No. 19-10204

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONSTANCE DANIELS,

Plaintiff-Appellant,

v.

SELECT PORTFOLIO SERVICING, INC.,

Defendant-Appellee.

On Appeal from a Final Order of the
United States District Court for the Middle District of Florida
No. 8:18-cv-01652-JSM-CPT, Hon. James S. Moody, Jr., U.S.D.J.

BRIEF FOR AMICI CURIAE PUBLIC CITIZEN AND U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND IN SUPPORT OF APPELLANT AND REVERSAL

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May 3, 2019

No. 19-10204, *Daniels v. Select Portfolio Servicing, Inc.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

A. Pursuant to 11th Circuit Rules 26.1-1 through 26.1-3, Amici Curiae Public Citizen and U.S. Public Interest Research Group Education Fund provide the following list of the persons and entities that have or may have an interest in the outcome of this case:

Allred, Alexander R.

Altekruse, Cliff, Circuit Mediator

Brown, Benjamin B.

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Cuykendall, Amy E.

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Public Citizen Foundation, Inc.

No. 19-10204, *Daniels v. Select Portfolio Servicing, Inc.*

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B. Amici curiae Public Citizen, Inc., and U.S. Public Interest Education Fund, Inc., are nonprofit, non-stock corporations. They have no parent corporations, and no publicly traded corporation has an ownership interest in them of any kind.

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INTEREST OF AMICI CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. In particular, Public Citizen advocates strong protection for borrowers against predatory lending and debt-collection practices and for vigorous enforcement of the Fair Debt Collection Practices Act (FDCPA), the statute at issue in this case. Public Citizen often represents its members' interests in litigation and as amicus curiae, including in many cases involving the FDCPA and other federal consumer protection statutes.

U.S. Public Interest Research Group Education Fund, Inc. (U.S. PIRG Education Fund) is an independent, non-partisan 501(c)(3) organization that works for consumers and the public interest. U.S. PIRG

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[1] Amici curiae have moved for leave to file this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amici curiae, their members, or their counsel contributed money intended to fund the brief's preparation or submission.

Education Fund seeks to advance the interest of consumers in robust protections under the FDCPA and other consumer-protection statutes against harmful financial products and services. U.S. PIRG Education Fund regularly advances this interest through litigation, including the submission of amicus briefs in cases in the federal courts.

Amici curiae Public Citizen and U.S. PIRG Education Fund submit this brief because they are concerned that the district court in this case (and other district courts within this circuit) have misread an advisory opinion of the Consumer Financial Protection Bureau (CFPB) and created an unintended and damaging loophole in the protections offered to consumers by the FDCPA. The CFPB opinion limits the liability of mortgage servicers only under a single provision of the FDCPA, but the district court in this case misunderstood it to exempt periodic billing statements issued by mortgage servicers from the scope of the FDCPA entirely. Amici curiae believe that a short brief that provides a thorough discussion of the scope of the CFPB advisory opinion and its reasoning may be helpful to this Court in deciding this appeal.

STATEMENT OF THE ISSUE

Whether the district court erred in holding that a mortgage servicer's periodic billing statements fall completely outside the scope of debt-collection activity subject to the FDCPA based on a CFPB advisory opinion that provides only that sending periodic billing statements does not violate the "cease communication" requirement of the FDCPA, 15 U.S.C. § 1692c(c).

SUMMARY OF ARGUMENT

The district court held as a matter of law that defendant-appellee Select Portfolio Servicing, Inc., was not engaged in debt-collection activity subject to the FDCPA when it sent mortgage billing statements to plaintiff-appellant Constance Daniels that contained material misrepresentations about the amounts due. The court rested its holding on an advisory opinion of the CFPB addressing a provision of the FDCPA that prohibits a debt collector from communicating with a consumer about a debt after the consumer has directed the debt collector to "cease further communication with the consumer." 15 U.S.C. § 1692c(c). The CFPB advisory opinion concluded that periodic billing statements sent by mortgage servicers are exempt from that one provision.

The district court's holding that the CFPB's advisory opinion, tightly targeted on a single provision of the FDCPA, completely exempts mortgage billing statements from all FDCPA requirements reflects a misunderstanding of the function of CFPB advisory opinions, the scope of the specific advisory opinion at issue, and the reasoning underlying the advisory opinion. The CFPB's advisory opinion states only that when a mortgage servicer sends a debtor a periodic billing statement, it may not be held liable for violating 15 U.S.C. § 1692c(c). The advisory opinion provides mortgage servicers a safe harbor against liability limited to that section.

