WHITE PAPER
OF THE
COMMERCIAL LAW LEAGUE OF AMERICA

INTRODUCTION

The Commercial Law League of America (CLLA) is a 112-year-old national organization of attorneys, collection agencies, and other experts in credit and finance actively engaged in the fields of debt collection, commercial law, and bankruptcy and reorganization. The CLLA is the publisher of the award-winning Commercial Law Journal, and a leading provider of legal education to collection attorneys and agencies throughout the country. While it has long been associated with the representation of creditor interests, the Commercial Law League has also been an advocate for the fair, equitable, and efficient administration of collection, commercial and bankruptcy cases for all parties-in-interest. The League has been firmly committed to policing its own industry and has regularly provided articles and presentations to its members on consumer and commercial law issues, including many programs since the late 1980's on the FDCPA and related consumer law issues.

Through its representatives, the CLLA has testified before Congress on numerous occasions, and has provided expert testimony in the fields of collections and bankruptcy and reorganization. The League has appeared as *amicus curiae* before the United States Supreme Court and multiple federal appeals courts on issues ranging from FDCPA to TILA to bankruptcy.

ISSUES AND DISCUSSION

The League is concerned with the failure of Congress to modernize the FDCPA to keep pace with technologies which are now a part of our daily lives, but which either did not exist or were in their infancy in 1977 when the FDCPA was enacted. The failure to update the Act serves the interests of consumers as little as it serves those of the collection industry, and recent court decisions have the effect of seriously impairing consumer privacy.

The CLLA is urging the FTC to support a modernization of the Act that would address current technological issues. The League is also urging a change in the Act to preserve vital common law immunities from liability for the contents of pleadings and for witness testimony.

1. Voice Mail

Recent court decisions affecting voice mail messages by debt collectors have had such an impact upon both debt collection and consumer privacy interests that the League regards this as the most important of the technology issues to be addressed. When the FDCPA was adopted in 1977, answering machines

were used by few, if any debtors. Today, answering machines and voice mail are commonplace. The League has been unable to identify any statistics on the number of consumers or households with answering machines or voice mail. However, a recent report indicated that

- 12.8% households did not have a traditional landline telephone, but did have at least one wireless telephone.
- More than one-half of all adults living with unrelated roommates (54.0%) lived in households with only wireless telephones.
- Adults renting their home (26.4%) were more likely than adults owning their home (5.8%) to be living in households with only wireless telephones.
- One in four adults aged 18-24 years (25.2%) lived in households with only wireless telephones.
- Nearly 30% of adults aged 25-29 years lived in households with only wireless telephones.
- Adults living in poverty (22.4%) were more likely than higher income adults to be living in households with only wireless telephones.[1]

Given the fact that voice mail is a standard feature with virtually all cell phone services, these statistics demonstrate that, unlike 1977, debt collectors today are being faced with and must deal with voice mail on a regular basis. It should also be noted that these figures address only those consumers who have only wireless phones. The League suspects that almost all non-homeless consumers have some sort of voice mail access, either at home, at work, or both.

Section 807(11) of the FDCPA[2] mandates what is known to the debt collection industry as the "mini-Miranda" warning:

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[1] *See* "Wireless Substitution: Early Release of Estimates Based on Data from the National Health Interview Survey, July – December 2006" by Stephen J. Blumberg, Ph.D., and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics (May 14, 2007).

[2] 15 U.S.C. § 1692e(11).

> **§ 807. False or misleading representations**
>
> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
> . . .
>
> (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action. [3]

Historically, the position taken by the collection industry was that voice mail/answering machine messages which do not convey information regarding consumers' debts are not "communications" for FDCPA purposes; therefore, they do not trigger the duty to give the mini-Miranda warning. The basis of this position is the FDCPA's definition of the term "communication."

> The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.[4]

A voice mail message which does not convey information regarding the consumer's debt is definitionally not a "communication" as defined in the FDCPA; therefore, such a message should not be subject to Section 807(11). This position is consistent with the FTC's Staff Commentary on the FDCPA, which states:

> The term [communication] does not include situations in which the debt collector does not convey information regarding the debt, such as:
> - A request to a third party for a consumer to return a telephone call to the debt collector, if the debt collector does not refer to the debt or the caller's status as (or affiliation with) a debt collector.

[3] Multiple state laws impose a similar obligation. *See, e.g.,* 32 Col. Rev. Stat. Ann. § 12-14-107(l)(l); Iowa Code § 537.7103(4)(b); Me. Rev. Stat. § 11013(2)(K-1); N.C. Gen. Stat. § 75-54(2); Tex. Fin. Code Ann. § 392.304(5).
[4] 15 U.S.C. § 1692a(2).

Until last year the collection industry generally avoided leaving mini-Miranda warnings on answering machines and voice mail out of a genuine concern for consumer privacy and a fear that such message would result in unintended third-party disclosures that violate Section 805(b).[5] Prior to the issuance of the decisions discussed below the majority of collection industry members had policies that prohibited leaving voice mail messages which disclosed information about a debt or which indicated that a call was for collection purposes. In light of the enforcement position of the Commission (a position which matched the reality of consumer debt collection) those policies were both reasonable and appropriate.

However, in 2005, the United States District Court for the Southern District of California issued an order in *Hosseinzadeh v. M.R.S. Assocs., Inc.,* 387 F. Supp. 2d 1104 (C.D. Cal. 2005), in which the court concluded that answering machine messages are "communications for FDCPA purposes."

> While the messages may not technically mention specific information about a debt or the nature of the call, § 1692a(2) applies to information conveyed "directly or indirectly." Defendant conveyed information to plaintiff, including the fact that there was an important matter that she should attend to and instructions on how to do so.

Hosseinzadeh at 1116.

