6th Circuit Rules in Favor of NCBA Member Firm, Reverses Van Hoven v. Buckles Decision

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[UNIVERSITY PARK, FL] As the premier advocate for attorneys practicing creditors rights law, the National Creditors Bar Association (NCBA) could not be more pleased with the court's ruling in the case of *Van Hoven v. Buckles & Buckles, P.L.C.* By providing an *amicus* brief in this matter, NCBA continues to demonstrate support for its members and the principles that guide the independence of the practice of law. NCBA wants to take this opportunity to congratulate the firm of Buckles and Buckles for zealously defending this matter and the attorneys at Simmonds and Narita, LLP for drafting a comprehensive and persuasive NCBA *Amicus* Brief. Tomio Narita and Jeff Topor of Simmonds & Narita LLP, co-authors of the amicus brief along with Travis Campbell, provided a detailed outline below of the matter including the Court's legal reasoning and findings.

On January 16, 2020, the United States Court of Appeals for the Sixth Circuit issued a significant opinion in *Van Hoven v. Buckles & Buckles, P.L.C., F.3d , 2020 WL 239290 (6th Cir. Jan. 16, 2020)*, reversing a decision of the Western District of Michigan that had been entered against NCBA member, Buckles & Buckles, P.L.C. The NCBA filed an *amicus* brief in support of appellants, authored by Simmonds & Narita LLP, urging the Court to rule that the Fair Debt Collection Practices Act's "bona fide error" defense can apply to mistaken interpretations of unsettled issues of state law. Ultimately, however, the Court did not reach the bona fide error question, because it ruled that statements made about an unsettled issue of state law were not "false" under the FDCPA, and therefore were not actionable. The reasoning employed by the Van Hoven decision should be useful for NCBA members in a variety of contexts.

In *Van Hoven*, plaintiff filed a class action lawsuit, asserting defendants violated the FDCPA by falsely stating in writs of garnishments submitted in Michigan state courts that they were entitled to recover the costs associated with filing the garnishment requests. After years of litigation, the district court ruled in favor of the plaintiff (and also certified the case as a class action). As the Sixth Circuit colorfully described it: "A lawyer sued two lawyers, and each side hired more lawyers. Five years later, after 'Stalingrad litigation' tactics, discovery sanctions, and dueling allegations of professional misconduct, we are left with $3,662 in damages and roughly $180,000 in attorney's fees."

The Sixth Circuit reversed, concluding the request for costs was not a false statement under Michigan state law. Importantly, the Sixth Circuit began by recognizing that not "every violation of state law" is "transformed into a violation of the Act." Rather, only a "*material* misstatement" is actionable. Thus, the statement must be both false and material. Although the

court concluded the inclusion in the writ of the cost – $15.00 – was material (at least to some consumers), it ultimately held that the statement was not false.

Key to the Court's analysis was the unsettled state of the law when the debt collector makes the statement or representation. To be false, the court said, the statement "must be a 'false . . . representation' *at the time the creditor makes it*." Thus, although "'false' material statements about state law" are subject to the FDCPA, the Act does not "extend[] to every representation about the meaning of state law later disproved." The court observed that

> In dealing with open questions of state law, excellent arguments sometimes will appear on either side. And we generally don't think of a position on the meaning of state law as false at the time it was issued whenever a higher court over time takes a different position in a later case. A representation of law is not actionably false every time it turns out to be wrong.

Analogizing to the requirement of Rule 11, the *Van Hoven* court continued: "Just because a court ultimately disagrees with the attorney's argument doesn't mean it was '[un]warranted by existing law' at the time it was made." Instead, the question "is whether the legal contention was objectively baseless at the time it was made, making it 'legally indefensible,' . . . or 'groundless in law.'" The court explained that "a lawyer does not 'misrepresent' the law by advancing a reasonable legal position later proved wrong. That logic applies with even more force to representations of law given the frequent before-the-case difficulty, sometimes indeterminacy, of legal questions." Consequently, "[l]egal contentions must be objectively baseless, not just later proved wrong, to be actionable under the act."

Applying this standard, the Court reversed the district court, ruling that Buckles & Buckles' request for the state court to include the *current* costs of the request for a writ of garnishment was not a false statement under Michigan law. As to plaintiff's claim that the firm also improperly sought to recover the costs associated with *prior* failed garnishments, the court reversed because the district court never gave the firm an opportunity to prove that it had procedures in place to prevent such requests, *i.e.*, to prove that the requests were the result of a factual bona fide error. The Court also observed that, even if the plaintiff ultimately prevailed on remand, the district court's damages analysis was possibly flawed and it also questioned whether "the class may need to be trimmed down or decertified."

The *Van Hoven* decision was well-reasoned and provides an important victory for NCBA members who must constantly grapple with unsettled issues of state law. Congratulations to Buckles & Buckles.

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