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Hunstein on Rehearing – Revisiting Article III Standing in the Eleventh Circuit

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On April 21, 2021, the Eleventh Circuit Court of Appeals issued its decision in *Richard Hunstein v. Preferred Collection and Management Services, Inc.,* and potentially created a new claim under the Fair Debt Collection Practices Act (FDCPA) – ruling that a debt collector's sharing of information with a vendor is a violation of that statute, specifically of 15 U.S.C. §1692c(b). The debt collector has now moved for rehearing *en banc* of the Court's decision, arguing that the ruling is contrary to both the U.S. Supreme Court's 2016 ruling in *Spokeo, Inc. v. Robins*, and multiple prior decisions of the Eleventh Circuit.

The underlying facts are simple. A creditor referred a medical debt to a debt collector. The debt collector used a third-party mail vendor to send a dunning letter to the debtor. In doing so, certain information was conveyed, including (1) the debtor's status as a debtor, (2) the balance of the debt, (3) the entity to which the debt was owed, (4) that the debt concerned medical treatment for the debtor's son, and (5) the name of his son. The debtor sued, and the district court dismissed the suit. The debtor appealed.

As an initial matter, the Eleventh Circuit examined standing under *Spokeo, Inc. v. Robins*. In examining the facts, the Court found that the debtor, Richard Hunstein, could not establish standing through either tangible harm or a risk of real harm. Nevertheless, the Eleventh Circuit found that a concrete injury existed sufficient to provide Article III standing, due to the invasion of Hunstein's privacy. The Court found that FDCPA plaintiffs are not limited to those individuals with actual damages, particularly where the statutory language addresses the very harm alleged by the debtor in the instant case.

Preferred, the debt collector, has now sought *en banc* review of the Court's decision, requesting to have the full Eleventh Circuit consider the issues presented to avoid what it argues is an intra-circuit split. In its petition for rehearing *en banc*, filed on May 25, 2021, Preferred asserts three main points in support of its overarching argument that the Court erred in finding that Hunstein had Article III standing to bring this claim: (1) the Court's decision deviated from established Eleventh Circuit precedent; (2) Preferred's conduct does not constitute "public" disclosure; and (3) the electronic transmission of the data to Preferred's mail vendor is not a harm that Congress has identified.

Preferred outlines each of its primary arguments in turn. It argues that *Spokeo* confirmed that Article III standing requires a concrete injury, and that on three separate occasions, the Eleventh Circuit determined that a statutory injury alone did not give rise to a concrete injury sufficient to confer standing. In *Nicklaw v. CitiMortgage*, the Court reinforced the common law tradition of "no harm, no foul." In *Trichell v. Midland Credit Management, Inc.*, the Court found that the "serious harms" to which the FDCPA was directed were a "far cry from whatever injury may suffer from receiving in the mail a misleading communication that fails to mislead." Finally, in *Muransky v. Godiva Chocolatier, Inc.*, the Eleventh Circuit sitting *en banc* vacated a district court's order, finding that the plaintiff in that case had no Article III standing because he had suffered no harm; the Court went on to state that it interpreted "concrete" to mean "real" in measuring an injury necessary for establishing Article III standing. Indeed, the *Hunstein* decision is contrary to a number of other decisions on Article III standing that were favorable to defendants and could mark a shift in how the Eleventh Circuit views the issue. Preferred notes that in reaching its decision in the instant case, the Court did not analyze whether

Hunstein's injury was particularized or personal, and in fact, explicitly expressed doubt that the harm occurred or even would likely occur.

Preferred also argues that the challenged conduct does not constitute public disclosure, and that the Court failed to consider whether the specific allegations raised by Hunstein were of the type typically protected by the courts. It asserts that the panel did not examine whether Hunstein's assertions were the type that had any relationship to a harm protected at common law, and further surmises that on their face, there is no connection between the type of electronic transmission of data to a private server maintained by an agent of the debt collector and the tort of "public disclosure of private facts." Preferred further articulates the perfunctory and ministerial transmittal of the data at issue and points out it was done for a specific and singular purpose – to send Hunstein a letter that only he (the consumer) would see.

In this same vein, Preferred argues that this type of electronic transmission does not implicate a harm that Congress has identified. Preferred submits that the purpose of the FDCPA is to prohibit abusive debt collection practices, without imposing unnecessary restrictions on ethical debt collectors. In support of this third argument, Preferred raises three points: (1) the ministerial use of "third-party" agents is an acceptable method of communications with consumer, such as the use of telegrams, which is specifically contemplated by the FDCPA; (2) the Colorado Supreme Court has specifically held that use of letter vendors presents no harm to consumers, and that such use did not violate the state equivalent of §1692c(b); and (3) the CFPB found no consumer injury in the use of letter vendors, specifically in relation to seeming acceptance without objection of this common practice in the forthcoming amendments to Regulation F, which implements the FDCPA.

However, Preffered's efforts to overturn the decision are hampered by a significant issue: Preferred has admitted that the transfer of information to its mail vendor constituted a communication under the FDCPA. Nevertheless, Preferred makes several compelling arguments as to why the panel decision should be reconsidered by the Court *en banc*, the most compelling of which is the potential for an intra-circuit split on what constitutes concrete injury sufficient to confer Article III standing under *Spokeo* and prior decisions of the Eleventh Circuit.

The Court will now likely receive amicus briefs from others in the debt collection industry and other industries that could be substantially impacted should the original decision remain unchanged.

Moreover, although unspoken in the petition, the Eleventh Circuit panel had recognized that its ruling "runs the risk of upsetting the status quo in the debt-collection industry," and may require debt collectors to bring in-house services that were previously referred out to vendors. Indeed, the potential disruption of companies handling their own mailings may ultimately lead to more errors and increased consumer harm as companies seek to replicate the expertise of mail vendors. The importance of this decision may lead the Court to grant *en banc* review and potentially short circuit the flood of litigation that has arisen in the wake of the Hunstein decision.

A response to the petition for rehearing *en banc* is not permitted unless specifically requested by the Court, and a briefing schedule will issue should the rehearing *en banc* be granted.

While the rehearing petition remains pending, and unless the Court grants the request for an *en banc* rehearing, the Court's original decision of April 26, 2021 remains in place. This decision has broad-reaching impact, as it is not limited to debt collectors (in the traditional sense) and their law firms, but also has the potential to implicate banks, mortgage servicers, and other financial services companies, as these types of entities have been held by courts across the country to be "debt collectors" under certain circumstances. This decision may have a chilling effect on the use of third-party vendors by these companies.

If you have any questions about how this decision might impact your business, please contact Eve A. Cann for assistance.