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# Consumer Behavior and the Regulation of Consumer Financial Services

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## CONSUMER BEHAVIOR AND THE REGULATION OF CONSUMER FINANCIAL SERVICES

Karl Boedecker\* & Laurie Lucas\*\*

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### I. INTRODUCTION

Calls for regulation of the credit markets are increasing as the worldwide credit crisis continues. The Group of Twenty's (G-20) recent meeting in London ended with a communiqué asserting that "[m]ajor failures in the financial sector and in financial regulation and supervision were fundamental causes of the crisis. Confidence will not be restored until we rebuild trust in our financial system."<sup>1</sup> The Obama administration also recently issued a white paper calling for the creation of a Consumer Financial Protection Agency (CFPA) to regulate consumer financial products and services.<sup>2</sup> Within the United States, regulation of the financial services industry is inevitable. While the exact shape of an emerging regulatory framework is unclear, an increased focus on consumer disclosures for complex financial products is likely.<sup>3</sup>

On the one hand, increased regulation of the consumer financial services industry raises significant issues in the United States which values private industry and freedom of contract over government interference in the marketplace.<sup>4</sup> On the other hand, consumers, particularly in a capitalistic economy, need complete information to make smart choices. Failure to effectively convey information to consumers about complex financial products and services may result in ineffective comparison shopping, unnecessary and burdensome costs and penalties, and eventual default. Ineffective consumer disclosures also may substantially increase the likelihood of litigation, and ultimately increase costs for the industry and consumers.

This paper attempts to improve the understanding and efficacy of consumer disclosures based on the level of a consumer's sophistication by deconstructing current litigation over

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<sup>1</sup> Group of Twenty, London Summit, Leaders' Statement (Apr. 2, 2009).

<sup>2</sup> See Financial Regulatory Reform a New Foundation: Rebuilding Financial Supervision and Regulation, available at <http://www.financialstability.gov/roadtostability/index.html> [Hereinafter *Financial Regulatory Reform*]. See also Elizabeth Warren, *Product Safety Regulation as a Model for Financial Services Regulation*, 42 J. CONSUMER AFF. 452 (2008) (advocating and explaining the need for a centralized commission to protect consumers using financial products). Elizabeth Warren, a Harvard law professor, is currently the head of the Congressional Oversight Panel overseeing the Troubled Assets Relief Program (TARP).

<sup>3</sup> See e.g., Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-024 (requiring enhanced consumer disclosures under the federal Truth in Lending Act, among other things); Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22 (requiring disclosure to consumer of purchasers and assignees of consumer's mortgage loans, among other things); Consumer Credit and Debt Protection Act, H.R. 2309, 111th Cong. (2009) (requires certain disclosures related to fee structures used by providers of debt settlement services, among other things). See also *Financial Regulatory Reform*, *supra* note 2 at 57 (one mission of the CFPA would be to provide information to consumers need to make "responsible financial decisions.").

<sup>4</sup> See e.g., Alvin C. Harrell, *Basic Choices in the Law of Auto Finance: Contract Versus Regulation*, 7 CHAP. L. REV. 107 (2004) (article provides an insightful and interesting discussion of freedom of contract among private parties versus a regulatory environment for the effective management of the marketplace using, by example, the federal Truth in Lending Act and Fair Debt Collection Practices Act, among other consumer statutes, and ultimately arguing that the common law process is more responsive to market changes than regulation).

consumer disclosures mandated under the federal Fair Debt Collection Practices Act (FDCPA or Act),<sup>5</sup> a subchapter of the Consumer Credit Protection Act.<sup>6</sup> Whether these disclosures have been conveyed effectively to a consumer has resulted in substantial litigation and a split in the federal circuits over both the standards and the procedure used to evaluate the efficacy of the disclosures.<sup>7</sup> Deconstructing this FDCPA precedent may help provide legal practitioners with the basis for establishing a violation of that Act, and also may provide insight to practitioners in the consumer financial services industry working to craft more effective consumer disclosures and avoid the risk of unnecessary and costly litigation.

Part II of this paper briefly reviews the framework of the FDCPA, including the legal standards currently used by the federal courts when determining whether the Act has been violated. Part III of the paper reviews the relevant FDCPA precedent and attempts by plaintiffs to introduce acceptable extrinsic evidence, incorporating insights from the trademark literature. Part IV of the paper discusses the factors in the FDCPA standard used in the U.S. Court of Appeals for the Seventh Circuit and evaluates the utility of the standard from a marketing and consumer psychology perspective. The policy implications that flow from the application of marketing theory to the standard also are discussed. Finally, the paper concludes with recommendations for future research directed at improving consumer disclosures in the consumer financial services industry.

## II. FDCPA PROHIBITIONS, DISCLOSURES AND CONSUMER STANDARDS

The FDCPA was an attempt to regulate perceived abuses<sup>8</sup> in the collection of consumer debts by third-party debt collectors.<sup>9</sup> The Federal Trade Commission (FTC) is the administrative agency with primary enforcement powers under the Act,<sup>10</sup> although the FTC's staff commentary under the FDCPA and advisory opinions under the FDCPA are not binding.<sup>11</sup> The FDCPA prohibits certain actions and requires that specific disclosures be made by the debt collectors to protect and inform consumers about their rights under the Act. The statute is a strict liability statute, so violations may result in both statutory and actual damages, as well as attorney's fees.<sup>12</sup> Class action litigation under the Act is common.

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<sup>5</sup> 15 U.S.C. §§ 1692-1692p (as amended 2006).

<sup>6</sup> 15 U.S.C. §§ 1601 *et seq.*

<sup>7</sup> See Laurie A. Lucas & Alvin C. Harrell, *Consumer Standards under the Fair Debt Collection Practices Act: A Case for Regulatory Expansion*, 62 CONSUMER FIN. L.Q. REP. 232 (2009) (article provides a thorough doctrinal explication of the consumer standards under the FDCPA and the resulting split in the federal circuits) [hereinafter *Consumer Standards*].

<sup>8</sup> 15 U.S.C. § 1692(a) (“There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”).

<sup>9</sup> The Act primarily applies to third-party debt collectors, or people collecting debts that are owed to another. See 15 U.S.C. § 1692a(6). When this paper uses the term “debt collector” it means a third-party debt collector as defined under the Act.

<sup>10</sup> 15 U.S.C. § 1692l(a).

<sup>11</sup> See *Heintz v. Jenkins*, 514 U.S. 291 (1995) (noting that the FTC Staff Commentary is not binding on the FTC or the public and therefore can be disregarded). See also *Financial Regulatory Reform*, *supra* note 2 at 58 (proposing that the CFPB would have sole authority to promulgate regulations under the FDCPA, among other consumer protection laws).

<sup>12</sup> See 15 U.S.C. §§ 1692k(a)(1)-(2)(A) (damages under the Act include actual and statutory damages with the latter being up to \$1000 per action or “the lesser of \$500,000 or 1 per centum of the net worth of the debt collector” in a class action).

### *A. Prohibited Conduct*

Under the FDCPA, there are three general categories of prohibited behavior: conduct that harasses or abuses the consumer;<sup>13</sup> conduct that is false, deceptive or misleading to the consumer;<sup>14</sup> and, conduct that is considered an unfair practice.<sup>15</sup> The various sections under the Act provide a non-exhaustive list of actions which might be possible violations. For example, a debt collector who threatens a consumer or a consumer's property<sup>16</sup> or uses obscenity<sup>17</sup> during attempts to collect a debt may violate the Act if the debt collector's conduct is found to constitute harassment or abuse of the consumer. If a debt collector falsely states the amount of the debt being collected,<sup>18</sup> or threatens actions that are not intended or legal,<sup>19</sup> the debt collector's conduct also may be considered false, deceptive or misleading, violating that section of the Act. Finally, if a debt collector attempts to collect amounts, other than the debt, which are not allowed by law or contract,<sup>20</sup> those actions may be considered a violation if they are found to be an unfair practice.

### *B. Required Disclosures*

Debt collectors also are required to make certain disclosures to consumers with the primary disclosure provision being the validation of debts section of the Act (validation disclosures).<sup>21</sup> The Act's validation disclosures, which must be made in the initial contact or within five days of an initial "communication"<sup>22</sup> with a consumer, specifically require that the debt collector give the consumer the following information: a statement of the amount of the debt owed; the name of the creditor who holds the debt; instructions on how to dispute the validity of the debt; instructions indicating verification of the debt is available if a written request is made by the consumer; and instructions on how to make a written request for the name of the original creditor if that information has changed.<sup>23</sup>

The most common vehicle for the validation disclosures is a debt collection letter. The validation disclosures must be conveyed effectively to the consumer, to avoid consumer

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<sup>13</sup> See 15 U.S.C. § 1692d(1)-(6) (section lists six examples of conduct constituting harassment or abuse—list is not inclusive).

<sup>14</sup> See 15 U.S.C. § 1692e(1)-(16) (section lists 16 examples of conduct considered false or misleading—list is not inclusive).

<sup>15</sup> See 15 U.S.C. § 1692f(1)-(8) (section lists eight examples of conduct constituting an unfair practice—list is not inclusive).

<sup>16</sup> 15 U.S.C. § 1692d(1).

<sup>17</sup> 15 U.S.C. § 1692d(2).

<sup>18</sup> 15 U.S.C. § 1692e ("A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of a debt.").

<sup>19</sup> 15 U.S.C. § 1692e(5).

<sup>20</sup> 15 U.S.C. § 1692f(1).

<sup>21</sup> 15 U.S.C. § 1692g. There are other disclosures required under the Act, but these are not the paper's main focus. See e.g., 15 U.S.C. § 1692e(11) (this section is frequently referred to as a "mini-Miranda notice" as it requires disclosure that debt collector is attempting to collect a debt from the consumer and any information obtained will be used for that purpose).

<sup>22</sup> 15 U.S.C. § 1692a(2) ("The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.").

<sup>23</sup> See 15 U.S.C. § 1692g(a)(1)-(5) (Act's validation of debts section). Subsection (b) also requires that the debt collector cease communication with the consumer until the debt is verified if the consumer makes the required written request, but is not part of the required disclosures.

confusion, and not just included in the letter.<sup>24</sup> To be an effective conveyance, the validation disclosures must not be overshadowed or contradicted by other information, directives or visual cues in the letter in which the disclosures are made.<sup>25</sup> Further, if other information, directives or visual cues in the letter create an apparent, but unexplained contradiction, the validation disclosures also may be found to be ineffective.<sup>26</sup>

As noted, while the Act gives some examples of the types of conduct which might be considered a violation of the Act, these terms are not defined in the statute and the examples included in the statute are not exhaustive. Additionally, a violation of one section can form the basis for alleging a violation of another. For example, a debt collector who incorrectly states the amount of the debt owed may violate not only the validation disclosures requirement, but also the prohibition against making a false, deceptive or misleading representation while attempting to collect that debt.<sup>27</sup> When violations are alleged by a consumer, a judicial determination of whether that conduct violates the Act is required.

