ORIGINAL

In the

Supreme Court of Ohio

SANDRA J. TAYLOR JARVIS,	:	Case No. 2013-0118
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Summit County
v.	:	Court of Appeals,
	:	Ninth Appellate District
FIRST RESOLUTION INVESTMENT CORP., et al.,	:	
	:	Court of Appeals
	:	Case No. CA26042
Defendants-Appellants.	:	

MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF APPELLEE SANDRA J. TAYLOR JARVIS

JEFFREY C. TURNER (0063154)
JOHN LANGENDERFER (0079094)
KEVIN A. LANTZ* (0063822)
*Counsel of Record
Surdyk, Dowd, & Turner Co., L.P.A.
One Prestige Place, Suite 700
Miamisburg, Ohio 45342
937-222-2333; 937-222-1970 fax
klantz@sdtlawyers.com

Counsel for Appellants
First Resolution Investment Corp. and
First Resolution Management Corp.

BOYD W. GENTRY* (0071057)
*Counsel of Record
Law Office of Boyd W. Gentry, LLC
2661 Commons Blvd., Suite 100
Beavercreek, Ohio 45431
937-839-2881; 800-839-5843 fax
Bgentry@boydgentrylaw.com

Counsel for Appellants
Cheek Law Offices, LLC and
Attorney Parri Hockenberry

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SUPREME COURT OF OHIO

MICHAEL DEWINE (0009181)
Attorney General of Ohio

MICHAEL HENDERSHOT* (0081842)
Chief Deputy Solicitor
*Counsel of Record
MELISSA G. WRIGHT (0077843)
TERESA A. HEFFERNAN (0080732)
TRACY MORRISON DICKENS (0082898)
JEFFREY LOESER (0082144)
BRITTANY M. STEELE (0089188)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
michael.hendershot@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio

JAMES F. BURKE, JR.* (0013029)
*Counsel of Record
JOHN J. HORRIGAN (0017464)
Burke & Horrigan
1660 West 2d Street, 900 Skylight Office Tower
Cleveland, Ohio 44113
216-685-1700; 216-664-6901 fax
jfburkejr@yahoo.com

Counsel for Appellee
Sandra J. Taylor Jarvis

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INTRODUCTION

The State has a keen interest in one question raised in this appeal: Whether debt buyers collecting credit card debt are subject to the Consumer Sales Practices Act ("CSPA"). The answer is yes. Like other merchants who solicit transactions with consumers, debt buyers are covered when they propose transactions to resolve outstanding debts.

The debt-collection industry affects thousands of Ohio consumers yearly. The Federal Trade Commission ("FTC") receives more consumer complaints about debt collectors than about any other industry. Federal Trade Commission: The Structure and Practices of the Debt Buying Industry i (Jan. 2013) ("Structures and Practices"). And debt-collection complaints are frequently among the top complaints received by the Ohio Attorney General's Office. For example, in 2012 complaints filed about debt collectors were the second-most common type of complaint among more than 30,500 total consumer complaints filed with the Office. 2012 Consumer Protection Annual Report, (available at http://www.scribd.com/doc/123383844/2012-Consumer-Protection-Section-Annual-Report (last visited Aug. 13, 2013). Both the FTC and the Ohio Attorney General frequently field complaints that debt collectors and debt buyers act on incomplete information or seek to collect debts or collect amounts that consumers assert they do not owe.

Debt collectors, including debt buyers, often have "inadequate" information about debts, which "results in attempts to collect from the wrong consumer or to collect the wrong amount." Federal Trade Commission, Collecting Consumer Debts: The Challenge of Change 24 (Feb. 2009). Debt buyers frequently use this information vacuum to sue consumers for debts allegedly owed without possessing documentation that proves the consumer owes the amount alleged in the complaint or even owes the debt at all. *See, e.g.*, Structure and Practices at 30 n.124 (collecting studies). Often the complaint does not contain enough information "to allow the

consumer to admit or deny the allegations and assert affirmative defenses." *Id.* at 33; *see also Asset Acceptance Corp. v. Proctor*, 156 Ohio App. 3d 60, 2004-Ohio-623, ¶ 13 (4th Dist.) (debt holder "failed to provide documentation of the charges, debits, or credits that would permit [the creditor], the trial court, or this court to calculate the balance claimed to be due"). Debt collectors may contact consumers and attempt to collect on debts that are often so old that the debt is uncollectible because the statute of limitations has run. *See* Structure and Practices at 45 (noting the "risk that consumers will be subject to a default judgment on a time-barred debt").

