No. _____ 10-1417 MAY 12 2011



In The
# Supreme Court of the United States

FEIN, SUCH, KAHN & SHEPARD, P.C.,

*Petitioner,*

v.

DOROTHY RHUE ALLEN, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is a communication from a debt collector to a debtor's attorney actionable under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*?

## PARTIES TO THE PROCEEDINGS

The parties in this Court and to the proceedings before the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit are as follows:

Fein, Such, Kahn & Shepard, P.C., is the Petitioner in this Court and was a Defendant-Appellee below.

Dorothy Rhue Allen is a Respondent in this Court and was the Plaintiff-Appellant below.

LaSalle Bank is a Respondent in this Court and was a Defendant-Appellee below.

Cenlar Federal Savings Bank is a Respondent in this Court and was a Defendant-Appellee below.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Fein, Such, Kahn and Shepard, P.C., has no parent company and no publicly owned company owns ten percent or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Fein, Such, Kahn and Shepard, P.C. respectfully petitions for a writ of certiorari to review the January 12, 2011 opinion and judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 629 F.3d 364, and is reprinted in the appendix hereto. App. 1-12.

The opinion of the United States District Court for the District of New Jersey (Thompson, D.J.) is unreported, but is reprinted in the appendix hereto. App. 17-33.

The District Court had jurisdiction under 28 U.S.C. § 1331 and the Third Circuit had jurisdiction under 28 U.S.C. § 1291.

## JURISDICTION

The United States Court of Appeals issued its opinion on January 12, 2011. No petition for rehearing was filed. On April 1, 2011, Justice Alito extended the time to file this petition until May 12, 2011. App. No. 10A9790.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), which states, in pertinent part, "[c]ases in

the courts of appeals may be reviewed by the Supreme Court by the following methods (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case. . . ." *Id.*

## STATUTES INVOLVED

This case involves the following provisions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*:

### § 1692. Congressional findings and declaration of purpose

* * *

**(e) Purposes**

It is the purpose of this subchapter 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 abuses.

### § 1692a. Definitions

As used in this subchapter –

* * *

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

**§ 1692c. Communication in connection with debt collection**

**(a) Communication with the consumer generally**

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt –

* * *

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

* * *

**(c) Ceasing communication**

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector

shall not communicate further with the consumer with respect to such debt, except –

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.

**(d) "Consumer" defined**

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

**§ 1692f. Unfair practices**

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly

authorized by the agreement creating the debt or permitted by law.

15 U.S.C. §§ 1692, 1692a, 1692c and 1692f are reprinted in the appendix hereto. App. 89-96.

## STATEMENT OF THE CASE

The purpose of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), is to protect consumers from unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors. S. REP. NO. 95-382, pp. 1-2 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695, 1696. This case presents an important question of law over which there is a tripartite split between the circuit courts: whether a communication from a debt collector to a debtor's attorney is actionable under the FDCPA? This question substantially affects the enforcement of a significant and frequently employed piece of federal consumer protection legislation. The resolution of this question will certainly have consequences and effects on the debt collection industry and those who engage its services.

Petitioner Fein, Such, Kahn & Shepard, P.C. ("FSKS") was retained on behalf of LaSalle Bank, which held a mortgage on Respondent's home. App. 17-18. On May 7, 2007, FSKS filed a complaint for foreclosure in state court as Respondent had defaulted on her secured loan. App. 3. Upon service of the foreclosure complaint, Respondent's counsel contacted

FSKS to request payoff information for the defaulted debt and fees and costs associated with the foreclosure action. *Id.* On June 7, 2007, in furtherance of resolving the foreclosure action, FSKS sent a letter to Respondent's counsel that set forth the requested information. App. 3, 18. This letter specifically advised that the payoff quote "is subject to audit and verification." App. 85. Respondent's counsel then requested additional payoff information from FSKS regarding the amounts identified in the June 7, 2007 letter. App. 3, 18. In response, FSKS sent a second letter to Respondent's counsel on June 7, 2007 providing an itemization of the attorney's fees and costs sought by FSKS relevant to the foreclosure action.[1] App. 3, 18, 87.

Less than three weeks later on June 26, 2007, Respondent filed a class action Counterclaim and Third Party Complaint in the foreclosure action alleging that the Payoff Letters sent by FSKS to Respondent's counsel on June 7, 2007 violated the FDCPA. App. 3, 18, 60-88. FSKS moved to dismiss the Counterclaim and Third Party Complaint, but before the state court reached that motion on the merits, LaSalle Bank agreed to release the mortgage and dismiss the foreclosure action. App. 4, 19. The state court then dismissed the Counterclaim and Third Party Complaint without prejudice. *Id.*

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[1] The two June 7, 2007 letters to Respondent's counsel are herein referred to as "Payoff Letters" and are included in the appendix hereto. App. 85-88. The Payoff Letters were originally referenced in Respondent's pleadings and were part of the motion record before the lower courts.

