Michael D. Slodov, Esq.
15 East Summit Street
Chagrin Falls, Ohio 44022
mslodov@roadrunner.com

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Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW.
Washington, DC 20552

In re: **Debt Collection (Regulation F)**
Docket No. CFPB–2013–0033
Regulatory Identification Number (RIN) 3170–AA41

Ms. Jackson:

Please accept this letter in response to question number 150 of the Bureau of Consumer Financial Protection's Advance Notice of Proposed Rulemaking, concerning the Fair Debt Collection Practices Act, which states:

> Q150: The FTC's Staff Commentary to section 803 excludes from the definition of "communication" "formal legal actions," like the filing of a lawsuit or other petition/pleadings with a court, as well as the service of a complaint or other legal papers in connection with a lawsuit, or activities directly related to such service. [citing FTC Staff Commentary on FDCPA section 803(2), comment 2]. Should the Bureau address communications in formal legal actions in proposed rules? If so, how?

The undersigned encourages the Bureau to address the issue of statements appearing in or related to a formal legal action by excluding "pertinent statements made in the course of judicial proceedings" or "any activity other than the use of judicial process which is intended to bring about or does bring about repayment of all or part of a consumer debt" from the definition of the term "collect," "collection," "collecting" or "debt collection" in its proposed rules.

While the term "communication" is statutorily defined in 15 U.S.C. § 1692a(2) quite broadly,[1] the terms "collect," "collecting," "collection" and "debt collection" are not defined. The latter terms appear throughout the Act. See 15 U.S.C. §§ 1692(a), (c), (d), (e); 1692a(4), (6), (6)(A), (6)(B), (6)(C), (6)(E), (6)(F); 1692b(5); 1692c(a), (b), (c); 1692d; 1692e; 1692f; 1692g(a), (b); 1692j.

I. The plain meaning of collecting a debt does not include judicial proceedings

The ordinary meaning of "collect" does not include litigation. See American Heritage Dictionary, p. 261 (1973) (defining 'collect' as "[t]o call for and obtain payment of: *collect taxes*…[;] to take in payments or donations"); p. 763 (defining 'litigation' as "legal action or process").

Courts have held that to qualify as a communication, representation, conduct or means "in connection with the collection of any debt," 15 U.S.C. § 1692c, "in connection with the collection of a debt," 15 U.S.C. § 1692d, "in connection with the collection of any debt," 15 U.S.C. § 1692e, to "collect or attempt to collect any debt," 15 U.S.C. § 1692f, or " in connection with the collection of any debt," 15 U.S.C. § 1692g, the "animating purpose of the communication must be to induce payment by the debtor." *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir.2011); *Bailey v. Security National Servicing Corp*., 154 F.3d 384, 388-89 (7th Cir.1998); *Gburek v. Litton Loan Servicing LP,* 614 F.3d 380, 384–86 (7th Cir.2010) *Simon v. FIA Card Servs., N.A.,* 732 F.3d 259, 266 (3d Cir.2013). In addition, Courts consider the relationship of the parties and the purpose and context of the communication. See *Powell v. Palisades Acquisition XVI, LLC*, CIV.A. RDB-13-0219, 2014 WL 334814 (D. Md. Jan. 29, 2014).

The animating purpose of a genuine lawsuit is to obtain judicial redress or an adjudication of rights and liabilities. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 643 (1985)("Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail."); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 534 (2002).

Until the Court acts by entering a final judgment, there can be no pre-judgment seizure, attachment or collection of a debt. *See e.g.*, *Sniadach v. Family Fin. Corp.*,

[1] The statute defines the term "communication" as meaning "conveying of information regarding a debt directly or indirectly to any person through any medium."

395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

II. The Federal Trade Commission credit practices rule defines collecting a debt as excluding the use of judicial process.

The Federal Trade Commission and the States began regulating debt collection practices in late 1960's and early 1970's. FTC, *Guide Against Debt Collection Deception*, 71 Com. L.J. 17 (1966); 16 C.F.R. §§ 237.0-.6 (1968); John M. Connelly, *Recent Statutes Regulating Debt Collection Or Nunc De Minimis Curat Lex*, 14 B.C. Indus. & Com. L. Rev. 1274 (1972-1973). The FTC's Debt Collection Deception guides were promulgated under 15 U.S.C. § 45 and were repealed in 1995 as superseded by the FDCPA. 60 Fed.Reg. 40263-01 (1995). See *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1173 (11th Cir. 1985) (citing *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 n. 29 (Alaska 1980) (citing numerous cases brought by the FTC under the debt collection deception guides)); *In The Matter Of State Credit Control Bureau, Inc.*, 68 F.T.C. 560 (1965).

While the debt collection guide did not define the term "collecting a debt," in 1975, the Federal Trade Commission promulgated a trade practice rule for creditors, that defined the term "collecting a debt" as "[a]ny activity **other than the use of judicial process** which is intended to bring about or does bring about repayment of all or part of a consumer debt, except: (1) Inquiry to locate a consumer whose whereabouts are genuinely unknown to the creditor; and/or (2) Inquiry to determine the nature and extent of a consumer's wages or property; *provided* that in these two instances no specific mention is made of the alleged indebtedness." FTC, Proposed Trade Regulation Rule, 40 Fed. Reg. 16347 (Apr. 11, 1975).

After years of commentary and consideration, the Federal Trade Commission adopted the definition, truncated but substantially unchanged in March of 1984, codified at 12 C.F.R. § 444.4(b)[2]. See Federal Trade Commission, Final Trade Practices Rule, 49 FR 7740-01, 1984 WL 139281 (March 1, 1984); see also 12 C.F.R. § 227.15(b); 12 C.F.R. § 535.14(b); 12 C.F.R. § 706.4(b).

In light of the historical antecedent understanding that the use of judicial process does not constitute debt collection, the Bureau ought to follow suit in this context.

[2] "For purposes of this section, 'collecting a debt' means any activity other than the use of judicial process that is intended to bring about or does bring about repayment of all or part of a consumer debt."

III. The Legislative History of the Fair Debt Collection Practices Act supports the view that Congress did not intend to apply the Act to statements made in the course of judicial proceedings.

Congress took up consideration of debt collection legislation in the mid 1970's, and evaluated existing state law and rules in the field. *Debt Collection Practices Act of 1976, Hearings on H.R. 11969 Before the House Comm. On Banking, Currency & Housing* 94th Cong. 2d Sess. (March & April 1976) pp. 144-55, 183-184 (Statement of John W. Johnson, Model Legislation Exhibits B & C); pp. 230-34 (Statement of Jay I. Ashman); pp. 237-41 (Statement of Joel Weisberg); pp. 252-56 (Statement of Richard Gross); pp. 264-65 (Statement of Thomas Raleigh); pp. 274-75 (Statement of Lewis Goldfarb) (hereinafter "Hearings on H.R. 11969"). See also H.R. 10191, 94th Cong. 1st. Sess. (1975), H.R. 11969, 94th Cong. 2nd Sess. (1976); H.R. 13720, 94th Cong. 2nd Sess. (1976); H.R. Rep. 94-1202 (6-1-76); William Richard Carroll, *Debt Collection Practices: The Need for Comprehensive Legislation*, 15 Duq. L. Rev. 97, 116 (1976)(evaluating H.R. 10191 94th Cong. 1st. Sess. (1975), H.R. 13720, 94th Cong. 2nd Sess. (1976)).

