

**STATEMENT OF ANNE P. FORTNEY**

**BEFORE THE**

**UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON FINANCIAL SERVICES  
SUBCOMMITTEE ON  
FINANCIAL INSTITUTIONS AND CONSUMER CREDIT**

**ON**

**LEGISLATIVE PROPOSALS FOR A MORE EFFICIENT FEDERAL  
FINANCIAL REGULATORY REGIME**

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Chairman Luetkemeyer, Congressman Clay, and members of the Subcommittee, thank you for the opportunity to appear before the Subcommittee on Financial Institutions and Consumer Credit.

I am the partner emerita with the Hudson Cook law firm. Our firm specializes in consumer financial services; my practice involved primarily issues arising under consumer protection laws, including the Fair Credit Reporting Act,<sup>1</sup> the Federal Debt Collection Practices Act,<sup>2</sup> the Credit Repair Organizations Act,<sup>3</sup> and similar laws. In all, I enjoyed more than 40 years' experience in the consumer financial services field, including service as Associate Director for Credit Practices at the Federal Trade Commission (FTC), as in-house counsel at a retail creditor, and as a practitioner counseling clients on compliance with the consumer protection laws. I also served as a consultant and an expert witness in litigation involving these consumer protection laws.<sup>4</sup>

Although I am not currently involved in the day-to-day practice of law, I was pleased to receive this Subcommittee's invitation to testify on three bills: the draft of the Credit Services Protection Act (CSPA); H.R. 1849 (the Practice of Law Clarification Act of 2017); and H.R. 2359 (the Fair Credit Reporting Liability Harmonization Act). I believe that my extensive experience with the subject matter of all three bills will assist in understanding the urgent need for their enactment. I commend you for holding this hearing.

## **I. Overview**

While all three bills involve different consumer financial services laws, each of those laws was designed to address industry practices that caused substantial injury to consumers. Prior to the

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<sup>1</sup> 15 U.S.C. § 1681 et seq.

<sup>2</sup> 15 U.S.C. § 1692 et seq.

<sup>3</sup> 15 U.S.C. §§ 1679-1679j.

<sup>4</sup> A detailed description of my background and experience is attached to this statement.

Fair Credit Reporting Act, there were inadequate protections regarding the accuracy and confidentiality of consumer report information. Congressional hearings on the Fair Debt Collection Practices Act included testimony about consumer debt collectors' unfair and sometimes abusive acts and practices. The Credit Repair Organizations Act was designed to regulate the conduct of credit repair organizations and to address the injury that these organizations inflicted through their false promises that they could eliminate negative, but accurate, information in consumers' reports. Industry representatives supported the enactment of each of these consumer protection laws.<sup>5</sup>

Today, there is universal support for these laws and for their essential protections for consumers in the financial services marketplace. None of the three bills before you would jeopardize those protections. On the contrary, each bill would make each law more effective and fair for everyone.

The bills would accomplish this result by bringing common sense into the interpretation of each law and by correcting some judicial misinterpretations. The Supreme Court of the United States admitted that the Fair Credit Reporting Act is "less than pellucid."<sup>6</sup> I believe that the Court misunderstood the Fair Debt Collection Practices Act's applicability to the practice of law.<sup>7</sup> If the highest court in the land sometimes struggles to understand these laws, you can imagine the difficulty for the lower courts and for the industry. In the efforts to apply these laws, some courts

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<sup>5</sup> Associated Credit Bureaus (the predecessor to the Consumer Data Industry Association) worked with Congress on the Fair Credit Reporting Act prior to its enactment in 1970. The Act reflected the industry standards for consumer reporting. Similarly, the American Collectors Association supported enactment of the Fair Debt Collection Practices Act in 1977. Finally, the Credit Repair Organizations Act was passed in 1996 at the urging of the consumer credit and credit reporting industry.

<sup>6</sup> *Safeco Insurance Company of America v. Burr*, 551 U.S. 47, 70 (2007). Three federal courts (the U.S. District Court, the U.S. Court of Appeals for the 9<sup>th</sup> Circuit, and the U.S. Supreme Court) each had very different interpretations of the same language in the Act's provision in the same case.

<sup>7</sup> *Heintz v. Jenkins*, 514 U.S. 291 (1995).

have ignored the Congressional purpose, federal agency policy statements, and the real-world consequences of their interpretations. Some courts' decisions ignored the common sense meaning of the statutes' language. My testimony describes the adverse effects of these decisions and explains how each bill would solve the problems in a manner consistent with common sense and full protection for consumers.

## **II. H.R. \_\_\_\_\_, the Credit Services Protection Act**

I begin with the Discussion Draft of the Credit Services Protection Act (CSPA). This bill would maintain the Credit Repair Organization Act's (CROA) prohibition against, and enforcement of, illegal credit repair activities, while creating an environment in which legitimate companies may facilitate the delivery of individualized credit education and improvement services to consumers, under the supervision of the Federal Trade Commission (FTC). My testimony describes: (1) the demonstrable consumer demand and need for these services, (2) why CROA, as interpreted by some courts, has created an unnecessary impediment to the provision of these services, and (3) the solution set forth in the CSPA.

### **A. Need for Individualized Credit Education and Protection Services**

Today, more than ever, consumers are provided resources to learn about their credit scores and credit standing. This is in large part due to efforts by Congress to make transparency of credit reports and scores a top priority, along with the efforts of the CFPB to encourage greater access to scores.

Consumers have access to their credit report information in a variety of ways. Since the passage of the Fair and Accurate Credit Transactions Act in 2003, consumers may now request a free annual credit report from each of the nationwide consumer reporting agencies, including Experian, Equifax and TransUnion (through [www.annualcreditreport.com](http://www.annualcreditreport.com)). Additionally, since

the CFPB launched its Scores on Statements initiative in 2014,<sup>8</sup> more than 50 million credit card account holders have been receiving a free credit score in their monthly statements.<sup>9</sup> Consumers also receive an estimated 120 million credit-score disclosures each year through various statutory notices.<sup>10</sup> However, despite having improved access to their credit score and consumer report information, consumers remain confused about their credit histories and are unsure of how to take control of their finances.

The CFPB's study on consumer reports revealed that "[c]onsumers appreciated the presence of their scores on their [credit card] statement, but had questions about what actions to take once they had seen their scores."<sup>11</sup> Having access to their full credit report did not necessarily alleviate the confusion. While some consumers viewed their credit reports as helpful to improving their scores and general financial situation, many reported that they "were not sure how to improve their scores and were confused by conflicting advice about what actions to take." When consumers want to know more, they often call the consumer reporting agencies.

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<sup>8</sup> See CONSUMER FINANCIAL PROTECTION BUREAU, "CFPB Calls on Top Credit Card Companies to Make Credit Scores Available to Consumers" (February 27, 2014), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-calls-on-top-credit-card-companies-to-make-credit-scores-available-to-consumers/>.

<sup>9</sup> CONSUMER FINANCIAL PROTECTION BUREAU, "CFPB Reports That More Than 50 Million Credit Card Consumers Have Access to Free Credit Scores" (February 19, 2015), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-reports-that-more-than-50-million-credit-card-consumers-have-access-to-free-credit-scores/> (noting that in the first year alone, the number of consumers reached by the Scores on Statements initiatives passed the 50 million mark).

