# ABUSE, HARASSMENT, AND DECEPTION: HOW THE FDCPA IS FAILING AMERICA'S ELDERLY DEBTORS

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*The consumer-credit industry is booming in the United States. Due to the deregulation of the consumer-credit market, it has become easier for Americans to obtain credit, and thus, accumulate debt. Along with this debt often comes abusive, harassing, and deceptive practices by debt collectors. The nation's elderly are particularly vulnerable to such practices. Although the Fair Debt Collection Practices Act (FDCPA) was enacted in 1977 to protect consumers from abusive debt-collection practices, the elderly continue to receive unjust treatment from debt collectors.*

*In this Note, Mr. Matthew Ludwig analyzes the current state of the debt-collection industry as it relates to the nation's elderly. In doing so, Mr. Ludwig examines its history and the abusive practices that led to the passage of the FDCPA. Finally, Mr. Ludwig offers several suggestions to decrease the amount of abuse experienced by the elderly at the hands of debt collectors, including congressional amendment of the FDCPA to require greater consumer awareness of their debtor rights, increased regulation of collection-agency practices, greater penalties for violations, and increased financial education of the elderly.*

## I. Introduction

In November 2005, a debt-collection agency obtained a seemingly ordinary court order freezing the assets of

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Judith Guillet.[1] Ms. Guillet was a fifty-seven-year-old retired nurse on full disability due to fibromyalgia (a disorder including muscle pain and fatigue).[2] The debt collectors could not, and were not required to, prove the underlying debt was valid.[3] In fact, the underlying debt of $2,300 had not been incurred by Ms. Guillet.[4] Because her assets were frozen, she could not "pay [her] rent, buy food or pay [her] electricity bills."[5] It was not until January 2006, after Ms. Guillet had contacted a nonprofit legal clinic, that she was able to unfreeze her bank account and reach a settlement with the collection agency.[6]

Incidents of debt-collection agencies subjecting elderly Americans to harassing and abusive practices have the potential to occur at an alarming rate. Elderly Americans, like Americans in general, enjoy increasing access to the consumer-credit market.[7] The deregulation of the consumer-credit market has increased access to credit for those members of society historically deemed too risky by commercial lenders.[8] Lenders have likewise been eager to enter this subprime market because of the high interest rates charged to compensate for the increased risk of nonpayment.[9]

However, as the story of Ms. Guillet illustrates, the consumer-credit industry in America has been plagued with abusive practices throughout its history. Many of these practices either explicitly target the elderly or exploit their lack of awareness concerning their rights. As more elderly Americans are forced to deal with credit-industry lenders and collectors, the potential for abuse only increases.

1. Sewell Chan, *An Outcry Rises as Debt Collectors Play Rough*, N.Y. TIMES, July 5, 2006, at A1.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *See, e.g.*, TAMARA DRAUT & JAVIER SILVA, DĒMOS, BORROWING TO MAKE ENDS MEET: THE GROWTH OF CREDIT CARD DEBT IN THE '90S 25 (2003), *available at* http://www.demos.org/pubs/borrowing_to_make_ends_meet.pdf. The report notes the growth of credit card access and debt among the elderly. *Id.* It also describes some industry practices, such as increased marketing and credit-line extensions, that have made consumer credit available to more, and more risky, consumers. *Id.* at 37.
8. *Id.* at 34; *see also* David A. Moss & Johnson A. Gibbs, *The Rise of Consumer Bankruptcy: Evolution, Revolution or Both?*, 73 AM. BANKR. L.J. 311, 333–37 (1999).
9. DRAUT & SILVA, *supra* note 7, at 34; *see also* ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 12–13 (Vanessa Mobley ed., 2000).

This Note analyzes the current state of the debt-collection industry as it affects the elderly Americans who must deal with it on a daily basis and suggests changes to the current legislative, enforcement, and educational schemes to better protect the elderly from abusive debt-collection practices. Part II examines the consumer-credit industry, the debt-collection industry, and the Fair Debt Collection Practices Act (FDCPA).[10] Part III analyzes the current debt crisis facing both the elderly and the soon-to-be elderly, as well as the history of the deceptive and abusive practices utilized by the debt-collection industry, which ultimately led to the passage of the FDCPA in 1977. Additionally, this Part analyzes abusive practices that target vulnerable elderly debtors and suggests changes to better protect them. Part IV argues that any proposed solution must recognize the urgency of the situation, as well as the importance of greater consumer education.

## II. Background

### A. The Consumer-Credit Industry

In dealing with consumer-credit issues, it is helpful to think of three different nodes, or stages, in the credit life cycle. Progression through the consumer-credit cycle affects fewer borrowers at each step. Thus, actions affecting the first node will affect more borrowers than actions affecting the second. Each node is a necessary element to the proper functioning of the consumer-credit market and the availability of credit to subprime borrowers, including the elderly. However, each node is also fraught with the potential for abuse, deception, and unfairness.

The first node can be thought of as the lending node. This is the stage in which a lender decides to extend credit to a borrower. The deregulation of the credit industry has enabled subprime borrowers, traditionally spurned by the credit markets, to easily obtain credit to buy homes, make home improvements, or make other purchases.[11] However, the rise of predatory lending demonstrates that access to

10. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692o (2000)). The FDCPA regulates the debt-collection industry.

11. Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1311 (2006).

credit comes with a heavy price.[12] Higher-risk borrowers are often subjected to a number of restrictive terms (including much higher interest rates and fees), as well as lending based solely on home equity (as opposed to the ability of the borrower to repay).[13] Most troubling, high-risk borrowers are often the targets of deceptive practices and fraud.[14]

Predatory lenders are known to target minorities, the rural poor, and the elderly.[15] The elderly are particularly vulnerable to predatory lending practices because "they typically have a great deal of equity in homes that they have owned for many years and because they likely operate on fixed incomes."[16] While this is an important area for further discussion, it is relevant to this Note only to the extent it explains one reason why the elderly might find themselves in debt.

Assuming the borrower is able to fully and timely repay her debts, she will have no need to progress to the second node, or the collection node. In this step, the borrower has failed to fully repay her debts in a timely matter. Sometimes the creditor will attempt to collect the debt itself;[17] oftentimes the creditor will outsource the collection to an independent collection agency.[18] Independent collectors are

12. *Id.* at 1310–16. Predatory lending is characterized by

> high interest rates and points that exceed the amount necessary to cover the lender's risk, excessive fees and closing costs that are usually financed as part of the loan, frequent refinancing or 'loan flipping' with additional points and fees, lending based on home equity without regard to the borrower's ability to repay, and outright fraud.

*Id*. at 1312.

13. *Id.* at 1312. Lending based solely on home equity, as opposed to ability to repay, can cause borrowers to lose their homes. *Id.* at 1315. The elderly generally have substantial equity in their homes, but live on a fixed, and often modest, income. *Id.* at 1314. If debts outstrip the ability to repay, the elderly debtor may be forced to sell his or her home for the liquidity necessary to pay off the debt. *Id.*

14. *Id.* at 1312–13.

15. *Id.* at 1313–14.

16. *Id.* at 1314; *see also Predatory Mortgage Lending: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 296–97 (2001) (statement of Esther Canja, President, American Association of Retired Persons); U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 72 (2000), *available at* http://www.huduser.org/Publications/pdf/treasrpt.pdf; ROBERT J. HOBBS ET AL., AM. ASS'N RETIRED PERS. PUB. POLICY INST., CONSUMER PROBLEMS WITH HOME EQUITY SCAMS, SECOND MORTGAGES, AND HOME EQUITY LINES OF CREDIT 9 (1989).

17. Such in-house debt collectors are not covered by the FDCPA. 15 U.S.C. § 1692a(6)(A) (2000).

18. Financial Web, Debt Collection Tactics, http://www.finweb.com/banking-credit/debt-collection-tactics.html (last visited Jan. 13, 2008) (noting that "[o]ne of the most common procedures employed by creditors is to turn the delinquent account over to a collection agency").

usually only paid a portion of the debts they are able to collect.[19] Thus, collectors have strong incentives to collect as many debts as possible and to collect as much of each debt as possible.[20]

The collection process is an important step in the consumer-credit cycle. Borrowers have an obligation to fulfill their contractual requirements,[21] and lenders should have access to legitimate recourse when borrowers fail to pay them back. Securing access to credit would be more difficult if lenders believed they would be unable to recoup their loan, either in whole or in part.[22] However, this process can also be subject to abuse.

Finally, if the debtor is unable to repay her debts after having gone through the collection process, she would progress to the next and final node—bankruptcy. Bankruptcies rose through the 1980s and 1990s, prompting Congress to pass comprehensive bankruptcy reform in 2005.[23] While the new bankruptcy regulations will affect elderly debtors, it is unlikely to be at rates disproportionate to the general population.[24]

### B. The Debt-Collection Industry

It is also helpful to examine how the debt-collection industry works and why harassment and unfairness are both common and likely to continue. Collection services are beneficial to both businesses and consumers, and have the potential to "return billions of dollars to

19. *Id.* (Debt collectors "usually receive accounts by one of two ways: the creditor forwards the debt to the collection agency and agrees to pay a percentage of any amounts successfully collected; or the creditor sells the debt with the right to collect on it to the agency, who can then keep all that they're able to collect").

20. *Id.* ("The agents that work for the collection company generally do so on a commission basis, which makes them highly motivated to get the debtor to pay what's owed").

21. *See id.* ("There are a number of tactics that creditors can legally use to collect money owed to them").

22. *See* Financial Web, Credit-Building and Management, http://finweb.com/banking-credit/credit-building (last visited Jan. 13, 2008) ("Having good credit is one of the most important financial components that you can possess").

23. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005); Todd J. Zywiki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2021 (2003).

24. The means test under the new bankruptcy code only takes into account income, which among the elderly is usually quite modest. Ken McDonnell, *Income of the Elderly Population, Age 65 and Over, 2004*, 27 ERBI NOTES 9, 9 (2006). Because most elderly debtors will not pass the means test, it is unlikely they will be significantly affected by the recent bankruptcy reforms. *See id.*; MARK JICKLING, CONGRESSIONAL RESEARCH SERV., BANKRUPTCY REFORM: THE MEANS TEST 1 (2005).