No. 19-14434

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
Case No. 8:19-cv-00983-TPB-TGW

# BRIEF OF *AMICUS CURIAE* THE NATIONAL CREDITORS BAR ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

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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**

In accordance with FED. R. APP. P. 26.1, the undersigned counsel states that *Amicus Curiae* the National Creditors Bar Association is an organization that has no corporate parent, and in which no publicly held company has an ownership interest.

Pursuant to 11th Cir. R. 26.1-1 through 11th Cir. R. 26.1-3, the aforesaid *Amicus Curiae* adopt the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellee Preferred Collection and Management Services, Inc. at Pages 2-3 of its Petition for Rehearing and for Rehearing *En Banc*.

/s/ Manuel H. Newburger
Manuel H. Newburger

## RULE 35 STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether 15 U.S.C. § 1692c(b) applies to communications with vendors who provide the ministerial services of printing and mailing letters.

2. Whether the transmittal of data to by a debt collector to a back-office vendor is a third-party communication in connection with the collection of a debt that is prohibited by 15 U.S.C. § 1692c(b).

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## INTEREST OF THE *AMICUS CURIAE*

The National Creditors Bar Association ("NCBA" or "Association") is a nationwide, not-for-profit association of over 400 law firms whose practices focus on, or substantially involve creditors' rights. It is the only bar association in the country dedicated to promoting and protecting all creditors' rights attorneys, including attorneys who collect consumer debt. The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*. has a direct impact on its members, and NCBA has appeared as an *amicus curiae* at the Supreme Court in a number of significant FDCPA cases.

NCBA has a strong interest in ensuring that the FDCPA is interpreted in a way that allows creditors' attorneys to discharge their ethical duty to advance their clients' legitimate interests without constantly exposing themselves to personal liability.

The panel decision that is the subject of the petition for rehearing creates industry confusion and exposes the attorney and law firm members of the *Amicus*, and many clients of those members, to individual and class action claims under the FDCPA. Thus, the *Amicus* has a substantial interest in this litigation and the organization has authorized the filing of this brief.

No counsel for any party authored this brief in whole or in part.

No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

No person other than NCBA, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

## INTRODUCTION

An *en banc* hearing or rehearing may be ordered if:

(1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or
(2) the proceeding involves a question of exceptional importance.

FED. R. APP. P. 35(a). The NCBA asserts that this matter involves a question of exceptional importance.

Law firms engaged in debt collection operate in a highly regulated environment. In addition to having to comply with the Rules of Professional Conduct, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Electronic Funds Transfer Act, and the Telephone Consumer Protection Act, they are regulated by the Consumer Financial Protection Bureau ("CFPB") and numerous state debt collection regulators. For good reason, those regulators support the use of third-party vendors to promote compliance with consumer protection laws. The use of a letter vendor by a debt collector – the very conduct at issue in this case, was

endorsed by the CFPB in its long-awaited debt collection rule, Regulation F. 85 Fed. Reg. 76734; 86 Fed. Reg. 5766 .[1]

The use of letter vendors has become a commonplace tool of the collection industry, not only because of the absence of critical case law in the 44 years since the FDCPA was enacted but also because of the approbation of state and federal regulators. Until the panel decision in this case, no court has held that the practice is prohibited, no state or federal regulator has forbidden it.

In fact, a variety of third-party vendors provide what are known as "back office" services that are invisible to consumers, but which greatly enhance the compliance practices of debt collectors. For example:

- Letter vendors ensure that the compliance decisions of management are implemented and protected through mechanisms that guarantee accurate delivery of content and prevent alteration of, or interference with otherwise-compliant letters.

- Similarly, voice analytics vendors use complex software to review the words used in calls, ensuring that collectors are not engaging in the sort of abusive and threatening practices that led to the enactment of the FDCPA.

- Cloud vendors provide reliable, secure data storage that guards against data breaches and disaster-related losses of data that would impair the accuracy of consumer accounts.

[1] Reg. F was not addressed by the parties in their briefs, and the final rule was not formally adopted until after the briefing in this case had closed. Thus, it was not called to the attention of the panel.

