The CFPB and its Revival of the FDCPA

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I. INTRODUCTION

Virtually everyone today either uses or is familiar with the concept of social media. "[O]ne would have to be living under a rock to have missed the social changes that Social Media have wrought on virtually everyone in the world. Social Media has been involved with virtually every business and part of government revolutions around the world."[1]

On July 20, 2010, Devilin Wilson received an unexpected message on his Facebook from a man who identified himself as "Jeff Happenstance."[2] The message asked Wilson to "please have Melanie D. Beacham call" a phone number provided in the message.[3] Wilson responded that he would relay Happenstance's request, but informed Happenstance that Beacham had her own Facebook account, thus it would be simpler for Happenstance to contact her directly.[4]

One month later, Ms. Beacham received a Facebook message from someone identifying himself as "Loxley Duffus."[5] Unlike the message Wilson received, this message was much more pressing: there was an "urgent" matter, and Beacham was directed to contact "Supervisor Duffus at MarkOne" by 6 p.m. that day at a number provided in the message.[6]

Both messages were from a debt collector, and were made to induce Beacham to repay a $362 car loan.[7] Instead of prompting Beacham to pay, the messages led Beacham to file a civil

[1] Peter S. Vogel, *TXCLE Oil and Gas Disputes Course*, STATE BAR OF TEXAS (2018).
[2] Colin Hector, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 CAL. L. REV. 1601, 1602 (2011).
[3] *Id.*
[4] *Id.* at 1603.
[5] *Id.*
[6] *Id.*
[7] *Id.*

suit in state court, alleging violations of state debt collection laws and intentional infliction of emotional distress.[8]

These types of cases seemed challenging in 2010, "applying the main federal law concerning debt collection practices—the Fair Debt Collection Practices Act (FDCPA)—to debt collectors' use of new technologies is a challenging endeavor."[9] The FDCPA was passed by Congress in 1977, long before e-mail, internet mobile, and voicemail technologies; additionally, Congress gave no agency the power to create rules to clarify and interpret the law, thus the FDCPA had remained largely unchanged when the early 2000s witnessed the explosion of social media and other technologies.[10]

Primarily in response to the 2008 financial crisis, in 2010, at the urging of President Obama, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (CFPA).[11] The Act created the Consumer Financial Protection Bureau (CFPB) to consolidate consumer protection powers into one entity, heightening government accountability.[12]

Hector's 2011 comment anticipated a surge of litigation like Beacham's with the growth of debt and social media usage, but remained optimistic that the creation of the CFPB had the potential to make rules allowing the FDCPA to better address new technologies.[13] That surge did not materialize. The CFPB did, however, issue rules that clarified the compliance and legal risks of new technologies in debt collection or financial markets in general.[14]

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[8] Hector, *supra* note 2, at 1603.
[9] *Id.* at 1604.
[10] *Id.*
[11] *Building the CFPB*, CONSUMER FIN. PROT. BUREAU (Jan. 29, 2024), https://www.consumerfinance.gov/data-research/research-reports/building-the-cfpb/#:~:text=In%20July%202010%2C%20Congress%20passed,Protection%20Bureau%20(the%20CFPB).
[12] *Id.*
[13] Hector, *supra* note 2, at 1603.
[14] *Social Media: Consumer Compliance Risk Management Guidance,* FED. FIN. INST. EXAMINATION COUNCIL (Jan. 29, 2024), https://files.consumerfinance.gov/f/201309_cfpb_social_media_guidance.pdf.

> Compliance and legal risk arise from the potential for violations of, or nonconformance with, laws, rules, regulations, prescribed practices, internal policies and procedures, or ethical standards. These risks also arise in situations which the financial institution's policies and procedures governing certain products or activities may not have kept pace with changes in the marketplace. This concern is particularly pertinent to an emerging medium like social media. Further, the potential for defamation or libel risk exists where there is broad distribution of information exchanges. Failure to adequately address these risks can expose an institution to enforcement actions and/or civil lawsuits. . . . The laws and regulations discussed in this Guidance do not contain exceptions regarding the use of social media. Therefore, to the extent that a financial institution uses social media to engage in lending, deposit services, or payment activities, it must comply with applicable laws and regulations as when it engages in these activities through other media. Financial institutions should remain aware of developments involving such laws and regulations.[15]

The guidance goes on to address the FDCPA and how it relates to social media: "Using social media to inappropriately contact consumers . . . may violate the restrictions on contacting consumers imposed by the FDCPA. Communicating via social media in a manner that discloses the existence of a debt or to harass or embarrass consumers about their debts (e.g., a debt collector writing about a debt on a Facebook wall) or making false or misleading representations may violate the FDCPA."[16] This guidance clearly puts debt collectors on notice that social media communications with consumers will be policed in the same way that traditional communications have been since the enactment of the FDCPA. Courts' handling of cases involving new technologies has shown that the challenges anticipated at the time of the creation of the CFPB were exaggerated. The cases in this comment illustrate the workability of the CFPB's social media guidance in the courts' handling of debt collection cases. The absence of cases like Beacham's from litigation since the CFPB social media guidance implies that the

[15] *Id.* at 8.
[16] *Id.* at 11.

guidance has been effective at deterring debt collectors from engaging in illegal debt collection conduct through the use of social media.

