NO. 18-328

IN THE

Supreme Court of the United States

KEVIN ROTKISKE,

Petitioner,

v.

PAUL KLEMM, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF FOR THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PETITIONER

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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INTEREST OF *AMICUS CURIAE*[1]

The **National Consumer Law Center** is a non-profit research and advocacy organization that focuses on the legal needs of low-income, financially distressed, and elderly consumers. Founded at Boston College Law School in 1969, NCLC is a Section 501(c)(3) non-profit legal aid organization that employs many attorneys and advocates with twenty or more years of specialized consumer law expertise.

NCLC has been a leading source of legal and public policy expertise on consumer issues for Congress, state legislatures, agencies, courts, consumer advocates, journalists, and social service providers for fifty years. NCLC is the author of a twenty-one-volume Consumer Credit and Sales Legal Practice Series. NCLC's mission is to protect the rights of economically vulnerable consumers through education, publications, policy analysis, and advocacy.

SUMMARY OF ARGUMENT

Debt collection, which affects millions of Americans each year, is often accompanied by deceptive or unfair practices, particularly by the third-party debt collectors that are subject to the Fair Debt Collection Act (FDCPA). The FDCPA was intended to curb such abuse, but that purpose will be impaired if consumers are not given a fair

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

opportunity to pursue violations that go undetected when they occur. For this reason, the one-year statute of limitations should not be construed as an absolute bar to claims that are brought beyond a year from the date of the violation.

ARGUMENT

I. DEBT COLLECTION ACTIVITY IS PERVASIVE IN THE UNITED STATES AND NEGATIVELY IMPACTS CONSUMERS WHO ARE LOW-INCOME, ELDERLY, OR PERSONS OF COLOR IN PARTICULAR

A. Debt Collection Is Prevalent

Astonishingly, approximately one in three adults in the United States has a debt in collection reported on their credit reports. "About one-in-three consumers with a credit record (32 percent) indicated that they had been contacted by at least one creditor or collector trying to collect one or more debts during the year prior to the survey."[2] Just one of the many debt buying companies, Encore Capital Group, has claimed that 20 percent of Americans either owe it money or have owed it money in the past.[3]

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[2] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 5, 46 (Jan. 2017), *available at*: https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (hereinafter CFPB 2017 Consumer Views Report).

[3] Chris Albin-Lackey, Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 11 (Jan. 2016) *available at* https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor.

A natural consequence of the prevalence of debts in collection is the high frequency of contacts with debt collectors. By one estimate, debt collectors contact Americans more than a *billion* times a year.[4]

Unsurprisingly, contacts with debt collectors generate many complaints. Debt collection is consistently at or near the top of complaints made to the Federal Trade Commission (FTC)[5] and the Consumer Financial Protection Bureau (CFPB).[6]

In the CFPB's 2017 national survey of consumer experiences with debt collection, respondents who had been contacted about debts reported specific debt collection problems: 53 percent said the debt was not theirs, was owed by a family member, or was for the wrong amount; 63 percent said they were contacted too often; 36 percent were

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[4] Robert Hunt, *Understanding the Model: The Life Cycle of a Debt*, presented at FTC-CFPB Roundtable "Life of a Debt: Data Integrity in Debt Collection," 10 (June 6, 2013), *available at* https://www.ftc.gov/news-events/events-calendar/2013/06/life-debt-data-integrity-debt-collection.

[5] *See* Federal Trade Commission, Consumer Sentinel Network: Data Book 2018, at 7 (Feb. 2019), *available at* https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2018/consumer_sentinel_network_data_book_2018_0.pdf (reporting that with more than 475,000 complaints generated in 2018, debt collection was the second leading source of complaints collected by the FTC).

[6] Consumer Fin. Prot. Bureau, Consumer Response Annual Report: January 1–December 31, 2018, at 1 (Mar. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf (hereinafter CFPB 2019 Report) (reporting that the CFPB received approximately 81,500 complaints about debt collection in 2018, making it one of the most common topics of consumer complaints regarding financial products and services that year).

called after 9 p.m. or before 8 a.m.; and 27 percent had been threatened.[7] Complaints made to the CFPB in 2018 included many by consumers stating that they did not owe the debt or that the amount was incorrect.[8]

Because complaints about debt collection are likely severely underreported, these statistics do not paint a comprehensive picture. Many people do not file complaints with government agencies because they lack knowledge of their rights under the Fair Debt Collection Practices Act; do not know where or how to file a complaint; have limited access to the internet; or have limited English proficiency.[9]

B. Debt Collection Litigation Is Also Prevalent

Technology has increased the ways collectors contact consumers, including the use of automated telephone dialing systems to automatically dial thousands of numbers at a time,[10] and has enabled

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[7] CFPB 2017 Consumer Views Report, *supra*, at 5, 46.

