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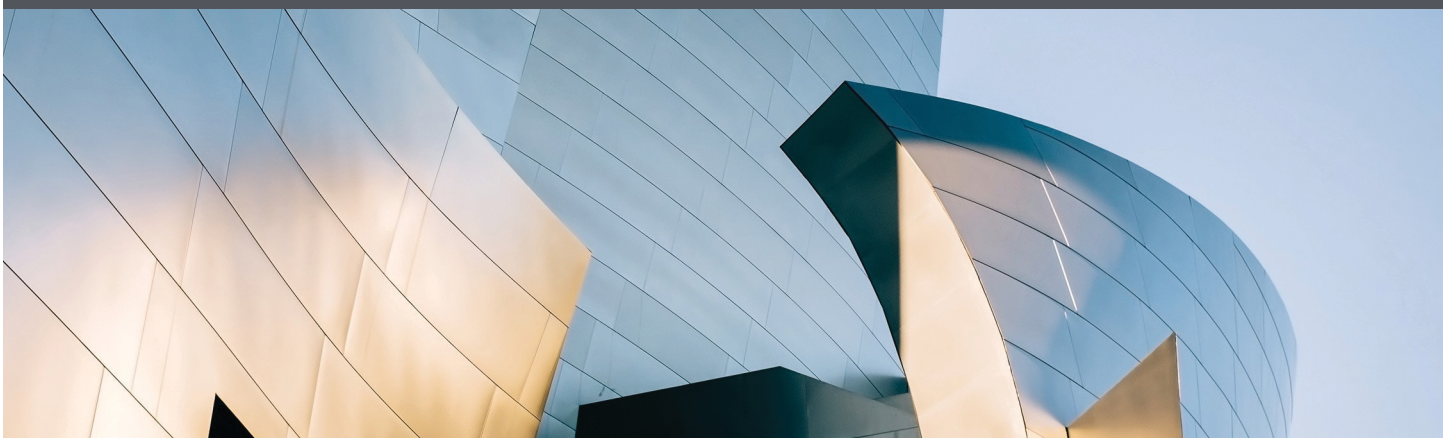

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Farewell, *Hunstein*–Eleventh Circuit Holds Disclosing Debtor's Information to Mail Vendor Does Not Establish Concrete Harm

Financial institutions, debt collectors, debt collection law firms, and consumer-facing businesses should take note that the Eleventh Circuit Court of Appeals reversed the prior panel's decision and has ruled that merely providing a consumer's information to a mail vendor to send a debt collection letter did not violate the FDCPA since it is not a public disclosure and, therefore, the consumer did not suffer concrete harm sufficient to confer Article III standing. The Eleventh Circuit En Banc Panel's decision should result in the dismissal of other pending FDCPA actions based on this mailing vendor theory and reduce future actions. Further, the decision has broader implications beyond FDCPA cases, as it outlines the Eleventh Circuit's overall approach in evaluating whether a plaintiff has sufficiently alleged concrete harm.

In *Hunstein v. Preferred Collection and Management Services, Inc.,* 2022 WL 4102824 (11th Cir. Sept. 8, 2022), the Eleventh Circuit's En Banc Panel reversed the prior panel's decision and held "no concrete harm, no standing," citing the United States Supreme Court's decision in *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190 (2021). As such, the Eleventh Circuit held that the United States District Court for the Middle District of Florida ("District Court") lacked jurisdiction to adjudicate plaintiff's claim, vacated the District Court's Order, and remanded with instructions to dismiss the case without prejudice.

SUMMARY OF FACTS AND BACKGROUND

After Richard Hunstein ("Plaintiff") failed to timely pay a medical bill, the hospital transferred the debt to Preferred Collection and Management Services, Inc. ("Defendant"), a debt collection agency. Defendant sent Hunstein a debt collection letter through a commercial mail vendor. In preparation for mailing the letter, Defendant provided the mail vendor with certain information, including Hunstein's name, his son's name, and the amount of the debt.

Upon receiving the letter, Hunstein commenced an action in the District Court against Defendant alleging that it had disclosed information about his debt to a third party in violation of the Fair Debt Collection Practices Act ("FDCPA").[1] The District Court granted Defendant's motion to dismiss, finding that Defendant did not violate the FDCPA because the communication with the mail vendor "was not in connection with the collection of any debt." Hunstein appealed and the

Eleventh Circuit reversed, finding that Hunstein's injury was concrete because it was enough that his harm had a "close relationship" to "invasion-of-privacy torts," especially "public disclosure of private facts" *("Hunstein I")*.[2] Before *Hunstein I* went into effect, the United States Supreme Court issued *TransUnion.* As such, the Eleventh Circuit vacated *Hunstein I* and issued a new decision *("Hunstein II"),* which reached the same conclusion as *Hunstein I,* holding that the allegation that some disclosure occurred "was close enough to the tort of public disclosure to constitute a concrete injury."[3] The dissent in *Hunstein II* disagreed, arguing that the majority's logic "swe[pt] much more broadly than *TransUnion* would allow."[4] In light of the decisions in *Spokeo, Muransky,* and *TransUnion,* the full Eleventh Circuit panel voted to take the case en banc and consider whether Hunstein had Article III standing.

