Consumer Finance Monitor (Season 3, Episode 31): New York City's Department of Consumer Affairs Adopts New Language Proficiency Requirements for Debt Collections: What You Need to Know

Speakers: Chris Willis and Stefanie Jackman

Chris Willis:

Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm your host today, Chris Willis, the practice group leader of Ballard Spahr's consumer financial services litigation group. And I'll be moderating today's program. For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those of us in the industry. So, to subscribe to our blog or get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, let us know. Leave us a review on Apple Podcasts, Google Play, or wherever you get your podcasts. Today. I'm joined by my partner, Stefanie Jackman, who's in the Atlanta office with me when we're actually both in the office. And Stefanie is one of our foremost experts on all things related to collections. Stefanie, welcome to the podcast today.

Stefanie Jackman:

Thanks, Chris. Glad to be here.

Chris Willis:

Today, we're going to be talking about something very interesting, sort of like a stealth development that seems to have snuck up on the industry because of its timing. And in particular, it's the New York City Department of Consumer Affairs' new rules relating to collections, and particularly regarding collections involving people who have limited English proficiency or LEP, that is they speak English maybe not at all or not as a first or primary language. And it's a, as I said, a development that seems to have kind of caught the industry a little bit by surprise, because the rules unfolded right as the Coronavirus pandemic started. So, can you just start off the podcast by telling the audience, what are these rules about? Can you give them an overview?

Stefanie Jackman:

Yeah, I'd be happy to. And you're right, these really did kind of fly under the radar. And some are questioning the extent to which the rulemaking followed the requirements under DCA's rules for that. So, I know there've been some foil requests and other things. For instance, any comments or who attended the public hearing on April 10th. So, to back up, the rule was proposed and published on March 5th. And if you recall, in March, we were starting to see a real uptick in the virus, lots of states starting to implement shut down orders, different regulators limiting servicing and collection activities. The CARES Act was working its way through Congress. And New York City, which was at that time, the epicenter of the infection was rapidly going down into a total lockdown. The public hearing, which I imagine was not held in person and must have been virtual if indeed it was held, was scheduled for April 10th.

Stefanie Jackman:

And the department says they didn't receive any comments in the rule that they then later published. So, when this kind of came to the industry's attention in the beginning of June, it caused a lot of question. And in fact, there are calls from different

industry groups for DCA to reopen the comment period. And I understand that as a result of conversations between those groups and DCA, DCA has acknowledged that there's a lot of components and considerations that perhaps they weren't thinking about when they wrote the rule. Nonetheless, they have not yet agreed, and I am becoming increasingly less hopeful that they will agree, to reopen the comment period. Although they did give a 60 day enforcement extension to August 26th. So, what are they going to start enforcing on August 26th? Because the rules took effect on June 27th.

Stefanie Jackman:

Well, as you pointed out, Chris, it's some requirements for disclosures, data gathering, and as well as a few prohibitions relating to services that may be offered or perhaps are not offered to consumers whose preferred language is other than English. What's interesting about the rules is that they have, and we'll talk about them in more detail, but they have requirements that apply to all accounts. And these requirements also apply to those accounts when they are being collected on by creditors, as well as their collection partners. And you can have two different types of collection partners as well. You can have a first party, entity, which is, which is collecting in your name, but not subject to the FDCPA, because they began servicing the account before delinquency, and then more of a traditional third-party agency or debt buyer that's going to be subject to the FDCPA.

Stefanie Jackman:

These requirements apply to all of those entities on all accounts, regardless of whether the consumer speaks English or not, prefers a language other than English or not. And it's going to result in some awkward conversations, at least some clients I'm talking to, with people about, "Why are you asking me my preferred language? Everything we've done to date has been in English. And the contract is in English and I speak English. Why are you asking me if I want English?" So, it's causing a lot of discussion, chatter. And then as companies are working to implement and start building out their processes for compliance, a lot of unanswered questions.

Chris Willis:

So, that's a good segue into talking about what the rule actually requires. So, you noted that some of the rules may apply to creditors and first-party collection activities and other parts to true third-party collections, as we would understand it to be covered by the provisions of the Fair Debt Collection Practices Act. Tell us what are the requirements? First, the ones that are sort of applicable to everyone and then maybe separate out the ones that would be applicable only to third-party debt collectors.

