

**DEBT COLLECTORS DISGUISED AS FACEBOOK “FRIENDS”:
SOLUTIONS TO PREVENT VIOLATIONS OF THE FAIR DEBT
COLLECTION PRACTICES ACT ON SOCIAL MEDIA PLATFORMS**

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I. INTRODUCTION

Tosha Sohns, a debtor, claimed that Bramacint, LLC, a debt collector, was liable for violations of the Fair Debt Collection Practices Act and “for invasion of privacy by intrusion upon seclusion.”¹ The United States District Court for the District of Minnesota ultimately granted Sohns’s motion for summary judgment against Bramacint, LLC for the reasons set forth below.²

In 2006, Tasha Sohns negotiated a consumer credit transaction with Chrysler Financial for a 2005 Chrysler Sebring.³ In 2008, Sohns started to miss her payments, so Chrysler hired Bramacint, LLC to collect the debt from Sohns.⁴ On February 16, 2009, Vanessa Hummel, a Bramacint employee, called Sohns’s cell phone using “caller ID spoofing.”⁵ This practice allowed Hummel to call Sohns from a phone number that appeared on Sohns’s caller ID as

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1. Sohns v. Bramacint, LLC, No. 09-1225, 2010 WL 3926264, at *1 (D. Minn. Oct. 1, 2010); see also Brian Sullivan, *Debt Be Not Proud: Unpunctual Payors Bristle at Collectors’ Tacky Tactics*, 97 A.B.A. J., July 2011, at 71.

2. *Sohns*, 2010 WL 3926264, at *3.

3. *Id.* at *1.

4. *Id.*

5. *Id.*

Sohns's mother-in-law's phone number.⁶ During her deposition, Hummel explained that she did this so that Sohns would answer the call.⁷ Hummel also explained that the call with Sohns involved Hummel disclosing that she was calling on behalf of the car company and proceeding to provide Sohns with the option of either paying the debt, surrendering the car, or resolving the issue through the legal system.⁸

In contrast, Sohns claimed that Hummel claimed to be Investigator Ortiz, refused to disclose her company affiliation, and threatened to involve the police.⁹ Sohns also claimed that Hummel referred to Sohns's daughter:

She then stated that she googled me, and I said go[od] for you. [I'm] glad that you googled me. What did you find out? She said that she went to my web site and saw that I had a daughter, a beautiful daughter. And I then said, what do my kids have anything to do with this conversation, about my Sebring? She then said, wouldn't it be terrible if something happened to your kids. Because you were getting hauled off by the sheriff's department.¹⁰

In response, Hummel admitted to mentioning Sohns's daughter, but claimed to do so only to compliment her MySpace photo. Hummel denied that she ever threatened Sohns.¹¹ When asked why she mentioned Sohns's daughter, Hummel replied:

Well, I mean, she did have a beautiful daughter. . . . And I did tell her that she had a beautiful daughter. And I was trying not to be threatening, but, you know, intimidating to her that I knew or that I had found her and I would find

6. *Id.*

7. *Id.*

8. *Id.* Hummel detailed the conversation as follows:

When she [Sohns] answered the phone, I asked if she was Tosha Traynor, and she asked who was calling. I identified myself as Investigator Ortiz, and I told her that I was calling on behalf of Chrysler Financial in reference to her 2005 Chrysler Sebring. I asked her if she was in possession of the vehicle, and she said yes. I advised her that Chrysler Financial was making legal demand for the vehicle back. I also advised her that she had one of two options, to pay the total amount due, which was roughly around \$14,500, or surrender the vehicle.

. . . .

Tosha Traynor's voice got a little louder, and she told me that we weren't getting the vehicle back. I advised her that if Chrysler Financial wanted to, they could go legal, which would involve Chrysler filing for a writ of replevin, and a sheriff would come to their residence and serve them.

Id.

9. *Id.* Sohns's testimony was quite different:

[Hummel] said, are you going to give us the car? I said, we have been telling you to come and pick it up, for several phone calls now. Nobody has come to get it. She started stating that if we did not release the call, the car, excuse me, that she was going to call the police or the sheriff's office and get an arrest warrant.

Id.

10. *Id.* at *2.

11. *Id.*

the car.¹²

This story is one of the many recent examples of a collection agency using social media to try to collect its debt.¹³ This Note explores the many ways in which debt collectors violate the Fair Debt Collection Practices Act ("FDCPA" or "Act")¹⁴ in their use of social media and proposes five primary strategies for preventing such violations: (1) social media sites should actively deter FDCPA violations,¹⁵ (2) state criminal online impersonation laws should prevent FDCPA violations,¹⁶ (3) the Consumer Financial Protection Bureau ("CFPB") should examine and rate debt collectors,¹⁷ (4) the FDCPA should be amended to apply to all types of communications and to allow for robust damages and penalties,¹⁸ and (5) the FTC should educate both consumers and debt collectors through innovative means in order to convey potential FDCPA violations through the use of social media.¹⁹

Debt collectors²⁰ use social media to track consumers' common names, unlisted phone numbers, and address changes in order to find out whether, despite unpaid debt,²¹ a consumer is making "unneeded purchases", as a photo of a fancy boat on the debtor's Facebook page might demonstrate.²² Once debt collectors retrieve this sort of information, they frequently use it to harass or

12. *Id.*

13. See Colin Hector, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 CAL. L. REV. 1601, 1603-04 (2011) (listing recent debt collectors' attempts to collect debts via social media).

14. Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 (2006). Although the FDCPA is the primary debt collection statute, there are a number of federal, state, and local laws that might apply to debt collection. A small subset of these laws include the Fair and Accurate Credit Transactions Act, Fair Credit Reporting Act, Fair Credit Billing Act, Equal Credit Opportunity Act and Regulation B, Gramm-Leach-Bliley Act and Regulation P, Federal Trade Commission Act, Federal Privacy Act of 1974, and the Electronic Communications Privacy Act. James D. Burchetta, *Email Communications in the Debt Collection Industry*, FTC, 4, <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00045.pdf> (last visited May 22, 2013).

15. See *infra* Part III.A.

16. See *infra* Part III.B.

17. See *infra* Part III.C.

18. See *infra* Part III.D.

19. See *infra* Part III.E.

20. The term "debt collector" typically includes debt collection agencies and collection law firms, "but . . . does not [usually] include creditors' in-house collectors." WILLIAM E. KOVACIC ET AL., FTC, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 5 (2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

21. The FDCPA defines the term "debt" as "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." 15 U.S.C. § 1692a(5) (2006).

22. See, e.g., Renée C. Lee, *Got Debt? Better Watch What You Post on Facebook: More Collection Agencies Turning to Social Networking Sites*, HOUS. CHRON. (July 21, 2010), <http://www.chron.com/life/mom-houston/article/Got-debt-Better-watch-what-you-post-on-Facebook-1716875.php>.

shame the consumer into paying their debts.²³ This Note analyzes a variety of unlawful methods that debt collectors use to retrieve debts owed, and how greater enforcement should be accomplished in order to uphold the purpose of the FDCPA. In Part II, this Note discusses the background to the debt collection process and the FDCPA. Part III explains why greater enforcement is needed and how it should be accomplished. Part III.A argues that social media sites should self-regulate FDCPA abuses by granting users easier access to report abuses and by resolving abuses that occur, whether by blocking the debt collector from Facebook or even suing the debt collector. Part III.B explains how state impersonation laws should apply to the social media and FDCPA contexts. Part III.C recommends that the CFPB examine and rate larger debt collectors and acknowledges the limitations of uncovering FDCPA violations on social media sites. Part III.D explains the ways in which the FDCPA should be amended. For instance, the statute should clarify that communication by “any medium” is prohibited. Part III.E proposes the need to educate consumers and debt collectors through modern, online mechanisms. Finally, Part IV provides a summary of the recommendations that will accomplish greater debt collector compliance with the FDCPA on social media.

II. BACKGROUND

In 2012, debt collection, a multibillion-dollar industry, impacted many consumers. Thirty million Americans, or fourteen percent of Americans with credit reports, had debt subject to the debt collection process.²⁴ The debt collection process starts when a company that issues credit to a consumer determines that the consumer’s account is delinquent and that the consumer should be contacted in efforts to collect the debt.²⁵ Initially, the company’s internal collections department might handle the debt collection process by contacting the debtor via phone calls and letters.²⁶ Alternatively, the company will hire a third-party debt collector, which, if successful, is usually paid approximately thirty percent of the amount recovered from the debtor.²⁷ If the debtor’s account is instead placed with a collection law firm, the firm may file a lawsuit against the debtor in order to collect.²⁸ These firms are the equivalent of collection agencies that contact the debtor via phone calls and letters in order to collect the debt.²⁹ In addition, these law firms are paid at either a contingency or hourly rate.³⁰ However, no matter who wears the hat of a debt collector, debt collectors may struggle to collect debts so they frequently resort to collection

23. *See id.*

24. Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65775-01, 65777 (Oct. 31, 2012) (to be codified at 12 C.F.R. pt. 1090).

