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No Country for Voicemails: How the CFPB Can Resolve a Paradox and Protect America's Consumers from the World's Fourth Oldest Profession

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No Country for Voicemails: How the CFPB Can Resolve a Paradox and Protect America’s Consumers from the World’s Fourth Oldest Profession*¹

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1. In the beginning, there were prostitutes. Way back in the earliest days of human history, there were no jobs because there was no division of labor; folks huddled together in groups and focused primarily on getting enough to eat while avoiding being eaten. Over time, with survival secured, certain occupational niches emerged. Conventional wisdom has it that the first of these involved women willing to barter for sex. While it is unclear exactly what profession came next—for colloquial speculation including a not-so-flattering reference to politicians from former President Ronald Regan, see *THE YALE BOOK OF QUOTATIONS* 629 (Fred R. Shapiro ed., 2006) (“Politics is supposed to be the second oldest profession. I have come to realize that it bears a very close resemblance to the first.”)—“keeping the village from getting plundered by marauding savages” seems to have served as one of the basic organizational principles anthropologists have identified as widely shared by our ancient ancestors, and so logical inferences suggest “highway banditry” as a plausible candidate for second place. Defend a patch of land long enough and you inevitably begin to think of it as your own; inchoate notions of private property arise and inequality cracks the façade of the utopian ideal of a classless society. Once we stop sharing and start borrowing, lending emerges as the world’s third-oldest profession, and following in its immediate wake come the notion of debt, and the realization that sometimes people don’t pay so maybe it would be easier to hire somebody else to handle the heavy lifting. Enter the debt collectors at number four.

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INTRODUCTION

Debt collectors are a necessary evil. Sometimes, they are also just flat-out evil. In the 1970s, Congress wisely decided there should be nationwide rules governing just exactly how evil debt collectors are allowed to be. The Fair Debt Collection Practices Act² (“FDCPA”) provides safeguards against harassment and abuse, protecting the sanity, dignity, and privacy of the debtor.³ Unfortunately, some of its provisions have fallen into disrepair due to the passage of time, the wonders of modern technology, and a lack of consistent guidance from federal regulators. This Comment will (1) examine the FDCPA’s so-called “Voicemail Paradox” as an illustration of the Act’s shortcomings; (2) analyze the negative impact the law’s current state of disarray has on consumer privacy interests; and (3) ultimately advocate that the Consumer Financial Protection Bureau (“CFPB”) take an aggressive stance to resolve the Voicemail Paradox in a manner that sends the right message to the collectors it regulates and the public it protects by using its considerable rulemaking and enforcement authority to categorically prohibit debt collectors from leaving messages on a consumer’s answering machine.

Part I sets the stage by foregrounding the issue of debt in twenty-first century America, exploring its collection as a cultural phenomenon. First, it introduces the reader to a real live American debtor to illustrate how easy it is to get caught up in the collections cycle and how unpleasant that process can be. Next, by employing the

2. Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2012).

3. *See, e.g., Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002). As the court explained,

The substantive heart of the FDCPA lies in three broad prohibitions. First, a “debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” § 1692d. Second, a “debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.” § 1692e. Third, a “debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.” § 1692f. Violation of these standards subjects debt collectors to civil liability, § 1692k, or administrative enforcement by the Federal Trade Commission

Id.

film *No Country for Old Men* as a metaphor, it tracks the FDCPA's evolution and decay.

Part II analyzes the Voicemail Paradox. Answering machines were not in wide use at the time of the FDCPA's enactment, but nowadays when consumers don't pick up their phones, collectors who want to leave a message after the proverbial "beep" are faced with an allegedly vexing conundrum. By complying with the Act's "mini-Miranda" requirement⁴—which mandates that collectors properly identify themselves in all communications with consumers—they risk violating the Act's prohibition on disclosing the existence of a debt to an unauthorized third party if anyone other than the message's intended recipient overhears it.⁵ Collectors have complained since 2006 that this forces them into an untenable Hobson's choice,⁶ but most courts have rejected such arguments, pointing out the dilemma is largely self-imposed.⁷

After outlining the general trend, Part II focuses on *Zortman v. J.C. Christensen & Associates, Inc.*,⁸ which shifts the issue into the brave new world of cellphones, demonstrates the perils of the inherently patchwork approach our federal judiciary's interpretation of the FDCPA has taken, and (potentially) provides collectors seeking an end-run around the Act with a map for future malfeasance. A closer inspection of the provisions that trigger the Voicemail Paradox suggests stronger privacy interests are at stake than *Zortman* and collectors' advocates acknowledge. Both the Paradox and the FDCPA as a whole reflect deep respect for the American debtor's right to be let alone.⁹ More broadly, telephone and electronic communications are already heavily regulated by laws that tilt in favor of consumer privacy interests.

Part III focuses on how the CFPB can resolve the Paradox. The Bureau, which is uniquely insulated from regulatory capture and Congressional meddling,¹⁰ recently inherited rulemaking and

4. 15 U.S.C. § 1692e(11) (2012); *see also id.* § 1692d(6) (prohibiting phone calls without revealing the caller's identity). For a more in-depth discussion of the mini-Miranda requirement, *see infra* note 15. The phrase draws its name from the famed case, *Miranda v. Arizona*, 384 U.S. 436 (1966).

5. § 1692c(b).

6. *See infra* note 140.

7. *See, e.g., Foti v. NCO Fin. Sys.*, 424 F. Supp. 2d 643, 659–60 (S.D.N.Y. 2006).

8. 870 F. Supp. 2d 694 (D. Minn. 2012).

9. *See infra* notes 301–08 and accompanying text for a discussion of how Professor Prosser's famous turn of phrase taps into a fundamental American value.

10. *See infra* Part III.A.

enforcement authority over the FDCPA.¹¹ Reforming the Act is a tall order, and the CFPB is still in the process of “standing up,” but collectors already seem to sense there is a new sheriff in town. Utilizing its rulemaking and enforcement authority to clarify existing regulations and update them to fit contemporary contexts by declaring that debt collectors cannot leave voicemails, period, is well within the Bureau’s authority. Moreover, taking such a step would (1) be in keeping with both the FDCPA’s original intent and the vast majority of case law, and (2) create a clear bright line rule to help collectors avoid future violations while (re)establishing a broader principle that could easily extend to cover whichever new technological or social media platform innovative debt collectors find most convenient for exploitation next time.

I. EVENING REDNESS IN THE WEST¹²

A. Horton Hears Harassment

“*This is a call to collect a debt.*”¹³ Josh Horton still remembers the first time he answered the phone and heard those eight magic words.¹⁴ It was spring 2009, just after he defaulted on the student loans he incurred while earning a J.D. from a private law school near Pittsburgh, Pennsylvania. The “mini-Miranda” provision of the Fair Debt Collection Practices Act requires that collectors identify themselves as such whenever they communicate with a debtor about repaying what he owes.¹⁵ In the months that followed, Horton heard

11. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1011, 1022, 124 Stat. 1376, 1964, 1980 (2010).

12. With apologies to Cormac McCarthy for borrowing the subtitle to his novel *Blood Meridian* as well as for bastardizing the plot of *No Country for Old Men*, which was based on his 2005 novel of the same name. See generally NO COUNTRY FOR OLD MEN (Paramount Vantage 2007); CORMAC MCCARTHY, NO COUNTRY FOR OLD MEN (2005); CORMAC MCCARTHY, BLOOD MERIDIAN, OR, THE EVENING REDNESS IN THE WEST (1985).

13. Interview with Josh Horton, in Carrboro, N.C. (Sept. 25, 2012) [hereinafter Horton Interview].

14. *Id.*

15. See 15 U.S.C. §§ 1692e(11), 1692d(6) (2012). As discussed in Part II.A, these two FDCPA provisions mandate that debt collectors properly identify themselves in all communications with a consumer. While the former is an anti-fraud measure, the latter is geared towards preventing harassment. However, as Part II.D contends, both also protect consumers’ privacy rights. As for the origins of the “mini-Miranda” nickname, it gained popularity amongst consumer advocates “because it bears similarities to the Miranda rights that law enforcement must use to warn suspects of their right to remain silent, the right to an attorney, and the right to a court-appointed attorney if the suspect cannot afford one.” *What is the mini-Miranda?*, MGJDLAW.COM, <http://minimiranda.com/what-is-the-mini-miranda/> (last visited Jan. 3, 2014). The website is maintained by the Florida law

them recited so frequently that eventually those eight magic words seared themselves across the dark side of his memory, haunting his dreams and inspiring a Pavlovian shudder every time his telephone rang (which was often).¹⁶

Horton enrolled in law school in 2004, hoping to wait out a stagnant job market by acquiring the sort of post-graduate, white-collar skill set that so many thousands before him had translated into financial security.¹⁷ Tuition bills were high, and the federally guaranteed student loans available to him were not sufficient to cover them, let alone the cost of living while he attended law school full-time, and so he took out supplemental private loans from a commercial provider to support himself, justifying it as an “investment.”¹⁸ Remember, this was back in the days when so many were lured to law school by the prospect of a six-figure starting salary.¹⁹ In retrospect, such rose-tinted delusions seem as ill-founded as the then-conventional wisdom that housing prices would never fall, but at the time these assumptions were widely held as Gospel truth—for decades, millions of Americans had staked their futures on both, and for many if not most, the gamble seemed to pay off.²⁰ Horton was one of the folks who found themselves stuck without a chair when the music finally stopped.

As with many other facets of the U.S. economy, the legal market was already faltering by the time Horton graduated in 2007.²¹ He

firm Greenwald Davidson PLLC, which specializes in representing consumer plaintiffs in FDCPA complaints.

16. Horton Interview, *supra* note 13.

17. *Id.*

18. *Id.*

19. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1, BU6 (examining the struggles recent law school graduates have encountered in obtaining gainful employment and repaying their student loans).

20. See *id.* Segal's reporting emphasizes how fundamental shifts in the legal job market, combined with ever-escalating tuition rates, have undermined what was once widely viewed as a path towards prosperity, leaving thousands of recent law school graduates struggling to find gainful employment and pay off their student loan debts. For a broader view of how debt has historically driven the American economy at the macro-level while also functioning at the individual level as a tool for upward social mobility, see generally MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010); ROBERT E. WRIGHT, *ONE NATION UNDER DEBT: HAMILTON, JEFFERSON, AND THE HISTORY OF WHAT WE OWE* (2008); Jackson Lears, *The American Way of Debt*, N.Y. TIMES (June 11, 2006), http://www.nytimes.com/2006/06/11/magazine/11wwln_lede.html?pagewanted=all&_r=0. As Lears notes, “[d]ebt has always played an important role in Americans' lives—not merely as a means of instant gratification but also as a strategy for survival and a tool for economic advance.” *Id.*

21. See Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1 (“The majority of law-school graduates are suffering from a supply-

eventually found a job with a small firm near North Carolina's Research Triangle, but business was slow and his salary was based on commissions; before long, Horton was faced with the choice between paying his bills or the interest payments on his loans.²² When he chose the former, his provider turned his account over to a debt collection agency; Horton's phone started ringing shortly thereafter.²³ At first, the agency called him at home. The conversations started off polite but quickly turned hostile. When negotiations proved fruitless, Horton grew frustrated²⁴ and eventually stopped answering his home phone altogether. So then the agency called his firm's office. The FDCPA bars collectors from contacting debtors at work against their will,²⁵ but despite Horton's protests, the calls continued, sometimes as many as four per day, often utilizing caller-ID scrambling technology to disguise their source.²⁶ By Horton's recollection, these calls were more akin to schoolyard lunch-money bullying than cordial discussions about shared interests and mutually beneficial outcomes.²⁷ They soon became a source of contention with his employer. Horton eventually left the firm, further undermining his ability to repay his debts.²⁸ Desperate for work, he set up a solo practice and started taking on consumer protection cases, hoping to help others avoid his plight.²⁹ When the collectors finally quit calling, the creditor sued him in state court.³⁰ Horton filed a counterclaim for violations of the FDCPA and added the debt collector as a party.³¹ The odds against

and-demand imbalance that's suppressing pay and job growth. The result: Graduates who don't score at the top of their class are struggling to find well-paying jobs to make payments on law-school debts that can exceed \$100,000.").

22. See Horton Interview, *supra* note 13.

23. *Id.*

24. *Id.* Nobody enjoys coming home from a hard day at the office only to spend his leisure time explaining to debt collectors why he was incapable of paying as much as they wanted as soon as they wanted it.

25. *Id.* The FDCPA prohibits collectors from communicating with a consumer at times and places they know are inconvenient. 15 U.S.C. § 1692c (2012). Specifically, if informed that a consumer's employer prohibits such contacts, the collector violates the FDCPA if he continues to call the consumer at work. *Id.* Moreover, consumers can cut off all contact by sending a cease and desist notice in writing. *Id.*

26. See Horton Interview, *supra* note 13. Caller-ID scrambling is especially useful when dealing with a consumer whose business depends on cold calls from prospective clients.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Horton's counterclaims also included causes of action under the U.S. Telephone Consumer Protection Act, 47 U.S.C. § 227 (2012); the North Carolina Fair Debt Collection Practices Act, N.C. GEN. STAT. § 58-70-90 (2011); the North Carolina

his prevailing at trial were steep: while the collection agency had ignored his protests by calling him repeatedly at work (and also left several messages on his home answering machine that likely violated the FDCPA's so-called Voicemail Paradox, discussed in Part II), Horton was then unfamiliar with the requirements for triggering the protections the Act provides debtors.³² "And if I spent three years in law school," he laments, "then how is the average American consumer supposed to know?"³³ Horton eventually settled his case, which gives his saga a happy ending, but his broader point remains no less salient: most debtors do not share his insider's knowledge of the legal system and for them, things do not always work out so fortuitously.

B. Understanding Debt Collection and the FDCPA, with a Little Help from Hollywood

No Country for Old Men is a blood-drenched epic, half-Western and half-"take-the-money-and-run" chase movie.³⁴ It is also the best way to understand the American debt collection industry and the current state of the Fair Debt Collection Practices Act, which was enacted in 1977 to protect consumers against harassment, abuse, and invasions of privacy by debt collectors.³⁵

No Country for Old Men opens in a usually quiet stretch of Texas Hill Country, where a Vietnam veteran named Llewellyn Moss happens across the remnants of a drug deal gone horribly awry while hunting. Moss discovers a suitcase full of cash amidst all the bodies and bloodshed. He sees an opportunity to improve

Telephone Solicitation Act, N.C. GEN. STAT. § 75-101 (2011); and North Carolina law regarding invasion of privacy, negligence, and wanton and intentional conduct.

32. See Horton Interview, *supra* note 13. These days, when Horton explains he had no idea he should have saved those messages or mailed a written cease-and-desist notice to his telephonic antagonizers, he takes some solace in the irony of how few of his colleagues actually practice what they preach, noting "[i]n our own lives, we lawyers almost never follow the advice we give our clients." *Id.*

33. *Id.*

34. NO COUNTRY FOR OLD MEN, *supra* note 12. This may well be the first spoiler alert the *North Carolina Law Review* has ever published. Nonetheless, any readers who have not yet seen the film and do not want to know the details of its plot are hereby advised to stop reading now.

35. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692 (2012)).

*his lot in life, and he takes a risk by seizing what does not belong to him. The year is 1980.*³⁶

For our purposes, Moss represents the American consumer. America has always been a nation built on risk; the concept is inherent in the act of crossing an ocean, or settling a frontier, or starting a business. Throughout our nation's history, American consumers have likewise embraced risk, utilizing debt as a tool for social mobility. Indeed, in many respects, the post-World War II American ideal was fueled by mortgages, credit cards, and student loans.³⁷ If the American Dream is best understood as a gamble, then a defaulted debt is basically the result of a wager that did not work out.

Debtor delinquency rates fluctuate based on broader economic trends, and since the start of the Great Recession and the collapse of the job market, an awful lot of bets have gone badly.³⁸ In 2009, Americans owed \$2.5 trillion in consumer debt.³⁹ These debts came from home loans and credit cards; while some consumers lived beyond their means, others could barely make ends meet or afford to pay for unanticipated healthcare costs. By 2011, thirty million Americans—nearly fourteen percent of adults—owed debts subject to collections processes.⁴⁰

Unsurprisingly, the Mexican drug cartel whose money Moss took decides they would like it returned. The film's plot thus revolves around Moss's quest to escape the Lone Star State as he himself is hunted by a ruthless hitman called Anton Chigurh, who has to rank high on the all-time list of memorably menacing cinematic villains. Chigurh inhabits the screen like an angel of death,

36. See NO COUNTRY FOR OLD MEN, *supra* note 12; CORMAC MCCARTHY, NO COUNTRY FOR OLD MEN (2005). Throughout this Comment, the italicized text summarizes the plot of both the film and the novel it was based on.

37. See LEWIS, *supra* note 20; WRIGHT, *supra* note 20; Lears, *supra* note 20.

38. 1 ROBERT J. HOBBS, NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION 3 (7th ed. 2011) [hereinafter NCLC].

39. *Id.* As the NCLC statistics illustrate, residential and credit debt have skyrocketed since the economic crisis of 2008. In 2006, only 1.12% of residential loans were considered delinquent, as were 2.21% of credit debts; by 2009, those figures escalated to 9.1% and 6.52%, respectively. *Id.* According to the NCLC, debts are considered "delinquent" after thirty days. *Id.*

40. CONSUMER FIN. PROT. BUREAU, CFPB ANNUAL REPORT 2012: FAIR DEBT COLLECTION PRACTICES ACT 4 (2012) [hereinafter CFPB], available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf.

*ruthlessly murdering cops, drug dealers, innocent civilians, and anybody else who stands between him and the money.*⁴¹

When a consumer debt goes delinquent, a creditor may attempt to collect on its own, sometimes using an in-house or subsidiary collection divisions to seek payment via mail or telephone.⁴² If that fails, the creditor will usually “charge off the account,”⁴³ and send it to a third-party collection agency for further pursuit and/or legal action.⁴⁴ Some debt collectors work on contingency, contracting with creditors to collect the debt before a designated period of time elapses in return for a percentage of the amount collected.⁴⁵ Other collectors, known as debt buyers, purchase (old and difficult to collect) consumer debts outright at steep discounts—usually for pennies on the dollar—and can then attempt to collect or sue.⁴⁶ Scholars have noted that debt collectors frequently find themselves stuck in a variation on the classic prisoner’s dilemma.⁴⁷ Debtors often

41. See NO COUNTRY FOR OLD MEN, *supra* note 12. In the film, the cartel nearly catches Moss when he foolishly returns to the scene of the massacre to give a dying man a drink of water. *Id.* While this event triggers the chase that forms the plot, it is noteworthy that the cartel also hid a transponder/tracking device inside that briefcase full of money, which was pretty high-tech for 1980—Moss was always going to be a marked man, doomed whether he knew it or not by a technology he was unaware existed. See *id.* As will be seen, there is a certain degree of symmetry here between the film’s plot and the evolution of the debt collection industry, as well as the FDCPA’s gradual decay.

42. FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 2 (Feb. 2009) [hereinafter FTC], available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

43. “At any stage of the debt collection process, the creditor may ‘write’ or ‘charge’ the debt off for its tax and accounting purposes . . .” NCLC, *supra* note 38, at 18. Once charged off, a debt “is no longer carried as an asset of value on the company’s books.” *Id.* at 19. However, that does not mean the debt is cancelled. “Collection efforts continue on many charged-off debts for a substantial amount of time after it is charged off. Any payment on the charged-off debt is then treated as income—a recovery on a bad debt—on the creditor’s books.” *Id.*

44. FTC, *supra* note 42, at 3.

45. *Id.* (explaining the various collection agencies and modes of compensation).

46. *Id.* at 4 (“Debt buyers generally pay 5% or less of the amount owed . . .”).

