Date of Hearing: July 2, 2012

ASSEMBLY COMMITTEE ON BANKING AND FINANCE
Mike Eng, Chair
SB 890 (Leno) – As Amended: June 27, 2012

SENATE VOTE: 22-14

SUBJECT: Debt buyers.

SUMMARY: Enacts the Fair Debt Buyers Practices Act, imposing various requirements on practices that may be used to collect on purchased consumer debt. Specifically, this bill:

1) Defines "debt buyer" to mean a person or entity that is regularly engaged in the business of purchasing delinquent or charged-off consumer loans, consumer credit accounts, or other delinquent consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation.

2) Prohibits a debt buyer from making any written statement in an attempt to collect a consumer debt unless the debt buyer possesses certain information, including, among other things: (a) the debt balance; (b) the name and address of the debt buyer and all persons or entities that purchased the debt after charge off; and (c) a statement that the buyer is the sole owner of the debt or has authority to assert the rights of all owners of the debt.

3) Prohibits a debt buyer from making any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer has access to a copy of a contract or other document evidencing the debtor's agreement to the debt or if no signed contract exists, demonstrating that the debt was incurred by the debtor.

4) Requires a debt buyer to provide all of the above information or document to the debtor without charge within 15 calendar days of receipt of a debtor's written request for information regarding the debt or proof of the debt, or to cease all collection of the debt until the debt buyer provides the information or documents to the debtor.

5) Requires the debt buyer to provide a specified written notice with its initial written communication to the debtor that, among other things, informs the debtor of his or her right to request records from the debt buyer showing information that the debt buyer is required to possess as a condition of collecting on the debt.

6) Prohibits a debt buyer from bringing suit, initiating another proceeding, or taking any other action to collect a consumer debt if the applicable statute of limitations on the cause of action has expired.

7) Requires specific information regarding the underlying debt, the debt buyer, the debtor, and charge-off creditors to be so stated in any action brought by a debt buyer on a consumer debt.

8) Provides that in an action initiated by a debt buyer, no default of other judgment may be entered against a debtor unless the following authenticated documents have been submitted

by the debt buyer to the court:

a) Business records establishing facts about the debt, debtor, and charge-off creditors that are required by this act to be alleged in the complaint; and

b) A copy of a contract or other document evidencing the debtor's agreement to the debt, or if no signed contract exists, demonstrating that the debt was incurred by the debtor.

9) Provides that a debt buyer who violates any provision of this act with respect to any person is liable to the person in an amount equal to the sum of the following: (a) actual damages sustained as a result of the violation; (b) statutory damages, as specified for an individual or class action; and (3) costs of the action and reasonable attorney's fees.

10) Relieves a debt buyer from any liability under this act if the debt buyer shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably designed to avoid any such error.

11) Provides that these requirements shall only apply to debt buyers with respect to all debt sold or resold on or after July 1, 2013.

12) Requires a claim of exemption and related financial statement form to be provided to a judgment debtor by the levying officer whenever a writ of execution or an earnings withholding order is served upon the judgment debtor or the debtor's employer, as specified.

EXISTING FEDERAL LAW:

1) Regulates the collection of debt through, among other things, the Fair Debt Collection Practices Act; Fair Credit Reporting Act; and the Gramm-Leach-Bliley Act.

2) Defines "debt collector" as any person who uses any instrumentality of interstate commerce or mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. The term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

a) Exempts: any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor; any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts; any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties; any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt; any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers

and distributing such amounts to creditors; and any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor. [15 USC 1692a]

EXISTING STATE LAW:

1) Provides the Rosenthal Fair Debt Collection Practices Act, generally prohibits deceptive, dishonest, unfair and unreasonable debt collection practices by debt collectors, and regulates the form and content of communications by debt collectors to debtors and others. [Title 1.6C of Part 4 of Division 3 of the Civil Code, commencing with Section 1788.]

2) Defines "debt collector" as any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection, but does not include an attorney or counselor at law. [Civil Code, Section 1788.2]

FISCAL EFFECT: None.

