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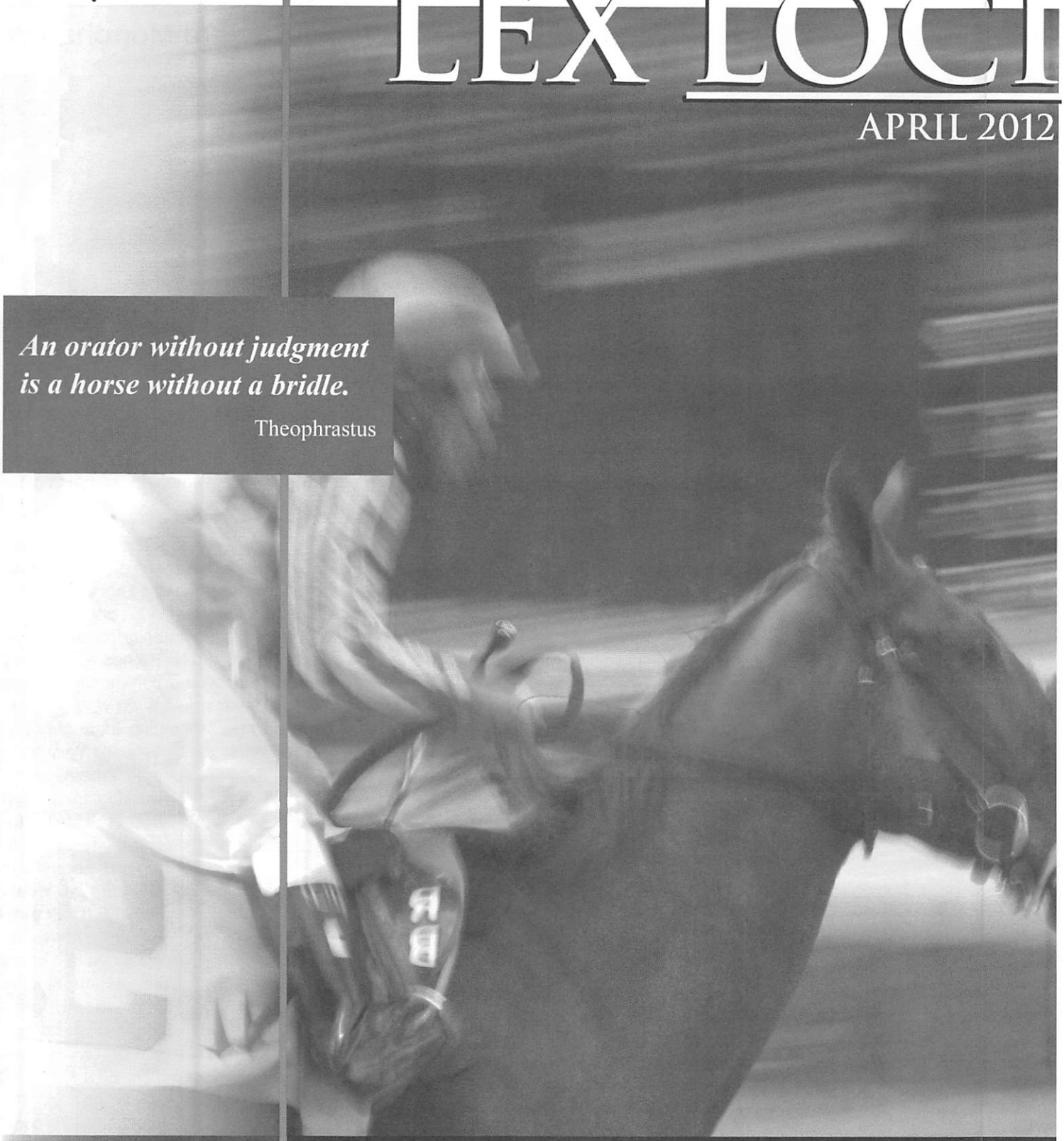

An orator without judgment is a horse without a bridle.

Theophrastus

Northern Kentucky Bar Association

DEFENDING SUITS BROUGHT BY DEBT BUYERS

Steve Shane and Gregory S. Reichenbach

The Debt-Buying Industry

In recent years a new industry has sprung-up which can be largely attributed to our distressed economy. They refer to themselves as "distressed debt buyers." We attorneys who have to deal with them on a regular basis use a less polite term. You have no doubt heard of them: Midland Funding; Asset Acceptance; NCO Financial; Arrow Financial and others too numerous to list herein. Creditors of every kind, rather than attempting to collect their own accounts, will bundle them in large portfolios and offer them at a huge discount on the open market to these debt-buyers who will bid on them. The accounts within each portfolio will vary greatly, but the one thing they each have in common is that they are in default. The typical portfolio will contain thousands of accounts which are discounted and sold for as little as pennies on the dollar. Portfolio Recovery Associates, for example, reported paying as little as two cents on the dollar for many of the portfolios it purchased. It is estimated by sources within the Federal Trade Commission (FTC) that in one year the entire industry paid an average of five cents on the dollar for all debt purchased. The debt buyer, although obtaining each of the accounts at a huge discount will, nevertheless, attempt to collect the current face value of the debt. Although many of the accounts in the portfolio will be considered uncollectible, there are enough that are collectible to make the purchase of one of these portfolios hugely profitable.