The League would concede that the messages at issue in *Hosseinzadeh* were not innocuous and did convey information to the recipient of the messages. The various voice mail messages left for the plaintiff in *Hosseinzadeh,* stated:

> Hello, this is Thomas Hunt calling. Please have an adult contact me regarding some rather important information. This is not a sales call, however, regulations prevent me from leaving more details. You will want to contact me at 1-877-647-5945 as soon as possible. This is a toll free number. Once again this is Thomas Hunt calling and my number is 1-877-647-5945. Thank you.
>
> This message is for Ashraf. Ashraf, my name is Clarence Davis. I have some very important information to discuss with you. I have to make a decision about a situation that concerns you. I am going to make this

[5] 15 U.S.C. §1692c(b).

> decision with or without your input. Contact my office right away at 877-647-5945, Extension 3619. Failure to return my call will result in a decision-making process that you will not be a part of.
>
> This message is for Ashraf. Ashraf my-name is Clarence Davis. I have some very important information to discuss with you in reference to a file that has been forwarded to my office that involves you personally. Contact my office right away at 877-647-5945, extension 3618. Failure to return my call will result in a decision making process that you will not be a part of.
>
> This message is for Ashraf. Ashraf, my name is Clarence Davis. I have some very important information to discuss with you. There has been a trial that has been sent to my office that I'm sure you're not aware of but involves you personally. Contact me right away at 877-647-5945, extension 3618. Failure to return my call will result in a decision making process that you will not be a part of.
>
> Hello! This is Thomas Hunt calling. Please have an adult contact me regarding some rather important information. This is not a sales call, however, regulations prevent me from leaving more details. You will want to contact me at 1-877-647-5945 as soon as possible. This is a toll free number. Once again this is Thomas Hunt calling and my number is 1-877-647-5945. Thank you.

The defendant in *Hosseinzadeh* argued that the messages in question were not "communications" as defined in the Act, but the Court rejected that argument, stating:

> The Court concludes that the messages left by defendant on plaintiff's answering machine constitute "communications." The messages at issue appear to fall within § 1692a(2)'s definition of "communication." See Ahart § 2:43 (citing FTC Staff Commentary on FDCPA, 53 Fed. Reg. 50103 (Dec. 13, 1988) (rejecting contentions that "contacts that do not explicitly refer to the debt are not communications' and, hence, do not violate any provision where that term is not used" and concluding that some contacts that do not mention debt may refer to the debt "indirectly," thereby constituting communications). While the messages may not technically mention specific information about a debt or the nature of the call, § 1692a(2) applies to information conveyed "directly or indirectly." Defendant conveyed information to plaintiff, including the fact that there was an important matter that she should attend to and instructions on how to do so. Defendant further admits that the calls

> were merely the first step in a process designed to communicate with plaintiff about her alleged debt. Mot. at 14; McCusker Decl. P 3.
>
> Because it appears that defendant's messages are "communications" subjecting defendant to the provisions of § 1692e(11), it also appears that defendant has violated § 1692e(11) because the messages do not convey the information required by § 1692e(11), in particular, that the messages were from a debt collector. Accordingly, the Court, sua sponte, finds it appropriate to treat the matter as a motion for summary judgment by plaintiff and to grant plaintiff's motion.

The League does not contend that the *Hosseinzadeh* messages were proper, nor that they were consistent with the collection industry standards regarding such messages since they clearly did convey information regarding a debt, thereby making them "communications." However, the League does believe that the mini-Miranda warning has no place in a proper voice mail message.

Subsequent to the *Hosseinzadeh* decision, on March 25, 2006, the United States District Court for the Southern District of New York issued an opinion in *Foti v. NCO Financial Systems*, 424 F.Supp.2d 643 (S.D.N.Y. 2006). One of the issues before the Court was NCO's motion to dismiss on the issue of whether a "mini-Miranda warning" must be given in voice mail messages left for consumers. The Court's reasoning in denying the motion presents the collection industry with the "Hobson's choice" of either leaving no messages for consumers or leaving messages which contain the mini-Miranda warning, thereby risking unintentional third-party disclosures in the name of FDCPA compliance.

The message at issue in *Foti* was a "uniform, pre-recorded, and standardized message" which 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 class plaintiffs in *Foti* alleged that the prerecorded message violated the FDCPA by failing to include a mini-Miranda warning. The plaintiffs also alleged that the defendant had violated Section 806(6), which forbids "the placement of telephone calls without meaningful disclosure of the caller's identity."

In its discussion the *Foti* Court acknowledged:

> In order to be subject to some of the protections of the FDCPA, correspondence must be a "communication" within the meaning of the Act.

However, the *Foti* Court also stated:

> In any event, NCO's Memorandum of Law in support of its Motion failed to cite one case in support of its position that the January 18 Pre-Recorded Message is not a communication, and pointed to only one case at oral argument. (Tr. 7) Given this paucity of authority, the Court has little difficulty in rejecting NCO's narrow interpretation of the word "communication," and concludes that the January 18 Pre-Recorded Message is protected as a "communication" under the FDCPA.

The impact of these two decisions is that collection industry members are now forced to leave mini-Miranda warnings as part of their voice mail/answering machine messages. Doing so, however, exposes an industry member to the types of claims that the industry's historical standard was designed to avoid. In leaving a message that contains the mini-Miranda warning the collector risks the possibility that the machine may actually belong to a person other than the consumer,[6] that the message might be screened or heard by someone other than the consumer, or that (with some answering machines) whoever is in the room where the answering machine is located will hear the message as it is left.

A second impairment of consumer privacy rights created by these decisions is that they also require a debt collector to state his or her employer's name in voice mail messages, as both cite with favor the decision in J*oseph v. J.J. Mac Intyre Cos., L.L.C.,* 281 F. Supp. 2d 1156 (N.D. Cal. 2003), another case that dealt with voice mail messages. In *Joseph,* the plaintiff complained, in part, that the Defendant had violated Section 806(6)[7] by "the placement of telephone calls without meaningful disclosure of the caller's identity." The defendant's automated message system did not disclose that the call was from a debt collector or on behalf of the creditor SF General Hospital.

