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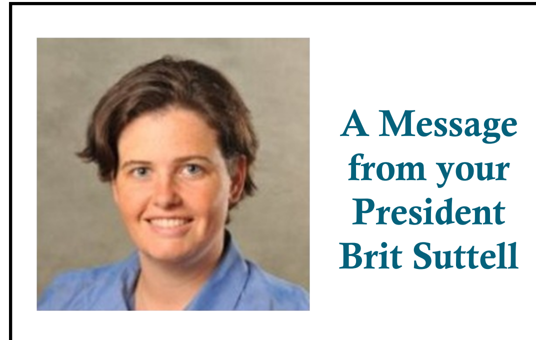

A Message from your President Brit Suttell

My name is Brit Suttell and am your new President for the Pennsylvania Creditors Bar Association. I was elected in October at the annual conference. As 2015 comes to a close, I would like to first thank our membership for a successful year for our Association. With increasing industry regulation, it more important that we continue to have one united voice in Pennsylvania as a creditors bar association. Case in point, in November, four state senators introduced Pennsylvania Senate Bill 1072 which seeks to amend the Fair Credit Extension Uniformity Act to make it an abusive practice for creditors and debt collectors to call a consumer more than three (3) times. While it appears likely, this bill will die at the end of the legislative session, we are closely watching the bill and are looking to meet with the legislators.

Second, I would like to take a moment and thank Yale Weinstein for his service as the preceding past President of PACBA. Under his leadership, PACBA continued to grow and, hopefully, that growth will continue.

Looking into the New Year, a committee has been formed to reevaluate the by-laws. Additionally, I hope PACBA can engage in more outreach with local magistrates, Common Pleas judges, and state legislators. I think we can all agree that PACBA deserves a seat at those tables to discuss the debt collection industry. I hope everyone had a safe and happy holiday season and Happy New Year.

PENNSYLVANIA SENATE PROPOSES TO LIMIT DEBT COLLECTION CALLS TO THREE IN TOTAL

Kenneth S. Shapiro, Esq.
Shapiro Law Office, PC

On November 20, 2015, Pennsylvania Senate Bill SB-1072 was introduced jointly by State Senators Greenleaf, Tartaglione, Rafferty and Pileggi. This Bill (if enacted) would limit the number of telephone communications that a creditor or debt collector may have with a debtor to three in total. Senator Greenleaf explained to his fellow Senators that this legislation is necessary due to the volume of debt collection complaints received by the Pennsylvania Attorney General's Bureau of Consumer Protection and Consumer Financial Protection Bureau. He further stated that this bill "will further protect consumers from harassment or abuse in connection with debt collection, while still allowing businesses to collect debts owed to them."

The proposed legislation amends the Pennsylvania Fair Credit Extension Uniformity Act by adding the following as an unfair act or deceptive practice:

"(b.1) Limitation on telephone contacts with consumers.
(1) It shall constitute an unfair or deceptive debt collection act or practice under this act if a debt collector or creditor communicates with a consumer regarding a debt more than three times by telephone.
(2) Nothing in this subsection shall be construed to prohibit a debt collector or creditor from communicating with a consumer regarding a debt on a fourth or subsequent time by another form of communication, other than telephone. "

One glaring problem with this proposed legislation is that it makes no provision for debtors who actually want to continue a telephone conversation beyond three calls to resolve their debt, or for calls initiated by debtors. Presumably, any voicemail left for a debtor would also count towards the total.

This Bill goes far beyond the Massachusetts regulation, frequently lauded by consumer advocates, that prohibits calls "in excess of two such communications in each seven-day period to a consumer's residence or cellular telephone and two such communications in each 30-day period other than at a consumer's residence, or cellular telephone for each debt… "209 CMR 18.1418.14(1)(d).

SB-1072l was referred to the Consumer Protection and Professional Licensure Committee for further deliberation. As of 1/19/16, no committee or floor votes have been scheduled for the bill. Members of the Creditors' Bar should carefully follow the status of this proposed legislation during the upcoming calendar year.

