No. 15-1056

In the United States Court of Appeals
for the Third Circuit

DANIEL BOCK, JR.,
Plaintiff-Appellee,

v.

PRESSLER & PRESSLER, LLP,
Defendant-Appellant.

On Appeal from the
United States District Court for the District of New Jersey
Case No. 2:11-cv-07593

BRIEF OF *AMICI CURIAE* CONSUMER FINANCIAL PROTECTION BUREAU AND FEDERAL TRADE COMMISSION IN SUPPORT OF APPELLEE AND AFFIRMANCE

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GLOSSARY

Bureau or CFPB	Consumer Financial Protection Bureau
Commission or FTC	Federal Trade Commission
FDCPA	Fair Debt Collection Practices Act
NARCA Br.	Brief of National Association of Retail Collection Attorneys (NARCA) *et al.* as *amici curiae* (filed July 12, 2015)
Pressler Br.	Brief of Defendant-Appellant Pressler & Pressler, LLP (filed July 5, 2015)

INTEREST OF AMICI

The Consumer Financial Protection Bureau and the Federal Trade Commission, agencies of the United States, file this brief pursuant to F.R.A.P. 29(a).

This case concerns the application of the Fair Debt Collection Practices Act (FDCPA or the Act) to debt-collection law firms that mass-file collection lawsuits without any meaningful attorney review. The Bureau and the Commission have a substantial interest in protecting the consumers affected by these suits. Congress established the Bureau "to protect consumers from abusive financial services practices," *see* Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010), and the Commission has long been responsible for protecting consumers from unfair and deceptive trade practices. Congress vested the Bureau with authority to enforce the FDCPA and to prescribe rules implementing the Act. 15 U.S.C. §§ 1692*l*(b), (d). The Commission similarly has authority to enforce the FDCPA—an authority it has exercised since the statute's enactment in 1977, *see* Pub. L. No. 95-109, § 814, 91 Stat. 874, 881-82 (1977)—and over the last several decades has studied, and issued numerous reports on, the debt collection industry. Both agencies accordingly have a substantial interest in the issue presented in this case.

BACKGROUND

A. Statutory Framework

1. Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). To achieve that goal, the Act creates a wide range of consumer protections, including broad prohibitions on harassing or abusive collection practices; false or misleading representations; and unfair or unconscionable debt-collection methods. *Id.* §§ 1692d-1692f.

These prohibitions apply to third-party debt collectors that collect debts from individual consumers. *See id.* §§ 1692a(3), (5), (6). As originally enacted, the Act exempted debt-collecting attorneys from its coverage, Pub. L. No. 95-109, § 803(6)(F), 91 Stat. at 875, because Congress believed "that bar associations would adequately police attorney violations." H.R. Rep. No. 99-405, at 6 (1985). That, however, "prove[d] not to be the case," and Congress accordingly repealed the attorney exemption in 1986. *Id.*; Pub. L. No. 99-361, 100 Stat. 768 (1986). The Act thus now applies to "lawyers engaged in litigation." *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995).

2. As relevant here, the Act prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection

with the collection of any debt." 15 U.S.C. § 1692e. Within that "broad category of prohibited conduct," the Act provides a non-exclusive list of "examples of specific practices that are prohibited." *FTC v. Check Investors, Inc.*, 502 F.3d 159, 166 (3d Cir. 2007). Those specifically prohibited practices include making a "false representation or implication …that any communication is from an attorney," 15 U.S.C. § 1692e(3), "us[ing] …any written communication …which creates a false impression as to its source, authorization, or approval," *id.* § 1692e(9), and using "any false representation or deceptive means to collect or attempt to collect any debt," *id.* § 1692e(10).

In this Court, whether a communication is misleading in violation of § 1692e "should be analyzed from the perspective of the least sophisticated debtor." *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 454 (3d Cir. 2006). This standard ensures that the Act "protect[s] all consumers, the gullible as well as the shrewd, the trusting as well as the suspicious." *Id.* (quotations omitted). At the same time, the standard does not permit "liability for bizarre or idiosyncratic interpretations." *Id.*

3. The FDCPA gives consumers a private right of action to sue for violations of the law. 15 U.S.C. § 1692k(a). The Act also authorizes the Bureau, the Commission, and several other agencies to enforce its

requirements. *Id.* §§ 1692*l*(a), (b). Pursuant to that authority, the Bureau has brought an enforcement action against a debt-collection law firm that allegedly filed hundreds of thousands of collection suits against consumers without meaningful attorney involvement. Complaint, *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, No. 1:14-cv-02211 (N.D. Ga. July 14, 2014) (ECF No. 1) (motion to dismiss denied July 14, 2015).

The Act also empowers the Bureau to issue advisory opinions and to prescribe rules "with respect to the collection of debts by debt collectors." *Id.* §§ 1692k(e), 1692*l*(d). In November 2013, the Bureau issued an advance notice of proposed rulemaking on debt collection, which sought comment on various issues relating to debt-collection litigation. Debt Collection (Regulation F), 78 Fed. Reg. 67,848, 67,877 (Nov. 12, 2013).