[8] CFPB 2019 Report, *supra*, at 9.

[9] Fed. Trade Commission, Annual Report 2011: Fair Debt Collection Practices Act 2–3 (Mar. 2011), *available at* https://www.ftc.gov/reports/federal-trade-commission-annual-report-2011-fair-debt-collection-practices-act (noting consumers often only complain to the debt collector or the underlying creditor).

[10] Ernst & Young, The Impact of Third-Party Debt Collection on the US National and State Economies in 2016, at 5 (Nov. 2017).

collectors to use sophisticated software to maintain accounts and accept payments online.[11]

These advances in technology have also facilitated the proliferation of the debt-buying industry and helped fuel debt collection litigation: large numbers of accounts can be purchased cheaply and transferred via electronic spreadsheets or data files with the press of a button.[12] Many debt collection law firms specialize in filing a high volume of consumer collection suits. *See, e.g.*, *Bock v. Pressler & Pressler, LLP*, 30 F. Supp. 3d 283, 290 (D.N.J. 2014) (one collection attorney "reviewed 673 complaints" in one day, approving 663 that were then filed; some days that one attorney reviewed for court filing as many as 1,000 collection lawsuits); *Commonwealth v. Lustig, Glaser & Wilson, P.C.*, Complaint ¶¶ 22–23 (Mass. Super. Ct. Dec. 21, 2015) (stating that the debt collection law firm filed more than 100,000 collection lawsuits from 2011 through 2015).[13]

In a 2015 CFPB survey, 15 percent of all consumers who were contacted about a debt in

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[11] Consumer Fin. Prot. Bureau, Study of Third-Party Debt Collection Operations 24, 33 (July 2016), *available at* https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf.

[12] *See, e.g.,* Fed. Trade Commission, The Structure and Practices of the Debt Buying Industry 35 (Jan. 2013), *available at* https://www.ftc.gov/reports/structure-practices-debt-buying-industry.

[13] *See also* The Legal Aid Society, et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower Income New Yorkers 1–2 (May 2010) (finding that five law firms filed roughly two-thirds of the 457,322 debt buyer lawsuits filed between January 2006 and July 2008).

collection were sued.[14] Combined with the estimate that 70 million Americans were contacted about a debt in a year, this figure translates into more than 10 million Americans being sued in debt collection lawsuits each year.[15]

But advances in technology in the field of collection do not correlate with higher quality collection efforts. To the contrary, for example, the robo-signing deficiencies that came to light during the 2009 foreclosure crisis also infiltrated the debt collection industry. Thus, in *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 966-69 (N.D. Ohio 2009), the court found that an affidavit signed by a "specialist" who signed 200 to 400 affidavits per day, falsely claiming to have personal knowledge of its contents, was misleading and violated the FDCPA. Mass filings of debt collection cases have also resulted in the mass entry of default judgments, none of which are obtained on the merits, with studies showing such defaults occurring in 70 to 94 percent of cases.[16] The FTC reported that, at a

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[14] CFPB 2017 Consumer Views Report, *supra*, at 27.

[15] *See* Paula Hannaford-Agor, et al., Nat'l Ctr. for State Courts, The Landscape of Civil Litigation in State Courts iii (2015), *available at* https://ncsc.contentdm.oclc.org/digital/collection/civil/id/133/(hereinafter Landscape of Civil Litigation Report).

