16-2165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANKLIN ARIAS,

Plaintiff-Appellant,

v.

GUTMAN, MINTZ, BAKER & SONNENFELDT, PC and 1700 DEVELOPMENT CO. (1500), INC.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE CONSUMER FINANCIAL PROTECTION BUREAU AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT

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INTEREST OF THE BUREAU

The Consumer Financial Protection Bureau, an agency of the United States, files this brief pursuant to F.R.A.P. 29(a).

This case is about the protections the Fair Debt Collection Practices Act (FDCPA or the Act) affords consumers who are subjected to the deceptive or unfair collection of their federally protected Social Security benefits. The Bureau has a substantial interest in protecting consumers affected by such conduct. Congress established the Bureau "to protect consumers from abusive financial services practices," *see* Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010), and vested it with authority to enforce the FDCPA and to prescribe rules implementing the Act, 15 U.S.C. §§ 1692*l*(b)(6), (c), (d).

Congress also entrusted the Bureau with a special mandate to empower older consumers to protect themselves from unfair, deceptive, and abusive practices. *See* 12 U.S.C. § 5493(g). As noted by the Bureau's Office of Financial Protection for Older Americans, consumers have reported attempts by debt collectors to garnish their Social Security and other protected federal benefits "even though these funds ordinarily are not subject to garnishment by the collectors." Office for Older Americans, CFPB, *A Snapshot of Debt Collection Complaints Submitted by Older*

Consumers 14 (2014), http://files.consumerfinance.gov/f/201411_cfpb_snapshot_debt-collection-complaints-older-americans.pdf (CFPB Snapshot). For older consumers, these baseless collection efforts can cause "significant distress, especially when they rely on these federal benefits to pay essential living costs." *Id.* at 14-15.

STATEMENT

A. Statutory Background

1. ***The FDCPA.*** Congress enacted the Fair Debt Collection Practices Act in 1977 because it concluded that existing laws and procedures were inadequate to protect consumers from serious and widespread debt collection abuses. Pub. L. No. 95-109, § 802, 91 Stat. 874, 874 (1977) (codified at 15 U.S.C. § 1692(a)-(b)); *Goldman v. Cohen*, 445 F.3d 152, 155 (2d Cir. 2006). Congress intended the Act to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010).

To effectuate its "broad, pro-debtor objectives," *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 87 (2d Cir. 2003), the Act prohibits a wide range of practices pertaining to the collection of consumer debts by debt collectors, *see generally* 15 U.S.C. §§ 1692b-1692i. Two such prohibitions are at issue here. First, the Act prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Second, the Act prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt." *Id.* § 1692f. Both of these provisions also set forth specific examples of conduct that violates the general bans. *Id.* §§ 1692e(1)-(16), 1692f(1)-(8).

As originally enacted, the Act exempted debt-collecting attorneys from its coverage, Pub. L. No. 95-109, § 803(6)(F), 91 Stat. at 875, because Congress believed "that bar associations would adequately police attorney violations," H.R. Rep. No. 99-405, at 6 (1985). That, however, "prove[d] not to be the case," *id.*, and in 1986 Congress repealed the attorney exemption in response to "the explosion of law firms conducting debt collection businesses," *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814, 817 (8th Cir. 2012); *see also* Pub. L. No. 99-361, 100 Stat. 768 (1986). The Act thus now applies to "lawyers engaged in litigation." *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995).

The FDCPA also addresses the relationship between the Act and state laws. The Act contemplates that the FDCPA and state debt collection laws will work in concert to protect consumers. The FDCPA preempts state law to the extent it is "inconsistent" with the FDCPA, but where a state's debt collection law is more protective of consumers, both the State's law and the FDCPA apply. *See* 15 U.S.C. § 1692n. The FDCPA empowers the Bureau to issue regulations exempting debt collection practices that it finds are subject to "substantially similar" state law requirements for which "adequate provision" has been made for enforcement. 15 U.S.C. § 1692*o*; *see also* 12 C.F.R. pt. 1006.

2. ***New York's Exempt Income Protection Act.*** Federal law has long exempted Social Security benefits from "execution, levy, attachment, or other legal process." 42 U.S.C. § 407(a); *see Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 382-83 (2003). Save for some exceptions that are not relevant here, Social Security benefits and other protected funds are thus not to be subject to forcible debt collection, such as garnishment. *Cf. Lockhart v. United States*, 546 U.S. 142, 144-45 (2005). Nevertheless, in 2008, New York's legislature found that "difficulties in protecting exempt funds from forcible collection" had "'reached epidemic proportions.'" *Cruz v. TD Bank,*

N.A., 711 F.3d 261, 270 (2d. Cir. 2013) (quoting N.Y. State Senate Introducer's Mem. in Supp., Bill No. S6203, at 4 (2008)). The legislature responded by enacting the Exempt Income Protection Act. 2008 N.Y. Laws Ch. 575.

