

Wiley Rein Files Petition for a Writ of Certiorari in *Law Offices of Mitchell N. Kay, P.C. v. Leshner*

October 18, 2011

On October 17, Wiley Rein, along with co-counsel Maurice & Needleman, PC, filed a petition for a *writ of certiorari* with the Supreme Court of the United States on behalf of the Law Offices of Mitchell N. Kay, P.C., seeking review of a recent decision of the United States Court of Appeals for the Third Circuit.

At issue is the proper interpretation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (FDCPA), which regulates the content of debt collection letters. In the Third Circuit decision, a divided panel held that the mere use of law firm letterhead to send routine, non-threatening debt collection letters constituted a false, implied representation that an attorney had reviewed the debtor's file, notwithstanding that the letters at issue contained an express disclaimer that said exactly the opposite. The Third Circuit also held that the firm's use of law firm letterhead falsely implied a threat of legal action, despite the fact that the letters made no threats whatsoever, but merely tendered an offer to settle the debtor's account at a substantial discount accompanied by disclosures required by the FDCPA.

Following the reasoning of a split panel decision issued by the Fifth Circuit, the Third Circuit majority rejected a Second Circuit decision that approved a law firm debt collection letter containing an identical disclaimer. Wiley Rein's petition argues that Supreme Court review is warranted because conflicting decisions among the circuits and many district courts that have addressed the issues presented have cast substantial doubt on whether a law firm may participate in routine debt collection at all without exposing itself to FDCPA liability.

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The quandary that law firms and lawyers confront is particularly acute because the Supreme Court's recent decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605 (2010), stripped debt collectors of the ability to rely on a mistake of law defense under the FDCPA. The Third Circuit's decision also intrudes on the attorney-client relationship by conditioning law firm participation in debt collection on the disclosure of client confidences. The petition further points out that the Third Circuit's decision implicates a threshold issue whether application of the FDCPA to a written communication presents a question of law or fact – an issue on which the federal courts of appeals are also divided. Because the Supreme Court recently called for the views of the Solicitor General in another FDCPA case out of the Third Circuit that raises questions about the regulation of attorney communications under the FDCPA, *see Fein, Such, Kahn & Shepard, P.C. v. Allen*, No. 10-1417, consolidation of the two petitions would afford the Court an opportunity to bring much needed clarity to this area of law.

Wiley Rein partners Richard A. Simpson and John E. Barry filed the petition for a *writ of certiorari*. To read the brief, [click here](#).