No. 14-14200

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Keith Davidson,
Plaintiff-Appellant,

v.

Capital One Bank (USA), N.A.,
Defendant-Appellee,

On Appeal from the United States District Court
For the Northern District of Georgia
No. 1:13-cv-2307
Hon. William S. Duffy, Jr.

Amicus Brief of the Federal Trade Commission Supporting Rehearing En Banc

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Eleventh Circuit Rule 35-5(C) Statement

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

> Whether the panel correctly held, in conflict with every other court of appeals that has considered the issue, that a person who regularly acquires debts that are in default and attempts to collect on them does not qualify as a "debt collector" within the meaning of the Fair Debt Collection Practices Act.

s/ Theodore (Jack) Metzler
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STATEMENT OF ISSUE MERITING EN BANC CONSIDERATION

Whether the panel correctly held, in conflict with every other court of appeals that has considered the issue, that a person who regularly acquires debts that are in default and attempts to collect on them does not qualify as a "debt collector" within the meaning of the Fair Debt Collection Practices Act.

INTEREST OF AMICUS CURIAE

The Federal Trade Commission, an agency of the United States, files this brief pursuant to Eleventh Circuit Rule 35-6 to urge the Court to review en banc the panel decision in this case, which restricts the scope of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 *et seq.*

Congress has directed the FTC to protect the rights of consumers under the FDCPA. 15 U.S.C. § 1692*l*(a). An FDCPA violation is "deemed an unfair or deceptive act or practice in violation of [the FTC] Act," and the FTC may proceed against an FDCPA violator as though it had broken "a Federal Trade Commission trade regulation rule." *Id.*

Abusive debt collection practices are a primary focus of the Commission's consumer-protection efforts. The agency has brought many cases enforcing the FDCPA and has published several reports on problems in the debt collection industry, in particular those associated with debts that are sold to others.[1] Courts have relied on the Commission's perspective on and experience with the FDCPA. *E.g., Bridge v. Ocwen Fed. Bank*, 681 F.3d 355, 361 (6th Cir. 2012); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014). The Commission is concerned that the panel's decision will remove important protections for consumers in the

[1] See FTC, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010), http://1.usa.gov/buF50z ("Broken System"); FTC, The Structure and Practices of the Debt Buying Industry (Jan. 2013), http://1.usa.gov/Z0EjxZ ("Structure & Practices"); FTC, Collecting Consumer Debts: The Challenges of Change (Feb. 2009), http://1.usa.gov/3ZLwb.

states of this Circuit and may hamper both government and private efforts to combat abusive debt-collection practices.

STATEMENT OF THE CASE

This case concerns who qualifies as a "debt collector" subject to FDCPA requirements vital to protecting consumers from abuse. If a person collecting a debt is not a "debt collector," he is not subject to the statute. The panel held that a company that buys debts that are already in default is not a debt collector. That decision squarely conflicts with (and does not acknowledge) the decisions of four other courts of appeals—the Third, Fifth, Sixth, and Seventh Circuits—that have directly addressed the same question. No court of appeals before now has reached the panel's conclusion.

The panel misinterpreted the statute, resulting in a construction of the FDCPA that is both under- and overinclusive. It created an irrational loophole in the FDCPA that enables unscrupulous debt collectors to avoid its requirements. And it removed an important exception to the statute, which ironically extends the FDCPA's strictures to companies that Congress did *not* intend the statute to cover.

A. Statutory Background

The FDCPA is a consumer protection statute passed against the backdrop of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Congress enacted the FDCPA to

(among other things) "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e).

The statute's definitional section creates two complementary, mutually exclusive categories of debt holders: "creditors" and "debt collectors." Creditors are not regulated by the statute, whereas debt collectors are subject to regulation and to both private and government lawsuits for violations. Congress defined a "creditor" as "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4). It defined a "debt collector" as "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6).

Congress recognized that debts can be bought and sold in the marketplace and anticipated that some of those debts might be in default at the time of assignment and transfer. It took such transactions into account in defining creditors and debt collectors. Thus, the meaning of "creditor" "does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4). Correspondingly, the meaning of "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). As explained below, until the

panel decision here, courts have uniformly determined that, with respect to acquired debts, those definitions distinguish between creditors and debt collectors based on whether the relevant debt was in default when it was transferred.

