FAIR DEBT COLLECTION PRACTICES ACT, AMENDMENT

For Legislative History of Act see Report for P.L. 99-361 in Legislative History Section, post.

An Act to amend the Fair Debt Collection Practices Act to provide that any attorney who collects debts on behalf of a client shall be subject to the provisions of such Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the last sentence of section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)) is amended—

(1) by striking out clause (F) and redesignating clause (G) as clause (F); and

(2) in clause (E), by inserting "and" at the end thereof.

(b) The second sentence of section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)) is amended by striking out "clause (G)" and inserting in lieu thereof "clause (F)".

Approved July 9, 1986.

LEGISLATIVE HISTORY—H.R. 237:

HOUSE REPORT No. 99-405 (Comm. on Banking, Finance and Urban Affairs).
CONGRESSIONAL RECORD:
Vol. 131 (1985): Dec. 2, considered and passed House.
Vol. 132 (1986): June 26, considered and passed Senate.

FAIR DEBT COLLECTION PRACTICES ACT, AMENDMENT

P.L. 99–361, see page 100 Stat. 768

DATES OF CONSIDERATION AND PASSAGE

House December 2, 1985
Senate June 26, 1986

House Report (Banking, Finance and Urban Affairs Committee) No. 99–405, Nov. 26, 1985 [To accompany H.R. 237]

Cong. Record Vol. 131 (1985)

Cong. Record Vol. 132 (1986)

No Senate Report was submitted with this legislation.

HOUSE REPORT NO. 99–405

[page 1]

The Committee on Banking, Finance and Urban Affairs, to whom was referred the bill (H.R. 237) to amend the Fair Debt Collection Practices Act to provide that any attorney who collects debts on behalf of a client shall be subject to the provisions of such act, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

INTRODUCTION

The Fair Debt Collection Practices Act prohibits the use of abusive, deceptive, and unfair debt collection practices by persons engaged in the business of collecting debts owned by consumers to third parties. As enacted on September 20, 1977 (Public Law 95–109), the Act exempted "any attorney collecting a debt as an attorney on behalf of and in the name of a client" from its provisions. Since passage of the Act, attorneys have increasingly entered the debt collection business and used the exemption to evade compli-

[page 2]

ance with the Act. There are now about 5,000 attorneys engaged in the business of debt collection, compared to approximately 4,500 lay debt collection firms. H.R. 237 would remove the exemption from the Fair Debt Collection Practices Act and bring attorney collectors under the provisions of the Act.

HISTORY OF THE LEGISLATION

H.R. 237 was introduced by Mr. Annunzio on January 3, 1985, and is cosponsored by 127 Members. The bill is identical to H.R. 4617, introduced by Mr. Annunzio in the 98th Congress, and which was the subject of hearings by the Subcommittee on Consumer Affairs and Coinage on January 31, 1984. It is also identical to section 1103 of S. 2851, which passed the Senate of the 98th Congress on September 13, 1984.

On October 22, 1985, the Subcommittee on Consumer Affairs and Coinage heard testimony from Ms. Anne Price Fortney, Associate Director for Credit Practices, Bureau of Consumer Protection, Federal Trade Commission; Mr. John W. Johnson, Executive Vice President, American Collectors Association, Minneapolis, Minnesota; Mr. Walter R. Kurth, President, Associated Credit Bureaus, Inc., Houston, Texas; Mr. Leonard O. Abrams, Berman, Fagel, Haber, Maragos & Abrams, Chicago, Illinois, representing the Commercial Law League of America; Mr. Robert J. Sheridan, Robert J. Sheridan and Affiliates, Washington, D.C.; Ms. Karen Leichtnam, Legislative Assistant, HALT, Americans for Legal Reform, Washington, D.C.; and Mr. Alan Fox, Legislative Representative, Consumer Federation of America, Washington D.C.

On November 6, 1985 the Subcommittee on Consumer Affairs and Coinage met in executive session and by voice vote ordered H.R. 237 reported to the full Committee without amendment.

The full Committee met on November 20, 1985 in executive session to mark up H.R. 237 and by voice vote ordered the bill favorably reported to the House without amendment.

SUMMARY OF THE LEGISLATION

As ordered reported by the Banking Committee, H.R. 237 would remove the exemption for attorneys contained in section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)).

The "term collector" is defined in section 803(6) of the Act as—

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

The Act exempts several classes from its coverage, including creditors' in-house collectors, government officials, non-profit consumer credit counselors, and attorneys.

