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Newsletters

Consumer Law Hinsights – April 2021

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Consumer Law Hinsights is a monthly compilation of nationwide consumer protection cases of interest to financial services and accounts receivable management companies.

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Eleventh Circuit Delivers Surprising Decision on Use of Third-Party Vendors in FDCPA Case

A Fair Debt Collection Practices Act (FDCPA) decision from the Middle District of Florida was appealed to the Eleventh Circuit where it was recently reversed and remanded. The plaintiff, Richard Hunstein, sued Preferred Collection and Management Services, Inc. for allegedly violating 15 U.S.C. § 1692c(b) that prohibits a debt collector from sharing information about an outstanding debt to anyone but a specific set of enumerated parties. As is commonplace, Preferred sent information about plaintiff and the debt to its letter vendor as part of their collection process, and Hunstein brought suit.

The district court dismissed the case for lack of standing and Hunstein appealed. The Eleventh Circuit concluded that the requirements of standing could be met in one of three ways: 1) tangible harm in the form of physical injury, financial loss, or emotional distress; 2) a risk of real harm requiring factual allegations that establish substantial, significant, or real danger; and 3) statutory violations. The court found that while Hunstein failed to establish either tangible harm or risk of real harm, he did establish a statutory violation that granted him standing. Their statutory violation analysis involved looking at "history and the judgment of Congress." The court took a very textualist view of the law and surprisingly held that providing information about the plaintiff and the debt to a third-party letter vendor was an impermissible disclosure to a third party in violation of the FDCPA.

The irony is that in a suit relating to privacy, it appears Hunstein's information is more exposed now than it had been prior to the lawsuit. This was not lost on the court, which pointed out that their "obligation is to interpret the law as written, whether or not we think the resulting consequences are particularly sensible or desirable." The court even went on to address the anticipated negative consequences of their decision: "Our reading of § 1692c(b) may well require debt collectors (at least in the short term) to in-source many of their services that they had previously outsourced, potentially at great cost. We recognize, as well, that those costs may not purchase much in the way of 'real' consumer

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privacy, as we doubt that the Compumails of the world routinely read, care about, or abuse the information that debt collectors transmit to them." Thus the court recognized the repercussions of increased costs to available credit and the little improvement to privacy from its decision.

The opinion will likely be subject to further review, including amicus briefs on the issue. Debt collectors should be mindful of the use of third-party vendors in the interim, especially in the Eleventh Circuit, as this issue continues to develop.

The case is *Hunstein v. Preferred Collection and Management Services, Inc.*, No. 8:19-cv-00983-TPB-TGW (11th Cir. April 21, 2021).

Third Circuit Follows Trend Finding $0 Interest Not Misleading

Earlier this month, the Third Circuit court upheld a decision to dismiss a Fair Debt Collection Practices Act claim that alleged the plaintiff was misled by defendant entering $0 interest applied to the debt. As in previous cases, the plaintiff alleged that the language in the dunning letter misled them to believe that their static debt was actually dynamic. The court had no sympathy for the plaintiff and held that under the unsophisticated or least sophisticated debtor standard, this practice was not deceptive.

Other circuits that support this trend:

- Second Circuit: *Dow v. Frontline Asset Strategies*
- Fifth Circuit: *Salinas v. R.A. Rogers Inc.*
- Seventh Circuit: *Degroot v. Client Services Inc.*

The case is *Hopkins v. Collecto, Inc.*, No. 20-1955 (3d Cir. Apr. 12, 2021)

Harm Must Be Tangible to Meet Federal Court Standing Requirements

A number of recent decisions across various circuits are starting to require that plaintiffs show tangible harm that resulted from a defendant's action in order to have standing for their cases alleging violations of the Fair Debt Collection Practices Act (FDCPA), the Telephone Consumer Protection Act (TCPA), and the Fair Credit Reporting Act (FCRA). These developments stem from the 2016 Supreme Court decision in *Spokeo Inc. v. Robins*. In *Spokeo*, the plaintiff alleged violations of the FCRA resulting from the defendant posting inaccurate information about him on their website. The court held that the injury had to be both particular and concrete creating the current two-prong test being relied upon by appellate courts. So far, the following courts have dismissed claims for lack of standing, issuing decisions that support this higher requirement for injury:

D.C. Circuit:

- *Frank v. Autovest LLC*, 961 F.3d 1185 (2020)

Third Circuit:

- *Long v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, No. 17-1889 (2018)

Seventh Circuit:

- *Casillas v. Madison Ave. Assocs. Inc.*, 926 F.3d 329 (2019)
- *Larkin v. Fin. Sys. Of Green Bay Inc.*, 982 F.3d 1060 (2020)
- *Pennell v. Global Trust Mgmt, LLC*, No. 30-1524 (Mar. 11, 2021)

Ninth Circuit:

- *Dutta v. State Farm Mutual Automobile Insurance Co.*, No. 16-17216 (2018)

- *Bassett v. ABM Parking Services, Inc.*, No. 16-35933 (2018)
- *Adams v. Skagit Bonded Collectors LLC*, 836 F. 544 (2020)

Eleventh Circuit:

- *Trichell v. Midland Credit Mgmt. Inc.*, 964 F.3d 990 (2020)

Text Messages Alone Not Enough for Article III Standing

Recently, in *Guerra v. Newport Beach Auto*, the U.S. District Court for the Southern District of Florida found that an unsolicited text message did not involve an injury-in-fact sufficient to meet the requirements of Article III standing in a TCPA case. The court referred to *Salcedo v. Hanna*, an Eleventh Circuit decision, which stated that while a text message may be annoying it does not result in an injury that would confer jurisdiction on the court.

The case was remanded to state court where the remaining allegations made by the plaintiff are to be heard (invasion of privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion). That said, the Eleventh Circuit also notes in *Salcedo v. Hanna* that the alleged harm was too isolated, momentary, and peripheral to support a finding of injury, but we'll have to wait and see what the state court ultimately decides.

The case is *Guerra v. Newport Beach Auto. Grp. LLC*, No. 21-20568, S.D. Fla. March 12, 2021 (unpublished opinion).

Appellate Court to Decide Whether TCPA is Unenforceable from November 2015 to July 2020

Cases have been popping up across the country looking at the applicability of the Telephone Communication Privacy Act (TCPA) during an exemption period that ran from November 2, 2015 (when a "government debt exception" was added to the rule), to July 6, 2020 (when the Supreme Court struck down the provision in *Barr v. American Association of Political Consultants (AAPC)* by finding it an unconstitutional content-based restriction on speech). Currently, the debate is playing out in *Lindenbaum v. Realgy Inc.* an Ohio case, which has been appealed to the Sixth Circuit. *Lindenbaum* is the first district court case on appeal on this issue.

The case is *Lindenbaum v. Realgy LLC et al.*, case number 20-4252, in the U.S. Court of Appeals for the Sixth Circuit.