

CASE NO. 99-2291

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

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CHERYL BESSETTE

Plaintiff-Appellant,

v.

AVCO FINANCIAL SERVICES, INC, *et al.*

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND  
CIVIL ACTION NO. 97-487L

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**BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS  
IN SUPPORT OF PLAINTIFF/APPELLANT**

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Gary Klein (45412)  
John Rao (45867)  
National Consumer Law Center  
18 Tremont St., Ste. 400  
Boston, MA 02108(617) 523-8010

ATTORNEYS FOR *AMICUS CURIAE*,  
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

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## STATEMENT OF INTEREST OF NACBA

### AS AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 1,400 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. First Circuit NACBA members file many thousands of bankruptcy cases per year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues which cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various appellate courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); In re Weinstein, 164 F.3d 677, 683 (1<sup>st</sup> Cir. 1999).

The NACBA membership has a vital interest in the outcome of this appeal. NACBA members primarily represent individual low- and moderate-income wage-earners. Many of these individuals are members of the putative class in this case, or in similar actions, who have been harmed by the wrongful practices described in

plaintiffs' Complaint. NACBA members are concerned that the lower court's decision will deny class members any truly effective means to recover payments collected by defendants on illegal reaffirmation agreements. Since the cost of validating their clients' discharges through contempt proceedings would outweigh the recovery in individual cases, NACBA members are concerned that non-contempt remedies for violations of the discharge injunction remain viable.

*Amicus* is additionally troubled by the far-reaching implications of the lower court's preemption ruling in this case. The decision below bars debtors from pursuing state law causes of action based on violations of the reaffirmation and discharge provisions of the Code. If allowed to stand, debtors will lose an effective method of combating creditor bankruptcy abuses of the kind alleged in this case and described in more fully In re Latanowich, 207 B.R. 326 (Bankr.D.Mass. 1997).

## **SUMMARY OF ARGUMENT**

Ironically, the District Court opinion concludes that a statutory injunction Congress enacted to *enhance* the Bankruptcy discharge is a *complete bar* to equitable and legal relief to enforce that discharge. By focusing predominantly on whether the particular Code section authorizes a private right of action, the court

gives short shrift to its inherent authority to grant equitable relief based on the plaintiffs' valid state and federal non-bankruptcy causes of action.

The Court's opinion not only misunderstands the fundamental purpose and scope of the statutory injunction, but it is inconsistent with Supreme Court precedent and at least one binding decision of this court. Cases including California v. American Stores Co., 495 U.S. 271, 110 S.Ct. 1853, 109 L.Ed. 2d 240 (1990) and CIA. Petrolera Caribe, Inc., v. Arco Caribbean, Inc., 754 F.2d 404, 428 (1<sup>st</sup> Cir. 1985) have held that, absent a clear Congressional mandate to the contrary, the authority to issue equitable remedies contained in statutes is intended to supplement rather than limit the District Court's inherent equitable powers. There is thus no question that plaintiffs' claims for restitution of illegally collected payments on void reaffirmation agreements must remain available.

The Court also incorrectly analyzed fundamental principles of federal preemption. Affirmance of the Court below would institutionalize an entirely unprecedented and overbroad limit on state power to provide remedies to its citizens for unfair business practices. The defendants are asking this court to accept an unprecedented expansive reading of precedents regarding "field" preemption and to place itself in direct conflict with the Court of Appeals for the Eighth Circuit.

The decision of the District Court in this matter should be reversed. The plaintiffs have stated a claim for relief that the District Court must reach and resolve.

## ARGUMENT

### I. THE DECISION BELOW IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE BANKRUPTCY DISCHARGE. IT ALLOWS DEFENDANTS TO PROFIT FROM ILLEGAL CONDUCT THAT STRIKES AT THE HEART OF THE BANKRUPTCY SYSTEM.

#### A. The injunction available under section 524 was designed by Congress to enhance rather than defeat consumer remedies.

It is black letter law that a discharge in bankruptcy cancels the debtor's legal obligation to pay discharged debt. 11 U.S.C. § 524. The court below has illogically concluded that a statutory injunction that Congress enacted to make the bankruptcy discharge *more easily enforceable* is a ground to deny restitution and other relief to the plaintiffs.

