Judicial Isolation of the Third Circuit's "Glassine Window" FDCPA Decision in *Douglass v. Convergent Outsourcing*

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I. Introduction

In *Douglass v. Convergent Outsourcing*,[1] the United States Court of Appeals for the Third Circuit found that a sequence of numbers visible through the glassine window[2] on an envelope containing a collection letter violated section 1692f(8) of the Fair Debt Collection Practices Act (FDCPA),[3] which identifies as an "unfair or unconscionable means to collect or attempt to collect" a debt "[u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business."[4] *Douglass* spawned a flurry of individual and class actions under section 1692f(8).[5] It also triggered a swift reaction by the debt collection industry.[6]

1. 765 F.3d 299 (3d Cir. 2014). *See generally*: Comment, *Of Language and Symbols: A Move Toward Defining What is "Benign" Under the Fair Debt Collection Practices Act* [Douglass v. Convergent Outsourcing, 765 F.3D 299 (3D CIR. 2014)], 54 Washburn L.J. 761 (2015) [hereinafter *Of Language and Symbols*]; Phillips, *Third Circuit: Envelope Containing Dunning Letter Violated the FDCPA*, 11-14 Consumer Cred. & Truth-In-Lending Compl. Rep. 3 (Nov. 2014); Note, *No "Benign Language" Exception Where Account Number Visible in Envelope Window,* 18 No. 9 Consumer Fin. Services L. Rep. 3 (2014).

2. *See generally* Phillips, *The Problem of Glassine Windows in Envelopes with a Dunning Letter,* 09-15 Consumer Cred. & Truth-in-Lending Compl. Rep. 4 (Sept. 2015).

3. 15 U.S.C. § 1692f(8) [hereinafter section 1692f(8)].

4. *Id. See generally*, Karnezis, *Construction and Application of Provision of Fair Debt Collections Practices Act Concerning Use of Language or Symbol on Mailed Envelope, 15 U.S.C.A. § 1692f(8),* 5 A.L.R. Fed. 2d 605 (2005 and Supp.).

5. *E.g. In re:* Financial Recovery Services, Inc., Fair Debt Collection Practices Act (FDCPA) Litigation, 2015 WL 4879386, at *1 (U.S. Jud. Pan. Mult. Lit. 2015).

6. *See, e.g., Of Language and Symbols*, *supra* note 1, at 782 ("Those in the industry recognize *Douglass* as an important

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For obvious reasons, district courts within the Third Circuit[7] and a handful outside the Third Circuit[8] followed *Douglass*. However, the overwhelming majority of courts outside the Third Circuit have been hostile to the Third Circuit's analysis in *Douglass*. Many courts have disagreed with the decision entirely, applying a "benign language" interpretation of section 1692f(8)'s prohibition against "[u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails" that is consistent with the FTC's Official Staff Commentary.[9] As noted below,[10] other courts have distinguished *Douglass* factually, finding the Third Circuit's factual analysis to be either inapplicable or inconsistent with the FDCPA's "least sophisticated consumer" test.

Thus, and as illustrated further in this article, district courts increasingly have isolated the Third Circuit's decision in *Douglass*. Although *Douglass* still provides fodder for FDCPA class actions, the legal and factual analyses underpinning the decision are widely subject to attack and of questionable viability outside the Third Circuit.

II. The FDCPA's Regulation of Envelopes Containing Dunning Letters

A. The FDCPA's Limitation on Visible Language or Symbols on Collection Envelopes

Section 1692f(8) lists as an unfair means to collect a debt "[u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business."[11] The purpose of this provision is to ensure that the envelope does not disclose a debt collection purpose.[12]

The FTC's Official Staff Commentary suggests that courts apply a realistic, practical interpretation of section 1692f(8):

> [A] rigid, literal approach to [section 1692f(8)] would lead to absurd results (*i.e*. taken literally, it would prohibit showing any part of the consumer's address on the envelope). The legislative purpose was to prohibit a debt collector from using symbols or language on envelopes that would reveal that the contents pertain to debt collection – not to totally bar the use of harmless words or symbols on an envelope.[13]

