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## THEY FOUGHT THE LAW AND THE LAW WON

To our Friends and Clients:

It has been a tough season for collection lawyers. And the hits just keep on coming. In this edition we discuss recent developments concerning the Fair Debt Collection Practices Act (“FDCPA”) and the conduct of collection lawyers. At their essence, these developments reveal a disconnect between the realities of modern commerce and the law, specifically the FDCPA. At a time when the state of the economy has created increased debt collection activity, the Federal Courts and the Federal Trade Commission (“FTC”) have made collections an increasingly complicated and perilous activity.

A series of recent rulings have altered the legal landscape for debt collectors by limiting the *bona fide* error defense while imposing additional pre-suit requirements. In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605 (2009), the Supreme Court held that the *bona fide* error defense to an FDCPA claim does not apply to a debt collector’s mistaken interpretation of the law, but is limited to certain factual errors. In *Jerman*, a firm of collection lawyers sought to collect a debt by transmitting a dunning letter that included a notice that the mortgage debt would be assumed valid unless it was disputed in writing. The debtor filed suit contending that the “in writing” dispute requirement violated the FDCPA. The District Court granted the law firm summary judgment on the *bona fide* error defense noting the split of authority on the question. The Sixth Circuit affirmed, holding that the *bona fide* error defense is not limited to clerical or factual errors. The Supreme Court relying in part upon the maxim that “ignorance of the law will not excuse any person, either civilly or criminally”, reversed and concluded that the FDCPA limited the *bona fide* error defense to mistakes of fact.

In *Miller v. Upton, Cohen & Slamowitz*, 687 F.Supp.2d 86 (E.D.N.Y. 2009), the Court found that a law firm violated the FDCPA in failing to conduct a sufficiently meaningful attorney review of the debtor’s file as was implied by the collection letters sent to the debtor. The Court found that the cursory review of basic information without more is insufficient data on which to form a reasoned professional judgment. The Court noted that “failure to inquire into such core issues implicates basic concerns of attorney competence and speaks directly to an appreciable lack of professional care.” The Court also found that the issuance of no fewer than 211 debt collection letters on the same date and more than 3,000 letters in the same month supports the conclusion that the “debt collection letters and litigation documents were regularly mass-produced at Upton by non-lawyers at the push of a button.” The Court concluded that while an attorney may rely upon and consider a prior review and/or opinion from reputable and reliable attorneys, it does not wholly obviate the need for the attorney to conduct their own independent inquiry.

Earlier this week, the New York Times highlighted the growing trend of trial court's demanding that debt collectors provide additional information and/or verification in support of their collection actions. In a recent New York State Court case, a law firm sought to collect a credit card debt from an individual, who disputed the claim. It is likely that the Trial Court was familiar with this law firm, which reportedly filed more than 80,000 collection actions per year from 2006 – 2008. The Trial Court Judge found that providing a debtors' social security number, date of birth and address together with the amount allegedly owed was insufficient information to support the filing of a law suit and dismissed the action. Subsequently, the Trial Court issued an order requiring the law firm to provide further proof of a debt be provided if a defendant challenged the claim.

The FTC has now issued a report entitled “Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration” which addresses reforming debt collection litigation and contained recommendations to prevent abuses of the Court system and adequately protect consumers. Despite acknowledging that “debt collection plays a vitally important role in the consumer credit system” and “helps keep credit prices low and helps ensure that consumer credit remains widely available”, the FTC recommended that states enact measures that will further burden the debt collection process. These measures include requiring collectors: to include in their complaints additional information about the alleged debts (such as name of original creditor, last four digits of the account number, date of default and amount due at that time, name of the current owner of the debt, total amount currently owed, breakdown of amount owed and relevant terms of the credit contract); to clarify the applicable statute of limitations and require the collectors to prove the debts are not time barred; and advise debtors that they cannot lawfully be sued to collect on time barred debts. To the extent these recommendations are adopted and employed by the States, they will make the process of debt collection more time consuming and costly while potentially increasing the debt collectors' exposure to FDCPA (or the state equivalent) claims.

The recent decisions and FTC Report establish a clear trend that the practices employed by debt collectors will receive heightened scrutiny at both the state and federal level. An action to collect a debt must be founded upon an attorney's personal, meaningful review of the file. The use of automated software programs to manage debt collections will need to be closely evaluated and perhaps modified to provide sufficient information for an attorney's meaningful review. Meanwhile, the *Jerman* decision significantly limits the defenses available to debt collectors who have been sued under the FDCPA. The *Jerman* decision suggests that very few defenses will find a sympathetic ear. Notwithstanding the existence of an undisputed debt (much less a disputed debt), the debt collector will be held to strict compliance with the FDCPA. In conjunction, these forces will alter the practical reality that debt collectors must operate in and create a dangerous, if not hostile, legal environment.

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