NYLAG
New York Legal Assistance Group

Sent via electronic mail

June 5, 2023

Hon. Joseph Zayas
Chief Administrative Judge
New York State Unified Court System
25 Beaver Street, Room 852
New York, NY 10004

Dear Judge Zayas:

We write from the New York Legal Assistance Group, Legal Services of the Hudson Valley, Legal Services NYC, The Legal Aid Society, and Mobilization for Justice. Our organizations each serve thousands of New Yorkers with low incomes by providing critical free legal services. We congratulate Your Honor on your appointment, and look forward to working cooperatively with you to protect the rights of our clients, who include thousands of tenants and borrowers with low incomes across the state. We know that you are committed to the Court system properly serving these litigants and others by ensuring that the laws are fairly and justly administered. We write to inform you about and request your assistance with a matter of urgent concern for our organizations and our clients: ensuring that all New York consumer debt judgments subject to last year's new 2% post-judgment interest rate are entered fairly and correctly. We raised this compliance issue with the prior Office of Court Administration (OCA) leadership, but, unfortunately, were unable to resolve our concerns. We look forward now to collaborating with you in your new role, and respectfully request the opportunity to discuss this issue with you further.

By way of background, as of April 30, 2022, when the Fair Consumer Judgment Interest Act's amendment to N.Y. C.P.L.R. § 5004 went into effect, "the annual rate of interest to be paid in an action arising out of a consumer debt where a natural person is a defendant shall be two per centum per annum." N.Y. C.P.L.R. § 5004(a). The statute mandates that the new interest rate be applied to all "consumer debt(s)," which includes "*any* obligation . . . arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes. . . ." N.Y. C.P.L.R. § 5004(b) (emphasis added). As we are sure you can appreciate, the legislature enacted this amendment to prevent New Yorkers like our clients, many of whom "are already unable to pay their bills, including rent [and] medical bills" and other necessities, from "long-lasting economic effects" of high interest rate judgments.[1]

[1] Sponsor Memo, S.5724A, 2021-2022 Sess. (N.Y. 2021), *available at* https://www.nysenate.gov/legislation/bills/2021/S5724.

Unfortunately, we have seen a consistent practice of New York courts issuing judgments that improperly reflect the now unlawful 9% interest rate, rather than the 2% rate. Clerks' offices routinely accept applications for default judgments and renewal judgments improperly seeking the 9% rate, even though such applications should be rejected. Judges regularly issue, and clerks enter, judgments incorrectly reflecting the 9% rate with no apparent consideration of the new statute and no meaningful opportunity for litigants, many of whom are *pro se*, to contest the rate. Many of us, as well as other advocates, have raised this issue to judges, clerks, and court administrators in multiple New York Courts, but these practices continue. In February, we wrote to the prior OCA leadership to request that OCA address this critically important issue (see attached letter dated February 9, 2023).

On April 11, 2023, we received the attached response on behalf of prior OCA leadership. We were glad to hear that the Court System has circulated notice and provided training to judges and non-judicial employees on the amendments to C.P.L.R. § 5004. However, we have concerns about the efficacy of the guidance, given persistent misapplication of the law. More importantly, as detailed below, we strongly disagree with the legal position expressed in the letter that the scope of the term "consumer debt" in § 5004 is not "definitive[]"—with its implication that judgments entered against tenants for rental arrears, against student loan borrowers, and against patients with medical debt, for example, may remain subject to the 9% rate. Finally, we have questions, as a practical matter, regarding the position that "[i]t is only when a judge determines that a matter does not qualify as a consumer debt" that the judgment form generated by OCA provides a 9% interest rate; in our experience, judges do not make (and have no opportunity to make) such a determination with respect to the vast majority of judgments.

Judgments Against Tenants Who Owe Rent Arrears and Consumers with Personal Debts are Unequivocally Covered by C.P.L.R. § 5004(b).

