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February 13, 2023

Meredith Weill
Deputy General Counsel
New York State Department of Financial Services
One State Street
New York, NY 10004-1511

Re: Comments on Proposed Amendments to Regulation 23 NYCRR 1

Dear Ms. Weill:

The Consumer Relations Consortium (CRC) is an organization comprised of more than 60 national companies representing the diverse ecosystem of debt collection, including creditors, data/technology providers, and compliance-oriented debt collectors that are larger market participants. Established in 2013, CRC is evolving the debt collection paradigm by engaging stakeholders — including consumer advocates, federal and state regulators, academic and industry thought leaders, creditors, and debt collectors — and challenging them to move beyond talking points and focus on fashioning real-world solutions that actually improve the consumer experience. CRC's collaborative and candid approach is unique in the market.

CRC members exert substantial positive impact in the consumer debt space, servicing the largest U.S. financial institutions and consumer lenders, major healthcare organizations, telecom providers, government entities, utilities, and other creditors. CRC members engage in millions of compliant and consumer-centric interactions every month. Members subscribe to the following core principle:

"Collect the Right Debt, from the Right Person, in the Right Way."

We appreciate the opportunity to participate in the rulemaking process and comment on the Proposed Amendments to Regulation 23 NYCRR 1. The CRC commented previously on the proposed rules; those comments are attached and incorporated herein.

The CRC's current comment highlights the following issues with the Proposed Amendments:

- The ADA-compliant letter format conflicts with existing law.
- The Statute of Limitations is a complex calculation, not a simple statement.
- The prohibition of using charge-off date as debt itemization will harm consumers.
- Digital collection restrictions have unintended consequences and harm consumers.

We are happy to provide any additional insight regarding these topics.

Missy Meggison

Sincerely,
Missy Meggison,
Co-Executive Director of the Consumer Relations Consortium

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Comments on Proposed Amendments to Regulation 23 NYCRR 1

On December 15, 2021, the New York Department of Financial Services (NY DFS) published its first proposed amendments to the debt collection regulations in 23 NYCRR § 1 et seq. In response to public comments, NY DFS made significant changes to its proposed amendments, which were published in the State Register on December 28, 2022. This comment addresses issues with parts of the new proposed amendment and urges the NY DFS to consider the conflicts discussed in detail below.

The ADA-Compliant Letter Format Conflicts with Existing Law

The proposed amendments to rule § 1.2(c) address disability accommodations debt collectors must provide New York citizens. Specifically the proposed amendments state that upon request, debt collectors "shall provide notice…in the format requested by the ***consumer***." This proposed rule directly conflicts with the plain language of NY GBL § 601-b, which states "the consumer may request the letter in an alternative, reasonably accommodatable format selected by the ***principal creditor or debt collector***." The NY DFS does not have authority to change NY GBL § 601-b as passed by the New York state legislature and shift the choice of disability accommodation format from the principal creditor or debt collector – as set forth in NY GBL § 601-b – to the consumer as suggested in proposed Rule § 1.2(c). Any update to the proposed amendments must address this conflict.

The Statute of Limitations is a Complex Calculation, Not a Simple Categorical Statement

The proposed revisions to § 1.2(A)(1)(II) AND (IV)-(VII) seek to require debt collectors to advise consumers of "the applicable statute of limitations for the debt, expressed in years" in the initial notice. This complex legal question requires contract review and conflict of law analysis to determine at the individual account level. Non-attorney debt collectors should not be expected to conduct a legal review, give legal advice, or hire an attorney for every account.

Further, the proposed statute of limitations disclosure is contrary to extensive consumer research conducted by the Consumer Financial Protection Bureau (CFPB). The CFPB's 2020 study of statute of limitations disclosures[1] concluded that the most effective statute of limitations disclosure was the following (described in the report as "Revival (5)"):

> The law limits how long you can be sued for a debt. If you do nothing in response to this notice, we will not sue you to collect this debt. This is because the debt is too

[1] https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-quantitative-disclosure-testing_report.pdf

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> old. BUT if you make a payment or acknowledge in writing that you owe this debt, then we can sue you to collect it.

See CFPB Debt Collection Qualitative Disclosure Testing Report, Section 3.4.3 at page 25.

Notably, the CFPB's recommended disclosure advises consumers of their rights but does not require the debt collector to include a specific time period. NY DFS has not conducted a study regarding the consumer impact of its proposed amendment and there is no evidence that the NY DFS proposal would be more effective than the above disclosure.

The CRC addressed this issue in greater detail in its comments to the first proposed amendments (attached). See Comments on § 1.2(a)(1)(vi) and Comments on § 1.3(a).

The Prohibition of Using Charge-off Date as a Debt Itemization will Harm Consumers

New York presently requires debt collectors to provide debt itemization "as of charge-off." See § 1.2(b). The proposed revisions to § 1.2(a)(1)(i) seek to replace the existing NY DFS debt itemization rule with the Regulation F rule, **EXCEPT** that the amendments dictate which itemization dates can be used.

Regulation F allows debt collectors to choose from any of the five following itemization dates:

(1) Charge-off date;

(2) Last payment date, if applicable;

(3) Last statement date;

(4) Transaction date (debt incurred); or

(5) Judgment date, if applicable.

See 12 C.F.R § 1006.34(b)(3).

The NY DFS Proposed Amendment would limit the use of charge-off date (used by the vast majority of debt collectors today) to revolving or open-end credit accounts only. For all other types of accounts, collectors must use the last payment date "if it is available." See § 1.2(a)(1)(i). If the last payment date is unavailable, collectors would presumably use the last statement date, transaction date, or judgment date.

In its previous comments (attached), the CRC explained that the charge-off date is the preferred option because it's a static, well-defined date and more recent than the transaction date. The CRC's previous comment also addresses the chaos (and increased risk of consumer confusion) that would occur if debt collectors were forced to use different dates.

It is unclear why New York would seek to limit the use of charge-off date in debt collection communications. The Consumer Financial Protection Bureau (CFPB) spent millions of dollars and more than five years of study to determine that the use of charge-off date in debt collection was so positive for consumers that it provided a "safe harbor" to debt collectors for its use. *See 12 C.F.R § 1006.34(b)(3)*. The NY DFS has not provided any alternative study or explanation regarding why using the charge-off date would benefit consumers.

