Are the FTC's Warnings on Debt Collection by Text Message Prescient or Predictable?

By Scott J. Hyman and Mary Kate Kamka

Scott J. Hyman is the Managing Director of Severson & Werson's Orange County office. He specializes in representing financial institutions in all aspects of consumer transactions, risk management, litigation, and compliance. Mr. Hyman is a member of the State Bars of California and Texas, graduated with honors from the Schreyer Honors College of The Pennsylvania State University, and graduated with distinction from The University of the Pacific, McGeorge School of Law. During his 25 years of practice, Mr. Hyman has authored or co-authored dozens of articles and publications on issues related to consumer finance, including, most recently: Eric J. Troutman, Scott J. Hyman & Divya S. Gupta, *Staying TCPA Cases Under the Primary Jurisdiction Doctrine*, 68 Consumer Fin. L.Q. Rep. 312 (2014); and Scott J. Hyman & Eric J. Troutman, *Certification of Class Actions Under the Telephone Consumer Protection Act and the Prohibition against "Fail-Safe" Classes*, 68 Consumer Fin. L.Q. Rep. 326 (2014). Mr. Hyman is the author of "Fair Debt Collection Practices Acts" in Debt Collection Practice in California (CEB) and the co-author of "Telephone Consumer Protection Act" in Debt Collection Practice in California (CEB). Since 2008, Mr. Hyman has been the administrator and lead author of Severson & Werson's California weblog on personal property finance (www.calautofinance.com), to which hundreds of industry professionals subscribe and which has summarized and categorized over 2,000 court decisions on subjects relevant to consumer finance.

Mary Kate Kamka is an associate in Severson & Werson's San Francisco office, where she practices in the Financial Services Litigation group. Ms. Kamka has experience in a range of consumer and commercial financial services litigation and regulatory investigations. Ms. Kamka has worked with clients in both state-wide and national class actions brought under a variety of state and federal consumer protection statutes. Additionally, Ms. Kamka has experience in advising clients on cost-effective strategies for gathering, reviewing, and producing electronically stored information. Ms. Kamka graduated from UC Davis School of law in 2011. Prior to law school, Ms. Kamka earned her B.A. at Yale University.

I. Introduction

In March, 2016, Bureau of Consumer Financial Protection (CFPB) Director Richard Cordray warned that financial services and debt collection compliance attorneys commit "compliance malpractice" if they do not monitor CFPB enforcement actions.[1] On March 28, 2016, the Federal Trade Commission (FTC), a sister agency of the CFPB, threw down the gauntlet on debt collection activities that utilize text messaging or "SMS" communications with debtors. In a weblog post entitled, "Debt collectors: You may 'like' social media and texts, but are you complying with the law?," the FTC noted that the Fair Debt Collection Practices Act (FDCPA) does not prohibit debt collection by text message,[2] but opined that "recent FTC law enforcement actions suggest that using them can present particular compliance challenges."[3] The FTC's weblog post regarding debt collectors is interesting for several reasons, since the CFPB carries most of the water on enforcement

1. *E.g.* Kate Berry, Cordray: CFPB Is Right to Use Enforcement Actions to Craft Policy, http://www.americanbanker.com/news/law-regulation/cordray-cfpb-is-right-to-use-enforcement-actions-to-craft-policy-1079823-1.html (Mar. 9, 2016) ("Financial industry executives would be engaging in 'compliance malpractice' if they did not glean information from consent orders and respond by cleaning up their own practices, says CFPB Director Richard Cordray.").

2. Christina Miranda, "Can Debt Collectors Message You for Money?" (May 21, 2015), https://www.consumer.ftc.gov/blog/can-debt-collectors-message-you-money.

3. Colin Hector, Debt collectors: You may "like" social media and texts, but are you complying with the law?" (Mar. 28, 2016), https://www.ftc.gov/news-events/blogs/business-blog/2016/03/debt-collectors-you-may-social-media-texts-are-you-complying. Interestingly, Mr. Hector's weblog post for the FTC echoes the points that he made in a law review comment that he also wrote for the University of California Law Review as a young law student. *See* Colin Hector, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 Cal. L. Rev. 1601, 1627 (2011).

actions against debt collectors under the FDCPA.[4] Nevertheless, given the risk of committing "compliance malpractice," the FTC's comments raise significant issues of FDCPA compliance for financial institutions and entities collecting consumer debts through text messages with debtors. This article explores the compliance issues raised in the collection of consumer debts by means of text messaging.

II. Collecting Consumer Debts by Text Message

A. Practicalities of Debt Collection by Text Message

Technologists tout text messaging as the next-best way to remind debtors to pay their bills.[5] Short Message Service (SMS) or, colloquially, "text messaging," is a messaging service component of phone, Web and mobile communication systems that uses standardized communication protocols to allow fixed line or mobile phone devices to exchange short text messages. At the end of 2010, SMS was the most widely used data application, with an estimated 3.5 billion active users, or about eighty percent of all mobile phone subscribers. The term "SMS" is used for both the user activity and all types of short text messaging in many parts of the world. As of September 2014, the global SMS messaging business is said to be worth over $100 billion, and SMS accounts for almost fifty percent of all the revenue generated by mobile messaging.[6]

Hard statistics vary as to how well debt collection by text messaging works. Some measure success by the return on the investment,[7] others by a forty-nine percent increase in late bill collections.[8] At a minimum, however, it is clear that debt collection by text message has a positive impact on debt repayment. Given how effective and ubiquitous text messaging is, financial institutions and debt collectors are eager to offer customers and borrowers the option of communicating via text.

However, text messages are a unique form of communication that differs from both telephone communications and traditional written communications, such as letters or emails. Like telephone calls, text messages are real time communications that are often accompanied by an audio alert. Like written communications, however, a recipient can elect when and where to read the content of the message. Given the hybrid nature of this new form of communication, the FTC highlights the fact that complying with the traditional requirements of the FDCPA poses unique challenges.