COMMENTS:

According to the sponsor, Attorney General Kamala Harris, "the debt buying industry purchases large tranches of consumer debt at deep discounts. The industry has become a significant focus of public concern, related, in part, to the inadequacy of documentation maintained by the industry to support its debt collection activities and litigation. There are wide-spread accounts of debt buyer collection efforts, including collection litigation, against the wrong person, or targeting debt that is time-barred or has already been paid. Collection efforts become increasingly misdirected as the consumer debt is repeatedly sold and resold without reliable documentation evidencing its origin. The more remote the debt buyer is from the original creditor, the more likely it is that collection efforts will target stale debt or the wrong person."

According to the Department of Consumer Affairs (DCA), since 2004, the Federal Trade Commission (FTC) has received more than 1.8 trillion inquiries nationwide about debt collectors. In 2010, the FTC received more complaints about debt collection than any other industry. The complaints involved repeated and harassing communications, collection of debt not owed or amounts more than what was truly owed, inflated fees and interests, debt collection on discharged or impermissible debt, and even allegations of threats of life and liberty.

In 2010, debt collection was the number one consumer complaint in California, according to the FTC. Furthermore, the DCA goes on to state, the owners of these debt portfolios sometimes do not have sufficient documentation to substantiate the amount owed or even the correct debtor. Some debt buyers purchase the debt portfolios and directly file court actions where they can overwhelm the court system and almost always obtain a default judgment against the consumers. Armed with a default judgment, the debt collection organization is able to attach wages and

garnish a consumer a consumer's bank account without ever verifying that the consumer actually owned the money. Current law, under the federal Fair Debt Collection Practices Act and California's Rosenthal Fair Debt Collection Practices Act does not get to the heart of these issues but as drafted, SB 890 attempts to alleviate these concerns.

According to the Federal Reserve Bank of New York, Debt collection is a large, multi-billion dollar industry that directly affects many consumers. In 2011, approximately 30 million individuals, or 14 percent of American adults, had debt that was subject to the collections process (averaging approximately$1,400).

California's courts are swamped with debt collection lawsuits at a time that could not be worse given recent court closures and the fiscal crisis facing our judicial system. A recent New York Times article reported that collection lawsuits across California have increased by 20% over the past five years, with an estimated 96,000 consumer debt collection cases filed in three Bay Area counties in 2009 alone, up from 53,700 cases in 2007. ("Some Lawyers Want to Keep Debt Collection Out of the Courts," NY Times, 4/22/2010.)

This bill provides a private right of action against a debt buyer who violates any provision of this act. Under this bill, a debt buyer is liable to the person bringing the action in an amount equal to the sum of the following: (a) actual damages sustained as a result of the violation; (b) statutory damages, as specified for an individual or class action; and (3) costs of the action and reasonable attorney's fees. However, a debt buyer is relieved from any liability under this bill if he shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, and occurred notwithstanding the maintenance of procedures reasonably designed to avoid any such error. These provisions appear similar to the private right of action under the Rosenthal Fair Debt Collection Practices Act (Civil Code Section 1788 *et seq.*) It should be noted that even with this private right of action, there is no known opposition from the debt buyer industry to this bill as proposed to be amended.

Federal Fair Debt Collection Practices Act (FDCPA)

In 1977, the federal government established the FDCPA, to prohibit abusive practices by debt collectors. The FDCPA was established to provide more regulation on the act of debt collecting from a consumer but only applies to those whose primary business is to collect debts. This act does not apply to original creditors so only to professional collection agencies. SB 980 provides additional protection for the act of debt buying and if anything provides additional protection not provided in the FDCPA. The FDCPA does explicitly state " this title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title." The FDCPA was enforced administratively by the FTC until recently. Now, Under the Dodd-Frank Act, the Consumer Financial Protection Bureau (CFPB) has primary government responsibility for administering the FDCPA.

Today's collection industry is different from the industry contemplated by the FDCPA 35 years ago. Key new economic players—debt buyers and collection law firms—have entered the industry since its inception. Additionally, the industry has seen dramatic technological advances.

Forty years ago, collection activities depended on typewritten collection notices and local phone calls. Collection firms may now use sophisticated analytics to identify the specific debtors to target. Predictive dialers and internet telephony have lowered the cost of contacting consumers so that a small collections firm economically can reach out to hundreds of thousands of consumers. Database improvements have facilitated the sale of debt and created a new sub-industry of debt buyers. But, even as the industry has changed, abuses remain an issue. The collection industry continues to be a top source of complaints to the FTC.

