# NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS' COMMENT TO FEDERAL TRADE COMMISSION WORKSHOP "PROTECTING CONSUMERS AND DEBT COLLECTION LITIGATION AND ARBITRATION"

## I. PREFACE

In October, 2007, the Federal Trade Commission conducted a two-day workshop in Washington, DC to examine the Fair Debt Collection Practices Act ("FDCPA"). The workshop was timed to coincide with the 30th Anniversary of the passage of the FDCPA and was intended to examine how changes to debt collection practices and new technologies have impacted FDCPA compliance by debt collectors.

On February 26, 2009, the FTC issued its report on the workshop that called for reform of the debt collection regulatory system and for modernization of the FDCPA. The report referred to "certain debt collection litigation and arbitration practices (that) appear to raise substantial consumer protection concerns."[1] The FTC observed that "because the workshop record does not contain adequate information for the FTC to determine the nature and extent of (the concerns regarding debt collection litigation and arbitration), the agency will convene regional roundtables this year . . . to obtain more information about these concerns and develop possible solutions."[2]

The first roundtable was conducted in Chicago, Illinois on August 5, 2009 and August 6, 2009.

[1] "Collecting Consumer Debts: The Challenges of Change: A Workshop Report February, 2009, Federal Trade Commission", Introduction, p. ii.
[2] Id.

## II. THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS

The National Association of Retail Collection Attorneys (NARCA) is a nationwide trade organization comprising over 700 law firms that practice primarily in the fields of consumer debt collection and enforcement of creditor rights. NARCA was formed in 1993 to assist lawyers and other professionals in the legal arena by expanding education about federal and state law regulating debt collection activities through educational conferences, seminars and industry publications. NARCA assists debt collection law firms by publicizing the benefits of using a lawyer to collect consumer debts through the legal system. NARCA also advocates before federal and state legislatures, judiciaries and regulators regarding the interest of lawyers practicing in the field of debt collection.

Membership in NARCA is granted on a law firm wide basis and not to individual attorneys. Member firms assume an obligation to follow NARCA's ethical principles, which extend beyond the minimum requirements of existing laws and regulations.[3] Many credit grantors and debt buyers only retain NARCA member firms to collect consumer debt.

NARCA's current President and two of its past Presidents participated in the Chicago workshop. Robert Markoff, an Illinois attorney who serves as NARCA's current President and who is also Vice Chair of the Illinois Institute for Continuing Legal Education and General Editor of its Publication, "Creditors' Rights in Illinois", Past President Michael H. R. Buckles, a Michigan attorney with 35 years experience and present Director of Government Affairs for the Michigan Creditors Bar Association, and Past President Ira B. Leibsker, a member of the Illinois Bar and the founder and Vice President of the Illinois Creditor Bar Association each participated in the session on consumer litigation.

[3] NARCA's Code of Ethics is published on its website, www.NARCA.org.

Ronald S. Canter, a NARCA board member and member of the Bar of the State of Maryland and several other jurisdictions served on the debt collection arbitration panel.[4]

## III. THE DEBT COLLECTION LITIGATION PROCESS

The recently concluded workshop focused on all aspects of the litigation of a consumer debt collection case from the commencement of the lawsuit, to service of process on the debtor, to the quantum of proof needed to establish that the debt is owed. The workshop also focused on post-judgment remedies impacting on the garnishment of exempt funds.

### A. THE FAIR DEBT COLLECTION PRACTICES ACT APPLIES TO LAWYERS WHO COLLECT CONSUMER DEBTS THROUGH LITIGATION

Over 20 years ago, Congress repealed the prior exemption enjoyed by attorneys collecting consumer debts from the definition of a "debt collector" under the FDCPA. See, Pub. L. 99-361 In Heintz v. Jenkins, 514 U.S. 291 (1995), the Supreme Court held that the FDCPA applies to lawyers who file debt collection lawsuits. In the aftermath of the repeal of the attorney exemption and the Supreme Court's decision Heintz v. Jenkins, attorneys who file suit on behalf of clients against consumer debtors have been the frequent source of FDCPA lawsuits, a significant portion of which have involved technical violations where the debtor has not suffered any actual harm.

The onslaught of these suits has recently been described by a Federal Appeals Court as a generating a "cottage industry (of lawyers) that … (do)not bring suits to remedy the 'widespread and serious national problem' of abuse that the Senate observed in adopting the legislation… nor to ferret out collection abuse in the form of 'obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing

[4] Given the recent upheaval in consumer debt arbitration, NARCA's comments here are limited to debt collection litigation issues.

a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.' Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs ....(who) upon receiving a debt collection letter that contains some minute variation from the statute's requirements, immediately exclaims 'This clearly runs afoul of the FDCPA!' and- rather than simply pay what he owes- repairs to his lawyer's office to vindicate a perceived 'wrong.'"[5]

The increased number of lawsuits involving these types of claims has unnecessarily inflated the costs and expenses of collecting legitimate, undisputed consumer debts.

