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## Debt Collection—A Benign Language Exception Should Be Read Into the Fair Debt Collection Practices Act’s “Unfair Practices” Section—*Donovan v. FirstCredit, Inc.*, 983 F.3d 246 (6th Cir. 2020)

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**DEBT COLLECTION—A BENIGN LANGUAGE  
EXCEPTION SHOULD BE READ INTO THE FAIR  
DEBT COLLECTION PRACTICES ACT’S “UNFAIR  
PRACTICES” SECTION—*DONOVAN V.  
FIRSTCREDIT, INC.*, 983 F.3D 246 (6TH CIR. 2020).**

The Fair Debt Collection Practices Act (“FDCPA”) is a federal statute designed to eliminate abusive, deceptive, and unfair debt collection practices by debt collection agencies.<sup>1</sup> Section 1692f of the FDCPA itemizes the prohibited debt collection practices, and subsection 8 of 1692f lists terms debt collectors are prohibited from using on envelopes when sending communications to consumers.<sup>2</sup> Since the FDCPA was created, circuit courts have disagreed on the interpretation of § 1692f(8), (“f(8)”),—whether it should be construed according to its plain language, or whether a benign language exception should be read into the statute.<sup>3</sup> *Donovan v. FirstCredit*,

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<sup>1</sup> See *Compliance Handbook: Fair Debt Collection Practices Act*, FEDERAL RESERVE, <https://perma.cc/F7X9-QQUF> (last visited Oct. 27, 2022) (setting forth goals of FDCPA); 15 U.S.C. § 1692f (2022) (listing prohibited debt collection practices). While the FDCPA seeks to protect consumers from unfair, harassing, and deceptive debt collection practices, it must do so without imposing unnecessary restrictions on ethical debt collectors. See 15 U.S.C. § 1692e; see also *Peter v. GC Serv. L.P.*, 310 F.3d 344, 351-52 (5th Cir. 2002) (discussing Senate Report accompanying FDCPA).

<sup>2</sup> See 15 U.S.C. § 1692f (listing prohibited debt collection practices); 15 U.S.C. § 1692f(8) (“Using 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 [is prohibited], except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.”). For purposes of full disclosure, § 1692f(1) was impliedly repealed in *Townsend v. Quantum3 Group, LLC* because it conflicted with a bankruptcy provision that afforded every creditor the right to file a claim against their debtor. See *Townsend v. Quantum3 Group, LLC*, 535 B.R. 415, 427-29 (M.D. Fla. 2015) (impliedly repealing § 1692f(1) based on contradiction with bankruptcy code). The court’s reasoning in *Townsend* and the implied repeal of § 1692f(1) has no impact on the validity of f(8).

<sup>3</sup> See *Preston v. Midland Credit Mgmt.*, 948 F.3d 772, 782-84 (7th Cir. 2020) (holding there is no benign language exception in f(8)); *Strand v. Diversified Collection Serv.*, 380 F.3d 316, 319 (8th Cir. 2004) (recognizing benign language exception because literal reading of statute does not comport with legislative purpose); *Goswami v. Am. Collections Enter.*, 377 F.3d 488, 493-94 (5th Cir. 2004) (accepting benign language exception due to statutory ambiguity), *aff’d* 395 F.3d 225 (5th Cir. 2004); *DeCraene v. Weber & Olcese, P.L.C.*, 300 F. Supp. 3d 978, 982 (W.D. Mich. 2018) (reading benign language exception into statute). The benign language exception was first introduced in *Masuda v. Thomas Richards & Co.*, where the district court declined to find the debt collector in violation of f(8) for printing “PERSONAL & CONFIDENTIAL” on an envelope. See 759 F. Supp 1456, 1466 (C.D. Cal. 1991); see also Matthew S. Robertson, Comment, *Of Language and Symbols: A Move Toward Defining What is “Benign” under the Fair Debt Collection Practices Act* [*Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014)], 54 WASHBURN

*Inc.*<sup>4</sup> interpreted f(8) by its plain language, holding that the benign language exception should not be granted and that only information necessary for the successful delivery of the letter is allowed on debt collection envelopes.<sup>5</sup>

On April 11, 2019, Donovan received a letter from FirstCredit, Inc. (“FirstCredit”), a debt collection agency.<sup>6</sup> The letter, which demanded a payment for a purported medical debt, was delivered in a white envelope with two transparent glassine windows stacked on top of each other, taking up the majority of the left half of the envelope.<sup>7</sup> Donovan’s name, address, and an empty checkbox followed by “Payment in full is enclosed” were visible through the glassine windows.<sup>8</sup> Occasionally, when the envelope was held in a different way, additional words became visible through the transparent windows, saying “I need to discuss this further. My phone number is \_\_\_\_\_.”<sup>9</sup>

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L.J. 761, 773 (2015) (discussing pre- and post-*Masuda*’s benign language exception). The exception’s introduction was based on the *Masuda* court’s finding that Congress’ interest in protecting consumers would not be promoted by proscribing benign language. *Masuda*, 759 F. Supp at 1466.

