

Memorandum in Opposition BUSINESS LAW SECTION

BLS #4

March 9, 2020

S. 7508-A; PART LL
A. 9508-A; PART LL

By: BUDGET
By: BUDGET
Senate Committee: Finance
Assembly Committee: Ways and Means

AN ACT to amend the Banking Law, in relation to consumer debt collectors.

LAW & SECTION REFERRED TO: New Article 7 of the Banking Law.

THE BUSINESS LAW SECTION OPPOSES THIS LEGISLATION

The Section strongly opposes the passage and enactment of this legislation to the extent that it does not exempt attorneys not employed by a debt collector.

The bill would require the licensing of “consumer debt collectors,” which is defined in relevant part as “any person who engages in a business, a principal purpose of which is the collection of consumer debts or of debt buying, or who regularly collects or attempts to collect, directly or indirectly, consumer debts owed or due to another person.”

Although the initial part of the definition refers to a business “a principal purpose of which” is consumer debt collection, that is not a necessary part of the definition. Rather, consumer debt collectors also include “any person...who regularly collects or attempts to collect” consumer debts. “Consumer debt” is defined in relevant part as a natural person’s debt arising from a transaction “primarily for personal, family, or household purposes.” Thus, for example, any law firm whose clients may include a landlord of residential property and which collects rent arrears several times a year might be deemed a consumer debt collector. It would be appropriate, however, not to exempt a lawyer who is individually employed by a business (other than a law firm) that is a consumer debt collector, as for example if a real estate management company employs an attorney on its staff.

Lawyers are licensed by the Appellate Division of the Supreme Court and subject to extensive rules regarding ethical and legal obligations that balance many interests and concerns of confidentiality and professional responsibility unique to the profession of law. Law firms must be owned exclusively by attorneys. It is inappropriate for the Department of Financial Services to be given licensing, regulatory, and examination authority over law firms functioning as law firms or attorneys practicing law individually.

This separation between (a) licensing by the courts and (b) licensing and examination authority of the Superintendent of Financial Services, is especially significant when it comes to the protection of the attorney-client privilege. Under no circumstances do we believe it appropriate for a government agency to have the authority to review and examine law firm communications with its own clients. Lawyers have a special professional position in our society in which they act as advocates for clients, and they have express duties to those clients. Their behavior is governed by the court-approved Rules of Professional Conduct and they are subject to discipline by the applicable grievance committee, and by the Appellate Division, for violating those rules or committing other offenses. It is inappropriate to create a separate set of rules governing their conduct in a narrow field. Conflicts between competing interests are inevitable, and clients may be unable to obtain competent representation if their own lawyer is subject to additional third party licensing, examination, and regulation.

Existing regulations of the Department of Financial Services regarding debt collectors include a definition similar to the bill's definition (see 23 NYCRR Part 1), but also contain specific provisions and exclusions as to the application of the regulations to attorneys. The bill, however, lacks such provisions, which is all the more troublesome in light of the greater potential reach of the bill and hence the greater potential threat to the attorney-client relationship.

There are additional weaknesses in the proposed new article of the Banking Law, including the use of specialized terms that are not defined (e.g., "loan buyer") and the insistence that New York courts should be closed to out-of-state litigants when it comes to confessions of judgment without adequate consideration of either the loss of revenue that would be suffered by the court system or the importance of establishing New York as a center of the legal world.

For the foregoing reasons, the Business Law Section **OPPOSES** this legislation and respectfully recommends its defeat unless it is amended to exempt lawyers and law firms from the definition of consumer debt collector, other than lawyers employed by businesses that are not law firms and that would otherwise be subject to the definition.