47. See generally Winton E. Williams, *Resolving the Creditor’s Dilemma: An Elementary Game-Theoretic Analysis of the Causes and Cures of Counterproductive Practices in the Collection of Consumer Debt*, 48 FLA. L. REV. 607 (1996). Game theorists use the term “prisoner’s dilemma” to describe situations where information deficits undermine the capacity of rational actors to cooperate in pursuit of mutually beneficial goals. *Id.* Professor Williams explains how even though it is usually in both the debtor’s and the collector’s best interests to reach a settlement, information deficits between the parties, exacerbated by structural changes in the collection industry—namely, increased competition from new collection agencies entering the field, which has evolved from local to regional to national in scope—have increased the adversarial nature of the typical collector/debtor relationship, thus lowering the chances of a mutually beneficial outcome while raising transaction costs. *Id.* at 620, 627–29.

owe money to more than one creditor, and different creditors turn to different agencies to collect.⁴⁸ This creates an incentive for abuse by individual collection agencies that compete against one another for whatever funds are available to repay what is owed,⁴⁹ a dynamic that is furthered by collectors' and creditors' desire to avoid the costs of litigation, which in the case of consumer debts often exceeds the amount owed.⁵⁰

The character of Anton Chigurh fits well within a broader narrative archetype debt collectors have long occupied in American popular culture. If popular culture emerges from the intersection of art, politics, and life as actually lived, and if the American Dream is fundamentally a gamble—one that, as recent years illustrate, can be lost with catastrophic results—it makes sense that so many classic Hollywood plots and protagonists are implicitly or overtly motivated by debts and/or fear of men who collect them.⁵¹ Meanwhile, collectors (and their narrative stand-ins, like Anton Chigurh) embody a combination of relentlessness, rugged outlaw cool, and unflinching amorality—silver screen shadows lurking on the dark side of the American Dream to prey upon those who fall short.⁵²

48. See *id.* at 616–26.

49. See *id.* at 626 (arguing that insistent creditors are often paid first).

50. See *id.* at 649 (discussing the fees and court costs associated with a bankruptcy proceeding).

51. Think for a moment about why Jimmy Stewart stepped out on that ledge in *It's a Wonderful Life*, and why Han Solo joined forces with the rebel alliance to hide from Jabba the Hutt in *Star Wars*, and what it is the iconic antiheroes played by Samuel L. Jackson and John Travolta actually do for their employer in *Pulp Fiction*. See *IT'S A WONDERFUL LIFE* (Liberty Films (II) 1946); *STAR WARS: EPISODE IV: A NEW HOPE* (Twentieth Century Fox 1977); *PULP FICTION* (Miramax 1994).

52. See, for example, the aforementioned characters played by Jackson and Travolta in *Pulp Fiction*, or the repo men protagonists of the 1984 cult classic *Repo Man*, starring Harry Dean Stanton and Emilio Estevez as glorified thieves who live the high life brazenly snatching cars for cash before stumbling into an Roswell/Area 51-style alien cover-up by the United States government. See *PULP FICTION*, *supra* note 51; *REPO MAN* (Edge City 1984). Interestingly, this was not the only time the repossession industry was mined as narrative ground for science fiction. The 2010 similarly titled, but unrelated, film *Repo Men* is set in a dystopian future where collectors seize debtors' internal organs as collateral for their defaulted loans (ironically, this film lost its studio fourteen million dollars). See *REPO MEN* (Universal Pictures 2010); *Box Office/Business for Repo Men*, IMDB (Apr. 22, 2010), http://www.imdb.com/title/tt1053424/business?ref_=tt_dt_bus (noting an estimated budget of thirty-two million dollars while grossing approximately eighteen million dollars worldwide). On the other hand, *Rocky* offers a notable contrast to Hollywood's typical representation of collectors: before becoming a professional boxer the hero worked as a debt collector-with-a-heart-of-gold, which (given the contrast) is clearly intended to reflect his strong moral character and engender sympathy from the audience for his tale of underdog triumph. See *ROCKY* (Chartoff-Winkler Productions 1976).

With the collection industry booming in recent years,⁵³ it seems only natural then that debt collectors would come to play a more prominent role in American film and television. As has been clear ever since [insert whichever reality television program you, the reader, personally find most egregiously repugnant here], the American viewing public will watch practically anything. The Great Recession spawned two new TV shows that thematically revolve around the collection industry. *Operation Repo*⁵⁴ dramatically reenacts the real life stories of repo-men who seize the automobiles of insolvent debtors. There are stakeouts and elaborate undercover ruses, chase scenes and confrontations, unsympathetic deadbeats and hardworking blue-collar “heroes” who are just doing their jobs. *Repo Games*⁵⁵ adopts a classic game show quiz format, with a twist: the hosts are actual repo-men, and the contestants are the defaulted debtors whose possessions will be seized at the end of the program unless they answer enough trivia questions correctly. Presumably to make up for their low production values, both these programs offer a healthy dose of *schadenfreude*, inviting viewers to delight in the comeuppance of the deadbeat “villains” whose self-entitled recklessness (partially) wrecked the country’s economy.⁵⁶

53. See NCLC, *supra* note 38, at 3. As reflected in both NCLC’s statistics and the CFPB’s 2012 annual FDCPA report, there is a strong (and obvious) correlation between our country’s recent recession and the number of consumer debt defaults, which in turn has resulted in an uptick in the volume of debts the collection industry handles. See *id.*; CFPB, *supra* note 40. Of course, as seen below, that does not always translate into increased profits for all collectors: while larger agencies have certainly benefited, smaller operations often find the problem with an increase in volume is that—for the exact same structural/economic reasons—many of their new targets have no money whatsoever to pay them with.

54. *Operation Repo* (truTV 2008–2013).

55. *Repo Games* (Spike TV 2010–2013).

56. There are strong parallels between the premises of these shows and public resentment fueled since the crash by conservative arguments blaming debtors rather than the lenders that enabled them. Perhaps the most infamous example of the latter came in 2009 when CNBC host Rick Santelli indignantly asked his audience, “How many of you people want to pay for your neighbor’s mortgage that has an extra bathroom and can’t pay their bills?” *CNBC Business News* (CNBC television broadcast Feb. 19, 2009), available at <http://www.youtube.com/watch?v=6XkjyKfLZTI>. For a generally insightful discussion of this rhetorical strategy, see Paul Krugman, *Mugged by the Moralizers*, N.Y. TIMES, Oct. 31, 2010, at A33. Obviously, the Great Recession has injured millions of Americans who have worked hard every day of their lives and never had a dime drawn against their names in the lender’s ledger. It is in no way surprising that some of these people might feel slightly resentful about all this, nor is it particularly shocking that politicians and pundits would take note and pander accordingly by making scapegoats out of easy targets. In a similar vein, it seems reasonable to posit that there is a certain kind of American television viewer who might enjoy programs like *Operation Repo* and *Repo Games*. For many viewers, shows like these presumably function in much the same way as shows like *COPS*

Of course, the life of a debt collector is not nearly as glamorous as what you might see on television. The collection industry currently employs nearly 130,000 people, the majority of whom are paid low wages, often supplemented by salary incentives that increase based on how much they actually collect.⁵⁷ The average collector spends most of her time in an office cubicle, placing between 44 and 142 calls per day, often reading from pre-approved scripts that guide them through what are usually not pleasant conversations.⁵⁸

In a recent magazine article,⁵⁹ reporter Jake Halpern profiles “Jimmy,” a former cocaine-dealer-turned-debt collector in Buffalo, New York,⁶⁰ to provide a revealing glimpse into the everyday world of small-time debt collectors.⁶¹ Jimmy’s collection agency, located in a former karate academy in a rough neighborhood, purchases old, uncollected accounts from debt brokers and at any given time employs between three and ten people as “point callers” who spend long hours tracking down delinquent debtors.⁶² Jimmy notes that it is often difficult to find and keep good employees; the job is boring and pays poorly, and sometimes he is forced to fire workers who push too far and violate state or federal law in their overzealous collection efforts.⁶³

While Jimmy prides himself on following the law—“we’re professional nags, not con men”⁶⁴—his preferred tactics for dealing

and *Judge Judy*, restoring law and order while simultaneously defining, demonizing, and punishing the “bad guys” for their moral failures. See *COPS* (20th Century Fox Television 1989–2013); *Judge Judy* (Worldvision Enterprises 1996–2013). Like the hapless carjacker or the neighbor who cannot control her pet poodle, the debtor is presented as a social pariah to be cut back down to size for the audience’s amusement.

57. See NCLC, *supra* note 38, at 7.

58. *Id.* at 6–7. For more information on the sorts of scripts collectors use and the strategies that go into producing them, see Robert M. Tharnish, *Six Tips for Making Collection Calls that Get Results*, CREDIT-TO-CASH-ADVISOR.COM (Oct. 23, 2012), <http://www.credit-to-cash-advisor.com/Articles/Collections/CollectionCalls>.

59. Jake Halpern, *Pay Up: A Debt Collector Struggles to Stay Out of Debt*, THE NEW YORKER, Oct. 11, 2010, at 60.

60. Halpern notes that Buffalo was hit so hard by the economic crisis that in 2010, debt collection was among its few remaining profitable industries, which is why the city boasted more debt collectors than “taxi-drivers, bakers, butchers, steel workers, roofers, crane operators, hotel clerks, and brick masons combined.” *Id.*

61. *Id.* at 60–67.

62. *Id.* at 62.

63. *Id.* at 66. For example, Jimmy’s company faced several lawsuits for violations a former employee committed. *Id.* at 65. The article further describes a common (illegal) practice employed by Buffalo’s collectors: falsely threatening to have debtors arrested, implying that police are en route to their homes and afterwards their children will be taken away by social service agencies. *Id.*

64. *Id.* (quotation omitted).

with debtors are manipulative and at times cross into (or over) legal grey areas. Halpern describes a typical collection call in which Jimmy adopts a tough tone with an alleged debtor, interrupting her attempts to explain her situation by bluntly informing her what she owes and what will happen if she does not pay.⁶⁵ Eventually, the debtor works herself into a frenzy, at which point Jimmy abruptly hangs up and predicts she will call back soon.⁶⁶ Indeed, within moments she does.⁶⁷ Another employee then picks up the phone and begins to play the role of the “good guy” who is actually trying to help her avoid the higher fees she will have to pay the bank and its lawyers if a lawsuit ensues.⁶⁸ The employee nearly succeeds in convincing her to pay, although the call ends when she eventually admits she simply does not have the money.⁶⁹

*Chigurh is not the only man searching for Moss. The local sheriff, Ed Tom Bell, has served the tiny patch of Texas where the story begins for decades. He has seen it all, knows every trick in the book, but is nearing retirement. When he realizes Moss—one of the citizens he swore an oath to protect—took the money and is being pursued by a bloodthirsty killer, he decides to track them both down.*⁷⁰

Debt collectors perform a critical role in helping the American consumer credit market function properly. “By collecting delinquent debt, collectors reduce creditors’ losses from non-repayment and thereby help to keep consumer credit available and potentially more affordable to consumers.”⁷¹ For millions of American consumers, “[a]vailable and affordable credit is vital . . . because it makes it possible for them to purchase goods and services that they could not

65. *Id.* at 64.

66. *Id.*

67. *Id.*

68. *Id.* Later, Halpern interviews a collector at a different agency who reveals a similar strategy she deployed when attempting to collect a debt from a disabled veteran. *Id.* at 67. The collector explained, “[Y]ou have to empathize with debtors but not have sympathy, because if you have sympathy you don’t get paid.” *Id.* (internal quotation marks omitted).

69. *Id.* at 65. This turns out to be a persistent problem for Jimmy’s collection agency; while the overall number of delinquent debts has risen dramatically since 2008, the economic recession and weak job market have meant that many of those debtors simply cannot pay. As a result, Jimmy often has a hard time coming up with sufficient funds to meet his weekly payroll. *Id.* at 66–67.

70. See NO COUNTRY FOR OLD MEN, *supra* note 12.

71. See CFPB, *supra* note 40, at 4.

afford if they had to pay the entire cost at the time of purchase.”⁷² In short, debt collectors are a necessary evil.

But, as Congress realized in the 1970s, sometimes they are also just plain evil.⁷³ In 1977, Congress passed the Fair Debt Collection Practices Act to combat rampant abuses by debt collectors.⁷⁴ By “establish[ing] general standards of proscribed conduct, defin[ing] and restrict[ing] abusive collection acts . . . and provid[ing] specific rights for consumers,” the Act protects consumers against “invasion[s] of privacy, harassment, abuse, false or deceptive representations, and unfair or unconscionable collection methods” while also insuring that honest collectors who actually do play by the rules are not disadvantaged.⁷⁵ The Act specifically defines who qualifies as a debt collector⁷⁶ and generally imposes strict liability

72. *Id.*

73. See S. REP. NO. 95-382, at 2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696. The Senate Committee Report

found that debt collection abuse by third party debt collectors is a widespread and serious national problem. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer’s legal rights, disclosing a consumer’s personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

Id.

74. See Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692 (2012)). The Act is in keeping with America’s history of treating debt as a tool for social mobility and protecting debtors. The United States is something of an outlier in this regard. See Andrew J. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, 100 COM. L.J. 191 (1995). Duncan notes that laws mandating harsh treatment for insolvent debtors may well be as old civilization itself: the Code of Hammurabi authorized selling debtors and their families into slavery; the Romans’ famous Twelve Tablets allowed creditors to “divide” a debtor’s body limb-from-limb amongst themselves to recoup their lost assets. *Id.* at 211–12. In sharp contrast with that historical backdrop, American colonists abolished the English practice of indefinitely imprisoning insolvent debtors under harsh conditions like hostages held for ransom. *Id.* at 212–13. Moreover, throughout the eighteenth century, the institution of indentured servitude provided a platform upon which aspiring immigrants could build better lives for themselves and their children. See, e.g., Alfred L. Brophy, *Law and Indentured Servitude in Mideighteenth Century Pennsylvania*, 28 WILLAMETTE L. REV. 69, 75 (1991). By the dawn of the twentieth century, Congress had passed legislation enabling the legal discharge of defaulted debts via bankruptcy. See Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

75. NCLC, *supra* note 38, at 93 (summarizing the FDCPA provisions of 15 U.S.C. § 1692).

76. 15 U.S.C. § 1692a(6) offers a broad definition, specifying the Act regulates “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or

against those who violate its provisions governing how and when they are permitted to communicate with consumers.⁷⁷ Violations are judged against the “least sophisticated consumer”⁷⁸ standard, which reflects the FDCPA’s aim of protecting “all consumers, the gullible as well as the shrewd.”⁷⁹ The Act provides aggrieved consumers with a right of action in federal court, with a statutory remedy of \$1,000 plus whatever actual damages are incurred, as well as attorney’s fees in order to encourage lawyers to take on cases that would otherwise not be lucrative.⁸⁰ For our purposes, Sheriff Bell represents the FDCPA.

Yet Sheriff Bell is always at least one step behind in his quest to save Moss from Chigurh. His monologue during the film’s opening scenes makes clear that he is the last of a dying breed of old-school lawmen. He fondly remembers the days when the cops in these parts seldom even needed to carry a sidearm, and he is wary of the newly ascendant brand of hyper-violent bad guys who populate the film’s plot. In other words: he’s lost a step, and he knows it. But nothing in his years of service has prepared him for the likes of Chigurh, who seems practically supernatural in surviving several serious injuries throughout the course of the plot. He kills with a ruthless, almost mechanical, efficiency and speaks in aphoristic riddles about fate and the folly of man’s ambition and the inevitability of all lives ending in loss. As the chase unfolds, numerous supporting characters expire shortly after crossing his path, felled by a weapon nobody’s ever seen before.⁸¹

attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6) (2012).

77. NCLC, *supra* note 38, at 171. However, while strict liability is the norm, several FDCPA provisions specifically include an intent requirement. *See, e.g.*, 15 U.S.C. § 1692d(5). The Act also provides a bona fide error defense that exempts collectors from liability if they can show their alleged violation “was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” *Id.* § 1692k(c).

78. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993) (explaining that district courts and all federal appellate courts have adopted the standard).

79. *Id.* As the Second Circuit has explained, “the test is how the least sophisticated consumer—one not having the astuteness of a ‘Philadelphia lawyer’ or even the sophistication of the average, everyday, common consumer—understands [the collector’s challenged conduct or communication].” *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996).

80. 15 U.S.C. § 1692k. If the collectors demonstrate the suit was filed in bad faith, the Act requires plaintiffs to pay the collector’s attorney’s fees. *Id.*

81. *See NO COUNTRY FOR OLD MEN*, *supra* note 12.

Nowadays, collectors, consumer advocates, and federal regulators all agree that the FDCPA was written to fit the context of the 1970s. It has not been meaningfully updated since then, and it is woefully outdated on account of crucial shifts the last three and one-half decades have produced in the industry's relevant players and their methods of collection.⁸² When Congress passed the FDCPA, most collection agencies were relatively small, local(ish) operations working on contingency, contacting consumers mostly through mail or by dialing their telephone numbers individually and engaging in live conversations.⁸³ Since then, however, the number of collection agencies has grown—6,500 by 2007—many of which have expanded vastly in size and scope.⁸⁴ Some benefited from contracts with the federal government, while others took advantage of creditors downsizing their internal collection departments.⁸⁵ By 1990, the top six collection firms in the United States handled almost a third of the nation's debts.⁸⁶

Moreover, there are now entire law firms dedicated to collecting debts. In 2006, those firms posted nearly \$1.2 billion in revenues.⁸⁷ Many of these firms take work from creditors on contingency, receiving a percentage of what they collect at trial for their services.⁸⁸ Others purchase debts outright, and some function like de facto collection agencies, employing paralegals as collectors in addition to the lawyers who file suits against delinquent debtors in state courts.⁸⁹ Consumer advocates point out that despite the FDCPA's protections against abuse and the right of action it offers, the Act does little to assist consumers when they are the ones being sued; moreover, collection law firms often provide insufficient notice of these suits and otherwise exploit consumers' ignorance of their rights and the legal

82. See FTC, *supra* note 42, at 1. The FTC workshop, "Collecting Consumer Debts: The Challenges of Change," brought together players from all sides of the collection industry for their input on how best to update the FDCPA's rules and protections in light of these shifts. *Id.*

83. *Id.* at 15 (explaining the costs of debt collection).

84. See NCLC, *supra* note 38, at 7.

85. See *id.*

86. For a glimpse inside life at a sleek corporate collection firm, see Halpern, *supra* note 59, at 67. Halpern pays a visit to the offices of a typical big money collector called Northstar, which works on consignment for major credit card companies. *Id.* at 66. Northstar reported 2010 as a record-breaking year, with profit increases of thirty-five to forty percent. *Id.* at 67.

87. NCLC, *supra* note 38, at 8.

88. *Id.*

89. *Id.* at 9.

process generally.⁹⁰ As a result, the vast majority of consumer collection suits are ineffectively contested and result in default judgments in favor of the collectors, who are then able to seize the consumer's property or garnish wages in order to satisfy the debt.⁹¹

In a similar vein, the practice of debt-buying has increased exponentially since the Act's passage, which consumer advocates caution has increased the potential for abuse.⁹² Instead of working on contingency for creditors, debt buyers purchase the debt outright for a fraction of its value after the creditor writes it off as a loss.⁹³ Often, these delinquent debts are several years old, most have already been assigned for collection (without success) to multiple agencies before they are purchased, and sometimes have already been paid off in full.⁹⁴ Debt buyers tend to be more persistent in their attempts to collect, but they frequently lack crucial verification information and legal paperwork, which consumer advocates contend only furthers the potential for harassment and abuse.⁹⁵

Technological innovation has further transformed the industry. On the one hand, collectors now utilize call centers with sophisticated computer databases and predictive dialers to track down consumers with increased efficiency.⁹⁶ Social media and internet phone directories make debtors easier to locate, while automated systems using predictive dialers

determine the number of calls to make based on the time of day, the number of collectors logged on to the system, and the average length of time collectors speak with consumers . . . [thereby] permit[ting] debt collectors to be far more productive [by] eliminat[ing] the time spent dialing and waiting for a consumer to answer.⁹⁷

90. *Id.* at 6.

