

LEGAL STRATEGIES TO ADDRESS COERCED DEBT

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CHAPTER 2

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BIOGRAPHICAL INFORMATION

Carla Sanchez-Adams is board certified by the Texas Board of Legal Specialization in Consumer and Commercial Law. She is a managing attorney with Texas RioGrande Legal Aid, Inc. (TRLA) and is a board member for the National Association of Consumer Advocates (NACA). Carla assists low-income Texans on issues related to debt collection, credit reporting, auto fraud, debt management and other consumer related disputes. She leads a team of advocates who utilize a holistic approach to achieving economic security for victims of crime including survivors of family violence, sexual assault, and human trafficking. This advocacy includes litigation when consumer rights have been violated, representation and assistance with federal tax liability, financial empowerment, and cross-training and collaboration with other attorneys within TRLA and its partner organizations. Carla has spoken at several national conferences for the National Consumer Law Center and the National Association of Consumer Advocates on the topics of credit reporting, debt collection, and coerced debt. She has also spoken at several state-wide conferences for domestic violence advocates on the importance of addressing economic abuse and the legal remedies available to do so. Carla is a founder of the Texas Coalition on Coerced Debt, which is an initiative that aims to build awareness of coerced debt and identity theft; develop solutions to address the problem; and create connections between different groups in Texas, including domestic violence and consumer attorneys and advocates, law enforcement, and banking and finance professionals.

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Legal Strategies to Address Coerced Debt

I. Introduction¹

*When Emma first met Andrew, she was a successful real estate agent who was about to buy her first apartment. At first, she thought Andrew, the man who would become her husband, was perfect. After they got married however, their relationship changed drastically. He took over running their finances and limited her time with family and friends. Emma tried to leave the relationship no less than five times before she was able to leave for good. Later, she learned that Andrew had spent tens of thousands of dollars on her credit cards and had taken out several loans solely in her name, saddling her with substantial debt.*²

Emma's experience with *coerced debt, debt incurred through threat, force, or fraud*, is part of the dynamic of coercive control found in intimate relationships, especially common in relationships where there is domestic violence.³ Perpetrators of domestic violence exert power and control over their partners using a variety of tactics, including physical or sexual violence, emotional abuse, and *economic abuse*. It is estimated that between 94% and 99% of survivors of domestic violence experienced economic abuse.⁴ Coerced debt happens at the intersection of economic abuse and identity theft.⁵ In relationships where economic abuse is present, an abuser utilizes credit to control, harm, or in other ways limit their partner,⁶ resulting in coerced debt.

Coerced debt encompasses both traditional identity theft and transactions where coercion was used to force a victim to take on debt. It is a common assumption that identity theft occurs only when a stranger—not an intimate partner—steals someone's personal identifying information; it is also a widely held, though mistaken belief, that "an identity theft victim is responsible for repaying debt when the identity theft is [committed by] his or her spouse."⁷ A 2014 survey of callers to the National Domestic Violence Hotline found that 52% of the survey participants had experienced coerced debt. Among those, 55% reported coercive debt transactions, 17% reported fraudulent transactions, and 28% reported debts that included both fraudulent and coercive transactions.⁸

Coerced debt creates barriers to economic independence for survivors of domestic violence.⁹ This article provides legal strategies to help victims of coerced debt¹⁰ by using identity theft protections under Texas and federal law. The article includes an overview of a new Texas law that expands the definition of identity theft to include debts incurred through coercion and provides tools to use that definition to access protections in state and federal law.

¹ Thanks to Grace Gnasigamany for her research support in the drafting of this article.

² These facts are based on real events; however, names have been changed for anonymity. Fiona McCormack, "How Did a Confident, Successful Woman Become a Poverty-Stricken Recluse?", *GUARDIAN* (Aug. 7, 2018), <https://www.theguardian.com/commentisfree/2018/aug/08/how-did-a-confident-successful-woman-become-a-poverty-stricken-recluse> [<https://perma.cc/2NFU-HPJR>].

³ Although this article is focused on coerced debt through the lens of domestic violence, it is the author's experience that this dynamic also occurs in other family violence situations— such as among the elder population, especially when other forms of elder abuse exist, and among foster youth.

⁴ J. Postmus, S. Plummer, S. McMahon, N. Murshid, & M. Kim. (2012). *Understanding economic abuse in the lives of survivors*. *Journal of Interpersonal Violence*, 27(3), 411-430.

⁵ Ann Baddour and Marissa Jefferies, "Abuse by Credit: The Problem of Coerced Debt in Texas," Texas Appleseed (Jan. 2019).

⁶ Megan E. Adams, *Assuring Financial Stability for Survivors of Domestic Violence: A Judicial Remedy for Coerced Debt in New York's Family Courts*, 84 Brook. L. Rev. (2019).

⁷ Amy Cao, *Identity Theft & Survivors of Domestic Violence*, from the Guidebook on Consumer & Economic Civil Legal Advocacy for Survivors, Center for Survivor Agency and Justice, 70 (2017).

⁸ Adrienne Adams, Angela Littwin, and Mackenzie Javorka, *The Frequency, Nature, and Effects of Coerced Debt Among a National Sample of Women Seeking Help for Intimate Partner Violence* [Pending Publication].

⁹ See Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951,954 (2012).

¹⁰ Although both men and women can experience coerced debt, for purposes of this article the use of the pronoun "she" will be used when referring to a victim of coerced debt.

II. Using the Texas Penal Code to Help Victims of Coerced Debt

The Texas Penal Code includes two offenses that victims of coerced debt can report to law enforcement depending on the type of debt and when the debt was obtained.

Credit or debit card abuse¹¹ occurs when the perpetrator has not obtained “*effective consent*” to use a victim’s credit or debit card. Consent is not effective if “induced by force, threat, or fraud.”¹² This definition fits all coerced debt transactions, since they occur through fraud, force, or threat. However, the offense of credit or debit card abuse is limited to coerced debt accrued by use of a credit or debit card.

If the coerced debt was something other than credit or debit card debt, then the victim of coerced debt could assert the broader offense of identity theft, termed “fraudulent use or possession of identifying information” in our penal code.¹³ However, prior to September 1, 2019, effective consent was not included in the definition of identity theft. *As a result, if you are assisting a victim of coerced debt whose debt was obtained with her consent but without her effective consent prior to September 1, 2019, the victim will be unable to report identity theft to law enforcement, though she may be able to report credit or debit card abuse.* In other words, in order to report identity theft prior to September 1, 2019, the victim must not have known about the debt and the abuser must have obtained it through fraud only. If the victim obtained the debt through threat or force (coercion or duress), then it would not be covered under the old definition.

As of September 1, 2019, identity theft is now defined in Texas as follows:

(b) A person commits an offense if the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of:

(1) identifying information of another person without the other person’s consent or **effective consent**;¹⁴

This change allows victims of coerced debt to report identity theft to law enforcement for any coerced debt transaction obtained without effective consent on or after September 1, 2019. The result is that attorneys representing victims of coerced debt now have a wider range of tools to challenge coerced debts as identity theft.

Making a police report, also called a criminal complaint or an identity theft report, is extremely helpful. Having a copy of the report enables a victim of coerced debt to more effectively assert protections and remedies available to victims of identity theft. With a criminal complaint a victim can access the remedies in state and federal law that are discussed in the subsequent sections of this paper.

III. Using Texas Business and Commerce Code Chapter 521 to Help Victims of Coerced Debt

Chapter 521 of the Texas Business and Commerce Code offers an important opportunity to provide relief to victims of coerced debt. If a case is successful, a victim will receive an order from the court declaring the person a victim of identity theft in regard to the specific debts included in the application.¹⁵ A court order declaring a person a victim of identity theft can be a powerful tool to remove coerced debt from a credit report, compel the owner of a debt to cease collection activities, and to defend against a debt claim lawsuit. An order can also be used to challenge a previous court order when there is an avenue to reopen a judgement such as a bill of review.

A Chapter 521 order can also help victims remove their identity from fraudulent public records and help those who have received no cooperation from creditors in removing their identity from fraudulent accounts.¹⁶ In the court order,

¹¹ Tex. Penal Code § 32.31(b).

¹² Tex. Penal Code § 1.07(a)(19).

¹³ Tex. Penal Code § 32.51(b).

¹⁴ Tex. Penal Code § 32.51(b).

¹⁵ Tex. Bus. & Com. Code § 521.103.

¹⁶ Tex. Bus. & Com. Code §§ 521.101.

a victim lists the different accounts or information that resulted from the identity theft. Accounts can include a range of debts, such as a car loan, a mortgage loan, or a credit card debt, making this the most holistic relief for victims of coerced debt.

In order to use this remedy, a victim of coerced debt will need to file a criminal complaint if the debt was obtained without effective consent. This is because the remedy requires that a person have filed a criminal complaint or meet the definition of identity theft in the Texas Business and Commerce Code.¹⁷ ***If the coerced debt was obtained without consent, then a criminal complaint is not necessary.***¹⁸ In other words, this remedy can be used for any debt that was obtained without the victim's consent but can only be used for any debt that was obtained without the victim's effective consent for debts incurred after September 1, 2019.

Nuts and Bolts of Filing a Ch. 521 Suit

*Know Your 521: Tips for Assisting Victims of Identity Theft*¹⁹ provides a detailed overview of the application process for suits under Chapter 521. The article emphasizes the importance of excluding any personal identifying information of the victim in the application to avoid having this information in the public record. The article also lists important items that must be included in the application such as:

- A statement that jurisdiction is governed by Tex. Bus. & Com. Code § 521.101(a);
- A venue statement;
- A statement that the victim is seeking only non-monetary relief;
- Discovery, if any;
- A statement that the applicant is seeking an order declaring them to be a victim of identity theft as a cause of action;
- If the victim needs removal of information from a public record, a statement that the victim is seeking an order directing the custodian of the public record to remove the victim's information from the record and substitute it with the impostor's information, which will usually be John or Jane Doe;
- A description of the bare facts using no personal identifying information;
- A statement that statutory notice will be given to all known creditors pursuant to Tex. Bus. & Com. Code § 521.103(a); and
- A prayer for relief.²⁰

Once the application has been filed and the filing has been accepted, the victim or the victim's attorney can set the matter for a hearing. The victim (also known as the applicant) must give notice of hearing to the affected creditors and to the alleged perpetrator, if known.²¹ It is helpful to draft the final order prior to the hearing. The statute lays out the components of the order:

- (1) any known information identifying the violator or person charged with the offense;
- (2) the specific personal identifying information and any related document used to commit the alleged violation or offense; and
- (3) information identifying any financial account or transaction affected by the alleged violation or offense, including:
 - (A) the name of the financial institution in which the account is established or of the merchant involved in the transaction, as appropriate;
 - (B) any relevant account numbers;

¹⁷ "A person who is injured by a violation of Section 521.051 or who has filed a criminal complaint alleging commission of an offense under Section 32.51, Penal Code, may file an application with a district court for the issuance of an order declaring that the person is a victim of identity theft." Tex. Bus. & Com. Code §521.101(a).

