

Northern District of New York Dismisses another Avila Claim Based on Accrual of New York Pre-Judgment Interest

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One of the latest trends in the New York FDCPA space has been filing so called “Reverse Avila” cases, based on the Second Circuit’s decision in *Avila v. Riexinger and Assocs.*. In *Avila*, the Second Circuit found that a debt collection letter violated the FDCPA because the letter failed to state that interest on the debt was accruing. Since *Avila*, new theories related to the accrual of interest claims have surfaced, including: (1) the “Reverse Avila” claim, and (2) claims requiring *Avila* safe harbor language in correspondence if there is any possibility (however small) that interest will accrue in the future—even if the debt was not actually increasing at the time of the correspondence. Courts have begun to deny these claims because they stretch the meaning of *Avila* into the realm of pure speculation.

Last month, the Northern District of New York, in *Altieri v. Overton, Russell, Doerr and Donovan, LLP*, dismissed a claim that the debt collector violated *Avila* solely on the basis that the amount of the debt could increase due to the accumulation of statutory pre-judgment interest under N.Y. C.P.L.R. § 5001. The *Altieri* court found that such statutory interest cannot be assessed “unless and until” a civil action is commenced. In so ruling, the court followed a trend in New York District Courts in dismissing increasingly speculative *Avila*-type claims, especially those based on statutory pre-judgment interest. See, e.g., *Cruz v. Credit Control Services, Inc.*, 2017 U.S. Dist. LEXIS 186125 at *11 (E.D.N.Y. Nov 8, 2017) (“The Court holds that, as a matter of law, pre-judgment interest under N.Y. C.P.L.R. § 5001 is not considered part of the ‘amount of the debt’ if no request for relief of pre-judgment interest has been made upon a court.”); and state court actions like *Jackson v. Computer Credit, Inc.*, No. 613935/2016E (N.Y. Sup. Ct. Suffolk Cty Nov. 22, 2017); *Brown v. Computer Credit, Inc.*, No. 617003/2016E (N.Y. Sup. Ct. Suffolk Cty Nov. 22, 2017). As the *Altieri* court noted, statutory pre-judgment interest only exists when a court awards it upon request and after a judgment has been awarded. The interest claimed as damages simply does not exist prior to the commencement of a collection action.

However, litigants should be forewarned that these decisions are based on New York’s prejudgment interest statute and may not always be applicable across state lines.^[1] In addition, the New York state court decisions also

stand for the more general proposition that *Avila* safe harbor language is not necessary just because there is some remote possibility that a debt may increase, for whatever reason, in the future. *Jackson*, No. 613935/2016E (N.Y. Sup. Ct. Suffolk Cty Nov. 22, 2017) (rejecting argument that safe harbor language was required because the underlying agreement allowed for the recovery of attorneys' fees and reasoning that there was no allegation that the creditor had commenced suit); *Brown*, No. 617003/2016E (N.Y. Sup. Ct. Suffolk Cty Nov. 22, 2017)(same).

Altieri solidifies that an *Avila* claim based on extremely speculative interest should not survive a motion to dismiss. While some courts have found *Avila* claims to exist where interest is actually accruing on the account, several courts have dismissed such claims where interest was not being assessed on the outstanding amount of the debt at the time of the communication. There is still much uncertainty with regard to what constitutes a claim under *Avila*, but it seems that a claim for statutory pre-judgment interest prior to the commencement of a legal action is, in most cases, not one of them.

[1] For example, while Minnesota appears to treat pre-judgment interest the same way as New York, the Ninth Circuit has found that the State of California treats prejudgment interest differently and allows such amounts to be added prior to obtaining a judgment. See *Diaz v. Kubler Corp.*,; but see *Gorman v. Messerli & Kramer, P.A.*, No. 15-1890, 2016 U.S. Dist. LEXIS 23474, at *8 (D. MN. Feb. 25, 2016) (rejecting *Diaz* because Minnesota's prejudgment interest status is unlike California's and can only be added after a judgment).

Topics

New York, Debt Collection