Consumer Finance Monitor (Season 4, Episode 18) The Eleventh Circuit's Troubling and Unprecedented FDCPA Decision in Hunstein: Profound Implications for the Collections Industry

Speakers: Alan Kaplinsky, Stefanie Jackman, Burt Rublin

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor podcast where we explore important new developments in the world of consumer finance and what they mean for your business, your customers, and the industry. I'm your host Alan Kaplinsky, senior council at Ballard Spahr and I'll be moderating today's program. For those of you who want more information about the topic that we're going to be talking about today, which I will describe in a moment, or anything else pertaining to the consumer financial services world or at least legal issues that are raised in the consumer finance industry, please make sure to subscribe for our blog, Consumer Finance Monitor, which goes under the same name as our weekly podcast show.

Alan Kaplinsky:

So before I introduce our presenters today, let me just give you a very, very quick background. An opinion came down from the 11th circuit on April 21. The name of the opinion is Hunstein, that's H-U-N-S-T-E-I-N, versus Preferred Collection and Management Services. We've written up this opinion almost immediately in our blog and I would certainly encourage you to read our blog about the opinion. This opinion really is a, I refer to it, as a game changer in the world of the Federal Debt Collection Practices Act or the FDCPA. It reports to interpret certain language in the FDCPA in a very broad and bizarre manner and to me it reflects a lack of understanding of how the FDCPA actually operates or a failure of the parties to educate the 11th circuit panel that heard the opinion.

Alan Kaplinsky:

Because they came down with an opinion that the panel themselves acknowledged that they knew it was going to cause major problems in the industry. That because it was so different than anything else that had ever been issued by any court in the country. So I hope I've whetted your appetite to hear more about this opinion and what its implications are and what the real problems are with the opinion. So let me first introduce our panelist today. And first of all I want to introduce Stefanie Jackman. Stefanie is a partner in our Consumer Financial Services Group located in our Atlanta office.

Alan Kaplinsky:

She is the leader of our collections team and nationally known for her expertise in servicing and collection related issues. She's also an experienced litigator who regularly assists clients that are facing regulatory exams and investigations by the CFPB, the California Department of Financial Protection and Innovation, and other state regulators and attorneys general. Stefanie is actively working with industry trade groups and relevant stakeholders to coordinate the industries response to this Hunstein opinion. And it's already been retained to draft an amicus brief in connection with the next step in the Hunstein case and Stefanie will describe that in a moment.

Alan Kaplinsky:

Let me also introduce my colleague Burt Rublin. Burt is a member of the Consumer Financial Services Group and he serves as leader of Ballard Spahr's Appellate Practice Group. Burt and I go back a long, long way. We actually came to Ballard Spahr together on February 1, 1995. I hope I got that day right Burt. You'll tell me if I'm wrong. We came together as part of the

core group of four lawyers who started the Consumer Financial Services Group at Ballard Spahr. And Burt over the years has been involved in many, many cases involving landmark issues involving consumer finance around the country including cases in the Supreme Court that Burt had.

Alan Kaplinsky:

Well anyway, enough of the introductions. Let me first of all welcome both of you. Stefanie welcome to our show.

Stefanie Jackman:

Thanks Alan.

Alan Kaplinsky:

And Burt, welcome to our show.

Burt Rublin:

Thanks Alan and you got the date right. 1995.

Alan Kaplinsky:

Okay. That's good to know. All right. So I'm going to start with you Stefanie and the first thing I'd like to have you do, because we can't assume that everybody is as familiar with this case as the three of us are. What does this case involve? What are the facts in the case and what was the holding of the court and we'll start there.

Stefanie Jackman:

Sure. Thanks Alan. So yes, the Hunstein versus Preferred Collection and Management Services case, the order we're talking about came out from the 11th circuit court of appeals on April 21st. It was rendered by judges Jordan, Newsom, and TJOFLAT. And in this, the court was evaluating what it believed to be an issue of first impression, namely whether the electronic transmission of debt information, consumers name, address, amount of the debt, etc, to a letter vendor that would then create and send collection letters to consumers on the debt collectors behalf, something that is a pretty common practice across the collections industry.

