University of Cincinnati Law Review

Volume 90 | Issue 3 Article 7

March 2022

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Recommended Citation

Sebastian West, *Benign Language on Letters from Debt Collectors and Avoiding Violations of the Fair Debt Collection Practices Act*, 90 U. Cin. L. Rev. (2022)
Available at: https://scholarship.law.uc.edu/uclr/vol90/iss3/7

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BENIGN LANGUAGE ON LETTERS FROM DEBT COLLECTORS AND AVOIDING VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT

Sebastian West

I. INTRODUCTION

People may expect solicitations or prank calls from unknown callers, not threats of legal action. But this happened to Jessica Burke after she fell behind on her car payments and asked the financing company for more time to pay back her loan.[1] Ms. Burke's experience was not unique; other consumers receive calls from people threatening to place liens on their homes,[2] sue their children,[3] or dig up dead bodies.[4] These phone calls occur thousands of times a year[5] and are just one example of abusive practices used by debt collectors.[6] Fortunately, consumers can seek protection from abusive debt collectors under the Fair Debt Collection Practices Act ("FDCPA").[7]

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress created the Consumer Financial Protection Bureau ("CFPB") to collect, investigate, and respond to consumer complaints and bring suit for violations of the FDCPA.[8] In 2020 alone, the CFPB collected approximately 82,700 complaints reported by consumers for deceptive, abusive, and unfair debt collection services—the second largest category of complaints reported.[9] The majority of the complaints arose from debt collectors trying to collect debts consumers reported were not owed.[10] Conversely, consumers also filed complaints

1. Allie Johnson, *True Debt Collection Horror Stories*, FOX BUSINESS NEWS (Jan. 11, 2016), https://www.foxbusiness.com/features/true-debt-collection-horror-tales. The caller was not an attorney, but a debt collector alleging to be one.

2. *Id.*

3. *Id.*

4. Blake Ellis, *Debt Collection Horror Stories*, CNN MONEY (Feb. 6, 2013, 10:53AM), https://money.cnn.com/2013/02/06/pf/debt-collection/index.html.

5. *See* BUREAU OF CONSUMER FINANCIAL PROTECTION, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2021, 18-20 (March 2021) (depicting in Table 1 that 8% of the 82,700 debt collection complaints received in 2020 related to communication tactics over the phone) [hereinafter BUREAU: CFPB ANNUAL REPORT].

6. *See* 15 U.S.C. § 1692d(2) & (5) (explaining debt collectors violation the Fair Debt Collection Practices Act if they use obscene or profane language or cause the telephone to ring or engage any person in conversation with intent to annoy, abuse, or harass).

7. 15 U.S.C § 1692 *et seq*.

8. BUREAU OF CONSUMER FINANCIAL PROTECTION, CONSUMER RESPONSE ANNUAL REPORT, 4 (Jan. 1 – Dec. 31, 2020) [hereinafter BUREAU: CONSUMER RESPONSE ANNUAL REPORT].

9. *Id.* at 9. The highest category of complaints is credit or consumer reporting.

10. *See* BUREAU: CFPB ANNUAL REPORT, *supra* note 5, at Table 1 (49% of 82,700 complaints

Published by University of Cincinnati College of Law Scholarship and Publications, 2022

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alleging debt collectors sent abusive notifications, threatened to take negative or legal action, made false statements or representations, practiced abusive communication tactics, and threatened to contact others or share information improperly.[11] Notwithstanding whether debt is owed, many consumers have experienced the oppressive behavior of debt collectors hounding for payment.

Debt collection is a large industry. As of 2019, the CFPB reported third-party debt collection was a $12.7 billion industry, employing nearly 141,000 people across approximately 6,950 collection agencies in the United States.[12] These debt collectors attempt to collect debt owed for auto loans, credit cards, federal student loans, medical bills, and more.[13] Regardless of the debt source, debt collectors must comply with the FDCPA in their communications with consumers.

This Comment explores a circuit split on how debt collectors comply with 15 U.S.C. §1692f(8), under which debt collectors are only allowed to include limited language and symbols on envelopes and other written communications to consumers.[14] The permissible language and symbols include the debt collector's address, business name so long as the name does not indicate that it is a debt collecting business, and the consumer's address.[15] Because written notification about debt accounted for twenty percent of all the debt collection complaints in 2020,[16] compliance with §1692f is important for debt collectors to avoid getting sued. Although the Seventh Circuit held in *Preston v. Midland Credit Management* that there were no exceptions to §1692f(8)'s requirements,[17] both the Fifth and Eighth Circuits had previously recognized a benign language exception when debt collectors included language on envelopes such as "priority letter," "personal," and "confidential."

Part II of this Comment provides background on the FDCPA and discusses activities by debt collectors that constitute violations of the FDCPA. Part II also summarizes the federal district court cases which first adopted the benign language exception under §1692f(8), the Fifth and Eighth Circuit decisions which upheld the benign language exception under §1692f(8), and the Seventh Circuit's decision which rejected that

related to attempts collect debts not owed).

11. *Id.*

12. *Id.* at 13.

13. *See* BUREAU: CONSUMER RESPONSE ANNUAL REPORT, *supra* note 8, at 28. In 2020, other debt and credit card debt were the most complained about debt type.

14. *See infra* note 44.

15. *See* Donovan v. Firstcredit, Inc., 983 F.3d 246, 254-55 (6th Cir. 2021) (finding those requirements necessary for delivery of the communication).

16. *See* BUREAU: CFPB ANNUAL REPORT, *supra* note 5, at Table 1.

17. 948 F.3d 772, 781 (7th Cir. 2020) (reading the statute on its face and ruling any other language or symbol expressly provided is a violation).

exception. Part III lastly argues that the Seventh Circuit took the correct approach. Finally, Part IV recommends ways to provide more clarity to debt collectors regarding what constitutes a violation of §1692f(8) when communicating with consumers.

II. BACKGROUND

The FDCPA provides consumers relief from abusive debt collection practices and ensures debt collectors refrain from using abusive debt collection methods.[18] Before its passage, Congress recognized that consumers facing abusive collection practices lacked adequate legal protection.[19] Congress accordingly enacted laws imposing liability on debt collectors who violate consumers' rights.[20] First, Part A of this Section provides a brief history of the FDCPA and discusses the statutory framework of the FDCPA. Part B summarizes the federal district court decisions that led to the present circuit split between the Fifth, Eighth, and Seventh Circuits regarding a benign language exception to unfair and unconscionable debt collection practices. Finally, Part C explains how each circuit decided to either adopt or reject the exception.

A. The Fair Debt Collection Practices Act

In 1977, Congress enacted the FDCPA[21] in response to the debt collection industry's perceived abusive debt collection practices.[22] Generally, consumers experienced two common forms of abuse: threatening late-night phone calls and disclosure of personal information to third parties.[23] The FDCPA was therefore "designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists."[24] Congress reasoned, regardless of an individual's level of debt, the FDCPA would ensure the "right to be treated in a reasonable and civil manner."[25] To allow debt

18. 15 U.S.C. § 1692(e).

19. *Id.* at § 1692(b).

20. *Id.* at § § 1692c, 1692d, and 1692k.

21. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977), codified as amended at 15 U.S.C. § 1692 et *seq*. (2020).

22. Matthew S. Robertson, *Of Language and Symbols: A Move Toward Defining What is "Benign" Under the Fair Debt Collection Practices Act* [Douglass v. Convergent Outsourcing, 765 F.3d 299 (3d Cir. 2014)], 54 WASHBURN L.J. 761 (2015).

