No. 16-15467

In the United States Court of Appeals for the Ninth Circuit

PATRICIA ARELLANO,
Plaintiff-Appellant,

v.

CLARK COUNTY COLLECTION SERVICE, LLC, BORG LAW GROUP, LLC,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
(The Honorable Jennifer A. Dorsey)

PLAINTIFF-APPELLANT'S OPENING BRIEF

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INTRODUCTION

Congress enacted the Fair Debt Collection Practices Act (FDCPA) to rein in abusive debt collectors. The Act accomplishes this goal in large part by allowing victims of debt-collection abuse to bring their own private lawsuits for damages.

The question of first impression in this appeal is whether a debt collector may avoid suit under the FDCPA by buying the consumer's FDCPA claim out from under her. Put another way: May a debt collector use the debt-collection process to purchase the consumer's debt-collection-abuse claim—at a sheriff's sale on the courthouse steps—and then dismiss that claim as its owner?

As remarkable as it may seem, that is what happened here: Patricia Arellano sued Clark County Collection Service (CCCS) for FDCPA violations. But rather than respond to Ms. Arellano's suit on the merits, CCCS devised an ingenious way out. It obtained a writ of execution commanding the Clark County Sheriff to sell Ms. Arellano's FDCPA claim to satisfy her debt. Then, using a process designed almost exclusively for real estate, CCCS showed up to an obscure auction on the Clark County courthouse steps, bid $250, and left as the ostensible owner of Ms. Arellano's legal claims—that is, her claims *against CCCS itself*. It then moved, in its capacity as owner of her claims, to dismiss the lawsuit that it was theoretically prosecuting against itself.

The district court granted the motion. A debt collector was thus able to use the debt-collection process to avoid facing liability for debt-collection abuse.

For two reasons, the district court's decision to bless this novel purchase-and-dismiss maneuver should be reversed. *First*, to the extent that state law allows enforcement of the property transfer, it is preempted by the FDCPA. State laws governing property transfers, like other state laws, are preempted when they "undermine the purpose" of a federal law—for example, its "solicitude" for a vulnerable group. *Boggs v. Boggs*, 520 U.S. 833, 843, 844 (1997). That can happen when state law interferes with "the methods by which [a federal law] was designed to reach [its] goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Thus, a state-law property transfer is preempted where, as here, it would "frustrate the essential purpose" of a federal consumer-protection statute by thwarting its private damages action and thereby "discourag[ing] debtors from bringing . . . claims." *Dias v. Bank of Haw.*, 732 F.2d 1401, 1403 (9th Cir. 1984).

Allowing the purchase-and-dismiss tactic at issue here would undermine the FDCPA in exactly these ways. The FDCPA is meant to accomplish its goals through a nationwide scheme of private enforcement; victims of debt-collection abuses may bring suit, and win statutory damages, to deter future violations. But if CCCS gets its way, that system would crumble. In states allowing the purchase-and-dismiss maneuver, debtors would have no incentive to sue, since debt collectors could simply arrange to have consumers' claims sold in a sheriff's sale and then buy them for pennies on the dollar. The FDCPA would become a state-by-state patchwork. And the economics of sheriff's sales like the one in this case show why: because no serious bidder would compete against the debt collector in the auction, the debt collector could name its own price to evade liability.

Second, a debt collector's purchase of an FDCPA claim against itself is void under the common law, which prohibits the assignment of personal-injury claims. Claims under the FDCPA are properly understood as analogous to traditional personal-injury tort claims and are thus unassignable under this common-law rule. That rule applies with special force here, where the unique relationship between the parties—a debt collector seeking to destroy a consumer's collection-abuse claim—is so stark. And enforcing this specific prohibition is consistent with the common law's traditional anti-assignment rule, which grew out of a suspicion that the rich and powerful would "pervert[] the process of law into an engine of oppression." *Thallhimer v. Brinckerhoff*, 3 Cow. 623, 644 (N.Y. 1824) (citing 4 William Blackstone, *Commentaries on the Laws of England* 135 (1775)). For similar reasons, modern courts have prevented parties from hijacking their opponents' claims.

Thus, under both federal law and the common law, CCCS's purchase-and-dismiss maneuver must fail. Instead, CCSS should be required to defend itself the old-fashioned way: with legal arguments on the merits.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). After granting the defendant's motion for summary judgment on March 7, 2016, ER-12–14, the court entered judgment for the defendant on March 8, 2016, ER-4. Ms. Arellano filed her timely notice of appeal on March 21, 2016. ER-1. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The federal FDCPA allows consumers harmed by debt-collection abuses to sue for damages. CCCS—a debt collector sued by Patricia Arellano for FDCPA violations—responded to Ms. Arellano's suit by obtaining a writ of execution, purchasing her FDCPA claims at the resulting sheriff's sale, and moving to dismiss her suit. Under the Supremacy Clause, state law is preempted when it would undermine the purposes and objectives of a federal statute. And claims are likewise unassignable under the common law when they qualify as personal-injury claims or when public policy recognizes a unique relationship between the parties.

The issue presented here is whether enforcing Clark County Collection Service's purchase of Ms. Arellano's FDCPA claims is (1) preempted by the FDCPA because it frustrates the Act's purposes and objectives, or (2) contrary to common-law limitations on the assignment of claims.

STATEMENT OF THE CASE

A. The FDCPA and the debt-collection industry

The FDCPA is a federal statute enacted "to eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692. The Act thus seeks "to protect vulnerable and unsophisticated debtors from abuse, harassment, and deceptive collection practices." *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007). Though it also empowers the Consumer Financial Protection Bureau and the Federal Trade Commission to enforce its provisions, Congress particularly sought to effect the FDCPA's "broad remedial" goals through "private enforcement"—that is, by "permitting aggrieved individuals to bring suit as private attorneys general." *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1060–61 (9th Cir. 2011).[1] In keeping with its desire "to promote consistent State action to protect consumers against debt collection abuses," 15 U.S.C. § 1692, Congress made clear that state laws that are "inconsistent with any provision" of the statute are preempted "to the extent of the inconsistency," *id.* § 1692n.

[1] The Senate Report accompanying the FDCPA emphasized this goal: "The committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance." S. Rep. No. 95-382, at 5 (1977). And the Supreme Court has echoed this point, noting "the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 603 (2010).

In enacting the FDCPA, Congress observed that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692. Even four decades after the Act's passage, "consumers are still regularly subjected to many of the same coercive debt collection tactics that Congress originally intended to eradicate," including "repetitive profanity-filled telephone calls, intentional harassment at work, threats of arrest, and threats of physical violence." Matthew R. Bremner, *The Need for Reform in the Age of Financial Chaos*, 76 Brook. L. Rev. 1553, 1553 (2011). Congress has found that these tactics exact a personal toll on consumers, "contribut[ing] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692. In fact, such abuses "have caused some consumers to flee their homes in fear, sign over their property to debt collectors in desperation, and even commit suicide." Bremner, *supra*, at 1554.

