CLIENT ALERTS & INSIGHTS

Bay Area Credit Defeats FDCPA Claim: Fifth Circuit Affirms Covered "Communications" Must Convey Information Regarding a Debt

MARCH 9, 2021

The Fifth Circuit's decision in Fontana v. Bay Area Credit Services, No. 20-30471 (5th Cir. 2021) sets another important limitation on the scope of covered "communications" under the FDCPA. In this case, Bay Area Credit Services was attempting to collect a debt from Zachary Fontana. Bay Area called Fontana's sister, though was trying to contact Fontana. When Fontana's sister asked who was calling, Bay Area identified itself, gave the typical explanation that it was trying to contact Fontana regarding a "personal business matter," and gave a contact number for Fontana to call. Standard operating procedure under the Fair Debt Collection Practices Act.

But that didn't stop Fontana from suing Bay Area. The FDCPA provides that a debt collector "may not communicate, in connection with the collection of any debt, with any person other than the consumer" or certain other prescribed parties "without the prior consent of the consumer." There are a few important exceptions to this, like when a debt collector contacts a third-party to try and obtain "location information" on the debtor, including the debtor's phone number. But even then, a debt collector must follow a specific protocol, including identifying itself, not state that the consumer owes a debt, and may not communicate with that third-party more than one.

Bay Area's call checked all three boxes, right? The call agent identified Bay Area, did not state that Fontana owed a debt and only that Bay Area was trying to contact him regarding a "business matter," and only called Fontana's sister once. The district court thought so, and dismissed the case.

Fontana appealed up to the Fifth Circuit, making some creative arguments as to why Bay Area failed to comply with the requirements of the location information exception. For example, Fontana argued that Bay Area called Fontana's sister intending to contact Fontana, not merely to confirm his phone number, and asked to speak with him. And instead of simply obtaining location information, Bay Area left a message with instructions for Fontana to return its call.

Now, Fontana's arguments probably would (should) have failed specifically in the context of the location information exception, but the Fifth Circuit didn't even get that far. Instead, the Fifth Circuit started with the threshold issue of whether the conversation was subject to the FDCPA. This is because the FDCPA does not cover any and all communications with a third-party, but only communications that convey "information *regarding a debt* directly or indirectly." The Fifth Circuit held that merely conveying the name of the debt collector did not convey any information regarding, or necessarily imply the existence of, a debt, nor did simply stating that the agency was calling regarding a personal business matter. (Can you imagine how potentially disastrous that would have been if the Court concluded otherwise?!)

The Court did note that if Bay Area had conveyed *more* information--such as identifying itself as a debt collector--then the substance of the call likely would have been a covered communication under the FDCPA. But Bay Area didn't. So, the Fifth Circuit concluded that the limited information Bay Area provided during the call did not make it a "communication" subject to the FDCPA in the first place, and didn't even have to address Fontana's creative arguments as to why the call supposedly ran afoul of the FDCPA's third-party communication provision.

Key takeaway from *Fontana*: When speaking with third-parties, always try to convey the minimal amount of information legally necessary. It's a lot easier to win an FDCPA claim when all you need to show is that the conversation wasn't covered by the FDCPA in the first place, rather than trying to tackle some odd or creative argument alleging some spurious technical violation.

For more information on this topic, contact David M. Krueger at dkrueger@beneschlaw.com or 216.363.4683.