

May 12, 2014

Members

United States Senate Committee on Banking, Housing and Urban Affairs

Re: Opposition to Fair Debt Collection Practices Technical Clarification Act of 2013, S. 2328

Dear Senator:

We write to express our opposition to the Fair Debt Collection Practices Technical Clarification Act of 2013, S. 2328. The changes to current law made in the bill – exempting debt collection attorneys from the Fair Debt Collection Practices Act (“FDCPA”) – would seriously harm consumers. This bill would effectively permit lawyers and law firms engaging in debt collection to evade essential requirements of the FDCPA which prohibit deception, unfair activities, and harassment against consumers. Unfortunately lawyers and law firms have been at the forefront of some of the worst debt collection abuses in this nation. Rather than limiting protections, we need to increase them for consumers.

The FDCPA was enacted in 1977 to prohibit debt collectors from engaging in abusive, deceptive, and unfair debt collection practices and from making false or misleading representations. S. 2328, like its companion bill in the House (H.R. 2892), would circumvent strong legal precedent on how debt collectors are identified under the FDCPA. In 1995, the United States Supreme Court considered this issue of whether the FDCPA’s defined term of debt collector should apply to litigating lawyers in *Heintz v. Jenkins*¹ and unequivocally confirmed that it does. In finding that litigating lawyers were and should be covered by the FDCPA, the Court said that it doesn’t matter if a person is soliciting a consumer by phone or through the use of a legal proceeding – both activities are considered attempts to collect a debt. That analysis is still true – attempts to collect debts through the courts have just as much capacity for harm to consumers – if not more – as telephone calls and threats. Although S. 2328 is described as a “clarification” of the law, this is disingenuous. There is no ambiguity in the current law – no one argues that the FDCPA does not now clearly cover attorneys collecting debts in litigation.

There are hundreds of reported cases against attorneys for violations of the FDCPA, illustrating the continued need for lawyers collecting debts through litigation to be fully covered under this law. Indeed, the abuses by lawyers for debt collectors in state courts have become so widespread and egregious that the Federal Trade Commission recently concluded in relation to the court system that “the system for resolving disputes about consumer debts is broken.”² Millions of consumers have been the victims of abusive debt collection through the courts, resulting in faulty judgments against them, wage or benefit garnishments, frozen bank accounts, and ruined credit records that could prevent them from obtaining insurance, housing or even employment.

Below are just a few examples of kinds of abuse by attorneys while in litigation on debt collection claims (with the citations to just a sampling of the cases illustrating these abuses in the endnotes at the end of this letter):

- Routinely failing to properly notify consumer-defendants of the lawsuits – a practice known as sewer service, and noted by the FTC.³

- Filing motions that contain misrepresentations.⁴
- Falsely stating in a garnishment affidavit that the collection attorney had a “reasonable basis” to believe that non-exempt funds “may have” been in plaintiff’s bank account.⁵
- Falsely swearing to having personal knowledge of the factual basis for the amount of or liability for the claim in a state court debt collection suit.⁶
- Manufacturing fake credit card billing statements and attaching them to complaints in collection actions.⁷
- Falsely stating the amount of a debt.⁸
- Using false pretenses to induce a consumer to sign a consent judgment.⁹
- Filing a false affidavit in a state debt collection suit against a consumer.¹⁰
- Violating a promise to refrain from further action in return for a settlement agreement.¹¹
- Attempting to garnish wages with interest on the judgment when the judgment struck a provision for interest.¹²
- Threatening to file or the filing of a time-barred suit.¹³
- Filing a state debt collection complaint on a debt that was discharged in bankruptcy.¹⁴

Moreover, research strongly suggests that while millions of debt collection suits are filed in state courts each year, only a fraction of those suits can be substantiated with authentic documents. Nevertheless, perhaps as many as 90% of those suits result in default judgments that in many states last for 20 years or even more. Studies have documented the disadvantages that debtors face in the courts. They have found, for example, that notices were vague and confusing, and often sent to the wrong addresses; that only one in five defendants even showed up for court hearings; that those who did show up have their interests undercut by court officials and collection attorneys who routinely failed to observe court guidelines. In addition, while consumer-defendants generally represented themselves, creditors were usually represented by a lawyer.¹⁵ As an Illinois judge noted in his court – “the tubs of default records are enormous, so you’ll have sometime, in a collection call, 300 to 600 default orders to go through.”¹⁶

Year after year, problems with debt collection have been among the top consumer complaints to the Federal Trade Commission (FTC). Complaints are skyrocketing: from 13,950 in 2000 to 199,721 in 2012 – more than a 900% increase in just over a decade. In January 2014 alone, consumers registered more than 30,000 complaints regarding debt collection with the Consumer Financial Protection Bureau (CFPB). Standards need to be strengthened to rein in these abuses. Instead, S.2328 would move in the wrong direction and weaken the protections against abusive debt collection.

