No. 14-858

In The
Supreme Court of the United States

LVNV FUNDING, LLC, *et al.*,

Petitioners,

v.

STANLEY CRAWFORD,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS IN SUPPORT OF PETITIONER

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The National Association of Retail Collection Attorneys respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

The National Association of Retail Collection Attorneys ("NARCA") is a nationwide, not-for-profit association of attorneys and law firms engaged in the practice of creditor rights and debt collection law. NARCA members include nearly 5,000 lawyers located throughout the country, all of whom must meet association standards designed to ensure professionalism in the practice of collection law. They are guided by NARCA's code of ethics, which imposes obligations beyond the requirements of applicable laws and regulations.

NARCA has played a prominent role in advancing the interest of creditor rights attorneys through its advocacy, education, and outreach programs. NARCA's mission to preserve the integrity and viability of legal debt collection is advanced through its semi-annual conferences, a

[1] Pursuant to Rule 37.6, NARCA affirms that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NARCA, its members, or their counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(b), the Petitioner has filed its blanket consent for *amicus curiae* with the Clerk of Court. Respondent has consented to the filing of this brief. Notice of NARCA's intent to file this *amicus curiae* brief has been provided to counsel for Petitioner and Respondent not less than 10 days prior to the filing of this brief.

mandatory code of ethics, and a certification program requiring members to complete annual continuing education in the areas of creditor rights and ethics. NARCA has filed Amicus Briefs in each of the three Fair Debt Collection Practices Act cases decided by this Court[2] and NARCA's Amicus Brief was cited four times in the majority opinion in *Jerman v. Carlisle*, *McNellie*, *RIni*, *Kramer & Ulrich LPA* 559 U.S. 573, 596-98 (2010).

The application of the Fair Debt Collection Practices Act to a lawyer's compliance with the Bankruptcy Code's proof of claim procedures is a matter of great concern to NARCA members. NARCA members are regularly involved in the lawful collection of past-due consumer debts on behalf of creditor clients in bankruptcy proceedings and are routinely called upon to interpret and apply unsettled requirements in applicable collection law, principally the Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. § 1692 *et seq*. The Eleventh Circuit has incorrectly characterized the mere act of filing a proof of claim as an attempt to collect a debt from a consumer. Left unchecked, this decision gives birth to a cottage industry of bankruptcy court litigation against attorneys and their clients which impedes the efficient claims adjudication process of the bankruptcy court and creates the absurd results this Court warned against in *Jerman*, *supra at* 599-600.

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[2] *Heintz v. Jenkins*, 514 U.S. 296 (1995); *Jerman v. Carlisle*, *McNellie*, *Rini*, *Kramer & Ulrich LPA*, 559 U.S. 573 (2010) and *Marx v. General Revenue Corp.*, ___ U.S. ___, 133 S. Ct. 1166 (2013).

NARCA urges this Court to grant the petition for writ of certiorari to resolve significant uncertainty created by conflicting Circuit rulings regarding two unsettled questions: (1) whether a creditor's lawful participation in bankruptcy proceedings and communications relating thereto are subject to the FDCPA and (2) whether the least sophisticated consumer standard applies where an FDCPA lawsuit is based on communications from a debt collection attorney to counsel for the consumer.

SUMMARY OF ARGUMENT

The Circuit Courts are split on issues of profound importance to members of the National Association of Retail Collection Attorneys, who are caught in the uncomfortable intersection of the Bankruptcy Code and the Fair Debt Collection Practices Act. This Court should grant the instant petition and decide whether the FDCPA, a statute designed to prevent consumers from filing bankruptcy by curbing abusive collection practices, applies to a debt collector's conduct in bankruptcy proceedings.

The Circuit Courts are hopelessly conflicted on whether the FDCPA extends to communications from a debt collector to the consumer's counsel, and if so, what standard should be applied in measuring liability for those communications. This Court should resolve this conflict as well.

NARCA asks that this Court grant the petition.