[16] Peter Holland, *Junk Justice: A Statistical Analysis of 4400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179, 226 (2014) (comparing the results of seven prior studies between 1967 and 2010 and finding that between 70 percent and 94 percent of consumers "failed to respond" to collection lawsuits) (hereinafter Junk Justice Report); Ellen Harnick, Lisa Stifler, & Safa Sjadi, Ctr. for Responsible Lending, Debt Buyers Hound Coloradans in Court for Debts They May Not Owe (Dec. 2016), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/colorado_

forum in 2010, "panelists from throughout the country estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent."[17]

The National Center for State Courts (NCSC) conducted a study of all non-domestic relations civil cases disposed of between July 1, 2012 and June 30, 2013 in 152 courts with civil jurisdiction in 10 urban counties. Summarizing its findings, the NCSC wrote: "State courts are the preferred forum for plaintiffs in [debt collection, landlord/tenant, foreclosure and small claims] cases for the simple reason that in most jurisdictions state courts hold a monopoly on procedures to enforce judgments. Securing a judgment . . . is the mandatory first step to being able to initiate garnishment or asset seizure proceedings."[18]

Many, if not most, defaults occur because consumers do not receive actual notice of lawsuits, oftentimes because of problems with service of process, another prevalent problem in debt collection cases. For example, the New York attorney general's

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debt_buying.pdf ("A review of 375 randomly selected cases filed by four debt buyers in the county courts in five Colorado counties from 2013 through 2015 revealed that 71 percent of the cases resulted in default judgments against the individuals sued.").

[17] Fed. Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration 7 (July 2010), *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 (also collecting studies).

[18] Landscape of Civil Litigation Report, *supra*, at iii, v.

office alleged that a process serving company failed to properly serve consumers across New York State, resulting in approximately 100,000 default judgments.[19]

C. Debt Collection Particularly Impacts Vulnerable Consumers and Consumers of Color

Many people impacted by debt collectors are seniors: for older adults seeking assistance from legal hotlines, collection-related matters were the second-most common type of case in 2017.[20] Those impacted also include those in the military: approximately two out of every five complaints filed by servicemembers with the CFPB were about debt collection, and servicemembers were on average more likely to complain about debt collection than all other consumers filing complaints at the CFPB.[21]

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[19] Office of the N.Y. Att'y Gen., Press Release, Attorney General Cuomo Sues to Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection Investigation (July 22, 2009), *available at* https://ag.ny.gov/press-release/attorney-general-cuomo-sues-throw-out-over-100000-faulty-judgments-entered-against-new.

[20] Ctr. for Elder Rights & Advocacy, Senior Legal Helplines Annual Report 2017, at 8 (Oct. 2018), *available at* https://legalhotlines.org/resources/2017-senior-legal-helplines-annual-report/

[21] Consumer Fin. Prot. Bureau, 50 State Snapshot of Servicemember Complaints: A Nationwide Look at Complaints 2 (Oct. 2017), *available at* https://files.consumerfinance.gov/f/documents/cfpb_complaint-snapshot-servicemembers-50-state_report.pdf (stating 39 percent of complaints by servicemembers, veterans, and their families are about debt collection, compared to 26 percent of complaints from non-servicemembers).

Studies have found racial and ethnic disparities in who is affected by debt. One study found that 44 percent of non-white respondents were contacted about a debt in collection, compared to 29 percent of white respondents, and 39 percent of Hispanic respondents were contacted about a debt in collection, compared to 31 percent of non-Hispanic respondents.[22] Disparities are prevalent in who is sued in collection lawsuits as well.[23] Default judgments are also more prevalent against people living in communities of color.[24]

Vulnerable consumers are almost overwhelmingly unrepresented in debt collection lawsuits, leading to a significant power and knowledge imbalance. Studies have found as little

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[22] CFPB 2017 Consumer Views Report, *supra*, at 17–18.

[23] *See, e.g.,* Junk Justice Report, *supra*, at 218 (reporting that "[d]ebt buyers sued disproportionately in jurisdictions with larger concentrations of poor people and racial minorities); Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 Fla. L. Rev. 1, 3 (2008) (concluding that "civil litigation is disproportionately concentrated in cities and counties with lower median income and homeownership rates; higher incidences of poverty and crime; and higher concentrations of relatively young and minority residents").

