SC21-159

In the Supreme Court of Florida

STEVEN J. PINCUS,
Appellant,

v.

AMERICAN TRAFFIC SOLUTIONS, INC.,
Appellee.

ON REVIEW OF CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case No. 19-10474

AMICUS BRIEF OF THE OFFICE OF FINANCIAL REGULATION IN SUPPORT OF APPELLEE

JEFFREY PAUL DESOUSA
(FBN110951)
Chief Deputy Solicitor General
EVAN EZRAY (FBN1008228)
Deputy Solicitor General
DAVID M. COSTELLO (FBN1004952)
Assistant Solicitor General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
david.costello@myfloridalegal.com

ANTHONY CAMMARATA
(FBN767492)
General Counsel
Office of Financial Regulation
200 E. Gaines St.
Tallahassee, Florida 32399

Counsel for the Office of Financial Regulation

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IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

The Florida Office of Financial Regulation (Office) submits this brief as *amicus curiae* in support of Appellee American Traffic Solutions, Inc. (ATS).

The Eleventh Circuit asks this Court to decide questions related to Section 560.204(1), Fla. Stat., which requires licensure for those "engage[d] in . . . the activity of a money transmitter[] for compensation." The Office administers and enforces Florida's money transmitter laws. §§ 560.105, 560.103(25), Fla. Stat. It thus has an interest in advancing the correct interpretation of Section 560.204(1) and in whether that statute can be privately enforced through an unjust enrichment claim.

SUMMARY OF THE ARGUMENT

Money transmission is fraught with the risk of money laundering and terrorist financing. To minimize this risk and provide legitimate financial services, Florida adopted a comprehensive framework governing money transmitters. For over a decade, this framework has been administered and enforced by an agency of trained professionals: the Office of Financial Regulation.

Yet Appellant Steven Pincus claims that he, too, can enforce this complex regulatory scheme. After receiving a red-light-camera ticket in the City of North Miami Beach, Pincus chose to pay his penalty by credit card. The City's vendor, Appellee ATS, charged him a convenience fee for processing the card and sent his penalty payment to the City. Pincus then sued in federal court, seeking to certify a class and claiming, among other things, that ATS violated Section 560.204(1), Fla. Stat., by "engag[ing] in . . . the activity of a money transmitter[] for compensation" without a license. He asserted that this violation supports a claim for unjust enrichment.

The district court dismissed his complaint. *Pincus v. Am. Traffic Sols., Inc.*, 2019 WL 9355827, at *9 (S.D. Fla. Jan. 14, 2019). The

Eleventh Circuit then certified questions to this Court, asking whether Pincus states a Section 560.204(1) violation and, if so, whether the violation can support his unjust enrichment claim.[1] The answer to these questions is no.

First, Pincus does not state a Section 560.204(1) violation. He claims that ATS unlawfully engaged in money transmission without a license when it accepted a convenience fee as "compensation" for transmitting his penalty payment to the City. However, the convenience fee does not constitute "compensation" for "engag[ing] in . . . the activity of a money transmitter"; it is compensation for processing Pincus's credit card. Thus, Pincus cannot show that ATS violated the statute.

Second, and in any event, Section 560.204(1) cannot support his unjust enrichment claim. This provision does not endow Pincus with a legally protected interest. Even if the Court were to hold that it did, the statutory scheme shows that this interest is not actionable through an unjust enrichment claim. And, regardless, Pincus cannot

[1] The Circuit also asked several questions related to Florida's motor vehicle code. The Office takes no position on those issues.

claim that the violation harmed him, so ATS was not unjustly enriched at his expense.

