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COURT OF APPEALS

STATE OF NEW YORK

ERIC M. BERMAN, P.C.,
LACY KATZEN, LLP,

Respondents,

-against-

No. 114

CITY OF NEW YORK, et al.,

Appellants.

20 Eagle Street
Albany, New York 12207
June 3, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 114, Eric Berman.

2 Okay, counsel, do you want some rebuttal
3 time, coun - - -

4 MS. ZALEON: Yes, I'd like to reserve three
5 minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Three minutes, sure.
7 Go ahead.

8 MS. ZALEON: May it please the court, I'm
9 Janet Zaleon for the City. This law and all these
10 debt collection regulations sit against the
11 background of the way the debt collection industry
12 actually operates.

13 CHIEF JUDGE LIPPMAN: No, but your target
14 is the debt - - - the debt collection industry, not
15 lawyers?

16 MS. ZALEON: Correct.

17 CHIEF JUDGE LIPPMAN: And is that clear in
18 the - - - in the local law?

19 MS. ZALEON: Yes, for this reason. The
20 phrase that the respondents have tried to cut out of
21 their analysis which is the traditional debt - - -
22 activities of a debt collector, is - - - is a - - -
23 it's - - - is itself a phrase that in a footnote in
24 the beginning of our brief, we've noted an FTC
25 document in which that phrase appears.

1 The phrase indicates to the reader that the
2 definition of - - - first of all, the definition of
3 debt collectors is in the local law. Then the
4 exemption for attorneys, which has been there since
5 1984, and then the words clarifying that the
6 exemption for attorneys does not exempt them from the
7 same kinds of things that other debt collection - - -

8 CHIEF JUDGE LIPPMAN: So we're saying - - -
9 so let's make it simple. If they act as traditional
10 debt collectors, you want to regulate them. If they
11 act as lawyers, you're not regulating them. Is that
12 - - -

13 MS. ZALEON: Yes, and - - -

14 CHIEF JUDGE LIPPMAN: - - - is that the
15 basic distinction here?

16 MS. ZALEON: Yes, it is, and the - - - and
17 the activities that have been historically carried
18 out in this industry carried out by lay debt
19 collection agencies that have obtained licenses since
20 this act was passed in 1984.

21 CHIEF JUDGE LIPPMAN: So your - - - your
22 goal - - - your goal is to stop the industry from
23 using lawyers to get around your regulations, and
24 that they're going to do the things that the debt
25 collection industry does, not really that lawyers do,

1 and that you can't use the - - - the legal license as
2 a kind of a shield against your regulating certain
3 practices. Is that - - -

4 MS. ZALEON: Yes, and we know that would
5 happen - - -

6 CHIEF JUDGE LIPPMAN: I'm trying to
7 understand the - - -

8 MS. ZALEON: Yes. We know that would
9 happen because it has happened. In the beginning of
10 our appellant's brief where we point out the way that
11 the Congress addressed the federal law, what had
12 happened was because that federal law had an attorney
13 exemption in it, attorneys were beginning to enter
14 this field and the - - - Congress found that the
15 number of attorney - - - of debt collection law firms
16 was attor - - - was outstripping the number of lay
17 debt collection firms. And of course - - -

18 JUDGE STEIN: Who's going to decide in any
19 particular case whether a debt collector is acting as
20 an attorney or acting as a debt collector?

21 MS. ZALEON: This isn't a situation in
22 which the debt collection attorneys know their
23 industry. They are regularly - - - and remember, it
24 has to be regularly, so you're not going to have
25 somebody - - -

1 JUDGE STEIN: No, but my question is, is
2 when there's a question - - - a lawyer who's doing
3 debt collection says I don't need to register; I
4 don't need to - - - to follow all these rules,
5 because I'm acting as a lawyer. And then somebody's
6 going to come around to enforce the rules, and say,
7 oh - - - oh, no, you are; you're acting as a debt
8 collector, not as a lawyer. Who - - - who makes that
9 decision and how does that decision get made?

10 MS. ZALEON: DCA both gets opinions from
11 entities asking if they need to be licensed, and also
12 when a consumer makes a complaint, they check to see
13 whether the entity that's trying to collect - - -
14 collect the debt is licensed and can assess them at
15 that point whether the - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but you agree
17 that - - - that some of these distinctions are not so
18 easy to make.

19 MS. ZALEON: In the context of the debt
20 collection agent - - - agencies and - - - and the
21 activities that they traditionally engage in, and
22 that's why we've described, and the amici have
23 described as well, the high volume of debt collection
24 activity carried out without any lawyers' involvement
25 in any of it.

1 Your Honor, is that this is a fateful challenge to
2 the law. And if there is a situation that requires
3 discussion with the DCA to interpret the law in a
4 particular type of entity - - - as to a particular
5 type of entity that's different from the most common
6 types of entities in this field, then that can be
7 handled.

8 JUDGE STEIN: Okay, can you give me any
9 other example of a local municipality regulating this
10 kind of conduct, as opposed to the federal government
11 or some agency of the state government?

