No. 22-10250

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHELLY MILGRAM,

Plaintiff - Appellant,
v.

CHASE BANK USA, N.A.

Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
THE HONORABLE AILEEN M. CANNON**

PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Shelly Milgram, by her undersigned counsel and pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, hereby files this Certificate of Interested Persons and Corporate Disclosure Statement. Appellant is not a publicly held corporation and has no parent corporations, affiliates, or subsidiaries with an interest in the outcome of this case. Identifiable interested parties to the action are:

Cannon, Aileen – District Court Judge

Chami, David – Attorney for Plaintiff-Appellant

Dakroub, Jenna – Attorney for Plaintiff-Appellant

Dec the Walls Interiors, Co. a/k/a YOLO Interiors – Third-Party Defendant

Ellice, Christine – Attorney for Defendant-Appellee

Frontino, Brian – Attorney for Defendant-Appellee

JPMorgan Chase Bank, N.A. (JPM) – Defendant-Appellee

Milgram, Shelly – Plaintiff and Counter-Defendant

Plati, Michael – Attorney for Plaintiff-Appellant

Price Law Group, APC – Firm for Plaintiff-Appellant

Stroock & Stroock & Lavan, LLP – Firm for Defendant-Appellee

Taormina, Alisa – Attorney for Defendant-Appellee

Weiss, Jason – Attorney for Plaintiff-Appellant

Weiss Law Group, P.A. – Firm for Plaintiff-Appellant

Date: June 29, 2023

/s/ David A. Chami
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Counsel for Appellant

11th Cir. R. 35-5(c) STATEMENTS OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedents of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

- *Felts v. Wells Fargo Bank*, 893 F.3d 1305 (11th Cir. 2018)
- *Hinkle v. Midland Credit Mgmt., Inc.*, 827 F.3d 1295 (11th Cir. 2016)
- *Hunt v. JPMorgan Chase Bank, Nat'l Ass'n*, 770 F. App'x 452 (11th Cir. 2019)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following serious questions of exceptional importance: Whether a victim of identity theft has no remedy as to their credit reporting when a furnisher of information refuses to correct their credit report, and whether a victim must spend tens of thousands of dollars in state court establishing that they are not liable for fraudulent charges before being afforded the protections provided by Congress under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*

/s/ David A. Chami
David A. Chami
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PLAINTIFF-APPELLANT SHELLY MILGRAM

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STATEMENT OF THE ISSUES

1) Whether the Panel erred by holding that Chase's verification of its inaccurate reporting, was reasonable as a matter of law and permissible under prior Eleventh Circuit precedent interpreting the FCRA and furnisher duties to investigate.

2) Whether the Panel erred by holding that Chase conducted a reasonable investigation under the FCRA as a matter of law when Chase made an in-house determination that Shelly was negligent and/or had given an identity their apparent authority to open accounts without her knowledge, when Chase made this determination based on knowingly false assumptions, and Chase otherwise failed to conduct an investigation for fraud when Shelly's disputes were fraud-coded disputes.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Shelly filed this FCRA action against Chase on April 10, 2019. Case No. 19-60929-CIV, Doc. 1. Shelly alleged Chase violated the FCRA by failing to conduct reasonable investigations of her FCRA disputes. *Id.* at 14-15.

In July 2020, Shelly and Chase filed competing motions for summary judgment. Doc. 126; Doc. 135. On December 30, 2021, the trial court granted Chase's motion, (erroneously) concluding there were no disputed issues of fact about the reasonableness of Chase's investigation, and that Chase conducted a reasonable investigation under the FCRA as a matter of law. Doc. 252.

Shelly timely filed a notice of appeal and requested reversal of the trial court's entry of summary judgment. Doc. 254.

After briefing and oral argument, the Panel entered its Opinion for publication, affirming the lower court's summary judgment ruling.

