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RECENT TRENDS IN CONSUMER LITIGATION

In this article, after an overview of the Fair Credit Reporting Act and the Fair Debt Collection Practices Act, the authors turn to Spokeo challenges to standing, developments in consumer class actions, and other recent trends in litigation under the acts.

By David N. Anthony and Timothy J. St. George *

Over the past decade, civil litigation under the Fair Credit Reporting Act ("FCRA") has surged, and putative class actions are being brought under the FCRA with increasing frequency. This article provides an update on recent litigation trends under the FCRA, along with a brief history of the statute. The same is true under the Fair Debt Collection Practices Act ("FDCPA"), which year after year represents the largest source of consumer litigation.

A recognition of such trends can assist the many entities touched by the FCRA and FDCPA – employers, consumers, background screening companies, creditors, debt collectors, and data furnishers – to better access their compliance and avoid the substantial risks of litigation that are presented by those statutes.

I. THE FAIR CREDIT REPORTING ACT

The FCRA governs the collection, assembly, and use of consumer report information in the United States.[1]

Enacted in 1970, the FCRA has since been amended several times. The two most extensive amendments were the Consumer Credit Reporting Reform Act of 1996 (the "1996 amendments") and the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act").

The FCRA regulates the practices of consumer reporting agencies ("CRAs") that collect and compile consumer information into consumer reports for use by credit grantors, insurance companies, employers, landlords, and other entities in making eligibility decisions. The FCRA was enacted to: (1) prevent the misuse of sensitive consumer information by limiting recipients to those who have a legitimate need for it and (2) improve the accuracy and integrity of credit reporting systems. Under the FCRA, CRAs are required to establish procedures to ensure accuracy and legitimacy in reporting, disclose information in their files to consumers, and investigate disputed items.

The Consumer Credit Reporting Reform Act of 1996 expanded the duties of CRAs, particularly in regard to disputes – establishing a time frame for investigations, mandating written notice of the results and adding restrictions on the reinsertion of deleted items. The 1996 amendments also increased the obligations of "users" of consumer reports, particularly employers. Most

[1] The summary that follows has been drawn extensively from the background provided by the Federal Trade Commission in its report: "40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT, an FTC Staff Report with Summary Interpretations" (July 2011).

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significantly, they imposed duties on a new class of entities by introducing requirements related to accuracy and dispute resolution by furnishers of information to CRAs.[2]

The FACT Act bolstered protections against identity theft and its effects. It also ordered agencies to promulgate rules governing the proper disposition of consumer report information, granted consumers the right to request free annual reports, and required businesses to provide copies of relevant records to identity theft victims.

The FCRA imposes liability for willful noncompliance and negligent noncompliance, respectively. In the case of negligent noncompliance, the consumer can recover actual damages, costs, and attorney's fees. In the case of a willful violation, the consumer can also recover statutory damages between $100 and $1,000 per consumer, plus punitive damages. \

II. THE FAIR DEBT COLLECTION PRACTICES ACT

The FDCPA was signed into law by President Jimmy Carter in 1977. It establishes guidelines for how debt collectors may contact consumers and conduct business. According to the text of the law, these guidelines are intended to prevent the use of abusive and deceptive practices.

The FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." The act prohibits the following actions in the conduct of debt collection:

- calling a consumer during hours that the collector is aware are inconvenient to the consumer. Generally, this allows a collector to call between 8 a.m. and 9 p.m., unless they have knowledge to the contrary;
- continuing to contact a consumer after receiving written notice that the consumer wishes no further communication or refuses to pay, with the exception of informing the consumer that collection efforts are being terminated or a lawsuit is being filed;
- continuing to contact a consumer who has requested validation of the debt before mailing the consumer the validation;
- threatening the consumer with violence or arrest;
- publishing a list of consumers who refuse to pay, except to a credit reporting agency;
- advertising the sale of debt to coerce payment of the debt;
- intentionally causing a telephone to ring with the intent to annoy or harass the consumer;
- contacting a consumer's place of employment after having been advised not to by the employer;
- contacting a consumer who is represented by an attorney;
- using abusive or profane language;
- reporting false information on a consumer's credit report or threatening to do so; and
- misrepresenting the debt owed or the identity of the collector.

