FEDEDERAL APPELLATE COURT EXPANDS FDCPA PROTECTIONS

Last month the U.S. Court of Appeals for the Eleventh Circuit clarified and effectively expanded provisions of the Fair Debt Collection Practices Act ("FDCPA") in *Hunstein v. Preferred Collection & Mgmt. Services, Inc.*, 19-14434, 2021 WL 1556069 (11th Cir. Apr. 21, 2021). In *Hunstein*, the debtor (Hunstein) incurred debt due to medical treatment his son received at Johns Hopkins All Children's Hospital.[i] Johns Hopkins assigned Hunstein's debt to Preferred Collection & Management Services ("Preferred") for collection. Preferred hired a commercial mail vendor ("Compumail") to send out a dunning letter and, to facilitate that, sent Compumail information about Hunstein's collections account including: "(1) his status as a debtor, (2) the exact balance of his debt, (3) the entity to which he owed the debt, (4) that the debt concerned his son's medical treatment, and (5) his son's name."

As a result of the dunning letter, Hunstein filed a complaint in federal court against Preferred alleging Preferred violated § 1692c(b) (titled "Communication with third parties") of the FDCPA, which reads:

> 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.

15 U.S.C. § 1692c(b). The district court dismissed Hunstein's complaint concluding Preferred's communications with Compumail did not "qualify as a communication 'in connection with the collection of a[ny] debt.'" Hunstein appealed that dismissal to the Eleventh Circuit.

The Court's first consideration on appeal was whether it had subject matter jurisdiction pursuant to Article III of the U.S. Constitution. The Court's Article III standing analysis centered around whether Hunstein suffered an "injury in fact" based on Preferred's violation of § 1692c(b). The Court explained "that in determining whether a statutory violation confers Article III standing, we should consider 'history and the judgment of Congress.'"[ii] As to history, the Court stated if the § 1692c(b) claim "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts" then such violation would constitute an "injury in fact" under the Article III analysis.

The Court surmised that "invasions of personal privacy" through the "public disclosure of private facts" have long formed the basis for tort claims. The Court then looked to the FDCPA's own statutory findings which it noted "explicitly identif[ied] 'invasions of individual privacy' as one of the harms against which the statute is directed.[iii] The Court concluded claims brought under § 1692c(b) bore a close relationship to invasion of privacy tort claims so history favored Article III standing. The Court then surmised that the "judgment of Congress" also weighed in favor of standing since Congress identified invasion of privacy as a harm against which the statute was directed. The Court concluded Hunstein had standing to sue Preferred.

The Court then narrowed the issue on appeal to "whether Preferred's communication with Compumail was 'in connection with the collection of any debt,' such that it violates § 1692c(b)."[iv] Looking to the plain meaning of the phrase "in connection with" the Court concluded that Preferred's communication with Compumail "concerned," was related to and was in "reference to" the collection of Hunstein's debt. The Court rejected Preferred's three rebuttal arguments. First, Preferred argued that there must be "a demand for payment" in the communication in order for the communication to be considered made "in connection with the collection of any debt." The Court disagreed explaining that such a requirement would render the exceptions under § 1692c(b) "superfluous."[v] The Court elaborated that four of the six excepted parties – the debtor's attorney, a consumer reporting agency, the creditor, and the creditor's attorney – "would never include a demand for payment." Since every word and provision in a statute is to be given effect, the Court concluded a demand for payment was not a requirement for a communication to be considered made "in connection with the collection of any debt."

The Court also refused to adopt the "multi-factoring balancing test" urged by Preferred.[vi] Under that test the Court would consider a list of seven factors and based on those factors determine whether the communication was made "in connection with the collection of any debt." In rejecting this approach the Court again explained the phrase "in connection with the collection of any debt" had a "discernible ordinary meaning that obviates the need for resort to extratextual factors" which "all too often…obscure more than they illuminate."[vii] Lastly, the Court acknowledged its holding "runs the risk of upsetting the status quo in the debt-collection industry" but still rejected Preferred's "industry practice argument." The Court explained it was obliged to "interpret the law as written, whether or not…the resulting consequences are particularly sensible or desirable." The Court invited Congress to comment or amend § 1692c(b) if it thought the Court misread the statute. The Court reversed the lower court's dismissal and remanded the matter for further proceedings.

In a hurry? Click here to read the key points.