The defendants here collected a substantial amount of discharged debt by illegal means.<sup>1</sup> If there were no statutory injunction, the plaintiffs could unquestionably state claims for restitution *and prospective injunctive relief* under

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<sup>1</sup> The court below correctly assumes the defendants conduct was unlawful on this motion to dismiss. Bessette v. Avco Financial Services, Inc., C.A. No. 97-487L, *slip op.* at pp. 2-5. (D.R.I. October 18, 1999).

federal and state statutory law and based on common law rights in equity. Since the sums collected were not legally owed, and since the defendant collected those sums illegally given Code section 524(c) and (d), restitution would be available to make the plaintiffs whole and an injunction could be entered to prevent future illegal conduct. A variety of equitable theories would be available, including claims for unjust enrichment, restitution, constructive trust, conversion, and monies had and received.<sup>2</sup>

The substance of the decision of the court below is that the statutory injunction preventing collection of discharged debt, 11 U.S.C. § 524(a), eviscerates the Court's inherent authority to issue injunctive relief. Anomalously, the court has concluded that the existence of the statutory injunction *prevents* equitable relief under 11 U.S.C. § 105 and, by preemption, precludes equitable claims otherwise available under state law.<sup>3</sup> Instead of being eligible for restitution, statutory damages, and prospective injunctive relief, the court concludes that because of the

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<sup>2</sup> By way of example, under black letter principles of common law, restitution and constructive trust are equitable claims designed to prevent unjust enrichment when a person holding property is under a duty to convey it to another to whom it justly belongs. *E.g.*, Bender v. Centrust Mortgage Co., 51 F.3d 1027 (11th Cir. 1995); Knox v Knox, 222 Minn. 477, 25 N.W. 2d 225 (1946); Restatement of Restitution, §160. The illegality of the means by which the plaintiffs funds were unjustly obtained would be amply sufficient to make out a claim for restitution on these theories. *Id.*

<sup>3</sup> Plaintiffs' claims include a cause of action for restitution and unjust enrichment. See Count VII of Plaintiffs' Complaint.

statutory injunction, plaintiffs are limited to acting by way of individual contempt proceedings in the court in which their discharge was entered.

When stripped of its trappings, the District Court's holding requires a conclusion that Congress established a statutory injunction *to undermine* remedies for conduct that violates the bankruptcy discharge. The irony of this conclusion is reinforced by several holdings of the United States Supreme Court which establish that Congressional grant of injunctive power to courts under various statutes is sufficient to constitute authority for that court to order related equitable relief such as disgorgement or divestiture. *See California v. American Stores Co.*, 495 U.S. 271, 110 S.Ct. 1853, 109 L.Ed. 2d 240 (1990) (injunctive relief available under the Clayton Act creates power in the court to order other equitable relief including divestiture of acquired assets);<sup>4</sup> *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086; 90 L.Ed. 1332 (1946) (grant of specific equitable powers to the district court under the Emergency Price Control Act did not undermine the court's inherent equitable powers, including authority to order restitution of illegally collected rent overcharges).<sup>5</sup> Given these holdings, how can it be possible that

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<sup>4</sup> The Supreme Court stated: "the suggested distinction between [the equitable remedy of] divestiture and injunctions that prohibit future conduct is illusory". *Id.* at 495 U.S. 289.

<sup>5</sup> The Court stated, "[u]nless a statute in so many words or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied". *Id.* at 328 U.S. 398. *See also California v. American Stores Co.*, *supra*, 495 U.S. at 295.

when Congress creates the injunction itself (rather than merely allow the Court to create it), related equitable relief becomes unavailable?

Clearly, Congress did not intend to restrict consumer remedies by enacting the injunction related to discharge of debts. The opposite is true. As stated at 4 King, Collier on Bankruptcy, ¶ 524.L.H. at p. 524-46.1 (15<sup>th</sup> ed. rev.1999):

Section 524 is derived from Section 14f of the former Bankruptcy Act, which was added to Section 14 by the 1970 amendment to the Act. Before 1970, the effect of the discharge was to create an affirmative defense that the debtor could plead in any action brought on the discharged debt.

The Collier treatise then goes on to reprint the legislative history of the addition of Section 14f in the form of a statement by the House Committee on the Judiciary. That statement is summarized in the following passage:

The major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment upon the discharge. ... As a result a default judgment is taken against him and his wages or property may again be subject to garnishment or levy. ... S 4247 is meant to correct this abuse.

*Id.* at pp. 524-46.1-47 *citing* H.Rep. No. 91-1502, 91<sup>st</sup> Cong.2d Sess. 1-2 (1970).<sup>6</sup>

Nothing in the relevant legislative history suggests that the injunction was intended to take away important rights<sup>7</sup> -- that is the right to pursue a lawsuit on

any legal theory for restitution and other relief when a creditor illegally collects discharged debt. Yet this is the fundamental conclusion of the Court below.

