

15.9 Memorandum in Support of Motion for Attorney Fees

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

)	
[Plaintiff],)	Case No.:
on behalf of herself, and)	
all others similarly situated,)	
)	
Plaintiff,)	MEMORANDUM IN SUPPORT OF
)	MOTION FOR ATTORNEY FEES
vs.)	
)	
Cavalry Investments, LLC,)	
a Delaware limited liability corporation,)	
)	
Defendant.)	
)	

I. INTRODUCTION

Plaintiff submits this memorandum of law in support of her application for an award of attorney’s fees of \$24,280.00, and costs of \$890.85.

II. FACTS

The following facts relevant to this motion are contained in the court’s file. Pursuant to Fed. R. Evid. 201, Plaintiff requests that the court take judicial notice of the following facts.

1. Prior to the initiation of this suit, Plaintiff approached counsel regarding what she felt was an unfair practice, namely Defendant’s attempt to collect a time barred debt. After reviewing Plaintiff’s paperwork, counsel sent two demand letters to Defendant as part of counsel’s Rule 11 investigation and as required by Wis. Stat. § 426.110(4)(a). Defendant did not respond to either of these demands.

2. Plaintiff initiated this suit for violations of the Fair Debt Collection Practices Act (FDCPA) and supplemental claims for violations of the Wisconsin Consumer Act (WCA) by filing a complaint with the Barron County Circuit Court in August of 2001. In response, Defendant filed an answer to Plaintiff’s complaint and removed the action to Federal court.

3. After removal, counsel for Plaintiff offered to settle this case on a class basis, whereby Defendant would pay reasonable counsel fees, reasonable actual and statutory damages, and would consent to the formation of an injunctive class and the issuance of a permanent injunction preventing the collection of time barred debts from Wisconsin residents. This offer was repeated on several instances. Defendant repeatedly declined to accept this offer.

4. Plaintiff continued with litigation including preparation of a Rule 26f pretrial report and Rule 26a disclosures. Defendant did not timely file or serve its Rule 26a disclosures

necessitating Plaintiff's motion to compel these disclosures. This motion was withdrawn when Defendant served its disclosures.

5. Plaintiff next commenced with discovery serving Defendant with discovery requests. Defendant declined to make a corporate representative available for deposition.

6. Plaintiff then commenced briefing class certification. Defendant opposed Plaintiff's request for class certification on the sole ground that neither the FDCPA nor the WCA provided for injunctive relief. The court initially denied Plaintiff's motion for class certification, but upon reconsideration, granted the motion certifying an injunctive class.

7. Plaintiff also moved for partial summary judgment, and opposed Defendant's request for summary judgment. The district court denied Defendant's motion, but granted Plaintiff's, directing entry of partial summary judgment in favor of Plaintiff.

8. During the pendency of the litigation, Defendant sent an additional dunning letter directly to Plaintiff. This additional contact violated the FDCPA and WCA. In accordance with the requirements of Fed. R. Civ. P. 15 (d) (upon motion of a party . . .), Plaintiff moved the court for permission to file a supplemental complaint. This motion was granted by the court and Plaintiff filed such a complaint.

9. Defendant subsequently agreed to pay actual and statutory damages to Plaintiff in the amount of \$3,000.00. This agreement was memorialized by a stipulation between the parties filed with the court.

10. Plaintiff has sought final injunctive relief, asking this court to enjoin Defendant from collecting time barred debt in Wisconsin.

11. In sum, virtually all relief Plaintiff sought from the outset of this case has been recovered. All relief Defendant has sought has been denied. Plaintiff has also, in an effort to minimize the work load of this busy court, repeatedly sought to settle this case on the basis that was ultimately achieved by Plaintiff. Defendant repeatedly denied all overtures for settlement until the end of this case.

12. Plaintiff now moves the court for an award of attorney's fees and costs, pursuant to 15 U.S.C. § 1692k and Wis. Stat. § 425.308.

III. ISSUES

- A. Plaintiff is entitled to an award of attorney's fees and costs as the prevailing party
- B. Attorney fees shall be calculated pursuant to the Lodestar Formula.
- C. "Proportionality" has no place in the court's analysis.
- D. Vigorous defense leads to higher fees.

IV. ARGUMENT

A. Plaintiff is entitled to an award of attorney's fees and costs as the prevailing party.

The Fair Debt Collection Practices Act (FDCPA) authorizes the payment of attorney fees to a successful consumer:

. . .any debt collector who fails to comply with any provision of this subchapter . . . is liable to such person in an amount equal to the sum of - [actual damages] [statutory damages] and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. § 1692k(a)(3). The purpose of this fee shifting provision is to attract competent counsel. *Zagorski v. Midwest Billing Services, Inc.*, 128 F.3d 1164, 1167 (7th Cir. 1997). In litigation under to the FDCPA, an award of attorney fees is mandatory, not discretionary *Graziano v. Harrison*, 950 F.2d 107, 113 (3rd Cir. 1991). *Piples v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989) (“Because the FDCPA was violated, however, the statute requires the award of costs and reasonable attorney’s fee”); *Mace v. Van Ru Credit*, 109 F.3d 338, 344, note 3 (7th Cir. 1997).

