

**SUPPLEMENTAL COMMENTS OF THE NATIONAL ASSOCIATION OF RETAIL  
COLLECTION ATTORNEYS (NARCA)**

The National Association of Retail Collection Attorneys (NARCA) represents over 700 law firms that practice in the field of consumer debt collection. NARCA acknowledges the efforts of the attorneys and staff of the FTC Division of Financial Practices in the preparation, organization and implementation of the unprecedented examination of the Fair Debt Collection Practices Act conducted during the recent two day Debt Collection Workshop at which NARCA's president, president elect, former president and executive director participated in four of the panel discussions.

NARCA members regularly file suit in state court to collect consumer debts. When the Fair Debt Collection Practices Act was amended in 1986 to remove the existing exemption for attorneys collecting debts on behalf of the client, the sponsor of the bill explained that the legislation was "a direct response to the explosive growth in the number of law firms that had entered the debt collection business and were abusing the exemption." Statement of Congressman Frank Annunizzo, 132 Cong. Rec. H10031 (Daily Ed. October 14, 1986) (emphasis added). Congressman Annunizzo further explained that "the filing of a complaint is not covered by the Act . . . since the attorney will be required to prove the validity of the debt as an element to the legal proceeding paragraph." Id. Notwithstanding the stated legislative purpose, the plain language of the law says nothing "about retaining the exemption in respect to litigation." Heintz v. Jenkins, 514 U.S. 296, 297 (1995). Because courts are restrained from considering extraneous legislative intentions, the FDCPA is now frequently used to target litigation practices by debt collection attorneys in state courts, activities that were never intended to be subject to Federal regulation.

Because attorneys collecting consumer debts are subject to the FDCPA, the process by which consumer debts are referred to attorneys for state court lawsuits was discussed at length during the Debt Collection Workshop. For collection attorneys, fair collection practices are not merely an aspirational goal, but a mandatory requirement for professional licensure. Several consumer representatives expressed the opinion that the FTC should recommend that the FDCPA be amended to include minimum requirements for the prosecution of a debt collection lawsuit, including recommendations that debt collection attorneys must be certain that they have admissible evidence to prove the debt before a lawsuit is initiated. The experience of our members shows that this suggestion is particularly inappropriate in light of the varied opinions of a state court judges as to the quality and quantity of evidence needed to prove that a consumer owes the debt.

The use of state courts is an effective and appropriate method of debt collection. The traditional principles inherent in our system of justice require that courts operate in a fair fashion that protects the interest of all parties and preserves the public trust. Attorneys collecting consumer debts understand that power of filing a lawsuit to collect on a claim. This power is measured by the attorney's duty as a member of the bar to present claims in good faith and not for a frivolous or improper purpose.

The FTC is part of the executive branch of the Federal Government. Its regulatory role is not designed to examine, comment upon or modify state court rules of procedure, a function traditionally reserved to the judicial branch of state governments. The judiciary's role in overseeing the court process, when coupled with the basic tenets of our adversary system of justice provides adequate protection for debtors sued on consumer obligations. Our legal system is designed to provide every party due process rights, requiring that the defendant receive notice

of the court action; have the opportunity to answer the complaint; make the party bringing the action prove its case by a preponderance of evidence and also allows the defendant to put forth evidence that negates the claim.

Although the traditions inherent in our Court system create balance and fairness to all parties, the FTC can nonetheless play an important role in fostering better knowledge and understanding of the process by which consumer debts are collected through litigation. The FTC's role in enforcing the FDCPA will be enhanced through implementation of two initiatives; (1) encouraging state judicial officials to convene meetings with consumer advocates, debt collection attorneys, court officials and the FTC to review debt collection litigation processes to make sure that state court proceedings are balanced and fair to both the collector and the debtor and (2) encouraging an extensive dialogue with state bar authorities to expand knowledge and awareness of the Fair Debt Collection Practices Act.

The FTC should engage state judiciary officials to encourage dialogues similar to the one recently concluded in the Commonwealth of Massachusetts where attorneys, judicial officials and consumer advocates at the state level met to exchange ideas about debt collection litigation processes in small claims courts. The FTC should work to prompt similar conferences in other states. In this fashion, the Federal Trade Commission can obtain a better understanding of the state court litigation process and at the same time provide the court system a perspective from the federal regulatory authority charged with enforcing the Fair Debt Collection Practices Act.

Lawyers collecting consumer debts have a unique perspective to offer pertaining to FDCPA compliance. Not only are lawyers deemed "debt collectors" under the FDCPA, attorneys are similarly bound to follow state promulgated rules of professional practice which are

enforced by the courts in each state. Lawyers who fail to comport their practice with the professional conduct regulations face severe sanctions, including suspension or disbarment.