91. *Id.*

92. *Id.* at 8.

93. *Id.*

94. For an entertaining insider's explanation of debt-buying, see Halpern, *supra* note 59, at 62. The accounts are commonly referred to as "papers," which vary widely in quality. *Id.* "Fresh" papers are sold to large, established collectors by major credit issuers; they cost more but generally have a higher rate of successful collection. *Id.* "Scummy" papers often come from payday lenders; these are cheaper but typically for smaller amounts that are more difficult to collect because the debtors are more likely to be totally insolvent; often they are resold to multiple collection agencies simultaneously. *Id.*

95. See NCLC, *supra* note 38, at 11 (describing scenarios in which debt buyers attempted to collect from debtors who already paid back what was owed).

96. See FTC, *supra* note 42, at 16.

97. *Id.* A 2005 survey conducted by the collector and creditor lobbying group ACA International: The Association of Credit and Collection Professionals ("ACA

On the other hand, consumers have embraced new communication technologies—such as cell phones, answering machines, and social media—that Congress had no way of anticipating when it passed the FDCPA in 1977. These modern technologies make it easier to communicate with consumers, but that convenience comes at a cost to both sides. Consumer advocates warn these new methods also increase the chances for illegal abuse and harassment by unscrupulous collectors.⁹⁸ Meanwhile, collectors contend that the real risk of harassment is from crooked plaintiffs’ lawyers aggressively targeting while at the same time exposing collectors who play by the rules to liability for technical violations of outdated laws.⁹⁹

In a typical Western, when the old sheriff is ailing, a new sheriff rides into town to take his place. In No Country for Old Men, the most logical candidate to replace Ed Tom Bell as the embodiment of law and order is a bounty hunter named Carson Wells. He enters the story midway through, visiting Moss in the hospital as he recovers from a gun battle with Chigurh, promising to protect him in exchange for the money. Wells is a decorated veteran, a proud hero who lives by his own code, but he is also arrogant, and he eventually gets lazy, lets his guard down, and that is what gets him killed by Chigurh. Just before pulling the trigger, Chigurh asks him a cold-blooded and existentially harrowing question, “If the rule you followed brought you to this, of what use was the rule?” Wells wilts, begs, dies. The phone rings and it’s Moss; we never know why he is calling—perhaps to accept Wells’s offer of protection—but Chigurh informs him it is too late, he is on his own. He offers Moss a deal: he cannot save himself, but if he hands over the money, his wife’s life will be spared.¹⁰⁰

For our purposes, Wells is represented by the Federal Trade Commission (“FTC”), which Congress entrusted with primary enforcement authority over the FDCPA.¹⁰¹ However, in three

International”) found that roughly fifty percent of its members made use of this technology. *Id.*

98. See NCLC, *supra* note 38, at 26 (citing changes in telecommunication systems and computers to expedite collection procedures).

99. For a discussion of these legal perils from the collection agency’s point of view, see generally William P. Hoffman, Comment, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 549–52 (2010).

100. See NO COUNTRY FOR OLD MEN, *supra* note 12. This sort of threat would clearly violate the FDCPA.

101. Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 815, 91 Stat. 874, 882 (1977), *repealed by* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.

decades of supervision, the FTC filed only sixty lawsuits against collectors for violations.¹⁰² Moreover, although the agency has sporadically offered nonbinding advisory opinions on how to interpret the Act,¹⁰³ these have often sent inconsistent messages.¹⁰⁴ For example, FTC staff opinions promoted an unusually narrow definition of what constitutes “communication” between a collector and a consumer or third party.¹⁰⁵ Those FTC staff opinions are inconsistent with federal case law, which identifies Congress’s intention to use a broad definition of the term “communication.”¹⁰⁶ Nevertheless, debt collectors rely on the FTC staff opinions’ narrow use of the term—sometimes successfully—to argue that communications or conduct that would otherwise violate the FDCPA is exempted from liability.¹⁰⁷

Meanwhile, consumers have largely been left to fend for themselves. Although collectors prevail at a high rate of success when they initiate suits against debtors,¹⁰⁸ experience suggests that most Americans are largely unaware of the rights and remedies the Act grants consumers.¹⁰⁹ In 2011, the FTC received more than 140,000 consumer complaints about debt collectors, far surpassing complaints

L. No. 111-203, § 1089(1), 124 Stat. 1376, 2092 (2010) (codified at 15 U.S.C. § 1692m (2012)).

102. See FTC, *supra* note 42, at viii (noting that the FTC increased its emphasis on enforcement over the last half-decade, bringing more prosecutions against collectors with the aim of promoting deterrence); see also CFPB, *supra* note 40, at 14 (“[In 2011], the FTC . . . brought or resolved seven debt collection cases, the highest number . . . in any single year.”).

103. See NCLC, *supra* note 38, at 192 (“While the courts are not bound by FTC staff theories, they sometimes defer to them.”).

104. See *id.* (“The FTC staff commentary appears contradictory.”).

105. See *id.* (analyzing and criticizing the FTC staff opinions). The FDCPA defines “communication” as “the conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2) (2012).

106. See, e.g., *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 655 (S.D.N.Y. 2006) (citation omitted) (explaining how most courts adopt a broad definition of “communication” to honor both the letter and spirit of the FDCPA).

107. For example, see Part II’s analysis of *Zortman v. J.C. Christensen & Associates, Inc.*, 870 F. Supp. 2d 694 (D. Minn. 2012).

108. See NCLC, *supra* note 38, at 6. (“Almost all of the millions of collection suits filed against consumers each year are ineffectively contested and result in default judgments against the consumer.”).

109. See, e.g., CFPB, *supra* note 40, at 5. (“Based on the FTC’s experience, many consumers never file complaints with anyone other than the debt collector itself. Other consumers complain only to the underlying creditor or to enforcement agencies other than the FTC. Some consumers may not be aware that the conduct they have experienced violates the FDCPA or that the FTC enforces the FDCPA. For these reasons, the total number of consumer complaints the FTC receives may understate the extent to which the practices of debt collectors violate the law.”).

about any other industry for the thirteenth year in a row.¹¹⁰ Yet the FTC does not have the resources to investigate (or even review) all the complaints it receives.¹¹¹ And although consumers often complained to the FTC about practices that are actually legal under the FDCPA, evidence suggests the overall number of complaints is much larger because many consumers mistakenly file complaints with the wrong federal agency, or else merely with the collectors and creditors themselves.¹¹²

In 2009, the FTC released a workshop report entitled *Collecting Consumer Debts: The Challenges of Change*.¹¹³ The report summarized the state of disarray into which the Act has fallen, concluding that “the debt collection legal system needs to be reformed and modernized to reflect changes in consumer debt, the debt collection industry, and technology.”¹¹⁴ The report noted that widespread abuses by collectors have continued, and it advocated several practical measures to rein them in, such as increasing the amount of statutory damages available to plaintiffs whose rights under the Act are violated.¹¹⁵ However, the report’s overall tone was

110. *Id.* at 6. (“The FTC continues to receive more complaints about the debt collection industry than any other specific industry. Complaints about third-party debt collectors and in-house collectors in 2011 together totaled 142,743 complaints and accounted for 27.16% of all complaints the FTC received.”); *see also* NCLC, *supra* note 38, at 27 (describing the collection industry’s unparalleled thirteen-year run of excelling at generating consumer complaints). The 2011 FTC statistics published in a report by the Consumer Sentinel Network list “identity theft” as the most frequent subject of consumer complaints. FED. TRADE COMM’N, CONSUMER SENTINEL NETWORK DATA BOOK: JANUARY – DECEMBER 2011, at 3 (2012), available at http://www.ftc.gov/sites/default/files/documents/reports_annual/sentinel-cy-2011/sentinel-cy2011.pdf. Yet, as the CFPB notes, “identity theft” is not confined to any single specific industry. CFPB, *supra* note 40, at 6 n.10. Moreover, several of the other complaint categories significantly overlap with the collection industry. *Id.* Apart from debt collection, the industries that prompted the most complaints in 2011 were “Prizes, Sweepstakes, and Lotteries” (6%), “Shop-at-Home and Catalog Sales” (5%), “Banks and Lenders” (5%), “Internet Services” (5%), “Auto Related Complaints” (4%), “Impostor Scams” (4%), “Telephone and Mobile Services” (4%), “Advance-Fee Loans and Credit Protection/Repair” (3%), and “Foreign Money Offers and Counterfeit Check Scams” (2%). FED. TRADE COMM’N, *supra*, at 3.

111. *See* Halpern, *supra* note 59, at 65. When Halpern interviewed Reilly Dolan, an assistant director at the FTC, Dolan argued “such detective work does not fall within [the FTC’s] purview [and] when asked how many complaints were actually read replied that there was no way to know for certain.” *Id.*

112. *See* CFPB, *supra* note 40, at 5.

113. *See* FTC, *supra* note 42.

114. *Id.* at i. As if to hammer home the point, the FTC’s 2010 follow-up report was called *Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, FED. TRADE COMM’N (July 2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

115. *See* FTC, *supra* note 42, at ii.

surprisingly sympathetic to the collection industry, emphasizing its importance to the American consumer credit market and generally treating collectors and their advocates as partners in regulation, rather than adversaries.¹¹⁶ For example, with regards to new technologies invented since the Act's passage, the FTC sided with collectors—who argued they should be allowed to utilize all available methods of communicating with consumers—over the objections of consumer advocates concerned about potential invasions of privacy.¹¹⁷

The plot gradually builds towards a climactic showdown that never occurs. In the end, Moss gets killed, but off-screen, and not by Chigurh. Instead, the Mexican cartel narrowly beats both its hired hitman and Sheriff Bell in their race to reach him. Moss dies in a hail of bullets, and the drug dealers go home with their money.¹¹⁸ In the aftermath, Sheriff Bell visits the darkened interstate motel room where Moss got gunned down and nearly comes face to face with Chigurh, who is likewise investigating how his target slipped away. For a moment, it seems Sheriff Bell might actually avenge Moss's death by bringing Chigurh to justice. But the good sheriff knows what he is up against, and walks away. Maybe he is a coward, or maybe he is a pragmatist,¹¹⁹ either way, his abdication has consequences. Chigurh keeps killing innocent people, including, shortly before the film ends, and true to his word—Moss's widow.¹²⁰

In the absence of consistent guidance from regulators, most federal district courts have relied on the Act's plain meaning and legislative history in applying it. Some courts, however, have offered novel interpretations of various FDCPA provisions. For example, the Seventh Circuit has long objected to the Act's "least sophisticated

116. *Id.* Collectors were well represented at these workshops, which is unsurprising given that collections has evolved into a multi-billion dollar industry. *See id.* at 35. Leading collectors advocates include ACA International and the National Association of Retail Collection Attorneys ("NARCA"). *Id.* at 14, 40.

117. *See id.* at 35.

118. When *No Country* was released, there was some degree of popular dissatisfaction about the fact that none of what happens in this sentence is ever seen by the audience. Nonetheless, it is true to the book. It is also pretty well in keeping with how a contingency contract to collect a debt functions; if the collection agency fails to collect during the allotted time, the right reverts back to the creditor. *See* FTC, *supra* note 42, at 3. Of course, most creditors stop short of resorting to firearms when this happens.

119. The novel includes a scene omitted from the film that seemingly favors the first of those two hypotheses. *See* CORMAC MCCARTHY, *NO COUNTRY FOR OLD MEN* 274–80 (2005). On the other hand, there is something undeniably heroic in knowing when to make an exit.

120. *See id.*

consumer” standard on what might uncharitably be characterized as grammatical grounds.¹²¹ Instead, the Seventh Circuit has created its own “unsophisticated consumer” standard, although the court has also clarified that the two mean essentially the same thing.¹²² The Seventh Circuit has also read a “materiality” element into the Act, which has in some cases exempted collectors from strict liability for minor violations—such as obvious typographical errors—that would not deceive or mislead a reasonable unsophisticated consumer.¹²³ Such judicial “innovations” are not necessarily unreasonable, but they do seemingly conflict with the Act’s strict liability standard. And as such innovations slowly spread to district courts in other circuits,¹²⁴ they sometimes produce incongruous outcomes that risk undermining the Act’s explicit goal of protecting consumers.¹²⁵ In a related development, the Tenth Circuit’s decision in *Marx v. General Revenue Corporation*¹²⁶ broke new ground with its unprecedented holding that a successful debt collector should be entitled to have a consumer-plaintiff pay the collector’s legal fees without having to

121. See, e.g., *Gammon v. GC Servs. Ltd. P’ship*, 27 F.3d 1254, 1257 (7th Cir. 1994) (“Literally, the least sophisticated consumer is not merely ‘below average,’ he is the very last rung on the sophistication ladder. Stated another way, he is the single most unsophisticated consumer who exists. Even assuming that he would be willing to do so, such a consumer would not likely be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion. Courts which use the ‘least sophisticated consumer’ test, however, routinely blend in the element of reasonableness.”).

122. See *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996) (“*Gammon* does not significantly change the substance of the ‘least sophisticated consumer’ standard as it had been routinely applied by the courts.”).

123. See, e.g., *Hahn v. Triumph P’ships*, 557 F.3d 755, 758 (7th Cir. 2009).

124. See, e.g., *Stewart v. Bierman*, 859 F. Supp. 2d 754, 762–63 (D. Md. 2012) (describing how the materiality element has spread from the Seventh Circuit to the Sixth, Ninth, and now the Fourth Circuits as well). The Fourth Circuit has justified its adoption of the materiality requirement by noting “[a]lthough Congress did not expressly require that any violation of § 1692e be material, courts have generally held that violations grounded in ‘false representations’ must rest on material representations.” *Warren v. Sessoms & Rogers*, 676 F.3d 365, 374 (4th Cir. 2012). However, as the *Bierman* court acknowledged, the materiality analysis is not always straightforward in application because it does not apply to all FDCPA provisions relating to false representations. See *Bierman*, 859 F. Supp. 2d at 763 (quoting *Warren*, 676 F.3d at 374). For example, in *Warren*, the Fourth Circuit court reversed the district court’s erroneous application of the materiality standard to the plaintiff’s section 1692e(11) failure to disclose claim when a collector did not disclose “that the communication . . . was from a debt collector.” *Warren*, 676 F.3d at 374 (internal quotation marks omitted).

125. See *Bierman*, 859 F. Supp. 2d at 764 (dismissing plaintiffs’ FDCPA claim against a law firm for lack of materiality despite the fact it engaged in “robo-signings” to forge notary signatures and seals when foreclosing on plaintiffs’ homes, essentially because the foreclosures would have happened eventually regardless of the fraudulent robo-signings at issue).

126. 668 F.3d 1174 (10th Cir. 2011).

demonstrate the complaint was brought in bad faith, which the Act explicitly requires.¹²⁷

Meanwhile, debt collectors continue to make headlines with innovative and abusive strategies. In Minnesota, collectors stalked emergency room waiting areas, demanding sick and injured patients pay before receiving treatment.¹²⁸ And in Missouri, collection lawyers briefly resurrected English-style debtors' prisons by using civil attachments to have consumers who do not pay judgments against them thrown in jail.¹²⁹

While these outrageous actions would almost certainly violate the FDCPA and other laws, it must be acknowledged that most debt collectors are clearly not as evil as a homicidal maniac like Anton Chigurh, or even his real-life counterparts who stalk their prey in hospitals.¹³⁰ The fact that *No Country for Old Men* provides a convenient narrative metaphor for explaining the current state of affairs ought not be taken as direct personal condemnation of the

127. *Id.* at 1178–79. The text of 15 U.S.C. § 1692k(a)(3) reads:

[I]n the case of any successful action to enforce the foregoing liability, the costs of the action, together with 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.

15 U.S.C. § 1692k(a)(3) (2012) (emphasis added). However, despite the seemingly clear statutory language, the Supreme Court of the United States ultimately upheld the district court's award of attorney fees. *See Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1170–71 (2013). Writing for the majority, Justice Thomas contended,

The Fair Debt Collection Practices Act (FDCPA), 91 Stat. 881, 15 U.S.C. § 1692k(a)(3), provides that “[o]n 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.” This case presents the question whether § 1692k(a)(3) “provides otherwise” than Rule 54(d)(1). We conclude that § 1692k(a)(3) does not “provid[e] otherwise,” and thus a district court may award costs to prevailing defendants in FDCPA cases without finding that the plaintiff brought the case in bad faith and for the purpose of harassment.

Id.

128. Jessica Silver-Greenberg, *Medical Debt Collector to Settle Suit for \$2.5 Million*, N.Y. TIMES, July 31, 2012, at B1–B2.

129. Jim Gallagher, *Payday Lenders Use Courts to Create Modern Debtor's Prison*, ST. LOUIS POST-DISPATCH (Aug. 19, 2012, 12:15 AM), http://www.stltoday.com/business/local/payday-lenders-use-courts-to-create-modern-debtors-prison/article_f56ca6aa-e880-11e1-b154-0019bb30f31a.html (“[J]udges often set the debtor's release bond at the amount of the debt and turn the bond money over to the creditor – essentially turning publicly financed police and court employees into private debt collectors for predatory lenders.”).

130. *See* Silver-Greenberg, *supra* note 128 (describing debt collection in emergency rooms).

collection industry's thousands of employees, most of whom are no doubt honest and hardworking as they toil through the thankless—but (from a macro-economic perspective) vital—tasks before them. Indeed, for many—including the plaintiff in the lead case discussed below in Part II—being employed by a debt collector is the main thing that separates them from being called by one.¹³¹

That, of course, brings up one last thing No Country for Old Men can remind us about the collection industry and its targets. Part of what makes what is perhaps the film's most iconic scene so remarkable is the fact that Anton Chigurh does not kill someone. Instead, he offers the proprietor of a rural gas station the chance to keep his life by correctly calling the outcome of a coin flip, heads or tails. The old man behind the cash register inherited the store from his father-in-law and is guilty of nothing more than slightly delaying Chigurh in his quest by virtue of having attempted to engage him in polite small-talk. He is first confused, then terrified, when the hitman delivers an ominous soliloquy about coins and destiny and how everything inevitably ends. After the old man asks what is at stake, Chigurh answers "everything." The old man objects that he has no recollection of wagering anything. Chigurh insists the old man has been putting it up his whole life and did not even know. Then Chigurh flips the quarter and the old man guesses right.¹³²

In a way, most of us are never very much further removed than a couple of bad decisions or a long-term illness or injury or economic recession away from a brush with Anton Chigurh, buried like Josh Horton beneath an avalanche of unpleasant telephone conversations.¹³³ If the American Dream is a gamble, then whatever our noble intentions or diligent preparations, to a certain extent the hand that tosses the coin is influenced by events beyond our individual control. Some bets just don't pay off, although like the old man, those folks lucky enough to marry or be born into financial privilege often stand a better chance than the rest. The law may aim to shield us, but like Sheriff Bell, the FDCPA has grown long in the tooth.¹³⁴

131. See NCLC, *supra* note 38, at 7 (describing the low pay collectors typically receive); Halpern, *supra* note 59, at 67 (describing same).

