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JULY 2021 HOUSTON BAR ASSOCIATION PRESENTATION

A. Consumer Financial Protection Bureau Final Rule for the Fair Debt Collection Practice Act Scheduled to Take Effect in Late 2021 and Effects of Same.

1. Introduction—History of FDCPA

In 1977, the United States Congress passed the Fair Debt Collection Practices Act ("FDCPA"), to protect consumers from unfair and deceptive practices and to eliminate abusive practices in the debt collection industry without imposing unnecessary restrictions on ethical debt collectors.[1] Prior to the FDCPA, the Federal Trade Commission ("FTC") had the responsibility of protecting consumers from abusive collection efforts; however, the FTC was unable to stem or control the wave of collection abuses sweeping throughout the country. As the result, Congress sought to implement new laws that would curtail collection abuses and deceptive practices.[2]

After the enactment of the FDCPA, and until the implementation of the Dodd-Frank Act, no federal agency had any authority to regulate the FDCPA, which meant the interpretation and enforcement of the FDCPA was left in the hands of the courts. Over the last 40 years, courts have been inundated with consumer FDCPA lawsuits and given the responsibility of interpreting and enacting standards under the FDCPA. As a result, courts throughout the country have issued conflicting and often inconsistent

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[1] Fair Debt Collection Practices Act of 1977, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692-1692o (1994 & Supp. I1 1998)).

[2] HOFSTRA LAW REVIEW Volume 28, No. 1 Fall 1999 THE FAIR DEBT COLLECTION PRACTICES ACT: RECONCILING THE INTERESTS OF CONSUMERS AND DEBT COLLECTORS, Elwin Griffith citing Senate Committee Report:

> The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

S. REP. No. 95-382, at 2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696.

interpretations leaving consumers and debt collectors confused how to navigate through the sea of FDCPA opinions and how to apply the 1977 statute to modern technology.[3]

2. History of CFPB and Final Rule Involving FDCPA

On June 25, 2010, Congress passed the Dodd-Frank Act that established the CFPB within the Federal Reserve with a director appointed by the President and confirmed by the Senate. Dodd-Franks gave the CFPB authority to "prescribe Rule with respect to the collection of debts by debt collectors" and to act as a consumer "watchdog." Section 1031 of the Dodd-Frank Act also authorized the CFPB to prescribe Rule applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. [4]

In 2020, the CFPB issued a final rule ("Final Rule") that amends Regulation F, 12 C.F.R. part 1006, which implements the Fair Debt Collection Practices Act, 15 U.S.C. 1692, *et. seq*., to resolve confusion as to the interpretation of the FDCPA and to establish standards with respect to communication technology and practices not contemplated in the 1970s. The Final Rule is expected to take effect on November 30, 2021. However, in April 2021, the CFPB recommended an extension of the effective date by sixty (60) days, until January 29, 2022, considering the Covid-19 Pandemic.[5]

3. Scope of New Regulation F or Final Rule

Although the CFPB has the authority to change or modify the scope of the FDCPA to apply to first party debt collectors or first party collection through its Final Rule making process, the CFPB expressly refused to exercise such authority and chose, instead, to limit the Final Rule to debt collectors as defined in the FDCPA.[6] The Final Rule restates nearly all of the FDCPA's substantive provisions largely in the order that they appear in the statute, sometimes without further interpretation. The CFPB stated,

> "restating the statutory text in this way should facilitate understanding and compliance by making it possible for stakeholders to, in general, consult only the

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[3] Federal Register: Debt Collection Practices (Regulation F).

[4] *See* 15 U.S.C. 1692; Dodd-Frank Act section 1031(b), 12 U.S.C. 5531(b); 5481(5), (6),(15)(A)(i),(x).

[5] Final Rule, Debt Collection Practices (Regulation F), Docket No. CFPB-2019-0022 (to be codified at 12 S.F.R. pt. 1006)(hereinafter Final Rule), https://files.consumerfinance.gov/f/ocuments/cfbp_debt-collection_final-rule_2020-10.pdf.

[6] *See* Final Rule at 32.

