No. 17-3408

In the United States Court of Appeals for the Seventh Circuit

DIANE RHONE,

Plaintiff-Appellee,

v.

MEDICAL BUSINESS BUREAU, LLC,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:16-cv-05215.
The Honorable **Samuel Der-Yeghiayan**, Judge Presiding.

BRIEF OF ACA INTERNATIONAL AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL OR VACATION

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Appellate Court No: 17-3408

Short Caption: Diane Rhone v. Medical Business Bureau, LLC

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Attorney's Signature: s/ Brian Melendez Date: April 27, 2018

Attorney's Printed Name: Brian Melendez

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Statement of Identity, Interest, and Source of Authority to File

Pursuant to Fed. R. App. P. 29(a)(4)(D), Amicus Curiae ACA International states:

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota.

Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. Defendant-Appellant Portfolio Recovery Associates, LLC, is an ACA member.

ACA company members range in size from small businesses with a few employees to large, publicly held corporations. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city, or state, and the very largest of national corporations doing business in every state. But most ACA company members are small businesses, collecting rightfully owed debts on behalf of other small and local businesses. Approximately 75% of ACA's company members maintain fewer than twenty-five employees.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Without an effective collection process, the economic viability of these businesses — and, by extension, the American economy in general — is threatened. Recovering rightfully owed consumer debt lets organizations survive; helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls.

In 2017, ACA commissioned a study to measure the various impacts of third-party debt collection on the national and state economies. The study found that, in calendar year 2016:

- Third-party debt collectors recovered about $78.5 billion from consumers on behalf of creditor and government clients, to whom nearly $67.6 billion was returned.[1]

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[1]Ernst & Young, *The Impact of Third-Party Debt Collection on the US National and State Economies in 2016* at 2 (2017), *online at*

- The third-party collection of consumer debt returned an average savings of $579 per household by keeping the cost of goods and services lower.[2]

All the Parties have not consented to ACA filing this brief, so ACA is filing a motion for leave to file this brief under Rule 29(a)(3).

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https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-the-industry-report-final-5.pdf (accessed Apr. 26, 2018).

[2] *Id.*

Statement Under Rule 29(a)(4)(E)

No Party's counsel authored this brief in whole or in part. No Party or Party's counsel contributed money that was intended to fund preparing or submitting this brief. No person — other than Amicus Curiae ACA International, its members, and its counsel — contributed money that was intended to fund preparing or submitting this brief.[3]

[3]"A party's or counsel's payment of general membership dues to an amicus need not be disclosed." Fed. R. Civ. P. 29(c)(5) advisory committee note (2010).

Argument

I. Not every debtor–creditor relationship is an open account, and the Fair Debt Collection Practices Act explicitly contemplates that the same consumer may owe "multiple debts" that are being collected together.

It is undisputed that Ms. Rhone owed money to MBB for nine physical-therapy sessions;[4] that the amount due was $60 per session, for a total of $540;[5] that the creditor, Illinois Bone & Joint Institute, assigned a different account number to the bill for each session;[6] and that MBB relied on the creditor Institute's treatment of the bills as nine separate debts in choosing how to report to the consumer reporting agencies about Ms. Rhone's indebtedness. [7]The critical question in this case is whether Ms. Rhone owed nine debts, or one.

There are instances where a debtor has an ongoing relationship with a creditor that is based on a single contract, or a course of dealing, or a revolving-charge account, where the entire debtor–creditor relationship is a single account that can be treated as a single debt, known as an "open account": "[a]n account that is left open for ongoing debit and credit entries by two parties and that has a fluctuating balance until either party finds it

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[4]App. at A-2; *id.* at A-4 to -5.

[5]*Id.* at A-4 to -5.

[6]Appellant's Br. at 5.

[7]*Id.*; App. at A-5.

convenient to settle and close, at which time there is a single liability."[8] The law recognizes many such open accounts, perhaps most familiarly the "open end consumer credit plan" that is the subject of the Truth in Lending Act, and which is the form that most credit-card and revolving-charge accounts take: "a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance."[9]

But not every debtor–creditor relationship is an open account. Sometimes a customer shops at a store or hires a service provider more than once, but each visit is an independent transaction that is not aggregated with the other transactions, even though the business or the service provider may hope for the customer's continued business and even though the customer may indeed return again and again to patronize the store or the service.

Whether or not a debtor–creditor relationship is an open account can have significant legal consequences. For example, ACA recently participated as a friend of the court in a case that involved whether the underlying claim was for "services rendered" or was a claim on an "account," where the federal court explained that "the two types of actions needed to be pleaded

[8] *Black's Law Dictionary* 22 (10th ed. 2014) (defining "open account"), s.v. "account."

