No. 15-1187

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Ricky Henson, Ian Glover, Karen Pacouloute f/k/a Karen Welcome Kuteyi and Paulette House, on behalf of themselves and all others similarly situated,
Plaintiffs - Appellants,

v.

Santander Consumer USA, Inc.,
Defendant - Appellee.

and

NCB Management Services, Inc.; Commercial Recovery Systems, Inc.
Defendants.

On Appeal from the United States District Court for the District of Maryland
No. 12-3519

PETITION FOR REHEARING *EN BANC*

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STATEMENT REQUIRED BY RULE 35(b)

Rehearing *en banc* is warranted because this case involves a question of exceptional importance. FED. R. APP. P. 35(b). The panel's holding that the *Fair Debt Collection Practices Act* ("FDCPA"), 15 U.S.C. §§ 1692-1692p "generally does not regulate creditors when they collect debt on their own account" dramatically curtails the scope of the FDCPA, strips consumers of valuable federal statutory rights by removing from coverage any entity purchasing a defaulted debt and collecting the debt on behalf of itself and is in direct conflict with decisions of other circuits that have addressed this identical issue.

The FDCPA prohibits specific entities (debt collectors)[1] from using specifically enumerated unfair or deceptive practices to collect debts from consumers. This appeal only concerns which *entities* are covered by the FDCPA. Under this panel's opinion, a federal statute enacted to provide important rights and protections from debt collectors has been judicially repealed in part.

The panel decision that any entity collecting on its own debt is not a "debt collector" subject to the FDCPA, even when the entity collecting did not originate the debt and where the debt was purchased years after default, is in direct conflict with the decisions of the Third, Sixth and Seventh Circuits, the Federal Trade

[1] Congress identified two types of entities that collect debts: (1) debt collectors [15 U.S.C. § 1692a(6)]; and (2) creditors [15 U.S.C. § 1692a(4)]. The FDCPA applies to restrict and punish the actions of "debt collectors" and generally exempts "creditors" from coverage.

Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB"). *FTC v. Check Investors, Inc.*, 502 F. 3d 159 (3d Cir. 2007); *Ruth v. Triumph Partnerships*, 577 F.3d 790, 796 (7th Cir. 2009); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir.2003); *McKinney v. Cadleway Properties*, 548 F.3d 496, 501 (7th Cir. 2003); *Bailey v. Security Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir. 1998); *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355 (6th Cir. 2012); FTC Report, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration,* p. 6 n. 15 (2010) (available at www.ftc.gov/os/2010/07/debtcollectionreport.pdf) (last visited April 6, 2016); and Consumer Financial Protection Bureau, 2013 FDCPA Annual Report, at 14 n.14 (available at http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf) (last visited April 6, 2016). These cases and agency interpretations hold categorically that the determination of whether an entity is a debt collector (covered) or creditor (not covered) under the FDCPA is whether the debt was in default at the time the entity acquired the specific debt. These decisions and administrative agency interpretations appropriately apply the FDCPA's definition of debt collector to include all debt buyers purchasing debts after default. If the panel opinion were left untouched, debt buyers would be entirely unregulated by the FDCPA because regardless of whether it is the principal purpose of the

business or whether the entity only regularly participates in debt collection activities, the debt buyer always collects on its own debt.

In addition, the panel decision confuses whether an *entity* is a "debt collector" subject to the FDCPA due to its general business practices in collecting debts with whether a *specific debt* is subject to or excluded from FDCPA coverage. By requiring a consumer to allege that an entity is collecting the specific debt "for another[,]" the panel opinion sets a dangerous precedent that could be read to eliminate from FDCPA coverage all debt buyers collecting their own debts.

This Court should grant rehearing *en banc* to address the scope of the important consumer protections afforded by the FDCPA as this Court's interpretation will control hundreds of thousands (100,000's) of transactions and millions (1,000,000's) of interactions between consumers and commercial entities each year within the Fourth Circuit.

BACKGROUND

This consumer class action was filed by Appellants against Appellee Santander Consumer USA, Inc. ("Santander") alleging multiple violations of the FDCPA for alleged abusive debt collection activities undertaken by Santander and its agents. Appellants alleged that the original creditor hired Santander to collect from Appellants and more than three thousand (3,000) other Maryland consumers after each of their consumer debts were in default and that sometime thereafter

when each of Appellants' debts were still in default Santander purchased the debts and began attempting to collect the defaulted debts in its own name.