12 MS. ZALEON: I'm not familiar with another
13 locality that has a law quite like this one, but the
14 thing to remember here, is that we're talking about
15 actions that attorneys are not really getting
16 involved in, and even if - - - even if they are - - -
17 are the heads of these organizations, no matter what
18 activities their staffs may engage in, they remain in
19 the practice of law, without - - - unless and until
20 the Appellate Division decides to discipline them.

21 The - - - the - - - there is nothing that
22 says in the - - - in the general authority to - - -
23 to discipline an attorney that - - - that carves out
24 any restriction on - - - on local consumer protection
25 laws, which is a different field, which provides

1 different remedies, and by the same token, there's
2 nothing about this law that affects the right to
3 practice law.

4 JUDGE ABDUS-SALAAM: Counsel, you mentioned
5 that some attorneys in their regular practice do some
6 debt collection, and you're only trying to reach
7 those whose practice is substantially that or some
8 percentage of that. Have you done some analysis
9 where you've decided what the cutoff is and
10 percentage for firms that do debt collection?

11 MS. ZALEON: Well, first of all, the term
12 "regularly" also comes from the federal law and, in
13 fact, we - - - both the State and our brief cites a
14 case called Goldstein which set out the criteria
15 under that law for what constitutes regular
16 collection of - - - of - - - engagement in debt
17 collection activity. There is nothing that confuses
18 the experienced practitioners in this discrete field.

19 If there were something where it was
20 somehow unusual, then we would address that matter at
21 that time, but this is not a situation like that
22 because of the history in this field.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 MS. ZALEON: Thank you, Your Honor.

25 CHIEF JUDGE LIPPMAN: Thank you.

1 Counsel?

2 MS. LIN: May it please the court, Karen
3 Lin, for the State of New York as amicus.

4 CHIEF JUDGE LIPPMAN: What's the interest
5 of the State of New York here?

6 MS. LIN: The State's interest is that the
7 State has an interest in protecting consumers from
8 abusive debt collection practices in the State. The
9 State has demonstrated this through its own - - -
10 through its own laws and enforcement.

11 CHIEF JUDGE LIPPMAN: Do you think that the
12 - - - the - - - the two sets of - - - of regulations,
13 one regulating attorney conduct, and one, reg - - -
14 regulating debt collection, is - - - is your view
15 that they can exist together? They compliment each
16 other rather than - - - I mean, how does this work?
17 We know you have an interest in protecting the
18 consumer, but I assume you also have an interest in
19 the - - - in the regulation of the legal profession,
20 which is laid out in statute how that's done.

21 MS. LIN: Correct, Your Honor, and we do
22 believe that these two schemes are complimentary of
23 each other and can coexist. The local law clearly
24 exempts from its scope attorneys who are - - - law
25 firms who are acting in the capacity as such, solely

1 through activities that require a law license. That
2 only applies to those activities that are
3 traditionally carried by debt collectors and that
4 don't require a law license.

5 CHIEF JUDGE LIPPMAN: And in answer to
6 Judge Stein's questions before about, well, you know,
7 where it's not clear who makes the decision. You
8 don't think it's a big - - - big issue to - - - to
9 make those distinctions? Your argument that the feds
10 do it and we can do it or what?

11 MS. LIN: Your Honor, I think - - -

12 CHIEF JUDGE LIPPMAN: Or don't you think
13 there's really a - - - such a great divide on this?

14 MS. LIN: Your Honor, I think there are a
15 few responses to that question. We don't believe
16 there is a large concern because in the vast majority
17 of cases, it will be clear whether an attorney is
18 engaging in the practice of law versus not the
19 practice of law. I think - - -

20 JUDGE PIGOTT: What was wrong with the law
21 in the first place? Why did you need this amendment?

22 MS. LIN: The amendment to include
23 attorneys who are acting as traditional debt
24 collectors? Well - - -

25 JUDGE PIGOTT: Yeah, it says - - - it says

1 "solely through activities that may only be performed
2 by a licensed attorney". I mean, licensed attorneys
3 get handled by, as was pointed out, the Appellate
4 Division. You could go after collect - - - debt
5 collectors all you want. If it happened to be an
6 attorney, it doesn't make any difference; it's still
7 a debt collector, right?

8 MS. LIN: Well, yes, Your Honor, and that's
9 the point of this exception is that it allows the
10 City to regulate attorneys to the extent that they're
11 acting outside of the scope of practice.

12 JUDGE PIGOTT: Why don't you just go after
13 them as debt collectors?

14 MS. LIN: That - - - that is the purpose of
15 the - - - the - - - of the local law, is to go after
16 them when they're acting as debt collectors, and
17 characterizing them as debt collection.

18 JUDGE PIGOTT: Well, I guess I'm not being
19 clear about my - - - in other words, the complaint
20 here is, that lawyers get taken care of - - - get
21 regulated by the State and by - - - by the Appellate
22 Divisions. Debt collectors are getting handled by
23 the City of New York in this particular case. Why
24 isn't that the end of the story? Why do you have to
25 - - - why do you have to say we're going to regulate

1 lawyers? You're going to regulate debt collectors;
2 some of them may be lawyers. So go do that.

3 MS. LIN: Well, I think under - - - under
4 the previous - - - previous version of the law, it
5 wasn't clear that attorneys just acting as debt
6 collectors could be regulated as debt collectors.

