STATE OF MICHIGAN
IN THE SUPREME COURT

GEORGE BADEEN, an individual and on behalf of a proposed class and MIDWEST RECOVERY AND ADJUSTMENT, INC, a Michigan for profit Corp and on behalf of a proposed class,

Plaintiffs-Appellants,

v

PAR, INC, d/b/a, PAR NORTH AMERICA, an Indiana corporation; REMARKETING SOLUTIONS, a Delaware limited liability company; CENTERONE FINANCIAL SERVICES LLC, a Delaware corporation; FIRST NATIONAL REPOSSESSORS, INC, a Minnesota corporation; MILLENNIUM CAPITAL AND RECOVERY CORPORATION, an Ohio corporation; RENOVO SERVICES, LLC, a Delaware limited liability company; RENAISSANCE RECOVERY SOLUTIONS, INC, a Nevada corporation; ASR NATIONWIDE, LLC, a Florida limited liability corporation; THE M. DAVIS COMPANY, INC d/b/a USA RECOVERY SOLUTIONS, a California Corporation; REPOSSESSORS, INC, a Minnesota corporation; AMERICAN RECOVERY SERVICES, INC, a California corporation; DIVERSIFIED VEHICLE SERVICES, INC, an Indiana corporation; NATIONAL ASSET RECOVERY CORP, a Florida corporation; CONSUMER FINANCIAL SERVICES, LLC, a Connecticut limited liability company, TD AUTO FINANCE, LLC, a Michigan limited liability company, TOYOTA MOTOR CREDIT CORPORATION, a California corporation; NISSAN MOTOR ACCEPTANCE CORPORATION, a California corporation; SANTANDER CONSUMER USA INC, an Illinois corporation; PNC BANK, an Ohio corporation; BANK OF AMERICA, a North Carolina company; FIFTH THIRD BANK, an Ohio company, THE HUNTINGTON NATIONAL BANK, an Ohio corporation, jointly and severally,

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Defendants-Appellees

and

MV CONNECT, LLC d/b/a IIA, LLC, an Illinois limited liability company; GE MONEY BANK; and MANHEIM RECOVERY SOLUTIONS,

Defendants.

Supreme Court No. 147150

Court of Appeals No. 302878

Wayne County Circuit Court
No. 10-004053-CZ
Hon. Michael F. Sapala

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES PAR, INC; REMARKETING SOLUTIONS; CENTERONE FINANCIAL SERVICES LLC; MILLENIUM CAPITAL AND RECOVERY CORP; RENOVO SERVICES, LLC; THE M. DAVIS CO.; DIVERSIFIED VEHICLE SERVICES, INC; NATIONAL ASSET RECOVERY CORP; TD AUTO FINANCE LLC (FORMERLY CHRYSLER FINANCIAL SERVICES AMERICAS LLC); TOYOTA MOTOR CREDIT CORP; NISSAN MOTOR ACCEPTANCE CORP; SANTANDER CONSUMER, USA; PNC BANK; BANK OF AMERICA, FIFTH THIRD BANK; and THE HUNTINGTON NATIONAL BANK IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Are "forwarders," who manage the hiring of licensed repossession agents for lenders, "engaged in soliciting a claim for collection" within the meaning of MCL 330.901(b), and thus required to be licensed as "collection agencies"?

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

The trial court said "No."

The Court of Appeals said "No."

INTRODUCTION

Here the Plaintiff repossession company, required to be licensed as a collection agency, is attempting to beguile the Michigan courts into deconstructing the licensure statute that applies to Plaintiffs and to force licensure on forwarders – entities that have no debt collection functions at all and act solely to secure for lenders the services of licensed collection agencies to take action necessary to repossess collateral. The only effect would be to protect collection agencies like Plaintiffs from forwarders' ability to negotiate reduced fees. Those familiar with the teachings of the law and economics movement would recognize this suit as a classic rent-seeking exercise, which would harm consumers by raising prices.[1] The problem with Plaintiffs' effort is that the licensing statute, using traditional and well accepted rules for statutory interpretation, will not bear such a reading.