The entities regulated by the FDCPA comprise a "shadowy," "booming" industry that traffics in consumers' unpaid debts—purchasing lists of consumer debt for "pennies on the dollar," "collect[ing] what they can," and then selling the data on to other collectors until the spreadsheets are "picked clean." Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. Times Mag. (Aug. 15, 2014), http://nyti.ms/1px6sMx. These private actors call consumers at home and at work, sometimes alleging debts that are not even accurate, recoverable, or applicable to a living debtor. *Id.*; Jessica Silver-Greenberg, *For Families of Some Debtors, Death Offers No Respite*, Wall Street J. (Dec. 3, 2011), http://on.wsj.com/2awEeCW. The Consumer Financial Protection Bureau "receives far more complaints about debt collection than any other issue—more than 7,000 a month, on average." Stacy Cowley, *Debt Collectors' Abuses Prompt Consumer Agency to Propose New Rules*, N.Y. Times (July 28, 2016), http://nyti.ms/2ayVHdH.[2]

B. Ms. Arellano's FDCPA suit

Patricia Arellano is a resident of Las Vegas, Nevada. ER-42. She is one of roughly 77 million Americans with debt in the collections process and one of roughly 43 million Americans with medical debt—the number one cause of personal bankruptcies in the United States.[3]

[2] *See also* Press Release, Consumer Fin. Protection Bureau, *Consumer Financial Protection Bureau Considers Proposal to Overhaul Debt Collection Market* (July 28, 2016), http://bit.ly/2asTJJp; Press Release, Fed. Trade Comm'n, *FTC Releases Annual Summary of Consumer Complaints* (Mar. 1, 2016), http://bit.ly/1nhl3gK.

[3] *See* Caroline Ratcliffe et al., Urban Institute, *Delinquent Debt in America* 7 (July 30, 2014), http://urbn.is/2adr0Y3; Consumer Fin. Protection Bureau, *Consumer Credit Reports: A Study of Medical and Non-Medical Collections* (Dec. 2014), http://bit.ly/1umJmpZ (19.5% of 220 million consumer credit reports have "one or more medical collections tradelines"); Dan Mangan, *Medical Bills Are the Biggest Cause of US Bankruptcies: Study*, CNBC (June 25, 2013), http://cnb.cx/1bUm31L ("Bankruptcies resulting from unpaid medical bills will affect nearly 2 million people this year."); Margot Sanger-Katz, *Even Insured Can Face Crushing Medical Debt, Study Finds*, N.Y. Times (Jan. 5, 2016), http://nyti.ms/1kHWIQ4 ("[R]oughly 20 percent of people under age 65 with health insurance nonetheless reported having problems paying their medical bills over the last year.").

In March 2015, Ms. Arellano received an envelope in the mail from CCCS, a private debt collector headquartered in Las Vegas, Nevada. ER-19; ER-16. The envelope contained a summons and complaint seeking to collect on outstanding medical debt. ER-19. Paragraph two of the complaint read: "Within 30 days from the receipt of this complaint you may . . . [d]ispute the validity of this debt or any part thereof; if you do not dispute the debt, it will be presumed valid . . . ." *Id.* Ms. Arellano did not file a response, ER-16–17, and CCCS obtained a default judgment in May 2015 against her for the $370 in medical debt that she owed. ER-23. With costs and fees, the total came to approximately $800. *See id.*

A few months later, Ms. Arellano filed a lawsuit alleging that CCCS's debt-collection practices violated the FDCPA in two ways. ER-41, ER-48. First, she raised a claim for misleading practices under 15 U.S.C. § 1692e(10). She alleged that the complaint's statement that recipients could "[d]ispute the validity of this debt or any part thereof" "[w]ithin 30 days" of receipt overshadowed the fact that they were required to file an answer with the court within *twenty* days. ER-43, ER-46; *see Swanson v. S. Or. Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988); *Battle v. Gladstone Law Grp.*, 951 F. Supp. 2d 1310, 1315 (S.D. Fla. 2013) ("The 'least sophisticated consumer' could be deceived or confused when the summons sets out a 20-day deadline to respond to the lawsuit and the attached notice provides for a 30-day deadline to request validation of the debt.").

Second, she alleged that CCCS's name impermissibly implied that it was affiliated with the government of Clark County, in violation of 15 U.S.C. § 1692e(1). ER-46–47; *see Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994) ("By prohibiting representations by debt collectors that they are 'affiliated with' or 'vouched for' by a governmental entity, the FDCPA forbids a range of implications wider than merely the direct representation that the debt collector is or is a part of state or federal government.").

A week later, CCCS prepared and "caused a Writ of Execution and Notice of Execution to be issued" against Ms. Arellano for the May 2015 medical-debt default judgment. ER-17. The writ "commanded" the Clark County Sheriff "to satisfy this judgment with interests and costs as provided by law, out of the personal property of the judgment debtor," ER-30—specifically, "[a]ll claims for relief, causes of action, things in action, and choses in action in any lawsuit pending in Nevada, including, but not limited to, the rights of Patricia Arellano, in the civil action [against CCCS]," ER-34. There is no evidence that Ms. Arellano had any lawsuits pending at the time besides her FDCPA suit against CCCS.

C. The sheriff's sale process

Ms. Arellano's FDCPA claims against CCCS were sold for $250 on the steps of the Clark County courthouse on Thursday, November 19, 2015. ER-35, ER-38.

They sold to the auction's highest bidder: CCCS. ER-38. As far as the record shows, there were no rival bids.

Sheriff's sales in Clark County occur on Tuesday, Wednesday, and Thursday mornings on the courthouse steps. *Sheriff Sales 2015*, Clark County, Nevada, http://bit.ly/2a5yeeK (last visited July 21, 2016). Judgment creditors can arrange for a sheriff's sale of a judgment debtor's property by preparing and getting the court to approve a writ and notice of execution to satisfy a given judgment. *See* Civil Law Self-Help Center, Clark County, Nevada, *Overview of Collection of a Civil Judgment*, http://bit.ly/2a0zF2z (last visited July 21, 2016). As the Clark County Sheriff's office explains on its website, judgment creditors seeking to arrange a sale of any kind of "personal property besides vehicles[,] . . . must call [the] Sheriff['s] Civil Process Section prior to bringing in documents to arrange for an estimate for seizing and storing property." Clark County, Nevada, *Sheriff Civil: Writ of Execution: Personal Property (Vehicles, Equipment, etc.)*, http://bit.ly/2ainaMa (last visited July 21, 2016). The website does not acknowledge the possibility that a judgment creditor might want to execute on an intangible good like a legal claim. *See id.*

To go forward with the sale, in addition to notifying the owner of the property personally, the sheriff must post a notice of the sale "in three public places of the township or city where the property is situated and where the property is to be sold," and at least attempt to publish a notice of the sale "once each week, for 3 successive weeks, in a newspaper." *See* Nev. Rev. Stat. § 21.130. The statute does not provide guidance on where something intangible like a legal claim "is situated." *See id*. In this case, the sheriff published notice during three successive weeks in October in the *Nevada Legal News*—a low-circulation local publication that specializes in disseminating legal notices.[4]

In keeping with a process that contemplates only tangible property, the sale of legal claims is rare. While the Clark County website lists 289 scheduled sales for 2015 (the year in which Ms. Arellano's claims were auctioned), only two of those sales are "chose in action" sales; the other 287 appear to be for real property. *See Sheriff's Sales 2015*, *supra.* The other "chose in action" case is also listed as having sold to a judgment creditor's attorney. *See id.* (listing buyer as "PLTF ATTY").

The $250 closing price for Ms. Arellano's FDCPA claims made the auction of her legal rights by far the smallest sale among Clark County's 164 completed sheriff's sales in 2015. *Sheriff Sales 2015*, *supra*. In fact, it seems to have been the only sale of the year below $2,000, and one of only three below $25,000. *See id.*

D. CCCS's motion and the district court's decision

A few months after purchasing Ms. Arellano's FDCPA claims, CCCS filed a motion to dismiss or, in the alternative, for summary judgment. ER-15. It argued that Ms. Arellano "no longer possesse[d] any rights of action in this case, and [no]

[4] *See* Nevada Legal News, https://www.nevadalegalnews.com/index.php (last visited July 29, 2016).

longer possesse[d] standing to sue," since CCCS had "purchased [those] rights." ER-17. In addition to relying on general Nevada law allowing for the execution on "things in action," ER-17–18 (citing Nev. Rev. Stat. §§ 10.045, 21.080(1)), CCCS cited a Nevada Supreme Court case that it characterized as "providing that statutes specifying kinds of property liable to execution 'must be liberally construed'" for the creditor's benefit, ER-18 (quoting *Sportsco Enter. v. Morris*, 917 P.2d 934, 937 (Nev. 1996)).

