

CTQ—2014-00007
Court of Appeals
STATE OF NEW YORK

ERIC M. BERMAN, P.C., LACY KATZEN, LLP,

Plaintiffs-Respondents,

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 a Question Certified by the United States Court of Appeals
For the Second Circuit (USCOA Docket No. 13-598)*

**BRIEF OF AMICI CURIAE 17 CONSUMER ADVOCACY ORGANIZATIONS IN
SUPPORT OF DEFENDANTS-APPELLANTS URGING REVERSAL**

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PRELIMINARY STATEMENT

Amici curiae consumer advocacy and other organizations submit this amici curiae brief to urge this Court to answer the two questions certified by the United States Court of Appeals for the Second Circuit in the negative and, more specifically, to hold: that Local Law 15 of 2009 is not preempted by Sections 53 and 90 of the New York Judiciary Law, and that such regulation does not violate Section 2203(c) of the New York City Charter. The Court should answer two additional questions presented by Plaintiffs-Respondents also in the negative. Traditional, non-litigation debt collection is clearly and easily discernible from attorney conduct. Debt collection law firms employ large staffs of lay personnel who engage in non-litigation, debt collection activity. Moreover, for decades, federal law has required debt collection law firms to operate with this distinction in mind. For this Court to hold otherwise would create a perverse incentive for debt collection law firms in New York City to engage in abusive and deceptive non-litigation activities and traditional debt collection practices behind the shield of attorney conduct.

INTEREST OF THE AMICI

Amici curiae, which include Bromberg Law Office, P.C., CAMBA Legal Services, Inc., Community Development Project at Urban Justice Center, DC 37 Municipal Employees Legal Services, Feerick Center for Social Justice, The Law

Office of Ahmad Keshavarz, The Legal Aid Society, Legal Services NYC, Lincoln Square Legal Services, Inc., The Louis Stein Center for Law and Ethics, MFY Legal Services, Inc., New Economy Project, New York Legal Assistance Group, Queens Volunteer Lawyers Project, Inc., St. Vincent de Paul Legal Program, Inc. Consumer Justice for the Elderly: Litigation Clinic, St. John's University School of Law, Schlanger & Schlanger, LLP, and Teamsters Local 237 Legal Services Plan, share the mission of protecting consumers' rights and ensuring that only lawful means are used to collect debts. Nearly all amici provide direct legal services to low-income or financially distressed consumers in debt collection cases, and all amici participate in legislative, educational or other advocacy efforts to protect consumers' rights. Clients of amici are among the most vulnerable of consumers, including the elderly, non-English speaking immigrants, low-wage workers, the disabled, and other New Yorkers whom Local Law 15 was enacted to benefit. The outcome of this case will dramatically affect amici's clients, who are currently denied the City law's protections and rights when they are routinely contacted by debt collection law firms. Additionally, the amici include the Stein Center for Law and Ethics, which studies the legal profession and its ethics and regulation, including the interrelationship between judicial regulation of the bar and legislative and administrative regulation.

QUESTIONS PRESENTED

The United States Court of Appeals for the Second Circuit certified to this Court two questions pertaining to New York City’s licensing and regulation of debt collection law firms engaged in traditional debt collection activities: (1) “Does Local Law 15, insofar as it regulates attorney conduct, constitute an unlawful encroachment on the State’s authority to regulate attorneys, and is there a conflict between Local Law 15 and Sections 53 and 90 of the New York Judiciary Law?” and (2) “If Local Law 15’s regulation of attorney conduct is not preempted, does Local Law 15, as applied to attorneys, violate Section 2203(c) of the New York City Charter?” The Second Circuit also stated this Court might “reformulate or expand these certified questions as it deems appropriate.” *Eric M. Berman, P.C. v. City of New York*, 13CV598, slip op. at 19 (2d Cir. Oct. 29, 2014).

Plaintiffs-Respondents added two of their own questions for review, including one question on field preemption and one question on whether Local Law 15 is “unconstitutionally vague and therefore invalid.” (Plaintiffs-Respondents’ Brief at 4.)

As explained below, the Court should answer both certified questions in the negative, because the conduct at issue here is easily identifiable and is not preempted. The Court should answer Plaintiff-Respondents’ questions negatively as well. As Defendants-Appellants argue persuasively, Plaintiffs-Respondents’

preemption arguments fail. And the notion that Local Law 15's definition of debt collector is vague, when it is nearly identical to the definition under analogous, longstanding federal law, is disingenuous at best.

