No. 10-1363

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OLIVEA MARX,

Plaintiff-Appellant,

v.

GENERAL REVENUE CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Richard P. Matsch
(D. Ct. No. 08-cv-02243-RPM)

BRIEF OF THE CONSUMER FINANCIAL PROTECTION BUREAU AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC OR REHEARING BY THE PANEL

LEONARD J. KENNEDY
General Counsel
TO-QUYEN TRUONG
Deputy General Counsel
DAVID M. GOSSETT
Assistant General Counsel
KRISTIN BATEMAN
Attorney
(202) 435-7821

CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street, NW
Washington, D.C. 20006-4702
www.consumerfinance.gov

Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress vested the Consumer Financial Protection Bureau with authority to enforce and promulgate rules regarding the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq*. *See* Pub. L. No. 111-203, § 1089 (2010). The Bureau therefore has a substantial interest in this case. The Bureau could not participate in the earlier briefing because it did not assume its powers until July 21, 2011, after briefing concluded. *See id.* § 1061; Designated Transfer Date, 75 Fed. Reg. 57,252 (Sept. 20, 2010).

Pursuant to F.R.A.P. 29(a), the Bureau does not need the parties' consent or leave of court to file this brief, which complies with Tenth Circuit Rule 29.1's 3,000-word limit. If it would aid the Court, the Bureau would welcome the opportunity to file a longer brief further explaining its reasoning.

INTRODUCTION

Panel or *en banc* rehearing is warranted because the majority's decision erodes two important FDCPA protections. First, the majority unduly limits the Act's general ban on contacting third parties in con-

nection with debt collection. The Act's structure reveals that, in balancing risks to consumers against debt collectors' interests, Congress chose generally to bar third-party contacts except those necessary to locate debtors. The earlier briefing largely omitted this crucial background, leading the majority to adopt an interpretation that conflicts with the statute's text, purposes, and accepted understanding.

Second, the majority erroneously concludes that the FDCPA does not supplant F.R.C.P. 54(d)'s default rule that prevailing parties may recover costs "[u]nless a federal statute … provides otherwise," even though the FDCPA provides that prevailing defendants may recover costs "[o]n a finding by the court that [the suit] was brought in bad faith and for the purpose of harassment," 15 U.S.C. § 1692k(a)(3). The majority's opinion misinterprets the statutory text, creates a circuit split, and undermines Congress's goal of encouraging private enforcement of the Act.

STATEMENT

While attempting to collect on Plaintiff Olivea Marx's defaulted student loan, General Revenue Corporation (GRC) inquired into Marx's employment status to assess her eligibility for wage garnishment. Slip

op. 2-3. When Marx's employer asked GRC to make its request in writing, GRC sent it a fax bearing GRC's full name, a fax header designating "Sallie Mae" as the sender, and Marx's account number labeled as "ID." Aplt. App. 113. The fax asked for Marx's employment status, hire date, full- or part-time status, and title, as well as the employer's address. *Id.*

Marx sued, contending that the fax violated the FDCPA's prohibition on communicating with third parties in connection with debt collection. After a bench trial, the district court concluded that Marx did not prove any FDCPA violations, and awarded GRC $4,543 in costs under F.R.C.P. 54(d) without finding that Marx brought suit in bad faith. Marx appealed both the judgment and the costs award. This Court affirmed over Judge Lucero's dissent.

ARGUMENT

I. The panel's erroneous interpretation of the FDCPA's prohibition on communicating with third parties erodes an important consumer protection, disregards the Act's text and structure, and disturbs accepted understandings of the Act.

The FDCPA provides that a debt collector generally "may not communicate, in connection with the collection of any debt, with any

person other than the consumer" or other specified parties. 15 U.S.C. § 1692c(b). The statute provides specified exceptions, such as when a debt collector seeks "location information" about a consumer under § 1692b.[1]

The majority concludes that a debt collector violates § 1692c(b) only if it makes a "communication," which § 1692a(2) defines as "the conveying of information regarding a debt directly or indirectly to any person." Slip op. 4. According to the majority, a debt collector does not "convey[]" information regarding a debt, and thus does not "communicate" in violation of § 1692c(b), unless the recipient "knew or inferred that the [communication] involved a debt." *Id.* at 5-6. Thus, the same correspondence may or may not violate the Act depending on the recipient and how she interprets the message. *See id.* at 17.

