No. 13-2523

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESTHER BUCHANAN, individually
and on behalf of a class,
Plaintiff-Appellant,

v.

NORTHLAND GROUP, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:12-cv-1011

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMING THE COURT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Circuit Rule 26.1 *amicus curiae*, the National Association of Retail Collection Attorneys, is a not-for-profit corporation and does not have any parent entities and there are no publicly held companies that own ten percent or more of its stock.

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Dated: May 7, 2014

STATEMENT PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 29(c)(5)

No party's counsel authored the within brief in whole or in part. No party and no party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus curiae*, the National Association of Retail Collection Attorneys, contributed money that was intended to fund preparing or submitting this brief.

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The National Association of Retail Collection Attorneys respectfully submits this amicus curiae brief in support of Defendant-Appellee.

STATEMENT OF IDENTITY AND INTEREST IN CASE

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 more than 700 law firms located in all 50 states, all of whom must meet association standards designed to ensure experience and professionalism. NARCA member attorneys are subject to the various Codes of Professional Ethics adopted in the jurisdictions where they are licensed to practice law. NARCA has adopted a Code of Professional Conduct and Ethics which imposes professional standards beyond the requirements of state codes of ethics and regulations that govern attorneys.

NARCA members are regularly retained by creditors to lawfully collect delinquent debts. In the exercise of their

[1] Additional information concerning NARCA is available at its website http://www.narca.org/ (last accessed May 5, 2014).

professional skills in the practice of debt collection law they are often subject to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, *et. seq.* As the only national trade association dedicated solely to the needs of attorneys engaged in debt collection, NARCA has a significant interest in ensuring that the FDCPA is interpreted in a manner consistent with its members' professional responsibilities to their clients, the courts, their adversaries and the general public.

NARCA supports Defendant-Appellee's position in this matter and urges this Court to find that the Fair Debt Collection Practices Act does not require lawyers to provide legal advice to unrepresented persons. NARCA makes this brief to alert the court that when an attorney makes such a disclosure to unrepresented persons, she violates her professional responsibilities.

NARCA has obtained Defendant-Appellee's consent to file this brief, but Plaintiff-Appellant has not consented. Pursuant to Fed. R. App. P. 29(b), NARCA has moved for leave of the court to file this brief.

LEGAL ARGUMENT

I. Background

The FDCPA requires the debt collector to make certain disclosures to "consumers" in the course of collecting a debt. These disclosures are contained in §§ 1692g(a) and 1692e(11) of the FDCPA. A debt collector seeking "location information" from a person other than consumers is also required to provide the third-party with a disclosure. 15 U.S.C. § 1692b(1). Failure to make these disclosures can result in the debt collector's violation of the FDCPA. *See Lee v. Thomas & Thomas*, 109 F.3d 302 (6th Cir. 1997) (failure to make § 1692e(11) disclosure).

The making of these disclosures do not require specialized legal knowledge. All that is required is that the attorney's disclosure tracks the statutory language. *Sims v. GC Servs. L.P.*, 445 F.3d 959, 964 (7th Cir. 2006).

The same cannot be said for disclosures concerning the applicability of a statute of limitations to a particular debt. Attorneys can be punished by attorney disciplinary authorities for their violations of their professional responsibility, and may be

subject to liability if they disclose possible limitations bars exposing their client's potential litigation weaknesses.

II. A Debt Collecting Lawyer Violates the Rules of Professional Conduct If He Advises a Debtor That a Limitations Period May Have Expired

In *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010 (7th Cir. 2014), the Seventh Circuit suggested that when a debt collector does not know whether the debt being collected is "time-barred, it would be easy to include general language about that possibility." *McMahon v. LVNV Funding, LLC*, 744 F.3d at _____. Presumably, the debtors receiving such disclosures are not represented by counsel.

Whether there is a "possibility" that the defense of an expired limitations period exists with respect to a particular claim, requires an analysis of the specific facts of the claim, particular to the debtor.