<sup>4</sup> 983 F.3d 246 (6th Cir. 2020), *reh ’g en banc denied by* *Donovan v. FirstCredit, Inc.* 2021 U.S. App. LEXIS 4802 (6th Cir. 2021).

<sup>5</sup> *See id.* at 254, 258 (finding no exception for benign language under f(8)).

<sup>6</sup> *See id.* at 249 (discussing sequence of events leading to lawsuit); *see also* Amy Fontinelle, *Debt Collection Agency*, INVESTOPEDIA, <https://perma.cc/RG9Z-ADMU> (last updated Oct. 29, 2021) (detailing function of collection agencies). Debt collection agencies are companies hired by the original creditor when it determines that it is unlikely to collect its debt from the creditor. *See Fontinelle, supra.* The types of debts that debt collection agencies pursue varies—the debt could be a medical debt, a student loan debt, or even a utility bill debt. *See Fontinelle, supra.* A debt collector must rely on the debtor to pay and cannot seize the debtor’s assets unless provided with a court order. *See id.* Moreover, debt collectors only get paid when they recover their debts. *See id.* This payment structure incentivizes unethical behavior because the debt collector does not get paid unless they obtain the payments from the debtor. *See id.*; *see also Debt Collection FAQs*, FEDERAL TRADE COMMISSION: CONSUMER INFORMATION (May 2021), <https://perma.cc/6T3N-RKZS> (explaining rights consumers have when contacted by debt collectors).

<sup>7</sup> *See Donovan*, 983 F.3d at 249 (describing envelope received by Donovan).

<sup>8</sup> *See id.* (describing information potentially visible to observing third party). These additional words are a technical violation of f(8), since a plain reading of the statute would prohibit the use of *any* language or symbol, other than the debt collector’s address and business name, provided that the name does not indicate that the debt collector is in the debt collection business. 15 U.S.C § 1692f(8); *see also* Brief for Appellee at 10, *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014) (No. 13-3588) (discussing effects of strict interpretation of f(8)). “Any means any. If § 1692f(8) is to be applied ‘as written,’ then **nothing**, without exception, may be included on an envelope other than a debt collector’s address.” *Id.*

<sup>9</sup> *See Donovan*, 983 F.3d at 249 (describing envelope which sparked lawsuit). The occasional visibility of the additional language was due to the fact that the paper inside the envelope was allegedly smaller than the envelope itself, causing the interior contents to shift and reveal certain text to become visible through the envelope’s transparent glassine windows. *See id.* Donovan recognized that these additional phrases represent options for the consumer to choose from when responding to the letter. *See* Complaint at 2, *Donovan v. First Credit*, 983 F.3d 246 (6th Cir. 2020) (No. 20-03485).

Donovan filed a complaint against FirstCredit in the United States District Court for the District of Ohio, alleging that the visibility of the checkboxes and accompanying language through the envelope's glassine windows violated § 1692f(8) of the FDCPA.<sup>10</sup> Donovan argued that anyone able to catch a glimpse of the envelope could recognize that Donovan was receiving mail from a debt collection agency, which she argued caused her embarrassment and emotional distress.<sup>11</sup> After filing an answer, FirstCredit moved for judgment on the pleadings, arguing that the visible language did not violate f(8) because the statute incorporates an implied benign language exception for language that is considered harmless to the consumer.<sup>12</sup>

The district court granted FirstCredit's motion for judgment on the pleadings, concluding that the language made visible by the envelope's glassine window was benign and thus did not violate f(8).<sup>13</sup> Donovan timely

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<sup>10</sup> See *Donovan*, 983 F.3d at 246, 249-50 (noting cause of action); Complaint, *supra* note 9, at 2. Donovan also alleged that FirstCredit violated § 1692e(10), which prohibits the "use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." § 1692e(10); *Donovan*, 983 F.3d at 250 n.2. The FDCPA is a federal statute, but Donovan also sought relief under Ohio's Consumer Sales Practices Act ("CSPA"), alleging that any violation of the FDCPA necessarily violates Ohio Revised Code § 1345.02(A), which prohibits "unfair or deceptive act[s] or practice[s] in connection with a consumer transaction." *Donovan*, 983 F.3d at 250; Ohio Rev. Code Ann. § 1345.02 (West) (defining unfair or deceptive practices against consumers).

<sup>11</sup> See *Donovan*, 983 F.3d at 249 (stating plaintiff's alleged injuries). Embarrassment to the consumer, while not a necessary element in making a FDCPA claim, is a concern that has continued to present itself in new debt collector regulations. *Id.* at 255; see also Michelle Singletary, *New rule will allow debt collectors to track you down on social media*, THE WASHINGTON POST (Nov. 30, 2021, 6:16 PM), <https://perma.cc/2CZH-B4WC> (discussing limitations to contacting debtor via social media). For example, debt collectors are now allowed to contact debtors via text messages and social media; however, if the debt collector sends the debtor a message via social media, the message must be sent privately—unable to be viewed by anyone else. Singletary, *supra* (discussing novel ways to contact debtors). Privacy continues to be a central concern in regulating novel methods of debt collection, such as through social media, indicating that it is a core concern that underlies the rules behind the FDCPA. *Id.*; see Robertson, *supra* note 3, at 772-73 (discussing *Masuda*'s holding in light of concern for consumer privacy). *Masuda* ultimately held that certain words on an envelope did not violate f(8) because of Congress's intention behind drafting the f(8) provision, which is to protect the privacy of consumers and prevent embarrassment to debtors. *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1466 (C.D. Cal. 1991); see also S. REP. 95-382, at 4 (1977) (acknowledging legislation "strongly" protects consumers' right to privacy).