> regulation to view relevant definitions and substantive provisions. Except where specifically stated, by restating the statutory text, the [CFPB] does not intend to codify existing case law or judicial interpretations of the statute."[7]

In October 2020, the CFPB issued its Final Rule with respect to **communication** in connection with debt collection and prohibitions on harassment or abuse, false, or misleading representations, and unfair debt collection practices. In December 2020, the CFPB issued Final Rule regarding **consumer disclosures** and certain related consumer protections, including (1) clarifying the information that a debt collector must provide to a consumer at the outset of its debt collection efforts, (2) promulgating a model debt validation notice, and (3) addressing requirements regarding the furnishing of information to consumer reporting agencies and the collection of time-barred debt.

4. Communication Provision of Final Rule

a. Purpose of Final Rule

The purpose of the communication provision of Final Rule is "to address…concerns about debt collection communication and to clarify the application of the FDCPA to newer communication technologies that have developed since the FDCPA's passage in 1977." The Final Rule states its purpose is:

- Clarify restrictions on the times and places at which a debt collector may communicate with a consumer, including by clarifying that a consumer need not use specific words to assert that a time or place is inconvenient for debt collection communications.
- Clarify that a consumer may restrict the media through which a debt collector communicates by designating a particular medium, such as email, as one that cannot be used for debt collection communications.
- Clarify that a debt collector is presumed to violate the FDCPA's prohibition on repeated or continuous telephone calls if the debt collector places a telephone call to a person more than seven times within a seven-day period or within seven days after engaging in a telephone conversation with the person. It also clarifies that a debt collector is presumed to comply with that prohibition if the debt collector places a telephone call not in excess of either of those telephone call frequencies. The final rule also provides non-exhaustive lists of factors that may be used to rebut the presumption of compliance or of a violation.

[7] *See* Final Rule at 32.

- Clarify that newer communication technologies, such as emails and text messages, may be used in debt collection, with certain limitations to protect consumer privacy and to protect consumers from harassment or abuse, false or misleading representations, or unfair practices. For example, the final rule requires that each of a debt collector's emails, and text messages must include instructions for a reasonable and simple method by which a consumer can opt out of receiving further emails or text messages. The final rule also provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure if the debt collector follows the procedures identified in the rule when communicating with a consumer by email or text message.

- Define a new term related to debt collection communications: Limited-content message. This definition identifies what information a debt collector must and may include in a voicemail message for consumers (with the inclusion of no other information permitted) for the message to be deemed not to be a communication under the FDCPA. This definition permits a debt collector to leave a voicemail message for a consumer that is not a communication under the FDCPA or the final rule and therefore is not subject to certain requirements or restrictions.

b. Communication Definition:

Under the current version FDCPA, communication is defined as:

> "conveying of information regarding a debt directly or indirectly to any person through any medium."[8]

Under the Final Rule, the CFPB restated the statutory definition of communication, with only minor changes for clarity in an apparent attempt to address conflicting interpretation of the meaning of a "communication" under the FDCPA. In particular, the new definition of communication encompasses "an attempt to communicate" which includes any act to initiate a communication or other contact about a debt with any person through any medium. This includes leaving a limited message voice mail, which was not contemplated at the time of the FDCPA's enactment and courts struggled with for 40 years.

[8] *See* 15 U.S.C. 1692a (2).

i. Limited-Content Voicemail

Under the Final Rule, a "limited-content message" does not constitute a "communication" under the FDCPA if it includes all the following information:

1. The business name for the debt collector (so long as the name does not indicate the company is in the debt collection business);
2. A request that the consumer reply to the message;
3. The name of one or more natural persons whim the consumer can contact to reply to the message; and
4. A telephone number(s) that the consumer can use to reply to the message.

In addition, the "limited-content message" *may* include the following:

5. A salutation;
6. The date and time of the message;
7. Suggested dates and times for the consumer to reply to the message; and
8. A statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates.

If a voicemail message left by a debt collector for a consumer contains the required items (1 through 4) and any or all of the additional items allowed (5 through 8) and nothing else, the "limited-content message" will not be considered a "communication" under the law and the debt collector will not be in violation of third party disclosure prohibitions if a third-party hears it or for failing to disclose that the call is from a debt collector. To take advantage of this provision, the debt collector may *not* identify the consumer or reference any "account."

The "limited-content message" appears to be the CFPB's solution the infamous *Foti* problem that has plagued debt collectors for years. As you may recall, the *Foti* issue involves what a debt collector can say on a voicemail without violating the FDCPA's requirement to provide certain disclosures to consumers while at the same time complying with the FDCPA's prohibition on authorized third-party disclosure in the event someone other than consumer hears the message.

