WHEN A COMMUNICATION IS NOT A "COMMUNICATION": THE EVER GROWING JURISDICTIONAL SPLIT REGARDING THE SCOPE OF PERMISSIBLE THIRD PARTY CONTACTS UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

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I. INTRODUCTION

Imagine that you had fallen behind on your bills for the first time in your life. Maybe you unexpectedly lost your job. Maybe your child or spouse suddenly became ill and you had to make difficult decisions about which bills needed to be paid first. As one who has always been able to provide for yourself, you are naturally very sensitive about your financial troubles. The last thing you want is for others to know about your problems. Suppose that an anonymous individual from a debt collection company called your mother at her home one afternoon, and after being told that you did not live there, asked her to tell you to return the call because it was an "urgent" matter? Your mother naturally calls you immediately and asks you questions about the message and why this mysterious individual was looking for you so urgently. You discover upon calling the telephone number given to your mother that this individual in fact works for a debt collection company. Understandably, you might feel angry or embarrassed. Did a debt collection company just use your mother to try to collect a debt? Was this legal?

As many are discovering in this difficult economy, this is a very common situation which has presented an increasingly frequent legal question for federal courts across the country: Does the Fair Debt Collection Practices Act (hereafter "FDCPA")[1] allow a debt collector to leave an anonymous callback message with a third party so long as the debt collector does not provide information that could reveal the existence of the debtor's outstanding debt? The FDCPA prohibits a debt collector from "communicating" with a third party in "connection with the collection of any debt."[2] Curiously, however, the FDCPA appears to greatly restrict this

1. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2012).
2. Section 1692c(b) provides:

> 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.

Section 1692c(b) (emphasis added). As will be explained in detail throughout this article, the dispute amongst the courts arises from the FDCPA's own definition of the term

seemingly broad prohibition by defining a "communication" as "the conveying of information regarding a debt directly or indirectly."[3] Therefore, a communication really is not a "communication" unless some information about the debt is actually conveyed "directly or indirectly" to the third party.[4] Where does this leave the debtor who finds that his or her mother is unknowingly relaying callback messages for anonymous debt collectors?

Defining the scope of the prohibited third-party "communication" under the FDCPA has been the subject of numerous lawsuits, which have resulted in a divisive split between two interpretive camps of federal district courts. A majority of courts hold that the perceived intent of Congress to protect the debtor demands that a third-party callback message, or other similar contact, is always an illegal "communication" under the FDCPA regardless of whether actual debt information is disclosed.[5] But a minority

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"communication" used in § 1692c(b). Section 1692a(2) of the FDCPA explains that "the term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium.'" As such, § 1692c(b) does not appear to prohibit every third party contact, but only those in which the debt collector actually conveys "information regarding a debt." *See* § 1692a(2).

3. § 1692a(2).

4. *See id.*

5. A majority of courts have found that the definition of the term "communication" must be interpreted broadly to prohibit a debt collector from ever contacting a third party in connection with the collection of a debt regardless of whether information about the debt is actually conveyed. *See* Thomas v. Consumer Adjustment Co., 579 F. Supp. 2d 1290, 1296-97 (E.D. Mo. 2008) (holding that a telephone message constitutes a "communication" under the FDCPA so long as the message was connected to the collection of a debt, regardless of whether actual information about the debt was conveyed); Berg v. Merchants Ass'n Collection Div., Inc., 586 F. Supp. 2d 1336, 1340-41 (S.D. Fla. 2008) ("Courts generally consider pre-recorded messages and voicemail messages from debt collectors to be 'communications,' even if the messages do not state what the calls are regarding."); Costa v. Nat'l Action Fin. Servs., 634 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007) ("Although the messages do not mention specific information about plaintiff's debt or the nature of the call, § 1692a(2) applies to information conveyed 'directly or *indirectly*.' Here, defendant's messages conveyed information to plaintiff, including the fact that there was a matter that she should attend to and instructions on how to do so."); Leyse v. Corp. Collection Servs., Inc., 2006 WL 2708451, at *6 (S.D.N.Y. Sept. 18, 2006) ("[The debt collector's] [m]essages were intended as the first phase of an ongoing communication 'regarding a debt.' . . . [M]essages like the ones left by CCS were intended to initiate further dialogue regarding Plaintiff's alleged debt, and therefore constitute 'communications.'"); Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 655-56 (S.D.N.Y. 2006) ("Defendant's voicemail message, while devoid of any specific information about any particular debt, clearly provided some information, even if indirectly, to the intended recipient of the message. Specifically, the message advised the debtor that the matter required immediate attention, and provided a specific number to call to discuss the matter. Given that the obvious purpose of the message was to provide the debtor with enough information to entice a return call, it is difficult to imagine how the voicemail message is not a communication under the FDCPA."); Belin v. Litton Loan Servicing, L.P., 2006 WL 1992410, at *4 (M.D. Fla. July 14, 2006) ("The Court

of courts strictly interprets the plain meaning of the FDCPA's definition of a "communication" to require that the debt collector provide actual information about the debt (which would include the debt's very existence).[6] These cases continue to accrue across the country despite this district court majority, as debt collection companies continue to test new districts to see if they might preserve another tool to reach the debtor.[7]

Debt collection companies recently got the major victory they had been searching for in the Tenth Circuit case of *Marx v. General Revenue*

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rejects this argument, since courts have found that messages left on answering machines that did not directly convey information about a debt were still communications under the FDCPA, because they conveyed information about a debt indirectly, since the purpose of the message is to get the debtor to return the call to discuss the debt."); Hosseinzadeh v. M.R.S. Assocs. Inc, 387 F. Supp. 2d 1104, 1115-16 (C.D. Cal. 2005) ("While the messages may not technically mention specific information about a debt or the nature of the call, § 1692a(2) applies to information conveyed 'directly or indirectly.' Defendant conveyed information to plaintiff, including the fact that there was an important matter that she should attend to and instructions on how to do so. Defendant further admits that the calls were merely the first step in a process designed to communicate with plaintiff about her alleged debt."); West v. Nationwide Credit, Inc., 998 F. Supp. 642, 643-45 (W.D.N.C. 1998) (holding that a "communication" under the FDCPA does not require that actual information about the debt be conveyed, but rather simply that the contact related to a debt in some way); Edwards v. Niagara Credit Solutions, Inc., 586 F. Supp. 2d 1346, 1359 (N.D. Ga. 2008) ("[T]he messages left by Defendant on Plaintiff's answering machine are 'communications' under the FDCPA because they were telephone calls placed to Plaintiff for the purpose of attempting to collect a debt, and thus indirectly referenced the debt even if the messages did not contain specific information about the debt."); Ramirez v. Apex Fin. Mgt., LLC, 567 F. Supp. 2d 1035, 1041 (N.D. Ill. 2008) ("[I]t becomes apparent that messages left on a debtor's answering machine can be considered *indirect* communications regarding the debt, even if the debt collector fails to expressly mention that the call pertains to collection, payment, deadlines or any other observable characteristics of a collection call.") (emphasis in original).

6. A growing number of minority courts have adhered to a strict construction of the plain meaning of "communication" under § 1692a(2) and have found that a prohibited "communication' only occurs when actual information about the debt is conveyed. *See* Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1177 (10th Cir. 2011) ("A third-party 'communication,' to be such, must indicate to the recipient that the message relates to the collection of a debt; this is simply built into the statutory definition of 'communication.'"), cert. granted on other grounds, 132 S. Ct. 2688 (2012); Zortman v. J.C. Christenson & Assocs., Inc., 870 F. Supp. 2d 694, 707-08 (D. Minn. 2012) (holding that a simple identification message which does not identify a debt is not a "communication" for purposes of the FDCPA); Biggs v. Credit Collection, Inc. 2007 U.S. Dist. LEXIS 84793, at *13 n.3 (W.D. Okla. Nov. 15, 2007) ("The statutory definition [of a 'communication'] does not include messages or communications that do not impart (or are not at least intended to impart) information about a debt."); Zamos v. Asset Acceptance, LLC, 423 F. Supp. 2d 777, 782 (N.D. Ohio 2006) (holding that a voice message did not violate § 1692c(b) because the message did not "convey[ ] information relating to [the debtor's] debt liability in violation of the FDCPA"); Horkey v. J.V.D.B. & Assocs., Inc., 179 F. Supp. 2d 861, 867-68 (N.D. Ill. 2002) (reasoning that although the message used inappropriate language that violated other sections of the FDCPA, it did not violate § 1692c because information about the debt was not actually conveyed).

7. *See* cases cited *supra* notes 5, 6.

Corp.[8] In *Marx*, the Tenth Circuit cut sharply against the district court majority by adhering to the minority courts' strict interpretation of a "communication" as requiring the conveyance of actual information about the debt.[9] Importantly, the Tenth Circuit also provided a novel evidentiary requirement that an illegal "communication" has occurred only if the third party actually understood that the information provided in the message implicated a debt.[10] Being the first circuit level opinion on this issue, the *Marx* opinion will disrupt the current majority balance and undoubtedly serve as a catalyst that will fuel the growth of this debate to other circuit level courts.[11]

This article will analyze the major points of contention in this growing debate and address those questions of both textual interpretation and policy that await future courts. This analysis will lead to two conclusions. First, and most importantly, this article will show future courts that the FDCPA as currently constructed does not prohibit a debt collector from leaving a third-party callback message so long as the debt collector does not provide actual information that could reveal the existence of a debt. A prohibited third-party "communication" under the FDCPA is a contact in which the debt collector has provided actual information that could reveal the existence of a debt. The majority courts' fear that debt collectors will use the debtor's family, friends, and coworkers as unknowing tools to apply pressure upon the debtor through anonymous callback messages is very real. This, however, is not the fear that is embodied in the third-party "communication" prohibitions of the FDCPA.

The second conclusion of this article will be an acknowledgment that Congress should clarify its structure of the third-party "communication" provisions of the FDCPA. Although this article will explain how the current

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8. *Marx*, 668 F.3d at 1177.

9. A third-party "communication," to be such, must indicate to the recipient that the message relates to the collection of a debt; this is simply built into the statutory definition of "communication." . . . In order to substantiate the claim that the [facsimile message] "conveys" information "regarding a debt," either "directly or indirectly," [the plaintiff] had the burden of proving such a conveyance; the standard is not whether the [facsimile message] *could have had* such an implication. No testimony shows that [the plaintiff] suffered any actual harm (such as embarrassment or a denial of promotion) or that her employer was aware that the [facsimile message] in any way concerned a default on a student loan. [The plaintiff] did not call any witnesses from her employer's office to testify as to what they inferred from the facsimile.

Id. (citation omitted).

10. *Id*.

11. The Supreme Court has granted certiorari in part regarding the Tenth Circuit's opinion in *Marx* on other grounds dealing with the ability of a prevailing defendant under the FDCPA to recover costs even when the lawsuit was brought in good faith. *See* Marx v. Gen. Revenue Corp., 132 S. Ct. 2688 (2012). The Supreme Court denied certiorari regarding the Tenth Circuit's interpretation of the term communication" under the FDCPA. *Id.*

structure of the FDCPA's third-party "communication" provisions is not actually superfluous or contradictory so as to strip the term "communication" of its defined meaning, this article will acknowledge that the awkward structure of these provisions has led to much of the ensuing debate. This article will conclude with a brief suggestion on how Congress might clarify its purposes for these third-party "communication" provisions through simple restructuring.

II. INTRODUCING THE FDCPA AND ITS PROVISIONS REGARDING ILLEGAL THIRD PARTY "COMMUNICATIONS."

A. The Vast Presence of the Debt Collection Industry and the Importance of Debt Collection Regulation.

The debt collection industry has an enormous presence in the United States economy and legal system. In 2010, third party debt collection companies successfully collected approximately $54.9 billion in outstanding debts, which generated over $10.3 billion in commissions for debt collection agencies.[12] In recovering such enormous amounts of outstanding debt, it is estimated that debt collection companies contact debtors more than one billion times per year.[13] The Federal Trade Commission (FTC), which is the administrative agency assigned to enforce the FDCPA, receives more complaints about the debt collection industry than any other industry.[14] Indeed, in 2010 the FTC received 108,997 complaints from consumers regarding third party debt collection companies, which implicated actions in violation of the FDCPA.[15] This figure alone represented approximately 21% of all complaints that the FTC received from consumers.[16] Of these complaints, 23,758 related to a debt collector allegedly revealing information about a consumer's debt to a third party in violation of the FDCPA.[17] It is not surprising then that the FDCPA set an all-time litigation high in 2011 by becoming the subject of 11,811

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12. *See* ERNST & YOUNG LLP, THE IMPACT OF THIRD PARTY DEBT COLLECTION ON THE NATIONAL AND STATE ECONOMIES 6 (Feb. 2012), http://www.acainternational.org/files.aspx?p=/images/21594/2011acaeconomicimpactreport.pdf.

