# NATIONAL CONSUMER LAW CENTER *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT IN *HEINTZ V. JENKINS* (NO. 94-367)

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## INTEREST OF *AMICI CURIAE*

Johnnie Mae Johnson is a resident of Chicago with a pending claim raising the identical issue to the one in this case of whether Congress intended the courts to create an exemption under the Fair Debt Collection Practices Act for the collection activities of lawyers that involve court processes.

The National Consumer Law Center, Inc. is a non-profit corporation established in 1969 to carry out research, education and litigation regarding significant consumer matters. The Center has as one of its primary objectives the provision of assistance to attorneys in advancing the interests of their low-income clients in the area of consumer law.

The activities of the National Consumer Law Center, Inc., have included research and providing expertise on consumer law for legal

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

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services attorneys, the Congress of the United States, state legislatures, and state and local offices charged with the enforcement of consumer protection acts; participation as counsel, co-counsel, *Amicus Curiae* in litigation throughout the country; and sponsorship of and participation in conferences designed to provide continuing education for legal services and private attorneys. The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq*. (1988), has been a major focus of the work of the Center. The Center publishes *Fair Debt Collection* (2d ed. 1989 & 1994 Supp.), a treatise of over 750 pages in length to assist attorneys who deal with consumer debt collection problems. In addition, the Center has directly assisted attorneys in scores of cases arising under the Fair Debt Collection Practices Act. The Center was active in the passage of the FDCPA, testifying at hearings, and frequently conferring with counsel to the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs prior to the Act's passage. The Center's article on attorney coverage under the FDCPA was cited as authoritative in *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989).

The Legal Assistance Foundation of Chicago ("LAFC") is the principal provider in Chicago of free legal services in civil law matters to individuals who are unable to afford private legal counsel. The mission of LAFC is to provide the poor of Chicago with access to justice and equal justice in civil legal matters. Each year LAFC lawyers represent thousands of individuals with consumer-related problems. Many of these cases involve a wide range of collection abuses by collection agencies and collection attorneys. LAFC has litigated numerous cases involving the FDCPA, and is currently representing Johnnie Mae Johnson and thousands of other consumers in a federal FDCPA class action now pending in the Northern District of Illinois.

The American Association of Retired Persons (AARP) is a not-for-profit membership organization of more than 34 million people aged 50 and older. As the largest organization in the United States serving older people, AARP seeks to (a) enhance the quality of life for older people; (b) promote independence, dignity, and purpose for older people; (c) advance the role and place of older people in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) ensure that the rights of older people are protected through the implementation and enforcement of federal and state laws and regulations.

Studies by AARP and others identify older people as being more vulnerable than younger people to consumer fraud and less wary than younger people about the existence of deceptive practices in a wide variety of businesses. Moreover, they are considerably less aware of their rights than are younger people, and less assertive in seeking redress for grievances or dissatisfaction. *See, e.g.*, American

Association of Retired Persons, *A Report on the 1993 Survey of Older Consumer Behavior* at 4 (1993), H. Keith Hunt, *Consumer Satisfaction, Dissatisfaction, and Complaining Behavior*, in 47 J. OF SOCIAL ISSUES 107, 111 (Monroe Friedman, ed. 1991). In addition, the core values of people aged 50 and above, particularly those 70 and older, include obedience to authority figures. *See* Yankelovich Partners, Inc., *The AARP Membership: Looking to the Year 2000 with a Generational Perspective*, at 12 (1994).

These findings underscore the need to ensure that the rights afforded by consumer protection laws such as the Fair Debt Collection Practices Act are not weakened. AARP's constituents are, as a group, less likely than others to be aware of their right to be free of harassment and other abusive practices in the debt collection process. Their overall vulnerability may make them more likely to fall prey to misleading statements and scare tactics, and to subject them to greater emotional and physical distress in the face of harassment or abusive practices. When such misconduct occurs, they are unlikely to know that these practices may be illegal, that they have alternatives to complying with payment demands, and that they have the right to seek relief. The situation may be somewhat exacerbated when an attorney is collecting the debt, because a higher percentage of people 50 and older, as compared with younger people, place a great deal of confidence in the advice of lawyers, and older people are more likely to "play by the rules." *Id.* at 29, 60.

AARP has recognized the importance of protecting older people from unfair debt collection practices. The Association believes that the FDCPA already protects consumers from "unscrupulous and unreasonable tactics of credit collection agencies and *the actions of law firms* hired to collect the debts" (emphasis added), and supports extending the law's protections to collection practices not currently covered by the law, *i.e.*, a creditor's in-house collection activities. *See* AARP *Toward a Just & Caring Society: The AARP Public Policy Agenda* at 321-22 (1994).

The National Association of Consumer Advocates, Inc. was formed in response to the widely expressed belief that an organization of law professors and students, private and public sector attorneys, and legal services attorneys whose primary practice involved the promotion of consumer justice, was needed. Its purpose is to promote communications and information sharing between consumer attorneys across the country and to serve as a voice for consumers.

*Amici* will address the issue of whether the defendant attorneys are debt collectors as defined by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(6). This issue is of special importance because it will determine the responsibilities of many attorneys who pursue debts for their clients. Thus, the decision of this Court will affect hundreds of attorneys and thousands of consumers nation-

wide. It is of importance also because it involves a serious question concerning the purposes of the Fair Debt Collection Practices Act.

