No. 11-492

IN THE

Supreme Court of the United States

LAW OFFICES OF MITCHELL N. KAY, P.C.,

Petitioner,

v.

DARWIN LESHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent Darwin Lesher does not dispute that the petition properly frames the Question Presented (Opp. at 1), or that the Question Presented directly implicates two well-defined circuit splits, one of which relates to law firm debt collectors and the other to all debt collectors. Those circuit splits are interfering with routine debt collection nationwide by making the same conduct a basis for strict liability under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq.*, in some States but not others. Respondent asserts in conclusory fashion that "discrepancies [between the Circuits] can be expected" and speculates without any foundation that the lower courts might "self-correct." Opp. at 8-9. Nothing in the Brief in Opposition, however, negates either the extent of the confusion generated by the conflicting decisions below, or the importance of Supreme Court review to resolve the conflicts and permit uniform application of the Act. Accordingly, the Court should grant the petition. Alternatively, the Court should request the views of the Solicitor General, as it recently did in connection with another Third Circuit decision involving the application of the FDPCA to lawyers. *Fein, Such, Kahn & Shepard, P.C. v. Allen*, No. 10-1417 (U.S. filed May 12, 2011), available at http://www.supremecourt.gov/Search.aspx?FileName=docketfiles/10-1417. htm.

A. Respondent's Reliance On State Rules Of Professional Conduct Is Fundamentally Misplaced, Because The FDCPA Regulates The Conduct Of All Debt Collectors On A National Basis And State Standards Were Immaterial To The Divided Decisions Below.

Respondent devotes the bulk of his Opposition to a lengthy discourse on the Pennsylvania Rules of Professional Conduct, arguing that the Kay Law Firm violated the Rules by failing to make certain disclosures (Opp. at 11-12, 14), and that in any event attorneys acting as debt collectors cannot reasonably expect uniform application of the FDCPA on a national basis because attorney conduct is regulated by the States. Opp. at 6, 10-14. None of Respondent's arguments has merit or supports denial of the petition.

As a threshold matter, Respondent's assertion that the Kay Law Firm failed to disclose where it is admitted to practice (Opp. at 11-12) is false. Putting aside that Rule 7.5(b) of the Pennsylvania Rules of Professional Conduct, 204 Pa. Code § 81.4, R. 7.5(b) (2011), has no application to a law firm that does not maintain offices "in more than one jurisdiction," the debt collection letters at issue clearly state beneath the Firm's letterhead that the Firm is "Admitted in New York & Washington D.C." App. 56a; *see also* App. 58a. Equally unavailing are Respondent's unsupported insinuations that the Kay Law Firm violated the Rules of Professional Conduct by allegedly hiding the name of its client. Opp. at 12, 14. The Kay Law Firm letters complied in all respects with the affirmative disclosure requirements of 15 U.S.C. § 1692g, including the requirement that a debt collector disclose "the name of the creditor to whom the debt is owed." *Id.* § 1692g(a)(2). The

district court denied summary judgment on Respondent's claim under Section 1692g without discussing any of the state law contentions that Respondent advances here, App. 45a, and the Third Circuit did not consider Respondent's state law contentions either.

More importantly, Respondent's arguments regarding the Pennsylvania Rules of Professional Conduct ignore the reasoning of the courts below, ignore that Respondent abandoned any claim based on 15 U.S.C. § 1692n,[1] and fundamentally misapprehend the nature of the FDPCA. While the Third Circuit's decision effectively construes the Act to bar attorneys from engaging in routine debt collection for the reasons set forth in the petition (Pet. at 25-27), by its terms the FDCPA does not regulate the practice of law or purport to set standards for the professional conduct of attorneys. To the contrary, the Act applies on an equal basis to all debt collectors, attorneys and non-attorneys alike, by imposing proscriptive and prescriptive requirements that govern communications between debt collectors and consumers. *See, e.g.*, 15 U.S.C. §§ 1692e(1)-(10) & (12)-(16) (describing prohibited debt collector conduct); *id.* §§ 1692e(11) & 1692g(a) (enumerating disclosure requirements for written notice to debtor).