**B. The decision of the court below frustrates Congressional intent, undermines the bankruptcy system, and allows the defendants to profit from illegal conduct.**

It is well settled that the cornerstone of federal bankruptcy policy is the fresh start associated with a discharge of debt. In passing the Bankruptcy Code in 1978, Congress was concerned that once a debtor meets the requirements of the law, he or she obtain a meaningful and effective fresh start. *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 1st. Sess. 117 (1977) (fresh start is the "essence of modern bankruptcy law"); H.R. Rep. No. 595, 95th Cong., 1st Sess. 125 (1977) ("purpose of straight bankruptcy... is to obtain a fresh start"); H.R. Rep. No. 595, 95th Cong. 1st Sess. 118 (1977) (Chapter 13 designed to ensure "the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start"); *id.*, at 118 (Whether debtor uses Chapter 7 or 13, "bankruptcy relief should be effective, and should provide the debtor with a fresh start."). *See also* H.R. No. 95-595, p. 128 (1977) ("Perhaps the most important element of the fresh start for a consumer

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<sup>6</sup> The relevant committee reports are also reprinted at 2 U.S.C.C.A.N. 4156 (1970).

<sup>7</sup> This court has stated that "when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." CIA. Petrolera Caribe, Inc., v. Arco Caribbean, Inc., 754 F.2d 404, 428 (1<sup>st</sup> Cir. 1985).

debtor after bankruptcy is discharge. ... [This bill] proposes to remedy the deficiencies in the current discharge provisions and to make the discharge effective relief for consumer debtors".)

The Supreme Court has frequently expressed the same principle. For example:

This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."

Grogan v Garner, 110 U.S. 1945, 111 S.Ct. 654, 659, 109 L. Ed. 2d 308 (1991), *citing* Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934).

Perhaps the most essential element of the fresh start is freedom from using post-bankruptcy income to pay pre-bankruptcy debts.<sup>8</sup> The defendants have undermined this principal by collecting money on debts that were discharged. Even the court below acknowledged, "... the alleged practices of defendant appear to abuse the carefully designed bankruptcy laws ..." Bessette, *Slip Op.* at 2.

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<sup>8</sup> For example, the Supreme Court stated in Local Loan Co. v. Hunt, *supra*, 292 U.S. at 245: "[t]he new opportunity in life and the clear field for future effort, which it is the purpose of the bankruptcy act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy".

Absent reversal, the defendants will be unjustly enriched. Although each member of the class whom plaintiffs seek to represent might be able to pursue contempt claims in the court that granted them a discharge, the decision of the court below deprives them of the ability to pursue relief jointly under Fed. R. Civ. P. 23 (or similar state procedural rules). Joinder of common claims under Rule 23, as the plaintiffs seek here, provides the only effective means for consumers to challenge unlawful business conduct, stop such practices, and obtain appropriate monetary relief.

Numerous consumer debtors have been harmed by the wrongful practices described in plaintiffs' complaint and individual contempt proceedings would be impracticable. The individual recovery in most cases would not be sufficient to justify the expense of bringing separate proceedings.<sup>9</sup> Particularly since the class of affected consumers is comprised of individuals who have filed bankruptcy and likely do not have the means to retain counsel to pursue their claims, the only hope of recovery for consumers harmed by defendants' bankruptcy collection practices is through the aggregation of their relatively small monetary claims with others in a class action. The Supreme Court has long recognized that without Rule 23, consumers with small claims would be unable to obtain relief. *See Phillips*

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<sup>9</sup> Since discharges have been entered and cases have been closed, each case would have to commence with a timely and expensive motion to reopen under 11 U.S.C. §350, further extending the debtor's resources.

Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (“Class actions ... may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”); Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 338 n. 9 (1980) (damages claimed by two named plaintiffs totaled approximately \$1,000).

The class action device is particularly appropriate in consumer cases where the litigation serves an important purpose beyond simply compensating injured class members. As in this case, the class representatives are seeking to require the disgorgement of defendants’ illegal profits. In so doing, plaintiffs are appropriately carrying out an important function of class litigation by serving as private attorneys general. *See* Herbert Newberg & Alba Conte, *Newberg on Class Actions*, §§5.49 and 5.51 (3d ed. 1992).

Unless plaintiffs are allowed to proceed, the defendants will retain the vast majority of their ill-gotten gains. Moreover, defendants’ and others would have an incentive to continue to violate the law since their revenues from illegal collection practices would outstrip their liability in foreseeable contempt cases.

## II. BY ITS DECISION, THE DISTRICT COURT HAS READ SECTION 105(a) OUT OF THE BANKRUPTCY CODE.

The Bankruptcy Code includes broad language granting courts authority to enforce its provisions:

### **105. Power of court.**

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105.

This language is so broad that courts have struggled to find limiting principles. The Supreme Court has held that “[u]nder this section, a court may exercise its equitable power only as a means to fulfill some specific Code provision”. Norwest Bank Worthington v. Ahlers, 485 U.S. 197,206, 108 S.Ct. 963, 99 L.Ed. 2d 169 (1988). Similarly, this court recently concluded that “since subsection 105(a) is not a source of substantive rights, the bankruptcy court may invoke section 105(a) only if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code”. In re Ludlow Hospital Society., Inc., 124 F.2d 22 (1<sup>st</sup> Cir. 1997).

