

Consumer Plaintiff Avila Sues Using the Safe Harbor Precedent She Established in Avila Decision—and Loses

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Following the Second Circuit's 2016 decision in [Avila v. Riexinger & Associates](#) (*Avila I*), consumer plaintiff Annmarie Avila returned to court in [Avila v. Reliant](#) (*Avila II*) to sue for violations of the Fair Debt Collection Practices Act (FDCPA) under the so called “safe-harbor” provision she helped establish in her previous successful appeal.

In *Avila I*, Annmarie received a collection letter, which failed to disclose that her outstanding balance was increasing due to interest and late fees despite the fact that interest was actually accruing at a daily rate equivalent to 500% per year. The Second Circuit held that the collection letter violated FDCPA § 1692e because “a reasonable consumer could read the notice and be misled into believing that she could pay her debt in full by paying the amount listed in the notice,” but in reality interest was accruing daily. The Court, however, also held that a debt collector will not be liable under § 1692e “if the collection notice either accurately informs the consumer that the amount of the 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.” In doing so, the Court adopted “safe harbor” language first promulgated by the Seventh Circuit in [Miller v. McCalla Raymer Padrick Cobb Nichols & Clark LLC](#):

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].

On her return to court in *Avila II*, Annmarie attempted to argue that collectors could not simply use the safe harbor language because the FDCPA required narrowly tailored safe-harbor provisions. Specifically, she alleged that the letter she received in *Avila II* containing the exact safe-harbor approved by the Second Circuit in *Avila I* was false,

deceptive, and misleading because although interest was accruing on her account neither “fees” nor “late charges” were being added. The Eastern District of New York dismissed *Avila II* on grounds that *Avila I* did not require debt collectors to state whether each of the additional charges for “interest, late charges,” and/or “other fees,” were individually increasing and that protection would be available if one of the three components was increasing. In dismissing *Avila II*, Judge Spatt determined that since interest was accruing on the debt, the notice was fully compliant with *Avila I*, and he cautioned that not every technically false statement in a collection notice violates the FDCPA. Essentially, *Avila I* foreclosed Annmarie’s argument in *Avila II*; holding “otherwise would upset the reliance interest of the many debt collectors who, taking the Second Circuit at its word, drafted collection letters based on that guidance.”

While an appeal of *Avila II* is possible, for the time being, Annmarie is bound by *Avila I* — her own case. A litigant who won on a Second Circuit appeal might wonder — can I “double-down” and win again? The answer, this week, was no.

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