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[6] Many answering machine and voice mail messages do not identify the name of the device's owner.

[7] 15 U.S.C. § 1692d(6).

> Hi. This is Julie Green and I have an important message for you. To reference your message, please call 1-800-777-9929. Again, my name is Julie Green. Please call me to retrieve your message at 1-800-777-9929.

While the *Joseph* court indicated that the "'meaningful disclosure'" required by Section 806(6) has been made if an individual debt collector who is employed by a debt collection company accurately discloses the name of her employer and the nature of her business and conceals no more than her real name, such an interpretation is inconsistent with the express wording of the FDCPA; nevertheless, the *Hosseinzadeh* and *Foti* courts followed *Joseph*.

It is clear that the *Joseph* decision disregards both the express wording of the Act and the rules of legislative construction. Section 806(6) forbids:

> except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

The text of the Act requires disclosure of the identity of "***the caller,***" not the identity of the caller's employer. In fact, when Congress intended to refer to an employer of an individual it had no trouble in doing so. Section 805(a)(3) of the Act[8] refers to the "consumer's employer." Moreover, Section 807(14)[9] forbids the use "of any business, company, or organization name other than the true name of the debt collector's business, company, or organization." It is quite clear that Congress knew how to mandate identification of the caller's employer and could have done so if that had been its intention.

As the Supreme Court has so clearly stated:

> When the statute's language is plain, "the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms."

Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000), *quoting United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989); *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917). On this point, the statutory language is plain. What must be disclosed is "***the caller's***" identity and not that of the caller's employer. Courts should neither enlarge nor restrict the

[8] 15 U.S.C. § 1692c(a)(3).
[9] 15 U.S.C. § 1692e(14).

effect of a Congressional act. *See Iselin v. United States*, 270 U.S. 245, 251, 70 L. Ed. 566, 46 S. Ct. 248, 62 Ct. Cl. 755 (1926); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 56 L. Ed. 2d 581, 98 S. Ct. 2010 (1978).[10] The *Joseph* court clearly enlarged the wording of the Act by requiring disclosure of the identity of the individual collector's employer and the nature of its business. This error was perpetuated by the *Hosseinzadeh* and *Foti* courts.

Although the Defendant in *Joseph* raised the privacy and third-party disclosure concerns that have driven the industry standard, the District Court rejected those arguments. The arguments were also rejected in *Hosseinzadeh* and *Foti,* where the courts also held that a message must identify the collector's employer and the nature of its business. The *Hosseinzadeh* court reasoned:

> The Court finds the decision in *Joseph I* to be persuasive in that "meaningful disclosure" presumably requires that the caller must state his or her name and capacity, and disclose enough information so as not to mislead the recipient as to the purpose of the call or the reason the questions are being asked.

It is that final sentence which demonstrates the fallacy of the theory. A voice mail message does not require that *any* questions be answered; rather, it is a request for a return call. The purpose of the Act is served as long as the message identifies the caller in language specific enough for the consumer to know whose call to return and the identity of the caller in the event of any suit.

The effect of these decisions is that collectors are mandated to identify their company names, even when those names state or imply that the employer is in the collection business. Businesses that have names which include words such as "Collections," "Collectors," "Debt," *etc.* will be identified in voice mail messages left for consumer debtors. This is a court-created situation which

[10] The rationale for this policy is that the Supreme Court traditionally grants deference to "the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill" and requires the Court "to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 471 U.S. 84, 95, 85 L. Ed. 2d 64, 105 S. Ct. 1785 (1985), *citing Richards v. United States*, 369 U.S. 1, 9, 7 L. Ed. 2d 492, 82 S. Ct. 585 (1962). "Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982) (quoting *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977)).

wholly fails to further the public policies embodied in the FDCPA and which injures, rather than serves consumer interests.

Although the Act's impact upon voice mail messages has not yet reached an appellate court, other district courts have followed *Hosseinzadeh* and *Foti*. For example, the case of *Leyse v. Corporate Collection Services*, 2006 U.S. Dist. Lexis 67719 (S.D.N.Y. 2006) involved the use of an Automated Dialing and Answering Device which left three different messages on the Plaintiff's answering machine, two of which[11] were worded as follows:

> "Hello, this is Michael. I'm calling from CCS. I'm calling re - [sic] - I need a return call tomorrow or today. The number is 800-741-9922. Once doing so, ask for extension 7092. It's urgent that I speak to you today. Thank you."
>
> "This is Tom Green calling from CCS. I have a very important matter to discuss with you. My phone number is 800-741-9922. Again, my toll-free number is 800-741-9922."

The *Leyse* plaintiff alleged three violations of the FDCPA: (1) a violation of § 806(6) by failing to make a meaningful disclosure of the identity of the caller; (2) a violation of § 807(11) by failing to give the mini-Miranda warning; and (3) a violation of § 807(10) by the use of a false representation or deceptive means to collect or attempt to collect a debt or to obtain information concerning a consumer. Both the plaintiff and the defendant in *Leyse* moved for summary judgment, as the facts were not in dispute.

The district court granted summary judgment in favor of the Plaintiff on the claim under § 806(6), finding that use of the term "CCS" was not a meaningful disclosure of the caller's identity. The Defendant argued that the phone messages were not a "communication" as defined by the FDCPA and that disclosure of any further information would result in a violation of the privacy provisions of the FDCPA which prohibit almost all communications with third parties. The Defendant argued that they were being placed between the rock of having to make meaningful disclosures and the hard place of the FDCPA's prohibition of even inadvertently communicating with a third party who might listen to the phone message.

[11] The wording of the third message was not included in the opinion, other than a note that the message referred to a specific individual who was identified as an attorney and that the message did not give the name of the individual calling nor identify CCS as a debt collector.

