



May 6, 2021

Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Sent via E-Mail: 2021-IFR-Eviction-Notice@cfpb.gov

Re: Consumer Financial Protection Bureau (CFPB) Interim final rule
Debt Collection Practices in Connection with the Global COVID-19 Pandemic (Regulation
F)
Docket No. CFPB-2021-0008 RIN 3170-AA41

Dear Acting Director Uejio:

We submit this comment in response to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") interim final rule Debt Collection Practices in Connection with the Global COVID-19 Pandemic (Regulation F) on behalf of the National Creditors Bar Association ("NCBA"). The NCBA is the only bar association in the country dedicated to promoting and protecting all creditors' rights attorneys, including attorneys who collect consumer debt. NCBA member firms practice law in a manner consistent with their responsibilities as officers of the court and must adhere to rules of state civil procedure, state bar association licensing, certification requirements, and the rules of professional conduct of each state in which they practice. NCBA's values are: Professional, Ethical, Responsible.

Important facts about NCBA member firms are as follows:

- Over 2,500 creditors' rights attorneys in over 400 law firms and other creditors' rights practices in all 50 states, Canada, Puerto Rico, and the United Kingdom;
- The majority of NCBA law firms are considered small businesses pursuant to the Small Business Administration classification;
- 45% practice creditors' right law across multiple state jurisdictions;
- NCBA member law firms are subject to audits on a regular basis by their clients and devote significant time and resources on compliance and preparing for those audits; and
- NCBA member firms practice various subsets of creditors' rights law including:

Auto Loans
Bankruptcy
Commercial Collections
Contracts – General
Credit Cards
Credit Unions
Family Support

FDCPA Defense
Foreclosure
Government/Tax
HOA
Insurance Subrogation
Judgment Enforcement
Landlord/Tenant
Liens/Mechanic's Liens
Medical Bills
Probate
Repossession/Replevin
Student Loans
Utilities/Communications

Attorneys, like lenders and consumers, are a necessary part of the “credit ecosystem.” More than half of NCBA members represent local small businesses including retail establishments, small or regional banks, credit unions, and small medical providers. These are long-term attorney-client relationships that have existed, on average, for over two decades. These small business clients do not have vast legal departments or even in-house attorneys and rely on their local attorneys to ensure that outstanding receivables are paid so that their businesses can continue to operate.

Attorneys who are members of NCBA law firms understand that they are officers of the court and work diligently to ensure that consumers, especially those that appear *pro se* in court, are treated fairly and with dignity and respect. Although our legal system is complex, NCBA attorneys make every effort to work with consumers throughout the legal process including efforts to help resolve their debts in a reasonable manner.

Request to Correct the Record

P. 11: “Therefore, attorneys who engage in eviction proceedings on behalf of landlords or residential property owners to collect unpaid residential rent may be “debt collectors” as defined by the FDCPA.⁴²”

Footnote 42: According to the National Creditors Bar Association, 52 percent of their members practice in the area of landlord and tenant law, <https://www.creditorsbar.org/about-ncba> (last visited Apr. 3, 2021) (NCBA)

The Bureau’s IFR in the above referenced footnote notes inaccurate information. The data taken from NCBA’s website reflected self-reported information as of 2018. Currently, NCBA data indicates that only 25% of the NCBA members practice landlord-tenant law. Of those, most define their representation of landlords as pursuing the balance due and owing under defaulted residential and commercial leases for past due rent and physical damages to the rented premises post-eviction. An even smaller subset of NCBA members file actions for possession of the premises and evictions. It is estimated that approximately 5-10% of NCBA members file evictions proceedings on behalf of landlords on a regular basis.

NCBA supports hardship accommodations for consumers and tenants

P. 18 “The Bureau has concluded that consumer harms associated with evictions during the COVID-19 pandemic necessitate immediate action, specifically pertaining to the activity of debt collectors who are involved in the evictions process during the pendency of the CDC Order. For these reasons and the reasons discussed below, the Bureau is amending Regulation F in this interim final rulemaking to require certain debt collectors to provide written notice to certain consumers of their protections under the CDC Order’s eviction moratorium and prohibit certain misrepresentations.”

NCBA supports the need for residential tenants to be fully informed of all their available rights and relevant protections. However, with the exception of New Jersey, actions seeking possession and eviction are not considered “debt collection” under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692, *et seq.*; 15 U.S.C. § 1692f(6)(A). While the CFPB purports to derive its rulemaking authority in this instance under the FDCPA, we feel the CFPB is overstepping since such possessory actions are, generally, not considered “debt collection.”

