Why States Should Have Primary Oversight of Attorney's Activities in Debt-Collection Litigation

By Thomas B. Pahl and Matthew J. Wilshire[1]

Since its enactment in 1977, there has been great controversy over if the Fair Debt Collection Practices Act ("FDCPA")[2] does and should apply to attorneys' conduct in debt-collection litigation, most of which occurs in state court. Although the statute originally exempted attorneys, Congress rescinded that exemption and courts have since applied the FDCPA to a growing range of activities in litigation. The National Creditors Bar Association and the American Bar Association have advocated that Congress pass legislation[3] that would exempt lawyers' litigation activities from the FDCPA.[4] Even though we take no position on this proposed legislation, we generally agree that the best approach to protecting consumers from the litigation activities of lawyers is to rely on state court and state bar enforcement of state law along with FTC enforcement of the FTC Act as a backstop.

The FDCPA's application to lawyers has expanded over time. When Congress first enacted the FDCPA, it exempted attorneys completely by defining "debt collector" to exclude "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client."[5] Courts generally construed that definition to immunize attorneys for conduct inside or outside of litigation, including practices non-attorneys generally do today.

Some creditors and other owners of debts responded by placing their accounts with certain unscrupulous law firms instead of with non-attorney debt collectors. These law firms could engage in deceptive and abusive collection practices without risk of liability under the FDCPA. To protect consumers from growing harm attributable to this activity, Congress in 1986 rescinded the attorney exemption.

Congress apparently revoked the attorney exemption primarily to stop attorneys from engaging in pre-litigation collection conduct that caused harm to consumers. To justify revoking the attorney exemption, for example, Congress cited attorneys using abusive tactics like calling

---

[1] Thomas B. Pahl is the Acting Director of the Bureau of Consumer Protection at the Federal Trade Commission, and Mathew J. Wilshire is a Senior Attorney in the Division of Financial Practices at the FTC. The views expressed in this article are the personal views of the authors and do not necessarily reflect the views of the FTC or any FTC Commissioner.

[2] 15 U.S.C. § 1692 et seq.

[3] See letter dated November 16, 2017, from Hilaire Bass, President, American Bar Association, to the Honorable Jeb Hensarling, Chairman, and the Honorable Maxine Waters, Ranking Member, Committee on Financial Services, U.S. House of Representatives, supporting H.R. 1849, The Practice of Law Technical Clarification Act of 2017.

[4] H.R. 1849, 115th Cong. (2017).

[5] Pub. L. 95-109, Sec. 803(6)(F) (1977).

at all hours of the night.[6] Congress did not cite to problems in attorney litigation conduct to support its decision to revoke the exemption.

Nevertheless, in 1995, the Supreme Court held in *Heintz v. Jenkins* that the FDCPA as amended covers lawyers' "litigating activities." The Court reasoned that after the 1986 amendment nothing in the FDCPA limited its applicability to lawyers, so there was no basis for carving out "litigating activities."[7] The Court further reasoned that the ordinary meaning of "debt collection" included filing lawsuits.[8] It also pointed out that because Congress repealed a blanket lawyer exemption from the original FDCPA, Congress could have easily carved out litigating activities in a refashioned lawyer exemption if it wanted to do so.[9] Since *Heintz*, courts have held that the FDCPA applies to attorney conduct in litigation. Moreover, as a former head of the FTC's Division of Credit Practices recently testified before Congress, courts have done so in cases involving lawyer "technical violations for information they included in a complaint, or for harmless errors, or even errors that benefit the consumer."[10]

Attorney conduct in all types of civil litigation of course can harm consumers. Indeed, the FTC issued a report in 2010 discussing problems that had arisen from lawyers' conduct in debt-collection litigation. For example, the report stated, "debt collection actions too often are filed against the wrong consumer, seek the wrong amount, or both, or are otherwise based on erroneous information."[11]

Consumers may have a difficult time protecting themselves from harm arising from attorney litigation conduct in the absence of legal restrictions. Consumers can choose their creditors, but they cannot choose their debt collectors. Consumer choices in the marketplace therefore are unlikely to deter adequately collection lawyers from engaging in litigation conduct that harms consumers.

States have traditionally protected consumers from misconduct in litigation by regulating the conduct of attorneys in their courts, including in debt collection litigation. The FTC has recognized that states play this role. In its 2011 report, the Commission noted that "state law is the main source of . . . substantive and procedural standards" for debt collection lawsuits and that "[e]ach state also applies its own rules of civil procedure and evidence and uses them to determine whether service of process was adequate [and] the pleadings contained appropriate

---

[6] H.R. Rep. 99-405; 1986 U.S.C.C.A.N. 1752, 1755.

[7] *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995).

[8] *Id.* at 294.

[9] *Id.* at 295.

[10] *Anne Fortney, "Legislative Proposals for a More Efficient Federal Financial Regulatory Regime"* before House Financial Services Subcommittee on Financial Institutions and Consumer Credit (Sept. 7, 2017), at 17.