In response, the *Leyse* Court first noted that § 806(6) relates to conduct and not communications. Hence, whether or not the phone message constituted a "communication" was not relevant to the obligation to make a meaningful disclosure of the caller's identity. The Court next pointed out that the Plaintiff had never had any prior dealings with CCS and had no way of knowing who or what was being referred to. The Court specifically stated that "mere reference to 'CCS' does not amount to meaningful disclosure."

As to the "disclosure vs. privacy" argument, the Court viewed this as an argument by CCS that they were "expressly entitled to use pre-recorded messages for debt collection." In response, the *Leyse* Court stated that "CCS has been 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."

The League must concede that Section 806(6) does, in fact, apply to the placement of calls, rather than to "communications," as such a method of statutory analysis is consistent with the analysis that should be used in interpreting the Act. However, the CLLA asserts that the courts and the Commission should recognize a distinction between a "live" message left by an actual collector and a pre-recorded message left by a computer/dialing device. In the former situation the "caller's identity" is that of the individual employee, whereas in the latter situation the caller is the computer or dialer, *i.e.,* the collection company. Such an interpretation is consistent with the express wording of the Act and complies with the Supreme Court's dictate neither to restrict nor expand the statutory language.

While such an interpretation presents a workable solution, it is not truly one for the 21st century. The reality of modern collections is that computers and dialers are essential tools of a collection practice. The Act should be modernized to permit the use of such tools in a manner that is protective of consumer privacy rights.

With regard to the mini-Miranda issue, the *Leyse* decision illustrates the slippery slope of judicial activism. Responding to the argument that the phone message did not constitute a "communication" under the FDCPA, the Court cited *Foti*, *supra*, finding that "CCS' Messages were intended as the first phase of an ongoing communication 'regarding a debt." Thus, the narrow, non-Webster's, statutory requirement that an FDCPA "communication" convey

information regarding a debt has now been expanded to the process leading up to the conveying of such information. Such an expansion of the FDCPA is inconsistent with the text of the Act.

It is clear that the district judges in these cases appear to believe that the following rules should apply to all voice mail messages left by debt collectors on consumers' answering machines:

- The collector should identify him/herself.
- The collector should give the company name of his/her employer.
- The collector should give a mini-Miranda warning.
- The collector should not leave a message unless he/she has no reason to anticipate that anyone other than the debtor will overhear or retrieve the message.

The consequences of *Joseph, Hosseinzadeh, Foti,* and *Leyse* are that debt collectors are left with a no-win proposition. If they leave voice mail messages without mini-Miranda warnings they risk class actions. If they leave messages that contain mini-Miranda warnings they risk individual claims for third-party disclosures. Similar problems exist when identification of the caller's employer would indicate that the call concerns a collection matter.

The real-life implications of reading Section 805[12] in conjunction with the cases discussed above appears to be that collectors may be unable to leave voice mail messages unless they are certain that the answering machine/voice mail belongs to the consumer and there is no reason to anticipate that anyone other than the consumer will retrieve or overhear the message. It is easy to suggest that collectors should simply not leave messages, but such a suggestion is extremely naïve. A cessation of the practice of leaving voice mail messages will have three clearly predictable results:

1. collection rates will drop, and the resulting losses will be passed on to and borne by those consumers who do pay their bills;

[12] 15 U.S.C. § 1692c.

2. consumers will feel harassed by callers who do not leave messages; and

3. consumers will be more likely to be sued, as creditors, debt buyers, and collectors will have fewer options if they cannot communicate with the consumers.

Given the concerns of both the Commission and various consumer groups regarding the recent increases in collection suits against consumers, it is clear that an interpretation of the Act that hinders non-legal collections is not likely to serve the interests of consumers any more than it serves the interests of debt collectors. Consumer interests would be bolstered by an amendment to the FDCPA which would permit voice mail messages to be left in a way that protects consumer privacy. The League suggests that Section 805 should be amended to add a new sub-section stating:

> e. VOICE MAIL. A message left on voice mail or an answering machine is not a violation of this act if the message is limited to the name of the caller, the name of the consumer, a request for a call back to the caller's toll-free number, and the caller's file or reference number. Sections 1692d(6) and 1692e(11) shall not apply to a message that is limited to such information.

Alternatively, if the Commission truly believes that consumer interests are served by having collectors leave mini-Miranda warnings in voice mail messages it should support amendments to Sections 806(6) and 807(11) stating:

> A debt collector shall not incur liability to a consumer or a third party for leaving a voice mail or answering message for the consumer which states the information required by this sub-section.

2. Cell Phones

When the FDCPA was enacted in 1977, modern cell phone technology did not exist. Car phones were a rare, luxury item, and Congress could not have contemplated the current cell phone culture. The statistics cited above in Section 1 clearly show how integral a part of our 21st century culture cell phones have become.

Numerous courts have referred to the FDCPA as a strict liability statute. *See Clark v. Capital Credit*, 460 F.3d 1162 (9th Cir. 2006); *Turner v. J.D.V.B. & Assc.*, 330 F.3d 991 (7th Cir. 2003); *Russell v. Equifax*, 74 F.3d 30 (2nd Cir. 1996). This is tempered only by the *bona fide* error defense found in Section 813(c).[13] Strict liability becomes especially significant when considering the issue of communicating with a consumer on his/her cell phone.

Section 805 of the FDCPA[14] deals with any communication in connection with debt collection. Sub-section (a) contains a number of prohibitions including communicating with a consumer:

> (1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

This provision of the FDCPA includes several potential pitfalls for the unwary debt collector. The first is contacting the consumer at any unusual time or place. By their nature, cell phones accompany their users wherever they may go, including destinations which may be considered as an "unusual place" for purposes of the FDCPA. The possibilities in this regard are, quite literally, endless -- from the debtor's place of employment to a position beside the hospital bed of the debtor's dying relative.

