



A Changing Environment: The Hanna Consent Order and Its Implications for Debt Buyers

By Christopher J. Willis and Daniel L. Delnero

The Consent Order between the CFPB and the Frederick J. Hanna & Associates law firm has rightly received substantial attention among debt collection law firms.¹ The order imposes new requirements on licensed attorneys not found in existing case law or state bar rules. But it would be a mistake to read the order in isolation or as only affecting law firms. Instead, the order should be seen as the most recent step in the CFPB's effort to bring about systemic changes in all facets of consumer debt collection.

The Hanna Consent Order has significant implications for the debt buyers in particular. The order shares many common themes – and some explicit requirements – with the Encore² and PRA³ consent orders. For example, all three consent orders require “original account level documentation,” including chain-of-title documentation for purchased debts, and contain detailed provisions regulating the use of affidavits in debt collection litigation. This article examines the Hanna Consent Order, with particular emphasis on its implications for debt buyers.

The article is organized into four sections. The first section provides background on the Hanna litigation and consent order. The second section examines the injunctive requirements of the Hanna Consent Order. The third section examines portions of the order that explicitly relate to purchased debt. Throughout both of these sections, we will discuss the interplay between the Hanna Consent Order and

the Encore and PRA consent orders. And, finally, the fourth section offers guidance on steps sellers and purchasers of debt must take in light of the orders.

I. The Hanna Litigation.

Frederick J. Hanna & Associates is a law firm based in a suburb of Atlanta, Georgia. Founded by Frederick J. Hanna, the firm represents creditors and debt buyers in consumer debt collection lawsuits. Through the firm's substantial experience and innovative use of technology, it was able to efficiently bring a significant number of cases on behalf of its creditor and debt buyer clients. At all times, however, it maintained robust processes to ensure the accuracy of its filings.

Nevertheless, the Consumer Financial Protection Bureau filed suit against the Hanna firm and its three individual partners in July 2014. Relying on the UDAAP provision of the Consumer Financial Protection Act and the Fair Debt Collection Practices Act, the CFPB alleged: 1) lack of meaningful attorney involvement (Counts One and Two); and 2) improper use of affidavits (Counts Three and Four).⁴

The meaningful-attorney-involvement claims center on the CFPB's view that the Hanna Firm was filing such a high volume of lawsuits that its attorneys could not have been involved meaningfully in their preparation. For example, the complaint is replete with allegations related to the “mass scale” of complaints and the ratio of attorneys to non-attorney staff. The CFPB criticized the law firm for allegedly relying too

heavily on automated processes and non-attorneys to qualify accounts for lawsuits.

The affidavit claims related to affidavits that the Hanna Firm's clients executed, and the firm filed in support of collection lawsuits. The CFPB alleged that “the affiants represented that they had personal knowledge of the validity and ownership of debts,” but that the firm “knew or should have known that many of these affidavits were executed by persons who lacked personal knowledge of the facts contained in them.”⁵

In addition to the actual claims, the complaint included atmospheric allegations that influenced the eventual consent order. For example, the CFPB alleged that “debt buyers often could not support their collection activities with basic documents, such as the original contracts underlying the alleged debts or the chain of title evidencing that the debt buyer had standing to sue the consumer.”⁶ The CFPB also alleged that the firm “routinely dismissed” cases when the consumer responded to the complaint, particularly when the consumer was represented by an attorney.⁷

We filed a motion to dismiss on behalf of the Hanna Firm, raising five arguments: 1) the Dodd-Frank Act's practice-of-law exclusion bars the UDAAP claims; 2) the meaningful attorney involvement standard does not apply to the filing of complaints; 3) restrictions on filing debt collection lawsuits violate the First Amendment and Equal Protection clause; 4) licensed attorneys are entitled to rely on their client's affidavits; and 5) a one-year statute of limitation applies to the FDCPA claims.

The district court rejected the first four arguments outright.⁸ With regard to the final argument, the court did hold that a statute of limitations applies to the FDCPA claims, but declined to decide whether a one or three year statute applied.⁹

After the district court denied the motion to dismiss, the Hanna firm and CFPB engaged in extensive negotiations, which ultimately culminated in the consent order.

