InBrief

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CFPB Publishes Proposals for Revisions to the FDCPA

Molly E. Rose

On July 28, 2016, the Consumer Financial Protection Bureau ("CFPB"), under the authority granted it by the Dodd-Frank Act, published an outline of proposals for revisions to the Fair Debt Collections Practices Act ("FDCPA"). The proposals, if enacted, would apply to collection agencies, debt buyers, collection law firms, and loan servicers, though many proposals are designed in such a way that creditors and debt owners will also be affected by these proposals.

Substantiation of Debt

Of paramount concern to the CFPB is "information integrity." The CFPB believes poor information transfer from creditors to debt collectors is a large contributor to lack of information integrity, resulting in debt-collection efforts being directed to the wrong consumers, being pursued for the wrong amount, or being made when the debt collector is not otherwise entitled to collect the debt. This concern represents the largest number of complaints filed with the CFPB.

To address this, the CFPB has proposed that, prior to attempting collection, debt collectors "substantiate" a debt in three ways:

(1) First, the CFPB proposes a requirement that debt collectors possess a "reasonable basis" that a particular consumer owes the debt. Recognizing that rigid rules cannot be made in a wide-ranging world of credit transactions, the CFPB is considering certain fundamental information that collectors can rely on to establish a "reasonable" claim for indebtedness, including:

- The full name, last-known address, and last-known telephone number of the consumer;
- The consumer's account number with the debt owner at the time the account went into default;
- The date of default, the amount owed at default, and the date and amount of any payment or credit applied after default;
- Each charge for interest or fees imposed after default, and the contractual or statutory source for such interest or fees; and
- The complete chain of title from debt owner at the time of default to the creditor.

(2) Secondly, substantiation would include obtaining written representation from the debt owner that it has implemented written policies and procedures to ensure the accuracy of transferred information.

(3) Finally, substantiation would require collectors review for "warning signs" that raise questions as to the accuracy of information (e.g., consumer information not being in an understandable form, the consumer filing a dispute, etc.). The CFPB has not limited this review to only pre-collection efforts and proposes a list of actions to be taken when warning signs are received at specified times over the course of collections. These proposed actions might be additionally required of subsequent collectors, if the dispute was not resolved. Consequently, the CFPB is also proposing requirements that require subsequent collectors to obtain and review certain information from past collection efforts, as well as requiring collectors to provide certain information if the account is transferred back to the debt owner or to a subsequent debt collector.

Required Disclosures

The CFPB currently finds the validation notices lack sufficient information to allow consumers to recognize past obligations. As such, it is proposing inclusion of additional information such as the amount owed at the time of default and interest fees and credits applied since the date of default. In addition to this enhanced notice, the CFPB is proposing debt collectors provide consumers a "Statement of Rights," which sets forth various rights under the FDCPA. A collector may be required to send the Statement of Rights a second time to a consumer 180 days after said consumer received the first Statement of Rights, if communications are still ongoing. The CFPB has provided a model notice for both the validation notice and the Statement of Rights.

(Continued)

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Proposals for Revisions to the FDCPA *continued*

In a similar vein, the CFPB is also considering a requirement for the debt collector to provide "litigation disclosures," advising that the collector intends to sue, that a court could rule against the consumer if no action is taken, and that additional consumer information (including contact information for legal services programs) is available on CFPB's website.

Lastly, the CFPB is considering a proposal that would require a collector provide a "time-barred debt disclosure," if an attempt is made to collect a time-barred debt. There are additional proposals to prohibit suit or threat of suit when time-barred debts are involved.

Communications with Consumers

Communication practices comprise the second largest source of complaints and, accordingly, a number of proposals are being considered on this front. The CFPB recognizes a resolution is needed for the long standing FDCPA dilemma posed when collectors leave a voicemail message, which may or may not constitute an FDCPA violation. Acknowledging that many consumers may benefit from discussing an obligation with a debt collector, it is proposing to allow collectors to leave messages that convey only (1) the individual debt collector's name, (2) the consumer's name, and (3) a toll-free number the consumer can dial to reply to the collector. The following would be an acceptable message: "This is John Smith calling for David Jones. David, please contact me at 1-800-555-1212."