132. See NO COUNTRY FOR OLD MEN, *supra* note 12.

133. See Horton Interview, *supra* note 13.

134. In the film's final scene, we see Sheriff Bell sitting at his breakfast table, retired, full of regret. He describes the dreams he had the night before. They are about his father, and borrowing money, and the way they carried fire in the olden days. These dreams are

II. THE VOICEMAIL PARADOX

A. *Origins of the Voicemail Paradox*

In February 2012, U.S. Representative Barney Frank introduced H.R. 4101.¹³⁵ If passed, the Fair Debt Collection Practices Clarification Act of 2012 would have amended the FDCPA to allow debt collectors to

leave messages for a consumer in connection with the collection of a debt on the consumer's answering machine, voice messaging system, or other similar device, including in an initial communication with the consumer, so long as the message complies with regulations prescribed by the [Consumer Financial Protection] Bureau to ensure the preservation of the privacy and other rights granted to the consumer, including the restrictions on communications with third parties¹³⁶

Frank's bill was designed to cure what debt collectors have come to call the Voicemail Paradox.¹³⁷ They contend that voicemails are a cheap, efficient, and vital means of contacting consumers.¹³⁸ Since 2006, debt collectors have found it increasingly difficult to leave a message after the proverbial "beep" without incurring liability for violating the FDCPA.¹³⁹ Over the last half-decade, collectors and their advocates have repeatedly called on Congress to amend the Act to exempt them from what they view as an undeserved deluge of frivolous suits based on hyper-technical infractions brought by debtors confused by unscrupulous consumer advocate lawyers.¹⁴⁰

enigmatic, but it would not be wholly implausible to hear in Sheriff Bell's monologue a profound statement about the very progress and perpetuation of the human species, and how the light that guides us is the law, which is a precious but fragile tool, waning but worthy of preservation, not only for ourselves but the generations to follow us. Judging from his tone and the glint in his eyes, it is difficult not to conclude that the good sheriff thinks himself a failure in this grander enterprise. But then, who are we to judge Tommy Lee Jones? See *NO COUNTRY FOR OLD MEN*, *supra* note 12.

135. Fair Debt Collection Practices Clarification Act of 2012, H.R. 4101, 112th Cong. (2012).

136. *Id.* The bill was later amended in May 2012, by H.R. 5794, which was substantially the same with the addition of a disclaimer stating: "Nothing in the previous sentence shall be construed as providing an exemption from liability based on any rule, regulation, interpretation, advisory opinion, or approval made by any entity other than the Bureau or an official or employee of the Bureau." Fair Debt Collection Practices Clarification Act of 2012, H.R. 5794, 112th Cong. § 2 (2012).

137. See H.R. 5794.

138. See FTC, *supra* note 42, at 47-49.

139. *Id.* at 47.

140. See Hoffman, *supra* note 99, at 556. As is inevitably the case when a well-funded industry objects to being sued, most of the trouble is blamed on avaricious lawyers, who

They argue that restrictions on their ability to leave voicemails are unsupported by the Act itself and therefore contradict Congressional intent, violate the First Amendment as unreasonable restrictions on commercial free speech, and harm consumers by denying them the opportunity to negotiate settlements.¹⁴¹

Unfortunately for debt collectors, Representative Frank's bill eventually died in committee.¹⁴² As it stands today, in the vast majority of federal district courts, a debt collector who leaves a voicemail on a consumer's answering machine will be liable for violating the FDCPA if he does not properly identify himself.¹⁴³ However, even if his voicemail does comply with FDCPA's mini-*Miranda* requirement, if his message is overheard by the consumer's neighbor, roommate, child, co-worker, or employer, the debt collector will be held liable for violating the Act's prohibition against communicating about a debt with an unauthorized third party.¹⁴⁴

This Section begins with a tour of the FDCPA provisions that combine to create the Voicemail Paradox. Part II.A.1 illustrates that while voicemails were not widely used at the time of the Act's passage in 1977, when taken together, subsections 1692c(b), 1692d(6), 1692e(11) were always intended to protect consumers against similar harms. Next, in Part II.A.2, the focus shifts to an analysis of the landmark holding in *Foti v. NCO Financial Systems*,¹⁴⁵ which held a collector liable for violating the Voicemail Paradox and sparked a

"exploit the vagueness of the FDCPA" and its strict liability standard to tempt debtors into filing frivolous lawsuits with disingenuous promises their debts will disappear, thus resulting in "an onslaught of litigation . . . pitting the unwitting consumer against the often fair and honest collector. In the end, the losers are creditors, consumers, and the taxpayers who support our courts, suffering at the expense of consumer advocacy attorneys." *Id.* at 550-51.

141. See, e.g., Patrick Lunsford, *Another Circuit Court Ruling Complicates Answering Machine Use in Debt Collection*, INSIDEARM.COM (Oct. 20, 2009), <http://www.insidearm.com/daily/debt-collection-news/debt-collection/another-circuit-court-ruling-complicates-answering-machine-use-in-debt-collection/print/> (quoting a collection lawyer arguing that "Congress never intended to prevent communicating with consumers by telephone" (internal quotation marks omitted)).

142. See H.R. 5794 (112th): *Fair Debt Collection Practices Clarification Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr5794> (last visited Jan. 3, 2014). While the exact reasons for the bill's demise are murky, one plausible explanation might be since Dodd-Frank's passage, Congressional Republicans have been far less concerned with amending individual provisions of consumer protection laws than with neutering or abolishing the CFPB altogether. See, e.g., Paul Krugman, *Friends of Fraud*, N.Y. TIMES (Feb. 3, 2013), <http://www.nytimes.com/2013/02/04/opinion/krugman-friends-of-fraud.html?ref=consumerfinancialprotectionbureau>.

143. See *infra* Part II.A.3.

144. See 15 U.S.C. § 1692c(b) (2012).

145. 424 F. Supp. 2d 643, 659 (S.D.N.Y. 2006).

wave of related litigation in federal district courts across the country. An examination of the post-*Foti* cases in Part II.A.3 demonstrates not only *Foti*'s widespread influence but also the persistence some debt collectors have shown in searching for a loophole to avoid liability. The remainder of Part II focuses on *Zortman v. J.C. Christensen & Associates*,¹⁴⁶ a case that potentially provides collectors with a script for leaving messages after the proverbial “beep” without triggering the Paradox. After Section B explains the facts and holding of *Zortman*, Section C argues the court’s holding was based on flawed reasoning, which Section D contends could threaten to undermine consumer privacy interests.

1. FDCPA Provisions

The FDCPA’s Voicemail Paradox is not actually a paradox.¹⁴⁷ Debt collectors frequently describe it as an untenable Hobson’s choice, but courts have roundly rejected that characterization, pointing out the dilemma is self-imposed.¹⁴⁸ Nonetheless, the Voicemail Paradox does exemplify how unanticipated shifts in communication technologies and collection industry practices—combined with a lack of timely reforms—have left the FDCPA in a state of disarray. If the Act is best understood as a product of its

146. 870 F. Supp. 2d 694 (D. Minn. 2012).

147. See WEBSTER’S NEW INTERNATIONAL DICTIONARY 1636 (3d ed. 1993). The term implies an inherent, inescapable logical contradiction. While it is true most courts have held collectors cannot comply with either section 1692c(b) or the FDCPA’s mini-Miranda provision without violating the other, there is no legal requirement collectors must leave voicemails, nor is voicemail the only practical means of communicating with a consumer in an effort to collect a debt. See *Foti*, 424 F. Supp. 2d at 659.

148. Some courts have taken collectors to task over the dire terms they (mis)apply to describe their (entirely avoidable) plight. See, e.g., *Mark v. J.C. Christensen & Assocs., Inc.*, No. 09-100, 2009 WL 2407700, at *4 n.2 (D. Minn. Aug. 4, 2009) (describing why this is not a Hobson’s choice). As the *Mark* court notes,

The predicament JCC claims the FDCPA creates is not technically a “Hobson’s choice.” A “Hobson’s choice” describes a situation presenting an individual with “the option of taking the one thing offered or nothing.” . . . JCC’s claimed predicament is more aptly described as a “Morton’s Fork.” Named after John Morton—the Archbishop of Canterbury and minister of Henry VII, who supposedly employed a “method of levying forced loans by arguing that those who were obviously rich could afford to pay, and those who lived frugally must have amassed savings”—the term refers to “a practical dilemma, esp. one in which both the choices or alternatives available disadvantage or discredit the chooser.” A much more familiar, baby-boomer-esque description for the claimed dilemma would be a “Catch 22,” which refers to a “law or regulation containing provisions which are mutually frustrating.” The term, of course, derives its name from Joseph Heller’s 1961 novel, *Catch-22*.

Id. (citations omitted).

times, then the so-called “Voicemail Paradox” illustrates how dramatically times have changed over the last three and a half decades. With scant guidance from federal regulatory agencies, district courts have been forced to step into the void and determine how best to reinterpret outdated legislation to fit contemporary contexts.¹⁴⁹ Although courts have generally honored the FDCPA’s mission of protecting consumers and their privacy, the patchwork nature of the federal judiciary has enabled incongruous results in several jurisdictions,¹⁵⁰ which highlights the need for the CFPB to assert its authority and update the Act.

The FDCPA never actually mentions voicemails, which is unsurprising given that although answering machines had already been invented by 1977, they were not widely used in American homes and businesses until the late 1980s.¹⁵¹ Instead, the Act focused on regulating collectors’ use (and abuse) of then-dominant technologies—such as telephones, telegrams, and the mail—to communicate with consumers.¹⁵² Nonetheless, the roots of the Voicemail Paradox were planted at the Act’s inception in separate provisions.

On the one hand, the FDCPA prohibits debt collectors from communicating with any unauthorized third parties “in connection with the collection of any debt.”¹⁵³ While the Act provides a narrow

149. See, e.g., *Foti*, 424 F. Supp. 2d at 657 (contemplating various constructions of the term “communication”).

150. See, e.g., *Zortman*, 870 F. Supp. 2d at 699 (explaining federal district courts’ difficulty interpreting the FDCPA due to “practical concerns and technological developments”); see also *supra* notes 124–27 and accompanying text (describing judicial improvisations, such as the materiality requirement).

151. See *Zortman*, 870 F. Supp. 2d at 698 (“The FDCPA has not been significantly amended since its enactment in 1977. Technology, however, has changed significantly since then. In particular, voicemail was not available until 1977. Consumers might have had answering machines, but those machines would not have been as widely used as voicemail today.”).

152. See, e.g., 15 U.S.C. § 1692d(5) (2012) (barring “[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number”); *id.* § 1692f(7)–(8) (prohibiting communication via postcards and “[u]sing any language or symbol, other than the debt collector’s address, on any envelope when communicating with a consumer by use of the mails or by telegram”).

153. See *id.* § 1692c(b) (“Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not *communicate*, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.” (emphasis added)).

range of exceptions to this rule to allow collectors to contact third parties to obtain location information about an alleged debtor, even in those cases collectors may not reveal that the consumer owes a debt, and may not even identify themselves as collectors unless specifically asked.¹⁵⁴ This statute reflects congressional intent to protect consumers' privacy by barring the "noxious practice"¹⁵⁵ collectors frequently employed before the FDCPA's passage of "disclosing a consumer's personal affairs to friends, neighbors, or an employer."¹⁵⁶ Prohibiting unauthorized third-party communications limits collectors' ability to shame or intimidate a consumer by revealing (or threatening to reveal) embarrassing financial information that could potentially contribute to "marital instability, to the loss of jobs, and to invasions of individual privacy."¹⁵⁷ In 2011, 17.5% of all FDCPA complaints related to third-party communications, and 10.8% of all complaints specifically involved the unauthorized disclosure of the existence of a debt.¹⁵⁸

On the other hand, two FDCPA provisions mandate that debt collectors must properly identify themselves in all communications with a consumer. First, under section 1692e(11), if a debt collector fails to disclose in any communication with a consumer that he is "attempting to collect a debt and that any information obtained will be used for that purpose,"¹⁵⁹ he violates the Act's prohibition on utilizing "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt."¹⁶⁰ This subsection of the statute is commonly referred to as the Act's "mini-Miranda" requirement, and it was modeled after a series of pre-FDCPA consent decrees designed by the FTC to prevent collectors from tricking consumers into unknowingly revealing private and financial information that could make it easier to collect the debt or to harass or deceive the debtor.¹⁶¹ Generally, compliance with mini-Miranda

154. *See id.* § 1692b.

155. *Zortman*, 870 F. Supp. 2d at 701.

156. S. Rep. No. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

157. 15 U.S.C. § 1692; *see* S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

158. CFPB, *supra* note 40, at 9.

159. § 1692e(11).

160. *Id.* § 1692e.

161. *See* NCLC, *supra* note 38, at 291. These disclosure requirements partially arose as a response to combat a common scam by which collectors sent fake sweepstake entries to debtors, offering fictitious prizes to induce the debtor to unwittingly reveal his address, phone number, and financial information. *Id.* For a more recent example, *see Romine v. Diversified Collection Servs. Inc.*, 155 F.3d 1142, 1144 (9th Cir. 1998), in which collectors hired Western Union to mail debtors notification they had received a "personal telegram,"

requires the collector to give either his name or the name of his employer and also to state that the communication is being made in an attempt to collect a debt explicitly.¹⁶² Although the mini-Miranda requirement fits into the Act's broader anti-fraud goals by prohibiting false or misleading representations, this Comment will argue that given the FDCPA's stated purpose and subsequent judicial interpretations of the rule, it also embodies important, if sometimes overlooked, privacy considerations. Moreover, under section 1692d, if a debt collector "place[s] . . . telephone calls without meaningful disclosure of [his] identity,"¹⁶³ he violates the Act's ban against "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."¹⁶⁴ While this latter provision addresses conduct rather than communication, its function overlaps significantly with the mini-Miranda requirement; generally speaking, violating one is typically sufficient to violate the other, and most complaints usually allege breaches of both. In 2011, 17.7% of all FDCPA complaints listed violations of one or both.¹⁶⁵

The Act specifies that mini-Miranda applies to both oral and written communications, and its interplay with the bar against unauthorized third-party disclosures is clearly contemplated. For example, the Act prohibits communicating with consumers via postcards and also bans them from sending telegrams or mailing letters that identify their senders as debt collectors on the outside of the envelope.¹⁶⁶ Of course, since the FDCPA's passage in 1977, postcards and telegrams have largely been relegated to the proverbial "ash heap of history."¹⁶⁷ As answering machines proliferated over the 1980s and 1990s, collectors naturally sought to exploit this convenient new means of communicating with debtors. Yet from the outset, there was widespread recognition by collectors of the potential for liability

along with instructions to call Western Union and confirm their personal information to insure accurate delivery. *Id.* When debtors complied, Western Union recorded their telephone numbers, then sold them to the collectors, who utilized them to contact the debtors directly. *Id.*

162. Mini-Miranda does not require collectors to describe the debt further. *See* § 1692e. The Act does not prescribe specific language collectors must use, but saying some variation of the words "this is an attempt to collect to debt" suffices to comply.

163. § 1692d(6)

164. *Id.* § 1692d.

165. CFPB, *supra* note 40, at 9.

166. § 1692f(7)-(8).

167. *See* Mark Liberman, *The What of History?*, LANGUAGE LOG (Dec. 23, 2011, 4:21 AM), <http://languagelog ldc.upenn.edu/nll/?p=3654> (discussing the origins of this oft-repeated turn of phrase).

created by the combination of the Act's bar on third-party disclosures and mini-Miranda requirement as applied in the context of voicemails.¹⁶⁸ For the most part, collectors ignored the latter in order to avoid running afoul of the former.¹⁶⁹

2. *Foti*

This strategy worked until roughly 2006, when the Southern District of New York issued its landmark holding in *Foti v. NCO Financial Systems, Inc.*,¹⁷⁰ which laid the foundations for what would come to be called the Voicemail Paradox.¹⁷¹ The plaintiffs in *Foti* received pre-recorded messages on their answering machines urging them to call a toll-free phone number regarding “a personal business matter that requires your immediate attention.”¹⁷² Although the voicemails specifically identified NCO as their source, they made no reference to the fact that NCO is a collection agency or that the messages were left by a debt collector seeking to collect a debt.¹⁷³ Those who called the toll-free number provided were unexpectedly connected to NCO collectors, who aggressively confronted them about the debts they allegedly owed and demanded immediate payment in full.¹⁷⁴ When the plaintiffs sued claiming these voicemails

168. See, e.g., *Zortman v. J.C. Christensen & Assocs., Inc.*, 870 F. Supp. 2d 694, 699 (D. Minn. 2012) (“For many years, debt collectors refrained from identifying themselves on voicemail messages. This was, as counsel for JCC explains it and as is evident from litigation around the country, out of concern for running afoul of § 1692c(b).”).

169. See *id.* “After all, once a message is left, the person who left the message has no control over who might listen to the message. Messages that contained information about a named consumer’s debt could be heard by individuals other than the intended consumer,” which would violate section 1692c(b). *Id.*

170. 424 F. Supp. 2d 643 (S.D.N.Y. 2006).

171. *Foti* was not the first Paradox case; in 2005, the Central District of California found a similar violation in *Hosseinzadeh v. M.R.S. Associates, Inc.*, 387 F. Supp. 2d 1104 (C.D. Cal. 2005). Nonetheless, most courts and critics have subsequently identified *Foti* as the point where the trend actually took off.

172. *Foti*, 424 F. Supp. 2d at 648.

173. *Id.* In its entirety, the message ran as follows: “Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention. Please call back 1-866-701-1275 once again please call back, toll-free, 1-866-701-1275, this is not a solicitation.” *Id.*

174. *Id.* In addition to violating mini-Miranda, the plaintiffs further alleged these return calls violated section 1692g’s requirement that collectors provide consumers with information about the process for disputing the validity of a debt. *Id.* at 649–50. The FDCPA allows a thirty-day window, starting at the first communication, in which a consumer can dispute the debt. 15 U.S.C. § 1692g(b) (2012). If she does, the collector is prohibited from further communication with her until validity is confirmed. *Id.* In *Foti*, NCO had provided written notice about these procedures roughly two and one-half weeks before leaving the voicemails. *Foti*, 424 F. Supp. 2d at 647–48. However, plaintiffs argued these procedures were intentionally and illegally “overshadowed” by both the pre-

violated the FDCPA's mini-Miranda requirement, NCO responded by arguing that the message was not a "communication" as defined by the Act "because it [did] not convey any information regarding a debt, but instead simply request[ed] a return call regarding an important business matter."¹⁷⁵

The court was unconvinced by NCO's (novel and self-servingly) narrow interpretation of what "communication" means.¹⁷⁶ After noting that the FDCPA's statutory definition of the term encompasses "the conveying of information regarding a debt directly or indirectly to any person through any medium"¹⁷⁷ and outlining the general tendency across all federal circuits towards construing the Act liberally in favor of consumers, the *Foti* court ultimately rejected NCO's contention that the voicemail was not a "communication" because it never explicitly mentioned any debt.¹⁷⁸ Instead, reasoning that "the obvious purpose of the message was to provide the debtor with enough information to entice a return call"—which, as indicated by the transcripts introduced at trial, clearly revolved around the underlying debt and its collection—the *Foti* court concluded "it is difficult to imagine how [this] voicemail message is not a communication under the FDCPA."¹⁷⁹ To hold otherwise, it noted, would create a gaping loophole in the Act that would be "inconsistent with Congress's intent to protect consumers from 'serious and widespread' debt collection abuses."¹⁸⁰

The court was similarly unsympathetic towards NCO's fallback argument that, given the FDCPA's bar against unauthorized third-party communications, forcing collectors to identify themselves in voicemails presents them with an untenable Hobson's choice, forcing them to violate one provision of the Act in order to comply with

recorded messages and the return calls they encouraged. *Id.* at 650. The transcript of a representative return call reveals that the collector made no reference to the still unexpired thirty-day dispute window and instead demanded immediate payment in full. *Id.* at 648–49.

175. *Foti*, 424 F. Supp. 2d at 654.

176. *Id.* at 654–55. As the court noted, NCO could not find a single case to cite in its brief as authority in support of its definition. *Id.* at 654.

177. *Id.* at 654 (quoting 15 U.S.C. § 1692a(2)).

178. *Id.* at 669. Although the court allowed that properly identifying itself in the message as "NCO Financial Services" might plausibly be sufficient to alert some consumers they had received a call from a collection agency regarding a debt, the message still violated section 1692e(11) in light of the FDCPA's least sophisticated consumer standard. *Id.*

179. *Id.* at 656.

