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Newsletters

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California Fair Debt Buying Practices Act Takes Effect

On January 1, 2014 California's Fair Debt Buying Practices Act ("FDBPA"), Civil Code § 1788.50 *et seq*. took effect. The Act applies to charged-off debt purchased after January 1, 2014, and provides that before any written notice is sent to a debtor in an attempt to collect a consumer debt, the Debt Buyer must possess the following information: (1) that the Debt Buyer is a sole owner of the debt at issue; (2) the debt balance at charge-off and an explanation of the amount of any post charge-off fees and expenses; (3) the date of default or the date of last payment; (4) the name and address of the charge-off creditor at the time of the charge-off and the charge-off creditor's account number associated with the debt; (5) the name and last known address of the debtor; and (6) the name and addresses of all persons or entities that purchased the debt after the charge-off including the Debt Buyer.

The FDBPA defines "Debt Buyer" as a person or entity that is regularly engaged in the business of purchasing charged-off consumer loans or other delinquent consumer debt for collection purposes, whether it attempts to collect the debt itself or hires a debt collection agency or an attorney for collection litigation.

A Debt Buyer cannot send a statement to a debtor in an attempt to collect a debt unless the Debt Buyer has access to a copy of a contract or other document evidencing the debtor's agreement to the debt. A Debt Buyer must provide the information or documents identified above to the debtor without charge within 15 calendar days of receipt of a debtor's written request for the information. If the Debt Buyer cannot provide the information or documents within 15 calendar days, the Debt Buyer must cease all attempts to collect the debt until providing the debtor with the information or documents.

In addition to the foregoing requirements, in the first written communication to the debtor, in no smaller than 12 point type, there must be "a separate prominent notice" stating that the debtor may request the information described

above.

The FDBPA also contains disclosure requirements for communications concerning a time-barred debt and collection litigation procedures. When collecting on a time-barred debt where the debt is not past the date for obsolescence provided for in Section 605(a) of the Fair Credit Reporting Act (15 U.S.C. § 1681c), the writing must state:

> The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it. If you do not pay the debt, [insert name of debt buyer] may [continue to] report it to the credit reporting agencies as unpaid for as long as the law permits this reporting.

When collecting on a time-barred debt where the debt is past the date for obsolescence provided for in Section 605(a) of the Fair Credit Reporting Act (15 U.S.C. § 1681c), the notice must state: "[t]he law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it, and we will not report it to any credit reporting agency."

The FDBPA contains a bona fide error defense, and a plaintiff cannot recover on a claim for violations of the FDCPA and/or the Rosenthal FDCPA, and cannot also recover on a claim under the FDBPA. The statute permits a recovery of actual damages, statutory damages of not less than $100 nor greater than $1,000 and attorney's fees. A prevailing Debt Buyer may recover attorney's fees upon a finding that the action was not filed in good faith.

Debt Buyers attempting to collect in California will now be subject to new notice requirements under the FDBPA in addition to the notice requirements under the FDCPA, (15 U.S.C. § 1692g) and the California Rosenthal FDCPA, (Civil Code section 1812.700(a)).

Debt collection agencies active in California may want to review their service contracts with Debt Buyer clients to confirm that the Debt Buyers acknowledge possession of and/or access to the information required under the FDBPA.

For more information, please contact: David Dalby

Percentage-Based Fee Impermissible under FDCPA

Bradley v. Franklin Collection Service, Inc., --- F. 3d ----, 2014 WL 23738 (11th Cir. Jan. 2, 2014)

The Eleventh Circuit held as a matter of first impression that the collection of a percentage-based collection fee by a debt collector was impermissible as it was not expressly authorized by the agreement creating the debt or permitted by law.

