SUPREME COURT OF FLORIDA

CASE NOS. SC18-2142 & SC18-2143

EUGENE HAM, III, and
LAURA FOXHALL, Petitioners,

vs.

PORTFOLIO RECOVERY ASSOCIATES, LLC, Respondent.

On Appeal from the First District Court of Appeal

AMICUS BRIEF OF NATIONAL CREDITORS BAR ASSOCATION AND FLORIDA CREDITORS BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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I. INTERESTS OF THE AMICI

THE NATIONAL CREDITORS BAR ASSOCIATION

The National Creditors Bar Association ("NCBA")[1] is a non-profit association comprised of over 500 law firms from all 50 states. NCBA members must meet self-imposed ethical standards that go beyond the requirements of laws and regulations governing the conduct of attorneys. NCBA members, while adhering to the principle of zealous advocacy when representing clients, are also duty bound to comply with the rules of professional conduct adopted by courts in each state where a NCBA member is licensed to practice law.

NCBA members regularly collect debts, including consumer obligations. The NCBA has participated, as amicus, in several United States Supreme Court cases, advocating for the interests of attorneys representing creditors. *See, e.g.*, *Heintz v. Jenkins*, 514 U.S. 291 (1995), *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573 (2010), *Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029 (2019), and *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019).

THE FLORIDA CREDITORS BAR ASSOCIATION

The Florida Creditors Bar Association ("FLCBA") was established in 1997 to advance the interests of Florida attorneys practicing in the field of creditor rights and debt collection. The FLCBA serves its ninety plus members through

[1] The NCBA was formerly known as the National Association of Retail Collection Attorneys ("NARCA").

advocacy, lobbying and yearly continuing education programs. FCLBA members have also served on the Rules of Judicial Administration Committee. Three FLCBA members, one of whom is chair, presently serve on the Small Claims Rules Committee.

The FLCBA's two-day annual conference provides at least twelve continuing legal education credit hours for its members. Each conference includes presentations on matters of interest to creditor rights attorneys including programs on legal ethics and technology. Past conferences have featured presentations by Florida Judges, representatives of the Lawyer Regulation Department of the Florida Bar, experts on legal ethics and law firm technology, and representatives from Florida's E-Filing Portal Administrator's office.

II. SUMMARY OF ARGUMENT

An account stated cause of action permits a creditor to whom a debt is owed to plead this theory of recovery even where the underlying transactions comprising the account were based on a written agreement. Because a claim on an account stated is not one to enforce a contract, §57.105(7), Fla. Stat. does not permit a debtor to recover attorney fees where the creditor fails to prevail on its claim.

Section 57.105(7) applies only to claims based on a written agreement. A holding by this Court that a prevailing defendant sued on an account stated would be entitled to claim and possibly recover attorney fees under §57.105(7) would

generate extensive "second litigation," an unintended result straining already limited and overtaxed judicial resources.

The Amicus filed by the National Association of Consumer Attorneys (NACA) presents a biased view focusing only on a single kind of debt subject to an account stated lawsuit.

III. ARGUMENT

A. THE RECIPROCAL ATTORNEY FEE PROVISION OF FLORIDA STATUTES SECTION 57.105(7) APPLIES ONLY TO SUITS TO ENFORCE A CONTRACT

A creditor pleading an account stated cause of action need not allege the existence of underlying contract nor furnish an itemized statement of the charges to prevail on a claim against a defaulting debtor. *See, e.g. Farley v. Chase Bank, U.S.A., N.A.*, 37 So.3d 936 (Fla. 4th DCA 2010) (affirming judgment on credit card debt pled as account stated cause of action). For this reason, a Plaintiff suing on an account stated need not introduce evidence of any written instrument. *Id.* at 937-38, *citing Whittington v. Stanton*, 63 Fla. 311, 58 So. 489, 491 (Fla. 1912). Because proof of a written agreement is not required to prove an account stated, the Respondent in *Ham* did not attach a copy of a written agreement to its lawsuit. *See, Ham v. Portfolio Recovery Services*, 260 So.3d 450, 452 (Fla. 1st DCA 2018). In *Bushnell,* Respondent, Portfolio Recovery Services, LLC, as the Plaintiff below, did not challenge the debtor's proffer of the written agreement between the parties,

see Bushnell v. Portfolio Recovery Services, 255 So.3d 473, 474-75 (Fla. 2nd DCA 2018), because its position was that attorney fees are not available under §57.105(7) where a claim is made on an account stated. *See* Answer Brief of Respondent at p. 5.

