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Common Use of Third-Party Mail Vendors is Actionable Under the FDCPA

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In its just-released decision, the Eleventh Circuit Court of Appeals has potentially created a new claim under the Fair Debt Collection Practices Act (FDCPA). In *Richard Hunstein v. Preferred Collection and Management Services, Inc*., the Court examined a district court's dismissal of a novel argument – one that the decision itself notes is a question of first impression. The issue brought before the Court was whether a debt collector's sharing of information with a vendor is a violation of the FDCPA, specifically of 15 U.S.C. §1692c(b). The underlying facts are simple. A creditor referred a medical debt to a debt collector (Preferred). The debt collector utilized a third-party mail vendor (Compumail) to send a dunning letter to the debtor (Richard Hunstein). In doing so, certain information was conveyed, including (1) Hunstein's status as a debtor, (2) the balance of the debt, (3) the entity to which the debt was owed, (4) that the debt concerned medical treatment for the Hunstein's son, and (5) the name of his son. Hunstein sued and the district court dismissed the suit. Hunstein appealed.

As an initial matter, the Eleventh Circuit examined standing under *Spokeo, Inc. v. Robins*. In examining the facts, the Court found that Hunstein could not establish standing through either tangible harm or a risk of real harm. Nevertheless, the Eleventh Circuit found that a concrete injury existed sufficient to provide Article III standing, due to the invasion of Hunstein's privacy. The Court noted that the Congressional findings underlying the FDCPA establish that the statute was enacted to prevent invasions of privacy. In doing so, the Court examined its decision in *Trichtell v. Midland Credit Management, Inc.*, which found that a violation of 15 U.S.C. §1692e does not automatically create a concrete injury. The Court found that FDCPA plaintiffs are not limited to those individuals with actual damages, particularly where the statutory language addresses the very harm alleged by Hunstein in the instant case.

This decision alone would make this case notable. However, the Eleventh Circuit did not stop there. The Court noted that there was no question that the defendant, Preferred, was a debt collector, that the plaintiff, Hunstein, was a consumer and that, "helpfully, the parties also agree that [the debt collector's] transmission of the [plaintiff's] personal information to the [third party vendor] constitutes a communication" under the FDCPA. The Court then stated that the sole issue for decision by it was whether Preferred's communication with its vendor, Compumail, was "in connection with the collection of any debt," such that it violates § 1692c(b).

While considering its answer to this question, the Court analyzed the parties' arguments. The debt collector, Preferred, first argued that for a communication to be "in connection with the collection of any debt," it must necessarily include a demand for payment. The Eleventh Circuit rejected Preferred's argument by noting that §1692c(b) contained exceptions allowing a debt collector to communicate with a consumer reporting agency, the creditor, the attorney for the creditor, or the attorney for the debt collector. The Court found that in order for these exceptions to have meaning, the phrase "in connection with the collection of any debt" must include communications involving more than a mere demand for payment. Despite Preferred's argument, the Court also declined to adopt, as a means of determining whether a communication is "in connection with the collection of any debt," the seven-factor test set forth in the unpublished opinion of the Sixth Circuit in *Goodson v. Bank of America, N.A.*

It is important to note that in its closing, the Eleventh Circuit recognized that its conclusion "runs the risk of upsetting the status quo in the debt-collection industry" and noted that its interpretation may require debt collectors "to in-source many services that were previously outsourced." Perhaps as an advance apology to the industry, the Court noted that it could only interpret the law as written, and that it would fall to Congress to amend the statute, if Congress so desires.

The impact of this development is still unclear. Preferred can seek an *en banc* review of the decision. However, unless it is reversed, it will become the binding precedent in the Eleventh Circuit. This decision has broad-reaching impact, as it is not limited to debt collectors (in the traditional sense) and their law firms, but also has the potential to implicate banks, mortgage servicers, and other financial services companies, as they can and have been held by courts across the country to be "debt collectors" under certain circumstances. This decision may have a chilling effect on the use of third-party vendors by these companies.

However, based on the facts at issue in this specific case, there are potential arguments for debt collector companies to use in future litigation. For example, the Court expressly noted that the parties agreed that Preferred was a debt collector, that Hunstein was a consumer, and that the debt at issue was a consumer debt. All those designations which are required for a valid claim of violation under the FDCPA could be challenged. The argument that certain types of financial services companies are not debt collectors is not a new one and should certainly be considered once more in these types of cases.

Similarly, Preferred did not challenge whether the submission of information to the third-party mail vendor was a "communication." That term is defined by the FDCPA as the "conveying of information regarding a debt directly or indirectly to any person through any medium." There was an argument to be made that the information was not being conveyed to the third-party mail vendor, but was being "indirectly" conveyed to the consumer, Hunstein, that is, that the mail vendor was a means of communication, such as an email service, the U.S. Postal Service, or a third-party courier or parcel service. This argument may require an examination of the relationship between the vendor and its client, as well as the procedures utilized by each entity. In addition, the applicability of the case to other types of vendors may be limited by the amount of information about the consumer and the type of debt that was provided to the vendor. This decision will likely lead to a fresh wave of FDCPA litigation from parties and counsel seeking to capitalize on this development, both within the jurisdiction of the Eleventh Circuit, and across the country.

If you have any questions about how this decision might impact your business, please contact Eve A. Cann for assistance.