Respondent subsequently filed a putative class action Complaint in the United States District Court for the District of New Jersey alleging that FSKS had violated the FDCPA. App. 34-59. FSKS thereafter moved to dismiss the Complaint pursuant to Fed. R. Civ. Proc. 12(b)(6). App. 4. The District Court – in the absence of Third Circuit precedent and faced with conflicting decisions from other courts of appeals – followed the Seventh Circuit's analysis in *Evory v. RJM Acquisitions L.L.C.*, 505 F.3d 769 (7th Cir. 2007) and determined that a communication to a debtor's attorney is actionable under the FDCPA, but only if it were likely to deceive a "competent attorney." App. 5-6, 24-29. The District Court reasoned that "the standard under which a court must evaluate statements made only to a debtor's *attorney* is whether a competent lawyer would likely be mislead [sic]" because a "lawyer is less likely to be deceived, intimidated, [or] harassed. . . ." App. 26 (internal citation omitted) (emphasis in original). Applying that reasoning, the District Court found that overcharges in the Payoff Letters were "transparent" to Respondent's counsel, noting that "Plaintiff's attorney did not struggle long to uncover the alleged overcharges and deceptive statements in the June 7 letters and was able to fully catalogue them in Plaintiff's state court filing shortly after receiving the letters." App. 29-31. Because Respondent's counsel had protected Respondent from any unfair or unconscionable means to collect a debt, the District Court dismissed the Action on the grounds that Respondent had failed to state a claim. *Id.*

On appeal and during oral argument before the Third Circuit, Respondent limited her FDCPA claim to an alleged violation of section 1692f(1). App. 4. Eschewing the Seventh Circuit's holding that a communication from a debt collector to a debtor's attorney is to be analyzed from the perspective of a competent attorney, the Third Circuit reversed the District Court and aligned itself with the Fourth Circuit's decision in *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007). App. 7-11. The panel concluded that "[a] communication to a consumer's attorney is undoubtedly an indirect communication to the consumer" and is therefore actionable under section 1692f(1) of the FDCPA. App. 9.

Acknowledging that the circuits "are divided on this issue," the Third Circuit also rejected the Ninth Circuit's holding that "communications directed only to a debtor's attorney and unaccompanied by any threat to contact the debtor, are not actionable under the Act." App. 5, 9; *Guerrero v. RJM Acquisitions LLC,* 499 F.3d 926, 936 (9th Cir. 2007). The Third Circuit then characterized the FDCPA as "a strict liability statute to the extent that it imposes liability without proof of an intentional wrong" and posited that "[t]he only inquiry under § 1692f(1) is whether the amount collected was expressly authorized by the agreement creating the debt or permitted by law. . . ." App. 10-11.

This petition followed.

## REASONS FOR GRANTING THE WRIT

This Court has never addressed the question presented. In *Heintz v. Jenkins*, 514 U.S. 291 (1995), this Court held that the FDCPA's definition of "debt collector" includes lawyers who regularly attempt to collect consumer debts through litigation. *Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich LPA,* 130 S. Ct. 1605, 1618 (2010). While *Heintz* involved a claim under the FDCPA arising out of a communication between a creditor's attorney and a debtor's attorney, that decision said nothing about whether a communication from a debt collector to a debtor's attorney is actionable under the FDCPA. *See Allen v. LaSalle Bank, N.A.,* 629 F.3d 364, 368 n.6, App. 9-10 (3d Cir. 2011) ("Although the *Heintz* opinion referred to the fact that the communication there had been sent to the consumer's attorney, the Court did not pass on the precise question before us."); *Guerrero,* 499 F.3d at 937 ("[T]he question on review [in *Heintz*] was the entirely different matter of whether a law firm engaged in collecting a debt is a debt collector for purposes of the Act."). Sixteen years later, this Court now has the opportunity to squarely address this issue.

This Court's intervention is necessary to establish uniformity on an important question of federal law: is a communication from a debt collector to a debtor's attorney actionable under the FDCPA? Since 2007, a three-way circuit conflict has developed over this question, which now encompasses four federal courts of appeals. From any perspective, the inconsistency

and variability in the interpretation and application of the FDCPA is wrong and should be harmonized by this Court. Further, the conflict between the circuits is untenable in light of current economic conditions: as more consumers find themselves unable to repay their debts, efforts to collect those debts are likely to increase in both number and intensity. This case presents an ideal opportunity to provide much-needed guidance and to resolve the two-to-one-to-one circuit split, which was both squarely raised below and is outcome determinative.

## I. Federal Courts are Deeply Divided Over Whether a Communication by a Debt Collector to a Debtor's Attorney is Actionable Under the Fair Debt Collection Practices Act.

