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ATTORNEY FEE HEARING FACTORS & TESTIMONY

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> "If you know where your weaknesses are, you can prepare for them. If you know where your strengths are, you can take advantage of them. The same is true in war, as it is in an attorney fee hearing and, make no mistake about it, an attorney fee hearing is nothing but a war over your fees." R. Burdge, 1996.

Defendants and defense attorneys usually attack the consumer's attorney fee petition on several primary approaches. Knowing these, and preparing for them in advance, is helpful to minimize their impact on the court's ultimate attorney fee decision. Moreover, office time-keeping procedures (and litigation tactics) should be considered which implement safeguards to avoid the success of the defendant's attack on the fee petition.

The fundamental idea should be to balance the additional time-keeping work necessary to make your future fee petition "bullet proof," while presently litigating the case in the best manner needed to assure ultimate victory.

Partial Success

First, non-compensable claims in the complaint.

In other words, your complaint may frame several causes of action and some of those may not have a right to recover attorney fees in the first place. The defense will usually try to argue that much of the time spent on the case was on those matters. You need to bear in mind that sometimes the work spent on one claim (which is not attorney fee-compensable) is exactly the same work that would have been spent on another claim, that was attorney fee-compensable.

For example, a Commercial Code Breach of Warranty claim carries practically the identical elements of a federal Magnuson Moss cause of action, but the Commercial Code in virtually every state does not give the consumer the right to recover attorney fees, while the Magnuson Moss Act does. Thus, one way to defeat this argument is to point out that the work under the non-compensable claim also established elements of a cause of action under a compensable claim.

Unsuccessful Pretrial Motions

Another argument is to attack compensation for consumer motions that did not succeed. An example is a motion filed by the consumer for a summary judgment which was not successful.

It must be remembered that many motions serve a dual function. Not only do they attempt to resolve some fundamental issue (such as the

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Consumer Victory: Equifax Must Pay $2.9 Million for Mixing Up Credit Files

In November, NACA members **Robert Sola** and **Steve Fahlgren** won a $2.9 million verdict against Equifax for mixing up the credit file of Plaintiff Angela Williams with the file of another person. Mrs. Williams discovered the error in 1994, and—over the next 13 years—repeatedly notified Equifax of the serious mistakes on her file.

Equifax reported approximately 25 false accounts on Mrs. Williams' file. After claiming to have deleted some false accounts, Equifax repeatedly would reinsert them. In addition, Equifax reported Mrs. Williams private account information on the other person's file and to that person's creditors (for at least three years after the filing of the lawsuit), including debt collectors. In 2002, Equifax merged one of Mrs. Williams' credit files with the other person's file, and changed the identity of the owner of the file to the other person. Mrs. Williams' argued these actions resulted in repeated denials of credit, lost opportunity to receive credit, and economic loss, in addition to damage to reputation, loss of self-esteem, invasion of privacy, interference with normal and usual activities, and emotional distress.

Equifax denied there was inaccurate information on Mrs. Williams' file, and denied it reinserted false accounts on her file. Equifax claimed it followed its policies, which it argued were reasonable, and that it did not intend to change them.

Equifax had notice of a mixed file problem as early as 1992, and it never implemented sufficient procedures to address the problem. Instead, it made required investigations cheaper. It fired many of its domestic investigators, and outsourced its reinvestigations first to Jamaica, then to the Philippines. Equifax reduced the cost of reinvestigations to about $2.00 per dispute through automation and by withholding a consumer's supporting documentation to furnishers. Testimony suggested Equifax conducted increasing numbers of reinvestigations without any Equifax representative involved, and that it asked furnishers simply to match fields rather than conduct an investigation about whether false accounts belonged to someone else. In Mrs. Williams' case, Equifax did not tell its furnishers that it had mixed her file with another.

Throughout the litigation, Equifax maintained its policies worked as intended and denied any wrongdoing (despite admitting it destroyed important records after the initiation of litigation, which its policy permits). However, on the final day of trial, Equifax suggested there may have been "human error" and that it may have "dropped the ball."

The jury awarded Mrs. Williams $219,000 in compensatory damages and $2.7 million in punitive damages. The punitive damages amount is one percent of Equifax's 2006 profits.

Ohio trial court issues TILA recission order

NACA Member **Harold Williams** with the Legal Aid Society of Cleveland recently obtained fantastic results in a mortgage case, in *First Union National Bank v. Richard Wilson, et al.,* Court of Common Pleas for Cuyahoga County, Ohio. Mr. and Mrs. Wilson entered into an adjustable rate note and mortgage in favor of American Surety Bankcorp, which mortgage was subsequently assigned to First Union National Bank. The Wilsons defaulted, and First Union filed an action in foreclosure against them. The Wilsons rescinded the American Surety transaction pursuant to the Truth in Lending Act ("TILA"), and counterclaimed against First Union, asserting rescission of the note and mortgage pursuant to the Home Ownership and Equity Protection Act ("HOEPA") based on the failure of the HOEPA rescission notice to include a statement as to the maximum possible payment for the Wilsons' variable rate loan.

