

Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 23, 2009

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Dear Ms. Anderson and Mr. Beato:

This responds to an issue raised in your comment filed on February 11, 2008, on behalf of American Collectors Association International, with the Federal Trade Commission ("Commission") and other agencies charged by Congress in Section 312 of the FACT Act with writing regulations relating to certain duties of furnishers of information to consumer reporting agencies ("CRAs"). On pages 7-8 of your comment, you urged the following action:

To avoid a statutory conflict between the FDCPA and FACT Act, the regulation should clarify that the act of responding to a consumer dispute is not an attempt to collect a debt under the FDCPA. Further the regulation should clarify that a consumer that sends a written dispute to a furnisher *after* having invoked his or her cease communication rights under the FDCPA has revoked his or [her] cease communication instruction for purposes of communicating with the furnisher to process the dispute. (Emphasis yours)

The Commission is treating this portion of your comment as a request for an advisory opinion interpreting the Fair Debt Collection Practices Act (FDCPA) pursuant to Sections 1.1-1.4 of its Rules of Practice. 16 C.F.R. §§ 1.1-1.4. The subject matter of the request and consequent publication of this Commission advice is in the public interest. 16 C.F.R. § 1.1(a)(2). Specifically, it is in the public interest for the Commission to clarify the intersection of the FDCPA and this new rule implementing the FACT Act, thus encouraging debt collector compliance with both laws.

The applicable provisions of the FDCPA and the furnisher disputes rule (Rule) are:

- Section 805(c) of the FDCPA provides that if a consumer has notified a debt collector in writing that "the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate with the consumer with respect to such debt" (with some exceptions not applicable here).
- The Rule requires furnishers of information to CRAs to report the results of a direct dispute to the consumer, 16 CFR § 660.4(e)(3), or notify the consumer if the furnisher determines the dispute is frivolous or irrelevant. 16 CFR § 660.4(f)(2).

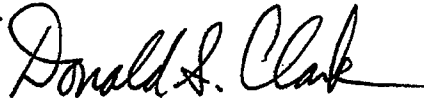
APR 19 2010

The potential conflict arises when a consumer orders a debt collector in writing to cease communication, but at some future time submits a direct dispute about information the debt collector has provided to a CRA. The Rule requires the collector to notify the consumer either of the results of the investigation or of its determination that the dispute is frivolous or irrelevant. Section 805(c) of the FDCPA, however, prohibits the collector from communicating with that consumer with respect to the debt, which could be interpreted to include providing the notice that the Rule requires.

The Commission does not believe that providing the notice the Rule requires undermines the purpose of Section 805(c) of the FDCPA. Section 805(c) empowers consumers to direct collectors to cease contacting them to collect a debt so that consumers can be free of the burden of being subject to unwanted communications. In contrast, communications from debt collectors which do nothing more than respond to disputes consumers themselves have raised do not impose such a burden. Rather, such communications benefit consumers through providing them with information demonstrating that collectors have been responsive to their disputes.

After reviewing the language of the FDCPA and the Rule, and considering the goals of the statute and the regulation, the Commission concludes that a debt collector does not violate Section 805(c) of the FDCPA if the consumer directly disputes information after sending a written "cease communication" to the collector, and the collector complies with the Rule by means of a communication that has no purpose other than complying with the Rule by stating (1) the results of the investigation or (2) the collector's belief that the communication is frivolous or irrelevant.

By direction of the Commission.



Donald S. Clark
Secretary



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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

March 19, 2008

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Dear Ms. Sinsley and Mr. Newburger:

This is in response to the request from the USFN, formerly known as the U.S. Foreclosure Network, for a Commission advisory opinion ("Request") regarding whether the Fair Debt Collection Practices Act ("FDCPA")¹ prohibits a debt collector in the foreclosure context from discussing settlement options in the collector's initial or subsequent communications with the consumer. The Request asserts that the receipt of information about settlement options could enable the consumer to save his or her home from foreclosure. As explained more fully below, the Commission concludes that debt collectors do not commit a *per se* violation of the FDCPA when they provide such information to consumers. Moreover, the Commission believes that it is in the public interest for consumers who may be subject to foreclosure to receive truthful, non-misleading information about settlement options, especially in light of the recent prevalence of mortgage borrowers who are delinquent or in foreclosure.²

¹ 15 U.S.C. §§ 1692 - 1692p.

