TAXPAYER COLLECTION RIGHTS AS A DEFENSE TO PRIVATE DEBT COLLECTION

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I. INTRODUCTION

Americans are keenly aware of their Constitutional rights and civil liberties. This awareness exists primarily because of the relative clarity of the Constitution,[1] the conciseness of the Constitution and its amendments, and the publicity of individuals exercising their rights. Many of our rights are contained within the Bill of Rights. Recently, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[2] the U.S. Supreme Court opined on the interaction of the Establishment Clause and the Free Exercise Clause of the First Amendment. This dispute occurred only because U.S. citizens were aware of their rights and chose to act on them.

While Americans are generally aware of their Constitutional rights, they are increasingly unaware of their rights arising under the tax laws. This is true because of the complexity of the statutory language, the substantial size of the Internal Revenue Code ("Code"), and the limited publicity of tax disputes. In 2015, Congress pledged to give taxpayers rights by codifying the Taxpayer Bill of Rights.[3] While this statute did not create actionable rights,

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[1] It is well documented that there are many different interpretations of the text of the U.S. Constitution. However, U.S. citizens can read the Constitution and the amendments thereto, and understand Congress cannot improperly limit free speech, the exercise of religion, the right to bear arms, and many other rights.

[2] *Trinity Lutheran Church of Columbia, Inc., v. Comer,* 137 S. Ct. 2012, 2019-25 (2017).

[3] Taxpayers Bill of Rights, Pub. L. No. 114-113, § 401, 129 Stat. 2242, 3117 (2015); I.R.C. § 7803(a)(3) (2015). The Taxpayer Bill of Rights provides the following rights: (1) the right to be informed, (2) the right to quality service, (3) the right to pay no more than the correct amount of tax, (4) the right to challenge the position of the Internal Revenue Service and be heard, (5) the right to appeal a decision of the Internal Revenue Service in an independent forum, (6) the right to finality, (7) the right to privacy, (8) the right to confidentiality, (9) the right to

it did provide a basis for assuring that taxpayers were treated fairly and honestly in connection with the determination and collection of taxes. However, Congress can only fulfill its pledge by providing taxpayers with actionable rights and ensuring they are aware of such rights.

On December 4, 2015, Congress passed the Fixing America's Surface Transportation ("FAST") Act.[4] The FAST Act was passed primarily to authorize federal funds for use in resurfacing, constructing, and rehabilitating America's transportation infrastructure.[5] Despite this purpose, Congress inserted several unrelated, but important, tax collection provisions into the bill. Specifically, the FAST Act made substantial changes to section 6306 of the Code,[6] which controls the Department of Treasury's use of qualified collection contracts.[7]

Section 6306 was first added to the Code in 2004 with the passage of the American Jobs Creation Act.[8] The initial framework of section 6306 gave Treasury the explicit authority to use private collection agencies ("PCAs") to collect outstanding federal tax debts.[9] Prior to the creation of section 6306 the IRS had implied authority to contract with PCAs.[10] Consequently, the addition of section 6306 merely clarified Treasury's existing authority to outsource its collection function.[11]

Congress's clarification of Treasury's implied authority limited the services that could be contracted to PCAs. Treasury was only permitted to use qualified collection contracts to (1) locate and contact the taxpayer, (2) request full payment from the taxpayer, (3) attempt to obtain an installment agreement from the taxpayer to pay the debt within five years (if full payment could not be obtained), and (4) obtain the taxpayer's financial information as

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retain representation, and (10) the right to a fair and just tax system. I.R.C. § 7803(a)(3).

[4] Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312.

[5] *Id.*

[6] Fixing America's Surface Transportation Act, § 32102.

[7] The term "qualified collection contract" is the defined by the Code as the type of contract that the Treasury Department may use to outsource its collection function to private debt collectors. I.R.C. § 6306(b) (2015).

[8] American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 881, 118 Stat. 1418, 1625 (2004).

[9] *Id.*

[10] T.D. 9778, 2016-31 I.R.B. 197 (stating that section 6301, 6331, and 6335 had previously provided statutory authority for the IRS to use private agents to collect taxes prior to the enactment of section 6306).

[11] *Id.* When section 6306 was passed, subsection (a) stated, "Nothing in any provision of law shall be construed to prevent the Secretary from entering into a qualified tax collection contract." Instead of granting new authority, the language of this subsection clarified the IRS' existing authority to contract with PCAs and prevented any legal analysis which would limit such authority.

specified by the Secretary of the Treasury ("Secretary").[12] Treasury's ability to outsource installment agreements was further constrained by the PCA's lack of authority to independently verify a taxpayer's eligibility for an installment agreement.[13]

Nonetheless, the Secretary retained unfettered discretion to implement or terminate the private debt collection program.[14] In 2006, the Internal Revenue Service ("IRS") began using private collection agencies to collect taxpayer debts.[15] However, the program proved unsuccessful and was ultimately terminated in 2009.[16]

In 2015, the FAST Act amended section 6306 by requiring the IRS to enter into at least one qualified tax collection contract with a PCA.[17] Congress inserted the term "shall," thereby removing Treasury's discretion to implement the private debt collection program. Accordingly, Treasury and the IRS were tasked with the implementation of the law regardless of any assent or dissent from the Secretary or the IRS Commissioner. The IRS selected several PCAs to implement the requirements of section 6306.[18] The

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[12] I.R.C. § 6306(b)(1) (2015). The FAST Act was silent as to services which PCAs can perform under qualified collection contracts. As a result, PCAs are still limited by this subsection as to the services which they can contractually execute on behalf of the IRS.

[13] I.R.S. Announcement 2006-63, 2006-2 C.B. 445 2006 WL 2423308. Taxpayers are not eligible for installment agreements unless they are tax compliant. Tax compliance requires the filing of all required tax returns and deposit of required estimated tax payments. If a taxpayer requested an installment agreement PCAs were required to ask the IRS to verify whether the taxpayer was tax compliant, since PCAs were not given unfettered access to a taxpayer's account transcripts.

[14] When section 6306 was added to the Code there was no requirement that it be implemented. Rather, this section created explicit authority allowing the Department of Treasury to utilize public actors to accumulate tax revenues. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 32102, 129 Stat. 1312, 1733-36 (2015).

[15] *Id.*

[16] I.R.S. News Release IR-2009-19. (Mar. 5, 2009). On March 5, 2009, the IRS Commissioner decided not to renew the qualified collection contracts it had with two PCAs. Interestingly, the IRS felt the collection of tax debts was best performed by IRS employees. The IRS cited the need for flexibility in evaluating cases in which taxpayers were experiencing economic hardship. This will likely prove to be an issue for PCAs in 2017, since their authority to make certain determinations is still limited.

[17] I.R.C. § 6306(c)(1) (2015); Fixing America's Surface Transportation Act, § 32102.

[18] *Private Debt Collection,* I.R.S. https://www.irs.gov/businesses/small-businesses-self-employed/private-debt-collection [https://perma.cc/WQ9A-7ZNG] (last visited May 1, 2017).

PCAs are currently ConServe, Pioneer,[19] Performant, and the CBE Group.[20] The IRS recently informed the public that these PCAs will begin collecting federal tax debts in Spring 2017.[21]

In light of these developing collection efforts, it is important to understand collection rights that taxpayers can use as a defense against PCA collection actions. First, this article will provide a baseline explanation of changes that the FAST Act made to section 6306. The article will then describe the collection rights that taxpayers can deploy to protect themselves from PCA collection activities. The article will conclude by exploring the remedies available to taxpayers whose rights have been violated and propose Congressional amendments to these remedies to ensure Congress fulfills its pledge to provide taxpayers with actionable rights.

II. CHANGES TO I.R.C. SECTION 6306

The FAST Act made several changes to section 6306. Subsections (c), (d), and (i) were added to section 6306 and subsection (e) was amended.[22] This part will examine subsections (c), (d), and (i) due to their significant impact on taxpayer receivables, while subsection (e) will be briefly discussed due to its impact on the use of revenues generated by the PCA collection activities. This part serves not only to clarify present taxpayer collection law, but also identify certain statutory language that curtails taxpayer rights.

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[19] The IRS's use of Pioneer as a PCA is particularly troubling. The Department of Education ("DOE") recently utilized Pioneer to collect federal student loan debts. In 2015, the DOE executed a review of 22 private collection agencies to determine if they were abiding by the terms of the collection contracts. The DOE collection contracts prohibited private debt collectors from engaging in unfair or deceptive collection practices and required compliance with applicable federal and state laws, to include the FDCPA. The DOE's review determined that Pioneer had provided borrowers with inaccurate and misleading information concerning their credit reports and various fees. The report further explained that Pioneer's inaccurate communications occurred at an "unacceptably high rate." Consequently, the DOE did not renew Pioneer's contract. *U.S. Department of Education to End Contracts with Several Private Collection Agencies,* DEP'T OF EDUC. (Feb. 27, 2015), https://www.ed.gov/news/press-releases/us-department-education-end-contracts-several-private-collection-agencies [https://perma.cc/NR8D-GP9N].

[20] Private Debt Collection, *supra* note 20.

[21] *Id.*

[22] Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 32102, 129 Stat. 1312, 1733-36 (2015). The FAST Act also added subsections (h) and (j) to section 6306, however, this article will not address these additions to the Code because they deal primarily with contracting and Congressional reporting, respectively.

A. *Collection of Inactive Tax Receivables*

The addition of subsection (c) changed the impact of section 6306 and defined the scope of tax debts subject to collection. Subsection (c), entitled "Collection of Inactive Tax Receivables," is composed of two subparagraphs.[23] The first subparagraph imposes a strict requirement that the Secretary "shall" enter into one or more qualified tax contracts to collect "all" outstanding inactive tax receivables.[24] Two important points of law must be drawn from this subparagraph.

1. *All Inactive Tax Receivables Must Be Collected*

First, the IRS must utilize PCAs.[25] While the public may want to vilify the IRS and the media may attack the IRS as the creator of this private debt collection regime, it is Congress who is fully responsible for this program. As usual, the IRS is the messenger of bad news and will likely be the recipient of angst upon delivery.

Second, the IRS must collect "all" outstanding inactive tax receivables.[26] At first glance, the term "all" does not jump off the page or strike concern in the hearts of taxpayers. However, the term "all" is quite significant because it effectively prevents an end to this debt collection program. One may first wish to define what "inactive tax receivables" are, which is a very important question and will be addressed shortly. However, prior to such an inquiry it should be noted that tax liabilities accrue annually.[27] As liabilities accrue, taxpayers will inevitably fail to pay their liabilities creating a tax receivable. Because the statute requires collection of

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[23] I.R.C. § 6306(c) (2015).
[24] I.R.C. § 6306(c)(1) (2015).
[25] People v. O'Rourke, 13 P.2d 989, 992 (Cal. Dist. Ct. App. 1932) ("In common, or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears . . .").
[26] I.R.C. § 6306(c)(1) (2015).
[27] I.R.C. § 6072(a) (2015). Individual returns required under section 6012, 6013, or 6017 must be filed by the 15th day of the fourth month following the end of the taxable year. Generally, individual taxpayers file their returns on a calendar basis causing the due date to fall on April 15th. Tax returns filed voluntarily are self-assessments. If taxpayers are deficient in paying the full amount of their assessment a tax receivable will immediately accrue.

all inactive tax receivables and Congress appears commissioned to regularly penalize the IRS by imposing budgetary sanctions,[28] leaving no staff to collect receivables, it is extremely likely that there will always be inactive tax receivables on the IRS balance sheet. Therefore, without an act of Congress repealing or amending subsection (c)(1), the use of PCAs will be required and will continue indefinitely.

2. *Inactive Tax Receivables*

The second paragraph of subsection (c) defines "inactive tax receivable,"[29] establishing the scope of the debt that the IRS must outsource to the PCAs.[30] An inactive tax receivable is defined as a tax receivable that (1) has been assessed and subsequently removed from active inventory due to a lack of resources or an inability to locate the taxpayer,[31] (2) more than one-third of the applicable statute of limitations[32] has lapsed and such receivable has not been assigned for collection,[33] or (3) has been assigned for collection and more than 365 days have passed without interaction with the taxpayer or a third party for purposes of collecting the receivable.[34] Any one of these three scenarios will cause a tax receivable to become inactive and subject to referral to a PCA.

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[28] The IRS budget has been reduced almost every year since 2010. In 2010, Congress appropriated approximately $14 billion to fund IRS operations. By 2013, the IRS budget had been decreased to $12 billion. In 2017, the continuing resolution provided the IRS with $11.5 billon, and Trump's budget for 2018 proposes to decrease agency funding to $11 billion. Brandon Debot, Emily Horton, and Chuck Marr, *Trump Budget Continues Multi-Year Assault on IRS Funding Despite Mnuchin's Call for More Resources* (March 16, 2017), http://www.cbpp.org/research/federal-budget/trump-budget-continues-multi-year-assault-on-irs-funding-despite-mnuchins [https://perma.cc/N8U6-D3UT] (the Center on Budget and Policy Priorities study was based on data from the Congressional Budget Office, Office of Management and Budget, and the Bureau of Labor Statistics).

[29] I.R.C. § 6306(c)(2)(A) (2015).

[30] It should be noted that I.R.C. § 6306(c)(2)(B) defines "tax receivable" as any outstanding assessment which the IRS includes in potentially collectible inventory. As a result, the tax debts at issue have been (1) self-assessed by taxpayers by voluntarily filing returns, (2) summarily assessed pursuant to a specific statutory grant, or (3) assessed after deficiency procedures have been exhausted (i.e., taxpayers have defaulted on a notice of deficiency, resolved the matter administratively, or received a judicial determination).

[31] I.R.C. § 6306(c)(2)(A)(i) (2015).

[32] I.R.C. § 6502(a)(1) (2012) (generally, a collection of an assessment of tax by levy or a proceeding in court can be properly made within 10 years after the assessment of tax).

[33] I.R.C. § 6306(c)(2)(A)(ii) (2015).

[34] I.R.C. § 6306(c)(2)(A)(iii) (2015).