<sup>12</sup> See *Donovan*, 983 F.3d at 250 (asserting affirmative defense to complaint); see also Robertson, *supra* note 3, at 773-74 (discussing parameters of benign language exception); *Douglass v. Convergent Outsourcing*, 765 F.3d 299, 303-04 (3d Cir. 2014) (deciding display of consumer's debt account number on glassine envelope not benign). The Third Circuit decided that the disclosure of *Douglass*' account number was not benign because it was an invasion of privacy, since it pertains to his "status as a debtor." *Douglass*, 765 F.3d at 303.

<sup>13</sup> See *Donovan v. FirstCredit, Inc.*, No. 19-3006, 2020 WL 11912721, at \*3 (S.D. Ohio May 5, 2020) (explaining why visible language was considered benign), *rev'd and remanded*, 983 F.3d 246 (6th Cir. 2020). Although the court determined that "payment in full is enclosed" was made visible through the envelope, they concluded that this language is commonly used in other businesses and therefore is not unique to debt collection. *Id.*

appealed on the issue of whether a benign language exception should be read into f(8) of the FDCPA, which has the effect of expanding the permissible language creditors may use on envelopes sent to debtors.<sup>14</sup> On appeal, the Sixth Circuit reversed the lower court's decision and held that the plain language of f(8) governs its interpretation, concluding no benign language exception implicitly exists within the statute.<sup>15</sup>

Post World-War II America saw a sharp increase in debt—farm loans, home mortgage loans, and corporate debt increased six-fold, while consumer loans expanded by a factor of sixteen.<sup>16</sup> With the dramatic

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<sup>14</sup> See *Donovan*, 983 F.3d at 246 (describing appeal). In her reply brief, Donovan offered two main arguments surrounding the benign language exception: (1) “the text of f(8) is clear, and resort to legislative history is thus unnecessary and impermissible; (2) even if FirstCredit’s absurd interpretation is the only correct way to read the plain language of the statute, that absurdity is better cured by a mailing exception than the ‘benign language exception.’” Reply Brief Of Appellant at 6, 10, *Donovan v. FirstCredit, Inc.*, 983 F.3d 249 (No. 20-3485), 2020 WL 4742124, at \*6, 10; See also *Douglass*, 765 F.3d at 301 (arguing in favor of expansive definition of “any” in f(8)). Similar to the appellant in *Donovan v. FirstCredit*, the appellant in *Douglass v. Convergent Outsourcing* argues that having anything other than what is proscribed is a violation of f(8). *Id.* Both appellees argue that if the plain language of the statute is to be interpreted as written, the sender would not be able to include a stamp nor a return address. *Id.* at 303. Recognizing this potential for absurd results, both appellees argue for an alternative exception to the statute: a mailing exception that allows text and symbols necessary for mailing. See Brief of Appellee Convergent Outsourcing, *supra* note 8, at \*10. *But see* *Strand v. Diversified Collection Serv.*, 380 F.3d 316, 317 (8th Cir. 2004) (“[B]ecause a strict reading [of the statute] would lead to bizarre and impracticable consequences, we conclude the statute does not prescribe benign language and symbols such as those printed on the envelopes Mr. Strand received . . .”) (alteration in original). However, neither *Donovan* nor *Douglass* can read an exception into the statute while still maintaining that a strict reading of the statute is necessary. See *Strand*, 380 F.3d at 317 (adopting benign language exception). The benign language exception has its limits, though—the debt collector can still be liable even though the language on the envelope is unrelated to debt collection and is unlikely to cause embarrassment to the consumer, so long as there is a risk of actual harm to the debtor. See *Voris v. Resurgent Capital Servs., L.P.*, 494 F. Supp.2d 1156, 1166-67 (S.D. Cal. 2007) (explaining scope of benign language exception does not apply if actual harm occurred). In *Voris*, debtors received an envelope with the words “You are Pre-Approved\* See Conditions Inside” on the outside of the envelope. *Id.* at 1160. The court held that although a benign language exception was implied in f(8), in this particular instance, the language exceeded the scope of the exception. *Id.* at 1166. The debt collection company urged the court to consider benign language as anything that does not pertain to debt, debt collection, or cause embarrassment to the debtor; however, the court sided with the Plaintiff debtor and held that language is benign so long as it does not cause injury to the debtor. *Id.* Because the language in this case would cause the debtor to think the envelope is one of many letters sent by credit card companies pre-approving consumers for cards, the debtor would be more likely to discard the envelope before reading it and actual harm would flow to the debtor because the debtor would end up discarding notice of a debt. *Id.* at 1166-67. While the district court applied the benign language exception narrowly in this instance, the court declined to articulate a broad definition of what constitutes benign language. *Id.* at 1166.