² According to press reports, in 2007, there were an estimated 2.2 million foreclosure filings in the United States, a 75% increase from 2006. The number of foreclosure filings increased late in 2007 – in December there were 215,749 foreclosure filings, a 97% increase from the number of filings in December 2006. December was the fifth consecutive month in which foreclosure filings topped 200,000. Associated Press, *Home Foreclosure Rate Soars in 2007*, N.Y. TIMES, Jan. 29, 2008, available at www.nytimes.com/aponline/us/AP-Foreclosure-Rates.html. Mortgage delinquency is also escalating. The number of borrowers falling behind on first-lien mortgage payments for residences during 2007 was the highest it has been since 1986 – 2.64 million borrowers fell behind on payments. Michael M. Phillips, Serena Ng & John D. McKinnon, *Battle Lines Form Over Mortgage Plan*, WALL ST. J., Dec. 7, 2007, at A1.

USFN submitted the Request pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1-1.4. The Request focuses on two sections of the FDCPA, Sections 807 and 809, 15 U.S.C. §§ 1692e, 1692g,³ and presents three specific questions for consideration:

- (1) Does a debt collector violate the FDCPA when he, in conjunction with the sending of a "validation notice" pursuant to Section 809(a) of the FDCPA, notifies a consumer of settlement options that may be available to avoid foreclosure?
- (2) Does a debt collector violate the FDCPA when he, subsequent to sending the validation notice pursuant to Section 809(a) of the FDCPA, notifies a consumer of settlement options that might be available to avoid foreclosure?
- (3) Does a debt collector commit a false, misleading or deceptive act or practice in violation of Section 807 of the FDCPA when he presents to a consumer settlement options that are available to the consumer to avoid foreclosure?

The Request states that there is no case law addressing these specific questions. We address the questions *seriatim*.

USFN's first two questions specifically reference Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a). Section 809(a) provides, in pertinent part, that a debt collector must, within the first five days after the initial communication with the debtor, provide a written notice containing specific information including the amount of the debt, the debtor's right to dispute the validity of the debt in writing within 30 days, and the collector's obligation to obtain verification of the debt in response to the consumer's dispute document. Congress enacted Section 809 to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."⁴

Section 809(a) does not expressly prohibit debt collectors from adding language to the written validation notice with the mandatory disclosures. The statute also does not expressly prohibit debt collectors from presenting information to consumers about settlement options in subsequent communications. The Commission therefore concludes that there is no *per se* violation of Section 809(a) of the FDCPA if a debt collector includes information regarding foreclosure settlement options along with a validation notice or in subsequent communications after that notice is delivered.

³ The Commission has considered only these sections in rendering this opinion and it should not be construed to pertain to any other section of the FDCPA, to any other law, or to any issue of legal ethics.

⁴ S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698.

Nevertheless, collectors must take care that communicating information about settlement options does not undermine the consumer protections in Section 809(a). The touchstones of Section 809(a) are the consumer's rights to dispute his or her debt in writing within 30 days and to obtain verification of that debt from the collector. To protect these rights, in 2006 Congress amended Section 809(b) to expressly state that "[a]ny collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt. . . ."⁵ This statutory amendment ratified court decisions holding that debt collectors that provide consumers with information in addition to the mandatory disclosures violate Section 809(a) if the additional information effectively obscures the consumer's right to dispute his or her debt and obtain verification from the collector.⁶ Specifically, these cases concluded that providing additional information is unlawful if it overshadows or contradicts required disclosures or creates confusion regarding the basic right to dispute the debt and obtain verification from the collector.⁷ In making these determinations, courts considered the communication from the perspective of an unsophisticated consumer.⁸

In sum, with respect to USFN's first two questions presented in its Request, the Commission concludes that there is no *per se* violation of Section 809(a) if a debt collector in the foreclosure context discusses settlement options in the collector's initial or subsequent communications with the consumer. This conclusion, however, does not prevent a fact-based finding that a specific communication violates the Act if it overshadows or is inconsistent with the disclosures of the consumer's right to dispute the debt within 30 days.

