

No Treasure at the End of the Rainbow

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Trustees should abandon the vast majority of the Consumer Protection Act claims¹ because they are unlikely to provide economic benefit to the estate. Whether a trustee pursues the claims requires much more than a review of the Consumer Protection Acts. Like many bankruptcy issues, myriad factors must be considered before commencing litigation. In the rare consumer case where debt-collection activities are extraordinary, trustees might materially increase the recovery for creditors by pursuing the claims with substantial actual damages.

As a practical matter, the vast majority of claims involve only statutory damages or minimal actual damages that will not benefit creditors. Pursuit of such claims will delay distributions to creditors and case closure, ultimately costing

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administer the estate as expeditiously as possible. Statutory damages, without substantial actual damages, are simply not worth the trustee's time and effort and do not serve the best interests of the estate.⁴

The pursuit of most claims will not result in a meaningful distribution to creditors; as a result, actual harm to creditors and the bankruptcy system may result. As aptly stated in the *Chapter 7 Trustee's Handbook*:

Delays in case closure diminish the return to creditors, undermine the creditors' and public's confidence in the bankruptcy system, increase the trustee's exposure to liability, raise the costs of administration.... Delays also give rise

Carlisle, et al.,⁶ resulted in neither actual nor statutory damages, despite years of litigation. The Court concluded that statutory damages may be awarded when there are no actual damages, but "when there are no actual damages and no evidence of an intent to engage in abusive and deceptive debt-collection practices,"⁷ additional damages are unjustified.



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Similar outcomes have occurred in the Sixth,⁸ Seventh⁹ and Ninth Circuits,¹⁰ each of which held that false and misleading statements do not violate the FDCPA unless such statements are "material." Prior to

this line of cases, immaterial or hyper-technical violations were the mainstays of FDCPA litigation. It appears that for cases without actual injuries, quick returns for litigants may be coming to an end, and there is no reason for trustees to jump on board now.

Burden on the System

Pursuit of the claims will often return nothing more than *de minimis* value to the estate while creating an unnecessary administrative burden on the courts, clerks' offices, trustees and the U.S. Trustee. If trustees were to litigate the claims in volume, the already-burdened bankruptcy system may not function in the way stakeholders have come to expect. For example, in addition to increased litigation, pursuit of the claims would require approval by the court to retain contingency counsel, as well as a Bankruptcy Rule 9019 hearing on settlement of the claims. Such additional costs to the estate and burdens on the judicial system must be considered by trustees in determining whether to pursue the claims. In sum, trustees are required to use business judgment and avoid such costs absent an expectation of a material recovery for creditors.

Unjust Enrichment of Estate Professionals

A trustee's compensation is based on the sliding scale found in § 326 of the

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the overall bankruptcy system significantly more than the claims will return.

Pursuant to § 554(a) of the Bankruptcy Code, a trustee is generally free to abandon property of inconsequential value or that is burdensome to administer.² The trustee should exercise business judgment and abandon most claims because they are of inconsequential value.³ Moreover, prosecution of the claims will unnecessarily burden the courts with potentially massive amounts of new litigation, while frequently resulting in benefit to only trustees (by way of increased commissions) and contingency counsel.

Nominal Recovery for Estate

A trustee is the fiduciary appointed to represent the debtor's estate under § 323(a). In this capacity, the trustee is duty-bound to act in the best interests of creditors. Section 704 of the Code requires the trustee to collect, and reduce to money, property of the estate. However, these duties are tempered by the trustee's simultaneous mandate to

to public criticism of the bankruptcy process. To ensure compliance with § 704(1), the [U.S.] Trustee monitors the number and age of open cases and the reasons they remain open.⁵

The bankruptcy process is simply not served by pursuit of the vast majority of claims, and trustees should not pursue claims without a substantial probability of collecting material actual damages. Creditors are better served when the trustee overlooks what may be technical violations of the Consumer Protection Acts (unless there are actual damages) in favor of a rapid and efficient resolution of the bankruptcy case.

Courts Are Trending Toward Reducing Damage Awards

As consumer lawsuits alleging abuse by debt collectors increase, a trend may be developing that undercuts the viability of claims for merely technical violations. After remand from the U.S. Supreme Court on unrelated grounds, *Jerman v.*

¹ These are claims brought under the Fair Debt Collection Practices Act (FDCPA) and Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1692, *et seq.*, and 15 U.S.C. § 1681, respectively).

² The trustee is required to file a notice of abandonment under Bankruptcy Rule 6007 to dispose of any claims.

³ If the trustee abandons the claims, the debtor would then be free to pursue the claims outside of the bankruptcy court.

⁴ This article does not explore the interplay between the claims and a debtor's statutory exemptions, a factor that may significantly reduce the return to the estate.

⁵ See www.justice.gov/ust/fo/private_trustee/library/chapter07/docs/7handbook/7handbook.htm, Chapter 6, Part N.

⁶ 2011 WL 1434679 (N.D. Ohio April 14, 2011).

⁷ *Id.* at 11.

⁸ *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009).

⁹ *Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 757 (7th Cir. 2009).

¹⁰ *Donohue v. Quick Collect Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010).

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Code. As an example of how little the bankruptcy estate and creditors benefit from a single statutory violation of the Consumer Protection Acts, consider the following hypothetical.

A trustee distributes less than \$5,000 from an estate, of which \$1,000 is from the recovery of a single statutory violation of the Consumer Protection Acts. The net effect of a single statutory recovery is the return of \$750 to the estate and \$250 for the trustee, while contingency counsel may reap thousands of dollars

in attorneys' fees. The estate's recovery is likely to be further diminished by the legal work required by the trustee's bankruptcy counsel to administer the asset (*i.e.*, retaining contingency counsel, attending the Bankruptcy Rule 9019 hearing, monitoring contingency counsel, etc.). Unless there are actual damages, which must be material for trustees to pursue, turning a "no-asset" case into an "asset" case by pursuing an award of statutory damages under the Consumer Protection Acts is not warranted and

trustees should avoid pursuit of claims in the majority of cases.

Conclusion

Research and an informal survey of trustees suggests that trustees are unaware of the asset class presented by the Consumer Protection Acts. However, before trustees begin to investigate and prosecute the claims, vigorous debate within the bankruptcy community is appropriate to ensure that the integrity of the bankruptcy system is maintained. ■

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