Helping Main Street Businesses Keep the Lights On

Support H.R. 5082, The Practice of Law Technical Clarification Act of 2018

The National Creditors Bar Association (NCBA) supports H.R. 5082, The Practice of Law Technical Clarification Act of 2018; a bill to protect small businesses in their efforts to seek recovery of their legitimate accounts receivables by their outside counsel. This bi-partisan legislation would clarify that the Fair Debt Collection Practices Act (“FDCPA”) so that creditor attorneys can adequately provide legal services to local and small businesses who rely on these services.

Attorneys, like lenders and consumers, are a necessary part of the “credit economy”. 60% of NCBA members represent local retail establishments, small or regional banks, credit unions and medical providers. These small businesses do not have vast legal departments or even in-house attorneys and rely on their local attorneys to ensure that outstanding receivables are paid so that their businesses can continue to operate. NCBA members are small law firms whose attorneys serve the needs of their local community businesses.

THE FDCPA WAS NEVER MEANT TO REGULATE ATTORNEYS

The FDCPA originally contained a complete exemption for lawyers collecting debts on behalf of their clients. In 1986, Congress voted to eliminate the lawyer exemption, based on its belief that the revised FDCPA would only allow the regulation of lawyers’ non-litigation collection activities. Despite Congress’ intent, however, the courts have applied the FDCPA to creditor lawyers even when they are engaged in litigation. In 2010, Congress passed the Dodd-Frank Act (DFA), which granted the Consumer Financial Protection Bureau (CFPB) broad authority to regulate debt collectors and to enforce the FDCPA. Although Section 1027(e) of the DFA exempts most consumer lawyers from the CFPB’s authority, that exemption does not apply to creditor lawyers.

HR 5082 looks to restore the original intent of the FDCPA. Attorneys are already subject to significant oversight by the courts where they are licensed. HR 5082 would not eliminate the protections of the FDCPA when lawyers engage in non-litigation debt collection activities, such as sending letters to consumers and making telephone calls. Rather HR 5082 looks to bring clarity to the debt collection process by allowing attorneys to advocate for their clients without fear of liability.

FRIVOLOUS LAWSUITS FOR VIOLATIONS OF THE FDCPA ARE NOT PROTECTING CONSUMERS

Unfortunately, from 2007-2017, Federal lawsuits alleging violations of the FDCPA have increased 77.6%. Between 2015 and 2017, there have been 32,147 federal lawsuits filed against debt collectors including attorneys. Many of these lawsuits are highly technical in nature and allege violations or claims that would not otherwise violate state rules of civil procedure or actionable in any other civil matter. These FDCPA lawsuits result in substantial attorneys’ fees, which go exclusively to the consumer’s attorney and not the consumer, as well as assess harsh statutory penalties against the attorney for the simply act of representing a client.

A recent court decision noted that FDCPA litigation has resulted in a glorified game of “gotcha,” with a cottage industry of plaintiffs’ lawyers filing suits over fantasy harms the statute was never intended to prevent. See, Kraus v. Professional Bureau of Maryland, Inc., 281 F.Supp. 3d 312 (E.D.N.Y., 2017). Last month the 6th Circuit in the case of Hagys v. Demers & Adams, 882 F.3d 616 (6th, 2018) found that a consumer failed to show any harm from a “bare procedural violation” by a law firm that sent a letter confirming a settlement in a foreclosure action. The Circuit Court found that that conduct of the law firm was not the type of abusive conduct the FDCPA was intended to protect. Finally, less than two weeks ago, a Judge in the Northern District of Illinois found that the ridiculous nature of FDCPA claims against debt collector places them between a rock and a hard; they are damned if they do and damned if they don’t. “This is clearly not what Congress intended the FDCPA to do – essentially turn debt collectors into a modern-
day version of Goldie Locks”. Delgado v. Client Services, 2018 WL 1193741 (Mar 7, 2018, Case No. No. 17 C 4364, N.D. IL)

MANY STATES ALREADY EXEMPT ATTORNEY LITIGATION ACTIVITY UNDER CONSUMER PROTECTION STATUTES

17 states which have FDCPA-type statutes exempt attorneys either outright or when they are engaging in litigation activity from the definition of debt collector.

AMERICAN BAR ASSOCIATION AND THE FTC SUPPORT ATTORNEY EXEMPTION

The American Bar Association, with over 400,000 attorney members, strongly supports this exemption. The Federal Trade Commission who until the passage of Dodd-Frank was the primary regulatory of the debt collection industry, had consistently from 1998 through 2006, urged Congress to reexamine and amend the definition of “debt collector” to exclude lawyers.

NCBA IS WORKING WITH THE CFPB TO PROMULGATE RULES FOR THE DEBT COLLECTION INDUSTRY

The FDCPA has not been subject to rulemaking since its inception in 1977. NCBA is leading the effort and actively working with the CFPB to promulgate well-reasoned rules to bring clarity and regulatory certainty around the debt collection process in the area of non-litigation activity. This will benefit consumers as well as debt collectors and attorneys.

PRESEVERE AND MAINTAIN MAINSTREET’S LEGAL ADVOCATES

Main Street businesses rely on their attorneys to ensure that their receivables and their employees are paid and that they have capital to operate. Creditors’ rights attorneys will continue to struggle in their efforts to advocate for these small business clients unless clarity is returned to the FDCPA. The risk of “gotcha” lawsuits and the “Goldilocks” mentality will simply result in these small law firms being unable to provide necessary legal services to the businesses in their community.

Sincerely,

Yale Levy, President

Mark Dobosz, Executive Director

The National Creditors Bar Association (NCBA) is the only bar association in the country dedicated to promoting and protecting creditors rights attorneys. NCBA attorney members practice law in a manner consistent with their responsibilities as officers of the court and must adhere to applicable state and federal laws, rules of civil procedure, state bar association licensing and certification requirements and rules of professional conduct.

About the National Creditors Bar Association

• Creditors rights attorneys in over 550+ law firms and other creditors' rights practices.
• Over 1,500 attorneys in all 50 states, Canada, Puerto Rico, and the U.K.
• 90% of firms are considered law firm small businesses under the Small Business Administration
• 27% are woman- and minority-owned law firms
• 60% of members represent local retail establishments, small or regional banks, credit unions and medical providers and have been doing so for over 22 years