No. 11-492

In The Supreme Court of the United States

LAW OFFICES OF MITCHELL N. KAY, P.C.,

Petitioner,

v.

DARWIN LESHER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.2(b), the National Association of Retail Collection Attorneys ("NARCA") respectfully moves this Court for permission to file the attached brief as amicus curiae in support of Petitioner. In accordance with Rule 37.2(a), NARCA has provided notice to counsel for the parties of NARCA's intent to file a brief more than ten (10) days prior to the due date for the brief. Petitioner has consented, but Respondent has not consented.

As the only nationwide, not-for-profit trade association dedicated to the needs of consumer collection attorneys, NARCA has a keen interest in the outcome of this case and believes that it can bring an important additional perspective to the issues raised on behalf of its members. NARCA members must understand and comply with the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. (the "FDCPA" or the "Act"), and thus NARCA has a significant interest in ensuring that the FDCPA is interpreted to allow its members to be zealous advocates for the interest of their creditor clients.

In its brief, NARCA explains why the ruling of the Third Circuit should be reversed, because it improperly disrupts the attorney-client relationship between NARCA members and their creditor clients. The FDCPA does not regulate the practice of law, nor does it govern the relationship between a collection attorney and his client. The Act does not define when an attorney is acting "as an attorney" or in a "legal capacity" for his client, and when he is not. The FDCPA should not be used as a mechanism to dictate

the steps that an attorney must take in order to properly represent his client.

NARCA respectfully requests that the Court grant it leave to file the attached brief, and for the reasons stated therein, that it grant the petition and reverse the ruling of the Third Circuit.

Dated: November 16, 2011

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

INTEREST OF *AMICUS CURIAE*

The National Association of Retail Collection Attorneys ("NARCA") is a nationwide, not-for-profit trade association comprised of attorneys and law firms engaged in the practice of debt collection law.[1] NARCA members include over 700 law firms located in all fifty states, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by NARCA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of state laws and regulations that govern attorneys.

NARCA members are regularly engaged by creditors to lawfully collect delinquent consumer debts, and thus must interpret and comply with federal and state laws governing debt collection, including the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. (the "FDCPA" or the "Act"). As the only national trade association dedicated solely to the needs of consumer collection attorneys, NARCA has a significant interest in ensuring that the FDCPA is

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file. The petitioner has consented to the filing of this brief and that consent has been filed with the Court. The respondent withheld consent and therefore a motion for leave to file is included with this brief.

interpreted in a manner that allows collection attorneys to discharge their ethical duty to zealously and lawfully advance their client's legitimate interests.[2]

SUMMARY OF ARGUMENT

NARCA writes separately on behalf of its members to urge the Court to grant the petition and reverse the decision of the Third Circuit. If the ruling stands, it will improperly disrupt the attorney-client relationship between NARCA members and their creditor clients in the Third Circuit and across the country. The FDCPA prohibits debt collectors, including collection attorneys, from making materially false or misleading statements to consumers when collecting debts. But the FDCPA does not regulate the practice of law, nor does it govern the relationship between a collection attorney and his client. The Act does not define when an attorney is acting "as an attorney" or in a "legal capacity" for his client, and when he is not. The FDCPA should not be used as a mechanism to dictate the steps that an attorney must take in order to properly represent his client. These are private matters, to be decided between the attorney and the client, subject to appropriate regulation by the state legislatures and state courts.

[2] NARCA has previously participated as *amicus curiae* in other cases before the Court involving the interpretation of the FDCPA. *See, e.g.*, *Jerman v. Carlisle*, 130 S. Ct. 1605 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995).

The Third Circuit's opinion overlooks these important considerations and interprets the FDCPA in a manner that improperly interferes with the attorney-client relationship. It concludes that a collection attorney is not acting "as an attorney" for his client, nor acting in a "legal capacity" for his client, unless he has reviewed the consumer's file and has determined that the consumer is a "candidate for legal action." The ruling would effectively prevent creditors from engaging an attorney for purpose of notifying a consumer that he is a candidate for settlement short of litigation. Instead, creditors are encouraged to retain attorneys solely to file suit against consumers, with little warning or opportunity to resolve the claim.

The FDCPA does not define when an attorney is acting "as an attorney" or in a "legal capacity" for a client. The Act does not provide that a creditor may only retain an attorney to communicate on its behalf after it has decided that the consumer is a "candidate for legal action." The FDCPA does not regulate the attorney-client relationship, nor is there any indication that Congress wanted to prohibit all communications between collection attorneys and consumers prior to the time that the client has decided to file suit.