¹⁸ *Id.* See also Tex. Bus. & Com. Code § 521.051.

¹⁹ Paula Pierce, *Know Your 521: Tips for Assisting Identity Theft Victims*, 14 *Advanced Consumer & Commercial Law* (2019).

²⁰ *Id.* at 4.

²¹ Tex. Bus. & Com. Code § 521.103(a).

- (C) the dollar amount of the account or transaction affected by the alleged violation or offense; and
- (D) the date of the alleged violation or offense.²²

At the hearing, the victim's testimony can be used to prove up all the elements of the claim. For example, the testimony must:

- Establish the victim's identity;
- Describe what happened and how the victim found out about the identity theft;
- List the personal identifying information that was compromised and how it was used;
- List every account that was compromised or opened without the victim's permission;
- Include the business name, account number, description of what happened or what was purchased, and give the dollar amount involved;
- Establish that the victim did not authorize the transactions;
- State whether the victim knows who the thief is;
- If the victim knows who the thief is, state the thief's name and contact information if known;
- Describe the steps the victim went through to try to recover – especially notifying law enforcement;
- Introduce the documentary evidence the victim has; and
- Establish the relief that the victim wants.

In the rare case where the identity thief is criminally convicted under Texas Penal Code § 32.51, it is presumed that the applicant of the Chapter 521 petition is a victim of identity theft.²³ The court can vacate the order if it later finds the application was fraudulent or the applicant misrepresented material facts.²⁴

It is vital to get a copy of the executed order as soon as possible after the hearing, since the order is required to be sealed.²⁵ The victim or the victim's attorney should send a copy of the order to the uncooperative creditors, debt collectors, or agencies with a demand to remove the victim's identifying information from the records, accounts, or transactions. It is important to remind those entities that the order is confidential and cannot be released to others.²⁶

IV. Using the Fair Credit Reporting Act to Help Victims of Coerced Debt

The Fair Credit Reporting Act²⁷ (FCRA) provides relief for consumers with inaccurate information in their consumer reports, including specific protections for identity theft victims. Since credit reporting affects almost every aspect of our financial system, the appearance of coerced debt on a victim's consumer report is one of the most negative consequences of coerced debt. It impacts the ability of a coerced debt victim to get housing, employment, a car loan, or other access to credit.

The FCRA includes unique protections for identity theft recovery such as fraud alerts and a block of all the inaccurate information on a consumer report resulting from the identity theft.²⁸ Other rights under the FCRA include, but are not limited to:

1. The right to obtain a free security freeze restricting access to the consumer's credit report;²⁹

²² Tex. Bus. & Com. Code § 521.103(b).

²³ Tex. Bus. & Com. Code § 521.102.

²⁴ Tex. Bus. & Com. Code § 521.105.

²⁵ Tex. Bus. & Com. Code § 521.104.

²⁶ Paula Pierce, *Know Your 521: Tips for Assisting Identity Theft Victims*, 14 *Advanced Consumer & Commercial Law* (2019). See also Tex. Bus. & Com. Code § 521.104(c).

²⁷ 15 U.S.C. §§ 1681-1681x.

²⁸ 15 U.S.C. § 1681c-1(a)(1); 15 U.S.C. § 1681c-1(b); 15 U.S.C. § 1681c-2. A victim also has the right to receive copies of records from a business entity that extended credit or accepted payment or other consideration for a commercial transaction with a copy of the application and business transaction records related to the identity theft. 15 U.S.C. § 1681g(e).

²⁹ 15 U.S.C. §§ 1681c-1(i).

2. The right to dispute fraudulent or inaccurate information appearing on a consumer's credit report and the right to receive results of the investigation of the dispute;³⁰
3. The right to obtain a free copy of a consumer's credit report every twelve months from each of the three nationwide consumer reporting agencies;³¹ and
4. The right to obtain all information in the consumer's credit file.³²

A. Fraud Alerts

Fraud alerts are a protection offered by the FCRA to identity theft victims. Coerced debt victims can request two types of fraud alerts to be included in their credit files, an initial fraud alert and an extended alert.³³ A fraud alert is a safety mechanism that is supposed to protect a victim's credit file when their personal information has been compromised. The fraud alert notifies lenders and other businesses (users of the credit reports) that the victim does not authorize the establishment of any new credit plan or an extension of credit, issuance of an additional card on an existing credit account, or any increase in the credit limit on any existing account; but an extension of credit under an existing open-end credit account (e.g., a credit card) is exempt.³⁴

The most common coerced debts occur when an abusive partner opens new credit card accounts in the name of victim. Since the fraud alert "protection" exempts new open-end credit accounts, it is often ineffective at preventing additional coerced debts.

When a victim requests a fraud alert from any one of the three nationwide CRAs, then that CRA must notify the other two³⁵ who must also include the alerts in their files.³⁶

1. Initial fraud alerts

Victims of coerced debt *do not need to have* an identity theft report to request an initial fraud alert; they must merely assert a "good faith suspicion" that they are or might be a victim of identity theft or fraud.³⁷ This standard makes an initial fraud alert appealing for coerced debt victims who are unable to provide an identity theft report. The victim does, however, need to provide proof of identity to obtain the initial fraud alert.³⁸ An initial alert only lasts one year,³⁹ so if a coerced debt victim can provide an identity theft report, the extended fraud may be a better option.

Once the alert is included in the victim's credit file, the CRAs must present to users of the report a "clear and conspicuous" view of the alert,⁴⁰ notifying them that the victim may be a victim of fraud, including identity theft.⁴¹ A user of a report containing an initial fraud alert may not proceed with a credit transaction, unless the user "utilizes reasonable policies and procedures to form a reasonable belief that the user knows the identity of the person making the request."⁴² The "reasonable policies and procedures" that are supposed to be put in place by creditors do not actually prevent identity thieves from taking out new credit if, for example, the application is completed online.

³⁰ 15 U.S.C. § 1681i.

³¹ 15 U.S.C. § 1681j(a).

³² 15 U.S.C. § 1681g(a).

³³ 15 U.S.C. § 1681c-1(a).

³⁴ 15 U.S.C. § 1681c-1(h)(1)(A) (initial fraud alerts), § 1681c-1(h)(2)(A) (extended fraud alerts).

³⁵ 15 U.S.C. § 1681c-1(a)(1)(B) (initial fraud alerts), § 1681c-1(b)(1)(c) (extended fraud alerts).

³⁶ 15 U.S.C. § 1681c-1(e).

³⁷ 15 U.S.C. § 1681c-1(a)(1).

³⁸ *Id.*

³⁹ 15 U.S.C. § 1681c-1(a)(1)(A).

⁴⁰ 15 U.S.C. § 1681a(q)(2)(B).

⁴¹ 15 U.S.C. § 1681a(q)(2)(A).

⁴² 15 U.S.C. § 1681c-1(h)(1)(B)(i).

Additionally, as already mentioned, an initial fraud alert does not prevent the opening of new credit card accounts in the victim's name, since they are exempted from this provision.⁴³

In addition to placing the fraud alert, the CRA must notify the victim of their right to a free consumer report and provide a requested report within three business days of the request.⁴⁴

2. Extended Fraud Alerts

The extended fraud alert operates similarly to the initial fraud alert in that a victim need only notify one of the three nationwide CRAs who must then inform the others.⁴⁵ Again, once an extended fraud alert is included in the victim's file, the CRAs must provide a "clear and conspicuous view" of the alert to any person requesting the consumer report.⁴⁶ In addition to placing the fraud alert, the CRA must notify the victim of the right to receive two free consumer reports over the following twelve-month period⁴⁷ and provide a requested report within three business days of the request.⁴⁸

Unlike the initial fraud alert, a victim must provide an identity theft report along with proof of identity in order to obtain an extended fraud alert.⁴⁹ The extended fraud alert lasts seven years instead of just the one year under the initial fraud alert,⁵⁰ and victims who obtain an extended fraud alert are also excluded from any prescreened lists generated and sold by the CRAs to users for five years.⁵¹

A user of a report containing an extended fraud alert may not proceed with a credit transaction unless the user contacts the victim in person or by using the contact method designated by the consumer.⁵² So, if you are assisting a victim in requesting an extended fraud alert, make sure to include in your request what phone number or other contact method (email, physical address) the victim wants to have users confirm her identity. However, as already mentioned, an extended fraud alert does not prevent new credit card accounts from being opened under the victim's name.⁵³

B. Security Freeze

A security freeze (or a credit freeze) is a protection guaranteed by the FCRA to all consumers, not just victims of coerced debt. It is the most secure way to protect a coerced debt victim's credit because it restricts access to the victim's consumer report.⁵⁴ A security freeze prevents coerced debt victims and anyone else from opening accounts in the victim's name since it prevents a lender from accessing credit reports altogether.⁵⁵ Thanks to a recent legislative update,⁵⁶ security freezes are now free, and no documentation, (i.e. a police report or identity theft affidavit), is required to obtain the freeze.

⁴³ *Id.*

⁴⁴ 15 U.S.C. § 1681c-1(a)(2).

⁴⁵ 15 U.S.C. § 1681c-1(b)(1)(A).

⁴⁶ 15 U.S.C. § 1681a(q)(2)(B).

⁴⁷ 15 U.S.C. § 1681c-1(b)(2). Note how the extended fraud alert provides for two additional free reports within the subsequent twelve-month period as compared to just one additional free report provided under the initial fraud alert.

⁴⁸ *Id.*

⁴⁹ 15 U.S.C. § 1681c-1(b)(1).

⁵⁰ 15 U.S.C. § 1681c-1(b).

⁵¹ 15 U.S.C. § 1681c-1(b)(1)(B).