Stefanie Jackman:

Whether the transmission of that data from the collector to the letter vendor was an unauthorized disclosure of the debt in violation of a very specific section of the FDCPA. Section 1692C, as in cat, B as in boy. And that's a provision. It's in the section that talks about you're not allowed to communicate with third parties except in certain instances and it talks about what those instances are. In subsection 1692CB, the statute says that, "Absent expressed consent from the consumer or a court order or because it's part of an effort to effectuate a post judgment remedy, a collector may not disclose the debt or communicate in an attempt to collect the debt with anyone other than," and it lists specific parties.

Stefanie Jackman:

The debtor, the debtors attorney, the creditor, the creditors attorney, the collectors attorney, if they have one, like a law firm if they retain somebody to sue, or with a permissible purpose a credit reporting agency. So the court was asked to evaluate if the transmission of this data to a third party that was not specifically listed in that section was problematic. Now at the district court level this came out of, as I recall, the middle district of Florida. The district court had held in the defendant collection agencies favor in how this wasn't an unauthorized disclosure of the debt in violation of that section of the FDCPA.

Stefanie Jackman:

So when the plaintiff appealed the 11th circuit took up two issues. One, whether there was standing, which Burt is going to talk about later on and two, if there was standing, if this was a violation of the FDCPA section at issue, and ultimately the 11th circuit concluded it was.

Alan Kaplinsky:

Okay. So Stefanie, it sounds like, as you articulated, a simple case of statutory construction, right? Interpreting some very specific language in the FDCPA, which over the years the very conventional wisdom was that applied, not to people, to independent contractors and agents that debt collectors were dealing with that I could say almost like back office people, not employees, but third parties for sure, but third parties really connected with providing support to the debt collector.

Alan Kaplinsky:

It had never been applied in that context before and this is the first time that that's happened. Am I right in saying that this is a game changer?

Stefanie Jackman:

It certainly has the potential to be because you're right Alan. I mean the FDCPA was enacted in 1977. And we've had a lot of very smart attorneys on both sides of the aisle look at it, bring claims on it, defend against claims, and there's been a development of case law larger arising under 1692E, but not exclusively. Talking about what constitutes a communication in an intent to collect a debt. That language, which was really a critical point of the 11th circuit statutory interpretation, appears not just in 1692CB, but in other sections of the FDCPA like 1692d, 1692e. So the defendant, in prevailing at the lower court, relied on that existing precedent that thought about something that is a communication in connection with a debt to be something that's demanding payment.

Stefanie Jackman:

Something that is going to an outside third party, not a letter vendor working for and at the behest of the collection agency essentially in sort of a principal-agent type relationship and most certainly pursue it to a master servicing agreement with non-disclosure provisions and confidentiality provisions and data breach provisions and all sorts of those things. The court looked to that existing precedent. So did the 11th circuit, but it viewed it differently and I think one of the real key points in forming the courts statutory interpretation and they say it on page 13 of the opinion and going into page 14.

Stefanie Jackman:

It says, "Helpfully, the parties agree that prefer the defendants transmittal of the plaintiffs personal information to the vendor constitutes a communication within the meaning of the statute." And a communication is defined by the FDCPA in section 1692a2, the definition section, as, "The conveying of information regarding a debt directly or indirectly to any person through any medium." So in conceding it was a communication, we didn't get to see a discussion or an evaluation of whether perhaps the letter vendor is the medium conveying the communication if there could be other ways to approach it.

Stefanie Jackman:

And the court instead said, I'm paraphrasing, but since there's no dispute on it being a communication, we'll accept that for purposes of deciding this. We're then really looking at the rest of the phrase. "In connection with a collection of any debt." And they did a plain language analysis citing things like Oxford dictionary, Webster's dictionary, to say that in connection with is loose connectives in some way related and concluded here that if you're conceding it's a communication, well it's under that kind of definition, which is very broad and loose, in connection with an attempt to collect the debt. And you're not one of the parties listed in 1692cb, that that can be disclosed to.

Stefanie Jackman:

The court also then distinguished the case law that talked about what in connection with a debt meant and how to understand that language, but was arising under another section of the FDCPA 1692e and distinguished it and distinguished it by looking at the purpose of that section, which is prohibiting certain things when you're communicating with the person you're trying to collect the debt from, from 1692c, which is putting in restrictions on third party and location calls and things like that, communications with people other than the consumer about the debt.