The CFPB provided a sample "limited-content message" as follows:

> **This is Robin Smith calling from ABC Inc. Please call me or Jim Johnson at 1-800-555-1212.**
>
> **Hi. This is Robin Smith calling from ABC, Inc. It is 4:15 PM on Wednesday, September 1. Please contact me or any of our representatives at 1-800-555-1212 today until 6:00 PM or any weekday from 8:00 AM to 6:00 PM Eastern time**.

The "limited-content message" *Foti* workaround does not, however, provide much of a solution for companies with names that indicate they are debt collectors. Recognizing the solution may not constitute a solution for business with names indicating they are in the

collection industry, the CFPB suggests debt collectors could adopt a doing-business-as name or d/b/a but fails to recognize the difficulties changing a collection company's name may have on many aspects of the business from collection letters, messages, credit reporting, corporate structures, and licensing implication.

ii. Advertising and Marketing Exclusion

The CFPB also provided that communication involving advertising and marketing are not "communication" under the FDCPA.

c. Communication Prohibitions.

i. No Communication Via Medium Person Requested Not to Use

Under the Final Rule, debt collectors are prohibited from communicating or attempting to communicate with a person through a medium if the person has requested the collector not to use said medium. This new right provided to consumers may be requested orally and need not be in writing. With limited exceptions, if a consumer tells a debt collector to stop calling or emailing, the Final Rule prohibits the debt collector from additional communications using that technology. The goal of the CFPB is to afford consumers greater control over the communications they receive from a debt collector.

ii. Time or Place Restrictions

In enacting the Final Rule, the CFPB attempted to address industry concerns regarding the ambiguity of the FDCPA's prohibition on attempting to collect debts at any time or place "known or which should be known" to be inconvenient to a consumer by addressing the concerns in the commentary to the final rule.[9] Like the original FDCPA, the Final Rule prohibits debt collectors from communicating or attempting to communicate with a consumer at unusual times or places, or at a time or place that the debt collector knows or should know is inconvenient to the consumer.[10] The CFPB recognizes the consumer as the one to in the best position to know what time or place inconvenient and debt collectors may ask follow-up questions to better understanding when a time or place is inconvenient.[11] However, consumers are not required to use any specific wording to convey to a debt collector that a particular time or place is inconvenient. In the absence of the debt collector's knowledge of circumstances to the contrary, a time before 8:00 a.m. and after 9:00 p.m. is inconvenient. [12] The commentary to the Final Rule provides numerous examples showing how a consumer may inform a debt collector that a collection calls has occurred during an "inconvenient time".

[9] 12 C.F.R. §1006.6(d)(5)(i)(ii);(e).
[10] 15 U.S.C §1692c(a)(1); Final Rule at 225; Comment 6(b)(1)-1ii to 12 C.F.R. §1006.6
[11] 12 C.F.R. § 1006.6(b)(1)(i)
[12] Comment 6(b)(1)-1ii to 12 C.F.R. § 1006.

The Final Rule does not change the restrictions under the FDCPA that prohibits debt collectors from communicating with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communications. Likewise, the Final Rule does not change the prohibition to communicate with consumers when the debt collectors know the consumers are represented by an attorney.[13]

ONE TIME EXCEPTION: Under the Final Rule, a debt collector may respond one (1) time to a consumer-initiated communication during a time or place previously described as inconvenient.

iii. Frequency of Phone Calls

Under the Final Rule, the CFPB adopts a rebuttable presumption approach to the number of calls a debt collector may make to a consumer *per week* to be in "presumed compliance" with the FDCPA's prohibition of "repeated or continuous calls with the intent to annoy, abuse or harass. Debt collectors who make no more than seven (7) telephone calls to a debtor within seven (7) consecutive days, nor makes a call within seven (7) days after having had a telephone conversation with the debtor in connection with the collection of the debt is to be presumed in compliance with the FDCPA. The restrictions on call frequency applies to ringless voicemail but does not include text messages or emails that may be received to cellular phones.[14]

According to the Comment 14(b)(4)-2i to the Final Rule, a debt collector who is collecting on three outstanding debts (one medical and two credit cards) may be allowed to call the consumer twenty-one (21) times during a period of seven consecutive days (seven calls for each debt).

