What You Don’t Say Can Hurt You

September 12, 2016

On September 8, 2016, the Fifth Circuit Court of Appeals issued an opinion interpreting the Fair Debt Collection Practices Act (‘FDCPA’)1 in a way that further constrains the actions of debt collectors.

The Fair Debt Collection Practices Act

Congress enacted the FDCPA to protect consumers against abusive debt collection practices.2 Importantly, the statutory definition of “debt collectors” not only includes persons who collect debts for others, but also includes creditors who use certain methods to collect their own debts.3 If a debt collector violates the FDCPA, the statute allows a debtor to recover actual damages, additional damages of up to $1,000 (or more if the case is a class action), costs, and reasonable attorney’s fees.4

The Fifth Circuit’s Interpretation of the FDCPA in Daugherty

In Daugherty v. Convergent Outsourcing, Inc.,5 the Fifth Circuit considered Section 1692e of the FDCPA, which prohibits the use of “false, deceptive, or misleading representation or means in connection with the collection of any debt.” At issue in Daugherty was an attempt to collect a debt after the statute of limitations had expired for the collection of the debt.6 Specifically, a debt collector sent a letter to a debtor that offered to “settle” a $32,405.91 debt for a payment of $3,240.59.7 The debtor sued the debt collector. Among other things, the debtor argued that the collection letter violated the FDCPA because it did not inform her that the debt was unenforceable “and that a partial payment would revive the entire debt.”8

The Fifth Circuit instructed that “[w]hen evaluating whether a collection letter violates § 1692e . . . a court must view the letter from the perspective of an unsophisticated or least sophisticated consumer.”9 The court then noted that there is an apparent circuit split on the issue of “whether a collection letter offering ‘settlement’ of a time-barred debt can violate the FDCPA if the debt collector does not disclose the debt’s unenforceability or expressly threaten litigation.”10 After reviewing the varying approaches of its sister circuits, the Fifth Circuit held that “a collection letter seeking payment on a time-barred debt (without disclosing its unenforceability) but offering a ‘settlement’ and inviting partial payment (without disclosing the possible pitfalls) could constitute a violation of the FDCPA.”11 Thus, the Fifth Circuit joined those circuits that take a more expansive view of prohibited conduct under the FDCPA.

Points to Consider in Light of Daugherty

The FDCPA’s definition of “debt collectors” is not limited to third-party debt collection services. Depending on how creditors seek to collect their own debts, they may be subject to the FDCPA’s restrictions.

Under Daugherty, what collection letters fail to state may result in liability for debt collectors. It is not enough to avoid affirmative misstatements; collection letters must contain sufficient disclaimers to avoid misleading unsophisticated consumers.

If you would like more information about this subject or other litigation-related topics, please contact your Andrews Kurth representative in the Litigation Practice Section.

6. *Id.* at *1.
7. *Id.*
8. *Id.* at *2.
9. *Id.* (internal quotation marks and citations omitted).
10. *Id.* at 3.
11. *Id.* at *4-5.*