COURT OF APPEALS
STATE OF NEW YORK

ERIC M. BERMAN, P.C., LACY KATEN, LLC, *Plaintiffs-Respondents,* -against CITY OF NEW YORK NEW YORK CITY COUNCIL, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, JONATHAN MINTZ, in his official capacity as the Commissioner of the New York City Department of Consumer Affairs *Defendant-Appellants.*	:	No. CTQ-2014-00007 **NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE**

PLEASE TAKE NOTICE that upon the accompanying Affirmation of Susan Ann Silverstein, Esq., dated April 21, 2015 in Support of the Motion for Leave to File Amici Curiae Brief, and upon the proposed Brief of Amici Curiae AARP, National Consumer Law Center, and National Association of Consumer Advocates, an upon all of the pleadings and papers heretofore filed herein, the undersigned will move this Court at the New York Court State of Appeals, 20 Eagle Street, Albany, New York on the 4th day of May, 2015 for an order (a) granting the motion of AARP, National Consumer Law Center, and National Association of Consumer Advocates for leave to file an Amici Curiae brief in support of Defendant-Appellants,

pursuant to Rule 500.23(a) of this Court; and (b) for such other and further relief as this Court deems just and proper.

Dated: Washington, D.C.
April 21, 2015

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SUSAN ANN SILVERSTEIN, an attorney duly licensed to practice law in the State of New York, hereby affirms under penalty of perjury:

1. Pursuant to Rule 500.23, Amici Curiae AARP, National Consumer Law Center, and National Association of Consumer Advocates ("Amici") move for leave to file the accompanying brief as Amici Curiae (Exhibit 1 to this motion), supporting Defendant-Appellants on the question certified to the Court by the United States Court of Appeals, Second Circuit.

2. I am a Senior Attorney of AARP Foundation Litigation. I am one of the attorneys of record for the organizations seeking leave to submit the annexed brief as Amici. I base this affirmation on my personal knowledge of all matters

discussed herein or upon information and belief. I am familiar with the underlying litigation and appeal in the federal courts.

3. I make this affirmation in support of Amici's motion to file the attached *amicus curiae* brief in the above-captioned matter.

4. This case addresses the power of the New York City Council to enact Local Law 15, requiring licensing of attorneys who are in the practice of debt collection. Amici are non-profit organizations that share a mission of protecting the rights of consumers and ensuring that debt collectors use only lawful means of collecting debts. Amici advocate for the rights of low income and elderly consumers and are intimately familiar with the prevalence of consumer abuse in the debt collection industry. This Court's determination of whether Local Law 15 conflicts with the New York Constitution or New York Judiciary Laws will have a broad impact on millions of low-income New Yorkers who are subject to the practices of the debt collection industry, including collection by attorneys. Participation by Amici satisfies all three criteria enumerated in Rule 500.23(a)(4) (though grounds for participation require satisfaction of just one criteria).

MOVANTS' BRIEF WOULD REMEDY THE PARTIES' INABILITY TO FULLY AND ADEQUATELY ADDRESS THE CONSUMER ABUSE INHERENT TO THE DEBT COLLECTION INDUSTRY AND DISTINCT FROM THE PRACTICE OF LAW

5. Amici provide a national perspective on the regulation of attorney-operated debt collection mills that is not fully addressed by the parties. Amici are advocates for poor, disabled and elderly consumers who struggle to support themselves and their families, often on fixed income from sources such as Social Security, disability, public assistance and/or on minimum wage employment. Amici represent economically disadvantaged people who have suffered as a result of negligence, carelessness, or pure disregard of debt collectors in their aggressive collection of debt. The automation used by debt collection mills and the increase of judicial collections have drastically increased the volume of collections and complaints about wide spread abuses. Federal, state, and local governments are acting to prevent these abuses, including by enacting licensing statutes. These laws do not address the practice of law at all. Amici's brief provides an overview of how other states and state courts have approached the regulation of lawyers as debt collectors that provides a useful framework for this Court's consideration and that is absent from the briefs presented by the parties.

AMICI PRESENT LAW AND ARGUMENTS REGARDING THE LICENSING OF ATTORNEY-OPERATED DEBT COLLECTION AGENCIES THAT WOULD OTHERWISE ESCAPE THE COURT'S ATTENTION

6. The certified questions in this appeal ask the Court to consider whether the City Council's enactment of Local Law 15 conflicts with the New York Constitution or the New York Judiciary laws relating to the judiciary's power to regulate attorneys in the State.

7. Amici address the distinction between the practice of law and the practice of debt collection that allow the Court to see that Local Law 15 does not infringe on the powers of the judiciary, nor conflict with the New York Constitution. Amici provide background about the debt collection industry to demonstrate that the regulation of debt collection is distinct from the practice of law and that Local Law 15 serves an important purpose of protecting consumers from business practices that can be provided by either lay people or attorneys.

THE PROPOSED AMICI CURIAE BRIEF WOULD BE OTHERWISE HELPFUL TO THE COURT BECAUSE THE BRIEF PROVIDES INFORMATION OF OTHER STATES' ACTIONS IN THE AREA OF DEBT COLLECTION THAT NO PARTY PROVIDES.

