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THE THREE Cs VERSUS THE DINOSAUR: UPDATING THE TECHNOLOGICALLY ARCHAIC FDCPA TO PROVIDE CONSUMERS, COLLECTORS, AND COURTS CLARITY

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I. INTRODUCTION

"Creditors have better memory than debtors," Benjamin Franklin once famously quipped.[1] Perhaps, however, his words could be updated to suit today's reality rather than his own simple time: "Creditors will go to great lengths for a return of *their* money, soliciting the help of third party debt collectors who often resort to unsavory collection tactics, having no incentive to maintain good standing with debtor-consumers."[2] Or even:

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* J.D./LL.M Employee Benefits Law Candidate, May 2011, The John Marshall Law School. The author wishes to thank her family and friends for their love and support, Justin C. Hagan and Reilly C. Travis for their patience and companionship, and the John Marshall Law Review for assisting the author in readying this Comment for publication. The author also wishes to thank her former and forever beloved boss Astor Blake who serves as the author's inspiration for this Comment. Finally, the author wishes to dedicate this Comment to her Grandpa Buddy whose love for learning and writing about God's law inspired the author's passion for man's law.

1. *See generally* BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (1736), *available at* http://www.vlib.us/amdocs/texts/prichard36.html (providing a list of Franklin's famous maxims while using the pseudonym Richard Saunders). Franklin's Almanack contained the types of material commonly found in an almanac—calendars, weather forecasts, common household tips, and puzzles—but his version also included maxims, such as the one cited, that counseled readers on thrift and courtesy with a bit of healthy cynicism. *Id.*; *see also Franklin Publishes "Poor Richard" Almanac on Frugality, Cynicism*, THE OAKLAND PRESS (July 04, 2010), http://www.theoaklandpress.com/articles/2010/07/04/opinion/doc4c2d3bf18c7b9928962008.txt (noting that these aphorisms were a reflection of the norms and social mores of Franklin's time).

2. The Fair Debt Collection Practices Act (FDCPA) defines a creditor as a "person who offers or extends credit creating a debt or to whom a debt is owed, but . . . does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4) (2006). *See also* S. REP. No. 95-382, at 2, (1977), *reprinted in* U.S.C.C.A.N. 1695, 1696 (presenting testimony that because independent collectors often work on a 50-percent commission and are likely to have no future contact with the consumer, they have more incentive to resort to unsavory tactics and are unconcerned with

"Creditors, upon realization they are not going to get the desired return of *their* money will, without reservation, sell charged-off debts to debt purchasers for pennies on the dollar, which ultimately results in debtor-consumers receiving communications regarding their debts from parties to which they never agreed to do business."[3] These lengthy creditor proverbs might demonstrate why Mr. Franklin was a fan of brevity in his writings, but more importantly they showcase the current state of consumer-creditor relationships in a society that has, for many years, lived through the aid of credit card debt.[4]

Even though Congress created the Fair Debt Collections Practices Act ("FDCPA") in response to such harassing tactics, FDCPA law today is a maze of definitions and provisions that are both vague and outdated.[5] With the wave of financial reform and the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[6] specifically the provisions that

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the consumer's opinion of them). For a brief overview of Congressional findings on the effects of these abusive tactics on consumers, including creating issues of marital instability as well as contributing to job loss, see 15 U.S.C. § 1692(a) (2006).

3. Debt buyers are those, often a company, collection law firm, and contingency collection agency, who purchase delinquent or charged-off debts from a creditor for a fraction of the value of the debt. THE FEDERAL TRADE COMMISSION (F.T.C), COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 4 (2009) [hereinafter "F.T.C., COLLECTING CONSUMER DEBTS"], *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf. Commonly, purchased debt is purchased in portfolios for "pennies on the dollar" from either the original creditor or from the debt purchaser who most recently owned right to collect on the debt. *See* Sam Glover, *Poverty Law: Has the Flood of Debt Collection Lawsuits Swept away Minnesotan's Due Process Rights?*, 35 WM. MITCHELL L. REV. 1115, 1118 (2009) (noting that these are debts purchased for such a low price because the portfolios often lack the proper validation documentation to adequately serve as admissible evidence in a lawsuit).

4. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 12-13 & n.72 (2009) (providing updated data from January 2009 for consumer delinquency and noting that there has been a 40-percent increase in defaults from December 2007 to 2008 due to the economic downturn). According to the report, which gathered statistics from 2007, "[r]evolving consumer debt (which includes mostly credit card debt) increased . . . 5%" over a decade and that as of June 2007, American consumers held, on average, $3,000 in credit card debt. *Id.* at 11-12.

5. *See* Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p (2006), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre27.pdf (providing comprehensive list of federally mandated standards for debt collection practices); *see, e.g.*, *FTC Urges Reform of Debt Collection Laws*, THE DALY FIN. GROUP (March 3, 2009), http://www.dalyfinancial.com/news.html (explaining the need for FDCPA reform and referencing statistics that the FTC received nearly 80,000 complaints in 2008 against third-party debt collectors).

6. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); The Consumer Financial Protection Act of

authorize the creation of the Consumer Financial Protection Bureau ("CFPB"), comes an opportunity for FDCPA clarity.[7] Although many provisions of the FDCPA are in need of clarification, this Comment will focus on the problems that advancements in technology have caused with the FDCPA's antiquated language.[8] The CFPB will have the unique opportunity to "fix" substantive provisions of the technologically out-of-touch FDCPA and can do so in a manner that makes it less confusing for the three Cs—the consumers, the collectors, and the courts.[9]

In Part II of this Comment, both the CFPB and the FDCPA will be explained, from their creation to the problems currently facing the outdated consumer protection statute. Part III will address the problem of what constitutes a communication in the FDCPA and will examine the conflict as it has arisen in the courts. Finally, Part IV will propose ways in which the CFPB can combat the problems associated with the outdated FDCPA and how such enforcements can clarify debt collection law for the three Cs.

II. BACKGROUND

A. *Dodd-Frank Wall Street Reform and Consumer Protection Act*

A fallen financial market that has been compared to the likes of that which spurred the financial regulations of the Great Depression[10] serves as the backdrop to Dodd-Frank and its intended financial systems overhaul.[11] Dodd-Frank serves to overhaul the consumer financial institutions throughout the

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2010, Pub. L. No. 111-203, Tit. X, § 1001-1100 124 Stat. 1376, 580-731 (2010).

7. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 69-70 (requesting rule-making authority in order to effectively respond to FDCPA concerns).

8. The term consumer refers to an "individual or an agent, trustee, or representative acting on behalf of an individual." 12 U.S.C.S. § 5481(1) (2010); *see* 15 U.S.C. § 1692a(3) (providing the FDCPA definition of a consumer).

9. *See* discussion *infra* Part III.

10. *See generally* Robert Hockett, *The Fixer-Upper for Finance*, 87 WASH. U. L. REV. 1213 (2010) (providing scholarly analysis as to factors leading to the late 2000s economic recession). Hockett focuses mainly on the mortgage crisis that helped lead to current financial troubles, noting that the economic failure can be attributed to a "recent departure from the originally bipartisan package of mutually reinforcing mortgage and finance-regulatory innovations." *Id.* at 1213.

11. *See* Daniel J. Morrissey, *Regulation and the Recession: Causes, Effects, and Solutions for Financial Crisis: After the Meltdown*, 45 TULSA L. REV. 393, 397-98 (2010) (pointing to the scandals of corporate America and the laws that Congress tried to pass to combat the failures that led to "economic calamity"). *See also* Damian Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, WALL ST. J., (Oct. 9, 2007), http://online.wsj.com/article/SB100014240527487046826045753690300618399 58.html (calling the Dodd-Frank Bill the biggest expansion of government power over the banking markets since the Great Depression).

country.[12] This all-encompassing law also produces an increase in consumer financial protection through Article X: the Consumer Financial Protection Act.[13] This Act authorizes the creation of the CFPB and provides it with the power to regulate, interpret and create law regarding consumer financial protection.[14] This authority includes interpreting and clarifying the FDCPA.[15] The need for consumer financial reform motivated the drafters of Dodd-Frank to include Article X into the Act.[16] This section of Dodd-Frank serves to "implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer

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12. *See supra* note 10, 11 and accompanying text (providing greater depth to the cause of the most recent economic recession as well as a look into the state of the economy after the downturn).

13. *See generally* 12 U.S.C.A. § 5481 (LexisNexis 2010) (enforcing both the creation of the CFPB as well as a time table for the gradual transfer of authority from federal agencies previously holding enforcement power over consumer financial protection areas to the CFPB). For a look at other areas of consumer financial protection not covered in this comment, see Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Tit. XIV, 124 Stat. 1376 (2010).