Exceptions: The frequency of call limitations do not apply to the calls (1) placed with a consumer's prior consent and within a period of no longer than seven (7) consecutive days after receiving the prior consent; (2) not connected to the dialed number; or (3) placed to the consumer's lawyer, a consumer reporting agency, the creditor, the creditor's attorney, or the debt collector's lawyer. [15]

Overcoming Presumption: CFPB set forth several factors that may be used to rebut the presumption of compliance such as the frequency, pattern, and intervals of the calls. The following are examples of factors that may be considered: (1) content of prior communications; (2) debt collector's conduct in prior communications or attempts to communicate; (3) frequency, pattern and intervals of voice messages left for the consumer; and (4) frequency, pattern, and intervals of the calls to the consumer, including calls placed in rapid succession or in a highly concentrated manner.[16]

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[13] Comment 6(b)(1)(i)-2 and 3.
[14] 12 C.F.R.§1006.14(b)(2),(4).
[15] 12 C.F.R.§1006.14) (b)(3).
[16] Comment 14(b)(2)(i)-2i, 2ii, 2iii, 2iv to 12 C.F.R. §1006.14

No Restriction on Other Mediums. The restriction on the frequency of calls does not apply to an electronic message such as a text message or email.

iv. Communication with Third Person

Pursuant to the Final Rule, a debt collector may only communicate with a third party to (1) acquire location information; (2) with prior consent of the consumer given directly to the debt collector; (3) with express permission of a court of competent jurisdiction, or (4) reasonably necessary to effectuate a post-judgment judicial remedy.[17]

When a debt collector does communications with a person for the purpose of acquiring location information, the debt collector must identify himself or herself individually by name, NOT state that the consumer owes a debt, and state that he or she is confirming or correcting the consumer's location information, and, only if expressly requested, identify his or her employer. Additionally, the debt collector must NOT communicate more than once with such person UNLESS requested to do so by the person, or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information.

d. Technology Used for Communication

One of the purposes of the Final Rule is to address the uncertainties debt collectors, consumers and courts faced in applying a 1977 law to modern technology such as email, text messages, and social media, and to provide guidance as to how this technology may be used while complying with the FDCPA. Conflicting court opinions forced many debt collectors to choose between using modern technology in its collection practices while risking potential liability in different jurisdictions or foregoing the use of modern technology in its entirety to avoid risking liability under the FDCPA.

i. Email and Text Message Safe Harbor

Section 1006.6(d)(3) establishes a safe harbor from civil liability for third-party disclosures resulting from email or text communications if the debt collector establishes procedures to confirm reasonably and document that the debt collector emailed or texted the consumer in accordance with certain established procedures.

Email Communication:

A debt collector may send an email communication if it maintains procedures that demonstrate it (1) relies on direct receipt of a consumer's prior consent to use that email address and the consumer has not opted-out; (2) uses an email address obtained from the creditor the creditor notifies the consumer that the debt collector will be communicating about the debt and incudes other required information in the notice,

[17] 12 C.F.R. §1006(c)(1);(d)(1).

provides an opt-out period, and the email address must be one available for general public use; or (3) relies on an email address obtained from the prior debt collector that was used for collection and the consumer did not opt-out.

Text Messages

As stated above, Section 1006.6(d)(3) of the Final Rule, provides a safe harbor for text messages but only under two circumstances: (1) consumers used the telephone number to communication with the debt collector via text message about the debt ("Consumer-Use" Method) or (2) debtor collector received direct prior consent to use that number for text messages ("Prior Consent" Method).

Under the Consumer-Use Method, a debt collector may text a phone number if:

(1) the consumer used the number to communicate with the debt collector about the debt by text message and

(2) the consumer has not since opted out of text communications to that number; and, within the past 60 days, either:

(a) the consumer sent a text message to the debt collector from the phone number; or

(b) the debt collector confirmed, using a complete and accurate database, that the phone number has not been "re-assigned" since the date of the consumers most recent text message to the debt collector from that phone number.