USFN's third question asks whether a debt collector commits a false, misleading or deceptive act or practice in violation of Section 807 of the FDCPA when he presents to a consumer settlement options that are available to the consumer to avoid foreclosure. Section 807 of the FDCPA establishes a general prohibition against the use of any "false, deceptive or misleading representation or means in connection with the collection of any debt" and provides a list of 16 specific practices that are *per se* false, deceptive or misleading under the Act. In enacting Section 807, Congress noted that this general prohibition on deceptive collection practices would "enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."⁹

⁵ 15 U.S.C. § 1692g(b).

⁶ See, e.g., *Swanson v. Oregon Credit Servs.*, 869 F.2d 1222 (9th Cir. 1988).

⁷ *Id.*; See, e.g., *Durkin v. Equifax Check Servs.*, 406 F.3d 410 (7th Cir. 2005); *Shapiro v. Riddle & Assocs.*, 351 F.3d 63 (2d Cir. 2003); *Renick v. Dun & Bradstreet Receivable Mgmt. Servs.*, 290 F.3d 1055 (9th Cir. 2002).

⁸ See, e.g., *Sims v. G.C. Servs.*, 445 F.3d 959 (7th Cir. 2006) ("unsophisticated consumer"); *Smith v. Transworld Sys.*, 953 F.2d 1025 (6th Cir. 1992) ("least sophisticated consumer").

⁹ S. Rep. No. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1698.

As a general matter, the Commission concludes that a debt collector's communication with a consumer regarding his or her options to resolve mortgage debts and to potentially avoid foreclosure would not necessarily violate either the general or specific prohibitions of Section 807. However, we also stress that a particular communication with settlement option information could be deceptive in violation of Section 807 if it contains a false or misleading representation or omission of material fact. Determining whether a specific communication is false or misleading is a fact-based inquiry that considers all the facts and circumstances surrounding the particular communication at issue.¹⁰

After reviewing the language of the FDCPA, its legislative history, and relevant case law, as well as the information contained in the Request, the Commission concludes that a debt collector in the foreclosure context does not commit a *per se* violation of Sections 807 or 809 of the FDCPA when he or she addresses settlement options in the collector's initial or subsequent communications with the consumer.

By direction of the Commission.

Donald S. Clark
Secretary

¹⁰ See *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985) (noting that FDCPA expands pre-existing FTC deception authority); see also *FTC Policy Statement on Deception, appended to In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174-84 (1984) (setting forth deception test).



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 5, 2007

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Dear Mr. Beato:

This is in response to ACA International's ("ACA's") request for a Commission advisory opinion ("Request") regarding whether the Fair Debt Collection Practices Act ("FDCPA") prohibits a debt collector from notifying a consumer who disputed a debt that the collector has ceased its collection efforts. ACA submitted the Request pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1-1.4. As explained more fully below, the Commission concludes that a debt collector providing such a notice to a consumer would not violate the FDCPA.

The Request focuses primarily on Section 809 of the FDCPA, 15 U.S.C. § 1692g. Section 809(a) provides that, within five days after its initial communication with a consumer about a debt, a debt collector must send the consumer a written notice. Among other things, this notice must state that "if the consumer notifies the debt collector in writing within [thirty days after receipt of the notice] that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector." Section 809(b) provides that if a consumer provides such a notice, the debt collector must cease collection until it has obtained verification of the debt or a copy of the judgment and mailed it to the consumer.

In July 2007, ACA amended its Code of Ethics and Code of Operations ("Ethics Code"). If a debt collector receives a written request for verification and is unable to verify the debt, the Ethics Code now requires "the cessation of all collection efforts, removal of the account from the consumer's credit report or reporting the account as disputed, and prompt notification of the **creditor or legal owner** of the debt that collection activities have been terminated due to the inability to provide verification information." Request at 3 (emphasis added). ACA "also has considered amending the Ethics Code to promote the notification of a **consumer** that collection activity has been terminated if the debt collector is unable to verify the debt following the receipt of a written request for verification." *Id.* (emphasis added). However, ACA has not yet amended its Ethics Code to include such a provision because of "concern that communication with the consumer following a request for verification might be construed as an attempt to collect, even though the intention merely is to inform the consumer that there will no further collections." *Id.* at 2.

