



**NEW YORK
CITY BAR**

Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

**REPORT ON LEGISLATION BY THE
CONSUMER AFFAIRS COMMITTEE AND
THE CIVIL COURT COMMITTEE**

**A.455-A
S.219-A**

**M. of A. Dinowitz
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 A.455-A/S.219-A, which would amend the General Business Law by requiring the licensing of debt collection agencies and amend the Civil Practice Law and Rules regarding pleading requirements. 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, legal services, and business organizations.

CURRENT LAW AND THE EXISTING PROBLEM

While debt collection agencies are currently regulated under New York State law pursuant to New York's debt collection statute (Article 29-H of the New York 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, despite the licensing requirement, the New York City Department of Consumer Affairs (DCA) reported that in 2012, debt collection abuses were the top complaint for the fifth year in a row.¹ Similarly, the New York State Consumer Protection Division reported that in 2011 debt collection was the second highest complaint, next to Do Not Call registry violations.² The types of complaints against debt

¹ Press Release, N.Y.C. Dep't. of Consumer Affairs, Department of Consumer Affairs (DCA) Names Debt Collectors Top Complaint for the Fifth Year in a Row (Mar. 5, 2012), *available at* http://www.nyc.gov/html/dca/html/pr2013/pr_030513.shtml (last visited May 2, 2013).

² N.Y.S. Assembly Standing Committee on Consumer Affairs and Protection, Public Hearing on the Effectiveness of the Consumer Protection Division (CPD) Within the Department of State (DOS) 19-20 (Nov. 28, 2012) [hereinafter Hearing of Effectiveness of the CPD] (Testimony of Marcos Vigil, Deputy Secretary for Business and Licensing, N.Y.S. Dep't. of State), *available at* <http://assembly.state.ny.us/write/upload/hearings/2012/20121128Consumer.pdf> (last visited May 2, 2013).

collectors commonly include failure by collectors to verify their ownership of the debt owed, failure to verify the identity of the debtor, improper service of process in filed debt collection lawsuits, and improper garnishment of debtors' wages and bank accounts.³

The Federal Trade Commission (FTC) reported that for New York State, in 2012, debt collection complaints were the most common consumer fraud complaint.⁴ Further, nationally, the Consumer Financial Protection Bureau (CFPB), in its "Annual Report 2012: Fair Debt Collection Practices Act," based on 2011 data reported by the FTC, stated that complaints about all types of debt collectors increased in absolute terms from the year before (from 141,285 to 142,743), although the figures saw a negligible drop as a percentage of total complaints (from 27.23% to 27.16%).⁵ The 2013 report showed a 13.4% decrease in complaints about all types of debt collectors from 2011 to 2012 (from 144,451 to 125,136) and a 3.4% decrease as percent of total complaints.⁶ The FTC also reported that it "continues to receive more complaints about the debt collection industry than any other specific industry."⁷

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 2007.⁸ Also 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.⁹

More recently, the FTC conducted a survey of the "debt buying" industry, culminating in a report issued in January 2013.¹⁰ Debt buyers are companies that make large-scale purchases of

³ *Id.* at 34-35 (testimony of Kirsten E. Keefe, Senior Staff Attorney, Empire Justice Center).

⁴ FTC, Consumer Sentinel Network Data Book for January – December 2012 54 (Feb. 2013), *available at* <http://ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf> (reporting that 10% of all consumer fraud complaints for 2012 concerned debt collection) (last visited May 2, 2013).

⁵ Consumer Financial Protection Bureau, CFPB Annual Report 2012: Fair Debt Collection Practices Act (Mar. 2012), *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf (last visited May 2, 2013). Prior to the establishment of the CFPB, these reports were issued by the FTC from 1977 to 2011.

⁶ Consumer Financial Protection Bureau, CFPB Annual Report 2013: Fair Debt Collection Practices Act 14, 56 (Mar. 2013), *available at* http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf (last visited May 2, 2013).

⁷ *Id.* at 14.

⁸ FTC, Collecting Consumer Debts: The Challenges of Change, (Feb. 2009), *available at* <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf> (last visited May 2, 2013).

⁹ FTC, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010), *available at* <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf> (last visited May 2, 2013).