By making the legality of any given communication depend on the recipient's subjective understanding, the majority's interpretation creates unnecessary uncertainty. Moreover, the majority's interpretation

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[1] The statute also permits contacts with the consumer's consent, a court's permission, or to effectuate a judgment. 15 U.S.C. § 1692c(b). Thus, debt collectors often may contact employers to assess garnishment possibilities *after* obtaining a court judgment.

erodes an important consumer protection, conflicts with the FDCPA's text and structure, and departs from widely accepted understandings of the Act. The Court should therefore reverse it.

A. The majority's holding threatens substantial harm to consumers. The majority mistakenly assumes that the Act could not have been "meant to quell" contacts that recipients do not realize concern debt. Slip op. 17. But the Act does not prohibit only contacts that cause proven harm—else it would not allow statutory damages absent proof of actual injury. *See* 15 U.S.C. § 1692k(a)(2). Instead, it bars contacts that pose a *risk* of harm.

All third-party contacts by debt collectors inherently pose risks to consumers. Even where a collector simply calls and asks for a consumer's employment status, an employer familiar with collection practices may well realize the communication relates to debt. And even if the employer does not realize it, the consumer may learn of the contact and be legitimately concerned about what her employer may suspect.

The majority's interpretation increases these risks. By requiring consumers to prove that a third party actually realized an exchange related to debt, the majority opinion subjects debt collectors to liability for

only a fraction of risky third-party communiqués. The majority's holding thus reduces the expected cost of such interactions, and makes debt collectors more likely to engage in them—absorbing any liability as a cost of business. Consumers will suffer more invasions of privacy as a result. And because it may often be difficult to prove a recipient's knowledge, consumers will also have less ability to obtain, and thus less incentive to seek, redress under the Act. Moreover, debt collectors that do not employ these risky practices will suffer a competitive disadvantage, contrary to Congress's intent. *See id.* § 1692(e).

B. Given the harms that would result from the majority's interpretation, it is reassuring that the FDCPA's structure and text do not support this result. The Act carefully balances the need to protect consumers' privacy against debt collectors' interests in collecting debts. S. Rep. No. 95-383, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698. The Act's structure reflects Congress's judgment that debt collectors' interests generally outweigh the risks to consumers only when collectors need to determine "the whereabouts of missing debtors." *Id.* In particular, with few exceptions, the Act allows debt collectors to communicate with third parties *only* to ascertain "location information"—the consum-

er's home address, phone number, or place of employment. 15 U.S.C. §§ 1692a(7), 1692b, 1692c(b). Even then, § 1692b strictly regulates those communications to minimize the risks to consumers: Those contacts cannot include certain content that could reveal the consumer's indebtedness, and cannot be made at all by certain means or in certain circumstances where the benefit to collectors would not outweigh the risks to consumers.[2]

If Congress also wanted to permit debt collectors to contact third parties to obtain other information—like the employment-status information GRC sought here—it would have provided for such contacts and required them to follow the same risk-minimizing restrictions. But it did not. This reflects Congress's judgment that debt collectors' interest in such other information was not sufficiently important to justify exposing consumers to the concomitant risks.

The majority's interpretation not only disturbs this congressional judgment, but is also inconsistent with the statutory text and canons of

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[2] Collectors may not state that the consumer owes a debt; indicate that the communication relates to debt collection; identify their employer unless specifically asked; send postcards; contact a third party more than once; or contact any third parties if they can locate the consumer's attorney. 15 U.S.C. § 1692b.

statutory interpretation. As the dissent points out and the majority acknowledges, the majority's interpretation renders superfluous § 1692b(5)'s bar on "indicat[ing] … that the communication [seeking location information] relates to the collection of a debt." Dissent 5-6; Slip op. 18-19. It also renders it nonsensical. Under the majority's interpretation, § 1692b(5) bars a "communication"—which by definition refers only to correspondence that indicates a debt is being collected—from indicating a debt is being collected.

