

Circuit Seeks Advice on Impact On Lawyers of City Debt Rules

BY MARK HAMBLETT

A LAW FIRM'S challenge to a New York City law governing debt collection activities and how it impacts attorneys is headed to the New York Court of Appeals.

The U.S. Court of Appeals for the Second Circuit has asked the state's highest court to answer two questions on Local Law 15, part of which was invalidated by a judge who held the law conflicted with the state's authority to regulate attorneys.

The case of *Berman v. City of New York*, 13-598 is before the Second Circuit on appeal from the



Judge Pooler

Eastern District, where Judge Eric Vitaliano held in 2013 the law does not apply to plaintiff law firms that attempt to collect debts, and violates

a provision of the New York City Charter because it purports to grant New York City the authority to grant or withhold licenses to practice law.

Judges Rosemary Pooler, Barrington Parker and Denny Chin heard oral argument on Dec. 13, 2013, when the city Law Department defended Local Law 15 and asked the court to reverse Vitaliano. Pooler wrote the court's opinion certifying unresolved questions of New York law to the Court of Appeals.

The challenge to Local Law 15 was brought five years ago by Eric Berman, a Long Island attorney, and 21-member Lacy Katzen LLP of Rochester. Berman passed away in 2010.

The legislative declaration on the purposes for Local Law 15, passed in 2007, states that "there is a minority of unscrupulous collection agencies in operation that practice abusive tactics such as

threatening delinquent debtors or calling people at outrageous times of the night."

The law specifically excludes from the definition of a debt collection agency "any attorney-at-law or law firm [1] collecting a debt in such capacity [2] on behalf of and in the name of a client [3] solely through activities that may only be performed by an attorney."

Pooler said that "Local Law 15 does not, on its face, appear to regulate an attorney who is collecting a debt in her representative capacity as a licensed attorney, in the name of a client, and through activities that only a licensed attorney can perform. However, the law does apply to certain attorney conduct."

That's because the law defines a debt collection agency as including an attorney "who regularly engages in activities traditionally performed by debt collectors" such as "contacting a debtor through the mail or via telephone with the purpose of collecting a debt."

Pooler said the » Page 8 tension between the two provisions need not be decided by the Second Circuit because the issue is really whether the law is preempted by the state's authority to regulate attorneys—and the circuit cannot predict how the New York Court of Appeals would resolve the issue.

Under the law, she said, attorneys' regular activities that resemble those traditionally performed by debt collectors are subject to regulation, so "The issue is whether the regulation of that attorney conduct constitutes the regulation of the practice of law, or whether it is more like subjecting an attorney who runs a fruit stand to regulations governing fruit stands."

Given that the law "implicates policy questions of significant importance to New York City and the State," Pooler said it was appropriate to certify two questions to

the Court of Appeals.

The first is "Does Local Law 15, insofar as it regulates attorney conduct, constitute an unlawful encroachment on the state's authority to regulate attorneys and is there a conflict" between the law and Sections 53 and 90 of the New York Judiciary Law?

Section 53 gives the New York Court of Appeals authority to make rules on the admission of attorneys to practice law and Section 90 gives New York courts the power to regulate attorney conduct.

The second certified question, which Pooler said is "substantially intertwined" with the issue surrounding regulation of attorney conduct, is whether Local Law 15 violates §2203(c) of the new York City Charter.

The charter gives the city's Department of Consumer Affairs commissioner power over all licenses and permits except in cases regarding powers conferred on other persons or agencies.

Assistant corporation counsels Janet Zaleon, Kristin Helmers and Nicholas Ciappetta represent the city.

Max Gershenoff, Evan Krinick, Cheryl Korman and Michael Versichelli, partners at Rivkin Radler in Uniondale represent the plaintiffs.

"We think the issue is pretty clear cut," Gershenoff said. "While some abuses may exist within the debt collection business, and while the city is entitled to enact legislation in an attempt to curb such abuses, the city, just like the debt collectors it seeks to regulate, must operate within the confines of the law."

"Plaintiffs believe that, in New York, it is and always has been the state judiciary that is responsible for regulating attorney licensing and the practice of law. Plaintiffs have contended through this litigation that Local Law 15 constitutes an improper encroachment on the judiciary's regulatory authority," he said.

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