Digital Collection Restrictions have Unintended Consequences and Harm Consumers.

The proposed changes to Section 1.6(b), which restrict digital collection methods, will have unintended consequences and harm consumers. The proposed changes create barriers for consumers to correspond with debt collection agencies in their preferred channel and reduce consumer protection. Digital communication channels increase consumer protection, and consumer behavior shows that they prefer to communicate digitally. Opt-in requirements burden consumers and cause them additional stress and substantive harm.

Increased Consumer Protection. Digital communications provide superior consumer protection than phone calls for several reasons. A person's email address is typically the best, most accurate contact method—where phone numbers and addresses change, a person's email does not. Unlike phone numbers which are reassigned, email service providers do not reassign email addresses. More so than phone calls, emails get to the right person.

Debt collectors are legally required to send certain disclosures to consumers advising them about their rights, such as the right to dispute the debt. The fewer channels consumers have to receive information about their debt, the less likely they will be able to receive these crucial disclosures. Conversely, allowing debt collectors to communicate digitally without opt-in requirements increases the number of consumers apprised of their rights.

Communicating digitally means consumers will always have records of their communications. Digital communications are written, documented, and can be searched. Email providers offer search and archiving options, automatically creating a paper trail of communication between the consumer and the collector.

Consumer Preference. In addition to protecting consumers from unwanted phone calls, consumers want the ease offered by email and text. They want consistency. They want to communicate in the same way that they did with the creditor. They don't want to go back to phone calls after they've expressed a preference for texts, emails, or messaging through an app. They want to reply at any time from any place. They want self-service options and emotionless engagement. They want less intrusion into their daily life and to be able to opt-out easily. With electronic communication, Consumers are in control. They can easily opt out of electronic communication by clicking "unsubscribe," marking emails as spam, and replying STOP to a SMS.

Consumer Harms. Restricting electronic communication causes a loss of convenience for consumers. There is no "easy path" for those who want to take care of their debt. They will always have to get on the phone with someone at some point. Restrictions prevent consumers from

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resolving accounts early, directly impacting and increasing negative credit reporting. The longer an account is in collections, the longer it will be reported negatively. In a world where credit scoring so meaningfully impacts consumers' lives, anything that blocks debt collectors from reaching a consumer causes consumer harm. Many accounts not resolved with an agency end up in litigation. When communication channels are closed off, only mail and litigation remain. The result is that consumers who could have resolved their debt early end up in court.

Consumers want to communicate via text and email. Electronic communication makes things easier for consumers. It takes the emotion out of debt collection and allows consumers to be in control of handling their debts and getting their financial lives back on track. Though done under the umbrella of "consumer protection," consumers are harmed by restrictive regulations. Restrictions like those considered serve only to impede consumers' will and force them to endure what they least desire – phone calls.

We thank you again for your consideration of these comments.

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Previous Comment

February 14, 2022

Meredith Weill
Deputy General Counsel
New York State Department of Financial Services
One State Street
New York, NY 10004-1511

Re: Comments on Proposed Amendments to Regulation 23 NYCRR 1

Dear Ms. Weill:

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"Collect the Right Debt, from the Right Person, in the Right Way."

We appreciate the opportunity to participate in this process that is so important to all debt collection stakeholders and to comment on the Proposed Amendments to Regulation 23 NYCRR 1. As you are aware, consumers and debt collectors alike oppose the proposed amendments for three primary reasons:

1. Proposed Section 1.3 will be confusing to consumers;

2. Proposed Section 1.3 will be contrary to the laws in most other jurisdictions; and,

3. The proposed prohibition on phone calls on time-barred debt will have a negative impact on consumers, creditors, debt collectors and the courts.

We look forward to collaborating with you and your team to modify these proposed amendments so they can be clarified and structured to provide maximum protection for consumers.

Sincerely,

Missy Meggison,
Executive Director of the Consumer Relations Consortium

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§ 1.2: ELIMINATING CHARGE-OFF AS A BASIS FOR DEBT ITEMIZATION

Problem: Proposed Section 1.2(a)(1)(i) requires debt collectors to itemize the debt using any itemization date defined by Regulation F "except that a debt collector shall not use charge-off date as a reference date for the itemization date." This conflicts with Regulation F and the current version of Section 1.2(b), which specifically requires debt collectors to provide "an itemized account of the debt … as of charge-off." It is also likely to uniquely disadvantage New York consumers who are accustomed to debt itemization based on the charge-off date by suddenly forcing collectors to use older or less predictable dates for itemization and increasing the likelihood of consumers receiving letters reflecting different itemizations based on different reference points over time.

Solution: Proposed Section 1.2(a)(1)(i) should be revised to allow debt collectors to continue using the charge-off date for debt itemization. The charge-off date is a regulated, well-defined, fixed point in time, making it an ideal choice for clear and consistent itemization. Allowing collectors to continue using it as a reference point would avoid conflicts and promote clarity, consistency, and continuity in communications with consumers.

» **Eliminating Charge-Off Date as a Permissible Itemization Date is Harmful and Confusing to the Consumer**

Debt itemization based on the charge-off date has been the industry standard for debt collection notices in New York since these Regulations were adopted in November, 2014. Indeed, the practice is so well-regarded that the Consumer Financial Protection Bureau (CFPB) decided to expand it nationwide by including a debt itemization requirement in Regulation F with the charge-off date listed as one of the reference points.[1] The proposed amendments to Section 1.2 threaten to reverse this progress by eliminating charge-off date as a permissible itemization date. This proposal will not only be confusing and harmful to the consumer but directly conflicts with Regulation F, 12 C.F.R. § 1006.34(b)(3).

