

NCLC REPORTS

Deceptive Practices and Warranties Edition

Volume 28
November/December 2009

Developments and Ideas For the Practice of Consumer Law

In This Issue

- Eight tips for LSC offices (and others) on utilizing new authority to recover attorney fees
- New limits on mandatory arbitration agreements
- Old warranty claims against new GM and Chrysler
- NCLC releases new UDAP Supplement, 8 other updates

Eight Tips for LSC Offices (and Others) on Recovering Attorney Fees Under New Law

The President has just signed an appropriations bill giving Legal Services Corporation-funded offices authority to recover attorney fees. This article provides pointers for these offices and others on seeking such fees.

1. The Big Winners Are Legal Services Clients

Legal services attorneys should understand that the ability to seek an attorney fee award changes the relative positions of the litigants. Delaying tactics become very expensive for the opposing party, and quick settlements favorable to the legal services client are often the direct consequence of the other party's desire to avoid attorney fee awards many times the size of a consumer's damages recovery.

Seeking attorney fees in appropriate cases can also significantly add to the office's funding, allowing the office to expand and hire new attorneys, or at least to avoid lay-offs in the current funding crunch. A legal services office's ability to represent more clients is clearly enhanced, particularly considering the fact that attorney fee awards are computed using standard billing rates in the community (see #4, *infra*) and not based upon the salaries and overhead in the legal services office.

2. Virtually Any Successful Consumer Case Can Lead to an Attorney Fee Award

A host of consumer statutes require the defendant to pay a successful consumer's attorney fees. The most important of these is the state UDAP statute that typically provides for attorney fees for deceptive and in some states unfair or unconscionable practices. But many federal and state consumer credit statutes—the Fair Debt Collection Practices, Fair Credit Reporting, and Truth in Lending Acts just to name three—also provide for fees for prevailing consumers. While a UCC warranty claim about a defective product does not provide for fees, the same claim can usually be made under the Magnuson-Moss Warranty Act, which does provide for attorney fees. The Equal Access to Justice Act and 42 U.S.C. § 1988 provide fees in suits against the government.

Less well-known is the fact that consumers successfully defending debt collection or foreclosure lawsuits can often obtain attorney fees even without raising counterclaims that authorize such fees. California, Connecticut, Florida, Hawaii,

Montana, New Hampshire, New York, Oregon, and Washington have statutes that provide attorney fees to a prevailing consumer if the credit agreement provides for fees for a prevailing creditor.¹ Other statutes provide for attorney fees for the prevailing party in certain types of actions, such as contract claims, whether or not the contract provides for fees.²

3. Consumer Statutes Can Lead to Fees in *Non-Consumer* Cases

Many state UDAP statutes are broad in scope, applying to practices in trade or commerce or the sale of goods or services.³ UDAP statutes can be utilized to recover damages and attorney fees in cases involving landlord-tenant disputes, mobile home parks, migrant farmworker housing, utilities, medical services, insurance claims, and of course foreclosures. In some states, the UDAP statute covers business transactions. The Electronic Funds Transfer Act provides for attorney fees for violations relating to payroll cards, as well as for debit and ATM cards. The Fair Credit Reporting Act provides fees for certain practices relating to consumer reports used in employment and apartment applications.

4. Legal Services Attorneys and Paralegals Receive Hourly Rates Prevailing in the Community

LSC-funded attorneys no longer need gasp at hourly rates private attorneys charge. Fee awards provide LSC attorneys the same hourly rate. The Supreme Court, in *Blum v. Stenson*, 465 U.S. 886 (1984), ruled that the rate for legal services attorneys should not reflect the cost of their service to their program, but should be based on the prevailing market rate. Court-awarded fees should include work by paralegals, law clerks, and law students, at the prevailing rate in the community for similar services.⁴ The hourly rate or hours expended in a case should never be reduced because the client's recovery is relatively small or the attorney's salary is below market. All that matters is that the consumer prevailed in the case.

The market rate is the rate in the community for attorneys (or other support staff) with similar experience in the same area of law. The billing rate of opposing counsel is one such measure. Non-LSC funded offices report that attorneys in their community are willing to provide affidavits as to the prevailing rate in the community. The D.C. U.S. Attorney's Office's "Laffey Matrix" shows paralegals at \$130 an hour and attorneys with 11 to 19 years experience at \$410 an hour.

Community Legal Services in Philadelphia some years ago created a committee that set and periodically updated hourly rates for each attorney in the program, based on surveys of

¹ See NCLC, Collection Actions § 14.1.3 (2008 and 2009 Supp.).

² *Id.* § 14.1.4.

³ See NCLC's Unfair and Deceptive Acts and Practices Appx. A (7th ed. 2008 and 2009 Supp.) (summarizing each state's UDAP statute).

⁴ See *Missouri v. Jenkins*, 491 U.S. 274 (1989).

similar attorneys in the community. Courts have often used those figures as a benchmark.