In addition to these prohibitions, the act requires debt collectors to perform certain actions during the collection process to identify themselves to consumers. The act requires collectors to do the following:

- identify themselves in every communication;
- give the name and address of the original creditor;
- notify the consumer of his or her right to dispute the debt; and

[2] The ensuing years brought a number of more modest revisions, the most significant of which was a 1999 amendment that specifically authorized the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Thrift Supervision, and National Credit Union Administration to promulgate regulations under the FCRA.

- provide verification of the debt.

As originally passed, the FDCPA granted enforcement authority to the Federal Trade Commission. The passage of the Dodd-Frank Act in 2010 transferred this responsibility to the Bureau of Consumer Financial Protection.

Private causes of action are available under the FDCPA. Consumers can recover actual damages, statutory damages up to $1,000, costs, and attorney's fees. Class action litigation is also allowed under the FDCPA, with damages capped at $500,000 or 1% of the net worth of the defendant, whichever is less.

III. CURRENT STATUS OF *SPOKEO* CHALLENGES TO STANDING

In 2016, the United States Supreme Court handed down its now well-known opinion with respect to Article III standing, *Spokeo, Inc. v. Robins*.[3] In *Spokeo*, the Court held that a federal plaintiff must allege an injury in fact, *i.e.*, an injury to a legally protected interest that is both concrete and particularized, even if the cause of action is provided via statute. In the intervening years, courts nationwide have struggled to uniformly apply *Spokeo*. Nonetheless, challenges to standing based on *Spokeo* continue mostly unabated for FCRA, FDCPA, and other types of actions. However, the success of such challenges is mixed and highly dependent on the case law in a given judicial district and the specific asserted claim.

As is discussed in more detail below, challenges to standing remain a prominent tactic in FCRA actions. That is especially true for FCRA actions under the FACT Act amendment ("FACTA") where challenges to standing have gained an especially strong and effective foothold.[4] As one court noted with regards to claims under the FACT Act, "the Seventh and Second Circuits, as well as multiple district courts, have held that under *Spokeo*, a plaintiff does not have standing to pursue a FACTA claim if the plaintiff has not suffered any actual harm or material risk of harm."[5] This close scrutiny of FACT Act cases shows no sign of slowing, as the Ninth Circuit recently joined these other courts in *Bassett v. ABM Parking Servs.*[6] In those types of cases, courts have found that a plaintiff must allege that actual identity theft or harm to the plaintiff's credit occurred as a result of the violation, rather than simply an increased "risk of identity theft."[7] In other words, the alleged injury cannot be speculative but "certainly impending."[8]

Claims under other sections of the FCRA also have come under attack for a potential lack of Article III standing. For example, there have been an influx of recent decisions for claims under Section 1681b(b) (governing required disclosures to consumers) where courts have found that the plaintiff did not allege sufficient injury to meet the standing requirements elucidated in *Spokeo*.[9] In many of these cases, not only must the plaintiff allege a sufficiently concrete and particularized injury, but the injury must also be traceable to the defendant's allegedly violative conduct.[10] A more detailed discussion of these cases is provided in Section VI(A), *infra*.

Challenges to standing based on *Spokeo* have continued in the FDCPA sphere as well, although to a lesser extent compared to the FCRA. Last February, the Sixth Circuit held that two plaintiff debtors did not have standing to bring their FDCPA action because the defendant debt collector's failure to include a disclosure in its collection letter was only a bare procedural violation that caused no real harm to plaintiffs.[11] The Sixth Circuit's decision could spark a renewed interest in

[3] 136 S. Ct. 1540 (2016).

[4] *See Jacobson v. Peter Piper, Inc.*, No. CV-16-0596 (D. Ariz. June 28, 2018) ("Since *Spokeo*, the cases have been trending towards finding no standing for plaintiffs alleging violations of FACTA with no actual harm resulting) (citation omitted); *see, e.g.*, *Daniel v. Nat'l Park Serv.*, 891 F.3d 762 (9th Cir. May 30, 2018); *Taylor v. Fred's, Inc.*, 285 F. Supp. 3d 1247 (N.D. Ala. Feb. 2, 2018); *Gesten v. Burger King Corp.*, No. 17-22541 (S.D. Fla. Sept. 27, 2017) (finding the plaintiff did not allege a sufficient injury arising out of the alleged FACTA violation to confer standing under Article III).