7 JUDGE PIGOTT: What was unclear about it?
8 "Any attorney at law collecting a debt as an attorney
9 on behalf of and in the name of a client."

10 MS. LIN: I - - - the way that it was being
11 interpreted by pe - - - by attorneys prior to this,
12 was that they were exempt from this law and immune in
13 their debt collection activities. And the State
14 clearly did not intend for attorneys to be immune
15 from all other regulation of their professional
16 conduct outside of the judiciary law. And this is
17 borne out by the history - - -

18 JUDGE STEIN: No, but this goes to my - - -
19 clearly, the lawyers are subject to the penal law and
20 - - - and other laws as - - - as you've mentioned,
21 but all of those laws are state laws that - - - that
22 - - - that work jointly with - - - with the judiciary
23 law. What I - - - what concerns me, is that if we
24 start having municipalities - - - every different
25 municipality setting up different rules that may

1 affect how attorneys do their work, that - - - that
2 that's a whole different situation and - - - and may
3 not be authorized.

4 MS. LIN: Well, Your Honor, again, this - -
5 - this - - - the law doesn't reach the practice of
6 law. Additionally, the history of specifically debt
7 collection regulations shows that the state did
8 contemplate cooperative efforts between the federal,
9 state, and local governments and the different
10 branches of the governments to protect consumers
11 against these abuses.

12 It's done this - - - for instance, by the
13 fact that rather than pre - - - trying to preempt and
14 oust the City from this regulation in the year since
15 Local Law 15 was passed, it has instead enacted
16 statewide regulations that build upon the City's own
17 - - - the City's own laws. And that's demon - - -

18 JUDGE ABDUS-SALAAM: So in other words, a
19 lawyer who may be acting as a debt collector in New
20 York City would be subject to this city law, but if
21 that same law firm were doing those same practices in
22 Yonkers, they would still be regulated, but by the
23 State, is that what you're saying?

24 MS. LIN: Yes, Your Honor. That's correct.
25 So the - - - the - - - all attorneys who act as debt

1 collectors would be subject to the state laws, but
2 the city's laws add an additional layer of protection
3 for consumers within New York Ci - - - City, and
4 there has been a demonstrated record of many
5 complaints to DCA of the abuses that debt collectors
6 have engaged in against consumers.

7 JUDGE READ: So what - - - you said a floor
8 statewide, but did they - - - but they built on that,
9 and added more protections for the City. Is that
10 what you're saying?

11 MS. LIN: That's correct. In this case,
12 that's correct. And in this specific case, this
13 local law is not preempted by the State's regulation
14 of attorneys under the judiciary law, which is
15 targeted at the practice of law, and not anything
16 broader than that.

17 JUDGE ABDUS-SALAAM: So going back to Judge
18 Stein's question, every municipality in the state
19 could assume that the State law is a floor and do
20 exactly what New York City has done?

21 MS. LIN: Your Honor, that - - - it would
22 be hypothetical. We don't know if any other
23 municipality would pass similar laws and what those
24 laws would say. Right now the question is whether
25 the judiciary law preempts the Local Law 15, not

1 whether any other law or regulation might pre - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but all we're
3 asking is it's conceivable that every - - - every
4 county could say, oh, that's a good idea; every
5 municipality - - - we're just going to adopt a
6 similar regulation. So what - - -

7 JUDGE READ: As one of our former
8 colleagues used to say, we ask hypothetical
9 questions.

10 MS. LIN: It's go - - -

11 JUDGE READ: So hypothetically, that would
12 be possible, right?

13 MS. LIN: Hypothetically it would be
14 possible, and it would be ba - - - and it would be -
15 - -

16 CHIEF JUDGE LIPPMAN: But - - - but in your
17 - - -

18 MS. LIN: - - - dependent on - - -

19 CHIEF JUDGE LIPPMAN: But I guess the
20 question is, in your view, there'd be nothing with
21 that.

22 MS. LIN: There would be nothing - - - it
23 would depend on what those individual laws actually
24 said and how they interacted with the state law. In
25 this case, the state judiciary law does not pose a

1 bar to the City's regulation of - - -

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 Thanks, counsel.

4 MS. LIN: Sure.

5 MR. GERSHENOFF: Good afternoon, and may it
6 please the court, my name is Max Gershenoff. I'm
7 here on behalf of plaintiffs Eric M. Berman, P.C.,
8 Lacy Katzen, LLP.

9 CHIEF JUDGE LIPPMAN: Counsel, what's wrong
10 with the kind of regulatory scheme that's laid out by
11 your - - - your adversaries that you have a state
12 floor, and then you have a local law that provides
13 some additional protection and makes a distinction
14 between the regulation of law or the legal
15 profession, which is in the judiciary law, and the
16 regulation of debt collection. What's - - - what's
17 wrong with that scheme?

18 Who is - - - who is - - - who is hurt by
19 that and why isn't the public helped by this kind of
20 scheme that says that when a lawyer acts as a debt
21 collector or the things that debt collectors
22 traditionally do, then we're - - - we're regulating
23 debt collection, but we specifically don't want to
24 regulate lawyers in what they do as professionals.