<sup>10</sup> Required by the Fair Credit Reporting Act, a credit score disclosure includes a letter sent by a lender advising a consumer that the lender has not been able to approve the application for credit, due at least in part, to the consumer's credit score, and it explains to the consumer the key factors that have negatively impacted the score (such as the number of delinquencies, or the existence of a bankruptcy, etc.). The credit score disclosure directs the consumer to contact the consumer reporting agency from which the report was obtained for more information.

<sup>11</sup> CONSUMER FINANCIAL PROTECTION BUREAU, CONSUMER VOICES ON CREDIT REPORTS AND SCORES (2015), available at: [http://files.consumerfinance.gov/f/201502\\_cfpb\\_report\\_consumer-voices-on-credit-reports-and-scores.pdf](http://files.consumerfinance.gov/f/201502_cfpb_report_consumer-voices-on-credit-reports-and-scores.pdf) [hereinafter CFPB Consumer Voices Report].

Consumer reporting agencies, and others in the marketplace, are developing solutions to help consumers know how to improve their financial situation. These consumer education services vary from advising on general steps about managing one's finances (i.e. "pay your bills on time each month"), to providing specific guidance to the consumer as to what that consumer should do about their accounts in the future (i.e. transfer balances from card A to card B). It is the latter, the personalized credit education services, which provide the solution to the very question consumers are asking – "what do I do now?"

Recent studies show the effectiveness of personalized credit education services, and the results are exciting. After completing a personalized credit education program, 62% of consumers had an increase in their credit score, with nearly half of those (30%) seeing a 21 point or greater score improvement. More importantly perhaps, 86% of those participants surveyed answered that their credit management skills had improved and that they were "more capable" than before the education, with 39% of those responding stating they were "much more capable." Eighty-eight percent of consumers who participated in the post-program survey answered that they had a better understanding of what they could do that may positively affect their credit score, with 60% responding they were more likely to request their free annual credit reports, 63% stating they were more likely to look for, and dispute, perceived errors. Individuals with thin files (who lack sufficient credit history information to generate a score) had a 29% increase in the number of tradelines as opposed to those who did not complete the program (who saw only a 7% increase)<sup>12</sup>. This study confirms what industry has observed anecdotally for years: Consumers want and need more education to improve their financial circumstances.

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<sup>12</sup> POLICY & ECONOMIC RESEARCH COUNCIL, PERSONALIZED CREDIT EDUCATION: CONSUMER AND SMALL BUSINESS OWNER ATTITUDES, IMPACTS AND IMPEDIMENTS (2016), available at [http://www.perc.net/wp-content/uploads/2016/11/CE\\_PERC\\_FinalReport\\_113016web.pdf](http://www.perc.net/wp-content/uploads/2016/11/CE_PERC_FinalReport_113016web.pdf) [hereinafter PERC Report].

Today's consumers demand access to information where, how, and when they want it. Most consumers who request copies of their consumer reports do so online.<sup>13</sup> Consumers demand easy to understand, and where possible, streamlined websites to obtain their services quickly, and the failure to timely provide these services leads to a lower adoption rate. Even where personalized education services were offered free of charge, consumers were still deterred by the requirement that they wait three days to complete the program, with 46% of those surveyed in 2015 indicating they would have used the credit education program if they had not been forced to wait.<sup>14</sup> This means a significant number of consumers who want, and would benefit from, the consumer education services are not using them. This delay is caused by the breadth of the definitions in CROA and various courts' misinterpretations of CROA, which force companies to comply with a law that was never intended to cover them or their products and services. As a result, companies offering credit education must turn consumers away for three days or more before allowing them to try to take advantage of the beneficial service. It is not surprising that few consumers complete these helpful programs or get the timely help that they may need when in the market for credit.

### **B. CROA and the Courts' Misinterpretations of Credit Repair**

More than 20 years ago, at the urging of the FTC and the consumer credit industry, Congress enacted CROA.<sup>15</sup> The Act provided much-needed consumer protection from scam artists and other fraudulent operators who falsely claimed that they could "clean up" or "repair" a consumer's existing credit report history by removing negative information from their files – even when the information was accurate. These "credit repair" clinics charged exorbitant fees in

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<sup>13</sup> CFPB Consumer Voices Report, *supra* note 11.

<sup>14</sup> Michael Turner, Michael Staten, and Patrick Walker, "Is CROA Choking Credit Report Literacy?" (April 2015), Policy and Economic Research Council (PERC), available at: <http://www.perc.net/publications/is-croa-choking-credit-report-literacy/>.

<sup>15</sup> 15 U.S.C. § 1679 *et seq.*

advance, but failed to produce the promised results. In the process, they also abused the consumer dispute procedures, flooding credit reporting agencies (“CRAs”) with frivolous disputes. The accuracy, integrity, and reliability of consumer report information was compromised because CRAs were often forced to delete negative but accurate information in the consumer report file because of this “gaming” of the dispute system. As a result of the incomplete picture painted by these reports, credit grantors were injured when they extended credit to consumers without the benefit of the information.

CROA protects consumers in the following ways: (1) prohibiting the advance payment of fees for services, (2) giving consumers a 3-day right to cancel the services after signing a written contract, during which the services may not be provided, (3) requiring the provision of notice to consumers of their legal right to dispute and remove inaccurate information in their credit report files at no cost, and (4) prohibiting false and deceptive acts or practices in connection with credit repair services. CROA is a strict liability statute: any violation of one of its many technical requirements results in liability, regardless of any consumer harm. CROA provides for a private right of action, including class actions, and the penalties for violation include complete disgorgement of any fees paid by consumers.<sup>16</sup>

In addition, the FTC and the State Attorneys General may enforce CROA.<sup>17</sup> The FTC has vigorously enforced CROA against credit repair operators and has protected consumers from

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<sup>16</sup> 15 U.S.C. § 1679(g).

<sup>17</sup> 15 U.S.C. § 1679(h).

misleading and fraudulent practices.<sup>18</sup> In all their CROA enforcement activities, the FTC and State Attorneys General have focused exclusively on true credit repair activities, and have not interpreted CROA's definitions to apply to consumer education or identity theft protection services. In fact, the FTC has testified that it saw "little basis on which to subject the sale of legitimate credit monitoring and similar educational products and services to CROA's specific prohibitions and requirements, which were intended to address deceptive and abusive credit repair business practices." These services, "if promoted and sold in a truthful manner, can help consumers maintain an accurate credit file and provide them with valuable information for combating identity theft."<sup>19</sup>

The FTC's interpretation is consistent with the distinction between (a) credit repair, which is *retroactive* in its effect (you repair, or fix, something that is broken or damaged) and (b) consumer education and other services, including identity theft protection, which are *prospective* in their application (these services help maintain the status quo or improve a situation).