For a time, at least, some courts were critical of the FTC's Official Staff Commentary because it "appeared to preclude recovery for some of the very conduct explicitly prohibited as 'unfair or unconscionable' by the statute."[14] These courts applied a "plain language" test to section 1692f(8),[15] bolstered by perceived support in later, equally formalistic interpretations by the FTC Staff in two Informal Staff Opinion Letters.[16] Accordingly, they found that "benign," non-threatening, and even non-embarrassing language on collection envelopes still violated section 1692f(8).[17]

B. A Benign Language Interpretation of Section 1692f(8)

By contrast, another line of cases, in the United States Courts of Appeal for the Fifth[18] and Eighth Circuits[19] and in a number of district courts,[20] developed

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decision"). *See also*: http://www.acainternational.org/iap-update-third-circuit-refuses-to-rehear-case-about-disclosure-of-accountnumber-through-envelope-33629.aspx ("On Sept. 22, 2014, the Third Circuit Court of Appeals denied, without comment, a Petition for Rehearing En Banc or Panel Rehearing (the 'Petition') filed by ACA International member Convergent Outsourcing (a 'Collection Agency') in *Douglass v. Convergent Outsourcing*, No 13-3588, 2014 WL 4235570, –F.3d– (3d Cir. 2014)"); Rossman, "Defeat Claims That Your Envelopes Violate the FDCPA," InsideArm..com (Oct. 24, 2014), (http://www.insidearm.com/daily/debt-collection-news/debt-collection/defeat-claims-that-your-envelopes-violate-the-fdcpa/); Chang, Crowley, Rakowski & Streibich, "Third Circuit Holds that Envelope Revealing Consumer's Account Number Violates the FDCPA," JDSupra Bus. Adv. (Oct. 16, 2014).

7. *See, e.g.*: Styer v. Professional Medical Management, Inc., 2015 WL 4394032, at *8 (M.D. Pa. 2015) ("Assuming, without deciding, that a benign symbol exception was adopted and applied to the instant circumstances, the QR code would still be a violation of the FDCPA because it is not a benign symbol."); Waldron v. Prof'l Med. Mgmt., 2013 WL 978933 (E.D. Pa. 2013).

8. *See, e.g.,* Adkins v. Financial Recovery Services, Inc., 2015 WL 5731842, at *3 (N.D. Ill. 2015) ("Where a disclosure on an envelope implicates such core privacy concerns, 'it cannot be deemed benign' and the statute should be applied according to its clear terms….[T]he disclosure of an account number is a disclosure of a debtor's private information. This court cannot find this disclosure so clearly benign that the unequivocal language of the statute should be ignored.").

9. FTC Staff Commentary On The Fair Debt Collection Practices Act, 53 Fed.Reg. 50097, 50099 (Dec. 13, 1988).

10. *See infra* Part III.B.2.

11. *See, e.g.*: *In re* Hodges, 342 B.R. 616, 625 (Bankr. E.D. Wash. 2006) ("The purpose of these two sections is clearly to prevent sensitive information about debt collection from being disclosed to third parties. Debtors Exhibit 7 shows that Armada disclosed sensitive information by sending a window envelope where anyone seeing that envelope could see the statement, 'You have a total of $1,278.04 owing at this….' The Court finds that Armada violated both [sections] 1692f(7) and 1692f(8) by mailing this window envelope disclosing this language."); Shulick v. Credit Bureau Collection Services, Inc., 2004 WL 234374, at *1 (E.D. Pa. 2004) (holding that letters which were in technical violation of the statute "because the envelopes partially revealed the content of the letters, and disclosed, to the casual observer, that the persons to whom the letters were mailed had an account with Verizon and owed specified sums of money").

12. *See, e.g.*: National Consumer Law Center, Fair Debt Collection § 5.6.8 (2015); Johnson v. NCB Collection Servs., 799 F. Supp.1298, 1305 (D. Conn. 1992) ("The point of this restriction is 'to protect the privacy of the debtors.'").