### C. FDCPA Consumer Standards

The federal courts use two different consumer standards when evaluating most types of violations under the Act: the least-sophisticated consumer standard and the unsophisticated consumer standard.<sup>28</sup> The U.S. Court of Appeals for the Seventh and the Eighth Circuits have adopted the unsophisticated consumer standard, with the remainder of the circuits using the least-sophisticated consumer standard, a theoretically lower standard.<sup>29</sup> When a FDCPA violation is alleged, the courts must determine whether the tactic used by the debt collector would have confused the consumer about the consumer's rights under the Act. Most federal courts make this determination as a matter of law.<sup>30</sup> The Seventh Circuit, however, considers violations under the Act as a mixed question of fact and law.<sup>31</sup>

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<sup>24</sup> See, e.g., *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991) (disclosure notices must be effective); *Swanson v. Southern Or. Credit Serv., Inc.*, 869 F.2d 1222 (9th Cir. 1988) (same).

<sup>25</sup> See, e.g., *Chuway v. Nat'l Action Fin. Servs., Inc.*, 362 F.3d 944 (7th Cir. 2004) (including a 1-800 for consumer to call regarding payment owed was a violation because it could confuse a consumer about validation rights); *Miller v. Payco-General Am. Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991) (placing the validation notice on reverse side of collection letter and using small gray ink was ineffective); *Durkin v. Equifax Check Servs.*, 406 F.3d 410 (7th Cir. 2005) (consumer unsuccessfully argued that validation notice in initial communication to consumer was overshadowed by information in follow-up letters).

<sup>26</sup> See *Barlett v. Heible*, 128 F.3d 497, 500 (7th Cir. 1997) (“A contradiction is just one means of inducing confusion; “overshadowing” is just another; and the most common is a third, the failure to explain an apparent though not actual contradiction [.]”). The *Barlett* court did note that despite this often repeated trio of possible violations, “[i]t would be better if the courts just said that the unsophisticated consumer is to be protected against confusion, whatever form it takes.” *Id.*

<sup>27</sup> See 15 U.S.C. § 1692g(1) (requiring disclosure of “the amount of the debt”) and 15 U.S.C. § 1692e(2)(A) (prohibits “the false representation of the character, amount, or legal status of any debt”) (emphasis added).

<sup>28</sup> See generally *Consumer Standards*, *supra* note 7 (tracing the evolution of both standards).

<sup>29</sup> *But see Peter v. GC Servs., L.P.*, 310 F.3d 344 (5th Cir. 2002) (the Fifth Circuit Court of Appeals asserts that there is no real difference between the two standards—both are low and require some level of reasonableness—and therefore they refuse to choose one or the other).

<sup>30</sup> See *Consumer Standards*, *supra* note 7 at 234-35 (providing overview of cases in which standards were adopted by federal circuits).

<sup>31</sup> Procedurally the other federal circuits, including the Eighth Circuit, consider alleged violations as a matter of law. See *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051 (8th Cir. 2002) (case notes that while the court has adopted the unsophisticated consumer standard from the Seventh Circuit, it has not adopted the attendant procedural requirement for extrinsic evidence).

The primary focus of this paper, therefore, is the FDCPA precedent from the U.S. Court of Appeals for the Seventh Circuit and the unsophisticated consumer standard, as that is the only standard requiring the production of extrinsic evidence, although the insights gleaned from an analysis of that legal construct also may be helpful in understanding the dimensions of the least-sophisticated consumer standard. Both standards are based on the consumer's level of vulnerability, or susceptibility to deception or confusion, although the Seventh Circuit's unsophisticated consumer is not as credulous as the least-sophisticated consumer.<sup>32</sup> The Seventh Circuit has made it clear that an unsophisticated consumer "isn't a dimwit."<sup>33</sup> Rather the unsophisticated consumer has been variously described in Seventh Circuit precedent as follows:

uninformed, naïve and trusting, but not completely ignorant; possessing a rudimentary knowledge about the financial world; wise enough to carefully read a collection notice; reasonably intelligent; capable of making basic logical deductions and inferences; and, unlikely to interpret debt collection letters in bizarre or idiosyncratic ways.<sup>34</sup>

In *Durkin v. Equifax Check Services, Incorporated*,<sup>35</sup> the Seventh Circuit articulated the procedure for demonstrating consumer confusion under the unsophisticated consumer standard.

The *Durkin* court noted that there may be situations where violations in a debt collection letter are obvious and the plaintiff will prevail as a matter of law.<sup>36</sup> The plaintiff, however, may not "merely speculate" that an unsophisticated consumer would be confused by a debt collection letter; rather, the plaintiff needs to introduce acceptable extrinsic evidence, either using "a carefully designed and conducted consumer survey," or perhaps "an appropriate expert witness."<sup>37</sup> To prevail, the plaintiff's extrinsic evidence needs to demonstrate "that a significant fraction" of unsophisticated consumers would be confused by whatever tactics or language were used in the letter at issue in the litigation.<sup>38</sup>

Previously, the Seventh Circuit pointed to trademark litigation as a basis for crafting acceptable survey evidence under the FDCPA.<sup>39</sup> The court noted that, as in trademark litigation, an admissible survey must measure not only the level of confusion caused by the tactic or language at issue in the specific case, but also must include a control group measure which can provide a "benchmark" of the level of confusion that would be experienced by unsophisticated consumers if the at-issue tactic or language had not been used.<sup>40</sup> The court then would be able to

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<sup>32</sup> See *Consumer Standards supra* note 7 at 240 (summing up the precedent underpinning both standards). The standard used by the courts affects the degree of consumer protection extended and thereby raises significant policy questions. Courts using the least-sophisticated consumer standard effectively provide more protection to consumers than courts using the unsophisticated consumer standard because the lower standard increases the likelihood that a debt collector will be found in violation of the Act, *i.e.*, it is more likely that the least-sophisticated consumer will be deceived or confused than an unsophisticated consumer.

<sup>33</sup> *Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643, 645 (7th Cir. 2009) (citations omitted).

<sup>34</sup> See *Consumer Standards, supra* note 7 at 239 (citations omitted).

<sup>35</sup> 406 F.3d 410 (7th Cir. 2004).

<sup>36</sup> *Id.* at 415.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 423. See *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007) ("The standpoint is not that of the *least* intelligent consumer in this nation of 300 million people, but that of the average consumer in the lowest quartile (or some other substantial bottom fraction) of consumer competence.") (internal citations omitted).

<sup>39</sup> See *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057 (7th Cir. 1994) (Easterbrook J., concurring) (citing *Gammon v. GC Servs., L.P.*, 27 F.3d 1254 at 1260).

<sup>40</sup> *Id.* at 1060-61.

compare the level of consumer confusion experienced by the universe of unsophisticated consumers under both treatments and determine whether the at-issue tactic or language had “unacceptably increase[d] the level of confusion” constituting a violation of the Act.<sup>41</sup>

Just as in trademark litigation, the proffered evidence also must meet the standards for professional survey research in order to qualify for admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Incorporated*,<sup>42</sup> and its progeny, as well as the Federal Rules of Evidence.<sup>43</sup> Attempts to comply with the Seventh Circuit’s requirements and the *Daubert* standards have met with limited success,<sup>44</sup> demonstrating the difficulty of the task.<sup>45</sup> Compliance with *Daubert* likewise has been difficult under the trademark cases.<sup>46</sup> Insight can be gained, however, from reviewing these attempts within the context of the trademark cases and literature.<sup>47</sup>

### III. FDCA CONSUMER CONFUSION CASES AND TRADEMARK LAW

A good consumer survey requires a qualified expert, reliability and relevancy.<sup>48</sup> After *Durkin*, attempts to comply with the Seventh Circuit’s requirements for extrinsic evidence have been problematic.<sup>49</sup> This section of the paper reviews attempts to introduce survey evidence in recent FDCA cases, in the light of insights gained from the trademark literature, particularly recent theoretical and empirical work within that field.<sup>50</sup> These cases include determinations

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<sup>41</sup> *Id.* at 1060.

<sup>42</sup> 509 U.S. 579 (1993).

<sup>43</sup> See, e.g., *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); Fed. R. Evid. 702 (as amended) (codifying holdings in *Daubert* and *Kumho Tire Co.*).

<sup>44</sup> See *Consumer Standards*, *supra* note 7 at 241–44 (reviewing cases through 2007 in the Seventh Circuit requiring extrinsic evidence and noting difficulty for plaintiffs).

<sup>45</sup> See e.g., Itamar Simonson, *The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test*, 83 TRADEMARK REP. 364 (1993) (noting that experimental methods are extremely difficult and risky given costs).

<sup>46</sup> See e.g., Robert C. Bird, *The Impact of the Moseley Decision on Trademark Dilution Law*, 26 J. PUB. POL’Y & MARKETING 102, 115 (2007) (“The proverbial gold-standard consumer survey design is far from established in trademark dilution law. . . . A marketing perspective on trademark dilution law is needed.”); Gary T. Ford, *The Impact of the Daubert Decision on Survey Research Used in Litigation*, 24 J. PUB. POL’Y & MARKETING 234 (2005) (provides summary of consumer survey standards after *Daubert*).

<sup>47</sup> See e.g., Patricia J. Kaeding, *Clearly Erroneous Review of Mixed Questions of Law and Fact: The Likelihood of Confusion Determination in Trademark Law*, 59 U. CHI. L. REV. 1291 (1992) (exploring problems in trademark law when using mixed fact/ law standards under the Lanham Act).

<sup>48</sup> See Ford *supra* note 46 at 247–48 (provides summary of consumer survey standards after *Daubert*). See also Bird, *supra* note 46 at 113 (“[A] well-constructed survey must define the universe of consumers to be sampled; select a representative sample of that universe; ask questions that are clear, precise, and nonleading; use appropriately trained survey interviewers and interview procedures; ask filter questions to reduce guessing by respondents; and analyze and report data according to established statistical principles.”) (citing, Shari Diamond, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000)). See also *DeKoven v. Plaza Assocs.*, No. 05-CV-3462, 2009 U.S. Dist. LEXIS 30034 at \*10 (N.D. Ill. Mar. 31, 2009) (“In assessing the methodology used, courts consider: (1) whether the proffered conclusion lends itself to verification by the scientific method through testing; (2) whether it has been subjected to peer review; (3) whether it has been evaluated in light of the potential rate of error of the scientific technique; and (4) whether it is consistent with the generally accepted method for gathering the relevant scientific evidence.”) (citing *Cummins v. Lyle Industries*, 93 F.3d 362, 367 (7th Cir. 1996)).

<sup>49</sup> See e.g., *Consumer Standards*, *supra* note 7 at 241 (Table summarizing survey cases applying standard through 2007).

