GC Servs., L.P.*, 397 F. App’x 24, 28–29 (5th Cir. 2010) (“[P]laintiffs [must] produce some evidence of the third party conversations other than their own assertions in order to prove that the call was for purposes other than obtaining location information.”). *See also* *Williams v. Web Equity Holdings, LLC*, No. 2:13-cv-13723, 2014 WL 3845952, at \*4 (E.D. Mich. Aug. 5, 2014) (“The language of § 1692b(3) creates an exception for debt collectors seeking to locate the debtor to contact persons they reasonably believe have such location information. This, in turn, imposes a pleading burden on plaintiffs alleging a violation of this section to provide facts to support an inference that the debt collector had no reason to believe that the person knew the whereabouts of the debtor or that they provided an incomplete or erroneous response.”).

121. It is in the best interests of debt collectors to stay informed on the developments of the law governing the industry they work in. Furthermore, published materials are available to help debt collectors avoid violating the Fair Debt Collection Practices Act. *See generally* Alvin C. Harrell, *Twenty More Ways to Avoid Liability Under the Federal Fair Debt Collection Practices Act*, 52 CONSUMER FIN. L.Q. REP. 71, 71–72 (1998) (offering such advice as: “Never use profanity. It is a violation of the [Fair Debt Collection Practices Act] for the debt collector to use any ‘obscene or profane language.’ Any such violation, no matter how minor, harmless or technical, may trigger a claim for statutory damages and the plaintiff’s attorney fees,” and “Be aware of the relationship between the [Fair Debt Collection Practices Act] and state ethics rules and deceptive trade practices laws. [Act] violations may also be deemed a violation of these state laws, and vice versa, and the state laws typically have no creditor exemption.” (quoting 15 U.S.C. § 1692d(2) (2012))). Manuel H. Newburger, *FDCA Case Law Review*, 51 CONSUMER FIN. L.Q. REP. 158, 158 (1997) (discussing “a few important cases reflecting the new legal environment and some emerging trends”).

122. S. REP. NO. 95-382, at 4.

## V. CONCLUSION

When Congress passed the Fair Debt Collection Practices Act in 1977, it did so with the express purpose of protecting millions of Americans from debt collectors' predatory and abusive collection tactics. This Act protected debtors' rights at the expense of debt collectors, but still granted debt collectors a number of exceptions to allow them to effectively do their jobs, provided they followed the letter of the law. Within this tension between the rights of debtors and debt collectors, an ambiguity arose: whether debtors or debt collectors carried the burden of proving the debt collector's intent under the location information safe harbor codified in 15 U.S.C. § 1692b.

Courts have traditionally utilized an almost purely textual interpretation for this provision, and due to the ambiguity inherent in the provision's language, have reached inconsistent conclusions. This Note argues that such a methodology is an ineffective way to interpret the Act and offers an alternative historical analysis. By interpreting the Act in light of its historical context and original purpose, courts will be much more likely to come to the same conclusion: When a debt collector invokes the safe harbor provision, the burden of proof rests on them.