The division in the circuits is traceable to three decisions, which were all issued within six months of each other in 2007. The Fourth Circuit, now joined by the Third Circuit, was the first to hold that a communication to debtor's counsel "plainly qualifies as an indirect communication to the debtor" and is thus actionable under the FDCPA. *See Sayyed,* 485 F.3d at 232-33; *see also Allen,* 629 F.3d at 367-68, App. 8-9. Then followed the Ninth Circuit in *Guerrero,* which held that "communications directed solely to a debtor's attorney are not actionable under the Act." *Guerrero*, 499 F.3d at 934.[2] Finally, the Seventh Circuit

[2] Five years earlier, the Second Circuit in *dicta* expressed a consonant view in *Kropelnicki v. Siegel,* 290 F.3d 118, 127-28 (2d Cir. 2002) ("[T]his Court's treatment of the FDCPA in other cases

(Continued on following page)

weighed in, holding that debt collectors who communicate with a debtor's lawyer can violate sections 1692d, e, or f of the FDCPA if the communications would be likely "to deceive a competent lawyer, even if he is not a specialist in consumer debt law. . . ." *Evory,* 505 F.3d at 775.

Numerous courts, including the Third Circuit, have recognized this split in authority. *See, e.g., Allen,* 629 F.3d at 366, App. 5-6; *Misleh v. Timothy E. Baxter & Associates,* No. 10-13777, 2011 U.S. Dist. LEXIS 41292 at *7 (E.D. Mich. April 15, 2011); *Capital Credit & Collection Service, Inc. v. Armani,* 206 P.3d 1114, 1119 (Or. Ct. App. 2009). The entrenched circuit split regarding whether communications to a debtor's attorney are actionable under the FDCPA undermines the legislative goal of promoting "consistent [government] action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Without a uniform interpretation, liability under the FDCPA turns upon accidents of geography.

### A. FSKS Would Have Prevailed in the Ninth Circuit.

The Ninth Circuit's reasoning is consistent with the text of the FDCPA and is faithful to the purposes of the statute and mindful of its contours. Whether a

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leads us to believe that alleged misrepresentations to *attorneys* for putative debtors cannot constitute violations of the FDCPA.") (emphasis in original).

claimant alleges violations of sections 1692d, 1692e, or 1692f, communications to a debtor's attorney fall outside the ambit of the FDCPA. Marshalling the arguments against a strict liability interpretation of communications, the *Guerrero* court ruled:

> A consumer and his attorney are not one and the same for purposes of the Act. They are legally distinct entities, and the Act consequently treats them as such. For example, a debt collector who knows that a consumer has retained counsel regarding the subject debt may contact counsel, but may not generally contact the consumer directly, unless the attorney gives his consent. *See 15 U.S.C. § 1692c(a)(2)*. Subject to certain exceptions, a debt collector may not communicate in connection with a debt with "any person other than *the consumer, his attorney*, a consumer reporting agency . . . , the creditor, the attorney of the creditor, or the attorney of the debt collector." *15 U.S.C. § 1692c(b)* (emphasis added). And "consumer" is defined broadly in *§ 1692c* to include "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator." *15 U.S.C. § 1692c(d)*.

*Guerrero*, 499 F.3d at 935.

In so holding, the Ninth Circuit analyzed the text of section 1692c(a)(2) and noted that a consumer's attorney is "notably absent" from the list of relatives and fiduciaries [in § 1692c(d)] sharing in common the identity of consumer. *See Guerrero,* 499 F.3d at 935.

The Court reasoned that "[s]ection 1692g(b)'s repeated emphasis on the 'consumer,' along with the Act's clear distinction between consumer and attorney, compels the conclusion that a collection effort must be aimed directly to the consumer itself to be prohibited by § 1692g(b)." *Guerrero,* 499 F.3d at 936; *accord O'Rourke v. Palisades Acquisition XVI, LLC,* No. 10-1376, 635 F.3d 938, 2011 U.S. App. LEXIS 5295, at *15 (7th Cir. 2011) ("we read the Act's protections as extending to consumers and those who stand in the consumer's shoes and no others."); *Volden v. Innovative Financial Systems, Inc.,* 440 F.3d 947, 954 (8th Cir. 2006) ("The weight of authority applying *section* 1692e does so in the context of a debt collector making a false, deceptive, or misleading representation *to the plaintiff.*") (emphasis in original).

Especially in the context of settlement communications, the FDCPA's "purposes are not served by applying its strictures to communications sent only to a debtor's attorney. . . ." *Guerrero,* 499 F.3d at 938. Congress was concerned with "disruptive, threatening, and dishonest tactics" directed at consumers when it enacted the FDCPA; "these concerns quickly evaporate" when an individual is represented by counsel who receives all communications relevant to debt collection. *Id.* at 938-39.

