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Locke Lord QuickStudy: A Stunning Opinion on “Dunning” ?Letters – Revised Opinion Following Motion for ?Reconsideration ?

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Earlier this year, the United States Court of Appeals for the Eleventh Circuit released the controversial decision *Hunstein v. Preferred Collection & Mgmt. Services, Inc.,* No. 19-14434, 2021 WL 1556069 (11th Cir. Apr. 21, 2021), which potentially spelled trouble for debt collectors utilizing third-party vendors to prepare and mail correspondence to consumers.

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 prior opinion was vacated and substituted with a new opinion on October 28, 2021. *Hunstein v. Preferred Collection & Mgmt. Services, Inc.*, No. 19-14434, 2021 WL 4998980 (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 *9. While the dissent agreed that *TransUnion’s* “kind, not degree” analysis was appropriate, it did not agree that the allegations in *Hunstein* passed muster.

Considering a question of first impression, the Court reviewed a debtor’s Article III standing as well as a debt collector’s liability under 15 U.S.C. § 1692c(b) for communications with a third party in connection with the collection of a debt. Of particular significance is the Court’s holding that the debt collector’s transmission of a debtor’s information, including information involving the medical care and identity of a minor, to a third-party vendor who created and mailed “dunning” letters – a notice to a debtor of an overdue payment – was a violation of 15 U.S.C. § 1692c(b). While there was no “tangible harm” to the consumer, the Court nonetheless determined that the statutory violation alone was an “intangible-but-nonetheless-concrete” injury such that there was standing under *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016), *as revised* (May 24, 2016).

The transmitted information at issue, however, went well beyond the consumer’s debt. The alleged communications also included the name of the consumer’s minor son and that the debt emanated from the minor

son's medical treatment.

This information was transferred to the vendor so that it could create, print, and mail the dunning letter to the purported debtor in the course of the vendor's relationship with the creditor. Despite the fact that the information was transmitted on behalf of the debt collector and not the third-party vendor, the Court found this communication was a violation of the FDCPA. The Court also rejected the notion that the mail vendor is only a medium delivering the information rather than a third-party receiving information and the dissent's suggestion that Congress intended to allow communications to pass through intermediaries such as third-party vendors.

The Court did so even while understanding that its interpretation "runs the risk of upsetting the status quo in the debt-collection industry." *Hunstein* at *15. The Court also recognized that "debt collectors share information about consumers not only with dunning vendors…but also with other third party vendors." *Id.* Indeed, the Court was aware its reading of the statute "may well require debt collectors (at least in the short term) to in-source many services that they had previously outsourced, potentially at great cost." *Id*. Nevertheless, the Court maintained its strict interpretation of the statute despite noting that the "great cost" that may be borne by debt collectors "may not purchase much in the way of 'real' consumer privacy." *Id.*

The Court reiterated its obligation is to "interpret the law as written, whether or not we think the resulting consequences of that reading are particularly sensible or desirable." *Id*. Ultimately, the Court advised that if Congress believes it has misread the statute, or that the statute needs to be amended, "it can say so." *Id.*

However, the Court did acknowledge that the *Hunstein* defendant could still prevail on the merits if it could prove that the disclosure of the personal information to the vendor was too insignificant, or that the vendor's employees did not actually read and merely processed the information, to constitute a sufficient public disclosure. *Id.* at *10. Nevertheless, because *Hunstein* did not progress past a motion to dismiss, it could not address the merits in its opinion.

Starting with the premise that "the FDCPA did not mean to eliminate debt collection practices", only "*abusive* debt collection practices", the dissent disagreed that the debtor had Article III standing following the opinion in *TransUnion. Id.* at *17 (emphasis added).

Specifically, the dissent believed that the alleged statutory violation was not sufficiently analogous to any recognized tort – namely the tort of public disclosure of private facts – such that a statutory violation alone would convey standing to the consumer. *Id.*

In doing so, the dissent's position was that providing the information regarding a consumer's debt to a vendor who has a business relationship with the debt collector does not constitute "public disclosure of private facts." *Id.* The dissent's position was essentially that disclosing the information to a vendor hired by the debt collector for purposes of preparing and mailing written correspondence only intended for the consumer is not different in any meaningful way from it being shared with its in-house employees for the very same purpose. The dissent also points out that the entire purpose of utilizing an outside vendor is to decrease costs that would otherwise be passed on to consumers. *Id.* at *21.

The tension between communications intended only for a vendor juxtaposed with communications disseminated to

the public could be an important consideration for further appellate review. That a private communication *could* be a public communication does not make it so. As the dissent put it, "[t]his is like saying that sugar cookie batter is the same thing as chocolate chip cookie batter because sugar cookie batter would be chocolate chip cookie batter if you added chocolate chips." *Id.* at *19.

With this backdrop, the case may be destined for a request for rehearing *en banc* or the U.S. Supreme Court. But until that time, debt collectors and their counsel should be aware of the potential impact of this decision and prepare accordingly.

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