13. FTC Staff Commentary On The Fair Debt Collection Practices Act, 53 Fed.Reg. at 50099.

14. McMillan v. Collection Professionals Inc., 455 F.3d 754, 764 (7th Cir. 2006) ("[W]e do not find the FTC commentary particularly helpful. Nor do we find it persuasive as a comprehensive statement of the meaning of the statutory terms before us. The test articulated by the FTC appears to preclude recovery for some of the very conduct explicitly prohibited as 'unfair or unconscionable' by the statute.").

15. *E.g.*, Peter v. GC Servs., L.P., 310 F.3d 344 (5th Cir. 2002).

16. Ziegler, FTC Informal Staff Letter, (April 25, 1978); Mangano, FTC Informal Staff Letter (Feb. 22, 1978).

17. *See, e.g.*, sources cited *supra* at notes 14 & 15.

18. Goswami v. Am. Collections Enter., Inc., 377 F.3d 488, 495 (5th Cir. 2004), *aff'd en banc* 395 F.3d 225, 226 (5th Cir. 2004) ("We are most persuaded by the FTC's commentary on the statute.").

19. Strand v. Diversified Collection Services, Inc., 380 F.3d 36 (8th. Cir. 2004) ("Because an interpretation of § 1692f(8) exempting benign words and symbols better effectuates Congressional purpose, and because a strict reading would lead to bizarre and impracticable consequences, we conclude the statute does not proscribe benign language and symbols such as those printed on the envelopes Ms. Strand received from DCS.").

20. Davis v. Baron's Creditor's Service, Inc., 2001 WL 1491503 *5 (N.D. Ill. 2001) (recognizing benign language exception); Lindbergh v. Transworld Sys., Inc., 846 F. Supp.175, 180 (D. Conn. 1994) (benign language exception – envelope contained the word "transmittal"); Masuda v. Thomas Richards & Co., 759 F. Supp.1456, 1466 (C.D. Cal. 1991) ("personal & confidential" and "theft of mail or obstruction of delivery is a federal crime" was benign language); Waldron v. Professional Medical Management, 2013 WL 978933, at *6 (E.D. Pa. 2013) (visible

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a "benign language" interpretation of section 1692f(8)'s unfair practices in the years before *Douglass*. In large part, these courts followed and gave deference to the FTC's Official Staff Commentary's fear that "a literal application of this provision would produce absurd results."[21]

C. The Third Circuit's Decision in *Douglass*[22]

The plaintiff in *Douglass* received a debt collection letter from Convergent Outsourcing regarding the collection of a debt that she allegedly owed to T-Mobile USA. Visible on the face of the letter, above Douglass's name and address, was the following sequence of numbers representing Douglass's account number with Convergent. "R-xxxx-5459-R241." This number does not refer or relate to her account with T-Mobile USA. Convergent mailed the letter in an envelope with a glassine window. When mailed, the top portion of the letter, including Douglass's account number, was visible through the window. Also visible through the window was Douglass's name and address, a United States Postal Service bar code, and a quick response (QR) code, which, when scanned by a device such as a smart phone, revealed the same information as that displayed through the glassine window, as well as a monetary amount corresponding to Douglass's alleged debt.

The Third Circuit found that section 1692f(8) prohibits the appearance of language and symbols (other than the recipient's name and address) through a glassine window on an envelope (as opposed to items written or appearing on the envelope itself):

> As a threshold matter, we conclude that [section] 1692f(8)'s prohibition on language and symbols applies to markings that are visible through a transparent window of an envelope. Section 1692f(8) regulates language "on any envelope"….In this case, the alleged violation involves language printed on the letter itself that appeared through the glassine window of the envelope. Interpreting [section] 1692f(8) in accordance with its plain meaning, we construe language "on any envelope" to mean language appearing on the face of an envelope….Like language printed on the envelope itself, language appearing through a windowed envelope can be seen by anyone handling the mail. And Convergent makes no argument to the contrary. Accordingly, we hold [that section] 1692f(8) applies to language visible through a transparent window of an envelope.[23]

