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News

Carlos A. Ortiz Discusses Recent Case Law Impacting the Debt Collection Industry in ARM Compliance Digest

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Hinshaw attorney Carlos A. Ortiz recently analyzed several debt collection cases in the industry newsletter *ARM Compliance Digest*.

The first case involved a settlement between a debt collection agency and the Attorney General of North Carolina for allegedly attempting to collect debts in the state without obtaining a proper license.

The second case involved a ruling by the Second Circuit Court of Appeals in which it affirmed a lower court's ruling dismissing a class-action lawsuit that accused a collection agency of violating the Fair Debt Collection Practices Act (FDCPA) because of disclosures in the letter related to the accrual of interest on the unpaid debt.

The third case involved a Florida magistrate judge recommending summary judgment in favor of the debt collection defendant in an FDCPA letter overshadowing matter. Ortiz was lead counsel for the defendant in that case.

Ortiz' full analysis follows below.

NC AG Reaches $15k Settlement with Agency for Operating Without Proper Permit

Now more than ever, the collection industry is under a tremendous amount of regulation. Not only do many states require licensing to collect in their jurisdictions, municipalities within those states are now also requiring additional steps for collection agencies to take in order to collect against their residents, regardless of whether the agencies have a local physical presence. For example, at least twenty-nine states require licensing or registration of the business. The District of Columbia, Buffalo and New York City are some examples of municipalities that have their own collection regulations. When an agency is confronted with a transient debtor who incurred a debt in one state, but has since moved to another, compliance with various jurisdictions becomes more complicated. In circumstances where litigation commences as a result of alleged noncompliance with the various regulations, whether principals of the collection agency have exposed themselves to personal liability also becomes a consideration.

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This situation that occurred in North Carolina underscores the importance for any entity in the business of collections to be diligent in ensuring that they are complying with the laws of the states and municipalities where they collect. The consequences for not doing so may place the future of that business at risk. (For additional information, *see* https://www.accountsrecovery.net/2019/05/02/nc-ag-reaches-15k-settlement-with-agency-for-operating-without-proper-permit/

Second Circuit Affirms Dismissal of FDCPA Suit over Interest Disclosure in Letter

In *Kolbasyuk v. Capital Mgmt. Servs., LP*, 918 F.3d 236 (2d Cir. 2019), the U.S. Court of Appeals for the Second Circuit joined other circuit and district courts in declining to expand the requirements that the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692 et seq., places on debt collectors' written attempts toward collection. Under Section 1692g(a)(1) of the FDCPA, a debt collector's initial written communication must include the total, present money due that the debtor is obligated to pay. The Second Circuit rejected Kolbasyuk's argument that 1692g(a)(1) also required the debt collector to itemize the components of the total, present money due (e.g. interest, fees, etc.) or identifying the rates by which the amount may increase in the future. The Second Circuit held that as long as the initial written communication includes the total, present amount of the debt due, 1692g(a)(1) is satisfied. This is especially important for those debts that include interest, fees and/or penalties or may include those in the future.

The FDCPA also prohibits a debt collector from use of any false, deceptive or misleading representations, pursuant to 15 U.S.C. §1692e. Kolbasyuk argued that Section 1692e required the debt collector to disclose in their letters that the total, present money due might increase due to, for instance, interest so that a debtor would not be misled into believing that payment of the amount listed in the letter would satisfy the debt. The defendant's letter included safe harbor language that the Seventh Circuit introduced in *Miller v. McCalla, et al.*, 214 F.3d 872 (2000) and that the Second Circuit adopted in *Avila v. Riexinger & Assoc., LLC*, 817 F.3d 72 (2016), which, in short, informs the debtor of the total, present money due and that because of interest, fees and/or penalties the amount due may increase from day to day. Because the defendant's letter included that disclosure, the Second Circuit rejected Kolbasyuk's claim under 1692e and reaffirmed its holding in Avila, which was that use of the Miller safe harbor language immunizes a debt collector from a 1692e claim that is based on an alleged failure to disclose that amount of the debt may increase due to interest and fees.

Debt collectors should take care to ensure their letters track the Miller safe harbor language when collecting on debts where the balance may increase.

Florida Judge Recommends Summary Judgment in Favor of Defendant in FDCPA Letter Overshadowing Case

There has been a recent uptick in FDCPA lawsuits that target collection letters under a theory of overshadowing the so-called validation notice. In *Rafferty v. Retrieval-Masters Creditors Bureau, Inc.*, No. 5:17-cv-00426-PGB-PRL, 2019 U.S. Dist. LEXIS 25761 (M.D. Fla. Feb. 15. 2019), the Florida district court granting the defendant summary judgment in this putative class action reaffirms several key points that have been settled law for some time.

First, requesting payment in the initial collection letter does not on its own conflict with the 30-day period provided for under the statute for the debtor to request verification of the subject account balance. Thus, the statement "Now is the time for you to address this seriously past due account" was found to be compliant with the Act. Likewise, requesting payment for the full amount of the account balance in the initial collection letter was found to be compliant because it would not confuse the least sophisticated consumer about being able to still act on the validation language.

Second, informing debtors of possible negative consequences regarding delinquent account balances is acceptable, as long as to avoid those consequences action does not need to be taken immediately or within thirty days. As a result, informing the debtor that the account balance "has been reported to a credit bureau" was found to be compliant because it had already occurred and would not impact the 30-day period for requesting validation.

Next, the court held that placing the validation language on the backside of the initial collection letter will comply with the statute; however, care must be taken to effectively direct the debtor to the backside of the letter, and the debtor should be made aware that the information on the backside regards their rights. In its reasoning, the court also pointed out that the structure and format of a collection letter are important considerations in the overshadowing analysis and that using the same font size and color type-face throughout the collection letter will likely result in a compliant letter.

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The court also underscored the fact that the law expects debtors to read a collection letter in its entirety, and that use of the least sophisticated consumer standard would not permit a debtor to recklessly disregard clear and prominent directions to important information about her rights. In fact, the court stated that the least sophisticated consumer "is neither irrational nor a dolt" and held that plaintiff's arguments "seem more like the bizarre or idiosyncratic interpretations of a collection letter that the [least sophisticated] standard is supposed to protect against."

In sum, initial collection letters can be effectively written, but careful consideration should be given to not using language that would conflict with or distract the debtor away from the validation notice.

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