IN THE SUPREME COURT
STATE OF FLORIDA

ECHEVARRIA, McCALLA, RAYMER, BARRETT & FRAPPIER, a Florida general partnership, et. al.,

Petitioners,

vs.

BRADLEY COLE, individually and on behalf of all others similarly situated,

Respondent.
_____/

CASE NO. SC05-564
L. T. CASE NOS. 1D02-4746
1D02-4982

ANSWER BRIEF ON THE MERITS BY RESPONDENT, BRADLEY COLE

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STATEMENT OF THE CASE

Respondent Bradley S. Cole ("Cole") sued Petitioners[1] for violating the Florida Consumer Collection Practices Act ("CCPA"), Fla. Stat. § 559.72(9) (1997), and the Florida Deceptive and Unfair Trade Practices Act, ("DUTPA"), Fla. Stat. § 501.204 (1997). Cole seeks declaratory and injunctive relief and actual damages under both statutes, and minimum statutory damages and punitive damages under the CCPA. (See copies of statutes, App. 1).

Cole represents a class of persons to whom Petitioners sent mortgage reinstatement letters seeking to collect fees or expenses that exceeded actual expenses, as a condition to reinstate their mortgages. The Circuit Court conducted an evidentiary hearing on Cole's motion for class certification, and made extensive factual findings that all class requirements were met. (Order granting class certification, App. 2).

However, the Circuit Court defined the class much more narrowly than Cole had requested. Specifically the Court held:

> B. The Court certifies a class defined as all persons in the State of Florida to whom the Echevarria firms sent

[1] Petitioners include three law firms: Echevarria, McCalla, Raymer, Barrett & Frappier, Barrett, Daffin & Frappier, LLP; McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.; Echevarria & Associates, P.A.; and Michael Echevarria, individually.

> reinstatement letters as counsel for a lender or mortgagee for the period of July 6, 1994, through June 30, 2001, where the firms sought to collect amounts for:
>
> (1) A title search or title examination that exceeded the Echevarria firms' actual out-of-pocket expense incurred to a third party vendor for either the title search or the title examination.
>
> (2) Service of process upon two or more persons commonly identified by the Echevarria firms as "an unknown tenant" in possession.
>
> (3) Fees or costs that had not been incurred at the time the Echevarria firms demanded payment in the reinstatement letter.
>
> *And whose default or failure to timely pay their mortgage obligations did not ultimately result in a foreclosure judgment or sale.*

(App. 2, p. 18) (emphasis added).

By limiting the class to persons whose mortgage default or failure to timely pay did not result in a foreclosure judgment or sale, the Court excluded persons who were sent a reinstatement letter but were unable to pay, or chose not to pay, the claimed mortgage reinstatement charges. This limitation is inconsistent with the Court's specific finding that it is immaterial whether the individual receiving the reinstatement letter relied on the letter to reinstate the mortgage or did not rely on the letter and was subject to a foreclosure judgment; Petitioners' mere act of sending the reinstatement letter triggers the violation of the statutes. (App. 2, p. 11).

Cole appealed because the Circuit Court's definition of the class was inconsistent with its findings and was therefore too narrow. The First District Court of Appeal agreed with Cole that the Circuit Court's order was inconsistent and that it was either an oversight or an error as a matter of law, because there was no legal justification for limiting the class definition as the Circuit Court did. (Echevarria v. Cole, 896 So.2d 773, at 776).

Petitioners assert that the lower Courts should have dismissed the case entirely, or at least excluded debtors whose homes went to foreclosure, based on the so-called "judicial immunity rule." Petitioners raised this defense at various times in the Circuit Court, without success. (See, e.g., Echevarria, 896 So.2d at 776-77). The First District agreed with the Circuit Court that the "judicial immunity rule" has no application in this case. (App. 3).

Petitioners sought the jurisdiction of this Court, alleging the First District's decision conflicts with Boca Investors Group, Inc. v. Potash, 835 So.2d 273 (Fla. 3d DCA 2002), which relies upon Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So.2d 606 (Fla. 1994).

This Court granted review, but limited its review to the issue of "whether the decision of the First District Court of Appeal is in conflict with

decisions on the issue of litigation immunity privilege." (Order on jurisdiction, App. 4). Petitioners' brief raises matters that go beyond the scope of the Court's jurisdictional Order in an attempt to revisit issues determined in a previous partial summary judgment order, not under review.

STATEMENT OF THE FACTS

The pertinent facts are stated in the Circuit Court's Order Granting Plaintiff's Second Amended Motion for Class Certification (App. 2) and the District Court of Appeal's opinion (App. 3), and are summarized below.

In January 1998, Cole learned he was two months behind on his home mortgage payments because of circumstances related to his divorce. He immediately contacted the bank, which told him to contact Petitioners' firm where the bank had sent Cole's file for collection. On February 2, 1998, he contacted Petitioners to get the amount he needed to pay to reinstate his mortgage. (Tr. of evidentiary hearing on class certification, App. 5, p. 74). Cole's mortgage provides that he has the right to reinstate his mortgage after default if he pays the arrearage and "all expenses incurred" in enforcing the mortgage, including reasonable attorney's fees. (Mortgage excerpt, App. 6).

Petitioners only provide reinstatement figures when the debtor specifically requests them, which occurs in about 40% of the collection matters. (App. 5, pp. 434-35). The collection practices they used in Cole's

case are their firm's standard practices used in all collection matters where the debtor requests reinstatement information. (App. 5, p. 445).

The next day, February 3, in response to Cole's request, Petitioners faxed Cole a reinstatement letter stating as follows (App. 7):

> Pursuant to your request, please find listed below the reinstatement figures for the above-referenced property as given to me by Sun Trust Mortgage, Inc.:
>
> | | |
> |---|---|
> | PAYMENTS | 5,083.72 |
> | ACCUMULATED LATE CHARGES | 357.49 |
> | PROPERTY INSPECTIONS | 7.00 |
> | TITLE SEARCH | 175.00 |
> | TITLE EXAMINATION | 150.00 |
> | FILING FEES | 210.00 |
> | PROCESS SERVICE | 820.00 |
> | EXPRESS CHARGES | 8.35 |
> | RECORDING COSTS | 15.00 |
> | ATTORNEY'S FEES | 600.00 |
> | | |
> | TOTAL TO REINSTATE THROUGH 2/27/98 | $7,426.56 |

The letter included mandatory instructions on how to make the payment.

