A recent appellate court ruling highlights the availability of attorney fees for a consumer when a creditor or debt buyer fails to prevail in a credit card or other collection action. This article sets out seven ways in which consumers can recover such attorney fees if the creditor fails in its collection lawsuit.

1. What’s Good for the Goose Is Good for the Gander

Ten states—California, Connecticut, Florida, Hawaii, Montana, New Hampshire, New York, Oregon, Utah, and Washington—have enacted statutes that provide for reciprocal attorney fees. See NCLC’s *Collection Actions § 17.1.3* [1]. If a credit agreement provides attorney fees for a prevailing creditor, then, under a reciprocal fee statute, a prevailing consumer has the right to recover fees. Since a debt buyer has the right to recover fees when the contract provides fees for a prevailing creditor, the reciprocal statute provides fees to the consumer who prevails in a debt buyer’s collection action.

In *Bushnell v. Portfolio Recovery Associates, L.L.C.* [2], 2018 WL 4374251 (Fla. Dist. Ct. App. Sept. 14, 2018), a debt buyer initially brought and then voluntarily dismissed its own collection lawsuit that had been based on an account stated cause of action—that the consumer had been sent a statement of the amount owing and the consumer had not objected to the statement. The credit agreement provided for attorney fees for a prevailing creditor and Florida provides for reciprocal attorney fees. The question before the court was whether the reciprocal attorney fee statute applies where the collector’s cause of action is not based on a breach of contract, but on the debtor’s failure to object to a statement of account.

Although the debt buyer’s case was not based upon a breach contract, the appellate court found it was based on a claim with respect to the contract. An account stated cause of action requires there to have been an agreement between the parties. As such, the court found the account stated cause of action is inextricably intertwined with the contract, and ruled the consumer was entitled to fees.

Courts have also provided for reciprocal attorney fees even where the consumer has successfully argued that the contract containing the attorney fee provision is unenforceable or not applicable to the consumer. The reciprocal attorney fee statute still applies. See NCLC’s *Collection Actions § 17.1.3* [1].

The appellate court in *Bushnell* also noted that in Florida there is no dispute that a consumer prevails on a lawsuit if the collector voluntarily dismisses the claim. This though is not the result under California law. See NCLC’s *Collection Actions § 17.1.3* [1].

2. Surprisingly, Credit Card Agreements Sometimes Provide Fees for Either Prevailing Party

While the typical credit card agreement only provides attorney fees for the prevailing creditor, occasionally some credit agreements provide for fees for either prevailing party. Then, as a matter of the contract, a prevailing consumer is entitled to fees. Any ambiguity as to whether a prevailing consumer is contractually entitled to fees should be interpreted in the consumer’s favor because the creditor drafted the agreement.

3. Statutes in Fourteen States Provide Fees to a Prevailing Consumer

Fourteen states—Alaska, Arizona, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Mississippi, Nevada, New Mexico, Oklahoma, Virginia, and Washington—provide in at least certain collection lawsuits that the prevailing party recovers. This is the case even if the credit agreement does not mention attorney fees.

The types of lawsuits that allow for such fees vary significantly by state. Examples of lawsuits allowing for a fee recovery, depending on the state, include: any civil case; an action arising out of a contract; an action to recover under a retail installment contract; an action to recover on a credit card agreement; an action to recover on an open account; an action seeking under $10,000; or when an action is voluntarily dismissed. For a description of each of these statutes, see NCLC’s *Collection Actions § 17.1.4* [3].

4. Bringing Counterclaims to the Collection Lawsuit
There are legal and strategic advantages and disadvantages to bringing counterclaims to the collector’s lawsuit. See NCLC’s Collection Actions § 5.7.1 [4]. One benefit is that prevailing on counterclaims that allow for statutory attorney fees provides the consumer with an attorney fee award for time spent not only on the successful counterclaim, but for time spent that is intertwined with the consumer’s defense of the collection claim.

