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IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

ON CERTIFICATION FROM UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN

KELLI GRAY, ET AL.,

Petitioners,

vs.

SUTTELL & ASSOCIATES, ET AL.,

Respondents.

RESPONDENT SUTTELL'S BRIEF RE: CERTIFIED QUESTIONS

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ORIGINAL

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I. INTRODUCTION

The Petitioners in this consolidated action are debtors whose debts were acquired by Midland Funding, LLC ("Midland Funding"). There is no dispute that Midland Funding owns these debts, and pursued them in state court lawsuits filed by a Washington law firm, Suttell & Hammer.[1] Petitioners assert a variety of claims against the Respondents, only one of which is relevant to the certified questions here: whether Midland Funding was required to be licensed as a "collection agency" under the Washington Collection Agency Act (WCAA) before initiating suit to recover on the debts it had purchased.

As a matter of law, neither Midland Funding nor others who own debts (be they the original lenders, successors to those lenders, or those who purchase those debts) are "collection agencies" under the WCAA.

The current version of the WCAA, first enacted in 1971, does not include "debt buyers" or other creditors in its definition of "collection agency," and since at least 2004, the Collection Agency Board has explicitly rejected such an interpretation of the Act. Were there room for

[1] The defendants in the underlying consolidated actions are Suttell & Associates, Mark T. Case and Jane Doe Case, Karen Hammer and John Doe Hammer, Suttell & Hammer, P.S., Malisa L. Gurule and John Doe Gurule, and William Suttell and Jane Doe Suttell ("Suttell Defendants").

debate (which there is not), the legislature recently amended the WCAA effective October 2013 to add certain debt buyers as persons who are properly licensed under the WCAA. As a result, Midland Funding was not a collection agency required to be licensed when it brought suit to recover on debts it purchased, and the Petitioners have failed to establish any different applicable law. In fact, much of Petitioners' brief argues facts and issues unrelated to the certified questions and beyond this Court's jurisdiction.

II. QUESTION CERTIFIED

The Eastern District of Washington certified the following questions for the Washington Supreme Court:

(a) Does the definition of collection agency in RCW 19.16.100(2) include a person who (1) purchases claims that are owed or due or asserted to be owed or due another, (2) undertakes no activity on said delinquent consumer account, but rather contracts with an affiliated collection agency to collect the purchased claims, and (3) is the named plaintiff in a subsequent collection lawsuit for said purchased claims?

(b) Can a company, such as Midland Funding, LLC, file lawsuits in Washington [sic] on delinquent consumer accounts without being licensed as a collection agency as defined by RCW 19.16.100(2)?

III. STATEMENT OF THE CASE

There are few facts directly relevant to the questions certified to this Court. Midland Funding is an entity that purchases portfolios of delinquent debt. The Petitioners allege that Midland Funding violates the WCAA by bringing lawsuits in its own name, on debt it owns, without being licensed as a "collection agency." It is undisputed that Midland Funding is not collecting the debt of another person or entity, nor does it advertise or solicit to collect debts for third parties. The Eastern District of Washington has certified the above questions to this Court to determine application of the WCAA; as lawyers for Midland Funding, the Suttell Defendants have a significant interest in the proper interpretation of the law applicable to its clients here.

IV. ARGUMENT

The Suttell Defendants join the Midland/Encore defendants' response on the certified questions, and incorporate those same arguments, and make the following response to the Petitioners' brief.

A. The Petitioners argue irrelevant facts and law beyond the scope of the certified questions.

In providing an answer to a certified question from the federal court, the Court is to answer only the discrete questions that are certified. Louisiana-Pacific Corp. v. Asarco, Inc., 131 Wn.2d 587, 604, 934 P.2d 685 (1997). When an issue is not within the certified questions, and is within the province of the federal court, the Supreme Court will not reach the issue. See, Wilmot v. Kaiser Aluminum & Chemical Corp., 118 Wn.2d 46, 78-79, 821 P.2d 18 (1991). In answering federal certified questions, the Supreme Court does not seek to make broad statements outside of the narrow questions and record before it. Ruiz-Guzman v. Amvac Chemical Corp., 141 Wn.2d 493, 509, 7 P.3d 795 (2000).

