
Federal Court Paves Way for CFPB to Pursue Enforcement Action Against Law Firm

By Joann Needleman / Jul 15, 2015

This is an update from Clark Hill's Consumer Financial Services Regulatory & Compliance Group.

"Frederic J. Hanna & Associates, P.C. ... is a self-proclaimed creditors' rights law firm." This was the opening salvo from the Federal District Court in the Northern District of Georgia yesterday in a case that will have lasting implications for any lawyer that represents a creditor in consumer debt collection litigation.

In *CFPB v. Frederick J. Hanna & Associates, P.C.* ("Hanna"), ___ WL, ___, 2015 U.S. DIST LEXIS _____, Case No 1:14-cv-2211-AT, (Jul 14, 2015, N.D. Ga), the Consumer Financial Protection Bureau ("CFPB") alleged that the Hanna law firm violated the Fair Debt Collections Practice Act ("FDCPA") as well as the Consumer Financial Protection Act ("CFPA"). Specifically, the Bureau alleged that Hanna lawyers had "essentially no meaningful involvement in the lawsuits they file" and that the firm and its named partners knew, or should have known, the affidavits, executed by their own clients, were done so without personal knowledge. The decision was a scathing rebuke of all of Hanna's defenses, as well as an indictment of the debt buying industry as a whole, even though no specific debt buyer was named as a party in this action.

Hanna put forth a series of arguments challenging the validity of the CFPB's claims and the Court flatly denied each with one issue punted until later in the litigation. Hanna argued the following:

- **Practice of Law Exclusion.** 12 USC § 5517(e)(1) provides an express exclusion from the Bureau's supervision and enforcement authority for the practice of law. However, Congress found it necessary to include two very convoluted "exceptions to the exception" which are: services or products that are part of, or incidental to, the practice of law, § 5517e(2)(A) and services offered by an attorney with "respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial products or services," § 5527e(2)(B). The Court found that although Hanna was practicing law, because it was not rendering legal advice to the consumer and the activities fell within the definition of a consumer financial product or service, the Bureau was well within its rights to bring this action under § 5527e(2)(B). Put another way, as was further argued by the Bureau in its papers, because Hanna represented a creditor in an effort to collect a debt and was otherwise adverse to the consumer, Hanna does not receive the benefit of the practice of law exclusion.
- **Constitutional Defenses.** Hanna argued that the Bureau's claims infringed on its First Amendment rights to petition the Court for redress (*Noerr-Pennington Doctrine*) as well as violated the Equal Protection Clause of the Fifth Amendment for imposing what amounts to additional burdens on filing certain law suits. The Court rejected both arguments, finding that *Noerr-Pennington* does not extend to FDPCA claims and the fundamental right to access the Court rests with the client and not the law firm.
- **Meaningful Involvement.** The crux of the CFPB's claims rested on the assertion that Hanna lawyers do not act like lawyers. They utilize and delegate functions to non-legal staff and are not otherwise involved in cases in any meaningful way. Thus, the Bureau alleges that Hanna violated § 1692e(3) of the FDCPA by falsely representing or implying its representatives are lawyers or that the pleading was from a lawyer. Although the FDCPA has no express "meaningful involvement" standard written anywhere in the statute, numerous Circuit and District courts have adopted this theory when it involved the sending of a letter. Here, the Court found that when the least sophisticated consumer is served with a debt collection lawsuit, the consumer will believe a lawyer has reviewed the account and was professionally involved in the decision to file the lawsuit. For these same reasons, the Court found that the lack of meaningful involvement allegations also fell under the CFPA because such conduct could be deemed unfair, deceptive and abusive.
- **Use of Affidavits.** The Bureau alleged that Hanna knew, or should have known, that its clients had no personal knowledge of the material facts of the affidavits they executed and Hanna otherwise used in its lawsuit. The Court went so far as to take judicial notice that "debt buyers often or may routinely lack evidence of the debt they seek to recover" as support for the Bureau's claim.
- **Statute of Limitations.** Hanna's final argument was that the one-year statute of limitations found in the FDCPA should otherwise be applied to the Bureau. The Bureau stated that "quod nullum tempus occurrit regi" or "time does not run against the King." The Court somewhat sided with the "King" by declining to rule on the issue so as to "consider further judicial developments that may be of assistance."

There is much speculation that Hanna will seek a request for Interlocutory Appeal. However, the decision is peppered with statements like "discovery may support these claims" or "at the early stage of this litigation," which suggests the Court wants the issues to be more fully developed. Nevertheless, the scope of the CFPB's reach has now entered into law firms. The determination of how lawyers should discharge their professional duties is determined by the rules of professional conduct and the state in which a lawyer is licensed. Many law firms support financial services institutions, whether it be through litigation, transactional activities or regulatory and compliance consulting. Much of this work will be adverse to consumers. The CFPB, and now the Courts, seek to set the standards of what constitutes professional judgment and activity in uncharted territory.

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