The Litigation

Due to the large volume of accounts, debt buyers by necessity must work closely with large law firms that do the collection work because the collection efforts related to these accounts consist primarily of filing suits. In recent years, this has resulted in an explosion of litigation, obviously creating a greater burden to an already overburdened and congested court system. In some courts it is estimated that these collection suits sadly make up 50% of the docket. One very significant feature of these suits is that upwards of 80% result in default judgments. As an unfortunate consequence of this fact, not much care is taken in the preparation and filing of these suits. Studies done indicate that, in the vast majority of those cases in which a default judgment was taken, the materials presented to the Court consisted of hearsay and other inadmissible evidence.

Defenses That Can Be Asserted

In too many cases we notice that attorneys will panic or give-up too easily and immediately attempt to make a financial settlement with the debt buyer or even consider bankruptcy, without giving much thought to the possibility that their client may have a defense to the suit. In many situations, when these portfolios are sold precious little information and documentation is passed along by the seller of these accounts to the debt buyers. That is a result of the relatively inexpensive cost of acquiring each of these accounts. That fact opens the door to a number of potential attacks and defenses which can be asserted on behalf of consumers.

1. Filing an Appearance on Behalf of the Debtor

This may sound too easy but sometimes merely filing a responsive pleading on behalf of the consumer will lead to a dismissal of the action. As stated, the debt buyer relies on obtaining a default judgment in a majority of instances and does not wish to have to deal with a consumer who has retained an attorney. When we file an answer, we usually accompany it with a Request for Production of Documents. This tends to hasten a dismissal since, in many instances, the debt buyer does not acquire documentation when it purchases a portfolio and is unable to acquire any later on. We have never gotten a debt buyer to admit it, but its attitude may be that when it pays pennies on the dollar for these accounts, it may not be worth the time and effort to spend in further collection efforts. The dismissal that you will receive will most often be without prejudice. This should not concern you, however, since we have rarely seen one of these suits re-filed.

2. Accord & Satisfaction

When many of these accounts are paid and settled by consumers, either with the original creditor or a debt buyer, they may inadvertently endup being re-packaged or re-sold. To complicate things further, the new debt-buyer will typically change the account number so as to make the same account unrecognizable to the consumer. Not surprisingly, this happens more often than one would think. When defending one of these suits, it is critical obtain all previous account numbers because the defense of accord and satisfaction may apply. Also, it is helpful to have the consumer obtain their credit report, which will reflect the fact that an account has been sold and will relate back to the former account. Just as importantly, whenever you settle one of these cases it is critical to make sure that all account numbers ever associated with this account are placed in the release.

3. Standing to Sue

The debt buyer has the burden of proof that it has the right to seek collection of the debt because it owns the consumer's obligation at the time it filed suit. It is always an excellent idea to request proof from the debt buyer that it actually acquired the debt that it sued upon because, not surprisingly, the debt buyer is unable to provide the proof. This may result from the fact that a particular account may be bought and sold multiple times within a short period of time.

4. Statute of Limitations

In every instance, you must determine the particular statute of limitations which applies to the particular account sued upon. Many portfolios contain accounts that are quite old. As noted, since the vast majority of debt collector suits result in a default judgment, it is not unusual for a debt buyer to consciously sue on debt that is time-barred. Unfortunately, it is often not easy to determine the appropriate statute to apply. First, the calculation of any statute of limitations must begin with the date of default on the account. While others may not, we define default as being delinquent on the account for 90 days. Next, the statute to apply de-

pends on the nature of the transaction itself. Many portfolios will contain defaulted retail installment sales contracts for automobiles and other retail goods that will consist of a deficiency balance. These will involve the shortest and easiest statute to calculate and apply which will be the four year statute for sale of goods under the UCC.

