



# Consumer Debt, Debt Collection, and Utility Law in NYS in 2020

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## “Consumer Debt”

- “Consumer Credit Transaction” i.e. credit is extended by a private individual or company to an individual or family for primarily personal, familial, or household uses
- Credit can be a monetary loan, or property, or a service, for which payment not yet made
- Out of such a transaction arises “Consumer Debt”



# Examples of Consumer Debt

## Consumer Debt

- Auto Loan
- Personal Credit Card
- Rent
- Appliance/Furniture Installments
- Contractors Services in Home

## Not Consumer Debt

- Small Business Transactions
- Child Support
- Court Fines or Restitution
- Federal Student Loans



# Truth in Lending Act (TILA)

Truth in Lending Act (TILA) is Federal Law that covers consumer transactions that will be paid in four or more installments and where there will be some sort of finance charges or interest:

- Lenders must clearly set out what the full cost of the loan or contract will be including interest rate, APR, finance charges, fees, and length of loan, among other terms
- Claim or Counterclaim possible in action to recover debt, fees, rescission of contract, damages, even criminal liability possible



## Cooling Off Rules

These are the exceptions not the rule, generally in New York, the contract is enforceable once signed.

- NYS law allows rescission for up to 72 hours after contracts made for dating services, health clubs/gyms, home improvement contracts, or via door-to-door sales, etc.
- FTC allows rescission up to 72 hours after sales made at consumer's home or at place other than seller's usual place of business
- TILA has provisions allowing rescission up to 72 hours after agreeing to any loan incl. Second mortgage where one's home is the security



# Fair Debt Collections Practices Act

(FDCPA)

- Protects Consumers from Debt Collectors, not Original Creditors
  - Can include original creditors agents
- Restrains those who regularly collects consumer debts for another
- Prohibits unreasonable and misleading attempts at debt collection
- Violations of the FDCPA can be their own claim or can be counterclaims in debt collection actions in Court



# The FDCPA Obligations of a Debt Collector

- Must identify who they are and where they are contacting from
- Must inform debtor at first contact they are attempting to collect a debt and will use any information the debtor provides them
- Inform consumer in writing they have 30 days to request validation of the debt
  - Itemized accounting of the debt
- Advise consumer of prohibited collection practices under the FDCPA



## FDCPA Prohibited Debt Collection Activities

- May not call between 8am and 9pm
- May not inform consumers family or friends that the debt is owed
  - May contact them for contact info however
- Use any profane, demeaning, harassing language
- May not call place of work if advised not to
- May not make any misrepresentations
- May not charge fees not allowable by the contract or law





## Consumers Rights under the FDCPA

- Consumer can write a letter stating they do not wish to be contacted any further as:
  - They do not feel the debt is theirs; or
  - They are judgment proof; or
  - They do not wish to be contacted about it until/unless the debt is validated
- If so informed, the Debtor must cease further attempts to collect w/o legal action
- The FDCPA provides for actual, statutory, and punitive damages for each and every violation as well as attorneys fees
  - One year statute of limitations
- Telephone Consumer Protection Act (TCPA) also provides for significant damages for harassing, automated, or unwanted calls



## Other NYS Consumer Protection Laws

### General Business Law § 349-350

- Prohibits false advertising and other deceptive sales and advertising practices
- Provides claims and counterclaims, specific penalties, additional penalties for misuse of authority or for taking advantage of vulnerable

### Penal Law art. 190

- While there may be comparable civil remedies as well, criminal action is available
- False Advertising, Violations of the Truth in Lending Act, Impersonation of Another, Interest of >25%, Fake Court/Financial Papers, Schemes to Defraud, Identity Theft



# Repossession

Common Collection Method for  
Secured Debt

- Typically things purchased via installment contract remain owned by the creditor until fully paid for
  - Automobiles, Furniture, Electronics
- If consumer defaults, the creditor can take the item back without notice and without going to Court



# Repossession

- Consumer still has rights to notice after repo, before auction, statement of proceeds
- Repossession may not be affected by a breach of the peace aka any otherwise illegal actions
- Consumer may still obtain property by full payment of balance and amount from repo
- After the auction or sale, proceeds go to costs of repo and storage, then the balance owed, creditor can still seek any deficiency



## Consumer Credit Court Cases

- Brought by the Original Creditors or Debt Owner who purchased debt to obtain a judgment
- Brought where a debt is secured by insufficient, or difficult to recover collateral, or where the debt is unsecured entirely



# Forum

The rights of the respondent will depend on where the suit is brought, the jurisdictional requirements will as well and territorial jurisdiction is usually waived as a defense if not asserted:

- Town or Village Small Claims Courts

“Substantial Justice”

- City Courts

- Small Claims Part
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- Civil Part

- County Court

Civil Procedure Rules, Rules of Evidence

- Supreme Court



# Initial Service

Outside of the Small Claims Forums, the action can begin by either:

- Summons with Notice
- Summons and Complaint

Either *must* specify the nature of the action and the basis of the relief sought, and the full amount of money including all fees that could be taken in a default.