14. *See Venable CFPB Watch: Introducing the New Sheriff in Town*, VENABLE LLP (July 2010), http://www.venable.com/files/Publication/2a3969ea-eff7-4874-a4db-049824b607a0/Preview/PublicationAttachment/922a420d-0f85-45bf-ac62-4b88f079c38b/Venable_CFPB_Watch--July-2010.pdf (providing an initial overview of the CFPB—how it will be structured, what authority it will have, and who is implicated in its coverage). The Consumer Financial Protection Act also includes an implementation timeline and guidelines. *Id.* July 21, 2011 served as the transfer date, when agencies in control of consumer financial systems transferred their authority to the CFPB, in the Act. Bureau of Consumer Financial Protection: Designated Transfer Date Notice 75 Fed. Reg. 57, 252 (Sep. 20, 2010), *available at* http://www.gpo.gov/fdsys/pkg/FR-2010-09-20/pdf/2010-23487.pdf. The CFPB website is now up and running, so for more information pertaining to the Bureau's role and goals pertaining to consumer financial protection, see CFPB, http://www.consumerfinance.gov/ (last visited Aug. 1, 2011).

15. The Consumer Financial Protection Act of 2010, Tit. X, § 1001-1100, 124 Stat. at 580-731.

16. *See* Adam J. Levitin, *The Consumer Financial Protection Agency*, AM. ENTERPRISE INST. FOR PUB. POLICY RESEARCH (2009), http://www.aei.org/docLib/Levitin%20-%20Consumer%20Financial%20Protection%20Agency.pdf (arguing that due to consumer financial protection spread among ten agencies with differing levels of authority demonstrates one of the reasons that consumer financial protection is in need of reform – for uniformity). *Cf.* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at i (calling for FDCPA reform due to its inability to address consumer protection issues). The FTC expressing a need for power to reform the FDCPA demonstrates that these agencies with authority over consumer financial areas of the law are in need of reform themselves. *Id.* at viii-ix. As a result, merging these different areas of consumer financial protection law under the helm of one agency would allow for the unification necessary to facilitate consumer financial reform. Levitin at *1.

financial products and services are fair, transparent, and competitive."[17]

B. Consumer Financial Protection Bureau – the CFPB

The general structure of the CFPB is explained in Dodd-Frank.[18] The CFPB is funded by the Federal Reserve, but not controlled by it.[19] Additionally, in July 2011, the CFPB took over regulatory authority for all consumer financial protection issues currently spanned across the ten agencies and twelve different consumer protection statutes.[20] For example, the CFPB plans to take over the FTC's regulation of the FDCPA.[21] While the FTC has had no rule-making authority in overseeing the FDCPA, the CFPB will "have authority to issue rules, and issue orders and guidance necessary or appropriate to carry out the purposes of Federal consumer financial laws."[22]

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17. *See* Tomino Narita, *An Overview of the Consumer Financial Protection Act of 2010 for Debt Collection*, FDCPA DEFENSE BLOG (July 23, 2010), http://www.fdcpadefense.blogspot.com/2010/07/overview-of-consumer-financi al.html (explaining specifically how this provision of Dodd-Frank and the resulting CFPB will affect the area of debt collection).

18. Pub. L. No. 111-203, Tit. X, § 1011-18, 124 Stat. 1376 (2010). Various law firms have provided overviews of the Consumer Financial Protection Act. For a basic look at the Act's structure and capabilities, see *Financial Regulatory Reforms Update: Title X – Bureau of Consumer Financial Protection*, SIDLEY AUSTIN LLP (June 30, 2010), http://www.sidley.com/files/ News/9daacd6d-9deb-446a-b4da-57b96610f49a/Presentation/NewsAttachment /f18ba912-4786-4636-b2c6-72cba80d777e/FRR_063010_Title10.pdf.; *See also supra* note 14 (providing a vision of the CFPB from another authority).

19. SIDLEY AUSTIN LLP, *supra* note 18, at 1.

20. *Member Alert – Consumer Financial Protection Agency (CFPA)*, DBA INTERNATIONAL, http://www.dbainternational.org/eblast/cfpa.asp (last visited Aug. 1, 2011). Levitin, *supra* note 16, at 1 (proposing that CFPB will gain all regulatory and rulemaking power that is spread across the ten agencies currently overseeing consumer financial protection). Although he later points to concerns many fear would be brought by the creation of the CFPA - increase in costs of financial products if overregulation occurs and as well as a possible burden on new innovation in the financial industry – Levitin concludes that these issues are separate from the one at issue in consolidating control of the consumer protection statutes under one agency roof. *Id.* at 15.

21. *See* Tomino Narita, *An Overview of the Consumer Financial Protection Act of 2010 for Debt Collection*, FDCPA DEFENSE BLOG (July 23, 2010), http://www.fdcpadefense.blogspot.com/2010/07/overview-of-consumer-financial.html (explaining how this provision of Dodd-Frank and the resulting CFPB will affect the area of debt collection).

22. *Title X: Bureau of Consumer Financial Protection*, AMERICAN BANKERS ASSOCIATION, http://www.aba.com/RegReform/RR10_3.htm (last visited Aug. 1, 2011). Interestingly enough, the FTC asked for this same kind of rule-making authority in past reports. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at vi-ix, (noting that thirty years after its codification, the FDCPA is outdated; as a result, the FTC urged Congress to give them the authority to create rules to address the current FDCPA problems and to combat new issues as they arise). *Cf.* F.T.C., FEDERAL TRADE COMMISSION

C. Fair Debt Collection Protection Act – The FDCPA

The FDCPA is a powerful federal statute that regulates the debt collection industry.[23] In 1978, the FDCPA was created in order to protect consumers from harassment and abuse directed at them by debt collectors.[24] The FDCPA drafters intended to increase consumer protection while maintaining the policy that the collection of valid debts was economically important to society.[25]

Essentially, the statute aimed to provide consumers and the debt collection industry with clear-cut regulations defining consumer rights and outlining permissible collection practices.[26] In an attempt to provide clarification regarding the FDCPA's scope, the drafters included a list of definitions essential to both those inside and outside the debt collection industry, such as "consumer," "creditor," "debt," and "debt collector."[27]

ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT 19 (2011), *available at* http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf (acknowledging the creation of the CFPB and its rule-making authority that ultimately renders any of the FTC's previous requests for regulatory authority now moot).

23. *See generally* FDCPA, 15 U.S.C §§ 1692-1692p (2006) (providing regulations to promote consumer protection and increase uniformity in the debt collection industry).

24. *See* 15 U.S.C § 1692(a) (2006) (detailing Congress' finding: "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors . . . [that have] contribute[d] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."). For additional Congressional findings regarding the debt collection industry, see 15 U.S.C. § 1692(b)-(d). *See also* S. REP. No. 95-382, at 2, (1977), *reprinted in* U.S.C.C.A.N. 1695, 1696 (referring to the findings of abuse in the debt collection industry).

25. "The Commission recognizes that the timely payment of debts is important to creditors and that the debt collection industry offers useful assistance toward that end." F.T.C., FEDERAL TRADE COMMISSION ANNUAL REPORT 2005: FAIR DEBT COLLECTION PRACTICES ACT 1 (2005), *available at* http://www.ftc.gov/os/2006/04/P0648042006FDCPAReport.pdf.

26. *See* 15 U.S.C. § 1692(e) (2006) (noting that "[i]t is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses"). Some provisions of the FDCPA demonstrate this creation of boundaries quite clearly. 15 U.S.C. § 1692f(1)-(8) (2006). For example, according to the Unfair Practices section of the statute, "a debt collector cannot use unfair or unconscionable means to collect or attempt to collect any debt." *Id.* The section proceeds to list conduct that is a violation and includes such tactics as depositing or threatening to deposit a postdated check and communicating with a consumer regarding a debt by a post card. *Id.* § 1692f(4), (7). The specific acts listed demonstrate areas in which the statute has created clear-cut lines by which the three Cs all know what can and cannot be done. *Id.* § 1692f(1)-(8).

27. 15 U.S.C. § 1692a(3)-(6) (2006). The term "consumer" means "any natural person obligated or allegedly obligated to pay any debt." *Id.*

In addition to defining these basic terms of the debt collection process, the FDCPA also defines a communication between a collector and a consumer as "the conveying of information regarding a debt directly or indirectly to any person through any medium."[28] This definition provides for how a debt collector may communicate with third parties for the purpose of acquiring a consumer's location information, but restricts a debt collector's communication with third parties to only instances of obtaining that location information.[29] Furthermore, of particular importance to this Comment, the FDCPA provides that every time a debt collector tries to communicate with a consumer, he has a duty to disclose that he is a debt collector attempting to collect a debt.[30]

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§ 1692a(3). The term "creditor" means "any person who offers or extends credit creating a debt or to whom a debt is owed, but . . . not . . . any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." *Id.* § 1692a(4). The term "debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." *Id.* § 1692a(5). The term "debt collector" means "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6). For a more definitive explanation of what a debt collector is, see 15 U.S.C. § 1692a(6)(A)-(F) (2006).

28. 15 U.S.C. § 1692a(2) (2006). For a review of more definitions provided under the FDCPA, see generally 15 U.S.C. § 1692a.