ARGUMENT

I. Pincus does not state a Section 560.204(1) violation.

As of 2008, money transmission was already considered a "rapidly" expanding industry. *See* Fla. Staff Analysis, S.B. 2158, 4/8/2008. Yet this industry had historically faced "limited supervision," making it an "increasingly prevalent conduit for laundering illicit proceeds" of criminal activity. *Id.*; *see also Amendment to the Bank Secrecy Act Regulations—Definitions Relating to, and Registration of, Money Services Businesses*, 64 Fed. Reg. 45438, 45442 (Aug. 20, 1999) ("Congress found that [money transmitter] businesses are largely unregulated and are frequently used in sophisticated schemes to transfer large amounts of money that are the proceeds of unlawful enterprises.").

Florida thus enacted an all-encompassing regulatory scheme for money services businesses. *See* Ch. 560, Fla. Stat. The scheme is administered by the Office, an agency of financial experts that have unparalleled experience administering Florida's regulatory code. *See*

§ 560.105, Fla. Stat. Along with general administration, Florida charges the Office with enforcing its money transmitter requirements. *Id.* § 560.105(1)(c).

One such requirement is licensure. A person "may not engage in . . . the activity of a money transmitter, for compensation, without first obtaining a license" from the Office. *Id.* § 560.204(1). As relevant here, a "money transmitter" is a business entity that receives "currency . . . for the purpose of transmitting the same by any means." *Id.* § 560.103(23). A business must obtain a license, then, if it receives money "for the purpose of transmitting" money "for compensation."

The final phrase—"for compensation"—is key to understanding Section 560.204(1). This phrase limits the statute's reach to those that transfer money in exchange for payment. Indeed, when the statute passed in 2008,[2] "'[f]or' indicat[ed] purpose or aim." *Hoever v. Marks*, 993 F.3d 1353, 1357 (11th Cir. 2021) (en banc) (citing *For*, *Webster's New College Dictionary* (3d ed. 2008)). That "purpose" is the next phrase—"compensation," which meant "payment" or

[2] See Ch. 2008-177, § 30, Laws of Fla. (2008).

"remuneration." *Compensation*, *Webster's New International Dictionary* (3d ed. 2002). Thus, Section 560.204(1) requires licensure only for those who transmit money for the purpose of receiving payment in exchange.

Pincus claims ATS transmitted money for the purpose of receiving payment in exchange. In his view, ATS violated Section 560.204(1) when it charged the convenience fee as "compensation" "in exchange for money transmission services" without a license. R. 95 (complaint);[3] R. 254 (response to motion to dismiss); R. 357 (Eleventh Circuit opening brief); *see also* Init. Br. 27. According to Pincus, the convenience fee is "compensation" for transmitting his penalty payment to the City. Init. Br. 27.

Pincus is mistaken. He did not pay the convenience fee so ATS would transmit his payment to the City; he paid it so ATS would process his credit card.[4]

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[3] Because the record is not bates stamped, cites to the record refer to the PDF page numbers.

[4] Pincus does not argue, and so this Court should not address, whether ATS acts as a money transmitter for compensation more generally through its administering of the City's red-light program. It

Indeed, processing a credit card is not free: Credit-card companies charge merchants a fee for each transaction. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2281 (2018). Merchants—including Florida government entities—pass the cost of processing a credit card to the consumer through convenience fees. *E.g.*, § 215.322, Fla. Stat. These fees, then, are not payment for the underlying good or service; they are payment for the added service of processing a credit card.

An example from this case makes this clear. Say Pincus had paid his ticket by check instead of by card. ATS's contract would still compel ATS to send his payment to the City, even though ATS did not receive a convenience fee from Pincus. *See* R. 143 (noting that

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is unlikely that Pincus would have standing to advance such a theory in any event because ATS's being compensated by the City does not harm him. And the Court should not address this question unmoored from briefing or factual development, given that it involves the complex and important issue of whether those who incidentally move money as part of larger transactions that also provide additional goods and services must be licensed under Florida law. *Cf. Amendment to the Bank Secrecy Act Regulations—Definitions Relating to, and Registration of, Money Services Businesses*, 64 Fed. Reg. 45438, 45442 (Aug. 20, 1999) (recognizing the significance of money transmitter registration and construing the federal money transmitter statute—which in many ways mirrors Florida's in relevant part—to exempt incidental money transmitters from registration).