If this Court holds that §57.105(7) applies where a creditor sues on an account stated, a trial court, after disposing of the underlying suit, will likely be faced with challenges by the creditor seeking to avoid payment of fees. In this circumstance, litigation can ensue over whether an agreement exists that allows for fees. These post-disposition issues could encompass: (1) whether, in the first instance, there is a binding written agreement between the parties, s*ee, e.g., Delrey v. Capital One Bank*, 2009 WL 5103229, at * 3 (Fla. 11th Cir. Ct. July 7, 2009) (applying Virginia law as provided for in contract but holding that terms were not a complete "written agreement" allowing use of Virginia's longer statute of limitations); (2) if so, the terms of the agreement; (3) whether the original agreement was amended or modified and, if so, the terms of the amendment; and (4) whether the writing includes a clause designating that the laws of another state, which has not enacted a reciprocal fee shifting statute, govern the agreement. *See, e.g., Walls v. Quick & Riley, Inc.*, 824 So.2d 1016, 1018-20 (Fla. 5th DCA 2002) (recognizing New York choice of law provision in contract and precluding award of attorney fees based on determination that no strong Florida public policy

outweighs application of New York law) *and Precision Tune Auto Care, Inc. v. Radcliffe*, 815 So.2d 708 710-11 (Fla. 4th DCA 2002) (reversing award under §57.105(7) because underlying contract provides Virginia law applies). *See also, Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So.3d 73, 81 (Fla. 2012) (holding Florida's offer of judgment statute (§678.79, Fla. Stat.) does not apply where parties agreed to be bound by substantive of law of another state).

Litigation over whether there is a writing, the terms of the writing, and whether the writing provides that the governing law of another state applies may require discovery and an evidentiary hearing, resulting in a significant strain on limited judicial resources. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("[a] request for attorney's fees should not result in a second major litigation"). This is an avoidable result given that §57.105(7), by its terms, is limited to actions to enforce contracts.

B. CREDITORS, REPRESENTED BY COMPETENT COUNSEL, SHOULD BE ABLE TO LITIGATE A CLAIM AS PLED WITHOUT THE COURT RETROSPECTIVELY CHANGING THE CAUSE OF ACTION TO BENEFIT THE DEBTOR

A Florida attorney is duty bound to furnish competent representation, which requires the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 4-1.1, Rules Regulating the Florida Bar (hereinafter "Rules"). The comment to Rule 4-1.1 explains that "competent

handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem."

When furnishing competent representation, an attorney, where appropriate, can and should consider pleading alternative causes of action. *See*, Answer Brief of Respondent at pgs. 11-13 (citing cases). It follows that an attorney, in the exercise of the best judgment for the client, and after informed disclosure, may decide to plead only one of many plausible causes of action. As to the creditor claim in this appeal, an attorney, exercising the degree of competency required of a Florida lawyer, and after obtaining authority from the client, should be free to plead an account stated theory of recovery in lieu of a breach of contract claim. This voluntary election operates as a waiver of all rights the creditor/client has under a written contract including: (1) the longer five year statute of limitations for a claim based on a written agreement, *see* §95.111(2)(b), Florida Statutes, in contrast to a four year limitation period for actions not based on a writing; *see* §95.111(3)(b), Florida Statutes; (2) a contractual choice of law provision that would apply the laws of another state to the agreement, *see, e.g., Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 313 (1978) (a National Bank's home state laws apply to its contracts with out-of-state customers), *see also, Continental Mort. Investors v. Sailboat Key, Inc.*, 395 So.2d 507, 509 (Fla. 1981) (there is no Florida public policy exception to applying the

usury laws of a sister state); and (3) the right to claim attorney fees as permitted in a contract.

A ruling that §57.105(7) allows a debtor/defendant to claim attorney fees after a successful defense of an account stated lawsuit means that the judge, and not the advocate hired by the creditor, would be the one deciding what cause of action should have been pled. However, the adversary system of justice distinguishes between the role of the advocate who brings the lawsuit and the role of the judge, which is limited to deciding the case based on the pleadings alleged by the Plaintiff. *See, e.g.*, *Feinberg v. Naile*, 561 So.2d 1307 (Fla. 3rd DCA 1990) (reversing trial court ruling precluding home purchaser from pursuing alternative theory of rescission of contract). Otherwise, the creditor and its attorney/advocate are in an untenable position where the court decides, after the conclusion of a case brought on an account stated claim, that the lawsuit should have been filed as one for breach of contract. This result means that the Court will retrospectively apply a single provision of the written contact, *i.e.*, the fee-shifting clause, even though the creditor, after consultation with its counsel, elected to plead an account stated claim, thereby waiving all contract claims.

A one-way, *ex post facto* ruling that a defendant may assert rights under a contract that was not part of the Plaintiff's claim is fundamentally inconsistent with the nature of the adversary system. This determination also places the attorney at

risk. After furnishing competent advice to a client to plead an account stated cause of action and to give up any contract claims, the attorney may then be faced with a claim for negligently advising the client if a creditor is later adjudged liable for attorney fees under an unpled action to enforce a contract.