Within this Circuit, courts have applied varying limitations statutes to similar debts, for example, in the sale of goods. *See, Fisher Sand & Gravel Co. v. Neal A Newbie, Inc.*, 494 Mich. 543, 560 (Mich. 2013) (declining to apply Uniform Commercial Code ("UCC") 2-725 to the sale of goods because "an action on an account stated

is indeed an independent cause of action, separate and distinct from the underlying transactions giving rise to the antecedent debt. Therefore, it is immaterial whether the underlying transactions involved the sale of goods."); *May Co. v. Trusnik*, 54 Ohio App. 2d 71, 74-75 (Ohio Ct. App., Cuyahoga County 1977) (applying to the sale of goods a four-year limitation period under UCC 2-725, but noting that if a third-party provided financing for the goods purchased, Ohio's statute providing a longer limitation period for breach of contract would apply).

As is the case in the instant action, creditors and debtors are not often located in the same jurisdiction. In these instances, what limitation period governs a particular debt is further complicated by application of "borrowing statutes." Borrowing statutes permit state courts to "borrow" shorter limitations periods from foreign jurisdictions where the cause of action accrues. See, *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 578 (6th Cir. 2004) (A borrowing statute "is a legislative exception from the general rule that the forum always applies its statute of limitation."). Kentucky, Michigan and Ohio all have enacted borrowing statutes. *Ky. Rev. Stat. Ann.* § 413.320;

Mich. Comp. Laws § 600.5861; *Ohio Rev. Code Ann.* § 2305.03 (LexisNexis 2014).

Credit contracts may also contain provisions which provide that a foreign jurisdiction's law governs the parties' contract. Michigan courts will enforce a choice of law provision unless "(1) the chosen state has no substantial relationship to the parties or the transaction, or (2) there is no reasonable basis for choosing that state's law." *Martino v. Cottman Transmission Sys.*, 218 Mich. App. 54, 60 (Mich. Ct. App. 1996). Even when the credit agreement identifies the law of a foreign jurisdiction as applicable, Michigan courts can and have declined to enforce the choice of law provision. *Hudson v. Mathers*, 283 Mich. App. 91, 97 (Mich. Ct. App. 2009) citing *Martino,* 218 Mich. App. at 60.

Determining which statute of limitation may be applicable requires a lawyer to consider the particular facts and circumstances of a debt and make a professional judgment. Because the proper limitation period can sometimes turn on the residence of the debtor and the creditor, the role played by the creditor-client in the underlying transaction and a state's policy interests, any

determining of a statute will be highly individualized and specific to the debtor's circumstances.

The several authorities that have provided guidance on the subject, all caution lawyers to avoid providing statements to unrepresented persons concerning the possible application of the law to their particular circumstances. *Model Rules of Prof'l Conduct* R. 4.3 (2013); *K.Y. SCR* 3.130(4.3); *MRPC* 4.3 cmt.; *O.H. Prof. Cond.* Rule 4.3 ; *Tenn. Sup. Ct. R.* 8, RPC 4.3. A lawyer provides "legal advice" when he provides an opinion concerning legal questions specific to an individual's circumstances. *ABA Comm. on Ethics & Prof'l Responsibility*, Formal Op. 10-457 (2010) (Lawyer Websites);. *Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipl.*, Op. 94-13 (1994)[2] (in the context of giving legal seminars to non-lawyers); *NY City Bar Assn. Comm. on Prof Ethics*, Formal Op 1998-2 (1998)[3] (when providing legal seminars to non-lawyers, lawyers "should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems since slight

[2] Publicly available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/1994/Op%2094-013.doc (last accessed May 5, 2014).
[3] Publicly available at http://www2.nycbar.org/Ethics/eth1998-2.htm (last accessed May 5, 2014).

changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised.").

NARCA attorneys also are guided by the State Bar of Michigan's Informal Opinion CI-597 (1980). It cautions attorneys who communicate with unrepresented persons whose interests are adverse to their clients from offering "any advice other than the advice to seek counsel." Ethics Opinion: CI-597 (1980).[4] In the context of debt collection, the creditor client's interests are always in conflict with the debtor. The Michigan State Bar warned that where any doubt exists as to communication with the unrepresented party, "[a]ll doubts on this subject should be resolved in favor of non-communication unless otherwise authorized by law or Court Order." *Id.*

An attorney's statement to an unrepresented debtor of the "possibility" of an expired limitations period is therefore prohibited as a matter of professional responsibility. The only permissible

[4] Publicly available at http://www.michbar.org/print/printit.cfm?thePage=%2Fopinions%2Fethics%2Fnumbered%5Fopinions%2FCI%2D597%2Ecfm? (last accessed May 5, 2014).

statement a NARCA attorney may make is for the unrepresented debtor to seek the advice of counsel of their own choice.

