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Consumer Finance Litigation

Third Circuit Clarifies FDCPA Restrictions on Third-Party Communications

Action Item: Lenders and servicers should continue to maintain policies and procedures that minimize third-party communications and ensure maintenance of sufficient records documenting the frequency and purpose of those communications.

In *Evankavitch v. Green Tree Servicing, LLC*, the Third Circuit considered, as a matter of first impression, which party bears the burden with respect to alleged improper third-party communications under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. (“FDCPA”). *Evankavitch v. Green Tree Servicing, LLC*, ---F.3d---, 2015 WL 4174441, at *1 (3d Cir. Jul. 13, 2015). Put differently, the court was asked to determine whether the debt collector must prove that allegedly improper third-party communications fall within § 1692b’s exception, or whether it is incumbent on the debtor to disprove the applicability of that exception as an element of his claim. *Id.*

Under the FDCPA, a debt collector is liable to a consumer for contacting third parties in pursuit of that consumer’s debt unless the communication falls under a statutory exception. One such exception permits communication with a third party “for the purpose of acquiring location information about the consumer” but, even then, prohibits more than one such contact “unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now

has correct or complete location information.” 15 U.S.C. § 1692b.

The Third Circuit ultimately determined that the burden falls on the debt collector. *Evankavitch*, 2015 WL 4174441, at *10. Noting the “‘longstanding convention’ that a party seeking shelter in an exception . . . has the burden to prove it,” the court held that Green Tree was required to prove that any alleged third party communications were only for purposes of obtaining location information about Evankavitch, and therefore within the narrow exception to the FDCPA’s general prohibition on communications with third parties. *Id.* at *5.

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