APR 19 2010

We note first that courts have construed Section 809(b) as giving debt collectors two options when they receive a written dispute or a request for verification¹: (1) provide the requested verification and continue collection activities, or (2) cease all collection activities. If the debt collector ceases collection, it is not required to provide verification. *See, e.g., Guerrero v. RJM Acquisitions LLC*, 2007 U.S. App. LEXIS 20072, at *35-36 (9th Cir. Aug. 23, 2007); *Jang v. A.M. Miller & Assocs.*, 122 F.3d 480,483 (7th Cir. 1997); *Wilhelm v. Credico Inc.*, 426 F. Supp. 2d 1030, 1036 (D.N.D. 2006); *Zaborac v. Phillips and Cohen Assocs*, 330 F. Supp. 2d 962, 966 (N.D. Ill. 2004); *Sambor v. Omnia Credit Servs., Inc.*, 183 F. Supp. 2d 1234, 1243 (D. Haw. 2002).

The Request poses the question of whether a debt collector that discontinues debt collection activities after receiving a written request for verification can inform the consumer that it has done so without violating the FDCPA. As noted above, Section 809(b) requires a debt collector to cease collection of a debt until the collector has provided verification of the debt to the consumer if the consumer, in writing within the thirty-day window, has either disputed the debt or requested verification. If a debt collector cannot provide such verification to the consumer, merely informing the consumer that debt collection efforts have been terminated is not an attempt to collect a debt and therefore does not violate the FDCPA.²

We note that Congress enacted Section 809 to “eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.”³ The provision allows a consumer who does not believe that he or she owes a debt to require that the debt collector obtain and provide verification prior to contacting the consumer

¹ Courts interpreting Section 809(b) have used the phrases “disputing the debt,” “requesting verification,” and “requesting validation” interchangeably. *See, e.g., Jang v. A.M. Miller and Assocs.*, 122 F.3d 480, 482 (7th Cir. 1997) (collection agencies “ceased collection activities immediately upon receiving the requests for validation, in compliance with [Section 809(b)]”); *Wilhelm v. Credico Inc.*, 426 F. Supp. 2d 1030, 1036 (D.N.D. 2006) (debt collector’s Section 809(b) obligations triggered “once a debt collector receives a request for verification”); *Sambor v. Omnia Credit Servs., Inc.*, 183 F. Supp. 2d 1234, 1243 (D. Haw. 2002) (debt collector’s Section 809(b) obligations triggered “[w]hen timely asked in writing to validate a debt”); *see also Clark’s Jewelers v. Humble*, 823 P.2d 818, 821 (Kan. Ct. App. 1991) (a consumer need not use the word “dispute” to trigger the debt collector’s obligation to cease collection and provide verification of the debt, as long as the consumer’s notice makes clear that the debt is contested).

² The Request also raises the question whether a notice informing a consumer that collection efforts have ceased “might be construed as a ‘communication’ in furtherance of collecting the debt.” Request at 5. Regardless of whether such a notice is a “communication” under 15 U.S.C. § 1692a(2), a debt collector telling a consumer that debt collection has ceased is not “in furtherance of collecting the debt.”

³ S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698.

again. The purpose of Section 809 therefore is to stop further calls and letters from collectors unless the consumer incurred and continues to owe the debt. Interpreting Section 809 as allowing debt collectors to notify consumers that they have ceased collection efforts, without conveying any other message, is consistent with this purpose. A consumer receiving such a notice would benefit both from having the calls and letters from that collector stop and from knowing that the collector will not renew its collection efforts.⁴

The only other FDCPA provision that could be implicated by the notification that ACA proposes to require of its members is Section 805(c). That provision provides that, if a consumer notifies a debt collector in writing that he or she “refuses to pay a debt or . . . wishes the debt collector to cease further communication,” the debt collector is not permitted to communicate further with the consumer about the debt. However, Section 805(c) includes an express exception to its prohibition on communication that permits a debt collector to “advise the consumer that the debt collector’s further efforts are being terminated.” Thus, even if a consumer demands in writing that a debt collector cease communicating about a debt, the debt collector would not violate Section 805(c) if it notified the consumer that the collector’s collection efforts have ceased.⁵

After reviewing the language of the FDCPA and its legislative history as well as information contained in the Request, the Commission concludes that a debt collector does not violate the FDCPA if, after receiving written notice of a dispute, it informs the consumer that it has ceased collection efforts.