Stefanie Jackman:

Yeah, sure. So, the rules amend several sections of DCA's collection rules, specifically it's in title 6 RCNY 2-193, 6 RCNY 5-77, and title six of the rules of the city of New York, RCNY 6-62. So, the portion that applies to everyone, although there is one requirement within it and I'll get to it in a minute that is not applicable to creditors and their first-party collection partners, companies that are allowed to collect in the creditor's name and are not subject to the FDCPA is 6 RCNY 5-77. And it has several new requirements. So, first and foremost, everyone, creditors collecting their own debts all the way to purchase debts being collected subject to the FDCPA, must request and record the consumer's language preference. And this is on all accounts, not accounts where you have reason to think the consumer might prefer a language other than English.

Stefanie Jackman:

And if it's an account that you for whatever reason have been servicing in a language other than English, you must ask again and confirm again the consumer's language preference after you start "debt collection procedures". And this is a defined term under the rules of New York City. It's actually in section 6 RCNY 5-76, which gives the definitions for that particular code section. It has three different scenarios. One where you are legally required to send monthly statements, one where you are not, and then acceleration.

Stefanie Jackman:

So, when you are required to send, by law or some other applicable regulation, a monthly statement or a monthly bill on an account, this debt collection procedures begin once you are able to cease sending those or have threatened legal action. For many of our creditor clients, this is going to be something that is a post-charge off event on those accounts. Similarly, if you are not legally required to send monthly statements, but you may, it applies again, once you stop sending those or threaten legal action. And then the third way that a debt collection procedure can begin so that the rules are then applicable to you is after you accelerate a debt.

Stefanie Jackman:

So, it's a defined term, and I like to flag that, because for people that are operating in the more traditional third-party world, that may not matter from day one, you're going to be engaged in debt collection procedures, but for creditors, banks and other non-bank lenders who are collecting their own debt, this can sometimes cut out a portion of your servicing process, and just helps to know the time when the rules are actually live and applicable to whatever you're doing. That doesn't mean, however, that you won't have to deal with some of these even before the institution of debt collection procedures as they're defined by the rule, because of what they require. And we'll talk about that in just a second. But first and foremost, the first communication you have with the consumer who owes you money after starting debt collection procedures must involve eight specific requests from you from that consumer's language preference on all accounts, and you must record it.

Stefanie Jackman:

And you're not allowed to rely on prior questions that you may have asked the consumer where they answered that before debt collection procedures started. You're not allowed to rely if there were predecessor collectors, what they might have obtained in the way of that information. You're not allowed to rely or assume that because the contract's in English and all of the servicing, and communications you've had to date have been in English, and the consumer seem to understand them that they prefer English. You must ask. It prohibits to the extent that you support any limited non-English languages. You cannot have any false, inaccurate, or partial translations. And they're not specific about whether that's just in a verbal context or a written context. It doesn't say. I would assume it means in both if you offer both, but it's not clear that you have to offer both.

Stefanie Jackman:

And in fact, DCA hasn't clarified whether if you provide verbal, you must also give written or vice versa. So, that remains an unanswered question. It prohibits any false representation or omission of the consumer's language preference when an account is being returned, an account is being sold, or an account is being placed for litigation. And then it requires that you disclose, again, this is everyone, creditors, debt, collectors, debt buyers, everyone. On your public website, and this is one of those requirements that I don't see how you can comply with this only after you institute debt collection procedures, because the consumers own online portal with you, once they've logged on, is not public. So, I mean, this is your consumer facing public website, at least looking at the language of the statute, which a consumer is likely going to encounter for creditors at least before they've ever even maybe opened an account with you, but you have to have some disclosure there that says the extent of any language services that are provided, and that translations of certain common debt terms are available on DCA's website.

Stefanie Jackman:

And so, the extent of any language services that are provided, DCA has clarified you are not required to offer support for languages other than English. And if you don't, you just disclose on your website that you conduct business in English and do not provide those services. But if you provide some services, or full services, or coordinate with a language line, DCA is requiring an affirmative disclosure on your public website. And then there's two other provisions, but these are only applicable to a traditional third-party collection agency, somebody collecting under the FDCPA or debt buyers as well. One is an amendment to 6 RCNY 2-193, which is New York City's third-party collection statute. And it requires an annual report be maintained on the number of accounts that were serviced or attempted to be serviced in a language other than English, as well as the number of your employees who serviced or attempted to service an account in a language other than English.

Stefanie Jackman:

The rule says, "This will be a publicly available report," but DCA has then told different industry participants in their conversations they don't intend to make this publicly available on their website, but rather they're wanting it maintained as a regular business record that is available upon request by DCA. So, that's an interesting... The rule doesn't say that, but that's what they've been saying kind of behind closed doors in some of these early informal conversations. The other provision that amends 6 RCNY 5-77, so remember that's the one that applies normally to everyone, but this particular amendment only applies to companies that are collecting subject to the FDCPA for all intents and purposes. So, again, debt buyers and traditional third-party collection agencies that aren't collecting in the name of the creditor. In 5-77 F, there are validation letter requirements. There is a section for creditors. If you accelerate a debt in New York City, even as the creditor, you have to send a validation notice.