1. Last month the U.S. Court of Appeals for the Eleventh Circuit clarified and effectively expanded provisions of the Fair Debt Collection Practices Act ("FDCPA") in *Hunstein v. Preferred Collection & Mgmt. Services, Inc.*, 19-14434, 2021 WL 1556069 (11th Cir. Apr. 21, 2021). In *Hunstein*, a consumer debt collector ("Preferred") hired a third-party company ("Compumail") to mail out dunning letters. To facilitate that, Preferred sent Compumail private information about Hunstein's collections account including that the debt concerned his son's medical treatment and his son's name, among other things.
2. As a result of the dunning letter, Hunstein filed a complaint in federal court against Preferred alleging Preferred violated § 1692c(b) which prohibited such communications "without the prior consent of the consumer…" The lower court dismissed the case, but the appeals court reversed finding Preferred's communication to Compumail was "in connection with the collection of any debt" based on the plain, "discernible ordinary meaning" of that phrase.
3. The Court rejected Preferred's argument that the communication must include a demand for payment and further refused to employ the "multi-factoring balancing test" suggested by Preferred finding neither argument persuasive. Lastly, the Court acknowledged the adverse impact its holding would likely have on the industry, but explained it was obliged to "interpret the law as written, whether or not…the resulting consequences are particularly sensible or desirable."

[i] *Hunstein*, at *2. All future citations and quotations are to this cite unless indicated otherwise.
[ii] *Hunstein*, at *3 quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), *as revised* (May 24, 2016).
[iii] *Hunstein*, at *4.
[iv] *Hunstein*, at *5. All future citations and quotations are to this cite unless indicated otherwise.
[v] *Hunstein*, at *6. All future citations and quotations are to this cite unless indicated otherwise.
[vi] *Hunstein*, at *7-8.
[vii] *Hunstein*, at *8. All future citations and quotations are to this cite unless indicated otherwise.

FLORIDA COURT FINDS PARTY LACKED STANDING TO SUE FOR VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT

Earlier this month Florida's Third District Court of Appeals determined a customer of Pet Supermarket, Troy Eldridge (Eldridge), lacked standing to bring a class action lawsuit against Pet Supermarket based on alleged violations of the Telephone Consumer Protection Act ("TCPA" or "the Act"). *Pet Supermarket, Inc. v. Eldridge*, No. 3D21-1174, 2023 WL 3327267 (Fla. 3d DCA May 10, 2023). The TCPA[i] is a federal statute which prohibits the use of "automatic telephone dialing systems to call residential or cellular telephone lines without the consent of the called party."[ii] Sending a text message qualifies as a "call" and is therefore considered prohibited conduct covered by the Act.[iii] In *Eldridge*, the alleged TCPA violations occurred after Eldridge visited a Pet Supermarket and voluntarily sent the text "PETS" to a short code provided by Pet Supermarket to enter a raffle to win free dog food for a year.[iv] Over the next three months Pet Supermarket sent Eldridge a total of seven text messages which Eldridge claimed violated the TCPA.

After receiving the text messages, Eldridge initiated a putative class action lawsuit in federal court claiming the messages deprived him of his privacy, wasted his time and intruded upon his seclusion.[v] The Southern District of Florida concluded the first two of the seven messages were not the type of telemarketing or advertising messages the Act intended to prohibit.[vi] Neither message referenced "shopping or purchasing," rather, the messages were simply part of the registration process for the free dog food raffle. As to the remaining five messages the federal court concluded that they were advertisements because they appeared "to encourage the purchase of goods and services." The court then analyzed the messages to determine if they constituted "a concrete injury-in-fact," the first of three required elements[vii] for establishing standing to bring suit in federal court.[viii]

The Southern District relied heavily on the 11th Circuit's holding in *Salcedo v. Hanna* concluding that the act of receiving one or two text messages per month for three months did "not rise to the level of being such an 'objectively serious and universally condemnable' intrusion on Plaintiff's privacy, so as to resemble the injury actionable under intrusion upon seclusion."[ix] Further, the court reasoned that the intrusion on privacy by virtue of a text message requiring only seconds to open and read was not sufficient to constitute a concrete injury even if multiple text messages were sent. The court rejected Eldridge's position that *Salcedo* was distinguishable because in that case only one text message was sent. The Southern District explained that the quantity of text messages was not the determining factor; rather, it was the qualitative nature of text messages that failed to satisfy the concreteness of injury element for Article III standing. The federal court dismissed Eldridge's lawsuit.