Notably, in consideration of the need for debt collection legislation leading to the enactment of the FDCPA, the subject of state court litigation by attorneys seeking to adjudicate a consumer's liability for a debt was never discussed. Hearings on H.R. 11969; *Debt Collection Practices Act of 1977: Hearings on H.R. 29 Before the House Comm. on Banking, Currency & Housing*, 95th Cong. (March 1977); *Hearings on S. 656, S. 918, S. 1130, and H.R. 5294 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing and Urban Affairs*, 95th Cong. (1977); S. Comm. on Banking, Housing & Urban Affairs, Markup on Debt Collection Legislation (June 30, 1977); *Senate Comm. on Banking, Housing & Urban Affairs*, Markup on Debt Collection Legislation (July 26, 1977).

Early state formulations to address extra-judicial collection were modeled after the National Consumer Act, the Model Consumer Credit Act, and the Model Consumer Debt Collection Fair Practices Act. Connolly, *Recent Statutes*, at nn. 50-65 (citing Fla. Stat. Ann. §§ 559.55-.78, (Supp. 1972); Md. Ann. Code art. 83, § 167 (Supp. 1972); Mass. Gen. Laws Ann. 93 §§ 24-28, 49, 93A §§ 9,10 (1972); Wash. Rev. Code Ann. §§ 19.16.100-.950 (1972); Wash. Rev. Code Ann. § 19.86.090 (1972); Wis. Stat. Ann. §§ 427.101-.105, 425.304 (Spec. Pamphlet 1973)); David F. Maxwell, *Model Consumer Debt Collection Fair Practices Act*, 80 Com. L.J. 184 (1975); Robert E. Scott & Diane M. Strickland, *Abusive Debt Collection: A model Statute for Virginia*, 15 Wm. & Mary L. Rev. 567, 575-77, 594-600 (1973-1974) (hereinafter "Abusive

Debt Collection"); National Conference of Lawyers and Collection Agencies, *A Model Act to License & Regulate Collection Agencies*, 70 Com. L. J. 38 (1965). The state statutes were criticized because they varied in scope, in terms of available remedies and they could not be enforced across state lines. *Hearings on H.R. 11969*; William Richard Carroll, *Debt Collection Practices: The Need for Comprehensive Legislation*, 15 Duq. L. Rev. 97, 99-108 (1976); Seth D. Shenfield, *Debt Collection Practices: Remedies for Abuse*, 10 B.C. Indus. & Com. L. Rev. 698-700 (1968-69); Scott & Strickland, *Abusive Debt Collection*, 15 Wm. & Mary L. Rev. 567, 567-78. None of these early laws, however, applied to a lawyer engaged in litigation.

The objective of these statutes was to identify and ban collection activities that were viewed as unreasonable, impermissible and intolerable at common law, and to thereby codify existing tort law. Carroll, *Debt Collection Practices: The Need for Comprehensive Legislation*, 15 Duq. L. Rev. 97, 114-19; Scott & Strickland, *Abusive Debt Collection*, 15 Wm. & Mary L. Rev. 567, 581-90.

Congress' initial draft of the bill regulating debt collection prohibited debt collectors from engaging in the practice of law. H.R. 10191 § 803(6), 94th Cong. 1st Sess. (1975). Subsequent drafts prohibited debt collectors from falsely representing that "any individual is an attorney," while exempting attorneys at law from the definition of a "debt collector." H.R. 11969, § 806(3), 94th Congress, 2nd Sess. (1976); H.R. 13720 § 806(3), 94th Cong. 2nd Sess. (May 1976); H.Rep. 94-1202, p. 2 (June 1, 1976) ("Consumers are frequently sent phony legal documents. They are harassed by phone at home and at work. Debt collectors impersonate attorneys and policemen. If these tactics do not work, threats of bodily harm or death are sometimes made."); *id.* at p. 4 ("The term 'debt collector' also does not include any person who does not directly or indirectly collect debts owed to another ... such as... attorneys at law collecting debts as attorneys on behalf of clients and in the name of such clients."); H.R. 29, § 806(3) 95th Cong. 1st Sess. (Jan. 1977); H.R. 5294, §§ 802(f), 806(3), 95th Cong. 1st Sess. (Mar. 1977); H.Rep. 95-131, p. 2 (Mar. 29, 1977).

Initially, it also prohibited "falsely representing or falsely implying any facts about the character, extent or amount of an alleged debt of a consumer or of its status **in any legal proceeding**." H.R. 10191 § 804(6), 94th Cong. 1st Sess. (1975) (emphasis added). When enacted, the FDCPA prohibited only the false representation of "the character, amount, or legal status of any debt" – the provision referring to its "status during a legal proceeding" was removed by Congress in the final version of the Act. Pub. L. 90–321, title VIII, §807 (15 U.S.C. §1692e(2)(A)), as added Pub. L. 95–109, Sept. 20, 1977, 91 Stat. 877; amended Pub. L. 104–208, div. A, title II, §2305(a), Sept. 30, 1996, 110 Stat. 3009–425.

Had Congress intended the FDCPA to apply to legal proceedings, it could have kept this provision intact, or have defined the term "collect" or "collection" to include attorneys engaged in litigation - its omission compels the opposite conclusion. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). That Congress earlier discarded such a requirement in favor of other language, strongly suggests that Congress did not intend such a statutory requirement. *Chickasaw Nation v. U.S.*, 534 U.S. 84, 93 (2001).

Additionally, the acts and practices addressed in the FDCPA when it was originally enacted were those undertaken by lay debt collectors, and as originally enacted, solely prohibited extra-judicial activities such as late night phone calls, telephone calls to employers, neighbors and family, and threats of physical harm. See *Debt Collection Practices Act of 1976, Hearings on H.R. 11969 Before the House Comm. on Banking, Currency & Housing*, 94th Cong. (March & April 1976); H.R. 11969, 94th Cong. (1976); H.R. 13720, 94th Cong. (1976); H.R. Rep. 94-1202, pp. 3-4, 94th Cong. 2nd Sess. (1976); S. 656, S. 918, S. 1130, & H.R. 5294 95th Cong. (1977); *Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130, & H.R. 5294 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing & Urban Affairs*, 95th Cong. (May 12-13, 1977). Congress never intended the Act to apply to litigation conduct. *Senate Comm. on Banking, Housing & Urban Affairs, Markup on Debt Collection Legislation* 19-32 (June 30, 1977).

Moreover, when initially enacted, the Act specifically exempted from coverage as a debt collector, "attorney[s]-at-law collecting a debt as an attorney on behalf of and in the name of a client." Pub. L. 90-321, title VIII, § 803 (15 U.S.C. §1692a(6)(F)), as added Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 875. *See also U.S. v. Central Adjustment Bureau*, 667 F.Supp. 370, 379-80, n .16 (N.D. Texas 1986).

