CCEF Alert: Describing the Creditor

The form complaints you've used with success for the past few years may be out of date. This year, courts have handed down increasingly broad interpretations of the FDCPA (42 U.S.C. § 1692g) regarding chain of title. It's easy to grow complacent with your forms, but it's important that attorneys adapt them to conform with these changes.

On its face 1692g only requires you to provide the "name of the creditor." However, the growing trend among liberal judges and/or judges posed with bad fact scenarios is to hold that a complaint clearly describe who owns the debt and debt's chain of title from original creditor to current holder. While this additional information may seem unnecessary if you are used to simpler "notice pleading," this heightened pleading requirement is the new trend in bad decisions. At the state level, New Jersey, Maryland, and California already have statutes that require litigants to plead chain of title. In most states auto loan litigation has required that chain of title be pleaded for some time. Courts have now expanded this requirement to the debt buying scenario. (whether or not the debt is in default.)

In a July 15, 2013 case out of S.D. Cal., *Heathman v. Portfolio Recovery Assocs., LLC*, 2013 U.S. Dist. LEXIS 98742, the court held that the "least sophisticated consumer" will be *per se* confused if you do not provide the name of the original creditor in your complaint.

The defendant PRA used a form complaint and did mention generally that there was a "predecessor" who owned the debt before them, but it never named the original creditor specifically. Compounding that, it referred to the "predecessor" and itself interchangeably as the plaintiff.

The court provides a few examples of why this is confusing to the unsophisticated consumer:

> [W]ithout the true identity of the original creditor, the least sophisticated consumer is left unable to verify the debt purportedly owed, much less attempt to resolve that debt directly and extrajudicially....So too, the least sophisticated consumer could assume the lone party identified, PRA, to be the original creditor, yet knowing she in fact owes no debt to PRA, choose to ignore the case entirely as an obvious mistake likely to sort itself out....Or, again given apparent mistake, the least sophisticated consumer could misapprehend the complexity of and risks posed by the claims alleged, reason that no attorney is necessary, and to her detriment opt to proceed pro se.

Simply providing the names of the creditors isn't enough – they have to be clearly stated. In *Janetos v. Fulton Friedman & Gullace, LLP*, 2013 U.S. Dist. LEXIS 29655 (N.D. Ill.

Mar. 4, 2013), the court held that even where the collector provides all of the information regarding the original creditor, if it is in a confusing format, it may be a violation.

FF&G was a collections agency for Asset Acceptance, LLC, who in turn was the assignee of various banks. FF&G sent demand letters, from FF&G, which stated, for example:

> Re: Asset Acceptance, LLC Assignee of CAPITAL ONE BANK, NA
> Original Creditor Acct #: XXXXXXXXXXXX3984
> Fulton, Friedman & Gullace, LLP Acct #: XX-XX3986
> Balance Due: $7187.26

Even though the court said it was "skeptical that FF&G's letters would confuse an unsophisticated consumer, let alone in any material way," it also noted that confusion was an issue of fact. FF&G's letters did not "expressly identify which entity currently owns the purported debts—the headers contain various information, including references to both Asset Acceptance and FF&G, but do not actually label either entity as the owner of the purported debts." In other words, simply dumping the information on the consumer isn't enough; the categories of information need to be well-labeled.

Finally, don't use weird abbreviations. In *Eun Joo Lee v. Forster & Garbus LLP*, 2013 U.S. Dist. LEXIS 28534 (E.D.N.Y. Mar. 1, 2013), the defendant, debt buyer, referred to itself as "NCOP XI, LLC A/P/O CAPITAL ONE." The court noted with disfavor:

> There is nothing identifying the relationship of either NCOP or Capital One to the debt and the Collection Letter does not explain why these entities appear in the letter. The court is also unaware of any commonly understood meaning of "A/P/O" and Defendants do not define the term in the Collection Letter or their motion papers.

The lesson for creditors, agencies, and attorneys: write your letters and pleadings for the unsophisticated audience, and put the unabbreviated names of the original creditor and current owner of the debt in bold headings.

By Jay Winston and Anthony Niescier, Winston & Winston, P.C.
Winston & Winston, P.C. is a New York City law firm which regularly engages in FDCPA defense and compliance work, and is a member of CCEF, NARCA, and ACA.