Ms. Arellano opposed the motion, arguing that the transfer of her FDCPA claims to CCCS was invalid because "Nevada citizens are not permitted to assign tort claims as a matter of state public policy." D. Ct. Dkt. 17 at 4. She also argued that "[t]he FDCPA is a federal law which is directed toward the compensation of individuals for wrongs suffered within the scope of their legally recognized interests." *Id.* at 7.

The court briefly heard oral argument, at which this exchange took place:

> COUNSEL FOR CCCS: My client, Clark County Collection Service, owns the claim and asks that the Court dismiss the action.
>
> THE COURT: And Clark County Collection Service wants that claim dismissed; correct?
>
> COUNSEL FOR CCCS: Correct, on behalf of all of the claims against the Defendants. Only Clark County Collection possessed the Judgment, but it now owns all the claims in this case.
> Thank you.
>
> THE COURT: Thank you so much.

ER-9. The district court then issued an oral ruling. Observing that the case "presented an interesting situation," the court rejected Ms. Arellano's argument that "these claims are the type of tort claims that public policy prevents from being transferred." ER-12–13. Instead, the court concluded that "[CCCS] obtained as a judgment creditor the cause of action that is pled in this case and it is the party with standing to bring this claim." ER-13. "And because it wants this claim dismissed," the court granted its motion for summary judgment. ER-12–14. The entire hearing lasted only eleven minutes. Ms. Arellano now appeals.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of summary judgment. *Univ. Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004).

SUMMARY OF ARGUMENT

I.A. This Court should reverse the district court's judgment because enforcement of CCCS's purchase and dismissal of Ms. Arellano's legal claims would frustrate the FDCPA's purposes and is therefore preempted. State law is preempted where, "under the circumstances of [a] particular case," it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The FDCPA is "a broad remedial statute designed to 'eliminate abusive debt collection practices by debt collectors'" by allowing victims of abuses to "bring suit as private attorneys general." *Gonzales*, 660 F.3d at 1060–61 (quoting 15 U.S.C. § 1692). Enforcing CCCS's maneuver would allow abusive debt collectors to evade liability by purchasing and dismissing consumer's suits for pennies on the dollar, thus "discourag[ing] debtors from bringing . . . claims," *Dias*, 732 F.2d at 1403, and "clash[ing]" with Congress's "solicitude" for victimized consumers, *Boggs*, 520 U.S. at 843–44. In other words, it would impermissibly "interfere[] with" both the FDCPA's goal of deterring abuses by debt collectors and the "methods by which the federal statute was designed to reach this goal." *Int'l Paper Co.*, 479 U.S. at 494.

I.B. Enforcing CCCS's purchase-and-dismiss maneuver would also thwart uniform application of the FDCPA across the states. Where "an Act 'is designed to vindicate a *federal* [regulatory] policy'" and state law threatens the perverse result of having a "federal statute . . . interpreted differently in all 50 states," federal law controls. *Bluebird Partners, L.P. v. First Fid. Bank, N.A. N.J.*, 85 F.3d 970, 974 (2d Cir. 1996) (quoting *In re Nucorp Energy Sec. Litig.,* 772 F.2d 1486, 1489 (9th Cir. 1985)). This rule applies with even more force when applying the state law would yield a result at odds with Congress's goals in enacting the federal framework. That is true here: The FDCPA exists to "promote consistent State action," 15 U.S.C. § 1692, and makes clear that "the laws of any State . . . that [are] inconsistent with any [of its] provision[s]" are preempted "to the extent of the inconsistency," 15 U.S.C. § 1692n. Allowing debt collectors to evade FDCPA liability simply where a particular state's law allows a purchase-and-dismiss maneuver like CCCS's would create a quilt of on-again-off-again consumer protection that Congress clearly did not intend.

I.C. The real-world dynamics of the sheriff's sale through which CCCS purchased Ms. Arellano's claims confirm that allowing CCCS's maneuver will frustrate the goals of the FDCPA. That's because it is all but certain that a debt collector like CCCS will be able to name its own price. *First*, sheriff's sales are too obscure to draw a high number of third-party rivals to bid up the price, and debtors like Ms. Arellano are by definition too poor to meaningfully compete with corporate collectors themselves. *Second*, because legal claims are hard to appraise, the high level of risk will discourage even any rival bidders who *might* be interested. *Third*, bids in auctions of "common value goods" like legal claims are especially sensitive to signals from other bidders—a dynamic that will further depress competition, since so little information will be available given the obscurity of the sale and the difficulty of valuing legal claims. And *fourth*, because a debt collector like CCCS buys the claim to destroy it rather than prosecute it, there is no way to determine on the back end how poorly its bid undervalued the claim in order to course-correct in the future. Given these real-world concerns, it is unsurprising that CCCS was able to purchase Ms. Arellano's claims for $250 at an auction at which it likely was the only bidder. That debt collectors like CCCS would be able to effectively name their own prices to purchase and dismiss consumers' claims shows why enforcement of CCCS's maneuver would undermine the FDCPA and must be preempted.

II.A. The transfer of Ms. Arellano's claims to CCCS is in any event impermissible under the common law. Federal common law limits the assignment of federal statutory claims, and traditional common law yields the same result in this case. Specifically, the common law's longstanding prohibition on the assignment of personal-injury claims covers FDCPA claims, given the personal nature of the abuse that the Act seeks to redress. Indeed, as many courts have recognized, FDCPA claims grow out of traditional tort claims like intentional infliction of distress. And the unique relationship between the parties in this case—a debt collector who uses the debt-collection process to purchase a consumer's claim only to dismiss it—demonstrates why this rule is especially apt here. General rules allowing the assignability of non-personal-injury claims purchased for more conventional purposes are not to contrary; just because *some* claims are assignable does not mean that these should be.

II.B. The rationale underlying the historical prohibition of all claim assignments confirms that Ms. Arellano's FDCPA claims are not assignable. That prohibition responded to the danger that powerful interests would "pervert[] the process of law into an engine of oppression." *Thallhimer*, 3 Cow. at 644 (citing

Blackstone, *supra*, at 135). The law of claim alienability has liberalized since then, but only as those dangers have subsided. Where, as here, there remains a great risk that parties like CCCS will "us[e] their power and influence in supporting questionable titles against the weak and oppressed of various degrees and distinctions, and thus perhaps obtain[ing] judgments and decrees to which they were not entitled," the rationale behind the common-law prohibition is as strong as ever. *Merchants' Protective Ass'n v. Jacobsen*, 127 P. 315, 317 (Idaho 1912). Accordingly, where modern courts have encountered analogous cases of parties seeking to "short-circuit[] the justice system" by "misusing writs of execution," they have cried foul. *See generally* Kristopher Wood, *Short Circuiting the Justice System: How Defendants Are Misusing Writs of Execution*, 39 Pepp. L. Rev. 747 (2012). Like those courts, this Court should firmly reject CCCS's purchase-and-dismiss maneuver.