[5] *Gesten*, No. 17-22541.

[6] 883 F.3d 776 (9th Cir. 2018).

[7] *Tarr v. Burger King Corp.*, No. 17-23776 (S.D. Fla. Jan. 5, 2018).

[8] 883 F.3d at 783 (citations omitted).

[9] *See, e.g., Miletak v. General Info. Servs.*, No. 5:17-cv-07022 (N.D. Cal. May 2, 2018) (Sections 1681e(b) and 1681b(b)(3)); *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017) (Section 1681b(b)(2)).

[10] *Miletak*, No. 5:17-cv-07022 (finding the plaintiff's claim that he suffered "loss of employment income and benefits, damage to reputation, embarrassment, humiliation and other . . . emotional distress" due to the defendant's inaccurate reporting was not "sufficient allegations of an injury-in-fact . . . ." because the alleged injuries were conjectural and not fairly traceable to the defendant's conduct).

[11] *Hagy v. Demers & Adams*, 882 F.3d 616 (6th Cir. 2018).

the viability of *Spokeo* challenges in the FDCPA context. In the years following *Spokeo*, many courts found that alleged FDCPA violations resulted in Article III standing for the plaintiff.[12] That has generally held true for alleged violations under Sections 1692e and 1692f.[13] However, as the Sixth Circuit examined in *Hagy*, not all violations of Section 1692e result in actual harm to the plaintiff simply because Congress created a new legal obligation.[14] This appears to be especially true where "Congress [does not] explain why the absence of . . . [the new legal obligation] always creates an Article III injury."[15] These conflicting decisions suggest courts are still having trouble consistently interpreting *Spokeo*.

However, litigants should not expect the Supreme Court to step in to settle the developing circuit and district splits any time soon. In January 2018, the Court declined to again grant *certiorari* in *Spokeo* following the Ninth Circuit's subsequent decision on remand that the plaintiff had standing under the additional guidance supplied by the Supreme Court.[16]

IV. CONSUMER CLASS ACTION DEVELOPMENTS

Class action litigation under both the FCRA and FDCPA remains frequent. Two recent developments from the Supreme Court with respect to procedural class action issues are important to litigation under both provisions and are already affecting the way in which defendants approach such cases.

A. *Bristol-Myers Squibb Co. v. Superior Court of California.*

The first development is the Supreme Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California*.[17] In *Bristol-Myers*, a group of plaintiffs, consisting of 86 California residents and 592 residents from 33 other states, brought product liability claims in California state court against an out-of-state defendant. The California Supreme Court held that there was no general personal jurisdiction over the defendant, but applied a "sliding scale" to find that there was specific personal jurisdiction for the claims alleged by the non-resident plaintiffs. On appeal, the United States Supreme Court applied "settled principles" regarding specific personal jurisdiction to hold that a state court's attempt to exercise jurisdiction over claims by non-resident plaintiffs against a non-resident defendant violated the Due Process Clause of the Fourteenth Amendment.

Since the *Bristol-Myers* decision, lower federal courts have reached differing conclusions regarding whether the holding should be extended to class actions or is only applicable to mass tort and product liability actions or in state court. For example, in *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*,[18] the court held that the reasoning of *Bristol-Myers* (*i.e.*, that individual plaintiffs each had to have standing in a mass action tort case) was not applicable to class action cases, where class members are present in a representative capacity. In contrast, in *DeBernardis v. NBTY, Inc.*,[19] the court ruled that the reasoning of *Bristol-Myers* applied to class action cases, meaning that the court lacked personal jurisdiction over the claims asserted by putative out-of-state class members against the defendants. Courts continue to sort through these issues, but *Bristol-Myers* is a potential weapon for use by defendants in the context of nationwide class actions filed outside the defendant's principal place of business or state of incorporation, and it is being used by at least some

[12] *See, e.g., Byrne v. Or. One, Inc.*, No. 3:16-cv-01910 (D. Or. July 18, 2017) (collecting cases and noting "successful post-*Spokeo* standing challenges to FDCPA claims are a small minority."); *see also Hernandez v. Midland Credit Mgmt.*, No. 15-CV-11179 (N.D. Ill. July 13, 2017) (exploring district courts' treatment of challenges to standing in the context of FDCPA actions in the Seventh Circuit and finding that many courts "uniformly conclude that FDCPA claims satisfy *Spokeo*'s standing requirements.").

