The Real Story of Hunstein is the Enhanced Analysis, Not the Outcome

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On October 28, 2021, the Eleventh Circuit vacated its April 21, 2021 opinion (*Hunstein I*) that had sent shockwaves through the debt collection industry and substituted a new Opinion (*Hunstein II*) in its place. Our analysis of *Hunstein I* can be found here.

While *Hunstein II* reaffirms the holding of *Hunstein I*, looking beyond the surface of the opinion reveals significant limitations to the holding that should alleviate some of the concerns initially raised by *Hunstein I*. For example, *Hunstein II* adds nuance to the ruling that helps highlight its limitations, including added emphasis on the procedural posture. In addition, *Hunstein II* includes a scathing dissent from Judge Tjoflat who explained that with the benefit of the Supreme Court's June 25, 2021 opinion in *TransUnion LLC v. Ramirez*, he changed his mind on the Article III standing analysis.

It is also important to keep in mind that rehearing *en banc* appears to be highly likely now (assuming it is sought by defendant/appellant again), in light of the strong dissent and significant industry impact (demonstrated by the 17 amicus briefs submitted in support of the previous motion for rehearing). All of this is to say that while *Hunstein II* raises many of the same concerns as *Hunstein I* and the associated risk should not be ignored, the sky has not fallen and there are signs of light at the end of the tunnel. We explain some of these signs of light below after a brief history regarding *Hunstein I*.

Overview of the Dispute

Hunstein involves an FDCPA lawsuit brought by Richard Hunstein (Hunstein) in the Middle District of Florida against Preferred Collection and Management Services, Inc. (Preferred). The crux of the allegations in the Complaint are as follows: Hunstein incurred a debt to a hospital arising out of his minor son's medical treatment. That debt was assigned to Preferred for collection. Preferred used CompuMail, a commercial mail vendor, to generate and send a dunning letter to Hunstein. In order to do so, Preferred sent data to CompuMail that disclosed: (a) Hunstein's status as a debtor; (b) the amount of his debt and to whom it was owed; (c) that the debt concerned his son's medical treatment; (d) his son's name; and (e) other highly personal pieces of information. On these facts, Hunstein filed his complaint alleging Preferred violated the FDCPA's prohibition on debt collectors communicating with third parties "in connection with the collection of a debt" unless certain conditions apply. Notably, Hunstein did not allege he experienced any tangible injury, nor that there was any 'certainly impending' risk of harm.

Preferred filed a motion to dismiss that was granted by the district court on the basis that the transmission of information to the mail vendor was not "in connection with the collection of a debt," a conclusion largely based upon prior Eleventh Circuit decisions interpreting a different provision of the FDCPA for the proposition that absent a demand, request for payment, or threat of punitive action if payment is not made, a communication will not be considered "in connection with collection of a debt." Hunstein appealed.

Hunstein I

In *Hunstein I*, the unanimous three-judge panel reversed the district court's order, finding that a debt collector's use of a third-party vendor to print and mail a dunning letter can violate the FDCPA's general prohibition against communicating with third parties "in connection with the collection of any debt." Moreover, the panel found that Article III standing was satisfied despite Hunstein failing to allege a tangible harm or "risk of real harm" and concluded that he alleged an "intangible-but-nonetheless-concrete injury." In reaching this conclusion, the panel found that the statutory violation at issue: (1) bears a close relationship to historical invasion of privacy claims (i.e. public disclosure of private facts); and (2) that in Congress' judgment, a statutory violation constitutes a concrete injury in this situation.

The panel did not consider any of the other elements of an FDCPA claim in reversing the district court's decision, noting that the only issue on appeal was whether the transmission was "in connection with the collection of a debt." This is because the parties agreed that: (1) Preferred is a debt collector, (2) Hunstein is a consumer, (3) the debt is a consumer debt, and (4) the transmission was a communication, within the meaning of these terms in the FDCPA. The panel interpreted the phrase "in connection with the collection of a debt" extremely broadly, rejecting the need for the communication to the third-party to constitute debt collection activity itself. The panel found the phrase to be "invariably a vague, loose connective," and merely "concerning, being "with reference to, or "bearing a relationship or association" to debt collection is sufficient. This interpretation conflicts with previous opinions interpreting the phrase within the context of another section of the FDCPA, which require something akin to a demand for payment to be included for a communication to be "in connection with the collection of a debt." To distinguish these cases, the panel explained that differences in the structure and list of exceptions in the two sections required different interpretations to apply to the matching phrase.

After *Hunstein I* was released, Preferred filed a motion seeking rehearing or rehearing *en banc*, and 17 amicus briefs were filed in support of the motion by 28 entities representing a broad array of interests. An order was entered withholding issuance of the mandate, but in an unusual turn, the case went dormant for over six months. During that time, the Supreme Court issued its opinion in *TransUnion LLC v. Ramirez*, a case that impacts (or dictates) the Article III standing analysis in *Hunstein*. Finally, on October 28, 2021, the panel issued *Hunstein II*.

