13-598

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERIC M. BERMAN, P.C., LACY KATZEN, LLP,
Plaintiffs-Appellees,

DBA ASSET HOLDINGS CORP,
Plaintiffs,

v.

CITY OF NEW YORK, NEW YORK CITY COUNSEL, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, JONATHAN MINTZ, in his official capacity as the Commissioner of the New York City Department of Consumer Affairs,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF *AMICUS CURIAE* 19 CONSUMER ADVOCACY ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLANTS URGING REVERSAL
(*Amici Listed on Next Page*)

Carolyn E. Coffey (CC 6741)
Of counsel to Jeanette Zelhof, Esq.
MFY Legal Services, Inc.
299 Broadway, 4th Fl.
New York, NY 10007
(212) 417-3701

Theodora Galacatos (7144)
Executive Director
Feerick Center for
Social Justice
33 West 60th Street, 9th Fl.
New York, NY 10023
(212) 636-7747

Claudia Wilner (1995)
Senior Staff Attorney
New Economy
Project, Inc.
176 Grand St., Ste. 300
New York, NY 10013
(212) 680-5100

May 31, 2013

Counsel for *AMICI CURIAE*

LIST OF AMICI CURIAE

Bromberg Law Office, P.C.
40 Exchange Place, Suite 2010
New York, NY 10005
(212) 248-7906

CAMBA, Legal Services, Inc.
885 Flatbush Avenue, 2nd Floor
Brooklyn, NY 11226
(718) 827-0100

Community Development Project at Urban Justice Center
123 William Street, 16th Floor
New York, NY 10038
(646) 602-5600

DC 37 Municipal Employees Legal Services
125 Barclay Street
New York, NY 10007
(212) 815-1818

Feerick Center for Social Justice
33 West 60th Street, 9th Floor
New York, NY 10023
(212) 636-7671

The Legal Aid Society
120-46 Queens Blvd. 3rd Fl.
Kew Gardens, NY 11415
(718) 286-2474

Legal Services NYC
40 Worth Street, 6th Floor
New York, NY 10013
(646) 442-3565

Lincoln Square Legal Services, Inc.
33 West 60th Street, 3rd Floor
New York, NY 10023
(212) 636-7353

The Louis Stein Center for Law and Ethics
140 West 62nd Street
New York, NY 10023
(212) 636-6000

MFY Legal Services, Inc.
299 Broadway, 4th Floor
New York, NY 10007
(212) 417-3701

National Association of Consumer Advocates
1730 Rhode Island Avenue, NW
Suite 710
Washington, DC 20036
(202) 452-1989

National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
(617) 542-8010

New Economy Project (dba/formerly Neighborhood Economic Development Advocacy Project)
176 Grand St., Ste. 300
New York, NY 10013
(212) 680-5100

New York Legal Assistance Group
7 Hanover Square, 18th Floor
New York, NY 10004
(212) 613-5000

Queens Volunteer Lawyers Project, Inc.
90-35 148th Street
Jamaica, NY 11435
(718) 739-4100

St. Vincent de Paul Legal Program, Inc.
Consumer Justice for the Elderly: Litigation Clinic
St. John's University School of Law
8000 Utopia Parkway
Jamaica, NY 11439
(718) 990-6689

Schlanger & Schlanger, LLP
9 East 40th St, Suite 1300
New York, NY 10016
(914) 946-1981

Teamsters Local 237 Legal Services Plan
216 West 14th Street
New York, NY 10011
(212) 924-1220

Law Office of Kevin Thomas, P.C.
20 Kingston Street
Elmont, NY 11003
(516) 902-9122

CORPORATE DISCLOSURE STATEMENT OF BROMBERG LAW OFFICE, P.C.

Bromberg Law Office, P.C., an organizational amicus curiae, is a New York professional corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and there are no publicly issued shares. Attorney Brian L. Bromberg is its sole owner and officer.

Dated: May 30, 2013
New York, New York

BROMBERG LAW OFFICE, P.C.

/s/
Brian L. Bromberg
40 Exchange Place, Suite 2010
New York, NY 10005
(212) 248-7906

CORPORATE DISCLOSURE STATEMENT OF CAMBA LEGAL SERVICES, INC.

CAMBA Legal Services, Inc., an organizational amicus curiae, is a non-profit, non-stock corporation.

CAMBA Legal Services, Inc. has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

CAMBA Legal Services Inc. is related to CAMBA Inc., and the organizations share many of the same board members. CAMBA Inc., has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 30, 2013
New York, New York

/s/

Kathleen Masters, Esq.
Executive Director
CAMBA Legal Services, Inc.
885 Flatbush Avenue, 2nd Floor
Brooklyn, NY 1226
Tel: 718-287-0010

CORPORATE DISCLOSURE STATEMENT OF COMMUNITY DEVELOPMENT PROJECT AT THE URBAN JUSTICE CENTER

The Urban Justice Center is a non-profit 501(c)(3) corporation with no parents, affiliates, or subsidiaries.

Dated: May 30, 2013
New York, New York

/s/

Nasoan Sheftel-Gomes
Senior Staff Attorney
Community Development Project at the Urban Justice Center
123 William Street, 16th Floor
New York, NY 10038
(646) 459-3013

CORPORATE DISCLOSURE STATEMENT OF DC 37 MUNICIPAL EMPLOYEES LEGAL SERVICES

DC 37 Municipal Employees Legal Services (DC 37 MELS), an organizational amicus curiae, is a non-profit, non-stock unincorporated organization. It is affiliated with the District Council 37 Health & Security Plan and District Council 37 of AFSCME (the American Federation of State, County and Municipal Employees). DC 37 MELS has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 28, 2013
New York, New York

/s/

Robert A. Martin
Associate Director
DC 37 Municipal Employees Legal Services
125 Barclay Street
New York, NY 10007
(212) 815-1818

CORPORATE DISCLOSURE STATEMENT OF FEERICK CENTER FOR SOCIAL JUSTICE

Fordham University School of Law's Feerick Center for Social Justice, an organizational amicus curiae, is an academic unit of a not-for-profit educational institution and as an academic unit the Feerick Center for Social Justice takes independent positions and views on issues of social policy and social justice. Fordham University has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 30, 2013
New York, New York

/s/
Theodora Galacatos, Esq.
Executive Director
FORDHAM UNIVERSITY SCHOOL OF LAW FEERICK CENTER FOR SOCIAL JUSTICE
33 West 60th Street, 9th Floor
New York, NY 10023
Tel: 212-636-7747

CORPORATE DISCLOSURE STATEMENT OF THE LEGAL AID SOCIETY

The Legal Aid Society, an organizational amicus curiae, is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 28, 2013
New York, New York

_/s/_Tashi T. Lhewa___

Tashi T. Lhewa, Esq.
Staff Attorney
The Legal Aid Society
120-46 Queens Blvd. 3rd Fl.
Kew Gardens, NY 11415
(718) 286-2474

CORPORATE DISCLOSURE STATEMENT OF LEGAL SERVICES NYC

Legal Services, NYC, an organizational amicus curiae, is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 28, 2013

/s/ Edward Johnson
Edward Johnson
Director of Litigation
Legal Services NYC
40 Worth Street
New York, NY 10013

CORPORATE DISCLOSURE STATEMENT OF LINCOLN SQUARE LEGAL SERVICES, INC.