<sup>50</sup> Thomas R. Lee, Eric D. DeRosia & Glenn L. Christensen, *Sophistication, Bridging the Gap, and the Likelihood of Confusion: An Empirical and Theoretical Analysis*, 98 TRADEMARK REP. 913 (2008) (study finding some empirical support for hypothesis that some sophisticated consumers may be *more likely* to experience confusion in a hypothetical brand extension by luxury automakers to notebook computers) [hereinafter *Empirical Analysis*];

about whether the selected expert was qualified, the survey methodology was appropriate, the proper survey methods were used, and, perhaps most importantly, the correct consumer universe was surveyed.

### A. Qualified Expert Witnesses

A good expert witness needs to be qualified in the relevant subject area and able to fully articulate the methodology used in the survey.<sup>51</sup> This was an issue in *Durkin*, discussed above, wherein the court rejected the plaintiff's expert witness, a linguist, because he was unable to articulate the methodology he had used to reach his conclusions.<sup>52</sup> Additionally, the district courts have excluded expert testimony because of a failure to articulate the methodology used when they have testimony from an expert qualified in the relevant area of law, but not consumer psychology, or vice versa.<sup>53</sup> The Seventh Circuit also recently found that plaintiffs who did hire an expert in survey research to administer a survey made a "mistake" by allowing their attorney to draft the survey questions which were then excluded.<sup>54</sup>

### B. Appropriate Methodology

Use of an appropriate methodology also is required under the FDCPA precedent. While the Seventh Circuit allows testimony from an expert witness to establish consumer confusion,<sup>55</sup> the preference appears to be for extrinsic empirical evidence like a professional consumer survey.<sup>56</sup> Assessments of the readability and design analysis of debt collection letters have been

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Thomas R. Lee, Glenn L. Christensen & Eric D. DeRosia, *Trademarks, Consumer Psychology, and the Sophisticated Consumer*, 57 EMORY L.J. 575 (2008) (article provides theoretical model of consumer sophistication based on consumer psychology for use in establishing validity of consumer confusion factor in trademark cases; equates consumer sophistication with consumer care) [hereinafter *Consumer Psychology*]; Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006) (empirical study of trademark decisions indicates that decisions are usually made with only a few of the factors from the multifactor trademark tests; Beebe urges the use of a streamlined national multifactor test); Julie Manning Magid, Anthony D. Cox & Dena S. Cox, *Quantifying Brand Image: Empirical Evidence of Trademark Dilution*, 43 AM. BUS. L.J. 1 (2006) (offering conceptual framework for randomized studies to measure trademark dilution).

<sup>51</sup> See Ford, *supra* note 46 at 247.

<sup>52</sup> *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410 (7th Cir. 2004). The plaintiff did not present a consumer survey, but relied on expert witness testimony which the district court found unreliable and irrelevant. *Id.* at 420.

<sup>53</sup> See *McCabe v. Crawford & Co.*, 272 F.2d 736 (N.D. Ill. 2003) (excluded expert testimony from a law professor because it contained inappropriate legal conclusions and opinions regarding the statute at issue in the case and because of a failure to use consumer research). Cf. *Holt v. Wexler*, No. 98 C 7285, 2002 U.S. Dist. LEXIS 5244, at \*8 (N.D. Ill. Mar. 27, 2002) (expert witness trained in finance but not relevant area of law or "communication, rhetoric, psychology or sociology" not qualified to give opinions regarding FDCPA); *White v. Fin. Credit. Corp.*, No. 99-C-4022, 2001 U.S. Dist. LEXIS 21486 (N.D. Ill. Dec. 27, 2001) (expert unable to articulate methodology used in "casual survey" of undergraduate students).

<sup>54</sup> *Muha v. Encore Receivable Mgmt. Inc.*, 558 F.3d 623, 626 (7th Cir. 2009) (survey questions were leading).

<sup>55</sup> *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 415 (7th Cir. 2004) (use of testimony from "an appropriate expert might suffice").

<sup>56</sup> See *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769, 776 (7th Cir. 2007) (extrinsic evidence must meet requirements for "professional survey research" to be admissible); Ford *supra* note 46 at 249 (Supreme Court's preference is likely for empirical rather than opinion evidence). Even assuming such a preference, what type of survey is appropriate still may be an issue. See e.g., Magid, Cox & Cox, *supra* note 50 at 26-28 (arguing for superiority of randomized experiments over consumer surveys, at least when attempting to prove trademark dilution).



rejected,<sup>57</sup> and the use of telephonic survey methods discouraged.<sup>58</sup> As in trademark litigation, the best survey method depends on the issue being litigated,<sup>59</sup> but the mall-intercept survey is probably among the most cost effective approach for use under the FDCPA.<sup>60</sup>

The Seventh Circuit also requires the use of a control group regardless of the methodology selected.<sup>61</sup> As noted above, the requirement of a control group is meant to provide a benchmark or baseline level of confusion that might be caused by the statutory language itself.<sup>62</sup> Alternatively, the survey's control for confusion might be language from one of the

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<sup>57</sup> See *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410 (7th Cir. 2004). The fact that the expert focused on the "overall readability" of debt collection letters in general, rather than the specific language from letters at issue in the litigation, was a primary reason the court rejected the expert's testimony; the expert's testimony was not offered to prove the at-issue language would increase an unsophisticated consumer's level of confusion. *Id.* at 420-21. *Sims v. GC Servs., L.P.*, 445 F.3d 959 (7th Cir. 2006) (expert testimony irrelevant using readability and design analysis because expert did not review letters at issue in litigation and did not offer extrinsic evidence of consumer confusion).

<sup>58</sup> *Muha v. Encore Receivable Mgmt. Inc.*, 558 F.3d 623, 626 (7th Cir. 2009) ("We add parenthetically that a telephone survey is not an ideal method of testing the understanding of a written statement, since inflection can alter meaning and some written statements are easier to understand when read than when heard.").

<sup>59</sup> See Itama Simonson, *Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications*, 13 J. PUB. POL'Y & MARKETING 181 (1994) (all methods of measuring likelihood of consumer confusion are flawed, so the better approach is to choose best method for particular situation; article evaluates several used in trademark litigation with empirical data from field studies).

<sup>60</sup> *Cf. Evory v. RJM Acquisitions Funding, L.L.C.*, No. 1:05-CV-0140-DFH-TAB, 2008 U.S. Dist. LEXIS 91879, \*2-3 (S.D. Ind. Nov. 12, 2008) (unpublished opinion) (after reversal and on remand, granting plaintiff's motion to dismiss (with prejudice but without costs or Rule 11 sanctions), noting that "Ms. Evory and her attorneys have concluded that the prospects of success are slim enough that it is not worth spending \$25,000 or more to conduct the survey."). *But cf. Magid, Cox & Cox, supra* note 50 at 26 (when demonstrating trademark dilution, these authors assert that randomized experiments are superior to consumer surveys to establish confusion).

<sup>61</sup> See *Muha v. Encore Receivable Mgmt. Inc.*, 558 F.3d 623 (7th Cir. 2009) (survey flawed—needs control group); *Hernandez v. Attention, L.L.C.*, 429 F.Supp.2d 912, 917 (N.D. Ill. 2005) (survey must include a control group because "the issue is not merely the meaning of the letter, but whether the contested language significantly increases the level of confusion over that potentially caused by the Validation Notice itself.") (citations omitted).

<sup>62</sup> The statute's validation notice requirements read as follows:

- (a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –
  - (1) the amount of the debt;
  - (2) the name of the creditor to whom the debt is owed;
  - (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
  - (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
  - (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

many safe-harbor cases that the Seventh Circuit has issued for use in the Seventh Circuit.<sup>63</sup> A plaintiff's failure to use the statutory language or the safe-harbor language in a control group treatment has resulted in the rejection of surveys on the grounds that the control language that was used was not reliable.

For example, two district court cases recently addressed this issue in cases where settlement offers with a 35-day deadline for acceptance were made in letters to consumers, a commonly used collection strategy. The plaintiffs argued this offer would confuse consumers about their rights in the validation disclosures, which provide the consumer 30 days to dispute the validity of the debt, and also that the statement was false, deceptive and misleading, since the debt collector would likely have extended the offer after the 35-day deadline had expired. The same survey expert was used in both cases. In both cases, the safe-harbor language offered in *Evory v. RJM Acquisitions Funding L.L.C.*,<sup>64</sup> for use in this type of collection letter, was not included in the control group treatment and the surveys were rejected.<sup>65</sup> In situations where the at-issue language in a case does not lend itself to a control group treatment based on the statutory language<sup>66</sup> or a safe-harbor case,<sup>67</sup> the Seventh Circuit has indicated that the control group could

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15 U.S.C. §1692g(a)(1)-(5). Most validation disclosures closely track this statutory language. A typical validation disclosure in a debt collection letter might read as follows:

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of this debt or any portion thereof, this office will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

*Hernandez v. Attention, L.L.C.*, 429 F.Supp.2d 912, 915 (N.D. Ill. 2005). The issue in *Hernandez* was whether the additional language in the collection letter that stated “[y]our failure to remit the balance due will result in our agency continuing our collection efforts[,]” would confuse an unsophisticated debtor about how much time he had to request validation. *Id.*

<sup>63</sup> The Seventh Circuit has provided safe-harbor language to help debt collectors avoid a violation of § 1692e's prohibition against false or misleading statements when the debt collector offers to settle a debt by a deadline, at less than face value. *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 776 (7th Cir. 2007) (court offered the following additional language as a safe harbor: “We are not obligated to renew this offer.”). The court also offered language to avoid a misstatement of the amount of a debt that varies daily. *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000). A complete letter was drafted to help debt collectors avoid liability for indicating that a consumer may be sued within the 30-day validation period (or that the debt collector might take any action within that period). *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997).

<sup>64</sup> 505 F.3d 769 (7th Cir. 2007). *See also supra* note 63 (cites to safe-harbor cases).

<sup>65</sup> *Kubert v. AID Assocs.*, No. 05-C-5865, 2009 U.S. Dist. LEXIS 38601 at \*9 (N.D. Ill. May 7, 2009) (“[W]ithout the [safe harbor] language included, the results gleaned from the control group do not provide reliable evidence as to whether the settlement offer contained in the initial collection letter was misleading.”); *DeKoven v. Plaza Assocs.*, No. 05-CV-3462, 2009 U.S. Dist. LEXIS 30034 at \*17-18 (N.D. Ill. Mar. 31, 2009) (“[T]he safe harbor language provides an outer boundary for the kind of language that protects creditor interests as much as possible without becoming misleading or deceptive.”).

<sup>66</sup> Like a letter that included only the statutory validation disclosures plus a statement of the debt. *See Johnson v. Rev. Mgmt. Corp.*, 169 F.3d 1057 (7th Cir. 1999).

