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Back to School: A Lesson on the Materially Misleading Debt Collection Standard

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'Tis the season for returning to school and learning something new. When I was growing up, we learned the long multiplication algorithm by which you multiply numbers right to left, insert zeros along the way, write some leading digits on top rather than on the bottom, add some of those numbers for an intermediate answer, and then add those intermediate answers together to get the final answer. For those of a certain age, this is a familiar method that ultimately gets you to an answer despite the process being a little unclear. I recently learned there is what some are touting as an easier way to solve a multiplication problem by breaking it down into one operation at a time. While you likely will get to the same answer, this method allows you better visibility into each step.

Similarly, a recent 10th Circuit ruling gives debt collectors the opportunity to learn a simpler method for determining whether a consumer debtor has been misled in violation of Section 1692e of the Fair Debt Collection Practices Act.

Jason Tavernaro defaulted on his federal student loan, which was subsequently sold to Educational Credit Management Corporation. ECMC retained Pioneer Credit Recovery, Inc., a debt collector, to assist in collecting Tavernaro's debt. Pioneer sent Tavernaro's employer an Order of Withholding from Earnings that ordered the employer to garnish Tavernaro's wages and remit them to Pioneer.

The subject of Tavernaro's subsequent lawsuit is the two-page letter of the OWE packet. The first page "prominently displayed" ECMC's logo and the letter's title—"Order of Withholding from Earnings"—and identified ECMC as "the holder of a defaulted federally insured student loan debt owed to ECMC by the employee referenced below." The first page also provided a mini-*Miranda* warning and directed the employer to review the following page for "important information."

In the middle of the second page, the letter identified Pioneer as the company "assisting ECMC with administrative activities associated with this administrative wage garnishment." The letter instructed the employer to remit payments to Pioneer and provided Pioneer's mailing address. The letter then informed the employer that any questions be directed to Pioneer and again provided Pioneer's mailing address and phone number. The letter's signature line identified ECMC.

After receiving the OWE, Tavernaro's employer garnished his wages, which it then tendered to Pioneer. Tavernaro sued Pioneer, asserting claims on behalf of himself and a putative class that Pioneer violated Section 1692e of the FDCPA's prohibition against the use of "false, deceptive, or misleading representations" or "unfair or unconscionable means" in attempting to collect a debt. The trial court granted Pioneer's motion to dismiss. Tavernaro appealed, arguing that the letter gave the appearance

that it was sent by ECMC, not Pioneer. The U.S. Court of Appeals for the Tenth Circuit affirmed the trial court's decision.

The federal appellate courts agree that to violate Section 1692e, a "false representation" must be material, meaning that the statement must be "capable of influencing the consumer's decision-making process." If a statement has no bearing on the consumer's choice, it is not material and cannot be the basis for a cause of action under Section 1692e.

But how is materiality measured? Here is where the 10th Circuit's ruling requires debt collectors to go back to school and relearn the applicable standard.

The U.S. Supreme Court has not ruled on the applicable standard. Some appellate courts, including the 2nd and 9th Circuits, apply a "least sophisticated consumer" standard. Under that standard, a consumer "may be uninformed, naïve, and gullible," but "her interpretation of a collection notice cannot be bizarre or unreasonable." The 3rd Circuit's view of a "least sophisticated consumer" is one who may be deceived or misled by a communication that might not deceive or mislead a "reasonable consumer." The "unsophisticated consumer" standard, applied in the 7th, 8th, and D.C. Circuits, is functionally the same as the "least sophisticated consumer" standard but more descriptively accurate.

The 10th Circuit, looking to other consumer protection laws and wanting to provide a clear and easily applied standard, determined that the correct measure of materiality is the "reasonable consumer" standard. To apply the standard, a court should "assume the reasonable consumer would read a communication in its entirety and make sense of a communication by assessing it as a whole and in its context." First, the court must answer "whether the reasonable consumer could reasonably interpret the representation to have multiple meanings, one of which is untrue." If the reasonable consumer's interpretation is accurate, then Section 1692e has not been violated because the representation is not misleading. However, if a reasonable consumer could understand a representation as misleading, then the next question in the analysis is "whether the reasonable consumer would have his ability to intelligently respond frustrated."

The *Tavernaro* court reviewed the entire letter to conclude that a reasonable consumer would not be misled as to who sent the letter because its express language made clear that ECMC owns the debt, Pioneer is the debt collector assisting ECMC in collecting the debt, and the letter was an attempt to collect that debt. However, even if a reasonable consumer were misled as to who sent the letter, the appellate court determined that such an interpretation would not frustrate Tavernaro's ability to respond intelligently. A reasonable consumer would not be confused as to whom to contact with questions or concerns about the letter because the letter clearly and repeatedly directed the reader to contact Pioneer.

In light of this case, debt collectors performing collection activities with consumers within the jurisdiction of the 10th Circuit should review the entirety of their debt collection communications and ask themselves the two questions set forth in the *Tavernaro* case. While the answer may be the same as under the "least sophisticated consumer" or "unsophisticated consumer" standards, debt collectors may find this method simpler to understand and apply and, therefore, be better able to minimize risk.

Tavernaro v. Pioneer Credit Recovery, Inc., 2022 U.S. App. LEXIS 21914 (10th Cir. (D. Kan.) August 8, 2022).

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