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## “DEAD AIR” ON ANSWERING MACHINE DID NOT VIOLATE FDCPA

The United States District Court for the Southern District of Texas recently held that a debt collector's voicemail message consisting only of “dead air” did not require “meaningful disclosure” of the caller's identity and was not a “communication” under the federal Fair Debt Collection Practices Act. *Garza v. MRS BPO, LLC*, 2012 WL 3527072 (S.D. Tex. Aug. 15, 2012).

In *Garza*, the debt collector left a single, 20-second voicemail that included only “dead air” on the debtor's answering machine. The debtor brought claims under Sections 1692(d) and 1692(e) of the federal FDCPA and under Section 392.304 of the Texas Debt Collection Act (TDCA) and Section 17.5 of the Texas Deceptive Trade Practices Act (DTPA).

In considering the debtor's claims on a Motion to Dismiss, the court first rejected the claim under Section 1692d(6), which provides that a debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, including, the placement of telephone calls without meaningful disclosure of the caller's identity. Assuming that a “communication” is not necessary for liability under Section 1692d(6), the court examined whether the debt collector should have provided “meaningful disclosure” of its identity on the voicemail. In examining case law, the court found the “dead air” in *Garza* more like missed call/hang up cases, which imposed no liability, rather than substantive voicemail cases, which imposed liability. In examining the statutory language, the court found that the statutory purpose of the FDCPA would not be furthered upon finding the debt collector liable without identifying any harassment, oppression, or abuse.

As to Section 1692e(11), which provides that a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt, including, the failure to disclose that the communication is from a debt collector, the court found that case law supports a voicemail being a “communication” only when it conveys more information than a missed call. Silence, the court stated, does not meet this standard. The court also dismissed the debtor's state law TDCA claim, which

required finding that the silent voicemail was a “communication,” based on this same reasoning, and its DTPA claim based on its dependence on finding a violation of the TDCA.

While the court did not find liability for the “dead air” in *Garza*, collectors still may wish to minimize the impact of blank voicemails, such as by limiting the length of time that the dead air lasts, in order to avoid other possible harassment claims. □

✧ *Mike Tomkies and Margaret Stolar*

## FTC INCREASES FEES FOR ACCESS TO “DO NOT CALL” REGISTRY

The Federal Trade Commission recently issued a final rule amending the Telemarketing Sales Rule (TSR) to update fees charged to entities accessing the National Do Not Call Registry (“DNC Registry”). See 77 Fed. Reg. 51697.

The TSR, among other things, makes it unlawful for certain “sellers” and “telemarketers” to initiate outbound telephone calls to persons whose telephone numbers are within a given area code unless the seller has paid an annual fee for access to the telephone numbers within that area code that are included in the DNC Registry.

The final rule increases the annual fee for access to the DNC Registry for each area code of data from \$56 to \$58 per area code, and increases the maximum amount that will be charged to any single entity for accessing area codes of data from \$15,503 to \$15,962. The final rule also increases the fee per area code of data during the second six months of an entity's annual subscription period from \$28 to \$29.

The increases are required by the Do-Not-Call Registry Fee Extension Act of 2007. The Act requires the fees to be increased, beginning after fiscal year 2009, by amounts set forth in the Act.

The new fees are effective October 1, 2012 (*i.e.*, the start of fiscal year 2013). □

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