29. *See* 15 U.S.C. § 1692b (2006) (explaining that any additional contact with third parties regarding collection of the debt may only be permissible with the consumer's written consent or the permission from a competent jurisdiction). Furthermore, even though a collector may call third parties to gather location information, if this information has already been gathered or the collector has already spoken with the third party on a previous occasion, subsequent communications may only be made upon the third party's request or if the collector reasonably believes the previous response to questions were erroneous or incomplete. *Id.* § 1692b(2). *See also* 15 U.S.C. § 1692c(b) (2006) (providing a list of the only third parties a debt collector is allowed to communicate with in connection with the collection of any debt 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.").

30. 15 U.S.C. § 1692e(11) (2006) (hereinafter "mini-Miranda"). An interesting problem resulting from the requirement of the mini-Miranda occurs with mortgage servicers, who are considered debt collectors because the mortgage is in default. Due to the blunt language of a mini-Miranda and the requirement that it be spoken with every communication, its utterance can actually mislead delinquent borrowers into thinking that the contact is "just another debt collector" instead of a phone call about an active, non-defaulted, yet delinquent mortgage. MORTGAGE BANKERS ASSOC. ISSUES AND RECOMMENDATIONS CONCERNING SERVICING OF MORTGAGE DEBT AND THE FAIR DEBT COLLECTION PRACTICES 2-3 (June 2007), *available at*

This disclosure requirement is known throughout the industry as a mini-Miranda.[31]

Despite the drafters' attempt to create a debt collection statute that defines and regulates each aspect of the industry for the benefit of the three Cs,[32] time and technology have complicated what the FDCPA term communication[33] means today.[34] The main problem with the FDCPA is its failure to predict and account for the introduction of new communication technologies.[35] Because

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http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00023.pdf. For a look at the mini-Miranda in the context of Florida consumer protection law, see generally Shera Erskine, Note, *Please Leave a Message After the Tone: How Florida Lawyers Should Approach the "Mini-Miranda" Warning Requirement of the Fair Debt Collection Practices Act*, 32 NOVA L. REV. 245 (2007). The author explains that the Florida Consumer Collection Practices Act (FCCPA) only requires a debt collector to provide the mini-Miranda when requested by the consumer. *Id.* at 259. She further argues that collectors in Florida should adhere to the FCCPA disclosure requirement because it provides consumers more protection in the areas of tort privacy laws. *Id.* at 268. This argument fails to consider that allowing collectors leeway with full disclosure disadvantages the least sophisticated consumer who does not know that he needs to request this disclosure to find out the purpose of the communication. *See* 15 U.S.C. § 1692e (2006) (providing the list of false and misleading representations that have created this least sophisticated consumer notion).

31. 15 U.S.C. § 1692e(11) (2006).

32. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at iii-iv (proposing extensive transformations in FDCPA law to meet with the dramatic changes in the debt collection industry since 1977). The FTC points out that multiple changes—from inflation to the increase in third-party collections and debt purchasing, to the invention of new technologies that make the industry able to work large volumes of debt quickly and inexpensively—demonstrate that FDCPA created for the 1977 debt collection industry is not nearly as effective against today's industry. *Id.* at iv-v.

33. *See* 15 U.S.C. § 1692a(2) (2006) (providing the definition of communication according to the FDCPA). This simplistic definition of communication has caused problems previously for the FDCPA including the issue of whether the initiation of a lawsuit through summons is considered an initial communication. *Compare* Goldman v. Cohen, 445 F.3d 152, 157 (2d Cir. 2006) (holding the initiation was an initial communication that required proper disclosure), *and* Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914, 920 (7th Cir. 2004) (providing a broad interpretation of the statute to hold that service of summons and complaint was an "initial communication"), *with* Vega v. McKay, 351 F.3d 1334, 1337 (11th Cir. 2003) (holding that legal action did not constitute an "initial communication" because the FTC had excluded legal pleadings as a communication).

34. In thirty years, aspects of the industry have changed. F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at iii-iv. Now each collector has access to a personal computer with the ability to mass-produce and send letters to debtors. *Id.* at 19. Each collector has access to sophisticated automated dialer systems with interactive voice recording technology to place telephone calls to consumers. *Id.* at 16.

35. Consumers also have access to new technologies, including mobile phones, caller ID, email, text messaging, and social networking sites. *Id.* at 17. The FTC generally believes that such new innovations should be able to be

communications technology has advanced considerably since 1978, the FDCPA shows its age through its failure to account for and accept such advancements.[36]

For example, some confusion has arisen regarding the use of answering machines in the debt collection process. Although answering machines did not become popular with consumers until the 1980s, the product had been commercially sold in the U.S. since the early 1970s.[37] The FDCPA failed, however, to contemplate their use in the context of collector communications.[38] The drafters only defined that a communication could be achieved "orally" or "in writing."[39] Consequently, new technologies have created interpretive difficulties for the three Cs with respect to proper debt collection disclosure practices.[40]

For debt collectors, this difficulty with leaving voice messages is compounded due to a risk of FDCPA liability even when complying with the statute as enacted. For example, if a message

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used in the collection of a debt, but without rule-making authority, the FDCPA remains dated. *Id.* at 50.

36. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at vi-vii (finding that FDCPA is in need of modernization). The FTC's recommendations for FDCPA reform garnered attention from the United States Government Accountability Office, which recommended both that the FTC should be given rule-making authority and that, with that authority, it should update the statute to reflect the current and future technology the statute failed to foresee when it was enacted in 1977. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 51 (2009), *available at* http://www.gao.gov/new.items/d09748.pdf (finding, additionally, that with increased debt purchaser business, FDCPA modification should focus on ensuring better maintenance of credit account documentation for collectors and buyers).

37. *History: The History of Answering Machines*, FCC, http://www.fcc.gov/cgb/kidszone/history_ans_machine.html (last updated June 24, 2004). Another example of the dramatic technological advances can be seen through the use of personal computers (PCs). *See, e.g.*, The National Academy of Engineering, *Computers*, http://www.greatachievements.org (last visited Aug. 1, 2011) (providing a basic history of computers in society, including the invention and commercialization of PCs). The Apple II, the accessible home computer, was not introduced on the market until 1977; the wave of other PCs did not hit the market until the early 1980s. *Id.*

38. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 15 & n.109 (demonstrating that answering machine technology had not been considered in the drafting of the FDCPA).

39. 15 U.S.C. § 1692e(11) (2006).

40. The drafters of the FDCPA could not have reasonably foreseen debt collection industries of today involving personal computers, online collection data storage sites and, in some instances, in-house tech departments to help with the implementation of sophisticated collections software. F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 15-17. For a look at the FDCPA third-party communications and disclosure provisions, see 15 U.S.C. § 1692b-c, e (2006).

is left including a proper mini-Miranda, the debt collector leaves open the possibility of a FDCPA violation if someone other than the original message recipient overhears the communication.[41] If the debt collector leaves a simple message (perhaps "This is Johnny, please call me back about this important matter at . . . ."), he may have violated the FDCPA for not leaving a mini-Miranda.[42] This communications issue has created much confusion resulting in a split among the district courts.[43]

Further, based upon the consideration that communication under the FDCPA can be through "any medium," the question arises whether the drafters of the FDCPA intended for collectors to be able to use newer avenues of communication.[44] In addition to problems surrounding the use of voice messages in attempts to contact consumers, new mediums such as social networking websites create a unique opportunity for collectors to acquire a consumer's location information[45] in order to facilitate the debt collection process.[46] Because these new technologies lack

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41. 15 U.S.C. § 1692e(11) (2006); *see supra* text accompanying note 30 (referring to § 1692e(11) as the common industry term "mini-Miranda").

42. *See* Tomio Narita, *Leaving Voice Messages – Ninth Circuit May Resolve the* Foti *issue*, FDCPA DEFENSE BLOG (Aug. 9, 2010), http://fdcpadefense.blogspot.com/2010/08/leaving-voicemail-messages-ninth.html (discussing how the debt collector defendant in *Koby v. ARS National Service, Inc.*, is appealing the Southern District of California's decision that the brief voice message left by the collector could be deemed a violation of § 1692e(11) as a failure to disclose yet not a communication in compliance with § 1692a(2)); Koby v. ARS Nat. Services, Inc., CIV. 09CV0780, 2010 WL 1438763, at *7 (S.D. Cal. Mar. 29, 2010).

43. For examples of case law holding that a brief voice message is not a communication, see *Koby*, 2010 WL 1438763 at *2-6; *e.g*, Biggs v. Credit Collections, Inc., CIV-07-0053-F, 2007 WL 4034997, *4 (W.D. Okla. Nov. 15, 2007) (holding that due to the narrowness of the statutory language, the court could not read into the language that a message that conveyed "no information regarding a debt" was a communication); *but see* Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 669-70 (S.D.N.Y. 2006) (holding that the a broad interpretation of FDCPA communication includes conveying information of some kind and that a simple voice message from the debt collector fit that definition). The court also noted that a voice message without disclosure puts too much burden on the least sophisticated consumer to recall the first communication. *Id.* at 668-70.

44. Even though the original intent of the drafters is an interesting consideration, the FTC has taken a proactive approach in their last report and stated that the FDCPA should be adapted to use this communication. F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at vi, 14-20.

45. Location information means the consumer's place of abode and the accompanying telephone or his place of employment. 15 U.S.C. § 1692a(7) (2006). For a consideration of the use of social networking sites to gather location information, see *infra* IV.B.1a-b.

