

**COMMISSION
APPROVED**

Statement of

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before the

Subcommittee on Consumer Affairs and Coinage

of the

Committee on Banking, Finance and Urban Affairs

United States House of Representatives

October 22, 1985

Mr. Chairman and Members of the Subcommittee: Good morning. I am Anne Price Fortney, Associate Director for Credit Practices in the Federal Trade Commission's Bureau of Consumer Protection. On behalf of the Commission, I would like to thank you for inviting us to appear before you to express our views concerning the attorney-at-law exemption of the Fair Debt Collection Practices Act ("the Act") and H.R. 237, which would repeal that exemption. I shall first explain the Commission's current enforcement position regarding the exemption; then outline our concerns about the need for and the potential problems that may accompany a total repeal of the exemption; and finally offer our recommendation for Congressional action.

In January 1984, I appeared before this Subcommittee to discuss a legislative proposal identical to the one being considered today. At that time, I noted with pleasure the Act's success in significantly reducing abusive, deceptive, and unfair collection practices by debt collectors. Nearly two years later, I am happy to report the continuation of that trend. In the period since the Act first took effect, we have witnessed a significant reduction in the number of complaints we receive describing the practices that prompted Congress to enact this law, such as severe telephone harassment, damaging contacts with employers, and other acts causing substantial consumer injury.

This notable improvement is due, in part, to the Commission's enforcement efforts. Since 1978, seventeen U.S. district courts

have entered judgments in cases brought by the Commission for violations of the Act, eight of these in the last three years. We currently have two major enforcement actions in litigation, and have initiated several non-public investigations of debt collection firms in the last year and a half. In addition, the Commission consistently endeavors, through its industry and consumer education programs, to improve industry's voluntary compliance. In that regard, we salute the American Collectors Association for the exceptionally effective educational activities it has undertaken to promote its members' compliance with the Act.

Scope of the Exemption

While the Act continues to protect consumers in their dealings with independent debt collectors, some uncertainty has arisen regarding the scope and purpose of the attorney exemption. As you know, Section 803(6) of the Act defines "debt collector" generally to include those persons who regularly collect obligations owed to others, but specifically exempts from coverage "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client."

The Commission believes that the exemption appropriately covers those attorneys who collect debts incidentally in the course of providing other legal services to their clients. However, the Commission believes that a debt collection business is not exempt from the Act simply because it is owned or operated

by an attorney. To the contrary, the Commission takes the position that the Act applies to any business that functions as a traditional debt collection firm and engages in the same kind of collection activity, regardless of whether it is owned or operated by an attorney. The Commission's enforcement action against the law firm of Chicago attorney Milton Shaffner for violations of the Act by and through its non-attorney employees,¹ together with the Commission's formal statement (attached) issued in conjunction with the settlement of that case, are the clearest expressions of the Commission's enforcement policy on this issue.

We suggest that it is attorneys or law firms operating much like the law firm in Shaffner that cause the greatest concern, particularly where those attorneys or law firms claim to be exempt from the Act. In fact, attorneys or law firms whose operations are virtually indistinguishable from a debt collection agency have no legitimate claim to exemption. In our view such attorneys have been, are now, and should continue to be covered by the Act.

For that reason, we consider it unnecessary to amend the Act in order to bring such legal practitioners within its provisions. We suggest, though, that any uncertainty regarding the scope of the exemption might best be resolved if Congress clarifies the Act's applicability to attorney debt collection firms. In addition, Congressional clarification would assist all concerned

¹ United States v. Shaffner, No. 83-C3130 (N.D. Ill., May 5, 1983) (consent judgment).

parties in evaluating the Act's application to those attorneys or law firms whose collection activity falls somewhere between the two extremes of a debt collection agency clearly covered by the Act and an attorney or law firm that collects debts occasionally in the course of providing various other legal services to clients.

Reasons to Retain Some Form of the Attorney Exemption

The Commission believes that the attorney exemption serves a sound purpose with regard to those attorneys whose debt collection activity is ancillary to the other legal services they provide. Since the Act's inception, the Commission has received little evidence of any widespread use of abusive debt collection practices by attorneys. Moreover, those attorneys exempt from the Act who use unfair or deceptive practices to collect debts can be reached by the Commission's authority under Section 5 of the Federal Trade Commission Act.²

Further, there are certain practical problems that should be considered in connection with any proposal to repeal the exemption in toto. The Act does more than prohibit unfair and deceptive

² The Commission obtained a number of orders against attorneys for unfair and deceptive practices of the type the Act prohibits before the Act's passage. These include New Process Co., Inc., et al., 87 F.T.C. 1359, 1370 (1976); Compact Electra Corp., et al., 83 F.T.C. 547, 568-69 (1973); Wilson Chemical Co., 64 F.T.C. 168 (1964). See also, Pay 'N Save Corp., 86 F.T.C. 688 (1975) and Commercial Service Co., Inc., 86 F.T.C. 467 (1975).

practices; it also establishes specific affirmative requirements that may impose an undue and unjustifiable burden on attorneys whose debt collection activity occupies but a fraction of the total legal services they provide.

