RECORD NO. 19-14434-HH

In The
United States Court of Appeals
For The Eleventh Circuit

RICHARD HUNSTEIN,

Plaintiff – Appellant,

v.

PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE'S PETITION FOR REHEARING *EN BANC* BY THE FLORIDA CREDITORS BAR ASSOCIATION

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Richard Hunstein v. Preferred Collection and Management Services, Inc. – Case No. 19-14434-HH

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Florida Creditors Bar Association, Inc. proposed Amicus Curiae, a Florida not for profit corporation hereby discloses all trial Judges, attorneys, persons, association of persons, firms, partnerships or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

1. **Barger, Thomas** – United States District Judge, Middle District of Florida, Tampa Division.
2. **Bonan, Thomas** – Appellant's Counsel.
3. **Goldberg, Philip R.** – Principal Attorney at Seraph Legal, P.A.
4. **Hunstein, Richard** – Appellant.
5. **Kaufman Dolowich & Voluck, LLP** – Firm representing Appellee.
6. **Perr, Richard J.** – Appellee's Co-Lead Counsel.
7. **Preferred Collection and Management Services, Inc.** – Appellee.
8. **Seraph Legal, P.A.** – Firm representing Appellant.
9. **Solomon, Vigh & Springer, P.A.** – Firm representing Appellee.
10. **Vigh, Robert** – Appellee's Co-Lead Counsel.

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11. **Florida Creditors Bar Association, Inc.** has no parent corporation and issues no stock.

The undersigned further certifies that to his knowledge there is no publicly traded company or corporation with an interest in the outcome of this case.

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STATEMENT OF INTEREST OF FLORIDA CREDITORS BAR ASSOCIATION (FLCBA)

The FLCBA was established in 1997 to advance the interests of Florida attorneys practicing creditor rights and consumer debt collection. The FLCBA serves its 90 plus members through advocacy, lobbying, and educational programs, including a two day annual conference offering 12 CLE hours. The FLCBA recently participated as amicus before the Florida Supreme Court in *Ham v. Portfolio Recovery Associates*, *LLC*, 308 So.2d 942 (Fla. 2020).

Most FLCBA members who collect consumer debt do not use mail vendors to send debt collection letters. However, FLCBA members "share information about consumers . . . with third party entities,"[1] by contracting with companies furnishing, by way of example, updates on debtor bankruptcy filings, or with vendors providing "skip tracing"[2] and asset search services. Attorneys also regularly hire messengers to deliver papers to courts and receive returned "file stamped" copies.

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[1] *Hunstein v. Preferred Collections and Management Services*, *Inc*., 994 F.3d 1341, 1352 (11th Cir. 2021)

[2] "A 'skip tracing' agency is defined as a 'service that locates persons (such as delinquent debtors). . . .'" *Ponce v. BCA Financial Services*, *Inc.*, 2011 WL 13175624, at n.12 (S.D. Fla. May 25, 2011), *citing* Black's Law Dictionary, 952 (8th Ed. 2004).

The panel's decision will expose debt collection attorneys who contract with agents that assist in handling and processing consumer debt collection cases to consumer lawsuits.

STATEMENT REQUIRED BY FED. R. APP. P. 29(A)(4)(E)

Undersigned counsel was solely responsible for the contents of this motion and proposed brief. The FLCBA is the only party that contributed money for this filing.

STATEMENT OF THE ISSUES

I. SHOULD EN BANC REVIEW BE GRANTED BASED ON THE EXCEPTIONAL IMPORTANCE OF THE PANEL'S RULING

II. SHOULD EN BANC REVIEW BE GRANTED SO THE ENTIRE COURT CAN CARRY OUT ITS DUTY TO DECLARE WHAT THE LAW IS

III. ALTERNATIVELY, EN BANC REVIEW BE GRANTED TO CONSIDER WHETHER A REMAND SHOULD BE ORDERED TO CONDUCT A EVIDENTIARY HEARING ON ARTICLE III STANDING

SUMMARY OF ARGUMENT

This case concerns an issue of exceptional importance involving the collection of consumer debt. The panel's ruling will impose extraordinary costs on the debt collection industry and debt collect attorneys without advancing consumer privacy.