Santander filed a Motion to Dismiss in the United States District Court arguing that it was not a "debt collector" and therefore not subject to the FDCPA. Rather, Santander asserted that it was a "creditor" with respect to its debt collection activities against Appellants because Santander purchased the consumer debts and was not attempting to collect from Appellants on behalf of another. The District Court granted the Motion to Dismiss holding that Santander was not a "debt collector" subject to the FDCPA because Santander purchased the debt and was attempting to collect the defaulted consumer debts on behalf of itself. Appellants appealed the District Court's decision dismissing the case. After oral argument, the Fourth Circuit Panel affirmed the District Court's opinion. Dk. #62.

ARGUMENT

A. The Panel Decision is in Direct Conflict with the Decisions of Other Circuits

The panel's conclusion that the FDCPA never applies to a debt buyer (*i.e.* an entity other than the original creditor that is collecting on behalf of itself) is in direct conflict with the decisions of the Third, Sixth and Seventh Circuits.[2]

[2] The Panel Decision recognized but refused to address or analyze the Circuit split. Dk. #62 at 12 (*citing Bridge*, *Ruth* and *Check Investors*).

In *FTC v. Check Investors, Inc.*, 502 F. 3d 159 (3d Cir. 2007), a large group of consumers drafted checks that were not covered by deposited funds. Multiple third-party companies guaranteed these checks for merchants in exchange for all rights in collecting any insufficient funds checks which were considered debts under the FDCPA. The third-party companies originally hired Check Investors to collect the debts on their behalf. Assuming that it could skirt the requirements of the FDCPA and use deceptive and harassive debt collection techniques by acquiring the debts and collecting in its own name, Check Investors began buying these insufficient funds checks from the third-party companies for pennies on the dollar.

Check Investors as a non-originating debt buyer argued that it was not subject to the FDCPA because "they are actually 'creditors' collecting debts actually owed to them, as opposed to 'debt collectors' collecting obligations owed to someone else." *Id.* at 172 (citations omitted). The Third Circuit found that "pursuant to § 1692a, Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA." *Id.* at 173. The Third Circuit held that under the FDCPA a non-originating debt buyer that acquires a debt prior to default is a "creditor" and if that same entity acquires a debt after default it is a "debt

collector[.]" *Id.* at 173 (*citing Pollice v. National Tax Funding, L.P.*, 225 F.3d 379, 403-04 (3d Cir. 2000)).

In *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003), a consumer obtained a mortgage from a debt originator. After default, the debt originator sold the consumer's mortgage obligation to a non-originating debt buyer. The consumer alleged causes of action under the FDCPA and the Seventh Circuit Court of Appeals was called on to determine whether a non-originating debt buyer that obtains a debt in default is a "debt collector" under the FDCPA. The Seventh Circuit analyzed the definition of "debt collector" under 15 U.S.C. § 1692a(6) and any applicable exclusion thereto contained in 15 U.S.C. § 1692a(6)(F) and determined that a non-originating debt buyer is classified as a "debt collector" or "creditor" under the FDCPA based on "the status of the debt at the time of the assignment[.] In other words, the Act treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not." *Schlosser*, 323 F.3d at 536. The Seventh Circuit reinforced its statutory interpretation with the policy choice Congress made in setting the default status of the debt as the determining factor of whether a non-originating debt buyer is a "debt collector" or a "creditor" under the FDCPA:

> Focusing on the status of the obligation asserted by the assignee is reasonable in light of the conduct regulated by the statute. For those who acquire debts originated by others, the distinction drawn by the statute—whether the

> loan was in default at the time of the assignment—makes sense as an indication of whether the activity directed at the consumer will be servicing or collection. If the loan is current when it is acquired, the relationship between the assignee and the debtor is, for purposes of regulating communications and collection practices, effectively the same as that between the originator and the debtor. If the loan is in default, no ongoing relationship is likely and the only activity will be collection.

