

# U.S. House Bill Would Allow Lawyers to Abuse Consumers in Debt Collection Lawsuits

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A bill pending in the U.S. House of Representatives, H.R. 1849: Practice of Law Technical Clarification Act of 2017 (Trott), would exempt attorneys and law firms engaged in litigation from the Fair Debt Collection Practices Act (FDCPA) and eliminate Consumer Financial Protection Bureau (CFPB) authority over them. Claiming that state courts and bar associations would adequately police bad-actor attorneys, supporters of the bill ignore the critical role that the FDCPA plays in providing relief for unsophisticated consumers abused by the sharp practices of sophisticated collection attorneys.

Congress<sup>1</sup> and the courts<sup>2</sup> have recognized for decades that consumers must be protected from false, deceptive, misleading, and unfair practices by lawyers collecting debts in courts. This bill attempts to turn back the clock, and would allow collection attorneys to engage in egregious practices such as:

- Proceeding to trial without any witnesses or admissible evidence, relying on court rules to award them judgment if the consumer does not appear or asking the court to continue or dismiss the case if the consumer does appear.<sup>3</sup>
- Routinely filing court documents without confirming the accuracy of that information,<sup>4</sup> often resulting in default judgments based on inaccurate information.
- Filing lawsuits in courts hundreds of miles away from the consumers' homes,<sup>5</sup> making it nearly impossible for most consumers to appear in court to defend themselves against the collection lawsuit.<sup>6</sup>
- Filing lawsuits on time-barred debt after the statute of limitations has expired,<sup>7</sup> such that consumers who have paid their debts are less likely to have critical records to be able to prove their payments.
- Seeking fees or costs that are not legally allowable,<sup>8</sup> adding to the amount of judgments against unsophisticated consumers who often do not have the means to challenge these additional and illegal charges.
- Misusing state garnishment proceedings,<sup>9</sup> such as by knowingly garnishing income or property that is exempt from collection.

## State Consumer Protection Laws May Not Cover Attorneys.

Many states do not have laws that are equivalent to the FDCPA. In these states, exempting attorneys from coverage under the FDCPA would mean that no federal or state laws would protect consumers from abusive litigation practices by consumer attorneys.<sup>10</sup>

## States Would Not Have the Capacity to Protect Consumers.

Even states with legal authority (see previous paragraph) would not have the resources to monitor the tens of thousands of debt collection lawsuits that are filed yearly in each state<sup>11</sup> or to bring sufficient enforcement or disciplinary actions in response to abusive litigation activity.

## **Court and Ethical Rules Are No Substitute for the FDCPA.**

To date, neither the courts nor bar associations have been effective in policing litigation abuses by collection attorneys.<sup>12</sup> There is no reason to believe that these agencies will suddenly step up now if FDCPA sanctions against collection attorneys for litigation abuses are eliminated.

## **Collection Attorneys Would File More Lawsuits.**

H.R. 1849 would exempt lawyers from the FDCPA for conduct in litigation that would be a violation outside of court. For example, misstating the amount owed in a lawsuit would be exempt from FDCPA liability but misstating the amount owed in a pre-litigation letter or phone call would be a violation. As a result, attorneys would be encouraged to file suit first rather than attempting to reach a resolution with consumers outside of court. This would drive a huge increase in collection lawsuits filed in state courts for amounts that exceed what is actually owed, further clogging the already overburdened trial courts.

## **H.R. 1849 Would Prohibit CFPB Supervision and Enforcement.**

The CFPB has special insights into abusive collection practices through extensive national data from consumer complaints and information gleaned from industry supervision. H.R. 1849 would tie the CFPB's hands and prevent it from acting on abusive practices by attorneys or law firms when they are engaging in debt collection litigation. Previous CFPB enforcement actions against collection law firms have focused on law firms operating large debt collection "mills" churning through a high volume of lawsuits with minimal attorney oversight.<sup>13</sup>

## **H.R. 1849 would protect attorneys who engage in abusive litigation collection practices that hurt American consumers. We urge members of Congress to oppose this bill.**

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### **Endnotes**

1 In 1986, as the result of clear findings of abuses by debt collection attorneys, Congress amended the FDCPA to ensure that attorneys who meet the statutory definition of debt collector must comply with all of the provisions of the law. Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986). In the process of adopting the 1986 amendment, Congress considered but rejected "language designed to keep litigation activities outside the Act's scope." *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995).

2 See, e.g., *Heintz v. Jenkins*, 514 U.S. 291 (1995).

3 *Demarais v. Gurstel Chargo, P.A.*, \_\_ F.3d \_\_, 2017 WL 3707437, at \*1 (8th Cir. Aug. 29, 2017).

4 Statements made without meaningful attorney review may be false or misleading in violation of 15 U.S.C. § 1692e. See, e.g., *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342 (N.D. Ga.) (denying motion to dismiss 1692e claims where "the few attorneys on staff

were allegedly left to essentially skim and sign the prepared pleadings” taking “less than a minute to approve each suit”); *Bock v. Pressler & Pressler, LLP*, 30 F. Supp. 3d 283, 290 (D.N.J. 2014) (finding a violation of 1692e where “neither [reviewing attorney] nor any other member of Pressler’s staff reviewed, or otherwise had knowledge of, the contract between Bock and the bank, including any choice of law, choice of venue, or dispute resolution clause governing disputes between Bock and his creditor . . . Nor did [reviewing attorney] or anyone else at Pressler review the agreement by which Bock’s original creditor allegedly assigned this debt to Pressler’s client, Midland.”).

