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ABSTENTION DOCTRINE AND THE FAIR DEBT COLLECTION PRACTICES ACT

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INTRODUCTION

Bonnie Gray was an elderly woman living in Salt Lake City, Utah, who sought medical services from Wasatch Endoscopy Center in 2004.[1] After Medicare covered most of her medical bills, Mrs. Gray was left with a bill for $90.73, which, being on a fixed income, she was unable to pay at the time.[2]

The following year, the medical center assigned Mrs. Gray's bill to a debt collector, who sent her a letter threatening to sue her in state court if she did not immediately pay the $90.73.[3] The collector also sent her a "10-day Summons" and a "*Proposed Complaint*," a device used in Utah to imply that a suit may be filed within ten days following the notice.[4] Frightened by the risk of a lawsuit, Mrs. Gray called the collection agency and stated she "could bring a check the very same day."[5] Mrs. Gray's income was limited to social security, which is exempt from collection activity;[6] however, she was afraid of the potential repercussions and decided to pay the debt with her social security benefits. When making the payment, the collection agency also informed Mrs. Gray that she had to pay $250 in attorney's fees for the lawsuit. When Mrs. Gray protested the amount as unfair because a suit had not yet been filed, the representative told her that

* J.D., Chicago-Kent College of Law (Dec. 2013). The author would like to thank Professor Elizabeth De Armond for her invaluable insight and editorial assistance.

1. Gray v. Parry, No. 2:07-CV-113, 2008 U.S. Dist. WL 821592, at *1 (D. Utah Mar. 27, 2008).

2. *Id.*

3. *Id.*

4. Amended Complaint at ¶ 68, Gray v. Parry, No. 2:07-CV-113, 2008 U.S. Dist. WL 821592 (D. Utah June 25, 2007-2008) [hereinafter Gray Complaint].

5. *Id.*

6. *See* 42 U.S.C.A. § 407(a) (West, Westlaw through P.L. 113-74); Philpott v. Essex Cnty. Welfare Bd., 409 U.S. 415 (1973).

the lawsuit had indeed been filed, when in fact the suit was not filed until one week after the payment was made.[7]

The debt collector's actions were deceptive under the Fair Debt Collection Practices Act ("FDCPA") for several reasons. First and foremost, the collector misrepresented the legal status of the debt when it told Mrs. Gray it had filed a lawsuit when it had not.[8] Second, the debt collector did not likely have the right to charge Mrs. Gray for any legal fees in the absence of an actual suit.[9] Mrs. Gray filed a lawsuit in federal court to enforce her claim under the FDCPA. However, the district court abstained from hearing the case since Mrs. Gray had filed the same complaint as a counterclaim in her state court case where an appeal was still pending.[10] In the end, the state court did not permit Mrs. Gray to amend her counterclaims to include the FDCPA complaint. Rather, the court held that Mrs. Gray had paid the debt at "about the same time" as the state court lawsuit was filed,[11] even though the check was cashed a full week before the collector filed their lawsuit.[12] Clearly, there was no lawsuit filed at the time Mrs. Gray paid the collector's attorney's fees.

Contrast Mrs. Gray's case with that of the DeHarts in New Jersey. In 2011, Mr. and Mrs. DeHart brought an FDCPA claim against their bank after the bank threatened to foreclose on the DeHart's home if they did not become current with their mortgage payments and pay $600 in attorneys' fees.[13] As in Mrs. Gray's case, no foreclosure case had actually been filed, and so it was against New Jersey state law to demand attorney's fees from a consumer.[14] By law, the DeHarts could have just paid their missed mortgage payments (plus interest) to successively reinstate their mortgage.[15] However, the letter sent to the DeHarts did not make it clear that attorney's fees were not required, and in a victory for the DeHarts, the court held that the letter was misleading and deceptive under the FDCPA.[16]

In both cases, debt collectors attempted to illegally collect attorney's fees from consumers in connection with the collection of an underlying

7. The state court noted that the suit was filed "about the same time" as Mrs. Gray's payment and denied Mrs. Gray's petition to amend her counterclaims to include an FDCPA counterclaim. Gray, 2008 U.S. Dist. WL 821592, at *2.

8. 15 U.S.C.A. § 1692e(2)(A) (West, Westlaw through P.L. 113-74).

9. Gray Complaint, *supra* note 4, at ¶ 157.

10. Gray, 2008 U.S. Dist. WL 821592, at *5.

11. *Id.* at *2.

12. Gray Complaint, *supra* note 4, at ¶ 75.

13. DeHart v. U.S. Bank, 811 F. Supp. 2d 1038, 1054 (D.N.J. 2011).

14. *Id.* at 1055.

15. *Id.*

16. *Id.*

debt. In both cases, the collectors misled the consumer as to the necessity of paying those fees. And in both cases, the collectors were collecting these fees from consumers across the state, so much so that both Mrs. Gray and the DeHarts filed class action suits on behalf of all similarly situated consumers in their respective states.[17] Thus, when one court abstained from hearing the FDCPA case and the other did not, the inconsistency in justice was amplified across hundreds of consumers.

Unfortunately, this story does not end with Mrs. Gray and the DeHarts. United States district courts throughout the federal court system apply abstention doctrine to FDCPA cases in varied and different ways,[18] leading to confusion among consumers and running counter to the principles of justice and fairness, which are crucial to the legitimacy of our court system.[19]

This note will explore the practice of federal district courts abstaining from hearing consumer FDCPA claims related to state court cases, will attempt to group FDCPA claims into two types, and will recommend that district courts consider the type of claim before making the abstention decision. Further, this note will argue that a consistent application of abstention doctrine in the FDCPA arena will better serve consumers. In Part I, this note defines and explains the abstention doctrine, focusing on the more common *Colorado River* and *Younger* doctrines, along with mention of other more seldom used abstention doctrines. Part II defines the FDCPA and explains why Congress passed the Act, and how Congress intended the Act to be used. Part III reviews and categorizes the application of abstention doctrines in FDCPA cases throughout the federal court system. Finally, Part IV advocates for a consistent application of abstention doctrine in consumer FDCPA cases.

I. ABSTENTION DOCTRINE

Abstention doctrine is a relatively new phenomenon in American jurisprudence. Beginning in 1941 with *Rail Road Commission of Texas v. Pullman Co*., the Supreme Court held that a federal district court could "[stay] its hands" in the absence of a showing that a state court ruling could

17. *Id.* at 1054; Gray v. Parry, No. 2:07-CV-113, 2008 U.S. Dist. WL 821592, at *1 (D. Utah Mar. 27, 2008).

18. Based on the author's survey of federal court cases where the court analyzes a request to abstain in an FDCPA case, conducted using Westlaw and Lexis in October 2012 (i.e., does not include cases where court does not reach the issue). Michael Wood, Survey of FDCPA Cases Where Court Considers Abstention (Oct. 11, 2012) (unpublished survey).

