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Please Leave a Message After the Tone: How Florida Lawyers Should Approach the "Mini-Miranda" Warning Requirement of the Fair Debt Collection Practices Act

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PLEASE LEAVE A MESSAGE AFTER THE TONE: HOW FLORIDA LAWYERS SHOULD APPROACH THE "MINI-MIRANDA" WARNING REQUIREMENT OF THE FAIR DEBT COLLECTION PRACTICES ACT

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I. INTRODUCTION

In the world of consumer debt collection in the State of Florida, the boundaries within which a debt collector may communicate with a debtor in an attempt to collect a consumer debt are proscribed by both the Federal Fair

Debt Collection Practices Act (FDCPA), and the Florida Consumer Collection Practices Act (FCCPA).[1] In order to avoid a lawsuit for improper communication with a debtor, a Florida attorney acting as a debt collector must comply with the communication provisions of both the federal and state statutes.[2] The FDCPA only invalidates state laws dealing with consumer debt collection if such laws are inconsistent with the federal statute.[3] State consumer debt collection statutes that provide more protection for the consumer than the federal statute are not considered inconsistent for the purposes of preemption.[4]

A dilemma exists, however, when the FDCPA meets modern technology—the FDCPA "was enacted in 1977," prior to the common usage of answering machines.[5] Thus, the limited types of communication made compliance with the FDCPA's communication restrictions fairly straightforward.[6] The technological advances that have occurred over the past three decades, however, have made compliance with the FDCPA difficult.[7] These compliance issues have, "for the most part, . . . been [left] unaddressed by case law."[8] With answering machines being "used in more than 77 percent of all [United States] households," debt collectors are unsure as to whether leaving a message would violate various provisions of the FDCPA.[9] In light of the

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1. *See* 15 U.S.C. § 1692 (2000); *see also* FLA. STAT. §§ 559.55–.785 (2007).
2. S. REP. NO. 95-382, at 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700.
3. *Id.*
4. 15 U.S.C. § 1692n.
5. Posting of Meghann Marco to The Consumerist, http://consumerist.com/consumer/fair-debt-collection/is-it-legal-for-debt-collectors-to-leave-a-message-26681.php (June 7, 2007, 16:36 EST). When the FDCPA was enacted, "[t]here were no cell phones," fax machines, or e-mails—"[e]ven the telephone answering machine was still in its infancy." Cindy D. Salvo, *Technology and the Law (Debt Collection)*, N.Y.L.J., Nov. 1, 2005, at 5. The FDCPA was "the first consumer protection bill passed by the 95th Congress." John Tavormina, Comment, *The Fair Debt Collection Practices Act—The Consumer's Answer to Abusive Collection Practices*, 52 TUL. L. REV. 584, 584 (1977).
6. Salvo, *supra* note 5.
7. *Id.*
8. *Id.*
9. *Id.* Debt collectors are required to provide meaningful disclosure as to their purpose and identity, however, may not disclose information regarding the debt to a party other than the debtor, thus creating a dilemma when leaving a message on an answering machine. *Id.* (citing 15 U.S.C. §§ 1692c(b), 1692d(6) (2000)).

technological advances, especially in the communication arena, the FDCPA is "a technological dinosaur that should be updated to include directives aimed at the new technology."[10] Categorized as "static legislation,"[11] the FDCPA is no longer serving its purpose in the rapidly advancing technological world.[12]

Without any congressional or court directives regarding compliance with the FDCPA and the recent technological advances, debt collection attorneys also face the issue of simultaneous compliance with state law.[13] The solution for Florida attorneys, however, may lay in the preemption provision of the FDCPA.[14] This provision expressly states that the FDCPA does not preempt any state statute concerning debt collection if that statute provides more protection for the consumer.[15] The FCCPA does not explicitly require a communication from a debt collector to disclose that it is an attempt to collect a debt, rather requires the debt collector to disclose his or her identity and purpose only upon being asked to do so.[16] This appears to provide more protection for the consumer in the form of upholding their expectations of privacy by preventing disclosure of private information to third parties.[17]

This paper will explore the reasons why Florida attorneys acting as debt collectors should follow the FCCPA, rather than the FDCPA, because it provides more protection for the debtor or consumer. Part II of this paper will

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10. Salvo, *supra* note 5. "With recent advances in computer and information technology, the acquisition and distribution of private information has created new and perplexing privacy issues. Technology has created these issues faster than the courts are able to address them." Robert H. Thornburg, *Florida Privacy Law: Potential Application of Intentional Tort Principles and Florida's Constitutional Right of Privacy as Safeguards to Governmental and Private Dissemination of Private Information*, 4 FLA. COASTAL L.J. 137, 137 (2003).

11. Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 723 (2006). "The most successful legislative regimes are open-ended and worded to anticipate future behavior." *Id.*

12. *Id.* at 723–24. This could be due to the fact that the FDCPA's purpose is currently to correct harassment associated with debt collection that "haunted the country's debt-collection industry before its enactment." *Id.* at 723.

13. *See* John H. Bedard, Jr., *Update on FDCPA Compliance and Litigation*, 61 CONSUMER FIN. L. Q. REP. 25, 146 (2007).

14. 15 U.S.C. § 1692n.

15. *Id.* Despite the fact that the Legislature is scheduled to convene in October 2007 to tackle the anti-technology nature of this statute, their efforts may be delayed by other political maneuvers such as the "war in Iraq" or the 2008 Presidential election. Caitlin Devitt, *The Mid-Year Washington Outlook; Reviewing the FDCPA Will Be a Major Issue,* COLLECTIONS & CREDIT RISK, June 2007, at 30. At this hearing, the legislature intends to review data collection practices, including the new communication technology available. *Id.*

16. FLA. STAT. § 559.72(15) (2007).

17. *Id.* § 559.72(5). The FCCPA prohibits disclosure of the debtor's information to third parties without express consent from the debtor. *See id.*

discuss the *Foti v. NCO Financial Systems, Inc.*[18] decision and its effect on Florida attorneys acting as debt collectors. Part III of this paper will discuss the underlying purpose of the FDCPA. Part IV of this paper will discuss exactly what constitutes "communication" within the statutory meaning provided by the FDCPA. Part V will outline the consumer protections provided by the FDCPA via its restrictions on communication with the consumer or debtor in comparison with the protections provided by the FCCPA. Part VI will discuss the FDCPA's meaningful disclosure requirement and the potential of infringement of consumer or debtor privacy rights. Part VII will discuss potential tort liability that attorneys may face in dealing with the Fair Debt Collection Practices Act. Part VIII will briefly discuss how the Fair Debt Collection Practices Act constructively excludes attorneys' use of technology when practicing under the Fair Debt Collection Practices Act and how this constructive exclusion may constitute an infringement upon one's right to earn a living. Part IX will provide the author's conclusion as to why the FCCPA provides consumers or debtors with more protection than the FDCPA.

II. THE *FOTI V. NCO FINANCIAL SYSTEMS, INC.* DECISION AND ITS EFFECT ON FLORIDA LAWYERS

A debt collector[19] receives instructions from a client to recover a balance left unpaid by a debtor.[20] In response to these instructions, the debt collector sends a letter to the debtor followed by two phone calls consisting of a pre-recorded, standardized message.[21] The pre-recorded, standardized message consisted of a greeting and a request for the debtor to return the phone call as it dealt with "a personal business matter that requires . . . immediate attention."[22] The debt collector was then sued by the debtor for vio-

18. 424 F. Supp. 2d 643, 647 (S.D.N.Y. 2006).

19. 15 U.S.C. § 1692a(6).