The relief the plaintiffs request here is nothing more and nothing less than an equitable remedy necessary to preserve a right provided in other Code sections. The plaintiffs have rights provided under §§ 727 and 1328 to a discharge of debts, they have received those discharges, and they have the right to the protections associated with the discharge injunction found in §524(a). Surely the court has power and authority to grant the equitable remedy of restitution under § 105 to effectuate those rights if it finds that a creditor has collected money illegally in derogation of the discharge. Any other conclusion would effectively read § 105(a) out of the Code.

Moreover, a ruling that the bankruptcy court lacks power to order disgorgement under § 105 when disgorgement is consistent with other provisions of the Code would have far-reaching implications on the administration of the bankruptcy system. For example, such a holding would effectively overrule an important line of cases related to bankruptcy court oversight of professional fees. These cases conclude that bankruptcy courts may invoke §105(a) to order disgorgement of professional fees that are obtained in a manner that is inconsistent with Code section 328 governing compensation of professionals. *E.g. In re Kids Creek Partners*, 219 B.R. 1020, 1022 (Bankr. N.D. Ill. 1998) aff'd on other grounds, 2000 U.S. App. Lexis, 469 (7<sup>th</sup> Cir. 2000); *In re Kearing*, 170 B.R. 1, 7

(Bankr. D. D.C. 1994).<sup>10</sup> Like section 524, 11 U.S.C. § 328 does not include an express private right of action or other specific authority for the court to order disgorgement. Nevertheless courts have appropriately found authority to do so in §105(a). *Id.*

In addition to the powers available to the court under § 105, the District Court unquestionably possesses “inherent powers of equity regardless of whether equitable remedies are expressly authorized by the statute”. CIA. Petrolera Caribe, Inc., v. Arco Caribbean, Inc., 754 F.2d 404, 428 (1<sup>st</sup> Cir. 1985). These powers alone are broad enough to authorize the District Court<sup>11</sup> to award the restitution relief that plaintiffs seek.

The Supreme Court’s precedent in California v. American Stores Co., *supra*, and this court’s own precedent in CIA. Petrolera, *supra*, compel a finding that this authority exists. Those cases stand for the principle that an express grant of injunctive power does not undo a court’s inherent equitable authority. In this instance, Congress has done more than simply grant power to issue injunctions to

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<sup>10</sup> Without specifically locating their power to do so within section 105(a), courts in this district have ordered disgorgement of professional fees or payments on administrative claims. These cases would presumably be overruled if the overbroad decision of the District Court is affirmed, since there is no place other than section 105 for this power to reside. In re Anolik, 207 B.R. 34 (Bankr. D. Mass. 1997) (exhaustive discussion of the court’s reasons for ordering disgorgement of trustee fees without discussion of the source of the power to do so). *See also* In re Kingston Turf Farms, Inc., 176 B.R. 308 (Bankr. D.R.I. 1995) (disgorgement by administrative creditor required to achieve appropriate distribution under §726; no discussion of source of authority to order disgorgement).

the District Court; the injunction itself is part of the statute. That injunction is then amplified by an additional grant of authority under §105. It must follow that the District Court has power to grant equitable relief to enforce the injunction.

**IV. THE RELEVANT SECTIONS OF THE BANKRUPTCY CODE DO NOT CREATE SO PERVASIVE A SET OF REGULATIONS AS TO IMPLIEDLY PREEMPT PLAINTIFFS' STATE LAW CAUSE OF ACTION AND THERE IS NO CONFLICT BETWEEN STATE LAW AND THE REAFFIRMATION AND DISCHARGE PROVISIONS OF THE CODE.**

As a general matter, this Court has recognized that preemption of state law is disfavored. McCoy v. Mass. Institute of Technology, 950 F.2d 12 (1<sup>st</sup> Cir. 1991).

Only where the “nature of the regulated subject matter permits no other conclusion, or ... Congress has unmistakably so ordained” will state law be preempted. *Id.* at 16; *quoting* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963); *see also*, In re Roach, 824 F.2d 1370, 1373-74 (3d. Cir. 1987) (“the basic assumption [is] that Congress did not intend to displace state law.”).

