

PACBA Enews

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**A Message
from your
President
Yale D.
Weinstein**



The education committee has been hard at work planning the October Annual Conference. You will now receive 5 CLE credits for attending the education sessions at the seminar. As you may know, this will satisfy your NARCA requirements.

We have also moved the conference from Center City Philadelphia to King of Prussia. It will be at the Valley Forge Casino Resort.

At the conference, topics will include initial and subsequent written communications with consumers, new regulations, what is 'meaningful involvement', update on the CFPB v. Hanna litigation, best practices as a collection attorney, and the hot topics in our industry.

The speakers we have presenting this year are true subject matter experts, and are coming from three states. It will be an all star presentation. There will also be vendors attending.

The industry is constantly changing so it is important to stay on top of these changes. Important discussions will take place regarding the FTC ruling on the TCPA as well as several CFPB Consent Orders. The conference is a great learning experience.

What has happened since our last meeting:

- New test program with Philadelphia Municipal Court in cooperation with Consumer Legal Services.
- Accomplished our goal of increasing membership. There are 6 more solo practitioners. The amount of members increased from 66 to 73.
- Four newsletters.
- Increased awareness with the courts.

Please note there will be elections for all board positions at the Conference. Let us know if you would like to run.

Look forward to seeing everyone at the Conference on October 5th.

BEWARE OF PROBLEMS WITH YOUR ENVELOPES

SUBMITTED BY: KENNETH S. SHAPIRO, ESQ., BOARD MEMBER

By now, you should be fully aware that debt collectors should never use window (or glassine) envelopes to mail any written communication to a debtor. Even though you may have followed this advice in the past, recent federal court decisions dictate that extreme care must now be taken to avoid the pitfalls of a debtor's FDCPA claim against you every time an envelope is mailed containing a written communication to a debtor.

Last year, the Third Circuit concluded that a debtor's account number on the outside of an envelope violates the FDCPA. See *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (2014) which held that "disclosure of the plaintiff's account number implicated a core concern animating the FDCPA – the invasion of privacy" *Douglass* at 302. In *Douglass*, the Third Circuit bypassed the "benign" language exception set forth in Section 1692f (8) of the FDCPA and ruled that disclosure of the account number was not "benign" because the account number was information capable of identifying the plaintiff as a debtor.

Relying on the holding in the *Douglass* opinion, U.S. District Judge William J. Nealon of the Middle District of Pennsylvania concluded on July 15, 2015 that embedding an account number in a bar code on an envelope addressed to a debtor is equally problematic given the advent of smartphone bar-code readers. See *Styer v. Professional Medical Management*, Civil Action No. 3:14-CV-2304 (M.D. Pa 2015) finding that disclosure of a quick response (QR) code on a debt collection envelope that revealed a consumer's name, address, and account number when electronically scanned rises to the level of an FDCPA violation.

One week later, Judge Nealon further ruled that an envelope containing a glassine window through which the return address and a barcode printed directly below that address was visible also violates the FDCPA, relying on the Third Circuit's holding in the *Douglass* opinion. See *Lisa Kostik v. ARS National Services, Inc.*, Civil Action No. 3:14-CV-2466 (M.D. Pa 2015). The District Court ignored the debt collector's argument that the envelope did not violate the FDCPA because the barcode was a "benign symbol."

As these recent rulings indicate, any information contained on an envelope addressed to a debtor, other than the sender's name, return address, and possibly language indicating that return service from the USPS is requested, could rise to the level of an FDCPA violation. Multiple violations could potentially provide the fuel for a class action filing by an over-zealous plaintiff's attorney. Care should be taken to ensure that only allowable information is printed on the outside of every envelope used in connection with your ongoing collection efforts.

Third Circuit Recognizes Materiality Component For FDCPA Claims

SUBMITTED BY: THOMAS W. SMITH, JR., ESQ., PACBA MEMBER

Earlier this year, the Third Circuit decided that allegations made by a law firm in the course of litigation (i.e. a foreclosure complaint) are subject to scrutiny under the FDCPA. See *Kaymark v. Bank of America NA*, 783 F.3d 168 (3d Cir. 2015). In *Kaymark*, the Third Circuit rejected the argument that formal pleadings cannot be the basis of an FDCPA claim and also rejected the argument that a pleading is not a communication with a debtor because it is directed to the court. The *Kaymark* decision was seemingly an indication that the Third Circuit would continue its disturbing trend toward expanding the scope of the FDCPA.

However on June 30, 2015, the Third Circuit deviated from their trend towards expanding the scope of FDCPA. The Second, Fourth, Sixth, Seventh and Ninth Circuits have interpreted the FDCPA's prohibition of false, deceptive or misleading practices to include a materiality requirement. In *Paula Jensen v. Pressler & Pressler*, Docket No. 14-2808 (3rd Cir. 2015), the Third Circuit joined a growing body of authority that recognizes a materiality component in claims brought under FDCPA §1692e. In *Jensen*, Pressler sought to enforce a judgment from the Superior Court of New Jersey by sending an information subpoena to Paula Jensen. However, the subpoena sent to Jensen contained the incorrect name on the clerk's signature line. While Pressler's error was technically a false statement, the Court decided that "a false statement is only actionable under the FDCPA if it has the potential to affect the decision-making process of the least sophisticated debtor; in other words, it must be material when viewed through the least sophisticated debtor's eyes". The Court reasoned that a materiality requirement is simply another way of phrasing the least sophisticated debtor standard and therefore consistent with Congress's intent.

The *Jensen* decision is an encouraging indication that the Third Circuit is willing to utilize a common sense approach in interpreting the intent of the FDCPA. The Third Circuit's decision in *Kaymark* that formal pleadings can be the basis of an FDCPA claim is troubling but the *Jensen* decision curbs the scope of that ruling by now requiring a materiality standard for FDCPA complaints filed in this Circuit.