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After Reconsideration Brings Split Ruling on Privacy Claims, Collection Agencies Worry About What's Next

Cindy Salvo, an attorney representing debt collectors, said she would be inclined to settle the case under such circumstances but she thinks defendants are unlikely to settle "Hunstein" because "it's really important to the industry."

By Charles Toutant | November 08, 2021



(L-R) Louis Mendez of Bressler, Amery & Ross in Birmingham, Alabama; Cindy Salvo, a lawyer in West Caldwell, New Jersey; and Jibrael Hindi of the Law Offices of Jibrael S. Hindi in Fort Lauderdale, Florida. Courtesy photos

Debt collectors were already feeling the jitters after a federal appeals court ruling became the basis for a crop of suits by consumers. But since Oct. 28, they have become even more unsettled thanks to the appeals court's reconsideration of the case, which saw the unanimous ruling for the plaintiff vacated in favor of a split decision.

Lawyers for debtors have filed a crop of privacy suits against collection agencies ever since the U.S. Court of Appeals for the Eleventh Circuit ruled on April 21 that a debtor had standing to sue a collection agency for using an outside company to print and mail collection letters. The suits are viewed with great concern by the collections industry, where using outside companies to print correspondence is a widespread practice. The latest decision appears to be prolonging the anxiety for the collections industry.

The Eleventh Circuit panel ruled unanimously

([//images.law.com/contrib/content/uploads/documents/399/66594/Docket-Hunstein-v-Preferred-11th-Circuit-FDCPA.pdf](https://images.law.com/contrib/content/uploads/documents/399/66594/Docket-Hunstein-v-Preferred-11th-Circuit-FDCPA.pdf)) in *Hunstein v. Preferred Collections & Management Services* that consumers may assert a claim under the Fair Debt Collection Practices Act for a debt collector's transmittal of the consumer's personal information to a third-party printer. But after granting a motion for reconsideration, the Eleventh Circuit panel changed from an unanimous ruling to a 2-1 decision

([//images.law.com/contrib/content/uploads/documents/399/70614/hunstein-numero-dos.pdf](https://images.law.com/contrib/content/uploads/documents/399/70614/hunstein-numero-dos.pdf)). Lawyers for the defendants have asked the court to conduct a rehearing before all Eleventh Circuit judges.

For debt collectors, "Everybody is just on edge. Everybody's on tenterhooks and pins and needles waiting to find out when [the court] goes en banc," said Cindy Salvo, a lawyer in West Caldwell, New Jersey, who represents collection agencies.

Salvo said the change from a unanimous decision to a 2-1 decision "really doesn't effect anything because the opinion stands," but it nonetheless "was encouraging that one person seemed to recognize the insanity of the [prior] decision. When the dissent was filed, psychologically, [defendants] got a little bit excited."

However, debt collectors are concerned that if the court grants an en banc hearing and rules the plaintiff has standing to bring the suit, the case will be remanded to the district court and the defendant will have lost the case, according to Salvo. She said she would be inclined to settle under such circumstances, but she thinks defendants are unlikely to settle *Hunstein* because "it's really important to the industry."

Jibrael Hindi, a Fort Lauderdale, Florida, lawyer who represents plaintiffs in multiple privacy suits in Florida over the use of printing vendors by collection agencies, said the Eleventh Circuit's 2-1 ruling doesn't impact the viability of plaintiffs' suits because the appellate court has still gone on record with a published ruling and the majority of the panel giving the plaintiff a green light to proceed.

Hindi said his cases are not impacted by the dissent's finding that the court lacks jurisdiction to hear the suit by plaintiff Richard Hunstein because he files them in state court and defense lawyers later remove them to federal court.

Hindi said the 2-1 ruling on reconsideration from the Eleventh Circuit, which has appellate jurisdiction over Alabama, Florida and Georgia, had prompted some defendants in the cases he filed in Florida to offer settlements.

Judge Gerald Tjoflat, who changed his ruling in the *Hunstein* case, said he was influenced by the U.S. Supreme Court's June decision in *TransUnion v. Ramirez*, which held that all plaintiffs must be able to show a "concrete injury," not just an increased risk of harm, in order to sue in federal court.

Tjoflat argues the majority's analysis of Hunstein's injury "goes off the rails" because it ignores what *TransUnion* requires a plaintiff to allege in the context of intangible harm.

"The Court's dearth of analysis to two of the three necessary elements of the tort of public disclosure of private facts signals the sheer misfit between sending debt collection notices through a mail vendor and the tort itself," he wrote.

The others on the *Hunstein* panel, Judges Kevin Newsom and Adalberto Jordan, wrote that Hunstein has Article III standing to bring a claim because the collection agency's disclosure of the status of his debt, his minor son's name and the fact that the debt arose from the boy's medical treatments "could clearly offend a reasonable person and is not of legitimate public concern."

Manuel Newburger, who heads the consumer financial services law group at Barron & Newburger in Austin, Texas, and teaches at the University of Texas School of Law in Austin, said previously that he knows of more than 1,000 suits nationwide focusing on outsourcing of printing by collection agencies.

Newburger said the 2-1 ruling from the Eleventh Circuit "is not a decision on the merits of Article III standing, the existence of damages, or even the existence of a violation. As with any Rule 12(b)(6) appeal it is a decision on the adequacy of the pleading, assuming that the pleading is factually correct. I therefore do not expect it to affect any of the similar cases, except in the situations where defendants attack the sufficiency of a plaintiff's complaint," he said.

The Eleventh Circuit is likely to hear the case en banc, given the split ruling, says Louis Mendez, an attorney in the financial institutions practice at Bressler, Amery & Ross in Birmingham, Alabama. Although the Eleventh Circuit ruling is binding in only three states, Mendez said he thinks it's possible that someday it could be adopted in other jurisdictions. Therefore, the split ruling is cause for concern among collection agencies around the country, he said.

"When a consumer files a claim now in whatever district court, it can cite to the *Hunstein* opinion to say this is an actionable claim. To the extent that this ruling could spread across the country, you're looking at a mushroom cloud of these kinds of cases. I think [collection agencies] need to be worried about it," Mendez said.