19. Michelle Maiese, *Principles of Justice and Fairness*, BEYOND INTRACTABILITY (July 2003), http://www.beyondintractability.org/bi-essay/principles-of-justice.

not properly address the merits of the case while protecting the parties' constitutional claims.[20] That is, it is preferable to avoid a constitutional question altogether when a case can be resolved on issues of state law.[21]

Prior to that ruling, Chief Justice Marshall's perspective guided jurisprudence in this area:

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution . . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.[22]

Since *Pullman*, the abstention doctrine has tended to consist of four general types of abstention: (1) the aforementioned avoidance of deciding a constitutional question where state law may dispose of an issue; (2) the refrain from conflict with a state's ability to administer its own affairs; (3) a deference to the rights of states to resolve their own unsettled questions of state law; and lastly, (4) the avoidance of piecemeal and duplicative litigation.[23] This note will address each doctrine in order, though it should be noted that the lines between each doctrine are not clear and that "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases."[24] To underscore that point, this note will devote a short section following the four major doctrines to describing some lesser-known and lesser-used abstention doctrines.

A. Pullman Abstention Doctrine

The Pullman Company ("Pullman") brought an action against the Railroad Commission of Texas ("Commission") for requiring that all sleeper cars have Pullman conductors working on them.[25] The order made illegal Pullman's practice of employing lower-paid porters on trains with only one sleeper car, a practice which the company employed to reduce costs and to avoid hiring an additional conductor to manage only one

20. 312 U.S. 496, 501 (1941); CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE DESKBOOK § 54 (2012).

21. WRIGHT & KANE, *supra* note 20.

22. 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE JURISDICTION AND RELATED MATTERS § 4241 (2013) (citing Cohens v. State of Virginia, 19 U.S. 264 (1821)).

23. WRIGHT & KANE, *supra* note 20.

24. *Id.* (citing Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987)).

25. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 497-498 (1941).

sleeper car.[26] Pullman argued the ruling violated the Commerce, Due Process, and Equal Protection clauses of the U.S. Constitution.[27]

The Supreme Court agreed that there were significant constitutional issues in the case, but noted that the basis for the Commission's original authority to create the requirement was unclear under Texas state law.[28] Rather than rule on the constitutional issues, which would become moot if the Texas Supreme Court found that the Commission had not had the authority to create such a regulation in the first place, the Court ordered the district court to abstain to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."[29]

Moving forward, courts analyze three elements when considering abstention under *Pullman*: (1) the case includes both state and constitutional federal issues; (2) the state issues involve unsettled matters of state law; and (3) the resolution of those unsettled matters of state law may resolve or make moot the federal constitutional matter.[30]

B. Burford Abstention Doctrine

Burford v. Sun Oil Co., another case against the Texas Railroad Commission, involved the Commission's issuance of a permit to allow Burford to drill four small oil wells in an East Texas oil field.[31] The case concerned technical details about the spacing between the oil wells and the Court noted that the "geologic complexities in deciding when additional wells are needed" is best regulated by a state administrative agency.[32] The Court went on to hold that intervening in the operation of a state agency "could lead only to delay, misunderstanding of local law, and needless federal conflict with the State policy."[33]

Burford allows abstention when federal adjudication would "unduly intrude upon complex state administrative processes."[34] In *Burford*, the oil field in question was approximately forty miles long, had nearly 26,000 wells drilled on it, and surface rights divided among 900 different parties. Any one party could draw oil from under another party's surface holding,

26. *Id.* at 497.
27. *Id.* at 498.
28. *Id.* at 498-99.
29. *Id.* at 500.
30. Weitzel v. Div. of Occupational & Prof'l Licensing of the Dep't of Commerce of the State of Utah, 240 F.3d 871, 875 (10th Cir. 2001).
31. 319 U.S. 315, 317 (1943).
32. 17A CHARLES ALAN WRIGHT ET AL., *supra* note 22.
33. *Id.* (citing Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943) (internal quotations omitted)).
34. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 362 (1989).

requiring a complex system of regulation. The doctrine recognizes that at times, federal review might disrupt "efforts [by a state] to establish a coherent state policy with respect to a matter of substantial public concern."[35]

C. Younger Abstention Doctrine

Younger v. Harris involved a criminal defendant that, in the midst of his state court criminal proceeding, sued the District Attorney ("DA") of Los Angeles County in federal court asking the court to enjoin the DA from prosecuting him.[36] The Supreme Court held that abstention was necessary, relying upon a "fundamental policy against federal interference with state criminal prosecutions."[37] Although at first limited to preventing federal courts from enjoining state criminal proceedings, the doctrine expanded to include state civil proceedings, and eventually, state administrative proceedings.[38]

A court analyzes three elements in considering abstention under *Younger*: (1) there must be an ongoing state proceeding; (2) proceedings must implicate an important state interest; and (3) there must be an adequate opportunity to raise federal challenges in the state forum.[39]

Ultimately, Younger abstention is "mandated if the State's interests in the proceedings are so important that exercise of the federal judicial power would disregard the comity extended between the States and the National Government."[40] As such, it is a fairly malleable standard,[41] which has been successfully raised in some FDCPA cases.[42]

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35. *Id.* at 350.

36. 401 U.S. 37, 38 (1971).

37. *Id.* at 46 (reversing district court's decision that it had jurisdiction to restrain the DA from prosecuting).

38. 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE JURISDICTION AND RELATED MATTERS § 4254 (3d ed. 2013).

39. *See, e.g.*, Whittiker v. Deutsche Bank Nat. Trust Co., 605 F. Supp. 2d 914, 922 (2009). Note that the *Whittiker* court listed the third requirement as an opportunity to raise *constitutional* claims in state court, whereas some courts have expanded the doctrine to apply if there is an opportunity to raise *federal* claims in state court, not necessarily limiting it to constitutional claims. *See also* Goolsby v. Deutche Bank, No. 1:12–CV–00118, 2012 U.S. Dist. WL 1435735, at *4 (N.D. Ohio Apr. 25, 2010); Mattson v. Lasalle Bank Nat. Ass'n, No. 09-C-662, 2009 U.S. Dist. WL 1956674, at *1 (E.D. Wis. July 7, 2009).

40. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 2 (1987).

41. Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings A Response to Professor Stravitz*, 58 FORDHAM L. REV. 173, 184 (1989).

42. *See, e.g.*, Vitranschart, Inc. v. Levy, No. 00Civ.3618 (SHS), 2000 U.S. Dist. WL 1239081, at *1 (S.D.N.Y. Aug. 31, 2000).

D. Colorado River Abstention Doctrine

Colorado River is an effort by federal courts to avoid duplicative litigation.[43] The United States brought suit in the District Court of Colorado to assert its water rights against 1,000 water users in Colorado.[44] Colorado had enacted legislation creating a series of Water Divisions to manage these rights through a State Engineer, and one of the defendants in the federal case joined the United States to a state proceeding analyzing the same issue.[45] The court stated a general rule that the existence of a parallel action in state court is no reason for federal courts to abstain, and that

> the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist."[46] The court then found such circumstances to apply because the United States had specifically created a law to consent to federal jurisdiction in state courts in matters regarding water rights.[47] Thus, abstaining "furthers the policy [expressed by] the McCarran Amendment.[48]

In *Colorado River*, the Court enumerated a series of factors for federal courts to consider in determining the existent of "exceptional circumstances." While those factors have changed slightly over time, and among circuits, the most common set includes (1) whether the state has assumed jurisdiction over property at issue in the federal case; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) the source of governing law; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of state and federal proceedings; (8) the presence or absence of concurrent jurisdiction; (9) the availability of removal; and (10) the vexatious or contrived nature of the federal claim.[49] No single factor is determinative, and the weight given to any particular factor will vary depending on the circumstances of the case.[50] The factors

43. WRIGHT & KANE, *supra* note 20.

44. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 800 (1976).

