Pennsylvania Creditors Bar Association

THE LATEST NEWS AND UPDATES REGARDING CREDIT AND COLLECTION AND THE FINANCIAL SERVICES INDUSTRIES

IN THIS ISSUE

Welcome Message From The President

by Brit J. Suttell

Greetings from the Pennsylvania Creditors' Bar Association! Much has happened within our industry and commonwealth since the last newsletter. First, our industry received not one, but TWO opinions from the United States Supreme Court – Midland v. Johnson and Henson v. Santander. This newsletter contains great articles on both decisions and their potential impact on debt collection.

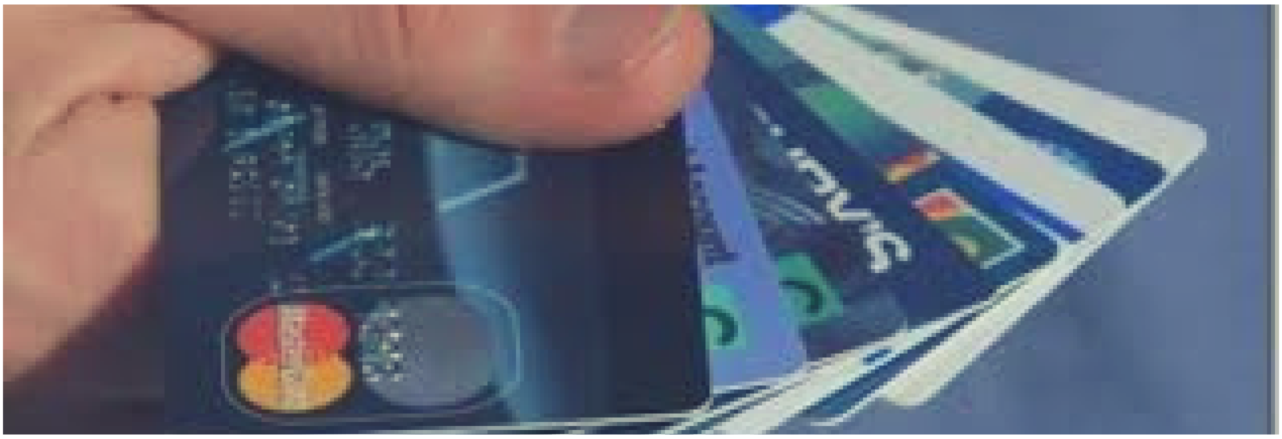
Second, Pennsylvania Attorney General Josh Shapiro announced the creation of the Consumer Financial Protection Unit. Mr. Shapiro has tapped Nicholas Smyth, who helped create the federal Consumer Financial Protection Bureau (CFPB) to lead the Unit. PACBA is actively reaching out to both the Attorney General's Office and Mr. Smyth to establish a working relationship.

Third, the CFPB filed suit against another prominent law firm in our industry, Weltman, Weinberg & Reis, LPA. The suit, while lacking in detail, alleges that WWR mislead consumers by using its own firm name in communication with consumers. WWR has promised a vigorous defense and so far it has lived up to expectations. In addition to filing an answer to the CFPB's complaint, WWR simultaneously filed a motion for judgment on the pleadings. The CFPB responded to WWR's motion and recently filed a motion for protective order. The latter motion is also fully briefed. No word on possible oral argument for either motion. In the meantime, we will all await rulings.

Last, but certainly not least, I would be remiss without pointing you towards PACBA's Vice-President for Education Matt Urban's article on the upcoming fall conference. Matt has a spectacular program lined up and PACBA is excited to be returning to The Desmond Hotel in Malvern for our conference!

Pennsylvania Creditors Bar Association

INTRODUCING JUSTICE NEIL GORSUCH: THE U.S. SUPREME COURT AFFIRMS THAT DEBT PURCHASERS ARE EXEMPT FROM THE FAIR DEBT COLLECTION PRACTICES ACT



Madison McGuirk

Shapiro Law Office, PC

On June 12, 2017, the U.S. Supreme Court held that the term "debt collectors" as defined in the Fair Debt Collection Practices Act (hereinafter "FDCPA") does not include debt purchasers when the principal purpose of their business is not the collection of debts. Pursuant to 15 U.S.C. § 1692a(6), the statutory language defining the term "debt collector" embraces anyone who "regularly collects or attempts to collect debts owed or due… another." Accordingly, persons or entities whose principal purpose is not the collection of debt that purchase debt and thereafter seek to collect that debt on their own behalf will not be subject to the FDCPA. Although this decision constrains the reading of the FDCPA, it does not alleviate all debt purchasers from FDCPA compliance. Rather the decision offers salient legal defenses for some debt purchasers sued for FDCPA violations. The newest member of the Supreme Court, the Trump-Appointee, Neil Gorsuch, delivered as his first opinion this carefully crafted unanimous decision.