Reading the plain language of MCL 339.901(b) in its statutory and grammatical context, as required by the decisions of this Court, "soliciting a claim for collection" means communicating with a ***consumer debtor*** to ask the debtor to repay a debt owed to a creditor. Since Plaintiffs concede in their complaint that forwarders only manage the hiring of repossession agents for lenders and neither contact debtors nor undertake repossession of collateral, the statutory definition has no application to forwarders.

Plaintiffs argue that "soliciting a claim for collection" means contacting a ***lender*** to ask for the right to collect a claim owed to the lender ("the use of the word 'solicit' can only mean asking the lender for the assignment," Plaintiffs' Reply Brief at p. 5). Thus, Plaintiffs contend, forwarders require licenses, and the lenders who have hired unlicensed forwarders are also liable to Plaintiffs because Michigan law prohibits lenders' use of collection agencies who should be

[1] See, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, pp. 284-87 (2007).

licensed, but are not. Plaintiffs' reading disregards the meaning of "solicit," the definition of the term "claim" contained in the statute itself, principles of grammar, and the balance of the statute, which confirms that the Legislature intended to protect consumers (debtors) from abusive collection practices, not collection agents' ability to charge high fees.

Importantly, even if Plaintiffs' reading were the correct one, which it is not, forwarders still are not "soliciting a claim for collection" – because, again, they merely arrange, on behalf of lenders, for licensed repossession agents to undertake the repossession activity. Forwarders do not contact debtors, do not collect claims, and do not repossess collateral. Nor do they ask lenders for the right to do so.

Moreover, if the statute could be read as the Plaintiffs urge, such a reading would cause it to violate the dormant Commerce Clause to the U.S. Constitution, which prohibits the states from regulating interstate commerce, as well as Equal Protection and Due Process, as there can be no rational basis for forcing collection agency licensing on those, such as forwarders, who do not repossess collateral or collect debts. This Court never construes a statute in a manner that would make its application unconstitutional, if there is a construction that results in the statute being constitutional.

This supplemental brief will discuss the statutory interpretation doctrines and then the constitutional issues that we respectfully believe should lead the Court to summarily affirm the Court of Appeals or deny the application for leave to appeal.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Defendants incorporate the counter-statement of facts and proceedings in their Brief in Opposition to the Application.

On May 9, 2013, Plaintiffs-Appellants George Badeen and Midwest Recovery and Adjustment, Inc. (collectively "Badeen") filed their application for leave to appeal the decision of the Court of Appeals dated April 11, 2013, which affirmed the trial court's order granting Defendants' motion for summary disposition. Defendants-Appellees filed their brief in opposition on June 17, 2013 ("Defendants' Brief").

On January 29, 2014, this Court issued an Order directing the parties to submit supplemental briefs "addressing whether the defendant forwarding companies engage in 'soliciting a claim for collection' and therefore are 'collection agenc[ies]' as defined by MCL 339.901(b)."

The dispositive facts, all pleaded by Plaintiffs, are the following: Formerly, when a creditor needed to engage the services of a repossession agent to repossess automobile collateral, the creditor would directly contact, negotiate with, and retain a repossession agent where the car was located. (Second Amended Complaint ("SAC") ¶ 34). In recent years, lenders have outsourced this task to forwarders, who find and retain repossession agents for lenders but do not themselves repossess collateral or contact debtors. (*Id.* ¶¶ 3, 35-40). In Michigan, where repossession agents are required to be licensed as "collection agencies", lenders and forwarders deal with licensed repossession agents. (*Id.* ¶ 40). All of the Forwarder Defendants are incorporated outside Michigan, and most do business nationally. (*Id.* ¶¶ 4-18, 35). Forwarders have negotiated favorable rates with repossession agents. This reduces costs for lenders and the borrowers who must pay for this service. (*Id.* ¶¶ 40, 52).