23. Elwin Griffith, *The Peculiarity of Language in the Debt Collection Process: The Impact of Fair Debt Collection Practices Act*, 54 WAYNE L. REV. 673, 674 (Summer 2008).

24. Baker v. G. C. Services Corp., 677 F.2d 775, 777 (9th Cir. 1982) (citing 1977 U.S. Code Cong. & Adm. News, 1695, 1696).

25. Jeter v. Credit Bureau, 760 F.2d 1168, 1178 (11th Cir. 1985) (citing 123 CONG. REC. H10,241 (daily ed. Apr. 4, 1977)(statement of Rep. Annunzio); 123 CONG REC H10,10138, at *H10,241 (LEXIS).

collectors to engage in otherwise abusive practices would certainly contribute to invasions of individual privacy.[26] Thus, the FDCPA added several more protections for consumers in addition to the two already-existing consumer rights laws: the Consumer Credit Protection Act[27] and Fair Credit Reporting Act.[28]

To provide the widest protection for consumers, the FDCPA defines a consumer as "any natural person obligated or allegedly obligated to pay any debt."[29] Similarly broad, a debt collector is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts."[30] The FDCPA governs communications between consumers and debt collectors[31] and prohibits debt collectors from engaging in any conduct to "harass, oppress, or abuse any person in connection with the collection of a debt."[32] Other violations include the use of false, deceptive or misleading representations to consumers[33] and unfair or unconscionable collection practices.[34]

To ensure compliance with the FDCPA, Congress enabled the Federal Trade Commission ("FTC") to authorize faithful enforcement of the FDCPA.[35] Congress empowered the FTC to investigate alleged violations of the FDCPA and bring suit against debt collectors to redress consumers' claims. When alleged violations occur, consumers are advised to contact the FTC or the CFPB[36] or independently bring a lawsuit against the debt collector, to determine a possible remedy. Generally interpreted as a strict liability statute,[37] if the consumer proves any violation, she is entitled to actual damages and up to $1,000 in statutory damages as determined by

26. *See* § 1692(a) (reading "there is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy").

27. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat 163 (1968), codified as amended at 15 U.S.C. § 1671 et s*eq*. (2021).

28. Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat 1128 (1970), codified as amended at 15 U.S.C. § 1681 et *seq*. (2021).

29. 15 U.S.C. §1692a(3).

30. *Id*. at § 1692a(6).

31. *Id*. at § 1692c.

32. *Id*. at § 1692d.

33. *Id*. at § 1692e.

34. *Id*. at § 1692f.

35. *Id*. at § 1692l(a).

36. FED. TRADE COMM'N, *Consumer Information: Debt Collection FAQs*, https://www.consumer.ftc.gov/articles/debt-collection-faqs (last visited Sept. 14, 2021).

37. *See e.g*., Beuter v. Canyon State Prof'l Servs., 261 Fed. Appx. 14, 15 (9th Cir. 2007) (holding the FDCPA imposes strict liability on debt collectors); Som v. Daniels Law Offices, P.C., 573 F. Supp. 2d 349, 356 (D. Mass. 2008); McCollough v. Johnson, Rodenberg & Lauinger, 610 F. Supp. 2d 1247, 1257 (D. Mont. 2009); Owen v. I.C. Sys., 629 F.3d 1263, 1270-71 (11th Cir. 2011).

the court.[38] Nevertheless, the statute provides two safe harbor provisions removing liability.[39] First, the debt collector can avoid liability by showing "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error."[40] Second, the debt collector shall not have any liability to "any act done or omitted in good faith in conformity with any advisory opinion of the [CFPB]."[41]

When consumers bring violations under §1692e for false or misleading representations, they usually bring additional claims under §1692f for unfair and unconscionable practices. Section 1692f covers not only unfair or unconscionable practices but also lists eight other distinct practices that constitute violations.[42] A few of these practices include: (1) collecting any amount not expressly authorized by the agreement creating the debt, (2) accepting a check postdated more than five days unless the consumer is notified in writing that the debt collector will be depositing the check, (3) soliciting by a debt collector of any postdated check for the purpose of threatening or instituting a criminal prosecution, and (4) communicating with a consumer regarding a debt by post card.[43] Nevertheless, a consumer often alleges a debt collector violated §1692f(8) because the collector included prohibited language on the letter to the consumer. A debt collector violates Section 1692f(8) by:

> [u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.[44]

That provision appears absolute in its language; however, several courts have allowed debt collectors a benign language exception, permitting debt collectors to add innocuous language such as "priority mail."[45] Part B will now examine the federal district court decisions that first recognized a benign language exception.

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38. 15 U.S.C. § 1692k(a)(2)(A).

39. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 578, 130 S. Ct. 1605 (2010) (providing exceptions to FDCPA violations including § 1692k(c) and § 1692k(e)).

40. 15 U.S.C. § 1692k(c).

41. *Id.* at § 1692k(e). The provision continues to say "notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." *Id.* Here, the advisory opinion seeks to provide some protection for the debt collector who asks the CFPB for review and approval of the debt collecting methods before using them on consumers.

42. *See generally* § 1692f(1)-(8).

43. *Id.* The examples provided above were abbreviated version of § 1692f(1)-(3), (7). Please see § 1692f for all 8 practices of violative conduct.

44. *Id.* § 1692f(8).

45. *See infra*, Part II, Section B.

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B. Federal District Court Decisions

In *Masuda v. Thomas Richards & Co.*, the United States District Court for the Central District of California held when a debt collector prints "PERSONAL AND CONFIDENTIAL" and "Forwarding and Address Correction Requested" on an envelope, §1692f(8) is not violated because the language is benign.[46] The plaintiff brought several FDCPA claims against the debt collector, but the court denied summary judgment on the alleged violation of §1692f(8).[47] The court acknowledged in some cases "a strict interpretation of the FDCPA may be necessary to protect consumer privacy and prevent embarrassment to consumers."[48] However, the court reasoned Congress's interest in protecting consumers is not furthered by benign language printed on letters to consumers.[49] The statute was designed to prevent debt collectors from using symbols on envelopes that indicated debt collection,[50] and the court held there was no such violation on the defendant's letter.

In *Johnson v. NCB Collection Services*, the United States District Court for the District of Connecticut ruled debt collectors did not violate §1692f(8) when they innocuously printed "Revenue Department" on the return address.[51] The debt collector included "Revenue Department" on its return address as a department designation and to distinguish its collection letter from other junk mail.[52] The court reasoned this designation was similar to "other permissible forms of correspondence such as direct billings from creditors for debts not yet past due."[53] Citing

46. 759 F. Supp. 1456, 1466 (C.D. Ca. 1991) (denying plaintiff's motion for summary judgment because of a benign language exception to § 1692f(8)).

47. *Id.* To reach its conclusion, the court analogized the plaintiff's alleged violation to the violation brought in Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979). In *Rutyna*, the court held the debt collector violated § 1692f(8) because the debt collector's return address—COLLECTION ACCOUNTS TERMINAL, INC.—indicated the debt collector was in the debt collection business. *Id.* at 982. The *Rutyna* court held the violation would cause consumers the type of embarrassment § 1692f(8) was specifically drafted to prevent. *Id.* Thus, in *Masuda*, the court held including "PERSONAL AND CONFIDENTIAL" and "Forward Address Correction Requested" on an envelope would not raise the same embarrassment concerns for the plaintiff. 759 F. Supp at 1466.

48. *Masuda*, 759 F. Supp. at 1466. It would be reasonable to believe then the court acknowledged these phrases violated § 1692f(8).