The Appellant debtor incurred a debt to a healthcare institution. The debtor ultimately failed to pay the outstanding debt, and it was subsequently referred to the Appellee debt collector for collection. Prior to assignment, the healthcare institution added a percentage-based collection fee of 33.3% to the debtor's existing debt balance. The percentage-based fee was assessed pursuant to a contract between the healthcare institution and the debt collector whereby the healthcare institution agreed to assess a 33.3% percentage-based fee upon assignment of the debt for collection, of which 30% would be kept by the debt collector upon collection of the debt. The debtor never expressly agreed to pay a percentage-based collection fee, but only agreed to pay for "costs of collection, including a reasonable attorney's fee" in the event the matter was referred for collection.

While the district court found the assessment of a percentage-based fee permissible, the Eleventh Circuit disagreed. It held that the debtor only agreed to pay the costs of the collection of the debt. However, the percentage-based fee, which was assessed before collection of the debt, did not bear any correlation to the actual cost of collection of the debt. Since the fee was assessed unilaterally, and without any correlation to the actual cost of collection, it was impermissible as a matter of law. The Court was careful to note that such a percentage-based fee would have been permissible had the debtor's contractual agreement with the hospital reflected that such a charge could be assessed in the event an outstanding debt was referred to collection.

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First Circuit Affirms Dismissal of "Kitchen-Sink" Complaint Against Lender

McKenzie v. Flagstar Bank, FSB --- F. 3d ----, 2013 WL 6840611 (1st Cir. Dec. 30, 2013)

Appellants alleged eleven counts of state law violations against the bank that owned their loan, based on the bank's denial of a loan modification under the Home Affordable Modification Program ("HAMP") and decision to initiate foreclose proceedings. The district court dismissed the complaint, and the First Circuit affirmed. In doing so, the First Circuit issued a number of notable rulings.

First, the Court's decision confirmed that there is no obligation to provide a borrower with a pre-foreclosure loan modification. Second, the Court confirmed that there is no duty between a lender and borrower except when the lender is exercising the power of sale in the mortgage. Moreover, the Court applied a heightened pleading standard and dismissed many of the state law claims, including promissory estoppel, finding that all elements of those claims must be clearly pleaded in the complaint, and that a formulaic recitation of the elements is insufficient.

District Court in California Applies Good Faith Standard to Collector's Actions in TCPA Claim

Chyba v. First Financial Asset Management, Inc., 2013 WL 6880237 (S.D.Cal. Nov. 20, 2013)

A district court in California held that a debt collector was exempt from liability under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") because it had a "good faith basis" to believe the debtor had given consent to the creditor. The debtor in *Chyba v. First Financial Asset Management, Inc.*,sued defendant debt collector for calling her cellular telephone using an "automatic telephone dialing system" in violation of the TCPA. The debtor also asserted claims under the Fair Debt Collection Practices Act.

Defendant debt collector was attempting to collect an amount owed resulting from a vehicle the debtor rented from the creditor rental agency. Defendant debt collector called the phone number contained in the home field of the rental agreement, which was actually debtor's cellular telephone number. Despite the fact that the debtor disputed she provided the cellular number to the creditor, the district court entered summary judgment in the debt collector's favor.

The district court looked to the FCC's 2008 ruling which found that when a consumer provides a cellular telephone number to a creditor as part of the underlying transaction, the provision of the number constitutes express consent for the creditor to contact the consumer about the debt. *In re Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C. Rcd. 559, 564–65 (2008). The district court further recognized that the Ninth Circuit has found that a debt collector can reasonably rely upon information provided by a creditor. *Clark v. Capital Credit & Collection Services*, 460 F.3d 1162, 1174 (9th Cir.2005).

Following the FCC and the Ninth Circuit's reasoning, the district court held that the debt collector was exempt from TCPA liability because it had a "good faith basis" to believe the debtor had given consent to the creditor since the phone number called was listed on the rental agreement and in the home phone field, noting "it would be incongruous with the larger statutory and regulatory scheme to interpret TCPA to require that a debt collector be liable for acting where it had a good-faith basis for doing so." *Id*. at *11.

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