No. 14-1195

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re Oteria Q. Moses,
Debtor.

CASHCALL, INC.,
Creditor-Appellant

— v. —

OTERIA Q. MOSES,
Debtor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA – NO. 13-223

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR-APPELLEE AND SEEKING REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

CashCall, Inc. v. Moses – No. 14-1195

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

__/s/ Tara Twomey_____
Tara Twomey, Esq.

Dated: April 7, 2015

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STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process.

NACBA and its membership have a vital interest in the outcome of this case. CashCall is a predatory lender hiding behind an affiliation with a Native American tribe to evade state licensing and usury laws and issue loans to vulnerable debtors at exorbitant interest rates and unfair terms. The Bankruptcy Court exercised its discretion to retain both the core declaratory judgment claim and the related non-core monetary damages claim in the face of CashCall's attempt to remove the claims to arbitration. The district court agreed. In reversing the decision below with respect to the monetary damage claim, the panel misconstrued the applicable state law, and the panel's per curiam holding invites inconsistent rulings regarding the extent and validity of claims filed in the bankruptcy courts.

CONSENT

The debtor/petitioner has consented to the filing of this amicus brief, and CashCall has not consented.

CERTIFICATION OF AUTHORSHIP

Pursuant to FRAP 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than NACBA contributed money to fund this brief.

ARGUMENT

I. Introduction – The Panel Majority's Deviation from Prior Bankruptcy/Arbitration Rulings.

Bankruptcy courts exercise few functions more integral to the proper operation of the bankruptcy system than when they determine the extent and validity of claims filed by creditors in bankruptcy cases. Courts of appeals have consistently held that matters directly related to the bankruptcy claims resolution process cannot be extricated from the bankruptcy courts and sent to arbitration.

Oteria Moses filed an adversary proceeding in her chapter 13 case against CashCall after CashCall filed a proof of claim in her bankruptcy case. Her adversary proceeding contained two counts. The first count asked for a declaration that CashCall's high-cost loan agreement was void and unenforceable under state banking law. The second count sought monetary damages against CashCall under the North Carolina Debt Collection Act ("NCDCA"). This second count raised only one general theory of liability: that CashCall had violated two related sections of the NCDCA. These two sections prohibit creditors from attempting to collect on debts that are legally unenforceable. In essence, both counts of Ms. Moses' adversary proceeding asked the bankruptcy court to determine whether the CashCall debt was a valid legal obligation. Neither count presented any other legal issue for the court to resolve. In

terms of the sole legal issue presented in both counts of Ms. Moses' adversary proceeding, the overlap was complete.

The bankruptcy court and the district court denied CashCall's request to send both counts of the adversary proceeding to arbitration. The district court noted that the two counts were "inextricably intertwined." J.A. 127. The court of appeals panel majority reversed in part. Judges Gregory and Davis would send the second count (the NCDCA claim) to arbitration. Judge Davis would send both counts to arbitration. Judge Niemeyer would affirm the lower courts' decisions and have the bankruptcy court rule on both counts.

Judge Niemeyer's opinion presented a sound application of the current consensus of opinion on the role of arbitration in matters directly related to a bankruptcy proof of claim dispute. While Judge Gregory appropriately recognized the centrality of the bankruptcy claims resolution process in affirming the bankruptcy court's retention of Count I, his reasoning in support of sending Count II to arbitration represented a significant departure from rulings of this and other circuits. In particular, Judge Gregory's decision ignores the significant problem that will inevitably arise when bankruptcy judges and arbitrators render inconsistent decisions regarding the validity of a transaction that serves as the basis for a bankruptcy claim. These concerns are heightened here where the controlling contract states on its face that the arbitration forum is barred from applying federal and state law and must

apply only "the exclusive laws of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation." J.A. 73.

In his concurring opinion Judge Davis goes to extraordinary lengths to deprive the bankruptcy court of any role in determining the validity of a claim filed by a creditor in a bankruptcy case. His decision allows CashCall to continue to manipulate the bankruptcy system by waiving and then reclaiming tribal immunity in order to maximize its ability to enforce patently void loan agreements. A bankruptcy court judge has the authority to control this type of conduct. Here, the bankruptcy court judge had been willing to assume that important responsibility. His effort should be supported, not undermined.