[9] 15 U.S.C. § 1602(j).

separately" and that mischaracterizing the debt could result in liability for unfair debt-collection practices.[10] Some states have different limitations periods for open accounts than for other contractual liabilities.[11]

The Fair Debt Collection Practices Act explicitly contemplates that the same consumer may owe "multiple debts" that are being collected together,[12] so the fact that a debt collector is collecting more than one bill owed by the same debtor to the same creditor does not mean that only a single "debt" is involved within the Act's meaning. Nevertheless, the District Court in this case took it upon itself to decide that Ms. Rhone owed only one debt, not nine, even though the creditor "presented MBB with nine separate debts."[13] If that decision were correct, then it could have adverse consequences for Ms. Rhone — for example, if she made a partial but not a full payment toward her outstanding indebtedness. If the entire indebtedness were a single account, then her partial payment would toll the statute of limitations as to the entire

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[10] *Robinson v. Accelerated Receivables Sols. (A.R.S.), Inc.*, No. 8:17-cv-00056-LSC-SMB, 2018 U.S. Dist. LEXIS 66540, at *7 (D. Neb. Apr. 19, 2018).

[11] *See, e.g.*, Ala. Code § 6-2-37(1); Ariz. Rev. Stat. Ann. § 12-543; Cal. Civ. Proc. Code § 337(2); Conn. Gen. Stat. § 52-576; La. Civ. Code art. 3494; Nev. Rev. Stat. § 11.190; Tex. Civ. Prac. & Rem. Code Ann. § 16.004(c); Utah Code Ann. § 78B-2-307.

[12] 15 U.S.C. § 1692h (multiple debts).

[13] App. at A-5.

indebtedness.[14] But if the indebtedness were nine separate accounts, then a partial payment might pay off some of them, while leaving the benefit of the statute of limitations intact with respect to the others.

II. A debt collector must be able to rely on information that the creditor provides, as long as such reliance is reasonable.

A debt collector is not a party to the debt, and so must rely on information that the creditor provides. That reliance must be reasonable: a debt collector cannot rely "blindly."[15] Otherwise, though, such reliance does not amount to an unfair debt-collection practice,[16] since "the statute does not require an independent investigation of the debt referred for collection."[17] As this Court has explained,

> A distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditors'

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[14] *See Krawczyk v. Centurion Capital Corp.*, No. 06-C-6273, 2009 U.S. Dist. LEXIS 12204, at *31 (N.D. Ill. 2009) (citing *Dep't of Mental Health v. Mitchell*, 324 N.E.2d 94, 96 (Ill. 1975)).

[15] *Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1275 (11th Cir. 2011).

[16] *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997) (rejecting argument that "would require debt collectors to investigate the charge for which recovery is sought"); *see Hyman v. Tate*, 362 F.3d 965, 968 (7th Cir. 2004) ("it would not be reasonable to require [debt collector] to independently confirm that the accounts forwarded by the bank were not in bankruptcy, where the bank, in the first instance, limited the accounts forwarded to those not in bankruptcy. . . . Under these circumstances, [the debt collector] was not required to independently research each account . . . before sending collection letters.").

[17] *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025, 1032 (6th Cir. 1992).

> activities at all. Courts do not impute to debt collectors other information that may be in creditors' files — for example, that debt has been paid or was bogus to start with. This is why debt collectors send out notices informing debtors of their entitlement to require verification and to contest claims. 15 U.S.C. § 1692g. Verification would be unnecessary if debt collectors were charged with the creditors' knowledge. The due-care defense of § 1692k(c) also would be pointless if creditors' knowledge were imputed to debt collectors.[18]

MBB relied for its treatment of Ms. Rhone's debts on the way that the creditor, the Illinois Bone & Joint Institute, treated them: as nine separate debts, not a single debt. Nothing in the record contradicts that conclusion.

III. Congress has provided powerful remedies for inaccurate credit reporting in the Fair Credit Reporting Act.

This case is a credit-reporting dispute that has been re-purposed as a debt-collection complaint. Federal law provides powerful tools for a consumer to dispute inaccurate information being furnished about that consumer to a consumer reporting agency. Yet Ms. Rhone has sidestepped that process.

Congress, finding that "[a]n elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers,"[19] has extensively and exhaustively regulated the credit-granting and consumer-credit-reporting industries. To impose uniform nationwide standards on the

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[18] *Randolph v. IMBS, Inc.*, 368 F.3d 726, 729 (7th Cir. 2004).