In Henson v. Santander Consumer USA Inc., the U.S. District Court class action alleged that petitioners had been loaned money by CitiFinancial; that respondent Santander then purchased the defaulted loans from CitiFinancial; and that Santander later sought to collect in ways that petitioners believed were in violation of the FDCPA. Nonetheless, the Fourth Circuit sided with Santander, finding that the company did not qualify as a debt collector because it did not regularly seek to collect debts "owed…another."

However, the Fourth Circuit also noted that some circuits faced with the same question arrived at a contradictory conclusion. So as to eradicate these incongruous FDCPA interpretations, the Supreme Court issued an unambiguous decision regarding the proper statutory construal for determining whether an individual or entity qualifies as a "debt collector" under the FDCPA.

FDCPA § 1692a(6) provides two distinct definitions of the term "debt collector." However, a person or entity must only fall under one of these definitions to be subject to the FDCPA regulations. First, the FDCPA defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts…" However, the Court declined to address this part of the definition because the parties did not considerably litigate whether part of the definition was at issue. Second, the FDCPA also defines a "debt collector" as those that collect debts "owed… another." Because Santander does not qualify as a debt collector under the first statutory definition, the Court only assessed whether Santander was a "debt collector" as defined by the second part of the statute—reaching the conclusion that the facts as presented to the Court did not indicate Santander was a debt collector under the alternative definition of "debt collector." Unanimously, the Court found that under the statutory construction, Santander could not be considered a "debt collector."

Justice Gorsuch's first opinion demonstrates his commitment to strict interpretations of statutory text. While the Circuit Courts dispelled contradictory statutory interpretations of the term "debt collectors," Justice Gorsuch and the Court easily clarified these discrepancies reminding that "… the Act defines debt collectors to include those who regularly seek to collect debts "owed…another" [a]nd by its plain terms this language seems to focus [readers'] attention on third party collection agents working for a debt owner—not a debt owner seeking to collect debts for itself." Henson v. Santander, --U.S.-- (June 12, 2017). Justice Gorsuch purports that how one came to be a debt owner (either as a loan originator or a debt purchaser) is of no significance for purposes of determining the applicability of the FDCPA. Rather, the crux of determining whether one is subject to FDCPA regulations is contingent upon whether the target of the lawsuit seeks to collect debts for its own account or does so for "another."

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Furthermore, although one may qualify for FDCPA exemption, this does not mean that their exemption precludes that person or entity from FDCPA compliance. It is important to note that this decision is narrowly tailored to only one of the two statutory definition of "debt collector" and may not provide a loophole for debt buyers. Justice Gorsuch emphatically explains that the Supreme Court cannot and will not replace the actual statutory text with speculation as to Congress' intent.

In a true textualist fashion, Justice Gorsuch admonishes that it is never the job of the Supreme Court to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced that specific question. Instead, it is the duty of the Supreme Court to apply faithfully the law that Congress has written.

Justice Gorsuch makes his traditional debut—writing a unanimous decision on a simply resolved statutory matter—and introduces the legal community to his traditional textualist approach to constitutional law. While this decision is one small victory for the debt collection industry, the even greater victory is that the Court is now lead by justices who believes in a statutorily accurate application of the law as opposed to statutory interpretations that freely inject subjective public policy rather than objective legal reasoning.

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U.S. SUPREME COURT DENIES FDCPA LIABILITY IN BANKRUPTCY PROOF OF CLAIMS: REVERSES 11TH CIRCUIT IN MIDLAND FUNDING, LLC V. JOHNSON

Cote Stover

Shapiro Law Office, PC

On May 15, 2017, the U.S. Supreme Court held in a 5-3 decision that creditors and their attorneys are not liable under the Fair Debt Collections Practices Act (FDCPA) for filing a proof of claim that on its face is time barred during a Chapter 13 Bankruptcy proceeding. The FDCPA prohibits false, deceptive, misleading, unfair debt collection practices. In the matter of Midland Funding, LLC V. Johnson the Court found that the filing of a claim that on its face is time barred does not fall under any of the five provisions prohibited by the FDCPA.

The consumer in Johnson filed a Chapter 13 Bankruptcy petition in Alabama. Midland was a creditor of Ms. Johnson, having previously purchased her credit card debt. Midland filed its proof of claim and accurately acknowledged that the last payment on the debt was 10 years prior, while the applicable Alabama statute of limitations was only 6 years. During the pending bankruptcy proceeding, Ms. Johnson objected to the proof of claim and brought suit against Midland for an alleged violation of the FDCPA. The U.S. District Court in Alabama dismissed the FDCPA case, but the Eleventh Circuit reversed. The Eleventh Circuit decision contributed to the split among the circuits as to whether or not filing a claim known to be time-barred in state court collection matters in bankruptcy proceedings surmounts to an FDCPA violation. To settle this discrepancy, the U.S. Supreme Court granted certiorari.

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The first issue the Court decided was whether an unenforceable claim in a state court collection case was still considered a viable claim under the Bankruptcy Code. The Court decided in the affirmative, basing its decision on the intent of Congress when it created the Code.