46. For conflicting views on the use of social networking sites to locate and contact consumers, compare Vanessa Romo, *Elusive Debtors Foiled by Their Social Media Sites*, NPR (July 12, 2010), http://www.npr.org/templates/story/story.php?storyId=128464415&ps=cprs, with Gary Nitzkin, *Who Looks*

regulation or definition within the FDCPA, the three Cs have been left with no guidelines as how to address their use.[47] As it stands, the FDCPA causes great difficulty for the consumer trying to understand the law, the collector trying to abide by the law, and the courts trying to interpret the law.

The steep rise in FDCPA complaints against debt collection agencies in recent years signals the need for clarity for the three Cs. Further, the FTC has acknowledged that the statute is no longer serving its purpose of combating abusive collections tactics given the technological advancement of recent times.[48] More importantly, existing case law evidences many courts' confusion over FDCPA issues, like that of communication. A lack of confidence in the FTC and no clear guidance from the courts demonstrates a need for statutory reformation.[49]

As of July 2011, both the regulatory power and rulemaking authority the FTC lacked while overseeing the FDCPA has since been transferred to the CFPB.[50] Uniformity is sorely needed in a world where consumers often work with out-of-state financial institutions, collectors often try to collect out-of-state debts, and the courts are left to sort it all out. In order to facilitate greater consumer protection, the CFPB must utilize its rule-making authority over the outdated FDCPA; otherwise, uniformity will remain quixotic and the CFPB's ability to be an effective consumer advocate questionable.

III. ARGUMENT

Although communications technology has advanced greatly since the FDCPA's implementation thirty years ago, the FTC lacks rule-making authority to address these innovations.[51] Because the FDCPA remains silent regarding technological tools invaluable to consumers, collectors, and the courts,[52] the three Cs lack the

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Silly Now, NPR?, MICH. COLLECTION L. BLOG (July 22, 2010), http://www.michigancollectionlawblog.com/?p=148 (providing case law to argue that using social networking sites to 'friend' consumers is not actionable under FDCPA).

47. F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at vi-vii.

48. *Id.* at 14-20.

49. *See supra* note 43 and accompanying text (providing a list of cases that demonstrate the conflict among courts in deciphering simplistic language of communication skewed by the introduction of technology in the FDCPA).

50. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at vi-viii (noting the lack of authority).

51. *See* 15 U.S.C. § 1692*l*(d) (2006) (expressing that no commission or agency referred to in the FDCPA has regulation or rule-making authority over debt collection practices as defined in the statute). *See*, F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at viii (exhibiting the FTC's knowledge that it cannot effectively enforce debt collection law without this rule-making authority).

52. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 21

necessary guidance to adhere to, understand, and analyze the statute's communications provisions. First, this section addresses the paradox collectors face by leaving voice messages for consumers.[53] Second, this argument examines cases that consider the FDCPA voice message issue. Finally, it presents arguments for and against the use of social networking sites in debt collection practices.[54]

A. Technology, Communications, and the Three Cs

In our technological society, consumers anxiously await new products to better connect them to the world around them.[55] Debt collectors and courts also utilize technology to realize efficiency and cost advantages in their businesses.[56] A central problem for courts evaluating these communications in the FDCPA context is striking a balance between perpetuating the policy of protecting consumers from abusive collection practices while acknowledging collectors' rights to use these tools to collect valid debts.[57]

(concluding that modernization of debt collection law is necessary to take account of today's new communication technologies). By having the advantage of websites like Pacer, Westlaw, and LexisNexis to provide comprehensive databases of information, courts have also been able to embrace the use of new technology; specifically, courts' acceptance of new technology can be seen through acceptance of e-discovery submissions to the Federal Rules of Civil Procedure in 2006. *See generally* FED. R. CIV. P. 16, 26, 33, 34, 37, & 45 (providing examples of how the Federal Rules of Civil Procedure accept and address the use of electronic discoverable materials); K&L Gates LLP, *E-Discovery Amendments to the Federal Rules of Civil Procedure Go Into Effect Today*, ELECTRONIC DISCOVERY LAW (Dec. 1, 2006), http://www.ediscoverylaw.com/2006/12/articles/news-updates/ediscovery-amendments-to-the-federal-rules-of-civil-procedure-go-into-effect-today (providing a summary of each update to the FRCP that addresses e-discovery).

53. *See* 15 U.S.C. § 1692e(11) (2006) (providing meaningful disclosure regulations for initial and subsequent communications); *see also* 15 U.S.C. § 1692c(b) (2006) (providing that without prior written consent, a debt collector may not communicate with a third party in the connection with the collections of a debt).

54. *See generally* Romo, *supra* note 44; Nitzkin, *supra* note 44 (showcasing the opposing argument to the NPR article covering debt collection and social networking sites).

55. The FTC Report acknowledges that consumers use many of these technologies in daily activities, including answering machines, caller ID, cell phones, email, and Internet. F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 15.

56. *See id.* at iv-v (providing that technology has increased the ability for debt collectors to mass produce and send letters, use automated dialer services, store data, and increase the payment options by which consumers can repay a debt). The FTC points out that technological innovations have helped facilitate the creation of both large, full service debt collections operations as well as thriving niche collection operations. *Id.* at 14-15.

57. 15 U.S.C. § 1692(e) (2006).

1. Voice Message Paradox

The FDCPA does not advise the three Cs on whether a collector's voice message may be left on a consumer's answering machine.[58] As the statute stands, debt collectors can incur liability by leaving a voice message under two separate scenarios: third-party disclosure[59] and detailed disclosure.[60] Although the technology has been used for decades,[61] because the FTC cannot create FDCPA rules, the question remains: Can a collector leave a voice message for a consumer without violating the FDCPA?

a. Disclosure of Information to Third Parties

To comply with § 1692c(b) of the FDCPA, a collector cannot communicate with third parties absent the consumer's permission.[62] When leaving voice messages, there exists the possibility that someone else is present when the message is left or when the consumer listens to it. If a third party overhears the communication, the collector faces FDCPA sanctions.[63] Many collectors have tried to avoid this liability by leaving brief messages, divulging little information outside a call-back phone number.[64]

For example, a collector may say: "Hi, this message is for Bob Brown. This is Ms. Black. Please call me at 555-5555 regarding an important matter." Some agencies may include the collection account's reference number;[65] others, as suggested in the example

58. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3 at 47 (providing analysis of the importance of answering machines in debt collection industry).

59. 15 U.S.C. § 1692c(b) (2006).

60. *Id.* § 1692e(11).

61. FCC, *supra* note 36.

62. *See* 15 U.S.C. § 1692c(b) (2006) (including that, under this provision, permission to communicate with third parties may also be authorized through a judicial decision). Courts may expressly grant this permission for a collector to communicate with a third party if they have competent jurisdiction and may also do so to promote post judgment remedies. *Id.* § 1692c(b).

63. *Id.* § 1692c(b).

64. *See, e.g*, *Koby*, 2010 WL 1438763 at *3 (leaving a message that simply stated: "This is Brian Cooper . . . for Mike Simmons, I need you to return this call as soon as you get this message 877-333-3880 . . . ."). The collector in *Biggs v. Credit Collections, Inc.*, also survived FDCPA sanctions on the communications issue by leaving a brief message. 2007 WL 4034997 at *4. The court refused to read the language of the FDCPA liberally to include a voice message that did not include words that would implicate the statutory definition of communication. *Id.* Interestingly the court does note that if the FDCPA language instead read to include "a communication in furtherance of any attempt to collect a debt," the voice message would have been implicated under the FDCPA. *Id.* For further analysis of the FDCPA and communications problems see Elwin Griffith, *The Role of Validation and Communication in the Debt Collection Process*, 43 CREIGHTON L. REV. 429, 452-57 (2010).

65. *See, e.g.*, Inman v. NCO Fin. Sys., Inc., No. CIV.A. 08-5866, 2009 WL

above, merely provide a name and call-back number. Collectors contend that the uninformative messages are not communications because under the FDCPA, a communication must "convey[] information regarding a debt."[66]

b. Improper Disclosure of Debt Collection Intentions

Debt collectors also face a problem with respect to leaving voice messages on answering machines pursuant to § 1692e(11).[67] Failing to provide meaningful disclosure, known as a mini-Miranda,[68] leaves collectors open to liability for FDCPA violations.[69] The most common way collectors attempt to avoid liability under this provision is by stating something like the following: "This message is for Greg. If this is not Greg, please stop listening now." After a thirty second pause, the collector says, "by continuing to listen, you agree that you are Greg, the proper

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3415281 at *2 (E.D. Pa. Oct. 21, 2009) (providing an example of a message left by a debt collector that includes a reference number). "This message is for-Thomas Inman. Please call us back today at toll-free number, 1-800-350-2457. When calling back, the Reference ID is EL9170 . . . Thank you. Goodbye." *Id.*

66. 15 U.S.C. § 1692a(2) (2006).

67. *Id.* § 1692e(11).

