Managing Risk

How to sidestep these 11 common collection letter claims and protect your business.

By Michael Klutho, Jessica Klander and Patrick Newman

The tide of lawsuits challenging collection letters ebbs and flows every year. There are always novel claims du jour (*Douglass* envelope lawsuits, anyone?), but there are also many commonly filed, run-of-the-mill letter claims that recur with far too much frequency.

It's not difficult to imagine consumer lawyers poring over collection letters and cross-checking them against a spreadsheet of archetypal Fair Debt Collection Practices Act claims to see if they can find an easy hit. If the consumer's lawyer does spot one, a lawsuit is sure to follow.

We've compiled a list of the most common claims currently crossing our desks, and offer some tips on how to lessen your risk of facing them.

CREDITOR DISCLOSURE

Section 1692g(a)(2) of the FDCPA requires collection letters to provide "the name of the creditor to whom the debt is owed." Accordingly, collection letters should use the term "creditor" rather than terms such as "regarding" or "client."

Consumer attorneys are not shy about asserting claims of "confusion" or alleged "inadequate disclosure" when letters use language other than what's expressly identified under the statute. You can help protect your company by using "Creditor: [Creditor Name]" in your letters.

MINI-MIRANDA

Section 1692e(11) requires the initial communication with the consumer to include a disclosure that "the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." Under the FDCPA, all subsequent communications only require a disclosure that "the communication is from a debt collector." Avoid any impulse to get creative with this language.

VALIDATION LANGUAGE

Many lawsuits allege improper disclosure of the consumer's right to seek verification of the debt. The most common trip wire here involves confusion about whether a dispute must be made in writing.

The key is to remember that a consumer dispute within the 30-day validation period has two effects:

1. If in writing, it triggers the debt collector's obligation to cease collections and to provide verification under the statute; and
2. Regardless of method, the dispute prevents the collector from assuming the debt is valid.

Agencies can get into trouble, for example, when a letter indicates that all disputes must be in writing—which is only partially accurate. In fact, a consumer can dispute the debt verbally, which then prevents the collector from assuming the debt is valid. As written, the statute's writing requirement only applies to triggering the verification obligation.

Avoid this confusing issue altogether by following the statutory language as written, even if your changes to the statutory language are intended to make it easier or more convenient for the consumer to dispute the debt.

Section 1692g(a) requires the following:

1. Unless the consumer notifies this office within 30 days after receiving this notice that the consumer disputes the validity of this debt, or any portion thereof, this office will assume this debt is valid;
2. If the consumer notifies this office in writing within 30 days from receiving this notice that the consumer disputes the validity of this debt, or any portion thereof, this office will obtain verification of the debt or obtain a copy of a judgment and mail the consumer a copy of such judgment or verification; and
3. If the consumer requests of this office in writing within 30 days after receiving this notice, this office will provide the consumer with the name and address of the original creditor, if different from the current creditor.

AMOUNT OWED

Section 1692g(a)(1) requires collection letters to disclose the "amount of the debt." Consumer attorneys regularly bring claims based on use of any other language than the "amount owed." Do not use statements such as "balance" or "current balance" as these may imply that the amount will change. Be like Pete Sampras when it comes to statutorily mandated language: boring but effective.

PUFFERY

Collection letters are sent to induce the consumer to pay the debt. We get that. But added statements aimed at encouraging payment (that do not convey any concrete information regarding the debt) are often unnecessary and ineffective, and almost always risky.

To be blunt, extraneous language in collection letters invites lawsuits. We encourage agencies to test their letters to determine whether the additional language is actually effective. Compare returns on the accounts using letters with and without the extraneous language. If the additional language isn't increasing revenue, it represents all risk and no reward. Again, remember Sampras.

CREDITWORTHINESS AND CREDIT REPORTING

Statements regarding a consumer's creditworthiness should be avoided in collection letters, and references to credit reporting should be used with extreme caution.

If your agency doesn't credit report, don't reference credit or credit reporting in any communications with consumers.

For letters that do reference credit reporting, make sure all statements regarding credit reporting are truthful. If you say you're going to credit report, do it. If credit reporting is prohibited by a client or type of debt, make sure all references to credit and credit reporting are omitted from communications related to that debt.

This is a hotbed for consumer attorneys, and courts have shown a willingness to entertain lawsuits based on statements made concerning credit reporting or a consumer's creditworthiness. If your letters reference

> *"If the additional language isn't increasing revenue, it represents all risk and no reward."*

credit reporting, have them reviewed at least annually by outside counsel.

ATTORNEY INVOLVEMENT

This one is straightforward. You should never reference legal action or involvement of an attorney unless the next step is attorney referral and litigation. Any reference to a "legal team" or having the file reviewed by an "attorney" is likely to be construed by courts as a threat of litigation. Don't use such statements unless litigation is imminent (if at all).

ENVELOPES

With regard to envelopes, Section 1692f(8) prohibits the use of "any language or symbol, other than the debt collector's address." The debt collector's "business name [can be used] if such name does not indicate that [the collector] is in the debt collection business."

Accordingly, if the agency's name is used, the name cannot imply that the mailing is from a collection agency. In addition, if an acronym or some other iteration of the agency is used, be sure that it's properly registered with the appropriate regulators, registered with the applicable secretary of state, insured, etc.

