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Bill would clarify regulatory authority **ABA urges exemption of creditor lawyers engaged in litigation from FDCPA, CFPB regs**

ABA President Robert M. Carlson wrote to all members of the House in September urging them to pass H.R. 5082, the Practice of Law Technical Clarification Act of 2018.

Carlson said the legislation, which was approved by the House Financial Services Committee in March and is ready for floor action, would “protect the ability of small, main street businesses and their local attorneys to recover legitimate debts by curbing abusive lawsuits and burdensome regulations against those attorneys that relate to their litigation activities.” In addition, the bill would also restore traditional state court regulation and oversight of the legal profession while preserving essential consumer protections, he wrote in a [Sept. 28 letter](#).

The bill, sponsored by Reps. Alex Mooney (R-W.Va.) and Vicente Gonzalez (D-Texas), would achieve these goals by clarifying that the Fair Debt Collection Practices Act (FDCPA) and the regulatory authority of the Consumer Financial Protection Bureau (CFPB) do not apply to creditor attorneys when they are engaged in debt collection litigation and thus are under the direct supervision of the trial judge.

Carlson explained that lawyers have been regulated for centuries primarily by the state supreme courts that license them and that the FDCPA, enacted in 1977, originally contained a complete exemption for attorneys engaged in the practice of law who collect debts on behalf of their clients.

Congress voted to eliminate the broad exemption in 1986, however, in the belief that the change would only subject attorneys to potential liability for their non-litigation activities such as improper phone calls and letters to debtors, not for their court-related activities that are already being supervised by judges. Congress later passed the Dodd-Frank Act in 2010, which granted the new CFPB broad authority to enforce the FDCPA and regulate debt collectors, but which exempted most lawyers engaged in the practice of law from the bureau’s regulatory and enforcement authority.

Despite the intention of Congress, the courts have applied the revised 1986 act to creditor lawyers even when they are engaged in litigation. As a result, many creditor lawyers are now routinely sued in federal or state court for their actions in state court proceedings that are alleged to be technical violations of the FDCPA, even when the consumer suffers no harm. In recent years, the CFPB has also aggressively sought to regulate the collection activities of creditor attorneys – including their litigation or court-related activities – despite the broad practice-of-law exemption contained in the Dodd-Frank Act.