Beyond the textual analysis of the FDCPA, the Ninth Circuit reasoned that the statute's purposes are not furthered by disregarding the distinction between a consumer and a consumer's attorney. "Alleged misrepresentations to *attorneys* for putative debtors

cannot constitute violations of the FDCPA" because the FDCPA's "underlying policy" is "protect[ing] consumers," not their lawyers, "from deceptive or harassing actions taken by debt collectors[.]" *Guerrero,* 499 F.3d at 937 (quoting *Kropelnicki,* 290 F.3d at 127) (emphasis in original). The Court explained that "[w]here an attorney is interposed as an intermediary between a debt collector and a consumer, we assume the attorney, rather than the FDCPA, will protect the consumer. . . ." *Id.* (quoting *Kropelnicki*).

Thus, had this case originated in one of the eleven states or territories encompassed within the Ninth Circuit FSKS would have prevailed.

### B. FSKS Would Have Prevailed in the Seventh Circuit.

In *Evory,* the Seventh Circuit held that while the FDCPA applies to communications to a debtor's attorney, "a representation by a debt collector that would be unlikely to deceive a competent lawyer . . . should not be actionable" under sections 1692d, e or f of the FDCPA. *Evory*, 505 F.3d at 775. The Seventh Circuit reasoned that "the 'unsophisticated consumer' standpoint is inappropriate for judging communications with lawyers" and that "[m]ost lawyers who represent consumers in debt collection cases are familiar with debt collection law and therefore unlikely to be deceived." *Id.* at 774; *accord, Kropelnicki,* 290 F.3d at 128 ("Where an attorney is interposed as an intermediary between a debt collector and a consumer, we

assume the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior."); *Dikeman v. National Educators, Inc.*, 81 F.3d 949, 954 (10th Cir. 1996) (unsophisticated consumer standard is inappropriate for judging communications with a debtor's counsel). Accordingly, the court concluded that the "standard for determining whether particular conduct violates the [FDCPA] is different when the conduct is aimed at a lawyer than when it is aimed at a consumer." *Id.* at 774.

Three years after deciding *Evory* and after the Third Circuit decided *Allen*, the Seventh Circuit "[u]nequivocally . . . held that under § 1692c, a lawyer representing a debtor is not a consumer." *See O'Rourke*, 635 F.3d 938, 2011 U.S. App. LEXIS 5295, at *11 (analyzing *Tinsley v. Integrity Financial Partners, Inc.*, 634 F.3d 416 (7th Cir. 2011)). The Court rejected a debtor's argument that "under the [FDCPA an] attorney should be treated the same as a consumer" and that communications sent to the debtor's attorney violated section 1692c(c). *Id.* The Seventh Circuit reasoned that treating notice to the lawyer as notice to the debtor under subsection 1692c(c) would render subsections 1692c(a) and (b) "gibberish." *Id.*; *see Tinsley,* 634 F.3d at 417-18.

Consistent with the District Court's holding below, had venue been laid in the states encompassing the Seventh Circuit, FSKS would have prevailed because Respondent's counsel was not deceived by the alleged inaccuracies in the Payoff Letters.

### C. FSKS Would Not Prevail in the Third and Fourth Circuits.

The Seventh and Ninth Circuits' law conflicts with the law of the Fourth Circuit, as the Third Circuit has acknowledged. *See Allen,* 693 F.3d at 366, App. 5. In *Sayyed,* the Fourth Circuit held that a debtor stated a legally cognizable FDCPA claim based on interrogatories and a summary judgment motion that a law firm had served on the debtor's counsel. *Sayyed,* 485 F.3d at 229. The Court reasoned that "[a] communication to a debtor's counsel . . . plainly qualifies as an indirect communication to the debtor" under Section 1692a(2) and that section 1692c(a)(2) "is but another indication that communications with a debtor's attorney with regard to the debt are 'communications' as defined and regulated by the FDCPA. . . ." *Id.* at 233.

The Fourth Circuit also incorrectly reasoned that "[i]f the statute left any room for doubt about this issue, *Heintz* resolved it. *Heintz* itself involved a communication from a debt collection attorney to debtor Darlene Jenkins' counsel, not to Jenkins herself. . . . Thus, plainly, the FDCPA covers communications to a debtor's attorney." *Id.* The Third Circuit rejected this reading of *Heintz* but nonetheless aligned itself with the Fourth Circuit's holding. *See Allen,* 629 F.3d at 368 n.6, App. 9-10; *see also Guerrero,* 499 F.3d at 937-38 (criticizing *Sayyed*'s reliance on *Heintz*).

As the Third and Fourth Circuits have concluded that a consumer and her attorney are indistinguishable

under the FDCPA, the claims against FSKS would be allowed to proceed in those circuits.

### D. This Court's Intervention is Necessary.

As this important issue is now ripe, this writ should be granted. The conflicts in the circuits are widespread and entrenched, encompassing four federal courts of appeals. In aligning itself with the "indirect communication to the debtor" rationale of the Fourth Circuit, the Third Circuit specifically considered and rejected not only the holdings but also the reasoning of the Seventh and Ninth Circuits. For its part, the Ninth Circuit has expressly considered and rejected the Fourth Circuit's holding and reasoning in *Sayyed*. The Seventh Circuit in *Evory* disregarded *Sayyed* and *Guerrero,* and has denied *en banc* review in *Tinsley*. *See Tinsley,* 634 F.3d 416. As a result, it is unlikely that this conflict will be resolved without this Court's intervention.

