

## High Court Ruling On Debt Collectors Could Spur CFPB Action

By **Cara Salvatore**

*Law360, New York (May 16, 2016, 9:15 PM ET)* -- The U.S. Supreme Court's ruling Monday that private attorneys can use government letterhead in debt-collection communiques could spur the Consumer Financial Protection Bureau to respond aggressively in its anticipated proposal on collection practices, experts said, as long as the regulator is prepared to burn political capital by heading in the opposite direction from a unanimous court.

The Supreme Court ruled 8-0 on Monday that private attorneys hired by states to collect back taxes and other state debts can use state officials' letterhead, reversing a Sixth Circuit decision that lawyers tapped to collect money owed to Ohio misrepresented themselves by using the letterhead and left the impression that the letters came directly from the state attorney general's office.

The CFPB had asked the Supreme Court to rule the opposite way, and consumer advocate groups were chagrined by the decision Monday. But the context is opportune for the regulator, which is in the midst of writing a proposed rule on the Fair Debt Collection Practices Act. Monday's decision could make regulators come out swinging harder, according to Craig Nazzaro, an attorney with Baker Donelson who watches the CFPB closely.

That the Supreme Court virtually ignored the agency's amicus brief "leads me to believe that the CFPB will just ... legislate around it; they'll just put this in the rule," Nazzaro said.

When the CFPB sent word in late 2013 that it had begun working toward a proposal on the FDCPA, it said it was looking to better define the terminology of unfair and deceptive acts and practices and to give more examples of behavior so as to create "a more bright-line test of what is deceptive," Nazzaro said. "This decision alone might shape how they word the rule, what they come out with; they might specifically mention the usage of state agency letterhead."

But Monday's opinion, authored by Justice Ruth Bader Ginsburg, said that the attorneys didn't misrepresent themselves and didn't run afoul of debt-collection law.

"Use of the letterhead accurately conveys that special counsel, in seeking to collect debts owed to the state, do so on behalf of, and as instructed by, the attorney general," the court said. "The letterhead identifies the principal — Ohio's attorney general — and the signature block names the agent — a private lawyer hired as outside counsel to the attorney general."

It's certain that consumer groups who watched the case closely will be pushing for an explicit response

to that take. The National Consumer Law Center, which filed an amicus brief in the case, communicates regularly with the CFPB and is still worried about the use of the letterhead by debt collectors. Monday's ruling hasn't changed views on the matter, NCLC attorney April Kuehnhoff said Monday afternoon, speaking for herself.

"Our position hasn't changed about our concern about the potential to mislead or deceive or confuse consumers with letterhead that purports to be coming from a government agency but is actually coming from the debt collector," Kuehnhoff said. "I think, unfortunately, what we see all too often around the country is a lot of fraud by scammers who are pretending to be government officials to collect debts."

Kuehnhoff said the NCLC has filed extensive comments with the CFPB in response to the advance notice of proposed rulemaking, or ANPR, the official name of the document released in late 2013.

"And we've had meetings to discuss our comments, so we've certainly shared our position and our thoughts" on the collector-identification question, Kuehnhoff said. The CFPB declined to comment Monday.

When it was created under 2010's Dodd-Frank Act, the CFPB became the first entity with the power to make rules regarding 1977's FDCPA. And in the Federal Register announcement of the ANPR, the agency declared a commitment to "improving the integrity and flow of information within the debt collection system." A third of consumer complaints to the CFPB concern debt-collection practices, it says, and neither enforcement, policy, consumer education or supervision has been able to stop collection agencies' myriad misdeeds.

Still, other attorneys think that the CFPB's loss in the high court has weakened its stature in the conventional wisdom, making an aggressive response more difficult and therefore less likely.

The CFPB "had a unanimous Supreme Court and an opinion written by a justice who would normally be friendly to their views," all going against them, said Ori Lev of Mayer Brown LLP, a former deputy enforcement director at the CFPB.

To attack Monday's ruling head on, "they'd need some statement of basis and purpose to support such a restriction, and see what kind of record they could create, and have evidence that consumers are somehow deceived and harmed," he said.

"They already get so much criticism; is this really where you want to push back, where the Supreme Court has told you unanimously that there's nothing wrong?"

--Editing by Sarah Golin and Patricia K. Cole.

---