13. Robert M. Hunt, *Collecting Consumer Debt in America*, BUS. REV., Second Quarter 2007, at 11, 11, http://www.philadelphiafed.org/research-and-data/publications/business-review/2007/q2/hunt_collecting-consumer-debt.pdf.

14. *See* FTC ANN. REP. 2011: FAIR DEBT COLLECTION PRACTICES ACT, at 4, *available at* http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf.

15. *See id.* at 5.

16. *See id.*

17. *See id.* at 8-9.

lawsuits.[18] These statistics lead to three important conclusions regarding the context and practical importance of this article's analysis. First, the debt collection industry has an enormous presence in the United States economy that affects millions of people each year. Second, the FDCPA is a statute that is heavily enforced and highly litigated nation-wide. Finally, third party contacts by debt collectors account for a substantial portion of the negative impact felt by debtors in this area, which lead to a substantial number of complaints and lawsuits.

B. The FDCPA and Its Regulation of Debt Collector Conduct.

The FDCPA is one of seven statutory acts that comprise the Consumer Credit Protection Act.[19] The purpose of the FDCPA is to prohibit the "abusive, deceptive, and unfair debt collection practices" that had become prevalent amongst "many debt collectors" across the country.[20] According to congressional findings, such collection abuses took "many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."[21] Such "abusive" debt collection practices had contributed to everything from "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[22]

Importantly, the FDCPA only seeks to restrict the conduct of debt collectors and not the creditors that had generated the debt at issue.[23] As such, the prohibitions of the FDCPA do not generally apply to a creditor

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18. *See* Inside Arm, *FDCPA Lawsuits Set Another Record in 2011*, INSIDEARM.COM (Jan. 12, 2012), http://www.insidearm.com/daily/collection-laws-regulations/collection-laws-and-regulations/fdcpa-lawsuits-set-another-record-in-2011/.

19. Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693r (2012).

20. § 1692.

21. Zortman v. J.C. Christenson & Assocs., Inc., 870 F. Supp. 2d 694, 698 (D. Minn. 2012) (quoting S. Rep. No. 95–382, at 2 (1977)).

22. § 1692(a).

23. *See* § 1692a(6); s*ee also* Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003) ("[T]he FDCPA distinguishes between 'debt collectors' and 'creditors.' Creditors, 'who generally are restrained by the desire to protect their good will when collecting past due accounts' are not covered by the Act. Instead, the Act is aimed at debt collectors, who may have 'no future contact with the consumer and often are unconcerned with the consumer's opinion of them.' In general, a creditor is broadly defined as one who 'offers or extends credit creating a debt or to whom a debt is owed,' whereas a debt collector is one who attempts to collect debts 'owed or due or asserted to be owed or due another.") (citations omitted).

that wishes to collect its own debt.[24] Furthermore, the FDCPA only regulates the collection of "consumer" debts, which were incurred "primarily for personal, family, or household purposes."[25] Such personal debts typically stem from personal healthcare costs, credit card charges, or personal utilities such as cell phone accounts.[26] In sum, the FDCPA seeks to protect the most common American consumer from deceptive or unconscionable tactics committed by individuals and companies that have made it their business to collect debts.

When Congress established the FDCPA, it had balance in mind. Indeed, the very purpose of the FDCPA expressed by Congress was to "eliminate abusive debt collection practices" without unfairly disadvantaging non-abusive debt collection companies, and by direct implication, the debt collection industry itself.[27] Since a debt collection company's purpose is to persuade the debtor to pay his or her debt, the continuing existence of the debt collection industry depends primarily upon the ability of the debt collector to effectively communicate with the debtor. It was, however, this very tool of communication that provided an arena for the worst abuses committed by debt collectors. As such, the focal point of regulating the debt collection industry was balancing restrictions regarding communication.

Congress addressed the most critical communication abuses with straightforward standards for honesty and reasonableness, which prohibited the use of deception, harassment, and intimidation.[28] These restrictions include prohibitions of:

- The use of profane language;[29]
- Threats to ruin a person's reputation or cause physical harm;[30]
- Placing phone calls repeatedly or continuously with the intent to annoy;[31]
- Placing telephone calls before 8:00 a.m. or after 9:00 p.m.;[32]
- Except for special notification exceptions, continuing to call the debtor after he or she has asked the debt collector to cease communication;[33]

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24. *Schlosser*, 323 F.3d at 536.
25. § 1692a(5).
26. *See* ERNST & YOUNG LLP, *supra* note 12, at 8.
27. § 1692.
28. §§ 1692d–1692f.
29. § 1692d(2).
30. § 1692d(1).
31. § 1692d(5).
32. § 1692c(a)(1).

- Calling the debtor's place of business if it is known that the debtor's employer prohibits the debtor from receiving such calls;[34]
- Unfair solicitation or use of postdated checks to satisfy the debt;[35] and
- Any false, deceptive, or misleading statement.[36]

Whereas these baseline prohibitions were established with relatively little difficulty or resulting ambiguity, Congress approached a much more difficult decision when it came to exactly what types of contacts with third party non-debtors were "abusive." Should debt collectors ever be allowed to contact third parties that may know the debtor in order to help locate the debtor or otherwise aid in the contact of the debtor? If so, what types of contacts would be appropriate given the balance sought by the FDCPA between consumer protection and the maintenance of a non-abusive debt collection industry?

C. FDCPA Provisions Regarding Third Party Contacts.

The FDCPA contains two sections that are directly relevant to a debt collector's ability to contact a third party. The first and most important of these is § 1692c(b), which provides a broad prohibition of any third party "communication."[37] Specifically, § 1692c(b) provides that a debt collector may not "*communicate*, in connection with the collection of any debt, with any person other than the consumer [(the debtor)], 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."[38] This broad prohibition is not as sweeping or definitive as it may appear, however, as the FDCPA defines the operative term "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium."[39] Therefore, the FDCPA does not expressly prohibit the contact of a third party in connection with a debt; it only prohibits the "conveyance of information regarding the debt" to that third party.[40]

The second relevant section for consideration is § 1692b, which provides specific instructions that a debt collector must follow if it contacts a third party to acquire location information for the debtor.[41] An example of

33. § 1692c(c).
34. § 1692c(a)(3).
35. § 1692f.
36. § 1692e.
37. § 1692c(b).
38. *Id.* (emphasis added).
39. § 1692a(2).
40. *Id*.
41. § 1692b.

this would be if a debt collector were to call a known relative of the debtor to determine if the debtor still lived at a certain address or was still employed by a particular employer.[42] Importantly, § 1692b does not provide any further explanations or rules regarding third party "communications" or contacts.[43] Section 1692b is simply a list of the dos and don'ts to follow during an acquisition of location information telephone call.[44] Indeed, § 1692b does not even explain that the acquisition of location information is allowable under the FDCPA.[45] Rather, § 1692b relies upon the before-mentioned § 1692c(b) for its authority, as § 1692c(b) explains that its broad prohibition of "communications" with third parties does not apply to the acquisition of location information under § 1692b.[46] Accordingly, although § 1692b stands alone as a separate section of the FDCPA, it should really be read as a subsection to § 1692c(b) which explains that § 1692b is the lone exception to the FDCPA's prohibition of third party "communications."[47]

Section 1692b provides:

> Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall--
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> (1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;
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> (2) not state that such consumer owes any debt;
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> (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;
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> (4) not communicate by post card;
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> (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
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> (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.[48]

Notably, the only additional allowance given to a debt collector who utilizes the § 1692b exception is that the debt collector may identify his or

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42. *See* § 1692b(1).
43. § 1692b.
44. *Id*.
45. *Id*.
46. *Compare* § 1692b, *with* § 1692c(b).
47. *See* sources cited *supra* note 46.
48. § 1692b.

her employer if asked.[49] This disclosure could of course tip off the third party that it was a debt collection call if the name of the employer was something like "Debt Collection Services, Inc." Outside of the safe harbor provided by § 1692b, this hypothetical disclosure would arguably turn the contact into a "communication" under § 1692a(2) because the name of the company would "indirectly" allude to the existence of an overdue debt.[50]

Another notable aspect of § 1692b is that it expressly requires the debt collector to avoid disclosing: 1) the existence of a debt; 2) that the caller is in the debt collection business; or 3) that the contact relates to the collection of a debt.[51] The importance of this is that such instructions would seem to be duplicative of § 1692a(2) since each of these disclosures would already have been considered a conveyance of "information regarding the debt" under the definition of a "communication."[52]

In sum, the general "communication" rule under a plain reading of the FDCPA is that a debt collector cannot convey actual "information regarding the debt directly or indirectly" to a third party.[53] The lone exception to this prohibition is that a debt collector may contact a third party to acquire location information and, during that contact, disclose the name of the debt collection company if asked.[54] Sections 1692c(b), 1692b, and 1692a(2) fail to expressly restrict the ability of a debt collector to leave a message.[55] If one takes these rules at face value, it is rather difficult to imagine how a third-party callback message that does not disclose any information about the debt can somehow qualify as a prohibited "communication" under § 1692a(2). So, where then does this debate come from?

III. SURVEYING THE "COMMUNICATION" DEBATE: DOES THE FDCPA ONLY PROHIBIT THIRD-PARTY CALLBACK MESSAGES THAT DISCLOSE ACTUAL INFORMATION REGARDING THE DEBT?

The crux of the debate is this: did Congress really mean to limit the term "communication" to an actual "conveyance of *information* regarding the debt"?[56] This may seem somewhat confusing, given that Congress did in fact define the term "communication" as such, but—as case law on this issue makes evident—the majority of courts presented with § 1692a(2)'s definition of "communication" simply cannot reconcile the proposition that the FDCPA would bind debt collection activity in most areas of contact so

49. *Compare* § 1692a(2), *with* § 1692b.
50. *Compare* § 1692a(2), *with* § 1692c(b).
51. §1692b(2), (5).
52. *Compare* § 1692a(2), *with* § 1692b.
53. *See* sources cited *supra* note 52.
54. *See* §§1692b(1), c(b).
55. §§ 1692a(2), b, c(b).
56. §§ 1692a(2) (emphasis added).

tightly and yet still allow a debt collector to contact a third party to further the collection of the debt.[57] The result has been that a majority of courts have adopted a working definition of the term "communication" that does not require a "conveyance of information regarding the debt" at all, but rather simply that the intent of the debt collector's contact was to further its efforts in collecting a debt.[58] In sum, an unwavering devotion to perceived policy in favor of the debtor has overtaken a natural interpretation of the language of the FDCPA. An introduction to this result is amply provided by *West v. Nationwide Credit, Inc.*,[59] the leading case cited by most courts that have concluded that a third-party callback message or other similar contact is a "communication" under § 1692a(2), regardless of whether actual debt information was disclosed by the debt collector.

A. *West v. Nationwide Credit, Inc.* and the Majority: A "Communication" Does Not Require the "Conveyance" of Actual "Information."