Regarding judicial proceedings, it is evident Congress intended state judicial proceedings could trump the standards set forth in the Act. For instance, Congress deferred to state judicial decision-makers regarding acceptable communications with consumers and communications with third parties. 15 U.S.C. §§ 1692c(a),[3] 1692c(b).[4]

[3] "Without the prior consent of the consumer given directly to the debt collector or <u>*the express permission of a court of competent jurisdiction*</u>, a debt collector may not communicate with a consumer in connection with the collection of any debt--…."

[4] (b) Communication with third parties

"Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, <u>*or the express permission of a court of competent*</u>

In connection with communicating with consumers at their place of employment, Congress initially proposed prohibiting communications at a consumer's place of employment entirely until after "a court of competent jurisdiction enters a final judgment establishing the consumer's obligation to repay all or any portion of the debt[.]" H.R. 11969, §§ 804(a)(1)(A), 804(b)(1), 94th Congress, 2nd Sess. (1976); see also H.R. 5294 § 804(b) (allowing three communications at a place of employment every thirty days, except as permitted by a court of competent jurisdiction); S. 656 § 804(b)(one communication every thirty days except as permitted by a court of competent jurisdiction).

Congress understood that consumers had a substantially lesser interest in preventing communications at a place of employment attempting to collect a debt after the debt had been reduced to judgment. 123 Congressional Record H10238, 10240-242,10242 (Apr. 4, 1977)(Statement of Frank Annunzio) (" Balancing a debt collector's desire to contact a consumer's employer against the harm that such contact can cause, the bill permits contacting an employer with the prior consent of the consumer, by express court permission, or after a final judgment.").

In only one respect, did the FDPA preempt state law governing litigation regarding venue (15 U.S.C. § 1692i), and only to the extent state law was inconsistent with the protection afforded by the Act. 15 U.S.C. § 1692n. Congress modeled 15 U.S.C. § 1692i on the Federal Trade Commission's "fair venue" standard, developed in the 1970's under the FTC Act, 15 U.S.C. § 45, which prohibited lenders and creditors from suing consumers in the state where the consumer does not reside and lender does business. S. Rep. No. 382, p. 95th Cong., 1st Sess. 1977, 1977 U.S.C.C.A.N. 1695, 1699. *In re Spiegel, Inc.*, 86 F.T.C. 425, Doc. No. 8990, 1975 WL 173254, *10-20 (1975), *aff'd in relevant part*, 540 F.2d 287 (7th Cir.1976); *In re State Credit Assn.*, 86 F.T.C. 502, Docket C–2722, 1975 WL 173258, *5 (1975); *In The Matter of J.C. Penney Company, Inc.*, 109 F.T.C. 54, Docket No. C-3208, 1987 WL 874620 (1987). § 1692i merely extended the same protections applicable under the fair venue standards to legal actions by debt collectors.

In 1986, the FDCPA was amended to remove the exemption for attorneys. P.L. 99-361, 100 Stat. 768. In hearings held by the Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance, and Urban Affairs, the ostensible

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jurisdiction, or *as reasonably necessary to effectuate a postjudgment judicial remedy*, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector."

reasons for amending the act to remove the attorney exemption, were two-fold: first, with the exemption, attorneys could engage in debt collection activities unregulated by the Act, which gave them an unfair competitive advantage over traditional collection agencies, and second, that because of this advantage, as well as for other reasons, an increased number of attorneys began devoting a substantial portion of their legal practices to debt collection activities. *Hearings on H.R. 237, Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance, and Urban Affairs*, pp. 1-3 (Oct. 22, 1985)(statement of Chairman Annunzio). See also *Hearings on H.R. 4617, Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance, and Urban Affairs*, pp. 1-2 (Jan. 31, 1984).

In describing the type of problem the amendment was meant to remedy, Chairman Annunzio, who sponsored the bill stated: "The vast majority of accounts placed with these debt collection law firms never see the inside of a courtroom. In 1983, for example, no suit was brought in 93 percent of the 400,000 accounts handled by the largest firms. These accounts are handled in the same manner as lay collectors. There is only one difference, and that is ...[t]hese attorney collection firms are not bound by the provisions of the . . . Act." Hearings on H.R. 237, Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance, and Urban Affairs, pp. 1-3(10/22/85)(comments of Chairman Annunzio). *See also id*. Statement of Anne Fortney, Associate Director for Credit Practices, Bureau of Consumer Protection, Federal Trade Commission, pp. 11-22; Statement of American Collectors Ass'n. pp. 30- 44, 42-43; Statement of Dalton Sheppard, American Collectors Assn. 110-111; Statement of Walter Kurth, Associated Credit Bureaus Inc., pp. 114-121. “The removal of the attorney exemption will not interfere with the practice of law by the nation's attorneys. It will not prevent them from representing the interests of their clients. It will not subject them to onerous regulation.” 131 Cong. Record H10535, 99th Cong. 1st Seas. #164 (12/2/85).

During discussion of the proposed amendment at the hearing, Mr. Abrams, an attorney and representative of the Commercial Law League, raised concerns regarding whether a repeal of the attorney exemption would impose requirements upon attorneys engaged in representing clients when making a demand prior to instituting suit. 164-68, 168 (see also comments of Mr. Zion). He then stated:

> I am concerned about the fact [that] if I make a legitimate demand on a debtor, if I make a legitimate phone call and then I take the appropriate steps from A all the way down to the final act of collecting the debt and the debtor is upset with the fact that he ultimately has to pay this bill, that he

> will then be allowed to ... file lawsuits against these lawyers merely as harassment to get even - -
>
> Mr. Morrison: Just like people do against the collectors because he is upset - -
>
> Mr. Abrams: Collectors cannot take this man to court, they cannot garnish his wages, they cannot make his come in on a citation to discover assets, they cannot ask the court to enforce the provision to have the debtor picked up on a body attempt order because he repeatedly ignores court orders to appear to be examined to fwd out if that debt can be collected.

Id. at p. 168. In Annual Reports to Congress that followed, the Federal Trade Commission repeatedly urged Congress to clarify that the FDCPA should not apply to litigation. See 1999 Annual Report, Federal Trade Commission, online at http://www.cardreport.com/laws/fdcpa/fdcpa-report.html; 2005 Annual Report: Fair Debt Collection Practices Act: Federal Trade Commission, p. 12 ("The Commission recommends eight amendments to, or clarifications of, the Act. The Commission's legislative proposals, detailed below, would:… (3) exempt from the FDCPA's provisions attorneys who pursue debtors solely through litigation (or similar "legal" practices); *id*. at pp. 15-16:

> The difficulties in applying the Act's requirements to attorneys in litigation, however, and the anomalies that result, remain. For example, pretrial depositions could violate Section 805(b) because they involve communicating with third parties about a debt.28 In addition, if a complaint represents an attorney's initial contact with a consumer, it appears that the attorney must include the Section 809 validation notice in the complaint itself or in some other written communication within five days after serving the complaint on the consumer. Such a notice does not make sense in a litigation context….
>
> Because it still seems impractical and unnecessary to apply the FDCPA to the legal activities of litigation attorneys, and because ample due process protections exist in that context, the Commission recommends that Congress re-examine the definition of "debt collector" contained in Section 803(6) and state that an attorney who pursues alleged debtors solely through litigation (or similar "legal" practices) – as opposed to one who collects debts by sending dunning letters or making calls directly to the consumer (or similar "collection" practices) – is not covered by the statute. Alternatively, Congress could amend the definition of "communication" to state that the term "does not include actions taken pursuant to the Federal Rules of Civil Procedure or,

> in the case of a proceeding in a State court, the rules of civil procedure available under the laws of such State."