25. KOVACIC ET AL., *supra* note 20, at 2.

26. *Id.*

27. *Id.* at 3.

28. *Id.*

29. *Id.*

30. *Id.*

methods that violate the FDCPA.³¹

While there are several federal and state laws that apply to debt collection practices, the FDCPA is the primary tool for protecting consumers in the debt collection process.³² The FDCPA was passed in order to prevent debt collection practices that include "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."³³

Further, the FDCPA applies only to third-party debt collectors.³⁴ Congress's rationale for this third-party application may be summarized as follows:

While unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial. Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them. Collection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means.³⁵

The FDCPA grants the Federal Trade Commission ("FTC") leading

31. See, e.g., *Sohns v. Bramacint, LLC*, No. 09-1225, 2010 WL 3926264, at *1-2 (D. Minn. Oct. 1, 2010).

32. See KOVAVIC ET AL., *supra* note 20, at 4.

33. *Id.* at 4-5 (quoting S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697); see 123 CONG. REC. 9113 (1977) (statement of Sen. John Tower).

34. See 15 U.S.C. § 1692a(6)(A) (2006). A "debt collector," as stated, is "any person [(1)] who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of . . . debts, or [(2)] who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." § 1692a(6). "Original creditors are . . . excluded . . . except when a creditor 1) uses a pseudonym which suggests that a third-party collector is involved in the collection process or 2) obtains the debt after default for the purpose of collection." William P. Hoffman, Comment, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 552 (2010); see § 1692a(4). "In addition, the statute only applies to debt [acquired through] purchases for personal, family, or household purposes; it does not cover debts incurred in one's business." Hoffman, *supra*, at 552. However, a creditor can fall within the purview of the FDCPA if it "uses a[] name other than his own which would indicate that a third person is collecting or attempting to collect such debts." § 1692a(6).

35. S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697. The legislative intent of the FDCPA shows that, at the time the Act was passed, Congress believed that third-party debt collectors dominated most of the abuses in the debt collection industry. See *id.*; see also Alan Farnham, "Sexual-Scandal Blackmail" Alleged to Collect on Car Loan, ABC NEWS (Dec. 6, 2011), <http://abcnews.go.com/Business/sexual-scandal-blackmail-alleged-collect-car-loan/story?id=15090837#.T2bwxmLcioe>. However, this might no longer be true. See Farnham, *supra*. Thus, an empirical study should be conducted to determine where most of the debt collection abuses are coming from. If original creditors are just as abusive as third-party debt collectors, original creditors should also fall under the realm of the FDCPA.

enforcement authority over the Act.³⁶ In general, the FTC works to protect consumers and maintain business competition.³⁷ Due to its broad powers, the FTC receives a variety of complaints, with grievances regarding debt collection ranking second out of the ten most common complaints received in 2010.³⁸

If an FTC investigation exposes potential FDCPA violations, FTC attorneys may sue in “federal court seeking preliminary and permanent injunctive relief that would prohibit the collector from continuing to violate the Act, award restitution to consumers, order the disgorgement of ill-gotten gains, and impose other ancillary relief under Section 13(b) of the FTC Act.”³⁹ An alternative is for the FTC to request that the Department of Justice sue in federal court to seek injunctive relief and a civil penalty on behalf of the FTC.⁴⁰

In 2010, the Dodd-Frank Act of 2010⁴¹ established the Consumer Financial Protection Bureau (“CFPB”) to prevent abusive and deceptive practices targeted at consumers and to protect consumers overall.⁴² Accordingly, the CFPB currently oversees the amending and clarifying of the FDCPA.⁴³

The FDCPA provides consumers⁴⁴ a private right of action in which they can sue individually or as part of a class action.⁴⁵ Individuals may be awarded statutory damages of up to \$1,000, and class action members may receive statutory damages “not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector.”⁴⁶ Consumers may be awarded any actual

36. §§ 1692(a), 1692l; KOVACIC ET AL., *supra* note 20, at 5. The FDCPA also grants seven other agencies FDCPA enforcement responsibility for entities within their jurisdictions. These agencies include: the Office of the Comptroller of the Currency, the Department of Transportation, the Department of Agriculture, the Federal Deposit Insurance Corporation (“FDIC”), the Federal Reserve Board, the National Credit Union Administration, and the Office of Thrift Supervision. § 1692(b).

37. *About the Federal Trade Commission*, FED. TRADE COMM’N, <http://ftc.gov/ftc/about.shtm> (last updated Jan. 5, 2012).

38. *FTC Releases List of Top Consumer Complaints in 2010*, FED. TRADE COMM’N, <http://ftc.gov/opa/2011/03/topcomplaints.shtm> (last updated June 24, 2011).

39. KOVACIC ET AL., *supra* note 20, at 5. The FTC Act grants the FTC the power to sue in federal district court in order to obtain a preliminary injunction against entities that violate the FDCPA. Federal Trade Commission (FTC) Act, 15 U.S.C. § 53(b)(2) (2006). The district court, after determining that the defendant was given notice and “weighing the equities and considering the Commission’s likelihood of ultimate success,” may decide that a temporary restraining order or a preliminary injunction should be granted if “such action would be in the public interest.” *Id.* The FTC Act also allows a federal district court to grant a permanent injunction. *Id.*

40. KOVACIC ET AL., *supra* note 20, at 5.

41. *See generally Administrative Law—Agency Design—Dodd-Frank Act Creates the Consumer Financial Protection Bureau*, 124 HARV. L. REV. 2123, 2123-24 (2011) (discussing the purpose of the Dodd-Frank Act and the creation of the CFPB).

42. *Id.*; *About Us*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited May 23, 2013).

43. *See* Consumer Financial Protection Act of 2010, Pub. L. No. 111-205, §§ 1002(12), 1022; Hector, *supra* note 13, at 1611.

44. The FDCPA defines a “consumer” as “any natural person obligated or allegedly obligated to pay any debt.” 15 U.S.C. § 1692a(3) (2006).

45. § 1692k.

46. § 1692k(a)(2)(B).

damages they incur.⁴⁷ Further, a court may order debt collectors to pay consumers' reasonable court costs and attorneys' fees.⁴⁸

"Since the enactment of the FDCPA, consumer debt has risen dramatically."⁴⁹ Along with this rise, consumer delinquency rates have also risen.⁵⁰ For instance, in January 2009, "[d]elinquencies on U.S. credit cards rose to record highs" because of the effect of the recession on consumers' finances.⁵¹ Therefore, it is no surprise that debt collection has become a billion-dollar industry in the United States.⁵²

As a result of this changing landscape and the invention of new technologies, there have been new methods introduced into the debt collection process to gain access to both the debtor and their information, including the use of social media.⁵³ The numbers show that the use of social media is growing at high levels.⁵⁴ From 2010 to 2011 alone, the number of registered users grew 138% for LinkedIn, 82% for Facebook, and 26% for Twitter.⁵⁵ Such tools have further transformed debt collection from a primarily local device to an easily accessible, worldwide tool.⁵⁶

Before engaging in a discussion of what debt collectors cannot do, it is important to clarify that debt collectors can likely comport with the FDCPA by exploring the Internet, including social media sites, to obtain information about a debtor.⁵⁷ For instance, a debtor will likely not violate the FDCPA by using social media to "skiptrace"⁵⁸ or locate debtors and to obtain credit report

47. § 1692k(a)(1).

48. § 1692k(a)(3).

49. KOVACIC ET AL., *supra* note 20, at 11.

50. *Id.* at 12.

51. Al Yoon, *US Credit Card Delinquencies at Record Highs – Fitch*, REUTERS (Feb. 4, 2009, 1:01 PM), <http://www.reuters.com/articlePrint?articleId=USN0428871920090204>.

52. KOVACIC ET AL., *supra* note 20, at 12.

53. *Id.* at 17.

54. See Jenise Uehara Henrikson, *The Growth of Social Media: An Infographic*, SEARCH ENGINE J. (Aug. 30, 2011), <http://www.searchenginejournal.com/the-growth-of-social-media-an-infographic/32788/>.