A debt collector who contacts a consumer on a cell phone can expect that (s)he will sometimes reach the consumer at his or her place of employment.[15] This may be considered as a time which is inconvenient to the consumer. Calling persons of particular religious beliefs at certain times of the day and/or on certain days of the week or year may result in contacts at inconvenient times. The possibilities are endless, and collectors will not know of a particular consumer's religious beliefs unless and until (s)he is informed by the consumer.

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[13] 15 U.S.C. § 1692k(c).
[14] 15 U.S.C. § 1692c.
[15] If the debt collector knows that the debtor's employer does not allow such call, they may also incur liability pursuant to § 1692c(a)(3).

When contacting a debtor on their cell phone, a debt collector may never be sure what time zone the debtor is in. Because consumers both travel with their cell phones and keep the same numbers when moving across the country, calling someone who lives on the East Coast of the United States at what the debt collector believes to be 8:30 a.m. may result in liability under § 805 if the recipient of the call happens to be in California, where it is 5:30 a.m., at the time the call is received.

Clearly, cell phones present some challenges to the collection industry for which there are no perfect solutions under the Act. As pointed out above, many people have abandoned fixed telephones and use cell phones as their only telephones. However, there are also many people who treat their cell phones as private, desiring that only close friends and associates contact them on their cell phones. In this instance, any call by a debt collector to a cell phone might be considered conduct the natural consequence of which is to harass in violation of § 806.

Yet another problem is the fact that any contact with someone on a cell phone results in some costs to the person who owns the cell phone. It is unclear whether courts would consider such costs to be give rise to liability under Section 808(5).[16] Liability attaches under that sub-section only if the charges are made by concealment of the true purpose of the communication.

These problems are exacerbated by the fact that: (1) the collector may not know that (s)he is calling a cell phone number; and (2) anyone calling a consumer on a cell phone has no way of ascertaining where the recipient is at any given time. With the current ability to transport telephone numbers from one service to another, what was a "land line" yesterday may be a cell phone today. A number which yesterday would reach someone only at home in Bangor, Maine, might reach him at work tomorrow in Hawaii.

Mistakes will be made, and the debt collectors who inadvertently run afoul of one of these situations have only the refuge to be found in the FDCPA's *bona fide* error defense. That defense requires the maintenance of procedures reasonably adapted to avoid the violation. Any meaningful discussion of the procedures necessary to avoid the errors discussed would be beyond the scope of this paper. The procedures to be maintained will probably develop over time, and they may even become the subject of state or federal legislation. However,

[16] 15 U.S.C. § 1692f(5).

the League submits that the FDCPA should be updated to recognize that cell phones are rapidly replacing land lines as consumers' primary phones and to protect the ability of debt collectors to place calls to those primary lines. The "ceasing communications" provision of Section 805(2) provides consumers with a simple mechanism to stop unwanted calls to their cell phones.

3. Caller ID

The League agrees that it is not permissible for a collector to use a false Caller ID, as such conduct would run afoul of Section 807(10)'s general prohibition of the use of false representations and deceptive means to collect debts and Section 807(14)'s specific prohibition against the use of any name other than the debt collector's true business, company, or organization name. However, two issues that are of concern to the League are:

a. can Caller ID be blocked; and

b. must the Caller ID disclose that the call is from a debt collector?

These seem at first blush to be somewhat silly questions, yet at least one court has suggested that the Caller ID message must comply with Section 807(11), and that Section 806(6) applies to Caller ID. *See Knoll v. IntelliRisk Management Corporation*, 2006 U.S. Dist. LEXIS 77467 (D.Minn. 2006). Given the 15-character limit on Caller ID, this is simply unrealistic.

The League would begin with an acknowledgement that certain Caller ID practices are, and should be prohibited by the FDCPA. Specifically, the practice of using false caller identification text to trick the consumer into thinking that a different business is calling or (even worse) that a law enforcement agency is calling would be practices prohibited by Section 807 of the Act. The prohibition of such conduct is not the issue that is of concern to the CLLA.

Caller identification devices create a somewhat difficult problem for debt collectors because, like answering machines, the collectors have no way of knowing when they will encounter one of these devices when making a telephone call, nor will they automatically know that they have run afoul of a caller identification device even after making the call. The Caller ID technology creates a unique difficulty as a result of the nominal amount of information that can be conveyed. Such information is essentially limited to a name

(possibly not even allowing for a complete name) and/or a ten digit telephone number. At present there is a 15-character limit on the amount of information that a caller can place into its caller identification.

Section 806(6)[17] prohibits the placement of telephone calls to debtors without meaningful disclosure of the caller's identity. The question then arises as to whether or not the information imparted by a Caller ID device (of which the debt collector will not be aware) provides a "meaningful disclosure." A second Caller ID issue is whether the mini-Miranda warning is required in the caller identification. Since the current level of technology (or at least the restrictions imposed by telephone service providers) only allows fifteen characters, compliance with such a requirement is not possible.

Two Caller ID decisions are of particular concern to the collection industry. In the first, *Knoll v. Intellirisk*, 2006 U.S. Dist. Lexis 77467 (D.Minn. 2006), the defendant attempted to contact the plaintiff by telephone. Although the plaintiff did not answer, the telephone number appeared on the plaintiff's Caller ID device and the caller was identified as "Jennifer Smith." When the plaintiff returned the call, he was informed that he had reached Allied Interstate, a debt collector, and that the company did not employ a "Jennifer Smith." The plaintiff argued that meaningful disclosure must be made even on a caller identification device. The agency argued that meaningful disclosure was impracticable because of the limited text available on Caller ID. The district court stated that the defendant's argument was baseless, finding that the "device need only display that the call is from a debt collector." Unfortunately, the court did not feel the need to explain how that could be accomplished.[18]

In *Udell v. Kansas Counselors*, 313 F.Supp. 2d 1135 (D.Kan. 2004), the defendant attempted to collect a number of separate debts from the plaintiff. The defendant sent letters to the plaintiff and subsequently made automated telephone calls to the plaintiff. The plaintiff became aware of the calls due to his Caller ID system. In a letter from the plaintiff's attorney, the attorney listed the telephone numbers from which the telephone calls to the plaintiff were made.

