Banking and Finance Law Daily Wrap Up, DEBT COLLECTION—N.D. Ga.: Debt collecting law firm comes under CFPB authority, (Jul. 16, 2015)

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By Richard A. Roth, J.D.

The Consumer Financial Protection Bureau has the authority to enforce the Fair Debt Collection Practices Act and Consumer Financial Protection Act against a law firm that specializes in consumer debt collections, according to a federal district court judge in Atlanta, Ga. The law firm's claims that the bureau was attempting to illegally regulate the practice of law and was violating its constitutional rights both were rejected (*CFPB v. Frederick J. Hanna & Assoc., P.C.*, July 15, 2015, Totenberg, A.).

According to the CFPB, Frederick J. Hanna & Associates files thousands of consumer debt collection suits each year—more than 350,000 between 2009 and 2013—while employing a small staff of attorneys. According to the bureau's calculations, the firm's procedures mean that each complaint receives no more than one minute of attention from an attorney before it is filed. Also, suits often are simply dismissed if the consumer appears in court, especially if the consumer has an attorney.

The CFPB's main charges are that the firm violates the FDCPA by misrepresenting that attorneys are involved in reviewing the suits and by relying on affidavits signed by individuals who the firm knows, or should know, had no personal knowledge of the asserted facts. These practices violated the FDCPA and also were unfair, deceptive, or abusive under the CFPA.

Practice of law. The law firm's practice of law objection to the bureau enforcement action applied only to the CFPA claim, not the FDCPA claim, the judge first made clear. The Dodd-Frank Act says that the bureau can enforce any of the "enumerated consumer laws" against attorneys, and the FDCPA is such a law. There is no question the FDCPA applies to attorneys engaged in debt collection litigation.

However, the bureau's authority to act against unfair, deceptive, or abusive acts and practices under the CFPA is constrained by an exclusion that protects the practice of law. According to the act, "the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed …" (12 U.S.C. §5517(e)(1)). That exclusion covers the law firm's debt collection suits, the judge said.

The CFPB noted in reply that there are two exceptions from that exclusion, one of which applies to services performed "by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney …" (12 U.S.C. §5517(e)(2)). The judge decided that this exclusion clearly applied to the law firm's debt collection suits, giving the bureau the authority to act. The suits were services provided to the law firm's clients with respect to consumers who were not receiving services from the firm.

The judge rejected the firm's counter-arguments, including one based on the legislative history of the Dodd-Frank Act, as unpersuasive and contrary to the clear meaning of the statute. It was irrelevant that the practice of law historically was regulated by the states, the judge added, as that tradition did not mean the federal government had no authority.

First Amendment objection. The law firm claimed that applying the FDCPA and CFPA to its litigation practice infringed on its right to petition the government for redress of grievances, a right guaranteed by the First Amendment to the Constitution. The theory, which is referred to as the *Noerr-Pennington* doctrine, has its roots in antitrust law. According to the judge, the doctrine originally was that the First Amendment immunized persons from liability under the antitrust laws when they were petitioning the government, and has been extended to judicial proceedings and to contexts other than antitrust.

However, the doctrine does not extend to debt collection suits, the judge said. The Supreme Court determined that the FDCPA applies to debt collecting attorneys in *Heintz v. Jenkins*, 514 U.S. 291 (1995)), and the act's

applicability was not in doubt. There was, in fact, no support for the claim that debt collection suits were constitutionally protected.

Equal protection objection. Because the CFPB's enforcement action did not limit the access of the firm's clients to the courts in any "constitutionally significant way," there was no violation of the Constitution's equal protection clause, the judge continued. In fact, the judge said, the firm's equal protection argument "fails right out of the gate" because it relied on an assertion that any action that would in any way infringe on access to the courts required strict scrutiny. In fact, the clients' right to sue to recover debts was not a fundamental right that was entitled to special constitutional protection.

This meant the bureau's enforcement activities were permissible as long as they had a rational basis. The firm did not even try to argue that the enforcement of the CFPA and FDCPA did not have a rational basis. In fact, the firm offered no reason to believe the CFPB suit would meaningfully interfere with the clients' ability to file nonfrivolous collection suits, the judge observed.

Statutory violations. The law firm also asserted that the practices the CFPB was complaining about did not violate the FDCPA and therefore, by extension, did not violate the CFPA either. The laws did not prescribe any degree of attorney involvement in screening suits, the firm argued, and the CFPB simply had not adequately described any violations concerning the affidavits.

