NO. A09-1221

State of Minnesota
In Supreme Court

Mona Savig and Robert Savig,

Plaintiffs,

vs.

First National Bank of Omaha
and Messerli & Kramer, P.A.,

Defendants.

BRIEF OF AMICUS CURIAE ACA INTERNATIONAL

BASSFORD REMELE
A Professional Association
Charles E. Lundberg (#6502X)
Michael A. Klutho (#186302)
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
(612) 333-3000

Attorneys for Amicus Curiae
ACA International

(Additional Counsel listed on following page)

2009 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

BARRY & SLADE, LLC
Nicholas P. Slade (#0270787)
2021 East Hennepin Avenue
Suite 195
Minneapolis, MN 55413
(612) 379-8800

Attorneys for Plaintiffs

MASLON EDELMAN BORMAN & BRAND, LLP
David F. Herr (#44441)
Haley N. Schaffer (#0313099)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8200

MESSERLI & KRAMER, P.A.
Derrick N. Weber (#241623)
Truman W. Schabilion (#388018)
3033 Campus Drive, Suite 250
Plymouth, MN 55441
(763) 548-7942

Attorneys for Defendants

FAEGRE & BENSON LLP
Charles F. Webber (#215247)
Aaron D. Van Oort (#315539)
Nathaniel J. Zylstra (#0314328)
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

Attorneys for Amicus Curiae National Association of Retail Collection Attorneys and Capital One Bank (USA), N.A.

MINNESOTA BANKERS ASSOCIATION
Teresa E. Rice (#0270209)
9521 West 78th Street
Eden Prairie, MN 55344
(952) 857-2613

Attorneys for Amicus Curiae Minnesota Bankers Association

MINNESOTA CREDIT UNION NETWORK
Simone Suri (#324899)
555 Wabasha Street North, Suite 200
Saint Paul, MN 55102
(651) 288-5170

Attorneys for Amicus Curiae Minnesota Credit Union Network

GURSTEL STALOCH & CHARGO, P.A.
Heidi L. Staloch (#271445)
Michael Johnson (#31044X)
Bridget A. Sullivan (#265974)
6681 Country Club Drive
Golden Valley, MN 55427
(763) 267-6700

Attorneys for Amicus Curiae Gurstel Staloch & Chargo, P.A.

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INTEREST OF AMICUS CURIAE ACA INTERNATIONAL

ACA International is an association of credit, collection, and debt purchasing professionals who provide a wide variety of accounts receivable management services.[1] ACA's interests in this matter are both public and private.

Founded in 1939 and headquartered in Minneapolis, Minnesota, ACA represents approximately 5,200 third party collection agencies, asset buyers, attorneys, credit grantors, and vendor affiliates. ACA members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. Including among its membership are 3,400 third-party debt collection companies, 750 credit grantors, 80 asset buyers, and over 800 in-house, compliance, defense or collection attorneys. Many ACA collection agency members are based in Minnesota.

ACA members range in size from small businesses with several employees to large, publicly held corporations. Together, ACA members employ close to 150,000 collectors. These members include the very smallest of businesses that operate within a limited geographic range of a single state, and the very largest of multinational corporations that operate in every state and non-U.S. jurisdictions. Approximately 2,000 of the company members of ACA maintain fewer than 10 employees. Many of the companies are wholly or partially owned or operated by minorities or women. ACA

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[1] No part of this brief was authored by counsel for a party. No person or entity, other than ACA and its counsel, made any monetary contribution to the preparation or submission of this brief.

helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

As part of the process of attempting to recover outstanding accounts and balances, ACA members act as an extension of every community's businesses. They represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. Each year, the combined effort of ACA members results in the recovery of billions of dollars that are returned to business and then reinvested in local communities. Without an effective collection process, the economic viability of these businesses, and by extension, the Minnesota and U.S. economies in general, are threatened; at the very least, citizens would be forced to pay higher prices to compensate for uncollected debts.

Finally, ACA members also assist governmental bodies in recovering unpaid obligations, a function that is increasingly important as many of our government clients face record budget deficits.

ARGUMENT

ACA International has absolutely no interest in the specific dispute being litigated in this lawsuit between these plaintiffs and defendants. Instead, our interest is in the broader issues of law and policy which this Court must decide to govern future cases.

The Order of the United States District Court certifying the question to this Court does an excellent job of pointing out the legal problems raised by Plaintiffs' interpretation of this Court's *Enright* opinion. (Add. 1)

Further, the brief of Defendants in this Court exhaustively cites the controlling and persuasive authority on the issue from Minnesota and many other jurisdictions, and elegantly demonstrates how that law points to only reasonable answer to the certified question.

ACA has no reason to repeat any of those arguments or authorities. We simply want to advise the Court that -- from the perspective of ACA members -- it is critically important that this Court define a bright-line rule that allows legitimate, statutorily authorized debt collection procedures to continue in Minnesota. Otherwise, the practical realities flowing from the recent misinterpretations of *Enright* could well result in the wholesale elimination of bank garnishments in Minnesota.