[13] *See, e.g., Papetti v. Doe*, 691 Fed. Appx. 24 (2d Cir. 2017) (unpublished) (Section 1692e and 1692g claims "entail the concrete injury necessary for standing.") (citation and internal quotation marks omitted); *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685 (8th Cir. 2017) (finding that in enacting Section 1692f, "Congress created a statutory right to be free from attempts to collect debts not owed, helping to guard against identified harms."); *Napolitano v. Ragan & Ragan*, No. 15-2732 (D.N.J. Aug. 17, 2017) ("When considering violations of § 1692e in general, the trend favors finding concrete injury under the FDCPA where violations of the statute have been alleged.").

[14] 882 F.3d at 622–23.

[15] *Id.* at 622 (emphasis in original) (alteration added).

[16] *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017), *cert. denied*, *Spokeo, Inc. v. Robins*, 138 S. Ct. 931 (2018).

[17] 137 S. Ct. 1773 (2017).

[18] No. 17-cv-564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).

[19] No. 17-cv-6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018).

courts in that manner to police and strike down forum shopping.[20]

B. *China Agritech v. Resh*

The Supreme Court's second recent important development in class action litigation concerns a 2018 decision in *China Agritech v. Resh*.[21] In that case, the Supreme Court resolved a split among the Circuit Courts as to whether a plaintiff who files a subsequent class action against a defendant can receive the benefit of statute of limitations tolling from a previous class action against that same defendant. Under the Supreme Court's previous decision in *American Pipe & Construction Co. v. Utah*, the Court held that the filing of a class action tolls the limitations period for the individual claims of a purported class member if those claims fall within the scope of the pending class action. In *China Agritech*, the Court addressed whether the tolling effect of *American Pipe* is limited to claims asserted in a subsequent individual (non-class) case or whether a plaintiff who asserts a subsequent class action can receive the benefit of *American Pipe* tolling on behalf of the entire purported class.

Specifically, in *China Agritech*, shareholders of the defendant filed a putative class action alleging that the company committed securities fraud. China Agritech moved to dismiss, arguing that the putative class action was untimely because the shareholders filed it after the applicable two-year limitations period had lapsed. In response, the plaintiffs argued that, under *American Pipe*, the lawsuit was timely because the limitations period was tolled during the pendency of two earlier-filed class actions against the same defendants based on the same underlying events.

The district court granted China Agritech's motion to dismiss, finding that the putative class action was untimely. The Ninth Circuit, however, reversed the district court's decision, reasoning that the Supreme Court adopted its tolling rule in *American Pipe* to "promote economy in litigation." In the Ninth Circuit's view, if successive class actions do not receive the benefit of tolling, plaintiffs will begin filing multiple simultaneous class actions to avoid a potential statute of limitations defense in the future. The federal appellate courts had previously split on the issue. The First, Second, Third, Fifth, Eighth, and Eleventh Circuits had held that *American Pipe* tolling only tolls the limitations period for subsequent individual (non-class) claims. In contrast, the Sixth, Seventh, and Ninth Circuits had held that *American Pipe* allows for tolling of individual and class claims in subsequent class actions.

The Supreme Court resolved this split. According to the Supreme Court, "*American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action." In the Court's view, it makes practical sense to allow a previous class action to toll the statute of limitations from running on subsequent individual claims. If this type of tolling did not exist, courts might receive multiple individual lawsuits from purported class members during the pendency of a class action just to ensure the limitations period does not run against them. This would be inefficient. After all, if class certification is granted, then those individual claims would proceed on a class basis. As a result, the Court believed that tolling individual claims until resolution of class certification is in the interest of efficiency and economy. The Court reasoned, however, that there is no analogous "efficiency" rationale to allowing *American Pipe* to toll the limitations period on claims asserted in a subsequent class action. According to the Court, "efficiency favors early assertion of competing class representative claims," with a determination at the outset of the case as to the viability of the class mechanism to resolve the claims. This is consistent, in the Court's view, with Rule 23's "preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on."[22] Allowing tolling in subsequent class claims would encourage potential named plaintiffs to "piggyback" by waiting to see the outcome of a previous class case. It would also effectively "allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation."[23]

The Supreme Court's decision in *China Agritech* is a significant win for defendants. If a defendant successfully defeats class certification in a lengthy litigation, that may foreclose subsequent class actions on the same issue because, without tolling, those class members' claims may become time-barred.