B. Regulator Activity on Debt Collection by Text Message

1. The FTC's Weblog Post Throws Down the Gauntlet

The FTC's blog post makes clear that, while the FDCPA does not prohibit the use of text messaging for debt collection purposes, this new form of electronic communication is still subject to the traditional statutory requirements. The FTC identifies four unique FDCPA compliance issues that debt collectors should be wary of when implementing or expanding the use of text messaging to collect debts.[9]

First, the FTC says that text messages cannot be deceptive. The FTC analogized to previous law enforcement activities where deceptive text messages were sent to consumers suggesting that a payment by credit card had been declined and a telephone number needed to be called. In fact, however, these text messages were from debt collectors seeking a response from the consumers.[10] The FTC stressed that the debt collector's duty to avoid deception extends not only to debtors, but also to attempts to obtain location information from third parties: "A collector can't obtain location information about a consumer by using false pretenses to approach a friend or coworker – *e.g.*,

4. The FTC is no longer the administrative agency charged with interpreting the FCRA--that duty passed to the CFPB in 2010. *See* 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summaries of Interpretations, at 1 - 2 (July 2011) ("As described below, since its initial passage in 1970, the Federal Trade Commission ('FTC' or 'Commission') has played a key role in the implementation, oversight, enforcement, and interpretation of the FCRA. Under the Consumer Financial Protection Act of 2010 ('CFPA'), the FTC retains its enforcement role but will share that role in many respects with the newly created Consumer Financial Protection Bureau ('CFPB'). The CFPB also will take on primary regulatory and interpretive roles under the FCRA. As the FTC role evolves, the staff seeks to share its extensive experience with the CFPB and the public through a summary of its key interpretations and guidance"), https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf. Accordingly, it's interpretations might be entitled to less weight. *See* I.N.S. v. Cardoza-Fonseca 480 U.S. 421, 447 n. 30 (1987) ("[a]n agency interpretation of a relevant provision which conflicts with the agency's [or perhaps its predecessor's] earlier interpretation is entitled to considerably less deference than a consistently held agency view."); *see also* Boydstun v. U.S. Bank National Association, N.D., 2016 WL 2736104, at *1 (D.Or., 2016) ("the FTC interpretation in the 40 Years Report is not binding…the FTC is no longer the administrative agency charged with interpreting the FCRA – that duty passed to the Consumer Financial Protection Bureau in 2010. 40 Years Report at 1 - 2. In light of the extraordinary weight of case law supporting Defendant's motion and the clear intent of Congress, the Court declines to follow the FTC's non-binding interpretation of the FCRA on this point.").

5. *See, e.g.*: https://collect.org/golivesms.html ("Text Messaging (SMS) is the cutting edge in technology when sending payment reminders or debt collection notices to consumers. Text Messaging is the latest and most inexpensive augmentation to automated voice messaging campaigns, creating both a significant lift in call-backs and dramatic increase in interactive responses for all customer communications"); http://www.collectplus.com/product_info/text_messaging_sms.html ("Text messaging allows you to communicate with debtors quickly and economically. It is faster and more reliable than email. And people pay more attention to a text than an email. It is especially useful to remind debtors of an upcoming payment date when they are on a payment plan schedule."); *see generally* Zywicki, *The Law & Economics of Consumer Debt Collection and its Regulation*, 28 Loyola Consumer L. Rev. 167, 229 (2016).

6. https://en.wikipedia.org/wiki/Short_Message_Service.

7. *See, e.g.*: Piia Pekonen, Are text message reminders effective in debt collection? Randomized controlled trial in debt collection in Finland, https://aaltodoc.aalto.fi/handle/123456789/14613 (2014) ("The results indicate that text message reminders have a positive impact on debt repayment. The rate of debts repaid at least partially is 14.6 percent in the treatment group and 10.9 percent in the control group. The difference, 3.7 percentage points, appears statistically significant."); http://www.ibshome.com/debt-collection-via-text-news.php (02/05/2016) ("According to Juniper Research, the mobile device owner reads 97% of text messages and 90% of those are looked in the first 4 - 6 minutes of delivery…Text messaging works as payment reminder because it is immediate and reaches customers directly in a non-intrusive manner."); http://www.messagemedia.com.au/sms-solutions/debt-collection ("Another customer piloted SMS in its collections and fraud division, and early indications of the effectiveness of SMS for debt collection were excellent achieving a monthly ROI of 640%.").

8. *See, e.g.*: http://whatsnext.nuance.com/customer-experience/text-messaging-provides-cost-effective-customer-experience/ ("Time Warner used text messages to boost late bill collections by 49 percent.").

9. Colin Hector, Debt collectors: You may "like" social media and texts, but are you complying with the law?" (Mar. 28, 2016), https://www.ftc.gov/news-events/blogs/business-blog/2016/03/debt-collectors-you-may-social-media-texts-are-you-complying.

10. FTC v. United Global Group, 1:15-cv-00422-EAW (W.D. N.Y 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-halts-three-debt-collection-operations-allegedly-threatened.

by using a fake Facebook account to send a friend request to a purported debtor's social connections in the hope of uncovering address or asset information."[11]

Second, the FTC says that text messages qualify as communications[12] under the FDCPA, and must comply with the FDCPA's mini-Miranda and debt validation requirements: "[T]he initial communication between a collector and a consumer must disclose that it's from a debt collector attempting to collect a debt and that any information obtained will be used for that purpose. Later communications must make it clear that they're from a debt collector."[13] The FTC noted that SMS character limitations, that might preclude including the mini-Miranda text, are no defense to a FDCPA claim: "The disclosure provisions of the FDCPA apply regardless of how debt collectors choose to communicate with consumers."[14]

Third, the FTC said that a text message cannot reveal the existence of a debt to third parties. While the FTC's weblog post focused primarily on posting information on social media, the FTC reiterated the oft-litigated issue in leaving messages by other media, such as voicemail: "it's illegal to reveal the existence of a debt to a third party."[15]

Finally, the FTC said that text messages cannot be used to impose illegal charges. Interestingly, the FTC provided no further discussion on this issue other than to reiterate the text of the FDCPA, which "prohibits debt collectors from collecting charges unless the charge is expressly authorized by the agreement creating the debt or permitted by law."[16]

2. CFPB Commentary and Enforcement Activity Regarding Debt Collection by Text Message

Not to be outdone, the CFPB also has addressed debt collection by text messaging, both in proposed regulations and in its enforcement actions.[17] On November 12, 2013, the CFPB sought comment about debt collection activities in anticipation of proposed rulemaking.[18] The CFPB noted that although the FDCPA was passed at a time when text messaging did not exist and, therefore, was focused on telephone communications:

> Newer technologies like email and text messages present challenges in applying section 805(a)(1) because the technologies themselves are hybrids between the textual nature of postal mail and the immediate delivery of telephone calls (as with faxes). For email, recipients arguably do not receive their messages until they affirmatively check their email account, thus allowing consumers to control when they view new messages. However, some consumers have devices that notify them when the email is delivered to their email provider, such as a smartphone that makes a sound upon the delivery of an email. The extent to which the receipt of an email occurs at an unusual or inconvenient time may therefore differ greatly among consumers. Text messaging presents similar but distinct issues. Text messages arrive primarily over telephones, whereas emails can arrive on any device with an internet connection. As with email, a consumer may not view a text message until long after it was delivered to her phone, but many consumers are alerted when a text message arrives, often by an audio alert.[19]

On November 12, 2013, the CFPB issued its Advanced Notice of Proposed Rulemaking, part of which focused on new technological forms of communicating with debtors, and the comment period closed on February 28, 2014.[20] Additionally, the CFPB's 2016 Annual Report on the FDCPA highlights three recent FTC investigations into debt collectors' use of

11. Colin Hector, Debt collectors: You may "like" social media and texts, but are you complying with the law?, *supra* note 3.