II. The Consent Order's Injunctive Provisions

The consent order imposes three main injunctive requirements. First, the firm must have “original account level documentation” before filing, *or threatening to file*, a debt collection lawsuit. Second, an attorney must review facts and documentation before signing or approving a lawsuit for filing. And third, the Hanna Firm has oversight responsibilities with respect to its clients' affidavit execution processes.

A. Original Account Level Documentation

The requirement of “original account level documentation” is part of the CFPB's emphasis on the need to substantiate consumer debt. It is designed to prevent a law firm from threatening or filing a lawsuit based on a spreadsheet containing consumer identities and basic information about the accounts (e.g. name, address, account number, and amount owed). Instead, before the firm may file, *or threaten to file*, a debt collection lawsuit, it must possess documentation reflecting “the [c]onsumer's name, the last four digits of the account number associated with the [d]ebt at the time of [c]harge-off, the claimed amount, excluding

any post [c]harge-off payments, and if Defendants are suing under a breach of contract theory, the contractual terms and conditions applicable to the debt.”¹⁰

The Consent Order also contains the following definition of “Original Account Level Documentation”:

- i. any documentation that a Creditor or that Creditor's agent (such as a servicer) provided to a Consumer about a Debt;
- ii. a complete transactional history of a Debt, created by a Creditor or that Creditor's agent (such as a servicer); or
- iii. a copy of a judgment, awarded to a Creditor¹¹

This definition includes a few key features that make the requirement manageable. The first, and most significant, is that the definition uses “or,” rather than “and,” meaning that any of the three categories of documentation will suffice. That is significant, because a “complete transactional history of a debt” is often unavailable for older accounts.

The second key feature is that “any documentation that a creditor . . . provided to a [c]onsumer about a [d]ebt” is sufficient.¹² Under this clause, even a charge-off statement sent to a consumer satisfies the requirement. Thus, a law firm does not have to be in possession of an original copy of the contract creating the debt to satisfy the original account level documentation requirement.

The original account level documentation requirement should be familiar to debt buyers, because it is also contained in the PRA and Encore consent orders.¹³ It is part of the CFPB's effort to prevent collection activity based solely on data contained on a spreadsheet, rather than underlying documentation.¹⁴ The provision will require debt collection law firms and debt buyers to have media on hand to “substantiate” a debt before engaging in legal collection activity. This concept of substantiation also appeared in the New York Department of Financial Services' debt collection regulations, promulgated in 2015.¹⁵ Given the prominence of this concept in the CFPB's three recent consent orders, we also expect to see it expressed in the Bureau's proposed debt collection rules, which are said to be forthcoming this year.

B. Pre-Suit Attorney Review.

The second major feature of the Hanna Consent Order is that the attorney of record must review certain facts and documentation before filing suit.¹⁶ This requirement has several components. First, the attorney must log onto an electronic case management system in a manner that will create an electronic record showing that the attorney reviewed the consumer's account. Second, the attorney must review the original account level documentation discussed above. Third, the attorney must confirm, to the best of his or her ability, that the statute of limitations has not expired. Fourth, the attorney must confirm that the account has not been discharged in bankruptcy. Fifth, the attorney must confirm the consumer's identity and correct address for purposes of filing in the correct venue. Sixth, the attorney must certify that he or she has complied with the terms of

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the order.¹⁷

The attorney review section of the Consent Order fleshes out what the CFPB considers to be meaningful attorney involvement in debt collection litigation. Many of the requirements can be satisfied, in part, with the aid of technology and support staff. For example, technological products can scan bankruptcy filings, verify a consumer's address, and check the statute of limitations. The Consent Order provides that, with respect to these issues, the attorney may employ "methods or means proven to be historically reliable and accurate."¹⁸

Although technological resources can aid in these requirements, the Consent Order does require that the attorney of record be involved in the process. And the Order unambiguously requires that the attorney personally examine the original account level documentation prior to filing suit.