B. Facts & Procedural History

Plaintiff Keith Davidson had a credit card account with HSBC bank. When he defaulted on payment, HSBC sued Davidson, and the parties settled the case for $500. Slip op. 3. Capital One later acquired Davidson's account from HSBC and then sued Davidson to collect the same account, but this time for $1,114.96 rather than the $500 Davidson owed under the earlier judgment. *Id.* at 4. Davidson alleges that Capital One violated the FDCPA by (among other things) falsely representing "the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A).

The district court dismissed the claim, holding that Capital One is not a "debt collector" within the meaning of the FDCPA because it collected only debts owed to itself, not "debts owed or due or asserted to be owed or due another" at the time Capital One attempted to collect them. Slip op. 5; 15 U.S.C. § 1692a(6). Davidson argued on appeal that because Capital One acquired his debt when it was already in default, Capital One was a debt collector and not a creditor when it attempted to collect the account.

The panel rejected Davidson's argument. It examined the definition of "debt collector," with particular emphasis on the phrase that refers to debts "owed or due another." Without addressing the contrary holdings of four other courts of appeals,

the panel held that, under this language, "a person must regularly collect or attempt to collect debts *for others* in order to qualify" as a debt collector. Slip op. 13. But because "Capital One's collection efforts in this case relate only to debts owed to it—and not to 'another,' " Capital One did not fall within the panel's interpretation of "debt collector." *Id.* at 17. And the panel rejected Davidson's reliance on 15 U.S.C. § 1692a(6)(F)(iii), which, as noted, exempts persons from the definition of "debt collector" to the extent they acquire debts that are not in default at the time of acquisition. The exception, the panel held, "cannot . . . bring entities that do not otherwise meet the definition of 'debt collector' within the ambit of the FDCPA." Slip op. 11-12.

REASONS FOR GRANTING REHEARING EN BANC

The question presented here is exceptionally important, and the panel incorrectly decided it in conflict with the decisions of four other courts of appeals. The panel's decision both eliminates critical consumer protection features of the FDCPA and, by nullifying a key statutory exception, unwittingly extends the FDCPA's requirements to businesses that Congress meant to exclude. And the panel decision creates these anomalies in a region of the country—the territory covered by this Circuit—that is disproportionately subject to abusive debt-collection practices. This case thus warrants rehearing en banc.

I. THE PANEL DECISION DIRECTLY CONFLICTS WITH THE DECISIONS OF FOUR OTHER COURTS OF APPEALS.

The FDCPA establishes complementary and mutually exclusive definitions of "creditor" (15 U.S.C. § 1692a(4)) and "debt collector" (15 U.S.C. § 1692a(6)). All courts of appeals that have previously addressed these definitions—the Third, Fifth, Sixth, and Seventh Circuits—have held that, with respect to debts transferred from one person to another, the acquirer is a "creditor" if the debt is *not* in default at the time of transfer and a "debt collector" if the debt *is* in default. No other court of appeals that has directly addressed the issue has come to a different conclusion.[2]

For example, the Seventh Circuit has rejected the argument—identical to the panel's holding here—that a party is "a creditor and not a debt collector [if] it purchases delinquent debt thereby becoming one 'to whom a debt is owed.' " *Ruth v. Triumph Partnerships*, 577 F.3d 790, 796 (7th Cir. 2009). The court held instead that when "the party seeking to collect a debt did not originate it but instead acquired it from another party . . . the party's status [as a debt collector] under the FDCPA turns on whether the debt was in default at the time it was acquired." *Id.*; *accord McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 501 (7th Cir. 2008); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *Bailey v. Sec. Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir. 1998). Directly contrary to the panel here, the Seventh Circuit ruled that

[2] Davidson's petition suggests that the Ninth Circuit's decision in *Schlegel v. Wells Fargo Bank*, 720 F.3d 1204 (9th Cir. 2013), is consistent with the panel holding, but that case did not address the question presented here because it did not involve loans that were in default at the time they were acquired.