3. *Tiers of Delinquency*

The three bases outlined above for classifying a tax receivable as inactive can be grouped into three different tiers of delinquency. The first tier is for tax receivables that have been assessed, but the assessment is removed from active inventory because the IRS does not have the resources to work the collection of the receivable or cannot locate the taxpayer. This tier can occur fairly quickly within a debt's lifecycle.

Once a tax debt is assessed, the IRS will send a series of demands for payment over a six-month timeframe.[35] This six-month timeframe is referred to as "notice status."[36] If the taxpayer cannot be reached or the debt is not resolved during notice status, the debt becomes delinquent and enters Taxpayer Delinquent Account ("TDA") status.[37] Debts in TDA status will be collected by the Automated Collection System,[38] assigned to a revenue officer, await assignment to a revenue officer, or be shelved.[39] Shelved cases are not actively worked.[40] The shelved cases and other cases classified as Currently Not Collectible ("CNC") are likely the cases referred to in section 6306(c)(2)(A)(i) as assessments which have been removed from active inventory. However, some of these cases have been excluded from contracting. The IRS has informed the Taxpayer Advocate that cases classified as CNC because of hardship status[41] will not be considered a tax

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[35] 2015 ANNUAL REPORT TO CONGRESS TAS RESEARCH AND RELATED STUDIES IRS COLLECTABILITY CURVE, TAXPAYER ADVOCATE SERVICE, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume2_2-CollectibilityCurve.pdf. (last visited Nov. 15, 2017).

[36] *Id.*

[37] *Id.*

[38] IRM § 5.19.5.2. The Automated Collection System ("ACS") is a computerized collection system which contains a database of balance due accounts and return delinquency investigations. ACS utilizes mail and telephone contact with taxpayers to solicit payments, obtain information about assets subject to levy, file liens, and serve levies. Telephone contact is made using a predictive dialer system. The predictive dialer system conducts staffed and unstaffed campaigns. When ACS deploys a staffed campaign the automated call will connect the taxpayer with an IRS employee. If ACS executes an unstaffed campaign the taxpayer will be directed to call the IRS back. IRM § 5.19.5.3.9.2.

[39] Taxpayer Advocate Service, *supra* note 37. Shelved cases generally describe Currently Not Collectible accounts which are too small in amount to validate use of resources for collection.

[40] *Id.*

[41] IRM § 1.2.14.1.14. Hardship status will arise when a taxpayer has some assets or income that the IRS could levy upon, but such a levy would prevent the taxpayer from meeting her necessary living expenses. Hardships should be distinguished from inconveniences, as the latter would not prevent assignment to a PCA. IRM § 1.2.14.1.14.

receivable[42] and therefore will not be contracted out to PCAs.[43] The remaining CNC cases and other inactive inventory will be ripe for contracting and must be sent to PCAs for collection action. Debts within this first tier of delinquency could become inactive tax receivables within six months of assessment.

The second tier of delinquency is for debts that have been assigned for collection but collection representatives or revenue officers have not successfully interacted with the taxpayer or a third party in connection with the taxpayer, over the course of one year.[44] These cases would have previously been through the six-month notice status. Tax receivables in this tier could become inactive within eighteen months of assessment.

The third tier of delinquency is for debts that have been outstanding for more than one-third of the applicable statute of limitations period and have yet to be assigned to an IRS collection representative or revenue officer. The applicable statute of limitations will be the collection statute of limitations, which is generally ten years.[45] One-third of this statute of limitations is forty months (three and one-third years). These debts would not have been removed from inactive inventory (otherwise they would be deemed inactive by means of tier one) but rather would have been awaiting assignment to an IRS employee for collection. As a result, these debts would have been through notice status and then would have been awaiting assignment. However, because the statute refers to the collection statute period as the determining factor, the six-month period would be added to the period awaiting assignment. Therefore, the debt would need to be sitting in TDA status for only thirty-four months to become inactive. Debts in the third tier could become inactive within forty months of assessment.

B. Tax Receivables Excluded from Qualified Collection Contracts

The FAST Act added section 6306(d) to the Code to limit the types of tax receivables that could be contracted to PCAs. Tax receivables are defined as any outstanding assessments that the IRS deems potentially

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[42] I.R.C. § 6306(c)(2)(B) (2015).
[43] The IRS Plan for Implementing the Private Debt Collection Program Includes Practices That Will Harm Taxpayers and Tax Administration, TAXPAYER ADVOCATE SERVICE, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-JRC/Area_of_Focus_2.pdf. (last visited Nov. 15, 2017).
[44] I.R.C. § 6306(c)(2)(A)(iii) (2015).
[45] I.R.C. § 6502(a)(1) (2012) (there are several exceptions to the general ten-year statute of limitations, including the suspension of the statute during the period in which a taxpayer's case is pending before a tribunal for adjudication of the collection of the tax or determination of the liability).

collectible.[46] The all-inclusive nature of this definition creates the potential for most outstanding assessments in TDA status to become inactive and subject to referral to the PCAs regardless of their administrative classification. To prevent such an impact, Congress added subsection (d).

Subsection (d) excludes tax receivables from qualified collection contracts that are (1) subject to a pending offer-in-compromise[47] or installment agreement,[48] (2) classified as an innocent spouse case,[49] (3) characterized as receivables related to a (a) decedent, (b) person under the age of 18, (c) taxpayer in a designated combat zone, or (d) victim of tax-related identity theft, (4) currently under examination, litigation, criminal investigation, or levy, or (5) subject to a right of appeal under the Code.[50] The subsection (d) exclusions can be grouped into two categories: active tax receivables and special circumstances.

1. Active Receivables

The receivables described in subsections (d)(1), (2), (4), and (5) should be classified as active receivables. Pending offers-in-compromise and installment agreements, innocent spouse cases, cases currently under examination, litigation, criminal investigation or levy, and receivables currently on appeal are all being actively worked by IRS employees.[51] While these active receivables could technically fall into inactive status for purposes of section 6306(c),[52] in reality the Service is actively engaged in determining

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[46] I.R.C. § 6306(c)(2)(B) (2015).
[47] I.R.C. § 7122(a) (2014). Section 7122 provides a basis for the IRS to compromise a liability. However, an offer-in compromise cannot be pending for the purposes of this exclusion unless the taxpayer has submitted a written offer, presumably on Form 656. Treas. Reg. § 301.7122-1(d) (2002); Huntress v. Commissioner, T.C.M. 2009-161 (CCH) (an offer must be submitted to be considered); O'Neil v. Commissioner, T.C.M. 2009-183 (taxpayer and Appeals officer had conversations about an offer-in-compromise, but the taxpayer's failure to submit a written offer prevented the Appeals officer from considering the offer).
[48] I.R.C. § 6159. (2012).
[49] I.R.C. § 6015 (2012).
[50] I.R.C. § 6306(d) (2015).
[51] *See, e.g.*, IRM § 5.8.8.1 (Oct. 20, 2016) (IRS employees must analyze the facts, circumstances and financial situation when considering an offer-in-compromise); IRM § 9.5.1.2.1 (July 2, 2014) (criminal investigations require the accumulation of facts and evidence to determine if the person has committed a criminal violation).
[52] For example, innocent spouse cases are not classified as collection cases in the I.R.S. IRM, but rather as "special topics" in part twenty-five. IRM § 25 (Sept. 5, 2017). As a result, it is possible for such a tax debt to have been self-assessed on a married filing jointly return more than forty months prior to the filing of a request for innocent spouse relief and for such debt to have never been assigned to a collection employee. Such a scenario would cause a debt to be deemed an inactive

the existence of a taxpayer's liability, the amount of the liability, and/or the payment of the liability. Administratively, the IRS would have no interest in farming out these receivables because it is currently involved in the resolution of the liability. Further, the functions that the IRS could perform on these active receivables greatly outnumber the statutorily authorized duties that PCAs could execute on behalf of the IRS.[53] Thus, section 6306(d) properly excludes these active receivables from qualified collection contracts to achieve collection efficiencies.

2. *Special Circumstances*

The situations described in subsection (d)(3) should be classified as special circumstances. This subsection excludes taxpayer receivables that involve a taxpayer who is (a) deceased, (b) under the age of 18, (c) in a designated combat zone, or (d) a victim of tax-related identity theft.[54] Each of these circumstances presents a special set of issues that could require further investigation by the IRS. Accordingly, these receivables are excluded from qualified collection contracts in part due to the special training that IRS employees have to determine the amount or collectability of the tax receivable.[55] Several examples of the complexities will illuminate the need for these receivables to be excluded from qualified collection contracts.

Collecting taxes from a decedent are particularly cumbersome. The IRS often has to determine whether the liability is joint and several, and then must inquire as to whether there is a surviving spouse.[56] If the liability was not joint and several or there was no surviving spouse, then the IRS will need to consider filing a proof of claim in a probate proceeding.[57] The IRS collection employee would need to engage in research to determine whether the probate estate is open, whether the estate contains assets, and the cost of collecting assets from the estate.[58] IRS employees are highly qualified to perform the decedent estate analysis due to their training and experience in

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receivable pursuant to section 6306(c)(2)(A)(ii) despite being actively worked by an IRS employee.

[53] I.R.C. § 6306(b) (2015).

[54] I.R.C. § 6306(d)(3) (2015).

[55] 2016 Annual Report to Congress, TAXPAYER ADVOCATE SERVICE, https://taxpayeradvocate.irs.gov/reports/2016-annual-report-to-congress/most-serious-problems [https://perma.cc/NP3K-S44V] (last visited Nov. 15, 2017). The National Taxpayer Advocate cited a lack of training PCA employees as a serious concern to taxpayer rights. *Id*. In light of this lack of training, it is no surprise that the types of occurrences listed in section 6306(d)(3) are being excluded from qualified collection contracts due to the complexities associated with collecting these tax receivables.

[56] IRM § 5.5.3.2.

[57] *Id.*

[58] IRM § 5.5.3.5.1.

such matters which could not be said of PCA employees executing a similar inquiry. Further, IRS employees would also have access to account transcripts, wage and income transcripts, and other taxpayer data that would quickly assist in making a cost-benefit determination of pursuing probate assets PCAs will not have access to similar taxpayer data.

Tax receivables connected to a taxpayer claim of identity theft require even more investigation and analysis than a receivable involving a decedent. When a taxpayer's identity is stolen, often a fraudulent 1099 or W-2 will be issued using the taxpayer's social security number, creating unreported income.[59] This will lead to the issuance of notice of deficiency[60] and ultimately an assessment.[61] Once the IRS attempts to collect this deficiency, taxpayers may claim that they never earned such income. Taxpayers who claim that their identity was stolen will be required to authenticate their identity and submit Form 14039 "Identity Theft Affidavit."[62] Investigation will then be required to determine whether the taxpayer is entitled to relief. Ultimately, the IRS may decide to completely abate the assessment associated with identity theft, thereby eliminating the tax receivable.[63]

These two examples solidify Congress's decision to exclude this category of receivables from qualified collection contracts. Special training and experience will be necessary to properly determine the amount of such receivables and whether collection efforts should be pursued.

C. Use of Qualified Collection Contract Proceeds

The FAST Act also amended subsection (e), which controls how Treasury uses the funds collected through qualified collection contracts. Originally, subsection (e)(2) stated that no more than twenty-five percent of proceeds collected under qualified collection contracts could be used to fund collection enforcement activities.[64] In 2015, subsection (e)(2) was amended

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[59] IRM § 8.6.5.1.1.
[60] I.R.C. § 6212(a)-(b) (2012) (if the IRS determines a tax return was deficient in its payment of taxes, a notice of deficiency will be sent to the taxpayer's last known address).
[61] I.R.C. § 6213(a) (2017) (if the taxpayer fails to petition the Tax Court within applicable ninety-day or 150-day period, the IRS will legally assess the deficiency related to the unreported income created by the fraudulent 1099 or W-2).
[62] IRM § 8.6.5.2. When the IRS requests authentication of identity and Form 14039, taxpayers have thirty days to provide such substantiation. If the taxpayer provides the information after the thirty-day period, the IRS will presume there was no identity theft. Time is of the essence when supporting a claim for identity theft.
[63] IRM § 8.6.5.8.
[64] I.R.C. § 6306(e)(2) (2015); Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 32103, 129 Stat. 1312, 1736 (2015).

by changing the use of funds from "collection enforcement activities" to the "special compliance personnel program account under section 6307."[65]

The amendment to section 6306(e)(2) cannot be fully comprehended without analyzing section 6307. The FAST Act added section 6307,[66] entitled "Special Compliance Personnel Program Account."[67] Congress added section 6307 to require the IRS to establish an account to fund the hiring, training, and employment of special compliance personnel.[68] Special compliance personnel are defined as IRS field function collection officers (i.e., revenue officers) or automated collection system employees.[69] While section 6306(e)(2) limits the amount of qualified collection contract proceeds that can be used to fund the special compliance personnel program account to twenty-five percent, section 6307(a) requires Treasury to transfer some funds to this account.[70] As a result, Treasury must use some of the qualified collection contract proceeds to hire and train collection employees, but it cannot use more than a quarter of the collection proceeds to achieve this purpose.[71]

In sum, this amendment appears to have minimal impact on the IRS collection budget. While Treasury must disburse some collection proceeds to enforce IRS collections, they are not required to allocate hardly any funds. The statutory language which grants the IRS a portion of the private collection proceeds is cloaked in administrative discretion, thereby removing the majority of the monetary benefit contained in the flush language.

