

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Kyle Andernacht,

Civil No. 02-928 (DSD/SRN)

Plaintiff,

v.

ORDER

Interstate Credit Control, Inc.,

Defendant.

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Thomas J. Lyons, Jr., Esq., on behalf of Plaintiff.

Richard L. Muske, Esq., on behalf of Defendant.

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SUSAN RICHARD NELSON, United States Magistrate Judge

The above-entitled matter came before the undersigned United States Magistrate Judge on Plaintiff's Motion for Attorneys Fees and Costs (Doc. Nos. 8 & 11).

This Order addresses that motion.

**I. BACKGROUND**

On April 30, 2002, Plaintiff filed the Complaint alleging a violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq. On September 25, 2002, at a settlement conference conducted by this Court, Plaintiff obtained \$1,000 as statutory damages for the alleged violation. Plaintiff now requests an award of \$7,207.50 in attorneys fees and \$285.05 in costs, for a total of \$7,492.55.

**II. DISCUSSION**

The FDCPA contains a fee shifting provision. This provision states:

(16)

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JUDGMENT ENTRY  
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Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of-

(1) any actual damages sustained by such person as a result of such failure; . . .

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. § 1692k(a).

"Given the structure of the section, attorney's fees should not be construed as a special or discretionary remedy; rather, the Act mandates an award of attorney's fees as a means of fulfilling Congress' intent that the Act should be enforced by debtors acting as private attorneys general." Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991) (citation omitted). The Court has broad discretion in determining the amount of attorneys' fees that are reasonable in an FDCPA action. Bell v. United Princeton Properties, Inc., 884 F.2d 713, 721 (3d Cir. 1989).

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."<sup>1</sup> Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). "Assessing the reasonableness of a fee requires us to consider the plaintiff's overall success; the necessity and usefulness of the plaintiff's activity in the particular matter for which fees are requested; and the efficiency with which the plaintiff's attorneys conducted that activity." Jenkins v. Missouri, 127 F.3d 709, 718 (8<sup>th</sup> Cir. 1997). To determine a reasonable hourly rate, the Court should consider the prevailing market rate for similar services in the community where the litigation takes place when performed by "lawyers of reasonably comparable skill, experience, and reputation." McDonald v. Armontrout,

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<sup>1</sup>This approach is referred to as the lodestar method.

860 F.2d 1456, 1458-59 (8<sup>th</sup> Cir. 1988).

To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested raters are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

Blum v. Stenson, 465 U.S.886, 895 n.11 (1984).

"*Hensley* teaches that limited success on the merits is a factor in considering the reasonableness of the fee in relation to the results obtained. *Id.* at 719 (citation omitted).

A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise "billing judgment" with respect to hours worked, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.

Hensley, 461 U.S. at 437.

**A. Hourly Rates.**

Plaintiff seeks reimbursement for his attorney's billing rate of \$250 per hour. Plaintiff's attorney states that he practices extensively in the area of FDCPA litigation, having represented over 1,000 plaintiffs. In light of his experience, competence, and knowledge, Plaintiff's attorney argues the Court should accept his hourly rate. He notes that in Sonmore v. CheckRite Recovery Services, Civil No. 99-2039, another FDCPA case, the Honorable Donald D. Alsop, United States District Judge for the District of Minnesota, found rates of \$200 and \$360 per hour reasonable. Further, in Armstrong v. Rose Law Firm, Civil No. 00-2287 MJD/SRN, 2002 WL 31050583 (D. Minn. September 4, 2002), this Court also granted his fee request.

Defendant responds that Plaintiff has not demonstrated that the hourly rate claimed is consistent with that of Minneapolis and St. Paul practitioners. Further, Defendant states,

No attempt has been made to provide verification of the agreed fee rate between Plaintiff Andernacht and Attorney Lyons. No attempt has been made to verify that Andernacht will actually incur the fee and the fee is not partially or entirely contingent upon a fee being awarded by the court. If Andernacht has no obligation to compensate his attorney, the hourly rate claimed is fictitious and cannot reflect the true hourly rate of attorneys with clients that actually compensate their attorneys.