V. RECENT TRENDS IN FCRA LITIGATION

Many important decisions in cases brought under the FCRA were handed down in the last year, but two areas

[20] *Mussat v. IQVIA Inc.*, No. 17C8841, 2018 WL 5311903 (N.D. Ill. Oct. 26, 2018).

[21] 138 S. Ct. 1800 (2018).

[22] *Id.* at 1802.

[23] *Id.* at 1808.

in particular saw key developments: standing and the pre-adverse action requirements.

A. Standing

As noted above, standing under Article III and *Spokeo* continues to play a critical role in FCRA litigation. Courts continue to grapple with the standing issue in the face of statutory violations of the FCRA. Several key decisions over the past year have illustrated the importance of the plaintiff having suffered a concrete injury to bring suit.

In *Dutta v. State Farm Mutual Automobile Insurance Co.*,[24] the plaintiff claimed State Farm had made an adverse employment decision based on his credit report before giving him the chance to dispute the accuracy of that report. However, the Ninth Circuit found he lacked standing because accurate information on his report disqualified him from employment. State Farm presented evidence of its hiring criteria clearly establishing that the plaintiff was not qualified for the job. Therefore, "all of the inaccuracies or explanations [the plaintiff] wanted to present" were immaterial. As a result, he had not suffered actual harm or a material risk of harm sufficient to confer Article III standing.

Similarly, in *Black v. General Information Solutions Inc.* ("GIS"),[25] plaintiff alleged that an inaccurate background report furnished by the defendant background screening company caused him to miss out on a job opportunity. The evidence showed that the background screening company corrected its report after a dispute and the employer continued the application process, requesting references from the plaintiff. However, plaintiff never provided those references, so he was not considered for the job. The District Court for the Northern District of Ohio raised the issue of standing *sua sponte*. Because the plaintiff had missed out on a job opportunity based on his own failure to provide the requested references, the court found that it was "apparent" that the plaintiff had not "suffered any such harm as a result of GIS' alleged violation of the FCRA." With no injury resulting from the report, plaintiff lacked standing to bring a suit.

In *Ratliff v. A&R Logistics, Inc.*,[26] the District Court for the Northern District of Illinois confirmed that even if an employer fails to follow the proper pre-adverse action procedure, an applicant may not have standing to bring an adverse action claim if the background check at issue is accurate. The court rejected the plaintiff's argument that he had suffered an "informational injury," because the defendant was not disseminating any inaccurate information.

In *Groshek v. Time Warner.*,[27] the Seventh Circuit affirmed the district court's dismissal of a putative class action on the basis of Article III standing. Plaintiff alleged that Time Warner's background check and authorization form violated the FCRA because it contained extraneous information. However, the complaint "contained no allegation that any of the additional information caused him not to understand the consent he was given; no allegation that he would not have provided consent but for the extraneous information on the form; no allegation that additional information caused him to be confused; and no allegation that he was unaware that a consumer report would be procured." Because he had alleged nothing more than a statutory violation, his claims were dismissed.

Interestingly, the District Court for the Southern District of Indiana in *Robertson v. Allied Solutions, LLC*,[28] refused to approve the parties' class action settlement because the plaintiff lacked standing. She had alleged only a statutory FCRA violation and did not allege that she did not understand her rights under the FCRA. Moreover, she also failed to allege that she had any information that would have changed Allied Solutions' decision to revoke her employment had she been afforded the opportunity to dispute the results of her background check. Despite the parties' settlement, the court dismissed plaintiff's complaint and declined to give her an opportunity to amend it.