Rosenthal Fair Debt Collection Practices Act (RFDCPA)

Established in 1977, California created an Act similar to the FDCPA. SB 980 does not conflict with either of these acts but rather adds more protection to consumers and those involved in the act of debt buying. The FDCPA and the RFDCPA focuses more on the behavior of those collecting debt and the means that should be used to collect debt through mailers, phone calls, etc. Nothing in these Acts provides that the debt collector prove they have the right to collect the debt. Commercial debt is excluded from the statute. Enforcement of this act is only through private civil actions. SB 980 provides added protections by having debt buyers show that they do in fact own the debt they are trying to collect on and the person they are calling does in fact owe the debt trying to be collected.

22 states including California do not currently license or have bonding requirements for collection agencies. 30 States do have a license or bond requirement for debt collection companies.

Major Problems: A recent article, from the American Banker, dated March 29, 2012, titled, Bank of America Sold Card Debts to Collectors Despite Faulty Records, found that "in the "as is" documents Bank of America has drawn up for such sales, it warned that it would initially provide no records to support the amounts it said are owed and might be unable to produce them. It also stated that some of the claims it sold might already have been extinguished in bankruptcy court. Bank of America has additionally cautioned that it might be selling loans whose balances are "approximate" or that consumers have already paid back in full. Maryland resident was a victim of s such a sale, which resulted in a three-year legal battle."

The article goes on to state, as the originators of credit card loans, banks are the headwaters of the river of bad debt that flow into the collections industry. Over the last two years, Bank of America has charged off $20 billion in delinquent card debt. The bank settles or collects a portion of that itself and retires other accounts when borrowers go bankrupt or die. An undisclosed portion of the delinquent debts get passed along to collectors. Once sold, rights to such accounts are often resold within the industry multiple times over the several years.

The U.S Office of Comptroller of the Currency investigated JPMorgan Chase's handling of credit card debt records. The American Banker article states, "a group of current and former employees described at the time how the bank had sold card accounts previously deemed "toxic

waste" and which suffered from errors in the amounts being claimed." JPMorgan Chase had a similar problem as Bank of America where Chase sold debt to debt buyers that had been long been considered unreliable and lacked documentation.

Lastly, the article states, "According to the trade organization for the collections industry, much of the criticism of collectors' records stems from banks' failure to provide adequate documentation of debts. "We're not getting what we need from the seller," says Mark Schiffman, a spokesman for the American Collections Association, which wants to see better recordkeeping and more documentation included in debt sales. "Consumer groups want to see original contracts and original documentation. That would make a lot of these debts disappear because a lot of that documentation may not exist.""

In an article from the New York Times, dated April 2, 2012, titled "Why People Hate Banks," Karen Petrou, the managing partner of Federal Financial Analytics, stated, banks are outsourcing their dirty work and then washing their hands as the debt collectors harass and sue and make people miserable, often without proof that the debt is owed. Banks, she said, should not be allowed to "avert their gaze" so easily.

CFPB

The CFPB is looking into debt collection practices and have gone on record stating, "We take seriously any reports that debt is being bought or sold for collection without adequate documentation that money is owed at all or in what amount." In March, 2012, the CFPB submitted to Congress its first annual report summarizing its activities to administer the Fair Debt Collection Practices Act. These activities represent the CFPBs inaugural effort to curtail deceptive, unfair, and abusive debt collection practices in the marketplace. Illegal collection practices cause substantial harm to consumers, who may pay amounts not owed, unintentionally waive their rights, suffer emotional distress, and experience invasions of privacy. Such practices can even place consumers deeper in debt.

PREVIOUS LEGISLATION

AB 350 (Lieu, 2009 Legislative Session) Failed passage in Senate Judiciary. This bill would have enacted the Debt Settlement Service Act for the purpose of licensing debt settlement service providers. That Act would, among other things:

- prohibit the offering of debt settlement services unless that provider is licensed by the Department of Corporations, as specified;

- exempt a person or entity licensed as a debt settlement services provider from the Check Sellers, Bill Payers, and Proraters Law, as specified;

- provide specific requirements that a provider must comply with in offering debt settlement services, including the preparation of a written financial analysis, and a good faith estimate on the length of time it will take to complete the program, prior to entering into an agreement with a consumer; and

- Provide that an agreement is void if the provider is not licensed by the Act.