12. *See* Hector, *supra* note 9. *But see* Olmos v. Bank of America, N.A., 2016 WL 3092194, at *3 (S.D.Cal., 2016) ("this Court cannot assume that the message was sent in order to collect debts or even in connection in any way with Plaintiff's debts. 'Servicing matter' could be referring to services that FIA Card Services could offer to plaintiff and the very tenor of the message makes it appear more likely that it was advertising some sort of additional service as opposed to collecting a debt.").

13. *See* Hector, *supra* note 9.

14. *See id*. *See, e.g.,* https://www.ftc.gov/news-events/press-releases/2013/09/ftc-brings-first-case-alleging-text-messages-were-used-illegal<https://www.ftc.gov/news-events/press-releases/2013/09/ftc-brings-first-case-alleging-text-messages-were-used-illegal> ("The FTC, the nation's consumer protection agency, alleged that Archie Donovan and two companies he controls – National Attorney Collection Services, Inc., and National Attorney Services LLC used English- and Spanish-language text messages and phone calls in which they unlawfully failed to disclose that they were debt collectors. The FTC charged the defendants with violating both the Fair Debt Collection Practices Act and the FTC Act."); *see also* https://www.ftc.gov/news-events/blogs/business-blog/2013/09/dont-viol8-fdcpa-k-thx ("That abbreviated headline illustrates just one of the technological challenges posed when using new means of communication. But regardless of the method debt collectors choose when contacting people who owe money, the consumer protections of the Fair Debt Collection Practices Act still apply. That's just one point members of the industry should take from the FTC's $1 million settlement with National Attorney Collection Services.").

15. *See* Colin Hector, Debt collectors: You may "like" social media and texts, but are you complying with the law?, *supra* note 3.

16. *Id*.

17. *See*: Clark, FTC Stay/Advisory Opinion/Comment Letter to Director Richard Cordray (Feb. 13, 2017), 2017 WL 657051 (discussing "Operation Collection Protection," by the FTC as targeting collection by lawful text messages); The Hon. Richard Cordray, 2016 WL 692538, at *7 ("Also in 2015, at the Federal Trade Commission's request, federal courts in New York and Georgia temporarily halted three debt collection operations that allegedly violated the FDCPA and the FTC Act by threatening and deceiving consumers via text messages, emails, and phone calls"); Kevin Petrasic, Benjamin Saul, Jolina Cuaresma, Katherine Lamberth, What Should Banks Expect from the CFPB's Debt Collection Rulemaking?, 35 Banking & Fin. Services Pol'y Rep. 9, 11 - 12 (Aug. 2016) ("Cordray also noted, as did several members of the panel, changes in technology that have occurred since the enactment of the FDCPA. In particular, the use of postcards and telegrams, which is regulated by the FDCPA, has declined while the use of email, text messages, and other social media has proliferated. Notwithstanding the acknowledgements that the use of social media could not have been predicted in the 1970s when the FDCPA was enacted, the Proposals noticeably fail to address the changes in technology directly. Throughout the hearing, industry members urged the CFPB to adopt rules to create and/or clarify standards applicable to new forms of technology that would enable debt collectors to more effectively and efficiently communicate with consumers without violating requirements of the FDCPA."); DEBT COLLECTION PROPOSALS AIM TO 'DRASTICALLY OVERHAUL' INDUSTRY: CFPB., Bk. Compl. Gd. P 102-481 (July 28, 2016), 2016 WL 4468793 ("With regard to the FDCPA specifically, the ANPR also sought comment about interpreting the nearly forty-year old statute to address contemporary debt collection challenges, including questions such as how collectors apply the FDCPA to technology such as cell phones, text messages, and email. The FDCPA has not been significantly amended to address such challenges, and reliance on case law alone has created uncertainty for stakeholders. The Bureau's rulemaking seeks to decrease such uncertainty.").

18. https://www.federalregister.gov/articles/2013/11/12/2013-26875/debt-collection-regulation-f.

19. *Id*.

20. 78 Fed. Reg. 67848 (Nov. 12, 2013) [ANPR]. *See also* Needleman, The Consumer Financial Protection Bureau's Advance Notice of Proposed Rulemaking for Debt Collection Practices: A Critical Look and the Attorneys' Response, Bus. Law Today (April 2014), http://www.americanbar.org/publications/blt/2014/04/03_needleman.html.

text messaging.[21] In those investigations, the FTC accused debt collectors of using text messages that falsely threatened litigation over a debt, misled consumers to return the debt collectors' phone calls, and failed to disclose the fact that the message was from a debt collector.[22] The existence of these investigations, and the issues analyzed therein, demonstrate the CFPB's increased interest in this topic, and perhaps their inclination to rigorously apply the FDCPA requirements to this new form of communication.