Stefanie Jackman:

And on that basis they thought that that case law therefore did not inform their analysis here. Also, in saying that the case law that had developed under 1692e really focused on, among other things, it's factors analysis, but one of the critical things is a demand for payment, a request for payment, which we often see in a validation letter or later communication saying, "There's an opportunity to resolve the debt. Please call us." There's either an express or an implied request or demand for payment that's been a real focal point of this case law to date.

Stefanie Jackman:

Here, they said, "That doesn't make sense to look at in connection with 1692c because you would never make a demand for payment from the creditor." But that's somebody you're allowed to disclose the debt to, is the agency.

Alan Kaplinsky:

Right.

Stefanie Jackman:

You'd never make a demand for payment of a credit reporting agency. So that's how the court parsed this together to understand 1692c to not be informed by the almost five decades of case law that would not have, and to date has not, to my knowledge, resulted in the sharing of information to a communication vendor or, and we will talk about this a little bit I'm sure Alan, other vendors who are assisting a collector in collecting a debt in compliance with the law and in a responsible legal way. That's never before been identified, to my knowledge, as a violation of the FDCPA, but here we have it.

Alan Kaplinsky:

Yeah. And let me pick up on one of the last points that you made. In this particular case, we were talking about a letter vendor, somebody, I assume, or company, that was helping the debt collector send out a validation notices, I assume. And you sort of hinted at the fact that this could apply to other kinds of situations as well. And I'm wondering if you might just give us an idea of what are some of the other third parties that help debt collectors who could be swept in by this opinion?

Stefanie Jackman:

Sure. And the one thing I want to do is give you a caveat because I've been speaking with a number of people in the industry for the last week about this as have many others. And there's a lot of concern, there's a lot of fear and I don't want to cause panic or sound the alarm. I think there are many ways and there are a lot of parties right now, very smart minds, working on ways to deal with Hunstein as it currently stands as well as positioning to defend in the future claims that are already starting to be filed in the 11th circuit and elsewhere.

Stefanie Jackman:

We've seen some filings in New York and California as well and I've heard, I haven't seen it, but I heard there've been a couple of filings in Colorado. So with that in mind, and I think there are options from a defense perspective, when we start thinking about the potential scope of these 11th circuits panel opinion in Hunstein, it could apply to any vendor because no vendors are listed, applying the courts interpretation, are listed beyond the seven that I mentioned earlier in 1692c. So it certainly can include the letter vendor like it did here, a text vendor, an email platform vendor, scrub vendors, companies that provide collectability scores, shoot it could be telecom companies to the extent that information might reside on their servers in

connection with how the debt collectors use them to facilitate communications, it could impact our debt buyers especially passive debt buyers who often will buy accounts, but place them with other agencies to collect.

Stefanie Jackman:

Are they able to do that? They're not a collection agency I thought was, "Well, we could take the position of collection agency is allowed and the debt buyers the creditor." The problem with that, to try to get them in the categories that are specifically 1692c for disclosure. If you look at the definition of creditor in the FDCPA, and this has been further solidified by reg F, it doesn't include debt buyers. It talks about creditors being the ones that extended credit and we've seen in reg F a further clarification to make sure that it's clear that a debt collector subject to the FDCPA would also include passive debt buyers purchasing defaulted debt.

Stefanie Jackman:

So that's going to be difficult because when you're looking to define a creditor, the first place you're going to go is does the statute and it defines it in a way that doesn't include debt buyers. So it can have a real impact there. So we've been talking a lot about how-

Alan Kaplinsky:

And what about servicers of defaulted debt?

Stefanie Jackman:

Well it depends. When you say a servicer of defaulted debt, that's what I'm thinking would be an FDCPA collection agency.

Alan Kaplinsky:

Oh, okay.

Stefanie Jackman:

But if we're talking about like a process server, usually they're acting at the behest of a law firm that's been hired. They're not the law firm. There could be challenges there, but they're also sometimes exempted, like thinking about like a repossession agent. You have to think about are the people who are getting the information, and I want to tell you what information specifically matters, but getting the information that results in the disclosure authorized under 1692c to get that or not and it's incredibly narrow.

Alan Kaplinsky:

Right.