Lincoln Square Legal Services, Inc., and organizational *amicus* curiae, is a non-profit, non-stock corporation. It is law firm through which Fordham University School of Law operates most of its clinical legal education program, and has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 30, 2013
New York, New York

/s/ Ian Weinstein
IAN WEINSTEIN, ESQ.
Executive Director
LINCOLN SQUARE LEGAL SERVICES, INC.
33 West 60th Street, 3rd floor
New York, N.Y. 10023
Tel.: (212) 417-3701

CORPORATE DISCLOSURE STATEMENT OF LOUIS STEIN CENTER FOR LAW AND ETHICS

The Louis Stein Center for Law and Ethics at Fordham University School of Law, an organizational amicus curiae, is an academic unit of a not-for-profit educational institution and as an academic unit the Louis Stein Center for Law and Ethics takes independent positions and views on issues of legal ethics and the legal profession. Fordham University has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 29, 2013
New York, New York

/s/ Bruce Green

Bruce Green, Esq.
Faculty Director
LOUIS STEIN CENTER FOR LAW AND ETHICS
140 West 62nd Street
New York, NY 10023
Tel: 212-636-6851

CORPORATE DISCLOSURE STATEMENT OF MFY LEGAL SERVICES, INC.

MFY Legal Services, Inc., an organizational amicus curiae, is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 30, 2013
New York, New York

/s/

Jeanette Zelhof, Esq.
Executive Director
MFY LEGAL SERVICES, INC.
299 Broadway, 4th Floor
New York, NY 10007
Tel: 212-417-3701

CORPORATE DISCLOSURE STATEMENT OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

The National Association of Consumer Advocates (NACA), is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 31, 2013
Washington, D.C

/s/
Ira Rheingold
Executive Director
National Association of Consumer Advocates
1730 Rhode Island Avenue, NW
Suite 710
Washington, DC 20036
(202) 452-1989

CORPORATE DISCLOSURE STATEMENT OF THE NATIONAL CONSUMER LAW CENTER

The National Consumer Law Center ("NCLC") is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of §501(c)(3) of the Internal Revenue Code. It has no parent corporations and no publicly held company owns 10% or more of its stock.

DATED: May 31, 2013

/s/ Charles M. Delbaum
Charles M. Delbaum
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
(617) 542-8010

CORPORATE DISCLOSURE STATEMENT OF NEW ECONOMY PROJECT

New Economy Project (dba/formerly Neighborhood Economic Development Advocacy Project), an organizational amicus curiae, is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 30, 2013
New York, New York

/s/

Joshua Zinner, Esq.
Co-Director
NEW ECONOMY PROJECT, INC.
176 Grand St., Ste. 300
New York, NY 10013
Tel: 212-680-5100

CORPORATE DISCLOSURE STATEMENT OF THE NEW YORK LEGAL ASSISTANCE GROUP

The New York Legal Assistance Group, an organizational amicus curiae, is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 30, 2013
New York, New York

/s/
YISROEL SCHULMAN, ESQ.
New York Legal Assistance Group
7 Hanover Square, 18th Fl.
New York, NY 10004
Tel.: (212) 613-5000

CORPORATE DISCLOSURE STATEMENT OF
QUEENS VOLUNTEER LAWYERS PROJECT, INC.

Queens Volunteer Lawyers Project, Inc., an organizational amicus curiae, is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 29, 2013
New York, New York

/s/
Mark Weliky, Esq.
Executive Director
QUEENS VOLUNTEER LAWYERS PROJECT, INC.
90-35 148th Street
Jamaica, NY 11435
Tel: (718) 739-4100

CORPORATE DISCLOSURE STATEMENT OF ST. VINCENT DE PAUL LEGAL PROGRAM, INC.

The organization amicus curiae – The St. Vincent de Paul Legal Program, Inc. – is a non-profit, non-stock corporation. It has no parent corporation, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 29, 2013
New York, New York

/s/ Ann L. Goldweber
Ann L. Goldweber
President, Board of Directors and Treasurer
St. John's University School of Law
8000 Utopia Parkway
Jamaica, New York 11439
(718) 990-6689

CORPORATE DISCLOSURE STATEMENT OF SCHLANGER & SCHLANGER, LLP

Schlanger & Schlanger, LLP, an organizational amicus curiae, is a for-profit law firm. The firm is a limited liability partnership. Its sole partners are attorneys Michael Schlanger and Daniel Schlanger. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 30, 2013
New York, New York

/s/

Daniel A. Schlanger, Esq.
Schlanger & Schlanger, LLP
9 E. 40th St., Suite 1300
New York, New York 10016
(914) 946-1981

CORPORATE DISCLOSURE STATEMENT OF TEAMSTERS LOCAL 237 – LEGAL SERVICES PLAN

Teamsters Local 237 Legal Services Plan, an organizational amicus curiae, is a non-profit, non-stock unincorporated organization. It is affiliated with Teamsters Local 237 and part of Teamsters Local 237 Welfare Fund. Teamsters Local 237 Legal Services Plan has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: May 30, 2013
New York, NY

/s/

Mary E. Sheridan, Esq.
Director
Local 237 Legal Services Plan
216 W. 14th Street
New York, NY 10011
(212) 924-1220

CORPORATE DISCLOSURE STATEMENT OF THE LAW OFFICE OF KEVIN THOMAS, P.C.

The Law Office of Kevin Thomas, P.C., is a domestic professional corporation. It has no parent corporation; no publicly held corporations have ownership interests in it. One hundred percent of shares issued are owned by Kevin Thomas, Esq.