49. *Id.* It should be noted the court failed to provide other examples of benign language, which do not violate § 1692f(8).

50. *Id.*

51. 799 F. Supp. 1298, 1305 (D. Conn. 1992) (denying plaintiff's motion for summary judgment because "Revenue Department" was an innocuous designation of debt collector's address).

52. *Id.* Although not raised by the plaintiff as another alleged § 1692f(8) violation, nor addressed by the court in its opinion, the debt collector also included "Personal and Confidential" in large, boldfaced, and underlined capital letters on the envelope's exterior. *Id.* at 1301.

53. *Id.* at 1305. Here the court postulates the "Revenue Department" might suggest a credit-related transaction is involved, but it concluded that nothing in that language would suggest the letter came from an entity in the debt collection business. The court reasoned the letter could have been sent from a creditor

Masuda for support, the court held mere use of the innocuous designation was not the type of abusive collection practices the FDCPA was drafted to prohibit.[54]

In *Lindbergh v. Transworld Systems*, the United States District Court for the District of Connecticut held the use of the word "TRANSMITTAL" printed across a bold blue stripe did not violate §1692f(8).[55] The plaintiff alleged the debt collector's use of "transmittal" over a bold blue stripe constituted a symbol, indicating the debt collector was in the business of collecting debts.[56] The court summarily dismissed this argument because there was no supporting case law and Congress drafted §1692f(8) to prevent debt collectors from indicating their business was a debt collecting business through language and symbols, which the bold blue stripe did not implicate.[57] Additionally, the court relied on both the *Masuda* opinion and the FTC's commentary that §1692f(8) was designed to prohibit symbols and language revealing the debt collector's true business—not to "totally bar the use of harmless words or symbols on an envelope."[58] Thus, the court held the plaintiff's mechanical interpretation of §1692f(8) was not supported by case law, legislative history, or the governing administrative agency.[59]

With three opinions favoring the benign language exception, future courts would have guidance for adjudicating violations of §1692f(8). If a plaintiff sought to prove a violation, she would have to show the language on the debt collector's envelope was not benign but caused embarrassment and invaded one's privacy.[60] When the Fifth and Eighth Circuits addressed this issue a decade later, they agreed with those district court opinions; however, the Seventh Circuit held the provision unambiguously afforded no exception for benign language. Part C will now discuss the circuit split between the Seventh Circuit and the Fifth and Eighth Circuits.

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attempting to collect debts from the debtor, which is expressly allowed by § 1692a(6). *Id.*

54. *Id*.

55. 846 F. Supp. 175, 180 (D. Conn. 1994) (denying granting defendant's cross-motion for summary judgment because the use of "TRANSMITTAL" over a blue stripe was not a symbol § 1692f(8) was designed to prevent). Because *Johnson* and *Lindbergh* were decided by the same judge, Chief Judge Jose A. Cabranes, one can only speculate what the outcome might have been if another judge adjudicated *Lindbergh.*

56. *Id.*

57. *Id.*

58. *See id*. (quoting the FTC Official Staff commentary on the FDCPA. *See* 53 Fed. Reg. 50097, 50099 (Dec. 13, 1988)).

59. *Id*. Important to note the court implicitly appears to take the position there is a benign symbol exception, or that the court glossed over the fact "TRANSMITTAL" would fall into the benign language exception.

60. A core concern for the FDCPA. *See* § 1692(a).

C. The Circuit Split

Before the Seventh Circuit broke away from its sister circuits, the Fifth and Eighth Circuits provided the leading opinions for furthering the benign language exception among the district courts.[61] Although the Fifth Circuit gave more precedential weight to the exception first argued in *Masuda*, the court changed the analysis for its justification by looking to legislative intent to remove the ambiguity in §1692f(8).[62] This Section discusses the split between the circuits. First, this Section explains how the benign language exception was adopted by the Fifth Circuit in *Goswami v. American Collections Enterprises* and the Eighth Circuit in *Strand v. Diversified Collection Services*. Then, it examines the Seventh Circuit's rejection of the exception in *Preston v. Midland Credit Management*.

1. The Fifth Circuit's benign language exception in Goswami

The Fifth Circuit ruled the inclusion of "priority letter" on an envelope's exterior failed to be anything more than benign language.[63] In *Goswami*, the plaintiff received a second letter bearing an inch-thick blue bar across the entire envelope and containing the words "priority letter" in white ink.[64] The debt collector even admitted the letter was designed to entice debtors to open the letters, but the benign language exception applied because the letter was not deceitful or indicative of the debt collector's business.[65] Ultimately affirming the district court's approval of the argument, the Fifth Circuit first decided §1692f(8) was ambiguous and allowed for a review of the legislative history to resolve the

61. *See e.g.* Voris v. Resurgent Capital Servs., L.P., 494 F. Supp. 2d 1156, 1166 (S.D. Cal. 2007) (acknowledging a benign language exception but wanting to expand its use from the *Goswami* and *Strand* decisions); Waldron v. Prof'l Med. Mgmt., No. 12-1863, 2013 U.S. Dist. LEXIS 34402, at *8 (E.D. Penn. March 13, 2013) (adopting the benign language exception); Gonzalez v. FMS, Inc., No. 14 C 9424, 2015 U.S. Dist. LEXIS 87660, at *13 (N.D. Ill. July 6, 2015); Davis v. MRS BPO, LLC, No. 15 C 2303, 2015 U.S. Dist. LEXIS 91726, at *15 (N.D. Ill. July 15, 2015); Anenkova v. Van Ru Credit Corp., 201 F. Supp. 3d 631, 636 (E.D. Penn. 2016); *but cf.* Schmid v. Transworld Sys., No. 15 C 02212, 2015 U.S. Dist. LEXIS 118708, at **11-14 (N.D. Ill. Sept. 4, 2015) (discussing the benign language exception).

62. *See* Goswami v. Am. Collections Enter., 377 F.3d 488, 493-94 (5th Cir. 2004) (reasoning when § 1692f(8) is read together with § 1692f, the provision takes on another reasonable meaning and permits courts to look to the statute's legislative history to resolve the ambiguity).

63. *See id*. at 491 (affirming the district court's granting of defendant's motion for summary judgment for the alleged § 1692f(8) violation but reversing and remanding plaintiff's other claim for the defendant's violation of § 1692e(10)).

64. *See id.* (providing the debt collector sent a letter more than 180 days prior but never received a response).

65. *Id.* at 492 (summarizing the debt collector's successful argument for its summary judgment motion).

ambiguity.[66]

The court reasoned FTC commentary clearly allowed for benign language exceptions.[67] The FTC stated a collector can communicate with a consumer using a telegram or similar service, "that uses a Western Union (or other provider) logo and the word 'telegram' (or similar word) on the envelope, or a letter with the word 'Personal' or 'Confidential' on the envelope."[68] The Fifth Circuit used the FTC's commentary as direct support for language such as "priority letter" and other benign language appearing on debt collection letters.[69] To further support its holding, the court referred to a U.S. Senate report arguing so long as symbols on envelopes do not indicate debt collection practices, there can be no violation of the FDCPA.[70] And while *Masuda*, *Johnson*, and *Lindbergh* were used as support for the Fifth Circuit's conclusion that the use of "priority letter" was benign, the court did not mention those cases were decided without finding statutory ambiguity.[71] This was important because the court could only look to legislative history if it concluded the statute was ambiguous from its plain meaning.[72]

Conclusively, the court held unless the language would intimate debt collection, innocuous language such as "priority letter" cannot violate §1692f(8) and poses no threat or embarrassment to consumers.[73]

2. The Eighth Circuit's benign language exception in Strand

The Eighth Circuit held interpreting §1692f(8) to exempt benign language and symbols better effectuates Congressional purpose, and thus, "**PERSONAL AND CONFIDENTIAL**," "IMMEDIATE REPLY REQUESTED," and even some neutral corporate initials are not

66. *See id.* at 492-93 (reasoning when § 1692f(8) is read in isolation, the language reasonably bars any markings on the outside of debt collection letters other than the name and address of the parties; however, when read together with the opening paragraph of § 1692f, the subsection is only to prohibit unfair and unconscionable practices such as markings which signal the letter is indeed a debt collection letter and tends to humiliate, threaten, or manipulate debtors. Because of these two reasonable interpretations, the court looked to the legislative history to determine the purpose of the statute which provides the most reasonable interpretation).