Removal of the exemption would require any attorney who comes within the definition of "debt collector" contained in section 803(6) to comply with the provisions of the Fair Debt Collection Practice Act. Quite simply, any attorney who is in the business of collecting debts will be regarded by the Act as a debt collector.

[page 3]

The application of several provisions of the Act to attorney collecting debts are worthy of note. The restrictions of sections 804 and 805(b) on contacts with third parties regarding a consumers' debt are intended to protect the privacy of consumers' financial affairs. These contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs. The Committee discerns no reason to make any distinction based upon the identity of the debt collector.

Section 805(c) of the Act requires that a debt collector cease communication with a debtor when the debtor so requests. The provision is a means by which the consumer can end what he or she considers harassment and bring the matter of the debt to a head. Like the proscription on third party contacts, the Committee finds

no reason to permit attorneys to engage in conduct prohibited lay collectors.

Requiring the validation of debts under section 809 "protects people who do not owe money at all." H.R. Rep. No. 95-131, 95th Cong., 1st Sess. 8 (1977). The provision was termed a "significant feature of [the] legislation" by the Senate Report on H.R. 5294, which became the Fair Debt Collection Practices Act. S. Rep. No. 95-382, 95th Cong., 1st Sess. 4 (1977). Attorneys, no less than lay collectors, can make errors in cases involving common names or similar addresses. Consumers should not be stripped of an important protection solely because the collector happens to have a law degree.

The Committee intends that attorneys in the business of collecting debts be subject to all provisions of the Act, if they meet the definition of debt collector contained in section 803(6). Distinctions between attorney debt collectors and lay debt collectors are eliminated by H.R. 237.

NEED FOR THE LEGISLATION

GROWTH OF ATTORNEY COLLECTION INDUSTRY

In the eight years since the passage of the Fair Debt Collection Practices Act, attorneys have entered the debt collection industry in ever increasing numbers. There are now 5,000 attorneys engaged in debt collection activities. As a result of the attorney exemption, consumers are harmed and debt collectors who must comply with the Act are at a competitive disadvantage.

The scope of debt collection activities by attorneys can be seen from the testimony of Mr. John W. Johnson, Executive Vice President, American Collectors Association, before the Subcommittee on Consumer Affairs and Coinage:

> Representatives of a major national law firm, testifying in a hearing before a subcommittee of the U.S. Senate on May 25, 1983, estimated that there are 5,000 practicing attorneys in the United States who handle consumer collection accounts on a regular basis, or a number approximately equal to the total lay collection industry. In addition, this law firm estimated that in 1982 it alone received 365,471 consumer accounts for collection, representing a total dollar value of more than $355 million. This is rough-
>
> [page 4]
>
> ly ten times the volume of collections handled by the average ACA member agency, as determined by a recent national survey. This law firm also testified that it filed about 30,000 collection lawsuits in 1982, which means that nearly 92% of the accounts handled that year did not involve legal action. (Citations omitted.)

CONSUMER HARM

The range of harm that befalls consumers as a result of the attorney exemption was outlined by a series of rhetorical questions posed by Mr. Walter R. Kurth, President of Associated Credit Bureaus while testifying before the Subcommittee:

Is it good public policy to permit attorneys collecting debts to use threats of violence or harm to the person, his reputation, or property?

Is it good public policy to allow lawyers collecting debts to communicate with a debtor's employer or neighbors or any other third person about the consumer's economic problems?

Is it good public policy to permit an attorney collector to continue communications with a debtor after the debtor has requested that he cease such communication?

Is it good public policy not to require attorney collectors to provide an initial validation of debt notice?

Is it good public policy not to require lawyers attempting to collect debts to revalidate the debt and mail certification to the consumer while a non-lawyer collector must do so?

Specific examples of attorney debt collection abuses were presented as exhibits attached to Mr. Johnson's testimony. These abuses, all prohibited by the Act, but inapplicable due to the attorney exemption, included late night telephone calls to consumers, calls to consumers' employers concerning the consumers' debts, frequent and repeated calls to consumers, disclosure of consumers' debt to third parties, threats of legal action on small debts where there is little likelihood that legal action will be taken, simulation of legal process, harassment, abuse, threats of seizure, and attachment and sale of property where there is little likelihood that such action will be taken.