» **Charge-Off Balances are the Most Regulated Balances in the Financial Services Industry**

Pursuant to Regulation Z of the Truth and Lending Act (TILA), a lending institution must disclose in periodic statements all credit activity.[2] On June 12, 2000, the Federal Financial Institutions Examination Council (FFEIC) revised the Uniform Retail Credit Classification and Account Management Policy to establish standards for classification and account management of retail credit in banks and thrifts.[3] It generally requires that closed-end loans be charged off at 120 days past due and that open-end credit (e.g., credit cards) be charged off at 180 days past due.[4] All three prudential regulators – the Federal Deposit Insurance Corporation (FDIC), the Office of Comptroller of the Currency (OCC), and the Federal Reserve Board (FRB) – adopted the FFEIC guidelines.

[1] Regulation F are the regulations promulgated by the CFPB to implement the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq.*
[2] *See* 12 C.F.R. § 226.1, *et seq.*
[3] 65 FR 36903.
[4] 65 FR 36903, 36904.

Charge-off is also made in conformance with established policies of federal or state supervisory authorities.[5] Financial institutions report their charge-off amounts to their primary regulator, who reviews these amounts to ensure overall safety and soundness. Charge-off amounts are recorded and maintained within the financial institution's call reports.[6]

Consumers also recognize and understand the charge-off balance. That amount is disclosed in the final periodic statement from their financial institution, as required under TILA,[7] and, in most instances, that same financial institution will report that amount to the credit reporting agencies.

Prior to the proposed amendment to 23 NYCRR 1, DFS also recognized charge-off balance as an important piece of information that must be disclosed to the consumer.[8] DFS was one of the first regulators in the country to require debt collectors to itemize the debt by providing the "total amount of the debt due as of **charge-off**"[9] (emphasis added), plus all fees and charges accrued, as well as payments after charge-off. The CFPB modeled this regulatory scheme when it crafted Regulation F.[10]

» Regulation F Recognizes the Charge-Off Balance

Regulation F ensures that a debt collector is collecting the right amount from the right person. One way it accomplishes this goal is by requiring debt collectors to provide additional information up front in their initial notice letters, including debt itemization based on one of five itemization dates: (1) charge-off date; (2) last statement date; (3) last payment date; (4) transaction date; or (5) judgment date.[11] Regulation F includes the CFPB's suggested form for the standard Model Validation Notice (MVN), which demonstrates how to provide required information in a format that consumers can easily understand.[12] While use of the MVN is optional,[13] the overwhelming majority of debt collectors across the country have implemented the MVN using the charge-off date as their itemization date specifically because it allows them to comply with Regulation F and New York law simultaneously.

As the CFPB noted in the preamble to Regulation F, "while consumers might not know the specific charge-off date, they may, in fact, recognize account information as of approximately the charge-off date because charge-off often occurs at around the time the creditor provided a last account statement."[14]

» Confusion Caused by Changes Would Uniquely Disadvantage New York Consumers

The proposed amendment to Section 1.2 is confusing for several reasons. First, it eliminates the use and reference to the charge-off date and balance which has become the mainstay of debt collection notices in New York since November 2014. Although the proposed amendments allow the debt collector to use one of the other four itemizations date in Regulation F,[15] the vast majority of debt

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[5] Treas. Reg. § 1.166-2(d)(1)(ii).
[6] *See* https://www.fdic.gov/regulations/laws/rules/5000-1000.html (5000- Statement of Policy)
[7] 12 C.F.R. § 1026.7(b).
[8] 23 NYCRR 1.2(b)(2)
[9] *Id.*.
[10] 12 C.F.R. § 1034(b)(3)(ii).
[11] 12 C.F.R. §§ 1034(b)(3)(i) – (v).
[12] 12 C.F.R. Part 1006 Appendix B.
[13] 12 C.F.R. § 1034(d)(2)(i).
[14] 86 FR 5766, 5794.
[15] Proposed Section 1.2(a)(1)(i)-(ii).

collectors have used the charge-off date as their itemization date for all consumers nationwide since Regulation F took effect on November 30, 2021. Forcing debt collectors to use a different itemization date for New York consumers only puts New York consumers at a unique disadvantage. First, as discussed above, charge-off is a regulated, well-defined, fixed point in time, making it a more reliable and recent reference point than the alternatives. Second, because of existing law, New York consumers are particularly accustomed to receiving debt itemization based on charge-off date and may be confused by a sudden change. Third, New York consumers will be more likely than anyone else to receive multiple different itemizations based on different reference points over time. For example, a New York consumer could receive a letter from one agency with debt itemization based on transaction date and a letter from a different agency with debt itemization based on last payment date. It is also quite possible that a New York consumer could be sent a validation notice that contains two different itemization tables, each based on a different itemization date (e.g., a standard MVN with an itemization table based on charge-off date with a separate New York itemization table based on another reference point printed on the back of the letter). This overall lack of consistency and continuity is sure to cause uncertainty and frustration for New York consumers.

Furthermore, without a reference to the charge-off date, the information provided to New York consumers may be very different than the information contained in the charge-off statement previously sent by their creditor. The amount on that charge-off statement could be much different than the amount identified and accounted for in the notification required under the proposed amendments. This inconsistent information will not only fail to adequately inform the consumer about the debt, it will also create needless confusion.

Since November 30, 2021, the effective date of Regulation F, debt collectors have sent the required validation information pursuant to 12 C.F.R. § 1006.34(c), whether in a stand-alone letter or by use of the MVN to New York consumers. Many debt collectors, especially those that are collecting on credit cards or other retail credit transactions, elected to use the charge-off date as a permissible itemization date given the highly regulated nature of that number.[16] However, if the proposed modifications to 23 NYCRR 1 are adopted, debt collectors would be forbidden to use the charge-off date in those same validation notices directed to New York consumers. This is a significant departure from the allowances provided in Regulation F.

Ironically, Section 1.4(c) has not eliminated the use of a charge-off statement to satisfy a substantiation request by the consumer. It makes no practical sense why the proposed amendments restrict the use of the charge-off date when informing the consumer about the debt when the same regulations permit the use of a charge-off statement to substantiate the debt. This contradiction will not assist the consumer in understanding or recognizing the debt. As shown above, both the charge-off date and charge-off amount are recognized by prudential regulators as inherently reliable information.

