



The Hunstein Decision's Ripple Effect on Mortgage Servicing in a Post- Forbearance World

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The *Hunstein* Decision

Issue

- Can a debt collector share consumer data to a third-party vendor without the consumer's prior consent?

Holding

- No. Providing consumer data to a third-party vendor is a communication in connection with debt collection under the Fair Debt Collection Practices Act and runs afoul of 15 U.S. Code § 1692c(b).

The *Hunstein* Decision

In coming to its decision, the Court focused on Section 1692c(b), which states the following:

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

Strict Reading of the Statute & Recognized Impact by Court

Arguments and Holding

- The defendant argued that this section only applied if the communication at issue was accompanied by a corresponding demand for payment.
- And that sharing data with a vendor to create a letter in the ordinary course of business lacked that demand.
- The Court, however, found no such requirement, and instead held that it was required to give meaning to every word and provision, and rejected Preferred's argument that Congress intended to limit the scope of § 1692c(b) to include only demands for payment.

Court Acknowledges there will be Costs, But Not the Full Impact of its Decision

- “We presume that, in the ordinary course of business, debt collectors share information about consumers not only with dunning vendors like Compumail, but also with other third-party entities. Our reading of § 1692c(b) may well require debt collectors (at least in the short term) to in-source many of the services that they had previously outsourced, potentially at great cost.”

Impact Beyond Just “Pure” Debt Collectors

- While the vendor at issue in *Hunstein* was a letter vendor, this decision will likely implicate a variety of other vendors used by “Debt Collectors.”
- Since the court’s decision on April 21, more than 100 lawsuits have been filed throughout the country.

So Who is a Debt Collector under Federal Law.

FDCPA

- Companies like Preferred who own or buy bad debt.

The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. 15 USC 1692a(6).

- Lenders and Banks that purchased loans that were in default.

The FDCPA's definition of a "debt collector" excludes "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt **which was not in default at the time it was obtained by such person.**" 15 U.S.C. § 1692a(6)(F)(iii); *Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d 159, 171 (3d Cir. 2007) (emphasis added).

- This also includes Mortgage Servicers and Sub-Servicers who received loan transfers when those loans were in default.

Courts have also interpreted section 1692a(6)(F)(iii) as exempting a "mortgage servicer" from the FDCPA's definition of "debt collector." *Bridge v. Ocwen Fed. Bank, FSB*, 2012 WL 1470146, at *4 (6th Cir. Apr. 30, 2012) (holding that Congress "did not intend the definition of [debt collector] to cover . . . mortgage servicing companies and others who **service outstanding debts for others, so long as the debts were not in default when taken for servicing.**"). (emphasis added).

So Who is a Debt Collector under Florida Law?

Florida Consumer Collection Practices Act (“FCCPA”)

- Any “person” collecting on a consumer debt, including loan originators and servicers.

Schauer v. Gen. Motors Acceptance Corp., 819 So. 2d 809, 812 (Fla. 4th DCA 2002).

“While the Act does not define the term ‘person,’ it is not restricted to debt collectors. It also mandates that no person shall engage in certain practices in collecting consumer claims whether licensed by the division or not. This court has held that this language includes all allegedly unlawful attempts at collecting consumer claims.”

- The FCCPA does not have the “consent” language at issue in *Hunstein*, but it does limit disclosure, and some courts have read the consent language into the statute.

Florida Statute § 559.72(5). Prohibited practices generally.—In collecting consumer debts, no person shall:

“Disclose to a person other than the debtor or her or his family information affecting the debtor’s reputation, whether or not for credit worthiness, 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.” (emphasis added).

- At least one Florida Appellate Court has noted this section implies a consumer must consent. See *Read v. MFP, Inc.*, 85 So. 3d 1151, 1154 (Fla. 2nd Cir. 2012).

What are Servicer Obligations to Borrowers as the Exit Forbearance?

CFPB Proposed Rules

- Give borrowers additional time.
- Must stay in contact with borrowers, and keep them informed.
 - Live Contact with borrowers.
 - Offer them assistance by phone.
- Offer streamlined loan modifications.
- Decision accounts 30 days prior to leaving forbearance where application on file.
- Generally prevent referral to foreclosure until December 31, 2021.

How Does this Impact Post-Forbearance Loans?

Customers Who are in Forbearance May Have Been Past Due before COVID-19

- Are you a debt collector from a Florida perspective?
- You might be one from a Federal perspective.

Outreach Strategy

- What is your calling strategy, do you use an outside vendor?
- Sending letters – this is of course a central issue in *Hunstein*.
- Same with sending out monthly statements.

Loss Mitigation

- Putting aside outreach, how will you tackle loss mitigation?
- Do you have a vendor that helps decision loss mitigation?
- Do you use an outside vendor to document the agreed to loss mitigation?

Opportunities to Reduce Risk

- Maybe use this as an opportunity to get consent on using third-parties.