STATEMENT FACTS NECESSARY TO ARGUMENT OF THE ISSUES

Shelly Milgram was the victim of organized fraud and identity theft by her employee, Jean Williams. Chase permitted Williams, using Shelly's personal information but Williams' contact information, to open a fraudulent credit card. Despite initially assuring Shelly she would not be responsible for the debt, Chase reversed course and concocted a legal theory that, despite the criminal conduct by Williams, Shelly was responsible for the debt under a theory of negligence and apparent authority. Even though credit reports report consensual consumer debts, Chase reported the fraudulent account as being opened and used by Shelly even after Chase was presented with indisputable evidence that Shelly did not open the account, make any of the purchases on the account, or make any of the electronic account payments. Further, when presented with this evidence, Chase chose to ignore it and rely instead on baseless, prior determination that, because the fraudulent credit account had been paid out of Shelly's separate business account, Chase could ignore the indisputable evidence that Shelly had not opened the credit account, given Williams authority to open the credit account, or done anything that would lead Chase to think that Williams had such authority. Notably, Chase's investigations of the later disputes with the new information did not include any fraud investigation even though Shelly's disputes were coded for fraud. Instead, Chase conducted cursory Automated Consumer Dispute Verification investigations

which consisted of no more than matching the account information on record with Chase with Shelly's consumer information (i.e., verifying that the name and personal information used to open the account was correct).

As to Chase's initial determination of apparent authority, this determination was based on **three fundamentally incorrect and mistaken** assumptions—each of which Chase knew was false or would have known was false had Chase conducted a reasonable investigation (or any fraud investigation).

First, a reasonable (or any) investigation by Chase would have confirmed that Shelly did not in fact open the personal account or authorize the identify thief (Williams) to do so. Yet Chase's failure to reasonably investigate resulted in Chase's mistaken assumption that Shelly had authorized the account opening. A Chase representative asserted during a phone call recording produced by Chase that Shelly had verbally acknowledged that the Chase Personal Card was hers and that Shelly designated Jean Williams as an authorized user. However, records produced by Chase prove that this was not true, a fact admitted by Chase's representative at a deposition.

Second, and relatedly, a reasonable (or any) investigation by Chase would have confirmed that Shelly had not therefore designated the identity thief Williams as an authorized user on this Chase account. Yet Chase's failure to reasonably investigate resulted in Chase's mistaken assumption that Shelly designated

Williams as an authorized user on the account.

Third, a reasonable (or any) investigation by Chase would have confirmed that Shelly had not made any payments on the fraudulent account by written check. Yet Chase's failure to reasonably investigate resulted in Chase's mistaken assumption that Shelly had made a payment on the fraudulent Chase account by writing a check thereby implying her awareness or knowledge of the account. However, Chase's records confirm that these payments were not made by check, but by unauthorized electronic ACH transfers from accounts to which Williams had access.

The Panel held that Chase was permitted to rely on its prior determination (presupposed on the false assumptions described above) as a "baseline", and that its refusal to investigate further was therefore reasonable as a matter of law because no new information could have been uncovered to dissuade Chase from this prior decision.

ARGUMENT AND AUTHORITIES

The Panel's Opinion essentially holds that a creditor may evade statutory liability for refusing to comply with the requirements of 15 U.S.C. § 1681s-2(b) in a case of stolen identity by independently making an unsubstantiated determination—based upon an unreasonable investigation and reliance upon information known to be false—that an identity thief had apparent authority to open fraudulent credit accounts in a consumer's name. This holding represents a seismic shift in FCRA furnisher liability in this Circuit and further imposes a draconian and unprecedented burden upon victims of identity theft who seek to protect their credit reputations by utilizing the processes established by Congress in the FCRA. This is especially true here considering that the furnisher admittedly failed to investigate a fraud-coded dispute for fraud, and instead relied upon a prior determination that itself was based upon false assumptions to support "apparent authority" despite possessing records and information which confirmed the falsity of those assumptions.