The CFPB is in the midst of an examination of the adequacy of current laws, including the FDCPA, designed to protect consumers from abusive debt collection activities, and in the process has asked questions of the industry and consumers of how the protections need to be updated and improved.¹⁷ The issues addressed in S.2328 are among those under review. We urge you to give the CFPB the opportunity to use its new rulemaking powers given by Congress to properly regulate the debt collection industry.

Unfortunately, if S.2328 is allowed to pass, it will open the floodgates for abusive and harmful debt collection practices by attorneys that will be left uncovered by the protections of the FDCPA. We strongly urge you not to support this legislation.

Thank you very much for your consideration of our point of view. For further information please contact Ellen Taverna at the National Association of Consumer Advocates, 202 452-1989, ext.109, ellen@naca.net or Margot Saunders at the National Consumer Law Center, 202 452-6252, ext.104, msaunders@nclc.org.

Sincerely,

Americans for Financial Reform

Center for Responsible Lending

Consumer Action

Consumer Federation of America

Consumers Union

National Association of Consumer Advocates

National Consumer Law Center on behalf of its low-income clients

National Fair Housing Alliance

U.S. PIRG

Endnotes

¹ Heintz v. Jenkins (94-367), 514 U.S. 291 (1995).

² Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010) at I (Executive Summary), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

³ *Id.* at 9.

⁴ See e.g. Harrington v. CACV, L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007) (filing a motion for default misrepresenting that the consumer had not responded to discovery violated § 1692e(5)); Hasbrouck v. Arrow Fin. Servs. L.L.C., 2010 WL 1257885 (N.D.N.Y. Mar. 26, 2010) (denying debt collector's motion on pleadings where consumer's complaint that defendant filed false or "phony" affidavit in seeking default judgment against her gave rise to at least "plausible inference of falsity"); Capital Credit & Collection Serv., Inc. v. Armani, 206 P.3d 1114 (Or. Ct. App. 2009) (jury could properly conclude that litigation after reaching settlement agreement violated § 1692e). Young v. Meyer & Njus, 1997 WL 452685 (N.D. Ill. Aug. 6, 1997) (deception claim stated where collection attorney allegedly verified collection suit based on insufficient information from creditor to form belief in veracity of complaint).

⁵ See e.g. Chalik v. Westport Recovery Corp., 677 F. Supp. 2d 1322 (S.D. Fla. 2009) (collectors' filing of sworn statement denying consumer's claim of exemption, without any specific knowledge regarding exemption, in garnishment proceeding violation of § 1692e).

⁶ See Ison v. Javitch, Block & Rathbone, 2007 WL 2769674 (S.D. Ohio Sept. 18, 2007); Gionis v. Javitch, Block, Rathbone, L.L.P., 238 Fed. Appx. 24 (6th Cir. 2007) (unpublished) (affidavit claiming attorney fees to which collector was entitled was deceptive when collector may not have been entitled to any fees); Gutierrez v. LVNV Funding, L.L.C., 2009 U.S. Dist. LEXIS 54479 (W.D. Tex. Mar. 16, 2009) (certifying class action alleging that defendant debt buyer violated §§ 1692e, 1692e(2), and 1692e(10) by filing all of its state court collection complaints with attached "Affidavit of Account" that falsely attested that affiant had "personal knowledge" of supporting account documents); Williams v. Javitch, Block & Rathbone, L.L.P., 480 F. Supp. 2d 1016 (S.D. Ohio 2007) (denying defendant law firm's motion to dismiss where consumer alleged that law firm knew or should have known that "accounts specialist" who executed affidavits lacked personal knowledge of matters she was attesting to); Gonzalez v. Lawent, 2004 WL 2036409 (N.D. Ill. Sept. 10, 2004) (allegation that attorney who verified collection complaint "on information and belief" in fact had been presented evidence prior to verifying complaint that debt in question had been paid in full stated claim for violating FDCPA); Hartman v. Asset Acceptance Corp., 2004 U.S. Dist. LEXIS 24845 (S.D. Ohio Sept. 29, 2004) (FDCPA claims that affidavit misrepresented that debt buyer was holder in due course in state collection action violated § 1692e(2), (12)); Lockett v. Freedman, 2004 WL 856516 (N.D. Ill. Apr. 21, 2004) (denying motion to dismiss claim that filing verified complaint including inflated collection attorney fees was deceptive where complaint was verified based on personal knowledge and not information and belief).

