No. 19-14434

United States Court of Appeals
For the Eleventh Circuit

Richard Hunstein
Plaintiff-Appellant

v.

Preferred Collection & Management Services, Inc.
Defendant-Appellee

Appeal from the United States District Court
for the Middle District of Florida
Case No. 8:19-cv-00983-TPB-TGW

Motion of Missouri Creditors Bar, Inc. for Leave to File a Brief as *Amicus Curiae* in Support of the Petition for Rehearing and for Rehearing En Banc of Defendant-Appellee Preferred Collection & Management Services, Inc.

David J. Weimer
Kramer & Frank, P.C.
1420 NW Vivion Road, Suite 105
Kansas City, MO 64118
Telephone: 816.778.8620
david.weimer@lawusa.com

William J. Denius
Killgore, Pearlman, Semanie, Denius & Squires, P.A.
800 N. Magnolia Avenue, Suite 1500
Orlando, FL 32803
Telephone: 407.425.1020
wjdenius@kpsds.com

Counsel for *Amicus Curiae* Missouri Creditors Bar, Inc.

Certificate of Interested Persons and Corporate Disclosure Statement

Under Fed.R.App.P. 26.1, the undersigned counsel states that Amicus Curiae Missouri Creditors Bar, Inc., is an organization that has no corporate parent, in which no publicly held company has an ownership interest, and is not itself publicly held.

Under Eleventh Circuit Rule 26.1-1 through 26.1-3, Amicus Curiae adopts the Certificate of Interested Persons and Corporate Disclosure of Appellee Preferred Collection and Management Services, Inc. at pages 2-3 of its Petition for Rehearing and for Rehearing *En Banc*.

/s/ David J. Weimer
David J. Weimer (*pro hac vice* pending)

/s/ William J. Denius
William J. Denius

Motion

Missouri Creditors Bar, Inc. ("MCBI"), under Rule 29(a)(3) of the Federal Rules of Appellate Procedure, respectfully requests that the Court grant it leave to file the attached brief as *amicus curiae* in support of the Petition for Rehearing and for Rehearing *En Banc* filed by Defendant-Appellee Preferred Collection and Management Services, Inc.

The Court should grant this motion because MCBI has a strong interest in protecting the ability of creditors' rights attorneys to represent their clients effectively and within the bounds of the law. MCBI is a non-profit association of attorneys and law firms that practice primarily in the area of creditors' rights. It is a leading provider of education to members and non-members on topics ranging from legal ethics, professional regulation, and compliance with consumer-protection laws that affect the creditors' bar, especially the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA").

MCBI members must interpret and comply with the FDCPA and other consumer-protection statutes in their everyday practices, and therefore have a substantial interest in ensuring that courts interpret the FDCPA consistently and in harmony with the statutory text. Otherwise, its members cannot, with confidence, stay within the bounds of both federal law and MCBI's Code of Ethics and

Conduct. It has therefore appeared as *amicus curiae* in other cases affecting the practice of law in the creditors'-rights space.

In this case, the Panel decision affects MCBI members and their creditor clients, some of whom are also subject to the FDCPA. The Panel decision impairs the ability of MCBI members to use a variety of tools that help them comply with laws in ways that inure to the benefit of consumers. The decision also may expose members and their creditor clients to both individual and class-action liability under the FDCPA. During the short time since the Panel announced its decision, consumers' attorneys have filed dozens of lawsuits across the country, including nearly one hundred class-action lawsuits. These numbers suggest that the Panel decision opened a new line of production for what has been described as a "glorified game of 'gotcha,' with a cottage industry of plaintiffs' lawyers filing suits over fantasy harms the statute was never intended to prevent." *Kraus v. Prof'l Bureau of Collections of MD, Inc.,* 281 F.Supp.3d 312, 322 (E.D.N.Y. 2017) (footnote omitted).

MCBI further has an interest in ensuring that courts, without an announced change in the statute, do not subject member lawyers to liability for actions that the FDCPA, the courts, and state and federal regulators have long recognized and even encouraged. MCBI wishes to help its member attorneys comply with their ethical obligations to represent their creditor clients zealously, and to further stay abreast

of changes in technology and utilize those changes to assist them in such representation. The Missouri Code of Professional Responsibility expects lawyers, where appropriate, to utilize nonlawyers outside their firms to assist them in rendering legal services where appropriate. Mo.R.Prof'l.Cond. 4-5.3, cmt. [3]. The Panel decision, however, renders the use of such services illegal to a sector of the bar.

