

## **Eleventh Circuit Agrees to *En Banc* Rehearing of *Hunstein***

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The Eleventh Circuit's controversial FDCPA decision – *Hunstein v. Preferred Collection and Management Services, Inc.* – is no more (at least for the time being). On November 17, 2021, the Court ordered that the case be reheard *en banc*. The *en banc* order vacated the prior panel decision and directed that the case be reheard by the entire Court. In *Hunstein*, the panel held that the electronic transmission of information about a debtor to a mailing vendor constituted an unlawful communication with a third party in violation of the FDCPA.

The original – and unanimous – panel decision was issued on April 21, 2021. Preferred Collection filed a Petition for Rehearing En Banc on May 26, 2021. However, under Eleventh Circuit rules, such a petition is also treated as a petition for rehearing before the original panel. In this case, the panel issued a substitute opinion on October 28, 2021, in response to the Petition for Rehearing En Banc. The substitute opinion was issued to address the impact, if any, of the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). *TransUnion* was a case that further addressed whether plaintiffs have Article III standing to assert claims for statutory damages in the absence of actual harm. The substitute opinion concluded that *TransUnion* did not change its conclusion from the original opinion that *Hunstein* had Article III standing. However, the panel was not unanimous in this holding. Unlike the original opinion, the substitute opinion included a vigorous dissent from Judge Gerald Tjoflat, who argued that the proper application of *TransUnion* should mean that *Hunstein* lacks Article III standing.

Before Preferred Collection had an opportunity to file a Petition for Rehearing En Banc following issuance of the substitute opinion, the Court acted on its own and ordered that the case be heard *en banc*. This unilateral action of the Court, combined with the speed at which the

Court issued the *en banc* order, is perhaps a strong indication that a majority of judges believe that the panel opinion was wrongly decided. Of note, Judge Tjoflat, the dissenting judge, is a senior judge who ordinarily would not sit with the Court *en banc* (since it consists only of active judges), but Eleventh Circuit rules permit a senior judge to sit *en banc* to review a decision of a panel of which they were a member. Thus, Judge Tjoflat could be instrumental in the ultimate decision by the Court.

Briefing is due to be concluded by February 1, 2022, and oral arguments are scheduled for the week of February 21, 2022, in Atlanta.