The Third Circuit then concluded that, because the account number was visible through the glassine window, Convergent violated section 1692f(8). Its holding was resolute:

> The text of [section] 1692f(8) is unequivocal. "[A]ny language or symbol," except the debt collector's address and, in some cases, business name, may not be included "on any envelope"….The plain language of [section] 1692f(8) does not permit Convergent's envelope to display an account number. Because the statute's language is plain, our sole function is "to enforce it according to its terms," so long as "the disposition required by that [text] is not absurd."[24]

The Third Circuit rejected the argument that the visible numbers were meaningless:

> Convergent insists that Douglass's account number is a meaningless string of numbers and letters, and its disclosure has not harmed and could not possibly harm Douglass. But the account number is not meaningless – it is a piece of information capable of identifying Douglass as a debtor. And its disclosure has the potential to cause harm to a consumer that the FDCPA was enacted to address….[W]e find the statute not only proscribes potentially harassing and embarrassing language, but also protects consumers' identifying information. Accordingly, Douglass's account number is impermissible language or symbols under [section] 1692f(8).

The Third Circuit further held that it did not have to decide whether section 1692f(8) permitted the use of benign language on the face of an envelope containing a dunning letter because the revelation of Douglass's account number was, the court decided, not benign.[25]

III. Judicial Reaction to, and Isolation of, the *Douglass* Decision

A. District Courts within the Third Circuit and Only a Smattering of Other District Courts Have Followed *Douglass*

As noted above at Part I, a number of decisions within the Third Circuit, such as in New Jersey[26] and Pennsylvania,[27] have followed, as they must, the

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QR code does not violate FDCPA: "On the contrary, it included only a cryptic symbol that, once 'decoded,' included an equally cryptic combination of numbers and letters."); Voris v. Resurgent Capital Services, L.P., 494 F. Supp.2d 1156, 1165 (S.D. Cal. 2007) ("Here in the Ninth Circuit, the Central District of California has adopted the benign language exception….").

21. *E.g.*, Gulley v. Markoff & Krasny, 664 F.3d 1073, 1074 (7th Cir. 2011).

22. 765 F.3d 299 (3d Cir. 2014).

23. *Id.* at 302.

24. *Id.* at 303 - 4.

25. *See generally* Phillips, *supra* note 1.

26. *In re* ACB Receivables Management, 2015 WL 5248567, at *4 (D. N.J. 2015); Park v. ARS National Services, Inc., 2015 WL 6579686, at *5 (D. N.J. 2015).

27. Kostik v. ARS Nat. Services, Inc., 2015 WL 4478765, at *7 (M.D. Pa. 2015), *interlocutory rev. den.* 2016 WL 69904 at *2 - 4 (M.D. Pa. 2016); Styer v. Professional Medical Management, Inc., 2015 WL 4394032; Pirrone v. NCO Financial Systems, Inc., 2015 WL 7766393, at *1 (E.D. Pa. 2015) ("Although Plaintiff alleges in this case that her account number was embedded in a QR Code, disclosure of such a QR Code implicates the same 'core concern animating the FDCPA – the invasion of privacy' highlighted by the Third Circuit in

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Third Circuit's decision in *Douglass*.[28] For example, in *In re ACB Receivables Management*,[29] the district court found that the defendant failed to distinguish *Douglass* on the basis that "[t]he only information available is a jumble of letters and numbers," and that "the monetary amount corresponding to the debt is not available and no identifying information is discoverable."[30] The district court found *Douglass* not so limited, explaining that: "the Third Circuit in *Douglass* did not limit its holding to the information found in the QR code; rather, the decision focuses entirely on the display of the plaintiff's account number."[31] In other words, "the law in this Circuit undoubtedly is that the mere display of an account number violates [section] 1692f(8)."[32] A handful of district courts outside the Third Circuit have followed the Third Circuit's analysis in *Douglass* as well.[33]