[19] 15 U.S.C. § 1681(a)(2).

industry, Congress enacted the Fair Credit Reporting Act,[20] which regulates both consumer reporting agencies[21] and the furnishers who provide information to them.[22] The Act establishes a detailed scheme by which a consumer can dispute any information that is being reported to a consumer reporting agency.[23] The Act likewise sets forth detailed steps that a furnisher must take in case of such a dispute.[24]

The duties of a furnisher of information that can result in civil liability under the Fair Credit Reporting Act are triggered only "[a]fter receiving notice . . . of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency."[25] Only a consumer reporting agency can give such a notice.[26]

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[20]Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified at 15 U.S.C. ch. 41, subch. III).

[21]*See* 15 U.S.C. § 1681(a)(3) ("Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers."); *id.* (4) ("There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.").

[22]*See* 15 U.S.C. § 1681s-2(b) (duties of furnishers of information).

[23]*See* 15 U.S.C. § 1681i (procedure in case of disputed accuracy).

[24]*See* 15 U.S.C. § 1681s-2(b) (duties of furnishers of information).

[25]15 U.S.C. § 1681s-2(b)(1).

[26]*See* 15 U.S.C. § 1681i(a)(2) (prompt notice of dispute to furnisher of information).

The Fair Credit Reporting Act does impose a "[d]uty of furnishers of information to provide accurate information,"[27] but provides for administrative enforcement as the exclusive remedy for any violation.[28] The Act's scheme does let a consumer bring a civil action directly against a furnisher — but only after the furnisher "receiv[es] notice . . . of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency" and has had an opportunity for investigation.[29] Thus, a consumer (like Ms. Rhone) can sue a furnisher (like MBB) directly, but only after notice from a consumer reporting agency to the furnisher and an opportunity for the furnisher to investigate the consumer's dispute and modify the information that the furnisher is reporting. If the consumer does not follow the statutory procedures under section 1681s-2(b) and allow such notice and opportunity, then only administrative enforcement is available for the alleged violation, and the consumer has no private right of action against the furnisher.

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[27] 15 U.S.C. § 1681s-2(a) (caption).

[28] 15 U.S.C. § 1681s-2(c)(1).

[29] 15 U.S.C. § 1681s-2(b) (duties of furnishers of information upon notice of dispute).

IV. MBB's credit reporting is unimpeachable from the Fair Credit Reporting Act's standpoint because credit reporting requires "independent professional judgment."

Ms. Rhone has bypassed the Fair Credit Reporting Act entirely, and framed her complaint solely in terms of the Fair Debt Collection Practices Act. Whether such an approach is appropriate is questionable, since it deprives MBB of the Fair Credit Reporting Act's protections for furnishers, and credit reporting is generally not an act of debt collection. Courts around the nation have repeatedly rejected claims to that effect. For example, in *In re Mahoney*,[30] after an extensive review of applicable precedents, the court rejected a debtor-plaintiff's argument "that making a credit report is itself an act to collect a debt"[31] and concluded that the "reporting of a debt to a credit reporting agency — without any evidence of harassment, coercion, or some other linkage to show that the act is one likely to be effective as a debt collection device — fails to qualify on its own as an 'act' that violates" a bankruptcy-discharge injunction.[32] Ms. Rhone's claim is based on the theory that MBB's credit reporting was an act of debt collection, a theory that the

[30] *In re Mahoney*, 368 B.R. 579 (W.D. Tex. 2007).

[31] *Id.* at 585 (court's emphasis).

[32] *Id.* at 589.

Mahoney court — and many other courts around the nation[33] — have soundly rejected.