Hunstein II

Hunstein II vacated *Hunstein I* and replaced it with an opinion that is more than twice as long, in no small part thanks to a blistering dissent from Circuit Judge Tjoflat, and dozens of footnotes capturing back-and-forth exchanges between Judge Tjoflat and the two-judge majority. While *Hunstein II* largely tracks *Hunstein I*, there are a few significant changes.

The Standard of Review is Critical and Whether the Information is Actually Reviewed by Employees within the Third Party Vendor is Key.

First, *Hunstein II* emphasizes the procedural posture of the case and that it arises from a motion to dismiss, so the Court must accept the allegations in the Complaint as true. While this is an obvious proposition that could be grounds to limit the impact of virtually any decision at the motion to dismiss stage, the following quote reveals why this is so significant in *Hunstein*:

> *Again, Hunstein claims that the debt collector, Preferred, "disclosed" what he calls "**sensitive medical information**"—including his minor son's name and prior medical treatment—**to "the employees of an unauthorized third-party mail house**," CompuMail. That means, **based on the allegations of the complaint**—which, again, **we must accept as true** for purposes of appeal— that **some measure of disclosure in fact occurred**. And, it seems to us, that disclosure of intensely private information—including, most notably, the status of Hunstein's debt, his minor son's name, and that his debt arose from his son's medical treatment —could clearly offend a reasonable person and is not of legitimate public concern.*

In short, the outcome of *Hunstein* may have been different if it had arisen from a different posture. This is addressed head-on in *Hunstein II*, with the majority explaining that one reason *TransUnion* can be distinguished is because *TransUnion* arose from a trial whereas *Hunstein* arises from a motion to dismiss and "[h]ere, by contrast, the case didn't proceed beyond the motion-to-dismiss stage . . . [w]e thus have no 'evidence' by which to evaluate whether anyone at CompuMail 'actually read and not merely processed' Hunstein's sensitive information." This statement suggests that the majority is acknowledging that the outcome may have been different at a subsequent stage if Hunstein were unable to prove anyone at CompuMail actually read the sensitive information.

In the same quote, another significant change from the panel's prior opinion is that the sensitive information was allegedly disclosed to the **employees** of CompuMail, something that was never mentioned in *Hunstein I*. In effect, the allegation is that the sensitive information was disclosed to strangers that work at a company that processes mail. Arguably, the Court lacks information to determine whether these employees were creating a "wall of shame" or merely processing letters. As a result, courts may require the answer to be developed through discovery. From a litigation perspective, this may create problems for disposing of a case at the pleading stage, but it seems likely the evidence adduced would establish the latter. At a minimum, this suggests it may be important to understand what level of human interaction your vendors have with the data you transmit.

This distinction of 'read' versus 'processed' is not only critical from a practical litigation sense, but it also addresses a major problem in the logic of *Hunstein I* that raised a significant and troubling ambiguity. In *Hunstein I*, there was no meaningful and consistent way to distinguish the post office from the mail vendor. Under the broad reading of *Hunstein I*, giving a postal worker a sealed envelope containing the debt collection letter could arguably be an improper disclosure under the statute, an unreasonable and unpalatable conclusion. Similarly, encrypted information sent through an Internet Service Provider could also be considered to be an improper disclosure. This signals a potential resolution which hinges on whether the vendor reads the information. This also ties into a second takeaway from *Hunstein II*, the 'medium' argument.

A Mail Vendor May be a 'Medium'

One argument advanced in amicus briefs was that a mail vendor is not a 'person' under the FDCPA but is instead a medium. The relevant provision of the FDCPA is limited to communications to "persons," an undefined term. The FDCPA defines 'communication' as "the conveying of information regarding a debt directly to any person through any medium." Without deciding the question, the dissent strongly suggests he was persuaded by the argument that the mail vendor is no different than a telegram company and is simply a medium. This issue serves as the basis for a lengthy back-and-forth between the majority and dissent in responsive footnotes. This 'medium' argument could also resolve the problem of explaining how to consistently draw a line where sending mail through the post office or an e-mail through an Internet Service Provider would not be considered an improper disclosure.

As the dissent explains: "[d]ebt collectors do not send mail vendors information for the mail vendors' keeping. The mail vendor's sole purpose is to take that information and turn it into a debt collection notice, just like a telegram operator's position exists for the purpose of transmitting a message. But I leave this discussion for another day when our plaintiff has standing." This argument will undoubtedly continue to be developed. A notable development favoring this argument is that the recently enacted Regulation F contemplates and supports the use of outside vendors, including mail vendors. This provides further support for the notion that this transmission of information is not the type of disclosure contemplated by the FDCPA.