What's more, the majority's interpretation would render several other of § 1692b's risk-minimizing restrictions nugatory. By its terms, § 1692b applies only to debt collectors "communicating with" third parties to obtain location information. Under the majority's interpretation, a debt collector is not "communicating" if it does not reveal to the recipient that the contact relates to debt collection. Thus, if a debt collector complies with § 1692b's content restrictions—most notably, § 1692b(5)'s bar on "indicat[ing] … that the communication relates to the collection of a debt"—it is not "communicating" and thus need not comply with the rest of § 1692b. This effectively nullifies § 1692b's other restrictions. Under the majority's interpretation, therefore, debt collectors seeking

location information will be able to send postcards, contact third parties more than once, and contact third parties when they could contact the consumer's attorney instead—all in contravention of any reasonable understanding of § 1692b.

C. An alternative reading of the Act finds support in the plain text and avoids rendering these statutory provisions superfluous. Specifically, *any transmission* of information regarding a debt qualifies as a "communication."[3] The Act defines "communication" as "the conveying of information regarding a debt directly or indirectly." 15 U.S.C. § 1692a(2). Contrary to the majority's contention (Slip op. 17), the word "convey[]" does not imply that the recipient must realize the communication relates to debt. A common meaning of "convey" is "transmit" (MERRIAM-WEBSTER DICTIONARY, HOME & OFFICE ED. 116 (1998)), which does not imply any understanding by the recipient.[4]

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[3] Contacts designed to induce future debt-related discussions, such as voicemails urging consumers to call about unspecified "important matters," may also qualify as indirect "communications." *See Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 655-57 (S.D.N.Y. 2006).

[4] Even accepting the majority's view that "convey" means "make known" (Slip op. 17), a communication could make "*information* regarding a debt" known without also making it known that the *communication* relates to a debt.

Most information held by debt collectors constitutes "information regarding a debt"—*e.g.*, the debtor's name, account number, and creditor. The collector would not have the information, or be able to transmit it to anyone, but for the debt. That information remains "information regarding a debt" when the collector transmits it to a third party, regardless of how the recipient interprets it.[5]

In this case, GRC transmitted several pieces of information regarding Marx's debt. The fax contained not only the delinquent account number under the heading "ID" (which the dissent recognized (at 3) squarely to be "information regarding a debt"), but also a header referring to "Sallie Mae," a well-known student lender, and the name and logo of "General Revenue Corporation," a company that an Internet search reveals to be a debt collector. At the very least, the panel clearly erred in concluding that this fax "could [not] reasonably be construed to imply a debt." Slip op. 5. The majority's ruling highlights the risks that its interpretation poses to consumers.

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[5] Under this interpretation, what constitutes a "communication" is determined by a straightforward test that debt collectors can easily follow. The majority's focus on the recipient's subjective understanding, by contrast, provides a moving target for compliance.

Moreover, even if the majority had correctly interpreted "communication"—which it did not—it overlooked the fact that the FDCPA's definition of "*communication*" in § 1692a(2) does not necessarily apply to § 1692c(b), which provides that a debt collector "may not *communicate*, in connection with the collection of a debt, with [third persons]."

It is well established that a statute's definition of a noun—here, "communication"—does not necessarily control the meaning of a related verb or adverb. *See FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011) (definition of "person" did not limit ordinary meaning of "personal"); *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1275 (D.C. Cir. 1996) (definition of "disposal" did not apply to statute's use of verb "dispose"). Whether it does in a particular case must be determined "in light of the whole statutory scheme." *Indiana Michigan Power*, 88 F.3d at 1275. Here, the statutory structure discussed above shows that the definition of "communication" is not meant to limit the ordinary meaning of "communicate" in § 1692c(b).[6] Without that qualification,

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[6] That § 1692c(b) is labeled "Communication with third parties" is irrelevant. Congress specified that "[c]aptions … are intended solely as aids to convenient reference, and no inference as to the legislative in-

§ 1692c(b) is properly interpreted as an absolute prohibition on third-party contacts, subject to narrow exceptions.

