CARLTON FIELDS

Hunstein and the FCCPA

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With its recent decision in *Hunstein v. Preferred Collection & Management Services Inc.*, which concluded that a debt collector's mundane transmittal of consumer information to its dunning vendor ran afoul of the Fair Debt Collection Practices Act (FDCPA), the Eleventh Circuit's interpretation of an infrequently litigated FDCPA section likely surprised (and vexed) financial services companies and others subject to the act, resulting in their examining financial products, relationships, and circumstances the ruling may impact. Creditors may be less concerned with *Hunstein*'s wake. However, they are (and should be) paying close attention, and not only to the FDCPA component. Although the Eleventh Circuit's opinion focused on the FDCPA, Hunstein also brought claims under the Florida Consumer Collection Practices Act (FCCPA) for the same underlying misconduct. And the FCCPA, unlike the FDCPA, applies with equal force to original creditors.

Hunstein: An Overview

As my colleagues explained this spring, the debt collector in *Hunstein* transmitted data concerning a consumer's debt (his name, the outstanding balance, what his debt resulted from, etc.) to a third-party vendor, Compumail, which used that data to create, print, and mail a dunning letter on the collector's behalf. Any financial services company likely wouldn't bat an eyelash at this fact pattern; such practices are routine and ubiquitous in the industry. The consumer, Hunstein, alleged that communication — and, by extension, the practice itself — violated section 1692c(b) of the FDCPA.

Subject to several exceptions, section 1692c(b) precludes debt collectors from communicating "in connection with the collection of any debt" with anyone other than the consumer and other select few (the consumer's attorney, credit reporting agency, the creditor or its attorney, or the debt collector's attorney). On appeal from the district court's order dismissing the consumer's FDCPA claim, the Eleventh Circuit considered an "interesting question of first impression": whether the debt collector's communication with its dunning vendor — the transmission of data to the dunning vendor to create and mail a letter for the collector — was "in connection with the collection of any debt." It was, according to the Eleventh Circuit.

The FDCPA, the court explained, "broadly prohibits a debt collector from communicating with anyone other than the consumer 'in connection with the collection of any debt,' subject to several carefully crafted exceptions," which didn't apply to the debt collector's communication. The debt collector's communication "concerned," was "with reference to," and "bore a relationship or association" with the consumer's debt; in turn, it was "in connection with the collection of any debt." Communications need not contain a demand for payment to fall within section 1692c(b)'s language. The fact that such practices may be commonplace in the industry was, according to the Eleventh Circuit, immaterial. So, too, was whether the "Compumails of the world read, care about, or abuse the information that debt collectors transmit to them"; those communications still violate the FDCPA.

The Eleventh Circuit acknowledged its ruling's implication, presuming (rightfully so) that debt collectors, in the ordinary course of business, routinely share information not only with mail vendors but also with other third parties. Yet the court was constrained by section 1692c(b)'s plain language. And until Congress concludes the Eleventh Circuit misread it or amends the statute (or the Eleventh Circuit decides to revisit the decision on rehearing), debt collectors, in the short term, may be required "to in-source many of the services that they had previously outsourced, potentially at great cost."

An FCCPA "Equivalent" or Not?

Hunstein's claims against the debt collector weren't limited to the FDCPA; he also asserted claims under the FCCPA, over which the district court declined to exercise supplemental jurisdiction when it dismissed Hunstein's FDCPA claim. Although less widely scrutinized, the impact of *Hunstein* on the FCCPA warrants diligent exploration, particularly for financial services companies and debt collectors regularly conducting business in Florida.

Both the FDCPA and FCCPA generally apply to the same types of conduct, and Florida courts give great weight to federal interpretations of the FDCPA when interpreting and applying the FCCPA. The FCCPA expressly provides that, in the event of any inconsistency between any provision of the acts, the provision that is more protective of the consumer or debt is supposed to prevail.