II. BACKGROUND ON THE FAIR DEBT COLLECTION PRACTICES ACT AND THE DEBT COLLECTION INDUSTRY

a. Growth of debt collection business

Before Congress enacted the FDCPA, the debt collection industry was already substantial.[17] According to legislative notes, in 1976 creditors turned over $5 billion in debt to around 5,000 collection companies in the country.[18] The debt collection industry has grown exponentially in recent years, following the enormous increase in credit card debt.[19] According to the Federal Reserve's statistical reports, the amount of revolving consumer credit rose from $273 billion in 1992 to $973 billion in 2008.[20] The rate of increase has slowed since 2008, but the amount has grown to $1.28 trillion total outstanding revolving consumer credit for August, 2023.[21] Credit card default rates rose with the increase in outstanding debt from the 1990s into the 2000s, but have fallen drastically since 2009.[22] This may signal a significant shift in the debt collection industry's interest in aggressive debt collection tactics as fewer debtors are defaulting on payments since the publishing of the Hector article.

However, the "foundation for growth" of the debt collection industry remains with the ever-increasing outstanding consumer debt.[23] In 2006, debt collection companies received $10

[17] Hector, *supra* note 2, at 1608.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 1608-09.
[21] *Consumer Credit – G.19,* BD. OF GOVERNORS OF THE FED. RSRV. SYS. (accessed Jan. 8, 2024), https://www.federalreserve.gov/releases/g19/current.
[22] Hector, *supra* note 2, at 1608 (2011) (describing credit card default rates rising from 4% to 6.75%); *See also Delinquency Rate on Credit Card Loans, All Commercial Banks*, ECONOMIC RESEARCH, https://fred.stlouisfed.org/series/DRCCLACBS (showing 2.77% 2023 Q2).
[23] Hector, *supra* note 2, at 1608.

billion in revenues and law firms specializing in debt collection made around $1.2 billion.[24] That much revenue required third party debt collectors to make an estimated excess of one billion contacts with debtors each year.[25] An Ohio University study from the peak of the delinquency period (2009) revealed that nearly half of respondents reported receiving a telephone call from a debt collector.[26] In recent years the CFPB has reported a decline in contacts to about one in three consumers being contacted by a debt collector in the previous twelve months.[27] These still represent a substantial number of consumers, more than 70 million Americans.[28] Additionally, the number of consumer complaints concerning debt collection practices continue to rise: the FTC received 78,925 complaints in 2008, 88,190 in 2009, and 121,700 in 2021.[29] The number of complaints continues to climb even as the delinquency rate has fallen drastically since 2009.[30]

b. Goals of the FDCPA

Congress passed the FDCPA in 1977 to combat the "abusive, harassing, and deceptive debt collection methods."[31] The FDCPA sought to further two main policy goals: first, to protect

[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *CFPB Survey Finds Over One-In-Four Consumers Contacted By Debt Collectors Feel Threatened,* CONSUMER FIN. PROT. BUREAU (Jan. 12, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-survey-finds-over-one-four-consumers-contacted-debt-collectors-feel-threatened/#:~:text=According%20to%20the%20CFPB%20debt,medical%20and%20credit%20card%20debt. ("According to the CFPB debt collection survey, about one-third of consumers – or more than 70 million Americans – were contacted by a creditor or debt collector about a debt in the previous 12 months. Consumers are most often contacted about medical and credit card debt.").
[28] *Id.*
[29] *Id.*; *CFPB Annual Report 2022,* CONSUMER FIN. PROT. BUREAU (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_04-2022.pdf.
[30] *Delinquency Rate on Credit Card Loans, All Commercial Banks*, ECONOMIC RESEARCH, https://fred.stlouisfed.org/series/DRCCLACBS.
[31] Hector, *supra* note 2, at 1606.

consumers from an array of egregious debt collection practices; second, to disincentivize engaging in certain debt collection practices so that ethical debt collectors would not suffer a competitive disadvantage.[32]

At the time of enactment, there was a severe inconsistency regarding debt collection regulation among the states.[33] "[T]hirteen states had no debt collection laws, and an additional eleven states had wholly ineffective laws regulating third-party debt collections."[34] The FDCPA made it unlawful in every state for debt collectors to engage in practices including: "contacting consumers at inconvenient times and places; failing to cease communication upon written request; making spurious threats of legal action; using abusive or profane language; and communicating with putative debtors without meaningful disclosure."[35] Consistent with providing this baseline protection to consumers, the FDCPA creates a private right of action against debt collectors who engage in prohibited collection tactics.[36] Additionally, the FDCPA is a strict liability statute, allowing debtors to recover from debt collectors without showing intent on the part of the debt collector to violate the statute.[37] These characteristics of the FDCPA "created a powerful remedy that consumers could assert against aggressive debt collectors."[38]