> The term "debt collector" means 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 attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

Id. In addition, "[a] lawyer who regularly attempts to obtain payment of consumer debts through litigation or legal proceedings is considered a 'debt collector' under the FDCPA." Brussels v. Newman, No. 06-61325-CIV-COHN/SNOW, 2007 WL 676189, at *1 (S.D. Fla. Feb. 28, 2007) (citing Heintz v. Jenkins, 514 U.S. 291, 292, 299 (1995)).

20. *Foti*, 424 F. Supp. 2d at 647.

21. *Id.* at 648.

22. *Id.* The exact message was as follows: "Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention.

lating various sections of the FDCPA, specifically, for a failure to identify to the debtor that the message was in fact from a debt collector.[23]

In an attempt to defend against the allegations made, the debt collector asserted that the messages left on the debtor's answering machine did not constitute "communication" as defined by the FDCPA.[24] Thus, the debt collector argued that he was not required to provide notice to the debtor that the message was an attempt to collect a debt.[25] The debt collector also attempted to argue that even if the message was considered a "communication" for the purposes of the FDCPA,[26] that the provision requiring the debt collector to identify to the debtor that the message was an attempt to collect a debt owed would "[place] debt collectors in a virtual 'Hobson's choice.'"[27] The debt collector went on to suggest that a debt collector could not simultaneously comply with the notification requirement of the FDCPA and the provision of the FDCPA prohibiting any disclosure of information to a third party without violating either provision.[28] The court disagreed with both arguments proposed by the debt collector, holding that the messages left were "communications" for the purpose of FDCPA, and thus the debt collector failed to comply with the notification requirement.[29] In addition, the court held that the debt collector could avoid the issue surrounding disclosure of the debtor's information to third parties by utilizing a debt collection method other than leaving messages on answering machines.[30]

Please call back 1-866-701-1275, once again please call back, toll-free, 1-866-701-1275, this is not a solicitation." *Id.*

23. *Id.* at 649–50 (citing 15 U.S.C. § 1692e(11)).

24. *Foti*, 424 F. Supp. 2d at 654. "The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

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

26. 15 U.S.C. § 1692a(2).

27. *Foti*, 424 F. Supp. 2d at 658. "Hobson's choice" is defined as "an apparently free choice when there is no real alternative." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 551 (10th ed. 1999).

28. *See Foti*, 424 F. Supp. 2d at 658 (citing 15 U.S.C. §§ 1692c(b), 1692e(11)).

29. Hosseinzadeh v. M.R.S. Assocs., 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005) (citing 15 U.S.C. §§ 1692a(2),1692e(11)).

30. *Foti*, 424 F. Supp. 2d at 659 ("Debt collectors, however, could continue to use other means to collect, including calling and directly speaking with the consumer or sending appropriate letters."); *see also Hosseinzadeh*, 387 F. Supp. 2d at 1112 (citing Joseph v. J.J. Mac Intyre Cos., 281 F. Supp. 2d 1156, 1164 (N.D. Cal. 2003) (discussing how "disclosure to third parties was 'less likely' in the context of a [message being placed] to a debtor's residence")). "The collector was 'cornered between a rock and a hard place, not because of any contradictory provisions of the FDCPA, but because the method they have selected to collect debts has put them there.'" *Court Rakes Collector Over Misleading Prerecorded Messages*, CONSUMER FIN. SERVS. L. REP., Oct. 18, 2006, at 1 [hereinafter *Court Rakes Collector*] (quoting Leyse v.

Following this recent court decision, debt collection attorneys throughout the country have been faced with whether to leave a message or not—an issue which the Federal Trade Commission has declined to address.[31] This refusal by the Federal Trade Commission is surprising because the overall number of complaints submitted by consumers in regards to harassing debt collection practices has quadrupled between 2001 and 2006.[32] In addition to the growing number of complaints, the number of debt collectors continues to grow,[33] thus leaving debtors and debt collectors alike confused about the ability to leave a message in an attempt to collect a debt.

While plaintiff attorneys feel that "[i]t's not difficult for someone who wants to comply to stay in the straight and narrow,"[34] debt collection attorneys feel that it is not so simple, and rather that the "vague and broad language" of the FDCPA leaves them especially vulnerable to lawsuits.[35] The FDCPA seems to "cause[] honest and diligent debt collectors" difficulty in complying with its ambiguous provisions.[36] Even further, some debt collection attorneys feel that the abundance of litigation alleging violations of the FDCPA is a tactic employed by plaintiff attorneys in order "to get their clients out from under lawful debt-collection activities."[37] Regardless of the reason behind the increase in litigation against debt collection firms, debt collectors are left in the dark as to how to keep up with technology without violating multiple provisions of the FDCPA.[38]

Corporate Collection Servs., Inc., No. 03 Civ. 8491 (DAB), 2006 WL 2708451, at *5 (S.D.N.Y. Sept. 18, 2006)).

31. Bedard, *supra* note 13, at 146–47.

32. Goldberg, *supra* note 11, at 712. "The Federal Trade Commission . . . regularly receives more consumer complaints about debt collectors than any other industry." Audri Lanford & Jim Lanford, *A Scary New Breed of Debt Collectors and Debt Collection Scams*, INTERNET SCAMBUSTERS, http://www.scambusters.org/debt.html (last visited Nov. 3, 2007). The Federal Trade Commission received 69,204 complaints related to violations of the FDCPA in 2006—almost four percent higher than the amount received in 2005. *Consumers Complaining About Wide Range of Issues, Exclusive Analysis Finds*, COLLECTIONS & CREDIT RISK, July 2007, at 12.

33. Lanford & Lanford, *supra* note 32.

34. Sheri Qualters, *Debt Firms Slammed by Consumer Lawsuits*, NAT'L. L.J., June 12, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1181552737289 (last visited Nov. 3, 2007).

35. *Id.*

36. Goldberg, *supra* note 11, at 723.

37. Qualters, *supra* note 34.

38. *See* Salvo, *supra* note 5.

III. THE UNDERLYING PURPOSE OF THE FAIR DEBT COLLECTION PRACTICES ACT

The purpose of the FDCPA is expressly stated within the statute as being "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[39] "[More] [s]pecifically, the FDCPA 'prohibits unfair or unconscionable collection methods, conduct which harasses, oppresses or abuses any debtor, and the making of any false, misleading, or deceptive statements in connection with a debt, and it requires that collectors make certain disclosures.'"[40] This purpose is justified by Congressional findings that debt collectors were utilizing "abusive, deceptive, and unfair" practices in their attempts to collect debt.[41] Congress further found that these "abusive, deceptive, and unfair" practices were contributing factors in "personal bankruptcies, [] marital instability, . . . loss of jobs, and [] invasions of individual privacy."[42] Thus, the FDCPA was enacted as a remedial statute,[43] based on the additional congressional finding that the existing laws and remedies at the time were "inadequate to protect consumers."[44] Thus, "[t]he FDCPA establishes a civil cause of action against 'any debt collector who fails to comply with any provision of this subchapter with respect to any person,'"[45] and allows for parties to enforce the legislation through private litigation.[46]

In considering claims under the FDCPA, including claims dealing with "communications," the court should analyze the claim from the perspective of the "least sophisticated [consumer]" standard.[47] In applying this objective

39. 15 U.S.C. § 1692(e) (2000). Apropos to the concept of protecting the consumer, "[t]he government regulation strengthens the hand of the weaker party, providing in effect the rules that party would have demanded if it had the bargaining power." Scott J. Burnham, *What Attorneys Should Know About the Fair Debt Collection Practices Act, or, the 2 Do's and the 200 Don'ts of Debt Collection*, 59 MONT. L. REV. 179, 183 (1998).

40. Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 653 (S.D.N.Y. 2006) (quoting Acosta v. Campbell, No. 6:04CV761ORL28DAB, 2006 WL 146208, at *12 (M.D. Fla. Jan. 18, 2006)).