CRC understands that the proposed amendments speak to the concern of collecting upon older debt that is possibly out-of-statute. CRC supports the disclosure of the last date of payment as one of many ways to inform consumers of the age of the debt being collected. However, eliminating references to the charge-off date or the charge-off balance deprives consumers of the more critical and reliable information about the debt. Providing more, not less, information is better consumer protection.

[16] *See, e.g.,* 65 FR 36903.

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» **Proposed Solution**

CRC proposes that Section 1.2(a)(1)(i) permit the use of the charge-off date consistent with the requirements of Regulation F.

§§ 1.2 & 1.3: ADVISING CONSUMERS OF APPLICABLE STATUTE OF LIMITATIONS

Problem: Proposed Sections 1.2(a)(1)(vi) and 1.3(a)-(b) create a serious risk of violating rules prohibiting the unlicensed practice of law by requiring non-attorney debt collectors to analyze the law to determine which statute of limitations applies (an extremely complex legal question involving in-depth analysis), applying the law to the facts of a specific consumer's account, and then advising the consumer about the law that applies to their accounts by disclosing "the applicable statute of limitations for the debt, expressed in years" and, if applicable, telling the consumer they cannot be sued because "the statute of limitations applicable to the debt has expired." Such legal analysis and advice should be given by a licensed attorney, not a layperson.

Solution: This problem is easily solved by: (1) removing the requirement to disclose the applicable statute of limitations for the debt; and (2) reverting back to the old time-barred debt disclosure language which says the debt collector "believes that the statute of limitations applicable to the debt may be expired," instead of unequivocally stating that it "has expired."

» **Requiring Non-Attorney Debt Collectors to Determine the Applicable Statute of Limitations and Then Advise Consumers About It May be the Unlicensed Practice of Law**

Proposed Sections 1.2(a)(1)(vi) and 1.3(a)-(b) create a serious risk of violating rules prohibiting the unlicensed practice of law by forcing non-attorney debt collectors to determine which statute of limitations applies – a complex legal question involving many factors – and then to advise consumers how the law applies to their individual circumstances. The current version of Section 1.3 presents this problem to some extent but the proposed amendments exacerbate it by requiring more legal conclusions with less equivocal language.

Since 2014, Section 1.3 has required debt collectors to "maintain reasonable procedures for determining the statute of limitations applicable to a debt it is collecting" and provide disclosures if the statute of limitations has expired.[17] Currently, the disclosure language has built-in "wiggle room," saying the debt collector "*believes* that the statute of limitations applicable to the debt *may be* expired."[18] Proposed Section 1.3(b) removes this "hedging,"[19] requiring debt collectors to state unequivocally that "the statute of limitations applicable to the debt *has* expired," while Proposed Section 1.2(a)(1)(vi) adds a new requirement for debt collectors to advise consumers of "the applicable statute of limitations for the debt, expressed in years."

These Proposed Sections would require a lay person – a non-attorney debt collector – to engage in the unlicensed practice of law. They do not simply ask collectors to restate what the law says; they force collectors to analyze the law (something they are not trained to do) to make a determination

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[17] 23 NYCRR 1.3(a).
[18] 23 NYCRR 1.3(b) (emphasis added).
[19] This "hedging" may help shield collectors from legal challenges based on the unlicensed practice of law, even if it has done little to protect them from being sued under the FDCPA if they miscalculate and provide disclosures too soon.

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on the statute of limitations which is a legal determination that must be made by an attorney.[20] Then, after making that complex legal determination for which they are the not trained, the lay person must give the consumer advice about which statute of limitations applies to their account and decide whether it is appropriate to provide a mandated time-barred debt disclosure. Under this structure, it is completely within the realm of possibility that such non-attorney debt collectors may be accused of engaging in the unauthorized practice of law in New York when they are merely attempting to comply with the Department's mandate.[21]

» **Statute of Limitations Determinations Require Complex Legal Analysis Based on a Variety of Account-Specific Factors**

The determination regarding the applicable statute of limitations for a debt involves numerous factors, each of which are very specific to each particular type of debt, as well as the specific circumstances of each particular consumer's account. The creditor's location,[22] consumer's residence,[23] place of repayment,[24] terms and conditions of the underlying obligation,[25] and conduct (such as circumstances surrounding partial payment, imprisonment, bankruptcy, and acknowledgement of indebtedness)[26] all affect the statute of limitations. Furthermore, each of those factors may change during the life-cycle of a debt, meaning that the statute of limitations assessment may lead to different conclusions at different times. Other factors that must be considered include:

- The place where the parties were located when the underlying transaction occurred;[27]
- The place where the parties are located when collection commences;[28]
- The venue where a lawsuit may be brought;
- The nature of obligation – written or non-written;[29]
- Whether the creditor accelerated the debt or demanded the full balance;[30]

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[20] 1 C. CORMAN, LIMITATION OF ACTIONS § 1.1, p. 4.

[21] *Am. Auto. Ass'n v. Merrick*, 117 F.2d 23, 25 (D.C. Cir. 1940) ("giving of advice prior to collection of a claim and the urging of legal propositions in discussions with the person from whom collection is attempted does involve the practice of law and may be performed only by lawyers…."); *In re Shoe Mfrs. Protective Ass'n*, 295 Mass. 369, 372–73, 3 N.E.2d 746, 748 (Ma. 1936) (concluding that collection agency engaged in the unauthorized practice of law because in part, it "determined whether or not legal proceedings should be instituted …."); *McMillen v. McCahan*, 14 O.O.2d 221, 167 N.E.2d 541, 551 (Ohio Com. Pl. 1960) ("The Court is clearly of the opinion that the giving of advice as to whether a claim is good or not is the giving of advice as to legal rights. This is essentially the character of the service that is performed by an attorney in the practice of law.").
The unauthorized practice of law is governed by both the New York Judiciary Law § 478, and the New York Rules of Professional Conduct 5.5.

[22] *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1213 (9th Cir. 2001).

[23] *Becker v. Mktg. & Research Consultants, Inc*., 526 F. Supp. 166, 170 (D. Colo. 1981).

[24] RESTATEMENT SECOND, CONFLICT OF LAWS § 195 (1971).