1. Section 1692n provides in part that the FDCPA "does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency." As set forth in the petition, Lesher stipulated to the dismissal of his Section 1692n claim in the district court, Pet. at 11 n.5, and he cannot revive that claim here. *See* Opp. at 11.

There is no suggestion whatsoever in the decisions below that the Kay Law Firm violated any rule of professional conduct, and no factual basis for any contention that the Firm did so. Instead, like the decisions below, the Question Presented – which Respondent concedes "adequately reflect[s] the issues involved in this case" (Opp. at 1) – is strictly limited to whether the debt collection letters sent by the Kay Law Firm violated the *FDCPA*'s prohibition on "false, deceptive, or misleading representation[s]." 15 U.S.C. § 1692e. That is a question of federal law that is governed by federal standards; application of the Act should not and does not vary from state to state. *See Gonzalez v. Kay*, 577 F.3d 600, 609 (5th Cir. 2009) (Jolly, J., dissenting) ("This is an area of law where national uniformity is particularly important . . . ."). Indeed, not one of the many conflicting decisions below addressing the Question Presented suggests that application of the Act may vary from State to State, or that variations in state rules of professional conduct have any relevance to whether a debt collection letter sent by an attorney violates the Act.[2] Accordingly, Respondent's arguments regarding the Pennsylvania Rules of Professional Conduct are meritless and

2. The FDCPA does not, of course, relieve attorneys of their obligation to conform their conduct to applicable standards of professional conduct or – in the absence of a clear conflict, *see* 15 U.S.C. § 1692n – preempt state law governing the conduct of attorneys. But even if there were some argument that the Kay Law Firm violated a state ethical rule, which there is not, that argument was not considered below, and in any event would properly be directed to the relevant state authority with jurisdiction over the Firm's compliance with the rules of professional conduct.

completely irrelevant to this Court's evaluation of the Question Presented and the well-defined circuit splits that are squarely implicated by the Third Circuit's ruling.

B. This Case Presents An Ideal Vehicle For The Court To Resolve Two Sharp Circuit Splits Regarding Important Issues Of Federal Law Governing Debt Collection Activity That Are Of Central Importance To The National Economy.

Respondent's Brief in Opposition confirms that this case presents an ideal vehicle in which to resolve two important issues regarding application of the FDCPA to law firms engaged in the vital function of debt collection, each of which implicates a three-way circuit split.

First, Respondent effectively concedes that, as the law stands now, the same debt collection letter sent on law firm letterhead will be held to comply with the Act in Second Circuit, violate the Act as a matter of law in the Third Circuit, present a question of fact for a jury in the Fifth Circuit, and produce unknown results in the other circuits. Opp. at 8; see Pet. at 15-16. Moreover, the circuit decisions could not be more closely divided. On one hand, two of the three opinions below have favored the debtor (although they are in conflict with one another as to whether the debt collection letters at issue violate the Act as a matter of law or present an issue of fact for a jury to determine). On the other hand, counting the dissents by Judge Jolly in Gonzalez and Judge Jordan in this case, and the unanimous Second Circuit decision written by Judge Calabresi in *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005), five of the nine circuit judges

who have considered the issue have concluded that the letters comply with the Act. Resolution of the Question Presented will eliminate this intolerable inter-circuit confusion and uncertainty for law firms engaged in debt collection.

Second, Respondent does not dispute that there is also a three-way circuit split on the critical issue of whether application of the FDCPA to a written communication presents a question of law or fact. The Second, Third and Ninth Circuits have held that whether a written communication violates the Act is a question of law for the Court. The Fifth, Sixth and Eleventh Circuits allow a jury to determine liability in some cases. And the Seventh Circuit has taken a hybrid position requiring the debtor to produce survey evidence before a case can go to a jury. *See* Pet. at 21-22. Resolution of this threshold issue, which is necessarily subsumed within the Question Presented, will eliminate confusion and uncertainty for all debt collectors.