Recognizing that the pre-statute, commission-based model of debt collection created the incentive to collect debt by any means necessary, Congress prohibited certain practices to ensure debt collectors who refrained from overzealous debt collection practices were not competitively

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Hector, *supra* note 2, at 1606 - 1607.
[37] *Id.* at 1607.
[38] *Id.*

disadvantaged.[39] In this way the FDCPA protects the interests of both debtors and ethical debt collectors.

c. Courts' Handling of FDCPA

Consistent with its goal of consumer protection, courts interpret the FDCPA liberally, in favor of the debtor.[40] Because consumers of below average intelligence or sophistication are especially vulnerable to fraudulent collection schemes, courts have generally applied a "least sophisticated" consumer test rather than a "reasonable" consumer standard to protect all consumers, even the naïve and the trusting, against deceptive debt collection practices.[41]

Under this test, courts ask "whether a debt collector's activity would mislead or deceive the 'least sophisticated' consumer . . . courts look at the impression that a debt collection activity is likely to leave on a consumer who 'lacks the astuteness of a Philadelphia lawyer or even the sophistication of the average, every day, common consumer . . ..'"[42] Additionally, this test protects debt collectors from "liability for bizarre or idiosyncratic interpretations of collection notices" as it presumes that even the least sophisticated consumer possesses a "rudimentary amount of information about the world and a willingness to read a collection notice with some care."[43]

d. FDCPA Regulatory Landscape and New Technologies prior to the CFPB

Before Congress created the Consumer Financial Protection Bureau (CFPB) there was widespread criticism that the FDCPA was not equipped to address the usage of new technologies

[39] *Id.*
[40] *Id.*
[41] Hector, *supra* note 2, at 1607.
[42] *Id.* at 1607-08.
[43] *Id.* at 1608.

in the debt collection industry and that revising the statute was a difficult process because "the only route to change has been through Congress."[44]

The criticism came from both sides. Regulators and industry representatives complained that the law had not kept pace with new technologies.[45] Additionally, the Federal Trade Commission (FTC), the government agency tasked with enforcing the statute, determined in 2009 that the decades old statute needed to be modernized "to provide more certainty to the industry and to protect consumers from harm . . .."[46] At the time (2009), some consumer advocates voiced concerns that "opening up more technologies just gives [debt collectors] more avenues to harass . . . embarrass . . . and cause [consumers] problems at work . . ."[47]

In 2010, the passage of the Consumer Financial Protection Act established the CFPB, vesting the new bureau with "the power to promulgate rules clarifying and amending the FDCPA."[48] This new development was seen as promising; it presented "a workable, promising path to reforming the FDCPA so it may better reflect the technological developments that have taken place over the last thirty years."[49] In the debate regarding how the CFPB should enforce the FDCPA, organizations have argued that without clearer guidance, the use of new technologies in debt collection may become a challenge, with "regulatory compliance a guessing game, rather than a predictable endeavor."[50] Concerned commentators even worried new technologies had the potential to create a "race to the bottom" by "incentivizing aggressive

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[44] *Id.* at 1610.
[45] *Id.*
[46] *Id.*; *Collecting Consumer Debts: The Challenges of Change*, FED. TRADE COMM'N, 36 (Feb. 2009), https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.
[47] Hector, *supra* note 2, at 1610-11; Transcript of Challenges of Change Workshop at 163 (Oct. 10, 2007) (remarks of Lauren Saunders, Managing Attorney, National Consumer Law Center), available at http://www.ftc.gov/bcp/workshops/debtcollection/FTC_DebtCollect_ 071010.pdf.
[48] Hector, *supra* note 2, at 1611.
[49] *Id.*
[50] *Id.*

collectors to take advantage of this legal gray area in ways that jeopardize the welfare of consumers – exactly what Congress sought to avoid."[51] The question then, is whether those concerns materialized in the years following the creation of the CFPB, or if courts have been able to navigate the landscape of new technology through litigation, giving more certainty to debt collectors while protecting consumers.

e. Common Complaints in 2022 FDCPA Annual Report Prepared by CFPB

The CFPB receives complaints submitted by consumers categorized by the problem experienced.[52] The CFPB began accepting debt collection complaints in 2013.[53] Most complaints (48%) came from consumers who claimed the debt was not their debt; these complaints covered a variety of topics, "such as being called about debts they do not recognize, attempts to collect a debt that belongs to someone else, and being in collections for services or products they did not receive."[54] 36% of those complaints were reported as having resulted from identity theft.[55] 14% claimed that their debt was already paid and 3% claimed it was discharged in bankruptcy and no longer owed.[56]