8. Amici are national interest groups and are intimately familiar with the nationwide activity of federal and local governments to halt the abuses of the debt collection industry. Amici provide the Court with examples of debt collection licensing laws in other states that are similar to Local Law 15 and argue that this

Court should similarly find that such laws do not conflict with the authority of the judiciary to regulate the practice of law. As a core part of their work, Amici regularly analyze the various local laws around debt collection practices.

9. In addition, because of the large numbers of consumer debt cases in New York and the resulting judgments, the issues raised in this case have an impact on hundreds of thousands of New Yorkers each year, and the disposition of this case may have an effect on other states. The impact is profound, as abusive collections—particularly judicial collections—can have devastating consequences for people subsisting on low- to moderate-income levels.

10. Amici respectfully request that the Court grant this motion in its entirety.

Dated: April 21, 2015
Washington, D.C.

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EXHIBIT 1

No Oral Argument Requested

Case No. CTQ-2014-00007

State of New York
Court of Appeals

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

Plaintiffs-Respondents,

-against-

CITY OF NEW YORK NEW YORK CITY COUNCIL, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, JONATHAN MINTZ, in his official capacity as the Commissioner of the New York City Department of Consumer Affairs,

Defendants-Appellants.

BRIEF FOR AMICI CURIAE AARP, NATIONAL CONSUMER LAW CENTER AND THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF DEFENDANTS-APPELLANTS

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April 21, 2015

CORPORATE DISCLOSURE STATEMENTS

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951. Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust. AARP has no parent corporation, nor has it issued shares or securities.

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of § 501(c)(3) of the Internal Revenue Code. It has no parent corporations and no publicly held company owns 10% or more of its stock. NCLC is not a corporate party within the meaning of Federal Rules of Appellate Procedure 26.1 and 29(c).

The National Association of Consumer Advocates is a non-profit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. It is organized under the

laws of the State of Massachusetts and is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

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STATEMENTS OF INTEREST

Older people are confronted with an increasing barrage of debt collection abuses by debt collection agencies and law firms. The incidence of such abuse has been exacerbated drastically by the exponential growth of the debt buying industry. Debt collection mills churn out collection calls, letters, and lawsuits to collect on debt that has been sold on the secondary market "as is" for pennies on the dollar and without any business records to support a claim that the debt is owed by the person who is being pursued, that the amount alleged is correct, and that the debt is within the statute of limitations.

Though distressing at any age, older people are especially vulnerable to abusive debt collection practices. Abusive debt collection tactics can actually threaten the health of older people who misunderstand or fear the legal process and who become greatly distressed by abusive and repetitive telephone calls and letters. Many older people also believe that they will go to jail if they receive a threat of litigation or an actual court summons.

AARP has an interest in protecting older people from abusive collection practices, such as those that prompted the New York City Council to require licensing of debt collectors, including attorneys, at issue in this case. AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the

issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP is greatly concerned about fraudulent and abusive practices being used to collect debt.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions for low income and elderly consumers. Since its founding as a non-profit corporation in 1969 at Boston College School of Law, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. NCLC is recognized nationally as an expert in debt collection issues, including the Fair Debt Collection Act, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years. NCLC is, among other roles and accomplishments, author of a widely praised twenty-volume series of treatises on consumer law, including *Fair Debt Collection* (8th ed. 2014) and *Collection Actions* (3d ed. 2014). The Supreme Court of the United

States has relied upon *Fair Debt Collection* as supporting authority. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 591 n.12 (2010).

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Enforcement and compliance with consumer protection laws has been a continuing concern of NACA since its inception.

SUMMARY OF THE ARGUMENT

Collection of debts sold on the secondary market and owned by debt buyers who seek to collect debt in their own names, rather than in the name of an original creditor, has become a booming and lucrative industry. The industry thrives on a practice of highly automated collections using inherently unreliable data. Predictably, these industry practices have spurred an alarming increase in consumer complaints about debt collection abuses.

City, state and federal regulators, and the judiciary endeavor to address the ever increasing volume of consumer complaints about abusive debt collection.

New York State has long regulated debt collection agencies. New York City built upon the state regulation with Local Law 15, which modernizes the City's licensing statute to properly address the increasing prevalence of attorney debt collectors. *See* Br. of New York City at 8. Local Law 15 now requires all debt collection agencies, including those operated by attorneys, to be licensed. *See* N.Y.C., N.Y., Code § 20-489(a)(5). Law firm collection mill operations are often indistinguishable from those of mills operated by lay debt collectors. Local Law 15 helps regulators protect consumers against unscrupulous law firm collection practices by eliminating a loophole that previously shielded this sizeable portion of the industry.

There is no inherent conflict between the regulation of the legal profession and the regulation of a debt collection business operated by a lawyer. Local Law 15 does not infringe on the state judiciary's authority to govern the practice of law; in fact, it does not regulate the practice of law at all, making it unnecessary for this court to reach the constitutional issue. *See Peters v. N.Y.C. Hous. Auth.*, 307 N.Y. 519, 527 (1954) ("It is well settled that issues of constitutionality should not be decided before they need be."). Instead, Local Law 15 serves its intended purpose—protecting consumers from abusive debt collection practices, regardless of the person or profession responsible for the assault.