25 Why is that in - - - in its - - -

1 conceptually flawed? And if it's not conceptually
2 flawed, what is it - - - what is it specifically
3 about this local law that - - - that's wrong or
4 flawed?

5 MR. GERSHENOFF: The plaintiffs have no
6 problem with the concept of regulating - - -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. GERSHENOFF: - - - debt collectors.
9 This is a - - - this is a - - -

10 CHIEF JUDGE LIPPMAN: Okay, so what's wrong
11 with this local law?

12 MR. GERSHENOFF: This is a concept that was
13 flawed in its - - - in its execution, okay?

14 CHIEF JUDGE LIPPMAN: Okay. How so? How
15 so?

16 MR. GERSHENOFF: As a practical matter,
17 Local Law 15 makes an extremely vague distinction
18 between attorneys - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but the - - -

20 MR. GERSHENOFF: - - - and the practice of
21 law - - -

22 CHIEF JUDGE LIPPMAN: But the feds make
23 similar distinctions. It seems to work okay, right?

24 MR. GERSHENOFF: Well, actually, federal
25 courts have made that distinction. The federal Fair

1 Debt Collection Practices Act doesn't even mention
2 attorneys.

3 CHIEF JUDGE LIPPMAN: Yeah, but it's able
4 to be done, isn't it, on a federal level?

5 MR. GERSHENOFF: To the extent that a
6 federal court interpreting federal law interprets a
7 given attorney to be doing something other than
8 practicing law in the course of their professional
9 life - - -

10 CHIEF JUDGE LIPPMAN: Why - - - why can't
11 we do it here?

12 MR. GERSHENOFF: In this particular case,
13 we can't do it here, because here we have the
14 Municipal Home Rule Law, and we have had for
15 centuries control over attorney licensing and the
16 practice of law vested in the state judiciary.

17 CHIEF JUDGE LIPPMAN: Well, we know - - -
18 we know that. We're very sensitive to that.

19 MR. GERSHENOFF: Yes. And Local Law 15
20 empowers Department of Consumer Affairs bureaucrats
21 to make that determination - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but are they -
23 - -

24 MR. GERSHENOFF: - - - in the first
25 instance.

1 CHIEF JUDGE LIPPMAN: Yeah, but again, are
2 they regulating lawyers or they're regulating debt
3 collection, and sometimes distinctions have to be
4 made if - - - if - - - if the concept is a good one.
5 And I understand what you're saying that - - - that
6 in - - - in practice it's - - - in the execution it's
7 not good. You're saying it can't be in its execution
8 done without violating the judiciary law?

9 MR. GERSHENOFF: No, it can't, not to the
10 extent - - -

11 CHIEF JUDGE LIPPMAN: Why not? Why - - -
12 why not?

13 MR. GERSHENOFF: Because to the extent that
14 they are trying to regulate attorneys who are
15 engaging in activities that are part of the core
16 practice of law. Contacting an adverse party on
17 behalf of a client in an attempt to enforce that
18 client's rights, that is part of the core practice of
19 law, as much as drawing a contract, appearing in this
20 court today - - -

21 JUDGE PIGOTT: I would think - - -

22 MR. GERSHENOFF: - - - or any other type of
23 lawyering.

24 JUDGE PIGOTT: I would think that lawyers
25 would support this. I - - - you know, when I'm

1 reading all of this, and - - - and I get your point,
2 I mean that there are law firms - - - but there - - -
3 there isn't a law firm that I know of, and I'll bet
4 that you know of, that would call people late at
5 night, that would threaten them, that would - - -
6 that would make assertions, even though - - - I know
7 the statute of limitations is an affirmative defense
8 - - - would chase somebody over a debt that may be
9 eight years old, that would not bother to research to
10 make sure it was a legitimate debt, and - - - and
11 that it can and should be pursued.

12 There's no - - - there is no law firm - - -
13 there's no lawyer that ever - - - would ever do
14 anything like that. And so all this - - - all this
15 statute seems to do is say, don't do that. And I
16 would think lawyers would say, thank God, somebody is
17 - - - you know, in case we have one of - - - you
18 know, somebody out there that's doing this, they're
19 getting stopped.

20 MR. GERSHENOFF: Well, here's the problem,
21 Your Honor. Local Law 15 - - - and I - - - I can't
22 discuss what some other statute might potentially say
23 in the future, or I could, but as for Local Law 15,
24 the law which we're faced with here and now today - -
25 - Local Law 15 defines traditional debt collection

1 activities to include regularly contacting an adverse
2 party by mail or telephone in an attempt to collect a
3 debt on behalf of a client.

4 JUDGE PIGOTT: So but when you say "party"
5 does - - - does it - - - it doesn't mean another
6 attorney. It means - - - it means the person who's
7 not represented, right?

8 MR. GERSHENOFF: Sure, and to the extent
9 that the attorney, of course, learns that that person
10 is represented, they'll be obligated thereafter to
11 communicate - - -

12 JUDGE PIGOTT: That's no problem. It's the
13 - - - it's scaring people. You know, it's calling
14 them in the middle of the night or at - - - you know,
15 at bad hours. I think that's what they're trying to
16 get at.