Complaints regarding written notifications about debt were the second-most prevalent issue selected by consumers.[57] The FDCPA "requires collectors within five days after the initial communication with a consumer, to provide the consumer with a written notice informing them . . . of their right to dispute, unless this information is contained in the initial communication or

[51] *Id.*
[52] *Fair Debt Collection Practices Act,* CONSUMER FIN. PROT. BUREAU (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_04-2022.pdf.
[53] *Id.* at 15.
[54] *Id.*
[55] *Id.* at 15-16.
[56] *Id.* at 16.
[57] *Id.*

the consumer has paid the debt."[58] In response, 74% of consumers who complained of this type of communication reported not having received enough information to verify the debt.[59] This category of complaints often included consumers who asked for additional information and supporting documentation.[60] Consumers who complained about medical debt collections reported both receiving too little information to identify their medical provider as well as complaints that collectors had access to personal medical information, such as medical documents referencing the types of procedures received or medications prescribed.[61] 25% of consumers complained that they did not receive a notice of their right to dispute and 3% reported the notification did not disclose that it was an attempt to collect a debt.[62]

The third-most complained about issue in 2021 were "complaints about taking or threatening to take a negative or legal action."[63] The majority of these complaints reported "threats or suggestions that the consumers' credit histories would be damaged (52%), threats to sue on a debt that is old (17%) or being sued without proper notification of the lawsuit (11%)."[64] 9% related to seizures or attempted seizures of property, 5% threats to arrest or jail consumers if they did not pay, another 5% collection or attempts to collect exempt funds (child support or unemployment benefits), 2% being sued in a different state from where the debtor lives or where they signed the contract, and less than 1% complained of threats of deportation or turning the consumer over to immigration.[65]

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[58] *Fair Debt Collection Practices Act,* CONSUMER FIN. PROT. BUREAU (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_04-2022.pdf.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Fair Debt Collection Practices Act,* CONSUMER FIN. PROT. BUREAU (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_04-2022.pdf.
[64] *Id.*
[65] *Id.*

The fourth-most common complaint regarded false statements or misrepresentations, most commonly attempts to collect the wrong amount from the consumer (81%).[66] 13% of these complaints reported companies that impersonated an attorney or law enforcement or government official.[67] 5% told the consumer they had committed a crime by not paying debt and 2% indicated that the consumer should not respond to a lawsuit.[68]

Fifth-most common were complaints about communication tactics.[69] The majority of communication tactic complaints were about "frequent or repeated calls" (51%).[70] 30% complained of continued contact after requests to stop contact while 15% complained that companies used "obscene, profane, or abusive language, and 4% reported collectors calling outside of the FDCPA's assumed convenient calling hours from 8:00 a.m. to 9:00 p.m. at the consumer's location."[71]

The least complained about debt collection issue was complaints about threatening to contact a third party or sharing information improperly.[72] 54% of these complaints reported that the debt collector had talked to a third party about the debt, 19% reported that an employer was contacted, 25% reported the consumer had been contacted after being asked not to do so, and 2% reported contacting the consumer directly, rather than contacting the consumer's attorney.[73]

III. CASE LAW APPLYING FDCPA TO NEW TECHNOLOGIES SINCE THE CFPB

a. Social Media Communications under the FDCPA

[66] *Id.* at 17.
[67] *Id.*
[68] *Fair Debt Collection Practices Act,* CONSUMER FIN. PROT. BUREAU (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_04-2022.pdf.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*

In 2010 Melanie Beacham was the victim of deceptive debt collection practices over multiple forms of communication, including her Facebook account.[74] On July 20, 2010 a debt collector who identified himself as "Jeff Happenstance" sent an unsolicited Facebook message to Beacham's friend, Devilin Wilson.[75] The message asked Wilson to "please have Melanie D. Beacham call" a phone number provided.[76] Wilson responded that he would but that Beacham had her own Facebook profile and it would be easier for Happenstance to reach her directly.[77] Happenstance thanked Wilson and did not message him again.[78]

One month later, Beacham received a Facebook message from someone who identified himself as "Loxley Duffus," stating that there was an "urgent" matter and providing Beacham with a phone number to call, asking her to contact "Supervisor Duffus at MarkOne" by 6 p.m. that day.[79]

Both messages were sent by a debt collector in an attempt to collect a $362 car loan.[80] Instead of inducing Beacham to make a payment, the "unwanted online contacts" led Beacham to file a civil suit, alleging violations of state debt collection laws and intentional infliction of emotional distress.[81] Beacham's action marked the first time a debt collector had been sued based on unwanted Facebook messages.[82]

b. Voicemail Communications under the FDCPA

[74] Hector, *supra* note 2, at 1611.
[75] *Id.* at 1602.
[76] *Id.*
[77] *Id.* at 1603.
[78] *Id.*
[79] *Id.*
[80] Hector, *supra* note 2, at 1603.
[81] *Id.*
[82] *Id.*

