No. 11-1175

# In The Supreme Court of the United States

OLIVEA MARX,

*Petitioner,*

v.

GENERAL REVENUE CORPORATION,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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

## STATEMENT OF IDENTITY AND INTEREST IN THE CASE.

The National Association of Retail Collection Attorneys ("NARCA") is a nationwide, not-for-profit trade association comprised of attorneys and law firms engaged in the practice of debt collection law. NARCA members include over 700 law firms located in all fifty states, all of whom must meet association standards designed to ensure experience and professionalism. NARCA member attorneys are subject to the various Codes of Professional Ethics adopted in the jurisdictions where they are licensed to practice law. NARCA has adopted a Code of Professional Conduct and Ethics which imposes professional standards beyond the requirements of state codes of ethics and regulations that govern attorneys.

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a 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 *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

NARCA members are regularly retained by creditors to lawfully collect delinquent debts. In the exercise of their professional skills in the practice of debt collection law they are often subject to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, et seq. As the only national trade association dedicated solely to the needs of attorneys engaged in debt collection, NARCA has a significant interest in ensuring that the FDCPA is interpreted in a manner consistent with their members' professional responsibilities to their clients, the courts, their adversaries and the general public.[2]

NARCA supports the position of the debt collector in this matter and urges this Court to find that where a person files a lawsuit invoking the protections of the FDCPA and does not prevail, the debt collector/defendant be awarded its costs in defending the litigation as a prevailing party, a principle firmly rooted in American jurisprudence.



## SUMMARY OF ARGUMENT

The court of appeals' holding correctly applied Fed. R. Civ. P. 54(d)(1) to the taxation of costs to a

[2] NARCA has previously participated as *amicus curiae* in other cases involving the interpretation of the FDCPA. (*See, e.g.*, *Jerman v. Carlisle*, 130 S. Ct. 1605 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995); *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130 (2d Cir. 2010); *Guerrero v. RJM Acquisitions, L.L.C.*, 499 F.3d 926 (9th Cir. 2007).

person who unsuccessfully claimed a debt collector violated 15 U.S.C. §§ 1692, et seq., the Fair Debt Collection Practices Act. Federal courts have noted a "cottage industry" has developed which has flooded the courts with actions under the Fair Debt Collection Practices Act. Courts observe that many of these cases allege technical violations with no actual damages, but are driven by outrageous attorney's fee demands.

A. The Fair Debt Collection Practices Act (also referred to herein as the "FDCPA") is a fee shifting statute which makes a debt collector liable for her conduct even in the absence of actual damage. 15 U.S.C. § 1692k(a). In addition, it requires the debt collector to pay the plaintiff's "reasonable attorney's fee." 15 U.S.C. § 1692k(a)(3). Courts have recently observed a growing number of FDCPA cases which are maintained simply to increase the award of attorney's fees. Technical violations seeking pre-suit demands of $3,000 to $5,000 are routinely made to NARCA members. When the demands are accompanied by patently unsustainable claims, debt collectors may choose to litigate in an effort to stem the tide of outrageous FDCPA demands. When debt collectors do prevail in contesting these specious cases, they should not be penalized by denying them their taxable costs, especially when the suit was continued simply to enhance attorney's fees.

B. Fed. R. Civ. P. 54(d)(1) provides that a prevailing party "should be allowed" to recover its "costs." Rule 54(d)(1). Courts interpret Rule 54(d)(1)

as creating a presumption that a prevailing party will recover its costs. *Mathews v. Crosby*, 480 F.3d 1265, 1276 (11th Cir. 2007). Costs are not recoverable under Rule 54(d)(1) when a federal statute "provides otherwise." Rule 54(d)(1). The FDCPA does not provide otherwise. When an action under the Fair Debt Collection Practices Act has been found by a court to have been "brought in bad faith and for the purpose of harassment . . . " it may impose "attorney's fees reasonable in relation to the work expended and costs . . . " upon a showing that a case was "brought in bad faith and for the purpose of harassment . . . " 15 U.S.C. § 1692k(a)(3). Section 1692k(a)(3) solely concerns when a court may impose attorney's fees and costs, together. It does not prohibit the imposition of costs, alone, under Rule 54(d)(1) in other circumstances.



## ARGUMENT

### I. THE FDCPA IS REGULARLY ABUSED TO GENERATE ATTORNEY'S FEES AND DEBTORS ARE OFTEN UNKNOWING PARTICIPANTS TO THE SCHEME.

In 1977, Congress passed the Fair Debt Collection Practices Act for the purpose of eliminating abusive, deceptive and unfair debt collection practices by third party debt collectors. 15 U.S.C. § 1692(a). Initially, attorneys at law representing clients were exempt from coverage, however, the exemption was repealed in 1986. *See* Pub. L. No. 99-361.

Because the FDCPA has been interpreted by this Court and others as a strict liability statute, debt collection lawyers are frequently subject to FDCPA lawsuits even where the debtor has suffered no actual damage as a result of alleged misstatements in a pleading or a debt collection letter. *See, e.g.*, *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 652 (3d Cir. 1993), *Nero v. Law Office of Sam Streeter, P.L.L.C.*, 655 F. Supp. 2d 200, 210 (E.D.N.Y. 2009); *Navarro v. Eskanos & Adler*, No. C 06-02231, 2007 U.S. Dist. LEXIS 15046 (N.D. Cal. Feb. 20, 2007).

