MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com
September 4, 2013
THE DOLAN COMPANY

Law firm cannot be held liable under 93A

Despite FDCPA violation

By Eric T. Berkman

A law firm that violated the Fair Debt Collection Practices Act while seeking to collect unpaid condominium fees on behalf of its condo association client could not be held liable under Chapter 93A, a U.S. magistrate judge has found. Following a bench trial, U.S. Magistrate Judge Marianne B. Bowler found that the defendant law firm — Marcus, Errico, Emmer & Brooks, or MEEB — violated the FDCPA by communicating directly with the plaintiff condo owner instead of through his attorney and by communicating with the plaintiff's mortgagees without his consent.

As a result, Bowler found the Braintree firm per se liable under Chapter 93A pursuant to state regulation. The law firm argued in a Rule 59(e) reconsideration proceeding that it could not be held liable under 93A absent a showing that its conduct arose in the course of trade or commerce.

Bowler agreed, noting that she issued her earlier order prior to the Supreme Judicial Court's 2013 Klairmont v. Gainsboro Restaurant, Inc. decision, in which the SJC indicated that Massachusetts regulations do not, in fact, mandate per se 93A liability when a consumer protection law has been violated.

"[The SJC's] intervening change in the controlling law provides a basis for Rule 59(e) relief," Bowler wrote, amending her earlier judgment.

"Although the scale of MEEB's representation of condominium associations is large, it did not inject itself into the external marketplace in the course of its efforts to collect monies owed to its client," Bowler continued. "Here, MEEB filed the lawsuits to collect monies owed to and incurred by [the association] as a result of plaintiff's delinquencies. MEEB's motives were not unduly influenced by the desire to increase its profits."

The 31-page decision is McDermott v. Marcus, Errico, Emmer and Brooks, P.C., Lawyers Weekly No. 02-447-13. The full text of the ruling can be found by clicking here.


Vincent Pisegna

Enabling predatory practices?

Plaintiff's counsel Philip Cahalin of Lynn said his client likely will appeal. If the decision withstands appeal, he said, condo owners will be far more vulnerable to predatory debt collection practices, since Chapter 93A remedies create such a powerful deterrent.

The decision could have a much broader scope than just condominium associations, he said. "If I were an attorney debt collector, I'd look to this decision and argue that all attorney debt collectors are exempt from Chapter 93A because when they litigate, they're not engaged in trade or commerce," Cahalin said. "A [non-attorney] debt collector might even be able to say the same thing."

Kenneth D. Quat, a Cambridge attorney who represents debtors in collection cases, called the ruling a "departure" from what he and others in the consumer rights bar have always believed about the scope of Chapter 93A as applied to debt collection activity.

"Certainly all Massachusetts governmental authorities in promulgating legislation and regulations have concluded that a third-party debt collector is engaged in trade or commerce," Quat said.

If the decision is upheld, Quat said, it will "leave Massachusetts residents without recourse if, for whatever reason, the FDCPA can't be applied to a particular matter."

Because the FDCPA has a very short statute of limitations, it is common for 93A to be a Massachusetts resident's only remedy. Not only does it offer a longer statute, Quat said, the potential monetary recovery is greater. And while Quat said the decision at the very least makes attorneys a subclass of debt collectors who are shielded from 93A, he echoed Cahalin's concerns that the ruling might be read even more broadly to cover all debt collectors.

"[Bowler] comments about a lawyer's motives not being unduly influenced by the profit motive," Quat said. "But now aren't you kind of splitting hairs about how big the profit motive must be? There's no question attorneys engage in debt collection to make money. In fact, for some attorneys, that's all they do. So I can certainly foresee an argument that even collection agencies could seek refuge behind this opinion."

Vincent J. Pisegna, a commercial litigator in Boston who handles Chapter 93A disputes, said the ruling is "evidence of the continuing effort by the courts to balance the public policy dictates of Chapter 93A to prevent unfair and deceptive practices without turning every potential claim into a Chapter 93A claim."

The Krokidas & Bluestein lawyer added that the decision indicates that courts will look critically upon efforts to make an "end run" around limitations on 93A claims, such as McDermott suing a condo association's attorneys when the statute did not allow for a lawsuit against the real target — the association itself.