## SUMMARY OF ARGUMENT

The plain meaning of the federal Fair Debt Collection Practices Act requires this Court to find the Petitioners to be debt collectors subject to the requirements of the FDCPA. The FDCPA's definition of debt collector explicitly states that where one's "principal purpose" is the collection of debts or where one "regularly" collects debts directly or *indirectly* for another, one is a debt collector. 15 U.S.C. § 1692a(6). This is a broad, all-encompassing approach that directly refutes the Petitioners' assertion.

The Act's own internal structure leaves no question that litigation activities are covered. Several specific provisions address litigation activities directly, and others only have application, and therefore only make sense, if litigation efforts are otherwise regulated by the Act.

The legislative history outlines the exclusions to the Act's definition of debt collector. None of the numerous specific exclusions includes a broad exemption for litigation activities, and the inclusion of limited litigation-related exceptions (*e.g.*, an exemption for process servers) only reinforces the fact that litigation activities are otherwise covered. Congress has stated: "The Committee intends that attorneys in the business of collecting debts be subject to all provisions of the Act . . . Distinctions between attorney debt collectors and lay debt collectors are eliminated by the [amendment]." H.R. Rep. No. 405, 99th Cong., 1st Sess. 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1754.

The Petitioners rely on a post-enactment statement made by Representative Annunzio three months after the passage of the amendment. The Court does not rely on such remarks as an expression of Congressional intent. *See*, *e.g.*, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979).

The Petitioners are concerned with "absurd outcomes" if the decision below is not reversed. None of these "absurd outcomes" is necessary, and furthermore none has been realized under the Act. The FDCPA has raised the plane on which debt collectors compete to one based on ethical debt collection standards, a fundamental goal specified in the Act itself. 15 U.S.C.§ 1692(e). The Congressional purpose should be upheld by affirming the decision below.

## I. THE PLAIN MEANING OF THE FAIR DEBT COLLECTION PRACTICES ACT REQUIRES THIS COURT TO FIND THE PETITIONERS TO BE DEBT COLLECTORS SUBJECT TO THE REQUIREMENTS OF THE FDCPA

### A. INTRODUCTION

The specific question addressed subsumes two threshold issues. First is the general issue of whether the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o [hereinafter the "FDCPA" or the "Act"] provides any exemption for consumer debt collection activities performed by an attorney. This question must be answered in the negative, in view of the 1986 FDCPA amendment, P.L. 99-361, 100 Stat. 768 (July 9, 1986). This amendment deleted the original exemption which had excluded from FDCPA coverage "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." This action unequivocally demonstrates both the statute's effect and Congress' intent to eliminate all distinctions between lay and attorney debt collectors.

The second preliminary issue is whether the FDCPA applies to activities conducted in debt collection litigation. Again, the Act's own internal structure leaves no question that the Act covers these activities. Several specific provisions address litigation activities directly, and others only have application, and therefore make sense, if litigation efforts are otherwise regulated by the Act.

Since the FDCPA applies both to attorney debt collectors as well as to unlawful collection practices committed in the course of litigation, there is no basis whatsoever for Petitioners' asserted position to the contrary. Congress has chosen to regulate, explicitly and intentionally, attorney litigation activity. Petitioners ask nothing less than that this Court nullify through judicial interpretation a knowingly made legislative policy decision.

### B. REPEAL OF THE ATTORNEY EXEMPTION

Congress clearly extended its authority to regulate collection attorneys when, on July 9, 1986, it amended the FDCPA to repeal the limited attorney exemption.[1] The amendment literally consisted of deleting one sentence and renumbering the affected portion of the Act.[2] Congress' action was spurred by, among other things, collection attorneys advertising their FDCPA exemption to their com-

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1. 15 U.S.C. § 1692a(6)(F) (Supp. II 1979).

2. "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That (a) The last sentence of section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)) is amended—

(1) by striking out clause (F) and redesignating clause (G) as clause (F); and
(2) in clause (E), by inserting 'and' at the end thereof.

mercial advantage over regulated debt collectors.[3] The sentence that Congress chose to delete from the Act's definition of debt collector previously had exempted "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." Subsequent to the repeal of the attorney exemption, twelve circuit court judges have found that the FDCPA's definition of debt collector plainly and unambiguously applies to litigation-related collection activities of attorneys.[4] The removal of the attorney exemption makes clear that the FDCPA applies to attorneys who meet either of the two broadly written prongs of the definition of "debt collector" in 15 U.S.C. § 1692a(6).[5] In fact, Petitioners and their *Amici* concede this issue. Petitioners' Brief at 10; *Amicus Curiae* Brief of the Commercial Law League of America at pp. 7-8.

### C. THE FDCPA APPLIES TO LITIGATION

#### 1. Introduction

It also is clear from the plain meaning of the Act that the FDCPA generally applies to "legal activities," including litigation. As dis-

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(b) The second sentence of section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)) is amended by striking out 'clause (G)' and inserting in lieu thereof 'clause (F).'" P.L. No. 99-361, 100 Stat. 768.

3. *Oversight Hearing on FDCPA and H.R. 4617 Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. (Jan. 31, 1984); *Hearings on H.R. 237, Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. (Oct. 22, 1985); H.R. Rep. No. 405, 99th Cong., 1st Sess. (Nov. 26, 1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 132 Cong. Rec. H10534 (daily ed. Dec. 2, 1985) (statement of Rep. Annunzio).

4. *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994), *cert. granted*, __ U.S. __ (1994); *Paulemon v. Tobin*, 30 F.3d 307 (2d Cir. 1994); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992).

The court in *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993) (*per curiam*), did not base its contrary decision on the text of the Act or any purported ambiguity in its language.