ARGUMENT

I. Enforcing the purchase-and-dismiss maneuver would impermissibly undermine the FDCPA's purposes and objectives.

There is a direct conflict between Congress's plan for preventing debt-collection abuses through the FDCPA's scheme of private enforcement and CCCS's scheme to thwart that plan by purchasing Ms. Arellano's claim for purposes of dismissing it. To the extent that state law allows such a tactic, state law must give way to "the supreme Law of the Land." U.S. Const., art. VI, cl. 2.

Preemption comes in several flavors, but "[t]he scope of a statute's pre-emptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Therefore where, "under the circumstances of [a] particular case, [a state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," that state law must give way. *Hines*, 312 U.S. at 67; *see also Boggs*, 520 U.S. at 844. For example, "[a] state law . . . is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Int'l Paper Co*, 479 U.S. at 494.

As detailed above, the FDCPA is "a broad remedial statute designed to 'eliminate abusive debt collection practices by debt collectors.'" *Gonzales*, 660 F.3d at 1060 (quoting 15 U.S.C. § 1692). It is predicated on Congress's vision of "debtors acting as private attorneys general," *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008), alongside "consistent State action," 15 U.S.C § 1692. To the extent any state law is "inconsistent with any provision" of the Act, Congress made clear that such state law is preempted. *Id.* § 1692n.

Enforcement of CCCS's attempt to purchase and dismiss Ms. Arellano's FDCPA claims is preempted for two reasons. First, enforcement of the maneuver would allow debt collectors to immunize themselves against debtors' FDCPA claims, clashing directly with the system of deterrence by "private attorneys general" that Congress created to protect vulnerable debtors. *Gonzales*, 660 F.3d at 1061; *Camacho*, 523 F.3d at 978. Such a conflict "cannot stand." *Boggs*, 520 U.S. at 844. Second, and equally impermissibly, allowing the maneuver would undermine uniform application of a statute that Congress sought to have applied consistently. *See Bluebird*, 85 F.3d at 974. As discussed further below, *see* Part I.C, the market dynamics of this particular type of sale confirm that allowing maneuvers like CCCS's would "frustrate the essential purpose of the Act" by "discourag[ing] debtors from bringing . . . claims." *Dias*, 732 F.2d at 1403.

A. CCCS's purchase-and-dismiss maneuver frustrates the FDCPA's system of private enforcement.

Allowing CCCS to assign Ms. Arellano's claims to itself for the purpose of dismissing those claims would impermissibly thwart Congress's objective in enacting the FDPCPA: to create a system of private enforcement to protect "vulnerable" debtors. *Guerrero*, 499 F.3d at 938.

State rules governing the transfer of property are preempted when they "undermine the purpose of" a federal law—for example, a statute's "solicitude" for a vulnerable group. *Boggs*, 520 U.S. at 843–44. That is true despite the fact that property rules lie "within the traditional domain of the States." *Id.* at 840. In *Boggs*, for example, Louisiana property law seemed to permit a deceased employee's first wife to transfer her rights to a survivor's annuity at the expense of the employee's still-surviving second wife. *Id.* at 836–37. ERISA, on the other hand, evinced

Congress's clear "solicitude for the economic security of surviving spouses"—solicitude that clearly "would be undermined by" such a transfer at a surviving spouse's expense. *Id.* at 843. Thus, given that applying the Louisiana law would "undermine the purpose of ERISA[]," the Supreme Court held, "the state law cannot stand." *Id.* at 844. That principle applies here as well: Whatever Nevada law says about claim assignments, it may not permit actions that undermine Congress's intent to protect consumers from debt-collection abuses.

Likewise, a state law is preempted when it specifically undermines "the methods by which [a federal law] was designed to reach [its] goal." *Int'l Paper Co.*, 479 U.S. at 494. This Court has recognized that principle in the context of a closely related federal consumer-protection statute—the Truth in Lending Act (TILA)—similarly predicated on private enforcement.[5]

In *Dias v. Bank of Hawaii*, for example, a borrower sued a lender for TILA violations, much as Ms. Arellano sued CCCS for FDCPA violations. And like CCCS, the lender sought to evade full liability—in that case, by "offset[ting]" the borrower's judgment "against [the bank's] pending collection claims" against the

[5] "TILA . . . was the first of several statutes collectively known as the Consumer Credit Protection Act (CCPA) that now include the FDCPA." *Jerman*, 559 U.S. at 589. Like the FDCPA, TILA is principally concerned with misleading conduct and statements by creditors. *See Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1121 (9th Cir. 2009) (noting that "TILA prohibits not only literal falsities, but also misleading statements"). And also like the FDCPA, it too features "private enforcement provisions" that signal a "remedial-penal nature." *Palmer v. Wilson*, 502 F.2d 860, 862 (9th Cir. 1974).

borrower. *Dias*, 732 F.2d at 1402–03. This Court said no: Allowing such a common-law offset would, without any hope of recovery, eliminate the incentive for consumers like Dias to bring TILA claims in the first place. *Id.* In other words, allowing offsets would "frustrate the essential purpose of the Act" by "discourag[ing] debtors from bringing . . . claims." *Id.* at 1403.

This Court came to the same conclusion in *Riggs v. Government Employees Financial Corp.*, 623 F.2d 68, 74 (9th Cir. 1980), another case in which it prevented a defendant from sidestepping a judgment against itself in a way that would have frustrated TILA's scheme of private deterrence. In *Riggs*, a bankruptcy trustee brought a successful TILA suit; rather than pay the judgment, the defendant sought to offset it against the bankrupt estate's debt. *Id.* at 69. As this Court made clear, that offset ran counter to Congress's deliberate intent "to ensure compliance with [TILA] by providing an incentive for self-enforcement: actual monetary recovery by the individual borrower-litigant and recovery of his attorney's fees." *Id.* at 74. "[A]llowing lenders to subtract [TILA] awards from amounts owed them by bankrupt borrowers" would undermine that intent, since it "would eliminate any incentive for bankruptcy trustees to pursue [TILA] claims." *Id.* The plaintiff therefore had to retain the right to the judgment; anything else would have impermissibly scuttled Congress's purpose. *Id.*

So too here. Congress's solicitude for vulnerable consumers and its chosen method of protecting them are imperiled by CCCS's maneuver—one that, if sanctioned by this Court, threatens to quash any incentive for victimized debtors to bring FDCPA claims. Congress intended for the FDCPA's "broad remedial" goals to be achieved through the work of "aggrieved individuals . . . bring[ing] suit as private attorneys general." *Gonzales*, 660 F.3d at 1060–61. Enforcing a purchase-and-dismiss maneuver like CCCS's, however, would render that system of private enforcement a nullity. After all, it is hard to imagine how "vulnerable and unsophisticated debtors," *Guerrero*, 499 F.3d at 938—who are overwhelmingly likely to be poor—can be expected to outbid corporate debt collectors. Nor, by the same token, would debt collectors be deterred from using "abusive debt collection practices." 15 U.S.C. § 1692. Instead, debt collectors would be safe in the knowledge that they could always extinguish FDCPA suits against themselves for pennies on the dollar, *see* Part I.C, *infra*. Such futility would undoubtedly "discourage debtors from bringing [FDCPA] claims." *Dias*, 732 F.2d at 1403.

