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THE NATIONAL CREDITORS BAR ASSOCIATION™

The National Creditors Bar Association supports H.R. 1849, *The Practice of Law Technical Clarification Act of 2017*. The legislation, the “Practice of Law Technical Clarification Act,” would clarify that the Fair Debt Collection Practices Act (“FDCPA”) does not apply to creditor attorneys engaged in litigation activities and would expand Section 1027(e) of the Dodd-Frank Act (“DFA”) to cover both consumer and creditor attorneys.

Congress passed the FDCPA in 1977 to eliminate deceptive, unfair and abusive conduct by third-party debt collectors. The FDCPA originally contained a complete exemption for attorneys. When Congress repealed the “attorney-at-law” exemption to the FDCPA in 1985, the sponsor of the amendment explained that that the intent was to regulate only non-litigation collection activities performed by attorneys:

The Fair Debt Collection Practices Act regulates debt collection, not the practice of law. Congress repealed the attorney exemption to the act, not because of attorney's conduct in the courtroom, but because of their conduct in the backroom. Only collection activities, not legal activities, are covered by the act. ... Actions which can only be taken by those possessing a license to practice law are outside the scope of the act.¹

Despite this clear intent, the Supreme Court in *Heintz v. Jenkins*² held that collection attorneys can be subject to the FDCPA even when engaged in litigation. Since *Heintz*, attorneys are routinely sued in federal court for their conduct in state court proceedings that is construed as a technical violation of the FDCPA. This occurs because the FDCPA is a strict liability statute that encourages separate litigation for statutory damages and, notably, attorneys' fees for even harmless technical violations that occur when a judge has oversight over an attorney's conduct. An attorney who voluntarily corrects his or her mistake to the benefit of the consumer cannot escape this liability despite the lack of harm.

¹ 132 Cong. Rec. H. 10031 (1986).

² 514 U.S. 291 (1995).

A case decided by the Northern District of California³ illustrates the collection attorney's dilemma. The attorney filed suit against a husband and wife for the assignee of a consumer debt but omitted listing the name of the original creditor in the state court complaint. Although the Court determined that there was no dispute that the consumers owed the obligation and that the creditor was entitled to collect it, the Court awarded statutory damages under the FDCPA's "strict liability" provision based on the attorney's failure to list the name of the original creditor. Notably, state court rules do not require that the original creditor be identified in the state court complaint. The astonishing aspect of this ruling is reflected in the fact that the consumer's lawyer received \$113,000 in attorneys' fees, in contrast to the \$1,000 statutory damages awarded to the purported aggrieved consumers.

As reflected by the following quote, the issue addressed by H.R. 1849 was even addressed previously by the Federal Trade Commission:

Because it still seems impractical and unnecessary to apply the FDCPA to the legal activities of litigation attorneys, and because ample due process protections exist in that context, the Commission continues to recommend that Congress re-examine the definition of "debt collector" ...⁴

Some consumer organizations have described H.R.1849 as a complete attorney exemption from the FDCPA. Such an interpretation is wholly contrary to the plain language of the legislation. H.R. 1849 clarifies the intent that the FDCPA should not apply to litigation-related attorney conduct that is already subject to judicial oversight. The legislation retains the FDCPA's applicability to attorney extrajudicial activities such as demand letters and phone calls.

These consumer organizations argue that "H.R. 1849 would turn back the clock on this important protection for struggling families by exempting attorney conduct from the consumer protections provided by the FDCPA." In fact, as the American Bar Association points out in their statement of support for H.R. 1849 that the opposite is true. The exemption in H.R. 1849 is not broad, and consumers continue to retain their right to redress egregious actions related to litigation by the judge in the state court litigation and with an attorney's state bar and state supreme court.

The scope of the legislation is narrowly tailored and would only exempt creditor lawyers engaged in litigation activities; it would not create a broad exemption for lawyers' non-litigation debt collection activities. H.R. 1849 would clarify that while the FDCPA does not apply to lawyers' filing of lawsuits and other litigation activities already subject to judicial oversight, the Act would still apply to lawyers' extrajudicial collection activities, such as

³ De Amaral v. Goldsmith & Hull, case no. 12-cv-03580-WHO.

⁴ Federal Trade Commission, *Annual Report: Fair Debt Collection Practices Act* (June 2000). This recommendation was included in the FTC's Annual Report on the FDCPA from 1998-2006. Beginning in 2007, the FTC's Annual Report on the FDCPA no longer contained legislative recommendations.

demand letters and phone calls to debtors. Similarly, while the bill would expand the current exemption in Section 1027(e) of the DFA to include both creditor and consumer lawyers, the CFPB would retain its existing authority over lawyers and others engaged in non-litigation collection activities.⁵

Consumer organizations have referenced “recent enforcement actions” as highlighting “numerous” and “widespread” abusive and deceptive practices by collection law firms and attorneys. The first definition for “numerous” in the dictionary is: “Great in number; many.” The three examples cited by the consumer organizations hardly meet the definition of numerous. Of the three, two of the consent order agreements held no admission of guilt or record of consumer harm and the third case is in active litigation pending outcome.

For centuries, lawyers have been permitted reasonable latitude in connection with statements made in court complaints so that a lawyer would not be subject to suit from a disgruntled opposing party for making an erroneous claim in a pleading on behalf of a client. Moreover, lawyer conduct in a court proceeding is better addressed by the judge overseeing the proceeding. This common law litigation immunity protected attorneys from frivolous lawsuits based solely on unsuccessful litigation. Subjecting attorneys to liability in the event their legal arguments are unsuccessful is in direct conflict with the ethical duty to assert the client’s best case.⁶ The FDCPA’s strict liability, compounded by the disallowance of a bona fide error defense for mistakes of law,⁷ contravenes United States history in which the regulating of attorneys and the standards of professional conduct to which attorneys must abide have been left exclusively to the States.⁸ H.R. 1849 would reaffirm the original intent underlying the FDCPA and support this historical position to retain attorney regulation under the purview of the states by amending the FDCPA and clarifying Section 1027(e) of DFA.

⁵American Bar Association, Preserving State Court Regulation of the Legal Profession - ABA Supports H.R. 1849, the “Practice of Law Technical Clarification Act of 2017” (May 2017).

⁶*Johnson v. Riddle*, 305 F.3d 1107, 1123 (10th Cir. 2002).

⁷*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 604 (2010).

⁸*Leis v. Flynt*, 439 U.S. 438, 442 (1979).