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NATIONWIDE CRACKDOWN AGAINST ABUSIVE DEBT COLLECTORS ANNOUNCED BY FTC AND FEDERAL, STATE AND LOCAL PARTNERS

The Federal Trade Commission recently joined with federal, state and local law enforcement authorities to announce a federal-state enforcement initiative aimed at deceptive and abusive debt collection practices. The initiative, known as "Operation Collection Protection," so far this year has resulted in more than 115 actions through more than 70 law enforcement partners. Practices targeted include (i) harassing phone calls, (ii) false threats of litigation, arrest and wage garnishment, (iii) knowingly attempting to collect so-called "phantom debt" (*i.e.*, phony debts not actually owed), (iv) failing to provide consumers with required notices and (v) failing to follow state and local licensing requirements. The announcement addressed five new enforcement actions. The FTC is requesting to halt operations in three of those cases and has settled with two.

The FTC said it receives more complaints about debt collection than any other industry. Also, since 2010, it has sued more than 250 debt collectors, obtained judgments of more than \$350M and banned 86 debt collectors from the industry. Illinois Attorney General Lisa Madigan stated that her office receives thousands of calls and complaints each year from consumers who are victims of illegal debt collection tactics. Minnesota Commerce Commissioner Mike Rothman asserted that illegal and abusive tactics by debt collectors are a nationwide problem and require a nationwide response.

In addition to the FTC, the Consumer Financial Protection Bureau has been focusing on debt collection for some time now. In November 2013, it released its advanced notice of proposed rulemaking regarding debt collection practices. See our ALERT dated Nov. 13, 2013. The scrutiny of debt collectors by federal, state and local officials can be expected to continue to intensify under this initiative. □

✧ *Mike Tomkies and Margaret Stolar*

SIXTH CIRCUIT RULES VOICEMAIL LEFT AT DEBTOR'S BUSINESS WAS NOT A "COMMUNICATION" UNDER THE FDCPA

The United States Court of Appeals for the Sixth Circuit recently held that a voicemail message left by a debt collector at the debtor's business was not a "communication" under the federal Fair Debt Collection Practices Act because it did not convey information regarding a debt. *Brown v. Van Ru Credit Corp.*, 2015 WL 6220521 (6th Cir. Oct. 22, 2015).

Brown involved a student loan debt that was referred for collection to Van Ru Credit Corp., a debt collection agency. Van Ru contacted the debtor on two occasions. The second occasion, involved a voicemail message left in a "general mail box" at the debtor's business which the debtor alleged violated the FDCPA, specifically, Sections 1692c(b), regarding unlawful third party communications, and 1692g(a), regarding required written notices after an initial communication with the debtor. The district court granted Van Ru's motion for judgment on the pleadings finding the voicemail message did not imply the existence of a debt and therefore was not a "communication" under the federal FDCPA. On appeal, the Sixth Circuit affirmed.

The voicemail message under consideration in the case stated:

Good morning, my name is Kay and I'm calling from Van Ru Credit Corporation. If someone from the payroll department can please return my phone call my phone number is . . . and the reference number is . . . ; again my telephone number is . . . and reference number is . . .

There was an employee at the debtor's business who heard the message and was aware that Van Ru was a debt collector.

Section 1692c(b) provides that except in certain specified situations, 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. The term "communication" is defined under Section 1692a(2) to mean the conveying of information regarding a debt directly or indirectly to any person through any medium.

The Sixth Circuit stated that to convey information regarding a debt, a communication must at a minimum imply the existence of a

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debt. It concluded that Van Ru's voicemail message, which does not more than ask for someone from the debtor's payroll department to return the call, does not do so.

Based on the allegations in the debtor's complaint, the Sixth Circuit found that the voicemail message did not convey information regarding the debt. Nothing in the message, the court said, even suggests that any kind of debt exists. The court rejected the debtor's argument that the word "Credit" in "Van Ru Credit Corporation" refers to debt collection. Instead finding that the word "credit" covers a much broader category of financial activities than just debt collection. Also, the court did not consider the other information provided in the message (*i.e.*, the reference number and the toll-free call back number), nor the information asked for in the message (*i.e.*, payroll information), to suggest anything more than a present or future business relationship between the caller and the debtor's business or someone at the business. Thus, the court concluded, while information clearly is conveyed in the message, it is not information regarding a debt.

The Sixth Circuit determined that its conclusion with respect to the voicemail message was consistent with the purposes of the FDCPA, the FTC Commentary on the FDCPA and prior caselaw. The court stated that a third party communication poses little threat unless it inspires the third party to harass the debtor or otherwise reveals embarrassing or harmful information. The court pointed to the Senate Report on the FDCPA with respect to third party contacts, which said such contacts were prohibited in order to avoid "invasions of privacy" and "loss of job." This suggested to the court that the FDCPA does not cover communications that do not refer to or imply the existence of a debt.

This conclusion, the court found, is supported by FTC Commentary, which notes that Congress intended a common sense approach to the definition of "communication." The Commentary cited by the court says that "communication" does not include a situation in which the debt collector does not convey information regarding the debt, such as a request to a third party for information about the consumer's assets, if the debt collector does not reveal the existence of a debt.

Finally, the court found its conclusion to also be supported by a 2011 Tenth Circuit decision, which considered a similar claim. In that case, the Tenth Circuit found no "communication" based on a fax request for employment verification and information. The fact that an employee of the debtor in the instant case may have been aware that the voicemail was for the debtor and was regarding a debt (a fact not found in the Tenth Circuit case) did not change the Sixth Circuit's conclusion. Just because a third party may have guessed that the voicemail was related to a debt, the Sixth Circuit said, does not mean that the message conveyed that information or that it was reasonable to conclude that it did.

One judge dissented in the opinion, concluding that the question of whether Van Ru's representative conveyed information to the debtor's employee that related to the loan had not been answered. That question, the dissent concluded, would depend on whether the reference number left in the voicemail message related to the debtor's loan, a fact not answered since the case was dismissed before discovery. Whether information regarding the debt was conveyed has nothing to do, the dissent said, with what the debtor's employee knew, but should only concern what information was left by the debt collector.

Some courts look beyond content to consider the relationship of the parties and, as the Sixth Circuit referenced, whether a communication can have a larger effect (such as to inspire a third party to harass the debtor and so indirectly aid the collector). Collection communications require careful scripting in light of varying circumstances. □

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