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[17] 15 U.S.C. § 1692d(6).

[18] Oddly, the *Knoll* court did not place a great deal of weight to the fact that the debt collector had used a fictitious name. The Court stated that the use of an alias was allowed as long as it is disclosed that the call is from a debt collector. Had the decision been based on the use of a name other than that of the caller the League would have far fewer concerns about the case.

The plaintiff in *Udell* alleged that the defendant had violated the FDCPA by not making a meaningful disclosure of its identity because the telephone calls were not answered and no messages were left. The court found that there was "nothing harassing, oppressive, or abusive about this conduct. Certainly, it does not fall within the realm of the other types of egregious conduct specifically prohibited by § 1692d." *Id.* at 1144.

The *Udell* Court also noted as follows:

> The court cannot envision a theory that KCI affirmatively attempted to hide its identity when it placed the telephone calls because Mr. Bryan's May 13, 2003, letter lists the KCI telephone numbers from which the four telephone calls were placed to plaintiffs. Thus, it appears that plaintiffs knew KCI called them by virtue of a caller identification system and further that KCI did not attempt to block plaintiffs' caller identification when it placed the telephone calls.

Id. at 1143. This is important in two respects. While we are not told what information was left on the Caller ID, we are told that sufficient information was given to provide meaningful disclosure. However, it is strongly implied, if not directly stated, that blocking the collector's identification would have violated the statute. Thus, at least according to the *Udell* court, it is possible to provide sufficient information on a Caller ID to make a meaningful disclosure and it would appear that providing a telephone number and identification of the debt collector is sufficient.

The League can find no basis in the Act for the proposition that a debt collector's caller identification message must state specifically its name, its number, or that it is a debt collector. The requirement of Section 807(11) that the caller identify itself as a "debt collector" applies only to a "communication" with the consumer. However, the term "communication" is narrowly defined as "the conveying of information regarding a debt . . . ." Since the caller identification conveys no information regarding the debt it cannot be a communication that is subject to Section 807(11).

More to the point, it is generally undesirable and not in the best interests of consumers for Caller ID to display the words "debt collector" as there is far too great a likelihood that such a display would result in countless third-party disclosures to friends, roommates, family members, or others who may be in the consumer's home. Consumers are far better off if Caller ID shows only a

number or nothing at all, as such results are far less likely to lead to embarrassing third party disclosures.

No case has reached the issue of whether or not the mini-Miranda warning must be given in the context of a caller identification device. It is suggested that, like the issue of leaving messages on answering machines, the resolution of this issue will be based upon the FDCPA's definition of a communication as the conveying of information regarding a debt directly or indirectly to any person through any medium. Some information will be conveyed when making a call to a telephone which is connected to, or includes, a Caller ID device, but that information concerns the caller and not the debt. Thus, caller identification information does not satisfy the Act's definition of a "communication."

If "common sense" is applied it will be difficult for even the most anti-creditor courts to hold that the mini-Miranda warning must be conveyed to a Caller ID device. Sadly, sense is not always common, and the League urges the FTC to take the position that caller identification is not a communication for FDCPA purposes. Such a position would not enable collectors to use false caller identification, as the use of any "false representation or deceptive means" to collect a debt would still be prohibited by section 807(10).

4. Pagers

Pagers provide a mechanism by which debt collectors may contact consumers and leave a digital call-back request. However, the League is concerned about whether Sections 806(6) and 807(11) apply to pager calls. The problems discussed above with regard to voice mail and Caller ID could apply equally to pager calls.

5. Electronic Mail

Realistically, many consumers would prefer to communicate with collectors by email, rather than talk to the collectors. However, what are the limits under the FDCPA for the use of email? What consent, if any, is required to send an email to a consumer? Given the fact that many consumers use workplace email addresses (for which they have no privacy rights), is email to be treated as the same as standard letters or more akin to the forbidden post card?[19] Is

[19] *See* 15 U.S.C. § 1692f(7).

email adequate for the sending of required notices (e.g., post-dated checks, verification of debt, validation notice)? What if the consumer expressly consents to receiving all notices required by state or federal law by email?

The League asserts that email to a consumer's email address should be treated no differently than "snail mail." There is a reasonable expectation that the consumer will be the recipient of email messages directed to his or her email address. The consumer has the choice of deciding whether to delete the email in such a way that it cannot be retrieved by a third party. The League suggests that the Act should be amended to clarify its application to email communications. Given the fact that many consumers are more likely to read email than "snail mail" and email programs contain tools permitting the sender to obtain a read receipt at no cost, the Act should specifically provide that any communication permitted or required by the FDCPA may be given by email, provided that the email is sent with a read receipt requested.

6. Skip-tracing ("Location Information")

Most calls to verify employment result in a transfer to the Human Resources Department. May a collector send a fax to an HR dept? If so, under what conditions?

Fax technology was not in use in 1977, and Congress could not have contemplated it. A debt collector who sends a fax to a Human Resources Department is required by the Telephone Consumer Protection Act[20] to include on the fax a stamp stating the name of the sender. However, Section 804 of the FDCPA[21] forbids a debt collector who is seeking to verify a consumer's employment to identify the collector's employer unless specifically requested. Moreover, a debt collector may not send a communication which creates a false impression as to its source (Section 807(9)), nor may (s)he use any company name other than the debt collector's true company name (Section 807(14)). These restrictions combine to make it frequently impossible for a collector to send a fax to the HR Department. Congress clearly intended to allow debt collectors to verify consumers' employment, and the Act needs to be clarified to address how and when facsimile communications are permitted.

[20] 47 U.S.C. § 227.
[21] 15 U.S.C. § 1692b.