D. Collection Relief for Taxpayers in a Federal Disaster Area

Congress added subjection (i) to give the IRS discretion to provide private debt collection relief to taxpayers who have experienced a federal disaster.[72] Subsection (i) provides Treasury with the authority to prescribe procedures whereby a taxpayer who is determined to have been affected by

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[65] Fixing America's Surface Transportation Act, § 32103.
[66] *Id.*
[67] I.R.C. § 6307 (2015).
[68] I.R.C. § 6307(a)-(b) (2015) (the Secretary is prohibited from using the funds for any purpose other than for expenses associated with developing collection employees' skills and reimbursing governmental agencies that are incurring costs in connection with the administration of qualified collection contracts).
[69] I.R.C. § 6307(d)(1) (2015).
[70] I.R.C. § 6307(a) (2015) (the statute is unclear as to exactly when the proceeds from private collections must be transferred into this program account, and instead provides the Secretary with significant discretion as to when the funds must be transferred into the account – "time to time").
[71] *Id.*; I.R.C. § 6306(e)(2) (2015).
[72] Fixing America's Surface Transportation Act, § 32103.

a federally declared disaster[73] may request (1) relief from PCA collection action, and (2) a return of the inactive tax receivable to the IRS for collection by an IRS employee.[74]

The addition of subsection (i) provides limited relief, if any, to taxpayers in a federal disaster area. First, the IRS will need to issue revenue procedures to grant taxpayers relief.[75] This section did not create taxpayer relief, rather it granted the IRS authority to create relief by publishing procedures through which taxpayers could request relief. Section 6306(i) is a permissive, not compulsory, statute. Consequently, without an IRS revenue procedure, taxpayers in a federal disaster area with inactive tax receivables will not have an independent basis for relief from private debt collection.

Second, even if the IRS publishes guidance for federal disaster area collection relief, these taxpayer receivables will still be sent to PCAs if categorized as inactive. Disaster area inactive tax receivables are not excluded from qualified collection contracts. The construction of this statute places the burden on the taxpayer to request relief. Administratively, it may be difficult for the IRS to systematically identify taxpayers who are located in a federal disaster area and tie the year of the receivable to the year of such disaster. However, this difficulty exists only because Congress and the IRS have failed to invest in information technology that would allow the agency to perform such a query.[76] This lack of resources and foresight curtails taxpayer rights.

Section 6306 has been drastically changed by the addition of subsections (c), (d), and (i) and the amendment to subsection (e). Congress removed Treasury's discretion to implement the private debt collection program and now requires the IRS to outsource its collection function. Section 6306 specifically defines the debts which must be contracted to PCAs. Certain active receivables and special receivables have been

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[73] I.R.C. § 165(i)(5) (2017). A federally declared disaster area is any disaster that is determined by the President of the United States to warrant federal assistance. Section 165 generally deals with personal losses. Personal losses incurred as a result of a federally declared disaster are a type of casualty loss. Revenue procedure 2016-53 provides guidance on how to elect the year for deducting such a casualty loss. Rev. Proc. 2016-53, 2016-44 I.R.B. 530. It will be interesting to see how this particular revenue procedure may impact a taxpayer's ability to request relief under section 6306(i).

[74] I.R.C. § 6306(i) (2015).

[75] *Id.*

[76] Jen Wieczner, *The IRS and the Terrible, Horrible, No Good, Very Bad Decade*, FORTUNE, April 1, 2016, *available at*, http://fortune.com/2016/03/25/irs-technology-taxes (discussing the recent illegal hacks of taxpayer data and citing that the IRS "still uses half-century-old magnetic tapes to store and process tax return records, as well as versions of Windows so old that Microsoft abandoned upkeep for them years ago.").

specifically excluded from qualified collection contracts to ensure collection efficiencies. Congress set aside a portion of the funds received from qualified collection contract efforts to assist the IRS with its internal collection efforts, but it is unlikely these funds will significantly increase the IRS collection budget. Potential protections for taxpayers in federal disaster areas were built into the statute, but administrative action will be necessary to implement such relief. Overall, the effect of the changes to section 6306 are to force the IRS to outsource inactive tax receivables to PCAs, regardless of the possible impact on taxpayer rights.

III. TAXPAYER COLLECTION RIGHTS

In Spring 2017, PCAs began calling taxpayers and requesting payment of inactive tax receivables.[77] Many taxpayers will be unaware that the IRS has been authorized to contract with PCAs[78] and they will be even more uninformed regarding what rights they can assert against PCA collection efforts. This part will discuss taxpayers' collection rights and how they can assert such rights. It will begin by providing a general discussion of Fair Tax Collection Practices ("FTCP")[79] and the Fair Debt Collection Practices Act ("FDCPA"),[80] and how these two bodies of law are incorporated into Code section 6306. This part will then catalog specific taxpayer collection rights granted by the FTCP and FDCPA and suggest strategic methods for asserting such rights. The analysis of taxpayer rights will include a review of case law and administrative data to illuminate what factual scenarios could give rise to violations of taxpayer rights.

A. Taxpayer Collection Rights Incorporated Into Section 6306

In 1977, Congress passed the FDCPA in response to the abundant evidence of abusive and unjust debt collection practices by private debt collectors.[81] The FDCPA created significant rights for consumers as a protection against aggressive private debt collectors.[82]

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[77] Private Debt Collection, (Sept. 26, 2016), https://www.irs.gov/businesses/small-businesses-self-employed/private-debt-collection.

[78] Roger Yu, *That Call from an Unlisted Number? Might be a Collections Rep for IRS*, USA TODAY, (Jan. 26, 2017), (discussing how consumer advocates are worried about the use of PCAs to collect tax receivables and noting that criminal scams will surely be associated with the rollout of the private debt collection program) http://www.usatoday.com/story/money/2017/01/26/call-unlisted-number-might-collections-rep-irs/97008668/.

[79] I.R.C. § 6304(a)-(b) (2012).

[80] 15 U.S.C. § 1692 (2012).

[81] Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977).

[82] *Id.*

In 1998, Congress passed the Internal Revenue Service Restructuring and Reform Act ("RRA").[83] The passage of the RRA was in response to Congressional concerns that the IRS was trampling on the rights of American citizens.[84] The RRA overhauled the organization of the IRS and added a large number of taxpayer protections.[85] One type of protection came in the form of collection rights. Section 3466(a) of the RRA added section 6304 to the Code, entitled Fair Tax Collection Practices.[86] The private sector was already subject to the provisions of the FDCPA, but no similar laws existed to restrict the public sector, such as the IRS, from engaging in abusive and harmful collection tactics.[87] The FTCP codified certain portions of the FDCPA to protect taxpayers from government tax collectors.[88]

In 2004, Congress added section 6306 with the passage of the American Jobs Creation Act.[89] As discussed, section 6306 provided explicit authority for the IRS to outsource its collection function.[90] Congress tempered this explicit authority by providing taxpayers with certain collection rights. Section 6306(b)(2) prohibited contractors from committing

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[83] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L.No. 105-206, 112 Stat. 685 (1998).

[84] Senator Baucus discussed a letter he received from one of his constituents. In the letter, the taxpayer described how the IRS employee had tracked down the taxpayers and left a nasty note on the front door of the taxpayer's house. When the taxpayer called the IRS, the employee was very rude and spoke to the taxpayer in a degrading manner. Further, the IRS employee said he expected to be paid in full and treated the taxpayer as if she and her husband were criminals. Ultimately the agent put a lien on the taxpayer's home. Senator Baucus summarized the note by saying, "I think this letter sums up the issue in a nutshell; that is, to make the Government work much more for people, not against them, that is, put service back into the Internal Revenue Service instead of being arrogant and degrading people as much as the Service has in the past." 114 CONG. REC. S7643-02 (daily ed. Jan. 15, 1998) (Statement of Sen. Baucus).

[85] Internal Revenue Service Restructuring and Reform Act enacted a large number of taxpayer protections. Specifically, Low-Income Taxpayer Clinics were authorized by the addition of I.R.C. § 7526 and collection due process rights were given to taxpayers subject to lien filings and levies by means of §§ 6320 and 6330, respectively. I.R.C §§ 7526, ;6320, ;6330 (2012).

[86] Internal Revenue Service Restructuring and Reform Act, at 768 (no changes have been made to section 6304 since its addition in 1998).

[87] S. Rep. No. 105-174, at 93 (1998). The FDCPA already had laws impacting the times private debt collectors could call debtors (local time between 8 a.m. and 9 p.m.) and preventing these companies from harassing or abusing debtors, among others. Congress determined the IRS should at least be as polite and professional as private debt collectors.

[88] 144 CONG. REC. E411-02 (daily ed. Mar. 18, 1998) (Representative William Coyne of Pennsylvania included in his summary of the bill that it required "the IRS to comply with Fair Debt Collection Practices Act rules . . .").

[89] American Jobs Creation Act of 2004, § 881.

[90] I.R.C. § 6306(a) (2015).

acts or omissions which IRS employees were prohibited from committing during the performance of collection activities.[91] This language effectively incorporated preexisting FTCP rights contained in section 6304. Section 6306(g) [92] also provided taxpayers with the rights contained in the FDCPA to the extent not superseded by section 6304 or section 7602(c).[93] Consequently, it is important to identify which section 6306 taxpayer rights are controlled by the FTCP and which taxpayer rights are controlled by the FDCPA.

The FTCP controls communications with taxpayers[94] and third parties[95] with respect to collection of a tax.[96] The FTCP also prohibits harassment and abuse of taxpayers in connection with the collection of unpaid taxes.[97] All additional rights described in the FDCPA are available for defense against PCAs.

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[91] I.R.C. § 6306(b)(2) (2015).

[92] I.R.C. § 6306(g) (2015). When section 6306 was initially added to the code in 2004 the FDCPA rights were codified as section 6306(e). American Jobs Creation Act of 2004, § 881. Due to the significant changes made to section 6306 by the FAST Act, the FDCPA rights were redesignated as section 6306(g). Fixing America's Surface Transportation Act, § 32102.

[93]I.R.C § 7602 (2017) (describing I.R.C § authorized and prohibited conduct for IRS employees when they are determining or collecting a tax liability); I.R.C.7602(c) (2017) (specifically limiting certain IRS employee conduct in connection with collection actions); I.R.S. § 6306(g) (ensuring taxpayers received collection rights on par with IRS collection actions, Congress incorporated section 7602(c) and section 6304 into the qualified collection contract statute). For simplicity, throughout the text for the remainder of this article, when the term "FTCP" is used, it will include not only rights under section 6304, but also rights under section 7602(c).

[94] I.R.C. § 6304(a) (2012); 15 U.S.C. § 1692c(a) (2012) (A review of Code section 6304(a) and section 1692c(a) of the FDCPA will reveal a nearly symmetrical framework of limitations regarding communications with a debtor. I.R.C. § 6304(a) (2012); 15 U.S.C. § 1692c(a) (2012). As a result, there can be no doubt that Code section 6304(a) supersedes section 1692c of the FDCPA. As will be discuss *infra*, while the frameworks of these two sections are substantially the same, certain language utilized in section 6304(a) will expand taxpayer rights.

[95] Code section 7602(c) controls IRS communications with third parties with respect to the collection of a tax. I.R.C. § 7602(c) (2017). Code section 7602(c) speaks to the same collection concerns as section 1692c(b) of the FDCPA, use of third parties to collect tax. 15 U.S.C. § 1692c(b) (2012). As a result, section 7602(c) supersedes 1692c(b) of the FDCPA.

[96] I.R.C. §§ 6304(a) (2012), 7602(c) (2017).

[97] I.R.C. § 6304(b) (2012). A comparison of code section 6304(b) and section 1692d of the FDCPA will disclose nearly identical language. *Id.*; 15 U.S.C. § 1692d (2017). The only significant difference between the two statutes concerns a private prohibition against publication or advertisement of consumer debts. 15 U.S.C. §1692d(3)-(4) (2017). Clearly Congress was not concerned with the IRS's ability to harass taxpayers by publishing the names of delinquent taxpayers, in light

This general overview of how the FTCP and FDCPA were incorporated into section 6306 is very instructive as to what statutes provide taxpayer rights. However, further analysis of the FTCP and FDCPA is necessary to determine what specific rights taxpayers may assert against PCAs.

B. Taxpayer Rights Established By Fair Tax Collection Practices and Fair Debt Collection Practices Act

As PCAs begin contacting taxpayers to collect inactive tax receivables, taxpayers should be fully aware of the rights that they may assert during collection activities. This portion of the article will discuss collection rights established by the FTCP and FDCPA. Specifically, the article will address rights associated with (1) communications with taxpayers, (2) communications with third-parties, (3) ceasing communication, (4) harassment and abuse, and (5) validation of debts. These rights will be examined by reviewing the statutory law and then analyzing the applicable case law, if any, to illuminate factual issues.

1. Communications with Taxpayers

As discuss *supra*, communications with taxpayers are controlled by the FTCP. Section 6304(a) of the FTCP prevents PCA employees from communicating with taxpayers to collect a tax debt (1) at an unusual time or place or a place inconvenient to the taxpayer (whether such inconvenience was known or should have been known), (2) if the PCA knows the taxpayer is represented by an attorney or power of attorney[98] (i.e., authorized representative) and has knowledge or access to the representative's contact information, unless the representative is nonresponsive or the taxpayer consents to direct communication, or (3) at the taxpayer's place of employment if the PCA is on notice the taxpayer's employer prohibits such communication.[99] Additionally, PCAs are generally limited to contacting the taxpayer within the hours of 8 a.m. and 9 p.m., local time.[100]

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of Code section 6103's limitations on public disclosure of taxpayer information. *See generally* I.R.C. § 6103 (2016). To ensure that PCAs were required to abide by similar disclosure laws, Congress added a subparagraph (k)(12) to Code section 6103. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 32102(d), 129 Stat. 1312, 1734-35 (2015). Therefore, while the FTCP does not appear to be as comprehensive as the FDCPA, in actuality the two statutes provide the same collection rights.

[98] IRM 4.11.55.1.2.1 (taxpayers who wish to have a practitioner represent them before the IRS will generally be required to file a Form 2848 with the IRS).

[99] I.R.C. §§ 6304(a)(1)-(3) (2012); I.R.C. § 6306(b)(2) (2015).

[100] I.R.C. § 6304 (2012) (hanging paragraph).