The Court finds the rate of \$250.00 per hour ordinary and reasonable for prosecuting FDCPA cases in this community. The Court does not believe that Plaintiff's attorney has artificially inflated his billing rate simply for fee shifting purposes.

**B. Hours Reasonably Expended.**

Plaintiff's attorney's billing records indicate he expended 28.83 hours working on the present case. Plaintiff states he is entitled to a complete recovery of attorneys fees because he obtained the maximum recovery for his statutory violation claim. Plaintiff's attorney states the number of hours he spent were reasonable and efficient. He explains that Defendant's offer of judgment merely conceded an obvious violation, but left the statutory violation amount and mandatory attorneys fees and costs to be litigated. Further, by the time this ineffective offer of judgment was sent, Plaintiff's attorney had researched and begun drafting a summary judgment motion. In correspondence dated May 2, 2002, he informed Defendant that he had spent time on this motion. Plaintiff's attorney also explains that his practice is to review the file before participating in any in-person or telephonic hearings. Consequently, there are half-hour billing increments for certain conferences that only took 15 minutes.

Defendant responds that Plaintiff's attorney spent an unreasonable amount of time on the

present case. Defendant states it made settlement overtures from the moment the summons was served. At the time the summons was served, according to Defendant, Plaintiff had no actual damages, the prospect of a maximum \$1,000 civil penalty, and could claim \$2,750 in attorneys fees. Nevertheless, at that time Plaintiff demanded a figure in excess of \$10,000 for settlement. Defendant explains that it did not accept this outrageous demand. Defendant contends that by demanding such a large amount, Plaintiff's attorney ignored his ethical obligation to expedite litigation.

Defendant explains that it made an offer of judgment seeking to avoid further litigation. Plaintiff's attorney then spent five hours considering this offer, only to ultimately ignore it rather than make a counteroffer. Defendant also takes issue with Plaintiff's attorney spending time consulting with co-counsel on the offer of judgment. Defendant states it is unreasonable for someone as experienced as Plaintiff's attorney to require such consultation.

At the settlement conference, Defendant states Plaintiff's demand of \$9,000 was again excessive. Part of the basis for the claimed attorneys fees incurred to that date was fees incurred preparing a dispositive motion. Defendant notes Plaintiff's attorney's billing records indicate the research for this summary judgment motion was actually conducted before the summons was ever served. This peculiarity, according to Defendant, raises the question of whether the itemization of hours is accurate. Defendant also explains that the billing records indicate Plaintiff's attorney reviewed Defendant's offer of judgment in part on May 16, 2002, and reviewed the Answer on May 22, 2002. The offer of judgment and Answer, however, were dated respectively May 16, 2002, and May 22, 2002. Defendant states that it is inconceivable that these documents were mailed and received the same day. Therefore, it concludes Plaintiff's

billing statement is not accurate.

Defendant also observes that with only one exception, all of the billings are in half-hour or hour segments. As an example, Defendant notes that the Rule 26(f) conference, which Plaintiff's attorney participated in telephonically, lasted approximately 15 minutes, yet is billed for a half hour. Defendant takes similar issue with the half hour billed for preparing a Rule 26(f) report, which Defendant states is a generic form that is presumably prepared and filled in by office staff. Defendant concludes that the billing records exaggerate the fees allegedly due.

The Court finds that Plaintiff's attorney spent a reasonable amount of time working on the present case. Nothing in the record indicates that Plaintiff's attorney pursued unreasonably time consuming strategies. Plaintiff's attorney researched and began preparing a summary judgment motion, and when Plaintiff then received an offer of judgment that was unacceptable, informed Defendant that he was prepared to file that motion. This behavior is not an unreasonable approach to the present case. With respect to the dates listed for reviewing the offer of judgment and Answer, Plaintiff has since responded that he mistakenly entered the date of the correspondence rather than the subsequent review. The Court finds no reason to doubt that these entries accurately record the amount of time spent on each particular activity. Further, the Court does not find unreasonable that Plaintiff's attorney spent five hours considering the offer of judgment. According to the billing records, two and a half hours of the time was spent researching the issue arising from Defendant not having specified a dollar amount in the offer. While certain attorneys might have completed this research in less time, the Court does not find two and a half hours unreasonable.

