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LEGAL ALERT

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Federal Fair Debt Collection Liability for Violation of State Licensing Laws

On February 23, 2011, the United States District Court for the District of Maryland followed the United States Court of Appeals for the Eleventh Circuit in holding that a debt collection company could incur liability under the federal Fair Debt Collection Practices Act for failing to obtain a debt collection license required under state law.

In the Maryland case, defendant Hilco Receivables had failed to obtain a license for debt collection under the Maryland Collection Agency Licensing Act but nevertheless impermissibly filed actions in the Maryland state courts to collect consumer accounts purchased by Hilco after the accounts went into default.[1] The Eleventh Circuit, in *LeBlanc v. Unifund CCR Partners*, had previously held that a debt collection firm's similar violation of a Florida licensing statute could support a cause of action under the FDCPA.[2]

One of the defendants Hilco sued in Maryland was Wayne Bradshaw, who responded by filing the subject class action on behalf of all Maryland consumer debtors who had been contacted by Hilco in the three years prior to the Bradshaw complaint.[3] Bradshaw contended on behalf of the class that, by filing suit against Maryland debtors, Hilco acted as a "collection agency" without obtaining the required license in Maryland, thereby violating both Maryland and federal law.[4]

The Maryland District Court agreed, granting summary judgment to the plaintiffs and awarding statutory damages. Even though the Maryland licensing statute does not give rise to a private right of action, the *Bradshaw* court reasoned, its violation could serve as the basis for a federal cause of action under the FDCPA, which does allow for the recovery of damages by private parties.[5]

The interplay between the FDCPA and the Maryland licensing law was critical to the *Bradshaw* decision. The federal Act prohibits the use of any "false, deceptive, or misleading representation or means in connection with the collection of any debt."[6] The statutory language includes a non-exhaustive list of conduct that violates the FDCPA, including "[t]he threat to take any action that cannot legally be taken."[7]

The Maryland statute requires that "a person have a license whenever the person does business as a collection agency in the State."[8] By filing debt collection lawsuits without first obtaining the requisite

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[1] *Bradshaw v. Hilco Receivables, LLC*, No. RDB-10-113, 2011 WL 652476, at *10 (Feb. 23, 2011 D. Md.).

[2] 601 F.3d 1185, 1192 n.13 (11th Cir. 2010).

[3] *Id.* at *1.

[4] *Id.*

[5] *Id.* at *7.

[6] 15 U.S.C. § 1692e.

[7] *Id.* § 1692e(5).

[8] MD. CODE. ANN., BUS. REG., § 7-301(a).

license, the plaintiffs argued, Hilco violated the prohibition in FDCPA against threatening action that cannot legally be taken.[9]

At the heart of Hilco's liability was its status as a "debt collector" under the FDCPA and as a "collection agency" under the MCALA. The FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts or who regularly collects or attempts to collect, directly or indirectly, debts owed or due to asserted to be owed or due another."[10] The court in *Bradshaw* concluded that Hilco was clearly "a debt collector within the meaning of [the FDCPA]" and that Hilco had "engaged in debt collection activity as a result of its initiation of state court lawsuits."[11]

Furthermore, the court was not persuaded by Hilco's argument that it did not qualify as a "collection agency" under the MCALA.[12] The MCALA defines a "collection agency" as "a person who engages directly or indirectly in the business of . . . (ii) collecting a consumer claim the person owns, if the claim was in default when the person acquired it."[13] The legislative history of the MCALA revealed the Maryland legislature's concern about "[e]ntities such as 'debt purchasers' who enter into purchase agreements to collect delinquent consumer debt in the State without complying with any licensing or bonding requirement."[14] The law extended "the purview of the State Collection Agency Licensing Board to include persons who collect consumer claims acquired when claims were in default," which prevented debt purchasers from collecting debt without a license under the exemption for businesses that only collect their *own* consumer debts.[15]

Finding that Hilco was required to obtain a license under the MCALA, the court went on to hold that the violation of the state licensing law could support a cause of action under the FDCPA.[16] The court, however, added a significant limitation, holding that the failure to obtain a license did not constitute a *per se* violation of the FDCPA.[17] The court in *Bradshaw* relied heavily on *LeBlanc v. Unifund CCR Partners*, an Eleventh Circuit case, in rejecting the plaintiffs' assertion of a *per se* violation.[18]

Despite this limitation both the *Bradshaw* and *LeBlanc* courts went on to find in favor of the plaintiff debtors. In *Bradshaw*, the court granted summary judgment in favor of the plaintiff debtors, awarding

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[9] *Id.* at *3.

[10] 15 U.S.C. § 1692a.

[11] *Id.* at *3.

[12] *Id.* at *4-5.

[13] MD. CODE. ANN., BUS. REG., § 7-101(c).

[14] Testimony in Support of HB 1324 by Charles W. Turnbaugh, Comm'r Fin. Reg. (emphasis removed), ECF No. 16-9.

[15] H.B. 1324, 2007 Leg. Sess., S. Fin. Comm. (Md. 2007), ECF No. 16-9.

[16] *Id.* at *7.

[17] *Id.*

[18] 601 F.3d at 1192 n.13.

them damages under the FDCPA.[19] The *LeBlanc* court reversed the lower court's grant of summary judgment in favor of the defendant debt collector.[20]

Both decisions, of course, have significant implications for debt collection businesses and reinforce the need for full compliance with state licensing regimes, even if private actions are not available for violations of state licensing laws. Both *Bradshaw* and *LeBlanc* involved defendants who squarely fit within the definition of a "debt collector" because both defendants were businesses whose principal purpose was the collection of debts.

The implications are less clear for entities that acquire consumer debt through mergers or acquisitions, consumer portfolio acquisitions or asset securitization transactions. Even though companies regularly acquire the consumer receivables of other companies, including delinquent receivables, if their *principal* business is not collecting such receivables, then their ownership (by acquisition) of the receivables they are collecting exempts them from FDCPA liability.

The exemption from state law liability, as well as compliance obligations, may not be so clear. The language of a particular state's licensing laws is crucial to the determination of a company's obligations and risk. The Florida licensing law at issue in *LeBlanc*, for example, contains an important exemption for out-of-state consumer debt collectors that do not "solicit consumer debt accounts for collection from credit grantors who have a business presence within Florida."[21] Whether or not FDCPA liability is an issue, companies acquiring consumer debt that includes delinquent receivables should carefully consider relevant state debt collection licensing laws.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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[19] *Id.* at *11.

[20] 601 F.3d at 1202.

[21] *Id.* at 1197.