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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

Eleventh Circuit Holds Voice Mail Message is a Communication

October 27, 2017 | by

The Eleventh Circuit has held that a voice mail message left for a consumer is a "communication" under the FDCPA. In *Hart v. Credit Control, LLC,* 2017 U.S. App. LEXIS 18375 (11th Cir. Sept 22, 2017), the debt collector left a message which stated:

> **THIS IS CREDIT CONTROL CALLING WITH A MESSAGE. THIS CALL IS FROM A DEBT COLLECTOR. PLEASE CALL US AT 866-784-1160. THANK YOU.**

Hart at *2. The message was the first communication. The consumer filed suit alleging two violations of the FDCPA. First, the consumer alleged that the message was a "communication" under the FDCPA and violated 15 U.S.C. §1692e(11) because it failed to disclose that "the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." Secondly, the consumer alleged the message did not meaningfully disclose the caller's identity and therefore violated 15 U.S.C. §1692d(6).

The debt collector moved to dismiss relying, in part, on *Zortman v, J.C. Christensen & Assocs., Inc*. 870 F. Supp. 2d 694 (D. Minn. 2012) and similar cases which had previously rejected the consumer's argument and noting that the message provided no more information than would otherwise be available from a hang-up or missed call. The District Court agreed and granted the motion to dismiss, concluding that the instant message was not a communication for purposes of the FDCPA. The District Court further held that the message disclosed enough information so as not to mislead the recipient as to the purpose of the call. Importantly, the court held that it is the *debt collector's* identity not that of the individual caller which is meaningful to a consumer.

On appeal, the Eleventh Circuit reversed in part and affirmed in part. With respect to the meaningful disclosure issue, the appellate court agreed with the district court. Noting that the FDCPA is silent on what constitutes meaningful disclosure, the court looked to the purpose of the FDCPA. "The FDCPA provides consumers with recourse following abusive behavior by debt collectors during the course of collecting a debt. Given this scheme, the debt collection company's name is plenty to provide 'meaningful disclosure.'" *Hart* at *9-10.

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The Eleventh Circuit, however, disagreed with the district court as to whether the voice mail message constituted a communication, holding that the voice mail "falls squarely within the FDCPA's definition of a communication." *Id.* at *5. Looking to the express language of the statute, the FDCPA defines a communication as being "the conveying of information regarding a debt [either] directly or indirectly to any person through any medium." 15 U.S.C. §1692a(2). The court concluded that the message fell squarely within the definition. "The voicemail, although short, conveyed information directly to Hart – by letting her know that a debt collector sought to speak with her and by providing her with instructions and contact information to return the call. The voicemail also indicated that a debt collector was seeking to speak to her as part of its efforts to collect a debt." *Id.* at 5-6. The court was dismissive of the debt collector's assertion that the voice mail message did not disclose any more information than what would have been revealed in a hang-up call. Doing so would require that it ignores the plain language of the statute – "[i]n order to be a considered a communication, the only requirement of the information that is to be conveyed is that it must be regarding a debt… There is no requirement in the statute that the information must be specific or thorough in order to be considered a communication." *Id.* at *6.

The court's opinion leaves debt collectors, at least in the Eleventh Circuit, in peril should they decide to leave messages for consumers. Once again, they are left with Hobson's Choice- either include all necessary disclosures and run the risk of violating the third party disclosures prohibitions or leave no message and fail to provide the required disclosures. The question that needs to be evaluated further is whether debt collectors need to consider whether the message is left on a cell phone (where there is a great expectation of privacy and therefore less risk of third party disclosure) or a landline.

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