[11] FEDERAL TRADE COMMISSION, *Repairing a Broken System*, at p. 15.

and sufficient information."[12] The CFPB likewise has acknowledged that states play this role, recognizing "the traditional role of the States in overseeing the administration and operation of their court systems [in debt collection actions]."[13]

State courts and state bars have ample authority to stop the conduct of lawyers in debt collection litigation that harms consumers. State courts generally have rules, like Federal Rule of Civil Procedure 11, which prohibit debt-collection attorneys from filing frivolous lawsuits to harass or intimidate defendants. State court rules also typically prohibit debt-collection attorneys from making false or misleading claims in affidavits, motions, and other documents in litigation. State bars further have the authority to sanction or otherwise discipline debt collection attorneys who file frivolous lawsuits or make deceptive claims. State judges and bars know their court systems best, and they have expertise from decades if not centuries of enforcement against lawyers. State courts and bars should remain primarily responsible for overseeing the conduct of collection attorneys in litigation.

Although state courts and bars generally can protect consumers from abuse in their court systems, they may face challenges in addressing certain lawyer misconduct in debt collection litigation. Many consumers appear *pro se* in debt collection litigation. Many of them may not recognize conduct that violates court or bar rules, and, even if they do, they may not report it. Moreover, at times, state court and bar standards and enforcement have not been robust. Therefore, we believe the best way to ensure protections for consumers is to supplement state enforcement with a federal "backstop."

Should the FDCPA be such a backstop? No. Applying the FDCPA to collection attorney litigation activities creates risks of substantial conflict and confusion. Case law interpreting the FDCPA would require that attorneys be "meaningfully involved" in the preparation and review of any pleadings they sign.[14] This case law indicates that collection attorneys in litigation have a duty to independently investigate complaint allegations in debt collection cases that appears to go beyond what state court and state bar rules require. Case law also has interpreted the FDCPA to require that debt collectors have substantiation, that is, a "reasonable basis," for the representations in the complaint. In addition to this FDCPA case law, the CFPB is developing new federal rules for debt collection that may impose even more extensive and complicated requirements to flesh out meaningful involvement, substantiation, and other FDCPA concepts for representations made in complaints. Applying these FDCPA standards and state court and state bar standards at the same time to the representations in complaints risks conflict and confusion that will make it harder for collection litigation attorneys to comply with the law. Not applying the FDCPA to the conduct of attorneys debt collection litigation also would avoid conflict and

[12] *Id.* at p. 6. *See also id.* at p. 10 ("The FTC believes that service of process problems should be addressed at the state and local level.").

[13] 78 Fed. Reg. 67848, 67877 (Nov. 12, 2013).

[14] *CFPB v. Frederick J. Hanna & Assocs.*, 114 F. Supp. 3d 1342, 1368 (N.D. Ga. 2015); *Bock v. Pressler and Pressler, LLP*, 30 F. Supp. 3d 283, 305 (D.N.J. 2014) *remanded on other grounds*, 658 F. Appx. 63 (3d Cir. 2016).

confusion from overlapping federal and state standards. We, therefore, do not believe the FDCPA should apply to the collection litigation conduct of attorneys.[15]

Federal Trade Commission enforcement of the FTC Act is a much better backstop than the FDCPA. First, because the FTC Act is far less prescriptive than the FDCPA, using FTC Act enforcement as a backstop decreases the prospect of conflict and confusion with state standards. Second, only the FTC enforces the FTC Act, while both the federal government and private individuals enforce the FDCPA. This decreases the prospect of conflict and confusion with state standards because federal enforcers are more likely than private individuals to consider the broader consequences of filing an action. Finally, the FTC has a history of reconciling Section 5 with many other federal and state standards for lawyers,[16] including some hard experience with courts rejecting its regulation of lawyers,[17] and so its past is critical to the governmental restraint needed to serve as a backstop.

In conclusion, state courts and state bars should continue to be the main actors protecting consumers from the conduct of attorneys in debt collection litigation. FTC enforcement of the FTC Act, not the application of the FDCPA, should be the backstop for the states.

[15] To avoid circumvention of the FDCPA's important consumer protection function, it is important to apply the FDCPA to the **pre-litigation** activities of debt collection attorneys. Likewise, it is important to apply the FDCPA to **non-litigation** activities of debt collection attorneys once they have filed a complaint, such as an attorney communicating with a consumer's neighbors to pressure a consumer to pay a debt following the attorney's filing of a complaint to recover on that debt from the consumer.

[16] *See generally* Thomas B. Pahl and Evan R. Zullow, *Update on Federal Regulation of Attorneys under the Financial Services Laws*, 67 The Business Lawyer 617 (Feb. 2012).

[17] *See ABA v. FTC*, 671 F. Supp. 2d 64, 66 (D.D.C. 2009), *vacated*, 636 F. 3d 641 (D.C. Cir. 2011).