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# REPORT ON LEGISLATION BY THE CONSUMER AFFAIRS AND CIVIL COURT COMMITTEES

A.1028 M. of A. Pheffer S.1439 Sen. Squadron

AN ACT to amend the general business law and the civil practice law and rules, in relation to debt collection agencies

### THIS BILL IS APPROVED WITH RECOMMENDATIONS

## Introduction

The Consumer Affairs and Civil Court Committees of the New York City Bar Association are pleased to submit these comments concerning Assembly Bill A.1028 and Senate Bill S.1439, which would amend the General Business Law by requiring the licensing of debt collection agencies. Our committees consist of lawyers with a significant interest in consumer issues and civil court practice, including current and former government regulators, private practitioners and members of firms, and representatives from consumer and business organizations.

## **Current Law and the Existing Problem**

While debt collection agencies are currently regulated under New York State law pursuant to the Fair Debt Collection Law (Art. 29-H of the General Business Law), such agencies are not required to be licensed to conduct business in the state. The cities of New York and Buffalo already do have such laws in effect (as, according to the legislative memorandum in support of the bill, do 29 other states). However, the number of consumer complaints against debt collection agencies has continued to rise, and such complaints generally rank at or near the top complaint category for regulatory agencies. In 2009, the New York State Consumer Protection Board reported that in the last five years, complaints about debt collection have become the largest source of consumer complaints filed with the agency. The New York City Department of Consumer Affairs (DCA) reports having received 760 complaints against collection agencies in fiscal year 2007 and 1,286 in 2008, an almost 70% increase which moved

<sup>&</sup>lt;sup>1</sup> Testimony of Mindy A. Bockstien, Chairperson of the New York State Consumer Protection Board, Public Hearing on Consumer Protection in the Debt Collection and Debt Management Industries held by the Assembly Standing Committee on Consumer Affairs and Protection, Assembly Standing Committee on Judiciary, Assembly Standing Committee on Banks, May 14, 2009.

debt collectors into DCA's top complaint category.<sup>2</sup> According to DCA, the types of complaints filed overwhelmingly concern billing disputes (where those being dunned have already paid the debt in question or dispute the validity of the debt), or claims of harassment by debt collectors.<sup>3</sup>

In 2006, the Metropolitan New York Better Business Bureau reported that 89% of the complaints received by the New York BBB concern consumers being contacted about debts they do not believe they owe.<sup>4</sup> Further, the Federal Trade Commission ("FTC"), in its "Annual Report 2010: Fair Debt Collection Practices Act," based on 2009 data, stated that complaints about third-party debt collectors continued to increase in absolute terms from the year before, though as a percentage of total complaints to the FTC the figures dropped slightly as a percentage of total complaints (from 19% to 16.8%). The FTC reported that it "receives more complaints about the debt collection industry than any other specific industry." In the past few years the FTC has undertaken a comprehensive review of the debt collection industry, and in February, 2009, it released a lengthy report with findings and recommendations for changes in the debt collection system, stemming from its two-day public workshop in 2007. In 2009 the FTC hosted a series of regional roundtables, bringing together representatives from the debt collection industry, consumer advocates, academics, government officials and representatives of the judicial system, to discuss consumer protection problems arising out of debt collection litigation. As a result of these roundtables, the FTC issued a follow-up report that concluded that the system for resolving consumer debt collection disputes is broken, and recommended significant litigation and arbitration reforms to improve efficiency and fairness to consumers.<sup>8</sup>.

