

No. 17-2851

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

James Tepper and Allison Tepper,

Appellees

v.

Amos Financial LLC,

Appellant

Appeal from the
United States District Court for the Eastern District of Pennsylvania
(Joyner, C.)
Case No. 2:15-cv-05834-CJ

**AMICUS CURIAE BRIEF BY MARY BARBATO IN SUPPORT OF
APPELLEES JAMES TEPPER AND ALLISON TEPPER AND FOR
AFFIRMANCE**

Carlo Sabatini (PA83831)
Brett Freeman (PA308834)
SABATINI LAW FIRM, LLC
216 N. Blakely St.
Dunmore, PA 18512
(570) 341- 9000
ecf@bankruptcypa.com
bfecf@sabatinilawfirm.com

Daniel A. Edelman
Francis Greene
EDELMAN, COMBS,
LATTURNER & GOODWIN LLC
20 S. Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
courtecl@edcombs.com

Counsel for Amicus Curiae Mary Barbato

January 10, 2018

Table of Contents

Table of Contents i

Table of Authorities ii

Statement of Identity of Amicus Curiae 1

Statement of Compliance with Rule 29(a)(4)(E) 1

Argument 2

Table of Authorities

Cases

<i>Davidson v. Capital One Bank (USA), N.A.</i> , 44 F.Supp.3d 1230 (N.D.Ga. 2014), <i>aff'd</i> , 797 F.3d 1309 (11th Cir. 2015).....	3
<i>FTC v. Check Investors, Inc.</i> , 502 F.3d 159 (3d Cir.2007)	2
<i>Henson v. Santander Consumer USA Inc.</i> , 137 S. Ct. 1718 (2017)	2, 3
<i>Kimber v. Federal Financial Corp.</i> , 668 F.Supp. 1480 (M.D.Ala. 1987)	3
<i>Schlosser v. Fairbanks Capital Corp.</i> , 323 F.3d 534 (7th Cir.2003).....	3

Statutes

15 U.S.C. §1692a(4)	2
15 U.S.C. §1692a(6)(F)(iii).....	2
15 U.S.C. 1692a(6).....	3

Statement of Identity of Amicus Curiae

Pursuant to Fed. R. App. P. 29(c)(4), Amicus Curiae Mary Barbato (“Barbato”) states that she is an individual who is the plaintiff-appellee in a pending interlocutory appeal, *Barbato v. Greystone Alliance, LLC et al.*, 17-8064. Barbato has an interest in this appeal because the cases have an issue in common: whether a company that purchases accounts in default, and attempts to collect them directly and indirectly, is a “debt collector” under the “principal purpose” definition set forth in § 1692a(6) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (“FDCPA”). The Court’s holding in this case may impact whether the defendant-appellant is held to be a debt collector in Barbato’s case.

Barbato has filed a motion under Fed. R. App. P. 29(a)(3) and 29(a)(6) seeking leave to file this brief.

Statement of Compliance with Rule 29(a)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), Barbato states:

- (A) No party’s counsel authored this brief in whole or in part.
- (B) No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief.

(C) No person, other than Barbato and her counsel, contributed money that was intended to fund preparing or submitting this brief.

Argument

Barbato agrees with the Teppers' brief, with one exception that she feels necessary to discuss.

Prior to the Supreme Court's decision in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017), this Court in *FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007), held that an entity's status as a "debt collector" depends on whether the debt was actually or allegedly in default at the time it was acquired. In the course of adopting the "default" test, this Court stated that an entity could be a creditor or debt collector, but not both.

Courts adopting the "default" test did so by relying on the 15 U.S.C. § 1692a(4) definition of "creditor," with its exception for debts in default at the time of acquisition, and the similar provision in 15 U.S.C. § 1692a(6)(F)(iii). The courts inferred from these provisions that default status upon acquisition or first involvement was the touchstone of whether an entity was a "debt collector."

Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir.2003); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D.Ala. 1987). This analysis naturally gave rise to the strict dichotomy between “creditors” and “debt collectors.”

The Supreme Court’s rejection of this entire line of cases in favor of reliance on the strict statutory language of the FDCPA makes it necessary to reconsider the proposition that an entity can be a creditor or debt collector but not both. Indeed, decisions which anticipated the Supreme Court’s reading of the FDCPA in *Henson* referred to the “incorrect notion that one cannot be both a ‘creditor’ and a ‘debt collector.’” *Davidson v. Capital One Bank (USA), N.A.*, 44 F.Supp.3d 1230 (N.D.Ga. 2014), *aff’d*, 797 F.3d 1309 (11th Cir. 2015).

The term “creditor” is used in a number of places in the FDCPA, so there is a reason for defining it. However, the word “creditor” does **not** appear anywhere that is pertinent to whether a “principal purpose” debt collector cannot also be the party to whom the debt is owed. Specifically, the key language in 15 U.S.C. § 1692a(6) – “any person who uses any instrumentality of interstate commerce or the mails in any business the principal

purpose of which is the collection of any debts” – does not contain the word “creditor.”

The Court should simply determine whether Amos Financial, LLC (“Amos”) is “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts.” If Amos does not extend credit, or do anything other than acquire defaulted debts and collect them by dunning and litigation, it would be such a person.

Respectfully submitted,

/s/Carlo Sabatini

Carlo Sabatini

Carlo Sabatini (PA83831)
Brett Freeman (PA308834)
SABATINI LAW FIRM, LLC
216 N. Blakely St.
Dunmore, PA 18512
(570) 341- 9000
ecf@bankruptcypa.com
bfecf@sabatini-lawfirm.com

Daniel A. Edelman
Francis Greene
EDELMAN, COMBS,
LATTURNER & GOODWIN LLC
20 S. Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
courtecl@edcombs.com

Counsel for Amicus Curiae Mary Barbato

CERTIFICATION OF BAR MEMBERSHIP

I, Carlo Sabatini, hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

s/ Carlo Sabatini
Carlo Sabatini

CERTIFICATION OF COMPLIANCE

The undersigned counsel of record for the Amicus Curiae certifies that the foregoing brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 5 and 29(a)(5). The foregoing brief contains 1,167 words. This document was prepared in a proportionally spaced typeface in Microsoft Office Professional Plus 2013 using 14 point Bookman Old Style.

s/ Carlo Sabatini
Carlo Sabatini

CERTIFICATION OF IDENTICAL TEXT

I, Carlo Sabatini, hereby certify that the text of the electronic copy and the hard copies of the foregoing document are identical.

s/ Carlo Sabatini
Carlo Sabatini

CERTIFICATION OF VIRUS CHECK

I, Carlo Sabatini, hereby certify that a virus check was performed on the PDF file of the foregoing document prior to electronic filing using Windows Defender version 1.1.14405.2 with antivirus definition version 1.259.1440.0.

s/ Carlo Sabatini
Carlo Sabatini

CERTIFICATION OF SERVICE

I, Carlo Sabatini, certify that, on January 10, 2018, I caused ten copies the foregoing document to be served, via United States First Class Mail, on the following:

Clerk's Office
U.S. Court of Appeals
21400 U.S. Courthouse
601 Market St.
Philadelphia, PA 19106-1790

and I served a copy of the foregoing document electronically on counsel for the parties.

s/ Carlo Sabatini
Carlo Sabatini