17 MR. GERSHENOFF: Sure, but that's not what
18 they've got at. What they've got at is something
19 much broader and completely different and much more
20 problematic.

21 JUDGE PIGOTT: If a lawyer represents that
22 - - - the local gas company and his job is all day
23 long to call people who haven't paid their gas bill,
24 do they fall within this? Is that - - - is that
25 somebody who's doing a debt collection who may be

1 subject to this licensure?

2 MR. GERSHENOFF: I'm not sure if that would
3 qualify as a consumer debt that would be subject to
4 Local Law 15. It's possible that it would. To the
5 extent that it is, then, yes, it would fall within
6 the ambit of Local Law 15. The problem is what else
7 falls within the ambit of Local Law 15? And it's
8 quite a bit. They define, again, traditional debt
9 collection activities to encompass things that are a
10 core part of the legal practice, you know.

11 Every attorney who regularly represents
12 creditor clients, would have to - - - pursuant to
13 this law - - - obtain a separate license from the New
14 York City Department of Consumer Affairs as a
15 condition precedent to engaging in their professional
16 - - -

17 JUDGE PIGOTT: That's - - - that's your
18 point about the - - - the vagueness of what
19 traditional debt collectors - - -

20 MR. GERSHENOFF: I mean - - -

21 JUDGE PIGOTT: - - - traditionally
22 performed by.

23 MR. GERSHENOFF: To the extent that they've
24 provided any definition of all - - - at all, with
25 respect to what they consider to be traditional debt

1 collection activities, the definition that they've
2 provided, which appears, by the way, on the face of
3 the statute, okay, would encompass basic day-to-day
4 activities that constitute the practice of law, like
5 calling up a prospective defendant and saying, you
6 know, I'm representing client A.

7 CHIEF JUDGE LIPPMAN: What - - - what kind
8 of statute would be okay with you or what kind of
9 local law would be okay? Does it have to say, you
10 can't call them up in the middle of the night? I
11 mean, you got to get to that level. You can't
12 frighten the consumer. It's clear that's what
13 they're trying to get at. But how narrowly do you
14 have to draw this kind of local law to be okay?

15 MR. GERSHENOFF: You would have to define
16 it pretty narrowly to the extent that that the law
17 would purport to apply to attorneys, because
18 attorneys have, for centuries, been regulated by the
19 judiciary, and the judiciary should continue, in the
20 first instance, to regulate those attorneys, not only
21 their practice of law - - -

22 JUDGE PIGOTT: Yeah, but - - - they don't
23 have the army. I - - - you know, the Fourth
24 Department Disciplinary Committee, they couldn't
25 handle this in a heart - - - in a hundred years. I

1 mean, I'm - - - I'm assuming there is - - - there are
2 none up in the Fourth Department.

3 CHIEF JUDGE LIPPMAN: Of course.

4 JUDGE PIGOTT: We don't - - - we don't have
5 people like this.

6 MR. GERSHENOFF: To the extent that an army
7 has to be deput - - - deputized to handle this issue,
8 okay - - -

9 JUDGE PIGOTT: Yeah.

10 MR. GERSHENOFF: - - - the conscription
11 shouldn't occur amongst the officeholders at the New
12 York City Department of Consumer Affairs.

13 JUDGE PIGOTT: Well, I want to go back to
14 my gas company, and then I'll shut up. You say
15 that's not consumer. Let's make it Macy's, all
16 right. So you got a lawyer whose job it is to - - -
17 to debt collect at Macy's. That's what he does all
18 day long, all right. Does this law mean that he
19 can't - - - that he or she has to register? And
20 traditional debt collection, does that mean now that
21 second envelope is - - - got a lightning bolt
22 through it - - - it's pink - - - that that's a
23 traditional debt collection thing?

24 MR. GERSHENOFF: If you have a - - - a debt
25 collector who is attempting to collect consumer debts

1 and they're not an attorney, then presumably they
2 would have to obtain a license from the New York City
3 Department - - -

4 JUDGE PIGOTT: No, if they were an
5 attorney, I'm saying.

6 MR. GERSHENOFF: If they actually are an
7 attorney?

8 JUDGE PIGOTT: Right. Under - - - under
9 the new law, they would have to register.

10 MR. GERSHENOFF: If what the attorney does
11 in the course of fulfilling that role is, for
12 example, sending out letters in which the attorney
13 holds herself out as an attorney, and holds herself
14 out as representing a client in an attempt to enforce
15 that client's rights, then that attorney cannot and
16 should not be subject to Local Law 15, because that
17 attorney is practicing law, because her obligation's
18 to the court - - -

19 CHIEF JUDGE LIPPMAN: Even if - - - even if
20 - - - even if that attorney in the scenario that the
21 Judge gives you, that's all they do, everyday, is
22 send up a letter, send up a follow letter, then I
23 call, then I do that. That's what the attorney's
24 practice is, and Macy's is their only client, and
25 they do that all day. That's practicing law or

1 practicing debt collection?

2 MR. GERSHENOFF: It's an interesting
3 question because every time an attorney writes to an
4 adverse party on behalf of a client in an attempt to
5 enforce that client's rights, and in so doing, holds
6 herself out as an attorney, her responsibility is to
7 the court, to the adverse party, by the way, and to
8 her client, travel with and are intrinsic to that
9 communication.

