Appeals court decision potentially up-ends debt collection practices

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The Eleventh Circuit released an Opinion on April 21, 2021, related to the Fair Debt Collection Practices Act (FDCPA), which is a must-read for all in the business of servicing loans or collecting debts. The Eleventh Circuit explains that "[i]t's not lost on us that **our interpretation of [the FDCPA] runs the risk of upsetting the status quo in the debt-collection industry**. . . . Our reading of [the FDCPA] **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**." At least one class action has already been filed in response to this Opinion, and we expect many more copycat lawsuits, will follow. Similar lawsuits are also expected to be filed against creditors in multiple states where there is an analog statute that tracks the FDCPA.

In Hunstein v. Preferred Collection and Management Services, Inc. the Eleventh Circuit held that a debt collector's transmittal of a debtor's personal information to its printing vendor for purposes of preparing a dunning letter constituted a communication "in connection with the collection of any debt" within the meaning of 15 U.S.C. § 1692c(b) of the FDCPA. Section 1692c(b) generally prohibits communication with third parties "in connection with the collection of any debt" without the consumer's prior consent, except under limited circumstances.

In reaching this conclusion, the Eleventh Circuit interpreted "**in connection with the collection of any debt**" extremely broadly, rejecting the need for the communication to the third-party to constitute debt collection itself. The Court treated the phrase as one that is "invariably a vague, loose connective", and therefore merely 'concerning,' being 'with reference to,' or 'bearing a relationship or association' to debt collection is sufficient.

Significantly, this is not the only time this phrase appears in the FDCPA. There is a long line of cases interpreting the phrase "**in connection with the collection of any debt**" narrowly in the context of §1692e claims related to false, deceptive, or misleading representations, generally requiring the communication to include a demand for payment. However, the Eleventh Circuit expressly rejected applying this narrow interpretation to § 1692c(b) claims, taking the unusual position that the phrase does not need to be interpreted consistently throughout the FDCPA. Fortunately, by expressly stating that different interpretations are appropriate and focusing on the specific context of §1692c(b), the Eleventh Circuit likely created a significant hurdle for any attempts to extend this decision to other provisions of the FDCPA, including those involving direct communication to the debtor.

The Court's extremely broad interpretation of this phrase creates immediate risk for companies who transfer consumer data to third parties even in the performance of ministerial tasks like creating and mailing dunning letters and making telephone calls.

The Court explains that the consequence of the holding may require companies to in-source "**many of the services**" that would typically be outsourced, signaling that there are a broad array of third-party services that could be swept into the scope of the ruling. In addition to copycat lawsuits related to third-party mailing, we expect the plaintiff's bar to target other types of vendor services as well, testing the waters regarding how far they can stretch the Eleventh Circuit's interpretation of what is "**in connection with the collection of any debt**."

We are closely monitoring developments related to this issue, and early signals are that the collection agency will be seeking *en banc* rehearing. However, we have already begun developing arguments distinguishing the opinion. We welcome the opportunity to discuss strategies regarding how best to defend yourself against the anticipated influx of litigation and how to limit your risk going forward.

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