III. Providing Advice To An Adverse Party Harms The Attorney-Client Relationship

The provision of legal advice to unrepresented persons also poses a potential conflict between the lawyer and an existing client and the potential for improper disclosure of client confidences. *Arizona State Bar,* Opinion 97-04 (1997).[5] In determining the applicability of a limitations period, a lawyer necessarily obtains information from her client concerning the particular circumstances of the client with respect to the debt. *Model Rules of Prof'l Conduct* R. 1.6 (2013) makes this information confidential and the lawyer cannot disclose it absent the client's "informed consent." *Model Rules of Prof'l Conduct* R. 1.8 (2013) also prohibits a lawyer from using information relating to her representation of a client to the client's disadvantage, absent the client's informed consent.

Neither Plaintiff-Appellant nor *amici curiae* Federal Trade Commission and Consumer Financial Protection Bureau

[5] Publicly available at http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480 (last accessed May 5, 2014).

(hereinafter collective referred to as the "FTC/CFPB") have addressed the harm such disclosures have to the attorney-client relationship.

IV. Disclosures Made Pursuant To FDCPA Decisional Law Have Already Been Identified As Contrary To Attorney Professional Responsibility

NARCA has first-hand witnessed such a judicial "disclosure" running afoul of attorney disciplinary authorities. In *Greco v. Trauner*, the Second Circuit Court of Appeals was faced with an FDCPA claim alleging that lawyer debt collectors were not "meaningfully involved" in their debt collection activities. To overcome the claim, it approved the use by lawyers of the following disclaimer when communicating with consumers:

> [A]t this time, no attorney with this firm has personally reviewed the particular circumstances of your account."
>
> *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 365 (2d Cir. 2005)

The New Jersey Supreme Court took the extraordinary step of issuing a formal opinion denouncing the Greco disclaimer.[6] It held that "[w]hile the FDCPA arguably permits a law firm to send debt collection letters in a lay capacity, New Jersey ethics rules have always prohibited the practice." Joint Opinion, Opinion 48 *Committee on the Unauthorized Practice Of Law*, Opinion 725 *Advisory Committee on Professional Ethics*, 208 N.J.L.J. 710 (June 4, 2012). The opinion further noted that engaging in the practice of sending debt collection demand letters on law firm letterhead which have not been reviewed and approved by attorneys "is assisting in unauthorized practice of law in violation of RPC 5.5(a)(2) and engaging in deceitful conduct in violation of RPC 8.4(c)." *Id.* New Jersey's pronouncement is unequivocal – the FDCPA is no exception to adherence to attorney professional responsibility.[7]

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[6] Publicly available at http://njlaw.rutgers.edu/collections/ethics/acpe/acp725_1.html (last accessed May 5, 2014).

[7] NARCA wishes the Court note its concern with this opinion. Soon after the opinion was announced, NARCA organized a presentation featuring Carol Johnston, NJ Administrative Office of the Courts who also serves as Secretary to the NJ Advisory Committee on Professional Ethics, Secretary to the NJ Committee on Attorney Advertising and Secretary to the NJ Committee on Unauthorized Practice of Law along with Wallace E. "Gene" Shipp, Jr., District of

Amici, FTC/CFPB, point to various studies concerning the purported need for disclosure of limitations periods, but these studies do not address the views of state attorney disciplinary authorities on the proposed disclosures. The issue, which should be apparent in light of New Jersey's 2012 ethics opinion, is wholly ignored.

NARCA believes that state disciplinary authorities will likewise find that the long-standing tenants of ABA Model Rules 4.3, 1.6 and 1.8 (and as they are adopted within this Circuit) do not give way to the FDCPA in this instance as well.

V. The FDCPA's Legislative History Does Not Indicate Congressional Intent to Preempt State Rules Concerning Attorney Professional Responsibility

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Columbia Bar Counsel and former president of the National Association of Bar Counsel, to discuss the New Jersey opinion and its implications for debt collection attorneys. Program description publically available at http://www.narca.org/?Fall12Program (last accessed May 5, 2014). NARCA subsequently held a symposium in which it included a program entitled "The Court System Provides a Level Playing Field" which included Mr. Shipp as well as the Hon. Robert A. Pustilnik (VA), Hon. Shaem C.P. Spencer (MD) which explored, among other things, lawyer professional responsibility in debt collection. Program description publically available at http://www.narca.org/?page=Symposium2013 (last accessed May 5, 2014). NARCA's argument is founded upon its findings from these presentations.