Despite these practices, debt buyers collecting their own debt often have significant room to reach a pre-litigation settlement because debt buyers purchase debts for pennies on the dollar. *See, e.g.*, Robert M. Hunt, Collecting Consumer Debt in Am., Business Rev. 15 (2d Q 2007) (bad credit-card debt sold for average of 4.5 cents per dollar). Therefore, as in this case, debt buyers are motivated to hound consumers and try to persuade them to settle the debt with them.

The CSPA provides a remedy to consumers and empowers the Attorney General to combat these practices. The CSPA unquestionably covers the debt buyers that engage in these practices because the buyers, at minimum, "solicit[]" consumers to "transfer . . . a service" to them when the debt buyers offer to settle the consumer's debt without the need for a lawsuit. R.C. 1345.01(A). That makes debt buyers no different from advertisers who solicit the sale of goods or sellers who propose an unconsummated transaction. Advertisers and sellers who propose transactions are covered by the CSPA. And so are debt buyers who solicit transactions with consumers. Furthermore, because debt buyers are not financial institutions, they do not satisfy the CSPA's financial-institution exemption. The Court should therefore hold that debt buyers collecting on credit card debt are subject to the CSPA.

STATEMENT OF AMICUS INTEREST

The State has a substantial interest in protecting consumers from unfair and deceptive debt collection practices. The State has an equally strong interest in the consistent interpretation and enforcement of Ohio's consumer protection laws. The CSPA protects consumers from "unscrupulous suppliers in a manner not afforded under the common law." *Elder v. Fischer*, 129 Ohio App. 3d 209, 214 (1st Dist. 1998). The CSPA is the principal tool for consumers (and the Attorney General) for remedying unfair, deceptive, or unconscionable business practices. *See* R.C. 1345.09 and 1345.07(A) and (B).

The CSPA plays a key role in remedying unfair and deceptive debt-collection practices. The debt buyers in this case urge a categorical exemption for their industry, despite the widespread abuses in the industry that consumers report to the FTC and the Ohio Attorney General. The State opposes any narrowing of the protection that the CSPA provides consumers against unfair and deceptive practices by debt collectors and debt buyers or any interpretation of the CSPA that undercuts the imperative that the CSPA should be "liberally construed." *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27, 29 (1990).

STATEMENT OF THE CASE AND FACTS

Sandra Jarvis opened and used a First USA credit card account that was later acquired by JP Morgan Chase. After Jarvis missed some payments, Chase marked the account delinquent. Chase then sold the account to First Resolution Investment Corporation (FRIC), a debt buyer, who in turn hired First Resolution Management Corp. (FRMC) to communicate with Jarvis. FRMC reached out to Jarvis by letter several times, proposing that Jarvis "resolve" the debt "without the need for litigation" by "making satisfactory payment arrangements." First Am. Compl., Ex. 4. FRMC's overtures to "resolve" the debt "on a voluntary basis" did not succeed, *id.*, so FRIC hired Cheek Law Offices to pursue the debt. First Am. Compl., Ex. 5.

The law firm sued Jarvis, seeking more than $16,000 plus future interest at 24%. Cheek did not attach a copy of the original credit card agreement to the complaint and Jarvis never received the summons or complaint. Opp. Jur. at 5. When Jarvis did not answer, FRIC converted the complaint into a default judgment. *Id.*

When Jarvis learned of the complaint and default judgment, she hired a lawyer and moved to vacate the default judgment. *Id.* The parties stipulated to vacate the default judgment. *Id.* Next, Jarvis filed a counterclaim alleging, among other things, a CSPA violation. *Id.* FRIC then dismissed its complaint and the trial court realigned the parties making Jarvis the plaintiff and FRIC, FRMC, Cheek, and Parri Hockenberry (an attorney at Cheek Law Offices) the defendants. The trial court granted summary judgment to all defendants and Jarvis appealed. *Id.*

The Ninth District reversed, and defendants appealed. One proposition asks whether the CSPA covers debt buyers. Jur. Mem. at 13. The Ninth District's remand implicitly held that debt buyers are covered, but the opinion does not discuss the question. *See Jarvis v. First Resolution Inv. Corp.*, No. 26042, 2012-Ohio-5653 ¶¶ 36-37 (9th Dist.) ("App. Op.").