II. The Majority Ruling Invites Inconsistent Rulings Regarding the Extent and Validity of Claims Filed in the Bankruptcy Courts.

Arbitration conflicts with an essential bankruptcy function when it interferes with bankruptcy courts' authority to make definitive rulings regarding the extent and validity of claims filed in bankruptcy cases. *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1023-24 (9th Cir. 2012); *In re White Mountain Mining Co.*, 403 F.3d 164, 169-70 (4th Cir. 2005); *In re Gandy,* 299 F.3d 489, 499 (5th Cir. 2002). The liability determination inherent in Ms. Moses' NCDCA claim is the mirror image of the claim resolution dispute that the bankruptcy court must rule upon in Count I of her adversary proceeding. Contrary to the panel majority's view, a bankruptcy court must be able to make a conclusive decision on the validity of a debt that is subject to litigation as part

of the claims resolution process. *Katchen v. Landy*, 382 U.S. 323, 334 (1966) ("The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts. More specifically, a creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined; and if his claim is rejected, its validity may not be relitigated in another proceeding on the claim." (internal citations omitted)). This court recently reaffirmed the importance of the finality of bankruptcy court adjudications. *Covert v. LVNV Funding, LLC*, 779 F.3d 242 (4th Cir. 2015). This finality doctrine applies to bankruptcy court determinations in litigated proof of claim challenges. *Sampson v. Chase Home Finance*, 667 F. Supp. 2d 692, 695-96 (S.D.W. Va. 2009).[1]

In an effort to alleviate concerns about inconsistent decisions, Judge Gregory refers to non-bankruptcy decisions and cites repeatedly to *In re Hays*, 885 F.2d 1149 (3d Cir. 1989). Slip op. 54-56. However, the *Hays* court clearly stated that the non-core proceedings sent to arbitration in that case did not involve "the allowance of claims against the estate." 885 F.2d at 1157 fn. 9. Therefore, in *Hays* there was no potential that a decision from arbitration would conflict with the decision of the bankruptcy court on the validity of a proof of claim.

Judge Niemeyer's rulings are consistent with the principles enunciated in *Stern v. Marshall*, 131 S. Ct. 2594, 2617 (2011). Ms. Moses' NCDCA claim scarcely fits the

[1] Unlike the debtors in *Covert* and *Sampson*, Ms. Moses filed her adversary proceeding (Doc. # 13, Aug. 17, 2012) objecting to CashCall's claim several months before the bankruptcy court confirmed the chapter 13 plan. Ms. Moses' plan (Doc. # 4 Aug. 1, 2012) and the bankruptcy court's confirmation order (Doc. # 21 Oct. 25, 2012) expressly preserved the debtor's claim objections from the scope of the confirmation order's finality.

paradigm of a counterclaim with merely "some overlap" with a creditor's bankruptcy claim. *Id.* The overlap is virtually total. The process of adjudicating CashCall's proof of claim "would necessarily resolve" the issue of liability of the NCDCA claim. *Id.* To the extent that the *Stern* non-core criteria enter into the decision to refer to arbitration, the bankruptcy court must be able to exercise discretion to hold on to a proceeding having maximum overlap with an essential core claim.

Judge Gregory's other suggested alternatives for avoiding inconsistent rulings on the same issue do not really present alternatives to the lower court rulings here. Slip op. p. 55. He suggests that a federal court could decide before a referral to arbitration that the federal court's determination will be controlling, no matter what the arbitration decides. He also suggests that the bankruptcy court could make a controlling determination first, then let the arbitrator decide. It is difficult to see what the practical difference is between these options and simply affirming the district court in this case.

III. Judge Gregory's Opinion Misread the Content of the Operative Adversary Proceeding, While Judge Niemeyer Read it Correctly.