Stefanie Jackman:

The information here though is critical. It's information, at least in my view, and looking at cases like Zortman and its progeny, how reg F is approaching this issue. The information needs to connect a specific consumer to the fact that there's a debt. Maybe it doesn't have to say the exact amount of the debt. Maybe it could just be general. I don't think it has to be connecting on one to one, but it's disclosing that the consumer owes a debt. So there are ways that you can think about, when you're working with scrub vendors and other types of communication vendors, this is difficult for like letter and email, but maybe for text or ringless voicemail or vendors like that, they may not need anything other than a social or the last four of a social or the phone number.

Stefanie Jackman:

And they're not doing scrubs that would then link that number to a specific consumer, like a reassigned number scrub or looking up who owns this social security number. So there may be ways that some vendors can avoid this risk by simply not getting that kind ... no vendors. I misspoke. The risk here is not the debt collector disclosing it to the vendor, but in not providing that type of information sort of anonymizing as much as you can who is associated with a debt, you might be able to avoid the impact of this, but that gets more challenging with like a letter vendor who kind of needs a name and address.

Stefanie Jackman:

There's ways to anonymize that, but it's more difficult than for instance if all that's needed to deliver a message, like a text or a ringless voicemail is the cell, just give the cell and don't give the consumers name.

Alan Kaplinsky:

Right. One of the things, and maybe mentioned in the opinion, is that the 11th circuit acknowledged, I believe, that a lot of debt collectors now are going to have to in source things that they have outsourced forever. They're now going to have to do it themselves. Is that a practical work around the Hunstein opinion? I mean it sounds like something, yeah, maybe it could be done, but it's going to take a long time to do it and it's going to be very costly.

Stefanie Jackman:

Yeah. It depends. It depends. There are agencies that are thinking about whether they can bring it in house.

Alan Kaplinsky:

Right.

Stefanie Jackman:

There are agencies that are thinking about whether they can purchase a print vendor. There's discussion about does it make sense to lease employees. There's lots of things floating around right now. None of it is perfect. None of it has really been tested because this is a completely new take on 1692c, but you're right Alan. The court acknowledged that this is going to be very impactful, that they don't even say, it says, this is a quote. "We recognize as well that these costs may not purchase much in the way of real consumer privacy as we doubt that the letter vendor of the world routinely read, care about, or abuse the information that collectors transmit to them, but our obligation is to interpret the law as written, whether or not we think the resulting consequences are particularly sensibile or desirable."

Stefanie Jackman:

And then they say, "Congress can amend it." Now I don't know that they had to get there, but I read it to say you have two judges that, in my view, tend towards more conservative interpretations, more textual interpretations of statutes, and then you have another judge who was appointed under the Obama administration and who tends to be more of the liberal judicial approach to reading statutes, to read in some of those contextual considerations, but I'll note, this was a unanimous opinion.

Alan Kaplinsky:

Yeah.

Stefanie Jackman:

There was a descent and it's sort of ironic because one of the things that collection industry has long lamented are judges that are reading things into the statute that aren't there in order to support claims. And here that kind of got turned on its head, in a way that found a claim. So it's a real gut punch honestly-

Alan Kaplinsky:

Yeah.

Stefanie Jackman:

To the industry in something that, for many decades, they've done in the open. There's case law finding now that these letter vendors are collectors in their own right. So it's not something I think anybody thought was really going to happen until it did.

Alan Kaplinsky:

Yeah. So okay. Where are we with the case? I take it the defendant has got a couple of choices at this juncture, maybe three. One, to go back and continue to litigate it in the district court. Not a really attractive option. To seek a rehearing on bank before the 11th circuit. Or to file in the Supreme Court. Do you know at this juncture what they are going to do or are they still considering their options?

Stefanie Jackman:

I know there will be a challenge in the 11th circuit. Whether it will be a petition for rehearing before the panel, a petition for en banc hearing by the entire court, or a request for both I think is still being batted around and thought about strategically by council for the defendant and different industry trade groups that are sort of consulting and trying to be helpful if they can.