The controlling statutory law of the FTCP closely mirrors the FDCPA. In fact, the language of the FTCP includes the rights existing under the FDCPA and further expands those rights. Due to a lack of FTCP litigation, a review of the FDCPA case law is illustrative of the factual circumstances that could give rise to taxpayer communication violations.

a. Time or Place Known to be Inconvenient

PCAs cannot contact taxpayers at an unusual time or place or a time or place known to be inconvenient.[101] Debt collectors have been held responsible for contacting consumers at times or places they knew were inconvenient to the consumer. In *Austin v. Great Lakes Collection Bureau, Inc.*, the debt collector called the consumer at work several times to collect a debt.[102] The consumer responded to the debt collector, informing it that she was very upset that calls were being made to her while she was at work.[103] The debt collector placed four additional calls to the consumer at work after receiving notice that such calls were inconvenient.[104] The court held the debt collector violated section 1692c(a)(1) of the FDCPA when it communicated with the consumer after receiving notice the phone calls were inconvenient.[105]

In *Chiverton v. Federal Financial Group, Inc.*, the debt collector called the consumer numerous times at work in an attempt to collect a debt.[106] The consumer informed the debt collector that the debt had been previously paid, but the collection calls persisted.[107] The consumer repeatedly told the debt collector that he was not allowed to receive personal calls at work, and requested that no more calls be made to his work number.[108] The debt collector did not honor the request, and, in one instance, made five calls to

[101] I.R.C. §§ 6304(a)(1) (2012); I.R.C. § 6306(b)(2) (2015).
[102] Austin v. Great Lakes Collection Bureau, 834 F. Supp. 557, 558 (D. Conn. 1993).
[103] *Id.*
[104] *Id.*
[105] *Id.* at 559. *But see* Sanchez v. Client Services, Inc., 520 F. Supp. 2d 1149, 1160 (N.D. Cal. 2007) (finding that when a debt collector made fifty-four telephone calls and left twenty-five messages at the consumer's workplace in an attempt to collect the debt, the debt collector's actions were not considered to be made at an inconvenient time or place because consumer did not inform the debt collector it was inconvenient).
[106] Chiverton v. Fed. Fin. Grp., Inc., 399 F. Supp. 2d 96, 99 (D. Conn. 2005) (finding that because the plaintiff in this case was employed by the U.S. Department of Defense as a fiscal supervisor, it was particularly important that the debt collector not contact the plaintiff at work).
[107] *Id.* (noting that the consumer sent the debt collector proof that the debt had been paid in full, but collector responded by calling the consumer a liar and threatened to report the debt to the credit agencies).
[108] *Id.*

the consumer's work number in a span of several minutes.[109] The court held the debt collector liable for making calls at a place known to be inconvenient.[110]

Taxpayers do not have to receive phone calls at work from PCAs if it is distracting or upsetting, even if the employer permits such calls. Taxpayers can defend themselves from PCA collection actions by informing PCAs that it is inconvenient for them to be contacted at work. To properly assert this defense, taxpayers must explicitly request that PCAs not contact them at work. Further, taxpayers should send the PCA a certified letter documenting the inconvenience to create and preserve evidence of PCA knowledge.

b. Taxpayer Represented by Person Authorized to Practice Before IRS

PCAs cannot contact taxpayers if they have knowledge that the taxpayers are represented by a person authorized to practice before the IRS.[111] PCAs will be very familiar with the majority of the FTCP requirements in Code section 6304(a) because they generally mirror the FDCPA, but section 6304(a)(2) adds a wrinkle not applicable to their general operations. The FDCPA prevents private debt collectors from communicating with persons represented by an attorney, but it does not discuss persons represented by a person authorized to practice before the IRS.[112] Because attorneys who file a written statement with the IRS are persons authorized to practice before the IRS, and various other tax professionals may register with the IRS and become authorized, this portion of the FTCP expands taxpayer rights.[113] IRS transmission of taxpayer materials to PCAs will require detail regarding whether a taxpayer is represented by an authorized representative. PCA employees will need to be aware that taxpayer representation by CPAs and other non-attorney tax professionals prevents direct communication with taxpayers. Taxpayers and

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[109] *Id.* at 100. (finding that even after this series of phone calls, the debt collector called the consumer's place of employment again and spoke with the consumer's supervisor about the alleged debt).
[110] *Id.*
[111] I.R.C. § 6306(g) (2015); I.R.C. § 6304(a)(2) (2012).
[112] 15 U.S.C. § 1692c(a)(2) (2012).
[113] 31 C.F.R. § 10.3 (2014). Treasury Department Circular 230 provides a detailed list of persons who may practice before the IRS. This list includes attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, registered tax return preparers, individuals representing themselves, and representatives of partnerships and corporations. *Id.*

their representatives should be attentive to whether PCAs comply with this provision.[114]

Debt collectors have illegally contacted represented consumers on a number of occasions. In *Isham v. Gurstel, Staloch, & Chargo, P.A.*, the debt collector attempted to collect a disputed debt from a consumer.[115] Despite the consumer's communication to the credit card company that the charges to the card were fraudulent, and after she filed a police report to that effect, the creditor sent the debt to a debt collector.[116] In response to the collection action, the consumer sent the debt collector a letter, which stated that she disputed the debt, requested no further communications, and informed it that she was represented by an attorney.[117] After the consumer mailed the letter, the debt collector contacted the consumer two times on the phone, during which the consumer informed the collector that she was represented by an attorney.[118] Approximately two weeks after these contacts, the consumer sent a second letter via certified mail containing the same representations.[119]

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[114] While this article deals with defenses to PCA collection actions, it is interesting to note that the IRS appears to have substantially complied with the requirements of Code section 6304. Since 2010, the IRS has closed only six cases for administrative violations under section 6304 and has cited no litigation arising under this statute. Treas. Inspector Gen. for Tax Admin., *Programming Changes Would Allow More Accurate Tracking of Fair Tax Collection Practices Violations*, Ref. No. 2016-10-068 (September 14, 2016) (two violations); Treas. Inspector Gen. for Tax Admin., *Review of Fair Tax Collection Practices Violation During Fiscal Year 2014*, Ref. No. 2015-10-045 (May 28, 2015) (two violations); Treas. Inspector Gen. for Tax Admin., *Review of Fair Tax Collection Practices Violation During Fiscal Year 2013*, Ref. No. 2014-10-036 (May 27, 2014) (two violations); Treas. Inspector Gen. for Tax Admin., *Potential Fair Tax Collection Practices Violations Were Inaccurately Coded*, Ref. No. 2013-10-074 (July 3, 2013) (no violations recorded, but a significant number of cases were miscoded as unprofessional conduct cases instead of Fair Collection Tax Practices cases); Treas. Inspector Gen. for Tax Admin., *No Fair Tax Collection Practices Violations Were Closed in Fiscal Year 2011*, Ref. No. 2012-10-044 (April 26, 2012) (no violations recorded); Treas. Inspector Gen. for Tax Admin., *Collection Employees Adhered to Fair Tax Collection Practices During Fiscal Year 2010*, Ref. No. 2011-10-045 (April 25, 2011) (no violations recorded). However, the IRS's numbers may be misleading. It is very possible the low number of reported violations are the result of a lack of taxpayer knowledge regarding collection rights or inadequate remedies to compensate for violations.
[115] Isham v. Gurstel, Staloch, and Chargo, P.A., 738 F. Supp. 2d 986, 989 (D. Ariz. 2010).
[116] *Id.* at 989.
[117] *Id.* The consumer's written communication stated, "[k]indly don't bother me anymore." The court determined that this statement was sufficient to be classified as a request to cease communications. *Id.* at 990, 994.
[118] *Id.* at 990.
[119] *Id.*

The debt collector signed the return receipt.[120] The debt collector made at least one additional contact after receipt of the second letter.[121]

In responding to the consumer's motion for summary judgment, the court held the debt collector liable for contacting the consumer after receiving notice that she was represented by an attorney.[122] The court made a distinction between the phone contacts made after the first letter and second letter.[123] The court determined an issue of fact remained as to whether the debt collector had notice of representation after the first letter, because the debt collector disputed receipt.[124] However, there was no dispute as to whether the debt collector had actual notice after signing the return receipt, and therefore it was liable for contacts made to the consumer after receipt of the second letter.[125]

In *Buckley v. Afni, Inc.*, the debt collector was attempting to collect a debt from a consumer represented by an attorney.[126] In 2012, the debt collector received a letter from the consumer's attorney informing the collector that the consumer was represented by an attorney for all debts that may be subject to collection.[127] The representation letter provided detailed identifying information about the consumer, including her former last name and last four digits of her social security number.[128] In 2013, the consumer filed a Chapter 7 bankruptcy petition.[129] Notice of the bankruptcy was sent to the debt collector, which showed that the consumer was represented by the same attorney.[130] The consumer received a discharge of the debt at issue.[131]

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[120] *Id.*
[121] *Isham*, 738 F. Supp. 2d at 990.
[122] *Id.* at 993.
[123] *Id.*
[124] *Id.*
[125] *Id.* The court reached this conclusion despite the fact that a paralegal signed for the certified letter and the letter was subsequently lost, never reaching the debt collector handling the case. *Id.* at 990. The court also noted that the debt collector received a phone call from the consumer, during which the consumer informed the debt collector that she had retained an attorney. *Id.* In response to the consumer's claimed representation, the debt collector placed an unknown adverse attorney code ("XATTY") on the consumer's account. *Id.* The court noted that even if the debt collector had not received the second letter, which constituted actual notice, it still had actual notice of attorney representation as evidenced by the XATTY code placed on the account after the phone communication. *Id.* at 993.
[126] Buckley v. Afni, Inc., 133 F. Supp. 3d 1140, 1145-46 (S.D. Ind. 2016).
[127] *Id.* at 1146.
[128] *Id.* at 1145.
[129] *Id.*
[130] *Id.*
[131] *Buckley*, 133 F. Supp. 3d at 1145.

Several months after the discharge, the debt collector sent a collection letter directly to the consumer.[132]

The court held that the debt collector illegally contacted the consumer.[133] In reaching this conclusion, the court analyzed the debt collector's defense of lack of knowledge regarding the consumer's representation.[134] The court reasoned that the attorney's letter and the bankruptcy notice sufficiently identified the consumer to put the debt collector on notice of the representation.[135]

The debt collector's lack of knowledge defense in *Buckley* was unsuccessful, but this defense has been effective in other cases. In *Bacelli v. MFP, Inc.*, the consumer's attorney filed a Chapter 7 bankruptcy petition on her behalf to obtain relief from her creditors.[136] The creditor's debt was listed on the bankruptcy petition and notice of the filing was delivered to the creditor.[137] After the debt was discharged, the creditor forwarded the debt to a debt collector, MFP.[138] Unaware of the bankruptcy filing (containing notice of the consumer's representation) or the subsequent discharge, MFP sent the consumer a collection letter.[139]

The court held that MFP did not illegally contact the consumer because it lacked knowledge of the consumer's representation.[140] MFP never obtained actual knowledge that the consumer had hired an attorney.[141] Further, the court declined to impute the creditor's knowledge to the agent, MFP, to create liability under the FDCPA.[142]

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[132] *Id.* at 1146.
[133] *Id.* at 1150.
[134] *Id.* at 1149-50.
[135] *Id.* (noting that the debt collector attempted to draw a distinction between the consumer's identification of "AKA Smock," the consumer's former last name as compared to the proper identification of "FKA Smock," which would have been the proper acronym. The court was not persuaded by this technicality, and noted that the most important piece of the acronym was "KA," or known as. Therefore, the debt collector had sufficient knowledge as to the identity of the consumer). *Id.* at 1149.
[136] Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328, 1330 (M.D. Fla. 2010).
[137] *Id.* at 1330-31(stating, importantly, while the creditor's debt was listed on the plaintiff's bankruptcy mailing matrix, the debt collector was not listed. Further, the debt collector received no other actual notice from the bankruptcy court, the consumer, or the creditor). *Id.* at 1331.
[138] *Id.* at 1331.
[139] *Id.*
[140] *Id.* at 1334.
[141] *Bacelli*, 729 F. Supp. 2d at 1334.
[142] *Id.*

Isham, *Buckley*, and *Bacelli* highlight several important taxpayer representation issues. First, taxpayers need documentation of notice given to PCAs and the IRS concerning their representation.[143] Return receipts will likely be the best way to prove that the debt collector received actual notice. Second, taxpayers need to adequately identify themselves in the notice to ensure that the debt collector cannot claim it lacked knowledge due to inadequate identification. Use of social security numbers, maiden names, "doing business as," and account numbers should clarify the taxpayer's identity and put the PCA on notice of representation.

Third, if a tax receivable is transferred to a PCA, taxpayers may want to file a second notice of representation with the PCA (assuming an initial form 2848 was on file with the IRS). PCAs will not have actual notice of taxpayer representation unless the IRS provides this notification.[144] Further, courts will probably not impute IRS knowledge of taxpayer representation to the PCA.[145] Taxpayers who have individuals representing them before the IRS want to ensure these professionals negotiate with the IRS. If PCAs are not required to work with taxpayer representatives, the collection outcome may result in the taxpayer paying more tax or agreeing to an installment agreement for a shorter term than necessary. In either case, the taxpayer will be negatively impacted. Taxpayers must protect their rights by requiring the PCA to communicate with their representative to achieve the best result.

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[143] While it was not discussed in the FTCP portion of the article, the FTCP only prevents direct communication with the taxpayer when the IRS *knows* the taxpayer is represented by a person authorized to practice before the agency. As a result, if a taxpayer is going to assert a claim under § 6304(a)(2), the taxpayer will need to prove the IRS had notice of his representation. I.R.C. § 6304(a)(2) (2012).

[144] Generally, returns and return information are confidential. I.R.C. § 6103 (2016). Therefore, PCAs will not have knowledge of taxpayer representation absent IRS disclosure.

