

NY Debt Collectors Face Possible Negative Changes in Law

By Marti Lythgoe, National List Editor, and Scott Wortman, Esq., Partner at MSH

When I saw “New York Assembly Passes Debt Collection Bill; Also Lowers Statute of Limitations” on [insideARM](#) 4/25/13, I immediately contacted Scott E Wortman, Esq., Partner at [Mel S. Harris & Associates, LLC](#) (“MSH”) and the author of the NL White Paper on [NY Debt Collection Law](#), and asked for an interview. I knew he wouldn’t be happy about the implications of this bill, and I was sure he would have some very interesting things to say about it. He did! What follows are some of the questions I asked him and his candid, outspoken responses.

What is the main purpose of the bill? (Titled the “Consumer Credit Fairness Act”)

That depends on who you ask. Some consumer advocacy groups would say that the purpose behind the bill is to broadly protect consumers from unscrupulous debt collectors. There is also an assertion by the Bill’s sponsor, Judiciary Committee Chair Assembly Member Helene Weinstein that “This bill... helps to address the long-term impact of economic abuse, including identity theft, which is often suffered by domestic violence victims at the hands of their abusers.”

From my perspective, the bill’s intended focus does nothing to stop only unscrupulous debt collectors, nor does it mention a tangential link between any of the proposed changes to the CPLR (Civil Practice Law and Rules) and victims of domestic violence. As a person who used to work in the social service field, my heart goes out to all victims of both emotional and physical abuse, but there is no nexus between this bill and protecting victims of domestic violence. Rather, the bill relates to (1) the veracity of records when filing a complaint and filing for a judgment on default; and (2) improved notice of litigation for consumers. However, the Bill fails to address these issues in a reasonable manner. Instead, it effectively eliminates any collection of receivables. It does this by creating impractical standards and regulations that cannot be overcome by simply amending internal policies and procedures. More importantly, reading this bill from the standpoint of a consumer, it paradoxically impairs those consumers the Act purports to assist by making it impossible for them to improve their credit rating and qualify for loans.

How will the Bill “significantly restrict the use of the legal collection channel”?

Some of the more troubling ways the Bill restricts the use of legal collection channels are as follows:

- *The imposition of an absolute, unassailable, evidentiary qualifier prior to moving forward with a lawsuit and at time of possible default by defendant.* This includes, but is not limited to, a contemporaneous, account-level affidavit from the original creditor of all the facts constituting the debt, even though the account has been charged off and subsequently sold by the original creditor. The purchaser of the receivable can’t sign it, and they can’t go back to the original creditor for present-day information that wouldn’t be in the original creditor’s possession. They can’t go back and they can’t go forward. This provision alone completely eliminates the possibility of any debt purchaser ever meeting the criteria for entering a default judgment in the State of NY.
- *Compelling the debt buyer to itemize principal versus interest and other charges made by the original creditor.* By definition, the principal is representative of all the charges, payments and interest from the last time the account had a zero sum balance, or when it is legally and statutorily charged off from the original creditor. The vast majority of these accounts involve revolving credit, on which interest is always accruing on different amounts at different points in time. This bill does not take into account that there are numerous federal regulations governing the rules of charging off debt and that a purchaser of a distressed receivable can rely on the records provided by the original creditor without the successor having to recreate, redo and re-formulate every single transaction from date of opening to charge off.
- *Requiring hard copy contracts and written instruments that never existed* in order to simply commence litigation, irrespective of all federal law to the contrary. The vast majority of these contracts and instruments are produced electronically.
- *Singling out this industry to allow for the preservation of jurisdictional defenses by a consumer defendant in perpetuity*, which means that a Process Server would have to be available to testify

at every trial, notwithstanding whether the defendant previously raised the defense of lack of personal jurisdiction.

What will be the effect of cutting the statute of limitations from 6 to 3 years?

- This bill eliminates the right to collect voluntary payments beyond the statute of limitations, even though this right is expressly recognized by the Federal Trade Commission. New Yorkers would be left with no way to repair their credit history in the time period between the expiration of the statute of limitation (historically used solely for litigation purposes) and the 7 ½ year reporting period on credit reports as prescribed by the Fair Credit Reporting Act.
- This portion of the bill will have the unintended consequence of extinguishing the rights of consumers who want to improve their credit, while severely limiting the availability of credit to those who most depend upon it. By cutting the statute in half, rather than creditors attempting to work with consumers in financial distress, the bank or creditor will be forced to file suit probably two years into the process, in order to obtain judgments that have a 20-year limitation period. Parties should be allowed to work it out and not forced to move to the court system so quickly.

Do you agree with Speaker Sheldon Silver, who said, “There is an epidemic of unfair debt collection lawsuits in New York State....This bill would institute several measures to address these abusive debt collection practices and combat this menace”? Why or why not?

I agree with the Speaker that unscrupulous and unethical debt collectors have no place in this industry. It is commendable that New York is attempting to address this issue. However, the alleged collection epidemic is actually a fiction, and the method and manner in which the Bill attempts to address this and other issues go well beyond the stated purposes of this Act. As someone specializing in creditors' rights defense litigation, I can unequivocally state that the vast majority of lawsuits our clients are forced to defend against are either based on contrived attempts at leveraging various statutory fee-shifting provisions, or on alleged technical violations of the law, not on claims of harassment and abuse. Unfortunately, this Bill treats all debt collectors in a monolithic and punitive manner, not just the very few bad apples.

What are your firm and other debt collectors in NY doing to prevent this bill from being passed by the Senate and signed into law by the Governor?

Mel S. Harris and Associates, LLC and various other firms and attorney groups have taken a proactive approach. New York attorneys, agencies and various trade groups (DBA, ACA, etc.) are attempting to work with elected officials and state leaders to better inform and educate them about our industry, thereby mitigating the myths and distortions that abound. We will continue to work with our Representatives and are confident that a common understanding can be obtained.

What are the chances of it being signed into law?

I am far from a political expert, and I can't prognosticate as to the outcome of this bill. There are so many variables at play, many of which are behind the scenes and out of my view. However, it should be noted that some form of this bill has been sponsored every year since 2009 and has even previously passed through the assembly only to be defeated in the Senate. This year, due to the makeup of the Senate we are more concerned, but we are hopeful that reasonableness and fairness will once again prevail.

What advice would you give to help prevent passage of a similar bill in another state?

My advice is to definitely make your trade groups aware of any adverse potential legislation, and to also take your own initiative and form appropriate synergetic collaborations with your peers and others in the industry or related industries. Also, don't be shy about standing up for this vital industry, and don't assume that your elected officials are necessarily antagonistic to the industry, simply because they may be under-informed. Talk person-to-person with your representatives. There's always common ground.

Most importantly, speak up and be proud to be a member of this essential industry that serves as a primary foundation for economic freedom and liberty and is fundamental to continued economic stability.