This presumption in favor of the inviolability of state law is not easily overcome in the bankruptcy context. Unlike other areas of federal oversight, the bankruptcy statutory scheme draws heavily upon state law for many critical

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<sup>11</sup> The District Court has original jurisdiction of bankruptcy cases. 28 U.S.C. § 1334(a). That jurisdiction is generally delegated to the Bankruptcy Court. 28 U.S.C. § 157(a).

bankruptcy determinations.<sup>12</sup> See Paul v. Monts, 906 F.2d 1468 (10<sup>th</sup> Cir. 1990) (“In fact, the common law of the various states provides much of the legal framework for the operation of the bankruptcy system.”). As recognized by the Third Circuit, this interplay between state and federal law is a reflection of Congress’ respect for important state interests in bankruptcy matters:

Our task is to ascertain and give effect to congressional intent. However, we must approach that task with the realization that the Bankruptcy Code was written with the expectation that it would be applied in the context of state law and that federal courts are not licensed to disregard interests created by state law when that course is not clearly required to effectuate federal interests.

In re Roach, *supra*, 824 F.2d at 1374.

Particularly in the area of property interests, the Supreme Court has not ignored Congress’ attempts to weave state law throughout the Bankruptcy Code. In Butner v. United States, 440 U.S. 48, 57, 99 S. Ct. 914, 919, 59 L. Ed. 2d 136 (1979), the Supreme Court concluded that absent an overriding federal interest, “the basic federal rule is that state law governs.” See also Nobelman v. American Sav. Bank, 508 U.S. 324, 329, 113 S. Ct. 2106, 2110, 124 L. Ed. 2d 228 (1993)

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<sup>12</sup> The following are examples of the prominent role state law plays in many determinations under the Code: Amount to cure a default through a Chapter 13 plan determined by the “underlying agreement and applicable nonbankruptcy law” under § 1322(e); determination of whether corporate or partnership entities have authority to seek federal bankruptcy protection turns on state law, see In re Phillips, 966 F.2d 926 (5<sup>th</sup> Cir. 1992); debtors permitted to choose state law exemptions and states are permitted to opt out of the federal exemption scheme under § 522(b).

("In the absence of a controlling federal rule, we generally assume that Congress has left the determination of property rights in the assets of a bankrupt's estate to state law.") (*citation omitted*). The Butner court explained further:

Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy.

Butner, 440 U.S. at 55, 99 S. Ct. at 918 (*citations and internal quotations omitted*).

By denying Plaintiffs the right to pursue their state law causes of action based on preemption, the lower court has deprived the Plaintiffs of a state law property interest and afforded the Defendants a “windfall merely by reason of the happenstance of bankruptcy.”

**A. Congress has not expressly or impliedly preempted the field of consumer bankruptcy law.**

Since the sections of the Bankruptcy Code pertinent to this case contain no explicit statutory language preempting state law,<sup>13</sup> the presumption that state law

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<sup>13</sup> Though there are clear expressions in the Code where Congress has explicitly provided that state law shall be preempted, no such provision is found in § 524 or § 105. *See, e.g.*, 11 U.S.C. § 1123(a) ("Notwithstanding any otherwise applicable nonbankruptcy law, a [reorganization] plan shall ..."); 11 I.S.C. § 365(e)(1) ("Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired

is valid can only be overcome 1) where the federal statutory scheme controlling a particular subject is so pervasive that Congress clearly intended to “occupy the field” to the complete exclusion of state law, or 2) where a particular state law or action is in direct conflict with federal law such that enforcement of the state law would “stand as an obstacle to the accomplishment and execution” of the purposes of the federal statute. Hillsborough Cty. v. Automated Medical Labs, Inc., 471 U.S. 707, 713, 85 L.Ed. 2d 714, 105 S.Ct. 2371 (1985).

Though not entirely clear, the lower court’s decision appears to be exclusively based on “field” preemption. To the extent that “field” preemption exists, it must be founded on a clear expression of legislative intent. In the final analysis, the issue of whether state law is preempted by federal law “is one of congressional intent.” McCoy, 950 F.2d at 17; *quoting* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208, 105 S.Ct. 1904, 1909-10, 85 L.Ed. 2d 206 (1985); Pedrazza v. Shell Oil Co., 942 F.2d 48 (1<sup>st</sup> Cir. 1991).

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lease of the debtor may not be terminated or modified...”); 11 U.S.C. § 541(c)(1) (“An interest of the debtor in property becomes property of the estate ... notwithstanding any provision in ... applicable nonbankruptcy law (A) that restricts or conditions transfer of such interest by the debtor ...”); 11 U.S.C. § 728(b) (“Notwithstanding any State or local law imposing a tax on or measured by income, the trustee shall make tax returns of income ... only if [the] estate or corporation has net taxable income for the entire period after the order for relief...”); 11 U.S.C. § 363(l) (“Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section ... notwithstanding any provision in ... applicable law that is conditioned on the insolvency or financial condition of the debtor ...”).