[145] Schmitt v. FMA Alliance, 398 F.3d 995, 997-98 (8th Cir. 2005) (holding that there is no special exception to general agency law in the FDCPA); Randolph v. IMBS, Inc., 368 F.3d 726, 729-30 (7th Cir. 2004) (holding that the creditor's knowledge of the consumer's counsel contained in the creditor's file could not be imputed to the debtor to create liability under the FDCPA); *contra* Micare v. Foster & Garbus, 132 F. Supp. 2d 77, 80-81(N.D.N.Y. 2001) (stating debt collectors must maintain some procedures to determine whether a consumer is represented and if such procedures are lacking the creditor's knowledge will be imputed to the debt collector to prevent a blatant circumvention of the purposes of the FDCPA); *contra* Powers v. Prof'l Credit Servs., Inc., 107 F. Supp. 2d 166, 169 (N.D.N.Y. 2000) (holding that the creditor's knowledge the consumer was represented by counsel was imputed to the debt collector where the creditor intentionally withheld such information from the debt collector). In light of the foregoing case law, it will be interesting to see if IRS knowledge will be imputed to the PCA where the PCA lacks actual knowledge, but the IRS or the PCA failed to establish proper procedures to identify taxpayer representatives.

2. *Communications with Third Parties*

The FTCP[146] controls PCA communications with a third party in connection with the collection of a tax. PCAs may not contact a third party in connection with the collection of an assessment unless they provide reasonable notice in advance to the taxpayer that contacts may be made.[147] If a PCA contacts a third party in connection with the collection of a tax, it must periodically inform taxpayers of the persons contacted.[148] Taxpayers may request this information at any time and a report must be provided.[149]

To a certain extent, the FTCP compromises collection rights existing under the FDCPA. Under the FDCPA, private debt collectors are not allowed to contact third parties in connection with collection of a debt unless they receive consent from the consumer.[150] Consequently, PCAs have more legal authority with whom they may contact to collect inactive tax receivables than when they are collecting private debts.

Third party contacts in connection with the collection of a debt should be distinguished from contacts made to locate a taxpayer. Clearly, a PCA would be unable to provide advance notice to a taxpayer if the PCA does not know where the taxpayer is located. Therefore, when a PCA is merely trying to locate a taxpayer, the FTCP is not controlling.

Thus, PCAs may contact third parties to locate a taxpayer.[151] However, when PCAs contact third parties they are limited in the substance of their communications. Generally, PCAs may not (1) discuss the debt or communicate in any way that they are in the debt collection business, (2) communicate with the same third party more than once, or (3) communicate via post card.[152] PCAs must identify themselves and state that they are

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[146] As noted previously, this article is generally referring to the FTCP as rights arising under the Code. Communications with third parties are specifically controlled by I.R.C. § 7602(c) (2017).
[147] I.R.C. § 7602(c)(1) (2017). There are several exceptions to this general rule. Specifically, third party contacts are allowed without notice if (1) consent is given, (2) providing notice would jeopardize collection, (3) notice could result in harm to someone, and (4) contact is made in connection with a pending criminal investigation. I.R.C. § 7602(c)(3) (2017).
[148] I.R.C. § 7602(c)(2) (2017).
[149] *Id.*
[150] 15 U.S.C. § 1692c(b) (2012). Courts of competent jurisdiction may also provide authorization for third party contacts. In certain instances, debt collectors may also be able to communicate with third parties in connection with the collection of a debt if it is reasonably necessary to carry out a post judgment judicial remedy. *Id.*
[151] 15 U.S.C. § 1692b (2012).
[152] 15 U.S.C. § 1692b(2)-(5) (2012).

confirming location information, but they may disclose the identity of their employer only if the third party requests such information.[153]

Debt collectors have been held liable for improperly contacting third parties. In *Clayson v. Rubin & Rothman, L.L.C.*, the debt collector attempted to collect a debt by contacting the consumer's mother.[154] The debt collector left two messages on the mother's answering machine disclosing that the consumer owed a debt, which was being collected by a debt collector.[155] The mother's telephone number was not provided by the consumer, nor did the consumer consent to communication with her mother.[156] Despite a jury verdict to the contrary, the court held the debt collector liable as a matter of law for illegally contacting the consumer's mother in connection with the collection of a debt.[157]

In *Jackson v. Eltman, Eltman & Cooper, P.C.*, the court held a debt collector accountable for illegally communicating, in connection with the collection of a debt, with the consumer's employer without the consumer's consent.[158] The debt collector sent a fax to the consumer's employer to verify the consumer's employment status.[159] The fax identified the consumer and contained a header with the word "COLLECTION" in all capital letters.[160] The debt collector argued that the fax was not a communication as defined by the FDCPA and, therefore, no violation occurred.[161] The court disagreed,

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[153] 15 U.S.C. § 1692b(1) (2012).

[154] Clayson v. Rubin & Rothman, LLC, 751 F. Supp. 2d 491, 493 (W.D.N.Y. 2010).

[155] *Id.* at 495.

[156] *Id.*

[157] *Id.* at 496. The court reached this conclusion by relying on two different pieces of evidence. First, the debt collector conceded at trial that if someone overheard the messages left on the consumer's mother's answering machine, the person would know that the consumer owed a debt and that the debt collector was attempting to collect the debt. *Id*. at 495. Second, the consumer's mother's decision to give the debt collector some of the consumer's medical records, which was relevant to the consumer's ability to pay, without the consumer's consent would only have occurred if the mother had discussed the debt with the debt collector. *Clayson, supra* note 156 at 495-96.

[158] Jackson v. Eltman, Eltman, & Cooper PC, 128 F. Supp. 3d 980, 986 (E.D. Mich. 2015).

[159] *Id.* at 982.

[160] *Id.*

[161] *Id.* at 983. The debt collector cited two cases that held a fax and a phone call from a debt collector did not amount to a communication from the debt collector for purposes of the FDCPA. *Id*. at 984. In analyzing both cases, the court distinguished the communications from the facts in the present case, noting that neither communication referenced the debt, and therefore persons receiving the information would be required to make inferences to determine the consumer owed a debt. *Id.* at 984-86 (citing Marx v. General Revenue Corp., 668 F.3d 1174, 1177

noting that the FDCPA defined communication as the "conveying of information regarding a debt directly or indirectly to any person through any medium."[162] Consequently, because a communication occurred (as defined in the FDCPA) with a third party without the consumer's consent, the debt collector was liable for violations of the FDCPA.[163]

When the IRS implemented its private debt collection program in 2006, it administratively restricted the communications that PCAs could make to third parties. PCAs were prohibited from calling or writing third parties (i.e., employers, banks, neighbors) to obtain information about the taxpayer's financial health.[164] However, PCAs were allowed to contact the taxpayer's spouse or leave messages on an answering machine in an attempt to locate the taxpayer.[165] Once a PCA knew how to contact a taxpayer, it was not allowed to contact third parties.[166] It is very likely that the IRS will issue similar guidance to PCAs under the current private debt collection regime.

In light of the conflicting statutes, case law, and administrative guidance, it is important to summarize what rights taxpayers have with respect to PCA third party contacts. PCAs are legally allowed to contact third parties to collect a tax debt without the consent of the taxpayer if they provide notice prior to making such contacts.[167] This would require some advance communication to the taxpayer, most likely in a letter. However, the IRS will likely restrict these communications, with exceptions for discussions and messages left with spouses and parents.[168] PCAs will not be allowed to contact the taxpayer's employer, bank, or neighbor to assess the taxpayer's ability to pay.[169] PCAs will not have the same discretion to contact third parties as is available to IRS employees.

PCAs may be liable under Code section 7433A for improper third party contacts if they rush the collection process or disclose too much information when attempting to locate the taxpayer.[170] One important issue will be the timing of advance notice provided to the taxpayer and the timing of third party contacts. Taxpayers clearly have a right to know the names of

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(10th Cir. 2011); Zortman v. J.C. Christensen & Assoc., Inc., 870 F. Supp. 2d. 694, 704-05 (D. Minn. 2012).

[162] *Id.* at 983 (citing 15 U.S.C. § 1692(a)(2) (2012)).

[163] *Id.* at 985. The debt collector was held liable for violating sections 1692(b)(5) and 1692c(b) of the FDCPA.

[164] I.R.S. Announcement 2006-63, 2006-2 C.B. 445, 2006 WL 2423308.

[165] *Id.*

[166] *Id.*

[167] I.R.C. § 7602(c)(1) (2017).

[168] *See* I.R.S. Announcement, *supra* note 166.

[169] *Id.*

[170] *Id.* at 446.

the third parties that PCAs contact.[171] The right to this information will assist in asserting a claim for improper third party contact. Taxpayers can review the timing of the advance notice, if any, and the third party data provided by the PCAs to determine if a violation occurred. If PCAs are attempting to locate a taxpayer, the holdings in *Clayson*[172] and *Jackson*[173] would give rise to legal claims under section 7433A.[174]

3. *Ceasing Communication*

The FTCP does not speak to taxpayer rights concerning ceasing communications. As a result, FDCPA private collection rights concerning ceasing communications are incorporated into qualified collection contracts.[175] Taxpayers may defend themselves from PCA collection action by requesting in writing that the PCA cease communications.[176] If a taxpayer makes a written request to a PCA to stop contacting him by phone and/or

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[171] I.R.C. § 6306(g) (2015); I.R.C. § 7602(c)(2) (2017).
[172] Clayson, *supra* note 156 at 495-96.
[173] Jackson, *supra* note 160 at 983-85.
[174] If PCAs violate administrative guidance it is unlikely they will be subject to legal liability, but it could impact their ability to retain the qualified collection contract. For example, if PCAs provide taxpayers with advance notice that third party contacts may be made and they contact the taxpayer's bank to obtain collection information, this contact would not give rise to a legal claim under section 7433A, but it could impact the PCA's ability to retain the qualified collection contract. Clayson, *supra* note 156 at 495-96; Jackson, *supra* note 160 at 983-85; I.R.C § 7433A(a) (2012).
[175] I.R.C. § 6306(g) (2015); 15 U.S.C. § 1692c(c) (2012).
[176] *Id.* This defense may be particularly useful to taxpayers. The Taxpayer Advocate has identified an issue within the new Policy and Procedures Guide for Private Collection Agencies, which allows the PCAs to request "voluntary" payments when the taxpayer is unable to make a full lump sum payment of the liability or establish a five-year installment agreement. The Taxpayer Advocate is concerned that these voluntary payment solicitations are outside the scope of the permissible services PCAs can perform pursuant to section 6306. Discussions have taken place with the IRS Commissioner, bringing this issue to his attention. The Commissioner agreed to limit the voluntary payments, which PCAs can accept to only one payment. However, it does not appear that this agreement has been formally added to the Policy and Procedures Guide. Further, even if such an agreement is formalized, it would not limit the communications which could occur to obtain the voluntary payment. Consequently, taxpayers may need to utilize this communications defense if their account is referred to a PCA and they are unable to resolve the liability. Taxpayer Advocate Service, Private Debt Collection (PDC): The IRS Is Implementing a PDC Program in a Manner That Is Arguably Inconsistent With the Law and That Unnecessarily Burdens Taxpayers, Especially Those Experiencing Economic Hardship, ANNUAL REPORT TO CONGRESS (2016), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1_MSP_12_PDC.pdf (last visited May 1, 2017).

mail, the PCA must cease general communications.[177] After receipt of the written request, PCAs may communicate with taxpayers only to advise the taxpayer that collection efforts are being terminated.[178] The language in the FDCPA broadly defines the "consumer" as the debtor's spouse, parent (if debtor is a minor), guardian, executor, or administrator.[179] As a result, several different individuals may file a written request with the PCA. As a practical matter, the IRS will likely restrict PCAs from making multiple communications with the individuals (other than the taxpayer) defined in the FDCPA as "consumers," leaving the taxpayer as the only individual who will mail a cease communications request to the PCA.[180]

Debt collectors have failed to comply with consumer requests to cease communications. In *Webster v. ACB Receivables Management, Inc.*, the debt collector was required to pay damages for failing to cease communications after the consumer's request to cease and desist.[181] The debt collector was attempting to collect a disputed debt from a consumer.[182] The consumer requested validation of the debt from the debt collector, but the debt collector responded by requesting information to identify the consumer.[183] The consumer responded to the information request with a cease and desist letter to prevent further communication between the parties.[184] The debt collector failed to honor the cease and desist request, and instead mailed an additional letter to the consumer requesting information.[185]

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[177] 15 U.S.C. § 1692c(c) (2012).
[178] *Id.* The FDCPA does allow debt collectors to communicate with consumers regarding its ability or intention to invoke specific remedies to collect a debt. However, since the Code defines and limits the services which PCAs can perform pursuant to a qualified collection contract, communications regarding remedies cannot be made, as these actions would be outside the scope of the statute. I.R.C. § 6306(b)(1) (2015).
[179] 15. U.S.C. § 1692c(d) (2012).
[180] *See* Internal Rev. Service, Internal Revenue Bull. No. 2006-37, Overview of the IRS's Use of Private Collection Agencies (PCAs) in 2006 (2006), 2263 C.B. 445. In 2006, PCAs were generally restricted from communicating with third parties during the course of their collection activity for the IRS. However, PCAs were allowed to speak with intermediaries in an attempt to locate the taxpayer by phone. Intermediaries included a taxpayer's spouse, and probably encompassed the individuals defined as "consumers" in section 1692c(d). However, once a PCA knew how to contact a taxpayer the PCA was not allowed to contact these intermediaries. While this guidance is quite old, it is likely that similar guidance will be issued. As a result, in 2017, the intermediaries or "consumers" will be unlikely to file a written request with the PCA to cease communications due to the restrictions the IRS will place on PCA third party communications. *Id.*
[181] Webster v. ACB Receivables Management, Inc*.*, 15 F. Supp. 3d. 619, 637 (D. Md. 2014).
[182] *Id.* at 623.
[183] *Id.*
[184] *Id.* at 623-24.
[185] *Id.* at 624.

