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Entering the FDCPA Safe Harbor Just Got More Difficult in the Second Circuit

By David Bizar and Michael Jusczyk

The Second Circuit's recent opinion in *Carlin v. Davidson Fink LLP*, No. 15-3105-cv (2d Cir. Mar. 29, 2017), has important ramifications for the debt collection industry.

Carlin, a putative class action, addressed the adequacy of a Fair Debt Collection Practice Act ("FDCPA") initial notice sent per Title 15, U.S.C., § 1692g, which requires a debt collector to send a written notice to a consumer as or within five days of its initial communication with a consumer in connection with the collection of any debt, containing the amount of the debt, the name of the creditor to whom the debt is owed, and certain information about the consumer's rights.

In *Carlin*, the initial notice set forth a "Total Amount Due" as a dollar figure, but added that such amount "may include estimated fees, costs, additional payments and/or escrow disbursements . . . which are not yet due" and apprised the consumer that if he paid the total amount specified to be due by a certain date, he would get a refund of any charges and fees that had not been incurred as of the time of payment. The Second Circuit held that because the initial notice did "not specify what the 'estimated fees, costs, [and] additional payments' are" the "least sophisticated consumer" would not be able to determine from the initial notice how any additional "fees are calculated, whether they may be disputed, or what provision of the note gives rise to them."

The Second Circuit kept the "safe harbor" language it had approved just a year before in *Avila v. Riexinger & Assoc.*, LLC, 817 F.3d 72 (2d Cir. 2016), that if the initial notice advises 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," a debt collector is insulated from § 1692g liability. But it found that this initial notice fell outside the safe harbor because it only provided "that the Total Amount Due *may* include *estimated* fees and costs" and failed to provide "clarity as to whether new fees and costs are accruing" or on what basis they would accrue. By its use of the words "may" and "estimated," the initial notice only informed the consumer of a theoretical amount that might or might not be due. The court concluded that the initial notice effectively told the consumer that he would have to pay the amount demanded and wait to see whether a refund would be issued to determine how much he actually owed.

Significantly, the Court recognized that the language of this initial notice may well be commonplace in the debt collection industry, but found that provided no insulation to liability under the FDCPA.

Consumer debt collectors should review their initial notices, and prepare for the possibility of suit. The consumer financial services litigation attorneys at Seyfarth Shaw LLP stand ready to help if needed.

If you have any questions, please contact your Seyfarth attorney, David Bizar at *dbizar@seyfarth.com* or Michael Jusczyk at *mjusczyk@seyfarth.com*.

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