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Big Win, Bigger Warning: Hidden Liability Risks Lurking for Debt Buyers After New Jersey's *Diana* Decision

SPEAKERS

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In this episode of *The Consumer Finance Podcast*, host Chris Willis sits down with Partners Joseph DeFazio and Joseph Froehlich to discuss the New Jersey Supreme Court's ruling in *Diana*, a unanimous ruling and long-awaited victory for debt buyers operating in New Jersey. At the center of the conversation is a high-volume litigation campaign waged by the Kim Law Firm, which targeted the chain of title for consumer debts under the New Jersey Consumer Finance Licensing Act (NJCFLA). Kim's core theory argued that any consumer debt under $50,000 — including personal loans, auto loans, and retail credit — that was ever touched, transferred, or assigned by an unlicensed entity is void and unenforceable as a matter of law, and that any attempt to collect on such a debt independently triggers statutory liability.

The trio walks through how that theory played out across dozens of lower court decisions, appellate losses, a Third Circuit ruling, and ultimately, the New Jersey Supreme Court's definitive holding that no private right of action exists under the NJCFLA. Despite the favorable ruling in *Diana* for debt buyers, the threat of litigation has not disappeared. Kim has signaled an intent to pivot rather than retreat, leveraging the ruling's unresolved questions to pursue claims under the Federal Fair Debt Collection Practices Act and the New Jersey Consumer Fraud Act.

Tune in to this episode to hear about post-*Diana* implications and critical issues that remain for debt buyers following the decision.

Transcript

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Host: Chris Willis
Guests: Joseph DeFazio and Joseph Froehlich
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Chris Willis (00:05):
Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper Locke's

Consumer Financial Services Regulatory Practice. And today we're gonna be talking about a recent Supreme Court decision from the Supreme Court of New Jersey, the *Diana* case, that seems to have made a big dent in a legal theory asserted by a prominent plaintiff's firm there in New Jersey, under the New Jersey Consumer Finance Licensing Act. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, consumerfinancialserviceslawmonitor.com and troutmanfinancialservices.com. And don't forget about all of our other great podcasts, the *FCRA Focus*, the *Crypto Exchange*, *Payments Pros*, and *Moving the Metal*. All of those are available on all popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on your platform of choice and tell us how we're doing.

Now, as I said, today, we're gonna be talking about a recent, very consequential decision from the New Jersey Supreme Court in a case called *Diana* that addresses a wave of consumer litigation brought by a plaintiff's firm in New Jersey called the Yongmoon Kim Firm. Joining me to talk about this important litigation development, which really impacts debt collection-related litigation, are my two partners, Joe Froehlich and Joe DeFazio. So Joe and Joe, welcome to the podcast.

Joe DeFazio (01:21):
Thanks for having me back, Chris. Happy to be here.

Joe Froehlich (01:23):
Thanks, Chris.

Chris Willis (01:24):
All right. I'm really glad that the two of you are here to talk about this. So Joe DeFazio, let me start with you. What is the legal basis for these claims? What is the theory at issue that was finally now decided by the New Jersey Supreme Court?

Joe DeFazio (01:37):
The New Jersey Consumer Finance Licensing Act is the statute that's at issue. It has two main requirements. One is for consumer lenders, and one is for sales finance companies. So a consumer lender is defined as an entity that makes a loan directly to a consumer, and a sales finance company is defined as an entity that purchases or finances retail installment contracts. This licensing requirement applies to loans under $50,000. That's a meaningful threshold because it captures such a large volume of consumer debt, personal loans, auto loans, retail credit, and it's not just limited to originators. The act applies to an entity that holds or acquires a consumer debt in New Jersey. And obviously a failure to obtain that license can have some significant consequences, and one of them would likely be being sued by Yongmoon Kim in the state of New Jersey.

He's developed pretty aggressive high volume litigation strategy targeting the chain of title for consumer debts. And basically, the core theory in all these cases is that if a debt was ever touched, transferred, assigned by an unlicensed entity at any point, the argument is it's void and unenforceable. It's not a narrow theory. It captures originators, servicers, debt buyers, collectors, anyone who may be subject to the NJCFLA. So most of his lawsuits, and, and there are plenty, they created, I think, a little bit of an uproar in the industry because if you think about the number of debts under $50,000 for consumers, it's quite large. So these suits really brought two kind of distinctive forms of relief. Most of them involved voiding the debt entirely, arguing that it was unenforceable as a matter of law because you didn't have the license. And then the other part of it is seeking damages, arguing that any attempt to collect on a void debt is itself a statute violation.