Dated: May 30, 2013
Nassau County, New York

/s/
Kevin Thomas, Esq.
Law Office of Kevin Thomas, P.C.
20 Kingston Street
Elmont, NY 11003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules, Regulations, and Statutes

Court Documents

Other Sources

AMICI'S STATEMENT OF INTEREST

Those who seek to appear as *amici curiae* (listed on page i) share the mission of protecting consumers' rights and ensuring that only lawful means are used to collect legitimate debts. Nearly all *Amici* provide direct legal services to low-income or financially distressed consumers in debt collection cases. All *Amici* participate in legislative, educational or other advocacy efforts to protect consumers' rights. Clients of *Amici* include the disabled, the elderly, low-wage workers, and other New Yorkers whom Local Law 15 was enacted to benefit. Counsel for all parties consent to the filing of this brief. [1]

SUMMARY OF ARGUMENT

The District Court's decision to invalidate Local Law 15, New York City's debt collection statute, as it applies to debt collection attorneys, was improper as a matter of law and public policy for many reasons. The court ignored the ample evidence demonstrating that attorneys engaged in debt collection -- and those who lend their names to debt collection mills disguised as law offices -- conduct the identical non-legal activities as non-attorney debt collectors, while wielding the power of their law licenses. The court erred in finding that state law preempts Local Law 15, and that Local Law 15 presents ethical dilemmas for debt collection

[1] No party's counsel authored this brief in whole or in part and no party or party's counsel or person contributed money that was intended to fund preparing or submitting the brief.

attorneys. The District Court also failed to abstain from analyzing the unsettled question of whether a municipality may regulate attorneys doing non-legal work. Furthermore, the District Court overlooked the public policy behind Local Law 15 and the law's positive benefit to consumers. Finally, despite clear evidence to the contrary, the court determined that existing disciplinary rules suffice to regulate attorneys. Thus, the court has left a gaping hole in New York City's regulatory scheme, which will now engender affirmative litigation by consumers seeking to vindicate the rights the City Council intended to champion.

BRIEF STATEMENT OF FACTS

A. Explosion of Debt-Buyer Industry

The third-party debt collection industry has undergone radical growth and transformation in the last two decades, in part due to a burgeoning consumer credit market, technological innovation, and debt buying. Transcript of the Federal Trade Commission Collecting Consumer Debts: The Challenge of Change at 9-11 (Oct. 10, 2007).[2] Advanced information and credit risk technology have enabled creditors to dramatically expand their customer base, while debt collection firms use "sophisticated analytics" to target debtors most likely to pay, relying on "automated dialers, predictive dialing algorithms, and internal telephony" to lower cost and enhance their reach. Consumer Financial Protection Bureau (CFPB), Fair

Debt Collection Practices Act: CFPB Annual Report, at 9 (Mar. 20, 2013) ("CFPB Annual Report 2013").

Third-party debt collection is a "growth industry." Robert M. Hunt, *Collecting Consumer Debt in America*, Federal Reserve Bank of Philadelphia Business Review, Second Quarter, at 11, 13 (2007). Between 1982 and 2002, while total household consumer debt adjusted for inflation doubled, collection industry revenues more than tripled and employment in the industry more than doubled. *Id.*

The NYC metropolitan area has the fourth highest employment level for debt collectors in the nation. U.S. Dep't of Labor Bureau of Labor Statistics, Occupational Employment Statistics: Employment of Bill and Account Collectors by state (May 2012). As recently as 2010, New York ranked among the top five states in total debt collected, $5.3 billion, with debt collectors earning $1.13 billion in commissions. Ernst & Young, The Impact of Third-Party Debt Collection on the National and State Economies 6-7 (Feb. 2012).

Notably, the Federal Trade Commission (FTC) has stated that "[t]he most significant change in the debt collection business in the past decade . . . has been the advent and growth of debt buying (*i.e.*, the purchasing, collecting, and reselling of debts in default)." FTC, *Collecting Consumer Debts: The Challenges of*

[2] *Available at* http://www.ftc.gov/bcp/workshops/debtcollection/FTC_DebtCollect_071010.pdf.

Change; A Workshop Report iv (Feb. 2009). Recently, the FTC released an illuminating study of the debt buying industry, examining more than 5,000 portfolios containing nearly 90 million consumer accounts. FTC, *The Structure and Practices of the Debt Buying Industry* ii (Jan. 2013) ("Debt Buying Industry"). Of the accounts analyzed, debt buyers paid an average of four cents per dollar of debt face value. *Id.* The report concluded that buyers "rarely received dispute history," *id.*, rarely received underlying documents about debts such as account statements or terms and conditions of credit, and purchased the portfolios "as is" – without warranties as to the accuracy of information provided. *Id.* at iii.

B. Increasing Role of Debt Collection Law Firms

The expansion of debt collection and the advent of debt buying have transformed the collection law firm sector. Today, "collectors more commonly use litigation as a collection strategy than they did when the FDCPA was enacted" in 1977. CFPB Annual Report 2013 at 9. "Attorneys play an integral role in the debt collection process[;] [w]hether acting independently as debt collectors, assisting collection agencies, or working in concert with creditors, attorneys write letters, pursue collection, and ultimately file suit to collect delinquent debt." Comments of ACA International Regarding the Debt Collection Workshop at 45 (June 6, 2007). Debt collectors themselves acknowledge the "gravity of influence" attorney involvement can have on consumers. *Id.*

Collection law firms vary in methods of collection. Many law firms simply send on behalf of, or furnish to, the creditor a dunning letter or series of letters for a small flat fee or pursuant to a retainer. *See, e.g., Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86, 103 (E.D.N.Y. 2009). Other collection firms specialize in filing a high volume of consumer collection suits, of which 53% resulted in default judgments in NYC Civil Court in 2012. Memorandum Re NYC Civil Court Consumer Debt Matters 2012 (March 8, 2013) (on file with authors); *see also* The Legal Aid Society, et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower Income New Yorkers* 1-2 (May 2010) ("Debt Deception") (finding that five law firms filed roughly two-thirds of the 457,322 debt buyer lawsuits filed between January 2006 through July 2008, and that four out of five cases initially resulted in default judgments for debt buyers). These law firms typically retain a portion, *e.g.*, 15-50%, of any amount collected. R. Hobbs, National Consumer Law Center, Fair Debt Collection at 7 (7th ed. 2011) ("Fair Debt Collection").

