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Hunstein: A Primer on the 11th Circuit's Ruling

You've probably heard that on **April 21, 2021**, a three-judge panel in the U.S. Court of Appeals for the **11th Circuit** released an opinion in ***Hunstein v. Preferred Collection and Management Services Inc.*** This short primer explains what the opinion said and why it might matter.

In the opinion, the panel made two key **holdings**:

(1) As to standing, a "bare statutory violation" of Section 1692c(b) of the Fair Debt Collection Practices Act, which broadly prohibits communications with unauthorized third parties, gives rise to a concrete injury-in-fact under Article III of the U.S. Constitution; and

(2) As to the merits, the debt collector's transmittal of the consumer's personal information to its mailing vendor *in this case* constituted an impermissible third-party communication "in connection with the collection of [a] debt" within the meaning of Section 1692c(b).

Holding 1: Article III Standing

In evaluating standing, the panel undertook a two-part analysis that coalesced in *Spokeo v. Robins*, considering first whether FDCPA Section 1692c(b) had a historical counterpart in common law and, if so, whether "the judgment of Congress" in creating Section 1692c(b) indicated that a bare statutory violation of that provision, i.e., a violation causing no concrete injury, should confer Article III standing.

As to the first part of this analysis, the panel likened the injury sought to be prevented by Section 1692c(b) to a legal claim called "publication of private facts," a type of invasion-of-privacy tort.

In the second part of the standing analysis, the panel looked to the congressional findings set forth in FDCPA Section 1692(a), which mention invasions of privacy as among the "abusive" practices that created a need for the FDCPA in the late 1970s. In the panel's view, set forth in a single paragraph, this language in the congressional findings indicates that, in the judgment of Congress, violations of Section 1692c(b) constitute per se invasions of consumer privacy, even without an allegation that another "person" actually saw the "private" information, much less conveyed it broadly to the public.

Holding 2: Impermissible Third-Party Communication

As to the second half of the court's holding, i.e., "the merits" of the case, the court's decision addressed only the facts of this appeal. Specifically, the panel evaluated whether, *in this case*, the debt collector's transmission of information to the letter vendor for the purpose of generating a dunning letter—which transmission the parties had "helpfully" agreed to be a "communication" within the meaning of the FDCPA—had been made "in connection with the collection of any debt" under Section 1692c(b).

The panel construed the phrase "in connection with" broadly, relying on dictionary definitions and legal usage guides to find that the agency's transmission of information to the mail vendor "concerned" or was "with reference to" the collection of Hunstein's debt. And, in the panel's view, the plain meaning of Section 1692c(b) therefore required it to find that unless an FDCPA communication went to one of the four parties expressly named in Section 1692c(b) or was otherwise authorized under one of the four narrow exceptions in that section, then the communication must be prohibited under the act.

So, really, *Hunstein's* merits analysis comes down to the meaning of "in connection with" the collection of a debt, the question of whether it was a "communication" having already been conceded in this case.

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The Hunstein Fallout: Actual and Potential

It's true that the *Hunstein* panel's logic, *if allowed to spread and become precedent in all jurisdictions*, could pose an existential threat to print and mail vendors, and potentially to other vendors.
That said, it's critical to note a few key points:

- **Limited facts, limited opinion.** *Hunstein* remains at least impliedly limited to the facts of the case, in which the transmittal of four specific pieces of information from an agency to a letter vendor were conceded to be a "communication" within the definition provided in the FDCPA.

- **Procedural posture.** *Hunstein* rests on an undeveloped factual record, having come up on appeal after the court below issued a powerful and succinct dismissal of the claims under Federal Rule of Civil Procedure 12(b)(6), relying on existing 11th Circuit law to do so. This means that the "facts" of the case were essentially the plaintiff's well-pleaded allegations and any factual concessions made in the case. With the better developed factual record that discovery will yield, the outcome might well have been different—that's true for similar copycat cases, too. In short, more and better facts yield narrower, more considered decisions.

- **Narrow jurisdictional reach.** *Hunstein*, if it stands, will be precedent only in the 11th Circuit, which comprises Florida, Alabama and Georgia. In the rest of the country, it would merely be "persuasive authority" for courts to consider. We have seen outlier decisions like this elsewhere in the history of the accounts receivable management industry, in which one circuit stood on an island with its decision while others rejected it. And here, we already have case law in other jurisdictions—including at least one decision supported by state regulators—that goes the other way.

- **The regulatory elephant in the room**. *Hunstein* did not consider the significant regulatory backdrop that Regulation F provides because, at the time the appeal was taken and the briefs were written, the Consumer Financial Protection Bureau had not yet issued the final rules that comprise the new Reg F. As a result, even if it stands, *Hunstein* may well remain an outlier case as other courts can, will and should consider the regulatory backdrop in adjudicating claims like those presented in *Hunstein*.