Under the Prior Consent Method, a debt collector may text a phone number if: debt collector obtained prior consent or renewed consent from the consumer to communicate by text message about the debt and within the prior sixty (60) days, the consumer provides consent or debt collectors confirms, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent consent to use that telephone number to communicate about the debt by text message; and consumer has not since opted out or withdrawn consent.[18]

ii. Social Media

Under the Final Rule, a debt collector is prohibited from communicating or attempting to communicate with a person, not just the debtor, in connection with the collection of a debt using social media if the communication is viewable by the public or person's contacts. Debt collectors who want to send "friend requests" may not use "false, deceptive or misleading" conduct to induce or persuade a person into accepting the friend request. A debt collector would be required to identify himself or herself as a debt collector.[19]

[18] 12 C.F.R.§ 1006.6(d)(4)(iii); Comment 6(d)(5)(i)-1 to 12 C.F.R. § 1006.6.
[19] Comment 18(d)-1 to 12 C.F.R.§1006.18.

iii. Electronic Delivery of Notices

The Final Rule allows debt collectors to send FDCPA validation notice electronically, provided the debt collector does so in accordance with E-Sign Act.[20] A debt collector must also make sure the disclosures are provided in a manner that is reasonably expected to provide actual notice and in a form the consumer may keep ad access later. There are not express requirements for the debt collector to obtain the consumer's E-Sign consent directly but allows the debt collector to rely on consent provided to the creditor or prior debt collector.

CFPB allows a consumer to send any written cease and desist communications or refusal to pay notices to a debt collector using an electronic communication to any portal or electronic means that the collector uses to accept consumer communications.[21]

5. Consumer Disclosures

On December 18, 2020, the CFPB issued Final Rule to address three specific areas:
(1) validation information and disclosures which must be provided when a debt collector contacts consumers;
(2) required actions before a debt collection may report to consumer reporting agencies; and
(3) prohibitions on threatening legal action against a consumer for time-barred debt.

a. Validation Information and Disclosures

Under the Final Rule, debt collectors must validate certain information *upon contacting a consumer* regarding a debt or *within five (5) calendar days after initiating such contact*. In particular, a consumer must be provided the following: (1) communication is from a debt collector; (2) the debt collector's name and mailing information; (3) the account number of the associated debt; (4) the amount of the debt, with applicable charges itemized (including interest, fees, payments, credits, etc.); (5) information relating to consumer protections; and (6) information on how a consumer may properly respond.

b. Required Actions before Reporting to Consumer Reporting Agency

Under the Final Rule, a debt collector must also take one of the following steps before reporting a consumer to a Consumer Reporting Agency ("CRA"):

1. Speak with the consumer about the debt, either in person or by phone; or
2. Send a consumer a letter or email regarding the debt and wait a reasonable period to receive notice of undeliverability. Upon the receipt of notice of undeliverability

[20] **Electronic Signatures in Global and National Commerce Act** (**ESIGN**, Pub.L. 106–229 (text) (pdf), 114 Stat. 464, enacted June 30, 2000, 15 U.S.C. ch. 96).
[21] 12 C.F.R. §1006.6(c)(1).

within a reasonable period, the debt collect must send a second notice by mail or email, or otherwise discuss the debt with the consumer in person or by phone, before reporting the debt to a CRA.

c. Prohibition on Threatening Legal Actions Relating to Time-Barred Debt

Debt collectors are prohibited from bringing or threatening to bring a legal action against a consumer to collect debt that is barred by the applicable statute of limitations. Proof of a claim filed in connection with a bankruptcy proceeding does not prohibit actions to collect a debt through legal action, including through bankruptcy court.

6. Changes to Definitions

Another area affected by the Final Rule is the definition section of the FDCPA. Changing the definitions used in by the FDCPA will undoubtedly change what debt collectors must do to collect within the new statutory requirements. Below are some of definitions modified by the Final Rule:

a. Consumer

Under the FDCPA, a "consumer" is defined as "any natural person obligated or allegedly obligated to pay any debt."[22]

Under the Final Rule, a "consumer" is "any natural person obligated or allegedly obligated to pay any debt" and for the purpose of a debt collector's communication, may include a spouse, parent of a minor, legal guardian, estate executor, or confirmed successor in interest. The CFPB did not address how the definition should be applied if the consumer is decreased, which may be useful in the context of debt validation notices.

b. Debt Collector

Under the FDCPA, the term "debt collector" is defined broadly to include any person who uses any instrumentality of interstate commerce (i.e., phone, email) or the mails in any business the principal purpose of which is the assist in the collection of debts, whether such agencies or entities hold themselves out as a professional "debt collector" or "collection agency." [23] The definition includes creditors who, in the process of collecting their own debts, use any name other than their own.

