SECOND CIRCUIT RESOLVES LOWER COURT SPLIT OVER INTEREST AND LATE FEES IN FDCPA CLAIMS

When a consumer's current balance will increase over time due to interest and late fees, a debt collection notice must disclose this information, the U.S. Court of Appeals for the Second Circuit has ruled.

In *Avila v. Riexinger & Associates, LLC*, the plaintiffs received collection notices from the defendant, a debt collector. While the notice stated a "current balance," it did not disclose that the balance continued to accrue interest, or that the plaintiffs could be charged a late fee if they did not pay on time.

The plaintiffs brought a claim under Section 1693e of the Fair Debt Collection Practices Act (FDCPA) alleging that these notices were misleading because they believed the current balance was "static." Section 1693e broadly prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." The district court granted the debt collector’s motion to dismiss, holding that failure to disclose that a debt may accrue interest over time or may be subject to fees was not deceptive or misleading.

The Second Circuit reversed. Noting that it was resolving a split among the district courts within the Circuit, the *Avila* court held that if a consumer's account balance will increase over time due to interest and late fees, a collection notice must disclose this fact. In coming to this conclusion, the Second Circuit reiterated the principles that the FDCPA should be liberally construed as a consumer protection statute and that courts should apply the "least sophisticated consumer standard" to determine whether a challenged practice violates the FDCPA.

To alleviate the "legitimate concern" that consumers may be coerced into paying debts under the threat of interest and fees, the *Avila* court adopted the "safe harbor" approach set forth by the Seventh Circuit in *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C.* There, the Court held that a collection notice violated the FDCPA because, while it stated that interest and fees were owed in addition to the "unpaid principal balance," the notice did not include the total amount of the unpaid interest and fees. To minimize similar future litigation, the Seventh Circuit approved safe harbor language for use in collection notices when interest and fees could vary the total amount owed day to day. The Court found the following language acceptable:

> 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].

Though use of this particular disclaimer was not mandatory, *Miller* held that its use would discharge the debt collector's duty as a matter of law to correctly state the amount due.

As in *Miller*, the court in *Avila* did not require that collection notices contain specific safe harbor language, but concluded that debt collectors could avoid future liability if a collection notice "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."