The Panel's decision has substantially disrupted the *status quo* in the collection space.[2] The decision jeopardizes numerous compliance mechanisms that debt collectors have implemented for the protection of consumers. Additionally, state and federal regulators (whose examiners are familiar with and confident in the validity and effectiveness of these various compliance tools) will be forced to determine the validity and effectiveness of processes that will no longer be as secure as those that made use of the known, third-party tools. While these facts do not demonstrate the error inherent in the decision (which is addressed below) they do demonstrate that this case "involves a question of exceptional importance" that warrants a rehearing *en banc*.

## ARGUMENT

### I. The Panel's decision does not withstand scrutiny under basic principles of statutory construction.

The Panel's decision was based on its interpretation of 15 U.S.C. § 1692c(b), which provides:

> Except as provided in section 804 [15 USCS § 1692b], without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer

[2] NCBA tracks FDCPA litigation trends. The decision in this case has already generated over 100 federal court lawsuits across the country, mostly class actions, with more being threatened or filed daily in federal and state courts. No appellate decision in decades (and possibly none, ever) has sparked such a flood of FDCPA litigation in so short a time.

> reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

NCBA respectfully asserts that the Panel's statutory analysis was incomplete.

**A. The plain text of the FDCPA contemplates the use of third-party vendors.**

Proper analysis of 15 U.S.C. § 1692c(b) requires consideration of the FDCPA's permitted use of telegrams. The FDCPA imposes three restrictions on the use of telegrams:

> 1. When seeking location information about a consumer, using "any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt". 15 U.S.C. § 1692b(5).
>
> 2. "Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees." 15 U.S.C. § 1692f(5).
>
> 3. "Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." 15 U.S.C. § 1692f(8).

The importance of these provisions becomes clear upon application of the rule of statutory construction known as the canon against surplusage. That canon reflects "the idea that 'every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.'" *Nielsen v. Preap*, 139 S. Ct. 954, 969, 203

L. Ed. 2d 333 (2019) (alteration in original) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, 174 (2012) ).

Application of this canon necessitates the conclusion that Congress allowed debt collectors to communicate with consumers via telegram, even though it would not be possible to do so without conveying the contents of the communication to Western Union. The Court can also take judicial notice of the fact that one could not send a telegram without disclosing to the Western Union operator the content of the message. The surplusage canon requires recognition that the use of telegrams to collect debts, within the three constraints noted above, must be permitted; otherwise, these restrictions would be mere surplusage without any real meaning or impact.

Furthermore, Section 1692b restricts the "contents" of a telegram that is sent to obtain location information, but Section 1692f imposes no restrictions on the content of a telegram to the consumer. It merely limits the content of the telegram's envelope and prohibits tricking a consumer into paying for the telegram. Again, applying the canon, the sending of telegrams to consumers must be permitted by the FDCPA; otherwise, these sections (and the differences in their constraints) would be meaningless surplusage.

Few (if any) debt collectors still use telegrams. Instead, many use mail vendors to provide the analogous service of transmitting correspondence to the consumer. NCBA asserts that the panel erred in failing to recognize that the FDCPA

expressly permits the use of a third-party vendor to transmit correspondence to a consumer. Rehearing should be granted to address that issue.

**B. The transmittal of data to back-office vendors is not a third-party communication.**

Although the FDCPA clearly authorizes the use of a third party to transmit correspondence, the Panel also failed to consider that the Act more broadly allows the use of vendors that provide back-office services. Again, this is a result of failing to adhere to established methods of statutory construction.

The word "communicate" is used as a verb in Sections 1692b, 1692c, 1692e, and 1692f of the FDCPA. In two of those instances, it is followed by the words "in connection with the collection of any debt"; in one instance it is followed by the words "with respect to such debt"; in one instance it is followed by the words "regarding a debt"; and in the remaining instances it is not tied to either of those phrases.

> Although the "normal rule of statutory construction [is] that words repeated in different parts of the same statute generally have the same meaning," that default principle does not govern where—as here—the repeated word is modified in one instance but not the other.