Stefanie Jackman:

And then there's a section F2 that is applicable to agencies that are already likely sending a validation notice under the FDCPA, the third-party world. There are requirements for that same disclosure that needs to be on your public website that I mentioned earlier also being put in the validation letter. So, you have to disclose the extent of any language services you provide or the fact that you don't provide any and make a disclosure about the debt term translations that are available on DCA's website, but that is only for third-party agencies and debt buyers. And it's actually a little bit hard to pick that up quickly, because it's a subtle difference. And the rule actually breaks across two pages in the PDF that DCA published. So, it's easy to miss that that requirement does not apply to creditors and their collection partners that are collecting in their own name, but it is an additional requirement, invalidation letters being sent by those who are collecting subject to the FDCPA if that makes sense, Chris.

Chris Willis:

Yeah, it does. And everything that you just went through sounds very comprehensive, and complicated, and difficult, and it sort of makes me wonder, you don't normally see individual cities doing regulation on this level and of this scope. And so, where does the authority from for the New York City Department of Consumer Affairs to create these rules?

Stefanie Jackman:

Well, that's a great question. And I don't know of any active efforts right now to actually mount any sort of legal challenge to these rules, but just in general, one of the things a lot of clients have been asking, with all of these state rules that have come out to try to manage the pandemic and its impact on consumers, and I'm not saying that the LEP rules are part of that, I'm just saying in general, there've been lots of questions about where's the authority? Am I exempt from this? Particularly from our bank clients. Banks are accustomed to having a National Bank Act level preemption from a lot of different state rules. We also have FCRA preemption of most state rules impacting furnishing.

Stefanie Jackman:

So, this is a really common question, and the answer is unfortunately that this rule, well, first of all, the rule that it's amending 5-77 has been in place for a number of years now, and my understanding is that banks are complying with it, and in fact should be complying with it, because it is being executed by New York City DCA's general police powers. So, usually what we see is that the preemption afforded to banks does not apply to collection rules when it's challenged by courts, because those are rules that are enacted under general police power authority that sovereigns have to protect their citizens from bad acts or whatever they deem their citizens need protection from.

Stefanie Jackman:

And there isn't as direct a conflict in the eyes of most courts between these types of collections limitations and say a state usury cap or something that we more traditionally will see be preempted under the National Bank Act and subsequent authority. That doesn't mean there aren't arguments that can't be made. That doesn't mean that there aren't ways to read this

rule where I've heard people talking about, well, it talks about individuals can't do this, not companies. I'm not saying there aren't some creative arguments that might be worth testing. I'm just saying to date, they haven't been. And generally, most of the authority that is out there across the nation when banks or other entities that want to claim exemption from a state collection law under Bank Act preemption or other preemption principles, they haven't enjoyed success in this area. So, it's general police powers, Chris, but who knows if we won't see a new creative argument be levied down the road, because of the challenges of complying with these.

Chris Willis:

So, Stefanie, if I'm a creditor or even if I'm a debt collector and I currently have my operation completely in English, I only have phone support in English. I only my letters in English, if I'm in legal collections, I only file pleadings in court in English. Do these new rules require me to offer anything in languages other than English?

Stefanie Jackman:

No, as I mentioned earlier, and as DCA at least in these informal discussions, I've mentioned it's been having with different collection industry trade group representative, that is not an express requirement nor how DCA intends to enforce the rule. If you only offer English, there is no requirement that you now start offering, for instance, Spanish. There is just a requirement that you ask and record the consumer's preference. If they say, for instance, "My preferred language is Spanish."

Stefanie Jackman:

So, we've had a lot of questions saying, "Okay, but if I don't support that and you're telling me I don't have to support that, I don't have to build out a Spanish language servicing department, am I in trouble if I keep collecting against this consumer after they've told me, 'I prefer Spanish?'" No, DCA, at least right now has said they will not consider that a UDAP violation or a violation of the statute to continue collections after the consumer tells you they prefer a language other than English and by collecting or continuing those collections in English, which is weird and one of the awkward conversation moments you're going to have where essentially a consumer says, "No, I don't speak English. I don't understand English. My language is Spanish."