"a party that seeks to collect on a debt that was in default when acquired is a debt collector under the FDCPA, '*even though it owns the debt and is collecting for itself.*' " *Ruth*, 577 F.3d at 797, quoting *McKinney*, 548 F.3d at 501 (emphasis added). The court explained that the statute "excludes from its definition of 'creditor' those who acquire and seek to collect a 'debt in default,' and excludes from its definition of 'debt collector' those who seek to collect a debt 'which was not in default at the time it was obtained.' " *Ruth*, 377 F.3d at 797, quoting 15 U.S.C. §§ 1692a(4) & 1692a(6)(F) (internal citations omitted). Thus, "one who acquires a 'debt in default' is categorically *not* a creditor; one who acquires a 'debt not in default' is categorically *not* a debt collector." *McKinney*, 548 F.3d at 501.

The Third Circuit likewise differentiates debt collectors from creditors on the basis of whether a debt was in default at the time of its transfer. In *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), the Third Circuit held that a company became a debt collector when it bought a portfolio of overdue utility bills. The court reasoned: "an assignee of an obligation is not a 'debt collector' if the obligation is not in default at the time of the assignment; conversely, an assignee may be deemed a 'debt collector' if the obligation is already in default when it is assigned." *Id.* at 403. That determination cannot be squared with the panel's statutory interpretation.

The Third Circuit's separate decision in *FTC v. Check Investors, Inc.*, 502 F.3d 159, 162-64 (3d Cir. 2007), likewise rested on a rationale directly contrary to the panel's holding. There, the defendant purchased bounced checks and attempted to

collect them using means prohibited by the FDCPA. It argued that, having bought the bad checks, it collected debts for itself and not for another. The court held that even though a debt collector may "actually be owed the debt," the status of the debt at the time of acquisition was dispositive. *Id.* at 173. The alternative reading (the one adopted by the panel here) "would elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." *Id.*

The Sixth Circuit has similarly held that "[t]he distinction between a creditor and a debt collector lies precisely in the language of § 1692a(6)(F)(iii)." *Bridge*, 681 F.3d at 359. Contrary to the panel's holding here, the court ruled that "an entity that did not originate the debt in question but acquired it and attempts to collect on it . . . is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired." *Id.* at 359.

Finally, the Fifth Circuit has likewise held that the "assignee of a debt" is not a debt collector "as long as the debt was not in default at the time it was assigned." *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985). Like the courts discussed above, the court classified a person acquiring a debt as a debt collector or creditor depending on whether the debt was in default when assigned, and not (as under the

panel decision here) whether the defendant was collecting debts "for" another rather than itself (slip op. 13).[3]

II. THE PANEL MISINTERPRETED THE STATUTE.

The other four circuits correctly decided the issue in this case. A company that regularly buys debts owed to others and collects them is a "debt collector" under the FDCPA for debts that were in default at the time it acquired those debts, even though, in acquiring them outright, the company was collecting them on its own behalf rather than "for" another entity with a continuing ownership interest in them. In concluding otherwise, the panel erred in three distinct but interrelated ways.

First, the panel erred in construing the phrase "owed or due another" to mean, in effect, "*currently* owed or due another." The debts at issue were obviously "owed or due another" (the assignor) when they were incurred. Only by implicitly injecting the word "currently" into the statute could the panel interpret the phrase "owed or due another" to refer to debt collection undertaken "for another." *See* slip op. 13. But Congress did not include the word "currently" in the definition of debt collector. As the panel observed, Congress did not include the word "originally" either, *see* slip op. 12-13. But that observation—coupled with the panel's implicit need to insert a its

[3] The FTC also has consistently interpreted the FDCPA to mean that those who regularly collect debts that they obtain after the debts are in default are "debt collectors" and not "creditors." *Structure & Practices*, *supra* note 1, at 3-4 & nn. 13-14; *Broken System*, *supra* note 1 at 6 n.15.

own temporal adverb —simply shows that the statutory phrase is susceptible to more than one interpretation.