An award of attorney’s fees to a successful consumer under the FDCPA is designed to compensate the consumer for her role in privately enforcing the FDCPA. *Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir. 1995); see also, *Murphy v. Ford Motor Credit Co.*, 629 F.2d 556 (8th Cir. 1980) (Truth in Lending case). Congress intended that the prevailing consumer recover reasonable attorney’s fees.

Given the structure of the section, attorney’s fees should not be construed as a special or discretionary remedy; rather, the Act **MANDATES** an award of attorney’s fees as a means of fulfilling Congress’s intent that the Act should be enforced by debtors acting as private attorneys general.

Graziano, 950 F.2d 107, 113 (3d Cir. 1991) (emphasis added). See also *DeJesus v. Banco Popular de Puerto Rico*, 918 F.2d 232, 235 (1st Cir. 1990) (awarding attorney fees under Truth in Lending Act).

The Wisconsin Consumer Act (WCA) also authorizes the payment of attorney fees to a successful consumer:

(1) If the customer prevails in an action arising from a consumer transaction, the customer shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred on the customer’s behalf in connection with the prosecution or defense of such action, together with a reasonable amount for attorney fees.

(2) The award of attorney fees shall be in an amount sufficient to compensate attorneys representing customers in actions arising from consumer transactions. In determining the amount of the fee, the court may consider:

- (a) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause;
- (b) The customary charges of the bar for similar services;

- (c) The amount involved in the controversy and the benefits resulting to the client or clients from the services;
- (d) The contingency or the certainty of the compensation;
- (e) The character of the employment, whether causal or for an established and constant client; and
- (f) The amount of the costs and expenses reasonably advanced by the attorney in the prosecution or defense of the action.

Wis. Stat. § 425.308. Attorneys fees awarded under the WCA are designed to ensure that such cases are taken by competent counsel. *First Wisconsin National Bank v. Nicolaou*, 335 N.W.2d 390, 397 (Wis. 1983). This remedy is to liberally administered. *Id.* at 393.

In the present case, Plaintiff is entitled to an award of attorney’s fees and costs, since Plaintiff is the prevailing party. Plaintiff sought and recovered actual and statutory damages of \$3,000.00.

B. Attorney Fees shall be calculated pursuant to the Lodestar Formula.

In calculating an award of attorney’s fees, the court must begin with the “lodestar” figure, which is the hours reasonably expended times an allowed hourly rate. See *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1939 (1983) (viewing an award of fees under 42 U.S.C. § 1988). The burden is on the applicant to prove that the fee request is reasonable, with a strong presumption that the lodestar amount represents a fair and appropriate fee award. *Hensley*, 103 S.Ct. at 1941. See also Wis. Stat. § 425.308(1) (mandating Lodestar analysis for fee awards under WCA).

Although *Hensley* was decided in the context of a civil rights case, the lodestar analysis is applicable to all cases involving an attorney fee shifting statute. The Supreme Court has previously noted that, “We have stated in the past that fee shifting statutes’ similar language is ‘a strong indication’ that they are to be interpreted alike.” *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989) (quoting *Northcross v. Memphis Bd. Of Education*, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973)) See also *City of Burlington v. Dague*, 112 S.Ct. 2638, 2641 (1992) (clean water act case applying lodestar analysis); *Simpson v. Sheahan*, 104 F.3d 998, (7th Cir. 1997) (civil rights case); *DeJesus v. Banco Popular de Puerto Rico*, 918 F.2d 232, 234 (1st Cir. 1990) (truth in lending case).

The determination of the allowable hours rests with the sound discretion of the trial court. *Hensley*, 103 S.Ct. at 1941. A determination of the hourly rate by the trial court should consider a rate “commensurate which [counsel] could obtain by taking other types of cases.” *Tolentino*, 46 F.3d 645, 652 - 653 (7th Cir. 1995).

C. “Proportionality” has no place in the court’s analysis.

Plaintiff anticipates that Defendant may argue that the size of Plaintiff’s recovery (\$3,000.00) should be considered in determining what is a “reasonable” attorney fee award. However, the amount of attorney’s fees awarded pursuant to statute is not required to be

proportionate to the amount of damages recovered. To the contrary, a trial court may abuse its discretion when it applies proportionality to the fee award.

The U.S. Supreme Court has previously considered the question of proportionality in attorney fee awards and held:

We reject the proposition that fee awards under section [42 U.S.C.] 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.

City of Riverside v. Rivera, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986). The Court went on to state:

A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting section 1988.

Id., 477 U.S. at 578, 106 S.Ct. at 2696.