As the reinstatement letter shows, Petitioners conditioned reinstatement of the mortgage on Cole's paying not only the arrearage and late charges he owed the bank, but almost $2,000 extra for Petitioners' costs and fees. Cole repeatedly asked Petitioners to justify these charges, but he never received an explanation. (App. 5, pp. 76, 77, 79).

Although Petitioners were entitled to collect the actual costs they incurred, as of February 3, 1998, many of the costs presented to Cole in the reinstatement letter had not been incurred. (App. 5, pp. 438-40). In particular, Petitioners included in their reinstatement letter fees for service of process, filing fees, and recording costs even though, as of the date of the reinstatement letter, no complaint had been filed or served. (App. 5, pp. 453-56). Petitioners also charged Cole $325 for the "cost" of a title search and title examination when they actually spent only $55 for these services. (App. 5, pp. 382-83).

Petitioners misstate that "the $325 amount became the centerpiece of this litigation." (Petitioners' Brief p. 4).[2] On the contrary, there are many other false costs in the Reinstatement letter. The following chart is based on figures taken from the Reinstatement letter (App. 7) and testimony as noted:

[2] Petitioners sought to emphasize this $325 charge in their motion for summary judgment, alleging the bank never objected to this cost item. The Circuit Court denied Petitioners' motion, and granted partial summary judgment in favor of Cole, finding that "Defendants have violated Florida law by attempting to collect amounts in excess of $55.00 for title search and examination 'costs.'" (Vol. 10, T. 215, p. 10). The Circuit Court's ruling on this point is not an appealable order and not within the scope of this Court's review order, and is only one of many false charges in this case.

Item Charged	Charged Cost	Actual Cost	False Charges	App.
Title Search	$ 150.00	$ 55.00	$ 95.00	App. 5, pp. 382, 397
Title Examination	$ 175.00	$ 0.00	$ 175.00	App. 5, pp. 383, 397
Filing Fee	$ 210.00	$ 0.00	$ 210.00	App. 5, p. 453
Process Service	$ 820.00	$ 0.00	$ 820.00	App. 5, pp. 397, 453
Recording Costs	$ 15.00	$ 0.00	$ 15.00	App. 5, pp. 398, 423
TOTAL	$1,370.00	$ 55.00	$1,315.00	

In addition, Petitioners charged Cole a $600 attorney's fee, when the only apparent service was sending a form letter on Petitioners' letterhead to forward reinstatement amounts allegedly obtained from Sun Trust. No justification was offered for this $600 fee charge. The total amount of Petitioners' challenged charges is $ 1,915.00.

Petitioners may have anticipated some charges that they might incur if and when they filed a foreclosure action against Cole, but these charges were not incurred or valid at the time of the reinstatement letter, because no legal action had been filed as of that date.

Cole felt he had no choice but to pay the full amount demanded if he wanted to get his mortgage out of default. (App. 5, p. 75). Thus, on February 10, 1998, just one week after he received the reinstatement letter,

Cole paid the $7,426.56 demand in full. (App. 5, pp. 75-76). When he sent his check, he made a written request for an explanation of the charges claimed. (App. 5, p. 77).

Instead of receiving an explanation, Petitioners sent him back a check dated February 11, 1998, in the amount of $768.50. (App. 5, p. 78). Cole assumed this amount represented a refund for the interest on his mortgage, since he paid the reinstatement fees on February 10, before the end of the month. (App. 5, p. 79). Only after this lawsuit was filed did Petitioners assert that Cole's partial refund was based on a reduction in the amounts billed for the filing fee, service of process, and recording cost. (App. 5, pp. 397-398).

Six days after the reinstatement letter, on February 9, 1998, Petitioners filed a foreclosure action against Cole. On February 13, Petitioners, having received Cole's payment and issued a partial refund, dismissed the complaint. (App. 5, pp. 82, 394).

Although the complaint had been dismissed, eleven days later, on February 24, Petitioners nevertheless unnecessarily served it on Cole, his former wife, and on Wakulla Bank (which held a second mortgage), and (allegedly) on two additional still-unnamed persons whom Petitioners falsely designated as "tenants" of the home. (App. 5, pp. 85-86, 394). For the

service and attempted service of the dismissed complaint, Petitioners charged Cole $35 per party, for a total charge of $175 for serving five parties. (App. 5, pp. 390, 394) Petitioner Michael Echevarria is the president, sole director and majority owner of the process server, Lightning Serve. (App. 5, pp. 419, 423). This $175 charge for serving process was not part of the earlier refund but was kept by Petitioners. (App. 5, pp. 394, 397).

Petitioners contend that they generally serve at least two and as many as four unknown, unnamed tenants in each foreclosure matter. (App. 5, pp. 362-63). Although this adds to the fees their captive process server charged, there is no legal purpose for serving or trying to serve "tenants" when there are in fact no tenants. (App. 5, pp. 364, 427-29).

Petitioners estimate that from 1994 to 2001, they handled approximately 45,000 collection and foreclosure cases. (App. 5, p. 364). In about 40% of those cases, the debtor requested reinstatement amounts, and Petitioners sent reinstatement letters consistent with the practices in Cole's case. (App. 5, pp. 434-35). Therefore, as many as 18,000 people whose mortgages were in default sought information from Petitioners regarding the amount required for reinstatement, and were given false, inflated figures. Petitioners can identify these people by searching their database and their files. (App. 5, pp. 456-57).

These expense claims were not authorized by the terms of Cole's mortgage note (App. 6), and were not authorized by the bank's written instructions to foreclosure attorneys, which specifically required that "The reinstatement figure quoted should include . . . your total fees and expenses as of the date of the reinstatement quote. Any fees to be included in these figures must be for actual work completed to date." (e.s.) (App. 8). Thus the bank actually prohibited Petitioners from padding their reinstatement quotes with expenses not incurred.

Notwithstanding the bank's directive, Petitioners filed motions and affidavits asserting that the expenses charged were justified by their contracts with their clients. However, they failed to respond to discovery requests to produce any contracts. After repeated orders compelling discovery of these contracts, see Orders dated March 13, 2000 (V2 T45 ¶ 5); September 6, 2000 (V3 T71 ¶2); and December 19, 2001 (V5 T117), Petitioners advised in a hearing that they really had no written contracts with their clients. (V9 T200 pp. 24-25, 33-34, 40-47, 49, 64-66). The Court found Petitioners had flagrantly and willfully violated its prior orders, imposed attorney's fees, and ordered Petitioners to promptly disclose the terms of any oral contracts. (V6 T142). When Petitioners still did not comply, the Court held their conduct merited a sanction prohibiting them

from offering any evidence or argument regarding their agreements with the lender/mortgagee clients. Order dated August 22, 2002 (V10 T 214). This sanction Order was in effect when the Court heard the motion for class certification and certified the class. Accordingly, Petitioners cannot contend that their false expense claims were justified by any contract with the bank.[3] Cole, and about 18,000 other debtors, received Petitioners' reinstatement letter demanding costs that had not been incurred. Cole was able to pay the demanded amount, but other debtors did not or could not afford to do that and their homes went into foreclosure. The Circuit Court and the First District held that Petitioners may be held liable under the statutes, not only in cases where the deception was successful, but also for attempts to deceive (for which the law allows statutory minimum damages, as discussed below), and that the common law privilege for statements in litigation does not apply or supercede these statutory rights.