ARGUMENT

I. THE COURT SHOULD DECIDE WHETHER THE FAIR DEBT COLLECTION PRACTICES ACT REGULATES A DEBT COLLECTOR'S BEHAVIOR IN BANKRUPTCY COURT

When Congress enacted the FDCPA in 1977, it found that abusive debt collection practices by third party collectors "lead to the number of personal bankruptcies" in this country. 15 U.S.C. § 1692a. The stated purpose to reign in abusive collection practices and prevent consumers from resorting to bankruptcy is at odds with Circuit Court rulings extending the reach of the FDCPA to attorneys and third party agents representing creditors in bankruptcy. *See*, *Randolph v. IMBS*, *Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (FDCPA claim stated where debt collector sends a demand letter to a bankrupt debtor) and *Simon v. FIA Card Services*, *N.A.*, 732 F.3d 259, 271 (3rd Cir. 2013) (an FDCPA claim may arise from a debt collector's communications to bankrupt debtor's counsel). The Eleventh Circuit followed these rulings, holding that the filing of a proof of claim on time barred debt is an "attempt to obtain payment . . . by legal proceeding" which violates the FDCPA. *Crawford v. LVNV Funding*, *LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014).

Other Circuit rulings have reached the opposite result – that the FDCPA does not extend to efforts to recover creditor claims through the bankruptcy process. *See*, *Walls v. Wells Fargo Bank*, *N.A.*, 276 F.3d 502 (9th Cir. 2002) (Bankruptcy Code

precludes FDCPA claims premised on conduct by a creditor in a bankruptcy proceeding) and *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2nd Cir. 2010) (the filing of a proof of claim in bankruptcy is not collection activity under the Fair Debt Collection Practices Act). These conflicting and irreconcilable rulings have sown confusion and uncertainty amongst creditor rights attorneys who are faced with substantial challenges in properly advising clients as to the legality of filing proofs of claim in bankruptcy as well as to the proprietary of communicating with the bankruptcy court and debtor's counsel. Creditor attorneys who are also debt collectors are themselves at risk of civil liability for filing a proof of claim in bankruptcy court on behalf of a creditor client.[3]

NARCA urges this Court to grant the petition and decide whether the FDCPA applies to the behavior of debt collectors operating inside the confines of the highly regulated and controlled environment of a bankruptcy court proceeding so that collection lawyers will have clear rules on how to represent creditor clients in bankruptcy court and avoid their own civil liability. Exposing creditor attorneys to civil liability under the FDCPA for filing a permissible proof of claim in bankruptcy court frustrates the attorney client relationship and discourages creditors from exercising their right to participate in the orderly distribution of a debtor's estate.

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[3] In 1986, Congress repealed the exemption previously accorded to attorneys collecting consumer debts for clients. Pub. Law 99-361.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE ELEVENTH CIRCUIT'S DECISION SIGNIFICANTLY IMPAIRS THE PROMPT AND EFFICIENT ADMINISTRATION OF A DEBTOR'S ESTATE BY CREATING AN OVERLAY OF BANKRUPTCY COURT LITIGATION TO ADJUDICATE CREDITOR CLAIMS

This Court has recognized that a chief purpose of bankruptcy is to "secure a prompt and effectual administration in settlement of the estate of all bankrupts within a limited period." *Katchen v. Landy*, 382 U.S. 323, 329 (1996) (internal citation omitted). If the FDCPA extends to the behavior of lawyers and creditors inside the confines of the highly regulated, balanced, and controlled environment of a bankruptcy proceeding, unpredictable delays will impair the efficient administration of bankruptcy cases. FDCPA claims by debtors which arise out of conduct related to a bankruptcy proceeding are considered non-core proceedings in which bankruptcy court rulings must be reviewed by a U.S. District Court. *See*, *Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594 (2011) (Bankruptcy Judges lack authority under Article III to enter final judgments as to non-core adversary

proceedings).[4] The large number of FDCPA claims filed each year in the District Courts suggests that a deluge of new FDCPA claims will flood the Bankruptcy Courts and frustrate the goal of efficient administration.[5]