<sup>15</sup> See *Donovan*, 983 F.3d at 254 (stating holding). According to the court in *Donovan*, the debt collector, FirstCredit, ignores an “alternative, available, and reasonable” reading of the statute, which does not create additional exceptions or absurd results. *Id.* at 254-55.

<sup>16</sup> See Logan Kraus, Note, *A Forgotten Past Creates a Fractured Present: Why Courts Should Utilize Historical Context When Interpreting Ambiguous Provisions of the 1977 Fair Debt*

increase in debt, delinquency quickly followed, with some studies suggesting that the delinquency rate for consumer loans increased by fifty percent beginning in the 1960s.<sup>17</sup> As a result of the increasing debt and failing businesses, the gross dollar volume of new business reported by debt collection agencies more than doubled within a nine-year span, growing from \$40 million in 1965 to \$93 million in 1974.<sup>18</sup> Predictably, the increase in debt collection activity led to criticisms of debt collection practices, namely certain agencies' abusive tactics.<sup>19</sup> Alleged collection tactics ranged from relatively mild repeated contact of debtors, to the invasive, such as contacting the debtor's family and friends, and even threatening to have the debtor arrested if their debt was not paid.<sup>20</sup> Accordingly, abuse of consumers by debt collectors and the increasing need for regulation led Congress to enact the FDCPA in 1977.<sup>21</sup>

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*Collection Practices Act*, 102 IOWA L. REV. 1789, 1795 (2017) (discussing economic factors leading to FDCPA creation); see Robert A. Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 L. & SOC'Y REV. 323, 330 tbl.1 (1984) (displaying types of private debt in billions of dollars pre and post-World War II).

<sup>17</sup> See Kraus, *supra* note 16, at 1795-96, n.40 (explaining path to proliferation of debt collection agencies).

<sup>18</sup> See *id.* at 1796 (describing rise in debt collection activity).

<sup>19</sup> See *id.* (recounting collection practices that "invaded debtors' human rights"). Prior to the FDCPA, state legislatures individually regulated and addressed abuse in the collection practices occurring in their states. See Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 718 (2006) (discussing debt collection prior to FDCPA enactment).

<sup>20</sup> See Kraus, *supra* note 16, at 1796-97 (describing various tactics used by collectors); see S. Rep. No. 95-382, at 2 (1977), reprinted in 1977 U.S.C.A.N. 1695, 1696 (discussing various methods of abuse).

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.

S. Rep. No. 95-382, at 2. Debt collection abuse by third-party debt collectors is "a widespread and serious national problem." *Id.*

<sup>21</sup> See 2 CFPB ANN. REP. 2013, *Fair Debt Collection Prac. Act* (2013), <https://perma.cc/9ZNJ-TM4E> 1, 6 (describing inception of FDCPA). Originally, the Federal Trade Commission ("FTC") had primary responsibility for administering the FDCPA; however, with the passing of the Dodd-Frank Act, the Consumer Financial Protection Bureau ("CFPB") was delegated primary governmental responsibility for administering the FDCPA. *Id.* The CFPB has the authority 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." *Id.* The enforcement responsibility of the rules, however, is shared among the FTC and other federal agencies. *Id.*; see S. Rep. No. 95-382, at 2 (explaining why Congress is in best position to enact this legislation). The lack of meaningful legislation on the state level was an impetus for enacting the FDCPA; thirteen states with a total of forty million people had no debt collection laws while an additional eleven had debt collection laws

The enactment of the FDCPA received mixed reviews; some commentators applauded the FDCPA for the positive effect it had on the debt collection industry.<sup>22</sup> Other commentators, while acknowledging Congress' good faith intentions, described the FDCPA as a "misdirected and poorly drafted statute."<sup>23</sup> Most notable is the critique that the FDCPA is filled with ambiguities, which make it difficult for honest and diligent debt collectors to follow the law because of their lack of legal knowledge on the appropriate debt collecting procedures.<sup>24</sup>

The FDCPA was enacted, in part, to curb abuse between debt collectors and consumers while also ensuring that unnecessary restrictions on ethical debt collectors were not imposed.<sup>25</sup> In particular, section f(8) was enacted to protect consumer privacy and to prevent embarrassment to consumers that arises from debt collection.<sup>26</sup> Since the enactment of the

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that provided virtually no protection for consumers. S. Rep. No. 95-382, at 2. Moreover, an increase in interstate debt collections compelled Congress to enact a uniform law that would serve consumers equally. *Id.* Not all members of the Senate agreed—some thought a country-wide enactment was an intrusion into an area best left to the states, and that the enactment of the FDCPA would further harm small businesses by imposing "one more regulatory burden" on them. *Id.* at 9.