ATS must pay the City "all payments received" each month). Since ATS must transmit Pincus's payment to the City no matter if it receives the convenience fee, the fee is not "compensation" for the transmission. Pincus therefore has not stated a Section 560.204(1) violation.[5]

II. Section 560.204(1) cannot support an unjust enrichment claim.

If the Court holds that Pincus has not stated a Section 560.204(1) violation, it needn't decide whether such a violation could sustain an unjust enrichment claim. But if it reaches the question, the answer is no. A statutory violation can support an unjust enrichment claim only when (1) the statute endows the plaintiff with a "legally protected interest" and (2) the statute does not make that

[5] Although the Office agrees with much of ATS's argument and agrees on the outcome, the Office disagrees with ATS's argument that it technically never received any funds in its individual capacity because it received them as the City's agent. Ans. Br. 27. A money transmitter almost always is the agent of a principal. Western Union, for instance, is the agent of its customer. If the statute treated agents as the principal, agents would never "receive" funds, and thus, would never be money transmitters. That application of agency law would swallow the licensing statute whole. So if the common law would engender that outcome, the statutory scheme preempts it. *See Baker v. State*, 636 So. 2d 1342, 1344 (Fla. 1994).

interest nonactionable. Both factors cut against holding that a private actor can enforce Section 560.204(1) through an unjust enrichment claim. And even if the Court held that Pincus could do so, the purported violation has not injured him, so he cannot show that ATS was unjustly enriched at his expense.

1. Though Florida law has not answered whether statutory violations can sustain unjust enrichment claims, the Third Restatement of Restitution and Unjust Enrichment shows that they can.[6] It explains that one "who obtains a benefit by conscious interference with a claimant's *legally protected interests* (or in consequence of such interference by another) is liable in restitution as necessary to prevent unjust enrichment." Restatement (Third) of Restitution and Unjust Enrichment § 44 (Am. L. Inst. 2011) (emphasis added) (hereinafter "Restatement"). Whether a statute creates a "legally protected interest[]" is a "question of local law." *Id.* And even when a statute creates a legally protected interest, if the

[6] Florida courts have relied on this Restatement. *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So. 3d 689, 695 n.4 (Fla. 3d DCA 2018); *Bailey v. St. Louis*, 268 So. 3d 197, 199 n.2 (Fla. 2d DCA 2018).

statute was not intended to be actionable privately, the plaintiff cannot "circumvent this legislative omission by styling his action one for unjust enrichment." *Id.* Unjust enrichment should "be denied if its effect would be inconsistent with other rules that define . . . the claimant's remedies." *Id.*

In the context of a statutory violation, then, an unjust enrichment claim involves a two-step inquiry (along with the other elements and equitable considerations that need not be addressed here): (1) does the statute endow the plaintiff with a "legally protected interest"?; and (2) does the statute reflect an intent to make that interest nonactionable through unjust enrichment? *Cf. Murthy v. N. Sinha Corp.,* 644 So. 2d 983, 986 (Fla. 1994) (distinguishing between statutes that "purport to establish civil liability" and statutes that "merely [make] provision to secure the safety or welfare of the public as an entity").

Two Eleventh Circuit cases construing Florida law exemplify this test in action. *See State Farm Fire & Cas. Co. v. Silver Star Health & Rehab*, 739 F.3d 579 (11th Cir. 2013); *Buell v. Direct Gen. Ins. Agency, Inc.*, 267 F. App'x 907 (11th Cir. 2008).