The Panel's Opinion meets both express reasons for *en banc* review under 11th Cir. R. 35-3, involving both (1) a statement of law and an outcome that are directly in conflict with this Court's prior precedent, and (2) serious and important ramifications for victims of identity theft in this Circuit.

I. THE PANEL'S OPINION IS CONTRARY TO THIS COURT'S PRIOR PRECEDENT

The FCRA provides that a furnisher of consumer credit information must, upon receiving notice of a consumer's disputing the accuracy or completeness of that information through a consumer reporting agency, conduct an investigation into that dispute and provide the consumer reporting agency with the results of that investigation. 15 U.S.C. § 1681s-2(b). This investigation must be "reasonable" and non-cursory. *Hinkle*, at 1301-02; *Felts*, at 1312.

Up until the publication of the Panel's Opinion in this case, in the Eleventh Circuit the end point of a furnisher's investigation was to be one of the following: "[1] verification of accuracy, [2] a determination of the inaccuracy or incompleteness, or [3] a determination that the information 'cannot be verified.'" *Felts*, 893 F.3d at 1312 (citing *Hinkle*, 827 F.3d at 1301-02). In order to verify the disputed information as accurate, the furnisher was required to "uncover[] documentary evidence […] sufficient to prove that the information is true," or to "rely[] on personal knowledge sufficient to establish the truth of the information." *Felts*, at 1312 (*citing Hinkle*, at 1303).

Further, up until the publication of the Panel's Opinion, "[w]hen a furnisher end[ed] its investigation by reporting disputed information [had] been verified as accurate, the question of whether the furnisher behaved reasonably [would] turn on whether the furnisher acquired sufficient evidence to support the conclusion that

the information was true." *Hunt*, 770 F. App'x at 457 (quoting *Felts*, at 1312).

The Panel's Opinion is directly contrary to this Court's previous holdings in *Hunt*, *Felts*, and *Hinkle*. Here, the Panel found that Chase's investigation was reasonable as a matter of law when Chase **verified** that the information being reported was accurate even though Chase provided no proof that it had "acquired sufficient evidence to support [that] conclusion..." in an investigation. *Hunt*, 770 F. App'x at 457. (Indeed, it is undisputed that Chase **did not conduct any investigation whatsoever** upon receipt of Shelly's **multiple** disputes containing proof positive that the account at issue had been opened by an identity thief without any authority to do so.)

This finding erodes the FCRA's fundamental protections provided to consumers, expressly recognized by this Court's previous FCRA case law. As explained in *Hinkle*:

> This framework reflects the fact that § 1681s–2(b) is designed not only to exclude false information from credit reports, **but also to prevent the reporting of unverifiable information.** What "the results of the reinvestigation" require may vary depending on the nature of the disputed information. But when a furnisher is unable to verify the identity of an alleged debtor, **we are persuaded by the parallel structure of §§ 1681s and 1681i that the appropriate response will be to delete the account or cease reporting it entirely.**

827 F.3d at 1304 (emphasis added).

The Panel's Opinion is incompatible with *Hinkle's* holding. Chase could not

possibly verify as accurate its reporting to the credit world at large that Shelly had opened the account, ran up a significant debt, and then failed to pay it off, because such reporting is not accurate.[1] Under *Hinkle*, Chase should have therefore **deleted** or **ceased reporting** the account. Instead, Chase **verified** its reporting as accurate. Without any analysis into whether Chase had "acquired sufficient evidence to support the conclusion that the information was true…" (*Hunt*, 770 F. App'x at 457), the Panel proceeded to hold that no reasonable jury could find Chase's actions to be in violation of its duty to conduct a reasonable investigation, despite the undisputed fact that no investigation was completed.