45. *Id.* (noting that the United States had consented to jurisdiction "in any suit (1) for the adjudication of water rights, or (2) the administration of such rights, where it appears that the United States owns or is acquiring such rights by appropriation under state law or otherwise.").

46. WRIGHT & KANE, *supra* note 20. (citing Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)).

47. *Colo. River*, 424 U.S. at 800.

48. *Id*.

49. AXA Corporate Solutions v. Underwriters Reinsurance Corp., 347 F.3d 272, 278 (7th Cir. 2003).

50. Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 16 (1983); LaDuke v. Burlington N. R.R. Co., 879 F.2d 1556, 1559 (7th Cir. 1989).

are not intended to be a "mechanical checklist,"[51] but instead are "to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand."[52]

E. Other Abstention Doctrines

While the majority of district courts abstain under one of the doctrines listed above,[53] other lesser-used abstention doctrines are briefly described below.

1. Brillhart/Wilton

Brillhart/Wilton abstention doctrine has its basis in the Declaratory Judgment Act, 28 U.S.C. § 2201, which provides "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."[54] The doctrine originated in *Brillhart v. Excess Insurance Co. of America*[55] and was reaffirmed in *Wilton v. Seven Falls Co*.[56] The Court held in *Brillhart* that the Declaratory Judgment Act confers discretion upon district courts to declare the legal rights of parties to a case, but not an absolute right of litigants to that declaration.[57] The Court went on to suggest that actions, which are already pending in state court, might be an appropriate situation in which to stay the federal action.[58]

Brillhart/Wilton is rarely raised, and has not yet been considered by a court, in cases seeking relief under the FDCPA. Declaratory relief is often requested as a remedy in FDCPA cases through other counts, including quiet title claims,[59] requests that the federal court prohibit defendant from proceeding with its concurrent state court action (frequently a foreclo-

51. *LaDuke*, 879 F.2d at 1559.

52. *Moses H. Cone*, 460 U.S. at 21.

53. WRIGHT & KANE, *supra* note 20.

54. Beals v. Bank of America, N.A., No. 10-5427 (KSH), 2011 U.S. Dist. WL 5415174, at *8 (D.N.J. Nov. 4, 2011) (internal quotation omitted).

55. 316 U.S. 491 (1942).

56. 515 U.S. 277 (1995). For a discussion on both cases, see Eric C. Surette, Annotation, *Application of Brillhart-Wilton Abstention Doctrine, Enunciated in Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942), in Action Seeking Declaratory Relief Under the Declaratory Judgment Act, 28 U.S.C.A. §§ 2201, 2202*, 63 A.L.R. FED. 2d 51, § 2 (2012).

57. *Id.*

58. *Id.*

59. *See, e.g.*, Karl v. Quality Loan Serv. Corp., 759 F. Supp. 2d 1240, 1249 (D. Nev. 2010).

sure),[60] and requests that the federal court invalidate an obligation between the plaintiff and defendant (e.g., a mortgage, a contract, etc.).[61] However, the FDCPA itself does not provide declaratory relief.[62]

2. Anti-Injunction Act

The Anti-Injunction Act, 28 U.S.C. § 2283, prohibits federal courts from staying any state court proceedings.[63] FDCPA cases necessarily involve an underlying transaction around which the FDCPA plaintiff claims violations by the defendant (e.g., a mortgage or a credit card debt). Often that underlying transaction is itself the subject of a state court action, such as a foreclosure suit, and the plaintiff requests relief from that state action in addition to their statutory relief under the FDCPA.[64] In some cases, where diversity jurisdiction is lacking, a plaintiff may use the FDCPA claim as the basis for pendant jurisdiction to gain access to the federal forum to litigate counts far more valuable than the relief available under the FDCPA.[65]

While courts refer to this "gamesmanship" when analyzing *Colorado River* factors, they tend not to abstain under the Anti-Injunction act.[66] Courts offer a variety of reasons for not abstaining under the Anti-Injunction Act: (1) the relief requested is not a stay of any court proceeding, but rather more general relief such as "compelling Defendants to cease their unlawful actions";[67] (2) the case falls under an exception to the Anti-Injunction Act (e.g. claims under 42 U.S.C. § 1983 may result in the stay of a state court proceeding);[68] or (3) because the state court action does not meet the Act's required burden that the state court proceeding would "seriously impair[]" the federal courts ability to adjudicate the case.[69]

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60. *See, e.g.*, Roberts v. American Bank and Trust, 835 F. Supp. 2d 183, 194 (E.D. La. 2011).

61. *See, e.g.*, Beepot v. J.P. Morgan Chase, No. 3:10-cv-423-J-34TEM, 2011 U.S. Dist. WL 4529604, at *2 (M.D. Fla. Sep. 30, 2011) (asking court to dissolve promissory note).

62. Vitullo v. Mancini, 684 F. Supp. 2d 760, 766-67 (E.D. Va. 2010) ("[T]he FDCPA does not permit private litigants to seek injunctive or declaratory relief that has the effect of cancelling or extinguishing a debt . . . [i]nstead, these litigants are limited to the damages [provided by statute]").

63. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C.A. § 2283 (West, Westlaw through P.L. 113-74).

64. *See, e.g.*, *Roberts*, 835 F. Supp. 2d at 191.

65. *See, e.g.*, Stampley v. LVNV Funding, LLC, 583 F. Supp. 2d 960, 962 (N.D. Ill. 2008).

66. *See, e.g.*, Beals v. Bank of America, N.A., No. 10-5427 (KSH), 2011 U.S. Dist. WL 5415174, at *7-8 (D.N.J. Nov. 4, 2011); Mitchum v. Foster, 407 U.S. 225 (1972); In re Madera, No. 07-CV1396, 2008 U.S. DistWL 447497 at *5 (E.D. Pa. Feb. 7, 2008).

67. *Beals*, 2011 U.S. Dist. WL 5415174, at *4.

68. *Mitchum*, 407 U.S. at 226 (holding that Congress authorized the federal courts to stay actions in state courts that deprive a party of their constitutional rights).

69. *Madera*, 2008 U.S. Dist. WL 447497, at *5.

II. THE FDCPA

Congress passed the FDCPA in 1977 in response to an abundance of abusive debt collection practices that were taking place across the country.[70] Congress felt that these practices were contributing materially to the increasing number of personal bankruptcies, job losses, and marital problems among consumers.[71] Further, Congress did not believe that there was adequate existing law to address these practices, which included the use of "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentations of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."[72]

The FDCPA permits consumers to bring an action to enforce their rights under the act in a United States district court without regard for the amount in controversy, or to bring an action in "any other court of competent jurisdiction."[73] In 2011, 11,811 FDCPA cases were filed in federal district courts,[74] while an unknown number of FDCPA counterclaims were brought in state courts.[75] The debt collection industry itself has grown to $12.2 billion in 2011,[76] and while national figures on the number of debt collection lawsuits filed against consumers are not available, one major collector in the industry filed 245,000 cases in 2009.[77]

To put the number of FDCPA cases in the federal and state courts into context, and to understand the intent of Congress with respect to enforcement of the FDCPA, it is important to describe the concept of the *private attorney general*.