While the financial industry did receive an exemption in the bill, this language is not statute since the measure failed passage. The language stated, " This division shall not apply to the following persons or their employees when the person or the employee is engaged in the regular course of the person's business or profession: (b) A bank or bank holding company, or the subsidiary, agent, or affiliate of either, or a credit union or other financial institution licensed under state or federal law."

That amendment was taken because banks do not act as debt settlement companies. Debt settlement companies work on a consumer's behalf with the consumer's creditors to reduce their overall debts. Consumers who contract with a debt settlement company are typically instructed to put money aside in a bank account, and add to that account each month. The debt settlement company then negotiates with the consumer's creditors to reach a settlement on the debt that the consumer then pays with funds that were set aside in the bank account. Debt settlement companies work on behalf of the consumer, debt buyer's work on behalf of the company trying to collect the debt from the consumer.

Arguments in Support

The Public Law Center states the need for SB 890, "low-income and formerly middle-class Californians are routinely the victims of unscrupulous debt buyer practices, including people who were illegally sued on debts past the statute of limitations; people sued for debts by companies they had never heard of; and people sued in cases for which a debt buyer could not provide one iota of proof of the debt, or that the debt buyer had a right to collect it. Passage of SB 890 will stop the flow of meritless debt buyer suits as similar legislation did when it passed in North Carolina."

According to the California Labor Federation, SB 890 simply requires adequate documentation behind efforts to collect purchased debts. For example, SB 890 requires debt buyers to prove sole ownership of a given debt prior to bringing a collection lawsuit. Another common sense reform requires written settlement agreements between debt buyers and debtors, and the bill also prohibits suits on debt barred by an applicable statute of limitations.

Arguments in Opposition

According to the California Bankers Association, this bill's definition of debt buyer is so broad that it can apply to a bank that acquires another bank or purchases a portfolio of consumer credit that has past due accounts. This type of acquisition can make a bank a debt buyer under the bill's definition causing bank acquisitions to be much more problematic, and the purchasing of consumer credit accounts cost prohibitive.

According to the Civil Justice Association of California, "this bill imposes a host of detailed new requirements on debt buyers creating new obligations enforceable through lawsuits. The bill's definition of debt buyer would broadly encompass financial institutions and would apply even in the cases where one bank acquires another has overdue consumer credit accounts."

Amendment #4 below should eliminate any concerns the oppositions has remaining. The amendment being proposed by the author and sponsor states, "Neither the acquisition, by a

depository institution chartered under state or federal law, of consumer debt incidental to a corporate acquisition, corporate debt restructuring, or other similar transaction, nor the purchase by such an institution of consumer accounts for servicing purposes, is a purchase of delinquent consumer debt under this Act."

AMENDMENTS:

1) On page 10, line 36, delete "an" and add "such"

2) On page 10, between line 28 & 29 add:

(d) Except as provided herein, this section is not intended to modify or otherwise amend the procedures established by section 585 of the Code of Civil Procedure.

3) On page 10, line 10, strike “privacy” and insert “confidentiality”

4) On page 4, line 27 insert : (d). Neither the acquisition, by a depository institution chartered under state or federal law, of consumer debt incidental to a corporate acquisition, corporate debt restructuring, or other similar transaction, nor the purchase by such an institution of consumer accounts for servicing purposes, is a purchase of delinquent consumer debt under this Act.

5) On page 4 line 28, change (d) to (e)

6) On page 4, line 31, change (e) to (f)

7) On page 7, line 38, delete “contract” and replace with “contact”

REGISTERED SUPPORT / OPPOSITION:

Support

Attorney General Kamala Harris (sponsor)
Alexander Community Law Center
American Federation of State, County and Municipal Employees
California Consumer Affairs Association
California Labor Federation
California Public Interest Research Group
California Reinvestment Coalition
Consumer Federation of California
Consumers Union
East Bay Community Law Center
Housing and Economic Rights Advocates
Lawyers’ Committee for Civil Rights of the San Francisco Bay Area
Mexican American Legal Defense and Educational Fund
Professor Scott Maurer, Santa Clara University School of Law
Public Counsel
Public Law Center

Service Employees International Union
Several individuals

Opposition

California Bankers Association (CBA)
Civil Justice Association of California (CJAC)

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