B. The Debt Collection Process

When creditors are unable to collect defaulted debts, they often sell them to debt buyers, typically as part of a large portfolio of debts sold for a percentage of the combined debts' face value. Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change* 3 (2009) ("*FTC 2009 Report*").[1] When a creditor sells a portfolio of debts, it may transfer

[1] Available at http://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

only an electronic spreadsheet showing basic account information. *See id.* at 22. Debt buyers only rarely receive underlying account documents along with the portfolio; sellers generally disclaim the accuracy of the account data they transfer; and sale contracts often limit buyers' access to supporting documentation. Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* iii (2013) ("*FTC 2013 Report*").[2] The debt-buying industry has grown in recent years. *Id.* at 12.

This growth in debt buying has fueled increases in debt-collection lawsuits because debt buyers "often use collection law firms as their primary tool for recovery." Gov't Accountability Office, *Credit Cards—Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* 41 (2009) ("*GAO Report*").[3] Although no precise nationwide figures are available, the number of debt-collection lawsuits filed across the country "is widely recognized to be very large." *Id.* Indeed, such suits comprise a majority of many state-court dockets. *Id.*

These collection suits have generated significant consumer-protection concerns. Consumers often fail to respond to such suits, resulting in high

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[2] Available at http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[3] Available at http://www.gao.gov/new.items/d09748.pdf.

rates of default judgments. Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 7 (2010) ("*FTC 2010 Report*").[4] This has caused heightened concern about "debt collectors often fil[ing] suits with weak evidence supporting the alleged debt." *GAO Report* at 41. Further, when consumers do respond, participating in the litigation can be "particularly costly" because collectors are often unprepared to proceed—and consumers thus must "once again …bear the costs of taking off work and coming to court" for rescheduled hearings. *FTC 2010 Report* at 14.

C. Facts and Proceedings Below

1. This case arises out of a debt-collection lawsuit that Defendant-Appellant Pressler & Pressler, LLP (Pressler) filed against Plaintiff-Appellee Daniel Bock, Jr. (Bock). That lawsuit concerned a defaulted debt that Bock owed on an HSBC Bank Nevada, N.A., credit card account. Appx. 72-73, 80. HSBC had sold the account to The Bureaus Investment Group, and the account was later sold again to Midland Funding, LLC (Midland). Appx. 263; *see id.* 80. Midland, a large debt buyer and regular client of Pressler, enlisted Pressler to collect the debt on Midland's behalf. Appx. 126.

[4] Available at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf.

The pertinent facts are undisputed. Pressler, a law firm specializing in collecting consumer debts, employs a highly automated process to bring collection suits against consumers. *See* Appx. 124-39. The firm first receives from the client a spreadsheet or text file containing basic information about the debts it will collect. Appx. 126-27. Non-attorney personnel and various computer programs then run "scrubs" to check for missing personal data, invalid addresses, any related claims in Pressler's system, records showing that a debtor is bankrupt or deceased, and similar issues. Appx. 127-31. Nothing in the record indicates that the process involved any steps designed to ascertain whether the spreadsheet accurately represented the amounts that consumers owed when the debt was referred to Pressler.

Based on that largely automated review, the firm sent Bock a collection letter demanding payment. Appx. 72, 77. The letter advised that, "[a]t this time, no attorney with this firm has personally reviewed the particular circumstances of your account." Appx. 77.

After Bock did not respond, the firm set in motion its process for filing a lawsuit against him. *See* Appx. 73, 131-32. Pursuant to that process, other teams of non-attorney personnel, again aided by computer programs, performed similar "scrubs" to check again for missing

information, bankruptcies, or deaths, and also to confirm that the initial letter was sent, that the statute of limitations had not expired, that there was no unresolved "'dispute' code," and that the suit would be filed in the right venue. Appx. 132-34. Non-attorney personnel then populated a template summons and complaint with the debtor's information. Appx. 134-35.

At this point, the results of this process were sent to an attorney. An "automatic feed process" displayed the draft complaint on one computer screen, with the electronic data from the client displayed on a second monitor. Appx. 135. The sole attorney responsible for filing the firm's New Jersey lawsuits, Ralph Gulko, compared the two screens. Appx. 70, 135, 221. Gulko attested that his review consisted of ensuring that the information in the summons and complaint was "the same information that was received from the client," and checking whether there had been any post-referral credits or address changes. Appx. 70.

For the complaint against Bock, the firm's computer records show that Gulko's review lasted four seconds. Appx. 193. That same day, Gulko also reviewed 672 other complaints, approving all but 10 of them. Appx. 193. That volume was not unusual. Gulko reviews an average of 300 to

400 complaints per day, and some days reviews as many as 1,000. Appx. 221.

Based on his review, Gulko approved the complaint for filing. Appx. 137-38. Other than Gulko's four-second scan, no other attorney ever reviewed the case against Bock before the complaint was filed. Bock initially responded to the complaint *pro se*, and requested evidence of the outstanding bill, which the complaint listed as $8,021.57 plus interest. *See* Appx. 80, 82. Bock eventually retained counsel, and the parties settled for $3,000. Appx. 98.