The judiciary's authority to regulate the practice of law does not—and should not—be interpreted as exclusive authority to regulate all aspects of any business in which attorneys may engage. Many states similarly have enacted debt collection agency regulation that applies to lawyers and does not conflict with the judiciary's authority to regulate the practice of law. This Court should not construe the New York Constitution or N.Y. Judiciary Laws §§ 53, 90 as preventing regulation of business practices that are indistinguishable from those used by lay debt collectors simply because those practices are conducted by attorneys.

ARGUMENT

I. Local Law 15 does not conflict with the judiciary's regulation of the practice of law.

To protect consumers from debt collection abuses, New York City enacted Local Law 15 to require licensing of debt collection agencies, including those operated by attorneys. There is no inherent conflict between Local Law 15 and the judiciary's authority to regulate the practice of law pursuant to N.Y. Judiciary Laws §§ 53, 90 that would prohibit application of licensing requirements to attorneys that operate debt collection agencies.

A. Attorneys' activities are not inherently immune from commercial regulation.

While the practice of law, historically, has been considered outside the regulation governing commerce, "the belief that lawyers are somehow 'above'

trade has become an anachronism[.]" *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371-72 (1977). Beyond the professional and ethical responsibilities relating to the practice of law, which the judiciary has authority to regulate in every state, 7 Am. Jur. 2d *Attorneys at Law* § 2 (1980), the activities of lawyers are subject to generally applicable business regulation. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 237 (2010) (rejecting the argument that it impermissibly trenches on an area of traditional state regulation to apply statute regulating "debt relief agencies" to attorneys); *Heintz v. Jenkins*, 514 U.S. 291, 292 (1995) (holding that even litigation activities of "attorneys who 'regularly' engage in consumer-debt-collection activity" are covered by the Fair Debt Collection Practices Act ["FDCPA"]); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788 (1975) (holding attorneys are subject to the Sherman Act, recognizing that "[i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.").

State courts have followed the lead of the federal courts in finding that attorneys can be subject to consumer protection statutes. *Nelson v. Ho*, 564 N.W.2d 482, 485 (Mich. 1997) ("Such federal decisions interpreting federal antitrust laws have served as the basis for state decisions interpreting state consumer acts."). Indeed, state courts recognize that:

> It would be a dangerous form of elitism, indeed, to dole out exemptions to our antitrust laws merely on the basis of the educational level needed to practice a given profession, or for that matter, the impact which the profession has on society's health and welfare. Clearly, the more appropriate and fairer course is to examine the nature and conduct involved in the profession on a case by case basis together with the context in which it is practiced.

Short v. Demopolis, 691 P.2d 163, 167 (Wash. 1984) (quoting *U.S. v. Nat'l Socy. of Prof. Eng'g.*, 389 F. Supp. 1193, 1198 (D.D.C. 1974), vacated and remanded 422 U.S. 1031 (1975) for reconsideration in light of *Goldfarb, supra. Accord Brookins v. Mote*, 292 P.3d 347, 358 (Mont. 2012) (provisions under the Consumer Protection Act did not conflict with medical licensing from hospital); *Nelson v. Ho*, 564 N.W.2d 482, 486 (Mich. 1997) (applying consumer protection act to the entrepreneurial, commercial, or business aspect of doctor's practice).

While recognizing that textual variations in state laws govern the outcome of the ultimate question, state courts have often rejected the notion that the judiciary's inherent and statutory authority to regulate the practice of law requires the categorical exclusion of attorneys from regulation under statutes of general applicability. That interpretive approach is consistent with New York's recognition that separation of powers is a delicate balance, in which "[t]he genius of the system is synergy and not 'separation'. . ." *Cohen v. State*, 94 N.Y.2d 1, 13-14 (N.Y. 1999). The separation of powers is characterized by "*institutional interdependence*

rather than *functional independence*". *Id.* (quoting Tribe, American Constitutional Law, at 20 [2d ed] (1988)(emphasis in original)).

Though each state has its variant on the test to determine whether the application of business regulation to lawyers violates judiciary authority to regulate the practice of law, many consider factors such as whether the subject matter is vested exclusively in the judiciary, and whether the regulation interferes in or detracts from the judiciary's role. *See State v. Campbell*, 617 A.2d 889, 894 (Conn. 1992) (courts will uphold "a statute that is alleged to violate the separation of powers doctrine by impermissibly infringing on the judicial authority" unless "(1) it governs subject matter that not only falls within the judicial power, but also lies exclusively within judicial control; or (2) it significantly interferes with the orderly functioning of the Superior Court's judicial role."). For example, in *Heslin v. Conn. Law Clinic of Trantolo & Trantolo*, 461 A.2d 938 (Conn. 1983), the court rejected arguments that the separation of powers doctrine prevented application of the state unfair trade practices act to attorneys. The court found that the purposes and remedies of the unfair trade acts were quite different from the advertising practices at issue and fell squarely within the definition of "trade and commerce" in the act. *Id.* at 941-943. The court held that the regulations did not conflict with the rules of professional responsibility, and that the regulation of the practice of law and the regulation of trade practices were not mutually exclusive. *Id.*

Washington and other state courts have also rejected challenges to statutes regulating the entrepreneurial aspect of the practice of law, which "does not trench upon the constitutional powers of the court to regulate the practice of law" because the requirements of the statute covered "trade or commerce" and does not conflict with the judiciary's power to regulate the practice of law. *Short*, 691 P.2d at 168-70 (applying unfair trade practices law to the entrepreneurial aspects of the practice of law).