Once a collector has confirmed good contact information for the consumer, the CFPB is considering a "contact cap" limiting the number of times a collector may contact the consumer in a given week. This would include both successful and attempted contacts. The CFPB is considering these limits for all combined avenues of communication (letters, calls, emails, etc.). In other words, the collector may only contact or attempt to contact a consumer by any combination of these methods a specified number of times in a week.

The CFPB has made attempts to address contacts with consumers that occur at inconvenient times or places. Though it is considering certain areas as presumptively inconvenient – medical facilities, places of worship, places of burial, or grieving and child-care centers – the CFPB has not gone as far as to say workplace calls are presumptively inconvenient. Conversely, the CFPB is considering prohibitions on sending an email to a consumer at their workplace, unless the consumer consents.

The foregoing is not an exhaustive summary of proposals, and the CFPB intends to conduct further proceedings within the next several months to determine the impact of the regulations.

To see the full outline of proposals, please visit: http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

Molly E. Rose

Recent Jury Verdict Highlights Importance of Correctly Completing Consumer Disclosure Forms

M. Thurman Senn

A recent jury verdict in the Jefferson Circuit Court in Louisville highlights the importance of correctly completing consumer disclosure forms in the sale of motor vehicles. In *Brown v. Kentuckiana Auto Mart, LLC,* No. 14-CI-005864, the jury awarded the purchasers of a vehicle damages of $3,442 plus an additional $25,000 in punitive damages based upon a claim that the motor vehicle seller failed to disclose that the vehicle was the subject of a "branded title" reflecting it had been rebuilt from a salvaged vehicle.

According to the purchasers, the dealer had supplied them with a disclosure form about the nature of the vehicle's title, but the box disclosing that the vehicle had a branded title was not checked. When they later received their title certificate reflecting the branded title, they sued claiming they had been defrauded into purchasing the vehicle.

M&P did not represent any party to this suit, but we know some of our good clients will be interested in the outcome as highlighting the importance of correctly completing consumer disclosure forms. Had the vehicle dealer correctly completed the form, the purchasers might not have had a claim. M&P recommends that clients required to provide consumer disclosures have (1) a sound system for training personnel that complete these forms and provide them to a purchaser, and (2) a post-transaction audit system to verify that required consumer disclosures are being properly given.

If you need help with consumer financial disclosures or disputes over consumer transactions, you can contact M&P.

M. Thurman Senn

M&P Welcomes Jake Michul and Charlie Otten

Jake Michul

Charlie Otten

Morgan & Pottinger is excited to announce that Jake Michul and Charlie Otten have joined the firm. Jake will focus primarily on real estate law, business law and litigation, and regulatory law. Charlie will support several of the firm's practice areas including banking and finance law, business law and litigation, employment and labor law, and real estate law.

Attorney General Opinion on "Full Name" Provision in KRS 382.135

Since the recently completed legislative session, there has been confusion among lenders, practitioners, and county clerks as to the meaning of the "full name" provision in the amendments to KRS 382.135. On July 15th, the Office of the Attorney General issued the following opinion (full opinion, OAG 16-06, at http://ag.ky.gov/civil/civil-enviro/opinions/Pages/2016.aspx):

The requirement in KRS 382.135(1) of a "full name" in a deed requires a surname and a personal name, initials, or combination of those. If a person's full name does not have a surname and some combination of a personal name and/or initials, such as in the case of a person who has only a single name, the person's legal name will suffice. County clerks are not liable for erroneous or false uses of a full name in a deed.

If you need assistance or require more information, please contact Branden Gross.

How Not to Expose a Liar in Court

Thomas R. Coffey

Just this past March, the Kentucky Supreme Court handed down a complex decision in *Sneed v. Burress* that has implications for trial conduct beyond the criminal-trial setting involved in the case.