INTEREST

Section 1692(f)(1) of the FDCPA prohibits the collection of "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

If interest is assessed on the debt, it must be permitted by the underlying consumer agreement (not the agreement between the collection agency and creditor-client) or state or federal law. The availability of interest (either by contract or law) may also be impacted if the debt has been purchased.

Does your letter need disclosure language and, if so, what type? Make sure to include the appropriate disclosure language. If a variable amount of interest is assessed, disclose that in collection letters. Section 1692g(a)(1) of the FDCPA requires that collection letters disclose the accurate amount of the debt.

Some courts have interpreted this to mean that the letter must disclose that the amount of debt will change due to variable interest and/or costs. In *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark,* LLC, 214 F.3d 872 (7th Cir. 2000), the court provided the following safe-harbor language:

> *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].*

But beware! This so-called safe-harbor language is not a one-size-fits-all shield against claims. A recent court decision said that the safe-harbor language only works if it is accurate as applied to the particular collection effort.

Be especially cautious using the safe-harbor language in form collection letters that are used for various clients on a multi-state basis. Ask yourself whether all or only some of the safe-harbor language applies to the debt you are attempting collect.

Courts have concluded that if only some of the so-called safe-harbor language applies to a specific debt (e.g., interest is assessed, but costs are not allowed by specific state laws, etc.), then use of the complete safe-harbor language may be misleading or deceptive. See *Boucher v. Fin. Sys. of Green Bay, Inc.*, 880 F.3d 362 (7th Cir. 2018) ("Although the *Miller* language is not misleading or deceptive on its face, it may nevertheless be inaccurate under certain circumstances."). In this situation, one size does not fit all.

Omit "$0.00" balance references. Consumer attorneys have attempted claims based on the inclusion of references to interest (or other added costs) but then note a "$0.00" balance. The argument is that any reference to interest (whether $0.00 or otherwise), implies that interest may be assessed at some future time. While these arguments typically are rejected by courts, it's best to avoid the potential risk of litigation. Bottom line: omit any reference to interest in letters where it hasn't been or won't be assessed.

ADD-ON FEES

As with interest, Section 1692f(1) limits add-on fees to fees "expressly authorized

by the agreement creating the debt or permitted by law." There are a few states, such as Wisconsin, that have codified the availability of convenience fees when paying by credit card.

Absent such state law (or an express provision in the underlying consumer agreement), consumer attorneys will contend a collection agency cannot collect a convenience fee from a consumer. Claims for improper collection of additional fees based on convenience fees are becoming more common. The case law in this area is still developing, but there are a few takeaways to be gleaned:

Free options. The availability of other free options might not be enough. There were a few early cases that suggested offering a "free" alternative to the consumer to pay the debt (e.g., by check or money order) was sufficient to avoid liability. As the case law continued to develop, however, some courts began rejecting that argument, concluding that the statute does not allow for such an add-on, regardless of other free options.

No profit. Evidence that the collection agency doesn't profit from the fee probably isn't enough. Courts have rejected the argument that a convenience fee that is collected from the consumer to cover the costs associated with credit card payments doesn't qualify as an "additional amount." Here again, such courts rely on a strict interpretation of the statute, concluding that if the convenience fee isn't allowed by the underlying contract or other law, it is not permitted.

Third-party payment processor. What if a third-party servicer processes the payment and it alone collects the convenience fee? There is some limited case law that suggests if a collection agency retains a third-party servicer to process the payments, then the third-party servicer may collect a convenience fee from the consumer. See *Majors v. Prof'l Credit Mgmt., Inc.*, 2018 WL 1251914 (E.D. Mo. Mar. 12, 2018).

In *Majors*, a case successfully defended by our law firm, the challenged letter included statements that the convenience fee was separate from the consumer's total balance due; the convenience fee was being charged solely by a third-party servicer (and named the third-party servicer); and the collection agency would not receive any part of the convenience fee.

Ultimately, the case was dismissed, but not before the court stated that the letter was not deceptive because a reasonable unsophisticated consumer would understand that the convenience fee was not a part of the principal debt.

Unfortunately, the case law is still too scant to conclude that using a third-party servicer to process payments (and solely collect convenience fees) will absolutely avoid liability, but the *Majors* decision is certainly promising. Ultimately, the best approach is to lobby your state legislature to codify a statute permitting collection of such fees (as Wisconsin was able to do).

OVERSHADOWING

Section 1692g(b) prohibits any "collection activities and communication" during the 30-day validation period that "overshadow" or are somehow "inconsistent" with the consumer's validation rights.

The safest approach here is to hold off on all collection efforts until at least 45 days have elapsed since the initial letter was sent. That way, the period during which the consumers can timely exercise their rights has safely expired and collection attempts can begin in earnest with little risk of overshadowing claims.

To the extent communications do continue during the 30-day window, letters should be short and sweet, and should not demand or imply payment is required within the validation period.

What's the bottom line? Shoring up compliance gaps related to these commonly asserted claims should pay dividends (i.e., by avoiding litigation).

Michael Klutho is a shareholder/attorney, Jessica Klander is a shareholder/attorney and Patrick Newman is an associate/attorney at Bassford Remele, an ACA International member company.

This article appeared in the April 2019 edition of ACA's Collector magazine.

KEYNOTES

1 Keep your collection letters short and sweet; don't imply that payment is required within the validation period.

2 Don't change the statutory language. Be cautious when using form letters for multiple clients in multiple states.

3 At a minimum, have your letters reviewed by outside counsel annually to receive feedback on risk levels and current trends in consumer litigation.