



# Pennsylvania Creditors Bar Association

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



## WELCOME / A MESSAGE FROM THE PRESIDENT

As I'm writing this message, I hope that you all are opening your offices and beginning the task of figuring out your new "normal." Since the courts were closed most of this Spring, I hope you found some time to do those pesky law firm maintenance tasks that always seem to get swept to the wayside. This time last year we were frantically going through the CFPB proposed rule on debt collection and now we are frantically reading up on "social distancing" and re-opening guidelines.

Perhaps the most exciting news for the industry came on June 29th when the United States Supreme Court issued its long-anticipated decision in *Seila Law LLC v. Consumer Financial Protection Bureau*. In the opinion written by Chief Justice Roberts, the Court held that Congress overreached when it limited the President's power to remove the single director of the Bureau. Although some observers thought that the Court might remand based on standing grounds, the Court found there was an active and live controversy between the parties.

Upon holding that the CFPB's structure was incompatible with the structure of the Constitution and the separation of powers, the Court next turned to whether that provision (removal of the Director for cause, only) could be severed. This brought more agreement among the justices who held, 7-2, that the provision could be severed.

The question left unanswered by the Court was whether the civil investigative demand propounded upon *Seila Law* was enforceable. The CFPB argued that all acts of the CFPB had been properly ratified, but the Court remanded the case to the Ninth Circuit Court of Appeals "to consider whether the civil investigative demand was validly ratified." A copy of the opinion can be found [here](#).

While things slowed down on the debt collection litigation front, other items kept trucking along. In the Pennsylvania Senate, a bill has been introduced to amend the Fair Credit Extension Uniformity Act to exclude municipal taxes and the like. PACBA supports the bill and is in the process of drafting a letter in support to the Banking and Insurance Committee which is currently reviewing the bill. A copy of Senate Bill 1138 can be found [here](#). PACBA encourages its members to reach out to your local state representatives and senators to voice your support for the bill.

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- [Brit J. Suttell, Barron & Newburger, P.C.](#)



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## PACBA SUPPORTS SENATE BILL 1138

BY: KEVIN BURAKS, PORTNOFF LAW ASSOCIATES, LTD

Pennsylvania Senate Bill No. 1138, introduced by Senators Pat Browne and Scott Martin on May 11, 2020, seeks to amend Pennsylvania's Fair Credit Extension Uniformity Act (the "FCEUA") by excluding municipalities and municipal authorities from the scope of the FCEUA. The purpose of the FCEUA is to establish "what shall be considered unfair methods of competition and unfair or deceptive acts or practices with regard to the collection of debts." 73 P.S. § 2270.2. The FCEUA provides a list of acts and practices by creditors and debt collectors that are deemed to be unfair or deceptive. While the FCEUA specifically exempts any debt owed to the Commonwealth or Federal government, local municipalities and authorities currently fall under the definition of "creditor" and their attorneys are considered "debt collectors" under the FCEUA.

The purpose of SB 1138 is to provide the same exemptions for Pennsylvania municipalities and authorities as are currently provided to the Commonwealth and the United States. The proposed amendment will negate the ability to wage frivolous litigation against municipal entities and their attorneys, as the FCEUA currently creates competing legal requirements that cannot be lawfully met. For example, the FCEUA applies to municipalities and school districts that collect taxes. While taxing bodies are required to maintain a public record of delinquent taxes, the inclusion of political subdivisions in the definition of "creditor" creates a potential violation under the FCEUA by communicating this information with third parties without the prior consent of the consumer. Similarly, when a title company seeks tax payoff information for a property, the information is requested from the organization collecting the municipality's delinquent taxes. This information is public information, but because the municipality falls under the umbrella of the FCEUA, the providing of this payoff information by the delinquent tax collector to the title searcher might constitute a technical violation of the FCEUA.

Real estate tax revenue is the lifeblood of Pennsylvania's municipalities and school districts; yet, Pennsylvania is the only state that regulates the collection of real estate taxes by attorneys under its state consumer protection law. If Congress decided to place a moratorium on debt collection, Pennsylvania municipalities and school districts would be precluded from collecting unpaid real estate taxes as a result of this Federal freeze, as the FCEUA specifically adopts and incorporates the provisions of the Federal Fair Debt Collection Practices Act.

It is obvious that municipalities and taxing districts should not be treated as creditors under the FCEUA. SB 1138 succinctly rectifies this oversight without removing the existing consumer protections provide to Pennsylvania's taxpayers. The Pennsylvania Creditors Bar Association asks that you contact members of the Senate Banking & Insurance Committee and ask for their support to move this important bill out of committee.



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## BEST PRACTICES WHEN ADMITTING BUSINESS RECORDS INTO EVIDENCE AT TRIAL

BY: KENNETH C. GROZIER, SHAPIRO LAW OFFICE, PC

A record of an act, condition or event shall, insofar as relevant, be competent evidence *if* the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.” The phrase “*in the opinion of the tribunal*” indicates that even on the face of the law the application is left up to the discretion of Judges. In Pennsylvania, with the numerous counties, and the vast number of MDJs in each county, it is especially important that attorneys familiarize themselves with a specific judge’s preferred practices before appearing in court.