The Panel decision analysis of the FDCPA stopped before considering the entire context of the Act. The Panel's reading, that debt collectors may communicate only with those enumerated in 15 U.S.C. §§ 1692b and 1692c(b), means that they may not even convey information to their employees and partners, let alone carefully selected and supervised agents. Such a reading means that virtually all debt collectors, including virtually all debt-collection attorneys, are suddenly and without fault exposed to individual and class-action lawsuits, that they may not utilize tools that the FDCPA and regulators have approved, and that they cannot comply with their ethical obligation to represent their clients effectively and zealously within the bounds of the law. This case therefore is one of exceptional importance to MCBI's member law firms and attorneys.

MCBI therefore respectfully requests that the Court grant the petition of the defendant-appellee and rehear this case, whether via the Panel or *en banc*.

June 1, 2021

Kramer & Frank, P.C.
By: /s/ David J. Weimer
David J. Weimer (*pro hac vice* motion pending)
1420 NW Vivion Road, Suite 105
Kansas City, MO 64118
Telephone: 816.778.8620
david.weimer@lawusa.com

Killgore, Pearlman, Semanie, Denius & Squires, P.A.
By: /s/ William J. Denius
William J. Denius
800 N. Magnolia Avenue, Suite 1500
Orlando, FL 32803
Telephone: 407.425.1020
wjdenius@kpsds.com

Counsel for Amicus Curiae
Missouri Creditors Bar, Inc.

Proof of Service

The undersigned certifies that he filed the foregoing Motion for Leave with the Clerk of the Court of the United States Court of Appeals for the 11th Circuit via the ECF system, copies of which were provided to counsel of record via the ECF system.

/s/ William J. Denius

No. 19-14434

United States Court of Appeals
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Appeal from the United States District Court
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Brief of Amicus Curiae Missouri Creditors Bar, Inc. Supporting the Petition of Appellee for Rehearing and for Rehearing En Banc

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David J. Weimer
Kramer & Frank, P.C.
1420 NW Vivion Road, Suite 105
Kansas City, MO 64118
Telephone: 816.778.8620
david.weimer@lawusa.com

William J. Denius
Killgore, Pearlman, Semanie, Denius & Squires, P.A.
800 N. Magnolia Avenue, Suite 1500
Orlando, FL 32803
Telephone: 407.425.1020
wjdenius@kpsds.com

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Missouri Creditors Bar, Inc.

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/s/ David J. Weimer
David J. Weimer (*pro hac vice* pending)

/s/ William J. Denius
William J. Denius

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 a debt collector conveying information about a debt to an employee, partner, or agent constitutes communication in connection with the collection of a debt within the meaning of 15 U.S.C. § 1692c(b).

2. Whether a debt collector that transmits a message to a consumer via a letter vendor, providing the letter vendor only enough information to enable the letter vendor to transmit the message to the consumer, constitutes a third-party communication within the meaning of 15 U.S.C. § 1692c(b).

David J. Weimer (*pro hac vice* motion pending)
Kramer & Frank, P.C.
1420 NW Vivion Road, Suite 105
Kansas City, MO 64118
Telephone: 816.778.8620
david.weimer@lawusa.com

William J. Denius
Killgore, Pearlman, Semanie, Denius & Squires, P.A.
800 N. Magnolia Avenue, Suite 1500
Orlando, FL 32803
Telephone: 407.425.1020
wjdenius@kpsds.com

Counsel for Amicus Curiae
Missouri Creditors Bar, Inc.

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Statement of the Interest of the Amicus Curiae

Missouri Creditors Bar, Inc. ("MCBI") is a Missouri non-profit, mutual benefit corporation forming an association of attorneys licensed to practice law in Missouri. The firms focus their practices on creditors' rights. MCBI comprises nineteen law firms and solo practitioners representing creditors in, among other things, consumer collection matters. MCBI members must abide by the Missouri Rules of Professional Conduct and MCBI's Code of Professional Conduct and Ethics, and MCBI advocates in favor of an environment compatible with the zealous and ethical representation of creditors while providing a forum for discussion and cooperation. (Articles of Incorporation of a Nonprofit Corporation (Missouri Creditors Bar, Inc.).

