PACBA Enews

Spring 2017

In This Issue:

Brit Suttell, PACBA President

Greetings from the Pennsylvania Creditors' Bar Association! Looking back since our last newsletter, several interesting nation-wide developments have occurred. First, as noted in our last newsletter, United States Supreme Court agreed to accept *cert. Midland Funding, LLC v. Johnson*, Docket No. 16-348; that concerns whether the filing of proofs of claim on debt that is beyond the statute of limitations is actionable under FDCPA. Since then, the Court heard oral argument on January 17, 2017. I will not make any predictions, nor even attempt to guess at how the Court may rule other than to say the Court seemed divided. Since there are only eight (8) members who heard the case, any number of things could happen. Whatever, the outcome, the industry should know by the end of the term in June.

Second, the Supreme Court granted *cert.* in another FDCPA case, *Henson v. Santander Consumer USA, Inc.*, Docket No. 16-349. This case comes up from the 4th Circuit and looks at the definition of "debt collector," specifically whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default should be considered a "debt collector." Oral argument has been scheduled for April 18, 2017. Again, I believe, the industry could have an opinion by the end of this Court's term.

Next up on the national front, I think it would be fair to say that the entire industry is watching the continuing drama of *PHH v. CFPB* currently before the D. C. Circuit and pending an *en banc* hearing. Multiple briefs have been filed by both sides and their amici. A couple of the more interesting developments include the D.C. Court refusing to allow a number of state attorneys general to intervene on behalf of the CFPB and the possible shift in the stance of the U.S. Solicitor General. The Solicitor's Office asked for and was granted a one week extension to file its brief. The D.C. Circuit asked the Solicitor's office to file the brief, originally, and many people speculate that the request for an extension signals a shift in the Trump Administration's stance away from the Obama Administration's. Oral argument has been scheduled for May 24, 2017, with the Court granting each PHH and the CFPB thirty minutes for argument.

In short, lots of activity on the national scene for the industry! Vice President of PACBA, Rob Polas has an informative article about changes in many local rules regarding the Notice to Defend Form and I would recommend everyone read it!

HAVE YOU LOOKED AT YOUR NOTICE TO DEFEND THIS MORNING?

by

ROBERT N. POLAS, JR., ESQ.

In January of 1975, the Pennsylvania Rules Committee promulgated Rule 1018.1. The Rule requires that “every complaint filed by a plaintiff and every complaint filed by a defendant against an additional defendant to begin with a notice”. It was a uniform notice that provided the least sophisticated party with easy to read instructions on what to do with the complaint packet and a designated entity that can help. The exact wording required in the notice was laid out completely. The Rule slowly evolved over the years. In May of 1979 the Rules Committee amended Rule1018.1 for the second time to include that “each court shall by local rule designate the officer, organization, agency or person to be named in the notice from whom information can be obtained”.

Fast forward to March of 2017 - the Rule has now been in effect for over 42 years. Throughout Pennsylvania, each local county court has created its own Local Rule 1018.1. I am sure most attorneys do not think twice about the Notice to Defend when creating their elaborate, money making masterpiece. It’s probably saved to your computer and the one easy part of the document you just spent hours creating. If Not You Should!

However, I have been closely monitoring the Notice to Defend changes since early February of 2014. My client was a counter claim Defendant and the only issue raised was that Defendant incorrectly provided the wrong address in the Notice to Defend per the most recent years Local Rules. It turned out that Plaintiffs’ counsel was correct. The Address notated in the county’s Local Rule 1018.1 had changed 6 months earlier.

Due to this issue, I launched a significant legal review project. I found that in a three year span 26 counties had made changes to their Local Rule 1018.1. The changes ranged from a simple area code change, a complete address change or designating a completely new entity to contact. Further, a number of counties now require that you provide multiple names, addresses and phone numbers for either a legal service, bar association or court house entity. More significant changes occurred in Forest and Warren County's involving the requirement to include a disclaimer about the American with Disability Act. Schuylkill County now requires that you include a mediation provision.