The Final Rule basically adopts the FDCPA's definition of a debt collector. However, the Final Rule clarified that companies that purchase defaulted debts and collect the debts for themselves are not debt collectors. The CFPB refused to exclude attorneys or mortgage service provides since the public was not provided an opportunity to participate

[22] See 15 USC 1692a(3)
[23] 15 U.S.C. 1692a(6).

in the revisions of the rule and such a change to the definition would be a significant deviation from the current definition of debt collector.[24]

B. *Bonus Update:* Eleventh Circuit Court of Appeals Upsets the Collection Industry, Forcing Those in the Industry to Rethink the Status Quo and How to Effectively Send Out Collection Letters Without Running Afoul with the FDCPA.

1. Analysis of Opinion in *Hunstein v. Preferred Collection and Management Services*

On April 21, 2021, the Eleventh Circuit Court of Appeals issued an opinion in *Hunstein v. Preferred Collection and Management Services, Inc.,* -- F.3d --, 2021 WL 1556069 (Apr. 21, 2021), upsetting the entire debt collection industry and triggering a flurry of lawsuits.

In *Hunstein*, a plaintiff asserted a debt collection defendant violated Section 1692c of the Fair Debt Collection Practices Act ("FDCPA") by making an unauthorized "communication in the connection with the collection of any debt" to a third-party vendor. Like most debt collectors in the industry, the defendant used a commercial letter vendor to send consumers collection letters. In doing so, the debt collection defendant provided the third-party vendor limited information about each consumer, such as name, address, account number, amount of debt and name of creditor, to be used by the third-party vendor to create collection letters for the collection agency. Since the debt collection defendant did not have the plaintiff's express consent to divulge the consumer's information to the third-party vendor, the plaintiff alleged the disclosure of said information violated the FDCPA.

FDCPA § 1692c(b) states:

> "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."

Initially, the district court dismissed the claims holding merely providing information about a consumer's debt to a vendor to be used to file out a form did not constitute a violation of the FDCPA. However, the Eleventh Circuit Court of Appeals reversed the district court's opinion and held a debt collector violates the FDCPA if the debt collector shares a consumer's information with a third-party vendor, like letter vendor, without the consumer's consent. Interestingly, the Eleventh Circuit Court of Appeals also acknowledged the impact its opinion would uncertainly have on the debt collection industry, by stating:

[24] See Final Rule at 45.

> **"It's not lost on us that our interpretation of § 1692c(b) runs the risk of upsetting the status quo in the debt-collection industry…. Our reading . . . 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. We recognize, as well, that those costs may not purchase much in the way of "real" consumer privacy, as we doubt that the Compumails of the world routinely read, care about, or abuse the information that debt collectors transmit to them."**

In rendering its opinion, the Eleventh Circuit Court applied a modern textural interpretation to Section 1692c of the FDCPA, like the approach recently used by the United States Supreme Court in *Facebook* and *AMG Capital Management*, that refuses to look beyond the text of the statute or to consider legislative history or the purpose of the statute. In doing so, the Eleventh Circuit Court also rejected a longstanding history of appellate courts using a common-sense interpretation to statutory construction and adopted the position that its role was "to interpret the law as written, whether or not [the court thinks] the resulting consequences are particularly sensible or desirable."

The *Hunstein* opinion most certainly has upset the debt collection industry and forced most in the industry to re-examine their collection efforts, practices, and procedures to ensure compliance with the FDCPA and *Hunstein*. For the time being, debt collection agencies, in Georgia, Florida and Alabama[25], can no longer share consumer information with vendors, such as letter vendors, data hosting services, insurance providers, and other third parties who may have been given the information to assist the collector in the collection process.