The court held the debt collector liable for violation of the FDCPA for communicating with a consumer after receipt of a written request to cease communications.[186]

In *Hagen v. Messerli & Kramer, P.A.*, the debt collector was held liable for contacting a consumer after receipt of a letter containing a request to cease communications.[187] The debt collector, a law firm, obtained a judgment against the consumer for failing to pay a debt.[188] The consumer's attorney sent the debt collector a cease and desist letter that stated "pursuant to the Fair Debt Collection Practices Act, [consumer] wants no further *non-litigation contact* from you or any other debt collector to whom the above account may be assigned or sold."[189] The debt collector sent several non-litigation collection letters to the consumer after receipt of consumer's letter.[190] The court held the debt collector liable for violation of the FDCPA's cease and desist requirement.[191] Although court noted the consumer's letter was somewhat ambiguous, it reasoned that no reasonable interpretation of the consumer's letter would have allowed additional collection letters to be sent to the consumer.[192]

While cease and desist letters are an effective way to protect against annoying, harassing, or unethical debt collectors, if a consumer or taxpayer incurs additional debts after the mailing of such letter, the debt collector may be able to resume collection efforts with respect to new debts. In *Udell v. Kansas Counselors, Inc.*, a debt collector legally communicated with a consumer after receipt of a cease and desist letter because the communication related to future debts.[193] In 2001, the debt collector began efforts to collect certain debts from the consumer.[194] In March of 2003, the consumer sent the

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[186] *Webster,* 15 F. Supp. 3d at 626. It should be noted that the debt collector raised the bona fide error affirmative defense, but such defense was unsuccessful. This defense will be discussed in detail in the remedies section of this paper.

[187] Hagen v. Messerli & Kramer, P.A., 85 F. Supp. 3d. 1028, 1032 (D. Minn. 2015).

[188] *Id.* at 1030.

[189] *Id.*

[190] *Id.*

[191] *Id.* at 1032.

[192] *Hagen*, 85 F. Supp. 3d. at 1031 (noting that in addition to claiming the consumer's letter was ambiguous, the debt collector argued that the consumer's letter was invalid because it was sent by the consumer's attorney and not directly by the consumer. The court noted that the FDCPA's definition of consumer did not include the consumer's attorney, but it offsets this concern by referencing a lack of authority discrediting a letter sent by a consumer's attorney. The court stated there it would need to be express authority to discount the attorney's letter, and no such authority exists).

[193] Udell v. Kan. Counselors, Inc., 313 F. Supp. 2d. 1135, 1142-43 (D. Kan. 2004).

[194] *Id.* at 1136-37.

debt collector a cease and desist letter with respect to "[a]ll [a]ccounts."[195] The debt collector ceased communications with the debtor after receipt of the letter.[196] In May of 2003, the debt collector received five new debts for the same consumer.[197] The debt collector called the consumer several times in an attempt to collect the new debts, but was unsuccessful.[198] The consumer argued that the phone calls related to the new debts were in violation of the FDCPA because the consumer had mailed the debt collector a cease and desist letter.[199] The court disagreed.[200] The court's opinion primarily analyzed the plain language of the statute, noting that it limits the application of cease and desist letters to existing debts, not future debts.[201]

Udell raises an important issue for taxpayers and their representatives may wish to cease communications with the PCAs and may do so by executing a written cease and desist letter.[202] However, due to the nature of the annually recurring tax reporting periods and potential tax receivables associated with such reporting periods, new debts could be assigned to the same PCA for collection after receipt of a cease and desist letter. If such a scenario arises, the taxpayer should file a subsequent cease and desist letter with the PCA to prevent further communications. *Udell* effectively requires a new cease and desist letter for each tax year.

Cease and desist letters may be a particularly useful tool in light of PCA's limited collection authority. As noted previously, PCAs can only locate taxpayers, obtain financial information, request full payment of the tax receivable, or offer an installment agreement for a term not to exceed five years.[203] Therefore, PCAs cannot resolve a liability by providing a taxpayer with an offer in compromise, nor can they reduce the amount of the receivable if there is a dispute as to the underlying liability.[204] Consequently,

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[195] *Id.* at 1137.
[196] *Id.*
[197] *Id.*
[198] *Udell*, 313 F. Supp. 2d. at 1137 (noting that while phone calls were placed to the consumer's phone number, the complaint alleged that no one at the plaintiff's home answered the phone calls, and no messages were left for the consumer).
[199] *Id.* at 1138.
[200] *Id.* at 1142-43.
[201] *Id.* at 1140-43 (finding the *Udell* Court also analyzed an informal advisory letter issued by the Federal Trade Commission ("FTC"), the FTC letter addressed the existing versus future debt issue with respect to debt collector communications. The FTC reached the same conclusion as the *Udell* Court).
[202] *See* 15 U.S.C. § 1692(c) (2012).
[203] I.R.C. § 6306(b)(1) (2015).
[204] IRS settlement officers can provide taxpayers with a reduced tax liability based on the reasonable collection potential of a particular account. These liability reductions normally come in the form of offers in compromise, doubt as to collectability. IRM § 5.8.4.3. However, some taxpayers may submit an offer in

taxpayers may determine that it is in their best interest to send the PCA a cease and desist letter and attempt to resolve their tax receivable with the IRS.

4. Harassment and Abuse

The FTCP prevents PCA employees from engaging in conduct to harass, oppress, or abuse any person in connection with the collection of a tax debt.[205] Unlawful conduct includes, but is not limited to, (1) threats, use of violence, or other criminal means to harm a person, the person's reputation, or property, (2) use of obscene language to abuse the debtor, (3) calling the debtor repeatedly or continuously to annoy, abuse, or harass the debtor, and (4) generally, calling without meaningful disclosure of identity.[206]

There are virtually no reported cases dealing with IRS instances of taxpayer harassment or abuse in connection with the collection of a tax. The limited cases that do exist were mostly disposed of on procedural grounds.[207] However, one case has been litigated in which the taxpayer alleged IRS abuse and harassment. In *Gessert v. United States*, the taxpayers were a corporation and its Chief Executive Officer ("CEO"), both of which failed to pay employment taxes pursuant to the Federal Income Contribution Act ("FICA").[208] Because the corporation failed to pay the FICA taxes, also known as trust-fund taxes, the IRS assessed a Trust Fund Recovery Penalty against the taxpayer to personally collect the corporate trust-fund taxes. [209] The corporation and the CEO alleged that the IRS employee exhibited aggressive, abrupt, and threatening behavior during collection activities.[210] The district court disagreed.[211] Employing a reasonableness standard, the court stated the evidence only revealed that the IRS employee displayed aggressive and persistent conduct.[212] The court noted that the IRS employee

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compromise to reduce the amount of the liability. These offers are commonly referred to as doubt as to liability offers. IRM § 4.18.2.

[205] I.R.C. § 6304(b) (2012).

[206] *Id.*

[207] Marsoun v. United States, 880 F. Supp. 2d 59, 65 (D.D.C. 2012) (taxpayer claimed the IRS harassed, oppressed, or abused him in the course of collecting tax, but no facts were pled to support such a claim); Scott v. United States, 608 F. Supp. 2d 73, 81 (D.D.C. 2009) (taxpayer's claim the IRS agents engaged in conduct to harass, oppress, or abuse them in connection with the collection of taxes failed to plead sufficient facts upon which relief could be granted).

[208] Gessert v. United States, 627 F. Supp. 2d 942, 946 (E.D. Wis. 2009), *aff'd*, 703 F.3d 1028 (2013).

[209] *Id.* at 946.

[210] *Id.* at 950.

[211] *Id.*

[212] *Id.*

did not place harassing phone calls, commit criminal acts, or threaten violence.[213]

In contrast to IRS employees, debt collectors have been held liable for harassing and abusing consumers in connection with collection of a debt. In *U.S. v. Central Adjustment Bureau, Inc.*, the Department of Justice brought suit against a private debt collector for sweeping violations of the FDCPA.[214] The government was successful in proving the debt collector engaged in abusive and harassing collection practices.[215] Specifically, the debt collector made calls using (1) racial slurs, (2) terms like "liar, deadbeat, crook," and (3) profane language such as "the judge doesn't give a f[***] about your complaint."[216] The court utilized the "least sophisticated consumer" standard to hold the debt collector liable for FDCPA violations.[217] The court's remedy for the violations came in the form of civil penalties and injunctive relief.[218] The injunctive relief prohibited the debt collector from (1) threatening that the consumer's credit would be destroyed, (2) stating that the person will be in trouble, (3) using obscene or profane language, and (4) suggesting that the consumer is a criminal.[219]

In *Bingham v. Collection Bureau, Inc.*, the debt collector was required to pay damages for harassing the consumer over the telephone.[220] The debt collector attempted to collect a debt from the consumer for hospital services rendered.[221] The debt collector began its collection efforts by sending a series of collection letters to the consumer.[222] When the letters proved unsuccessful, the debt collector resorted to telephone communications, calling the consumer fourteen times over a thirty-day period.[223] During the first call the debt collector asked the consumer about her ownership of valuable assets, including whether she owned a wedding ring.[224] In a subsequent call, when the consumer offered to pay ten dollars a

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[213] *Gessert,* 627 F. Supp. 2d at 946.
[214] United States v. Cent. Adjustment Bureau, Inc., 667 F. Supp. 370 (N.D. Tex. 1986).
[215] *Id.* at 374-375.
[216] *Id.* at 375-76.
[217] *Id.* at 375. ("Under the Fair Debt Collection Practices Act, the test is not whether 'a reasonable consumer' would be deceived, misled or harassed by the prohibited practices – because the Act is intended to protect 'unsophisticated consumers.' Therefore, the court must look not only at the 'reasonable consumer,' but also to a *less sophisticated consumer* in determining whether the debt collection practices act has a tendency or capacity to deceive") (citations omitted).
[218] *Id.* at 383-387.
[219] *Cent. Adjustment Bureau, Inc.,* 667 F. Supp. at 385-86.
[220] Bingham v. Collection Bureau, Inc., 505 F. Supp. 864, 875-76 (D.N.D. 1981).
[221] *Id.* at 867.
[222] *Id.* at 867-68.
[223] *Id.* at 868-69.
[224] *Id.* at 868.

week, the debt collector said that the offer was insufficient and stated "she shouldn't have children if she couldn't afford them."[225] The court applied the "least sophisticated consumer" standard to the debt collector's communications, and determined that the debt collector's comments about the consumer's wedding ring and the statement regarding childbearing were personal and egregious, the natural consequence of which was to harass.[226]

One of the critical factors in determining whether a PCA will be held liable for harassing or abusing a taxpayer during collection activities is the applicable standard. In *Gessert*, the district court appeared to apply a reasonable person standard.[227] In *Central Adjustment Bureau, Inc.* and *Bingham*, the courts utilized the least sophisticated consumer standard.[228] While the conduct in *Central Adjustment Bureau, Inc.* would likely have offended a reasonable person, it is not entirely clear whether a reasonable person would have been harassed by the conduct in *Bingham*. Of significant importance is the fact that *Gessert* appears to have employed the reasonable person standard, and that case dealt directly with Code section 6304(b). However, it is very possible that a court would select the least sophisticated consumer standard in a case brought by a taxpayer against a PCA.

While it is likely courts will use the least sophisticated consumer test, its use will not correspond to various tax law standards that generally favor the government. Collection due process cases involving tax liens and levies place the burden on the taxpayer to prove that the government abused its discretion by sustaining the use of the lien or levy.[229] Tax deficiency cases generally place the burden of proof on the taxpayer to prove that the notice of deficiency is incorrect.[230] Courts will depart from the norms cited above due to the fact that the defendant will be a private actor verses a public actor. The applicable standards utilized by FDCPA case law become more relevant in light of the correlation between the purpose of the FDCPA and the nature of the debt collector.

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[225] Bingham, *supra* note 222 at 869.
[226] *Id.* at 870-75 (A psychologist was utilized to assess the damage caused by the debt collector's conduct. The psychologist determined that the consumer had become unhappy, nauseous, distrustful of telephones, lost sleep, and suffered headaches and nightmares. Despite such proof, the jury only awarded the consumer and her husband $1,100 in actual damages and another $400 in statutory damages. *Id.* at 875. This article will address damage issues in detail in part IV).
[227] Gessert v. United States, 627 F. Supp. 2d 942, 946-950 (E.D. Wis. 2009).
[228] United States v. Cent. Adjustment Bureau, Inc., 667 F. Supp. 370, 375 (N.D. Tex. 1986); *Bingham*, 505 F. Supp. at 870-71.
[229] Keller v. Comm'r, 568 F.3d 710, 715-716 (9th Cir. 2009); Johnson v. Comm'r, T.C.M. (RIA) 2007-29, *4; Robinette v. Comm'r, 123 T.C. 85, 93 (2004).
[230] TAX CT. R. 142(a)(1).

Taxpayers should be aware of their rights when communicating with PCAs. If a PCA engages in abusive or harassing behavior, taxpayers should document the behavior. If the behavior continues, taxpayers have a duty to fight back against such actions and protect themselves. At the very least, taxpayers should inform the IRS of the PCA's collection tactics to ensure that the IRS prevents its contractors from acting illegally in the future.

5. *Validation of a Debt*

Taxpayers who are contacted by PCAs may be surprised to find out that they have outstanding tax liabilities. Taxpayers may be unaware of their tax liabilities for a number of reasons, including (1) a lack of notice of automatic assessments of failure to file, failure to pay, or estimated tax penalties,[231] (2) deficiency assessments stemming from defaulted notices of deficiency, where the notice was not sent to the taxpayer's last known address, (3) a lack of communication between the taxpayer and CPA, (4) a failure to submit all tax payments, and (5) the embezzlement of employment tax deposits by an employee. As taxpayers become aware of the outstanding assessments, they may wish to challenge the assessments.

The FDCPA's incorporation into Code section 6306 provides taxpayers with the ability to challenge the validity of the debt.[232] Legally, taxpayers will have a thirty-day period following receipt of the initial notice from the PCA to challenge the validity of the tax debt.[233] Administratively, it is likely that the taxpayer will still be able to dispute the debt after the thirty-day period.[234] Taxpayers need to be aware of their right to dispute the liability as it could significantly impact the amount of tax that they are required to pay.