ARGUMENT

I. FORWARDERS ARE NOT "ENGAGED IN SOLICITING A CLAIM FOR COLLECTION" WITHIN THE MEANING OF ARTICLE 9 OF THE OCCUPATIONAL CODE

This Court's Order dated January 29, 2014, directs the parties to address whether forwarding companies engage in "soliciting a claim for collection" within the meaning of MCL 339.901(b). The trial court and the Court of Appeals both correctly answered this question "no." The language of MCL 339.901(b) is unambiguous. "[S]oliciting a claim for collection" means contacting a ***consumer debtor*** to ask for payment of a debt. Because Plaintiffs concede that forwarders do not contact debtors, see SAC ¶¶ 3, 40; COA Op., p. 7 (Apx. 2), MCL 339.901(b) has no application to forwarders. As such, forwarders are not "soliciting a claim for collection" within the meaning of MCL 339.901(b), and are not required to be licensed in Michigan as "collection agencies."

A. Standard of Review.

Statutory interpretation is a question of law that is reviewed de novo on appeal. *Eggleston v Bio–Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). Likewise, this Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint by the pleadings alone. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007).

B. Under the Plain Language of the Occupational Code, "Soliciting a Claim for Collection" Means Contacting a Debtor to Collect a Debt.

The primary task of statutory interpretation "is to discern and give effect to the intent of the Legislature." *Shinholster v Annapolis Hosp,* 471 Mich 540, 548-49; 685 NW2d 275 (2004). "The overarching rule of statutory construction is 'that this Court must enforce clear and

unambiguous statutory provisions as written.'" *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 12; 795 NW2d 101 (2009), quoting *In re Certified Question (Preferred Risk Mut Ins Co v Michigan Catastrophic Claims Ass'n)*, 433 Mich 710, 721; 449 NW2d 660 (1989).

This Court interprets the words "in light of their ordinary meaning and **context within the statute** and read[s] them harmoniously to give effect to the statute as a whole." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (emphasis added). As this Court stated in *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003):

> [Statutory] language does not stand alone, and thus it cannot be read in a vacuum. Instead, "[i]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute...." *Arrowhead Dev. Co. v. Livingston Co. Rd. Comm.*, 413 Mich 505, 516, 322 NW2d 702 (1982). "[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." *Gen. Motors Corp . Erves* (On Rehearing), 399 Mich 241, 255, 249 NW2d 41 (1976)(opinion by Coleman, J.). Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. *McCarthy v Bronson*, 500 US 136, 139, 111 SCt 1737, 114 LEd2d 194 (1991); *Hagen v Dep't of Ed*, 431 Mich 118, 130–131, 427 NW2d 879 (1988).

Article 9 of the Occupational Code, MCL 339.901 et seq. ("Article 9"), provides that "collection agencies" must be licensed.[2] Definitions for Article 9 are set out in MCL 339.901. "[W]hen a statute specifically defines a given term, that definition alone controls." *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). Thus, the first step in reviewing a statute is to review the terms defined in the statute.

[2] Article 6 of the Occupational Code provides that a person shall not engage in an occupation regulated by the Act unless the person is licensed. MCL 339.601(1).

"Claim" is defined by MCL 339.901 itself:

> "**Claim**" or "**debt**" means an **obligation or alleged obligation for the payment of money** or thing of value arising out of an expressed or implied agreement or contract for a purchase made primarily **for personal, mfamily, or household purposes**.

MCL 339.901(a) (emphasis added). Thus, for the purposes of Article 9, the Legislature defined "claim" as synonymous with "debt," and both terms mean a ***consumer's*** "***obligation*** or alleged obligation for the payment of money" or another thing of value.

MCL 339.901(b) defines "Collection agency":

> "Collection agency" means a person directly or indirectly engaged in **soliciting a claim for collection** or collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement . . . .

(Emphasis added).

Inserting numbers for reference, MCL 339.901(b) consists of three clauses:

> "Collection agency" means a person
>
> [1] directly or indirectly engaged in **soliciting a claim for collection** or
>
> [2] collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or
>
> [3] repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement . . . .

(Emphasis added).

Plaintiffs do not allege that forwarders engage in the activities listed in Clause 2, receiving money from the consumer debtor or attempting to do so. Nor do Plaintiffs allege that forwarders engage in the activities listed in Clause 3, the actual physical repossession of collateral from a consumer debtor. "Repossess" means "to regain possession of," "to reclaim

possession of for failure to pay installments due," or "To give back possession to." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).[3]

Instead, Plaintiffs base their complaint on Clause 1, contending that it means contacting a lender for the purpose of asking for the right to collect on the lender's behalf. Plaintiff's argument is defeated by the plain language of MCL 339.901(b), read, as it must be, in its statutory and grammatical context.