1. Sections 804 and 805(b)

Sections 804 and 805(b) generally prohibit debt collectors from communicating with third parties about a consumer's debt, except to obtain location information. Under repeal, these sections would prohibit an attorney from contacting anyone other than a debtor's spouse or (if a debtor is a minor) his parent or guardian, except to obtain location information, in which case the attorney could only reveal his name, that he is confirming location information about the debtor, and, if expressly asked, his employer's identity. These restrictions fail to consider the unique, legitimate informational needs attorneys may have in these cases. For example, these sections would bar attorneys from contacting third parties in an effort to assess a debtor's assets, and thus, the efficacy of filing suit. It is unclear whether an attorney could even suggest to a third party that he needed to contact the debtor about possible legal action involving the debtor. A third party might be willing to provide the debtor's location to an attorney who is about to sue the debtor, even if he or she would be unwilling to give that information to someone perceived as a total stranger. In these cases, an attorney's

inability to reach a debtor could effectively deprive the debtor of the information he needs to understand the situation's urgency.

2. Section 805(c)

Section 805(c) provides that if a debtor writes to a collector and states that he refuses to pay or wants the collector to stop further collection efforts, the debt collector must cease further collection efforts, except to notify the debtor that a specific remedy may or will be invoked, or that further collection efforts are being terminated. Under repeal, an attorney retained by a debt collector or a client-creditor would be required to so comply.³ Thus, any attorney assisting in the collection of delinquent accounts would be required to honor a debtor's "cease communication" notice, even in cases where the notice was provided immediately following the attorney's first contact with a debtor.

This section was designed to enable debtors to escape illegal harassment on their own. Not only is there little evidence of such harassment being conducted by attorneys, but the application of Section 805(c) to attorneys in these situations clearly diminishes the potential for negotiating an agreement or payment plan. An attorney's options would be limited to recommending suit

³ In cases where an attorney is hired or retained by a debt collector, it is important to consider whether a debtor's "cease communication" notice to a debt collector would constitute notice to the attorney. We urge that this issue be addressed in the process of considering any proposal to repeal the exemption.

or suggesting that the client consider the debt uncollectible. To the extent that the application of this section to attorneys would create barriers to out-of-court settlements, it would impose costs on society, whether litigation or an addition to a company's bad debt figure results.

3. Section 809

Section 809 requires debt collectors to furnish debtors with a prescribed notice setting forth the elements of the debt, the consumer's rights, the procedures available to dispute the debt, and the debt collector's obligation once the debt is disputed. It also requires a debt collector who receives a debtor's written notice of dispute to cease further collection efforts until he has obtained verification of the debt and mailed it to the debtor.

Section 809 was intended to eliminate the problem of debt collectors' dunning the wrong person because of mistaken identity or mistaken facts. The application of this requirement to attorneys, which would occur with repeal of the exemption in Section 803(6)(f), is unnecessary. Where an attorney is hired by a debt collector, for example, this notice would already have been furnished to the debtor by the collector.⁴ In other cases, there

⁴ Of course, one might argue that, in these situations, the collector's notice in accord with this section would serve for purposes of an attorney's follow-up efforts on an account. We suggest that this issue be duly considered, including the extent to which such an attorney would be responsible for determining conclusively that the debtor has received the notice prescribed by the Act.

seems to be little reason to require an attorney to verify debts in the effort to resolve disputes where the attorney is about to use the ultimate procedure for such resolutions -- litigation.

Conclusion and Recommendation

We believe that these affirmative requirements need not be imposed on attorneys who occasionally collect debts in their practice of law in order to address the current uncertainties surrounding the Act's attorney-at-law exemption. Concurrently, however, we believe that attorneys or law firms that operate like traditional debt collection agencies are and should continue to be covered by the Act and all its provisions. This is the Commission's enforcement position, however, and, while some courts look to the Commission's interpretations of the Act when considering the purpose and scope of its provisions,⁵ others do not.⁶ Only the Congress can fully and definitively clarify the scope of the attorney exemption and establish appropriate limitations. For this reason, the Commission respectfully recommends that Congress determine the extent of the Act's applicability to attorney debt collection firms by clarifying the attorney-at-law exemption.

⁵ Bingham v. Collection Bureau, Inc., 505 F. Supp. 864 (D.N.D. 1981); Alaska v. O'Neill Investigations, 609 P. 2d 520 (1980); Pressley v. Capital Credit and Collection Service, Inc., 794 F. 2d 1309 (9th Cir. 1984).

⁶ Staub v. Harris, 626 F. 2d 275 (3d Cir. 1980); Blackwell v. Professional Services, 526 F. Supp. 535 (N.D. Ga. 1981).

Commissioner Bailey has asked the Commission to include the following statement that only reflects her own views. It is Commissioner Bailey's view that it may be preferable as a practical matter and for reasons of public policy for the Congress to go further. Commissioner Bailey supports the Commission's current law enforcement position. However, she questions the need for an exemption for attorneys from any of the Act's requirements without some further analysis, given the potential for consumer harm and anticompetitive effects as a consequence of their exclusion. Thus, she would support replacing the current exemption for attorneys with certain designated exceptions from the Act's affirmative requirements.

Again, we thank the Subcommittee for this opportunity to address the attorney exemption and the proposal for its repeal. Although this concludes the Commission's testimony on this issue, I would be happy to answer any questions you might have.