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Debt Collection Letters Now Have a Safe Harbor In The Second Circuit

Avila v. Riexinger & Associates, LLC, 15-1548, --- F.3d ---- , 2016 WL 1104776 (2d Cir. March 22, 2016)

The U.S. Court of Appeals for the Second Circuit recently adopted "safe harbor" language for debt collection letters. In doing so, the Second Circuit held that a collection notice must disclose that a consumer's "current balance" may increase due to interest and fees in order to comply with § 1692e of the FDCPA.

Section 1692e of the FDCPA prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." The debtors here received dunning letters that did not include a disclosure that the current balance listed on the notice may increase due to interest and fees. As a result, they claimed they assumed their balance was "static" and since that was not the case, the debt collector violated § 1692e. The district court disagreed and dismissed the debtor's claims.

On appeal, the Second Circuit vacated the dismissal reasoning that under the least sophisticated consumer, "a collection notice can be misleading if it is open to more than one reasonable interpretation, at least one of which is inaccurate." In this instance, a consumer reading the collection notice could believe that she could satisfy her debt in full by paying the amount listed on the notice, when in fact, the balance may have increased since the date of the collection notice.

The Second Circuit adopted the following "safe harbor" previously fashioned by the Seventh Circuit in *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872 (7th Cir.2000):

> As of the date of this letter, you owe $____ [the exact amount due]. Because of interest, late charges, and other charges that may vary from

> day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1-800-[phone number].

The Second Circuit further suggested the following alternative language:

> As of today, [date], you owe $____. This amount consists of a principal of $____, accrued interest of $____, and fees of $____. This balance will continue to accrue interest after [date] at a rate of $____ per [day/week/month/year].

As in *Miller,* the Court did not hold that a debt collector must use any particular disclaimer. Rather, it stated that using the *Miller* language, or the suggested alternative language, would qualify for "safe-harbor treatment." Finally, the Court stated that a collector will not be liable under § 1692e for failing to disclose that the consumer's balance may increase due to interest and fees if "the collection notice either accurately informs the consumer that the amount of debt stated in the letter will increase over time, or clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date."

Debt collectors that operate within the Second Circuit should be aware of the holding in *Avila* and its effect on collection notices that include current balances owed. The ruling provides language that debt collectors can use in their notices when requesting payment on current balances owed.

The Ninth Circuit Rejects Attempt to 'Pick Off' Class Representative in a TCPA Class Action Lawsuit

Chen v. Allstate Ins. Co., No. 13-16816, 2016 WL 1425869 (9th Cir. Apr. 12, 2016)

The U.S. Court of Appeals for the Ninth Circuit rejected an insurance company's attempt to avoid TCPA class claims by offering judgment be entered against it as to only the named plaintiff. In *Chen v. Allstate Insurance Company*, the Court concluded that the insurance company's offer of judgment to fully satisfy all of the individual claims would result in those claims becoming moot upon full payment, but also held that it would not prevent named plaintiff from continuing the suit as a class action.

The claim involved unsolicited automated telephone calls to the called party's cell phone without his permission in violation of the Telephone Consumer Protection Act (TCPA). The insurance company made an offer of judgment with respect to named plaintiff's individual claims only, tendered the funds into an escrow account in plaintiff's name, and then moved to dismiss for lack of standing. The district court denied and the insurance company appealed.

The law generally states that an offer of judgment to fully satisfy a plaintiff's claims will result in the claim becoming moot. Here, the insurance company argued that because of its offer and tendered payment, all of the individual claims were now satisfied and thus moot. While the Ninth Circuit agreed that the offer of judgment afforded the named plaintiff complete relief on the individual claims, it explained that those claims do not become fully moot until the named plaintiff actually receives all of the relief he seeks. The Court reasoned that because the district court would not enter the order requested because of the looming class claim, the named plaintiff did not actually receive those funds, and therefore, the claim was not yet fully resolved.

While the offer of judgment and satisfaction mooted the individual claims, the Court took issue with how it may affect the class claims. The Court reasoned that because the plaintiff pled a class action in its complaint, the plaintiff's claims would not yet be fully satisfied until he had an opportunity to attempt to certify a class.

Did the Massachusetts Supreme Judicial Court Create a Super, Super Lien Jurisdiction in Favor of Homeowners' Associations?

Drummer Boy Homes Ass'n, Inc. v. Britton, 474 Mass. 17, 47 N.E.3d 400 (March 29, 2016)

The Massachusetts Supreme Judicial Court (SJC) interpreted the state condominium statute to permit a homeowners' association (HOA) to "establish multiple contemporaneous priority liens on a condominium unit by filing successive legal actions to collect unpaid monthly common expense assessments." The condominium statute, G.L. c. 183A, § 6, permits an HOA to obtain a priority lien for six months of unpaid common expenses, plus legal fees and costs in establishing that lien.