<sup>67</sup> *See supra* note 63 (cites to safe-harbor cases).

be “shown a wording of the dunning letter that the [parties] agreed would not be confusing or that simply omitted the challenged sentence.”<sup>68</sup>

Even with the use of a control group, the survey still must demonstrate that the consumer’s level of confusion was *unacceptably* increased by the at-issue language in the collection letter<sup>69</sup> which will require measurement of how much confusion is caused by the statute, the safe-harbor language, or an acceptable control group treatment which omits the disputed language.<sup>70</sup> As in trademark cases, defining what constitutes confusion<sup>71</sup> and how much is required to demonstrate a violation also remains an issue under the FDCPA. The Seventh Circuit has not yet had a case where they could begin to establish precedent on this critical issue.<sup>72</sup> In reported cases where levels of confusion between two survey treatment groups were compared, the surveys were rejected on other grounds, and the courts did not address the specific issue.<sup>73</sup> In the trademark litigation, surveys demonstrating a 27.7% level of consumer confusion have been accepted as proof of a likelihood of confusion, and a 40% level of consumer confusion nationally as proof of actual confusion.<sup>74</sup> Beebe notes that courts have

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<sup>68</sup> *Muha v. Encore Receivable Mgmt. Inc.*, 558 F.3d 623, 626 (7th Cir. 2009). In *Muha*, the plaintiffs had argued that language in collection letter stating “your original agreement with the abovementioned creditor has been revoked[,]” was false, misleading and confusing. *Id.* at 625.

<sup>69</sup> See *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057 (7th Cir. 1994).

<sup>70</sup> In *DeKoven*, the plaintiff argued that the Seventh Circuit’s safe-harbor language had not been subjected to a consumer survey to determine how much confusion *that language* would cause an unsophisticated consumer, making it unnecessary to include the safe-harbor language in the control group’s letter. The district court held that the safe-harbor language was *not* confusing as a matter of law. *Id.* at \*17. A valid measurement of how much confusion the safe-harbor language caused an unsophisticated consumer, however, would be necessary to provide a benchmark for comparing survey group treatment. In *DeKoven*, the plaintiff’s control group treatment did omit the challenged language which would appear to conform to the Seventh Circuit’s statements regarding appropriate control group treatment choices, even though safe-harbor language was available and not used. See *Muha v. Encore Receivable Mgmt. Inc.*, 558 F.3d 623 (7th Cir. 2009).

<sup>71</sup> See e.g., Ellen R. Foxman, Phil W. Berger & Joseph A. Cote, *Consumer Brand Confusion: A Conceptual Framework*, 9 PSYCHOL. & MARKETING 123 (1992) (noting difficulty of distinguishing “brand confusion” from uncertainty, miscomprehension, infringement or deception and offering a framework based on stimulus, individual and situational factors); Arlene A. Hahn, Bernadette McCann Ezring & Jeffrey Steck, *Seventh Circuit Adopts Second Circuit Interpretation of the Causes Dilution Element of Trademark Dilution Act Claim, Requiring Demonstration of Likelihood of, Not Actual, Dilution*, 13 INTELL. PROP. & TECH. LAW J. 17 (2001) (Seventh Circuit rejects precedent from other federal circuits and only requires proof of likelihood of dilution, not actual dilution).

<sup>72</sup> The Seventh Circuit noted recently that the FDCPA does not define “confusion,” but given that the overall purpose of the Act was preventing “abusive debt collection practices,” any claim that a debt collection practice was “false, deceptive or misleading,” may consider, for example, whether the at-issue language would have an “intimidating effect” on the unsophisticated consumer or would confuse such a consumer about his rights under the Act. See *Muha v. Encore Receivable Mgmt. Inc.*, 558 F.3d 623, 629 (7th Cir. 2009) (citations omitted).

<sup>73</sup> See *DeKoven v. Plaza Assocs.*, No. 05-CV-3462, 2009 U.S. Dist. LEXIS 30034 (N.D. Ill. Mar. 31, 2009) In this offer to settle case, 58.8% of respondents who received the letter with the at-issue language did not believe the offer would be extended, while 23.8% of respondents in the control group did. *Id.* at \*18. Survey was rejected on other grounds; *Kubert v. AID Assocs.*, No. 05-C-5865, 2009 U.S. Dist. LEXIS 38601 (N.D. Ill. May 7, 2009) (survey with data from two treatment groups failed because it did not include safe-harbor language). See also *Jackson v. Midland Credit Mgmt., Inc.*, 445 F.Supp.2d 1015 (N.D. Ill. 2006) (although survey showed 82.5% of respondents read the letter as making a one-time offer to settle, the offer was in fact truthful, and the survey did not measure whether the truthful offer to settle confused any of those respondents).

<sup>74</sup> See e.g., Robert H. Thornburg, *Trademark Survey Evidence: Review of Current Trends in the Ninth Circuit*, 21 SANTA CLARA COMPUTER & HIGH TECH L.J. 715 (2005).

found trademark infringement when evidence indicated consumer confusion was “as little as 15%, or even 8.5%[.]”<sup>75</sup>

### C. Proper Survey Methods

The overall questionnaire design and the construction of survey questions also must conform to proper behavioral research standards.<sup>76</sup> Proper survey design is needed,<sup>77</sup> including questions that are clear,<sup>78</sup> control for bias against debt collectors and the industry,<sup>79</sup> discourage guessing,<sup>80</sup> and do not lead the respondent.<sup>81</sup> Two recent cases help demonstrate just how difficult it is to get a survey admitted and also the problems for practitioners inherent in the common law process.<sup>82</sup>

Plaintiffs in both cases used closed-end survey questions, the same expert and similar survey techniques; the basic interview process—described in one of the cases—was as follows:

[a]s each closed-end question was asked, the interviewer handed a printed card to the respondent visualizing the options and reflecting the order in which the options were presented verbally. The visual cards were used to aid interviewees in responding and eliminate any need to memorize the options. Each card gave interviewees the opportunity to say “don’t know” or “not sure” if they could not offer an opinion.<sup>83</sup>

The judges in the cases, however, ruled differently on the issue of survey design, with *Kubert* holding that the failure to read the option to the interviewee invalidated the survey, even though the option was printed on the response card given to the interviewee;<sup>84</sup> and, *DeKoven* holding

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<sup>75</sup>Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2038 (2005).

<sup>76</sup> See *supra* note 48. See e.g., *Hernandez v. Attention, L.L.C.*, 429 F.Supp.2d 912 (N.D. Ill. 2005) (survey flawed because only 40 respondents were sampled).

<sup>77</sup> See e.g., *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769 (7th Cir. 2007) (surveys must measure respondent’s level of confusion not respondent’s belief about an unsophisticated consumer’s level of confusion).

<sup>78</sup> See e.g., *Jackson v. Midland Credit Mgmt., Inc.*, 445 F.Supp.2d 1015 (N.D. Ill. 2006) (survey flawed because it did not define key terms used in questions like, “limited-time offer”); *Jackson v. Nat’l Action Fin. Servs., Inc.*, 441 F.Supp.2d 877 (N.D. Ill. 2006), *aff’d*, *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769 (7th Cir. 2007) (survey question flawed because it did not define what was meant by “limited-time offer” for respondents).

<sup>79</sup> See e.g., *Jackson v. Midland Credit Mgmt., Inc.*, 445 F.Supp.2d 1015 (N.D. Ill. 2006) (survey flawed because it did not ask questions designed to determine whether respondents were biased against debt collectors); *Hernandez v. Attention, L.L.C.*, 429 F.Supp.2d 912 (N.D. Ill. 2005) (survey flawed because it did not control for bias against debt collectors).

<sup>80</sup> See *Kubert v. AID Assocs.*, No. 05-C-5865, 2009 U.S. Dist. LEXIS 38601(N.D. Ill. May 7, 2009) (survey interviewers failure to read the “don’t know/not sure” choice to respondents *was not* a fatal flaw because choice was included on written response card—survey inadmissible on other grounds.); *DeKoven v. Plaza Assocs.*, No. 05-CV-3462, 2009 U.S. Dist. LEXIS 30034 (N.D. Ill. Mar. 31, 2009) (failure of interviewer to read the “don’t know/not sure” choice to respondents *was* a fatal flaw because choice was included on written response card. ).

<sup>81</sup> See e.g., *Muha v. Encore Receivable Mgmt. Inc.*, 558 F.3d 623 (7th Cir. 2009) (survey flawed because questions were leading).

<sup>82</sup> These cases both came from the Eastern Division of the Northern District Court for the Seventh Circuit demonstrating that not even proximity leads to consensus on these topics. See *Kubert v. AID Assocs.*, No. 05-C-5865, 2009 U.S. Dist. LEXIS 38601(N.D. Ill. May 7, 2009) (Coar, J.) ; *DeKoven v. Plaza Assocs.*, No. 05-CV-3462, 2009 U.S. Dist. LEXIS 30034 (N.D. Ill. Mar. 31, 2009) (Kocoras, J.).

<sup>83</sup> See *DeKoven*, *supra* note 88 at \*14-15 (survey was rejected on other grounds).

<sup>84</sup> See *Kubert*, *supra* note 80 at \*10-11 (“For those respondents, [who were not read the option] the danger that their response represents a guess rather than an actual assessment of the language presented is apparent.”).

that only the failure to include the option at all on the written response card and not the failure to read it to the interviewee would invalidate the survey.<sup>85</sup> In support, both courts relied on the Federal Judicial Center's *Reference Manual on Scientific Evidence*. The contradictory holdings under nearly identical facts illustrate how difficult the process can be for survey experts and highlight the need for further research, particularly since an appellate level decision will now be required to resolve the split in the district courts. In the trademark literature, the inclusion of an "I don't know/not sure" response—regardless of whether it is printed on a response card and/or read to the respondent—or whether it deters guessing also is debated.<sup>86</sup>

In sum, while the Seventh Circuit directed practitioners to the trademark cases in its initial determination that extrinsic evidence would be needed to demonstrate consumer confusion under the FDCEPA, a review of the trademark literature indicates the difficulty practitioners have had in that arena and the FDCEPA cases appear to mirror those difficulties. In response, some trademark scholars have called for pre-approval of surveys by the courts or the relevant administrative agency and/or the use of survey rules that could provide a foundation for survey design.<sup>87</sup> Asking for preapproval of survey design has been met with mixed results in the Seventh Circuit, but a recent FDCEPA unpublished opinion, in light of the above discussion on closed-end survey questions, illustrates that there also are problems with a pre-approval approach.

In *Hubbard v. Midland Credit Management, Incorporated*,<sup>88</sup> the plaintiff asked the court to review her proposed survey over the defendants' objections.<sup>89</sup> *Hubbard* also was a settlement offer case wherein the plaintiff was alleging that the debt collector's willingness to take payment after the time limit stated in the letter had expired constituted a false and misleading statement.<sup>90</sup>

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<sup>85</sup> See DeKoven *supra* note 80 at \*16.

<sup>86</sup> Michael Rappeport, *Litigation Surveys-Social "Science" as Evidence*, 92 TRADEMARK REP. 957, 984 (2002) ("Including "I don't know" option is, in this author's opinion, less likely to encourage guessing and thus may be a harmless practice, although not of real value."); Jacob Jacoby, *A Critique of Rappeport's "Litigation Surveys—Social 'Science' as Evidence"*, 92 TRADEMARK REP. 1480, 1483 (2002) ("[W]hen a DK [I don't know] answer category is not included, closed-ended questions become biased and can give seriously misleading results. ... Logically, DK response options should be included."); Michael Rappeport, *A Rejoinder to a Critique*, 92 TRADEMARK REP. 1502, 1507 (2002) ("The empirical evidence is beyond dispute that whether they ["I don't know" instructions] conceivably do any good is dependent on the subject matter, the structure of the survey, the particular question, and the nature of the respondents. As such, it is *impossible* to extrapolate from specific cases to general rules about the use of such instructions.").

