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The Eleventh Circuit Calls Into Question the use of Letter Vendors as Violative of the FDCPA

The Eleventh Circuit in *Hunstein v. Preferred Collection and Management Services, Inc.* issued an opinion yesterday that confronted an issue of first impression, namely, whether a debt collector can use a third party vendor to send collection letters without violating the Fair Debt Collection Practices Act ("FDCPA"). The facts were simple. The defendant/debt collector used a third party letter vendor to send an initial "dunning" letter to the plaintiff/consumer. In doing so, the defendant provided the vendor with the plaintiff's name, his outstanding balance, the fact that his debt resulted from his son's medical treatment, and his son's name. The plaintiff filed a lawsuit alleging that the defendant violated the FDCPA by disclosing his personal information to the third-party vendor.

As relevant here, and with exceptions that do not apply to these facts, the FDCPA provides that a debt collector may not, without the prior consent of the consumer, communicate "in connection with the collection of any debt" with a third party. The district court rightly rejected the consumer's claim on the basis that sending a consumer's information to a third party vendor did not qualify as a communication "in connection with the collection of a debt."

On appeal, the Eleventh Circuit first addressed the plaintiff's standing to bring his claim. With respect to standing, the court acknowledge that the plaintiff must establish that his alleged injury is sufficiently concrete. Concreteness can be shown through a tangible harm, risk of real harm, or a statutory violation that gives rise to an intangible-but-nonetheless-concrete injury. The Eleventh Circuit found that the plaintiff had pled sufficient facts to establish that he suffered from a statutory violation that gave rise to an "intangible-but-nonetheless-concrete injury." The court distinguished its prior ruling in *Trichell v. Midland Credit Management* and found that the FDCPA was designed to prevent an "invasion of individual privacy," thus evidence that a debt collector disclosed a consumer's information to a third party was enough to establish Article III standing.

With respect to the merits, the only issue on appeal was whether the transfer of the plaintiff's information to the third party vendor constituted a communication "in connection with the collection of a debt." Relying on the Oxford Dictionary of English, the court stated that "in connection with" means "with reference to [or] concerning." Therefore, the court held that the defendant violated the FDCPA because it was "inescapable" that the defendant's communication to the vendor was at least "with reference to" the consumer's debt.

The court rejected the defendant's strong arguments to the contrary. The court declined to limit communications "in connection with the collection of a debt" to only those demanding payment. Additionally, the defendant made an "industry practice" argument which focused on the wide-spread use of mail vendors in the collection industry. In rejecting this equitable argument, the court stated:

> It's not lost on us that our interpretation of § 1692c(b) runs the risk of upsetting the status quo in the debt-collection industry. We presume that, in the ordinary course of business, debt collectors share information about consumers not only with dunning vendors…, but also with other third-party entities. Our reading of § 1692c(b) may well require debt collectors (at least in the short term) to in-source many of the 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 privacy, as we doubt that the [vendors] of the world routinely read, care about, or abuse the information that debt collectors transmit to them. Even so, our obligation is to interpret the law as written, whether or not we think the resulting consequences are particularly sensible or desirable. Needless to say, if Congress thinks that we've misread § 1692c(b)—or even that we've properly read it but that it should be amended—it can say so.

The Eleventh Circuit expressly acknowledged that the results from its decision would likely not be "sensible or desirable." Instead of applying the FDCPA in a logical way that harmonizes all of its provisions, the Eleventh Circuit attempted to punt this issue to Congress. It goes without saying that the practical effect of this ruling will have far-reaching implications.

To the extent you would like more information about this decision and its implications on the industry, please join myself, Josh Dickinson, Kersten Holzhueter, and Kirby McDonough for a webinar next week where we will discuss this opinion in-depth.

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