Examples of counterclaims that may lead to a statutory fee award are those under a state unfair and deceptive acts and practices statute, the Fair Debt Collection Practices Act (FDCPA), a state debt collection statute, or a state credit statute. See NCLC’s Collection Actions § 17.1.5 [5]. Even if a counterclaim for litigation misconduct is based on tort or a state debt collection statute not authorizing statutory fees, the fees to defend the action can be sought as actual damages for the creditor’s litigation misconduct in bringing the lawsuit. See NCLC’s Collection Actions § 17.1.5 [5].

Another option is to bring a class counterclaim. Then an attorney fee recovery will be possible if the counterclaim is based on a fee-shifting statute or under a common fund theory if is not. The circuit courts of appeals have unanimously found that the Class Action Fairness Act (CAFA) cannot force such a class action into federal court. See NCLC’s Collection Actions § 5.7.3 [6].

Note that the Supreme Court has just accepted certiorari on a related question as to whether CAFA allows a third party to remove to federal court a case where the consumer brings a class counterclaim and adds the third party to the class counterclaim. See Home Depot U.S.A., Inc. v. Jackson [7], 2018 WL 1950484 (U.S. Sept. 27, 2018) (cert. granted).

5. Creditor’s Denial of Consumer’s Request for Admission Can Lead to a Consumer Fee Recovery

A favorite (and often abusive) collector tactic is to send requests for admissions to an unrepresented consumer. It may be advantageous for the consumer’s attorney to turn the tables on the collector. If a collector fails to timely respond to the consumer’s request for admissions, the requests are deemed admitted under most court rules.

The collector also can be liable for the reasonable expenses of the consumer’s proof when the collector denies facts propounded in the consumer’s request for admissions. If the consumer later proves those facts to be true, and the collector did not have a reasonable basis for that denial, then the collector is liable for the reasonable expenses of the consumer’s proof—which would include attorney fees and other expenses. See NCLC’s Collection Actions § 17.1.7 [8].

6. Bring a Second Lawsuit After the Consumer Prevails in the First

Particularly where the consumer wishes to bring a claim based upon the collector’s litigation misconduct, it is often prudent to bring that not as a counterclaim in the collection lawsuit, but in a second lawsuit after prevailing in the first. For example, faced with an FDCPA counterclaim, the collector may try to clean up its litigation misconduct in that lawsuit. The FDCPA claim will be more effective after the consumer prevails in the collection action and it is too late for the collector to alter its conduct in that collection action.

Such a second lawsuit alleging litigation misconduct can seek attorney fees from the first lawsuit as damages under the FDCPA, under a UDAP statute, or for malicious prosecution. See NCLC’s Collection Actions § 17.4 [9]. The prevailing consumer in this second action may be able to recover statutory fees for attorney time spent on the second action (such as under an FDCPA or UDAP cause of action) while also recovering as actual damages in the second action the fees expended in the first case. See NCLC’s Collection Actions § 17.1.6 [10].

7. Seeking Fees Where the Collector’s Claims Are Groundless

Many states pattern their state court rules of procedure on the federal rules of civil procedure. Federal Rule of Civil Procedure 11 provides for sanctions which may include reasonable attorney fees and other expenses if the litigation meets any of three standards, including that the opposing party’s factual contentions do not have evidentiary support unless, if specifically so identified, they will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. It may be that a debt buyer when bringing a collection action does not have evidentiary support and does not specifically identify that it will have such support after a further investigation. See NCLC’s Collection Actions § 17.1.8.2 [11].
Other state statutes provide for attorney fees when a claim is groundless, when there is no justiciable issue of law or fact, or when it is brought without substantive justification. For a summary of thirty-six such state statutes, see NCLC’s *Collection Actions § 17.1.8.4* [12]. For example, sanctions might be awarded where a claim is clearly beyond the statute of limitations or where the collector has no evidence to base its claim. Other examples of facts leading to sanctions are discussed in NCLC’s *Collection Actions § 17.1.8.3* [13].

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