When Fair Is Foul: The Confusing State of FDCPA Guidance in the Second Circuit

By **Paul R. Niehaus and Emily B. Kirsch** May 11, 2018

Recent developments in the Second Circuit's interpretation of the Fair Debt Collections Practices Act (FDCPA) have undermined the security of the safe harbor previously established by the court and have created a situation whereby almost any debt collection letter is susceptible to claims that it violates FDCPA. The resulting confusion has resulted not only in a proliferation of FDCPA lawsuits, but has prevented debt collectors from knowing with any certainty what information they must convey to consumers, or what information they may convey to consumers. Ultimately, this lack of clear guidance harms the consumer, since debt collectors may convey either too little or too much information, potentially leaving consumers more confused than ever. Fortunately, the Second Circuit has ample opportunity to rectify the current situation and provide clear rules for all parties.

Enacted in 1978, the stated purpose of FDCPA is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. §1692, et seq. To that end, FDCPA prohibits third-party debt collectors from making "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. §1692e. When determining whether a collection notice is "false, deceptive, or misleading," courts of the Second Circuit judge the notice from the perspective of the "least sophisticated consumer," meaning that a collection notice may be misleading if it is "open to more than one reasonable interpretation, at least one of which is inaccurate." *Avila v. Riexinger & Associates*, 817 F.3d 72, 75 (2d Cir. 2016). The statute also requires debt collectors to provide the consumer with a written communication setting forth "the amount of the debt," a seemingly simple provision that has turned into a minefield for collectors. 15 U.S.C. §1692g(a)(1).

In *Avila*, the Second Circuit held that a collection notice violated §1692e where it advised the consumer of the amount then due, but failed to note that the amount due could increase over time due to accruing interest or late fees. *Avila*, 817 F.3d at 76. At the same time, the court feared that debt collectors could use (or be accused of using) the threat of accruing interest and fees to coerce consumers into paying their debts more promptly—or at all. Thus, "in order to minimize litigation under the FDCPA," the Second Circuit adopted a "safe harbor" approach originally fashioned by the Seventh Circuit, holding that a debt collector will not be subject to liability under §1692e if the collection notice either: (1) accurately informs the consumer that the amount of the debt stated in the letter will increase over time, or (2) 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. Id. at 77. The court even provided specific language that could, though need not, be employed: "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." While noting that more specific language setting forth a formula for how the debt would increase over time might be "preferable," the *Avila* court rejected the notion that such specific language was required, instead adopting the more generalized safe harbor language set forth above.

However, just one year later, the Second Circuit muddied the waters through its ruling in *Carlin v. Davidson Fink*, 285 F.2d 207 (2d Cir. 2017). There, the collection notice set forth the anticipated amount that would be due on the debt some two weeks hence. In an apparent attempt to follow the second "safe harbor" option provided by *Avila* (that the debt holder would accept payment of a specific amount if payment is made by a specified date), the notice further stated that if the stated amount were paid within two weeks, the debt would be satisfied, and the consumer might be entitled to a refund of amounts that had not actually accrued by the time payment was received. The Second Circuit ruled that the notice failed to state "the amount of the debt due" as required by §1692g. The court reasoned that the notice failed to provide "information allowing the least sophisticated consumer to determine the minimum amount she owes at the time of the notice, what she will need to pay to resolve the debt at any given moment in the future, and an explanation of any fees and interest that will cause the balance to increase." Id. at 216. While articulated in the context of 1692g, this formulation appeared to undercut *Avila* by implying that a collection letter may be "misleading" under 1692e if it simply states that a stated debt may increase, and fails also to provide the tools and data necessary for a consumer to determine the exact amount due on any given day.

The Second Circuit most recently addressed these issues in *Taylor v. Financial Recovery Services*, 886 F.3d 212 (2d Cir. 2018), and seems to have unintentionally further roiled the waters. (A petition for rehearing en banc was filed as of April 12,

2018.) In *Taylor*, the court ruled that a collection notice did not violate FDCPA §1692e where it failed to inform the consumer that additional fees and interest were *not* continuing to accrue. Because, as a matter of uncontested fact, the debt holder had stopped accruing additional fees or interest, the court found that the collection notice was not misleading, and that additional disclosure was unnecessary, rejecting plaintiff's argument that language suggesting that additional fees or interest "may accrue" in the future would unfairly coerce the plaintiff to pay her debt, or to prioritize this debt over others. The Second Circuit distinguished *Carlin*on the ground that the collection letter as issue accurately set forth the amount due. However, the court continued that if a notice were to contain "no mention of interest or fees, and they *are* accruing, then the notice will run afoul of the requirements of both Section 1692e and Section 1692g." *Taylor*, at 215. This seemingly casual aside could be read to both expand the holding of *Avila* to apply to §1692g from its original application to §1692e, and to imply that the only way to accurately state "the amount of the debt" then due (if fees and interest were continuing to accrue) would be to provide consumers with the means to calculate the amount of the debt due on any given day. These readings, of course, would have the effect of contradicting *Avila*, which expressly adopted safe harbor language that did *not* require an exact mathematical formula to be set forth in the correspondence.

So under current Second Circuit law, the amount of detail necessary in a collection letter could depend on: (1) whether the collection letter is stating an amount due as of the date of the letter, or a future payoff amount due; (2) whether fees and interest are actually continuing to accrue and (3) whether a static debt has the potential to begin accruing interest and fees again in the future. In some instances, no additional disclosure appears to be required, in some instances a general notice appears to be required, and in some instances a specific formula appears to be required. And in each instance, a debt collector must be wary of providing too much or contradictory information, lest they be accused of "overshadowing pre-approved language" thereby improperly coercing payment. These overly complex matrices for the varying levels of

seemingly required disclosure serve none of the stakeholders—not the consumer (who may receive more or less information than she would like), not the debt collectors (who are not certain of the rules of the road), and not the courts (which must deal with endless litigation on these issues).

Fortunately, at present there are several FDCPA cases pending appeal before the Second Circuit. The court should take the opportunity to clarify once and for all the level of information that should be provided to consumers under both 1692e and 1692g. Clear rules would benefit all stakeholders. A thoughtful, realistic and comprehensible interpretation of how to state an "amount due" is badly needed to protect the best interests of consumers, while giving clear guidance to debt collectors who have and will take the Second Circuit at its word and draft collection letters specifically to stay within the law. See *Timoshenko v. Nullooly, Jeffrey, Rooney & Flynn*, 2018 WL 1582220, No. 17-cv-4472, (E.D.N.Y. March 30, 2018). But what shall the debt collectors do in the mean time? At a minimum, stay in very close contact with counsel who must in turn be watching the myriad of decisions coming out of the district courts and ultimately the Second Circuit to stay current on which way the courts appear to be trending with regard to how much information to provide—or not.

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