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## *A Creditor May Be Held Liable Under the FDCPA Even if it Hires a Third Party to Collect on the Debt*

In a significant decision issued on November 13, the United States Court of Appeals for the Second Circuit held that a creditor may be found liable under the Fair Debt Collection Practices Act (the FDCPA) even when that creditor hires a third party to collect on its debts. *Vincent v. The Money Store*, \_\_\_ F.3d \_\_\_, No. 11-4525-cv (2d Cir. 2013). Specifically, if the creditor hires a third party for collections, but that third party "engages in no *bona fide* efforts to collect [on the] debts," the creditor may be held liable under the FDCPA's "false name exception."

### **Factual Background**

In *Vincent*, defendant The Money Store hired a law firm (the "Firm") to send collection letters to debtors who breached their loan obligations. The Firm had advertised the collection letters as a method for "client[s] to send breach letters on attorney letterhead." Notably, the Firm allegedly had no role in debt collection aside from printing and mailing the letters on the Firm's letterhead. In other words, even though letters were mailed using the Firm's name and stationery, The Money Store controlled the means and methods of collecting the debts.

Plaintiffs filed an action in the United States District Court for the Southern District of New York alleging that The Money Store violated the FDCPA. Although the Firm asserted that the only "required legal analysis was the drafting of language for the breach letter templates to ensure . . . compliance with applicable state and federal laws," The Money Store maintained that the Firm exercised independent judgment in handling the debt collections. The district court granted summary judgment to The Money Store, reasoning that The Money Store could not be held liable under the FDCPA because a third party actually sent the letters and The Money Store did not exercise sufficient control to render the Firm "its alter ego."

### **Second Circuit Decision**

In a divided opinion, the Second Circuit reversed the district court's grant of summary judgment. In so doing, the court interpreted the false name exception to the FDCPA, which is a provision in the statute that imposes liability on a creditor collecting its own debts, to find The Money Store liable. The court held that, when a third party "is merely operating as a 'conduit' for a collection process that the creditor controls," the FDCPA



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may impose liability on the creditor under the false name exception. Alternatively, when a "third party is making *bona fide* attempts to collect the debts of the creditor," the creditor is insulated from liability under the FDCPA.

Applying that standard to The Money Store, the court rejected the argument "that by generating and mailing the breach letters alone, [the Firm] was 'collecting or attempting to collect' The Money Store's debts." Viewing the facts in the light most favorable to the plaintiffs, as it must on a motion for summary judgment, the court highlighted that the Firm played "virtually no role in the actual debt collection process." Instead, the Firm performed only "essentially ministerial tasks of verifying the debt with The Money Store, informing debtors of the identity of their creditor, and verifying whether a debtor's debts had been discharged in bankruptcy." As a result, the court concluded summary judgment was inappropriate because a jury could find that the Firm "acted as a mere 'conduit' for a collection process that The Money Store controlled."

The dissenting opinion characterized the decision as "vexing" and predicted that "future courts [will] struggle with determining whether a creditor, supposedly exempt from the FDCPA and despite always acting in its own name, is nevertheless subject to [FDCPA liability] merely for hiring a debt collector whose practices are deemed inadequate in some respect." In its view, "[t]he parameters of the false name exception . . . will become unpredictable."

### **Significant Ramifications After *Vincent***

Prior to *Vincent*, in the Second Circuit, a creditor could be held liable under the false name exception of the FDCPA only if it actually used a false name, giving a debtor the impression that the creditor was using a third party when it in fact was collecting the debt on its own behalf. Now, after *Vincent*, a creditor must be careful to ensure that it does not exercise too much control over a third party tasked with debt collection and that the third party actually takes steps to collect on the debts. Importantly, a creditor is no longer shielded from liability under the FDCPA merely by hiring a law firm – or any other third party – to send collection letters to debtors. *Vincent* significantly expands potential liability and requires third parties hired by creditors to exercise sufficiently independent judgment and control.

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