B. Initial Grades and Pre-Adverse Action Requirements

A highly litigated area of the FCRA has been the timing of pre-adverse action requirements. Under 15 U.S.C. § 1681b(b)(3), when an employer intends to take an adverse action against a job applicant based on a background check, it must follow a pre-adverse action protocol. This requires the employer, before taking any adverse action, to provide the applicant with a copy of the background check and a summary of rights. Plaintiffs have been advancing the theory that the initial grade assigned to an applicant constitutes an adverse action, meaning the pre-adverse action requirements

[24] No. 16-17216 (9th Cir. July 13, 2018).

[25] No. 1:15cv1731 (N.D. Ohio Feb. 26, 2018).

[26] No. 17cv2787 (N.D. Ill. Feb. 28, 2018).

[27] 865 F.3d 884 (7th Cir. 2017).

[28] No. 1:15-cv-1364 (S.D. Ind. Oct. 10, 2017).

should have already been satisfied. Courts have so far been reluctant to embrace this theory.

For example, in *Reid v. The Kroger Co.*,[29] Kroger initially graded the plaintiff as "not clear for hire" and sent her a pre-adverse action letter based on a conviction for felony assault appearing on her background check. Plaintiff alleged this preliminary grade was an adverse action, and was thus taken in violation of the FCRA. The District Court for the Southern District of Ohio rejected this argument, finding instead the grade was only preliminary. Kroger presented evidence showing that the preliminary grade was subject to change and plaintiff remained under consideration for hire pending the resolution of her dispute. Therefore, Kroger had not violated the FCRA in making a preliminary grade.

Similarly, in *Culberson v. Walt Disney Parks and Resorts*,[30] plaintiffs asserted that Disney's coding of an applicant as "no hire" in its hiring system constituted adverse action. The state court in California rejected plaintiffs' claims that this coding triggered the pre-adverse action requirements. Instead, the "no hire" coding did not constitute an adverse action because it was simply an "internal decision." An employer is permitted to make an internal decision regarding an applicant without that internal decision constituting an adverse action. Therefore, Disney did not violate the FCRA by creating an internal "no hire" coding before sending out pre-adverse action letters.

Likewise, in *Branch v. Geico*,[31] plaintiff was assigned a preliminary "Fail" grade based on her background report. At the summary judgment stage, the District Court for the Eastern District of Virginia ruled the preliminary grade could constitute an adverse action depending on the facts. For instance, plaintiff claimed a representative of GEICO rescinded her offer of employment over the phone based on the preliminary grade. However, at the class certification stage, the court acknowledged that "assigning a 'Fail' grade does not violate Section 1681b(b)(3)(A) unless an applicant is, contrary to the Adjudication Process, denied a legitimate opportunity to cure the deficiency causing that grade."[32] Therefore, plaintiff's claims were not typical of the class she sought to represent. Nor could she satisfy the predominance requirement. Therefore, the court denied the plaintiff's motion for class certification.

These recent FCRA decisions highlight the importance of thoroughly developing the facts relevant to defenses to a claim. Defendants have been able to prevail on standing grounds at the summary judgment stage when the record clearly demonstrates that plaintiff could not have suffered an actual injury even in the face of a statutory violation. Likewise, defendants fighting alleged pre-adverse action violations can prevail if the record clearly demonstrates the action at issue was preliminary and subject to change. Moreover, the decisions also underscore the importance of having guidelines in place and adhering to those guidelines, as that can be used as evidence to support the above arguments.

VI. RECENT TRENDS IN FDCPA LITIGATION

FDCPA litigation has continued at a steady pace in 2018 throughout the country. While Circuit Courts of Appeals have started to provide clarity on some of the trends from 2017, new theories are constantly being tested. In addition, courts continue to address threshold applicability issues which, in certain instances, can expand potential FDCPA liability.

A. Threshold Issues of Applicability

As noted above, the FDPCA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." In *Norman v. Allied Interstate, LLC*,[33] a debt buyer argued that it was not a debt collector under the FDCPA because its business was purchasing defaulted debts, not collecting them. The Eastern District of Pennsylvania rejected this argument, finding that the plaintiff alleged the debt buyer's principal purpose was to collect debt and this principal purpose was evidenced through collection letters stating the debt was being collected on behalf of the debt buyer. While debt buyers were able to take some solace in the Supreme Court's decision in *Henson v. Santander Consumer USA Inc.*,[34] the Court's holding in *Henson* was limited to situations where the debt buyer had been alleged to be a debt collector under the definition "regularly collects or attempts to collect, directly or indirectly, debts owed . . . [to] another." *Henson*

[29] No. 1:16-cv-815 (S.D. Ohio Mar. 15, 2018).

