

CLASS ACTION

ALERT

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SUPREME COURT HOLDS THAT SOLICITATION OF CLIENTS IS NOT A PERMITTED USE UNDER THE DRIVER'S PRIVACY PROTECTION ACT

By Arlene Fickler and John R. Timmer

On June 19, 2013, in *Maracich v. Spears*, No. 12-25, the Supreme Court of the United States issued an opinion interpreting the Driver's Privacy Protection Act (the DPPA), which prohibits the use of personal information from motor vehicle records except for 14 specifically enumerated purposes. In an opinion written by Justice Kennedy, the Court held that if an attorney's predominant purpose in contacting individuals whose addresses were obtained from motor vehicle records is the solicitation of clients, then the use of the information is not permitted under the DPPA's "litigation exception," one of the act's permitted purposes. The 5-4 *Maracich* opinion resolved a split among the circuits about the interpretation of the litigation exception, which provides that motor vehicle record information may be used "in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution of judgments and order, or pursuant to an order of a Federal, State, or local court." 18 U.S.C. § 2721(b) (4). Justice Kennedy's opinion, in which Justices Roberts, Thomas, Breyer, and Alito joined, set forth a "predominant purpose" test as the means to determine whether an individual's obtainment and use of motor vehicle information is permitted by the litigation exception. That is, if an attorney's predominant purpose in obtaining or using motor vehicle information is the solicitation of clients (as contrasted with developing the factual basis for the complaint, locating witnesses, identifying additional defendants, or performing any

other investigative function relating to litigation), then that obtainment or use is not permitted by the litigation exception. Yet despite this relatively narrow holding, it is the "predominant purpose" test itself that may be the most important legacy of the *Maracich* opinion, as that test establishes how courts likely will address the permissibility of how motor vehicle information is used in the future.

The respondents in *Maracich* were South Carolina lawyers who had been engaged to file litigation against car dealerships for alleged violations of South Carolina law. Before filing suit, the South Carolina lawyers obtained from the South Carolina Department of Motor Vehicles the names of automobile purchasers and sent letters to those individuals, soliciting them to join the litigation that was to be filed. Recipients of the letters subsequently brought a putative class action against the lawyers, alleging DPPA violations for the obtainment and use of their personal information from motor vehicle records and seeking liquidated damages of \$2,500 for each violation of the DPPA. Because of the number of solicitation letters sent by the South Carolina lawyers, the potential damages approximated \$200 million.

The District Court for the District of South Carolina granted the South Carolina lawyers' motion for summary judgment, finding that the acquisition and use of the purchasers' personal information satisfied the litigation exception to the DPPA because it was an "investigation in anticipation of litigation." An appeal

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followed and the Fourth Circuit affirmed the decision of the District Court, finding that the lawyers were not in violation of the DPPA because their non-permitted purpose (solicitation of potential clients) was “inextricably intertwined” with their permitted purpose (investigation in anticipation of litigation).

Utilizing various canons of statutory interpretation, the Supreme Court rejected the South Carolina lawyers’ argument that the language of the litigation exception — allowing “for use *in connection with* any civil ... proceeding” and for “investigation *in anticipation of litigation*” (emphasis added) — was sufficiently broad to encompass solicitation of clients. The Supreme Court found that “in connection with” must have a limit and that an attorney’s solicitation of prospective clients falls outside of that limit. The Supreme Court also limited “investigation in anticipation of litigation” to “background research to determine whether there is a supportable theory for a complaint, a theory sufficient to avoid sanctions for filing a frivolous lawsuit, or to locate witnesses for deposition or trial testimony.”

In determining whether obtaining, using, or disclosing personal information from motor vehicle records is for the prohibited purpose of solicitation, the Supreme Court set forth the proper inquiry as “whether the defendant had the predominant purpose to solicit.” Recognizing that a communication may serve more than one objective, the Supreme Court found that the finder of fact must discern the predominant purpose of the communication, whether evident from the communication itself or the defendant’s whole course of conduct. The Supreme Court therefore remanded the case for a determination whether solicitation was the predominant purpose for the South Carolina lawyers’ sending letters to the individuals whose motor vehicle information they had obtained.

The dissenting opinion, authored by Justice Ginsburg and joined by Justices Scalia, Sotomayor, and Kagan, agreed with the majority that the words “in connection

with” must be contained within reasonable bounds, but found that the South Carolina lawyers’ use of the motor vehicle information to send the letters to the potential clients was “in connection with” a specific civil proceeding. The dissenters also found support in the phrase “in anticipation of litigation,” interpreting it to require a lawyer to “have a client whose claim presents a genuine controversy,” while preventing “[t]rolling for prospective clients with no actual or imminent proceeding.” They would find a use permitted under the DPPA when it is “tied to a concrete civil action between identified parties that is ongoing or impending.”

The majority’s interpretation of the DPPA in *Maracich* is important for two reasons. First, it holds that the use of personal information from motor vehicle records for purposes of solicitation of potential clients is not encompassed by the DPPA’s litigation exception, despite the broad language of that provision.

Second, the “predominant purpose” test espoused by the Supreme Court is likely to change not only how courts analyze the use of motor vehicle information under the litigation exception, but also how courts analyze the other 13 permitted purposes enumerated in the DPPA. Frequently, the individual who obtains personal information from motor vehicle records has both a permitted and a non-permitted purpose. In *Maracich*, attorneys were undertaking an investigation in anticipation of litigation (permitted) at the same time as they were soliciting clients (non-permitted); in *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008), a union used motor vehicle record information for union organizing (non-permitted) and to investigate potential legal claims against the employer being organized (permitted). Although the Fourth Circuit in *Maracich* adopted the “inextricably intertwined” standard and found that the use was permitted, the Third Circuit majority in *Pichler* found that the union had violated the DPPA, stating that “the [DPPA] contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permis-

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sible purpose.” However, in her dissent in *Pichler*, Judge Dolores Sloviter wrote that she would instead “have the fact-finder determine which is the primary purpose and whether that purpose was permitted under § 2721(b).” The Supreme Court’s “predominant purpose” test is closely aligned with the test set forth by Judge Sloviter in her dissent in *Pichler*.

Although the Supreme Court’s holding in *Maracich* was limited to whether solicitation of potential clients was permitted under the litigation exception, it is likely that courts will utilize the “predominant purpose” test not only for situations involving the litigation exception, but for all situations involving both a permitted and a non-permitted purpose under the DPPA. Therefore, *Maracich*’s “predominant purpose” test will be significant not only for determining when motor vehicle information may be obtained and used in connection with litigation, but whenever a person using the information is alleged to have both a permitted and a non-permitted purpose under the DPPA. ♦

Arlene Fickler and John R. Timmer filed an amicus curiae brief on behalf of the Electronic Frontier Foundation in Maracich v. Spears. They also represented UNITE in the Pichler v. UNITE litigation discussed herein.

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