5. *See Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992); *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992); *Carroll v. Wolpoff & Abramson*, 961 F.2d 459 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 298 (1992); *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989); *Dutton v. Wolhar*, 809 F. Supp. 1130 (D. Del. 1992); *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992); *Stojanovski v. Strobl & Manoogian*, 783 F. Supp. 319 (E.D. Mich. 1992); *Dorsey v. Morgan*, 760 F. Supp. 509 (D. Md. 1991); *Littles v. Lieberman*, 90 B.R. 700 (E.D. Pa. 1988); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992), *aff'g Zartman v. Shapiro & Meinhold*, 811 P.2d 409 (Colo. Ct. App. 1990); *Yale New Haven Hosp. v. Orlins*, 1992 WL 110710 (Conn. Super. Ct. 1992).

*See also*, Zager, FTC Informal Staff Letter (Nov. 10, 1992) *reprinted in* National Consumer Law Center, *Fair Debt Collection* 244 (Supp. 1994).

*Cf. Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993) (*per curiam*); *Firemen's Ins. Co. v. Keating*, 753 F. Supp. 1127 (S.D.N.Y. 1990); *National Union Fire Ins. Co. v. Hartel*, 741 F. Supp. 1139 (S.D.N.Y. 1990) (law firm is not a debt collector under the FDCPA where the debt was not incurred for a consumer purpose, and the firm only engaged in legal activities, i.e., filing a suit in a distant forum).

cussed more fully below, the Act provides for the proper venue for filing consumer debt collection suits;[6] it provides exceptions to its prohibitions against contacting third parties for enforcement of post-judgment remedies or for communications made with a court's permission;[7] it provides that a post-judgment debt may simply be verified by a copy of the judgment;[8] and it provides that courts may not construe a consumer's failure to dispute the validity of a debt as an admission of liability.[9] These provisions, among others, are consistent with the plain reading of the statute only as applied to litigation activities, whether undertaken by an attorney or a lay debt collector.

Moreover, Congress clearly knew how to provide exemptions to the Act's requirements. The Act has seven explicit exemptions in 15 U.S.C. § 1692a. In addition, there are exemptions for some litigation activities. For example, process servers are expressly exempt. 15 U.S.C. § 1692a(6)(D). Court and other government officials are exempt when performing their legal duties. 15 U.S.C. § 1692a(6)(C). The broad prohibition of contacting unobligated third parties provides an exception for post-judgment judicial remedies or for communications in other court proceedings with the court's permission. 15 U.S.C. § 1692c(b).

Petitioners argue that an invisible portion of the attorney exemption—an exemption for litigation activities under some circumstances—remains valid. Petitioners contend that because the FDCPA's broadly written definition of debt collector does not specifically mention litigation, litigation with the sole purpose of collecting a debt should not be considered the direct or indirect collection of a debt. The FDCPA's definition of debt collector explicitly states, however, that where one's "principal purpose" is the collection of debts or where one "regularly" collects debts directly or *indirectly* for another, one is a debt collector. 15 U.S.C. § 1692a(6). This is a broad, all-encompassing approach that directly refutes the Petitioners' assertion.

Petitioners further argue that because the language of the FDCPA does not address litigation activities, the FDCPA does not apply to them. The underlying assumption of that argument, however, is objectively false. In fact, as discussed above, several provisions of the FDCPA expressly regulate or exempt litigation activities, as conceded by *Amici*. *Amicus Curiae* Brief of Commercial Law League of America at pp. 8-9. These portions of the Act confirm that Congress intended the FDCPA to apply to litigation efforts and therefore eliminate the statutory basis of the Petitioners' argument.

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6. 15 U.S.C. § 1692i.
7. 15 U.S.C. § 1692c(b).
8. 15 U.S.C.§ 1692g(b).
9. 15 U.S.C. § 1692g(c).

2. The Wrongful Venue Provision

One of the ways the FDCPA regulates litigation activities is through 15 U.S.C. § 1692i, the wrongful venue provision, which Petitioners seem to ignore. This provision must be considered, however, because statutory language always must be read in its proper context. *McCarthy v. Bronson*, 500 U.S. 136 (1991). When construing a statute, the Court must look not just at one provision in isolation, but must view that provision in the context of the statute as a whole. *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991).

Section 1692i prohibits a debt collector from bringing a debt collection action in any judicial district other than where the consumer either signed the contract or resides. The choice of venue or forum is a litigation decision. The attorney's decision to file an action in an improper venue is a particularly abusive violation of the FDCPA committed in order to obtain an unfair advantage over the consumer. Filing the debt collection action in a distant forum increases the incidence of default. It also frequently forces the consumer to agree to unfavorable settlements in order to avoid the burdens of the resulting additional inconvenience. In the latter situation, the consumer must weigh the cost of defending in a distant or inconvenient forum against the amount of the claimed debt and the possible settlement. Defending a case in a distant forum is almost impossible to do *pro se* and requires the consumer to hire an attorney. The motivation for venue violations also may be personal to the attorney. Suing in the proper forum may be inconvenient to the attorney and require him to obtain local counsel, thereby diminishing his fee. Also, attorneys violating the venue provision almost always bring the action in the forum in which they regularly practice. The well known concept of "home court advantage" thus applies to law as well as basketball.

Wrongful venue FDCPA actions are traditionally brought against the attorney filing the action. *See*, *Dutton v. Wolmar*, 809 F.Supp. 1130 (D. Del. 1992). However, the Petitioners' theory would leave the attorney debt collector immune from liability even though he made the venue decision and took the action that violated the FDCPA. It is absurd to argue that there is an implicit litigation exemption when that argument necessarily conflicts with the explicit requirements of the Act.