Typically, the majority of accounts you will find in today's portfolios will be for credit cards originally issued by banks and other financial institutions. The statute in those cases is not as easy to apply. Many courts, including Kentucky and Ohio, consider credit card agreements to be written contracts and subject to a 15-year statute. However, discovery of the credit card agreement may reveal a "choice of law" provision that provides the transaction is governed by the law of a jurisdiction invariably having a statute of limitations shorter than that of Ohio or Kentucky. In Kentucky, unless that agreement is capable of being produced, it is appropriate to invoke the 5-year statute for a contract not in writing. In Ohio, it is possible to invoke the 6-year statute under similar circumstances.

One of the best "defenses" is not a defense at all. Sometimes debt buyers and their attorneys need a reminder that they have the burden to prove each element of the claim with admissible evidence. You should approach a debt defense case like any other litigation by doing discovery and objecting to the introduction of evidence that does not comply with the rules.

Counterclaims and Affirmative Suits

The expression that the best defense is sometimes a good offense is certainly applicable in these cases. Just as every case must be examined to determine the existence of a defense, each case must also be analyzed to determine whether your client has a claim arising out of the conduct of the debt buyer that can be asserted to defeat or negate the claim of the debt buyer. Since the debt buyer is considered a debt collector , this invokes the Fair Debt Collection Practices Act (FDCPA). There are any number of claims under the FDCPA that can arise out-of a debt buyer suit. The following are just a few examples that we most commonly encounter. The filing of a time-barred suit, in addition to being a complete defense, makes for an excellent claim that be asserted either as a counterclaim or an affirmative claim in a separate lawsuit. Frequently, affidavits will be attached to a debt buyer suit which contain false information and/or that falsely claim the information asserted therein is based on personal knowledge. Because many debts are old and the consumer will have moved, the debt buyer will have served its suit at the wrong address, resulting in the wrong person being sued. Some debt buyers, unable to obtain account statements, will prepare false or bogus statements of account for the purpose of deceiving consumers. Lastly, the amount demanded by debt buyers in their suits should always be questioned. The FDCPA expressly prohibits and makes it a violation for a debt collector to attempt to collect an amount of money exceeding what is owed. These are just a few of many claims which can arise in the course of a debt buyer suit against your client.

Steve Shane is a 1971 graduate of the University of Cincinnati College of Law and admitted to practice in Ohio (1973) and New York (1978) and several federal district and appellate courts. He specializes in Consumer Credit Law Litigation which largely consists of claims under the Fair Credit Reporting Act, The Fair Debt Collection Practices Act and the Truth-in-Lending Act as applied to the prosecution of autofraud cases. He files both class and individual actions on behalf of consumers primarily in the local federal courts. He is a member of the Northern Ky Bar Association, the Clermont County Bar Association, and the National Association of Consumer Advocates.

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[1] See *Hartman vs. Asset Acceptance,* 467 F. Supp. 2d 769 (S.D. Ohio 2004), *Kimber v. Federal Financial Corp.,* 668 F. Supp. 1480 (M.D. Ala. 1987).

[2] See Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts,* 60 Fla. L. Rev. 1 (Jan. 2008).

[3] In fairness, it is important to note that the lack of documentation is not always the case. Some of these portfolios contain more recent accounts where documentation is expressly provided as part of the sale. These portfolios cost the debt buyer more and the accounts are considered more collectible.

[4] See *Miller v. Wolpoff & Abramson, LLP,* 2007 WL 2694607 (N.D. Ind. 2007) and *Provident Bank vs. Community Home Mortgage,* 498 F. Supp. 2d 558 (E.D.N.Y. 2007).

[5] See *USA v. Asset Acceptance,* case no. 8:12cv182 (M.D. Fla. 2012) which involved a complaint filed by the FTC against debt buyer Asset Acceptance that, among other things, accused it of knowingly collecting and suing on debt it knew to be time-barred. This recently resulted in a consent decree in which Asset has agreed to no longer engage in this activity and in the payment of a large penalty.

[6] See KRS 413.120; See also, *First Resolution Investment Corp. v. Todd,* case no. 07-C-725 (Calloway Dist. Ct. 2008).

[7] A creditor is generally exempt from the regulation by the FDCPA. However, an exception to this is the debt buyer who purchases the debt in default. See *Kimber vs. Federal Financial,* 668 F. Supp. 1480 (M.D. Ala. 1987).

[8] See 15 U.S.C. § 1692, *et seq.*

[9] See 15 U.S.C. § 1692(e)(5).

[10] See *Todd v. Weltman, Weinberg & Reis,* 434 F.3d 43 (6th Cir. 2006); *Gionis vs. Javitch, Block & Rathbone,* 405 F.Supp. 2d 856 (S.D. Ohio 2005).

[11] See *Hartman v. Great Seneca,* 2009 WL 1852930 (6th Cir. 2009).

[12] See 15 U.S.C. § 1692e(2)(A) and 15 U.S.C.§1692f(1).