In *Nicaisse v. Stephens and Michaels Associates, Inc.*, plaintiff debtor, Nicaisse, lived in New York with her adult daughter, Jessica, and her other children.[83] Plaintiff maintained a landline phone number that was used by her daughter, who would routinely provide the number to acquaintances and received calls on it every day.[84] The phone number was connected to an external answering machine, which all members of the household had permission to access.[85] On September 9, 2013, plaintiff's daughter listened to a message left on the answering machine by defendant Stephens and Michaels.[86] The message stated the following:

> This is a private message for Inez Nicaisse. Inez Nicaisse, do not listen to this message in the presence of others. By continuing to listen to this message, you acknowledge that this message is not being heard by others. This is a communication from a debt collector attempting to collect a debt. Any information obtained will be used for that purpose. Please contact Stephens and Michaels regarding the personal matter at (866) 679-9649.[87]

Plaintiff's daughter heard the message being recorded and was unable to stop the recording.[88]

The court acknowledged the purpose of the FDCPA to be to "eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses,"[89] noting that "one of the abusive practices the FDCPA seeks to eliminate is the disclosure of 'a consumer's personal affairs to friends, neighbors, or an employer.'"[90] The court explained that the FDCPA is a strict liability statute; the consumer need not prove the debt collector acted intentionally to be awarded damages.[91]

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[83] Nicaisse v. Stephens & Michaels Assocs., Inc., 2015 WL 9462106, at *1 (E.D.N.Y. 2015).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] 15 U.S.C § 1692(e).
[90] Nicaisse v. Stephens & Michaels Assocs., Inc., 2015 WL 9462106, at *3 (E.D.N.Y. 2015).
[91] *Id.*

However, there is an exception where "the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[92] FDCPA Section 1692(c) indicates that unless a debt collector has the debtor's consent or permission of the court, "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."[93] Communications between the debt collector and third parties are extremely limited and the content of those communications is "strictly defined;" the debt collector may not disclose that the debtor owes any debt.[94] Voicemail and answering machine messages constitute "communications" under the FDCPA.[95] The *Nicaisse* court took the initiative to distinguish three voicemail debt collection cases with similar facts but inconsistent results.[96]

In *Marisco v. NCO Financial Systems*, the defendant repeatedly left a pre-recorded message on plaintiff's answering machine:

> This is an important message from NCO Financial Systems, Inc. The law requires that we notify that this is a debt collection company. This is an attempt to collect a debt and any information obtained will be used for that purpose. Please call Mack Harris today at . . .[97]

The message was overheard by the plaintiff's mother-in-law at least once.[98] The court denied the defendant's motion to dismiss, rejecting the argument that "the FDCPA only prohibits the

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Nicaisse v. Stephens & Michaels Assocs., Inc., 2015 WL 9462106, at *3 (E.D.N.Y. 2015).
[97] *Id.* at *4.
[98] *Id.*

deliberate disclosure of information regarding a consumer's debt and does not prohibit inadvertent disclosures."[99] The defendant further argued that, "penalizing debt collectors for inadvertent disclosures to third-parties provides them with the untenable choice of complying with the FDCPA's requirement that debt collectors identify themselves in messages to debtors or complying with Section 1692c(b)'s privacy requirement."[100] The court responded to this argument by adopting the reasoning set forth in *Leyse v. Corp. Collection Servs., Inc.* that "the Court has no authority to carve an exception out of the statute just so the defendant may use the technology they have deemed most efficient . . . The defendant has been cornered between a rock and a hard place . . . because the method they have selected to collect debts has put them there."[101] As a strict liability statute, the FDCPA does not require knowledge or intent to create a cause of action for its violation.[102]

The *Nicaisse* court then considered the *Friedman v. Sharinn & Lipshie, P.C.* decision.[103] The *Friedman* court held that the plaintiff stated a valid claim for a violation of the FDCPA when the defendant left multiple voicemails on plaintiff's answering machine containing personal and confidential information and stated that the message was "an attempt to collect a debt."[104] As in the present case and *Marisco*, the messages were overheard by third parties, including plaintiff's daughter.[105] The *Friedman* court noted that district courts in other circuits had held that warning messages that "instruct third parties to stop listening before the content of the message is revealed" do not relinquish liability under the FDCPA.[106]

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] Nicaisse v. Stephens & Michaels Assocs., Inc., 2015 WL 9462106, at *4 (E.D.N.Y. 2015).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

