

# DAILY REPORT

A SMART READ FOR SMART READERS

An ALM Publication

## Judge Sanctions Federal Consumer Bureau in Debt Collection Case

**R. ROBIN MCDONALD**

rmcdonald@alm.com

CALLING OUT attorneys with the U.S. Consumer Financial Protection Bureau for their “blatant disregard” for judicial instructions, a federal judge in Atlanta has sanctioned the agency by dismissing four payment-processing companies from its ongoing case against debt collection agencies in Georgia and New York.

In an order handed down Friday, U.S. District Judge Richard Story held that the consumer protection agency “willfully violated” his repeated instructions to identify the factual basis for its claims against multiple defendants. Story also chastised the agency for its “willful” failure to make a knowledgeable witness speak on behalf of the agency at depositions sought by the defendants.

In 2015, the CFPB sued a dozen debt-collection agencies, debt-

payment processors and their agents in Georgia and New York, claiming they placed millions of robocalls to threaten and harass consumers into collectively paying millions of dollars in what the agency described as “phantom debts” they did not owe.

The agency’s suit claimed the alleged debt-collection scheme by Universal Debt & Payment Solutions, WNY Account Solutions, Check & Recovery and others violated federal fair debt collection practice and consumer financial protection laws. The suit also claimed the scheme would not have succeeded without the participation of telemarketing company Global Connect and payment processors that included Global Payments,



ZACH PORTER

**U.S. District Judge Richard Story said the Consumer Financial Protection Bureau demonstrated “blatant disregard” for his judicial instructions.**

Pathfinder Payment Solutions, Frontline and Electronic Merchant Systems. Story on Friday dismissed the four payment processors.

In his order, Story said the sanctions he imposed stemmed from efforts by the defendants to depose CFPB personnel that had been percolating “for quite some time.”

“The Court has consistently held that the CFPB was obligated to sit for those depositions, and that it needed to produce a witness prepared to apprise the defendants of the facts they would face at trial, the judge’s order said. “But the CFPB has put up as much opposition as possible at every turn. And in doing so, it has recycled many of the same arguments over and over.”

Story said the CFPB’s apparent recalcitrance manifested itself in two ways. “The first is to bury the defendants in so much information that it cannot possibly identify, with any reasonable particularity, what supports the CFPB’s claims,” he said. “The second is to assert [attorney work product] privilege objections to questions that the Court has repeatedly ordered to be answered.”

Together, he added, the tactics “demonstrate a willful disregard for the Court’s instructions.”

In deposing CFPB personnel, attorneys for the defendant payment processors were pressing for any exculpatory information. But, according to Story’s order and court filings by the payment processing firms’ counsel, CFPB attorneys repeatedly have asserted that there were no exculpatory facts.

Story wasn’t buying it. “In other words, despite frequently reminding the court of the immense volume of documents and facts in this case, the CFPB’s position is that not a single fact is exculpatory to any of the defendants,” he said.

By doing so, Story continued, “the CFPB takes advantage of the court’s instruction to testify about any exculpatory facts that it could reasonably identify. It makes the CFPB’s job much easier if it simply claims to not be able to identify any such facts. But the CFPB’s position is not a reasonable one. Surely, in the mass of evidence in this case, the CFPB could find some exculpatory evidence. Its insistence that it could not reflect an unwillingness to comply with the court’s instructions and a bad faith attempt to frustrate the purpose of defendants’ depositions.”

Atlanta attorney John Da Grosa Smith, counsel for Pathfinder Payment Solutions, which was dismissed Friday from the case, said Monday, “For years now, the Consumer Financial Protection Bureau has attempted to legislate by litigation and to hold business to impossible standards. But when it came time for the Bureau to show its cards, it chose instead to repeatedly and willfully violate the court’s clear instructions to provide live testimony in support of its claims. The court’s order demonstrates the bureau is not above the law.”

Story’s decision to toss out civil claims against the defendant payment processors marked an about-face from his initial handling of the suit, which he permitted to be filed under seal. When the suit was filed, the judge granted the CFPB a preliminary injunction to stop

the robocalls and freeze the assets of the individual defendants and their business operations. Story held that, absent the injunction, the court’s ability to grant financial relief to consumer victims might suffer “immediate and irreparable damage” because of the possibility that debt collectors would transfer, conceal or otherwise dispose of their assets and their business records.

In issuing the 2015 injunction, Story held that the defendants were “likely to continue to violate federal law and that the CFPB was poised to “prevail on the merits” of the case. ®