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Eleventh Circuit Upends an Industry Standard for Debt Collectors and Their Vendors

by Jim McCabe and Nanci Weissgold

Creditor and debt collector court watchers were disappointed late last month when the Eleventh Circuit finally took action on pending petitions for panel rehearing and for rehearing en banc in *Hunstein v. Preferred Collection and Management Services Inc*. The court, unfortunately, applied different reasoning to maintain its original holding that plaintiff Hunstein suffered Article III injury in fact and left in place the entirety of its unfounded and arguably unconstitutional interpretation of the Fair Debt Collections Practices Act (FDCPA). Had the court concluded that Hunstein lacked standing, its prior opinion would have been vacated for lack of subject-matter jurisdiction, and debt collectors would not have to contend with an appellate court ruling that a standard industry practice violates the law. Given last month's decision, debt collector defendants may have to contend with *Hunstein*'s substantive holding for some time.

Let's take this from the top. On April 21, 2021, a three-judge panel in the Eleventh Circuit upended the consumer debt collection business with its decision in *Hunstein v. Preferred Collection and Management Services Inc.* 994 F.3d 1341 (11th Cir. 2021) (*Hunstein I*). *Hunstein I* held that a debt collector's thoroughly unremarkable (and industry standard) practice of sending data to a third-party vendor to have debt collection letters printed and mailed violated Section 1692c(b) of the FDCPA. That section provides, subject to exceptions not relevant here, that "a debt collector may not communicate, in connection with the collection of any debt," with anyone other than the debtor. In district court in the Middle District of Florida, Preferred conceded that its transfer of data to the print vendor was a "communication" under the FDCPA, but argued that the transfer was not made "in connection with the collection of any debt." The district court accepted Preferred's argument and dismissed the case. Hunstein appealed.

The panel asked the parties for supplemental briefing on whether the complaint alleged an Article III injury sufficient to create subject-matter jurisdiction in federal courts. Much of the *Hunstein I* decision focused on the Article III issue, which, while interesting, has no bearing on the question of greater interest to debt collectors: does the FDCPA really bar the use of print vendors? What about other vendors, like process servers? *Hunstein I* concluded that since the disclosure of information about Hunstein's medical debt was akin to the public disclosure of private facts actionable

at common law, a violation of the FDCPA's communication prohibition was sufficient to create Article III standing. The panel thus had subject-matter jurisdiction to consider the interpretation of Section 1692c(b).

This is where, from a debt collector's viewpoint, things went off the rails. Accepting the parties' stipulation that the data transfer to the print vendor was a "communication," the panel rejected Preferred's arguments that a covered "communication" must contain a demand for payment, and that the court should follow the Sixth Circuit's decision in *Goodson v. Bank of America N.A.*, 600 F. App'x 422 (6th Cir. 2015), and adopt a multifactor balancing test to determine whether the communication was "in connection with the collection of any debt." Finally, noting that "[i]t's not lost on us that our interpretation of § 1692(c) runs the risk of upsetting the status quo in the debt-collection industry," the panel rejected Preferred's "industry practice" argument, suggesting the industry go back to Congress for relief.

Unsurprisingly, the *Hunstein I* decision led to hundreds of new suits – some of them class actions – being filed against debt collectors. Preferred filed a petition for panel rehearing and rehearing en banc. By early June 2021, seventeen potential amici sought leave to file briefs in support of Preferred's position. Those submitting amicus briefs included state and national creditors' bar associations, the major banking trade associations, debt collectors, a consortium of print and mail vendors, telephone and cloud vendors, and a process server trade association. Collectively, the briefs' principal arguments were (1) *Hunstein I*'s standing analysis was wrong; (2) the court should not have accepted the parties' stipulation that Preferred's data transfer was a "communication" because it wasn't; (3) the FDCPA's restrictions on the contents of debt collection telegrams make clear that communications through a third-party medium (e.g., the telegraph company or the print vendor) do not violate the FDCPA; (4) if the interpretation were to stand, it would profoundly disrupt debt collection because collectors necessarily use many vendors; and (5) the court's construction of Section 1692(c) is a restriction on commercial speech that does not survive First Amendment scrutiny under the Supreme Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980). The court granted amici leave to file their briefs in mid-June, and on June 14, a judge of the Eleventh Circuit withheld the mandate in the case. On June 25, 2021, the Supreme Court handed down its decision in *TransUnion LLC v. Ramirez*, discussing Article III standing for statutory violation claims under the Fair Credit Reporting Act. Amici quickly filed supplementary authority with the Eleventh Circuit. Court watchers then awaited a request from the court for Hunstein to file oppositions to the petitions. For more than four months, it didn't come.

Instead, on October 28, 2021, the original *Hunstein* panel withdrew its panel opinion of April 21, 2021 and issued a new opinion. *Hunstein v. Preferred Collection and Management Services Inc.*, No. 19-14434 (11th Cir. 2021) (*Hunstein II*). *Hunstein II* differs from *Hunstein I* only in its analysis of Article III standing – it now deals with *TransUnion*, and holds (over a vigorous dissent) that Hunstein's complaint alleges an Article III injury. "Vigorous" doesn't really do justice to the tenor of the disagreement between the majority and the dissent – the new opinion features an epic exchange of nasty footnotes. The portion of the *Hunstein II* opinion dealing with the construction of Section 1692(c) is almost word-for-word identical to the discussion in *Hunstein I*.

Where does that leave things? We still have a published decision from a federal appellate court that reaches a questionable conclusion on statutory interpretation and does not contend with a number of problems (identified by amici) with that interpretation. Outside the Eleventh Circuit, litigants can argue that *Hunstein II* is wrong on the FDCPA and is not persuasive. It is conceivable that, in time, contrary authority will develop. In courts within the circuit, though, litigants will have to mount direct challenges to *Hunstein II*, such as on the "communication" question or under the First Amendment, or distinguish it on grounds that the information in *Hunstein* was especially sensitive. Is there any

hope of further action by the Eleventh Circuit? Possibly. Preferred has signaled that it will request rehearing en banc, obtaining an extension until December 3 to file a petition. While the Eleventh Circuit has recently taken no more than four en banc petitions a year, the bitterness of the panel's division on standing and the national interest in the case might prompt en banc interest. *If* en banc review is granted and *if* the en banc court concludes that Hunstein did not allege Article III injury, the crisis ends: absent subject-matter jurisdiction, the Eleventh Circuit is powerless to interpret the FDCPA in this particular case, and both *Hunstein* opinions lose their precedential value. This will not happen quickly, though. It would likely take at least a year to complete en banc proceedings, even if review were granted.

In the meantime, expect more lawsuits against debt collectors for harmless and industry-standard practices. If you are interested in more information about *Hunstein* and its impact on debt collection practices, Alston & Bird LLP can provide guidance.

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32.2.550.3700 ■ Fax: +32.2.550.3719
CHARLOTTE: One South at The Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, TX 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
FORT WORTH: Bank of America Tower ■ 301 Commerce ■ Suite 3635 ■ Fort Worth, Texas, USA, 76102 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 1950 University Avenue ■ Suite 430 ■ East Palo Alto, California, USA, 94303 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333