GUIDELINES TO DETERMINE REASONABLE ATTORNEY FEES IN THE EASTERN DISTRICT OF PENNSYLVANIA

Thomas W. Smith, Jr., Esq.
Shapiro Law Office, PC

As you are aware, the FDCPA allows a prevailing Plaintiff to recover costs and reasonable attorney's fees. See 15 U.S.C. 1692k(a)(3). The case of Mary Ann Navarro v. Monarch Recovery Management Inc. (E.D.Pa. No. 13-3594) ("Navarro") offers some excellent guidelines regarding how the U.S. District Court for the Eastern District of Pennsylvania determines "reasonable attorney's fees" in FDCPA actions. In his Memorandum Decision dated June 20, 2014, Judge Surrick offered a well-reasoned explanation as he reduced Plaintiff's attorneys' fee request of $3,405.00 down to $2,530.00 (exclusive of costs).

The Navarro court references the Lodestar approach as the baseline of their analysis to determine reasonable attorney's fees. The Lodestar is a calculation of number of hours reasonably expended multiplied by a reasonable rate. Plaintiff has the burden to provide evidence to support what they believe to be a reasonable rate. Where a Plaintiff fails to meet their burden, the court exercises its discretion to determine a reasonable rate by using a variety of factors, including but not limited to, the skill required, time spent and experience of the attorney(s) involved. (See Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) for an in depth analysis of factors to be considered)

The first step under the Lodestar approach is to determine a reasonable hourly rate. In Navarro the court aligns itself with other courts within the 3rd Circuit and relies upon the local attorney fee schedule published by Community Legal Services, Inc. ("CLS"). The CLS fee schedule outlines market rates for an attorney based on geographic region. The Court views CLS's fee schedule as recommended rates and makes adjustments based on variables such as skill required, time spent and experience of attorney(s) involved.

The second step under the Lodestar approach is to determine the number of hours reasonably expended on litigation. The Navarro court reasoned that where time cannot be billed to a client it cannot be bill to an adversary. Of particular interest is the fact that this Court determined that administrative fees such as opening a file or speaking with a process server were not billable hours and therefore not charged to the Defendant.

It should be noted that Navarro involved a Rule 68 Offer of Judgment. When properly utilized, a Rule 68 Offer of Judgment can be an effective tool to set parameters for settlement and limit attorney's fees. Be careful when drafting an offer of judgment to cap the accrual of attorney's fees only to the time when the offer is served on the Plaintiff (or counsel). Defense Counsel in Navarro included language in their offer that allowed for the accrual of attorney's fees through the resolution of the Offer of Judgment.

LIFE AFTER THE PRA, ENCORE AND HANNA CONSENT ORDERS: THE NEW NORMAL FOR A DEBT COLLECTION ATTORNEY

Joann Needleman, Esq.
Member and Consumer Financial Services
Regulatory & Practice Group Leader
Clark Hill, PLC

The recent Consumer Financial Protection Bureau ("CFPB") Consent Orders ("Orders") levied against Portfolio Recovery Associates ("PRA"), Encore Capital Group ("Encore") and Frederick J. Hanna and Associates ("Hanna") will have a significant impact upon attorneys who practice in the area of debt collection including those who litigate.

In case you were on hiatus, here is the rundown.

PRA/Encore.

Collectively the Orders found the following:

- Improper Debt Buying Practices – Both companies purchased debt that they knew or should have known that the information to substantiate the debt was inaccurate and in some instances the seller disclaimed its accuracy and enforceability. Both companies stated incorrect balances, interest rates, and payment due dates in attempting to collect debts from consumers;
- Improper Handling of Consumer Disputes - Both companies relied upon the consumer to advise as to the accuracy of the debt and failed to provide "account level documentation" after the validation period, failed to investigate oral disputes and referred matters to law firms knowing the accounts had been disputed;
- Illegal Litigation Practices – The CFPB also found that the companies engaged in unlawful litigation practices both internally and with outside law firms. Notably, the companies sued consumers in state courts across the country with no intention of ever proving the debts. Instead, the companies made no effort to obtain the documents to back up their claims, relying instead on consumers not to file a defense and winning the lawsuits by default. Additionally, the companies filed affidavits that contained misleading statements as well as sent thousands of letters to consumers offering to settle, without revealing that the debt was time-barred or too old for litigation.

The CFPB also concluded that PRA and Encore did nothing to investigate the accuracy of the debt they were collecting even in instances where there was no dispute from the consumer, thus expanding the requirements of § 1692g(a)(3). Thus the assumption that a debt can be valid absent a formal dispute by the consumer seems to have been repealed. The CFPB also found that PRA and Encore failed to investigate oral disputes outside the 30 day validation period, even though the FDCPA does not require a debt collector to do so.