### B. COMMENCEMENT OF THE LAWSUIT

State law rules of procedure vary as to the timing and mechanism of filing a civil lawsuit. Several of the consumer bar participants in the workshop expressed concerns about the procedure in states where a lawsuit is docketed in Court only after service is made upon the Defendant.[6] These state rules different from the Federal counterpart which provides that "a civil action is commenced by filing a Complaint with the Court."[7]

The Federal Trade Commission's jurisdiction over enforcement of the FDCPA does not extend to state court rules of practice and procedure. The Federalist system established by the United States Constitution delegated to the states the power to regulate state courts. Recent developments suggest that state regulation is the proper approach. State legislatures are actively examining debt collection litigation procedures and have recently passed laws that address the

[5] Federal Home Loan Mortgage Corp. v. Lamar 503 F. 3d 504,513 (6th Cir. 2007)
[6] See, e.g., South Dakota Codified Laws, §15-2-30 (commencement of suit occurs upon service of summons); Minnesota Rules of Civil Procedures 3.01(a) (a civil action is commenced when the summons is served); Colorado Rules of Civil Procedures, Rule 3(a) and 303(a); Rhode Island Rules of Civil Procedure, Rule 3; Washington Superior Court's Civil Rule 3(a); and Vermont Rules of Civil Procedure 3 (permitting service of the summons and then filing of the lawsuit, except for cases filed in its Small Claims Court).
[7] Federal Rules of Civil Procedure, Rule 3.

process by which a consumer debt collection lawsuit is handled.[8] Additionally, state courts are adopting revised procedures for handling debt collection cases.[9] For these reasons, NARCA does not believe that the FTC's role should be expanded to encompass regulation of state court debt collection suits.

### C. SERVICE OF PROCESS AND ENTRY OF DEFAULT JUDGMENT

A fundamental cornerstone of the civil litigation system in the United States is the principle that an individual who is sued in court be given notice of the lawsuit and an opportunity to be heard. This due process requirement applies to all civil lawsuits.

State rules of procedure are designed to ensure that a person who is sued receives notice of the pending action. Although the paradigm for service of process is by personal delivery on the individual, many state court rules parallel the Federal Rules of Procedure which allow for service upon a person of suitable age and discretion who resides with the defendant. [10] As with state court rules relating to the commencement of the lawsuit, rules pertaining to service of process applied to any civil action and not just lawsuits filed by creditors against consumers.

NARCA members who file debt collection lawsuits have a vested interest in ensuring that a consumer debtor is properly notified of the lawsuit. The entry of a default judgment and consequential efforts to enforce that judgment can unravel if it turns out that service of process was not validly effected. This can result in substantial consternation for the lawyer and his or her client when, after locating assets, the creditor is faced with a motion to strike the judgment based on lack of service of process.

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[8] See, e.g., Senate Bill 974, General Assembly of North Carolina, Session 2009, ratified August 7, 2009 and New York City Administrative Code, Title 20, §488, et. seq., adopted March 18, 2009.
[9] See, Rule 2, Uniform Small Claims Rules, Trial Court Rule III, Massachusetts Supreme Judicial Court.
[10] See, Rule 4(e)(2)(B), Federal Rules of Civil Procedure.

Because process servers are exempt from the definition of a "debt collector" under the FDCPA,[11] the Federal Trade Commission has no authority over the mechanism of service of process in state court collection proceedings. NARCA recommends that the procedures for regulating service of process remain at the state court level. NARCA is open to working with the Federal Trade Commission to develop best practices and procedures on a state level for service of process. A model embodying this approach as has recently been implemented by the Michigan Creditors' Bar Association. NARCA also believes that state court and legislatures may have a role to play in promulgating rules and procedures, including licensing requirements, for private process servers.