The most recent change occurred in Westmoreland County. Since 2014, Westmoreland County has required that you reference an arbitration provision in your Notice to Defend. However this was not referenced within the counties Local Rule 1018.1. If you are filing a claim under $30,000 and you were not well read on the counties Local Rules you may have missed this nuisance, and your notice was deficient. This may be news to you or you may have been the victim of a law suit. Either way the County recognized the error and took swift action to correct Local Rule 1018.1. Local Rules 1301 or 1303 are now referenced. You're Welcome!

It's like slapping yourself in the face for not drinking your V8 when you woke up. You would never have thought that address would have changed. I believe this rule was initially created by the rules committee with a good purpose. It evolved into an array of addresses and phone numbers that change yearly or even bi-yearly county by county depending if the entity in the notice needs to relocate the office or require a new phone number. I strongly suggest that you buy your own personal copy of the 2017 PA Rules of Civil Procedure. I believe having those books in print and making sure your notice matches the rule completely is the only way to protect you from having to settle your next claim.

POST SPOKEO FDCPA VIOLATION ANALYSIS – WHERE DO WE 'STAND'

Natan M. Schwartz, Shapiro Law Office P.C.

In the 10-months since the U.S. Supreme Court announced the *Spokeo* decision, courts across the country have grappled with the task of refining and determining whether or not procedural or statutory violations satisfy the requirements for Article III standing. This article will examine recent decisions in the Third Circuit concerning whether or not procedural violations of the FDCPA can create Article III standing and if as a result consumers have standing to pursue meritorious claims against debt collectors.

At the outset, it seems that answer is two-fold. First, *Spokeo* reinforced the idea that Congressional recognitions and statutory enactments protecting consumers from tangible or intangible harms may be enough of an injury for standing. Second, bare procedural violations, (where the harm is not concrete, actual, recognized, or is merely speculative) may not constitute a sufficient injury to qualify for Article III standing. Courts across the country are struggling with the latter distinction – what sorts of procedural or statutory violations of the FDCPA satisfy the *Spokeo* standard for Article III standing.

Within our Third Circuit, there are only a few cases that have dealt with FDCPA violations explicitly. Others have considered how Article III standing requirements have changed post-*Spokeo*. A brief analysis of these cases follows:

In In re Nickelodeon, a class action suit was filed involving unauthorized collection and appropriation of children's online activity. The Third Circuit Court of Appeals ruled that a statutory violation could satisfy Article III requirements with regard to privacy statutes. However, this case does not specifically address how courts would deal with FDCPA violations. Defendants in the case claimed that disclosure of information about online activities should not qualify as an injury-in-fact. The Court reasoned, "when it comes to laws that protect privacy, a focus on economic loss is misplaced. Instead, in some cases an injury-in-fact may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing" *In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262 (3d Cir. 2016).* The history and nature of the Congressional intent to create or protect a certain right is instructive in determining whether an invasion into that right is a sufficient injury. Invasion of Congressionally mandated privacy rights seem to rise to the level of sufficiency needed to establish standing.

In *Thomas*, a class action suit was filed involving debt collectors sending letters to consumer debtors stating the amount of debt plus a $3.00 convenience fee that would be added if the debt were paid by credit card. Plaintiffs alleged this to be in violation of the FDCPA. In considering this case, the Court summarized other like cases in the District. In a similar case,
Benali v. AFNI, Inc., Civil Action No. 15-3605-BRM-DEA, 2017 U.S. Dist. LEXIS 78 3 (D.N.J. Jan. 4, 2017)
, involving unauthorized convenience charges, the District Court held that "a complaint alleging violations under §1692e and §1692f(1) had failed to set forth a concrete injury." However, in that case, the plaintiff stated that he knew the debt was sent to him in error, so there was no opportunity for him to incur the additional charges. Accordingly, the FDCPA violations (which did occur) did not result in any actual harm to the plaintiff.
Thomas v. Youderian, No. 2:16-CV-01408-KM-MAH, 2017 U.S. Dist. LEXIS 16585 (D.N.J. Feb. 3, 2017)