55. *Id.*

56. See KOVACIC ET AL., *supra* note 20, at 15-17; see also Hector, *supra* note 13, at 1603.

57. See Daniel Edelman, Principal, Edelman, Combs, Lattuner & Goodwin, Remarks at the Debt Collection 2.0 Technology Workshop of the Federal Trade Commission 272 (Apr. 28, 2011), available at <http://www.ftc.gov/bcp/workshops/debtcollectiontech/docs/transcript.pdf>

("I have little problem with the idea of doing an Internet search for information that anybody in the world can get about you. When you go beyond that . . . there's . . . a high degree of risk of [FDCPA] violation . . ."); Michelle Dunn, *Using Social Media in Collections*, available at <http://www.slideshare.net/MichelleDunn/using-social-media-in-collections> (last visited Feb. 12, 2012).

58. Black's Law Dictionary defines a "skiptracing agency" as a "service that locates persons (such as delinquent debtors, missing heirs, witnesses, stockholders, bondholders, etc.) or missing assets (such as bank accounts)." BLACK'S LAW DICTIONARY 1155 (8th ed. 2005). While certain types of skiptracing might be allowed, the FDCPA prohibits debt collectors from contacting third parties in the process. See 15 U.S.C. § 1692b (2006).

information.⁵⁹ The issue arises when the debt collector goes beyond this realm to initiate some sort of communication with the debtor or the debtor's contacts.⁶⁰

The ease of pursuing debtors via social media has resulted in debt collectors violating the FDCPA in various ways.⁶¹ For example, debt collectors often violate § 807(11)⁶² of the FDCPA by requesting that debtors "friend" or add them on Facebook⁶³ and other social media sites without fulfilling the requirement that debt collectors, in its "initial written communication" with the debtor, disclose that it is attempting to collect a debt.⁶⁴ The example in Part I of this Note would likely violate this provision.⁶⁵ Debt collectors also violate § 805(b)⁶⁶ of the FDCPA by communicating "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."⁶⁷ Section 805 will likely be violated when there are "general social media posts by a debt collector, such as on a debtor's Facebook Wall or a public Tweet, as the information would be viewable to third persons. However, it would not likely apply to private

59. *Collecting via Electronic Media: An Evolving Situation*, HEALTH CARE COLLECTOR, Mar. 2012, at 1. With respect to obtaining location information about the debtor, the debt collector may not communicate with third parties to obtain such information. § 1692b; *Collecting via Electronic Media: An Evolving Situation*, *supra*, at 5. One source also lists "[a]ccepting debtor payments" and "[a]ccessing consumer payments, with authorization for each specific payment or transaction" as permissible uses of social media for debt collectors. *Collecting via Electronic Media: An Evolving Situation*, *supra*, at 5. However, carrying out those activities on social media would likely violate the FDCPA. *See* § 1692. Among other requirements, in its initial written communication with the debtor, the debt collector needs to disclose that it is attempting to collect a debt. *See infra* notes 64-74 and accompanying text.

60. *See* Edelman, *supra* note 57, at 272; Dunn, *supra* note 57.

61. *See* Letter from Joel Winston, Assoc. Dir., Div. of Fin. Practices at Federal Trade Commission, to Charity A. Olson, Esq., Olson Law Group (Mar. 10, 2011), 2011 WL 895750, at *1. It is relatively simple for debt collectors to find debtors on social media in order to obtain enough information about the debtor to pursue them even after old debt:

Say you're John Smith, and a collector is after you for some disputed college-related debt from 15 years ago. You might be completely impossible to find. But if the collector were able to find you on MySpace, s/he would see what university you graduated from, and then know whether s/he had the right John Smith. Not only that, you might have your current job posted on your MySpace profile, along with your hometown and salary range. Suddenly, a debt collector goes from having an untraceable "John Smith" debt to having confirmation of your identity, your location, salary, job, etc.

Jeff Michael, *The Future of Debt Collection*, CREDIT/DEBT RECOVERY BLOG (Nov. 8, 2007, 10:48 PM), <http://credit.typepad.com/credit/2007/11/the-future-of-d.html>.

62. § 1692e(11).

63. This Note refers to Facebook both as its own entity and also as a representation of other social media sites.

64. § 1692e(11).

65. *See supra* notes 1-2 and accompanying text. Additionally, the debt collector who posed as a female in a bikini would also be likely to be a violation of this provision. *See* Hector, *supra* note 13, at 1603-04; *infra* note 110 and accompanying text.

66. § 1692c(b).

67. *Id.*

messages sent directly to a debtor.”⁶⁸ Debt collectors also violate § 804⁶⁹ by “communicating with third parties to obtain location information about debtors.”⁷⁰ Both of these sections, 805(b) and 804, are violated when a debt collector attempts to contact a debtor’s friends with respect to the debt, as was the case when debt collector Bramacint contacted Melanie Beacham’s Facebook friends regarding Beacham’s \$362 car loan debt.⁷¹ Additional potential FDCPA violations with respect to social media include “utilizing social media in a manner that constitutes a publication of a list of debtors who allegedly refuse to pay debts, in violation of Section 806(3) of the FDCPA,”⁷² and “communicating with debtors or third parties in a false, deceptive, or misleading way, in violation of Section 807 of the FDCPA.”⁷³ These provisions represent a fraction of the various ways in which debt collectors can and often do violate the FDCPA.⁷⁴ Thus, greater enforcement is needed.

III. GREATER ENFORCEMENT IS NEEDED

In 2010, the number of consumer complaints to the FTC about potential FDCPA violations increased to 108,997, reflecting twenty-one percent of all complaints sent directly to the FTC.⁷⁵ By comparison, in 2009, the number of consumer complaints was 88,326, or 16.8% of all complaints sent to the FTC.⁷⁶ These numbers represent only a small percentage of individuals contacted by debt collectors, as many consumers never file a complaint.⁷⁷

With the rise of social media sites,⁷⁸ debt collectors are commonly using these avenues to reach debtors, thereby violating the FDCPA.⁷⁹ The frequency

68. *Social Media and Debt Collection: The United States*, LAPIN LAW OFFICES BLOG, <http://lapinlawoffices.com/lapin-law-offices-blog/social-media-and-debt-collection-united-states> (last visited May 23, 2013); *Collecting via Electronic Media*, *supra* note 59.

69. § 1692b.

70. See Letter from Joel Winston to Charity Olson, *supra* note 61.

71. See Complaint at 2-3, *Beacham v. MarkOne Financial, LLC*, No. 10-12883CI-15 (Fla. Pinellas Cnty. Ct. Aug. 26, 2010). This initial complaint included allegations regarding the debt collector’s contact with the debtor’s Facebook friends. See *id.*; Hector, *supra* note 13, at 1603; Alexia Tsotsis, *Facebook Debt Collection Case Is Definitely a First*, TECHCRUNCH (Nov. 19, 2010), <http://techcrunch.com/2010/11/19/debtbook>.

72. § 1692d(3); Letter from Joel Winston to Charity Olson, *supra* note 61.

73. § 1692e; Letter from Joel Winston to Charity Olson, *supra* note 61.

74. See § 1692.

75. FED. TRADE COMM’N, ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT 5 (2011), available at <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf>.

76. *Id.*

77. *Id.*

78. See *supra* notes 53-59 and accompanying text.

79. See Hector, *supra* note 13, at 1603-04 (listing several instances of debt collectors using social media and noting that “[a] growing number of similar lawsuits and media stories reveal that debt collectors are increasingly turning to emerging technologies as a way to collect payments on defaulted debts”); Letter from Joel Winston to Charity Olson, *supra* note 61 (recognizing a debt collector’s possible FDCPA violation by friending debtors on social media sites, but declining to recommend enforcement action); Alexis C. Madrigal, *Facebook Warns Debt Collectors About Using Its Service*, ATLANTIC (Nov. 19, 2010, 3:54 PM),

of these violations through the use of social media is a serious issue that needs to be resolved.⁸⁰

A. *Social Media Sites Should Actively Deter FDCPA Violations*

Social media sites like Facebook, Twitter, LinkedIn, and Google+, among others, should make it easier for debtors to report FDCPA abuses. For example, while Facebook has a function for reporting abuses, it should include a specific category that includes an individual being contacted by a debt collector.⁸¹ Facebook already includes an extensive list of potential abuses one can report, including: imposter accounts, bullying, intellectual property infringements, unauthorized payments, advertising violations, pornography, scams, phishing and spam, violent content, hate speech, and the promotion of self-mutilation, eating disorders, or drug use.⁸² A debtor might easily report a debt collector who contacts the debtor in a way that falls under one of the proscribed categories (for example, a debt collector might use an imposter account to friend the debtor in efforts to collect the debt).⁸³ However, if a debt collector uses a nonimposter account to friend the debtor and later asks the debtor for payment of its debt, a debtor might not realize that this could constitute an abusive practice under the FDCPA.⁸⁴ Although Facebook includes a category

<http://www.theatlantic.com/technology/archive/10/11/facebook-warns-debt-collectors-about-using-its-service/66831> (describing how one debt collection firm contacted a debtor through her Facebook friends); Renée C. Lee, *An Unpaid Status: Debt Collectors Test Privacy Boundaries, Use Social Media to Expose, Find Credit Abusers*, HOUS. CHRON., July 22, 2010, at B1 (noting an increase in the number of debt collection firms that use social media to attempt to collect debts); Vanessa Romo, *Elusive Debtors Foiled by Their Social Media Sites*, NPR (July 12, 2010, 3:00 PM), <http://www.npr.org/templates/story/story.php?storyId=128464415> (discussing one debtor's experience where he was contacted by a debt collector the day after the debtor added his contact information to his Facebook account); Press Release, PRWeb, Increased Use of Social Media by Debt Collectors Reported (Nov. 30, 2011) (noting that New Horizon Credit Counseling, a nonprofit organization providing debt management services, found that debt collectors are increasingly using social media to reach New Horizon's clients).