Under New York's exempt income law, a judgment creditor that wishes to restrain funds in a bank account must serve the relevant banking institution with specific forms. N.Y. C.P.L.R. 5222-a(b)(1). The institution must then provide copies of those forms to the consumer. N.Y. C.P.L.R. 5222-a(b)(3). Where exempt payments (including Social Security benefits) have been directly deposited to the account within the last forty-five days, New York's law automatically protects the first $2,500 (adjusted every three years for inflation)[1] from being taken to satisfy a money judgment.[2] N.Y. C.P.L.R. 5205(*l*). To claim an exemption for any part of the remaining

[1] From April 1, 2012, until April 1, 2015, the exempted dollar amount was $2,625. *See* New York Department of Financial Services, *DFS: Regulations – Legal Notices*, http://www.dfs.ny.gov/legal/legal_notices.htm.

[2] Federal regulations also impose requirements on financial institutions that receive garnishment orders. *See* 12 C.F.R. pt. 212. Among other things, those rules establish a protected amount of federal benefits that financial institutions may not freeze in response to a garnishment order, *id.* § 212.6(a), and provide that a state law that requires a higher protected amount is not preempted if a financial institution can comply with both the state law and the federal rules, *id.* § 212.9(b). The Bureau's understanding is that in this case New York's exempt income law required Arias's bank to establish a higher protected amount than the federal rules would have.

amount in the account, the judgment debtor executes the exemption claim and sends it back to the bank and the judgment creditor. N.Y. C.P.L.R. 5222-a(c)(1).

The "restraint shall be deemed void" unless the judgment creditor presents a timely objection to the executed exemption claim. N.Y. C.P.L.R. 5222-a(c)(3). To object, the creditor must commence a special proceeding in state court supported by an affirmation or affidavit that "demonstrate[s] a reasonable belief that such judgment debtor's account contains funds that are not exempt from execution and the amount of such nonexempt funds." N.Y. C.P.L.R. 5222-a(d). "The affirmation or affidavit shall not be conclusory, but is required to show the factual basis upon which the reasonable belief is based." *Id.*

A judgment creditor may not object and, indeed, must instruct the bank to release the restrained funds, if it receives an executed claim form "accompanied by information demonstrating that all funds in the account are exempt." N.Y. C.P.L.R. 5222-a(c)(4). If the judgment creditor determines that the account contains some funds from exempt sources and some funds from non-exempt sources, the judgment creditor must use the "lowest intermediate balance principle of accounting"[3] to identify the exempt funds in the account and must instruct the bank to release all exempt funds. *Id.* A hearing on any objection filed by the judgment creditor must be noticed to be held within seven days. N.Y. C.P.L.R. 5222-a(d).

B. Facts and Procedural Background

1. ***Facts.*** In 2006, Franklin Arias was sued by his landlord for back rent. Joint Appendix (JA) 10, ¶ 12.[4] Arias was not aware that back rent was due and was never served. *Id.* ¶¶ 11, 13-14. Nevertheless, the landlord obtained a default judgment against Arias for $4,656.15. *Id.* ¶ 15. Eight

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[3] As a general matter, the lowest intermediate balance principle is an accounting rule for tracing specified funds after they are deposited in a commingled account. Under that rule, the funds that are to be traced—whether trust funds, criminal proceeds, or, here, funds that are protected from restraint and garnishment—are treated as the last funds taken out of the account. Under this "last out" approach, a commingled account is treated as containing the amount of traced funds that were deposited in the account unless the account balance has subsequently dropped below that amount. *See generally Black's Law Dictionary* 1090 (10th ed. 2014); *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159 (2d Cir. 1986). To illustrate, assume a consumer deposits $5,000 in exempt funds and $5,000 of non-exempt funds into her account. She then spends $6,000, before depositing an additional $5,000 of non-exempt funds into the account. The Bureau's understanding is that a collector must treat $4,000, the lowest intermediate balance, as exempt funds. *Cf. Restatement (Second) of Trusts* § 202 cmt. j, illus. 20 (1959).

[4] All facts are taken from the allegations in Arias's complaint. The Bureau takes no position on the ultimate truth of these allegations.

years later, the landlord's law firm Gutman, Mintz, Baker & Sonnenfeldt, P.C. (Gutman or the law firm) issued a restraining notice to Arias's bank seeking to recover $4,656.15. *Id.* ¶ 16.