The Alaska Supreme Court similarly held that the "attorney disciplinary system and consumer protection laws can coexist as long as the legislature does not purport to take away [the] court's exclusive power to admit, suspend, discipline, or disbar." *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1024-25 (Alaska 2009) (citing *Short*, 691 P.2d at 168-70). Montana and Michigan also have adopted this reasoning that acknowledges the distinction between professional licensing and the commercial practices of professionals in finding no conflict is presented by the application of state consumer protection regulation to professionals. *See Brookins v. Mote*, 292 P.3d at 358; *Nelson v. Ho*, 564 N.W.2d at 486.

Colorado courts have held "there is no manifest inconsistency between the [Colorado Consumer Protection Act ("CCPA")] and the attorney regulatory system." *Crowe v. Tull*, 126 P.3d 196, 207-08 (Colo. 2006). *Crowe* recognized that the consumer protection act is not inconsistent with the ethical rules applicable to

attorneys, and "the remedies of the CCPA differ in purpose, consequence, and method of enforcement from the remedies employed by Colorado's attorney disciplinary scheme." *Id.* The court concluded that "[a]pplied to attorneys, the CCPA complements, rather than contradicts, this court's implementation of the professional rules and cannot be seen 'as impinging in any real sense upon our further right to discipline those licensed by us to practice law.'" *Id.* (quoting *People v. Buckles,* 453 P.2d 404, 406 (Colo. 1968)).

Similarly, the First Circuit found that a violation of the FDCPA by a law firm was a *per se* violation of the Massachusetts Deceptive Trade Practices Act, which covers only activities in "trade or commerce." *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109 (1st Cir. 2014) (holding that the debtor was entitled to judgment against law firm under Mass. Gen. Laws Ch. 93A, § 2 because the law firm's violations of the FDCPA constituted per se Ch. 93A violations).

Even where a legislative pronouncement overlaps the regulation of lawyers within the prerogative of the judiciary, state courts often recognize that such regulation is not necessarily impermissible or undesirable. "[*T*]*he state has a substantial interest in maintaining a competent bar, and the legislature, under the police power, may act to protect the public interest, but in so doing, it acts in aid of the judiciary and does not supersede or detract from the power of the courts.*"

Wash. State Bar Ass'n v. State, 890 P.2d 1047, 1050-51 (1995) (quoting 7 Am. Jur. 2d *Attorneys at Law* § 2, at 55-56 (1980) (emphasis in original)). The California Supreme Court similarly held that "[the] legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." *Hustedt v. Workers' Comp. Appeals Bd.*, 636 P.2d 1139, 1144 (Cal. 1981) (quoting *Brydonjack v. State Bar of Cal.*, 281 P. 1018, 1020 (Cal. 1929)). "This pragmatic approach is grounded in this court's recognition that the separation of powers principle does not command 'a hermetic sealing off of the three branches of Government from one another.'" *Id.* at 1143 (quoting *Buckley* v. *Valeo,* 424 U.S. 1, 121 (1976)).

B. The purposes and requirements of Local Law 15 do not interfere with the judiciary's regulation of the practice of law.

This Court should find that attorneys may be subject to the requirements of Local Law 15 because it serves purposes specific to the regulation of debt collection agencies and it complements, rather than conflicts with regulation of the practice of law. *See Crowe v. Tull*, 126 P.3d 196, 208 (Colo. 2006) (rejecting argument that consumer protection regulation may not apply to attorneys, finding "[w]hile safeguarding the public against consumer fraud may at times be an ancillary consequence of the disciplinary system, its rules and remedies are not tailored to that specific purpose.").

Given that the business operations of a debt collection agency regulated by Local Law 15 may be carried out by a lay person, such practices do not fall within the practice of law and are not within the exclusive control of the judiciary. When applied to attorneys engaged in operations that may be carried out by a lay person, the licensing regulations do not interfere with the orderly functioning of the courts or with bar admission, legal practice, or attorney discipline. For example, while the City can refuse to issue a license to a debt collection agency operated by an attorney, only the state bar can discipline debt collection attorneys who fail to fulfill their obligations under the rules of professional conduct. Such laws can coexist without infringing on the judiciary's inherent and statutory authority to regulate the practice of law, and therefore do not violate the separation of powers doctrine.

1. Local Law 15 was enacted to protect consumers from debt collection abuses arising from the abuses inherent in the debt buying industry.

"[C]onsumer related problems" prompted the New York City Council to require licensing of debt collection agencies:

> Due to the sensitive nature of the information used in the course of such agency's everyday business, and the vulnerable position consumers find themselves in when dealing with these agencies, it is incumbent upon this council to protect the interests, reputations and fiscal well-being of the citizens of this city against those agencies who would abuse their privilege of operation.

N.Y.C., N.Y., Code § 20-488.