The Panel attempted to reconcile this result with *Hinkle* by holding that no investigation would have changed Chase's mind because, "[b]y April 2017, Chase had determined that Milgram had vested apparent authority in Williams to use the credit card." Opinion, pg. 17. The Panel concluded, citing to no authority, that this prior determination was the "baseline." *Id.*

Nowhere in Eleventh Circuit case law is such a standard found. A furnisher is not entitled to make a pre-dispute determination, refuse thereafter to investigate a dispute, and yet verify its reporting as accurate to a consumer reporting agency. To the contrary, the FCRA requires that a furnisher conduct a reasonable

[1] To be "accurate" under the FCRA, "information must be factually true and also unlikely to lead to a misunderstanding." *Erickson v. First Advantage Background Servs.*, 981 F.3d 1246, 1252 (11th Cir. 2020).

investigation upon "receiving notice […] of a dispute…" from a consumer reporting agency. 15 U.S.C. § 1681s-2(b)(1). Further, Eleventh Circuit precedent does not permit furnishers to verify information for credit reporting where the verification is based on information known by the furnisher to be false, or where the furnisher simply refuses to conduct a fraud investigation for a fraud-coded dispute.

Simply put, Chase's prior (unsubstantiated) determination that a Florida jury might find that Williams had apparent authority to steal Shelly's identity is utterly irrelevant to the standard established by *Hunt*, *Felts*, and *Hinkle* (and in any case a determination rooted in information known to be false based on information Chase already possessed). Chase's reliance on false assumptions and its failure to investigate a fraud dispute for fraud cannot be reasonable as a matter of law where Chase "verifies" its reporting as accurate. Under these Circuit rulings, a furnisher must "verify" disputed reporting or delete/cease reporting the same. If the furnisher verifies disputed reporting, the analysis shifts and the furnisher must show that its investigation revealed facts which established the accuracy of the reporting. Here, Chase did not investigate, and certainly did not obtain facts which established the accuracy of its reporting. Indeed, Chase ignored facts and information known and relied on multiple false assumptions to reach its pre-determined "baseline" that the

Panel simply accepted.[2] Thus, it was required under *Hinkle* to delete or cease reporting the credit information at issue. It did neither and yet the Panel blessed this decision with the rule of law in this Circuit.

The Panel's Opinion is incompatible with this Court's FCRA precedent regarding a furnisher's duties under 15 U.S.C. § 1681s-2(b). Furnishers are required to conduct reasonable investigations and may not rely upon knowingly false information. Furnishers also cannot refuse to investigate a fraud-coded dispute for fraud by relying on a prior investigation which itself was based on information known to be false by the furnisher or that would have been discovered through a reasonable investigation. An *en banc* review is necessary to cure the confusion caused by the Opinion, and to clearly establish the ground rules for § 1681s-2(b) litigation in this Circuit.

II. THE PANEL'S OPINION RAISES SERIOUS ISSUES OF EXCEPTIONAL IMPORTANCE BECAUSE IT WILL HAVE NOVEL, FAR-REACHING, NEGATIVE, AND ONEROUS IMPLICATIONS FOR VICTIMS OF IDENTITY THEFT AND THEIR EXERCISE OF FEDERAL RIGHTS IN THIS CIRCUIT

Judge Rosenbaum's concurrence begins by acknowledging that "[t]he ultimate resolution of this case is surely frustrating for some consumers." Opinion, pg. 20. This is an unfortunate understatement. As a practical matter, the Panel's

[2] The Panel explicitly "express[ed] no opinion on the correctness of that determination." Opinion, pg. 18 n. 8.

Opinion eliminates essential and long-standing protections afforded by the FCRA to the financial reputations of identity theft victims who happen to live in Alabama, Florida, or Georgia.

A. The Panel's Opinion Provides Nearly Impenetrable Insulation For Furnishers Seeking To Avoid Liability Under § 1681s-2(b) By Relying On Prior Determinations

As noted previously, the "baseline" set by Chase (that apparent authority existed) that the Panel simply accepted was based on multiple false assumptions: (1) Shelly had orally acknowledged on a phone call with Chase that the account was hers and that Jean Williams was permitted to utilize the same; (2) Because of this initial assumption, Chase determined that Shelly had therefore designated the identity thief Williams as an authorized user on the account; and (3) Shelly had made payments on the fraudulent account by written check thereby implying her awareness or knowledge of the account.