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70. 15 U.S.C.A. § 1692a (West, Westlaw through P.L. 113-74).

71. *Id*.

72. Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L.J. 135, 140 (2008).

73. 15 U.S.C. § 1692k(d) (West, Westlaw through P.L. 113-74).

74. *FDCPA Lawsuits Set Another Record in 2011*, INSIDEARM.COM (Jan. 12, 2012), http://www.insidearm.com/daily/collection-laws-regulations/collection-laws-and-regulations/fdcpa-lawsuits-set-another-record-in-2011/.

75. Given the lack of any consistent electronic system to track state court claims, it is not possible to know how many FDCPA counterclaims are filed, or even how many debt collection lawsuits overall are filed.

76. *U.S. Debt Collection Industry Worth $12.2 Billion*, PRWEB.COM (Apr. 10, 2012), http://www.prweb.com/releases/2012/4/prweb9383739.htm.

77. Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, THE WALLSTREET JOURNAL (Nov. 28, 2010), http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html.

Congress intended the FDCPA to be enforced by debtors, acting as "private attorney[s] general" to bring cases against bad actors,[78] as opposed to relying on criminal statutes or administrative complaint processes through state attorneys general, as, for example, many insurance matters are handled. The Committee on Banking, Housing, and Urban Affairs viewed the legislation "primarily as self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance."[79] Thus, it was the intent of Congress that consumers be the enforcers of this legislation, which is why the large number of FDCPA cases in federal courts is desirable from the perspective of Congress. It is also the reason why federal courts should be wary of abstaining from hearing FDCPA cases since consumers may not have an alternative forum in which to effectively enforce their consumer rights.

The FDCPA is divided into several parts, each describing conduct by debt collectors that creates liability, including acquisition of location information, communication in connection with debt collection, harassment or abuse, false or misleading representations, and unfair practices.[80] Conduct barred by the statute may be the actions a collector takes with respect to the collection of a debt (regardless of the validity of the underlying debt),[81] or the collector's representation of the validity of the debt (regardless of how benign the collection activity is). That is, a very polite call to a consumer regarding a debt the collector knows is not owed is just as much a violation of the FDCPA as a debt collector physically threatening violence when collecting a valid debt. This distinction becomes important in Section III, where I will describe how abstention doctrine is applied to FDCPA cases in the federal courts.

III. ABSTENTION DOCTRINE APPLIED TO FDCPA CASES

This section will examine how abstention doctrine has been applied in FDCPA cases throughout the federal court system, looking at the trend over time, by circuit, by doctrine, and finally, by decision to abstain. The author surveyed all cases available in Lexis and Westlaw where courts considered abstaining from hearing an FDCPA case. Cases in which the court did not reach the issue were not counted. The final pool of available cases was fifty. It should be noted that the vast majority of FDCPA cases settle out of court meaning that the number of cases where a court opinion

78. Weiss v. Regal Collections, 385 F.3d 337, 345 (3d Cir. 2004).
79. S. REP. NO. 95-382, 5, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.
80. 15 U.S.C. §§ 1692e-f (West, Westlaw through P.L. 113-74).
81. DeHart v. US Bank, 811 F.Supp.2d 1038, 1046 (D. N.J. 2011).

is available is a small subset of all FDCPA cases, and the number of opinions in which abstention doctrine is discussed is even smaller still.[82] However, the pool is large enough to detect some trends.

A. Abstention Doctrine and the FDCPA Over Time

Abstention in FDCPA cases is a new phenomenon.[83] Before 2007, there were only eight cases where courts ruled on abstention issues in an FDCPA case.[84] Since 2007, there are nearly that many cases ruling on the issue *each year*.[85] This is likely because of the rise in foreclosure cases in the period following the housing bubble in the late 2000's, which are particularly problematic with respect to federal and state court comity given the central issue of property within the state's borders. Courts often find property to invoke important state interests, a key factor in both *Colorado River* and *Younger* doctrine analyses.[86]

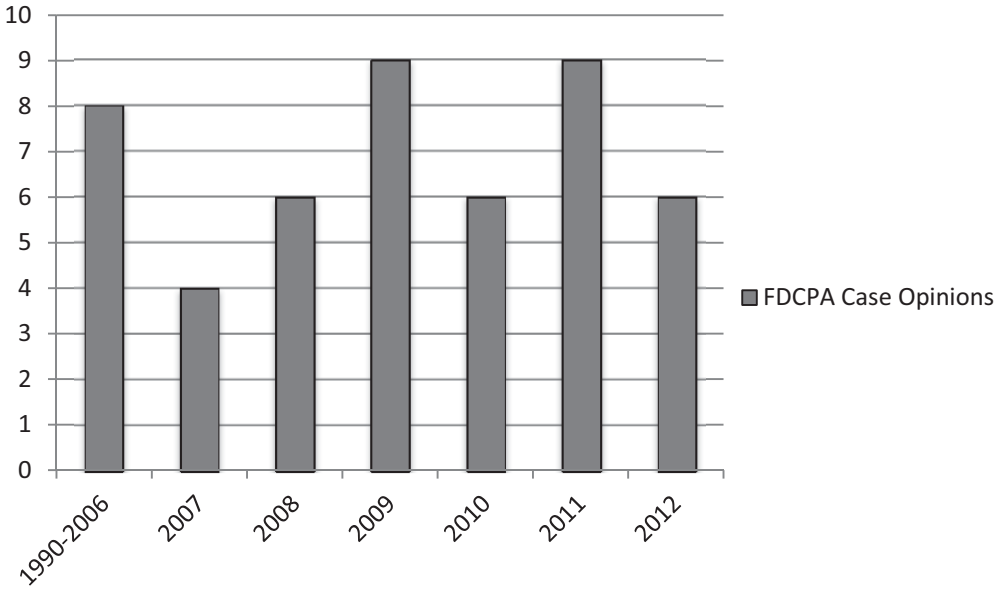
82. For example, there are an estimated 11,811 FDCPA cases filed in 2011, of which 1459 have written opinions available in Westlaw (published and unpublished), of which 11 discuss abstention. *See FDCPA Lawsuits Set Another Record in 2011*, *supra* note 74.

83. Wood, *supra* note 18 (survey).

84. *Id*.

85. *Id*.

86. *See, e.g.*, Lyons v. WM Specialty Mortg. LLC, No. 08-cv-00018-WYD-BNB, 2008 U.S. Dist. WL 2811810, at *7 (D. Col July 18, 2008); Beck v. Wells Fargo Bank, N.A., CIV.A. 10-4652, 2011 WL 3664287, at *5 (E.D. Pa. Aug. 19, 2011).