Understandably, then, the FDCPA's own language suggests that Congress did not intend for FDCPA claims to be transferable to debt collectors for the purposes of vitiating those claims. The statute provides that "any debt collector who fails to comply with any provision of this subchapter with *respect to any person is liable to such person*"—language that makes clear that the individual victim, as the person to whom an offender is liable, is intended to retain the right. 15 U.S.C. § 1692k (emphasis added). And logic confirms this conclusion: "It would be odd, to say the least, if Congress" passed a law empowering consumers to hold abusive debt collectors accountable through private rights of action, only to allow those same abusive debt collectors to immunize themselves by using the debt-collection process to purchase and destroy those consumers' claims under the law. *Boggs*, 520 U.S. at 843. "Nothing in the language of" the FDCPA suggests that Congress "made such an inexplicable decision." *Id.* at 844. Instead, enforcing CCCS's purchase-and-dismiss maneuver plainly threatens to "frustrate the essential purpose of the Act," *Dias*, 732 F.2d at 1403, and is therefore preempted.

B. Allowing the transfer of Ms. Arellano's claims to CCCS would impermissibly undermine uniform enforcement of the FDCPA's protections.

CCCS's purchase-and-dismiss maneuver is also preempted because it would frustrate Congress's goal of a nationally uniform scheme of private enforcement.

Just as they have disallowed state property rules that would frustrate a federal statute's system of private deterrence, courts have likewise disallowed the state-law assignment of claims where assignment would undermine uniform application of a federal law designed to protect consumers. In the securities context, for example, the Second Circuit has ruled that federal law precludes "New York's law of automatic assignment," which would have otherwise provided that claims held by bondholders under the Trust Indenture Act were "automatically assigned to a subsequent purchaser" of the bond. *Bluebird*, 85 F.3d at 973. Federal law controlled, the court observed, where an "Act is 'designed to vindicate a *federal* policy of protecting investors'"—consumers with financial interests just like debtors—and where allowing state law to control could yield the perverse result of having a "federal statute . . . interpreted differently in all 50 states." *Id.* at 974 (quoting *Nucorp*, 772 F.2d at 1489).[6]

While a patchwork of state laws that still uniformly *promote* Congress's goals might present a different case, preemption is especially appropriate when allowing state laws to diverge from a uniform federal framework would yield results *at odds with* Congress's desired ends. As then–Judge Mukasey observed in his affirmed district-court opinion in *Bluebird*, for example, automatic assignment runs counter to the purposes of the federal securities laws, which "were enacted to protect those who have been injured, not treasure hunters shrewd or lucky enough to have put [their] hands on a security that once belonged to a person who was defrauded." *Bluebird Partners, L.P. v. First Fid. Bank*, 896 F. Supp. 152, 157 (S.D.N.Y. 1995).

[6] These cases resolved the question as a matter of federal common law rather than preemption, *see, e.g.*, *Nucorp*, 772 F.2d at 1489, relying on "interstitial federal common law [to ensure] harmony with" the federal statute's "overall purposes." *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 891–92 (9th Cir. 2005) (Berzon, J., dissenting) (collecting cases). If the Court declines to rely on preemption, it too should ground its decision in federal common law—based on both the FDCPA's purposes and the longstanding common-law principles discussed in Part II, *infra*.

These same considerations apply here. The FDCPA exists to "promote consistent State action," 15 U.S.C. § 1692, and thus confirms that "the laws of any State . . . that [are] inconsistent with any [of its] provision[s]" are preempted "to the extent of the inconsistency," *id.* § 1692n. It would contravene this purpose to allow debt collectors in some states to effectively immunize themselves from FDCPA suits by purchasing and dismissing consumers' claims while allowing the claims of consumers in other states to proceed. Whether a consumer could count on the FDCPA's deterrence would depend on what state she lived in—a "patchwork scheme of regulation" that Congress clearly did not intend. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (discussing ERISA preemption).

And if Judge Mukasey was worried about "treasure hunters" in the securities-law context, *Bluebird*, 896 F. Supp. at 157, this Court should be especially worried about pirates in the debt-collection context. *See, e.g.*, Bremner, *supra*, at 1553. Congress passed the FDCPA to corral abusive debt collectors, not to immunize them. As the supreme law of the land, the FDCPA—and its uniform purpose—controls.

C. That sheriff's sales like this one are destined to undervalue consumers' claims confirms why allowing CCCS's maneuver would undermine the FDCPA.

While this case may be the first to feature a debt collector purchasing a consumer's FDCPA claim for the purpose of extinguishing it, the dangers have not been lost on those who have observed similar tactics. As one scholar has noted, for example, if the law allowed parties to purchase and dismiss their opponent's claims and a "debt collector were to obtain a judgment against [a] debtor in default, he would be free to engage in [tortious or harassing] conduct because if the debtor sued, he could obtain a writ of execution against the claims and extinguish them." Wood, *supra*, at 780 n.219. And one danger that observers have especially noted is that a maneuver like CCCS's is almost certain to massively undervalue a claim like Ms. Arellano's. This confirms why, if CCCS's maneuver were allowed, the FDCPA would be unable to do the work that Congress meant it to do.

There are four main reasons why a maneuver like CCCS's allows a debt collector to pay pennies on the dollar to extinguish an FDCPA claim.

First, because of the obscurity of the sheriff's-sale process, "in many instances the . . . creditor will be the sole bidder at such sales, just as mortgagees frequently submit lone bids at foreclosure auctions." *Amphibious Partners LLC v. Redman*, 389 F. App'x 762, 767 (10th Cir. 2010); *cf.* Restatement (Third) of Property (Mortgages) § 8.3 cmt. a (1997) (noting that foreclosure notice is "frequently published in the classified columns of legal newspapers with limited circulation"); Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. Cal. L. Rev. 843, 848 (1980) (noting that the foreclosure notice process usually results in a "dearth of bidders at the foreclosure sale" and consequently "purchase of the property by the foreclosing mortgagee at a nominal price").

That flawed process is exactly what unfolded here. The brief ad that Clark County placed in the *Nevada Legal News*—circulation 1,500—could not be expected to elicit many rival bidders. Meanwhile, even among speculators who might follow publications like the *Nevada Legal News*, the sale of Ms. Arellano's legal rights was obscure—the county's website acknowledges only two such "chose in action" sales in 2015, while the other 162 completed sales appear to be for real property whose purchase price was orders of magnitude higher. *See Sheriff's Sales 2015*, *supra* (listing 164 completed sheriff's sales, all but three of which closed for more than $40,000).

That obscurity is underscored by the sheriff's-sale process itself, which is built on a presumption of *tangible* property. Nevada law, after all, requires the sheriff to post notice "where the property is situated," Nev. Rev. Stat. § 21.130, and the Clark County Sheriff's web page says that judgment creditors must "bring[] in documents to arrange for an estimate for seizing and storing property," *Sheriff Civil: Writ of Execution: Personal Property*, *supra*. This focus on tangible property is understandable—legal claims are not a commonly sought-after commodity. *See, e.g.*, Isaac Marcushamer, *Selling Your Torts: Creating A Market for Tort Claims and Liability*, 33 Hofstra L. Rev. 1543, 1548 (2005). But it also further demonstrates why it was unlikely that CCCS would draw a rival bidder for such an obscure, relatively low-value sale.

This inherent dearth of competition is certain to be compounded by the fact that the most obvious rival bidder to a debt collector—the consumer herself—is part of a class that is especially ill-equipped to challenge corporate debt collectors' bidding power. Debtors, after all, by definition occupy a financially precarious position in our society. *See, e.g.*, Tom Abate, *Debt Pushes Millions Below Poverty Line*, San. Fran. Chron. (June 18, 2009, 4:00 AM), http://bit.ly/2aeOycU. They are exactly the kind of group, in other words, unlikely to have money to redeem their rights if those rights are put up for sale. And medical debtors like Ms. Arellano are especially vulnerable. *See, e.g.*, Olga Khazan, *Why Americans Are Drowning in Medical Debt*, The Atlantic (Oct. 8, 2014), http://theatln.tc/1senIYH; Mangan, *supra*. All in all, then, it is unsurprising that CCCS was able to buy Ms. Arellano's claims for $250 at an auction at which it was almost certainly the only bidder.