In *West*, a debt collection representative called the debtor's neighbor, left his name and telephone number, and requested that the neighbor tell the debtor to call him back because it was "very important."[60] The debt collector did not indicate either that he worked for a debt collection company or that he was calling about a debt.[61] In analyzing whether this third-party callback message was a "communication" that violated § 1692c(b), the *West* court explained that the foundational issue was

> whether Congress intended the phrase "information regarding a debt" [in § 1692a(2)'s definition of "communication"] to include the conveying of any information relating to a debt or whether Congress intended to limit the definition of this phrase to only those conversations where a debt collector actually discloses some information about a specific debt to a third party.[62]

Importantly, since the debt collector only gave the third party his name and telephone number, the "any information relating to a debt" contemplated by the *West* court was quite simply the contact itself.[63]

After considering dictionary definitions for the term "regarding" as meaning "to relate to" or "with respect to: concerning[,]" the *West* court concluded that the ordinary meaning of "regarding" supported the conclusion that the term "communication" must be construed broadly to

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57. *See* cases cited *supra* note 5.
58. *See* cases cited *supra* note 5.
59. West v. Nationwide Credit, Inc., 998 F. Supp. 642, 643-45 (W.D.N.C. 1998).
60. *Id.* at 643.
61. *Id*.
62. *Id*. at 644.
63. *Id*. at 643.

concern any conversation that is related to the collection of a debt, regardless of whether the debt is ever discussed in any manner.[64] The *West* court anchored this interpretive conclusion within the argument that this all-inclusive construction of "communication" was consistent with what it perceived to be Congress' intent to "broadly regulate contact between debt collectors and third parties."[65]

The *West* court further justified its interpretation by explaining that if a "communication" included only conversations "in which some information about a debt is actually disclosed[,]" then § 1692b's exception for the acquisition of location information would have been "superfluous."[66] Specifically, the *West* court argued that if a "communication" under § 1692a(2) only encompassed those contacts that actually disclosed information about a debt, then § 1692b would have been completely unnecessary since the acquisition of location information as delineated by § 1692b would already have been an acceptable contact.[67] The *West* court summarized its interpretation of § 1692a(2) by explaining that the plaintiff in that case had a valid claim under § 1692c(b) since the debt collector allegedly contacted the third party "in connection with the collection of [his] debt," and was not otherwise trying to acquire location information.[68]

The *West* case introduces the two primary arguments used by the majority courts in most cases: 1) the "broad" intent and policy of Congress to protect the consumer and regulate debt collector contact mandates that the term "communication" be interpreted to prohibit any third party contact that is not limited to location information; and 2) if a "communication" really required the conveyance of actual information about the debt, then § 1692b's exception and instructions would be "superfluous" or otherwise unnecessary.[69]

1. Perceived Congressional Policy Favoring the Debtor Demands an Interpretation of "Communication" That Prohibits any Third Party Contact That Furthers the Collection of a Debt.

Generally, most all courts recognize at some level that ambiguities in the FDCPA should be construed liberally in favor of the debtor–consumer.[70]

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64. *Id*. at 644.
65. *West*, 998 F. Supp. at 644.
66. *Id.* at 644-45.
67. *Id.* at 645.
68. *Id*.
69. *Id.* at 643-45.
70. *See* Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002) ("Because the FDCPA . . . is a remedial statute, it should be construed liberally in favor of the consumer."); *see also* Ramirez v. Apex Fin. Mgt., LLC, 567 F. Supp. 2d 1035, 1040 (N.D. Ill. 2008)

This policy alone has led some courts in the majority—like the court in *Thomas v. Consumer Adjustment Company*—to simply find that a debt collector's motivation to call the third party "in connection with the collection" was enough to establish a "communication" under § 1692c(b) without much more justification.[71] Most courts in the majority, however, use this perceived policy as momentum to push forward an all-inclusive interpretation of the term "indirectly" used within § 1692a(2)'s definition of "communication" to reach the same conclusion.

Again, § 1692a(2) provides that the term "communication" means "the conveying of information regarding a debt directly *or indirectly* to any person through any medium."[72] What does "indirectly" convey information regarding a debt mean? According to the majority of courts, a debt collector "indirectly" conveys information regarding the debt simply by contacting a person (whether it be the debtor or a third party)[73] and leaving any message with the intention of that contact furthering the collection of the debt.[74] Although no information has actually been conveyed during that contact, these courts argue that a chain of events, namely a return call from the debtor, has been initiated that would assist in the collection of the debt.[75] Essentially, these courts conclude that although debt information was not indirectly conveyed, the debt collector has established a path that will *indirectly* lead the *debtor* to the debt collection company.

Although the majority of courts that rely upon the "indirect" language in § 1692a(2) tie their conclusion to the definition of "communication" to some degree, it is more than evident that the true momentum behind their interpretation is still the policy to favor the debtor–consumer. In *Ramirez v. Apex Financial Management, LLC*, the court fervently rejected a strict interpretation of § 1692a(2)'s definition of "communication" as found by the minority courts, not because these courts' textual construction was flawed, but rather because of what it perceived to be an unwavering policy to protect the debtor–creditor:

> To that end, the [minority court] reviewed the voice-mail transcripts and found that they did not expressly convey information regarding the debt; thus, they did not constitute "communication." . . . What the [minority court] failed to consider, how-

("Because the FDCPA is designed to protect consumers, it is liberally construed in favor of consumers to effect its purpose.").

71. Thomas v. Consumer Adjustment Co., 579 F. Supp. 2d 1290, 1296-97 (E.D. Mo. 2008).

72. 15 U.S.C. § 1692a(2) (2012) (emphasis added).

73. Many majority decisions are not considering the definition of "communication" specifically for purposes of § 1692c(b), but for its general application to all provisions of the FDCPA. *See, e.g.*, Edwards v. Niagara Credit Solutions, Inc., 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008); *Ramirez*, 567 F. Supp. 2d at 1041-42.

74. *See* cases cited *supra* note 5.

75. *See* cases cited *supra* note 5.

> ever, was Congress's intent in enacting the FDCPA, which calls for a broad construction of its terms in favor of the consumer. *Working under this construct*, it becomes apparent that messages left on a debtor's answering machine can be considered *indirect* communications regarding the debt, even if the debt collector fails to expressly mention that the call pertains to collection, payment, deadlines or any other observable characteristics of a collection call. Any other interpretation would require a claimant to prove, without exception, that the debt collector conveyed *direct* information about the debt. . . . [T]his Court declines to adopt the narrow interpretation of "communication" that [the minority court and debt collector] put forth. The FDCPA's legislative intent emphasizes the need to construe the statute broadly, so that we may protect consumers against debt collectors' harassing conduct. This intent cannot be underestimated. . . . The Court will tarry no longer on the rulings of other district courts that hold otherwise.[76]

Similarly, in *Foti v. NCO Financial Systems Inc.*, the court explained:

> While the Second Circuit has not precisely defined the scope of the term "communication," it has suggested in other contexts that, consistent with Congress's intent in enacting the FDCPA, the statute should be broadly construed. . . . *Thus*, given the choice of language by Congress, the FDCPA should be interpreted to cover communications that convey, directly or indirectly, *any information relating to a debt*, and not just when the debt collector discloses specific information about the particular debt being collected. Indeed, a narrow reading of the term "communication" to exclude instances such as the present case where no specific information about a debt is explicitly conveyed could create a significant loophole in the FDCPA . . . .[77]

Simply put, the majority of courts hold that Congress could not have meant to restrict the term "communication" only to instances in which actual information about the debt was conveyed either directly or indirectly. As has been seen, these courts begin by explaining what appears to be an unwavering, unalterable policy under the FDCPA to protect debtors. Whereas the *West* court built towards its conclusion from here by broadening the term "regarding" into an all-inclusive term,[78] most other courts in the majority have built their conclusions upon an all-inclusive interpretation of the term "indirectly."[79] Regardless of the path to this all-inclusive understanding of "communication," all of these majority courts share the ultimate conclusion that despite § 1692a(2)'s emphasis on the "convey[ance] of information" that specifically is "regarding a debt," a debt collector that contacts a person with the motivation of furthering its collection effort has "communicated" with that person regardless of what the debt collector actually conveys. Indeed, as the *Foti* court explains, the only type of telephone call that a debt collector could place that would not be considered a "communication" is one that "in no way regards, or relates

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76. *Ramirez*, 567 F. Supp. 2d at 1041-42 (emphasis added).

77. 424 F. Supp. 2d 643, 655-56 (S.D.N.Y. 2006) (emphasis added).

78. *See* West v. Nationwide Credit, Inc., 998 F. Supp. 642, 643-45 (W.D.N.C. 1998).

79. *See* cases cited *supra* note 5.

to, an outstanding debt."[80] Since it is entirely inconceivable that a debt collector would contact a third party for reasons completely separate from collecting an outstanding debt, the *Foti* court essentially reiterates the majority conclusion that any third party contact is illegal.

2. Section 1692b Rendered Superfluous.

The central theme that connects the majority courts is the conclusion that the policy to liberally construe the FDCPA in favor of the debtor demands a prohibition of any third party contact. However, several of these courts bolster this primary argument with a secondary explanation that has firmer roots in the canons of statutory interpretation, namely that to conclude that the term "communication" requires the conveyance of actual information regarding the debt would render § 1692b unnecessary or superfluous (hereafter the "superfluity canon").[81] As noted in *West*, "The Supreme Court has stated that '[a] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"[82]

As was explained above, § 1692b provides a safe harbor to § 1692c(b)'s broadly worded prohibition against third party "communications" where a debt collector contacts a third party for the purpose of determining location information.[83] Section 1692b specifically allows for the debt collector to ask if the third party can confirm location information for the debtor, but in doing so, § 1692b requires that the debt collector avoid disclosing: 1) the existence of a debt; 2) that the caller is in the debt collection business; or 3) that the contact relates to the collection of a debt.[84] The majority courts argue that this entire section would be unnecessary if a "communication" required a conveyance of some actual information about the debt because the basic act of acquiring location information (with no further disclosure) would already have been acceptable.[85] Furthermore, majority courts argue that § 1692b's specific

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80. *Foti*, 424 F. Supp. 2d at 658.

81. *See* Thomas v. Consumer Adjustment Co., 579 F. Supp. 2d 1290, 1296-97 (E.D. Mo. 2008); West, 998 F. Supp. at 645. *See also* Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1186-87 (10th Cir. 2011) (Lucero, J., dissenting), *cert. granted on other grounds*, 132 S. Ct. 2688 (2012).

82. *West*, 998 F. Supp. at 645 (quoting United States v. Menasche, 348 U.S. 528, 538 (1955)); *See also* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991) (citations omitted) ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

83. *Compare* 15 U.S.C. § 1692b (2012), *with* § 1692c(b).

84. § 1692b(2), (5).

85. *See Thomas*, 579 F. Supp. 2d at 1296-97; *West*, 998 F. Supp. at 645; *see also Marx*, 668 F.3d at 1186-87 (Lucero, J., dissenting).

prohibitions of the disclosure of the existence of the debt, or the nature of the call as being a collection call, would be entirely redundant unless such provisions were carving out new guidelines for the only case in which a third party contact was permissible.[86] In sum, the majority courts find that Congress would not have wasted its efforts in defining the location information exception under § 1692b if the very definition of a prohibited "communication" under § 1692a(2) would have allowed for such a contact.[87] According to majority courts, § 1692b's existence only makes sense if the "communications" prohibited by § 1692c(b) in fact prohibited any third party contact.[88]

B. *Marx v. General Revenue Corp.* and the Minority Courts: A "Communication" Requires the Conveyance of Actual Information Regarding the Debt.

1. Strict Interpretation of the Requirement for a "Conveyance of Information."

A minority of courts separate themselves from the majority by applying a strict construction of § 1692a(2)'s definition of "communication."[89] The majority courts hold that § 1692a(2)'s explanation that a "communication" only occurs when "information regarding a debt" is actually "conveyed" is unambiguous; therefore, it is not the place of the courts to stretch terms within this definition to align with any perceived policy.[90] Simply put, Congress meant what it said in limiting the definition of "communication" to the conveyance of actual information regarding the debt.