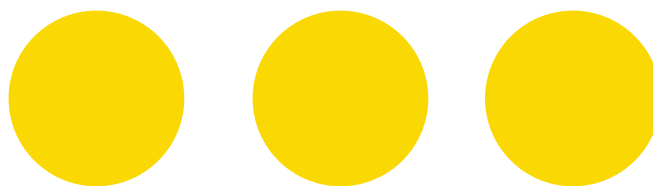
### KNOW YOUR JUDGE BEFORE APPEARING IN ANY EVIDENTIARY COURT HEARING

A quick review of two recent evidentiary cases shows the discrepancy in the application of Pennsylvania’s evidentiary rules. In *Bayview Loan Servicing LLC v. Wicke* (a mortgage foreclosure action), the Pennsylvania Supreme Court held that the trial court did not err in allowing plaintiff’s records custodian to lay a foundation under Pa. R. Evid. 803(6) for admission of records from the loan servicer. *Bayview Loan Servicing LLC v. Wicker*, 206 A.3d 474, 476 (2019). Asking the court to overturn the Superior Court’s holding, the defendants argued that “a conflict exists in the Superior Court’s precedent relating to the application of the business records exception in debt collection and mortgage foreclosure cases. *Id.* at 480. In response, the court noted that “in reviewing evidentiary decisions, this Court has repeatedly emphasized that the **admissibility of evidence is within the sound discretion of the trial court**, which appellate courts will not disturb absent an abuse of discretion or error of law. *Id.* at 482. This case highlights two important points: (1) because there is considerable discretion afforded to trial court’s in making these types of evidentiary rulings, attorneys engaged in debt collection practices should ensure that they are prepared for each individual judge’s evidentiary preferences; and (2) attorneys will be hard-pressed to get a trial court decision overturned on appeal, further emphasizing the importance of preparation.



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In a footnote to *Neff v. PNC Bank, Nat'l Ass'n*, the Pennsylvania Superior Court in a non-precedential decision noted that “[r]ecently, the Pennsylvania Supreme Court held that the business records exception to the hearsay rules extends to business records generated by a prior loan servicer. Thus, there can be no doubt that Citibank’s business records were admissible *to show what the parties said to one another.*” *Neff v. PNC Bank, Nat'l Ass'n*, 2020 Pa. Super Unpub. LEXIS 619, No. 728 WDA 2019, n. 9 (emphasis added). On the one hand, this could be read to indicate the Superior Court’s belief that the lower courts are becoming more solidified in their application of the business records exception. On the other, it should be noted that the Superior Court is only referencing the admissibility of the evidence, *to show what the parties said to one another.* As this is one specific element of the business records exception, and it is one of the few rulings that has cited to *Bayview*, it is unclear whether the Superior Court will continue to act in harmony with the lower courts, or whether there is still a range of applications of the rule.



The critical question then becomes what can attorneys acting as third-party debt collectors do to ensure that, at trial, they will be permitted to admit evidence in the form of business records. One way to help ensure the admissibility of evidence is to get to know the judge that will be making the critical rulings. ALM Publishing (publisher of *The Legal Intelligencer*) annually publishes its “Insider’s Guide to the Pennsylvania Judiciary and Court” (SKU# PJUDD20). Orders may be placed online at [www.lawcatalog.com](http://www.lawcatalog.com) or by phone at 1-877-807-8076. This book lists all of the judges in the Commonwealth from the Magisterial District Courts through the Pennsylvania Supreme Court, and even includes the three federal districts in the Commonwealth. In compiling this softcover manual, judges were asked about their preferred practices and for each judge that responded, their preferences were listed under their name. Once an attorney purchases a copy of this manual, they will then have the ability to familiarize themselves with the judge they will be advocating in front of and be able to get a feel for how that specific judge conducts court proceedings (i.e., if the judge is formal or informal). With this knowledge in hand, attorneys will have a better idea of how strictly a judge will apply various evidentiary rules and be better prepared to get their evidence admitted within the sound discretion of the trial judge.



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## PACBA ANNUAL MEETING

For the past several years we have hosted the PACBA Annual Meeting at the Desmond Hotel in Malvern, PA. We are still determining if this year's meeting will be an in-person or virtual event.

**We want to hear from you!**

Please complete our survey to help us gauge your interest in attending this year's annual meeting in person or virtually.

**[CLICK HERE FOR SURVEY](#)**

**Please complete the survey by July 15, 2020**

Visit the PACBA website for updates  
(<https://pacbar.org/>).

Questions? Please contact our Association Manager, Tricia Fusilero, at the PACBA office.

PACBA@CorpEvent.com or call 312-540-9300



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 Bill Molczan, Weltman, Weinberg & Reis Co., LPA, wmolczan@weltman.com  
 Gregg Morris, Patenaude & Felix APC, gmorris@pandf.us  
 Bryan Polas, Patenaude & Felix, A.P.C., bryan.polas@pandf.us  
 Yale Weinstein, Burton Neil & Associates, P.C, yale@burt-law.com

## INTERESTED IN GETTING MORE INVOLVED?

If you are looking to grow your professional network, we invite you to get involved in PACBA. Opportunities include running for the board, participating in committee work, contributing to the newsletter or presenting at the Annual Meeting.

Please contact Association Manager, Tricia Fusilero, to learn more.  
 PACBA@CorpEvent.com or call 312-540-9300