Well established statutory construction rules confirm that a debt collector who electronically transmits data to a mail vendor agent does not engage in a third party communication as defined by the Fair Debt Collection Practices Act.

Alternatively, the court should accept the petition to determine whether the proper disposition is a remand to the District Court for an evidentiary hearing as to Appellant's Article III standing.

ARGUMENT

I. REASONS FOR GRANTING THE PETITION FOR *EN BANC* REVIEW

This case of first impression concerns a question of exceptional importance.[3] Each year, 70 million Americans are contacted by a collector about an overdue debt.[4]

The panel observed that it was "not lost on us that our interpretation of § 1692c(b) runs a risk of upsetting the status quo in the debt collection industry."

[3] *See*, Fed. R. App. P. 35(a)(2)

[4] *See*, "Consumer Debt Collection Facts" published February, 2018 at *NCLC.org/issues/consumer-debt-collection-facts.html*.

Hunstein, at 1352. The panel also recognized that "in the ordinary course of business, debt collectors shared information about consumers . . . with other third party entities"[5] and that the decision "may well require debt collectors (at least in the short term) to in-source many of the services that they had previously outsourced, potentially at great costs." *Id.* (parenthesis in original). However, the panel conceded "those costs may not purchase much in the way of 'real' consumer privacy, as we doubt that the CompuMails of the world routinely read, care about or abuse the information that debt collectors transmit to them." *Id.*

The panel's acknowledgment that its ruling: (1) would have far ranging consequences as to the method by which consumer debt is collected and (2) would not significantly advance the privacy rights of consumers provides compelling reasons for *en banc* review.

II. *EN BANC* REVIEW SHOULD BE GRANTED SO THE COURT CAN CARRY OUT ITS DUTY TO SAY WHAT THE LAW IS

The panel abdicated its duty to say what the law is, accepting the parties' "agreement" that Preferred's electronic transmittal of information to its mail vendor agent met the definition of a "communication" under the Fair Debt Collection Practices Act (FDCPA). However, the opinion failed to consider

[5] 85% of debt collection agencies use outside mail services. *See*, Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766, 5845 at n. 466 (Jan. 19, 2021).

whether a debt collector's mailing agent is a "third party" as defined by the FDCPA.

Over two centuries ago, the Supreme Court confirmed that the judicial branch's function in our tri-part system of government is to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).[6] The panel jettisoned this duty, basing its ruling on what the parties agreed was the law, rather than independently declaring what the law is.

This Court should grant the petition and execute its duty to decide whether the electronic transmission of information to a mailing agent meets the legal definition of "communication" under the FDCPA and whether a mail vendor is a "third party" as defined by this consumer protection law. The panel relied on the principle that a statute "ought, upon the whole, . . . be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous,"[7] rejecting the District Court's determination that a "communication" must include a demand for payment. However, the panel's reliance on this single canon of statutory

[6] Cases applying this bedrock principle include *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1065 at n.15 (C.D. Cal. 1998) *aff'd in part*, *rev'd in part on other grounds*, 255 F.3d 1063 (9th Cir. 2000), *rev'd other grounds*, 534 U.S. 19 (2001); *Wagner v. Federal Election Commission*, 717 F.3d 1007, 1012 (D.C. Cir. 2003) and *Green Valley Specialty Utility District v. City of Cibolo*, 2016 WL 3963224 at *3 (W.D. Tex. July 20, 2016)

[7] *See*, *Dunkin v. Walker*, 533 U.S. 167, 174 (2001)

construction overlooked corollary principles that should have generated a different result.