# Respondent *Must* Respond

## Settle:

- Repayment schedule that works for consumer
- Negotiate how debt reported, if at all
- Creditor may prefer lump sum now versus the right on paper to collect more later

## Answer:

- 20 days to answer if served in person, 30 otherwise
- Can raise any and all defenses, claims, counterclaims

## Move to Dismiss:

- CPLR 3211 applies here as in any other case
- Typical causes for motion to dismiss include lack of appropriate notice, service, jurisdiction, etc.
- Buys client time even if not dismissed, consumer has 10 days to answer after denial





## Burden of Proof

The Plaintiff *always* bears the burden of proving in a consumer debt case:

- There was a contract creating such a debt
- They specifically own the debt and have standing to sue
- Respondent is a person obliged to pay the debt
- Respondent owes the *exact* amount of money that is claimed owed



## Defenses or Causes for Dismissal

If no enforceable underlying contract, there may be no collectable debt:

- Fraud
- Duress
- Illegality
- Incapacity
- Statute of Frauds
- Illusory Promise



## Defenses or Causes for Dismissal

General contractual defenses:

- Unjust Enrichment
- Duty of Good Faith and Fair Dealing
- Unconscionability
- Laches
- Bankruptcy



## Defenses or Causes for Dismissal

General defenses against a case:

- Territorial Jurisdiction
- Improper Service
- Res Judicata
- Mistaken/Stolen Identity
- Debt Fully/Partially Paid
- Authorized User of Credit Card



# Defenses or Causes for Dismissal

## Statute of Limitations

- Typically 6 years in NYS for debts
- Store credit cards have a 4 year SoL
- Starts running when first payment that was missed comes due
- SoL can be reset even past the six years if the debtor pays anything
- Party raising SoL has burden of proof
- SoL could be lower if creditor is out of state and/or contract governed by law of another state even if current debt holder in NYS



## Defenses or Causes for Dismissal

Collateral not sold at Commercially Reasonable Price &  
Failure to Mitigate Damages

- Where the collateral is seized and auctioned/sold but a deficiency remains the creditor can still bring an action for the remainder, must have been sold at a commercially reasonable price
- Creditor also has a Duty to Mitigate Damages, i.e. if Creditor waits months or years to auction collateral as it depreciates in value, the full deficiency should not be awarded as the Creditor Failed to Mitigate Damages



# Defenses or Causes for Dismissal

## No Business Relationship with the Plaintiff

- Where the plaintiff is not the original creditor, the Plaintiff must prove they are the lawful owners of the debt by assignment, and by pleading this defense, the Respondent requires them to prove that
- Plaintiff must prove *specific, itemized, precise* chain of title, so proving each and every assignment back to the original contract



# Defenses or Causes for Dismissal

## Out of State Plaintiff

- Corporate debt buyers or original creditors need to be registered with the NYS DOS in order to do business in New York.
- Debt collection is a form of doing business, and failure to register a foreign LLC or other corporate entity to do business in NY precludes them from maintaining any suit in NYS Courts.





# Judgments

- Enforceable for 20 years, accrue 9% annual statutory interest
- Court must enter the Judgment and Creditor serve a notice of entry on the debtor in order to begin enforcement of said debt
- Not all judgments will be field in County Clerk's Office, but usually required if to be enforced against real property, other personal property, or the debtor's income

  


# Post-Judgment

## Information Subpoenas

- Post-judgment interrogatories ordered by court clerk commanding debtors or third parties who may have knowledge of debtors income or assets to answer questions that will assist the enforcement of the judgment
- Must be quickly returned to Court, failure to answer or answer to best of ability can be punishable as contempt with fines or even jail time



# Post-Judgment

## Enforcement

- **Property Executions/Orders of Attachment:** Sheriff can seize bank accounts, or personal or real property and conduct an auction or sale
- **Garnishments:** An amount from a stream of income may be redirected to satisfy a judgment



## Garnishment Protections

- Sheriff is to first serve the debtor and give them an opportunity to come up with a reasonable repayment plan to avoid service upon their employer or other interested parties and garnishment
- If no repayment plan the Sheriff will serve the debtor's employee and/or financial institution and require a certain amount calculated by the Sheriffs be forwarded to them



# Garnishment Protections

Consumer Credit Protection Act (CCPA) protects by limiting amount of wages/income that can be garnished for consumer debts:

- If debtors disposable income is at or below 30hrs a week at local min. wage\* all income is exempt
- If higher: Judgement holders can garnish up to 10% of gross or 25% of disposable income per week, whichever is lesser, may not reduce the debtor below 30hrs a wk as disposable income

\*Minimum wage differs throughout the state: 450 a week in NYC, 390 in Westchester, 375 elsewhere upstate



## “Judgment Proof”

Under federal and state law many types of income and property are wholly exempt from debt collection for consumer debts:

- Public Benefits including those from SSA, VA, Workers Comp, Unemployment, etc.
- Spousal Support or Child Support
- Retirement Income from Retirement Accounts, Pension Income
  - 90% of income from a private trust, other 10% could be garnished



