New Year's Eve Countdown: Five--Four--Three--Two--One--Fined?! Further Confusion For Debt Collectors Under the FDCPA

Client Advisories

12.31.2018

With a new year upon us, it's a good time to take a closer look at some of the things that we take for granted for most of the rest of the year. One example is form letters. How often do we take a close look at the language in the templates that we will use many times over the course of 2019? When is the last time we evaluated that language in light of recent case law?

For debt collectors, the answers to these questions could drastically affect the potential risk of exposure for violations of the Fair Debt Collection Practices Act ("FDCPA"). As we cautioned in the past https://archerlaw.wpengine.com/words-matter-debt-collectors-who-are-not-careful-with-their-language-could-be-open-to-liability/, debt collectors must choose their words carefully when contacting debtors lest they violate the FDCPA. Debt collectors must also remember that a court evaluating their words is going to measure them on the basis of their effect on the hypothetical "least sophisticated debtor," without regard for their effect on the actual debtor to whom the words were directed. And what the heck is the "least sophisticated debtor?" One recent case shows that different judges within the same district may understand the term differently.

In *Kassin v. AR Resources*, 2018 WL 6567703 (D.N.J. Dec. 13, 2018), the plaintiff attempted to bring a class-action lawsuit against AR Resources on the basis of statements in a debt-collection letter. This letter contained the FDCPA-required validation notice, which informs the debtor that he or she may dispute the debt by sending written notice to the debt collector within 30 days. Sending this notice triggers a requirement that the debt collector verify the debt or judgment and send the verification to the debtor. The notice also allows the debtor to request the name and address of the original creditor, if different from the current creditor. If the debtor makes one or both of these requests, the debt collector must cease all collection activities until it provides the requested information.

In this case, AR Resources provided these notices. So far, so good. However, this case involved the attempt to collect a medical debt, so the debt-collection letter also contained information regarding medical insurance coverage. Specifically, the letter invited the debtor to call the debt collector if he or she has medical insurance that may cover all or a portion of the debt. The plaintiffs argued-and the Court agreed-that the letter was misleading because the "least sophisticated debtor" could interpret the letter to mean that he or she could call the debt collector (rather than write) to dispute the debt. Such a phone call would not count as disputing the debt (and thus would not trigger the debt-collector's duty to validate the debt) because notice of the dispute must be in writing, at least in the Third Circuit.

But wait-there's more.

This result differs from two other district court opinions in the Third Circuit. One of the cases-*Cruz v. Financial Recoveries*, 2016 WL 3545322 (D.N.J. June. 28, 2018)-was decided by a different judge in the same district court that heard *Kassin*. The other case-*Anela v. AR Resources*, 2018 WL 2961813 (E.D. Pa. June 12, 2018)-was filed in the Eastern District of Pennsylvania, and the defendant in that case was AR Resources, the same defendant in *Kassin*.

These divergent rulings will likely be resolved at some point by the Third Circuit. Until that happens, debt collectors should remember that the words they use matter and that the law may vary based on the jurisdiction in which they operate, and they should seek legal counsel that can meet these needs. And that's where we can help. Our Commercial Collections & Consumer Litigation Practice Group stays current with 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 Group Chair, Thomas A. Muccifori, at 856-354-3056, Anthony M. Fassano at 856-616-2618, or any member of the Commercial Collections & Consumer Litigation Practice Group.

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Attachments

Client Advisory- New Years Eve Countdown