Collection of debts sold on the secondary market and owned by debt buyers who seek to collect debt in their own names, rather than in the name of an original creditor, has become a booming and lucrative industry. Profits are maximized by automation and economies of scale; collectors rely almost exclusively on computer software to generate large volumes of collection letters, robocalls, affidavits, and litigation pleadings. *See, e.g., Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86, 100 (E.D.N.Y. 2009) ("The volume of business at UCS. . .supports the conclusion that debt collection letters and litigation documents were regularly mass-produced at UCS by non-lawyers at the push of a button."). Such collection mills produce debt collection letters and pleadings often without any human review of the documents or factual information underlying the collection attempts. *See id.*; *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70 (2d Cir. 2015) (certifying RICO class action suit against "default judgment mill" debt collection enterprise including law firm and process servers). Moreover, the available information about the debts validity, amount, and the identity of the alleged debtor that is used to generate the automated document production is inherently unreliable. *See* Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* 29-41 (Jan. 3, 2013) [hereinafter "FTC, Debt Buying Report"]; Peter A. Holland, *The One Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 Md. J. of Bus. & Tech. L. 259, 268-69 (2011).

Accounts that creditors must "charge off" when they are 180 days delinquent[1] frequently include debt that has been disputed, resulted from identity theft, was discharged in bankruptcy, or was incurred by fraud, unauthorized use, or a decedent. Even accounts that have been paid but are not properly credited get charged off as delinquent because bank consolidation and mergers over the last several decades have resulted in large banks operating using numerous—and often incompatible—software systems that result in accounting errors. Banks often sell the charged off debt in large portfolios without first scrubbing it to remove accounts they know to be disputed or otherwise invalid. Knowing the debts are inherently unreliable, banks sell it "as is"—without warranties and with explicit affirmative disclaimers that it may be inaccurate—and subject to all the defenses to collection that would apply to the original creditor. *See* FTC, Debt Buying Report, *supra*, at 25-26. Because the information transmitted to debt buyers about debt portfolios is inherently unreliable and debt buyers typically have no access—or choose not to pay for—the underlying account documents, such debt is sold for only pennies on the dollar. *See* Holland, *supra*, at 268.

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[1] Under the Interagency Uniform Retail Classification and Account Management Policy guidelines, banks must "charge off" open-ended retail credit loans, such as credit cards, once they have become 180 days past due. *See* OCC Bulletin 2000-20, *Uniform Retail Credit Classification and Account Management Policy,* http://www.occ.gov/news-issuances/bulletins/2000/bulletin-2000-20.html.

The huge increase in highly automated debt buyer collections of inherently unreliable debt has correspondingly been met with an alarming increase in consumer complaints about debt collection abuses. Debt collection mills that generate high volumes of debt collection letters and lawsuits prey on relatively unsophisticated consumers. Few debtors have access to legal representation and even those with valid defenses are unable to defend themselves effectively, particularly against judicial debt collection. State courts are inundated by debt collection lawsuits, many of which result in default judgments against alleged debtors. *See Map of Default Judgments by Region*, New York Attorney General, http://www.ag.ny.gov/debt-settlement/map-default-judgments-region (last visited Apr. 20, 2015) (detailing by judicial district the names of law firms that have obtained the highest volumes of default judgments). As a result of widespread concerns about the high volume of default judgments being obtained by debt collectors and evidence that service of process is often lacking, the New York courts announced enhancements to debt collection procedures to address entry of 100,000-plus unwarranted default judgments every year. *See* Press Release, NY State Unified Court System, *NY Court System Adopts New Rules to Ensure A Fair Legal Process in Consumer Debt Cases* (Sept. 16, 2014), *available at* https://www.nycourts.gov/PRESS/PDFs/pr14_06.pdf (announcing "reforms reflect the most comprehensive effort by a court system nationally to ensure a fair legal

process in consumer debt litigation, building on the collective efforts of the Attorney General's Office, the State Department of Financial Services and the State Legislature to combat deceptive debt collection practices and protect consumers.").

2. Exempting attorneys operating as debt collection mills from Local Law 15 licensing requirements would weaken needed protection.

It would be incongruous, at best, especially in light of the coordinated and comprehensive efforts to protect consumers, to now hold that attorneys are exempt from the regulation applicable to other debt collection agencies pursuant to Local Law 15. The business operations of collection mills operated by law firms are indistinguishable from those operated by lay persons. Moreover, courts have recognized that "[a]buses by attorney debt collectors are more egregious than those of lay collectors because a consumer reacts with far more duress to an attorney's improper threat of legal action than to a debt collection agency committing the same practice." *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 1004 (3d Cir. 2011) (Jordan, J., dissenting) (quoting *Crossley v. Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989)) (noting that because "[a] debt collection letter on an attorney's letterhead conveys authority and credibility," there is "inherent intimidation in correspondence of that kind"). *See also Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996) ("[a]n unsophisticated consumer, getting a letter from an

'attorney,' knows the price of poker has just gone up. . . the attorney . . . is better positioned to get the debtor's knees knocking."). Indeed, the mere perceived threat of litigation may be enough to spur the consumer to act to her detriment to avoid the time, embarrassment and personal and financial ramifications of fighting a collection action in court. *See* Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65775, 65777 (Oct. 31, 2012) (to be codified at 12 C.F.R. pt. 1090) ("unlawful collection practices can cause significant reputational damage, invade personal privacy, and inflict emotional distress . . . a collector's inappropriate interference with a consumer's employment relationships can also impair the consumer's ability to repay debts.").

