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COURT RULES VOICEMAIL MESSAGE IDENTIFYING CALLER AS DEBT COLLECTOR DID NOT VIOLATE FDCPA

The United States District Court for the District of Minnesota recently held that a message left by a debt collector on the debtor's voicemail did not constitute a "communication" under the federal Fair Debt Collection Practices Act. *Zortman v. J.C. Christensen & Assoc., Inc.*, 2012 WL 1563918 (D. Minn. May 2, 2012). The case involved a suit by a debtor against her debt collector for violating the FDCPA's prohibition on communications with third parties and was before the Court on the debt collector's motion for summary judgment.

The facts, which were not in dispute, were that Zortman had incurred credit card debt, which was assigned for collection to J.C. Christensen & Associates (JCC). In its attempt to contact Zortman, JCC called both the home and work telephone numbers that it had been given by Zortman's creditor. The work telephone number was the number for Zortman's cell phone. No one answered JCC's calls at either number, both of which were connected to voicemail with outgoing messages that did not identify Zortman by name. JCC left the following message: "We have an important message from J.C. Christensen & Associates. This is a call from a debt collector. Please call 866-391-8619." Zortman regularly lent her cell phone to her children, who accessed the phone's voicemail and heard the message.

Zortman alleged that JCC's messages violated Section 1692c(b) of the FDCPA, which provides that, except in certain situations not applicable to the case, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

In examining the FDCPA, the Court noted that while neither Congress, nor the Federal Trade Commission, addressed the use of voicemail with respect to the FDCPA, the FTC, in its commentary on communications with third parties, did address contact with telephone operators or telegraph clerks and allowed contact in certain limited situations. This discussion, the Court concluded, indicates that the FTC recognized the need to effectively transmit

messages from debt collectors to consumers and acknowledged the possibility of communicating with certain third parties to effect such transmission. The Court also noted that although the FDCPA has not been significantly amended since 1977, technology has changed significantly in that time, including the widespread use of voicemail. A bill introduced recently by Congressman Barney Frank, the Court pointed out, explicitly would permit debt collectors to leave voicemails for consumers.

The Court went on to discuss at length the interplay between the FDCPA's requirement for meaningful identification and its prohibition on third party communications in the context of telephone and voicemail contacts. It noted that, for the most part, courts have had to consider only voicemail messages that did more than just identify the caller as a debt collector (*i.e.*, they also identified the intended recipient, revealed that the intended recipient owed a debt, or both). In looking at JCC's message, the Court noted that in today's world, it virtually is impossible to use a telephone without revealing directly or indirectly that a debt collector is calling (*e.g.*, even if JCC left no message, Zortman's cell phone's missed call log would reveal JCC's number, which is readily identifiable through a reverse directory).

As to whether JCC's message was a "communication" under Section 1692c(b), the Court noted that the FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." In order to fit within this definition, the Court said, a third-party listener would have to make two key inferences – first, that because it was Zortman's phone, that she was the intended recipient, and second, that the only reason a debt collector calls is to collect a debt. Inferences and assumptions, the Court found, are not "indirect communications." And, labeling the message as "important" does not, as Zortman argued, convert the message into an indirect conveyance of information about a debt. Thus, the Court concluded, the message left by JCC did not constitute a "communication" with a person other than the consumer.

Notably, the Court specifically discusses the fact that finding a violation for merely identifying oneself as a debt collector effectively would remove the telephone as a means of communication (action the Court seemed to view as significant). As the Court indicated, the FDCPA explicitly permits telephone calls from debt collectors. While

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the FDCPA does not address voicemail, as mentioned above, merely placing a telephone call and hanging up when no one answers essentially conveys the same information as JCC's voicemail conveyed. To allow the call, but not the voicemail, the Court concluded, would not be a fair reading of the FDCPA.

This case provides new information to consider in developing a strategy for complying with the FDCPA in the context of telephone and voicemail contacts. □

✧ *Judy Scheiderer and Margaret Stolar*