10 CHIEF JUDGE LIPPMAN: Then - - - then
11 you're saying - - - then you're saying even in the
12 example that was given before by Judge Pigott, that
13 we want to stop these people who call in the middle
14 of the night and all of that, you - - - according to
15 what you're saying, you can never regulate, because
16 the person's an attorney.

17 The only one who can deal with them is the
18 Appellate Division and you can't say, if you're going
19 to call in the middle of the night, you're going to
20 threaten people, if you're going to do that, we're
21 going to regulate you as - - - as debt collectors,
22 you can't even do that, because I'm an attorney, and
23 you can't - - - you can't tell me what to do, only
24 the Appellate Division could tell me.

25 MR. GERSHENOFF: Not at all. Not only - -

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CHIEF JUDGE LIPPMAN: Why? Why not?

MR. GERSHENOFF: - - - the Appellate Division because the State can also pass laws to regulate those attorneys.

CHIEF JUDGE LIPPMAN: Yeah, yeah, but what - - - assume for the sake of argument that the local law isn't in conflict with the statutory - - - with the state floor, and you're adding some more protections, and that's what it says. You can't call in the middle of the night; you can't threaten people. Don't ring their doorbell and tell them whatever - - - that you're going to - - - you know, go to hell if you don't pay your - - - your debt. And - - - and that's what we're regulating. But I'm an attorney, so don't come near me, uh-uh. It says "esquire" on it. I can't touch you or I can?

MR. GERSHENOFF: I - - - the City - - -

CHIEF JUDGE LIPPMAN: Could - - - could a local - - -

MR. GERSHENOFF: The City - - - the City of New York and every other municipality in this state from Buffalo to Montauk can't.

CHIEF JUDGE LIPPMAN: Yeah. Do you - - -

JUDGE STEIN: Why?

1 JUDGE READ: But the State can? The State

2 - - -

3 MR. GERSHENOFF: The State can, absolutely.

4 JUDGE STEIN: Then why the distinction?

5 Why can the State, but not - - - not the

6 municipality?

7 MR. GERSHENOFF: Well, because Judiciary

8 Law Sections 53 vests the judiciary with authority

9 over attorney licensing - - -

10 JUDGE STEIN: Yeah, but - - -

11 MR. GERSHENOFF: - - - and Section 90 vests

12 the judiciary with regulatory authority over the

13 practice of law - - -

14 JUDGE STEIN: But - - - but the penal law

15 isn't part of - - - is that the judiciary? I mean, I

16 don't know.

17 MR. GERSHENOFF: Well, the penal law is the

18 state law.

19 JUDGE STEIN: How about the executive law?

20 MR. GERSHENOFF: The Executive Law is also

21 a state law. These are state laws.

22 JUDGE STEIN: But that's not the judiciary

23 law. You - - - you seem to be - - -

24 MR. GERSHENOFF: Well, because the

25 Municipal Home Rule Law, Section 10 and Section 11 as

1 well, prohibit the cities from - - - as well as
2 Article 9 of the New York State Constitution, which
3 is essentially effectuated through Municipal Home
4 Rule Law Section 10, those laws prohibit local
5 municipalities from essentially encroaching on areas
6 which are regulated by the State, and which are
7 subject to state law. And in that - - -

8 JUDGE READ: Okay, so the State could pass
9 exactly the same statute that the City Counsel
10 passed, and it'd be okay?

11 MR. GERSHENOFF: Without a doubt. In fact,
12 the State could repeal Judiciary Laws Section 53 and
13 90, which I would not recommend, okay, and could - -
14 -

15 JUDGE FAHEY: But you're just saying it's
16 preempted. It's preempted by the State - - -

17 UNIDENTIFIED SPEAKER: Yeah, yeah.

18 MR. GERSHENOFF: It's preempted.

19 JUDGE FAHEY: Yeah, yeah.

20 MR. GERSHENOFF: Both on a conflict
21 preemption basis and on a field preemption basis.
22 Yes, Your Honor.

23 JUDGE ABDUS-SALAAM: Well, going back to, I
24 think, Judge Read's question about the local law, the
25 Human Rights Law is a local law. The City Human

1 Rights Law is a local law, and attorneys are subject
2 to that law, right?

3 MR. GERSHENOFF: Um-hum.

4 JUDGE ABDUS-SALAAM: Attorneys' offices and
5 so on. So why isn't that preempted by the judiciary
6 law?

7 MR. GERSHENOFF: It's not preempted by the
8 judiciary law, because it doesn't purport to regulate
9 what are historically have been core areas of the
10 practice of law, contacting adverse parties. There's
11 no doubt that lawyers are subject to laws, you know,
12 regarding false advertising, even if they're
13 municipal laws. There's no doubt that an attorney
14 who happens also to be a taxicab driver, such a Your
15 Honor in the past, you know, would potentially be - -
16 -

17 CHIEF JUDGE LIPPMAN: What - - - what do
18 you mean - - - what do you mean in the past? No
19 conflict there, go - - - go ahead.