Second, because legal claims are "extraordinar[ily] difficult[]" to appraise, even a bidder who somehow *was* interested in contesting a debt-collector's lowball bid would be discouraged by the high degree of financial risk involved. *See Amphibious Partners*, 389 F. App'x at 765. While this valuation problem has been noted in the foreclosure setting, *see, e.g.*, Washburn, *supra*, at 848, it looms especially large here, since legal claims are even harder to appraise, *see Staffend v. Lake Cent.*

Airlines, Inc., 47 F.R.D. 218, 220 (N.D. Ohio 1969) ("The value of any lawsuit for settlement purposes varies from time to time and often from day to day."). When it's a legal claim rather than an easily appraisable house that's up for auction, weak competition only gets weaker—further undervaluing claims like Ms. Arellano's.

Third, since the auction value of a legal claim is a "common value" to all parties—that is, anyone who owns it can expect to collect the same amount—that value will drop particularly far in the absence of meaningful competitive bidding. *See, e.g.*, Vijay Krishna, *Auction Theory* 3–5 (2d. ed. 2010) (discussing how, in a "common value" auction, seeing a lack of interest from other bidders "may cause a bidder to reduce his own estimate of the object's value"). This dynamic is on display in foreclosure auctions, in which fear of the "winner's curse" leads parties to "scale[] down" their bids in the absence of strong signals from the bank and other bidders. Ronald Goldstein, *Reforming the Residential Mortgage Foreclosure Process*, 21 Real Est. L.J. 286, 290 (1993). There is no reason to expect any difference here. Thus, any meaningful competitor to the debt collector faces not only (1) a paucity of information from other bidders thanks to the obscurity of the process and (2) a good that is difficult to appraise, but also (3) faces those problems *in the context of* an auction in which bids are especially sensitive to signals from other bidders. The result is that the debt collector will be able to effectively name its own price.

Fourth, because there is no back-end check on a gross undervaluation, debt collectors like CCCS can get away with underpaying in perpetuity. *See Amphibious Partners*, 389 F. App'x at 766 (noting that "[t]he risk of excessive seizure is particularly high" where a litigant buys a claim "it has no intention of litigating," but rather seeks to destroy). Were a third party to buy Ms. Arellano's claim in good faith—that is, to prosecute it—Ms. Arellano, the court, and the public would ultimately find out if the price turned out to have been wildly inequitable. But here, CCCS's maneuver "preclude[s]" such "a determination of the merit and value of [Ms. Arellano's] claim." *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 762 (Tex. App. 1992); *see also RMA Ventures California v. SunAmerican Life Ins. Co.*, 576 F.3d 1070, 1076–77 (10th Cir. 2009) (Lucero, J., concurring) (observing that in such a case "we will not know whether [the defendant] paid fair value").

Enforcing the results of such a deeply flawed marketplace therefore would not just allow CCCS to name its own price to destroy Ms. Arellano's FDCPA claims in the short term; it would also prevent any *future* competitor-bidders from ever seeing the size of the opportunity created by just how badly CCCS is underpaying. Debt collectors like CCCS would have a guaranteed path to cut-rate immunity, and Congress's plan for achieving its statutory goals—having the FDCPA's consumer protections enforced by "debtors acting as private attorneys general," *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991)—would be dashed.

"In the face of [such a] direct clash . . . the state law cannot stand." *Boggs*, 520 U.S. at 844.

II. The assignment of Ms. Arellano's FDCPA claims is also prohibited by the common law.

Regardless of whether CCCS's purchase-and-dismiss maneuver is preempted, Ms. Arellano's claims may not be assigned to CCCS under the common law. For this reason, too, the judgment below should be reversed.

If the Court reverses for this reason, it should ground its decision in federal common law, looking to whether "the general goal of the statute would be served by prohibiting the type of assignments involved in th[e] case." *Misic v. Bldg. Serv. Emps. Health & Welfare Trust*, 789 F.2d 1374, 1377 (9th Cir. 1986); *see Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1081–83 (9th Cir. 2000); *Nucorp*, 772 F.2d at 1489. These cases show that "the question of valid assignment is appropriate for the development of interstitial federal common law [to ensure] harmony with the overall purposes" of the federal statute. *Silvers*, 402 F.3d at 891–92 (Berzon, J., dissenting). Under that approach, federal common law prohibits the assignment here for the same reasons that support preemption: Allowing a debt collector to use the debt-collection process to evade FDCPA liability would gut the statute.

This conclusion is buttressed by traditional common-law principles. The transfer of Ms. Arellano's claims to CCCS is prohibited under the common law because FDCPA claims are personal-injury claims, and personal-injury claims—

under a longstanding common-law rule—are unassignable. This rule should apply with even greater force where, as here, the unique relationship yields a debt collector who seeks to purchase a claim not to proceed with it, but to destroy it. Thus, while state law generally provides for execution on "things in action," *see* Nev. Rev. Stat. § 21.080(1); Nev. Rev. Stat. § 10.045, that general statute does not control this case.

Meanwhile, even as the traditionally broad-scale prohibition of claim assignment has been pared back, its rationale—preventing the powerful from purchasing claims to take advantage of the weak—confirms why the assignment of Ms. Arellano's claim should be prohibited. And correspondingly, the decisions of modern courts that have confronted analogous maneuvers confirm that the logic, applicability, and equity of these common-law principles apply here as well.

A. Ms. Arellano's FDCPA claims cannot be assigned because they are personal-injury claims, which the common law has long held to be unassignable.

1. Because Ms. Arellano's FDCPA claims are personal-injury claims—analogous to torts like the intentional infliction of emotional distress—they are unassignable under longstanding common-law precedent. Like the common law of the vast majority of states,[7] Nevada's common law prohibits the assignment of

[7] *See, e.g.*, *Bd. of Trade of S.F. v. Swiss Credit Bank*, 728 F.2d 1241, 1243 (9th Cir. 1984) ("With the exception of causes of action of a personal nature, such as injuries arising out of tort, a cause of action is assignable."); *Mallory v. Hartsfield, Almand &*

personal-injury claims. *See Butwinick v. Hepner*, 291 P.3d 119, 121 (Nev. 2012) (citing *Achrem v. Expressway Plaza Ltd. P'ship*, 917 P.2d 447, 449 (Nev. 1996), as holding that "rights to a tort action are not assignable"); *see also* Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 Chi.-Kent L. Rev. 11, 21–22 (2014) (noting the 37 states that prohibit the assignment of personal-injury claims).