Moreover, the conflict in the law is outcome determinative. Because the June 7, 2007 Payoff Letters were not sent directly to Respondent, FSKS would have prevailed in the Ninth Circuit. Similarly, as the District Court below held, a dismissal motion would succeed in the Seventh Circuit because Respondent's counsel recognized the errors in the Payoff Letters. FSKS, however, is subject to strict liability in the Third Circuit. This divergent treatment confounds the statute's goal of "promot[ing] consistent [government] action to protect consumers against debt collection

abuses" without imposing unnecessary restrictions on ethical debt collectors – purposes that are just as important for consumers as they are for debt collectors. *See* 15 U.S.C. § 1692(e).

Clarity as to the scope of coverage under the FDCPA is an important issue affecting consumers and debt collectors alike in the massive United States debt collection industry. The total U.S. consumer debt in 2010 was $2.4 trillion. *See* Federal Reserve G.19 Report on Consumer Credit, April 2011, *available at* http://www.federalreserve.gov/RELEASES/G19/20110407/. The number of Americans filing for personal bankruptcy surpassed 1.5 million in 2010. *See* National Bankruptcy Research Center, *NBKRC December 2010 Bankruptcy Filings Report*, January 4, 2011, *available at* http://www.nbkrc.com/Premium/NBKRC_Report_January_2011.pdf. This represents a 9 percent increase from 2009 and is the highest level since the Bankruptcy Code was revised in 2005. *Id.* In the mortgage industry, foreclosure-related filings jumped 23 percent between 2008 and 2010, and a record one in every 45 housing units received at least one foreclosure related filing in 2010. *See* RealtyTrac Staff, *Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December*, RealtyTrac, January 12, 2011, *available at* http://www.realtytrac.com/content/press-releases/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309.

Since 2006, FDCPA claims have increased dramatically. The Federal Trade Commission saw a 23.4

percent increase in FDCPA consumer complaints from 88,326 in 2009 to 108,997 in 2010. *See* Federal Trade Commission Annual Report 2011: Fair Debt Collection Practices Act, p.5, *available at* http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf. In the last four years, the number of FDCPA lawsuits has nearly tripled from 3,710 complaints filed in 2006 to 10,914 complaints filed in 2010. *See* FDCPA and OTHER CONSUMER LAWSUIT STATISTICS, December 16-31, 2010, *available at* https://www.webrecon.com/b/fdcpa-case-statistics/fdcpa-and-other-consumer-lawsuit-statistics-december-16-31-2010/.[3] This increase in FDCPA litigation, and a corresponding cause, has been identified by the Courts. *See Federal Home Loan Mortgage Corp. v. Lamar,* 503 F.3d 504, 514 (6th Cir. 2007) ("The cottage industry that has emerged does not bring suits to remedy the widespread and serious national problem of abuse that the Senate observed in adopting the [FDCPA.]") (citation and internal quotation marks omitted); *see also Jerman,* 130 S. Ct. at 1631 (Kennedy & Alito, J., dissenting citing to *Lamar*).

The circuit conflict and present economic conditions ensure that the question presented will continue to arise in the future. Indeed, the question

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[3] This trend continues with 2,120 FDCPA lawsuits having been filed between January 1, 2001 and March 15, 2011. *See* FDCPA and OTHER CONSUMER LAWSUIT STATISTICS, March 1-15, 2011, *available at* https://www.webrecon.com/b/fdcpa-case-statistics/fdcpa-and-other-consumer-lawsuit-statistics-march-1-15-2011/.

presented arises regularly across the country. *See, e.g., Misleh*, 2011 U.S. Dist. LEXIS 41292, at *7-*8; *Anderson v. The Good Shepherd Hospital, Inc.,* No. 09-112, 2011 U.S. Dist. LEXIS 23457, at *15-*17 (E.D. Tex. March 8, 2011); *Panto v. Professional Bureau of Collections,* No. 10-4340, 2011 U.S. Dist. LEXIS 23328, at *21 (D.N.J. March 7, 2011); *Hemmingsen v. Messerli & Kramer, P.A.,* No. 09-1384, 2011 U.S. Dist. LEXIS 11864, at *7-*8 (D. Minn. Feb. 7, 2011); *Villegas v. Weinstein & Riley, P.S.*, 723 F.Supp.2d 755, 761 (M.D. Pa. 2010); *Kline v. Mortgage Electronic Security Systems,* 659 F.Supp.2d 940, 947-49 (S.D. Ohio 2009); *Davis v. R&R Prof'l Recovery, Inc.,* No. 07-2772, 2009 U.S. Dist. LEXIS 11879, at *13-*14 n.4 (D. Md. Feb. 17, 2009); *Duraney v. Wash. Mut. Bank, F.A.,* No. 07-13, 2008 U.S. Dist. LEXIS 72087, at *39-*43 (W.D. Pa. Sept. 11, 2008); *Captain v. ARS Nat'l Servs. Of N. Am.,* No. 05-1515, 2006 U.S. Dist. LEXIS 47796, at * 8-*12 (S.D. Ind. July 7, 2006), *rev'd on other grounds,* 505 F.3d 769 (7th Cir. 2007); *Diesi v. Shapiro,* 330 F.Supp.2d 1002, 1004 (C.D. Ill. 2004); *Tromba v. M.R.S. Assocs., Inc.,* 323 F.Supp.2d 424, 427-428 (E.D.N.Y. 2004); *Ignatowski v. GC Services,* 3 F.Supp.2d 187, 190-91 (D. Conn. 1998); *Ringer v. Credit Bureau, Inc.,* No. 83-134, 1983 U.S. Dist. LEXIS 20346, at *3-*4 (D. Or. Oct. 4, 1983).