[30] No. BC526351 (Superior Court of California, L.A. County, Feb. 9, 2018).

[31] 323 F.R.D. 539 (E.D. Va. Jan. 10, 2018).

[32] *Id.* at 551.

[33] Case No. 2:17-cv-05181, No. 15 (E.D. Pa. May 25, 2018).

[34] 137 S. Ct. 1718 (2017).

declined to decide whether debt buyers were debt collectors under the "principal purpose" definition.

B. Tax Consequence Language

Another issue that has been hotly litigated throughout 2018 is the inclusion of "tax consequence" language on collection letters. Decisions on acceptable use of tax consequence language differ throughout the country and the main takeaway for debt collectors is to use the language "at your own risk." Debt collectors should be familiar with the case law in the jurisdictions in which they are collecting debts in order to ensure the language they are using is acceptable.

In general, courts have found that general language indicating settlement offers may have tax consequences does not violate the FDCPA. For example, in *Rozzi v. Financial Recovery Services, Inc.*,[35] the Western District of New York found the following language to be acceptable:

> These settlement offers may have tax consequences. We recommend that you consult independent tax counsel of your own choosing if you desire advice about any tax consequences which may result from this settlement. FRS is not a law firm and will not initiate any legal proceedings or provide you with legal advice. The offers of settlement in this letter are merely offers to resolve your account for less than the balance owed.

Earlier this year, the Eastern District of New York reached a similar conclusion in *Ceban v. Capital Management Services, L.P.*[36] In *Ceban*, the court held that the following language – "[t]his settlement may have tax consequences" – did not violate the FDCPA. According to the court, the language was not deceptive or misleading and the defendant's "decision to alert Plaintiff to something he should consider without wading into the technicalities of an issue about which it has no expertise is perfectly in keeping with the FDCPA's goal of enabling the consumer to 'understand, make informed decisions about, and participate fully and meaningfully in the debt collection process.'"

C. "Current Balance" Cases

In March 2018, the Second Circuit rendered a long-awaited opinion in *Taylor v. Financial Recovery Services, Inc.*[37] In *Taylor*, the Second Circuit addressed what is commonly called a "reverse-Avila" or "current account balance" case, and held that it is not a violation of the FDCPA for a debt collector to state a consumer's balance without mentioning interest or fees, when no such interest or fees are accruing.

In the underlying case, plaintiffs argued that the collection letters they received were misleading because they did not expressly state that no interest and fees were accruing. Plaintiffs relied heavily on the Second Circuit's holding in *Avila v. Riexinger & Assocs., LLC*,[38] where the court held a debt collection letter violates the FDCPA if it states a "current balance" of a consumer's debt without disclosing that interest and fees are accruing on that balance, when they are in fact accruing such that paying the balance listed on a letter would not pay a debt in full. The district court granted summary judgment in *Taylor* in favor of the debt collector and plaintiff appealed.

On appeal in *Taylor*, the Second Circuit affirmed the district court, noting that no interest or fees were accruing, so the balances included in the collection notices sent to the plaintiffs correctly stated the payment needed to satisfy the debt in full, and that no language regarding interest and fees was required. Unlike *Avila* where the court found the message prejudicially misleading, in *Taylor* prompt payment of the stated balance would have satisfied the plaintiffs' debts. The Second Circuit further held that if there is no interest and fees accruing on the balance, then collection notices are not misleading and the balance is accurately stated. Conversely, if interest and fees are accruing and no disclosure is given in the notice, then it would run afoul of both sections 1692e and 1692g.

Following the *Taylor* decision, district courts in the Second Circuit have dismissed attempts to revive reverse-*Avila* claims. For example, on March 22, 2018, the Eastern District of New York granted summary judgment to a collection agency in *Polizois v. Vengroff Williams, Inc.*,[39] and found no violation of the FDCPA because the debt collector did not have to notify the consumer that her balance may increase.