⁵² 15 U.S.C. § 1681c-1(h)(2)(B)(i).

⁵³ *Id.*

⁵⁴ "The term 'security freeze' means a restriction that prohibits a consumer reporting agency from disclosing the contents of a consumer report . . . to any person requesting the consumer report." 15 U.S.C. § 1681c-1(i)(1)(C).

⁵⁵ 15 U.S.C. § 1681c-1(i)(1)(C).

⁵⁶ Congress passed the Economic Growth, Regulatory Relief, and Consumer Protection Act in response to the Equifax breach. Pub. L. No. 115-174, 132 Stat. 1296 (May 24, 2018). *See also* 15 U.S.C. § 1681c-1(i).

When a victim places a security freeze, potential creditors and, in some cases, other third parties will not be able to get access to the consumer's credit report, unless the consumer temporarily or permanently lifts the freeze.⁵⁷ There are exceptions as to who can view the victim's credit report while a freeze is in place,⁵⁸ some of which include:

- Creditors of existing accounts;⁵⁹
- Certain government entities like child support agencies;⁶⁰
- Any federal, state, local, private collection, or law enforcement agency, or trial court acting pursuant to a court order, warrant, or subpoena;⁶¹
- Companies hired to monitor credit file to prevent fraud;⁶²
- Insurance underwriting;⁶³
- Any entity using the information for employment, tenant, or background screening purposes.⁶⁴

A security freeze does not prevent victims of coerced debt from accessing their own reports.⁶⁵

The victim must request the freeze from each of the CRAs and send proper identification.⁶⁶ The CRAs must place the freeze within one business day if the request was made by telephone or electronic means, (for example, on the CRA's website), and within three business days if the request was made by mail.⁶⁷ Once the CRA has placed the freeze, it has five business days to send confirmation of the freeze's placement to the victim and provide the victim information on how to remove the freeze.⁶⁸ A security freeze remains in place until the victim removes it⁶⁹ or chooses to temporarily lift it,⁷⁰ often called a thaw. If the victim requests a thaw, she can specify the time period of the thaw.⁷¹ If the victim requests a removal or a thaw, then CRA must remove it within one hour, if the request was made by phone or electronic means, or three business days, if the request was made by mail.⁷²

Security freezes are the most secure protection for coerced debt victims under the FCRA, but they are the least flexible. If the victim anticipates she will need access to credit outside of employment or housing (rental) purposes, then she will need to agree to lifting the freeze every time she needs the credit. If there is no immediate new identity theft threat from the abuser, the victim could also decide to wait to place the freeze until after she obtains the credit she needs.

C. Identity Theft Block

A powerful protection under the FCRA available only to identity theft victims is the identity theft block. The three nationwide consumer reporting agencies, (Trans Union, Experian, and Equifax, also known as the Big 3), must block

⁵⁷ 15 U.S.C. § 1681c-1(i)(3).

⁵⁸ 15 U.S.C. § 1681c-1(i)(4).

⁵⁹ 15 U.S.C. § 1681c-1(i)(4)(A).

⁶⁰ 15 U.S.C. § 1681c-1(i)(4)(C).

⁶¹ 15 U.S.C. § 1681c-1(i)(4)(B).

⁶² 15 U.S.C. § 1681c-1(i)(4)(F).

⁶³ 15 U.S.C. § 1681c-1(i)(4)(H).

⁶⁴ 15 U.S.C. § 1681c-1(i)(4)(I).

⁶⁵ "... for the purpose of providing a consumer with a copy of the consumer's consumer report or credit score, upon the request of the consumer." 15 U.S.C. § 1681c-1(i)(4)(G).

⁶⁶ 15 U.S.C. § 1681c-1(i)(2)(A).

⁶⁷ 15 U.S.C. § 1681c-1(i)(2)(A)(i), (ii).

⁶⁸ 15 U.S.C. § 1681c-1(i)(2)(B)(ii)(II). Usually, this involves assigning the victim a PIN that is required to lift the freeze.

⁶⁹ 15 U.S.C. § 1681c-1(i)(3)(C).

⁷⁰ 15 U.S.C. § 1681c-1(i)(3)(E).

⁷¹ 15 U.S.C. § 1681c-1(i)(3)(E), (j)(4)(D).

⁷² 15 U.S.C. § 1681c-1(i)(3)(C) (ordinary consumers), § 1681c-1(j)(4)(C) (requests from a protected consumer sixteen or older or a protected consumer's representative).

theft-related debt from a coerced debt victim's file. In order to activate the block, the coerced debt victim must provide the following to the consumer reporting agency (CRA):⁷³

- A letter explicitly requesting an identity theft block and explaining what information is fraudulent as a result of the identity theft. The letter should state that the information does not relate to any transaction that the consumer made or authorized. It is also helpful to include a copy of the relevant credit report with the information highlighted or marked in some way.
- Proof of identity, which may include a copy of the victim's social security card (or other document evincing their social security number), a driver's license, a copy of a recent utility bill or bank statement, and any other personal information requested by the CRA; and
- A copy of an identity theft report.

1. Identity Theft Reports

Regulation V defines the term "identity theft report."⁷⁴ To qualify as an "identity theft report" under the FCRA, the report must meet the following criteria:

- (1) Allege identity theft with as much specificity as the consumer can provide;
- (2) Be a copy of an official, valid report filed by the consumer with a law enforcement agency; and
- (3) Expose the person to criminal penalties relating to the filing of false information if the information in the report is false.⁷⁵

After a victim sends the identity theft report with the letter requesting the identity theft block, a CRA or a furnisher (the creditor or other entity reporting the debt to the CRA), may require the report to include "additional information" to determine the validity of the "alleged identity theft."⁷⁶ However, the CRA or the furnisher must make the request within fifteen days of receiving the report.⁷⁷ Since the regulation allows a furnisher or CRA to demand more information before accepting the identity theft report, it may require more specificity than "a law enforcement agency would require to make a criminal report; not even the FTC's own Identity Theft Affidavit will necessarily suffice to meet the regulation's definition."⁷⁸

As a practical matter, it is often best to submit the FTC identity theft affidavit and obtain a police report. However, if the coerced debt was incurred through threat or force, it is questionable whether the victim may utilize the FTC form since it requires the victim to swear she did not consent to the debt. As a result, if the coerced debt was incurred on or after September 1, 2019, a police report is a better option. If use of the mail was involved in the identity theft, an identity theft report may also be filed with the U.S. Postal Inspection service.⁷⁹

2. CRA Responsibilities

If the CRA accepts the identity theft report, they must block the fraudulent information the victim has identified within four business days after accepting the identity theft report.

⁷³ 15 U.S.C. § 1681c-2(a).

⁷⁴ 12 C.F.R. § 1022.3. For a detailed discussion on the challenges consumers face in meeting this statutory definition, see section 9.2.2.3.2 of NCLC's FCRA manual. National Consumer Law Center, Fair Credit Reporting (9th ed. 2017), *updated at* www.nclc.org/library.

⁷⁵ 12 C.F.R. §§ 1022.3(i)(1)(i) to 1022.3(i)(1)(ii).

⁷⁶ 12 C.F.R. § 1022.3(i)(1)(iii)(A).

⁷⁷ *Id.* Also note that the furnisher or CRA can make a second request for information within another fifteen days of its first request for information. 12 C.F.R. § 1022.3(i)(1)(iii)(B).

⁷⁸ National Consumer Law Center, Fair Credit Reporting (9th ed. 2017), Section 9.2.2.3.2, *updated at* www.nclc.org/library.

⁷⁹ See <https://ehome.uspis.gov/mailtheft/idtheft.aspx>.

The CRA must also notify the furnishers of the fraudulent information:

- That the information furnished may be a result of identity theft;
- That the victim has filed an identity theft report;
- That a block has been requested; and
- The effective dates of the block.⁸⁰

The CRA may also refuse to block the disputed information, or it may remove an existing block, if it reasonably determines that the victim:

- Has not told the truth (made a material misrepresentation of fact) relevant to the request to block;
- The information was blocked in error or the block was requested by the victim in error; or
- The victim obtained possession of goods, services, or money as a result of the transactions identified in the blocking request.⁸¹

The CRA must also notify the victim if it refuses to place or remove the block.⁸²

D. Dispute/Reinvestigation Under Section 1681i

Even if the coerced debt victim is unable to request a block under §1681c-2 because she is unable to get an identity theft report, the victim still has the ability to dispute the inaccurate information and trigger the reinvestigation procedures under §1681i as this mechanism is available for all consumers. The inaccurate information can be anything from name variations, social security numbers, addresses, phone numbers, employment history, or any accounts (tradelines) in the reports. Identity theft victims often have incorrect addresses, phone numbers, and even employment history on their reports because the thief falsified this data or listed his contact information for an account. Additionally, if the inaccurate information appears on a consumer report that is not prepared by one of the three nationwide CRAs, (e.g. a tenant screening CRA), the only avenue a victim may have to remove the inaccurate information is through §1681i as the block is a remedy provided only by the Big 3.

After a CRA receives a dispute from the victim, it must delete the disputed information or conduct a reinvestigation.⁸³ The dispute letter should have as much detail and specificity as to why the information is inaccurate. If the victim has supporting documentation, (for example, a police report on credit or debit abuse or a court order), that should be included with the dispute letter as well. If the dispute letter is not specific enough, it may be difficult to impose liability on a CRA for failure to conduct a reasonable investigation.⁸⁴

There are numerous court cases surrounding the question of what constitutes a reasonable investigation,⁸⁵ but the FCRA does delineate deadlines for conducting a reinvestigation and notifications. For example:

- A CRA must send notification of the dispute to the furnisher within 5-business days of receipt of the dispute, along with all relevant information provided by the victim regarding the dispute;⁸⁶

⁸⁰ 15 U.S.C. § 1681c-2(b).

⁸¹ 15 U.S.C. § 1681c-2(c)(1).

⁸² 15 U.S.C. § 1681c-2(c)(2).

⁸³ 15 U.S.C. § 1681i(a).

⁸⁴ See e.g., *Brooks v. Citibank (South Dakota)*, 2009 WL 2870046 (9th Cir. Sept. 8, 2009) (unpublished) (upholding summary judgment where dispute letter “did not indicate that [plaintiff’s] domestic partner was responsible for [the debt], nor did it claim that [plaintiff] was the victim of fraud; rather, [plaintiff] simply made generic claims of inaccurate account information”). See also National Consumer Law Center, *Fair Credit Reporting* (9th ed. 2017), Section 4.5.2.2, updated at www.nclc.org/library.