Judges Niemeyer and Gregory disagreed over what should be done with Count II of Ms. Moses' adversary proceeding. The disagreement appears to be based, at least in part, on Judge Gregory's misreading of Count II. In this Count Ms. Moses raised two distinct claims under the North Carolina Debt Collection Act ("NCDCA"). N.C. Gen. Stat. §§75-50 – 75-56. The NCDCA prohibits unfair, deceptive, or

fraudulent practices in the collection of debts. *DIRECTV, Inc. v. Cephas*, 294 F. Supp. 2d 760, 763 (N.D. N.C. 2003). Like many similar state statutes regulating debt collection, the NCDCA is modeled after the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692a, *et seq*. North Carolina courts look to other courts' interpretations of the FDCPA and the FDCPA's legislative history in construing provisions of the NCDCA. *Redmond v. Green Tree Servicing*, LLC, 941 F. Supp. 2d 694, 698 (E.D.N.C. 2013).

The NCDCA and the FDCPA share many common features. Both are construed as strict liability statutes. *Allen ex rel. Martin v. Lasalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011); *In re McClendon*, 2012 WL 5387677 * 9 (Bankr. E.D.N.C. Nov. 2, 2012) (under the NCDCA a claimant need not show deliberate acts, deceit or bad faith but that actions had capacity or tendency to mislead or create likelihood of deception). The NCDCA and the FDCPA have similar structures. Both the NCDCA and the FDCPA describe specific prohibited debt collection actions. The statutes list these prohibited actions in a series of distinct sections and subsections. 15 U.S.C. §§ 1692b – 1692f; N.C. Gen. Stat. §§ 75-51 – 71-55. *See generally Heintz v.* Jenkins, 514 U.S. 291, 292 (1995) (summarizing FDCPA sections prohibiting specific debt collection practices); *Green Tree Servicing LLC v. Locklear*, 763 S.E. 2d 523, 527 (N.C. App. 2014) (same for NCDCA). The NCDCA paraphrases many unfair and deceptive debt collection practices described in the FDCPA, often taking provisions verbatim from the federal statute. The NCDCA's prohibited practices include: eight specific

forms of unfair threats and coercion, including threats of arrest or violence, N.C. Gen. Stat. §75-51; four specific types of harassment, including use of profane or obscene language, frequent phone calls, and communication with third parties, *Id.* at §75-52; public release or publication of the debtor's personal information, *Id.* at § 75-53; and eight specific types of deceptive representation regarding the identity of the debt collector, the nature of the collection activity, and the status of the debt, *Id.* at §75-54. The NCDCA authorizes courts to impose statutory penalties of up to $4,000 per violation (compared to $2,000 under the FDCPA). N.C. Gen. Stat. §75-56(d).

In Count II of her adversary proceeding, Ms. Moses described only two closely related NCDCA violations. First, she alleged:

> That the defendant has willfully engaged in multiple and repeated violations of N.C. Gen. Stat. §75-51 by threatening to draft funds from debtor's account on a loan obligation what was illegal as defined under the North Carolina Consumer Finance Act and making telephone calls and threatening to take other actions to collect a debt that was not permitted under law. Complaint ¶30 (J.A. 38-39).

This averment refers to the terms of the CashCall credit agreement that required the borrower to authorize the creditor to withdraw funds directly from the borrower's bank account. Complaint ¶7, 8 and note 3. The complaint asserts that the CashCall loan was invalid under state law and that CashCall's threats and telephone calls were attempts to collect on this invalid loan. The averment refers specifically to 75 N.C. Gen. Stat. §75-51. Reading paragraph 30 in its entirety and in the context of all the complaint's factual averments, the reference is clearly to subsections (6) and (8)

of §75-51. Under these subsections, the prohibited practice is the attempt to collect on a debt that is unenforceable under state law. No reasonable reading of the complaint supports a claim under any other provision of §75-51.

Count II describes the second NCDCA violation as:

> That defendant has willfully engaged in multiple and repeated violations of N.C. Gen. State. 75-54 by deceptively representing through telephone calls to Ms. Moses that the alleged debt owing was a valid debt when such "contract for loan" was made in violation of the North Carolina Consumer Finance Act and void *ab initio*. Complaint para. 31; J.A. 39.

This is a straightforward allegation that CashCall attempted through phone calls to collect a debt from Ms. Moses and that CashCall represented that the debt was valid when it was void. The NCDCA expressly prohibits "[f]alsely representing the character, extent, or amount of a debt against a consumer" 75 N.C. Gen. Stat. §75-54(4).