2. After retaining counsel, Bock filed this suit against Pressler in the U.S. District Court for the District of New Jersey. Appx. 40. Bock's complaint alleged that Pressler violated the FDCPA's prohibition on "false, deceptive, or misleading" debt-collection practices by filing a debt-collection suit that appeared to be from an attorney even though no attorney had meaningfully reviewed it. Appx. 46.

In the order now on appeal, the district court granted summary judgment to Bock and denied Pressler's motion for summary judgment. Appx. 4-5, 6-30. The court acknowledged that, in the context of debt-collection *letters*, "[i]t is well established that one cannot, consistent with the FDCPA, mislead the debtor regarding meaningful 'attorney'

involvement." Appx. 15 (quotations omitted). The court concluded that this well-established doctrine also applies when an attorney files a debt-collection complaint because "[t]he language of [the statute] …contains nothing suggesting a distinction between attorney letters and civil complaints for these purposes." Appx. 19. Thus, when a debt-collection law firm files a complaint, it represents that "an attorney is working vigorously on the creditor's behalf, is reasonably knowledgeable about the creditor's case against the debtor, and has exercised his or her professional judgment." Appx. 26. "If, in fact, the attorney who signed the complaint is not involved and familiar with the case against the debtor," then those representations are false—and "the debtor has been unfairly misled and deceived within the meaning of the FDCPA." *See id.*

Applying these principles, the court concluded that Pressler violated the FDCPA. As the court explained, "[w]hatever reasonable attorney review may be, a four-second scan is not it." Appx. 7. According to the court, "Gulko's rapid look-over of the complaint …cannot really be considered a careful review of the complaint, let alone an exercise of the professional skills of a lawyer." Appx. 29.

SUMMARY OF ARGUMENT

Under the FDCPA, an attorney who lends his name to a debt-collection effort must actually be meaningfully involved in the case to avoid misleading the consumer about his role. This basic requirement—long recognized in the context of debt-collection letters—applies equally when attorney debt collectors file debt-collection lawsuits against consumers.

A. This Court has held that misrepresentations that attorneys make in debt-collection pleadings violate the FDCPA. *Kaymark v. Bank of America, N.A.*, 783 F.3d 168, 171-72 (3d Cir. 2015). This precedent—which Pressler does not even cite—forecloses Pressler's contention that the FDCPA does not apply to attorney debt collectors' litigation activities.

B. It is well established—by this Court and other courts of appeals—that an attorney may not send debt-collection *letters* under his name unless the attorney has actually been meaningfully involved in deciding to send the letter. This is because the attorney's imprimatur conveys that an attorney, acting as an attorney, has reached a professional judgment about the consumer's case—an impression that is false if the attorney has not actually had any meaningful professional involvement. This "gets the debtor's knees knocking" and makes him more likely to pay up.

These basic principles apply with full force when, instead of sending debt-collection letters, attorneys file debt-collection lawsuits in court. Indeed, a formal document filed in court—which necessarily requires the involvement of a licensed professional—only heightens the impression that an attorney is meaningfully involved.

Pressler contends that misrepresentations about an attorney's involvement no longer matter once a lawsuit is filed because the fact of the suit alone—not the attorney's backing—is what pressures the consumer to pay. Not so. There is a world of difference between a suit filed by an attorney exercising professional judgment and a suit that an attorney merely rubber-stamps. The understanding that a complaint reflects the judgment of a licensed professional can make the least sophisticated consumer more likely to accede to the demand for payment. By contrast, the consumer may be more likely to question the debt and to raise any defenses in court if he knew no attorney had meaningfully assessed the merits of the case. Moreover, an attorney who has had no meaningful involvement in a case cannot possibly know whether he will actually pursue the litigation, or even if there is any valid basis for doing so. Pressler is therefore wrong to contend that the "sense of urgency" that a rubber-stamped complaint creates is entirely "legitimate."

C. No attorney at Pressler meaningfully reviewed Bock's case before filing suit against him. The undisputed evidence shows that an attorney spent a total of four seconds approving the suit against Bock—a level of review that does not constitute meaningful involvement under any conceivable standard.

Nor does the firm's automated review process justify that cursory review. While an attorney may rely on automated processes, he still must make the ultimate professional judgment that filing suit is appropriate. No attorney exercised any such judgment here. Instead, the attorney's four-second review consisted entirely of ministerial checks. Reaching a professional judgment, moreover, requires at least some inquiry into the validity of the debt—simply being told by the client that a debt is overdue generally is not enough. Nothing in the record indicates that any such inquiry occurred here.

D. Finally, Pressler cannot avoid its obligations under the FDCPA by resorting to the Constitution. The First Amendment does not give attorney debt collectors a right to make misrepresentations in debt-collection litigation. Nor do federalism principles preclude Congress from regulating attorney debt collectors' litigation conduct.

ARGUMENT

Filing a Debt-Collection Lawsuit Without Meaningful Attorney Involvement Violates the FDCPA.