see “FDCPA,” page 3

LEGISLATIVE BOXSCORE

LEGISLATIVE ISSUE	HOUSE	SENATE	FINAL	ABA POSITION
<p>Criminal Justice. H.R. 1809 and S. 860 would reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDP). H.R. 2480, H.R. 2473, S. 1311 and S. 1312 are aimed at combating human trafficking. H.R. 510 and S. 139 would establish a system for the use of Rapid DNA. H.R. 5854 would expand the Debbie Smith DNA Backlog program. S.1917 would reform sentencing and corrections practices. S. 1994, S. 2795 and H.R. 5682 would implement corrections reforms. H.R. 2899 would reauthorize the Second Chance Act. HR. 1795 would reform asset forfeiture laws. H.R. 38 and S. 446 would mandate concealed-carry reciprocity.</p>	<p>House passed H.R. 1809 on 5/23/17. House passed H.R. 2473 on 5/23/17. Judiciary Cmte. approved H.R. 2480 on 6/28/17. House passed H.R. 510 on 5/16/17. House passed H.R. 38 on 12/6/17. House passed H.R. 5682 on 5/22/18.</p>	<p>Senate passed S. 860 and H.R. 510 on 8/1/17. Senate passed S. 1311 and S. 1312 on 9/11/17. S. 1917 was referred to Judiciary Cmte. on 10/4/17; S. 1994, on 10/19/17. Judiciary Cmte. approved S. 1917 on 2/15/18. Judiciary Cmte. held a hearing on gun violence on 3/14/18.</p>	<p>President signed P.L. 115-50 (H.R. 510) on 8/18/17. President signed P.L. 115-257 (H.R. 5854) on 10/9/18.</p>	<p>Supports sentencing and correction reform. Supports JJDP and Second Chance Act reauthorization. Supports funding for federal and state indigent defense programs. Supports certain civil asset forfeiture reforms. Supports bills to combat human trafficking. Supports prompt collection and testing of DNA evidence. See page 7.</p>
<p>Immigration. The U.S. Supreme Court ruled on 6/26/18, that the president's third travel ban restricting entry into the country from six Muslim-majority countries, North Korea and Venezuela is constitutional. The president announced he is phasing out the Deferred Action on Childhood Arrivals (DACA) program by 3/5/18, but federal courts have blocked the president's action and ordered on 8/3/18 that the administration must continue to process DACA applications. The administration implemented a "zero tolerance" policy resulting in family separations at the border, but reunifications are now underway. S. 3036 would limit the separation of families at the border.</p>		<p>Senate failed to pass several proposals to address the DACA program. Judiciary subc. held a hearing on the immigration court system on 4/18/18. S. 3036 was referred to the Judiciary Cmte. on 6/8/18.</p>		<p>Supports improvements in the immigration court and adjudication system. Opposes mandatory detention and supports alternatives to detention. Supports access to counsel and due process safeguards. Supports legislation that includes a path to citizenship for certain undocumented persons who enter the country as minors and have significant ties to the United States.</p>
<p>Legal Services Corporation (LSC). The president's FY 2018 and 2019 budgets included phaseout funding for LSC. P.L. 115-141 (H.R. 1625) includes a \$25 million increase to \$410 million for FY 2018.</p>	<p>House passed H.R. 1625 on 3/22/18. Approps. Cmte. approved \$410 million for LSC for FY 2019 on 5/17/18.</p>	<p>Senate passed H.R. 1625 on 3/23/18. Approps. Cmte. approved \$410 million for LSC for FY 2019 on 6/14/18.</p>	<p>President signed P.L. 115-141 (H.R. 1625) on 3/23/18.</p>	<p>Supports an independent, well-funded LSC.</p>
<p>Tort Reform. H.R. 1215 would preempt state medical liability laws to impose caps on non-economic damages H.R. 985 would class action lawsuits. H.R. 720 would require mandatory monetary sanctions against lawyers who file non-meritorious lawsuits.</p>	<p>House passed H.R. 1215 on 6/28/17. House passed H.R. 985 on 3/9/17. House passed H.R. 720 on 3/10/17.</p>			<p>Opposes the bills. Opposes preemption of state medical liability laws and the bypassing of the Rules Enabling Act to amend the Federal Rules of Civil Procedure.</p>

Congress approves language supporting ALJ independence

Congress included language emphasizing the importance of the independence of administrative law judges (ALJs) in the conference report on H.R. 4167, a fiscal year 2019 appropriations bill signed into law Sept. 28 as P.L. 115-245.

The language, which the ABA urged be included, states that it is vital that ALJs be “independent, impartial, and selected based on their qualifications.” The conferees expressed the expectation that the Social Security Administration (SSA) will maintain a high standard for the appointment of ALJs, including the requirement that ALJs “have demonstrated experience as a licensed attorney and pass an ALJ examination administered by the Office of Personnel Management (OPM).”

The ABA sought the language in response to an executive order signed July 10 by President Donald J. Trump that replaces the current competitive selection process for ALJs through OPM with a system providing for the appointment of ALJs by the president and federal agency heads. The executive order raised concerns about politicization of the process.

ALJs, who preside over administrative proceedings on the record before federal agencies, are employed throughout the federal government and currently apply for their jobs through OPM. The process requires applicants to pass an examination to evaluate the skills, competencies/knowledge, and abilities essential to performing ALJ work. Agencies then select the ALJs they hire from a list of individuals that OPM has determined are qualified for the position.

The executive order creates a new excepted service “Schedule E” for ALJs that allows agencies to bypass the OPM process and hire ALJs directly. The White House stated in a fact sheet that, under the

new process, “agencies will be free to select from the best candidates who embody the appropriate temperament, legal acumen, impartiality, and judgment required of an ALJ, and who meet the other needs of the agencies.”