The FDCPA is a strict liability statute that imposes liability without regard to fault. *See*, *Tourgeman v. Collins Fin. Servs.*, 755 F.3d 1109, 1119 (9th Cir. 2014), *Kistner v. Law Offices of Michael P. Margelefsky*, *LLC*, 518 F.3d 433, 438 (6th Cir. 2008), *Ruth v. Triumph P'Ships*, 577 F.3d 790, 806 (7th Cir. 2009), *Newman v. Ormond*, 396 Fed. Appx. 636, 638 (11th Cir. 2010) and *Maynard v. Bryan W. Cannon*, *P.C.*, 401 Fed. Appx. 389, 397 (10th Cir. 2010). A debt collector or creditor attorney who files a proof of claim which, for example, may inadvertently misstate the name of the creditor, the amount of the debt, or the charges added on to the debt is subject to FDCPA liability. *See*, *e.g.*, *Owen v. I.C. Systems*, *Inc.*, 629 F.3d 1263, 1276 (11th Cir. 2011) (Error in calculating compound interest on past due interest violates FDCPA); *Knighten v. Palisades Collection*, *LLC*, 721 F. Supp.

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[4]This duplicate review process is illustrated by *In re Humes*, 496 B.R. 557, 588 (Bkrtcy. E.D. Ark., July 17, 2013) (recommending entry of judgment in favor of consumer debtor pursuant to claims under the FDCPA) and *In re Rinaldi*, 487 B.R. 516, 537 (Bkrtcy. E.D. Wis., Feb. 22, 2013) (recommending dismissal of FDCPA claims).

[5] 9,720 FDCPA lawsuits were filed in Federal Courts in 2014. *See*, "FDCPA Lawsuits Decline for Third Straight Year, But TCPA Suits Up 25%." *See*, www.insidearm.com/daily/fdcpa-lawsuits-decline-for-third-straight-year-but-tcpa-suits-up-25/, published January 23, 2015 (last visited February 12, 2015).

2d 1261, 1270 (S.D. Fla. 2000) (Debt collector liable under FDCPA for inadvertently naming assignee of a debt as "creditor") and *Grant-Fletcher v. McMullen & Drury, P.A.*, 964 F. Supp. 2d 516 (D. Md. 2013) (Unintentional error in including $205.00 fee not yet due in collection letter sent by law firm creates liability under FDCPA). If the Eleventh Circuit's decision stands, every disallowed proof of claim filed by a debt collector will likely result in a deluge of FDCPA adversary actions seeking recovery for alleged "misrepresentation" and "deceptive" collection practices. [6]

Debt collectors subject to FDCPA liability can take little comfort in the fact that the Act's bona fide error provision [15 U.S.C. § 1692k(c)] allows a collector to escape liability where the error was unintentional despite reasonable procedures adapted to avoid such errors because this defense is a time consuming and expensive process and does not extend to mistakes of law. *See*, *Jerman*, *supra* at 581. Further, the generous fee shifting provisions of the FDCPA that compensate attorneys in no actual damage cases, *see*, *e.g. Pipiles v. Credit Bureau*, 886 F.2d 22, 27 (2nd Cir. 1989) (holding that plaintiff was entitled to award of fees and costs despite failure to establish actual or additional damages) must be contrasted with the adequate damages available to debtors who are harmed by a knowing

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[6] It is expected that bankrupt debtors will choose to file any FDCPA claim as an adversary proceeding and avoid paying a filing fee that is imposed for a new District Court suit given that the Bankruptcy Court fee schedule, as authorized by 28 U.S.C. Section 1930, does not require a debtor to pay a fee to initiate an adversary case. The fee schedule is posted at http://www.uscourts.gov/FormsAndFees/Fees/BankruptcyCourt.

violation of the automatic stay or discharge injunction provisions of Bankruptcy law. *See*, *Eskanos & Adler v. Roman (in Re Roman)* 283 B.R. 1, 7 (9th Cir. BAP 2002) (An award for actual damages ... requires a showing by the debtor that [he] sustained an injury from a 'wilful' violation of the stay.") *and In Re Lohmeyer* 365 B.R. 746, 754 (Bkrtcy. N.D. Ohio 2007) (Plaintiffs must allege an injury in fact (for)...compensatory sanctions payable to Plaintiffs for contempt from Defendant's alleged violation of the discharge injunction").

