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IN THE SUPREME COURT  
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ON CERTIFICATION FROM UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

IN

KELLI GRAY, ET AL.,

Petitioners,

v.

SUTTELL & ASSOCIATES, ET AL,

Respondents.

RESPONDENTS SUTTELL'S BRIEF IN RESPONSE TO AMICUS  
CURIAE MEMORANDUM OF NORTHWEST JUSTICE PROJECT

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## I. INTRODUCTION

The issue presented to the Court by way of two certified questions is whether the owner of a debt who is not the original creditor, but who instead purchased the debt from another, is a “collection agency” under the Washington Collection Agency Act, RCW Ch. 19.16 (“WCAA” or the “Act”). The parties have each filed briefs on this legal question. The Suttell Defendants<sup>1</sup> submit this response to the brief of amicus curiae, the Northwest Justice Project (the “NJP”).

## II. RESPONSE TO NJP BRIEF

### A. Debt Buyers are Not Collection Agencies

“Debt buyers” and other creditors who own debts are not collection agencies under the WCAA, a point that was not seriously debated for more than 40 years after the law was enacted. Indeed, until NJP’s counsel recently joined the Collection Agency Board (the “Board”) and agitated for a new interpretation, the Board and the Department of Licensing had expressly rejected such a reading of the Act.<sup>2</sup> Collection agencies were (and are), as the name suggests, third parties (*i.e.* “agents”) collecting debts on behalf of another. RCW 19.16.100(2)(a) (collection

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<sup>1</sup> The “Suttell Defendants” are Suttell & Associates, Mark T. Case and Jane Doe Case, Karen Hammer and John Doe Hammer, Suttell & Hammer, P.S., Malisa L. Gurule and John Doe Gurule, and William Suttell and Jane Doe Suttell.

<sup>2</sup> The underlying lawsuit arises from events well before the Board supposedly revisited the application of the WCAA to debt buyers.

agency solicits or collects claims “owed or due or asserted to be owed or due another person”); RCW 19.16.260 (bar against unlicensed collection agency bringing an action “involving the collection of a claim of any third party”); *see Walter v. Everett School Dist. No. 24*, 195 Wash. 45, 48, 79 P.2d 689 (1938) (“Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”) (quoting RESTATEMENT OF AGENCY § 1).

The Act expressly states when a debt owner will be considered a collection agency:

Any person who in attempting to collect or in collecting *his or her own claim* uses a *fictitious name* or any name other than his or her own which would *indicate to the debtor that a third person is collecting* or attempting to collect such claim.

RCW 19.16.100(2)(c). In other words, a debt owner is considered to be a collection agency *when it pretends to be a third party collector*. The other subpart of the existing definition of collection agency further affirms the tri-partite nature of the regulated relationship – referring to a “creditor,” a “debtor,” and a third party (the collection agency) that sells forms represented to be a collection system. RCW 19.16.100(2)(b).

The issue before the Court is interpretation of the Act, not whether it should be rewritten by judicial fiat based on “weighing the burden and benefits” of NJP’s proposed reading. The WCAA was not intended to cover debt owners; as discussed at length in the parties’ briefing, the legislature recently changed the law to add persons “engaged in the business of purchasing delinquent or charged off claims for collection purposes” – effective October 2013. The change in the law does not render Petitioners’ licensing claims “moot,” it simply reaffirms that the claims never existed in the first place. The WCAA does not apply to Midland Funding, and NJP’s arguments as to why it would be better if it did are misplaced in a discussion of statutory interpretation.

**B. Like Petitioners, NJP Fails to Cite Precedent for Its Proposed Expansion of the WCAA**

NJP cites three decisions in support of its argument that debt buyers are “collection agenc[ies]” under the WCAA; the only one that actually makes such a ruling is a 2013 superior court decision, *Portfolio Recovery Associates, LLC v. Alexander et al.*, No. 12-2-10730-1 SEA (King County Superior Court), obtained by NJP’s counsel, which in turn apparently included consideration of 2012 Board minutes generated, in part, by NJP’s counsel, ostensibly in his role as a “public member” of the Board. *See* NJP Appx. at 18 (“Mr. Corbit stated that at this time the Board

is not intending to use the debt buyer policy from the 2004 minutes. In the past, attorneys have used the minutes out of context.”). NJP concedes that the superior court decision “is not persuasive authority,” NJP Brf. at 11 n.22, and given that the decision is the by-product of counsel’s simultaneous actions as an advocate and a regulator, even less so.

*Semper v. JBC Legal Group*, 2005 WL 2172377 (W.D. Wash. 2005) does not hold that a debt buyer is a collection agency. *In re Krsyl*, 304 B.R. 425, 428 (Bankr. D. Or. 2004), is an Oregon bankruptcy case applying Oregon law in which a debt buyer for some unknown reason “conceded . . . that he would ordinarily fit within the statutory definition of ‘collection agency’”; the relevant question was not litigated to the bankruptcy court. Instead, the opinion is about whether the buyer met an Oregon statutory exception for factoring services that applied to “accounts that have been purchased from commercial clients under an agreement,” *id.* at 428, provisions that have no analog in the WCAA.

