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Win in Hunstein Pays Immediate Dividends and Will for Years to Come

Tag(s): [11th Circuit](#), [Collection Letters](#), [FDCPA](#), [Hunstein](#), [Letter Vendors](#)

We're seeing a significant downturn in federal FDCPA lawsuits since the win in *Hunstein*. And for those state lawsuits that have been filed, we've been winning those too. ACA International Board Member Michael Klutho writes about this landmark case.

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By Michael Klutho

This fall will mark a year since the long-awaited ruling from the 11th Circuit's *en banc* panel in *Hunstein v. Preferred Collection & Management Services*, and we are seeing milestone state court decisions over the last several months that highlight the far-reaching impact of the *Hunstein* victory for the accounts receivable management (ARM) industry.

The *Hunstein* lawsuit challenging collection agencies' utilization of third-party vendors to send collection letters to consumers represented a significant existential threat to the ARM industry.

First, it threatened the industry's long-standing use of letter vendors to safely deliver required notices to consumers. Moreover, if Preferred hadn't successfully challenged *Hunstein*—with ACA International's financial and strategic support—this decision would have created federal circuit court precedent that deemed just about any set of circumstances alleged by a consumer (including hyper-technical violations of consumer protection statutes devoid of any actual harm) sufficient to establish standing under the U.S. Constitution.

Left unchallenged, *Hunstein* truly represented the proverbial "opening of the floodgates" when it comes to an onslaught of Fair Debt Collection Practices Act lawsuits.

Why? Remember that the plaintiff in the case (*Hunstein*) couldn't establish (or even allege) that a single person in the general public actually saw his collection notice while it was being processed by the letter vendor. But that reality didn't deter him from filing the lawsuit. Instead, the plaintiff claimed that it's enough to simply allege that (1) the letter vendor was a "third-party" and (2) information about *Hunstein* and his debt was sent to the letter vendor by the collection agency (Preferred.) That's it. *Hunstein* claimed nothing more was needed to support an FDCPA claim.

The district court judge disagreed and dismissed his case. *Hunstein* appealed, and in April 2021, the 11th Circuit Court of Appeals reversed in a 3-0 opinion in which it held that *Hunstein's* allegations *were* sufficient to establish the required standing.

We all know what happened next. We saw a wave of copycat federal cases being filed and prosecuted across the country.

It was at this point in the arc of the *Hunstein* case that ACA was first contacted. Preferred could not fight this fight alone. It needed and asked for ACA's expertise and support. ACA stepped forward, knowing that this appellate precedent could not be allowed to stand.

ACA—through the Industry Advancement Fund (IAF)—moved this critical fight to the forefront both in terms of providing financial support and developing a strategy necessary to reverse the appellate court's decision.

Several members, understanding the implications *Hunstein* would have for their businesses if it were allowed to stand, even saw fit to send in funds in addition to their IAF assessments to help support this fight.

Based in no small part on this support from ACA and various ACA members, Preferred chose to file a petition for rehearing by the 11th Circuit. After ACA and other interested stakeholders filed amicus briefs in support of the petition, the 11th Circuit, which has 12 judges, agreed to reconsider its initial ruling. This alone is not common.

The second appeal go-around resulted in a 2-1 ruling issued in October 2021, this time with only two of the judges ruling in favor of *Hunstein's* claims. Preferred, with strong amicus briefs filed by ACA and others in the appeal, was successful in convincing one of the original three judges to reverse his decision and side with the agency.

While this was a crucial step in the right direction, it was not a complete reversal of the 11th Circuit's decision. So, the battle continued.

ACA worked with Preferred to determine how to best continue the fight, including a decision to file a request for an *en banc* rehearing. For background on this legal procedure, an *en banc* request is a legal maneuver that seeks to have all judges of a particular court rehear a case.

It is worth noting that an *en banc* review is rare and is typically granted only for unusually complex or important cases, or when the court feels there is a particularly significant issue at stake. Such further review is typically allowed in less than 1% of cases.

Fortunately, in November 2021, before either party could even request a rehearing, the 11th Circuit issued an order *sua sponte* (i.e., on its own) agreeing to rehear the case *en banc* and vacating both of its prior opinions. The circuit court determined that this case was of such importance that all 12 of the judges sitting on the 11th Circuit should rehear the case and make a decision *en banc*. Now Preferred, with ACA's continued support, needed to win the rehearing of the appeal.

The last critical date in this saga was Sept. 8, 2022. On this date, the 11th Circuit sided with Preferred and held that the prior appellate court opinions were incorrectly decided. That is, it held that *Hunstein had failed* to establish he possessed the necessary constitutional standing required to sue in federal court. It also noted that it didn't think much of his allegations and claims even if it had jurisdiction to decide the case on its merits.

Thankfully, the IAF investment in *Hunstein* not only helped secure a victory in this case, but it also served to dramatically reduce the deluge of federal FDCPA lawsuits (as well as claims under other consumer-protection statutes) against ACA members.

This final decision essentially stopped *Hunstein* copycat cases, and its impact served to reduce all "varieties" of FDCPA lawsuits.

Moreover, the fear some felt "that we'd see an onslaught of lawsuits in *state* courts," failed to materialize. And for those state lawsuits that have been filed, we've been winning those, too.



Here are some data points showing these very favorable trends courtesy of Jack Gordon, CEO of WebRecon.

- In the six months since the final *Hunstein* opinion was issued, FDIPA lawsuits have **fallen by more than 43% in the federal courts.**
- Comparing the same six-month period of the *preceding* year (i.e., while the *Hunstein* onslaught was upon us), on average 507 federal lawsuits were being filed each month.
- Once the final *Hunstein* opinion was issued, that average monthly number dropped to just 287 per month.
- **A drop of 220 lawsuits per month representing a total drop over six months of 1,320 federal lawsuits.**
- And the trend of fewer lawsuits in comparison to the preceding year continues to decline.

Critical Support

In sum, your association—ACA International—on behalf of and in collaboration with its members, provided critical support to member-agency Preferred in a legal battle that ultimately led to the 11th Circuit striking down the serious threat *Hunstein* presented to the ARM industry.

The 2022 win in *Hunstein* would not have happened without ACA's IAF, a member-supported fund that provides both direct and amicus support to ACA members defending themselves in precedent-setting cases as well as when fighting abusive plaintiffs and their attorneys.

Throughout the course of the *Hunstein* appeal, ACA spearheaded the industry's efforts to secure a reversal of the initial negative *Hunstein* opinions. ACA worked with a broad consortium of stakeholders to achieve this result because of the far-reaching effects of this case if allowed to stand, which resulted in the filing of amicus briefs by ACA and a multitude of industry stakeholders in support of Preferred's efforts to reverse the negative initial appellate result.

ACA members are now reaping significant long-term benefits from ACA's investment and Preferred's fight in the *Hunstein* case, which has been a chief goal of the IAF program since its inception. Your IAF investment was vitally necessary to achieve the successful reversal of *Hunstein*. This win represents a critical investment that's truly paid off. The *Hunstein* win will continue to reverberate in our favor for years to come.

Legal battles like these are time-consuming, expensive and an unfortunate distraction to the operations of ACA's members. To stay ready for challenges like *Hunstein* going forward, it is vital to keep the IAF funding robust. After the last couple of years of heavy action on both the state and federal level—heavy action that will continue—your help in the form of voluntary contributions to the IAF will make a needed difference. [Log in to ACA's website here](#) to learn more about how to contribute today.

Michael Klutho is an attorney with Bassford Remele and Treasurer on ACA's Board of Directors.

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