The statutory structure resolves that ambiguity in favor of the majority rule adopted by four circuits and against the panel's interpretation. First, the definition of "debt collector" must be read in tandem with the complementary definition of "creditor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570 (1991) (noting "the cardinal rule that a statute is to be read as a whole"). As described above, "creditor" means a person to whom a debt is owed, but does not mean one who acquired a defaulted debt "solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4). Similarly, "debt collector" means a person who collects debts owed or due another, but does not mean a person who collects acquired debts that are not in default. The two definitions work together to create complementary and mutually exclusive categories that differ on the basis of the default status of a transferred debt. The panel's reading upends that structure.

Second, the panel's interpretation unnecessarily—and thus impermissibly—drains a portion of the statutory definition of any meaning: the statutory exception for debts *not* in default when acquired. Subparagraph (F)(iii) excepts from the definition of "debt collector" any person "[1] attempting to collect any debt owed or due or asserted to be owed or due another [2] to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). The first half of the quoted language exactly replicates the

language that appears earlier in the definition of "debt collector." As noted, the panel construed that language to mean attempting "to collect any debt *for* [*i.e.*, on behalf of] *others*." *See* slip op. 13. If that interpretation were correct, subparagraph (F)(iii) logically would never apply: a person who has "obtained" a debt and seeks to collect on it for itself is by definition *not* collecting it on behalf of another. The panel's contrary interpretation thus violates the "basic interpretive canon" that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S. Ct. 2276 (2004) (citation omitted).

Third, for the same reason, the panel's construction anomalously extends the statutory restrictions on "debt collectors" to entities and activities that Congress did *not* wish those restrictions to cover. *See* slip op. 15 n.8. Congress included the subparagraph (F)(iii) exception (which would be nullified by the panel's approach) because it wished to exempt from the statutory requirements those who obtain debts that are not in default, such as loan servicers. The exception applies both to persons who otherwise qualify as a debt collector under the first statutory definition (for companies whose "principal purpose" is debt collection) or the second (the definition at issue here, involving those who regularly collect debts "owed or due another"). *See Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106-07 (6th Cir. 1996). Because the panel's reading reduces this subparagraph (F)(iii) exception to a nullity, the exception can no longer play its designated role. As discussed below, that is a particular

problem for companies meeting the first definition: in the Eleventh Circuit such companies are now apparently subject to FDCPA restrictions whenever they seek to collect "[a]ny debts," slip op. 15 n.8, even those that were not in default at the time they acquired them. That result flouts congressional intent.

Finally, the panel had no persuasive response to Davidson's observation that its opinion was greatly underinclusive as well, opening a loophole in the statutory scheme. Davidson had explained that, under the interpretation adopted by the panel, a company could avoid the FDCPA's debt-collection restrictions simply by restructuring its agreements with primary creditors. Specifically, instead of acting as a paid collection agent for such creditors, a company could simply buy the same debt portfolios outright at risk-adjusted prices. Because such a company will always be collecting debts on its own behalf rather than "for" another, such a company is automatically and anomalously exempt from "debt collector" status under the second ("regularly collects") definition of debt collector at issue in this case. The panel acknowledged that point but stated that such a company might nonetheless be subject to regulation under the *first* ("principal purpose") definition of "debt collector." Slip op. 15 n.8. But that answer to Davidson's "loophole" argument is unpersuasive because the company in this scenario could escape regulation even under the first definition if it runs—or, in light of the panel's opinion, strategically creates—a diversified business that includes commercial activities unrelated to debt collection. That outcome would make nonsense of this statutory scheme.

III. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE BECAUSE THE PANEL'S MISINTERPRETATION WILL IMPAIR ENFORCEMENT OF THE FDCPA.

The question presented here is exceptionally important because the panel's decision creates a direct circuit split with four other courts of appeals, *see* Fed. R. App. P. 35(b)(1)(B), because it will deprive consumers of important protections against abusive debt collection practices, and because it could hamper the FTC's efforts to enforce the FDCPA. It also sweeps entities that Congress did not intend to be considered debt collectors into the statute's restrictions.