A. The FDCPA prohibits attorney debt collectors from making misrepresentations in litigation.

The FDCPA broadly bars debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This prohibition applies to attorney debt collectors attempting to collect debts through litigation. As the Supreme Court held twenty years ago, the FDCPA "applies to the litigating activities of lawyers." *Heintz*, 514 U.S. at 294. This Court accordingly held in *Kaymark v. Bank of America, N.A.*, that misrepresentations that debt collection attorneys make in pleadings "constitute[] actionable misrepresentation under the [FDCPA]," just like any other misrepresentation in connection with a debt. 783 F.3d at 171-72 (upholding § 1692e claim based on misrepresentation in foreclosure complaint).

Kaymark—which Pressler does not cite, much less attempt to distinguish—forecloses Pressler's contention that attorney debt collectors' "litigation activities" are exempt from the FDCPA. (*See* Pressler Br. 11-18.)

But even putting *Kaymark* aside, Pressler's arguments still fail.[5] Contrary to Pressler's contention (at 13), *Heintz* leaves no room to doubt that the FDCPA regulates attorney debt collectors' litigation *activities*: The Court in *Heintz* explained that "[i]n ordinary English, …tr[ying] to obtain payment of consumer debts through legal proceedings" qualifies as "'attempt[ing]' to 'collect' those consumer debts," *Heintz*, 514 U.S. at 294 (citing Black's Law Dictionary 263 (6th ed. 1990)); noted that the Act contained no "litigation-related[] exemption," *id.* at 294-95; refused to "read the statute as containing an implied exemption for those debt-collecting activities of lawyers that consist of litigating," *id.* at 295; and rejected an argument that the Act did not regulate "the practice of law" or "tasks of a legal nature," *id.*

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[5] *Kaymark* specifically rejects one of the precise arguments that Pressler makes here (at 27)—that "a complaint, because it is directed to the *court*, is not a communication to the *consumer* subject to [the FDCPA]," *Kaymark*, 783 F.3d at 178 (emphases in original). *Kaymark* thus also forecloses Pressler's amici's attempt to rely on 1988 FTC Staff Commentary opining that a pleading is not a "communication" under the FDCPA, 53 Fed. Reg. 50,097, 50,101 (Dec. 13, 1988). (*See* NARCA Br. 4-5.) That commentary is obsolete in any event because Congress subsequently amended the FDCPA to provide that "formal pleading[s]" are not "communications" for purposes of two specific provisions of the Act that are not at issue here. Those amendments show that Congress did not "want[] to exclude formal pleadings from the protections of the FDCPA under any of its *other* provisions," *Kaymark*, 783 F.3d at 177 (emphasis added). *See* Pub. L. No. 109-351, § 802(a), 120 Stat. 1966, 2006 (2006) (adding 15 U.S.C. § 1692g(d)); Pub. L. No. 104-208, § 2305(a), 110 Stat. 3009, 3009-425 (1996) (amending 15 U.S.C. § 1692e(11)). The FTC, moreover, joins this brief and agrees that pleadings are covered under the FDCPA.

at 297. Indeed, the Court noted, some members of Congress had "proposed alternative language designed to keep litigation *activities* outside the Act's scope, but that language was not enacted." *Id.* at 298 (emphasis added).

Moreover, there is no support for Pressler's contention (at 11-13) that Congress intended to cover attorney debt collectors only as necessary "to eliminate unfair competition" between attorneys and lay collectors performing "non-litigation activities." Congress *also* amended the Act to cover attorneys because, "[a]s a result of the attorney exemption, *consumers are harmed*." H.R. Rep. No. 99-405, at 3 (1985) (emphasis added). Further, excluding litigation activities from the Act's requirements would allow unscrupulous attorney debt collectors to "competitively disadvantage[]" *other* attorney debt collectors "who refrain from using abusive debt collection practices"—in contravention of the FDCPA's express purposes. 15 U.S.C. § 1692(e).

B. Filing a debt-collection lawsuit without meaningful attorney review unlawfully misrepresents the attorney's involvement in the case.

When an attorney debt collector files a debt-collection lawsuit without meaningfully reviewing it first, he engages in a deceptive debt-collection practice in violation of the FDCPA.

1. It is well established—by this Court and other courts of appeals—that sending a dunning letter signed by an attorney or on attorney letterhead violates the FDCPA's prohibition on deceptive debt-collection activities if no attorney was meaningfully involved. *See, e.g.*, *Lesher v. Law Offices of Mitchell N. Kay PC*, 650 F.3d 993, 1003 (3d Cir. 2011); *Gonzalez v. Kay*, 577 F.3d 600, 604-07 (5th Cir. 2009); *Kistner v. Law Office of Michael P. Margelefsky, LLC*, 518 F.3d 433, 440 (6th Cir. 2008); *Avila v. Rubin*, 84 F.3d 222, 228-29 (7th Cir. 1996); *Clomon v. Jackson*, 988 F.2d 1314, 1320-21 (2d Cir. 1993). This is because such letters "imply that an attorney, *acting as an attorney*, is involved in collecting [the consumer's] debt," *Lesher*, 650 F.3d at 1003 (emphasis added)—that is, that the attorney "has become professionally involved in the debtor's file," *Gonzalez*, 577 F.3d at 604 (quotations omitted); has some "*genuine* involvement in the process through which the letter was sent," *Nielsen v. Dickerson*, 307 F.3d 623, 635 (7th Cir. 2002) (emphasis added); and "has reached a considered, professional judgment" about how to manage the consumer's case, *Avila*, 84 F.3d at 229. Where the attorney has not actually been meaningfully involved in the process, those representations are false.