B. Courts Outside the Third Circuit Overwhelmingly Reject *Douglass*

1. Hostility to *Douglass'* Analysis of the Benign Language Interpretation of Section 1692f(8)

a. Deferring to the FTC's Official Staff Commentary and Avoiding "Absurd Results" Created by Literal Interpretation of Section 1692f(8)

Notably, the Third Circuit concluded that it did not have to decide whether section 1692f(8) permitted the use of benign language on the face of an envelope.[34] But, as noted below, some courts have criticized, and refused to follow *Douglass* based on the rationale that *Douglass*, as a practical matter, did refuse to allow benign language[35] – a position that was inconsistent with the FTC's Official Staff Commentary.

In *Gonzalez v. FMS, Inc.*,[36] for example, Judge Castillo declined to follow *Douglass*, and dismissed the FDPCA claim premised on the debtor's account numbers – an 8-digit account number being part of a 15-digit tracking number being visible on envelope in which the dunning letter was sent:

> Considering Section 1692f(8) in context and in light of the purposes of the FDCPA, it is clear to this Court that the provision was only intended to prohibit markings that could be considered unfair or unconscionable, not those that are innocuous or benign. This reading is consistent with the commentary issued by the Federal Trade Commission ("FTC"), an agency that "holds some interpretative and enforcement authority with respect to the FDCPA[.]" *Gulley v. Markoff & Krasny,* 664 F.3d 1073, 1074 (7th Cir/2011) (citation omitted). The FTC's commentary states, "[A] rigid, literal approach to [section 1692f(8)] would lead to absurd results (*i.e.*, taken literally, it would prohibit showing any part of the consumer's address on the envelope). The legislative purpose was to prohibit a debt collector from using symbols or language on envelopes that would reveal that the contents pertain to debt collection – not to totally bar the use of harmless words or symbols on an envelope." FTC Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097-02, 50099 (Dec. 13, 1988)….The FTC's interpretation is also supported by the legislative history of the FDCPA.[37]

Similarly, Judge Polk-Failla observed in *Gardner v. Credit Management LP*[38] that the *Douglass* court's concern "with an account number's potential for disclosing the recipient's status as a debtor should a third party choose to investigate the number's meaning…seems misplaced."[39] Bolstering the FTC's Official Staff Commentary, she resolved that "[b]oth the Senate Committee Report that accompanied the passage of the FDCPA and the application guidelines issued by the Federal Trade Commission (the 'FTC') provide reassurance that [section] 1692f(8) need not be

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Douglass"); Berry v. ARS National Services, Inc., 2015 WL 9315993, at *3 (E.D. Pa. 2015) ("[E]ven assuming, without deciding, that a benign symbol exception was adopted and applied to these circumstances, the barcode would still be a violation of the FDCPA because it is not a benign symbol.") (citing *Pirrone*, *supra*); Palmer v. Credit Collection Services, Inc., 2015 WL 9315986, at *2 (E.D. Pa., 2015) ("The bar code in issue is designed to apply specifically to the plaintiff and relates to the debt she allegedly owes. Contrary to the focus of the parties' arguments, it is irrelevant whether the bar code, when scanned, reveals a scrambled or unscrambled number. Again, § 1692f(8) plainly forbids bar codes of any kind. In sum, the FDCPA is remedial and must be interpreted 'to give full effect' to its purposes. *See Douglass*, 765 F.3d at 306.").

28. *E.g*. Erlbaum v. Prudential-Bache Securities, Inc., 1985 WL 5993, at *4 (E.D. Pa. 1985).

29. *ACB Receivables Management*, 2015 WL 5248567, at *4.

30. *Id*.

31. *Id*.

32. *Id*.

33. *In re* Financial Recovery Services, Inc., 2015 WL 4879386, at *1; *Adkins*, 2015 WL 5731842, at *3 (*see supra* note 8).