One of the main reasons that debt collection practices have attracted heightened attention is the growth of "debt buying" and the problems associated with the debt buyer industry. Debt buyers are companies that make large-scale purchases of delinquent or charged-off consumer debt from a creditor for pennies on the dollar, and then seek to collect the full amounts owed. The practices associated with the growth of this industry include suing on debts which are beyond the statute of limitations, that have already been paid or result from identity theft or mistaken identity, or where the debt collector has no documentation to support its claim for the debt. In New York City, as a result of the rising complaints about debt buyers and debt collection agencies collecting on their behalf, the City Council amended New York City Administrative Code to clarify that debt buyers fall under the definition of a debt collection

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<sup>&</sup>lt;sup>2</sup>Testimony of Andrew Eiler, DCA Director of Legislative Affairs, before New York City Council Committee on Consumer Affairs, February 25, 2009. Although the number of complaints against collection agencies has decreased since the peak in 2008 - to 857 in 2009 and 662 in 2010 – these complaints continue to be DCA's top complaint category.

<sup>&</sup>lt;sup>3</sup> <u>Id.</u>

<sup>&</sup>lt;sup>4</sup> Testimony of Walter Brewster, Senior Vice President of Metropolitan New York Better Business Bureau, before the Assembly Judiciary Committee and Committee on Consumer Affairs and Protection.

<sup>&</sup>lt;sup>5</sup> Available at <a href="http://www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf">http://www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf</a>.

<sup>&</sup>lt;sup>6</sup> Id.

<sup>&</sup>lt;sup>7</sup> Federal Trade Commission, "Collecting Consumer Debts: The Challenges of Change," February 2009, available at <a href="http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf">http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf</a>.

<sup>&</sup>lt;sup>8</sup> Federal Trade Commission, "Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration," July 2010, available at <a href="http://www.ftc.gov/opa/2010/07/debtcollect.shtm">http://www.ftc.gov/opa/2010/07/debtcollect.shtm</a>.

<sup>9</sup> See Id. at 3-4.

<sup>&</sup>lt;sup>10</sup> See Eiler Testimony, *supra*; testimony of Janet Ray Kalson on behalf of New York City Bar Association, before New York City Council Committee on Consumer Affairs, February 25, 2009; testimony of Claudia Wilner, Neighborhood Economic Development Advocacy Project, at hearing on Scams Affecting Senior Citizens, N.Y. Assembly Committee on Consumer Affairs and Protection and Committee on Aging, December 1, 2008.

agency and are required to be licensed by the Department of Consumer Affairs. 11 The City Council also strengthened existing local debt collection laws to require debt collection agencies to provide specific information to consumers about the debts they are collecting, including disclosing whether the statute of limitations has run on the debt. 12

Although many observers, including the sponsors of this bill, apparently acknowledge that most collection agencies do comply with the law, it is thus clear that the activities of collection agencies generate a significant number of complaints. New York State requires the licensing of a large number of businesses and professions, many of which would appear to have less impact on the citizens of the state than do the activities of debt collectors. <sup>13</sup> In the case of many businesses and professions. New York legislators have made a judgment that a licensing scheme makes sense. It does in this case, as well.

## **Proposed Legislation**

The proposed legislation would benefit the public by ensuring that debt collection agencies adhere to minimum standards of conduct, and by allowing the Secretary of State and the Attorney General to regulate the activities of debt collectors and to take enforcement action against licensees who fail to adhere to the law. This legislation includes provisions designed to protect consumers from abusive and deceptive practices identified with some businesses in the debt buying industry.

The important highlights of the bills are:

- 1. Third party debt collectors, including those who buy and sell consumer debt, and debt collection law firms and debt collection attorneys who engage in traditional debt collection activity such as making phone calls and sending dunning letters, would be required to be licensed by the Department of State. 14
- 2. In addition to commonly-required business information, a license applicant would need to make various other disclosures, including: a detailed description of the methods used to confirm the validity of debts it seeks to collect; whether the applicant regularly sells or intends to sell debt, and if so, a summary of its policy on the information about a consumer's account that it transmits to a purchaser; and a summary of its record-keeping policies, including how it records and stores information on such matters as consumer challenges to the validity of a debt, billing errors, claims of identity theft, and assertions that the consumer's income is statutorily exempt from collection. Applicants would also have to disclose the existence of any unpaid civil judgment relating to debt collection activity, and whether they have ever been issued a debt collection license by any other state or local authority, as well as whether that license was ever

<sup>&</sup>lt;sup>11</sup> N.Y. City Admin. Code § 20-489 (2009).

