

# THE NINTH CIRCUIT HOLDS THAT SUBSEQUENT DEBT COLLECTORS MUST SEND FDCPA VALIDATION-OF-DEBT NOTICES

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## Consumer Financial Services Alert

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The Ninth Circuit recently construed the Fair Debt Collection Practices Act ("FDCPA") provision<sup>[1]</sup> that requires a debt collector to send a validation-of-debt notice within five days of "the initial communication" with a consumer regarding the collection of a debt. In *Hernandez v. Williams, Zinman & Parham P.C.*,<sup>[2]</sup> the Court addressed the question of whether "the initial communication" refers only to the very first communication sent to a consumer regarding the debt or to the first communication sent by each debt collector that seeks to collect on the debt. The question has divided district courts, and the Ninth Circuit is the first federal court of appeals to provide an answer in a published opinion.<sup>[3]</sup> In doing so, the Court held that the FDCPA requires each debt collector to send a debt validation notice containing specific disclosures within five days of that collector's first communication with the consumer regarding the collection of the debt, regardless of whether a prior debt collector had sent a notice regarding the same debt.

## THE PROCEEDINGS BELOW

The *Hernandez* action arose from a loan obtained by the plaintiff to finance the purchase of an automobile. When the plaintiff stopped making payments on the loan, a debt collector sent a letter to the plaintiff seeking to collect on the debt. The debt collector later retained a law firm to assist with the collection efforts. The law firm sent the plaintiff a collection letter but did not provide a full validation-of-debt notice.<sup>[4]</sup> On that basis, the plaintiff filed suit against the law firm alleging violation of the FDCPA § 1692g.

The law firm asserted that it was not required to provide a validation-of-debt notice because the initial debt collector's letter to the plaintiff was the "initial communication" with respect to the debt at issue and, therefore, the sole communication triggering § 1692g(a)'s requirements. The district court agreed and granted summary judgment in favor of the law firm.<sup>[5]</sup>

## THE NINTH CIRCUIT'S DECISION

On appeal, the plaintiff argued that under § 1692g(a), each and every debt collector must provide a debt validation notice to the subject consumer. The Ninth Circuit agreed, holding that "although the sentence in § 1692g(a) in which the phrase 'the initial communication' appears is ambiguous when read in isolation, when the sentence is read in the context of the FDCPA as a whole and in light of the statute's remedial purpose, it is clear that the validation notice requirement applies to each debt collector that attempts to collect a debt."<sup>[6]</sup>

The Ninth Circuit noted that although the statute refers to "the initial communication," which suggests that there may be only one initial communication, the statute also refers to "a debt collector," which suggests that Congress may have intended to impose the validation-of-debt notice requirement on any debt collector subject to FDCPA requirements.<sup>[7]</sup> The Court concluded that only the latter interpretation is consistent with the rest of the statutory text and avoids creating substantial loopholes that would undermine the protections the statute provides.<sup>[8]</sup> The Court further held that interpreting "the initial communication" to refer to the first communication by any debt collector is consistent with the FDCPA's declared purpose of protecting consumers from abusive debt collection practices, and that the FDCPA must be liberally construed in favor of the consumer in order to effectuate this goal.<sup>[9]</sup>

Although it ruled that review of external interpretative sources was not necessary, the Court noted that a Senate Report discussing § 1692g(a) provided that "[a]fter initially contacting a consumer, a debt collector must send him or her written notice" with the required information.<sup>[10]</sup> The Ninth Circuit stated that "[a]lthough the Senate Report does not expressly define the meaning of 'the initial communication,' its discussion of § 1692g's purpose extinguishes any doubt that Congress intended the validation notice provision to protect consumers throughout the entire lifecycle of a debt."<sup>[11]</sup> The Court further noted that both the Consumer Financial Protection Bureau ("CFPB"), which has rulemaking authority under the FDCPA, and the Federal Trade Commission, which shares concurrent authority with the CFPB to enforce the FDCPA, asserted in an amicus brief that § 1692g requires all debt collectors to send a validation-of-debt notice. The Court, however, ruled that it need not defer to agency interpretation because the statute as a whole was unambiguous with respect to the question presented.

## CONCLUSION

The Ninth Circuit has now held that the reference in § 1692g to "the initial communication" refers to the first communication by each and every debt collector that seeks to collect on a debt. As noted above, however, two other federal courts of appeal have reached a contrary conclusion (albeit in unpublished rulings), and several district courts in other circuits have likewise refused to extend the validation-of-debt notice requirement of § 1692g to subsequent debt collectors.

Thus, it is possible a circuit split may develop with respect to the issue. Nevertheless, in light of the *Hernandez* decision, debt collectors who conduct business within Ninth Circuit jurisdictions now must comply with its holding, even if a prior debt collector has already sent the consumer a validation-of-debt notice concerning the debt.<sup>[12]</sup>

### Notes:

<sup>[1]</sup> 15 U.S.C. § 1692g(a).

<sup>[2]</sup> --- F.3d ---, No. 14-15672, 2016 WL 3913445 (9th Cir. July 20, 2016).

<sup>[3]</sup> The Tenth Circuit and the Third Circuit have each declined to apply the debt-validation-notice requirements of 15 U.S.C. § 1692g to a subsequent debt collector, but have only done so in unpublished decisions, which do not explain the basis for their construction of the statute. See *Lee v. Cohen, McNeile & Pappas, P.C.*, 520 F. App'x 649 (10th Cir. 2013) (unpublished); *Oppong v. First Union Mortg. Corp.*, 326 F. App'x 663 (3d Cir. 2009) (per curiam) (unpublished).

<sup>[4]</sup> The law firm conceded that it was acting as a "debt collector" for purposes of the FDCPA. *Hernandez*, 2016 WL 3913445 at \*1, n.1. Because the law firm did not argue before the district court or on appeal that it was

exempt from § 1692g(a)'s requirements because it was acting as an agent for the original debt collector, the Ninth Circuit noted that it would not address that issue on appeal. *Id.*

[5] *Hernandez v. Williams, Zinman & Parham, P.C.*, No. CV-12-731-PHX-SMM, 2014 WL 977649, at \*3-5 (D. Ariz. Mar. 13, 2014), *rev'd* --- F.3d ---, No. 14-15672, 2016 WL 3913445 (9th Cir. July 20, 2016).

[6] *Hernandez*, 2016 WL 3913445 at \*3.

[7] *Id.* at \*5.

[8] *Id.* at \*7–8.

[9] *Id.* at \*8.

[10] S. Rep. No. 95-382, 95th Cong. 1st Sess. 4 (1977) (emphasis added).

[11] *Hernandez*, 2016 WL 3913445 at \*10.

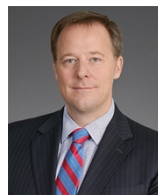
[12] The Ninth Circuit covers the states of Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington and the territories of Guam and the Northern Mariana Islands.

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