<sup>87</sup> See Irina D. Manta, *In Search of Validity: A New Model for the Content and Procedural Treatment of Trademark Infringement Surveys*, 24 CARDOZO ARTS & ENT. L.J. 1027, 1058 (2007) (article argues for the adoption of survey rules to set the floor for survey admissibility and also preapproval of surveys noting that "[t]he legal situation of trademark surveys...rests on an uneasy foundation."). *But cf.* Michael Rappeport, *Litigation Surveys-Social "Science" as Evidence*, 92 TRADEMARK REP. 957, 961-62 (2002) ("[t]he constant search for a model survey represents a refusal to accept the basic principle that *any survey is the calling of witnesses in a specific case to testify about a specific set of "facts,"* where those reflect the respondents' (witnesses') own perceptions. Once one accepts that presenting a survey in court is no more than recounting of the (hopefully clarifying ) testimony of witnesses, why would anyone expect a model to exist?").

<sup>88</sup> No. 1:05-CV-0216-DFH-TAB, 2009 U.S. Dist. LEXIS 13938 (S.D. Ind. Feb. 23, 2009).

<sup>89</sup> In *Hubbard*, the court noted that in another district court case, the judge had refused the same request (citing *Kubert v. AID Assocs.*, No. 05-C-5865, 2009 U.S. Dist. LEXIS 38601 (N.D. Ill. May 7, 2009)) and noted that concerns expressed by the judge in *Kubert*, discussed throughout Part III. of this paper, did not persuade the "court that it would always be error for a district court to exercise its discretion to entertain such a motion[.]" *Hubbard supra* note 88 at \* 2-3.

<sup>90</sup> *Hubbard* had previously been reversed and remanded after the district court had dismissed the case on the pleadings. *Hubbard v. Midland Credit Mgmt.*, NO. 1:05-cv-0216-DFH-TAB, 2008 U.S. Dist. LEXIS 102982 (S.D.

The plaintiff in *Hubbard* indicated the proposed use of a mall-intercept survey, although the court did not discuss whether the “mall shoppers” intended as the survey universe would be appropriate; the planned survey universe included “40 [mall shoppers] who had no education beyond high school and 40 with at least some college.”<sup>91</sup> The proposed survey would control for bias by asking the shoppers whether they had used consumer credit and determining if the prospective respondents had ever worked in or had family members working in the debt collection industry.<sup>92</sup> The proposed control group treatment did not use the relevant safe-harbor language, but instead planned to use a letter without the language that indicated there was a time limit to the offer to settle for less than the amount of the debt.<sup>93</sup> Finally, in yet another iteration of the closed-end question debate, the proposed survey did not include either a “don’t know/not sure” verbal or written instruction.<sup>94</sup>

Although the court noted that it did not have “the benefit of expert testimony or a truly adversarial presentation” of the proposed survey, the proposed survey demonstrated too many problems, including the failure to include a “Don’t know/not sure” response, and denied the plaintiff’s motion.<sup>95</sup> Another district court judge recently summed up the problem of interpreting survey methodology for the district courts in the Seventh Circuit:

Each successive survey is slightly closer to being factual evidence that could be used to determine whether a sufficiently large segment of the unsophisticated are likely to be deceived, but each survey has thus far failed. The confounding state of jurisprudence on the FDCPA in this circuit avoids the problem of federal judges deciding an issue they are not best equipped to decide (whether unsophisticated consumers would be deceived by a particular debt collection statement) by asking them instead to determine yet another issue they are not best equipped to decide (whether a consumer survey comports with reliable scientific methodology).<sup>96</sup>

The FDCPA survey cases discussed herein do represent a bit of a paradox for the district courts. Even one of the most detailed appellate cases to date dealing with the contents of consumer surveys reflects these contradictions.

In *Evory v. RJM Acquisitions Funding L.L.C.*,<sup>97</sup> the court held that including the word “obligated” in the safe-harbor language offered for use in settlement offer cases was so “strong...even the unsophisticated consumer will realize that there is a renewal possibility but that it is not assured[,]” while at the same time requiring the use of extrinsic evidence to *demonstrate* consumer confusion because “[t]he intended recipients of dunning letters are not federal judges, and judges are not experts in the knowledge and understanding of unsophisticated consumers facing demands by debt collectors.”<sup>98</sup> Regardless of such inconsistencies, measuring

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Ind. Dec. 19, 2008), *rev’d* *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 (7th Cir. 2007) (claim made proceed with the use of appropriate extrinsic evidence), and *class certification granted sub nom. Hubbard v. M.R.S. Assocs., Inc.*, NO. 1:05-cv-0218-DFH-TAB, 2008 U.S. Dist. LEXIS 102983 (S.D. Ind. Dec. 19, 2008).

<sup>91</sup> *Hubbard*, No. 1:05-cv-0216-DFH-TAB, 2009 U.S. Dist. LEXIS 13938 at \*4-5.

<sup>92</sup> *Id.* at \*5.

<sup>93</sup> *Id.* at \*9-10.

<sup>94</sup> *Id.* at \*6-9. In this proposed survey methodology all the answer choices would be read to respondent.

<sup>95</sup> *Id.* at \*10-11.

<sup>96</sup> *DeKoven v. Plaza Assocs.*, No. 05-CV-3462, 2009 U.S. Dist. LEXIS 30034, at \*10-20 (N.D. Ill. Mar. 31, 2009).

<sup>97</sup> 505 F.3d 769 (7th Cir. 2007).

<sup>98</sup> *Id.* at 776. *See also supra* note 63 (cites to safe-harbor cases and language from *Evory*).

the level of confusion the “intended recipients of dunning letters” experience, of course, rests on the presumption that the appropriate consumer universe was identified and surveyed.

#### *D. Relevant Consumer Universe*

Bird has argued that determining the appropriate survey universe in trademark litigation is a crucial decision and “represents one of the most significant challenges a survey expert will face in drafting a consumer survey.”<sup>99</sup> Under the FDCPA, this problem is compounded by the fact that the survey universe also must meet the statutory definitions for “consumers”<sup>100</sup> and “debt,”<sup>101</sup> in addition to the dimensions of “unsophisticated consumer” construct used in the Seventh Circuit.<sup>102</sup> The amorphous quality of the legal construct, gleaned from disparate cases at the district, and even fewer at the appellate level, adds to that difficulty.<sup>103</sup>

Given these requirements, at a minimum, a valid FDCPA survey must demonstrate that the respondents were natural persons, without bias against the debt collection industry, who have been obligated to pay a consumer debt at some point and who fall within “the lowest quartile (or some other substantial bottom fraction) of consumer competence.”<sup>104</sup> Valid proxies for consumer sophistication are required.<sup>105</sup> For example, in a case using a mall-intercept survey method, the consumer universe was described as “80 consumers, 40 of whom had completed high school or less and 40 of who had at least completed some college[,]”<sup>106</sup> while another used a mall-intercept survey of “160 users of credit[.]”<sup>107</sup> Neither case, however, discussed whether the appropriate consumer universe had been surveyed because, as noted above, the surveys were invalidated on other grounds. The Seventh Circuit did recently note that a random survey of

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<sup>99</sup> Robert C. Bird, *Streamlining Consumer Survey Analysis: an Examination of the Concept of Universe in Consumer Surveys Offered in Intellectual Property Litigation*, 88 TRADEMARK REP. 269, 276 (1998).

<sup>100</sup> 15 U.S.C. § 1692a(3) (“The term “consumer” means any natural person obligated or allegedly obligated to pay any debt.”). See *Jackson v. Nat’l Action Fin. Servs., Inc.*, 441 F.Supp.2d 877 (N.D. Ill. 2006), *aff’d*, *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769 (7th Cir. 2007) (survey rejected in part because it did not consider FDCPA definition of “consumer”).

<sup>101</sup> 15 U.S.C. § 1692a (5) (“The term “debt” means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes...[.]”).

<sup>102</sup> See *Jackson v. Nat’l Action Fin. Servs., Inc.*, 441 F.Supp.2d 877 (N.D. Ill. 2006), *aff’d*, *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769 (7th Cir. 2007) (survey must demonstrate adequate proxy used to establish respondents were “unsophisticated consumers”).

<sup>103</sup> See also *supra* note 34 for the dimensions of the “unsophisticated consumer” construct.

<sup>104</sup> *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007).

<sup>105</sup> See e.g., *Jackson v. Nat’l Action Fin. Servs., Inc.*, 441 F.Supp.2d 877 (N.D. Ill. 2006), *aff’d*, *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769 (7th Cir. 2007) (expert could not articulate why consumer universe—those with a high school education or less—was an adequate proxy for sophistication; one, but not the, fatal flaw found in the survey). See also Beebe *supra* note 72 at 2035-36 (noting that consumer sophistication regarding source confusion of trademarks includes factors like “age, gender, education level, cognitive style, and experience with the trademarked product and product area.”). Beebe also notes that the higher the level of a consumer’s “search sophistication,” the less protection required because these consumers pay more attention to their product purchasing decisions. *Id.* at 2038. But cf. Daniel J. Howard, Roger A. Kerin & Charles Gengler, *The Effects of Brand Name Similarity on Brand Source Confusion: Implications for Trademark Infringement*, 19 J. PUB. POL’Y & MARKETING 250 (2000) (study finding that “highly motivated consumers may evidence more brand source confusion than unmotivated consumers, depending on the nature of the brand similarity presented, such as when brand names share a common meaning.”).

<sup>106</sup> *DeKoven v. Plaza Assocs.*, No. 05-CV-3462, 2009 U.S. Dist. LEXIS 30034 at \*11 (N.D. Ill. Mar. 31, 2009)

<sup>107</sup> *Kubert v. AID Assocs.*, No. 05-C-5865, 2009 U.S. Dist. LEXIS 38601 at \*3 (N.D. Ill. May 7, 2009).

consumers rather than a survey of unsophisticated consumers could only benefit a defendant, (presumably because it increases the average level of sophistication for the total group of consumers surveyed making a violation less likely) even though “a better survey would include questions designed to filter out the sophisticated[.]”<sup>108</sup> Defining the appropriate survey universe and appropriate proxies for sophistication under the unsophisticated consumer standard likely will require more litigation. The requirement by the Seventh Circuit, however, that appropriate proxies for the factors in the unsophisticated consumer construct be justified can be met using insights from marketing and consumer psychology literature. This perspective may provide insight for practitioners trying to comply with the standard, as well as adding to a better understanding of what constitutes an effective disclosure for consumer financial products.