In *Drummer Boy Homes Ass'n, Inc. v. Britton*, the SJC endorsed the HOA's strategy of filing a lawsuit every six months to establish a priority lien on the condominium unit. The SJC held that an HOA can stack consecutive six month liens by simply filing another lawsuit, even if the prior lawsuit remains pending. The rationale asserted by the SJC is that the condominium statute allows a first mortgagee to assume the payment of the unit owner's common expenses, and thus, "the Legislature has balanced the interest of a condominium association with those of a first mortgagee."

This decision spells trouble for lenders who finance the purchase of condominium units in Massachusetts because, in addition to having to pay the six months of unpaid common expenses, the lender is also required to pay the HOA's attorney's fees and costs for each consecutive lawsuit. This incentivizes the law firms used by HOAs to immediately file suit every six months because the recovery of their fees and costs are guaranteed under the condominium statute as interpreted by the SJC in *Drummer Boy*.

The impact of this decision is compounded by the length of time it takes to conduct a non-judicial foreclosure in Massachusetts. Typically, foreclosures take more than six months to complete given the statutory cure period and the required attempt at loss mitigation. Thus, to avoid multiple priority liens from being established while a foreclosure is in process, the foreclosing entity or servicer should assume payment of the common expenses from the time that the loan goes into default through the time that the property is sold to a third party.

Eleventh Circuit Holds Initial Communication from Debt Collector's Attorney to Consumer's Attorney is Subject to Requirements of § 1692g of the FDCPA

Bishop v. Ross Earle & Bonan, P.A., ___ F.3d ___, 2016 WL 1169064 (11th Cir. 2016)

In *Bishop v. Ross Earle & Bonan, P.A.*, the Eleventh Circuit held that an "initial letter" from a debt collector lawyer to a consumer's lawyer was a "communication" to the consumer that triggers the Fair Debt Collection Practices Act (FDCPA). The Court further concluded that the debtor stated a claim for a false, misleading or deceptive behavior under § 1692e(10) based upon the failure to include the "in writing" requirement for disputes under § 1692g of the FDCPA.

The Court addressed what it perceived were three issues of first impression in the Eleventh Circuit.

> The first is whether a debt-collection letter sent to the consumer's attorney — rather than directly to the consumer — qualifies as a "communication with a consumer" so as to trigger § 1692g of the FDCPA. The second is whether omitting the "in writing" requirement set forth in § 1692g amounts to waiver of that requirement by the debt collector, and, if so, whether such a waiver advances the purpose of the FDCPA. The third is whether omission of the "in writing" requirement states a claim for "false, deceptive, or misleading" behavior in violation of § 1692e.

The Court determined all three issues in favor of the consumer plaintiff.

The Complaint alleged the debt collector lawyer sent a letter to the consumer's attorney that omitted the "in writing" requirement of § 1692g(a)(4). The Court observed that the letter properly informed the debtor that she had 30 days to dispute the debt, but neglected to inform her that she must dispute the debt "in writing."

The Court noted that the definition of "communication" in the FDCPA included both direct and indirect communications, and held that a collection notice sent to a consumer's attorney is an indirect communication that triggers the requirements of § 1692g. The Court recognized that circuit courts have disagreed on this issue of whether communications to a consumer's counsel are a "communication" with the consumer. The Court determined, however, that "[o]nly by applying § 1692g to attorney communications can we ensure that consumers receive both legal representation and the full protections intended by Congress", and that removing the protections of § 1692g from debtors represented by counsel would be contrary to the aims of the FDCPA.

The Court also held that the failure to notify the debtor's attorney in an initial communication that a dispute must be "in writing" to trigger certain FDCPA rights violated § 1692g of the FDCPA. Under the specific facts of the case before it, the Court rejected the debt collector lawyers' arguments that the "least competent lawyer" standard should apply to the initial communication sent to a consumer's lawyer. Instead, the Court applied the "least sophisticated consumer" standard to evaluate the letter at issue. The Court rejected arguments that a consumer's attorney should know the statutory rights or that a debt collector could afford more protection and waive the right to receive disputes in writing. The Court noted that

some circuit courts have examined whether communications with a consumer's attorney were misleading through the eyes of a "competent attorney", but declined to adopt a standard in this case, because the omission of statutorily required language was false and misleading regardless of whether it was viewed through the eyes of an attorney or a consumer. Thus, the appellate court determined that "[t]he 'initial communication' alleged in this case states a claim under § 1692e because it misstates the law, omits a material term required by § 1692g(a), and misrepresents consumer rights under the FDCPA."

Thus, the Eleventh Circuit has held that the disclosures required in an initial written communication with the consumer under § 1692g are also required in an initial communication to the consumer's lawyer, and the failure to include the "in writing" requirement for disputes stated a claim for misleading conduct under § 1692e(10) of the FDCPA. It remains to be seen, however, whether the Eleventh Circuit will apply the "least competent lawyer" standard to different factual scenarios involving communications with a consumer's lawyer or filings in litigation.