NEW YORK CITY BAR

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

REPORT BY THE
CIVIL COURT AND CONSUMER AFFAIRS COMMITTEES
IN SUPPORT OF INTRO. 0660-2007

The Civil Court and Consumer Affairs Committees of the New York City Bar Association are pleased to submit these comments in support of Int. 0660-2007, which amends the administrative code of the City of New York in relation to buyers of consumer debt. This legislation would clarify that debt buyers, including those entities that refer debts to other agencies for collection and/or litigation, are considered "debt collection agencies" under local law and accordingly must be licensed by the New York City Department of Consumer Affairs (DCA) in order to collect debts from New York City residents.

In 1984, the New York City Council passed a law requiring all debt collection agencies to be licensed by DCA before engaging in debt collection activities against New York City residents. The City Council's intent was to protect New York City residents from debt collection abuse. At that time, most of the abuse emanated from third party agencies, collecting on behalf of original creditors, who engaged in campaigns consisting of harassing letters and phone calls.

In the last twenty years, the debt collection landscape has changed. The industry now includes a growing number of debt buyers – companies that purchase defaulted debts for pennies on the dollar and then seek to collect the full face value of the debts for themselves. While some debt buyers perform their own in-house collections, many outsource the collection work to other entities, and, increasingly, to debt collection law firms. Debt buyers are heavy users of the New York City Civil Court; some of the larger debt buyers file tens of thousands of debt collection lawsuits each year. The New York City Civil Court expects to see at least 300,000 consumer credit filings in 2008 alone, with the majority of filings made by debt buyers.

CPLR 3015(e) requires that if a plaintiff's cause of action arises from the plaintiff's conduct of a business which is required to be licensed by DCA, "the complaint shall allege, as part of the cause of action, that plaintiff is duly licensed and shall contain the name and number, if any, of such license and the governmental agency which issued such license." This provision applies to debt collection agencies. Therefore, if a debt collection agency files a consumer credit lawsuit against a New York City resident, it must allege, as part of its cause of action, that it is licensed by DCA, and it must include the license number in the complaint. If the debt collection agency fails to plead its license status and number, the consumer defendant may move for dismissal of the action. CPLR 3015(e).

In recent years, some debt buyers have argued that they are not "debt collection agencies" and do not have to comply with the licensing requirement because they are "passive," i.e. they engage in no collection activities themselves, but instead hire others to do this work. However,

these unlicensed "passive" debt buyers have been among the worst perpetrators of abusive debt collection practices against New York City residents, disproportionately affecting those who are poor, disabled, or elderly. *See, e.g.*, "Debt Weight: The Consumer Credit Crisis in New York City," Community Development Project, Urban Justice Center, October, 2007.

The proposed legislation would eliminate the self-described "active/passive" distinction and make clear that all debt buyers who are seeking to collect debt from New York City residents, including those who hire a collection agency or law firm to collect on their behalf, are "debt collection agencies," and accordingly must obtain a license from DCA. The Committee supports this legislation for three reasons.

First, the Committee notes that the federal Fair Debt Collection Practices Act ("FDCPA"), on which the New York City statute is based, applies to all debt buyers. For purposes of the FDCPA, a debt buyer is considered a "debt collector" if the debt that it is seeking to collect was in default at the time the debt buyer acquired it. *See Federal Trade Comm'n v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003); *Larsen v. JBC Legal Group, P.C.*, 533 F. Supp. 2d 290 (E.D.N.Y. 2008); 15 U.S.C. § 1692a(6)(F). This is almost always the case when a debt buyer is involved, because debt buyers, by definition, purchase defaulted debt. The committee believes that if a debt buyer is a "debt collector" for purposes of the FDCPA, then it should also be a "debt collection agency" under local law.

Second, the Committee believes that the proposed legislation will lead to increased efficiency in the Civil Court and lessen the burden on overworked court clerks and judges. For example, debt buyers currently allege in their complaints either that they are licensed by the DCA or that they are passive debt buyers and do not require a license. This second allegation raises serious problems with regard to proof. If a *pro se* defendant wishes to raise the lack of a license as a defense, how does the court decide whether a particular debt buyer is "active" or "passive?" Who has the burden of proof, and what kind of evidence should be required? What does the inquest clerk do when presented with a request for a default judgment from a debt buyer that claims to be "passive" and does not include a DCA license number on its complaint? How does the clerk make the determination whether to issue the judgment? The proposed legislation would eliminate these thorny questions by implementing a bright line rule: All debt buyer plaintiffs must obtain a license and plead their license in the complaint as required by CPLR 3015(e). Under this rule, if a *pro se* defendant raises the defense that the debt buyer plaintiff lacks a license, the court can easily adjudicate the matter. Moreover, the non-attorney clerks who review and decide applications for default judgments can apply a clear rule and refuse to issue judgments to entities that have not properly pled their licensure status.

Finally, the Committee believes that a debt buyer that brings a debt collection lawsuit is, by virtue of that act, engaging in debt collection activity that should be subject to licensure and government oversight. It is no secret that some lawsuits brought by debt buyers raise substantial questions as to the validity of the lawsuits and even the underlying debts. Problems such as improper service, the attempt to collect time-barred debts, the filing of suits that cannot be proven, and the seizure of exempt income abound in these cases. *See, e.g.*, "Justice Disserved," Consumer Rights Project, MFY Legal Services, June, 2008; "Debt Weight," *supra*. While these issues can be raised in individual cases, litigants, almost all of whom are *pro se*, and overworked judges should not be the only enforcers of the law. Moreover, when more than 90% of these

cases result in default judgments, it is imperative that some protections be built into the process. Mandatory licensing requirements would make clear that DCA has jurisdiction to conduct investigations and enforce the law against all debt buyers filing cases in the New York City Civil Court to collect consumer debts from New York City residents.

Respectfully submitted,

Janet Ray Kalson
Chair
Civil Court Committee
New York City Bar Association

Robert Martin
Chair
Consumer Affairs Committee
New York City Bar Association

January 21, 2009