A. THE PANEL WAS BOUND TO READ THE ENTIRE STATUTORY TEXT AND CONSIDER THE PURPOSE AND CONTEXT OF THE FDCPA.

The interpretation of the words "communication" and "third party" "depends upon reading the whole statutory text, considering the purpose and context of the statute and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). The purpose of the FDCPA's restrictions on third party communications was to prohibit "disclosing [of] a consumer's personal affairs to friends, neighbors, or an employer." Sen. Rep. No. 95-382, Cong. Record, Vol. 123, at p. 1696 (1977). These contacts with third parties, all of whom know the debtor, were deemed "not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs." *Id.* at 1699. Although the FDCPA restricts communications with third parties about a debt, the bar is not absolute.

As to delivery of legal notice of a collection lawsuit, a process server hired to serve a summons will invariably read the summons to find out the identity of the person to be served, thereby obtaining information about the consumer and the debt that is owed. Although, process servers obtain information about the debt

subject to collection, they are excluded from coverage under the FDCPA. *See*, 15 U.S.C. § 1692a(6)(d).

As to the delivery of collection notices, when the FDCPA was enacted in 1977, collection practices of that era included the use of telegrams. The FDCPA limits, but does not prohibit the sending of telegrams to consumers. [8] Over 40 year ago, technology had not advanced to the point where an electronic transmittal of information by a collector through a computer to a mail vendor agent was possible.

The information a collector transmits to a telegraph vendor (e.g., Western Union) include data about the consumer and the debt that is owed, the same kind of information electronically transmitted by Preferred Collections to its mail vendor. The panel overlooked the fact that the FDCPA recognizes the use of telegrams to communicate with consumers and that the collector's transmittal of information to the telegraph operator is not a prohibited third party communication.

The panel's failure to recognize and apply the canon of statutory construction that requires reading the entire FDCPA statutory text and to consider the purpose and context of the statute as it relates to the electronic transmission of information to a collector's agent justifies *en banc* review.

[8] *See*, 15 U.S.C. § 1692f(5) and 15 U.S.C. § 1692f(8)

B. THE PANEL'S RELIANCE ON THE PARTIES' AGREED LEGAL DEFINITION OF "COMMUNICATION" WOULD DEFEAT THE PURPOSE OF THE FDCPA.

"It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of a statute." *Bob Jones University, Inc. v. U.S.*, 461 U.S. 574, 586 (1983). The FDCPA was enacted to "eliminate abusive debt collection practices by debt collectors". 15 U.S.C. § 1692(e). This purpose is not advanced by the panel's ruling that concededly upsets the status quo in the debt collection industry while not "purchasing" much to advance consumer privacy.

The conveyancing of information to generate a telegram or to transmit information to a mail agent do not involve a disclosure of personal affairs to friends, neighbors and employers, the harm that Congress identified when enacting § 1692b(c). *En banc* review is warranted because the panel's reading of the term "communication" (as agreed to by the parties) would defeat the overall purpose of the statute that recognizes a collector's right to transmit limited information to its agents to facilitate communication with a consumer.

C. THE PANEL WAS REQUIRED TO DEFER TO THE CONSUMER FINANCIAL PROTECTION BUREAU'S INTERPRETATION OF THE FDCPA.

"As a general rule, an agency's interpretation of the statute which it administers is entitled to [Chevron] deference if the statute is silent or ambiguous

and the interpretation is based on a reasonable construction of the statute." *Hylton v. U.S. Attorney General*, 992 F.3d 1154, 1157 (11th Cir. 2021)(internal citations omitted). In November, 2020, the CFPB published its Final Rule interpreting the FDCPA. 85 Fed. Reg. 76734- 76907. The Bureau revised this Rule in January, 2021, adding provisions for enhanced initial disclosures under § 1692g. 86 Fed. Reg. 5766-5862.

The revised Final Rule permits a debt collector to disclose a vendor's mailing address in its initial § 1692g disclosure if that is an "address at which the debt collector accepts disputes and requests for original-creditor information. [9] When a mail vendor processes a dispute, this agent acquires information about the debt. Because the CFPB's interpretation of the FDCPA permits this transmittal of information to a mail vendor, the panel should have given deference to this recent guidance by the agency charged with enforcement of the FDCPA.