The phrase "soliciting a claim for collection" begins with the verb "solicit", which simply means to ask someone persistently for something. The dictionary says "solicit" means "2. To entreat or petition (a person) for, or to do, something, to urge, importune; to ask earnestly or persistently." OXFORD ENGLISH DICTIONARY (1971).[4] Such a meaning is consistent with construing "soliciting a claim for collection" to mean to ask a person – the consumer debtor – to pay the claim and to be persistent in such efforts. It is not consistent with the use of the word in the context urged by Plaintiffs, as it would not make sense for someone to make repeated demands upon a lender to assign a right to collect an account.

A verb often has an object, and "statutory language must be read and understood in its grammatical context." *Department of Environmental Quality v Worth Twp*, 491 Mich 227, 238; 814 NW2d 646 (2012), citing *Sun Valley Foods Co v Ward*, 460 Mich 237; 596 NW2d 119 (1999). In MCL 339.901(b), the object of "solicit" is the noun "claim," plus the prepositional phrase "for collection." The term "claim" is defined in MCL 339.901(a), as noted above. The

[3] Article 9 of the Uniform Commercial Code ("UCC"), MCL 440.9101 et seq., does not define "repossession," but speaks of the "secured party's right to take possession after default," and the parties' rights and duties thereafter. See MCL 440.9609-9615.

[4] Similarly, the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE supra, defines ""solicit" as "1.) To seek to obtain by persuasion, entreaty, or formal application, 2.) To petition persistently; importune."

relevant definitions of "collection" are "collecting of money," and "the sum so collected." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, supra.

Objects of verbs may be "direct" or "indirect," with the "direct" object being the thing upon which the action is performed, with an indirect object describing for whom or to whom an action is done. See AMERICAN HANDBOOK OF GRAMMAR & USAGE, pp. 92 and 137 (1977). For example, in the sentence "We bought shoes," the direct object is "shoes." The sentence can be clarified by adding an indirect object: "We bought the children shoes."

As it is here, the word "solicit" or "soliciting" is often used in a context where the direct object ("claim") is inanimate, and the person to whom the solicitation is directed – the indirect object – is not expressly stated but is implied. For example, to "solicit votes" is to ask potential voters for votes. To "solicit a charitable contribution" is to ask a potential donor for a charitable contribution. When used in the context of a crime, "solicit" or "solicitation" means to ask a person to commit a crime.[5] In each of these uses, the person to whom the solicitation is directed is apparent from the context. That is the case in MCL 339.901(b).

Applying the definition of "claim" mandated by MCL 339.901(a) to the language of MCL 339.901(b) makes the meaning of "soliciting a claim for collection" clear. "Claim" means the same thing as "debt," i.e., "an obligation or alleged obligation to pay" money or another thing of value. It is the ***debtor*** who has an "***obligation*** to pay" a debt. "[S]oliciting a claim for collection" thus means contacting a ***debtor*** for the purpose of asking the debtor to pay the debt.

A lender, in contrast, has the ***right to receive*** payment, not an "obligation" to pay. "[S]oliciting a claim for collection" in MCL 339.901(b) does not mean and cannot mean contacting a lender to ask for the right to collect on the lender's behalf. The statute itself

[5] See, e.g., MCL 750.157b(2), (3).

expressly exempts lenders from licensing as "collection agencies," see MCL 339.901(b)(i), (ii); *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 731-32; 635 NW2d 804 (2001), and forwarders are merely standing in the shoes of the lenders when they contract with licensed repossession agents, so it would be illogical to read the statute to require forwarders to be licensed in order to perform this function on the lenders' behalf.

The solicitation activity referenced in MCL 339.901(b) is not activity directed to the ***claim***, but rather is activity directed to a person, the ***debtor***, asking for payment of the claim. It would be nonsensical to speak of soliciting (or asking) a ***claim*** to do something. A claim is inanimate. In contrast, it does make sense to construe the provision to mean asking the debtor to make payment of the claim or debt.