Stefanie Jackman:

The deadline for that filing is May 12th. And this is one point where there's been a little confusion. So for anyone listening that may not be aware, I just want to clear that up. The actual federal rules of appellate procedure provide that a petition for rehearing or petition for en banc has to be filed within 14 days of the judgment unless local rules provide for a different timeframe. Helpfully the 11th circuit rules allow for 21 days. So that's how we get 21 days from April 21st is May 12th. I don't know why I have March on the mind. I'm sorry.

Stefanie Jackman:

And then amicus briefs, and there will be many filed. A number of industry trade groups are going to file them, some independent stakeholders, a number of vendors obviously and collection agencies. Those are due seven days after the petition is filed. So assuming that Preferred does not file early, which I believe their council is onboard with filing on the actual May 12th deadline, the amicus briefs would be due by May 19th. And one of the things to know about these briefs is they have to be both a petition for the court to consider it and the argument the amicus would like considered.

Stefanie Jackman:

You won't get a chance as an amicus to re-brief the issues if the court grants the rehearing or the en banc or whatever's requested ultimately. And then yes Alan, a couple things to think about is, personally my thought is, request both, a rehearing and en banc. They have slightly different standards. They're both extraordinary remedies. They're not easy to get. They're not a sure thing at all. Courts don't like to undo their opinions or reverse opinions of their colleagues for obvious reasons.

Stefanie Jackman:

But if you file for both and the court ultimately decides to give a panel rehearing, it preserves the ability to seek if that panel rehearing doesn't come out in the outcome you want to still re-request an en banc review. Now whether you'll get it or not I think it's going to be difficult, but at least preserves that. And then yes, as you know after that you could file a petition. In fact you don't actually have to feel a petition for rehearing or en banc in the 11th circuit in order to petition for Supreme Court, but I got to be honest with you.

Stefanie Jackman:

Hopefully we don't get their number one, and I think there's a lot of ways we don't get there. And number two, I don't think the court would take this up. There isn't a circuit split. I just think that the Supreme Court's got a lot of things going on and it's never a sure thing and this doesn't jump out as a case that own its face looks like something with a better chance than most of a petition being granted. So hopefully we're able to get some traction with the 11th circuit. And the 11th circuit may not be willing to reconsider, may not agree to en banc.

Stefanie Jackman:

This was a motion to dismiss. So going back to the district court, there can still be a development of the record on summary judgment about whether this actually was a communication. I don't think that stipulation for purposes of a motion to dismiss holds throughout the case. It doesn't. There can also be a development of whether or not there was actually a breach of privacy here, which is the standing part that Burt will talk about in a minute. So this is a lot of ways to say, "We have a long road ahead of us with Hunstein."

Stefanie Jackman:

Going back to earlier, while we need to be mindful, we need to be thinking about ways we can reduce risk particularly within the 11th circuit because it's there. The mandate hasn't issued, it's not binding yet, we're not done. And even if the mandate does issue, there's ways to deal with it if it were remanded to the district court and there's ways to position your own litigation, which for many of you, unfortunately, is surely to come because you've been sending letter through letter vendors and emails, through email vendors and scrubs through scrub vendors for the year. There are ways to position your case differently.

Alan Kaplinsky:

Right. And I assume that all this new litigation that's happened after the opinion came down that it's class action litigation. Am I right or is it some class, some individual?

Stefanie Jackman:

From what I've seen, we had somebody pull a bunch of this the other day through, I think it was Web Recon and they said about 15 complaints, or mended complaints, yeah. They're mending and making it a punitive class. We're seeing those in California, Florida, Alabama, New York

Alan Kaplinsky:

Is that it's very rare, not unheard of, but it's rare for a debt collector to be able to rely on an arbitration provision that includes a class action waiver. Once in a while you can get lucky and you can find you have an arbitration provision that applies to the creditor itself and that the language is broad enough to make the debt collector a third party beneficiary, but in order to put all the pieces together to make an effective motion and compel arbitration requires a lot of work and you have to jump through a lot of hoops.

Alan Kaplinsky:

I want to ask you one other question that sort of comes to mind Stefanie and that is the new regs that you referred to, reg F I believe, issued by the CFPB under the Kathy Kraninger, the former acting director of the CFPB. Do those regs shed any light on the answer to this question? And further, do you know what position the CFPB either has taken or might take in a case like this?

