

**Written Comments of the Committee on Consumer Affairs  
Association of the Bar of the City of New York  
on Debt Collection Practices**

**Assembly Standing Committee on Consumer Affairs and Protection  
Assembly Standing Committee on Judiciary  
(Hearing Date October 24, 2006)**

The Committee on Consumer Affairs of the Association of the Bar of the City of New York is pleased to submit these comments concerning proposals to amend the New York Fair Debt Collections Practices Act (“NYFDCPA”), General Business Law § 600 *et. seq.* Our committee consists of lawyers with a significant interest in consumer issues, including current and former government regulators, private practitioners and members of firms, and representatives from consumer and business organizations.

The Committee on Consumer Affairs supports amending the NYFDCPA to afford consumers with a private right of action against debt collectors who violate the law. The Committee believes that such a right should be permitted under the NYFDCPA. Through an amendment to GBL § 602 to allow a private right of action, New York consumers will have a weapon to protect themselves against unscrupulous debt collection practices, consistent with the rights afforded to them under federal law for violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. seq.*

In 1995, this Committee submitted comments in support of amending the law to permit a private right of action under New York law in light of the Court of Appeals ruling in *Varela v. Investors Insurance Holding Corp.*, 81 N.Y.2d 958 (1993). That decision provided that no private right of action exists under the NYFDCPA. The Committee’s 1995 comments, “Creating A Private Cause of Action Under the New York Fair Debt Collections Practices Act”, 50 *The Record* 335-345, are being resubmitted herewith for your consideration. After those comments were published, the Second Circuit issued its decision in *Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001), concluding that New York’s UDAP statute, N.Y. Gen. Bus. Law § 349, could not be used to create a private claim to enforce § 601. Thus, we believe that it is even more imperative that § 602 be amended to authorize a private cause of action.

We note that while we support the additional right to the award of attorney’s fees to successful plaintiffs who might bring a private action, we also recognize that there should be a balance to discourage unwarranted claims. The Committee notes that the federal Fair Debt Collection Practices Act seeks to strike that balance by providing for both an award of attorney’s fees as determined by the court for a successful plaintiff, and an award of attorney’s fees and costs to a defendant where the court determines that the action was brought in bad faith and for the purpose of harassment. *See* 15 U.S.C. § 1692k(a)(3). As we suggested in our prior Comments on this issue, we would propose that the Assembly strike a similar balance under New York law.

While the Committee remains committed to the principles set forth in its prior Comments with respect to this issue, the Committee recognizes that one modification would be appropriate. We believe that consistent with granting consumers a private right of action, the law should provide for the creation of a safe harbor provision to permit legitimate debt collectors to carry out their tasks consistent with the governing law without unwarranted fear of lawsuits. We note that with respect to federal law, the Federal Trade Commission has specifically requested that Congress amend the Fair Debt Collection Practices Act to permit the agency to create model collection letters, which if adhered to, would form a safe harbor for compliance purposes as to matters covered by the letters. *See* Federal Trade Commission Annual Report 2006: Fair Debt Collection Practices Act at 11 (<http://www.ftc.gov/os/2006/04/P0648042006FDCPARreport.pdf>); Federal Trade Commission Annual Report 2005: Fair Debt Collection Practices Act at 16-17 (<http://www.ftc.gov/reports/fdcpa05/050729fdcpaprpt.pdf>).

For the foregoing reasons, the Committee on Consumer Affairs respectfully recommends that the NYFDCPA be amended to create a private cause of action; that the statute provide for the creation of model collection practices that would amount to a safe harbor for legitimate collection practices; that the statute provide for awards of damages and attorney's fees to successful plaintiffs; and that the statute provide for awards of attorney's fees and costs to defendants who prevail on NYFDCPA claims against plaintiffs who bring such claims in bad faith and for the purpose of harassment.

Respectfully submitted,

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Chair  
Committee on Consumer Affairs  
Association of the Bar of the City of New York