Initially, the courts interpreting CROA adopted this common-sense difference between retroactive "repair" of credit and prospective improvement in credit. *Hillis v. Equifax Consumer Servs. Inc.*, 237 F.R.D. 491, 514 (N.D. Ga. 2006) ("Congress did not intend for the definition of a credit repair organization to sweep in services that offer only prospective credit advice to consumers or provide information to consumers so that *they* can take steps to improve their credit

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<sup>18</sup> As the FTC testified in 2007 before this Committee, the FTC, in conjunction with other law enforcement agencies state and federal, has enforced CROA in several "sweeps" since its enactment, including Project Credit Despair (bringing 20 enforcement cases in 2006); Operation New ID-Bad Idea I and II (bringing 52 actions in 1999); and Operation Eraser (32 actions filed in 1998). See S. HRG. 110-1170 "Oversight of Telemarketing Practices and the Credit Repair Organizations Act (CROA)." Prepared statement of the Federal Trade Commission before the Committee on Commerce, Science, and Transportation. US Senate, 110th Congress, 1st Session. July 31, 2007, page 18.

<sup>19</sup> FTC Congressional Testimony, *supra* note 18 at p. 20.

in the future.”). More recently, however, some courts have interpreted CROA to encompass also “services aimed at improving future creditworthy behavior with prospective promises of improved credit” *Stout v. Freescore, LLC*, 743 F.3d 680, 686 (9th Cir. 2014) and *Zimmerman v. Puccio*, 613 F.3d 60, 72 (1st Cir. 2011) (finding that credit counseling aimed at improving future creditworthy behavior is credit repair). Thus, under these courts’ interpretation, CROA may cover any product or service that possibly helps consumers improve their credit, or even prevent deterioration, including products and services that millions of consumers already use, such as credit monitoring and identity protection.

Not surprisingly, such peculiar definitions of credit “repair” have prevented or significantly hampered the offering and delivery of new and innovative consumer credit education products, like personalized credit score simulators, and other credit maintenance and improvement services, even when the providers of the services do, in fact, help consumers prospectively improve their credit histories and credit scores and achieve tangible benefit from the services.<sup>20</sup>

### **C. The Solution**

There is a clear solution to the barriers that CROA and the courts’ interpretations of it have created to the development and delivery of new credit education tools and identity theft protection services. Congressman Ed Royce (R-CA) has developed draft legislation, the Credit Services Protection Act (“CSPA”), to create a narrow exemption for the provision of credit education services and credit and identity protection services. The new draft is based upon the feedback from many stakeholders that Congressman Royce and a bipartisan group of lawmakers received on H.R. 347, during the 114th Congress.

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<sup>20</sup> PERC Report, *supra* note 12.

This would *not* be a blanket exemption from CROA's requirements for the nationwide consumer reporting agencies and other companies that currently are inhibited from delivering innovative credit education. Rather, the CSPA would enable "authorized credit service providers" ("ACSPs") to provide credit education and identity theft protection services following their registration with the FTC in accordance with the CSPA's requirements for registration, including informing the FTC of their intention to deliver legitimate credit education services and/or credit and identity protection services. These registered entities would be prohibited from engaging in the type of credit repair activities that CROA was intended to prevent, and would be required to follow a stringent set of requirements, including submitting a written certification to the FTC with detailed information about the business, and providing a public representation of adherence to the practices, commitments, and obligations prescribed by the law. Further, each ACSP would be required to provide the FTC with ongoing, biannual audits on its compliance program and other details relating to its products and services.

In addition, the CSPA would adopt the consumer protections in CROA that are relevant for the services that an ACSP provides. These would include a notice explaining the consumer's rights with respect to access to and the ability to dispute information in a credit report file. Consumers would be apprised of their right to receive their credit report, and the right to a free copy of the report annually from the nationwide consumer reporting agencies. Consumers would have the right to cancel the service within three business days of enrollment and to receive a refund for any services not provided during that time.

The safe harbor under the CSPA would not create a loophole for any entity to engage in credit repair free from CROA's liability provisions. If an ACSP were found to have been delivering traditional credit repair, the entity would be subject to CROA's provisions, including a private

right of action if the FTC revoked the ACSP's registration. Moreover, the FTC, the CFPB, the State Attorneys General, and consumers, under state law, would maintain existing rights to sue for unfair and deceptive acts or practices by an ACSP.

In sum, the CSPA would provide a framework to enable legitimate businesses to offer existing products and develop innovative new products to protect consumers' credit information from identity theft and to provide the credit information that consumers want and need, and it would accomplish this goal while assuring full protection for consumers in their utilization of these services.

### **III. H.R. 1849 (the Practice of Law Clarification Act of 2017)**

Next, I discuss H.R. 1849, introduced by Representative Trott (R-MI). As its name implies, this bill would clarify that the practice of law by licensed attorneys does not involve debt collection activities that should be subject to the Fair Debt Collection Practices Act (FDCPA).

This bill would exclude law firms and licensed attorneys from the FDCPA's definition of "debt collector," but the exclusion would apply only to the extent that the law firm or attorney engaged in legal proceedings on behalf of a client. The bill would also amend the Consumer Financial Protection Act (CFPA) to exempt licensed attorneys while engaged in such legal proceedings from the Consumer Financial Protection Bureau's (CFPB's) enforcement and supervisory authority.

My support for this bill is based on my experience, first in working with Congressional staff on behalf of a retail creditor when Congress was considering the enactment of the FDCPA in 1977, and then in the mid-1980s as the director of the FTC's division responsible for enforcing the FDCPA. Drawing on this experience, I discuss the history of the FDCPA's applicability to attorneys and my reaction to courts' interpretations of that issue. I also discuss the scope of

CFPB's regulatory authority over collection attorneys. As I believe the following demonstrates, H.R. 1849 is a long overdue, common-sense approach to attorneys collecting debt on behalf of their clients using legal proceedings.

#### **A. The FDCPA as Enacted in 1977**

Given the broad definition of “debt collector” and the kinds of activities that the Act was designed to police, Congress recognized that certain exemptions were appropriate. One such exemption was “any attorney-at-law collecting a debt *as an attorney* on behalf of and in the name of a client.”<sup>21</sup> Congress recognized that “debt collection” and the practice of law involve different activities and should be subject to different regulation. An attorney collecting a debt on behalf of a client in a legal proceeding prepares the complaint and other legal documents to be served on the debtor, communicates with the debtor or her attorney in connection with the lawsuit, communicates with the court, and enforces any resulting judgment. On the other hand, a debt collector sends dunning letters to debtors, calls debtors, enters into payment plans with debtors, and skip traces. While an attorney would be subject to standards of professional conduct and overseen by the state bar (or bars) of which she was a member, a debt collector would not. In fact, in 1977, only 37 states and the District of Columbia regulated debt collectors in any capacity. Of those 37 states and the District, only 26 and the District provided “effective protection” against collection abuses according to the Senate Committee on Banking, Housing and Urban Affairs.<sup>22</sup>

Over time, however, a new trend emerged: unscrupulous debt collectors, who happened to also be attorneys, were engaging in abusive collection practices outside of the litigation channel of collection, and evading FDCPA coverage. For example, attorney debt collectors were calling

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<sup>21</sup> Pub. L. 95-109, § 803(6)(F) (1977) (emphasis added).