At the time of the notice, Arias had $4,019.62 in his account. JA 30. All of the money in Arias's checking account came from the monthly deposits of $785 made by the Social Security Administration. JA 10-11, ¶¶ 17, 19. Because the account showed recent deposits of Social Security benefits, it appears that the bank established $2,625 as the automatically protected amount under state and federal law. JA 30. The remaining $1,294.62 was restrained. *Id.*

On December 15, 2014, Arias received the notification that the Social Security benefits in his bank account had been restrained. JA 14, ¶ 47. He immediately went to his bank and had the bank fax his account statements to Gutman to show that the only deposits to the account were his monthly Social Security benefits. *Id.* ¶¶ 48-49. Four days later, Arias mailed his completed exemption claim form to Gutman along with bank records showing his last eleven months of deposits. JA 15, ¶ 59. Arias's account statements reflected eleven monthly Social Security deposits of $785 each for a total of $8,635. JA 35-36. Even though these eleven deposits exceeded Arias's checking account balance, Gutman did not release the restrained funds but, instead, filed an objection to Arias's exemption claim along with a supporting affirmation. JA 38.

The supporting affirmation was signed by a Gutman associate who declared under penalty of perjury that he was "fully familiar with the facts and circumstances" of the proceeding. JA 40, ¶ 1. The affirmation claimed that it was "not possible" for Gutman's client "to determine what funds, if any, contained in the Bank of America account are exempt as social security" because Arias "failed to provide any bank records starting from a zero balance." JA 44, ¶ 14. Further, the affirmation asserted that Arias's exempt Social Security benefits would "lose their exempt status if commingled with personal funds," JA 43,¶ 12, and that the bank statements that Arias provided were insufficient to protect his benefits because he "failed to provide any documentation that he never commingled the account with non-exempt funds," JA 44, ¶ 15.

Two weeks later on January 6, Arias appeared *pro se* at a hearing in Bronx County Civil Court. JA 18, ¶ 76. After Arias advised the court that his account only contained deposits of his Social Security benefits, a Gutman attorney asked him to discuss the case outside the courtroom. Arias showed the Gutman attorney the documents he had brought with him—documents that Arias had already sent Gutman twice before. *Id.*

¶¶ 77-80. The parties then returned to the courtroom and Gutman withdrew its motion and stipulated to the release of the restrained funds. JA 18-19, ¶ 81.

2. ***District Court Proceedings.*** Arias filed an action in the United States District Court for the Southern District of New York, alleging that Gutman violated two provisions of the FDCPA.[5] Arias claimed that Gutman's objection was false, misleading, and deceptive in violation of 15 U.S.C. § 1692e, and unfair and unconscionable in violation of 15 U.S.C. § 1692f. JA 21, ¶ 94.

The district court concluded that Arias failed to state a claim under either provision of the Act and granted Gutman's motion for judgment on the pleadings. The court assumed that it was false for Gutman to claim that exempt funds lose their protections under New York law when they are commingled with non-exempt funds and also false to claim that consumers, like Arias, have to provide account statements starting from a zero balance to prove that no commingling has occurred. JA 269. This was presumably

[5] The complaint also asserted two state law claims on which the Bureau expresses no opinion.

because Gutman did not defend the reasonableness or accuracy of these claims in its briefs to the district court.[6]

Nevertheless, the district court found that Gutman's misrepresentations were not actionable because they were not material. *Id.* Applying the objective "least sophisticated consumer" standard this Court has applied in evaluating alleged FDCPA violations, the district court determined that Gutman's misrepresentations would not have impeded the least sophisticated consumer's ability to respond to or dispute collection because, as required by New York law, Gutman's objection sought a prompt hearing and the original exemption notice included information about how to obtain free legal representation. JA 269-70. The court reasoned further that because Arias had alleged in his complaint that he never commingled non-exempt and exempt funds, Gutman's misrepresentations would not have had an impact on the least sophisticated consumer. JA 270. In the court's view, the least sophisticated consumer would "realize" that Gutman's misstatement about commingling funds "would be an insufficient ground to allow [Gutman] to garnish such funds." *Id.*

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[6] In fact, as explained above, New York law contains an express directive to collectors in situations where they believe an account contains exempt and non-exempt funds: They must use the "lowest intermediate balance principle of accounting" to identify the exempt funds. N.Y. C.P.L.R. 5222-a(c)(4).