The president’s executive order followed the June 21 Supreme Court decision in *Lucia v. Securities and Exchange Commission*, 585 U.S. (2018), which determined that ALJs are officers of the United States, not employees, and must be appointed under the Constitution’s Appointments Clause. The clause requires that only the president, a court of law, or a head of a department can appoint an officer. The case originated when plaintiff Raymond J. Lucia appealed an ALJ ruling from the SEC, arguing that the ALJ who heard his case had not been properly appointed.

While the *Lucia* decision pertained only to ALJs at the SEC, there was widespread concern that the decision had implications for ALJs at other agencies. In their jobs, ALJs rule on preliminary motions, conduct pre-hearing conferences, issue subpoenas, conduct hearings (which may include writ-

ten and/or oral testimony and cross-examination), review briefs, and prepare and issue decisions. All but about 300 of the approximately 1,900 ALJs are at the SSA.

In a related action, Sens. Maria Cantwell (D-Wash.) and Susan Collins (R-Maine) introduced legislation Aug. 23 to restore ALJs to the competitive service, which would require those seeking appointment to be chosen based on a competitive exam. In addition, the bill would require that final ALJ appointments be made by the agency head from a list of eligible candidates provided by the OPM or based upon OPM approval of the qualifications of an individual seeking the position.

“Administrative law judges make decisions every day that affect people’s lives like Social Security and Medicare benefits, workers’ compensation claims, and even licenses for radio stations and nuclear power plants. We must ensure these judges are fair, impartial, and qualified,” Cantwell said.

The bill, S. 3387, has been referred to the Senate Committee on Homeland Security and Governmental Affairs. ■

FDCPA

continued from front page

The reforms in H.R. 5082 are appropriate, Carlson said, “as the judge presiding over the court cases – not the CFPB or debtor attorneys – is in the best position to discipline any attorney who engages in misconduct, impose appropriate sanctions based on the circumstances, and protect all the parties.”

Carlson disagreed with claims by some consumer groups that the bill would “turn back the clock” and undermine existing consumer protection, emphasizing that the bill is narrowly tailored and “consumers would still be fully protected at all times.”

“The narrow, common-sense technical reforms in H.R. 5082 are also consistent with the Federal Trade Commission’s repeated recommendations that Congress clarify the FDCPA to exclude creditor attorneys engaged in litigation,” Carlson emphasized.

U.S. District Court for the District of Columbia hears arguments in ABA's lawsuit concerning PSLF program

The ABA is awaiting a decision from the U.S. District Court for the District of Columbia following a Sept. 26 hearing on the association's lawsuit over the Department of Education's administration of the Public Service Loan Forgiveness (PSLF) program.

Judge Timothy Kelly heard motions for summary judgment and a preliminary injunction in the lawsuit, which seeks to prohibit the department from continuing to adhere to its changed interpretation of the PSLF program's governing statute and regulation, and thereby reinstating the ABA's status as a PSLF-eligible public service organization.

Under PSLF, established in 2007, individuals who have made 120 payments on eligible federal student loans while employed full-time in qualified public service jobs are eligible to have the balance of their loans forgiven.

In 2014, however, the department began rescinding, without explanation, its prior approvals of some borrowers' employment as eligible for forgiveness. Even though for years the department had affirmed the ABA as qualified public service employment and its employees eligible for forgiveness under PSLF, the department reversed course and started to deny requests for approval from ABA employees because it maintained that the ABA was not primarily a public service organization. When discussions with government officials did not resolve the issue, the ABA filed a lawsuit against the department in December 2016.

In its [request](#) for a preliminary injunction, the ABA highlighted mounting harm suffered by the associa-

tion, which operates numerous programs with the purpose of educating the public, enhancing legal education, and/or providing direct legal services to low-income and disadvantaged populations. One program particularly affected by the department's actions is the ABA South Texas Pro Bono Asylum Representation Project (ProBAR), which provides a wide range of free legal services to immigrants detained by the U.S. government in southern Texas. Critical attorney positions at ProBAR remain unfilled, and existing lawyers have departed, because attorneys have been unwilling to take the risk that they would not be entitled to PSLF relief.