34. *See generally*: *Of Language and Symbols*, *supra* note 1, at 787 ("[Information that Implicates Consumer Privacy is Not Benign]…¶…Although the crux of Convergent's argument was that applying the FDCPA as written would lead to absurd results, the protection of a consumer's privacy cannot be considered absurd."); and Phillips, *supra* note 1.

35. *See generally, Of Language and Symbols, supra* note 1, at 782 ("[A]lthough the Third Circuit's decision in *Douglass* moves closer to what Congress intended--the court should have gone further – and in the interests of the reasonableness requirement of the least sophisticated consumer standard, should have adopted the benign language exception.").

36. 2015 WL 4100292 (N.D. Ill. 2015).

37. *Id*. at *5.

38. Gardner v. Credit Management LP, 2015 WL 6442246, at *3 (S.D. N.Y. 2015). *See also*: Perez v. Global Credit and Collection Corp., 2015 WL 4557064, at *3 (S.D. N.Y. 2015); Gelinas v. Retrieval-Masters Creditors Bureau, Inc., 2015 WL 4639949, at *3 (W.D. N.Y. 2015).

39. *Gardner*, 2015 WL 6442246, at *5.

applied so narrowly."[40] Her reasoning was similar to that of Judge Castillo:

> …The return address printed on the envelope – text that is expressly allowed by [section] 1692f(8) – is equally "capable of identifying [the recipient\ as a debtor." In the case of CMI, all a sufficiently curious party needs to do is enter the return address into an internet search engine, and the name and business purpose of CMI appear, thereby disclosing that the letter's recipient has received a debt collection letter. If the [FDCPA] were concerned with the display of information that could, if diligently investigated, disclose a recipient's debtor status, it would not permit return addresses – or, arguably, use of the mails – at all. Instead, however, the Act expressly allows not only return addresses, but also a collection agency's name, so long as, on its face, the name "does not indicate that [the sender is in the debt collection business"….Given that the internal tracking number at issue here in fact has less potential than the return address to disclose Gardner's debtor status (plugging the return address into a search engine reveals CMI's information, whereas plugging in the tracking number reveals nothing to connect the letter to debt collection), the Court declines to follow the *Douglass* opinion insofar as it concluded that the display of a similar internal account number violates [section] 1692f(8).[41]

Other courts evaluating *Douglass* have also echoed the FTC's Official Staff Commentary, noting that a court should not apply a literal reading of section 1692f(8) that gives rise to absurd results.[42]

b. Applying a Sensible "Plain Language" Rule: Privacy is Not Anonymity

Other courts have found that even a literal reading of section 1692f(8) does not necessarily eliminate allowing benign language to appear on or through the envelope. The prefatory language of section 1692f(8) requires use of a "means" to collect a debt. And section 1692f(8) itself prohibits "using" such language or symbols in "communicating" with the consumer. Thus: "Each piece of quoted text – reinforced by the need for the conduct to be a 'means' to collect a debt – demands that the ban apply only to language or symbols that actually *communicates* something to the debtor."[43] Although it is true that this section was designed to protect consumers' privacy,[44] "[i]t was never within section 1692f(8)'s reach to make all debt-collections letters 100% untraceable."[45] In other words, privacy does not equate to anonymity.

c. Applying the "Least Sophisticated Consumer" Rule

Even a literal reading of the FDCPA remains subject to the so-called "least sophisticated consumer" standard.[46] To be prohibited, the language or symbol must "communicate" something to the "least sophisticated consumer" – not, for example, to someone who might be able to divine or to understand the numbers and symbols on the envelope,[47] know to apply an iPhone application to innocuous language or symbols, or know how or whether to "Google" random strings and numbers to determine their source or meaning.[48] Nor does the "least sophisticated consumer" standard allow the application of a "most prying neighbor" or "Superman-with-XRay-Vision"[49] standard to determine whether

40. *Id*. at *3.

41. *Id*. at *5.