As a general matter, field preemption is rarely found in the bankruptcy area. *See, Paul v. Monts, supra*, 906 F.2d at 1475 (Based on the important role of state law in defining bankruptcy interests, “it cannot be said that Congress has intended to ‘occupy the field’ leaving nothing to state law.”); Baler & Drake, Inc. v. Public Service Comm’n, 35 F.3d 1348, 1353 (9<sup>th</sup> Cir. 1994) (Bankruptcy Code not that “‘sufficiently comprehensive’ to allow inference that Congress ‘left no room’ for state regulation” of taxicab business).

The only Court of Appeal to rule on “field” preemption in the consumer bankruptcy reaffirmation context has followed this general rule. In Sears, Roebuck and Co. v. O’Brien, 178 F.3d 962 (8<sup>th</sup> Cir. 1999), the debtor alleged that Sears violated the Iowa Consumer Credit Code, which prohibits creditor contact with a debtor who is represented by counsel, by sending a copy of a letter soliciting a reaffirmation agreement directly to the debtor. In response, Sears sought a declaratory judgment that its actions did not violate the automatic stay or any other federal bankruptcy law, and that the Iowa consumer protection statute was preempted. In finding for the debtor, the Eighth Circuit noted that while bankruptcy law is “expansive,” Congress did not intend to “exclusively” regulate the area and therefore there could be no “field” preemption. *Id.* at 966-67.

In this case, the lower court’s finding of “field” preemption is premised on the view that Congress left no room for enforcement of the relevant Code sections

other than through contempt proceedings. However, the lower court could point to no clear indication in the Code itself or in the legislative history that a contempt proceeding should be the exclusive remedy for reaffirmation and discharge violations. It describes the remedy as one which flows from the bankruptcy court's "inherent" contempt power, thus confirming that there does not exist an express statutory foundation for the remedy. In fact, there are no references in § 524 or its legislative history to contempt proceedings as an enforcement mechanism, let alone that contempt should be viewed as an exclusive remedy. This Congressional silence simply cannot form the basis for preemption of complimentary state law remedies.

As support for its finding of "field" preemption, the lower court cites to In re Shape, 135 B.R. 707, 708 (Bankr. D.Me. 1992) and Periera v. First N. Amer. Nat'l Bank, 223 B.R. 28, 31 (N.D.Ga. 1998), which in turn repeat without analysis the statement made in Periera v. Chapman, 92 B.R. 903, 908 (C.D.Ca 1988), that "the Bankruptcy Code reflects a balance, completeness and structural integrity that suggests remedial exclusivity."<sup>14</sup> See also, Holloway v. Household Automobile Finance Corp., 227 B.R. 501, 507 (N.D.Ill. 1998) (*quoting Periera v. Chapman*).

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<sup>14</sup> In finding that a state law claim based on violation of the automatic stay was preempted, the court in In re Shape simply embraced the statement from Periera v. Chapman and conducted no analysis of its own relating to "field" preemption.

However, this statement was made in a wholly different context and is not consistent with the legislative history of sections 362 and 524.

In Periera v. Chapman, the court found that a debtor could not bring a section 1983 civil rights action based on an automatic stay violation because the plaintiff could state a claim under § 362(h). Thus, in finding that § 362(h) provides a comprehensive enforcement scheme precluding a section 1983 civil rights claim, the court in Periera v. Chapman was not engaging in state law preemption analysis but rather was applying the test set forth in Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 28, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981) to determine whether the federal civil rights statute (42 U.S.C. § 1983) can provide a cause of action for the denial of rights created by another federal statute.

More importantly, the justification given by the court in Periera v. Chapman for reaching its conclusion is flawed. The court explained that it engaged in an analysis of the “comprehensiveness of the statutory remedial scheme” because Congressional intent behind § 362(h) could not be gleaned from the statutory language itself or its legislative history. Apparently, the court in Periera v. Chapman was unaware of the persuasive legislative history at odds with its conclusion: “This private right of action is an additional right of individual debtors, and is not intended to foreclose recovery under already existing remedies.” 130

Cong. Record 6504 (House March 26, 1984)(remarks of Rep. Rodino), *see also*, In re Wagner, 74 B.R. 898, 902 (Bankr. E.D. Pa. 1987).

In finding “field” preemption of the discharge and reaffirmation provisions, the lower court, as well as the courts it relied upon, reached this conclusion based on the slim reed of an unstated contempt remedy without actually examining § 524 for signs that Congress truly intended to “occupy the field” of creditor bankruptcy abuses. A close review of § 524, however, reveals that Congress intended for state law to serve a significant role in the reaffirmation process.

Section 524(c) provides that a debt otherwise dischargeable may be reaffirmed “only to any extent enforceable under nonbankruptcy law.” This language permits a bankruptcy court to withhold approval of a reaffirmation agreement where the underlying contractual agreement violates state law. In re Melendez, 235 B.R. 173 (Bankr. Mass. 1999) (in fulfilling obligations under § 524(c), debtor’s counsel must verify the validity under state law of underlying security agreement). Likewise, this provision also preserves any state law claims a debtor may have based on the pre-bankruptcy debt.