During the court hearing, the government argued that any hardships on plaintiffs were the result of contractor mistakes in preliminary certifications of annual qualification determinations for PSLF eligibility that did not amount to final agency action.

The first group of public service workers was eligible to apply for forgiveness in 2017, but only 96 out of the more than 19,000 individuals who submitted applications had received forgiveness as of the end of June 2018.

A Government Accountability Office [report](#) released Sept. 27 found that key information was not being provided by the department to PSLF loan servicers and borrowers.

The office recommended the development of a timeline for a comprehensive guidance and instruction document for the program as well as an authoritative list of qualifying employers. ■

Judicial Vacancies/Confirmations—115th Congress* (as of 10/31/18)

<u>Court</u>	<u>Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	2
US Courts of Appeals (179 judgeships)	11	7	29
US District Courts (678 judgeships)	109	48	53
Court of International Trade (9 judgeships)	2	2	0
Totals	122	57	84

*Includes territorial judgeships

WASHINGTON NEWS BRIEFS

MARRAKESH TREATY: President Trump signed legislation Oct. 9 to implement the ABA-supported Marrakesh Treaty to Facilitate Access to Published Works to Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. P.L. 115-261 (S. 2559) adjusts U.S. copyright law relating to the requirements of the treaty, under which contracting parties adopt copyright exceptions and limitations in their domestic copyright laws to permit reproduction of public works into accessible formats usable by individuals with a range of disabilities that interfere with the effective reading of printed material. The treaty also requires participating countries to allow eligible individuals and libraries to export and import works among those countries. The treaty, which is administered by the World Intellectual Property Association, was negotiated in June 2013 in Marrakesh, Morocco, and submitted to the Senate in February 2016 by President Obama, who noted that the United States played a leadership role in negotiating the treaty and its provisions are broadly consistent with the approach and structure of existing U.S. law. The treaty came into force in September 2016 when Canada became the 20th nation to ratify it, and now more than 30 countries are party to the treaty. The Senate gave its advice and consent to ratification on June 29. During an April 17 Senate Foreign Relations Committee hearing on the treaty, an [ABA letter](#) that was included in the hearing record stated that ratification “would help open doors to countries worldwide by allowing literature to be disseminated in accessible format with no borders.”

DNA BACKLOG: Legislation signed Oct. 9 by President Trump aims to increase the capacity of state local and local prosecutors to address the backlog of DNA analysis. P.L. 115-257 (H.R. 5854) amends the Debbie Smith DNA Backlog Grant Program to provide that for fiscal years 2019 through 2022 the Department of Justice must allocate at least 5 percent, but not more than 7 percent, of funding for a DNA analysis and capacity enhancement program and for other forensic activities to prosecute cold cases involving violent crime where suspects have been identified through DNA evidence. Reps. John Carter (R-Texas) and Bill Pascrell (D-N.J.) introduced the bipartisan legislation. During House debate on the bill, House Judiciary Committee Chairman Bob Goodlatte (R-Va.) highlighted the impact of the Debbie Smith program, which since 2004 has enabled states to process more than 725,000 cases and upload more than 327,000 DNA profiles into the FBI Combined Index

System (CODIS). The change made by the new law, Goodlatte said, will “allow victims of crime and their families to receive justice by giving prosecutors the tools they need.” Rep. Sheila Jackson Lee (D-Texas) applauded the legislation, explaining that it is keeping with the Debbie Smith program’s initial purpose of reducing the backlog of DNA kits but now also allows the program to assist in the solving of cold cases and bringing the perpetrators of violent crimes to justice. While the ABA has not taken a position on the specifics of P.L. 115-257, the association supports the prompt collecting, testing and interpreting of DNA evidence and adopted the *ABA Criminal Justice Standards on DNA Evidence* in 2006. The standards address, among other things, the preservation of DNA evidence and its use in criminal trials.