<sup>22</sup> See Goldberg, *supra* note 19, at 722 (reviewing effects of FDCPA). Those who look favorably upon the enactment of the FDCPA point to a decrease in consumer complaints to the FTC. *Id.* at 722, n.74. The decrease in complaints made by consumers can be attributed to a number of reasons—not necessarily due to new laws. *Id.* For example, the decrease in complaints may be attributed to fewer consumers understanding their rights. *Id.*

<sup>23</sup> See Mike Voorhees, *Definitional Issues for Debt Collectors Under the FDCPA*, 58 CONSUMER FIN. L.Q. REP. 83, 83 (2004) (mentioning pitfalls of the FDCPA). Another large critique of the FDCPA is that it is "static" legislation, with its sole purpose to correct issues that were prevalent among consumers in 1977, when the FDCPA was enacted. See Goldberg, *supra* note 19, at 723. Rather than include language specific to the issues sparking the enactment of a statute, it is argued that FDCPA's drafters should have worded the statute to be more open-ended and anticipatory of future behavior. See *id.* at 723-24. For example, f(8) reads "using any language or symbol . . . on any envelope when communicating with a consumer by use of the mails or by telegram." § 1692f(8). The world of debt collection has technologically evolved since the enactment of the FDCPA, and debt collectors are resorting to completely different methods to collect debt. See Singletary, *supra* note 11 (describing debt collection practices via text and social media). As sending information by mail (or telegram) is becoming less popular, the relevance of f(8) slips into oblivion. See *id.*

<sup>24</sup> See Goldberg, *supra* note 19, at 723 (describing detriments of FDCPA's enactment to debt collectors).

<sup>25</sup> See S. Rep. 95-382, at 1696 (recognizing need to balance interests of consumers with interests of debt collectors); see also *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989) (explaining Congressional purpose in enacting FDCPA).

<sup>26</sup> See *Rutyna v. Collection Accts. Terminal, Inc.*, 478 F. Supp. 980, 982 (N.D. Ill. 1979) (holding debt collector's language on envelope revealing sender violated f(8)). The court in *Rutyna* focused heavily on the debtor's embarrassment and made it a key factor in its holding. See *id.* A recipient is "embarrassed" if the information in their letter leads third parties to think less of the recipient due to the fact that the recipient is in debt. *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1466 (C.D. Cal. 1991) (highlighting Congress' interest in enacting FDCPA). In *Masuda*, the consumer sued the debt collection agency for its envelope that included: "(1) notice that

FDCPA, courts have differed on how to interpret f(8), with some circuits interpreting f(8) by its plain language, thus excluding a benign language exception.<sup>27</sup> On the other hand, some courts hold that a plain language interpretation of f(8) leads to absurd results, leading those courts to permit correspondence on an envelope so long so long as it does not violate consumer privacy.<sup>28</sup>

In *Donovan v. FirstCredit Inc.*,<sup>29</sup> the Sixth Circuit diverged from the majority of circuits and followed the Seventh Circuit in holding that f(8) should be read by its plain language and should not include a benign

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theft of mail or obstruction of delivery is a federal crime, (2) the language ‘PERSONAL & CONFIDENTIAL’ and, (3) the phrase ‘Forwarding and Address Correction Requested.’” *Id.* at 1466. The court noted that although the writing on the envelopes appeared to violate “the statutory proscription against the use of ‘any language’ other than a return address, the statute should not be construed” so narrowly as to neglect promoting Congress’ interest. *See id.* Prohibiting any language other than what is allowed in f(8)—regardless of whether the language is benign—would not promote Congress’ interest in protecting consumers. *See id.*

<sup>27</sup> *See* *Preston v. Midland Credit Mgmt.*, 948 F.3d 772, 777 (7th Cir. 2020) (interpreting f(8) by its plain language); Elwin Griffith, *The Peculiarity of Language in the Debt Collection Process: The Impact of the Fair Debt Collection Practices Act*, 54 WAYNE L. REV. 673, 725-26 (2008) (recognizing Congress’ intent and policy rationale regarding f(8)’s strict language). Arguably, the absolute bar to additional language would accomplish Congress’s objective to remove any temptation for the debt collector to “prod” the consumer into compliance. *See* Griffith, *supra*, at 725-26. *Compare* *Preston*, 948 F.3d at 782-84 (holding statute’s plain meaning unambiguously prohibits all markings other than those required for sending mail), *with* *Strand v. Diversified Collection Serv.*, 380 F.3d 316, 319 (8th Cir. 2004) (invoking benign language exception to allow for words consistent with congressional intent), *and* *Goswami v. Am. Collections Enter.*, 377 F.3d 488, 494 (5th Cir. 2004) (incorporating FTC staff commentary and legislative history to read benign language exception into f(8)).