3. Regulation of Other Litigation Activities

In addition to the venue provision, the Act addresses a variety of other litigation activities including, but not limited to, providing exemptions for legitimate servers of process,[10] deceptive threats of

10. 15 U.S.C. § 1692a(6)(D).

legal activities,[11] and false representations that the transfer of any interest in a debt could cause the consumer to lose legal claims or defenses.[12] The FDCPA clearly has applied to litigation activities.

There is no language in the Act that exempts "purely legal" or "litigation" activities. To the contrary, the plain language of the FDCPA requires that this Court find Petitioners to be debt collectors subject to the requirements of the FDCPA.

## II. THE LEGISLATIVE HISTORY OF THE FDCPA SHOWS THAT CONGRESS DID NOT INTEND AN EXEMPTION FOR LITIGATION ACTIVITIES

### A. INTRODUCTION

Petitioners argue that the definition of debt collector has an implicit exemption for attorneys engaged in "purely legal activities." Because the plain language of the Act is clear and unambiguous, it is unnecessary to examine the legislative history. *Howe v. Smith*, 452 U.S. 473, 483 (1981). Even if such a task were appropriate, the legislative history supports a finding that the Act protects consumers from false, deceptive and unfair litigation activities.

### B. LEGISLATIVE HISTORY OF THE FDCPA

Congress passed the FDCPA to give even the least sophisticated consumers the ability to defend themselves against abusive or deceptive debt collectors. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). Congress recognized that "one of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are 'deadbeats.'" S. Rep. No. 382, 95th Cong. 1st Sess. 3 (1977) *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697. In fact, Congress relied on several studies which found that "the vast majority of consumers fully intend to repay their debts." *Id.* Congress recognized that consumer debtors overwhelmingly are ordinary citizens who have encountered "an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce." *Id.* As the Senate Report on the Act points out, prior to the enactment of the FDCPA, the majority of American consumers "ha[d] no meaningful protection from debt collection abuse." *Id.* Therefore, "the serious and widespread abuses in this area and the inadequacy of existing State and Federal laws ma[d]e this legislation necessary and appropriate." *Id.* at 3.

The FDCPA was enacted to redress the false or deceptive representations, the unfair or unconscionable collection methods, the invasion of privacy, and the harassment and abuse to which many consumers were subject. 15 U.S.C. §§ 1692(a), 1692(b), 1692(e). It

11. 15 U.S.C. §§ 1692e(4), 1692e(5).
12. 15 U.S.C. § 1692e(6).

is clear that in passing the FDCPA, Congress intended to afford consumers broad and meaningful protections. The FDCPA expressly states that it was premised on the inadequacy of existing law to protect consumers. 15 U.S.C. § 1692(b). In Congress' view, tort law and the limited enforcement resources of the Federal Trade Commission were not enough to provide the necessary consumer protections.

It also is clear from the legislative history that Congress intended a broad definition of debt collector, thus requiring its limited specified exceptions. "The committee intends the term 'debt collector,' subject to the exclusions discussed below, to cover all third persons who regularly collect debts for others." S. Rep. No. 382, 95th Cong. 1st Sess. 2 (1977). The legislative history goes on to outline the exclusions to the Act's definition of debt collector. None of the numerous specific exclusions includes a full exemption for litigation activities and, as addressed above, the inclusion of limited litigation-related exceptions only reinforces the fact that litigation activities are otherwise covered.

### C. LEGISLATIVE HISTORY OF THE FDCPA AMENDMENT REPEALING THE ATTORNEY EXEMPTION

Congress took further action to protect consumers in 1986, by addressing the problem of attorney debt collection. The problem arose because attorneys largely were exempt from FDCPA coverage. Some attorneys capitalized on this exemption by advertising their availability and exemption from the Act.[13] Thus, faced with a major loophole in the law, Congress determined "that current law does not adequately protect consumers from attorney debt collection abuses and that repeal of the attorney exemption to the Fair Debt Collection Practices Act is an appropriate way to reduce the amount of this abuse." H.R. Rep. No. 405, 99th Cong., 1st Sess. 7 (1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 1758.

The legislative history requires the conclusion that Congress, in amending the Act to repeal the attorney exemption, intended to extend FDCPA coverage to all attorneys regardless of the "type" of activity in which they were engaged. In introducing the amendment to the FDCPA, Congressman Annunzio stated that "any attorney who collects debts on behalf of a client shall be subject to the provisions of [the FDCPA]. . . . The rules governing debt collection practices ought to apply evenly to all debt collectors, whether the collector is an attorney or not." 31 Cong. Rec. H226 (daily ed. Jan. 31, 1985). The House Report which accompanied this statement provided: "The Committee intends that attorneys in the business of collecting debts be subject to all provisions of the Act . . . . Distinc-

13. H.R. Rep. No. 405, 99th Cong., 1st Sess. 5 (1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 1756.

tions between attorney debt collectors and lay debt collectors are eliminated by the [amendment]." H.R. Rep. No. 405, 99th Cong., 1st Sess. 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1754. It is clear that the FDCPA applies to attorneys, and that the Act makes no distinction as to the type of debt collection activity in which an attorney is engaged.

### D. THE COURT SHOULD NOT GIVE WEIGHT TO CONGRESSMAN ANNUNZIO'S POST-ENACTMENT STATEMENT

The legislative proceeding on which the Petitioners primarily rely is a post-enactment statement made by Representative Annunzio three months after the passage of the amendment. The Court may not rely on these remarks as an expression of congressional intent. *See*, e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979). This Court has recognized that

> isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment . . . . Nor do these comments, none of which represents the will of Congress as a whole, constitute subsequent 'legislation' such as the court might weigh in construing the meaning of an earlier enactment. (Citations omitted.)