By direction of the Commission.

Donald S. Clark
Secretary

⁴ Even if, as the amended Ethics Code now requires, a debt collector that is unable to provide verification of a debt ceases collection efforts, closes the account, and notifies the credit grantor, client, or owner of legal title to the debt that collection activities have been terminated because the collector could not provide verification of the debt, the credit grantor, client, or debt owner might choose to refer the account to a different debt collector. Thus, although the consumer will no longer be contacted by the first debt collector, he or she might receive collection calls and letters from a different debt collector.

⁵ We note, however, that any such communication must not violate any other FDCPA provision.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

March 31, 2000

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Washington, D.C. 20036

Dear Mr. Mezines:

This is in response to the American Collectors Association's ("ACA's") request for two Commission advisory opinions ("Request") regarding the Fair Debt Collection Practices Act ("FDCPA"), which the association submitted pursuant to Sections 1.1 - 1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1 - 1.4. The two issues will be addressed in the order in which they were presented.

FIRST ISSUE:

Does Section 809(b) of the FDCPA permit a collection agency to either demand payment or take legal action during the pendency of the thirty (30) day period for disputing a debt in situations where a debtor has not notified the collection agency that the debt is disputed?

"[The] starting point in every case involving construction of a statute is the language itself." *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). The language of Section 809(b) provides that, "[i]f the consumer notifies the debt collector in writing within the thirty-day period" that the debt is disputed, the debt collector must cease collection of the debt until verification of the debt is obtained and mailed to the consumer.⁽¹⁾ Where Congress intended that debt collectors cease their collection efforts during the thirty-day dispute period, it so specified: if, and only if, a consumer sends the debt collector a notice in writing. Congress did not specify that collectors must cease collection efforts during the dispute period even if consumers send nothing in writing.

The Commission has voiced this opinion in recent annual reports to Congress mandated by the FDCPA. As the Commission stated in the 1999 report, for example, "Nothing within the language of the statute indicates that Congress intended an absolute bar to any appropriate collection activity or legal action within the thirty-day period where the consumer has not disputed the debt." Letter from Chairman Robert Pitofsky to the Honorable Albert Gore, Jr. regarding Twenty-First Annual Report to Congress Pursuant to Section 815(a) of the Fair Debt Collection Practices Act, at 10 (Mar. 19, 1999) ("1999 Annual Report"). Because there appears to be some confusion regarding whether the thirty-day period is a dispute period or a grace period, the Commission has recommended in recent annual reports that Congress clarify the FDCPA by adding a provision expressly permitting appropriate collection activity within the thirty-day period, if the debt collector has not received a letter from the consumer disputing the debt. The Commission emphasized that the clarification should include a caveat that the collection activity should

not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt specified. 1999 Annual Report at 10-11.⁽²⁾

Federal circuit courts that have addressed this issue recently have arrived at the same conclusion. In a 1997 opinion, the Seventh Circuit stated that "[t]he debt collector is perfectly free to sue within the thirty days; he just must cease his efforts at collection during the interval between being asked for verification of the debt and mailing the verification to the debtor." *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997) (Posner, J.). In the most recent federal appellate court pronouncement on the subject, the Sixth Circuit stated, "A debt collector does not have to stop its collection efforts [during the thirty-day period] to comply with the Act. Instead, it must ensure that its efforts do not threaten a consumer's right to dispute the validity of his debt." *Smith v. Computer Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir. 1999).