D. The panel's opinion threatens settled understandings of the Act that were not previously brought to the panel's attention. As Marx's petition for rehearing details, the opinion conflicts with the vast majority of cases interpreting "communication." Pet. for Reh'g 8-10 (citing twenty cases); *see also Shand-Pistilli v. Prof'l Account Servs.*, 2010 WL 2978029, *3-4 (E.D. Pa. 2010) (inquiry into consumer's employment status qualified as "communication"); *Shaver v. Trauner*, 1998 U.S. Dist. LEXIS 19647, *6 (C.D. Ill. 1998) (same). It also conflicts with the debt collection industry's general understanding. The Association of Credit and Collection Professionals, a debt-collector trade association, advises in a compliance guide that "[t]he only information a debt collector can request from a third party is the consumer's location information," and debt collectors "may not attempt to obtain the employment address, … dates of employment, [or] job title." ACA International, *Guide to the Fair Debt Collection Practices Act*, Vol. 1, 62, 64 (2009/10 ed.) (attached

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tent … may be drawn from them." Pub. L. 90-321 § 502, *codified at* 15 U.S.C. § 1601 note.

as Appendix 2). The Bureau's and at least three other federal banking regulators' examination handbooks echo this view.[7]

In departing from these widely accepted understandings, the majority's opinion introduces uncertainty and erodes an important consumer protection. The Court should accordingly revisit it.

II. The panel's holding on the availability of costs in FDCPA suits disregards the statutory text, creates a circuit split, and threatens to chill private enforcement of the Act.

F.R.C.P. 54(d) permits a prevailing party to recover its costs from its opponent "[u]nless a federal statute … provides otherwise." The FDCPA "provides otherwise": "On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1693k(a)(3).

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[7] Consumer Financial Protection Bureau, *Supervision and Examination Manual, FDCPA* 2-3, http://www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf; Office of the Comptroller of the Currency, *Comptroller's Handbook* 24, http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/other.pdf; FDIC, *Compliance Examination Manual* VII-4.1-2, http://www.fdic.gov/regulations/compliance/manual/pdf/VII-4.1.pdf; Federal Reserve Board, *Consumer Compliance Handbook, FDCPA* 2, http://www.federalreserve.gov/boarddocs/supmanual/cch/fairdebt.pdf.

The panel majority erroneously concludes that this provision merely recognizes that prevailing defendants may recover costs—with or without a showing of bad faith—under Rule 54(d). As Judge Lucero explained (at 7-8), this interpretation contravenes the *expressio unius* canon: Stating that costs may be recovered upon showing bad faith implies that costs may *not* be recovered without such a showing. It also contravenes "well-established principles of statutory interpretation that require statutes to be construed in a manner that gives effect to all of their provisions." *United States ex rel. Eisenstein v. New York*, 129 S. Ct. 2230, 2234 (2009). Under the majority's interpretation, § 1693k(a)(3)'s reference to "costs" has no effect; a prevailing defendant could recover costs anyway under Rule 54(d).

Contrary to the majority's suggestion, there are no reasons to disregard these interpretative canons here. First, interpreting the Act to allow defendants to recover costs only in cases of bad faith does not fail to "harmonize" the Act with Rule 54(d). By its express terms, Rule 54(d) applies only when a federal statute does not "provide[] otherwise." It is therefore necessarily in harmony with any statute restricting costs awards.

Second, contrary to the majority's suggestion, the FDCPA does not adopt a costs provision from other statutes that courts have "long and consistent[ly]" interpreted not to supplant Rule 54(d). To the contrary, the few cases analyzing such provisions have concluded that they *do* supplant Rule 54(d). *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 702, 706 (9th Cir. 2010) (FDCPA); *Gwin v. Am. River Transp. Co.*, 482 F.3d 969, 974 (7th Cir. 2007) (seaman's statute allowing costs to prevailing defendant "if the courts finds that [the suit] is frivolous or has been brought in bad faith"). Although other courts have not analyzed the question, nearly all have understood the FDCPA to allow prevailing defendants to recover costs *only* upon showing bad faith. *See* Pet. for Reh'g 14 (collecting cases). The majority cites not a single case holding otherwise.

Finally, the presumption, reflected in Rule 54(d), that prevailing defendants may recover costs even from good-faith plaintiffs (Slip op. 9) does not counsel against interpreting the FDCPA to limit costs awards. Rule 54(d) specifies that a statute may supplant this presumption by "provid[ing] otherwise." The FDCPA provides otherwise.