Many collection law firms employ dozens to hundreds of collectors, but only a handful of attorneys. In a 2009 deposition of a partner at the New York law firm of Cohen & Slamowitz, David A. Cohen admitted to employing 14 lawyers, 30 to 40 legal secretaries and paralegals, and 60 debt collectors in his office. Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. Times, July 13,

2010, at B1. The website of another local debt collection law firm, Pressler & Pressler, boasts "over 300 employees and 18 attorneys."[3] These law firms use their sizable non-legal staff to engage in non-litigation debt collection activities, even absent the possibility of a lawsuit. According to the deposition of attorney Michael Young, who worked at the debt collection law firm James A. West P.C. in Texas, his firm filed approximately 30 to 40 lawsuits per month on behalf of creditors, and he personally sent between 500 and 4,000 debt collection letters *per day*. *Villarreal v. JP Morgan Chase*, 10 CV 0053 (S.D. Tx), Deposition Tr. Of Michael Young (Sept. 15, 2010) at 17-18 (on file with authors). Recently, The Schreiber Law Firm, PLLC, which has two attorneys, entered into a "strategic alliance" with AMG Financial Services, LLC that will allow it to "offer all of its collection services to clients whose account debtors are located nationally," even though its two attorneys are licensed to practice law in only five states and the District of Columbia. InsideArm, *AMG Financial Services Expands and Enters Strategic Alliance with the Schreiber Law Firm*, May 20, 2013.

Law firms increasingly are entering into the debt buying industry themselves. Prohibited from purchasing debt directly, they create separate companies to purchase and collect debt. Jane Adler, *Law Firms Balloon*, Cards and Payments, Apr. 2006, at 48-51. For example, the following law firms in NYC

[3] *Available at* http://presslerjobs.com/.

have created their own debt-buying LLCs: Mel S. Harris and Associates (Pinpoint Technologies); Cohen & Slamowitz (Gemini Asset Recoveries and Metro Portfolios); Eltman Eltman & Cooper (Erin Capital Management); and Mullooly, Jeffrey, Rooney & Flynn (NY Financial Services). *Debt Deception* at 4.

C. Debt Collection Complaints

The debt collection industry is rife with abuse and is often unfair to unsophisticated consumers. In its 2013 Annual Report to Congress, the CFPB declared that the debt collection industry "remains a top source of consumer complaints." CFPB Annual Report 2013 at 9. Notably, third-party debt collection complaints significantly outnumber in-house, original creditor debt collection complaints. *Id*. at 56. In 2012, debt collection complaints accounted for 24.1% of all consumer complaints to the FTC, of which 19.8% involved third-party debt collection and a mere 4.3% involved original creditor debt collection. *Id.*

At the state level, the NYS Consumer Protection Division reported that in 2011 debt collection was the second highest complaint. NYS Assembly Standing Committee on Consumer Affairs and Protection, Public Hearing on the Effectiveness of the Consumer Protection Division (CPD) Within the Department of State (DOS) 19-20 (Nov. 28, 2012). In NYC, the Department of Consumer Affairs (DCA) reported that, in 2012, debt collection abuses were the top consumer complaint for the fifth year in a row. Press Release, NYC Dep't of Consumer

Affairs Names Debt Collectors Top Complaint for the Fifth Year in a Row (Mar. 5, 2012).

D. Government Oversight of Debt Collection

1. Federal Response

In 1977, Congress passed the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection practices." § 1692(e). Congress found that "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." § 1692(a). The FDCPA provides for a private right of action and statutory penalties, § 1692k, and civil enforcement of the law is now shared by the CFPB and the FTC. § 1692l.

Although the FDCPA originally exempted attorneys from coverage, Congress eliminated this exemption in 1986, having found that it had become a major loophole in the law. Some law firms had become indistinguishable from collection agencies, except for their letterhead and immunity from the FDCPA, and even touted their exemption from the FDCPA to garner additional debt collection

business. *See* H.R. Rep. No. 99-405, at 1 (1985), as reprinted in 1986 U.S.C.C.A.N. 1752, 1752. Similarly, in promulgating rules subjecting nonbank financial companies to oversight, the CFPB rejected public comments urging it to exclude attorneys from the consumer debt collection market. 77 Fed. Reg. 65784-5 (Oct. 31, 2012).

2. State Response

In 1973, before the FDCPA was enacted, New York adopted protections against abusive debt collection practices. N.Y. Gen. Bus. Law § 601, *et seq*. The state law prohibits creditors and their agents from, inter alia, attempting to collect charges that are not "justly due and legally chargeable." *Id.* However, the statute does not provide for a private right of action and enforcement is limited to the Attorney General or district attorneys. § 602(2). New York, unlike numerous other states, does not license debt collectors.

3. NYC Response

In 1968, NYC established the nation's first municipal consumer protection agency and has been at the forefront of consumer protection policy and practice for over 50 years. DCA, 2007 Annual Report (2007) (Overview of DCA). In 1984, the City Council stated that debt collection agencies used "tactics which would shock the conscience of ordinary people." NYC Admin. Code § 20-488 (2013). It therefore enacted a local law in 1985 to license debt collection agencies and to

subject them to DCA's regulation. N.Y.C. Admin. Code § 20-488, *et seq*. Thus, NYC established a mandate for licensing debt collection agencies in order to "protect the interests, reputations and fiscal well-being of the citizens of this city against those agencies that would abuse their privilege of operation." NYC Admin. Code § 20-488. Substantive protections against abusive debt collection practices are set out in municipal regulations. Rules of City of N.Y. Pt. 6 (2013). For example, they require debt collectors to verify a debt when disputed; disclose a person's legal rights when the debt is past the statute of limitations; confirm in writing an agreed-upon debt payment schedule or settlement agreement within five business days; maintain records for the debts upon which it collects; and provide a call-back number answered by a natural person. N.Y.C. Admin. Code § 20-489; Rules of the City of New York § 5-77.

In 2009, the City Council enacted N.Y.C. Local Law No. 15 Int. No. 660-A (2009) (hereinafter "Local Law 15") after conducting hearings that revealed how debt collectors often collect on questionable debts and, in doing so, frequently abuse Amici's clients, who are disabled, elderly, poor, and lack knowledge of their rights. The new law clarified that the licensing requirement of the existing law applied to entities that purchase and collect delinquent debt, as well as attorneys and law firms who engage in activities traditionally performed by debt collectors.