The Commission continues to believe that the thirty-day time frame set forth in Section 809 is a *dispute* period within which the consumer may insist that the collector verify the debt, and not a *grace* period within which collection efforts are prohibited. In response to the ACA's question, therefore, the Commission opines that Section 809(b) does permit a collection agency to either demand payment or take legal action during the thirty-day period for disputing a debt when a consumer from whom the collection agency is attempting to collect a debt has not notified the collection agency that the debt is disputed. The collection agency must ensure, however, that its collection activity does not overshadow and is not inconsistent with the disclosure of the consumer's right to dispute the debt specified by Section 809(a).

SECOND ISSUE:

Where an attorney debt collector institutes legal proceedings against a debtor but has no prior communications with the debtor, are the requirements for the validation of debts set forth in Section 809 of the FDCPA supreme to state law or state court rules that otherwise prohibit the inclusion of the validation notice on court documents?

In responding to this issue, the Commission notes first that Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a), provides:

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing --

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and

address of the original creditor, if different from the current creditor.

Section 803(2) of the FDCPA, 15 U.S.C. § 1692a(2), defines the term "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." In its Staff Commentary, Commission staff stated that the term "communication" "does not include formal legal action (e.g., filing of a lawsuit or other petition/pleadings with a court; service of a complaint or other legal papers in connection with a lawsuit, or activities directly related to such service)." 53 Fed. Reg. at 50101, comment 803(2)-2. Similarly, in the introductory portion of the Staff Commentary, Commission staff opined that "[a]ttorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but those whose practice is limited to legal activities are not covered."⁽³⁾ *Id.* at 50,100.

Seven years after the Staff Commentary was issued, the United States Supreme Court held that the FDCPA's definition of "debt collector," Section 803(6), 15 U.S.C. § 1692a(6), "applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995). In arriving at this conclusion, the Court explicitly considered and rejected Commission staff's introductory remark regarding the coverage of litigation attorneys. *Id.* at 298. In light of *Heintz*, the Commission concludes that, if an attorney debt collector serves on a consumer a court document "conveying [] information regarding a debt," that court document is a "communication" for purposes of the FDCPA.⁽⁴⁾

If an attorney debt collector has had no prior communications with a consumer before serving a summons or other court document on the consumer, that document would constitute the "initial communication" with the consumer if it conveys information regarding a debt. The attorney would therefore have to include the written notice mandated by Section 809(a) (often referred to as the "validation notice") in the court document itself or send it to the consumer "within five days after the initial communication."

According to the ACA's Request, some "state laws or state court rules [] prohibit the inclusion of additional language such as the validation notice on documents filed with courts." Request at 9. The association asks whether the requirements of Section 809(a) are "supreme to," and thus preempt, these state laws or state court rules. *Id.* Preemption cases generally proceed from "the starting presumption that Congress does not intend to supplant state laws." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).⁽⁵⁾ According to the Court in *English v. General Electric Co.*, 496 U.S. 72 (1990):

[S]tate law is pre-empted under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so

dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 78-79 (omission in internal quotation in original) (citations omitted).

The preemption provision of the FDCPA, Section 816, 15 U.S.C. § 1692n, provides:

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

The Commission does not believe that this section expressly preempts state laws and court rules that prohibit attorney debt collectors from including validation notices in court documents. The quoted provision makes express that Congress did not intend to preempt the field, but allowed only for conflict preemption. However, there is no conflict preemption here.

First, there is no conflict preemption based on impossibility of compliance because it is possible for attorney debt collectors to comply with both the federal provision and the state provisions.⁽⁶⁾ Instead of including such notices in court documents, attorney debt collectors in jurisdictions that prohibit validation notices in court documents may deliver the notices to consumers via some other medium -- either before serving the court document on the consumer or, if the court document is truly the first communication with the consumer, within five days of serving the court document.⁽⁷⁾