With respect to § 1692f, the district court concluded Gutman could not have engaged in unfair or unconscionable conduct because it had "objectively complied with New York's legislatively prescribed process," whether or not it had acted in bad faith. JA 271. By referring to Gutman's "objective" compliance, the court evidently meant that Gutman had taken each of the formal steps New York law requires: It sent the right forms to Arias's bank; it filed and served on Arias a timely objection that triggered a hearing; and it did not stop Arias from attending the hearing. *Id.* The court does not appear to have meant that Gutman *actually* complied with New York law because the court recognized that New York law "explicitly creates a cause of action for the conduct about which Arias complains—*i.e.*, the bad-faith maintenance of a restraint and filing of an objection to a claimed exemption." JA 272. Arias's allegation that Gutman had engaged in just such bad faith conduct was irrelevant to the court because the "impact of such conduct on Arias would have been identical even if [Gutman] had acted in good faith." *Id.*

Finally, the court pointed to the existence of a separate remedy under New York law as a basis to reject Arias's claims. In the court's view, "[i]mposing liability under the FDCPA is not necessary when a state statutory scheme already provides substantive protection from a specific type of conduct." JA 273.

SUMMARY OF ARGUMENT

In this case, a debt collection law firm told a consumer that he could protect his Social Security benefits from forcible collection only by showing that he had not commingled his benefits with non-exempt funds. There was no dispute before the district court that the law firm's claim was false. Indeed, there does not seem to have been any basis for the law firm's claim whatsoever. The law firm relied on its apparently false and baseless claim as its principal support for the filing of an objection that automatically extended a freeze on the consumer's checking account and triggered a hearing the consumer had to attend to avoid default. Nevertheless, the district court held that the consumer could not state a claim for either deceptive or unfair practices in violation of the FDCPA. The district court erred on both counts.

First, this Court has squarely held that a misrepresentation by a debt collector that has the "capacity to discourage debtors from fully availing themselves of their legal rights" violates 15 U.S.C. § 1692e. *Easterling v. Collecto, Inc.*, 692 F.3d 229, 235 (2d Cir. 2012). The misrepresentation alleged in this case meets that standard easily: It would have led a debtor to believe that he had to surmount a potentially daunting (but evidently fictitious) procedural hurdle to safeguard his exempt Social Security benefits from garnishment. While this misrepresentation could have led any consumer to forfeit his rights, it would have had a particularly chilling effect on a consumer who had, in fact, commingled his benefits with non-exempt funds. Under the objective least sophisticated consumer inquiry, the district court erred by failing to consider the effect of the law firm's misrepresentation on a hypothetical consumer, rather than on one who claimed to have never commingled his account.

Contrary to the district court's view, this Court's nonprecedential opinion in *Gabriele v. American Home Mortgage Servicing, Inc.*, 503 F. App'x 89 (2d Cir. 2012) does not excuse Gutman's misrepresentations. *Gabriele* recognized that, as in *Easterling*, a misrepresentation violates the FDCPA when it could impede a consumer's ability to respond to or dispute collection. And while *Gabriele* indicates that misrepresentations might need to be material to be actionable under the FDCPA, this Court need not resolve that question in this case. The law firm's misrepresentation would satisfy any materiality requirement because it would have been important to the least sophisticated consumer in deciding how (and whether) to respond to the law firm's objection. Finally, this case is not impacted by *dicta* in *Gabriele* suggesting that the protections of the FDCPA may not be necessary in an adversary proceeding between represented parties in state court. Here, the law firm's misrepresentation was directed to a *pro se* consumer at the outset of a summary proceeding. As courts and regulators have long observed, misconduct in pleadings that initiate legal proceedings can escape the attention of courts and lead consumers to forfeit their rights.

Second, the allegations in this case—that the law firm filed a baseless objection with the purpose of intimidating the consumer into forfeiting his rights—fit comfortably into the broad scope of collector conduct that the FDCPA proscribes. The district court's reliance on the fact that the law firm used the right procedures to file its apparently baseless objection was fundamentally misplaced. Timely filing and service are no substitute for a good faith, reasonable basis to act. By alleging that the law firm filed a baseless pleading in the hopes of recovering exempt funds, the consumer in this case stated a claim for a violation of the FDCPA.

The consumer's claim is no less viable because he could have also pursued relief under New York law. As this Court has held, neither the states nor the courts have the authority to displace the protections of the FDCPA in favor of a state law.

ARGUMENT

I. Misrepresentations by Collectors That Would Discourage the Least Sophisticated Consumer from Asserting a Legal Right Violate the FDCPA

1. The law in this Circuit is clear: Misrepresentations by debt collectors with the "capacity to discourage debtors from fully availing themselves of their legal rights" violate 15 U.S.C. § 1692e. *Easterling*, 692 F.3d at 235; *see also Russell v. Equifax A.R.S.*, 74 F.3d 30, 32 (2d Cir. 1996) (debt collectors may not collect debts "in a manner that prevents consumers from exercising their legal rights"); *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1122 n.9 (9th Cir. 2014) ("Debt collectors must not make representations that tend to lead consumers to forego the valuable rights granted to them by the Act."). Whether a misrepresentation has such a capacity must be judged against the objective standard of the hypothetical least sophisticated consumer. *Easterling*, 692 F.3d at 234-35. This standard "ensures the protection of all consumers, even the naive and the trusting, against deceptive debt collection practices." *Clomon v. Jackson*, 988 F.3d 1314, 1320 (2d Cir. 1993). At the same time, the standard does not permit liability for "bizarre or idiosyncratic interpretations" of collection communications. *Id.*