42. *E.g.*, Datta v. Asset Recovery Solutions, LLC, 2016 WL 3163142, at *5 - 10 (N.D. Cal. 2016) ("No court has found FDCPA liability based upon symbols or characters on an
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42. *(Continued from previous column)*
envelope that are associated with a letter vendor and that do not identify the letter recipient as a debtor.")….Davis v. MRS BPO, LLC, 2015 WL 4326900 *5 (N.D. Ill. 2015) (citing Shlahtichman v. 1-800-Contacts, Inc., 615 F.3d 794, 798 (7th Cir. 2010)); *Gardner*, 2015 WL 6442246, at *2 ("However, a literal application of the statute would similarly prohibit the inclusion of the recipient's name, her address, or preprinted postage, which would – as several courts have recognized – yield the absurd result that a statute governing the manner in which the mails may be used for debt collection might in fact preclude the use of the mails altogether"); *Adkins*, 2015 WL 5731842, at *2 ("The courts that have held that the display of a debtor's account number through a glassine envelope does not violate § 1692f(8) base their decisions on circuit law finding § 1692f(8) ambiguous. These courts reason that if § 1692f(8) is read literally to bar any markings on the outside of a debt collection letter envelope other than the names and addresses of the parties, it would lead to absurd results, such as proscribing the use of a stamp on a collection envelope."); Brooks v. Niagara Credit Solutions, Inc., 2015 WL 6828142, at *1 (D. Kan. 2015) ("Both the legislative history and the FTC commentary clearly state that § 1692f(8) is intended to prohibit markings on the outside of debt collection envelopes that suggest that the contents of the envelope pertain to debt collection. While a 'very determined snoop, with the help of extrinsic research' might conceivably be able to determine from the account number that the contents pertain to debt collection [citation] the statute prohibits only those markings that might 'intimate' to those who glimpse at the envelope that it pertains to debt collection."); *…but see Garcia v. Creditors Specialty Service, Inc*., 2016 WL 3345459, at *1 (N.D. Cal. 2016) (denying defendant debt collectors' motion to dismiss where plaintiff alleged that defendants sent a letter bearing its company's name, along with the symbol of a dollar sign and the words "SPECIAL SETTLEMENT OFFER" on the envelope, which arguably "convey information about a debt as they plausibly give rise to the inference that Plaintiff has a debt and the envelope contained debt collection information, especially where Plaintiff plausibly alleged that several people had access to her mailbox, including her child and roommate).

43. Schmid v. Transworld Systems, Inc., 2015 WL 5181922 *3 (N.D. Ill. 2015).

44. National Consumer Law Center, Fair Debt Collection § 5.6.8 (2015); *see, e.g., Johnson*, *supra* note 12.

45. *Schmid*, 2015 WL 5181922 *5.

46. Wahl v. Midland Credit Mgmt., Inc., 556 F.3d 643, 645 (7th Cir. 2009) (to determine whether a collection practice violates the FDCPA, it must be "viewed…through the eyes of the 'unsophisticated consumer'").

47. *Gonzalez*, 2015 WL 4100292, at *5 (*see supra* note 36) ("But an unsophisticated consumer viewing the envelope could not plausibly divine that the letter inside was associated with a delinquent debt. Plaintiff has not alleged, nor is there any basis to infer, that the account number embedded in the string of numbers would have meaning to anyone other than Defendant. The number is not identified in any way as an account number, and this same number is printed on the envelope just below Defendant's return address…viewing the envelope could just as easily conclude that the numbers were part of a postal code and that the letter consisted of unwanted junk mail.").

48. *Schmid*, 2015 WL 5181922, at *3; *Davis*, 2015 WL 4326900, at *4 ("Because an unsophisticated consumer would not perceive the approximately 60 letters and numbers on Plaintiff's envelope as connected to a debt collection, the core concern of privacy as highlighted in the *Douglass* decision does not come into play.").