Other witnesses made similar points. Mr. Alan Fox, Legislative Representative of the Consumer Federation of America, pointed out to the Consumer Affairs Subcommittee that:

> [Attorneys] actually do engage in practices which Congress has determined should not be permitted. For example, a collection agency may not threaten legal action which in fact it is not entitled to take, but an attorney, on attorney's letterhead with all the authority and credibility which that letterhead and the title of attorney convey, may make such a threat. We submit that consumers are under far more duress from an attorney improperly threatening legal action than from a debt collection agency committing the same practice. Yet only the agency

[page 5]

> is now prohibited from engaging in this form of harassment.

Ms. Karen Leichtnam, Legislative Assistant to HALT, Americans for Legal Reform testified:

> To the consumer-debtor, harassment looks and feels very much the same, whether it comes from a lawyer or non-lawyer. It is clear from the proliferation of attorney debt-collection firms that exemptions such as the existing one are an invitation to the abuses we are now witnessing. But even *without* the growth in attorney debt-collection firms

there would be no reason attorneys should be exempted from the rules.

The legislation will put a stop to the abusive and harassing tactics of attorney debt collectors by requiring them to adhere to the standards of conduct that Congress enacted to govern consumer debt collection activities.

UNFAIR COMPETITION

Many of the attorney debt collection firms use procedures such as precollection letters and skiptracing, and use fee structures similar to those used by lay collection firms. Similarly, the attorneys generally employ lay persons as account representatives and collectors.

Attorney debt collectors use solicitations for their services that are similar to those employed by lay debt collection firms. They often advertise under both "attorney" and "collection agency" headings in telephone directories. For those attorneys, debt collection is an important, if not the most important, portion of their business.

Attorney debt collectors tout the exemption from the Act in solicitations directed at creditors. Attorneys imply that they can use tactics that collection agencies are prohibited from using, and that as a result, collections by attorneys are more effective.

The point is underscored by two examples taken from exhibits submitted by Mr. Johnson of the American Collectors Association to the Consumer Affairs Subcommittee. The first advertisement states:

> Collection agencies are governed by the Fair Debt Collection Practices Act which requires that suit be filed in the county of the debtor's residence. As an attorney, I am exempt from this Act, allowing me to file suit where the debt was to be paid, i.e., the county of the creditor's place of business. This can save delays in filing suit, logistics problems in prosecuting the suit, and ultimate collection of the account. We do not have to refer your accounts to other counties which usually involves fee splitting and further delays and expenses, including travel (of attorney and witnesses) to other counties in the event of trial or other court hearings.

[page 6]

The second, a brochure sent to creditors, implies the attorney exemption protects the creditor from liability arising from the attorney's questionable collection tactics:

> Your member attorney is exempt from the requirements of the Fair Debt Collection Practices Act of 1978, you are therefore protected against judgments on counter claims by your debtor based on unfair collection practices.

Legitimate and law-abiding debt collection firms have business diverted unfairly as a result of the use such tactics. The Committee believes that all firms engaged in the business of debt collection must abide by the same rules.

LACK OF BAR ASSOCIATION DISCIPLINARY PROCEEDINGS

Section 802(b) of the Fair Debt Collection Practices Act found that passage of the Act was necessary because "[e]xisting laws and procedures for redressing . . . injuries are inadequate to protect consumers." One of the basis for the attorney exemption was a belief that bar associations would adequately police attorney violations. That has proven not to be the case.

According to the testimony of Ms. Leichtnam of HALT:

> HALT's experience has been that the state bar associations' attempts at self-regulations have *never* provided adequate protection for consumers.
>
> * * * * *
>
> Evidence . . . has convinced HALT that the main concern of state and local bar assocations is not the protection of consumer, but the protection of lawyers.
>
> * * * * *
>
> No profession can regulate itself adquately as though it had no regard for its own economic self-interest. Because of their obvious conflict-of-interest, state bar grievance committees cannot be viewed as a substitute for the protections given to consumers under the Fair Debt Collection Practices Act.

Other sources confirm the lack of commitment by bar associations to discipline attorneys. According to an article by a former Assistant Regional Director of the Federal Trade Commission:

> Unfortunately, the notion that self-regulation affords the consumer adequate protection may be more optimistic than pragmatic. More than half of the attorney disciplinary agencies responding to the author's survey indicate that no disciplinary action had been taken against an attorney for engaging in conduct that would constitute a violation of the FDCPA if engaged in by a debt collector. Of the remaining eleven agencies that reported any disciplinary action, such action was either in the form of private admonitions or private reprimands. (citations omitted) Lewis, *Regulations of Attorney Debt Collectors—The Role of the FTC and the Bar,* 35 Hastings L.J. 669, 696 (1984).