BACKGROUND

I. Government Has Sought to Address the Consumer Debt Collection Industry's Long History of Abusive and Deceptive Practices Through Licensure and Oversight

The consumer debt collection industry has a long history of abusive and deceptive practices. *See* Lauren Goldberg, *Dealing in Debt: The High Stakes World of Debt Collection after FDCPA*, 79 S. Cal. L. Rev. 711, 714-17 (2005-2006). Consumers have suffered—and routinely complain about—a wide range of debt collection abuses, including telephone harassment, false and misleading statements regarding debts, false threats of litigation, debt collectors contacting third parties or collecting funds they know are exempt, collection of time-barred debt and debts that have been paid, and even impersonation of law enforcement. *See* Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual FDCPA Report 2015* 11-15 (Mar. 2015) [hereinafter CFPB, *2015 Annual FDCPA Report*].¹ Such egregious tactics and the distinctive vulnerability of consumers prompted adoption of protective consumer measures by the federal

¹ The CFPB's 2015 FDCPA Report available at <http://www.consumerfinance.gov/reports/fair-debt-collection-practices-act-annual-report-2015/>.

government, *see* Goldberg, *Dealing in Debt, supra*, at 719-22, and, as discussed below, other levels of government.

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 noted “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.” § 1692(a). Among other measures, the FDCPA provides for a private right of action and statutory penalties. § 1692k. Civil enforcement power is now shared by the Consumer Financial Protection Bureau (“CFPB”) and the Federal Trade Commission (“FTC”). § 1692l. The CFPB additionally has rulemaking authority. On November 5, 2013, it issued an Advanced Notice of Proposed Rulemaking about debt collection, recognizing the “critical” role collection law firms play in the debt collection industry. Bureau of Consumer Financial Protection, 12 CFP Part 1006, Debt Collection (Regulation F); Advanced Notice of Proposed Rulemaking, 78 Fed. Reg. 67,848, 67,850 (Nov. 12, 2013) [hereinafter CFPB 2013 Debt Collection ANPR] (noting that “a considerable amount of debt collection

activity, including direct collection from consumers as well as debt litigation, is conducted by law firms”).

New York State adopted protections against abusive debt collection practices in 1973. N.Y. Gen. Bus. Law § 601 *et seq.* The statute does not provide for a private right of action, and enforcement power is limited to the Attorney General or district attorneys. § 602(2). Unlike numerous other states, New York does not license debt collectors. *See, e.g.*, Conn. Gen. Stat. § 36a-801 (2015); Fla. Stat. Ann. § 559.544 (2014).

In December 2014, the New York State Department of Financial Services (“DFS”) issued new regulations to better protect New York State residents against abusive and deceptive debt collection practices. 23 N.Y.C.R.R. Pt. 1.² The DFS regulations require that debt collectors, among other things, make certain disclosures (about the types of income that are exempt from debt collection, §§ 1.2(a)(2), 1.5(a)(2), and about time-barred debts, § 1.3), provide specific information in response to a person’s dispute or request for substantiation of the debt, § 1.4, and confirm payment plans in writing, § 1.5.

The DFS regulations apply to all third-party debt collectors, including debt collection attorneys when they are not engaging in litigation-related or judgment-

² Regulations available at <http://www.dfs.ny.gov/legal/regulations/adoptions/dfs23t.pdf>.

enforcement activity.³ The regulations do not apply, however, unless the collection activity is on debt arising from the extension of credit, § 1.1(d); for example, they do not apply to efforts to collect on debt arising from medical bills or unpaid rent. They also do not apply to credit extended directly by a merchant for the purpose of purchasing goods or services from the merchant. § 1.1(d).⁴ Nor do the regulations concern any debt collection activity involving litigation or judgment enforcement. § 1.1(e)(7).

New York City (“NYC” or “the City”) has been at the forefront of consumer protection policy and practice for more than 50 years. In 1968, it established the nation’s first municipal consumer protection agency. New York City Department of Consumer Affairs, *2007 Annual Report* (2007) (Overview of DCA).⁵ In 1984, the City Council stated that “the presence of consumer related problems with respect to the practices of debt collection agencies” was due in part to “tactics which would shock the conscience of ordinary people.” N.Y.C. Admin. Code § 20-488 (2015). The City adopted a licensure requirement for debt collection agencies

³ The regulations exempt from their application “any person with respect to (i) serving, filing, or conveying formal legal pleadings, discovery requests, judgments or other documents pursuant to the applicable rules of civil procedure; (ii) communicating in, or at the direction of, a court of law or in depositions or settlement conferences or other communications in connection with a pending legal action to collect a debt on behalf of a client; or collecting on or enforcing a money judgment.” 23 N.Y.C.R.R. § 1.1(e)(7).

⁴ In addition, certain provisions, such as the requirement to substantiate debts, apply only to charged-off debt. § 1.4.

⁵ 2007 Annual Report available at http://www.nyc.gov/html/dca/media/video/Annual%20Report/AR_Print.pdf.

“[d]ue to the sensitive nature of the information used in the course of [debt collection] agency’s everyday business” and “the vulnerable position consumers find themselves in when dealing with such agencies.” *Id.* Substantive protections against abusive debt collection practices are set out in regulation. Rules of City of N.Y. Title 6 (2015).