This case is an ideal vehicle for this Court to resolve the Question Presented, which is both squarely raised by, and outcome determinative in the Third Circuit's decision. Clearly, liability under the FDCPA should not depend upon circuit geography. Whether

governed by the Ninth or Seventh Circuit application of the FDCPA, the judgment of the Third Circuit should be reversed.

## II. The Third Circuit's Decision is Wrong on the Merits.

The Third Circuit's decision conflicts with the statutory language and intent of the FDCPA and departs from this Court's well-established principles for statutory interpretation. The Third Circuit should be reversed because: 1) the Act twice defines consumer and neither definition includes a debtor's attorney, *see* 15 U.S.C. §§ 1692a(3) and 1692c(d); 2) the structure of the FDCPA as a whole recognizes a distinction between a debtor and her attorney and provides that they be treated differently; 3) the Act's fundamental purposes are not served when applied to communications only sent to a debtor's attorney, particularly in the context of settlement negotiations; and 4) the Third Circuit's holding constitutes an unwarranted expansion of the Act's coverage such that it will needlessly increase litigation in conflict with the fundamental purpose of the FDCPA.

Congress intended and recognized that attorneys may serve as intermediaries to protect debtors from abusive debt collection practices. This was confirmed by the Ninth Circuit:

> The Act was meant to shield debtors from abusive collection practices, but it was never intended to shift the balance of power

> between debtors and creditors such that a debt collector cannot work with a debtor's attorney to settle claims without exposing itself to liability out of proportion to the debt allegedly owed.

*Guerrero*, 499 F.3d at 941. The Third and Fourth Circuits' holdings disregard the distinction between a debtor and her attorney and are inconsistent with the text, structure and purpose of the FDCPA.

### A. The Text of the FDCPA Distinguishes Between a Debtor and Her Attorney.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *see also Milner v. Dept. of the Navy*, 131 S. Ct. 1259, 1264 (2011) (citing to *Park 'N Fly, supra*); *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2350 (2009) (same); *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004) (same). Further, when a statute defines a group and excludes from that group members that are included in other associated aspects of the statute, the exclusion and omission of those associated members is intentional. *See Barnhart v. Peabody Coal Company*, 537 U.S. 149, 168 (2003) ("[T]he canon *expressio unius est exclusio alterius* . . . has force . . . when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were

excluded by deliberate choice, not inadvertence.") (citation and internal quotations omitted). The Third Circuit departed from these long-standing principles of statutory construction.

The text of the FDCPA distinguishes between a "consumer" and a consumer's attorney. Toward this end, section 1692a(3) defines a "consumer" to mean "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3). For purposes of section 1692c only, the FDCPA expands the definition of "consumer" to include "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator." 15 U.S.C. § 1692c(d). Absent from the extensive list of relatives and fiduciaries sharing a common identity of a "consumer" is a consumer's attorney. *See Guerrero,* 499 F.3d at 935. This omission confirms that the exclusion of a debtor's attorney from the statutory definition of a "consumer" was a deliberate Congressional choice and not inadvertent. *Zaborac v. Phillips and Cohen Associates, Ltd.,* 330 F.Supp.2d 962, 967 (E.D. Ill. 2004) (section 1692c(d)'s expansion of definition of consumer without including a consumer's attorney buttresses the conclusion that "[a]ny expansion of that definition to encompass a consumer's lawyer would impermissibly flout the congressional definition.").

This reading of the FDCPA is consistent with its legislative history which confirms that Congress did not intend to include an attorney in the definition of a "consumer." *See* H. R. REP. NO. 95-131, p.8 (1977) ("Another group of people who do not owe money, but

may be deliberately harassed are the family, employer and neighbors of the consumer. These people are also protected by this bill.").

