

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



Jerry Myers is Smith Debnam's Managing Partner and for more than 30 years, he has focused his practice in the area of creditors' rights, with an emphasis on debt collection, judgment enforcement, and commercial litigation. Jerry is certified by the American Board of Certification as a Specialist in the field of Creditors Rights law. Jerry is a past President of the Commercial Law League of America and was the first President of the North Carolina Creditors Bar Association. He has written and lectured extensively on debt collection and judgment enforcement, including CLE presentations sponsored by Wake Forest University School of Law, the North Carolina Bar Foundation, the Commercial Law League of America, and the National Association of Retail Collection Attorneys.

Law Firm Assessed \$3.1 Million Fine – The Hanna Consent Order

January 21, 2016 | by

This article is an update to the article titled: [Best Practices for Collection Law Firms in the Face of Increasing Regulatory Scrutiny](#), published October 8, 2015.

Law firms that collect consumer debt continue to face increasing challenges. The newest and perhaps most daunting challenge is coming from the Consumer Financial Protection Bureau. Established by the Dodd-Frank Act, the CFPB seeks to protect consumers from unfair practices undertaken by financial institutions. While its initial focus was on policing the activities of large banks, the CFPB has broadened its scope to encompass the activities of virtually all financial institutions and their vendors, including attorneys.

CFPB investigations of lenders have often led to enforcement actions. The culmination of many enforcement actions against lenders has been a consent order requiring the lender to modify its practices, refund money to consumers, and pay a hefty fine. While all of this is painful for lenders, most are large, publicly held institutions that can weather such storms.

Recently, however, the CFPB has turned its attention toward much smaller companies – collection law firms. In its recent enforcement action filed against Frederick J. Hanna and Associates in Atlanta, the CFPB raised specific concerns about the firm's work on behalf of its clients. The complaint filed against Hanna includes allegations that the firm knew or should have known that affidavits supplied by its clients contained false statements. Many of the cases reviewed were filed on behalf of debt buyers. The supposed problem with the affidavits appears to arise from a belief within the CFPB that persons signing affidavits on behalf of debt buyers often lack the personal knowledge to which they are attesting. The CFPB also alleged that Hanna's attorneys are not meaningfully involved in the cases they file against consumers, complaining that the attorneys' caseloads are too large to allow the attorneys to be meaningfully involved in any of them.

Hanna aggressively defended the action, filing a motion to dismiss the complaint. The motion raised several defenses, including whether the CFPB has the power to regulate the practice of law, power normally exercised by the Supreme Court of the jurisdiction in which the attorney is licensed. The US District Court judge assigned to the case recently

produced a lengthy ruling denying Hanna's motion to dismiss.

Clearly faced with an unfriendly court, the Hanna firm shifted its focus to resolving the enforcement action. The result is a consent order that requires members of the Hanna firm to follow certain guidelines in its prosecution of consumer collection cases. The consent order also requires the Hanna firm to pay a penalty of \$3,100,000.00 to the CFPB.

The consent order is focused primarily on two aspects of the firm's collection practice. First, the Hanna firm is now responsible for ensuring that affidavits supplied by its clients are factually correct and were executed properly before a notary public. Collection law firms who represent national consumer lenders have become accustomed to being audited by their clients to assure the firm's compliance with state and federal laws and regulations and the clients' own work standards. Now it appears the shoe is on the other foot. The consent order places on the Hanna firm the responsibility for auditing its clients to assure that no "robo-signing" is taking place. The firm must also confirm that all statements made in clients' affidavits, such as an affirmation of the affiant's personal knowledge of the account, are truthful.

Secondly, the Hanna firm must also demonstrate that its attorneys are meaningfully involved in the collection cases they file. To demonstrate meaningful attorney involvement, the firm must:

- Have in its possession, before sending a demand letter or making a collection call, a charge-off statement, and if the case is based on a breach of contract, either account statements from the creditor indicating the actual use of the account or a copy of the account/loan agreement signed by the consumer. If the account is owned by a debt buyer, the attorney must also have evidence of the chain of title to the account.
- Before filing suit, the attorney of record for the case must log into the consumer's account in the firm's case management system, creating a record showing the attorney's review of the account. In addition to reviewing the account level documentation, the attorney must also confirm that the case is being filed within the statute of limitations, that the consumer has not filed bankruptcy, that the consumer's address has been confirmed using a historically reliable and accurate source, and that the case is being filed in a proper venue.

The Consent Order is only binding on the Hanna law firm. It contains guidance, however, for all law firms who collect consumer debt. Aspects of the Consent Order will also likely appear in the regulations that the CFPB is working to establish governing debt collection.

There are steps that law firms can take to address the concerns raised in the Consent Order. First, law firms should take the time to understand their clients' businesses. The firm should know the processes by which its clients verify the balances due on accounts and execute affidavits. The firm should make sure that the clients' affidavits are factually correct. A firm's review of its clients' policies and practices should be performed annually.

Next, law firms should put themselves in a position to demonstrate that their attorneys are meaningfully involved in the accounts handled by the firm. Many of the tasks involved in handling consumer debt collection cases may be competently handled by staff acting under the supervision of attorneys. Attorneys must, however, retain final approval and ultimate oversight of all processes followed by their staff. Attorneys must also have final approval for all letter and pleading templates used by the firm in prosecuting their cases. While attorneys do not have to personally perform every step involved in the prosecution of their cases, they must be involved in the key decisions arising in their cases.

In addition to maintaining control and oversight of internal processes and staff, attorneys need to make it easy to demonstrate their own involvement in handling the cases. The attorney should not only review the consumer's file in the firm's case management system before filing suit, but she should also make a note in the electronic records proving that the review took place.

Executing and retaining a checklist of items reviewed before a lawsuit is filed is also helpful in demonstrating the attorney's meaningful involvement.

The present climate for debt collection law firms is, and will remain, challenging. Firms must adopt practices that bring them in line with the expectations of their clients and regulators. Although many in Congress believe the CFPB has overstepped its bounds and should be reformed, law firms must face the reality that their practices may be faced with increased scrutiny in the days to come.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

CHARLESTON OFFICE

171 Church Street
Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541