In *Silver Star*, an insurer sued a medical clinic for unjust enrichment after the clinic collected insurance payments on behalf of patients without a license. 739 F.3d at 582–83. The clinic responded that the licensing scheme could not support an unjust enrichment claim because it lacked a private cause of action. *Id.*

The Eleventh Circuit disagreed, reasoning that accepting payments without a license rendered the charges "unlawful," "noncompensable," and "unenforceable" under Sections 400.9935(3) and 627.736(1)(a), Fla. Stat. *Id.* at 582–83. The statutes thus endowed patients and insurers with a legally protected interest in not paying charges issued by an unlicensed medical provider. And since nothing in the statutory scheme suggested that the Florida Legislature meant to place this legally protected interest beyond the reach of an unjust enrichment action, the "unenforceable" charge was actionable through such a claim. *See id.* at 584 (citing *Standifer v. Metro. Dade Cnty.*, 519 So. 2d 53, 54 (Fla. 3d DCA 1988) (holding that plaintiff could state an unjust enrichment claim based on a statute that lacked a private cause of action for damages)).

Buell shows how the test can come out the other way. There, insureds sued their carrier for unjust enrichment. They claimed that the carrier had violated the Florida Unfair Insurance Trade Practices Act (FUITPA) by illegally adding extra coverage to the insureds' policies and by selling them insurance through unlicensed agents. *Buell*, 267 F. App'x at 908–09. The Eleventh Circuit held that these violations could *not* sustain an unjust enrichment claim. First, it recognized that some parts of FUITPA have private causes of action, but the provisions plaintiffs sued under did not. *Id.* at 909. It also noted that although the insurers violated the statute, the violations did not make the policies unenforceable under the statutory scheme—in fact, the licensure provision provided that the policies remained enforceable despite a licensure violation. *Id.* at 909–10. The statutes thus did not convey an intent to endow plaintiffs with a legally protected interest, and so the plaintiffs could not bring an unjust enrichment claim.

Applying this approach here, Section 560.204(1) cannot support an unjust enrichment claim. For one thing, the statute does not endow Pincus with a legally protected interest. Unlike the statute

in *Silver Star*, this statute does not render the penalty transaction void or unenforceable. This omission was no oversight, either; other licensure provisions in Chapter 560 expressly void unlicensed financial activity. *E.g.*, § 560.125(1), Fla. Stat. (an unlicensed "deferred presentment transaction . . . is void, and the unauthorized person has no right to collect, receive, or retain any principal, interest, or charges relating to such transaction"). Nor does anything else in the statute's text suggest that it contains individual rights—its generalized language suggests that it protects only "the safety or welfare of the public as an entity." *Cf. Murthy*, 644 So. 2d at 986.

But even if the statute created a legally protected interest, the regulatory scheme shows that this interest is not privately actionable. For starters, the scheme contemplates that the Office almost[7] exclusively enforces its regulatory requirements. *See, e.g.*, § 560.105(1)–(2), Fla. Stat. (giving the Office supervisory and rulemaking powers); *id.* § 560.125(4) (empowering the Office to impose fines); *id.* § 560.114(4) (enabling the Office to issue cease and

[7] The State enforces the criminal penalties in the money transmitter scheme. *E.g.*, § 560.125(5)–(8), Fla. Stat.

desist orders and suspend or revoke licenses); *id.* § 560.113 (allowing the Office to seek injunctive relief and petition for receivership); Fla. Admin. Code R. 69V-560.1000 (creating disciplinary guidelines enforced by the Office). In fact, Section 560.113(3) gives the court, in a suit brought by the Office, the power to appoint a receiver to obtain restitution from unlawfully unlicensed money transmitters, and then pay that money to any victims, underscoring that the regulatory scheme does not authorize private actions for damages through an unjust enrichment claim.

There is only one narrow instance in which a private party may seek relief under Chapter 560. *See id.* § 560.125(3). That statute allows a private actor to seek injunctive relief against a violator, but only when the Office has already begun a proceeding against that violator. *Id.* In addition, the private actor can intervene only if the "proceeding"—not the violator's actions—affect the actor's "substantial interests." *Id.* And even then, the private actor can seek only to enjoin unlawful money transmitter activity; it cannot seek damages. *Id.* These statutory features make clear that Section 560.204(1) is meant to be enforced by the experts at the Office, not

by private actors seeking money damages through unjust enrichment.