180. *Id.* at 657–58.

another.¹⁸¹ As the court noted, “NCO’s argument is essentially based on the assumption that it is somehow entitled to leave pre-recorded messages.”¹⁸² However, while the FDCPA explicitly authorizes telephone communications and does not specifically ban voicemails, the court emphasized that the Act “does not entitle the collector to use *any* means, even if those means are the most economical or efficient.”¹⁸³ Thus, after acknowledging that there is indeed a conflict in complying with both section 1692e(11) and section 1692c(b), the court concluded

the fact that NCO may not be able to leave a pre-recorded message that complies with both [provisions] in no way warrants a conclusion that “communication” should be narrowly interpreted. Rather, it merely suggests that a debt collector is not permitted to leave a pre-recorded message in violation of the FDCPA.¹⁸⁴

Moreover, because collectors still have numerous other methods for effectively and legally communicating with debtors,¹⁸⁵ the *Foti* court held this supposed Hobson’s choice was actually just a self-imposed (and easily averted) dilemma, created by NCO’s own actions.¹⁸⁶

3. Post-*Foti* Litigation Trends

Although the court stopped short of declaring a categorical prohibition on collector voicemails, its holding sparked a new wave of related FDCPA suits and heavily influenced their outcomes. Citing *Foti* as persuasive authority, most courts have held debt collectors liable for violating the Act if they leave voicemails that do not comply

181. *Id.* at 658. Citing this dilemma as further reason to hold the voicemail did not fit the Act’s statutory definition of communication, NCO contended, “The safest thing to do is to recognize what it is. It is not a communication. Once you recognize that it is not a communication, then there is no obligation to identify that you are a debt collector.” *Id.* (quotation omitted). The court rejected NCO’s argument, but it remains interesting insofar as it illustrates perhaps the most paradoxical aspect of the Voicemail Paradox—that is, debt collectors believe voicemails are both a convenient way to communicate with consumers but are also simultaneously not “communication” as defined by the Act. *See id.* at 659.

182. *Id.* at 659.

183. *Id.*

184. *Id.*

185. *Id.* (“Debt collectors, however, could continue to use other means to collect, including calling and directly speaking with the consumer or sending appropriate letters.”).

186. *Id.*

with the Act's mini-Miranda requirement.¹⁸⁷ Furthermore, following *Foti's* logic, collectors who actually do identify themselves in voicemails have usually been held liable for violating section 1692c(b) when those messages are overheard by third parties.¹⁸⁸

Unsurprisingly, this trend has proven extremely unpopular amongst debt collectors, who have argued "the ability to leave messages for consumers [via voicemail] is essential in seeking payment on delinquent debts"¹⁸⁹ and that prohibiting them from leaving voicemails will not only increase their own costs, but also the cost of credit to all consumers.¹⁹⁰ Some have offered dire warnings and slippery slope arguments that the Voicemail Paradox will eventually outlaw all telephone contact¹⁹¹ and thus risks eliminating "all communications with debtors with the exception of lawsuits."¹⁹² When sued, collectors sometimes cite a handful of FTC advisory opinions from the 1980s supporting a narrower definition of "communication,"¹⁹³ as well as the text of the Act itself, which

187. See, e.g., *Mark v. J.C. Christensen & Assocs., Inc.*, No. 09-100, 2009 WL 2407700, at *3 (D. Minn. Aug. 4, 2009); *Edwards v. Niagara Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1359 (N.D. Ga. 2008); *Costa v. Nat'l Action Fin. Servs.*, 634 F. Supp. 2d 1069, 1075 (E.D. Cal. 2007).

188. See *Branco v. Credit Collection Servs. Inc.*, No. S-10-1242, 2011 WL 3684503, at *4 (E.D. Cal. Aug. 23, 2011); *Valentine v. Brock & Scott, PLLC*, No. 09-CV-2555, 2010 WL 1727681, at *4 (D.S.C. Apr. 26, 2010); *Leahey v. Franklin Collection Serv., Inc.*, 756 F. Supp. 2d 1322, 1327 (N.D. Ala. 2010); *Berg v. Merch. Ass'n Collection Div.*, 586 F. Supp. 2d 1336, 1340 (S.D. Fla. 2008).

189. FTC, *supra* note 42, at 47 (citation omitted).

190. *Id.* at 35.

191. A typical iteration of this type of "slippery slope" logic is illustrated by the debt collector's argument in *Mark*, 2009 WL 2407700, at *6. As the court summarized,

If debt collectors leave messages that include the [mini-Miranda] disclosures, they might violate the third-party disclosure prohibition; if they leave messages without the disclosures, they violate the requirement on giving such disclosures; and if they leave no message, opting instead to call back later in the hope of reaching a live person, they run the risk of violating the prohibition on repeated calling in 15 U.S.C. 1692d(5). Thus . . . a debt collector's only safe practice is simply not to use telephone messaging at all.

Id.

192. See *Lunsford*, *supra* note 141.

193. See, e.g., *Zortman v. J.C. Christensen & Assocs., Inc.*, 870 F. Supp. 2d 694, 698 (D. Minn. 2012) (citing 53 Fed. Reg. 50097-02 (Dec. 13, 1988)). As noted in Part I, the FTC often sent mixed messages to collectors, whom it often seemed to view less as targets for regulation than as partners. Further evidence of this viewpoint can be seen in an FTC report, where the agency more or less agreed with collectors that (despite the Paradox) they should generally be permitted to contact consumers using whatever new technologies those consumers adopt. See FTC, *supra* note 42, at 36 ("To provide more certainty to the industry and to protect consumers from harm, the Commission concludes that debt

expressly allows them to utilize telephones.¹⁹⁴ Moreover, collectors claim courts have misconstrued the Act, asserting neither mini-Miranda nor the bar against third-party communications were intended to penalize innocent mistakes that do not actually harm consumers.¹⁹⁵ In short, they allege Congress never intended they should suffer such an untenable dilemma.¹⁹⁶

Generally, these arguments have garnered little sympathy from the courts. Thus far, the highest authority on the Voicemail Paradox comes from the Eleventh Circuit, which openly mocked the collector's description of the Hobson's Choice it allegedly faced by noting,

In an oft-repeated statement from the Vietnam War, an unidentified American military officer reputedly said that "we had to destroy the village to save it." That oxymoronic explanation may be apocryphal, but the debt collection agency in this case offers up much the same logic to explain why it violated the Fair Debt Collection Practices Act: it was necessary to violate the Act in order to comply with the Act.¹⁹⁷

Following *Foti*, most courts have agreed that nothing in the FDCPA guarantees or entitles debt collectors the right to leave voicemails¹⁹⁸ and that collectors who choose to leave them do so at their own peril.¹⁹⁹ Courts have also rejected arguments that the Paradox violates

collection law needs to be modernized to take account of today's new communication technologies.").

194. See, e.g., *Mark*, 2009 WL 2407700, at *2.

195. See, e.g., Lunsford, *supra* note 141 (quoting a collection lawyer arguing "[w]hen consumers use answering machines, they are inviting the unknown public to leave them messages . . . [i]t does not hurt consumers for collectors to leave respectful messages . . . that's [not] something Congress ever contemplated").

196. To combat this state of affairs, collectors have proposed solutions implicating both prongs of the so-called "Paradox." ACA International, for example, has recommended amending the FDCPA to absolve collectors from liability for voicemails that accidentally disclose the existence of a debt to third parties. FTC, *supra* note 42, at 48. On the other hand, NARCA advocates propose weakening the applicability of the mini-Miranda rule by allowing collectors "to leave voicemail messages that request a return call but do not reveal the collector's identity or the nature of the call." *Id.*

197. *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1351 (11th Cir. 2009) (rejecting the collector's argument and imposing liability for violating the FDCPA).

198. *Id.* at 1354 ("[I]f [the debt collector's] assumption is correct, the answer is that the [FDCPA] does not guarantee a debt collector the right to leave answering machine messages."); see also *Koby v. ARS Nat'l Servs., Inc.*, No. 09CV0780, 2010 WL 1438763, at *4 (S.D. Cal. Mar. 29, 2010) ("Nothing in the FDCPA or the Constitution entitles or guarantees a debt collector the right to leave a message on a debtor's voice mail.").

199. See, e.g., *Berg v. Merch. Ass'n Collection Div.*, 586 F. Supp. 2d 1336, 1341 (S.D. Fla. 2008); see also *Sclafani v. BC Servs., Inc.*, No. 10-61360-CIV, 2010 WL 4116471, at *3 (S.D. Fla. Oct. 18, 2010) (rejecting defendant collector's arguments in favor of the

the First Amendment—and that the FDCPA therefore unconstitutionally restricts commercial speech—by applying the four-pronged test laid out in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*²⁰⁰ to uphold the challenged provisions because they (1) address unlawful or misleading commercial speech, and (2) serve a substantial government interest that they (3) directly advance (4) in a manner no more extensive than necessary.²⁰¹

While some collectors have abandoned leaving voicemails until reforms are enacted, others have sought to craft solutions of their own by refining the scripts of the messages they leave after the beep. So far, these endeavors have proven fruitless, as exemplified in *Berg v. Merchants Ass'n Collection Division, Inc.*²⁰² There, the debt collector left a voicemail identifying the consumer by name and then provided a warning to anyone else who might be listening to disconnect the answering machine; after a brief pause, the message complied with mini-Miranda by identifying the collection agency and admitting the call was placed in connection with a debt.²⁰³ The plaintiff sued for a violation of section 1692c(b) after his neighbor and relatives overheard the message.²⁰⁴ The court held the collector liable, reasoning that while the introductory disclaimer might alert third parties they should stop listening to avoid overhearing potentially private information, it did not give the consumer sufficient warning to disconnect if listening while others were present.²⁰⁵ While acknowledging that *Foti* left open the possibility that collectors could

Eleventh Circuit's reasoning discussed in *Edwards*); *Leahey v. Franklin Collection Serv., Inc.*, 756 F. Supp. 2d 1322, 1327 (N.D. Ala. 2010) (holding that a pause before complying with the disclosure requirements was nevertheless a violation of 15 U.S.C. § 1692c(b)).

200. 447 U.S. 557 (1980).

201. *Id.* at 566; *see also Koby*, 2010 WL 1438763, at *6 (holding the FDCPA provisions at issue do not violate the *Central Hudson* test); *Mark v. J.C. Christensen & Assocs., Inc.*, No. 09-100, 2009 WL 2407700, at *7-8 (D. Minn. Aug. 4, 2009) (same).

202. 586 F. Supp. 2d 1336, 1339 (S.D. Fla. 2008).

203. *Id.* The full text of the *Berg* message is as follows:

Hello. This message is for Thomas Berg. If you are not the person requested, disconnect this recording now. By continuing to listen to this recording you acknowledge you are the person requested. This is MAF Collection Services. We are expecting your call at 1-800-749-7710. This is an attempt to collect a debt. Any information obtained will be used for that purpose. 1-800-749-7710.

Id. (quotation omitted).

204. *Id.*

205. *Id.* at 1343. Indeed, given human nature and the unquenchable thirst for gossip, one wonders if the message might have the unintended effect of actually encouraging unauthorized third parties to keep listening.

potentially leave voicemails that do not violate the FDCPA, the *Berg* court emphasized that by choosing to leave voicemails, collectors essentially assume the risk of utilizing “an inherently risky method of communication.”²⁰⁶ Since it is not clear what language courts will accept, collectors have continued to search for the perfect script by which to leave a message after the beep.

B. *Zortman and the Search for the Perfect Script*

As noted above, trends in communication technology have shifted dramatically in recent years. Just as the original FDCPA did not anticipate the rise of answering machines and voicemails, *Foti* and its progeny focused on messages left via traditional landline telephones. Since *Foti*, however, consumers have increasingly abandoned landlines in favor of cellphones;²⁰⁷ ironically then, a line of cases based on the notion that contemporary technology has rendered parts of the FDCPA obsolete may itself risk obsolescence.

Collectors recognize this trend and have argued that in a world where cell phones, text messages, e-mails, and social media have eclipsed the means of communication originally envisioned under the FDCPA, in order “to maximize their chances of successfully reaching consumers”²⁰⁸—especially younger consumers—they must be allowed to contact them via whatever primary contact method they choose to adopt.²⁰⁹ However, consumer advocates have warned that allowing collectors to utilize social media to communicate with debtors increases the risk of abuse, harassment, and privacy invasions.²¹⁰ Both sides view the Voicemail Paradox as an important battle in this longer war.

Collectors recently won what may prove an important breakthrough in a 2012 case decided by Minnesota’s federal district

206. *Id.*

207. See FTC, *supra* note 42, at vi, 39.

208. *Id.* at 39.

209. See *id.* at 35–39.

210. See, e.g., Colin Hector, Note, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 CAL. L. REV. 1601, 1619 (2011). Hector offers an insightful account of the Voicemail Paradox’s evolution since *Foti* and argues that the broad construction of “communication” the vast majority of courts have adopted since should be used as a model/standard for applying the FDCPA to social media and new communications technologies in the future. *Id.* at 1612–17. Hector has a strong point: following the logic of *Foti* and its progeny would fulfill the Act’s mission of protecting consumers. *Id.* at 1615. Unfortunately, however, debt collectors have not yet conceded the issue, and indeed that may well be a key victory in *Zortman*. See *infra* notes 211–19 and accompanying text.

court. *Zortman v. J.C. Christensen & Associates, Inc.*²¹¹ provides an interesting case study of collectors' strategies for finding a loophole that might allow for an end-run around *Foti* and its progeny.²¹² Indeed, the *Zortman* court's holding—which, based on a narrow view of “communication,” found no liability for what seemed like a clear-cut section 1692c(b) violation under the vast majority of Paradox cases—could potentially function as the perfect script for debt collectors, not only in leaving voicemails but also in their efforts to contact consumers via a broad range of social media and new communication technologies.²¹³

The plaintiff in *Zortman* was employed by a debt collector and owed roughly \$650 on a credit card issued by Kohl's Department Store.²¹⁴ When she failed to pay, her account was referred to J.C. Christensen & Associates, Inc. (“JCC”) for collection.²¹⁵ A JCC debt collector left a message on her cellphone's voicemail account stating “[w]e have an important message from J.C. Christensen & Associates. This is a call from a debt collector. Please call 866-319-8619.”²¹⁶ Unbeknownst to JCC, Ms. Zortman regularly loaned her cellphone to her children for use outside the home.²¹⁷ Her children listened to the message, then asked their mother if something was wrong, forcing her to reveal the family's financial instability.²¹⁸ Ms. Zortman, claiming this revelation resulted in emotional distress and loss of sleep, sued JCC for violating the FDCPA's prohibition against third-party communications.²¹⁹

This was not JCC's first time in court. In its 2009 holding in *Mark v. J.C. Christensen & Associates, Inc.*,²²⁰ the same court denied the collector's motion for judgment on the pleadings when the plaintiff alleged the collector violated mini-Miranda on facts similar to those in *Foti*.²²¹ Most of the *Mark* opinion focused on rejecting JCC's argument challenging the Voicemail Paradox's constitutionality.²²²

211. 870 F. Supp. 2d 694 (D. Minn. 2012).

212. *See id.* at 707–08.

213. *Id.* at 705 (“The Court concludes that the messages left by JCC on Zortman's voicemail do not constitute ‘communications’ with a person other than the consumer.”).

214. *Id.* at 695–96.

215. *Id.* at 696.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 695–96.

220. No. 09-100, 2009 WL 2407700 (D. Minn. Aug. 4, 2009).

221. *See id.* at *9 (denying JCC's motion for judgment on the pleadings).

222. *Id.* at *4–8. JCC argued the alleged Hobson's Choice created by the Act's relevant provisions is an unreasonable, content-based restriction on commercial speech that could

However, the *Mark* court's opinion departed from *Foti* and its progeny in one crucial respect: while most other courts have agreed this so-called "Paradox" makes it exceedingly difficult—perhaps impossible—for collectors to leave voicemails without violating the FDCPA, *Mark* suggested there may not be a dilemma after all.²²³ Based on a federal district court decision (in a non-Paradox case) weighing violations of the FDCPA and analogous California law, the *Mark* court posited that Congress's original intent in barring third-party communications applied only to "messages, deliberately intended [to be] heard by third parties . . . as a method of embarrassing the consumer, not to protect against the risk of an inadvertent disclosure that could occur if another person unintentionally overheard the messages."²²⁴ In other words, the court indicated JCC could avoid the Paradox entirely and leave FDCPA-compliant voicemails so long as it had no deliberate intention that (or reasonable basis to suspect) they might be overheard by third parties.²²⁵

JCC's *Zortman* brief makes clear it relied heavily on *Mark* in designing its script for future voicemails.²²⁶ In 2011, the collector moved for dismissal, arguing that because its voicemail was not deliberately intended as a third-party communication about a debt, it had complied with *Mark*'s requirements and thus avoided triggering section 1692c(b) liability.²²⁷ In denying the collector's motion to dismiss, the court emphasized that the language JCC relied on from *Mark* was merely dicta that bore no effect on the outcome of that

not survive strict scrutiny and therefore violated the First Amendment. *Id.* at *4. Furthermore, JCC contended the Voicemail Paradox subverts Congressional intent by potentially rendering any sort of attempt to contact a consumer via telephone illegal. *Id.* at *6. For more details on this slippery-slope argument, see *supra* note 181.

223. *Mark*, 2009 WL 2407700, at *5.

224. *Id.* (citing *Joseph v. J.J. Mac Intyre Cos.*, 281 F. Supp. 2d 1156, 1164 (N.D. Cal. 2003)).

225. *See id.* ("The risk of disclosure to third parties here was minimal.").

226. *See* Brief for Defendant, *Zortman v. J.C. Christensen & Assocs., Inc.*, 819 F. Supp. 2d 874 (D. Minn. 2011) (No. 10-03086), 2010 WL 6530512. In its brief, JCC irately bemoans being hauled back into court by the same plaintiff's attorneys for a violation incurred by following the court's instructions, essentially arguing the new lawsuit amounted to a bait-and-switch, based on frivolous hyper-technicalities. *Id.*

227. *Zortman*, 819 F. Supp. 2d at 877. JCC also relied on a 1988 FTC advisory opinion suggesting a collector should not be held liable for section 1692c(b) violation if he had no reason to anticipate an eavesdropper might overhear. *Id.* at 880 (citing Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,104 (FTC Dec. 13, 1988)).

case²²⁸ and conflicted with the FDCPA's strict liability standard, the Act's statutory definitions, and the vast majority of Voicemail Paradox holdings.²²⁹ In short, *Mark* had never intended to establish a legally binding loophole for exempting collectors from liability, which meant that although JCC may not have intended for a third party to overhear its voicemail, it assumed the risk of an FDCPA violation by leaving one.²³⁰ However, just as in *Mark*, in denying the motion to dismiss, the *Zortman* court also offered JCC something of a consolation prize, once again leaving the door open for further argument over what it takes to trigger section 1692c(b) liability. In a footnote, the court described what it characterized as a circuit split over exactly how much information a collector must convey about a debt in order to violate the prohibition against third-party communications.²³¹ It also requested the parties supplement their briefs to address the issue.²³²

In its supplemental brief, JCC argued its voicemail was not a communication because it did not name the plaintiff and thus did not provide sufficient information to convey that she specifically owed a debt.²³³ The court rejected this argument because JCC was unable to

228. *Zortman*, 819 F. Supp. 2d at 877–78. As the court explained, “*Mark* held that certain semi-anonymous messages violated the FDCPA because the messages did not include certain disclosures; it is a logical error to conclude that this holding implies that messages with the disclosures will be necessarily in compliance with the FDCPA.” *Id.* at 877 (emphasis added).