<sup>28</sup> *See* *Estate of Laboy v. Apex Asset Mgmt.*, No. 18-10844, 2019 WL 1417249, at \*3 (D.N.J. Mar. 29, 2019) (emphasizing obligation of sensible statutory interpretation in order to avoid unjust results). Although there is no consensus on how “absurd” a statutory application must be to trigger the doctrine, there comes a time where “any competent user” would say that the language in the statute does not apply to the results that the words produce. *See* Michael D. Cicchini, Article, *The New Absurdity Doctrine*, 125 PENN ST. L. REV. 353, 357-58 (2021) (explaining the spectrum of absurdity doctrine); Andrew S. Gold, *Absurd Results, Scrivener’s Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 79 (2006) (discussing challenge in pinpointing exactly when something becomes “absurd”). The concept of absurdity is subjective—what seems absurd to one person may seem plausible to another. *See* Gold, *supra*, at 82 (recognizing the relativity of the absurdity doctrine); *see also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003) (“[S]tandard interpretive doctrine . . . defines an ‘absurd result’ as an outcome so contrary to perceived social values that Congress could not have ‘intended’ it.”). “The general rule of statutory interpretation is that novel interpretations of substantive statutes always apply retroactively, with the understanding that a statute means what it says from the date of its enactment.” *Paulino v. U.S.*, 352 F.3d 1056, 1059 (6th Cir. 2003) (stating rules of statutory construction always beginning with plain meaning of statute upon enactment).

<sup>29</sup> 983 F.3d 246 (6th Cir. 2020) (en banc), *reh’g denied* by *Donovan v. FirstCredit, Inc.*, 2021 U.S. App. LEXIS 4802 (6th Cir. 2021).



language exception.<sup>30</sup> The Sixth Circuit reached its conclusion by first starting with the plain language of the statute, noting that if the language of a statute is clear, the inquiry ends with the words of the statute.<sup>31</sup> “Where, however, the ‘language is ambiguous or leads to an absurd result,’ courts may rely on extra-textual sources.”<sup>32</sup> The Sixth Circuit concluded that the statute should be read according to its plain meaning for two reasons: (1) a literal reading of the statute would not produce an absurd result, and (2) the statute itself is unambiguous.<sup>33</sup>

According to the Sixth Circuit, a literal interpretation of the statute would not lead to absurd results because FirstCredit ignores an alternative, available, and reasonable reading of the statute which would allow a debt collector to include items necessary for delivery of mail on the envelope.<sup>34</sup> Rather than reading f(8) as “plainly sanction[ing] ‘use of the mails’ to communicate with a debtor,” the Sixth Circuit held the blanket prohibition on “any language or symbol” is only triggered “when communicating with a consumer by use of the mails.”<sup>35</sup> Because the statute uses the word “when,” it supposedly operates under the presupposition that the envelope used by the debtor will employ features necessary for the delivery of the envelope.<sup>36</sup> Moreover, according to the Sixth Circuit, a strict reading of f(8) would be consistent with the legislative purpose, whereas reading a benign language exception into the statute would incentivize gamesmanship and disadvantage ethical debt collectors following the strict language of the statute.<sup>37</sup> The Sixth Circuit concluded that no compelling reason exists to deviate from the

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<sup>30</sup> See *Donovan* 983 F.3d at 254 (holding benign language exception not applicable because plain text forecloses possibility). See sources cited *supra* note 27 and accompanying text (comparing circuits that invoke benign language exception with those that do not).

<sup>31</sup> See *Donovan*, 983 F.3d at 254 (quoting *Tenn. Prot. & Advoc., Inc. v. Wells*, 371 F.3d 342, 350 (6th Cir. 2004)) (“Only when following the literal language of the statute would lead to ‘an interpretation which is inconsistent with the legislative intent or to an absurd result’ can a court modify the meaning of the statutory language.”).

<sup>32</sup> See *id.* at 253 (remarking extra-textual sources can include legislative history or administrative guidance).

<sup>33</sup> See *id.* at 254-56 (outlining two rationales for Sixth Circuit’s conclusion).

<sup>34</sup> See *id.* at 254-55 (explaining flaws of interpreting statute as prohibiting features necessary for delivery). The court’s rationale is contrary to FirstCredit’s contention that a literal statutory interpretation would preclude necessary mail symbols, such as a stamp. See *id.* at 253-254.

<sup>35</sup> See *id.* at 255 (alteration in original) (emphasis added) (offering equally plausible reading of f(8) according to literal language of statute).

<sup>36</sup> See *Donovan*, 983 F.3d at 255 (interpreting “when” in conjunction with “communicating with a consumer by use of the mails”). This interpretation excludes necessary features for delivery because they do not fall into the category of communication between the debt collection agency and the debtor. See *id.* at 254.

<sup>37</sup> See *id.* at 255 (affirming “[t]his reading of § 1692f(8) is fully consistent with FDCPA’s three stated purposes, and even more so than a ‘benign language’ exception.”).

literal language of the statute and read a benign language exception into the statute where none exists.<sup>38</sup>

The Sixth Circuit was incorrect in holding that a benign language exception should not be read into f(8).<sup>39</sup> Contrary to the Sixth Circuit's holding, reading f(8) by its literal language would produce absurd and harsh results to debt collectors.<sup>40</sup> A reading of the statute on its face indicates that "using *any* language or symbol . . . on any envelope when communicating with a consumer by the use of the mails of by telegram . . ." is prohibited.<sup>41</sup> Under the rules of statutory interpretation, a literal reading of the language clearly prohibits debt collectors from placing *anything* on the envelope, other than the debt collector's business name and address.<sup>42</sup> However, the Sixth Circuit cursorily dismisses the importance of a benign language exception by emphasizing the word "when" in the sentence "when communicating with a consumer by the use of mails" to read an exception for additions necessary for delivery.<sup>43</sup>