[24] *See, e.g.*, Mary Spector & Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 Hastings L. J. 1427, 1458 (2016) (finding "a somewhat higher likelihood of default judgments in precincts with a higher non-White population"); Annie Waldman & Paul Kiel, ProPublica, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas 22 (Oct. 8, 2015) ("Data from St. Louis indicated that suits against residents of majority black census tracts were more likely to result in default judgments or consent judgments and residents of majority black census tracts were less likely to be represented by an attorney when they were sued.").

as 1% of consumers have the assistance of an attorney.[25]

D. The FDCPA Provides Important Protections for Consumers

The FDCPA was passed by Congress in 1977 with bipartisan support and became law in 1978. 15 U.S.C. §§ 1692–1692p. It was enacted "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection practices." 15 U.S.C. § 1692(e). Congress found that abundant evidence existed of the use of "abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Congress further recognized that regulating debt collection was critically important because "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to

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[25] *See* Task Force to Expand Access to Civil Legal Services in N.Y., Report to the Chief Judge of the State of New York 16 (Nov. 2010) (only 1% of debtor-defendants in New York has legal assistance), *available at* http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT.pdf; Paul Kiel, ProPublica, So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine (May 5, 2016) (finding 99% of defendants sued by New Jersey collection law firm Pressler & Pressler did not have attorneys; 97% of defendants in debt collection cases filed in New Jersey's lower level court in 2013 did not have attorneys; and 91% of defendants in Missouri debt collection cases in 2013 did not have attorneys); Junk Justice Report, *supra*, at 210 (stating that consumers were represented by an attorney in only 2% of debt collection lawsuits in Maryland).

invasions of individual privacy." 15 U.S.C. § 1692(a). The FDCPA provides for a private right of action, statutory penalties, and attorney's fees. 15 U.S.C. § 1692k.

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the CFPB and gave it enforcement and rule-making authority over debt collectors.[26] 15 U.S.C. § 1692l(d). Both the FTC and the CFPB have enforcement authority to investigate and penalize bad actors and conduct. In the CFPB and FTC's most recent report to Congress,[27] the FTC reported that in 2018 it had obtained more than $58.9 million in judgments, and secured bans against 32 companies from working in the debt collection industry.[28] In the same report, the CFPB indicated it was engaged in six public enforcement actions arising from alleged FDCPA violations.[29]

Congress intended the FDCPA to be "primarily self-enforcing" by private attorneys general.[30] Therefore, in addition to enforcement

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[26] On May 7, 2019, the Bureau issued a Notice of Proposed Rulemaking (NPRM) to implement the FDCPA and is currently seeking comments from the public. Consumer Fin. Prot. Bureau, Press Release, Consumer Financial Protection Bureau Proposes Regulations to Implement the Fair Debt Collection Practices Act (May 7, 2019).

[27] Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act (Mar. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf

[28] *Id.* at 3.

[29] *Id.* at 23.

[30] S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

actions against debt buyers by the CFPB and FTC, consumers have brought numerous cases alleging various debt collection abuses since the FDCPA was enacted. It would contravene the salient purposes of the Act to close the door to all such private enforcement actions without exception at the expiration of one year.

II. FDCPA CLAIMS OFTEN EVADE DETECTION DURING THE YEAR AFTER THE VIOLATION OCCURS

FDCPA claims can evade detection during the one-year statute of limitations period in a wide variety of contexts, despite the due diligence of the consumer. The examples set forth below show scenarios in which consumers did not file suit within a year of the violation because, through no fault of their own, they did not learn of the FDCPA violation until the one-year period had expired. Cases are discussed regardless of the court's analytical basis for permitting the claim to proceed.

A. Improper or Untimely Service of Process Can Impede the Timely Assertion of FDCPA Claims Based on the State Court Proceeding

Improper or untimely service of process in a state court collection action initiated by the debt collector, as occurred in the instant case, sometimes happens either because the debt collector deliberately causes it or because the debt collector knowingly permits it.

1. Improper or Untimely Service of Process Was Deliberately Caused

In *Bevan v. Butler & Associates, P.A.*, 2017 WL 6557418 (D. Kan. Dec. 22, 2017), the defendant law firm was alleged to have caused the sheriff to serve plaintiff at an address at which it knew plaintiff did not reside, thereby making "false, deceptive, or misleading representation[s] or means in connection with the collection of [a] debt." 15 U.S.C. § 1692e(10). The sheriff filed a return of service receipt showing the sheriff had served plaintiff by tacking notice at this address and mailing notice to the same address, as permitted by Kansas law. The law firm then took a default judgment and, more than a year later, garnished plaintiff's wages. Plaintiff then sued the debt collector for false representations in connection with its collection activities. The court held that equitable tolling applied because a reasonable person would have no reason to have known about these activities, including the defendant's instructions for service to the sheriff, until her wages were garnished.

