U.S. Court of Appeals for the Eleventh Circuit Finds Monthly Mortgage Statement Containing Boilerplate "This Is An Attempt To Collect A Debt" Language Constitutes a Communication "In Connection With The Collection of A Debt" Under the Fair Debt Collection Practices Act

*By Christopher A. Riley**

Given a recent federal circuit court decision, the author suggests that mortgage servicers should strongly consider removing from their monthly mortgage statements any language that reads "this is an attempt to collect a debt."

In *Daniels v. Select Portfolio Servicing, Inc.*,[1] a panel of the U.S. Court of Appeals for the Eleventh Circuit addressed the question "whether a required monthly mortgage statement that generally complies with the [Truth in Lending Act ("TILA")] and its regulations can plausibly be a communication 'in connection with the collection of a debt' under the [Fair Debt Collection Practices Act ("FDCPA")] if it contains additional debt-collection language."

Relying almost exclusively on the single sentence in the monthly mortgage statement that read "[t]his is an attempt to collect a debt," the panel in a 2-1 decision said "yes" and reversed the granting of a motion to dismiss in favor of the mortgage servicer.

While the majority explained that the decision was not contrary to those from other circuit courts and within its own circuit, the dissent pointed out how this decision was arguably inconsistent with such precedent.

Going forward, mortgage servicers face a risk (at least in the Eleventh Circuit) that monthly mortgage statements that otherwise

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comply with TILA and its regulations could subject the servicer to liability under FDCPA if the statement contains errors and includes language that "this is an attempt to collect a debt."

On July 1, 2022, a unanimous panel of the Eleventh Circuit relied on *Daniels* to again reverse a district court's dismissal of a consumer's FDCPA claim associated with a monthly mortgage statement. This recent decision in *Lamirand v. Fay Servicing, LLC*,[2] indicates that courts will continue to scrutinize monthly mortgage statements for language that may subject them to the FDCPA.

BACKGROUND

In *Daniels*, the borrower sued the mortgage servicer under the FDCPA and the Florida Consumer Collection Practices Act alleging that several monthly mortgage statements contained errors. In particular, the borrower alleged that the statements contained errors in the deferred principal balance, outstanding principal balance and the amount of the interest-only payment that was due. The statements were consistent with the requirements of TILA and its regulations.

The court in *Daniels* noted that the primary monthly statement at issue in the decision included the following language:

- This is an attempt to collect a debt. All information obtained will be used for that purpose.
- You are late on your mortgage payments. Failure to bring your loan current may result in fees and foreclosure - the loss of your home.
- [The mortgage servicer] has completed the first notice or filing required to start a foreclosure.
- Paying your mortgage on time is an important obligation, so please pay on or before the payment due date. Payments are not considered paid until received and posted to your account.
- [The mortgage servicer] furnishes information to consumer reporting agencies. You are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your Note and Mortgage.

The district court granted the servicer's motion to dismiss, and dismissed the case with prejudice on the grounds that the mortgage statements were not communications in connection with the collection of a debt under the FDCPA.

THE CIRCUIT COURT'S DECISION

In reversing that decision on appeal, the majority first noted that communications can have "dual purposes" - providing a consumer with information and demanding payment of a debt. The majority then discussed two prior decisions involving letters from law firms, *Reese v. Ellis, Painter, Ratterree & Adams*,[3] and *Caceres v. McCalla Raymer, LLC*,[4] where the court concluded that the letters were related to debt collection for purposes of the FDCPA.

After reviewing the monthly mortgage statements in *Daniels*, the majority concluded that "viewed holistically, a communication that expressly states that it is 'an attempt to collect a debt,' that asks for payment of a certain amount by a certain date, and that provides

for a late fee if the payment is not made on time is plausibly 'related to debt collection.' "

In several places in the opinion, the majority reiterated that the servicer included the "this is an attempt to collect a debt" language that was not required by TILA or its regulations. It is clear from the opinion that the inclusion of such language was the critical factor in the decision. The majority noted that, while some portions of the monthly mortgage statements may have been for informational purposes, the communication can have "dual purposes." As such, the mere fact that the monthly mortgage statements were otherwise consistent with TILA and its regulations was not dispositive.

