

# A CAREFUL BALANCING ACT: SECOND CIRCUIT REQUIRES DEBT COLLECTORS TO DISCLOSE WHEN A CONSUMER'S CURRENT BALANCE MAY INCREASE DUE TO INTEREST AND FEES

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## Financial Institutions and Services Litigation Alert

By: Gregory N. Blase, Eric W. Lee, Andrew Glass, Roger L. Smerage

In *Avila v. Riexinger & Associates, LLC*, No. 15-1584, --- F.3d ---, 2016 WL 1104776 (2d Cir. Mar. 22, 2016), the Second Circuit Court of Appeals construed the scope of Section 1692e of the Fair Debt Collection Practices Act ("FDCPA"). Section 1692e prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt."<sup>[1]</sup> The Second Circuit held that when notifying consumers of their current account balance, Section 1692e requires debt collectors to disclose when the balance may increase due to interest and fees.

The *Avila* plaintiffs received debt collection notices without such a disclosure. As a result, the plaintiffs allegedly believed that the "current balance" stated on their notice was "static" and that their payment of that amount would satisfy the debt irrespective of when they sent their payment. When this did not turn out to be the case, the plaintiffs brought suit. The district court recognized a division among courts as to whether a debt collector must disclose that the amount of the debt will increase over time due to interest or fees. Siding with courts that have held no such disclosure is required, the district court dismissed plaintiffs' complaint.

The Second Circuit vacated the dismissal, applying two principles of statutory construction. First, the court stated that because the FDCPA is primarily a consumer protection statute, it must construe the statute liberally to achieve the underlying congressional purpose. Second, the court applied the "least sophisticated consumer" standard—that is, a standard based on a consumer who lacks "even the sophistication of the average, everyday, common consumer."<sup>[2]</sup> The court stated that "[u]nder this standard, a collection notice can be misleading if it is open to more than one reasonable interpretation, at least one of which is inaccurate."<sup>[3]</sup> Applying these principles, the court held that in reading the notice, even a reasonable consumer (let alone the least sophisticated one) could believe (incorrectly) that she could satisfy her debt in full by paying the amount listed on the notice.

In rendering its decision, the Second Circuit extensively reviewed a Section 1692e opinion from the Seventh Circuit Court of Appeals, *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 875 (7th Cir. 2000). There, the Seventh Circuit considered a debt collection notice that listed the "unpaid principal balance" and that indicated "this amount does not include accrued but unpaid interest, unpaid late charges, escrow advances or other charges."<sup>[4]</sup> The disclosure at issue in *Miller* also stated that the "amount to reinstate or pay off your loan changes daily. You may call our office [at the toll-free number provided] for complete reinstatement and payoff figures."<sup>[5]</sup> The Seventh Circuit held that the "unpaid principal balance" is only part of the debt owed and that the FDCPA requires debt collectors to state the total amount due on the date the notice

was sent, with interest and other charges included.<sup>[6]</sup> The Second Circuit went further, holding that a debt collector's notification of a debtor's "current balance," even when it includes interest and fees, violates Section 1692e when it lacks language disclosing that the amount of the debt will increase over time due to interest or fees.<sup>[7]</sup>

Nevertheless, to alleviate the concern that consumers could accuse a debt collector of using the threat of interest and fees to coerce the payment of debts, the Second Circuit adopted a "safe harbor" previously fashioned by the Seventh Circuit in *Miller*. The safe harbor permits a debt collector to use the following statement to satisfy its duty with respect to stating the amount of debt where the amount varies day to day:

As of the date of this letter, you owe \$\_\_\_\_ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1-800-[phone number].

The Second Circuit noted that an alternative safe-harbor statement, adopted by one district court within the Second Circuit, "may be preferable to the extent it advises the consumer of the specific rate of increase in debt over time."<sup>[8]</sup> The proposed alternative language states:

As of today, [date], you owe \$\_\_\_\_. This amount consists of a principal of \$\_\_\_\_, accrued interest of \$\_\_\_\_, and fees of \$\_\_\_\_. This balance will continue to accrue interest after [date] at a rate of \$\_\_\_\_ per [day/week/month/year].<sup>[9]</sup>

The Second Circuit concluded by stating that a debt collector was not required to use any particular disclaimer and "will not be subject to liability under Section 1692e for failing to disclose that the consumer's balance may increase due to interest and fees if the collection notice either accurately informs the consumer that the amount of 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."<sup>[10]</sup>

In holding that Section 1692e of the FDCPA requires debt collection notices to state when the current account balance may increase due to interest and fees, the Second Circuit resolved the disagreement among the district courts in the circuit regarding whether such a disclosure was required. Debt collectors that operate within the Second Circuit should be aware of the holding in *Avila* and its impact on communications they make to borrowers that include balance statements.

**Notes:**

<sup>[1]</sup> 15 U.S.C. § 1692e.

<sup>[2]</sup> *Avila*, 2016 WL 1104776, at \*2.

[3] *Id.*

[4] *Miller*, 214 F.3d at 875.

[5] *Id.*

[6] *Id.*

[7] *Avila*, 2016 WL 1104776, at \*4.

[8] *Id.*

[9] *Id.*

[10] *Id.*

## KEY CONTACTS



**ANDREW C. GLASS**  
PARTNER

BOSTON  
+1.617.261.3107  
ANDREW.GLASS@KLGATES.COM



**GREGORY N. BLASE**  
PARTNER

BOSTON, NEW YORK  
+1.617.951.9059  
GREGORY.BLASE@KLGATES.COM



**ERIC W. LEE**  
PARTNER

BOSTON  
+1.617.951.9240  
ERIC.LEE@KLGATES.COM

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