[25] *Wise v. Zwicker & Assocs., P.C*., 780 F.3d 710, 717 (6th Cir. 2015).

[26] *Thacker v. Bank of N.Y. Mellon*, 2019 U.S. Dist. LEXIS 40734, *16-18 (W.D. Wash. Mar. 13, 2019) (acknowledgement of debt extended limitations period); *Nilsson v. Kielman*, 70 S.D. 390, 392, 17 N.W.2d 918, 919 (S.D. 1945) (credits given by defendant toward obligation did not qualify as partial payment); *Robin v. Ely & Walker Dry Goods Co*., 137 S.W.2d 164, 165 (Tex. Civ. App. 1940) (statute of limitations on account claim was tolled during Defendant's incarceration in Oklahoma).

[27] *Glob. Fin. Corp. v. Triarc Corp*., 93 N.Y.2d 525, 529, 715 N.E.2d 482, 485 (N.Y. 1999) (cause of action accrues "where the plaintiff resides and sustains the economic impact of the loss").

[28] *Ko v. Eljer Indus., Inc*., 287 Ill. App. 3d 35, 42, 678 N.E.2d 641, 646 (Ill. App. 1997) (construing 735 ILCS 5/13–210 (West 1994))(Illinois borrowing statute only applies if none of the parties is an Illinois resident.).

[29] *Annotation, What constitutes a contract in writing within statute of limitations*, 3 A.L.R.2d 809 (1949).

[30] *Annotation, When statute of limitations begins to run against note payable on demand*, 71 A.L.R.2d 284 (1960); *Annotation, Acceleration provision in note or mortgage as affecting the running of the Statute of Limitations*, 34 A.L.R. 897 (1925).

- The time when the cause of action accrued;[31]
- Whether any conduct of the parties may have interrupted, restarted or suspended the operation of the running of the statute of limitations – acknowledgement of the debt,[32] partial payment,[33] bankruptcy,[34] or forbearance agreements;[35]
- State tolling provisions;[36] and
- Borrowing statutes.

The last factor – borrowing statutes – is perhaps the stickiest of them all. Approximately 75% of states have enacted some form of a borrowing statute.[37]

A borrowing statute is a legislative exception from the general rule that the forum state always applies its statute of limitations to a cause of action. A borrowing statute provides that the forum state will apply the statute of limitations from the foreign jurisdiction in which a cause of action arises in another state, and addresses the situation where a plaintiff fails to sue within the time period allotted by the state where the action accrued, and then files suit in another state's court to avoid the time bar.[38]

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[31] *CMACO Auto. Sys., Inc. v. Wanxiang Am. Corp*., 589 F.3d 235, 242, n.7 (6th Cir. 2009).
[32] *Thacker*, *supra.* n.9.
[33] *Annotation, Payment on account, or claimed to be on account, as removing or tolling statute of limitations*, 156 A.L.R. 1082 (1945); *Annotation, When Statute of Limitations begins to run against action to recover upon contract payable in instalments*, 82 A.L.R. 316 (1933); *Annotation, Payment on account as removing or tolling statute of limitation,* 36 A.L.R. 346 (1925).
[34] 11 U.S.C. §§ 108(c), 362(a)(1), 1301(a); *HSBC Bank USA, N.A. as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 206 (5th Cir. 2018) (while in effect, bankruptcy stay operated to toll statute of limitations on foreclosure); *In re Swintek*, 906 F.3d 1100, 1106 (9th Cir. 2018) (bankruptcy stay tolled limitations period for lien enforcement).
[35] *JPMorgan Chase Bank, N.A. v. Mullen*, Case No. 2:16-cv-426, 2019 U.S. Dist. LEXIS 20034, *14 (S.D. Ohio Feb. 7, 2019).
[36] *Avery v. First Resolution Management Corp*., 568 F.3d 1018 (9th Cir. 2009), *cert. denied,* 130 S. Ct. 554, 175 L. Ed. 2d 383 (2009) (applying Oregon law); Annotation*, Provision of statute of limitation excluding period of absence of debtor or defendant from state as applicable to action on liability or cause of action accruing out of state*, 148 A.L.R. 732 (1944).
[37] *U.L.A., Uniform Conflict of Laws-Limitations Act, Prefatory Note* (Supp.1989) ("Another consequence [of the substantive-procedural dichotomy] was that about three-fourths of the state enacted so-called "borrowing statutes" which followed no regular pattern but required application of a limitation period other than the forum state's if some stated aspect of the cause of action occurred in or was connected with another state. These borrowing statutes are often difficult to interpret and apply. They have been the source of considerable judicial confusion."). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142, 143 (1971). *See generally Cope v. Anderson,* 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947) (applying Ohio and Pennsylvania borrowing statutes)(location of bank defined where the cause of action arose under Ohio's former borrowing statute, G.C. § 11234 (1939)). *See, e.g.*, Arizona - ARIZ. REV. STAT. § 12-506; California - CAL. CIV. P. CODE § 361; Colorado - COL. REV. STAT. § 13-80-110; Delaware - DEL. CODE ANN., tit. 10, § 8121; Florida - FLA. STAT. ANN. § 95.10; Idaho - IDAHO CODE § 5-239; Illinois - ILL. COMPILED STAT. ANN., Ch. 735/13-210; Indiana - IND. CODE ANN. § 34-11-4-2; Kansas- KANS. STAT. ANN. § 60-516; Kentucky - KY. REV. STAT. ANN. § 413.320; Maine - MAINE REV. STAT. ANN., tit. 14, § 866; Michigan - MICH. COMP. LAWS ANN. § 600.5861; Missouri – MO. REV. STAT., § 516.190; North Carolina - N.C. GEN. STAT. ANN. § 1-21; Nevada - NEV. REV. STAT. § 11.020; New York - MCKINNEY'S C.P.L.R. § 202; Ohio – R.C. § 2305.03(b); Oklahoma - 12 OKL. ST. ANN. § 105; Oregon - OR. REV. STAT. § 12.430; Pennsylvania - 42 PA.C.S.A. § 5521; Texas - TEX. CIV. PRAC. & REM. CODE § 16.067; Utah - UTAH CODE ANN. § 78B-2-103 (1953); Virginia - VA. CODE ANN. § 8.01-247; West Virginia - W. VA. CODE, § 55-2A-2; Washington - WASH. REV. CODE § 4.18.020; Wisconsin - WISC. STAT. ANN. § 893.07; Wyoming - WY. STAT. ANN. § 1-3-117.
[38] 51 Am. Jur. 2d Limitation of Actions § 88.