The position taken by prior OCA leadership that a judge must interpret whether a matter qualifies as a consumer debt is not correct. The text and legislative history of § 5004(b), as well as legal precedent, make clear that money judgments arising from residential rental arrears are straightforwardly "consumer debt," and thus subject to a 2% interest rate. So are many entire categories of personal consumer debts, including but not limited to: (1) medical debt; (2) student loans; (3) tuition debt; and (4) residential utility debt. These judgments all fall within the plain language of the statute, which defines "consumer debt" as "any obligation or alleged obligation of any natural person to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes. . . ." The language allows for no reasonable interpretation other than that the "person" in the statute must include a tenant, patient, or student; the "transaction" must include a lease, medical treatment, education, or utility service; and the "personal use" must include residing in a property or securing medical services or education for oneself.

This plain language interpretation is bolstered by decades of unambiguous caselaw interpreting identical language in the federal Fair Debt Collection Practices Act (FDCPA)

to cover these exact same categories.[2] It was crystal clear that the legislature intended the bill's language to be interpreted consistent with its identical counterpart in the FDCPA. As one co-sponsor explained, the amendment to § 5004 was drafted so that "[c]onsumer debt, as defined in [the] . . . bill . . . follows the Federal Fair Debt Collection Practices Act."[3] Accordingly, as the New York Attorney General's Office has explained, § 5004's "definition of 'consumer debt' tracks that term's settled meaning under the identical definition in the Fair Debt Collection Practices Act.'" [4]

That "settled meaning" is unambiguous: the Second Circuit has "conclude[d] that back rent is a debt" under the Fair Debt Collection Practices Act, reasoning that "[b]ack rent by its nature is an obligation that arises only from the tenant's failure to pay the amounts due under the contractual lease transaction" and that "the duty to pay back rent . . . [arises] because the payor breached its payment obligations in the contract between the parties."[5] Likewise, medical debt, student loans, tuition debt, and residential utility debt are within the settled meaning of "debt" under the Fair Debt Collection Practices Act.[6] Critically, § 5004

---

[2] The definitions are word-for-word identical, except that § 5004 uses the general term "natural person" rather than the more specific term "consumer." The definition of "debt" in the Fair Debt Collection Practices Act, 15 U.S.C. 1692a(5), is:

"any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."

CPLR 5004(b)'s definition of "consumer debt" is:

"any obligation or alleged obligation of any natural person to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment."

[3] Statement of Assembly Member Helene E. Weinstein in the N.Y. State Assembly Debate on Assembly Bill A6474-A, 244th Sess. (June 10, 2021) 369, *available at* https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_c35758e06597384522732f96cc4ce4e6.pdf&view=1.

[4] Mem. of Law of Def. Letitia James in Supp. of her Mot. to Dismiss, *Greater Chautauqua Federal Credit Union, et al., v. Marks et al.*, 22 Civ. 2753 (S.D.N.Y.) (June 13, 2022) (S.D.N.Y.) 2022 WL 18110780 at fn.4.

[5] *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 115 (2d Cir. 1998); *see also Rani v. Drobenare*, No. 19 Civ. 5186, 2020 WL 6370249, at *5 (E.D.N.Y. Aug. 19, 2020), ("[C]ourts in this Circuit have concluded that [the FDCPA's] definition includes overdue rent for residential premises."), R. & R. adopted, 2020 WL 5417555 (E.D.N.Y. Sept. 9, 2020); *Capogrosso v. Troyetsky*, No. 14 Civ. 00381, 2015 WL 4393330, at *3 (S.D.N.Y. July 17, 2015) ("Rent in arrears is a form of debt."); *Finch v. Slochowsky & Slochowsky, LLP*, No. 19 Civ. 6273, 2020 WL 5848616, at *1 (E.D.N.Y. Sept. 30, 2020) (allowing FDCPA claim based on rental arrears to proceed); *DiMatteo v. Sweeney, Gallo, Reich & Bolz, L.L.P.*, 619 F. App'x 7, 11 (2d Cir. 2015) (similar); *Sanchez v. Ehrlich*, No. 16 Civ. 8677, 2018 WL 2084147, at *1 (S.D.N.Y. Mar. 29, 2018) (similar).