See also 2006 Federal Trade Commission Annual Report, p. 11 (same).

In 2010, the Federal Trade Commission released its report on state debt collection litigation. See http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf (last visited 2/3/14). Summarizing, the FTC recommended that:

> States should consider adopting measures to make it more likely that consumers will defend in litigation.
>
> States should require collectors to include more information about the debt in their complaints.
>
> States should take steps to make it less likely that collectors will sue on time-barred debt and that consumers will unknowingly waive statute of limitations defenses available to them.
>
> Federal and state laws should be changed to prevent the freezing of a specified amount in a bank account into which a consumer has deposited funds that are exempt from garnishment.[5]

Id. at pp. iii-iv.

Conspicuously absent from the FTC's report on state court litigation, however, is any suggestion that attorneys engaged in debt collection litigation were making statements in the course of judicial proceedings that violated the FDCPA.

The history of amendments made to the Act after 1986 shows that litigation was not intended to be covered by the FDCPA. The only two affirmative disclosure requirements in the Act appeared in 15 U.S.C. § 1692e(11) and § 1692g; yet, both

[5] This issue was largely resolved when the Treasury Department, the Social Security Administration and other federal agencies imposed the burden of identifying exempt funds in a bank account in response to state court garnishment orders. See 31 C.F.R. § 212.1 *et seq*.; Department of the Treasury, Joint Notice of Proposed Rulemaking regarding Garnishment of Accounts Containing Federal Benefit Payments, 75 FR 20299-01, 2010 WL 1521263 (Apr. 19, 2010).

sections were amended to make clear that the Act does not apply to pleadings in litigation. An amendment was made in 1996 to § 1692e(11) to exempt pleadings from the subsequent disclosure requirements under that section. Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub.L. 104-208, Title II, § 2305(a), 110 Stat. 3009-425 (1996). In 2006, Congress again amended the Act to expressly provide that pleadings were not communications under § 1692g, to resolve a circuit conflict. Financial Services Regulatory Relief Act of 2006, Pub.L. 109-351, Title VIII, § 802, 120 Stat. 2006 (2006)(amending 15 U.S.C. § 1692g(d)(2006)). *Goldman v. Cohen,* 445 F.3d 152, 157 (2d Cir. 2006); *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir. 2004); *Vega v. McKay*, 351 F.3d 1334, 1337 (11th Cir. 2003). The Amendment was intended to make clear that "a formal pleading in any civil action will not be considered communications now as defined by the FDCPA." 152 Cong. Rec. H7573-01, H7588 (Remarks of Rep. Garrett) (9-27-06) (consideration of Financial Services Regulatory Relief Act of 2006, PL 109-351, 120 Stat. 1966, § 802, effective October 13, 2006).

In light of the 2006 amendment, "it is far from clear that the FDCPA controls the contents of pleadings filed in state court." *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 473 (7th Cir. 2007).

Thus, even if litigation could be construed to fit within the plain language of the Act, it cannot be regulated by the Act because doing so is "not within its spirit nor within the intention of its makers.'" *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

IV. The "practice of law" is not synonymous with "debt collection."

When originally enacted, the FDCPA prohibited the Federal Trade Commission from enacting regulations to interpret its meaning. Pub. L. 90–321, title VIII, §814, as added Pub. L. 95–109, Sept. 20, 1977, 91 Stat. 881; amended Pub. L. 98–443, §9(n), Oct. 4, 1984, 98 Stat. 1708; Pub. L. 101–73, title VII, §744(n), Aug. 9, 1989, 103 Stat. 440; Pub. L. 102–242, title II, §212(e), Dec. 19, 1991, 105 Stat. 2301; Pub. L. 102–550, title XVI, §1604(a)(8), Oct. 28, 1992, 106 Stat. 4082; Pub. L. 104–88, title III, §316, Dec. 29, 1995, 109 Stat. 949; Pub. L. 111–203, title X, §1089(3), (4), July 21, 2010, 124 Stat. 2092, 2093. As amended by Dodd-Frank, § 1692l provides: "Except as provided in section 5519(a) of Title 12, the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this subchapter." Under Dodd-Frank, the Bureau was given the authority to enact regulations under the FDCPA, however, the Bureau was prohibited from "exercise[ing] any supervisory or enforcement authority with respect to an activity

engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law . . . [however, this] shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to … [the FDCPA]." 12 U.S.C. § 5517(e)(1),(3).

The Bureau has taken the position that "[a]lthough attorneys are generally excluded from the Act's coverage, see Act section 1027(e)(1), this exclusion does not preclude the exercise of the Bureau's supervisory authority over collection attorneys. . . . Collection attorneys are subject to the Fair Debt Collection Practices Act, which is included among the enumerated consumer laws listed in section 1002(23) of the Act. See *Heintz v. Jenkins*, 514 U.S. 291 (1995)."

This begs the question when is an attorney a "collection attorney" and what is collection, as contradistinguished from the practice of law.

In order to answer this question, the converse question of when debt collection crosses the line and becomes the unauthorized practice of law helps explain the functional distinction between a debt collector and a lawyer. If a person is required to hold a law license to engage in the act or practice at issue, one may safely assume that the act or practice involves the practice of law, and cannot be engaged in by a lay debt collector. See e.g., *Ohio State Bar Assn. v. Lienguard, Inc.*, 126 Ohio St.3d 400, 400-401, 934 N.E.2d 337, 2010-Ohio-3827, ¶¶ 2-12.[6]

[6] {¶ 2} "1. The unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice law in Ohio. Gov.Bar R. VII(2)(A).

{¶ 3} "2. With limited exception, a corporation may not give legal advice to another, directly or indirectly, through its employees or attorney employees. *Judd v. City Trust & Savings Bank* (1937), 133 Ohio St. 81, 88 [10 O.O. 95, 12 N.E.2d 288].

{¶ 4} "3. The practice of law encompasses the preparation of legal documents and instruments upon which legal rights are secured and advanced. *Lorain County Bar Association v. Kocak,* 121 Ohio St.3d 396 [2009-Ohio-1430, 904 N.E.2d 885, ¶ 17].

{¶ 5} "4. The practice of law is not limited to the conduct of cases in court, but embraces the preparation of pleadings and other papers incident to actions, the management of such actions, and in general all advice to clients and all action taken for them in matters connected with the law. *Cincinnati Bar Association v. Foreclosure Solutions, LLC,* 123 Ohio St.3d 107 [2009-Ohio-4174, 914 N.E.2d 386, ¶ 21].