Members of this Court have commented on the "cottage industry" that has developed in prosecuting no damage FDCPA cases. *Jerman v. Carlisle*, 130 S. Ct. 1605 (2010). The Second Circuit, too, has recognized that FDCPA lawsuits are principally driven by a desire to enhance attorney fee awards. *Jacobson v. Health Care Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008); *see also Zavodnick v. Gordon & Weisberg, P.C.*, Civ. No. 10-7125, 2012 U.S. Dist. LEXIS 78868, at **1-5 (E.D. Pa. June 6, 2012) (Request made for $10,136.50 in fees and costs, but awarded only $3,703.00, where plaintiff accepted an offer of judgment made six days after defendant filed its answer. The Court noted "It appears that [plaintiff's counsel] actually performed precious little original work on Plaintiff's behalf. As disturbing are [plaintiff's counsel's] specious arguments and evidence, which Courts in this Circuit have repeatedly and decisively rejected . . . "); *Arlozynski v. ARS Nat'l Servs.*, Case No. 8:11-CV-196-27MAP, 2012 U.S. Dist. LEXIS 94429 (M.D.

Fla. June 5, 2012) (Following acceptance of offer of judgment, fee request of $6,265.00 reduced to $878.50); *Cotner v. Buffaloe & Assocs., PLC*, No. 3:11-CV-299, 2012 U.S. Dist. LEXIS 67161 (E.D. Tenn. May 14, 2012) (Fee request of $7,232.50 denied and award made for fees of $2,415.35, where Plaintiff accepted an offer of judgment for $1,001 in damages); *Pierson v. Gregory J. Barro, PLC*, No. 3:11-CV-312, 2012 U.S. Dist. LEXIS 67163 (E.D. Tenn. May 14, 2012) (Defendant made offer of judgment for damages of $750 and attorney's fees and costs before filing an answer, which was later accepted. Plaintiff's request for $4,765.00 in attorney and "support staff fees" reduced by the court to $2,056.91).

Federal District Courts in New Jersey have expressed particular concern at what they observe as the use of FDCPA claims for abusive purposes:

> Although the fees in dispute are relatively small, the integrity of the billing process in small Fair Debt cases is called into question. Often, the law firms involved on both sides are the same. This Court has observed that liability is commonly resolved immediately and the real dispute presented to the federal court is about legal fees. Deciding the fee issue can be time consuming, even though the sums in dispute are often similar to numbers handled by small claims courts.

*Weed-Schertzer v. Nudelman, Klemm & Golub*, 2011 U.S. Dist. LEXIS 108928, 2011 WL 4436553 (D.N.J.

Sept. 23, 2011), *adopted at*, 2011 U.S. Dist. LEXIS 119340, 2011 WL 4916309 (D.N.J. Oct. 13, 2011).

Despite this warning, Federal District Courts in New Jersey continued to be flooded with FDCPA cases involving nominal damage claims seeking ridiculous attorney's fees demands.[3] Four months following *Weed*, in *Cohen v. Am. Credit Bureau, Inc.*, 2012 U.S. Dist. LEXIS 33687 (D.N.J. Mar. 13, 2012), *adopted at, Cohen v. Am. Credit Bureau, Inc.*, 2012 U.S. Dist. LEXIS 73846 (D.N.J. May 29, 2012), the plaintiff alleged a violation of the FDCPA in connection with a single telephone call which failed to state the amount of the debt, despite her having already received three letters where the debt amount was disclosed. *Id.* at *1. The debtor retained an attorney, who happened to be her husband. *Id.* at *2. Prior to filing her complaint, the defendant made what the court described as "the equivalent of" a Fed. R. Civ. P. 68 offer of judgment. Plaintiff did not accept the offer, and instead threatened to file 14 separate federal FDCPA lawsuits each seeking separate attorney's fee awards. *Id.*[4] As the court observed, the

[3] "The Court inquired into the number of Fair Debt cases filed in each of the past four years. Jack O'Brien, Esq., Chief Deputy of Court Operations, indicated that there has been a consistent increase in the number of FDCPA filings from 2008 through 2011. More specifically, in this district there were 182 FDCPA cases filed in 2008; 238 cases filed in 2009; 364 cases filed in 2010; and 683 cases filed in 2011." *Id*. at *3, n. 1

[4] "For the sake of clarity, the Court notes that Plaintiff's objection misconstrues the R&R. The R&R specifically finds that

(Continued on following page)

purpose to proceed with litigation was not to resolve a wrong, but,

> [Plaintiff's attorney's] intention – expressed to the Court, his adversary, and in the papers submitted on this motion – was to use his wife's case to "make law." (Def.'s Ex. 3; CM/ECF No. 24-4.) Apparently the "law" he sought to make was to establish the right to bring 14 separate subsequent lawsuits – each one targeting a single one of the 14 alleged violations – even though many of the supposed violations were quite technical and apparently occurred during the same telephone message and all involved the same $150 debt.