The construction proposed by Plaintiffs would limit the plain and ordinary meaning of "solicit" to "seeking employment" or entreating someone to hire you. As discussed above, contrary to Plaintiffs' contentions, the word "solicit" simply means "to ask for," which may be followed by the object of the solicitation, and an indirect object either expressly stated or implied from the context to describe the person to whom the solicitation is directed. Applying Plaintiffs' meaning would render "solicit" or "soliciting" nonsensical in the ordinary usage of the word in other contexts. For example, according to Plaintiffs' reasoning, "soliciting a charitable contribution" would mean asking the charity for the right to collect money on its behalf. "Soliciting votes" would mean asking a candidate for the right to canvas voters on the candidate's behalf. "Soliciting murder" would mean asking someone for permission to commit murder on their behalf.

Plaintiffs' argument distorts the plain and ordinary meaning of "solicit" and "collection," and ignores the statutory definition of "claim." The plain meaning of "soliciting claims for

collection" is "seeking payment of obligations." Plaintiffs' tortured interpretation would require the insertion of additional words, such as "soliciting **the right to pursue** a claim for collection" or "soliciting **assignment** of a claim for collection." It is improper to read words into a statute that are not there. *Rowland v Washtenaw County Road Comm'n*, 477 Mich 197, 226; 731 NW2d 41 (2007) (Markman, J., concurring).

Badeen argues that interpreting "soliciting a claim for collection" to mean "asking a debtor to pay" makes this phrase redundant with the one that follows it, "collecting or attempting to collect a claim owed or due or asserted to be owed or due another." Ordinarily, "no word of a statute should be treated as surplusage or made nugatory."[6] *Apsey v Memorial Hospital*, 477 Mich 120, 127; 730 NW2d 695 (2007). The two phrases, however, are not synonymous, and describe two distinct activities, as contemplated by the plain language of the statute. As discussed above, "soliciting a claim for collection" means ***asking a debtor to pay the debt.*** This might be accomplished directly, as by means of calling the debtor, or writing the debtor, or even knocking on the debtor's door. It may also be accomplished indirectly, such as by calling or communicating with a debtor's family member, housemate, or employer, asking the recipient to convey a demand to the debtor.

"[C]ollecting or attempting to collect a claim," in contrast, literally means receiving payment or property of the debtor, or taking substantial steps to do so, whether or not successful. Examples of "attempting to collect" (as opposed to actually "collecting") might include asking and holding the debtor's post-dated checks, and/or presenting a debtor's check(s) for payment,

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[6] This canon, of course, is not absolute. "Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." ANTON SCALIA & BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 176-77 (2012) (italics in original).

attempting to charge a debtor's credit card, obtaining a debtor's consent for payments to be deducted from the debtor's bank account or wages, or having a debtor sign over property or a chose in action to the creditor.

Another section of Article 9 of the Occupational Code shows that when the Legislature intended to address the act of soliciting a lender for the right to purchase or pursue a claim, it did so clearly. MCL 339.915a(f) prohibits licensed collection agents from "[s]oliciting, purchasing, or receiving an ***assignment*** of a claim for the sole purpose of instituting an action on the claim in a court." (Emphasis added). This statutory context confirms that "soliciting a claim for collection" in MCL 339.901(b) means contacting a debtor to collect a debt. In MCL 339.915a(f), the Legislature unambiguously paired the verb "soliciting" with the object "assignment," making it clear that this section deals with soliciting a lender for an assignment of the lender's right to receive payment. In contrast, as discussed above, in MCL 339.901(b) the object of "soliciting" is "claim", which is defined in MCL 339.901(a) as an obligation to ***pay***. Thus, MCL 339.901(b) unambiguously involves "soliciting" a debtor to pay a debt, while MCL 339.915a(f) unambiguously involves "soliciting" a lender for an assignment. Badeen's argument that the use of the same verb makes the two sections synonymous ignores the fact that in the two sections, the verbs have distinctly different objects, and therefore distinctly different meanings.

