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Fate of FDCPA Claims Remains in Limbo in Eleventh Circuit

by [Stephanie N. Bedard](#)

In a case full of surprises, the Eleventh Circuit has vacated its October 2021 substitute opinion in *Hunstein vs. Preferred Collection & Management Services, Inc.*, --- F. 4th ----, No. 19-14434, 2021 WL 4998980 (11th Cir. Oct. 28, 2021), and will reconsider *en banc* whether a debt collector's transmission of a debtor's private information to a third party vendor violated the Fair Debt Collection Practices Act ("FDCPA"). See 2021 WL 5353154 (11th Cir. Nov. 17, 2021).

The FDCPA prohibits debt collectors from publishing or disseminating information in connection with collection efforts to anyone other than debtors, creditors, their attorneys, and credit reporting agencies. The *Hunstein* decision addressed whether debt collector Preferred violated the FDCPA when it sent private information about a medical debt owed by Hunstein – including the outstanding balance, his son's name, and the fact that his debt resulted from his son's medical treatment – to Preferred's mail vendor, which simply printed and mailed a collections letter.

The district court dismissed Hunstein's claims, concluding that Preferred's transmission of Hunstein's private information to its vendor did not constitute a communication "in connection with the collection of any debt" within the meaning of the FDCPA. *Hunstein v. Preferred Collection and Mgmt. Servs., Inc.*, No. 8:19-CV-983-T-60SPF, 2019 WL 5578878, at *3 (M.D. Fla. Oct. 29, 2019).

An Eleventh Circuit panel initially finds Hunstein's FDCPA claims actionable

In April 2021, a panel of the Eleventh Circuit reversed the district court's dismissal of the complaint, holding that Hunstein had standing to sue because the alleged statutory violation bore sufficient similarity to an invasion of privacy tort, particularly the common law tort of public disclosure of private facts. *Hunstein vs. Preferred Collection & Mgmt. Servs., Inc.*, 994 F.3d 1341, 1348-49 (11th Cir. 2021). The panel further concluded that Hunstein had sufficiently alleged Preferred's communication to its mail vendor constituted a communication "in connection with the collection of any debt." *Id.* at 1352.

Preferred then petitioned for an *en banc* rehearing, arguing that its transmission of information to its mail vendor constituted an automatic and ministerial task insufficiently "public" to be actionable.

The Supreme Court issues its ruling in TransUnion LLC v. Ramirez

Meanwhile, in June 2021 the Supreme Court issued its decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). In *Ramirez*, the Court held that debtors whose inaccurate credit reports had been disseminated only to

a mailing vendor did not suffer injuries and had no standing to sue under the Fair Credit Reporting Act. *Id.* at 2214.

In a footnote, the Supreme Court questioned whether providing consumer information to a printing vendor could qualify as a “publication,” since that type of communication did not seem sufficiently similar to a traditional defamation tort claim to constitute an actionable injury. *Id.* at 2210 n.6.

Despite Ramirez, a divided Eleventh Circuit panel keeps Hunstein’s FDCPA claims alive

Post-*Ramirez*, the Eleventh Circuit panel vacated its prior decision *sua sponte* and issued a replacement opinion. See 2021 WL 4998980.

That replacement opinion, however, did not reach a different outcome. Instead, the majority of the now-divided panel reaffirmed its original opinion and found that Hunstein had standing to sue. While finding *Ramirez* “in some tension with our holding here,” the majority nonetheless found Preferred’s alleged statutory violation sufficiently analogous to the common law tort of public disclosure of private facts to convey standing under the FDCPA. *Id.* at *10. In so holding, the majority reasoned that a statutory harm need only be similar in *kind* to a common law tort, not necessarily similar in *degree*. *Id.* at *5-10.

In a sharp dissent, Judge Tjoflat claimed the majority opinion “goes off the rails” and ignored the requirement set by *Ramirez* that a plaintiff must allege a statutory violation sufficiently analogous to a common law tort. *Id.* at *17. He viewed Preferred’s communication to its vendor as insufficiently “public” to constitute a public disclosure of private facts. *Id.*

The Eleventh Circuit Grants En Banc Review

On November 17, 2021, the Eleventh Circuit yet again vacated a prior opinion – the replacement opinion issued just a few weeks earlier – and agreed *sua sponte* to reconsider *en banc* whether Preferred’s transmission of private debtor information to its mail vendor violated the FDCPA. See 2021 WL 5353154.

The Eleventh Circuit’s decision to rehear the case *en banc* may reflect the substantial industry implications of its prior ruling (as reflected in the large number of amicus briefs that have been submitted in the appeal). If debtors have standing to sue when collections agencies outsource private information to any vendor, the opinion in *Hunstein* could have a dramatic impact on the litigation exposure of debt collectors and require those collectors to conduct ministerial functions “in-house.”