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Careful What You Wish For-

United States Supreme Court Rules That Prevailing Defendants in FDCPA Cases May Recover Costs Without Having to Show That Case Was Brought in Bad Faith

By: Steven M. Kaplan and Gregory N. Blase

Will the United States Supreme Court's decision in *Marx v. General Revenue Corp.*[1] be the death knell of frivolous and nuisance lawsuits alleging violations of the Fair Debt Collection Practices Act ("FDCPA")? Only time will tell, but the decision certainly is a step in the right direction. In *Marx*, the Supreme Court ruled that a defendant that prevails in a suit under the FDCPA[2] may recover its reasonable costs without having to show that the suit was filed in bad faith or for the purpose of harassment. The decision resolves a split among the circuits as to whether a defendant may recover costs in an FDCPA case without having to prove bad faith and harassment.[3]

The FDCPA, among other things, prohibits any debt collector from harassing, abusing or oppressing any person in connection with the collection of a debt. Although the statute provides examples of behavior that would violate the prohibitions, the list is non-exhaustive and it is common for plaintiffs to file individual and class actions alleging that certain actions violate the statute. Until now, the only deterrent in many circuits for losing a lawsuit was out-of-pocket costs. The stakes have been raised.

In *Marx*, the debtor defaulted on her student loan debt, and was contacted by a debt collector, General Revenue Corp. ("GRC"). Debtor sued the debt collector, citing various forms of alleged abuse and harassment which, debtor contended, violated the FDCPA. At the conclusion of a bench trial, the district court found that the debtor had failed to prove a single violation of the FDCPA, and ordered debtor to pay $4,543.03 in litigation costs to GRC.[4] Debtor appealed the award of costs, and the United States Court of Appeals for the Tenth Circuit affirmed. Debtor next sought and obtained certiorari to the United States Supreme Court.

Under Section 1692k of the FDCPA, a prevailing defendant may recover attorney's fees and costs after showing that the suit was filed in bad faith and for the purpose of harassing the defendant.[5] Rule 54(d)(1) of the Federal Rules of Civil Procedure, on the other hand, states that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party."[6] The issue that the Court resolved in *Marx* was whether the language in the FDCPA that limits recovery of costs to situations of bad faith and harassment "precludes an award of costs under Rule 54(d)(1)."[7]

The Court, in a 7 to 2 decision, ruled that Section 1692k of the FDCPA governs the award of costs in cases where the debtor files in bad faith and for the purpose of harassment. The Court went on to hold, however, that nothing in Section 1692k limits a district court's discretion to award costs under Rule 54 in cases where bad faith and harassment are not present. In particular, the Court observed as follows:

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> Congress intended [Section]1692k(a)(3) to deter plaintiffs from bringing nuisance lawsuits. It, therefore, 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. The statute does address this type of case — i.e., cases in which the plaintiff brings the action in bad faith and for the purpose of harassment. But it is silent where bad faith and purpose of harassment are absent, and silence does not displace the background rule that a court has discretion to award costs.[8]

In reaching this conclusion, the Court rejected debtor's argument that the FDCPA's "allowance of costs creates a negative implication that costs are unavailable in any other circumstances."[9] The Court noted that a negative implication may not be drawn "unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."[10] And, as the Court reasoned, "[h]ad Congress intended the second sentence of [Section]1692k(a)(3) to displace Rule 54(d)(1), it could have easily done so by using the word 'only' before setting forth the condition '[o]n a finding by the court that an action . . . was brought in bad faith and for the purpose of harassment . . . .'"[11]

While the Court's ruling addressed the award of litigation costs – and not attorney's fees – it may nevertheless have far-ranging implications for suits under the FDCPA. Attorney's fees are usually the greatest expense in litigation, but costs associated with a lawsuit can also be high. This is particularly true in the context of a class action that involves extensive discovery, depositions, or the potentially high cost of notice to a putative class. In a class action, the FDCPA allows for recovery of (a) actual damages and statutory penalties of up to $1,000 for the named plaintiff; and (b) "the lesser of $500,000 or 1 per centum of the net worth of the debt collector" for the putative class.[12] After *Marx*, the amount in costs that a court could potentially award to a prevailing defendant in an FDCPA class action could approach, if not exceed, the amount that is available for recovery in most class actions.

Even in an individual action, costs may be quite high, relative to the potential recovery. The *Marx* case provides an example of this fact. The most a borrower can recover in an individual suit under the FDCPA is the amount of any actual damages plus statutory penalties of not more than $1,000. Yet, in *Marx*, the debtor was ordered to pay more than four times that amount in costs.

The fact that it is now settled that defendants can seek recovery of costs under Rule 54(d) hopefully will give plaintiff's counsel pause before filing suit under the FDCPA.

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1 Case No. 11–1175, 568 U.S. ___ (Feb. 26, 2013).

[2] 15 U.S.C. §§ 1692, *et seq.*

[3] Prior to the Supreme Court's ruling in *Marx*, the Fourth, Sixth, Seventh and Tenth Circuits have ruled that good faith by the plaintiff in filing suit under the FDCPA, by itself, cannot defeat a request for costs under Fed. R. Civ. P. 54(d)(1). *Teague v. Bakker*, 35 F.3d 978, 996 (4th Cir. 1994) ("the mere fact that a suit may have been brought in good faith is alone insufficient to warrant a denial of costs in favor of a prevailing defendant"); *Cherry v. Champion*, 186 F.3d 442, 446 (4th Cir. 1999) ("a party's good faith, standing alone, is an insufficient basis for refusing to assess costs against that party"); *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 731 (6th Cir. 1986) ("[g]ood faith without more … is an insufficient basis for denying costs to a prevailing party"); *Coyne–Delany v. Capital Dev. Bd. of Ill.*, 717 F.2d 385, 390 (7th Cir. 1983) ("[t]he losing party's good faith and proper conduct of the litigation is not enough...."); *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1527 (10th Cir. 1997). The Ninth Circuit has ruled that "[t]he FDCPA's remedial purpose is served by interpreting § 1692k(a)(3) as authorizing an award of attorneys' fees and costs only upon a finding that plaintiff brought the action in bad faith and for the purpose of harassment." *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 705 (9th Cir. 2010).

[4] The costs claimed by GRC included witness fees, witness travel expenses, and deposition transcript fees.

[5] 15 U.S.C. § 1692k(a)(3). The statute states, in relevant part, 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." *Id.*

[6] Fed. R. Civ. P. 54(d)(1).

[7] *Marx*, slip op. at 8 (stating that "[t]he question in this case is not whether costs are allowed under §1692k(a)(3) but whether §1692k(a)(3) precludes an award of costs under Rule 54(d)(1)").

[8] *Marx*, slip op. at 8.

[9] *Id.*

[10] *Id.* at 9.

[11] *Id.* at 12.

[12] 15 U.S.C. § 1692k(a)(2)(B).

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