II. The Debt Collection Sector, Including Debt Collection Law Firms, Has Undergone Radical Growth and Transformation in the Last Decade

The third-party debt collection industry has undergone radical growth and transformation in the last decade, in part due to a burgeoning consumer credit market, technological innovation, and debt buying. Transcript of the Federal Trade Commission Collecting Consumer Debts: The Challenges of Change 9-11 (Oct. 10, 2007) [hereinafter *Challenges of Change*].⁶ Among other changes, the industry can collect against more consumers, through more contacts and by employing more methods. Fred Williams, *FIGHT BACK AGAINST UNFAIR DEBT COLLECTION PRACTICES: KNOW YOUR RIGHTS AND PROTECT YOURSELF FROM THREATS, LIES, AND INTIMIDATION* 5 (2011) (stating that the debt collection industry is growing and makes an estimated one billion contacts with consumers per year); *see also* Comments of ACA International Debt Collection 2.0 4 (Apr. 7, 2011) (stating that

⁶ Transcript available at https://www.ftc.gov/sites/default/files/documents/public_events/collecting-consumer-debts-challenges-change/ftc_debtcollect_071010.pdf.

ACA International data indicated hundreds of millions of annual collection communications).⁷ 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 and rely on “[a]utomated dialers, predictive dialing algorithms, and internet telephony” to lower cost and enhance their reach. Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2013* 9 (Mar. 20, 2013);⁸ see also Transcript of Roundtable on Data Integrity in Debt Collection: Life of a Debt 39-40 (June 6, 2013) [hereinafter 2013 FTC and CFPB Roundtable] (presentation by Robert Hunt describing the service providers who provide information, communication, technology, and risk management technology to first- and third-party debt collectors in connection with “skip tracing,” *i.e.*, locating consumers; other service providers offer collection scoring to assist collectors in maximizing collection efforts)⁹; Transcript of the Federal Trade Commission Debt Collection 2.0-Draft: Protecting Consumers as Technologies Change 17-57 (Apr. 28, 2011) (describing the availability and sophistication of vast databases, specialized

⁷ Comments available at <https://www.ftc.gov/policy/public-comments/comment-00010-31>.

⁸ CFPB Annual Report 2013 available at http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf .

⁹ Transcript available at http://www.ftc.gov/system/files/documents/public_events/71120/life-debt-roundtable-transcript.pdf.

products, analytics, predictive modeling, and scoring based on historical consumer behavior for debt collection).¹⁰

Nationwide, the collection industry generates \$13 billion in revenues and employs more than 140,000 workers at approximately 6,000 companies. CFPB, *2015 Annual FDCPA Report*, at 7. Third-party debt collection is also a growth industry. 2013 FTC and CFPB Roundtable, at 44; *see also* Robert M. Hunt, “Collecting Consumer Debt in America,” *Federal Reserve Bank of Philadelphia Business Review* 13 (2007).¹¹ Between 1982 and 2002, while total household consumer debt adjusted for inflation doubled, collection industry revenues more than tripled (growing by 3.6 times) and employment more than doubled (by 2.5 times). Hunt, “Collecting Consumer Debt in America,” at 13. According to the CFPB, “[a]round 35 percent of adults, or 77 million of the 220 million Americans with credit files, show debts in collection.” CFPB, *2015 Annual FDCPA Report*, at 7. According to an annual survey commissioned by ACA International, the nation’s largest debt collection lobby, 190 respondents reported, on average, \$182 million in new business, with the largest agencies reporting, on average, \$596 million in new business in 2011. ACA International, *2012 Agency Benchmarking*

¹⁰ Transcript available at <https://www.ftc.gov/news-events/events-calendar/2011/04/debt-collection-20-protecting-consumers-technologies-change>.

¹¹ Article available at http://www.philadelphiafed.org/research-and-data/publications/business-review/2007/q2/hunt_collecting-consumer-debt.pdf.

Survey: For Period: Jan. 1, 2011-Dec. 31, 2012 9 (2012).¹² As the gross average profit for debt collection agencies is \$10 to \$12 per account, this business is built on volume. 2013 FTC and CFPB Roundtable, at 46-47.

Notably, New York State is a nexus of the debt collection industry. In 2013, New York debt collectors collected the most of any state, \$5.4 billion, and earned \$1.01 billion in commissions. Ernst & Young, *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2013* i, 4 (July 2014).¹³ New York led the nation by significant amounts, outpacing the second leader by 10% and the fifth leader with twice the level of collections. *Id.* Moreover, the New York City metropolitan area employs significant numbers of debt collectors, the sixth highest in the nation. U.S. Dep't of Labor Bureau of Labor Statistics, *Occupational Employment Statistics: Occupational Employment and Wages, May 2014; 43-3011 Bill and Account Collectors* (May 2014) (metropolitan areas with the highest employment level in this occupation); *see also id.* (New York State has the fourth highest employment level of debt collectors in the nation).¹⁴

Debt buying has also transformed debt collection—and greatly exacerbated deceptive and abusive debt collection. The FTC has stated that “[t]he most

¹² Survey available at <https://www.acainternational.org/files.aspx?p=/images/12898/2011tmspreview.pdf>.