"There are a number of other similar limitations," he said. "For example, stockholders [in corporations] and partners [in business partnerships] have been held as not being able to sue each other under Chapter 93A. If you allowed them to sue each other's lawyers instead, it would also cut against how the statute has been interpreted."

Stephen J. Duggan of Lynch & Lynch in South Easton defended the law firm. He could not be reached for comment prior to deadline.

Collection action

Plaintiff William McDermott was a unit owner at Pondview condominiums in Lynn.

According to Pondview's master deed and declaration of trust, the condominium association trustees had the authority to assess condo fees, attorneys' fees, late charges and collection costs against unit owners.

Over the summer of 2004, the plaintiff fell behind in paying his assessments, late fees and loan payback charges for both his units. The trust apparently had trouble collecting the debts and, in March 2005, hired the defendant law firm to collect on its behalf.

Between April 2005 and September 2008, the firm filed multiple collection suits in state District Court against McDermott as well as a final action in Superior Court. On Feb. 3, 2009, McDermott sued the firm in U.S. District Court alleging that it had violated multiple provisions of the FDCPA in the course of its debt collection activities.

Following a bench trial, Bowler found that the law firm violated the FDCPA by communicating with McDermott directly instead of through his counsel and by filing one of its collection suits in an improper forum. She also found that the firm had committed a number of other violations outside the FDCPA's one-year limitations period.

Though Bowler determined that the untimely violations were neither unfair nor deceptive, they formed the basis for per se liability under 93A pursuant to §3.16(4) of the attorney general's regulations.

Bowler read that provision to mandate 93A liability for any conduct that violates a federal consumer protection law, such as the FDCPA, that falls under 93A's purview.

Accordingly, she awarded $800 in statutory damages on the counts that were not time-barred under the FDCPA and $10,400 in damages under Chapter 93A. The firm moved for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure, arguing that it was not engaged in "trade or commerce" and thus could not be held liable under Chapter 93A.

Neither trade nor commerce

On reconsideration, Bowler said she had reasoned in her prior order that if an act violates regulation 3.16(4) by violating the FDCPA, it automatically constitutes "unfair or deceptive acts … in the conduct of trade or commerce" under Chapter 93A.

But after she issued her decision and the defendant law firm moved for reconsideration, the SJC, in Klairmont, rejected such a view. In that case, the SJC held that regulation 3.16(3), which has similar language to 3.16(4) except that it is based on state rather than federal consumer protection law, was subject to a "trade or commerce" determination.

Such a change provides a basis for Rule 59(e) relief, the judge said. "Alternatively, it was a manifest error of law under Rule 59(e) to find that the untimely FDCPA violations were per se violations of [Chapter 93A] without regard to whether MEEB was engaged in trade or commerce under [the statute]."

Bowler then held that the firm was not, in fact, engaged in trade or commerce since it was not acting in a "business context." The relationship between the plaintiff and defendant was merely that of adversaries on opposite sides of litigation, she said, adding that the mere filing of litigation — as the law firm did in the collection context — does not in and of itself constitute trade or commerce.

The firm filed the suits to collect money owed to its client due to the plaintiff's delinquencies, and the firm was not "unduly influenced" by a profit motive, Bowler said. "Contrary to plaintiff's view of the facts, this court finds that MEEB was not being deceitful, purposefully concealing its legal fees or its interactions with plaintiff's mortgagees or unduly or improperly focusing on the collection of its attorneys' fees to the exclusion of the interests of its client," she wrote. "MEEB's motives were based on a desire to represent its client to the fullest extent possible in a vigorous and aggressive manner."

Under such facts, she concluded, the defendant firm's acts were not made in the conduct of trade or commerce and thus it was not liable under Chapter 93A.

CASE: McDermott v. Marcus, Errico, Emmer and Brooks, P.C., Lawyers Weekly No. 02-447-13

COURT: U.S. District Court

ISSUE: Could a law firm that violated the Fair Debt Collection Practices Act while seeking to collect unpaid condominium fees on behalf of its client, a condo association, be held liable under Chapter 93A?

DECISION: No, because its actions did not occur in the conduct of "trade or commerce"