Recent decisional law demonstrates NARCA's interpretation is correct and that these core elements of lawyer professional responsibility were not dispensed with by the FDCPA. *United States v. Quest Diagnostics, Inc.*, 734 F.3d 154, 163 (2d Cir. 2013) ("Nothing in the False Claims Act evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences."). Congress' purpose in enacting the False Claims Act (31 U.S.C. §§ 3729-3733) in 1863 was to "aid in the effort to root out fraud against the government." *United States v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 915 (E.D.Va.1989) (citing Act of March 2, 1863, c. 67, 12 Stat. 696). Even when the integrity of transactions with the government are at issue, *Quest* instructs that this interest is not superior to the need to preserve client confidences and other attorney professional responsibilities. The Congressional purpose of the FDCPA, in regulating debt collection practices, cannot be rationally construed to preempt the same principles that the False Claims Act, an act to protect government integrity, otherwise left intact.

Congress' intent that the FDCPA not upset fundamental principles of the attorney-client relationship is also apparent from

the FDCPA's legislative history. Initially, attorneys at law representing clients were exempt from the FDCPA's coverage. Pub. L. 95-109, § 803(6)(F), 91 Stat. 874, 875; *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995). In 1986, Congress repealed the exemption, but did not otherwise amend the Act. *Heintz v. Jenkins*, 514 U.S. at 294-295. The sponsor of the House Bill repealing the attorney exemption described its purpose as ". . . a fairness bill. It makes certain that all debt collectors operate under the same set of rules, a set of rules which debt collectors themselves have testified are easy to follow and do not restrict the business of ethical debt collectors." 131 Cong. Rec. 10534 (1985). The only other remarks made in support of eliminating the exemption noted that "[c]ertainly, a more level playing field would be accomplished for collectors with the passage of H.R. 237, because all those engaging in third-party debt collection would be playing by the same rules." *Id*, (emphasis added).

Congress' repeal of the attorney exception without otherwise modifying the FDCPA, and its pronouncement that all debt collectors – attorneys and non-attorneys alike – are governed by the

same rules, evinces no intent to preempt an attorney's obligation to adhere to the Rules of Professional Conduct.

VI. The FDCPA Cannot Be Construed to Cause Attorneys to Engage In Conduct Contrary to Their Professional Responsibilities or Harmful to Their Clients

In *Heintz v. Jenkins*, the Supreme Court recognized that when Congress removed the attorney exemption to the FDCPA, it did not "revisit the wording of these substantive provisions [of the Act]." *Heintz v. Jenkins*, 514 U.S. at 294-295. Because of this legislative history, when applying the FDCPA to attorney conduct, ". . . some awkwardness is understandable." *Heintz v. Jenkins*, 514 U.S. at 295.

In order to resolve this "awkwardness," the Court found that there exists within the FDCPA "some such additional, implicit, exception" to attorney conduct. *Id*, at 296-297. The Court has since reiterated the existence of implied exceptions for attorney conduct under the FDCPA. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 600 (2010) ("As in *Heintz*, we need not authoritatively interpret the Act's conduct-regulating provisions to

observe that those provisions should not be assumed to compel absurd results when applied to debt collecting attorneys.").

This implicit exception for certain attorney conduct has been recognized by the Eighth Circuit. *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814, 819 (8th Cir. 2012) ("We conclude that the diverse situations in which potential FDCPA claims may arise during the course of litigation, and the Supreme Court's caution in *Heintz* that careful crafting may be required in applying the statute's prohibitions to attorneys engaged in litigation, counsel against anything other than a case-by-case approach, at least in this, our first case requiring us to address these issues.").

NARCA believes that the same implicit exception saves attorneys from violating their professional responsibilities by the proposed disclosure. The Court should not compel attorneys to make disclosures which directly contradict the Rules of Professional Conduct, undermine client confidentiality and cause attorneys to become in conflict with their clients because, as we will now explain, a debt might, possibly, be subject to the FDCPA.

VII. The Proposed Disclosure Will Be Made When Collecting Debt Not Subject to the FDCPA.

Plaintiff-Appellant and *amici* FTC/CFPB advance their argument for disclosures concerning limitations periods under the mistaken belief that such disclosures will only be made when collecting debt subject to the FDCPA.