3. Private Party Enforcement and Commentary

None would argue that debt-collection by text message is prohibited.[23] Non-regulator commentary largely has been consistent with the broad guidelines issued by the FTC.[24] No caselaw has held that a debt collection message is not a "communication" under the FDCPA simply because it is sent by text; courts have found to the contrary, at least as far as the Telephone Consumer Protection Act (TCPA), another consumer protection statute, is concerned, finding that a text message is a telephone "call" under the TCPA.[25] If a debt collection text message is a communication under the FDCPA, commentators have not stretched much to argue that the FDCPA should treat voicemails and text messages the same, such that a tripartite disclosure and/or "mini-Miranda" warning would be required in either circumstance.[26] And, those on the plaintiff's and regulatory side of the aisle have so argued.[27] Private party litigation is scarce, but the point also has been argued.[28] Others have argued that text-messaging is a special form of communication, and ought to be prohibited absent express consent by the debtor.[29]

III. Is It Such a Surprise?

A. FDCPA Compliance Issues Raised by Text Message Debt Collection

1. Overview

When faced with new technology, such as voicemails for example, the vast majority of courts have held that such communications are subject to the FDCPA's disclosure provisions as "communications" when: (1) the content of the communication suggests debt collection; (2) the practical consequence of exempting certain types of communication would allow debt collectors to avoid the consumer protection purposes of the FDCPA; and (3) the context of the communication implies a debt collection purpose.[30]

21. ANPR, *supra* note 20, § 5.2.3. "Debt Collection Via Unlawful Text Messages and Email," http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

22. *Id.*

23. *See, e.g.*, http://www.acainternational.org/news-ftc-outlines-use-of-social-media-text-messages-in-debt-collection-39047.aspx (May 29, 2016) ("Communication with consumers through social media or text messages isn't banned under the Fair Debt Collection Practices Act; but, according to a recent blog post from the Federal Trade Commission, collectors need to be extra careful to maintain compliance with the law if those methods are used."); http:/www.thebalance.com/cnn-debt-collectors-send-text-messages-960579 (June 26, 2016).

24. *See, e.g.*: http://www.insidearm.com/daily/debt-collection-news/debt-collection/new-study-finds-consumers-prefer-text-messaging-fdcpa-still-doesnt/ (April 10, 2012) ("The Fair Debt Collection Practices Act isn't necessarily the clearest on things like text messaging. And creditors — for instance, in this case, mortgage lenders — aren't always bound by the FDCPA. (As WebRecon's Jack Gordon explains, 'In some cases, creditors actually are bound by FDCPA. Not by the FDCPA, but by other statutes that impose FDCPA on them, like California's Rosenthal Act.' Additionally, in some cases where they may not be legally bound, they voluntarily adhere to it as well. 'This seems to be a growing trend,' Gordon suggested.) So, while a mortgage or micro lender could use the technological ease of a friendly text message, this actually isn't something third-party debt collectors could avail themselves of."); http://www.insidearm.com/daily/debt-collection-news/debt-collection/text-messaging-as-the-next-frontier-in-collection-communication/#comments (Jan. 27, 2010) ("The mini-Miranda and other disclosures could be included in a letter or right-party telephone contact, then, with the consumer's permission, the communication could continue via text messaging, under what Berrey called 'multichannel blending.' He said some collection firms are already conducting some communications this way, but he could not reveal any company names."); Edens, *Texting: The Final Frontier?*, 16 Collection Advisor No. 4 pp. 10 (July/Aug. 2016) ("How are there two extremes when it comes to sending a text message to a debtor? The answer is actually quite simple. There is no answer because the FDCPA does not specifically address text messaging.").

25. *See* Satterfield v. Simon & Schuster, Inc. 569 F.3d 946, 953 (9th Cir 2009) (definition of "call" in Webster's suggests that, in enacting the TCPA, Congress intended to regulate the use of an ATDS to communicate or try to get into communication with a person by telephone).

26. *See, e.g.*, Colin Hector, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 Cal. L. Rev. 1601, 1627 (2011) [Hector] ("Likewise, as the voicemail cases suggest, there may be inconsistent judicial treatment of text-based messages that leave only a name, phone number, and request for a return call. In order to ensure that these contacts reflect the underlying impetus behind the FDCPA's basic protections, the definition of 'communication' needs to reflect the privacy concern raised by the context in which a debt collection contact is made…A solution to this problem would be to shift the definition of 'communication' from its current focus on content toward the role that the contact plays as part of the overall debt collection process. This approach would encompass voicemails, 'friend requests,' and some text messages that have minimal substance relating to the debt, but are intended primarily to induce the recipient into future action. While these contacts may not directly convey information about a debt, because they are part of the debt collection strategy, the general prohibition against anonymous communications should apply."). *See also infra* Part III.A.2.

27. *See*: http://www.krumbeinlaw.com/text-messaging/ ("It means that a debt collector CAN collect by text message IF they comply with all of the rules of the Fair Debt Collection Practices Act. But they are very limited, when they have a limit of 140 characters."); http://www.debtdefenselaw.com/2013/10/text-messages-from-debt-collectors-same-harassment-different-way/<http://www.debtdefenselaw.com/2013/10/text-messages-from-debt-collectors-same-harassment-different-way/> (accord); http://blog.credit.com/2015/10/can-a-debt-collector-text-you-127048/<http://blog.credit.com/2015/10/can-a-debt-collector-text-you-127048/> (NCLC lawyer opines that a text message is the same as a voicemail message).

28. Glaser v. Simm Associates, Inc., 2012 WL 4994976 (E.D.N.Y. 2012) (Trial Pleading -- Complaint) ("48. That the text message defendant sent to plaintiff on May 24, 2012 is a communication within the meaning of the FDCPA. 49. That said text message simply states: 'PLEASE CALL 443-406-2230,' and does not contain any information which would meaningfully identify the name of the company sending the text message, the name of the particular employee sending the text message or that the text message is from a debt collector.").

29. *See, e.g.*: Ramasastry, *Debt Collecting by Text: Why This Practice Should Be Prohibited Absent Express Consumer Consent*, Justicia, https://verdict.justia.com/2013/10/22/debt-collecting-text (Oct 22, 2013) ("The FTC has provided a way forward in its recent settlement – to make it clear that explicit disclosure and consent are needed before consumers may be texted about debt collection. The FTC and the CFPB need to look further, however, to gauge the impact of multiple parties potentially receiving and reading a text that identifies someone by name as a possible deadbeat. The chance of stigma may outweigh the convenience of this new form of communication."); https://collect.org/golivesms.html ("Of concern to all debt collectors are the requirements of the Fair Debt Collection Practices Act. Section 808(5) states that debt collectors engage in unfair and unconscionable collection practices when they cause a consumer to incur charges for a communication, THE TRUE PURPOSE OF WHICH IS CONCEALED. In order to avoid a violation of this subsection, debt collectors need to provide meaningful disclosure of their identity as well as the true purpose of the communication when sending a text message to a consumer's cellular phone. Provided that debt collectors disclose their identity as debt collectors and the true purpose of the message, contacting a consumer via the consumer's cellular phone would most likely comply with the provisions set forth in the FDCPA. The risk of an FDCPA violation may be minimized, if not absolved, if the collector obtains the prior express consent of the consumer. The consent may be verbal, written or electronic. Ideally, the consumer's authorization should be in writing. If the collector accepts verbal consent, such authorization should be documented by the collector. According to the FDCPA, a lender can hire a third party to send messages on their behalf. However, the third party may not send collection messages for the lender under its own name unless it has purchased debts from the lender. Lenders and financial institutions may send debt collection notices via text message just as if they were making collection calls. And like all communication, collection messages must meet regulatory requirements. For example, the sender must disclose its company name and intention to collect the money owed. If the lender's name is not disclosed, the debtor has right to collect the cost of the call, including but not limited to the fee(s) for the phone call received.").