*Sargeant v. Hall*, 951 F.3d 1280, 1283 (11th Cir. 2020) (internal citations omitted). *See, also, Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) ("[T]he natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there

is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.") (Citation and internal quotation marks omitted.)

One of the two instances in which the FDCPA links the verb "communicate" to the phrase "the collection of any debt" is in the section at issue in the present case – Section 1692c(b). Applying the rule stated above, Appellee was prohibited from communicating with third parties "in connection with the collection of any debt", but it was not prohibited from communicating "with respect to" or "regarding" Hunstein's debt, and it was not prohibited from "communicating" with third parties. For these distinctions to have meaning (as they must) there must be a statutory distinction that separates:

- communicating with a third party to obtain location information (15 U.S.C. §§ 1692b(3), (4), and (6));
- communicating or threatening to communicate credit information that is known or should be known to be false (15 U.S.C. § 1692e(8));
- communicating with a consumer "with respect to" the debt (15 U.S.C. § 1692c(c)) ;
- communicating with a consumer "regarding" the debt (15 U.S.C. § 1692f(7)); and
- communicating with a consumer or a third party "in connection with the collection of "that debt (15 U.S.C. §§ 1692c(a) and (b)).

These distinctions require recognition that communicating "regarding a debt" is different than communicating "in connection with the collection of" a debt. In a world of modern devices, that distinction is critical. Text messages may be directed

to consumers, but they reside on the servers of phone carriers. Email messages to consumers similarly reside on the servers of email providers. Information is conveyed to those third parties, but not "in connection with" any collection effort by those entities. The same is true of mail carriers and "cloud" storage vendors that handle data storage for debt collectors. And the same is true of letter vendors.

Letter vendors, such as Compumail, play the anonymous role of back-office vendor. Like stagehands moving scenery, they facilitate the performance, but they play no part in the drama. Quite simply, they are not the third-party recipients of communications; rather, they are the medium by which the debt collector effectuates its communications to the consumer, just as Western Union and its operator employee are part of the process of sending a telegram.

This conclusion is consistent with the purposes set forth in 15 U.S.C. § 1692. Unlike communications to family, friends, or neighbors, which can be intended to shame the consumer into paying (regardless of whether a demand for payment is made), the letter vendor (like Western Union) is merely a mechanism to transmit to the consumer letters that will still be subject to the protections of the FDCPA. At least one federal appellate court has recognized the exclusion of back-office services: "The Fair Debt Collection Practices Act is not aimed at . . . companies that perform ministerial duties for debt collectors, such as stuffing and printing the debt collector's letters." *White v. Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000). This

is consistent with the rule that "for a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor." *Gruden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011); *see also Gburek v. Litton Loan Serv. LP*, 614 F.3d 380, 385 (7th Cir. 2010). The animating purpose of communicating with a letter vendor is not to induce payment nor is it to embarrass or harass the consumer; rather, it is to secure the ministerial services of printing, folding, stuffing, sealing, metering, and mailing.

## CONCLUSION

> Where the literal reading of a statutory term would "compel an odd result," we must search for other evidence of congressional intent to lend the term its proper scope. "The circumstances of the enactment of particular legislation," for example, "may persuade a court that Congress did not intend words of common meaning to have their literal effect." Even though, as Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."

*Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989) (internal citations omitted). The decision of the panel ignores the surplusage canon, producing the "odd result" that Preferred's use of Compumail is deemed a violation

of the FDCPA, even though it could have lawfully sent the same message through Western Union. Respectfully, the Court should grant rehearing en banc and, upon such rehearing, affirm the decision of the district court.

Dated: May 27, 2021

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## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing *amicus* brief complies with the type-volume limitation of Rule 32(a)(7) because, excluding the parts of the document exempted by Rule 32(f), it contains 2,587 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: May 27, 2021

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## CERTIFICATE OF SERVICE

I certify that on the 27th day of May, 2021, I electronically filed the foregoing Brief of Amicus Curiae The National Creditors Bar Association in Support of Appellee's Petition for Rehearing and for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 27, 2021

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