The WCAA is also materially different from the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (the “FDCPA”). “Collection agencies” under state law are not the equivalent of “debt collectors” under the FDCPA. *See* RCW 19.16.100 (4) (using the FDCPA to define an “out-of-state collection agency” as excluding “any person who is excluded from the definition of the term ‘debt collector’ under the

federal fair debt collection practices act (15 U.S.C. Sec. 1692a(6)).”; 15 U.S.C. § 1692a(6) (defining “debt collector” as including “any business the principal purpose of which is the collection of any debts”). Unlike the FDCPA, the WCAA is not a scheme that applies only to consumer household debts. 27 Marjorie Dick Rombauer, WASHINGTON PRACTICE: CREDITORS' REMEDIES - DEBTORS' RELIEF § 1.43 (2012) (“Unlike the FDCPA, the CAA does not limit covered claims to those arising out of consumer transactions.”). The WCAA applies equally to in-state collection agencies who assist with the collection of commercial claims, and there is no principled way to conclude that the Act applies to “buyers” of some debts and not others. A ruling that “debt buyers” must be licensed would mean that persons and businesses that acquired “claims,” even bonds or commercial paper, would instantly become “collection agencies.” This was never the intent of the WCAA, and is only one of the collateral consequences that would result from Petitioners’ misinterpretation of the Act.

**C. All Washington Consumers are Protected from Unfair and Deceptive Acts or Practices**

Unable to muster more than a conclusory argument from the text of the Act, NJP argues that as a matter of good policy, debt buyers should be licensed because in the absence of licensure, debtors will lose “robust

consumer protections” which will “undermine[] consumers’ rights,” NJP Brf. at 3-4, 13, this even though no such “protections” have been in place for the past 40 years. Curiously, NJP further asserts that licensure is “especially important” because most debtors (presumably a reference to consumers) “default,” *id.* at 4-5, a fact that is true whether or not the named plaintiff is or is not licensed, and whether or not suit is prosecuted in the name of the original creditor (*e.g.*, Capital One) or someone who purchased the debt (Midland Funding).

Debt owners are qualitatively different than third parties who seek to collect debts on behalf of another because debt owners can never take legal action without subjecting themselves directly to counterclaims for their own conduct. In the case of the subset of consumer debtors for whom NJP advocates, the claims against debt buyers include possible claims under both the FDCPA *and* the Washington Consumer Protection Act, RCW Ch. 19.86, a statutory regime that provides broad relief from conduct – by debt buyers or anyone else – that is deemed to be unfair or deceptive.

It is untrue that “[i]f debt buyers are outside the scope of the [WCAA], then Washington consumers . . . find themselves entirely reliant on the FDCPA for relief from unfair and deceptive acts and practices.” NJP Brf. at 13. This Court has ruled otherwise, and there is no evidence

that courts lack the tools to remedy creditor misconduct directed towards consumers. *Panang v. Farmers Ins. of Washington*, 166 Wn.2d 27, 54, 204 P.3d 885 (2009) (“That the collection of subrogation claims is beyond the scope of the [W]CAA does not mean deceptive subrogation collection practices are exempt from suit under the broader scope of the CPA. A central purpose of the CPA is to provide ‘an efficient and effective method of filling the gaps’ in the common law and statutes. . . . Accordingly, debt collection activities that are not regulated under the CAA may constitute unfair and deceptive practices under the broader scope of the CPA . . .”) (citations and footnotes omitted).

Ultimately, however, NJP’s policy arguments do not change the outcome. As stated by Division Three of the Court of Appeals, courts “are not free to create public policy under the guise of interpreting a statute. That is a legislative matter.” *Graham v. Notti*, 147 Wn. App. 629, 640, 196 P.3d 1070 (2008). In this case, multiple constituencies have worked with the legislature to change the law effective this fall. Those who did business under the law as it was written, interpreted by the Board and Department of Licensing, and applied prior to this change were not in violation of the WCAA.

### III. CONCLUSION

Like others who act to collect on their own claims, Midland Funding is not a collection agency under WCAA, and it need not be licensed to bring suit on such debts. The imminent legislative change in this law is just that – a change. Until such amendments become effective, debt buyers are not subject to the Act, and the Suttell Defendants respectfully request that the Court so rule in answering the certified questions.

RESPECTFULLY SUBMITTED this 5th day of August, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 5<sup>th</sup> day of August, 2013, I caused a true and correct copy of the foregoing document to be served on the following counsel in the manner indicated:

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Attached is Respondents Suttell's Brief in Response to Amicus Curiae Memorandum of Northwest Justice Project.

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