

Debt buyer violates MDCPA, 93A by collecting while unlicensed

Panel says co. not merely 'passive holder' of debt

By: Eric T. Berkman © March 2, 2017



A debt buyer violated the Massachusetts Debt Collection Practices Act and Chapter 93A by attempting to collect on a consumer debt it had purchased without being licensed as a debt collector in the commonwealth, the Appellate Division for the Southern District has ruled.

The debt buyer, plaintiff Midland Funding, LLC, had acquired defendant Judy Juba's credit card debt that was in default and sued to collect on it.

In response to Juba's counterclaims under the MDCPA, Chapter 93A and the federal Fair Debt Collection Practices Act, Midland argued that it was merely a passive holder of her debt and thus not subject to licensing requirements.

The Appellate Division disagreed.

"In this case, Midland exists only to own defaulted debt and, presumably to receive any money collected on those obligations," Judge Kathryn E. Hand wrote for the Appellate Division. "In our view, it is clear that despite its agreement [with a separate entity] to handle the majority of the direct collections efforts, Midland regularly participates indirectly in [that entity's] attempts to collect Midland-owned defaulted consumer debt."

The 12-page decision is *Midland Funding, LLC v. Juba*, Lawyers Weekly No. 13-009-17. The full text of the ruling can be ordered here.

Consumer-friendly

Juba's attorney, Elizabeth A. Miller of Boston, said that if other courts were to follow the Appellate Division's reasoning, it would be a "very positive" development for consumers in Massachusetts, since Midland is one of the most active debt buyers in the state.

At the same time, Miller was hesitant to suggest that the decision would apply more broadly than her client's case, given a series of opinion letters from the Division of Banks that some observers have interpreted to suggest a "passive debt buyer" exemption from debt-collector licensing requirements — an interpretation with which she disagrees.

"To the extent that this decision or ultimately a higher court rules on the viability of such an exemption, or even to the extent that the Division of Banks has even articulated one, which depends on your reading of the opinion letters, then it could be useful against other debt buyers as well," Miller said. "This is a preliminary decision that specifically notes that it's very fact-specific. But it's one that, in our opinion, is certainly moving in the right direction."

Kenneth D. Quat, a consumer rights attorney in Framingham, said he was unaware of any prior decision in which a court specifically found that a debt buyer needs to be licensed if it engages in certain direct or indirect collection activities.

"We understand this is the Appellate Division and there are other levels of appeal which Midland could eventually seek depending on what happens now in this case, but it's still a ruling of first impression and helps to clarify what a number of consumer lawyers have been thinking and saying for a while — which is that debt buyers do have to be licensed in Massachusetts," he said.

Quat also said it is unequivocally better for consumers if debt buyers are licensed.

"Licenses can be suspended or revoked, and presumably other action can be taken if there are egregious abuses or if there's systematic noncompliance with regulations," he said. "So it's an important layer of protection, rather than forcing consumers to rely on private attorneys or handling litigation themselves to address abuses. ... A decision like this provides a legal basis for such a safeguard, at least for the time being."

Boston attorney Steven S. Broadley, who defends debt collectors accused of state and federal regulatory violations, called it a "common sense" decision and said it serves as an important reminder to debt buyers to either get themselves licensed as debt collectors or to maintain complete separation from the entity they engage to collect on the debts, which Midland apparently did not do.

"If you get sued and, as a factual matter, you weren't making decisions about [your collector's] conduct in Massachusetts, you can probably avoid being tagged vicariously," he said. "If you've made this separation and have someone who's licensed going after the debt, that's the answer. It seems like Midland wanted to have it both ways."

Broadley said he was surprised that Midland, which he described as a "big player" in the debt-buying industry, was not licensed in Massachusetts in the first place.

"Massachusetts has a reputation of being pretty strict on these matters," he said. "I know people who do this kind of work in other states, and they like to stay out of Massachusetts because they perceive it as a fairly tight regulatory state."

Midland's attorneys declined to comment. But Katie Lilley, a spokesperson for Midland's parent company, Encore Capital Group, said the company believes the Appellate Division's order "is in error" and has filed a notice of appeal.



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— Kenneth D. Quat, Framingham

Debt purchase

Midland's primary business is purchasing, on a large scale, defaulted credit card debt in order to collect on past-due accounts.

At all times relevant to the case, Midland contracted the practical aspects of such debt collection to a separate entity, Midland Credit Management (MCM), which is also wholly owned by Encore Capital Group.