The prohibition arises out of the fact that these claims involve "wrongs done to the person," thus creating a *personal* stake in pursuing the remedy. *See Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 84–85 (Ct. App. 1976); *see also Platinum Unit-Owners' Ass'n v. Residential Constructors, LLC*, No. 2:14-CV-01076, 2015 WL 1186530, at *5 (D. Nev. Mar. 16, 2015). For such a personal claim, "public policy" recognizes a need to preserve "the injured party's ability to prosecute the action

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Grisham, LLP, 86 S.W.3d 863, 866 (Ark. 2002) (reaffirming the state's "long-standing common-law prohibition against the assignment of tort cases"); *Midtown Chiropractic v. Ill. Farmers Ins. Co.*, 847 N.E.2d 942, 945 (Ind. 2006) ("[I]t remains well-settled in Indiana law that a cause of action in tort to recover for personal injuries is not assignable."); *Bolz v. State Farm Mut. Auto. Ins. Co.*, 52 P.3d 898, 901 (Kan. 2002) ("It has long been recognized in Kansas that all choses in action, except torts, are assignable."); *Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1118 (Mont. 2015) ("Neither Montana nor Michigan law permits the assignment of a personal injury cause of action to a third party."); *A. Unruh Chiropractic Clinic v. De Smet Ins. Co. of S.D.*, 782 N.W.2d 367, 370 (S.D. 2010) ("South Dakota recognizes the common-law prohibition on the assignment of personal injury claims."); *Jennings v. Farmers Mut. Ins. Co.*, 687 S.E.2d 574, 579 (W. Va. 2009) ("Our law on this question is clear: a cause of action for personal injuries may not be assigned.").

independently." *Volvo Const. Equip. Rents, Inc. v. NRL Rentals, LLC*, No. 2:09-CV-00032, 2012 WL 27615, at *2 (D. Nev. Jan. 3, 2012).

Much like a claim for harassment or intentional infliction of emotional distress, an FDCPA claim arises from personal injuries. Congress made clear that the FDCPA seeks to prevent personal harms, observing that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692. And even with the FDCPA on the books, "abusive debt collectors still exploit financially distressed consumers with repetitive profanity-filled telephone calls, intentional harassment at work, threats of arrest, and threats of physical violence," yielding untold personal trauma—including "consumers [being distressed enough] to flee their homes in fear, sign over their property to debt collectors in desperation, and even commit suicide." Bremner, *supra*, at 1553–54. Indeed, the Act's own language—which provides that "any debt collector who fails to comply with [Act] with respect to any person *is liable to such person*," 15 U.S.C. § 1692k (emphasis added)—reflects the personal nature of the injury that the FDCPA seeks to remedy. Thus, the common-law prohibition on personal-injury-claim assignments applies.

That courts have treated FDCPA claims as analogous to traditional tort claims confirms this conclusion. As the Eleventh Circuit has observed: "The thrust of the Fair Debt Collection Practices Act is prevention of harassment and abuse as well as false, deceptive or misleading practices. It clearly falls into a traditional tort area analogous to a number of traditional torts." *Sibley v. Fulton DeKalb Collection Serv.*, 677 F.2d 830, 834 (11th Cir. 1982); *see also id.* at 834 n.4 (collecting fifteen cases that likewise recognize collection abuses as "sounding in tort").

In particular, courts analogize FDCPA claims to intentional infliction of emotional distress—"[t]he very inadequacy of [which] to create a cause of action to prevent abusive collection practices was undoubtedly the motivation behind the enact of such measures as the FDCPA." *In re Littles*, 90 B.R. 669, 680 (Bankr. E.D. Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989). As one court explained: "[W]e believe that violations of the FDCPA, by their very nature . . . are those kinds of actions which may be expected to cause emotional distress." *Crossley v. Lieberman*, 90 B.R. 682, 692 (Bankr. E.D. Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989). And this Court itself has endorsed that parallel—albeit prior to the enactment of the FDCPA—by applying California's common law of intentional infliction of emotional distress to a suit brought by a debtor who received a series of harassing letters from a creditor. *See Moore v. Greene*, 431 F.2d 584, 589–91 (9th Cir. 1970).

Therefore, just as a claim for "intentional infliction of emotional distress is a type of personal injury claim[]," *Thomas v. Hickman*, No. 1:06-CV-0215, 2009 WL 1273190, at *19 (E.D. Cal. May 5, 2009), so too is an FDCPA claim. And since "[i]t is clear that under Nevada law tort claims involving personal injuries are not assignable," it is likewise clear that under Nevada law FDCPA claims are not assignable. *Waterton Glob. Mining Co. v. Cummins Rocky Mountain, LLC*, No. 3:14-CV-0405, 2015 WL 714485, at *2 (D. Nev. Feb. 19, 2015). CCCS's "purchase" is thus void, and it had no right to dismiss Ms. Arellano's case.

2. The rule that personal-injury claims like Ms. Arellano's are unassignable should apply with even greater force in this context: where the purchasing party comes not to press the claim but to bury it. The Nevada Supreme Court, for example, has recognized that public policy sometimes requires that when a claim is "peculiarly vested in" a party, assignment is prohibited. *Chaffee v. Smith*, 645 P.2d 966, 966 (Nev. 1982); *see also RMA Ventures*, 576 F.3d at 1077 (Lucero, J., concurring) (indicating assignment may be prohibited where there is "a special relationship between the plaintiff and defendant").

This case presents such a unique relationship, clearly implicating public policy. The debt collector–consumer relationship is one that is both important enough and vulnerable enough to abuse that Congress, acting on "abundant evidence of . . . abusive, deceptive, and unfair debt collection practices," sought to regulate it through the very statute CCCS seeks to evade. *See* 15 U.S.C. § 1692. It is a relationship shaped by critical factors—the consumer's poverty and lack of sophistication—that in turn make the debt collector's attempts to thwart the debtor's claims not only brazen, but also especially likely to succeed. *See* Part I.C.

And thus a debt collector like CCCS is especially the kind of party who should have no right to use the debt-collection process to purchase and destroy a consumer's personal-injury claim alleging debt-collection abuses.

3. The fact that Nevada law permits the assignment of a claim where the injury is non-personal—and, moreover, where the assignee has a normal incentive to press the claim—does not affect this case's result. In its district-court arguments, CCCS relied heavily on inapposite cases in which the injuries were *not* personal ones, and the relationship between the parties *was* the conventional one—that is, the assignee purchased the claim *to prosecute it*. *See* ER-17–18, D. Ct. Dkt. 18 at 4–5, ER-8–9. But those general cases, which lack this case's attributes as described above, in no way undercut Ms. Arellano's argument here.

As discussed above, personal injury claims are unassignable because of the personal nature of the claim, which in turn makes it especially important that "the injured party's ability to prosecute the action independently" be preserved. *See Volvo*, 2012 WL 27615, at *2. At the same time, in a more conventional assignment, a party seeks to assign itself a claim because it wants to prosecute that claim.

That is what happened in *Denham v. Farmers Ins. Co.*, 262 Cal. Rptr. 146 (Ct. App. 1989), a California case on which CCCS earlier relied. *See* ER-18. There, a couple injured in a car crash executed on their judgment against the driver who hit them, taking the driver's bad-faith claims against his auto-insurance company, which had refused to settle on his behalf. 262 Cal. Rptr. at 147. The court allowed the couple to obtain those claims and press them against the insurer. *Id.* at 152.

Those facts are very different from these. The claim sounded in contract, not personal injury, *see id.*, and there was nothing about the relationship between the driver and the insurer that would make transferring the claim to the injured couple problematic—indeed, they had a similarly adverse relationship to the insurer, and the exact same incentive to press the claim. The transfer, then, simply helped effectuate the victims' right to restitution. That is the opposite of what CCCS is trying to accomplish here.[8]

Instead, the personal-injury nature of Ms. Arellano's claims and the unique relationship between the parties—the right "peculiarly vested in" in Ms. Arellano, and "[t]he public policy issue[s]" at stake—demonstrate why CCCS's maneuver is no good. *Chaffee*, 645 P.2d at 966–67. And those considerations make clear that whatever else *is* assignable under Nevada law, Ms. Arellano's claims should not be.