MEDICAID: The Support for Patients and Communities Act, a new law addressing the nation’s opioid crisis, includes provisions to protect Medicaid coverage for incarcerated juveniles. P.L. 115-271 (H.R. 6), signed Oct. 24 by President Trump, prohibits a state from terminating eligibility for Medicaid coverage for an eligible juvenile when the juvenile is an inmate of a public institution. The state is allowed, however, to suspend coverage during the period of incarceration. Prior to the juvenile’s release, the state will conduct a redetermination of eligibility and, if the juvenile is determined to be eligible, will restore Medicaid coverage. “The At-Risk Youth Medicaid Protection Act will keep young American Medicaid recipients from being permanently kicked off their health care if they come into contact with the criminal justice system,” said Rep. Tony Cárdenas (D-Calif.), who sponsored the provisions as a separate bill with Rep. Morgan Griffith (R-Va.). Cárdenas pointed out that “these young people suffer greatly when they return home to find they can no longer see their doctor, especially if they are recovering from addiction.” The new law also requires states to ensure that former foster youth are able to keep their Medicaid coverage across states lines until the age of 26. The ABA supports Medicaid and the shared legal obligation that the federal and state governments have to provide comprehensive benefits to all individuals who meet eligibility criteria. The association, in previous correspondence to Congress during debate on the Affordable Care Act, emphasized that Medicaid is a “lifeline” for millions of low-income seniors, children and parents in the United States who cannot otherwise afford quality health care, including preventative care.

ABA submits comments on foster home licensing standards

ABA President Robert M. Carlson submitted [comments](#) Sept. 28 on the proposed National Model Family Foster Home Licensing Standards (National Standards), suggesting ways that the proposed standards could be improved to better serve children and families.

In the letter accompanying the comments, which were prepared as a memorandum by the ABA Center on Children and the Law (CCL) for the Children's Bureau of the Department of Health and Human Services, the ABA president emphasized that the views expressed in the recommendations derive from substantive expertise at CCL but not all have been adopted by the ABA House of Delegates as ABA policy.

Development of the National Standards is required under the Family First Prevention Services Act of 2018, which was signed into law in February.

As a main source for the new National Standards, the Children's Bureau used model national standards published in 2014 and updated in 2018 by CCL in partnership with the National Association for Regulatory Administration (NARA) and Generations United. Those standards, known as the NARA Standards, were developed through extensive research and review of family foster home licensing standards in all 50 states and the District of Columbia, details from the federal child welfare policy manual and language from numerous child wel-

fare organizations, and consultation with the National Indian Child Welfare Association.

The memorandum noted the ABA's long-standing policy recognizing the importance of identifying, supporting, and screening kinship caregivers with whom children can live while in foster care. The proposed National Standards include efforts similar to those in the NARA Standards to break down barriers that may disproportionately hinder kin caregivers from caring for relatives in the child welfare system, the memorandum stated.

The memorandum divided CCL's recommendations into categories.

Under foster home eligibility, CCL focused on: threshold requirements for verbal and non-verbal communication with children and foster parent applicants; background checks for licensing foster parents; home studies; and requirements for living space.

Other categories included: foster home capacity regarding the number of foster children who may be

in a home; foster home sleeping arrangements providing guidance on who may share a bed in the home; transportation regarding safe and reliable transportation for foster children; training requirements that should specify the number of training hours necessary; and assurances that a foster care applicant will provide a foster child with fair and equal access to services.

The ABA recommendations also expressed concerns that the National Standards do not include emergency placement procedures, which were left out because the Children's Bureau considered them to be outside the scope of the Family First Protection Services Act. Emergency licensing allows a child to be placed immediately with a relative while the relative completes the remaining licensing process.

CCL maintained that provisions for emergency licensing are critical to reducing the trauma of removal from the home and keeping children connected to their family from the onset of a case. ■



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American Bar Association, Suite 400, 1050 Connecticut Avenue NW, Washington, DC 20036.
(202) 662-1017

Rhonda J. McMillion, editor; Rhonda.McMillion@americanbar.org
Jennifer Sherman, legislative associate, Jennifer.Sherman@americanbar.org