Along the same lines, equitable tolling was also held to apply in *Greco-Rambo v. Prof'l Collection Consultants*, 2011 WL 3759676 (S.D. Cal. Aug. 25, 2011). In this case, service was purportedly made at plaintiff's former residence when the residence, a foreclosed property, was locked and boarded up and, despite knowing that plaintiff was never properly served, defendants went ahead with obtaining a default judgment.

2. Improper or Untimely Service of Process Was Knowingly Permitted

Butler v. J.R.S.-I, Inc., 2016 WL 1298780 (N.D. Ill. Apr. 4, 2016) is illustrative of violations where the debt collector knew or should have known that service was inadequate. There, a process server left service of a collection complaint with a third party. Plaintiff, however, had not lived at that address since her home had been foreclosed upon four years earlier and sold at a judicial sale. The defendant later obtained a default judgment, but she did not learn of it until her wages were garnished many months later. Within four months of receiving notice, she sued under the FDCPA, asserting that defendants had made false and misleading representations about amounts allegedly owed, in violation of 15 U.S.C. §§ 1692e and 1692f. The court held that the statute of limitations was tolled between the date of the alleged violations and the date of garnishment.

Similarly, in *Bynes v. Liberty Acquisitions Servicing, LLC*, 2012 WL 6962888 (D. Colo. Nov. 8, 2012) (mag.), *adopted by* 2013 WL 360010 (D. Colo. Jan. 30, 2013), the plaintiff was allegedly served by a process server at the home he previously owned before it was foreclosed upon five years earlier. This violates 15 U.S.C. § 1692i, which forbids filing collection actions in a venue where the consumer does not reside at the time of suit unless the contract was signed there. At an evidentiary hearing held in response to his invocation of the discovery rule, he proved he was living in another city than the one in which he had allegedly been served, and his claim was permitted to proceed.

To similar effect is *Kubiski v. Unifund CCR Partners*, 2009 WL 774450 (N.D. Ill. Mar. 25, 2009). Plaintiff alleged that defendant had filed suit on a time-barred debt,[31] but she had not been served with the complaint in the state court action until two years after filing, and defendant had made just three attempts at service in that two-year period. Although plaintiff filed her lawsuit more than a year after the collection action was filed, the court held it was not barred by the statute of limitations, reasoning that "[i]f the statute of limitations were to run while a defendant delayed service, the result would be absurd and in contradiction of the policy behind the FDCPA." *Id.* at *2 (quoting *Andersen v. Gamache & Meyers, P. C.,* 2007 U.S. Dist. LEXIS 39446, at *23 (E.D. Mo. May 31, 2007)).

B. False Affidavits of Service Cause Violations to Go Undetected

Outright false affidavits of service of process also have been found to justify extending the one-year FDCPA limitation period in several cases.

In *Sykes v. Mel Harris & Associates, LLC*, 757 F. Supp. 2d 413, 419 (S.D.N.Y. 2010), the court found plaintiffs had sufficiently alleged that debt buyers and their attorneys engaged in a massive scheme to fraudulently obtain default judgments against them and more than 100,000 other consumers by failing to effect proper service and then misrepresenting that

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[31] Cases holding that threatening to sue and suing on a time-barred debt violate the FDCPA prohibitions in 15 U.S.C. §§ 1692e and 1692f against unfair and deceptive conduct are collected in § 7.2.12.3.1 of National Consumer Law Center, Fair Debt Collection (9th ed. 2018). *See also Midland Funding, LLC v. Johnson*, ___U.S.___, 137 S. Ct. 1407, 1413, 197 L. Ed. 2d 790 (2017).

service had been accomplished by filing false affidavits of service, as well as making additional misrepresentations in affidavits of merit, thus violating 15 U.S.C. § 1692e(10). The court applied equitable tolling because the defendants had concealed plaintiffs' cause of action, and plaintiffs had not failed to act diligently.[32]

Likewise, in *Coble v. Cohen & Slamowitz, LLP*, 824 F. Supp. 2d 568 (S.D.N.Y. 2011), plaintiffs alleged that the defendant law firm had violated the FDCPA by relying on false affidavits of service to obtain default judgments and collecting on the judgments despite having reason to know that the affidavits were false. Plaintiffs cited an affidavit of an employee of the process server which stated that the server's illegal practices, including making no attempts at service before effecting service by the "nail & mail" method, were pervasive, and that defendants had been on notice of these practices. As in *Sykes*, equitable tolling was applied.