80. See Press Release, PRWeb, *supra* note 79 (noting an increased use of social media by debt collectors and explaining that although not all of the complaints to the FTC "involve social media, the FTC received 140,036 complaints about third-party debt collectors and in-house collectors in 2010, more than any other specific industry").

81. See *How to Report Things*, FACEBOOK, <http://www.facebook.com/help/181495968648557> (last visited May 23, 2013) (listing several possible reasons for reporting an abuse).

82. See *Report a Violation*, FACEBOOK, <http://www.facebook.com/help/263149623790594/> (last visited May 23, 2013); *Facebook Community Standards*, FACEBOOK, <http://www.facebook.com/communitystandards> (last visited May 23, 2013).

83. See Tamara Lush, *Judge: Debt Agency Can't Contact Woman on Facebook*, WASH. POST (Mar. 9, 2011, 3:39 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/09/AR2011030903436.html>.

84. See Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692e(11) (2006) ("The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.").

for "bullying," a debtor will probably not be inclined to report an act by a debt collector as "bullying" when the debt collector fails to disclose the initial communication requirements under § 1692e(11).⁸⁵ While a Facebook user is free to report any general abuses,⁸⁶ the user might not know about the different ways in which the FDCPA deems an action by a third-party debt collector as "harassment" or "abuse."⁸⁷

Similarly, Twitter, LinkedIn, and Google+ all have general ways to report abuse.⁸⁸ Additionally, these social networking sites already include extensive lists of abuses, not including potential abuses by a debt collector, in order to inform their members of what could be considered abusive.⁸⁹ These sites should also include a specific category that addresses potential debt collection abuse to help address debt collectors' increasing use of social media.⁹⁰ While this is a specific category that might be addressed under an already existing category like "illegal activities" on Google+,⁹¹ debtors may not realize that the act of a debt collector contacting them on Facebook may be "illegal" pursuant to the FDCPA.⁹²

Additionally, there should be better regulation on social media sites. For example, Facebook and other sites could opt to prevent entities that identify themselves as collection agencies or as individual debt collectors from registering on Facebook. While this would be taking a proactive approach, collection agencies can easily choose not to identify themselves as such, so a more feasible approach would be to deactivate a profile that is verified as

85. *Id.*

86. See *How to Report Things*, *supra* note 81 (explaining how to report abuse).

87. §§ 1692-1692p.

88. Twitter includes a form for reporting general and specific abuses. *Twitter Help Center*, TWITTER, <https://support.twitter.com/forms/general> (last visited Apr. 27, 2013). LinkedIn includes a form for reporting only general abuses. *Contact Us*, LINKEDIN, <https://help.linkedin.com/app/ask/> (last visited May 23, 2013). Google+ does not include a particular reporting form, but it instead allows users to click on the "abusive" content itself in order to report it. *Report a Photo or Video for Abuse*, GOOGLE+, <http://www.google.com/support/plus/bin/answer.py?hl=en&answer=1047388&topic=1698318> (last visited May 23, 2013).

89. See *How to Report Violations*, TWITTER, <http://support.twitter.com/groups/33-report-a-violation/topics/122-reporting-violations/articles/15789-how-to-report-violations> (last visited May 23, 2013) (listing brand and trademark, breach of privacy, child sexual exploitation, harassment and violent threats, and impersonation as categories of its policy violations); *User Agreement*, LINKEDIN, <http://www.linkedin.com/legal/user-agreement> (last visited May 23, 2013) (listing harassment, misrepresentations, the posting of objectionable content, and intellectual property infringement among its policy violations); *Policies and Principles*, GOOGLE+, <http://www.google.com/intl/en/+/policy/content.html> (last visited May 23, 2013) (listing illegal activities, malicious products, hate speech, personal and confidential information, account hijacking, child safety, spam, ranking manipulation, gambling, sexually explicit material, violent or bullying behavior, and impersonation or deceptive behavior as categories of its policy violations).

90. See KOVACIC ET AL., *supra* note 20, at 14-15.

91. Alternatively, Google+ should take a broader approach and use the term "harassment" for debtors to report abuses, which would include debt collection on social media. See *Policies and Principles*, *supra* note 89.

92. See §§ 1692-1692p.

belonging to a debt collector.⁹³ However, debt collectors are arguably entitled to engage in social media just like other Facebook members and companies so long as these entities do not use their profiles to contact debtors about a debt, in violation of the FDCPA.⁹⁴ This requires balancing the interest in debtor privacy with the interest in allowing debt collectors to have Facebook profiles. Overall, both these interests are important because Facebook's purpose is to have a large social networking space, and a debt collection agency could have reasons for creating a Facebook profile that are unrelated to debt collection, like promoting its business.⁹⁵ Therefore, Facebook should wait until it is informed about a debt collector that engaged in some questionable activity that could violate the FDCPA before it unduly burdens debt collectors by preventing them from having Facebook profiles.

Social media sites can also self-regulate by going after the "real bad guys publicly."⁹⁶ Facebook recently supported this principle by suing spammers in January 2012.⁹⁷ The spammer-marketing firm engaged in a practice of adding links to user homepages and making it appear as though the user "liked" the item in order to make users click on the links, which would then take them to external sites.⁹⁸ Facebook sued the spammer for "spreading spam through misleading and deceptive tactics."⁹⁹ Further, in support of Facebook's action, the State of Washington filed a complaint against the spammer.¹⁰⁰ In light of these lawsuits, social media sites might reasonably decide to pursue legal action against debt collectors that target social media member debtors through deceptive means in violation of the FDCPA.¹⁰¹ While there are numerous

93. In this scenario, a Facebook member might report a debt collector's Facebook profile, and Facebook should deactivate the profile if there is enough information on that profile (or in a Facebook interaction between the debtor and the debt collector) to suggest that the profile belongs to a debt collector.

94. See Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p (2006).

95. See *About*, FACEBOOK, <https://www.facebook.com/facebook/info> (last visited May 23, 2013) ("Facebook's mission is to give people the power to share and make the world more open and connected."); Mike Ginsberg, *Why Debt Collection Firms Should Join the Social Media Soiree*, INSIDEARM.COM (Nov. 9, 2011), <http://www.insidearm.com/daily/debt-collection-news/accounts-receivables-management/why-debt-collection-firms-should-join-the-social-media-soiree/> (listing reasons outside of collecting a debt from a debtor for why a debt collector should use social media, such as finding out about general legal issues surrounding the industry).

96. JOHN LOVETT, SOCIAL MEDIA METRICS SECRETS 309 (Carol Long et al. eds., 2011).

97. *Id.*; *Facebook Sues Alleged Clickjacking Spammer Sparking Row*, BBC NEWS (Jan. 27, 2012, 5:04 PM), <http://www.bbc.co.uk/news/technology-16755434>.

98. *Facebook Sues Alleged Clickjacking Spammer Sparking Row*, *supra* note 97.

99. *Id.* Facebook compared its "efforts to an 'arms race'" and claimed that it was determined to pursue "bad actors." *Id.*

100. *Id.* ("We don't 'like' schemes that illegally trick Facebook users into giving up personal information or paying for unwanted subscription services through spam . . ."); Complaint for Injunctive and Additional Relief Under the Can-Spam Act, the Unsolicited Commercial Email Act, and the Consumer Protection Act, *State v. Adscend Media, LLC*, No. 12-cv-00139 (W.D. Wash. Jan. 26, 2012), 2012 WL 256181.