<sup>22</sup> H.R. REP. NO. 95-38, at 37 (1977).

debtors frequently and at odd hours, including late at night, disclosing the debt to third parties, and making false threats.<sup>23</sup> A law license was not required to engage in any of these practices – any non-attorney debt collector could do the same, but would be subject to liability under the FDCPA. Moreover, attorneys were using their law licenses as shields to protect large debt collection operations, staffed primarily by non-lawyers and engaged primarily in non-legal work. These collection firms were “law firms” in name only.<sup>24</sup>

### **B. Congress Repeals the FDCPA’s Attorney Exemption**

These abusive practices came to the attention of the FTC and Congress in the mid-1980s. At that time, I was the Associate Director for Credit Practices at the FTC’s Bureau of Consumer Protection, and as such directed the FTC’s division responsible for FDCPA enforcement. We were concerned about the abuses of the exemption, but also the compliance burden that the FDCPA imposed on attorneys litigating debt collection cases, including highly technical disclosure requirements, limits on contacts with third parties, and rules about ceasing to collect the debt.<sup>25</sup> Testifying on behalf of the FTC, I urged the committee to “retain some form of the attorney exemption,” but to also provide clarification concerning the scope of the exemption, including how it would apply to an attorney who does not operate a collection firm, but who also engages in more than occasional collection in the course of her legal practice.<sup>26</sup> In other words, we at the FTC recommended an exclusion for activities in the course of the practice of law, rather than an

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<sup>23</sup> H.R. REP. NO. 99-405 (1985).

<sup>24</sup> *To Amend the Fair Debt Collection Practices Act: Hearing on H.R. 237 Before the H. Subcomm. on Cons. Affairs and Coinage of the H. Comm. on Banking, Fin. and Urban Affairs, 99th Cong. 8-9 (1985)* (statement of Anne Fortney, Associate Director for Credit Practices, Bureau of Consumer Protection of the Federal Trade Commission).

<sup>25</sup> *Id.* at 16-19, 24-25.

<sup>26</sup> The FTC had asked Congress four times before 1985 to clarify the attorney exemption. *See id.* at 22-23.

exemption for attorneys. H.R. 1849 would address the very issues we were concerned about, by creating a narrow and specific exemption from the FDCPA for certain types of attorney litigation activities.

Congress ultimately repealed the attorney exemption in 1986. The stated purpose was to level the playing field between non-attorney debt collectors and attorney debt collectors, and to regulate the *collection* activities, and not the *legal* activities, of attorneys. In other words, Congress did not want to regulate any activities for which a law licensed is required.<sup>27</sup> However, Congress did not replace the broad attorney exemption with a narrower exemption for an attorney's litigation or other legal activities, as the FTC had requested.

Before 1986, the FTC's position was that attorneys engaged in non-litigation collection activities were covered by the FDCPA, because they were not acting as attorneys when they collected debt, and therefore did not fit within the attorney exemption.<sup>28</sup> Since the repeal of the attorney exemption, the FTC has consistently interpreted the FDCPA to apply only to attorneys engaged in non-litigation debt collection, and not to attorneys "whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment)."<sup>29</sup>

### ***C. Heintz v. Jenkins***

Over the next nine years following the repeal of the attorney exemption, it was unclear whether attorneys collecting debt through litigation were subject to the FDCPA. The federal circuit

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<sup>27</sup> 132 CONG. REC. H10031-02 (daily ed. Oct. 14, 1986) (statement of Rep. Annunzio).

<sup>28</sup> *Hearing on H.R. 237, supra* note 24, at 13-15 ("The [FTC] takes the position that the [FDCPA] applies to any business that functions as a traditional debt collection firm and engages in the same kind of collection activity, regardless of whether it is owned or operated by an attorney... attorneys or law firms whose operations are virtually indistinguishable from a debt collection agency have no legitimate claim to exemption.").

<sup>29</sup> FEDERAL TRADE COMMISSION, STATEMENTS OF GENERAL POLICY OR INTERPRETATION, STAFF COMMENTARY ON THE FAIR DEBT COLLECTION PRACTICES ACT, 53 Fed. Reg. 50097-02, 50102 (1988).

courts split on the issue, which eventually made its way to the U.S. Supreme Court in 1995. In *Heintz v. Jenkins*, the Supreme Court held that the FDCPA applies to attorneys who regularly engage in consumer debt collection activity, and regulates both the litigation and non-litigation collection activity of attorneys.<sup>30</sup> The Court disregarded the legislative history of the 1986 amendments and the FTC's 1988 Policy Statement on the scope of the FDCPA. Instead, the Court relied on Congress's failure in 1986 to replace the FDCPA's attorney exemption with a specific, narrower exemption for an attorney's litigation-related activity as proof that Congress intended to regulate all attorney debt collection activities at the time it amended the FDCPA in 1986.

However, the FTC's position remained consistent with the original underlying purpose of the 1986 amendments to the FDCPA. From 1998 until 2006 (the year that the FTC stopped making legislative recommendations in its annual reports), the FTC continued to recommend to Congress in its annual report on FDCPA enforcement that Congress clarify the extent to which the FDCPA applies to collection attorneys' litigation activities.<sup>31</sup> To my knowledge, the FTC has never brought an enforcement action under the FDCPA against a law firm or an attorney for litigation-related collection activity.

#### **D. The Consequences of *Heintz***

Despite the FTC's position, plaintiffs' attorneys have taken *Heintz* at face value, and routinely sue law firms over not only collection activity, but litigation-related activity, including information contained in legal filings. Lower courts, which must follow the Supreme Court's binding precedent in *Heintz*, typically find that litigation-related activities are subject to the

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<sup>30</sup> 514 U.S. 291 (U.S. 1995).

<sup>31</sup> 2006 FTC FDCPA ANN. REP. 11-12 (2006), available at: <https://www.ftc.gov/sites/default/files/documents/reports/fair-debt-collection-practices-act-federal-trade-commission-annual-report-2006-types-consumer/p0648042006fdcpareport.pdf>.

FDCPA.<sup>32</sup> It is difficult to believe that Congress could have intended the following consequences that flowed from repealing the attorney exemption in 1986.

For example, in 2010, the U.S. Supreme Court issued its opinion in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, bringing to a head a startling trend in FDCPA litigation against law firms and attorneys.<sup>33</sup> In *Jerman*, the Court held that the FDCPA's bona fide error defense – which generally protects from liability a debt collector who makes a bona fide and unintentional error, as long as it has procedures reasonably adapted to avoid such error<sup>34</sup> – does not apply to mistakes of law. In other words, a technical, but harmless, violation of the FDCPA can result in a lawsuit for an attorney exercising good faith legal judgment. Justices Kennedy and Alito, in their dissent in *Jerman*, warned:

After today's ruling, attorneys can be punished for advocacy reasonably deemed to be in compliance with the law or even required by it. This distorts the legal process. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk. It is most disturbing that this Court now adopts a statutory interpretation that will interject an attorney's personal financial interests into the professional and ethical dynamics of the attorney-client relationship.<sup>35</sup>

In many instances, plaintiffs suing law firms over legal pleadings have not even suffered any harm, and yet courts routinely find law firms can be sued over technical FDCPA violations for information they included in a complaint, or for harmless errors, or even errors that benefit the consumer. For example, the venue provision of the FDCPA requires a debt collector to sue a

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<sup>32</sup> *Marquez v. Weinstein, Pinson & Riley, P.S.*, 836 F.3d 808 (7th Cir. 2016); *Kaymark v. Bank of America, N.A.*, 783 F.3d 168 (3d Cir. 2015); *Miljkovic v. Shafritz and Dinkin, P.A.*, 791 F.3d 1291 (11th Cir. 2015); *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007).

