AMERICAN BAR ASSOCIATION *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS IN *HEINTZ V. JENKINS* (NO. 94-367)

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INTEREST OF THE *AMICUS CURIAE*

Amicus American Bar Association (ABA) is a private, voluntary professional organization of lawyers. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 443-44 (1989). The ABA's mission is to represent the legal profession nationally, serving the public and the profession by promoting justice, professional excellence, and respect for the law. The ABA has developed ethical standards for lawyers that nearly all states have adopted. In 1908, the ABA promulgated the CANONS OF PROFESSIONAL ETHICS; in 1969, the MODEL CODE OF PROFESSIONAL RESPONSIBILITY; and in 1983 the MODEL RULES OF PROFESSIONAL CONDUCT. These ethical standards address the nature of the attorney's duty of advocacy. The opinion below potentially affects this duty to the detriment of both attorney-client relationships and the administration of justice. The ABA's concern in this area prompts this brief.

SUMMARY OF ARGUMENT

The Federal Fair Debt Collection Act (FDCPA or Act) regulates "debt collectors." The opinion below applied these regulations to a

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Note: Only the text of the above brief has been included. The table of contents and table of cases for the brief have been eliminated.

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lawyer engaged solely in litigation. So interpreted, the FDCPA creates two unfortunate incentives that affect lawyers representing creditors. First, the Act exposes litigators who regularly represent creditors to strict personal liability for bringing "any action that cannot legally be taken." Litigators may violate this FDCPA provision by pursuing claims that do not ultimately prevail. This risk of strict personal liability will make litigators reluctant to bring even claims that are meritorious, because meritorious claims sometimes lose. A law that makes lawyers shrink from vigorously representing their clients will damage attorney-client relationships and the administration of justice in this field. Second, the Act exempts "debt collectors" who do not "regularly" collect debts. If applied to litigators, this provision exempts amateurs from regulation and liability. A law that tends to channel clients away from specialized but regulated litigators towards inexpert but unregulated counsel offends the interest of legal professionalism. It seems unlikely that Congress intended its debt regulation law to have such remote and unwarranted effects.

ARGUMENT

The FDCPA regulates "debt collectors." The opinion below applied the FDCPA's regulations to a lawyer engaged solely in litigation. Applying the FDCPA to litigators who regularly represent creditors can deter zealous advocacy in this field; can impede access to justice; and can reduce the quality of professional service. These mischievous effects can arise in two different ways.

1. By the logic of the interpretation below, the FDCPA would impose personal liability on litigators if they threaten "to take any action that cannot legally be taken . . . ." 15 U.S.C. Section 1692e(5). This quoted language appears to reach litigators for creditors who sue consumer debtors on claims that in some respect ultimately fail. As the Sixth Circuit stated, "[a]ssuming a lawsuit is brought, and the consumer prevails to any extent, it would appear that the law has been broken, as the creditor threatened to take action that apparently, as a result of the judgment, 'cannot legally be taken.' " *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993) (quoting FDCPA Section 1692e(5)). The litigator then would face personal liability for the failed action, liability that includes statutory damages and attorneys' fees. 15 U.S.C. Section 1692k(a)(2)(A) and (3). Thus interpreted, the FDCPA imposes strict personal liability upon litigators when hindsight shows their claims were not 100 percent successful.

This FDCPA standard differs markedly from the reigning ethical and procedural standard. The reigning standard requires lawyers to be prepared to "further the interests of [their] clients by all lawful means . . . ." *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973); *see*

MODEL RULES OF PROFESSIONAL CONDUCT Preamble [2] & Rule 1.3 cmt. 1 (1994). This reigning duty is to represent clients with vigor, and to be willing to bring any **meritorious** claim for them. The ethical limit on zealous advocacy thus allows all claims that are "not frivolous." *Id.* RULE 3.1; *accord*, FED. R. CIV. P. 11(b)(2) (no Rule 11 liability so long as arguments are "nonfrivolous"); *compare Green*, 9 F.3d at 22 ("[the FDCPA's] system of strict liability . . . conflicts with the current system of judicial regulation [under Rule 11]").