ARGUMENT

The court below improperly found that Local Law 15, which amended New York City's law to clarify that the City's debt collection licensing law applied to attorneys engaging in activities traditionally performed by debt collectors, conflicted with NYS judiciary law. In fact, a municipality may regulate licensed attorneys in certain circumstances -- as here, where the practice of prelitigation debt collection is easily differentiated from the practice of law -- without presenting ethical problems for attorneys. Further, to the extent that the applicable state law is unsettled, the court should not have exercised supplemental jurisdiction, and should have instead dismissed the claim. In addition, the court overlooked the important and well established policy of debt collection laws, and the need for strong local legislation to protect New Yorkers from exploitive debt collectors with law licenses. Without the City's oversight of debt collection lawyers and law firms, consumers have fewer protections from unfair attempts to collect questionable debts, no redress through the DCA, and little chance of obtaining relief through the State's grievance procedure. The court was wrong to find that the NYC Council exceeded its authority in passing Local Law 15. The decision should be reversed.

I. LOCAL LAW 15 IS A PERMISSIBLE MUNICIPAL REGULATION OF LICENSED ATTORNEYS

A. Debt Collecting is Distinct from Practicing Law

Attorneys may be regulated under Local Law 15 because traditional debt collection is distinct from the practice of law. The court found that it was "impossible to say" when a debt collection attorney "is acting simply as a debt collector, and not as an attorney." *Eric M. Berman, P.C. v. City of New York*, 895 F.Supp.2d 453, 471 (E.D.N.Y. 2012). In particular, the court found that traditional debt collection practices of calling consumers and sending dunning letters, for example, are "core aspects of the practice of law." 895 F. Supp. at 472. These conclusions reflect a fundamental misunderstanding of the nature of debt collection and are directly at odds with case law, Congressional findings, and Amici's experience.[4] By giving a competitive edge to unscrupulous debt collection attorneys, the court's decision opens the door to the same dangers that drove Congress, over 25 years ago, to include attorneys in the definition of debt collectors. Under the decision, attorneys collecting debts are in a unique position to use their licenses as both shields and swords.

[4] In three pages on this subject, Plaintiffs merely pointed out that it is hard for attorneys to distinguish between being a collector and being an attorney when calling consumers. Pl.'s Reply Mem. Supp. Summ. J. 18-20. In Amici's experience, debt collection attorneys rarely if ever speak directly with consumers pre-litigation; even most out-of-court contacts are by the law firm's non-attorney debt collectors.

The Second Circuit has found that attorneys act solely as debt collectors, and not as attorneys or in any legal capacity, when they send letters to consumers without actually reviewing the letters or consumers' individual files:

> [A]ttorneys can participate in debt collection in any number of ways, without contravening the FDCPA so long as their status as attorneys is not misleading. . . . our prior precedents demonstrate that an attorney can, in fact, send a debt collection letter without being meaningfully involved as an attorney within the collection process, so long as that letter includes disclaimers that should make clear even to the "least sophisticated consumer" that the law firm or attorney sending the letter is not, at the time of the letter's transmission, acting as an attorney.

Greco v. Trauner, Cohen & Thomas, LLP, 412 F.3d 360, 364 (2d Cir. 2005).

Other circuits agree:

> We caution lawyers who send debt collection letters to state clearly, prominently, and conspicuously that although the letter is from a lawyer, *the lawyer is acting solely as a debt collector and not in any legal capacity* when sending the letter. The disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time. Debt collectors acting solely as debt collectors must not send the message that a lawyer is involved, because this deceptively sends the message that the "price of poker has gone up."

Gonzalez v. Kay, 577 F.3d 600, 607 (5th Cir. 2009) (emphasis added); *see also Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 1003 (3d Cir. 2011) (emphasis added) ("[W]e believe that it was misleading and deceptive for the Kay Law Firm to raise the specter of potential legal action by using its law firm title to collect a debt *when the firm was not acting in its legal capacity* when it sent the

letters."). The established distinction between attorneys acting as attorneys and attorneys acting in a non-legal capacity is not one that the NYC Council created from whole cloth. The debt collection activity addressed by Local Law 15 does not require a law license, but exempting individuals who have such a license creates an obvious loophole for the debt collectors who retain attorneys and especially for those attorneys who collect on debts they purchase through subsidiary companies.

Regulatory agencies have not had difficulty in differentiating between actions taken by debt collection attorneys that are clearly collection-related and those that are purely legal in nature. FTC investigations of debt collection law firms show the underside of their businesses and reveal starkly the lack of "legal" work they conduct. For example, in 2013, the FTC entered into a consent order with the Jacob Law Group, a debt collection law firm, in an action brought in part for FDCPA violations. Stipulated Final Judgment and Order for Permanent Injunction, *FTC v. Security Credit Servs.*, 1:13-cv-00799 (N.D. Ga. Mar. 19, 2013).[5] The sophistication and scope of this firm's non-litigation activity firm is evident; it sought to collect on more than 300,000 consumer debt accounts, but filed only 5,600 lawsuits in five years. Complaint for Permanent Injunction and Other Equitable Relief at 7, ¶ 18, *FTC v. Security Credit Servs.*, 1:13-cv-00799

(N.D. Ga. Mar. 13, 2013) . Non-litigation efforts included traditional debt collection efforts such as "skip-tracing," issuing collection notices, and contacting consumers by telephone. *Id.* at 6, ¶ 17.

In another case, involving New York attorney Salvatore Spinelli and the debt collection agency Oxford Collection Agency, Inc. ("Oxford"), the FTC alleged that the law firm conducted a "major portion" of Oxford's collection activity. Complaint at 3, ¶ 8, *U.S.A. v. Oxford Collection Agency*, No. CV-09-2467 (E.D.N.Y. June 10, 2009) ("Oxford Complaint"). Defendants engaged in consumer debt collection nationwide and had three million active accounts. *Id*. at 5, ¶ 14. The complaint alleged multiple FDCPA violations, including contacting third parties illegally, *id.* at 9, ¶ 35; using obscene and profane language, *id*. at 10, ¶ 37(a); and falsely representing or implying that nonpayment of a debt would result in arrest or imprisonment. *Id*. at 10, ¶ 38(a).

The experiences of Amici's clients further illustrate the demarcation of debt collection and legal activity and why regulation of such actions is so important. A client of an Amici organization, Ms. F, began receiving harassing telephone calls from a non-attorney debt collector at a debt collection law firm while she was at work as a home health aide. The debt collector ignored her repeated requests to stop calling during work hours. If the entity that called Ms. F. had no attorneys, it

[5] Stipulation available at http://www.ftc.gov/os/caselist/1123175/130326scsorder.pdf.

would have to provide detailed verification of the debt, and be prohibited from calling more than twice in seven days. However, simply by having a law license, this firm's employees were exempt from the law that protects consumers like Ms. F from misconduct entirely distinct from practicing law.