In *Sneed v. Winston Honore Holdings, LLC*, 2017 WL 467686 (N.D. Ill. Feb. 3, 2017), plaintiff alleged that defendant had filed a false return of service that claimed to have executed substitute service upon plaintiff's mother regarding a foreclosure action. Plaintiff did not learn of the foreclosure proceedings until over a year after the alleged service, when he received a postcard advertising the upcoming sale of his own house. Applying the discovery rule that the statute of limitations begins running only when the plaintiff

[32] The parties ultimately settled, with the defendants paying $60 into a settlement fund. *Sykes v. Mel Harris & Assocs., LLC*, 2016 WL 3030156 (S.D.N.Y. May 24, 2016).

learns that he has been injured, and by whom, the court held that the FDCPA claim was timely.

C. Collectors' False Affidavits About Personal Knowledge of Account Records Are Hard for Consumers to Detect

False substantive affidavits of merit submitted by debt collectors in state court proceedings may be inherently self-concealing. In *Toohey v. Portfolio Recovery Associates, LLC*, 2016 WL 4473016 (S.D.N.Y. Aug. 22, 2016), for example, Portfolio Recovery Associates (PRA) was alleged to have violated 15 U.S.C. § 1692e(10)'s prohibition of making false representations in connection with attempting to collect a debt when it submitted a false affidavit of personal knowledge about the account records of the underlying debt in support of a motion for default judgment. Finding that only PRA would have been aware that the affiant lacked personal knowledge, the court applied equitable tolling and held that the FDCPA claims were timely despite being filed more than a year after the violation.

D. Debt Collectors' Explicit Misrepresentations to Consumers Can Lead to Default Judgments and Other Harm

In addition to a lack of proper service, default judgments may also be improperly taken when the consumer's failure to defend the collection action is caused by the defendant misrepresenting that entering into a payment plan will satisfy the debt and resolve the collection.

In *In re Humes*, 468 B.R. 346 (Bankr. E.D. Ark. 2011), plaintiff entered into a payment plan and

made the agreed-upon payments. He did not learn that the defendant had taken a default judgment against him until the defendant attempted to garnish his wages over a year later. The court applied the discovery rule and found timely the claims of mispresenting the amount of debt in violation of 15 U.S.C. § 1692e(2)(A).

Likewise, in *Scott v. Greenberg*, 2017 WL 1214441 (E.D.N.Y. Mar. 31, 2017), plaintiff was found to have adequately pled equitable tolling. Plaintiff alleged a scheme orchestrated by the debt collector in which a default judgment was obtained against her for more than was owed when the collector failed to properly serve her with process and then, when she happened to receive notice of the action, told her that she need not appear in the action, provided she continued to make payments.

E. Debt Collectors Often Conceal Important Information From Consumers

Debt collectors often hide facts necessary for consumers to recognize that they have an FDCPA claim or against whom their claim should be brought. Concealment of important information by debt collectors can lead to otherwise blameless consumers allowing the one-year period to bring FDCPA claims to lapse.

Thus, in *Holmes v. TRS Recovery Services, Inc.*, 2007 WL 4481274 (M.D. Tenn. Dec. 18, 2007), a court found that plaintiff had not learned for three years of the misrepresentations that the debt collector made to her in connection with its attempt to collect the alleged debt because of the defendants' wrongful concealment. The debt collector stated that

information about a bounced check would be removed from her account upon the resolution of that debt plus payment of a fee, but that did not happen. In the interim, the defendant's failure to remove the information had resulted in other merchants rejecting her checks.

Another example arises from the notorious relationship between the now defunct Mann Bracken law firm and the National Arbitration Forum (NAF), which ceased administration of new consumer arbitrations in 2009 as part of a consent decree with the Attorney General of Minnesota due to its ties with debt collection firms.[33] In *Townsend v. National Arbitration Forum, Inc.,* 2012 WL 12736 (C.D. Cal. Jan. 4, 2014), the plaintiff's claims, arising from letters sent two years prior that misrepresented the NAF as an impartial judicial forum, were found timely because plaintiff did not become aware of the collusion between the defendants until he read news articles about it.