Under § 524(c)(3)(c) and § 524(d)(1)(B), the debtor’s attorney or the court must advise the debtor of “the legal effect and consequences” of the reaffirmation agreement and “any default under such an agreement.” To fulfill this requirement, Congress clearly intended for the attorney or court to refer to state contract law and

inform the debtor of the state law remedies available to the creditor in the event of default.

In sum, Congress did not intend to “occupy the field” in remedying creditor abuse and Plaintiffs state law claim may coexist with their claims for violations of §§ 524 and 362.<sup>15</sup>

**B. Plaintiffs’ state law cause of action is not in conflict with federal law.**

Application of a “conflict” preemption analysis likewise compels a finding that Congress did not intend to foreclose Ms. Bessette’s state law claims. The Supreme Court has stated that an actual conflict “occurs either because ‘compliance with both federal and state regulations is a physical impossibility,’ or because the state law stands ‘as an obstacle’” to the accomplishing the Congressional purpose. California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281, 107 S.Ct. 683, 689 (1987) (*citations omitted*).

In addressing this issue in the reaffirmation context, the Eighth Circuit in Sears, Roebuck and Co. v. O’Brien found that Sears could not argue that it would

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<sup>15</sup> To the extent that this Court concludes that a private right of action exists under § 524 in addition to the right to pursue a contempt action, this does not compel a finding of preemption. The availability of alternative remedies within the Code for the same action does not in itself lead to the conclusion that Congress intended the Code remedies to be exclusive. Paul v. Monts, *supra*, 906 F.2d 1468, 1476 (no indication that Congress intended various remedies for enforcement of plan found in Code to be exclusive and therefore state law breach of contract cause of action not preempted).

be impossible for it to comply with the Iowa collection law since it need only send its reaffirmation solicitation letters exclusively to debtor's counsel. Sears, Roebuck and Co. v. O'Brien, *supra*, 178 F.3d at 967. Additionally, the court found that Sears' compliance with state law "presents no obstacle to the full enjoyment of Sears' federal rights." *Id.* See also, Greenwood Trust Co. v. Smith, 212 B.R. 599, 603 (8<sup>th</sup> Cir. BAP 1997) (Iowa state collection law does not impede creditor's rights under §§ 524(c)(3) and § 524(c)(6) authorizing negotiation of reaffirmation agreements); Sturm v. Providian Nat. Bank, 1999 U.S. Dist. LEXIS 20243 (S.D.W.Va. December 23, 1999) (enforcement of West Virginia statute prohibiting direct communications with a debtor represented by counsel "in no way impedes administration of bankruptcy case").

In this case, the Plaintiffs' pursuit of a state law unjust enrichment action is fully consistent with the objectives of Congress in mandating that unfiled reaffirmation agreements are unenforceable. It would simply require Defendants to disgorge monies they have collected on agreements that are unquestionably void. Additionally, Defendants cannot possibly argue that this cause of action impedes or takes away any rights available to them under federal law since the Bankruptcy Code gives them no right to collect or retain funds on void reaffirmation agreements.

Unlike this Court’s decision In re Weinstein, this is not a case where a state law provision is in direct conflict with a federal bankruptcy protection and enforcement of the state law would frustrate the remedial purpose of the Code in granting debtors a fresh start. In re Weinstein, 164 F.3d 677, 683 (1<sup>st</sup> Cir. 1999) (Massachusetts’ exception to state homestead exemption relating to pre-existing debts must “yield to the overriding policies of § 522(c)”).<sup>16</sup> On the contrary, enforcement of state law here is completely consistent with the intent of § 524(c) and helps to effectuate the debtor’s fresh start.

Finally, the lower court’s decision implies that the mere fact that Plaintiffs’ state law claim “piggybacks on their claims of violations of §§ 524 and 362”, it is of necessity preempted. This assertion belies logic as state law claims that find their derivation in violations of the Code are not preempted so long as they are compatible with the purposes of the Code. *See, e.g., Weners v. Great State Beverages, Inc.*, 663 A.2d 623 (1995)(Bankruptcy Code does not preempt state common law claim for wrongful termination alleging employment discrimination

