

Second Circuit Resolves Uncertainty Surrounding “Reverse Avila” Claims

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The Court of Appeals seems to have halted much uncertainty surrounding “reverse *Avila*” claims by unanimously affirming the New York federal court’s decision in *Taylor v. Financial Recovery Services, Inc.*, No. 17-1650, 2018 U.S. Dist. LEXIS ----- (2d Cir. March 29, 2018) ([found here](#)). In the wake of *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72 (2d Cir. 2016), savvy plaintiffs have argued that the failure to disclose that a debt is no longer accruing interest is false and misleading in violation of Section 1692e of the Fair Debt Collection Practices Act (FDCPA). The Second Circuit disagreed and held that “a collection notice that fails to disclose that interest and fees are not currently accruing on a debt is not misleading ” when the letter correctly states a consumer’s balance when the letter was issued.

Distinguishing *Avila*, the Second Circuit explained that the collection letter in *Avila* was misleading because a consumer could pay the full amount listed on the letter but such payment would not settle the debt. Under the facts of *Avila*, a consumer who paid the amount due on the collection letter would still be on the hook for an unpaid balance because interest and fees “accumulated after the notice was sent but before the balance was paid.” In *Taylor*, the creditor instructed the collector not to accrue interest or fees on the underlying debt. Thus, because a consumer could have satisfied their debt by “making reasonably prompt payment” of the balance stated on the collection letter, it was not misleading notwithstanding the creditor’s right to accrue post-placement interest on that same debt. The Second Circuit noted that the worst “harm” to plaintiffs in *Taylor* would be to pay sooner rather than later in order to avoid interest or fees accruing, but acceleration of payment “falls short of the obvious dangers facing consumers in *Avila*.”

The Second Circuit expressly stated that their decision in *Taylor* did not create any incongruity between Sections 1692e and 1692g of the FDCPA, pursuant to their decision in *Carlin v. Davidson Fink LLP*, 852 F.3d 207 (2d Cir. 2017). In *Carlin*, the Court held that a collection letter falls short of the requirements of Section 1692g if it omitted information allowing “the least sophisticated consumer to determine” the minimum amount owed at the time of the letter, the amount of payment needed to resolve the debt “at any given moment in the future, and an explanation of any fees and interest that will cause the balance to increase.” *Carlin*, 852 F.3d at 216. So long as the collection letter “correctly states the balance due without mentioning interest or fees, and no such interest or fees

are accruing, then the notice will neither be misleading within the meaning of Section 1692e nor fail to state accurately the amount of the debt under Section 1692g.” *Taylor* at *8.

Notably, the Second Circuit flatly rejected Taylor’s argument that a collection letter is misleading even if post-placement interest is not accruing because the creditor continued to retain the right to accrue interest. Put another way, so long as a creditor does not expressly waive or disavow the right to accrue interest, Plaintiffs argued that the creditor may always choose to collect such interest at any point in time notwithstanding its instructions at placement for the collector not to accrue such interest. From the Second Circuit’s perspective, because no interest or fees were being charged, “the debts remained static long enough” to permit consumers to satisfy the debt “through prompt repayment of their respective balances due.” Thus, there was no misrepresentation made to the least sophisticated consumer.

In affirming the District Court’s decision, the Second Circuit joined the Seventh Circuit’s holding in *Chuway v. Nat’l Action Fin. Serv., Inc.*, 363 F.3d 944, 949 (7th Cir. 2004), wherein the Seventh Circuit held that when a debt collector is trying to collect only the amount due on the date the letter is sent, there is no violation of the FDCPA by simply disclosing the balance due.

We will be writing a more detailed analysis of “reverse *Avila*” claims, in an upcoming article in *Law360*.

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Topics

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