

## ALERTS

### Finance, Insolvency & Restructuring Alert - Supreme Court Upholds Ability Of Successful FDCPA Defendant To Recover Costs

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In a 7-2 decision, the United States Supreme Court ruled in the case of *Marx v. General Revenue Corp.* that a provision of the Fair Debt Collection Practices Act (the FDCPA), namely 15 U.S.C. §1692k(a)(3) does not prohibit a court pursuant to a potentially conflicting or superseding provision of the Federal Rule of Civil Procedure from otherwise awarding costs to the defendant as the prevailing party in the litigation.

The facts of this case show that General Revenue Corp. (GRC) was hired to collect on a defaulted student loan by Marx. In response to the collection activity, Marx filed suit against GRC alleging that it violated the FDCPA by making harassing phone calls, threatening to garnish an improper percentage of her wages and wrongfully sending correspondence to her employer requesting information on her employment status. The District Court ruled in favor of GRC following a bench trial, finding no violation of the FDCPA. Afterward, GRC submitted a bill of costs for witness fees, witness travel expenses and deposition transcript fees totaling \$7,779.16 pursuant to FRCP 54(d)(1). The District Court disallowed certain items but entered an award of \$4,543.03 in favor of GRC. Marx sought to vacate the District Court's award on the basis that the FDCPA provides, in essence, the exclusive basis for an award of costs under FDCPA based actions but that this controlling statute did not apply to these facts.

The purportedly controlling statute, 15 U.S.C. §1692k(a)(3) provides that if a plaintiff's action under the FDCPA "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". FRCP 54(d)(i), on the other hand, states that "[u]nless a federal statute provides otherwise, costs – other than attorneys' fees – should be allowed to the prevailing party" (emphasis supplied). Marx argued to the District Court that since she was not found to have asserted her claim in bad faith or for purposes of harassment, then 15 U.S.C. §1692k(a)(3) is a federal statute which does "provide otherwise" and thus displaces the ability of a court to award costs pursuant to FRCP 54(d)(i). Neither the District Court, the 10th Circuit Court of Appeals, nor the United States Supreme Court agreed with Marx's analysis.

The crux of Marx's argument, as the Supreme Court saw it, was that a court's discretion under FRCP 54(d)(1) to award costs was displaced by negative implication under §1692k(a)(3). In other words, since the statute speaks to an award of costs where both bad faith and harassing conduct exist, then an award of costs is unavailable absent such conduct. The Court rejected this argument, however, as an attempt to read too much

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into congressional intent, determining that the context instead indicated Congress's intent that the statute did not foreclose an award of cost under the Rule, even in the absence of bad faith and harassment in Marx's pursuit of the FDCPA action.

Although a court's discretion remains limited in awarding attorneys' fees to the prevailing party to the "American Rule" (each party pays their own fees) except in instances of bad faith and harassing conduct in FDCPA cases, it is now uniformly established that a court has the discretion to award costs to the prevailing party defendant irrespective of the plaintiff's motive or conduct in bringing the action. Because costs can in and of themselves represent a significant outlay, this decision may serve to cause FDCPA plaintiffs to think twice before bringing an FDCPA action if the facts are not clearly in their favor.

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