The majority recognized that two prior unpublished district court cases from the Southern District of Florida held that the inclusion of "this is an attempt to collect a debt" language did not convert a monthly mortgage statement into a communication in connection with the collection of a debt under the FDCPA.[5] The majority, however, "respectfully disagree[d]" with the decision in both cases.

Notably, in a prior unpublished decision, *Green v. Specialized Loan Servicing LLC*,[6] a prior panel of the Eleventh Circuit held that a servicer's monthly mortgage statement did not "rise to the level of being unlawful debt collection language" when the statement did not contain any language "beyond what is required by TILA."

The majority in *Daniels* distinguished *Green* by noting that it was unpublished and, most importantly, did not contain the "this is an attempt to collect a debt" language. (Furthermore, the majority noted that *Green* reached the merits and held that the statement did not constitute an "unlawful" debt collection language, whereas the decision in *Daniels* merely held that the plaintiff had plausibly alleged an FDCPA violation.).

THE DISSENT

The dissent in *Daniels* took issue with the majority's reliance on the "this is an attempt to collect a debt" language contained in a monthly mortgage statement that otherwise complied with the TILA and its regulations. The dissent noted that this language "appears once on each statement, is not physically separated from other information in the statement, is not capitalized or otherwise emphasized and is printed using the same font and font size as the rest of the information contained in the statement."

The dissent discussed *Green* and other prior decisions (including the district court decisions in *Jones* and *Zavala*) and concluded that the mere inclusion of the "collect a debt" language was not enough to render an otherwise TILA-compliant monthly mortgage statement a communication "in connection with the collection of a debt" for purposes of the FDCPA. "[T]he majority's conclusion that, by including this extra language - which is not required but is neither inconsistent with nor materially additive to TILA's requirements - the periodic mortgage statements have become communications subject to the FDCPA is far too broad."

The dissent in *Daniels* then discussed decisions from other circuits, including from the U.S. Courts of Appeals for the Seventh and Eighth Circuits.

The dissent cited the Seventh Circuit's decision in *Gburek v. Litton Loan Servicing LP*,[7] in

which the court held that a communication stating that it was an attempt to collect a debt "does not automatically trigger the protections of the FDCPA, just as the absence of such language does not have dispositive significance."

The dissent also discussed the Eighth Circuit's ruling in *Heinz v. Carrington Mortgage Services, LLC*.[8] In *Heinz*, the court addressed "so-called Mini-Miranda statements" where the communication notes that it is from a debt collector and for the purpose of collecting a debt. Relying on *Gburek*, the court in *Heinz* held that such "boilerplate Mini-Miranda statements" do not trigger the protections of the FDCPA.

Therefore, according to the dissent in *Daniels* and consistent with these decisions in other circuits, the mortgage servicer's inclusion of "this is an attempt to collect a debt" language in the monthly mortgage statement should not trigger the protections of the FDCPA. Instead, the dissent would require "stronger demands for full or partial payment and threats of consequences for failure to do so" before a monthly mortgage statement would give rise to a claim under the FDCPA.

On June 14, 2022, the servicer filed a petition for rehearing and rehearing en banc asking the panel for a rehearing of the case. In the petition, the servicer recognized that "the majority holds that inclusion of the statement, 'this is an attempt to collect a debt,' transforms federal-required mortgage statements into debt-collection communications under the FDCPA." The servicer argued that the decision conflicts with prior case law inside and outside of the Eleventh Circuit, and "the well-reasoned dissent" was correct to conclude that such language should not render TILA-compliant monthly mortgage statements subject to the FDCPA. The petition for rehearing was later denied.