The balance of Article 9 provides statutory context that confirms the Legislature, by enacting the statute, intended to protect debtors from abusive collection practices, not collection agents from forwarders' ability to negotiate fees. The "personal, family or household purposes" language in the definition of "claim," MCL 339.901(a), underscores that Article 9 of the Occupational Code is intended to protect consumers, not collection agencies. Further, the activities regulated in Article 9 involve direct or indirect ***contact with debtors*** – either to ask the

debtor to repay a debt, to collect money from the debtor, or to repossess collateral from the debtor.[7] This context confirms that agents who actually perform these activities were the intended targets of Article 9. Forwarders, in contrast, engage in none of the activities that Article 9 regulates. Nothing in Article 9 regulates a forwarder's role – retaining licensed collection agencies. Moreover, nothing in Article 9 regulates what a forwarder can say to a lender, or how a forwarder may contract with a lender, so it would be illogical to read the statute as protecting lenders from abusive practices by forwarders. This is no surprise, as forwarders did not even exist at the time Article 9 was adopted in 1974 PA 361 and amended in 1980 PA 299.

B. Even if "Soliciting a Claim for Collection" Meant Asking a Lender for the Right to Collect on its Behalf, Forwarders Are Not Covered by the Definition.

Even if "soliciting a claim for collection" in MCL 339.901(b) meant asking a ***lender*** for the right to collect a claim owed to the lender – which it does not for the reasons discussed above – forwarders still are not covered by the definition of "collection agency." Forwarders do "solicit" (ask) lenders for something, but it is for the right to do ***forwarding*** – not the right to collect debts. Forwarding consists of managing lenders' retention of licensed repossession

[7] MCL 339.909 requires a collection agency to maintain a separate trust account in which money collected from debtors is deposited. MCL 339.910 requires a collection agency to maintain detailed books and records showing the funds received and disbursed. MCL 339.915 prohibits a licensee from deceiving or making inaccurate representations to a debtor, communicating with a debtor known to be represented by an attorney, contacting the debtor's employer without authorization, or threatening or harassing a debtor. MCL 339.915a prohibits conduct that could imply to a debtor that the collection agent is an attorney, commingling of funds collected with the collection agency's funds, and use of names other than the one appearing on the license. MCL 339.915a(f) prohibits a licensed collection agency from bringing a claim to court for the purpose of collecting it. MCL 339.918 establishes procedures by which the debtor can contest the validity or amount of the debt. Although the trust account and books and records provisions arguably benefit creditors, as well as debtors, see MCL 339.909 and MCL 339.910, those provisions apply only *after* monies are collected from the debtor.

agents; Badeen concedes that forwarders do not themselves contact debtors for any purpose, see SAC ¶¶ 3, 35-40, so forwarders do not ask lenders for the right to collect a debt.

Badeen's unpleaded assertions that forwarders are "indirectly involved in repossessions" by arranging for vehicle transport, arranging for the sale of the vehicle, and transferring proceeds (Appellant's Reply Brief, p. 5), even if they had been pleaded, and even if "indirectly" modified "repossessing,"[8] would not amount either to "soliciting a claim for collection," "attempting to collect a claim," or "repossessing or attempting to repossess a thing of value." By the language and structure of MCL 339.901(b), the Legislature treated the act of "repossessing" collateral as separate and distinct from either "soliciting a claim for collection" or "collecting or attempting to collect a claim." The plain and ordinary meanings of "repossess" and "collect" are very different: "Repossess" means to "regain possession of" or "reclaim" collateral; while the meaning of "collect" is to "take in payments." See AMERICAN HERITAGE DICTIONARY, supra. The statute does not define a "collection agency" to include a person with some role in the repossession process who neither asks the debtor to pay, actually repossesses the collateral, nor applies the proceeds to the debt. In sum, nothing in Article 9 mentions or applies to a service that simply manages the retention of licensed collection agents – a service industry that did not even exist at the time the statute was adopted.

[8] The "repossessing" language is separated from the rest of the first sentence in MCL 339.901(b) by a comma, so "directly or indirectly" does not modify "repossessing." See p. 6, supra. Moreover, the language of the first sentence of MCL 339.901(b) before and after the comma was adopted at different times. The portion before the comma (including "directly or indirectly") was first adopted in 1974 PA 361. The portion after the comma (", or repossessing or attempting to repossess . . . .") was adopted six years later, in 1980 PA 299.