101. *Facebook Sues Alleged Clickjacking Spammer Sparking Row*, *supra* note 97; see also Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 (2006).

considerations that go into deciding whether a major company like Facebook will pursue legal action,¹⁰² social media sites are able to offer a potential solution to FDCPA violators; where a debt collector is targeting users by engaging in illegal activities like violating the FDCPA, social media sites could potentially sue the debt collector.¹⁰³

The various ways in which social media sites can help users regulate their privacy settings would help not only debtors and the exponentially growing online-user community,¹⁰⁴ but also social media companies as well.¹⁰⁵ Because many users are skeptical of social media sites' use of their private information, the result could realistically be a decrease in the use of sites that disregard privacy concerns, and a greater use of the sites that respond to users' legitimate privacy concerns.¹⁰⁶ Therefore, it behooves social media sites to gain user trust by assuming that users prefer to start with the maximum possible privacy settings and allowing users to easily control those settings.¹⁰⁷

*B. State Criminal Impersonation Laws Should Prevent FDCPA
Violations on Social Media*

The enforcement of the FDCPA on social media platforms will be stronger if states enact laws that target online impersonators.¹⁰⁸ In February 2011,

102. In the example of Facebook suing the spammer, the spammer made about \$1.2 million per month. *Facebook Sues Alleged Clickjacking Spammer Sparking Row*, *supra* note 97. The spammer's high revenue was likely due to targeting a large number of Facebook users, which made the pursuit of this lawsuit worthwhile for Facebook. *Id.*

103. *Id.*

104. See Henrikson, *supra* note 54. In addition to the high increases in membership, Facebook had "[m]ore than a billion monthly active users" and "618 million daily active users on average" as of December 2012. *Key Facts*, FACEBOOK, <http://newsroom.fb.com/key-facts> (last visited May 23, 2013). Furthermore, Google found that Facebook had over 880 million unique users in July 2011, making Facebook the most-visited website on the Internet. *The 1,000 Most-Visited Sites on the Web*, GOOGLE DOUBLECLICK AD PLANNER (July 2011), <http://www.google.com/adplanner/static/top1000/>.

105. See Christina Bonnington, *Apple Says Grabbing Address Book Data Is An iOS Policy Violation*, WIRED (Feb. 15, 2012, 3:34 PM), <http://www.wired.com/gadgetlab/2012/02/apple-responds-to-path/>. The author describes privacy as "a growing concern" in the social media realm and notes that

we're not so ready to share our friends' contact information
. . . [W]e're scared of apps that track our every movement Apps that use location data now require a user opt-in.

Legislators have also stepped in to demand clearer transparency from Apple. House Energy and Commerce Committee Chairman Henry Waxman and Commerce Manufacturing and Trade Subcommittee Chair G.K. Butterfield wrote Apple CEO Tim Cook to express their concerns

Id.

106. See *id.*; see also LOVETT, *supra* note 96, at 310-12 (advocating for specific ethical standards of private user data because "[a]ny individual or organization that partakes in digital data collection that includes any personally identifiable information treads a dangerous line of trust with end users").

107. See LOVETT, *supra* note 96, at 310-12.

108. See *California Law Makes Online Impersonation A Crime*, INTERNET CRIM.

California introduced such a law to “criminaliz[e] the practice of impersonating someone else online.”¹⁰⁹ This law could have the direct effect of curbing FDCPA violations on social media because debt collectors have tended to resort to impersonating others online in order to obtain information and payment from the debtor.¹¹⁰ However, the California law requires proof that the impersonator intended to “harm[], intimidat[e], threaten[], or defraud[] another person.”¹¹¹ This is inline with the legislative intent of the law to prevent cyberbullying.¹¹² If this law were invoked in the case of an FDCPA violation with respect to social media, it seems that an impersonating debt collector could escape liability by arguing that it never had any malicious intent to defraud since it only intended to obtain the repayment of its debt. Therefore, for such a law to be applied against debt collectors, the intent requirement should be adjusted to encompass the act of impersonating someone with the intent to trick an individual for the purpose of obtaining certain information, such as information used to collect a debt.

C. *The CFPB Should Examine and Rate Debt Collectors for FDCPA Compliance*

As a result of a regulation that the CFPB proposed, which became effective in January 2013, the CFPB is responsible for examining the books of large-sized debt collectors for potential FDCPA violations.¹¹³ Findings of FDCPA violations could “lead to enforcement action.”¹¹⁴ The regulation includes under its purview companies that make more than \$10 million in annual revenue.¹¹⁵ Thus, it covers 175 debt collectors, which accounts for four percent of all debt collection companies and make up sixty-three percent of the annual revenue of all debt collectors in the United States.¹¹⁶ This is a positive step that could help prevent larger debt collectors from using social media to collect debts. On the

IMPERSONATION LAWS (July 11, 2011), <http://www.internetimpersonationlaws.blogspot.com/2011/07/california-law-makes-online.html> (describing California’s new anti-impersonation law).

109. *Id.*; CAL. PENAL CODE § 528.5 (West 2011).

110. *See supra* notes 1-24 and accompanying text. In another example, a debt collector posed as a woman in a bikini in order to friend the debtor. Lush, *supra* note 83. The debtor realized that the woman was actually a debt collector in disguise when he received the following message on his Facebook “wall” for everyone with access to his wall to view: “Pay your debts, you deadbeat.” *Id.*

111. *California Law Makes Online Impersonation A Crime, supra* note 108.

112. *Id.*

113. 12 C.F.R. § 1090 (2013); Carter Dougherty, *CPFB to Oversee Debt Collectors, Credit Bureaus*, BLOOMBERG (Feb. 16, 2012, 1:53 PM), <http://www.bloomberg.com/news/2012-02-16/consumer-bureau-to-supervise-debt-collectors.html>. Prior to enacting the regulation, the CFPB director, Richard Cordray, stated, “Our proposed rule would mean that those debt collectors and credit reporting agencies that qualify as larger participants are subject to the same supervision process that we apply to the banks.” Dougherty, *supra*. For the first time, the proposal was to apply at the federal level to debt collectors including “Asset Acceptance Capital Corp. (AACC), Portfolio Recovery Associates Inc. (PRAA) and Encore Capital Group Inc. (ECPG).” *Id.*

114. Dougherty, *supra* note 113.

115. *Id.*

116. *Id.*

other hand, it is difficult to envision situations where searching a company's books would reveal an FDCPA violation through its use of social media or any other type of "communication" with the debtor.¹¹⁷ Still, there should be checks on these companies because some violations might clear.¹¹⁸ One way that examining a company could reveal FDCPA noncompliance is to review records kept about debt, how certain debts were collected, or how the company plans to collect those debts. The CFPB should then ask these businesses detailed questions about their practices to ensure compliance. Although this process will likely pass over debt collectors who fail to disclose hints of noncompliance, it is a start.

In light of this regulation that has the CFPB examine the books of debt collectors, a solution to help prevent FDCPA violations through social media is to also examine the books of larger debt collectors on a random basis. While the regulation covers debt collection companies that make more than ten million dollars per year,¹¹⁹ companies that make slightly less should also be examined from time to time. This will help put more debt collection companies on notice that their compliance is expected and may be checked at any time.

Small debt collectors should also be examined, but it would probably be costly to do so because of the high number of small debt collectors in existence.¹²⁰ Furthermore, there are concerns that examining small debt collector businesses could negatively impact those businesses.¹²¹ For instance, additional reporting requirements that the CFPB imposes could cause a financial burden on small businesses because of their size and financial constraints.¹²² Still, the CFPB has yet to "vet the potential impact of regulations on companies with less than \$7 million in receipts."¹²³

In order to accurately figure out how to better regulate debt collectors who violate the FDCPA on social media, it would be helpful to conduct an empirical study about which debt collectors are named in consumer complaints and what their sizes are. If a significant number of complaints are about small debt collectors, the CFPB should consider examining a few of those businesses as well.

The regulation also includes compliance "ratings" of nonbanks.¹²⁴ This

117. See 15 U.S.C. § 1692a(2) (2006).

118. See Dougherty, *supra* note 113.

119. 12 C.F.R. § 1090 (2013).

120. See Dougherty, *supra* note 113 (noting that the proposal would cover only four percent of debt collectors, which account for sixty-three percent of the debt collection industry's total annual revenue).

121. See *id.* ("Republicans have criticized the potential impact of consumer bureau regulations on small business.").

122. See Rutheford B. Campbell, Jr., *Regulation A: Small Businesses' Search for "A Moderate Capital,"* 31 DEL. J. CORP. L. 77, 99 (2006) (describing how small businesses face impediments because of their small capital and that "[r]egulators significantly exacerbate these problems by imposing rules that foreclose a broad and efficient search for capital by small businesses").