229. *Id.* at 880. As the court noted, while certain FDCPA provisions do include an intent element for liability to ensue, those provisions explicitly state that requirement. *Id.* at 879. However, there is no intent requirement stated in section 1692c(b). *Id.* And, as the same court would note in its ultimate resolution of the case, “The FDCPA is a strict liability statute and is liberally construed to protect consumers.” *Id.* at 879 (citing *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446 (8th Cir. 2001)).

230. *See id.* at 881 (denying JCC's motion).

231. *Id.* at 878 n.4. The court cites *Horkey v. J.V.D.B. & Associates*, 333 F.3d 769 (7th Cir. 2003), in which the Seventh Circuit Court of Appeals upheld liability for a wide range of FDCPA violations for a collector who called a consumer at work repeatedly. *See Horkey*, 333 F.3d at 771. At the district level, the court had dismissed the plaintiff's allegation of a section 1692c(b) violation when the collector told her co-worker (who answered her phone and said she was not available) to tell her to “quit being such a [expletive] bitch.” *Horkey v. J.V.D.B. & Assocs., Inc.*, 179 F. Supp. 2d 861, 864 (N.D. Ill. 2002). Since the collector mentioned neither the debt nor identified himself as a debt collector, the district court dismissed the charge. *Id.* at 868. The plaintiff did not appeal that result, and the Seventh Circuit did not review it; however, the appellate court paused to note it conflicted with cases in other circuits where courts had found liability on similar facts. *Horkey*, 333 F.3d at 774 n.2.

232. *See Zortman v. J.C. Christensen & Assocs.*, 870 F. Supp. 2d 694, 703 (D. Minn. 2012) (“The Court, therefore, requested supplemental briefing on whether the voicemails left by JCC were communications.”).

233. *Id.* at 704.

cite any relevant precedents to support it.²³⁴ Nonetheless, it also rejected Ms. Zortman's argument that voicemails are like postcards, which are considered a communication under the Act and are specifically prohibited.²³⁵ In doing so, the court seemingly adopted JCC's premise, emphasizing that unlike a postcard, this voicemail did not identify the plaintiff by name.²³⁶ Unsatisfied with either party's analysis, the court embarked on its own.²³⁷

It began by citing U.S. Representative Frank's House Resolution 4101²³⁸—which it characterized as “explicitly” permitting collectors to leave voicemails—and noting that both Congress and the FTC “recognized the need to effectively transmit messages from debt collectors to consumers [and] acknowledge[d] and accept[ed] the possibility of communicating with certain third parties to effectuate such message transmission.”²³⁹ Next, the court compared the message JCC left on Ms. Zortman's cellphone with voicemails that were ruled section 1692c(b) violations in other jurisdictions. It emphasized that a common theme throughout those messages was that they “did more than merely identify the caller as a debt collector—the messages also identified the intended recipient of the message, revealed that the intended recipient owe[d] a debt, or both.”²⁴⁰ The court also cited two cases in which collectors were not found liable because their voicemails did not specifically mention that a collector was calling or

234. *Id.*

235. *Id.*

236. *Id.* The court also asserted the risk that a third party might see a postcard is higher than the risk of overhearing a voicemail. *Id.*

237. *Id.*

238. *Id.* at 698 (“A ‘clarifying’ bill has been introduced by Representative Barney Frank, but its fate is uncertain as of this writing.”). After *Zortman* was handed down, Frank's bill was quashed. *See supra* notes 135–42 and accompanying text.

239. *Zortman*, 870 F. Supp. 2d at 698–99. In support, the court cited section 1692b's exceptions that allow collectors to contact third parties in pursuit of location information. *Id.* at 701. The court also cited a 1988 FTC advisory opinion that posited collectors could communicate with certain third parties—such as telephone operators or telegraph clerks—“if the only information given is that necessary to enable the collector to transmit the message to, or make the contact with, the consumer.” *Id.* at 698 (quoting Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,104 (FTC Dec. 13, 1988)).

240. *Id.* at 700 (citing *Branco v. Credit Collection Servs. Inc.*, No. S–10–1242, 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011); *Valentine v. Brock & Scott, PLLC*, No. 09–CV–2555, 2010 WL 1727681 (D.S.C. Apr. 26, 2010); *Leahey v. Franklin Collection Serv., Inc.*, 756 F. Supp. 2d 1322 (N.D. Ala. 2010); *Berg v. Merch. Ass'n Collection Div.*, 586 F. Supp. 2d 1336 (S.D. Fla. 2008)).

that a specific consumer owed a debt.²⁴¹ By the *Zortman* court's logic, JCC's voicemail fell somewhere in-between: although JCC identified itself as a collection agency and provided a callback number, it never explicitly referenced the existence of a debt or the name of the alleged debtor. This, the court reasoned, was really no more information than would be available had the collector simply hung-up instead of leaving a message, given the widespread availability of caller-identification technology.²⁴²

Ultimately, this analogy proved determinative, given what the court characterized as two "key inferences" a third-party listener would need to make in order for the voicemail to satisfy the statutory definition of "conveying information regarding a debt."²⁴³ For starters, since the voicemail did not mention the plaintiff by name, a third-party listener could not know for certain that Ms. Zortman allegedly owed a debt without first assuming she was the message's intended recipient.²⁴⁴ But, the court cautioned, such assumptions could easily prove erroneous because

the number might have been dialed in error. The debt collector might have wrong or outdated information about the owner of the number it dialed. In a world where wrong numbers are a fact of life, the unintended third-party listener would understand that one possible explanation for the message he or she overheard might be a wrong number. Nothing in JCC's message removed that possibility.²⁴⁵

Furthermore, in order for JCC's voicemail to alert a third-party listener that a debt existed, he would next have to assume "that the only reason a debt collector calls is to collect a debt."²⁴⁶ The court then speculated as to other plausible reasons a collector might have called Ms. Zortman, including, for instance, that because she worked for a debt collector, the call could have been work-related.²⁴⁷

241. *Zortman*, 870 F. Supp. 2d at 705-06 (citing *Koby v. ARS Nat'l Servs., Inc.*, No. 09CV0780, 2010 WL 1438763, at *3 (S.D. Cal. Mar. 29, 2010); *Biggs v. Credit Collections, Inc.*, No. CIV-07-0053-F, 2007 WL 4034997, at *4 (W.D. Okla. Nov. 15, 2007)).

242. *Zortman*, 870 F. Supp. 2d at 703.

243. *Id.* at 704. As the court subsequently explained, "Inferences or assumptions by an unintended listener are not 'indirect communications' [under the Act]." *Id.* at 705.

244. *Id.* at 705.

245. *Id.* at 704.

246. *Id.* at 705.

247. *Id.*

Moreover, under the FDCPA, “[a] hang-up call is not a communication.”²⁴⁸ Nor, the court posited, is it an inference made by a third party (based on a hang-up or its functional equivalent).²⁴⁹ As justification, the court supplemented the Act’s statutory definition of the term, noting “communicating is an intransitive verb defined in the Merriam–Webster Dictionary as ‘to transmit information, thought, or feeling so that it is *satisfactorily received or understood.*’ ”²⁵⁰ In this view, communication does not occur unless a message is actually received. But if the message provides no more information to a third party than would already be available through caller-ID after a hang-up call, then it is not a communication either.²⁵¹ Thus, the court held JCC was not liable for violating section 1692c(b) and indicated that in the future, debt collectors who leave similar voicemails that only identify the collector, a callback number, and the fact the call was placed in connection with collecting a debt will not run afoul of the FDCPA (at least in the District of Minnesota).²⁵²

The court justified its decision by warning that to hold otherwise would only make things worse for consumers. If debt collectors are forbidden from leaving voicemails, they might resort to even more abusive or annoying measures, such as repeated hang-ups and redials from anonymous phone numbers.²⁵³ Even worse, such a precedent might risk eventually prohibiting collectors from using telephones

248. *Id.* at 706. The court cited a string of cases holding no liability for violating mini-Miranda by collectors who hung up instead of leaving voicemails because a hang-up call is not considered a “communication” under the FDCPA. *Zortman* relied on other federal district court cases that have addressed unanswered or “hang up calls.” *See id.*; *see also* *Worsham v. Acct. Receivables Mgmt., Inc.*, No. JKB–10–3051, 2011 WL 5873107, at *3 (D. Md. Nov. 22, 2011) (unanswered call); *Hicks v. America’s Recovery Solutions, LLC*, 816 F. Supp. 2d 509, 513 (N.D. Ohio 2011) (collector hung up); *Wilfong v. Persolve, LLC*, No. 10–3083, 2011 WL 2678925, at *4 (D. Or. June 2, 2011) (unanswered call).

249. *Zortman*, 870 F. Supp. 2d at 705.

250. *Id.* at 706 (emphasis added) (quoting *Cozmyk v. Prompt Recovery Servs., Inc.*, 851 F. Supp. 2d 991, 994 (S.D. W. Va. 2012)).

251. *Id.* at 706.

252. *Id.*

253. *Id.* at 707. As the court noted, while section 1692d(5) bars collectors from repeatedly calling consumers, that provision is only violated if the collector places those calls with the specific intent to harass or annoy. *Id.* As a result, many courts have declined to find violations even when the volume of calling is massive. *Id.* This would not only annoy consumers, it would also violate customary expectations about proper manners. Here, the court cites *Emily Post’s Etiquette* guidebook as authority for the proposition that it is rude not to identify oneself when placing a phone call. *Id.* at 706–07 (citing PEGGY POST, *EMILY POST’S ETIQUETTE* 224, 226 (18th ed. 2011)).

altogether.²⁵⁴ The thinking here is that if a voicemail that reveals no more than a caller-ID display after a hang-up violates the Act's bar against communicating with third parties, and collectors are barred from scrambling their caller-ID displays,²⁵⁵ then collectors might someday also be held liable for breaching section 1692c(b) just because a third party happened to glance at a consumer's caller-ID history.²⁵⁶ This, in turn, would violate Congress's intent and deprive consumers of important opportunities to negotiate settlements, avoid litigation, or even become aware of their alleged debts.²⁵⁷ Therefore, the court concluded, "interpreting § 1692c(b) to prohibit voicemail messages that merely identify the caller as a debt collector and leave a return phone number does not favor the consumer."²⁵⁸

C. *What Zortman Means (and Why It Was Wrongly Decided)*

In the aftermath of *Zortman*, debt collectors are cautiously optimistic that they may have finally found the perfect script for solving the Voicemail Paradox.²⁵⁹ While it remains to be seen whether its holding persuades courts outside the District of Minnesota, if other courts do find *Zortman*'s reasoning persuasive, it would carve out a gaping loophole in the Act, essentially enabling an end-run around *Foti*.²⁶⁰ This would have the unfortunate side effect of undermining the privacy interests protected by the intersection of mini-Miranda and the FDCPA's bar on third-party communications. It would also be bad law.

Zortman is susceptible to a wide range of criticisms. Its holding stands in stark contrast to the results in the vast majority of post-*Foti* cases and overstates the support for its implicit premise that surely there must be some way debt collectors could be allowed to leave voicemails. For example, the 1988 FTC opinion the *Zortman* case

254. *Id.* at 706 ("Such an interpretation would effectively remove the telephone as a means of communication and the Act explicitly allows telephone calls from debt collectors.").

255. *Id.* at 702 (citing *Knoll v. Allied Interstate, Inc.*, 502 F. Supp. 2d 943 (D. Minn. 2007) (holding scrambling caller-ID displays violates section 1692e's prohibition on deception and misrepresentation)).

256. *See Zortman*, 870 F. Supp. 2d at 703.

257. *See id.* at 707.

258. *Id.* As the court summarized, "The messages at issue here did not identify a consumer. They did not identify a debt. They conveyed no more information than would have been obvious in caller ID or could have been acquired in a simple internet search for the caller's phone number." *Id.* at 707-08.

259. *See supra* note 216 and accompanying text.

260. Even if *Zortman* is not widely adopted, its holding still illustrates the perils of leaving our patchwork federal judiciary to oversee the FDCPA's evolution.

cites is narrowly focused on collectors' interactions with telegraph clerks and phone operators in an effort to obtain location information about consumers, rather than directly with consumers.²⁶¹ Likewise, while true that the Frank bill would have allowed collectors to leave voicemails, those messages would have to be approved by the CFPB, which the bill authorized to set guidelines based on its interpretation of the law.²⁶² In doing so, the bill left open the possibility the Bureau might conclude *Foti* and its progeny were correct—that there really is no way for a debt collector to leave an FDCPA-compliant message.²⁶³ Moreover, Frank later amended his bill to explicitly state it was not intended to create a loophole.²⁶⁴ And in any case, the bill ultimately died in committee.²⁶⁵

At times, the *Zortman* opinion seems to be an attempt to solve a problem that does not exist yet, one that arises in large part from the court's flawed analogy to hang-up calls and its overly credulous acceptance of JCC's dire slippery slope arguments. Neither the Voicemail Paradox in general nor the specific facts of this case required the court to save debt collectors' right to make phone calls. Yet the court was still gravely concerned and, after assuming that JCC's voicemail is the functional equivalent of a hang-up call, it cited cases finding violations of the Act's bar against deceptive and

261. Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,104 (FTC Dec. 13, 1988). In its current form, the Act allows exceptions from liability to collectors seeking location information from non-consumer third parties. See generally 15 U.S.C. § 1692b (2012) (providing exceptions for location information but requiring collectors to follow several precautionary measures to avoid disclosing the existence of a debt). It could be argued that when a collector calls a consumer for the first time and is confronted by an outgoing answering machine message that does not specify the name of the phone number's owner—as was the case in *Zortman*—he is still technically seeking location information when he leaves his message, because he has not yet confirmed whether the consumer is still using that number. See *Zortman*, 870 F. Supp. 2d at 696. However, such arguments obscure congressional intent and the full context of those FTC opinions. A collector who dials a telephone operator in search of a consumer's phone number is clearly and intentionally contacting a third party, but can the same be said of a collector who dials the consumer's last known phone number as listed on her credit application?

262. See Fair Debt Collection Practices Clarification Act of 2012, H.R. 4101, 112th Cong. § 3 (2012).

263. See *id.*

264. Fair Debt Collection Practices Clarification Act of 2012, H.R. 5794, 112th Cong. § 3 (2012) (“Nothing . . . shall be construed as providing an exemption from liability based on any rule, regulation, interpretation, advisory opinion, or approval made by any entity other than the Bureau.”).

265. See H.R. 5794 (112th): Fair Debt Collection Practices Clarification Act of 2012, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr5794> (last visited Jan. 3, 2014).

misleading representations by collectors who scrambled their caller-ID displays to leave false numbers.²⁶⁶ However, this does not mean collectors are *required* to display anything on caller-ID; as the court admits, there is no authority holding collectors liable for third-party violations based on caller-ID displays that reveal their true phone numbers, nor is there any precedent mandating collectors' caller-ID displays include their agency's name.²⁶⁷ If collectors are free not to identify themselves in this way, it is premature to conclude that barring the functional equivalent of a hang-up with caller-ID will inevitably doom all future telephone conversations. As it stands, even if collectors cannot leave voicemails, they still have plenty of means at their disposal for contacting consumers, including—as pointed out in *Foti* and widely accepted outside the District of Minnesota—in live phone conversations, by mail, or in court.²⁶⁸

The court's decision to equate JCC's voicemail with a hang-up call is equally problematic. While it is arguably true that the message conveyed no more information than would be available via caller-ID, the court ignores the fundamental differences in both how these two separate kinds of calls convey information, and in what they require of both the caller and the unintended listener. On the one hand, leaving a voicemail obviously requires more action by the collector than simply hanging up. And, in the case of a hang-up call, a third party must actively perform several tasks before he knows a debt collector was on the line: he must decide to check the caller-ID display, which may only provide a phone number, which he then would have to look-up, possibly via the Internet. These are quick and easy actions, but they require a degree of agency that simply overhearing a voicemail—often an entirely passive activity—does not.

Zortman's most glaring error, however, comes in its consideration of the inferences an unintended third-party listener would need to make to realize the voicemail at issue was left to collect a debt. Here, the court largely ignores the standard by which FD CPA violations are customarily judged. While the court is correct to note that JCC's message contained *less* information about the existence of a debt than the voicemails previously held as violations in other

266. *Zortman*, 870 F. Supp. 2d at 702–03 (citing *Knoll v. Allied Interstate, Inc.*, 502 F. Supp. 2d 943 (D. Minn. 2007)).

267. *Zortman*, 870 F. Supp. 2d at 703.

268. See *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 659 (2006); see also *Berg v. Merch. Ass'n Collection Div., Inc.*, 586 F. Supp. 2d 1336, 1344 (2008) (listing U.S. mail, face-to-face contact, or real-time phone conversations as viable modes of communication).

jurisdictions,²⁶⁹ scant precedent exists to support the notion that violations should be measured on some sort of Goldilocks-style continuum or “sliding scale” in which some messages provide too much or too little information, but others are “just right.”²⁷⁰ Rather, FDCPA violations in the *Zortman* court’s jurisdiction are determined according to the unsophisticated consumer standard.²⁷¹

It is certainly true that given her employment by a collection agency, Ms. Zortman could reasonably be expected to understand the intricacies of the Act’s requirements, or at least the typical law-abiding collector’s standard practices.²⁷² Nonetheless, it does not logically follow that the same level of knowledge should be imparted to the average American, let alone her *children*. The unsophisticated consumer may be unaware of many things, but—at the risk of stating the obvious—even the dimmest bulb in the bunch knows that debt collectors are employed primarily to collect debts. JCC’s voicemail explicitly stated it was from a debt collector.²⁷³ Whatever inferences someone with an advanced background in finance or collections *might* make upon hearing it, the far more likely (perhaps even the natural) inference here is that somebody—presumably the person whose phone number was dialed—has not been paying her bills on time.

This similarly undermines the court’s emphasis on the fact that JCC’s voicemail did not identify Ms. Zortman by name.²⁷⁴ The following thought-experiment illustrates why: assume that a third

269. See *Zortman*, 870 F. Supp. 2d at 706.

270. Moreover, the two cases cited as examples of voicemails held not to trigger liability for communication about a debt are distinguishable from JCC’s voicemail. In both those cases, collectors’ messages conveyed considerably *less* information than here. In *Koby v. ARS National Services, Inc.*, No. 09CV0780, 2010 WL 1437863, at *3–4 (S.D. Cal. Mar. 29, 2010), the court held a voicemail was not a communication under the Act because the collector only gave his own name and a callback number—unlike *Zortman*, the call made no reference to the fact it was placed in connection with a debt. Meanwhile, *Biggs v. Credit Collections, Inc.*, No. CIV-07-0053-F, 2007 WL 4034997, at *4 (W.D. Okla. Nov. 15, 2007), dealt with an alleged mini-Miranda violation, but the court held the message was too vague to be considered a communication because the collector did not identify his agency or the existence of a debt. In addition, there was no suggestion anyone overheard the voicemail. See *id.*

271. The Eighth Circuit, which includes the District of Minnesota, has adopted the Seventh Circuit’s revision of the Act’s least sophisticated consumer standard. See *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002) (applying an objective “unsophisticated consumer test” when determining whether a debt collector’s practices are deceptive or misleading in violation of the FDCPA). However, as noted in Part I, these two standards are essentially the same.

272. See *Zortman*, 870 F. Supp. 2d at 695.

273. *Id.* at 696.

274. See *id.* at 704, 707.

party overhears two messages, both of which are substantially the same as JCC's insofar as they provide a callback number and identify the name of the person or company calling. However, the first message is from the *Raleigh News & Observer's* subscriptions department; the second is from a doctor who works in Duke Hospital's oncology department. In the former case, the third-party listener would likely infer the call was placed by a telemarketer whose job it is to dial hundreds of numbers per day and thus has no direct relationship with the message's intended recipient. In the latter case, the same third-party listener would likely infer the message relates directly to the intended recipient's health. In other words: different people make business calls for different reasons, which usually relate to their stated occupations. Some occupations imply a far more personal connection than others. In this sense, debt collectors are more like oncologists than newspaper salesmen. Put simply: had the *Zortman* court applied the correct standard, JCC would have been held liable for violating section 1692c(b).