NARCA respectfully requests that the Court grant the petition so that the opinion of the Third Circuit may be reversed. NARCA further urges the Court to take this opportunity to expressly reject the judicially-created "meaningful involvement" doctrine that was implicitly adopted by the Third Circuit.

Although the FDCPA prohibits the use of collection letters which falsely state they are from an attorney, there is no "meaningful involvement" requirement in the FDCPA, nor any basis for using the Act to regulate the manner in which an attorney must review his client's files before communicating with a consumer.

ARGUMENT

THE FDCPA WAS NEVER MEANT TO REGULATE THE RELATIONSHIP BETWEEN A COLLECTION ATTORNEY AND HIS CLIENT

There is nothing in the language of the FDCPA that purports to regulate the relationship between a collection attorney and his client. *See* 15 U.S.C. §§ 1692-1692p. To the contrary, the statute originally contained an express exemption for lawyers, and Congress therefore could not have intended for it to regulate the attorney-client relationship. *See Heintz v. Jenkins*, 514 U.S. 291, 294-95 (1995) (noting that original version of the FDCPA provided that a "debt collector" did not include "an attorney-at-law collecting a debt as an attorney on behalf of a client.").[3]

The FDCPA does not dictate what a lawyer must do for his client. It is a consumer protection statute that specifies what a collector must *not* say or do

[3] Although the attorney exemption was subsequently repealed, Congress has never added any provisions to the Act which expressly govern the attorney-client relationship.

when communicating with a consumer. *See* 15 U.S.C. §§ 1692b(2-6), 1692c, 1692d, 1692e, 1692f, 1692h, 1692j. There are a few mandatory disclosure provisions – at sections 1692b(1), 1692e(11) and 1692g(a) & (b) of the Act – which regulate what a collector must say to consumers or third parties when attempting to collect debts.[4] None of the provisions of the Act dictate what attorneys must do or say when they are interacting with their clients.

This is not surprising. The judiciary and the states, not Congress, regulate the professional standards for the bar and oversee the conduct of attorneys when they interact with clients. *See, e.g., Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 439 (9th Cir. 1983) ("[T]he regulation of lawyer conduct is the province of the courts, not Congress."). A court should not conclude that Congress intended

[4] *See* 15 U.S.C. § 1692b(1) (if collector is communicating with third party for "purpose of acquiring location information" he must "identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer"); *id.* § 1692e(11) (collector must "disclose" in initial communication with consumer "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose," and must "disclose in subsequent communications that the communication is from a debt collector"), *id.* § 1692g (collector must "send the consumer a written notice" of the amount of the debt and to whom it is owed, and inform consumer of right to "dispute[ ] the validity of the debt," to "obtain verification of the debt or a copy of a judgment against the consumer," and to be provided "with the name and address of the original creditor, if different from the current creditor.").

for the FDCPA to be used to regulate the method by which an attorney reviews his client's files. *See, e.g., American Bar Ass'n v. Federal Trade Comm'n*, 430 F.3d 457, 467 (D.C. Cir. 2005) (rejecting argument that Congress wanted the FTC to regulate attorneys through the Gramm-Leach Bliley Act: "[Congress] does not . . . hide elephants in mouseholes. (citation)").

Nor is there any indication that Congress wanted to discourage creditors from retaining attorneys to send polite letters offering consumers the chance to settle their account. The use of settlement letters is entirely consistent with the purposes of the FDCPA. *See Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 299 (3d Cir. 2008) ("There is nothing improper about making a settlement offer. Forbidding them would force honest debt collectors seeking a peaceful resolution of the debt to file suit in order to advance efforts to resolve the debt – something that is clearly at odds with the language and purpose of the [Act]."") (citations and quotation marks omitted). As the Ninth Circuit has observed,

> The purpose of the FDCPA is to protect vulnerable and unsophisticated debtors from **abuse, harassment and deceptive collection practices**. . . . Congress was concerned with **disruptive, threatening, and dishonest tactics**. . . . **In other words, Congress seems to have contemplated the type of actions that would intimidate unsophisticated individuals and which, in the words of the Seventh Circuit,**

> **'would likely disrupt a debtor's life.'** (Citation).

Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 938-39 (9th Cir. 2007) (emphasis added).

In short, Congress was targeting serious collection abuses when it passed this statute. The Act should not be interpreted in a way that discourages creditors from engaging attorneys to offer settlements to consumers.

THE THIRD CIRCUIT'S INTERPRETATION OF THE FDCPA IMPROPERLY INTERFERES WITH THE RELATIONSHIP BETWEEN A COLLECTION ATTORNEY AND HIS CLIENT

Given that the FDCPA was not designed to regulate the relationship between a lawyer and client, the Third Circuit clearly erred. The court held that the Kay Law Firm was not acting "as an attorney" and was not acting in a "legal capacity" for its client when it sent the settlement letters. *See Lesher v. Law Offices of Mitchell N. Kay*, 650 F.3d 993, 1003 (3d Cir. 2011). But it is undisputed that the law firm was, in fact, representing its client when it sent the letters. There was no evidence that the letters were unauthorized, or that the client was unhappy with the level of review that had been conducted by the Kay Law Firm before the letters went out.

A client may properly decide to engage a law firm solely for the purpose of sending a settlement offer to a consumer. The client and the lawyer must decide

what steps the lawyer should take before that letter is mailed. The FDCPA simply does not dictate when an attorney is, or is not, acting "as an attorney" or in a "legal capacity" for his clients.

Similarly, the Third Circuit held that because the letters appeared on the firm's letterhead, the least sophisticated debtor "may reasonably believe that an attorney has reviewed his file and has determined that he is a candidate for legal action." *Id.* But this ignores the text of the letters, which expressly state that "no attorney of this firm has personally reviewed the particular circumstances of your account." *Id*. at 995. The letters do not mention litigation, nor do they state or imply that the firm and the creditor have decided that the consumer is a candidate for legal action. *Id.*

The Third Circuit has effectively held that a collection attorney is not acting "as an attorney" nor acting in any "legal capacity" unless that attorney has reviewed the debtor's file and has determined with his client that the debtor is a "candidate for legal action." In other words, a collection attorney can only be retained by a client to file suit, and not to negotiate a settlement. There is no legitimate basis for interpreting the FDCPA in this manner.

THE COURT SHOULD EXPRESSLY REJECT THE "MEANINGFUL INVOLVEMENT" DOCTRINE

Section 1692e(3) of the FDCPA prohibits the "false representation or implication that any individual is

an attorney or that any communication is from an attorney." 15 U.S.C. § 1692e(3). Although this language is narrow, the Third Circuit relied upon decisions that have read it broadly, to impose an amorphous, qualitative requirement that an attorney must be "meaningfully involved" in reviewing a consumer's file before any collection letter is sent. *See Lesher*, 650 F.3d at 999-1000 (citing *Clomon v. Jackson*, 988 F.2d 1314, 1320-21 (2d Cir. 1993) (where attorney did not review debtor's file the letters were not "'from' Jackson in any meaningful sense of that word."), and *Avila v. Rubin*, 84 F.3d 222, 228-29 (7th Cir. 1996) (an attorney sending collection letters "must be directly and personally involved in the mailing of the letters in order to comply with the strictures of the FDCPA.")). But the FDCPA should not be read expansively in a manner that would allow judges, juries and consumers to second-guess the quantum and quality of the review performed by a collection attorney on behalf of his client. NARCA respectfully submits that the Court should take this opportunity to expressly reject the so-called "meaningful involvement" doctrine.

Nothing in the plain language of section 1692e(3) – and nothing in any other provision of the FDCPA – refers to "meaningful involvement" by attorneys. *See* 15 U.S.C. §§ 1692-1692p. Courts should not read words into the FDCPA where Congress elected not to use them. *See, e.g., Dutton v. Wolpoff and Abramson*, 5 F.3d 649, 654 (3d Cir. 1993) ("It is beyond our power to deviate from the text of the statute unless its

literal application would lead either to an absurd or futile result or one plainly at odds with the policy of the whole legislation."); *Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078, 1081 (9th Cir. 2005) ("'[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'"); *Newsom v. Friedman*, 76 F.3d 813, 819 (7th Cir. 1996) ("The plain meaning of legislation should be conclusive, except in rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters." (internal quotation marks omitted; alteration in original; quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)); *see also Jerman v. Carlisle*, 130 S.Ct. 1605, 1624 (2010) ("This Court may not, however, read more into § 1692k(c) than the statutory language naturally supports.").