In *Easterling*, the collector stated that a consumer's student loan debt was not eligible for discharge in bankruptcy. Even though it was undisputed that the consumer could, in fact, seek discharge, the district court thought that the collector's contrary statement could not violate § 1692e. The district court pointed out that the consumer had never tried to obtain a discharge and that it can be difficult to discharge student loan debt. This Court reversed. It found the collector's statement to be not just false, but "fundamentally misleading." *Easterling*, 692 F.3d at 235. The collector's suggestion that the consumer could not discharge her debt under any circumstances could make a big difference to a consumer who "might very well refrain from seeking the advice of counsel, who could then assist her in pursuing all available means of discharging her debt through bankruptcy." *Id.* The Court emphasized that the statement's "capacity to discourage debtors from fully availing themselves of their legal rights renders its misrepresentation exactly the kind of 'abusive debt collection practice[]' that the FDCPA was designed to target." *Id.* (quoting 15 U.S.C. § 1692(e)).

Easterling controls the outcome here. For purposes of this appeal, there appears to be no dispute that it was false for Gutman to claim that the Social Security benefits in Arias's checking account were subject to restraint and forcible collection unless he could provide documentation that he never commingled the account with non-exempt funds. JA 43-44, ¶¶ 12, 14-15. Specifically, while Gutman represented that Arias would need to provide bank records starting from a zero balance, no such requirement appears to exist in New York law; nor is there any apparent basis for claiming that it does.

But the hypothetical least sophisticated consumer would not know that he did not have to prove that he had never commingled his account. *Cf. Russell*, 74 F.3d at 34 ("[T]he test is how the least sophisticated consumer—one not having the astuteness of a 'Philadelphia lawyer' or even the sophistication of the average, everyday, common consumer—understands the notice he or she receives."). Such a consumer might be misled into thinking that he could only protect his Social Security benefits if he were able to demonstrate that he had never deposited any non-exempt funds in the account. Specifically, a consumer might think—because Gutman told him—that he would need to produce his entire account history starting from a zero balance. Meeting that burden could be quite daunting for the least sophisticated consumer; he might have to assemble and produce more than a decade's worth of bank statements in a week.[7] The least sophisticated consumer might "very well refrain" from appearing in court to contest the collector's objection. *Easterling*, 692 F.3d at 235. Alternatively, such a consumer might offer to use his exempt funds to settle the debt. *Cf. Muha v. Encore Receivable Mgmt., Inc.*, 558 F.3d 623, 629 (7th Cir. 2009) (explaining that even merely "[c]onfusing language in a dunning letter can have an intimidating effect by making the recipient feel that he is in over his head and had better pay up rather than question the demand for payment").

2. Moreover, the district court further erred by evaluating the potential impact of Gutman's claim on a least sophisticated consumer who had never commingled his account. JA 270. This was wrong because the "least sophisticated consumer test pays no attention to the circumstances of the particular debtor in question." *Easterling*, 692 F.3d at 234.

[7] As the Bureau has previously reported, relevant survey evidence suggests that consumers often maintain their checking accounts for many years. One survey found that households switched their checking account providers once every eleven years. CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau: January 1 – June 30, 2012*, at 25 (2012), http://files.consumerfinance.gov/f/201207_cfpb_Semi-Annual_Report.pdf. Depending on the institution, assembling eleven years of bank account statements could be difficult or even impossible.

In *Easterling*, the Court held that the district court violated this rule when it considered the consumer's failure to seek a discharge of her student loan debt. This Court explained that in evaluating whether the collector's statement that the consumer's debt was ineligible for a bankruptcy discharge violated the FDCPA, it did not matter whether the consumer "ha[d] received, or [was] likely to receive in the future, a discharge of her student loan debt." *Id.* What mattered is how the collector's statement would be interpreted by the hypothetical least sophisticated consumer. *Id.*

The same analysis applies in this case. Just as in *Easterling*, Arias's belief that he had not commingled his account is irrelevant to whether the least sophisticated consumer would have been misled by Gutman's claims regarding the impact of such commingling. The district court's contrary conclusion rested on this Court's suggestion in *DiMatteo v. Sweeney, Gallo, Reich & Bolz, L.L.P.*, 619 F. App'x 7, 9-10 (2d Cir. 2015), that it was unclear whether *Easterling* would preclude a court from considering what the least sophisticated consumer "would know about the context of the ongoing dispute leading to the assertion of the debt." In *DiMatteo*, the question was whether a collector's assertion that a consumer owed rent was misleading because it failed to account for the parties' existing disagreement about whether rent was actually owed. *Id.* at 9. But unlike *DiMatteo*, this is not a case in which the court is being asked to ignore the parties' course of dealing when determining whether a collector's statement would be misleading. Rather, what is at stake is whether a collector may escape liability for false statements if it turns out that a particular consumer is less likely to be affected by them. This Court conclusively answered that question in *Easterling*: It may not.

