



Words Matter: Debt Collectors Who Are Not Careful with Their Language Could Be Open to Liability

Client Advisories

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The concept of collecting a debt may seem simple—a person owes you money, so you contact that person to collect. This concept may seem so uncomplicated that it could be done without the assistance of legal counsel. However, for third-party debt collectors, such as collection agencies, such thinking could open a business up to liability.

There are a number of laws, both at the federal and state level, that regulate the communications that a debt collector can have with a debtor. One such law, the Fair Debt Collection Practices Act ("FDCPA"), is a federal law that prohibits "abusive, deceptive, and unfair debt collection practices." What makes a practice "abusive, deceptive, and unfair" may not always be clear. That's why from time to time we like to inform you about FDCPA cases so you know about specific examples of when debt collectors may have run afoul of the law and why. One recent case in the Third Circuit presents such an opportunity.

In the case, *Knight v. Midland Credit Management*, the debt collector, Midland, sent a debtor a letter indicating that "we can help with your future." The letter went on to provide three "discounts": (1) 40% off if paid by a specific date; (2) 20% off if paid over six months; and (3) monthly payments as low as \$50 per month. The letter further stated that Midland would consider the account "paid" upon receipt of the final payment, but noted that if it received less than the full balance, it would report the account as "Paid in Full for less than the full balance."

The debtor sued Midland under the FDCPA, and the district court dismissed the complaint. On appeal, however, the Third Circuit reversed and sent the case back to the district court for further proceedings.

The main conclusion to take from the opinion is that in analyzing FDCPA claims, the Third Circuit does not consider whether the plaintiff in the case was actually misled by the debt collector's statement. Instead, the court considers the hypothetical "least sophisticated debtor" and asks whether that person would be deceived or misled by the statement. This is because the FDCPA protects "the gullible as well as the shrewd." *Caprio v. Healthcare Revenue Recovery Group, LLC*, 709 F.3d 142, 149 (3d Cir. 2013). In fact, a shrewd debtor could argue that

a debt collector's statement, which did not in fact mislead the debtor, might mislead the "least sophisticated debtor" and file a lawsuit on that basis. Once the debtor establishes that the statement would mislead the "least sophisticated debtor," the debtor must show that the statement is material, or that it has the potential to affect the decision-making process of the "least sophisticated debtor," a showing that the court admits is not especially difficult to make.

In this case, the Third Circuit determined that all of the language from the letter quoted above had the potential to mislead the "least sophisticated debtor" and affect the debtor's decision-making process. The statement about "helping with the future" could lead the debtor to wrongly believe that paying the delinquent debt would improve the debtor's credit score. Furthermore, the letter was unclear as to whom Midland would report the debtor's delinquent payment. Finally, the statements about how the payment would be reported (i.e., that the debt was "Paid in Full for less than the full balance") was misleading because the ramifications of such a report were unclear.

In the end, debt collectors should keep one lesson in mind at all times: choose your words carefully when communicating with a debtor. In fact, it's a good idea to consult with counsel before communicating with a debtor. And that's where we can help. Our Commercial Collections & Litigation Practice group keeps abreast of developments in the law regarding debt collectors. We know the types of communications that have opened debt collectors up to liability in the past and the types of communications that courts have held do not violate the law. More importantly, we know how to distinguish them. We are here to advise you about how to ensure that your communications with debtors comply with the law so you can minimize your risk of liability. For more information, or if you have any questions regarding this advisory or other matters in general, please contact **Thomas A. Muccifori** at 856-354-3056.

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