The falsity of all three of these assumptions, upon which the initial apparent authority determination had been made, was made apparent with evidence at both the trial-court and appellate levels, to no avail. Thus, moving forward, furnishers in the Eleventh Circuit will be effectively insulated from liability since the record here confirms Chase's initial determination (accepted without analysis by the Panel) relied upon three critical assumptions that were **proven false**. In the future, any furnisher can simply "verify" disputed reporting by concluding that apparent

authority existed **even if such a conclusion is based on patently false assumptions**. On such a record, the furnisher will simply cite to the Panel's Opinion and argue that, if Shelly could not proceed past summary judgment when it was proven that the prior determination of apparent authority was made upon verifiably false assumptions, then no identity theft victim can do so.

It is undisputed that furnishers are permitted to come to wrong conclusions under § 1681s-2(b), but only if the investigation leading to such a conclusion is reasonable. However, going forward, a "reasonable investigation" will now include an admitted **non-investigation** where an initial conclusion is made on the assumption of facts **known to be false** by the furnisher. This outcome practically eliminates FCRA protections for identity theft victims in the Eleventh Circuit. As discussed in the previous section, none of this is compatible with this Court's prior precedent, and such an outcome has grave consequences for identity theft victims going forward.

B. The Panel's Opinion Acts De Facto To Shift The Financial And Legal Burden Of Proving Apparent Authority And/Or Negligence From The Creditor To The Identity Theft Victim

Further, if permitted to stand as Eleventh Circuit law, the Panel's Opinion will allow every creditor defrauded by an identity thief to ruin the financial reputation of the identity theft victim by parking the debt on the victim's credit. Prior to the Panel's Opinion, if a creditor believed that the identity theft victim

should recompense the creditor for the debts incurred by the thief, the creditor would be required to sue the victim in state court, prevail on a theory of apparent authority or negligence by a preponderance of the evidence, and then execute that state court judgement by garnishment, etc.

Under the Panel's Opinion, however, the creditor need not exercise this traditional path of obtaining a court finding the victim to have been negligent or to have given apparent authority. Now, the creditor can simply park the debt on the victim's credit report, relying on the threat of potential ruination of the victim's credit reputation to compel the victim to voluntarily make payments on the fraudulent charges. Previously, this simply would not have been an option, especially in a case such this. Here, the creditor was provided with absolute, undeniable proof that the victim had not opened the fraudulent account, had not designated the identity thief as an authorized user, had not made the fraudulent charges, and had not made payments on the account manually by check. Before the Panel's Opinion, (as discussed above) the creditor could not have "verified" as accurate any reporting which indicated that the victim had personally opened the account, had made legitimate charges, and had refused to pay off those charges.

Going forward, however, creditors will be able to simply create a *post hoc* determination that the victim was negligent or gave apparent authority to the thief, and **without any judicial determination of the same**, hold the victim liable for

the fraud even when the creditor bases this determination on information the creditor either knows is false or for which the creditor possesses records confirming the falsity. Worse yet, the creditor can decline to investigate a fraud-coded account for fraud with impunity. This result is diametrically opposed to this Court's previous reasoning in *Hinkle* and precedent confirming that furnishers must conduct reasonable investigations. There, this Court held that where the creditor could not verify the reporting as accurate, it was required to delete or stop reporting the account, **regardless of the implication for debt collection**. The Court continued to explain:

> Lest this result appear too strict, we hasten to observe that even though a furnisher that ends an investigation without verifying a disputed account must cease reporting the account to CRAs, § 1681s–2(b) does not require the furnisher to cease dunning or otherwise attempting to collect the debt. The requirement to delete or modify the offending information is limited to the credit-reporting context.