41. 15 U.S.C. § 1692(a).

42. *Id.*

43. Brown v. Card Serv. Ctr., 464 F.3d 450, 453 (3d Cir. 2006).

44. 15 U.S.C. § 1692(b).

45. *Foti*, 424 F. Supp. 2d at 653 (quoting Sakrani v. Koenig, No. Civ. A. 05-1192 (JAG), 2006 WL 20514, at *2 (D.N.J. Jan. 3, 2006)).

46. Burnham, *supra* note 39, at 183.

47. *Brown*, 464 F.3d at 453 (citing Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3d Cir. 2000)); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991).

standard, the court must analyze "whether a hypothetical least sophisticated consumer would be deceived or misled by the debt collector's practices."[48] The hypothetical "least sophisticated consumer" can, however, be supposed to possess a basic amount of comprehension about the world.[49] "'The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd.'"[50] This standard has been held to be "consistent with 'basic consumer-protection principles.'"[51]

The "least sophisticated consumer" standard, while applicable to most claims under the FDCPA, does not apply directly to FDCPA claims dealing with the placement of telephone calls by a debt collector without meaningful disclosure of his or her identity.[52] Thus, courts view these claims from the viewpoint of "'a consumer whose circumstances makes [sic] him relatively more susceptible to harassment, oppression or abuse.'"[53] This standard is analogous to the "least sophisticated consumer" standard.[54] Further, when looking to whether a debt collector has failed to provide meaningful disclosure, the court should look to the context of and the inferences drawn from the message at issue.[55]

IV. WHAT CONSTITUTES "COMMUNICATION" UNDER THE FDCPA?

In order to invoke the protections provided by the FDCPA, correspondence between the debt collector and the debtor must be considered a "'communication'" within the meaning set out by the statute.[56] The FDCPA broadly defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium."[57] In addition, the FDCPA should be broadly construed because it serves as a remedial statute.[58] In interpreting and applying the meaning of legislation,

48. Kuehn v. Cadle Co., No. 5:04-cv-432-Oc-10GRJ, 2007 WL 1064306, at *4 (M.D. Fla. Apr. 6, 2007) (citing Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1175 (11th Cir. 1985)).

49. *Id.* (citing Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993)).

50. *Foti*, 424 F. Supp. 2d at 661 (quoting *Clomon*, 988 F.2d at 1318).

51. *Brown*, 464 F.3d at 453 (quoting United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 136 (4th Cir. 1996)).

52. Hosseinzadeh v. M.R.S. Assocs., 387 F. Supp. 2d 1104, 1110 (C.D. Cal. 2005) (citing *Jeter*, 760 F.2d at 1179).

53. *Id.* at 1110 n.8 (quoting *Jeter*, 760 F.2d at 1179).

54. *Jeter*, 760 F.2d at 1179.

55. *Hosseinzadeh*, 387 F. Supp. 2d at 1110.

56. Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 654 (S.D.N.Y. 2006).

57. 15 U.S.C. § 1692a(2) (2000).

58. Brown v. Card Serv. Ctr., 464 F.3d 450, 453 (3d Cir. 2006). *See also* Blair v. Sherman Acquisition, No. 04 C 4718, 2004 WL 2870080, at *2 (N.D. Ill. Dec. 13, 2004) ("Be-

"'[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[59]

Here, the plain meaning of the term "communication" appears to be consistent with the underlying purpose of the FDCPA.[60] This apparent consistency, however, has been called into question when the issue of whether a message left on an answering machine constitutes a "communication" within the statutory meaning.[61] Even if a message left on an answering machine does not specifically mention detailed information regarding a debt, that message still constitutes a "communication" as defined by the FDCPA because it "indirectly" conveys information about the debt.[62] Courts have reasoned that such a message is conveying information regarding a debt based on the underlying purpose of getting the debtor to return the call and discuss the debt owed.[63] Some courts, on the other hand, have recently held that a communication in which a debt is not specifically mentioned is not a "communication" within the aforesaid statutory meaning.[64] The lack of judicial consistency may be due to the statute's "misdirected and poorly drafted"

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cause it is designed to protect consumers, the FDCPA is . . . liberally construed in favor of consumers to effect its purpose.").

59. Goldman v. Cohen, 445 F.3d 152, 155 (2d Cir. 2006) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989)).

60. *Id.* (citing Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996)).

61. Leyse v. Corporate Collection Servs., Inc., No. 03 Civ. 8491 (DAB), 2006 WL 2708451, at *6 (S.D.N.Y. Sept. 18, 2006); Belin v. Litton Loan Servicing, LP, No. 8:06-cv-760-T-24, 2006 WL 1992410, at *4 (M.D. Fla. July 14, 2006); *Foti*, 424 F. Supp. 2d at 654–56; Hosseinzadeh v. M.R.S. Assocs., 387 F. Supp. 2d 1104, 1115–16 (C.D. Cal. 2005).

62. *Hosseinzadeh*, 387 F. Supp. 2d at 1116. "15 U.S.C. § 1692d(6) applies 'equally to automated message calls and live calls.'" *Id.* at 1111 (quoting Joseph v. J.J. Mac Intyre Cos., 281 F. Supp. 2d 1156, 1163 (N.D. Cal. 2003)) (reasoning that the plain language indicates that the statutes "prohibit the *placement* of telephone calls without meaningful disclosure."). In addition, the Federal Trade Commission (FTC) has addressed the issue of contacts in which the debt collector does not specifically mention the debt and has come to the conclusion that a communication in an attempt to collect a debt can still violate the FDCPA because the communication "indirectly" conveyed information regarding a debt, "even if the obligation [was] not specifically mentioned." Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collections Practices Act, 53 Fed. Reg. 50,097, 50,099 (FTC Dec. 13, 1988).

63. *Belin*, 2006 WL 1992410, at *4.

64. Horkey v. J.V.D.B. & Assocs., 179 F. Supp. 2d 861, 868 (N.D. Ill. 2002) (denying "[p]laintiff's motion for summary judgment" for claim involving defendant's violation of FDCPA because defendant's contacts did not constitute "communications" within the statutory definition). Additionally, one court has found that a fax was not communication because it did not convey any information about a debt. Fava v. RRI, Inc., No. 96-CV-629 RSP/DNH, 1997 WL 205336, at *6 (N.D.N.Y. Apr. 24, 1997). Later courts, however, have avoided upholding this finding by labeling it as dicta. *See Belin*, 2006 WL 1992410, at *4.

nature, despite the fact that the number of complaints against debt collectors has decreased since 1970.[65]

The reasoning behind such a school of thought is based on the notion that if it were to be construed any other way, it would create a loophole[66] allowing debt collectors to avoid the disclosure requirement,[67] as well as other provisions of the FDCPA, by not conveying specific details regarding the debt.[68] Further, courts rationalize that messages left on an answering machine in an attempt to collect a debt are "intended to initiate further dialogue regarding [the debtor's] . . . debt, and therefore constitute 'communications.'"[69] Thus, in a majority of jurisdictions, the restrictions imposed by the FDCPA apply to all debt collection-related contacts, regardless of whether or not the debt is specifically mentioned.[70]

V. THE PROTECTION OF CONSUMERS VIA RESTRICTIONS ON COMMUNICATION WITH A DEBTOR IN AN ATTEMPT TO COLLECT A DEBT

The primary foundation upon which both the FDCPA and the FCCPA are premised is the protection of the privacy and reputation of the consumer or debtor,[71] as well as the prevention of harassing debt collection practices.[72] In order to promote the underlying purpose, each statute provides the debtor with a certain degree of protection.[73] Subsection A will discuss the protection provided by the Fair Debt Collection Practices Act, and subsection B will discuss the same for the Florida Consumer Credit Practices Act.