C. Affidavit Oversight

The Consent Order contains two provisions related to affidavits. The first requirement prohibits use of what the Order refers to as "deceptive affidavits."¹⁹ The second requires the Hanna Firm to "review and analyze the processes and procedures employed by any entity that employs" the firm on an annual basis to ensure that the client's affidavit procedures comply with the Consent Order.²⁰

The focus on affidavits is, of course, not unique to the Hanna Consent Order. The PRA and Encore consent orders, among others, also contained numerous affidavit-related requirements. And affidavits in connection with consumer debt collection have received regulatory and media attention since the onset of the 2008 financial crisis, most notably the robo-signing controversy that arose in the mortgage servicing context. The Hanna Consent Order should be viewed as the latest step in this continued regulatory focus, not as imposing an isolated requirement unique to a single law firm.

Unlike the meaningful attorney involvement and original account level documentation provisions, many of the affidavit requirements are found in existing law. The Hanna Consent Order prohibits falsely stating that the affiant has "personal knowledge of the validity, truth, or accuracy of the character, amount, or legal status of" the debt; stating that an affidavit is notarized when it was not executed in front of a notary; falsely stating that particular documents relate to the particular consumer being sued; and misrepresenting the affiant's review of original account level documentation.²¹ Finally, the attorney of record must certify that any affidavit submitted in connection with a debt collection lawsuit satisfies these conditions.

These examples are specific to the Consent Order, but state law already prohibits making any false representations in an affidavit. Each of the misrepresentations set forth in the Consent Order would likely violate that general prohibition.

The main difference between existing law and the Consent Order involves the attorney's knowledge requirement. Most state rules of professional conduct prohibit submitting evidence that an attorney "knows to be false," but do not

place an affirmative obligation to guarantee the truth of the evidence submitted.²² The Consent Order, by contrast, places an affirmative obligation on the attorney of record to certify that an affidavit does not contain any of the enumerated misrepresentations.²³

The Consent Order's affidavit provision relates to one core concern: ensuring that the person executing affidavits has actually reviewed the consumer's account. As long as the affiant personally reviews the consumer's account (including the underlying documentation establishing the facts set forth in the affidavit) and signs the affidavit in front of a notary, the substantive affidavit provisions of the Hanna Consent Order will have been satisfied.

In addition to the substantive requirements, the Consent Order requires the Hanna Firm to visit its clients annually to "reasonably ensure" that their affidavit processes and procedures comply with the Consent Order.²⁴ Compliance with this provision will require cooperation between the Hanna Firm and its creditor and debt buyer clients. We recommend similar cooperation and annual visits between other debt collection law firms and their clients as part of the vendor management process.

III. The Hanna Consent Order and Debt Buyers.

The Hanna Consent Order imposes a unique obligation on the firm when it represents a debt buyer, as opposed to an original creditor. Specifically, the attorney of record must possess "a certified or otherwise properly authenticated copy of each bill of sale or other document evidencing the transfer of ownership of the Debt at the time of Charge-off to each successive owner" prior to filing or threatening to file suit.²⁵ The document must reference the "specific debt being collected upon"; a general statement that company x is transferring accounts to company y will not suffice.²⁶

This provision establishes a chain-of-title documentation requirement for purchased debt (not unlike similar requirements in the NYDFS regulations and California's debt purchasing legislation).²⁷ Compliance is fairly straightforward for debt that has only been transferred once, but could become difficult for debt that has been transferred multiple times. It may also be difficult to establish the chain of title for debt that was transferred before the CFPB became active in this area, when transfer documents may have been less robust.

IV. Hanna and its Impact on Debt Buyers.

The Hanna Consent Order is the latest step in the CFPB's effort to affect systemic change of the debt purchasing and collection industries. The Order nominally applies to a single firm and its partners, but its implications for the debt purchasing industry are readily apparent. The similarities between the Hanna Consent Order and Encore and PRA consent orders are no accident. The CFPB was motivated by similar concerns, and addressed them with two different types of parties involved in the collection process.

The most significant change going forward relates to the type of documentation that a debt buyer must obtain and

provide to a collection law firm. The CFPB has made it clear that it expects to see original account level documentation pass from the debt seller to the debt buyer, and then from the debt buyer to the collection law firm. A complete chain of title referencing the specific debt being collected or sued upon must also pass from the seller to the buyer, and then to the law firm.