⁷ See e.g. Manlapaz v. Unifund CCR Partners, 2009 WL 3015166 (N.D. Ill. Sept. 15, 2009) (document's mere appearance as bill previously sent to plaintiff, when it was actually created for purpose of suit, may qualify as misrepresentation).

⁸ Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162 (9th Cir. 2006). *Accord* Ross v. RJM Acquisitions Funding L.L.C., 480 F.3d 493, 495 (7th Cir. 2007); Whitaker v. Hudson & Keyse, L.L.C., 2007 WL 2265057 (S.D. Ind. Aug. 6, 2007); Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002) (imposition of \$250 shoplifting fee on dishonored check not permitted by law under § 1692f(1) where state supreme court would hold that \$15 maximum fee in dishonored check law would apply).

⁹ Long v. Shorebank Dev. Corp., 182 F.3d 548 (7th Cir. 1999) (ordering reinstatement of complaint that collection attorney violated FDCPA by procuring tenant's signature on consent eviction judgment through fraudulent misrepresentations); Copeland v. Kramer & Frank, P.C., 2010 WL 2232712 (E.D. Mo. June 1, 2010) (disputed facts precluded summary judgment to attorney collectors who allegedly enticed consumer, acting *pro se* in underlying state collection case, to sign consent judgment under false and deceptive pretenses);

¹⁰ See Gionis v. Javitch, Block, Rathbone, L.L.P., 238 Fed. Appx. 24 (6th Cir. 2007) (unpublished) (affidavit seeking collection attorney fees attached to debt collection complaint falsely created deceptive impression that Ohio law would permit recovery of collection attorney fees in suit against consumer when that recovery was

prohibited by Ohio law); *Owings v. Hunt & Henriques*, 2010 WL 3489342 (S.D. Cal. Sept. 3, 2010) (consumer on duty with National Guard entitled to benefits of Servicemembers Civil Relief Act so as to render false, misleading, and unfair defendant's declaration that plaintiff was not in active military service).

¹¹ *Moore v. Diversified Collection Servs., Inc.*, 2009 WL 1873654 (E.D.N.Y. June 29, 2009) (consumer's FDCPA complaint, alleging violation of § 1692e for collector's wage garnishment after promising not to garnish when it settled claim for lump sum payment, stated cause of action).

¹² *Egletes v. Law Offices Howard Lee Schiff, P.C.*, 2010 WL 3025236 (D. Conn. July 30, 2010) ("inexcusable" for collection lawyers to seek interest).

¹³ *McCullough v. Johnson, Rodenberg & Lauinger*, 637 F.3d 939 (9th Cir. 2011). See also National Consumer Law Center, Fair Debt Collection §§ 5.5.2.13.3.1, 5.5.2.13.3.2, 5.5.2.13.3. (7th ed. 2011 and Supp.).

¹⁴ See National Consumer Law Center, Fair Debt Collection §§ 5.5.4.2, 8.11.3.4. (7th ed. 2011 and Supp.).

¹⁵ Massachusetts: "Dignity faces a steamroller: Small-claims proceedings ignore rights, tilt to collectors" by Boston Globe spotlight team, July 31, 2006.

Virginia: "Broke but not Bankrupt: Consumer Debt Collection in State Courts" by Richard M. Hynes, Florida Law Review, January 2008, at.46.

New York: "Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York," MFY Legal Services Inc., Consumer Rights Project, June 2008, p. 4. "Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court," news release of April 14, 2009, posted on-line at www.oag.state.ny.us/media_center/2009/apr/apr14a_09.html.

Iowa and Michigan: See transcript for Aug. 5, 2009 for "*Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion*" a workshop hosted by the Federal Trade Commission and Northwestern Law School's Searle Center, p. 34, posted on-line at <http://www.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90805.pdf>.

Minnesota: "Default surge: Misery by numbers; A deteriorating job market is blamed for a record amount of judgments in Minnesota in 2008, and 2009 might be worse" by Randy Furst and Glenn Howatt, Minneapolis Star Tribune, March 8, 2009.

Illinois: "Debt collectors pushing to get their day in court: More aggressive strategies fill court dockets, result in mistaken identities" by Ameet Sachdev, Chicago Tribune, June 8, 2008.

¹⁶ See transcript for Aug. 5, 2009 for "*Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion*" a workshop hosted by the Federal Trade Commission and Northwestern Law School's Searle Center, p. 34, posted on-line at <http://www.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90805.pdf>.

¹⁷ Bureau of Consumer Financial Protection. Advance notice of proposed rulemaking. [Docket No. CFPB-2013-0033]. November 5, 2013. Available at http://files.consumerfinance.gov/f/201311_cfpb_anpr_debtcollection.pdf.