C. If there is Any Ambiguity in MCL 339.901(b), it is Resolved by the Principles of Statutory Construction.

Ambiguity exists only if a statute "'irreconcilably conflict[s]' with another provision . . . or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Michigan Public Service Commission*, 470 Mich 154, 166; 680 NW2d 840 (2004) (italics in original), quoting *Klapp v United Insurance*, 468 Mich 459, 467; 663 NW2d 447 (2003). If MCL 339.901(b) is ambiguous in any respect, settled rules of statutory construction resolve that ambiguity, including the rule that statutes abrogating the common law must be construed narrowly, and the doctrine of ejusdem generis, which requires general terms in a statute (such as "directly or indirectly") to be interpreted to include things of the same kind, class, character or nature as those specifically enumerated. The legislative history confirms that the purpose of the statute was to protect ***consumer debtors*** from "unfair, deceptive and unethical practices of collection agencies,"[9] not collection agents from the ability of forwarders to negotiate fees. Defendants incorporate Part IC of their Brief in Opposition to the Application for Leave to Appeal.

II. MCL 339.901(b) SHOULD BE CONSTRUED SO AS TO AVOID CONSTITUTIONAL INFIRMITY

It is axiomatic that a statute, whenever possible, must be construed in a way that avoids constitutional infirmity. See, e.g., *People ex rel Att'y Gen v Fairfax Family Fund, Inc*, 55 Mich App 305, 311; 222 NW2d 268 (1974) ("We are obligated to construe a statute as constitutional if such a result can be reached.").[10] Plaintiffs' interpretation of the Occupational Code should be

[9] House of Representatives Analysis of SB 439, dated July 23, 1974 (Apx 7 to Appellees' Brief in Opposition to Application for Leave to Appeal).

[10] As a corollary to this rule, courts avoid reaching constitutional issues if alternative means are available for deciding a case. *Stewart v Algonac Savings Bank*, 263 Mich 272, 284; 248 NW 619 (1933).

rejected because it would cause Article 9 to violate the Dormant Commerce Clause, Article I, § 8, cl 3 of the US Constitution, which prohibits states from excessively regulating interstate commerce; and to lack a rational basis, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Michigan Constitution.

A. The Dormant Commerce Clause

As Badeen alleges, the Forwarder Defendants are all located outside the State of Michigan and operate nationally. See SAC ¶¶ 4-18, 35. The Forwarder Defendants' activity occurs outside the State of Michigan and has only limited and unpredictable in-state effects. The Forwarder Defendants and Lender Defendants do business in many states. When a forwarder "solicits" forwarding business from a lender, it does not know when, if ever, it will be called on to refer the lender to a repossession agent in Michigan. Yet Plaintiffs apparently contend that Article 9 of the Occupational Code requires the Forwarder Defendants to be licensed as collection agencies by the State of Michigan before they can "solicit" forwarding business from any of the Lender Defendants – regardless of the Lender Defendant's location – if the lender has any customers in Michigan whose vehicles might eventually be repossessed. Plaintiffs' interpretation would lead to an absurdity – a collection agency in Ohio could actually call debtors in Michigan to collect accounts without a Michigan collection agency license, see MCL 339.904(2),[11] but a forwarder in Ohio could not contact a national lender in California or Minnesota to ask for forwarding business without first obtaining a Michigan collection agency

[11] MCL 339.904(2), adopted in 1994 PA 143, provides that a "person is not subject to the licensing requirement of subsection (1) if the person's collection activities in this state are limited to interstate communications." Applying this section to the Forwarder Defendants would solve the Dormant Commerce Clause issue: Badeen has not alleged that the Forwarder Defendants have engaged in any conduct other than interstate communications. Badeen alleges that the Forwarder Defendants are all located outside Michigan, and simply retain collection agents in Michigan who are licensed by the State. (See SAC ¶¶ 4-18, 35, 40).

license, regardless whether the forwarder would ever be called on to retain a repossession agent in Michigan.

The US Supreme Court uses a balancing test when applying the Dormant Commerce Clause. "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v Bruce Church, Inc,* 397 US 137, 142 (1970). Applying this test, in *Quill Corp v North Dakota,* 504 US 298, 311-18 (1992), the Supreme Court held that a state whose residents purchased by mail from a seller that had no office in the state could not require the seller to collect use tax. The court in *Midwest Title Loans, Inc v Mills,* 593 F3d 660, 665-66 (CA7, 2010) (Posner, J), following *Quill,* invalidated an Indiana statute that required a lender with no place of business in Indiana to obtain an Indiana license in order to make loans to Indiana residents. See 593 F3d at 663.

