LAW OFFICES
BASS & ASSOCIATES
A PROFESSIONAL CORPORATION
WWW.BASS-ASSOCIATES.COM
FT. LOWELL CORPORATE CENTER
SUITE 200
3936 E. FT. LOWELL ROAD
TUCSON, ARIZONA 85712

December 1, 2010

Federal Trade Commission
Office of the Secretary, Room H–135(Annex W)
600 Pennsylvania Avenue NW.
Washington, DC 20580

RE: Statement of Policy Regarding Communications in Connection With Collection of a Decedent's Debt

Dear Secretary of the Commission:

Bass & Associates, P.C. is a creditor's rights law firm that in its practice represents clients in the filing of claims against decedent's estates. In our practice, we encounter the issues discussed in the Policy Statement on a daily basis, and have developed an FDCPA compliant method of obtaining the information required to identify an estate and file a claim. We encounter regularly the issues that the Policy Statement seeks to clarify, and have identified some areas in the Policy Statement where our insight may be valuable to the Commission in arriving at a final Statement that takes into account the actual issues that are faced by practitioners in this area.

Initially, we would like to thank the Commission for accurately identifying the gray areas. The summary of probate laws contained in the Policy Statement is excellent, and provides a good background for identifying where questions arise. As the Commission correctly identifies, where an estate is being administered through the probate laws and the court system, it is relatively easy to comply with the FDCPA (although identifying where an estate may have been filed is not always easy– more on that below). It is where an estate is small and being handled extra-judicially, and survivors have taken it on themselves informally to settle the decedent's affairs that questions may arise as to how to obtain resolution of debts in strict compliance with the FDCPA. The Commission has identified those questions and we would like to add a bit of our learnings in an attempt to provide what we believe would be fair answers.

The first item in the Policy Statement on which we would like to comment is the following:

> Before communicating with any individual in connection with the collection of a decedent's debt, a collector must assess whether the potential recipient of any such communication has authority to pay the decedent's debts from the estate's assets (i.e., falls within one of the categories listed above). (*75 Federal Register 62389, 62393 (October 8, 2010), emphasis added*)

This sentence would appear to require that someone seeking to file an estate claim must first determine whether an estate has been filed. Unfortunately, making that determination is not easy. As identified by the policy statement, probate is a process governed by the states, and estate filings are made in thousands of state court jurisdictions, not all of which provide easy remote access to their records. In some states, the filings take place in specialized or lower level courts which are the last to have their records processes updated. So while in some jurisdictions the search for a filed estate is easy and conducted online, in the majority of jurisdictions a call or visit to the court is required. And at that point, another factor – state revenue generation – can make the process a very costly one. In an effort to raise funds, a large number of State Court clerk's offices (which number is increasing almost daily) now refuse to answer a simple

question - whether an estate has been filed - over the telephone. Instead, they ask that the question be sent in writing, together with a "research fee" which can be as high as $30.00. And the answer can be "no" and the fee is still collected. When those fees are aggregated by the number of individual courts that might have to be contacted to locate a particular decedent's estate filing and by the number of times that those courts might have to be contacted (based on when in time the estate is filed), the cost can be large indeed. In addition, there are courts that will neither answer the question over the phone or in writing; instead they require that the requestor come in and examine the records themselves. When those courts are in states that are hundreds of miles from the collector, then determining through court records the identity of an executor or administrator is absolutely cost prohibitive. Complicating this search further, none of the major services that aggregate and sell court information (e.g., Westlaw©, Lexis-Nexis©) do so for probate courts or probate matters. There are a very few commercial providers (perhaps as few as two or three) that do aggregate probate court information, but they do not sell that information by itself. They instead sell a "service" whereby they will file the estate claims for the requestor, but if the requestor is doing the filing themselves, the additional expense for the filing "service" becomes cost prohibitive.

As a result of these many stumbling blocks to determining whether an estate has been filed, it is not always possible to determine the identity of the personal representative even if the estate has been filed, prior to making the first call or sending the first letter. Therefore, we would suggest that the Commission clarify the paragraph cited above to allow for the determination of the responsible individual through personal contact as a possible first step (prior to researching court records), provided that that contact otherwise complies with the direction of the remainder of the Policy Statement.