Eldridge then sued Pet Supermarket in state circuit court in Miami-Dade County "based on the same text messages" but relying on Florida's "more relaxed" standing requirements.[x] Eldridge claimed Florida courts did not require him to have suffered an "actual injury" to esetblish

standing to sue; rather, he argued the injury in fact requirement was satisfied simply by showing that Pet Supermarket violated the TCPA. This time, in support of his intrusion upon seclusion claim, Eldridge alleged that "the 'quantity and quality of messages ... constituted a barrage of messages that caused [him] to incur repeated aggravation by annoying him, costing him resources, and interfering with his daily activities such as driving safely or peacefully putting his children to bed.' " He also claimed the text messages "'wasted his time by requiring him to open and read the messages, depleted his cell phone battery, caused him to incur a usage allocation deduction to his text messaging or data plan, and took up approximately 190 bytes of memory' on his cell phone." The trial court found these allegations sufficient to confer standing since under Florida law Eldridge "need only allege a violation of his statutory rights…to have standing." Pet Supermarket appealed that finding.

While the Third DCA agreed that Florida courts were "not constrained by the 'hard floor' of injury in fact imposed by Article III jurisdiction[;]" the Court disagreed with Eldridge's argument that a statutory violation alone could confer standing to bring suit.[xi] The DCA concluded Eldridge still had to "demonstrate a concrete harm or injury from the TCPA violation" to demonstrate his standing to sue in state court. The DCA rejected Eldridge's position that the seven text messages sent by Pet Supermarket had "a 'close relationship' to the harm associated with the 'common law analogue [tort]' " of intrusion upon seclusion.[xii]

In evaluating the text messages, the DCA determined only one of the seven messages actually intruded on Eldridge's "private space" and that that message, although sent to Eldridge on the weekend while he was at home, simply did "not rise to the level of outrageousness required for an invasion of privacy, i.e., that it is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.' " The DCA concluded that Eldridge failed to show he was harmed from Pet Supermarket's alleged violation of the TCPA and therefore he failed to demonstrate he had standing to sue in state court. The DCA dismissed[xiii] Eldridge's complaint.

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1. Florida's Third District Court of Appeals determined a customer of Pet Supermarket, Troy Eldridge, lacked standing to bring a class action lawsuit against Pet Supermarket based on alleged violations of the Telephone Consumer Protection Act ("TCPA" or "the Act"). *Pet Supermarket, Inc. v. Eldridge*, No. 3D21-1174, 2023 WL 3327267 (Fla. 3d DCA May 10, 2023). The alleged TCPA violations occurred after Eldridge visited a Pet Supermarket and voluntarily sent a text message to enter a raffle to win free dog food for a year. Over the following three months, Pet Supermarket sent Eldridge seven text messages, five of which had nothing to do with the raffle and which the DCA determined were advertisements under TCPA.
2. Eldridge first sued Pet Supermarket in federal court, but the case was dismissed for lack of standing since Eldridge could not prove he suffered an injury in fact under the more stringent federal requirements for Article III standing. Eldridge then sued Pet Supermarket

in state court. The lower court found the text messages violated the TCPA and that that violation alone, even without a showing that the violation actually harmed Eldridge, was sufficient to satisfy Florida's injury in fact requirement for standing. Pet Supermarket appealed that decision to the Third DCA.

3. The Third DCA, like its federal counterpart, concluded that the text messages Pet Supermarket sent to Eldridge's cell phone over three months simply did "not rise to the level of outrageousness required" to qualify as an invasion of privacy and satisfy Florida's concrete injury requirement for standing. The DCA reversed the lower court and ordered the court to dismiss Eldridge's complaint.

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[i] The pertinent provisions of the TCPA are codified at 47 U.S.C. § 227(b).

[ii] *Eldridge*, at *1 (quoting *Salcedo v. Hanna*, 936 F.3d 1162, 1166 (11th Cir. 2019)).

[iii] *Eldridge v. Pet Supermarket Inc.*, 446 F. Supp. 3d 1063, 1067-8 (S.D. Fla. 2020).

[iv] *Eldridge*, at *1. All future references or quotations are to this citation until indicated otherwise.

[v] The federal case is: *Eldridge v. Pet Supermarket Inc.*, 446 F. Supp. 3d 1063, 1070-2 (S.D. Fla. 2020).

