

# Banking and Finance Law Daily Wrap

## Up, TOP STORY—6th Cir.: Attorney general “special counsel” are subject to debt collection laws, (May 11, 2015)

By Richard A. Roth, J.D.

Private attorneys designated by the Ohio Attorney General as special counsel for debt collection purposes are not officers of the state, meaning they are not exempt from the Fair Debt Collection Practices Act, according to the majority of a three-judge panel from the U.S. Court of Appeals for the Sixth Circuit. As a result, the attorneys’ use of the AG’s official letterhead on collection letters could be a misrepresentation that violates the FDCPA, the panel majority decided ([\*Gillie v. Law Office of Eric A. Jones, LLC\*](#), May 8, 2015, Clay, E.).

Congress enacted the FDCPA to protect consumers from abusive practices by debt collectors collecting debts owed to others. An officer or employee of a state is not considered to be a debt collector as long as he is collecting debts “in the performance of his official duties.”

Ohio law authorizes the state’s AG to use special counsel to collect debts owed to the state, the two-judge majority first noted. These special counsel are, by state law or by contract, independent contractors who are compensated on a contingent fee basis, and they are required to meet the standards of the FDCPA. The majority observed that Ohio law requires special counsel to use the AG’s official letterhead when they are collecting certain unpaid taxes (which were not at issue in the case), but not when they are collecting other debts.

The principal question for the court was whether the private attorneys who were designated as special counsel were Ohio state officials when they sent demand letters to two consumers.

**What is an “officer”?** Noting that the FDCPA does not define “officer,” the majority turned to the Dictionary Act (1 U.S.C. §1), which provides consistent definitions of words that are to be used in interpreting federal laws. According to the Dictionary Act, an officer is “any person authorized by law to perform the duties of the office.”

Rejecting the arguments of the special counsel and the AG, the court majority decided that the special counsel are not state officers. To begin with, they are not authorized by law, the majority said. Rather, their authority to collect debts comes from their contract with the AG.

Special counsel are not authorized to perform “the duties of *the* office,” the majority said (emphasis added). That phrase only made sense if it referred to all duties of some public office. The special counsel are not authorized to perform all of the AG’s duties. They have no association with any other public office because they have no authority to exercise any of Ohio’s sovereign powers.

**Appointment.** Their decision would be the same even if the Dictionary Act did not apply, the majority continued. The AG's emphasis on the state law provision giving him the authority to *appoint* special counsel was unconvincing. Under Ohio law, all of the AG's employees were appointed, the majority pointed out. However, regardless of the use of the word *appoint*, the special counsel were not employees, they were independent contractors, and independent contractors are not officers who are exempt from the FDCPA's coverage.

**Federalism.** The majority also turned back the AG's attempt to rely on principles of federalism. According to the AG, the FDCPA should be applied only if Congress plainly said it should.

However, the FDCPA neither regulated the state nor challenged the structure of the state's government, the majority replied. It applied only to debt collectors, who were third parties.

Besides, even Ohio's own laws made clear the special counsel were not officers, the majority added. Ohio law required a person to exercise some sovereign power to be an officer, and debt collection is not a sovereign power—anyone can collect a debt.

If special counsel are state officers, why were they not being defended in the suit by the AG, the majority queried. The AG had intervened in the suit to protect the state's interests, but he was not representing the special counsel.

According to the majority, "The Attorney General has legally distanced himself and the OAG [Office of the Attorney General] from special counsel so that the State of Ohio does not suffer the negative consequences of special counsel's actions. Now, he wishes to see that special counsel get treated as if they are officers of the State of Ohio, directly under his supervision. The Attorney General cannot have it both ways ..." The AG's contract makes special counsel independent contractors, so they cannot be officers, the opinion said.

**Misrepresentations.** Congress created the FDCPA to protect consumers from being pressured into making bad decisions about debt payments, the majority opinion said. Consumers are not to be intimidated into paying debts, and "Intimidation is at the heart of this case. There is no compelling reason for special counsel to use the OAG letterhead, other than to misrepresent their authority and place pressure on those individuals receiving the letters."

However, liability could not be based on bad intent alone, the majority conceded. The use of the letterhead violated the FDCPA only if it could confuse the least sophisticated consumer.

The AG admitted that the special counsels' use of the letterhead had confused consumers. However, the challenged letters had to be considered in full, and other parts—such as the names and addresses of the special counsel—might have been adequate to resolve that confusion. Whether the special counsel had misrepresented their status was a question for a jury to consider, the majority decided.

**Dissenting opinion.** Circuit Judge Sutton disagreed with the majority on both points. The special counsel were officers, he argued, and their collection letters could not have been misleading.

Independent contractors hired to collect debts clearly were authorized by law to perform the duty of debt collection, the dissenter said. Their authority to act under law was part of the AG's authority under law to hire them. Under the ordinary definition, "special counsel" was an office.

Contrary to the majority's belief, applying the FDCPA to the actions of special counsel debt collectors clearly did affect how Ohio carried out its governmental affairs, he added. Almost every state has delegated at least part of its debt-collection to some third party.

Moreover, special counsel were no different from assistant attorneys general who were involved in debt collection activities, the dissenter then asserted. The two types of attorneys often worked together. As a result, it was no surprise that the AG required the special counsel to use his official letterhead.

The special counsels' use of the letterhead did not misrepresent that the letters came from the AG because the letters, in fact, did come from the AG, Judge Sutton emphasized. None of the consumers' claims of misrepresentation or deception held up, in his view.

The case is [No. 14-3836](#).