If a taxpayer informs the PCA that he wishes to dispute the tax liability, the PCA will be required to return the account to the IRS for processing.[235] Taxpayer disputes will take various forms. Taxpayers may request audit reconsideration. Audit consideration is a valid request for taxpayers who have filed a tax return, must identify the specific adjustment in dispute, and have additional information for consideration.[236] To properly request audit consideration, it is likely that the taxpayer will need a copy of

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[231] I.R.C. §§ 6665(a)-(b) (2017).
[232] *See* I.R.C. § 6306(g) (2015).
[233] 15 U.S.C. § 1692g(a)-(b) (2012).
[234] Section 12.15, *Taxpayer Disputes*, Private Collection Agency (PCA) Policy and Procedures Guide (2008 version) (the author is aware that a subsequent policy and procedures guide has been issued to PCAs. The author submitted a FOIA request to the IRS to obtain the new Policy and Procedures Guide, but this request was denied by the IRS citing a policy exemption).
[235] *Id.*
[236] IRM § 4.13.1.4.

the revenue agent report or notice of deficiency to identify specific adjustments. Taxpayers can obtain this information using Freedom of Information Act requests.

Taxpayers may also wish to dispute the liability or the amount they are required to pay by using an offer in compromise.[237] Offers in compromise that dispute the amount of the liability are classified as doubt as to liability.[238] Offers in compromise that attempt to decrease the amount of tax that taxpayers are required to pay due to financial hardships are classified as doubt as to collectability.[239] Offers in compromise that attempt to decrease the amount of tax that taxpayers are required to pay due to financial hardships are classified as doubt as to collectability.[240]

Evaluation of offers in compromise vary depending on the classification of the offer. If an offer is classified as doubt as to liability, the evaluation will likely be made by a revenue agent. The agent will perform a normal audit of documentation provided by the taxpayer to determine if the liability should be reduced. To perform this analysis, the revenue agent will need to obtain the administrative file containing the audit work papers. Taxpayers should seriously consider disputing a liability if the tax liability is old. Offers based on doubt as to liability cannot be rejected solely because the IRS cannot locate the taxpayer's return or associated administrative file.[241] Over time the IRS has a tendency to misplace taxpayer information. As a result, it is possible a taxpayer could obtain a reduction of the tax liability by merely submitting an offer based upon doubt as to liability.

If an offer is made based on doubt as to collectability, the evaluation will likely be made by a settlement officer.[242] The settlement officer's analysis of how much tax can be collected will include allowances for basic living expenses, preventing the taxpayer from living below the poverty level.[243] Taxpayers who are experiencing financial hardships should consider making an offer in compromise based on doubt as to collectability.

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[237] *See* I.R.C. § 7122(a) (2014).
[238] Treas. Reg. § 301.7122-1(b)(1) (2002).
[239] Treas. Reg. § 301.7122-1(b)(2) (2002). All offers in compromises must be submitted on Form 656 to be valid. Bergdale v. Comm'r, T.C. Memo. 2014-152, at *4 (July 30, 2016); *see also*; Godwin v. Comm'r, T.C. Memo. 2003-289, at *11 (Oct. 14, 2003).
[240] Treas. Reg. § 301.7122-1(b)(2) (2002). All offers in compromises must be submitted on Form 656 to be valid. Bergdale v. Comm'r, T.C. Memo. 2014-152, at *4 (July 30, 2016); *see also*; Godwin v. Comm'r, T.C. Memo. 2003-289, at *11 (Oct. 14, 2003).
[241] Treas. Reg. § 301.7122-1(f)(4).
[242] Settlement officers will determine what a taxpayer's reasonable collection potential is by reviewing the taxpayer's Collection Information Statement, submitted on Form 433-A. I.R.S. IRM § 5.8.5.3.1.
[243] Treas. Reg. § 301.7122-1(c)(2)(i).

Taxpayers should not be intimidated when PCAs contact them to collect tax liabilities. If taxpayers believe that the IRS has erroneously calculated their tax liability, they should dispute the liability within thirty days of receipt of the first contact by the PCA. Even if taxpayers believe that the tax liability is correct, but they cannot afford to repay the full amount of the debt, they should inform the PCA that they wish to compromise the debt based on doubt as to collectability. Taxpayers should not be bullied into an installment agreement for the full amount of the debt when they cannot reasonably pay the full balance. Taxpayers have rights to dispute the debt and ensure that they pay only the amount of tax legally required.

The bundle of taxpayer collection rights discussed in this part is significant. Taxpayers must exercise their rights to ensure they pay only the correct amount of tax and at the correct intervals. Knowledge and application of these rights will deter illegal PCA conduct and provide a basis for taxpayer remedies.

IV. Taxpayer Remedies

Inevitably, PCAs will violate taxpayer collection rights during the course of their collection activities. In certain instances, taxpayers may feel so aggrieved that they wish to seek judicial redress. This portion of the article will discuss legal and factual issues surrounding obtaining a judicial remedy for violations of taxpayer collection rights. The analysis of taxpayer remedies will also propose Congressional amendments, where necessary, to bolster the impact of taxpayer collection laws.

As examined in part three, taxpayer rights are generally provided by two separate bodies of law, the FTCP and the FDCPA. Fittingly, there are two separate statutory bases for recovery. This part will begin by discussing the legal requirements for filing a claim with respect to FTCP violations. The article will then discuss possible recoveries available to taxpayers for FTCP violations and propose Congressional amendments to the applicable statutory law. This part will continue by analyzing the legal requirements for filing a claim in connection with FDCPA violations. This section will conclude by examining potential taxpayer recoveries for FDCPA violations and propose a Congressional amendment to the FDCPA.

A. Remedies Under Fair Tax Collection Practices

Code section 7433A provides the statutory authority for civil damage awards stemming from FTCP violations.[244] Accordingly, if PCAs illegally

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[244] I.R.C. § 7433A(a) (2012). The flush language of section 7433A(a) grafts in IRS employee violations arising in connection with the collection of a tax as noted in section 6306(b)(2). Section 6306(k)(1) also cross references section 7433A, to

(1) communicate with taxpayers, (2) harass and abuse taxpayers, or (3) contact third parties, section 7433A would be an appropriate basis for recovery.

1. Legal Requirements for Fair Tax Collection Practices Claims

Section 7433A incorporates section 7433 as the basis for taxpayer remedies, with several modifications.[245] Taxpayers who file suit under section 7433A must file a claim in U.S. district court, identifying the defendant as the PCA.[246] The jurisdiction for section 7433 and 7433A actions remain constant, but the defendant is no longer the IRS. Although the PCA is acting on behalf of the IRS, the IRS is not liable for collection right violations committed during the performance of a qualified collection contract.[247] Claims must be asserted by pleading facts that identify PCA conduct as intentional, reckless, or negligent.[248]

The characterization of PCA conduct may significantly impact the amount of monetary damages that a taxpayer is awarded. Damages for liability will be calculated by determining the actual, direct economic damages proximately caused by the PCA and the costs of the action.[249] However, these damages are capped at $1,000,000 for intentional or reckless conduct, and $100,000 for negligent conduct.[250] Consequently, taxpayers should closely assess whether PCA conduct was merely negligent, or could be proven to be intentional or reckless. Further, taxpayers must be sure that

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direct the reader to the authority for damages. It should be noted, that section 6304(c) contains a cross reference to section 7433, while section 7602(c) does not contain a similar reference. Notwithstanding, section 7602(c) clearly sets forth IRS employee acts or omissions in connection to collection of tax, and therefore would be the type of IRS employee prohibition described in section 6306(b)(2).

[245] I.R.C. §§ 7433A(a), (b) (2004).

[246] I.R.C. § 7433(a); I.R.C. § 7433A(b)(1) (1998).

[247] I.R.C. §§ 7433A(b)(1)-(2) (2004).

[248] I.R.C. § 7433(a) (1998).

[249] I.R.C. § 7433(b). Costs of the action must be distinguished from litigation costs. Costs of the action are limited to court clerk fees, marshal fees, court reporter fees, costs for copying and printing, docket fees, costs of compensation for court appointed experts or interpreters, and witness fees. Treas. Reg. § 301.7433-1(c). In a normal case under section 7433, litigation fees would be recoverable by means of a separate motion for attorneys' fees, with a showing the taxpayer was the prevailing party. Treas. Reg. § 301.7433-1(b)(2); I.R.C. § 7430(a), (c)(4). However, under section 7433A the defendant is not the United States, so section 7430 would not be the appropriate basis for recovering attorney's fees. Cases brought under the FDCPA do provide for attorneys' fees. 15 U.S.C. §1692k(a)(3). As a result, attorneys for taxpayers may need to consider if a cause of action could be filed under the FTCP, FDCPA, or both.

[250] I.R.C. § 7433(b) (1998)

the PCA conduct was the proximate cause of the damages. The court must determine that the damages would not have occurred "but for" the PCA's conduct for the taxpayer to prevail. The statute of limitations for bringing a suit for such FTCP violations is two years after the cause of action accrues.[251]

Taxpayers should be aware of two additional modifications to section 7433A that significantly impact their ability to obtain a remedy. If a PCA engages in certain unauthorized collection actions while providing services under a qualified collection contract, section 7433A is not the exclusive remedy.[252] This modification is a significant change from the plain language of section 7433(a), which states that 7433 is the exclusive remedy for IRS violations of taxpayer collection rights.[253] While the FTCP supersedes the FDCPA, it appears these violations can be litigated under the FDCPA as well.[254] However, as will be discussed, the standards of proof and statutes of limitations may vary depending on the source of the cause of action.

Section 7433A also modifies section 7433's requirement that IRS administrative remedies must be exhausted to obtain a judgment for damages.[255] Clearly, if a taxpayer is successful in a suit against a PCA for a violation of taxpayer collection rights, he would not need to have previously pursued an administrative remedy from a party unrelated to the suit. The statute properly excludes the IRS administrative exhaustion requirement, clearing the path for an award of damages.

2. *Taxpayer Recoveries for Fair Tax Collection Practices Violations*

As taxpayers decide whether or not to pursue a legal remedy, they will need to estimate the amount of damages recoverable if a PCA is found liable. Damages cannot exceed $1,000,000 for intentional conduct and $100,000 for negligent conduct.[256] Damages are defined as actual, direct economic damages proximately caused by the defendant and costs to bring

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[251] I.R.C. § 7433(d)(3) (1998).
[252] I.R.C. §§ 7433A(a), (b)(3) (2004).
[253] I.R.C. § 7433(a) (1998). The only exception to the exclusive remedy provision is if taxpayers file suit against the IRS for failure to release a lien. In such an instance, taxpayers may file a claim under Code section 7432.
[254] Where the FTCP and the FDCPA overlap, taxpayers will generally be able to litigate under Code section 7433A or FDCPA section 1692k. However, this is the case only if the laws are the same. If the FTCP expands taxpayer rights, then such rights would not be available under the FDCPA and therefore the remedy would only be available under section 7433A.
[255] I.R.C. § 7433A(b)(4) (2004); I.R.C. § 7433(d)(1) (1998).
[256] I.R.C. § 7433(b) (1998).

the action.[257] Actual, direct economic damages are pecuniary damages.[258] Pecuniary damages relate to money or monetary affairs.[259] Essentially, the damages sustained by a taxpayer must be quantified in monetary terms. Injuries classified as emotional distress or loss of reputation would be compensable only if the taxpayer could prove to have sustained an economic loss from the unauthorized collection action.[260] While calculation of the amount of damages is a significant factor in initiating litigation, analysis of whether the PCA is the proximate cause for such damages may be the determinative factor.

In *Information Resources, Inc. v. United States*, the taxpayer filed a claim for relief under section 7433 for damages sustained in connection with the government's erroneous filing of a tax lien.[261] During trial the government admitted that it erroneously filed a tax lien against the taxpayer's property.[262] The taxpayer claimed that the filing of the tax lien resulted in lost profits, a loss of goodwill, and costs for IRS representation.[263] Specifically, the taxpayer claimed that the filing of the tax lien caused its contract negotiations with a customer to fall through as well as a substantial impairment to goodwill.[264] The district court awarded the taxpayer $1,000 in damages for costs of IRS representation and denied any recovery for lost profits and loss of goodwill.[265] The appellate court sustained the district court's opinion.[266] The court cited the customer's testimony, which stated that the tax lien "could be considered one of the reasons [for not doing business with the taxpayer] [b]ut it's all speculative from that point forward."[267]

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[257] *Id.*
[258] Treas. Reg. § 301.7433-1(b)(1).
[259]*Pecuniary,* BARRON'S LAW DICTIONARY 370 (5th ed. 2003) (citing Robertson Pletke *v.* White Shobe, 136 N.E.2d 550, 554 (Ill. App. Ct. 1956)).
[260] Treas. Reg. § 301.7433-1(b)(1).
[261] Info. Res., Inc. v. United States, 996 F.2d 780, 781 (5th Cir. 1993) [hereinafter *IRI*].
[262] *Id.*
[263] *Id.* at 784.
[264] *Id.* The taxpayer's initial complaint asserted approximately $100,000 in damages for lost profits from the failed contract negotiations. *Id.* at 785. One week before the trial the plaintiff attempted to raise a $2.4Mil damages claim for impairment to goodwill. *Id.* Evidence of the impairment to goodwill was excluded by the trial court due to the taxpayer's delay in providing notice of this issue. *Id.* Accordingly, *IRI* is not persuasive or binding authority as to the goodwill issue. However, taxpayers who assert a damages claim concerning goodwill should determine how they can prove the goodwill would not have been impaired but for the collection violation.
[265] *Id.*
[266] IRI, supra note 263 at 784-85.
[267] *Id.* at 784.

Similarly, in *Music v. United States*, the taxpayer filed suit against the IRS under section 7433 for levying on her assets prior to giving her notice.[268] The IRS sent a notice of intent to levy to the wrong last known address, followed by service of a wage garnishment to the taxpayer's employer.[269] The taxpayer quit her job the day after receiving a garnished paycheck.[270] The plaintiff alleged that she was forced to quit her job because her new net paycheck was insufficient to cover her living expenses, which caused her to suffer in excess of $1,000,000 in damages.[271] The court held the IRS negligently failed to provide advance notice of the levy, and therefore was liable under section 7433.[272] However, the court determined that the IRS violation was not the proximate cause of actual, direct economic damages.[273] The court reasoned that the taxpayer's damages were the result of the size of her tax liability in relation to her income.[274] Consequently, even if the taxpayer had received proper notice, the taxpayer would have suffered the same damages.[275]

Information Resources, Inc. and *Music* reveal the serious challenge to recovery under section 7433A. If a PCA violates a specific collection right, such as improperly communicating with a third party, the taxpayer must show that the economic loss would not have occurred but for the action of the PCA. As in *Information Resources, Inc.*, it may be hard for a taxpayer to prove proximate causation when various circumstances exist that may have caused the pecuniary loss.

