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Locke Lord QuickStudy: A Stunning Opinion on "Dunning" ?Letters: Revised Opinion Following *En Banc* Review

Locke Lord LLP

WRITTEN BY

Steven J. Brotman | Dale A. Evans Jr.

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In a revised opinion issued September 8, 2022, an *en banc* panel of the Eleventh Circuit Court of Appeals reversed last year's controversial opinion which potentially spelled trouble for debt collectors utilizing third-party vendors to prepare and mail correspondence to consumers.

Last year, the United States Court of Appeals for the Eleventh Circuit released *Hunstein v. Preferred Collection & Mgmt. Services, Inc.,* 994 F.3d 1341 (11th Cir. Apr. 21, 2021), in which the Court reviewed a debtor's Article III standing as well as a debt collector's liability under the Fair Debt Collection Practices Act ("FDCPA") for communications with a third party. Of particular significance was the Court's holding that the debt collector's transmission of a debtor's information to a third-party vendor who created and mailed "dunning" letters – a notice to a debtor of an overdue payment – was a violation of the FDCPA.

Following a petition for rehearing, the review of *amicus curiae* briefs, and the U.S. Supreme Court's intervening decision in *TransUnion LLC v. Ramirez*, 131 S. Ct. 2190 (2021), the Eleventh Circuit panel vacated its prior opinion and substituted it with a new opinion on October 28, 2021. *Hunstein v. Preferred Collection & Mgmt. Services, Inc.*, 17 F.4th 1016 (11th Cir. Oct. 28, 2021).

While one judge from the original panel changed his position based on the analysis in *TransUnion*, the decision from the Court remained the same: a debtor had Article III standing to maintain a lawsuit against a debt collector for the alleged provision of a debtor's sensitive information to a third-party vendor in connection with the collection of a debt. The Court followed the same test articulated by *TransUnion* in its determination of standing – that a plaintiff's asserted harm must be of the same "kind, not degree" as a protected legal interest at common law. *Id.* at 1030. While the dissent agreed that *TransUnion's* "kind, not degree" analysis was appropriate, it did not agree that the allegations in *Hunstein* passed muster.

On November 17, 2021, the Eleventh Circuit vacated the substitute opinion and agreed to reconsider *en banc* whether a debt collector's transmission of private debtor information to its mail vendor violated the FDCPA. *Hunstein v. Preferred Collection & Mgmt. Services, Inc.,* 17 F.4th 1103, 1104 (11th Cir. 2021).

Following oral arguments, the *en banc* panel held that the debtor did not have standing because "a bare

procedural violation of the statute was not enough, at least on its own, to establish concrete injury." *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, No. 19-14434, 2022 WL 4102824, at *1 (11th Cir. Sept. 8, 2022). Using the same approach as the Supreme Court in *TransUnion,* the panel compared the elements of the alleged statutory violation with those of an existing tort claim. Though the debtor did not identify any specific harm in his complaint, he argued to the panel that the debt collector's act caused a concrete injury because it was analogous to the common-law tort of public disclosure. *Id.*

The panel, however, held that the debtor's theory lacked the express requirement of "disclosure to the *public.*" *Id.* Without publicity, the Court held, "a disclosure cannot possibly cause the sort of reputational harm remediated at the common law." *Id.*

Calling the analysis of Hunstein's claims "an exercise in simplicity," the panel held that simply providing information regarding a debt to a mail vendor to prepare and mail a letter on the debt collector's behalf does not constitute the publicity of the information necessary for the common law tort – no matter how personal – to the public at large. *Id.* at *6 (11th Cir. Sept. 8, 2022)

The panel's decision, however, was not unanimous. The dissent urged the "eminently reasonable inference" that the employees of the mail vendor must have read, and thus received, Hunstein's private information. *Id.* at *19.

But at oral argument, however, Hunstein's counsel failed to resonate that argument and only argued the employees had "access" to the information, not that they actually read or perceived the information. *Id.*

The *en banc* opinion allows debt collectors to continue utilizing third-party vendors to mail correspondence, including dunning letters, to consumers. It is unclear, however, whether a consumer could survive a motion to dismiss with more detailed allegations regarding damages and the extent to which an employee of the mail vendor accesses or reviews private information to prepare written correspondence.

But, the Supreme Court and the Eleventh Circuit have consistently dismissed lawsuits based on bare statutory violations. *See TransUnion*, *Spokeo, Inc. v. Robins,* 578 U.S. 330, 342 (2016); *Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1620 (2020); *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917, 930 (11th Cir. 2020). Clearly, consumers will need to move the needle much further to avoid dismissal for lack of standing in lawsuits based merely on statutory violations.

Lenders and loan servicers that continue using mail vendors to communicate with customers should continue to ensure that proper safeguards are in place to prevent disclosure to the general public and should ensure that both their internal policies and those maintained by their mail vendors prevent the unauthorized disclosure of private information.

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