Because the panel failed to accord deference to this agency interpretation that allows the use of mail vendors, *en banc* review is warranted.

III. ALTERNATIVELY, *EN BANC* REVIEW SHOULD BE GRANTED TO REMAND THIS CASE TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON MR. HUNSTEIN'S ARTICLE III STANDING

The panel's opinion addressed Mr. Hunstein's Article III standing in light of *Spokeo v. Robins*, 136 S. Ct. 1540 (2016). The panel explained that Mr. Hunstein

[9] 12 C.F.R. § 1006.34(c)(2)(i)

failed to allege he incurred a tangible harm and further concluded that Mr. Hunstein failed to demonstrate a "risk of real harm." *Id*., at 1347. However, the Court, relying on the Supreme Court's instruction that "in determining whether a statutory violation confers Article III standing, we should consider 'history and the judgment of Congress'"[10] held that Mr. Hunstein satisfied this requirement, pointing to the supposed close relationship between 15 U.S.C. § 1692c(b) and the historical common law claim for invasion of personal privacy. *Id*., at 1348.

The panel relied on *Perry v. Cable News Network*, *Inc.*, 854 F.3d 1336 (11th Cir. 2017) where this Court held that the Plaintiff established Article III standing under the Video Privacy Protection Act (VPPA) by alleging that CNN (Cable News Network), without his knowledge, recorded his use of CNN's App and transmitted the record of his activities to a third party. This third party (1) conducted data analysis as to the Plaintiff's use of the App; (2) constructed a digital file relating to the Plaintiff's online behavior; and (3) compiled Plaintiff's personal information, including his name, location, phone number, e-mail address and payment record.

The extensive acquisition, retention and analysis of a consumer's personal information contrasts with the record here that reveals only that the debt collector

[10] *Id*., *citing Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016).

electronically transmitted data concerning the debt its mail vendor agent to "create, print and mail a 'dunning' letter to the consumer." *Hunstein*, at 1344.

The panel analogized the electronic transmission of information to Preferred Collections' mail vendor to the common law claim of invasion of privacy for "public disclosure of private facts." *Id*., at 1347 (internal citations omitted). However, there is no allegation in the Complaint that there was any public disclosure of Mr. Hunstein's information. *See*, Black's Law Dictionary (11th Ed. 2019) (defining "disclosed" as "to make [something] known or public.") [11]

Because the allegations in the Complaint about the electronic transmission of the data was unaccompanied by any assertion that the information was "disclosed," this Court should accept *en banc* review to consider whether the appropriate disposition of the standing issue is to remand the case for an evidentiary hearing. *See*, *Bazile v. Finance System of Green Bay*, *Inc.*, 983 F.3d 274, 281 (7th Cir. 2020) (remanding FDCPA suit for evidentiary hearing as to consumer's purported standing to sue).

[11] It is likely that the transmission of data about Mr. Hunstein's debt was entirely an automated process, i.e., that the electronic transmission resulted in the printing of a letter which was then folded, placed in an envelope and delivered to the Postal Service by the mail vendor without any human intervention.

CONCLUSION

The FLCBA respectfully asks this Honorable Court to grant Appellee's petition for *en banc* review.

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CERTIFICATE OF COMPLIANCE

This Brief of Amicus Curiae complies with the type-volume limit of Fed. R. App. P. 29(b)(4) because, excluding the parts of the Brief of Amicus Curiae exempted by Fed. R. App. P. 32(f), it contains 2,560 words.

This Brief of Amicus Curiae complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-stye requirements of Fed. R. App. P. 32(a)(6) because this Brief of Amicus Curiae has been prepared using Microsoft Word in a proportionally spaced typeface named Times New Roman using a 14 point size with lines double spaced.

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CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on May 27, 2021, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

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