

High Court Ruling May Curb Debt Collection Lawsuits

By **Evan Weinberger**

Law360, New York (February 26, 2013, 7:02 PM ET) -- The U.S. Supreme Court on Tuesday said courts can force borrowers who lose debt collection cases to pay the defendant's litigation costs, in a ruling experts say will likely rein in a surge of consumer actions filed under the Fair Debt Collection Practices Act.

The high court ruling in *Marx v. General Revenue Corp.* changes the calculus of debtors, and by extension plaintiffs attorneys, who seek to bring a suit against debt collection firms by putting them at risk of paying out costs that could dwarf the amount they are seeking to recover from collections firms.

Rather than pursue a case to court, debtor plaintiffs are more likely to enter into a settlement early with a debt collection firm given the new risk in litigation that Tuesday's ruling put in place, Mayer Brown LLP partner Timothy Bishop said.

"In a run-of-the-mill case, not a big money case, it shifts the calculus for settlement and shifts the advantage to the defendant," Bishop said.

The high court found in a 7-2 ruling that the Federal Rule of Civil Procedure 54(d) and other statutes trump the FDCPA when it comes to awarding costs, upholding a Tenth Circuit opinion that allowed GRC to collect more than \$4,500 in costs from Olivea Marx, a California resident who defaulted on a student loan.

Under the FDCPA, a court can award costs to a prevailing debt collector defendant if it is found that the plaintiff in the case brought claims in bad faith or for the purpose of harassment. However, the law is silent on whether those costs can be awarded when a court does not find that a plaintiff brought a case under such grounds, Justice Clarence Thomas, writing for the majority, said.

"And silence does not displace the background rule that a court has discretion to award costs," Justice Thomas wrote in upholding the Tenth Circuit's ruling.

Chief Justice John Roberts and Justices Samuel Alito, Antonin Scalia, Anthony Kennedy, Ruth Bader Ginsburg and Stephen Breyer joined the majority opinion. Justices Sonia Sotomayor and Elena Kagan dissented.

Consumer advocates say the Supreme Court's interpretation flies in the face of all previous rulings on similar matters.

The “vast majority” of lower courts have found that the FDCPA blocked debt collectors from obtaining costs from debtors, said Public Citizen Litigation Group director Allison M. Zieve, who represented Marx.

“This is actually a significant change,” Zieve said.

The ruling could have a “chilling effect” on plaintiffs in FDCPA cases who stand to be hit with significant cost awards that are often larger than the amount they stand to gain from taking a debt collection firm to court, Zieve said.

“I think there's a significant potential for deterrence that will be really bad for consumers,” she said.

Counsel for GRC could not be reached for comment.

The debt collection industry saw the result of the case in terms very similar to those expressed by Zieve, however.

The Supreme Court ruling is likely to make sure that debtors, and their attorneys, bring cases only if they have the facts on their side, said Mark Schiffman, a spokesman for debt collection industry group ACA International.

Debt collection firms have been bombarded with what the industry calls frivolous lawsuits from debtors for years, Schiffman said.

According to litigation tracking firm WebRecon LLC, debtors filed 932 FDCPA lawsuits in January, a 7 percent jump from the number of FDCPA suits in January 2012. Overall, debtors filed nearly 11,500 FDCPA lawsuits in 2012, a drop of 7 percent from 2011, WebRecon reported.

FDCPA suits dwarfed the number of consumer debt lawsuits filed by debtors, the tracking firm said.

“We hope there's a chilling effect against those cases against collections agencies that don't have merit,” he said.

The risks of getting hit with a relatively large bill for litigation costs, including court transcripts, witness fees, translators and other charges, could also push individuals to settle early, Reed Smith LLP partner Roberta Torian said.

Marx, the plaintiff in the Supreme Court case, turned down a \$1,500 settlement from GRC before going to court, according to the opinion. Tuesday's ruling makes it more likely that a future debtor will take a similar deal, she said.

“This certainly would bode well for those parties that want to settle because now the stakes are higher for plaintiffs,” Bishop said.

Increasing the likelihood of settlements and decreasing the chance for litigation reduces the effectiveness of the FDCPA's primary enforcement tool, private civil litigation, Zieve said.

The Consumer Financial Protection Bureau filed an amicus brief supporting Marx's position.

Although the bureau has supervision authority over the debt collection industry, the CFPB cannot tackle small-dollar individual debt settlement cases, Zieve said.

“The way the statute is set up, individual lawsuits are still the primary way that the law is enforced,” she said. “The CFPB does not have the resources to go after every case in the same way that the FTC didn't over the last 30 years.”

Marx is represented by Allison M. Zieve of Public Citizen Litigation Group.

GRC is represented by Lisa S. Blatt of Arnold & Porter LLP and by Colorado attorneys Adam L. Plotkin and Steven J. Wienczkowski.

The case is Olivea Marx v. General Revenue Corp., case number 11-1175, in the U.S. Supreme Court.

--Additional reporting by Allison Grande. Editing by Sarah Golin and Richard McVay.

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