30. *See, e.g.*, Hector, *supra* note 26.

2. Mini-Miranda/ Meaningful Disclosure

The FDCPA requires that debt collectors provide the "mini-Miranda" notice in all debt collection communications which, of itself, is 160 characters long.[31] Coincidentally, 160 characters is also the maximum length of an SMS message.[32] Given this character limitation, a debt collector could not simultaneously comply with both the FDCPA's mini-Miranda and "meaningful identification" requirements,[33] and also include any specific information about the collection of the debt in any text message.[34]

Thus, some courts have held[35] or suggested[36] that the factual context of a call can matter for the purpose of determining whether a debt collector's communication is required to provide all of these required disclosures. For example, the United States Court of Appeals for the Ninth Circuit has held that, where the debtor already knows the identity of the debt collector, follow-up notices from the debt collector are not communications and do not require compliance with 15 U.S.C. section 1692e(11), as long as they are not misleading or false.[37]

In *Reed v. Global Acceptance Credit Co.*,[38] Judge Whyte found that there was no strict liability simply for failing to identify oneself as a debt collector because, in the factual context of that case, the least sophisticated consumer already knew who the caller was:

> [S]ince plaintiff wrote to defendants on April 25, 2007 disputing the debt and the defendant did not leave the messages until August 2007, plaintiff was aware that Global Acceptance Credit Company was a debt collector. Compl., Ex. 2. Indeed, by the time defendants left the voice mail messages, defendants gave verification of the debt to plaintiff. *Id.* at Ex. 4; see *Pressley*, 760 F.2d at 925 (stating that if debtor already knows identity of the debt collector then subsequent correspondence is not a communication and is not subject to § 1692e(11)).[39]

Hutton v. C.B. Accounts, Inc.[40] also discusses the interplay between the requirement that one identify oneself as a debt collector under section 1692e(11) and the meaningful disclosure requirement found in section 1692d(6). There, Judge McCluskey addressed the issue of "context" in connection with class certification, and concluded that the context of each call had to be considered in determining whether the meaningful disclosure requirement was met. The court accordingly refused to certify the class, finding that individual questions predominated. Judge McCluskey relied on authority holding that a failure to identify oneself as a debt collector in a phone call could be inactionable under the FDCPA when the mini-Miranda notice (identifying the sender as a debt collector) was given in previous correspondence. In other words, when the recipient of the phone call already knew that the phone call was from a debt collector, less disclosure might be required:

31. 15 U.S.C. § 1692(e)(11) ("(11) 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."). The so-called "mini-Miranda," thus, typically consists of a disclosure that substantially includes the following notice: "NOTICE: THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED FROM YOU WILL BE USED FOR THAT PURPOSE." *See* Hyman, *The Fair Debt Collection Practices Act*, in 2A DEBT COLLECTION § 2.37 (CEB Cal. 2015).

32. https://en.wikipedia.org/wiki/Short_Message_Service ("SMS as used on modern handsets originated from radio telegraphy in radio memo pagers using standardized phone protocols. These were defined in 1985 as part of the Global System for Mobile Communications (GSM) series of standards as a means of sending messages of up to 160 characters."); *see also* Mark Milian, Why text messages are limited to 160 characters?, http://latimesblogs.latimes.com/technology/2009/05/invented-text-messaging.html (May 3, 2009).

33. 15 U.S.C. § 1692d(6) ("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. Without limiting the general application of the foregoing, the following conduct is a violation of this section:…(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity."); *see also* Cal. Civ. Code § 1788.11(b) ("(11) No debt collector shall collect or attempt to collect a consumer debt by means of the following practices:…(b) Placing telephone calls without disclosure of the caller's identity, provided that an employee of a licensed collection agency may identify himself by using his registered alias name as long as he correctly identifies the agency he represents.").

34. It would only somewhat be better in "subsequent communications" where the debt collector need only identify itself as a debt collector. *See* 15 U.S.C. § 1692e(11). Once the debt collector meaningfully identifies itself by giving, in the text, its name and its company, there likely would be no character room left to provide any information, let alone meaningful information, regarding the purpose for the text.

35. *See, e.g.*: Dikeman v. Nat'l Educators, Inc., 81 F.3d 949 (10th Cir. 1996) ("context" and "situation" considered in whether debt collector complied with section 1692e(11)); Biggs v. Credit Collectors, Inc., 2007 WL 4034997 (W.D. Okla. Nov. *(Continued in next column)*

35. *(Continued from previous column)*

15, 2007) (the factual context of any given communication may be material); Foti v. WCO Fin. Systs., Inc., 424 F. Supp.2d 643, 669-70 (S.D. N.Y. 2006) (dismissing a section 1692e(11) claim based on a subsequent telephone call where it was clear the communication was from a debt collector); Hosseinzadeh v. M.R.S. Assocs., Inc., 387 F. Supp.2d 1104, 1112 (C.D.Cal.2005) (the tripartite disclosure was required, but the court noted that this obligation emanated from the requirement that the collector "disclose enough information so as to not mislead the recipient as to the purpose of the call or the reason the questions are being asked."); Epps v. Exam Indus., Inc., 1998 WL 851488 (N.D. Ill. 1998) (a debt collector satisfies section 1692e(11) as long as it is clear from the subsequent letter that the sender is a debt collector); Krug v. Focus Receivables Management, LLC, 2010 WL 1875533 (D.N.J. 2010) ("In a variation of its context argument above, Focus asserts that Plaintiffs' FDCPA claims under §§ 1692e(11) and 1692d(6) fail because 'nowhere do [Plaintiffs] allege the simple fact of whether any of the plaintiffs had contact with Focus prior to receiving the messages….Plaintiffs never allege whether the messages at issue were attempts to initiate collection efforts or a continuation of prior collection efforts.'…Focus, however, does not explain why this omission matters, other than to vaguely assert that 'context' should be 'considered' when determining whether the FDCPA's disclosure requirements have been violated."); Joseph v. J.J. Mac Intyre Companies, L.L.C., 281 F. Supp.2d 1156, 1163 (N.D.Cal. 2003) ("Defendant has not argued, and the Court does not address whether Defendant may claim in defense substantial compliance with the statutes or lack of demonstrable harm resulting from any violation of these particular statutes, since Plaintiff was arguably aware of the source and purpose of these calls.").