<sup>33</sup> 559 U.S. 573 (2010).

<sup>34</sup> 15 U.S.C. § 1692k(c).

<sup>35</sup> 559 U.S. at 622.

debtor in the judicial district in which she lives or in which she signed the contract creating the debt.<sup>36</sup> Courts generally interpret this rule to mean that a debt collector must sue in the smallest judicial unit that covers where the debtor lives or signed the contract, which is typically a county-level court. But, in some large counties – e.g., Cook County, Illinois – there are multiple judicial sub-districts. The U.S. Court of Appeals for the Seventh Circuit, which is the federal appellate court covering Illinois and several surrounding states, ruled in 1996 that a debt collector could sue a debtor who lived or signed the contract in Cook County in any of the judicial sub-districts within Cook County.<sup>37</sup> Debtors generally appreciated this, because they preferred to deal with legal actions close to where they worked, near downtown Chicago, rather than having to travel to suburban courts to handle legal actions. In 2013, relying on this Seventh Circuit case, a law firm, on behalf of a client, sued a debtor in Cook County in a judicial sub-district other than the one in which he lived or signed the contract. At the time the law firm sued the debtor, the venue for its lawsuit complied in all respects with applicable law. Then, in 2014, the Seventh Circuit reversed course, ruling that debt collectors had to sue in the judicial sub-district within Cook County where the debtor resided or signed the contract, and could not sue in any sub-district within the county.<sup>38</sup> Eight days after the Seventh Circuit reversed its 2014 decision, the law firm dismissed the collection case and even refunded an appearance fee that the debtor had paid. Nonetheless, the debtor sued the law firm, arguing that the law firm violated the FDCPA by suing him in the wrong venue. The court ultimately ruled against the law firm, finding that even though it had made a good faith legal judgment that complied in all respects with the existing law at the time, and had dismissed the lawsuit and refunded the debtor's appearance fees when it learned of the new ruling

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<sup>36</sup> 15 U.S.C. § 1692i(a)(2).

<sup>37</sup> *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996).

<sup>38</sup> *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014).

from the Seventh Circuit, the lawsuit was filed in the wrong judicial district and therefore the law firm could be liable for violating the FDCPA.<sup>39</sup> The debtor alleged no harm – this was merely a technical violation of the FDCPA. He was not dragged into a far-flung court. Instead, he was asked to appear in a court in the same county in which he lived, and within almost a week of learning about the change in position of the Seventh Circuit, the law firm dismissed its case and refunded the debtor’s appearance fees.

In another example, a consumer sued a law firm over an affidavit it filed with its debt collection complaint in state court in which the law firm requested attorneys’ fees “to the extent permitted by applicable law.” The U.S. Court of Appeals for the Sixth Circuit explained that the affidavit was not “technically” deceptive—there was no threat to take an action that could not be legally taken—but nonetheless held that because the debt collector filed the lawsuit in *Ohio*, which does not allow attorneys’ fees, the affidavit was deceptive in violation of the FDCPA.<sup>40</sup> In other words, an attorney can face liability for a lawful and truthful request in a court filing, which is subject to all the protections afforded by the legal system, including a neutral judge and the rules of civil procedure. These no-harm cases demonstrate that attorneys engaged in litigation can be held liable for a technical violation of the FDCPA, even if they exercise good faith legal judgment, comply with existing binding legal precedent, and the consumer suffers no harm.

No-harm liability for debt collectors continues even after the U.S. Supreme Court’s 2016 decision in *Spokeo, Inc. v. Robins*. In *Spokeo*, the Supreme Court held that plaintiffs must allege actual harm or a risk of harm to establish the standing necessary to bring a case in federal court and cannot rely on a mere technical violation of law.<sup>41</sup> However, since *Spokeo*, federal courts have

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<sup>39</sup> *Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 864 F.3d 492 (7th Cir. 2017).

<sup>40</sup> *Gionis v. Javitch, Block, Rathbone, LLP*, 238 Fed. Appx. 24 (6th Cir. 2007).

<sup>41</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016).

routinely found that any deceptive statement is, by itself, without any additional allegation of actual harm or risk of harm, sufficient to establish standing in FDCPA lawsuits.<sup>42</sup> And, in line with those decisions, attorney debt collectors engaged in litigation have also been held liable for pleadings that were allegedly deceptive, but did not harm the consumer. For instance, the U.S. Court of Appeals for the Third Circuit found that a debtor had standing to sue a law firm that demanded certain fees in a foreclosure complaint, even though the debtor suffered no harm from the demand. In that case, the fees were not yet incurred at the time of filing the complaint, but were ultimately incurred and were reasonable.<sup>43</sup>

The encroachment on the attorney-client relationship, and the attorney's ethical obligations to her clients, are not the only ways that the lack of clarity in the FDCPA, and the resulting *Heintz* decision, have affected attorneys collecting debt through litigation. Other provisions of the FDCPA impose hurdles on an attorney's ability to litigate a valid claim on behalf of her client. For example:

- The FDCPA's requirement that a debt collector honor a written cease communication request from a debtor, including a written statement that the debtor refuses to pay the debt,<sup>44</sup> interferes with an attorney's ability to settle lawsuits or negotiate payment plans.

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<sup>42</sup> See, e.g., *Thomas v. John A. Youderian Jr., LLC*, 232 F.Supp.3d 656 (Dist. N.J. 2017) (debtor had standing to bring FDCPA claim for collection letter that included unauthorized fee even though debtor did not actually pay fee); *Schweer v. HOVG, LLC*, 2017 WL 2906504 (M.D. Penn. July 7, 2017) (debtor had standing to bring FDCPA lawsuit alleging debt validation notice was overshadowed, even though she did not allege injury); *Bautz v. ARS National Services, Inc.*, 226 F.Supp.3d 131 (E.D.N.Y. 2016) (debtor who stated claim for deceptive collection letter had standing to sue under FDCPA without proof of injuries).

<sup>43</sup> *Kaymark v. Bank of America, N.A.*, 783 F.3d 168 (3d. Cir. 2015).

<sup>44</sup> 15 U.S.C. § 1692c(c).

- The FDCPA’s prohibition on false and deceptive statements, for which debt collectors are strictly liable,<sup>45</sup> means that a debt collector could be held liable for a pleading in which the collector seeks a portion of the debt or fees that are in dispute. This type of pleading would likely be allowed and even encouraged under state law and court rules, because the amount in dispute is typically what the litigation will resolve.

Debt collection attorneys’ compliance burdens do not end at the FDCPA’s private right of action. The CFPB has rulemaking, supervisory, and enforcement authority under the FDCPA and under the CFPA. As I will discuss below, the CFPB, interpreting *Heintz*, apparently views its authority as extending to the litigation activities of collection attorneys.

