# The Fair Debt Collection Practices Act—
# Hope on the Horizon for Debt Collectors?

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Debt collection is big business—easily a multibillion-dollar industry. In 2012, approximately 30 million individuals, or 14 percent of American adults, had debt (averaging about $1,500) that was or had been subject to the collections process, according to a March 20, 2013, report issued by the Consumer Financial Protection Bureau.[1] Several segments of the consumer population—including older Americans, students, service members, and veterans—were significantly impacted by the recession and continue to grapple with lingering debt collection issues. In seeking to recover such vast sums, debt collection and debt buyer companies, law firms, and other creditors that hold themselves out to be debt collectors regularly use evolving technology and advanced analytics to assist in their collection attempts.

Yet a consequence of these large-scale collection efforts has been a surge in the number of cases filed against debt collectors under the Fair Debt Collection Practices Act ("Act"), 15 U.S.C. § 1692 *et seq*. Enacted in 1978, the Act generally prohibits false, deceptive, harassing, abusive, and offensive conduct during the collection of consumer debts by any person or company that regularly collects the debts of *another* (e.g., an in-house collections department at a credit card company or hospital would not be covered). The Act applies to debts that were obtained primarily for personal, family, or household purposes—personal credit cards, student loans, and medical debts are covered under the Act, but business debts are not (i.e., businesses or individuals alleged to owe debts incurred in the operation of a business).

## The Act's Requirements, Prohibitions, and Penalties

Of critical import is that the Act contains numerous requirements and prohibitions that may trip up even the most prepared and well-intentioned companies. Just a sampling of such rules includes that a debt collector:

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[1] Consumer Financial Protection Bureau, *The Fair Debt Collection Practices Act, CFPB Annual Report 2013,* available at http://www.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf.

- must send written correspondence to the consumer's home address within five days of the first communication identifying who it is, who it is collecting on behalf of, and the balance owed. The correspondence must also advise the consumer that he or she has the right to dispute the debt and will have 30 days to demand that the collector validate the debt;

- cannot contact the consumer after the consumer's request for validation has been made;

- cannot contact the consumer, with certain exceptions, if he or she advises the collector, in writing, to cease communications or that the consumer refuses to pay;

- cannot call before 8:00 a.m. or after 9:00 p.m. or at any time that the collector is given notice that it is inconvenient to call;

- cannot tell any people other than the consumer's spouse or attorney (e.g., friends, family, neighbors) about the fact that a debt is owed or publish lists of debtors;

- cannot contact the consumer's place of work if the consumer told the collector not to contact his or her place of work;

- cannot make any misrepresentation of fact, such as how much is owed, or regarding certain actions that it may take to force payment;

- cannot cause the telephone to ring repeatedly for purposes of harassment or annoyance;

- cannot use obscene or profane language; and

- generally, cannot use any unfair or unconscionable means to collect a debt.

Penalties for violations of the Act can be severe. Upon successful litigation of an individual suit, a plaintiff/consumer is entitled to actual damages (including emotional distress and slander), statutory damages of up to $1,000, reasonable attorneys' fees, and costs. In a successful class action, the class of consumers is entitled to the lesser of $500,000 or 1 percent of the net worth of the debt collector, reasonable attorneys' fees, and costs. One violation is all that is needed to be potentially liable under the Act; plaintiffs are not required to prove repeated violations or an ongoing course of inappropriate conduct. The Act is a strict liability statute and has a one-year statute of limitations.

Given the potential for such punitive results, the Act has often been used to initiate actions seeking significant damages for minor technical violations or to file outright frivolous actions with the intention of inducing an early settlement. Consumers in these actions have also benefited from the lack of meaningful direction from Congress or the

courts with regard to thorny compliance issues arising from the advent of new communication methods developed over the past 35 years (e.g., fax machines, cell phones, and email). Despite a broad acknowledgment that the Act needs to be updated or substantially reformed to catch up with technological advances and address other problematic areas, at least six bills introduced in the last session of Congress that would have amended the Act have stalled.

### The *Marx* Case

A recent development in the courts, however, may help start stemming the tide of lawsuits under the Act. On February 26, 2013, the Supreme Court of the United States decided *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, finding that a debt collector sued by a consumer under the Act may recover its litigation costs, even if the consumer brought the suit in good faith and without the intent to harass the debt collector.

In *Marx*, the plaintiff, a single mother with two young children and a low-paying job, defaulted on a student loan. She sued General Revenue Corporation ("GRC"), which was retained to collect the plaintiff's debt. The plaintiff alleged that GRC violated the Act by harassing her with phone calls several times a day and falsely threatening to garnish up to 50 percent of her wages and take the money that she owed directly from her bank account. The district court found in favor of GRC and ordered the plaintiff to pay GRC about $4,500 in costs under Federal Rule 54(d)(1), which gives courts the discretion to award costs (excluding legal fees) to prevailing parties unless a federal statute or rule otherwise forbids it. In a motion to vacate the award, the plaintiff claimed that the court lacked authority to award costs because Section 1692k(a)(3) of the Act provides that a court can award costs only if it finds that the action was brought in bad faith and for purposes of harassment.

In a 7-2 decision, the U.S. Supreme Court concluded that, although Section 1692k(a)(3) is silent about a court's discretion to award *attorneys' fees* when bad faith and harassment are absent, such silence does not displace the court's discretion to award *costs* under Federal Rule 54(d)(1). The Supreme Court's majority therefore found that Section 1692k(a)(3) is not contrary to the Federal Rules, and the district court was allowed to award costs against the plaintiff. Note, however, that the *Marx* opinion does not allow for debt collectors to recover attorneys' fees in cases under the Act that they successfully defend.

### Conclusion

While it remains to be seen whether the *Marx* decision will substantially curtail abuse of the Act by some plaintiff attorneys, consumers and their counsel will likely be more cautious about bringing such claims, since losing plaintiffs can be liable for costs even if the case was not brought in bad faith. *Marx* may also encourage more reasonable settlement demands from plaintiffs given the specter of a sizeable adverse award after a potentially lengthy litigation. Furthermore, the holding and reasoning of *Marx* may now possibly be applied to other consumer protection statutes. Nevertheless, all

stakeholders in the debt collection industry should continue to monitor the number and outcomes of cases brought under the Act and keep a close eye on future legislative activity impacting this law.

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