

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) <i>et al. as amici curiae</i> (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.

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 As originally enacted, the Act exempted debt-collecting attorneys from its coverage, Pub.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 That, however, “prove[d] not to be the case,” and Congress accordingly repealed the attorney exemption in 1986.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

requirements. *Id.* §§ 16921

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

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

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.

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.*

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*, 13aptiid.

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., Leshner 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,” *Leshner*, 650 F.3d at 1003 (emphasis added)—that is, that the attorney “has become professionally involved in the debtor’s file,” *Gonzalez*,

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

from an attorney in this way. Under rules like New Jersey Rule of Court
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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," *Leshner*, 650 F.3d at 1003, and exercising professional judgment—not just affixing his name and bar number to his client's demand for payment.

violate §§ 1692e's and 1692e(10)'s gene

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

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*

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:

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)

claims” is a different matter from “fail[ing] to undertake a reasonable investigation” into the claims. 45

(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 FD CPA 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-Motorm5.281nsfm5.281ns Tc-.0308Tw an(th Firsc-)Tj*

(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

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

Dated: August 13, 2015

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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).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Georgia.

Dated: August 13, 2015

/s/ Kristin Bateman

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 31.1(c)

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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