

## [Banking and Finance Law Daily Wrap Up, TOP STORY—2nd Cir.: Consumer, attorney, and firm sanctioned in FDCPA litigation, \(Jul. 20, 2018\)](#)

Banking and Finance Law Daily Wrap Up

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By Nicole D. Prysby, J.D.

Finding that a consumer's claims under the Fair Debt Collection Practices Act were false and frivolous, and that the consumer's attorney and law firm had misled the court and unreasonably multiplied the proceedings, the Second Circuit Court of Appeals upheld the dismissal of the case and the sanctions against the consumer, attorney, and law firm. The consumer brought a claim under the FDCPA against a credit reporting agency, alleging that the company's representative told him that he could only dispute a debt in writing. The attorney repeated the allegation to the court. But the secret recording the consumer made of the conversation with the representative provide the claim to be false. The consumer, attorney, and law firm then engaged in various delay tactics, such as motioning for recusal of the judge, changing the theory of the case, and violating protective orders. The court found that the district court had correctly decided the substance of the FDCPA claim. The consumer's final theory was that the agency was required to end the conversation as soon as he said the debt was disputed, without asking any questions. While some level of follow-up questioning might be a FDCPA violation, this was clearly not the case in the present dispute. And the court upheld all of the sanctions, noting the multiple actions to delay the litigation or proceed in bad faith, and finding that the consumer (an FDCPA attorney himself) had played an integral part in the tactics (*Huebner v. Midland Credit Management, Inc.*, July 19, 2018, Livingston, D.).

**Background.** As previously reported (see *Banking and Finance Law Daily*, Feb. 12, 2015), a consumer (an attorney who had litigated several FDCPA cases), contacted a credit management company (Midland) to dispute a \$131 debt Midland had tried to collect from him, surreptitiously recording the call. He refused to answer multiple questions from the Midland representative as to the nature of the debt or his reasons for the dispute. Ultimately, he said only that the debt was "nonexistent." The consumer then filed the lawsuit. On the same day as the call, Midland had concluded that it was not worth it to dispute the debt and had contacted the major credit reporting agencies requesting that the debt be deleted from the consumer's credit reports.

The consumer's first complaint alleged that Midland told him he could only dispute the debt in writing and only if he provided a reason for the dispute. The consumer's attorney repeated that allegation in a 2015 letter to the court. But the court listened to the recording and discovered that the allegation was false. It then sanctioned the attorney \$500 for failure to participate in a status conference in good faith.

To keep his claim alive, the consumer amended it twice more. He also motioned for recusal of the trial court judge, arguing that the judge's ownership of a few shares in an exchange-traded fund, which held some shares of Midland's parent company, was good reason for recusal. The court denied the request, finding that the \$9 interest was not a conflict because the judge did not actively participate in the management of the fund. The consumer also fell afoul of the district court's confidentiality order, by filing confidential information on the court's open docket (and was sanctioned \$500).

In the third version of the complaint, the consumer alleged that Midland made multiple false or misleading representations in violation of 15 U.S.C. § 1692e. He asserted that Midland led him to believe that he could not dispute his debt without cause, that Midland reported his debt to credit reporting agencies without mentioning that the debt was disputed, and that Midland sent him a letter falsely claiming that it notified the credit reporting agencies that the debt was disputed. The court found that he had not raised a material issue of fact for any of his claims and granted summary judgment for Midland. It also ordered the consumer and his attorney's law firm

to pay some of the attorneys' fees for Midland, because, the court determined, the consumer had tried to trick Midland into violating the FDCPA during his initial call; his claim was meritless and prosecuted in bad faith; and both he and his counsel had needlessly multiplied the proceedings with, among other things, a baseless motion for recusal and a pretrial motion filed in flagrant disregard of the terms of the parties' joint protective order. The consumer, his attorney, and the law firm appealed the summary judgment and the sanctions.

**FDCPA claims.** The Second Circuit affirmed the district court. On the consumer's first theory of liability, that Midland led him to believe his could not dispute his debt without cause, the court found that the gist of the consumer's claim was that the Midland representative was obligated to record the dispute and end the conversation as soon as the consumer stated that he wanted to dispute the debt. The court rejected that interpretation of the law, holding that while there might be some level of follow-up questions about the nature of a dispute that might violate the FDCPA, that level was not present in this case. The least sophisticated consumer would have interpreted the questions from the Midland representative as just trying to learn more about the dispute so that it could be resolved. And had the consumer had any confusion about the status of the dispute, it should have been resolved when Midland sent a letter later that day telling him that the debt had been deleted. Because Midland immediately deleted the debt and informed the credit reporting agencies, there was also no question of material fact on the consumer's claim that Midland failed to communicate that a disputed debt is disputed.

**Sanctions.** The court also affirmed the district court's sanctions. The attorney had initially informed the court that the case turned on the Midland representative stating that the debt could only be disputed in writing. The attorney then denied the misrepresentation, moved to recuse the judge, and changed the nature of the allegations. This bait-and-switch routine delayed the litigation, found the court. Because the attorney misled the court and Midland about the theory of the case, the sanction was appropriate.

The sanction against the consumer for breaching the protective order was also upheld. The order required parties who wished to challenge the confidential designation of a document to take 10 days to attempt to resolve the dispute with the opposing party. The consumer failed to consult Midland before filing a letter with the court that sought to change the designation of a document. The court rejected the consumer's argument that because the district court did not give him a chance to withdraw the offending submission, he was denied fair notice of the sanctions sought. Given that it was his second violation of the protective order in eight days, the sanctions should have been foreseeable. The court also upheld the sanctions against the consumer for bad faith litigation, because the consumer had played a substantial role in crafting the strategy and had, for example, fed his attorney all of the questions during a deposition.

Finally, the sanctions against the law firm for unreasonably multiplying the proceedings were also upheld. The firm engaged in numerous frivolous and vexatious actions, including misrepresentations to the court, the recusal request, and changes to the theory of the case. The court rejected the argument that the claim for relief was not frivolous because it had not been decided in the circuit before, noting that a legal theory may be frivolous even if a court has never said so before. And the fact that the district court did not agree to have the law firm pay the entirety of Midland's attorneys' fees did not mean that Midland's motion for fees was meritless, just that the court did not grant Midland as large of a sanction as it desired.

The case is [No. 16-2363](#).

Attorneys: Lawrence Katz (Law office of Lawrence Katz) for Levi Huebner. Richard David Lane, Jr. (Marshall Dennehey Warner Coleman & Goggin, P.C.) for Midland Credit Management, Inc. and Midland Funding, LLC.

Companies: Midland Credit Management, Inc.; Midland Funding, LLC

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