The servicing agreement between Midland and MCM required MCM to act in accordance with all reasonable policies, procedures and instructions conveyed by Midland and apparently envisioned Midland exercising ongoing oversight over MCM's processing and handling of its servicing efforts.

At some point prior to July 2013, Midland purchased Juba's consumer debt from FIA Card Services, N.A./Worldpoints. Juba was in default at the time of Midland's acquisition.

In July 2013, Midland filed suit against Juba in District Court seeking to collect on the debt. The debt also was reported to three credit reporting agencies in Midland's name.

Juba filed a counterclaim alleging that by attempting to collect on the debt without being licensed, Midland had engaged in unfair and deceptive debt collection practices under the FDCPA, the MDCPA, the Massachusetts attorney general's regulations and the Massachusetts banking commissioner's regulations. She also alleged that Midland's attempts to collect on the debt violated Chapter 93A.

Midland moved for summary judgment on the counterclaims, arguing that it was merely a passive holder of Juba's debt and thus not subject to the MDCPA's requirements. Juba moved for summary judgment in her favor as to Midland's liability on the counterclaims.

The District Court denied both motions and reported to the Appellate Division three questions as to, respectively, whether Midland was required to be licensed by the Division of Banks pursuant to the MDCPA, whether Midland violated Chapter 93A, and whether it violated the federal FDCPA.

Per se violation

The Appellate Division looked to the FDCPA, after which the MDCPA was modeled, for guidance and noted that the federal statute is aimed at "debt collectors" who must be licensed as opposed to "creditors" who need not be.

The court explained that a creditor is the entity that made the loan in the first place (or which acquired the debt when it was not in default), whereas a debt collector is attempting to collect on a debt that was in default when the collecting party acquired it.

But the panel said the distinction becomes less clear when, as in this case, the entity that acquires a debt that is in default delegates some or all of its collection activities to a separate, licensed debt collector or to an attorney.

"The issue has been heavily litigated, is very fact specific, and has not been answered with any bright-line test," Hand said. "Unsurprisingly, the more control the purchaser or assignee of the defaulted debt maintains over efforts to collect that debt, the more likely the owner is to be a 'debt collector' for the purposes of the FDCPA."

Here, the court noted, Midland was relying on several opinion letters from the Division of Banks to suggest that, if represented by a licensed attorney, the fact that it was named as a plaintiff in a suit to collect on a defaulted debt that it owned would not remove it from the category of "passive debt buyer" exempt from licensing requirements.

However, the advisory opinions are not binding precedent, Hand said. Additionally, the judge said, the opinion letters appear to consider only the effect of a debt buyer delegating "direct" collection activities to third parties, when the MDCPA also defines a debt collector as one who attempts to collect indirectly on a debt.

"In this case, Midland exists only to own defaulted debt and, presumably, to receive any money collected on those obligations," Hand wrote, noting that while MCM does much of the legwork and nearly all pre-litigation contact with consumers, any actions it takes are subject to Midland's approval and oversight.

And if — as presumably happened here — MCM decides that litigation is in order, Midland becomes the plaintiff in the lawsuit seeking to collect on the account owned by Midland, Hand continued.

"Lastly, Midland is at least the nominal reporter of Juba's debt to three national credit reporting agencies," she said.

That all makes it clear that Midland is a regular, indirect participant in MCM's collection efforts on its behalf and, accordingly, was required to submit to licensure requirements and corresponding oversight and supervision mandated by the MDCPA, the judge said.

"Its failure to be licensed is, under these circumstances, a violation of the MDCPA and the FDCPA [and its] bringing suit, even through counsel, without the required license is a per se violation of G.L.c. 93A," Hand wrote.

Midland Funding, LLC v. Juba

THE ISSUE: Did a debt buyer violate the Massachusetts Debt Collection Practices Act and Chapter 93A by attempting to collect on a consumer debt it had purchased without being licensed to act as a debt collector in the commonwealth?

DECISION: Yes (Appellate Division, Southern District)

LAWYERS: William T. Bogaert and Erik J. Tomberg, of Wilson, Elser, Moskowitz, Edelman & Dicker, Boston; Sean M. Callahan of Lustig, Glaser & Wilson, Waltham (plaintiff)

Elizabeth A. Miller of Boston; Roger J. Bertling of Jamaica Plain (defense)