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A Stunning Opinion on "Dunning" Letters—Pending Rehearing En Banc in the Eleventh Circuit

By Steven J. Brotman, Dale A. Evans Jr. and R. Keith Ustler*

The authors of this article discuss the U.S. Court of Appeals for the Eleventh Circuit decision in Hunstein v. Preferred Collection & Mgmt. Services, Inc., *which is now before the Eleventh Circuit for rehearing en banc and may ultimately be destined for the U.S. Supreme Court.*

The U.S. Court of Appeals for the Eleventh Circuit released the controversial decision *Hunstein v. Preferred Collection & Mgmt. Services, Inc.*,[1] 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*,[2] the prior opinion was vacated and substituted with a new opinion.[3] Shortly thereafter, the Eleventh Circuit ordered a rehearing en banc and vacated the panel's two prior opinions.

THE DECISION

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

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[1] No. 19-14434 (11th Cir. Apr. 21, 2021).

[2] 131 S. Ct. 2190 (2021).

[3] *Hunstein v. Preferred Collection & Mgmt. Services, Inc.*, No. 19-14434 (11th Cir. Oct. 28, 2021).

interest at common law.[4] While the dissent agreed that *TransUnion's* "kind, not degree" analysis was appropriate, it did not agree that the allegations in *Hunstein* passed muster.

A Question of First Impression

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*.[5]

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 Fair Debt Collection Practices Act ("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."[6] The court also recognized that "debt collectors share information about consumers not only with dunning vendors . . . but also with other third party vendors."[7] Indeed,

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[4] *Id.*

[5] 578 U.S. 330, 340 (2016), *as revised* (May 24, 2016).

[6] *Id.*

[7] *Id.*

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."[8] 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."[9]

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."[10] 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."[11]

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.[12] Nevertheless, because *Hunstein* did not progress past a motion to dismiss, it could not address the merits in its opinion.

THE DISSENT

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*.[13]

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.[14]

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

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* (emphasis added).

[14] *Id.*

the debt collector does not constitute "public disclosure of private facts."[15] 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.[16]

REHEARING EN BANC

Subsequent to the panel decision, and after a polling of all Eleventh Circuit judges, the Eleventh Circuit Court of Appeals ordered a rehearing en banc and vacated the panel's substituted opinion.[17] The Eleventh Circuit directed the parties to focus their arguments on whether Hunstein has Article III standing to bring his lawsuit. The parties' en banc briefing is now complete and a rehearing was scheduled before the Eleventh Circuit's full bench on February 22, 2022, with a decision expected shortly thereafter. In addition, the Eleventh Circuit accepted amicus briefs from numerous "friends of the court," including creditor bar associations, financial industry participants, and the U.S. Chamber of Commerce.

Preferred Collection's main argument before the full court is that Hunstein lacks Article III standing because his alleged injury—dissemination of loan-related and medical information to a letter vendor—is unlike any harm recognized as actionable at common law. Specifically, the debtor's alleged injury does not sufficiently mirror the traditional tort of public disclosure of private facts because, among other things, Preferred did not disclose this information "to the community or public at large." This is the same argument the dissent articulated in the now-vacated panel decision. Further, the alleged injury did not sufficiently mirror the traditional tort of intrusion upon seclusion, because intrusion generally involves "gathering . . . private facts or information through improper means," and merely "disseminating information, without more, is not an intrusion." Preferred Collection also argues that it did not violate the FDCPA because its agents are not "third parties" with whom debt collectors may not communicate under § 1692c(b). Finally, Preferred Collection argues

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[15] *Id.*

[16] *Id.*

[17] *Hunstein v. Preferred Collection & Mgmt. Services, Inc.*, 17 F.4th 1103, 1104 (11th Cir. 2021).

that interpreting the FDCPA to bar debt collectors from communicating with their agents raises serious First Amendment concerns. The amicus briefs echo Preferred Collection's standing arguments and further emphasize that a ruling in accordance with the panel's original decision could functionally prohibit debt collection litigation.

CONCLUSION

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."[18]

With this backdrop, the case may be destined for the U.S. Supreme Court following the Eleventh Circuit's en banc decision. 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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[18] *Id.*