In *Horkey v. J.V.D.B. & Associates, Inc.*, the debt collector attempted to contact the debtor at work several times by telephone in an effort to collect a debt.[91] The debtor was away from the office for one of these telephone calls, which resulted in the debt collector having a conversation with the debtor's coworker.[92] When the coworker explained that the debtor was away from the office, the debt collector told the coworker to tell the debtor "to quit being such a fucking bitch" and then hung up the

86. *See* cases cited *supra* note 85.
87. *See* cases cited *supra* note 85.
88. *See* cases cited *supra* note 85.
89. *See* cases cited *supra* note 6.
90. *See, e.g.*, *Marx*, 668 F.3d at 1186-87 (10th Cir. 2011) (Lucero, J., dissenting) (finding that since the term "communication" is unambiguous, the superfluity cannon does not apply), *cert. granted on other grounds*, 132 S. Ct. 2688 (2012).
91. 179 F. Supp. 2d 861, 867 (N.D. Ill. 2002).
92. *Id.*

telephone.[93] The debt collector did not mention the debt in any way.[94] The court in *Horkey* found that although the message for the debtor contained abusive language which would violate other provisions of the FDCPA, it did not constitute a "communication" for purposes of § 1692c(b) because there was no evidence that the debt collector discussed the debtor's debt.[95] Essentially, determining whether a "communication" as defined by § 1692a(2) has occurred depends entirely upon the conveyance of actual information regarding the debt.

As the court in *Biggs v. Credit Collections, Inc.* explains, "[w]ords matter—in this instance, the words of [messages] and the words of the statutory definition of 'communication.'"[96] In a case where the debt collector left voice messages that did not mention the debtor's debt or reveal that the message was from a debt collection company, the *Biggs* court held that the messages did not constitute "communications" under § 1692a(2).[97] The *Biggs* court observed:

> In this respect, the statutory language [(§ 1692a(2))] is oddly narrow. The statutory definition does not include messages or communications that do not impart (or are not at least intended to impart) information about a debt. The voicemails at issue here would have been encompassed by a definition that included "a communication in furtherance of any attempt to collect a debt."[98]

The *Biggs* court ultimately held that since the voicemail messages in that case "'convey[ed]' no 'information regarding a debt[,]"' there was simply "[n]o amount of liberal construction [that could] broaden the statutory language [in § 1692a(2)] to encompass the words recorded in [the] voicemails."[99]

2. *Marx* v. General Revenue Corp.*: An Answer to the Superfluity Canon and the Establishment of a Novel Evidentiary Standard for a "Conveyance."*

In *Marx v. General Revenue Corp.*, the Tenth Circuit similarly concluded that a "third-party 'communication,'" occurs only when the debt collector provides information that indicates to the third party "that the message relates to the collection of a debt."[100] The *Marx* court explained that this principle was "simply built into the statutory definition of

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93. *Id.*
94. *Id.*
95. *Id.* at 868.
96. 2007 U.S. Dist. LEXIS 84793, at *13 (W.D. Okla. Nov. 15, 2007).
97. *Id.* at *12-14.
98. *Id.* at *13, n.3.
99. *Id.* at *13-14.
100. Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1177 (10th Cir. 2011), *cert. granted on other grounds*, 132 S. Ct. 2688 (2012).

'communication.'"[101] Simply put, the definition of a "communication" under § 1692a(2) is clear in that it requires an actual conveyance of information about the debt.[102] Unlike the majority courts, the *Marx* court did not find it appropriate to challenge the straightforward nature of § 1692a(2)'s limitation on the term "communication."[103] Essentially, clear language was clear language; as such, it was not the role of the court to delve into questioning whether Congress could really have meant to provide such a limitation in § 1692a(2).[104]

a) Section 1692a(2)'s definition of "communication" is unambiguous.

The *Marx* court further explained that the clarity of § 1692a(2)'s requirement for an actual conveyance of information regarding the debt also precluded the "superfluity canon" argument made by several of the majority courts.[105] The *Marx* court freely admitted that § 1692b was redundant since the definition of "communication" under § 1692a(2) already allowed for an acquisition of location information call and similarly prohibited the disclosure of debt related information.[106] However, the *Marx* court explained that this was not fatal to its interpretation of the term "communication" under § 1692a(2) because a court should not apply the superfluity canon unless it first determines that the term being construed is ambiguous.[107] Regardless of the resulting superfluity in § 1692b, the *Marx* court declined to follow the majority courts in creating "ambiguity where none exists" in § 1692a(2)'s definition of a "communication."[108]

As the *Marx* court noted, "[s]imply because a 'statute is awkward . . . does not make it ambiguous on the point at issue.'"[109] The *Marx* court explained that "'[t]he canon requiring a court to give effect to each word '*if possible* ' [(the superfluity canon)] is not absolute; it 'is sometimes offset by the canon that permits a court to reject words 'as surplusage' if inadvertently inserted or if repugnant to the rest of the statute.'"[110] The *Marx* court reasoned that if any canon of interpretation was to be applied, "the appropriate one is that of *ex abundanti cautela* (abundance of caution),

101. *Id.*
102. *Id.*
103. *See id.* at 1183-84.
104. *See id.*
105. *Id*. at 1183-84.
106. *Id.*
107. *Id*. (citing Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004)).
108. *Id.* at 1184.
109. *Id.* (citing *Lamie*, 540 U.S. at 534).
110. *Id.* at 1183 (citing Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001)) (emphasis in original).

which teaches that Congress may on occasion repeat language in order to emphasize it."[111] In sum, the *Marx* court determined that the superfluity canon was not a vehicle by which the court could or should implement a perceived policy of prohibiting all third party contacts because Congress defined the term "communication" unambiguously in requiring the conveyance of actual information regarding the debt.[112]

b) Section 1692a(2) requires evidence that a third party actually understood that the information communicated related to a debt.

In addition to confirming the minority courts' plain interpretation of § 1692a(2)'s definition of "communication" and defending such an interpretation against the majority courts' application of the superfluity canon, the *Marx* court took the minority courts' position one large step further by introducing a novel evidentiary requirement in this context. The *Marx* court determined that in order to establish that a debt collector's contact of a third party was a "communication" under § 1692a(2), the debtor must present evidence that the third party actually *understood* that information about the debtor's debt was being implied.[113] Whereas the *Marx* court may agree with the *Biggs* court's statement that the "words" of a message "matter,"[114] the *Marx* court would argue that such "words" could only create a "communication" if the third party actually understood those "words" to have related to the debtor's debt.[115] As the *Marx* court explained, "the standard is not whether the [contact] *could have had* such an implication."[116] It is important to observe that the *Marx* court holds that a "communication" under § 1692a(2) still requires that actual information about the debt must be conveyed.[117] The *Marx* court simply adds a component of proof regarding the conveyance of such information in that the conveyance creates a "communication" only when the information given is actually understood to be connected to a debtor's debt.[118]

The resulting evidentiary standard is critical. Instead of simply presenting a transcript of the debt collector's statement for the court to decide whether debt information was implicated on the face of the statement, a debtor must call the third party as a witness to testify that he or

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111. *Id.* (citing Fort Stewart Sch. v. FLRA, 495 U.S. 641, 646 (1990)).

112. *See* Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1183-84 (10th Cir. 2011), *cert. granted on other grounds*, 132 S. Ct. 2688 (2012).

113. *See id.* at 1177, 1182-83.

114. Biggs v. Credit Collections, Inc., 2007 U.S. Dist. LEXIS 84793, at *13 (W.D. Okla. Nov. 15, 2007).

115. *See Marx*, 668 F.3d at 1177, 1182-83.

116. *Id.* at 1177.

117. *Id.* at 1177, 1182-83.

118. *Id.*

she actually understood that the debt collector's statement alluded to the fact that the debtor owed some kind of outstanding debt.[119] In effect, the evidentiary standard takes the power out of the court's interpretive hands and places it within the bounds of the third party's understanding of the statement at the time it was made.

The *Marx* court argued that "such [an evidentiary] requirement is implicit in the word 'convey'" included within § 1692a(2)'s definition of the term "communication."[120] "To convey is to impart, to make known. If one drafts a letter full of unlawful collection threats, but never mails it, nothing is conveyed. So, too, if the 'communication' is in Sanskrit."[121] The *Marx* court extended this logic to third party contacts by implying that it would be very difficult to "convey" debt information if the debt collector does not use the words: "'debt,' 'collector,' 'money,' 'obligation,' or 'payment.'"[122] Or rather, it would be very difficult for a third party to *understand* that a debt was being discussed without the use of such terms.[123] The *Marx* court's application of this principle to the facts of that case illuminates the importance of this distinction, as it rejected the notion that a debt collector's reference to an abbreviated account number could implicate a debt unless the third party had some kind of personal knowledge about what the number actually referenced.[124] The *Marx* court reasoned that an account number could convey nothing in and of itself, as it "is a jumble of numbers, designed for internal identification purposes, the functional equivalent of a bar code."[125]

What is important about this example is that the disclosure of a debtor's account number is technically information regarding the debt. It would seem then that a straightforward application of § 1692a(2)'s definition of "communication" might be satisfied. But here, the *Marx* court concluded that although information regarding the debt was disclosed, it was not really understood, and therefore it was not truly "conveyed."[126] Even though the *Marx* court went to some length to explain why it would not expand the definition of the term "communication" as the majority courts have, one might argue that the *Marx* court is not altogether so different from the majority courts after all.[127] Whereas the majority courts expanded the term "communication" beyond the plain meaning of § 1692a(2), the *Marx* court's evidentiary standard narrowed the term

119. *See id*.
120. *Id*. at 1182.
121. *Id*.
122. *Id*.
123. *See id*.
124. *Id*. at 1183.
125. *Id*.
126. *See id*. at 1177, 1182-83.
127. *Id*.

"communication" at the opposite end of the spectrum beyond this same plain meaning to include far less than what might otherwise have been naturally included.

3. Policy Supporting the Minority Courts' Strict Interpretation of § 1692a(2).

The *Marx* court supported the strict interpretation of § 1692a(2) by arguing that this interpretation best aligned with Congressional policy to protect debtors from the pains of third party debt disclosure.[128] The *Marx* court's argument is simple—only an actual conveyance of debt information can cause such harm.[129] If no debt information is conveyed to a third party, then theoretically harm from third parties knowledge about the debt could not result from the contact. As this line of reasoning goes, the result would either be that the third party would: 1) provide location information to the debt collector without knowledge of why such location information was needed; or 2) otherwise deliver a callback message to the debtor without knowledge of any debt.

Indeed, as the court in *Zortman v. J.C. Christenson & Associates, Inc.* explained, Congress was not necessarily concerned that a debt collector would speak with a third party, but rather that a debt collector would disclose to the third party that the debtor had an outstanding debt.[130] The *Zortman* court noted that "deliberate communication with third parties is not forbidden," as § 1692b allows for a debt collector to contact a third party so long as information about the debt or the nature of the call is not disclosed.[131] The *Zortman* court further explained that the FTC shares this mindset.[132] Specifically, the *Zortman* court cited a very relevant FTC regulation, which provides that a debt collector may in fact provide information and even messages to a third party telephone/telegraph operator:

> A debt collector may contact an employee of a telephone or telegraph company in order to contact the consumer, without violating the prohibition on communication to third parties, if the only information given is that necessary to enable the collector to transmit the message to, or make the contact with, the consumer.[133]

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128. *Id.* at 1182-83.

129. *Id.*

130. Zortman v. J.C. Christenson & Assocs., 870 F. Supp. 2d 694, 698-99, 701-02 (D. Minn. 2012).

131. *Id.* (citing 15 U.S.C. § 1692b).

132. *Id.* at 698-99 (citing Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097-02, 50,104 (Dec. 13, 1988)).

133. *Id.*

Although the context of a contact with a neighbor or relative is of course distinguishable from an unknown operator, the *Zortman* court's point is that the substantive focus of the FDCPA and this FTC regulation is on the content of the contact, not whether a contact has occurred.[134]

IV. TEXTUAL ANALYSIS: § 1692A(2)'S DEFINITION OF "COMMUNICATION" REQUIRES THE DISCLOSURE OF ACTUAL INFORMATION THAT COULD REVEAL THE EXISTENCE OF THE OUTSTANDING DEBT.

Section 1692a(2) provides that the term "communication" means "the conveying of information regarding a debt directly or indirectly to any person through any medium."[135] It is surprising just how strained this concise, twenty-word definition has become within the jurisdictional split between the majority and minority courts. As discussed above, the fundamental question that divides the camps is whether § 1692a(2) in fact requires the conveyance of actual information regarding the debt in order to establish a "communication." It is important to recognize that the majority and minority courts do not even reach what one would think would be the most pertinent disagreement regarding what types of actual "information" reveal the existence of a debt. Instead, the competing camps have drawn their respective lines in the sand upon whether § 1692a(2) requires the "conveyance" of actual "information" at all, as the majority courts have determined that a "communication" may be established simply because a contact was intended to further the collection of a debt.[136]

As discussed above, two critical components of § 1692a(2) comprise the textual basis of the interpretive split. First, what is "information regarding a debt"?[137] Should the term "regarding" be interpreted as it was in

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134. *Id.* at 698-99, 701-02.