Stefanie Jackman:

You know it's a great question. Do the regs themselves say, "1692cb should be interpreted to allow this?" Not expressly. But there are a host, I mean dozens and dozens of references to the use of various outside vendors, scrub vendors, communication vendors, text vendors, letter vendors. They are specifically contemplated by the CFPB, noticed and known to the CFPB, and information from them and how they participate in this process was gathered over the seven year rule making period.

Stefanie Jackman:

So view it through that lens, yes. I think the CFPB has the regulator charged by Congress under the Dodd–Frank Act with sole authority to interpret and the FDCPA. I think they have a lot to say about this and I think they say that it's something the CFPB thinks makes sense. And of course the CFPB would think it makes sense because these companies have been developed over the year to efficiently and effectively send the right letter to the right consumer with the right required disclosures and the right information in a way that can be monitored, tracked, to avoid potential consumer harm.

Stefanie Jackman:

These communication vendors make sure the debt isn't disclosed to the wrong person. Scrub vendors make sure you're not sending letters when there's been a bankruptcy. You're not taking steps against service members when they have SCRA protection. You're not suing on deceased debt. You're aware of if it's time bars. You can make those disclosures. So telling collection agencies that send thousands of communications, tens of thousands depending on their size, on a monthly basis that they can no longer use these efficient, compliance tools is bonkers to me.

Stefanie Jackman:

But, what I am aware of with the CFPB is that they know about the decision, they've been contacted by numerous industry trade groups, I understand that there has been a response to one of those emails simply saying that we were always aware of and looking at the case. I don't know if they will file an amicus brief or not. If we're going to get them to, I think it's really important for them to understand how not being able to use these vendors and now having to build this in house is very bad for all of the compliance controls that exist. It will result in consumer harm, it will result in the wrong consumer getting information, consumers being sued or getting letters where they shouldn't, consumers being told they owe the wrong amount of the debt because these controls have been developed over years and years.

Stefanie Jackman:

I mean shoot, these vendors have made it so that they can make sure the letter folds correctly so you don't see information being disclosed through the envelope window. We're going to lose decades, decades of those very important controls if this decision is not reversed.

Alan Kaplinsky:

Yeah. Well Stefanie, I'm going to give you a little breather right now and Burt, I bet you thought I forgot about you, but I didn't. Okay?

Burt Rublin:

I wasn't worried Alan.

Alan Kaplinsky:

Yeah. Okay. So at the very beginning as Stefanie was describing the case, she mentioned that there also is a standing issue in the case and that the 11th circuit panel concluded that there was standing under the US Supreme Court opinion. So want to just tell our audience, Burt has had a lot of experience in dealing with this issue in a wide variety of cases. So I'm really delighted Burt to get your thoughts on what the court did here on standing.

Burt Rublin:

Yes Alan. The opinion is noteworthy, not only because it plowed new ground in terms of statutory interpretation as Stefanie discussed at some length, but also because it's the very first appellate decision that has addressed standing in the particular context of section 1692cb claim. No other appellate court has addressed that particular statutory provision in terms of standing. Interestingly, the defendant had not raised a standing challenge in the district court and the district court opinion did not discuss standing, but instead dismissed the complaint because it found that there was not a statutory violation.

Burt Rublin:

The case goes up on appeal to the 11th circuit and the defendant, once again, as it had done in the district court, did not raise a standing challenge. After the briefing was completed in the 11th circuit the court of appeals, after reading the briefs, but before oral argument was held somebody said, "You know what? We ought to look at standing." So an order directing both sides to discuss standing. And so the parties did that, there after argument was held, and the first part of the opinion does discuss standing. And where they begin their analysis is to say that in order to show an injury in fact, a plaintiff has to demonstrate an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical.

Burt Rublin:

And the courts say that the standing question in Hunstein turned on the concreteness element. The court said that a plaintiff can meet the concreteness requirement in one of three ways. First, he or she can allege a tangible harm, which includes physical injury, financial loss, or emotional distress. Alternatively second, a plaintiff can show a risk of harm that is substantial, significant, or poses a realistic danger. Or third, a plaintiff can identify a statutory violation that gives rise to an intangible, but none the less concrete injury.