Such false representations can have a significant impact on consumers. An attorney's imprimatur "conveys authority and credibility."

Crossley v. Lieberman, 868 F.2d 566, 570 (3d Cir. 1989). A consumer will be "inclined to more quickly react to an attorney's threat than to one coming from a debt collection agency," given "the special connotation of the word 'attorney' in the minds of delinquent consumer debtors." *Avila*, 84 F.3d at 229. Thus, "if a debt collector …wants to take advantage of [that] special connotation," it must "at least ensure that an attorney has become professionally involved in the debtor's file." *Id.*

2. These principles apply with full force when an attorney signs a debt-collection complaint. As with a debt-collection letter, the attorney's signature on the complaint conveys that the attorney has been meaningfully involved in reviewing the debtor's case and has reached a professional judgment that filing suit is appropriate. *Cf., e.g.*, *Nielsen*, 307 F.3d at 635 ("genuine involvement"); *Avila*, 84 F.3d at 229 ("considered, professional judgment"). And given the close association between attorneys and formal legal documents, the least sophisticated consumer will naturally understand that an "attorney, *acting as an attorney*, is involved in collecting [the] debt," *Lesher*, 650 F.3d at 1003 (emphasis added), and has exercised his professional judgment in deciding to file suit.

Rules of court confirm that it is eminently reasonable for the least sophisticated consumer—or any consumer—to understand a complaint

from an attorney in this way. Under rules like New Jersey Rule of Court 1:4-8 (a state-law equivalent to Federal Rule of Civil Procedure 11), an attorney who signs a complaint expressly represents that he has conducted "an inquiry reasonable under the circumstances" and concluded that "the factual allegations have evidentiary support."[6] N.J. R. Ct. 1:4-8(a)(3); *see also* Fed. R. Civ. P. 11(b)(3) (similar). An attorney can make that representation only if he has, in fact, meaningfully reviewed the case.[7] Under court rules, moreover, *only* an attorney can file a complaint on behalf of a creditor. *See* N.J. R. Ct. 1:21-1. This further confirms that the

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[6] The New Jersey rule also permits the lawyer to certify, "as to specifically identified allegations," that the allegations "are either likely to have evidentiary support or they will be withdrawn [if warranted]." N.J. R. Ct. 1:4-8(a)(3). The complaint against Bock contained no such "specifically identified allegations." *See* Appx. 80. But even if it did, it would not matter. Such allegations would not change the fact that "the least sophisticated debtor, upon receiving" a complaint filed by an attorney, would "reasonably believe that an attorney has reviewed his file and has determined that he is a candidate for legal action," *Lesher*, 650 F.3d at 1003.

[7] Contrary to Pressler's suggestion (at 22-25, 42), the claim here is not that the FDCPA punishes violations of state court rules. Rather, the FDCPA provides that attorney debt collectors cannot *misrepresent their involvement* in a debt-collection case. Rules of court simply confirm that, in signing a complaint, an attorney represents that he has had some *meaningful* involvement in the case. Pressler similarly errs in suggesting (at 17-18, 20) that Bock's claim would have the "absurd" result of making debt-collection attorneys owe "non-client" consumers a duty to work diligently on a case. The FDCPA imposes on debt collectors a duty not to use false or deceptive means to collect debts—a duty that is hardly "absurd."

attorney's involvement is not a mere formality. In invoking the power of the court, the attorney represents that he is "acting as an attorney," *Lesher*, 650 F.3d at 1003, and exercising professional judgment—not just affixing his name and bar number to his client's demand for payment.

3. Pressler does not dispute that a complaint signed by an attorney represents that the attorney was meaningfully involved. Instead, it contends that such representations are not deceptive when made in a complaint because "real attorneys" have filed a "real suit." (Pressler Br. 30.) This misses the point.

First, even though a complaint signed by a real attorney may be "'from' attorneys in the literal sense of that word, some degree of attorney involvement is required before a [communication] will be considered 'from an attorney' within the meaning of the FDCPA." *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 301 (2d Cir. 2003); *accord Avila*, 84 F.3d at 229. Thus, where an attorney signs a complaint without having been meaningfully involved, he violates § 1692e(3)'s prohibition on making a "false representation or implication …that any communication is from an attorney."[8] The attorney's misrepresentations about his involvement also

[8] In the same vein, the attorney also violates § 1692e(9)'s prohibition on "creat[ing] a false impression as to [a communication's] source, authorization, or approval." *Cf. Avila*, 84 F.3d at 229.

violate §§ 1692e's and 1692e(10)'s general prohibitions on using deceptive means to collect debts.