2. Potential Strategies to Ensure Compliance with *Hunstein*

a. Obtain Consent from Consumers

Debt collectors need to work with original creditors to obtain express written consent from consumers to share, to communicate, to disclose or to provide the consumers' information with debt collectors and their agents, employees, representatives, companies, partners, and third-party vendors for collection purposes. This needs to be done prior to placement of the debt for collection. Admission forms for hospitals and clinics, credit card applications, loan applications, service agreements and other debt agreements should include language that clearly states the consumer agrees to accept the service or inquire the debt and the consumer expressly consents to the sharing of the consumer's private information, including but not limited to information about any debt, service or monies owed, to debt collectors and credit bureaus and/or their respective agents, representatives, employees, partners, companies and third-party vendors. The

[25] Plaintiff attorneys in New York have already filed similar lawsuits in New York in attempt to expand the reasoning of Hunstein to other jurisdictions. Wide-spread litigation on this issue is almost certain.

agreements need to state clearly that the consumer's private information, including name, address, name of debt, amount due, type of debt, and account number may be communicated to third parties by the debt collector in connection with the collection of the debt.

Although obtaining written consent will not address past violations of the FDCPA, it will help address any future use of consumer information.

If the debt collectors are unable to obtain written consent from the original creditors, the debt collectors should attempt to obtain the written consent to share information with third-party vendors before sharing any consumer information to third parties. Debt collectors using web-based applications or platforms should incorporate an express consent form authorizing the sharing of information with third-party vendors. Since many courts do not recognize implied or verbal consent in the FDCPA context, debt collectors should avoid relying upon verbal consumer consents to get around *Hunstein*.

b. Stop Collecting or Sharing Information with Third Parties (at least in GA, Ala, and Florida)

For the time being, debt collectors should consider stopping all collection efforts in GA, Alabama and/or Florida if they are unable to engage in lawful collection efforts without sharing consumer information with third-party vendors without the consumer's consent. Now, no other Circuit Court has adopted the holding in *Hunstein*. However, there is no certainty other Circuits, like the Second (New York, Connecticut, and Vermont, Ninth (California, Oregon, Washington, Arizona, Montana, Hawaii, Nevada, Idaho, Alaska, Guam), will not adopt the *Hunstein* ruling, which means continuing to share consumer information with third-party vendors in other circuits could lead to liability in other circuits.

c. Evaluate All Vendors Who Receive Consumer Information to Assess Liability

Debt collectors must remember that the holding in *Hunstein* is not limited to "letter vendors." The sharing of consumer information, without consumer consent, to any vendor constitutes a violation of the FDCPA. Thus, debt collectors need to conduct an inventory of all third-party vendors who receive or have access to consumer information to evaluate and minimize all exposure and risks. A complete list of the type of consumer information shared with each third-party should be identified as well as the reason for sharing said information. If the debt collector can use the services of a third-party vendor without sharing confidential consumer information with the third-party vendor, then the debt collector should do so.

d. Acquire Vendor or Start Own Service

Debt collectors who have the financial ability to acquire third-party vendors, like letter vendors or third-party hosted software platforms, should consider doing so. However, these companies should be acquired as part of the debt collection company and not as separate legal companies because *Hunstein* did not resolve the issue of sharing consumer information with legal agents, representatives, parent, or sister companies. Thus, there can still be potential liability if the companies remain separate and distinct.

If the debt collector cannot acquire its third-party vendors, it should consider performing those services internally, if possible. For instance, debt collectors should consider preparing and handling all collection letters internally. Likewise, debt collectors should consider hosting its own software platforms and avoiding any external platforms that require the sharing of consumer information with third parties.

Word of caution: All debt collectors should review their service agreements with third-party vendors to evaluate if the agreements provide a mechanism for the debt collectors to terminate or cancel the agreements if the agreements violate current law. Remember to also look at any choice of law provision to evaluate whether Eleventh Circuit law should be applied to the agreements. If the Choice of Law provision applies law from the Eleventh Circuit, the debt collector may have a strong argument the contract is unenforceable because it would require debt collector to violate federal law. However, the debt collector may not be able to rely on *Hunstein* to terminate a third-party vendor contract operating under a jurisdiction outside the Eleventh Circuit.

e. Get Involved: File Amicus Brief in Support of Defendant in *Hunstein* and Contact Legislature

The *Hunstein* opinion is likely to be appeal for *En Banc* review. Debt collectors and others affected by the decision are encouraged to file amicus briefs in support of defendant.

Lobby Congress to address language of Section 1692c and protect legitimate debt collection practices.

C. Conclusion

Thank you for your time and consideration. I hope this information helps you, your practice and your clients navigate through the Final Rules enacted by CFPB and addresses any concerns or questions you may have regarding this topic. Should you have any questions or need any information, please do not hesitate to contact me.

Best Regards,

Kandy E. Messenger