Articles + Publications | May 5, 2021

Eleventh Circuit Throws Debt Collectors Under the FDCPA Bus for Sharing Account Information with Letter Vendors

RELATED PROFESSIONALS

John C. Lynch | Ethan G. Ostroff | Jason E. Manning | Kathleen M. Hutchenreuther | Leah Tedford

In a panel decision on April 21, the Eleventh Circuit held that (1) a consumer had standing to bring a claim under the Fair Debt Collection Practices Act (FDCPA) because he alleged an invasion of privacy based on the spread of his debt-related information; and (2) a debt collector's outsourcing of its letter process to a third-party letter vendor violates the FDCPA because sending the data to create and mail letters to consumers violates the prohibition on third-party disclosure set forth in Section 1692c(b) of the FDCPA.

Section 1692c(b) of the FDCPA prohibits a debt collector from communicating with most third parties "in connection with the collection of any debt" unless it has the consumer's consent. Communications with the consumer's attorney, a creditor or its attorney, the debt collector's attorney, or a consumer reporting agency are permissible, as are certain communications with third parties to locate a consumer or those required by a court or court judgment. A debt collector is subject to liability for all other third-party communications "in connection with the collection of any debt."

Plaintiff's Allegations

Plaintiff Richard Hunstein (Hunstein) allegedly owed a debt to Johns Hopkins All Children's Hospital for his son's medical care. The hospital hired debt collector Preferred Collection & Management Services, Inc. (Preferred) to collect the debt. Preferred hired a commercial mail vendor to send correspondence to Hunstein on its behalf.

Preferred electronically sent the mail house certain information about Hunstein: his status as a debtor, the balance of his debt, the entity to which he owed the debt, that the debt was for his son's medical care, and his son's name. The letter vendor then used the information to generate and mail Preferred's letter to Hunstein to collect his hospital debt.

Hunstein sued Preferred, alleging it violated the FDCPA by communicating sensitive medical debt information to the third-party mail vendor without Hunstein's consent. Preferred conceded the correspondence was a "communication" within the FDCPA, but the district court granted its motion to dismiss, holding that Preferred's electronic transmission to the mail vendor was not a communication "in connection with the collection of any debt." See Section 1692c(b).

Hunstein appealed the dismissal, and the Eleventh Circuit reversed, holding Hunstein had standing to pursue the FDCPA claim and had stated a claim because the communication by Preferred to the mail house was "in

connection with the collection of any debt."

Plaintiff's Invasion of Privacy Allegation Had Standing

The Eleventh Circuit first analyzed whether Hunstein alleged a concrete injury in fact necessary for standing under Article III. To bring his case in federal court, Hunstein had to establish an injury in fact or an invasion of a legally protected interest, which was concrete, particular to him, actual or imminent, and not hypothetical.

In his complaint, Hunstein alleged he "may well be harmed by the spread" of "sensitive medical" debt information to third parties like Preferred's mail vendor. The court acknowledged that Hunstein's "conclusorily" pleaded harm was not a tangible harm and did not create a substantial risk of actual harm.

Nevertheless, the panel concluded Hunstein's allegation was enough to allege a violation of a statutory right sufficient for standing. The court reviewed historically recognized injuries and Congress's intent in the FDCPA, and it held that Hunstein's alleged harm was the "intangible-but-nonetheless-concrete" injury of invasion of privacy via the public disclosure of private facts. Because the FDCPA expressly protects individual privacy (15 U.S.C. § 1692(a)) and prohibits a debt collector from communicating with all but a few third parties "in connection with the collection of any debt," Hunstein had alleged a "concrete" injury for standing purposes.

Data Transfer to Mail Vendor was a Communication in Connection with the Collection of a Debt

The Eleventh Circuit then considered whether Preferred's transmission of data to its letter vendor was "in connection with the collection of any debt" under Section 1692c(b). The court held that it was.

Employing dictionaries and the common usage of the word "connection," the Eleventh Circuit determined that Preferred's communication to the mail vendor "inescapabl[y]" "concerned," "was with reference to," and "bore a relationship or association to" the collection of Hunstein's medical debt.

The court rejected Preferred's three arguments to the contrary, which were based on the notion that the communication to the mail vendor was not a demand for payment and thus fell outside Section 1692c(b)'s restrictions because the transmission merely "related to" the collection of a debt and was not an unauthorized third-party disclosure.

First, Preferred pointed to another FDCPA provision, Section 1692e, which prohibits the use of "false, deceptive, or misleading representation or means *in connection with the collection of any debt*." (emphasis added). Citing prior cases within the Eleventh Circuit that held the language of Section 1692e necessarily entails a "demand for payment" from a consumer, Preferred asserted Section 1692c(b) does not apply to the transmission of information to a mail vendor. But, relying on canons of statutory construction, the court distinguished Section 1692e cases by explaining that most of the exceptions to Section 1692c(b) never include demands for payment (*i.e.*, from a consumer reporting agency or the attorney of the debt collector), and therefore would be superfluous under the "demand for payment" interpretation of Section 1692e. The court concluded that "the phrase 'in connection with the collection of any debt' in Section 1692c(b) must mean something more than a mere demand for payment. Otherwise, Congress's enumerated exceptions would be redundant."

Second, Preferred urged the panel to adopt a seven-factor test used in Section 1692e cases to determine whether a communication is "in connection with the collection of any debt." Again, distinguishing Section 1692e cases, the Eleventh Circuit rejected Preferred's position, concluding that "in connection with the collection of any debt" is easily understood, has an "ordinary meaning," and needs no complicated multifactor application.

Third, appealing to the industrywide practice of using third-party letter vendors, Preferred argued that Hunstein's interpretation of Section 1692c(b) would upend the debt collection industry. The Eleventh Circuit acknowledged the risk that its ruling might "upset[ ] the status quo in the debt-collection industry" and "may well require debt collectors (at least in the short term) to in-source many of the services that they had previously outsourced, potentially at great cost." Nevertheless, the court doubled down on its statutory interpretation and stated, "if Congress thinks that we've misread § 1692c(b) — or even that we've properly read it but that it should be amended — it can say so."

At present, the Eleventh Circuit's mandate will issue on May 5, though it is expected that Preferred will file a petition for rehearing en banc and request a stay of the mandate. Given the state laws analogues to the FDCPA that apply to first-party creditors, all financial services industry stakeholders should take note of this ruling and consider what steps to take as a result of the Eleventh Circuit's decision.

RELATED INDUSTRIES + PRACTICES

- Consumer Financial Services
- Fair Debt Collection Practices Act (FDCPA)