

FDCPA, FCRA Claims: Hidden Trustee Treasure?

Written by:

Robert J. Nahoum
Law Offices of Robert J. Nahoum PC
Nyack, N.Y.
rjn@nahoumlaw.com

In today's bankruptcy climate, chapter 7 trustees increasingly question whether appointment to the panel is economically viable.¹ Trustees are compensated based on the assets they recover and liquidate; a larger recovery of assets results in greater commissions for the trustee. Thus, it would seem that trustees have an incentive to pursue every asset that could potentially enrich the estate and result in higher commissions.

However, it appears that trustees are unaware of the Fair Debt Collection Practices Act² (FDCPA) and Fair Credit Reporting Act³ (FCRA) claims in chapter 7 cases, and they rarely—if ever—investigate or examine debtors at the 341 meeting regarding these claims. This article explores FDCPA and FCRA claims in chapter 7 cases that, if liquidated, may increase distributions to creditors and trustees' commissions. Should trustees pursue these claims, the hazards and expenses of doing so, and the likely net result for the estate?

Consumer Protection Acts



Robert J. Nahoum

Consumer protection laws, including the FDCPA and FCRA (together, the "Consumer Protection Acts"), provide private rights of action (the "claims") to consumers who have been the victims of improper

debt-collection and credit-reporting practices. Those who violate the Consumer Protection Acts may be liable to the consumer (and in a bankruptcy case, to the estate) for up to \$1,000 in statutory damages, as well as substantial actual damages,⁴ including pain and suffering⁵ and attorneys' fees and costs.⁶

¹ Trustee compensation has been a contentious subject for many years, and Congress recently held hearings on the issue. See www.gpo.gov/fdsys/pkg/CHRG-110nhrg44493/pdf/CHRG-110nhrg44493.pdf.

² 15 U.S.C. § 1692, *et seq.*

³ 15 U.S.C. § 1681, *et seq.*

⁴ Redacted Jury Verdict, *Yazzie v. Law Offices of Farrell & Seldin*, No. 10-CV-00292 (D.N.M.), ECF No. 182 (New Mexico jury awarded plaintiff \$161,000 in actual damages for emotional distress and \$1.1 million in punitive damages).

⁵ *McCollough v. Johnson, Rodenburg & Lauinger LLC*, 637 F.3d 939, 958 (9th Cir. 2011) (upholding \$250,000 jury verdict in favor of former janitor suffering from brain damage who claimed collection agency caused him "anxiety, increasing his temper, pain, adrenaline and conflict with his wife").

⁶ 15 U.S.C. § 1692k(a)(3).

About the Author

Rob Nahoum is a consumer protection attorney and advocate in Nyack, N.Y.

Conduct prohibited under the FDCPA includes, among other things, using false,⁷ misleading or harassing⁸ tactics by third-party debt collectors attempting to collect consumer debts. The FDCPA protects consumers by requiring, for example, that all communication from debt collectors to consumers contain certain language notifying consumers of their rights. Similarly, the FCRA prohibits, among other things, knowingly furnishing to credit-reporting agencies incomplete or inaccurate consumer credit information and the improper use of credit reports.⁹ In cases where improper collection and reporting activity occurs, claims under the Consumer Protection Acts may be brought by the trustee.

Consumer Point

Claims Should Be Pursued by Trustees

According to the *Handbook for Chapter 7 Trustees*, "[t]he chapter 7 trustee, as the estate representative responsible for the recovery, preservation, liquidation and distribution of chapter 7 estate assets, serves as a fiduciary to various parties in interest in a case [including the creditors]."¹⁰ As a result, if the claims have value, there is little doubt that the trustee should pursue them to maximize the recovery for creditors.¹¹

Recovery for the Estate

The Consumer Protection Acts impose dual liability on debt collectors found to have violated the statutes. While actual damages are available for pain, suffering and economic loss, actual damages are not required to be proven for courts to award statutory damages.

⁷ *Paul v. Metro Area Collections Inc.*, 2011 WL 2270515, at *5 (D. Ore. May 4, 2011) (holding that voicemail indicating lawsuit would be filed, even though no such plans had been made, constituted false statement).

⁸ *Kuhn v. Account Control Tech.*, 865 F.Supp. 1443, 1453 (D. Nev. 1994) (holding that creditor calling debtor's place of employment six times within 24-minute period constituted harassment).

⁹ *McNearney v. U.S. Bankcorp Inc.*, 2006 WL 1582250, at *4 (E.D. Cal. June 5, 2006).

¹⁰ See www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/ch7_handbook/ch7_handbook_2011.pdf, Chapter 1, Part A.

¹¹ Claims may also be brought in an individual chapter 11 case by the debtor in possession and in a chapter 13 case by the chapter 13 trustee.

The claims are straightforward to identify, uncomplicated to prosecute and routinely settle before reaching trial or even discovery. As a result, the claims have the potential to quickly inject much-needed funds into the estate and materially increase the probability of a distribution for creditors. Provided that the trustee retains counsel on a contingency basis (which is the preferred method to litigate the claims), there is no risk to the estate and only upside potential for creditors.

Fee-Shifting

A significant benefit for trustees and creditors is the fee-shifting component of the Consumer Protection Acts. The Consumer Protection Acts provide that, if successful, the plaintiff's reasonable attorney's fees and costs must be paid by the defendant, a factor that contributes to speedy settlement in the vast majority of cases. As a backstop, counsel should always be retained on

a contingency basis to prevent any expense to the estate in the event fees are not awarded.

The Trustee's Investigation

The claims are among the most readily identifiable estate assets that a trustee will administer. Before the 341 meeting, the trustee should instruct debtors and their counsel to bring to the 341 meeting any and all collection letters received in the preceding 12 months¹² and copies of their credit reports.¹³ At the 341 meeting, the trustee should examine the debtor regarding whether any meritorious claims exist.¹⁴

Pursuit of Claims Is Sound Public Policy

Failure to pursue the claims is a breach of the trustee's fiduciary duties and reduces the probability of a distribution for creditors while allowing unscrupulous debt collectors to circumvent federal law. Congress has made clear in the FDCPA that debt collectors that have wrongfully taken advantage of a consumer should be called to

¹² The FDCPA has a one-year statute of limitations. 15 U.S.C. § 1692k(d).

¹³ Copies of credit reports are available at no charge annually. 15 U.S.C. § 1681j.

¹⁴ A checklist of questions can be found at <http://nahoumlaw.com/resources/common-collection-law-violations/>.

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task for their conduct.¹⁵ The Consumer Protection Acts' private right of action permits the trustee to increase the probability of a distribution to creditors at no risk to the estate while simultaneously deterring debt collectors from engaging in prohibited conduct. Creditors' chances for a recovery are only increased

when trustees pursue the claims, while ignoring the claims encourages unscrupulous debt collectors to continue a pattern of conduct detrimental to society. Simply put, justice is served when the claims are pursued.

Conclusion

Congress enacted the Consumer Protection Acts to curtail abusive debt-

collection practices and compensate victims. The filing of a bankruptcy petition should have no bearing on whether the claims are pursued. When trustees fail to even consider claims under the Consumer Protection Acts (as the vast majority are currently doing), they contravene their obligations to the debtors' estates and diminish distributions to creditors. ■

¹⁵ "It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e).

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