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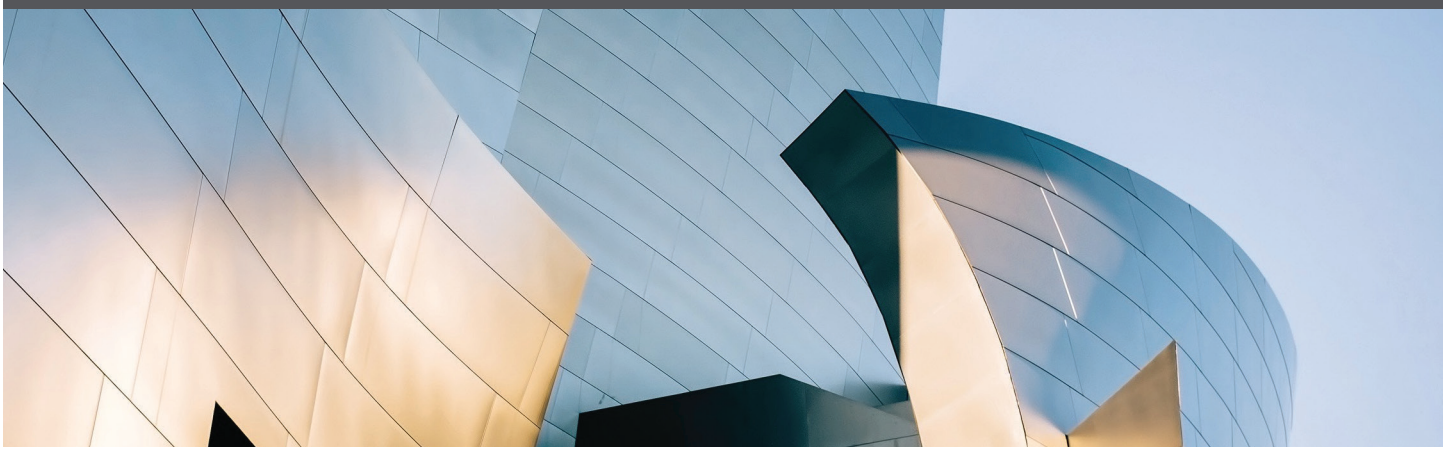

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Second Circuit Confirms Interest Disclaimer Not Required on Collection Notices Not Accruing Interest

In a win for the collection industry, the Second Circuit Court of Appeals confirmed an "interest disclaimer" is only necessary on collection notices if the debt is accruing interest. While this much-needed clarification may reduce the volume of "reverse-Avila" FDCPA litigation, questions still remain about the best method to accurately characterize balances in collection notices.

BACKGROUND

In *Taylor v. Fin. Recovery Servs., Inc.,* No. 17-1650-cv ("*Taylor*"), the Second Circuit confirmed that the appellants (and many other members of the consumer bar) were misapplying its decision in *Avila v. Riexinger & Associates, LLC,* 817 F.3d 72 (2d Cir. 2016) ("*Avila*").[1] In *Avila*, the Second Circuit ruled that a debt collector violates 15 U.S.C. § 1692e of the Fair Debt Collection Practices Act ("FDCPA") if it identifies the "current balance" of a debt without disclosing that such balance could increase due to the accrual of interest or fees. In that case, interest was actually accruing on the subject debt.

Following *Avila,* the accounts receivable management industry was plagued with litigation based on a "reverse *Avila*" theory, i.e., regardless of whether interest was accruing, the debt collection notice indicated that interest *may* be accruing. *See, e.g., Islam v. Am. Recovery Serv. Inc.*, No. 17-CV-4228 (BMC), 2017 WL 4990570 (E.D.N.Y. 2017).

In *Taylor*, a series of collection notices identified an unchanging "balance due." The notices did not include a statement indicating whether the balances were accruing interest or fees. Discovery established that the debts were not. On summary judgment, the lower court held that such an interest disclaimer was not required.

THE TAYLOR DECISION

In *Taylor*, the Second Circuit explained that *Avila's* holding was influenced by the concern that a consumer could read a collection notice where a debt was accruing interest and be misled about whether he or she could pay the debt in full by paying the amount listed on the notice. In contrast, in *Taylor*, the Second Circuit clarified that this concern did not exist where interest was not being charged and prompt payment of the amounts stated in the notices would have satisfied their debts.

[1] *Avila*, to some extent, followed the Seventh Circuit's ruling in *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000), where, among other things, they fashioned "safe harbor" language for debt collectors to use on collection notices where the amount of the debt varies each day.

The Court rejected the argument that, without the disclaimer, a consumer would pay the debt "sooner" assuming that interest was accruing, stating that "[i]t is hard to see how or where the FDCPA imposes a duty on debt collectors to encourage consumers to delay repayment of their debts." The Court joined the Seventh Circuit in *Chuway v. Nat'l Action Fin. Serv., Inc.*, 362 F.3d 944 (7th Cir. 2004), holding "that a collection notice that fails to disclose that interest and fees are not currently accruing on a debt is not misleading within the meaning of Section 1692e."

Finally, the Second Circuit rejected the argument that the collection agency could, at some point, collect interest (i.e., at judgment entry). Since no interest or fees were being charged, and the appellants could have satisfied their debts by prompt payment of the amounts listed in the notices, the Court believed it was a non-issue. In essence, the language of the *Taylor* notice did not implicate the concerns discussed by the Second Circuit in *Avila,* thereby confirming that the FDCPA does not require every statement in a debt collection notice to include an extra assurance that changes may occur in the long term.

CONCLUSION

This case should deter "interest disclaimer" suits where a consumer receives a series of collection notices reflecting a static balance. The decision may not, however, stave off all suits where it is unclear on the face of the notice whether the debt is accruing interest. Companies should follow the holdings of *Taylor* and *Avila* where appropriate, and, among other things, accurately characterize balances collected in their collection notices. That said, the plain language of a collection notice is still prone to ambiguities, and companies should consult with their attorneys concerning any specific issues.

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