B. Local Law 15 is Not Preempted by Judiciary Law §§ 53 and 90

The court held that Local Law 15's regulation of attorney conduct conflicts with and is thus preempted by New York Judiciary Law §§ 53 and 90, which vest the admission, supervision and regulation of attorneys with the judiciary. *Berman*, 895 F. Supp. 2d at 469. The court held that attorneys may be regulated by DCA only when engaging in unquestionably non-legal activities like "driving a taxi cab or operating a fruit stand." *Berman*, 895 F. Supp. 2d at 472.

However, the reach of the judiciary's power is based not on the status of the actor, but on whether the conduct constitutes the practice of law. *See In re Zuckerman*, 20 N.Y.2d 430, 439 (1967) (holding that pursuant to § 90, attorneys' "professional *conduct* is subject to the supervisory and corrective powers" of the state judiciary) (emphasis added); *In re Wong*, 275 A.D.2d 1, 5, (1st Dep't 2000) (holding that § 90 "broadly establishes judicial governance over the *conduct* of attorneys") (emphasis added). Even then, the state judiciary law does not occupy the entire field of attorney supervision, preempting all other bodies. *See Forti v. N.Y.S. Ethics Comm'n*, 75 N.Y.2d 596, 615 (1990) ("Plaintiff['s] separation of

powers claim rests on the erroneous assumption that only the judiciary may regulate the practice of law . . . ."); *People v. Law Office of Capoccia*, 289 A.D.2d 650, 651 (3d Dep't 2001); Press Release, NYS Office of the Attorney General, A.G. Schneiderman Announces $4 Million Settlement With New York Foreclosure Law Firm Steven J. Baum P.C. And Pillar Processing LLC (Mar. 22, 2012) (settling claims with Steven J. Baum P.C., a foreclosure law firm, for violating NY Executive Law and General Business Law by bringing foreclosure proceedings without taking appropriate steps to verify the accuracy of the allegations and the plaintiff's standing to foreclose—conduct that goes to the heart of litigation activity).

Local Law 15's conduct-based standard indicates that the City Council was fully aware of the prevailing standard: it excludes attorneys collecting a debt "through activities that may only be performed by a licensed attorney," but not attorneys "who regularly engage[] in activities traditionally performed by debt collectors, including, but not limited to, contacting a debtor through the mail or via telephone with the purpose of collecting a debt." § 20-489(5).

State courts have permitted similar municipal regulation of attorneys as that at issue here. In *Aponte v. Raychuk*, the court enjoined an attorney's newspaper advertisements as deceptive and misleading to the consumer public under the NYC

Consumer Protection Law. 140 Misc. 2d 864 (Sup. Ct. N.Y. Cty. 1988). It reasoned that:

> although the State has a comprehensive scheme to regulate attorneys' conduct, it does not appear to preempt the City's attempt to protect its consumers. Rather than being inconsistent with the scheme, the City's law supplements it, providing additional protection to the consuming public.

Id. at 869. The Appellate Division affirmed, "find[ing] no inconsistency between the local law and the legislative delegation of authority to this court to regulate the conduct of attorneys[, n]or [being] able to discern any implied legislative intent to preempt this area of regulation." 160 A.D.2d 636 (1st Dep't 1990).

The court distinguished *Aponte* because Local Law 15 "directly regulate[s] core aspects of the practice of law." *Berman*, 895 F. Supp. 2d at 472. State preemption law, however, is not nearly as limiting as the court described. The local law upheld in *Aponte*, Consumer Protection Law § 20-700, regulates nearly identical conduct as found in Local Law 15, and provides that: "[n]o person shall engage in any deceptive or unconscionable trade practice . . . ." Moreover, *Aponte* considered the application of this local law to conduct specifically regulated in great detail by NY Rule of Professional Conduct 7.1, attorney advertising, which is far from "the incidental regulations of attorney conduct that have been upheld by the New York courts." *Id.* at 472. Because the conduct in question here—traditional, prelitigation debt collection—is easily distinguishable from the practice

of law, Local Law 15 is not preempted; in fact, by protecting consumers, it is in keeping with state law pursuant to *Aponte*.[6]

C. Local Law 15 Does Not Cause Debt Collection Attorneys to Violate Ethical Duties to Clients

Local Law 15 does not conflict with the state judiciary's Rules of Professional Conduct, as stated by the court. 895 F. Supp. 2d at 472. The court reasoned that requiring a debt collector to inform a consumer when a debt is time-barred "require[s] attorneys to violate their ethical duties to clients," 895 F. Supp. 2d at 473, but did not specify which ethical duties. In fact, attorneys would not violate any ethical duties by informing consumers when a claim is time-barred: they would simply be acting as agents of their debt collector clients, who must provide this information.

Furthermore, these duties exist within the bounds of the law. *See, e.g.*, *Nix v. Whiteside*, 475 U.S. 157, 168–69, 106 S. Ct. 988, 89 L.Ed.2d 123 (1986) ("[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law . . . ."). For example, Section 3 of Rule 3.4, entitled "Fairness to Opposing Party and Counsel," prohibits an attorney from

[6] Additionally, New York rules of statutory interpretation require liberal construction of statutes that promote public welfare. N.Y. Stat. Law § 341. The court's failure to liberally interpret the law to permit licensure of debt collection attorneys advances their private interests, rather than the public welfare purpose of consumer protection.

concealing or failing to disclose "that which the lawyer is required by law to disclose." Local Law 15 simply defines one of these contemplated disclosures, in cases of time-barred debts.

D. The District Court Should Have Abstained from Deciding an Unsettled Area of Law

In finding Local Law 15 was preempted, the court relied on *Matter of Roth v. Turoff*, which found that a local ordinance requiring taxicab brokers to be licensed was preempted by the Judiciary Law to the extent that it applied to attorneys. 127 Misc. 2d 998 (Sup. Ct. N.Y. Cty. 1985), *aff'd sub nom.*, 124 A.D.2d 471 (1st Dep't 1986). However, *Roth* does not govern. First, it precedes *Aponte*, and, therefore, its statement that "no local legislature has the power to define new limitations on the practice of the law," *id.* at 1000, has been implicitly overruled. Second, the ordinance in *Roth* is distinguishable from Local Law 15 because the former, involving taxicab brokers, imposed requirements on attorneys that did not equally apply to their clients, whereas the latter simply closes a loophole by requiring attorneys who collect debts to conform to the same regulations as their clients, for whom they are agents.

