



JULY 2018 • NO. 4

Second Circuit Holds That Debt Collector's Inquiry Regarding Nature of Consumer's Verbal Dispute of Debt Did Not Violate the FDCPA

The Second Circuit held that a debt collector's follow-up questions regarding the nature of a consumer's verbal dispute of a debt in an attempt to resolve the issue did not rise to the level of a misleading or abusive communication under the Fair Debt Collection Practices Act ("FDCPA"). Notably, the Second Circuit also affirmed the district court's orders sanctioning the plaintiff and his counsel for, among other things, misleading the court and improperly attempting to entrap the debt collector. Debt collectors should take note of this decision when a consumer attempts to dispute a debt via telephone.

In *Levi Huebner v. Midland Credit Management, Inc.*, Nos. 16-2363-cv, 16-2367-cv (2d Cir. July 19, 2018), the Second Circuit affirmed the Eastern District of New York's ("Lower Court") order granting defendant Midland Credit Management, Inc.'s ("Midland") summary judgment motion and dismissing the complaint on the grounds that plaintiff Levi Huebner ("Plaintiff") failed to state a claim under Sections 1692e(5), (8), and (10) of the FDCPA. The Second Circuit held Midland's follow-up questions about the nature of Plaintiff's dispute cannot be interpreted as threatening, or conveying false information about the consumer's debt. Rather, Midland's questions were an endeavor to learn more about Plaintiff's dispute, so Midland could properly resolve the dispute. The Second Circuit also affirmed the Lower Court's imposition of sanctions against Plaintiff and his counsel on the grounds

they intentionally misled the court and Midland as to Plaintiff's theory of the case, breached the protective order entered into amongst the parties, acted in bad faith by "unreasonably and vexatiously" multiplying the proceedings in the action, and commencing a frivolous action and filing several frivolous motions in bad faith. As such, the Lower Court properly granted summary judgment in favor of Midland.

SUMMARY OF FACTS AND BACKGROUND

In August 2013, Midland sent a collection letter to Plaintiff seeking to collect \$131.21. In October 2013, Plaintiff called Midland regarding the debt and secretly recorded the phone call. Plaintiff asked how he could dispute the debt and was transferred to a Midland employee named Emma Elliot ("Elliot"). The crux of the

conversation consisted of Elliot inquiring as to what the dispute was and why Plaintiff wanted the debt deleted, which Plaintiff refused to answer. After the call, Midland deleted Plaintiff's account, ceased all collection and sent advisories to the credit reporting agencies requesting that Plaintiff's debt be deleted from his credit reports. Midland also sent Plaintiff a letter informing him of the steps it had taken concerning his account.

A year later, Plaintiff brought a putative class action lawsuit against Midland stemming from his October 2013 phone call and alleging violations under the FDCPA on the grounds that Elliot was misleading as to the dispute methods available to him during the course of the call. Specifically, Plaintiff alleged that Elliot told him "that he could not orally dispute" his debt but must do so in writing and "that he must have a reason to dispute a debt." After filing two amended complaints and court-ordered sanctions against Plaintiff and his counsel for, among other things, failure to participate in the initial status conference in good faith and filing a frivolous motion by failing to follow the protective order's procedures for challenging documents' confidential designations, Midland moved for summary judgment.

In its decision on summary judgment, the Lower Court focused on two theories raised by Plaintiff: (i) whether Elliot's questions about the nature of Plaintiff's dispute led Plaintiff to believe that he could not dispute his debt without cause, in violation of 15 U.S.C. §§ 1692e(8) and (10); and (ii) whether Midland reported Plaintiff's debt to credit reporting agencies without mentioning that the debt was disputed, in violation of 15 U.S.C. §§ 1692e(5), (8) and (10), and also mailed Plaintiff a letter falsely claiming that Midland notified the credit reporting agencies that the debt was disputed, thereby violating 15 U.S.C. § 1692e(2)(A).

The Lower Court rejected both theories and held "the FDCPA does not make it illegal to ask a consumer questions about the nature of his dispute when the consumer calls to lodge one" because requesting that information could help both the collector and consumer resolve the dispute faster. Specifically, the Lower Court explained that while "it might be unlawful to badger a consumer with harassing or browbeating questions 'to deter him from disputing his debt,'" here, it was Plaintiff who was "harassing the collection agent, who was just trying to do her job. . . ." Further, the Lower Court held that there was no material issue of fact regarding whether Midland informed the credit reporting agencies that the debt was deleted, and "the record showed that deleted debts are a subset of disputed debts." Plaintiff appealed.

THE SECOND CIRCUIT'S DECISION

In affirming the Lower Court's decision, the Second Circuit noted that while at some point, a debt collector's questions about the nature of a consumer's dispute could rise to the level of a violation of the FDCPA, when looking at the facts of this case, no reasonable jury could conclude that Elliot's questions were misleading or abusive in any way. Specifically, Midland did not condition acceptance of the dispute on a valid reason and the record was clear that the collector did not badger the consumer. Rather, Elliot asked basic questions throughout the call, remaining patient and polite in an attempt to assist the consumer in resolving the dispute. Thus, the "least sophisticated consumer" would not have interpreted Elliot as threatening Plaintiff, and Elliot conveyed no false information about the debt. In addition, the Second Circuit held that Midland did not violate Section 1692e(8) of the FDCPA because Midland deleted Plaintiff's account, sent several messages to the credit reporting agencies telling them to delete Plaintiff's

debt and sent a letter to Plaintiff informing him of the same. Finally, the Second Circuit affirmed the Lower Court's imposition of sanctions against Plaintiff and his counsel, noting that Plaintiff improperly tried to trick Midland into violating the FDCPA, commenced an action with meritless claims, prosecuted such action in bad faith and needlessly multiplied the proceedings with baseless motions, including a motion filed in blatant disregard for the parties' joint protective order.

CONCLUSION

Huebner is significant because it permits a debt collector, when responding to a verbal dispute of debt, to inquire regarding the nature of a debtor's dispute without fear of violating the FDCPA. While the *Huebner* decision implies that a debt collector's inquiry can at some point rise to the level of "sufficiently inquisitorial" to violate the FDCPA, when a debt collector asks polite, basic questions in an attempt to learn more about the consumer's dispute, it does not rise to the level of a violation under the FDCPA. Further, the Second Circuit's decision is a victory for debt collectors, as it signals that the court will not tolerate frivolous litigation by consumers who attempt to entrap debt collectors into technical violations of the FDCPA.

Wayne Streibich

215.569.5776 | wstreibich@blankrome.com

Jonathan M. Robbin

212.885.5196 | jrobbin@blankrome.com

Diana M. Eng

212.885.5572 | deng@blankrome.com

Andrea M. Roberts

212.885.5568 | aroberts@blankrome.com