Technically speaking, the Hanna Consent Order only requires this documentation before the firm files or threatens to file suit, not immediately upon placement. But we recommend obtaining it at the time of purchase, and providing it to a debt collection law firm when the account is placed. Doing so will avoid unnecessary risk and make the process of retaining counsel and initiating legal process more streamlined and efficient. Waiting until an account is referred to a law firm to obtain the necessary documentation from the creditor will delay the process and enhance the risk that the required documentation is not available. Moreover, because the documentation must be in the law firm's hands before it "threatens" suit, it would need to be provided before the law firm engages in any communication with the consumer (even an initial validation notice). As a practical matter, this means that providing the original account-level documentation must occur at the time of placement of the account with the law firm.

The affidavit requirements are fairly straight forward, at least in terms of affiant compliance. To comply with the consent order, the affiant must: 1) review the consumer's account and any documents attached to the affidavit; and 2) execute the affidavit in front of a notary public. The account review must be sufficiently thorough to establish personal knowledge of all facts stated in the affidavit. We also recommend that debt buyers meet annually with outside debt collection law firms retained by the company, to demonstrate that the company's affidavit processes and procedures are in compliance with the Hanna, Encore, and PRA Consent Orders, as well as any additional action the CFPB takes with respect to affidavits.

Finally, we recommend that debt buyers require their outside debt collection firms to comply with the substance of the Hanna Consent order, and to monitor their compliance as part of the vendor management process.

V. Conclusion.

The Hanna Consent Order is a significant development in the regulation not only of debt collection law firms, but also creditors and debt buyers. It provides much needed clarity on the judicially created and largely undefined meaningful attorney involvement standard. The order also reaffirms the CFPB's interest in all aspects of the debt purchasing and collection industries, and highlights the CFPB's focus on substantiation and the use of affidavits. The order further demonstrates that the CFPB is being consistent in its themes and areas of focus, which provides greater clarity to members across the debt collection and purchasing industries. ■

¹ CFPB v. Frederick J. Hanna & Assocs, P.C., 1:14-cv-02211-AT, Dkt. No. 61-1 (Dec. 28, 2015).

² In the Matter of Encore Capital Group, Inc., 2015-CFPB-0022 (Sep.

9, 2015).

³ In the Matter of Portfolio Recovery Assocs., LLC, 2015-CFPB-0023 (Sep. 9, 2015).

⁴ CFPB v. Frederick J. Hanna & Assocs, P.C., 1:14-cv-02211-AT, Dkt. No. 1 (Compl.).

⁵ Id. ¶ 37.

⁶ Id. ¶ 20.

⁷ Id. ¶ 22.

⁸ CFPB v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342, 1351-75 (N.D. Ga. 2015).

⁹ Id. at 1375-81.

¹⁰ Hanna Consent Order, pp. 6-7.

¹¹ Hanna Consent Order, p. 5.

¹² Id. (emphasis added).

¹³ See PRA Consent Order, pp. 4-5, 28-33; Encore Consent Order, pp. 4, 31-36.

¹⁴ The requirement for original account level documentation is also consistent with debt seller consent orders.

¹⁵ 23 NYRR § 1.4.

¹⁶ Hanna Consent Order, pp. 7-9.

¹⁷ Id.

¹⁸ Id. at 8-9.

¹⁹ Id. at 9-10.

²⁰ Id. at 11.

²¹ Id. at 9-10.

²² See, e.g., Ga. R. Prof. Responsibility 3.3.

²³ Hanna Consent Order, p. 10.

²⁴ Id. at 11.

²⁵ Id. at 7.

²⁶ Id.

²⁷ 23 NYRR § 1.4(c); Cal. Civ. Code. § 1788.52. Because the Consent Order allows for "other documents transferring ownership," an original bill of sale is not necessary to satisfy this requirement. Accordingly, the requirement could potentially be satisfied in the same manner that debt buyers have been complying with New York, California, and other pertinent state law requirements.

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