123. Dougherty, *supra* note 113.

124. Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65,775, 65,776 (Oct. 31, 2012) (to be codified at 12 C.F.R. pt. 1090).

plan includes debt collection companies and will help FDCPA compliance because ratings could “matter a lot to these entities, particularly the publicly traded ones because it might affect their ability to effectuate transactions.”¹²⁵ The issue then becomes how these ratings will be used. These ratings should be transparent and available to consumers, perhaps on the CFPB website itself. The CFPB should also include information about how it arrived at its ratings so that the public can understand the reasons behind the numbers. This should also make debt collection agencies care more about earning good ratings because the public will have more insight into the ratings’ meanings.

The CFPB has already begun to demonstrate its intention to strongly regulate large debt collectors.¹²⁶ In October 2012, it declared a \$112.5 million settlement with American Express due to claims of unfair debt collection.¹²⁷ Although public reaction to the CFPB’s new role after the regulation’s enactment is not yet readily available, the CFPB received a number of public comments pre-enactment that could mirror postenactment concerns.¹²⁸ Some comments criticized the CFPB for its supervisory role.¹²⁹ According to one commenter, this supervisory role, unlike a “rulemaking” role, will ignore the costs, benefits, and effects the regulation.¹³⁰ Other comments focused on the futility of the proposed regulation, arguing that debt collectors are already aware of the FDCPA and have effective compliance mechanisms in place.¹³¹ However, other comments claimed that many debt collectors would need to set up new, costly mechanisms to ensure compliance.¹³²

D. The FDCPA Should Be Amended to Apply to All Forms of “Communications”

Another way to increase compliance with the FDCPA is to amend the statute itself. However, the statute need not be amended to include a specific term such as “social media.” Although the FDCPA was enacted in 1977, predating social media, the FDCPA logically applies to social media as well.¹³³ Both a plain reading of the FDCPA statute and the case law on voicemails supports this position, but both should be clarified to show that the FDCPA

125. Dougherty, *supra* note 113 (“There could be quite a bit of power to this supervisory authority.”); *see* Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. at 65,776.

126. Carter Dougherty, *Debt Collectors Posing As Facebook Friends Spur Watchdogs*, BLOOMBERG (Jan. 24, 2013, 5:37 PM), <http://www.bloomberg.com/news/2013-01-24/facebook-friends-fronting-debt-collectors-draw-u-s-regulation.html>.

127. *Id.*

128. Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. at 65,795-65,796.

129. *Id.* at 65,795.

130. *Id.*

131. *Id.*

132. *Id.*

133. *See* 15 U.S.C. § 1692a(2) (2006).

prohibits communicating with a debtor through social media.¹³⁴

Section 1692a(2) provides that "[t]he term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium."¹³⁵ The statute does not need to be amended to specifically include "social media," but it should be amended to emphasize, in all of its provisions that mention forms of "communications" or "conduct," that it prohibits "communication" regarding a debt to *any* person through *any medium* as § 1692a(2) provides.¹³⁶ For example, § 1692d prohibits a wide range of "conduct" that may involve harassment and abuse,¹³⁷ but it does not mention the term "communication" as is mentioned throughout other parts of the statute, such as § 1692c.¹³⁸ Therefore, a debt collector might argue that communicating with a debtor via Facebook by sending them several messages would not violate § 1692d, which does not mention "communication," a term that would include social media.¹³⁹ Further, § 1692d includes a provision that prohibits contacting a debtor specifically by *phone*: "Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse; or harass any person at the called number."¹⁴⁰ It goes on to prohibit "the placement of telephone calls without meaningful disclosure of the caller's identity."¹⁴¹ While it may be inferred that what was meant by a "telephone" is now analogous to social media, this "Harassment or Abuse" section should be updated to import the term "communication" so that it clearly applies to social media.

Moreover, § 1692d(5) and § 1692d(6) should be updated to exclude the term "telephone" and replace it with "any form of communication" or "communication by any medium."¹⁴² This would help clarify that communication by any medium is prohibited, not just communication by phone.¹⁴³ Thus, these changes would clarify that the FDCPA protects debtors in all contexts of potential abuse by third-party debt collectors, including the social media context. In sum, while the FDCPA in its current form prohibits the use of social media because of its broad definition of "communication," the statute should be amended to make it clearer that such behavior constitutes a violation,

134. See Hector, *supra* note 13, at 1612-17 (describing the relevant case law regarding voicemails, which should also apply to the social media context).

135. § 1692a(2).

136. See § 1692d ("A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."); *cf.* Hector, *supra* note 13, at 1626-27 (recommending that the term "communication" in the FDCPA be redefined as "any contact with a debt collector that relates to the collection of the debt or seeks to induce future action" (emphasis omitted)).

137. § 1692d.

138. See § 1692c (prohibiting certain types of communication in connection with debt collection).

139. See § 1692d.

140. § 1692d(5).

141. § 1692d(6).

142. See § 1692a(2).

143. See *id.*; § 1692d.

even when not by telephone.¹⁴⁴

Even with the adoption of these amendments, a debt collector might argue that while “friending” someone on Facebook is a form of communication, this act alone does not convey information regarding a debt as § 1692a(2) requires. A counterargument to this is that a debt collector who tries to “friend” its debtor is at least indirectly communicating to the debtor that a debt is outstanding.¹⁴⁵ To attempt to resolve this ambiguity, we should look to the case law closest to the present issue.

The voicemail cases on the subject should, for the most part, apply to the social media context.¹⁴⁶ These cases were broadly construed and held that a voicemail is a form of communication subject to FDCPA disclosure provisions.¹⁴⁷ In the most notable voicemail case, *Foti v. NCO Financial Systems Inc.*, the court held that the voicemail at issue was a “communication” under the FDCPA.¹⁴⁸ The court reasoned that the FDCPA’s definition of “communication” is very broad.¹⁴⁹ The court also looked to the FDCPA’s legislative intent to prevent abusive and deceptive debt collection practices, which calls for a broad reading of a “communication.”¹⁵⁰ In further support of this position, the court looked to several opinions that have supported a broad construction of what is considered a “communication” and issued a warning to debt collectors: “[I]t does not seem unfair to require that one who goes deliberately close to an area of proscribed conduct shall take the risk that he may cross the line.”¹⁵¹

The *Foti* court also examined the debt collector’s purpose in leaving the voicemails, which was to initiate the first step in reaching the debtor by leaving the debtor a phone number to call back.¹⁵² The court employed this rationale to reject the debt collector’s argument that the voicemails were not “a communication” because they lacked direct or indirect information regarding a debt.¹⁵³ In further support of this broad view, courts have held that a

144. See Hector, *supra* note 13, at 1620-21 (recognizing that “where collectors use new technologies to prompt consumers into discussing a putative debt with them, courts likely would consider these messages a ‘communication’ under the current FDCPA framework”).

145. See § 1692a(2).

146. See Hector, *supra* note 13, at 1612-14; Mark v. J.C. Christensen & Assocs., No. 09-100 ADM/SRN, 2009 WL 2407700, at *2-3 (D. Minn. Aug. 4, 2009) (noting that a majority of courts have broadly construed the definition of an FDCPA “communication”).

147. See Hector, *supra* note 13, at 1612.

148. 424 F. Supp. 2d 643, 654-59 (S.D.N.Y. 2006); Hector, *supra* note 13, at 1614 (“*Foti v. NCO Financial Systems* . . . has become the most prominent of the FDCPA voicemail cases.”).

149. *Foti*, 424 F. Supp. 2d at 655.

150. *Id.* at 655, 657.

151. *Id.* at 659 (quoting *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir. 1996)); see *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965); see also *Blair v. Sherman Acquisition*, No. 04-C-4718, 2004 WL 2870080, at *2 (N.D. Ill. Dec. 13, 2004) (“Because it is designed to protect consumers, the FDCPA is, in general, liberally construed in favor of consumers to effect its purpose.”).

152. *Foti*, 424 F. Supp. 2d at 655-56.

153. See Hector, *supra* note 13, at 1614-16; *Foti*, 424 F. Supp. 2d at 657-58 (noting the role of

“communication need not itself be a collection attempt; it need only be ‘connect[ed]’ with one.”¹⁵⁴

This broad reading of the term “communication” makes it likely that a debt collector who tries to “friend” or to send a message to a debtor on Facebook or other social media tool runs a high risk that it will violate the FDCPA.¹⁵⁵ This would probably still be the case even if a debt collector uses the defense that it was exempt from making an initial disclosure because it did not contact the debtor about a specific debt under § 1692e(11).¹⁵⁶ The *Foti* court noted that allowing for such a defense would create a “significant loophole” that is inconsistent with the purpose of the FDCPA:

[A] narrow reading of the term “communication” to exclude instances such as the present case where no specific information about a debt is explicitly conveyed could create a significant loophole in the FDCPA, allowing debtors to circumvent the § 1692e(11) disclosure requirement, and other provisions of the FDCPA that have a threshold “communication” requirement, merely by not conveying specific information about the debt. In fact, under Defendant’s interpretation of “communication,” a debt collector could call regularly after the thirty-day validation notice is sent, and not be subject to § 1692e(11)’s requirement so long as the message did not convey specific information about the debt. Such a reading is inconsistent with Congress’s intent to protect consumers from “serious and widespread” debt collection abuses.¹⁵⁷

Thus, the various factors announced in *Foti* and its similar line of cases would probably apply to new technologies beyond the voicemail context.¹⁵⁸ The overarching point that these courts convey is that consumer protection is primary, so the term “communication” will be read broadly.¹⁵⁹

However, a small number of courts have held that voicemails that fail to specify the subject of the debt are not an FDCPA “communication.”¹⁶⁰ This

the FDCPA’s legislative intent in defining “communication”).