*Southeastern Community College v. Davis*, 442 U.S.397, 411 n. 11 (1979).

Congressman Annunzio's post-enactment statement is not convincing evidence that Congress, rather than repealing the attorney exemption, intended to replace it with a "sometimes litigation exemption." Moreover, Congressman Annunzio's post-enactment statement differs significantly from his earlier explanation of the amendment on which Congress as a whole relied in approving the amendment. This Court should not misinterpret Congressman Annunzio's post-enactment statement as the intent of the legislature when it repealed the attorney exemption.

## III. THE SECOND, FOURTH, SEVENTH, AND NINTH CIRCUITS, AS WELL AS THE COLORADO SUPREME COURT, HAVE REJECTED THE NOTION OF CREATING A "PURELY LEGAL" ACTIVITIES EXEMPTION

Because the FDCPA applies to both attorney debt collectors and to unlawful practices committed in the course of collection litigation, it is not surprising that no one has ever suggested a textual basis for the proposition that there is an exemption for activities conducted by collection attorneys who routinely engage in litigation. Indeed, the Second, Fourth, Seventh, and Ninth Circuits, as well as

the Colorado Supreme Court, each has stated that unlawful collection efforts conducted by attorneys in the course of litigation violate the FDCPA. *Paulemon v. Tobin*, 30 F.3d 307 (2d Cir. 1994); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992); *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994), *cert. granted*, __ U.S. __ (1994); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992). Each of these decisions is founded on the acknowledgment that the 1986 amendment eliminated any distinctions between lay and attorney debt collectors and, therefore, that an attorney debt collector, just as any other debt collector, is liable for unlawful conduct committed in the course of litigation.

The only federal appellate court to hold to the contrary is the Sixth Circuit, in *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993) (*per curiam*). *Green* employs a fundamentally flawed methodology and analysis, a conclusion which is underscored by the refusal of appellate courts which subsequently have been confronted with the identical legal question to follow its analysis or adopt its holding. The *Green* opinion explicitly eschews "a literal reading of the statute" in order to reach its stated result and avoid what it perceives as "absurd outcomes." 9 F.3d at 20-21. As even the Sixth Circuit itself recognized, however, in rejecting a similar argument presented in another FDCPA case, both the judiciary and the litigants "are bound by the plain language of the act." *Frey v. Gangwish*, 970 F.2d 1516, 1518 (6th Cir. 1992). To be sure, under very limited circumstances, an ambiguous statute may properly be re-crafted through judicial interpretation to alter statutory language which is at odds with a clearly-expressed contrary intention. The formal legislative history of the FDCPA, however, requires the rejection of the Petitioners' argument. Moreover, the "absurd outcomes" mentioned by the *Green* opinion are based on a misunderstanding of the FDCPA's requirements.

## IV. APPLICATION OF THE FDCPA TO NORMAL AND LEGITIMATE DEBT COLLECTION ACTIVITIES DOES NOT PRODUCE "ABSURD OUTCOMES"

### A. OUTCOMES INVOLVING A "COMMUNICATION" UNDER 15 U.S.C. § 1692c AND § 1692g

The *Green* opinion concerns itself with two "absurd outcomes": the consumer's ability to stop the prosecution of a collection suit if the consumer disputes the amount owed or requests that communications between the consumer and the debt collector cease; and the notion that if a consumer prevails on an issue in a collection case, the collector has violated the Act. 9 F.3d at 21. None of these outcomes is realized under the FDCPA.

*Green* cites 15 U.S.C. §§ 1692g and 1692c(c) as sources of the purported absurd outcomes. Both of these sections pertain as the Sixth Circuit stated, to the use of a "communication." 9 F.3d at 21. *Amici* agree that each of the recited outcomes is absurd, but none of them is a necessary consequence of the contrary holding. The FDCPA does not prohibit any of the normal litigation activities which the Sixth Circuit identified, regardless of whether attorney litigation activities are covered or exempt.

The linchpin of the "absurd outcomes" identified in *Green* is that the FDCPA prohibits a debt collector from communicating with the consumer or third parties under certain circumstances described in 15 U.S.C. §§ 1692c and 1692g. However, these prohibitions would not interfere with normal litigation practices, as *Green* posits, since none of the identified litigation practices constitutes a "communication," defined in 15 U.S.C. § 1692a(2) as follows:

> the conveying of information regarding a debt directly or indirectly *to any person* through any medium. (Emphasis added).

A court is not a "person" under this definition. 1 U.S.C. § 1 (Person defined to mean "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.") When Congress intends a "person," as used in a particular statute, to include additional entities, including a governmental agency such as a court and its personnel, it so states explicitly. *See, e.g.*, Equal Credit Opportunity Act, 15 U.S.C. § 1691a(f); Fair Credit Reporting Act, 15 U.S.C. § 1681a(b). Neither filing a complaint or other pleadings nor communicating with court personnel constitutes a "communication" under the FDCPA, as the Federal Trade Commission staff acknowledged six years ago. 53 Fed. Reg. 50097, 50100 (December 13, 1988) ("[F]iling or service of a complaint or other legal paper . . . is not a 'communication' covered by the FDCPA").[14]

The same conclusion attains pursuant to 15 U.S.C. § 1692c(b), which generally prohibits third party communications in connection with the collection of any debt, but which exempts from that prohibition any communication undertaken with "the express permission of a court of competent jurisdiction." Even if any of the various activities identified in *Green* were deemed to constitute a "communication" as defined, each of the normal events associated with filing and prosecuting litigation is subject to this exception.