67. *Id.* at 494. In a footnote, the court provided the FTC commentary is persuasive because commentary was "opened to public comment, was not a formal regulation, did not carry the force of law, and did not undergo full agency consideration." *see id.* at n.1.

68. *See id.* at 494 (quoting FTC Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50108 (Dec. 13, 1988)).

69. *Id.* The court also noted harmless language could appear on envelopes.

70. *Id.* (citing S. Rep. No. 95-382, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1702).

71. *See id.* (failing to acknowledge that those previous three cases were decided without requiring resolution of ambiguous statutory language).

72. *Id.* at 492-93 (citing Hightower v. Texas Hosp. Ass'n., 65 F.3d 443, 448 (5th Cir. 1995) ("Only if the language is unclear do we turn to legislative history.")).

73. *Id.*

violations of §1692f(8).[74] In *Strand*, each of the four letters mailed to the plaintiff bore the these terms and "D.C.S., Inc." above the return address.[75] After dismissing the plaintiff's claim,[76] the Eighth Circuit considered the plaintiff's argument that if §1692f(8) is read strictly, bizarre results would surface and exceed Congress's unambiguous intent.[77] The court rejected this argument and reasoned there was ambiguity in the provision.[78]

Unlike the Fifth Circuit's finding of ambiguity in §1692f(8),[79] the Eighth Circuit determined the word "name" in §1692f(8) created ambiguity and required an inquiry into the legislative history of the statute.[80] The issue being, whether "name" included a corporation's initials.[81] The court determined the word "name" included both a corporation's initials and logos and did not "thwart Congressional purpose [to prevent abusive collection practices] in any way."[82] The court reasoned that proscribing such benign language would not further congressional intent, and using corporate initials *decreases* the risk for invading a consumer's privacy.[83] Furthermore, the court was persuaded by the logic in *Masuda* and allowed the defendant's other language to fall into the benign language exception.[84]

In sum, the court ruled certain neutral logos and innocuous phrases like

74. Strand v. Diversified Collection Serv., 380 F.3d 316, 317, 319 (8th Cir. 2004) (affirming the district courts granting of defendant's 12(b)(6) motion because of the statute's benign language exception).

75. *Id.* at 317. "Immediately requested" was written in reverse typeface, which is defined as a "light colored typeface printed or otherwise set against a dark background, like white text on a black background." The PAPER Mill Store, https://blog.thepapermillstore.com/design-techniques-reversed-type (last visited Mar. 26, 2021).

76. *See id.* (providing the district court failed to strictly read § 1629f(8) and granting defendant's 12(b)(6) motion because the benign language exception failed to provide relief to the alleged violation).

77. *See id*. at 318 (stating a literal interpretation of § 1692f(8) would not allow a debtor's address and pre-printed postage on an envelope. The court took the plaintiff's argument further and determined a literal reading would prohibit innocuous marks related to post like "overnight mail" and "forwarding and address correction requested" even if used by the United States Postal Service).

78. *Id*.

79. *See supra* note 66.

80. *See Strand*, 380 F.3d at 318 (observing the statute does not definitely prohibit the use of initials for a corporate name, which gives rise to an inquiry to determine if the word "name" in the statute encompasses a reference to corporate initials. Because a corporation's initials can have a broader "currency" than just its name, there was sufficient doubt to the scope of the word "name" in § 1692f(8)).

81. *Id*.

82. *See id.* at 319 (relying on the same reasoning articulated in *Masuda*, which used the same 1977 Senate report stating § 1692f(8) prevents those symbols which indicate a debt collection business).

83. *See id.* (explaining abstract business names—such as initials—reveal less about the debt collector's business. Here D.C.S. is less revealing that printing the corporation's actual name). The court noted by applying a more liberal reading of the statute, it affords more advances to the statute's purpose and represents a more sensible statutory construction.

84. *Id.*

"personal and confidential" and "immediate reply requested" would render the alleged violative language benign.[85] The Eighth Circuit held those, and similar phrases, are benign because they fail to identify the source or purpose of the debt collection letters individually or collectively.[86]

3. The Seventh Circuit finds no benign language exception in Preston

Breaking from its sister circuits, the Seventh Circuit concluded the prohibition under §1692f(8) is clear and unambiguous—*any* language or symbol other than the debtor's name and address is a violation.[87] In *Preston v. Midland Credit Mgmt.*, the plaintiff received an interior letter bearing the words "TIME SENSITIVE DOCUMENT" visible through the exterior letter's glassine window.[88] The plaintiff argued the statute was unambiguous, and the blanket provision set forth in §1692f(8) achieved, rather than frustrated, Congressional intent.[89] The plaintiff argued that by allowing benign language exceptions, debt collectors would take "liberties" when sending their letters and avoid liability for their violations because the additional language was "benign."[90] Although the plaintiff lost at trial,[91] the Seventh Circuit found the plaintiff's claims meritorious and criticized how the Fifth and Eighth Circuit reached their holdings.[92] Because the statutory language failed to lead to peculiar results and afforded no ambiguity, the Seventh Circuit reasoned that resorting to legislative history was unnecessary and inappropriate.[93]

Beginning with its critique of the Eighth Circuit, the Seventh Circuit determined adhering to the plain wording of §1692f(8) would not produce bizarre results like prohibiting the debtor's address or pre-printed postage such as "overnight mail."[94] The Seventh Circuit noted §1692f(8)

85. *Id.*

86. *See id.* (denying plaintiff's request for a triable issue on "benign language" because defendant's letters were benign as a matter of law).

87. Preston v. Midland Credit Mgmt., 948 F.3d 772, 781 (7th Cir. 2020) (reading the statute on its face and ruling any other language or symbol expressly provided is a violation).

88. *Id.* at 777.

89. *See id.* at 778.

90. *Id.*

91. *See id.* at 779 (summarizing the district court's grant of defendant's 12(b)(6) motion because it held the Fifth and Eighth Circuit cases persuasive. The district court refused to apply a literal reading § 1692f(8), and it ruled Midland's benign language of "time sensitive document" indistinguishable from "priority letter" and "immediate reply requested," which both satisfied the benign language exception).

92. *Id.* at 781-82.

93. *Id.* at 782-83. For support of its conclusion, the court cites *United States v. Silva*, 140 F.3d 1098 (7th Cir. 1998). "If the language is unambiguous, we need not resort to legislative history or other sources to glean the legislative intent of the statute." 140 F.3d at 1102.