7. **Litigation**

Recently, a number of courts have allowed the common law litigation privilege to serve as a defense to suits based on alleged unfair debt collection practices. *See, e.g., Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007); *Sengchanthalangsy v. Accelerated Recovery Specialists, Inc.*, 473 F. Supp.2d 1083 (S.D.Cal. 2007); *Cox v. Great Seneca Financial Corp.*, 2007 WL 772937 (E.D.Mo. 2007). However, in *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007) the Court of Appeals recently rejected application of the common law litigation immunity privilege in FDCPA cases. Such a situation is simply untenable. As noted in Section 2 above, multiple courts have held that the FDCPA is a strict liability statute. Combining strict liability with the absence of judicial immunity creates the very problem that the Supreme Court denied could occur in its opinion in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

The League certainly accepts that certain specific portions of the FDCPA were intended to apply to litigation. For example, filing suit in an improper venue would give rise to liability under Section 811.[22] However, as the League pointed out in its *amicus curiae* brief in *Heintz*, application of the Act to litigation creates a variety of anomalies. Of greatest concern to the CLLA is the possibility that the elimination of litigation immunity could make attorneys strictly liable insurers of the success of their clients' claims.

The text of the *Heintz* decision is inconsistent with the imposition of strict liability such as the Act requires:

> In any event, the assumption would seem unnecessary, for we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an "action that cannot legally be taken."

Heintz at 514 U.S. 295-96. The Court's rejection of strict liability in connection with litigation is inconsistent with the rejection of litigation immunity by the Fourth Circuit in *Sayyed*. There are existing remedies for the filing of bad-faith lawsuits and for malicious prosecution. Eliminating litigation immunity diminishes the practice of law and chills the ability of creditors to secure adjudications of their rights. Such an outcome furthers no legitimate public policies. In fact, this situation has led to consumer lawyers, theoretically the

[22] 15 U.S.C. § 1692i.

stalwart opponents of SLAPP suits, indulging in their own form of SLAPP litigation by using claims against collection attorneys to try to impair the collection suits that those attorneys file.

The League is also concerned about the impairment of the witness immunity privilege reflected in cases such as *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006), in which the Court of Appeals held that FDCPA liability could attach to the use of an allegedly false affidavit by a debt collector. That privilege is a vital one, as it serves both to encourage witnesses to come forward to testify and, when they do testify, not to distort their testimony out of a fear of being held civilly liable for the testimony that they give. *See Briscoe v. LaHue*, 460 U.S. 325, 345-46, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983).

In light of *Todd* and *Sayyed*, the Commercial Law League believes that the FDCPA should be clarified to state that the Act does not alter nor impair the common law privileges of witness immunity and litigation privilege. The League does not seek to eliminate the existing common law exceptions to such immunity; rather, it merely seeks a recognition in the FDCPA both that such immunity can exist at common law and that the FDCPA did not preempt the immunity to the extent that it can be invoked under the applicable, non-FDCPA case law. Such an amendment would provide clarity and guidance to the courts for future interpretation of the Act when applying it to litigation activities.

8. Account Documentation

The FDCPA does not require a debt buyer or its collection agency or attorney to have account documents in-hand before making demand on a consumer. In *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324 (6th Cir. 2006), the plaintiff alleged that the defendant violated the FDCPA by filing a lawsuit to collect a purported debt "without the means of proving the existence of the debt, the amount of the debt, or that Defendant Great Seneca . . . owned the debt." The District Court dismissed Harvey's claims under Sections 806 and 807(10), and the Court of Appeals affirmed, finding that: "[e]ven when viewed from the perspective of an unsophisticated consumer, the filing of a debt-collection lawsuit without the immediate means of proving the debt does not have the natural consequence of harassing, abusing, or oppressing a debtor." Similarly, in *Deere v. Javitch, Block and Rathbone LLP*, 413 F.Supp.2d 886 (S.D. Ohio 2006), the Court stated:

> However, filing a lawsuit supported by the client's affidavit attesting to the existence and amount of a debt, is not a false representation about the character or legal status of a debt, nor is it unfair or unconscionable. A defendant in any lawsuit is entitled to request more information or details about a plaintiff's claim, either through formal pleadings challenging a complaint, or through discovery. [Plaintiff] does not allege that anything in the state court complaint was false, or that the complaint was baseless. She essentially alleges that more of a paper trail should have been in the lawyers' hands or attached to the complaint. The FDCPA imposes no such obligation.

It is illogical (and inconsistent with the validation scheme set forth in Section 809 to require a debt collector to possess more documentation to make demand on a consumer than would be needed in order to file suit. Moreover, it is reasonable for debt collectors and debt buyers to rely on the information provided by the banks that issue credit card accounts. The card-issuing banks are usually national banks, regulated and audited by the United States Government and charged with keeping and maintaining accurate records. It is therefore perfectly reasonable for the debt buyers and their attorneys to rely on the information provided by the banks.

Members of the consumer bar have essentially mounted an attack on debt buyers and their attorneys, asserting that lawyers may not sue on (or even demand payment of) consumer debts without having full account documentation in their possession. Such a position is not supported by the statute, nor by the case law, and it frequently runs contrary to the cardmember agreements.

In *Am. Express Travel Related Servs. v. Silverman*, 2006 Ohio App. LEXIS 6327 (Ohio Ct. App., Franklin County Dec. 5, 2006), the consumer tried to raise a number of dilatory attacks on the creditor's summary judgment proof. In rejecting those arguments the Court of Appeals noted that the cardmember agreement provided that any dispute of a bill or a transaction on a bill had to be submitted in writing, no later than 60 days after the date of the first bill on which the error or problem appeared.

> Thus, to dispute any charges, appellant was required to notify appellee in writing. Appellant admits that he did so by telephone. Appellee has no record of any notifications of a dispute of charges, written or oral. Notification by telephone is insufficient to satisfy appellant's burden to

> dispute the charges. Moreover, appellant has provided no evidence of the notification, such as the date, the specific charges disputed or any written communication. Thus, no material fact was at issue and the trial court did not err in granting appellee's motion for summary judgment. Appellant's assignments of error are not well-taken.

