DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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SEVENTH CIRCUIT HOLDS "AMOUNT OF DEBT" SAFE HARBOR LANGUAGE CAN BE DECEPTIVE

The U.S. Court of Appeals for the Seventh Circuit has reversed a district court's dismissal of a case involving a collection letter that included safe harbor language fashioned by the Seventh Circuit for collectors that collect debts that could vary in amounts. *Boucher v. Finance System of GreenBay, Inc*., 880 F.3d 362 (7th Cir. 2018). The Seventh Circuit held that the safe harbor language under the facts of this case could be materially misleading in violation of federal Fair Debt Collection Practice Act ("FDCPA").

In *Boucher*, the collection agency attempted to collect a medical debt by sending a letter with the following safe harbor language:

> As of the date of this letter, you owe $[a stated amount]. Because of interest, late charges and other charges that may vary form 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. For further information, write to the above address or call [phone number].

The debtor alleged that the safe harbor language is deceptive because under Wisconsin law, the collection agency could not lawfully or contractually impose late charges or other charges. The collection agency was entitled to charge interest on the debt, so the amount of the debt could vary from the amount of debt in the collection letter, but the variance would not be caused by "late charges or other charges."

The Seventh Circuit first analyzed whether the letter with the safe harbor language is deceptive under the FDCPA. The court concluded that the safe harbor language is misleading to an unsophisticated consumer because the letter falsely implies that "late charges and other charge" can be imposed, but legally they cannot be. The court also found that the misleading safe harbor language is material because the threat of late fees and other charges would be a factor in the consumer's decision to pay a debt sooner or later.

Next, the Seventh Circuit reviewed the history of the safe harbor language and analyzed whether the safe harbor language immunizes collectors from liability for false, deceptive or misleading representations or means under the FDCPA. To minimize litigation, the court provided the safe harbor language in a 2000 case involving an alleged violation of Section 1692g(a)(1), which requires a collector to send a consumer a written notice containing "the amount of the debt". *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC,* 214 F.3d 872 (7th Cir. 2000). The court noted that collectors are not required to use the safe harbor language, but a collector that uses the safe harbor language will not violate Section 1692g(a)(1), provided that the information that the collector furnishes is accurate and does not obscure the safe harbor language by adding confusing other information.

The court agreed with lower district courts that the safe harbor language for Section 1692g(a)(1) ("amount of debt" disclosure) should also immunize collectors from liability under Section 1692e (general prohibition on deceptive representations or means). However, here, the collector was not entitled to safe harbor protection because the safe harbor language was inaccurate since the collector could not legally charge "late fees or other charges" on the debt. The court concluded by stating that "debt collectors cannot immunize themselves from FDCPA liability by blindly copying and pasting" safe harbor language "without regard for whether that language is accurate under the circumstances". The court expects collectors to tailor boiler-plate language to avoid ambiguity.

Collection letters continue to be closely scrutinized by plantiffs' counsel and courts. We can help review letter templates, call scripts and other customer-facing documentation used in collections. ❑

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