ARGUMENT

***Amicus Curiae* State of Ohio's Proposition of Law:**

> *An entity whose usual and regular course of business is to solicit consumers for payment on debts owned by that entity is a "supplier . . . engaged in the business of effecting or soliciting consumer transactions" within the meaning of the Ohio Consumer Sales Practices Act.*

Debt collection is usually one of three types—direct collection by the entity to whom the debt is originally owed (for example, an appliance seller who offers credit), third-party collection on behalf of a debt owner (a debt-collection company) or direct collection by the debt buyer (an entity whose business is buying and collecting on debt). This case is about the last type. FRIC purchased Jarvis's debt from Chase, and then proposed that FRIC and Jarvis reach a mutual

agreement to resolve the debt. After the sale, Chase had no relationship with Jarvis. After the sale, FRIC (through its agents FRMC and Cheek) offered Jarvis the option of resolving her debt "without the need for litigation." FRIC wanted to collect the Jarvis debt owed to FRIC, not a debt owed to someone else, and not a debt FRIC initiated. This case therefore provides no opportunity to address whether the CSPA covers creditors who collect a debt they initiated or third parties who collect debts on behalf of debt owners.

A. FRIC solicited a "consumer transaction" when it offered Jarvis non-litigation options for satisfying her debt.

FRIC proposed a transaction when it solicited Jarvis for payment of her debt. A "consumer transaction" includes a "transfer of . . . a service" or a "solicitation" to transfer a service. R.C. 1345.01(A). FRIC solicited Jarvis, culminating in a "final notice" on September 16, 2009. First Am. Compl. Ex. 4. The final notice indicated that FRMC's earlier "attempts to resolve this matter with [Jarvis] on a voluntary basis [had] been unsuccessful." *Id.* The notices were all solicitations, all offers to resolve the outstanding debt on mutual terms. Both the CSPA and case law interpreting the CSPA show that these offers to resolve the debt were solicitations to transfer a service and are therefore consumer transactions under R.C. 1345.01(A).

The text of the CSPA implicitly recognizes that offers to resolve a debt are consumer transactions. The CSPA specifically covers transactions by "nonbank mortgage lenders." R.C. 1345.01(A). If a nonbank lender offers a loan modification to the debtor, the transaction is a solicitation to "transfer . . . a service" to the debtor and is covered by the CSPA. *Id.* The analysis is no different if the loan modification involves credit-card debt instead of housing debt.

And in another statute the General Assembly explicitly recognizes and regulates the "services" of adjusting or compromising debts. R.C. 4710.01. Violations of chapter 4710 expose the debt adjuster to penalties under the CSPA. *See* R.C. 4710.04. Chapter 4710 further

regulates a subset of those regulated by the CSPA, but it also shows that the General Assembly regards offers to resolve debts with consumers as transactions that should be regulated. Both statutes are part of how "Ohio protects its citizens from predatory and potentially harmful debt relief practices." *Bumpus v. Ward*, 5th Dist. No. 2012-CA-5, 2012-Ohio-4674, ¶ 3 (citing Chapter 4710 and the CSPA).

Case authority confirms that offers to resolve or compromise a debt are consumer transactions. "[I]t is not necessary that a sale actually take place before a supplier may be held liable for deceptive acts." *Weaver v. J.C. Penney Co.*, 53 Ohio App. 2d 165, 168-69 (8th Dist. 1977). A solicitation is enough. *See Utley v. M.T. Auto., Inc.*, 9th Dist. Nos. 24482 and 24483, 2009-Ohio-5161, ¶ 8. Negotiating an agreement is a solicitation under the CSPA. *See, e.g.*, *McDonald v. Bedford Datsun*, 59 Ohio App. 3d 38, 41 (8th Dist. 1989) (unconsummated sale of a car). And offers to resolve a debt are simply one subspecies of solicitations that are consumer transactions under the CSPA. *See, e.g.*, *Hagy v. Demers & Adams, LLC*, No. 2:11-cv-530, 2011 U.S. Dist. LEXIS 141466, at *3, 31 (S.D. Ohio Dec. 7, 2011) (denying motion to dismiss of law firm working for mortgage holder that made representations about a deed in lieu of foreclosure in exchange for waiving a "deficiency" on a mortgage).

