

# PUBLICATION

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## **CFPB: Incorrect Representations Regarding Debt Amounts are Actionable, Even if Made to a Consumer's Lawyer**

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**In a recent amicus curiae brief to the U.S. Court of Appeals for the Eighth Circuit, the Consumer Financial Protection Bureau (CFPB) took the position that a debt collector violates the Fair Debt Collection Practices Act (FDCPA) when it incorrectly represents the amount of debt it is attempting to collect, regardless of whether the debt collector is communicating with a consumer or the consumer's attorney. The CFPB's position and the Eighth Circuit's ruling could have far-reaching implications for the financial services industry.**

The CFPB amicus brief followed a ruling by the District Court for Minnesota, which held that because the debt collector's alleged misrepresentation was sent to the consumer's attorney, the higher "competent attorney" standard – and not the lower "unsophisticated consumer" standard – would apply. Accordingly, the District Court reasoned, the consumer's attorney would look into the amount of debt and make an appropriate challenge if the amount were incorrect, making the alleged misrepresentation not actionable under the FDCPA (15 U.S.C. § 1692 et seq.). On appeal, the CFPB argued that the District Court couldn't have gotten the opinion more wrong.

### **Case Background**

The facts of the case center around Appellant Brianna Johnson's (Johnson) past unpaid credit card debt with Wells Fargo Bank, N.A. According to the CFPB brief, Wells Fargo stopped adding interest and charged off Johnson's debt in 2010, allegedly waiving the right to collect interest under the Card Agreement. At that point, Johnson's account had accrued \$4,953.47 in debt.

Appellee Admiral Investments, LLC (Admiral) eventually acquired Johnson's debt and sent her a collection letter in 2012, seeking almost \$7,500 to account for interest, late and other charges. Johnson subsequently retained counsel. Admiral sent Johnson's counsel a letter in 2015, alleging that the debt had swelled to almost \$11,000. Admiral subsequently filed suit against Johnson in Minnesota state court in 2016, seeking to collect the original debt amount of \$4,953.47.

On February 23, 2016, Johnson filed suit against Admiral in federal court, alleging violations of the FDCPA. Specifically, Johnson contended that the letters sent from Admiral constituted a false representation of the character, amount or legal status of her debt. Admiral subsequently filed a motion to dismiss, arguing that the claims were time-barred, that Johnson lacked standing and that her Complaint had failed to state a claim under Rule 12(b)(6).

After finding that Johnson's claims regarding the second letter were not time-barred, the District Court held that the second letter, sent to Johnson's attorney, was not actionable under the FDCPA because the competent lawyer standard required Johnson's counsel to look into whether the amount asserted was correct and take action if the amount was incorrect. Because the alleged misrepresentation was "based on a legal interpretation and contained in a letter" to Johnson's counsel, the competent attorney standard shielded Admiral from violating the FDCPA. The District Court subsequently granted the motion to dismiss; Johnson then appealed to the Eighth Circuit.

## CFPB Brief

In its brief, the CFPB argues that the difference between the "unsophisticated consumer" and "competent attorney" standards has zero impact on an alleged misrepresentation regarding the amount of debt by a debt collector. As argued by the CFPB, the FDCPA has "no exception for misrepresentations" made to competent lawyers and a debt collector "cannot avoid its statutory responsibility to represent accurately the amount of a debt by shifting the burden to a consumer's counsel to uncover the falsehood." In other words, a misrepresentation regarding an amount of debt is still a misrepresentation, regardless of the recipient.

In support of its argument, the CFPB cited to decisions in the Seventh, Tenth and Eleventh Circuits, all of which have declined to extend the "competent attorney" standard to shield debt collectors from facially false statements to consumers' counsel. Essentially, the CFPB argued, regardless of whether the District Court applied the "competent attorney" standard or "unsophisticated consumer" standard, it reached the wrong conclusion in dismissing Johnson's claim for violations of the FDCPA.

## Impact

Because the unforgiving FDCPA is akin to strict liability, debt collectors and other creditors seeking to recover past due accounts need to take extra caution in calculating the proper amount of debt owed. Debt collectors would be wise to implement safeguards or engage counsel to ensure the amounts sought are not prohibited by the laws of the consumers' respective states – i.e., interest on interest in certain states.

According to the CFPB, debt collectors and other entities should be held liable for incorrectly representing the amount in communications to both consumers and their respective counsel.

The CFPB's position, if upheld by the Eighth Circuit (and potentially other courts), thus puts all debt collectors on notice to be cautious when dealing with a debtor's counsel. Accidentally providing an incorrect amount to the debtor's counsel will result in an FDCPA violation, probable litigation and a potentially heavy fine.