The inclusive licensing of debt collection agencies also enables regulators to protect consumers more comprehensively. For example, the City recommends that consumers "[c]heck that the debt collection agency is licensed." *See* New York City, *Debt Collection Guide*, Department of Consumer Affairs, *available at* http://www1.nyc.gov/assets/dca/downloads/pdf/consumers/Consumers-Debt-Collection-Guide-English.pdf (last visited Apr. 20, 2015). Excluding attorneys from the licensing scheme would prevent consumers from verifying claims that a debt is being collected by a legitimate law firm. Such an information gap would further open consumers to the now-widespread scams involving coercive payment of phantom debts. *See, e.g.,* Press Release, New York Office of the Attorney

General, *A.G. Schneiderman Warns Consumers of Fraudulent NYS Attorney General's Office Debt Collection Notices* (Feb. 4, 2015), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-warns-consumers-fraudulent-nys-attorney-general%E2%80%99s-office-debt. Additionally, because assigned debt is collected in the name of the debt buyer, not the original creditor, providing consumers with access to comprehensive information about attorneys who are licensed debt buyers also helps address the problem that consumers often do not recognize debts as belonging to them. This information would be unavailable if attorneys were not also subject to the licensing requirements.

Moreover, regulation of attorneys through the licensing of debt collection agencies does not interfere with the judiciary's oversight of the practice of law. Local Law 15 is similar in this regard to the wide variety of generally applicable business regulations with which lawyers must comply to do business. For example, lawyers and law firms must comply with New York's partnership and tax laws, civil rights and employment laws, and health and safety codes. While the City can refuse to issue a license to a debt collection agency operated by an attorney, it cannot and does not attempt to encroach upon the role of the judiciary to discipline a debt collection attorney or law firm that fails to fulfill its professional obligations in the practice of law. *See Heintz v. Jenkins*, 514 U.S. 291, 292 (1995) (rejecting

argument that subjecting litigation activities of lawyers to the FDCPA impermissibly encroaches on area of traditional state regulation).

Excluding attorney-operated debt collection agencies from the licensing requirements permits debt collection agencies to evade—and thereby weakens—the important protection provided to vulnerable consumers by Local Law 15. This Court should not define the practice of law so broadly that lawyers evade basic business regulation applicable to other debt collection agencies that fundamentally perform the same business practices. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (rejecting argument that law firm's preference to be treated as a law firm rather than a "debt relief agency" is a protected interest).

C. Ample evidence of abusive debt collection practices perpetrated by attorney-operated collection agencies and relatively limited oversight of the regulated business practices pursuant to the rules of professional responsibility strongly supports applying the licensing requirements of Local Law 15 to attorneys.

It is clear that attorney-operated collection mills are not above committing abusive debt collection practices that Local Law 15 seeks to address. For example, New York Courts have recognized disapprovingly that "lawyers engaged in the collection of assigned debts seem especially prone to pursuing claims improperly, often at the expense of the most vulnerable members of our society." *Erin Servs. Co., LLC. v. Bohnet*, 907 N.Y.S.2d 100, 100 (Dist. Ct. 2010) (finding 18 ethical

violations, warning "'[h]igh volume' debt collection law practices are subject to the same ethical rules as apply to lawyers handling any other civil litigation matter" and sanctioning collection law firm $14,800 for "multiple acts of frivolous conduct"). In *Miller v. Upton, Cohen & Slamowitz,* 687 F. Supp. 2d 86, 101 (E.D.N.Y. 2009), the court criticized the defendants' reliance on the evaluation of governing law made by referring law firm Wolpoff & Abramson, finding the attorney's failure to undertake any independent review as being "a naked attempt to substitute their judgment for his own in derogation of his professional duties and his obligations under the FDCPA." *See also Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 301 (2d Cir. 2003) (J. Sotomayor) (reversing summary judgment for law firm, finding "a reasonable jury could conclude that W&A and UC&S lacked sufficient professional involvement with plaintiff's file that the letters could be said to be from an attorney" if "discovery were to reveal that W&A and UC&S handled [approximately 55,000] accounts per month, received only the limited information described in the attorney affidavits, reviewed the collection files with such speed that no independent judgment could be found to have been exercised, and then issued form collection letters with the push of a button.").

Moreover, while the New York judiciary clearly has the authority to regulate *the practice of law* by attorneys in attorney-operated collection mills, it has not asserted that its authority under the rules of professional responsibility exempts

attorneys from all other oversight. There have only been a very few instances of public censure, suspension, or disbarment by the New York State Bar Association for violations of professional responsibilities related to debt collection activities since 2010. In *Matter of Cohen & Slamowitz, LLP*, 116 A.D.3d 13 (App. Div. 2014), the Grievance Committee for the Tenth Judicial District held that the firm of Cohen & Slamowitz and New York-barred attorney David A. Cohen should be publicly censured for violating several rules of the New York Code of Professional Responsibility, including: failure to exercise reasonable management authority over conduct of firm employees and engaging in conduct adversely reflecting on his fitness as a lawyer. *See id.* at 20-22.