Under borrowing statutes, the law of the state in which the action is brought is used to determine *where* the cause of action accrued or arose. Once that state law is identified, the law of the other state is addressed to determine *when* the cause of action accrued.[39]

Furthermore, a single debt may be the subject of more than one cause of action which, in turn, affects the applicable statute of limitations. For example, a credit card obligation can be based on a written contract, an account stated,[40] or an unwritten contract theory of recovery.[41] Each of those causes of action may have a different applicable statute of limitations period, which in turn would affect whether a non-attorney debt collector can adequately determine the appropriate statute of limitations for that particular debt.

There are some instances when, given the complexities and dynamic factors that go into such an analysis, even attorneys cannot determine the appropriate statute of limitations. Consider the following fact pattern:

Mr. Smith opened a credit card account in 2001. A $40 payment was made in May 2003 and reflected on the June 2003 billing statement. The last payment was made on the account in May 2004, but a balance remained on the account. A lawsuit was filed to recover the remaining balance in 2008. Article 2 of the U.C.C. governs transactions in goods and provides for four (4) year statute of limitations. However, the jurisdiction in which Mr. Smith resides and where the lawsuit was brought has a six (6) year statute of limitations for written contracts or accounts receivables. If the 4-year statute applies, the lawsuit was untimely; if the 6-year statute of limitations applies, the lawsuit is timely. Which applies?[42]

The above situation begs the question of how a non-attorney debt collector can be expected to determine the appropriate statute of limitations when determining whether to utilize the time-barred debt disclosure.

» **Proposed Solution**

The unlicensed practice of law problem is easily solved by: (1) removing Proposed Section 1.2(a)(1)(vi)'s requirement to disclose "the applicable statute of limitations for the debt, expressed in years"; and (2) reverting back to the old time-barred debt disclosure language in Section 1.3 which says the debt collector "believes that the statute of limitations applicable to the debt may be expired" instead of unequivocally stating that the statute of limitations "has expired."

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[39] *See CMACO Auto. Sys., Inc.*, *supra*, n.14.

[40] *Nyberg v. Portfolio Recovery Assocs., L.L.C.,* No. 3:15-CV-01175-PK, 2017 WL 1055962, at *3 (D. Or. Mar. 20, 2017).

[41] *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, 19, 372 S.W.3d 324, 336 (Ark. 2010) (written contract); *Portfolio Acquisitions, L.L.C. v. Feltman*, 391 Ill. App. 3d 642, 655, 909 N.E.2d 876, 886 (Ill. App. 2009) (oral contract); *Colorado Nat. Bank of Denver v. Story*, 261 Mont. 375, 378, 862 P.2d 1120, 1122 (Mont. 1993) (account stated).

[42] The fact pattern was modeled after the facts in *Gray v. Suttell & Assocs., et al.*, 123 F. Supp. 3d 1283 (E.D. Wash. 2015), in which the Court denied summary judgment to the debt collector finding that "the Court does not have sufficient, undisputed information in the record currently before it to determine the applicable statute of limitations." *Id.*, 123 F. Supp. 3d at 1293. The Court did find that Suttell & Assocs. had sufficiently met the standard for a *bona fide* error defense and granted summary judgment on that ground.

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Problem: Proposed Sections 1.3(b) and 1.3(c) give conflicting advice for time-barred debt disclosures. Proposed Section 1.3(b) implies there should be two different time-barred debt disclosures depending on whether or not the debt at issue is subject to the new statute of limitations rules in NY CPLR § 214-i. However, Proposed Section 1.3(c) only offers one disclosure to "satisfy" 1.3(b) and that disclosure will not work for the majority of consumer debts subject to NY CPLR § 214-i.

Solution: Clarify Proposed Sections 1.3(b) and 1.3(c) by clearly outlining the disclosure required for each type of debt. Specific recommendations are provided at the end of this section.

» Clarifying Time-Barred Debt Disclosures for Debts Subject to NY CPLR § 214-i

The Department has proposed amendments for Sections 1.3(b) and 1.3(c) in response to the legislature's passage of NY CPLR § 214-i, which reduces the statute of limitations for most (but not all) consumer debts and eliminates revival after that statute of limitations expires. However, as drafted, the proposed amendments appear to contradict the law, which will cause confusion and disagreement within the industry about whether debt collectors should continue to provide a "one-size-fits-all" disclosure or whether there should be two different disclosures: one for debts governed by NY CPLR § 214-i and one for debts exempt from it. Consumers will ultimately suffer as the result.

» NY CPLR § 214-i

For most consumer debts, NY CPLR § 214-i will impose a three-year statute of limitations that cannot be revived or extended by payment, affirmation, or other activity on the debt. However, it carves out exceptions for three categories of debt that will remain unchanged, keeping their existing statute of limitations which may be revived in certain circumstances.