135. § 1692a(2).

136. *Compare* Thomas v. Consumer Adjustment Co., 579 F. Supp. 2d 1290, 1296-97 (E.D. Mo. 2008); Berg v. Merchants Ass'n Collection Div., Inc., 586 F. Supp. 2d 1336, 1340-41 (S.D. Fla. 2008); Costa v. Nat'l Action Fin. Servs., 634 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007); Leyse v. Corp. Collection Servs., Inc., 2006 WL 2708451, at * 6 (S.D.N.Y. Sept. 18, 2006); Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 655-56 (S.D.N.Y. 2006); Belin v. Litton Loan Servicing, L.P., 2006 WL 1992410, at *4 (M.D. Fla. July 14, 2006); Hosseinzadeh v. M.R.S. Assoc., Inc. 387 F. Supp. 2d 1104, 1115-16 (C.D. Cal. 2005); West v. Nationwide Credit, Inc., 998 F. Supp. 642, 643-45 (W.D.N.C. 1998), *and* Edwards v. Niagara Credit Solutions, Inc., 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008); Ramirez v. Apex Fin. Mgt., LLC, 567 F. Supp. 2d 1035, 1040 (N.D. Ill. 2008), *with* Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1177 (10th Cir. 2011), *cert. granted on other grounds*, 133 S. Ct. 1166 (2012); Zortman v. J.C. Christenson & Assocs., Inc., 870 F. Supp. 2d 694, 707-08 (D. Minn. 2012); Biggs v. Credit Collection, Inc. 2007 U.S. Dist. LEXIS 84793, at *12–14 (W.D. Okla. Nov. 15, 2007); Zamos v. Asset Acceptance, LLC, 423 F. Supp. 2d 777, 782 (N.D. Ohio 2006); Horkey v. J.V.D.B. & Assocs., Inc., 179 F. Supp. 2d 861, 867-68 (N.D. Ill. 2002).

137. *See* § 1692a(2).

West to include a conversation that has some connection to the collection of a debt even if no "information" is actually conveyed?[138] Second, what does "indirectly" convey "information regarding a debt" mean?[139] Should the term "indirectly" be interpreted as it has been by most majority courts to include any contact in which the debt collector has established a path that will indirectly lead the debtor to the debt collection company?[140] Or should both of these components be strictly construed to require that a "communication" may only be established when "information" is "conveyed" by the debt collector that could actually reveal the existence of a debt?[141]

A. What Is "Information Regarding A Debt?": Rejection of *West v. Nationwide Credit, Inc.* and the Determination That the Contact or Anonymous Callback Message Itself Is "Information Regarding the Debt."

1. West v. Nationwide Credit, Inc.*: Ambiguity with "Information Regarding a Debt."*

"The term 'communication' means the *conveying of information regarding a debt* directly or indirectly to any person through any medium."[142] Section 1692a(2) provides one, and only one, characteristic of a "communication" for purposes of the FDCPA: that some information regarding the debt has actually been conveyed.[143] But what is "information *regarding* a debt"?[144]

Most courts have assumed that a "liberal" interpretation under the FDCPA is one that favors the debtor.[145] Accordingly, a conservative interpretation of "regarding" might be that only specific information about the debt meets this definition, such as the debt amount, time overdue,

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138. *West*, 998 F. Supp. at 643-45.

139. *See* § 1692a(2).

140. *See Costa*, 634 F. Supp. 2d at 1076; *Leyse*, 2006 WL 2708451, at *6; *Foti*, 424 F. Supp. 2d at 655-56; *Belin*, 2006 WL 1992410, at *4; *Hosseinzadeh*, 387 F. Supp. 2d at 1115-16; *cf. Edwards*, 586 F. Supp. 2d at 1350-51; *Ramirez*, 567 F. Supp. 2d at 1040.

141. *See* § 1692a(2).

142. § 1692a(2) (emphasis added).

143. *Id.*

144. *See id.* (emphasis added).

145. *See* Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002) ("Because the FDCPA . . . is a remedial statute, it should be construed liberally in favor of the consumer.") (citing Plummer v. Gordon, 193 F. Supp. 2d 460, 463 (D. Conn. 2002)); Ross v. Commercial Fin. Servs., 31 F. Supp. 2d 1077, 1079 (N.D. Ill. 1999); Harrison v. NBD, Inc., 968 F. Supp. 837, 844 (E.D.N.Y. 1997) (citations omitted); *see also* Ramirez v. Apex Fin. Mgt., LLC, 567 F. Supp. 2d 1035, 1040 (N.D. Ill. 2008) (citations omitted) ("Because the FDCPA is designed to protect consumers, it is liberally construed in favor of consumers to effect its purpose.").

interest accrued, creditor information, and the nature of the debt itself.[146] The most liberal interpretation would be that "information *regarding* a debt" includes any and all information about the debt itself, which would include not only all of this ,but also would include the very existence of the debt.[147] The fact that there is an outstanding debt is in a literal sense an important piece of information about the debt. There is very strong support for this liberal interpretation in the FDCPA itself, as § 1692b's location information exception to § 1692c(b) expressly prohibits the disclosure of the existence of the debt.[148]

Although there is room for some debate between these two interpretations, it is important to recognize that the "information" that is conveyed in either of these scenarios: 1) is actual information; that 2) could inform the third party about an outstanding debt in some manner.[149] In stark contrast to this type of ambiguity, the *West* court determined that there was ambiguity as to whether the phrase "information regarding a debt" in § 1692a(2) actually required the conveyance of "information" at all.[150]

In *West*, a debt collection representative called the debtor's neighbor, left his name and telephone number, and requested that the neighbor tell the debtor to call him back because it was "very important."[151] The debt collector did not indicate that he worked for a debt collection company or that he was calling about a debt.[152] The *West* court determined that the "regarding" term in § 1692a(2) was ambiguous as to whether it prohibited any conversation that related to debt collection.[153] The *West* court eventually interpreted the "regarding" language in § 1692a(2) to include this callback message because it was a conversation that "related" to debt collection.[154] Importantly, the *West* court did not state that any particular "information" was conveyed in the message that actually related to the debt. For example, the *West* court did not attempt to base its decision on a theory that the debt collector's anonymous telephone number was "information" that related to a debt. Rather, the *West* court determined that since the contact itself was "in connection with the collection of a debt," the contact "related" to debt collection and was therefore a "communication."[155]

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146. *See* § 1692a(2).
147. *See id*. (emphasis added).
148. *See* § 1692b(2).
149. § 1692a(2).
150. *See* West v. Nationwide Credit, Inc., 998 F. Supp. 642, 643-45 (W.D.N.C. 1998).
151. *Id*. at 643.
152. *Id*.
153. *Id*. at 643-44.
154. *Id*. at 644-45.
155. *Id*.

2. West v. Nationwide Credit, Inc.*'s Definition of "Regarding" Ignores § 1692a(2)'s "Conveyance" of "Information" Requirement.*

"The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium."[156] The *West* court's apparent ambiguity and eventual rule on the term "regarding" within § 1692a(2) ignores the textual fact that "regarding" is merely a preposition that describes the term "information."[157] Any interpretation of the term "regarding" cannot somehow ignore the fact that it is describing what type of "information" is being conveyed.[158] Therefore, if no "information" is conveyed, the contact could not possibly have been a "communication."[159] The *West* court's error is that it expanded the term "regarding" outside of its anchor to the conveyance of "information."[160] Although the debt collection representative's contact in *West* certainly was related to debt collection, or was otherwise "regarding" debt collection, the debt collector did not convey any actual "information" about the debt to the third party.[161]

The *West* court detached the preposition "regarding" from its subject term "information" so that a "communication" included any conversation that related to debt collection.[162] The grammar used to structure § 1692a(2) simply does not allow for this interpretation.[163] As the court in *Biggs v. Credit Collections, Inc.* explains, there is simply "[n]o amount of liberal construction [that could] broaden the statutory language [in § 1692a(2)]" to include a contact that "convey[ed]" no "information regarding a debt."[164] There may be some level of ambiguity as to what "information" is "regarding a debt" under § 1692a(2).[165] However, there is no ambiguity that a "communication" under § 1692a(2) requires that some actual "information" be conveyed.[166] Accordingly, the *West* court's interpretation of the term "regarding" must be rejected.

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156. § 1692a(2).
157. *See id.*
158. *See id*.
159. *See id*.
160. *See id*.
161. *See* West v. Nationwide Credit, Inc., 998 F. Supp. 642, 643-45 (W.D.N.C. 1998).
162. *See* § 1692a(2).
163. *See id*.
164. Biggs v. Credit Collections, Inc., 2007 WL 4034997, at *4 (W.D. Okla. Nov. 15, 2007).
165. *See* § 1692a(2).
166. *See id*.

B. What Does It Mean to "Indirectly" Convey "Information Regarding a Debt?": Rejection of the Majority Courts' Interpretation of the Term "Indirectly."

"The term 'communication' means the *conveying of information regarding a debt* directly or *indirectly* to any person through any medium."[167] Again, § 1692a(2) provides one, and only one, characteristic of a "communication" for purposes of the FDCPA—that some information regarding the debt has actually been conveyed.[168] Indeed, the conveyance of information regarding a debt is the only subject-phrase of this twenty-word sentence.[169] As such, it is critically important to acknowledge that the terms "directly" and "indirectly," which follow the conveyance-phrase in § 1692a(2), merely describe the method in which the information regarding the debt is conveyed.[170] Although one may argue about the parameters of what "indirectly" convey "information regarding a debt" means, one cannot argue that the descriptor "indirectly" operates within this definition separately from the subject of conveying "information regarding a debt."[171] Simply put, a debt collector could not have "indirectly" conveyed "information regarding a debt" unless the third party left the contact with actual information about the outstanding debt.[172] Although this "indirect" method is somewhat ambiguous, the required result under § 1692a(2) is not—§ 1692a(2) unambiguously establishes that a "communication" occurs only when "information regarding a debt" has been conveyed.[173]

What does "indirectly" convey information regarding a debt mean?[174] According to the majority courts, a debt collector "indirectly" conveys information regarding the debt simply by contacting a person (whether it be the debtor or a third party) and leaving any message with the intention of that contact furthering the collection of the debt.[175] Although no information has actually been conveyed in that contact, these courts argue that a chain of events, namely a return call from the debtor, has been initiated that would assist in the collection of the debt.[176] Essentially, these courts conclude that although debt information was not actually conveyed indirectly, the debt collector has established a path that will *indirectly* lead the *debtor* to the

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167. *See id.* (emphasis added).
168. *See id.*
169. *See id.*
170. *See id.*
171. *See* § 1692a(2).
172. *See id.*
173. *See id.*
174. *See id.*
175. *See* cases cited *supra* note 5.
176. *See* cases cited *supra* note 5.

debt collection company.[177] Since the contact assisted the debt collector in its collection efforts, a "communication" is established.[178]

The glaring problem with the majority courts' interpretation of § 1692a(2) is that it disconnects the term "indirectly" entirely from the "conveyance" of "information regarding a debt" and unapologetically imports a policy-driven rule, which finds no basis in the words of the definition itself.[179] Section 1692a(2) does not base its definition of the term "communication" in any way upon the likelihood that the debt collector's efforts in reaching the debtor were assisted by the contact.[180] Rather, § 1692a(2) places the sole basis for finding a "communication" upon whether "information regarding a debt" has been "convey[ed]."[181] Indeed, § 1692a(2) does not use the term "indirectly" in reference to anything but the conveyance of "information regarding a debt."[182] Accordingly, the text of § 1692a(2) simply does not allow the substantive question to be whether the debt collector's purposes were advanced by the contact.