68. *See generally A Debtor's Rights Primer: "The Mini-Miranda" Warning*, PENN LAWYER.COM (July 24, 2010), http://www.pennlawyer.com/fdcpa.pdf (discussing mini-Miranda requirements for debt collectors for both telephonic and written communications). Interestingly, sometimes the use of a mini-Miranda cannot save a collector from FDCPA liability if a court determines its use to be insufficient. *See* Tomino Narita, Lesher *and "Legal Capacity" - the Third Circuit Grafts a New Concept into the FDCPA with* Lesher v. Mitchell N. Kay, FDCPA DEFENSE BLOG (July 3, 2011) http://fdcpadefense.blogspot.com/2011/07/lesher-and-legal-capacity-third-circuit.html (discussing a 3rd Circuit case where the court determined that settlement letters sent to consumers that were written on a firm's letterhead with the mini-Miranda provided on the back—a procedure commonly accepted throughout the industry—were false and misleading because they "raise[d] the specter of potential legal action") (quoting Lesher v. Law Offices of Mitchell N. Kay, 2011 WL 2450964, *9 (3d Cir. June 21, 2011)). This issue demonstrates how even standard industry practice presented through a universally accepted communications medium can fall victim to a court's struggle to apply the FDCPA's antiquated language.

69. *See* 15 U.S.C § 1692k(2)(A) (2006) (providing that debt collectors who fail to comply with any provisions of this title, with respect to an individual, will result in a court-imposed fine of no more than $1,000 beyond actual damages awarded). The amount of this sanction also serves as another interesting problem that the FTC proposes should be reconsidered through a FDCPA revamp. F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 66-67. Many debt collectors who take an aggressive approach will risk the small monetary sanction for the reward of potentially coercing people to pay their debts. *Id.* The 2009 Report continues by noting that $1,000 in 1977 sanctions would likely equate to $3,600 in 2008 standards. *Id.* at 67. Consumer protection advocates address the failure to increase the amount of FDCPA fines as an important change to be made to the statute, one that should be adjusted periodically to keep with price increases. *Id.* at 66-67.

recipient of this message." Thereafter, the collector provides the mini-Miranda along with call-back information, hoping the consumer will respond.[70]

Although seemingly a clear way to avoid violations of the FDCPA disclosure provisions, courts often look unfavorably upon such tactics and have deemed the message still available for a third party to overhear.[71] Common sense leads one to side with these courts. Human nature being what it is, one rarely stops listening upon hearing "if this message is not meant for you, please stop listening." As a result, the current FDCPA provisions are not capable of addressing the answering machine problem.

c. Commercial Speech Argument

Perhaps the best advice for collectors would be to not leave voice messages at all.[72] Some collectors, however, have tried to defend their right to leave messages as commercial speech.[73] They claim that imposing strict liability on all brief communications[74]

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70. *See* A Debtor's Rights Primer, *supra* note 68 at 3-4 (providing information about the requirements of the mini-Miranda).

71. 15 U.S.C § 1692c(b) (2006).

72. *But see* F.T.C, COLLECTING CONSUMER DEBTS, *supra* note 3 at 48-49 (noting that collectors should have access to technologies not addressed by the FDCPA, including answering machines). As of now, collectors seeking to use these devices in daily business operations are left in the technological dark ages of calling and leaving no message to avoid FDCPA sanctions so long as the statute remains silent. *Id.* at 47.

73. *See* Narita, *supra* note 40 (providing that the *Koby* petition includes a commercial speech claim). *See, e.g.*, Mark v. J.C. Christensen & Associates, Inc., No. CIV 09-100, 2009 WL 2407700, at *6 (D. Minn. Aug. 4, 2009) (showing defendant's argument that the FDCPA burdens a collector's right to a communication). The defendant-collector argued that the FDCPA be subjected to a test of constitutionality on grounds that it has the effect of creating a total ban on a medium of communication. *Id.* In this case, the court applied a four-part test for determining whether a content based restriction on commercial speech was justifiable and determined that the restriction was constitutional. *Id.* at *28; *see* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980) (providing the four-part test for analyzing content restrictions on commercial speech).

74. *See, e.g.*, *Koby*, 2010 WL 1438763 at *10 (demonstrating how some courts find a brief, uninformative communication that provides only a call-back number and name fails to reach the level of information to warrant FDCPA liability). Other courts would find this information to be a communication under the FDCPA. *See, e.g.*, Hutton v. C.B. Accounts, Inc., No. 10-3052, 2010 WL 3021904 at *1, 3 (C.D. Ill. Aug. 3, 2010) (holding, conversely to the *Koby* case, that a brief message served as a communication). In *Hutton*, the message was similar to that in *Koby*. *Id.* at *1. It only stated: "This message is for Roseanne Hutton . . . this is Kyeisha . . . I need you to return my phone call . . . 866 207 8464," but the court distinguished *Koby* and stated that this was clearly an FDCPA communication. *Id.* at *1, *7. *Hutton*'s analysis demonstrates the Seventh Circuit's take on brief communications and comports with the concern that some courts apply a level of strict liability with all correspondence between collector and consumer, implicating the collector

between collectors and consumers violates the "constitutional avoidance" canon, which suggests courts should not interpret statutes in a way that raises constitutional concerns.[75] This defense, although not commonly accepted by courts,[76] demonstrates that, for collectors, such an interpretation against the argument of commercial speech impedes the collection process.[77]

2. *Conflicting Case Law Throughout District Courts*

Case law demonstrates that courts have been unable to agree as to whether a voice message constitutes an FDCPA communication.[78] The disparity helps demonstrate the problems facing courts wanting to both promote the purpose of the FDCPA and encourage the use of modern technology.[79]

a. Finding That a Voice Message Is a Communication Regardless of the Message's Brevity

The most notable case addressing voice messages under the FDCPA is *Foti v. NCO Financial Systems, Inc.*, which held that a voice message, regardless of the extent to which information is provided, is always an FDCPA communication.[80] In *Foti*,[81]

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regardless of the actual premise of the correspondence. Narita, *supra* note 40.

75. *See* Narita, *supra* note 40 (demonstrating that the commercial speech issue will be raised on appeal). This argument was already addressed in the *Koby* district court decision. *Koby*, 2010 WL 1438763 at *17-18. The lower court ruled that the messages were not entitled to constitutional protection because they were misleading. *Id.* The *Koby* petition essentially argues that the district court stopped short in its review of the constitutional issue and should have extended the analysis to include Congressional intent. Narita, *supra* note 40.

76. *E.g.*, Berg v. Merchants Ass'n Collection Div., Inc., 586 F. Supp. 2d 1336, 1344 (S.D. Fla. 2008).

77. *See* Narita, *supra* note 40 (providing an example of how this strict liability can be taken to an extreme in the debt collections process). In some instances, a consumer may return a call and seek a transfer to the person who handles his account. *Id.* If the person who transfers is a collector and fails to provide the "mini-Miranda," the collector may be subject to an FDCPA sanction for a mere transfer because their transfer served as part of the debt collection process. *Id. See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at iii (noting that collection of valid debts is an important economic interest).

78. *See* discussion *infra* Part III.A.2.a-b.

79. 15 U.S.C. § 1692(e) (2006) (finding that the purpose of this statute was to eliminate abusive debt collection practices by debt collectors, insure that those debt collectors who refrain from using abusive practices are not competitively disadvantaged, and promote consistent State action to protect consumers).

80. *Foti*, 424 F. Supp. 2d at 669.

81. *See id.* at 647 (explaining that the defendant debt purchaser began communications with consumer regarding two Columbia House Company debts that cumulatively amounted to $78.75).

defendant-collector left a uniform, pre-recorded message[82] on Foti's answering machine that gave the collector's name, phone number, and mentioned that this was an important business matter and not a solicitation.[83] Although defendant-collector argued that the message was not a communication because it simply requested a return call and did not convey any information regarding a debt,[84] the district court disagreed.[85] It construed the FDCPA broadly[86] and found that specific information about a debt need not be conveyed because § 1692a(2) "applies to information conveyed 'directly or indirectly.'"[87] By conveying that an important matter needed to be discussed, the court held that defendant-collector's correspondence reached the level of an indirect communication.[88]

The *Foti* court's reasoning follows *Hosseinzadeh v. M.R.S. Associates, Inc.*, a Central District of California case.[89] There, plaintiff-consumer incurred and subsequently failed to pay a Capital One debt that was eventually assigned to defendant-collector.[90] Analogous to the *Foti* case facts, defendant-collector left multiple messages for plaintiff with a call-back name, number, and an insistence that an important matter needed to be discussed.[91] In considering the substance of the messages, the court found it difficult to see voice message correspondence as anything other than a FDCPA communication because the purpose of the voice message was to provide enough information to elicit a response call.[92]

The *Foti* court relied on the same logic in determining that the defendant-collector achieved its purpose of eliciting a response call because plaintiff subsequently called defendant-collector.[93] As

82. *See id.* at 648 (noting that the call was actually made through the use of an automated dialing device).

83. *Id.*

84. *Id.* at 654.

85. *Id.* at 643.

86. *See id.* (following the approach by the Second Circuit and deeming that the message was a communication).