However, as you may recall, Preferred stipulated that the transmission of information to CompuMail was a 'communication' under the FDCPA. Therefore, it may not be necessary to resolve that issue in *Hunstein.* This highlights why, in litigation, it often makes sense to raise multiple challenges and not put all of your eggs in one basket. In this case, that basket was 'in connection with the collection of a debt,' but no secondary or alternative argument was available to fall back on in light of this stipulation. No matter how strong the authority may seem, every case can be distinguished if an attorney is creative enough, so contingencies are important.

Hunstein **Allegedly Involved "Sensitive Medical Information"**

Through *Hunstein II*, the majority repeatedly emphasized the fact that this case involves "sensitive medical information" regarding a minor's medical treatment and the minor's name, not merely a person's status as a debtor. For example, the majority states "[f]irst, and most conspicuously, the dissent ignores that Preferred communicated more—and more sensitive—information than just Hunstein's status as a debtor; it also included his minor son's name and the fact that the debt arose out of the son's medical care."

In the ordinary loan servicing or credit card communication, no such sensitive information is typically present. It remains to be seen whether the same outcome would have occurred if the information disclosed was merely the status as a debtor and/or the amount of the debt. At a minimum, this provides a reasonable basis to distinguish *Hunstein II* within the Eleventh Circuit where it is controlling authority.

TransUnion **Casts Serious Doubt Upon** ***Hunstein II*****'s Article III Standing Analysis**

As previously mentioned, Judge Tjoflat changed his opinion following *TransUnion*, and it is not hard to see why. The following quote appears in a footnote of *TransUnion,* an opinion issued two months after *Hunstein I* had drawn national attention, directly referencing mail vendors and intra-company disclosures in the Article III context. It is certainly possible this footnote was added in response to *Hunstein I*.

> *For the first time in this Court, the plaintiffs also argue that TransUnion "published" the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received. That new argument is forfeited. In any event, it is unavailing. Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation. Nor have they necessarily recognized disclosures to printing vendors as actionable publications. Moreover, even the plaintiffs' cited cases require evidence that the defendant actually "brought an idea to the perception of another," and thus generally require evidence that the document was actually read and not merely processed . . . That evidence is lacking here. In short, the plaintiffs' internal publication theory circumvents a fundamental requirement of an ordinary defamation claim—publication—and does not bear a sufficiently "close relationship" to the traditional defamation tort to qualify for Article III standing.*

This footnote suggests that the use of a mail vendor may not qualify as a disclosure. Initially, it is worth noting that the Supreme Court identifies mail vendors while addressing examples of internal 'publications.' This ties into the agency argument advanced in several amicus briefs that a mail vendor is merely an agent of the debt collector and is therefore not a third-party under the FDCPA to whom disclosure cannot be made. Moreover, while only dicta, it rejects the notion that disclosure to a mail vendor or internally is sufficient for publication in the context of the related tort at issue in *TransUnion*, defamation. This is significant because the offensiveness of a publication is more relevant in a defamation claim than it is in an invasion of privacy claim. In *TransUnion*, the offending disclosure was that the person was flagged as a potential terrorist or drug trafficker. There is unlikely to be much dispute that such a statement is more offensive than identifying a person as a debtor.

While the quoted language from *TransUnion* is dicta, *Hunstein II* acknowledges that "there is dicta and then there is Supreme Court dicta." In trying to distinguish *TransUnion*, the majority makes the procedural posture argument addressed above, and a second argument that this language should not be read to require a perfect match between the related tort and the statutory claim. However, there is wide chasm between requiring an exact duplicate and requiring some reasonable analog to publication as would be required for the tort of public disclosure of private facts. We expect courts will continue to grapple with this close relationship test.

Other Courts are Not Necessarily Persuaded nor Bound by *Hunstein II*

Circuit Court authority is not controlling outside of that Circuit. Therefore, the majority of the Country is free to disregard *Hunstein II* as precedent. That is not to say that there is no risk of a similar conclusion being reached elsewhere, but it does mean that one could convince the district court that *Hunstein II* is simply wrong. That is precisely what happened (with respect to *Hunstein I*) in the Eastern District of New York, where Judge Gary Brown dismissed six mail vendor FDCPA class actions in a single order based upon Article III standing. In the Order, Judge Brown explains that *Hunstein* is not binding and *TransUnion* "casts significant doubt on the continued viability of *Hunstein*."

Conclusion

In sum, *Hunstein II* opens many doors to distinguish the opinion. While using a mail vendor is not without risk as long as *Hunstein II* and its underlying logic remain viable, the landscape appears to have improved relative to when *Hunstein I* governed. However, *Hunstein II* could be short-lived if rehearing *en banc* is granted, at which point we look forward to addressing *Hunstein III* with you.

We are closely monitoring developments related to this issue and will keep you updated on future developments. We welcome the opportunity to discuss strategies regarding how best to defend yourself against any related litigation as well as how to limit your risk going forward.

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