The parties filed respective motions for summary judgment and the trial court granted the Wilsons' motion, holding that the mortgage was rescinded as a result of First Union's violation of the HOEPA disclosure requirements. The Wilsons then argued that they should only have to tender back $17,731.34, as a result of the rescission setoff of their payments, release of fees, and their damages awarded. The trial court issued an order regarding completion of rescission and First Union's termination of its security interest against the Wilson's home pursuant to TILA, essentially requiring that First Union initially release the security interest within 90 days and that the Wilsons tender $17,731.34 to First Union within six months thereafter.

Ninety days after the trial court's order, First Union remained the owner of the security interest in the Wilsons' home which was to have been released pursuant to TILA and the trial court's order. In fact, First Union attempted to sell the Wilson loan two months after the 90-day deadline had passed. As a result, the Wilsons moved to enforce the TILA sequential rescission due to non-

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compliance with the TILA rescission procedure and the trial court's order. The trial court exercised its statutory discretion to enforce TILA and granted the Wilsons' Motion for Relief from Tender Obligation. Alleging that First Union counsel's office did not receive the Wilsons' Motion for Relief from Tender Obligation until the day before the decision, First Union filed a Motion for Relief from Judgment. However, First Union did not assert that its other counsel, at a different address, similarly had not received the Wilsons' Motion for Relief from Tender Obligation, nor could it adequately account for the fact that the U.S. Postal Service did not deliver mail on Sunday, July 16, 2006, the date its counsel alleged that the Wilsons' motion was received at his office.

On December 19, 2006, the trial court denied First Union's Motion for Relief from Judgment because it had not complied with the TILA rescission requirements or the trial court's order. First Union, thereafter, appealed to the court of appeals. Oral argument was held on November 26, 2007.

NAF Arbitration Hearing Victory

An NAF arbitrator recently ruled in the debtor's favor in a proceeding brought by Mann Bracken to collect an MBNA credit card balance allegedly owed by the debtor. The attorney for the debtor, NACA member **Sharon K. Campbell**, attended the hearing alone, without the debtor. MBNA had filed a business records affidavit, although it was mailed 5 days beyond the deadline for such submissions according to the NAF Rules, and MBNA also failed to respond to the debtor's Request for Documents.

At the hearing, Ms. Campbell reminded the arbitrator that the forum was chosen by MBNA, that it filed numerous claims with NAF, and that it should be held to compliance with the rules of the forum it chose. Ms. Campbell also argued that, although rules of evidence were somewhat relaxed in arbitration hearings, some standards of trustworthiness and authentication must be met. MBNA's attorney kept emphasizing the absence of the debtor, claiming that if she were present she could affirm or deny some of the matters being discussed. Ms. Campbell responded that the debtor's presence was not necessary, that lack of a billing error dispute was not relevant, and that the MBNA had the burden of proof.

The hearing adjourned after approximately one hour. About two weeks after the hearing, the arbitrator ruled that the claim was dismissed with prejudice, although no particular findings were made or explanation given as to the basis of the decision.

(Note from the editors: Who cares if there were no findings? Sharon rocked a big win, especially from NAF!)

Pennsylvania Trial Court Issues Opinion Awarding $4,125,000 in Statutory Attorney Fees in Magnuson-Moss Class Action

Samuel-Bassett v. Kia Motors America, Inc., Philadelphia Court of Common Pleas, on remand from Pennsylvania Superior Court. (NACA member **Mike Donovan**) On November 14, 2007, a Philadelphia trial court issued a 42-page decision explaining the basis for its award of $4.12 million in attorney fees and reimbursement of over $250,000 in litigation expenses to the three plaintiffs' firms that successfully tried to verdict a statewide breach of warranty class action against Kia Motors. The suit claimed that the brakes on the Kia Sephia model automobile were defectively designed, resulting in premature wear due to inadequate dissipation of heat. The jury returned a verdict on the merits of $600 per class member, for a total of $5,641,200 for the Pennsylvania class. Class counsel were the firms of Donovan Searles, LLC; Francis & Mailman, P.C., and Feldman, Sheppard, Wohlgelernter, Tanner & Weinstock, all of Philadelphia, PA. Class counsel petitioned for an award of fees representing an enhancement of 1.375 to their lodestar. The trial court granted their petition, reasoning that class counsel's lodestar was reasonable in light of the similar hours and hourly rates billed by defense counsel. The court also found that the hours and hourly rates were consistent with prevailing rates for class counsel in the Philadelphia market. The court further found that an enhancement was justified because of the quality of the representation, the widespread benefit obtained, the magnitude, complexity and uniqueness of the litigation, and the litigation tactics of the defendant. The court further stated: "Enhancing fee recovery deters MMWA violations by discouraging companies from unfairly underpricing their competitors by over-promising but under-delivering in their transactions with plaintiffs . . . . Attorney fees are an important economic consideration encouraging all automobile warrantors to comply with the statute and to engage in early resolution of meritorious disputes." In some pointed analysis, the court unequivocally rejected the testimony of a purported "fee auditor," John Marquess of Legal Cost Control, Inc., whom Kia had hired to dispute plaintiff's fee application. The court found: "Mr. Marquess's opinion is totally and entirely rejected on the basis that he had no pretense to knowledge of what a plaintiff's firm needs to do to prepare and try a class action jury trial to verdict and failed to seek

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