87. 15 U.S.C. § 1692a(2) (2006).

88. *Foti*, 424 F. Supp. 2d at 655; *see also* 15 U.S.C. § 1692a(2) (2006) (providing that a communication can be the direct or indirect conveyance of information regarding a debt).

89. *See* Hosseinzadeh v. M.R.S. Assocs., Inc., 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005) (holding that although the voice messages did not convey much information, because they referred to an important matter to discuss, this was an indirect conveyance of debt information). The *Foti* court focused on this case's holding because the facts regarding the voice messages were very similar. 424 F. Supp. 2d at 655.

90. *Hosseinzadeh*, 387 F. Supp. 2d at 1107.

91. *Id.* at 1108.

92. *See id.* at 1116 (affirming that defendant conceded that the voice messages are merely the first step in a process designed to communicate with debtor-consumer regarding his debt).

93. *Foti*, 424 F. Supp. 2d at 648.

a result, the message left by defendant-collector was deemed an FDCPA communication. A majority of courts deciding the voice message issue have found *Foti*'s holding persuasive just as *Foti* found *Hosseinzadeh* persuasive.[94] These courts construe the FDCPA statute broadly to promote its policy to protect consumers against the abuses historically common in the debt collection industry.[95]

b. If a Message Is Uninformative, It Does Not Rise to the Level of a FDCPA Communication

Conversely, other courts have found that the limited information relayed through a voice message does not rise to the level of a FDCPA communication. For example, in *Koby v. ARS National Services, Inc.*,[96] the Southern District of California held that a message that only provided the caller's name and request for a return call did not constitute a direct or even indirect conveyance of information regarding a debt.[97] The court noted as important that the collector had failed to disclose that he was attempting to collect a debt or that any information obtained would be used for collecting a debt.[98] Because the voice message provided nothing more than the caller's name and a call-back number, it was not a communication as defined by the FDCPA.[99]

Although the majority of district courts have followed *Foti*, *Koby* demonstrates the disparity in analysis between federal district courts. This is evident because within five years, the Southern District of California in *Koby* held differently than did

94. *See generally* Gryzbowski v. I.C. Sys., Inc., 691 F. Supp. 2d 618 (M.D. Pa. 2010) (finding that a brief message where a collector did not identify self was a communication that failed to comply with § 1692e(11)); Edwards v. Niagara Credit Solutions, Inc., 586 F. Supp. 2d 1346 (N.D. Ga. 2008) *aff'd on other grounds*, 584 F.3d 1350 (11th Cir. 2009) (finding brief communication failed to comply with meaningful disclosure); Inman v. NCO Fin. Sys., Inc., No. 08-5866, 2009 WL 3415281 (E.D. Pa. Oct. 21, 2009) (finding collector NCO's voice message left for consumer was a communication under the FDCPA).

95. 15 U.S.C. § 1692(e) (2006).

96. *Koby*, 2010 WL 1438763. *See* Narita, *supra* note 40 (providing a look at the arguments raised by the *Koby* appeal). The author of the FDCPA defense blogs is one of the attorney's for defendant-collector ARS. *Id.*

97. *But cf. Koby*, 2010 WL 1438763 at *10 (distinguishing the claim against the other *Koby* plaintiffs where the message included a reference number). For example, collector's message to plaintiff Koby, which included the phrase, "Please refer to your Reference Number as 15983225," was deemed by the court to be a communication. *Id.* at *2, 10.

98. *Id.* at *16-17. Although under the Simmons claim, defendant-collector survived analysis that would find it subject to FDCPA violation pursuant to § 1692e(11), the court found it had participated in communications subject to violations with respect to the meaningful disclosure claim, § 1692d(6). *Id.* at *11-17.

99. *Id.* at *17.

the Central District of California when the *Hosseinzedah* court considered analogous FDCPA concerns, illuminating the difficulty that exists in simply trying to unify debt collection law within a single state. The inability to create consistent meaning within one state does not bode well for the debt collection industry, whose members contact consumers across state lines.[100] So long as collectors work to interpret the FDCPA and consumers care to know their rights, resolving the FDCPA communications issue regarding voice messages is vital.

B. Social Networking Sites

Advancements in technology have come a long way since the commercialization of the answering machine.[101] Cell phones, caller ID, fax machines, automated dialing systems, and the Internet serve as examples of new technologies that the three Cs could utilize. This next section will address the questions that arise when debt collectors use Internet technologies in the collections process.

1. When the Use of Social Networking Sites Is Not a Communication

The FTC believes debt collectors should have access to new technologies.[102] Most in the collection industry agree, finding that communications technology increases efficiency in the debt collection process.[103] Consequently, many in the collection industry believe the use of social networking sites to gather contact information should not lead to FDCPA violations.[104] They argue

100. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 14 n.101 (providing that technology has facilitated the expansion of the debt collection industry across state lines and geographic barriers).

101. *See supra* note 36 and accompanying text.

102. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at iii (finding that debt collectors, through collections efforts, help keep credit available and cost as low as possible). For information on how businesses are using social networking sites for their benefits, see David C. Vladeck, Dir., FTC Bureau of Consumer Prot., Promoting Consumer Privacy: Accountability and Transparency in the Modern World (Oct. 2, 2009), *available at* http://www.ftc.gov/speeches/vladeck/091002nyu.pdf.

103. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 16-17 (pointing out that collections through technology is important since many young consumers frequently use communications technology in daily activities). Further, restrictions on collectors' use of communications technology may lead to an increase in uncollected debt. *Id.* at 16-17.

104. *See* Nitzkin, *supra* note 44 (asserting not only that his employees use social networking sites in the debt collection process but also that there is nothing legally wrong with doing so). The FTC agrees to an extent, encouraging that the debt collection industry should have the advantage of using the same forms of technology as other businesses in the ordinary course of business. F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3 at 36. They

that "friending"[105] consumers merely allows collectors to gather location information.[106]

Specifically, collectors claim that contact through online social networking sites is not a communication "in the collection of any debt"[107] when the collector is not explicitly seeking payment of the collections account.[108] This argument can be found in *Bailey v. Security National Servicing Corp.*, a case involving a mortgage company that sent the consumer a letter regarding the current status of his account.[109] The court found in favor of the collector for a variety of reasons,[110] but specifically reasoned that "only communications 'in connection with the collection of any debt' . . . fall under the ambit of the Act, and the defendants' letters cannot reasonably be placed in that category."[111] This case may not directly address the issue of collection practices on social networking sites, but it supports the collectors' argument that not all contacts with consumers rise to the level of a communication that invokes FDCPA sanctions.

A recent Seventh Circuit decision, *Gburek v. Litton Loan Servicing LP*, distinguishes *Bailey*.[112] In *Gburek*, the court found

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do, however, note that more information needs to be gathered about how some of these tools like email and social networking can be used efficiently without violating the FDCPA. *Id.* at 50-51.

105. *See Friending*, THEFREEDICTIONARY.COM, http://www.thefreedictionary.com/Friending (last visited Aug. 1, 2011) (defining friending: "to add someone as a friend on a social networking site."); *see, e.g.*, *Adding friends: How do I add a Friend?*, FACEBOOK.COM, http://www.facebook.com/help/?page=767 (last visited Aug. 1, 2011) (providing instructions for how to add friends on Facebook).

106. *See* 15 U.S.C. § 1692b (2006) (providing the manner in which debt collectors may acquire debtor-consumer's location information).

107. *Id.* § 1692a(2).

108. *Cf. Koby*, 2010 WL 1438763 at *10 (finding that the uninformative voice messages are not actually FDCPA communications because there is no explicit solicitation of payment left in the voice message).

109. Bailey v. Sec. Nat. Servicing Corp., 154 F.3d 384, 386 (7th Cir. 1998).

110. *Id.* The court also found that because the mortgage company was not acting as a debt collector, it was not subject to FDCPA liabilities. *Id.* at 387. Here, the court distinguished between a defaulted debt and, as is in this case, a debt in a forbearance agreement, which was not in arrears at the time defendants obtained the debt. *Id.* The court ultimately found that defendant was not a debt collector under the definition of the FDCPA. *Id.* at 387-88; *see* 15 U.S.C. § 1692a(6)(F)(iii) (2006) (finding that a person trying to collect an owed debt that was not in default at the time the debt was obtained is not a debt collector).

111. *Bailey*, 154 F.3d at 388.

112. *See* Gburek v. Litton Loan Servicing LP, 614 F.3d 380, 384-85 (7th Cir. 2010) (finding that a communication does not have to explicitly demand a payment to be deemed a communication between collector and consumer). Although *Bailey* suggests limits on the FDCPA's reach, the case does not establish a "categorical rule" regarding every communication between a debt collector and a consumer. *Id.*

that *Bailey*'s holding demonstrated only one factor in an objective test to determine whether a contact is a communication.[113] Thereafter, the court held that letters sent to the consumer were communications despite the fact that they did not explicitly solicit payment of a debt.[114]

These cases demonstrate the concern with using social networking sites to contact consumers: whether these contacts reach the level of a communication as defined by the statute. Because "friending" may be used to merely gather contact information[115] and because "friending" does not include an explicit payment solicitation, debt collectors contend that use of these sites is within their rights.[116] How this argument will fair in court remains to be seen.