The Petitioners' brief purports to frame issues and facts well outside the certified questions, and makes assertions which are irrelevant to this Court's determination of the narrowly certified questions on the application of the WCAA to those who own debts. The Court should decline to consider matters outside the relevant scope of the certified questions, and address only those arguments necessary to answer the questions posed.

1. The Petitioners' discussion of the Encore/Midland corporate form is irrelevant to the certified questions.

Petitioners' assertion that Midland Funding is an "alter ego" of one of its parent corporations is not relevant to whether Midland Funding or other debt owners must be licensed as collection agencies. Allegations that Encore Capital, Midland Credit Management, Inc. and/or Midland Funding misused the corporate form are not only unsubstantiated, they are irrelevant to the legal questions presented to the Court, and the Petitioners' lengthy discussion of the concept of "alter ego" should be disregarded in its entirety.

2. Similarly, the Petitioners' lengthy discussion of the affidavit process has no relevance to the certified questions.

Petitioners spend almost half of their opening brief quoting detailed deposition testimony relating to the allegations of improper use of affidavits that were allegedly signed without personal knowledge. Similarly, neither that argument nor those facts are relevant in any way to the certified question before the Court of whether a debt buyer is defined as a collection agency under RCW 19.16.100. As a result, pages 12 through 23 of the Petitioners' brief must be disregarded.

B. The issue before this Court on the certified questions is easily answered based on the terms of the statute, and the subsequent legislative amendments.

Courts are not to read into statutes matters that are not there, or modify statutes by construction. Western Telepage, Inc. v. City of Tacoma, 95 Wn.App. 140, 147, 974 P.2d 1270 (1999). Very simply, statutes are to be construed as written. State v. Gary J.E., 99 Wn.App. 258, 264, 991 P.2d 1220 (2000). Here, the language of the definition contained in the WCAA does not include those who own debts, as further demonstrated by the recent amendment, not applicable here, which by express terms **adds** debt buyers to the definition. The Petitioners' argument requires a strained reading that is not supported by the plain language of the original statute, is contrary to the interpretation of the agency charged with enforcing it, and ignores the import of the recent amendment.

1. The express language of the statute does not include debt buyers.

RCW 19.16.100(2)(a), as enacted in 1971, defines collection agencies as:

> Any person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person.

Here, Midland Funding owned the debts on which it brought suit, and was not attempting to collect a debt "owed or due another person"; the language necessitates a third party collector.[2]

Petitioners assert that Midland Funding is included in the definition of a collection agency because it is a "person directly or indirectly engaged in soliciting claims for collection." That language does not include an entity that acquires debts, and such an interpretation would also improperly separate the two phrases which must be read together. See, State v. Ashenberner, 171 Wn.App. 237, 246, 286 P.3d 984 (2012) (provisions of an act must be viewed in relation to each other and harmonized). When the parts of the definition are properly read logically in conjunction with one another, the language simply addresses not only those entities which **actually** collect or attempt to collect claims, but also those who first **solicit** for the opportunity to do so. The statute specifically requires that in order to act "or advertise" as a collection company, a person must first obtain a license. RCW 19.16.110. The definitional

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[2] In fact, the statute identifies the only instance in which a person collecting his or her own claim will be defined as a "collection agency"; when he or she uses a fictitious name to indicate there is a third-party collector. RCW 19.16.100(2)(c). This demonstrates the statutory scheme as applicable to "third party collectors" or those acting as third party collectors. Midland owns the claims, and did not act as a third party collector.

phrases are not independent of one another, and cannot be read to create a category in addition to third party collectors that would somehow include debt buyers. To the knowledge of the Suttell Defendants, since the WCAA was enacted some 42 years ago, there is not a single published decision adopting Petitioners' proposed interpretation of the Act.

2. The new amended definition which includes debt buyers establishes that they were not previously included in the definition.

On May 7, 2013, the Governor signed Substitute House Bill 1822 into law, amending RCW 19.16.100(2), the definitional section of the WCAA on collection agencies. That law now defines "collection agencies" as not only "any person directly or indirectly engaged in soliciting claims for collection or collecting...claims...owed or due another person," **but also**:

> Any person or entity that is engaged in the business of purchasing delinquent or charged off claims for collection purposes, whether it collects the claims itself or hires a third party for collection or an attorney for litigation in order to collect such claims.

See, Laws of 2013, Ch. 148, §1.