Application of the FDCPA to any debt collection activity does not turn on a category of debt being collected – the fact that the debt might be labeled a "consumer" debt does not, alone, trigger the Act. *Riviere, et al. v. Banner Chevrolet, Inc.*, 184 F.3d 457, 462 (5th Cir. 1999) ("That the documents relevant to this transaction label it as 'consumer' is not dispositive."). The FDCPA applies only to "debts" as defined by 15 U.S.C. § 1692a(5):

> any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

Whether any debt is subject to the FDCPA requires focus on the debtor's purpose for incurring it. *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013). Seemingly commercial

debts can still be subject to the FDCPA where the transaction involved money, property, services or insurance primarily for a personal, family or household purpose. *See, Slenk v. Transworld Sys.*, 236 F.3d 1072 (9th Cir. 2001) (in resolving an FDCPA claim, it was an issue of material fact whether financing for purchase of construction equipment, a backhoe, was primarily for personal, family or household purposes) . Likewise, the fact that a debtor is an individual does not permit the inference that their debt was primarily for personal, family, or household purposes. *Boosahda v. Providence Dane LLC*, 462 Fed. Appx. 331, 335 (4th Cir. 2012) (collection efforts aimed at an individual are not dispositive of the purpose of the debt as "a person can be sued in his or her individual capacity even for business debts.").

Because a debtor's subjective purpose for incurring a particular debt is typically not known to the creditor's attorney, NARCA attorneys and other debt collectors make FDCPA disclosures as a precaution, in the event the debt is one within the FDCPA. *Boosahda v. Providence Dane LLC*, 462 Fed. Appx. at 334; *Golliday v. Chase Home Fin, LLC*, 761 F. Supp. 2d 629, 636 (W.D. Mich. 2010). The making of these disclosures, however, do not

transform obligations into "debts" within the meaning of the FDCPA. Id. Attorney debt collectors are, therefore, not "punished" simply because they use these disclosures as a precaution. *Id.*

The same cannot be said for disclosures concerning the applicability of a statute of limitations to a particular debt. If an attorney were to follow the Seventh Circuit's suggestion in *McMahon*, she would routinely disclose to unrepresented persons the possibility of a defense to her own client's claims. As decisional law demonstrates, these disclosures will be made even when debts are not within the FDCPA.

New Jersey's criticism of the *Greco* disclosure may spell problems for debt collection attorneys, but the impact it has upon their clients is minimal. However, the adoption of a McMahon disclosure, compelling a debt collecting attorney to disclose to an adverse, unrepresented party, client confidences which can be used to defeat the client's claim, directly impacts the rights of creditors who may have enforceable claims not within the scope of the FDCPA.

There is nothing to suggest that compliance with FDCPA decisional law will insulate an attorney from professional

malpractice or disciplinary charges. The guidance from bar disciplinary authorities suggests otherwise. And clients, whose confidences have been disclosed (even though in a good faith effort to comply with the FDCPA), will not likely believe that their otherwise valid claims should be harmed by a federal law which is not applicable to their claim.

CONCLUSION

"Attorneys are dutybound to represent their clients with diligence, creativity, and painstaking care, all within the confines of the law. When statutory provisions have not yet been interpreted in a definitive way, principled advocacy is to be prized, not punished." *Jerman* , 559 U.S. at 621 (Kennedy, J., dissenting). But when faced with conflicting requirements of the FDCPA and their professional obligations, then ". . . attorneys can be punished for advocacy reasonably deemed to be in compliance with the law or even required by it. This distorts the legal process. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk." *Id,* at 622.

Congress did not intend the FDCPA to preempt attorney professional responsibility. There is no room to suggest that attorneys may, even when faced with the potential that a debtor, adverse to their client, may not fully appreciate her "possible" defenses to a debt collection claim, break from those long-standing principles that have guided our concepts of attorney-client responsibilities.

The decision of the Court Below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d). Exclusive of the exempted portions of the brief, as provided by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 3,740 words, including footnotes and headings, as counted by the word-count function provided by Microsoft Word, the word-processing system used to prepare the brief. This brief has been prepared in 14-point Bookman Old Style font.

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Dated: May 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2014, the foregoing Brief of Amicus Curiae National Association of Retail Collection Attorneys in Support of Defendant-Appellee and Affirming the Court Below was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system.

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