A. *Protections Provided by the Fair Debt Collection Practices Act*

The FDCPA places restrictions upon how, when, and why a debt collector may contact or communicate with a debtor in order to preserve the deb-

65. *See* Goldberg, *supra* note 11, at 722–23.

66. *Court Rakes Collector*, *supra* note 30. "Under such an exception, debt collectors would be able to abuse and harass consumers with phone calls and other forms of correspondence so long as there is no express mention of the consumers' debts." *Id.*

67. 15 U.S.C. § 1692e(11) (2000).

68. Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 657 (S.D.N.Y. 2006).

69. Leyse v. Corporate Collection Servs., Inc., No. 03 Civ. 8491 (DAB), 2006 WL 2708451, at *6 (S.D.N.Y. Sept. 18, 2006).

70. Hosseinzadeh v. M.R.S. Assocs., 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005); Statements of General Policy or Interpretation Staff Commenatry on the Fair Debt Collections Practices Act, 53 Fed. Reg. 50,097, 50,099 (FTC Dec. 13, 1988).

71. Mathis v. Omnium Worldwide, No. CIV. 04-1614-AA, 2006 WL 1582301, at *5 (D. Or. June 4, 2006).

72. *Foti*, 424 F.Supp. 2d at 653.

73. *See* 15 U.S.C. § 1692b (2000); *see also* FLA. STAT. §§ 559.55–.785 (2007).

tor's privacy and reputation, as well as prevent loss of employment.[74] Specifically, "[t]he FDCPA regulates a debt collector's contacts with both the debtor and third parties."[75] As per the FDCPA, a debt collector may not, without prior consent from the debtor, communicate with the debtor in connection with the collection of a debt "at any unusual time or place" if the "debt collector knows [that] the [debtor] is represented by an attorney;" or at the debtor's "place of employment if the debt collector knows . . . that the . . . employer prohibits . . . such communication."[76] In addition, "a debt collector, may not communicate, [in an attempt to collect a debt,] with a third party . . . without the prior consent of the consumer, the express permission of a court, or unless reasonably necessary to effectuate a post-judgment judicial remedy."[77] An attempt to obtain location information about the debtor is the only exception to the prohibition against third party disclosure.[78] Further, the FDCPA "expressly prohibits [a] debt collector from mentioning that 'the consumer owes any debt' and from identifying himself as a debt collector when he [or she] seeks location information."[79] If a debt collector attempts to contact a third party in violation of the statute's provisions, such contacts are considered to be illegitimate collection practices.[80]

In addition to the FDCPA's restrictions on who a debt collector can communicate with,[81] the FDCPA requires a debt collector to provide a "meaningful disclosure" of his or her identity.[82]

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74. *Mathis*, 2006 WL 1582301, at *5.

75. Henderson v. Eaton, No. Civ. A. 01-0138, 2001 WL 969105, at *2 (E.D. La. Aug. 23, 2001).

76. 15 U.S.C. § 1692c(a)(1)–(3) (2000).

77. *Henderson*, 2001 WL 969105, at *1.

78. 15 U.S.C. § 1692b; *Mathis*, 2006 WL 1582301, at *5. In attempting to collect location information, the debt collector may only state that he or she is "confirming or correcting location information, and may not identify his [or her] employer unless expressly asked to do so." Mike Voorhees & Sharon Voorhees, *The Fair Debt Collection Practices Act, Communications, and Privacy Issues,* 58 CONSUMER FIN. L. Q. REP. 78 (2004).

79. *Henderson*, 2001 WL 969105, at *2 (quoting 15 U.S.C. § 1692(b)). Contacting a third party for information regarding the whereabouts of a debtor is further limited by the "one-contact" rule. Goldberg, *supra* note 11, at 721 n.64. As per the "one-contact" rule, a debt collector may not contact a third party more than once. *Id.* "The debt collector is permitted to contact the third party more than once upon the third party's request or if the collector 'reasonably believes that the earlier response of such person is erroneous or incomplete and that correct or complete information is now available.'" *Id.* (quoting David A. Schulman, *The Effectiveness of the Federal Fair Debt Collection Practices Act (FDCPA)*, 2 BANKR. DEV. J. 171, 174 (1985)).

80. Goldberg, *supra* note 11, at 722.

81. 15 U.S.C. § 1692c.

82. *Id.* § 1692d(6).

> [T]he "meaningful disclosure" required by section 1692d(6) has been made if an individual debt collector who is employed by a debt collection company accurately discloses the name of [his or] her employer and the nature of [his or] her business and conceals no more than [his or] her real name.[83]

The meaningful disclosure requirement also requires the debt collector to disclose that the communication is an attempt to collect a debt.[84] This "meaningful disclosure"[85] requirement is "often referred to as the [m]ini–Miranda" warning.[86] The "mini-Miranda' warning" applies to the initial written communication with the debtor or consumer.[87] If the initial communication is oral, the warning is required for that communication as well.[88] The debt collector must make a proper disclosure in every communication subsequent to the initial communication.[89] Failure to provide proper disclosure renders the communication a "false, deceptive, or misleading representation or means" in attempting to collect a debt.[90]

Though aimed at protecting the debtor, the "mini-Miranda" warning requirement loses its appeal when left as a message on an answering machine, able to be overheard by someone other than the consumer or debtor.[91] Courts have held that the disclosure requirement is applicable to answering machine messages despite the risk of disclosure to third parties.[92] Courts

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83. Hosseinzadeh v. M.R.S. Assocs., 387 F. Supp. 2d 1104, 1111 (C.D. Cal. 2005) (quoting Wright v. Credit Bureau of Ga., Inc., 548 F. Supp. 591, 597 (N.D. Ga. 1982)). A debt collector satisfies this requirement if he or she "disclose[s] enough information so as not to mislead the debtor as to the purpose of the call." Bedard, *supra* note 13, at 28.

84. MANUEL H. NEWBURGER & BARBARA M. BARRON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION ¶ 1.05[2] (2007).

85. 15 U.S.C. § 1692d(6).

86. Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 650 (S.D.N.Y. 2006).

87. NEWBURGER & BARRON, *supra* note 84, ¶ 1.05[2].

88. *Id.*

89. *Id.* The Sixth Circuit has even held that attorneys must give the requisite warning in post-judgment communications. *Id.* (citing Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992)).

90. *Id.* (quoting 15 U.S.C. § 1692e) (quotations omitted). A message left on a debtor's answering machine urging the debtor to call the same day or the next day was deceptive within the statutory meaning, because it "created a false sense of urgency." *Court Rakes Collector*, *supra* note 30.

91. *See* Fed. Trade Comm'n v. Check Enforcement, No. Civ. A. 03-2115 (JWB), 2005 WL 1677480, at *8 (D.N.J. July 18, 2005).

92. Leyse v. Corporate Collection Servs., Inc., No. 03 Civ. 8491 (DAB), 2006 WL 2708451, at *5 (S.D.N.Y. Sept. 18, 2006); Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 659 n.26 (S.D.N.Y. 2006); Hosseinzadeh v. M.R.S. Assocs., 387 F. Supp. 2d 1104, 1112 (C.D. Cal. 2005) (citing Joseph v. J.J. Mac Intyre Co., 281 F. Supp. 2d 1156, 1163 (N.D. Cal. 2003)).

have also avoided providing debt collectors with the appropriate means to utilize the answering machine technology without violating at least one provision of the FDCPA.[93] In essence, the courts have cut off an efficient technological avenue while simultaneously blaming the FDCPA's inadequacies on the debt collectors.[94] Thus, a gap exists in the FDCPA's protections because it is unlikely that debt collectors will stop using available technology.[95] It is thus up to the legislature to fill this void.[96]

B. *Protections Provided by the Florida Consumer Collection Practices Act*

The Florida Consumer Collection Practices Act (FCCPA)[97] "is a remedial statute . . . designed to prohibit certain conduct."[98] The FCCPA allows a debtor[99] to bring an action against "any person"[100] who violates any provision of the FCCPA.[101] Courts have interpreted the broad "any person" language of the FCCPA to permit a debtor to sue "persons generally,"[102] includ-

93. *See Foti*, 424 F. Supp. 2d at 659 n.26; Bedard, *supra* note 13, at 147; Salvo, *supra* note 5.