3. This Court's nonprecedential decision in *Gabriele v. American Home Mortgage Servicing, Inc.*, 503 F. App'x 89 (2012), on which the district court relied, is not to the contrary. In *Gabriele,* this Court concluded that the false statements a collector made in motions and affidavits during the course of litigation would not support FDCPA liability. The Court found that certain allegedly false statements made in the course of litigation to a consumer represented by counsel did not violate the FDCPA because the least sophisticated consumer would know that those particular statements were false. *Id.* at 95 ("These filings, even if false, would not mislead the least sophisticated consumer, particularly represented by counsel, as here, into believing that he had already received an exhibit he had not received, that he had not filed counterclaims that he had filed three months before, or that he was not under consideration for a program he was in mediation to address."). But *Gabriele* recognized

Easterling's holding that "communications and practices ... that *could* impede a consumer's ability to respond to or dispute collection[] violate the FDCPA." *Id.* at 94 (emphasis added). And, as explained above, Gutman's alleged misrepresentation of the evidence that Arias would need to produce to protect his Social Security benefits from garnishment is just the type of misrepresentation that could have this effect. *Id.*

Gabrielle also noted that many courts read a materiality requirement into § 1692e. This Court need not decide the issue here because Gutman's alleged misrepresentations would be material to the least sophisticated consumer. Most directly, Gutman's misstatement would be important to the least sophisticated consumer in deciding how (and whether) to respond to Gutman's objection. *See, e.g.*, *Powell v. Palisades Acquisition XVI, LLC*, 782 F.3d 119, 127 (4th Cir. 2014) ("[T]he [materiality] inquiry is not whether the least sophisticated consumer would have *acted* differently upon receiving Palisades' Assignment of Judgment. Instead, it is whether the information would have been *important* to the consumer *in deciding how to respond* to efforts to collect the debt." (emphasis in original)); *Lox v. CDA, Ltd.*, 689 F.3d 818, 827 (7th Cir. 2012) ("Whether or not this fact would have led Lox to alter his course of action, it would have undoubtedly been a factor in his decision-making process, and very well could have led to a decision to pay a debt that he would have preferred to contest. The false statement was therefore material.”).

Moreover, Gutman’s misrepresentation may have led the least sophisticated consumer to spend the limited time he had before the hearing hunting for years of irrelevant account statements. *See Tourgeman*, 755 F.3d at 1121 (holding that the collector’s misidentification of the original creditor was materially misleading because it might lead a consumer to “engage in a fruitless attempt to investigate the facts of this non-existent debt, in a responsible effort to determine how to most effectively respond to the collection notice”); *Wallace v. Wash. Mut. Bank, F.A.*, 683 F.3d 323, 327-28 (6th Cir. 2012) (holding that plaintiff had sufficiently alleged a material misrepresentation arising from the collector’s misidentification of the holder of a mortgage note in light of plaintiff’s claims of “confusion and delay in trying to contact the proper party concerning payment on her loan and resolution of the problem”).

Finally, the *Gabriele* Court suggested in *dicta* that the protections of the FDCPA may be less necessary “[w]ithin the context of an adversary proceeding in state court between two represented parties.” *Gabriele*, 503 F. App’x at 95-96; *see also, e.g.*, *Kropelnicki v. Siegel*, 290 F.3d 118, 128 (2d Cir. 2002) (“Where an attorney is interposed as an intermediary between a debt collector and a consumer, we assume the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior."). But whether or not this is so, this case does not call for application of that *dicta* because Arias never retained counsel.

More generally, complaints and other filings that initiate legal actions—such as the objection filed by Gutman in this case—pose particularly significant risks to consumers. As was the case here, such pleadings "are typically served on a consumer not yet represented by counsel and therefore can have the same ability to mislead and confuse as pre-litigation collection letters." *Powers v. Credit Mgmt. Servs. Inc.*, 776 F.3d 567, 573 (8th Cir. 2015). And, as courts, the Federal Trade Commission, and the Bureau have all observed, these pleadings "overwhelmingly" lead to default judgments and other forfeitures. *Marquez v. Weinstein, Pinson & Riley, P.S.*, No. 15-3273, ___ F.3d ____, 2016 WL 4651403, at *3 (7th Cir. Sept. 7, 2016); *accord* Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 7 (2010) (2010 FTC Report);[8] CFPB, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking:*

[8] Available at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf.