36. *See, e.g.,* Baker v. Allstate Financial Services, Inc., 554 F. Supp.2d 945 (D. Minn. 2008) ("Allstate's argument that Baker was alerted to the nature of its business from a prior debt collection letter sent to him is not cognizable on a motion to dismiss.").

37. Pressley v. Capital Credit & Collection Serv., 760 F.2d 922, 925 (9th Cir.1985) (per curiam) ("We therefore hold that the follow up notice sent in this case is not a 'communication' within which the disclosure required by 15 U.S.C. § 1692e(11) must be made."). California district courts have split on whether *Pressley* remains good law in light of the 1996 amendments to the FDCPA. *Compare* Schwarm v. Craighead, 552 F. Supp.2d 1056, 1082 (E.D.Cal. 2008) (*Pressley* no longer good law) *with* Luna v. Alliance One Receivables Management, Inc., 2006 WL 357823, *6 (N.D.Cal. 2006) (cited the Ninth Circuit's *Pressley* rule without discussing the 1996 amendments to the statute); *accord* Hosseinzadeh v. M.R.S. Assocs., Inc., 387 F. Supp.2d 1104, 1116 (C.D.Cal. 2005).

38. 2008 WL 3330165 (N.D.Cal. 2008). Decisions have declined to follow *Reed*, either finding its analysis faulty or finding that *Pressley*, on which it relied, did not survive the 1996 amendment to the FDCPA. *See*: Drossin v. National Action Financial Services, Inc., 641 F. Supp.2d 1314 (S.D.Fla. 2009); Winberry v. United Collection Bureau, Inc., 697 F.Supp.2d 1279 (M.D.Ala. 2010).

39. *Reed*, 2008 WL 3330165, at *4.

40. 2010 WL 5070882 (C.D. Ill. 2010), *recon. den.* 2010 WL 5463108 (C.D. Ill. 2010).

Hutton proposes a class whose common issue is receipt of voicemail from CBA which allegedly violated 15 U.S.C. § 1692e(11) due to CBA's alleged failure to identify itself a debt collector attempting to collect a bill. She seeks class certification of: (a) all persons; (b) with telephone numbers in the 309 and 217 area codes; (c) for whom CBA left voicemail or answering machine messages; (d) that did not identify CBA or state that the call was for collection purposes; (e) during a period beginning March 2, 2009, and ending March 22, 2010. See Motion, at p. 1. ¶ Approximately 62,093 people would be included in the proposed class…The difficulty for Hutton is that some of the approximately 62,093 putative class members may have received debt collection calls and letters from CBA prior to getting any offending voicemails. Individuals who received calls and letters which satisfied § 1692e(11)'s disclosure requirements prior to receiving offending calls and letters may not have actionable FDCPA claims. [] Given that CBA sent Hutton nine letters and spoke with her several times about her debt prior to leaving the January 12, 2010, voicemail, it remains to be seen whether Hutton has a valid FDCPA claim. The Court expresses no view on that now. Rather, the Court notes that all of CBA's correspondences to Hutton and the putative class members will have to be examined to determine if CBA's voicemails are actionable. Individuals who received correspondences in addition to an offending voicemail will not necessarily have legitimate FDCPA claims since proximate cause may be lacking. Every correspondence will have to be analyzed before such a decision can be made. As such, it appears that questions affecting individual class members will predominate questions affecting the class.[41]

Subsequent decisions, however, generally have not followed *Hutton*.[42] While *Hutton* brings into question whether or not a debt collector must specifically identify itself as a debt collector in subsequent communications with borrowers, it is clear that, given the 160 character limitation of a text message, it would be practically impossible and possibly risky to use a text message as an initial communication with a borrower.

3. Third Party Disclosure

The FDCPA prohibits a debt collector from disclosing a debt to third parties.[43] This requirement should raise legitimate concerns for debt collectors, given the array of different ways that text messages could potentially be unintentionally disclosed to third parties. For example, such messages could be disclosed to a third party who is carrying the telephone of the intended recipient, sitting near the recipient when the message "pops up" on the recipient's phone screen, and/or using a computer or tablet that also receives the recipient's SMS messages.

Debt collectors should further consider the the FDCPA's prohibition of the inclusion of any language or symbol on an envelope[44] containing debt collection letters or telegrams, other than the debt collector's address.[45] Text message notifications on a recipient's phone screen can include the name of the sender, and at times a portion of the messages' content. Moreover, a debt collector has little control over what types of text message notification options a borrower chooses to employ on his or her mobile telephone, tablet, or computer screen.

Could the pop-up notification on a borrowers' electronic device be likened to an "envelope" containing a traditional letter or telegram, due to its potential to be seen by third parties? The CFPB certainly has suggested that it will not be hamstrung by the limiting language contained in the FDCPA, particularly where technology has evolved since the FDCPA was passed in 1977.[46] If a pop-up screen could be treated as an "envelope," including any information in the pop-up notification

41. *Hutton*, 2010 WL 5070882, at *3.

42. *See, e.g.*: Kimball v. Frederick J. Hanna & Associates, P.C., 2011 WL 3610129 (D.Minn. 2011) ("Defendant directs the Court to a number of cases cited for the proposition that it is appropriate to consider the nature of written and oral communications that preceded the allegedly wrongful message to determine if the message in question satisfied the FDCPA disclosure requirements.….Accordingly, Defendant contends that each member of the putative class would have to have their claims individually examined in order to determine whether or not a violation of the FDCPA occurred with regard to the Hanna Message. The Court disagrees with Defendant's argument."); Garo v. Global Credit & Collection Corp., 2011 WL 251450 (D.Ariz. 2011) ("Defendant argues that a recent decision, *Roseanne Hutton v. D.B. Accounts, Inc.,* 2010 WL 5070882 (C.D.Ill. 2010), demonstrates that individual issues predominate in this case and that thus an FDCPA class should not be certified….¶ There are two problems with this argument. First there is nothing in the FDCPA that requires plaintiff to prove causation of actual damages to set forth a claim under the FDCPA….¶ Second, the text of the FDCPA requires specific disclosures in the initial communication between a debt collector and a consumer and further requires that in any subsequent conversations between them the debt collector identify "that the communication is from a debt collector." 15 U.S.C. § 1692e(11)….¶ In this case, the text of the automated telephone messages did not identify the caller in any fashion. The fact that a debt collector may leave a message, in which the debt collector is otherwise unidentified, to contact the consumer at a phone number that had previously been contained in the debt collector's correspondence with the consumer is insufficient to identify the subsequent communication as being from a debt collector as is required by section 1692e(11). Further, such a request does not constitute "meaningful disclosure of the caller's identity" as is required by 15 U.S.C. § 1692d(6). *See, e.g.*: Costa v. National Action Financial Services, 634 F. Supp.2d 1069 (E.D.Cal. 2007); Hosseinzadeh v. M.R.S. Associates, Inc., 387 F.Supp.2d 1104, 1115 (C.D.Cal. 2005). Thus, consideration of *Hutton* does not lead this court to believe that certification of an FDCPA class is inappropriate.").