Third, the Question Presented could not be placed before the Court on a clearer or more fully developed record. The resolution of the issues presented by the Third Circuit's decision turn on the application of the Act to two two-page letters that (1) are reproduced in full in the petition, App. 56a-59a; (2) are not subject to any collateral controversy; and (3) contain disclaimer language identical to that considered by the Second Circuit in *Greco* and the Fifth Circuit in *Gonzalez*. Moreover, because the disclaimer language endorsed by the Second Circuit in *Greco* has now been rejected as a matter of law in the Third Circuit and questioned in the Fifth, if the Court does not take this opportunity to clarify what the Act requires it could be years before a similarly clear vehicle

for Supreme Court review presents itself. Meanwhile, the confusion generated by the conflicting decisions below will inevitably spread and continue to interfere with routine debt collection activity nationwide.

Fourth, there is no doubt that the issues will be fully and effectively briefed on both sides if the petition is granted. The parties agree as to the Question Presented (Opp. at 1), and the legal issues raised by the petition already have been fully vetted in the lengthy, conflicting opinions rendered by multiple circuit judges below. The Court may also, of course, request the views of the Solicitor General on the proper interpretation and application of a federal statute. Furthermore, because debt collection is an essential economic activity of enormous importance to the Nation, prior FDCPA cases accepted for review have drawn vigorous *amicus curiae* participation on both sides. Thus, for example, in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605 (2010), multiple *amici* submitted briefs on both sides.[3] Similarly, *amici* were well represented in *Heintz v. Jenkins*, 514 U.S. 291

3. In *Jerman*, which presented the question whether the bona fide error defense to FDCPA liability codified in 15 U.S.C. § 1692k(c) extends to errors of law, *amicus curiae* briefs in support of petitioner were filed by the State of New York et al. and Public Citizen, Inc. et al. Briefs in support of respondent were filed by Ohio Creditor's Attorneys Association, et al., DRI – Voice of the Defense Bar, the American Legal and Financial Network, USFN – America's Mortgage Banking Attorneys, the California Association of Collectors, the Commercial Law League of America and DBA International, ACA International, the National Association of Retail Collection Attorneys, and the Mississippi Creditors' Attorneys Association.

(1995).[4] In this case, three *amici* have already submitted briefs in support of the petition, and given the significance of the Question Presented to business interests, consumers and the bar it is highly probable that, if the Court grants review, additional *amici* will seek leave to appear on the merits on both sides.

C. Respondent's Brief In Opposition Highlights The Disruptive Impact Of The Third Circuit's Decision Below And The Fifth Circuit's Decision In *Gonzalez*.

While Respondent's Brief in Opposition does not advance any credible reason to deny the petition, it does highlight the disruptive impact of the Third Circuit's decision below and the Fifth Circuit's decision in *Gonzalez*. By Respondent's lights, the FDCPA flatly prohibits law firms from engaging in routine debt collection (Opp. at 7) or using attorney letterhead to "cross state lines [and] . . . demand[] payment for alleged past due debts from unrepresented, least sophisticated consumers" (id. at 6), regardless of whether the letter contains an express disclaimer of attorney involvement. *Id.* at 11-12. According to Respondent, the FDCPA "simply does not permit attorneys to behave like a collection agency" and secure "a huge competitive advantage over non-attorney

4. In *Heintz*, which presented the question whether the FDCPA applies to attorneys, *amicus curiae* briefs in support of petitioner were filed by the American Bar Association, the Commercial Law League of America and the National Association of Retail Collection Attorneys. A brief in support of respondent was filed by the National Consumer Law Center, Inc., et al. A brief was also filed by Sherry Ann Edwards as *amicus curiae.*

collection agencies." *Id*. at 13. Although Respondent does not attempt to reconcile his position with the Act's stated purpose of "insur[ing] that those debt collectors who refrain from using abusive debt collection practices *are not competitively disadvantaged*," 15 U.S.C. § 1692(e) (emphasis added), Respondent paints the decision below in the stark terms that it deserves. As Judge Jordan noted in dissent, "the practical effect here is clear. Law firms take an extraordinary risk in sending a collection letter, no matter how conciliatory or how plain their prose." App. 30.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, consistent with the approach that the Court has taken in *Fein, Such, Kahn & Shepard, P.C. v. Allen*, No. 10-1417, the Court should request the views of the Solicitor General before taking further action on the petition.

December 29, 2011

Respectfully submitted,

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