In stark contrast to the judiciary's relatively conservative approach, in 2009 alone, the New York Attorney General filed enforcement actions against at least 37 law firms for abusive debt collection practices that also violate professional obligations of attorneys. *See* Press Release, *Attorney General Cuomo Sues To Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers In Next Stage Of Debt Collection Investigation* (July 22, 2009), http://www.ag.ny.gov/press-release/attorney-general-cuomo-sues-throw-out-over-100000-faulty-judgments-entered-against-new (naming 37 law firms and process server). Moreover, private litigants have also actively pursued claims against attorney-operated debt collection law firms that violate their professional

obligations. Class certification of a RICO claim challenging abusive debt collection practices by a debt buyer, law firm and its contracted process servers, including falsifying affidavits of service of process, was recently upheld in *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70 (2d Cir. 2015). The oversight and regulation of attorney-operated debt collection agencies is clearly not within the exclusive purview of the judiciary.

II. Numerous State legislatures impose regulatory requirements on attorney-operated debt collection agencies without conflicting with the judiciary's prerogative to regulate the practice of law.

Legislatures have imposed debt collection licensing regulations that apply to attorneys to varying degrees. Many states recognize that applying the regulatory requirements to attorneys does not detract from or interfere with the judiciary's regulation of the practice of law.

A. Debt collection agency licensing laws similar to Local Law 15 apply to attorneys in numerous states.

Several states require that attorneys or law firms that fit within the state statute's definition of debt collector or debt collection agency must obtain a license. For example, Washington, Maryland, and Oregon each have debt collection licensing laws of general applicability, similar to New York City's Local Law 15, that apply to attorneys and do not conflict with the judiciary's prerogative in those states to regulate the practice of law. *See* Wash. Rev. Code. § 19.16.100(5)(c); Md. Code Ann. Bus. Reg. § 7-102(b)(9); Or. Rev. Stat. § 697.005.

Challenges seeking to obtain an exemption for attorneys have been unsuccessful in Washington. Like other debt collectors, attorneys must obtain a license, except for lawyers "whose collection activities are carried on in his, her, or its true name and are confined and are directly related to the operation of a business other than that of a collection agency." Wash. Rev. Code § 19.16.100(5)(c). *See Mandelas v. Gordon*, 785 F. Supp. 2d 951, 961 (W.D. Wash. 2011) (rejecting argument that applying the Washington Collection Agency Act to attorneys violates the separation of powers doctrine to the extent it purports to regulate the practice of law, noting it is "no different than applying other generally applicable statutes, such as criminal laws to attorneys."); *Semper v. JBC Legal Grp.*, No. C042240L, 2005 WL 2172377, at *3 (W.D. Wash., Sept. 6, 2005) (holding that since the law firm purchased the debt from a third party merchant in the business of debt collection for the sole purpose of collecting on the debt, the law firm was "a collection agency subject to regulation under the Collection Agency Act."); *Snyder v. Daniel N. Gordon, P.C.*, No. C11-1379, 2012 WL 3643673, at *6 (W.D. Wash. Aug. 24, 2012) (attorney that must notify a debtor that it is a debt collection agency pursuant to the federal FDCPA "cannot argue in one instance that they acted as debt collectors, and in another that they acted as lawyers.").

Some states provide for fairly broad exemptions from regulation for attorneys, but nevertheless recognize that attorney-operated debt collection agency activities do not operate entirely or exclusively within the practice of law. For example, Wyoming, New Mexico, and Rhode Island impose licensing on all debt collectors, including attorneys, unless they are acting on behalf of clients in an attorney client relationship. *See* Wyo. Stat. Ann. § 33-11-101(b)(viii); N.M. Stat. Ann. § 61-18A-2; R.I. Gen. Laws § 19-14.9-3(5)(g). Similarly, Oregon and Alaska exempt from application of the debt collection licensing regulations "attorney[s]-at-law rendering services in the performance of the duties of an attorney-at-law." Or. Rev. Stat. § 697.005; *see also* Alaska Stat. § 08.24.090.

Moreover, even where attorneys practicing law are not subject to the regulation applicable to debt collection agencies, that result often arises from the legislature's political or policy views rather than a perceived or inherent conflict with the judiciary's authority to regulate the practice of law. In Nevada, for example, the licensing scheme previously applied to attorneys except for debt collection activities "incidental" to the practice of law. The statute was amended to broaden the exemption to "attorneys and counselors at law . . . retained by their clients to collect or to solicit or obtain payment of such clients' claims in the usual course of the practice of their profession." Nev. Stat. § 649.020.2(g). *See Calvert v. Alessi & Koenig, LLC*, 2013 U.S. Dist. LEXIS 20017, at *19-21 (D. Nev. Feb. 12,

2013) (finding that the change in statutory exemption narrows applicability of licensing statute to attorneys acting as debt collectors not within the scope of an attorney-client relationship); *see also* Commissioner George Burns, *Advisory Opinion Regarding Attorneys Acting as Collection Agencies*, Dep't of Bus. & Indus., Fin. Inst. Div. (Mar. 22, 2012), *available at* http://fid.state.nv.us/AdvisoryOpinion /2012/2012-03-22_OPINION_Attorney ActingAsCollectionAgency.pdf.