¹³ Survey available at <http://www.acainternational.org/files.aspx?p=/images/21594/theimpactofthird-partydebtcollectiononthenationalandstateeconomies2014.pdf>.

¹⁴ Report available at <http://www.bls.gov/oes/current/oes433011.htm>.

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).” Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change; A Workshop Report* iv (Feb. 2009).¹⁵ In 2013, the FTC released an in-depth and illuminating study of the debt buying industry and examined more than 5,000 portfolios containing nearly 90 million consumer accounts. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* ii (Jan. 2013).¹⁶ Of the accounts analyzed, debt buyers paid an average of four cents per dollar of debt face value. *Id.* Notably, buyers “rarely received dispute history,” *id.*, rarely received underlying documents about debts such as account statements or terms and conditions of credit, *id.* at iii, and purchased the portfolios “as is”—without warranties with regard to the accuracy of the information provided, *id.* The FTC also found that “consumers disputed 3.2% of the debts that debt buyers attempted to collect themselves”; this rate, which may be under-representative, accounts nationally for one million debts per year and is “a significant consumer protection concern,” according to the FTC. *Id.* at iv.

Collection of heavily discounted debts with limited information and original documentation—if any—has resulted in widespread collection of debts of incorrect consumers and/or incorrect amounts.

¹⁵ Report available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

¹⁶ Report available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf>.

As the CFPB has observed, collection law firms are critical to the debt collection industry. CFPB 2013 Debt Collection ANPR, at 67,850 (noting that “a considerable amount of debt collection activity, including direct collection from consumers as well as debt litigation, is conducted by law firms”); *see also* Comments of ACA International Regarding the Debt Collection Workshop 49 (June 6, 2007) (“[I]t is clear that collection law firms are a growing component of the recovery process”).¹⁷ According to leading industry group ACA International, “[a]ttorneys 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 in court to collect delinquent debt.” *Id.* at 45. Debt collectors themselves acknowledge the “gravity of influence” attorney involvement can have on consumers. *Id.* In 2007, an industry report concluded that the debt collection law firm sector was “the fastest growing market in the [accounts receivable management] industry” and was expected to “grow at 16 percent annually from

¹⁷ Transcript available with amici counsel. The extent and importance of non-litigation activities undertaken by collection law firms is evident in how these firms are organized and operate. For example, the Schreiber Law Firm describes itself as “a true hybrid delivering the technology and penetrative capabilities of a collection agency with the ability to litigation when necessary” in eight states. InsideARM.com, <http://www.insidearm.com/features/best-places-to-work/2013-bptw/2013-bptw-small-companies/the-schreiber-law-firm-llc/> (last visited Apr. 21, 2015). The Law Office of Mark A. Kirkorsky, P.C. has 60 employees, Best Places to Work in Collections 2014, InsideARM.com, <http://www.insidearm.com/features/best-places-to-work/2014-best-places-to-work-in-collections/?company=law-office-of-mark-a-kirkorsky> (last visited Apr. 21, 2015), but the law firm’s website appears to include only three lawyers among the staff listed. The Law Office of Mark A. Kirkorsky, <https://www.makcollections.com/staff> (last visited Apr. 21, 2015).

\$1.1 billion in 2006 to \$2.4 billion in 2011.” *The Kaulkin Report: The Future of Receivables Management* x (Kaulkin-Ginsburg Company 7th ed. 2007) (Executive Summary) (cited by the CFPB in its Advanced Noted of Proposed Rulemaking regarding Debt Collection Rules).¹⁸

The expansion of debt collection and the advent of debt buying have transformed collection law firms. Creditors demand sophisticated payment and technology systems and economies of scale. Jane Adler, “Law Firms Balloon,” *Cards and Payments*, Apr. 2006, at 48. Like the industry generally, collection law firms have become increasingly automated and streamlined, utilizing less actual legal skill or knowledge.

While litigation plays a role, much of the debt collection activity that collection law firms engage in involves traditional dunning activity such as mailing letters, making telephone calls, and processing payments. *See* Challenges of Change 83 (the then-president of the National Association of Retail Collection Attorneys comparing the process collection law firms undertake to regular collection firms as “very similar”).¹⁹ In fact, the vast majority of collection law firms’ employees are not attorneys. For example, in 2010, the New York law firm of then-Cohen & Slamowitz was reported to have had 14 lawyers on staff,

¹⁸ Report available at <http://www.insidearm.com/wp-content/uploads/The-Kaulkin-Report-7th-Ed-Executive-Summary.pdf>.