MCBI members regularly represent creditors seeking to collect delinquent consumer debt. They represent their clients in every circuit court in the state. MCBI members must interpret and follow federal consumer protection laws and therefore have a significant interest in assuring that courts interpret the FDCPA consistently and in a manner that permits them to discharge their ethical duties of diligently representing their clients in compliance with the law. Some MCBI members utilize letter vendors in an effort to provide secure transmission of information to consumers. Because of its primary focus on the ethical representation of creditors, MCBI holds a unique position qualifying it to speak to

the practice of debtor/creditor law and the effect of appellate decisions on that practice.

Statement Regarding Contribution to the Brief of the Amicus Curiae

Per the requirements of FED.R.APP.P. 29(c)(4)(E), Amicus Curiae MCBI makes the following statements:

Counsel for Petitioner did not author this brief in whole or in part.

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

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

Argument and Citations of Authority

1. Under Agency Law, the Agent of a Debt Collector Is Not a Third Party within the Meaning of the FDCPA

MCBI respectfully submits that the Panel decision involves a question of exceptional importance. The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"), prohibits debt collectors from communicating with any person other than the consumer in connection with the collection of a debt. The FDCPA does not preclude, however, communications among the representatives of the debt collector. A letter vendor, as an agent of the debt collector, is a representative of the debt collector and therefore the FDCPA permits communications aimed at and confined to permitting the agent to perform its assigned tasks. Indeed, the FDCPA contemplates exactly such contacts in furtherance of communications between the consumer and the debt collector.

Congress never intended to prevent debt collectors from relying on agents to assist them with their job of collecting debt from consumers. While it may seem unnecessary to say so, the FDCPA does not forbid debt collection. *See, e.g., Davis v. Hollins Law*, 968 F.Supp.2d 1072, 1080 (E.D.Cal. 2013) ("the FDCPA does not prohibit debt collection—only unfair debt collection"). Further, this Circuit recognizes that debt collectors may have employees or other debt-collector representatives to whom they may entrust consumer account data without

committing a *per se* violation of the FDCPA. *See, e.g., LeBlanc v. Unifund CCR Partners,* 601 F.3d 1185, 1201-02 (11th Cir. 2010) (debt collector liable for debt-collector partner's breach of FDCPA); *see also White v. Goodman,* 200 F.3d 1016, 1019 (7th Cir. 2000) (the FDCPA "is not aimed at the shareholders of debt collectors"). Congress, in enacting the FDCPA, thus contemplated that the "debt collector" who may have access to a consumer's information may comprise more than a single, individual human being.

If a debt collector can have employees or partners without violating the FDCPA's prohibition against third-party communication, it follows that a debt collector can likewise have independent contractors act as its agents—likewise without violating the FDCPA. "Agency is defined as 'the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'" *United States v. Schaltenbrand,* 930 F.2d 1554, 1560 (11th Cir. 1991), *quoting* RESTATEMENT (SECOND) OF AGENCY § 1 (1958). The principal of an agent, after all, is subject to the same principles of respondeat superior as is the employer of an employee—because of that fiduciary relationship. *See Franza v. Royal Caribbean Cruises, Ltd.,* 772 F.3d 1225, 1249 (11th Cir. 2014) ("respondeat superior derives from a principal's right to control the conduct of its agents").

Thus, for the purposes of the FDCPA, comparing an agent to an employee results in a difference without a distinction.

Yet the Panel's reading of the FDCPA, MCBI respectfully submits, suggests that its analysis stopped before it considered the whole context of the Act. Under the Panel's holding, a debt collector could no more convey information about a debt to its partner or employee than it could to an agent. The Panel decision holds that "[t]he FDCPA…broadly prohibits a debt collector from communicating with anyone other than the consumer 'in connection with the collection of any debt,' subject to several carefully crafted exceptions—some enumerated in § 1692c(b), and others in § 1692b." *Hunstein v. Preferred Collection & Mgmt. Servs.*, 994 F.3d 1341, 2021 U.S. App. LEXIS 11648*, *3 (11th Cir. 2021). In other words, according to the Panel, a debt collector must not communicate with anyone not on the list.

But Congress did not include other debt collectors, or employees of debt collectors, or partners of debt collectors, on the list of people with whom a debt collector may communicate in connection with collection of a debt. 15 U.S.C. §§ 1692b, 1692c(b). Read in this way, each individual debt collector would have to build a proverbial Great Wall of China around each consumer's data to preclude any employee, partner, or agent from accessing it. Congress never intended to require debt collectors to conduct their businesses in such a way.