This is not meant to penalize innocent defendants, but rather to encourage private enforcement of the Act. Congress intended the FDCPA to be "primarily self-enforcing" by private attorneys general. S. Rep. 95-382, at 5. Potential liability for defendants' costs—which, as here, can total thousands of dollars—discourages plaintiffs from bringing suit, especially when they already face financial hardship. Section 1692k(a)(3) eliminates this obstacle to private enforcement by protecting good-faith plaintiffs from potentially hefty costs awards. By failing to give this provision effect, the majority reinstates this obstacle and undermines Congress's goals.

CONCLUSION

The petition for rehearing or rehearing *en banc* should be granted.

Respectfully submitted,

LEONARD J. KENNEDY
General Counsel
TO-QUYEN TRUONG
Deputy General Counsel
DAVID M. GOSSETT
Assistant General Counsel

s/ Kristin Bateman
KRISTIN BATEMAN
Attorney
CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street, NW
Washington, D.C. 20006
(202) 435-7821
Kristin.Bateman@cfpb.gov

January 26, 2011

Counsel for *Amicus Curiae*

APPENDIX A

Relevant Statutory Provisions

15 U.S.C. § 1692a. Definitions

As used in this subchapter--

> * * *
> (2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.
>
> (7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.
>
> * * *

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall--

> (1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;
>
> (2) not state that such consumer owes any debt;
>
> (3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

15 U.S.C. § 1692c. Communication in connection with debt collection

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt--

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a

communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, 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.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except--

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

15 U.S.C. § 1692k. Civil liability

(a) Amount of damages
Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

* * *

Federal Rule of Civil Procedure 54. Judgment; Costs

* * *

(d) Costs; Attorney's Fees.

> (1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

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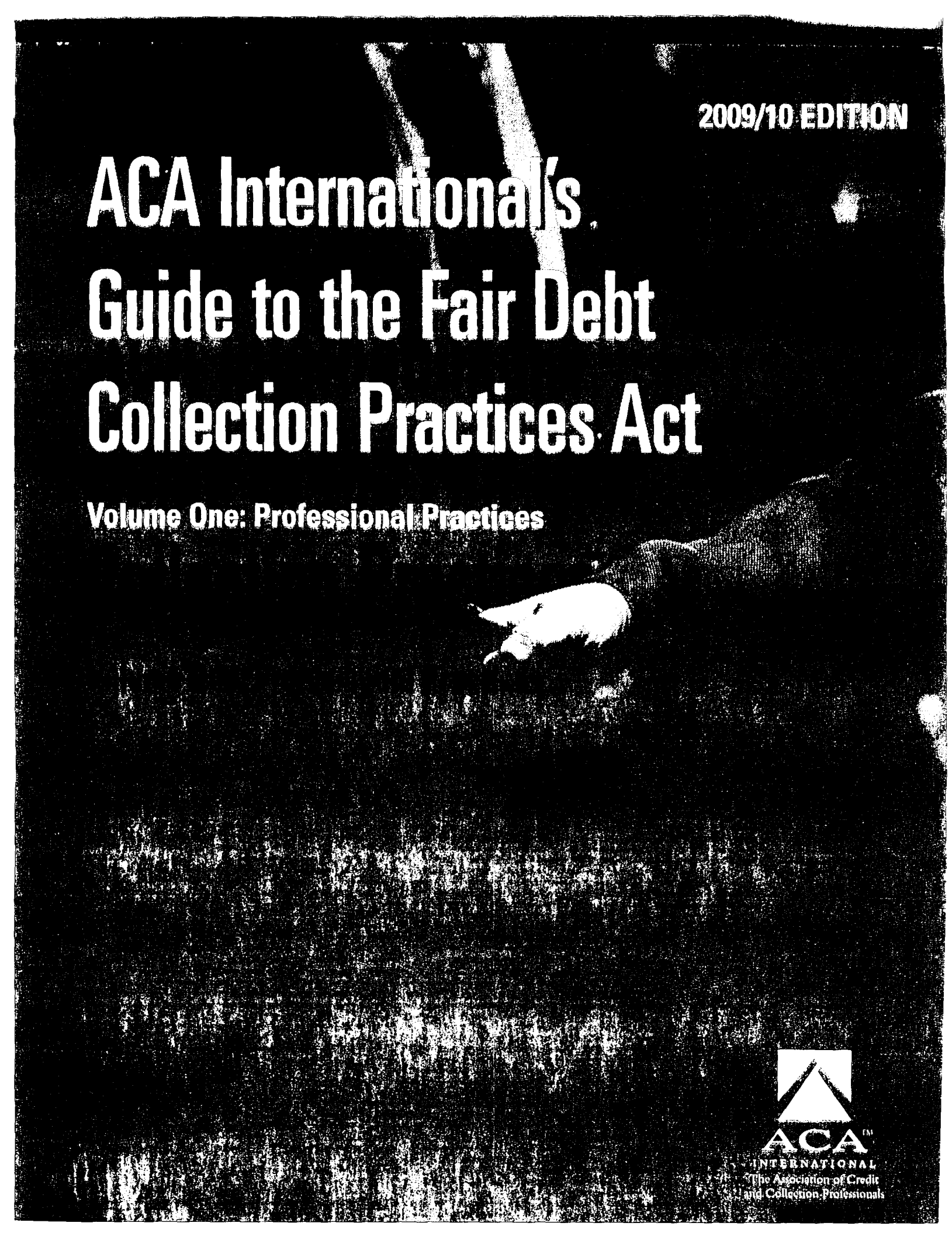
APPENDIX B