43. The FDCPA prohibits communications regarding the debt unless: (1) the debt collector obtains prior consent from the consumer; (2) the debt collector obtains express permission from a court of competent jurisdiction; or (3) the communication is reasonably necessary to effect a post-judgment remedy. *See* 15 U.S.C. § 1692c(b). State law is in accord. Cal Civ. Code §1788.12(d). *See* Hyman, *The Fair Debt Collection Practices Act*, in 2A Debt Collection §§ 2.25 - 2.26 (CEB Cal. 2015).

44. No case has held, or addressed, whether a cellular telephone's "pop-up" screen could be deemed an "envelope" under 15 U.S.C. § 1692f(8). Obviously, "pop-up" screens on cellular telephones did not exist when the FDCPA was enacted.

45. 15 U.S.C. § 1692f(8).

46. Fair Debt Collection Practices Act, CFPB Annual Report at 8 - 9 (2013), http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf ("For the most part, first-party creditors are not subject to the FDCPA, although the Dodd-Frank Act, state laws, and Section 5 of the FTC Act prohibit them from engaging in unfair, deceptive or abusive practices in theirown collection activity. Both the CFPB and the FTC have law enforcement powers under the FDCPA. Today's collection industry is markedly different from the industry contemplated when Congress enacted the FDCPA 36 years ago…Furthermore, evolving technology has significantly impacted the collections industry. Banks and financial institutions use advanced information and credit risk models to extend credit to Americans who might not have received it 36 years ago. Technology has also helped the industry respond to increasing numbers of consumers with delinquent debt payments. Once, collection activities depended on typewritten collection notices and local phone calls, and virtually everyone subject to collection efforts received a call or a letter. Today, both creditors and collection firms may use sophisticated analytics to identify specific debtors to target.").

other than the debt collector's address could potentially impact the FDCPA.[47]

Given the fact that a debt collector's use of text messaging is entirely optional, there is no "Hobson's Choice" between complying with the FDCPA and risking third party disclosure.[48] A debt collector choosing to use text messages as a form of debt collection does so at its own peril when it comes to FDCPA compliance. In endeavoring to comply with the FDCPA communication requirements, a debt collector should take into account the various methods by which an SMS text message could be disclosed when obtaining a borrower's consent to receive SMS text messages. A debt collector could mitigate this risk when obtaining a borrower's consent to be contacted via text.

4. Reasonable Time-and-Place Restrictions

The FDCPA prohibits communications with the debtor at unusual or inconvenient times or places. A debt collector can assume that times between 8:00 a.m. and 9:00 p.m. local time at the consumer's location are usual and convenient.[49] This restriction was intended to apply principally to telephone communications, as opposed to postal mail.[50] However, as discussed above, a text message is a hybrid between telephone and textual communications. Debt collectors should consider the unique nature of when a borrower "receives" a text message, when obtaining borrowers' consent to be contacted by text and when deciding the time of day to contact borrowers by text message.

5. Charging the Debtor for Costs Not Permitted by Law or the Obligation Creating the Debt

A debt collector would have no clue as to whether a text message that it sends necessarily results in an actual out-of-pocket cost to the debtor. The variety of text message plans differs only as much as the creativity of the cellular telephone company offering them, from "unlimited charges," to "free texts" up to a certain limit, to a "charge-per-text" plan.[51] The point is that receipt of an SMS text message by a debtor necessarily has some impact on the debtor, whether by counting against the debtor's "free" texts in the debtor's plan or actually resulting in a per-text cost either because the debtor already exceeded his/her "free" texts by the end of the month (when debt collection is at its highest) or because the debtor's plan requires payment of a per-text fee.[52]

The FDCPA forbids a debt collector from using unfair or unconscionable means to collect a debt and goes on to state that the following conduct (among others) is a violation of this prohibition: "The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."[53] A seminal case from the United States Court of Appeals for the Second Circuit distilled three rules from this provision when it looked at the propriety of charging service charges: (1) If state law expressly permits the charges, a charge may be imposed even if the contract is silent on the matter; (2) if state law expressly prohibits the charges, it cannot be imposed even if the contract allows it; (3) if state law neither affirmatively permits nor expressly prohibits the charge, it can be imposed only if the customer expressly agrees to it in the contract.[54]

47. *Compare* Douglass v. Convergent Outsourcing, 765 F,3d 299 (3rd Cir. 2014) (holding that any benign information visible through a glassline window of an envelope other than the debt collector's address violated the FDCPA) *with* Datta v. Asset Recovery Solutions, LLC, 2016 WL 3163142, at *5 - 10 (N.D.Cal. 2016) (applying a benign language exception where "Plaintiff has not challenged Fishbein's statement that the reference number and bar code are used solely for internal tracking purposes by Defendant's letter vendor."). *See generally,* Scott J. Hyman & Austin B. Kenney, *Judicial Isolation of the Third Circuit's "Glassine Window" FDCPA Decision in* Douglass v. Convergent Outsourcing, 69 Consumer Fin. L.Q. Rep. 142 (2015).