49. *Davis*, 2015 WL 4326900, *quoting* Sampson v. MRS BPO, No. 15 C 2258 (N.D. Ill. Mem. Op. & Order dated Mar. 17, 2015) ("In order for any hypothetical member of the public who views the envelope…to be able to perceive that debt collection is involved and is at issue, so that [defendant] assertedly used unfair and unconscionable means to collect a debt…that member of the public would have to be blessed (or cursed?) with x-ray vision that enabled him or her to read the letter contained in the sealed and assertedly offending envelope. Absent that, any deciphering of the impenetrable string of numbers and symbols on the outside of the…envelope would have to depend on some sort of divination. That is simply not the stuff of which any legitimate invocation of the Act or its constructive purposes can be fashioned."); *Perez*, 2015 WL 4557064, at *3 (purpose is to prevent the exposure of a recipient's debtor status, and, further, that an unidentified string of apparently random numerals will
(Continued on next page)

innocuous language and numbers disclose inherently private information.

2. Limiting *Douglass's* Factual Analysis

In *Douglass*, the defendant conceded that the FDCPA prohibited account numbers from being seen on or through the envelope.[50] Other courts have not agreed with this concession, or have distinguished it factually.

For example, *Douglass* relied in part on the fact that the debtor's account number could be seen through the glassine envelope. Subsequent courts have concluded that random numbers – even if special "decoder rings" are required to interpret them – do not constitute visible account numbers. Even some cases within the Third Circuit have distinguished *Douglass* on this basis.[51]

In *Gonzalez*, Judge Castillo concluded that the visible numbers were not "account information," as in *Douglass*:

> Plaintiff has not alleged, nor is there any basis to infer, that the account number embedded in the string of numbers would have meaning to anyone other than Defendant. The number is not identified in any way as an account number, and this same number is printed on the envelope just below Defendant's return address. (*See* R. 5-1, Ex. C.) Someone viewing the envelope could just as easily conclude that the numbers were part of a postal code and that the letter consisted of unwanted junk mail. See Strand, 380 F.3d at 319 ("Even from the perspective of an unsophisticated consumer, the envelopes must have appeared indistinguishable from the countless items of so-called junk mail found daily in mailboxes across the land.").[52]

Similarly, Judge Polk-Faailla held in *Gardner*[53] that, "to the extent that the Third Circuit's conclusion [in *Douglass*] pertained to a similar string of random-seeming numbers comprising an internal account number, the Court disagrees with the Third Circuit's analysis. The internal tracking number at issue in the present case does not appear in a format that would signify to anyone outside of CMI that it pertains to a debt."[54]

IV. Conclusion

Courts outside of the Third Circuit have overwhelming rejected the *Douglass* decision in the absence of a clear disclosure of payment or account information on an envelope or through its glassine window. As those courts properly have held, expanding *Douglass* to apply to benign numbers or symbols leads to absurd results, and is inconsistent with language of the FDCPA, the FTC's Official Staff Commentary, and the least sophisticated consumer standard.

49. *(Continued from previous page)*

not "convey to plaintiff's neighbors, friends or employer the fact that she owes anyone any money").

50. "Convergent does not dispute that the plain language of § 1692f(8) prohibits including Douglass's account number on the face of the envelope." *Douglass*, 765 F.3d at 302.

51. Kokans v. ACB Receivables Management, Inc., 2015 WL 4638279, at *3 (D. N.J. 2015) ("Defendant contends that the bar code utilized on the notice sent to Plaintiff does not violate the FDCPA because '[w]ithout the interfacing software and access to [Defendant's] computer files, there is no information that can be gleaned from the bar code' and therefore the display of the bar code 'does not result in the disclosure of private information.' Dkt. No. 7 at p. 3. Although the notice sent by Defendant did include a bar code, according to Defendant, unlike a QR Code, which can be scanned by members of the public to reveal an individual's information, Defendant's bar code does not reveal any information without interfacing with Defendant's "closed computer system.").

52. *Gonzales*, 2015 WL 4100292, at *5.

53. *Gardner*, 2015 WL 6442246, at *5. *See also*: *Perez*, 2015 WL 4557064, at *3; *Gelinas*, 2015 WL 4639949, at *3.

54. *Gardner*, 2015 WL 6442246, at *5.