¹⁰ FTC, The Structure and Practices of the Debt Buying Industry (Jan. 2013), *available at* <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf> (last visited May 2, 2013).

delinquent or charged-off consumer debt from a creditor for pennies on the dollar and then seek to collect the full amounts owed.¹¹ The practices associated with the growth of this industry include suing on debts for which the collector has verified neither the actual debt owed nor the debtor's identity, compounded by significant problems with service of process that lead to improperly obtained judgments and unjustly garnished wages and accounts.¹² As noted in the FTC report, "the most significant change in the debt collection business in recent years has been the advent and growth of debt buying."¹³

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 the New York City Administrative Code to clarify that debt buyers fall under the definition of a debt collection agency and are required to be licensed by the Department of Consumer Affairs.¹⁴ 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.¹⁵

Although many observers, including the sponsors of this bill, acknowledge that most collection agencies do comply with the law, it is clear, however, that the activities of collection agencies generate significant numbers 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.¹⁶ 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 bill are summarized below:

¹¹ FTC, *supra* note 9, at 5.

¹² See Hearing of Effectiveness of the CPD, *supra* note 2, at 34-35 (testimony of Kirsten E. Keefe, Senior Staff Attorney, Empire Justice Center).

¹³ FTC, *supra* note 10, at 1 (internal quotation omitted).

¹⁴ N.Y.C. Administration Code § 20-489.

¹⁵ See *Id.*

¹⁶ The website of the Office of Professions of the New York State Education Department (<http://www.op.nysed.gov/>) notes that that Office alone handles the licensing of 50 professions. There are many other professions, trades and types of businesses that 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, N.Y. Gen. Bus. Law Art. 35-C, junk dealers, N.Y. Gen. Bus. Law Art. 6, and "nail specialty, waxing, natural hair styling, esthetics and cosmetology," N.Y. Gen. Bus. Law Art. 27.

1. Third-party debt collectors, including those who buy and sell consumer debt, and debt collection law firms and debt collection attorneys who regularly 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.¹⁷
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 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 New York State's debt collection law or the federal Fair Debt Collection Practices Act (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 not more than \$500 per attempt to collect a debt in violation of section 604-L(19). 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.

¹⁷ 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 be required to obtain the local license. The state license would be in effect for two years and would be renewable for two-year periods. There is a precedent for dual licensing requirement. For example, both New York City and the state require wholesale cigarette dealers to be licensed. *See* N.Y. Tax § 480(1) (2013); N.Y.C. Admin. Code § 11-1301 (2013). In addition, both the City of Buffalo and the state require tattoo and body piercing establishments to be licensed. *See* N.Y. Pub. Health § 206(19) (2013); Buffalo, N.Y., Code § 6.42(3) (2013).

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 provides for a private right of action for injunctive relief and for actual damages, or \$3,500, whichever is greater, in cases of unlicensed debt collection activity. 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 to successful plaintiffs in these cases.
7. The bill provides that the requirements in the section would govern exclusively the licensing of debt collection agencies throughout the state and both create an exemption for local governments that have already enacted local laws and regulations governing the licensure and registration of debt collection agencies. Exemption provisions cover local government's authority "to enact, implement and enforce any amendments" to such local laws and regulations.
8. 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.455-A/S.219-A, but believe the bill can 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 to prevailing plaintiffs in cases of unlicensed debt collection activity should be mandatory rather than discretionary, as is the case for successful actions brought under the FDCPA.
2. The legislation should provide for a civil private right of action not only for instances of unlicensed debt collection activity but also for instances of illegal debt collection activity by licensed debt collectors. Currently, only the Attorney General and county district attorneys can enforce violations of the New York State Debt Collection Procedures Act.¹⁸
3. 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.

¹⁸ N.Y. Gen. Bus. Law § 602(2).

4. The Committees note that the bill proposes amending CPLR Rule 3015, which mandates plaintiffs required to be licensed to do business to so plead in the complaint.¹⁹ In particular, Rule 3015 require the complaint to allege “that plaintiff was duly licensed *at the time of services rendered.*” Since debt collectors do not render a service *per se* to consumers in the sense that generally applies to licensed entities, the Committees recommend that the rule be further amended to state “that plaintiff was duly licensed *at the time of services rendered or applicable licensed activity conducted.*”

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. Given the very high numbers of consumer complaints, adoption of a statewide licensure requirement for debt collectors is long overdue.

Thomas Cohn
Chair, Committee on Consumer Affairs

Dora Galacatos
Chair, Committee on Civil Court

Updated and Reissued May 2014

¹⁹ N.Y. C.P.L.R. § 3015 (requiring plaintiffs’ complaints to allege, “as part of the cause of action, that plaintiff was duly licensed at the time of services rendered and shall contain the name and number, if any, of such license and the governmental agency which issued such license”).