Excerpt from ACA International's Guide to the Fair Debt Collection Practices Act

2009/10 EDITION

ACA International's Guide to the Fair Debt Collection Practices Act

Volume One: Professional Practices



ACA INTERNATIONAL
The Association of Credit and Collection Professionals

Foreword

The Fair Debt Collection Practices Act (FDCPA) became effective in 1978. Shortly thereafter the American Collectors Association published a comprehensive analysis of every section of the Act based on its content, legislative intent, and the Federal Trade Commission Staff interpretations that had been issued at the time. *ACA International's Guide to the Fair Debt Collection Practices Act* continues the Association's tradition of providing quality educational resources regarding the FDCPA.

ACA International is an international trade organization of credit and collection professionals who provide a wide variety of accounts receivable management services. Founded in 1939 and headquartered in Minneapolis, Minnesota, ACA represents more than 5,500 members. As a service to its members, ACA provides numerous publications in order to help members comply with federal and state laws and regulations. *ACA International's Guide to the Fair Debt Collection Practices Act* is published to assist ACA members and other credit and collection professionals in complying with the FDCPA.

The 2009/10 guide is comprised of two volumes. The first volume, "Professional Practices," provides the text of the FDCPA and detailed analyses of the provisions of the Act as well as the issues that arise under the FDCPA. The second supplementary volume, "Legal Resource," provides summaries of FDCPA cases as well as the FTC informal staff letters and advisory opinions interpreting the Act. The first volume should be included as an integral part of training for all collection agency employees. The second volume should be used by management and attorneys to determine how the FDCPA applies to specific scenarios and how the FTC Staff interprets the Act.

While this guide is current and accurate at the time of its release, it must be recognized that the interpretation of the provisions of the FDCPA will continue to change with judicial decisions under the Act. Sound legal advice requires a thorough understanding of the factual content of any issue or problem that arises. Only then can a reasoned application of the law be made to the specific facts upon consideration of the practical problems presented and the legal alternatives available. This guide is not designed to provide legal advice to its readers. Rather, it is intended to provide a practical analysis of the provisions of the FDCPA and how courts and the FTC Staff have interpreted such provisions. Individuals using this guide should consult with their own attorneys for advice and guidance in interpreting the law as it applies to specific fact scenarios and in order to ensure full compliance with the Act. ACA members can visit the Compliance section at *www.acainternational.org* for more information regarding the FDCPA.

ACA International hopes you find this guide a valuable resource to assist you in complying with the Fair Debt Collection Practices Act.

Gary D. Rippentrop, CAE
Chief Executive Officer
ACA International

communications via e-mail. Thus, prior to communicating with the consumer by e-mail, a collector should obtain the express consent of the consumer. The consent may be verbal, written, or electronic. Any such consent provided by the consumer must be documented and maintained by the debt collector.