There is no public interest in allowing consumers to violate the terms of their contracts or to manufacture nonexistent disputes long after the time for raising legitimate disputes has passed. The League submits that the FTC should side with the courts and the collection industry, recognizing that it is not necessary to have a fully documented account in order to make demand upon or sue upon the account. To allow the tiny fraction of accounts on which written disputes were timely submitted to be determinative of how collections should be handled in general would truly be a case of the very tip of the tail wagging the dog.

9. Consumer Contacts

The FDCPA does not provide for an absolute ban on calls to the workplace if the consumer's employer does not prohibit such calls. The Act states two circumstances under which a consumer can stop contacts from a debt collector at the consumers place of employment: (a) a written demand to cease communications under Section 805(c) (which applies to all communications in general); or (b) an oral or written notice as per Section 805(a)(3) that the consumer's employer prohibits such communications. Although Section 805(a) forbids communications at times or places which are known or which should be known to be inconvenient to the consumer, the League asserts that the mere fact that the consumer states "I don't want to be called at work" cannot expand that prohibition into a new form of general bar to calls at work. If it did, consumers could similarly say "it is inconvenient for you to call me at home after a hard day at work or when I'm trying to spend quality time with my family," and that would be sufficient to prohibit calls to the consumer's home. The statutory scheme does not provide for such an additional method to compel collectors to cease their communications.

As discussed above, the Act should not be expanded beyond the limits set by Congress. A collector should not be prohibited from calling a consumer at the consumer's place of employment if the consumer's employer does not forbid personal calls. A consumer can always send a "cease" letter under Section 805

of the Act if such communications are so inconvenient that (s)he is willing to demand a cessation of all communications.

10. Bogus Complaints

The collection industry has been plagued for several years by a variety of debtor scams and debt elimination schemes. The League is prepared to furnish samples of some of the documents used to perpetrate these scams, which range from the filing of fraudulent, nonexistent liens to false claims by debtors that they have copyrighted their names, to the use of rogue, non-contractual arbitration forums to generate void awards against creditors. The problem is serious enough that the Federal Reserve Board has issued directives to banks regarding what action should be taken in response to some of the scams.[23] A number of suits have been brought against bogus arbitration forums, but such entities continue to operate, duping consumers into paying them for awards that have no validity.

Additionally, many of the complaints filed with the FTC and various state attorneys general essentially boil down to a complaint that the debt collector is refusing to accept a payment plan. Such a refusal is not a violation of the FDCPA, but the FTC does not weed such complaints out of its complaint statistics. Adding insult to injury, some states' attorneys general require debt collectors to incur the time and expense of responding to such complaints, rather than taking the far more appropriate measure of informing the complaining consumers that there is no duty to accept payments on a charged-off debt nor any right to compel the taking of such payments. These failures by the Commission and the various states result in disingenuous reporting of alleged FDCPA violations and clearly flawed statistics in annual reports.

Attorneys have an ethical duty to carry out the assignments given to them by their clients. Subsequent to charge-off neither a creditor nor a debt buyer who is its assignee is obligated to accept a payment plan. It is not an FDCPA violation for the attorney's client to refuse a payment plan; therefore, it is not a violation for the attorney to refuse (in accordance with client instructions) to accept such a plan. Acceptance of a payment plan in contravention of client instructions would be an ethics violation for an attorney and a breach of fiduciary duty for a collection agency.

[23] *See, e.g.*, Federal Reserve Board Supervisory Letter SR 04-3.

The League submits that the FTC should change its policies and procedures with regard to consumer complaints about debt collection practices so as to segregate all complaints which are based solely upon refusals to negotiate, settle, or accept payment plans on delinquent debts. Such complaints should be excluded from the FTC's annual reporting of complaints against debt collectors. States should enact similar policy changes so as not to engage in deceptive annual reporting. Finally, the FTC and the state attorneys general are encouraged to develop a response form which informs consumers that a debt collector has no duty to accept a settlement or a payment plan and that no response will be required to a complaint based upon such a refusal.

The Commercial Law League would be willing to work with the FTC to develop a more accurate model of the statistical significance of the volume of consumer complaints. The conventional wisdom of both the Commission's staff attorneys and most attorneys general is that 100 complaints could actually represent 10,000 or more violations because so few consumers actually complain. While this position may have had validity when a consumer had to write a letter, buy an envelope and a stamp, and go to the post office to mail the complaint, such an analysis may no longer have any validity. The ease of filing complaints online, and the availability of the internet to the majority of consumers suggests strongly that the conventional wisdom is no longer accurate. The increase in collection industry complaints is of great concern to the League ***if*** it truly represents an increase in the number of industry violations. However, if the increase merely represents the fact that it has become easier to complain, the numbers may not represent any increase in violations at all.

The Commercial Law League proposes that the FTC work with the collection industry to determine the whether the ability to file online complaints has made the number of complaints more truly representative of the number of actual violations. If it has, the current numbers would indicate an improvement in overall compliance, rather than an increase in violations. Both the collection industry and the consumers whose interests the Commission protects are deserving of an accurate understanding of the significance of the number of complaints.

CONCLUSION

The failure of Congress to modernize the FDCPA presents substantial problems for both debt collectors and consumers. The League has proposed several

changes to the Act that would mitigate, and in some instances cure, some of these problems.

Ultimately, what is truly needed is a mechanism that can respond to the needs of both consumers and debt collectors in a rapidly changing, technologically oriented society. To that end the Commercial Law League suggests that Congress should revisit an idea that was rejected in 1977 and grant to the FTC the power to write and enforce regulations implementing the FDCPA. By allowing such regulatory authority Congress would provide a mechanism to address not only some of the problems detailed above, but also the as-yet unrecognized problems of tomorrow.