⁸⁵ See National Consumer Law Center, *Fair Credit Reporting* (9th ed. 2017), Section 4.5.3.4, updated at www.nclc.org/library.

⁸⁶ 15 U.S.C. § 1681i(a)(2).

- A CRA must complete a reinvestigation within thirty days of receipt of the dispute;⁸⁷
- A CRA must delete information that is inaccurate, incomplete, or cannot be verified;⁸⁸ and
- A CRA must provide written notice of the results of the investigation to the victim within five business days after completion of the reinvestigation along with a statement that the reinvestigation is completed, a copy of the revised consumer report, and notice that consumer has right to add a statement to file disputing accuracy or completeness of disputed information.⁸⁹

A CRA can later reinsert information that was deleted if the furnisher certifies that the information is complete and accurate,⁹⁰ but the CRA must notify the victim in writing within 5 business days of the reinsertion.⁹¹ The notice must include:⁹²

- A statement that disputed information has been reinserted;
- The business name and address of furnisher, including the telephone number if available; and
- Notice that victim has right to add a statement to her file disputing the accuracy or completeness of the disputed information.

In practice, it often takes multiple disputes with the CRAs to ensure that a victim's report is accurate; reinvestigation results can appear confusing or incomplete.⁹³ Even though the CRAs are supposed to include a copy of the revised report, they often do not include it, especially when CRAs send multiple responses to a victim (several letters) regarding each request the victim made in the dispute letter—for example, if the victim requested a block, a security freeze, and/or deletion of inaccurate information if a block is denied.

As a result of the COVID-19 pandemic, the CRAs have stated that consumers will have access to their credit reports for free every week at <http://www.annualcreditreport.com>. This can be helpful if you are currently assisting a victim in verifying what is being reported by each CRA on a victim's report, even after a dispute.

E. Responsibilities of Furnishers Under 1681s-2

Furnishers also have responsibilities under the FCRA when a victim disputes inaccurate information.⁹⁴ Although a CRA must forward the dispute and all relevant documents to a furnisher,⁹⁵ it is best practice to send a copy of the dispute letter sent to a CRA to each furnisher.⁹⁶

⁸⁷ 15 U.S.C. § 1681i(a)(1)(A). If the dispute is sent after receiving a free annual report from a nationwide CRA via the centralized source, (i.e. www.annualcreditreport.com), the CRA has forty-five days to complete the reinvestigation. 15 U.S.C. § 1681j(a)(3).

⁸⁸ 15 U.S.C. § 1681i(a)(5).

⁸⁹ 15 U.S.C. § 1681i(a)(6).

⁹⁰ 15 U.S.C. § 1681i(a)(5)(B)(i).

⁹¹ 15 U.S.C. § 1681i(a)(5)(B)(ii).

⁹² 15 U.S.C. § 1681i(a)(5)(B)(iii).

⁹³ Frequently, the victim must live with the consequences of identity theft for months or years. See National Consumer Law Center, *Automated Injustice Redux* (2019), https://www.nclc.org/images/pdf/credit_reports/automated-injustice-redux.pdf (inability of consumers, including identity theft victims, to correct inaccurate information on credit reports). When CRAs are ineffective in keeping corrected information in the file and incorrect information from repeatedly reappearing in the file, the consumer's frustration and injury goes on for years. See, e.g., *Drew v. Experian*, 690 F.3d 1100 (9th Cir. 2012).

⁹⁴ 15 U.S.C. § 1681s-2(b).

⁹⁵ 15 U.S.C. § 1681i(a)(2).

⁹⁶ Whenever any dispute letter is sent, the best practice is to send by certified mail return receipt requested in order to have proof of receipt.

When the furnisher receives notice of the dispute from the CRA,⁹⁷ it must conduct a reasonable investigation⁹⁸ that looks at the merits of the dispute, including a review of “all relevant information” the victim provided with the dispute letter.⁹⁹

Multiple disputes are often necessary when disputing an account based on identity theft. Furnishers often verify the account information as accurate based on a cursory review of a victim’s name, social security number, and address. If the thief lives at the same address as the victim and knows all her personal identifiers, which is almost always the case with coerced debt, this cursory review will not be enough to determine the account was fraudulent. It is very helpful to dispute the account or fraudulent charges under other consumer statutes¹⁰⁰ while also disputing under the FCRA.

F. Legal Remedies for Failure to Comply with FCRA

Failure to comply with each of the provisions above subjects a CRA and/or a furnisher to liability under the FCRA. A victim has the right to seek actual damages, punitive damages, attorneys' fees, and costs for violations of the FCRA. However, punitive damages are only available if the conduct that led to the violation was willful.¹⁰¹

The statute of limitations for FCRA violations is two years from discovery or five years from the date of the violation.¹⁰² If the violation is failure to conduct a reasonable investigation in response to a dispute, each new dispute can restart the two-year period¹⁰³ and the initial dispute can still be used as evidence regarding the violation.¹⁰⁴

Besides the violations of the provisions discussed above, a coerced debt victim can have other claims under the FCRA.¹⁰⁵ Examples of other claims include: if a user accessed the victim’s credit report without a permissible purpose;¹⁰⁶ if a CRA failed to follow reasonable procedures to assure maximum possible accuracy of the information in the victim’s credit report;¹⁰⁷ or if a CRA failed to provide a victim with her report when requested.¹⁰⁸ In some instances, a CRA may still allow a furnisher to access a consumer’s report even after the victim has disputed that she never applied for or authorized an account to be opened with that furnisher and the account was deleted or blocked from the victim’s file. If the victim has no other accounts with that furnisher, any future access can be an impermissible purpose.

⁹⁷ The dispute must come from the CRA pursuant to 1681i in order to trigger the responsibilities under 1681s-2(b).

⁹⁸ 12 C.F.R. § 1022.43(e)(1); 16 C.F.R. § 660.4(e)(1) (FTC).

⁹⁹ 12 C.F.R. § 1022.43(e)(2); 16 C.F.R. § 660.4(e)(2) (FTC).

¹⁰⁰ For example, the victim should also dispute under the Truth in Lending Act if the account is a credit account or under the Fair Debt Collection Practices Act if the account is reported by a debt collector.

¹⁰¹ Punitive damages are only available if the conduct was willful. 15 U.S.C. § 1681(n).

¹⁰² 15 U.S.C. § 1681p.

¹⁰³ *Broccuto v. Experian Info. Solutions Inc.*, 2008 WL 1969222 (E.D. Va. May 6, 2008); *Larson v. Ford Credit*, 2007 WL 1875989 (D. Minn. June 28, 2007). *Contra Blackwell v. Capital One Bank*, 2008 WL 793476 (S.D. Ga. Mar. 25, 2008); *Bittick v. Experian Info. Solutions, Inc.*, 419 F. Supp. 2d 917 (N.D. Tex. 2006). *See also Anderson v. Equifax Info. Serv. L.L.C.*, 292 F. Supp. 3d 1211 (D. Kan. 2017) (declining to decide whether new dispute is subject to new statute of limitations because new inaccurate information had appeared within two years).

¹⁰⁴ *See, e.g., Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1236 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982); *Lazar v. Trans Union, L.L.C.*, 195 F.R.D. 665 (C.D. Cal. 2000).

¹⁰⁵ For a more thorough discussion of other violations and FCRA compliance generally, *see* National Consumer Law Center, *Fair Credit Reporting* (9th ed. 2017), *updated at* www.nclc.org/library.

¹⁰⁶ 15 U.S.C. § 1681b(f).

¹⁰⁷ 15 U.S.C. § 1681e(b).

¹⁰⁸ 15 U.S.C. § 1681g.

V. Using the Truth in Lending Act (TILA) to Help Victims of Coerced Debt

The Truth in Lending Act¹⁰⁹ (TILA) was created to ensure that consumers are treated fairly by businesses in the lending marketplace and are informed about the true cost of credit.¹¹⁰ TILA requires lenders to disclose credit terms in an easily understood manner so that consumers can confidently comparison shop interest rates and conditions. Although TILA covers a wide range of consumer transactions, the sections below focus only on open-end credit (i.e. credit card accounts) in the context of coerced debt. Under TILA, a victim of coerced debt can dispute the unauthorized use of a credit card account:

- Under the Fair Credit Billing Act as a billing error;
- Under the unauthorized use provision; and/or
- Raise “claims and defenses” she may have against a merchant for unauthorized use.

A. Billing Error Disputes under the Fair Credit Billing Act (FCBA)

Part D of the Truth in Lending Act governs credit card billing practices and is also known as the Fair Credit Billing Act¹¹¹ (FCBA). The FCBA protects consumers from unfair billing practices and provides a method for disputing errors. Billing errors include math errors, charges for the wrong date or amount, and unauthorized charges. The act also covers statements mailed to a wrong address or failure to credit payments to an account.

The billing error procedures covered by the FCBA apply to unauthorized charges as well as an entire unauthorized account,¹¹² which can both happen to coerced debt victims when an abuser opens an account in the victim’s name or when he uses an already existing credit account belonging to the victim to make unauthorized charges.

In order to dispute an account or a charge under the billing error provisions of the FCBA, the victim must assert that the disputed account or charge fits within one of the enumerated billing errors under 1666(b).¹¹³ Most often in the case of coerced debt, the billing error is “an unauthorized extension of credit not made to the consumer or to a person who has actual, implied, or apparent authority to use the consumer’s credit card or open-end credit plan.”¹¹⁴

¹⁰⁹ 15 U.S.C. §§ 1601–1666j.