ELEVENTH CIRCUIT'S EN BANC PANEL DECISION

In determining that Hunstein failed to allege a concrete harm, and thus lacked standing, the Eleventh Circuit Majority Panel ("Majority Panel") echoed the holdings in Spokeo, Muransky, and TransUnion regarding Article III standing. Specifically, the Majority Panel held that (1) a "bare statutory violation" is insufficient;[5] (2) the injury must be concrete because "it ensures that plaintiffs have a real stake in the actions they bring;"[6] and (3) the consideration of traditional torts as a means to determine whether an intangible harm meets the concreteness requirement is not "make-work for lower courts," and the comparison must be made "with an eye toward evaluating commonalities between the harms."[7] As the Majority Panel explained, "if an element from the common-law comparator tort is completely missing, it is hard to see how a statutory violation could cause a similar harm."[8]

Applying these principles, the Majority Panel held that the harm Hunstein alleged—disclosure of his information to the mail vendor—is ***not*** the same as the tort of public disclosure, which requires publicity. Without publicity, there is "no invasion of privacy—which means no harm, at least not one that is at all similar to that suffered after a public disclosure."[9] The Majority Panel rejected the argument that publicity includes *any* communication by the defendant to a third party; rather, it "requires that a matter be 'made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[10] The distinction is between public and private communication, as a disclosure to many people may still be private, or at least not public. Thus, the effect of a disclosure is what matters, not the number of people to whom it is made. Here, Hunstein made no such claim to suggest publicity and only alleged disclosure of his information to the mail vendor, an unauthorized third party that '"*populated* some or all of [his] information into a *pre-written* template, printed, and mailed the letter' to Hunstein."[11] In fact, the Majority Panel pointed out Hunstein's counsel agreed at oral argument that Hunstein did not allege that the mail vendor employees had read or perceived his information.[12] Accordingly, the Majority Panel held that Hunstein's complaint was drafted to allege a pure statutory violation and, therefore, Hunstein failed to establish a concrete injury to confer Article III standing.

The Majority Panel also rejected Hunstein's argument that Congress targeted "invasions of individual privacy" when it passed the FDCPA because "congressional intent does not automatically transform every arguable invasion of privacy into an actionable, concrete injury."[13] In addition, the Majority Panel noted that the dissent's criticism of the "element-for-element" approach "confuses the question of whether *this* plaintiff has alleged standing with the question of whether *any* plaintiff could allege standing."[14] Further, the Majority Panel rejected the dissent's "attempt to manufacture a circuit split" because none of the cases cited in the dissent address the issue in this case that the complaint failed to allege an element essential to the harm set out as a com-mon-law comparator.[15]

CONCLUSION

The long-awaited Majority Panel's decision is another victory for financial institutions, debt collectors, debt collection law firms, and consumer-facing businesses

that hire third-party vendors to mail letters to consumers. After *Hunstein I,* courts were flooded with FDCPA complaints alleging that the use of a third-party vendor violates the FDCPA. This decision should reduce the number of actions alleging the mailing vendor disclosure theory. However, the Majority Panel noted that Hunstein's complaint, as pled, did ***not*** point to a concrete harm because it did ***not*** suggest publicity, leaving the door open for the plaintiff's bar to tailor their pleadings to fit the elements of a public-disclosure tort to confer Article III standing. In addition, the decision has broader implications beyond FDCPA cases, as the Majority Panel provided the Eleventh Circuit's overall approach of applying the "element-for-element" test to evaluate whether plaintiffs have alleged concrete harm for purposes of federal jurisdiction.

For additional information or assistance, contact Wayne Streibich, Diana M. Eng, or Andrea M. Roberts, or a member of Blank Rome's Financial Institutions Litigation and Regulatory Compliance ("FILARC") group.

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1. Hunstein alleged that disclosing information about his debt to the mail vendor violated section 1692c(b) of the FDCPA, which prohibits communicating "in connection with the collection of any debt, with any person other than the consumer." *Hunstein,* 2022 WL 4102824, at *6 (citing 15 U.S.C. § 1692c(b)).
2. Prior to issuing *Hunstein I,* the Eleventh Circuit requested the parties submit supplemental briefing on Article III standing in light of the Eleventh Circuit's decision in *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917 (11th Cir. 2020), which made clear that a bare procedural violation of the FDCPA would ***not*** survive a standing inquiry and reiterated the United States Supreme Court's guidance in *Spokeo, Inc. v. Robins,* 578 U.S. 330 (2016), that one way to evaluate statutory harms is to compare the harm to traditional common-law tort claims.
3. *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.,* 17 F.4th 1016, 1027 (11th Cir. 2021).
4. *Id.* at 1038.
5. *Muransky,* 979 F.3d at 936; *Spokeo,* 578 U.S. at 341
6. *TransUnion,* 141 S. Ct. 2207.
7. *Muransky,* 979 F.3d at 926.
8. *Hunstein,* 2022 WL 4102824, at *6.
9. *Hunstein,* 2022 WL 4102824, at *6.
10. *Id.* at *7 (citing Restatement (Second) of Torts § 652D cmt. a).
11. *Id.* at *13.
12. *Id.*
13. *Id.* at *9.
14. *Id.*
15. Chief Judge Pryor, joined by Circuit Judge Tjoflat, issued a concurring opinion to identify other reasons why the appeal is "an exercise in simplicity." *Id.* at *10. Specifically, Chief Judge Pryor indicated that *TransUnion* resolves the appeal because the United States Supreme Court expressly rejected the dissent's theory that the dissemination of personal information to a mail vendor's employees bears a close enough relationship to the tort of public disclosure of private facts. *See id.* at *11. Moreover, the dissent's publication-to-mail-vendor theory "circumvents a fundamental requirement of an ordinary [public-disclosure] claim…and does not bear a sufficiently close relationship to the traditional…tort to qualify for article III standing." *Id.* (quoting *TransUnion,* 141 S. Ct. at 2210 n. 6). Further, Chief Judge Pryor found that Hunstein failed to assert any concrete injury because the complaint failed to allege that anyone read his private information, and the disclosure of Hunstein's information is not one that the law traditionally recognized as highly offensive. *See id.* at *12-13.