B. States apply other generally applicable regulatory schemes to attorney-operated debt collection agencies without conflicting with judicial authority to regulate the practice of law.

Several states, including Massachusetts, Texas, New Hampshire, Pennsylvania, and California, have adopted fair debt collection laws that mirror or complement the federal Fair Debt Collection Practices Act (FDCPA). While such laws often stop short of requiring licensing of debt collection agencies, they engraft into state law the federal FDCPA and Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), making state law implicitly applicable to attorneys. *See McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109, 123 (1st Cir. 2014) ("an unfair debt collection act in violation of the FDCPA is a per se violation of the FTC Act. And because Massachusetts has 'wholly incorporated' the FTC Act and its interpretation into state consumer protection law, a violation of the FDCPA not only per se violates the FTC Act, it also constitutes a per se [Mass. Gen. Laws Ch.

93A, § 2(a)] violation.") Thus, although state law that incorporates the federal FDCPA does not necessarily provide for licensing, such as that required by Local Law 15, it nevertheless applies to attorneys, which indisputably are subject to federal regulation, even when they are engaged in litigation. *See Heintz v. Jenkins,* 514 U.S. 291, 292 (1995).

The Texas statute, based on the federal FDCPA, is expressly applicable to attorneys that have employees who are "regularly engaged to solicit debts for collection," or who "regularly make contact with debtors for the purpose of collection or adjustment of debts." Tex. Fin. Code Ann. § 392.001(7). It requires debt collectors to post a surety bond and prohibits certain conduct. Tex. Fin. Code Ann. § 392.101 to 392.301 et seq. Such regulation does not inherently conflict with regulation of the practice of law.

New Hampshire's Unfair, Deceptive or Unreasonable Collection Practices Act likewise is based on the federal FDCPA. It provides a monetary penalty, attorney's fees or damages for debt collector practices that are "unfair, deceptive or unreasonable." N.H. Rev. Stat. Ann. § 358-C:2-4. A debt collector under this statute is any person who attempts to enforce a payment obligation "by any direct or indirect action, conduct or practice", or "for any fee, commission or charge other than wages or salary." Attorneys are not exempted from coverage. N.H. Rev. Stat. Ann. § 358-C:1. Notably, in *Rousseau v. Eshleman*, 519 A.2d 243, 245

(N.H. 1986), the New Hampshire Supreme Court, finding no explicit language made the statute applicable to lawyers, held that lawyers were exempt from coverage. The state legislature disapproved of that interpretation and amended the statute to include attorneys.

Pennsylvania, like Massachusetts, adopted the federal FDCPA in its entirety through the Pennsylvania Fair Credit Extension Uniformity Act. *See* 73 Pa. Cons. Stat. § 2270.4. While it expressly includes attorneys under the definition of a debt collector "whenever such attorney attempts to collect a debt," it explicitly excludes application of the act to activities "in connection with the filing or service of pleadings or discovery or the prosecution of a lawsuit to reduce a debt to judgment." 73 Pa. Cons. Stat. § 2270.3. Thus, state law recognizes that attorneys are subject to the act for their non-litigation debt collection activities.

California exempts individual attorneys from compliance with its state regulation of debt collectors, but the exemption does not apply to law firms. *See* Cal. Civ. Code § 1788.2(c); *Abels v. JBC Legal Grp., P.C.*, 227 F.R.D. 541, 548 (N.D. Cal. 2005).

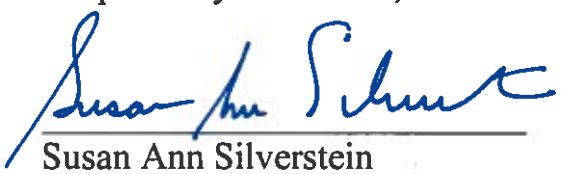
Clearly, many states regulate a variety of activities of attorneys outside the strictures of the rules of professional responsibility. Courts with authority to regulate the practice of law have approved such regulation, finding that, like the

FDCPA, it does not conflict with or detract from the authority of the judiciary to regulate the practice of law.

CONCLUSION

Amici Curiae respectfully urge this Court to hold that the application of Local Law 15 to attorneys is neither preempted nor precluded by sections 53 or 90 of the New York Judiciary code regulating the practice of law or prohibited by the New York Constitution.

Respectfully Submitted,



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STATE OF DISTRICT OF COLUMBIA

COUNTY OF Washington SS.:

Susan Ann Silverstein , being duly sworn, says: I am not a party to the action, am over 18 years of age and reside at: 92 Wire Ave, Silver Spring, MD, 20901. On the 21st day of April, 2015, I caused one copy of each of the annexed Notice Of Motion For Leave To File Brief As Amici Curiae and the Affirmation In Support Of Motion Of Amici Curiae For Leave To File Brief In Support Of Defendants-Appellants to be served by mailing it in a sealed envelope, with postage prepaid thereon, via overnight mail from Washington, D.C., addressed to the following at their last known addresses set forth below:

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Notary Public

JACQUELINE F. CRAWFORD
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires March 31, 2020

JACQUELINE F. CRAWFORD NOTARY PUBLIC DISTRICT OF COLUMBIA EXP. 3-31-20