That law goes into effect on October 1, 2013, and as a matter of course, establishes that debt buyers were **not** included in the original definition, and **not** previously covered by the WCAA. Amendatory

language added to an unambiguous statute is intended to work a change in the law. Tollycraft Yacht Corp. v. McCoy, 122 Wn.2d 426, 439, 858 P.2d 503 (1993). When the legislature amends a statute and makes a material change in the wording, a presumption exists that a change was intended. Spokane County Health Dist. v. Brockett, 120 Wn.2d 140, 154, 839 P.2d 324 (1992). Moreover, the legislature is presumed to be aware of the past interpretations of its legislation and, consequently, the passage of an amendment indicates an intent to change the existing statute to cure a previous issue. State v. Alberts, 51 Wn.App. 450, 453, 754 P.2d 128 (1988).

Here, the Washington State Collection Agency Board, the state administrative body overseeing collection companies and their licensure, had made clear that the WCAA did not include debt buyers. In 2004, in consultation with the Washington State Attorney General, the Board concluded that "[d]ebt buyers that collect solely on their own claims and in their own names" need not be licensed under the WCAA. ECF 429, Ex. C. The legislature is presumed to be aware of this interpretation, and it chose to **change** the law to something different, *i.e.* the inclusion of debt buyers. See, State v. Alberts, supra. Indeed, the bill reports prior to passage state that "CAA does not specifically address people or entities

purchasing delinquent claims and taking action to collect on those claims. This practice is commonly referred to as debt buying." See, Senate Bill Report to SHB 1822, attached as Ex. 1 to Midland Respondents' brief. The legislature's recent action, coupled with the Collection Agency Board's published reading of the Act, effectively precludes the argument that the legislature had previously intended to include debt buyers in the existing (and applicable to this case) definition in the WCAA.

3. The legislature declined to include the definition of Fair Debt Collection Practices Act "debt collectors" in the WCAA.

The Petitioners argue that while the Washington legislature and Collection Agency Board refuse to do so, this Court should retroactively adopt the definition of "debt collector" in the Fair Debt Collection Practices Act (FDCPA) as the meaning of "collection agency" in the WCAA. The terms in the two acts are separate, distinct, and different, and, moreover, when the legislature wanted to invoke the FDCPA, it did so expressly in defining regulated conduct under the WCAA. In RCW 19.16.100(4), the legislature defined an "out-of-state collection agency" as follows:

> (4) "Out-of-state collection agency" means a person whose activities within this state are limited to collecting debts from debtors located in this state by means of interstate communications, including telephone, mail, or facsimile

> transmission, from the person's location in another state on behalf of clients located outside of this state, but does not include any person who is excluded from the definition of the term "debt collector" under the federal fair debt collection practices act (15 U.S.C. Sec. 1692a(6)).

Not only does this definition once again confirm that "collection agencies" collect "on behalf of clients" (rather than themselves), it shows that the Washington legislature knew well there was a difference between a "collection agency" and a "debt collector."[3] Had the legislature intended to import the federal definition of "debt collector" into state law, it could and would have done so. It did not, but instead decided to define the term differently and in a more limited fashion to "agencies" who were working on behalf others.

V. CONCLUSION

For the foregoing reasons, a debt buyer who uses his own name to collect a debt he owns, and not for a third party, is not within the definition of a collection agency under RCW 19.16.100(2), and the answer to certified question A is "no." As a result, like other creditors with direct contractual claims, Midland Funding and other companies that own debts and pursue collection can bring lawsuits in Washington without being

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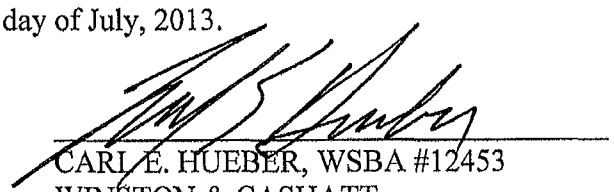
[3] Among other things, "debts" under the FDCPA are limited to consumer debts, and the federal act thus applies only to persons collecting consumer debt. See, 15 U.S.C. §1692a(5).

licensed as collection agencies; the answer to certified question B is "yes." A change in these answers – which is now imminent – is properly made by the legislature, not by way of an unprecedented and unwarranted interpretation of a long-standing statutory scheme.

DATED this 15th day of July, 2013.



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The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on July 15, 2013, I caused a true and correct copy of the foregoing document to be served on the following counsel in the manner indicated:

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