

MASSACHUSETTS SUPREME JUDICIAL COURT HOLDS PASSIVE DEBT BUYERS ARE NOT DEBT COLLECTORS UNDER MASSACHUSETTS LAW

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The Massachusetts Supreme Judicial Court recently held in *Dorrian v. LVNV Funding, LLC*, that "passive debt buyers" are not "debt collectors" required to be licensed under the Massachusetts Fair Debt Collection Practices Act ("MDCPA").

Dorrian is a class action lawsuit filed by borrowers in default who alleged that defendant LVNV Funding, LLC ("LVNV") was operating as a debt collector without being licensed under the MDCPA. Notably, the plaintiffs did not sue the third-party LVNV contracted with to handle all collection and servicing, which was licensed as a debt collector under the MDCPA. The trial court certified the class and granted summary judgment in the borrowers' favor on their claims that LVNV violated the MDCPA by operating as an unlicensed debt collector.

On appeal, the Supreme Judicial Court examined LVNV's structure and activities to determine whether the company met either of the two separate definitions of "debt collector" set out in the MDCPA. It held that neither definition applies to LVNV, which is a "passive debt buyer." Specifically, the court determined that LVNV purchased consumer debt and loans for investment, that it had no employees, and that it did not contact individual debtors. Rather, LVNV contracted with a third-party to be its collection and servicing agent, which was licensed under the MDCPA. LVNV did not participate in any decisions regarding collection activities, leaving the third-party with sole discretion and responsibility for the debt collection.

As noted, under the MDCPA, there are two alternate definitions of a "debt collector." The first definition encompasses entities of which the "principal purpose" is the "collection of a debt." The second applies to any entity "who regularly collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or due another."

The *Dorrian* court first examined whether LVNV was a "business the principal purpose of which is the collection of a debt." The court noted that the limited relevant legislative history indicated a focus on collection activities directed towards consumers and that there was no intent to include "debt buyers that own the debts but use a third party to collect the debts and therefore have no contact with the debtors." The court also accorded weight and deference to the Massachusetts Division of Banks's interpretation that the MDCPA did not include a passive debt buyer that "engages only in the practice of purchasing delinquent consumer debts for investment purposes without undertaking any activities to directly collect on the debt." Thus, the *Dorrian* court concluded that the first definition of debt collector under the MDCPA "does not apply to passive debt buyers like LVNV that have no contact with consumers."

The court next considered whether LVNV was a "business ... who regularly collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or due another." The court held that LVNV could not be

considered a debt collector under this definition because the only debts being collected for LVNV, by its third party contractor, were debts LVNV owned and not debts "due another." The court also noted that the U.S. Supreme Court had recently held that the analogous definition of "debt collector" under the federal Fair Debt Collection Practices Act ("FDCPA"), which the MDCPA is based upon, did not include companies not collecting debts owed to another.

Because LVNV did not meet either definition of "debt collector," the *Dorrian* court held that LVNV did not need to be licensed under the MDCPA. Accordingly, the Supreme Judicial Court vacated the lower court's order granting summary judgment against LVNV. Because the plaintiffs' case was premised upon the claim that LVNV was improperly unlicensed, the court's decision likely impacts the future of the entire case.

The *Dorrian* decision provides further guidance in Massachusetts regarding permissible debt collection activity under the MDCPA. We will continue to monitor and report on any developments in this area.

[1] --- N.E.3d ----, 2018 WL 1702436 (Mass. Apr. 9, 2018).

[2] Mass. Gen. Laws c. 93, §§ 24-28.

[3] *Dorrian*, 2018 WL 1702436 at *1, 4.

[4] *Id.*

[5] The *Dorrian* Court described a passive debt buyer as a "company that buys debt for investment purposes and then hires licensed debt collectors or attorneys to collect the debt on its behalf." *Id.* at *1.

[6] *Id.* at *3.

[7] *Id.*

[8] *Id.*

[9] *Id.* at *4 (quoting Mass. Gen. Laws c. 93, § 24).

[10] *Id.* at *5. The court also noted that several federal courts had held that the federal Fair Debt Collection Practices Act ("FDCPA") did not include passive debt buyers with no consumer contact. *Id.* n.11.

[11] *Id.* at *2, 6.

[12] *Id.*

[13] *Id.* at *7.

[14] *Id.*

[15] *Id.* (citing *Henson v. Santander Consumer USA Inc.*, --- U.S. ----, 137 S.Ct. 1718, 1720 (2017)).

[16] *Id.*

[17] *Id.*

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