The *Nicaisse* court then contrasted the holdings in *Marisco* and *Friedman* with the holding in *Zweigenhaft v. Receivables Performance Mgmt., LLC*.[107] In *Zweigenhaft*, the defendant left the plaintiff a voicemail stating, "[w]e have an important message from RPM. This is a call from a debt collector. Please call . . ."[108] The plaintiff's son heard the message and returned the call; when the plaintiff's son informed one of defendant's representatives that he was not the plaintiff, the representative said that she would take his number "off the list" and concluded the call.[109] The *Zweigenhaft* court held that the defendant "did not violate the FDCPA's prohibition on third-party communications" and granted summary judgment to the defendant.[110] The court there distinguished the case as, "somewhat different," since the third-party had received only two pieces of information: (1) that a debt collector had called and (2) that the call was for his father.[111] The court concluded that "finding the defendant liable under the FDCPA would 'place an undue restriction on an ethical debt collector in light of our society's common use of communication technology.'"[112] The defendant had left plaintiff only one message that provided the minimum information required to comply with the FDCPA and protect his privacy, and during the follow-up call, the defendant's representative only mentioned the plaintiff's name after verifying that someone was calling from his number.[113] Additionally, the court parenthetically asserted that the FDCPA was "out of touch with modern communication technology" and held that it would "defy both common sense and the FDCPA's purpose to categorize defendant's actions as a statutory violation."[114]

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[107] *Id.*
[108] Nicaisse v. Stephens & Michaels Assocs., Inc., 2015 WL 9462106, at *4 (E.D.N.Y. 2015).
[109] *Id.*
[110] *Id.* at *5.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Nicaisse v. Stephens & Michaels Assocs., Inc., 2015 WL 9462106, at *5 (E.D.N.Y. 2015).

The *Nicaisse* court interpreted the inconsistent opinions as "drawing a distinction between debt collector phone messages that contain confidential information and/or note that the call is an attempt to collect a debt, and debt collector phone messages that 'conveyed no more information than a hang-up call' would via caller id information."[115] Although it is a slight distinction, the voicemail messages in *Marisco* and *Friedman* stated that "this is an attempt to collect a debt," the message in *Zweigenhaft* "revealed nothing more than that the defendant was a debt collector that was trying to reach the plaintiff."[116]

What seems to have caused confusion for debt collectors and courts alike is Section 1692e(11), requiring debt collectors to state in their initial oral or written communications with consumers that they are "attempting to collect a debt and that any information obtained will be used for that purpose," has been repealed by implication.[117] This seems to be the most workable solution. However, another court cited by *Nicaisse*, in *Leyse v. Corp. Collection Servs., Inc.*, No. 03-CV-8491, 2006 WL 2708451 (S.D.N.Y. Sept. 18, 2006), declined the solution of no longer considering messages that do not mention the consumer's debt to be "communication" under the statute because, "if it were to hold that the subject message was not an FDCPA 'communication' regarding a debt, it would create an exception that would 'swallow the rule' and provide debt collectors with carte blanche to 'abuse and harass consumers with phone calls and other forms of correspondence so long as there is no express mention of the consumers' debts.'"[118] The *Nicaisse* court was not forced to consider that question, but its analysis follows the *Zweigenhaft* reasoning,

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[115] *Id.*

[116] *Id.*

[117] Townsend v. Quantum3 Grp., LLC, 535 B.R. 415 (M.D. Fla. 2015) (the court has consolidating this requirement with the §1692e(10) requirement prohibiting "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer")(this section was also repealed by implication by *Townsend*).

[118] Nicaisse v. Stephens & Michaels Assocs., Inc., 2015 WL 9462106, at *6 (E.D.N.Y. 2015).

that a message with minimal information by an ethical debt collector, that does not state that it is an attempt to collect a debt, will likely not constitute a violation of the FDCPA.[119] The message at issue in *Nicaisse*, however, did state that it was an attempt to collect a debt; thus, the court found that the defendant had violated Section 1692 because it "expressly indicate[d] that Defendant, a debt collector, [was] seeking to collect a debt from Plaintiff."[120]

c. Misrepresentations under the FDCPA

The FDCPA states "a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."[121] *Carter v. Capital Link Management LLC* presented the question of whether a debt collector violates the FDCPA when he communicates via text message his objective to collect a debt with a debtor whom, unbeknownst to the debt collector, is in bankruptcy.[122]

Capital Link sent the debtor, Ms. Carter, a text message on October 29, 2020, stating in pertinent part, "This communication is from a debt collector, this is an attempt to collect a debt."[123] Ms. Carter was both represented by an attorney and in bankruptcy proceedings. The court stated that a debt collector may not communicate with the consumer about the collection of any debt if the debt collector knows the consumer is represented by an attorney regarding such debt; if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector may not communicate with the consumer with respect to such debt.[124] Capital

[119] *Id.* at *7.
[120] *Id.*
[121] 15 U.S.C. § 1692e.
[122] Carter v. Cap. Link Mgmt. LLC, 614 F. Supp. 3d 1038, 1045 (N.D. Ala. 2022).
[123] *Id.* at 1046.
[124] *Id.*