Unfortunately, however, this precept also leaves some unsatisfactory ambiguity. The *Lineguard* case asserts that "an attempt to resolve a collection claim between debtors and creditors" amounts to the unauthorized practice of law. *Ohio State Bar Assn. v. Lienguard, Inc.*, 126 Ohio St.3d at 401. If that were so, then all debt collection by lay debt collectors involves the unauthorized practice of law. If a claim is not in litigation, most lay debt collection prototypically involves "an attempt to resolve a collection claim between debtors and creditors." At the same time, it is not uncommon to find that where a consumer debt claim is in litigation, paralegals or

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{¶ 6} "5. Nonlawyers engage in the unauthorized practice of law when attempting to represent others' legal interests and advise others of their legal rights during settlement negotiations. *Id.* at [¶ 25].

{¶ 7} "6. The unauthorized practice of law also occurs when a non-attorney acts as an intermediary to advise, counsel, or negotiate on behalf of an individual or business in an attempt to resolve a collection claim between debtors and creditors. *Id.* [at ¶ 26].

{¶ 8} "7. Lay persons cannot insulate themselves from responsibility for engaging in the unauthorized practice of law by using powers of attorney executed by customers or by simply informing customers that the layperson is not an attorney and is, therefore, incapable of giving legal advice. *Id.* [at ¶ 27].

{¶ 9} "8. Thus, a general power of attorney does not grant authority to prepare and file papers in court on another's behalf. *Lorain County Bar Association v. Kocak,* 121 Ohio St.3d 396 [2009-Ohio-1430, 904 N.E.2d 885, ¶ 18].

"9. Ohio Revised Code § 4705.01 provides: 'No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct or defend any action or proceeding in which the person is not a party concerned * * * unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules.'

{¶ 11} "10. When a person not admitted to the Ohio bar attempts to represent another on the basis of a power of attorney, he is in violation of Ohio Revised Code § 4705.01. *Disciplinary Counsel v. Brown,* 121 Ohio St.3d 423 [2009-Ohio-1152, 905 N.E.2d 163, ¶ 11].

{¶ 12} "11. Preparing an affidavit for mechanic's lien or in satisfaction of mechanic's lien is the unauthorized practice of law. *Id.* at [¶ 16].

{¶ 13} "12. Thus, advising others of their legal rights and responsibilities is the practice of law, as is the preparation of legal pleadings and other legal papers without the supervision of an attorney licensed in Ohio. *Id.* at [¶ 41].

lay debt collectors may be employed, under the supervision of a lawyer, to facilitate settlement or resolution of the litigation. See ABA Model Guidelines for the Utilization of Paralegals, Guideline 2.[7] Functionally, there is no distinction between these two, as both are engaged in "an attempt to resolve a collection claim between debtors and creditors."

Of the distinctions that do exist, that a lawsuit is (or is not) pending, and that a lawyer is (or is not) supervising the conduct of unlicensed collectors, either could be used as a dividing line between the attorneys engaged in the practice of law and a "collection attorney." But it is only the former circumstance, whether or not a lawsuit was filed, that can truly distinguish between the conduct of a "collection attorney" and a lawyer engaged in the practice of law, since a lay debt collector cannot file a lawsuit, and a collection attorney is unlikely to do so (per the legislative history).

The case law developed under the FDCPA suggests some guideposts to separate the debt collection lawyers from the non-debt collection lawyers, but these cases likewise collapse the inquiry onto the linguistic wheel of jeopardy, relying on 'regularity' and the 'principle purpose' to separate the two. *See e.g. Schryoer v. Frankel*, 197 F.3d 1170, 1175-76 (6th Cir. 1999); *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56, 62-63 (2d Cir. 2004). These concepts would allow a lawyer practicing law to unknowingly transform from a lawyer engaged in litigation to one who "'regularly' collects debts for purposes of the FDCPA, ... [if it can be shown that] the attorney or law firm collects debts as a matter of course for its clients or for some clients, or collects debts as a substantial, but not principal, part of his or its general law practice." *Schryoer,* 197 F.3d at 1176.

If the term "collecting debts" was clearly defined to exclude litigation, regularity and principle purpose would clearly have more meaning.

A. *Heintz v. Jenkins* does not answer the question.

[7] "Guideline 2: Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a paralegal any task normally performed by the lawyer except those tasks proscribed to a nonlawyer by statute, court rule, administrative rule or regulation, controlling authority, the applicable rule of professional conduct of the jurisdiction in which the lawyer practices, or these guidelines." Online at http://apps.americanbar.org/legalservices/paralegals/downloads/modelguidelines.pdf (last visited 2/4/14)

In 1995, the Supreme Court decided *Heintz v. Jenkins*, 514 U.S. 291 (1995). *Heintz v Jenkins* assessed whether the Act's definition of a debt collector, 15 U.S.C § 1692a(6), contained an implied exception for attorneys engaged in litigation. *Heintz v. Jenkins*, 514 U.S. 291, 292. The Court held it did not.

Heintz rested its holding on the plain language of the statute and the 1986 amendment eliminating the attorney exemption. *Heintz*, 514 U.S. 291, 294-95. *Heintz* observed that the anomalies suggested by applying the Act to attorneys engaged in litigation would be mitigated by the availability of the bona fide error defense and "depend for their persuasive force upon readings that courts seem unlikely to endorse," *Id*. at 295-96.

Heintz neither addressed whether the term "communication" applied to litigation, whether the substantive provisions of the Act applied to litigation, or whether litigation is in "connection with the collection of a debt." *Hemmingsen v. Messerli & Kramer, P.A.,* 674 F.3d 814, 817 (8th Cir.2012). Although the Supreme Court has not provided extensive guidance, it has made clear that the FDCPA "should not be assumed to compel absurd results when applied to debt collecting attorneys." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 130 S.Ct. 1605, 1622, 176 L.Ed.2d 519 (2010).

Some Courts have extended "the logic" of *Heintz* to support the spurious conclusion that because there is no implied exception for lawyers engaged in litigation within the meaning of the term "debt collector," that all of litigation is regulated by the FDCPA. See *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 229–32 (4th Cir.2007) (representations in interrogatories and motion for summary judgment were covered by FDCPA); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1031–32 (9th Cir.2010) (complaint served on consumer to facilitate debt collection is a communication under FDCPA). Courts that interpret *Heintz* this way employ a syllogistic fallacy, that because the FDCPA "applies to attorneys who regularly engage in consumer-debt-collection activity, even when that activity consists of litigation," this must mean attorneys "can be held liable for all litigation conduct, including the filing of the ... [state court] complaint, if that conduct violates the FDCPA." *Delawder v. Platinum Financial Services Corp*., 443 F.Supp.2d 942, 947 (S.D.Ohio 2005). This conclusion is clearly a half truth, as one must also be a debt collector who is engaged in debt collection for the act to apply. At the same time, Courts have held the FDCPA does not extend protection to communications directed to Courts. *See, e.g. O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 940-41, 44 (7th Cir. 2011)("the Fair Debt Collection Practices Act does not extend to communications that would confuse or mislead a state court judge.").