¹¹⁰ 15 U.S.C. § 1601(a) (congressional findings and declaration of purpose). *See, e.g., Cappuccio v. Prime Capital Funding L.L.C.*, 649 F.3d 180 (3d Cir. 2011) (“Congress enacted TILA to guard against the danger of unscrupulous lenders taking advantage of consumers through fraudulent or otherwise confusing practices.”); *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114 (9th Cir. 2009) (“Congress enacted TILA ‘to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available . . . and avoid the uninformed use of credit. . . .’”) (citing 15 U.S.C. § 1601); *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748 (7th Cir. 2000) (“Congress enacted TILA to ensure that consumers receive accurate information from creditors in a precise and uniform manner that allows them to compare the cost of credit.”); *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994) (TILA intended to promote informed use and awareness of cost of credit; ensure meaningful disclosure to enable ready comparison of credit terms); *First Nat’l Bank v. Office of the Comptroller*, 956 F.2d 1456 (8th Cir. 1992) (fundamental purpose of the Act is to require disclosure of true cost of credit so consumers can make informed choice); *Taylor v. Countrywide Home Loans*, 2010 WL 750215 (E.D. Mich. Mar. 3, 2010) (“TILA’s purpose is twofold: to facilitate the consumer’s acquisition of the best credit terms available and to protect the consumer from divergent and at times fraudulent practices stemming from the uninformed use of credit.”) (citing *Mourning Family Publication Serv.*, 411 U.S. 356 (1973)).

¹¹¹ 15 U.S.C. §§ 1666–1666j.

¹¹² Individuals who are liable on an account (an “obligor”) and those whom the creditor alleges are obligors are protected under FCBA. *See* National Consumer Law Center, Truth in Lending (10th ed. 2019), Section 7.9.2.1 *updated at* www.nclc.org/library.

¹¹³ *See e.g. Stafford v. Cross Country Bank*, 262 F. Supp. 2d 776, 790 (W.D. Ky. 2003) (holding that a “wrong person” error, which consisted in that case of charging a person who claimed to have never opened the account, qualified as a billing error under the FCBA); *Lau v. Credit Concepts*, 2007 WL 583, 623 (N.D. Okla. Feb. 21, 2007) (billing error dispute for a charge by a collection agency when he was not the underlying debtor for the collection account).

¹¹⁴ 15 U.S.C. § 1666(b)(1); Reg. Z § 1026.13(a)(1).

The billing error dispute must be in writing¹¹⁵ and received by the creditor within 60 days of receiving the first bill or statement that contains the error.¹¹⁶ This is particularly challenging for coerced debt victims who may not have discovered the account or the charge within the 60 day period where the creditor first sends a statement containing that charge. Coerced debt victims may not discover the existence of an account until months or years after it has been opened, especially if the abuser kept the mail from the victim (one very common form of coercive control).¹¹⁷ The dispute must also be sent to the address on the statement¹¹⁸ designated for “billing error inquiries” or it does not trigger the protections of the FCBA.¹¹⁹

There is no specific format required for the dispute,¹²⁰ but it must contain sufficient information to enable the creditor to identify the cardholder’s name and account number.¹²¹ If the coerced debt victim did not open the account, she will likely not have the entire account number; however, providing the victim’s name and social security number or unique address should be enough for the creditor identify the account.¹²² The dispute must indicate that the victim believes the credit card statement contains a billing error, including the amount, date, and type of error, and the reasons for the victim’s belief.¹²³ Even though victims do not have to provide any type of affidavit or police report,¹²⁴ they should include this documentary evidence, especially if they are not providing any other facts or information to allow the creditor to properly investigate the billing error. Another best practice is to request copies of documents the creditor uses in its investigation.¹²⁵ Victims of coerced debt often lack any documents (such as the credit application or all statements on the account) and failure to provide these documents can subject a creditor to liability.¹²⁶

A victim should not pay any unauthorized amount made by the abuser, whether it is a single charge or series of charges or the entire account. The FCBA provides protections to victims who choose to withhold payment of the disputed amount(s) and charge(s), but the victim should inform the creditor about the intent to withhold payment in the billing error notice dispute.¹²⁷ Sometimes the victim does not know what charges (i.e. late fees or interest) relate to an unauthorized amount so it may be helpful to withhold payment of the principal only and notify the creditor in the billing error notice that the victim expects an appropriate refund in the event the error is confirmed. Another alternative is to request in the billing error notice a clarification of the related charges that the victim need not pay pending resolution of the dispute. Although the victim can pay the disputed amount without waiving billing error

¹¹⁵ 15 U.S.C. § 1666(a); Reg. Z § 1026.13(b).

¹¹⁶ Reg. Z § 1026.13(b)(1).

¹¹⁷ The victim can still dispute new charges within the sixty-day period, even if the dispute would also relate to older charges. See *Burrell v. DFS Servs., L.L.C.*, 753 F. Supp. 2d 438 (D.N.J. 2010) (plaintiff could recover any charges, along with late fees, finance charges, and penalties included on the billing statement issued by the credit card company for a year-long series of identity theft charges when disputed within the sixty-day period).

¹¹⁸ See 15 U.S.C. § 1637(b)(10).

¹¹⁹ 15 U.S.C. § 1666(a); Reg. Z § 1026.13(b)(1).

¹²⁰ See *Burrell v. DFS Servs., L.L.C.*, 753 F. Supp. 2d 438 (D.N.J. 2010), (court held a completed and submitted “Affidavit of Fraud” form provided by the creditor was a sufficient billing error notice).

¹²¹ Reg. Z § 1026.13(b)(2).

¹²² Official Interpretations § 1026.13(b)(2)-1.

¹²³ Reg. Z § 1026.13(b)(3).

¹²⁴ Official Interpretations § 1026.13(f)-3).

¹²⁵ “Copies of documentary evidence of the obligor’s indebtedness” as described in 15 U.S.C. § 1666(a)(3)(B).

¹²⁶ 15 U.S.C. § 1640. Note that the outcome of the dispute does not absolve the creditor of its obligations under FCBA. See *Lyon v. Chase Bank*, 656 F.3d 877, 885 (9th Cir. 2011); *Catanach v. Citi Cards/Bank*, 2008 WL 11451608, at *8 (D.N.M. Mar. 18, 2008) (*pro se*; “That a billing error did not in fact occur does not absolve a creditor of all obligations under the FCBA”; citing cases); *Belmont v. Associates Nat’l Bank*, 119 F. Supp. 2d 149, 159, n.6 (E.D.N.Y. 2000) (“Section 1666’s requirements that a creditor promptly respond to consumer inquiries is triggered upon receipt of a timely notice of ‘billing error’ regardless of whether the consumer who sent the notice was correct in his belief that an error had been made. Simply put, the fact that a TILA plaintiff was incorrect in his belief that a billing error had occurred is not a defense to an action under § 1640”).

¹²⁷ Reg. Z § 1026.13(d)(1). After the victim gives notice of the billing error, the victim may withhold payment of the amount in dispute and related charges.

rights and still receive a refund if the error is confirmed,¹²⁸ paying the disputed amount does waive a separate TILA right, to assert merchant-related claims or defenses against the card issuer.¹²⁹

Once the creditor receives the dispute, it must acknowledge receipt of dispute within 30 days¹³⁰ and complete its investigation before the end of 90 days of receipt of the dispute.¹³¹ After the investigation, the creditor must either remove the unauthorized charge(s) or conclude that the amount is still owed.¹³² Regardless of the outcome of the investigation, the creditor must notify the victim of its decision.¹³³ If the creditor fails to complete an investigation and fails to provide a written explanation as to why there was no error or a different error, the creditor must credit the disputed amount and related finance or other charges.¹³⁴

If the investigation is resolved in the victim's favor, the creditor must credit the disputed amount and related charges; send the correction notice to the victim;¹³⁵ and update any reporting to each CRA notified of a delinquency as a result of the investigation.¹³⁶ The creditor cannot subsequently reverse a credit given on a billing error, even if it obtains evidence after the error resolution time period that the billing error did not occur as asserted by the victim.¹³⁷

If the investigation is not resolved in the victim's favor, the creditor must mail or deliver to the victim an explanation of its reasons;¹³⁸ give copies of any documentary evidence the victim requested; correct any different error discovered;¹³⁹ and promptly notify the victim in writing of the amount owed and time for payment.¹⁴⁰

While a billing error dispute investigation is pending, the disputed amount or disputed account cannot be reported to a CRA as delinquent,¹⁴¹ though it can be reported as in dispute.¹⁴² After the investigation is concluded (not in favor of the victim), and the victim is given 10 days to pay and fails to pay, then the creditor may report the disputed amount or account as delinquent.¹⁴³ However, if within the 10-day period the victim sends the creditor a written notice that the amount is still disputed, then the amount or account must be reported as "in dispute." In this case, the disputed

¹²⁸ Official Interpretations § 1026.13(d)(1).

¹²⁹ Official Interpretations § 1026.12(c)-1. *See Hasan v. American Express Centurion Bank*, 2017 WL 727166 (D. Colo. Feb. 17, 2017) (consumer could not assert claim that merchant failed to deliver his order because he had already paid issuer several years earlier for the charge); *Hasan v. Chase Bank USA, N.A.*, 2016 WL 9735767 (D. Colo. Oct. 12, 2016) (same).

¹³⁰ Reg. Z § 1026.13(c)(1); *Belmont v. Assocs. Nat'l Bank*, 119 F. Supp. 2d 149 (E.D.N.Y. 2000) (creditor liable where it did not acknowledge consumer's notice of billing error or provide its substantive response within thirty-day period).

¹³¹ 15 U.S.C. § 1666(a).

¹³² *Id.* Note that if the victim disputes a second time, reasserting the same dispute which has already been investigated, responded to, resolved, etc., the creditor need not respond again, unless it is not "substantially the same" billing error(s). Reg. Z § 1026.13(h). *See, e.g., Zevallos v. Citibank*, 2010 WL 3743864 (N.D. Cal. Sept. 20, 2010) (subsequent reiteration of the same dispute did not trigger creditor's obligations under FCBA); *Capital One Bank USA, N.A. v. Ponte*, 2013 WL 6692511 (Mich. Ct. App. Dec. 19, 2013) (creditor under no further obligation to respond to substantially the same allegation of dispute).

¹³³ 15 U.S.C. § 1666(a).

¹³⁴ Official Interpretations § 1026.13(c)(2)-2.

¹³⁵ Reg. Z § 1026.13(e). The correction notice may be sent separately, or on or with the periodic statement, but the amount of the billing error must be specifically identified. If the creditor sends a separate billing error correction notice, the periodic statement can merely identify the corrected amount as "credit." Official Interpretations § 1026.13(e)-2.

¹³⁶ 15 U.S.C. § 1666a(c).