Id. at 538. The Seventh Circuit has reached this identical conclusion on several different occasions. *Ruth v. Triumph Partnerships*, 577 F.3d 790, 796 (7th Cir. 2009) ("the party seeking to collect a debt did not originate it but instead acquired it from another party, we have held that the party's status under the FDCPA turns on whether the debt was in default at the time it was acquired"); *McKinney v. Cadleway Properties*, 548 F.3d 496, 501 (7th Cir. 2003) (holding that a non-originating debt buyer that attempts to collect on a debt that was in default when it was acquired is a debt collector under the FDCPA "even though it owns the debt and is collecting for itself"); *Bailey v. Security Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir. 1998).

The Sixth Circuit was presented with similar facts regarding a claim under the FDCPA against a non-originating debt servicer and a non-originating debt buyer and was required to determine when these entities are considered "debt collectors" under the FDCPA. *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355 (6th Cir. 2012). The Sixth Circuit determined that:

> The distinction between a creditor and a debt collector lies precisely in the language of § 1692a(6)(F)(iii). For an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired. The same is true of a loan servicer, which can either stand in the shoes of a creditor or become a debt collector, depending on whether the debt was assigned for servicing before the default or alleged default occurred. This interpretation of the Act is supported by Congress's intent in passing it.

Id. at 359 (citations omitted). The Sixth Circuit found that the non-originating debt servicer and non-originating debt buyer were "debt collectors" under the FDCPA because they each obtained the debt after it was in default.[3]

[3] In addition, the Federal Trade Commission and the Consumer Financial Protection Bureau, the two federal government agencies tasked with implementing, interpreting and regulating the FDCPA, have each interpreted the FDCPA definition of "debt collector" to include non-originating debt buyers that acquire debts after default. *See, e.g.*, FTC Report, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, p. 6 n. 15 (2010) (available at www.ftc.gov/os/2010/07/debtcollectionreport.pdf) (last visited May 8, 2015) ("Debt buyers – persons who collect debt on their own behalf that they have purchased from creditors or debt collectors – are covered by the FDCPA if the accounts were in default at the time the debt buyers purchased them. FDCPA §§ 803(4), 803(6); 15 U.S.C. §§ 1692a(4), 1692a(6)"); and Consumer Financial Protection Bureau, 2013 FDCPA Annual Report, at 14 n.14 (available at http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf) (stating that the FDCPA applies to "debt buyers collecting on debts they purchased in default"). Appellants feel that due to the nature of this Petition and the importance of the issue pending in this Petition, this Court should request that both the FTC and CFPB file *amicus* briefs stating their opinion on this issue.

For these reasons, the panel decision is not in line with the majority of Circuits to have considered this identical issue. *But see Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015). Accordingly, given the clear conflict between the panel decision and the decisions of the Third, Sixth and Seventh Circuits, *en banc* review is warranted so that this court can address the scope of the protections afforded to consumers under the FDCPA.

B. The Panel Decision Conflates Inclusionary and Exclusionary Language in the "Debt Collector" Definition

In determining whether a consumer can pursue remedies under the FDCPA a reviewing court must first determine whether *the entity* qualifies as a "debt collector" due to its general business operations. 15 U.S.C. § 1692a(6) ("principal purpose of which is the collection of *any debts*" or "regularly collects . . . *debts* owed or due or asserted to be owed or due another") (emphasis supplied). If *the entity* qualifies as a "debt collector" due to its general business operations all debts it collects are subject to the FDCPA unless the reviewing court determines that the *specific debt* at issue as alleged in the complaint is excluded from the definition of "debt collector." 15 U.S.C. § 1692a(6)(F) (stating that the term "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 . . . (ii) concerns *a debt* which was originated by such person; [or] (iii) concerns *a debt* which was not in default at the time it was obtained by such person[.]") (emphasis

supplied). The Panel Decision conflates these two concepts (entity analysis and specific debt analysis) by requiring a consumer to allege both that the entity "regularly collects . . . *debts* owed or due or asserted to be owed or due another" and that the *specific debt* alleged in the complaint was "owed or due another[.]" Dk. #62 at 13 (requiring Appellants to allege "that Santander regularly collects debts owed to others and was doing so here").