5. Settlement Negotiations and the Importance of the Retainer Letter and Co-Counseling Agreement

One of the most challenging aspects of the new attorney fee authority will be how to divide up the larger settlements that will ensue. Opposing counsel may offer a lump sum for you and your client to split.⁵ This puts you in a particularly difficult situation because legal services offices should not claim fees that come out of the client's recovery. It may in fact be unethical for opposing counsel to try to put you in a position detrimental to your client.⁶

The best practice is refuse to talk about fees and costs until an agreement has been reached as to the client's recovery. The settlement should be explicit that fees are to be determined later—silence may foreclose the ability to later recover fees. It is also important to have a retainer agreement that spells out the client's consent to your seeking fees from the opposing party, and how fees in general are to be handled.

If there is a co-counsel, it is also imperative to have a co-counseling agreement that sets out how fees are to be divided between the co-counsels. Samples of a retainer letter and a co-counseling agreement are set out in NCLC's *Consumer Class Actions* Appx. E (6th ed. 2006), which can easily be adapted for individual litigation. Clients should also be advised to seek a tax professional concerning an attorney fee award's possible tax consequences for the *client*.⁷

6. Preserving a Fee Claim When Settling a Case

The Supreme Court ruled in *Buckhannon*⁸ that attorney fees are not always available under federal fee shifting statutes if a matter is settled. There is probably no right to fees if the merits of the case are resolved by a stipulation that is signed only by the parties and does not state that the consumer is the prevailing party. Also risky is a simple dismissal entry where the defendant merely agrees to relief sought by the consumer. However, fees are probably available where:

- Fees are negotiated as part of the settlement agreement;
- An agreed *judgment* for money explicitly states that fees have not been waived;
- An agreed order is entered under which the court retains jurisdiction to make sure the defendant takes the steps required in the settlement;
- An agreed order includes a finding or stipulation that the consumer is the prevailing party or is entitled to fees in an amount determined by the court, as long as the court does not consider *Buckhannon* to be jurisdictional.⁹

Moreover, *Buckhannon* interpreted only federal, not state law. While state courts may find the Supreme Court's decision persuasive, the interpretation of state fee shifting statutes will be determined by the wording of those statutes and state court precedent.

⁵ See *Evans v. Jeff D.*, 475 U.S. 717 (1986) (permitting lump sum settlement).

⁶ See *Coleman v. Fiore Brothers, Inc.*, 552 A.2d 141 (N.J. 1989) (claim subject to settlement brought under state UDAP statute).

⁷ See NCLC's *Consumer Class Actions* § 15.5 (6th ed. 2006 and Supp.).

⁸ *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001).

⁹ For more detail, see NCLC's *Consumer Warranty Law* § 2.7.6.6 (3d ed. 2006 and 2009 Supp.).

7. Tips on How to Request Fees from the Court

The initial complaint, counterclaim, and motions should specify that attorney fees are being sought and the basis for the request. Keep careful, itemized time records, and request fees following the procedures and time limits set by the court.

Expect opposing counsel to resist the fee as strenuously as the case's merits. Prepare for a fee hearing as if it were a trial, with witnesses, exhibits, and case citations. A respected attorney testifying (or submitting a declaration) as to the case's difficulty, community billing standards, and quality of representation is very helpful. Write off or reduce hours where documentation is insufficient. Some attorneys deduct a percentage of their time to be conservative—letting the court know what they did.

Seek discovery of opposing counsel's hours and hourly rates. Attorney client and work product privileges do not apply; the records are relevant both to the time required for the case and the prevailing rate in the community.

Set out the history of settlement negotiations, showing that the consumer consistently sought to resolve the case and the other side strung the case out. Have as exhibits the other side's particularly wasteful and time-consuming discovery or motions. Be prepared for arguments that the client need not pay for the legal services, so why are fees necessary? Also seek fees for the time spent pursuing the fee request.¹⁰

8. Getting Up to Speed Quickly on Consumer Cases Yielding Attorney Fees

Join over 800 legal services and private consumer attorneys at NCLC's Consumer Rights Litigation Conference in Boston, November 11–14, 2010—it is packed with essential information and current developments. Discounted rates and scholarships are available for legal services offices.

NCLC also holds training events throughout the year, such as the basic training on the Fair Debt Collection Practices Act to be held on March 5 and 6 in Jacksonville, Florida. NCLC also broadcasts frequent free webinars. See www.consumerlaw.org for more information.

NCLC and the National Association of Consumer Advocates offer a number of free list serves that answer your questions with practical advice and let you eavesdrop on others' questions and the answers. See <http://lists.nclc.org> for NCLC list serves and www.naca.net for NACA information.

NCLC REPORTS is issued 24 times a year, is filled with the latest practice ideas and developments, and is free to legal services offices. Contact publications@nclc.org if your office is not receiving it.

Approximately 600 legal services offices subscribe to the complete set of NCLC manuals, viewed as the consumer law bibles—an absolute must. NCLC offers deep discounts to legal services offices off our already discounted set prices. Contact 617-542-9595 for more information. Also helpful for an office starting up a consumer practice is NCLC's *Practice of Consumer Law* (2d ed. 2006).

Finally, don't hesitate to call the intake attorney at NCLC at 617-542-8010. We provide limited free advice, and specific funding allows us to provide additional assistance to clients in certain states or who are 60 years old or over.

¹⁰ For more tips on preparing for fee hearings, see NCLC's *Unfair and Deceptive Acts and Practices* §§ 13.8.12 to 13.8.13 (7th ed. 2008 and Supp.).