¹³⁷ Official Interpretations § 1026.13(c)(2)-2. However, a creditor can reverse a credit for a billing error if the credit reversal is because the merchant also refunded the amount. *Id.*

¹³⁸ An ambiguous and cursory statement without an explanation of a legitimate justification for rejecting the dispute is insufficient. *See Dillard Dep't Stores, Inc. v. Owens*, 951 S.W.2d 915 (Tex. App. 1997) (interprets parallel provisions regarding unauthorized use) discussed below.

¹³⁹ 15 U.S.C. § 1666(a)(3)(b)(ii); Reg. Z § 1026.13(f); Official Interpretations § 1026.13(f).

¹⁴⁰ Reg. Z § 1026.13(g)(1).

¹⁴¹ 15 U.S.C. § 1666a. *See Belmont v. Assocs. Nat'l Bank*, 119 F. Supp. 2d 149 (E.D.N.Y. 2000) (creditor liable for notifying credit bureau of alleged delinquency and threatening consumer's credit rating while dispute was pending).

¹⁴² Official Interpretations § 1026.13(d)(2)-1. A creditor can still report any undisputed unpaid amount as delinquent. Reg. Z § 1026.13(d)(4).

¹⁴³ Reg. Z § 1026.13(g). *See Zevallos v. Citibank*, 2010 WL 3743864 (N.D. Cal. Sept. 20, 2010) (creditor permitted to report consumer as delinquent after terminating investigation in compliance with FCBA).

account or amount can be reported as delinquent,¹⁴⁴ if the creditor notifies the victim of the name and address of each party to whom the creditor is reporting information concerning the delinquency, a provides a copy of a credit report,¹⁴⁵ and reports any later resolution of the delinquency to each of those parties.¹⁴⁶

B. Unauthorized Use Disputes

Since the billing error notice provisions under the FCBA require timely, written notification, a coerced debt victim may be unable to properly trigger those protections as discussed above. However, a coerced debt victim may be protected against liability under TILA's unauthorized use provision.¹⁴⁷ A victim can invoke a dispute for unauthorized use orally,¹⁴⁸ though the best practice is to follow-up in writing. In fact, there are no requirements as to timing, form, or address or phone number used to make the dispute.¹⁴⁹ This means that the coerced debt victim can dispute the unauthorized use at any point in time¹⁵⁰ by contacting the card issuer at any number or address, or even at the card issuer's physical location.

TILA defines unauthorized use as “the use of credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder received no benefit.”¹⁵¹ Whether a person has actual, implied, or apparent authority is a matter of state law,¹⁵² but there is no actual, implied, or apparent authority when the transaction was initiated by a person who obtained the credit card from the victim though fraud or robbery.¹⁵³

If the abuser made himself an authorized user, he would be considered to have authority to make credit transactions on the account.¹⁵⁴ The victim can still challenge these transactions if the entire account was opened by the abuser without the victim's knowledge or consent or if he fraudulently made himself an authorized user on her existing account,¹⁵⁵ but it would be harder to challenge these transactions if the victim added the abuser as an authorized user under duress. It may be necessary for the victim to challenge the charges made by her abuser as a result of duress

¹⁴⁴ 15 U.S.C. § 1666a(b).

¹⁴⁵ Official Interpretations § 1026.13(g)(4)-2.

¹⁴⁶ Reg. Z § 1026.13(g).

¹⁴⁷ 15 U.S.C. § 1643. Unauthorized use of a credit card may be asserted as a billing error or as a claim or defense under TILA provisions discussed below. *See* Official Interpretations § 1026.12(b)(3)-3, (c)-1.

¹⁴⁸ Reg. Z § 1026.12(b)(3). *See Bromfield v. HSBC Bank Nevada*, 2014 WL 183895, at *3 (D. Or. Jan. 13, 2014) (*pro se*) (notification to issuer via telephone is sufficient under § 1643(a)(2)).

¹⁴⁹ Reg. Z § 1026.12(b)(3); Official Interpretations § 1026.12(b)(3)-1; 15 U.S.C. § 1643(a)(2). Notice can be given to any employee of the creditor and is effective even if not forwarded to proper department. *Id.*

¹⁵⁰ The Federal Reserve Board declined to impose a time period in which a claim of unauthorized use must be made, remarking that the statute does not do so. 74 Fed. Reg. 5244, 5362 (Jan. 29, 2009).

¹⁵¹ 15 U.S.C. § 1602(p).

¹⁵² Official Interpretations § 1026.12(b)(1)-1. *See Asher v. Chase Bank, N.A.*, 310 Fed. Appx. 912 (7th Cir. 2009) (state law on agency governs whether user is authorized); *Minskoff v. Am. Express Travel Related Servs. Co.*, 98 F.3d 703 (2d Cir. 1996); *Mas de Leon v. Banco Popular de Puerto Rico*, 312 F. Supp. 3d 279, 284 (D. P.R. 2018) (noting that “federal common law [is] in accord with the Restatement (Second) of Agency on the issue of apparent authority”, citing *Asher*); *Presta Oil v. Van Waters & Rogers Corp.*, 276 F. Supp. 2d 1128 (D. Kan. 2003) (unauthorized use under TILA is defined by incorporating the common law of agency); *First Nat'l Bank v. Fulk*, 566 N.E.2d 1270 (Ohio Ct. App. 1989) (former wife was “authorized user” under state law).

¹⁵³ Official Interpretations § 1026.12(b)(1)(ii)-4.

¹⁵⁴ Reg. Z § 1026.12(b)(1)(i). For a more detailed discussion of misuse by authorized users or whether a person is considered an authorized user, *see* National Consumer Law Center, Truth in Lending (10th ed. 2019), Sections 7.10.2.2 and 7.10.2.3 *updated at* www.nclc.org/library.

¹⁵⁵ If a consumer didn't apply for or request a credit card, the use of the card by another should meet the definition of unauthorized use. *See North Am. Capital Corp. v. O'Hara*, 2001 N.Y. Misc. Lexis 1078 (N.Y. Dist. Ct. Aug. 24, 2001 (father not liable for charges on a credit card that was sent unsolicited to him, which his son with a similar name had used without authorization). There is some ambiguity whether an identity theft victim is a “cardholder” under 15 U.S.C. § 1602(p).

under the Texas credit card abuse statute or the Texas identity theft statute if they were made after September 1, 2019.¹⁵⁶

Another challenge faced by coerced debt victims in asserting protections under TILA's unauthorized use provision is the requirement that the cardholder cannot benefit from the unauthorized use.¹⁵⁷ As a result, if the abuser purchased a good or service using the account without authorization but the victim benefited from the purchase of the good or service, the victim would not be able to assert protections under the unauthorized use provision, though she could still dispute the purchase under FCBA's billing error provision.

Once notice is given by the victim to the card issuer of the unauthorized use, the liability for unauthorized use is frozen at the amount of unauthorized use or \$50, whichever is less.¹⁵⁸ In order to impose the \$50,¹⁵⁹ the card issuer must have given notice to the victim prior to the unauthorized use of the maximum potential liability and how to notify the card issuer of loss or theft;¹⁶⁰ prove that the card was accepted by the cardholder;¹⁶¹ and prove that they provided a means to identify the cardholder or authorized user,¹⁶² such as a signature, picture, etc.¹⁶³ If the unauthorized use occurred by telephone, mail, or internet, the card issuer cannot hold the victim liable for the unauthorized use.¹⁶⁴

Unauthorized use is also considered a billing error,¹⁶⁵ so the creditor must attempt to resolve the dispute by conducting a "reasonable" investigation,¹⁶⁶ even if the consumer has not met the requirements of the billing error notice.¹⁶⁷ The resolution of the investigation is the same as that discussed above for billing errors, and billing error restrictions on adverse credit reporting also apply.¹⁶⁸

C. Raising Claims and Defenses

Even when a coerced debt victim is unable to assert the protections of the FCBA or TILA's unauthorized use provision, she may be able to raise claims and defenses she has against a merchant against the credit card issuer.¹⁶⁹ The claims or defenses must have to do with the purchase of goods or services purchased from a merchant using the credit card, so unauthorized use of the card to buy a good or a service can be raised as a claim or defense.¹⁷⁰

A credit card issuer can be subject to all claims (except tort claims)¹⁷¹ and defenses of a victim against a merchant when:

¹⁵⁶ This approach is untested since the change in the Texas identity theft law is recent.

¹⁵⁷ 15 U.S.C. § 1643; Reg. Z § 1026.12(b)(1)(i).

¹⁵⁸ Official Interpretations § 1026.12(b)(1)-2.

¹⁵⁹ For a more detailed discussion of these conditions, see National Consumer Law Center, Truth in Lending (10th ed. 2019), Section 7.10.2.4 updated at www.nclc.org/library.

¹⁶⁰ Reg. Z § 1026.12(b)(2)(ii).

¹⁶¹ Reg. Z § 1026.12(b)(2)(i). An "accepted credit card" is defined as a card that "is requested, received, signed, and used by the consumer or authorized for another to use by the consumer." 15 USC § 1602(m).

¹⁶² 15 U.S.C. § 1643(a)(1)(F); Reg. Z § 1026.12(b)(2)(iii); *Crestar Bank v. Cheevers*, 744 A.2d 1043 (D.C. Ct. App. 2000) (consumer not liable for \$50 because creditor did not prove it provided means of identification).

¹⁶³ Official Interpretations § 1026.12(b)(2)(iii)-1.

¹⁶⁴ Official Interpretations § 1026.12(b)(2)(iii)-3.

¹⁶⁵ Reg. Z § 1026.13(a)(1).

¹⁶⁶ For a more detailed description of a reasonable investigation of an unauthorized use claim, see National Consumer Law Center, Truth in Lending (10th ed. 2019), Section 7.10.2.6 updated at www.nclc.org/library.

¹⁶⁷ Official Interpretations § 1026.12(b)(3)-3.

¹⁶⁸ See Reg. Z § 1026.13(a)(1).

¹⁶⁹ 15 U.S.C. § 1666i(a).

¹⁷⁰ For a discussion on how claims of unauthorized use can be used to defeat a collection action based on an account stated claim, see National Consumer Law Center, Truth in Lending (10th ed. 2019), Section 7.10.8 updated at www.nclc.org/library.

¹⁷¹ 15 U.S.C. § 1666i(a).

