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The Hunstein Saga Ends at the Eleventh Circuit: Court Determines That Use of a Mail Vendor Did Not Inflict a Concrete Injury

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Consumer Financial Services Alert

On September 8, 2022, the Eleventh Circuit Court of Appeals gave its final word—after many twists and turns—in *Hunstein v. Preferred Collection and Management Services, Inc.*, No. 19-14434. The court issued an *en banc* opinion (that is, the case was decided by all the judges in the circuit—not merely the typical three-judge panel) holding that a debt collector's use of a mail vendor did not create a concrete injury necessary to give the plaintiff Article III standing to sue in federal court.

The facts of *Hunstein* are straightforward. A debt collector sought to collect a medical debt from the plaintiff via a collection letter. But it did not personally send the letter: instead, a vendor inserted several pieces of information about the debt into a prewritten form letter and mailed it. The plaintiff claimed this violated the Fair Debt Collection Practices Act—specifically section 1692c(b), which forbids debt collectors from communicating with a third party in connection with the debt collection.

A lengthy appellate process followed. An Eleventh Circuit panel initially held that the use of a mail vendor was a communication in connection with debt collection, and that plaintiff Hunstein had established standing. That opinion was later vacated and replaced with another opinion, which acknowledged recent Supreme Court precedent about standing but still affirmed that Hunstein had successfully alleged a concrete injury. Then, the Eleventh Circuit agreed to hear the case *en banc*, which led to this final decision.

The primary issue in *Hunstein* was standing: did plaintiff Hunstein articulate a concrete injury resulting from his claim that the collection agency had shared his debt information with a third-party mail vendor? The Court stressed that violation of a federal statute, by itself, does not confer standing. Every federal plaintiff must demonstrate a concrete injury to have standing under Article III of the Constitution, which would involve identifying an intangible harm in the absence of physical injury or monetary loss. The Court recognized that under the Supreme Court *Spokeo* case, the test is whether the intangible harm "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." Further, while *Hunstein* was on appeal, the Supreme Court ruled on a case with similar standing issues on a similar theory in *TransUnion v. Ramirez*. The Supreme Court explained that when a claim for a statutory violation is based on an injury that is traditionally

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protected at common law (like privacy), there is no close relationship if a fundamental requirement of the common law tort is missing from the statutory violation.

The majority of the panel in the Eleventh Circuit saw the *TransUnion* case as directly applying to Hunstein's claim. In *TransUnion*, the plaintiff sued a credit reporting agency under the federal Fair Credit Reporting Act because the agency sent a credit report to a car dealership stating that the plaintiff was potentially on a terrorist list. The plaintiff argued that his specific FCRA claim—and the related interest protected and resulting injury—was akin to a common law claim for defamation. The Supreme Court held that the claim did not bear a "close relationship" to defamation for the thousands of class members whose credit information—which would have included the warning that they were potentially a terrorist—was not sent to a third party. The Supreme Court reasoned that claims for defamation required publication to a third party, and that this core characteristic was not present for class members whose warning about potentially being a terrorist remained undisclosed in their owners' credit files.

In the Eleventh Circuit's eyes, the *TransUnion* case made Hunstein's mail vendor claim "an exercise in simplicity." Hunstein argued that the specific FDCPA violation of communicating about a debt to a third party mail vendor, and the corresponding protection of a privacy interest and potential resulting injury, was analogous to the privacy tort of public disclosure of private facts. But public disclosure of private facts has a core characteristic of publicity—that is, dissemination to the general public. Notably, under this tort, disclosure to a single person or even a group of people does not necessarily suffice. The Court noted that "the harm at the core of the tort is based not on the fact that embarrassing information exists, but that the public knows about it." The Court concluded that—even under a generous reading of Hunstein's complaint—"one company sent his information to another, where it was 'populated' into a private letter that was sent to his own home. That is simply not enough." Thus, Hunstein did not articulate a concrete injury and lacked standing to sue.

In a concurring opinion helpful to debt collectors defending similar claims, Chief Judge Pryor held that the mail vendor theory was totally invalid because the Supreme Court had already rejected that theory in *TransUnion*. He noted that alternative holdings are not dicta, but instead are as binding as solitary holdings. In *TransUnion*, the plaintiff argued that the credit information was published when TransUnion gave the information to vendors who printed and sent the mailings that the class members received. The Supreme Court held that this argument was forfeited, *but was also* unavailing, because intra-company disclosures are not actionable publications. Judge Pryor also included helpful analysis, pointing out that communicating information to mail vendors is not the type of disclosure that is recognized in privacy claims because it is a "bare electronic conveyance of information". He reasoned that although Hunstein claimed that the debt collector gave information to the vendor, the complaint described "the same automatic process that the Supreme Court explained does not constitute an injury." Notably, Hinshaw won a similar mail vendor theory argument in the Northern District of Illinois case *Quaglia v. NS193, LLC*, by successfully arguing that using a mail vendor cannot inflict a concrete injury under the FDCPA. The district court in *Quaglia* also stated that the FDCPA does not extend "so far as to prevent debt collectors from enlisting the assistance of mailing vendors to perform ministerial duties, such as printing and stuffing the debt collectors' letters . . . especially when so much of the process is presumably automated in this day and age." This reasoning dooms the mail vendor theory no matter how a plaintiff pleads it in a complaint.

Finally, *Hunstein* contained a lengthy dissent. This dissent posits that an element-comparison test is not the appropriate analysis for statutory violations. Instead, it would limit the inquiry to whether the alleged injury is similar "in kind" to the established common law claim. The dissent would have determined that Hunstein's allegations, showing "near publicity", were sufficient to establish standing. It appears the dissent hopes that the Supreme Court will eventually resolve its disagreement with the majority.

Ultimately, the court that sparked a flood of litigation about the use of mail vendors by debt collectors reversed its initial take on the issue, found the *TransUnion v. Ramirez* case controlling, and rejected Hunstein's claim for lack of standing. Despite the ruling, cases based on this theory still exist and will continue to be fought.

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