Second, the fact that a complaint is a "real suit" does not make the misrepresentations about the attorney's involvement any less misleading. Pressler contends (at 28-29) that such misrepresentations are misleading only to the extent they create a "false sense of urgency" that "litigation [is] imminent." Not so. Misrepresentations about an attorney's involvement *also* "falsely lead[] the consumer to believe that a lawyer has reviewed the debtor's account and assessed the validity of the creditor's position." *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, -- F. Supp. 3d --, 2015 WL 4272275, *17 (N.D. Ga. 2015). This false impression can make a big difference in how consumers respond. A consumer misled into believing that the complaint against him reflects an attorney's professional judgment is apt to be more intimidated—and thus less likely to defend against the suit and more likely to accede to the demand for payment.[9] By contrast, absent that misrepresentation, the consumer will be more likely to question the debt and to identify and raise the full range of

[9] Whether Pressler's misrepresentations had this effect on Bock is irrelevant. "[T]he specific plaintiff need not prove that *she* was actually confused or misled, only that the objective least sophisticated debtor would be." *Jensen v. Pressler & Pressler*, -- F.3d --, 2015 WL 3953754, *3 (3d Cir. 2015) (emphasis in original).

his defenses in court. This can be especially important where, as here, the party seeking payment is not the original creditor, but a debt buyer. The consumer has no way to know whether that debt buyer actually owns the debt and is entitled to payment—but the attorney's imprimatur will make the least sophisticated consumer less likely to question that fundamental fact.

Besides, Pressler can hardly claim that a rubber-stamped complaint creates a sense of urgency that is entirely "legitimate." (*See* Pressler Br. 29.) An attorney who has had no meaningful involvement in a case cannot possibly know whether he will actually pursue the litigation, or even if there is any valid basis for doing so. Indeed, attorney debt collectors commonly adjourn or dismiss collection suits if the consumer responds. *FTC 2010 Report* 21-22; *see also* Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 257, 295 (2011) (empirical study finding that over 60 percent of debt-collection suits were dismissed when the consumer-defendant appeared). The FDCPA does not permit an attorney to "get the debtor's knees knocking," *Avila*, 84 F.3d at 229, with a rubber-stamped complaint any more than with a rubber-stamped debt-collection letter.

C. The Pressler attorney's four-second review did not constitute meaningful attorney involvement.

The undisputed evidence shows that Pressler violated the FDCPA when it filed a debt-collection complaint against Bock after an attorney spent a total of four seconds reviewing the case. The Court need not decide here precisely what steps an attorney must take to ensure that the representations that he makes when filing a debt-collection complaint—that he has been meaningfully involved in the case and reached a professional judgment that filing suit is warranted—are not deceptive. Under any conceivable standard, four seconds is not enough to become meaningfully involved and form a professional judgment about the appropriate action to take. For that reason, Pressler's representation that an attorney had done so was deceptive and violated the FDCPA.

Pressler and its amici claim, however, that the firm's "complex review process that was created and implemented by attorneys" enabled Gulko to meaningfully review "virtually identical" collection actions so quickly. (Pressler Br. 34; NARCA Br. 8-11.) But attorneys' involvement in setting up the firm's process does not excuse them from reaching a professional judgment about individual debtors' cases, and the undisputed evidence shows that no attorney exercised any such professional judgment here.

1. Setting up a review process does not excuse the attorney from exercising professional judgment.

It is already established that it is not enough for the attorney simply to "approve[] the procedures according to which [dunning] letters [are] sent." *Clomon*, 988 F.2d at 1317; *accord Avila*, 84 F.3d at 228-29. For his representations of meaningful involvement to be accurate, the attorney "must be directly and personally involved." *Avila*, 84 F.3d at 228. That is not to say that the attorney must do everything himself. An attorney may delegate "part of the review process to a paralegal or even a computer program"—but only if "the ultimate professional judgment concerning the existence of a valid debt is reserved to the lawyer." *Boyd v. Wexler*, 275 F.3d 642, 648 (7th Cir. 2001).

Professional responsibility tenets confirm that lawyers who set up a process and delegate tasks must still exercise professional judgment themselves. The American Bar Association has advised that delegation is proper only if the attorney "personally exercises the care and independent judgment required to see that each letter sent is accurate and appropriate as to the account of the debtor when it is sent." ABA Informal Op. 1368 (1976). New Jersey likewise requires lawyers who send dunning letters to "*individually* review[] the file, ma[k]e appropriate inquiry, and exercise[] professional judgment." Joint Opinion: Opinion 48 of Committee on the

Unauthorized Practice of Law and Opinion 725 of Advisory Committee on Professional Ethics (2012) (emphasis added).[10] There is of course no reason that attorneys' obligations would be any less when they file debt-collection *complaints*.

