THE THIRD TIME IS THE CHARM: THE ELEVENTH CIRCUIT ALLOWS CREDITOR'S USE OF COMMERCIAL MAIL VENDOR

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On 8 September 2022, sitting en banc, the Eleventh Circuit held that a debt collector's communication of a customer's information to the debt collector's private, third-party commercial mail vendor was not actionable under the Fair Debt Collection Practices Act (FDCPA). In issuing the most recent iteration of *Hunstein v. Preferred Collection and Management Services, Inc.*,[1] the Eleventh Circuit reversed the panel decision.[2] The Eleventh Circuit examined, in particular, whether a bare procedural violation of the FDCPA on its own sufficed to establish a concrete injury for Article III standing purposes.[3] The Eleventh Circuit answered "no."[4] This is good news for loan servicers and collection agencies who seek to use third-party mail vendors to formulate, print, and mail collection letters, though institutions should still review, and update as needed, their mailing procedures to minimize and prevent potential disclosures.

In *Hunstein*, the plaintiff incurred a debt stemming from his minor son's medical treatment.[5] The hospital transferred the debt to the defendant, a collection agency.[6] The defendant, in turn, hired a commercial mail vendor to prepare and mail out a collection letter on the defendant's behalf, using the defendant's prewritten form letter.[7] After receiving the letter, the plaintiff filed suit alleging that the defendant's disclosure of his information to the defendant's mail vendor violated the FDCPA's prohibition on communicating "in connection with the collection of any debt, with any person other than the consumer."[8] The district court dismissed the action.[9] On appeal, an Eleventh Circuit panel reversed.[10] Shortly afterwards, the Supreme Court issued its decision *TransUnion LLC v. Ramirez*,[11] examining the basis for establishing Article III standing under another federal statute.[12] In light of *TransUnion*, the Eleventh Circuit panel vacated its opinion and issued another one, still finding that the defendant's communication to its mail vendor stated a FDCPA claim.[13] The Eleventh Circuit then voted to revisit the matter en banc.[14]

In reversing the panel decision, the Eleventh Circuit concluded that the plaintiff lacked Article III standing to proceed on the basis alleged.[15] In reaching this conclusion, the court found that the plaintiff had failed to plead that he had suffered a tangible, "real harm."[16] The court held that the subject communication did not constitute an allegation of a concrete harm.[17] In particular, the Eleventh Circuit held that the alleged intangible-reputational injury failed to give rise to an Article III injury because the defendant's communication to the mail vendor was not "public."[18] Stressing a distinction between public and private communications, the Eleventh Circuit reasoned "publicity" requires more than "*any* communication" but rather requires dissemination of the communication to "the public at large."[19] Further, the "*effect* of a disclosure is what matters—not the number of people to whom it is made."[20] In other words, "[t]ransmitting information" to a "single intermediary" who contacts a debtor through a private letter "without sharing it more broadly" is "simply not enough" to give rise to Article III standing under the

FDCPA.[21] In rendering its decision, the Eleventh Circuit held that the plaintiff was "simply no worse off because [defendant] delegated the task of populating data into a form letter to a mail vendor" and reiterated *TransUnion's* holding: "no concrete harm, no standing."[22]

KEY TAKEAWAY

Hunstein III is notable for all debt-collection businesses that delegate customer-related mailing tasks to vendors. The Eleventh Circuit ruling provides support to debt collectors for the use of third-party mail vendors to formulate, print, and mail collection letters. Nonetheless, a business should continue to be mindful of its operations in light of this and under governing FDCPA law.

FOOTNOTES

[1] Hunstein v. Preferred Collection & Mgmt. Servs., Inc., No. 19-14434, 2022 WL 4102824 (11th Cir. Sept. 8, 2022) [hereinafter *Hunstein III*].

[2] *See* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F.3d 1341 (11th Cir. Apr. 21, 2021) [hereinafter *Hunstein I*]; Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016 (11th Cir. Oct. 28, 2021) [hereinafter *Hunstein II*].

[3] *Hunstein III*, 2022 WL 4102824, at *9.

[4] *Id.*

[5] *Id. at *1.*

[6] *Id.*

[7] *Id.*

[8] *Id*. at *2 (quoting 15 U.S.C. § 1692c(b)). Two additional claims were brought by the plaintiff, but were not subject to appeal.

[9] Hunstein v. Preferred Collection & Mgmt. Servs., Inc., No. 19-CV-983-T-60SPF, 2019WL5578878, at *3 (M.D. Fla. Oct. 29, 2019).

[10] *Hunstein I,* 994 F.3d at 1352.

[11] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021) (examining basis for establishing Article III standing for alleged violation of the Fair Credit Reporting Act).

[12] *Id.* at 2200, 2203–07.

[13] *Hunstein II*, 17 F.4th at 1038.

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

[15] *Hunstein III*, 2022 WL 4102824, at *10.

[16] *Id*. at *1.

[17] *Id*. at *9.

[18] *Id.* at *1, *6-10.

[19] *Id*. at *7 (emphasis in original).

[20] *Id.* (emphasis in original).

[21] *Id.* at *8.

[22] *Id.* at *10 (quoting *TransUnion*, 141 S. Ct. at 2214).

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