[3] Petitioners unsuccessfully sought non-final review of these orders. They are not under review in this case. See Echevarria, et al. v. Cole, 896 So.2d 779 (Fla. 1st DCA 2005) (denying review by writ of certiorari).

SUMMARY OF THE ARGUMENT

The issue is whether Petitioners may deceive, or attempt to deceive, consumers into paying false expenses in order to exercise their right to reinstate home mortgages pursuant to provisions in the mortgage. Petitioners' mortgage reinstatement letters were padded with false expenses to gain extra profit for their firm. The letters targeted homeowners facing the loss of their homes, who generally had little knowledge or practical ability to challenge the false expenses. This practice is a flagrant violation of the Florida Consumer Collection Practices Act (CCPA) and Deceptive and Unfair Trade Practices Act (DUTPA), which prohibit attempts to deceive consumers with false claims.

Petitioners' deceptive letters are not protected by the common law litigation privilege. First, the letters were not sent in relation to litigation, nor were they necessary preliminaries to litigation. Second, even if they were, the statutes prohibit persons, including lawyers, from attempting to deceive consumer debtors to pay more than they lawfully owe.

Petitioners generally sent the reinstatement letters before any legal action was filed or served. They only sent the letters if the debtor requested information to reinstate the mortgage (bring it current), as the mortgage allows, and thus avoid litigation. By necessary implication, the debtor had a

right to an accurate account of the reinstatement amount. This was not an adversary proceeding, and the debtors were not on guard, as they had no other source for this information. Petitioners were obliged to truthfully state the actual expenses incurred. If the debtor did not request this information, Petitioners proceeded to court and did not use the letter, so the letter could not be a statement in litigation or a necessary preliminary to litigation.

When this scheme worked, as in Cole's case, the debtor paid the false expenses claimed in the reinstatement letter without litigation. However, it is irrelevant whether some debtors could not pay the amount demanded and did not rely on the letter. An attempt to mislead the debtor violates the statutes, and entitles the debtor to at least statutory minimum damages. The misleading reinstatement letter did not acquire privileged status just because it failed to exact improper payment in every case.

The reinstatement letter was an ultimatum, not a settlement offer to compromise disputed liability. In claiming the false charges, Petitioners were not even advocating a client's colorable demand, but rather pursuing their own interest to extract monies for themselves that were not properly due from the debtors. Whether the bank questioned the false charges is irrelevant. It had no contract obligation to pay them, and may not have checked them, as it expected debtors to ultimately pay all alleged costs that

Petitioners said they had properly incurred. The bank's indifference does not transform Petitioners' scheme into advocacy for the bank.

In any event, the state statutes hold lawyers responsible for pre-suit deceptive attempts to collect their own improper charges in violation of the debtor's reinstatement rights and overrule any applicable common law litigation privilege. The CCPA prohibits "persons" from attempting to enforce false debt claim against consumers. The DUTPA also provides remedies for lawyers' actions that are likely to deceive consumers. Both statutes by their plain language apply to lawyers, and both statutes would be ineffective if lawyers were exempt. Lawyers have no special privilege to cheat consumers, and they are subject to the same statutory remedies as any other person who knowingly sends false dunning letters attempting to collect amounts not owed for their own gain. By analogy, the federal Fair Debt Collection Practice Act has an extensive body of case law holding lawyers liable for similar actions.

The District Court of Appeal properly certified the class to include both debtors who relied on Petitioners' false reinstatement letters to reinstate the mortgage, and those who did not but were victims of Petitioners' attempted deception, based on both the non-litigation character of the letters and the plain language of the state statutes.

ARGUMENT AND CITATIONS OF AUTHORITY

NO LITIGATION PRIVILEGE ALLOWS LAWYERS TO KNOWINGLY ATTEMPT TO CONDITION DEBTORS' MORTGAGE REINSTATEMENT RIGHTS ON PAYMENT OF FALSE EXPENSES FOR THE LAWYERS' OWN PROFIT.

I. PETITIONERS' MORTGAGE REINSTATEMENT LETTER IS NOT A PRIVILEGED COMMUNICATION IN THE COURSE OF AND RELATED TO ONGOING LITIGATION.

Statements that are otherwise actionable are privileged if they are (1) made in the course of litigation and (2) pertinent to the subject of the litigation. Levin, Middlebrooks, et al. v. U.S. Fire Ins. Co., 639 So.2d 606 (Fla. 1994). The privilege helps to foster zealous advocacy in litigation and to put an end to litigation, and assumes the court will deter or remedy any falsehood. The instant false statements were made to consumer debtors outside of litigation. It serves no beneficial purpose to immunize them.

Petitioners' mortgage reinstatement letters were sent to debtors in response to their requests for information on the amount due and owing, including expenses incurred, in order to exercise mortgage reinstatement rights. Under the mortgage terms, the mortgagee (creditor) and its lawyer are obliged to provide an accurate statement so the debtor can fairly decide whether to exercise his or her reinstatement rights. If the debtor pays to reinstate the mortgage, there is no litigation. Adding false claims for

expenses not yet incurred, and which may never be incurred, for the lawyer's own profit, is not a statement in litigation or connected with litigation. The litigation privilege does not allow deception of consumers not in an adversary posture, who have no lawyer or practical ability to obtain truthful information from any other source.

In Fridovitch v. Fridovitch, 598 So.2d 65 (Fla. 1992), this Court joined the majority of jurisdictions holding that only qualified immunity applies to necessary preliminary communications to law enforcement, not an absolute privilege. Id. at 67-69. The Court observed:

> There is no benefit to society or the administration of justice in protecting those who make false and malicious defamatory statements to the police. The countervailing harm caused by the malicious destruction of another's reputation can have irreparable consequences. We believe the law should provide a remedy in situations such as this.