Although *Aponte* directly governs, to the extent *Aponte* and *Roth* conflict, rendering applicable state law unsettled, the court should have abstained from deciding this issue. A court abuses its discretion by exercising supplemental jurisdiction when a state law claim turns on conflicting state court precedent,

Valencia ex rel. Franco v. Lee, 316 F.3d 299, 308 (2d Cir. 2003), or "a novel and complex issue involving the interpretation of state statutes concerning the administration of state government," *Seabrook v. Jacobson*, 153 F.3d 70, 71 (2d Cir. 1998).

"[T]he interplay between the responsibilities imposed by municipal law and those imposed by state law are fundamental and complex questions involving the balancing of important policies of state government," and should be defined by the state court. *Id.* Regulation of debt collectors is of particular local concern. *See Silver v. Woolf*, 694 F.2d 8, 12 (2d Cir. 1982) ("Debt collection practices have long been viewed as a proper matter for regulation by the states . . . . The perceived abuses and consequent harm [caused by debt collectors—i.e.,] abusive language and threats followed by feelings of insult and humiliation and an urge to pay a disputed debt solely to avoid further harassment—are almost entirely localized."). Comity is doubly warranted here because the state court is not only the appropriate interpreter of state law, but also the body whose authority was found to be preemptive. Therefore, abstention was most prudent. The court abused its discretion by deciding this case on unsettled state law.

II. PUBLIC POLICY FAVORS STRONG DEBT COLLECTION LAWS TO LEVEL THE PLAYING FIELD, PROTECT CONSUMERS, AND PROVIDE THEM NECESSARY REDRESS

A. Local Law 15 and the Accompanying Rules Provide Critical Consumer Protections

For many of the same reasons the FDCPA was enacted and applies to attorneys, Local Law 15 and the DCA's implementing rules provide vital protections against egregious abuses by debt collectors, including collection attorneys against NYC consumers.[7] Specifically, the *Debt Deception* study found that regulation has a positive impact on collectors' behavior, and that unlicensed debt buyers "obtained a significantly higher percentage of default judgments than licensed debt buyers, suggesting that unlicensed debt buyers engaged in more abusive practices." *Debt Deception* at 97. Furthermore, "[a]buses by attorney debt collectors are more egregious than those of lay collectors because a consumer reacts with far more duress to an attorney's improper threat of legal action than to a debt collection agency committing the same practice." *Crossley v. Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989).

[7] Local Law 15 was enacted to "protect the interests, reputations and fiscal well-being of the citizens of this city . . .", N.Y.C. Admin. Code § 20-488, and is not, as Plaintiffs argue, "a trap in which thousands of good-faith attorneys likely will fall, thereby generating windfall revenues for New York City in the form of fines." Decl. Mark H. Stein in Supp. Pls.' Mot. Summ. J ¶ 12.

For example, Amici client Ms. J was hospitalized after an accident. Unemployed at the time, she should have qualified for Medicaid, but the hospital failed to submit all of the necessary paperwork. Three years after hospital discharge, Ms. J received a letter from a debt collection law firm that she had been sued for almost $60,000, that she had already been served with court papers (though she had not), and that the firm would move for a default judgment unless she replied to the letter. When Ms. J called the law firm, a paralegal told her that it was too late to do anything but pay, even though the firm had not yet sought a default judgment. Ms. J relied on this misinformation, resulting in a default judgment against her. Ms. J's story demonstrates the heightened potential for abuse of the collection process by unscrupulous attorneys, and the need for regulation.

The requirement that a debt collector verify a disputed debt is a critical consumer protection, given countless reports of debt collectors attempting to collect invalid debts – including debts resulting from identity theft, discharged in bankruptcy, or already paid or settled – or from the wrong person. *See* Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, American Banker, Mar. 29, 2012 (reporting that Bank of America sold portfolios of defaulted debts while warning that some had already been paid or might have been extinguished in bankruptcy); Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, American Banker, Mar. 12, 2012 (reporting that Chase

sold portfolios of defaulted debts that it considered unreliable, that lacked documentation, and with incorrect amounts listed as owed). Numerous studies have documented problems with debt buyers whose business model is to buy old, defaulted debts for pennies on the dollar and receive little to no documentation or assurances about the debts they purchase. Debt Buying Industry at ii-iii. In the collective experience of Amici, NYC debt buyers frequently attempt to collect debts that resulted from identity theft, were disputed with the original creditor or settled, or are time-barred. Amici have even seen instances where different debt buyers pursued the same person for a single debt.

The FDCPA inadequately remedies these abuses because its verification requirement has been diluted to the point of ineffectiveness, and because consumers must dispute debts within 30 days of receiving the collector's initial written communication to avail themselves of its protection. 15 U.S.C. § 1692g. In contrast, the local law and rules give NYC residents the right to more meaningful debt verification, which they may exercise at any time. An Amici client, Ms. B, is permanently disabled due to a congenital heart condition. With a store credit card, she purchased a bedroom suite, which was never delivered because the store filed for bankruptcy. The debt was then sold multiple times. In 2011, a debt collection law firm began contacting her about the debt. With help from a legal services organization, she sent a dispute letter requesting verification

under NYC law. Unable to provide the verification, the law firm was required to stop collection activity against Ms. B.

Local Law 15 and rules also give greater protection against unfair collection attempts on time-barred debts. As the FTC noted:

> Most consumers do not know their legal rights with respect to collection of [such] debts [. . .]. When a collector tells a consumer that she owes money and demands payment, it may create the misleading impression that the collector can sue the consumer in court to collect that debt.

Press Release, Federal Trade Commission, Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million for Alleged Consumer Deception (Jan. 30, 2012). Consumers may also have difficulty determining whether a debt is time-barred because the statute of limitations on a credit card debt ranges from three to six years, depending on where the original creditor is based. Amici have seen numerous instances in which a law firm began harassing the client for payment of a debt long after any applicable statute of limitations expired. Often by deceptive statements, the debt buyers then convinced the clients to make just a "token" $15 or $25 payment, for example, thereby reviving the statute of limitations. The DCA rule guards against this by requiring from debt collectors certain disclosures when a debt is time-barred.

In one case, a law firm collecting on a gym membership debt that was time-barred for over four years did not disclose the debt was stale as Local Law 15 then required. The elderly consumer made a payment with Social Security funds, unknowingly restarting the clock. She was sued one year later.

