

KEEP YOUR FRIENDS CLOSE & YOUR CONSUMER ATTORNEYS CLOSER

By Lloyd D. Dix, Dix & Associates and Stephen Turner, Lewis Brisbois Bisgaard & Smith, LLP

At ACA's Fall Forum in San Francisco last November, active members of the defense bar, Lloyd Dix, who is the managing partner of Dix & Associates and was formerly the Legal Advocate for the California Association of Collectors and Stephen Turner, a partner at Lewis Brisbois Bisgaard & Smith where he is the Chairman of the firm's Consumer Litigation Defense And Financial Services national practice group, participated in a panel discussion with leading members of the consumer bar regarding how the consumer attorneys evaluate and handle cases. Lloyd was the moderator and Stephen provided the perspective of the defense bar. Because the panel provided a rare look into how the consumer bar operates, Lloyd and Stephen were asked to share their observations of the comments made by the panelists.

THE PANELISTS

The panelists from the consumer bar were:

Tammy Hussin of the Hussin Law Firm;

Josh Swigart of Hyde & Swigart;

Abbas Kazerounian of the Kazerounian Law Group; and

Todd Friedman of the Law Offices Of Todd Friedman.

ST and LD: Each of the panelists are well known and experienced members of the consumer bar. All of the individuals have handled class actions. Recently, Messrs. Swigart and Kazerounian have jointly represented plaintiffs in these types of suits. The questioning began with their screening, selection and acceptance of clients.

THE PRELIMINARY EVALUATION AND SELECTION OF CASES

In response to being asked how they obtained, evaluated and selected their cases, the panelists said that they got many of their cases from the internet and referrals from other attorneys. When asked what percentage of his cases they rejected, Mr. Friedman said he accepted 85% of the prospective clients who contacted him.

ST: I inferred from Mr. Friedman's response and the fact the other panelists were equivocal, the panelists rejected very few cases.

LD: The panelists indicated that many of the cases they receive are very egregious. They indicated that the reason that they accept such a high percentage of the matters they review, is that there are many very bad actors, and the cases they obtain from referrals are "pre-screened" by the referring attorney.

THE PANELISTS COMMENTS ABOUT THE CHARACTERISTICS OF THEIR CLIENTS

The panelists all said that their clients were not financially sophisticated and could easily misunderstand communications they received from debt collectors. Ms. Hussin added that, by the time her clients contacted her they were emotionally battered by both their financial circumstances and their interactions with the debt collectors. The other panelists did not speak so explicitly about the emotional state of their clients.

ST: I have no doubt that people whose financial condition is such that they are being contacted by debt collectors are under

great stress and emotional pressure. However, like Lloyd I have defended many debtors who had filed a number of lawsuits at least some of which were, seemingly, frivolous.

LD: There is a large dichotomy in our perception, and the perception of the panel. Our clients typically spend tens of thousands of dollars trying everything to be compliant. It is easy to forget that there are people that do not care about compliance and are willing to break the law to get what they want. We rarely, if ever, have any knowledge or contact about these operations, except as they make the 6 o'clock news. The Plaintiffs' bar deals with these individuals and patterns on a daily basis.

HOW THE PANELISTS REACT TO THE THREAT FROM A DEFENDANT TO SEEK ATTORNEY'S FEES

All of the panelists said that they investigate a threat from a defendant to seek its attorney's fees. Mr. Swigart said that he personally investigates every case in which the defendant has threatened to seek to recover its attorney's fees. He added that because he very rarely drafts complaints now he meets with the associate in his firm who drafted the complaint and they "drill down" to determine if the allegations have merit and if there is any basis for the threat from the defendant.

The other panelists made similar comments. They all said that, not surprisingly, they do not take seriously a threat from a defense counsel, who, as a matter of course, threatens to attempt to recover his client's fees.

ST: I have litigated hundreds if not thousands of cases with the panelists. I know them to be honest, professional and skilled. I also note that of all the cases I have litigated with them, only one was dismissed. This is not to say that they bring frivolous cases. Rather, it reflects the reality that it is extremely difficult to obtain an award of attorney's fees under any theory including 15 U.S.C. § 1692k(a)(3) of the FDCPA and the Rosenthal Act which allow for the recovery of fees if a case has been brought in bad faith and for purposes of harassment. Federal Rule of Civil Procedure 11, 28 U.S.C. 1927 which allows the court to order an attorney to pay fees for unnecessarily multiplying the proceedings and the general authority of the court. I obtained the largest award of attorney's fees ever awarded under the FDCPA. It was reversed on appeal. I obtained the largest award of attorney's fees ever awarded under the Rosenthal Act. It was reversed on appeal. The threat to seek attorney's fees should be used sparingly and defendants should realize it is extremely unlikely that the plaintiff and his counsel will be ordered to pay the defendant's fees.

LD: The Plaintiffs' bar is just like us. If you threaten them, tell them that you are going to seek sanctions, and/or otherwise impugn their reputation, the Senior Partners of the various firms will get personally involved and do everything in their power to defeat you. It is not personal with them. It is personal with our clients. If we make it personal with Plaintiffs' Counsel, you can expect to incur their wrath.

CURRENT TRENDS IN CONSUMER LITIGATION

The panelists all agreed that they are handling far fewer cases based on improper letters. They said they were seeing an increase in the number of cases involving allegations of harassing phone calls.

Messrs. Friedman, Swigart and Kazeronian all said there was a significant increase in the number of Telephone Consumer Protection Act (TCPA) cases. They all anticipated that the trend would continue.

ST: I am experiencing the same shifts in cases as described by the panelists. As an aside, I note that there is an urgent need to amend the TCPA. At the time the TCPA was enacted a "mobile" phone, with antennae, was nearly two feet long and weighed 10 pounds.

LD: The panelists are moving away from the case with limited liability and only attorney's fees. Typically these cases settle for small dollars at an early stage of the proceedings. The trend is to go for higher dollar cases such as TCPA, FCRA, and call recording where both the damages and the amount of attorney time involved will lead to much larger monetary recovery.

CONCLUSION

For many years, people have believed that collectors are ugly monsters with six heads and 12 arms. As an industry we spend significant time and money doing everything we can to dispel this myth. This includes visits to the various legislative bodies, thousands of hours of charity work, numerous scholarship and education funds, and many other projects both large and small. Despite the fact that we are frequently victims of these stereotypes, it is easy to commit the same transgression with regard to the consumer attorneys. The panelists were completely honest, gracious, and answered each and every question that the audience asked. They took the time from their own law practice, and paid their own expenses. Those in attendance learned many new things and gained a new perspective, especially those audience members that had never met the panelists in person. Future sessions between the audience and the panelists can only be productive.