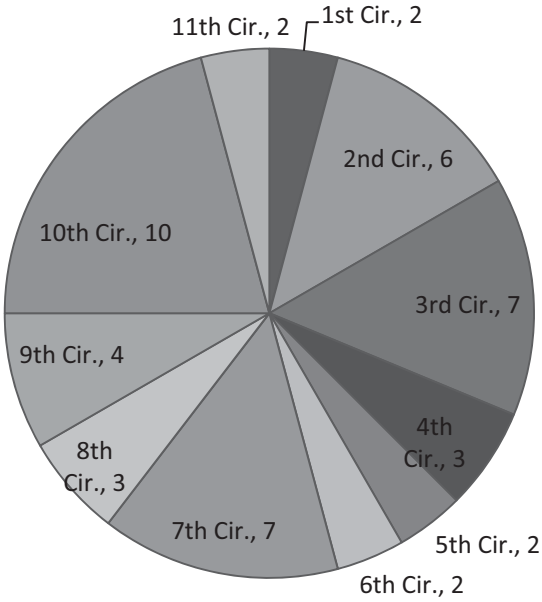


Abstention decisions in FDCPA cases by year, regardless of whether the court ultimately abstained, but where the court did reach the issue.[87]

B. Federal District Court Abstentions by Location

A survey of FDCPA cases where abstention is considered reveals no clear difference among district courts in different circuits with respect to the issue coming up.[88] More interestingly, each circuit has a district court that has considered the issue at least once since 2010, with the exception of the D.C. and Federal Circuits, which have never considered the issue at all. In fact, nearly half of FDCPA cases to consider abstention have taken place in the last three years, which is remarkable given the first case to take up the issue was in 1990.[89] Clearly, there is a trend in district courts considering abstention in FDCPA cases with unresolved underlying state court cases.

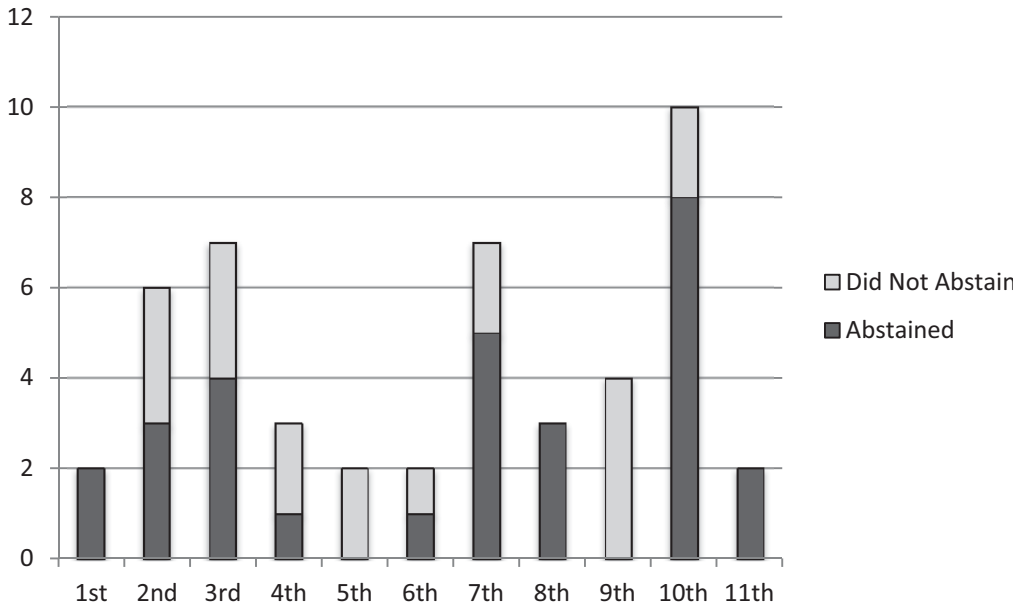
87. Wood, *supra* note 18 (survey).
88. *Id.*
89. Firemen's Ins. Co. of Newark, N.J. v. Keating, 753 F. Supp. 1137 (S.D.N.Y. 1990).



District courts considering abstention in FDCPA cases sit in most federal circuits, with the exception of the D.C. and Federal Circuits. The tenth circuit has considered the issue most often.[90]

With respect to preference for abstention, the author's survey is inconclusive. Some circuit's district courts have exclusively abstained (First, Eighth, and Eleventh) while the district courts in the Ninth circuit have never abstained. But the raw numbers are too small to draw any conclusions on preference among the district courts of each circuit.

90. Wood, *supra* note 18 (survey).



Many district courts in each circuit have split on the application of abstention doctrine to Fair Debt Collection Practices Act cases.[91]

C. Federal District Court Abstentions by Doctrine

There are four abstention doctrines currently in use in the federal court system.[92] As described above, they are (1) *Pullman* abstention, or the avoidance of deciding on a constitutional issue where resolution of unsettled state law may dispose of the issue;[93] (2) *Burford* abstention, the refrain from conflict with a state's complex administrative processes;[94] (3) *Younger* abstention, or the avoidance of federal interference with state court criminal, civil, or administrative proceedings;[95] and (4) *Colorado River* abstention, or the avoidance of piecemeal and duplicative litigation.[96]

91. *Id.* (note that the DC Circuit and the Federal Circuit Courts of Appeal hear very few FDCPA cases and have not considered abstention in those cases).

92. Though, as stated above, these doctrines are not "pigeonholes," and courts may use other forms of abstention. 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, § 54 The Abstention Doctrines. (citing Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9 (1987)).

93. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941).

94. Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943).

95. 17B CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4254 (3d ed. 2013).

96. Colo. River Water Conservation District v. United States, 424 U.S. 800, 817-18 (1976).

Pullman abstention doctrine is a poor fit for FDCPA cases because FDCPA cases do not tend to involve constitutional issues.[97] The exception lies in bad check collection activity that has been coordinated with local district attorney's offices, thereby involving a state actor, which can result in constitutional claims.[98] But in those cases, as in most FDCPA cases, the underlying debt collection state suit does not implicate matters of unsettled state law.[99] On the contrary, state law with respect to debt collection and foreclosure is fairly well developed.

The *Burford* framework is not frequently invoked in FDCPA cases because Fair Debt cases are far less complex and generally limited to a small set of underlying state court actions, including foreclosure, debt collection, bad checks, and occasionally seizure of property.[100] Therefore, there is not much risk of a federal court interfering with complex state administrative processes. Even in the one FDCPA case where a federal court abstained on the basis of *Burford*, the court noted that *Burford* is not only designed to prevent interference with complex state administrative processes, but also to "safeguard the integrity of state law," thus relying on a different interpretation of *Burford* altogether.[101] Further, the parties to an FDCPA action, typically a consumer and a debt collector, do not invoke the same complexities as transactions between commercial players in highly regulated industries with robust state regulation mechanisms (e.g. energy, manufacturing, etc.).

