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Eleventh Circuit Allows Article III Standing for Disclosure of Sensitive Information Relating to Debt

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Without more, "a bare procedural violation" of federal law cannot establish an injury in fact sufficient to confer Article III standing. Applying this requirement from the U.S. Supreme Court, the Eleventh Circuit has consistently found that challenges only to procedural violations of federal law fail to establish a concrete injury in fact.

In some circumstances, though, a procedural violation that involves disclosure of sensitive information can move a case over the line into a justiciable case or controversy. The Eleventh Circuit recently found such circumstances in *Hunstein v. Preferred Collection and Management Services Inc.* In this case, a debt collector disclosed to a vendor data about a consumer's debt, including "the fact that his debt resulted from his son's medical treatment" and the name of his son. The Eleventh Circuit then ruled that such a disclosure violated the Fair Debt Collection Practices Act (FDCPA) because it bars communicating with third parties "in connection with the collection of any debt."

The Eleventh Circuit first considered whether the debtor alleged a sufficiently concrete injury to establish "injury in fact" sufficient to confer standing under Article III of the U.S. Constitution. The debtor had not alleged either a tangible harm or an imminent risk of harm, so the court turned its analysis to "history and the judgment of Congress" as instructed by the Supreme Court in its seminal *Spokeo Inc. v. Robins* case. Reviewing history, the court concluded that communicating with third parties "in connection with the collection of any debt" was akin to an invasion of privacy tort at common law – where, quoting the Restatement (Second) of Torts, "the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." In addition, Congress's statutory declaration that the FDCPA was meant to address "invasions of individual privacy" led the court to conclude that the FDCPA bears a close relationship to the harm addressed by common-law invasion of privacy torts. In doing so, the court reconciled its ruling with its prior opinions in *Perry v. Cable News Network Inc.* (disclosure of news-viewing history causes Article III injury) and in *Trichell v. Midland Credit Management Inc.* (the alleged use of "false, deceptive, or misleading representation or means in connection with the collection of any debt" does not cause Article III injury).

The court then found that it was the "judgment of Congress" that a violation of the statute constituted an injury in fact because Congress enacted the FDCPA in part to curb "invasions of individual privacy." Since § 1692c(b) had both an analogous cause of action at common law and reflected the judgment of Congress, the court concluded, the plaintiff had standing.

Moving to the merits, the Eleventh Circuit held that the communication with the vendor was "in connection with the collection of any debt." It rejected the rule applied by the district court that there be some form of demand for payment to constitute "in connection with the collection of any debt." Instead, it found persuasive the debt-specific details of the communication to find the debtor stated a claim. Thus, if a debt collector wants to use an outside vendor in the course of debt collection, it will need to ensure that the vendor is one of the few exceptions listed in the statute the debt collector is allowed to communicate with – for example, "the attorney of the debt collector."

This case and *Perry* both involved similar prohibitions: "A may not share information about B with C." *Hunstein*, therefore, could stand for the proposition that, for purposes of the FDCPA, sharing information about someone with a third party may be found to constitute an Article III injury in fact – even without tangible harm or an imminent risk of harm. But *Hunstein* and *Perry* also involved the disclosure of sensitive (and, at times, intensely personal) information. Future panels likely will limit *Hunstein* and *Perry* based on the "information" disclosed – whether it is sensitive personal information, like a child's health problems or a person's news viewing history – as opposed to garden variety (or even public) information about the person. Notably, *Hunstein* arrives shortly before the Supreme Court is set to provide further clarity on *Spokeo* in *TransUnion LLC v. Ramirez*. There, the Supreme Court is considering the constitutional and procedural requirements for showing class member injury in the context of a damages class action for a violation of the Fair Credit Reporting Act. Whether *TransUnion* will affect future application of *Hunstein* remains to be seen.

Key Takeaways

In the Eleventh Circuit, a procedural violation of a congressional prohibition that "A may not share information about B with C" could give rise to Article III standing for a claim brought under the FDCPA even absent tangible harm or an imminent risk of harm. But future panels may limit this ruling to situations in which the information shared is sensitive and personal.

The FDCPA's prohibition on communications "in connection with the collection of any debt" applies to any communication, not simply those including a demand of payment, disrupting debt collectors' ability to use third-party vendors to send debt correspondence.

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