Article 9 of the Michigan Occupational Code, as Plaintiffs would have this Court interpret it, is even more of an over-reach than the statutes held unconstitutional in *Quill* and *Midwest Title Loans.* Under the Dormant Commerce Clause, Michigan lacks the power to require out-of-state forwarders to be licensed in Michigan as "collection agents" before they can ask even an out-of-state lender for forwarding business. The Court can avoid this constitutional infirmity by construing the statute not to apply to forwarders.

B. Equal Protection and Due Process

Further, if Article 9 is construed to require forwarders (whether located in Michigan or elsewhere) to be licensed in Michigan as "collection agents" before they can "solicit" a lender for forwarding business, the statute is not rationally related to a legitimate interest of the State of Michigan, and therefore denies equal protection in violation of the Fourteenth Amendment to the

U.S. Constitution and Article 1 of the Michigan constitution, Mich Const 1963, art 1, § 2. Statutes that are social or economic regulations, such as Article 9 of the Occupational Code, deny equal protection if the regulation is not "rationally related to a legitimate state interest."[12] *City of Cleburne v Cleburn Living Center*, 473 US 432, 439-40 (1985). See *Phillips v Mirac, Inc*, 470 Mich 415, 433-35; 685 NW2d 174 (2004). The same test applies under the Due Process clauses of the Fourteenth Amendment and Mich Const 1963, art 1, § 17. See *Phillips*, 470 Mich at 435-36, citing *Duke Power Co v Carolina Environmental Study Group, Inc*, 438 US 59, 83-84 (1978).

To the extent Article 9 of the Occupational Code is interpreted to require forwarders to be licensed, the statute is not "rationally related to any legitimate state interest." *Cleburne*, 473 US at 439-40. The State of Michigan can have no legitimate state interest in requiring foreign entities, the forwarders, who operate mainly outside the State, to obtain a Michigan license before they can do any business with lenders when there is no guarantee that the lenders will ever give them any Michigan-based business. It would be wholly irrational to force forwarders to be licensed in Michigan in order to do their work ***in other states***, and that is, in essence, what Badeen is demanding that the Court do in this case.

Moreover, lenders need no protection from forwarders, and Article 9 of the Occupational Code contains no provision that would protect lenders from forwarders in any event. Nor – since forwarders do not contact debtors – would a requirement that forwarders be licensed in Michigan before they can "solicit" a lender for forwarding business afford any protection to borrowers –

[12] The unequal protection here is between forwarders, who do not repossess collateral yet (according to Plaintiffs' interpretation) must be licensed as "collection agents," and all other persons who do not repossess collateral and need ***not*** be licensed as collection agents.

the persons Article 9 was actually meant to protect, as discussed above.[13] Since requiring forwarders to be licensed under Article 9 of the Occupational Code would not be rationally related to any legitimate state interest, such an interpretation of the statute would cause it to run afoul of even minimal scrutiny. See *Phillips*, 470 Mich at 433, citing *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000), and *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981).

Because there is no rational basis for requiring forwarders to be licensed as collection agencies, if this Court holds that forwarders, for no good reason, must satisfy the licensing requirement, the Court will have construed the statute to make it unconstitutional. This is contrary to the Court's duty to construe statutes, if at all possible, so they are constitutional. It is possible here by adopting the Forwarder and Lender Defendants' reading of the statute to make it constitutionally permissible.

For these additional and alternative reasons, Plaintiffs' complaint was properly dismissed.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth herein, this Court should either deny the application for leave to appeal or peremptorily affirm the decision of the Court of Appeals.

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[13] Badeen might suggest that the goal of Article 9 is to protect collection agencies from forwarders' ability to negotiate prices. But, as discussed above, nothing in Article 9 even remotely suggests that its purpose is to protect collection agents from pricing pressure. And forwarders did not even exist at the time Article 9 was adopted.

Respectfully submitted,

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