Neither the terms nor the reasoning of the advisory opinion extend to other provisions of the FDCPA. The opinion is based on the CFPB's view that because periodic billing statements are required by statute and regulation, a servicer does not violate the "cease communication" provision by sending a billing statement. That reasoning does not extend to violations of other FDCPA requirements, such as the prohibition on misrepresentations at issue here.

Moreover, the CFPB's opinion does not remotely suggest that sending billing statements is not debt-collection activity. Indeed, the

opinion explicitly presupposes that mortgage servicers who send billing statements to debtors *are* engaged in debt-collection activity to which the FDCPA otherwise applies. Thus, properly understood, the CFPB's opinion strongly *supports* the view that periodic mortgage billing statements are attempts to collect a debt and are thus subject to FDCPA requirements other than the requirement in § 1692c(c).

The district court's misreading of the CFPB's opinion wrongly limits the protections the FDCPA affords mortgage debtors by effectively exempting mortgage servicers who engage in debt-collection activity from requirements aimed at protecting debtors against abusive collection practices, including outright misrepresentations. This Court should not create such a loophole in the Act based on a CFPB opinion aimed at reconciling a single FDCPA provision with servicers' legal obligations under other laws.

ARGUMENT

I. The CFPB advisory opinion relied on by the district court does not support the court's holding that periodic mortgage billing statements are not debt-collection communications subject to the FDCPA.

A. The CFPB advisory opinion addresses only the FDCPA's "cease communication" requirement.

The CFPB advisory opinion at issue here is a narrowly focused exercise of the agency's authority to interpret the FDCPA to protect debt collectors against liability when they act in conformity with the CFPB's advice. In creating the CFPB, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), transferred to the new agency responsibilities with respect to a number of existing statutes governing consumer financial transactions, including the FDCPA. Among the powers the Dodd-Frank Act transferred from the Federal Trade Commission to the CFPB is the authority to issue advisory opinions providing debt collectors with safe harbors from liability under the FDCPA. Specifically, the FDCPA's civil-liability provision, 15 U.S.C. § 1692k(e), states that "[n]o provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or

determined by judicial or other authority to be invalid for any reason." Such opinions do not definitively establish the scope of the FDCPA—indeed, the statute itself recognizes that they may be determined to be invalid by the courts. But they provide a narrowly "tailored" protection for debt collectors who seek in good faith to conform themselves to the law "when the Act's prohibitions are uncertain." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 588 (2010).

In the advisory opinion at issue, the CFPB addressed one such uncertainty: how mortgage servicers that meet the FDCPA's definition of a "debt collector," 15 U.S.C. § 1692a(6), can comply with certain obligations under the CFPB's 2013 mortgage servicing rules, 12 C.F.R. Parts 1024 & 1026, without risking liability under the FDCPA for communicating with a debtor who has directed that the debt collector cease communications about the debt. *See* CFPB, Implementation Guidance for Certain Mortgage Servicing Rules, CFPB Bulletin 2013-12, at 6–7 (Oct. 15, 2013), https://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf ("Bulletin 2013-12").[2] Specifically,

[2] Bulletin 2013-12 is also available at 2013 WL 9001249; however, because the Westlaw version does not contain star pagination, this brief

Footnote continued

Bulletin 2013-12 discusses the "interplay" of the FDCPA's "cease communication" provision with "certain provisions of the servicing rules requiring disclosures to and communications with borrowers who have defaulted on the payments of their mortgage loans." *Id.* at 6. Of relevance here, those provisions include 12 C.F.R. § 1026.41, requiring a servicer "to provide borrowers … a periodic statement for each billing cycle." *Id.* at 7. The Bulletin addresses the concern that, "[t]o the extent the FDCPA applies to a servicer's activities regarding a borrower, the 'cease communication' provision of the FDCPA [15 U.S.C. § 1692c(c)] may make such a servicer uncertain whether it will be liable under the FDCPA" when it sends the communications required under the servicing rules. *Id.* at 6.

Exercising its authority under § 1692k(e) to provide debt collectors with a safe harbor for acts "in conformity with an advisory opinion of the CFPB while that advisory opinion is in effect," *id.*, the CFPB concluded in Bulletin 2013-12 that "the FDCPA 'cease communication' option does

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uses the page numbers of the original version available on the CFPB's website to allow specific references to the Bulletin's contents. Bulletin 2013-12 addresses three distinct topics, and the advisory opinion that is pertinent to this case makes up only the last two pages of the seven-page Bulletin.

not generally make servicers that are debt collectors liable under the FDCPA if they comply with certain provisions" of the servicing rules requiring that servicers communicate with borrowers, including 12 C.F.R. § 1026.41's requirement of periodic billing statements. *Id.* The Bulletin expressly states that it interprets only "the CFPB 'cease communication' requirement," *id.*, and it discusses no other prohibitions or requirements of the FDCPA.