Beyond the obvious limitation of the *Heintz* court's holding, the "logic" of *Heintz* does not compel the conclusion that all litigation conduct is regulated by the FDCPA. The cornerstone on which *Heintz* rested was the spurious conclusion that "[i]n ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts." *Heintz*, 514 U.S. 291, 294 (citing Black's Law Dictionary 263 (6th ed. 1990) ('To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings').

Strikingly, the definition of "collect," relied on by *Heintz*, was omitted from both the Seventh (1999), and Eighth (2004) edition of Black's Law Dictionary. The reason for its omission is that the definition was incorrect when written. See Black's Law Dictionary, preface pp. x-xi (7th ed. 1999). The definition of "collect" relied on in *Heintz* was purportedly drawn from a New York state court decision from 1925. Black's Law Dictionary 328 (Rev. 4th ed. 1968):

> To gather together; to bring scattered thing (assets, accounts, articles of property) into one mass or fund; to assemble.
>
> To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings. *Isler v. National Park Bank of New York*, 239 N.Y. 462, 147 N.E. 66, 68.

See also Black's Law Dictionary, p.238 (5th ed. 1979). A review of the *Isler* case reveals it neither supports a reading of the term "collect" as extending to legal proceedings, nor the proposition that a lawyer is a debt collector.

> We are of the opinion that the phrase 'failure or delay in collecting or remitting' does not cover this case. **'Collecting' is defined by Webster's Dictionary as meaning: 'To demand or obtain payment of an account or other indebtedness.'** Here was something more than failure to demand and collect an account which was due. Possession of property was turned over to the alleged debtor, and the loss was created, not by failure to collect an outstanding account, but by this neglected delivery of property to him.

Isler v. National Park Bank of New York 239 N.Y. 462, 468, 147 N.E. 66, 68 (N.Y.1925) (emphasis added). *Black's Law Dictionary* cannot be read to support the view that the term "collection" is synonymous with litigation.

In ordinary English, a 'lawyer' does not mean the same thing as a 'debt collector,' 'litigation' is not synonymous with 'debt collection,' and the term "collect" does not include litigation. See American Heritage Dictionary, p. 260 (1973) (defining 'collector' as "a person or thing that collects . . a person employed to collect taxes, duties or other payments"); p. 742 (defining 'lawyer' as "one whose profession is to give legal advice and assistance to clients and represent them in court. . . . Synonyms: lawyer, attorney, counselor, counsel, barrister, solicitor, advocate. These nouns denote persons who practice law"); p. 763 (defining 'litigation' as "legal action or process") and p. 261 (defining 'collect' as "[t]o call for and obtain payment of: *collect taxes*…[;] to take in payments or donations").

B. The practice of law and debt collection are distinguishable.

As the Seventh Circuit observed in *Jenkins v. Heintz*, the FDCPA was intended to place lawyers and debt collectors under the same standards, but the function performed by each differs when litigation is involved. See *Jenkins v. Heintz*, 124 F.3d 824, 833 (7th Cir. 1997):

> Congress in the FDCPA and the Supreme Court in its opinion in this case placed lawyers and lay debt collectors on equal footing. While a letter sent by an attorney after a lawsuit is filed arguably presupposes that the attorney-collector has put on a new hat and is now a litigator, not a collector, the Act still defines him as a collector, and the Supreme Court has confined the litigator to the standards of a collector. Filing a lawsuit does not insulate a lawyer from the restrictions of the Act, nor does it expose him to standards under the Act not applied to non-lawyer collectors.

Debt collectors, however, only wear one hat, and cannot, without engaging in the unauthorized practice of law, don the hat of a litigator. Lawyers filing a lawsuit are subject to the requirements of Rule 11, and the FDCPA, whereas debt collectors are not.

Referring back to the reasons for the 1986 amendment that omitted the attorney exemption, it should be evident that Congress did not want a law license to shield lay debt collection engaged in by a lawyer, and at the same time, Congress was not concerned with litigation engaged in by lawyers.

Congress used the term "collect" as contradistinguished from the term "litigation" to signify the legislation was intended to govern the communications, acts and practices undertaken by the unregulated "debt collection" industry, not litigation

engaged in by lawyers. *Senate Comm. on Banking, Housing & Urban Affairs*, Markup on Debt Collection Legislation 19-32 (June 30, 1977); H. R. Rep. 94-1202, 94th Cong. (1976); H.R. Rep. 95-131, 95th Cong. (1977); S.Rep.95-382, *reprinted in* 1977 U.S.C.C.A.N. 1695 (1977). A primary reason for the enactment of the FDCPA, was that lay debt collectors had no ethical code. *Debt Collection Practices Act of 1976: Hearings on H.R. 11969 Before the House Comm. on Banking, Currency & Housing*, 94th Cong. (March & April 1976), pp. 29-45, 43 (testimony of James Clark)(Mr. Grassley: … "Did your company . . . belong to any of the industry's professional organizations, which would provide association education and set ethical standards to which all members should adhere?" Mr. Clark: "…No, we did not belong to any associations, clubs, whatever. They prescribed all kinds of idealistic codes of conduct, and they were all a bunch of bull, because they themselves did not adhere to them. Why should we?"); p. 60 (statement of Chairman Annuzio)("I would also like to point out that we heard the word 'ethical' used this morning. There is a code of ethics for Congressmen, for doctors, for lawyers, or almost every profession or institution in the United States of America. … I would also like to mention that we are dealing with a $3 billion industry, and when money is involved, for some reason or another, people do become unethical."); *Debt Collection Practices Act of 1977: Hearings on H.R. 29 Before the House Comm. on Banking, Currency & Housing*, 95th Cong. (March 1977), pp. 27-64, 45, 62 (Mrs. Spellman: "…So, … I take it, that you can engage in debt collection in an ethical manner and still make a living?" Mr. Wilson: To a degree, yes. But you make more money by not being ethical."); *Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130, & H.R. 5294 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing & Urban Affairs*, 95th Cong. (May 12-13, 1977). When enacted, Congress made clear that ethical debt collectors were not meant to be competitively disadvantaged by the law, and it was intended to regulate "unscrupulous" debt collectors. 15 U.S.C. § 1692(e); S. Rep. 95-382, 1977 U.S.C.C.A.N. 1695, 1696, 1697, 1699("Its purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors.")(discussing the practices of "unscrupulous debt collectors"); H.R. REP. No. 95-131, p. 9 (1977)("The object of this legislation is to protect consumers by encouraging all debt collectors to adopt honest and ethical standards of conduct.").

In contrast, lawyer ethics and conduct has always been subject to judicial oversight, and since 1908, subject to ethical standards set forth in standardized canons of ethics; since 1968, in a code of professional responsibility, and more recently, in rules of professional conduct. WOLFRAM, MODERN LEGAL ETHICS, §§ 2.2.1, 2.2.5, 2.3, 2.6.1, 2.6.2, 2.6.3, 2.6.4 (West 1986).