154. *Hagy v. Demers & Adams, LLC*, No. 2:11-cv-530, 2011 WL 6091797, at *6 (S.D. Ohio Dec. 7, 2011) (“[F]or a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor. A letter that is not itself a collection attempt, but that aims to make such an attempt more likely to succeed, is one that has the requisite connection.” (internal citations and quotation marks omitted)).

155. *See Hector*, *supra* note 13, at 1620-21.

156. *Foti*, 424 F. Supp. 2d at 657-58.

157. *Id.*

158. *See id.*; *Ramirez v. Apex Fin. Mgmt., LLC*, 567 F. Supp. 2d 1035, 1042 (N.D. Ill. 2008) The *Ramirez* court reasoned that exempting voicemails that fail to mention a specific debt from the FDCPA would allow collectors to “continue calling debtors after having received a ‘cease and desist’ letter, so long as they avoid mentioning the underlying debt, which would absolve them of liability. Such a result would be in grave conflict with the standards that underlie the FDCPA.” *Id.*; *see also Edwards v. Niagara Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008) (noting that exempting unspecific voicemails that only made general references such as an “important matter” would “provide a loophole for debt collectors”).

159. *See Ramirez*, 567 F. Supp. 2d at 1042.

160. *See Biggs v. Credit Collections, Inc.*, No. CIV-07-0053-F, 2007 WL 4034997, at *4 (W.D. Okla. Nov. 15, 2007) (holding that a general voicemail that only provided the caller’s name and asked the alleged debtor to call a particular number was not an FDCPA “communication”); *Koby v.*

disagreement between the courts might be clarified in future opinions by reviewing the language of § 1692e(11) and considering an amendment to that provision. Currently, it provides, in part, that certain tactics by debt collectors will constitute a “false, deceptive, or misleading representation”:

The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose¹⁶¹

This provision seems to require some sort of initial disclosure by the debt collector when communicating with the debtor, but to provide further clarification, this provision should be amended. Given the development of new technologies since the enactment of the statute, this requirement is outdated because it envisions only communications that are “written” or “oral.”¹⁶² A broader, clearer alternative to this provision might be:

The failure to disclose in the initial communication, *whether or not the debt collector or its agent specifically asks for the payment of debt*, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

In this proposed provision, the “written” and “oral” requirements are omitted to allow for the changes in technology. For example, if a debt collector were to “friend” someone on Facebook, under this new provision it would be clearer that the debt collector would need to meet the disclosure requirements of § 1692e(11). Also, to avoid the issue in the voicemail cases discussed above, this new provision clarifies that the debt collector needs to make the necessary disclosures regardless of whether it makes a specific reference to a debt. This would result in an outcome that is more consistent with the legislative intent of the FDCPA. The focus would be more on the debt collector’s intent and less on whether the debt collector created a loophole by purposely failing to mention the specific debt (e.g., by leaving a message that only asks the debtor to call

ARS Nat'l Servs., Inc., No. 09-cv-0780, 2010 WL 1438763, at *4 (S.D. Cal. Mar. 29, 2010) (finding that the voicemail, which only asked the debtor to return the call, was not a “communication” because it did not provide any direct or indirect information regarding the debt). However, such cases have been criticized by a number of courts. *See, e.g.*, Mark v. J.C. Christensen & Assocs., No. 09-100, 2009 WL 2407700, at *2-3 (D. Minn. Aug. 4, 2009) (criticizing the *Biggs* holding and noting that most courts have rejected that line of reasoning in favor of broadly construing an FDCPA “communication”); *Edwards*, 586 F. Supp. 2d at 1359 (“[T]he majority of courts that have addressed this issue have held that a phone message referencing an ‘important matter’ or similar language may be considered a ‘communication’ under the FDCPA.”); *Wideman v. Monterey Fin. Servs.*, No. 08-1331, 2009 WL 1292830, at *2 (W.D. Pa. May 7, 2009) (declining to follow the *Biggs* line of cases in favor of those that uphold a broad definition of “communication”); *Krug v. Focus Receivables Mgmt., LLC*, No. 09-4310, 2010 WL 1875533, at *2 n.3 (D.N.J. May 11, 2010) (noting *Biggs* “fail[ed] to address prior cases holding otherwise even though the opinion suggests that the parties cited those cases”); *Hector*, *supra* note 13, at 1615 & nn. 87-89.

161. 15 U.S.C. § 1692e(11) (2006).

162. *Id.*

them back).¹⁶³

Additionally, the FDCPA should include more robust penalties for proven violations.¹⁶⁴ Currently, the FDCPA provides a private right of action where individual consumers can recover not more than \$1000, or in the case of a class action, the class receives the lesser of \$500,000 or one percent of the debt collector's net worth.¹⁶⁵ These figures have not been adjusted for inflation in over thirty years.¹⁶⁶ These amounts should be updated in order to incentivize debtors and their attorneys to bring such actions against creditors.¹⁶⁷ This view is reflected in some of the telephone interviews that Professors Mann and Porter conducted with several attorneys:

[E]ven if there are violations, I mean[,] what are your actual damages in most of these cases[,] and there really aren't any . . . [C]lients don't ever really want to pursue those [FDCPA actions] if you actually explain to them that there [are] not really any damages at the end of the day . . . [S]o why do they want to go through all that trouble if at the end of the day they do not get anything from it[,] and most of them say[,] "I don't want, you know, I don't want the hassle. I just want it to stop."¹⁶⁸

A related solution is to include the possibility of additional damages, such as punitive damages, within the FDCPA statute.¹⁶⁹ Overall, the money damages available should send a powerful message to both debtors and debt collectors that protecting consumers from FDCPA violations is a priority.¹⁷⁰

E. Educating Consumers and Debt Collectors

A broader solution to help inform consumers about social media debt collection should involve educating consumers through online resources, including social media itself.¹⁷¹ Making a concerted effort to educate

163. See *supra* notes 148-54, 160 and accompanying text (noting cases where voicemails were deemed to be a "communication" and not a "communication" under the FDCPA depending on the debt collector's unspecific voicemail asking the debtor to call them back).

164. See KOVACIC ET AL., *supra* note 20, at viii-ix; Matthew R. Bremner, Note, *The Fair Debt Collection Practices Act: The Need for Reform in the Age of Financial Chaos*, 76 BROOK. L. REV. 1553, 1589-90 (2011).

165. § 1692k(a).

166. See KOVACIC ET AL., *supra* note 20, at viii.

167. Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 335-36 (2010).

168. *Id.* at 335-36.

169. See Bremner, *supra* note 164, at 1589.

170. *Id.* ("[A] punitive damages provision would have many positive reformatory effects on the FDCPA, including: acting as a deterrent to consumer abuse; providing an incentive for talented attorneys to compete for and litigate the most egregious abuses of the FDCPA; and giving judges and juries more discretion to enforce the FDCPA by punishing the worst offenders in proportion to the egregiousness of the offense. Perhaps most importantly, increased sanctions for the most egregious violations of the FDCPA would reduce the profit motives underlying the industry's worst practices.").

171. See FED. TRADE COMM'N, *supra* note 75, at 13-14; Matthew W. Ludwig, Note, *Abuse, Harassment, and Deception: How the FDCPA Is Failing America's Elderly Debtors*, 16 ELDER L.J. 135, 163-64 (2008) (listing the online financial literacy resources available for youth and

individuals about their consumer rights is crucial, as “[m]ost consumers are likely to be unaware of the FDCPA and learn of their rights only upon consulting a bankruptcy attorney.”¹⁷² Since the debtors discussed in this Note already have an online presence, educating them through online avenues should naturally follow.

The FTC already has an online presence to educate consumers via YouTube, Facebook, and Twitter.¹⁷³ While this is a positive first step, its debt collection videos apparently focus on phone calls as the method that can lead to FDCPA violations.¹⁷⁴ These videos should be updated to mention social media as a potential avenue for FDCPA violations.