2. *When the Use of Social Networking Sites Is a Communication*

Those opposing collectors' use of new technologies fear that their use in communications could create new methods of abusive tactics within the industry.[117] NPR addressed the concern in a recent story on collections agencies utilizing social media sites to gather debtor-consumer information.[118] The article interviewed a consumer who had been "found" by debt collectors after creating a Facebook page.[119]

Concerns arise when collectors go beyond simply searching online in hopes of finding "public" contact information.[120] NPR

113. *Id.* at 385. The court points out that other relevant factors in considering whether a communication has been made by a debt collector with the connection of collecting debt include the nature of the parties' relationships as well as the purpose and context of the communications. *Id.*

114. *Id.* at 386-87.

115. 15 U.S.C. § 1692b (2006).

116. *See* Nitzkin, *supra* note 46 (arguing that using Facebook in collections efforts is legal).

117. 15 U.S.C. § 1692(e) (2006).

118. *See* Romo, *supra* note 46 (presenting the new way in which collectors are contacting consumers to collect debts).

119. *See* Romo, *supra* note 46 (explaining that the consumer had previously evaded collections efforts by not allowing his contact information to be made public). The consumer contends, however, that as soon as he provided his contact information on Facebook, pursuant to an employer request that he network with others in his field of work, he was contacted by a collector shortly thereafter. *Id.* The article does not delve into specifics regarding how the collector gathered the consumer's information through Facebook, but it is likely that the consumer allowed his contact information on his profile to remain public. *Id.*

120. *See* Vladeck, *supra* note 102, at 7 (pointing out that consumers are often unaware of a social networking sites privacy information). This is due to both difficult to read privacy provisions and that many consumers choose not to read the terms and conditions of sites they join. *Id. See, e.g.*, *Facebook Privacy Policy: Sharing Information on Facebook*, FACEBOOK.COM, http://www.facebook.com/help/?page=767 (last visited Aug. 1, 2011) (informing users how to

interviewed a collections attorney who stated that his employees go so far as to "friend" consumers and contact consumers' Facebook friends to find location information.[121] In fact, he stated that often asset information could be gathered through contacts.[122] The attorney contends that collectors are not subject to FDCPA liability so long as there exists a gray area in FDCPA law and technological communications.[123]

As the information above suggests, whether these social networking contacts will ultimately be determined to be communications under the FDCPA has not yet been resolved.[124] Once this determination is made, the issue of how to incorporate the use of these sites into the debt collection industry remains to be addressed. While awaiting resolution on the reach of the FDCPA with respect to social networking sites, the three Cs can be certain that this form of technological communication will serve as a manner by which the debt collection industry will want to operate in the future.[125]

As demonstrated, collectors face a predicament by using communication technologies: they can continue to proceed through the gray area and risk court-imposed FDCPA sanctions, or they can cease using communication forms that are undeniably beneficial to the industry. Until the FDCPA is updated to address these new communication technologies, the three Cs will carry this unnecessary burden of trying to apply the outdated FDCPA law to situations it was not intended to cover.

IV. PROPOSAL

In addressing technological changes that affect debt collection laws, this Comment proposes that the CFPB add or amend provisions to the FDCPA to address the use of new communication technologies.[126] Most industries rely on a myriad of technological

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create a profile and how to control who may view the information included in the profile). A consumer who fails to pay attention to how their contact information is conveyed publicly on social networking sites leave collectors the option of doing a quick Facebook search with a name to gather location information. Roma, *supra* note 46.

121. *Id.*

122. *Id.* (finding out asset information as simply as through asking a consumer's Facebook friends). For example, collectors were able to ascertain that a consumer had an asset by simply asking the consumer's friend what the consumer was doing. *Id.* The interviewed attorney replied that jet skis were deemed as a collector's assets by using the social networking sites in this manner. *Id.*

123. *Id.*

124. *See* discussions *supra* Part III.2.B1-2.

125. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 36 (stating that debt collectors "should be allowed to use all communication technologies, including new and emerging technologies, to contact consumers.").

126. *Id.* With respect to the FDCPA, some, including Senator Al Franken,

communication tools in daily activities.[127] Because debt collection is an economically necessary industry[128]—collecting valid debts is important because consumers who borrowed money from creditors and who failed to repay should be held accountable for their defaults—it should have access to the same tools as other valid businesses. The debt collection industry should not be excluded from technological benefits merely because the outdated FDCPA failed to consider them.[129] Specifically, provisions that address current communication tools that have proven useful to the industry need to be included as well as those that may prove useful in the future.

A. Voice Messages as an Acceptable Debt Collection Activity

1. Voice Messages Are a Communication

The weight of case law has determined that a voice message is, in fact, a communication.[130] By deeming voice messages as

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argue that the most important amendments include requiring that proper notification be provided to consumers of their FDCPA rights through the validation notice. End Debt Collector Abuse Act, S. 3888, 111th Cong. (2010). Among other amendments to the FDCPA, Senator Franken wishes to include new obligations for debt collectors in § 1692g(a) that require the initial validation notice to include various information including the date of last payment ("DOLP") of the debt as well as the amount of debt after the DOLP, the description of consumer's rights with respect to cease and desists as well as disputes, and the name and contact information for the person responsible for handling complaints on behalf of a debt collector. *Id.* Senator Franken also proposes that sanctions for FDCPA violations be increased given that the amount of the fine has not been increased for over 30 years *Id.* Such a large period of time without an increase in penalty demonstrates that FDCPA law is in great need of revision and that the CFPB should tackle this problem as soon as it has gained rule-making authority. This comment, however, focuses on the need for the CFPB to target problems with communications technology. *See infra* Part IV.A-B.

127. *See supra* notes 56 and 58 and accompanying text (providing that businesses utilize technological communications in ordinary course of business activities).

128. *See supra* note 25 and 102 and accompanying text (addressing the importance of debt collection in the process of recovering valid debts).

129. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 36 (asserting that the FDCPA contemplated making use of all technologies available at the time—"the mail, telephones, telegraphs, etc."—but that new technologies was not necessarily contemplated).

130. *See generally Foti*, 424 F. Supp. 2d at 643; *also Hosseinzadeh*, 387 F. Supp. 2d at 1104 (holding that voice messages were "merely first step in a process designed to communicate with plaintiff about [the] alleged debt."). Although *Koby* petitioner ARS filed an appeal so the Ninth Circuit could review the voice messages as communications issue, it was withdrawn by petitioner ARS shortly thereafter. *Koby*, 2010 WL 1438763, at *1 (S.D. Cal. Mar. 29, 2010) *appeal docketed*, No. 10-80158 (9th Cir., Aug. 9, 2010). Even if an analogous case were to be brought before one of the circuit courts, the court should deny review and instead allow the CFPB to amend the FDCPA to

communications, the CFPB may thereafter create specific regulations as to their accepted use in the industry.

2. Voice Messages Allowable Through Consumer Waiver

After determining voice messages to be communications, the CFPB should next delineate what types of voice message communications will be acceptable in debt collection practices. As the wording stands, collectors face the double-edged sword with respect to leaving voice messages:[131] providing too much information leads to third-party disclosures,[132] and providing too little may result in a communication that lacks meaningful disclosure.[133]

In order to eliminate these instances of liability, the CFPB should create a new FDCPA provision requiring that collectors only leave voice messages with prior, express permission from the consumer. Essentially, this FDCPA provision will serve as the consumer's waiver of certain FDCPA liabilities that could be raised against the collector in context with leaving a message. Through agreement, the consumer would acknowledge that any reasonable message left by the collector is acceptable and not subject to FDCPA sanctions through either third-party or lack of meaningful disclosure.[134]

3. Disclosures for Cell Phone and Landline Voice Messages

Further, the FDCPA should specify what can be left in the message to alleviate attempts by the collectors to push the boundaries of legality in a manner counter to the goals of the FDCPA.[135] For cell phones, the messages can be more detailed and can provide the reason for the call. This is due to the fact that most people have direct, private access to a cell phone voice message unlike a voice message left on one's home answering machine. For landline phone numbers,[136] the voice messages allowed should be limited to only the collector's name, the consumer's reference account number, and the collector's call-back number.

By creating these specific parameters for collectors in leaving

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directly address the issue by determining that all voice messages are communications.

131. *See* argument *supra* Part III.A.1.a-b.

132. *Id.* § 1692c(b).

133. *Id.* § 1692e(11).

134. 15 U.S.C. §§ 1692c(b), e(1)-(16) (2006).

135. *Id.* § 1692(e).

136. Through websites such as MelissaData, creditors can determine whether the prefix of a ten digit number (the second set of 3 digits after the area code) is for a cellular phone or landline phone. MELISSADATA, http://www.melissadata.com/Lookups/phonelocation.asp (last visited Aug. 1, 2011).

permissive voice messages, it gives the consumer equal footing in the debt collection process by allowing the consumer to control the level of creditor contact. Further, establishing such boundaries will create certainty within the industry, allowing collectors to better do their jobs without the fear of crossing into the gray areas of liability. Finally, courts will have the benefit of clear legislation to which they can defer when disputes arise.

