Preserving State Court Regulation of the Legal Profession

ABA Supports H.R. 5082, the “Practice of Law Technical Clarification Act of 2018”

For centuries, attorneys have been regulated primarily by the state supreme courts that license them, not Congress or federal agencies. Consistent with this principle, the Fair Debt Collection Practices Act (FDCPA) originally contained a complete exemption for attorneys collecting debts on behalf of their clients. In 1986, Congress voted to eliminate the exemption, based on its belief that the revised Act would only allow regulation of attorneys’ non-litigation collection activities. Despite Congress’ intent, however, the courts have applied the FDCPA to creditor attorneys even when they are engaged in litigation. In 2010, Congress passed the Dodd-Frank Act (DFA), which granted the new Consumer Financial Protection Bureau (CFPB) broad authority to regulate debt collectors and to enforce the FDCPA. Section 1027(e) of the DFA exempts most consumer attorneys from the CFPB’s authority, but it may not apply to certain creditor attorneys. H.R. 5082, cosponsored by Reps. Alex Mooney (R-WV) and Vicente Gonzalez (D-TX), would preserve traditional state court regulation of the legal profession by clarifying that the FDCPA and the CFPB’s regulatory authority under the DFA do not apply to litigation activities of creditor attorneys.

The ABA urges Congress to pass H.R. 5082 as soon as possible because:

- **State courts, not the CFPB or other agencies, are in the best position to regulate attorneys engaged in the practice of law.** Attorneys practicing law have long been regulated primarily by the highest court of the state in which the attorney is licensed, not federal agencies or Congress. Over time, an extensive and effective system of judicial regulation of attorneys has developed—including admission requirements, ethical codes and disciplinary rules—which govern virtually every aspect of an attorney’s professional life. As “officers of the court,” attorneys are subject to strict ethical rules and disciplinary action for any misconduct, including potential suspension or disbarment. Therefore, further regulation by the CFPB, other agencies, or Congress is unnecessary and is likely to conflict with regulation and oversight by the judicial branch of government.

- **The legislation is consistent with Congress’ original intent not to regulate attorneys engaged in the practice of law.** When Congress amended the FDCPA in 1986 to remove the original attorney exemption, the bill’s sponsor, Rep. Frank Annunzio (D-IL), explained that the purpose of the change was to regulate only attorneys’ non-litigation collection activities. Despite the sponsor’s clear intent, courts have applied the FDCPA to creditor attorneys even when they are engaged in litigation activities. As a result, many creditor attorneys pursuing legitimate collection actions for clients in state court are routinely sued in federal court for technical violations of the FDCPA, resulting in harsh statutory penalties and attorney’s fees. H.R. 5082 would restore Congress’ intent by clarifying that attorneys engaged in litigation are not covered by the strict requirements of the FDCPA, though they are still subject to extensive judicial oversight and discipline.

- **The scope of the legislation is narrowly tailored and would only exempt creditor attorneys engaged in litigation activities; it would not create a broad exemption for attorneys’ non-litigation debt collection activities.** H.R. 5082 would clarify that while the FDCPA does not apply to attorneys’ filing of lawsuits and other litigation activities already subject to judicial oversight, the Act would still apply to attorneys’ extrajudicial collection activities, such as demand letters and phone calls to debtors. Similarly, while the bill would expand the current exemption in Section 1027(e) of the DFA to include both creditor and consumer attorneys, the CFPB would retain its existing authority over attorneys and others engaged in non-litigation collection activities.

- **For years, the Federal Trade Commission also recommended that the FDCPA be clarified to exempt creditor attorneys engaged in litigation.** In each annual report on the FDCPA from 1998 through 2006, the FTC urged Congress to reexamine and amend the definition of “debt collector” to exclude such attorneys from the Act.

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