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[8] An unpublished case that CCCS made much of in the district court, *see* ER-18, D. Ct. Dkt. 18 at 4—*Brandstetter v. Boyd*, No. 54229, 2010 WL 4684450 (Nev. Nov. 12, 2010)—likewise has no relevance here. The case did not involve a personal-injury claim, *see* Order, *Brandstetter v. Bally Gaming, Inc.*, No. A571641, 2009 WL 7442274 (Nev. Dist. Ct. June 9, 2009), nor did it implicate a debt collector seeking to purchase and dismiss a debtor's underlying FDCPA claims against it—a relationship that raises the public-policy concerns that prompted Congress to pass the FDCPA in the first place. *See* 15 U.S.C. § 1692; Part I.A.

B. The rationale behind the historical common-law rule prohibiting assignments confirms that this Court should reject CCCS's purchase-and-dismiss maneuver.

1. That Ms. Arellano's FDCPA claims may not be assigned to CCCS makes particular sense when viewed against the legal history that gave rise to today's common-law rule prohibiting the assignment of personal-injury claims.

The rules just described are smaller pieces of a longstanding common-law doctrine that once prohibited the assignment of *all* claims—a doctrine that grew in part from the fear that the rich and powerful would "pervert[] the process of law into an engine of oppression." *Thallhimer*, 3 Cow. at 644 (citing Blackstone, *supra*, at 135). Indeed, legal claims were treated as unassignable up to the beginning of the twentieth century. *See, e.g.*, J.B. Ames, *The Disseisin of Chattels*, 3 Harv. L. Rev. 337, 337 (1890); Marcushamer, *supra*, at 1549–50. And prohibitions against maintenance—the "officious intermeddling in a suit that no way belongs to one"—alongside its cousins, champerty and barratry,[9] date back past the first Statute of Westminster, all the way to Roman law. Marcushamer, *supra*, at 1550–51 (citing Blackstone, *supra*, at 134–35).

[9] Blackstone defines champerty as "a species of maintenance; a bargain with a party to litigation to divide the subject of the suit, if successful; where the champertor is to carry on the party's suit at his own expense." Marcushamer, *supra*, at 1550 n.33 (quoting Blackstone, *supra*, at 134–35). And he defines barratry as "the offense of frequently exciting and stirring up suits and quarrels between . . . [parties] at law or otherwise." *Id.* at 1551 n.34 (quoting Blackstone, *supra*, at 133).

These prohibitions stemmed from "an apprehension, that justice itself, was endangered by these practices. Blackstone speaks of this offence, as perverting the process of law into an engine of oppression." *Thallhimer*, 3 Cow. at 644 (citing Blackstone, *supra*, at 135). There was, in other words, a consensus that rules against assignment were needed to "prevent[] great men of the times using their power and influence in supporting questionable titles against the weak and oppressed of various degrees and distinctions, and thus perhaps obtain[ing] judgments and decrees to which they were not entitled." *Merchants' Protective Ass'n*, 127 P. at 317.

That these broad-scale prohibitions have been pared back over the years is no reason to allow CCCS's maneuver here. The common law's broad claim-transfer prohibitions were creatures of their "socio-economic climate"—a climate in which they were geared toward "protecting the weaker parts of society from being abused through the legal system" of feudal England. Marcushamer, *supra*, at 1552. Although that rationale does not apply as broadly today, it does apply to this case, since allowing Ms. Arellano's FDCPA claim to be assigned to CCCS to defeat her own suit triggers the very same concerns that prompted the common-law rule: it allows CCCS to "pervert[] the process of law into an engine of oppression." *Thallhimer*, 3 Cow. at 644.

2. In light of these common-law principles, modern courts have condemned analogous attempts by parties to purchase and dismiss their opponents' claims. *See* *generally* Wood, *supra*. While we are not aware of previous FDCPA defendants "misusing writs of execution" to "short-circuit[] the justice system" in this way, courts' reactions to similar situations confirm both the applicability of the original common-law justification and the clear injustice of CCCS's purchase-and-dismiss maneuver here. *Id.*

In *MP Med. Inc. v. Wegman*, 213 P.3d 931 (Wash. Ct. App. 2009), for example, the Washington Court of Appeals held that "allowing one party to destroy the opposing party's appeal by becoming its owner through enforcement of the very judgment under review is fundamentally unjust." *Id.* at 936. In that case, a party that had been awarded attorney's fees by the trial court sought to satisfy that judgment by taking ownership of its opponent's right to appeal. *Id.* at 934. The court reasoned that although the judgment debtor had "no constitutional right to appeal in this case," "[t]he trial court has supervisory authority over its own process and should exercise that power to prevent the grossly inequitable situation where one party destroys the opposing party's cause of action by becoming the owner of the cause of action under review." *Id.*; *see also Paglia v. Breskovich*, 522 P.2d 511, 514 (Wash. Ct. App. 1974) ("[T]he potentiality for a grossly inequitable result is apparent. Into the hands of one party would fall the control and management of both ends of a lawsuit.").

The Texas Court of Appeals similarly reversed a state trial court's order turning over claims to parties who had "no intention of pursuing" them as a means of satisfying a judgment, even where a state statute provided for the transfer of claims for satisfaction of a judgment. *Associated Ready Mix*, 843 S.W.2d at 762. The court reasoned that allowing the order to stand would not only prevent the claims' "value" from "[]ever be[ing] determined," but also "ha[ve] the effect of denying Associated the right to a jury trial." *Id.* It thus concluded that the order, by "having the effect of extinguishing [the plaintiff's] causes of action, [did] not accomplish the purpose of the statute." *Id.* at 762–63.

And as a federal judge put it where a defendant sought to extinguish its opponent's appeal by having the underlying claim assigned to it in satisfaction of the judgment entered on its behalf:

> Neither party has directed this court to any case in which a court has ordered the judgment debtor to assign the very chose in action from which the judgment arose. This is not surprising, because such an interpretation of the statute would result in the extinction of every appeal from an adverse judgment by an impecunious judgment debtor. This court will not interpret the statute that broadly, or reach such an absurd result.

Tax Track Sys. Corp. v. New Inv'r World, Inc., No. 01-C-6217, 2006 WL 1648491, at *1 (N.D. Ill. June 9, 2006). As that court recognized, it would be antithetical to our system of justice—in fact, it would be "absurd"—to allow a judgment creditor to immunize itself against further legal challenge by a judgment debtor. *See id.* Yet that is precisely what CCCS asks this Court do here: to allow it to prevent Ms. Arellano from ever having her day in court by executing on her claims against it.

By seeking to purchase and dismiss her FDCPA claims, CCCS has proposed a radical theory of claim assignment that would render the FDCPA a nullity and effectively allow debt collectors to "harass . . . debtor[s] with impunity." Wood, *supra*, at 780. Our common-law tradition confirms that this Court should reject that theory. "Should the law permit [a debt collector] to destroy [a] plaintiff's cause of action [against it] by becoming the owner of it? To ask the question is to answer it. The law should never be interpreted so as to subvert justice." *Paglia*, 522 P.2d at 515 (Pearson, C.J., concurring).

CONCLUSION

Both because enforcement of CCCS's purchase of Ms. Arellano's claims is preempted by the FDCPA and because Ms. Arellano's claims are unassignable under the common law, this Court should reverse the district court's judgment.

Respectfully submitted,

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[10] Counsel gratefully acknowledge the valuable contributions of Michael L. Zuckerman, a third-year student at Harvard Law School.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

I hereby certify that my word processing program, Microsoft Word, counted 10,767 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

July 29, 2016

/s/ Deepak Gupta
Deepak Gupta

STATEMENT OF RELATED CASES

As required by Circuit Rule 28-2.6, Plaintiffs-Appellees state that they are not aware of any case pending before this Court that presents related legal issues.

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2016, I electronically filed the foregoing Brief for Plaintiff-Appellant with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
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