A debt collector's Web site may include a check-off box which would give consumers the option of receiving future communications from the collector via e-mail. The collector should ask the consumer not to provide a shared e-mail address or a work e-mail address. Additionally, the collector may wish to inform the consumer what information may be sent to her *e-mail address* and that the address will not be sold or distributed to any third party.

If a debt collector chooses to communicate by e-mail, the communication should be treated the same as any other type of written correspondence to a consumer. The e-mail will need to provide the mini-Miranda disclosure and any state special text requirements.

4.3 Obtaining Location Information (Skiptracing)

The FDCPA recognizes the need for a debt collector to occasionally contact a third party to seek the consumer's whereabouts.[38] A debt collector may contact a third party, such as the consumer's neighbor, friends, relatives or employer, for the purpose of acquiring location information of a consumer, commonly referred to as skiptracing. This is the only permissible reason a debt collector has to contact a third party. Otherwise a debt collector is prohibited from contacting a third party unless the consumer gives prior consent directly to the debt collector, a court of competent jurisdiction gives its express permission or it is necessary to carry out a post-judicial remedy.[39]

A debt collector must adhere to the provisions under § 804 [15 U.S.C. § 1692b] when contacting a third party for location information. The collector must identify herself and is required to inform the third party she is correcting or confirming location information regarding the consumer. The collector may not reveal the name of her employer unless specifically requested by the third party. Under no circumstances may the debt collector ever disclose the existence of the consumer's debt to the third party.[40]

The only information a debt collector can request from a third party is the consumer's location information. Location information is defined under the Act to only include the consumer's home address, home telephone number, and the consumer's place of employment.[41] Location information does not include the consumer's work telephone number, the names of the consumer's supervisors and their telephone numbers, the consumer's salary, or the consumer's paydays.[42] Asking a third party for any information other than the consumer's home address,

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[38] FTC Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50097, 50103 (Dec. 13, 1988).

[39] 15 U.S.C. § 1692c(b) (2006) [§ 805(b)].

[40] 15 U.S.C. § 1692b (2006) [§ 804]; *Kimberly v. Great Lakes Collection Bureau, Inc.*, No. 3:91CV220 (HBF); 3:92CV060 (HBF), 1996 WL 34445714, at *3 (D. Conn. Sept. 26, 1996).

[41] 15 U.S.C. § 1692a(7) (2006) [§ 803(7)].

[42] FTC Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50097, 50103 (Dec. 13, 1988); Kwait, *FTC Informal Staff Letter* (Jan. 24, 1989).

home telephone number or place of employment is strictly prohibited under the FDCPA. A debt collector may also be in violation of the Act if she already knows the consumer's location, but asks for "a better number" to reach the consumer.[43]

In attempting to obtain location information, a debt collector may not communicate with a third party more than once unless the person requests the debt collector contact her again or if the collector reasonably believes the response was erroneous or incomplete and the third party now has correct or complete information.[44] If the debt collector believes the third party's response was incomplete, but has no reason to believe the person now has updated information, the debt collector may not contact the person again. In addition, a debt collector may not contact a third party with the pretense of gaining information already in the collector's possession.[45]

The debt collector also must identify herself and state she is confirming or correcting location information when attempting to obtain location information in writing. As with verbal attempts to obtain location information, a debt collector attempting to obtain location information in writing may only identify her employer if expressly requested. In written attempts to obtain location information, a debt collector may not state the consumer owes any debt. Further, the debt collector may not communicate by postcard.[46] The debt collector is also prohibited from using any language or symbol on envelopes or in the contents of the communication indicating the debt collector is in the debt collection business or the communication relates to the collection of a debt.[47]

A debt collector is prohibited from asking neighbors, or other third parties, to convey messages to consumers.[48] In one case, a collector called the consumer's neighbor stating he was calling regarding a "very important matter" and asked the neighbor to have the consumer call him. The consumer alleged the debt collector violated the FDCPA by communicating with a third party regarding the consumer's debt and that the communication was not for the purpose of obtaining location information. The court concluded the allegations were sufficient to state a claim under the FDCPA.[49]

Importantly, it is not a per se violation of the FDCPA for a debt collector to leave a message with a third party if the message is specifically for the purpose of obtaining location information so long as the message satisfies the requirements for skiptracing mentioned above.