Id. at 69. The Court added the following statement pertinent here:

> In so holding, we emphasize that the [qualified] privilege applies ***only*** to statements voluntarily made to police or prosecutors, not to statements made to private individuals. Thus, for example**,** the defamatory statements made by Anthony and his sister to the family housekeeper are ***not privileged at all***.

Id. at 69 n.8. (e.s.) Justice MacDonald, dissenting, would retain the absolute privilege for pre-suit statements to law enforcement, but even he accepted the majority view "when a non-penal interest is at stake." Id. at 70-71.

Thus, in Fridovitch, the Court unanimously expressed the view that false statements made to a private individual prior to litigation are not privileged at all.

Two years later, Levin, Middlebrooks, et al. v. U.S. Fire Ins. Co., 639 So.2d 606 (Fla. 1994), held that the absolute litigation privilege applies to statements (1) made "during the course of judicial proceedings" (2) which have some relation to the proceedings. Id. at 608. The case involved a motion asking the court to disqualify a lawyer as a potential material witness. Both elements were present, so the privilege applied. Levin did not discuss immunity for pre-suit statements that might relate to the subject matter to be litigated. Neither the phrase "necessary preliminaries" or any variant thereof, appears in the Levin opinion. Indeed, Levin approvingly cited Fridovitch for other points, and did not disturb the Fridovitch ruling relative to the lack of any privilege for statements made to private persons prior to judicial proceedings. In sum, Fridovitch and Levin do not extend any privilege to Petitioners' deceptive reinstatement letters statements to consumer debtors prior to foreclosure litigation.[4]

[4] See Silver v. Levinson, 648 So.2d 240 (Fla. 4th DCA 1994) (lawyer's allegedly defamatory letter to company in which plaintiff held stock was not during the course of judicial proceedings or a necessary preliminary; it was premature to decide if qualified immunity applied); Boca Investors Group Inc. v. Potash, 835 So.2d 273, 275-76 (Fla. 3d DCA 2002) (Judge Cope,

Indeed, even a settlement agreement during litigation does not privilege false inducement to that contract, which is in essence outside the litigation to replace the controversy with an accord. See Ingalsbe v. Stewart Agency, Inc., 869 So.2d 30 (Fla. 4th DCA 2004) (holding that when parties enter a settlement that interfered with a lawyer's contract fee rights, no litigation privilege or settlement privilege applied), jurisdiction discharged, 889 So.2d 779 (Fla. 2004).

Here, Petitioners' mortgage reinstatement letters were not issued in the course of litigation, or even as a necessary preliminary to litigation. The law does not require such letters as a prerequisite to a foreclosure case. Petitioners did not send reinstatement letters in most of their foreclosure cases, but sent them only to debtors who asked for payoff information to reinstate the mortgage (bring it current) as the mortgage terms allow.

Petitioners apparently added false expenses to meet a desired revenue goal on the file even **if** there were no foreclosure action. Neither the bank's mortgage with the debtors, nor Petitioners' contract with the bank, authorized or required debtors to pay expenses that had not actually been incurred. Petitioners were not advocating a colorable position of the bank,

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concurring, noting Fridovitch rejected absolute immunity for pre-suit statements, stating "The 'necessary preliminaries' phrase is no longer the legal test for privilege for presuit communications").

but padding expenses for their own gain. Such deception cannot be justified as a lawyer's zealous advocacy for a client under the litigation privilege.

Again, Fridovitch makes clear that the Florida litigation privilege does not purport to immunize statements outside the course of litigation, such as the reinstatement letters. 598 So.2d at 69 n.8. See, e.g., Tyrell v. Kaye & Assocs. P.A., 2004 U.S. Dist. Lexis 16263 (S.D. Fla. 2004), holding that a pre-suit dunning letter demanding a $221 attorney fee was deceptive, because the applicable statute did not allow a creditor to recover such fees unless there was a final judgment. The Court rejected a defense argument that the letter was "within the ambit of a legal proceeding," saying "[J]ust because the issuance of a debt collection letter was a prerequisite to the commencement of a legal proceeding does not mean that every issuance of a debt collection letter is a legal proceeding." Id. at *12-*13. Accord, Paulemon v. Tobin, 30 F.3d 307, 310 (2d Cir. 1994) (lawyer's pre-suit letter "cannot be considered litigation activity sufficient to trigger such an exemption even if it were to exist . . . Such a 'litigation' exemption could apply only to litigation; that is, the filing of a complaint and related submissions to the court. It cannot apply to the sending of letters to a debtor or the debtor's lawyer prior to the actual filing of a complaint.").

II. FALSE OR DECEPTIVE MORTGAGE REINSTATEMENT LETTERS ARE UNLAWFUL CONDUCT UNDER FLA. STAT. §§ 559.72(9) AND 501.204.

Petitioners argue that the CCPA and DUTPA should not apply to them, but fail to analyze the statutes' language and purpose, which is the central issue. The common law litigation privilege existed before the CCPA and DUTPA were enacted, but neither statute created any special privilege or exception for lawyers. Petitioners do not question that a valid statute supercedes a common law rule, to the extent of any inconsistency. See, e.g., Ripley v. Ewell, 61 So.2d 420, 421 (Fla. 1952); Comptech International, Inc. v. Milam Commerce Park, Ltd., 753 So.2d 1219, 1222-23 (Fla. 1999).

A. CONSUMER COLLECTION PRACTICES ACT

The CCPA, Chapter 559 Part VI, was enacted in 1972 to protect consumers from false, misleading and unfair debt collection practices.[5]

Section 559.72 lists prohibited practices under the Act, including the following (references are to the 1997 statutes unless otherwise noted):

[5] See Harris v. Beneficial Finance Co., Inc., 338 So.2d 196 (Fla. 1976) (upholding constitutionality of Act's restriction on communication with debtor's employer, over objection that it interfered with commercial speech rights). This is likewise commercial speech that is subject to reasonable regulation to prevent and remedy unfair or deceptive practices.

> In collecting consumer debts, no person shall:
>
> * * *
>
> (9) Claim, attempt or threaten to enforce a debt when such person knows that the debt is not legitimate or assert the existence of some other legal right when such person knows that the right does not exist. (e.s.)

Section 559.77, entitled "Civil remedies," provides in pertinent part:

> (1) A debtor may bring a civil action against a person violating the provisions of s. 559.72…. (e.s.)