IV. The Majority Opinion Misconstrued the NCDCA.

The majority opinion misunderstood Ms. Moses' NCDCA claims. Her two closely related NCDCA claims were narrowly focused on one basic violation – the attempt to collect on a void debt. CashCall's assertion at oral argument that the NCDCA "says and in fact requires a showing that there's been harassment, threats, things like that" did not provide helpful guidance. Oct. 30, 2014 Argument Tape at 42.40. Violations of the NCDCA, N.C. Gen. Stat. §75-51(6), (8) and §75-54(4) do not require a showing of harassment, threats of violence, or other oppressive collection

techniques. The invalidity of the underlying debt alone is the basis for the violation. It is the threat to collect on that debt, even using what would otherwise be perfectly lawful collection procedures, that constitutes the NCDCA violation.

The NCDCA's proscription against"[f]alsely representing the character, extent, or amount of a debt against a consumer" closely tracks the similar provision of the FDCPA. 15 U.S.C. § 1692e(2)(A). This FDCPA section defines as a debt collection violation "The false representation of -- the character, amount, or legal status of any debt." Collectors violate this provision when they represent that a debt is valid and enforceable when it is not. Violations include attempts to collect debts discharged in bankruptcy, *In re Jones*, 2009 WL 2068387 (Bankr. E.D. Va. July 16, 2009); demands for interest not authorized by the parties' contract, *Sunga v. Broome*, 2010 WL 3198925 * 4 (E.D. Va. Aug. 12, 2010); and initiation of legal proceedings to collect on debts for which the applicable statute of limitations is expired, *Buchanan v. Northland Group, Inc.*, 776 F.3d 393, 399 (6th Cir. 2015) ("A misrepresentation about the limitations period amounts a 'straightforward' violation of §1692e(2)(A).").

A well-established FCDPA claim asserts that all or part of an underlying debt arose in violation of a state statute. Therefore, the collector's attempts to collect this debt constitute actionable misrepresentations. *Cruz v. International Collection Corp.*, 673 F.3d 991, 997 (9th Cir. 2012) (claims for interest and fees barred by Nevada statute); *Seeger v. AFNI, Inc.,* 548 F.3d 1107, 1111-12 (7th Cir. 2008) (collection fees not authorized by Wisconsin statute). In situations closely analogous to Ms. Moses' Count

II claims, courts have found violations of the FDCPA based on attempts to collect on payday and short-term loans where the loan terms violated state statutes regulating high-cost consumer loan products. *Conner v. Howe*, 344 F. Supp. 2d 1164, 1172 (S.D. Ind. 2004) (finance charge exceeded amount allowed under Indiana Unfair Consumer Credit statute and loan agreement void); *Mejla v. Marauder Corp.,* 2007 WL 806486 * 6-7 (N.D. Cal. Mar. 15, 2007) (payday lender's communications demanding charges not allowed under state statute regulating payday loans violate §1692e(2)(A)).

Referring to the NCDCA, Judge Gregory points to the possibility that Ms. Moses could possibly raise "other violations of the statute". Slip op. at 54. He notes that Ms. Moses reserved the right to amend her complaint and add new claims. *Id.* at 53. However, an amended complaint is not part of the record in this appeal. Certainly the mere possibility that a litigant may amend a complaint to add new claims cannot form the basis for an appellate decision reviewing a lower court's jurisdictional ruling. If this were appropriate, appellate courts could hypothesize that an amendment to add a party might destroy diversity jurisdiction or an amendment to withdraw a claim might remove federal question jurisdiction.

CONCLUSION

For the foregoing reasons the undersigned Amici respectfully request that the Court grant rehearing *en banc* and adopt as the Court's ruling the Opinion of Judge Niemeyer in the March 30, 2015, panel decision.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify that the foregoing Brief contains 2,811 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the word-processing system used to prepare the foregoing Brief.

The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

Dated: April 7, 2015

/s/ Tara Twomey
Tara Twomey

CERTIFICATE OF SERVICE

Tara Twomey, attorney for appellant, certifies that on this 7th day of April, 2015, she caused the foregoing Brief to be electronically filed. Copies of same have been served upon the following this same date by the CM/ECF system:

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