The Wisconsin Supreme Court has also recognized that attorney fee awards under the WCA **ARE NOT** subject to a proportionality restriction. In agreeing that "the recovery obtained in a WCA case is often far exceeded by the legal costs," *Nicolaou* at 398, the Wisconsin Supreme Court stated:

To a large extent the WCA depends upon private lawsuits for its enforcement. Ordinarily, however, the amount of damages flowing from a WCA violation is insufficient to make it economical for a consumer to initiate legal action. Indeed, the cost of legal representation will often exceed the recovery in a WCA case. However, WCA actions frequently present important legal questions for both the consumer and the creditor which bear on the public policy of consumer protection. The potential impact of these cases over the long run induces creditors to litigate them to the fullest. The result being that, in the absence of sufficient attorney fee awards, consumers will be financially unable to maintain meritorious claims. By the same token, the prospect of only a meager fee for a great deal of work will make WCA actions unattractive to attorneys. In short, the policies of the WCA will not be effectively carried out through private enforcement unless adequate attorney fees are awarded to prevailing consumers.

Nicolaou at 397.

In the context of the Fair Credit Reporting Act, ("FCRA"), the Fourth Circuit stated:

Proportionality of attorneys' fees to the amount recovered is not required in every action brought pursuant to the FCRA. Since there will rarely be extensive damages in an FCRA action, requiring that attorney's fees be

proportionate to the amount recovered would discourage vigorous enforcement of the Act.

Yoyay v. City of Alexandria Employees Credit Union, Inc. 827 F.2d 967, 974 (4th Cir. 1987). And under the FDCPA, the Seventh Circuit has noted that the “cumulative effect of petty violations . . . may not be petty” and thus a case involving a small amount of damages is no justification to deny attorney fees. *Zagorski*, 128 F.3d at 1167 (7th Cir. 1997) (quoting *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997)).

An exception to the bar against proportionality arises on the recovery of nominal damages. See, e.g., *Farrar v. Hobby*, 506 U.S. 103 113 S.Ct. 566, 575 121 L.Ed.2d 494 (1992) (Plaintiff demanding \$17 million dollars but recovering nominal damage of \$1.00 is entitled to no attorneys fees under civil rights statute); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 630 (4th Cir. 1995) (FDCPA Plaintiff seeking \$1,000.00 statutory damages but recovering \$50.00 in statutory damages, had attorney fee request for \$10,000.00 reduced to \$500.00); but see *Zagorski v. Midwest Billing Services, Inc.*, 128 F.3d 1164 (7th Cir. 1997) (trial courts denial of attorney fees, after Plaintiff’s recovery of \$100.00 statutory damages, constitutes abuse of discretion). This is not the present case. By recovering \$3,000.00 in actual and statutory damages, and by achieving class certification and (hopefully) permanent injunctive relief, Plaintiff has gone beyond a recovery of “nominal” damages, has vindicated her rights under the FDCPA, and is entitled to a full attorney fee award.

Courts have encountered many examples of fee awards disproportionate to damage awards see *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686, 91 L.Ed.2d 466 (1986) (\$245,456.25 in attorney fees, \$33,350.00 in damages); *Building Service Local 47*, 46 F.3d 1392 (6th Cir. 1995) (ERISA case, \$70,185.95 in attorney fees, \$25,598.71 in damages); *Northwest Women’s Center v. McMonagh*, 889 F.2d 466 (3rd Cir. 1989) (RICO case, over \$60,000.00 in attorney fees, \$2,661.00 damages); *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 726 (8th Cir. 1978) (Federal Odometer case, over \$14,000 attorney fees, \$3,000 in damages); *Perez v. Perkiss*, 742 F. Supp. 883 (D. Del. 1990) (FDCPA case, \$10,110 in attorney fees, \$1,200 damages); *First Wisconsin National Bank v. Nicolaou*, 335 N.W.2d 390, 398 (Wis. 1983) (WCA case, \$5,193.08 damages, \$20,462.00 in attorney fees).

D. Vigorous Defense leads to higher fees.

The harder a defendant fights in a consumer action, the larger the fees ultimately become. The Fifth Circuit, in *McGowan v. King, Inc.*, 661 F.2d 48, 51 (5th Cir. 1981), laid bare the ugly practicalities of consumer litigation when it held:

The borrower’s counsel did not inflate this small [Truth-In-Lending] case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost.

See also, *Diettrich v. Norwest Airlines, Inc.*, 967 F. Supp. 1132 (E.D. Wis. 1997); *Nicolaou*, at 397. Given the efforts of the Defendant, a higher fee application and award is natural.

IV. CONCLUSION

In the present case, Plaintiff requests a total award of \$25,170.85 for attorney's fees (\$24,280.00) and costs (\$890.85), including fees for preparing this motion. See affidavit of counsel, exhibit _____.

This request is reasonable and should be allowed. Based upon the lodestar calculation, attorney's fees and costs should be awarded to Plaintiff's counsel in the amount of \$25,170.85.

DATED:

[Attorney for Plaintiff]