Whereas some of the majority courts have made policy arguments as to why it might be unfair to allow debt collectors to leave anonymous messages that assist their collection efforts, no majority court has made a meaningful attempt to argue why the actual words that appear in § 1692a(2) contemplate that a "communication" is established by anything but a "conveyance" of "information regarding a debt." The reason why the majority courts have not offered such a meaningful textual analysis based upon § 1692a(2) is that it appears to be textually impossible.[183] A natural reading of § 1692a(2) must lead to the inescapable conclusion that the term "indirectly" is used within § 1692a(2) solely as a description of how a debt collector might "convey" "information regarding a debt."[184] Although this conclusion does not explain how a debt collector "indirectly" conveys information regarding a debt, it certainly establishes that the majority's interpretation of "indirectly"—somehow allowing for a rule that does not require the conveyance of information regarding a debt—must be rejected.

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177. *See* cases cited *supra* note 5.
178. *See* cases cited *supra* note 5.
179. *See* cases cited *supra* note 5; *see also* 15 U.S.C. § 1692a(2).
180. *See* § 1692a(2).
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*

C. A "Communication" Is Established Only if The Debt Collector Conveys Some Actual "Information Regarding a Debt": Acceptance of the Minority Courts' Strict Construction of § 1692a(2).

"The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium."[185] When read naturally apart from any perceived policy, § 1692a(2) is clear on at least one point: a "communication" is established only if the debt collector conveys some actual "information regarding a debt."[186] There is no ambiguity that the definition of "communication" is centered on the disclosure of information.

The minority courts simply take the definition of "communication" under the FDCPA at face value and apply it accordingly.[187] Essentially, the minority courts believe that Congress meant what it said in limiting the definition of "communication" to the conveyance of actual "information regarding the debt."[188] As the court in *Biggs v. Credit Collections, Inc.* explains, "[w]ords matter in this instance, the words of [messages] and the words of the statutory definition of 'communication.'"[189] There is simply "[n]o amount of liberal construction [that could] broaden the statutory language [in § 1692a(2)]" to include a contact that "'convey[ed]' no 'information regarding a debt.'"[190] In *Marx v. General Revenue Corp.*, the Tenth Circuit explained that this principle was "simply built into the statutory definition of 'communication.'"[191] Clear language is clear language; as such, it is not the role of a court to delve into questioning whether Congress could really have meant to provide such a limitation in § 1692a(2).[192] The minority courts' interpretation of § 1692a(2) must be accepted because it is faithful to the text of § 1692a(2)—a "communication" is established only if the debt collector conveys some actual "information regarding a debt."[193] Under § 1692a(2), it is not enough that the contact somehow advanced the debt collection effort.

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185. *See id.* (emphasis added).

186. *See id.*

187. *See* cases cited *supra* note 6.

188. *See, e.g.*, Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1183-84 (10th Cir. 2011), *cert. granted on other grounds*, 132 S. Ct. 2688 (2012) (finding that since the term "communication" is unambiguous, the superfluity cannon does not apply).

189. Biggs v. Credit Collection, Inc. 2007 U.S. Dist. LEXIS 84793, at * 13 (W.D. Okla. Nov. 15, 2007).

190. *Id.*

191. *Marx*, 668 F.3d at 1177.

192. *See id.* at 1183.

193. *See* § 1692a(2).

D. So, What Is "Information Regarding a Debt" and How Does a Debt Collector "Indirectly" Convey Such "Information?"

1. "Information Regarding a Debt" Includes the Foundational Piece of Information That an Outstanding Debt Exists, Along with any Specific Information About the Debt.

Since it is unambiguous that § 1692a(2)'s provision, "information regarding a debt," requires the conveyance of actual information, the important question becomes what qualifies as such "information." As pointed out several times in this article, the courts have become so bogged down with the question of whether § 1692a(2) requires the conveyance of "information" at all that little has been decided regarding the scope of such "information." As explained above, a conservative interpretation might be that only specific information about the outstanding debt meets this definition, such as the debt amount, time overdue, interest accrued, creditor information, and the nature of the debt itself.[194] On the other end of the spectrum, the most liberal interpretation would be that "information regarding a debt" includes not only any and all specific information about the debt, but also would include the very existence of the debt itself.[195] The fact that there is an outstanding debt is in a literal sense an important piece of information about the debt.

Since there is an actual ambiguity in this specific context, it would now be entirely appropriate to apply the interpretive maxim that actual ambiguities within the FDCPA should be construed liberally in favor of the debtor–consumer.[196] Importantly, § 1692b's exception to the third-party "communication" prohibition of § 1692c(b) provides that a debt collector may not disclose the existence of a debt when acquiring location information about the debtor from a third party.[197] This is direct evidence that Congress feared the disclosure of an outstanding debt itself. Indeed, the existence of the outstanding debt itself is the foundational piece of debt information that would cause a debtor distress if disclosed to a third party. "Information regarding a debt" is then that critical piece of information that an outstanding debt exists, along with any specific information about that debt, which may include the debt amount, time overdue, interest accrued, creditor information, and the nature of the debt itself.[198] As will be discussed in the next section, this straightforward definition of "information regarding

194. *See id*.
195. *See id*.
196. *See* cases cited *supra* note 145.
197. § 1692b(2).
198. *See* § 1692a(2).

a debt" also allows for a straightforward explanation of what it means to "indirectly" convey such "information."[199]

2. "Indirectly" Conveying "Information Regarding a Debt" Means to Convey Information That Could Reveal the Existence of an Outstanding Debt.

So how does a debt collector "indirectly" convey such "information?"[200] That is, how does a debt collector "indirectly" convey that an outstanding debt exists?[201] This question is similarly informed by § 1692b, which provides the parameters for a debt collector when requesting the debtor's location information from a third party.[202] Section 1692b expressly requires the debt collector to avoid disclosing: 1) the existence of a debt; 2) that the caller is in the debt collection business; or 3) that the contact relates to the collection of a debt.[203] It is clear that the first prong, the existence of a debt, is the focus of these prohibitions.[204] Indeed, why would Congress prohibit the debt collector from disclosing that it was in the debt collection business?[205] The only logical answer is that this disclosure would indirectly lead the third party to make the connection that the debtor owes an outstanding debt. Similarly, why would Congress prohibit the debt collector from disclosing that the contact related to the collection of a debt?[206] Again, the only logical answer is that the third party could then indirectly conclude that the debtor must owe some outstanding debt.

The focus of § 1692b is protecting one basic piece of information about an outstanding debt—its existence.[207] Although the term "indirectly" is not used in § 1692b, § 1692b's remaining prohibitions are undeniably focused on preventing the disclosure of pieces of information that would indirectly disclose the existence of that debt.[208] Working under this framework, § 1692a(2) prevents the "direct" disclosure of the existence of a debt (which of course includes specific debt information) and the "indirect" disclosure of the existence of a debt by conveying information that itself would allow the third party to conclude that the debtor had an outstanding debt.[209] The most obvious examples of this would be to provide the very

199. *See id.*
200. *See id.*
201. *See id.*
202. *See* 15 U.S.C. § 1692b.
203. *See* § 1692b(2), (5).
204. *See* § 1692b(2).
205. *See* § 1692b(5).
206. *See id*.
207. *See* § 1692b.
208. *See id*.
209. *Compare* § 1692a(2), *with* § 1692b.

information outlined by Congress in § 1692b, namely that the: 1) anonymous debt collector is in fact a debt collector; and/or 2) call is about debt collection.[210] Although these pieces of information are not debt information, they "indirectly" lead this third party to the immediate conclusion that an outstanding debt exists.[211]

There is some gray area here. What about the situation where the anonymous debt collector leaves a callback message with the third party and asks the third party to have the debtor reference an anonymous account number upon returning the call? The account number is in fact a number assigned to the collection of that debt. If no debt is mentioned, this account number is merely a "jumble of numbers" as described by the Tenth Circuit in *Marx v. General Revenue Corp.*[212] It is still, however, a piece of information that is related to the debt. A similar problem arises if the debt collector reveals the name of the debt collection company. If the debt collection company's name is "Debt Collection Services, Inc." or something similar, there is little doubt that a third party could make an indirect connection to an outstanding debt. However, if the name of the company were simply "Business Services," an argument could certainly be made that this piece of information could not "indirectly" convey the existence of a debt.[213] Reasonable minds could disagree about the potential "indirect" effect of disclosing these pieces of information.[214]

As such, this gray area is where courts should be spending their time. It is clear that § 1692a(2) requires the conveyance of information.[215] It is also clear that a "direct" conveyance of "information regarding a debt" includes the existence of an outstanding debt and any specific information about that debt.[216] What is unclear is the outer range of the scope of information that could "indirectly" convey the existence of an outstanding debt.[217] The appropriate role for courts in the context of finding "communications" under § 1692a(2) in the future is to carry out the case-by-case task of determining which pieces of actual information have a reasonable potential of "indirectly" conveying the existence of a debt when disclosed by debt collectors.[218] The established maxim that ambiguities in the FDCPA should be construed liberally in favor of the debtor–consumer

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210. *See* §1692b(5).
211. *See* § 1692a(2).
212. Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1183 (10th Cir. 2011), *cert. granted on other grounds*, 132 S. Ct. 2688 (2012).
213. *See* § 1692a(2).
214. *See id*.
215. *See id*.
216. *Compare* § 1692a(2), *with* § 1692b.
217. *See* § 1692a(2).
218. *See id*.

will likely lead to a broad range of pieces of information that could "indirectly" convey the existence of a debt.[219]

3. The Test to Determine Whether "Information" "Indirectly" Reveals the Existence of a Debt Must be Based Solely upon the "Information" Provided.

The task at hand was confused by the Tenth Circuit in *Marx v. General Revenue Corp*.[220] As was explained above, the *Marx* court recognized § 1692a(2)'s clear requirement for the disclosure of actual "information" to establish a "communication."[221] The *Marx* court also appeared to acknowledge that the focus of the "information regarding a debt" requirement was the existence of the debt itself and that an indirect conveyance was determined by analyzing whether the information given indirectly revealed the existence of a debt.[222] The *Marx* court took a drastic turn off course in determining what it meant to "convey" such "indirect" "information," however, by holding that a debtor must prove that the third party actually understood that an outstanding debt existed.[223] As the *Marx* court explained, "the standard is not whether the [contact] *could have had* such an implication."[224]

The *Marx* court argued that "[t]o convey is to impart, to make known. If one drafts a letter full of unlawful collection threats, but never mails it, nothing is conveyed. So, too, if the 'communication' is in Sanskrit."[225] The *Marx* court essentially turned a "communication" under § 1692a(2) into a transaction, as a "communication" does not occur unless both parties fulfill their roles. The *Marx* court's rule requires that the debt collector must disclose direct or indirect information regarding a debt and that the third party must actually understand such information to implicate a debt.[226] In effect, the evidentiary standard takes the power out of the court's interpretive hands and places it within the bounds of the third party's understanding of the statement at the time it was made.

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219. *See* Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002) ("Because the FDCPA . . . is a remedial statute, it should be construed liberally in favor of the consumer."); *see also*, Ross v. Commercial Fin. Servs., Inc., 31 F. Supp. 2d 1077, 1079 (N.D. Ill. 1999); Harrison v. NBD, Inc., 968 F. Supp. 837, 844 (E.D.N.Y. 1997); Ramirez v. Apex Fin. Mgmt., LLC, 567 F. Supp. 2d 1035, 1040 (N.D. Ill. 2008).

220. *See generally* Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1177, 1182-83 (10th Cir. 2011), *cert. granted on other grounds*, 132 S. Ct. 2688 (2012).

221. *See id.* at 1177.

222. *See id.* at 1177, 1182 (noting that the message did not imply a debt and did not otherwise use the words "debt," "collector," "money," "obligation," or "payment").

223. *See id.* at 1177.

224. *Id.*

225. *Id.* at 1182.

226. *See Marx*, 668 F.3d at 1177, 1182-83.