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14. Although not identified in *Green's* list of "absurd outcomes," *Amici* are well aware that the attorney debt collection industry has been arguing (although a court has never so held) that a debt collection complaint must include the § 1692g(a) and § 1692e(11) notices if *Green* is not correctly decided. Similarly, though, since a pleading is not a "communication" as defined, neither disclosure requirement is applicable irrespective of how the attorney litigation issue is resolved.

Furthermore, 15 U.S.C. § 1692c(c) will not curtail litigation as the *Green* court suggests. Section 1692c(c) prohibits dunning—not notices of specified remedies, which are specifically authorized under § 1692c(c)(3). The FDCPA requires that when a consumer invokes § 1692c(c), debt collectors may no longer request payment; debt collectors may, however, pursue legal remedies and notify the consumer of the specific remedies (*e.g.*, motions for summary judgment, interrogatories, notice).[15]

### 1. The FDCPA Imposes No Liability by Virtue of Merely Not Prevailing in a Collection Suit

We have no inkling of the basis for the Sixth Circuit's assumption that a contrary ruling would subject attorneys to FDCPA liability if the relief granted in collection litigation is in some manner less than that requested in the complaint. 9 F.3d at 21. In fact, no court has ever imposed FDCPA liability on an attorney or lay collector under such a theory.

As illustrated by the holdings in the instant case at the circuit court level, as well as in *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992), the potential liability of a collection attorney under § 1692e is in no manner as broad as assumed by the Sixth Circuit's *per curiam* opinion. In *Strange*, the attorney was found liable not simply for demanding an award of attorney fees for which the consumer was not liable; the actionable misconduct was based on the fact that the attorney's overreaching resulted from his complete failure to investigate the facts or law of the case prior to instituting the litigation. He filed suit through "a mass-production approach to collection litigation" without any regard for his own ethical and professional responsibilities. 796 F. Supp. at 1119-20; *compare*, *Clomon*, 988 F.2d at 1320, 1321 (2d Cir. 1993). Similarly, in the instant case, Ms. Jenkins has specifically alleged that "Heintz and his law firm

15. If the "absurd outcomes" identified by the Sixth Circuit were conceivable, an appropriate judicial interpretation merely would remedy the defective portion of the statute while retaining the language which is faithful to congressional intent. *See*, *e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). The *Green* decision accomplishes neither goal. Simply eliminating attorney litigation activities maintains the identical purported absurdities when committed by a collection agency engaged in collection litigation. In addition, insulating attorney collectors from liability for misconduct which is actionable when committed by lay collectors is directly contrary to the sole purpose of the 1986 amendment—eliminating all distinctions between the two groups. The alleged outcomes are equally absurd regardless of whether the underlying activities are committed by law firms or collection agencies, and the *Green* solution to its perceived phantom problems therefore is inappropriate in all circumstances. The proper solution—if there were a problem to solve—is the FTC staff's conclusion that normal collection litigation activities do not constitute "communications." In this manner, the clear directive of the FDCPA to bar unlawful means to collect a consumer debt—whether committed by an attorney or a lay collector and whether committed in the course of collection litigation or informal collection efforts—is preserved.

knew the insurance charge was unauthorized, but tried to pass it off anyway." 25 F.3d at 540. So long as an attorney abides by the ethical standards of the profession and exercises appropriate diligence in investigating the facts and law of a case, § 1692e imposes no liability simply because a claim is ultimately found wanting.

Furthermore, no liability attaches for any violation of the FDCPA where the attorney (or any other debt collector) can establish the elements of the good faith clerical error affirmative defense set out in 15 U.S.C. § 1692k(c). And, rather than being an "absurd outcome," each of the reported cases where an attorney has been found liable for unlawful litigation activities illustrates the precise result Congress intended, as shown by the following quotation from *Strange*:

> Wexler may have believed it was not in his interest to examine his cases carefully to determine whether he was entitled to attorney's fees from the debtor. A defendant debtor appearing in court without an attorney would be unlikely to know he was not liable for fees and the judge might not catch Wexler's overreaching; if the defendant defaulted, the judgment would probably include the fees.
>
> One purpose of statutory damages is to create an incentive to obey the law. It appears Wexler needs an incentive either to pay more attention to the complaints he files, or, taking another view, to dissuade him from taking advantage of debtors who do not know their rights. 796 F. Supp. at 1120.

Neither violating the venue provision of the FDCPA nor knowingly misrepresenting the relief to which a client is entitled interferes in any manner with that legitimate undertaking. Such misconduct is unfair, deceptive, oppressive, and indeed unethical, and therefore, as this Court has long recognized, the proper object of curtailment under federal law. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972); *See also* 131 Cong. Rec. H10535 (daily ed. Dec. 2, 1985) ("I should also point out that what we are asking lawyers to do is not very complicated. We only want them to operate in an ethical way.") (remarks of Rep. Annunzio).[16]

### 2. Outcomes Encouraging Creditors to Hire Under-Qualified Attorneys

The American Bar Association's *amicus* brief suggests that the FDCPA's coverage of litigation activities discourages creditors from hiring lawyers who regularly engage in the collection of debts. The

16. The acknowledgement by NARCA (Brief of *Amicus Curiae* National Association of Retail Collection Attorneys at pp. 12-13) of the "egregious attorney misconduct" committed by the Petitioners only underscores the vital importance of fulfilling the explicit congressional goal of the 1986 amendment to provide victims an adequate remedy for unethical attorney collection behavior.