#### IV. THE UNSOPHISTICATED CONSUMER STANDARD

As noted above,<sup>109</sup> the factors making up the unsophisticated consumer standard, like many of the terms used in the FDCPA, are largely undefined and gleaned from the cases. Part IV of the paper, therefore, reviews the factors in the unsophisticated consumer standard through the lens of marketing and consumer psychology to evaluate whether the factors used in the standard make sense under the FDCPA. Insights from marketing theory are then used as a basis for discussing the policy implications of the unsophisticated consumer standard under the FDCPA specifically and consumer disclosures generally.

##### *A. Factors in the Unsophisticated Consumer Standard*

As noted above, the unsophisticated consumer standard includes factors that encompass both individual ability and behavior as they relate to consumer sophistication.<sup>110</sup> The Seventh Circuit FDCPA cases assume that the more sophisticated a consumer is, the less likely it is that the consumer will be confused.<sup>111</sup> Only an unsophisticated consumer is likely to be confused by a false, deceptive or misleading tactic, or about his rights in the collection process.<sup>112</sup>

In trademark law, the context is similar. The relevant issue in trademark litigation is demonstrating a likelihood of confusion, but the confusion has a slightly different focus: whether the consumer was confused about the source or sponsorship of goods or services.<sup>113</sup> The relevant consumer universe also is different under trademark law with the focus on the *ordinary* consumer, not the *unsophisticated* consumer. More importantly, the level of the consumer’s

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<sup>108</sup> *Muha v. Encore Receivable Mgmt. Inc.*, 558 F.3d 623, 627 (7th Cir. 2009). The *Muha* court affirmed the district court’s exclusion of the survey but reversed the grant of summary judgment to the defendant and remanded the case, noting, “there is enough indication of confusion to place a burden of production on the defendant,” to explain what was meant by the challenged language. *Id.* at 630.

<sup>109</sup> See *supra* text accompanying note 34.

<sup>110</sup> See *supra* note 34 (elements of unsophisticated consumer standard).

<sup>111</sup> See *supra* note 26.

<sup>112</sup> Of course, even if a debt collector makes a false, or deceptive or misleading statement, without a demonstration that a significant portion of unsophisticated consumers were confused by said statement, there is no violation. See *Wahl v. Midland Credit Mgmt.*, 556 F.3d 643, 645-46 (7th Cir. 2009) (“If a statement would not mislead the unsophisticated consumer, it does not violate the FDCPA—even if it is false in some technical sense.”). The Seventh Circuit also has indicated that “[a] statement cannot mislead unless it is material, so a false but non-material statement is not actionable.” *Hahn v. Triumph P’ship L.L.C.*, 557 F.3d 755, 758 (7th Cir. 2009).

<sup>113</sup> See 15 U.S.C. § 1114(1) (2006).



sophistication is just one factor among many that courts use to make a determination of the likelihood of confusion.<sup>114</sup>

The approach under the FDCPA is different. Consumer sophistication is not just *one* factor among many used to determine the likelihood of consumer confusion. Rather, the consumer's sophistication level defines the *parameters* of the consumer universe which the court has deemed are in need of the Act's protection;<sup>115</sup> and, even then, the court would extend protection only if extrinsic evidence demonstrated that a significant proportion of those unsophisticated consumers were likely to be confused by the challenged action.<sup>116</sup>

The factors that define the parameters of the unsophisticated consumer standard include individual abilities like a basic knowledge of finance, reasonable intelligence, and the ability to make basic logical deductions and inferences, even if that same consumer is uninformed, naïve or trusting.<sup>117</sup> The unsophisticated consumer also is presumed to exhibit specific reasonable behavior, including the willingness to carefully read and avoid bizarre interpretations of a debt collection letter.<sup>118</sup>

There is support in the marketing and consumer psychology literature for the idea that consumer sophistication can best be viewed on a continuum,<sup>119</sup> and there is a great depth of research supporting the theory that both consumer characteristics—or abilities—and consumer behaviors—or motivation—should be considered when measuring sophistication.<sup>120</sup> The trademark cases also generally assume that the more sophisticated a consumer is, the more careful that consumer will be in making purchases, decreasing the likelihood of confusion.<sup>121</sup> Lee, Christensen and DeRosia offer a theoretical model designed to evaluate the validity of these assumptions in the trademark cases using consumer psychology literature that also emphasizes individual ability and behavior, specifically motivation or “need for cognition,” to evaluate various factors in the multifactor trademark test.<sup>122</sup>

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<sup>114</sup> See e.g., These factors are frequently referred to as the “Polaroid factors,” because they were first enunciated in a case with that style. *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2nd Cir. 1961) (articulating an eight-factor test).

<sup>115</sup> See *Muha v. Encore Receivable Mgmt., Inc.*, 558 F.3d 623, 626-27 (7th Cir. 2009) (“[T]he law is primarily intended to protect the unsophisticated consumer, since the sophisticated one can usually fend for himself (that is what “sophistication” means in this context).”).

<sup>116</sup> See *supra* Part II. C and Part III.B (discussing need for control group and demonstration of significant level of confusion).

<sup>117</sup> See *Muha*, 558 F.3d at 626-27. *But see Consumer Standards*, *supra* note 7 at 246 n.208 (suggesting that consumers who demonstrate these characteristics and behaviors are more likely to be sophisticated consumers rather than unsophisticated or even reasonable consumers).

<sup>118</sup> See *Muha*, 558 F.3d at 626-27.

<sup>119</sup> See e.g., Philip A. Titus & Jeffrey L. Bradford, *Reflections on Consumer Sophistication and its Impact on Ethical Business Practice*, 30 J. CONSUMER AFF. 170, 174 (1996) (“Consumer sophistication can be viewed as a continuum with consumers possessing varying levels of knowledge, experience, and ability....”).

<sup>120</sup> See e.g., Titus & Bradford, *supra* note 119 at 173 (reviewing early marketing literature focusing on consumer sophistication measured by individual characteristics and urging that an understanding of “sophisticated consumer behavior” also is required); Debra J. MacInnis, Christine Moorman & Bernard J. Jaworski, *Enhancing and Measuring Consumers’ Motivation, Opportunity, and Ability to Process Brand Information from Ads*, 55 J. MARKETING 32 (1991); Deborah J. MacInnis & Bernard J. Jaworski, *Information Processing from Advertisements: Toward an Integrative Framework*, 53 J. MARKETING 1 (1989); John T. Cacioppo & Richard E. Petty, *The Need for Cognition*, 52 J. PERSONALITY SOC. PSYCHOL. 116 (1982).

<sup>121</sup> See *Consumer Psychology*, *supra* note 50 at 579 (noting that courts alternatively refer to “consumer sophistication” as the “consumer’s degree of care”).

<sup>122</sup> See *Id.* An empirical work, using aspects of the theoretical model, tested the consumer sophistication factor, among others, and found some support for the finding that the consumer’s education level and product experience

In the FDCPA cases, the Seventh Circuit assumes that an unsophisticated consumer will exert a minimum level of motivation—the unsophisticated consumer is likely to carefully read and understand a debt collection letter. This assumption underpins the court’s requirement that any extrinsic evidence offered must demonstrate that a significant proportion of unsophisticated consumers in the survey universe were confused by the at-issue language used in a debt collection letter and not just demonstrate that confusion occurred.

The consumer psychology literature tends to support this assumption, but only if the unsophisticated consumer also enjoys the minimum level of abilities the court ascribes to this consumer universe, since motivation alone does not guarantee an absence of confusion.<sup>123</sup> Since the court presumes this minimum level of reasonable behavior or motivation as a matter of law, empirically verifying it using a scale which measures motivation and/or need for cognition is probably not necessary for litigation purposes.<sup>124</sup> An unsophisticated consumer, however, may lack the ability to understand a collection letter, even if properly motivated (or presumed by law to be properly motivated) to carefully read the letter, making this unsophisticated consumer more vulnerable to confusion.

### *B. Unsophisticated or “Vulnerable” Consumers*

In other words, the Seventh Circuit does not assume that all consumers in the unsophisticated consumer survey universe will experience confusion in the collection process. One of the reasons the Seventh Circuit rejected the more widely used “least-sophisticated consumer” standard was because that standard appeared not to appreciate this assumption.<sup>125</sup> The marketing literature on vulnerable consumers also supports this assumption. Baker, Gentry and Rittenburg point out that consumer vulnerability does not occur simply by virtue of a consumer being in the class of consumers a statute was designed to protect—not everyone in that class will experience vulnerability in a specific situation.<sup>126</sup>

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are valid proxies for sophistication, although the focus of the study was on *sophisticated* consumers and their likelihood of confusion in a brand extension experiment. See *Empirical analysis*, *supra* note 50 at 915 (study “finding that education and consumer experience (but not income, age, or gender) are meaningful predictors of consumer care [i.e., consumer sophistication].”).

<sup>123</sup> See *Consumer Psychology*, *supra* note 50 at 587 (“Motivation and ability are each necessary but insufficient conditions for an individual to exert cognitive effort. That is, if either motivation or ability is lacking, the individual will exert little cognitive effort while performing a judgment task.”).

<sup>124</sup> See e.g., Gianfranco Walsh, Thorsten Henning-Thurau & Vincent-Wayne Mitchell, *Consumer Confusion Proneness: Scale Development, Validation, and Application*, 23 J. MARKETING MGMT. 697 (2007) (three component conceptual model of consumer confusion proneness developed, operationalized and validated—looks at similarity, overload and ambiguity in product information); John T. Cacioppo & Richard E. Petty, *The Efficient Assessment of Need for Cognition*, 48 J. PERSONALITY ASSESSMENT 306 (1984) (provides scales for measuring need for cognition).

<sup>125</sup> See *Gammon v. GC Servs.*, 27 F.3d 1254, 1257 (7th Cir. 1994) (“Literally, the least sophisticated consumer is not merely “below average,” he is the very last rung on the sophistication ladder. Stated another way, he is the single most unsophisticated consumer who exists....such a consumer would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion.”).

<sup>126</sup> Stacey Menzel Baker, James W. Gentry & Terri L. Rittenburg, *Building Understanding of the Domain of Consumer Vulnerability*, 25 J. MACROMARKETING 128 (2005) (article reviews the literature on vulnerable consumers and offers an extension of earlier typology—both typologies include consumer sophistication as a variable); Fred W. Morgan, Drue K. Schuler & Jeffrey J. Stoltman, *A Framework for Examining the Legal Status of Vulnerable Consumers*, 14 J. PUB. POL’Y & MARKETING 267 (1995) (reviewing case law and offering typology of

They argue, for example, that consumer vulnerability is not the same as discrimination, stigmatization or disadvantage, so that a consumer's experience of any one of these conditions does not necessarily mean the consumer will experience vulnerability.<sup>127</sup> Marketing studies also indicate that many consumers traditionally characterized as "vulnerable" based on demographic characteristics or literacy levels may not actually experience harm in the marketplace or may develop coping strategies which help them overcome their limitations.<sup>128</sup> Baker, Gentry and Rittenburg argue that the historical focus on "perceived vulnerability" instead of "actual vulnerability"<sup>129</sup> tends to stereotypically treat vulnerability as an "equilibrium state," rather than a "short-run phenomenon" which may ultimately have an adverse affect on these consumers; they argue instead that "[c]onsumer vulnerability is a condition, not a status."<sup>130</sup>

Baker, Gentry and Rittenburg's perspective provides insight into the behavior, characteristics and context of consumer vulnerability. Specifically, there is support for the Seventh Circuit's position that the unsophisticated consumer standard, and not the least-sophisticated consumer standard, better reflects the reality of most consumers, even unsophisticated consumers, although further empirical work is needed to support this claim.<sup>131</sup> The literature on vulnerable consumers empirically supports what the Seventh Circuit had intuitively assumed: not all unsophisticated consumers will experience confusion within the debt collection process.