### B. The Structure of the FDCPA Distinguishes Between a Debtor and Her Attorney.

The structure of the FDCPA distinguishes between debtors and attorneys and treats them differently. Viewing the FDCPA as a whole, the structure of the statute confirms that Congress "contemplate[d] different roles for, and different treatment of, attorneys and their debtor clients . . . and that a debtor's attorney does not require the same protections as a debtor himself." *See Guerrero,* 499 F.3d at 938.

Subject to certain exceptions, a debt collector may not communicate in connection with a debt with "any other person other than the consumer, his attorney, a consumer reporting agency . . . , the creditor, the attorney of the creditor, or the attorney of the debt collector." *See* 15 U.S.C. § 1692c(b); *Guerrero,* 499 F.3d at 935. Section 1692c(a)(2) reinforces the "view that Congress treated attorneys as intermediaries between debtors and debt collectors, and that a debtor's attorney does not require the same protections as a debtor himself." *See Guerrero,* 499 F.3d at 938. Under that section, "a debt collector [generally] may not communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect

to such debt . . . unless the attorney consents to direct communication with the consumer." *See* 15 U.S.C. § 1692c(a)(2); *Guerrero,* 499 F.3d at 935; *Zaborac,* 330 F.Supp.2d at 967; *accord* 15 U.S.C. § 1692b(6) (requiring that once a debt collector learns that a debtor is represented by counsel it "may not communicate with any person other than that attorney."). The fact that section 1692c requires the intercession of an attorney between the debtor and the debt collector evinces Congress's intent that "the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior." *Kropelnicki*, 290 F.3d at 127-28; *see also Guerrero*, 49 F.3d at 935 ("the [FDCPA] as a whole thus suggests a congressional understanding that, when it comes to debt collection matters, lawyers and their debtor clients will be treated differently.").

The Third Circuit erred by not considering the FDCPA as a whole. *See United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citations omitted); *see also Abuelhawa v. United States*, 129 S. Ct. 2102, 2105 (2009) (". . . statutes are not read as a collection of isolated phrases."); *United States Nat'l Bank v.*

*Independent Ins. Agents of Am.*, 508 U.S. 439, 455 (1993). The circuit court failed to heed to sections 1692a(3) and 1692c(d), which distinguish between a "consumer" and an attorney. *See* 15 U.S.C. § 1692a(3); 15 U.S.C. § 1692c(d). Instead, the court based its holding on an analysis of section 1692a(2)'s definition of "communication" and concluded that FSKS violated the FDCPA by indirectly communicating with Respondent through her counsel – a conclusion that is inconsistent with the structure of the FDCPA. *See Allen,* 629 F.3d at 368, App. 9.

### C. Applying the FDCPA to Communications to a Debtor's Attorney does not Advance the Act's Purposes.

The Third Circuit's decision to impose liability for a communication under the FDCPA, regardless of the recipient, does not advance the Act's purpose to protect consumers from and to eliminate abusive debt collection practices. *See* 15 U.S.C. § 1692(e); *Allen,* 629 F.3d at 368, App. 9 ("§ 1692f(1) prohibits 'unfair or unconscionable means,' regardless of the person to whom the communication was directed."). In enacting the FDCPA, Congress was concerned about abusive debt collection practices which would likely disrupt a debtor's life. *See Simmons v. Roundup Funding, LLC,* 622 F.3d 93, 96 (2d Cir. 2010); *Guerrero,* 499 F.3d at 938; *Pettit v. Retrieval Masters Creditors Bureau, Inc.,* 211 F.3d 1057, 1059 (7th Cir. 2000). Indeed, the FDCPA's legislative history confirms that Congress sought to prevent debtors from being "terrorized and

abused by unethical debt collectors." H. R. REP. NO. 95-131, p. 3 (1977). For this reason, Congress enacted the FDCPA to curtail abusive debt collection practices that ranged from "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." S. REP. NO. 95-382, p. 2 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695, 1696.

These purposes are not served by applying the statute to communications sent to a debtor's attorney. *See Guerrero,* 499 F.3d at 938. When a debtor is represented by counsel, concerns about abusive debt collection practices which would likely disrupt a debtor's life "quickly evaporate" because "[a]ttorneys possess exactly the degree of sophistication and legal wherewithal that individual debtors do not." *See Guerrero,* 499 F.3d at 939; *accord Kropelnicki,* 290 F.3d at 127-28; *Dikeman,* 81 F.3d at 954, n.14 (10th Cir. 1996) ("in making our decision, we rely heavily on the professional status and representative role of the lawyer, as contrasted with that of a consumer, the kind of person the statute is designed to protect" and that "regardless of the standard used for communications with consumers, a lawyer acting as the representative of a debtor is not, in that capacity, a consumer under the Act.").