[page 7]

Clearly, bar associations have failed to fulfill their obligations underlying the premise of the attorney exemption. There is no indication that this is about to change. Having undermined the basis for the exemption, attorneys cannot complain about being brought under the Act.

STATEMENTS MADE IN ACCORDANCE WITH HOUSE RULES

In accordance with clauses 2(l)(2)(B), 2(l)(3) and 2(l)(4) of rule XI of the Rules of the House of Representatives, the following statements are made:

COMMITTEE VOTE (RULE (RULE XI, CLAUSE 2 (l) (2) (B))

H.R. 237 was ordered reported favorably by voice vote, with a quorum present.

OVERSIGHT FINDINGS AND RECOMMENDATIONS (RULE XI, CLAUSES 2(l)(3)(A) AND (D), AND RULE X, CLAUSES 2(B)(1) AND 4(C)(2))

The Subcommittee on Consumer Affairs and Coinage held hearings on October 22, 1985. The hearings received testimony from a representative of the Federal agency charged with enforcement of the Fair Debt Collection Practices Act, consumer groups, attorneys and trade associations of debt collectors. The hearings examined the nature and scope of the attorney exemption to the Act, current enforcement practices, injury to consumers resulting from the exemption, and the impact repeal would have on consumers and attorneys engaged in debt collection.

The Committee finds that current law does not adequately protect consumers from attorney debt collection abuses and that repeal of the attorney exemption to the Fair Debt Collections Practices Act is an appropriate way to reduce the amount of this abuse. Therefore, the Committee recommends that the House pass the bill H.R. 237 as ordered favorably reported by the Committee.

No formal oversight findings or recommendations have been submitted by the Committee on Government Operations.

COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE PURSUANT TO SECTION 403 OF THE CONGRESSIONAL BUDGET ACT OF 1974 (RULE XI, Clause 2(l)(3)(C))

The Congressional Budget Office has submitted the following report:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 22, 1985.

Hon. FERNAND J. ST GERMAIN,
Chairman, Committee on Banking, Finance and Urban Affairs, House of Representatives, Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 237, a bill to amend the Fair Debt Collection Practices Act to provide that any attorney who collects debts on behalf of a client shall be subject to the provisions of such Act, as ordered reported by the House Committee on Banking, Finance and Urban

[page 8]

Affairs, November 21, 1985. We estimate that enactment of this bill would result in no cost to the federal government, or to state and local governments.

If H.R. 237, is enacted, attorneys would no longer be exempt from the provisions of the Fair Debt Collection Practices Act. Based on information from the Department of Justice, we do not expect this change to have any budget impact.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER.

INFLATION IMPACT STATEMENT (RULE XI, CLAUSE 2(l)(4))

Your Committee believes that H.R. 237 as ordered reported favorably by the Banking Committee will have no inflationary impact.

SECTION-BY-SECTION ANALYSIS

SECTION 1

The bill would remove from the Fair Debt Collection Practices Act the exemption for attorneys who collect debts. The Fair Debt Collection Practices Act prohibits any person who regularly collects debts owed by consumers to a third party from using harassment, abuse or unfair practices in collecting the debts. The Act originally exempted attorneys from its provisions on the basis that attorneys were only incidentally involved in debt collection activities. In recent years a large number of law firms have gone into specialized debt collection, and many of these firms use lay persons full time to collect debts. Repeal of the exemption will require these firms to comply with the same standards of conduct as lay debt collection firms.

* * * * *

[page 10]

DISSENTING VIEWS OF THE HONORABLE JOHN P. HILER

On Wednesday, November 20, the House Banking Committee approved H.R. 237 by a voice vote. This legislation would repeal the existing attorney exemption under the Fair Debt Collection Practices Act (FDCPA). The current exemption applies only to "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client."

When the Fair Debt Collection Practices Act was enacted in 1977, most attorney collection services were performed incidentally to the general practice of law. Since enactment, attorneys' debt collection activities have expended. Unfortunately, some lawyers have intepreted their limited exemption under the FDCPA as a blanket exemption for anyone who has passed a bar examination. A few have established what are for all intents and purposes traditional debt collection agencies with the intent of exploiting the competitive advantage conferred by their supposed exemption from the law. Some of these attorneys have gone so far as to advertise their exemption.

The Federal Trade Commission, which enforces the FDCPA, has made clear its position that this exception does *not* apply to attorneys who are operating debt collection agencies. In its last four annual reports to Congress the Commission has recommended that Congress take action to clarify the attorney exemption in order to

eliminate the apparent confusion over its stops. At the same time, the FTC has indicated its opposition to an across-the-board repeal of the exemption. It continues to maintain that attorneys who collect debts on behalf of clients should be exempt from the Fair Debt Collection Practices Act.

