

Is the FDCPA's fee-shifting provision of any use to defendants?

By Alan D. Leeth and R. Frank Springfield*

The recent decision by the 9th U.S. Circuit Court of Appeals in *Hyde v. Midland Credit Mgmt., Inc.*, No. 07-55326 (9th Cir. 06/09/09), appears to have taken some of the bite out of the Fair Debt Collection Practices Act's fee-shifting provision. Though the FDCPA is a consumer protection statute and was enacted to prevent abusive practices in the collection of consumer debts, promote fair debt collection, and provide consumers with an avenue for disputing and obtaining validation of debt, it contains a fee-shifting provision at 15 USC § 1692k(a)(3), which permits a court to award attorney's fees to a defendant on a finding that an FDCPA action was brought "in bad faith and for the purpose of harassment."

While this fee-shifting provision is essentially the only recourse a defendant has under the FDCPA against a plaintiff debtor, the 9th Circuit recently narrowed the scope of the provision's reach. Specifically, on a matter of first impression, the Ninth Circuit held that the FDCPA does not authorize an award of attorney's fees and costs against a plaintiff's attorneys.

In *Hyde*, plaintiff Del Nero sued defendants Midland Credit Management Inc. and MRC Receivables Corp. alleging violations of the FDCPA. After a hearing on the merits, the U.S. District Court, Central District of California noted "the record of the present case as well as [Del Nero's] pattern of filing apparently frivolous cases asserting debt collection violations establishes that the present case was brought in bad faith and for the purpose of harassment as defined in [the FDCPA]." Accordingly, the District Court found in favor of Midland and MRC and dismissed the suit. In addition, the District Court, pursuant to Section 1692k(a)(3), awarded Midland and MRC attorney's fees and costs of \$155,979 against both Del Nero and his attorneys, Hyde & Swigart, jointly and severally. Hyde & Swigart subsequently appealed the ruling.

Fee-shifting only applies to offending plaintiffs

The sole question presented on appeal was whether attorney's fees and costs may be awarded under Section § 1692k(a)(3) against an attorney of an unsuccessful, abusive plaintiff. In reversing the District Court's award against Hyde & Swigart, the 9th Circuit Court of Appeals held that Section 1692k(a)(3) only authorizes attorney's fees and costs against the offending plaintiffs.

The 9th Circuit was not persuaded by contrary case law from the 4th Circuit or the Southern District of New York. (See *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir. 1999) (court affirmed an award in FDCPA case against unsuccessful plaintiffs and their attorneys under § 1692k(a)(3), Rule 11 and 28 USC § 1927); *Sierra v. Foster & Garbus*, 48 F. Supp. 2d 393 (S.D.N.Y. 1999) (court awarded attorney's fees against plaintiff's attorney in an FDCPA case).) Rather, the 9th Circuit's decision was based on similar reasoning it employed in a False Claims Act case, *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999 (9th Cir. 2002).

9th Circuit looks to other law

In *Pfingston*, the 9th Circuit Court of Appeals held that the FCA does not authorize attorney's fees against an attorney. In reaching their decision, the court examined the text and legislative history of the FCA, and noted that despite Congress' clearly expressed intent to deter bad-faith actions, attorney's fees against attorneys under the FCA should not be allowed given "the absence of any indication that Congress intended a different result."

Echoing *Pfingston*, the *Hyde* court began by stating there is a "presumption that an attorney is generally not liable for fees unless that prospect is spelled out." Thus, the 9th Circuit analyzed the text of Section 1692K(a)(3) and the FDCPA's legislative history in order to determine whether Congress intended attorney's fees to be assessed against attorneys under the FDCPA.

The court noted that § 1692K(a)(3) is silent as to who should pay attorney's fees and costs, and merely states that "the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." Furthermore, the court found that the FDCPA's legislative history revealed little more than the text of the statute, finding that "Congress stated only that it included the fee shifting provision to protect debt collectors from nuisance lawsuits." The court also stated:

"Just as in the FCA, Congress in the FDCPA failed to indicate any intention to authorize the award of attorney's fees and costs against attorneys representing debtors." Therefore, the 9th Circuit concluded, "based on the text and legislative history of § 1692K(a)(3), on our decision in *Pfingston* under the FCA, and on the presumption against awarding attorney's fees against attorneys, we believe ... Section 1692K(a)(3) ... authorizes attorney's fees and costs only against the offending plaintiff or plaintiffs."

Looking ahead after *Hyde*

The 9th Circuit's ruling certainly limits the scope of the FDCPA's fee-shifting provision, at least in the 9th Circuit, and effectively renders this provision moot. After all, if the FDCPA defendant was being sued by a plaintiff that had fallen behind on financial obligations in the first place, the likelihood of ever recovering attorney's fees from that plaintiff certainly seems pretty small.

Thus, the only real protection afforded to FDCPA defendants in the 9th Circuit is the availability to recover attorney's fees under Rule 11 of the Federal Rules of Civil Procedure and/or 28 USC § 1927. □

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