94. Bedard, *supra* note 13, at 147.

95. The new technologies available, such as sophisticated "phone systems and computer software," make it inefficient for a debt collector to adhere to the historical door-to-door means of debt collection. Goldberg, *supra* note 11, at 729–30.

96. Cox Communications has reported that eighty to eighty-five percent of their outbound collections calls end up as voicemail messages. *VMS Makes a Quiet Entrance*, COLLECTIONS & CREDIT RISK, Sept. 2004, at 22. [hereinafter *VMS*]. But, as stated by Judge Deborah A. Batts, U.S. District Court, Southern District of New York, "[t]he Court has no authority to carve an exception out of the statute just so [a debt collector] may use the technology they have deemed most efficient." *Court Rakes Collector*, *supra* note 30 (quotations omitted).

97. FLA. STAT. §§ 559.55–.785 (2007).

98. Campbell v. Providian Nat'l Bank, 14 Fla. L. Weekly Supp. 644a (Fla. 12th Cir. Ct. 2007) (citing Harris v. Beneficial Fin. Co. of Jacksonville, 338 So. 2d 196, 200 (Fla. 1976)).

99. The FCCPA defines a "debtor" as "a natural person obligated or allegedly obligated to pay a debt." FLA. STAT. § 559.55.

100. *See* FLA. STAT. § 559.72. "The prohibited practices contained in the FCCPA do not apply just to collection agencies and debt collectors. Section 559.72 [of the *Florida Statutes*] mandates [that] 'no person' shall engage in the prohibited activities." Fla. S. Comm. on Judiciary, CS for SB 94 (2001) Staff Analysis 2 (Mar. 6, 2001).

101. Belin v. Litton Loan Servicing, LP, No. 8:06-cv-760-T-24, 2006 WL 1992410, at *7 (M.D. Fla. July 14, 2006). The FDCPA is a strict liability statute. Kaplan v. Assetcare, Inc., 88 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000). "The strict liability view of the [FDCPA] is supported by a closer examination of the FDCPA itself." *Id.* at 1362. Unlike the FDCPA, the FCCPA "requires an allegation of knowledge or intent by the debt collector in order to state a cause of action." *Id.* at 1363.

102. Cook v. Blazer Fin. Servs., Inc., 332 So. 2d 677, 679 (Fla. 1st Dist. Ct. App. 1976).

ing corporations,[103] businesses,[104] and law firms.[105] Further, the FCCPA continues to be updated and amended by the legislature—unlike the FDCPA—in ways which provide additional protection for the debtor.[106] One possible reason as to why the updates to the FCCPA continue to provide significant protection is that the FCCPA is much "narrower in scope than" its federal counterpart.[107]

Similar to the Fair Debt Collection Practices Act, the FCCPA prohibits disclosure of information regarding the debt to anyone other than the debtor or his or her family.[108] In order to state a valid cause of action for violation of this provision, a debtor need only show "that there was a disclosure of information to [someone] other than" the debtor or his or her family; "that such person [did] not have a legitimate business need for the information; and . . . that such information affected the debtor's reputation."[109] Courts are very strict with this provision in that a debt collector cannot even disclose information to an intimate friend cohabiting with the debtor.[110]

Also similar to the FDCPA, the Florida Consumer Collection Practices Act prohibits communications so frequent in nature that they constitute harassment.[111] Specifically, the FCCPA makes it a violation to:

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103. *Id.* "The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." FLA. STAT. § 1.01(3) (2007).

104. *See* Williams v. Streeps Music Co., 333 So. 2d 65, 67 (Fla. 4th Dist. Ct. App. 1976) (holding that defendant music store violated a provision of the FCCPA by attempting to collect a debt that had already been satisfied).

105. Sandlin v. Shapiro & Fishman, 919 F. Supp. 1564, 1570 (M.D. Fla. 1996) (holding that a law firm was considered a "debt collector[] under the FDCPA"). Courts have also applied this section to automobile finance companies. Schauer v. Gen. Motors Acceptance Corp., 819 So. 2d 809, 812 (Fla. 4th Dist. Ct. App. 2002). A company "in the business of repossessing vehicles, however," did not fall within the parameters of the statute. Seibel v. Society Lease, Inc., 969 F. Supp. 713, 716 (M.D. Fla. 1997) (holding that absent evidence of company contacting debtors or being assigned any debts, company did not fit within statute's meaning).

106. Dale T. Golden, *Florida Legislature Considers Changes to Debt Collection Law*, DEF. DIG., Mar. 2005, http://www.marshalldennehey.com/CM/DefenseDigest/DefenseDigest286.asp.

107. *See* Cooper v. Litton Loan Servicing, 253 B.R. 286, 290 (Bankr. N.D. Fla. 2000).

108. FLA. STAT. § 559.72(5) (2007).

109. Heard v. Mathis, 344 So. 2d 651, 655 (Fla. 1st Dist. Ct. App. 1977).

110. *Id.* at 654. The meaning of the word "family," however, "has been extended beyond marital or blood relationships to include families 'in fact.'" *Id.* To qualify as a family "in fact," the homestead must consist of "(1) [a] legal duty to maintain arising out of the relationship [or] (2) a continuing communal living by at least two individuals under circumstances where one is regarded as the person in charge." *Id.*

111. FLA. STAT. § 559.72(7).

> [w]illfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family.[112]

Courts have further held that communication with a debtor regarding the debt which has passed the point of negotiation or persuasion constitutes harassment within the statutory meaning.[113]

Unlike its federal counterpart, the FDCPA only requires a debt collector to disclose his or her purpose and identity when asked to do so.[114] Specifically, the statute makes it a violation to "[r]efuse to provide adequate identification of herself or himself or her or his employer or other entity whom she or he represents when requested to do so by a debtor from whom she or he is collecting or attempting to collect a consumer debt."[115] This allows debt collectors to utilize available technology while still protecting the privacy and reputation of the debtor—the risk of third party disclosure via an answering machine would no longer exist. From this perspective, the FCCPA permits the use of available technology without compromising the protection of the debtor's privacy or reputation.

VI. POTENTIAL PRIVACY ISSUES ASSOCIATED WITH THE FAIR DEBT COLLECTION PRACTICES ACT'S "MINI-MIRANDA" WARNING REQUIREMENT

By requiring debt collectors to provide a "meaningful disclosure,"[116] the "mini-Miranda" warning requirement of the FDCPA yields a number of potential privacy issues. Specifically, there is a high risk of disclosure of information to a third party when a debt collector opts to use an answering machine as a means of contacting a debtor.[117] This is especially true since a large number of debtors are college students living with a roommate.[118]

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112. *Id.*

113. Story v. J.M. Fields, Inc., 343 So. 2d 675, 677 (Fla. 1st Dist. Ct. App. 1977).

114. FLA. STAT. § 559.72(15).

115. *Id.*

116. 15 U.S.C. § 1692d(6) (2000).

