

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



[Caren Enloe](#) leads Smith Debnam's consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: [Consumer Financial Services Litigation and Compliance](#) dedicated to consumer financial services and has

## Foti Revisited: When Does a Telephone Message Violate FDCPA

January 29, 2016 | by

Ten years after the Southern District of New York entered into its infamous decision in *Foti v. NCO Financial Systems, Inc.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006), the debate of how to properly leave telephone messages rages on. In *Foti*, the debt collector left a message stating:

*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. Foti*, 424 F. Supp. 2d 643, 648 (S.D.N.Y. 2006).

The court held that the message was a communication subject to the Fair Debt Collection Practices Act (FDCPA) and additionally held that the message must comply with Section 1692e(11) of FDCPA, which requires that in all communications with the consumer, the debt collector identify itself as a debt collector. *Id.* at 657. The court went on to famously reject NCO's argument that this interpretation placed debt collectors "in a virtual "Hobson's choice" – debt collectors must disclose their identity as a debt collector to comply with §1692e(11)'s requirements, but are prohibited from leaving a message identifying themselves as such by §1692c(b)'s prohibition on communications to third parties." *Id.* at 658.

Since then, the debate has raged on: what constitutes a communication and is there a way to leave a message for a debtor that complies with both §§1692e(11) and 1692c(b)? A new case out of the Eastern District of New York reminds us of the difficulties of complying with *Foti* and courts' growing dissatisfaction with FDCPA's antiquated provisions. In *Nicaisse v. Stephens and Michaels Assocs, Inc.*, 2015 U.S. Dist. LEXIS 172073 (E.D.N.Y. Dec. 28, 2015), the collection agency left a message that stated:

been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

*This is a private message for Inez Nicaisse. Inez Nicaisse, do not listen to this message in the presence of others. By continuing to listen to this message, you acknowledge this message is not being heard by others. This is a communication from a debt collector attempting to collect a debt. Any information obtained will be used for that purpose. Please contact Stephens and Michaels regarding the personal matter at (866)679-9649.*

Nicaisse filed suit, alleging that as the message was being left on her answering machine, her adult daughter overheard the message. Nicaisse asserted violations of Section 1692c(b) of FDCPA. On summary judgment, the court drew a distinction between messages that contained confidential information and/or note that the call is an attempt to collect a debt, and debt collector phone messages that “convey[ed] no more information than a “hang-up call” would via caller id information.” *Nicaisse*, \*14. Because the message left indicated it was an attempt to collect a debt, the court was left with no choice but to consider it a communication under the FDCPA.

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#### **The court’s frustration with the situation was thinly veiled:**

As set forth below, the Court need not reach the question of whether debt collector messages that do not reference an attempt to collect a debt violate FDCPA because the subject message specifically indicated that Defendant was attempting to collect a debt. However, the Court notes that while FDCPA’s definition of “communication” has been broadly construed, it requires a debt collector to convey information regarding a debt. *Id.* at \*16 (citations omitted). In reluctantly ruling for the plaintiff, the court noted that FDCPA is a strict liability statute and noted that instructions that urge a third party to stop listening before the content of the message is revealed does not obviate liability. The court expressed its concerns for “the potential of placing undue restrictions on ethical debt collectors by holding that FDCPA is violated when a third party inadvertently overhears a phone message that contains minimal information.” *Id.* at 18 (citations omitted). However, because the message stated that “[t]his is a communication from a debt collector attempting to collect a debt,” the court was left with little choice. “The Message constitutes a third-party communication in violation of Section 1692c(b) because it expressly indicates that Defendant, a debt collector, is seeking to collect a debt from Plaintiff.” *Id.* at \*18-19. However, while stuck with the conclusion that the defendant violated FDCPA, the court did not award the maximum statutory penalty. Instead, the court awarded the plaintiff \$250.00 in statutory damages (no actual damages were sought) noting that “defendant’s actions are limited to one phone message that was inadvertently overheard by a third party and was neither abusive nor threatening.” *Id.* at \*20-21.

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