



## Alerts

### Law Firm Violated FDCPA Relying on Client Information; Committed Malicious Prosecution by Not Acting on Client Information

April 5, 2011

*Lawyers for the Profession® Alert*

*McCullough v. Johnson, Rodenburg & Lauinger, LLC, 2011 WL 746892 (9th Cir. 2011)*

#### Brief Summary

The U.S. Court of Appeals for the Ninth Circuit held that a law firm that pursued a time-barred debt collection action violated the [Fair Debt Collection Practices Act \(FDCPA\)](#), even though the firm relied on its client's initial representation that the action was not time-barred. After the client corrected that information, the law firm continued to pursue the action for four months, leading to liability for malicious prosecution and abuse of process.

#### Complete Summary

The client hired the firm to pursue a debt collection matter. The firm's screening procedure flagged a potential statute of limitations problem, but the client reassured the firm that the debtor had recently made a partial payment, thereby tolling the statute of limitations. However, the debtor's payment to the client was not related to his debt; rather, it was related to an earlier litigation expense. Four months after the client alerted the firm to that fact, the firm dismissed the action.

The debtor then sued the law firm in federal court. The debtor obtained summary judgment on his FDCPA claim and eventually won a jury award of more than \$300,000 after prevailing at trial on additional claims including malicious prosecution and abuse of process.

The Ninth Circuit affirmed, holding that the law firm had engaged in abusive and unfair practices. The court further held that the firm was not entitled to rely on the statutory affirmative defense for debt collectors who make unintentional bona fide errors in violation of the FDCPA. That defense requires the debt collector to have procedures reasonably adapted to avoid such errors. The court held that the firm's reliance on the client's statement regarding the statute of limitations issue was, as a matter of law, not such a procedure. In reaching this conclusion, the court relied in part on the fact that in a contract between the firm and the client, the client disclaimed the accuracy or validity of information it provided, and shifted responsibility for determining the collectability of the debt to the firm.

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The court held that the firm violated the FDCPA in two ways. First, the firm requested attorney fees in the underlying action without presenting any evidence at the summary judgment stage that it was entitled to them. Second, the firm violated the FDCPA during discovery by serving a request for admission on the *pro* sedebtor that contained false information and did not contain an explanation that the requests would be deemed admitted if the debtor did not respond within 30 days.

The court also affirmed that the firm was liable for both malicious prosecution and abuse of process. Those holdings were primarily based on the fact the firm continued to pursue the underlying debt collection action four months after its client indicated that the statute of limitations had not been tolled. The firm continued to prosecute the case because, even though the firm's electronic case file contained information about the statute of limitations mistake, the lawyer in charge of the case did not see that information.

### **Significance of Opinion**

This opinion highlights the risks of relying entirely on a client—even a sophisticated business client—to establish a legal position or a key fact, as well as the risks of ignoring reliable client information in the prosecution or defense of a claim. The contours of the FDCPA's application to law firms remain a work in process, but this decision makes clear that the courts can apply a strict standard of conduct when imposing liability.

For more information, please contact your regular [Hinshaw](#) attorney.

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