117. *See* Fed. Trade Comm'n v. Check Enforcement, No. Civ. A. 03-2115 (JWB), 2005 WL 1677480, at *8 (D.N.J. July 18, 2005). "[T]he Court acknowledges that disclosure during an automated call could compromise the debtor's privacy if another party such [as] a neighbor or relative inside the home picks up the debtor's phone and hears the automated call." Joseph v. J.J. Mac Intyre Cos., 281 F. Supp. 2d 1156, 1163–64 (N.D. Cal. 2003).

118. Seventy-two percent of college freshmen have a credit card. NELLIE MAE, UNDERGRADUATE STUDENTS AND CREDIT CARDS IN 2004 4 (2005), *available at* http://www.nelliemae.com/pdf/ccstudy_2005.pdf. In 2004, the average credit card debt for

In *Federal Trade Commission v. Check Enforcement*,[119] the court held that messages left by a debt collector on the debtor's home answering machine were a violation of the FDCPA.[120] The court found that the messages, which were attempts to obtain payments from an alleged debtor, were overheard by family members of the debtors and other third parties.[121] Because there is no way of knowing whether the "debtor will answer the phone,"[122] the chance of violating the federal statute is high. In order to violate the prohibition against third party disclosure provision of the FDCPA—and thus invade the privacy of the debtor—communication need only be "'in connection with the collection of any debt.'"[123]

The Florida Constitution sets forth a much broader right to privacy than that set forth in the Federal Constitution.[124] "Florida's right to privacy 'embraces more privacy interests, and extends more protection to the individual in those interests, than does the Federal Constitution.'"[125] "Florida is one of only a handful of states wherein the state constitution includes an independ-

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undergraduate students was $2,169, with seven percent of undergraduate students carrying a debt of $7,000 or more. *Id.* at 7–8. For Florida debt collectors, a large number of debtors are undergraduate college students based on the fact that seventy-eight percent of undergraduate students in the southern region of the United States carry credit cards, with sixteen percent of those students carrying a balance between $3,000 and $7,000. *Id.* at 10. Including undergraduate college students, the number of unmarried households—which includes unrelated persons such as roommates—has steadily increased. Thomas F. Coleman, *Unmarried Households in the United* States, UNMARRIED AMERICA, Sept. 12, 2007, http://www.unmarriedamerica.org/Census_1990-2001/unmarried-majority-table.htm. In Florida, 52.1% of households were unmarried as of 2005. *Id.* This number leaves debt collectors with difficulty in determining who will actually be listening to any given answering machine message. The risk of disclosure to a third party is especially great when multiple roommates share an answering machine:

> [T]he way our voicemail was configured, one had to listen to a message in its entirety to get to the next message or to save a message. The only way you could cut a message short was to erase it. So I ended up having to listen to the messages and then saving them for my roommate.

Posting of ACAMBRAS to The Consumerist, http://consumerist.com/consumer/fair-debt-collection/is-it-legal-for-debt-collectors-to-leave-a-message-26681.php (June 7, 2007, 16:58 EST).

119. No. Civ. A. 03-2115 (JWB), 2005 WL 1677480, at *1.

120. *Id.* at *8.

121. *Id.*

122. *VMS*, *supra* note 96. If the debtor is not the person answering the phone, the debt collector placing the call risks violating FDCPA provisions. *Id.*

123. Henderson v. Eaton, No. Civ. A. 01-0138, 2001 WL 969105, at *2 (E.D. La. Aug. 23, 2001) (quoting 15 U.S.C. § 1692c(b)(2000)).

124. Bd. of County Comm'rs of Palm Beach v. D.B., 784 So. 2d 585, 588 (Fla. 4th Dist. Ct. App. 2001) (citing Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985)).

125. *Id.* (quoting *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989)).

ent, freestanding Right of Privacy Clause."[126] The Florida Constitution explicitly grants "Floridians the right of privacy."[127] Under this right of privacy, each person has a "right to 'determine for themselves when, how and to what extent information about them is communicated to others.'"[128] This explicit grant of privacy, however, only protects Floridians from governmental intrusion, as does the Federal Constitution.[129] In applying it to the FDCPA's "mini-Miranda warning," on the other hand, a debtor could argue that the provision was enforced by a state or federal judge—either of which is considered to be a state actor.[130] A state actor, such as a judge, enforcing an unconstitutional statute constitutes governmental action.[131] An action against a state official to enjoin the enforcement of an unconstitutional federal statute is a viable cause of action.[132]

Thus, in applying the right of privacy to the FDCPA's "mini-Miranda" warning requirement, this provision could pose a variety of claims against the government, as well as attorneys. The "mini-Miranda" warning, being enforced by courts, contradicts one of the FDCPA's underlying purposes—to protect the debtor's privacy.[133]

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126. Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 206 (Fla. 2007) (quoting N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 634 (Fla. 2003)).

127. Publix Supermarkets, Inc. v. Johnson, 959 So. 2d 1274, 1276 (Fla. 4th Dist. Ct. App. 2007).

128. *Id.* (quoting Shaktman v. State, 553 So. 2d 148, 150 (Fla. 1989)).

129. Sparks v. Jay's A.C. & Refrigeration, Inc., 971 F. Supp. 1433, 1441 (M.D. Fla. 1997). "The United States Supreme Court has refused to recognize a general, constitutionally-protected right of privacy." Thornburg, *supra* note 10, at 140–41.

130. People v. Garberding, 787 P.2d 154, 156 (Colo. 1990) ("State judges are . . . actors within the meaning of the [F]ourteenth [A]mendment."); Crespo v. U.S. Merit Sys. Prot. Bd., 486 F. Supp. 2d 680, 689 n.7 (N.D. Ohio 2007) ("[T]his case involves state action by the federal government.").

131. Fla. Dep't. of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982).

> The Eleventh Amendment does not bar all claims against officers of the State, even when directed to actions taken in their official capacity and defended by the most senior legal officers in the executive branch of the state government. . . . [A]n action brought against a state official to enjoin the enforcement of an unconstitutional state statute is not a suit against a State barred by the Eleventh Amendment.

Id. at 684.

132. *See Crespo*, 486 F. Supp. 2d at 689 n.7. "[T]he Court will review the . . . claims under the Fifth Amendment because this case involves state action by the federal government . . . enforcing . . . a federal statute." *Id.*

133. *See* Tavormina, *supra* note 5, at 590. "These communications constitute unwarranted invasions of the consumer's privacy . . . ." *Id.* The FDCPA's provisions prohibiting disclosure of a debt to third parties was intended to prevent unnecessary loss of jobs as well as protect against "serious invasions of privacy." Pearce v. Rapid Check Collection, Inc., 738 F. Supp. 334, 337 (D.S.D. 1990) (quoting S. REP. NO. 95–382 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699).

VII. POTENTIAL TORT LIABILITY ASSOCIATED WITH THE FAIR DEBT COLLECTION PRACTICES ACT'S "MINI-MIRANDA" WARNING REQUIREMENT

"The Supreme Court of [Florida] has recognized the right of privacy as a . . . tort" in addition to a constitutional guarantee.[134] Generally, where the right to privacy is recognized, the "oppressive treatment of a debtor" in an attempt to collect a debt may constitute "an invasion of privacy."[135] In addition, "oral communication . . . accompanied by sufficient publicity" can create a cause of action for invasion of privacy.[136] "'In some torts the entire injury is to the peace, happiness or feelings of the plaintiff . . . .'"[137] The FDCPA "was enacted [in order] 'to eliminate abusive debt collection practices' which 'contribute to . . . invasions of individual privacy.'"[138] Thus, if required to adhere to the "mini-Miranda warning," debt collection attorneys may open themselves up to pendent state law claims concerning the privacy of the debtor in addition to undermining the purpose of the FDCPA.[139]

Part A of this section will discuss public disclosure of a debt as an invasion of privacy, and part B of this section will discuss the tort of intrusion upon an individual's seclusion.