The Bulletin's reasoning is straightforward. It explains that the requirement that mortgage servicers issue a periodic billing statement for each billing cycle, together with disclosure requirements regarding forced placement of hazard insurance and adjustments to interest rates for adjustable-rate mortgages, was "specifically mandated" by amendments to the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) included in the Dodd-Frank Act. *Id.* at 7 (citing Dodd-Frank Act §§ 1418, 1420 & 1463, *codified at* 15 U.S.C. §§ 1638a & 1638(f), and 12 U.S.C. § 2605(*l*)(1)). The Bulletin notes that in requiring these communications, the Dodd-Frank Act "ma[de] no mention of their potential cessation under the FDCPA." *Id.* It reasons that the Dodd-Frank Act "presents a more recent and specific statement

of legislative intent regarding these disclosures than does the FDCPA." *Id.* "Moreover," the Bulletin adds, "the CFPB believes that these notices provide useful information to consumers regardless of their collections status." *Id.* Accordingly, the Bulletin states that "[t]he CFPB has determined that a servicer acting as a debt collector would not be liable under the FDCPA for complying with these requirements despite a consumer's 'cease communications' request." *Id.*[3]

[3] The Bulletin also concludes that communications that mortgage servicers are required to make in response to debtor-initiated reports of errors, requests for information, or applications for loss-mitigation relief should not be barred by a "cease communication" directive. The CFPB reasoned that a borrower's "cease communication" directive "should ordinarily be understood to exclude these categories of communication, because the borrower has specifically requested the communication at issue." Bulletin 2013-12, at 7. "Thus, only if the borrower sends a communication to the servicer specifically withdrawing the request for such action may a servicer cease to carry out the requirements of these provisions." *Id.*

B. Neither the safe harbor created by the CFPB opinion nor the opinion's reasoning extends beyond the "cease communication" requirement.

Nothing in the Bulletin supports the district court's view that it reflects the CFPB's conclusion that periodic billing statements sent by a mortgage servicer (or any of the other specific communications addressed in the Bulletin) fall completely outside the FDCPA because they are not communications in connection with the collection of a debt. The CFPB's advisory opinion addresses only a mortgage servicer's potential liability for communications that would violate the "cease communication" requirement of § 1692c(c): It states that "*the 'cease communication' option* does not generally make servicers that are debt collectors liable under the FDCPA," *id.* at 6 (emphasis added), if they make communications required by the mortgage servicing rules. *See also id.* at 7 (providing that a debt collector who sends required communications "despite a consumer's 'cease communication' request" would not for that reason alone be liable under the FDCPA). The Bulletin does not state that those communications are exempt from other FDCPA requirements or that servicers are protected against liability for violating provisions other than the "cease communication" requirement.

Moreover, the Bulletin's reasoning does not provide any basis for extending its safe harbor to FDCPA violations other than violations of the "cease communication" provision—much less for exempting mortgage servicers from FDCPA liability for blatant misrepresentations in periodic billing statements of the kind that are at issue here. The CFPB's reason for concluding that merely sending Dodd-Frank-mandated periodic billing statements and other required communications cannot give rise to liability based on the "cease communication" provision is that it makes no sense to impose liability for nothing more than having sent a communication when that communication is mandated by a legal requirement imposed subsequently to the enactment of the FDCPA. Thus, the CFPB determined that Dodd-Frank impliedly excluded such required communications from the scope of § 1692c(c)'s prohibition on debt-collection communications following a "cease-communication" directive.