¹⁹ Transcript available at <https://www.ftc.gov/news-events/events-calendar/2007/10/collecting-consumer-debts-challenges-change>.

compared to 30 to 40 support staff and 60 non-attorney debt collectors. “Collection Law Firm Files 80,000 Suits A Year,” *Collections & Credit Risk* 16 (Aug. 2010). The law firm used computer software to generate collection letters. *Id.*; *see also* Complaint at ¶¶ 2, 14, *Consumer Financial Protection Bureau v. Frederick J. Hanna & Associates*, No. 14-cv-02211-AT-WEJ (N.D. Ga. July 14, 2014) (noting that “the Firm operates less like a law firm than a factory,” and that “[f]rom 2009 through 2013, [the Firm] employed, at any given time, hundreds of non-attorney staff but only between 8 and 16 attorneys”).²⁰

Recognizing the opportunity for profit, collection attorneys have become integrally involved in the purchase of debts, as well. *See* LEGAL AID SOCIETY ET AL., *DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS* 4 (May 2010) [hereinafter *DEBT DECEPTION*];²¹ Mark Chediak, *When the Debt Collector Comes Calling...*, PBS: *FRONTLINE* (Nov. 23, 2004) [hereinafter *PBS REPORT*].²² To avoid state laws that prohibit law firms from buying debts, the principals of debt collection law firms set up subsidiaries or limited liability companies that purchase debt and retain the firm to help collect. *See* *DEBT DECEPTION*, at 4 n.29 (quoting debt buying expert John Russo’s advice that any law firm interested in buying debt should “get started by setting up an

²⁰ Complaint available at <http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-debt-collection-lawsuit-mill/>.

²¹ Report available at <http://www.mfy.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf>.

²² Report available at <http://www.pbs.org/wgbh/pages/frontline/shows/credit/more/collect.html>.

LLC or a corporation as the debt buying entity” because “many states don’t allow attorneys to own or have a vested interest in their files”); PBS REPORT. Often, the law firm’s debt collection subsidiary becomes its best client. PBS REPORT. The president of the National Association of Retail Collection Attorneys, an association of debt collection law firms, has stated that “[i]n essence, you’re collecting your own debt and it assures you of continuing business.” *Id.*

III. Debt Collection Complaints Consistently Top Consumer Complaint Categories

The scope, gravity, and nature of consumer debt collection abuses are reflected in complaint data. Time and time again, debt collection complaints top the list of complaints filed by consumers with federal, state, and local oversight agencies.

In its 2015 Annual Report to Congress, the CFPB declared that “the Bureau handled over 88,300 debt collection complaints, positioning debt collection as the leading source of consumer complaints.” CFPB, *2015 Annual FDCPA Report*, at 2. 2014 complaint data from the FTC show debt collection as the second most common consumer complaint, after identity theft. Federal Trade Commission, *Consumer Sentinel Network: Data Book for January – December 2014*, at 6 (Feb. 2015).²³ The FTC reported that, in 2014, it received 101,497 fraud and other

²³ Report available at <https://www.ftc.gov/reports/consumer-sentinel-network-data-book-january-december-2014>.

complaints from New York consumers, of which the second greatest number (10,332 or 10%) came from debt collection. *Id.* at 54.

Similarly, the New York State Consumer Protection Division reported that in 2011 debt collection was the second most frequent complaint after “Do Not Call” registry violations. N.Y.S. 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) (Testimony of Marcos Vigil, Deputy Secretary for Business and Licensing, N.Y.S. Dep’t. of State).²⁴ In New York City, the Department of Consumer Affairs reported that, in 2013, debt collection abuses were the second most common consumer complaint, following home improvement contracts (which were common in the aftermath of Superstorm Sandy). Press Release, N.Y.C. Dep’t of Consumer Affairs, *Dep’t of Consumer Affairs (DCA) Announces Home Improvement Contractors Are the Top Complaint for 2013* (Mar. 6, 2014).²⁵

IV. Federal Enforcement Actions Provide Ample Support for Local Government Oversight and Regulation of Debt Collection Law Firms

The enforcement actions against debt collector attorneys and law firms illustrate further the nature of debt collection abuses and the strong policy rationale

²⁴ Testimony available at <http://assembly.state.ny.us/write/upload/hearings/2012/20121128Consumer.pdf>.

²⁵ Press release available at http://www.nyc.gov/html/dca/html/pr2014/pr_030614.shtml (last visited on Apr. 21, 2015).

for local government oversight and regulation, particularly in a locality with New York City's high concentration of debt collection activity.