#### **E. The Dodd-Frank Act and the CFPB’s Supervisory Authority**

In 2010, Congress enacted the Dodd-Frank Act, giving the new CFPB enforcement, supervisory, and rulemaking authority to regulate certain consumer financial products and services, including debt collection.<sup>46</sup> The Dodd-Frank Act expressly excludes attorneys from the CFPB’s supervisory and enforcement authority, except under certain circumstances, including when an attorney offers or provides a consumer financial product or service with respect to a consumer, but does not represent the consumer in connection with the product or service.<sup>47</sup>

The legislative history shows that it was Congress’s intent that the CFPB not have “authority to regulate the practice of law, which is regulated by the [s]tate or [s]tates in which the attorney in question is licensed to practice.”<sup>48</sup> In fact, the purpose was to regulate individuals “who happen to be attorneys... if the conduct is not part of the practice of law or incidental to the practice

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<sup>45</sup> 15 U.S.C. § 1692e(2).

<sup>46</sup> *See* 12 U.S.C. §§ 5512(a), 5481(15)(A)(x).

<sup>47</sup> 12 U.S.C. § 5517(e)(2)(B).

<sup>48</sup> 156 CONG. REC. E1347-01, E1348-E1349 (daily ed. Jun. 30, 2010) (speech of Rep. Conyers).

of law.”<sup>49</sup> In other words, Congress intended a practice of law exclusion, not an attorney exemption.

In 2012, the CFPB issued its final Larger Participant Rule for the debt collection market.<sup>50</sup> The CFPB interpreted the Dodd-Frank Act to mean that the Bureau has supervisory authority over attorney debt collectors, because attorney debt collectors are providing a consumer financial product or service (debt collection) with respect to a consumer (the debtor), but are not representing that consumer.<sup>51</sup>

The Larger Participant Rules does not distinguish between attorney litigation practices, and attorney debt collection practices. While the CFPB does not expressly include or exclude litigation activities from the scope of its supervisory authority, the CFPB does cite to *Heintz* for the proposition that attorney debt collectors are subject to the FDCPA even when they are litigating.<sup>52</sup> Accordingly, any attorney who meets the definition of “debt collector” under the FDCPA, and also exceeds the income thresholds in the Larger Participant Rule, is subject to CFPB supervision, including in connection with her litigation activities.

#### **F. H.R. 1849 Would Resolve the Problems Created by *Heintz***

As I have said throughout my testimony, the original intent of the repeal of the attorney exemption from the FDCPA was to clarify that attorneys engaged in non-litigation collection activities are subject to the FDCPA. The FTC has always taken the position that the FDCPA should have a clear, narrow practice of law exemption for attorney debt collectors when they

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<sup>49</sup> *Id.*

<sup>50</sup> 12 C.F.R. § 1090.105 (2012).

<sup>51</sup> *Bureau of Consumer Financial Protection, Defining Larger Participants of the Consumer Debt Collection Market*, 77 Fed. Reg. 65775-01, 65784 (October 31, 2012). The CFPB’s Larger Participant Rule affects only the scope of its supervisory authority, and does not affect what types of entities are subject to the FDCPA. *Id.* at 65776.

<sup>52</sup> 77 Fed. Reg. 65775-01 at note 76.

litigate on behalf of their clients. The failure to include such an exemption in 1986 resulted in the Supreme Court's decision in *Heintz*, and its progeny, including cases that subject attorneys' legal judgment in litigation to FDCPA liability, and the CFPB's position that it has the authority to supervise attorneys litigating consumer debt collection cases.

H.R. 1849 – which essentially clarifies Congress's intent – solves many of the problems stemming from *Heintz* by creating a specific, narrow practice of law exemption from both the FDCPA and the CFPB's supervisory authority for attorneys that (1) serve, file, or convey formal legal pleadings, discovery requests, or other documents pursuant to the applicable rules of civil procedure, or (2) communicate in connection with a legal action to collect a debt on behalf of a client in, or at the direction of, a court of law, or in the enforcement of a judgment. Specifically, H.R. 1849 addresses the following issues:

- Attorneys can exercise legal judgment, and advocate zealously on behalf of their clients without fear of lawsuits and the reputational risks attendant to those lawsuits;
- Attorneys can exercise legal judgment, and advocate zealously on behalf of their clients without the burden of having to comply with complex technical rules that limit an attorney's ability to settle lawsuits; and
- Attorneys will be subject to supervision and discipline only from their state bars and state supreme courts, which control their ability to practice law, and not from a consumer protection regulator that has in mind only the interests of consumer debtors, who are typically averse to a debt collection attorney's clients.

H.R. 1849 also solves many of the problems that arose from the inclusion of a broad attorney exemption in the original version of the FDCPA. Specifically:

- Attorneys collecting debt are still subject to the FDCPA and the CFPB's supervisory authority when they make collection calls, send dunning letters, attempt to skip trace, or engage in any other activities for which a law license is not required;
- Debt collection law firms that primarily engage in non-litigation debt collection activities, and which employ large numbers of non-attorney staff to do those activities, will still be subject to regulation and supervision;
- The legal process still has built-in protections for debtors (e.g., the judge, rules of civil procedure, and requirements concerning the veracity of court filings); and
- Attorneys collecting debt using legal process will still be subject to the supervision and discipline of their state bars and supreme courts. An attorney who commits almost any act that the FDCPA prohibits, or that would be considered a UDAAP, would also be subject to discipline by her state bar, and could potentially lose her law license. Indeed, the prospect of an attorney losing her law license is at least as foreboding as facing potential monetary liability for a violation of the FDPCA.

## **G. Conclusion**

I believe that H.R. 1849 is a narrowly-tailored, practical solution to the unintended consequences of the 1986 repeal of the attorney exemption to the FDCPA and the Supreme Court's resulting decision in *Heintz*. H.R. 1849 would relieve collection attorneys who are engaged in litigation of unnecessarily burdensome compliance obligations and supervisory interference that inhibit their ability to zealously advocate for their clients. At the same time, H.R. 1849 would retain regulation and oversight of debt collection attorneys engaged in non-litigation activities.

#### **IV. H.R. 2359 (the Fair Credit Reporting Liability Harmonization Act)**

I next address H.R. 2359, the FCRA Liability Harmonization Act. This bill was introduced on May 4, 2017 by Representative Barry Loudermilk (R-GA) along with four original cosponsors<sup>53</sup> and, subsequently, eight more cosponsors.<sup>54</sup>

The bill would bring potential liability for FCRA violations in accordance with other titles of the Consumer Credit Protection Act<sup>55</sup> and other consumer financial protection laws, by placing a monetary cap on class action damage awards and eliminating awards of punitive damages. I will explain the scope of the FCRA's coverage of the business world and compare its liability provisions to those found in other titles of the CCPA. I will also describe the unfair litigation landscape under the FCRA and why liability harmonization with other consumer protection laws would benefit consumers, as well as businesses.

##### **A. Range of Businesses Subject to the FCRA**

The Fair Credit Reporting Act (FCRA) governs the content and the use of consumer reports, including credit reports. In doing so, the FCRA provides consumers with rights of access and correction, accuracy and data quality, and privacy and confidentiality. The FCRA covers much more than just credit reporting agencies. Because of the broad definitions of a “consumer report”<sup>56</sup> and a “consumer reporting agency,”<sup>57</sup> the Act governs the business of employment screening companies, check verification companies, insurance claims report agencies, tenant screening companies, and medical record and payment agencies. In addition, the Act applies to literally thousands of financial and other companies that furnish information to consumer reporting

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<sup>53</sup> Ted Budd (R-NC), Peter King (R-NY), Ed Royce (R-CA) and Ann Wagner (R-MO).