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[33]*See, e.g.*, *Giles v. James B. Nutter & Co. (In re Giles)*, 502 B.R. 892, 904 (Bankr. N.D. Ga. Sept. 30, 2013) (reporting declining balances does not violate discharge injunction: "Because the debt exists, its reporting alone is not a violation of the discharge injunction absent a showing that the purpose or effect of the reporting was to collect the discharged debt as a personal liability of the debtor"); *Montano v. First Light Fed. Credit Union (In re Montano)*, 488 B.R. 695, 709–10 (D.N.M. 2013); *Mortimer v. Bank of Am., N.A.*, No. C-12-01959-JCS, 2013 U.S. Dist. LEXIS 2993, at *15–16 (N.D. Cal. Jan. 3, 2013) ("the FCRA does not prohibit the accurate reporting, after discharge, of debts that were delinquent during the pendency of the bankruptcy action"); *Brown v. Bank of Am. (In re Brown)*, 481 B.R. 351, 362 (Bankr. W.D. Pa. 2012); *Small v. Univ. of Ky. Fed. Credit Union (In re Small)*, Bankr. No. 08-52114, Adv. No. 10-5111, 2011 Bankr. LEXIS 1868, at *10 (Bankr. E.D. Ky. May 13, 2011) ("courts have generally held that for a creditor to violate the discharge injunction by reporting information on a credit report, there must be an attempt by the creditor to collect a discharged debt"); *Mogg v. Midw. Collection Servs. (In re Mogg)*, Adv. No. 07-3076, 2007 Bankr. LEXIS 3086, at *9 (Bankr. S.D. Ill. Sept. 5, 2007); *In re Jones*, 367 B.R. 564, 569 (Bankr. E.D. Va. 2007) ("The reporting of a delinquent debt to a credit reporting agency is not inherently an act to collect a debt but rather to share information relative to credit granting decisions."); *Reeves v. Gateway Credit Card Plan (In re Reeves)*, 369 B.R. 338, 339 (Bankr. N.D. Ohio 2007) ("this Court rejected the contention that the mere act of continuing to report a debt as due and owing in a credit report constituted a compensable violation of bankruptcy law"); *Irby v. Fashion Bug (In re Irby)*, 337 B.R. 293, 295–96 (Bankr. N.D. Ohio 2005) ("it is difficult to discern how . . . the sole act of reporting a debt, whose existence was never extinguished by the bankruptcy discharge, violates the discharge injunction. . . . . the reporting of the debt will not likely run afoul with the discharge injunction unless it is also coupled with other actions undertaken by the creditor to collect or recover the debt"); *In re Miller*, No. 01-02004, 2003 Bankr. LEXIS 2230, at *5–6 (Bankr. D. Idaho Aug. 15, 2003); *Vogt v. Dynamic Recovery Servs. (In re Vogt)*, 257 B.R. 65, 70–71 (Bankr. D. Colo. 2000) ("The creditor was under no obligation under the Bankruptcy Code to change the way it reported the status of the loan. False reporting, if not done to extract payment of the debt, is simply not an act proscribed by the Code."); *see generally* Debra Lee

The Fair Debt Collection Practices Act is not silent about credit reporting. The Act explicitly exempts communication with a consumer reporting agency from its general prohibition against communication with third parties.[34] The Act likewise exempts consumer reporting agencies from the prohibition against "publication of a list of consumers who allegedly refuse to pay debts."[35] The Act prohibits "[t]he false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by [the Fair Credit Reporting Act, 15 U.S.C. § 1681a(f)]."[36] So Congress was mindful of fair credit reporting when it enacted the Fair Debt Collection Practices Act. But neither the Fair Debt Collection Practices Act nor the Fair Credit Reporting Act indicates that the Fair Debt Collection Practices Act should become an alternative means of challenging credit reporting with which a consumer debtor disagrees.

Since Ms. Rhone's debt-collection claim is premised exclusively on credit reporting, it is worth noting that MBB's credit reporting is unimpeachable from the Fair Credit Reporting Act's standpoint. That Act does not require that a furnisher report any particular information, or that it

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Hovatter, *Sommersdorf's Progeny: Can Wrong Credit Report Trigger a Debtor Claim Under the Code?*, Am. Bankr. Inst. J. 14 (2007).

[34]15 U.S.C. § 1692c(c).

[35]15 U.S.C. § 1692d(3).

[36]15 U.S.C. § 1692e(16).

report information in any particular way. A consumer cannot insist that a furnisher report certain favorable information if the information that the furnisher is reporting, albeit unfavorable, is accurate and not misleading: a furnisher's duty of investigation is not triggered unless the consumer first makes "a showing that the reported information was in fact inaccurate."[37] And the consumer has no right for information in his or her consumer report to be presented "in the best possible light for the consumer":

> Although a credit reporting agency has a duty to make a reasonable effort to report "accurate" information on a consumer's credit history, it has no duty to report only that information which is favorable or beneficial to the consumer. Congress enacted FCRA with the goals of ensuring that such agencies imposed procedures that were not only "fair and equitable to the consumer," but that also met the "needs of commerce" for accurate credit reporting. Indeed, the very economic purpose for credit reporting companies would be significantly vitiated if they shaded every credit history in their files in the best possible light for the consumer. Thus, the standard of accuracy embodied in section 607(b) is an objective measure that should be interpreted in an evenhanded manner toward the interests of both consumers and potential creditors in fair and accurate credit reporting.[38]

A consumer cannot prevail on a claim against a furnisher under the Fair Credit Reporting Act unless she can show that additional information

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[37] *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 67 (1st Cir. 2008); *accord Keuhling v. Trans Union, LLC*, 137 F. App'x 904, 908 (7th Cir. 2005) (affirming summary judgment for defendant where consumer "has produced no evidence tending to establish that his credit report was inaccurate"); *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991).