2. No attorney exercised professional judgment here.

a. The undisputed evidence shows that no attorney at Pressler exercised any professional judgment in filing suit against Bock. The attorney who reviewed the complaint against Bock merely (1) confirmed that the information in the summons and complaint was "the same information that was received from the client" and (2) checked for credits or address changes. Appx. 70. Such ministerial review "did not call for the exercise of professional judgment." *Nielsen*, 307 F.3d at 636 (concluding that attorney did not exercise professional judgment where he merely "identif[ied] missing data, typographical errors, and debtors whom he had already sent letters" and ascertained whether debtor had filed for bankruptcy or lived in a particular state).

b. Moreover, reaching a professional judgment requires at least *some* inquiry into whether the consumer actually owes the debt, and thus

[10] Available at http://njlaw.rutgers.edu/collections/ethics/acpe/acp725_1.html.

whether there is a reasonable basis to allege as much in a complaint. *See, e.g.*, *Nielsen*, 307 F.3d at 638 (finding FDCPA violation where attorney represented meaningful involvement even though he "made no independent, professional assessment of the delinquency and validity of any debt"); *accord Boyd*, 275 F.3d at 648 (requiring attorney who represents meaningful involvement to make "professional judgment concerning the existence of a valid debt"); *Miller*, 321 F.3d at 304 (similar); *cf. also* ABA Informal Op. 1368 (1976) ("[I]t is not enough that the lawyer rely upon the client's certification of the 'validity' of the account. The lawyer must take responsibility for the reasonable accuracy of each letter."). What that inquiry entails may vary based on the circumstances, but in general "merely being told by a client that a debt is overdue is not enough." *Miller*, 321 F.3d at 304. Nothing in the record indicates that *any* such inquiry occurred here—in either the firm's "lengthy review process" (Pressler Br. 6) or Gulko's four-second scan. *See* Appx. 69-71, 124-39.

Pressler objects (at 47) that it was entitled to "rely on the file provided by [its] client." But even assuming that an attorney in some circumstances could reasonably rely on the type of summary data provided here, the attorney must at a minimum make a professional judgment that such reliance is reasonable. No record evidence indicates that any Pressler

attorney reached such a professional judgment here. Pressler suggests that it relies on its history with Midland (Appx. 70-71)—but the data here did not originate with Midland; it originated with an HSBC credit card account. And the firm does not claim to have taken any steps, beyond checking for missing information in individual files, to evaluate the reasonableness of its nearly unshakeable assumption that the summary data reflected valid debts. That lapse was particularly unreasonable here. By the time Pressler obtained the information about Bock's debt, that information had been transferred three times—from HSBC to a debt buyer, from that debt buyer to Midland, and from Midland to Pressler. *See* Appx. 80, 126, 263. Such transfers of consumer debt information can entail high risk of error. As a recent Government Accountability Office report found, when a debt is transferred, "there are numerous areas in which account integrity could be compromised," as "important account information …may not always be transferred" with the debt. *GAO Report* 44.

Pressler suggests (at 47-48) that having to assess the validity of the debt unfairly subjects attorney debt collectors to higher standards than those imposed on lay collectors. But the rules are the same for everyone: No debt collector, attorney or not, may make misrepresentations when collecting debts—and lay collectors cannot falsely claim that an attorney

has reached a professional judgment any more than an attorney can. In any event, this Court has observed that "attorney debt collectors warrant closer scrutiny" given that they may exercise "certain privileges—such as the ability to file a lawsuit—not applicable to lay debt collectors." *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 301 (3d Cir. 2008).

Pressler further contends (at 47-49) that case law entitles it to take its client's summary data at face value—but the cases it cites do not address what an attorney must do to avoid misrepresenting his level of involvement in a particular matter. Rather, those cases at most hold that the FDCPA imposes no independent duty on debt collectors generally to investigate the validity of a creditor's claim before attempting to collect it. *See, e.g.*, *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1032 (6th Cir. 1992) ("[T]he statute does not require an independent investigation of the debt referred for collection." (quotations omitted)). They in no way suggest that an attorney may *represent* that he has formed a professional judgment about a case even if he has conducted no inquiry into the debt's validity.[11]

[11] Pressler similarly misses the point in citing cases holding that filing suit without the immediate means to prove one's claims does not violate the FDCPA. (*See* Pressler Br. 45.) Those cases, too, say nothing about what an attorney must do to avoid *misrepresenting* his involvement in a case. Moreover, as the Sixth Circuit recognized in *Harvey v. Great Seneca Financial Corp.*, suing without having "in hand the means to prove [the]

Finally, Pressler also errs in contending (at 46) that it was entitled "to assume that the claim against Bock was valid" because Bock did not respond to the initial letter that Pressler sent him. There could be any number of reasons why a consumer would not respond—for example, because mail is not delivered or opened, or because the consumer is too busy or unsophisticated to respond in time. It is therefore not reasonable to assume that a debt is valid just because a consumer does not respond.

Nor does §1692g give attorney debt collectors a right to assume a debt's validity. Section 1692g requires debt collectors, upon first contacting a consumer, to provide a notice with certain information about the debt and the consumer's rights, including the right to dispute the debt within thirty days. *See* 15 U.S.C. § 1692g(a). That notice advises that "unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." *Id.* § 1692g(a)(3). But, contrary to Pressler's contention, this provision only gives consumers a right to receive this notice; it does not give debt collectors any right to assume a debt's validity. *Cf. CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670 (2012)

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claims" is a different matter from "fail[ing] to undertake a reasonable investigation" into the claims. 453 F.3d 324, 333 (6th Cir. 2006).