In granting the defendant's summary judgment motion, the *Polizois* court confirmed the affirmative duty to disclose when a balance accrues interest and/or fees, under *Avila*; however, the court noted that the plaintiff

[35] No. 16cv6391, 2018 U.S. Dist. LEXIS 44540 (W.D.N.Y. Mar. 19, 2018).

[36] *See, e.g.*, No. 17-cv-4554 (E.D.N.Y. Jan. 17, 2018).

[37] No. 17-cv-1650 (2d Cir. Mar. 29, 2018).

[38] 817 F.3d 72 (2d Cir. 2016).

[39] No. 16-cv-7011 (E.D.N.Y. Mar. 22, 2018).

failed to provide any authority that a debt collector must provide the disclosure when in fact the balance remained "static."

The Eastern District of New York also recently ruled that a debt collector's inclusion of the "safe harbor" language from *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark*,[40] should insulate a debt collector from liability if that language is included when interest and fees are accruing. In *Timoshenko v. Mullooly, Jeffrey, Rooney & Flynn, LLP*,[41] the Eastern District of New York dismissed a claim, finding that use of the *Miller* language, which is considered "safe harbor language" in its collection letter, did not violate the FDCPA. In granting the debt collector's motion, the court made clear that the language at issue with the plaintiff was the very language that the Second Circuit previously identified as a "safe harbor" provision and thereby shielded the debt collector from any liability.

D. Overshadowing Claims

A final trend to note through 2018 is the continued attempt by the plaintiff's bar to challenge validation notices in collection letters. Particularly in the Third Circuit, there have been a flurry of cases on this issue. In these cases, plaintiffs are typically challenging the debt collector's inclusion of a telephone number in a validation letter. Plaintiffs claim this overshadows the validation notice.

In *Reizner v. National Recoveries, Inc.*,[42] the District of New Jersey granted a debt collector's motion to dismiss a class action asserting this claim by finding the validation notice in the collection letter was not overshadowed or contradicted by other language in the letter. In the second paragraph, in the letter at issue, the debt collector included the following validation notice:

> Unless you notify this office within 30 days after receiving this notice that you dispute the validity of the debt, or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice, that you dispute 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 you a copy of such verification or judgment. Upon your written request within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

The letter also provided a telephone number, fax number, and e-mail address to which complaints, questions, or concerns could be submitted. The court rejected the plaintiff's argument that the validation notice was overshadowed or contradicted, and found that the validation notice appeared in the first two paragraphs, preceded the debt collector's address and telephone number, did not expressly state that the plaintiff should call to contest the debt, and was in bold typeface and set off from the rest of the letter.

Recently, another District of New Jersey decision reached the same result in *Robinson v. Northland Group, Inc.*[43] In *Robinson*, the plaintiff challenged the letter's language, stating "[s]hould you have any questions regarding this account, please feel free to call us at 866-277-9745 . . . ." and "[w]e look forward to hearing from you." Plaintiff claimed this language overshadowed and contradicted the rights laid out in the validation notice section. The court rejected this argument, finding that "the debt collection letter adequately informs plaintiff how to dispute her debt in compliance with the requirements of the FDCPA." Importantly, the court also noted that its review of the relevant precedents in the Third Circuit did not create a "*per se* rule barring a debt collector from encouraging oral communication."[44]

Many of the recent FDCPA decisions present a continuing reminder that careful attention should be paid to the language used in collection letters, especially across differing jurisdictions. Debt collectors and debt buyers should pay close attention to all their letters, but especially in areas such as the Second and Third Circuits, where FDCPA litigation continues to see increased activity. ■

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[40] 214 F.3d 872 (7th Cir. 2000) (the "safe harbor" language is that the collection notice should either "accurately inform the consumer that the amount of the debt stated in the letter will increase over time, or clearly state 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.").

[41] No. 17-cv-4472 (E.D.N.Y. Mar. 30, 2018).

[42] No. 2:17-cv-2572 (D.N.J. May 2, 2018).

[43] No. 1:17-cv-12023 (D.N.J. July 18, 2018).

[44] *Id.* at *18.