Younger is a good fit for FDCPA cases in which consumers are complaining about misrepresentation during a foreclosure because the three elements required under *Younger* are naturally present in a foreclosure case: (1) an ongoing state proceeding (i.e. the foreclosure action itself) that, (2) implicates an important state interest where, and (3) there is an adequate opportunity to raise federal challenges.[102]

First, by its very nature, an FDCPA case involves an ongoing state proceeding as a consumer is often complaining about a defendant's action

97. Wood, *supra* note 18 (survey).

98. Including Indiana and Pennsylvania. *See, e.g.*, Hamilton v. American Corrective Counseling, No. 3:05-CV-434RM, 2006 U.S. Dist. WL 3332828, at *2 (N.D. Ind. Nov. 14, 2006); Shouse v. National Corrective Group, Inc., No. 3:10-CV-0175, 2010 U.S. Dist. WL 4942222, at *3 (M.D. Pa. November 30, 2010).

99. *See e.g.* Zhang v. Haven-Scott Associates, Inc., No. CIV.A. 95–2126, 1996 U.S. Dist. WL 355344, at *6 (E.D. Pa. June 21, 1996).

100. In a survey of cases applying *Burford* abstention doctrine to an FDCPA claim, the author only found one: Manson v. GMAC Mortgage, LLC, No. 08-12166-RGS, 2009 U.S. Dist. WL 3001203, at *2 (D. Mass. Jul. 28, 2010).

101. *Id.* at *2 (citing New Orleans Public Service, Inc. v. Council of City of New Orleans (NOPSI), 491 U.S. 350 (1989)).

102. Whittiker v. Deutsche Bank Nat. Trust Co., 605 F.Supp.2d 914, 922 (N.D. Ohio 2009).

regarding the subject of a state action (i.e., the foreclosure case). Second, courts typically consider issues relating to real property located within its jurisdiction an important state interest.[103] Third, the FDCPA explicitly permits a claim to be brought "in any . . . court of competent jurisdiction," including as a counterclaim in the consumer's state court foreclosure case.[104]

In fact, an analysis of *Younger* abstention in foreclosure related cases reveals that where a consumer pleads an FDCPA counterclaim in their state court action, federal courts almost always abstain.[105] The analysis only becomes interesting when the consumer does *not* plead the FDCPA counterclaim in state court, and the federal court must then decide whether the opportunity to have done so is enough to meet *Younger*. This requires an analysis of whether FDCPA counterclaims are compulsory in state court.[106] There is some disagreement among district courts as to whether FDCPA claims associated with a state court claim are compulsory counterclaims in that state court case. Some courts find that because "[t]he same operative facts serve as the basis of both claims . . . the logical relationship between them is established."[107] But the majority of courts hold that where consumers do not bring the FDCPA claim as a counterclaim in state court, they are permitted to bring it in federal court.[108] An analysis of whether FDCPA counterclaims are compulsory is a topic for another article, and would like likely help courts make a more consistent determination.

Colorado River is also frequently used by federal courts to abstain from hearing FDCPA claims.[109] It is a flexible doctrine with the lowest burden against exercising jurisdiction for the federal court.[110] That is, "the decision whether to surrender jurisdiction is necessarily left to the district

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103. Beck v. Wells Fargo Banks, NA, No. 10–4652, 2011 U.S. Dist. WL 3664287, at *5 (E.D. Pa. Aug. 19, 2011) (citing Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 728 (1996) (issues of property are typically considered by courts to implicate important state interests).

104. 15 U.S.C. § 1692k(d) (West, Westlaw through P.L. 113-74).

105. *See, e.g.*, Figueroa v. Merscorp, Inc., 766 F. Supp. 2d 1305, 1324 (S.D. Fla. 2011) (holding that raising the same claims in federal court that were raised in state court is an inappropriate attack on a state court judgment), *aff'd*, Figueroa v. MERSCORP, Inc., 477 F. App'x 558 (11th Cir. 2012).

106. *See* Hart v. Clayton-Parker & Assoc,, Inc., 869 F. Supp. 774, 777 (D. Ariz. 1994) (collecting cases showing FDCPA claims are not compulsory). *But see* Rader v. Citibank (South Dakota), N.A., No. 07-cv-00635-WDM-MEH, 2007 U.S. Dist. WL 3119543, at *9 (D. Colo. Oct. 18, 2007) (holding that an FDCPA claim was compulsory in the underlying state court action).

107. Beepot v. J.P. Morgan Chase Nat. Corp. Servs., Inc., No. 3:10-CV-423-J-34TEM, 2011 U.S. Dist. WL 4529604, at *6 (M.D. Fla. Sept. 30, 2011) (citing Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

108. *E.g.*, DeHart v. US Bank, 811 F.Supp.2d 1038, 1046 (D. N.J. 2011) (not making the distinction between compulsory and permissive counterclaims).

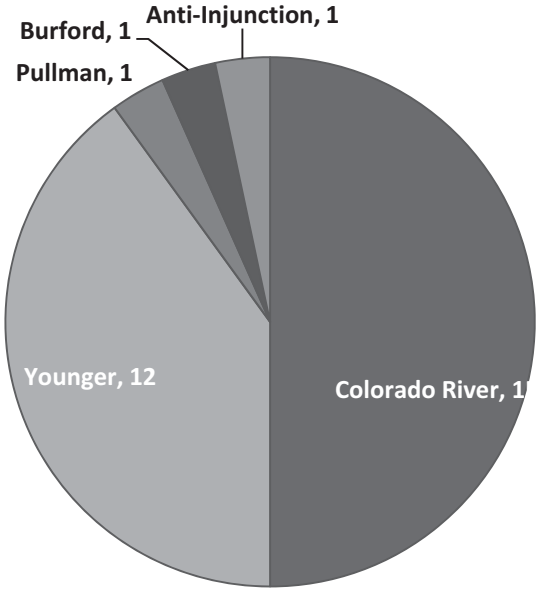
109. Wood, *supra* note 18 (survey).

110. Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 19 (1983).

court," which can only be reversed in that decision if it is found to have abused that discretion.[111] Its ten factors provide the court many paths to abstention as they perform a factor analysis in "a flexible manner with a view to the realities of the case at hand."[112]

Compare that flexibility with *Younger's* "strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances" espoused by the Supreme Court in *Middlesex County Ethics Committee*.[113] Where *Younger* requires a "proper respect for state functions,"[114] implying that the federal court *must* stay its hand when there is the potential to interfere with state proceedings, *Colorado River* leaves to the court's discretion how to best promote "wise judicial administration."[115]

The following chart illustrates the above analysis, showing a slight preference for *Colorado River* abstention and almost exclusive use of either *Younger* or *Colorado River* to abstain from FDCPA cases.



111. Elmendorf Grafica, Inc. v. D.S. America (East), Inc., 48 F.3d 46, 50 (1st Cir. 1995).
111*Id.* at 52.
113. Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431(1982).
114. *Id.*
115. AXA Corporate Solutions v. Underwriters Reinsurance Corp., 347 F.3d 272, 276 (7th Cir. 2003).

IV. WHEN AND WHY FEDERAL COURTS SHOULD ABSTAIN FROM HEARING FDCPA CASES

Abstention is warranted where the state court action will finally and comprehensively resolve all claims in the federal suit.[116] Where the federal claims are separate from the state claims, and where judgments in both suits would not be inconsistent, the court need not abstain.[117] Thus, where the FDCPA claims are separable from the state action, a federal court should not abstain from hearing them.