It is therefore important for this Court to examine whether the reach of the FDCPA extends to a debt collector's behavior, which is already scrutinized by the watchful eye of the bankruptcy court. The Eleventh Circuit's decision exposes creditors and their attorneys to the payment of attorney fees and strict liability damages for non-willful conduct in bankruptcy filings.

III. THIS COURT SHOULD DETERMINE WHAT STANDARD APPLIES WHERE A CONSUMER'S FDCPA LAWSUIT IS PREMISED ON ALLEGEDLY DECEPTIVE STATEMENTS MADE TO THE CONSUMER'S ATTORNEY

The remedial purpose of Federal consumer protection legislation is advanced by applying a "least sophisticated" or "unsophisticated" consumer standard in assessing liability for allegedly deceptive conduct directed to a consumer as opposed to communications addressed to the consumer's lawyer. *See*, *Pollard v. Law Office of Mandy L. Spaulding*,

766 F.3d 98, 102 (1st Cir. 2014) (adopting "least sophisticated consumer" standard applied by Second and Ninth Circuits); *Gammon v. GC Services, Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994) (adopting "unsophisticated" consumer standard) and *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002) (same). Circuit Courts are divided as to whether the FDCPA's definition of "communication" applies to allegedly deceptive statements not addressed to the consumer but instead to the consumer's attorney. Three separate approaches have been adopted. The Fourth Circuit has ruled that communications to attorneys are subject to the FDCPA, without discussing whether the "unsophisticated" or "least sophisticated" consumer standard applies to those practices. *See*, *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007). The Ninth Circuit categorically rejected an FDCPA claim based on a communication sent to the consumer's attorney. *See*, *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007). The Second Circuit agreed, albeit *in dicta*, *See*, *Kropelnicki v. Siegel*, 290 F.3d 118 (2nd Cir. 2002). The Seventh Circuit has determined that communications to attorneys may be actionable, but rejected the "unsophisticated consumer" standard and instead declared that communications to an attorney must be examined as to whether the conduct would "deceive a competent lawyer." *Evory v. RJM Acquisitions Funding, LLC*, 505 F.3d 769 (7th Cir. 2007). In *Crawford*, the Eleventh Circuit determined that the "least sophisticated consumer" standard applied to the filing of a proof of claim despite the fact that the communication was not made to the consumer/debtor but was directed to the

Court, the debtor's counsel, and to the Chapter 13 Trustee. *Crawford*, 758 F. 3d at1261.

An attorney who graduated from a law school and who sat for and passed what is often described as a grueling bar examination is a learned and wise professional, the antithesis of an unsophisticated and unschooled consumer. A licensed attorney is also subject to Rules of Professional Conduct, which apply to an attorney's conduct both in Federal and state courts, and which require that the attorney be competent to handle legal matters undertaken on behalf of clients. It is therefore critical for this Court to examine the question of whether the remedial purpose of the FDCPA is advanced by imposing liability on a debt collector, who may also be an attorney, on the basis that a communication to another attorney would deceive either the "least sophisticated" or "unsophisticated" consumer.

This Court should therefore grant the petition and resolve the Circuit Court split to decide, in the first instance, whether a consumer may pursue an FDCPA claim based on purportedly deceptive statements made to the consumer's attorney and, if so, the standard to be applied to those purportedly deceptive and misleading statements. The determination of this issue reaches beyond the realm of FDCPA litigation because a ruling by this Court as to the appropriate standard applied to the conduct of licensed attorneys in dealing with counsel for their client's adversary is a question of profound import.

CONCLUSION

NARCA respectfully asks this Honorable Court to grant the petition of LVNV Funding, LLC and decide the two important issues presented.

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