<sup>54</sup> Scott Tipton (R-CO), David Trott (R-MI), Keith Rothfus (R-PA), Tom Emmer (R-MN), Robert Pittenger (R-NC), Frank Lucas (R-OK), Steve Stivers (R-OH) and Bill Huizenga (R-MI).

<sup>55</sup> 15 U.S.C. § 1601 *et seq.*

<sup>56</sup> FCRA § 603(d); 15 U.S.C. § 1681a(d).

<sup>57</sup> FCRA § 603(f); 15 U.S.C. § 1681a(f).

agencies, which compile the reports. Moreover, virtually every business, large and small, uses consumer reports for credit determinations, insurance underwriting, employment background screening, or to meet any legitimate need to assist a consumer in a transaction initiated by the consumer for personal or household purposes.

### **B. FCRA Civil Liability Provisions**

When enacted in 1970, the FCRA created a private right of action for consumers for actual damages they sustained arising from a violation of the Act. The FCRA was amended in 1996 to permit a plaintiff to seek not just actual damages, but also, even in the absence of actual harm, statutory damages of not less than \$100 and not more than \$1,000 for any “willful” failure to comply with the Act. The 1996 amendments also included punitive damages for willful violations as determined by a court. But, the 1996 amendments failed, inexplicably, to include a cap on the amount of a class action award. The 1996 amendments also expanded the obligations of employers using consumer reports<sup>58</sup> and in 2003, the Fair and Accurate Credit Transactions Act (“FACTA”)<sup>59</sup> created new requirements and prohibitions, to be subject to private rights of action.

These amendments and the growing trend of class action lawsuits have significantly changed the environment in which consumer reporting agencies, furnishers, and users of consumer reports operate. This combination of statutory damages, untethered from any actual harm, opened the floodgates to frequent and massive class action judgments against restaurants, retailers, Internet sellers, grocery stores, university systems, financial institutions and even the Walt Disney Company.<sup>60</sup>

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<sup>58</sup> Title II, Subtitle D, Chapter 1, Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (Pub. L. No. 104-208, Sept. 30, 1996).

<sup>59</sup> Title I, Subtitle A, Fair and Accurate Credit Transactions Act (Pub. L. No. 108-159, Dec. 4, 2003).

<sup>60</sup> *See Culberson II and Joseph III v. The Walt Disney Co.*, Case No. BC526351 (2017).

### C. Comparison of the FCRA's Civil Liability Provisions with Other Consumer Financial Protection Laws

When it comes to class action litigation, the FCRA is an outlier. The Act is one of several titles of the omnibus Consumer Credit Protection Act. The other titles are the Truth in Lending Act (“TILA”), the Equal Credit Opportunity Act (“ECOA”), the Fair Debt Collection Practices Act (“FDCPA”), and the Electronic Fund Transfer Act (“EFTA”). Every other one of those acts places a monetary cap on class action damage awards. There is a reason for these caps.

The first title of the Consumer Credit Protection Act, TILA, was enacted in 1968 with a civil action recovery provision of \$100 to \$1,000 in statutory damages and with no class action cap. Within a few years, however, courts realized that the absence of a cap for statutory awards in TILA class action lawsuits was having a devastating effect on creditors. In 1972, in *Ratner v. Chemical Bank New York Trust Company*, a federal district court even went so far as to deny class certification on the grounds that the aggregated statutory damage award, “would be a horrendous, possibly annihilating punishment, unrelated to any damage to the reported class or to any benefit to the defendant for what is at most a technical and debatable violation of the Truth in Lending Act”.<sup>61</sup> In order “to protect small business firms from catastrophic judgments” awarded in class actions for technical violations of TILA, Congress amended the Act in 1974 to place a cap for statutory awards in class actions at \$500,000 or one percent of the defendant’s net worth.<sup>62</sup>

In the years that followed, in enacting subsequent financial consumer protection laws, Congress did not omit a cap on damages. For example, the FDCPA, enacted in 1977, caps a class

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<sup>61</sup> *Ratner*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

<sup>62</sup> Act of October 28, 1974 sec. 408, § 1640(a), 88 Stat. 1500, 1518. The cap was increased to \$1,000,000 in 2010. Pub. L. 111-203, § 1416, 124 Stat 1376, 2153 (2010).

action award at the lesser of \$500,000 or one percent of the net worth of the debt collector. The EFTA, enacted in 1990, similarly caps the class action award at the lesser to \$500,000 or one percent of net worth. The ECOA does the same. Other statutes using the same metric for a class action cap (the lesser of \$500,000 or one percent of net worth) include the Expedited Funds Availability Act<sup>63</sup> and the Homeowners Protection Act.<sup>64</sup> Furthermore, the TILA, FDCPA, and EFTA do not allow any award for punitive damages. ECOA caps the amount of punitive damages. Congress clearly balanced a consumer's right to redress with the impact that unchecked class action litigation could have on industry.

The FCRA was enacted in 1970, well before the problems with TILA's lack of a damages cap became evident and required change. When the FCRA was amended in 1996, the focus was on heightened damages for *willful* violations of the law, as opposed to negligent violations. Unfortunately, the amendment left "willfulness" undefined. In 2007, the Supreme Court in *Safeco Insurance Company of America v. Burr*<sup>65</sup> defined "willful" violations to include not only actions taken knowingly, but also where one acted in reckless disregard of the law. At the same time, *Safeco* made clear that reasonable interpretations of the law were not "willful."<sup>66</sup> While *Safeco* provided some relief, since that decision, courts have often found that whether a defendant acted recklessly is a question of fact,<sup>67</sup> thus eliminating the possibility that the plaintiffs' claims could be resolved without a protracted lawsuit.

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<sup>63</sup> 12 U.S.C. § 4010.

<sup>64</sup> 12 U.S.C. § 4907.

<sup>65</sup> 551 U.S. 47, 57-58 (2007).

<sup>66</sup> "Thus, a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 69.

<sup>67</sup> See e.g. *Miller v. Johnson & Johnson, Janssen Pharmaceuticals Inc.*, No. 6:13-cv-1016-ORL-40KRS \*10 (M.D. Fla. Jan. 14, 2015).

#### **D. The Consequences of Unlimited Class Action Liability under the FCRA**

FCRA private rights of action were intended to be a mechanism to enforce compliance with the law and recover actual damages, but have metastasized to become an opportunity for trial attorneys to target employers and other users of consumer reports in order to bring large class actions alleging technical violations of the statute, often where no consumer harm is alleged. The number of FCRA cases filed annually has increased substantially since the enactment of the FCRA. These claims are lodged not only against large consumer reporting agencies, but also employers and other users of consumer reports across countless industries, including retailers, restaurants, staffing agencies, employment background screeners, financial institutions, among others.