(explaining that "[t]he only …right [that similar disclosure provision in another consumer-protection statute] *creates* is the right to receive the statement, which is meant to describe the …protections that the law *elsewhere* provides" (emphases in original)). Nor does any other FDCPA provision give debt collectors that right—much less the right to represent that an attorney is meaningfully involved in a case, even though the attorney has reached no professional judgment about the debt's validity.

D. The Constitution does not prevent the FDCPA from barring misrepresentations that attorneys make in debt-collection litigation.

1. Attorney debt collectors have no First Amendment right to make misrepresentations in debt-collection litigation.

Nothing in the First Amendment or the *Noerr-Pennington* doctrine gives individuals a constitutional right to make misrepresentations in litigation. Under the *Noerr-Pennington* doctrine, an individual is generally "immune from liability for exercising his or her First Amendment right to petition the government" for redress of grievances. *Barnes Found. v. Twp. of Lower Merion*, 242 F.3d 151, 159 (3d Cir. 2001) (citing *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)). But the FDCPA does not punish debt collectors for exercising their right to petition courts for redress of unpaid debts. It simply prohibits debt collectors from making

false or deceptive representations when doing so. "[I]mposing FDCPA standards of accuracy and fairness on a state court filing" does not "constitute[] any genuine burden" on the "First Amendment right to petition." *Berg v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, No. 07-c-4887, 2009 WL 901011, *6 (N.D. Ill. 2009).

Besides, "[m]isrepresentations …are not immunized when used in the adjudicatory process." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Thus, *Noerr-Pennington* and the First Amendment do not preclude liability where a "party urging [government] action did so by bribery, deceit or other wrongful conduct." *Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem'l Hosp.*, 185 F.3d 154, 162 (3d Cir. 1999). Although no *antitrust* liability will attach, "[t]he remedy for such conduct rests with laws addressed to it." *Id.* The FDCPA—which specifically prohibits using deceptive means to collect debts—is just such a law.[12]

It is thus no surprise that courts have consistently concluded that "the First Amendment does not shield lawyers engaged in litigation from FDCPA liability." *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 616

[12] Because *Noerr-Pennington* immunity does not apply at all here, Pressler's discussion (at 37-38) of the "sham" exception to *Noerr-Pennington* immunity is a red herring.

(6th Cir. 2009); *accord Frederick J. Hanna*, 2015 WL 4282252, at *11-12; *Berg*, 2009 WL 901011, at *6; *Gerber v. Citigroup, Inc.*, No. 07-0785, 2009 WL 248094, *3-5 (E.D. Cal. 2009); *Sial v. Unifund CCR Partners*, No. 08-cv-0905, 2008 WL 4079281, *5 (S.D. Cal. 2008). And contrary to Pressler's contention (at 37), the Eighth Circuit did not conclude otherwise in *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814 (8th Cir. 2012). Quite the opposite: The court expressly acknowledged that "representations …in debt collection pleadings" may violate the FDCPA in some circumstances. *Id.* at 818.

2. Federalism principles do not preclude Congress from regulating attorney debt collectors' litigation conduct.

Pressler's suggestion (at 19-20) that the Tenth Amendment reserves to states the right to regulate attorney conduct is likewise unavailing. Pressler does not and could not dispute that the FDCPA's prohibition on using deceptive means to collect debts—in litigation or otherwise—is a valid exercise of Congress's authority under the Commerce Clause. Indeed, courts have consistently so held. *See, e.g.*, *Hartman*, 569 F.3d at 617; *Garcia-Contreras v. Brock & Scott, PLLC*, No. 1:09CV761, 2010 WL 4962940, *13-15 (M.D.N.C. 2010), *report and recommendation rejected in part on other grounds*, 775 F. Supp. 2d 808 (M.D.N.C. 2011); *Delawder v. Platinum Fin. Servs. Corp.*, 443 F. Supp. 2d 942, 951 (S.D. Ohio 2005).

And where "Congress acts under one of its enumerated powers—here its power under the Commerce Clause—there can be no violation of the Tenth Amendment." *United States v. Parker*, 108 F.3d 28, 31 (3d Cir. 1997) (quotations omitted). By the same token, it is no matter that "the licensing and regulation of lawyers" has historically been left to the states, *Leis v. Flynt*, 439 U.S. 438, 442 (1979), because "Congress may legislate in areas traditionally regulated by the States," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) in that it contains 6,982 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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I hereby certify that the text of the electronic brief filed by the Consumer Financial Protection Bureau on August 13, 2015, is identical to the text in the paper copies mailed on August 13, 2015. I further certify that the electronic submission was scanned for viruses using System Center Endpoint Protection by Microsoft version 4.8.204.0 and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on August 13, 2015. I have also caused seven paper copies of the brief to be sent to the Clerk's Office by UPS.

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