Debt collection abuse is a serious and growing consumer-protection problem. Since January 1, 2010, the FTC has sued more than 180 companies and individuals engaged in unlawful collection practices, securing over $220 million in consumer redress. FTC, Report to Consumer Financial Protection Bureau at 2 n.3, http://1.usa.gov/1QmPjQp (Feb. 2015) (2015 Report). In 2014 alone, the agency received more than 280,000 consumer complaints about debt collection—more than any other category of fraud and 35 percent more than it received the year before. *See* FTC, Consumer Sentinel Network Databook at 6, 79, http://1.usa.gov/1CrevD9 (Feb. 2015). The problem appears disproportionately acute in the states of this Circuit: more than 20 percent of those complaints were received from Alabama, Florida, and Georgia even though only 10 percent of the U.S. population lives in those states. *See id.* at 22, 31, 32; Wikipedia, U.S. Courts of Appeals, Circuit Population, http://bit.ly/1M99DGI.

If permitted to stand, the panel's decision may exempt a broad swath of debt collectors in this Circuit from the consumer protection requirements of the FDCPA. For example, mortgage servicers routinely purchase large portfolios of debt from loan originators. At the time of purchase, some of the accounts may be current and others in default. Such a loan purchaser would not fall within the panel's interpretation of "debt collector," leaving the FTC impotent to police collection abuses using the FDCPA. The FTC has brought at least four such cases,[4] resulting in judgments totaling more than $130 million—but under the panel ruling it could not bring such a case under the FDCPA in this Circuit.

Indeed, the panel opinion provides a roadmap for avoiding the strictures of the FDCPA in the states of this Circuit. A debt collector that formerly undertook to collect defaulted debts for other parties on a contingency basis now only needs to buy the debt outright (at a risk-adjusted price). As long as it ensures that debt collection is not its principal purpose (which would place it in the first prong of the definition), it no longer can be deemed a "debt collector" within the meaning of the statute, at least in this Circuit. The FTC could be unable to bring under the FDCPA cases such as *FTC v. Asset & Capital Management Group*, No. 8:13-cv-01107 (S.D. Cal.), which involved abusive and deceptive debt collection practices including threats of

[4] *See FTC v. Green Tree Servicing LLC*, No. 0:15-cv-2064 (D. Minn. 2015); *FTC v. EMC Mortg. Corp.*, No. 4:08-cv-338 (E.D. Tex. 2008); *United States v. Fairbanks Capital Corp.*, No. 1:03-cv-12219 (D. Mass. 2003); *FTC v. Capital City Mortg. Corp.*; No. 1:98-cv-237 (D.D.C. 1998).

garnishment, property seizure, and arrest. *See 2015 Report* at 3-4; FTC Press Release, *FTC Returns Almost $4 Million to Consumers in Debt Collection Scam* (June 30, 2015), http://1.usa.gov/1RQr255.

Finally, as noted above, the panel's interpretation of "debt collector" would perversely extend FDCPA restrictions to entities that the statute was not intended to cover. Automobile manufacturers, for example, often use financing companies whose principal purpose is to service car loans. When the loans are transferred to the servicing company, few if any of them are in default. Congress did not intend such loan servicers to be covered by the FDCPA. That is why the statute excepts from the definition of "debt collector" "any person collecting . . . any debt owed . . . another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained." 15 U.S.C. § 1692a(6)(F)(iii). Under the panel's reading, however, "an entity whose 'principal purpose' is the collection of '*any* debts,'" whether or not in default, is a debt collector subject to the statute, and the now-nullified (F)(iii) exception can no longer fix the problem.

CONCLUSION

The Court should grant appellant's petition for rehearing en banc and reverse the district court's decision.

Respectfully submitted,

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September 21, 2015

STATUTORY APPENDIX

15 U.S.C. § 1692a(4):

> (4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

15 U.S.C. § 1692a(6):

> (6) The term "debt collector" means 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, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. The term does not include—
>
> * * *
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity
>
> (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;
>
> (ii) concerns a debt which was originated by such person;
>
> (iii) concerns a debt which was not in default at the time it was obtained by such person; or
>
> (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.
>
> * * *

Certificate of Service

I hereby certify that on September 21, 2015, I filed the foregoing with the Court's appellate CM-ECF system, and that I caused the foregoing to be served through the CM-ECF system on the counsel of record for the plaintiff-appellant and the defendant-appellee, who are registered ECF users.

September 21, 2015

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