B. The CSPA's financial-institution exemption does not apply to FRIC.

FRIC (and its agents FRMC and Cheek) are suppliers engaged in a consumer transaction because they solicited Jarvis to enter a mutual resolution to her outstanding debt; and no exemption in the CSPA excludes FRIC. Nothing in the CSPA specifically exempts solicitations by debt buyers. Still, FRIC seeks shelter in the financial institutions exemption because the debt it bought traces to a bank credit card. FRIC, though, is not a financial institution. Although the origination of the underlying debt may have been an exempt transaction because a financial institution extended credit to Jarvis, FRIC's solicitation to collect on that debt is a new, distinct

transaction. That new transaction involves no entity exempt from the CSPA. The financial-institutions exemption does not travel with the debt, and that conclusion finds support in the CSPA, case law, and common sense.

The text of the CSPA shows that the financial-institutions exemption immunizes entities, not transactions. The exemption for banks and financial institutions (R.C. 1345.01(A); R.C. 5725.01) exempts transactions with certain entities, not transaction because of the kind of transaction involved. R.C. 5725.01(A). An example from the text illustrates. The CSPA covers mortgages extended by certain entities, but not others. The difference turns on whether a bank or a "nonbank" lender extends the mortgage. R.C. 1345.01(A). The CSPA covers a "residential mortgage" negotiated between a "nonbank" mortgage lender and a consumer. R.C. 1345.01(A). But the CSPA excludes residential mortgages between a "national bank" and a consumer. R.C. 1345.01(A); R.C. 5724.01(A)(1). FRIC and its agents are not "financial institutions" (or any other entity exempt from the CSPA). The transaction FRIC solicited is therefore a CSPA consumer transaction. The Ninth District correctly remanded with instructions to consider whether FRIC's actions violated the CSPA. App. Op. at ¶ 36.

Case authority also rejects FRIC's argument that its solicitations are exempt from the CSPA. Courts consistently reject "derivative use" of the exemptions and limit exclusion to the specifically named entities. *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783, 809 n.42 (S.D. Ohio 2006). Thus, a bank is exempt, but a bank subsidiary is not. *Kline v. Mortg. Elec. Registration Sys.*, No. 3:08-cv-408, 2010 U.S. Dist. LEXIS 31215, at *15 (S.D. Ohio Mar. 30, 2010) ("[T]he Ohio statute does not define 'financial institutions' to include subsidiaries of national banks, merely by virtue of their status as such subsidiaries."); *Munger v. Deutsche Bank*, No. 1:11-cv-00585, 2011 U.S. Dist. LEXIS 77790 (N.D. Ohio July 18, 2011) (same).

The entity exemptions carve with a precise blade. Even if an initial transaction is exempt because it involved a bank and a consumer, later transactions—even related transactions—with non-exempt entities are covered. *See, e.g.*, *Munger*, 2011 U.S. Dist. LEXIS 77790, at *30 (collecting cases holding that entities are "not generally exempt from the [CSPA], even where the original . . . transaction is between a 'financial institution' and its customer"). And nothing in the statute supports the notion that a bank assignee shares the exemption limited to banks. *Lee v. Javitch, Block & Rathbone, LLP*, 522 F. Supp. 2d 945, 956 (S.D. Ohio 2007) ("[N]o definitive Ohio authority suggests that an assignee of a financial institution . . . is also entitled to the financial institution exemption"), *rev'd on other grounds*, 601 F.3d 654 (6th Cir. 2010); *Kline v. Mortgage Elec. Registration Sys.*, 2011 U.S. Dist. LEXIS 60733, at *17 (S.D. Ohio Mar. 29, 2011) (CSPA "does apply to the assignee or purchaser of a mortgage").

Common sense tracks the case results. The exemptions exclude transactions with certain entities, not transactions qua transactions. Each exemption—for doctors, banks, lawyers, and so on—recognizes that the entities are otherwise regulated by the Revised Code, by exacting licensing standards, by professional ethics, or by all three. Customers of exempt entities have other remedies, so the entity exemptions make sense. For example, a "bank customer has other adequate remedies if a bank should engage in deceptive or unfair conduct in making a loan or issuing a credit card." *Lee*, 522 F. Supp. 2d at 956. "But if the financial institution sells a past due or defaulted debt at a deep discount to an unrelated party, whose only business is debt collection, the sound policy for the financial institution exemption evaporates." *Id.*

When the entity exits the picture (as Chase did here), the exemption exits with it. This is because no comparable state regulation otherwise covers debt buyers who solicit transactions with consumers. The CSPA is the remedy for consumers dealing with debt collectors and debt

buyers and the primary tool of the Ohio Attorney General to fight unfair practices in this industry. When FRIC bought the Jarvis debt from Chase, it eliminated the reason for an entity-based exemption. FRIC and its agents solicited a debt-resolution transaction with Jarvis; the financial-institutions origin of that debt is irrelevant.