Second, there is no conflict preemption based on state law standing as an obstacle to the full accomplishment and execution of Congressional purposes and objectives. As Congress declared in Section 802(e) of the FDCPA, 15 U.S.C. § 1692(e), the purpose of the panoply of protections under the federal debt collection statute is:

to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

The state provisions about which you inquire do not prevent consumers from receiving the full panoply of protections from abusive debt collection practices afforded by the FDCPA. The only FDCPA provision that could be affected by these state laws and court rules is Section 809(a). As noted above, an attorney debt collector who is prohibited from including the validation notice in court documents may deliver the notice to consumers before serving the consumer with the court document or, if the court document is the first communication with the consumer, within five days after serving the court document. Thus, even in a jurisdiction that prohibits validation notices in court documents, a

consumer will receive the validation notice and learn, for example, that the debt collector must provide the consumer with written verification of the debt if the consumer disputes the debt within thirty days. State legislation that prohibits validation notices in court documents also does not stand as an obstacle to the promotion of "consistent State action to protect consumers against debt collection abuses." Consumers will receive their validation notices in jurisdictions that prohibit validation notices in court documents as well as in jurisdictions that permit the practice.

After reviewing state laws and court rules that prohibit validation notices in court documents under a preemption analysis, the Commission concludes that such state legislation is not preempted by the FDCPA.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes

1. Section 809(b), 15 U.S.C. § 1692g(b), provides:

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

2. In the Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097 (1988) ("Staff Commentary"), and staff opinion letters, Commission staff have consistently read Section 809(b) to permit a debt collector to continue to make demands for payment or take legal action within the thirty-day period. See 53 Fed. Reg. at 50,109, comment 809(b)-1 ("A debt collector need not cease normal collection activities within the consumer's 30-day period to give notice of a dispute until he receives a notice from the consumer."); letter from John F. LeFevre, FDCPA Program Advisor, to S. Joshua Berger (May 29, 1997):

We interpret the "thirty-day period" as a period within which consumers must dispute their debts in writing in order to avail themselves of their Section 809(b) rights, but not as a "grace" period. Thus, we believe that there is nothing in the Act that prevents you from filing suit during this period, so long as you do not make any representations that contradict Section 809 (b).

3. The introductory remarks were not part of the Commentary itself. The statement in the Commentary that the quoted remark referred to provided that the term "debt collector" does not include "[a]n attorney whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment)." 53 Fed. Reg. at 50,102, comment 803(6)-2.

4. In an opinion letter issued after the *Heintz* decision, Commission staff opined that "all pleadings must be considered 'communications' if they convey 'information regarding a debt directly or indirectly to any person through any medium.'" Letter from John F. LeFevre, FDCPA Program Advisor, to S. Joshua Berger (May 29, 1997). See also *Mendus v. Morgan & Associates*, 1999 Okla. Civ. App. LEXIS 140, at *19 (Okla. Civ. App. 1999) ("[A] pleading or a summons is a 'communication' under the [FDCPA].").

5. This presumption does not apply to all cases. In particular, the Supreme Court recently held that it does not apply to state laws bearing upon national and international maritime commerce. *United States v. Locke*, 120 S. Ct. 1135, 1148 (2000). *Locke* was apparently based on the relatively large traditional federal role in this area and the relatively small traditional state role, see *id.* at 1147-48, and does not affect the current analysis.

6. See *Codar, Inc. v. Arizona*, No. 94-16902, 1996 U.S. App. LEXIS 21536, at *14-15 (9th Cir. Aug. 19, 1996) (memorandum) (Arizona laws requiring debt collectors to be licensed in the state before they may contact consumers preempted by Section 816 to the extent they prevent unlicensed out-of-state collector from providing Section 809(a) validation notices to Arizona residents who contact such debt collectors to discuss alleged debts; preemption because unlicensed out-of-state collectors that send validation notice would violate state law).

7. The Request refers to a Commission staff opinion letter which advised that, "[u]nder the principles that the Supreme Court set out in *Heintz v. Jenkins*, law firms that are 'debt collectors' presumably must include Section 809 notices in connection with every summons, if the summons is the first communication with the consumer in connection with the collection of a debt." Letter from Thomas E. Kane to Gordon N.J. Kroft (Mar. 8, 1996). While the letter was not binding on the Commission, it does accurately interpret the statute. An attorney debt collector must provide the validation notice "in connection with every summons," if the summons is the first communication with the consumer in connection with the debt. As the Commission notes here, however, the validation notice need not be included in the summons itself. It may be delivered either before or within five days after the summons is served on the consumer.