Interpreting the FDCPA to penalize unsuccessful litigation would deter proper advocacy. Like everyone else, litigators prefer to steer clear of potential personal liability. If the possibility of losing creates the threat of personal liability, litigators for creditors will hesitate to file claims that might lose. Nearly every claim might lose. Few rules of law are certain in all respects. Few factual allegations can be made without risk of rebuttal. This interpretation of the FDCPA thus can deter even meritorious claims. If the FDCPA penalizes litigation failures, then, it will deter even claims for creditors that clearly should win—but might not.

To deter advocacy for creditors is to undermine attorney-client relationships and the administration of justice. Litigators aware of their own personal exposure will become searchingly skeptical of their clients' cases. *Cf. Dissenting Statement of Justice Scalia Accompanying Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 507, __ (1993) (protesting an "intolerable strain upon lawyers' ethical duty to represent their clients"). Caution will supplant vigor. This skepticism and caution will not escape clients. It will corrode the trust essential to the professional relationship. And the FDCPA will do more than simply hammer a wedge between lawyer and client. Ultimately this reading of the FDCPA will hinder access to justice itself. All creditors, including those with plainly strong cases, will have a harder time hiring responsible lawyers. When litigators systematically shrink from vigorously representing creditors and their valid claims, injustice will be the result.

2. The FDCPA's wording threatens to create another harmful effect on professionalism if courts define "debt collectors" to include litigators. The Act regulates debt collectors only when they "regularly" collect debts, or when their business has the "principal purpose" of debt collection. 15 U.S.C. Section 1692a. Occasional debt collectors thus are exempt from the FDCPA. *See* S. REP. NO. 382, 95TH CONG., 1ST SESS. 3 (1977) ("[t]he requirement that debt collection be done 'regularly' would exclude a person who collects a debt for another in an isolated instance"). If applied to litigators, this provision would amount to an "amateur exception." It would tend to discourage banks from hiring litigators who are specialists in their field. The exception instead would make lack of specialized litigation experience into a virtue, because amateurs are unregulated

and can incur no liability under the Act. When repeated representations of creditors begin to season these inexpert lawyers, moreover, the Act would prompt creditors to terminate these budding specialists for new and more perfectly inexperienced litigators. Applying the FDCPA to litigators thus would tend to deprive creditors of the benefits of stable long-term relations with expert attorneys. This perversity would offend the interest of legal professionalism.

3. In the *Green* opinion, the Sixth Circuit documented other ways in which applying the FDCPA's rules to the normal procedure of litigation "would produce absurd outcomes." 9 F.3d at 21. Inquiring about absurd outcomes is a proper way to construe a statute, despite a contrary suggestion in the opinion below. The court below disagreed with the Sixth Circuit's ultimate interpretation in *Green*. The court below did not disagree that its own interpretation would produce absurd outcomes: "As the Sixth Circuit noted, there **are** conceivable problems with regulating attorneys in their debt collection efforts." *Jenkins v. Heintz*, 25 F.3d 536, 539 (7th Cir. 1994) (emphasis added). The court below did not investigate these problems, however, stating that "our analysis of the statute ends with its language; we do not reach the legislative history." *Id.* (emphasis added). But the Sixth Circuit's analysis of absurd outcomes in the *Green* case did not resort to legislative history. Rather the Sixth Circuit construed the words of the FDCPA itself. This method of statutory construction is conventional and correct. "Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce 'absurd' results . . . ." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515; *cf. United States v. X-Citement Video, Inc.*, No. 93-723, slip op. at 3 (Nov. 29, 1994) (Court will not assume Congress intended absurd results) (citing authorities). It therefore is proper to consider whether a proposed statutory reading implies peculiar consequences.

4. It seems improbable that Congress wanted its regulation of debt collectors to subvert any lawyer's role as faithful and active advocate. This Court should doubt that Congress intended to handicap anyone's access to justice, or to prompt creditors to avoid stable relations with expert litigators.

CONCLUSION

The Court should reverse the judgment of the court of appeals.