Pennsylvania Creditors Bar Association

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

IN THIS ISSUE

Welcome Message From The President

Happy Holidays from PACBA! We had another very successful annual conference in October at the Desmond Hotel. I would like to extend another big thank you to our Education Chair, Matt Urban, for putting together a great event. In case you missed it, there's a recap of the conference in this newsletter.

2019 was another big year for our industry. Leading the charge was the CFPB's Notice of Proposed Rulemaking on Debt Collection, Proposed Regulation F. PACBA submitted a comment in response to the Proposed Debt Collection Rules focusing on both the "in writing" issue that is plaguing our circuit and the proposed meaningful attorney involvement "safe harbor." If you would like to see a copy of the comment submitted by PACBA, please let me know.

Not to be left out, the United States Supreme Court issued two opinions favorably to the industry. Early in the year it was *Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029 (2019) holding that law firm engaged strictly in facilitating non-judicial foreclosures did not meet the FDCPA's definition of debt collector. Unfortunately, since Pennsylvania is a judicial foreclosure state that opinion is not likely to assist our members.

Last week, the United States Supreme Court issued its opinion in *Rotkiske v. Klemm*, in which the Court affirmed the Third Circuit's holding that there is no discovery rule to the FDCPA's one-year statute of limitations. Justice Thomas, writing for the Court, issued a succinct opinion which I urge you all to read it here. Congratulations to Paul Klemm and his firm for fighting and the favorable industry result.

Looking ahead, to 2020 many industry members believe the CFPB will issue its Final Debt Collection Rule. Additionally, the United States Supreme Court will be hearing oral argument on whether the single-director structure of the CFPB is constitutional in *Seila Law v. CFPB*. Not to be outdone, the Third Circuit is going to be hearing oral argument in *Riccio v. Sentry Credit, Inc*. on the "in writing" issue regarding the validation notice which many of you deal with on a daily basis. The argument is scheduled for February 19, 2020.

With so much going on in the industry, it is a great time to be part of a state-level creditors' bar association. If you would like to get more involved, please reach out as we welcome new ideas and opportunities for advancing the practice of law in the creditors' rights area.

PACBA wishes everyone a Happy and Prosperous New Year!

- Brit J. Suttell, Barron & Newburger, P.C.

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Beware of Unfair Consumer Billing Practices

By Kenneth C. Grozier
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Generally, “debt collectors” are regulated by the Fair Debt Collections Practices Act (FDCPA), codified at 15 U.S.C. § 1692. The FDCPA provides guidelines that debt collectors must follow when collecting debts. If a debt collector is found to be in violation of the FDCPA, they will be liable under the FDCPA to individuals for the amount of any actual damage caused, and additional damages applied in the court’s discretion up to $1,000. See 15 U.S.C. § 1692k(a)(1)-(2)(A). In the case of a class action, each individual may be entitled to recovery of the individual amount, in addition to the lesser of $500,000 or “1 per centum of the net worth of the debt collector.” 15 U.S.C. § 1692k(a)(2)(B). However, the definitions section of the FDCPA provides a limited definition of the term “debt collector”, as a “business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed . . . or due another.” Id. at § 1692a(6). Therefore, a company with a principal purpose of anything other than the collection of debts may seek to collect their own debts without being subject to the burdens imposed by the FDCPA. See e.g., Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017) (holding that “individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account” are not debt collectors under the FDCPA).

Pennsylvania law however provides two other remedies to individuals who have been harmed by a person or entity who would not be a “debt collector” under the FDCPA. The Pennsylvania Unfair Trade Practices and Consumer Law (UTPCL) and the Pennsylvania Fair Credit Extension Uniformity Act (FCEUA) govern unfair consumer billing practices irrespective of whether the FDCPA applies. The UTPCL provides that “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . are . . . unlawful.” 73 P.S. § 201-3. The UTCPL provides twenty-one examples of an “unfair method of competition” and “unfair or deceptive acts or practices”, the last of which is a “catch-all” which prohibits someone from “engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion.” 73 P.S. § 201-2(4). More importantly, the UTCPL provides a broad definition of “person”. Under the UTCPL a person is any “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.” 73 P.S. § 201-2(2). In Danganan v. Guardian Home Services, 645 Pa. 181 (2018), the Pennsylvania Supreme Court, in answer to a certified question from the Third Circuit, held that the UTCPL provides a remedy against any Pennsylvania-based business which engages in any trade or commerce directly or indirectly affecting the Commonwealth. Dangananan, at 193 (citing Commonwealth v. Fields, 630 Pa. 625 (2014)). Further, the UTCPL entitles plaintiffs $100, or actual