94. *See Preston*, 948 F.3d at 782. (disagreeing with the *Strand* court's argument of bizarre results

explicitly provides the words "use of mails" to communicate with debtors.[95] Thus, including the debtor's address or other stamps and affixing language or symbols by the United States Post Service ("USPS") to ensure successful delivery are both sanctioned.[96]

Next, the Seventh Circuit disagreed with the Fifth Circuit's conclusion that §1692f and §1692f(8) read together yield ambiguity.[97] The court plainly reasoned nothing in the prefatory language of §1692f renders §1692f(8) ambiguous.[98] It explained the prefatory language prohibits "unfair and unconscionable means to collect or attempt to collect debt" and is followed by eight discrete violations determined by each subsection's language.[99] The court ruled any other language, except what is prescribed, constitutes a violation, and §1692f(8) draws a bright line "to ensure consumers' rights are not lost in the interpretation of more subtle language."[100]

Therefore, determining violations of §1692f(8) is simple for the Seventh Circuit: a debt collector may not use *any* language or symbol on the envelope, except for its business name or address, so long as the name does not indicate it is in the debt collection business.[101]

III. DISCUSSION

Although the Seventh Circuit's decision to prohibit any language—save the two permissible exceptions—on an envelope delivered to a consumer to avoid violating §1692f(8) was legally sound, the court should have strengthened its decision by relying on another provision of

occurring because of a literal reading of § 1692f(8) and finding language like "overnight mail" and "forwarding address correction requested" provided by the United States Postal Service would be permissible).

95. *Id.*

96. *See id.* (reasoning these language and symbols are required for sending communication through the mail).

97. *See id.* at n.4. (providing additional dissatisfaction with the previous district court cases used by the Firth Circuit in *Goswami*. Specifically, the Seventh Circuit noted that the *Masuda* court never even considered if §1692f(8) was ambiguous in the first place, which would warrant the use of legislative history).

98. *Id.* at 782.

99. *Id.*

100. *Id.* at 783-84. The court's main concerned was a benign language exception will lead to the abusive debt collection practices § 1692f(8) was specifically drafted to prevent. Supporting its conclusion, the court then cites to Palmer v. Credit Collection Servs., Inc., 160 F. Supp. 3d 819 (E.D. Pa. 2015). In *Palmer*, the court provided that a bright line provides "certainty to debt collectors and avoids the problem of having to decide on a case by case basis what language or symbols intrude into the privacy of the debtor or otherwise constitute 'an unfair or unconscionable means to collect or attempt to collect a debt.' Congress wrote into the law a bright-line rule with respect to markings on envelopes sent to debtors and authorized the award of damages to debtors if debt collectors violate the plain language of § 1692f(8)." 160 F. Supp. 3d at 822-23.

101. *See Preston*, 948 F.3d at 784.

the FDCPA—§1692b(5).

Section A of this Part argues that the Seventh Circuit interpreted §1692f(8) correctly. Section B argues the Fifth and Eighth Circuit's holding was misplaced because it attempted to find textual ambiguity when there is none. Section C of this Part explains that the Seventh Circuit could have used another provision of the FDCPA to strengthen its holding. Because the FDCPA applies to consumers, debt collectors, and several other related parties in the collection of debt,[102] Congress likely intended the FDCPA to be read in whole, and if there is similar text in various sections, those sections should be read with the same statutory interpretation. Section D of this Part explores how the time difference between the circuit decisions may have impacted the outcome. Section E argues the Seventh Circuit's analysis provides debt collectors an opportunity to leave language on envelopes delivered to debtors. Finally, Section F of this Part suggests an amendment to §1692f(8), which would allow additional language on envelopes in accord with the Seventh Circuit's holding.

A. The Seventh Circuit simply read what is written

1. Applying the text as written

The Seventh Circuit was correct in holding that when communicating with consumers through the mails, debt collectors cannot use any language or symbol on envelopes except their business addresses and names.[103] Section 1692f(8) clearly indicates that using any language or symbol other than the business address and name is a violation of §1692f.[104] Although the prefatory language of §1692f is likely broad enough to encompass any unfair or unconscionable debt collecting practice, the next eight subsections provide a list of explicit examples constituting violations.[105] Thus, there is no need for courts to search for ambiguity or absurdity in the text of §1692f(8)—the plain language is unequivocal. Because there are no additional caveats or exceptions to §1692f(8),[106] debt collectors cannot reasonably believe any other language on envelopes would be permissible.

While the debt collector in *Preston* argued §1692f(8) would result in envelopes without a consumer's address, because the consumer's address

102. *See* § 1692a (providing definitions for the FDCPA).

103. *Preston*, 948 F.3d at 784.

104. *See* § 1692f(8).

105. *Id*. § 1692f.

106. Debt collectors can use their business name if their name does not indicate they are in the debt-collecting business. *Id.*

is not permitted language in the statute, the debt collector's position is untenable. As the court noted, any person seeking to make "use of the mails" must have a delivery address if the envelope is to be successfully delivered.[107] Even if any other language was allowed on envelopes, Congress would have included the additional permissible language in the provision, as opposed to courts creating judicial exceptions.[108] However, Congress did not include additional language in the statute; therefore, any language beside the consumer's address or the debt collector's address and business name violates §1692f(8).

2. Support from the Sixth Circuit

Recently the Sixth Circuit's decision in *Donovan v. Firstcredit, Inc.* agreed with the Seventh Circuit's conclusion that §1692f(8) did not include a benign language exception.[109] The court criticized the Eighth Circuit's approach and held §1692f(8) was unambiguous.[110] The Sixth Circuit noted the Eighth Circuit's reasoning was flawed because the court ignored the "alternative, available, and reasonable" reading of §1692f(8), which allows the debt collector to put the consumer's address on the envelope.[111] The court realized debt collectors must include the consumer's address if the letter is to be mailed and delivered, and it concluded §1692f(8) operates under the presupposition that the envelope will "employ those features necessary to facilitate it's delivery."[112] By contrast, the Sixth Circuit slightly weakens its decision by including the word "alternative" in its statutory analysis, suggesting there is another permissible reading of the statute. By providing dicta supporting the Fifth and Eighth Circuits' reading that an ambiguity exists *because* there is more than one reading of the provision, the Sixth Circuit should have refrained from using "alternative." Nonetheless, the Sixth Circuit's holding supports the purpose of §1692f(8), even more than a benign language exception, because the literal reading removes claims of absurdity.[113]

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107. *Preston*, 948 F.3d at 782.

108. *Compare* City of Arlington v. FCC, 569 U.S. 290, 304-05 (2013) (noting the Supreme Court cautions that "'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency" (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980))), *with* Congress has given the Consumer Financial Protection Bureau the authority to prescribe rules with respect to the FDCPA. *See* § 1692l(d) (2020).

109. 983 F.3d 246, 254 (6th Cir. 2021) (holding a literal reading of § 1692f(8) does not provide ambiguous text or absurd results).

110. *Id.*

111. *Id.* at 254-55.

112. *Id.* at 255.

113. *Id.* The court then provides three examples of how the literal meaning furthers the purpose of the FDCPA: (1) serves to eliminate abusive debt collection practices by exempting only language and

3. The CFPB does not recognize a benign language exception

The CFPB even opined §1692f(8) is unambiguous and without need for a benign language exception. In its amicus brief, filed *after* oral argument, the CFPB succinctly stated there is no "benign language" exception to §1692f(8).[114] As the CFPB has the power to "prescribe rules with respect to the collection of debts by debt collectors, as defined in this title," it has adequate and persuasive authority to instruct courts how FDCPA claims should be adjudicated.[115] In *Preston,* the CFPB[116] argued §1692f(8) expressly permits two pieces of information on envelopes and expressly recognizes debt collectors can use language and symbols that facilitate the delivery of mail.[117] The CFPB incontrovertibly declared §1692f(8) affords no benign language exception because the text explicitly delineates what are acceptable language and symbols.[118]

In sum, the Seventh Circuit's decision follows the law as written. Any use of language or symbol, other than the debt collector's address or name, unless the name indicates a debt collecting business, violates §1692f(8).