B. Delineating Communications and Non-Communications in Debt Collector's Use of Social Networking Sites

As the FTC has stated, the debt collection industry should have the ability to use new mediums of communication,[137] such as social networking sites. Creating regulations for these communication technologies may be a trickier determination to make because the use and scope of such tools is advanced every day.[138] Nonetheless, implementing change in FDCPA law will help update that bottom line by which the three Cs know how to evaluate communications through new technological mediums.

1. Instances of Social Networking Non-Communications

a. The One-Contact-Only Requirement

Similar to the contacts–with–third–parties provision under the FDCPA with regards to location information,[139] collectors should only be allowed to contact a friend or employer of a consumer once in attempting to locate the consumer's home and work address and telephone numbers.[140] To comply with the FDCPA in communicating with third parties, the collectors must hide any information that would display on their social networking

137. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 36 (providing that both the debt collection industry and the FTC believe that new technological communications should be made available to debt collectors in the debt collection process).

138. For example, in 2009 forty-six percent of small businesses were interested in learning more about social networking sites' application in the business world. Caron Beesley, *Twitter, Facebook, or LinkedIn? Finding the Right Fit for Your Small Business*, BUSINESS.GOV (Aug. 17, 2010), http://community2.business.gov/t5/Small-Business-Matters/Twitter-Facebook-or-LinkedIn-Finding-the-Right-Fit-for-Your/ba-p/31878. Their interest demonstrates an increasing trend in businesses using social networking technology, but also that this is still a very new tool by which many businesses need additional resources to determine if it will prove beneficial in both marketability and profitability. *Id.* Beesley provides useful resource links for those interested in incorporating social networking into a business model. *Id.*

139. *See* 15 U.S.C. § 1692a(7) (2006) (meaning a consumer's "place of abode and . . . telephone number at such place, or . . . place of employment.").

140. *See generally id.* § 1692b (providing grounds for contact with third parties).

profile that could identify them as collectors.[141] Thereafter, collectors should be required to de-friend[142] a person. The use of social networking sites in this manner would not be a communication because collectors would utilize the medium for the sole sake of obtaining contact information. Such practices are not deemed communications according to the FDCPA.[143]

One concern with the inclusion of this provision is the question: "Who is keeping track of collector's contacts with the third parties?" While actively attempting to collect a debt, collectors are encouraged to exercise good faith in adhering to a location information provision for social networking sites just as they are encouraged when making telephonic communications.[144] Otherwise, both consumers and third parties knowledgeable in this particular FDCPA law can easily prove a collector's violations through careful documentation. By producing a computer print screen of a Facebook page that shows a collector who failed to keep employment information private, who sent a subsequent message to a third party, or who remained friends with a third party after first contact, a consumer can demonstrate FDCPA violations that make the collector liable for sanctions.

b. The Acceptability of Gathering Public Information

Furthermore, collectors should be able to view and gather all information from the Internet and social networking sites that consumers leave public. In instances where collectors gather location information and other personal details about a consumer without having to contact a consumer or a third party, there is no action taken that elevates the collectors' methods to that of a communication.[145] As a result, such actions should be specified as

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141. *Id.* § 1692b(1)-(2). Two ways to avoid liability under this provision would be for the debt collector to limit employer information on his profile by making it unavailable to all third parties contacted for the purposes of gathering location information. *Friends: Friends List and Limited Profile – Limited Profile*, FACEBOOK.COM, http://www.facebook.com/help/?page=768 (last visited Aug. 1, 2011). A collector may also choose to use a "dummy" profile although this tactic may lead to liability for false and deceptive practices. 15 U.S.C. § 1692e(10) (2006).

142. "De-friending" or "unfriending" is a term used to explain the process of removing a person as a Facebook friend. *Definition: Unfriend*, TECHTERMS.COM (Nov. 21, 2009), http://www.techterms.com/definition/unfriend. *See also How to Unfriend Someone on Facebook*, EHOW http://www.ehow.com/how_5021242_unfriend-someone-facebook.html (last visited Aug. 1, 2011) (providing step-by-step instructions to de-friend a Facebook friend).

143. *See* 15 U.S.C. §§ 1692a (2006) (providing definition of communication); *see also* 15 U.S.C. § 1692c (2006) (providing additional regulations for collector-consumer communications).

144. *Id.* § 1692b.

145. *See supra* text accompanying note 120 (explaining how consumers' lack

acceptable methods of gaining information about a consumer.

2. *Social Networking Communications and the mini-Miranda*

As soon as a collector contacts the consumer, the contact should be deemed a communication no matter how brief. Therefore, if a debt collector contacts a consumer directly through a social networking site, this contact[146] should be accompanied by a message to the consumer explaining the purpose of the communication.[147] After the collector provides the mini-Miranda, the consumer has the control to lay the groundwork for acceptable methods of subsequent communications. Conversely, if the consumer does not want to continue communications, he may choose not to do so.[148]

Essentially, this disclosure and procedure for subsequent communications will be analogous to the mini-Miranda and disclosure requirement for telephonic communications, putting social networking sites on the same footing as phone calls where a consumer who so chooses may continue or cease communications. By extending the mini-Miranda provisions in the FDCPA to include these social networking contacts, the CFPB simplifies the law for the three Cs so that they know both old and new technological communications require the same disclosures by collectors.

C. *Future Technologies Consideration*

Finally, the CFPB should provide a general provision to the FDCPA that considers the use of future communication technologies not yet contemplated in the debt collection industry.

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of knowledge regarding privacy settings for social networking sites may leave them vulnerable to debt collectors utilizing the sites to gather location information).

146. An example of this type of contact through Facebook is the manner by which one person submits a friend request to another person. *See supra* note 105 and accompanying text.

147. *See Messages and Inbox: Sending a message – How do I Send a Message*, FACEBOOK.COM, http://www.facebook.com/help/?faq=12201&ref_query=sending+messages+to+non (last visited Aug. 1, 2011) (providing step-by-step approach to messaging Facebook friends and non-friends). If the consumer has de-activated the "send message" option on his profile, the collector must contact the consumer using alternate communications methods. *Message and Inbox: Privacy – How Can I Control Who Can Send Me Messages*, FACEBOOK.COM, http://www.facebook.com/help/?page=940 (last visited Aug. 1, 2011).

148. There is, however, no help for those who keep their information public or who choose to blindly accept friend requests without reading the accompanying message. *See* discussion *supra* Part IV.B.1a-b. Although collectors may not continue to contact consumers via social networking sites without express permission, they may utilize any location information found to pursue collections communication telephonically.

Because the CFPB will have rule-making authority, it will be able to readily address new forms of technological communications as they arise.[149] Nonetheless, if future legislation shifts authority regarding the FDCPA away from the CFPB or at a minimum eliminates the CFPB's rule-making capabilities,[150] such a blanket provision regarding future technologies in the FDCPA would eliminate a repeat of the problem that the FTC has faced in dealing with a consumer financial protection statute that was not forward thinking.[151] Further, providing a blanket provision for future technologies will ultimately demonstrate the FDCPA's acceptance that new technologies will be utilized in the future of the debt collection industry.

V. CONCLUSION

Now that the CFPB has taken control of all consumer protection statutes, it will have the opportunity to update and clarify the archaic FDCPA for the benefit of the three Cs. The CFPB will resolve both the voice message and social networking contact issue by determining that contacts through any medium by collectors to consumers are communications when the ultimate goal is to encourage future discussions of the consumer's debt. Next, the CFPB will provide clarity on both collectors' and consumers' rights to any court faced with a FDCPA communications dispute by specifying how collectors may communicate with consumers subsequent to determining that a contact is a communication. Ultimately, by including these new communications guidelines in FDCPA law, the CFPB will provide the three Cs the clarity it needs to know, follow, and enforce this debt collection law in a technologically evolving society.

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149. Pub. L. No. 111-203, Tit. X, § 1011-18, 124 Stat. 1376 (2010); *see supra* text accompanying note 20 (providing summary of CFPB rule-making authority).

150. Since Dodd-Frank has shifted authority over the FDCPA from the FTC to the CFPB, we cannot simply assume that another transfer will not happen in the future nor can we assume that the CFPB rule-making authority over the FDCPA will remain absolute. *See, e.g.*, Phyllis Salowe-Kaye, *Republicans Seek to Handcuff Consumer Financial Protection Bureau*, NJ.COM (July 28, 2011, 7:06 AM), http://blog.nj.com/njv_guest_blog/2011/07/republicans_seek_to_handcuff_c.html (discussing Republican's staunch opposition to the power currently held by the CFPB that has led to their assertion that "they would not confirm any [CFPB director] nominee unless the bureau's powers [was] gutted.").

151. *See* F.T.C., COLLECTING CONSUMER DEBTS, *supra* note 3, at 36, 50-51 (noting that the FDCPA does not provide any information regarding future communications, so the FTC was in a difficult position in determining how communication technologies could be implemented into the debt collection law).