20 MR. GERSHENOFF: But there's - - - there's
21 no doubt that attorneys who are engaged in activities
22 that have nothing whatever to do with the practice of
23 law are subject to regulation when they engage in
24 those activities. This law does something different.
25 This law purports to regulate attorneys in their life

1 as attorneys. And therefore it's preempted.

2 Laws that regulate attorneys in other
3 aspects of their lives are not preempted just by
4 virtue of the fact that the individuals happen to be
5 lawyers.

6 CHIEF JUDGE LIPPMAN: But what about - - -
7 what about lawyers who do - - - what are other core
8 functions that may be are - - - are regulated?
9 Lawyers do real estate.

10 MR. GERSHENOFF: Yes, and in fact, the
11 State contains state law - - -

12 CHIEF JUDGE LIPPMAN: And - - - and aren't
13 there - - - aren't there regulations about what you
14 can do, even though it might be considered a core
15 function?

16 MR. GERSHENOFF: It's interesting that you
17 ask - - -

18 CHIEF JUDGE LIPPMAN: Yes, go ahead.

19 MR. GERSHENOFF: - - - because the State
20 has exempted lawyers from, for example, licensing
21 requirements for real estate brokers. You know,
22 there was the case cited throughout the papers here -
23 - -

24 CHIEF JUDGE LIPPMAN: So a lawyer could
25 function as a real estate broker, go and sell houses

1 with no regulation, because we - - - we regulate him
2 as a lawyer?

3 MR. GERSHENOFF: Well, not - - - the lawyer
4 wouldn't be subject to the licensing requirements
5 that ordinarily would be required for real estate
6 brokers. So lawyers are exempt if they're - - -

7 CHIEF JUDGE LIPPMAN: So but not - - - but
8 would their activities as a broker be regulated by
9 whatever regulates brokers - - - real estate brokers?
10 Plenty of lawyers are in that business.

11 MR. GERSHENOFF: No, no, presumably, if it
12 was a state regulation, they would be regulated.

13 CHIEF JUDGE LIPPMAN: Oh, the State could
14 do it, but the City can't.

15 MR. GERSHENOFF: The State could it, but
16 the City cannot. Otherwise what you're going to have
17 is - - -

18 CHIEF JUDGE LIPPMAN: Does - - - does the
19 City do it?

20 MR. GERSHENOFF: To my knowledge, I - - -
21 offhand - - -

22 CHIEF JUDGE LIPPMAN: Oh, yeah.

23 MR. GERSHENOFF: - - - I don't know whether
24 or not the City has - - -

25 CHIEF JUDGE LIPPMAN: Yeah.

1 MR. GERSHENOFF: But if you allow a local
2 law like this to stand, then no attorney who
3 regularly represents creditor clients would be able
4 to practice law on a statewide basis, without
5 correctly predicting the individual opinions of
6 municip - - municipal bureaucrats in every city,
7 county, town, village and hamlet in the state. It'll
8 open the door to all of that.

9 CHIEF JUDGE LIPPMAN: Okay, counsel. We
10 get it. Let's hear - - -

11 MR. GERSHENOFF: Thank you, Your Honor.

12 CHIEF JUDGE LIPPMAN: - - - rebuttal from
13 your adversary.

14 MS. ZALEON: Thank you, Your Honor. I want
15 to address that uniformity question.

16 CHIEF JUDGE LIPPMAN: Go ahead.

17 MS. ZALEON: This exemption, which is the
18 same exemption for attorneys that has - - - has
19 existed in the local law since 1984, provides that a
20 debt collection agency doesn't include a lawyer
21 acting with - - - using the activities that are - - -

22 JUDGE PIGOTT: I think this law is really
23 good.

24 MS. ZALEON: - - - reserved to a law
25 license.

1 JUDGE PIGOTT: But if I was - - - if I was
2 in this business, and I was sitting in New York, I'd
3 hire somebody up in Buffalo, and I'd say I want you
4 to make all the calls down in New York City. I'll
5 make all the calls up to Buffalo, and we'll do
6 exactly what we've been doing forever. They can't
7 touch you, because you're in Buffalo, and they can't
8 touch me, because I'm making calls outside the City.

9 MS. ZALEON: Well, they can touch the - - -
10 DCA can require licensing - - - most of these lay
11 debt collection agencies are not located here. They
12 are - - - but they are seeking - - -

13 JUDGE PIGOTT: No, I'm talking about the
14 lawyers. I just formed a law firm. I was wondering
15 - - -

16 MS. ZALEON: But if they are - - - if
17 they're - - - if they're operating like debt
18 collectors and not lawyers, it - - - they cannot take
19 themselves as lawyers, and just reorganize to put a
20 lawyer at the top of the agency.