B. The Fifth and Eighth Circuit read ambiguity into plain language

The Fifth and Eighth Circuits wrongly held a benign language exception exists under §1692f(8). While all three circuits agree statutory interpretation begins with a reading of the plain language of the statute, the Fifth and Eighth Circuits have created ambiguity in a provision where it does not exist. These decisions should make any reader skeptical because it is unclear where the ambiguity lies in the provision.

1. The Fifth Circuit failed to read the statutory text

"Statutory interpretation, as [the Supreme Court] always say[s], begins with the text."[119] If the text is unambiguous and the statutory scheme is coherent and consistent, the inquiry ceases.[120] Thus, courts should "resist

symbols that facilitate mail delivery; (2) prevents debt collectors from being competitively disadvantaged because of the potential gamesmanship to push the limits on acceptable language and symbols; and (3) creates a bright-line rule for uniform application across the nation. *Id.*

114. Brief for the Consumer Financial Protection Bureau as Amicus Curiae Supporting Preston at 5, Preston v. Midland Credit Mgmt. Inc., 948 F.3d 772 (2020) (No. 18-3119) [hereinafter CFPB Br.].

115. *See* § 1692l(d) *rules and regulation for administrative enforcement*.

116. *Preston*, 948 F.3d 722, 780 n.19.

117. CFPB Br. 6.

118. *Id*. at 5, 9-10.

119. Ross v. Blake, 136 S. Ct. 1850, 1856, 195 L. Ed. 2d 117 (2016) (referencing Hardt v. Reliance Std. Life Ins. Co., 560 U.S. 242, 251, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010)).

120. Preston v. Midland Credit Mgmt., 948 F.3d 772, 780 (7th Cir 2020) (citing Kingdomware

reading words or elements into a statute that do not appear on its face."[121] The Fifth Circuit, however, failed to follow this canon of construction. Instead of reading the entire prefatory language of §1692f, the court glossed over the sentence following the first sentence on unfair and unconscionable language. The next sentence reads, "*[w]ithout limiting the general application of the foregoing*, the following conduct is a violation of this section."[122] The second sentence signals to debt collectors, and to courts, that *in addition to* unfair and unconscionable debt collecting practices, the following eight, separate types of conduct are prohibited as well.[123] There are no words or interpretations of the second sentence supporting the Fifth Circuit's conclusion that when read jointly, the prefatory language of §1692f and §1692f(8) produced ambiguity. The first sentence unequivocally proclaims unfair or unconscionable efforts to collect debts are prohibited. It does not confuse the second sentence, but rather codifies that all unfair or unconscionable practices are prohibitive and controls the second sentence which provides discrete examples of prohibited conduct.

Moreover, the court even concedes when §1692f(8) is read in isolation, it is "reasonable to understand it as barring any markings on the outside of a debt collection letter envelope other than the names and addresses of the parties."[124] This statement should have been the end of the court's inquiry. By its own words, the court correctly interpreted §1692f(8) and understood its prohibitory conduct. Therefore, like the Eighth Circuit in the *Donovan* opinion, the Fifth Circuit should be similarly criticized for ignoring the available and reasonable reading of §1692f(8).

2. The Fifth Circuit incorrectly consulted legislative history

When there is no ambiguity, there is no need to consult legislative history.[125] The Fifth Circuit acknowledged this rule and understood resorting to legislative history was only an option if the language was unclear.[126] The court already reasoned §1692f(8) provided clear prohibitions for debt collectors; therefore, its use of FTC commentary was improper. The review of FTC commentary exceeded the legal analysis because the text did not require consultation. Even if the court wondered

Techs., Inc. v. United States, 136 S. Ct. 1969, 1976, 195 L. Ed. 2d 334 (2016)).

121. CFPB Br. at 10 (quoting Dean v. United States, 556 U.S. 568, 572 (2009)).

122. 15 U. S. C. § 1692f.

123. *See supra* text accompanying note 43.

124. Goswami v. Am. Collections Enter., 377 F.3d 488, 493 (5th Cir. 2004).

125. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1749, 207 L. Ed. 2d 218 (2020) (explaining legislative history is consulted if statutory text is ambiguous and those consultations are to provide clarity to the ambiguity, not create it).

126. *See supra* note 72.

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why Congress drafted §1692f(8) as such, the language requires no ambiguity inquiry because the statutory provision is absolute.[127] The court could have reasoned Congress's absolute bar of any language or symbol, without limiting the ability to communicate with consumers, removed the temptation of debt collectors to force consumers into compliance with undesirable or embarrassing language stamped across envelopes.[128] Even if the Fifth Circuit had considered Congress's reasoning and let it guide the court's decision, consulting FTC commentary was improper because §1692f(8) is unambiguous.

3. The Eighth Circuit failed to recognize the similarity between name and initials

The Eighth Circuit reasoning that "name" produces ambiguity is also wrong, and thus, should have precluded the court from consulting legislative history. There was no need for the court to find ambiguity to determine if a debt collector's initials were the same as the debt collector's "name." Instead of finding ambiguity in the word "name," the court should have referenced a basic dictionary to read and understand the provision. A name is defined as "a word or words by which a person or thing is known," and initial is defined as "the first letter of a word or a name."[129] Thus, an initial is the first letter of a name by which a person is known. Had the court referenced a dictionary, the analysis would have ended because "name" is broad enough to include initials, making the meaning of the provision clear on its face. Furthermore, §1692f(8) even provides that a debt collector may use his business name on the envelope. Hypothetically, if Diversified Collection Services, Inc. went by DCS as its business name, those initials still would have been acceptable language pursuant to §1692f(8). Alternatively, even if the Eighth Circuit held initials were not an acceptable, or synonymous, method to express the debt collector's business name, the court should have ruled DCS violated §1692f(8) because they did not use the prescribed language.[130] Consequently, the court would have held using initials violated §1692f(8) because only the debt collector's *business* name is permitted. Therefore, the court would have avoided legislative history because it would have

127. Elwin Griffith, *The Peculiarity of Language in the Debt Collection Process: The Impact of the Fair Debt Collection Practices Act*, 54 WAYNE L. REV. 673, 725 (Summer 2008) (arguing the Fifth Circuit did not need to search for ambiguity because the "clear language merely forbids the use of any language or symbol.").

128. *Id.*

129. *Name* and *Initial*, The Merriam-Webster Dictionary (2004). The definition of "initial" used above is the second definition.

130. *See supra* note 75. The debt collector used "D.C.S., Inc." and not its business name Diversified Collection Services, Inc. on its envelope to the debtor.

Published by University of Cincinnati College of Law Scholarship and Publications, 2022

correctly concluded there is no ambiguity in §1692f(8).

4. The root problem of the ambiguous text

Consulting legislative history is not always improper; however, prior to consulting legislative history, courts must recognize ambiguous statutory language. The weak point in the Fifth Circuit's *Goswami* decision originates from the absence of an initial finding of ambiguity.