5 The FDCPA limits where collection lawsuits can be filed. 15 U.S.C. § 1692i. See, e.g., *Lyons v. Michael & Assocs.*, 824 F.3d 1169, 1171 (9th Cir. 2016) (“Lyons alleges that Michael & Associates violated the FDCPA by filing a collection lawsuit against her in Monterey County, a location where she neither lived nor ‘signed the contract sued upon.’”).

6 See, e.g., *Harold v. Steel*, 773 F.3d 884, 886 (7th Cir. 2014) (“If a debt collector violates [15 U.S.C. § 1692i], it inflicts an injury measured by the costs of travelling or sending a lawyer to the remote court and moving for a change of venue, no matter how the suit comes out.”); S.Rep. No. 95-382, at 5 (1977), 1977 U.S.C.A.N. 1695, 1969 (“This legislation also addresses the problem of ‘forum abuse,’ an unfair practice in which debt collectors file suit against consumers in courts which are so distant or inconvenient that consumers are unable to appear. As a result, the debt collector obtains a default judgment and the consumer is denied his day in court.”).

7 Courts have held that filing lawsuits on time-barred debts violates 15 U.S.C. § 1692e (prohibiting a debt collector from using “any false, deceptive, or misleading representation or means in connection with the collection of any debt”) or 15 U.S.C. § 1692f (prohibiting a debt collector from using “unfair or unconscionable means to collect or attempt to collect any debt”). National Consumer Law Center, *Fair Debt Collection*, §§ 5.5.2.13.3.1, 5.6.2 (8th ed. 2014). See, e.g., *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2011) (lawyers filed lawsuit against consumer despite evidence that the debt was beyond the statute of limitations).

8 “The false representation of . . . the character, amount, or legal status of any debt,” 15 U.S.C. § 1692e(2)(A), and “[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law,” 15 U.S.C. § 1692f(1) both violate the FDCPA. See, e.g., *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015) (listing fees not yet incurred in the foreclosure complaint stated a claim against law firm under the FDCPA); *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 911 F. Supp. 2d 1, 60 (D. Mass. 2012) (law firm violated the FDCPA by overstating the amount of attorney’s fees owed in a collection letter).

9 Abusive garnishment practices may violate 15 U.S.C. §§ 1692e or 1692f. See, e.g., *Waitkus v. Pressler & Pressler, L.L.P.*, 2012 WL 686025 (D.N.J. Mar. 2, 2012) (allegations that the collection attorneys obtained 100% of the consumer’s earnings violating state procedures to execute on wages and federal and state exemptions of 75% and 90% of earnings stated a claim for violation of § 1692f); *Bray v. Cadle Co.*, 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (plaintiff stated a claim that the defendants engaged in “unfair or unconscionable means to collect” the debt by alleging that: “1) his bank account was exempt by law from garnishment by the Social Security Act; and 2) the defendants garnished the bank account, despite knowing or having reason to know that it contained Social Security funds and despite having failed to conduct pre-garnishment discovery”).

10 See, National Consumer Law Center, *Fair Debt Collection*, at Appx. D (8th ed. 2014) (state-by-state discussion of debt collection statutes, including exemptions from coverage for attorneys); National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, at § 2.3.9.2 (9th ed. 2016) (discussing explicit statutory exemptions for attorneys from state statutes prohibiting unfair and

deceptive acts and practices); Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 *Tenn. L. Rev.* 131 (2006) (Table 3 contains a state-by-state list of licensed professionals, including attorneys, that are exempt from state “Little FTC” or unfair and deceptive acts and practices statutes).

11 See Annie Waldman & Paul Kiel, “Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas,” *ProPublica* (Oct. 8, 2015) (during a five year period there were 116,289 judgments in debt collection lawsuits in St. Louis City and County, Missouri; 278,566 in Cook County, Illinois; and 128,918 in Essex County, New Jersey); Jessica Mendoza, et al. “Collection claims abuses move up to higher courts,” *Boston Globe* (Mar. 28, 2015) (from 2004 to 2013 at least 1.2 million cases were filed in Massachusetts small claims and district court sessions by professional debt collectors); Peter A. Holland, “Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed By Debt Buyers”, 26 *Loy. Consumer L. Rev.* 179 (2014) (reporting that debt buyers filed 40,796 lawsuits in 2009; 43,581 in 2010; 37,202 in 2011; 22,566 in 2012; and 24,317 in 2013); Susan Shin and Claudia Wilner, *New Economy Project, The Debt Collection Racket in New York* (June 2013) (reporting that debt collectors filed 195,105 lawsuits against New Yorkers in 2011); Claudia Wilner and Nasoan Sheftel-Gomes, *Neighborhood Economic Development Advocacy Project, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers* (2010) (“In New York City, debt collectors filed approximately 300,000 lawsuits per year between 2006 and 2008.”). See also Consumer Financial Protection Bureau, *Consumer Experiences with Debt Collection: Findings from the CFPB’s Survey of Consumer Views on Debt* (Jan. 2017) (“One in seven consumers (15 percent) with a debt collection experience reported that they were sued by a creditor or debt collector during the preceding year”).

12 See, e.g., Chris Albin-Lackey, *Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor* (Jan. 2016); Paul Kiel, *So Sue Them: What We’ve Learned About the Debt Collection Lawsuit Machine*, *ProPublica* (May 5, 2016); Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010).

13 Consent Order, *In the Matter of Pressler & Pressler, LLP, Sheldon H. Pressler, and Gerald J. Felt* ¶ 39 (Apr. 25, 2016); *Consumer Fin. Protection Bureau v. Frederick J. Hanna & Assoc.*, Stipulated Final Judgment and Order, 14-cv-02211-AT, at ¶¶ 10-11 (D.Ga. 2015).