For example, in 2013, the FTC entered into a consent order against the collection law firm Jacob Law Group, in an action brought, in part, for violations of the FDCPA. Stipulated Final Judgment and Order for Permanent Injunction, *FTC v. Security Credit Servs.*, 1:13-cv-00799 (N.D. Ga. Mar. 19, 2013).²⁶ The collection law firm engaged in consumer debt collection activities nationwide, Complaint at 4, ¶ 11, *FTC v. Security Credit Servs.*, No. 1:13-cv-00799 (N.D. Ga. Mar. 13, 2013), including non-litigation activities,²⁷ *id.* at 6, ¶ 17. Non-litigation efforts included traditional debt collection efforts such as “skip-tracing” (*i.e.*, locating consumers), issuing collection notices and dunning letters, and contacting consumers by phone. *Id.* at 6, ¶ 17. The sophistication and scope of this non-litigation activity is evident in that, during a five-year period, the collection law firm collected on more than 300,000 consumer debt accounts but filed only 5,600 lawsuits. *Id.* at 7, ¶ 18. The FTC alleged that the collection law firm collected nearly \$800,000 in fees from consumers, *id.* at 10, ¶¶ 27, 11-12, ¶¶ 30-33, and falsely threatened legal action in violation of the FDCPA. *Id.* at 12, ¶¶ 34-37.

In another case, involving New York attorney Salvatore Spinelli and the debt collection agency Oxford Collection Agency, Inc. (“Oxford”), the FTC

²⁶ Stipulation available at <http://www.ftc.gov/os/caselist/1123175/130326scsorder.pdf>.

²⁷ Complaint available at <http://www.ftc.gov/os/caselist/1123175/130326scscompt.pdf>.

alleged that it was in fact the law firm that 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).²⁸ 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 FTC and Spinelli entered into a consent decree whereby he agreed to pay a civil penalty of \$1.06 million.

These federal enforcement actions highlight, not only how easily debt collection activity can be distinguished from the practice of law, but also that local regulation is needed to help curb rampant abuses by collection law firms.

**ARGUMENT:
LOCAL LAW 15 IS A PERMISSIBLE AND NECESSARY MUNICIPAL
REGULATION OF LICENSED ATTORNEYS**

The clarifying language in Local Law 15—stating that New York City’s debt collection licensing law applies to attorneys—simply does not conflict with NYS judiciary law, because the activities the attorneys engage in are those traditionally performed by debt collectors. A municipality may regulate licensed attorneys in certain circumstances, including as here, where the practice of non-

²⁸ Complaint available at <https://www.ftc.gov/enforcement/cases-proceedings/062-3177/oxford-collection-agency-inc>.

litigation debt collection is easily differentiated from the practice of law, and where a local licensing scheme serves to complement and support the State's regulatory efforts. In addition, the debt collection regulations at issue here present no ethical problems for attorneys whatsoever.

In holding that the NYC debt collection law does not apply to attorneys, the district court overlooked the important and well-established public policy behind debt collection laws, and the need for strong local regulations to protect New Yorkers from exploitative debt collectors seeking an unfair competitive advantage with their 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. Further, the NYS Department of Financial Services will have no local ally in regulating debt collection attorneys. For the reasons argued in Defendants-Appellants' brief and here, this Court should answer the certified questions presented in the negative, and determine that the NYC Council was well within its authority when it passed Local Law 15.

I. Debt Collecting is Distinct from Practicing Law

Debt collection attorneys may be regulated under Local Law 15 because traditional debt collection is distinct from the practice of law. The district 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.” *Id.* at 472. Similarly, Plaintiffs-Respondents express confusion over an “imaginary line” that Local Law 15 supposedly draws between debt collection and the true practice of law. (Plaintiffs-Respondents’ Brief at 55.)

These concerns reflect a fundamental misunderstanding of the nature of debt collection and how it is carried out, and are directly at odds with case law, Congressional findings, precedent by regulators, and amici’s experience. By giving a competitive edge to unscrupulous debt collection attorneys, the court’s decision opens the door to the same dangers that impelled Congress, over 25 years ago, to specifically include attorneys in the definition of debt collectors. The district court’s decision and Plaintiffs-Respondents’ self-serving interpretation of the local law put attorneys collecting debts in a favored position to use their licenses as both shields and swords.

The distinction between attorneys acting as attorneys and attorneys acting in a non-legal capacity is well established, not one that the NYC Council created out of whole cloth. 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*

Leshner 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 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 work with attorneys and especially for those attorneys who collect on debts they purchase through subsidiary companies, creating a manifestly unfair and perverse competitive advantage. *See supra* at 14-16.

Plaintiffs-Respondents argue that Local Law 15 is so vague as to be “impossible for any attorney to know, in good faith, when he or she traverses the imaginary line posited by Local Law 15.” (Plaintiffs-Respondents’ Brief at 55.) When Congress repealed the attorney exemption and specifically added attorneys to the definition of debt collector in FDCPA in 1986, it evaluated similar claims as Plaintiffs-Respondents make here. *See, e.g.*, 131 Cong. Rec. at H10535 (quoting a Congress member’s concerns about the impact of removing the attorney exception from the FDCPA on attorneys’ ability to practice law). Congress was not persuaded. *See, e.g.*, H.R. Rep. No. 405, reprinted in 1986 U.S.C.C.A.N. at 1758 (explaining that Congress found the current law did not “adequately protect consumers from attorney debt collection abuses”); *see also Heintz v. Jenkins*, 514 U.S. 291 (1995) (“Congress intended that lawyers be subject to the [Fair Debt Collection Practices] Act whenever they meet the general ‘debt collector’ definition.”).