In a footnote, the Seventh Circuit astutely highlights a major flaw in the *Masuda* case.[131] During the Seventh Circuit's unfavorable review of the three previous cases influencing the *Goswami* decision, it notes that the *Masuda* court never determined if §1692f(8) was ambiguous.[132] This revelation severely weakens all subsequent decisions that directly rely on *Masuda* for persuasive authority. If courts intimately espouse that legislative history can only be consulted if statutory text is ambiguous, then the initial case concluding the existence of a benign language exception was incorrectly analyzed because the *Masuda* court failed to find ambiguity. Since there was no ambiguity to warrant the consultation of FTC commentary, the influential value of *Masuda* is nil. With zero influential value, both the *Johnson* and *Lindbergh* holdings are severely weakened, and consequently *Goswami* and *Strand* as well. Therefore, the *Masuda* decision should not have been followed and instead led to several courts recognizing a benign language exception[133] which should have never existed.[134] In sum, finding ambiguity in the statutory text was unreasonable and could have been entirely avoided.

C. What about Section 1692b(5)?

Limiting the language and symbols on envelopes to avoid disclosing the debt collector is in the debt collecting business is enforced by another provision of the FDCPA.[135] Section 1692b(5) provides when communicating with third parties to acquire contact information for consumers, debt collectors may "not use any language or symbol on any envelope" that indicate the debt collector is in "the debt collection

131. *See* Preston v. Midland Credit Mgmt., 948 F.3d 772, n. 21.

132. *Id*. (providing "[t]he Masuda court never considered, in the first instance, whether the language of the statute was ambiguous therefore necessitating resort to legislative history").

133. *See supra* note 61.

134. *See supra* note 132.

135. *See* § 1692b(5) (providing when debt collectors communicate with third parties, they may "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").

business or that communication relates to the collection of a debt."[136] While the recipient of the mail is different, the prohibitions under §§1692f(8) and 1692b(5) are the same: debt collectors cannot use any language or symbol on any envelope if it indicates the debt collector is in the debt collection business. Nevertheless, this is where the Seventh Circuit should have parsed the language of the two provisions.

The court should have referenced §1695b(5) to support its conclusion that §1692f(8) unambiguous and cannot have a benign language exception because the statute is absolute.[137] Under §1692b(5), the use of any language or symbol is prohibited *only if* it conveys the debt collector is in the business of collecting debts. Under §1692f(8), the use of *any* language or symbol, save what is permitted, is absolutely barred. If Congress wanted to expand the language of §1692f(8), it would have expressly included those additional means for debt collectors to communicate with consumers.[138] This differs from §1692b(5) which allows debt collectors much more freedom when communicating with individuals. Section 1692b(5) implies debt collectors can include *any* of the language utilized by the debt collector defendants in any of the circuit court cases because none of those words equated to a debt collecting business. Thus, while both provisions limit the use of any language or symbols, §1692f(8) creates a bright-line rule, while §1692b(5) allows creative debt collectors to mark-up envelopes.

Therefore, because Congress did not include an exception or leave room for an implied exception, it was incorrect for the Fifth and Eighth Circuits to create one. The Seventh Circuit should have included this distinction to bolster its legal reasoning and holding. While the court did reach the correct conclusion, it could have added the distinction to the opinion and declared "[w]here Congress includes particular language in one section of a statute but omits it in another section of that same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[139]

D. The Impact of Time between Decisions

Delegating enforcement of the FDCPA to the CFPB likely had an impact on the Seventh Circuit's decision. Prior to enacting the CFPB in

136. *Id*. Note, this provision has also been challenged for ambiguous text, but relating to the phrase "communication relates to collection of debts," rather than the "use of any language or symbol" phrase. *See e.g*. Marx v. General Revenue Corp., 668 F.3d 1174, 1183-84 (10th Cir. 2011); Scribner v. Works & Lentz, Inc., 655 Fed. Appx. 702, 706 (10th Cir. 2016); Mahjub v. Rent Recover of Better NOI, LLC, 16 C 6574, 2017 U.S. Dist. LEXIS 33653, at **9-11(N.D. Ill. Mar. 9, 2017).

137. *See generally* CFPB Br. at 11-12.

138. *Id*. *See also* Griffith, *supra* note 127, at 727.

139. CFBP Br. at 12 (quoting Russello v. United States, 464 U.S. 16, 23 (1983).

2010,[140] Congress wrote the FTC was the enforcement agency of the FDCPA.[141] While the FTC did not have general rulemaking authority,[142] its staff commentary was quite influential for FDCPA litigation.[143] However, the FTC cautioned its commentary did not have the "force of a trade regulation rule or formal agency action" and was "not binding on the Commission or the public."[144] Therefore, the FTC commentary was only persuasive authority for the courts.

In 1988, the FTC acknowledged a literal reading of §1692f(8) would lead to absurd results, and it allowed for debt collectors to add a few words to envelopes.[145] The permissible language included words like "personal," "confidential," and "telegram," and the FTC explained those words would not violate §1692f(8).[146] Thus, the earlier courts found support for their decision to allow the allegedly violative language. As argued above, however, the courts' consultations on the FTC commentary were improper because the statutory language was never ambiguous.[147] Therefore, the FTC commentary might have allowed a benign language exception or even permitted the offending language if §1692f(8) was indeed ambiguous.

The question then becomes if the CFPB was enacted before the *Goswami* or *Strand* decisions, would the CFPB have argued against the benign language exception? While impossible to know, it seems likely the CFPB would still take the same position—there is no benign language exception—but this presumption is not absolute. Had the CFBP been in existence before 2004, it could have just as easily determined there *was* a benign language exception, and it would be up to Congress to amend or remove that exception.[148] This possibility is important because, before enacting the CFPB, debt collectors could have included language on envelopes that allegedly violated §1692f(8) if they obtained an advisory

140. *See id.* at 3 (stating the creation of the CFPB was part of the Dodd-Frank Wall Street Reform and Consumer Protection Act).

141. *See id.* at 2-3 (providing the FTC would enforce the FDCPA pursuant to § 1692l(a) (2010)).

142. *Id.*

143. This reflects the usage of FTC staff commentary for *Masuda*, *Johnson*, *Lindbergh*, *Goswami*, *Strand* and all subsequent cases recognizing a benign language exception.

144. Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097 (Dec.13, 1988).

145. *Id.* at 50099.

146. *Id.*

147. The Author acknowledges that FTC commentary allowing certain language to be included on envelopes indicates there is an argument the § 1692f(8) is ambiguous; however, as argued in this Note, the provision is no ambiguous because it provides exactly what is and is not allowed on envelops to consumers.

148. Courts could have determined the existence of a benign language exception, but following the canons of construction, they could only make this determination after first finding textual ambiguity.

opinion from the FTC.[149] Before its current version, §1692k(e) provided no liability if debt collectors acted in accordance with an advisory opinion issued from the then enforcing agency.[150] §1692k(e) now grants the CFPB the power to issue advisory opinions and explains that a debt collector faces no liability if an advisory opinion is obtained in the debt collector's favor or if after such act, the opinion is amended and the judiciary or some other authority determines the opinion invalid.[151] While time likely influenced each circuit's decision, debt collectors and consumers would benefit if Congress amended §1692f(8) and clarified the language.

E. Can both consumers and debt collectors be satisfied?

Either there is zero language or symbols listed on envelopes to consumers,[152] or there is permissible language for successful mail delivery. The former aligns with the previous argument and overall holding of the Seventh Circuit, yet the court ultimately allowed language for successful mail delivery. An argument then surfaces regarding what constitutes language for successful mail delivery and *who* may list it on envelopes.