Moreover, a ruling that a defendant/debtor can recover attorney fees when defending an account stated claim will result in creditors suing to enforce the contract which will permit the award of attorney fees in the overwhelming number of suits where the debt is not disputed. Creditors would use these fees to offset fee awards in the small number of cases where consumers successfully defend the suit. This result does not benefit those consumers who concede they owe the debt but only serves to benefit the "cottage industry" of consumer lawyers. *See*, *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009)("I)t appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by [the FDCPA], not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem' of abuse'").

C. THE AMICUS SUPPORTING THE PETITIONERS PRESENTS A BIASED VIEW FOCUSING ON A SINGLE KIND OF DEBT OBLIGATION

Settled rules of statutory construction confirm that §57.105(7), by its explicit terms, applies to any written agreement whether commercial, business or consumer

in nature. *See Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984) ("when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, . . . the statute must be given its plain and obvious meaning") (internal quotations omitted). Further, courts are not at liberty to add words to a statute not placed by the legislature. *See, Hayes v. State*, 750 So.2d 1, 4 (Fla. 1999). The singular focus of the National Association of Consumer Advocates' (NACA) brief on a particular type of contract, *i.e.*, a consumer credit card debt acquired by a third party, is misplaced because the clear and unambiguous language of §57.105(7)'s reciprocal fee provision applies to <u>all</u> contracts "entered into on or after October 1, 1988."

Many commercial transactions, initially based on a written agreement, can give rise to an account stated. *See, e.g., Mercado v. Lion's Enterprises, Inc.*, 800 So.2d 753 (Fla. 5th DCA 2001) (discrepancy in account balance precludes summary judgment on an account stated claim arising out of a written contract for management services for rental property); *Gendzier v. Bielecki*, 97 So.2d 604 (Fla. 1957) (judgment based on an account stated cause of action arising out of a written agreement for purchase of merchandise reversed where trial judge failed to properly instruct jury as to the effect of a party's initialing a purported agreed account balance). These commercial claims, for property management services and for purchase of merchandise, are but two of many business undertakings based on written contracts that can be sued on as an account stated. Those claims include

suits for services (*e.g.* maintenance services, security services, and information technology services); debts incurred for purchases (*e.g.*, for equipment, inventory and supplies), as well as claims based on a series of ongoing transactions with vendors and customers.

The unjustified, *ad hominem*, attack on debt buyers in the Amicus brief supporting the Petitioners diverts attention to the wide-ranging consequences that would follow from a ruling holding that a creditor who pleads an account stated claim is subject to a reciprocal contractual attorney fee claim even though the creditor did not assert an action to enforce a contract.

The criticism of debt buyers that permeates NACA's brief was answered by the United States Court of Appeals for the Seventh Circuit in *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 288 (7th Cir. 2005) when rejecting a consumer protection lawsuit asserting that debt buyers should not be treated as assignees under the common law. The Court explained that:

> There is an innocent reason that creditors can reduce their costs or increase their yield by assigning collection to other firms rather than doing it themselves. It is the same reason that most manufacturers sell to consumers through independent distributors and dealers rather than doing their own distribution. Outsourcing phases of the total production process facilitates specialization, with resulting economies. Specialists in debt collection are likely to be better at it than specialists in creating credit card debt in the first place.

NCBA and FLCBA members who regularly represent debt buyers in courts throughout Florida report that the overwhelming number of consumer debtors do not dispute that the debt is owed and are willing to work out payment terms, often with the assistance of court mediators. In contrast, the consumer's attorney is the one who objects to the fact that a debt buyer is collecting the account leading to a conflict between the interests of a consumer in seeking to resolve the debt through settlement with the attorney's incentive to recover fees. This tension adds to the number of contested cases on court dockets.

Members of NCBA and FLCBA also report, contrary to the protestations of the NACA, that resources are readily available to consumer debtors including services provided, free of charge, by Legal Aid programs. Consumers truly overwhelmed by debt can also seek bankruptcy protection. Further, consumer justly aggrieved by the conduct of creditors can pursue remedies permitted under consumer protection statutes by hiring the many of the NACA who advertise their specialty in suing creditors.

For all these reasons, this Court should not heed the biased and slanted views espoused in the NACA brief.

IV. CONCLUSION

The National Creditors Bar Association and the Florida Creditors Bar Association respectfully ask this Honorable Court to answer the certified direct

conflict in favor of the Respondent, Portfolio Recovery Associates, LLC, and to hold that the provisions of §57.105(7), Fla. Stat., do not apply where a creditor has filed suit on an account stated cause of action.

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CERTIFICATE OF SERVICE

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