A. *Public Disclosure of a Debt as an Invasion of Privacy*

Unreasonable publicity given to a private debt has generally been "recognized as an actionable invasion of the debtor's right of privacy."[140] Courts have held that a debtor has a valid cause of action where a debt collector has placed "calls to the debtor's relatives or neighbors."[141] The extent of the

134. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 10–11 (5th Cir. 1962) (citing Cason v. Baskin, 20 So. 2d 243, 247 (Fla. 1944)).

135. *Id.* at 11.

136. *Id.*

137. *Id.* at 11–12 (quoting Goodyear Tire & Rubber Co. v. Vandergriff, 184 S.E. 452, 454 (Ga. Ct. App. 1936).

138. Miller v. Payco-Gen. Am. Credits, Inc., 943 F.2d 482, 483–84 (4th Cir. 1991) (quoting 15 U.S.C. § 1692(a), (e) (2000)).

139. Mullins v. I.C. Sys., Inc., No. 07-cv-00397-RPM-PAC, 2007 WL 1795871, at *1 (D. Colo. June, 21, 2007).

140. J.L. Litwin, Annotation, *Public Disclosure of Person's Indebtedness as Invasion of Privacy*, 33 A.L.R. 3D 154, 156 (1970); *see also* RESTATEMENT OF TORTS § 867 (1939). "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others . . . is liable to the other." RESTATEMENT OF TORTS § 867. The tort of invasion of privacy "has generally been more successful for debtors than . . . the tort of intentional infliction of emotional harm." DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 13:4 (2007).

141. Litwin, *supra* note 140, at 156.

publicity, even via oral communication, determines whether the debtor has a cause of action for invasion of privacy.[142] In Florida, all communications accompanied by sufficient publicity are sufficient to support a debtor harassment case.[143] In addition, a creditor is liable for invasion of privacy where he or she has divulged information about the debt to one who had no legitimate interest in the information.[144]

A number of states have ruled that an oral declaration can constitute an invasion of one's privacy.[145] In particular, Florida courts are split on this concept.[146] In other states, courts have reasoned that "the oral publication of a private matter with which the public has no proper concern may be just as devastating and damaging as a written communication."[147]

"A person who unreasonably and seriously interferes with another's interest in not having his [or her] affairs known to others . . . is liable to the other."[148] This rule protects an individual's interest in living with some privacy.[149] This tort is particularly applicable to the "mini-Miranda" warning insofar as "liability exists . . . if the defendant's conduct was such that he [or she] should have realized that it would be offensive to" a reasonable person.[150] In order for an action for invasion of privacy to be viable, there must have been a disclosure of private information.[151] Private information includes an individual's "financial dealings"[152] or "debts."[153] Public disclosure

142. *Id.* at 157.

143. *Id.* at 165.

144. *See id.* at 156.

145. I.J. Schiffres, Annotation, *Invasion of Right of Privacy by Merely Oral Declarations*, 19 A.L.R. 3D 1318, 1321–22 (1968).

146. *See* Sacco v. Eagle Fin. Corp. of N. Miami Beach, 234 So. 2d 406, 408 (Fla. 3d Dist. Ct. App. 1970) (recognizing communication of insults to public regarding debt as possible invasion of privacy); Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 11 (5th Cir. 1962) (recognizing that an oral communication could invade a person's right to privacy if "accompanied by sufficient publicity" of such communication); *but see* Cason v. Baskin, 20 So. 2d 243, 252 (Fla. 1944) ("mere spoken words cannot afford a basis for an action based on an invasion of the right of privacy").

> In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant; and this question is to some extent one of law.

Cason, 20 So. 2d at 251.

147. Schiffres, *supra* note 145, at 1322 (quoting Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892, 897 (Mo. 1959)).

148. RESTATEMENT OF TORTS § 867 (1939).

149. *See id.*

150. *Id.* Thus, a cause of action only exists when the defendant knew or should have known of the offensive nature of his or her act. *Id.*

151. *Id.*

152. Mason v. Williams Disc. Ctr., Inc., 639 S.W.2d 836, 839 (Mo. Ct. App. 1982).

includes oral communications.[154] While public disclosure usually requires communication to a large number of persons, such disclosure can also occur where one merely initiates the process of the information eventually being disclosed to a large group of people.[155]

Generally, "[c]ommunication regarding a debt" to a third person—including the debtor's family—"is . . . found to be an invasion of the debtor's privacy."[156]

B. *Intrusion upon an Individual's Seclusion*

Because Florida's Constitution explicitly does not provide for protection against the unauthorized distribution of private information by private entities,[157] courts have identified four privacy torts in order to protect the citizens of Florida.[158] The four privacy torts recognized by the State of Florida include: "1) the misappropriation of an individual's name or likeness; 2) the intrusion upon an individual's seclusion; 3) the right of publicity; and 4) false light invasion of privacy."[159] Out of the four recognized privacy torts, "the . . . intrusion upon [an individual's] seclusion" is most applicable to the FDCPA's potential privacy issues.[160]

To establish a claim for the intrusion upon seclusion theory of invasion of privacy, a debtor must prove three separate elements: "1) an intentional intrusion, physical or otherwise, 2) upon the plaintiff's solitude or seclusion or private affairs or concerns, 3) which would be highly offensive to a reasonable person."[161] This particular tort is aimed at "protecting the privacy surrounding the activities inside the home."[162] The tort of intrusion upon

153. Challen v. Town & Country Charge, 545 F. Supp. 1014, 1016 (N.D. Ill. 1982); *see also* Trammell v. Citizens News Co., 148 S.W.2d 708, 710 (Ky. Ct. App. 1941).

154. Schiffres, *supra* note 145, at 1322.

155. *See* Norris v. Moskin Stores, Inc., 132 So. 2d 321, 322 (Ala. 1961).

156. PRIDGEN & ALDERMAN, *supra* note 140, § 13:4 (citing *Norris*, 132 So. 2d at 325); *see also* Boudreaux v. Allstate Fin. Corp., 217 So. 2d 439, 444 (La. Ct. App. 1968); La Salle Extension Univ. v. Fogarty, 253 N.W. 424, 426 (Neb. 1934)).

157. FLA. CONST. art. I, § 23.

158. Thornburg, *supra* note 10, at 138 (citing Cason v. Baskin, 20 So. 2d 243, 250–51 (Fla. 1944)). The four torts recognized by Florida courts can be traced to "*The Right to Privacy*, an infamous Harvard Law Review article written by Samuel Warren and Louis Brandeis." *Id.* at 141.

159. *Id.* at 141.

160. *Id.* at 149. "The tort of intrusion upon seclusion has been recognized as the privacy tort most directly available to protect an individual's basic right 'to be let alone.'" *Id.*

161. Hilburn v. Encore Receivable Mgmt., Inc., No. 06-6096-HO, 2007 WL 1200949, at *4 (D. Or. Apr. 19, 2007) (quoting Mauri v. Smith, 929 P.2d 307, 310 (Or. 1996)).