1. The victim made a good faith attempt to obtain satisfactory resolution with the merchant;¹⁷² (fact question)
2. The amount of the credit transaction exceeds \$50;¹⁷³ and
3. The place where the transaction occurred was in the same state as victim's current address or within 100 miles from that address.¹⁷⁴ This is a question of state contract law, so if the credit transaction occurred over the phone or by mail, it could be considered to be made at the address where the person making the transaction (whether the abuser or the victim) resided when they made the transaction.¹⁷⁵

However, even if the amount of the transaction is less than \$50 and the transaction occurred out of state, a victim can still raise claims and defenses where:

- The card issuer and the merchant are the same;
- The card issuer controls the merchant;
- The card issuer and merchant are both controlled by the same third party;
- The merchant is a franchised dealer in the card issuer's products or services; or
- The merchant obtained the order through a mail solicitation made by or participated in by the card issuer.¹⁷⁶

A victim must withhold payment in order to invoke the right to assert claims and defenses under TILA or as a defense in a collection action by the creditor; no written dispute is needed.¹⁷⁷ There is no independent right of action under this provision,¹⁷⁸ so a victim must either wait for a credit company to sue her in order to assert these defenses or claims in court. However, that does not mean that a victim is without any other protection. The card issuer must still conduct a reasonable investigation assessment based on the information provided by both the merchant and the victim.¹⁷⁹ Also, as with billing errors, the card issuer cannot make an adverse credit report¹⁸⁰ based on consumer's withholding payment "until the dispute is settled or judgment rendered."¹⁸¹ As a result, if a card issuer doesn't conduct a reasonable investigation or makes an adverse credit report, the victim should be able to bring an action for TILA violations.

¹⁷² Reg. Z § 1026.12(c)(3)(i)(A).

¹⁷³ Reg. Z § 1026.12(c)(3)(i)(B).

¹⁷⁴ *Id.*

¹⁷⁵ Official Interpretations § 1026.12(c)(3)(ii)-1. *See, e.g.,* In re *Standard Fin. Mgmt. Corp.*, 94 B.R. 231 (Bankr. D. Mass. 1988) (telephone credit card sale of coins made in consumer's home, stating "[s]ocial policy favors finding that the transaction took place in the customer's home"); *Citibank (South Dakota) v. Mincks*, 135 S.W.3d 545 (Mo. Ct. App. 2004) (mail order transaction occurred in Missouri because Missouri courts deemed a contract to have been made where the parties performed the last act necessary to complete the contract); *Citibank South Dakota, N.A. v. Schmidt*, 744 S.W.2d 829 (S.D. 2008) (whether transaction occurred within 100 miles or in consumer's home state depends on where contract formed). *Cf.* Conn. Gen. Stat. §§ 36a-770(c)(9) (when retail installment sale deemed made in Connecticut), 42-133c (when open-end credit plan deemed made in Connecticut), 51-345(d) (venue in consumer transactions); *Turner v. Aldens*, 433 A.2d 439 (N.J. Super. Ct. App. Div. 1981) (New Jersey Retail Installment Sales Act applies to New Jersey mail orders sent to Illinois). *But see Plutchok v. European Am. Bank*, 540 N.Y.S.2d 135 (N.Y. Dist. Ct. 1989), (where a call from a New York consumer to a fraud artist in Florida was deemed to have occurred in Florida).

¹⁷⁶ Reg. Z § 1026.12(c)(3)(ii).

¹⁷⁷ 15 U.S.C. § 1666i; Reg. Z § 1026.12(c). *See Schwartz v. Comenity Capital Bank*, 2015 WL 410321, at *9 (S.D.N.Y. Feb. 2, 2015) (requirement to raise dispute in writing not found in Reg. Z, 12 C.F.R. § 1026.12(c) or § 1666i).

¹⁷⁸ *See Baker v. Capital One Bank (USA), N.A.*, 2012 WL 5930094, at *4 (S.D. Ind. Nov. 26, 2012) (an independent cause of action is not available under 15 U.S.C. § 1666i); *Beaumont v. Citibank (South Dakota) N.A.*, 2002 WL 483431 (S.D.N.Y. Mar. 28, 2002); *Baccellieri v. HDM Furniture Indus., Inc.*, 2013 WL 1088338, at *8 (Del. Super. Ct. Feb. 28, 2013) (section 1666i does not create an independent cause of action), *aff'd*, 74 A.3d 653 (Del. 2013). *See also Rigby v. FIA Card Servs.*, 2011 WL 6669052 (S.D. Ala. Nov. 21, 2011) (declaratory judgment not available to assert claim under § 1666i; citing *Beaumont*), *adopted by* 2011 WL 6703955 (S.D. Ala. Dec. 21, 2011), *rev'd on other grounds*, 490 Fed. Appx. 230 (11th Cir. 2012); *Moynihhan v. Providian Fin. Corp.*, 2003 WL 21841719 (D. Md. July 14, 2003) (following *Beaumont*).

¹⁷⁹ Official Interpretations § 1026.12(c)(2)-2.

¹⁸⁰ An adverse credit report can include reporting the account is delinquent, in collections, or charged off. However, the account can be reported as "disputed." Official Interpretations § 1026.12(c)(2)-1.

¹⁸¹ Reg. Z § 1026.12(c)(2).

D. Legal Remedies for Failure to Comply with TILA

A creditor's failure to comply with any of the provisions described above subjects them to civil liability including actual damages, statutory damages, attorney's fees, and court costs.¹⁸² A lawsuit based on violation of these TILA provisions must be brought within one year from the date of the violation,¹⁸³ but a victim can assert a violation of these provisions in an action to collect the debt as a matter of defense by recoupment or set-off¹⁸⁴ even if the debt collection suit is over a year after the violation happened. Additionally, under Texas law, if the victim is sued by the credit card issuer in a debt collection action, the a victim may file a counterclaim for these TILA violations even if they are outside of the one-year statute of limitations so long as it is filed within thirty days of the answer due date.¹⁸⁵

1. Case study: Dillard Dept. Stores, Inc. v. Owens¹⁸⁶

This case involves the unauthorized use of a credit card account by a spouse.

In 1970, Owens opened a credit account with Dillard; twenty years later, he married.¹⁸⁷ A month after the marriage, he and his wife separated, and he filed for divorce.¹⁸⁸ While the divorce was pending, his wife obtained a temporary charge card on the account and purchased about \$5,000 worth of goods.¹⁸⁹ When Owens got his statement a month after the purchases were made, he sent a dispute letter to Dillard alleging the charges were unauthorized.¹⁹⁰ Dillard acknowledged the dispute; asked Owens to go into its store, examine receipts, and sign an affidavit that the purchases were fraudulently made; contacted his wife who said the purchases had been authorized; and then sent a letter to Owens denying the fraud claims.¹⁹¹

Dillard sued Richard Owens to collect a debt owed on the credit account under theories of breach of contract, quantum meruit, implied contract, unjust enrichment, and community debt. Owens counterclaimed for a declaratory judgment and raised claims and defenses under TILA's Section 1666i.¹⁹²

The jury found that, "while Owens complied with [Section 1666i](#) by making a good faith attempt to obtain a satisfactory resolution of the billing error, Dillard did not comply with the requirement of [Section 1666\(a\)\(B\)\(ii\)](#) concerning a written explanation or clarification setting forth the reasons the account was correctly shown."¹⁹³

Dillard did send a letter responding to Owens' dispute, but the court found it to be insufficient.¹⁹⁴ Here is the language of the letter:

"We are in receipt of a fraud affidavit in [sic] which you completed. However, after research and investigation, we find that you and Dianna McKay Owens were legally married at the time the purchases in question were made. For this reason, we are unable to process your request as fraud. We feel this should be handled as a civil matter."¹⁹⁵

¹⁸² 15 U.S.C. § 1640(a).

¹⁸³ 15 U.S.C. § 1640(e).

¹⁸⁴ *Id.*

¹⁸⁵ Tex. Civ. P. Rem. Code § 16.069.

¹⁸⁶ *Dillard Dept. Stores, Inc. v. Owens*, 951 S.W.2d 915 (Tex. App. ---Corpus Christi 1997, no writ).

¹⁸⁷ *Id.* at 915.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 916.

¹⁹³ *Id.* at 917-918.

¹⁹⁴ *Id.* at 918.

¹⁹⁵ *Id.*

However, the court stated that, “although Dillard did mention Owens' marriage to Davis as an impediment to “processing” his fraud claim, this ambiguous and conclusory statement offers no justification as to the basis on which Dillard asserted that Owens remained liable for such purchases.”¹⁹⁶

While Dillard did not plead a counterclaim based on a TILA violation (and thus did not obtain actual or statutory damages), the court concluded that the trial court did have authority to award attorney’s fees to Owens under TILA for the successful defense of Dillard’s claim.¹⁹⁷ More specifically, “had Dillard attempted to comply with TILA by stating its full theory of liability in a proper written explanation to Owens, it is likely that the futility of its attempt to enforce the debt against him would have become obvious at that time, and both parties could have avoided the time and expense of the present proceedings.”

Attorneys should keep this case in mind when assisting victims of coerced debt with credit card debt involving unauthorized use. In this case, counsel for Owens did not assert TILA violations as a counterclaim when he could have, but rather raised claims and defenses under 1666i. The court’s discussion of TILA, Congressional intent, and the Fifth Circuit’s analysis of attorney’s fees under TILA is worth digesting.

VI. Using Debt Collection Statutes to Assist Victims of Coerced Debt

A. Fair Debt Collection Practices Act (FDCPA)

The Fair Debt Collection Practices Act¹⁹⁸ (FDCPA) was enacted to curb abusive practices in the collection of consumer debts. It provides consumers with a means to verify information concerning a debt and to dispute that debt. These protections are extremely important to coerced debt victims since often they have very little or no information regarding the coerced debt. Many victims of coerced debt first learn about an account when contacted by a debt collector by the phone or through a collection letter, and in some cases, when sued by a debt collector.

Although many other consumer law trainings have focused on the FDCPA, an important protection that is vital to assisting victims of coerced debt is the requirement that a debt collector respond to a verification request and refrain from further collection of a disputed debt until the dispute is verified.¹⁹⁹ Obtaining more information about the account is crucial in determining what possible recourse a victim of coerced debt has. Since one component of economic abuse is the hiding of important financial information, coerced debt victims do not always know about the nature or amount of debt their abusers took out in their names.