The Bankruptcy Code defined the term “claim” broadly as a right to payment. Furthermore, the Court determined that applicable state law dictates whether or not a person has the right to payment. In most states, including Alabama, staleness eliminates the legal remedy to collect the debt, but does not eliminate the right to payment. This means that while a debt may not be enforceable in court because it was filed past the statute of limitations, the creditor still retains the right to payment. Furthermore, §502 (b) (1) of the Code says that unenforceable claims may be disallowed, but doesn’t say that they are not claims. This seemingly allows unenforceable claims to be brought. The Court decided that because the right to payment survives, stale proof of claims submitted in a Chapter 13 proceeding meets the broad definition of a claim under the Bankruptcy Code.

The second issue the Court decided (which the Court admitted was a much closer question) was whether submitting a properly prepared proof of claim that was stale on its face in a Chapter 13 case violated the FDCPA. The Court decided that this conduct does not violate the FDCPA, drawing a distinction between bankruptcy proceedings and civil law suits. While the Court did not decide the issue regarding properly prepared claims, it is generally held that in non-bankruptcy matters filing a claim to collect on a stale debt in a civil law suit violates the FDCPA. The U.S Supreme Court based its distinction between bankruptcy claims and civil law suits filed in state court on the added protections given to debtors in bankruptcy. First, the debtor is usually the one to initiate bankruptcy proceedings.

Accordingly, this makes it unlikely that an unsophisticated consumer would pay a stale debt after filing bankruptcy to avoid going to court. Nonetheless, filing bankruptcy to avoid court is the primary reason given by courts which have held that filing a claim for a debt known to the creditor in non-bankruptcy cases as stale does violate the FDCPA in civil law suits. Second, a knowledgeable bankruptcy trustee is assigned to each case and is duty-bound to analyze all the claims filed and object if they are stale or improperly filed.

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While it is generally understood that creditors are addressing a generally unsophisticated audience, in the eyes of the Court the Bankruptcy Trustees are generally more sophisticated. Third, the bankruptcy procedural rules directly guide the valuation of claims. Finally, the claims resolution process in bankruptcy proceedings is more streamlined and less unnerving for debtors than a collection lawsuit. For these four reasons, the Court decided that submitting a properly prepared proof of claim in bankruptcy proceedings that is on its face stale does not violate the FDCPA.

It is significant to mention what was and was not decided in this case. The Court did not conclude that the Bankruptcy Code precludes or pre-empts the FDCPA. However, the Court does hint at potential preclusions or preemptions, perhaps laying out a roadmap for future cases, by saying that the FDCPA and Bankruptcy Code have different purposes and structural features. The purpose of the FDCPA is to protect consumers, and prevent (if possible) consumer bankruptcies in the first place. In contrast, the Bankruptcy Code maintains the “delicate balance of a debtor’s protections and obligations.” The Court states that to find the FDCPA applicable here would upset that “delicate balance.” This sentiment seems to hint at the preclusion of the FDCPA in bankruptcy, but the Court does not go all the way to reach that conclusion. Rather, the Court decided this case on its specific facts; that properly prepared claims that are stale on their face do not violate the FDCPA. This does not necessarily mean that a stale claim that does not expressly state that it has surpassed the statute of limitations would not be a violation of the FDCPA. The Court also did not decide whether an inaccurate proof of claim violates the FDCPA. Rather than shift the burden of proof from the debtor to creditor to investigate the staleness of a claim the Court choose to keep the bankruptcy system the way it is, allowing Creditors to file stale claims without liability and Court’s to disallow them on the objection from the debtor or trustee.

The takeaways from this decision for the credit and collection industry as well as bankruptcy practitioners who represent creditors is that they may not be liable under the FDCPA for filing a properly prepared proof of claim they represent to be stale. However, improperly prepared claims on out of statute debts may be found to violate the FDCPA if they submit inaccurate or misleading information. Nonetheless, those may be subject to sanctions under applicable bankruptcy rules and regulations.

Pennsylvania Creditors Bar Association

THE 2017 PACBA SEMINAR AND ANNUAL MEETING
OCTOBER 6, 2017
8:30 AM - 4:00 PM

The Pennsylvania Creditors Bar Association is pleased to announce the scheduling of the 2017 Seminar and Annual Meeting. This years meeting will take place on Friday October 6, 2016 from 8:30 am - 4:00 pm at the Desmond Hotel in Malvern, Pennsylvania. On behalf of the board of directors, I would like to invite all members as well as prospective members to join us for our annual day long seminar. The seminar presents a great opportunity to not only listen to a great line-up of experts discuss topics that impact us all but also serves as a fantastic opportunity to meet and network with creditor rights attorneys from all across Pennsylvania. As an added bonus we again anticipate the program being approved for continuing legal education credits, including an ethics credit.

Interested individuals can see our outstanding list of speakers and register for the conference by visiting our web site (http://pacbar.org/education). Please register early to ensure that you reserve your spot at the conference. Please do not hesitate to contact us at PACBA@CorpEvent.com with questions.

We look forward to seeing you at the Desmond in October for this great event!

Matthew D. Urban
Attorney