Not only does the Sixth Circuit offer contradictory arguments by interpreting the plain text of the statute while also reading an exception into the statute for that which is necessary for delivery, it also incorrectly states

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<sup>38</sup> See *id.* at 256 (reciting holding). The Sixth Circuit admits that while there is a plausible reading of f(8) that would preclude the use of fixtures necessary for delivery, there is an equally plausible reading that allows for that which is necessary for delivery. *Id.* Therefore, the absurd results doctrine is not relevant, since the absurd results doctrine only comes into play when there is no plausible reading of the statute that would yield rational results. *Id.* However, if all of the literal readings of the statute would produce absurd results, then the absurd results doctrine *compels* a different reading that is consistent with the legislative purpose. See *id.*

<sup>39</sup> See *Strand v. Diversified Collection Serv.*, 380 F.3d 316, 318-19 (8th Cir. 2004) (arguing for benign language exception because having none would be inconsistent with legislative purpose); *Goswami v. Am. Collections Enter.*, 377 F.3d 488, 494 (5th Cir. 2004) (primarily relying on FTC commentary and legislative history to read benign language exception).

<sup>40</sup> See Brief of Appellee FirstCredit at 7, *Donovan v. FirstCredit Inc.*, 983 F.3d 246 (6th Cir. 2020), WL 4354439 at \*9 (reasoning "while the plain language of f(8) is clear, the faithful application of that language leads to ambiguity and absurd results"); see also Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 FED. REG. 50097, 50099 (Dec. 13, 1988) ("The [FTC] staff has already recognized that a rigid, literal approach to [f(8)] would lead to absurd results . . ." (alteration in original)). "The legislative purpose was to prohibit a debt collector from using symbols or language on envelopes that would reveal that the contents pertain to debt collection—not to totally bar the use of harmless words or symbols on an envelope." See Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 FED. REG. at 50099.

<sup>41</sup> 15 U.S.C. § 1692f(8) (emphasis added) (stating statute prohibitions).

<sup>42</sup> See *Strand*, 380 F.3d at 318 ("Under [the plaintiff's] literal reading of § 1692f(8), a debtor's address and an envelope's pre-printed postage would arguably be prohibited, as would any innocuous mark related to the post, such as 'overnight mail' and 'forwarding and address correction requested.'"); *Paulino v. U.S.*, 352 F.3d 1056, 1059 (6th Cir. 2003) (explaining issues of statutory interpretation must begin with examination of statute's plain language).

<sup>43</sup> See *Donovan*, 983 F.3d at 255 (explaining that blanket prohibition on any language or symbol only activated *when* communicating with debtor).

that reading the statute according to its plain language is consistent with the legislative purpose.<sup>44</sup> The legislative purpose of the FDCPA was to eliminate abusive debt collection practices, and by interpreting f(8) according to its plain language, the court expanded the breadth of the prohibition far beyond what is required to eliminate abusive debt collection practices.<sup>45</sup> The Sixth Circuit appears to favor drawing a bright-line rule to ensure that consumers' rights are not compromised by the subtlety of the statute's language; however, reading the statute with the implied exception of allowing symbols necessary for delivery is not a bright-line rule as it could subject debt collectors to a violation of the statute for minor, non-identifying infractions, such as putting a "Happy Holidays" sticker on the back of an envelope.<sup>46</sup>

Because the Sixth Circuit, in practice, does not follow a plain language reading of the statute by reading a mail transportation exception into f(8), courts should expand upon the Court's interpretation and read a complete benign language exception into the statute to avoid contradictory reasoning and confusing holdings.<sup>47</sup> Contrary to the Sixth Circuit's assertion that adopting the benign language exception would "incentivize gamesmanship" and "disadvantag[e] ethical debt collectors," adopting a benign

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<sup>44</sup> See Brief of Appellee FirstCredit at 11-12, *Donovan v. FirstCredit, Inc.*, 983 F.3d 246 (6th Cir. 2020), WL 4354439 at \*10 (arguing if certain implied exceptions are read into statute, ambiguity of statute is relevant); *Compare Donovan*, 983 F.3d at 254 (denying benign language exception due to plain meaning of the statute), with *Donovan*, 983 F.3d at 255 (allowing language or symbols necessary to effectuate delivery). The Sixth Circuit's attempt at arguing that a literal reading of the statute allows for fixtures necessary for delivery because of the word "when" is unprecedented. See *Donovan*, 983 F.3d at 255. The Sixth Circuit fails to realize that its "alternative, available, and reasonable" reading of f(8) is not a literal reading of the statute, rather, it is an exception disguised as a literal reading. See *supra* note 14 and accompanying text. Moreover, a literal interpretation of the statute should be avoided because "alternative interpretations consistent with legislative purpose are available." See *Donovan*, 983 F.3d at 254 (citing *Guzman v. U.S. Dep't of Homeland Sec.*, 679 F.3d 425, 432 (6th Cir. 2012)).