The civil remedies under the 1997 statute include actual damages or statutory damages of $500, whichever is greater; punitive damages, and equitable relief. Id.[6]

1. The term "person" includes lawyers.

From the Act's inception, courts determined that the term "person" means "all persons generally." Cook v. Balzer Financial Services, Inc., 332 So.2d 677 (Fla. 1st DCA 1976) (quoting title to enacting law, Ch. 72-81, Laws of Florida, and definition of "person" in Fla. Stat. § 1.01(3)); Williams v. Streeps Music Co., 333 So.2d 65 (Fla. 4th DCA 1976) (statute's prohibitions apply to persons, even those not defined as "collection agencies," quoting title to Ch. 72-81). See also Senate Staff Analysis of CS/SB 94 (Feb. 13, 2001) (available at www.flsenate.gov, copy at App. 9),

[6] In 2001 the Legislature increased the minimum statutory damages to $1000. Ch. 2001-206, Laws of Florida.

describing the "Present Situation" that CCPA's prohibited practices apply to "all persons," not just debt collectors, and citing a federal case under the Fair Debt Collection Procedures Act (discussed below).

The intent to include lawyers' actions is apparent from other provisions of the Act that specifically reference lawyers. Section 559.725(1) requires the Division of Consumer Services to maintain records of inquiries and complaints against "any and all persons who collect debts, including consumer collection agencies." (e.s.) Subsection (3) of that statute requires the Division to notify the Florida Bar when an attorney is named in five or more consumer complaints. Thus the term "person" and the Act generally must apply to lawyers.

The intent to cover lawyers is also apparent from the provisions that exempt lawyers from one portion of the Act, which requires "collection agencies" to be licensed. As originally enacted in Ch. 72-81, Laws of Florida, the Act defined a "collection agency" that is subject to licensure as "any person who … attempts to collect or collects consumer claims owed or alleged to be owed …" (e.s.), but expressly exempted "attorneys at law" from this definition. These provisions were repealed in Ch. 81-314, Laws of Florida. However, Ch. 93-275 reinstated the licensure requirements, and again exempted lawyers from licensure. Under this law, § 559.553 requires

"consumer collection agencies" to be registered, but exempts members of the Florida Bar from registration. The law defines "consumer collection agency" in § 559.55(7) with reference to "debt collector," and defines "debt collector" in § 559.55(6) as "any person" who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to by owed or due another (e.s.). As noted in Streeps Music, the civil remedies in § 559.77 apply to "persons," whether they are "collection agencies" or not. 333 So.2d at 67. The term "person," standing alone with no exemption, necessarily includes lawyers, or the express exemption of lawyers from registration as "collection agencies" would be redundant.

Section 559.565(2) confirms that "Any person, whether or not exempt from registration under this part, who violates the provision of s. 559.72 shall be subject to sanctions for such violations the same as any other consumer debt collector." Accordingly, lawyers are liable as "persons" when they engage in consumer debt collection practices prohibited by § 559.72.

The Court may find it helpful to consider case law under the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*. The FDCPA has the same general purpose as the Florida CCPA and

prohibits "debt collectors" from deceiving or attempting to deceive consumer debtors.[7]

As originally enacted in 1977, the FDCPA definition of "debt collector" contained an express exemption for attorneys. In 1986, Congress repealed this exemption. After this amendment, conflict arose among the federal circuits as to whether the law still impliedly immunized lawyers from liability for false debt collection statements during litigation.[8]

The Supreme Court resolved the conflict in Jenkins v. Heintz, 514 U.S. 291 (1995). In Heintz, in an action on a consumer loan, the creditor's lawyer allegedly wrote the debtors' lawyer "in an effort to settle the suit," claiming an insurance charge that was not authorized under the agreement creating the debt, and thus falsely represented the amount of the debt. Id. at 293. The Court held this allegation stated a cause of action for violation of

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[7] Sections 1692e(2) and (10) prohibit "debt collectors," as defined in the law, from falsely representing the amount of a debt or using other false or deceptive means to collect or attempt to collect a debt. Section 1962f(1) prohibits debt collectors from using unfair means to collect or attempt to collect any debt, including collection of any amount unless such amount is expressly authorized by the agreement creating the debt or by law.

[8] E.g., Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994), citing legislative history of the 1986 amendment showing Congress's concern that attorneys have increasingly entered the debt collection business and used the exemption to evade compliance with the Act, and citing a lawyer's advertising his exempt status to unfairly compete with non-lawyer debt collectors; see also Paulemon v. Tobin, 30 F.3d 307, 310 (2d Cir. 1994).

the FDCPA based on the plain language of the definition of "debt collector" and the legislative history of the amendment. The Court rejected arguments for an implied exemption for lawyers' activities in litigation. Id. at 295, 299.

Following Heintz, courts hold lawyers accountable under the FDCPA for their false or misleading statements to debtors, whether prior to or in the course of litigation. See Sandlin v. Shapiro & Fishman, 919 F.Supp. 1564 (M.D. Fla. 1996), involving facts very similar to this case, and holding that a lawyer's letter attempting to collect an unauthorized "payoff fee" to reinstate a mortgage violates the FDCPA. See also Fuller v. Becker & Poliakoff P.A., 192 F.Supp. 2d 1361 (M.D. Fla. 2002) (lawyer's misleading statements to debtor regarding liability for fees and costs violated Act); Williams v. Edelman, 408 F.Supp. 2d 1261 (S.D. Fla. 2005)(same).

Other federal courts hold creditors' lawyers accountable under the FDCPA for seeking unauthorized fees or charges in collecting a consumer debt. See Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998) (attempt to add unauthorized $12.50 "collection fee" violated Act); Stolicker v. Muller et al. P.C., 2005 U.S.Dist. Lexis 32404 (W.D. Mich. 2005) (pleading attempting to collect fixed sum as attorney fee, rather than a "reasonable fee" as debtor's contract provided, violated Act); Thinesen v. JBC Legal Group P.C.,

2005 U.S. Dist. Lexis 21637 (D. Minn. 2005) (attempt to add "service charge" $10 over legal maximum amount violated Act).

Of course, once the federal courts ruled that lawyers are not exempt from FDCPA in Heintz, the Florida Legislature's failure to amend the CCPA to exempt lawyers manifests its concurrence that covered "persons" include lawyers.

2. The term "attempts" includes unsuccessful attempts.

Section 559.77(9), quoted above, prohibits knowing "attempts" to enforce deceptive debts from consumers. It does not matter whether the attempt is successful. See Streeps Music, above, 333 So.2d at 67 (statute applies to "all unlawful attempts at collecting consumer claims," so that "attempts to effect the collection of amounts not due" entitles the debtor to recover the minimum statutory damages in § 559.77).

