THE CFPB HAS PURSUED LAWSUITS, AS WELL AS FORMAL ENFORCEMENT ACTIONS, CONCERNING MISREPRESENTATIONS OF ATTORNEY INVOLVEMENT IN DEBT COLLECTION-RELATED COMMUNICATIONS.

On April 17, the Consumer Financial Protection Bureau (CFPB) filed a lawsuit in Ohio district court against the Weltman, Weinburg & Reis law firm (WWR), alleging violations of the Fair Debt Collections Practices Act (FDCPA) stemming from the firm’s issuance of debt collection demand letters. The CFPB’s allegations against WWR closely resemble the FDCPA allegations that were considered by the D.C. Circuit Court of Appeals in Jones v. Dufek, 830 F.3d 523 (D.C. Cir. 2016). Dufek also concerned a debt collection letter that was sent by an attorney acting as a debt collector and not as legal counsel. On March 20, 2017, the U.S. Supreme Court denied the Dufek plaintiff’s petition for a writ of certiorari to review the Court of Appeals’ decision in favor of the defendant attorney/collector. Notwithstanding Dufek, however, debt collectors and first-party creditors are well-advised to be extremely diligent when using law firms as debt collectors.
In the CFPB press release announcing its lawsuit against WWR, CFPB Director Richard Cordray stated, “Debt collectors who misrepresent that a lawyer was involved in reviewing a consumer’s account are implying a level of authority and professional judgement that is just not true . . . [and] [s]uch illegal behavior will not be allowed in the debt collection market.” According to the CFPB, the collection demand letters sent by WWR “implied that lawyers had reviewed the veracity of a consumer debt,” and further represented “directly or indirectly, expressly or by implication, that attorneys were meaningfully involved in preparing and deciding to send the demand letters.”

In actuality, the CFPB’s complaint alleges that “no attorney had assessed any consumer-specific information . . . [a]nd no attorney had made any individual determination that the consumer owed the debt, that a specific letter should be sent to the consumer, that a consumer should receive a [collections] call, or that the account was a candidate for litigation.” Thus, according to the CFPB, the subject letters contained numerous misrepresentations that violated both the FDCPA and the prohibitions of the Consumer Financial Protection Act against unfair, deceptive or abusive acts or practices.

The specific deficiencies cited in the CFPB’s complaint against WWR include the fact that subject letters were printed on law firm letterhead, which prominently included the phrase “ATTORNEYS AT LAW” (in bold type and in all caps) and included the law firm’s name in the signature line. In addition, the complaint notes that some letters included a reference to possible future legal action, although no attorney had evaluated the appropriateness of such action, and none of the letters included a disclaimer “notifying consumers that an attorney has not reviewed the consumer’s file or formed an independent professional judgment about the subject debt.”

The attorney-issued demand letter considered by the D.C. Court of Appeals in *Dufek* was similar to the demand letters sent by WWR in that it was printed on law firm letterhead and included “Attorney David Sean Dufek” in the signature line. In addition, the letter included a printed facsimile of attorney Dufek’s signature. Unlike the letters sent by WWR, however, the *Dufek* letter included the following disclaimer, which appeared below the signature line on the single-page letter: “Please be advised that we are acting in our capacity as a debt collector and at this time, no attorney with our law firm has personally reviewed the particular circumstances of your account.”

In determining whether the *Dufek* letter violated the FDCPA as a false, deceptive or misleading representation, the Court of Appeals noted, as a threshold matter, that “if an attorney is acting only as a debt collector and has not formed a legal opinion about the case, he or she cannot send a letter [stating or implying] otherwise” without misleading
the recipient/debtor. In this regard, the court applied a “least sophisticated consumer” standard, under which “the basic goal is to prevent debt collectors from deceiving naïve consumers, but not to hold collectors liable merely because their letters may be deceptive under bizarre or idiosyncratic consumer interpretations.”

In finding that the subject demand letter contained no unlawful misrepresentations, the court cited supporting case law for the position that even the least sophisticated consumer is bound to read collection notices in their entirety. The court noted that “Dufek included a conspicuous disclaimer describing his involvement in the matter” and the assertions made in the letter that Dufek was an attorney and acting as a debt collector were accurate.

The court in *Dufek* rejected the plaintiff’s argument that merely “using the title ‘attorney’ in the letterhead and signature block impermissibly implies that an attorney has evaluated the case from a legal standpoint.” If that were true, the court opined, attorneys would be effectively barred from collecting debts on behalf of others, which is allowed to attorneys under the FDCPA. Finally, although the court acknowledged that “many circuits have agreed that a prominent and clear disclaimer stating that an attorney is acting as a debt collector is enough, but a hidden or confusing disclaimer is not,” the court rejected the argument that the disclaimer’s placement below the signature line rendered it obscured. “[T]here is no relevant difference we perceive between a disclaimer in the body of the letter before the signature block and one after the signature block,” the court stated. To this end, the court noted that the subject disclaimer was in the same font and size as the rest of the letter and thus “was not hidden.”

In its first footnote to the *Dufek* decision, the court noted that the plaintiff belatedly raised the issue of whether Dufek himself actually sent the demand letter in question. The court refused to consider this argument as it was untimely raised. If the argument had been allowed, however, the court might have reached a different decision. In *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996), the Seventh Circuit Court of Appeals concluded that certain mass-produced collection letters that were printed on attorney letterhead and included an attorney’s name and facsimile signature violated the FDCPA. The Seventh Circuit noted the following:
Clomon v. Jackson [988 F.2d 1314 (2d Cir. 1993)] establishes that an attorney sending dunning letters must be directly and personally involved in the mailing of the letters in order to comply with the strictures of FDCPA. This may include reviewing the file of individual debtors to determine if and when a letter should be sent or approving the sending of letters based on the recommendations of others. See Clomon, 988 F.2d at 1320. Given these requirements, Clomon concluded that “there will be few, if any, cases in which a mass-produced collection letter bearing the facsimile of an attorney’s signature will comply with the restrictions imposed by Section 1692e [of the FDCPA].”

In addition, as noted above, the CFPB has pursued lawsuits, as well as formal enforcement actions,\(^1\) concerning misrepresentations of attorney involvement in debt collection-related communications.

**Pepper Points**

- **Dufek** is likely to have narrow future applicability because the court assumed the subject letter bearing the facsimile signature of attorney Dufek was not mass-produced due to the plaintiff’s untimeliness in challenging the degree of Dufek’s direct and personal involvement.

- Other Circuit Courts of Appeals could conclude that placing a disclaimer regarding attorney review of the recipient/debtor’s account underneath the letter’s signature line does have the effect of obscuring the disclaimer, *e.g.*, especially if the letter in question included more than a single page.

- Misrepresentations regarding attorney involvement in collections letters and other communications continue to be a “hot button” issue with the CFPB. The collections letters targeted in the CFPB’s lawsuit against WWR are distinguishable from the letter at issue in Dufek in that the Dufek letter included a disclaimer regarding the attorney’s review of the underlying account. Yet, the CFPB’s complaint against WWR can be read as implying that the use of attorney letterhead and the inclusion of the law firm’s name in the signature line were per se improper.
Endnote