A New Wrinkle in Collection of Time-Barred Debts in California

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California Governor Jerry Brown recently signed a bill amending the Rosenthal Fair Debt Collection Practices Act and the California Code of Civil Procedure. The new law, which takes effect January 1, requires disclosures in any communication by a debt collector attempting to collect a time-barred debt. Because the RFDCPA defines the term “debt collector” to include first-party creditors in addition to third-party creditors, auto dealers and finance companies should pay attention.

New Notice Requirement. The RFDCPA currently bars a debt collector from obtaining a reaffirmation of a consumer debt subject to a bankruptcy discharge unless the debt collector discloses in writing that the consumer is under no obligation to reaffirm the debt. On January 1, a new disclosure requirement will apply to time-barred debts. Unlike the disclosure requirement for debts discharged in bankruptcy, the new disclosure requirement for time-barred debts is a statutorily prescribed statement. The form of the statement varies depending on whether the federal Fair Credit Reporting Act prohibits the debt collector from reporting the debt to credit reporting agencies because of its age.

If the debt collector may still report the debt, then the debt collector must send the following notice:

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, [name of debt collector] may [continue to] report it to the credit reporting agencies as unpaid for as long as the law permits this reporting.

If the debt is too old to be reported, then the debt collector must send the following notice:

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, and we will not report it to any credit reporting agency.

In either case, the statement must appear in the first written communication (including email or fax) that the debt collector sends to the debtor after the debt becomes time-barred.

To determine whether to send a notice and which notice to send, a debt collector needs to know both

- the statute of limitations; and
- FCRA prohibitions on reporting debts.

Statute of Limitations. The new law only requires these notices for debts barred by the statute of limitations. For a dealer or auto finance company, the relevant period is usually four years, California's limitations period for an action on a written contract. The new law amends California's Code of Civil Procedure to specify that reaffirmation of the debt is the only way to extend that 4-year period. Under California law,

- for debts that are not time-barred, a payment by the debtor during the limitations period resets the limitations period; and
- for debts that are already time-barred, only a new written promise by the debtor resets the limitations period.

As a result, if the debtor has not made a payment for at least four years, the debt collector has not sued, and the debt collector has not obtained a new written promise to pay from the debtor, then the debt collector must include one of the above notices in the first written communication (including email or fax) that it sends to the debtor.

Fair Credit Reporting Act. To figure out which notice to send, a debt collector must know the FCRA requirements for reporting debts to CRAs. The new law requires the first notice for debts that may be reported to CRAs under the FCRA and requires the second notice for debts that may not be reported to CRAs. For a dealer or auto finance company, the FCRA permits a creditor to report "[a]ccounts placed for collection or charged to profit and loss" for seven years and 180 days from the start of the delinquency that prompted the placement for collection or charge to profit and loss. Note that a debt collector must send the second notice in its first written communication after the debt becomes unreportable, even if it sent the first notice while the debt was time-barred but reportable.