Outline of Proposals under Consideration and Alternatives Considered 18-20 (2016) (CFPB Outline).[9] When consumers default they often unwittingly forego valid defenses and are subject to judgments that they might have otherwise avoided. *See* 2010 FTC Report at 29-30; CFPB Outline at 18-20. Moreover, the debt collector's "misleading or deceptive statements are more likely to influence the response of the [consumer] without ever coming to the attention of the court in any meaningful way." *Marquez*, 2016 WL 4651403, at *3.[10] The district court's reliance on *Gabriele* in this case was therefore misplaced.

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[9] Available at http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

[10] For the same reason, as Arias rightly contends, filing a debt-collection action without meaningful attorney review unlawfully misrepresents an attorney's involvement in the case every bit as much as sending a dunning letter that is signed by an attorney but which has not been meaningfully reviewed by an attorney. As with a debt-collection letter, the attorney's signature on a complaint or other pleading conveys that the attorney has been meaningfully involved in reviewing the consumer's case and has reached a professional judgment that bringing the action is appropriate. *Cf., e.g., Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 306 (2d Cir. 2003); *Clomon*, 988 F.2d at 1321. Although the Bureau agrees with Arias that this Court's meaningful attorney involvement case law applies with full force to legal pleadings, the Bureau does not express a view on whether Arias has properly stated a claim on that theory because the district court did not reach the issue.

* * *

The potential that Gutman's misrepresentation would discourage the least sophisticated consumer—whether he thought he commingled his account or not—from protecting his legal rights makes that misrepresentation actionable under 15 U.S.C. § 1692e. *See Easterling*, 692 F.3d at 235.

II. Technical Compliance with State Procedural Requirements Does Not Permit a Collector to File a Baseless Pleading to Restrain and Collect Exempt Funds

A. Filing a Baseless Pleading to Freeze and Attempt to Recover Exempt Funds Is Unfair and Unconscionable under the FDCPA

This Court has long recognized that "Congress painted with a broad brush in the FDCPA to protect consumers from abusive and deceptive debt collection practices." *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989). To that end, 15 U.S.C. § 1692f generally prohibits collectors from using any "unfair or unconscionable means to collect or attempt to collect any debt" and enumerates a non-exhaustive list of such practices. Congress wanted to ensure that consumers were protected from "other improper conduct, which is not specifically addressed." *McMillan v. Collection Prof'ls, Inc.*, 455 F.3d 754, 760 n.8 (7th Cir. 2006) (quoting S. Rep. No. 95–382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1698).

In this case, Gutman was alleged to have filed a baseless legal objection to extend the restraint on Arias's account in the hopes of recovering funds Gutman knew or should have known were exempt from garnishment. JA 16, 19, ¶¶ 61, 82. These allegations fit comfortably within the broad scope of conduct that Congress intended § 1692f to prohibit.

Indeed, Congress was so concerned with the possibility that a collector might convert or restrain exempt property (or even threaten to do so) that it made it a *per se* violation of the FDCPA for a collector to take or threaten to take "any nonjudicial action to effect dispossession or disablement of property" if "the property is exempt by law from such dispossession or disablement." *Id.* § 1692f(6)(C).[11] As Congress recognized, improper efforts to convert or restrain exempt property pose very substantial risks to consumers. Millions of Americans depend on their Social Security benefits and other exempt income to support themselves.[12]

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[11] Because the matter was not passed on by the district court below, the Bureau takes no position on whether any of Gutman's actions could have violated § 1692f(6).

[12] The Bureau recently reported that "two thirds of the nearly 40 million Americans aged 65 and older who receive Social Security benefits depend on" those benefits for at least half of their retirement income. Office for Older Americans, CFPB, *Issue Brief: Social Security Claiming Age and Retirement Security* 4 (2015), http://files.consumerfinance.gov/f/201604_cfpb_issue-brief-social-security-claiming-age-and-retirement-security.pdf. Indeed, according to the Bureau's analysis, Social Security is the only

And even the threat that a collector will restrain exempt income can cause consumers "significant distress, especially when they rely on these federal benefits to pay essential living costs." CFPB Snapshot at 14-15.