The Seventh Circuit noted that pre-printed postage or the use of "overnight mail" was permissible language.[153] Additionally, the court reasoned §1692f(8) did not prohibit markings required by the USPS for delivery like affixing language or stamps.[154] Importantly, the CFPB even provided "forwarding and address correction requested" as well as a USPS barcode would be permitted.[155] The CFPB also explained other markings were permissible so long as the markings facilitated using the mail.[156] Does the CFPB take the position "priority mail" or "priority letter" is permissible as well? Because such language would facilitate the use of mails, the answer seems to be yes; however, if those markings were allowed, they would clearly violate §1692f(8).

Although the CFPB argued "forwarding and address correction requested" was permissible, the Seventh Circuit avoided including that language in its opinion. The court acknowledged the CFPB's guidance

149. *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 588 130 S. Ct. 1605 (2010) (explaining Congress included a protection from liability where debt collects conducted "any act done or omitted in good faith in conformity with any advisory opinion of the [FTC]." §1692k(e)).

150. *See* 15 U. S. C. § 1692k(e) (2010).

151. *See generally* 15 U. S. C. § 1692k(e) (2020).

152. The exception being a debt collects business name and address if it does not indicate a debt collection business. *See* § 1692f(8).

153. Preston v. Midland Credit Mgmt., 948 F.3d, 772, 782 (7th Cir. 2020).

154. *Id.*

155. CFPB Br. at 13.

156. *Id.*

but potentially excluded this language because it was exactly the offending language in *Masuda*. If the court explicitly wrote "forwarding and address correction requested" was permissible, it would have implicitly accepted the *Masuda* court's conclusion that §1692f(8) was not violated.[157] Had the court accepted the reasoning in *Masuda*, the court would have weakened its own conclusion that §1692f(8) permits additional language to ensure successful mail delivery. Nonetheless, the court must know "forwarding and address correction requested" is permissible language because obtaining the correct address is necessary for successful mail delivery. Thus, it appears the Seventh Circuit's disagreement with *Goswami* and *Strand* is not over whether an exception exists but rather the poor word choice, "benign language exception," for describing permissible language as opposed to "[ensuring] the successful delivery of the communication."[158]

In sum, the language of §1692f(8) is absolute. It seems peculiar both the Seventh Circuit and CFPB allow for exceptions—although they both phrase it as permissible language—to §1692f(8). The court should have ruled if the affixing language, stamp, or shipping speed is on a letter to consumers, it must be marked by USPS itself and not the debt collector. To allow the debt collector to include other language on envelopes would violate §1692f(8). The permissible language should only be marked by USPS because USPS, not debt collectors, delivers mail. The only problem becomes: what happens if debt collectors themselves include the affixing language, stamp, or shipping speed?[159] According to USPS guidelines, individuals can write "priority mail" on their own envelopes.[160] Nonetheless, given the court's holding, debt collectors should probably have USPS stamp or affix language to their envelopes to avoid any potential violation, even if debt collectors themselves seek to facilitate the delivery of their mail.

F. Suggestion for amending 15 U.S.C. §1692f(8)

To ensure debt collectors no longer face potential litigation over §1692f(8) violations, Congress should consider the below amendment to the statute:

157. The *Masuda* court found no violation of § 1692f(8) because of the benign language exception.

158. *See Preston*, 948 F.3d at 782 (holding § 1692f(8) does not prohibit markings required by the United States Postal Service such as stamping or affixing language or symbols to ensure the successful delivery of the communication.").

159. According to the USPS, if individuals use their own boxes or envelopes for priority mail, they must identify it with the marking of "Priority Mail." USPS, Postal Explore, https://pe.usps.com/BusinessMail101/Index (follow "Classes of Mail" hyperlink; then follow "Priority Mail" hyperlink) (last visited Apr. 16, 2021).

160. *Id.*

> Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business. Notwithstanding any permitted language or symbol, additional language or symbol shall not violate this subsection if the language or symbol used on any envelope is **printed** by the United States Postal Service for the delivery of envelopes listed in the Mail Classification Schedule ***and*** identified as market dominant products.

This amendment allows debt collectors to have USPS envelopes already affixed with additional language.[161] By granting debt collectors the ability to use USPS envelopes with "priority" or other pre-printed language on envelopes, debt collectors would not be violating the statute or the Seventh Circuit's holding because the language on the letter would be for the successful delivery of the mail.

The amendment can be implemented because the USPS already has authority to "provide and sell postage stamps and other stamped paper, cards, and envelopes."[162] Debt collectors could simply consult the Mail Classification Schedule, as kept by the Postal Regulatory Commission,[163] and consult the part for market dominant products to explore which services and affixing language can be customized on the envelopes.[164] Within the market dominant products, debt collectors could select from various special services for their envelopes, such as address correction services, business reply mail, certified mail, and stamped envelopes.[165] Also, debt collectors can obtain personalized stamped envelopes with first-class mail postage.[166] Furthermore, debt collectors can consult the Domestic Mail Manual for specifications on all services provided, how language would look on envelopes, and other mail-related inquiries.[167]

Overall, this feasible solution allows additional language on envelopes without violating the amended §1692f(8). Under the proposed amendment, so long as debt collectors do not frustrate a core reason for passing the FDCPA,[168] they could obtain statutorily permitted envelopes with additional language, and courts would not have to be split over a

161. The Author's suggestion is limited to USPS, but § 1692f(8) could be amended to include other shippers like FedEx or UPS.

162. *See generally* 39 U.S.C. § 404(a)(4).

163. 39 C.F.R. § 3040.104(a).

164. *See id.* at § 3040.104(b)(2) (detailing the information concerning market dominate products).

165. POSTAL REGULATORY COMMISSION, MAIL CLASSIFICATION SCHEDULE, 121 (revised through March 31, 2021).

166. *See id.* at 150.

167. UNITED STATES POSTAL SERVICE, POSTAL EXPLORER: DOMESTIC MAIL MANUAL (2021), https://pe.usps.com/DMM300 (last visited Sept. 15, 2021).

168. *See generally* § 1692(a) (providing Congressional findings on the implications of abusive practices in debt collecting practices, namely invading individual privacy).

"benign language exception" or language ensuring the "successful delivery of the communication."

IV. CONCLUSION

Ensuring compliance with §1692f(8) is straightforward. Debt collectors cannot include any language or symbol on envelopes when communicating with consumers, except the debt collector's address and business name if the name does not indicate a debt collection business. Furthermore, debt collectors cannot use language such as transmittal, personal, confidential, or immediate reply requested because there is no benign language exception. There is no exception because §1692f(8) is unambiguous in its construction, and the Fifth and Eighth Circuits were incorrect in finding ambiguity in the text. Both circuits should have reached the same conclusion as the Seventh Circuit and held there is no benign language exception to §1692f(8). Additionally, if any language or symbol is to be included on the envelope, it will not violate §1692f(8) if it ensures the successful delivery of the communication. Nonetheless, if there was an exception, Congress would have written it into the statute to provide guidance on how debt collectors can guarantee they are not violating any unfair or unconscionable debt collecting practice.

Future courts faced with debt collectors claiming a benign language exception should follow the Seventh Circuit's approach and also recommend that Congress amend the statute. Congress should clarify the provision to enable the USPS to provide language and symbols on envelopes for debt collectors, so those can be affixed to envelopes and not violate the provision. Under this Comment's proposed amendment, debt collectors could more easily comply with §1692f(8), and consumers would still avoid any abusive, deceptive, or unfair debt collection practices. The proposed amendment does not restrict the FDCPA's efforts to protect consumers but rather simply guarantees that important mail is delivered legally.