In addition, several states specifically prohibit or place greater restrictions on obtaining location information through third parties.[50]

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[43] *Thomas v. Consumer Adjustment Co., Inc.*, 579 F. Supp. 2d 1290, 1297 (E.D. Mo. 2008).

[44] 15 U.S.C. § 1692b(3) (2006) [§ 804(3)].

[45] FTC Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50097, 50104 (Dec. 13, 1988).

[46] 15 U.S.C. § 1692b(4) (2006) [§ 804(4)].

[47] 15 U.S.C. § 1692b(5) (2006) [§ 804(5)].

[48] Atteberry, *FTC Informal Staff Letter* (Feb. 22, 1990).

[49] *West v. Nationwide Credit, Inc.*, 998 F. Supp. 642, 645 (W.D.N.C. 1998).

[50] *See, e.g.*, Ariz. Admin Code. R20-4-1512; 4 Colo. Code Regs. § 903-1, Rule 2.08, 2.15; D.C. Code §§ 28-3814(f)(3), (5)–(7), (9); Ga. Comp. R. & Regs. R. 120-1-14-.22(b); Iowa Code § 537.7103(3)(a)(4); Mass. Regs. Code Tit. 209, § 18.17(2), Tit. 940, § 7.06(2); Mich. Comp. Laws § 339.919; Minn. Stat. § 332.37(15); New York City, N.Y., Rules, Tit. 6, § 5-77(a); N.C. Gen. Stat. § 58-70-110; W. Va. Code § 46B-4-7; Wis. Admin Code DFI-Bkg § 74.16(15).

If the debt collector knows the consumer is represented by an attorney with respect to the debt, and the debt collector has knowledge of or can readily ascertain the attorney's name and address, the debt collector may not communicate with any person other than the attorney to attempt to obtain location information regarding the consumer.[51] If the attorney fails to respond to the debt collector within a "reasonable period of time," the debt collector may attempt to obtain location information from other sources.[52]

4.4 Employment Verification

While the FDCPA allows the debt collector to request the consumer's place of employment, the collector may not attempt to obtain the employment address, employment telephone numbers, dates of employment, job title, the consumer's salary or pay days.[53]

A consumer's place of employment is included in the FDCPA definition of "location information." Therefore, when a debt collector contacts a presumed employer to verify a consumer's employment, the debt collector may only request the company verify whether or not the consumer is currently employed by the company. The debt collector may not request the consumer's work phone number, supervisor's name, dates of employment or any other information as such a request would fall outside of the definition of location information.[54]

[51] *See Eads v. Wolpoff & Abramson, LLP,* 538 F. Supp. 2d 981, 987-88 (W.D. Tex. 2008) (possible violation of § 804(6) where debt collector served pleading papers on a consumer although the consumer's attorney filed appearance in court action).

[52] 15 U.S.C. § 1692b(6) (2006) [§ 804(6)]. The FDCPA does not define what constitutes a "reasonable period of time" for a debt collector to wait for a response from the consumer's attorney. See chapter 9.2 for an analysis of this issue.

[53] FTC Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50097, 50103 (Dec. 13, 1988).

[54] FTC Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50097, 50103 (Dec. 13, 1988); Kwait, *FTC Informal Staff Letter* (Jan. 24, 1989).

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). My word processing program, Microsoft Word, counted 2,994 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

January 26, 2012

s/ Kristin Bateman
Kristin Bateman
Attorney for *Amicus Curiae*
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20006
Kristin.Bateman@cfpb.gov
(202) 435-7821

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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January 26, 2012

s/ Kristin Bateman
Kristin Bateman
Attorney for *Amicus Curiae*
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20006
Kristin.Bateman@cfpb.gov
(202) 435-7821

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2012, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following:

David Michael Larson
larsonlawoffice@gmail.com

Richard Bruce Wynkoop, Esq.
rickwynkoop@yahoo.com

Allison M. Zieve
azieve@citizen.org

Counsel for Plaintiff-Appellant

Adam Plotkin
aplotkin@alp-pc.com

Steven J. Wienczkowski
swienczkowski@alp-pc.com

Counsel for Defendant-Appellee

January 26, 2012

s/ Kristin Bateman

Kristin Bateman
Attorney for *Amicus Curiae*
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20006
Kristin.Bateman@cfpb.gov
(202) 435-7821