Moreover, courts have determined that baseless or bad faith restraints on even non-exempt property can violate § 1692f. For instance, the Sixth Circuit has held that "filing and failing to release an invalid judgment lien against a debtor's home while the related state court collection action remains pending falls within the broad scope of practices prohibited by the FDCPA." *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 532 (6th Cir. 2014). Likewise, the Ninth Circuit has concluded that a jury could reasonably find that a debt collector violated § 1692f when it filed an application for a writ of garnishment after telling the consumer that she was current on a post-judgment repayment plan. *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1517 (9th Cir. 1994). Courts have similarly found violations of § 1692f when collectors try to exploit *pro se* consumers' inexperience with legal proceedings to win by default what they could not recover on the merits. *See, e.g.*, *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 952 (9th Cir. 2011) (finding that collector

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guaranteed monthly income for nearly 70% of America's older consumers. *Id.* at 7. Consumers grow even more reliant on Social Security benefits as they age. *Id.* at 4.

violated § 1692f when it served requests for admission containing false information upon a *pro se* defendant without an explanation that the requests would be deemed admitted after 30 days); *cf. Philips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013) (explaining that a debt collection suit brought after the statute of limitation runs violates § 1692f).

The district court thought that it made no difference whether Gutman filed a good faith objection with a reasonable basis or, as Arias alleged, a baseless objection in bad faith. Either way, the district court reasoned, the consumer had to deal with the objection. Not so. As this Court and other courts of appeals have recognized in the analogous context of debt collection complaints, baseless pleadings and those presented in bad faith are very different from pleadings filed with a reasonable basis and in good faith. *See Eades v. Kennedy, PC Law Offices*, 799 F.3d 161, 172 (2d Cir. 2015) (rejecting consumers' FDCPA claims because they "failed to allege that [the collector's] claims were frivolous or baseless" or that the collector "was without a good faith basis to file the lawsuit"); *cf. Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814, 818 (8th Cir. 2012) ("To take an obvious example, a § 1692e complaint alleging that the defendant debt collector lawyer routinely files collection complaints containing intentionally false assertions of the amount owed, serves the complaints on unrepresented consumers, and then dismisses any complaint that is not defaulted would raise far different issues of abusive, deceptive, or unfair means of debt collection than this case.”). Indeed, in a case similar to this one, the Sixth Circuit held that the “dispositive question” for a collector’s liability under both § 1692e and § 1692f was whether the attorney who signed an affidavit supporting garnishment “had a reasonable basis to believe that the [consumer’s] bank account may have contained” nonexempt funds, as the affidavit claimed. *Lee v. Javitch, Block & Rathbone LLP*, 601 F.3d 654, 657 (6th Cir. 2010). Arias’s allegation that Gutman filed a baseless pleading in the hopes of recovering funds Gutman knew or should have known were exempt from garnishment is sufficient to state a claim for violation of § 1692f.

B. The Availability of a State Law Remedy Does Not Preclude Relief under the FDCPA

Arias’s claim under § 1692f was not extinguished by the fact that he could have also sought relief for Gutman’s alleged misconduct under New York law. To achieve its enumerated purpose of “promot[ing] consistent State action to protect consumers against debt collection abuses,” 15 U.S.C. § 1692(e), the FDCPA ensures that consumers have the benefits of both the FDCPA and those state debt collection laws that are consistent with, or even more protective than, the FDCPA, *see* 15 U.S.C. § 1692n. Moreover, the Act empowers the Bureau—not the courts—to exempt certain debt collection practices from the FDCPA's requirements when the Bureau determines that those practices are "subject to requirements substantially similar to those imposed by [the FDCPA], and that there is adequate provision for enforcement." 15 U.S.C. § 1692*o*. The Bureau has not made such a determination here. As a result, the potential that Arias could have pursued an alternative remedy under state law is irrelevant to whether his allegations stated a claim under § 1692f.[13]

This Court reached the same conclusion in *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 117 (2d Cir. 1998). There, the Court was presented with a similar claim: that the FDCPA should not be applied according to its terms in light of the protections provided by New York's special landlord-tenant procedures. The Court soundly rejected this argument, explaining that to the extent that there was any conflict, "it would be [New York's law], and not the FDCPA, that would have to yield," *id.* at 118 n.10, and pointing out that the FDCPA gave (at that time) the FTC the authority to issue

[13] Indeed, the New York legislature provided an express savings clause in its exempt income law to ensure that "[n]othing in this section shall in any way restrict the rights and remedies otherwise available to a judgment debtor, including but not limited to, rights to property exemptions under federal and state law." N.Y. C.P.L.R. 5222-a(h).

exemptions in light of substantially similar state laws, *id.* at 118 n.11. No such exemption had issued, and the Court held the conduct to be prohibited by the text of the FDCPA. The same result holds here.

CONCLUSION

The judgment on the pleadings should be vacated and the case should be remanded to the district court for further proceedings.

Respectfully submitted,

Dated: October 26, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,942 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Christopher Deal
Christopher Deal

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Christopher Deal
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