Burt Rublin:

The court found that Hunstein 1692cb claim was not based on a tangible harm such as financial loss or emotional distress and was not based on a risk of real harm. However, the court relied on and found that the alleged statutory violation was sufficient to establish a concrete injury for purposes of standing. And what it did was it first found that a violation of section 1692cb is analogous to a type of harm that historically has been recognized as actionable under the common law, namely the tort of invasion of privacy and in particular, a subset of that tort, which is the disclosure of private facts to a third party.

Burt Rublin:

That tort is sometimes poetically referred to as the tort of intrusion upon seclusion. The court also emphasized that in the congressional findings and declaration of purpose in section 1692a for the statute. Congress explicitly identified, "Invasions of individual privacy," as one of the harms against which the statute was specifically directed. In addition, the court relied very heavily on its own prior decision in a case called Perry versus Cable News Network. That case involved a claim that CNN had violated the Video Privacy Protection Act by disclosing the plaintiffs news viewing history to a third party.

Burt Rublin:

And the 11th circuit found article three standing in the Perry case because the statute saw to prevent the disclosure of personal information to a third party, which it held was closely analogous to the common law tort of invasion of privacy and specifically, as I mentioned a moment ago, intrusion upon seclusion. So the court in Hunstein said that 1692cb of the FDCPA and the Video Privacy Protection Act claim in the Perry case, "Share a common structure. A many not share information about B with C." So the court found that Hunstein was on all fours with the Perry case, not withstanding the fact that Perry was not a FDCPA case and that there was sufficient nexus with the common law tort of invasion of privacy, coupled with the congressional statement in the preamble of the statute that invasion of privacy was one of the objectives of the statute to find article three standing.

Burt Rublin:

The court distinguished a decision that it had rendered last year in a case called Trichell versus Midland Credit Management where it found that the plaintiff had lacked standing to bring a claim under section 1692e of the FDCPA. In that case, it's stated that the provision at issue, which prohibits the use of false, deceptive, or misleading representations or means in connection with the collection of a debt lack the necessary close relationship to the common law torts of negligent or fraudulent misrepresentation.

Burt Rublin:

Whereas here in Hunstein, they found that there was a close nexus with the common law tort of invasion of privacy. And again, as Stefanie mentioned at the outset, the decision was unanimous so there's no dissent either with respect to the statutory interpretation or with respect to the standing analysis.

Alan Kaplinsky:

Right. Yeah. Thank you Burt. Stefanie, we're drawing to the end of our podcast, but there's another question that I have in my mind that I think some of our listeners may wonder about. This opinion is a major headache for debt collectors. There's no question about it. And they're the ones that are principally affected by it. But what about creditors? Creditors are not subject to the FDCPA, right? So this opinion, if you're a creditor, is there any reason to think about it for more than a couple of minutes?

Stefanie Jackman:

Well there's two reasons. One, just the impact on your collection agencies to continue seeking to collect on the debts you placed with them, the price that debt buyers might be willing to pay for paper that you're willing to sell that they may have difficulty placing with outside agencies until we get this resolved. But two, you have to think about state law. There are some state laws that apply to creditors collecting their own debt, among others that come to mind, the California Rosenthal Act.

Stefanie Jackman:

Maryland has a first party creditor applicable statute. Massachusetts does. New York City. There's others. North Carolina, Iowa, Vermont, Washington D.C. They're a number. Some of those expressly incorporate the FDCPA. They say, "It's a violation to fail to comply with," and they say, "Section 1692b to F, C to H," whatever, all of it, and two that I know do that offhand are the Rosenthal Act and the Maryland statute. So those are not in the 11th circuit. Thankfully within the 11th circuit you have the states of Alabama, Georgia, and Florida.

Stefanie Jackman:

Florida has a statute that has some aspects that could apply to creditors. It's a little bit of a complicated analysis that goes between the word debt collector, which is defined, but some of the restrictions are on persons, which is broader and could include a creditor. But it doesn't expressly incorporate this provision of the FDCPA. It's got a weird provision that can cause some trouble, but Florida, I think, within the 11th circuit is the biggest risk, but for first party, non-FDCPA collectors and creditors, I think it's very remote and Georgia and Alabama do not have statutes that apply to creditors.