No similar reason supports limiting the application of other substantive FDCPA requirements and prohibitions to periodic billing statements. In particular, nothing in the Dodd-Frank Act's amendments to TILA or RESPA, or the mortgage servicing regulations implementing

them, requires mortgage servicers to send borrowers billing statements that contain misrepresentations or make demands amounting to harassment or unconscionable conduct, in violation of the FDCPA provisions invoked by Ms. Daniels in this case, 15 U.S.C. §§ 1692d, 1692e & 1692f. Indeed, the requirement in the mortgage servicing regulations that servicers send billing statements containing specified information, including information about amounts due, 12 C.F.R. § 1026.41, requires *accurate* information, not misrepresentations.[4] As a result, unlike enforcing the "cease communication" requirement against a mortgage servicer merely because it sent out a required periodic billing statement, imposing liability under the FDCPA for *misrepresentations* in a billing statement would not result in holding a debt collector "liable under the FDCPA for complying with [mortgage-servicing rule] requirements." Bulletin 2013-12, at 7.[5] Put another way, nothing "specifically mandated"

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[4] *See* CFPB, Comment for 1026.41 – Periodic Statements for Residential Mortgage Loans, Comment 41(d)(1), https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/Interp-41/#41-c-Interp-4.

[5] *Cf. Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1039–40 (2019) (stating that a debt collector engaging in conduct required by another law is not excused from liability under the FDCPA for debt-

Footnote continued

by the Dodd-Frank Act, *id*., impliedly limits application of the FDCPA provisions at issue here to periodic billing statements issued by mortgage servicers.

In short, the Bulletin offers a practical solution to a practical problem. In practice, it would be impossible for mortgage servicers to comply both with the provisions of Dodd-Frank that require certain communications with consumers and with the FDCPA's "cease communication" provision. No such practical conflict, however, exists between Dodd-Frank's communication requirements and the provisions of the FDCPA that prohibit harassment (15 U.S.C. § 1692d), misrepresentation (15 U.S.C. § 1692e), and unconscionable practices (15 U.S.C. § 1692f). It is entirely possible for a mortgage servicer acting as a debt collector to make the required communications to consumers and do so without harassing the consumer, making misrepresentations, or engaging in unconscionable conduct.

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collection activity that the FDCPA prohibits and that is *not* required by the other law).

C. The CFPB Bulletin does not exclude periodic billing statements from the scope of the FDCPA's regulation of debt-collection activity.

Of critical importance to this case, the CFPB Bulletin does not even hint at the view adopted by the district court: that periodic billing statements fall completely outside the FDCPA because they are not communications in connection with the collection of debts. Had that been the CFPB's view, it would have written a completely different advisory opinion. Instead of finding that the Dodd-Frank Act's mortgage-servicing requirements implicitly limited application of a single FDCPA provision to periodic billing statements, the CFPB would have told mortgage servicers directly that they need not worry about FDCPA liability for such statements because they do not constitute debt-collection activity. And the CFPB would not have limited its opinion (and the resulting safe harbor) to "interpreting the FDCPA 'cease communication' requirement in relation to the 2013 Mortgage Servicing Final Rules." *Id.* at 6. Instead, its opinion would have covered a broad swath of FDCPA requirements.

Not only does the Bulletin contain no suggestion that mortgage servicers' periodic billing statements fall entirely outside the realm of debt-collection activity; it explicitly presupposes the contrary. The

Bulletin repeatedly states that it addresses the potential liability of mortgage servicers "that are debt collectors" within the meaning of the FDCPA. *Id*. The safe harbor that it grants with respect to the "cease-communication" provision applies to "a servicer that is considered a debt collector under the FDCPA with respect to a borrower," *id*., and renders the "cease communication" limitation applicable to periodic billing statements sent by "a servicer *acting as a debt collector*," *id*. at 7 (emphasis added). Indeed, the need for the safe harbor the CFPB advisory opinion creates exists only "[t]o the extent the FDCPA applies to a servicer's activities regarding a borrower." *Id*. at 6. The Bulletin could hardly be more explicit in stating that the CFPB is concluding that the Dodd-Frank Act's periodic-billing-statement requirement renders the "cease communication" provision (and only that provision) inapplicable in circumstances where the FDCPA's provisions otherwise apply *because the servicer is a debt collector engaging in debt-collection activity with respect to a debtor*.[6] It follows, therefore, that FDCPA provisions other

[6] That Bulletin 2013-12 does not suggest that communications required by the agency's TILA and RESPA regulations fall outside the scope of debt collection under the FDCPA is confirmed by its statement that certain of those communications (responses to error reports,

Footnote continued

than the specific one with which the CFPB excused servicers from complying continue to apply to periodic billing statements.