<sup>45</sup> See *Donovan*, 983 F.3d at 254 (discussing appellee FirstCredit's argument). "The essence of this approach to reading § 1692f(8) is that the provision's blanket prohibition is so sweeping that it inadvertently forbids language and symbols required of mail communication, even though Congress plainly intended to endorse debt collectors' ability to communicate with consumers by mail." *Id.*; see also *Fair Debt Collection Pracs. Act*, *supra* note 21, at 8 (discussing purpose and mission of FDCPA); *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1466 (C.D. Cal. 1991) (explaining Congress's interest would not be promoted by proscribing benign language).

<sup>46</sup> See *Donovan*, 983 F.3d at 255 (explaining bright-line rule will be easier to apply); Brief of Appellee, *Donovan v. FirstCredit, Inc.*, 983 F.3d 246 (6th Cir. 2020) (No. 20-3485), 2020 WL 4354439, at \*7 (characterizing *Donovan*'s argument as reading implied exceptions into statute); *DeCraene v. Weber & Olcese, P.L.C.*, 300 F. Supp. 3d 978, 982 (W.D. Mich. 2018) (exploring practical effects of strict reading of statute). The court in *DeCraene* entertains the plaintiff's strict reading of f(8), but quickly rejects it based on its practical implications, such as forbidding a "Happy Holidays" stamp on an envelope. *DeCraene*, 300 F. Supp. 3d at 982. The court in *DeCraene* noted it was "unlikely that Congress intended the statute to permit such absurd results." See *id.*

<sup>47</sup> See *supra* note 14 and accompanying text (describing inconsistency in argument).

language exception would only allow harmless language to be read into the exception.<sup>48</sup> The benign language exception is not a *carte blanche* for debt collectors to engage in any activity they want; it is simply a way for debt collectors not to be unfairly penalized for language that is completely harmless to debtors.<sup>49</sup> While the Sixth Circuit’s interpretation might yield a result that is more narrow in its application, the burden on debt collectors far outweighs the potential difficulties that might arise in determining the scope of benign language.<sup>50</sup>

In *Donovan*, the Sixth Circuit faced the issue of deciding whether to implement the benign language exception into f(8) to allow debt collectors to put harmless language or symbols onto envelopes containing information about a consumer’s debt to that consumer. Ultimately, the court decided that the benign language exception should not be read into f(8) and that a plain language reading of the statute should prevail, having the effect of prohibiting “any language or symbol” other than a debt collector’s address or possibly business name when communicating with a consumer. The Sixth Circuit should have followed the Fifth and Eighth Circuits in deciding that where language is harmless to the consumer, the language put onto the envelope is permissible. Despite declining to read a benign language exception into the statute, the Sixth Circuit reads another exception into the statute to allow

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<sup>48</sup> See *Donovan*, 983 F.3d at 255 (explaining possible effects of adopting benign language exception); *Preston v. Midland Credit Mgmt.*, 948 F.3d 772, 783-84 (7th Cir. 2020) (expressing concern that benign language exception would force courts to decide on individual basis). The benign language exception doubts are unfounded—ethical debt collectors would still be allowed to operate their practice as is while unethical debt collectors would still be at fault if the language placed on the envelope was found not to be benign. See *Douglass v. Convergent Outsourcing*, 765 F.3d 299, 303 (3d Cir. 2014) (holding displaying consumer’s debt account number on glassine envelope not benign). Moreover, a benign language exception would allow for “abstract business language” on an envelope that mirrors the appearance of other business correspondence, potentially decreasing the risk that the debtor’s “privacy and peace of mind” will be invaded by the collection attempt. See *Strand*, 380 F.3d at 319 (arguing benign language exception could actually further congressional intent of FCDPA).

<sup>49</sup> See *Voris v. Resurgent Capital Servs., L.P.*, 494 F. Supp. 2d 1156, 1166 (S.D. Cal. 2007) (explaining scope of benign language exception and finding exception not met if actual harm occurred). The benign language is still constrained by debt collectors’ ethical duties to debtors, elucidated by the legislative history of the FDCPA. See Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 § 802 (1977) (describing strong protection of consumers’ rights of privacy). A debt collector can still be liable even though the language on the envelope is unrelated to debt collection and unlikely to cause embarrassment to the consumer. See *Voris*, 494 F. Supp. 2d at 1164-65.

<sup>50</sup> See *Preston*, 948 F.3d at 783-84 (expressing preference for bright-line rule). Even if a bright-line rule included some sort of mailing exception—e.g., no words on an envelope other than that which is necessary for delivery—debtors and debt collection agencies would still have difficulty interpreting the scope of what constitutes “necessary for delivery.” See *Donovan*, 983 F.3d at 258. See generally *DeCraene v. Weber & Olcese, P.L.C.*, 300 F. Supp. 3d 978, 982 (W.D. Mich. 2018) (hypothesizing what would happen to debt collector who affixed “Happy Holidays” sticker on envelope).

language which is necessary for delivery of mail to be on the envelope, which directly contradicts its own reasoning for denying all benign language. Since reading beyond the literal text of f(8) is inevitable in practice, the court should read an exception that is in line with the legislative intent of the FDCPA, and which does not disadvantage debt collectors while simultaneously still ensuring that consumers' rights are protected.

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