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KD Petitions the 11th Circuit to Revisit Crucial FDCPA Ruling on Behalf of Industry Client

On May 25, 2021, Richard Perr, Monica Littman, and Graeme Hogan of the Philadelphia office of Kaufman Dolowich & Voluck authored a Petition for Rehearing en banc in the 11th Circuit Court of Appeals on behalf of Defendant Preferred Collection & Management Services, as well as the hundreds of entities in the Accounts Receivable Management ("ARM") industry in the matter captioned Hunstein v. Preferred Collection & Management Services, Inc., Case No. 19-14434-H. Hunstein, decided April 21, 2021, sent a shock wave through the industry for its effect on how the industry conducts everyday business.

The consequences from the 11th Circuit's decision flow from its interpretation of the federal Fair Debt Collection Practices Act ("FDCPA"), which regulates the conduct of debt collectors. In short, the FDCPA prohibits debt collectors from communicating with third parties concerning the debt of another without the prior consent of the debtor. 15 U.S.C. §1692c(b). The purpose of § 1692c(b) is to protect the consumers' privacy in what is often an emotionally distressing and embarrassing time. It has been common practice for businesses in the ARM industry to use third party letter vendors to distribute collection letters to intended debtors. As part of this process, collectors will transmit basic credit information of thousands of consumers, which are turned around to be sent to the consumers.

Plaintiff brought a class action complaint alleging that the use of these vendors violated the FDCPA for illegally disclosing information about the debt to an unauthorized third party. The 11th Circuit held that the injury suffered here was similar to the common law tort of public disclosure of private facts, which was sufficient to confer Article III standing. Next, the 11th Circuit held that based on the text of the statute, transmitting this data to a mail vendor is an unauthorized third-party disclosure under 15 U.S.C. § 1692c(b).

Defendant Preferred's Petition for Rehearing en banc focused on the fact that not only did the 11th Circuit deviate from the Supreme Court's standing jurisprudence, but also failed to conform with the 11th Circuit's own precedent. Preferred argued that the Supreme Court's decision in Spokeo, Inc. v. Robins required Plaintiffs to establish a concrete injury, and that in order to meet the standing requirement, the statutory harm at issue must have both a close relationship to a harm that had traditionally been a basis of a lawsuit in English or American Courts and that providing standing here aligns with Congress's intent on enacting the law.

The "injury" here, argued the Defendant, was based on a transmission that was an automatic, ministerial, electronic transmission of data sent privately to an agent of a debt collector for the sole purpose that a letter could be mailed to the Plaintiff. Such data was not published to the public. Thus, there is no connection between the transmission to a private server and the tort of public disclosure of private facts since the transmission was not published to the community as a whole. Preferred further argued that such a transmission is not a harm Congress identified when it enacted the FDCPA.

Looking at the history of the FDCPA, Preferred argued that the FDCPA explicitly allowed for the use of telegrams when it was enacted in the late 1970's. Telegrams in this case would be the modern day equivalent to the use of letter vendors today. Second, Preferred referred the panel to a 2008 decision of the Colorado Supreme Court, which had held when analyzing a similar provision analogous to the FDCPA that using a letter vendor did not present harm to a consumer. Lastly, Preferred referred the panel to the Consumer Financial Protection Bureau's final rule in Regulation F, which is effective in November of 2021. The CFPB specifically permits the use of letter vendors in the new regulations and found that the use of letter vendors did not injure consumers.

Since Preferred filed the Petition, multiple industry groups have filed amicus briefs in support of the 11th Circuit rehearing the Hunstein matter. On June 14, 2021, the 11th Circuit issued an order withholding issuance of the mandate as to the Hunstein decision, meaning the decision will not become final at this time. Although not final, the case remains binding and precedential in the 11th Circuit.

Information about KD's Consumer Financial Servicers Practice Group can be found here.