> Certain actions arising out of consumer credit transactions to be commenced within three years. An action arising out of a consumer credit transaction where a purchaser, borrower or debtor is a defendant must be commenced within three years, <u>except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law</u>. Notwithstanding any other provision of law, when the applicable limitations period expires, any subsequent payment toward, written or oral affirmation of or other activity on the debt does not revive or extend the limitations period.[43]

» Conflict for Clarification

Sections 1.3(b) and (c) are designed to work together. Section 1.3(b) establishes requirements for time-barred debt disclosures and Section 1.3(c) provides language that satisfies those requirements. Proposed Section 1.3(b) implies there should be two different time-barred debt disclosures because it lists four statements that are generally applicable and one additional statement about actions that

[43] NY CPLR § 214-i (effective April 7, 2022). *See also* UCC § 2-725 (contracts for sale), NY CPLR § 213-A (residential rent overcharges), and NY GBL Art. 36-B (warranties on sales of new homes).

may revive the statute of limitations "for those debts not subject to the statute of limitations set forth in Section 214-i of the Civil Practice Law and Rules."[44]

However, Proposed Section 1.3(c) only offers one disclosure that "satisfies" the requirements of Section 1.3(b). This disclosure includes the additional revival language that Section 1.3(b) suggests should only be used for the minority of consumer debts that are *not* subject to NY CPLR § 214-i. For the majority of consumer debts that are subject to it, this revival language would be misleading.[45]

» Proposed Solution

A few simple adjustments would help clarify what we believe to be the Department's original intent. For Section 1.3(b), we suggest reorganizing so that the generally applicable statements are grouped together with the additional statement for the "exception" debts listed at the end. We also recommend removing the reference to Section 1.3(b) in this provision because it is part of Section 1.3(b) itself.

Suggested changes to proposed § 1.3(b):

If a debt collector seeks to collect on a debt for which the debt collector has reason to know or has determined, including pursuant to subdivision (a) of this section, that the statute of limitations has expired, the debt collector must provide the consumer with clear and conspicuous notice, in all communications, including those required under subdivision (a) of section 1.2 of this Part, that:

(1) the statute of limitations applicable to the debt has expired;

(2) suing on a debt for which the statute of limitations has expired is a violation of the Fair Debt Collection Practices Act, 15 U.S.C. section 1692 *et seq.*;

(3) if the consumer is sued on a debt for which the statute of limitations has expired, the consumer may be able to stop the lawsuit by responding to the court that the statute of limitations has expired;

(4) the debt collector may not, without the prior written and revocable consent of the consumer alleged to owe such debt given directly to the debt collector, or the express permission of a court of competent jurisdiction, communicate with such consumer in connection with the collection of such debt by telephone or by other means of oral communication.

(5) for those debts not subject to the statute of limitations set forth in Section 214-i of the Civil Practice Law and Rules, in addition to and in the same form as the disclosures listed above, the debt collector must notify the consumer that: (i) the consumer is not required to provide the debt collector with an admission, affirmation, or

[44] 23 NYCRR § 1.3(b) (as amended by NY DFS Proposed Amendments to 23 NYCRR 1 *et seq.*).
[45] 23 NYCRR § 1.3(c) (as amended by NY DFS Proposed Amendments to 23 NYCRR 1 *et seq.*).

acknowledgment of the debt, a promise to pay the debt, or a waiver of the statute of limitations; and (ii) if the consumer makes any payment on a debt for which the statute of limitations has expired or admits, affirms, acknowledges, or promises to pay such debt, the statute of limitations may restart.

For Section 1.3(c), CRC recommends offering two proposed disclosures to satisfy Proposed Section 1.3(b). The current proposed language would apply to debts that are not subject to NY CPLR § 214-i and a modified version (without the revival language) that would apply to debts that are subject to NY CPLR § 214-i.

Suggested changes to proposed § 1.3(c):

The following language satisfies the notice requirement contained in subdivision (b) of this section:

(1) For debts that are subject to the statute of limitations set forth in Section 214-i of the Civil Practice Law and Rules:

"We are required by regulation of the New York State Department of Financial Services to notify you of the following information. This information is NOT legal advice:

It is against the law to sue to collect on this debt because the legal time limit (statute of limitations) for suing you to collect this debt has expired. It is a violation of the Fair Debt Collection Practices Act, 15 U.S.C. section 1692 *et seq.*, to sue to collect on a debt for which the statute of limitations has expired. If a creditor does sue you to collect on this debt, you may be able to prevent the creditor from obtaining a judgment against you by telling the court that the statute of limitations has expired.

If you would like to learn more about your legal rights and options, you can consult an attorney or a legal assistance or legal aid organization."

(2) For debts that are not subject to the statute of limitations set forth in Section 214-i of the Civil Practice Law and Rules:

"We are required by regulation of the New York State Department of Financial Services to notify you of the following information. This information is NOT legal advice:

It is against the law to sue to collect on this debt because the legal time limit (statute of limitations) for suing you to collect this debt has expired. It is a violation of the Fair Debt Collection Practices Act, 15 U.S.C. section 1692 *et seq.*, to sue to collect on a debt for which the statute of limitations has expired. If a creditor does sue you to collect on this debt, you may be able to prevent the creditor from obtaining a judgment against you by telling the court that the statute of limitations has expired.

However, if you make a payment on the debt, then your creditor or debt collector may be able to sue you in court to collect on the debt. You are not required to admit that you owe this debt, promise to pay the debt, or waive the statute of limitations.

If you would like to learn more about your legal rights and options, you can consult an attorney or a legal assistance or legal aid organization."

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By making these simple adjustments, CRC believes that DFS can ensure that all members of the industry are providing consistent disclosures that accurately reflect the law, as amended by NY CPLR § 214-i.

§ 1.3: PROHIBITING PHONE CALLS FOR TIME-BARRED DEBT

Problem: Proposed Section 1.3(b)(5) seeks to ban calls to collect time-barred debt. While there are limited exceptions, they are unclear and unlikely, rendering them functionally non-existent. Banning calls would increase the cost of collection, incentivizing creditors to sue New York consumers earlier and more often than consumers in other states where calls are allowed. The ban is also an unconstitutional infringement on debt collectors' rights to free speech under the First Amendment because it suppresses speech "on the basis of the speech's content and in advance of its actual expression."

Solution: Proposed Section 1.3(b)(5) should be eliminated to allow collectors to continue calling consumers. Calls are the best way to find the right solution for a consumer's individual circumstances and existing laws provide ample protection through call frequency limits, time-barred debt disclosures, etc.

» The Proposed Ban on Phone Calls for Time-Barred Debt is Unclear, Unconstitutional, and Harmful to Consumers

Proposed Section 1.3(b)(5) would prohibit a debt collector attempting to collect a time-barred debt from communicating with a consumer "in connection with the collection of such debt by telephone or by other means of oral communication."