In another opinion by the same judge in Benali, this time in *Carney v. Goldman, Civil Action No. 15-260-BRM-DEA, 2016 U.S. Dist. LEXIS 177 087 (D.N.J. Dec. 22, 2016)*, the District Court analyzed that opinion stating, "In *Carney*, the defendant's debt collection letters demanded an amount that included attorney's fees and costs not yet due. Such demands…were legitimately alleged to have inflicted a concrete injury" sufficient to create standing. In coming to its conclusion, the Court examined the Congressional intent of the FDCPA. The Court in *Thomas* concluded the case analysis by stating, "these and other recent cases trend in favor of finding concrete injury under the FDCPA where the amount or validity of the debt has been misstated….I am aware of no cases post-Spokeo that address whether a bare violation of §1692f or § 1692f(1) alone – the use of 'unfair or unconscionable means' to collect a debt – creates an injury-in-fact. Where the underlying theory is one of falsity or deception, however, the standing analysis under §1692e or §1692f should be similar"
Thomas v. Youderian, No. 2:16-CV-01408-KM-MAH, 2017 U.S. Dist. LEXIS 16585 (D.N.J. Feb. 3, 2017)

In *Thomas*, the plaintiff did not actually pay the debt thus did not incur the convenience fee, so establishing standing on the mere possibility of incurring a fee or the possibility of similarly situated consumers paying such a fee is untenable. The District Court states to that end, "personal standing based on a hypothetical injury to third-party consumers is highly problematic" Id at 17. Nevertheless, the Court does find that Article III standing can exist in this case as the presence of an unauthorized convenience fee can have the effect of dissuading consumers to pay by a certain easy-to-use payment system – a credit card, and may in fact still pay it, and under the least sophisticated debtor standard, the District Court reasons that debtors may be led into believing that the fee is a cost of paying off their debt as it is contained in a letter seeking repayment of a defaulted debt. That sort of FDCPA violation would seem to rise to the level of a concrete and particularized injury-in-fact.

In another case, *Kaymark,* the Plaintiff alleged FDCPA violations when a dated foreclosure complaint included attorney's fees that had not yet accrued in accordance with the date stated in the complaint. The plaintiff disputed these charges and never actually paid the fees. However, the Court found enough of an injury to create standing. In its reasoning the Court stated, "the injury alleged is one that Congress has elevated to the status of a legally cognizable injury through the FDCPA…this is not a case asserting a bare procedural violation… rather…this action involves an alleged misrepresentation of the legal status and amount of the debt itself" and under these circumstances, the defendant has a right to truthful information which the debt collector failed to provide *Kaymark v. Udren Law Offices, P.C., Civil Action No. 13-419, 2016 U.S. Dist. LE XIS 171061 (W.D. Pa. Dec. 12, 2016)*

.

In *re Horizon*, a class action case alleging an FCRA violation by an insurance provider (which has been instructive to courts in analyzing FDCPA cases) concerned a data breach, specifically the theft of company laptops containing private personal information. At the time of filing the suit, no actual harm had occurred to the customers whose data were contained on the stolen laptops. Plaintiffs claim that "a violation of their statutory right to have their personal information secured against unauthorized disclosure constitutes, in and of itself, an injury in fact." In assessing this claim the Third Circuit Court of Appeals concluded that "the plaintiffs here do not allege a mere technical or procedural violation of *FCRA*. They allege instead the unauthorized dissemination of their own private information – the very injury *FCRA* is intended to prevent. There is thus a *de facto* injury that satisfies the concreteness requirement for Article III standing" *In re Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625 (3d Cir. 2017).*

In summary, it is clear that courts will not treat all FDCPA violations equally. FDCPA violations that involve improper disclosures amounting to an invasion of a privacy right that Congress intended to protect can give rise to standing. Improper statements about the amount of a debt, fees associated, or statements that can negatively affect the manner and method of payment can also give rise to standing. The more confusing situations are those in which a debt collector defendant allegedly violated an FDCPA procedural provision that might not result in any sort of actual harm to the plaintiff. As the Court in *Thomas* hinted at, there is a lack of clear authority on whether bare procedural violations of the FDCPA can give rise to an injury sufficient to create standing. Over the next few months, debt collectors, attorneys, consumer advocacy groups and other professionals in this space should keep an eye on how courts across the circuits will deal with these questions.