During the 1984 subcommittee hearings considering a repeal of the attorney exemption, testimony established there were over 600,000 attorneys in the United States, and under the exemption, attorneys began operating collection agencies, and about 5,000 were engaged in "debt collection." Hearings on H.R. 4617, to Amend the Fair Debt Collection Practices Act, *Before the Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance & Urban Affairs*, pp. 1-2, 131 (January 31, 1984)(statement of John W. Johnson).

The chairman of the subcommittee, Frank Annunzio, observed that attorneys and law firms were setting up collection agencies where they "practice debt collection first and law second, and often barely at all.... show[ing] that there is no functional difference between the operation of the attorney debt collection firm." *Id*. at 1, 2.

If collection, as used in the Act was understood as synonymous with litigation, lawyers were not entering a new industry – they were always debt collectors.

V. Excepting litigation from the scope of the FDCPA is consistent with the common law, which afforded an absolute privilege for pertinent statements made in the course of judicial proceedings.

The common law afforded all necessary participants in the judicial process, including judges, attorneys, parties, and witnesses, with absolute immunity for pertinent statements made in the course of judicial proceedings. *White v. Nicholls*, 44 U.S. 266, 288 (1845); *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993); *Burns v. Reed*, 500 U.S. 478, 490 (1991)(quoting *King v. Skinner*, Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772)); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Briscoe v. LaHue*, 460 U.S. 325, 330-331, 334 (1983); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 536; *Bradley v. Fisher*, 13 Wall. 335, 351 (1871); *Surace v. Wuliger*, 25 Ohio St.3d 229, 235, 495 N.E.2d 939, 944 (1986); *Hastings v. Lusk*, 22 Wend. 410 (N.Y. 1839); *Mayrant v Richardson*, 1 Nott & McC. 347, 10 S.C.L. 347, 1818 Westlaw 915 (S.C. 1818); *Hoar v. Wood*, 3 Met. 193, 197-198, 44 Mass. 193, 1841 Westlaw 3465 (1841); *Swearingen v. Birch*, 4 Yeats 322 (Pa. 1806); *Harris v Huntington*, 4 Am.Dec. 728, 2 Tyl. 129, 1802 Westlaw 777 (Vt. 1802); EDWARD P. WEEKS, TREATISE ON ATTORNEYS & COUNSELLORS AT LAW, §§106, 110, pp.196-98, 205-210 (Fred B. Rothman & Co. 1997)(1878)(citing *Brook v. Montague*, 2 Cro. Jac. 90 (1606); *Hodgson v. Scarlet*, 1 B. & Al. 232); SACK ON DEFAMATION, §§8.2.1-8.2.1.6 (2004); T.L. Anenson, *Absolute Immunity From Civil Liability: Lessons For Litigation Lawyers*, 31 Pepp. L. Rev. 915, 918-919 (2004); J. M. Spanbauer, *The First Amendment Right To Petition Government For A Redress Of Grievances: Cut From A Different Cloth,* 1 Hastings

Const. L.Q. 15, 22-25, 52-57 (1993); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §57; RESTATEMENT (SECOND) OF TORTS §§ 586, 587, 588 (1977).

"[A] concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well." *Imbler v. Pachtman*, 424 U.S. 409, 426, n. 23 (1976). "Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Butz v. Economou*, 438 U.S. 478, 512 (1978).

Claims of absolute immunity were well-recognized at common law as a right not to stand trial, and may be applied to a federal statutory cause of action unless Congressional intent to abrogate appears manifest, or a statutory purpose to the contrary is evident. *U.S. v. Texas*, 507 U.S. 529, 534 (1993). See also *Malley v. Briggs,* 475 U.S. 335, 339 (1986); *Wyatt v. Cole,* 504 U.S. 158, 170-175 (1992) (Kennedy, J., concurring); *Richardson v. McKnight*, 521 U.S. 399, 403 (1997); 2A Sutherland, Statutory Construction § 50:1-§ 50:5 (6th Ed. 2005); P. Hayden, *Reconsidering the Litigator's Privilege to Defame*, 54 Ohio St. L.J. 985, 1004-1010 (1993). No clear statement of Congressional intent to abrogate common law immunity appears in the legislative text or its legislative history. *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d. 432 (6th Cir. 2006).

The common law permitted claims against debt collectors for improper methods or means of collecting debts, but did not annul or limit the absolute privilege for pertinent statements made in the course of judicial proceedings. William F. Julavits & Clinton A. Stuntebeck, *Effectively Regulating Extrajudicial Collection of Debts*, 20 Me. L. Rev. 261, 264-73 (1968); Charles E. Hurt, *Debt Collection Torts*, 67 W. Va. L. Rev. 201 (1965); Comment, *Collection Capers: Liability for Debt Collection Practices*, 24 U. Chi. L. Rev. 572, 579-87(1956); see also Annotation, *Right of action for damages because of methods used in attempting to collect debts*, 55 A.L.R. 971 (1928), 106 A.L.R. 1453 (1937); Annotation, *Threatening, instituting or prosecuting legal action as invasion of right of privacy*, 42 ALR3d 865 (1972); Annotation, *Use of criminal process to collect debt as abuse of process,* 27 A.L.R.3d 1202, (1969); Annotation, *Placarding debtor as libel*, 3 A.L.R. 1596; Annotation, *Methods employed in collecting debts as ground for disbarment or suspension of an attorney*, 47 A.L.R. 267, 93 A.L.R.3d 880 (1979); Annotation, *Recovery by debtor, under tort of intentional or reckless infliction of emotional distress, for damages resulting from debt collection methods*, 87 ALR3d 201; Annotation, *Public disclosure of person's indebtedness as invasion of privacy*, 33 A.L.R. 3d 154; Annotation, *Malicious prosecution: may prosecutor avoid liability on the ground of probable cause or*

absence of malice, despite the fact that his motive was to collect debt, enforce claim for damages, or recover property, 139 A.L.R. 1088.

This immunity has continued unabated from these historical origins, and has carried through into the present in all of the fifty States. Anenson, *Lessons*, at 917; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §57; RESTATEMENT (SECOND) OF TORTS §§586, 587; Douglas R. Richmond, *The Lawyer's Litigation Privilege*, 31 Am. J. Trial Advoc. 281 (2007).

Excepting statements made in the course of a judicial proceeding from the definition of collection would be consistent with the common law.

VI. Excepting litigation from the scope of the FDCPA is consistent with the First Amendment and Noerr-Pennington doctrine.

A. First Amendment Right to Petition

Filing a complaint in court is a form of petitioning activity protected under the First Amendment's Right to Petition. *McDonald v. Smith*, 472 U.S. 479, 484 (1985). Under the Right to Petition, strict liability cannot be imposed in retaliation for exercising this Right. *McDonald v. Smith*, 472 U.S. 479, 479. *McDonald* requires application of the actual malice standard enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), before liability can attach. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, (1974).

When applied to litigation activities, seeking a state court adjudication of the amount owed on a debt "stands apart" from other forms of "collection" conduct, and "runs headlong" into core values protected by the First Amendment, warranting a departure from a literal application of the FDCPA. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740-41 (1983). A law that, after-the-fact imposes a penalty based on strict liability for any misstatement contained in a petition invoking a court's jurisdiction, would violate or unduly chill this First Amendment right. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741; *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532, (2002). The Bureau is therefore required to "consider[ ] the right to petition when interpreting federal law." *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525.