[6] *See, e.g.*, Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,102 (explaining that "debt" "includes: [o]verdue obligations such as medical bills that were originally payable in full within a certain time period (e.g., 30 days)" and "[a] student loan, because the consumer is purchasing 'services' (education) for personal use."); CFPB Issues Bulletin to Prevent Unlawful Medical Debt Collection and Credit Reporting, CFPB (Jan. 13, 2022) (noting that medical bills are covered by the Act); *Kravitz v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrera & Wold, LLP*, 14 Civ. 7031, at *9 (E.D.N.Y. Apr. 3, 2019) ("[T]he Second Circuit has established that debt

defines "consumer debt" as "including, *but not limited to*, a consumer credit transaction, as defined [in C.P.L.R. 105(f)]." (Emphasis added). In other words, the statute expressly commands that not only "consumer credit transactions (like credit cards and car loans) are "consumer debts" subject to the 2% interest rate, *but also* categories of debt *other than* "consumer credit transactions."

There is No Legal Or Practical Basis for Entering Judgments with Unlawful Interest Rates

We also take issue with the suggestion in the prior OCA leadership's letter that court administrators cannot ensure compliance with § 5004(b) because they cannot "direct independently elected and appointed judges" to assign judgments a particular interest rate. This position provides neither a legal nor a practical justification for permitting courts to regularly enter judgments that contravene the law to the detriment of New Yorkers.

As a legal matter, given the statute's clear plain language, its legislative history, and the large volume of caselaw, there is no ambiguity on the scope of "consumer debt" as applied to tenant and borrower defendants and thus no room for judicial discretion. Indeed, in certain court parts, *every single case* is inherently a consumer debt case. For example, every case heard in the non-commercial parts of New York City Housing Court stems from rental arrears arising out of a residential landlord-tenant relationship, and is thus a "consumer debt" within the meaning of the statute; the same is true for residential "L&T"-indexed cases heard in the housing parts of courts outside of New York City, including many Justice Courts, and the consumer credit part of New York City Civil Court. The Court's letter appears to agree with the general principle that judges cannot exercise their discretion to contravene "controlling" authority, and that OCA's role is to "notify judges and non-judicial employees" of such authority. The time to do so is now.

As a practical matter, in our experience, post-judgment interest rates are not, in fact, being ordered under circumstances that involve the exercise of judicial discretion. On the contrary, whether a proposed judgment is initially prepared by litigants or judges, all judgments are entered by clerk's offices, and the responsibility of clerk's offices is to implement the instructions provided to them by court administrators. Pursuant to CPLR § 3215(a), default judgments for sums certain, for example, go directly to clerks and are virtually always rubber-stamped. Default provisions on stipulations of settlement are "so-ordered" by judges without any inquiry into, or considered review of, post-judgment interest rates, even when the consumer or tenant is appearing *pro se*. Even contested judgments are, in our experience, not subject to any judicial fact-finding about the nature of the underlying debt and whether it meets § 5004(b)'s criteria for 2% interest. And even these judgments must be subsequently entered by the clerks. Given this, we urge OCA to direct both judicial and non-judicial employees to comply with § 5004 to ensure that tenants and borrowers obtain the protections to which they are entitled to by law.

***

collection activities related to a nursing facility balance constitutes a 'debt' under the FDCPA.") (citing *Eades v. Kennedy, PC Law Offices*, 799 F.3d 161 (2d Cir. 2015)).

In light of the clear intent of the legislature and the statute's unambiguous wording, we do not believe that prior OCA leadership's suggestion to go back to the legislature to make clarifying amendments is necessary. Instead, we look forward to collaborating with you in your new role to ensure that the rights of tenants, borrowers, patients, and other consumers are protected. We respectfully request the opportunity to discuss this issue with you at your convenience.

Sincerely,

Shanna Tallarico
Danielle Tarantolo
Jonathan Fox
New York Legal Assistance Group

Marcie Kobak
Legal Services of the Hudson Valley

Mary McCune
Legal Services NYC

Tashi Lhewa
The Legal Aid Society

Carolyn Coffey
Mobilization for Justice

cc:
Anthony Perri
Acting Counsel

Jessica M. Cherry
Deputy Counsel: Civil and Legislative Matters