48. "A debt collector is not required to leave a voicemail message." Udell v. Kansas Counselors, Inc., 313 F.Supp.2d 1135, 1143 (D.Kan. 2004); *see also*: Koby v. ARS National Service, Inc, 2010 WL 1438763 (S.D. Cal. March 29, 2010) ("Nothing in the FDCPA or the Constitution entitles or guarantees a debt collector the right to leave a message on a debtor's voice mail."); Leyse v. Corporate Collection Servs., Inc., 2006 WL 2708451, at *4 (S.D.N.Y. Sept. 18, 2006) ("The Court has no authority to carve an exception out of the statute just so CCS may use the technology they have deemed most efficient."…"[The defendant] has been cornered between a rock and a hard place, not because of any contradictory provisions of the FDCPA, but because the method they have selected to collect debts has put them there."); Berg v. Merchants Assoc. Collection Div., Inc., 586 F. Supp.2d 1336, 1344 (S.D.Fla. 2008) (calling automated telephone messages an "inherently risky method of communication" and noting that debt collectors could use such a mode of communication at their peril); Mark v. J.C. Christensen & Associates, Inc, 2009 WL 2407700 (D.Minn. 2009) ("The risk of disclosure to third parties here was minimal and comes as a result of JCC's selection of what it views as being the easiest or most cost-effective method of attempting to collect debts….Furthermore, debt collectors have several forms of communication available to them in their efforts to collect a debt, including live conversation over the telephone, in person communication, and the mail."); Foti v. NCO Financial Systems, Inc., 424 F. Supp.2d 643 (S.D.N.Y. 2006) ("Thus, the alleged 'Hobson's Choice' in this case is self-imposed by NCO. It is only because of the method of debt collection selected – calling and leaving the type of pre-recorded messages – that NCO is faced with this potential dilemma….it 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."); Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350 (11th Cir. 2009) ("…even if Niagara's assumption is correct, the answer is that the Act does not guarantee a debt collector the right to leave answering machine messages.").

49. 15 U.S.C. § 1692c(a)(1); *see, e.g.,* Smith v. Capital One Fin. Corp., No. C 11-3425 PJH) 2012 U.S. Dist. LEXIS 107653 (N.D. Cal. Aug. 1, 2012). The FDCPA applies the Uniform Time Act of 1966 to account for discrepancies in various time zones for municipalities or states. Vinson v. Credit Control Services., Inc., 908 F. Supp.2d 274 (D. Mass. 2012). *See* Hyman, *The Fair Debt Collection Practices Act*, in 2A Debt Collection § 2.27 (CEB Cal. 2015).

50. Bureau of Consumer Financial Protection, 12 CFR pt. 1006, Debt Collection (Regulation F). https://www.gpo.gov/fdsys/pkg/FR-2013-11-12/html/2013-26875.htm.

51. https://www.consumercellular.com/Info/Services ("If texting and surfing the web when you're on the go is something you need to do all the time, or just some of the time, we have a data plan that's right for you.").

52. FTC, Collecting Consumer Debts: The Challenges of Change, at 41 (2009) ("The FTC is concerned that collection contacts to consumers' mobile phones will impose charges on consumers. The workshop record reflects that calls placed to mobile phones and text messages sent to such phones frequently cause consumers to incur charges. The Commission does not believe that a consumer should have to pay to be contacted by a debt collector. Given the widespread prevalence of mobile calling plans that charge consumers based on the calls they receive, the FTC concludes that the law should presume that consumers will incur charges for calls and text messages made to their mobile phones, and, therefore, generally prohibit debt collectors from contacting consumers via mobile phones.").

53. 15 U.S.C. § 1692f(1) (emphasis added). State laws may create more significant problems. For example, California's Rosenthal Act seemingly would prohibit any collection technique that results in a charge to the debtor. Cal. Civ. Code section 1788.14(b) ("Collecting or attempting to collect from the debtor the whole or any part of the debt collector's fee or charge for services rendered, or other expense incurred by the debt collector in the collection of the consumer debt, except as permitted by law."). *See also* Hyman, *The Fair Debt Collection Practices Act*, in 2A Debt Collection § 2.34B (CEB Cal. 2015).

54. Tuttle v. Equifax Check, 190 F.3d 9, 13 (2d Cir. 1999); *see also* FTC Official Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50097, 50108 (FTC 1988). As the staff commentary restates these rules: "A debt collector may attempt to collect a fee or charge in addition to the debt if either (A) the charge is expressly provided for in the contract creating the debt and the charge is not prohibited by state law, or (B) the contract is silent but the charge is otherwise expressly permitted by state law. Conversely, a debt collector may not collect an additional amount if either (A) state law expressly prohibits collection of the amount or (B) the contract does not provide for collection of the amount and state law is silent."

The argument that the FDCPA ought to require consent from the debtor derives from this legal and factual reality.[55] More specifically, if the financial instrument that creates the debt obligation does not explicitly allow the collection of such "amount" (*i.e.*, the text message cost) incidental to collection of the obligation, then the debt collector violates 15 U.S.C. section 1692f(1).[56] The FTC opined in 2009 that:

> The Commission believes that the law should allow collectors to call consumers on their mobile phones if they have given "prior express consent" to such calls. Consistent with express consent requirements it has imposed in many contexts, the Commission thinks that creditors and debt collectors should be permitted to place collection calls to the mobile phones of consumers only if: (1) the consumers have been adequately informed that they may receive collection calls on their mobile phones; and (2) the consumers have taken some affirmative step to indicate their agreement to receive such calls. The Commission concludes that requiring that prior express consent be obtained provides consumers with enhanced protection against being charged without their consent for collection calls made to mobile phones. If a debt collector has a consumer's prior express consent to contact the consumer's mobile phone, then it should be free to communicate with the consumer via that method so long as the debt collector has reason to believe that the consumer who provided that prior express consent can be contacted at that phone number, and so long as the collector complied with all other FDCPA provisions.[57]

Thus, under the FTC's proposal, either the written instrument could provide the consent, or the debtors could take some affirmative step to agree to receive texts for which they incur some type of charge.

IV. Conclusion

As creditors and debt collectors begin to implement or expand their contact of debtors by text message, both they, and the attorneys that advise them, should closely scrutinize their use of text messages to collector borrowers' debts to ensure compliance with the FDCPA.

55. Colin Hector, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 Cal. L. Rev. 1601, 1630 (2011) ("A third area of potential reform involves the form of consent that should be required to contact consumers through new technologies that may cause consumers financial harm. The most prominent example of this issue is mobile communications, such as calls and texts to mobile phones. Because mobile phone plans often charge users to receive calls and text messages, debt collectors' use of these technologies may impose unauthorized financial costs on individual consumers.").

56. *In the Matter of* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (FCC Jan. 4, 2008), at 5 ("We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt….We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.").

57. FTC, Collecting Consumer Debts: The Challenges of Change, at 41 - 42 (2009).