B. First Amendment Free Speech

To the extent that state court litigation between private parties does not warrant the classification as First Amendment petitioning activity, it is nonetheless a form of commercial speech, which is also protected by the First Amendment. The Supreme Court has developed a hierarchical test to determine whether the government may permissibly regulate commercial speech as 'misleading.' *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980); *Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002):

> In *Central Hudson, supra,* we articulated a test for determining whether a particular commercial speech regulation is constitutionally permissible. Under that test we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, we next ask "whether the asserted governmental interest is substantial." *Id.,* at 566, 100 S.Ct. 2343. If it is, then we "determine whether the regulation directly advances the governmental interest asserted," and, finally, "whether it is not more extensive than is necessary to serve that interest." *Ibid.* Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.

See also *In re R.M.J.*, 455 U.S. 191, 200 (1982); *Peel v. Attorney Disciplinary Comm'n*, 496 U.S. 91, 106 (1990); *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977); *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 638 (1985); *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 624 (1995). Even if collecting a debt could be construed as synonymous with litigation, the First Amendment counsels against that construction. U.S. Const. amend. I. *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 496 U.S. 91, 108.

In order to end the *Central Hudson* analysis on the first prong, the speech must be "inherently misleading," which is defined in *Central Hudson* as "more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563 (citations omitted); see also *In re R.M.J.*, 455 U.S. at 202. Whether speech is "inherently misleading" depends upon, *inter alia*, the "possibilities for deception," *Friedman v. Rogers*, 440 U.S. 1, 13 (1979); whether "experience has proved that in fact that such [communications are] subject to abuse," *In re R.M.J.*, 455 U.S. at 203, 102 S.Ct. 929; and, "the ability of the intended audience to evaluate the claims made." *Association of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 731 (9th Cir. 1994). See also *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001). In the absence of evidence that state court litigation engaged

in by collection attorneys is inherently misleading, it is entitled to First Amendment protection, as "[c]ommercial speech that is only potentially misleading" is still entitled to constitutional protection under the First Amendment." *Alexander v. Cahill,* 598 F.3d 79, 89 (2d Cir. 2010); *Parker v. Com. of Ky., Bd. of Dentistry*, 818 F.2d 504, 510 (6th Cir. 1987); *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004).

Thus, the first determination required in assessing whether "litigation" engaged in by lawyers collecting debts is or is not entitled to First Amendment constitutional protection requires a threshold determination as to whether it is either inherently misleading or only potentially misleading. *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (construing *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367). If the pleading is true or only potentially misleading, the regulation must meet the three *Central Hudson* requirements to pass constitutional muster: (1) the asserted government interest in the regulation must be substantial; (2) the regulation must directly advance the governmental interest served; and (3) the regulation may not be broader than necessary to advance that governmental interest. *Byrum v. Landreth*, 566 F.3d 442, 446.

C. *Noerr-Pennington* Doctrine

In addition, Courts have extended these First Amendment principles as a limitation on federal and state laws under the *Noerr-Pennington* doctrine. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. at 532; *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The *Noerr Pennington* doctrine operates as both as a rule of statutory construction and as a qualified defense to liability unless there is a showing that a prior suit was both objectively baseless and subjectively motivated by an unlawful purpose. *BE & K Const. Co., supra; Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931-33 (9th Cir. 2006).

Under the sham petition standard, so long as the lawsuit is not objectively baseless or subjectively motivated by an improper purpose, the content of a complaint containing no material or intentional misrepresentation should not be actionable under the FDCPA. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743–744 (1983); *BE & K Const. Co. v. N.L.R.B.,* 536 U.S. 516, 526; *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814, 820 (8th Cir. 2012); *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606, 616 (6th Cir. 2009). "[A]n objectively reasonable effort to litigate cannot be sham regardless of subjective intent."

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 57.

Petition clause jurisprudence does not recognize an exception from qualified immunity for *every* potentially misleading statement. See e.g. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1186 (9th Cir. 2005); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931-33 (9th Cir. 2006). Rather, "liability rests on deceits perpetrated with knowledge of their falsity." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009); *Kearney v. Foley & Lardner, LLP*, 582 F.3d 896, 906 (9th Cir. 2009). See also Federal Trade Commission, *Enforcement Perspectives on the Noerr-Pennington Doctrine*, p. 27(2006)("[I]n order to lose *Noerr* protection, the misrepresentation or omission must be: (1) deliberate (something more than mere error is necessary); (2) subject to factual verification; and (3) central to the legitimacy of the affected governmental proceeding.").[8]

First Amendment protection under the *Noerr-Pennington* doctrine extends to and includes "[a] complaint, an answer, a counterclaim and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something." *Sosa v. DIRECTV, Inc.,* 437 F.3d 923, 933 (9th Cir. 2006). Further, "conduct incidental to the prosecution of the suit" is protected by the *Noerr–Pennington* doctrine." *Sosa*, 437 F.3d. 923, at 934-35. In contrast, demand letters that are communicated to private parties before a lawsuit is filed, and which are unrelated to petitioning activities, do not qualify. *Id*. at 935.

One may be deprived of *Noerr-Pennington* protection only when evidence shows that a "party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy[;]" not when the litigation was commenced with an improper motive. *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155, 158-59 (9th Cir. 1993); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 68 F.3d 119, 123-24, 27 (3d Cir. 1999); *Baltimore Scrap Corp. v. The David J. Joseph Co.*, 237 F.3d 394, 399-401 (4th Cir. 2001); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1185, n. 2 (9th Cir. 2005); *Satre v. Wells Fargo Bank, NA*, 507 Fed.Appx. 655, 655 (9th Cir. 2013).

Per the canon of avoidance, the Bureau may either construe the FDCPA so that it avoids raising serious constitutional concerns, confirming that the FDCPA does not apply at all to court pleadings, or read the sham petition standard into the FDCPA regulations. *Professional Real Estate Investors, Inc. v. Columbia Pictures*

[8] http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf

Industries, Inc., 508 U.S. 49 (1993); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, (1991); *White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000). Otherwise, as applied, the FDCPA regulations would be unconstitutionally vague and overbroad under the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339.

Imposing strict liability on lawyers for literally true but potentially misleading representations in pleadings under the FDCPA is incompatible with the Supreme Court's First Amendment jurisprudence.

VII. Conclusion

Ultimately, the only sensible route to preserving a distinction between attorneys engaged in the practice of law and debt collection attorneys lies in giving an ordinary meaning of terms "collect," "collecting," "collection" and "debt collection" which is used throughout the FDCPA, and defining the term to mean making demand for payment, but excluding what transpires in judicial proceedings.

This construction is consistent with the terms plain meaning, the regulatory and legislative history, the common law, the First Amendment and *Noerr-Pennington* doctrine. It is also consistent with the apparent Congressional intent in Dodd-Frank to except the CFPB "supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law," but allow for regulation of attorneys who were not engaged in the practice of law but were engaged in debt collection.

Respectfully Submitted,

/s/ Michael D. Slodov

Michael D. Slodov, Esq.