The gloss placed on the statute by the Panel's decision, however, would preclude two employees who work for the same debt-collection agency or law firm from discussing a consumer's debt, perhaps even from being co-employees. Such a reading defies common sense and the context of the rest of the Act. Absent a clear expression of intent to the contrary, one must presume that Congress intended debt collectors to conduct debt-collection businesses in an ordinary, business-like way, using employees and agents where it makes sense to do so, as long as the debt collector, its employees, and its agents all comply with the FDCPA. Indeed, Congress clearly expected debt collectors to have employees engaged in debt collection. *See* 15 U.S.C. § 1692(c) (Congress permitted debt collection if carried on in a non-abusive manner); *and* 15 U.S.C. § 1692a(6) (defining "debt collector" to include "any person who uses any instrumentality of interstate commerce or the mails *in any business* the principal purpose of which is the collection of any debts") (emphasis added) *and* 15 U.S.C. § 1692b(1) (debt collector engaged in obtaining location information must *identify its employer* if asked to do so by the third party). Disallowing such conveyance of information reads those provisions out of the statute. One should not presume that Congress wasted its time by including those provisions in the Act.

Stated another way, a debt collector can convey information about a consumer's debt to its employees or agents without violating the FDCPA's

prohibition against communicating with a third party. Such activity is not a communication in connection with the collection of the debt. It is debt collectors conducting debt-collection activity, and they have partners, employees, and agents assisting them in their jobs. To hold otherwise runs contrary to congressional intent and could create unimaginable exposure to liability for every debt collector, including the law firms that comprise MCBI.

Congress intended debt collectors to convey information concerning the debts that they are collecting to their employees and agents. *See White v. Goodman,* 200 F.3d at 1019 ("The [FDCPA] is not aimed at the shareholders of debt collectors…or at companies that perform ministerial duties for debt collectors, such as stuffing and printing the debt collector's letters"). That it did not state that intent explicitly is more likely due to its assumption that such a conclusion was obvious than any desire to preclude debt collectors from having partners, employees—or agents.

Further, such a rule makes sense in the context of the Act. When Congress enacted § 1692c(b), it did not have a common law interest in privacy in mind. Instead, Congress intended to prevent debt collectors from using "abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a). Specifically, Congress had in mind debt collectors who publicly shame consumers or otherwise deliberately embarrass them in an unfair effort to coerce them to pay a debt. *See*

15 U.S.C. § 1692d(3), (4) (prohibiting publication of lists of non-paying consumers or advertising debts for sale to coerce payment). A debt collector who relies on employees or agents—subject to the same stringent rules as the debt collector—to assist it with its legal debt collection activity in no way offends that interest.

2. The FDCPA Does Not Prohibit Incidental Contact with a Letter Vendor Because It Does Not Involve Communication in Connection with Collection of a Debt

MCBI respectfully submits that the Panel's opinion raises a second, related issue of exceptional importance. The FDCPA permits the type of incidental third-party contact involved in the use of a letter vendor. The FDCPA's prohibition against third-party communication in connection with collection of a debt protects the consumer's interest in preventing debt collectors from shaming or publicly embarrassing a consumer into paying a debt. When a debt collector transmits data to its letter vendor, it is merely transmitting the information that is necessary to enable it to transmit the message to the consumer. It does not hold the consumer up to shaming or public embarrassment and so even if the vendor is a third party within the meaning of the FDCPA, it does not communicate with a third party "in connection with the collection of any debt."

The Staff of the Federal Trade Commission ("FTC") advised debt collectors that the FDCPA does not prohibit third-party communications necessary to

conduct debt collection activity, such as an attorney for the creditor communicating with a potential witness in order to establish the existence of a debt. *Cf.* FTC STAFF, FED. TRADE COMM'N, COMMENTARY ON THE FAIR DEBT COLLECTION PRACTICES ACT § 805(b), cmt. 8 (Dec. 13, 1988) ("FTC COMMENTARY"). This Court has recognized that courts must accord "considerable weight" to the FTC's interpretations because of its long history of enforcement of the FDCPA. *Leonard v. Zwicker & Assocs., P.C.,* 713 Fed.Appx. 879, 883 (11th Cir. 2017). The FTC recognized that a lawyer could not operate a debt-collection law firm without communicating with witnesses.