The *Zortman* opinion does briefly reference the unsophisticated consumer standard in rejecting the plaintiff's argument that JCC's voicemail is best analogized to a postcard and conveyed information about a debt by using language similar to the message left in *Foti*.²⁷⁵ The court concludes that the collector's description of the call as "important" does not in and of itself convey information about a debt to an unsophisticated consumer.²⁷⁶ While this is likely true, it also illustrates how the court implicitly embraces the "materiality" requirement the Seventh Circuit often applies in conjunction with its unsophisticated consumer standard in measuring FDCPA violations.²⁷⁷ Although the *Zortman* court never explicitly mentions materiality as a necessary condition for liability, its underlying premise—that a third party can overhear a message that identifies a collector and its connection with a debt but nonetheless does not qualify as "communication"²⁷⁸—certainly reflects this position.²⁷⁹

275. *Id.* at 704. The court rejected Ms. Zortman's postcard analogy because the voicemail did not identify her by name and because (the court asserted) the risk of a third party overhearing a voicemail is lower than the risk a postcard could disclose the existence of a debt. *Id.* Of course, the latter assertion is undermined by the facts of this case and also by the fact that consumers under financial duress frequently share phones. See NCLC, *supra* note 38, at 26, 186 (discussing shared phones).

276. *Zortman*, 870 F. Supp. 2d at 705.

277. For discussion of the materiality requirement, see *supra* Part I.B.

278. See *Zortman*, 870 F. Supp. 2d at 707.

279. As noted in Part I.B, the materiality requirement has no direct basis in the FDCPA's text, and seemingly contradicts the Act's strict liability standard.

While it may be tempting to dismiss *Zortman* as a wrongly decided outlier with no binding authority beyond its own jurisdiction, the case itself exemplifies collectors' strategies for exploiting the inherently ragtag nature of the federal judiciary. While consumers continue to prevail in most courts under a traditional application of the FDCPA, when collectors manage to convince a court to narrow their liability, their victories serve as precedents for future defendants in other jurisdictions; considered cumulatively, this risks undermining the Act's protections nationwide. Furthermore, *Zortman* not only provides collectors with a script for leaving future voicemails, it also potentially offers a blueprint according to which collectors might soon contact consumers across a wide array of social media and new technology. Indeed, some collectors are already licking their chops at this possibility.²⁸⁰

Zortman dealt specifically with a cellphone voicemail, but that fact was not determinative in the court's holding.²⁸¹ Under *Zortman*, it is permissible for a debt collector to leave a message for a consumer so long as it does not specifically identify her by name or explicitly state she owes a debt.²⁸² This precedent would easily apply to traditional landlines, but although the opinion is silent with regards to other communication technologies, it could also be expanded to cover emails, texts, and messages left via Facebook, Twitter, and [insert whatever social media innovation comes next]. Of course, when it comes to third-party communications, one could argue that social media are much more like postcards—which the FDCPA specifically bans—than voicemails, insofar as they can easily be viewed by the general (online) public. But by *Zortman*'s reasoning, the debt

280. See, for example, *Text Messaging Debtors*, INSIDEARM.COM (June 11, 2012, 11:59 PM), <https://www.insidearm.com/forum/topic/text-messaging-debtors/>, a recent discussion from collection industry website insideARM.com's message boards, which illustrates how collectors are speculating that all it takes to comply with the FDCPA when leaving messages via new/social media after *Zortman* is to avoid naming the specific consumer.

281. See *Zortman*, 870 F. Supp. 2d at 707–08. Ultimately, the court's reasoning rests not on the context of how the message was communicated but the content of the message itself:

Prohibiting voicemail messages, like those left by JCC that provide no more information than would be available through caller ID, does not directly advance the interests Congress set out to protect in the FDCPA. The messages at issue here did not identify a consumer. They did not identify a debt. They conveyed no more information than would have been obvious in caller ID or could have been acquired in a simple internet search for the caller's phone number. Under these circumstances, and for the reasons stated, JCC is entitled to summary judgment.

Id.

282. *Id.*

collector who posts a message on Bill Smith's Facebook wall may only be searching for location information for another person, or maybe he simply messaged the wrong Bill Smith. In either case, the collector has only conveyed as much information as would be available after a hang-up call, which means he has not "communicated" about a debt under *Zortman*, and therefore he is not liable for violating section 1692c(b), no matter how many third parties view his message. While this would no doubt delight debt collectors by providing a cheap and efficient way to contact consumers, it would be bad news for the American consumer.²⁸³

In that sense, *Zortman* threatens the privacy interests protected by the Voicemail Paradox in particular and the FDCPA more broadly. The court claims to be rescuing consumers from more annoying alternatives, such as an onslaught of anonymous hang-ups and incessant redials, which might ensue if voicemails are prohibited.²⁸⁴ Yet the fact that the Act allows such conduct by debt collectors only suggests the need for further reforms. And, if a voicemail really is the functional equivalent of (and conveys no more information than) a hang-up, that begs the question of just exactly why leaving a voicemail would be necessary, or even useful, in the first place.

It is possible that a voicemail could prompt the consumer to call the debt collector back, which might help facilitate a settlement and avoid litigation. But it is equally likely that call could result in providing further opportunity for abuse and harassment. Remember our friends Josh Horton²⁸⁵ and "Jimmy"?²⁸⁶ Their experiences suggest that when a debt collector calls a consumer, he is not necessarily planning to engage in a polite discussion about how best to pursue mutually beneficial interests and outcomes.²⁸⁷ To the contrary, they illustrate that the FDCPA leaves plenty of grey area between what is allowed and what is prohibited, which debt collectors regularly exploit to more or less bully consumers in their efforts to make them pay. For example, the Act prohibits collectors from using obscene language or overtly threatening to harm consumers²⁸⁸ (whether

283. Indeed, some collectors already utilize social networking sites as "an important tool" in the collections process. See Renée C. Lee, *Got Debt? Better Watch What You Post on Facebook*, HOUSTON CHRON. (July 21, 2010), <http://www.chron.com/disp/story.mpl/facebook/7118943.html>.

284. See *Zortman*, 870 F. Supp. 2d at 707.

285. See Horton Interview, *supra* note 13.

286. See Halpern, *supra* note 59.

287. See *supra* Part I.

288. 15 U.S.C. § 1692d (2012).

physically²⁸⁹ or by revealing the existence of the debt to a third party²⁹⁰), but it does not mandate the collector actually offer a reasonable settlement or refrain from deploying more subtle pressuring tactics. Furthermore, given section 1692d's intent requirement,²⁹¹ if the consumer decides not to answer the phone, the collector can call him repeatedly, so long as the collector intends to *speak* with him, rather than to annoy or harass him, even if the natural consequence is to leave the consumer feeling as though he is under siege.²⁹² Allowing debt collectors to leave vague messages that do not technically reveal the fact the recipient owes a debt—whether via voicemail, or email, Facebook, or Twitter—only reinforces this bullying dynamic. Whatever script the debt collector uses, the message is clear: the “bad guys” know where you are, and they have you surrounded, so you may as well talk to them.

Nothing in the FDCPA guarantees debt collectors the right to speak with consumers. The Act merely allows them to utilize the dominant technologies of the late-1970s to attempt to communicate

289. *Id.*

290. *Id.* § 1692c.

291. A collector may not cause a “telephone to ring or engag[e] any person in telephone conversation repeatedly or continuously with *intent* to annoy, abuse, or harass any person at the called number.” *Id.* § 1692d (emphasis added).

292. *See, e.g.,* *Clingaman v. Certegy Payment Recovery Servs.*, No. H-10-2483, 2011 WL 2078629, at *4, *5 (S.D. Tex. May 26, 2011) (finding no FDCPA liability for a collector that made fifty-five calls to a debtor over three and one-half months); *Carman v. CBE Grp., Inc.*, 782 F. Supp. 2d 1223, 1232 (D. Kan. 2011) (finding no FDCPA liability for a collector that made 149 calls to a debtor over a two-month period); *VanHorn v. Genpact Servs., LLC*, No. 09-1047-CV-S-GAF, 2011 WL 4565477, at *1, *5 (W.D. Mo. Feb. 14, 2011) (finding no FDCPA liability for a collector that made 114 calls to a debtor over a four-month period). The *Zortman* court cites these cases to support its contention that “[a] remarkable volume of telephone calls is permissible under FDCPA jurisprudence.” *Zortman*, 870 F. Supp. 2d 694, 707 (D. Minn. 2012). The court then speculates that

[i]f a person knows that he or she is being called by a debt collector, the FDCPA provides an avenue for relief from the harassment—sending a letter telling the collector to stop calling or informing the collector in writing that the consumer refuses to pay the debt. 15 U.S.C. § 1692c(c). That option, even the possibility of that option, is not available to a person who doesn't know that the persistent anonymous caller is a debt collector.

Id. This is technically accurate, but it does not necessarily follow that the “favor” *Zortman* claims to be granting is one most consumers would welcome. Perhaps it would be if we presume all debt collectors scrupulously follow the spirit, rather than merely the letter, of the FDCPA. But the same line of cases can just as easily be used to frame an argument that debt collectors consistently seek to exploit whatever legal loopholes the law will allow. Moreover, the court's rose-tinted optimism about how helpful allowing collectors to leave voicemails will be to consumers ignores the sorts of typical collector/consumer interactions detailed in Part I, as well as the privacy interests discussed in Part II.D.

with alleged debtors, with certain restrictions and regulations.²⁹³ While the Act certainly should be updated to reflect contemporary communication technologies and usage trends, it must also be remembered that at its core, the FDCPA explicitly protects privacy interests and implicitly sticks up for the consumer's right to be let alone.

D. FDCPA, Privacy, and the Right to Be Let Alone

The FDCPA has always been intended to protect consumers against invasions of privacy by debt collectors. This is explicitly stated in the congressional findings and declaration of purpose that preface the Act,²⁹⁴ and implicitly reflected across a wide range of the rules and restrictions it codifies. Several of its provisions are designed to help consumers exercise control over their personal and financial information; section 1692c(b) is an obvious example,²⁹⁵ while related provisions prohibit publishing the names of alleged debtors in order to prevent debt collectors from shaming or coercing the consumer into paying.²⁹⁶ More broadly, the Act regulates (and limits) how and when debt collectors may communicate with consumers: while section 1692c(a) bars collectors from attempting contact at inconvenient times and locations,²⁹⁷ section 1692d prohibits collectors from threatening consumers or using profane language while communicating with them.²⁹⁸ Furthermore, section 1692d(5) outlaws incessant calls intended to annoy or harass,²⁹⁹ and section 1692c(c) provides a process by which consumers can order collectors to cease and desist from future communications.³⁰⁰

These privacy protections are fundamentally rooted in what Professor William L. Prosser famously identified as “the right to be let alone.”³⁰¹ While Samuel Warren and Louis Brandeis laid the

293. See § 1692.

294. See *supra* notes 73–75 and accompanying text. For the statement of the FDCPA's sponsor, see 122 CONG. REC. H7, 22,484, 22,499 (daily ed. July 19, 1976) (statement of Rep. Annunio) (“The bill's controls on communications are quite reasonable and strike a fair balance between the debt collector's need to contact and the consumer's right to privacy and right to be free from harassment.”).

295. See § 1692c(b) (restricting communication with third parties).

296. *Id.* § 1692d(3).

297. Section 1692c(a) prohibits telephone contact before 8 a.m. and after 9 p.m.; it also bars collectors from calling a consumer at work if the collectors know or have reason to know such contact violates the consumer's employer's rules. *Id.* § 1692c(a).

298. *Id.* § 1692d.

299. *Id.* § 1692d(5).

300. *Id.* § 1692c(c).

301. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

foundations for treating individual privacy as a concept worthy of legal protection with their influential 1890 essay, *The Right to Privacy*,³⁰² Prosser is widely and justifiably understood as the “chief architect” of American privacy law.³⁰³ The Warren and Brandeis essay focused primarily on invasions of individual privacy by the sensationalistic scandal-hungry media,³⁰⁴ and it spawned a diverse but fractious array of new privacy-related causes of action across the country.³⁰⁵ Decades later, Prosser’s landmark 1960 essay “systematized and organized [privacy] law, giving it an order and legitimacy it had previously lacked,” which allowed privacy to become a “major topic in both academic and practical understandings of tort law.”³⁰⁶ Rather than a single all-encompassing right to privacy, Prosser’s taxonomy recognized “four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, ‘to be let alone.’”³⁰⁷ In recent years, legal scholars have argued that Prosser’s famous but somewhat derisive turn of phrase reflected a skepticism towards privacy torts that is inherent in the analytic framework he created and may have actually stunted the law’s evolution.³⁰⁸

Regardless of Prosser’s intentions, the notion of a “right to be let alone” taps into a broader undercurrent that has powerfully influenced the history of this country. The Framers implicitly codified it in the Bill of Rights.³⁰⁹ Less than a decade after the publication of

302. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

303. Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1888 (2010).

304. See Warren & Brandeis, *supra* note 302, at 206 (“[T]he existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.”).

305. See Richards & Solove, *supra* note 303, at 1892–95 (discussing the slow evolution of state privacy torts in the decades following publication of Warren and Brandeis’s essay).

306. *Id.* at 1888.

307. Prosser, *supra* note 301, at 389 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 19 (2d ed. 1888)).

308. See Richards & Solove, *supra* note 303, at 1890.

309. See U.S. CONST. amends. I–X. The Third Amendment, for example, prohibits quartering soldiers in homes during peacetime without the owner’s consent. *Id.* amend. III. The Fourth Amendment protects people, their homes, papers, and effects from unreasonable searches and seizures. *Id.* amend. IV. The Fifth Amendment safeguards individual autonomy even for criminals with its right against self-incrimination. *Id.* amend. V.

Prosser's essay, the Supreme Court of the United States recognized a constitutional right to privacy in *Griswold v. Connecticut*,³¹⁰ which expanded in subsequent cases to protect individual autonomy against interference from the state.³¹¹ Shortly thereafter, Congress enacted a series of federal regulatory schemes to protect individual privacy, including laws specifically aimed at safeguarding financial information and transactions.³¹² Once again, the FDCPA is best understood as a product of its times.

Although the Voicemail Paradox resulted from unforeseen shifts in communication technology, Congress clearly contemplated the interaction of its two prongs when it passed the FDCPA in 1977.³¹³ While *Zortman*'s holding most obviously undermines section 1692c(b)'s bar against communicating with third parties about a debt, it also ignores the broader consumer privacy interests protected by the FDCPA's mini-Miranda requirement. *Foti* illustrates mini-Miranda's importance as an anti-fraud measure designed to prevent debt collectors from deceiving misinformed consumers into unintentionally revealing personal or financial information.³¹⁴ But at a more basic level, mini-Miranda protects privacy and individual autonomy in much the same way as the Supreme Court's decision in *Miranda v. Arizona*.³¹⁵ While there are obvious and significant differences between criminal interrogations and calls made to collect debts, both situations revolve around magic words—"you have the right to remain silent" and "this is a call to collect a debt"—designed to alert the intended listener that he has an important choice to make. *Miranda* warnings protect a suspected criminal's autonomy by informing him that despite the inherently coercive atmosphere of a police interrogation, he still has the choice to stand on his rights, say nothing, and take his chances at trial.³¹⁶ In a far less (criminally)

310. 381 U.S. 479 (1965).

311. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

312. See, e.g., Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified as amended at 42 U.S.C. § 2000aa (2006)); Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (codified as amended at 12 U.S.C. § 3401 (2012)); Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (2012)); Family Educational Rights and Privacy Act of 1974 (FERPA), Pub. L. No. 93-380, 88 Stat. 571 (codified as amended at 20 U.S.C. § 1232 (2012)); Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended at 15 U.S.C. § 1681 (2012)).

313. Pub. L. No. 95-109, 91 Stat. 874 (codified as amended at 15 U.S.C. § 1692 (2012)).

314. See *Foti v. NCO Fin. Sys.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006).

315. 384 U.S. 436 (1966).

316. See *id.*

consequential but still related vein, mini-Miranda warnings inform a consumer both who is trying to communicate with him and why. The warnings signal to him that the conversation he is about to have is likely to be unpleasant and that the voice on the other end of the line likely does not have his own best interests at heart. And—in conjunction with section 1692c(c)'s cease-and-desist provision—the warnings allow him to make an informed decision as to whether or not this conversation will continue, at least until legal proceedings are instigated against him. In short, they preserve his right to be let alone. The trouble with the precedent established in *Zortman* is that now, debt collectors can basically force consumers to make such intensely private decisions in front of whoever else might happen to overhear their voicemails (or even, if *Zortman* expands to allow similar contact via social media, a public online audience).

III. HOW THE CFPB CAN PROTECT THE SHREWD, THE GULLIBLE, AND THOSE WHO WOULD PREY ON BOTH BY PROHIBITING DEBT COLLECTORS FROM LEAVING A MESSAGE AFTER THE BEEP

This Part argues that the CFPB can and should utilize its authority to update the FDCPA and protect consumer privacy by prohibiting debt collectors from leaving voicemails. First, Part III.A.1 details key structural factors that will assist the Bureau in achieving its core mission of protecting consumers. Next, Part III.A.2 focuses specifically on the CFPB's authority over the FDCPA, highlighting its rulemaking power as a crucial advantage that will enable the Bureau to succeed where the FTC previously fell short, while also detailing the measures the Bureau has taken so far to expand the scope of the Act's protections. Finally, Part III.B summarizes the justifications for barring collectors from leaving voicemails and describes the benefits such a straightforward, pragmatic utilization of the Bureau's authority will entail.

A. *There's a New Sheriff in Town*

1. A New Breed of Consumer Watchdog

The Dodd-Frank Act transferred authority over the FDCPA to the newly created CFPB.³¹⁷ While the CFPB only recently took up the

317. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010).

task of updating the Act,³¹⁸ there are early indications that the Bureau will adopt a more aggressive stance in its efforts to protect American consumers against abuse, harassment, and invasions of privacy by debt collectors.³¹⁹

On the one hand, the CFPB boasts key structural advantages that insulate it against the threat of regulatory capture and thereby insure the Bureau remains autonomous.³²⁰ Importantly, its funding is not dependent on congressional approval, which (theoretically) increases the Bureau's independence and decreases the ability of lobbyists and interest groups to influence consumer protection policies through the legislative process.³²¹ Instead, the CFPB functions as an independent bureau within the Federal Reserve System. However, the Federal Reserve Board ("FRB") is prohibited under Dodd-Frank from interfering with the Bureau's regulatory activities and has no power to appoint or remove any of its employees.³²² As a result, the CFPB has assembled a staff of seasoned regulators and dedicated consumer protection attorneys to fulfill its mission of creating "the strongest consumer financial protections in history"³²³ and functioning as a new kind of "consumer watchdog with just one job: looking out for people—not big banks, not lenders, not

318. See CFPB, *supra* note 40, at 3. When the Bureau released its first annual report on the FDCPA in 2012, it noted, "[Our] program to administer and enforce the FDCPA has only just begun." *Id.*

319. See *infra* notes 331–44 and accompanying text.

320. See generally Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 902 (2012).

321. See *id.* at 885. Wilmarth points out that the Bureau's autonomy, in terms of funding, contrasts starkly with other federal regulatory agencies like the SEC and CFTC, which do rely on Congressional funding and have been neutralized (and neutered) in their attempts to regulate the financial sector as a result of the legislative appropriations process, which financial institutions and trade groups have exploited to slash their budgets for implementing regulations that would jeopardize industry profits. *Id.*

322. *Id.* at 903–04 ("Title X [of Dodd-Frank] prohibits FRB from taking any of the following actions: (i) intervening in any CFPB examination, enforcement action or other proceeding; (ii) appointing, directing or removing any CFPB officer or employee; (iii) combining CFPB or any of its functions with any other FRB unit; (iv) reviewing, approving, or delaying any CFPB rule or order; or (v) reviewing or approving any legislative recommendations, testimony, or comments of CFPB's Director.").