On July 1, 2022, a different (and unanimous) panel of the Eleventh Circuit relied on *Daniels* and issued its decision in *Lamirand*. In that case, the court held that the mortgage servicer's monthly mortgage statement fell within the scope of the FDCPA as it contained "far more language than the [CFPB] model form did" to persuade the consumer to pay the outstanding debt.[9]

In reaching the decision in *Lamirand*, the court held that there was no conflict between the requirements of the TILA and FDCPA, such that a mortgage servicer can comply with the TILA and still be subject to the FDCPA:

> The Truth in Lending Act requires a servicer to send periodic statements, and the FDCPA requires those statements to be fair and accurate when they contain language that would induce a debtor to pay. The statutes thus reinforce each other, ensuring that consumers receive both regular and accurate information about their mortgage loans. We see no conflict in requiring that statements under the Truth in Lending Act be, in fact, truthful . . .
>
> The Truth in Lending Act encourages lenders to give consumers information about their loan - information that is useful only if it is accurate and fair, as the FDCPA requires. When servicers use periodic statements to collect a debt, then, they can be held liable for any misleading or unconscionable representations that they make in those statements.

TAKEAWAY

A mortgage servicer should strongly consider removing from its monthly mortgage statements any language that reads "this is an attempt to collect a debt." The relevant language is not required by the TILA or the CFPB. At least in the Eleventh Circuit now after *Dan-*

iels, the inclusion of such language will give borrowers pursuing FDCPA claims a much better chance to survive a motion to dismiss and move the case into the expensive discovery phase.

It should be noted that the majority decision in *Daniels* included an important qualification in a footnote: "We do not hold that the statements are, as a matter of law, communications in connection with the collection of a debt. Our ruling is that [the borrower] has plausibly alleged that they are."

Therefore, the mere inclusion of the "this is an attempt to collect a debt" language does not mean, even in the Eleventh Circuit, that a mortgage servicer's monthly mortgage statements are necessarily subject to the FDCPA as a matter of law. That said, as a practical matter, it will be difficult for a mortgage servicer to convince a district court that has already denied a motion to dismiss to change its mind at the summary judgment stage and conclude that the inclusion of such language does not render the mortgage statement a communication in connection with the collection of a debt.

Of course, even if the mortgage statement is a communication in connection with the collection of a debt, the borrower must still establish that the statement otherwise violated the substantive provisions of the FDCPA.[10] *Daniels* (and now *Lamirand*), however, are likely to help borrowers clear the threshold hurdle at the motion to dismiss stage.

NOTES:

[1]*Daniels v. Select Portfolio Servicing, Inc.*, 34 F.4th 1260 (11th Cir. 2022).

[2]*Lamirand v. Fay Servicing, LLC*, 38 F.4th 976 (11th Cir. 2022).

[3]*Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012).

[4]*Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299 (11th Cir. 2014).

[5]*See Jones v. Select Portfolio Servicing, Inc.*, 2018 WL 2316636 (S.D. Fla. 2018) and *Zavala v. Select Portfolio Servicing Inc.*, 2018 WL 6198685 (S.D. Fla. 2018).

[6]*Green v. Specialized Loan Servicing LLC*, 766 Fed. Appx. 777 (11th Cir. 2019).

[7]*Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010).

[8]*Heinz v. Carrington Mortgage Services, LLC*, 3 F.4th 1107 (8th Cir. 2021).

[9]The court in *Lamirand* noted that the monthly statement at issue in the decision included the following language:

Noted "[the mortgage servicer] is a debt collector, and information you provide to us will be used for that purpose."

Bolded the amount due and instructed that the borrowers "must pay this amount to bring [their] loan current.

Warned that failure to pay the amount due could "result in additional fees or expenses, and in certain instances" cause "the loss of [their] home to foreclosure sale."

Included a detachable payment coupon and "DETACH AND RETURN BOTTOM PORTION WITH YOUR PAYMENT."

Included on the back of the statement several other ways to pay the amount due.

[10]*See, e.g.*, 15 U.S.C.A. §§ 1692d, 1692e and 1692f.