

MASSACHUSETTS LAWYERS WEEKLY

Collateral attack on debt buyer allowed to proceed

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A potential class-action lawsuit brought by a debtor challenging collaterally a District Court judgment obtained by a debt buyer has survived a motion to dismiss, but the case presents a jurisdictional issue that the Supreme Judicial Court likely will have to resolve, attorneys say.

After Las Vegas-based LVNV Funding obtained a judgment

against her on a consumer debt, plaintiff Virginia Newton filed a complaint in the Superior Court's Business Litigation Session, alleging that LVNV had not registered as a debt collector as required by G.L.c. 93, §24. As a result, according to her complaint, LVNV's subsequent collection activity, including its use of the state's courts, "not only violated the rights of Massachusetts consumers, but was also criminal in nature."

The class, according to the complaint, consists of all Massachusetts residents — and at least 100 of them — from whom LVNV attempted to collect debts over the past four years.

LVNV moved to dismiss the suit, arguing that Newton needed to respond to the judgment against her in the court in which it originated.

But BLS Judge Janet L. Sanders disagreed. In the absence of "clear Massachusetts precedent on the issue," Sanders looked to a Maryland case "on all fours" with the present case, in which LVNV was similarly challenged over its failure to obtain a debt collection license in that state.

Sanders said the Maryland Court of Special Appeals held that, "if LVNV had no authority to bring the underlying suits against the debtor in the first place, then any judgment it obtained was a 'nullity' and thus could be collaterally attacked. Admitting that declaring a judgment void was a 'drastic remedy,' the Maryland court concluded that this was entirely in keeping with the legislative intent of protecting consumers by requiring licensure of debt collectors."

Sanders said she believed the SJC would reach the same conclusion.

The three-page decision is *Newton v. LVNV Funding*, Lawyers Weekly No. 12-119-15. The full text of the ruling can be ordered by [clicking here](#).

Void, or voidable?

Newton is being represented by consumer rights attorneys Kenneth D. Quat of Framingham and Josef C. Culik of Boston. Joining them are Charles M. Delbaum and April Kuehnhoff, of the National Consumer Law Center, which has taken an interest in the case due to its public policy ramifications.

Quat said he was not surprised by Sanders' decision, given the similar conclusions reached in the BLS case with which Newton has now been consolidated, *Dorrian v. LVNV Funding*, along with the earlier case *Gomes v. Midland Funding*, which presented a comparable issue centering on unlicensed debt collection but settled after it survived a motion to dismiss and motion for judgment on the pleadings.

The only difference between *Newton* and *Dorrian*, meanwhile, is that the plaintiff in *Dorrian* prevailed in District Court after being sued by LVNV, while Newton lost and made a few payments on the judgment against her.

But in rendering her decision in *Dorrian*, BLS Judge Christine M. Roach "reasoned that the district court action concerned whether Dorrian owed the debt, whereas the Superior Court case was about whether LVNV was permitted to bring the suit at all."

Sanders decided the same was true in *Newton*.

Moreover, Quat noted that Sanders had endorsed his and his colleagues' contention that, "unless a collateral attack on an existing judgment is permitted to go forward, many if not most of these folks would not have a remedy."

One of LVNV's local attorneys, Ranen S. Schechner of Hinshaw & Culbertson in Boston, declined to comment.

Others are dubious, however, whether the state will ultimately determine that the Legislature intended to bar the doors of the state's courthouses from unlicensed debt collectors, along with exposing them to criminal sanctions under G.L.c. 93, §28.

"I don't see anything [in the decision] that lays the necessary groundwork for the types of claims the plaintiff is making," said Boston attorney Steven S. Broadley, who has defended collection companies for more than a decade.

Broadley, a member of Posternak, Blankstein & Lund's litigation department, added that there is a big difference between suing on a debt and engaging in other types of collection activity, such as writing letters and making phone calls.

While the licensure requirement, part of a larger state regulatory framework, might be essential to rein in abuses by debt collectors, "when you go to court, some of the gloves come off," Broadley argued, as parties benefit from protections already embodied in court procedure. "Getting due process; that's what courts are about," he said.

Daniel J. Dwyer, of Murphy & King in Boston, said that the "debt collector could win, ultimately," pointing to a case decided in 2000 by now-Superior Court Chief Justice Judith Fabricant, *Clark v. Leasecomm Corp.*, which LVNV had cited in support of its motion to dismiss. Nonetheless, he called the case a "hot potato," which may demand the intervention of the Legislature, if not the SJC, to resolve.

While Sanders leaned on the *Finch* case out of Maryland, she also noted that the Illinois Supreme Court had ultimately reversed a similar finding, setting aside an appellate court decision and reinstating a lower court's ruling that a judgment in LVNV's favor could not be attacked collaterally.

Dwyer said the SJC, like its Illinois counterpart, ultimately might be called on to decide whether the District Court's judgment adverse to Newton is "void," and thus subject to unlimited challenge for want of jurisdiction, or merely "voidable," i.e., subject to challenge only in the court in which the decision was handed down, and only for a defined time period.

In Illinois, the Supreme Court said in essence that the Legislature could not take away what the state's constitution had given: general jurisdictional authority to the trial courts.

That the Massachusetts trial courts' jurisdiction arises from statute rather than the state constitution may change the analysis, Dwyer acknowledged, but at least as of now, there seems to be no clear expression of legislative intent to remove unlicensed debt collectors from the court's jurisdiction. Were the SJC to find that the District Court lacked jurisdiction over LVNV's claim, it could lead to unintended consequences, he said.

"Once you start fiddling around with the scope of jurisdiction and access to Massachusetts courts, you don't know who you are going to kick out of court in the future," Dwyer said.

Public policy

By the way Sanders crafted her decision, she has all but sent up a flare to the SJC, attorneys say. To the defendant's assertion that Newton's only remedy is in the District Court, she wrote that "[t]his Court is not convinced, however that the Supreme Judicial Court would accept defendant's position."

According to the allegations in the complaint, Sanders said, "LVNV has for years used the courts of this Commonwealth to collect on these claims, which were purchased for pennies on the dollar. If these claims should not have been asserted in the first place because LVNV should have been licensed as a debt collector, then that practice should not escape judicial review." Forcing plaintiffs such as Newton to head back to District Court to challenge the judgments against them individually is an undesirable result, she said.

"Decisions would be rendered on a case-by-case basis, most likely resulting in inconsistencies which would not clearly resolve the issue," Sanders wrote.

In the meantime, she added, LVNV would be allowed to continue a practice that might be "in violation of state law intended to protect consumers."

Newton v. LVNV Funding

THE ISSUE Should an unlicensed debt collector's motion to dismiss be granted on the basis that a debtor is permitted to attack a judgment against her only in the court in which it originated (District Court), rather than a collateral attack in Superior Court?

DECISION No (Superior Court Business Litigation Session)

LAWYERS Kenneth D. Quat of Framingham, Josef C. Culik of Boston, and Charles M. Delbaum and April Kuehnhoff, of National Consumer Law Center, Boston (plaintiff)

Ranen S. Schechner and Andrew M. Schneiderman, Hinshaw & Culbertson, Boston (defense)

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