September 19, 2018

Re: Support for H.R. 5082, the Practice of Law Technical Clarification Act of 2018

Dear Representative:

On behalf of the American Bar Association (ABA), which represents over 410,000 members, I write to express our strong support for H.R. 5082, the Practice of Law Technical Clarification Act. H.R. 5082 was approved on March 21 by the House Financial Services Committee and will soon be considered by the full House. We urge you to support this important legislation.¹

This bipartisan bill, sponsored by Reps. Alex Mooney and Vicente Gonzalez, 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. The bill would also restore traditional state court regulation and oversight of the legal profession while preserving essential consumer protections. To achieve these aims, the bill would clarify 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.

For many years, attorneys have been regulated and disciplined primarily by the state supreme courts that license them and their state bar agencies, not Congress or federal agencies. State courts and bars have extensive authority and tools to stop and punish attorney misconduct in debt collection litigation that harms consumers. For example, state courts generally have rules prohibiting attorneys from filing frivolous lawsuits that are not supported by law and fact, taking legal actions to harass or intimidate defendants, or making false or deceptive claims in affidavits, motions, and other litigation documents. Any creditor attorney violating these or other court rules can be sanctioned or otherwise disciplined by the state court or bar, including monetary sanctions, license suspension, or even disbarment.

Consistent with this longstanding principle of judicial regulation and oversight of the legal profession, the FDCPA of 1977 originally contained a complete exemption for attorneys engaged in the practice of law who collect debts on behalf of their clients. However, Congress voted to eliminate the exemption in 1986, based in part on its belief that the revised Act would only subject attorneys to potential liability for their non-litigation collection 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 of 2010, which granted the new CFPB broad authority to enforce the FDCPA and regulate debt collectors but which exempted most attorneys engaged in the practice of law from the CFPB’s regulatory and enforcement authority.

¹ For more detailed information regarding H.R. 5082 and the ABA’s reasons for supporting the bill, please see the ABA’s March 19, 2018 letter to the House Financial Services Committee and other background materials on the ABA’s FDCPA Reform web page.
Despite Congress’ intent, the courts have since applied the FDCPA to creditor attorneys even when they are engaged in litigation activities on behalf of clients. As a result, many creditor attorneys are now routinely sued for their actions in state court proceedings that are alleged to be technical violations of the Act. For example, if a creditor attorney sues a consumer for a valid debt but accidentally files the lawsuit in the wrong county or makes certain other inadvertent procedural errors in the court case, the consumer can sue the creditor attorney personally and recover statutory damages and substantial attorneys’ fees under the FDCPA even when the consumer suffered no actual 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 Section 1027(e) of the Dodd Frank Act.

H.R. 5082 would curb these abusive lawsuits against creditor attorneys—and prevent the CFPB from usurping the trial judge’s proper role in overseeing the litigation process and punishing any attorney misconduct—by clarifying that creditor attorneys engaged in litigation are not subject to technical lawsuits under the FDCPA or to the CFPB’s regulatory and enforcement authority under the Dodd-Frank Act. These reforms are appropriate, as the judge presiding over the court case—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.

Some consumer groups have claimed that the bill would somehow “turn back the clock” and undermine existing consumer protections. But this is simply not accurate because the bill is narrowly tailored and would only exempt the litigation or court-related activities of creditor attorneys that are conducted under the watchful eye of the trial judge. The bill would not exempt any of the attorneys’ other collection-related actions that take place before suit is filed or that are unrelated to the court case, such as improper demand letters and phone calls to debtors. Therefore, consumers would still be fully protected at all times and in all situations, i.e., by the FDCPA and the CFPB for any pre-suit or nonlitigation attorney misconduct or by the trial judge for any attorney misconduct related to the court case.

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. In each of its annual reports to Congress on the FDCPA from 1998 through 2006—a period spanning both Democratic and Republican administrations—the FTC urged Congress to reexamine and amend the definition of “debt collector” to exclude such attorneys from the Act. (See the FTC’s 2006 Annual Report to Congress at pgs. 11-12.)

For all these reasons, the ABA urges you to support prompt passage of H.R. 5082. Thank you for considering our views, and if you have any questions, please contact ABA Associate Governmental Affairs Director Larson Frisby at (202) 662-1098 or larson.frisby@americanbar.org.

Sincerely,

Robert M. Carlson
President, American Bar Association