## “Judgment Proof”

Earned income has various levels of protection:

- If individual receives Public Asst. or SSI, all earned income protected
- As mentioned, weekly income equal to 30 hrs a week at minimum wage is always protected
- If person earns more than that amount, the greater of 90% of gross or 75% of disposable income is exempt from debt collection if earned w/in last 60 days
- Tax Returns are *not* Exempt Income



# “Judgment Proof”

## New York’s Exempt Income Protection Act (EIPA)

- Protects bank accounts with up to 240x the minimum wage in area where account contains no public benefit derived income in last 45 days (190x if public benefit income present)
  - \$13.00 an hour in Westchester = \$3,120 *but* if public benefits: \$2,470
  - \$11.80 an hour elsewhere in LSHV service area = \$2,832 *but* if public benefits: \$2,242
- EIPA requires financial institutions to examine account for protected funds and to take steps to protect their account holders





# “Judgment Proof”

## Tangible Things

Some types of tangible property are always exempt from debt collection:

- Household goods like furniture, clothing, appliances
- Medical Equipment
- One TV, radio, computer, and cell phone
- Jewelry and art worth up to \$1,000
- Employment related “tools of the trade” worth up to \$3,000



# “Judgment Proof”

## Automobiles

- Automobiles may be seized to enforce a judgment only where the equity the debtor has in the car is greater than \$4,000
- If specialised vehicle for the disabled, may only be seized where equity exceeds \$10,000



# Vacating a Judgment

As in other contexts, a judgment can be set aside via OTSC for:

Excusable Default:

- Requires both a reason for non-appearance in Court, and a meritorious defense
- Respondent has one year to vacate a judgment from date served judgment

Lack of Jurisdiction:

- No time limit for seeking to vacate based on lack of jurisdiction, but can be held to have waived by ratification
- Burden on party asserting bad service



## Vacating a Judgment

- Having the judgment vacated only resets the case, not dispositive
- Once vacated, consumer must answer, move to dismiss, or settle



# Utility Law

Protections for Utility and other  
Essential Service Consumers

- Generally the more necessary the utility or service, and the less choice the consumer has in choosing their provider, the greater the consumer protections.



# Utility Disputes Generally

- Complaints should be made first to the company preferably in writing, company must respond in writing, and consumer may further make complaint then to higher authorities
- “Higher Authority” will vary:
  - NYS Public Service Commission (PSC) oversees electric, natural gas, and landline telephones
  - AG’s office takes complaints regarding cell phones, satellite TV, internet, and home delivered heating fuel
  - FCC oversees TV, Telephone, Radio (incl. WISPs)



# Electricity and Natural Gas

- Highest regulation by the state via the PSC
- Required to offer Budget Billing
- Must offer and affirmatively seek to make Deferred Payment Agreements
- Specific notice and shut off time periods, extra notice to tenants when landlord responsible for utilities
- HEAP/Public Assistance
  - Regular year over, but emergency HEAP available for those who need it
  - Cooling HEAP available now

## COVID-Specific Relief:

- Utilities “agreed” by Cuomo’s urging to suspend residential shut-offs for duration
- Some scheduled rate hikes were delayed
- Most utilities have stopped sending out meter readers, bills are being estimated



# Landline Telephone

- NYT Telephone Fair Practices Act (TFPA) protects residential customers access to basic phone service except for the most delinquent accounts after efforts to work with consumer
- Where some fees or bills not paid, suspension of some or all non-local services can occur only after proper notice
- Termination can only occur where all fees and charges unpaid after notice
- Company required in both instances to attempt to make a DPA





# Water

- PSC regulates only private water utilities, of which there are very few, for those companies, timely notice of proposed termination, attempts to make DPA, added notice for renters apply
- Most water/sewer is via municipalities, with more rural residents primarily using personal or private well systems, in such areas personal septic systems most common
- Courts are often the only forum for disputing issues if working with the company itself is fruitless



## Cable/Cable Internet Providers

- The PSC has *some* limited authority over these providers
- Companies must notify subscribers of billing practices and payment requirements, and changes as they are made to policies over time
- Companies must allow at least 30 days for a subscriber to dispute charges or service problems with company, and if not adequately addressed may appeal to the PSC
- Tenants have a right to cable services whether the landlord objects or would prefer a satellite dish
- Still some more limited notice and time requirements for disconnection of services



## Cell Phone Services

- Exclusively regulated by the FCC
- FCC has implemented very few regulations, but there is an industry code of conduct similar to the regs on cable providers
- Cell phone contracts are basic consumer contracts and should be treated accordingly, with Courts, Consumer Affairs, or the AG's office involved in any major disputes

### Lifeline Program a.k.a "Obamaphone"

- Monthly cell phone subsidy to the company for offering affordable plans that meet certain service criteria to those <135% poverty
- FCC waived recertification for those on program and has halted disenrolling current participants



**Thank You.**

**Questions?**

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