The provision for minimum statutory damages confirms that debtors may obtain relief even if they did not suffer actual damages in relying on the deception. In Harris, above, this Court explained the purpose for the statutory minimum damages, as follows:

> [T]he minimum award afforded by the statute exhibits aspects of both liquidated and punitive damages. It clearly appears to have been the intent of the Legislature to provide a remedy for a class of injury where damages are difficult to prove and at the same time provide a penalty to dissuade parties such as Beneficial from engaging in collection practices which may

> have been heretofore tolerated industry wide. Neither objective is without the purview of proper legislative action. The Consumer Collection Practices Act is a laudable legislative attempt to curb what the Legislature evidently found to be a series of abuses in the area of debtor-creditor relations.

338 So.2d at 200-01. A debtor who does not rely on the false statement can still recover statutory damages, which deters attempts to deceive debtors.

Like the CCPA, the FDCPA prohibits "attempts" to collect unauthorized debts, and allows statutory damages if actual damages are not shown. Under the FDCPA, a debtor has standing to sue even if he or she did not actually pay the amount unlawfully demanded. The courts certify class actions on behalf of all debtors who were sent or received an offending letter, including both debtors who paid the amount wrongfully claimed, and debtors who did not. See Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998) (certifying class of debtors who received lawyers' demand to pay unauthorized "collection fee," including debtors who did not pay this fee and had no actual damages); Fuller v. Becker & Poliakoff, 197 F.R.D. 697 (M.D. Fla. 2000) (receipt of letter sufficed for standing to bring class action); Agan v. Katzman & Korr P.A., 222 F.R.D. 692 (S.D. Fla. 2004) (same); Irwin v Mascott, 96 F.Supp.2d 968 (N.D. Cal. 1999); Talbott v. GC Services LP, 191 F.R.D. 99 (W.D. Va. 2000); In re Risk Management Alternatives, Inc. FDCPA Litigation, 208 F.R.D. 493 (S.D.N.Y. 2002). The statutes and case

law clearly prohibit "attempts" and the statutory minimum damages remedy must be given effect in such cases.

3. The general rule of construction for remedial statutes applies.

The CCPA is a remedial statute and should be liberally construed to carry out its purpose, even if in derogation of the common law. Irven v. Dept. of HRS, 790 So.2d 403 (Fla. 2001). See also Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002) (FDCPA is liberally construed).

B. DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

The Deceptive and Unfair Trade Practices Act, Fla. Stat. Ch. 501 Part II, was enacted, *inter alia*, to clarify and modernize the law governing consumer protection, to protect consumers from deceptive or unfair acts or practices, and to make state consumer protection and enforcement consistent federal law. § 501.202, Fla. Stat. The Act is liberally construed to carry out its remedial purposes. Id.

Section 501.204 (1), prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Subsection (2) of this statute directs courts to accord great weight to the FTC's and federal courts' interpretations of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

Section 501.211 allows anyone aggrieved by a "violation of this part" to bring an action for a declaratory judgment and to enjoin a "person" who

has violated this part, and for actual damages. There is no exemption for lawyers. Cf. list of exemptions in § 501.212, which confirms that lawyers are not exempt, under the *expressio unius* rule.

Section 501.203(3) defines a "violation of this part" to include any violation of any law or statute which prohibits unfair or deceptive acts or practices. Thus conduct that violates the FDCPA or the CCPA is a *per se* violation of DUTPA. See Schauer v. GMAC, 819 So.2d 809 (Fla. 4th DCA 2002); Fla. Atty. Gen. Op. 77-32. See also Fistos, "Per Se Violations of the Florida Deceptive and Unfair Trade Practices Act," 76 Fla. Bar Jour. 62, 64 n.33 (May 2002) (violation of the federal FDCPA is a *per se* DUPTA violation).

C. NO POLICY REASON TO EXEMPT PETITIONERS

A lawyer's knowing misrepresentation of the amount of indebtedness to cheat consumers for his own profit is a reprehensible practice. Petitioners' victims are unfortunate persons facing the loss of their homes. Such financial hardships often arise in conjunction with employment, health, or marital problems, which render such debtors particularly vulnerable to deceptive schemes.[9]

[9] 15 U.S.C. § 1692 contains findings that many debt collectors use abusive, deceptive and unfair debt collection practices, which contribute to the number of personal bankruptcies, to marital instability, and the loss of jobs;

There is no sound reason to judicially imply a special privilege for lawyers, not enjoyed by other "persons," to cheat consumers for the lawyers' own profit. The practice is no different from a false reinstatement letter by a non-lawyer. Petitioners simply used their status as lawyers to assist in carrying out a deceptive scheme for their own commercial benefit. Indeed, a deceptive reinstatement letter has greater credibility when it comes from a lawyer, and is all the more insidious because it trades on the legal profession's efforts to foster public trust of lawyers. As this Court observed in Fridovitch, to immunize such false statements prior to litigation does not preserve the integrity of the litigation process or otherwise benefit society.

The CCPA and DUTPA would be ineffective if lawyers were exempt. Any business could make deceptive communications through its lawyer, and claim this practice was connected with potential future litigation. Congress found this loophole was detrimental to the purpose of the FDCPA in repealing the exemption for lawyers in 1986.

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and that existing laws and procedures for redressing these injuries are inadequate to protect consumers. In determining whether a practice is deceptive under FDCPA, courts use standards of the Federal Trade Commission Act. Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985) (standard is whether the debt collection practice has a tendency to deceive the least sophisticated consumer).

When the statutes are clear, any applicable common law privilege must yield. Accordingly, even if Petitioners could show some rationale for a privilege, the Florida Legislature is competent to balance the relative harms and benefits, and subject lawyers' communications to debtors to the general remedy for deceptive consumer debt collection practices.