Like the FDCPA, class actions also may be brought under the FCCPA. In FCCPA class cases, courts may award additional statutory damages of up to $1,000 for each named plaintiff and an aggregate award of additional statutory damages up to the lesser of $500,000 or 1% of the defendant's net worth for all remaining class members. So, as under the FDCPA, the potential exposure to class claims under the FCCPA can be significant. However, unlike the FDCPA, the FCCPA's statute of limitations is two years. And the FCCPA also applies to original creditors, as well as debt collectors.

Hunstein asserted a claim against his debt collector under section 559.72(5) of the FCCPA. That section prohibits persons, in collecting consumer debts, from "disclos[ing] to a person other than the debtor or her or his family information affecting the debtor's reputation, whether or not for

creditworthiness, with knowledge or reason to know that the other person does not have a legitimate business need for the information or that the information is false." In other words, a third-party disclosure claim under the FCCPA requires that a consumer show that (1) there was a disclosure of information to a person other than a member of the consumer's family; (2) such person does not have a legitimate business need for the information; and (3) such information affected the debtor's reputation.

In comparing FCCPA section 559.72(5)'s requirements to section 1692c(b)'s language, the former appears to set a higher bar for consumers to state a claim. Indeed, despite the similarities between the FCCPA and the FDCPA, the statutes are not identical, and "a violation of one act does not automatically constitute a violation of the other." And federal courts have used both subsections as an example of where the acts diverge, explaining that the FCCPA, unlike the FDCPA, "places narrower, more specific constraints on a debt collector's contact with third parties."

However, at least one Florida District Court of Appeal noted the similarities between the two subsections of the FDCPA and the FCCPA, stating that they both "prohibit a consumer debt collector from disclosing any information about the consumer's alleged debt, or the attempts at collection thereof, to any third party without the consumer's prior consent."

Regardless of the apparent differences between the FCCPA and FDCPA subsections, consumers also have asserted claims under section 559.72(5) following the *Hunstein* decision, including putative class actions.

To satisfy section 559.72(5)'s requirement that the third-party disclosure affected their reputations, consumers have pointed to a variety of perceived injuries: the consumer's reputation regarding repayment of debts, truthfulness, solvency, trustworthiness, etc.

And at least one putative class action did not limit its FDCPA and FCCPA third-party disclosure claims to situations in which the consumer's information was provided to a mail vendor. Such information, according to the consumer's pleading, was also transmitted to other third parties, including skip trace services, "scrubbing" services (bankruptcy, SCRA, probate, etc.), and other independent third-party contractors to attempt to collect the consumer's debt.

There are defenses to alleged disclosure violations under section 559.72(5) of the FCCPA, both at the individual claim level (and whether the alleged disclosure can state a claim under the statute) and obviously at the class level (in opposition to any attempt to certify a class). However, nagging questions remain, including whether and how Florida courts may apply and interpret *Hunstein* to section 559.72(5) claims, and how courts will interpret certain elements of a section 559.72(5) claim, e.g., the "legitimate business need" and "affecting the debtor's reputation" prongs, when examining those elements in this new wave of third-party disclosure cases.

In any event, financial services companies operating and attempting to collect debts in Florida should take careful inventory of possible exposure to such FCCPA claims in the ordinary course of their regular business activities, and consider mitigating such exposure where feasible, including reexamining arbitration provisions with these potential claims (particularly putative class actions) top of mind.

Even if the Eleventh Circuit revisits *Hunstein* on rehearing, or if the FDCPA were eventually amended in light of concerns raised by *Hunstein*'s interpretation, there is no telling whether the Florida Legislature will follow suit. And there's no reason to think third-party disclosure claims will be isolated to the FDCPA or to instances in which a consumer's information is provided to a mailing vendor, as in *Hunstein*. Rather, in the coming months and beyond, FCCPA section 559.72(5) claims could become far more widespread than they previously were.

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