I share the FTC's view that the current attorney exemption under the FDCPA should be retained. I also agree with the Commission's contention that the existing exception should be clarified to help eliminate its abuse by misguided lawyers who believe that a law degree is all that is necessary to qualify for the exemption.

The Federal Trade Commission has testified in hearings before the Consumer Affairs and Coinage Subcommittee that attorneys collecting debts as attorneys-at-law are not causing a significant problem. In the year from February 1, 1984 to January 31, 1985, the FTC received slightly more than 2,000 complaints about collection practices. Only 42 of these concerned attorneys, and of these 42 only 29 *possibly* could be violations of the Fair Debt Collection Practices Act.

Furthermore, the FTC already has authority under section 5 of the Federal Trade Commission Act to take action against attorneys who engage in abusive, unfair, or deceptive collection practices.

I generally subscribe to the philosophy that "if it ain't broke, don't fix it." Attempting to "fix" a problem that doesn't exist more often than not leads to new problems. This promises to be the

[page 11]

result of repealing the attorney exemption under the Fair Debt Collection Practices Act.

The Federal Trade Commission has maintained that subjection to the FDCPA would create practical problems for attorneys collecting debts as attorneys-at-law. In particular, they have indicated that the application of Sections 804, 805(b), 805(c), and 809 to such attorneys would inhibit their ability to effectively represent a client. For example, if attorneys are subject to sections 804 and 805(b), their ability to contact third parties in order to facilitate settlements will be severely limited. In addition, the application of section 809, which deals with the validation of debts, could very easily interfere with a client's right to pursue judicial remedies.

The American Bar Association and Commercial Law League of America also have expressed concern with the potential effects of certain provisions of the FDCPA on the practice of law as it relates to debt collection.

We also should bear in mind that although the collection activities of attorneys have increased over the past several years, and the specialized collection firm has emerged in urban areas, much collection activity undertaken by attorneys is still performed incidentally to the provision of professional legal services. Certainly, the small firm which collects debts incidentally to the general practice of law would be hit particularly hard by the application of the FDCPA to attorneys.

For all these reasons—the absence of evidence that attorneys-at-law are engaging in abusive collection practices; the availability of an alternative enforcement mechanism (Section 5 of the FTC Act) for dealing with abusive practices exercises by attorneys; and the

adverse consequences that subjection to the FDCPA would have on the practice of law as it pertains to the collection of debts—I opposed H.R. 237 when it was considered in the Consumer Affairs and Coinage Subcommittee and later in the Banking Committee.

During both the Subcommittee and Committee mark-up of this legislation, I offered an amendment which I firmly believe will solve the problem that does exist with attorneys who think they can establish traditional debt collection agencies and consider themselves exempt from the FDCPA. This amendment proposes to retain the existing exemption, but with stipulated conditions under which such an attorney would forfeit this exemption. If an attorney-at-law collecting debts as an attorney either (1) owns, operates, or is employed by a firm that is engaged substantially in the collection of debts; or (2) employs non-attorneys whose primary responsibility is the handling or processing of debts; (3) or solicits debts for collection, he would lose his exemption under the Fair Debt Collection Practices Act. Regrettably, this amendment was defeated in both Subcommittee and Committee on a voice vote.

Congressman Shumway also offered an amendment at the Committee mark-up of H.R. 237, which would have limited the attorney exemption. Under the Shumway amendment, attorneys-at-law generally would be subject to the FDCPA. However, an attorney-at-law who collects a debt as an attorney on behalf of a client, and who does not solicit debts for collection, would be excepted from paragraphs (1), (2), and (3) of section 804 and sections 805(b), 805)c), and 809. This amendment also was defeated by voice vote.

[page 12]

While I too am concerned about the protection of the consumer from abusive, unfair, and deceptive debt collection practices, I do not support placing unnecessary shackles on attorneys who collect debts as part of a legitimate law practice. I would much prefer a targeted approach that eliminates the existing abuse of the exemption without interfering with the legitimate collection practices of attorneys-at-law; The shotgun approach represented by H.R. 237 almost certainly will create new problems. I remain convinced that a simple clarification of the existing attorney exemption under the Fair Debt Collection Practices, rather than a blanket repeal, is the advisable solution what is, afterall, a very limited problem.

JOHN HILER.