*Cohen*, 2012 U.S. Dist. LEXIS at *8.

While the court viewed these threats as improper and not within the spirit of the FDCPA, an award of attorney's fees, albeit only $1,046.75, was allowed. *Id.* at *45.

The facts in *Cohen* are typical of the progression of FDCPA claims. Technical violations seeking pre-suit demands of $3,000 to $5,000 are routinely made to NARCA members. When the demands are accompanied by patently unsustainable claims, debt collectors may choose to litigate in an effort to stem the tide of obscene FDCPA demands. When debt collectors do

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Plaintiff's 'threat of successive lawsuits borders on bad faith' not that Plaintiff actually acted in bad faith." *Id.* at **3-4.

prevail in contesting these specious cases, they should not be penalized by denying them their taxable costs, especially when the entire suit was frivolous. In *Shand-Pistilli v. Prof'l Account Servs.*, 2011 U.S. Dist. LEXIS 64446 (E.D. Pa. June 16, 2011), a lawsuit claiming a debt collector made numerous harassing, oppressive and abusive calls, the plaintiffs testified that the debt collector was actually "polite," did not abuse them, nor use profane language. In fact, the only profanity uttered was by one of the plaintiffs. *Id.* at *6. Despite the debt collector being described by the plaintiffs as "polite" and having never uttered an offensive or abusive statement or conducted themselves in an abusive or oppressive manner, the court declined to impose fees or costs under 15 U.S.C. § 1692k(a)(3) because plaintiffs (themselves) did not believe their action to be without merit or was motivated to harass. *Id.* at *19. Plaintiffs believed that these calls, which were polite and professional, were still harassment, despite the fact that the court found otherwise and dismissed the FDCPA lawsuit. *Id.*

Section 1692k(a)(3) provides a sanction based on the intent of the plaintiff in *bringing* the claim. It does not address the totality of the litigation the plaintiff or her counsel may pursue or that the plaintiff's beliefs in asserting a claim are contrary to well settled law. Courts recognize that many FDCPA claims are *maintained* solely for the purpose of enhancing fees, rather than affecting the salutary purposes of the FDCPA. If Section 1692k(a)(3) provides a free pass to maintain harassing suits without

consequence, FDCPA plaintiff's lawyers will continue to advance their exaggerated demands without fear of any repercussion. Because there is no concern with the imposition of costs, the result is the multiplication of FDCPA lawsuits which have transformed Federal Courts into small claims courts tasked to resolve outrageous demands concerning nominal claims.

## II. RULE 54(d) ALLOWS TAXATION OF COSTS IN FDCPA CASES BECAUSE IT ENCOMPASSES THE MAINTENANCE OF A LAWSUIT.

Fed. R. Civ. P. 54(d)(1) provides that a prevailing party "should be allowed" to recover its "costs." Rule 54(d)(1). Courts interpret Rule 54(d)(1) as creating a presumption that a prevailing party will recover its costs. *Mathews v. Crosby*, 480 F.3d 1265, 1276 (11th Cir. 2007); *McInnis v. Fairfield Cmtys., Inc*., 458 F.3d 1129, 1145 (10th Cir. 2006); *In re Derailment Cases*, 417 F.3d 840, 844 (8th Cir. 2005); *Jack Russell Terrier Network v. Am. Kennel Club, Inc.,* 407 F.3d 1027, 1038 (9th Cir. Cal. 2005); *United States Bank Trust Nat'l Ass'n v. Venice Md LLC*, 92 Fed. Appx. 948, 956 (4th Cir. 2004). To overcome the presumption, the opposing party must identify "good reason" for denial of a cost award. *Janis v. Biesheuvel*, 428 F.3d 795, 801 (8th Cir. 2005); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 623 (4th Cir. 1978). "Costs" which may be recovered under Rule 54(d) are delineated by 28 U.S.C. § 1920 and are strictly limited to those delineations. *Crawford Fitting Co. v. J. T.*

*Gibbons, Inc.*, 482 U.S. 437, 441-442, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987).

Costs are not recoverable under Rule 54(d)(1) when a federal statute "provides otherwise." Rule 54(d)(1). 15 U.S.C. § 1692k(a)(3), however, does not address the ordinary circumstance when a defendant prevails in defending a suit; the statute simply provides for the recovery of attorney's fees and costs by a defendant where a suit was brought in bad faith and for harassment. It does not even address the situation where a suit was *maintained* for bad faith and harassment. Nothing in 1692k(a)(3) expressly prohibits the imposition of *costs* alone where a suit is *maintained* to an unsuccessful result. Thus, the imposition of costs and attorney's fees upon the unsuccessful plaintiff under § 1692k(a)(3) will concern her intention in commencing the action. However, once an action is commenced, § 1692k(a)(3) is not a prohibition to the imposition of costs for the continuation of the action. Rule 54(d) must control FDCPA litigation in those instances.

## CONCLUSION

For these reasons, NARCA respectfully requests that the Court affirm the decision of the Court below.

Respectfully submitted,

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