Stefanie Jackman:

So when you go outside the 11th circuit where if Hunstein stands and the mandate is issued by the court, it becomes binding on lower courts within the 11th circuit, that's one thing. Maryland and California are not in the 11th circuits. So in order to bring a claim, plaintiffs are going to have to first decide to go after a creditor instead of third party, which is immediately going to be limited to a state law class and claim. You're not supposed to nationwide. They're going to have to convince a court that this interpretation from the 11th circuit, which is not binding and doesn't interpret the state law, should somehow be persuasive or inform how the state laws apply.

Stefanie Jackman:

The risk is greater when there's an expressed incorporation at the FDCPA. But on ballots, it's certainly not risk free, but I don't think the sky is falling for creditors.

Alan Kaplinsky:

Yeah. Well I hear what you're saying about Georgia and Alabama and Florida. It could have been a lot worse if this were in another circuit where there are debt collection statutes that clearly apply to creditors and incorporate the FDCPA. But Florida, Georgia, and Alabama all have laws, right, prohibiting, proscribing unfair and deceptive acts and practices. Is there a history, in those states that you're aware of, of a plaintiff's suing for violations based on some violation of the FDCPA? Is that really far fetched or is that another concern?

Stefanie Jackman:

I just think nothing's impossible. I think what you're saying is certainly ... but that requires a lot more effort than just filing and FDCPA case against a debt collection agency or debt buyer right now in the 11th circuit or another court, even outside the 11th circuit saying there's an FDCPA violation. That's the quickest way to make a claim, if you're a plaintiff's attorney. So I think it's unlikely that that's a place where they're going to focus right now.

Stefanie Jackman:

And for the CFPB I don't know what they're going to do here. But that's a real stretch in my mind given what they've said about reg F for them to come in and find an issue for a creditor in using some sort of communication vendor in connection with collection, it's completely inconsistent with what reg F would say on this. It's not impossible, but unlikely.

Alan Kaplinsky:

I guess I wouldn't worry so much about the CFPB using that theory, but a plaintiffs attorney is

Stefanie Jackman:

It's a lot of work for them to do it. There's much lower hanging fruit.

Alan Kaplinsky:

Yeah. Okay. All right. So we have drawn to the end of our podcast today, but before I wind it up, I'm just wondering, but either Stefanie, let's go you first and then Burt, do you have any final comments that you'd like to make? Or have we covered it, pretty much everything?

Stefanie Jackman:

Yeah. I think the final comment I would make is that whatever your segment in the industry, whether you're a creditor, collector, debt buyer, service provider, connect with your trade groups, connect with your operations or if you're operations, connect with your compliance and legal department and let's be deliberate and thoughtful about how we proceed, both within the litigation and operationally to mitigate risk. Remember what I said earlier. You've been sending these letters for over a year.

Stefanie Jackman:

We all feel like it's a novel interpretation of the statute, but the position of plaintiffs will be this should absolutely retroactively apply the year past because this isn't new language and it's just an interpretation of plain language. And the court didn't say that this is perspective only. So point being, you already have risk. The sky may not be falling. There are ways to deal with this and knee jerk reactions can sometimes cause more harm than the harm we're trying to mitigate in the first place. So be thoughtful and deliberate in how you decide to move forward in mitigating your risk because if you take a couple of extra days to think about it or weeks, it's not materially increasing it.

Alan Kaplinsky:

Right. Right. Burt, any final observations?

Burt Rublin:

I guess my observation would be with respect to standing that, as Stefanie points out, there will be a rehearing petition by the defendant. There will be a number of amicus briefs urging rehearing. From my perspective this opinion is far more susceptible to challenge on the statutory interpretation aspect than the standing aspect. So I would think-

Alan Kaplinsky:

Yeah.

Burt Rublin:

I would think that defendant and amicus supporting the defendant would be best served by focusing their energies on the substitutive part of the ruling rather than the standing part.

Alan Kaplinsky:

Yeah. Got it. Okay. Well I want to thank both Stefanie and Burt for joining us today on our podcast show and really taking, what I would consider, a pretty deep dive into the Hunstein opinion. I also want to thank all of our listeners today and encourage you to be a regular podcast listener. We release a new podcast show every Thursday and we basically cover the water front of the Consumer Financial Services law. We try to get in on all the really hot issues of the day and there's certainly this opinion that we talked about today is very much cutting edge.

Alan Kaplinsky:

So thank you all for listening.