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damages, whichever is greater. 73 P.S. § 201-9.2. With its broad definitions of persons, commerce, and deceptive acts, the UTCPL provides consumers dealing with any Pennsylvania business entity a far more expansive avenue of pursuing remedial relief than does the FDCPA.

The second remedy to consumers in Pennsylvania is the FCEUA, codified at 1999 Pa. SB 103. The FCEUA provides a definition of debt collector that is very similar to the FDCPA. See 1999 Pa. SB 103 § 3. However, the FCEUA also provides that a "creditor" is a "person, including agents, servant or employees conducting business under the name of a creditor and within this Commonwealth, to whom a debt is owed or alleged to be owed. Therefore, while the FCEUA provides similar guidelines for debt collectors as the FDCPA, it also provides for guidelines that creditors, the more expansive term, must follow. With this second definition, the FCEUA allows plaintiffs another broad avenue for pursuit of remedies. A violation of the FCEUA constitutes a violation of the UTCPL and provides for the same relief as the UTCPL. See id. at § 5.

Even if an attorney believes that their creditor client may be exempt from the provisions of the FDCPA in the aftermath of the decision in Henson v. Santander, they must still be mindful of state laws which may subject their client to liability and damages for deceptive or unfair consumer billing practices.

Why Membership in the Pennsylvania Creditors Bar Association is Beneficial:

- Access to member-only listserv: an internet discussion group
- Receive quarterly Newsletter to stay abreast of industry trends
- Seminars on relevant, practical topics
- Attorney to attorney networking opportunities

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Twenty (20) Year Statute of Limitations for Documents Signed Under Seal Thrives in PA

By Julie V. Peeler
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Historically, instruments signed “under seal” in Pennsylvania enjoyed a 20-year statute of limitations for legal enforcement compared to the 4-year statute of limitations ordinarily designated for notes and contracts. As mentioned in the Fall of 2018 PACBA newsletter, HB 1979 was signed in June 2018, preserving the 20-year statute of limitations for documents “under seal.” Earlier this year, the Superior Court of Pennsylvania issued a non-precedential decision, Driscoll v. Arena, 213 A.3d 253 (Pa. Super. 2019), which discussed the “seal” issue. See also Nat. Loan Investors, L.P. v. Gold, 2019 WL 2996565 (Pa. Com. Pl.). In July 2019, the United States Bankruptcy Court for the Eastern District issued a decision applying the reasoning of Driscoll and predicted that the Pennsylvania Supreme Court would follow the Superior Court’s holding in Driscoll regarding the requirements for rending a document a sealed instrument. In re George, 606 B.R. 236, 242 (Bankr. E.D. Pa. 2019)(noting that “any flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended”).

Most frequently, on an instrument that is executed under seal, there is the presence of the preprinted word “(SEAL)” next to the signature line of the obligor. Nat. Loan Investors, 2019 WL 2996565, at *2. However, in Driscoll, the applicable instruments- three promissory notes- were signed with no indication of the word “seal” next to the signature lines or even directly above them. Driscoll v. Arena, 213 A.3d at 260. Rather, each note included a paragraph entitled “Waiver,” which contained a sentence that was characterized by Judge Ott in her separate opinion as being “buried in the ‘Waiver’ paragraph.” Id. at 262. The sentence read: “Borrower intends this to be a sealed instrument and to be legally bound hereby.” Id. at 258. In its decision, our Superior Court recognized the lack of binding authority governing the circumstances before them and found that the quoted sentence was “the parties’ clear statement of intent” that the note be executed under seal. Id. at 260. The court reasoned that the clear statement was sufficient to render the notes as a sealed instrument and held that the use of the word “seal” next to the signature line was not required. Nat. Loan Investors, 2019 WL 2996565, at *2(citing Driscoll, 213 A.3d at 260). Therefore, the court concluded the notes in Driscoll were executed under seal and governed by the 20-year statute of limitations. Driscoll, 213 A.3d at 260.