ACA and its members are particularly concerned about the ramifications of Plaintiffs' arguments in this case. If those arguments were adopted, it would effectively prevent the collection of legitimate debts through garnishment proceedings directed to financial institutions where a debtor may happen to have an account that is jointly held. It also could result in new civil liability and damage exposure under the Fair Debt

Collection Practices Act ["FDCPA"] for ACA members -- and their counsel.[2] This case is an excellent example of the problem. Here, as in many other pending cases, parties performing routine collection roles using Minnesota's statutory garnishment remedy -- *just as ACA members do every day* -- are being sued for damages, all because of a misinterpretation and misapplication of *Enright.*

In *Enright v. Lehmann*, 735 N.W.2d 326 (Minn. 2007), this Court overturned the longstanding law in Minnesota that formerly held that a judgment creditor was entitled to all of the funds in a joint account, regardless of who deposited those funds. The Court concluded that "in a controversy between parties to a multi-party account and their creditors, funds in a joint account belong to the parties in proportion to their net contributions…."

In addition, the Court said, in order to seize any funds contributed by the non-judgment debtor, the judgment creditor must prove by clear and convincing evidence that the non-judgment debtor intended to convey the funds to the judgment debtor.

[2] FDCPA cases are normally litigated in federal court. It does not appear that this Court has ever dealt with the provisions of the statute, and the Court may not be familiar with the burdens of defending such claims. The statute can subject debt collectors and collection attorneys to a $1,000 civil penalty, plus all the debtor's reasonable fees and costs -- regardless of any actual damages and sometimes regardless of good faith on the part of a collector or collection attorney. The fact that such extraordinary penalties could be incurred for an innocent attempt to collect on a small judgment using routine statutory methods that have been in place for decades vividly illustrates the real problem here.

Enright only addressed the question of what the creditor has to prove *after* the source of the deposits in a joint account is known. In that case, there was no dispute as to the ownership of the funds levied upon by the creditor -- the non-debtor deposited *all* the money into the joint account. Therefore, *Enright* stands for the proposition that when none of the funds in a joint account were contributed by the judgment debtor, the judgment creditor bears the burden to show that the depositor intended to confer ownership on the judgment debtor.

As the district court noted, *Enright* did not address the precise question presented in this case -- which party bears the burden to prove who contributed the funds to a joint account in the first instance? There are in fact two issues the Court must decide here: who bears the burden of proof on the ownership of funds in a joint account, and at what stage in the garnishment process does that burden arise?

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Enright has had radical and extraordinary consequences for the banking and collection industries. As detailed in Defendants Brief (at p. 4 & n.1; *see also* Add. 1-2 & n.2), a number of lawsuits are now pending in the federal courts seeking damages against debt collectors based on the "joint account" issue, arguing that -- as a result of *Enright* -- even an attempt to collect from a joint account by garnishment is unlawful and actionable.

From ACA's perspective, the worst possible rule would be that adopted by the United States District Court in *Phillips v. Messerli & Kramer, P.A.*, which the district court below declined to follow. (Add. 7) Under that case, as argued by plaintiffs here, a creditor may *never* serve a garnishment summons that might reach a joint account unless all of the account holders are debtors. In other words, monies held in a joint account with a non-debtor are legally exempt from garnishment or levy.

With respect, if the Minnesota legislature had intended that result, it would have been very easy to create another classification of assets that are exempt from attachment/garnishment. The legislature did not do that.

The ramifications of adopting the *Phillips* rule would be staggering. It would mean that any garnishment that reaches a joint account would be unlawful, and constitute conversion. Moreover, anyone attempting to serve such a garnishment would presumably be subject to claims under the FDCPA.

The *Phillips* holding -- that a debt collector can be subject to damage liability under FDCPA, 15 U.S.C. § 1692 – as well as for the tort of conversion -- simply because it issued a garnishment summons that happened to reach a joint account at the outset of the garnishment process -- is discussed by both Judge Ericksen's opinion and by the Defendants' Brief. ACA wholeheartedly agrees with Judge Ericksen's comments and the Defendants' arguments on the point, and therefore will not repeat those legal arguments here.

As a *practical* matter, though, this misinterpretation of *Enright* is creating serious problems for the members of ACA on several levels:

First, there is simply no realistic, practical way for anyone other than the joint account holders themselves to determine who contributed or owns funds in a joint account at any given time. This is especially true when the joint account balance fluctuates on a daily basis -- as most bank accounts do.

Second -- as vividly illustrated by the *Phillips* decision -- debt collectors, including ACA members, now face far reaching new damage liability due to the misinterpretation of *Enright*. (In addition, banks and financial institutions who act as intermediary garnishees could presumably face similar liability.)