Under federal law, the definition of a debt collection agency is “any business the principal purpose of which is the collection of any debts, or who regularly

collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. 1692a(6). This definition is nearly identical to the definition under the City law, which states that a debt collector is “a person engaged in business the principal purpose of which is to regularly collect or attempt to collect debts owed or due or asserted to be owed or due to another.” NYC Admin Code § 20-489(a) (2015). Although engaging in a “bulk collection practice” is common with many debt collection law firms and makes identifying such firms as debt collectors easy, whether a firm sends out “mass mailings” is not a bright-line test. The statute is clear that whether a collector “regularly collect(s) or attempt(s) to collect” is the test, one that is easy to pass or fail in practice.²⁹ In practice there is no ambiguity about the activities of debt collection law firms because such attorneys must already determine whether they are a debt collector under the FDCPA, and identify themselves as such in communications and by sending a “g notice” within five days of the initial communication with a consumer. 15 U.S.C. § 1692g.³⁰ Under the FDCPA, attorney debt collectors’ traditional, non-litigation debt collection activities have been regulated for decades, and are easily discernible from their “law-related” work.

²⁹ Even if there were some ambiguity, which amici believe there is not, there can be no question that Plaintiffs-Respondents fall squarely in the City law’s definition of being debt collectors, rendering their argument entirely moot.

³⁰ Contrary to Plaintiffs-Respondents’ assertion (*see* Plaintiffs-Respondents’ Brief at 27), the source of law under discussion here is immaterial to the question of what constitutes debt collection conduct, which is identical behavior at the city, state or federal level.

Indeed, Plaintiffs-Respondents' own experience belies their supposed confusion over their quite obvious role as debt collectors. Plaintiff-Respondent Lacy Katzen's approximately 25 attorneys and 50 staff members engage in various types of law, including estate planning, residential real estate, personal injury, and family law, as well as debt collection.³¹ On their website, they explain clearly that when a client hires them to engage in debt collection (as opposed to a family law matter), "an initial demand letter is mailed to the Debtor" and such a letter "complies with all requirements of the Fair Debt Collection Practices Act."³² Therefore, Plaintiffs-Respondents' protestations ring hollow as they, like other debt collection law firms, already self-identify as debt collectors and acknowledge as much when interacting with consumers.

In addition, 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 and attorneys, including the Jacob Law Group and Salvatore Spinelli, *see supra* at 18-19, starkly reveal the lack of "legal" work they conduct, as well as the potential for abuse.

The experiences of amici and amici's clients further illustrate the clear demarcation between debt collection and legal activity, as well as why regulation

³¹ Lacy Katzen LLP website *available at* <http://www.lacykatzen.com/>.

³² Lacy Katzen LLP website *available at* <http://www.lacykatzen.com/collections-law-faq>.

of such actions is so important. Ms. F, a client of one of the amici, 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 calls, from a collection law firm, were indistinguishable from those that a non-attorney debt collection agency might make. The debt collector ignored Ms. F's repeated requests to stop calling. If the debt collector that called Ms. F. had no attorneys, it would indisputably be prohibited, under the City's law, from calling her more than twice in seven days. Also, upon request, the debt collector would have to provide detailed verification of the debt at any time Ms. F. requested it. Simply by having a law license, however, this collection law firm's employees would, in keeping with the district court's decision, be exempt from these key protections against misconduct, which are entirely distinct from practicing law. While Ms. F may have been able to exercise her rights under the FDCPA by taking the significant step of filing a lawsuit to remedy the illegal conduct, she could not complain to a licensing authority that would investigate and possibly prosecute the bad behavior by this collection entity, simply because it was a law firm.

II. Local Law 15 Is Not Preempted by Judiciary Law §§ 53 and 90

The Second Circuit raised the question of whether the district court was correct in holding 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.” *Id.* 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 Judiciary Law § 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 Judiciary Law § 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 New York 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." N.Y.C. Admin. Code § 20-489(5).

State courts have permitted similar municipal regulation of attorneys to that at issue here. In *Aponte v. Raychuk*, the supreme 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). The court 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 district 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 that 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 New York Rule of Professional Conduct 7.1, regarding 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, non-litigation debt collection—is easily distinguishable from the practice of law, as explained *supra* in Section A, Local Law 15 is not preempted; in fact, by protecting consumers, it is wholly in keeping with state law pursuant to *Aponte*.³³ Therefore, the Court should answer the first question posed by the Second Circuit in the negative.³⁴

³³ 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.