The volume and scope of his NJCFLA lawsuit campaign made it a pretty significant litigation threat for consumer finance companies in the New Jersey consumer finance space.

Chris Willis (03:53):
Let's talk about how these cases unfolded and played out in the New Jersey courts. So Joe Froehlich, let me go to you. How were these claims received by the lower level courts within New Jersey when they first started to emerge?

Joe Froehlich (04:08):
Right from the jump, I think the Defense Bar immediately identified this issue of there being a private right of action. So any case that he brought directly under the New Jersey Consumer Finance Licensing Act was attacked on the basis of there being no private right of action. And there's probably, you know, if not tens, if not dozens, maybe close to a hundred lower court decisions where the court held there's no private right of action. I don't think I ever saw one court actually entertain there being a private right of action. However, there were cases where Kim seems to have been able to, to get around that. And there are some cases where he would bring in an FDCPA claim on top of it. And by doing that, his argument was that even if there is no private right of action, the fact that the debt has been voided because it has touched an unlicensed entity suddenly makes it, you are in a position where you are trying to collect on a voided debt.

It's much the same as trying to collect on a debt the statute of limitations has run out on. So if you're collecting on that, the FDCPA, there's clear law that says you still can violate the FDCPA by seeking to collect on a voided debt. And he used that argument with some degree of success. There were several decisions that held, even if there is no private right of action, you can still sue under the FDCPA. But those were pretty limited, I would say. And really the vast majority of the cases, he lost. So he would lose the lower court cases. And then eventually he had a few of them get up to the New Jersey Appellate Division. And within that, he also lost those cases. So there's a case called Francavilla. He would bring these on federal cases also. And in one instance, he brought it on student loan debt.

And in that case, that actually went up to the Third Circuit. One of our partners, R.J. De Rose, actually argued that in the Third Circuit, and they also found that there was no private right of action. With all that in mind, he just did not have any success on the private right of action piece of it, had limited success on the FDCPA cases. And then that set him up, I think, to eventually, as Joe mentioned, make the application and the New Jersey Supreme Court took the case, which I think was somewhat of an interesting take, but they actually accepted it and heard the argument.

Chris Willis (06:32):
The story sounds like a pretty happy story so far from our side of the fence, which is representing the defendants in cases like this. The New Jersey Supreme Court took the case. So Joe, keep going. Tell me what happened. What did the court decide in *Diana*?

Joe Froehlich (06:46):
Just to comment on your point there about the happiness factor for our clients. I think the unhappiness part of it for

our clients is the fact that Mr. Kim was relentless. He would continue to bring these cases even despite losing over and over and over. We had several clients, which after the suit was originally filed, he would just keep bringing more and more, even though he would lose. I guess he thought he could bring it up to the New Jersey Supreme Court and was hoping for a different result. But at the end of the day, when you listen to the argument from the New Jersey Supreme Court, I would say the argument was such that you didn’t walk away from it completely convinced that this was gonna be a victory for our side. There were a lot of amici. And if you listen to the argument, there were, I believe, at least two other counsel besides Mr. Kim who argued the case.

In the end, when the New Jersey Supreme Court came down on it, they distinctly held there was no private right of action. And they analyzed the case this way. First, they identified the fact that there is obviously no direct right of action within the statute. They then looked at whether there’s an implied right of action. And they looked at the Cort factors, which the Supreme Court established, oh, I think probably back in the ’70s, and went through the three factors. And they took for granted the first factor, which in essence says, “Is this statute designed to benefit this class?” And they said, yes, that answer is in the affirmative. But then in the next two, they took a hard look at those and came to a different conclusion. So the second factor is whether the legislature intended to create the private right of action.

And then the third factor is, is this consistent with the legislative scheme? So on the first part, it’s very interesting. The Consumer Fraud Licensing Act is born out of multiple statutes over multiple times. And it goes all the way back to a 1913 statute. And what the court recognized is that every iteration of this statute before did have the ability and had language that at least implied a private right of action. For whatever reason, when they switched the statute and it became the New Jersey Consumer Finance Licensing Act, they did the analysis and they took that out and they made it just a crime of the fourth degree. By doing that, the court immediately latched onto that and held that if you had a private right of action before and you had that language in the statute and the legislature took that out, that’s pretty good evidence that they did not intend a private right of action within the statute.