21 JUDGE PIGOTT: No, you're missing my point.

22 JUDGE READ: Well, this is relocating - - -
23 he's talking about relocating.

24 MS. ZALEON: No, but what I'm saying is
25 that - - - that - - -

1 JUDGE PIGOTT: I'm sitting up in Buffalo
2 doing exactly what you don't want your city lawyers
3 to be doing, but - - - and I'm doing the - - - I'm
4 doing the city work. In the meantime - - -

5 MS. ZALEON: But if you're acting as a debt
6 collection agency, seeking to collect debts from New
7 York City residents - - -

8 JUDGE PIGOTT: Yeah.

9 MS. ZALEON: - - - and you are generally -
10 - - regularly engaged in the same thing that lay - -
11 - debt - - - lay debt collection agencies are doing -
12 - -

13 JUDGE PIGOTT: Right.

14 MS. ZALEON: - - - which is the kind of
15 phone calls that you described late at night - - -

16 JUDGE PIGOTT: Right.

17 MS. ZALEON: - - - which is - - -

18 JUDGE PIGOTT: You're going to come and get
19 me?

20 MS. ZALEON: - - - robocalls without
21 affording a natural person in some point - - -

22 MS. ZALEON: Are you going to come and get
23 me in Buffalo?

24 MS. ZALEON: Well, you would have to be
25 licensed based on that activity, not based on any

1 litigation you bring, or any - - - anything that
2 you're doing that's related to your - - - to your own
3 legal activities - - -

4 JUDGE PIGOTT: Right.

5 MS. ZALEON: - - - but for the things that
6 you do, that are lay debt collection agency's kind of
7 work, then you would need to get a license.

8 JUDGE ABDUS-SALAAM: From Buffalo into New
9 York City?

10 MS. ZALEON: Well, sure, these places - - -
11 a lot of these - - - these firms are located in
12 Florida or someplace. But the thing is that, if they
13 want to do collection work for New York City
14 residents, they need it - - - but - - - but it's not
15 - - -

16 CHIEF JUDGE LIPPMAN: Do you - - - do you
17 in practice, or is that what happens that you go
18 after a lot of people outside the New York City lines
19 - - -

20 MS. ZALEON: Well, there - - -

21 CHIEF JUDGE LIPPMAN: - - - who are calling
22 people inside New York City?

23 MS. ZALEON: Right. But because what
24 they're doing - - -

25 CHIEF JUDGE LIPPMAN: I mean, is that what

1 happens?

2 MS. ZALEON: - - - is they're - - - there's
3 not an attorney involved in what these people are
4 doing.

5 CHIEF JUDGE LIPPMAN: Yeah, but if the - -
6 - but - - - but the hypothetical was, if there is an
7 attorney in Florida or Buffalo or Yonkers, could you
8 go after them? And do you on a regular basis?

9 MS. ZALEON: It - - -

10 CHIEF JUDGE LIPPMAN: Or it doesn't happen?

11 MS. ZALEON: Well, there - - - there have
12 been debt collection law firms that - - - that got
13 licenses earlier, because they know that the bulk of
14 their activity is the kind of activity that's
15 covered. Just because they're the titular heard of
16 the firm, means that - - - doesn't mean that they're
17 - - -

18 JUDGE READ: I guess the question is, do
19 you - - - do you - - - do you, in practice, enforce
20 this against out-of-state or out-of-city rather - - -
21 out-of-city - - -

22 MS. ZALEON: Well, actually with regard to
23 licenses right now after this litigation was brought,
24 we're not currently doing it for attorneys - - -

25 JUDGE READ: Did you do it before?

1 MS. ZALEON: There were - - - there were
2 attorneys who were getting licensed because they knew
3 - - -

4 JUDGE PIGOTT: Forget the license. What
5 I'm worried about is when I reregister as an
6 attorney, you know, three years from now, and I - - -
7 and I have to fill out all that form and they ask me
8 if I've committed any, you know, infraction and
9 things like that, do I have to say I - - - I did a
10 debt collection down in New York City even though I'm
11 sitting up in Niagara Falls?

12 MS. ZALEON: No, because it doesn't affect
13 your ability to practice law. If some savvy consumer
14 went and made a disciplinary complaint, and then
15 you'd have to fill out the thing that says that a
16 disciplinary complaint was made about you - - -

17 JUDGE PIGOTT: Yeah, and you'd be calling
18 me, saying I'm not licensed, and then I - - - then I
19 got a problem with - - - with OCA, and with - - - and
20 possibly with somebody else, because - - -

21 MS. ZALEON: But that would be because the
22 disciplinary complaint went in under the attorney
23 disciplinary process.

24 CHIEF JUDGE LIPPMAN: Right. So your
25 advice - - -

1 MS. ZALEON: It doesn't have anything to do

2 - - -

3 CHIEF JUDGE LIPPMAN: So your advice is,
4 don't call into New York City from Buffalo collecting
5 debts at the moment.

6 MS. ZALEON: No, you're - - - the advice is

7 - - -

8 CHIEF JUDGE LIPPMAN: Yes?

9 MS. ZALEON: - - - to uphold the ability to
10 the extent that a firm does the same thing that a lay

11 - - -

12 CHIEF JUDGE LIPPMAN: Right.

13 MS. ZALEON: - - - party is doing, and
14 we're not talking about any other practice of law or
15 their litigation, that they can be licensed and
16 regulated, but there would be no disuniformity around
17 the state with regard to the regulating the practice
18 of law, because this law does not regulate - - -

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 MS. ZALEON: - - - the practice of law.

21 CHIEF JUDGE LIPPMAN: Okay, thank you all.
22 Appreciate it.

23 MS. ZALEON: Thank you.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Eric M. Berman, P.C. v. City of New York, No. 114, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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