Link argued that the text message made was not a demand for payment, included no threat of negative consequences, made no misstatement as to the amount of the debt, and made no representation as to its legal status.[125] The court rejected this argument, "[w]hile Capital Link is legally obligated to inform Ms. Carter that it is a debt collector and that it is attempting to collect a debt, those words–no matter why they were included in the message–convert Capital Link's communication into an attempt to collect a debt."[126] The court added that, because Carter was in bankruptcy, the debt collector's attempt to collect the debt *was* a false representation because it stated that money was due.[127]

However, there is a narrow exception to the FDCPA's general strict liability rule, known as the "bona fide error" defense.[128] Under the FDCPA, "[a] debt collector may not be held liable . . . if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[129] The court determined that Capital Link's error was objectively reasonable: Capital Link knew that the assigning company, Mountain Run Solutions, performed background scrubs on the accounts it assigned, before assigning them, in order to detect problem accounts, specifically including a search for existing bankruptcies; "[a]ccordingly, by virtue of Mountain Run Solutions having assigned Mr. Carter's account to Capital Link, it was objectively reasonable . . . for Capital Link to believe that it could contact Ms. Carter without violating the FDCPA."[130]

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Carter v. Cap. Link Mgmt. LLC, 614 F. Supp. 3d 1038, 1046 (N.D. Ala. 2022).
[129] 15 U.S.C. § 1692k(c); *see also* Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350, 1352-53 (11th Cir. 2009) ("A debt collector asserting the bona fide error defense must show by a preponderance of the evidence that its violation of the Act: (1) was not intentional; (2) was a bona fide error; and (3) occurred despite the maintenance of procedures reasonably adapted to avoid any such error.").
[130] Carter v. Cap. Link Mgmt. LLC, 614 F. Supp. 3d 1038, 1047 (N.D. Ala. 2022).

Next the court evaluated the procedures component of the bona fide error defense.[131] The first step is whether the debt collector had procedures to avoid errors; the second step is whether those procedures were reasonably adapted to avoid the specific error at issue.[132] Capital Link met the low threshold of the first prong: Capital Link maintained its procedure of relying on Mountain Run Solutions to perform background scrubs of accounts it assigned.[133] However, the court determined that this procedure, with no internal controls, was not "reasonably adapted to avoid the specific error at issue."[134] Mountain Run Solutions was not even contractually obligated to perform the background scrubs; the court noted that this appeared to be an informal agreement, clearly a procedure, but not a procedure reasonably adapted to avoid error.[135] The court held that Capital Link was not entitled to the bona fide error defense, and, thus, the text message violated the FDCPA.[136] This holding makes sense; the court points to the public policy issue it seeks to avoid:

> Debt collectors who presently maintain *internal* procedures to avoid FDCPA errors would be incentivized to scrap these measures altogether, since full immunity could be guaranteed by placing the onus of accuracy on creditors. This would precipitate a race to the bottom among debt collectors, rendering the FDCPA a dead letter.[137]

As illustrated in *Carter*, the FDCPA does not forbid debt collectors from using text message communications to debtors, but debt collection companies that are looking to save money by relying on creditors to do their due diligence for them will likely not be protected by the bona fide error defense.[138] However, a debt collector communicating with a debtor by mail rather than text would likely violate the FDCPA by making the same error made by Capital Link,

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[131] *Id.*
[132] *Id.*
[133] *Id.* at 1047-48.
[134] *Id.* at 1048.
[135] *Id.*
[136] Carter v. Cap. Link Mgmt. LLC, 614 F. Supp. 3d 1038, 1049 (N.D. Ala. 2022).
[137] *Id.*
[138] *Id.*

thus the use of text message communications to debtors is at least as viable an option for debt collectors as traditional mailed communications.

Debt collectors' sending of unwanted, repeated phone calls and text messages may open them up to liability independent of the FDCPA.[139] From *Carter*, it is clear that a misleading text message, even when the debt collector made a bona fide error, is a violation of the FDCPA when they do not have procedures reasonably adapted to avoid the specific error.[140] From *Nicaisse*, it is clear that voicemails unintentionally notifying third parties of the debtor's status violate the FDCPA.[141] But, even text messages and voicemails that do not violate the FDCPA due to their content may provide a common law claim for the tort of intrusion upon seclusion.[142] "Courts have recognized liability for irritating intrusions–such as when telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff. The harm posed by unwanted text messages is analogous to that type of intrusive invasion of privacy."[143]

However, the harm of receiving unwanted voicemails and text messages does, in fact, relate to the substantive rights protected by the FDCPA.[144] The FDCPA prohibits debt collectors from "communicating with a consumer in connection with the collection of any debt at any unusual time or place" and "engaging in conduct the natural consequence of which is to harass, oppress or abuse any person in connection with the collection of a debt."[145] These are important substantive protections that fulfill the statute's purpose to eliminate abusive debt collection practices by debt collectors.[146] Thus Congress's views illustrate that a debtor's right to be free