In an extension of Baker, Gentry and Rittenburg's analysis of consumer vulnerability, Commuri and Ekici argue that, while the former's insights are valuable and help avoid the shaming and stigmatizing of consumers, policy makers also should consider a more "integrative view of vulnerability."<sup>132</sup> They argue that consumer vulnerability should consider both "transient state-based components" like individual characteristics that vary within different social contexts, as well as "systemic class-based components," like individual characteristics or situational factors that cut across a whole class of consumers.<sup>133</sup> Transient state-based components may result in a temporary or passing state of vulnerability that all consumers, no

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vulnerable consumers including consumers' physical sensitivity and competency, mental competency and level of sophistication within five different situational contexts).

<sup>127</sup> See Baker, Gentry & Rittenburg, *supra* note 126 at 136.

<sup>128</sup> See e.g., Roland Gau & Madhubalan Viswanathan, *The Retail Shopping Experience for Low-Literate Consumers*, 15 J. RES. CONSUMERS 1 (2008) (study indicates functionally low-literate consumers can develop various coping strategies to navigate the retail environment); Natalie Ross Adkins & Julie L. Ozanne, *The Low Literate Consumer*, 32 J. CONSUMER RES. 93 (2005) (study identifies several coping skills used by low-literate consumers to get their needs met in the marketplace); Debra J. Ringold, *Social Criticisms of Target Marketing: Process or Product?* 38 AM. BEHAV. SCIENTIST 578 (1995) (arguing there is no empirical evidence supporting characterizing young people, women or minorities as vulnerable—looked at target marketing of tobacco and alcohol). *But cf.* Madhubalan Viswanathan, Jose Antonio Rosa & James Edwin Harris, *Decision Making and Coping of Functionally Illiterate Consumers and Some Implications for Marketing Management*, 69 J. MARKETING 15 (2005) (functionally illiterate consumers lack numeracy skills to make price-discount calculations).

<sup>129</sup> See Baker, Gentry & Rittenburg, *supra* note 126 at 128 (citing N. Craig Smith & Elizabeth Cooper-Martin, *Ethics and Target Marketing: The Role of Product Harm and Consumer Vulnerability*, 61 ETHICS & TARGET MARKETING 1 (1997)).

<sup>130</sup> *Id.* at 137.

<sup>131</sup> Whether the use of the unsophisticated consumer standard and its attendant procedural requirements is more appropriate than the more widely-used least-sophisticated consumer standard is beyond the scope of the present inquiry. Both standards were judicially created and neither is defined in the statute.

<sup>132</sup> Suraj Commuir & Ahmet Ekici, *An Enlargement of the Notion of Consumer Vulnerability*, 28 J. MACROMARKETING 183, 184 (2008).

<sup>133</sup> *Id.* at 184.

matter how highly sophisticated, may experience. For example, even a federal district judge may undergo a period of vulnerability when grieving the death of a loved one,<sup>134</sup> experiencing the stress of divorce,<sup>135</sup> or dealing with severe financial pressures.<sup>136</sup> Conversely, class-based components of vulnerability are viewed as more enduring or permanent like the characteristics of consumers with developmental disabilities.<sup>137</sup> Commuri and Ekici's model depicts total consumer vulnerability as the sum of both the transient, state-based consumer characteristics and the systemic characteristics shared by a class of consumers.<sup>138</sup>

They argue that policy makers should consider both components of consumer vulnerability because while not all consumers in a class—like a class of unsophisticated consumers—will experience an episode of transient vulnerability—like confusion over a debt collection letter—those unsophisticated consumers who do experience confusion are more likely to also experience some type of underlying systemic vulnerability.<sup>139</sup> They argue “if a characteristic or an external condition persists across many individuals (as is often the case), then that is reason enough for macromarketers and policy makers to adopt a respective class-based view of consumer vulnerability.”<sup>140</sup>

As an example, Commuri and Ekici note the work by Adkins and Ozanne on literacy wherein the latter demonstrated how low-literate consumers met their needs in the marketplace using various coping strategies; those consumers who refused to accept the stigma of their low literacy skills were better able to overcome their difficulties in the marketplace than those who did.<sup>141</sup> According to Commuri and Ekici, Adkins and Ozanne's work provides evidence that the presence or absence of “shame management” skills is best viewed as a systematic class-based characteristic, and, when understood in that context, can provide a better understanding of low-literate consumers and lead to insights for policy makers and others about how to help this class of consumers develop.<sup>142</sup> Commuir and Ekici urge that the recognition that systemic class-based vulnerabilities—whether based on individual characteristics or external conditions—may make a consumer group more susceptible to experiencing vulnerability allows policy makers to be proactive rather than simply reactive to the problems these consumers experience in the marketplace.<sup>143</sup>

Commuri and Ekici's perspective does not undermine the Seventh Circuit's approach, as they likely would agree with the court's position that not all consumers in the potential universe

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<sup>134</sup> See e.g., James W Gentry, Patricia F. Kennedy, Katherine Paul & Ronald Paul Hill, *The Vulnerability of Those Grieving the Death of a Loved One: Implications for Public Policy*, 14 J. PUB. POL'Y & MARKETING 128 (1994).

<sup>135</sup> See e.g., James H. McAlexander, John W. Schouten & Scott D. Roberts, *Consumer Behavior and Divorce*, 6 RES. CONSUMER BEH. 153 (1993).

<sup>136</sup> See e.g., Sandra Braunstein & Carolyn Welch, *Financial Literacy: An Overview of Practice, Research, and Policy*, 11 FED. RES. BULL. 445 (2002) (“Ineffective money management can also result in behaviors that make consumers vulnerable to severe financial crises.”).

<sup>137</sup> See e.g., Phylis M. Mansfield & Mary Beth Pinto, *Consumer Vulnerability and Credit Card Knowledge Among Developmentally Disabled Citizens*, 42 J. CONSUMER AFF. 425, 434 (2008) (study classified developmentally disabled consumers as vulnerable and finding that many of these individuals were unable “to make reasoned assessment of the financial concepts and credit card terms.”).

<sup>138</sup> See Commuri & Ekici, *supra* note 132 at 184.

<sup>139</sup> *Id.* at 185.

<sup>140</sup> *Id.* at 186.

<sup>141</sup> See Natalie Ross Adkins & Julie L. Ozanne, *The Low Literate Consumer*, 32 J. CONSUMER RES. 93 (2005).

<sup>142</sup> See Commuri & Ekici, *supra* note 132 at 186. See also Natalie Ross Adkins & Julie L. Ozanne, *Critical Consumer Education: Empowering the Low-Literate Consumer*, 25 J. MACROMARKETING 153 (2005) (providing alternative forms of consumer education strategies based on four types of consumer literacy profiles).

<sup>143</sup> See Commuri & Ekici, *supra* note 132 at 185-86.

of unsophisticated consumers will experience confusion in the debt collection process. A relevant inquiry under their model, however, is whether there are any systemic variables that cut across the broader class of consumers, regardless of their level of sophistication, which may make them more vulnerable to confusion within the debt collection process. The court defines the potential pool of unsophisticated consumers as “the average consumer in the lowest quartile of consumer competence.”<sup>144</sup> This definition implies of course that the average consumer in the remaining 75% of the potential pool is *more* competent than the average consumer in the bottom 25% of the potential pool because the former has the requisite abilities and behaviors necessary to avoid confusion.<sup>145</sup>

There are serious problems with this assumption. For example, the abilities ascribed to consumers under the unsophisticated consumer standard assume a minimum level of financial literacy.<sup>146</sup> The evidence indicates that financial literacy levels among U.S. consumers are low. For example, data recently released from the 2008 Jump\$Start Coalition survey of high school seniors, and for the first time in a national survey, college students, indicates that high school seniors scored an average of just 48.3% and college students an average of 62.2% on a 31-question exam financial literacy exam.<sup>147</sup> Although the scores for college students improved with every additional year of school, the study indicates that only about 25% of college students will graduate, leaving approximately 75% of young adults lacking basic financial skills.<sup>148</sup> Other financial literacy studies indicate that this pattern persists across the population,<sup>149</sup> and is chronic.<sup>150</sup>

“Financial literacy” lacks universal definition,<sup>151</sup> and the above studies surveyed much that is beyond the scope of the factors defining the parameters of the unsophisticated consumer standard. Lusardi and Mitchell, however, have effectively utilized three questions designed to test a consumer’s understanding of percentage calculations,<sup>152</sup> division<sup>153</sup> and compound

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<sup>144</sup> *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007). *See also supra* Part III.C.

<sup>145</sup> *See also*, Beebe *supra* note 75 at 2035-37 (Beebe notes that in the trademark cases “[t]he distribution of consumer sophistication across the general population is implicitly understood to form a bell curve[.]... Trademark doctrine also conceives of a spectrum of sophistication within the relevant consumer population itself, which tends to take the form of a bell curve as well.”).

<sup>146</sup> *See supra* text accompanying notes 117-18 (standard assumes consumers have basic knowledge of finance, reasonable intelligence, and the ability to make basic logical inferences and deductions).

<sup>147</sup> *See e.g.*, Lewis Mandell, *THE FINANCIAL LITERACY OF YOUNG AMERICAN ADULTS AT 5* (2009) (Results of the 2008 National Jump\$Start Coalition Survey of High School Seniors and College Students).

<sup>148</sup> *Id.*

<sup>149</sup> *See* Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Retirement Preparedness: Evidence and Implications for Financial Education*, 42 *BUS. ECON.* 35 (2007) (citing Marianne Hilgert & Jeanne Hogarth, *Financial Knowledge, Experience and Learning Preferences: Preliminary Results from a New Survey on Financial Literacy*, 48 *CONSUMER INTEREST ANNUAL* (2002) (study using 2001 data from University of Michigan’s 2001 Survey of Consumers with respondents aged 18-97)).

<sup>150</sup> *See e.g.*, Jinkook Lee & Jeanne M. Hogarth, *The Price of Money: Consumers’ Understanding of APRs and Contract Interest Rate*, 18 *J. PUB. POL’Y & MARKETING* 66 (1999) (study using 1997 data set found that only 10% of respondents (131 respondents who had applied for a home mortgage within five years of study) understood that the APR is greater than the CIR). *See also* Viswanathan, Rosa & Harris, *supra* note 128 (functionally illiterate consumers lack numeracy skills to make price-discount calculations).