Nothing in the structure, language, or natural purpose of § 1692a(2) requires this conclusion. The sole justification offered by the *Marx* court for this novel holding is that the ordinary use of the term "convey" required such an interpretation.[227] The *Marx* court's own definition, for which it did not cite to any dictionary or other resource, was "to impart, to make known."[228] In going beyond this abbreviated explanation, it is helpful to recognize that the Merriam–Webster Online Dictionary defines "convey" in relevant part as to: 1) "bear from one place to another"; 2) "impart or communicate by statement"; 3) "transfer or deliver"; or 4) "cause to pass from one place or person to another."[229] The Merriam–Webster Online Dictionary also provides the following textual example: "The message *conveyed* a sense of urgency."[230]

All of these definitions describe the term "convey" in the ordinary sense of a verb as an action taken by the active party. The active party in all of these definitions transfers some item or message from "one place to another."[231] Conveying is a one-sided affair.[232] It is the functional act taken by one to move something from one place to another.[233] The active party "imparts," "delivers," "communicates," or "causes" something "to pass" from one location to another.[234] Whether the conveyance is accepted or understood by the receiving party is something entirely different.[235] A conveyance is an action, not a transaction.[236]

This point is brought to bear in the *Marx* court's erroneous use of its own definition, "to make known."[237] One may, of course, make something *known* without making something *understood*. When some piece of information is disclosed, the active party has brought some piece of knowledge from outside of the receiving party's knowledge into the receiving party's knowledge. The active party has completed the transfer. The knowledge has been conveyed. What was previously unknown has been made "known," even if this knowledge is not yet understood.

This is another appropriate place to apply the maxim that actual ambiguities in the FDCPA should be construed liberally in favor of

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227. *See id.* at 1177.
228. *Id.* at 1182.
229. MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/convey (last visited Feb. 1, 2013).
230. *Id*.
231. *Id*.
232. *Id*.
233. *Id*.
234. *Id*.
235. *See id*.
236. *See id*.
237. *See Marx*, 668 F.3d at 1182.

protecting the debtor–consumer.[238] The textual argument presented above, at the very least, shows that the term "convey" in § 1692a(2) is ambiguous as to whether a "communication" is established at the moment that a debt collector discloses information that could "indirectly" reveal the existence of a debt.[239] The text of § 1692a(2) certainly does not require an interpretation of the term "convey" as a transaction that requires the debtor to prove that third party understanding would be placing a heavy burden upon the debtor.[240] Furthermore, the FDCPA's ability to protect debtors from third party disclosures would be severely weakened by such an interpretation because debt collectors would not be held to any kind of reasonableness standard that could be uniformly applied. Instead, the disclosure of identical information in similar cases could lead to completely different results. There would be no certainty to the rule and no basis for concrete training by debt collection companies to instruct their collectors on what types of disclosures are legally permissible. The protection of debtors everywhere would be left completely to the varying attentiveness and intelligence of the third parties that receive such a disclosure of information.

In sum, the *Marx* court's interpretation of the term "convey"—requiring that the debtor present evidence that the third party actually understood that the information disclosed by the debt collector revealed the existence of a debt—should be rejected for two reasons.[241] First, the ordinary meaning of the term "convey" is that of an action taken by the active party, not some kind of transaction between two parties whereby an understanding is required by the receiving party. Therefore, the *Marx* court's application of the ordinary definition of "convey" is simply incorrect.[242] Second, even if the *Marx* court's interpretation presented an ambiguity as to the meaning of "convey," the maxim that ambiguities in the FDCPA should be construed liberally to protect the debtor–consumer mandates that a "communication" is established at the moment that a debt collector discloses information that could indirectly reveal the existence of a debt to the reasonable third party listener.[243] This interpretation takes a tremendous burden off the shoulders of debtors and allows courts to provide uniform rules regarding what pieces of information reasonably establish an "indirect" conveyance of the existence of an outstanding debt.

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238. *See* cases cited *supra* note 145.
239. *See* 15 U.S.C. § 1692a(2).
240. *Id*.
241. *See Marx*, 668 F.3d at 1177.
242. *See id*. at 1182.
243. *See Johnson*, 305 F.3d at 1117; *see also, Ross*, 31 F. Supp. 2d at 1079; *Harrison*, 968 F. Supp. at 844; *Ramirez*, 567 F. Supp. 2d at 1040.

E. Superfluity

The majority courts point out two admittedly puzzling aspects of the relationship between the third-party "communication" prohibition in § 1692c(b), the single safe harbor for third party "communications" under § 1692b, and the definition of a "communication" in § 1692a(2).[244] First, the majority courts are troubled by the fact that § 1692b exists at all, since the entire section would be unnecessary if a "communication" as explained by § 1692a(2) required a conveyance of some actual information about the debt.[245] Indeed, the basic act of acquiring location information (with no further disclosure of any information) would have already been acceptable under the definition of "communication" in § 1692a(2).[246] Second, the majority courts ask why § 1692c(b) would expressly state that the only safe harbor for a third-party "communication" is § 1692b's allowance for the acquisition of location information, but then provide a definition of "communication" that allows for several other types of contacts with third parties?[247]

1. The Superfluity Canon Cannot Operate to Strip § 1692a(2) of Its Clear Meaning.

These structural aspects of the FDCPA's third-party "communication" prohibition are indeed puzzling on their face. An explanation for the seemingly awkward relationship between §§ 1692c(b), 1692a(2), and 1692b will be provided in the next section; however, it must first be established that such questions are substantively irrelevant for purposes of interpreting the definition of a "communication" under § 1692a(2). The *Marx* court correctly explained the well-established rule of interpretation that "a court should not apply the superfluity canon unless it first determines that the term being construed is ambiguous."[248] Section 1692c(b) only prohibits third party "communicat[ions]."[249] As explained extensively above, § 1692a(2) provides that a "communication" is established only when a debt collector conveys actual information that either directly or indirectly reveals the existence of a debt.[250] Even if § 1692b were entirely redundant and awkward, it could not somehow strip the clear meaning of § 1692a(2) as

244. *See generally,* Thomas v. Consumer Adjustment Co., 579 F. Supp. 2d 1290, 1296-97 (E.D. Mo. 2008); West v. Nationwide Credit, 998 F. Supp. 642, 645 (W.D.N.C. 1998); *Marx*, 668 F.3d at 1186-87 (Lucero, J., dissenting).

245. *See* cases cited *supra* note 244.

246. *See* cases cited *supra* note 244.

247. *See* cases cited *supra* note 244.

248. *Marx*, 668 F.3d at 1183 (*citing* Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004)).

249. *See* 15 U.S.C. § 1692c(b).

250. *See* § 1692a(2).

requiring that actual information be conveyed in order to establish a "communication."[251] As the *Marx* court rightly noted, "[s]imply because a 'statute is awkward . . . does not make it ambiguous on the point at issue.'"[252] Although it may be debated that the inclusion of § 1692b is puzzling given that the definition of a "communication" under § 1692a(2) would allow for the acquisition of location information, the majority's use of § 1692b to attempt to deprive § 1692a(2) of its clear requirement for the conveyance of actual information must be rejected.[253]

2. An Explanation for the Existence of § 1692b.

Section 1692c(b) only prohibits third party "communications."[254] Section 1692a(2) defines a "communication" as the conveyance of actual information that could directly or indirectly reveal the existence of an outstanding debt.[255] So what is the rationale for § 1692b's extensive instructions for the acquisition of location information when such an act would not be a "communication?"[256] Furthermore, why would § 1692c(b) expressly provide that § 1692b is the only exception to its "communication" prohibition when many other contacts would not be "communications" under § 1692a(2)?[257]

The language used in § 1692b provides two explanations. First, it appears that the main purpose of § 1692b is to instruct a debt collector on how to acquire location information from a third party without revealing the existence of a debt.[258] Accordingly, § 1692b tells a debtor how to avoid creating a "communication" in this context.[259] As such, § 1692b appears to be a practical application of the working definition of a "communication" from § 1692a(2).[260]

If it is assumed that the primary goal of a debt collector is to persuade the debtor to pay his or her debt, then it must also be assumed that locating and discussing the debt with the debtor is of paramount importance to a debt collector. As such, it would have been reasonable for Congress to assume that a telephone call to acquire location information would have been one of the most common remaining contacts that did not qualify as a

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251. *Compare* § 1692a(2), *with* § 1692b.
252. *Marx*, 668 F.3d at 1183-84 (citing *Lamie*, 540 U.S. at 534).
253. *Compare* § 1692a(2), *with* § 1692b.
254. *See* § 1692c(b).
255. *See* § 1692a(2).
256. *Compare* § 1692c(b), *with* § 1692a(2), *and* §1692b.
257. *See* sources cited *supra* note 256.
258. *See* § 1692b.
259. *Compare* § 1692b, *with* § 1692a(2).
260. *See* sources cited *supra* note 259.

"communication" under § 1692a(2).[261] Accordingly, Congress seems to have provided § 1692b as an express effort to ensure that this very likely type of third party contact did not enter into the realm of a prohibited "communication" in practice.[262] As a matter of emphasis, Congress protected the interests of potential debtors and debt collectors alike by providing debt collectors with specific instructions on how to avoid a prohibited "communication" in this very likely context.[263] Therefore, § 1692b is redundant as to the definition of a "communication" in § 1692a(2) because it is an application of § 1692a(2) in a specific context.[264] As the Tenth Circuit reasoned in *Marx*, if any canon of interpretation was to be applied, "the appropriate one is that of *ex abundanti cautela* (abundance of caution), which teaches that Congress may on occasion repeat language in order to emphasize it."[265]

This conclusion does not explain, however, why § 1692c(b) refers to § 1692b as the lone exception to its prohibition of a third party "communication."[266] This leads to the second explanation for this structure, which is the recognition that § 1692b not only operates as an application of § 1692a(2)'s definition of a "communication," but also as a small exception to § 1692a(2) in the acquisition of location information context.[267] As noted above in the introduction to the FDCPA, § 1692b additionally allows a debt collector to identify his or her employer if asked.[268] This disclosure could, of course, tip off the third party that it was a debt collection call if the name of the employer was something like "Debt Collection Services, Inc." Outside of the safe harbor provided by § 1692b, this hypothetical disclosure would arguably otherwise trigger § 1692a(2)'s component of conveying information about the debt "indirectly," as it would allude to the existence of an outstanding debt.[269]

Therefore, § 1692b is an exception to the normal "communication" definition under § 1692a(2).[270] If a debt collector is asked about the name of his or her company within a non-acquisition of location information call, that debt collector would indeed run the risk that conveying the name of the company would indirectly lead to knowledge about an existing debt.[271] This

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261. *See* sources cited *supra* note 259.
262. *See* sources cited *supra* note 259.
263. *See* sources cited *supra* note 259.
264. *See* sources cited *supra* note 259.
265. *Marx*, 668 F.3d at 1183 (citing Fort Stewart Sch. v. FLRA, 495 U.S. 641, 646 (1990)).
266. *See* 15 U.S.C. § 1692c(b).
267. *Compare* § 1692a(2), *with* § 1692b(1).
268. *See* § 1692b(1).
269. *Compare* § 1692a(2), *with* § 1692b(1).
270. *See* sources cited *supra* note 269.
271. *See* § 1692a(2).

is absolutely the case if the debt collection company's name implies the collection of debts.[272] However, the debt collector that attempts to acquire location information need not worry about this potential disclosure becoming a "communication" because such a disclosure is allowed by § 1692b.[273]

In sum, although the structure of §§ 1692c(b), 1692a(2) and 1692b appears awkward on its face, it is not so irreconcilable as to justify resorting to an interpretation of § 1692a(2) that distorts its clear meaning. Section 1692b is redundant of § 1692a(2) because it is an application of the definition of a "communication" from § 1692a(2) in a very common context.[274] Furthermore, § 1692c(b) describes § 1692b as the lone exception to its prohibition of third party "communications," because § 1692b does provide the lone exception for disclosing company identification information that would otherwise "indirectly" convey the existence of a debt.[275]

3. Restructuring the Third-party "communication" Provisions of the FDCPA to Avoid Confusion.

This article has provided an explanation for the current structure of the FDCPA's third-party "communication" provisions. However, it must be conceded that the current structure is needlessly awkward and has confused courts when trying to reconcile such provisions with the superfluity canon.[276] It would therefore be appropriate for Congress to consider a simple restructuring of the FDCPA's third-party "communication" provisions in three ways.