The Court of Common Pleas in Montgomery County followed Driscoll in a case where there was no indication of a seal next to the parties’ signatures, but there was language pre-printed above the signature lines, which read: “Mortgager has caused…its seal to be hereunto affixed.” Nat. Loan Investors, 2019 WL 2996565, at *2. The court held that if similar language was sufficient in Driscoll to render notes as instruments under seal, then the quoted language in the present case, which was not “buried” in the paragraphs setting forth the terms and conditions of the Mortgage, has the same effect. Id. at 2. Similarly,

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in In Re George, there was no seal or words to that effect next to the signature; however, the sentence directly above the signature line read: “The Guaranty…is intended to take effect as an instrument under seal.” 606 B.R. 236, 242-43 (Bankr. E.D. Pa. 2019). The United States Bankruptcy Court for the Eastern District found that the sentence, which had language almost identical to the one in Driscoll, to be an unambiguous expression of the parties’ intent and concluded that the Guaranty was a sealed instrument. Id. at 243.

More recently, on October 24, 2019 our Superior Court issued an opinion echoing that sealing has long since become constructive, rather than actual, and is now largely a matter of intention. Valley Natl. Bank v. Marchiano, 2019 PA Super 322 (Pa. Super. Oct. 24, 2019). The court held that that an instrument is sealed and subject to the 20-year statute of limitations where it contains an acknowledgement followed by the notary seal and signature. Id. at 322. The Mortgagee in Valley Natl. Bank v. Marchiano initiated a foreclosure action against mortgagors five years after borrower defaulted on a loan agreement secured by mortgages on mortgagors’ properties. Id. The Court of Common Pleas in Berks County, Civil Division, granted mortgagee’s motion for summary judgment and the mortgagors appealed. Id. The instrument in question contained an individual acknowledgement by the notary after the signatures in the instruments, which read: “…before me, the subscriber…(b) signed, sealed and delivered this document…” Id. Our Superior Court held that the acknowledgements by the notary by the signature certified that the mortgages were “signed, sealed and delivered.” Id. However, as this decision was issued very recently it may still be appealed to the State Supreme Court.

These decisions affecting whether documents are “sealed” are extremely new and it is not yet known what their impact will be; however, they appear to loosen the requirements around sealing documents by allowing the parties to express their intention to seal a document in various formats. The holding of Driscoll, which was recently followed by the United States Bankruptcy Court for the Eastern District, will allow more documents to fall within the 20-year statute of limitations for instruments under seal, especially if Driscoll’s holding is adopted by the Supreme Court of Pennsylvania as predicted by In Re George. If Valley Nat’l Bank is not overturned on appeal, it will also allow the 20-year statute of limitations for sealed documents to be applied more liberally.

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2019 Seminar & Annual Meeting Summary

The Desmond Hotel & Conference Center

On October 11, 2018, PACBA held its annual seminar and meeting at the Desmond Hotel in Malvern Pennsylvania. This years' conference saw creditors rights attorneys from across Pennsylvania converge on the Desmond for a wide ranging and informative educational session that was approved for 5 continuing legal education credits (4 Substantive, 1 Ethics). The day began with a full breakfast followed by our first speaker of the morning, Jason Wehrle, who went over the hot topics in debt collection during the past year. Jason was followed by Joann Needleman who gave an informative presentation on what to expect now that the CFPB's proposed debt collection rules have been released. Before lunch Ashley Beach provided a detailed update on issues surrounding the SCRA. After lunch Jim Warmbrodt provided the group with a bankruptcy update and excellent discussion of the ethical pitfalls that can arise in a bankruptcy case. Our last session of the day saw the return of the very popular panel discussion led by Rob Polas, Tom Michaels and Matt Urban who discussed the current trends in debt collection litigation.

As always the seminar could not have been a success without the support of the PACBA's great sponsor, Tim Clark of ForSure Legal Services. On behalf of the Board of Directors of the PACBA I want to thank our sponsors for their continued support and would encourage our members to reach out to them to learn more about the services they offer. Thanks again to everyone who attended this years' seminar. We hope you found the speakers informative. We are in the process of finalizing the date and location of our 2020 event. Please stay tuned for an announcement in the near future!

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