

Voice-Mail Messages: A Hobson's Choice

Determining when a servicer crosses the line from assertive debt-collection practices to aggressive and illegal tactics is not always cut and dry.

by Carolyn A. Taylor

Editor's note: This article is the first in a multi-part series that addresses FDCPA minefields that creditors must carefully navigate during the collections process.

Thirty-two years ago, in 1978, Congress - faced with "abundant evidence of the use of abusive, deceptive and unfair debt-collection practices by many debt collectors" that was contributing to "the number of personal bankruptcies, marital instability, loss of jobs and invasions of individual privacy" - enacted the Fair Debt Collection Practices Act (FDCPA). The legislation was designed to provide borrowers with a means for challenging payoff demands and for determining the accuracy of asserted debts, as well as to establish ethical guidelines for the collection of consumer debts.

The FDCPA broadly prohibits the use of "false, deceptive or misleading" representations or practices," "unfair or unconscionable collection methods," and/or "harassment or abuse," and regulates communications with the debtor and third parties. In addition, the FDCPA mandates certain disclosures, including a debt-validation notice in the debt collector's initial communication and a "Mini-Miranda" warning, which identifies the caller as a debt collector, in subsequent communications. Although the FDCPA applies only to third-party debt collectors, many states have enacted comparable consumer-protection statutes that

provide broader coverage that includes the conduct of the original creditor and its employees while collecting their own debts.

The range of remedies for violating the FDCPA includes administrative enforcement; a private right of action to recover actual damages, statutory damages, attorneys' fees and costs; and, in a class-action lawsuit, additional damages for the class not to exceed the lesser of \$500,000 or the percentage of the net worth of the debt collector. Significantly, the standard for review is the "least sophisticated consumer" described as "one not having the astuteness...or even the sophistication of the average, everyday common consumer."

This statute, now in its 32nd year, continues to provide a venue for borrowers who have suffered actual or perceived collection abuse. The number of cases alleging violations of the FDCPA, the Fair Credit Reporting Act (FCRA) or the Telephone Consumer Protection Act (TCPA) filed or removed to federal court during 2009 shattered the prior year's record number of filings:

- 2009: 8,287 FDCPA, 1,174 FCRA and 28 TCPA cases;
- 2008: 5,188 FDCPA, 1,164 FCRA and 16 TCPA cases;
- 2007: 3,813 FDCPA, 1,347 FCRA and 22 TCPA cases

That trend has continued this year. In January, 716 FDCPA cases were filed, compared to 551 during January 2009. The top venues for those suits continue to be the Illinois Northern District Court

(Chicago), the New York Western District Court (Buffalo), the California Central District Court (Los Angeles), the Minnesota District Court and the Pennsylvania Eastern District Court (Philadelphia).

The FDCPA impacts all aspects of consumer mortgage finance, from origination to servicing. The seemingly endless stream of foreclosures and investor fallout and the resulting financial pressure - as well as increased legislative, regulatory, judicial and public scrutiny - have forced lenders to expand their loss mitigation strategies. Many creative borrower-outreach programs have been implemented in attempts to reach non-communicative borrowers.

Yet determining when a creditor or loan servicer crosses the line from assertive debt-collection practices to aggressive and illegal tactics is not always easy. The FDCPA and related state legislation requiring disclosures and governing communications from debt collectors were written before the advent of answering machines, cell phones, fax machines and pagers. Use of these technologies has created a host of new issues.

Fundamental fairness is the principle underlying the FDCPA. The abusive, deceptive and unfair practices proscribed by the statute make common sense. It is reasonable that a debt collector should identify himself as such and state the purpose for his contact by giving certain disclosures to the consumer. It is logical that a bill collector should not be allowed to wake a consumer in the wee hours of the morning or threaten to take actions that he does not intend to take or legally cannot take. Similarly, a debt collector should not invade a consumer's privacy by use of postcard communications or third-party disclosures, directly or indirectly.

Four years ago, the inevitable happened: The long-standing FDCPA statute and modern technology collided in a New York courtroom in the seminal *Foti v. NCO Fin.Sys. Inc.* case. At issue in the class-action lawsuit was a pre-recorded voice-mail message left on a consumer's answering machine after the initial debt-validation notice was sent. The legal arguments centered on the seemingly irreconcilable conflict between the required Mini-Miranda and validation notices and the prohibition against third-party disclosure.

The Foti message stated, "Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention. Please call back: 1-866-701-1275. Once again, please call back, toll-free: 1-866-701-1275. This is not a solicitation."

The Foti court found that message deficient, because it did not include the Mini-Miranda warning. The court stated that mere identification of the collection agency by name (where the name did not reveal the nature of the agency's business) was not meaningful disclosure. Indeed, requiring the "least sophisticated consumer" to recall a prior communication from the debt-collection agency in order to recognize the current caller constituted an unreasonable burden.

The court was not sympathetic with the debt collector's defense that he was faced with a Hobson's choice: leave the required disclosures and risk prohibited third-party disclosure, or leave a more limited disclosure in attempt to satisfy both FDCPA requirements. To the contrary, the court emphasized that the "Hobson's choice is self-imposed.... it is only because of the method of debt collection selected - calling and leaving the type of pre-recorded message - that NCO is faced with this particular dilemma."