In a different setting, FDCPA claims based on harassing phone calls and emails sent in violation of 15 U.S.C. § 1692d were found timely as a matter of equitable tolling as to a particular defendant, because the plaintiffs established that they had been pursuing their rights diligently, while a discovery stay in pending litigation prevented them from learning of the "shadow management" role of a previously unnamed defendant. *Sweet v. Audubon*

[33] *See* Business Wire, National Arbitration Forum to Cease Administering All Consumer Arbitrations in Response to Mounting Legal and Legislative Challenges (July 19, 2009), *available at* https://www.businesswire.com/news/home/20090719005034/en/National-Arbitration-Forum-Cease-Administering-Consumer-Arbitrations.

Financial Bureau, LLC, 2016 WL 9777177 (D.N.M. June 27, 2016).

Similarly, in *Rivera v. JPMorgan Chase & Co.*, 2015 WL 12851710 (S.D. Fla. July 9, 2015), plaintiffs alleged that defendant mortgage servicer had violated the FDCPA by misrepresenting the legal status of the debt in letters and monthly statements, and by failing to provide initial disclosures required by 15 U.S.C. § 1692g, as well as by communicating directly with the plaintiffs when they were represented by counsel, in violation of 15 U.S.C. § 1692c. The court found equitable tolling of the FDCPA one-year statute of limitations was warranted because, during the state court foreclosure action, plaintiffs tried repeatedly to obtain documents relating to the alleged misrepresentations of ownership of the note and mortgage and the assignments and servicing rights, but defendant concealed and refused to produce the requested evidence.

In another case the court found equitable tolling appropriate when plaintiffs claimed that defendants regularly commenced and maintained actions in municipal court against the class members under the name "D.B.S. Collection Agency," when, unbeknownst to the consumers, the agency did not have the legal capacity to do so. *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783, 800 (S.D. Ohio 2006).

Likewise, in *Johnson-Morris v. Santander Consumer USA, Inc.,* 194 F. Supp. 3d 757 (N.D. Ill. 2016), the court declined to dismiss the consumer's FDCPA claims alleging that the debt collector charged unauthorized "convenience fees" for automobile loan payments, thereby falsely

representing the character and amount of the debt in violation of 15 U.S.C. § 1692e(2). The court observed that there were facts in dispute regarding discovery of the claims, such as when the plaintiff learned who, as between debt collector and third-party processor of fees, charged the fees, and when the consumer learned of the unauthorized nature of the fees.

In contrast, in *Hageman v. Barton*, 817 F.3d 611 (8th Cir. 2016), the plaintiff had filed suit promptly upon discovering that, contrary to the defendant attorney's statements in a collection action, he did not actually represent the plaintiff in that action. Disregarding the equities, the Eighth Circuit refused to apply equitable tolling or the discovery rule, citing its earlier holding in *Mattson v. U.S. West Communications, Inc.*, 967 F.2d 259 (8th Cir. 1992), that the FDCPA one-year limitation period is jurisdictional.

F. Misrepresentations to Consumer Reporting Agencies Often Go Undetected for Years

FDCPA claims based on misrepresentations of the amount of consumers' debts to consumer reporting agencies have been held timely when consumers file suit within a year of learning of the inaccurate reporting by checking their credit report.

In *Skinner v. Midland Funding, LLC,* 2017 WL 1134490 (N.D. Ill. Mar. 27, 2017), for instance, the debt collector allegedly included unlawful interest in its credit reporting, in violation of 15 U.S.C. § 1692e(8). The court rejected defendant's contention that the plaintiff could have run her credit report at any time to learn of the violations

and found the FDCPA claim timely under the discovery rule.

Likewise, in *Mooneyham v. GLA Collection Co.*, 2015 WL 3607647 (W.D. Ky. June 8, 2015), plaintiff did not learn of the debt collector's allegedly inaccurate reporting until he applied for a mortgage. The court held that plaintiff should not be assumed to have "constructive knowledge" of his credit report, despite the availability of free credit reporting services, and applied equitable tolling to find his FDCPA claim timely.

CONCLUSION

As these examples show, many types of violations of consumers' rights to be free of debt collection abuse necessarily fly under the radar for long periods of time—either by design of the debt collector or due to circumstances outside the consumer's control. Regardless, it would contravene the purposes of the Fair Debt Collection Practices Act and the role it relies upon private attorney generals to perform, to foreclose all claims after one year from the date of a violation which, through no fault of the consumer, is not detected at the time it occurs.

Respectfully submitted,

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