



September 22, 2022

## ELEVENTH CIRCUIT AFTER REHEARING OVERRULES PRIOR *HUNSTEIN* CASE

The entire Eleventh Circuit Court of Appeals reheard *Hunstein v. Preferred Collection and Management Services* and reversed the previous panel holding. The entire Eleventh Circuit now holds (8 to 4) that plaintiff Hunstein failed to allege a concrete harm that would provide Article III standing to pursue his claims in federal court. Previously, a three-judge panel of the Eleventh Circuit previously found Hunstein had standing to sue, which spawned thousands of copycat cases across the country. See our ALERT dated [Nov. 18, 2021](#).

This case does not address the underlying substantive question of whether the use of a third party letter vendor violates the Fair Debt Collection Practices Act ("FDCPA"), however. The case only addresses whether Hunstein has standing to sue in federal court. The majority opinion takes care to state that its holding is that Hunstein himself did not have standing to sue because there was no public disclosure of his private debt information. The district court proceedings did not go beyond a motion to dismiss so the factual record is limited and the court's discussion is limited solely to the issue of standing based on the pleadings.

The majority opinion applies the recent Supreme Court decision in *TransUnion v. Ramirez* that laid down the standard for when a plaintiff has standing to sue for a statutory violation that did not cause a tangible harm. Under *TransUnion*, a plaintiff can sue in federal court for a procedural statutory violation alone when the violation leads to a concrete harm or the violation is similar to a recognized common law tort. Here, Hunstein alleged that although providing information about his debt to a third-party letter vendor did not directly harm him, the disclosure was similar to the tort of public disclosure of private facts. However, the Eleventh Circuit found that a public disclosure is an essential element of the common law tort of public disclosure and the agency's disclosure of Hunstein's debt to a letter vendor was not public. Because of the missing element of public disclosure, the alleged violation is not similar to the tort of public disclosure. Because the alleged violation is not similar to a common law tort, the alleged violation, standing alone, is not enough to sue in federal court.

The dissenting opinion took aim at the mechanical, element-by-element analysis of the tort of public disclosure. Rather than

requiring a statutory violation to have all the same elements of a common law tort, the dissent would find a statutory violation confers standing so long as the kind of harm that the statute sought to prevent is the same kind of harm a common law tort seeks to redress. To the dissent, because both the FDCPA and the common law arguably seek to prevent unwanted disclosure of sensitive personal details, the dissent would find Hunstein has sufficient standing to survive a motion to dismiss.

Creditors and debt collectors should continue to use appropriate controls to ensure letter vendors do not disclose private debt-related information. Creditors should know what information they share with outside vendors and ensure that sharing is in line with their privacy policies. Securing proper consent to share information between the creditor, servicers, vendors and other parties remains important.

The Consumer Financial Protection Bureau has opined on the use of letter vendors or on the Eleventh Circuit holding. The CFPB may issue an interpretation on the permissible use of letter vendors and proper controls under the FDCPA and Regulation F. Notably, Regulation F was issued after the *Hunstein* case was appealed, so the Eleventh Circuit could not consider Regulation F.

Many trial courts have stayed numerous *Hunstein* copycat cases pending the Eleventh Circuit's decision. Now that the Eleventh Circuit found no standing, whether district courts will dismiss copycat cases remains to be seen. The Eleventh Circuit opinion is binding only in the Eleventh Circuit. Federal courts in other circuits or state courts may agree with the dissenting opinion and uphold standing in *Hunstein* copycat suits. As for Hunstein himself, it remains to be seen whether the plaintiff will appeal to the Supreme Court or re-file the case in Florida state court. We will continue to monitor and provide updates with any new information. □

✧ *Mike Tomkies and Benjamin Hurford*

### DEALING WITH MULTISTATE DEBT COLLECTION COMPLIANCE?

We routinely advise on collection-related activities and the regulated activities of creditors, third party debt collectors, debt buyers and loan servicers. We also publish an easy-to-use reference that compiles state and federal laws governing debt collection practices. Our DEBT COLLECTION DIGEST is organized topically, includes the federal Fair Debt Collection Practices Act and Commentary for easy cross-reference, and covers ADAD and monitoring and recording statutes. **Contact us for details.**

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