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Two for the Price of One? The First Circuit Holds that a Violation of the FDCPA is a *Per Se* Violation of the Massachusetts Consumer Protection Statute

By **Brian M. Forbes and Laura P. Rich**

A recent decision by the United States Court of Appeals for the First Circuit, *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*,¹ may have broad implications for persons and entities involved in debt-collection activities in Massachusetts. In *McDermott*, the First Circuit addressed the scope of the Massachusetts consumer protection statute, M.G.L. c. 93A, § 11 (“Chapter 93A”) and its interplay with the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (“FDCPA”). While prior decisions from the First Circuit had suggested that a violation of the FDCPA may also be a *per se* (intrinsically or by itself) violation of Chapter 93A, the Court took a fresh look at the issue in *McDermott* and made clear that it is. Notably, the coupling of FDCPA claims with a state unfair and deceptive trade practices statute could provide plaintiff debtors with additional avenues of relief, including statutory damages and injunctive relief.

The *McDermott* Trial Court Decision

The *McDermott* case began as a relatively simple dispute involving the collection of late fees by the trustees of a condominium association from a nonpaying resident.² The trustees hired a law firm to assist in their collection efforts.³ Soon thereafter, the resident-plaintiff brought suit against the law firm alleging various violations of the FDCPA and Chapter 93A.⁴ Among other things, the plaintiff alleged that the law firm’s collection letters were deliberately misleading and confusing, that the letters purportedly included “oppressive and extortive” language, and that the law firm allegedly directly contacted the debtor in violation of the FDCPA.⁵ After a six-day bench trial and 203-page written decision, the trial court ruled in favor of plaintiff on both counts.⁶ The trial court found that the law firm committed various violations of the FDCPA and that, “pursuant to regulations issued by the Massachusetts Attorney General, [the] FDCPA violations served as a basis for imposing liability under Chapter 93A, even though [the law firm] had not committed any unfair or deceptive acts.”⁷ Following a motion for reconsideration, in which the trial court considered a recent decision by the Massachusetts Supreme Court (“SJC”)⁸—which addressed the interplay between Chapter 93A and other state statutes/regulations—the trial court reversed itself and vacated

¹ *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, No. 13-2181, 2014 WL 7373201 (1st Cir. Dec. 29, 2014).

² *Id.* at *1.

³ *Id.*

⁴ *Id.*

⁵ *See id.* at *2.

⁶ *Id.* at *1, *3.

⁷ *McDermott*, 2014 WL 7373201, at *3.

⁸ *Klaimont v. Gainsboro Restaurant, Inc.*, 465 Mass. 165 (2013).

Two for the Price of One? The First Circuit Holds that a Violation of the FDCPA is a *Per Se* Violation of the Massachusetts Consumer Protection Statute

the judgment as to the Chapter 93A claim. The plaintiff thereafter appealed to the First Circuit.

The Appeal

In reviewing the trial court's decision, the First Circuit offered a lengthy and thorough discussion of *per se* Chapter 93A liability.⁹ First, *per se* Chapter 93A liability may arise directly from the consumer protection act, i.e., where the language of Chapter 93A so permits.¹⁰ For example, Chapter 93A expressly provides that a violation of the Massachusetts Unfair Settlement Claims Act is also a violation of Chapter 93A without regard to whether the violation was unlawful under Chapter 93A.¹¹ Second, *per se* liability may also arise through the text of an independent statute, where the statute provides that its violation also constitutes a violation of Chapter 93A.¹² Both circumstances show "a clear directive by the Legislature that a violation of that particular statute constitutes an automatic violation of Chapter 93A, without the need of showing the act was otherwise 'unfair or deceptive' or occurred in 'trade or commerce.'"¹³

With this in mind, the First Circuit next analyzed the SJC's decision in *Klaimont v. Gainsboro Restaurant, Inc.*, 465 Mass. 165 (2013).¹⁴ *Klaimont* addressed an alleged Chapter 93A violation based upon the defendant's violation of the Massachusetts building code. The plaintiff argued that violation of the building code was itself sufficient to establish Chapter 93A liability because a specific attorney general regulation declared that a violation of a state statute providing for public health, safety, or welfare was, itself, a Chapter 93A violation. The SJC disagreed, finding that the "reach of the regulation—emanating as it does from the Attorney General rather than the Legislature—is 'bound by the scope of [Chapter] 93A, § 2(a).'"¹⁵ The attorney general does not have the power to create *per se* Chapter 93A violations and, therefore, a Chapter 93A violation would only be established under these circumstances if the conduct was determined to meet the elements of 93A liability—the conduct must be unfair or deceptive and have occurred in trade or commerce.

