



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Benjamin M. Lawsky
Superintendent

October 18, 2013

Hon. A. Gail Prudenti
Chief Administrative Judge of the Courts
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Proposed rules for the use of statewide forms in consumer credit actions seeking award of a default judgment.

Dear Judge Prudenti:

The New York State Department of Financial Services (the "Department") appreciates the opportunity to comment on the proposed court rules requiring the use of standardized affidavits in consumer credit actions seeking default judgments. The Department is deeply engaged in fighting abusive and deceptive debt collection activity in New York. On July 25, 2013, the Department proposed a regulation that would address the most egregious pre-litigation collection abuses. The Department believes that reform of debt collectors' litigation abuses are also critical – and while the Court's proposed rules are a positive first step – we believe bolder reform is necessary. These reforms, as described further below, could include the following:

- Stronger affidavits to stop “robo-signing” and ensure debt collectors actually review a consumer's file
- Require debt collectors to include important information about these debts in the affidavit
- Require debt collectors to include documentation evidencing the debt with the complaint
- Requiring debt collectors to send consumers a pre-complaint notice before commencing a collection lawsuit
- Demanding demonstrable proof of service when a debt collector moves for a default judgment
- Provide consumers an opportunity to vacate a default judgment if a debt collector violates the Court's rules

In 2011, the former New York State Banking and Insurance Departments were merged to create a more modern and efficient regulator, and to fill regulatory gaps that would protect

consumers of financial products and services. The Financial Services Law created the new Department and empowered it with regulatory authority over financial products and services previously unsupervised by the predecessor departments. The Department's first major initiative pursuant to its "gap" authority was the August announcement of a proposed debt collection regulation.

The Department's proposed rules regulate *pre-litigation* collection activities. The principal ideas addressed are:

- Raise the requirements for information that must be provided to a consumer before collection activities can begin. Collectors of a charged off debt will need to provide a breakdown of each charge and fee added to the debt and each payment made after charge off.
- Provide greater protections to consumers when they dispute the validity of the alleged debt. Anytime a consumer disputes the validity of the debt, even on the phone, debt collectors will need to provide documentation proving that the debt is valid, such as a copy of the signed contract or documents evidencing the transaction resulting in the indebtedness, the final account statement, and a statement explaining the "chain-of-title" of the debt.
- Disclose to consumers their rights under the Exempt Income Protection Act so that consumers will know that some sources of income are protected from garnishment.
- If a debt collector tries to collect on a debt after the statute of limitations has expired, the collector will need to inform the alleged debtor of this fact and that this is an affirmative defense in the event of a suit. This is important since many alleged debtors are not represented by counsel and are surprised when collectors unearth very old debts that have gone uncollected for years.
- Provide consumers written confirmation of any debt settlement agreement to ensure that creditors honor any settlement agreements, including those made with debt buyers earlier in the chain-of-title.

While I am confident that this proposed regulation is an important step to rein in unscrupulous debt collectors and ensure safe and fair credit practices in New York, reforming how creditors collect debt in the New York courts is an important next step. We are encouraged to see that the Office of Court Administration is eager to reform debt collection litigation practices in New York. The Department believes, however, that the proposed rules could go much further to address the significant debt collection litigation abuses that have a profound impact on New Yorkers and the state court system.

Studies abound documenting the endemic abuses in debt collection litigation¹. This research and the Department's consumer complaints show that debt collectors often file

¹ Federal Trade Commission, [Collecting Consumer Debts: The Challenges of Change](#) (February 2009); The Legal Aid Society et al., [Debt Deception: How Debt Buyers Abused the Legal System to Prey on Lower-Income New](#)

collection lawsuits with little to no information supporting their claims. This is especially problematic in the rapidly growing debt buying market, where debts are sold off for pennies on the dollar and debt buyers aggressively work to get consumers to pay. To keep costs low, debt buyers typically purchase debts with little if any documentation as to ownership and amount owed. Due to the lack of records, consumers frequently complain that collectors are pursuing the wrong person or for the wrong amount of money. When a collector chooses to pursue litigation, collectors rarely provide, or can even access evidence of the debt beyond a few fields of data on a spreadsheet. Unscrupulous collectors have also been found to engage in “sewer service.” This all explains the collection industry’s litigation strategy, which relies on consumers failing to appear in court or if they do appear, being unrepresented by counsel. Should a consumer contest the action, debt collectors typically opt to drop the case completely. These practices are unacceptable. The Department believes that businesses should have the right to fairly collect their debts, and consumers should pay what they owe, but it is intolerable for professional collection companies to abuse the justice system and use the courts as a tool for collecting unverifiable debts from consumers who never had a fair opportunity to contest them.

The Court’s proposed rules expand statewide current New York City Civil Court requirements for prescribed affidavits when filing for a default judgment in a consumer credit action. A study by the New Economy Project in 2013, reviewed the effect of these requirements, and found that *none* of the sampled default judgment applications complied with the directives, even though default judgments were granted in 97% of these cases². The New Economy Report also found that, among other problems, it was unclear who attested to the facts or who the affiant worked for, and affiants only attested to facts based “on information and belief,” not personal knowledge. The study raises significant concerns, particularly where in 2011, alone, 82,000 default judgments were granted in debt collection cases in New York. Accordingly, the Department respectfully submits that the proposed affidavits should not only require affiants to attest to “personal knowledge” of the plaintiff’s books and records, but should require affiants to specifically have personal knowledge of the alleged debtor’s records. Further, debt collectors should also allege important facts in the proposed affidavits, such as the date of charge off and the date of last payment, which are necessary to evaluate whether the statute of limitations on a debt has run.

Moreover, the Department urges the Office of Court Administration to adopt further reforms to protect consumers and New York’s justice system. Important reforms could include the following:

- Debt collectors should send consumers a pre-complaint notice, informing them of impending collection litigation, as well as disclosure of the consumer’s rights and basic

Yorkers (May 2010); National Consumer Law Center, The Debt Machine: How The Collection Industry Hounds Consumers and Overwhelms Courts (July 2010); Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010); Consumer Financial Protection Board, Fair Debt Collection Practices Act: CFOB Annual Report 2013 (March 2013).

² New Economy Project, The Debt Collection Racket in New York (June 2013).

information identifying the debt. This would provide an opportunity to the alleged debtor to request more information if needed to evaluate options, such as settling or hiring an attorney.

- Courts should require enhanced service standards for these consumer credit cases, where service has historically been poor and consumers have typically been unrepresented. If filing for a default judgment in a debt collection case, plaintiffs should provide demonstrable evidence of service, such as a GPS report or time-stamped pictures.
- Debt collectors should include some documentation evidencing the debt with a complaint, including a final statement sent to the consumer, and, where available, the signed contract or other terms and conditions attached to the debt. Pursuant to the Department's proposed regulation, these documents will be provided to consumers who request verification of a debt. Also, requiring these documents with a complaint is a logical extension of the regulation's pre-litigation requirement that would not add significant burden to creditors.
- Consumers should be provided an adequate opportunity to vacate a default judgment if a debt collector does not comply with the Court's rules.

The Department would welcome further discussion on these suggestions. The Department believes that its proposed regulation of pre-litigation debt collection activities can complement and strengthen the Court's efforts in this important area. Please feel free to contact Executive Deputy Superintendent Joy Feigenbaum at (212) 480-6082 to discuss this further.

Very truly yours,



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cc:

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