Because Section 560.204(1) does not endow Pincus with a legally protected and actionable interest, he cannot state an unjust enrichment claim

2. Pincus also fails to state an unjust enrichment claim because the alleged Section 560.204(1) violation caused him no injury.

As the Restatement makes clear, the defendant's unlawful act must injure the plaintiff to trigger unjust enrichment. *See* Restatement § 44 ("[A] court will sometimes deny restitution on the elementary ground that the seller has not been *unjustly enriched at the buyer's expense*." (emphasis added)). Pincus's alleged Section 560.204(1) violation does not unjustly enrich ATS at his expense, because the violation does not invalidate the convenience fee or absolve him of his responsibility to pay his traffic penalty.

The Restatement cites a California case—*Peterson v. Cellco P'ship*, 80 Cal. Rptr. 3d 316 (Cal. App. 2008)—to explain this principle. There, a cell-phone provider charged users for required

cell-phone insurance as part of their cell-phone contracts. The users argued that, by doing so, the provider acted as an unlicensed insurer, and that they were thus entitled to restitution for unjust enrichment. The court rejected that claim. It noted that there was no allegation that the users paid more for their insurance than they might have in an outside market. Nor was there any indication that their insurance policies were void. They thus did not have an injury that needed to be remedied through restitution.

So too with Pincus's Section 560.204(1) claim. As noted above, unlicensed money transmission does not invalidate the convenience fee. *Supra* at 13. Nor has Pincus alleged that the purported Section 560.204(1) violation required him to pay more than he otherwise would have—he does not contest that he was required to pay the traffic penalty and does not argue that Section 560.204(1) prevented ATS from charging the convenience fee. So he has not alleged that the Section 560.204(1) violation harmed him in a way that must be remedied by restitution to avoid unjust enrichment. *See* Restatement § 44.

CONCLUSION

For these reasons, the Court should hold that Pincus does not state a Section 560.204(1) violation and, if it reaches the question, that such a violation could not support an unjust enrichment claim.

Respectfully submitted,

/s/ David M. Costello
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitor General
EVAN EZRAY (FBN1008228)
Deputy Solicitor General
DAVID M. COSTELLO (FBN1004952)
Assistant Solicitor General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
david.costello@myfloridalegal.com

ANTHONY CAMMARATA (FBN767492)
General Counsel
Office of Financial Regulation
200 E. Gaines St.
Tallahassee, Florida 32399
(850) 487-9687
(850) 410-9663 (fax)

Counsel for the Office of Financial Regulation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal, or by email, on June 3, 2021 to the following counsel of record:

/s/ David M. Costello
Assistant Solicitor General

Bret L. Lusskin, Jr.
BRET LUSSKIN, P.A.
20803 Biscayne Blvd., Ste. 302
Aventura, FL 33180
954-454-5841
blusskin@lusskinlaw.com

Keith J. Keogh
KEOGH LAW, LTD.
55 W. Monroe St., Ste. 3390
Chicago, IL 60603
312-726-1092

Scott D. Owens
SCOTT D. OWENS, P.A.
2750 N. 29th Ave., Ste. 209A
Hollywood, FL 33020
954-589-0588

Counsel for Appellant

Joseph H. Lang, Jr.
Kevin P. McCoy
David R. Wright
CARLTON FIELDS, P.A.
4221 West Boy Scout Blvd.,
Ste. 1000
Tampa, FL 33607
813-223-7000
jlang@carltonfields.com
kmccoy@carltonfields.com
dwright@carltonfields.com

Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that the size and style of type used in this notice is 14-point Bookman Old Style, in compliance with Fla. R. App. P. 9.045, and that the brief contains 3009 words, in compliance with Fla. R. App. P. 9.370.

/s/ David M. Costello
Assistant Solicitor General