[139] Gatchalian v. Atl. Recovery Sols., LLC, 2022 WL 3754523, at *2 (N.D. Cal.2022).
[140] Carter v. Cap. Link Mgmt. LLC, 614 F. Supp. 3d 1038, 1049 (N.D. Ala. 2022).
[141] Nicaisse v. Stephens & Michaels Assocs., Inc., 2015 WL 9462106, at *4 (E.D.N.Y. 2015).
[142] Gatchalian v. Atl. Recovery Sols., LLC, 2022 WL 3754523, at *2 (N.D. Cal. 2022).
[143] *Id. citing* Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017).
[144] *Id.*
[145] *Id.*
[146] *Id.*

from unwanted and misleading messages is a substantive right under the FDCPA, and violation of that right is a concrete justiciable harm.[147] The Plaintiff in *Gatchalian* had received a total of 15 text messages and voicemails between June and October, 2021.[148] The court did not specify what number of text messages or voicemails would cause a debt collector to cross this threshold violating the FDCPA, so this is likely a fact based analysis giving the court more discretion in determining whether a violation occurred.[149] This level of discretion is likely not favorable to debt collectors defending FDCPA claims, presenting a major downside to their continued use of text message and voicemail communications with debtors.

d. Debtors contacted via social media

As of the time of this publication, there have been no cases like Ms. Beacham's, discussed in Part I, since the creation of the CFPB and its issuance of rules and guidance concerning compliance and legal risks related to the use social media in the financial industry.

IV. FURTHER NECESSARY CHANGES

Hector's 2011 comment proposed three areas of reform that may be appropriate.[150] "First, the CFPB should clarify the term 'communication' to encompass all contacts with putative debtors that relate to the collection of a debt. Second, with respect to mobile and internet technologies, the CFPB should impose additional requirements to ensure that consumers receive adequate protections. Finally, the CFPB should give further consideration to whether it should impose an express written consent requirement on the use of technologies that may cause consumers financial harm."[151]

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[147] *Id.*
[148] Gatchalian v. Atl. Recovery Sols., LLC, 2022 WL 3754523, at *1 (N.D. Cal., 2022).
[149] *Id.*
[150] Hector, *supra* note 2, at 1625.
[151] *Id.* at 625-26.

The CFPB guidelines on social media express that use of social media in the pursuit of collecting a debt does constitute "communication" for purposes of the FDCPA.[152] The CFPB has not imposed additional requirements to ensure consumers receive adequate protections but the courts have been able to apply the FDCPA with the clarifying rules provided by the CFPB in cases involving new technologies. It is not clear that additional protections are needed when the protections provided by the FDCPA can effectively be applied to the new technologies as written with minimal supplemental guidance from the CFPB. The third point made by Hector, that the CFPB should consider an express written consent requirement on the use of new technologies in debt collection, may have seemed necessary when social media and other new forms of communication were brand new. We are now in a world that has been immersed in technologies like voicemail and texting for decades and social media for almost 20 years. Social media is considered a viable means of communication for all types of businesses, so it seems irrational to prohibit one business from using it when it is, in effect, just a more modern form of the communication they have engaged in for half a century.

From the results, it appears the CFPB's issuance of rules and guidance surrounding the FDCPA has achieved the FDCPA's original goal of protecting debtors and ethical debt collectors from the harms of debt collectors who engage in overly aggressive and unethical debt collection practices. Additionally, if the FDCPA can be easily applied to new technologies with minimal clarifying guidance, there is no reason to rewrite the statute.

V. CONCLUSION

New technologies and the advent of social media posed a challenge for the antique FDCPA. At first, it was unclear how courts or the many different regulatory agencies before the

[152] *Social Media: Consumer Compliance Risk Management Guidance,* FED. FIN. INST. EXAMINATION COUNCIL (Jan. 29, 2014), https://files.consumerfinance.gov/f/201309_cfpb_social_media_guidance.pdf.

CFPB would handle the risks presented by such a novel form of communication and social networking. With the soaring consumer debt and the 2008 financial crisis, Congress was finally forced to address the problem. Was the FDCPA outdated and unworkable in the world of social media and new technologies? By creating the CFPB and giving it the power to create rules and guidance related to the enforcement of the FDCPA, Congress left the question unanswered. Instead of amending the FDCPA, the CFPB created rules and guidance, interpreting the FDCPA so that it could be applied to the troublesome new technologies.[153]

This guidance was applied by the courts various cases, which illustrate the renewed workability of the statute. Scrapping the FDCPA and replacing it with a new statute would have been exponentially more difficult for debtors and debt collectors to navigate, opening both of those classes up to new unforeseen harms. By keeping the statute intact and only providing guidance on how to apply it to the new technologies, the CFPB has made it much simpler for debt collectors to maintain compliance while providing remedies to debtors who have been harmed by the small percentage of unethical debt collectors.

[153] *Id.*