The panel began its analysis correctly by noting that "[t]he material distinction between a debt collector and a creditor -- at least with respect to the second definition of 'debt collector' provided by § 1692a(6) -- is therefore whether a person's regular collection activity is only for itself (a creditor) or whether it regularly collects for others (a debt collector)[.]" Dk. #62 at 11. This statement is accurate[4] to the extent that the statute requires the Court to analyze the business practices of the entity in question prior to looking at the specific debt related to the allegations of the complaint. This is confirmed by the statutory language referring to the plural "any debts" and " regularly collects . . . debts[.]"[5] *See Davidson*, 797

[4] Appellants argued and maintain the position that "owed or due or asserted to be owed or due another" are meant to be read separately creating two types of debts, those - (1) owed or due, or (2) asserted to be owed or due another. "[O]wed or due" includes any entity that originated, was assigned or purchased debts and "asserted to be owed or due another" would include any servicer of debts.

[5] The FDCPA defines a "debt collector" in relevant part as:

F.3d at 1316 (stating that under 15 U.S.C. § 1692a(6) "'[a]ny debts' means 'all debts[]'"). Whether an entity has the "principal purpose of which is the collection of *any debts*" or "regularly collects . . . *debts* owed or due or asserted to be owed or due another" has nothing to do with the specific debt owed and at issue as alleged in the complaint. 15 U.S.C. § 1692a(6) (emphasis supplied).

The panel next overly limits the definition of "debt collector" by adding a second requirement under the definition of "debt collector" that the specific debt owed as alleged in the complaint was "owed to others[.]" Dk. #62 at 13 (requiring Appellants to allege "that Santander regularly collects debts owed to others and

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> 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 . . . (ii) concerns a debt which was originated by such person; [or] (iii) concerns a debt which was not in default at the time it was obtained by such person[.]"

15 U.S.C. § 1692a(6).

was doing so here"). This requirement that a consumer allege that the specific debt was "owed to others" does not find any support in the "debt collector" definition as that definition solely looks at the entity's general business practices to determine whether the entity qualifies as a "debt collector" subject to the FDCPA. *Davidson*, 797 F.3d at 1316 (stating that "a person must regularly collect or attempt to collect debts *for others* in order to qualify as a 'debt collector' under the second definition of the term") (emphasis in original). By requiring the consumer to allege that the "debt collector" was collecting the specific debt "for another[,]" the panel conflated the inclusionary definition of "debt collector" ("regularly collects . . . debts") with the exclusions to the definition of "debt collector" that relate only to the specific debt at issue as alleged in the complaint ("any debt owed or due or asserted to be owed or due another").

Had the panel solely analyzed Appellee's debt collection practices on an entity level as required to determine whether Appellee as an entity was subject to the FDCPA under the definition of "debt collector[,]" the panel would have determined that Appellee "regularly collects . . . *debts* owed or due or asserted to be owed or due another" under the allegations in this case.[6] In addition, the panel

[6] *See*, *e.g.*, *Davidson*, 797 F.3d at 1318 ("our inquiry under § 1692a(6) is not whether Capital One regularly collects on debts *originally* owed or due another and now owed to Capital One; our inquiry is whether Capital One regularly collects on debts owed or due another at the time of collection. The amended complaint makes no factual allegations from which we could plausibly infer that Capital One

would have found no basis for excluding the specific debt from coverage since Appellee purchased the debt well after default and did not originate the debt. 15 U.S.C. § 1692a(6) and 15 U.S.C. § 1692a(6)(F).

Rehearing *en banc* will allow the court to re-assess the panel decision that a consumer must allege that an entity was collecting the specific debt "for another" in order to afford coverage under the FDCPA "debt collector" definition. The Fourth Circuit now stands alone in requiring this additional allegation to an FDCPA complaint. In reaching this conclusion, the panel has set a dangerous precedent that will be used by all debt buyers (a multibillion dollar industry) to skirt liability under the FDCPA even though all debt buyers are plainly covered by the "debt collector" definition.

CONCLUSION

For the reasons set forth herein, the court should grant rehearing *en banc*.

Respectfully submitted this 6th day of April, 2016.

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regularly collects or attempts to collect debts owed or due to someone other than Capital One.") (emphasis in original).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 35(b)(2) because this brief does not exceed fifteen (15) pages.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using *Microsoft Office Word 2007* in *14pt Times New Roman*.

Dated: April 6, 2016

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Counsel for Plaintiffs-Appellants

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of April, 2016, I caused this Petition for Rehearing *En Banc* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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ADDENDUM

FAIR DEBT COLLECTION PRACTICES ACT, 15 U.S.C. § 1692a

As used in this subchapter—

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(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.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(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. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(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.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.