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<sup>16</sup> The lower court’s reliance on this Court’s decision in Summit Inv. & Dev. Corp. v. Leroux, 69 F.3d 608 (1<sup>st</sup> Cir. 1995) is misplaced. In Summit, it was held that § 365(e) of the Code preempted the *ipso facto* termination provisions of the Massachusetts Limited Partnership Act. The lower court suggests that since § 365 contains a preemption exception, and the pertinent Code provisions in this case contain no such exception, it follows that preemption in this case is “even stronger.” What the lower court omits is that § 365(e) contains express preemption language (“notwithstanding a provision . . . in applicable law”) in the prefatory clause in § 365(e). Thus, the exception found in § 365(e)(2)(A), which this Court found inapplicable, exists only because there is a more general and explicit preemption provision found in the statute. Once

based on violation of § 525(b)); Paul v. Monts, *supra*, 906 F.2d 1468, 1476 (state law breach of contract cause of action arising solely out of a participant's noncompliance with the obligations of a Chapter 11 reorganization plan not preempted). *See also* Miele v. Sid Bailey, Inc., 192 B.R. 611 (S.D.N.Y. 1996) (damages under Federal Debt Collection Practice Act and state tort law awarded against debt collector who attempted to collect discharged debt); In re Aponte, 82 B.R. 738 (Bankr.E.D.Pa. 1988) (debtor awarded damages under Pennsylvania Unfair Trade Practices and Consumer Protection Act for creditor's violation of the automatic stay).

This Court has recognized that a debtor's state law claims may be appropriately intertwined with violations of the Bankruptcy Code. In Vahlsing v. Commercial Union Ins. Co., Inc., 928 F.2d 486 (1<sup>st</sup> Cir. 1991), the debtor sought recovery under various state common law tort theories for a creditor's violation of the automatic stay. Although this Court did not squarely address the preemption issue in Vahlsing, and ultimately affirmed the jury verdict against the debtor, it clearly acknowledged that state law claims may be premised upon a violation of the Code. In responding to the debtor's argument that the bankruptcy court's

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again, none of the applicable Code sections in this case contain such an express preemption provision.

finding of a stay violation had some preclusive effect on his state tort claims, this

Court stated:

The actions may be void *ab initio* , but the actor’s culpability is a question to be settled by reference to some extrinsic legal standard, whether it is the ‘willfulness’ requirement of 11 U.S.C. § 362(h), or the various common-law and statutory theories under which [the debtor] chose to bring suit.

. . . .

Recovery under one or more of the legal theories advanced by [the debtor] requires proof that [the creditor] violated the stay under the circumstances which satisfy the elements of the [common law] theory in question.

Vahlsing, 928 F.2d at 490 (*citations omitted*).

Simply put, Plaintiffs’ pursuit of their state law claim is in accord with the purpose of the Code and does not deprive Defendants of any bankruptcy right.

**V. AMICUS SUPPORTS THE ADDITIONAL ARGUMENTS CONTAINED IN PLAINTIFFS’ BRIEF.**

As demonstrated by Ms. Bessette in her brief, the lower court ignored clear indications in the legislative history supporting an implied cause of action for violations of section 524, and instead based its decision on a negative inference drawn from Congress’ addition of a cause of action for § 362, but not to § 524. *Amicus* supports the arguments of Ms. Bessette that an implied cause of action exists under section 524, and that the court below erred in dismissing plaintiffs’

cause of action for violation of the Racketeer Influenced Corrupt Organizations Act (“RICO”).

## CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that the decision below be reversed.

Respectfully submitted,

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John Rao (Bar No. 45867)  
Gary Klein (Bar No. 45412)  
Attorneys for *Amicus Curiae*  
National Consumer Law Center, Inc.  
18 Tremont St., Suite 400  
Boston, MA 02108  
(617)523-8010

CERTIFICATE OF SERVICE

I hereby certify that I served both a paper copy and a 3.5 inch diskette containing an electronic version of this *Amicus Curiae* Brief of the National Association of Consumer Bankruptcy Attorneys on counsel for all parties, by U.S. mail, postage prepaid, on this 14th day of February, 2000, at the addresses listed below:

Deming Sherman  
Patricia A. Sullivan  
Edwards & Angell  
One BankBoston Plaza  
Providence, RI 02903

Mary Grace Diehl  
A. William Loeffler  
Troutman Sanders LLP  
Nationsbank Plaza  
600 Peachtree St., N.E., Ste. 6200  
Atlanta, GA 30308

Christopher M. Lefebvre  
Two Dexter St.  
Pawtucket, RI 02860

Daniel A. Edelman  
Cathleen M. Combs  
Edelman & Combs  
135 S. LaSalle St., Ste. 2040  
Chicago, IL 60603

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 5<sup>th</sup> Cir. R. 32.3, the undersigned counsel certifies that this amicus brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 5<sup>th</sup> Cir. R. 32.1.

1. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 5,953 words printed in a proportionally spaced typeface.
2. This brief is printed in a proportionally spaced typeface, using Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes; it was produced by Microsoft Word.
3. The undersigned counsel has provided an electronic version of this brief and/or a copy of the word printout to the Court.
4. The undersigned counsel understands that a material representation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7)(B), may result in the Court's striking this brief and imposing sanctions against the person who signed it.

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