Sneed was charged with first-degree rape, and Bullitt Circuit Court Judge Rodney Burress presided over Sneed's trial in July 2014. In an opening statement, Sneed's lawyer, Julie Kaelin, remarked that the victim's father, a witness to be called by prosecutors, was "a liar." The Commonwealth objected and asked for a mistrial. Judge Burress sustained the objection, but rather than granting a mistrial, simply directed Kaelin not to make any more such comments. Moments after that admonition, however, Kaelin made a remark about the victim herself having "trouble with lying." When Kaelin did that, Judge Burress granted a mistrial.

On Sneed's appeal, the Kentucky Supreme Court upheld the mistrial, but its decision consisted of a majority opinion, a concurring opinion, and a dissenting opinion, thereby demonstrating the intricate nature of the trial issues at hand.

All of the Court's justices seemingly agreed that *witnesses* called at trial are forbidden from characterizing the truthfulness (or lack thereof) of another witness. This rule applies to witnesses in all form of criminal cases and even in civil cases in that witness veracity is a fundamental determination treated as being within the exclusive province of a given jury.

Never before, though, has a court in Kentucky concluded that a *lawyer* cannot characterize a witness as being untruthful. Yet that appears to be what a majority of Kentucky Supreme Court justices in *Sneed* has ruled as being prohibited in courts of the Commonwealth from here on out. As the two dissenting justices emphasized, though, "Nothing…in any case that [we] know of, prohibits a lawyer in his opening statement from telling the jury that the evidence will show that an adversarial witness [is] lying." Interestingly, the concurring opinion may limit (or at least clarify) the majority ruling by prohibiting lawyers from making such characterizations in opening statements but not in closing arguments.

The full extent to which the majority's opinion will muzzle lawyers going forward is unclear because the Court's ruling hinges on the premise that Judge Burress had – indeed, that all judges must have – the discretion to grant a mistrial when a lawyer explicitly ignores a court's clear directives. Lawyers will be left to make sense of the ruling as it applies to specific cases they try, meaning it is almost guaranteed that the Sneed decision will be revisited sometime in the future.

Regardless of how the decision washes out for attorneys, *witnesses of any kind* – including in civil cases – should not comment on whether another party or witness is believable. Many might find it difficult to refrain from doing so in particular trial settings, but it is clear now that Kentucky courts only want a jury to make witness credibility assessments. If nothing else, *Sneed v. Burress* reflects the Kentucky Supreme Court's continued disdain for witnesses characterizing any other witnesses' veracity.

Thomas R. Coffey

Four M&P Attorneys Named Best Lawyers

Four M&P attorneys have been selected by their peers for inclusion in the 2017 Edition of *Best Lawyers in America*® in the practice areas of:

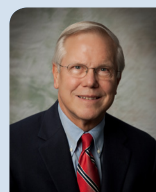
Banking and Finance Law – Louisville
John T. McGarvey
M. Thurman Senn

Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law – Lexington
Scott T. Rickman

Litigation – Banking and Finance – Louisville
John T. McGarvey

Mortgage Banking Foreclosure Law – Lexington
Scott T. Rickman

Real Estate Law – Lexington
James I. Murray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FirmNews

M&P IS PLEASED TO ANNOUNCE:

Brad Salyer

The 2016 Leadership Bowling Green class selected **Brad Salyer** to lead the program this year as class president. Leadership Bowling Green participants are chosen each year from a pool of applicants to study the community's strengths and challenges.

P. Branden Gross

Branden Gross has joined Commerce Lexington Inc.'s Public Policy Council. Commerce Lexington's Public Policy Council is instrumental in developing the organization's legislative agenda each year.

Branden Gross was sworn in on the Fayette County Board of Assessment Appeals on June 20. The board holds public hearings for each taxpayer protesting its property assessment by the property valuation administrator.

Branden Gross testified before the Senate Judiciary Committee on July 22, asking the committee for favorable consideration of a title insurance agent licensing bill during the 2017 Regular Session. The legislation would require title insurance agents operating in Kentucky to be licensed by the Department of Insurance.

Actual resolution of legal issues depends on many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter. If you have any questions about this newsletter, or suggestions for future articles, contact Eric Jensen, Editor.

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