The Supreme Court ruled in the case of the *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019) that the defendant McCarthy & Holthus was not considered a debt collector by definition as in this instance they pursued non-judicial foreclosures. The Court in *Obduskey* stated:

Here, however, the notices sent by McCarthy were antecedent steps required under state law to enforce a security interest, and the Act’s (partial) exclusion of “the enforcement of security interests” must also exclude the legal means required to do so.

Obduskey, 139 S. Ct. at 1033-32.

The CFPB's IFR is attempting to require a notice as an "antecedent step" to the landlord's enforcement of its security interest to regain possession of the rented premises. Accordingly, such notices are beyond the scope of the CFPB's authority as the enforcement of a security interest is not subject to the FDCPA.

It is uncontroverted that the Bureau has no authority to regulate landlords' conduct and just as the CDC is extending their authority to create an evictions moratorium, the Bureau is by extension looking to offer notices of the CDC's protections to tenants by regulating the only entities engaged in the legal process over which the Bureau has current authority. It should be noted that the CDC's Order has been challenged numerous times, with some Court holding that the CDC's Order is unconstitutional.¹

Despite believing that the CDC is overstepping, NCBA has been an outspoken advocate for consumers throughout the pandemic. In fact, NCBA, at the onset of the pandemic, was one of the first trade associations to call for robust hardship accommodations for affected consumers. With the passage of the CARES Act, NCBA communicated with the White House, the Secretary of the Treasury, and Congressional leaders in both the Senate and House of Representatives, on both sides of the aisle, calling for either regulatory or legislative exemption of direct stimulus payments from bank garnishment. NCBA reiterated the need for either regulatory or legislative exemptions for each of the following two additional stimulus checks sent to consumers.

As noted in the IFR, each State has different rules regarding evictions and possessory actions, including specific notice requirements and procedures. By attempting to issue additional notice requirements, the Bureau is extending private rights of action and class action liability to the attorney retained to represent the landlord. While NCBA has no issue with this requirement being placed on the landlord or made part of the CDC Order, placing the obligation to advise the tenant as part of the pleading requirement on the attorney that is not part of any particular State Court Rule, State statute or local ordinance is an overreach. In most instances the notices sent to the tenant are facilitated by the landlord and not the attorney who files the Court action for evictions. Imposing court rules on the judiciaries of individual States and local jurisdictions violates the separation of powers clause of the Constitution.

¹ See, e.g., *Tiger Lily, LLC v. U.S. Dep't of Housing & Urban Dev.*, No. 2:20-cv-2692, ___ F. Supp. 3d ___, 2021 U.S. Dist. LEXIS 59100, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021), *aff'd*, 992 F.3d 518 (6th Cir. Mar. 29, 2021); *Skyworks, Ltd. V. CDC*, No. 5:20-cv-2407, ___ F. Supp. 3d ___, 2021 U.S. Dist. LEXIS 44633, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021); *Terkel v. CDC*, No. 6:20-cv-00564, ___ F. Supp. 3d ___, 2021 U.S. Dist. LEXIS 35570, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021), *appeal docketed*, No. 21-40137 (5th Cir. Mar. 3, 2021); *Chambless Enters., LLC v. Redfield*, No. 3:20-cv-1455, ___ F. Supp. 3d ___, 2020 U.S. Dist. LEXIS 241269, 2020 WL 7588849 (W.D. La. Dec. 22, 2020), *appeal docketed*, No. 21-30037 (5th Cir. Jan. 22, 2021); *Brown v. Azar*, No. 1:20-cv-3702, ___ F. Supp. 3d ___, 2020 U.S. Dist. LEXIS 201475, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020), *appeal docketed*, No. 20-14210 (11th Cir. Nov. 9, 2020). *Alabama Association of Realtors v. U.S. Dept. of Health & Human Servs., et al.*, No. 20-cv-3377 (DLF), *slip op.* (D.C. Dist. May 5, 2021).

Conclusion

The NCBA respectfully requests that the CFPB consider the issues outlined above.

Thank you for considering the views of NCBA on this issue. If you have any questions regarding the NCBA's position on the Interim Final Rule, please contact NCBA Government Affairs Officer Nathan Willner at (410) 382-7588 or nathan@creditorsbar.org

Sincerely,

A handwritten signature in black ink, appearing to read "Liz Terry". The signature is fluid and cursive, with a large initial "L" and "T".

Liz Terry
Executive Director
National Creditors Bar Association