Part IV of this note will explore the circumstances under which abstention is appropriate. Subpart A will discuss cases where the FDCPA issue is based on the determination of the state court regarding a creditor's interest in the property in question. Subpart B will discuss cases where the FDCPA issue is based on the collection practices of the creditor that would implicate consumer protections regardless of the validity of the underlying debt. Subpart C will examine the similarity of parties between state and federal court cases and its implication on the application of abstention doctrine. Subpart D will examine whether a stay or dismissal is appropriate when the court finds abstention doctrine to be applicable to FDCPA claims.

A. The Validity of the Underlying Debt

The FDCPA makes any false and misleading representations regarding the validity of an underlying debt a violation of federal law.[118] The act breaks misrepresentation down into several categories, including the false representation of the amount of a debt, the false representation of the legal status of a debt, and the use of any deceptive means to collect or to attempt to collect any debt.[119] Therefore, many FDCPA claims are based on the legitimacy of the underlying debt itself, regardless of the practices engaged in by the collector to collect that debt.[120]

Plaintiffs tend to argue that because they did not owe the debt in the first place, the collector's attempts to collect the debt are a false representa-

116. *E.g.*, Alexander v. Bayview Loan Servicing, LLC, No. 4:10-CV-01535 SWW, 2011 U.S. Dist. WL 744986, at *3 (E.D. Ark. Feb. 24, 2011).

117. DeHart v. US Bank, 811 F.Supp.2d 1038, 1046 (D. N.J. 2011).

118. 15 U.S.C.A. § 1692e (West, Westlaw through P.L. 113-74).

119. 15 U.S.C.A §§ 1692e(2)(a), 1692e(10) (West, Westlaw through P.L. 113-74).

120. *See, e.g.*, Petit v. Wash. Mut. Bank, F.A., No. 12 C 318, 2012 U.S. Dist. Ct. WL 3437287, at *4 (N.D. Ill. Aug. 14, 2012); Gerald v. Collection Professionals, Inc., No. 01-1152, 01-1114, 01-1143, 2001 U.S. Dist. WL 793699, at *1 (C.D. Ill. June 26, 2001).

tion.[121] This situation presents the most complex situation for a federal court in determining whether to abstain from hearing an FDCPA claim. On the one hand, if the debt itself is not owed, the collector is indeed engaging in a practice banned by the FDCPA (misrepresentation),[122] which is a legitimate federal claim. On the other, the determination as to the validity of the underlying debt is frequently based entirely on state law. For example, in a foreclosure action, it is state law that determines whether the mortgagee has a legitimate interest in the underlying mortgage and note.[123]

Thus, the federal court is left to balance access to a federal forum against interference with legitimate state interests. This is the sweet spot of abstention doctrine, where the factor-based approach most abstention doctrines take is most suitable, whether it is the "legitimate state interest" articulated in *Younger*, or the "wise judicial administration" articulated in *Colorado River*. Unfortunately, for consumers, when the underlying FDCPA violation is so wrapped up in state law, it is difficult for the federal court to adjudicate. Thus, the consumer is left with fewer options when it comes to prosecuting this type of misrepresentation. The majority, though not all, of courts abstain in this situation[124] because should the state and federal actions proceed concurrently, "there is a risk of inconsistent results, which would throw the ownership of the subject property in turmoil, and lead to an 'abnormally excessive or deleterious' result."[125]

B. Abstention and Debt Collection Practices

A more straightforward type of FDCPA violation involves the practices engaged in by a debt collector regardless of the validity of the underlying debt. Even with a valid underlying debt, the FDCPA prohibits certain practices including communicating debt information to an unauthorized third party, threats of violence, use of profane language, excessive phone

121. *See, e.g.*, Petit v. Wash. Mut. Bank, F.A., No. 12 C 318, 2012 U.S. Dist. Ct. WL 3437287, at *4 (N.D. Ill. Aug. 14, 2012); Gerald v. Collection Professionals, Inc., No. 01-1152, 01-1114, 01-1143, 2001 U.S. Dist. WL 793699, at *1 (C.D. Ill. June 26, 2001).

122. 15 U.S.C.A. § 1692e(2)(A) (West, Westlaw through P.L. 113-74) (A debt collector may not use the false representation of the legal status of a debt to collect a debt).

123. *See, e.g.*, Petit v. Wash. Mut. Bank, F.A., No. 12 C 318, 2012 U.S. Dist. WL 3437287, at *4 (N.D. Ill. Aug. 14, 2012) (property interest is a matter of state law).

124. *E.g.*, *id*. *But see* Whittiker v. Deutsche Bank Nat. Trust Co., 605 F.Supp.2d 914, 922 (2009) (holding that an FDCPA violation with respect to the misrepresentation of the underlying debt does not "enjoin or otherwise interfere with the [state foreclosure action.]"). Most courts hold otherwise, concluding that a federal court nullifying a party's interest in property could result in inconsistent rulings if the state court were to find otherwise. Beepot v. J.P. Morgan Chase Nat. Corp. Servs., Inc., No. 3:10-CV-423-J-34TEM, 2011 U.S. Dist. WL 4529604, at *9 (M.D. Fla. Sept. 30, 2011).

125. Beepot v. J.P. Morgan Chase Nat. Corp. Servs., Inc., No. 3:10-CV-423-J-34TEM, 2011 U.S. Dist. WL 4529604, at *9 (M.D. Fla. Sept. 30, 2011) (internal quotations removed).

calling, false or misleading representations, etc.[126] In these circumstances, a party may raise an FDCPA claim either as a counterclaim or defense in a state court action or as an independent federal claim, but not both.[127] As explained in *DeHart v. US Bank*, if the claim is brought in both forums, the federal forum risks rendering a judgment that conflicts with the state court judgment, exactly the type of unwise judicial administration *Colorado River* attempts to avoid.[128] In *DeHart*, the federal plaintiff had not brought the FDCPA claim in state court, and further, the court found that its determination on fair debt violations would not impact the underlying foreclosure proceeding either way (i.e., even if US Bank foreclosed, they could still be held liable for fair debt violations).[129]

DeHart illustrates the greater flexibility a federal court has to hear FDCPA cases concerning collection practices. If the validity of the underlying debt is immaterial, then the federal court does not risk issuing a ruling inconsistent with the state court. For example, if a debt collector engages in abusive practices regarding a mortgage, they can foreclose on a consumer in state court while being found liable for abusive practices in federal court under the FDCPA since "the mere existence of similarities and common issues does not make the cases substantially identical."[130]

However, not all federal courts follow this interpretation, as the case of Mrs. Gray, which opened this note, demonstrates. There are some courts that hold that even where the FDCPA claim is separable from the validity of the underlying claim, the federal court should still abstain pending the resolution of the state claim.[131]

126. 15 U.S.C.A. § 1692d (West, Westlaw through P.L. 113-74).