[vi] *Eldridge v. Pet Supermarket Inc.*, 446 F. Supp. 3d 1063, 1068 (S.D. Fla. 2020).

[vii] To have standing to sue in federal court under Article III of the United States Constitution a plaintiff must demonstrate that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Eldridge v. Pet Supermarket Inc.*, 446 F. Supp. 3d 1063, 1067 (S.D. Fla. 2020) (quoting *Spokeo*, *Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016)).

[viii] *Eldridge v. Pet Supermarket Inc.*, 446 F. Supp. 3d 1063, 1066-7 (S.D. Fla. 2020).

[ix] *Eldridge v. Pet Supermarket Inc.*, 446 F. Supp. 3d 1063, 1070 (S.D. Fla. 2020) (citing *Salcedo v. Hanna*, 936 F.3d 1162, 1166 (11th Cir. 2019)).

[x] *Eldridge*, at *2. All future references or quotations are to this citation until indicated otherwise.

[xi] *Eldridge*, at *3. All future references or quotations are to this citation until indicated otherwise.

[xii] *Eldridge*, at *4. All future references or quotations are to this citation until indicated otherwise.

[xiii] Notably, the DCA dismissed the complaint without prejudice so Eldridge can still amend his complaint to try to satisfy the injury in fact pleading requirement to establish standing.

COURT PROVIDES FAVORABLE GUIDANCE ON INJURY-IN-FACT ELEMENT OF STANDING IN CONTEXT OF FDCPA CLAIM

This month the Sixth Circuit Court of Appeals affirmed the District Court's dismissal of an FDCPA[i] case filed by Gustav Buchholz ("Buchholz"), a debtor, against Meyer Njus Tanick, PA ("MNT"), a law firm engaged in debt collection activities. *Buchholz v. Meyer Njus Tanick, PA*, 18-2261, 2020 WL 35431, at *1 (6th Cir. Jan. 3, 2020). Buchholz was behind on payments on two credit cards so MNT sent two letters which contained information about the past due amounts for each account and "provided contact information for him to either challenge or pay the debts."[ii] Buchholz did not dispute the veracity of the letters, but the "letters made him feel anxious and fear that MNT would sue him if he did not promptly pay." Ostensibly, that fear of litigation passed, and Buchholz sued MNT.

The Court noted the merits of Buchholz's claim were based on "a series of inferences" culminating in the conclusion that MNT could not have engaged in a meaningful review of the two collection letters it sent to Buchholz because of the sheer number of collection letters it was sending out on a daily basis. Buchholz argued an attorney's signature on both letters he received from MNT "created the impression that the attorney…reviewed the file and made the professional, considered determination to send the letter." Buchholz reasoned the attorney-signed letters constituted a violation of several subsections of § 1692e of the FDCPA which prohibited "the use of any false, deceptive, or misleading representation[s] or means in connection with the collection of any debt."

Notwithstanding the tenuous nature of Buchholz's argument, the Sixth Circuit noted it could not even consider the merits of Buchholz's claim because he failed to show he suffered an "injury in fact that is traceable to MNT's challenged conduct." The Court, relying heavily on the Supreme Court's ruling in *Spokeo, Inc.*[iii], engaged in a detailed analysis of the three elements[iv] necessary to establish a plaintiff's standing to sue, focusing most of its analysis on the first element, injury in fact.

The Court noted an injury in fact must be both (1) concrete and particularized and (2) actual or imminent. The Court explained a concrete injury "is like it sounds, 'real and not abstract." Although the Court noted all concrete injuries are not necessarily "tangible economic or physical harms", the Court was "skeptical" about whether Buchholz's receipt of the two MNT letters constituted "extreme and outrageous" conduct which would cause "severe" anxiety or emotional distress - a standard employed by other courts when evaluating "psychological injuries.[v]

Likewise, the Court rejected Buchholz's argument that MNT's alleged FDCPA violation by itself constituted an injury in fact. The Court explained that injury in fact can be established and no "additional harm beyond the one Congress…identified" need be alleged if "the plaintiff alleges a violation of a procedural right that protects a concrete interest."[vi] However, again relying on *Spokeo*, the Court explained that a "bare procedural violation, 'divorced from any concrete harm,' cannot satisfy Article III's injury-in-fact requirement, even if the plaintiff has a statutory basis for litigating the claim in federal court.[vii] The Court surmised MNT's alleged FDCPA violation did not result in any harm, "much less harm that Congress intended to prevent when it enacted the FDCPA." The Court also noted Buchholz

failed to "identify an analogous harm and corresponding common law cause of action" which would support his claim that the alleged anxiety he suffered constituted a concrete injury.[viii]