Hinkle, 827 F.3d at 1304. In other words, the furnisher may continue to follow other, legitimate debt-collection methods (including the filing of a state court action, as described above). What it **cannot** do is continue to harm the victim's financial reputation by verifying patently false and misleading information. *Id.*

The Panel's Opinion flips this reasoning on its head. As the concurrence explicitly notes, instead of the creditor being required to take the first step in holding the victim liable for fraudulent charges (as would be required under normal application of Florida state law and this Court's holding in *Hinkle*) by filing

suit and proving negligence or apparent authority, **the victim** now bears the burden of suing the creditor for a declaratory judgement that **she was not negligent and did not give apparent authority**.

Even beyond the obviously inappropriate burden-shifting nature of this result,[3] and even setting aside the fact that this new paradigm places the creditor in the jury's position as finder-of-fact,[4] [5] this finding imposes upon victims what will in most cases be an insurmountable financial barrier to obtaining the accurate credit report the FCRA was intended to ensure. *See Safeco Ins. Co. v. Burr*, 551 U.S. 47, 52 (2007).

Attorneys are expensive, and paying a firm to litigate a state court lawsuit involves a price tag well above what the average consumer could afford, much less a victim of identity theft dealing with the resulting financial fallout. Furthermore, lawsuits take time. In the year or more that it would take for a victim to obtain a declaratory judgement, the damage to the victim's financial reputation (including

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[3] "**It is well settled that** an agency relationship may be express or implied from apparent authority, and **the burden of proving the agency belongs to the party asserting it**." *Regions Bank v. Maroone Chevrolet, L.L.C.*, 118 So. 3d 251, 255 (Fla. Dist. Ct. App. 2013) (emphasis added).

[4] "The existence of an agency relationship is normally one for the trier of fact to decide." *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003).

[5] Ironically, the Panel's opinion creates the very situation that the concurrence wishes to avoid: "Chase [being] a judge in its own cause" and "Chase get[ting] to decide whether Chase reasonably relied on Milgram's payments." Opinion, pg. 22, n. 2. As the concurrence notes, "[t]he conflict of interest is obvious." *Id.*

the inability to participate in the modern, credit-fueled economy) would already be done.

Simply put, shifting the financial and time burden of initiating a debt-validation lawsuit from the creditor to the victim will result in nearly all victims of identity theft being forced to either make payments on the fraudulent charges or suffer the complete destruction of their financial reputation. The terrifying reality of such a result is brought into sharp relief when it is recalled that the victim could be anyone (including the undersigned and the Justices reviewing this petition) and could find themselves in such a situation through absolutely not fault of their own.

The Panel's Opinion presents a serious problem of exceptional importance for victims of identity theft in the Eleventh Circuit going forward. Instead of being able to rely on *Hinkle* to remove fraudulently opened credit accounts from their consumer credit reports, victims who wish to stop creditors from "verifying" as accurate patently false and materially misleading information now must first spend thousands of dollars (and possibly years) on procedurally odd, state court litigation seeking a finding that they did not give the thief apparent authority. Only then will they be permitted to exercise their rights under the FCRA, by which time the damage of the inaccurate reporting will have already been done. *En banc* review is necessary to avoid placing such a draconian and unprecedented burden on identity theft victims in this Circuit.

CONCLUSION

For all the foregoing reasons, Shelly respectfully requests that the Court rehear this case *en banc*.

Date: June 29, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that document complies with the type-volume limitation set forth in Rule 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because it was prepared using Times-New Roman 14-Point font using Microsoft Word for Office 365.

The undersigned states the document does comply with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and contains 3,778 words.

Date: June 29, 2023

/s/ David A. Chami
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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2023, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users or that I will accomplish service by U.S. Mail for those participants that are not registered CM/ECF users.

Date: June 29, 2023

/s/ David A. Chami
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