FDCPA has applied without limitation to attorneys since 1986. Prior to the repeal of the attorney exemption, there were "5,000 practicing attorneys in the United States who handle[d] consumer collection accounts on a regular basis, or a number approximately equal to the total lay collection industry." H.R. Rep. No. 405, 99th Cong., 1st Sess. 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1754. Neither the ABA, the Petitioners, nor the other *Amici* involved in this case has presented any evidence that following the repeal of the attorney exemption, the number of collection attorneys has plummeted as creditors scramble to find attorneys who engage in debt collection in isolated instances only. On the contrary, the statements of interest by both the National Association of Retail Collection Attorneys and the Commercial Law League of America indicate that collection attorneys are prospering.

When Congress repealed the attorney exemption, creditors were not forced to seek out unqualified attorneys to avoid FDCPA liability. It would seem that quite the opposite occurred. Creditors sought out qualified attorneys with training in collections who would comply with the FDCPA. Typical creditors, which hire collection attorneys to file hundreds or thousands of collection suits each year, are hardly likely to negotiate separate contracts with scores of inexperienced attorneys to file their collection actions to guard against the minuscule risk of an experienced lawyer's liability for an FDCPA violation.

## V. THE FTC STAFF COMMENTARY ON THE FDCPA'S COVERAGE OF THE PURELY LEGAL ACTIVITIES IS AT ODDS WITH THE PLAIN LANGUAGE OF THE FDCPA

The *Green* opinion also relies on the Federal Trade Commission Staff Commentary as supporting an exemption for lawyers engaging only in purely legal activities. Because the FTC staff's interpretation conflicts with the plain language of the Act, it must be rejected. *Brown v. Gardner*, ___ U.S. ___ (1994). Furthermore, the FTC staff's Commentary was not adopted by the Commission, "does not have the force of a trade regulation rule or formal agency action, and . . . is not binding on the Commission or the public." 53 Fed. Reg. 50097 (Dec. 13, 1988). The FTC is prohibited from promulgating regulations for the FDCPA. 15 U.S.C. § 1692l(d). The FTC has declined to exercise its authority to issue advisory opinions under the FDCPA. *See* 15 U.S.C. 1692k(e). Because of the conflict with the language of the Act, the FTC's lack of rulemaking authority, and the Commission's failure to adopt its staff's interpretations, this is not a case where judicial deference is owed to an administrative agency or

its staff. *Cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980).[17]

The FTC Staff Commentary also offers no solace to the Petitioners because they admit that attorney Heintz does act as a debt collector.[18] The Staff Commentary does not take the sometimes covered, sometimes not approach of the Petitioners.[19] Since they engage in traditional debt collection activities, the Petitioners became "debt collectors" even under the FTC staff analysis.

## VI. RESURRECTION OF THE ATTORNEY EXEMPTION FOR LITIGATION ACTIVITIES WOULD HAVE DISASTROUS CONSEQUENCES

*Amicus*, Johnnie Mae Johnson, is one of two named plaintiffs in *Brewer v. Friedman*, 93 C 971 (N.D. Ill. 1993). *Brewer v. Friedman* is a class action that was consolidated for decision with an individual matter, *Tolentino v. Friedman*, 833 F. Supp. 697 (N.D. Ill. 1993). The district court has granted summary judgment on liability for the plaintiffs in *Brewer*, but the case is stayed pending the outcome of the appeal in *Tolentino v. Friedman*, which was argued before the U.S. Court of Appeals for the Seventh Circuit in December 1994, and is awaiting decision.

*Tolentino v. Friedman* provides an example of the problems posed by the "litigation activities" exception proposed by Petitioners. In effect, Petitioners seek to resurrect, by judicial veto, the pre-1986 attorney exemption to the FDCPA repealed by Congress. Although the Act still would apply to attorneys' pre-litigation activities, once a complaint was filed, the curtain would close and the attorneys' "litigation" activities, no matter how abusive, no longer would be subject to FDCPA scrutiny. The defendant's actions in *Tolentino* provide a stark demonstration of how attorneys could function, while collection litigation is pending, in a world unfettered by the FDCPA.

In *Tolentino*, plaintiffs alleged several violations of the FDCPA arising out of defendant's use of a dunning notice entitled "IMPORTANT NOTICE." In response, the defendant-attorney asserted that, irrespective of whether the notice was abusive or misleading, he was immune because the notice followed the filing of a lawsuit and therefore constituted "litigation activities" exempt from the FDCPA. The underlying facts of *Tolentino* are summarized in the

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17. The FTC staff position relies on the same post-enactment remarks of a single congressman on which the Petitioners rely. *See* McPhee, FTC Informal Staff Letter (Nov. 17, 1986), *reprinted in* National Consumer Law Center, *Fair Debt Collection* 583 (2d ed. 1991).

18. Petitioners' Brief at 11 ("Heintz does not deny that for *some* clients, on *some* occasions, he does act as a debt collector").

19. FTC Staff Commentary, 53 Fed. Reg. 50097, 50100, 50102 (Dec. 13, 1988).

reported decision. 833 F. Supp. at 698-99. The offending notice was not on letterhead and there was no greeting or signature. Instead, as found by the district court, the notice appeared to simulate a court document and to be issued as part of the formal judicial proceeding. *Id.* at 700-701.

