DEBT COLLECTOR MUST EITHER ACCURATELY INFORM THE CONSUMER THAT THE AMOUNT OF THE DEBT STATED IN THE NOTICE WILL INCREASE OVER TIME, OR CLEARLY STATE 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.

Just last week, the Second Circuit applied the least sophisticated consumer standard of the Fair Debt Collection Practices Act (the FDCPA) to effectively conclude that a consumer cannot be expected to know that when they are given a statement of their total debt, this amount continues to increase due to interest and other arrearages. This holding is important to any party who is a debt collector under the FDCPA, including mortgage servicers who take over loan servicing after a borrower is in default.

The case was *Avila, et al. v. Riexinger & Associates, LLC, et al.*, Case No. 15-1584(L) and, in its decision of March 22, 2016**, the Second Circuit held that when a debt collector issues a notice to a borrower that includes a statement of the complete amount of their debt, the debt collector must either accurately inform the consumer that the amount of the debt stated in the notice will increase over time, or clearly state 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.** This holding was part of the Second Circuit's reversal of the District Court's order dismissing the underlying putative FDCPA class action. In this same decision, the Second Circuit also adopted a safe harbor rule, similar to one already operative in the Seventh Circuit, to stem the potential exposure that debt collectors may face after this decision.

In *Avila*, a plaintiff consumer brought a putative class action against a debt collector under Section 1692e of the FDCPA, alleging that the practice of disclosing in a collection notice only the "current balance" of the amount owed amounts to "false, deceptive, or misleading" collection practices under the statute. The plaintiff argued that this practice led consumers to believe that the amount owed was not increasing, when, in this particular case, the debt was accruing interest at a rate of nearly 500% per year.

At the trial court level, Defendant Riexinger & Associates moved to dismiss the putative class action on the basis that, by providing the current amount

due, the billing statement was not false, deceptive, or misleading as a matter of law. Judge Raymond Dearie of the Eastern District of New York agreed and dismissed the complaint.

The central issue on appeal was whether the failure to disclose the ever increasing nature of the debt was a false, deceptive, or misleading statement as to the amount of the debt owed and therefore violated Section 1692e. In reversing the portion of the District Court decision concerning Section 1692e, **the Second Circuit held that the least sophisticated consumer could believe that payment in full of the current balance provided in the notice would satisfy the entire debt owed, and that a failure to mention the ongoing accrual of interest and fees was misleading. In doing so, the Court held that "the FDCPA requires debt collectors, when they notify consumers of their account balance, to disclose that the balance may increase due to interest and fees."**

The Second Circuit also held that Section 1692e requires additional disclosures to ensure that consumers are not misled into thinking that simply paying the "current balance" as listed on the collection notice will always result in full satisfaction of the amount owed. This holding rejected the District Court's contrary conclusion that providing the "current balance," without a disclosure concerning interest and fees, was not "false, deceptive, or misleading" and was sufficient to verify a debt under Section 1692g of the FDCPA. **"The two sections have different aims," the Circuit Court stated, "and compliance with Section 1692g does not guarantee compliance with Section 1692e, which always applies in connection with the collection of any debt by a debt collector."**

To avoid unnecessary litigation and to curb potentially abusive collection notices, the Second Circuit also adopted the "safe harbor" approach established by the Seventh Circuit in *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000). **The "safe harbor" doctrine allows a debt collector to shield itself from liability under Section 1692e "if the collection notice either accurately informs the consumer that the amount of the 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."**

The Second Circuit declined to establish the exact language of any disclosure that a debt collector must use to sidestep a possible FDCPA violation. However, the Court expressed that the language proposed in *Miller*, 214 F.3d, at 876, or in *Jones v. Midland Funding, LLC*, 755 F. Supp. 2d 393, 397 n.7 (D. Conn. 2010), would certainly qualify a debt collector for treatment under the newly-created safe-harbor.[1]

Though *Avila* may place additional disclosure burdens on debt collectors, it does provide them with a blueprint of acceptable language to include in collection notices going forward. This will of course satisfy the dual aim of protecting debt collectors from unwanted litigation under Section 1692e, and consumers from potentially misleading communications concerning the amount of their debt.

Parties who are in the regular business of debt collection, particularly mortgage servicers, should pay particular attention to the language of *Miller* and *Jones* that the Second Circuit suggests will satisfy the newly-recognized safe harbor provision. *Avila* could likely be interpreted to cover any statements by a debt collector to a borrower that include the payoff figure or unpaid balance of a loan. Accordingly, any loan servicer would be wise to consider incorporating the recommended language into any such communication.

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