Nor should *Clomon* and *Avila* be read as establishing a vague "file review" standard that attorneys must follow when representing their creditor clients. To the contrary, both cases stand for the unremarkable proposition that attorneys, like other collectors, may not send letters that contain false statements and threats.

In *Clomon*, the debtor received six collection letters, five of which were sent on attorney letterhead and which "bore a mechanically reproduced signature" of an attorney. *See* 988 F.2d at 1316-17. The letters falsely suggested that the attorney had personally reviewed Clomon's case and that litigation

was a very real possibility. *See id.* at 1317.[5] It was undisputed, however, that contrary to the text of the letters, the attorney never advised his client "about how to address particular circumstances of Clomon's case" and "never received any instructions from [his client] about what steps to take against Clomon." *Id.*

> The deception in *Clomon* occurred when the letters explicitly – and falsely – suggested the attorney had conducted an individualized review of the debtor's file: We also note that **the language used in the collection letters** was sufficient to cause the least sophisticated consumer to believe that [the attorney] himself had considered individual debtors' files and had made judgments about how to collect individual debts.

Id. at 1320 (emphasis added).

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[5] For example, the letters stated: "You have 30 days before **we take any additional steps deemed appropriate** regarding your outstanding balance. . . ."; " . . . **I am suggesting we take the appropriate measures provided under the law** to further implement collection of your seriously past due account. . . ."; "Your account was referred to us **with instructions to pursue this matter to the furthest extent we deem appropriate**. . . ."; **Acting as General Counsel for [my client], I have told them that they can lawfully undertake collection activity** to collect your debt. . . ."; "Accordingly, the disposition of your account has been scheduled for **immediate review and/or further action as deemed appropriate**. . . ."; "Because of your failure to make any effort to pay your lawful debt . . . **we may find it necessary to recommend to your creditor that appropriate action be taken** to satisfy the debt." *Clomon*, 988 F.2d at 1317 (emphasis supplied).

Similarly, in *Avila* the debtor received three letters on attorney letterhead "'signed' with a mechanically reproduced facsimile" of the attorney's signature. *See* 84 F.3d at 225. The first letter stated that if payment was not received within ten days, "'**a civil suit may be initiated against you by your creditor for repayment of your loan**.'" *Id.* (emphasis added). The second and third letters demanded payment and threatened a lawsuit if payment was not made. *See id.* Despite these express threats of suit, the court observed that it was "unclear (but we think doubtful) whether [Rubin & Associates] litigate anywhere." *Id*. at 224.

The rulings in *Clomon* and *Avila* hinged on the fact that the letters were sent on attorney letterhead, were signed by attorneys, and included false threats of legal action and other false statements.

Here, the settlement letters were sent on a law firm letterhead, but that is where the similarities to *Clomon* and *Avila* end. The letters were not signed. Nor do the letters include any threats of imminent legal action if the settlement offer is not accepted. The letters do not even demand payment. They simply refer to a "Settlement Offer" and an "opportunity to settle this account." There are no express or implied threats of legal action if the debtor decides not to accept the settlement offer. *See Lesher*, 650 F. 3d at 995.

Nor are there any misrepresentations in the letters suggesting that any attorney personally reviewed

the debtor's account. Rather, the letters state the firm is "handl[ing]" the account and has been authorized to make a settlement proposal, but that "no attorney with this firm has personally reviewed the circumstances of [the consumer's] account." *Id*. Nothing in the letters suggests or implies that the firm would initiate a lawsuit or otherwise escalate the matter if the recipient did not accept the settlement offer.

NARCA respectfully submits that the Court should clarify that the "meaningful involvement" doctrine simply does not exist under the FDCPA. Of course, Congress may properly prohibit collection attorneys from making false statements in letters sent to consumers. But the FDCPA does not regulate how a collection attorney interacts with his client. It does not dictate whether an attorney's review of the file has been sufficiently "meaningful." A collection lawyer, working in conjunction with his client, must be allowed to decide what amount of attorney involvement, if any, is appropriate before a settlement letter is sent on behalf of the client to the consumer. The FDCPA was not passed by Congress as a means to regulate the practice of law or to dictate the relationship and workflow between a client and a collection attorney.

CONCLUSION

For all of the foregoing reasons, NARCA respectfully submits that the Court grant the petition for writ of certiorari.

Dated: November 16, 2011

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