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In Reversing *Hunstein*, the Eleventh Circuit Stands Firm on Standing, But Other Questions Remain

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On September 8, 2022, following an en banc review, the Eleventh Circuit issued its much-awaited new decision in the *Hunstein v. Preferred Collection and Management Services* action, which involves a claimed violation of the federal Fair Debt Collections Practices Act (FDCPA). Judge Grant delivered the opinion of the Court joined by seven other judges, while Chief Judge William Pryor filed a concurring opinion, and Judge Newsom, the judge who drafted the prior panel decision, filed a lengthy impassioned dissenting opinion.

Overall, the crux of the Court's opinion rings true with what we learned from the U.S. Supreme Court's decision last year in *TransUnion v. Ramirez*: That without concrete harm, there is no Article III standing and, without Article III standing, the federal courts do not have jurisdiction, and dismissal of the underlying complaint is required. That is what the Eleventh Circuit has decided in its final treatment of *Hunstein*.

As laid out in prior alerts (Common Use of Third-Party Mail Vendors is Actionable Under the FDCPA and *Hunstein* on Rehearing – Revisiting Article III Standing in the Eleventh Circuit), *Hunstein* involves an effort to collect a debt. Hunstein alleged that his creditor, a medical provider, sent information about a debt that he owed for medical treatment received by his son to its third-party collections agency (Preferred). Preferred then sent specific and narrow data points regarding the debt owed by Hunstein to its mail vendor, which then inputted this information into a form dunning letter that was mailed to Hunstein. Hunstein alleged that it was this transmittal of his personal information that formed the basis of his claim for violation of the FDCPA under 15 U.S.C. §1692c(b).

Both the majority and the concurring opinions take great care to discuss the simplicity of the decision on appeal, based on the framework set forth by SCOTUS in *TransUnion* and, previously, in *Spokeo*. The framework is simple – mere allegation of a statutory violation is insufficient to create Article III standing, so more is needed – and does that "more" allow a comparison to a recognized common-law tort (i.e., a harm "traditionally recognized as providing a basis for lawsuits in American courts." *Hunstein* [quoting *TransUnion*, 141 S. Ct. at 2204].)

The Court reasons that while Hunstein asserts a pure technical violation of the statute (here, the FDCPA) that they must examine if his claim can be said to have a close relationship with any common-law tort. Based on Hunstein's allegations, the Court reasoned, it can be compared to invasion-of-privacy torts, namely the tort of public disclosure of private facts. The Court concludes that despite Hunstein's best efforts to "shove a nonpublic transfer of information into a tort targeting public disclosure, … it just does not fit" 2022 WL 4102824 at *3.

The Court spends considerable time discussing what exactly is required for the "publicity" element to allow Hunstein's FDCPA violation to be akin enough to the tort of public disclosure of private facts to allow for a concrete injury to be established that would give rise to Article III standing. Ultimately, the Court relies on the Restatement (Second) of Torts to determine that publicity requires far more than what Hunstein has alleged (the mere sending of information about his debt from one company to another). It outlines the distinction

between public and private communication, and how the measure is not quantitative in nature, but rather, qualitative.

Unfortunately, this decision will only slow the spread of this litigation. The decision did not hold that sharing information with mail vendors would not be a violation of the FDCPA. FDCPA suits, at least under this theory regarding "publication" of private information related to the collection of debt, may now be brought in state court, which has different standing requirements. This would mirror the recent trend in lawsuits filed for violations of the Telephone Consumer Protection Act (TCPA), after the Eleventh Circuit narrowly construed Article III standing for such cases in the *Salcedo v. Alex Hanna* case in 2019 (For more details see our prior alert Eleventh Circuit Delivers Crushing Blow to Single-Text TCPA Plaintiffs).

Moreover, this decision (which ultimately boils down to a dismissal without prejudice) does not forestall the potential for a better pleaded complaint successfully raising standing in regard to the provision of information to a mail vendor. Most troubling is the prospect that this theory could be applied to other third-party vendors of debt collectors and create new lines of litigation in the future. Servicers, debt collectors, and other companies that can be considered debt collectors should continue to follow the evolution of this litigation.

Should you have any questions about this ruling, how it may impact your business or ongoing matters, or have questions generally related to the FDCPA or other consumer protection statutes, please contact Eve A. Cann.