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Preemption: New York City Law Regulating "Non-Attorney" Debt Collection Practices May Violate Preemptive State Licensing Structure

Berman v. City of New York, No. 13-598 (2d Cir. Oct. 29, 2014)

The Second Circuit recently certified to the New York State Court of Appeals the question of whether a New York City debt collection law which purports to excludes attorneys but regulates "non-attorney" activity such as dunning telephone calls is preempted by the New York State attorney licensing structure.

In 1985 New York City passed Local Law 65 regulating the conduct of debt collection agencies and requiring them to obtain licenses. The law excluded lawyers who were collecting debt "as an attorney on behalf of and in the name of a client." In 2007, because the city found some attorney debt collectors acting improperly, it passed Local Law 15, which amended Local Law 65. The amended law included some lawyers within the definition of "debt collection agency."

As redefined, the term excluded "any attorney-at-law or law firm collecting a debt [as an attorney] in such capacity on behalf of and in the name of a client solely through activities that may only be performed by a licensed attorney, but not any attorney-at-law or law firm or part thereof *who regularly engages in activities traditionally performed by debt collectors, including, but not limited to, contacting a debtor through the mail or via telephone with the purpose of collecting a debt or other activities as determined by rule of the commissioner.*" (emphasis added).

Moreover, Local Law 15 defined "debt collection agency" as "a person engaged in business, the principal purpose of which is to regularly collect or attempt to collect debts owed or due or asserted to be owed or due to another and shall also include a buyer of delinquent debt who seeks to collect such debt either directly or through the services of another by, including but not

limited to, initiating or using legal processes or other means to collect or attempt to collect such debt."

The plaintiffs, a group of law firms that collect debt, brought suit against the city alleging that "it is the New York State Judiciary, not municipal governments, that has the sole authority to regulate attorney admissions, practice, and conduct." They cited violations of Article IX of the New York Constitution, the New York Municipal Home Rule Law, the New York Judiciary Law, and the New York City Charter. The District Court granted plaintiffs' motion for summary judgment, holding that the law was void as applied to them, because Local Law 15 improperly purported to give the city the authority to grant or withhold licenses to practice law, which is a prerogative of the state. The city appealed.

HELD: The Second Circuit did not resolve the appeal, but rather certified the question to the New York Court of Appeals.

DISCUSSION: The Circuit Court recited the standard for certification: "(1) whether the New York Court of Appeals has addressed the issue and, if not, whether the decisions of other New York courts permit [the Court] to predict how the Court of Appeals would resolve it; (2) whether the question is of importance to the state and may require value judgments and public policy choices; and (3) whether the certified question is determinative of a claim before [the Court]."

One question before the court was whether state law preempted the city's power to initiate Local Law 15. It noted the New York Judiciary Law provides that the New York Court of Appeals regulates the conduct of attorneys in the state, has the power to regulate the practice of law generally, and provides sanctions for attorneys that violate the disciplinary rules. Moreover, New York Home Rule Law prohibits the city from adopting any law that supersedes state law. The court highlighted that the issues at play required it determine what activities, when performed by an attorney subject to New York state regulation, can be regulated by a local government. The New York Court of Appeals had never addressed this preemption issue, and while the Second Circuit found two cases tangential to the issue, it determined neither allowed it to predict how the state's high court would ultimately resolve the question.

Moreover, the court found the question at hand - whether state law preempted the city's power to initiate Local Law 15 - involved policy questions significant to the state and best left to its high court. Local Law 15 was passed because the city legislature found that "a minority of unscrupulous collection agencies [are] in operation that practice abusive tactics such as threatening delinquent debtors, or calling such people at outrageous times of the night." They thus found it "incumbent upon th[e city] council to protect the interests, reputations and fiscal well-being of the citizens of th[e] city against those agencies who would abuse their privilege of operation." As a result of these statements, the Second Circuit held that the policy concerns and issues at play required the state's highest court have the first opportunity to address the questions surrounding Local Law 15—specifically, whether Local Law 15's attempt to regulate purportedly "non-attorney" conduct was nonetheless a violation of the state's attorney licensing scheme.

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