**C. Prevailing Party and Overall Success.**

Plaintiff argues that he obtained the maximum recovery possible of \$1,000 in the present case, and, therefore, is entitled to full attorneys' fees.

Defendant states that Plaintiff claimed actual damages in the Complaint, but conceded at the settlement conference that they did not exist. In addition, Plaintiff demanded that the underlying debt be satisfied, but that has not occurred. Further, Plaintiff demanded that his credit report be modified, but that has not occurred. Thus, Plaintiff's only success was the stipulated recovery of the civil penalty.

The Court finds Plaintiff was the prevailing party and his overall success was sufficient to entitle him to full attorneys fees. The Court acknowledges that Plaintiff did not succeed with his requests that the underlying debt be satisfied and his credit report be modified. Parties routinely enter settlement talks, however, with a list of demands they know will not all be met. Like Plaintiff's original offer that the settlement be kept confidential, a party's initial proposals are designed to achieve the most advantageous outcome possible. Success does not depend on each individual demand being satisfied. "[A] fee award should not be reduced merely because a party did not prevail on every theory raised in the lawsuit." Casey v. City of Cabool, Mo., 12 F.3d 799, 806 (8<sup>th</sup> Cir. 1993) (quoting Hendrickson v. Branstad, 934 F.2d 158, 164 (8<sup>th</sup> Cir. 1991)).

**D. Proportionality.**

Plaintiff states that proportionality will not bar his recovery of full attorneys fees. He states that by recovering the maximum amount of statutory damages allowed under the FDCPA, he has gone beyond a recovery of mere nominal fees. Plaintiff explains that the amount of

attorneys fees awarded pursuant to the statute is not required to be proportionate to the amount of damages recovered. Plaintiff also cites Supreme Court, Fourth Circuit, and Seventh Circuit precedent establishing that fee awards need not be proportionate to the amount of damages recovered.


Defendant argues that Plaintiff is entitled only to nominal attorneys fees. It explains that "Plaintiff's fee request should be reduced to a nominal amount, not to discourage FDCPA litigation, but to discourage unfounded demands intended solely to protract litigation and unwarranted fee generation." Defendant explains that it made an offer of judgment prior to serving the Answer that could have settled this matter entirely. With respect to the claims brought against it, Defendant states it did not act abusively or oppressively, nor did it engage in the kind of conduct the FDCPA was intended to eliminate. It concludes, "[o]ther than claiming a technical deficiency in the notice, Plaintiff is unable to show that Defendant violated any of the statutory requirements of the Fair Debt Collection Practices Act."

The Court finds that Plaintiff's attorneys' fees and costs are reasonably proportional to his recovered damages. The FDCPA contains a fee shifting statute to ensure that meritorious parties such as Plaintiff can attract competent legal representation. In the present case, Plaintiff's attorney achieved success on the statutory damages claim. Defendant argues that Plaintiff's claim was based on a technical deficiency in the notice. Given that this deficiency evidently qualifies as an actual violation of the FDCPA, however, it is not clear what distinction the term technical is intended to make.

**THEREFORE, IT IS HEREBY ORDERED that:**

Plaintiff's Motion for Attorneys Fees and Costs (Doc. Nos. 8-1, 8-2, 11-1, and 11-2) is **GRANTED** and Defendant is instructed within 10 days of this Order to pay Plaintiff the requested \$7,492.55.

Dated: April 28, 2003

  
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SUSAN RICHARD NELSON  
United States Magistrate Judge