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Supreme Court Decision May Reduce Debtor Claims Brought Under the FDCPA

Yesterday, the U.S. Supreme Court issued an opinion that may reduce the number of claims brought by debtors under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. ?? 1692 *et seq.*, or at least cause plaintiffs' counsel to think twice about bringing such claims. In *Marx v. General Revenue Corp.*, No. 11-1175, 2013 U.S. LEXIS 1859 (U.S. Feb. 26, 2013), the Court held that a district court's authority to award costs to prevailing defendants on a claim under the FDCPA, pursuant to Federal Rule of Civil Procedure ("FRCP") 54(d)(1), is not displaced by ?1692k(a)(3) of the FDCPA. The Court therefore concluded that a district court may award costs to prevailing defendants in FDCPA cases without a threshold finding that the plaintiff brought the case in bad faith or with the intent to harass. Thus, a finding that the claim was frivolous is not required to entitle a defendant to an award of costs against the debtor/plaintiff.

Prior to the Court's decision in *Marx*, there was a split among the circuits concerning whether 15 U.S.C. ? 1692k(a)(3) provided the exclusive basis for awarding costs in FDCPA actions. *Compare Marx v. Gen. Revenue Corp.*, 668 F.3d 1174, 1182 (10th Cir. 2011) with *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 701 (9th Cir. 2010). FRCP 54(d)(1) provides in part that "[u]nless a federal statute...provides otherwise, costs?-- other than attorney's fees?-- should be allowed to the prevailing party." Section 1692k(a)(3) of the FDCPA provides that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." The issue before the Court, therefore, was whether ? 1692k(a)(3) was a federal statute that "provide[d] otherwise," thereby displacing the district courts' authority pursuant to FRCP 54(d)(1).

Background of Case

Petitioner Olivea Marx defaulted on a student loan, and the creditor hired respondent General Revenue Corp. ("GRC") to collect the debt. *Gen. Revenue Corp.*, 2013 U.S. LEXIS 1859, at *6. Marx filed a claim against GRC under the FDCPA, alleging that GRC harassed her with phone calls and falsely threatened to garnish her wages and bank account. *Id.* at *6-7. The district court found Marx had failed to prove any violation of the FDCPA. GRC subsequently submitted a bill of costs seeking an award of its witness fees, witness travel expenses and deposition transcript fees in accordance with FRCP 54(d)(1). *Id.* at *7. The district court ordered Marx to pay GRC $4,543.03 in costs. *Id.* Marx filed a motion to vacate the award, arguing the district court lacked authority to award costs under FRCP 54(d)(1) because ? 1692k(a)(3) sets forth the exclusive basis for awarding costs in FDCPA cases. *Id.* at *8. The district court rejected Marx's argument and concluded it had discretion under Rules 54(d)(1) and 68(d) to award GRC its costs. *Id.* The U.S. Court of Appeals for the Tenth Circuit disagreed that costs were allowed under FRCP 68(d) but affirmed the district court's judgment that costs could be awarded pursuant to FRCP 54(d)(1). *Id.* at *9.

Supreme Court's Decision

The Supreme Court first noted that the discretion granted to the district courts pursuant to FRCP 54(d)(1) can be displaced by a federal statute that "provides otherwise." *Id.* at *12. According to the Court, a statute "provides otherwise" if it is contrary to FRCP 54(d)(1) by limiting the discretion of the district courts. *Id.* For example, the Court noted that a statute providing that "plaintiffs shall not be liable for costs" is contrary to FRCP 54(d)(1) because it precludes a court from awarding costs to prevailing defendants. *Id.* at *12-13.

The Court then addressed whether ? 1692k(a)(3) was contrary to FRCP 54(d)(1). GRC argued that Congress intended ? 1692k(a)(3) to deter plaintiffs from bringing nuisance lawsuits. *Id.* at *17. Therefore, it expressly provided that, when plaintiffs

bring an action in bad faith and for the purpose of harassment, the court may award attorney's fees and costs to the defendant. *Id.* at *17-18. Marx and the Consumer Financial Protection Bureau, as *amicus curiae*, conceded that the language of ? 1692k(a)(3) does not expressly limit a court's discretion to award costs under FRCP 54(d)(1) but argued it does so by negative implication. *Id.* at *18. They invoked the *expressio unius* canon of statutory construction and argued that, by specifying that a court may award attorney fees and costs when an action is brought in bad faith and for the purpose of harassment, Congress intended to preclude the district courts from awarding fees and costs when there is no showing of bad faith or intent to harass. *Id.*

The Court noted that the force of any negative implication depends on context and that *expressio unius* does not apply unless Congress considered the unnamed possibility and intended to preclude it. *Id.* at *19. The Court also noted that the *expressio unius* canon of construction can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion. *Id.*

Noting the general presumption that each litigant pays its own attorney fees, as well as the inherent power of a federal court to award such fees in certain circumstances, the Court concluded that "[i]t is undisputed that ? 1692k(a)(3) leaves the background rules for attorney's fees intact.... Because ? 1692k(a)(3) codifies the background rule for attorney's fees, it is dubious to infer congressional intent to override the background rule with respect to costs. The statute is best read as codifying a court's pre-existing authority to award both attorney's fees and costs." *Id.* at *21 (citation omitted.).

The Court also noted that the first sentence of ? 1692k(a)(3) provides that "defendants who violate the FDCPA are liable for the plaintiff's attorney's fees and costs," while the second sentence "similarly provides that plaintiffs who bring an action in bad faith and for the purpose of harassment may be liable for the defendant's fees and costs." *Id.* at *22. The Court stated that "[i]f Congress had excluded 'and costs' in the second sentence, plaintiffs might have argued that the expression of costs in the first sentence and the exclusion of costs in the second meant that defendants could only recover attorney's fees when plaintiffs bring an action in bad faith." *Id.* at *23. The Court concluded this argument was foreclosed by Congress' inclusion of the words "and costs" in the second sentence. *Id.* Finally, the Court found that the language in ? 1692k(a)(3) sharply contrasts with that of other statutes in which Congress has placed conditions on awarding costs to prevailing defendants. *Id.* at *24.

The Court rejected the final argument that ? 1692k(a)(3) "establishes explicit cost-shifting standards that displace [FRCP] 54(d)(1)'s more general default standard." *Id.* at *29 (citation omitted). The Court noted that ? 1692k(a)(3) "speaks to one type of case?-- the case of the bad-faith and harassing plaintiff," and "[b]ecause Marx did not bring this suit in bad faith, this case does not 'fal[l] within the ambit of the more specific provision.'" *Id* (citation omitted).

Justice Sotomayor (joined by Justice Kagan) dissented from the majority's opinion, stating that "[f]ar from merely restating a district court's discretion to award costs, this provision imposes a prerequisite to the exercise of that discretion: a finding by the court that an action was brought in bad faith and for the purpose of harassment." *Id.* at *37.

The *Marx* ruling is a positive development for debt collectors?-- not only because it theoretically entitles them to recover their costs in defending an FDCPA action without producing evidence that the action was brought in bad faith or for the purpose of harassment, but also because it is likely to reduce the number of frivolous and baseless actions brought by debtors, who now face a more significant downside risk in bringing an FDCPA claim.

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