**D. QUANTUM OF PROOF**

The question of what proof is necessary to establish that a consumer owes a debt varies from state to state depending on rules of evidence and procedure. A primary issue that all lawyers face upon the commencement of the lawsuit is whether the claim is barred by the applicable statute of limitations. Federal courts interpreting the FDCPA have held that the filing of a time-barred suit violates the FDCPA's prohibition on the unfair practices in debt collection. (15 U.S.C. § 1692f). [12] NARCA members take significant proactive measures to ensure that their client's claims are brought within the applicable statute of limitations. Notwithstanding this, debt collection lawyers have been subject to suit under the FDCPA based on claims that the statute of limitations of the state where the lawsuit is filed does not apply, but instead the law of the state where the credit agreement, which contains a shorter statute of limitations, governs the lawsuit. This principle, which has been accepted by some Federal courts deciding cases under

[11] 15 U.S.C. § 1692a(6)(D).
[12] See, e.g., Kimber v. Federal Financial Corp., 668 F.Supp. 1480, 1488 (M.D. Ala. 1987)

the FDCPA,[13] is contrary to the "well established principle of conflict of laws that . . . if an action is not barred by the statute of limitations of the forum, an action can be maintained." [14]

Lawyers who exercise reasoned judgment in analyzing a particular claim and who make a decision to file suit based on the law of the forum's limitation period should not be exposed to FDCPA liability merely because a state court later determines that the shorter period referred to in the consumer creditor contract applies. To the extent that the lawyer's judgment later turns out to be in error, the attorney should be entitled to assert the FDCPA's bona fide error defense based on a mistaken interpretation as to the proper statute of limitations. [15] Although members of the consumer bar who participated in the workshop portrayed the filing of time-barred lawsuits as a pervasive practice, the fact the collection attorneys have no incentive to filed time-barred lawsuits, coupled with the fact that lawyers are duty bound to zealously advocate for their clients, presents the conundrum where several different statute of limitations may apply to a debt claim. Lawyers who exercise reasoned legal judgment and who conclude that a longer limitation period applies to the claim should therefore not be subject to FDCPA liability.

The workshop also examined what level of proof was needed to establish that a consumer owes a debt. Although the quantum of proof needed to establish debtor's liability varies depending on state court rules of practice, procedures and evidence, debt collection attorneys are subject to the FDCPA's validation of debts requirement contained in 15 U.S.C. § 1692g. To the extent that the Federal Trade Commission believes that more documentation is

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[13] See, e.g., McCorriston v. L.W.T., Inc., 536 F.Supp. 2d 1268 (M.D. Fla. 2008) (holding that Delaware three year statute of limitations rather the Florida's four year statute applies to collection suit filed in Florida against Florida consumer)

[14] Order of United Commercial Travelers of America v. Wolfe, 231 U.S. 586, 607, 67 S.Ct. 1355 (1947).

[15] See, e.g., Richburg v. Palisades Collection, LLC, 247 F.R.D. 457 (E.D. Pa. 2008) and Gaisser v. Portfolio Recovery Services, LLC, 593 F.Supp. 2d 1297 (S.D. Fla. 2009). The Supreme Court has agreed to decide the question of whether the mistake of law defense is available to attorneys under the Fair Debt Collection Practices Act, See, Jerman v. Carlisle, McNellie, Rini, Kramer and Ulrich, LPA, 538 F.3d 469, 476 (6th Cir. 2008), *cert. granted* 129 S.Ct. 2863 (No. 08-1200).

needed to establish the existence of the debt, its focus should be on the validation of debts provisions under the FDCPA, rather than on proscribing rules of conduct and practice in state court action. Beyond the validation of debts process, the question of what information is needed to establish that a debtor owes an account should be left to state courts.

### E. GARNISHMENT OF EXEMPT FUNDS

The FTC's February, 2009 report indicated further information was needed regarding the garnishment of exempt funds, including social security benefits. Robert Markoff, NARCA's current President, emphasized during the workshop that NARCA members are encouraged to promptly release exempt funds upon learning of their exempt character. However, the ability to identify exempt funds, and exclude them from the garnishment process is in hands of the financial institution that receives notice of the garnishment. NARCA is willing to work with the consumer bar, the Federal Trade Commission, financial regulators, and the banking industry to forge a consensus as to how financial institutions can properly identify and segregate garnished funds so that those monies are never subject to the garnishment process. NARCA members will also continue to work with state courts, their colleagues and consumer bar advocates to fashion more efficient and appropriate mechanisms to ensure that exempt funds are not garnished.

## IV. CONCLUSION

NARCA members strive to file debt collection lawsuits within the proper time period under state law, endeavor to affect proper service of process of those suits and work toward obtaining the proof needed to ensure that its client's claim is reduced to judgment. NARCA, together with state creditor bar groups, have addressed the issues presented at the litigation workshop and will continue to do so in a constructive fashion that insures the preservation of creditor's remedies. NARCA welcomes the opportunity for further dialogue with the consumer

advocates on a statewide level for the purpose of prompting fairness in the court process both for the creditor who brings a claim and the debtor against whom the claim is brought.