Despite this logic and these authorities, FRIC says the CSPA does not reach them. FRIC relies on the recent decision in *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St. 3d 31, 2013-Ohio-1933. *Anderson* considers whether the CSPA covers a mortgage servicer, and concludes that it does not. The Court reasoned that consumer interactions with mortgage servicers are exempt both because they are "associated with a pure real estate transaction" and they are provided "to a financial institution," not a consumer. *Id.* ¶¶ 14, 17. Neither rationale exempts FRIC from the CSPA.

Unlike a mortgage servicer, FRIC "solicit[ed]" the "transfer of . . . a service" to Jarvis because FRIC wanted to collect the debt for itself. A mortgage servicer, in contrast, "neither sells nor gives" (nor solicits) the consumer for the "services it provides to the owner of the mortgage." *Id.* ¶ 17. FRIC sought a relationship with Jarvis so that FRIC could profit. That is the heartland of CSPA coverage, and FRIC is indistinguishable from suppliers who solicit transactions for cars, electronics, or home-repair services.

Also unlike a mortgage servicer, FRIC's solicitations are not "associated with" pure real estate transactions. *Id.* at ¶ 13. FRIC's proposed transaction was simply an offer to resolve a debt. It has no connection to real estate. That holds true even for the underlying credit agreement that generated the debt—it had nothing to do with real estate.

FRIC's citation to *Anderson* therefore does nothing to advance its argument that it is outside the coverage of the CSPA. FRIC cannot claim, as did the mortgage servicers, that it

"does not engage in the business of effecting or soliciting consumer transactions." *Id.* at ¶ 3. Nor can FRIC say that it does "not seek to enter into consumer transactions with borrowers." *Id.* FRIC was never collecting on behalf of Chase or anyone else; it was soliciting payment for debt it owned. As a debt buyer, FRIC and its agents are subject to the CSPA.

CONCLUSION

For these reasons, the Court should address Proposition of Law IV by holding that debt buyers collecting on credit card debt are subject to the Consumer Sales Practices Act.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

MICHAEL HENDERSHOT* (0081842)
Chief Deputy Solicitor
**Counsel of Record*
MELISSA G. WRIGHT (0077843)
Senior Assistant Attorney General
TERESA A. HEFFERNAN (0080732)
TRACY MORRISON DICKENS (0082898)
JEFFREY LOESER (0082144)
Associate Assistant Attorneys General
BRITTANY M. STEELE (0089188)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
michael.hendershot@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellee Sandra J. Taylor Jarvis was served by U.S. mail this 13th day of August, 2013 upon the following counsel:

Jeffrey C. Turner
John Langenderfer
Kevin A. Lantz
Surdyk, Dowd, & Turner Co., L.P.A.
One Prestige Place, Suite 700
Miamisburg, Ohio 45342

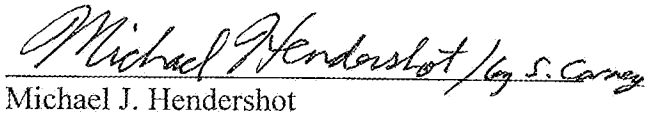
Counsel for Appellants
First Resolution Investment Corp. and
First Resolution Management Corp.

James F. Burke, Jr.
John J. Horrigan
Burke & Horrigan
1660 West 2d Street
900 Skylight Office Tower
Cleveland, Ohio 44113

Counsel for Appellee
Sandra J. Taylor Jarvis

Boyd W. Gentry
Law Office of Boyd W. Gentry, LLC
2661 Commons Blvd., Suite 100
Beavercreek, Ohio 45431

Counsel for Appellants
Cheek Law Offices, LLC and
Attorney Parri Hockenberry



Michael J. Hendershot
Chief Deputy Solicitor

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