

CONSUMERS MAY NEED TO PROVIDE EVIDENCE OF DECEPTION WHEN ALLEGING FDCPA VIOLATIONS

On March 19, the United States District Court for the Northern District of Illinois ruled in favor of a defendant debt collector because the plaintiff failed to submit extrinsic evidence showing an unsophisticated consumer would find the letter at issue to be misleading, false, or deceptive.

In [*Lemke v. Escallate, LLC*](#), No. 1:17-cv-5234, 2019 U.S. Dist. LEXIS 45152 (N.D. Ill. Mar. 19, 2019), consumer plaintiff Laura Lemke received a collection letter from Escallate that included the amount of the debt and the amount of accrued interest (“\$0.00”), and stated that “[y]ou may be charged a \$20.00 Non-Sufficient Funds Fee for any payment that is not honored because sufficient funds are not available in the account on which the payment was drawn.” Lemke contends the interest itemization and the non-sufficient funds, or “NSF,” statement contained in the letter were false, misleading, and deceptive.

In assessing whether an unsophisticated consumer would be misled, the Court pointed to the three categories of deceptive, misleading, or false statements outlined in *Ruth v. Triumph Partnerships*, 577 F.3d 790, 800 (7th Cir. 2009). The three categories are:

- (1) *Statements that plainly, on their face, are not misleading or deceptive* – The Court will not look at extrinsic evidence to determine whether consumers were confused. Instead, it will grant dismissal or summary judgment in favor of the defendant.
- (2) *Statements that are not plainly misleading or deceptive, but might possibly mislead or deceive the unsophisticated consumer* – The plaintiff may prevail only by producing extrinsic evidence, such as consumer surveys, to prove that unsophisticated consumers do in fact find the challenged statements misleading or deceptive.
- (3) *Statements are clearly misleading on their face* – The Court will grant summary judgment for the plaintiff without requiring them to prove what is already clear.

The *Lemke* Court determined the letter at issue falls under the second *Ruth* category, as an unsophisticated consumer may find it helpful to know that her account is not accumulating interest and it is possible the mere notice of zero “accrued interest” could lead an unsophisticated consumer to conclude that

interest is not being charged. However, because Lemke did not provide any extrinsic evidence suggestive that the interest itemization or the non-sufficient funds fee notice in the collection letter were false, misleading, or deceptive, the Court granted Escallate's motion for summary judgment on the FDCPA claims.