

Hilarie Bass
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5109
Fax: (312) 988-5100
abapresident@americanbar.org

March 19, 2018

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Maxine Waters
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

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

Dear Chairman Hensarling and Ranking Member Waters:

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. This bipartisan bill, cosponsored by Representatives Alex Mooney and Vicente Gonzalez, would restore traditional state court regulation and oversight of the legal profession by clarifying that the Fair Debt Collection Practices Act (FDCPA or Act) does not apply to creditor lawyers engaged in litigation activities and that the existing “Practice of Law Exclusion” in Section 1027(e) of the Dodd-Frank Act (DFA) covers both consumer and creditor lawyers. We urge you and your Committee colleagues to support this important legislation during the upcoming markup scheduled for March 21.

For centuries, lawyers have been regulated primarily by the state supreme courts that license them, not Congress or federal agencies. Consistent with this principle, the FDCPA originally contained a complete exemption for lawyers engaged in the practice of law who collect debts on behalf of their clients. However, after a small number of unscrupulous debt collectors who happened to be lawyers engaged in abusive collection practices outside of the litigation context and were shielded from FDCPA coverage, Congress voted to eliminate the lawyer exemption in 1986. Congress’ action was based in part on its understanding that the revised Act would only allow debtors to bring suits against creditor lawyers for their improper *non-litigation* collection activities and that judges and the courts would continue to be responsible for disciplining lawyers for any misconduct committed in connection with a pending court case.

Despite Congress’ intent, the courts have applied the FDCPA 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. For example, if a creditor lawyer sues a debtor for a valid debt but accidentally files the lawsuit in the wrong county, the debtor can sue the lawyer for damages under the Act even though the proper remedy would be to ask the court to transfer the case to the proper venue. But because the Act is a strict liability statute, any technical violation—even if it is unintentional and causes no harm to the consumer—can subject the creditor lawyer to statutory damages and substantial attorneys’ fees.

Congress subsequently passed the DFA in 2010, which granted the new Consumer Financial Protection Bureau (CFPB) the authority to enforce the FDCPA and to adopt new regulations affecting anyone who is deemed to be a “debt collector,” including creditor lawyers. Although Section 1027(e) of the DFA exempts most consumer lawyers engaged in the practice of law from the CFPB’s authority, the current exemption may not apply to certain creditor lawyers.

H.R. 5082 would restore proper judicial oversight of lawyers and the legal profession by clarifying that neither the FDCPA nor the CFPB’s regulatory authority under the DFA applies to the litigation activities of creditor lawyers. The ABA supports H.R. 5082, and urges you and your Committee colleagues to support the legislation as well, for several important reasons.

First, the ABA firmly believes that state courts, not the CFPB or debtor lawyers filing technical FDCPA suits, are in the best position to regulate and discipline creditor lawyers who are engaged in litigation activities to collect debts on behalf of their clients.

Lawyers practicing law have long been regulated primarily by the highest court of the state in which the lawyer is licensed, not federal agencies or Congress. Over time, an extensive and effective system of judicial regulation of lawyers has developed—including admission requirements, ethical codes, and disciplinary rules—which govern virtually every aspect of a lawyer’s professional life. As “officers of the court,” lawyers are subject to strict ethical rules and disciplinary action for any misconduct, including potential suspension or disbarment. Thus, if a creditor lawyer engages in abusive or improper conduct against a debtor in a collection lawsuit, the judge presiding over the case—not the debtor’s lawyer or the CFPB—is in the best position to discipline the creditor lawyer, impose the appropriate sanctions based on the circumstances, and protect the debtor.

Second, the legislation is consistent with Congress’ original intent not to regulate creditor lawyers engaged in litigation or other activities that are part of the practice of law. When Congress amended the FDCPA in 1986 to remove the original complete lawyer exemption, the bill’s sponsor, Rep. Frank Annunzio (D-IL), explained that the purpose of the change was to regulate only lawyers’ non-litigation and other non-legal collection activities. As Rep. Annunzio explained:

The Fair Debt Collection Practices Act regulates debt collection, not the practice of law. Congress repealed the attorney exemption to the act, not because of attorneys’ conduct in the courtroom, but because of their conduct in the backroom. Only collection activities, not legal activities, are covered by the act. . . . Actions which can only be taken by those possessing a license to practice law are outside the scope of the act. [132 CONG. REC. H10031 (daily ed. October 14, 1986) (statement of Rep. Annunzio).]

Despite the sponsor’s clear intent, the Supreme Court held in *Heintz v. Jenkins*, 514 U.S. 291 (1995), that creditor lawyers could be subject to the FDCPA even when they are engaged in litigation activities. As a result, many creditor lawyers pursuing legitimate collection lawsuits for clients in state court are routinely sued in federal or state court for technical violations of the FDCPA, resulting in harsh statutory penalties and attorney fees. H.R. 5082 would restore Congress’ intent by clarifying that creditor lawyers engaged in litigation activities are not covered by the strict requirements of the FDCPA, though they are still subject to extensive judicial oversight and discipline for any misconduct in the litigation.

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

Fourth, the legislation is consistent with the Federal Trade Commission's previous recommendations to Congress that the FDCPA be clarified to exclude creditor lawyers 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 lawyers from the Act. The FTC's 2005 and 2006 annual reports, for example, each made eight legislative proposals, including a recommendation that Congress “exempt from the FDCPA's provisions attorneys who pursue debtors solely through litigation (or similar ‘legal’ practices).” (See [Federal Trade Commission Annual Report 2006: Fair Debt Collection Practices Act](#), at pages 11-12.)

Some consumer groups have asserted that H.R. 5082 would “turn back the clock” to pre-1986 levels by completely “exempting attorney conduct from the consumer protections provided by the FDCPA.” But this claim is simply not accurate, as the bill would only exempt the litigation activities of creditor lawyers—not their other non-litigation collection activities—from the FDCPA and the CFPB's regulatory jurisdiction. This narrow exemption is appropriate, as the judge overseeing the lawsuit is in the best position to discipline any lawyer who engages in abusive litigation practices. The bill would preserve all existing consumer protections regarding any other non-litigation lawyer actions that are taken outside the watchful eye of a judge and the court system. Therefore, the bill will create no gaps in the consumer protection laws and will not harm consumers.

For all these reasons, the ABA urges you to support prompt passage of H.R. 5082. Thank you for considering our views on this important legislation, 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,

A handwritten signature in blue ink that reads "Hilarie Bass". The signature is written in a cursive, flowing style.

Hilarie Bass
President, American Bar Association

cc: Members of the House Financial Services Committee
Members of the House Judiciary Committee