323. President Barack H. Obama, Remarks on Signing the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act> [hereinafter Presidential Dodd-Frank Statement].

investment houses—looking out for people as they interact with the financial system.”³²⁴

Relatedly, the Bureau’s internal structure offers an additional reason to believe it will prove uniquely effective when compared to other federal regulatory agencies. Specifically, the CFPB is headed by a single director, who “may issue rules, orders and guidance ‘to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.’”³²⁵ Moreover, “[u]nlike agencies charged with writing rules to protect health and the environment, the Bureau’s rulemaking is not subject to review by the White House’s Office of Information and Regulatory Affairs.”³²⁶ While these provisions potentially allow for a great deal of independence—and clearly alarmed pro-business groups and their allies in Congress, who opposed Dodd-Frank’s implementation and lobbied to weaken the Bureau after its passage by warning of unprecedented bureaucratic interference that would stifle innovation and harm businesses and consumers alike³²⁷—they come with an important caveat, namely: “The bureau cannot operate without a director. Under the Dodd-Frank law, most of its regulatory powers—particularly its authority over nonbanks like finance companies, debt collectors, payday lenders and credit agencies—can be exercised only by a director.”³²⁸ Thus, Senate Republicans seeking to undermine the CFPB’s authority refused to allow a confirmation vote on President Obama’s nominee to head the Bureau until July 2013, when Director Richard Cordray was finally confirmed as part of a larger deal approving several other previously filibustered executive branch nominees.³²⁹ Consumer advocates hailed the news, noting that

324. Wilmarth, *supra* note 320, at 882 (quoting Presidential Dodd-Frank Statement); see also Rob Blackwell, *How the Specter of Regulatory Capture Shaped CFPB’s First Year*, AMERICAN BANKER (July 10, 2012), http://www.americanbanker.com/issues/177_131/how-specter-regulatory-capture-shaped-cfpb-first-year-1050723-1.html (detailing the Bureau’s early evolution and the measures taken to preserve its independence).

325. Wilmarth, *supra* note 320, at 901–02 (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(a), 124 Stat. 1376, 1980 (2010)).

326. Melissa B. Jacoby, *Dodd-Frank, Regulatory Innovation, and the Safety of Consumer Financial Products*, 15 N.C. BANKING INST. 99, 106 (2011).

327. See Wilmarth, *supra* note 320, at 886–90.

328. Editorial, *Quietly Killing a Consumer Watchdog*, N.Y. TIMES, Feb. 10, 2013, at A18.

329. See Jonathan Weisman & Jennifer Steinhauer, *Senators Reach Agreement to Avert Fight Over Filibuster*, N.Y. TIMES (July 16, 2013), <http://www.nytimes.com/2013/07/17/us/politics/senators-near-agreement-to-avert-fight-over-filibuster.html?ref=consumerfinancialprotectionbureau>.

although the Bureau had been up and running for over two years, without a director, “its legal authority remained uncertain.”³³⁰

2. Updating the FDCPA

As the Bureau noted in its inaugural “state of the FDCPA” report, its powers under Dodd-Frank include the ability to “prescribe rules with respect to debt collection; issue guidance concerning compliance with the law; collect complaint data; educate consumers and collectors; and undertake research and policy initiatives related to consumer debt collection.”³³¹ In exercising these powers, the CFPB has one crucial advantage over the FTC with regards to its stewardship of the FDCPA. Unlike the FTC, which could bring lawsuits to enforce the Act but had no power to issue legally binding interpretations of its provisions,³³² the CFPB has been vested with both enforcement *and* rulemaking authority.³³³ This means the Bureau is well positioned not only to take collectors to court when they violate the law, but also to update the Act’s provisions as necessary to reflect changing conditions and provide clear legal standards both collectors and consumers can rely on.

One of the Bureau’s top priorities in taking over FDCPA authority from the FTC is to make sure American consumers are actually aware of the rights and remedies they are entitled to under

330. Binyamin Appelbaum, *Vote Ushers in New Era in Oversight of Lending Practices*, N.Y. TIMES (July 16, 2013), <http://www.nytimes.com/2013/07/17/business/cordray-confirmed-as-head-of-financial-watchdog-after-long-wait.html?ref=consumerfinancialprotectionbureau>.

331. CFPB, *supra* note 40, at 3.

332. See NCLC, *supra* note 38, at 102–03. While Congress originally provided the FTC with enforcement authority, the Act is silent on the question of rule-making authority. As demonstrated by the FTC’s own recommendations in its 2009 “Challenges of Change” report, that significantly impaired the agency’s power to alter or update the Act’s provisions. See FTC, *supra* note 42, at viii, noting:

To address such concerns more quickly in the future, the FTC recommends that Congress give the Commission the authority to issue rules under the FDCPA. The Commission recommends that Congress empower the agency to issue rules to address problems that exist today as well as to issue rules as necessary to combat new issues and concerns as they arise.

Id.

333. Section 1022(a) of the Dodd-Frank Act empowers the CFPB to issue rules and guidelines “to administer and carry out the purposes and objectives of the federal consumer financial laws, and to prevent evasions thereof.” Additionally, sections 1022(b) and 1031(b) provide authority for issuing rules and regulations to prohibit “unfair, deceptive, or abusive act[s] or practice[s].” Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1022(b), 1031(b), 124 Stat. 124 Stat. 1376, 1980, 2005 (2010).

the Act. To that end, the CFPB is using its website to publicize the FDCPA's protections in an easy-to-understand and user-friendly format that includes a new system for reporting complaints and answering consumer questions directly.³³⁴ While the Bureau has yet to initiate any litigation in conjunction with its enforcement authority, in 2012 it filed amicus briefs in FDCPA-related appeals pending in the Tenth³³⁵ and Eleventh³³⁶ Circuits to challenge holdings by district courts that could potentially erode the Act's protections.

In its first exercise of FDCPA rulemaking authority, the Bureau announced its new "larger participant" rule in October 2012.³³⁷ This rule expands the CFPB's authority to directly supervise larger debt collectors, setting the threshold at \$10 million in annual consumer debt receipts.³³⁸ While this rule does not cover all collectors, the Bureau estimates that those to whom it applies account for over sixty percent of the collection industry's annual revenue.³³⁹ The rule's announcement drew the ire of many collectors, who complained they felt shut out of the process. The rule signals a more aggressive

334. See CONSUMER FIN. PROT. BUREAU, www.consumerfinance.gov (last visited Jan. 3, 2014).

335. Brief for Consumer Financial Protection Bureau as Amicus Curiae Supporting Plaintiff-Appellant, *Marx v. Gen. Revenue Corp.*, 668 F.3d 1174 (10th Cir. 2011) (No. 10-1363), 2011 WL 7144818. In *Marx*, the Bureau filed an amicus brief on behalf of a plaintiff who filed suit after a collector sent a fax to her workplace to inquire about her employment status and attempted to garnish her wages. *Id.*; *Marx*, 668 F.3d at 1176. The consumer alleged her co-workers saw the fax, which violated the Act's bar against third-party disclosures, but the lower court (employing logic similar to that in *Zortman*) held the fax did not constitute a "communication" about a debt, and also awarded the collector attorney's fees, despite no showing the suit was brought in bad faith (which the Act requires). See *Marx*, 668 F.3d at 1176-78. In its amicus brief, the Bureau articulated strong support for a broad interpretation of section 1692c(b)'s prohibition on third-party communications. Brief for Consumer Financial Protection Bureau, at *11-12. Ultimately, however, the Tenth Circuit affirmed the district court's holding that the fax was not a "communication" under the FDCPA and also upheld awarding attorney's fees to the collector despite no showing of bad faith. *Marx*, 668 F.3d at 1184. The case was eventually appealed to the Supreme Court of the United States, which affirmed the trial court despite another amicus brief the Bureau submitted with the United States. See *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166 (2013); Brief for the United States et al. as Amici Curiae Supporting Petitioner, *Marx*, 133 S. Ct. 1166 (No. 11-1175), 2012 WL 3186580.

336. Brief for Consumer Financial Protection Bureau as Amicus Curiae Supporting Plaintiffs-Appellants, *Birster v. Am. Home Mortg. Servicing, Inc.*, 481 F. App'x 579, 580 (11th Cir. 2012) (No. 11-13574-G). The *Birster* court opinion was consistent with the Bureau's argument that the scope of the FDCPA's protections against harassment and abuse extend to calls concerning mortgage foreclosure proceedings. *Birster*, 481 F. App'x at 580, 583.

337. See *Defining Larger Participants of the Consumer Debt Collection Market*, 77 Fed. Reg. 65,775, 65,777 (Oct. 31, 2012) (to be codified at 12 C.F.R. pt. 1090).

338. *Id.* at 65,777.

339. CFPB, *supra* note 40, at 12-13.

regulatory posture and suggests the CFPB (accurately) views collectors less as cooperative partners in regulation than as frequent offenders whose violations of the FDCPA must be deterred.³⁴⁰

More recently, in July 2013, the Bureau took further steps to protect consumers from abuses resulting from gaps in the FDCPA's coverage. Specifically, because the Act itself only applies to debt collectors, its provisions previously did not apply to lenders who sought to collect on their own.³⁴¹ "As a result, the lenders—from national banks like Capital One to big department stores like Macy's—can hound consumers behind on their bills with repeated calls, even though the practice is restricted by the Fair Debt Collection Practices Act."³⁴² To close this loophole, the Bureau issued a bulletin citing Dodd-Frank's prohibition on unfair, deceptive, or abusive acts or practices ("UDAAPs") as justification for expanding the scope of its regulatory authority, noting "[a]lthough the FDCPA's definition of 'debt collector' does not include some persons who collect consumer debt, all covered persons and service providers must refrain from committing UDAAPs in violation of the Dodd-Frank Act."³⁴³ Or, as Director Cordray put it more succinctly, "[i]t doesn't matter who is collecting the debt—unfair, deceptive or abusive practices are illegal."³⁴⁴

340. See, e.g., Gina McNaughton, *How Engaged is the CFPB with the ARM Industry?*, INSIDEARM.COM (Oct. 17, 2012), <http://www.insidearm.com/opinion/how-engaged-is-the-cfpb-with-the-arm-industry/> ("[T]he mainstream perception of the CFPB is that they are partnering with the financial services industry to better serve and protect consumers. The reality is that while they may, or may not, be working with banks, lenders, and other financial services providers, their partnership with the debt collection industry appears almost non-existent. As you may be aware, the CFPB recently appointed the Consumer Advisory Board (CAB) which was a part of the Dodd-Frank legislation. A review of the Board Members selected shows most of the financial sectors are represented, except for the ARM industry.").

341. See Jessica Silver-Greenberg & Edward Wyatt, *US Vows to Battle Abusive Debt Collectors*, N.Y. TIMES, July 10, 2013, at B1 ("The primary federal law that governs how companies pursue consumers behind on their bills does not apply to firms that are trying to recoup money that they lent directly to a consumer.").

342. *Id.*

343. CONSUMER FIN. PROT. BUREAU, BULL. 2013-07, PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS (2013), available at http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

344. Silver-Greenberg & Wyatt, *supra* note 341, at B1 (internal quotation marks omitted).

B. Please Don't Leave a Message After the Beep

The CFPB should make use of its rulemaking authority to resolve the Voicemail Paradox by prohibiting debt collectors from leaving voicemails.³⁴⁵ Following common sense, the vast majority of federal district courts, and the FDCPA's plain language, the Bureau should declare that voicemails *are* communications under the Act. Moreover, voicemails are an "inherently risky" form of communication.³⁴⁶ Nothing in the FDCPA entitles debt collectors to leave them. To the contrary, with its prohibition against sending postcards, the Act expressly forbids collectors from communicating with consumers in ways that risk disclosing the existence of a debt to unauthorized third parties.³⁴⁷ A rule barring voicemails is directly supported by the interplay of the section 1692c(b) and mini-Miranda requirements. Such a rule would meaningfully update the privacy protections those provisions embody to fit our contemporary technological contexts.

This update would also help debt collectors by rescuing them from themselves. By finally declaring voicemails impermissible, the Bureau can clarify the law and eliminate the supposedly unresolvable dilemma collectors claim to be confounded by, thereby removing the potential for further lawsuits generated by their mostly unsuccessful but persistent search for a legal loophole. Collectors will no doubt complain that a categorical bar against voicemails inconveniences them by restricting their ability to cheaply and efficiently communicate with consumers. But the many who already refrain from leaving voicemails to avoid violating the Act are still in business because there are ample alternative means—such as by mail or live telephone conversations—at their disposal for contacting debtors. The slippery slope arguments that carried the day in *Zortman* are

345. Others have suggested resolving the Paradox by allowing collectors to leave voicemails if a consumer provides written consent. *See, e.g.,* Melissa Travis, *The Three Cs Versus the Dinosaur: Updating the Technologically Archaic FDCPA to Provide Consumers, Collectors, and Courts Clarity*, 44 J. MARSHALL L. REV. 1033 (2011). However, it is difficult to imagine many consumers would freely choose to sign such consents if they were accurately informed they had a right not to sign. On the other hand, it is easy to envision such provisions being included on other forms consumers must sign, buried beneath mountains of fine print and legal jargon, which would clearly defeat the purpose of seeking consent in the first place. Moreover, it is likely such a solution could lead to an even more confusing dilemma in which collectors are allowed to leave voicemails for some consumers but not others, thereby sparking further litigation.

346. *Berg v. Merchants Ass'n Collection Div., Inc.*, 586 F. Supp. 2d 1336, 1343 (S.D. Fla. 2008)

347. *See* 15 U.S.C. § 1692c(b) (2012).

hyperbolic and unconvincing;³⁴⁸ nonetheless, the Bureau can alleviate concerns about preserving the ability to communicate via telephone by also declaring that a caller-ID display by itself is insufficient to trigger liability for violating section 1692c(b)'s third-party prohibition.

Furthermore, prohibiting debt collectors from leaving voicemails protects consumers' privacy not only from the risk of third-party disclosures but also more broadly by paying full respect to the Act's mini-Miranda requirement. Remember, even following *Zortman's* (strained) logic, voicemails are arguably unnecessary in the first place, given the prevalence of caller-ID technology. If the message conveys no more information than a hang-up call, what is its actual utility, apart from further reinforcing the bullying dynamic these calls often exhibit and extending an invitation for the consumer to call back for further bullying?³⁴⁹ While the FDCPA does give collectors the right to communicate with consumers via telephone, it does not guarantee the consumer will actually speak to them; indeed, the Act provides consumers with a way to cut off all further communication and take their chances in court. Viewed in this light, the mini-Miranda requirement plays a crucial role in preserving individual dignity and autonomy by assuring that consumers are given the opportunity to decide whether or not to engage in what are often unpleasant conversations.

Prohibiting voicemails will not only resolve this paradox, it will also set an important precedent for regulating how debt collectors are allowed to communicate with consumers using email, text messages, social media, and other new technologies. Whereas *Zortman's* logic could potentially be extended to allow vague but revealing messages that do not fit within a narrow interpretation of what constitutes "communication" about a debt, a categorical ban against leaving messages will help to preserve a broader definition of the term—one

348. *See supra* Part II.C.

349. This seems especially true in the context of cell phones, given the central role they have come to play in many consumers' lives. (For further illustration: once you finish reading this Comment, approach a close friend and clandestinely "borrow" his or her cellphone; chances are within fifteen minutes of realizing its absence, your friend will be on the verge of a nervous breakdown.). Phones are no longer just for talking, they now allow us to pay our bills, read the newspapers, and communicate via email with specific individuals or the general public. For better or worse, one's cellphone vitally impacts how one perceives the world and presents oneself to it. Allowing debt collectors to leave voicemails invades this virtual space and, by extension, individual privacy.

the CFPB has already embraced³⁵⁰—that better comports with Congress’s intention to prohibit most third-party communications.

In doing so, the Bureau will update the Act to reflect broader trends relating to issues of privacy and new technology that have emerged since its passage. Given the fact it has only heard three FDCPA-related cases in over three decades since the Act’s passage, it seems unlikely the Supreme Court will grant certiorari to clarify the Voicemail Paradox any time soon.³⁵¹ But in its recent Fourth Amendment jurisprudence, the Court has reiterated the importance of an individual’s reasonable expectations of privacy with regards to new technology. For example, in *Ontario v. Quon*,³⁵² the Court imported the framework established in *Katz v. United States*³⁵³ to decide whether or not a policeman’s Fourth Amendment rights were violated after he was disciplined for sending amorous non-work related texts on his department-provided pager.³⁵⁴ Although the Court ultimately found no violation—based largely on the department’s previous warnings to officers that the pagers were for work purposes only and that any communications might be monitored³⁵⁵—the case itself is noteworthy for its adoption of the *Katz* test and suggests that in future new technology-related cases, an individual’s reasonable expectations of privacy will be a factor.³⁵⁶

Furthermore, Congress frequently regulates and restricts actors who wish to communicate with consumers for commercial purposes via phone, fax, and email. The Telephone Consumer Protection Act (“TCPA”) restricts telemarketers,³⁵⁷ as does the Do-Not-Call Implementation Act of 2003.³⁵⁸ Likewise, the CAN-SPAM Act of 2003 established guidelines restricting the use of email for mass-marketing messages.³⁵⁹ Interestingly, the TCPA now expressly prohibits placing calls to consumers’ cellphones via auto-dialing

350. See Brief for Consumer Financial Protection Bureau as Amicus Curiae Supporting Plaintiff-Appellant, *Marx v. Gen. Revenue Corp.*, 668 F.3d 1174 (10th Cir. 2011) (No. 10-1363), 2011 WL 7144818.

351. Even if it did, the pro-collector holding in its 2013 *Marx* opinion might be seen as an ill omen for consumers and their voicemail inboxes. Yet *Marx* was more about attorney’s fees and the rules of civil procedure than consumer privacy. *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166 (2013).

352. 130 S. Ct. 2619 (2010).

353. 389 U.S. 347 (1967).

354. *Ontario*, 130 S. Ct. at 2629–30.

355. *Id.* at 2630–32.

356. See *id.*

357. 47 U.S.C. § 227 (2012).

358. 15 U.S.C. § 6101.

359. *Id.* § 7701.

technology without written consent; while the measure is aimed at telemarketers, most debt collectors utilize the same technology and are only allowed to call cellphones based on a controversial 2008 Federal Communications Commission ruling that concluded consumers provide express written consent for such calls simply by signing their names to a standard credit application.³⁶⁰

CONCLUSION

In light of the aforementioned judicial and legislative trends, and the importance of the interests the FDCPA's provisions protect, it is unlikely that a CFPB rule prohibiting debt collectors from leaving voicemails would be struck down as unconstitutional or invalidated as arbitrary and capricious. The Voicemail Paradox may not actually be a paradox at all, but resolving it by prohibiting debt collectors from leaving voicemails will honor the FDCPA's aim of shielding consumers and their privacy from harassment and abuse by debt collectors, thus protecting not only "the gullible as well as the shrewd"³⁶¹ but also those who would prey on both. We ought not allow our necessary evils to be unnecessarily evil.

TIM HENDERSON**

360. See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 9779 (FCC June 17, 2008). The FCC's ruling was challenged in *Leckler v. Cashcall, Inc.*, 554 F. Supp. 2d 1025 (N.D. Cal. 2008), in which the court held that credit application release forms only provide implied consent and are therefore insufficient to be considered waivers. However, that decision was later vacated for lack of jurisdiction. See *Leckler v. Cashcall, Inc.*, No. C 07-04002, 2008 WL 5000528 (N.D. Cal. Nov. 21, 2008).

361. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

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