Likewise, the text of the FDCPA itself supports the conclusion that a debt collector may utilize a letter vendor. The Act mentions the use of telegrams to communicate with consumers in three places. The first mention places restrictions on the content of telegrams used to obtain location information. 15 U.S.C. § 1692b(5). The second precludes debt collectors from coercing consumers to pay for the delivery of telegrams by concealing the purpose of the communication. 15 U.S.C. § 1692f(5). And the third restricts the information that a debt collector may place on an envelope containing a telegram to a consumer. 15 U.S.C. § 1692f(8). The Act therefore contemplates that debt collectors might use a telegram to communicate with consumers. It places no special restriction on the content of telegrams delivered to consumers. Yet Congress must have known that a debt

collector would have to reveal the entire content of the message to a Western Union operator in order to send a telegram. The FTC recognized this issue and advised that:

> A debt collector may contact an employee of a telephone or telegraph company in order to contact the consumer, without violating the prohibition on communication to third parties, if the only information given is that necessary to enable the collector to transmit the message to the consumer.

FTC COMMENTARY, § 805(b), cmt. 3.

Such contact is exactly analogous to the contact between a debt collector and a letter vendor. Debt collectors contact letter vendors not to shame the consumer into paying the debt, but to "enable the collector to transmit the message to the consumer." The FTC recognized that debt collectors are not communicating "in connection with collection of any debt" when they transmit data to telegraph operators—or to letter vendors. Instead, they are communicating *with the consumer*. The letter vendor is merely a conduit through which the communication takes place, just as the Western Union operator fulfills that role in the case of a telegram.

Further, even if Congress, despite the textual support shown above, truly had common-law privacy in mind when it drafted § 1692c(b), the use of a letter vendor does not offend that interest. At least one other court has visited this precise claim. In that case, the debt collector was attempting to recover the deficiency left after

the consumer's lender repossessed an automobile. *Flood v. Mercantile Adjustment Bureau, LLC,* 176 P.3d 769, 771 (Colo. 2008). When the debt collector sent the consumer a letter via a letter vendor, the consumer sued the debt collector for violation of Colorado law based on the FDCPA. *Id.* at 771. In affirming the relevant portion of the trial court's judgment for the debt collector, the Colorado Supreme Court held that "the use of an automated mailing service…by a debt collector is a *de minimus* communication with a third party that cannot reasonably be perceived as a threat to the consumer's privacy or reputation." *Id.* at 777, *citing* FTC COMMENTARY, § 805(b), cmt. 3. Such *de minimus* contact does not offend the interests protected by the FDCPA.

Conclusion

Even before Congress enacted the FDCPA, debt collectors used third parties as conduits to enable communication with consumers. Congress knew that and, within limits, approved of it. Moreover, Congress expected debt collectors to work through representatives, to whom those debt collectors, of necessity, would provide information regarding the consumer's debt. MCBI respectfully submits that the Panel decision overlooked this important context when it ruled in favor of Mr. Hunstein. The Court should rehear this matter, whether before the Panel or *en banc*.

Kramer & Frank, P.C.
By: /s/ David J. Weimer
David J. Weimer (*pro hac vice* motion pending)
1420 NW Vivion Road, Suite 105
Kansas City, MO 64118
Telephone: 816.778.8620
david.weimer@lawusa.com

Killgore, Pearlman, Semanie, Denius & Squires, P.A.
By: /s/ William J. Denius
William J. Denius
800 N. Magnolia Avenue, Suite 1500
Orlando, FL 32803
Telephone: 407.425.1020
wjdenius@kpsds.com

Counsel for Amicus Curiae
Missouri Creditors Bar, Inc.

Certificate of Compliance

1. The undersigned certifies that this document complies with the word limit of FED.R.APP.P. 29 because, excluding the parts of the document exempted by FED.R.APP.P. 32(f), this document contains 2,412 words.

2. The undersigned certifies that this document complies with the typeface requirements of 32(a)(5) and the type-style requirements of 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 or greater.

/s/ David J. Weimer
David J. Weimer (*pro hac vice* pending)

/s/ William J. Denius
William J. Denius

Certificate of Service

I certify that on June 1, 2021, I filed a true and correct copy of the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit via the ECF system. Two copies were also mailed to counsel of record.

/s/ William J. Dernius