A recurring theme of litigation surrounds technical compliance by employers relating to the use of consumer reports for employment purposes. When using a consumer report for employment purposes, an employer must: (1) provide a “clear and conspicuous” disclosure in writing before the report is procured in a separate document that consists only of the disclosure; (2) obtain the consumer’s written authorization; (3) provide a “pre-adverse action” notice to the consumer including the report and the Consumer Financial Protection Bureau’s Summary of Rights; and (4) provide a “post-adverse action” notice to the consumer. Employers that include additional information about the job, or the employer on the background check disclosure form, or have some other technical defect on the face of the document, have become attractive targets in class action litigation regardless of whether or not the plaintiffs allege any harm or confusion with the documents.

As a byproduct to the expansion of the types of businesses subject to FCRA liability over the years, the size and cost of FCRA class action litigation has put businesses in the precarious position of settling rather than defending their practices in court. When faced with the looming

threat of the expenses of discovery and uncapped liability for class sizes often reaching tens of thousands of members, businesses are effectively forced to enter into settlement negotiations to avoid being forced out of business.

It is difficult to ascertain the actual distribution of a settlement to class members. However, in five out of six lawsuits examined (for which information was publicly available), class members received .000006 percent of the award in one action; .33 percent in another; .966 percent in a third; 12 percent in a fourth; and 15 percent in the fifth.<sup>68</sup> The remainder went to class action lawyers and administrative costs. What is the bottom line? In an uncapped class action environment like the FCRA, class action lawyers are incentivized to bring FCRA class actions and consumers receive little, if any, benefit.<sup>69</sup>

There are countless examples of court approved settlements which result in massive payments to class action attorneys but very modest payments to consumers. These settlements would, in all likelihood, not have occurred but for the absence of caps on the potential amount of a class action award.

Some of these settlements arise from activity that did not harm consumers at all, but still resulted in massive awards – little of which reached these consumers. In *Erin Knights and Tresca Prater, et al. v. Publix Super Markets, Inc.*, 3:14-cv-00720, (M.D. Tenn. Oct. 17, 2014), for example, the Publix supermarket chain agreed to pay nearly \$6.8 million to settle a FCRA lawsuit. The FCRA requires employers that conduct pre-employment background checks to provide a written disclosure to applicants prior to the check – and that disclosure must be a “document that

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<sup>68</sup> See, Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* [hereinafter “Mayer Brown Study”] (December 2013) at 2, available at <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> (last viewed August 30, 2017).

<sup>69</sup> *Id.*

consists solely of the disclosure.” 15 U.S.C. §1681b(b)(2). Publix allegedly provided the necessary disclosure, but that same document also included other additional language.

The class included more than 90,000 members. Theoretically, each class member was awarded \$75, but after awarding attorneys’ fees of nearly \$2.4 million dollars and class representative service payments, each class member’s take home came to around \$48. No harm was ever alleged, let alone proven, in that case.

In *Fernandez v. Home Depot USA, Inc.*, No. 8:13-cv-00648 (C.D. Cal. Apr. 21, 2015), the defendant agreed to a \$1.8 million class action settlement for claims that were clearly a mere technical violation – that Home Depot included “extraneous information” in their employment background check disclosure form (beyond the notice that Home Depot would conduct a background check and obtain a consumer report on the applicant). There were approximately 120,000 class members, and each eligible class member would stand to receive somewhere between \$15 and \$100, after the plaintiffs’ counsel were awarded \$750,000 in fees.

In *Brown v. Delhaize America, LLC et al.*, 1:14-cv-00195 (M.D. N.C. July 20, 2015), two claims were made against Food Lion and others – first, that defendants failed to provide class members with a clear and conspicuous pre-background check employment disclosure consisting solely of the disclosure that a consumer report would be obtained for employment purposes, prior to obtaining the consumer report. The second allegation was for a smaller class claiming adverse employment action was taken based on their background checks without providing those employees with a pre-adverse action notice required by the FCRA.

The parties reached a \$3 million settlement. Counsel was permitted to petition for up to one-third of the fund as attorneys’ fees, costs, and for an award to the named Plaintiff (Brown) for up to \$2,000. Approximately 57,000 class members in the disclosure class were to receive a gross

payment of \$48 but, after deductions for attorneys' fees and costs, this class took home approximately \$31 each. The 2,500 class members in the adverse action class were to receive a gross amount of \$96, which was reduced to \$61 a person after deducting attorneys' fees and other expenses.

#### **E. Benefits of FCRA Liability Harmonization to Consumers and the Business Community**

As detailed above, businesses usually make the million dollar payouts in FCRA class action cases, but consumers aren't the ones seeing the big checks. Research has demonstrated that, for all class actions, class members receive little to no benefit at all.<sup>70</sup> The Consumer Financial Protection Bureau confirmed through its own research that class actions rarely actually put money in the hands of consumers.<sup>71</sup>

In fact, FCRA class actions may have the opposite effect on consumers by driving up the costs of consumer goods and services.<sup>72</sup> The more businesses must budget for anticipated litigation costs, the more they may have to consider increasing their prices. Further, increased FCRA class action litigation has an ancillary impact on the economy. With more constrained budgets, businesses create fewer new jobs and expand less. Innovation is also hindered and companies are less apt to develop new technologies to better serve consumers.

With the reasonable and consistent limits on liability in the FCRA Liability Harmonization Act, consumers could continue to seek redress for violations of the FCRA in court in several ways.

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<sup>70</sup> See Mayer Brown Study, *supra* note 14, and Joanna Shepherd, Emory University School of Law Legal Studies Research Paper Series, *An Empirical Survey of No-Injury Class Actions*, Research Paper No. 16-402, pages 15 through 18, available at <http://ssrn.com/abstract=2726905> (last viewed August 30, 2017).

<sup>71</sup> See Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, March 2015, available at [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) (last viewed August 30, 2017).

<sup>72</sup> See Shepherd, *supra* note 70, at footnote 60, page 23.

Consumers could bring individual cases seeking damages for actual harm and the costs of litigation either through willful noncompliance under section 1681n<sup>73</sup> or negligent noncompliance under section 1681o.<sup>74</sup> Additionally, the tool of class action litigation would still be available for violations affecting a broader population. All of these routes to court permit the award of attorneys' fees, therefore it is fanciful to make the argument that consumers could no longer afford to bring a case or attorneys would no longer take the case.

Finally, the FCRA is vigorously enforced by the Consumer Financial Protection Bureau, the Federal Trade Commission, and state Attorneys General, and the CFPB has supervisory authority over consumer reporting agencies and financial furnishers and consumer report users. The robust oversight and enforcement environment incentivizes FCRA users to adopt compliance policies to ensure their behavior is consistent with the requirements of the FCRA. Additionally, in the FCRA context, because there are so few class actions that actually result in new law being made, there is rarely a case that requires a change corporate behavior. Ultimately a combination of current litigation and regulatory and oversight initiatives make consumer class actions much less important in promoting compliance with the FCRA.

## **F. Conclusion**

The FCRA Liability Harmonization Act would bring relief to businesses by adding reasonable and consistent limits on liability, so that businesses can make real decisions about their litigation risks without essentially being forced into settlement by an out-of-sync and outdated statute. In this environment, businesses would be free to offer their products and services to consumers without fear of draconian liability.

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<sup>73</sup> 15 U.S.C. § 1681n.

<sup>74</sup> 15 U.S.C. § 1681o.