During the Debt Collection Workshop it became apparent that both the Federal Trade Commission and consumer advocates were concerned about the ability of state bar authorities to adequately police and regulate debt collection practices which may violate the FDCPA and also run afoul of state bar disciplinary rules. Although the function of the Federal Trade Commission is distinct from the mandate of state bar authorities, both the FTC and state bars would benefit from a dialogue addressing the Fair Debt Collection Practices Act and the overlapping ethical obligations of lawyers who collect consumer debts. NARCA encourages the Division of Financial Practices to approach state bar authorities to convene workshops that will facilitate the exchange of information about collection practices of lawyers that are subject to Federal regulation.

In addition to the two initiatives suggested herein, NARCA recommends that the FTC include the following suggested modifications to the FDCPA in its report to Congress.

#### I. MODEL VALIDATION OF DEBTS NOTICE

NARCA's previous submissions have described the host of concerns facing a debt collector in fashioning an initial disclosure letter that complies with 15 U.S.C. § 1692g. These challenges have caused the Seventh Circuit Court of Appeals on several occasions to suggest so-called "safe harbor" letters designed to provide guidance to debt collection attorneys and collection agencies. *See, e.g., Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997). *Miller v. McAlla, Raymer, Padrick, Cobbs, Nichols and Clark, LLC*, 214 F.3d 872 (7th Cir. 2000) and *Evory v. RJM Acquisitions*, 2007 U.S. App. Lexis 24740 (7th Cir. 10/23/07). This effort has been guided by a desire to "minimize litigation under the debt collection statute." *Miller*, 214

F.3d at 876. NARCA appreciates the Court’s desire to minimize FDCPA litigation, however, the issuance of safe harbor letters do not focus on any case or controversy presently before the Court but instead operate as advisory opinions, which Supreme Court precedent teaches is not binding on future cases. See, Boston Fire Fighters Union Local 718 v. Boston Chapter NAACP, Inc., 468 U.S. 1206, 1210, 104 S.Ct. 3576, 3578-79 (“such a ruling now rendered in the absence of the present case or controversy in this proceeding – what amount to no more than an advisory opinion.”)

A model validation letter would serve the useful purpose of reducing litigation over variances in language in letters and the nuances inherent in the interpretation of a statute that is viewed through the eyes of the least sophisticated consumer. NARCA suggests that the FTC craft a model initial validation of debts letter and that Congress incorporate that language in the Fair Debt Collection Practices Act.

## II. THE STATE COURT PROCESS SHOULD NOT BE SUBJECT TO FDCPA REGULATION

The purpose of the FDCPA amendment repealing the attorney exemption was not to regulate lawyer practices in the courtroom. Twenty-one (21) years after the passage of this amendment, it is time for Congress to revisit the FDCPA and resolve conflicting interpretations as to what are purely legal functions that should not be subject to regulation by a Federal executive authority. The Fair Debt Collection Practices Act should not provide an additional alternative remedy to a debtor who prevails in the collection lawsuit. For this reason, what attorneys say or claim in court papers should not be the basis for an FDCPA action. This principle is consistent with the Supreme Court’s interpretation that “we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it and ‘action that cannot legally be taken’”. Heintz v. Jenkins, 514 U.S. at 296.

### III. COMMUNICATIONS DIRECTED TO THE DEBTOR

Technology has made the use of cell phones, voicemail, and answer machines ubiquitous. None of these modern conveniences existed when the Fair Debt Collection Practices Act was passed in 1977. These new essential means of communication require a revision of the FDCPA to take into account both the modern day methods by which consumers interface with creditors and a debt collector's legitimate need to contact debtors to resolve delinquent accounts before resorting to litigation.

(A) Many cell phones now have a basic monthly charge and customers are no longer billed for each call. The FDCPA should be amended to specifically permit debt collectors to contact a debtor's cell phone number.

(B) A debt collector should not be required to disclose that the communication is an attempt to collect the debt [15 U.S.C. § 1692e(11)] when leaving a benign message on a voicemail or answering machine. This approach is consistent with the privacy concerns implicit in the FDCPA's requirement that the outside of an envelope not disclose that the sender is a debt collector. [15 U.S.C. § 1692f(8)]. In 1977, debt collectors had two means of communicating with debtors; (1) by sending a letter to the debtor or (2) by telephoning the debtor. Because the letter could be seen by a third party, the outside of the envelope could not state that the communication was from the debt collector. Similarly, a debtor could not disclose to a third party answering the phone the purpose of the call, but was limited to asking that the debtor make a return call. There is no practical difference in the situation where a message is left on answering machine. If the message is merely "please call", the debtor can elect to either return the call or ignore it. If the call is returned, the collector must disclose that the communication is

about the debt. If the call is never returned, there has truly been no communication concerning the collection of a debt.

#### IV. CONCLUSION

NARCA looks forward to continuing to work with the Federal Trade Commission pertaining to all aspects of the FDCPA. The focus on legal collections during the workshop and in its aftermath suggests that the work of collection attorneys is of significant concern to consumer groups, industry representatives, and the FTC. NARCA hopes to play a constructive and active role in the follow up to the workshop and in future endeavors involving the FTC's role in fostering compliance with the FDCPA.