³⁴ Although amici do not address the second question certified to this Court—whether Local Law 15 violates Section 2203(c) of the New York City Charter—the same reasoning that applies to

III. 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. Although not directly implicated in the Second Circuit’s certified questions to this Court, the issue was raised by the district court. The district court reasoned that requiring a debt collector to inform a consumer when a debt is time-barred, pursuant to the City regulations, “require[s] attorneys to violate their ethical duties to clients,” *Berman*, 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 indisputably must provide this information.

Furthermore, attorney ethical duties of loyalty cannot exceed 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 the New York Rules of Professional Conduct 3.4, entitled “Fairness to Opposing Party and Counsel,” prohibits an attorney from concealing

the answer to the first question compels this Court to answer that it does not. Section 2203(c) excludes from DCA’s authority “cases with respect to which and to the extent to which any of said powers are conferred on other persons or agency by laws.” As debt collecting is distinct from practicing law, the powers conferred to regulate both activities are similarly distinct. Accordingly, DCA is not exercising power that has been granted to any other agency. Amici also note that this provision appears to apportion powers among *City* agencies, and does not speak to *City*, as opposed to *State*, jurisdiction.

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, which is required of all licensed debt collection entities.

IV. Local Law 15 Complements and Supports State Regulation of Debt Collection

DFS’s new debt collection rules, which also govern collection attorneys, and which were promulgated since the district court decision was rendered, do not make Local Law 15 obsolete or preempted. (*See* Plaintiffs-Respondents’ Brief at 47 n.4.) Rather, regulation at both the state and city levels expands consumer protection, while conserving government resources.

The City rules provide certain protections not included in the State rules. For example, they require debt collectors to include the statute of limitations disclosure in every communication about a time-barred debt, whereas the State rules require this disclosure only before the debt collector accepts a payment. The City rules also require that the written confirmation of a payment plan include the address to which payments should be mailed, unlike the State rules. Although including this pertinent information may seem like common sense, debt collectors often refuse to provide even the most basic of information unless expressly mandated to do so.³⁵ In addition, the City rules require debt collectors to provide a

³⁵ *Amici* have had several clients whose timely payments were returned to them with a cover letter from the debt collection law firm indicating that its client had “recalled” the file, and no

call back number answered by a person, as well as a contact name, which facilitates resolution of consumer disputes. There is also a record-keeping requirement to help with enforcement of bad actors that try to skirt the rules.

Importantly, the DFS rules apply only to third-party credit transactions, not to medical debt, rent arrears, or credit extended by the vendor—yet our clients experience similarly abusive tactics by collectors of these types of debts.³⁶ There is no reason that collection attorneys, unlike other debt collectors, should be excused from these sound requirements for other kinds of debts.

Finally, DCA provides a much-needed ally in DFS's fight against unscrupulous debt collection attorneys. New York City has a high concentration of consumer debt, and, following home contractors, debt collection is the industry about which consumers most commonly complain. *See supra* at 17. Although DFS's role in the debt collection sphere greatly boosts accountability for the City's bad actors, its limited resources are disbursed throughout the State. The state

other information. The firms would not provide a new mailing address for payments or a contact at their former clients, causing the consumers to miss payments, to their detriment.

³⁶ One client of an amicus organization, Ms. S, who experiences significant physical and mental disabilities, including major depression and post-traumatic stress disorder, recently received a dunning letter from a law firm. The letter caused her significant confusion and stress because she does not believe she ever received the alleged medical treatment. Because the letter is from a self-identified debt collection law firm, there is no requirement—because of the district court's decision—that the collector meet Ms. S's request for meaningful verification of the debt, which would help her determine whether the debt is actually hers; because the alleged debt in question is not a third-party credit transaction, she also has no right to seek information under the DFS rules.

agency on its own will be less effective in addressing the rampant violations that debt collection attorneys commit against our clients.

DCA has led the country in many consumer reforms, including regulating debt collectors. Its rules served as a source for the DFS rules, and likely for the CFPB's forthcoming rules, discussed *supra* in Background at I. Plaintiffs-Respondents argue on appeal that various levels or kinds of regulation will hamper a lawyer's ability to practice across the state. But attorneys routinely adjust their practices to conform to local requirements, across and even within counties. Indeed, if any group of individuals is well suited to manage various sets of rules, it is attorneys. DCA's innovation complements the State's broad reach and ultimately benefits vulnerable consumers by providing greater protection. Plaintiffs-Respondents also characterize the laws as an attack on the practice of law and paint themselves as victims of a burdensome, onerous regulatory scheme instead of recognizing that Local Law 15 and the accompanying regulations were implemented to ensure fundamental fairness and to protect consumers from unfair, deceptive, and abusive debt collection tactics.

CONCLUSION

For the foregoing reasons, amici urge this Court to answer the certified questions and the new questions posed by Plaintiffs-Respondents in the negative, so that Local Law 15 may apply to all debt collectors equally.

/S/

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