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Hunstein: The Eleventh Circuit Cavalry Arrives

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Readers of a certain age (or at least readers who were one-time city dwellers and cigarette smokers) may recall the cynical strategy of lighting a cigarette to induce the arrival of a desperately needed, late-running bus. "This is bad," the thinking went. "But if the fates punish me a little more by wasting a cigarette, at least I brought the bus." When a bus arrived just after the cigarette was lit, there was a sense of smug satisfaction at having manipulated the universe just a little bit.

Today, like Yogi Berra, we have a sense of déjà vu all over again. Yesterday, (lighting a cigarette) we published a client update bemoaning the fact the Eleventh Circuit panel in *Hunstein v. Preferred Collection and Management Services Inc.* had, after a five-month silence on a rehearing petition, reaffirmed in *Hunstein II* its holding 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 Fair Debt Collection Practices Act (FDCPA). We noted that Preferred planned to file a new en banc petition but warned that relief could be months or even years away and that defendants might have to live with *Hunstein II* for a while.

But hard on the heels of our advisory, the Eleventh Circuit bus arrived in the form of a *sua sponte* grant of en banc review, coupled with an order vacating the *Hunstein II* decision. En banc review may be conducted under Federal Rule of Appellate Procedure 35(a) on a vote of the majority of the circuit judges who are in active service, without the filing by a party of a petition for rehearing en banc. Review under FRAP 35(a) is limited to circumstances where "en banc consideration is necessary to secure or maintain uniformity of the court's decisions," or "the proceeding involves a question of exceptional importance." A majority of the active circuit judges has determined that the *Hunstein II* decision falls into one or both of these categories.

What happened? Petitions for panel rehearing and rehearing en banc are considered in "behind closed doors" mode in the appellate courts, but we can speculate a bit, based on published internal operating procedures, about what may have happened. When, in May, Preferred filed a petition for panel hearing or for rehearing en banc, the petition and the 17 amicus briefs filed in support of it would have been distributed to all the judges of the Eleventh Circuit.

However, under the Eleventh Circuit's Internal Operating Procedures, the filing of a petition for rehearing en banc along with a petition for panel rehearing "does not take the appeal out of plenary control of the panel deciding the appeal." Here, the original panel granted *panel* rehearing, which caused the panel to retain control of the proceeding until it issued its opinion in *Hunstein II* on October 28. Once the revised opinion was issued, the Internal Operating Procedures permitted any active circuit judge to request that the court be polled on whether rehearing en banc should be granted. A poll was clearly requested, and likely informed by the original petition and the amicus briefs filed with the court, a majority of the 11 active circuit judges voted to grant en banc review.

What does it mean? The court's order explicitly vacates the *Hunstein II* decision, which is customary on a grant of en banc review. The hundreds of cases that have been filed on the premise that *Hunstein I*'s or *Hunstein II*'s interpretation of Section 1692c(b) of the FDCPA is controlling have now lost their footing. Plaintiffs can attempt to keep their actions alive by urging courts to follow the *logic* laid out in the *Hunstein* appellate decisions, but those decisions are no longer *precedential*. District courts – even district courts within the Eleventh Circuit – are free to disagree with that logic. Defendants in such cases should be well equipped to defeat those arguments in trial courts – the 17 amicus briefs filed on the original *Hunstein* en banc petition contain a broad range of arguments about why a debt collector's transfer of letter data to a mailing house does not violate Section 1692c(b) of the FDCPA. Defendants have a lot of breathing room, at least until the en banc panel issues a decision that interprets Section 1692c(b).

What's next? The chief judge of the Eleventh Circuit will appoint appeal managers who will prepare and circulate to the other members of the en banc court a proposed notice to the parties specifying the issues to be briefed, brief lengths, and whether oral argument should be heard. When the notice has been approved by the court, the clerk will transmit it to the parties. The contents of that notice will be telling: will the full court request briefing on only the standing issue, on only the FDCPA issue, or on both? If the full court does not request briefing on Section 1692c(b), its en banc decision will not ultimately address that section. If, on the other hand, the full court requests such a briefing, there remains a possibility that an appellate court could, in time, re-adopt the *Hunstein* panel's surprising and disruptive interpretation of Section 1692c(b).

For the time being, we are stashing our smokes. The Eleventh Circuit cavalry has arrived.

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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