They then looked at the third factor and the third factor then whether it was consistent with the scheme, they looked at it and said, “Well, the statute clearly provides for penal liability.” And by doing that, they recognized that New Jersey laws long recognized that if you have a penal scheme of something, you really don’t want to muck it up and put a civil scheme within it. And so they found basically that the second and the third factors were clearly outside the scope. And, and they went on to the ruling. From our standpoint, the one, another thing to be interested in here is there are two sort of questions that they left out. One of them good for us, probably one of them good for Kim. Which is first, they recognize that the entities that were being sued by Mr. Kim, and they, I think they used the word, “emphatically,” denied that they were subject to the statute.

That being sort of the entities that purchased the debt at one point, hand it off to somebody else, never contact the borrower, never have any interaction with the borrower. And there is a question of does the statute apply to that kind of situation? That question still sits open. And I think there’s good arguments on our side why it’s not involved in the making or collecting, which are the exact words from the statute. The second question is they distinctly, at the very end, in the last footnote threw Mr. Kim a bone maybe, and they said that because the issue is dispositive on the private right of action, they’re not gonna reach the question of whether other provisions of the New Jersey Consumer Finance Licensing Act permit private enforcement. And I think Joe probably will talk a little bit more to how Mr. Kim seems to view that footnote as his next line of cases.

Chris Willis (11:17):
Well, let's do that then, Joe DeFazio. So Joe Froehlich told us about the *Diana* decision. It came out great. It's a happy ending. But it's not really a completely happy ending from the standpoint of stopping this wave of litigation, is it?

Joe DeFazio (11:31):
No, it is not. *Diana* does one thing very well, and that's provide clarity on the NJCFLA private right of action question. That is settled New Jersey Supreme Court law. So defendants that are gonna face like a standalone NJCFLA claim, they now have the strongest possibility of that case being dismissed, because it effectively eliminates his core theory that he's been pressing in hundreds of these suits across New Jersey. For industry participants, it's obviously a significant victory from that aspect. It removes the most direct litigation vehicle that Kim was using against them. To Joe's last point, Kim has already signaled he's not abandoning the field. He's going to pivot, not retreat. His continued theory is gonna rest on two main points. The void argument is still gonna persist because he's going to argue even without a private right of action. The statute still operates to void the debt as a matter of law.

And that collecting on a void debt triggers liability under other statutes. So what are those other statutes? The most common ones would be the Fair Debt Collection Practices Act, the FDCPA. In most of the lawsuits, not all of them interestingly, but in most of his lawsuits, he does have an FDCPA claim. So he will argue that collecting on a debt that is void is a false or misleading representation under the FDCPA. So this theory is gonna survive post-*Diana*, I believe. I mean, it's survived in some courts pre-*Diana*. I think Joe mentioned that. So he'll continue to press it post-*Diana*. The other one would be the New Jersey Consumer Fraud Act. Kim is also asserting CFA claims, as we call them in these lawsuits, and that is attempting to collect a void debt, constitutes fraudulent or unconscionable commercial practices under New Jersey's broad consumer fraud statute.

So the CFA is particularly significant because it carries trouble damages and attorney's fees. So the stakes for clients remain high post-*Diana* if he's remotely successful on any of these claims. And then the unresolved licensing question is still an issue because it gives Kim room to argue that, you know, whether debt buyers must be licensed is a ground for predicate violation. So that one still exists based on where you are in the debt buying chain of title. Practically, for our clients, I think some of this is, you know, even post-*Diana*, your collection activity could carry some risk given these pivoting theories that Kim will use. My advice would be to engage experienced counsel, given the continued evolution of this area and Kim's claims and, and particular counsel that have specific experience with the Yongmoon Kim Law Firm and the consumer financial pieces that he'll continue to argue, mainly the CFA and FDCPA.

Chris Willis (14:30):
Joe, that strikes me as an excellent suggestion. And I'm just left wondering where one might find such experience, counsel, if it weren't already abundantly obvious from the discussion that you and Joe have given us on the episode today. So thank you for that suggestion. And it seems like you two are gonna have to continue to defend these cases and continue to follow them. And who knows? It might take another trip to the Third Circuit or another trip to the New Jersey Supreme Court or both to finally tamp this whole situation down. So I think we'll have to continue to follow it and report about it both on our blog and on this podcast. So gentlemen, thank you very much for being on the podcast today. And thanks of course to our audience for listening to today's show. As I reminded you at the beginning of the show, don't forget to visit and subscribe to our

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