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Hunstein Oral Arguments: Eleventh Circuit Weighs Use of Third-Party Vendors in Debt Collection

WRITTEN BY

David N. Anthony | Keith J. Barnett | Stefanie H. Jackman | Ethan G. Ostroff | Misha Tseytlin | Jonathan P. Floyd

On February 22, the Eleventh Circuit Court of Appeals held oral argument in *Hunstein v. Preferred Collection and Management Services Inc.* (Case Number 19-14434). Almost a year ago, on April 21, 2021, the Court of Appeals issued the original *Hunstein v. Preferred Collection and Management Services Inc.* opinion, which 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 mail 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.

For context, 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."

Further complicating the matter, the Eleventh Circuit then vacated its original opinion and issued a substitute opinion. *See Hunstein vs. Preferred Collection & Management Services, Inc.*, — F. 4th —, No. 19-14434, 2021 WL 4998980 (11th Cir. Oct. 28, 2021). Unfortunately for the collection industry, the substitute opinion did not reverse the panel's original opinion. Instead, the panel majority reaffirmed its original opinion and held that Hunstein had standing to sue. Despite considering *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190 (2021), which held that a concrete injury under the Fair Credit Reporting Act requires more than the existence of a risk of harm that never materializes, the *Hunstein* majority nonetheless ruled Preferred's alleged statutory violation sufficiently analogous to the common law tort of public disclosure of private facts to convey standing under the FDCPA. *Id*. at *10. In so holding, the majority reasoned that a statutory harm need only be similar in *kind* to a common law tort, not necessarily similar in *degree*. *Id*. at *5-10.

All was not lost however; in a sharp dissent, Judge Tjoflat claimed the majority opinion "goes off the rails" and ignored the requirement set by *TransUnion* that a plaintiff must allege a statutory violation sufficiently analogous to a common law tort. *Id*. at *17. He viewed Preferred's communication to its vendor as insufficiently "public" to constitute a public disclosure of private facts. *Id*.

On November 17, 2021, the Eleventh Circuit vacated the substitute opinion and agreed *sua sponte* to reconsider *en banc* whether Preferred's transmission of private debtor information to its mail vendor violated the

FDCPA. *See* 2021 WL 5353154 (11th Cir. Nov. 17, 2021). In ordering the en banc rehearing, the Eleventh Circuit indicated that it "desires for counsel to focus their briefs on the following issue: Does Mr. Hunstein have Article III standing to bring this lawsuit?"

At the February 22 oral argument, Chief Judge William H. Pryor Jr. challenged Hunstein's claim that Preferred violated the FDCPA by using a third-party mail vendor to send him a collection letter. Judge Pryor said a central argument in Hunstein's case, about whether the use of a third-party vendor or agent constituted unlawful disclosure of private information, was decided by the Supreme Court in its June 2021 opinion in *TransUnion*. Indeed, in *TransUnion*, when confronted with a nonpublic disclosure, the Court stated that "the plaintiffs' internal publication theory circumvents a fundamental requirement of an ordinary defamation claim — publication — and does not bear a sufficiently 'close relationship' to the traditional defamation tort to qualify for Article III standing." *See* 141 S. Ct. at 2210 n.6.

"[T]he argument that you're talking about here, just communicating it to the employees of the [third-party mail vendor], this was specifically rejected by the Supreme Court, wasn't it?" Judge Pryor asked Hunstein's counsel. "Didn't they reject [] your very theory, if that's your argument — that communicating it to a mail house vendor counts?"

Other judges on the Eleventh Circuit noted the lack of facts about the case, which never proceeded beyond a motion to dismiss at the district court level, and therefore focused on hypotheticals. For example, Judge Kevin C. Newsom, who was part of the two original majority opinions, posed a scenario in which Google discloses the browsing history of a user to 140,000 of its employees, and then asked Preferred's counsel whether that constituted publication.

Preferred answered that that scenario described "would not be" sufficient to establish a publication to the world at large — an answer to which Judge Newsom simply responded, "wow."

In response, Preferred clarified that there is no evidence in the record that Hunstein's information was ever read or viewed by anyone employed by the third-party mail vendor. However, counsel for Hunstein admitted that the underlying complaint was "inartfully drafted" and stated that, if allowed to return to the district court, would be amended.

Hunstein has created mass confusion in the collection industry and the courts. For example, in 2021, the Eastern District of New York dismissed six similar FDCPA complaints after the plaintiffs in each of the respective cases failed to demonstrate injury-in-fact sufficient for Article III standing in response to show cause orders. However, just this month, the Eastern District of Pennsylvania adopted *Hunstein* under similar facts. For these reasons, debt collectors who wish to engage a third-party vendor should seek legal counsel to learn how their respective jurisdictions treat the use of vendor services under the FDCPA.

Troutman Pepper contributed multiple amicus briefs to the Eleventh Circuit on behalf of various industry groups, including the Third-Party Payment Processors Association, and the Mail Vendors Coalition, as well as individual industry stakeholders. We will continue to monitor *Hunstein* and other FDCPA-related developments through our *Consumer Financial Services Law Monitor* blog.

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