Phillips suggests that creditors should conduct discovery to determine the extent of a debtor's assets *before* serving a garnishment summons. As a practical matter, that makes little sense. Although a judgment creditor is allowed to conduct post-judgment discovery, it is far from a perfect remedy. Such discovery is routinely ignored, and it creates a built-in 30+ day delay for the response. Worse, nothing prohibits a judgment debtor from turning an account into a "joint account" *immediately after* responding to the post-judgment discovery, but before any funds can be levied upon. In reality, such discovery only serves as an early warning to a debtor of an impending bank garnishment. The account is then promptly liquidated, "converted" into a joint account, etc., thereby making the funds off limits.

Moreover, most joint bank account are constantly moving targets – i.e., the source of the funds on any given day will change such that a judgment creditor will never be able to prove who owns what. The only persons with any ability to establish the source of the funds in a joint account at any given time are the joint account holders themselves.

Plaintiffs claim that under the "clear and convincing evidence" standard in the *Enright* decision, the judgment creditor should bear the burden of proof to show who owns which funds in an account -- *prior* to ever serving a garnishment summons. But that also makes little sense. Determining ownership is virtually impossible pre-garnishment, for several reasons.

First, as a threshold matter, before the garnishment procedure is commenced and the bank discloses a joint account, there would be no basis for knowing that a joint account even exists.

Moreover, because the debtor's funds are by definition commingled with the non-judgment debtor's funds at any point in time, it would be impossible for the creditor to know who owns what. A judgment creditor cannot possibly foresee *before* a garnishment summons is served what accounts might be reached by garnishment, whether those accounts will be joint, or who contributed the funds to the joint account. The standard plaintiffs suggest is stunningly impracticable.

While a judgment creditor could send discovery to the bank, such an effort would also be futile since the banks are similarly unable to establish who owns which funds in the account at any given time. (For example, when a check is deposited into a joint account, the bank does not know or maintain records of which funds belong to which depositor on an ongoing basis.) Only the depositors are able to establish ownership of the funds in a joint account at any given point in time.

In sum, the suggestion in *Phillips* that the judgment creditor should send discovery to the judgment debtor to determine ownership of a joint account's funds -- prior to serving a garnishment summons -- improperly shifts the burden of proof to the judgment creditor in a manner that was not contemplated by this Court in *Enright* and simply makes no sense as a practical matter.

Finally, it is also very important for this Court to focus on the difference between (1) serving a garnishment summons and (2) levying on the results of a garnishment. Both of those acts could be called "garnishing the account." When this Court said in *Enright* that "a creditor cannot garnish the account to satisfy a debt belonging to a non-contributing party unless the creditor provides clear and convincing evidence that the depositor intended to confer ownership of the funds on the debtor," 735 N.W.2d at 331, the Court presumably meant the latter -- that a creditor could not *levy on* the monies in the account. Presumably the Court did not mean to suggest that the mere service of a garnishment summons -- the act that starts the process of ascertaining whether the bank or other third party depository has any property belonging to the debtor at all, subject to the right of the debtor and third party to raise objections, etc. -- was itself an act that was prohibited to a creditor. If that were the case, then the *Enright* decision would effectively have meant that no one could *ever* serve a garnishment summons on any bank or other third-party depository without risking the fact that (unbeknownst to the creditor) the debtor might have a joint account in that bank with a non-debtor and therefore the mere service of the summons starting the process was itself illegal and unlawful.

That is precisely what the plaintiffs are arguing in this case. If that were to be the rule in Minnesota, it would be functionally no different than a total exemption protecting all monies held in a joint account. The only difference is that a creditor would (by definition) not know if there was a joint account at the time of the service of the garnishment summons.

The *Phillips* interpretation of *Enright* has created serious consequences in Minnesota. Judgment debtors are now taking the position that it is the creditor's burden to show -- *prior to ever even serving a garnishment summons on a bank* -- that the funds to be garnished by the garnishment are the debtor's only and that the account is not a "joint account." ACA is even aware of situations where consumer rights attorneys have advised judgment debtors to convert their accounts into joint accounts and then maintain at least $1.00 belonging to a non-judgment debtor, so that any garnishment thereafter will *ipso facto* invite a suit for damages for alleged conversion and FDCPA liability.

Minnesota law should not countenance such mischief. The Court should adopt a bright-line rule that allows legitimate, statutorily authorized debt collection procedures to continue in Minnesota. The Court should answer the certified question in a way that (1) will allow a judgment creditor to serve a garnishment summons on a financial institution where a debtor may hold a joint account, (2) at which point the account-holders should have the opportunity and obligation to establish net contributions to the account in the garnishment proceeding.

A holding to that effect would allow the proper use of the statutory garnishment processes going forward, but will completely protect non-debtor joint account-holders from ever having their funds applied to the debtor's debts. In light of the benefits of a owning a joint account -- and the fact that account-holders voluntarily choose to create such accounts -- it is not unreasonable to require the account-holders to establish who owns the funds in the account in the event of a garnishment.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

Dated: Aug. 19, 2009 By Chas Lundberg

Charles E. Lundberg (License #6502X)
Michael A. Klutho (License #186302)
Attorneys for ACA International
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
(612) 333-3000

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