<sup>151</sup> *See e.g.*, Jeanne M. Hogarth, *Financial Literacy and Family & Consumer Sciences*, 94 *J. FAMILY & CONSUMER SCI.* 14 (2002) (article provides four different definitions of concept).

<sup>152</sup> *See* Lusardi & Mitchell, *supra* note 149 at 37 (“If the chance of getting a disease is 10 percent, how many people out of 1,000 would be expected to get the disease?”).

<sup>153</sup> *Id.* (“If 5 people all have the winning number in the lottery and prize is 2 million dollars, how much will each of them get?”).

interest.<sup>154</sup> These questions reflect a focus more in line with the FDCPA cases<sup>155</sup> and the unsophisticated consumer factors.<sup>156</sup> Their results indicated that, while over 80% of the respondents aged 51-56 correctly answered the first question requiring a percentage calculation, fewer than 56% correctly answered the question requiring simple division.<sup>157</sup> Respondents who correctly answered either the first or second question also were asked to solve the third; only 18% correctly answered the question requiring an understanding of compound interest.<sup>158</sup>

A later national study of Americans by Lusardi and Tufano examining “debt literacy” also included three different questions evaluating respondents’ understanding of compound interest.<sup>159</sup> Only about 36% of respondents correctly answered the compound interest rate question.<sup>160</sup> The second question in this later study also similarly tested the respondents’ understanding of simple interest rate calculations; only about 35% of respondents correctly answered that question.<sup>161</sup> Lusardi and Tufano’s third question, designed to test respondents’ understanding of the time value of money, likely requires a higher level of sophistication than that ascribed to the unsophisticated consumer; fewer than 7% responded correctly.<sup>162</sup>

These financial literacy studies provide some evidence for valid sophistication proxies under the unsophisticated consumer standard. For example, the 2008 Jump\$start study and Lusardi and Mitchell’s study both found that financial literacy is enhanced with education, and the latter study also found that African Americans and Hispanics were more likely to answer incorrectly than were white respondents.<sup>163</sup> Lusardi and Tufano’s study also found that gender, age, ethnicity and marital status were significant variables related to financial literacy with women, older respondents, minorities and divorced or separated respondents scoring lower.<sup>164</sup> These studies demonstrate that a substantial majority of consumers, and not just unsophisticated consumers, lack basic financial literacy skills, and underscores Commuri and Ekici’s suggestion

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<sup>154</sup> *Id.* (“Let’s say you have 200 dollars in a savings account. The account earns 10 percent interest per year. How much would you have in the account at the end of two years?”).

<sup>155</sup> *See e.g.*, *Jackson v. Midland Credit Mgmt., Inc.*, 445 F.Supp.2d 1015, 1020 (N.D. Ill. 2006) (“An unsophisticated debt is aware of the effects of interest.”).

<sup>156</sup> *See supra* text accompanying note 34.

<sup>157</sup> *See Lusardi & Mitchell, supra* note 149 at 37.

<sup>158</sup> *Id.*

<sup>159</sup> *See Annamaria Lusardi & Peter Tufano, Debt Literacy, Financial Experiences, and Overindebtedness*, 5 (Nat’l Bureau of Econ. Research, Working Paper No. 14808, 2009) (“Suppose you owe \$1,000 on your credit card and the interest rate you are charged is 20% per year compounded annually. If you didn’t pay anything off, at this interest rate, how many years would it take for the amount you owe to double?”).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 6 (“You owe \$3,000 on your credit card. You pay a minimum payment of \$30 each month. At an Annual Percentage Rate of 12% (or 1% per month), how many years would it take to eliminate your credit card debt if you made no additional new charges?”). *See also* *Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643, 646 (7th Cir. 2009) (“The unsophisticated consumer, with a reasonable knowledge of her account’s history, would have little trouble concluding that the “principal balance” included interested charged.”).

<sup>162</sup> *See Lusardi & Tufano, supra* note 158 at 7 (“You purchase an appliance which costs \$1,000. To pay for this appliance, you are given the following two options: a) Pay 12 monthly installments of \$100 each; b) Borrow at a 20% annual interest rate and pay back \$1,200 a year from now. Which is the more advantageous offer?”). Only 7% of respondents correctly answered that option “b” was superior. This question, however, is arguably flawed because it lacks what market researchers call “ecological validity.” The question arguably does not pose a realistic scenario for most consumers. Additionally, the question does not disclose the relevant APR as would be required by the federal Truth in Lending Act and therefore fails to convey important information that the consumer would normally have before making this choice.

<sup>163</sup> *See supra* text accompanying note 147; *Lusardi & Mitchell, supra* note 149 at 37.

<sup>164</sup> *See Lusardi & Tufano, supra* note 159 at 3.

that systemic class-based characteristics, like financial illiteracy, also should be considered by policy makers.

### *C. Implications for FDCPA Policy*

These studies do not necessarily support a change in the factors under the Seventh Circuit's unsophisticated consumer standard. As noted above, the validity of the factors used in the unsophisticated consumer standard is largely supported by evidence from the marketing and consumer psychology literature.<sup>165</sup> Within the context of FDCPA litigation, in fact, lowering the standard may do more overall harm than good, as the courts and commentators have noted an "explosion" in FDCPA litigation.<sup>166</sup> A lower standard might lead to even further increases in litigation under the Act. These studies, however, do provide support for the argument that the plaintiff's survey only be required to demonstrate a *very low level* of consumer confusion between the control group and the treatment group, rather than requiring evidence that a "significant fraction" of the treatment group was confused.<sup>167</sup>

The Seventh Circuit's adoption of the unsophisticated consumer standard over the least-sophisticated consumer standard, coupled with the former standard's procedural requirements, has already lowered the probability that a plaintiff can establish a violation under the Act.<sup>168</sup> Of course, anytime the court finds a violation of the FDCPA, they are effectuating an act of consumer protection which benefits the entire consumer population, and not just the relevant population of unsophisticated consumers identified by the Seventh Circuit. Setting too high a threshold for the demonstration of consumer confusion among unsophisticated consumers (those in the bottom 25% of consumer competence), however, not only decreases the level of protection among that population, but also the general population of consumers (the remaining 75% of consumers) who are not as competent as the court assumes.<sup>169</sup> Setting a lower threshold for consumer confusion instead recognizes the "systemic vulnerability,"<sup>170</sup> a lack of basic financial literacy, which cuts across the broader class of consumers, increasing the scope of the FDCPA's protections while maintaining the utility of the Seventh Circuit's higher standard. Given the lack of binding regulations under the FDCPA,<sup>171</sup> and the emphasis on private enforcement,<sup>172</sup> this type of judicial intervention is warranted. Razook has argued that common lawmaking has the "ability to imbue regulation with necessary elements of justice," and can help "balance" the regulatory process.<sup>173</sup> The Seventh Circuit can achieve that balance by recognizing the limitations in the unsophisticated consumer standard and applying that standard accordingly.

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<sup>165</sup> See *supra* Part IV.A.

<sup>166</sup> See *e.g.*, *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F.Supp. 2d 133 (E.D.N.Y. 2006) (court noted that FDCPA cases in the Second Circuit increased from four in all of 2002 to 85 within the first five months of 2006); *Consumer Standards supra* note 7 at 246 (noting the increase in FDCPA litigation).

<sup>167</sup> See *supra* notes 28-47 and accompanying text (discussing the use of treatment groups in surveys). As noted, the court has not ruled on this specific issue. See *supra* notes 71-72 and accompanying text.

<sup>168</sup> For a related and interesting discussion of this phenomenon as it occurs in the trademark cases see *Beebe, supra* note 75 at 2035-42.

<sup>169</sup> See *e.g.*, *supra* notes 141-161 and accompanying text (reviewing financial literacy literature).

<sup>170</sup> See *Commuri & Ekici, supra* note 132.

<sup>171</sup> See *supra* notes 10-11 and accompanying text.

<sup>172</sup> See 15 U.S.C. § 1692k (section providing for civil liability in individual and class actions).

<sup>173</sup> See *Nim Razook, Common Law Obedience in a Regulatory State*, 47 AM BUS. L.J. (forthcoming 20) (arguing that there is a normative basis for the common law making it a particularly effective regulatory tool). See also *Nim Razook, Obeying Common Law*, 46 AM. BUS. L.J. 55 (2009) (article explores the role of the courts in the common

## V. CONCLUSIONS

The current split in the federal circuits over the appropriate consumer standard for use under the FDCPA provides a useful foundation for the exploration of the efficacy of consumer protection regulation. The U.S. Court of Appeal for the Seventh Circuit's unsophisticated consumer standard and the requirement that plaintiffs produce acceptable extrinsic evidence under the parameters of that standard provide a basis for gaining a better understanding of the effect of validation disclosures under the FDCPA, and consumer disclosures generally. Research grounded in consumer psychology and marketing may provide insight into the efficacy of the validation disclosures, and coupling those insights with research generated within the litigation process, only increases the utility of the process. Petty has argued that society would be well served using a variety of approaches in the regulatory process as long as "the approaches are appropriate to the substance of the law."<sup>174</sup> Multiple sources, including litigation, in the regulatory process "allows for experimentation that may evolve into consensus."<sup>175</sup>

The recent white paper issued by the Obama administration<sup>176</sup> also advocates that the proposed Consumer Financial Protection Agency (CFPA) be allowed to work with providers in the financial services industry, offering providers immunity from liability under the relevant regulation so that field tests assessing the efficacy of consumer disclosures can be conducted.<sup>177</sup> All of these sources, including the research underpinning the unsophisticated consumer standard in the Seventh Circuit can ultimately help provide critical information which can be used to improve the FDCPA specifically and consumer disclosures generally.

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law process and why it works). Razook's work also raises interesting questions about the normative context for debt collection and deceptive acts, or fraud under the common law, codified within the FDCPA, particularly given the split in the federal circuits about which standard ought to be applied under the FDCPA. Also interesting is whether either standard effectively manages to reflect the norms and/or deviations from the norms within the relevant communities of debt collectors, lawyers, and society generally. These issues, while interesting, are beyond the scope of the present inquiry.

<sup>174</sup> Ross D. Petty, *Societal Regulation of the Marketing Function: Does the Patchwork Create a Quilt?*, 24 J. PUB. POL'Y & MARKETING 63, 67 (2005).

<sup>175</sup> *Id.* at 72.

<sup>176</sup> *See supra* note 2 at 62

<sup>177</sup> *See also* Rebecca K. Ratner et al., *How Behavioral Decision Research Can Enhance Consumer Welfare: From Freedom of Choice to Paternalistic Intervention*, 10 MARKET LETTERS 383 (2008) (advocating the advantages of using field studies, despite difficulties, over academic studies). The white paper also advocates empowering the FTC, and giving the CFPA authority to promulgate binding rules under the FDCPA. *See supra* note 2 at 59.