Petitioners argue their conduct is more appropriately addressed by Bar disciplinary action, but Bar regulation does not supplant substantive law governing the duties of persons (including lawyers) in billing for services. See Preamble to the Code of Professional Conduct. The Code does not authorize lawyers to mislead consumer debtors, contrary to law.[10]

The fact that Petitioners are regulated in their professional legal practice by The Florida Bar and this Court is not a free pass to violate a statute regulating commercial conduct. See Heintz, 514 U.S. 291, and other cases cited above applying the FDCPA. See also Restatement 3d of the Law Governing Lawyers, § 56 (stating that lawyers are liable to a non-client in circumstances where other persons are liable); Id. cmt. f ("Misrepresentation is not part of proper legal assistance"); Id. cmt. j ("Some state consumer

[10] Petitioners cite the newly amended Rule 4-1.5(b)(2)(F), which allows contracts to purchase lawyers' in-house services, but this rule does not allow a lawyer to pad invoices with expenses not needed or incurred, in the hope of foisting this expense onto an unknowing opponent. Cf. Rule 4-4.1 ("a lawyer shall not knowingly (a) make a false statement of material fact or law to a third person…").

protection statutes have been held applicable in whole or part to law practice"); Id. § 41 cmt. a ("Disciplinary authorities sanction lawyers for abusive fee collection methods…. Lawyers are subject to the restrictions on debt-collection provided by general law"); Id. § 98 ("A lawyer communicating on behalf of a client with a nonclient may not (1) knowing make a false statement prohibited by law; (2) make other statements prohibited by law; ...." . And see U.S. v. Cueto, 151 F.3d 620, 631-34 (7th Cir. 1998) (rejecting argument that "lawyers should be plucked gently from the madding crowd and sheltered from the rigors of 18 U.S.C. § 1503 [prohibiting obstruction of justice]… Attorneys, like all other persons, are not above the law….").

Debtors' enforcement of FDCPA remedies against lawyers who demand phony expense charges over the last 20 years (since the 1986 amendment) has not impaired lawyers' zealous advocacy in litigation. Granting the litigation privilege in this case would serve no practical purpose, as lawyers must still conform their conduct to the paramount federal law in FDCPA. The state statute provides that in the event of any inconsistency

between the state and federal law, the provision that is more protective of the consumer shall prevail. [11]

Petitioners are not free to use their licenses to practice law to evade statutes that clearly subject them to the same regulation as all others engaged in debt collection.

[11] Section 559.77(5) directs that "In applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act." This guidance was added in 2001, but was not intended to change the pre-existing law. See 2001 Senate Staff Analysis of CS/SB 94, (CCPA presently applies to "all persons," citing Sandlin, above, 919 F.Supp. 1564, construing FDCPA to apply to lawyer's false statement of mortgage payoff amount) (App. 9).

III. THE FALSE REINSTATEMENT LETTERS ARE NOT SETTLEMENT OFFERS OR ATTORNEY WITNESS STATEMENTS THAT COULD BE PROTECTED BY THE LITIGATION PRIVILEGE.

Petitioners cannot avoid the statutory liability by mischaracterizing their false reinstatement letters as settlement offers or witness statements.

A false reinstatement letter is not privileged as a settlement offer. The Circuit Court obviously found Petitioners' reinstatement letters were not settlement offers. This is at least partly a factual ruling based on the parties' intent, the content and circumstances of the letters, and how debtors would reasonably perceive the letters. In requesting a reinstatement amount, the debtors were dependant on the Petitioners' veracity and were not yet in an adversary posture; by necessary implication under the mortgage, they had a right to expect accurate information in order to exercise their reinstatement rights. There was no discovery or other court process available to check the accuracy of the information, and there was nothing in the letters to put debtors "on guard" that the expenses claimed might be exaggerated or negotiable. The letter itself is an ultimatum, and does not offer any option to bargain or compromise the expenses. The Circuit Court's finding that this was not an offer of settlement is factually well supported. There is no basis to declare that the Circuit Court's factual finding is an error as a matter of law. This finding is consistent with the Florida federal court's view

rejecting an argument that mortgage reinstatement letters containing false "payoff fees" were privileged as "settlement communications" under the Florida Evidence Code:

> If this Court were to accept this argument it would in effect overrule Congress' express intent to include attorneys within the FDCPA. Heintz. If every letter which includes payoff amounts and reinstatement fees that is sent by an attorney engaged in the collection of debt is considered to be a settlement or negotiation offer, then all those letters would be excluded as inadmissible and the rights of the debtor to the protection offered by the FDCPA would be seriously hindered. This Court is not persuaded that providing a debtor with the amount of the debt owed is a settlement agreement. Settlement agreements protected by Fla. Stat. § 90.408 are "offers to compromise a claim." The definition of "compromise" is a "settlement of differences by mutual concessions," there were no concession in the amounts indicated in the letters sent by Defendants. (citing Black's Law Dictionary).

Sandlin, above, 919 F.Supp. at 1568-69. This reasoning applies to the instant reinstatement letters, which present unconditional demands, not offers to compromise or mutual concessions. See also Minton v. Shaw, 416 So.2d 3 (Fla. 3d DCA 1982) (affirming trial court's determination that statement was not a settlement offer).

While the reinstatement letters are clearly not settlement offers, even if they were, the Supreme Court in Heintz held that a settlement offer attempting to collect false charges from consumer debtors is actionable under the FDCPA. It would defeat the purpose of the statute if parties could

avoid statutory liability for deceptive practices by simply posturing the false expense claims as "settlement offers." See Armstrong v. The Rose Firm P.A., 2002 U.S. Dist. Lexis 4039 (D. Minn. 2002).

The reinstatement letters are not privileged witness statements either. As an aspect of the litigation privilege, the Courts extend immunity to witnesses' statements in litigation. In Briscoe v. Lahue, 460 U.S. 325 (1983), a civil rights action under 42 U.S.C. § 1983, the Supreme Court explained that without immunity, witnesses might be reluctant to come forward and testify, or might distort their testimony for fear of liability. The Court observed that witness immunity, coupled with the "crucible of the judicial process," is the path that would best lead to the ascertainment of truth. Id. at 330-34.

Briscoe is inapplicable here because the mortgage reinstatement letter is not sworn witness testimony in any judicial truth-seeking proceeding, but rather a statement outside the judicial process that attempts to deceive debtors on what they must pay to avoid the judicial process. Moreover, Briscoe is inapplicable where a statute specifically provides prohibitions and remedies for false statements. See Heintz, above, 514 U.S. 291, applying FDCPA.

This issue was recently analyzed in Todd v. Weltman, Weinberg & Reis Co. L.P.A., 434 F.3d 432 (6th Cir. 2006), which held the Briscoe reasons for witness immunity did not protect a lawyer who functioned as a complaining witness by filing a false statement in aid of garnishment, so the lawyer was subject to liability under the FDCPA. The Court observed that the purpose of immunity, to preserve the integrity of the judicial system, did not assist "a self-interested party who allegedly lies in an affidavit to initiate a garnishment proceeding." Id. at 447.[12] And see Blevins v. Hudson & Keyse, Inc., 395 F.Supp.2d 662 (S.D. Ohio 2004) (lawyer's affidavit filed in collection action is not protected by witness immunity or litigation privilege from liability under FDCPA).