Our next concern is with the following:

> …until a named individual with authority to pay the decedent's debts is identified and located, collectors generally should treat these communications as location communications under Section 804 of the FDCPA. The communication should state that the collector is seeking to identify and locate the person who has the authority to pay any outstanding bills of the decedent out of the decedent's estate, but cannot make any other references to the debts of the decedent, including providing any information about the specific debts at issue. (*75 Federal Register 62389, 62393 (October 8, 2010), footnotes omitted*)

The Commission clearly and correctly identifies the potential problems with this standard in its footnote 37 that accompanies it. Requiring a collector to treat a call or letter to a decedent's survivors requesting information about the decedent's personal representative as a location communication under 15 USC 1692b, will be very confusing for the recipients and fraught with legal peril for the collector. This would particularly be true in cases where the estate is being handled by a family extra-judicially, and *nobody* is legally recognized as a personal representative, but the family is taking care of the decedent's debts. For instance, the Policy Statement specifically calls out discussing a debt with someone who says "I think it is me," when asked the identity of the personal representative. According to the Policy Statement, further clarifying questions may be asked, but those will be questions that the person will likely be unable or unqualified to answer. Moreover, asking that person if she is or knows of the individual responsible for paying the debts of the estate in and of itself implies that the collector is calling about a debt, and could be viewed as a violation. Compare that call with a call to a neighbor of a living person for location information, being told that the person is in a hospital, and asking if someone is taking care of that person's debts while they are incapacitated.

The solution to the legal uncertainties that the Policy Statement (as written) could produce is found in the policy statement itself. As identified in footnote 37, a collector does have to be given some ability to generally reference a debt when trying to identify the personal representative of a deceased debtor. As is recognized, many if not most people die with some outstanding debt, and it would in no way impugn the integrity or reputation of a decedent to tell a relative, if asked, that a collector is trying to determine the personal representative for the purpose of filing a claim. In the case of a filed estate, the answer then

becomes easy for a knowledgeable relative, and in the case of extra-judicial handling, the relative would likely know who has voluntarily assumed the responsibility (and it may be more than one person). The line that the Commission is trying to draw (and that should be drawn), is against pressuring or deceiving someone that is not responsible for a decedent's debt into paying it. However, the mechanism for doing that is not 15 USC 1692b (unless the collector actually knows who the legally appointed personal representative is). Rather, 15 USC 1692e contains several subsections that would better address that particular question.

Our third area of concern is with the suggestion that a collector, when communicating with the legally appointed personal representative, may have to disclose that 1) they are seeking payment from estate assets only, and 2) the individual could not be required to use personal assets or assets that they owned jointly with the decedent to satisfy the debt. Initially, it should be made clear in the Policy Statement that any such disclosure need not appear on claims being filed with a court or on the copies of such claims sent to the personal representative. But the more important problem with this disclosure is that it is not always true. If the personal representative is a surviving spouse, community property laws or the doctrine of necessities may dictate that he or she is in fact also responsible for a decedent's debt. In some cases, jointly held savings accounts may have been held in such a way that a portion of the account is legally earmarked as estate funds, and the survivor may not realize it. Some estate debts may in fact have resulted from credit accounts jointly held with the personal representative. Other scenarios can be imagined. In short, it would be almost impossible to fashion a required disclosure that could accurately account for all of the possible situations to which it would have to be applied.

Finally, one issue that does not appear in the Policy Statement but which should be considered is where an estate debt is secured by estate property (or even non-estate property), most notably a vehicle. In such a case, there may exist a non-responsible third party who has a vested interest in seeing that the debt gets paid. For example, a father may have purchased a car for a child and financed the purchase, granting a security interest in the car. If the father passes away and the estate does not satisfy the debt, the car is likely subject to forfeiture. In such a case, it is not uncommon for a collector to suggest to that third party (who is not always the personal representative of the estate) that they will not execute on the lien if the debt is paid. The third party is usually very grateful that the collector did so. Taking the general tenor of the Policy Statement, a collector would be prohibited from even mentioning the fact of the debt to the third party, who otherwise would be perfectly willing to make the payments on a voluntary basis in order to keep the collateral. If the policy statement is adopted, there needs to be an exception made for those types of situations or else the first notice that a person might get that their property is encumbered is the repo man driving away with the car they thought was theirs.

We thank the Commission for their attempt to clarify this sometimes gray area of the law. We hope that this comment provides some insight from practitioners in the field who deal with these real questions on a daily basis. In the event that we can be of any additional assistance, please don't hesitate to contact the undersigned.

Respectfully submitted,

Bass & Associates, P.C.

by: David Melcer
Managing Attorney