Bulletin 2013-12 thus provides no support for the district court's conclusion that the FDCPA's prohibitions on misrepresentation, harassment, and unconscionable conduct are inapplicable to the billing statements in this case because those billing statements are not debt-collection activity. Rather, as another district court in this Circuit concluded, the Bulletin means only that "in some instances, [a] debt collector may contact the debtor directly despite the issuance of a cease and desist notice." *Foster v. Green Tree Servicing,* No. 8:15-cv-1878-T-27MAP, *LLC*, 2017 WL 5151354, at *5 (M.D. Fla. Nov. 3, 2017). Periodic mortgage billing statements that seek to collect a debt, however, still "constitute[] debt collection activity" and may be the basis of FDCPA liability if they violate FDCPA requirements or prohibitions other than § 1692c(c). *Id*.

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requests for information, and loss-mitigation requests) *can* give rise to liability even under the "cease communication" provision if the servicer persists in making them after being specifically requested to cease further communications on those subjects. Bulletin 2013-12, at 6.

In this case, the district court's misreading of the CFPB Bulletin was the sole basis for its conclusion that billing statements alleged to contain misrepresentations are not actionable under the FDCPA. As Ms. Daniels' brief demonstrates, absent the court's misplaced reliance on the Bulletin, there is no credible argument under this Court's precedents and the plain meaning of the statute that the billing statements were not debt-collection communications subject to the FDCPA.

Indeed, the Supreme Court itself recently recognized that collecting amounts due in connection with a home mortgage—which is undisputedly what the communications at issue in this case sought to do—falls easily within the plain meaning of debt collection. *Obduskey*, 139 S. Ct. at 1036. In *Obduskey*, other dictates of the statute's language and structure nonetheless compelled the conclusion that persons engaged principally in one way of collecting debts—enforcement of security interests—were largely excluded from the coverage of the FDCPA's "debt collector" definition. *See id.* at 1037–39. Here, by contrast, the statutory scheme does not require broadly excluding the communications at issue from the Act's coverage; and, indeed, the CFPB's explanation for why it excluded such communications from one specific provision of the Act

underscores why those communications are not exempt from the Act's fundamental command that debt collectors may not "make false, deceptive, or misleading representations in connection with a debt, like misstating a debt's character, amount, or legal status." *Id*. at 1036.

II. The district court's reading of the CFPB advisory opinion would create a gaping loophole in the FDCPA's protections.

If this court were to adopt the district court's reading of the Bulletin, it would create a significant and dangerous loophole in the FDCPA that could be exploited by unscrupulous mortgage servicers to the detriment of consumers. Under the district court's reading, the provisions of the FDCPA that prohibit harassment, misrepresentation, and unconscionable practices (15 U.S.C. §§ 1692d, 1692e, & 1692f) would not apply to a broad range of communications commonly made by mortgage servicers to consumers. In addition to the specific type of communications at issue in this case (periodic mortgage statements), the district court's reasoning also would exempt from the FDCPA the other types of communications identified in the Bulletin—including responses to error reports, requests for information, and loss-mitigation requests. Together, these communications constitute a significant portion of the

interactions that mortgage servicers regularly have with consumers. Allowing mortgage servicers acting as debt collectors to harass consumers, misrepresent information to them, or engage in unconscionable practices as long as they did so via a periodic mortgage statement or in response to an error report, a request for information, or a loss-mitigation request, would have significant negative practical consequences for consumers and the public at large.

This Court dealt with a similar concern in *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012), which addressed whether "any communication that attempts to enforce a security interest regardless of whether it also attempts to collect the underlying debt" is exempt from the provision of the FDCPA that prohibits misrepresentations, 15 U.S.C. § 1692e. *See Reese*, 678 F.3d at 1217. The Court in *Reese* recognized that such a rule "would create a loophole in the FDCPA. A big one." *Id.* at 1217–18. More specifically:

> In every case involving a secured debt, the proposed rule would allow the party demanding payment on the underlying debt to dodge the dictates of § 1692e by giving notice of the foreclosure on the secured interest. The practical result would be that the [FDCPA] would apply only to efforts to collect unsecured debts. So long as a debt was secured, a lender (or its law firm) could harass or mislead a debtor without violating the FDCPA. That can't be right. It isn't.

Id. at 1218.

Adopting the district court's reasoning here would have similar results. Under the district court's rule, a mortgage servicer acting as a debt collector could harass, mislead, and engage in unconscionable practices as long as it was communicating through one of the methods discussed in the CFPB Bulletin. In the words of this Court, "That can't be right. It isn't."

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Respectfully submitted,

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May 3, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a type-face of 14 points (Century Schoolbook), and, as calculated by my word processing software (Microsoft Word), contains 3,831 words, less than half the number of words permitted by the Court for the parties' briefs.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served on May 3, 2019, through the Court's ECF system on counsel of record for all parties required to be served, as follows:

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