The challenge with this provision, however, is that the request must be made thirty days from when the consumer (in this case the victim) received notice of the verification rights.²⁰⁰ Especially in the context of domestic violence and identity theft, the consumer may not receive the validation notice within the limited time period given to dispute a debt. Nevertheless, it is vital that a victim dispute the debt and notify the collector that they believe it is a debt resulting from identity theft. If the victim already knew about the debt and filed a police report, this should be included with the dispute letter. Debt collectors often continue to collect debt after it is disputed, or even continue to

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 919.

¹⁹⁸ 15 U.S.C. §§ 1692–1692p

¹⁹⁹ 15 U.S.C. § 1692g(b).

²⁰⁰ 15 U.S.C. § 1692g(a)(3). See *Henhaffer v. Simeone & Raynor, L.L.C.*, 2016 WL 6305939 (D.N.J. Oct. 27, 2016); *Diaz v. Residential Credit Solutions, Inc.*, 965 F. Supp. 2d 249 (E.D.N.Y. 2013); *In re Turner*, 2010 WL 3211030 (M.D. Ala. Aug. 13, 2010); *Rivera v. Amalgamated Debt Collection Services, Inc.*, 462 F. Supp. 2d 1223 (S.D. Fla. 2006); *Cavallaro v. Law Offices of Shapiro & Kriesman*, 933 F. Supp. 1148 (E.D.N.Y. 1996). See also *Jacobson v. Healthcare Fin. Serv., Inc.*, 516 F.3d 85, 90–92 (2d Cir. 2008) (notice’s clear statement that thirty days started from receipt of notice was obscured by request for notice within thirty days); *Monokrousos v. Computer Credit, Inc.*, 984 F. Supp. 233 (S.D.N.Y. 1997) (collector’s second letter shortened thirty-day time); *In re Hathcock*, 437 B.R. 696 (Bankr. M.D. Fla. 2010); *Spears v. Brennan*, 745 N.E.2d 862 (Ind. Ct. App. 2001) (omitted thirty days was calculated from receipt).

report the debt to the CRAs without noting that it is in dispute. This can lead to an FDCPA violation.²⁰¹ Because debt collectors often make misrepresentations about actions it can take even when a victim has advised them that they are victims of identity theft, it is important for victims of coerced debt to keep a log of all calls, names of creditors, copies of any letters or written communications, and if possible, save recordings of any messages from the debt collectors.

Another important protection provided by the FDCPA for victims of coerced debt is the requirement that the debt collector stop contacting the victim if she makes a request in writing to cease communication.²⁰² Because coerced debt is often only one component of the many forms of abuse a victim suffered, the debt collection process can retraumatize victims of domestic violence, sexual assault, and human trafficking. Consider this account from an advocate who routinely works with survivors facing debts related to their abuse:

I have had clients who have been abused over and over by financial institutions and by their partners, creating financial situations that become nearly impossible to get out of. A client of mine was an immigrant from India. Her abusive ex-husband brought her to the U.S. and kept her locked in their house for two years. She wasn't able to leave; she wasn't able to have a bank account or any financial access. She was only able to leave her husband when he abused her to the point that she had to go to the hospital because his abuse resulted in her miscarrying their child. After this, she racked up numerous medical debts and also *found out that her husband had opened six credit card accounts in her name*. She has been contacted by collection agencies over and over. Through her incredibly hard work, she was able to pay most of the debts off (debts that shouldn't belong to her) on her own, but still it plagues her. Recently, we set up a payment arrangement with a collections company who had been harassing her, and after we got off the phone with them, she sat next to me and cried. When she was able to speak, she told me that it was like he was abusing her all over again. *Every time she had to be reminded of this debt and every time she used her money to pay it off, she was reminded of the abuse she suffered at his hands.*²⁰³

Attorneys play a vital role in advising a victim of coerced debt of her rights under the FDCPA, assisting her with disputing a debt, requesting more information (verification) about coerced debts, and requesting that debt collectors refrain from contacting victims. Additionally, when debt collectors fail to comply with these protections, attorneys can help victims file suits and obtain monetary relief.

B. Texas Fair Debt Collection Practices Act (TDCA)

Since the FDCPA does not apply to original creditors, attorneys can utilize the TDCA²⁰⁴ to protect victims of coerced debt from unlawful and harassing collection. For example, a creditor and/or debt collector cannot falsely accuse a person of fraud (like lying that they are an identity theft victim),²⁰⁵ or using any false representation or deceptive means to collect a debt.²⁰⁶ As noted above, creditors and debt collectors often make misrepresentations about actions it can take even when a victim has advised them that they are victims of identity theft. It is likely that if one violation of the TDCA has occurred, there may other violations. Attorneys assisting coerced debt victims should advise them of their rights under the TDCA and advise the victim to keep a log of all calls, names of creditors and/or debt collectors, copies of any letters or written communications, and if possible, save recordings of any messages from creditors and/or debt collectors.

²⁰¹ 15 U.S.C. § 1692f (any unfair practice); 15 U.S.C. § 1692e(5) (threatening to take any action that cannot be legally taken); 15 U.S.C. § 1692e(8) (communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed).

²⁰² 15 U.S.C. § 1692c(c).

²⁰³ Center for Survivor Agency and Justice, Texas RioGrande Legal Aid, Inc., and undersigned comments on proposed rulemaking on debt collection practices (Regulation F) submitted to the CFPB, September 18, 2019.

²⁰⁴ Texas Finance Code Chapter 392.

²⁰⁵ Tex. Fin. Code § 392.301(a)(2).

²⁰⁶ Tex. Fin. Code § 392.304(a)(19).

VII. Using Counterclaims to Help Victims of Coerced Debt in Defending Debt Collection Lawsuits

A victim of coerced debt has a powerful tool at her disposal—the ability to assert counterclaims for the violation of her consumer rights as described in all the sections above, especially when these bringing these affirmative claims would be outside of the statute of limitations.²⁰⁷ Victims of coerced debt may have additional affirmative claims based on other consumer protection statutes if the coerced debt is an auto loan,²⁰⁸ a mortgage loan,²⁰⁹ or other unsecured loan.²¹⁰ Additionally, if the coerced debt consists of a loan that was tied to some kind of good or service, (not just the extension of credit, but associated with a purchase of the good or service), it is possible a coerced debt victim could assert DTPA violations if any occurred.²¹¹

Counterclaims that would otherwise be outside of the applicable statute of limitations must be filed within thirty days of the answer due date.²¹² For this reason, it is key that an attorney representing a victim of coerced debt conduct a thorough interview and investigation of all the facts and circumstances surrounding the coerced debt as soon as they are aware of a debt collection lawsuit. The Texas Coalition on Coerced Debt offers a coerced debt toolkit with helpful resources and information that can be accessed at: <http://financialabusehelp.org>. It includes a coerced debt screening tool, guidance on identifying and disputing coerced debts, and helpful forms. The Center for Survivor Agency and Justice, in conjunction with the National Consumer Law Center, provides a screening tool for consumer lawyers to use to identify domestic violence and economic abuse more generally.²¹³

In addition to asserting counterclaims under the FCRA and TILA, attorneys should consider whether the debt collector violated either the FDCPA or TDCA by filing the suit in the wrong venue,²¹⁴ by filing a suit on time-barred debt,²¹⁵ or by failing to be bonded as a debt collector.²¹⁶ Attorneys can also examine whether the debt collector or creditor violated the Telephone Consumer Protection Act²¹⁷ in seeking to collect payment for a coerced debt. Finally, attorneys should consider the availability of tort claims against a debt collector or creditor such as negligence, defamation, malicious prosecution or the like.²¹⁸

Regardless of the ability to assert other counterclaims, a coerced debt victim should almost always assert a counterclaim under the Uniform Declaratory Judgments Act²¹⁹ (UDJA). The UDJA allows a victim of coerced debt to request that the court “settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations between the parties,”²²⁰ including the determination of legal rights as to a contract.²²¹ Debt collectors often dismiss a debt collection suit without prejudice after a victim of coerced debt raises any defense (like

²⁰⁷ Tex. Civ. P. Rem. Code §16.069.

²⁰⁸ A victim of coerced auto loan debt could have claims under Texas Business and Commerce Code Chapter 9 for unlawful repossessions, claims against an assignee under the FTC holder rule for DTPA or TILA violations that are apparent on the face of the document, or other potential auto fraud claims such as violations of the Magnuson-Moss Warranty Act.

²⁰⁹ Some possible claims on mortgage loans include violations of RESPA, TILA, or debt collection/property code violations for wrongful foreclosure.

²¹⁰ Other types of unsecured loans could be payday loans, loans to purchase furniture, loans for medical procedures, and/or educational loans. All these loans can be subject to TILA and other consumer protection statutes such as the DTPA.

²¹¹ See Chapter 17 of the Texas Business and Commerce Code.

²¹² Tex. Civ. P. Rem. Code §16.069.

²¹³ The tool is available at https://csaj.org/document-library/CRDVSI_Screening_Tool.pdf

²¹⁴ 15 U.S.C. § 1692(i)(a).

²¹⁵ A time-barred suit on debt the collector knew or should have known was barred by the statute of limitations, constitutes a false representation regarding the character or legal status of the debt and a false representation or deceptive means to collect a debt in violation of 15 U.S.C. § 1692(e)(2)(A).

²¹⁶ Tex. Fin. Code §392.101.

²¹⁷ 47 U.S.C. § 227.

²¹⁸ For a more detailed discussion of tort claims in the context of debt collection, see NCLC National Consumer Law Center, *Fair Debt Collection* (9th ed. 2018), Section 15.1.5 updated at www.nclc.org/library.

²¹⁹ Tex. Civ. P. Rem. Code Ch. 37.

²²⁰ Tex. Civ. Prac. & Rem. Code §37.002(b).

²²¹ Tex. Civ. Prac. & Rem. Code §37.004(a).

identity theft). Asserting this counterclaim prevents a debt collector from depriving a victim of coerced debt with an adjudication of the merits of a debt collection claim.

VIII. Conclusion

Coerced debt impacts many survivors of domestic violence. It can also impact victims of elder financial abuse and persons with disabilities who rely on a caretaker for day-to-day needs. The protections and defenses outlined in this paper offer important tools to help victims of coerced debt.

As a result of the COVID-19 pandemic, both financial hardship and domestic abuse are on the rise. This concerning trend raises the likelihood of victims becoming saddled with coerced debts and creates a growing need for attorneys to help victims access the available legal tools to rebuild their financial lives.