Stefanie Jackman:

You say, "Okay, well, thank you, Mr. Willis. I'm going to keep talking to you in English. So, let's go." It's very strange, but that is the current state of things. Some other questions we've gotten though is, "What happens if I do offer some services? Can I stop?" Well, the first thing is, I don't know, but I wouldn't advise you to. I think that my impression here is that New York City DCA is attempting to gather information. They're attempting to gather data on the number of consumers who are identifying a language preference other than English, as well as how many of them are being able to be serviced in that language.

Stefanie Jackman:

I remember I told you that creditors don't have to actually make that report available, but in the third-party world, there's a report you must keep with that data. And you'll probably be able to, as a creditor, be able to figure it out too even if you don't have to actually keep the report and provide it to DCA. But my read of these rules, in addition to being a data gathering exercise, is that they're meaning to expand and make it at least more clear to consumers what language services are or are not available to them, so they can make educated decisions about who they do business with, because he supplied a creditor. So, perhaps if bank A says on their public website disclosure, "We provide limited services in Spanish," but bank B says, "We don't do anything," maybe this consumer picks bank A over bank B. I just can't see a world where DCA would look fondly on a retraction of what's already available.

Stefanie Jackman:

So, I'm not suggesting to companies that are already servicing in some language that they stop that. I think there's risk in that becoming a either violation of the statute or some other UDAP issue. So, you need to maybe maintain what you currently have. You don't have to expand it either, but that's been just my general read, but I really don't know and I don't believe anyone has yet asked DCA that specific question. And then I've had some other questions coming up, Chris about, "Well, what if I am that first-party servicing partner you mentioned? I'm able to collect accounts in the creditor's name outside the FDCPA, because I begin servicing before they're delinquent, often at or near the time they originated." I've had this come up in the online kind of FinTech world and also in mortgage servicing. "What if my partners offer support services, but I don't, and I'm the one that's going to be communicating?"

Stefanie Jackman:

That's a tricky question too. The way I read the rule it's talking about what you need to do. The entity that is interacting with the customer. And there are provisions in some of the, they're not formal FAQs yet, New York DCA has promised some formal guidance in FAQs, but they're not expected before at least the end of July. And generally as these things go, I wouldn't be surprised to see them come out even closer to the August 26th enforcement date. And they're not out yet. But the informal discussions that have been going on with sort of as the process to develop maybe some FAQs and help evolve the guidance by our industry participants in their conversations with DCA, DCA has made clear that subsequent entities involved with this account have to re-ask and rerecord the consumer's language preference.

Stefanie Jackman:

So, to me, that helps to support an argument that this is just the actual entity that is communicating with the consumer. So, if you have a partner and have the consumer called that partner, or had they previously been working with that partner, and then they got placed with you as it got closer perhaps to going past due or just the way that their particular outsourcing cycle works, I do not read there to be a requirement that you have to stand in the shoes of your creditor partners and provide their services. The closer question is, do you need to tell the consumer that if they call the creditor directly they might get something broader?

Stefanie Jackman:

Again, I say no, because they should be able to get that on the creditor's website, but that doesn't mean that you won't be in a situation of having to explain why even though they went to bank A's website that said, "We support Spanish," but now they're talking to you as their first-party collection's service provider, and you're telling them you don't provide anything that there won't be confusion. And them saying, "Wait a minute." And you might have to develop some scripting to help your customer service agents explain, "Well, that's just bank A and we're actually company X and we service these accounts, but we are not bank A." That can cause some challenges.

Chris Willis:

So Stefanie, you mentioned just a moment ago and earlier in the podcast that the Department of Consumer Affairs has delayed enforcement of these new rules until August 26th, even though they're technically enforced as of the end of June. What does that mean? Does it mean that people can just sort of ignore it until all the problems that you pointed out have been worked out by the regulator? I mean, what do people need to do? What does it mean?

Stefanie Jackman:

No, it's tricky. So, there's been a lot of discussion about well, DCA is not going to enforce, but what about private lawsuits? Can they start being filed for this period of time? I don't know. I don't know. And it isn't clear if all of these would have to go before DCA. DCA does have an administrative process to hear claims for alleged violations of its rules, but that doesn't mean that somebody wouldn't try to file a lawsuit in a state or federal court that's sitting in that jurisdiction. So, that's one risk. I don't want to have any listeners think those lawsuits have started. I'm not aware of any. Granted, I don't practice litigation specifically in New York City, but I'm not aware of it. I haven't heard of those suits being filed. So, this may be a fear people have that isn't coming to pass and may not come to pass.