The law's other provisions are also important. By requiring debt collectors to confirm a payment schedule or settlement agreement in writing, Local Law 15 and rules prevent debt collectors from making oral agreements with consumers, and then reneging or changing the terms to unfair ones. Requiring debt collectors to maintain records for the debts they collect, including of payments received, settlement agreements, debt purchases, and monthly call logs, helps ensure that consumers are not pursued for illegitimate debts. By requiring debt collectors to provide a call-back number answered by a natural person, NYC's laws address the frustration faced by unsophisticated consumers who must navigate Kafkaesque telephone systems with numerous prompts that discourage dispute resolution.

Exempting from the law attorneys engaged in the same practices as debt collection agencies undermines the City's attempt to level the playing field for consumers and protect them from abusive collection tactics.

B. Without Local Law 15 and DCA as an Enforcer and Mediator, Abused Consumers are Left to Pursue Redress Through Disciplinary Action or Through the Courts

New York State does not license debt collectors and its Debt Collection Procedures statute does not provide for a private right of action or monetary compensation. *See* N.Y. Gen. Bus. Law § 601, *et seq*. The only current recourse for an individual NYC consumer abused by a debt collection attorney is to lodge a complaint with the appropriate disciplinary committee, or to file an affirmative case.

C. The State's Disciplinary Rules Do Not Cover Activities Prohibited or Required By Local Law 15

The court reasoned that lawyers are governed by the rules of professional conduct, even when engaging in nonlegal services. 895 F. Supp. 2d at 470 "Charitably put, defendants' cramped view of the scope of the judiciary's authority over attorney conduct is inaccurate." *Id*. This misapprehension of what debt collection attorneys do is directly at odds with congressional findings regarding debt collection attorneys' conduct and lack of debt collection attorney oversight by states. New York's Rules of Professional Conduct ("disciplinary rules") provide only a "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Preamble § 6. The great majority of these rules

govern an attorney's conduct in representation of clients. *See, e.g.*, Departmental Disciplinary Committee of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, 2011 Annual Report 27; First Department Departmental Disciplinary Committee, Department of Disciplinary Committee, Supreme Court, *Complaint Against Lawyers Brochure* (referring to problems with "your lawyer" in the Introduction) ("*First Department Brochure*") . Those provisions that address a lawyer's conduct toward those other than their clients would not prevent the abusive and deceptive actions by debt collection agencies Local Law 15 was designed to address.

Additionally, the disciplinary procedure is not an adequate remedy for consumers harmed by such practices. Its purpose is to ensure that members of the bar adhere to the standards set forth in the Rules of Professional Conduct, not to oversee their non-legal practices. *See In re Popper*, 193 A.D. 505, 510, 184 N.Y.S. 406, 409 (1920) ("The purpose [of disciplinary proceedings] to exercise the great and summary power of the court, not for the benefit of a complaining individual, but for the good of the community, and to uphold the administration of justice." (quotation omitted)).

Attorneys found to have violated the rules can be sanctioned or lose their licenses to practice law. However, a disciplinary violation creates no civil liability and provides no monetary compensation. In contrast, the DCA can impose a civil

penalty for debt collection agencies that violate the rules. N.Y.C. Admin Code § 20-494.

When debating whether to eliminate the attorney exemption for the FDCPA, which Congress did in 1986, Representative Annunzio noted that "There are those who claim that H.R. 237 is unnecessary because attorney violations are rare and can be handled on a case-by-case basis by State and local bar associations. Unfortunately, the record does not bear this out." 131 Cong. Rec. 33584 (1985). He went on to quote a finding by the NYC Bar Association that:

> The staggering increase in recent years in installment and other credit sales has had a profound effect on that segment of the bar involved in collection work. The demand of volume threatens to destroy all vestiges of professionalism. The problem is too extensive to be remedied on a case-by-case basis.

Id.

During these debates, Congress cited an FTC survey finding that fewer than half of attorney disciplinary agencies had taken actions against attorneys for engaging in conduct that violated the FDCPA, and those that did issued only private admonitions. Wayne K. Lewis, *Regulations of Attorney Debt Collectors--The Role of the FTC and the Bar*, 35 Hasting L.J. 669, 696 (1984). In the FTC investigation involving the attorney Salvatore Spinelli and Oxford Collection Agency, consumers had complained about the firm's practices to the FTC, the Better

Business Bureau, and various state attorneys general, but not to any grievance committee.[8] Oxford Complaint at 6, ¶ 23.

D. Affirmative Litigation Should Not Be Aggrieved Consumers' Only Option

Apart from DCA's complaint mediation program and enforcement authority, consumers have little recourse when firms engage in abusive debt collection activities. The alternative of filing lawsuits based on the FDCPA or state law against debt collection law firms is unrealistic in many instances. First, not all violations of NYC law are necessarily violations of the FDCPA. Second, most consumers are unaware of their rights under the FDCPA or state law, of their rights to seek legal redress through litigation, or that the FDCPA is a fee-shifting statute which relieves litigants from paying counsel to vindicate their rights. Third, unlike the DCA mediation process, which typically mediates complaints in 20 days, litigation can be protracted and a daunting process for the average consumer. These factors, along with the limited relief available under the FDCPA ($1000 maximum statutory damages) and GBL § 349 (actual damages or $50, with the possibility of trebling up to $1,000), and the time and stress involved in litigation, lead many consumers to decide that even though a debt collection law firm may

[8] The law firm was located outside of NYC, and thus no complaints were lodged with DCA.

have violated their rights, the time and stress involved in a lawsuit outweigh the potentially for a small victory.

CONCLUSION

For these reasons, this Court should reverse the Memorandum & Order of the court invalidating Local Law 15.

Dated: May 31, 2013

____/s/_____
Carolyn E. Coffey (CC 6741)
Of counsel to Jeanette Zelhof, Esq.
MFY Legal Services, Inc.
299 Broadway, 4th Fl.
New York, NY 10007
(212) 417-3701

____/s/_____
Theodora Galacatos (7144)
Executive Director
Feerick Center for Social Justice
33 West 60th Street, 9th Fl.
New York, NY 10023
(212) 636-7747

____/s/_____
Claudia E. Wilner
Senior Staff Attorney

New Economy Project (dba/formerly
Neighborhood Economic Development
Advocacy Project)
176 Grand St., Ste. 300
New York, NY 10013
(212) 680-5100

Attorneys for Amici Curiae

Certificate of Compliance With FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14-point font.

Dated: May 31, 2013
New York, New York

____/s/_____
Carolyn E. Coffey (CC 6741)
Of counsel to Jeanette Zelhof, Esq.
MFY Legal Services, Inc.
299 Broadway, 4th Fl.
New York, NY 10007
(212) 417-3701
Attorneys for Amicus Curiae