The distinction between attorneys and their consumers within the FDCPA is consistent with the federal courts' standard for analyzing violations of the Act. In assessing liability under the FDCPA, circuit courts consider the degree of sophistication of the recipient. *See Brown v. Card Service Center*, 464 F.3d 450, 453-54, n.2 (3d Cir. 2006); *Evory*, 505 F.3d 769, 774 (7th Cir. 2007) (unsophisticated consumer); *Guerrero*, 499 F.3d 926, 934 (9th Cir. 2007); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *see also Peter v. GC Servs. L.P.*, 310 F.3d 344, 348, n.1 (5th Cir. 2002) (noting that circuits apply either the "least sophisticated consumer" standard or the "unsophisticated consumer" standard in analyzing communications to a consumer, and "the difference between the standards is *de minimis* at most"). Once a debt collector is aware that an attorney is representing a debtor, the FDCPA, as a general rule, requires the debt collector to communicate directly with the debtor's attorney. 15 U.S.C. § 1692c(a)(2). Accordingly, the professional expertise of the debtor's legal counsel renders the protections of the FDCPA superfluous or, at a minimum, justifies the adoption of a standard recognizing the attorney's expertise. *See Guerrero,* 499 F.3d at 939; *Kropelnicki,* 290 F.3d at 127-28; *see also Evory*, 505 F.3d at 774 ("the unsophisticated consumer standpoint is inappropriate for judging communications with lawyers just as it is inappropriate to fix a physicians standard of care at the level of that of a medical orderly.").

The FDCPA is remedial in nature and was never intended to be used as a sword like it was in this

matter. *See Guerrero*, 499 F.3d at 930, 939 (criticizing debtor's attorney for sending an "incendiary letter" and "morphing [a simple debt collection matter] into a federal battle royale . . . "). The Act's primary purpose is to shield debtors from abusive debt collection practices and not to shift the balance of power in favor of debtors or to stifle communications necessary for settlement. *See Guerrero*, 499 F.3d at 941.

Further, the Act was never intended to impede debt collectors from working with a debtor's attorney to settle claims without exposing themselves to potential liability out of proportion with the underlying debt owed. *Id.* The Third Circuit's holding will undoubtedly have a chilling effect on informal settlement discussions between counsel for debtors and debt collectors. Counsel for debt collectors, like FSKS, could expose themselves to class action lawsuits for representations made in the context of settlement negotiations which were expressly made "subject to audit and verification." App. 85. The FDCPA was not "intended as a sword to be brandished by debtors who have retained counsel – the very debtors least in need of the Act's protections." *Guerrero*, 499 F.3d at 941.

In fact, members of this Court have recently observed:

> "[W]hen the costs of discovery and litigation are used to force settlement even absent fault or injury; when class-action suits transform technical legal violations into windfalls for plaintiffs or their attorneys, the Court, by

> failing to adopt a reasonable interpretation to counter these excesses, risks compromising its own institutional responsibility to ensure a workable and just litigation system. This interpretation of the FDCPA the Court endorses today will entrench, not eliminate, some of the most troubling aspects of our legal system."

*See Jerman*, 130 S. Ct. at 1628-29 (Kennedy & Alito, J., dissenting). Accordingly, the Third Circuit's holding directly advances the unintended application of the FDCPA noted by Justice Kennedy in that it extends liability under the Act for communications issued to a debtor's attorney which do not harass or otherwise deceive a "consumer."

### D. The Third Circuit's Holding Constitutes an Unwarranted Expansion of the Act's Coverage.

While statutes may be liberally construed to achieve their purposes, that principle cannot trump the intended application of the FDCPA, as reflected in its plain language and structure. Plainly, "[t]hat principle may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme." *Director, OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995). This does not, however, render the FDCPA boundless. The Third Circuit erred in purporting to effectuate the remedial purpose of an unambiguous statute. The Court of Appeals afforded undue

weight to section 1692a(2)'s definition of "communication" and ignored section 1692c and the statutory structure which clearly distinguish between a consumer and an attorney. *See Timbers,* 484 U.S. at 381; *see also Lamar*, 503 F.3d at 510 (noting that "the [FDCPA] must be applied with some circumspection.").

In fact, the Third Circuit's holding that "§ 1692f(1) prohibits 'unfair or unconscionable means,' regardless of the person to whom the communication was directed" dramatically expands the coverage of the FDCPA. *Allen*, 629 F.3d at 368, App. 9. Taking the Third Circuit's reasoning to its logical extreme, the FDCPA now applies to representations made to third parties who are not "consumers" as defined by the FDCPA such as judicial bodies and automatic clearing houses that process checks for banking institutions. *Contra O'Rourke,* 635 F.3d 938, 2011 U.S. App. LEXIS 5295, at *15-16 (FDCPA does not apply where alleged misrepresentation was not made to debtor but in an attachment to a complaint which was filed with a court); *Volden,* 440 F.3d at 954 (FDCPA did not cover claim where alleged misrepresentations were not to debtor but to automatic check clearing house). Certainly, the structure and text of the FDCPA do not support the unbridled application afforded through the Third and Fourth Circuit holdings.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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