Petitioners cite Beck v. Codilis & Stawiarske P.A., 2000 WL 34490402 (N.D. Fla. 2000), which involved a statement in litigation, not a mortgage reinstatement letter, so it cannot apply here. Moreover, Beck found the attorney's flat title search fee was both authorized by the

[12] Todd cites a series of decisions after Briscoe clarifying that absolute witness immunity does not apply to a "complaining witness" who gives false testimony. Malley v. Briggs, 475 U.S. 335 (1986), held that a police officer who made a malicious complaint without probable cause in seeking a warrant does not have absolute immunity. Wyatt v. Cole, 504 U.S. 158 (1992), held that a private plaintiff's false statements in an *ex parte* replevin action (analogous to debt collection) does not have absolute immunity. Kalina v. Fletcher, 522 U.S. 118 (1997), held that a prosecutor's vouching for the truth of unsworn false statements, which functioned not as legal advocacy but as testimony, does not have absolute immunity.

mortgagee's engagement of the attorney, and reasonable, so there was no false statement to the debtor. Here, the Circuit Court found the bank had not authorized the contested expenses that Petitioners tried to collect from debtors. (V10, T 215) In sum, Beck does not allow absolute immunity for lawyers-as-witnesses in all circumstances, and its factual findings do not create any kind of precedent in this case, especially where the District Court of Appeal necessarily found the Circuit Court's factual findings were supported and did not disturb them.

IV. THE EXPANDED CLASS DEFINITION IS BEYOND THE SCOPE OF THIS COURT'S ORDER GRANTING REVIEW.

Petitioners' merits brief point II argues that the District Court of Appeal usurped the Circuit Court's discretion, by directing that the class definition include debtors who did not pay the false reinstatement charges. This argument is beyond the scope of this Court's Order granting limited review (App. 4), and should not be considered at all.

The District Court of Appeal ruled properly in any case. It gave effect to the Circuit Court's factual findings, and redefined the class consistent with those findings. The Circuit Court did not have discretion to limit relief inconsistent with its own findings and should have adhered to the statutes and case law that clearly allow all consumer-debtors who receive attempted false claims bring claims, and be included in class actions.

As discussed in Point II above, the CCPA prohibits "attempts" to deceive and provides minimum statutory damages, which means reliance by the debtor is not required. See also federal cases certifying class actions under FDCPA on behalf of all debtors who were sent or received an offending communication, cited in Point II above.

Under DUTPA, consumers who receive claims that are "likely to deceive" need not plead and prove reliance to sue. See Davis v. Powertel Inc., 776 So.2d 971 (Fla. 1st DCA 2000) (class action certified despite class

members' varying reliance); see also W.S. Badcock Corp. v. Myers, 696 So.2d 776 (Fla. 1st DCA 1996) (certifying DUPTA and TILA class action for improper attempts to collect "non-filing fee" charge); Latman v. Costa Cruise Lines N.V., 758 So.2d 699 (Fla. 3d DCA 2000) (certifying class action for attempts to collect inflated port charge); Turner Greenburg Assocs., Inc. v. Pathman, 885 So.2d 1004 (Fla. 4th DCA 2004) (certifying class action for attempts to collect inflated shipping charge). The debtor's reliance is not an essential element and lack of reliance does not defeats all relief.

V. THE COURT SHOULD DISMISS FOR LACK OF JURISDICTION.

To dispose of this case, the Court would have to first confirm its jurisdiction was providently invoked. Respondent would respectfully suggest that there is no "express and direct conflict … on the same question of law" between the decision under review and another appellate decision, as required for conflict jurisdiction under Fla. Rule App. Pro. 9.030(a)(2)(iv). The ruling below, that Petitioners' mortgage reinstatement letters contained false or deceptive statements that violate the CCPA and the DUTPA and are not within any common law litigation privilege, is one of first impression in the Florida appellate courts.

The Levin decision is not in conflict, because it dealt with a statement made to a court, during the course of litigation, and did not involve the violation of a statutory right.

Nor did Boca Investors Group, Inc. v. Potash, 835 So.2d 273 (Fla. 3d DCA 2002), deal with the same question of law. The Court majority held the litigation privilege barred a statutory antitrust claim that was based on filing three lawsuits, and on "necessary preliminary" pre-suit statements, the nature of which was not discussed in the majority opinion. Judge Cope, concurring, stated that the "necessary preliminary" test is no longer the test, but clarified that the pre-suit statements there were between plaintiffs,

potential plaintiffs and counsel, and in his view, these statements had qualified immunity. Potash, above, at 275-76, citing Fridovich, above, 598 So.2d 65. Petitioners' deceptive reinstatement letters to debtors are not lawsuits or "necessary preliminaries" to lawsuits, and are not privileged either under the rationale of the Potash majority or under the rationale of Judge Cope's concurrence.

Moreover, the antitrust laws referenced in Potash are not generally intended to regulate lawsuits (absent sham litigation, under the Noerr-Pennington doctrine) or lawyers' necessary pre-suit statements to clients or potential clients. Here, the statutes expressly prohibit any person's false statements of the debt amount to a consumer debtor, and this statutory prohibition is intended to apply to lawyers.

It may be desirable in an appropriate case for this Court to clarify what privilege, if any, applies to lawyers' pre-suit deceptive statements to opponents where no statute specifically prohibits deceptive communications. In this case, however, the CCPA and DUTPA expressly prohibit the deceptive statements. No Florida appellate case addresses the same issue.

Respondents respectfully suggest that express and direct conflict on the same issue of law, as required for this Court to exercise discretionary review, is absent. Accordingly, the case should be dismissed.

CONCLUSION

The Court should dismiss the case for lack of jurisdiction, or, if the Court chooses to decide the merits, it should limit its ruling to the issue identified in its jurisdictional order, and affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Michael J. McGirney, Esq., and Dale T. Golden, Esq.,** Marshall Dennehey Warner Coleman and Goggin, 201 East Kennedy Boulevard, Suite 1100, Tampa, FL 33602; and **John Beranek, Esq.,** Ausley & McMullen, 227 South Calhoun Street, Post Office Box 391, Tallahassee, FL 32302; by regular U. S. Mail this 26th day of April, 2006.

/s/ David K. Miller
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Respondent's Answer Brief on the Merits complies with the font requirements of Rule 9.100(1), Florida Rules of Appellate Procedure.

/s/ David K. Miller
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