Shortly after the Foti decision, another New York court reached a similar conclusion. In *Leyse v. Corporate Collection Services Inc.*, each answering-machine message contained the speaker's name, the acronym of the debt collection agency (i.e., CCS) and a number to call. The creditor argued that FDCPA requirements were contradictory, and the choice between disclosure and privacy placed it between a "rock and a hard place." Again

discounting the asserted defense, the court found that the acronym used was not a meaningful disclosure, because it was used by more than 100 different entities and there was no evidence of prior consumer contact. Further, the problem was not that the FDCPA is contradictory, but rather that "...the method of debt collection CCS used placed them in this predicament."

Two contemporaneous California court decisions also found messages left by a debt collector on consumers' answering machines to be FDCPA communications that must contain the

debt collector's first-amendment right of commercial speech. Others advanced a carve-out argument that the congressional purpose of enacting the FDCPA was to stop abusive collection practices, not to regulate voice-mail messages that merely return the debtor's call. Most agreed that congressional action providing a legislative "fix" was unlikely; thus, the industry had no option but to await an appellate court ruling.

On Oct. 14, 2009, the Eleventh Circuit Court of Appeals became the first appellate court to address the Foti issue. In *Edwards v. Niagara Credit Solutions*

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Mini-Miranda warning. Notably, the court in *Joseph v. J.J. MacIntyre Cos.* indicated *in dicta* that the risk of third-party disclosure in those situations was more remote than when information about a debt is disclosed on the face of an envelope or a postcard. Similar decisions from the Virginia and Florida courts followed. Significantly, all of the reported cases were lower-court decisions.

The Foti line of cases put the collection industry in a state of panic. In the aftermath, debt collectors attempted to find language that protected against FDCPA claims yet also allowed them to contact consumers through voice-mail messages. The American Collectors Association unofficially suggested use of the "Disconnect if Wrong Person" message. (That script identifies the name of the caller, states that the purpose of the call is debt collection, identifies the caller as a debt collector and leaves a return telephone number.) In response to a trade association request, the Federal Trade Commission issued an advisory opinion that a voice-mail message must reveal the name of the caller's employer, even if the name indicates that the message involves a debt.

The industry buzzed with discussions of the ramifications of the Foti case. Many believe that the Foti decision places an unreasonable restriction on a

Inc., the debt collector left more than 12 messages on the debtor's answering machine over a four-month period.

"This is an important message for Edwards, Brenda [sic]," stated one of the messages. "Please return this message at 1-800-381-0416 between the hours of 8 a.m. and 9 p.m. eastern standard time. It is important that you reach our office."

Another message stated, "This message is intended for Brenda Edwards. Please contact Jennifer [last name not clear] at 1-800-381-0416. My extension is 220. When returning my call, have your file number available. It's 1250740."

Neither message included the Mini-Miranda warning or identified the name of the debt collector.

The debt collector asserted the bona-fide error defense based upon its well-established debt-collection policy. That policy provided, among other things, that the debt collector leave a message asking the consumer to call back "about an important business matter," provide the debt collector's phone number, provide the first name of the person leaving the message and give the reference number assigned to the account.

The Eleventh Circuit denied the bona-fide error defense, holding that the debt collector made the deliberate decision in its policy not to disclose (a) the name of

the debt collector or (b) that communication was for debt collection. The court stated that although a third party listening to messages would “create a violation of [FDCPA section] 1692e (11),” that situation would involve only a small percentage of the calls.

“Just as it is not reasonable to destroy a village in order to save it, neither is it reasonable to violate an act in order to comply with it,” the court said.

The Eleventh Circuit is the only appellate court to have addressed the Foti debacle. The other reported opinions are lower-court opinions. No reported lower-court decisions were found in the First, Third, Fourth, Fifth, Sixth and Tenth Circuits. Lower courts in the Second, Eighth and Eleventh Circuits have ruled that the failure to give the disclosures is an FDCPA violation, noting that the “Hobson’s choice is self-imposed,” the “FDCPA protects against deliberate, not inadvertent, third-party disclosures,” and “the

FDCPA does not guarantee the right to leave voice-mail messages.” Courts in the Tenth Circuit align with those in the Second, Eighth and Eleventh Circuits with the caveat, *in dicta*, that an inadvertent disclosure may not be a U.S.C. Section 1692c(b) privacy violation.

There simply is no safe harbor. The debt collector must make a risk management business decision with regard to voice-mail messages and select the lesser of three evils: “hang up” if the consumer’s answering-machine message comes on in order to avoid prohibited third-party communications; leave the “Hang up if not right person” message; or leave the complete Mini-Miranda warning, including the name of the caller, the identity of the debt-collection agency, the purpose of the call and a return phone number.

It is ironic that the very legislation enacted to protect consumers may, in the current environment, actually impede efforts to save borrowers’ homes. The risks

of using voice-mail messages in consumer debt collection and the chilling effect that the Mini-Miranda warning has on borrowers may soon abdicate voice mail as a means of communication with debtors. The business decision to refrain from leaving voice-mail messages will likely have the unintended consequence of impeding meaningful communications with consumers. One thing is clear: These issues will consume a significant amount of the industry’s time, effort and resources as the law is further developed by the courts. **SM**



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