The judge disagreed.

Attorney involvement. The filing of a complaint that was signed by an attorney but in which the attorney had no meaningful involvement could be a misrepresentation that a communication was from an attorney or a deceptive debt collection method, the judge said. Either would violate the FDCPA.

The law firm conceded that a collection complaint is a communication under the act, the judge noted, and the "meaningful attorney involvement" theory that generally applies to dunning letters should apply to complaints as well. The least sophisticated consumer could believe that a complaint signed by an attorney indicated the attorney had considered the case and decided it had legal merit; if there had been no meaningful attorney involvement, the FDCPA could have been violated.

The law firm also contended that the CFPA could not have been violated because no consumer who read a complaint could be deceived as to whether he was being sued. However, that was not the basis of the bureau's claim, the judge pointed out. The bureau charged that the firm was deceiving consumers as to whether an attorney had reviewed the claim and decided it had at least some merit.

"Sloppy" use of affidavits. The CFPB's charges about the firm's use of affidavits centered on how the firm represented its debt-buyer clients, as opposed to its clients that were collecting their own accounts. The firm did two things wrong, the bureau said. First, it relied on affidavits when it knew, or should have known, that the person who signed the affidavit had no personal knowledge about the asserted facts. Second, it did not inquire whether the debt sale contracts disclaimed any warranties about the accuracy or validity of the debts.

As a result, the bureau alleged that the firm violated the laws in five different ways:

1. It misrepresented the character, amount, or legal status of debts, in violation of the FDCPA.
2. It used misrepresentations or deceptive means to collect debts, in violation of the FDCPA.
3. It used unfair or unconscionable debt collection means, in violation of the FDCPA.
4. It provided a consumer financial product or service in violation of the FDCPA, which in turn violated the CFPA.
5. It engaged in an unfair, abusive, or deceptive act or practice, in violation of the CFPA.

The law firm attempted to parry the bureau's allegations by complaining that those allegations were insufficient. The judge was not convinced.

First, she said, there was no reason to apply the higher pleading standards that must be met in fraud suits to the bureau's claims. While some courts have taken that step, the higher standards only were relevant to a claim

of fraud or mistake, neither of which was the case. The higher standards also would be inconsistent with the consumer protection policies of the two acts.

The CFPB's allegations were enough to satisfy the ordinary notice-pleading standards, the judge decided, relying on the bureau's math when it compared the size of the law firm's staff to the number of suits it filed. The "huge volume of lawsuits" the firm filed and the firm's alleged failure to verify the accuracy of the affidavits it used was enough to plausibly imply the firm had violated the two acts, especially in the context of the debt-purchase industry.

Statute of limitations. The judge did leave the law firm a glimmer of hope when she refused to rule on the firm's statute of limitations argument. The FDCPA sets a one-year statute of limitations, and the firm argued that could eliminate from consideration many of the suits on which the CFPB was building its case, which could perhaps reduce its liability. The CFPB, on the other hand, argued that there should be no statute of limitations on the claims. The judge pointed out a third possibility that neither side cared to argue—the CFPA's three-year time limit.

According to the law firm, the issue was settled by the language of the FDCPA, which says that "An action to enforce any liability" under the act had to be brought within one year. "Any liability" includes liability to the government, the firm argued.

The CFPB tried unsuccessfully to convince the judge that there should be no time limit. According to the bureau, the FDCPA statute of limitations section applies only to private civil suits. A different section, which sets no time limit, applies to the authority of the CFPB and the Federal Trade Commission to enforce the act. The judge, though, pointed out that this section refers to enforcing "compliance" and says nothing about imposing liability.

If Congress had said nothing about time limits, the CFPB might have had a good point, the judge conceded. However, the CFPA says explicitly that the bureau has three years to sue after it discovers a violation. Thus, the bureau's argument was that Congress gave consumers one year to sue under the FDCPA, and gave the bureau three years to sue under the CFPA, but put no limit on when the bureau could use under the FDCPA. The judge rejected that result.

While the judge was certain there had to be some statute of limitations, she was not prepared to decide what the time limit was. She was, however, able to decide that whether the time limit was one year or three did not matter at the early stage of the suit. None of the bureau's claims would be completely eliminated by the shorter time limit, she said, and the bureau and the firm would have to engage in the same discovery process no matter which time limit was correct.

That being the case, the judge invited the law firm to again raise the statute of limitations on summary judgment or after an appellate court considered the issue.

The case is No. 1:14-CV-221-AT.

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