First, Congress should make the language used in its definition of "communication" in § 1692a(2) crystal clear. Congress should replace the current phrase, "conveying of information regarding a debt directly or indirectly to any person through any medium," with the phrase, "conveying of information *that could reveal the existence of a debt* directly or indirectly to any person through any medium."[277] This would eliminate the need to search § 1692b and other provisions to try to glean what such "information" included. This act alone would likely eliminate the confusion that has led to this jurisdictional split. Second, Congress should incorporate § 1692b as a subsection of § 1692c(b)'s general third-party "communication"

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272. *See id*.
273. *Compare* § 1692a(2), *with* § 1692b(1).
274. *See* sources cited *supra* note 273.
275. *Compare* § 1692c(b), *with* § 1692a(2), *and* § 1692b(1).
276. *See* sources cited *supra* note 275.
277. § 1692a(2).

prohibition.[278] This would eliminate the awkward positioning of § 1692b on its own in a way that is completely detached from the main prohibition.[279] Third, Congress should change the language in § 1692c(b), which implies that an acquisition of location information call is the only allowed third party contact.[280] Instead of awkwardly beginning § 1692c(b) with "[e]xcept as provided in [§ 1692b]," Congress should simply give the third-party "communication" prohibition as currently stated after this injunction.[281] Congress should then provide an explicit explanation of the newly relocated § 1692b within § 1692c(b). The newly relocated subsection (formerly § 1692b) would explain that it: 1) provides specific instructions on how to avoid the creation of a prohibited "communication" during the common acquisition of location information call; and 2) allows for a safe harbor to disclose the name of the debt collection company if asked by the third party.

It should be noted that House Representative Barney Frank introduced a related bill in 2012, titled the "Fair Debt Collection Practices Clarification Act of 2012" (the "Clarification Bill").[282] The Clarification Bill's sole purpose was to expressly allow debt collectors to leave messages "in connection with the collection of a debt on the consumer's answering machine, voice messaging system, or other similar device . . . ."[283] As such, the Clarification Bill only addressed the issue of leaving messages with the debtor–consumer and not with a third party.[284] Indeed, the Clarification Bill expressly noted that such messages must still comply with "the restrictions on communications with third parties under subsection (b)."[285] Therefore, the Clarification Bill did not attempt to solve the textual issues noted above.[286] Regardless, the Clarification Bill died as it was referred to committee.[287]

F. Textual Conclusion

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We [(the United States Supreme Court)] have stated time and again that courts must presume that a legislature says in a statute what it means and

278. *Compare* § 1692c(b), *with* § 1692b.
279. *See* sources cited *supra* note 278.
280. *See* § 1692c(b).
281. § 1692c(b).
282. *See* Fair Debt Collection Practices Clarification Act of 2012, H.R. 5794, 112th Cong. (2012).
283. *Id*. § 2(d)(1).
284. *See id*.
285. *Id*.
286. *See id*.
287. *See* Fair Debt Collection Practices Clarification Act of 2012, H.R. 5794, 112th Cong. (2012) (unenacted), *available at* http://www.govtrack.us/congress/bills/112/hr5794 (last visited Feb. 3, 2013).

> means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."[288]

This article introduced the jurisdictional split by explaining that the crux of the debate was whether Congress really meant to limit the term "communication" to an actual "convey[ance] of *information* regarding the debt"?[289] Although this may have seemed like a strange proposition given the definition of a "communication" under § 1692a(2), a survey of the analysis and interpretations provided by the majority courts offer no other explanation for the current debate. On its face, § 1692c(b) does provide a sweeping prohibition of third party "communications" that are connected to "the collection of a debt."[290] This is, however, not the FDCPA's final say on the matter, as Congress expressly limited the definition of "communication" to those contacts that either "directly" or "indirectly" convey actual "information regarding a debt."[291] This is an undeniable requirement for the conveyance of actual information.[292] The jurisdictional split in this context has arisen because the majority of courts have established rules that do not acknowledge that Congress took this second step to define "communications" in such a limited manner.

This article has explained that "information regarding a debt" is the critical piece of information that an outstanding debt exists, along with any specific information about that debt.[293] In the face of an ever-growing majority, the minority courts have, on the other hand, remained faithful to a natural interpretation of § 1692a(2) as requiring the conveyance of actual information.[294] Whereas much remains to be decided regarding the outer scope of "indirect" third party "communications" under the FDCPA, this much is certain: the FDCPA unambiguously establishes that a "communication" requires the conveyance of actual information regarding the debt.[295] As the Supreme Court reiterated recently in *Connecticut National Bank v. Germain*, "courts must presume that a legislature says in a statute what it means and means in a statute what it says."[296] Regardless of what perceived policy future trial and appellate courts believe would be best for debtors in the third-party "communication" context, such courts should abide by the current minority's textual interpretation of § 1692a(2) because it is faithful to its unambiguous requirement for the conveyance of actual

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288. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (citations omitted).
289. *See* 15 U.S.C. § 1692a(2).
290. *See* § 1692c(b).
291. § 1692a(2).
292. *See id*.
293. *See id.*
294. *Compare* § 1692a(2), *with* cases cited *supra* note 6.
295. *See* § 1692a(2).
296. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (citations omitted).

information.[297] The fact that a third party contact may advance a debt collector's efforts is simply irrelevant to whether a "communication" has taken place.[298]

V. CHALLENGING PERCEIVED POLICY IN THE THIRD PARTY CONTACT CONTEXT: THE PURPOSE OF THE FDCPA IS TO PROTECT DEBTORS *AND* TO AVOID DISADVANTAGING A NON-ABUSIVE DEBT COLLECTION INDUSTRY.

As described above, majority courts in the key cases of *Ramirez v. Apex Financial Management, LLC* and *Foti v. NCO Financial Systems Inc.* rejected the minority's strict interpretation of § 1692a(2) because they believed that such an interpretation would violate the FDCPA's underlying purpose to protect consumers seemingly at all costs.[299] As a fundamental matter, this article has extensively explained that these courts' imposition of this perceived policy upon § 1692a(2) is inappropriate because no ambiguity exists in § 1692a(2)'s requirement for the conveyance of actual information. There is a second error here, however—one of the perceived policy itself. The problem with these courts' perception of the FDCPA's policy to protect debtors is not that it is incorrect, but that it is incomplete. Congress expressed not one, but rather two purposes of the FDCPA within the opening lines of the FDCPA itself: 1) to "eliminate abusive debt collection practices[;] 2) without unfairly disadvantaging non-abusive debt collection companies, and by direct implication, the debt collection industry itself."[300] As much as the FDCPA was instituted to protect consumers and debtors, so it was also instituted to protect upstanding debt collection companies and the debt collection industry itself.[301]

Congress essentially gave its thesis for the FDCPA in its purpose statement in § 1692(e), which states Congress's intent to protect debtors by maintaining a non-abusive debt collection industry.[302] Although the FDCPA

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297. *See* § 1692a(2).

298. *See id.*

299. *See* Ramirez v. Apex Fin. Mgmt., LLC, 567 F. Supp. 2d, 1035, 1041-42; Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 655 (S.D.N.Y. 2006).

300. § 1692.

301. This article recognizes that the FDCPA is primarily a consumer protection statute. Indeed, this article has applied the generally held maxim that the terms of the FDCPA should be construed liberally in favor of the debtor when actual ambiguities exist on a number of occasions. Majority courts in cases such as *Ramirez* and *Foti* are defining and applying a much different type of policy. Such courts have taken the narrow presumption to protect the debtor from abuse in the case of actual textual ambiguity and have expanded it into a pervasive rule to shield the debtor from collection efforts at all costs. The purpose of this article's challenge is to show that the FDCPA's purpose is multi-faceted and that an accurate view of the overarching purpose of the FDCPA must also recognize the intentions of Congress to maintain a functioning debt collection industry.

302. *See* § 1692.

is primarily a consumer protection effort, it must be acknowledged that Congress did not seek to protect debtors from every debt collection effort.[303] Congress only sought to protect debtors from "abusive" debt collection efforts.[304] As described in the introduction to this article, Congress set out on a mission to balance the protection of the debtor with the needs of a non-abusive debt collection industry.[305] Accordingly, protection of the debtor–consumer is not the only policy consideration of the FDCPA. As such, the maintenance of a non-abusive debt collection industry must be considered when analyzing any policy related issue under the FDCPA.

The FDCPA's definition of a "communication" within § 1692a(2) is a tangible example of Congress balancing these two policies.[306] Congress must have realized that a debt collector's contact of a third party had potential for much embarrassment to the debtor.[307] But Congress similarly realized that since the debt collection industry is based upon a debt collector being able to persuade the debtor to pay his debt, it was critical that debt collection companies be able to locate the debtor and have a conversation about the debt.[308] Third parties who have contact with the debtor would be fruitful sources that could lead to future conversations with the debtor.[309]

Section 1692a(2) demonstrates that Congress balanced the interests of the debtor and the non-abusive debt collection company by allowing debt collectors to contact third parties so long as the debt collector did not convey any information that would reveal the existence of the debt.[310] This balance makes a great deal of sense. Debtors are protected from the embarrassment that would result from a third party learning about the existence of the outstanding debt, while debt collectors retain the critical tool of gaining location information or securing a return call in order to speak with the debtor.[311] This balance fits perfectly within the expressed purpose of the FDCPA in § 1692 to acknowledge protections of both the debtor and the non-abusive debt collector.[312]

As pointed out by the court in *Zortman v. J.C. Christenson & Associates, Inc.*, this two-sided policy consideration is evident on the face of § 1692b's instructions for the acquisition of location information from a

303. *See* § 1692(e).
304. *See id*.
305. *See id*.
306. *See* § 1692a(2).
307. *See* §§ 1692a(2), 1692b.
308. *See* §§ 1692a(2), 1692b.
309. *See* §§ 1692a(2), 1692b.
310. *Compare* § 1692a(2), *with* § 1692b.
311. *See* sources cited *supra* note 310.
312. *See* §1692.

third party.[313] Section 1692b expressly allows a debt collector to contact a third party in relation to the collection of a debt.[314] Section 1692b limits this allowance by prohibiting a debt collector from providing actual information that would reveal the existence of a debt.[315] Congress was not concerned about the fact that a debt collector was contacting a third party; rather, it was concerned about the contact revealing the existence of an outstanding debt.[316] The focus was not upon the contact, but rather upon the content.[317] Both the debtor and non-abusive debt collector were acknowledged.[318]

In sum, the goal of the FDCPA is to protect debtors and to maintain a non-abusive debt collection industry.[319] This article's interpretation of § 1692a(2)'s definition of a prohibited "communication," which is in line with the minority court holdings, acknowledges that Congress protected both the debtor and non-abusive debt collector by only expressly prohibiting contacts that provide actual information that could reveal the existence of the outstanding debt.

VI. CONCLUSION

This article has two central conclusions. First, and most importantly, the FDCPA as currently constructed does not prohibit a debt collector from leaving a third-party callback message so long as the debt collector does not provide actual information that could reveal the existence of a debt.[320] A faithful interpretation of the text of the FDCPA establishes that a prohibited third-party "communication" under the FDCPA is a contact in which the debt collector has provided actual information that could reveal the existence of a debt.[321] Future courts should abide by the current minority's textual interpretation of § 1692a(2) because it is faithful to its unambiguous requirement for the conveyance of actual information.[322] The fact that a third party contact may advance debt collection efforts is simply irrelevant to whether a "communication" has taken place.[323]

Second, this article has reached the conclusion that Congress should clarify its structure of the third-party "communication" provisions of the

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313. *See* Zortman v. J.C. Christenson & Assocs., 870 F. Supp. 2d 694, 701 (D. Minn. 2012).
314. *See* § 1692b.
315. *See id.*
316. *See* § 1692b(2).
317. *See* § 1692b.
318. *See id.*
319. *See* § 1692.
320. *See* § 1692a(2).
321. *See id.*
322. *Compare* § 1692a(2), *with* cases cited *supra* note 6.
323. *See* §1692a(2).

FDCPA.[324] The current structure of the FDCPA's third-party "communication" provisions is not actually superfluous or contradictory, so as to strip the term "communication" of its defined meaning; however, the awkward structure of these provisions has led to much of the ensuing debate. Congress should consider restructuring the third-party "communication" provisions of the FDCPA as outlined above.

324. *Compare* § 1692c(b), *with* § 1692a(2), *and* § 1692b.