<sup>&</sup>lt;sup>12</sup> See Id.
<sup>13</sup> A press release issued by the Office of Professions of the New York State Education Department on April 7, 2008

What he lieuwing of 47 professions. There are many other professions, trades and types of businesses which are licensed through other agencies of the state. For example, the General Business Law requires the registration or licensing of such businesses as the operation of a pet cemetery, junk dealers and nail specialty, waxing, natural hair styling, esthetics and cosmetology.

Original creditors attempting to collect debts in their own name would not require a license. Collection agencies required to be licensed under local laws (i.e., New York City and Buffalo) would still require the local license. A license would be in effect for two years and would be renewable for two-year periods.

revoked or suspended. All of these disclosures are particularly important given recent changes in the debt collection industry and the emergence of debt buying as a common practice.

- 3. In addition, the Secretary of State would be authorized to refuse to issue a license, and to revoke a license once granted, to any applicant found to have violated either the New York Fair Debt Collection Law or the FDCPA. Those statutes contain important standards of conduct for debt collectors, including, for example, proscribing harassment such as calling debtors at unusual hours; knowingly attempting to collect attorney's fees or other costs unless such monies are legally chargeable to a debtor; threatening action which cannot legally be taken or which the collector does not normally take; and disclosing or threatening to disclose a disputed debt without disclosing that it is disputed. The Secretary of State would also have the power to impose a fine of no less than \$100 and no more than \$2,000 per violation. The Secretary of State would thus have the capacity to ensure that licensees follow the existing standards in state and federal law that govern the activities of debt collectors.
- 4. The Secretary of State and the Attorney General could conduct investigations with respect to any violations of the provisions of this article. The Attorney General would be empowered to seek an injunction and civil penalties. In addition, whenever a court determines that a violation occurred, the court would have the discretion to impose a civil penalty of no less than \$100 and no more than \$10,000 for each violation.
- 5. Debt collection agencies would be required to post a surety bond of between \$10,000 and \$75,000, depending upon the agency's number of employees.
- 6. The bill also provides for a private right of action for actual damages, or three thousand five hundred dollars, whichever is greater. A court would have the discretion to increase the damages to no more than three times the actual damages up to \$10,000 if the court found that the defendant willfully violated the law. A court would also have the discretion to award costs and reasonable attorney's fees.
- 7. The CPLR would be amended to permit alleged debtors who are sued by unlicensed debt collection agencies to move for dismissal of any such suit based on the fact that the agency has not been licensed.

### **Recommendations**

The Committees support the passage of A.1028/S.1439, but believes it could be strengthened in the following ways:

- 1. Because the private right of action will be critical to deterring debt collection abuse, the award of costs and reasonable attorney's fees should be mandatory rather than discretionary, as is the case for successful actions brought under the FDCPA.
- 2. The law should spell out substantive standards of conduct or prohibitions for which a collection agency could be liable to consumers, including currently prohibited debt collection agency practices. The best means of setting forth such standards is to reference the conduct prohibited by existing statutes such as Article 29-H of the General Business Law and the FDCPA. Given that the bill itself sets out no provisions relating to debt collection agency

conduct affecting consumers, the private right of action in the bill will be meaningless unless the bill contains a reference to conduct prohibited by other consumer protection statutes.

This legislation will not only give New York residents the assurance that debt collection activities will be undertaken only by licensed entities, but will establish a regulatory scheme that is appropriate for and tailored to modern-age debt collection. As such, our Committees urge the enactment of A.1028/S.1439.

Respectfully submitted,

Annie Ugurlayan Chair Committee on Consumer Affairs Janet Ray Kalson Chair Committee on Civil Court

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