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SUPREME COURT REVIEWING AWARD OF COSTS IN FDCPA CASE BUT NOT SCOPE OF PROHIBITION AGAINST THIRD PARTY COMMUNICATION

The United States Supreme Court announced recently that it will review the Tenth Circuit Court of Appeals' decision in *Marx v. General Rev. Corp.* on the issue of awarding costs in a federal Fair Debt Collection Practices case, but not on the issue of third party communications under the FDCPA. *Marx v. General Rev. Corp.,* 668 F.3d 1174 (10th Cir. 2011), *cert. granted,* No. 11-1175, 2012 WL 1030477 (May 29, 2012). With respect to the first issue, the Tenth Circuit Court of Appeals held that a prevailing defendant could be awarded costs in an FDCPA suit without a finding that the consumer brought the action in bad faith and for the purpose of harassment. With respect to the latter issue, the Court held that a debt collector did not violate the FDCPA by sending an employment verification form to a debtor's employer.

In *Marx,* a debt collector faxed a debtor's employer an employment verification form to determine whether the debtor was eligible for wage garnishment. The form displayed the debt collector's name (which did not disclose the nature of its business), logo, address, telephone number and internal account number for the debtor. The form also stated that its purpose was to verify employment and request employment information.

The debtor sued the debt collector claiming, among other things, that the debt collector violated Section 1692c(b) of the FDCPA by sending the employment verification form to the debtor's employer. Section 1692c(b) generally prohibits a debt collector from communicating with third parties in connection with the collection of any debt. The district court found that the debt collector did not violate Section 1692c(b) by sending the employment verification form and awarded costs to the debt collector.

The Tenth Circuit Court of Appeals held that the debt collector did not violate Section 1692c(b) because the employment verification form was not a "communication" subject to the FDCPA. The Court indicated that the FDCPA defines a "communication" as the "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The Court concluded that the employment verification form was not an FDCPA "communication" because the form did not expressly reference the debt, but rather spoke only of verifying employment. The Court opined that the form could not reasonably be construed to imply a debt because an employment verification request can be made for any number of reasons outside the context of debt collection such as for processing a mortgage, conducting a background check before hiring or determining eligibility for an extension of credit.

The Court also held that the award of costs to the debt collector as a prevailing party was appropriate even though there was no finding that the debtor brought the FDCPA action in bad faith or for the purpose of harassment. The Court indicated that Rule 54(d) of the Federal Rules of Civil Procedure requires courts to award costs to the prevailing party unless a federal statute provides otherwise. The Court found that Section 1692k(a)(3) of the FDCPA, which states that on a finding by a court that an action under Section 1692k was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorneys' fees reasonable in relation to the work expended and costs, did not override Rule 54(d). The Court stated that there is no clear and specific statutory command nor any legislative history indicating that Section 1692k(a)(3) overrides Rule 54(d)(1)'s provision for costs to a prevailing party.

Collectors should keep in mind that a number of courts have interpreted the term "communication" more broadly than the *Marx* court, at least when it comes to leaving voicemail messages and the so-called "mini-*Miranda*" requirement of the FDCPA. *See, e.g., Costa v. National Action Fin. Servs.,* 634 F. Supp. 2d 1069, 1074 (E.D. Cal. 2007) (holding that a message that merely informed a debtor of a matter that she should attend to and instructions on how to do so was a "communication" and that the debt collector violated the FDCPA by failing to provide a "mini-*Miranda*" notice). Accordingly, relying on *Marx* as a guide with respect to the scope of other provisions of the FDCPA may not be warranted, especially outside of the Tenth Circuit. ❑

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COLLECTORS MAY BE SUBJECT TO LIABILITY FOR CALLING REASSIGNED CELL PHONE NUMBERS

The United States Court of Appeals for the Seventh Circuit recently held that a debt collector may violate the Telephone Consumer Protection Act if the debt collector makes an autodialed or prerecorded call to a reassigned cellular telephone number without the consent of the person subscribing to the called number at the time the call is made. *Soppett v. Enhanced Recovery Co., LLC,* No. 11-3819, 2012 WL 1650485 (7th Cir. May 11, 2012).

In *Soppett,* a debt collector used an autodialer to call the cellular telephone numbers that were provided by two of the creditor's customers. Unbeknownst to the debt collector, however, the cellular telephone numbers had been reassigned to other individuals before the autodialed calls were made. The individuals who were reassigned the cellular telephone numbers sued the debt collector for allegedly violating Section 227(b)(1) of the TCPA, which prohibits a person from making autodialed or prerecorded calls to a cellular telephone number without the prior express consent of the called party.

The debt collector argued that it did not violate Section 227(b)(1) because the debt collector had the consent of the intended recipients of the calls. The Court disagreed and held that only the consent of the subscriber assigned to the number at the time of the call justifies an automated or prerecorded call to a cellular telephone number. The Court reasoned that Section 227(b)(1) states that consent must be provided by the "called party" which the statute unmistakably denotes to be the current subscriber (*i.e.,* the person who pays the bills or needs the line in order to receive other calls). The Court stated, however, that collectors need not abandon autodialers, but rather have other options including:

(1) Having a person make the first call and then switching to a predictive dialer after verifying that the cellular telephone number still is assigned to the customer.

(2) Using a reverse lookup to identify the current subscriber to the cellular telephone number.

(3) Asking the creditor who obtained the customer's consent whether the customer still is associated with the cellular telephone number and getting an indemnity from the creditor in case a mistake has been made.

The Court did not address various problems that may be associated with these options, however, including, (i) costs associated with manually dialing the first call to a debtor as described in Item (1) above, (ii) potential liability if a number is reassigned after manually dialing the first call and verifying the called party's number, (iii) costs associated with using a reverse lookup before making each call and (iv) potential liability for a creditor who agrees to indemnify a collector for calls made to reassigned numbers as described in Item (3) above. Debt collectors and creditors may wish to review their procedures with respect to autodialed or prerecorded calls to cell phones to determine whether they adequately address the compliance issues presented by this case. ❑

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