Further, the FTC should broaden its outreach tactics through its currently active Facebook and Twitter profiles to inform debtors about FDCPA violations that could occur on these same sites.¹⁷⁵ These online tools will help inform debtors who use social media about ways to avoid and resolve harassing messages. The FTC, along with state and local regulatory agencies,¹⁷⁶ should take the lead on using and promoting social media to help educate consumers on their rights with respect to the social media space.

These same strategies should also be used to educate the debt collection industry.¹⁷⁷ It is likely that many debt collectors are unaware that certain collection tactics might violate the FDCPA, especially because the FDCPA does not specifically address social media while it does address other forms of communication such as phone calls and letters.¹⁷⁸ Currently, the FTC educates

recommending that similar resources be targeted to other populations, including the elderly, who are becoming more “comfortable with the Internet”).

172. Mann & Porter, *supra* note 167, at 334.

173. FTC videos, *Federal Trade Commission*, YOUTUBE, <http://www.youtube.com/user/FTCvideos> (last visited May 23, 2013); *Federal Trade Commission*, FACEBOOK, <https://www.facebook.com/federaltradecommission?sk=wall> (last visited May 23, 2013) [hereinafter *Federal Trade Commission*, FACEBOOK]; FTC, TWITTER, <https://twitter.com/FTC> (last visited May 23, 2013) [hereinafter *FTC*, TWITTER]; see FED. TRADE COMM’N, *supra* note 75, at 14.

174. See FTC videos, *supra* note 173.

175. See *Federal Trade Commission*, FACEBOOK, *supra* note 173; *FTC*, TWITTER, *supra* note 173.

176. In April 2011 the New York City Department of Consumer Affairs (“NYCDCA”) started its own YouTube channel to offer consumers free advice in multiple languages. Tara Lynn Wagner, *DCA Offers Free Advice via YouTube*, NY1 NEWS (Feb. 2, 2012, 12:00 AM), http://bronx.ny1.com/content/ny1_living/money_matters/155260/dca-offers-free-advice-via-youtube; *NYCDCA’s Channel*, YOUTUBE, <http://www.youtube.com/user/NYCDCA/videos?flow=grid&view=0> (last visited May 23, 2013). In January 2012, NYCDCA uploaded to its channel a video titled, *Protect Your Money: Know Your Rights About Debt Collection*. N.Y.C. Dep’t of Consumer Affairs, *Protect Your Money: Know Your Rights About Debt Collection*, YOUTUBE (Jan. 23, 2012), <http://www.youtube.com/watch?v=elquQLo2JDo>. Such online methods will help inform debtors who use social media about how to respond to a harassing debt collector.

177. See FED. TRADE COMM’N, *supra* note 75, at 15 (describing the FTC’s efforts to educate the debt collection industry).

178. See *id.* at 13 (acknowledging the need to educate the collection industry); Dunn, *supra* note 57, at slides 13-14 (presenting a slide show addressing several potential FDCPA violations that debt collectors should refrain from, such as “convers[ing] with a debtor using social media sites” because

debt collectors through speeches and panel discussions at conferences held by the collection industry.¹⁷⁹ As discussed earlier with respect to educating consumers, the FTC should expand its outreach efforts on social media to include online videos and posts that are specifically targeted to inform debt collectors about the FDCPA.¹⁸⁰

Furthermore, the FTC should educate debt collectors by disseminating a set of rules or principles that the debt collection industry is expected to abide by.¹⁸¹ This is a solution that England implemented in order to address debt collection through social media there.¹⁸² Although different rules govern the issues presented in this Note, England's solution is a simple and logical solution that the FTC should apply. The FTC already publishes an annual report about its progress on FDCPA enforcement.¹⁸³ It should now use some of this information, such as its plans to educate consumers and debt collectors,¹⁸⁴ and include it along with a section about guidelines for debt collectors, in a report specifically addressed to the debt collection industry.¹⁸⁵ This set of guidelines should reflect those of England's and prohibit debt collectors from collecting debts by initiating contact with a debtor through social media.¹⁸⁶

IV. CONCLUSION

Many debt collectors are increasingly using social media to track debtors down.¹⁸⁷ In the process, debt collectors are violating the FDCPA by initiating

"[n]ew technology raises questions and issues not considered when the FDCPA was enacted"). The FDCPA gives outdated examples of communication, like telephone calls, which could lead a debt collector to violate the FDCPA through social media, which is not mentioned in the statute. *See supra* notes 133-34 and accompanying text.

179. FED. TRADE COMM'N, *supra* note 75, at 15.

180. *See supra* notes 124-125, 171-176 and accompanying text.

181. *See* OFFICE OF FAIR TRADING, DEBT COLLECTION: OFT GUIDANCE FOR ALL BUSINESSES ENGAGED IN THE RECOVERY OF CONSUMER CREDIT DEBTS 18, 22 [hereinafter OFT GUIDANCE], available at http://www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/OFT664Rev.pdf (listing in its report addressed to debt collectors that "posting messages on social networking sites in a way that might potentially reveal that an identifiable person is being pursued for the repayment of a debt" is an "unfair or improper" business practice); *Debt Collection Practices*, OFF. OF FAIR TRADING, <http://www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/debt-collection#named1> (last visited May 23, 2013) (explaining the role of the Office of Fair Trading in providing guidance for debt collectors); David John Walker, *England's OFT Bans Debt Collection via Social Media*, SOCIAL BARREL (Oct. 19, 2011), <http://socialbarrel.com/england's-offt-bans-debt-collection-via-social-media/24170/> (noting that, although the Office of Fair Trading ("OFT") in England has received only a small number of complaints about debt collectors using social media to collect, the OFT published a report for debt collectors that declares that "debt collectors can not go after debtors using social media websites like Twitter and Facebook").

182. Walker, *supra* note 181; Parmy Olson, *Debt Collectors Warned Off Using Facebook to Target Borrowers*, FORBES (Oct. 19, 2011, 7:55 AM), <http://www.forbes.com/sites/parmyolson/2011/10/19/debt-collectors-warned-off-using-facebook-to-target-borrowers/>.

183. *See* FED. TRADE COMM'N, *supra* note 75.

184. *See id.* at 13-15.

185. *See generally* OFT GUIDANCE, *supra* note 181 (OFT report to debt collectors).

186. *See* OFT GUIDANCE, *supra* note 181, at 22.

187. *See* KOVACIC ET AL., *supra* note 20, at iv ("Collectors and consumers also are beginning to

contact and even harassing debtors.¹⁸⁸ Therefore, greater enforcement of the FDCPA is necessary and should be accomplished through a variety of ways. First, social media sites should allow users to easily report abuses and should proactively resolve violations that occur.¹⁸⁹ In addition, states should enact anti-impersonation online laws, which should apply to debt collectors that impersonate individuals in order to collect a debt.¹⁹⁰ Further, debt collectors will be more likely to comply with the FDCPA if the CFPB enacts its proposal to examine and rate debt collectors.¹⁹¹ However, examining and rating “small” debt collectors will be problematic because of the financial burdens that such a proposal might impose on them because of their size.¹⁹² Furthermore, this Note argues that FDCPA compliance will increase if the statute itself is amended to clarify that communication by “any medium” is prohibited.¹⁹³ Finally, this Note recommends that the FTC educate consumers and debt collectors in nontraditional ways, including through the use of online videos and materials that are directly addressed to debtors and debt collectors.¹⁹⁴ Taking these steps will ensure that both debtors and debt collectors understand that the FDCPA protects debtors who receive threatening messages on Facebook just as much as debtors who receive harassing phone calls.¹⁹⁵

explore communicating with each other through other new technologies such as email, text messaging, and social networking sites. . . . Technological innovations have increased exponentially the ability of creditors and debt collectors to obtain, store, and transfer data about consumers and their debts.”).

188. See, e.g., Lush, *supra* note 83 (noting an example of a debt collector who “contacted [the debtor] six to 10 times a day by phone, sent [the debtor] a text message, contacted [the debtor’s] neighbor and sent a courier to deliver a letter to [the debtor’s] workplace, according to court documents”).

189. See *supra* Part III.A.

190. See *supra* Part III.B.

191. See *supra* Part III.C.

192. See *supra* notes 120-23 and accompanying text.

193. See *supra* Part III.D.

194. See *supra* Part III.E.

195. See Dunn, *supra* note 57; *supra* notes 60-74 and accompanying text (discussing various ways in which debt collectors violate the FDCPA through the use of social media and including the provisions of the statute that are violated in the process); Sohns v. Bramacint, LLC, No. 09-1225, 2010 WL 3926264, at *1 (D. Minn. Oct. 1, 2010); Sullivan, *supra* note 1, at 71.