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Finally, the CFPB also took issue with the law firms hired by both PRA and Encore suggesting that the number of attorneys in the respective law firms was extraordinarily small compared to the volume of the cases being sued upon. Neither consent order found that any of these law firms had violated any Rules of Professional Conduct or that any attorney in any of these firms was not otherwise qualified to represent PRA or Encore.

The Orders required both PRA and Encore to cease collections on millions of dollars of debt, and move to vacate all judgments and dismiss all lawsuits where it misrepresented that a debt was assumed valid or where a lawsuit was filed past the statute of limitations. Additionally, both companies are prohibited from making any representation regarding any debt unless it can be substantiated including a review of all "original account level documentation" including confirmation that the accounts were within the applicable statute of limitations. Any engagement with a law firm requires extensive policies and procedures to ensure not only compliance with federal consumer protection laws but termination in the event of non-compliance.

Hanna

The CFPB's complaint against Hanna sought unspecified damages and penalties as well as injunctive relief against the firm, including the potential shutdown of law firm operations. In the Order, which has now been approved by the Court, Hanna will agree to pay a civil penalty of $3.1 million dollars to the CFPB and the law firm will remain in operation. Hanna admitted no liability and both sides admitted that remaining issues of law were not otherwise adjudicated.

Much like the litigation requirements found in the PRA and Encore Orders, Hanna will be required (1) to show that for every lawsuit filed going forward "Account-Level" documentation from the client was reviewed and (2) to confirm "based upon methods and means proven to be historically reliable and accurate" that the statute of limitations has not run, venue is proper, and the consumer has not filed bankruptcy. Further, Hanna is prohibited from presenting any affidavit to any Court unless the affiant (Hanna's client) has personal knowledge of the truth or accuracy of the character, amount and legal status of the debt, that the documentation relates to the consumer being sued, that the affidavit was properly notarized, and that the affiant reviewed the Account-Level Documentation prior to making the affidavit.

Looking Ahead

The Orders reveal a clear disdain for debt buying industry by the CFPB. Hanna may have been targeted for numerous reasons including its prior run-in with the Georgia Attorney General, but that Hanna represented debt buyers was the clear motivation for the CFPB's suit. Therefore, collection attorneys will need to undertake a significant cost-benefit analysis as well as a soul-searching to determine whether the representation of a debt buyer is financially feasible. The reputations of both PRA and Encore have been severely compromised such that any evidence to substantiate a debt will be met with suspicion both by the consumer and the courts. Look for increased litigation against PRA, Encore and their law firms for no other reason that they do business together.

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The consent orders have also created an environment of mistrust resulting in a law firm being unable to rely on the information provided to it by its client. Law firms will be required to adopted enhanced policies and procedures to ensure that not only is the information provided to it by its client is otherwise accurate, but also that the debt has not otherwise been disputed and that evidence exists to substantiate it.

The Orders have also modified the traditional pleading standards found in many states; now requiring more than simply allegations sufficient enough to state a claim, to proving up your case from the moment the complaint is filed. Furthermore, the Orders contemplate that upon the forwarding of any account to a law firm "full account level documentation" must be provided from the outset. Gone are the days where a spreadsheet with just a name, address, balance or charge off will be sufficient. More is required including terms and conditions and statements which must show account activity including the last charge or payment. These requirements must not only in the possession of the attorneys prior to the sending of any demand letter or upon other collection activity but they must also be appropriated reviewed, (i.e. meaningful involvement). Finally it will not be enough to receive an affidavit from your client, but as their counsel, you will be required to ensure that the affidavit is accurate and as well as be familiar with the procedures of your client in generating the affidavit. Much like an audit a client performs on law firms, law firms will need to appropriately audit their client's procedures, which may include an on-site visit or interview with the affiant.

It certainly should be noted that there was nothing in the Hanna Order which suggests that Hanna failed to do any of these things; nor should these suggestions and requirements infer a major paradigm shift from what is already being done by many law firms who devote countless time and resources to such compliance. However, the hopeful take away here is that attorneys should now be in a better position to dictate the terms of their representation. Client standards that do not follow what is outlined in these Orders should be addressed with the client forthwith and modified. Failure of the any client to adapt to this new normal will require a law firm to consider whether the risk outweighs the benefits and whether the representation should continue.