127. St. Clair v. Wertzberger, 637 F.Supp.2d 251, 254 (D.N.J. 2009) (noting that plaintiff had made FDCPA argument as a defense in the state court action, which the judge rejected). *But see* Rader v. Citibank (South Dakota), N.A., No. 07-cv-00635-WDM-MEH, 2007 U.S. Dist. WL 3119543, at *9 (D. Colo. Oct. 18, 2007) (holding that an FDCPA claim was compulsory in the underlying state court action).

128. DeHart v. US Bank, 811 F.Supp.2d 1038, 1046 (D.N.J. 2011).

129. *Id*.; *see also* Owens v. Howe, No. 1:04-CV-152, 2004 U.S. Dist. WL 6070565, at *4 (N.D. Ind. Nov. 8, 2004) (holding that resolution of the state court case will not dispose of the FDCPA claims in the present case).

130. *See, e.g.*, Beals v. Bank of Am., N.A., Civ. Act. No. 10-5427 (KSH), 2011 U.S. Dist. WL 5415174, at *6 (D.N.J. Nov. 4, 2011).

131. Gray v. Parry, No. 2:07-CV-113, 2008 U.S. Dist. WL 821592, at *5 (D. Utah 2008); *see also* Beck v. Wells Fargo Bank, N.A., CIV.A. No. 10-4652, 2011 U.S. Dist. WL 3664287, at *3 (E.D. Pa. Aug. 19, 2011) (Truth In Lending Act case noting some case law that suggest a loan rescission notice is automatic upon receipt by the creditor).

C. Party Parity: Abstention in Class Action Federal Cases

The federal court should elect to exercise jurisdiction over FDCPA actions brought on behalf of a class, regardless of the nature of the underlying state court action. A class action FDCPA claim changes the abstention analysis in two important ways: (1) the parties to a class action are fundamentally different from the single party in the underlying state case and (2) piecemeal litigation becomes *more* likely to occur if the federal court abstains.

Beginning with the former, cases must be found to be parallel to invoke *Colorado River* abstention doctrine.[132] To be parallel, the parties must be the same.[133] While the named plaintiff in a federal class action under the FDCPA may be the same party to an underlying state action (e.g., a foreclosure), the members of the class she represents are not. Therefore, the parties are not the same and the cases are not parallel.[134]

Moving on to the latter, the third factor courts evaluate when considering abstention under *Colorado River* is the avoidance of piecemeal litigation.[135] "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results."[136] Simultaneous litigation is "unseemly" and poses two potential problems:

> First, a party may try to accelerate or stall proceedings in one of the forums in order to ensure that the court most likely to rule in its favor will decide a particular issue first. Second, the possibility exists that one court, unaware that the other court has already ruled, will resolve an issue differently, and create a conflict between the two forums.[137]

However, because of the impossibility of bringing a class action counterclaim in a state court case, the court avoids piecemeal litigation in a class action case by permitting the federal action to move forward, even in light of the potential for abuse listed above.[138] Each potential class member would need to bring their own individual FDCPA counterclaim in their state court case, leading to many more proceedings than necessary under the single federal class action.[139]

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132. Timoney v. Upper Merion Twp., 66 F. App'x 403, 405 (3d Cir. 2003).

133. *Id*.

134. *See, e.g.*, *Beals*, 2011 U.S. Dist. WL 5415174, at *6.

135. *See* AXA Corporate Solutions v. Underwriters Reinsurance Corp., 347 F.3d 272, 278 (7th Cir. 2003).

136. *See* LaDuke v. Burlington N. R.R. Co., 879 F.2d 1556, 1560 (7th Cir. 1989).

137. *Id*.

138. *Beals*, 2011 U.S. Dist. WL 5415174, at *7.

139. *Id*.

D. To Stay or Dismiss When Abstaining

Once a federal court decides to abstain, it is left with the decision to either stay or dismiss the federal action. A stay has several advantages, including the retention of jurisdiction should the consumer opt to later bring his federal claim after the state claim is resolved.[140] For example, if a state court determines that an underlying debt is not owed, a consumer may have a legitimate FDCPA claim based on misrepresentation they can bring in the federal forum. The stay makes that process procedurally simple and also tolls any statute of limitations on the FDCPA claim.

CONCLUSION

This survey of federal court abstentions in FDCPA cases shows that district courts vary in their application of abstention doctrine, whether it be the decision to abstain at all, which doctrine to use in abstention, or the nature of the underlying state court case. This note attempts to distinguish between two types of FDCPA claims: (1) consumers' disputes regarding the validity of an underlying debt and (2) the practices in which debt collectors engage to collect a debt.

Federal district courts should always hear FDCPA claims when the consumer alleges that the practices of the debt collector do not comply with the FDCPA, regardless of the validity of the underlying debt. When Congress passed the FDCPA, they intended to provide access to a forum of the consumer's choice to enforce their rights under the act by serving as private attorneys general. Where courts can separate issues of conduct from issues of the underlying ownership of the debt, courts should do so. One way courts can, and do, make this determination is to determine whether resolution of the state court claims will necessarily dispose of the federal FDCPA claims.[141] For example, a federal court can rule on whether a debt collector improperly garnished a consumer's wages, or improperly contacted a consumer's family members regarding a debt, even if there is an underlying state court case on the validity of the debt itself.[142] These practices are exactly what Congress found to be "abundant" in the industry, even where a debt is legitimate.[143]

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140. CIGNA HealthCare of St. Louis, Inc. v. Kaiser, 294 F.3d 849, 851-52 (7th Cir. 2002).

141. Owens v. Howe, No. 1:04-CV-152, 2004 U.S. Dist. WL 6070565, at *4 (N.D. Ind. Nov. 8, 2004) (holding that resolution of the state court case will not dispose of the FDCPA claims in the present case).

142. Bray v. Cadle Co., No. 4:09-CV-663, 2010 U.S. Dist. WL 4053794, at *4 (S.D. Tex. Oct. 14, 2010).

143. 15 U.S.C.A. § 1692(a) (West, Westlaw through P.L. 113-74).

On the other hand, where the basis of a consumer's claim lies exclusively in the validity of an underlying debt that is the subject of a state court action, federal courts must stay their hand. While misrepresentation is indeed a violation of the FDCPA, in the absence of any other FDCPA claims a state court is better suited to make the determination as to the validity of the underlying debt. Otherwise, the federal court risks "piecemeal litigation and inconsistent results."[144] Further, after the state court case is resolved, consumers can then bring FDCPA claims in federal court if collectors have misrepresented the legal status of a debt. Abstention, whether in the form of a stay or dismissal, preserves a consumer's right to return to the forum. A consistent approach by federal district courts would offer direction to consumers as to where and as to when to most efficiently bring their FDCPA claims.

Ultimately, consumers must carefully consider where they want their FDCPA claim heard and plead the claim in that forum. Even where it is possible for the court to separate claims regarding debt collector's conduct from the validity of an underlying debt, a federal court will abstain from hearing the claim in federal court if the party affirmatively pleads the FDCPA violation in state court. It is the hope of this note that a consistent and defined approach to handling abstention in FDCPA cases will better enable consumers to make that choice.

144. Petit v. Washington Mut. Bank, F.A., No. 12 C 318, 2012 WL 3437287, at *4 (N.D. Ill. Aug. 14, 2012).