There are two very limited exceptions: a debt collector may call if they have (1) "the prior written and revocable consent of the consumer…given directly to the debt collector;" or (2) "the express permission of a court of competent jurisdiction." As written, it's unclear if these exceptions require consent/permission to be given after the debt becomes time-barred (*i.e.,* consent/permission specifically to call about a debt that is time-barred) or if consent/permission given beforehand would continue to be effective even after the debt becomes time-barred. Either way, it seems highly unlikely that a court or a consumer would go out of their way to give a debt collector written permission to make collection calls. With exceptions so rare they might as well not exist, we are left with the functional equivalent of an all-out ban on calls to collect time-barred debt. CRC urges DFS reconsider this proposal because it would have a negative impact on consumers, creditors, and debt collectors.

» Collection Calls Are the Best Way to Help Consumers Based on Their Specific Circumstances and Existing Laws Already Provide Plenty of Protection

The most obvious negative impact will be that consumers will not obtain any benefit from this proposed regulation, and instead, will be harmed. Debt collectors rely on a variety of means to collect debt, including letters and credit reporting, when appropriate. But the most efficacious means for collecting debts is by telephone calls. Telephone calls allow debt collectors to discuss the underlying debt with consumers, evaluate the consumer's specific situation and any obstacles to repayment, respond in real time to questions about the debt, offer various repayment options or

settlement offers, and allow debt collectors to collaborate with consumers to solve their problems in real time. Debt collectors engaging consumers on the phone do so under a strict federal and state statutory scheme, with specific prohibitions on making false, deceptive, or misleading statements during these conversations.[46] The number of calls a collector makes to a consumer is also tightly regulated.[47]

Moreover, existing law already requires consumers to be advised that the debt is beyond the limitation period and that the consumer cannot be sued to collect that debt. *See N.Y. Rules, Title 6, § 2-191*. Consumers, in other words, already have sufficient protections against paying a time-barred debt against their will or being tricked into making a payment. Consumers are also protected from an excess number of telephone calls or telephone calls that contain harassing or false statements.[48] Placing consumers in a written communication bubble does not provide any meaningful value.

Banning Calls Would Increase Collection Costs, Incentivizing Creditors to Sue New York Consumers More Often Than Consumers Living in Other States That Still Allow Calls

If telephone calls on time-barred debt are banned, New York consumers will suffer. Delinquent accounts will become more prevalent because debt collectors will not be as successful at resolving debts. This means creditors will see a decrease in their receivables and an increase in the cost of collection associated with more print mail. This is not sustainable, so creditors will look to alternatives for collecting these debts. That means one thing – creditors will be forced to file collection lawsuits against New York consumers earlier and more frequently than consumers in other states that still allow collectors to call seeking voluntary repayment of time-barred debts.

If Proposed Section 1.3(b)(5) is adopted, New York consumers may avoid the petty annoyance of a phone call, but that annoyance will be replaced by the much more distressing and harmful effect of a defending against a collection lawsuit. In other words, rather than ten minutes on a phone call, consumers will face weeks or months of litigation, court appearances, a looming trial date, and possibly even a judgment enforceable by liens, garnishment, or attachment – and potentially, costs arising from same. A consumer given the choice between these two options will invariably elect the phone calls.

» **The Proposed Ban on Phone Calls for Time-Barred Debt Presents a Serious Constitutionality Question**

Additionally, Proposed Section 1.3(b)(5)'s restriction on calls to collect time-barred debt is an improper infringement on the First Amendment rights of debt collectors because it represents an artificial and arbitrary limitation on protected speech.

Though a debt collector's communications with a consumer can be regulated, and can rightly prohibit things like false or harassing statements, Proposed Section 1.3(b)(5) crosses the line to

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[46] *See, e.g.,* 15 U.S.C. §§ 1692c, 1692d, 1692e, and 1692f; 12 C.F.R. §§ 1006.6, 1006.14, 1006.18, and 1006.22; N.Y. Rules, Title 6, § 5-77(d)..

[47] *See* 12 C.F.R. § 1006.14(b)(2) (Absent consumer consent, calls made by a debt collector to a consumer are limited to no more than seven calls in a seven day period, and, absent consumer consent, a debt collector is prohibited from having more than one conversation with the consumer during any 7 day period). *See also* Proposed Amendment to § 1.6(a)(2) (proposing to prohibit "more than one telephone call and three attempted telephone calls per seven-day period per alleged debt").

[48] *See* 15 U.S.C. §§ 1692d, e, and f, generally.

prohibit **any** verbal communication on debts simply because the limitation period for legal enforcement of the debt has expired. This ban operates as a prior restraint on constitutionally-protected speech.

A prior restraint is a law or regulation that suppresses speech "on the basis of the speech's content and in advance of its actual expression."[49] A prior restraint is "the most serious and least tolerable infringement" on the First Amendment freedom of speech.[50] The proposed ban on telephone calls is a prior restraint because it is specifically targeted to the content of that speech (*i.e.*, the regulation applies only to debts after expiration of the applicable statute of limitations period), and in advance of any debt collector actually making any statement to the consumer.

Even if a debt collector's calls are reviewed under a commercial speech analysis, the total suppression of "concededly truthful information about lawful activity" is unconstitutional.[51] Here, there is no question that the proposed speech, involving collection of a valid debt, constitutes truthful and lawful activity. The debt, even if the limitation period has expired, is still owed.[52] When subjected to the "exacting review" required for a prior restraint,[53] the ban on verbal communications unique to those debt collectors attempting to collect a time-barred debt violates the First Amendment as a prior restraint.

» **Proposed Solution**

To protect consumers and avoid constitutional challenges, Proposed Section 1.3(b)(5)'s ban on telephone calls when collecting time-barred debt should be eliminated from the proposed amendments.

We thank you, again, for your consideration of these comments.

[49] *U.S. v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005).
[50] *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).
[51] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976).
[52] *Tanges v. Heiderlberg North America, Inc.,* 93 N.Y.2d 48, 55, 687 N.Y.S. 604 (1999) ("The expiration of the time period prescribed in a Statute of Limitations does not extinguish the underlying right, but merely bars the remedy.")
[53] *Quattrone*, 402 F.3d at 310.