On summary judgment, the court rejected all of the defendant's arguments and found four violations of the FDCPA. The notice failed to include the warnings required by 15 U.S.C. § 1692e(11). The notice was also found to be a deceptive means to collect a debt in violation of 15 U.S.C. § 1692e(10). Furthermore, the notice appeared to be authorized, issued or approved by a court and falsely implied that it was part of the legal process in violation of 15 U.S.C. §§ 1692e(9) and 1692e(13). *Id.*

The court gave short shrift to Friedman's claim that the notice was a traditional legal activity. "Friedman's use of the notice is distanced from the traditional role of attorney as litigator and has the effect of advancing the financial interest of the creditor through possibly oppressive means." 833 F. Supp. at 700. As the court pointed out, "the Notice is merely one step in Friedman's procedure for debt collection." *Id.* As such,

> Friedman cannot avoid liability by simply including debt collection communications in mailings containing court documents. A different holding would allow Friedman to hide behind the characteristic that sets attorneys apart from other debt collectors, which arises from their law degrees: the ability to personally represent the creditor before the court and instigate a suit on its behalf.

*Tolentino*, 833 F. Supp. at 702.

If the Petitioners' contention is sustained, debt collecting attorneys could follow Friedman's example en masse and attempt to hide behind the cloak of "litigation activities." What previously would have been unlawfully abusive collection letters now would become "settlement" letters.[20] Moreover, all post-filing collection efforts could be construed as settlement efforts. If this Court creates a litigation activities exemption to the FDCPA, the pre-1986 landscape would re-emerge, and collection attorneys would be unfettered by the FDCPA after commencing litigation, to the disadvantage of both reputable collection agencies and consumers.[21] Attorneys would regain their pre-1986 competitive advantage over collection agencies

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20. In fact, Friedman himself claimed that the notice which had no greeting, no information specific to the recipient debtor, and was not on letterhead, nevertheless was a "settlement" letter. 833 F. Supp. at 700.

21. Debt collection attorneys argue that FDCPA protection is unnecessary in light of professional ethics standards and judicial sanctions. However, those same ethical standards apply to attorneys' pre-litigation activities, and even the Petitioners do not argue that the FDCPA should not apply to attorney's pre-litigation activities. In addition, Rule 11 would not reach abusive tactics such as the defendant's in *Tolentino*, since

since they would not be subject to the FDCPA after filing suit.[22] Unfortunately, this competitive edge would likely result in an increase in litigation, not for the primary purpose of reducing a claim to judgment, but to evade the constraints imposed by Congress on the totality of attorney's collection tactics. Consumers would be subject to the abusive debt collection practices that the Act heretofore prohibited. Under the "amended" FDCPA proposed by the Petitioners, consumers would be confronted by the prospect of simultaneously facing both litigation and abusive collection activities. This result runs counter to the letter and spirit of the FDCPA and should not be countenanced by this Court.

## VII. ATTORNEY LITIGATION REGULATION HAS NOT INCREASED THE COST OF CREDIT

*Amicus Curiae*, Commercial Law League of America, asserts that the effect of Congress' regulating litigation collection activities under the FDCPA has been to increase the security required for credit and to cause higher interest rates to be charged.[23] The consumer credit industry has made this argument in opposition to every piece of the consumer protection legislation and agency rule which has been enacted in the last twenty years. And it has turned out not to be true. Indeed, the Commercial Law League of America has offered no substantiation at all for its bold assertion.

Since the enactment of the FDCPA, consumer credit in the United States has burgeoned from $298.2 billion to $741.1 billion in 1992.[24] Installment credit finance rates have for the most part *fallen* during this period generally in line with general market interest rates.[25] The number of unsecured credit cards jumped from 526 million cards in 1980 to 1.027 billion cards in 1991, and the amount of revolving, generally unsecured, debt increased from $55.1 billion to $243.6 billion.[26] The thirty-day delinquency rates on bank personal loans and bank cards remained fairly constant during the period with unemployment rates generally the factor most highly correlated with fluctuations in delinquencies.[27]

The enactment of the FDCPA and the 1986 amendment was supported by many of the affected trade groups and collection lawyers

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approximately half of the states have no Rule 11-type provision and, in any event, the deceptive conduct involved no signed pleadings.

22. In repealing the FDCPA attorney exemption, "Congress intended to treat attorney and non-attorney debt collectors similarly because the prior legislation could be construed to imply that attorneys could use tactics that collection agencies were prohibited from using." *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 655 (3d Cir. 1993).

23. *Amicus Curiae* Brief of Commercial Law League of America at 27.

24. U.S. Dept of Commerce, Statistical Abstract of the U.S. 1993 Table No. 815.

25. *Id*. *Compare* Table No. 816 *with* No. 825.

26. *Id*. No. 815.

27. *Compare* No. 818 *with* No. 621.

because the Act was a compromise tailored to suit their legitimate business needs while directed only at eliminating unethical practices in the industry. This higher plane of competition based on ethical debt collection standards is a fundamental goal specified in the Act itself.[28] It has long been upheld by this Court: "The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception." *FTC v. Standard Educ. Soc.*, 302 U.S. 112, 116 (1937).[29] The decision below must be affirmed to insure continuation of this congressional policy of ethical debt collection behavior.

## CONCLUSION

For the reasons stated above, the Seventh Circuit's decision should be affirmed.

28. 15 U.S.C. § 1692(e).

29. *See FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934) ("The courts must set their faces against a conception of business standards so corrupting in its tendency . . . . The careless and the unscrupulous must rise to the standards of the scrupulous and diligent"). *See also Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (There is no protection in the first amendment for deceptive commercial speech).