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Eleventh Circuit Decision in Hunstein Places Debt Collection Business Models At Risk: Is There a Trustee Impact?

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On April 21, 2021, the U.S. Court of Appeals for the Eleventh Circuit issued an opinion in ***Hunstein vs. Preferred Collection and Management Services, Inc.***, creating new risk and uncertainty around the most common, everyday business practices used by many debt collectors, including loan servicers. 994 F.3d 1341 (11th Cir. 2021). While a petition for rehearing *en banc* was filed on May 25, 2021, and thirteen industry-related *amicus curiae* briefs in support of the rehearing were also timely filed, the opinion remains published at this time.

Debt collectors often contract with third party vendors for services such as a creating and mailing collection letters, receiving incoming phone calls, even simple accounts receivable bookkeeping. These practices now face increased scrutiny and potential litigation as described in further detail below.

> ***"…counsel for the debt collector itself may be deemed a debt collector under federal or state definitions of a debt collector, subjecting the transfer of information by the law firm to a third-party vendor to potential coverage as well."***

In *Hunstein*, the debt collector provided its mail services vendor, Compumail, with information about Hunstein, including, among other things: (1) his status as a debtor, (2) the exact balance of his debt, (3) the entity to which he owed the debt, (4) that the debt concerned his son's medical treatment, and (5) his son's name. Compumail used that information to generate and send a dunning letter to Hunstein.

On Appeal, the 11th Circuit ruled that Hunstein could pursue claims that by providing this information to its third-party vendor the debt collector violated § 1692c(b) of the Fair Debt Collection Practices Act ("FDCPA"), entitled "Communication With Third Parties." This section provides—

> *Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a*

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> *consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.*

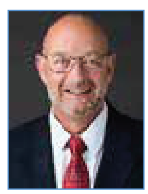
Thus, the mere act of providing its third-party vendor with the information necessary to create and deliver the collection correspondence can constitute a violation of the FDCPA.

Often it seems Courts do not appreciate the impact of their rulings on routine, widely understood and accepted business practices on which entire segments of industry depend. That is not the situation in *Hunstein*. The Court recognizes its ruling "may well require debt collectors . . . to in-source many of the services that they had previously outsourced, potentially at great cost." The Court goes on to note that its "obligation is to interpret the law as written, whether or not we think the resulting consequences are particularly sensible or desirable."

The 11th Circuit's decision is only binding in Alabama, Florida and Georgia. However, since the Court indicated that this is an issue of first impression, it is very likely that Federal Courts of Appeals covering other states may adopt the same approach in evaluating the inevitable lawsuits on this issue. It remains to be seen whether arguments regarding agency and/or severe services contract limitations on the use of information will be considered to mitigate claims of violation. As a result, loan servicers and debt collectors should evaluate each third party vendor relationship utilized in relation to interaction with or about a debtor. For residential loan servicers, this may include call center vendors, business process outsourcing vendors assisting in the processing of modification requests and, clearly, print and mail vendors.

For trustees who do not perform any debt collection activity, the *Hunstein* decision would arguably have no impact in light of the Supreme Court's 2019 *Obduskey v. McCarthy & Holthus LLP* decision (139 S. Ct. 1029) confirming the performance of statutory non-judicial foreclosure functions does not constitute debt collection under the FDCPA for purposes other than 15 U.S.C. §1692f(6) (wrongful threat or action to non-judicially enforce a security interest). Such trustees could arguably receive and transfer borrower information for the limited purpose of non-judicial foreclosure notice processing without any potential liability under *Hunstein* and 15 U.S.C. § 1692c(b) because the communication would not be made "*in connection with the collection of any debt.*" However, trustees who do perform services outside of the statutory non-judicial foreclosure functions which could be considered debt collection could face liability when communicating with others (including providing information to outsourcing vendors who are not specified exemptions) about collection of a consumer's debt.

Fortunately, the initial transfer of information to counsel for the debt collector would be exempt under the plain language of the statute. However, any further transfers of information by the debt collector's counsel to a subsequent vendor would be subject to scrutiny under *Hunstein*. There is no longer an attorney exemption to the federal FDCPA's definition of debt collector (and California recently eliminated its attorney exemption to the Rosenthal FDCPA). Thus, counsel for the debt collector itself may be deemed a debt collector under federal or state definitions of a debt collector, subjecting the transfer of information by the law firm to a third-party vendor to potential coverage as well.



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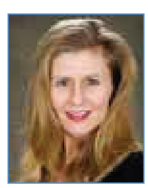

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