In light of this challenge, Congress should amend Code section 7433A to include statutory damages. If a PCA can harass, abuse, or make end runs around the FTCP with little concern about suffering monetary penalties, these laws do not serve their intended purpose. Taxpayers should not have to defend against numerous causes to deter PCAs from violating taxpayer collection rights. An amendment to section 7433A should allow taxpayers to obtain statutory damages up to $25,000.[276]

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[268] Music v. United States, 17 F. Supp. 3d, 1327, 1330 (N.D. Ga. 2014).
[269] *Id.* at 1331-32.
[270] *Id.*
[271] *Id.* at 1335. Without accessing the taxpayer's complaint, it is not entirely clear what the basis is for the taxpayer's calculation of damages.
[272] *Id.* at 1332.
[273] *Music,* 17 F. Supp. 3d at 1335. The court also held that even if the taxpayer did suffer actual, direct economic damages, the taxpayer failed to mitigate the damages by not availing herself of a collection due process hearing, calling the IRS, and quitting her job prior to determining why she actually owed $38,000 in taxes. *Id.* at 1336.
[274] *Id.* at 1335-36.
[275] *Id.* at 1335.
[276] *See* 15 U.S.C. § 1692k(a)(2)(A) (2012). The FDCPA authorizes statutory damages up to $1,000. While this amount is too low, Congress did provide consumers with some basis for recovery when they are unable to prove actual

To further ensure that PCA conduct does not go unpunished, Congress should include an amendment for attorney's fees. While recovery of the costs of the action is helpful, a failure to include a recovery for attorney's fees leaves taxpayers filing pro se complaints and likely losing against experienced defense attorneys. The amendments benefitting taxpayers can be offset by a final amendment to award of attorney's fees to the defendant if the court determines that the case was brought in bad faith.[277] To incorporate the amendments discussed above, the following language should be added to the Code:

> Section 7433A is amended by adding at the end the following new paragraphs:
>
> (c) **Additional Damages.** In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff for additional damages as the court may allow, but not exceeding $25,000.
>
> (d) **Attorney's Fee.** In the case of any successful action under subsection (a), the plaintiff will be entitled to a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

The incorporation of these amendments into the Code will substantially improve taxpayers' rights and ensure they receive adequate access to the legal system to protect themselves from illegal PCA collection activities.

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damages. There is no reasonable explanation for providing consumers with statutory damages and at the same time denying such damages to taxpayers. While this article is proposing an amendment to Code section 7433A, Congress should also consider an amendment to Code section 7433 to give taxpayers statutory damages for IRS violations. The lack of statutory damages may be the central reason for a lack of litigation in this area of law. Taxpayers and their attorneys may not see a reason to file suit when recovery is unlikely. The lack of statutory damages essentially takes the teeth out of the FTCP and Code section 7602(c).

[277] The FDCPA has a similar provision, which provides defendants with attorney's fees when the case is deemed to have been brought in bad faith. 15 U.S.C. § 1692k(a)(3) (2012).

B. Remedies Under the Fair Debt Collection Practices Act

1. Taxpayers May Also Obtain Civil Damage Awards Under the FDCPA.[278]

In fact, nearly all rights discussed in this article may be asserted by utilizing the FDCPA.[279] If PCAs illegally (1) communicate with taxpayers at an inconvenient time, when represented by an attorney, or after a cease and desist request, (2) contact third parties (i.e., when locating the taxpayer or without providing notice), (3) harass and abuse taxpayers, or (4) fail to validate a debt, section 1692k of the FDCPA would be an appropriate basis for recovery. Legal Requirements for Fair Debt Collection Practices Act Claims.

Taxpayers may bring a claim under the FDCPA by filing a complaint in U.S. District Court within one year of the date of the violation.[280] Because the FDCPA is a strict liability statute, the complaint must only plead facts to prove the PCA committed a collection violation.[281] The issue of culpability is relevant only to the calculation of damages.[282] If a PCA's conduct is deemed to be intentional, the taxpayer will receive some recovery.[283] However, if the PCA's conduct is deemed negligent or reckless, the PCA may be able to avoid paying damages.[284] FDCPA damages include (1) actual damages caused by the PCA, (2) statutory damages not to exceed $1,000, (3) costs of the action, and (4) attorney's fees.[285]

There are several important variances between the legal requirements for FDCPA and FTCP claims. Taxpayers who file a claim under the FDCPA must assert the claim within one year of the action, as compared to two years under the FTCP. Claims for violations of the FTCP must allege intent, recklessness, or negligence, while FDCPA claims need

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[278] 15 U.S.C. § 1692k (2012); I.R.C. § 6306(g) (2015).

[279] I.R.C. § 7433A(b)(3) (2012). Section 7433A states that it is not the exclusive remedy. However, certain rights such as restrictions on PCA communications with persons authorized to practice before the IRS, do not exist in the FDCPA (with the exception of attorneys). These rights would need to be litigated under section 7433A.

[280] 15 U.S.C. § 1692k(d) (2012).

[281] Pacheco v. Joseph McMahon Corp., 698 F. Supp. 2d 291, 294-295 (D. Conn. 2010); Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1177 (9th Cir. 2006); Bentley v. Great Lakes Collection Bureau, Inc., 6 F.3d 60, 63 (2d Cir. 1993).

[282] 15 U.S.C. § 1692k(c) (2012); Beck v. Maximus, Inc., 457 F.3d 291, 297-98 (3rd Cir. 2006).

[283] *See* 15 U.S.C. § 1692k(c) (2012).

[284] See *Id.*

[285] 15 U.S.C. § 1692k(a) (2012).

only plead facts showing a PCA violation. However, taxpayers filing a FDCPA claim should allege PCA intent when possible to contest the bona fide error defense. Damages under the FDCPA are also more generous than under the Code.

2. *Taxpayer Recoveries for Fair Debt Collection Practices Act Violations*

Taxpayers will likely not file suit against a PCA unless they foresee some reasonable recovery. The calculation of damages under the FDCPA and the FTCP are similar in some respects, and quite different in others. The FDCPA, like the FTCP, provides a statutory basis for recovering actual damages and the costs of litigation.[286] However, the FDCPA provides two additional bases for recovery in the form of statutory damages and attorney's fees.[287] Statutory damages are capped at $1,000, while attorney's fees are uncapped but must be reasonable in amount.[288]

The impact of the additional bases for recovery under the FDCPA are twofold. First, taxpayers do not have to prove actual damages to obtain statutory damages.[289] This may be particularly important to taxpayers who believe that they have suffered actual damages, but are unsure as to whether proof will be sufficient to persuade the trier of fact. In the event that taxpayers are successful as to the liability issue, they can be assured of some recovery by means of statutory damages.[290] Second, taxpayers will have more success in finding an attorney to litigate a claim arising under the FDCPA due to its inclusion of attorney's fees. While taxpayers may have the funds to pay for a plaintiff's attorney out of pocket, many taxpayers will not and will need the attorney to earn fees by means of a contingency arrangement. Plaintiffs' attorneys will not take contingency cases which provide $1,000 recoveries. Consequently, the inclusion of attorney's fees in the FDCPA removes a substantial bar to litigation and should enable more taxpayer suits against PCAs.

Although the statutory construction of section 1692k of the FDCPA seems very taxpayer friendly, one subsection of this statute significantly favors PCAs. If a PCA can show by a preponderance of the evidence that its violation of taxpayer rights was not intentional and resulted from a bona fide error, despite having reasonable internal controls, the PCA will escape

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[286] 15 U.S.C. § 1692k(a)(1), (3) (2012).
[287] *Id.* at § 1692k(a)(2)(A), (3) (2012).
[288] *Id.*
[289] Robey v. Shapiro, Marianos & Cejda, L.L.C., 434 F.3d 1208, 1212 (10th Cir. 2006); Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998); McCammon v. Bibler, Newman, & Reynolds, P.A., 493 F. Supp. 2d. 1166, 1171 (D. Kan. 2007) (actual damages are not required for standing under the FDCPA).
[290] This statement assumes the defendant is unable to prove the violation was a bona fide error.

liability.[291] The bona fide error defense requires proof of three elements: (1) the alleged violation was unintentional (i.e., negligent or reckless), (2) the alleged violation resulted from a bona fide error, and (3) the bona fide error occurred despite existing procedures designed to avoid such errors.[292]

In *Smith v. Transworld Systems, Inc.*, the debt collector issued the consumer a letter in connection with collection of a debt.[293] In response, the consumer hired an attorney, who sent a cease and desist letter to the debt collector.[294] The debt collector received the cease and desist, but a second letter was mailed to the consumer one day later.[295] The consumer's complaint alleged that the debt collector failed to honor the cease and desist letter, while the debt collector asserted that the second letter was merely a bona fide error.[296] The court determined the mailing of the second letter was a bona fide error. It relied upon affidavits of the defendant's employees stating the mailing was inadvertent and a five-page instruction manual describing the defendant's collection procedures.[297]

Conversely, in *Crafton v. Law Firm of Jonathan B. Levine*, the debt collector issued a collection letter that misstated the amount of the debt owed and failed to include the "in writing" requirement for contesting the validity of the debt.[298] The debt collector asserted the bona fide error defense only with respect to the amount of the debt.[299] The debt collector stated that it had various procedures in place to prevent errors, such as documenting calls to consumers, review of the ledgers enclosed with the collection letters for egregious or usurious charges, and ensuring that the ledger was associated with the correct consumer.[300] The court determined that the debt collector's procedures were not reasonably adapted to prevent inaccurate debt amounts.[301] The court referenced a need for some type of client agreement

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[291] 15 U.S.C. § 1692k(c) (2012).
[292] Beck v. Maximus, Inc., 457 F.3d 291, 297-98 (3rd Cir. 2006); Johnson v. Riddle, 443 F.3d 723, 727-28 (10th Cir. 2006); Kort v. Diversified Collection Servs., Inc., 394 F.3d 530, 537 (7th Cir. 2005).
[293] Smith v. Transworld Sys. Inc., 953 F.2d 1025, 1026-27 (6th Cir. 1992).
[294] *Id.* at 1027.
[295] *Id.*
[296] *Id.*
[297] *Id.* at 1031.
[298] Crafton v. Law Firm of Jonathan B. Levine, 957 F. Supp. 2d 992, 995-96 (E.D. Wis. 2013).
[299] See *Id.* at 998-99. Importantly, the debt collector did not assert the bona fide error defense with respect to informing the consumer he needed to dispute the debt in writing. Failure to include the "in writing" requirement is an error of law, to which the bona fide error defense does not apply. Jerman v. Carlisle, 559 U.S. 573, 604-05 (2010).
[300] Crafton, 957 F. Supp. 2d. at 999-1000.
[301] *Id.* at 999.

regarding the currency and accuracy of accounts delivered to the debt collector.[302]

Despite the challenges imposed by the bona fide error defense, taxpayer recoveries under the FDCPA are more feasible. Taxpayers will have easier access to plaintiffs' attorneys and they will have confidence that they can receive some sort of statutory recovery if they cannot prove actual damages. Nonetheless, Congress should consider an amendment to increase the statutory damages available if a case is brought pursuant to Code section 6306(g). Taxpayers are a particularly susceptible group of consumers in light of the complexity of the tax code. More protections should exist in light of these complexities. Accordingly, the statutory damages cap should be increased from $1,000 to $25,000.

To incorporate the amendment discussed above, the following language should be added to the FDCPA:

> Section 1692k is amended by adding at the end the following new paragraph:
>
> (f) **Actions Brought Under I.R.C. § 6306(g).** If an action is brought under I.R.C. § 6306(g) to enforce liability created by this subchapter, paragraph (2)(A) of subsection (a) shall be applied by substituting "$25,000" for "$1,000."

Taxpayers should fully examine the facts and law prior to determining the proper basis for filing a claim. Certain violations must be litigated under the Code section 7433A while other violations may be litigated under either body of law. Each body of law has its pros and cons. Depending on when the accrual of the claim occurred, Code section 7433A may be the only option for taxpayers due to its lengthened statute of limitations. It's also possible that a claim under the Code may be more successful in light of the absence of the bona fide error defense. However, taxpayers may have difficulty in finding a plaintiff's attorney to litigate a 7433A claim if no attorneys' fees are recoverable. Claims brought under the FDCPA have a greater likelihood of being awarded money damages and attorneys will be likely take such cases due to the attorney's fees provision.

Whatever the basis for litigation, taxpayers should protect their rights. Remedies are available for taxpayers and these recoveries should be utilized. Failure to protect taxpayer rights will result in harmful collection practices, which should not be employed when collecting public debts.

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[302] *Id.*

V. CONCLUSION

Congress's recent decision to require IRS use of private debt collectors is quite significant. PCAs must be employed to collect inactive tax receivables, which can accrue on an annual basis. As a result, PCAs will have an indefinite stream of business. Taxpayers may not be aware of collection rights that exist for tax debts. A lack of knowledge may easily impact the taxpayers' well-being and the amount of tax that they are required to pay. If collection rights are violated, taxpayers should be aware of judicial remedies. Depending on the level of PCA misconduct, taxpayers may wish to initiate litigation. An analysis of when the claim accrued, the nature of the claim, and damages available will assist in making a litigation determination.

Because these recent statutory amendments can significantly affect taxpayers' rights, this article proposes that Congress should amend Code section 7433A to provide statutory damages and attorney's fees, and amend the FDCPA to increase statutory damages for cases brought under the Code. These changes will bring the Code one step closer to legitimizing Congress's promise to provide taxpayers with a true Bill of Rights.