

Massachusetts Collection Procedure: Recent Decisions of Interest to Collectors

Main Contact(s)

John J. O'Connor

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By John J. O'Connor on June 29, 2017

Two recent decisions construing a provision of Massachusetts collection-law procedure should be of interest to collectors who contact consumers in Massachusetts. The subject provision is a regulation issued by the Massachusetts Division of Banks that requires publication of the following notice in collection letters to consumers:

NOTICE OF IMPORTANT RIGHTS. YOU HAVE THE RIGHT TO MAKE A WRITTEN OR ORAL REQUEST THAT TELEPHONE CALLS REGARDING YOUR DEBT NOT BE MADE TO YOU AT YOUR PLACE OF EMPLOYMENT. ANY SUCH ORAL REQUEST WILL BE VALID FOR ONLY TEN DAYS UNLESS YOU PROVIDE WRITTEN CONFIRMATION OF THE REQUEST POSTMARKED OR DELIVERED WITHIN SEVEN DAYS OF SUCH REQUEST. YOU MAY TERMINATE THIS REQUEST BY WRITING TO THE DEBT COLLECTOR.

209 CMR 18:14(1)(e). In *Krieger v. Financial Recovery Serv., Inc.*, 1:16-cv-01132, slip. op., (E.D. N.Y. 2016), the collector's collection form included this notice under the heading "Additional Information for Massachusetts Residents." The plaintiff alleged that the inclusion of the Massachusetts notice in the letter violated the federal Fair Debt Collection Practices Act ("FDCPA") because it allegedly misstated his rights under the FDCPA, and therefore was confusing and misleading. The Court rejected this argument, reasoning that the notice was not confusing because the letter made clear the notice was for Massachusetts residents, and also because it explained that the state-specific provisions it included "did not contain a complete list of the rights consumers have under Federal, State, or local laws." Further, the use of uppercase letters was not violative. Finally, the Court said that the fact that the FDCPA, unlike the Massachusetts regulation, did not mandate a notice of such rights did not constitute a violation, and that any contrary ruling would effectively read a new requirement into the FDCPA. After disposing of the plaintiff's other argument, the Court concluded that the suit should be dismissed.

In *Ensminger v. Fair Collections & Outsourcing, Inc.*, 2016 WL 6905882 (D. Kan. 2016), the result was different. There, the plaintiff complained that the Massachusetts collection notice was misleading because, unlike most of the other state-specific notices included in the demand, it was in bold, uppercase letters, and indented, and could be misunderstood as applying to all consumers, not just Massachusetts residents. The notice appeared under the heading "MASSACHUSETTS," but was not supplemented by other clarifications like the notice in *Krieger*. The Court reasoned that, because of the distinct formatting of the notice and the lack of any statement that it only applied to Massachusetts residents, the notice could mislead the least sophisticated consumer. The Court denied the collector's motion to dismiss.

The takeaway from these decisions for collectors is that all collection letters that include this mandatory Massachusetts notice should make sure that: (1) the notice is in the same format with the same typeface as all other such state-law notices; (2) the letter states that the Massachusetts notice applies only to Massachusetts residents; and (3) the letter says that state notices do not include a complete list of all of the rights consumers have under federal, state, and local laws. Letters meeting these requirements should withstand the sort of claims asserted in the *Krieger* and *Ensminger* cases, and provide grounds

for a motion to dismiss.