Stefanie Jackman:

But one, there's just the enforcement delay is only by DCA and not anybody else. But two, it takes time to implement and build out these processes. It takes time to figure out what your disclosure is going to be to get it programmed in. It takes time to update your training policies, procedures to align with whatever you're going to be saying, because if you're misrepresenting what you do or do not provide, that's going to risk of violation or an inaccurate disclosure of the statute itself with potential UDAP as well. So, you have to be thinking about this, thinking about what makes sense, thinking about what you actually do. For instance, something that we commonly see is that you don't provide formal Spanish. I'm choosing Spanish, because that's a very common language for people to request, but it's certainly not limited to that. But let's say you have no formal Spanish language customer service department or process, but everybody in an office knows that Sally and Bob can speak Spanish pretty well.

Stefanie Jackman:

And so, if they get somebody who says or appears to prefer Spanish or now tells you, "I want Spanish," you see if Sally or Bob are available, and try to transfer the call to them. There can be kind of this informal, this is what we try to do approach to service these customers that's well-intentioned, but does that require disclosures? DCA had given an example where if it just so happens, and happens was in the actual answer they gave, that a consumer calls, get somebody who speaks the consumer's preferred language, but the company does not provide any foreign language support services or support services in that language, and the customer service agent just happens to decide to speak to them in their language, that does not require disclosure.

Stefanie Jackman:

That does not equate to the offering of limited English proficiency support services under the rule. But that's just, when I read it, Chris, this is just a chance. It just was luck that it happened. That's different than a more informal, but yet deliberate routing of consumers to certain agents with known language skills. Often their managers will also be aware that happens, because they're managing the collection floor. And I'm not sure if that is the scenario that DCA is saying doesn't require a disclosure. In fact, I think it might be the opposite.

Speaker 5:

So, it seems like there's a lot of unanswered questions and issues here. What are some of the best practices or compliance tips that you'd mention for compliance with these new requirements?

Stefanie Jackman:

Well, so first, as you already said, it's assessing what you do, and don't do, and what you might not be aware that you do right now as far as supporting non-English-speaking consumers in New York City. And keep in mind, this is consumers in New York City, not businesses located in New York City. So, if you're a company in California that's communicating with a consumer who lives in Manhattan, these rules may be applicable. It's not the other way around where you're a New York City-based company calling a California-based consumer. In that instance, these rules don't apply.

Stefanie Jackman:

You might have to worry about California's Rosenthal Act, but you don't have to worry about DCA's Limited English Proficiency. So, first and foremost, it depends where the consumer is located. But figuring out what you do in New York City, but also more broadly with non-English speaking customers to figure out if you have any sort of these kind of informal processes in place, and then thinking about how you're going to message what you want to do there is an important first step, because you need to make an accurate disclosure about the level of support you do or do not provide.

Stefanie Jackman:

So, first, you have to figure out what you do or do not provide and figure out what direction you're going to go if you provide maybe some sort of unintentional or intentional hybrid. Maybe you have a foreign language line that you contract with, but you just need to be thinking about that and working on how to disclose it. Another best practice is if you... I am suggesting, and in fact some of the industry groups that have proposed different safe harbor disclosures, they're asking DCA to bless have also done, is to say what language you do conduct business in, even if you provide services in others say, "This is company A and we conduct business in English," then you add the second part that says, "And we do not provide any other foreign language services," or, "We provide limited in the following fashion for language support services for Spanish," or for whatever, but can't always promise it's available, or, "We provide it all the time, just call us depending on where you are," but always saying what language you conduct business in, I think is important to stave off creative consumer claims of confusion.

Stefanie Jackman:

And then I think it's also important to make sure that you're thinking about how will this play out with your own customer base in New York City. Whether or not you service non-English speaking consumers, do you have a lot of them? What does this mean looking to the future? Is it going to be easier to provide support than not to, if you haven't built that out yet? If you are providing support, do you have to worry about dialects? There can be very, very different regional dialects. And what does that mean? DCA hasn't yet answered that question, but they haven't said, "You don't have to worry about it." So, I think just understanding the composition of your own consumer base within New York City is really, really critical in planning for the future.

Chris Willis:

Well, Stefanie, thanks very much for sharing those insights. And this is obviously an issue that we're going to have to watch as an industry as it unfolds and as perhaps more clarification is given by the Department of Consumer Affairs. But I'd like to thank you for being on today's program and I'd also like to thank our listeners for tuning in. Be sure to visit us on our website ballardspahr.com, where you can subscribe to our show on Apple Podcasts, Google Play, Spotify or any other podcast platform. And don't forget to check out our blog, consumerfinancemonitor.com for daily insights about the financial services industry. If you have any questions or suggestions for our podcast, just email us at podcast@ballardspahr.com. And stay tuned each Thursday for a great new episode. Thank you all for listening.