Finally, the Court explained that even disregarding the "concrete injury" requirement for standing, Buchholz also failed to establish his injury was "actual or imminent," the second element in the injury-in-fact analysis.[ix] The Court looked to Buchholz's complaint allegations where he stated he "felt an undue sense of anxiety that he *would be* subjected to legal action" if he did not pay promptly.[x] The Court explained "[i]n other words, Buchholz was nervous about being sued at some point in the future," but "the fear of a future harm" is an injury "that is rarely cognizable." The Court surmised the potential litigation Buchholz was anxious about fell short of the injury-in-fact requirement because litigation was not "certainly impending" but rather was something that "may or may not occur in the future."[xi]

Lastly, the Court discussed the second and third elements necessary for standing which it labeled "traceability[xii] and redressability" prerequisites.[xiii] The Court agreed with MNT that Buchholz's anxiety stemmed from his "decision to not pay the debts that he does not dispute he owes" and not from the two MNT letters. The Court concluded anxiety stemming from failure to pay one's debts "looks like a self-inflicted injury" which is not an injury in fact, and which cannot be traced back to the defendant.[xiv] The Court affirmed the District Court's order of dismissal finding Buchholz lacked standing to bring his claim and the Court lacked subject-matter jurisdiction to consider it.[xv]

Buchholz did not move for rehearing so this opinion is now final and sets a binding precedent which the district courts must follow when evaluating whether a party has standing to bring an action. In any lawsuit it is imperative standing be analyzed and addressed first – for a plaintiff before bringing suit and for a defendant before answering the complaint. Both *Buchholz* and *Spokeo* demonstrate that standing is procedural hurdle that is not easy to overcome and cannot be fixed retroactively. In the context of FDCPA and related claims a defensive filing based on lack of standing, if applicable, is crucial as it can serve to wean out claims early.

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1. The Sixth Circuit Court of Appeals affirmed the District Court's dismissal of an FDCPA case filed by Gustav Buchholz ("Buchholz"), a debtor, against Meyer Njus Tanick, PA ("MNT"), a law firm engaged in debt collection activities. *Buchholz v. Meyer Njus Tanick, PA*, 18-2261, 2020 WL 35431, at *1 (6th Cir. Jan. 3, 2020). Buchholz was behind on payments on two credit cards so MNT sent two letters which contained information about the past due amounts for each account." Buchholz did not dispute the veracity of the letters, but the "letters made him feel anxious and fear that MNT would sue him if he did not promptly pay" so he sued MNT.
2. The Sixth Circuit found Buchholz could not satisfy any of the three elements of standing: (1) injury in fact, (2) traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision. The Court rejected Buchholz's argument that anxiety he allegedly suffered as a result of receiving the two collection letters constituted an injury in fact that could be traced back to MNT's collection letters. The Court concluded MNT's conduct was not adequately extreme and outrageous and Buchholz's anxiety was not adequately severe. The Court also found Buchholz's failure to pay debts he did not contest as due resulted in self-imposed anxiety which could not be an injury in fact.

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[i] The "Fair Debt Collection Practices Act" commonly referred to as the "FDCPA" is codified at 15 U.S.C.A. § 1692, *et seq*.
[ii] All quotations from and citations to *Buchholz* within this article are to page *1-2 unless indicated otherwise.
[iii] *Spokeo, Inc. v. Robins*, 136 So. Ct. 1540 (2016).
[iv] The three elements of standing are that the plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Buchholz*, at *2 (quoting *Spokeo, Inc.*, at 1547).
[v] *Buchholz*, at *4-5.
[vi] *Buchholz*, at *7-8.
[vii] *Buchholz*, at *7 (quoting *Spokeo, Inc.*, at 1549).
[viii] *Buchholz*, at *10.
[ix] *Buchholz*, at *5.
[x] *Buchholz*, at *5. (emphasis provided in case).
[xi] *Buchholz*, at *6.
[xii] The Court described this as the requirement to show "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Buchholz*, at *6 (citation omitted).
[xiii] *Buchholz*, at *6.
[xiv] *Buchholz*, at *6.
[xv] *Buchholz*, at *10.