[38] *Cahlin*, 936 F.2d at 1158.

would have produced a different result.[39] She must show that the furnisher overlooked some *fact* that an additional investigation would have uncovered and that would have led to a different result.

MBB was operating with full information; it simply disagrees with Ms. Rhone's view. A claim under the Fair Credit Reporting Act fails in such a case: "A consumer . . . cannot bring a section 611(a) claim against a credit reporting agency when it exercises its independent professional judgment, based on full information, as to how a particular account should be reported on a credit report."[40] The standards that apply to furnishers follow the standards that apply to consumer reporting agencies.[41]

Credit reporting requires "independent professional judgment," which MBB exercised in determining that Ms. Rhone's accounts with the Illinois Bone & Joint Institute should be treated — and reported to the consumer reporting agencies — as nine debts rather than one. MBB's credit reporting was unimpeachable from the Fair Credit Reporting Act's standpoint. The

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[39] *Chiang v. Verizon New England, Inc.*, 595 F.3d 26, 41 (1st Cir. 2010).

[40] *Cahlin*, 936 F.2d at 1160 (11th Cir. 1991) (affirming summary judgment for defendant where "no additional amount of factual investigation . . . would have revealed any 'inaccuracy'").

[41] *See, e.g., Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 431 (4th Cir. 2004); *Donovan v. Bank of Am.*, 574 F. Supp. 2d 192, 206 & n. 82 (D. Me. 2008); *King v. Asset Acceptance, LLC*, 452 F. Supp. 2d 1272, 1278 (N.D. Ga. 2006); *Bruce v. First U.S.A. Bank, N.A.*, 103 F. Supp. 2d 1135, 1143 (E.D. Mo. 2000).

Fair Credit Reporting Act and the Fair Debt Collection Practices Act are both part of the same statute, the Consumer Credit Protection Act,[42] so they should be read together, and it makes no sense that MBB should face liability under the Fair Debt Collection Practices Act for the same conduct for which it would face no liability under the Fair Credit Reporting Act.

Some debt-collection firms are law firms, but many are not. And some debt collectors are licensed lawyers, but many are not. While a non-lawyer debt collector may be able to reach an informed view about whether a debt is an open account, that view may be mistaken in the absence of a more sophisticated legal analysis. To impose that burden, and the concomitant risk of liability, on debt collectors acting in good faith goes far beyond any duty that Congress imposed on debt collectors under the Fair Debt Collection Practices Act.

[42]The Fair Credit Reporting Act and the Fair Debt Collection Practices Act are both subchapters of the Consumer Credit Protection Act, codified in the United States Code at title 15, chapter 41. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 176 (1968). The Fair Credit Reporting Act is subchapter III. Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970). The Fair Debt Collection Practices Act is subchapter V. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977).

V. The District Court cannot have properly reached the conclusions in its opinion on the available record, so this Court should either reverse or vacate the District Court's order.

One of two things must be true: either (1) MBB was entitled to exercise its independent professional judgment about how Ms. Rhone's indebtedness to the Illinois Bone & Joint Institute should be treated for credit-reporting purposes; or (2) this case depends on whether Ms. Rhone owed nine debts, or one.

If MBB was entitled to exercise its independent professional judgment about how Ms. Rhone's indebtedness should be treated for credit-reporting purposes, then Ms. Rhone's claim fails, and the District Court's order should be reversed.

But if this case depends on whether Ms. Rhone owed nine debts, or one, then the District Court lacked the information that it needed for that determination. (MBB's brief details the information that the District Court would have needed, but did not have, in order to make such a determination.[43]) If this case depends on whether Ms. Rhone owed nine debts or one, then this Court should vacate the District Court's order, and remand this case for the appropriate further proceedings.

[43]Appellant's Br. at 12–16.

Conclusion

Therefore, Amicus Curiae ACA International respectfully asks that this Court reverse (or, in the alternative, vacate) the District Court's order.

April 27, 2018.

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April 27, 2018.

BARNES & THORNBURG LLP

s/ Brian Melendez

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