162. Thornburg, *supra* note 10, at 150.

seclusion "'requires proof of an actual invasion of 'something secret, secluded or private pertaining to the plaintiff . . . .'"[163]

Intrusion upon seclusion "consists of a collector's interference with a debtor's interest in solitude or seclusion."[164] When telephone calls to a debtor become "'repeated with such persistence and frequency as to amount to a course of hounding the [debtor], . . . privacy is invaded.'"[165] Further, courts have held that a message left with debtor's sister-in-law and wife constituted a "wrongful intrusion" invasion of privacy.[166] In applying the "intrusion upon seclusion" tort to debt collection,

> [t]he mere efforts of a creditor . . . to collect a debt cannot without more be considered a wrongful and actionable intrusion. A creditor has and must have the right to take reasonable action to pursue his [or her] debtor and collect his [or her] debt. But the right to pursue the debtor is not a license to outrage the debtor.[167]

One court has further held that a single call made to a debtor in an attempt to collect a debt may constitute an invasion of privacy by intrusion upon one's seclusion.[168]

VIII. THE CONSTRUCTIVE EXCLUSION OF TECHNOLOGY FROM METHODS AVAILABLE FOR DEBT COLLECTORS TO COLLECT DEBT MAY CONSTITUTE INFRINGEMENT UPON ONE'S RIGHT TO EARN A LIVING

"The right to work, earn a living and acquire and possess property from the fruits of one's labor is an inalienable right."[169] The Florida Constitution

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163. *Id.* (quoting Nelson v. Me. Times, 373 A.2d 1221, 1223 (Me. 1977).

164. PRIDGEN & ALDERMAN, *supra* note 140, § 13:4.

165. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977). One court has held that repeated phone calls to a debtor's workplace disturbed the debtor's reasonable expectation of privacy and therefore instilled liability upon the debtor for invasion of privacy. Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443, 1448–49 (D. Nev. 1994).

166. Cartwright v. Tacala, Inc., No. CIV A 99-W-663-N, 2000 WL 33287445, at *15 (M.D. Ala. Nov. 1, 2000) (citing Norris v. Moskin Stores, Inc., 132 So. 2d 321, 324–25 (Ala. 1961)).

167. Jones v. U.S. Child Support Recovery, 961 F. Supp. 1518, 1522 (D. Utah 1997) (quoting *Norris*, 132 So. 2d at 323).

168. Diaz v. D.L. Recovery Corp., 486 F. Supp. 2d 474, 479 (E.D. Pa. 2007). The court reasoned that "the important point [of the tort] is not that the intrusions be persistent, but that . . . [they] rise to the level of 'highly offensive'" to a reasonable person. *Id.* at 480; *see also* RESTATEMENT (SECOND) OF TORTS § 652B (1977).

169. Lee v. Delmar, 66 So. 2d 252, 255 (Fla. 1953). To illustrate, a court has found that a real estate resolution prohibiting a real estate broker to employ any real estate salesman who worked a second job was unlawful. *Id.* at 254.

provides that citizens have an inalienable right "to be rewarded for [their] industry."[170] Therefore, the right to earn a living is recognized in Florida as a fundamental right.[171] Where one is negatively impacted by a rule restricting his or her profession an injury in fact exists.[172] Statutes which restrict "the right to earn a living" pose a serious threat to due process.[173] Thus, the "mini-Miranda" warning provision of the FDCPA, which essentially prohibits the use of answering machines, negatively impacts debt collectors and therefore an injury in fact exists.[174]

IX. CONCLUSION

Simultaneous compliance with both the Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act is near impossible for Florida debt collectors, keeping in mind the technological advances which have occurred since the creation of the FDCPA.[175] Specifically, the "mini-Miranda" warning is clearly at odds with not only the technological advances,[176] but with the remainder of the Fair Debt Collection Practices Act, as well.[177] The only answer for Florida debt collectors—until the FDCPA is updated with technology in mind—is utilizing the preemption provision of the FDCPA.[178] The FDCPA explicitly states that it does not preempt any state collection law which affords the consumer greater protection.[179]

Because federal courts in a variety of states[180] have held that a message left on an answering machine is a "communication" within the statutory meaning,[181] debt collectors must properly disclose their identity when leav-

170. FLA. CONST. art. I, § 2.

171. *Id.* "All natural persons, female and male alike, are equal before the law, and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property . . . ." *Id.*

172. Ward v. Bd. of Trs. of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th Dist. Ct. App. 1995). "A real and sufficiently immediate injury in fact has been recognized where the challenged rule or its promulgating statute has a direct and immediate effect upon one's right to earn a living." *Id.*; *see also* Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st Dist. Ct. App. 2005) (citing Fla. Med. Ass'n, Inc. v. Dep't. of Prof'l Reg., 426 So. 2d 1112, 1113–14 (Fla. 1st Dist. Ct. App. 1983)).

173. Callier v. Dir. of Revenue, 780 S.W.2d 639, 644 (Mo. 1989) (Blackmar, C.J., dissenting).

174. *See Ward*, 651 So. 2d at 1237.

175. *See* Thornburg, *supra* note 10, at 137.

176. *See id.*

177. *See* 15 U.S.C. § 1692 (2000).

178. *Id.* § 1692n.

179. *Id.*

180. *See* cases cited *supra* note 30.

181. Hosseinzadeh v. M.R.S. Assocs., 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005).

ing a message.[182] With the growing number of people living with persons other than their "family,"[183] the chances of disclosing private financial information to a third party is nearly inevitable.[184] The reality of this risk opens debt collectors up to a variety of federal and pendent state law claims.[185] Debt collectors may be left vulnerable to invasion of privacy claims,[186] as well as actions for violation of the FDCPA provision prohibiting disclosure to third parties.[187]

Debt collectors are not the only ones left vulnerable by the "mini-Miranda" warning requirement;[188] the government may be subjected to claims for invasion of privacy, as well.[189] Judges are state actors,[190] and a state actor enforcing a statute which invades the privacy of a citizen is a violation of both the Florida and United States Constitutions.[191]

Not only does the "mini-Miranda" warning open debt collectors up to a variety of liabilities, and place the government in a difficult situation, it lessens the protection to the consumer, as well. With the disclosure requirement in place, consumers now have no control over who may be informed of their financial situation, especially with the utilization of new technologies. With the potential for disclosure of private financial information, consumers are left in a bad situation.[192] The FCCPA, unlike the FDCPA, does not require disclosure of a debt collector's identity unless requested by the consumer.[193] This gives the consumer more control over the disclosure of information without infringing upon the debt collector's ability or right to earn a living. This solution leaves everyone in a "win-win" situation.

In conclusion, Florida debt collectors should adhere to the FCCPA disclosure requirement when attempting to collect a debt because it provides

182. NEWBURGER & BARRON, *supra* note 84, ¶ 1.05[2].

183. Coleman, *supra* note 118.

184. *See* Mason v. Williams Disc. Ctr., Inc., 639 S.W.2d 836, 839 (Mo. Ct. App. 1982); *see also* Norris v. Moskin Stores, Inc., 132 So. 2d 321, 322, 325 (Ala. 1961).

185. *See, e.g.*, Mullins v. I.C. Sys., Inc., No. 07-cv-00397-RPM-PAC, 2007 WL 1795871, at *1 (D. Colo. June, 21, 2007).

186. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 10–11 (5th Cir. 1962) (citing Cason v. Baskin, 20 So. 2d 243, 250–51 (Fla. 1944)). The right to privacy claims include four distinct privacy torts, namely intrusion upon one's seclusion. Thornburg, *supra* note 10, at 138, 141 (citing *Cason*, 20 So. 2d at 250–51).

187. Henderson v. Eaton, No. Civ. A 01-0138, 2001 WL 969105, at *1, *3 (E.D. La. Aug. 23, 2001).

188. *See* NEWBURGER & BARRON, *supra* note 84, ¶ 1.05[2].

189. Crespo v. U.S. Merit Sys. Prot. Bd., 486 F. Supp. 2d 680, 689 n.7 (N.D. Ohio 2007).

190. People v. Garberding, 787 P.2d 154, 156 (Colo. 1990).

191. *See Crespo*, 486 F. Supp. 2d at 689 n.7.

192. *See* Mason v. Williams Disc. Ctr., Inc., 639 S.W.2d 836, 839 (Mo. Ct. App. 1982).

193. FLA. STAT. § 559.72(15).

consumers with more protection, thus avoiding the FDCPA preemption provision.