Applying these principles to the dispute at issue in *McDermott*, the First Circuit rejected the plaintiff's argument that a regulation promulgated by the Massachusetts Attorney General required an automatic finding of Chapter 93A liability.¹⁶ Indeed, plaintiff's argument was predicated on a regulation that was substantially similar to the regulation addressed in *Klaimont*, which explicitly provided that violations of federal consumer protection law constituted Chapter 93A violations.¹⁷

⁹ See *id.* at *3–*8.

¹⁰ *Id.* at *5.

¹¹ *Id.*

¹² See *id.* at *6.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at *7.

¹⁶ See *id.* at *9.

¹⁷ See *id.*

Two for the Price of One? The First Circuit Holds that a Violation of the FDCPA is a *Per Se* Violation of the Massachusetts Consumer Protection Statute

The First Circuit's analysis, however, did not end there. The plaintiff also argued, and the First Circuit agreed, that *per se* liability arises through Chapter 93A's incorporation of the Federal Trade Commission Act ("FTC Act"). The Court acknowledged that Chapter 93A "incorporates the extensive body of Federal administrative and decisional law under the FTC Act, at least in so far as it relates to definitions of 'unfair' and 'deceptive,'" and that "unfair or deceptive conduct that violates the FTC Act also violates Chapter 93A."¹⁸ Likewise, the language of the FDCPA explicitly provides that any act that violates its provisions also violates the FTC Act. Reading the two statutes together, and relying upon the premise that *per se* Chapter 93A liability may arise from the text of an independent statute, the Court held that a violation of the FDCPA is not only a *per se* violation of the FTC Act, it is also a *per se* violation of Chapter 93A.¹⁹ Accordingly, the First Circuit held that, since the trial court found that the law firm debt collector had violated the FDCPA, those violations also "constitute *per se* Chapter 93A violations by virtue of the unambiguous statutory language in the FDCPA and the FTC Act."²⁰

Implications of the McDermott Decision

Although *McDermott's* holding is limited to the Massachusetts consumer protection statute, its reasoning could be applied by states with analogous consumer protection laws. Notably, the First Circuit also suggested that expiration of the statute of limitations on an FDCPA claim (typically one year), may not time-bar claims brought under Chapter 93A, which has a four-year statute of limitations period. Thus, exposure to claims under a state consumer protection statute could exist long after the underlying FDCPA claims have expired.

Despite the *McDermott* decision's seemingly bright line rule for *per se* liability in cases involving a Chapter 93A claim predicated on an FDCPA violation, it should not be construed as a clear path to judgment for consumers in Massachusetts or elsewhere. For instance, under Massachusetts law, a consumer bringing a Chapter 93A claim must first satisfy Chapter 93A's jurisdictional prerequisites, including the sending of a demand letter. And ultimately, the plaintiff-debtor will generally have the burden of proof, including proof that the debt collector violated the FDCPA. Likewise, the First Circuit made clear that an award of multiple damages under Chapter 93A still requires that the plaintiff establish a willful or knowing violation of Chapter 93A.²¹

It is too early to tell if the *McDermott* decision will lead to an increase in FDCPA litigation filed in Massachusetts. However, it does appear likely that any Massachusetts FDCPA plaintiff will include a Chapter 93A claim in his or her pleadings.

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¹⁸ *Id.* at *10.

¹⁹ *See id.*

²⁰ *McDermott*, 2014 WL 7373201, at *11.

²¹ *See id.* at *13–*14.

Two for the Price of One? The First Circuit Holds that a Violation of the FDCPA is a *Per Se* Violation of the Massachusetts Consumer Protection Statute

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