

## **New California Debt Buying Practices Act (FDBPA)**

[California Senate Bill 233](#), sponsored by CA State Attorney General Kamala Harris, and authored by State Senator [Mark Leno](#), was signed into law by Governor Jerry Brown on 7/11/13. The **California Debt Buying Practices Act** (FDBPA) will become effective on 1/1/14. The FDBPA imposes substantial new restrictions, requirements and mandated disclosures by debt buyers in CA. It also creates new liability for debt buyers.

### **Overview**

As of 1/1/14, debt buyers pursuing California debtors will need documentation in their possession even before they can send the initial demand letter to initiate collection activity on a debt. Debt buyers and debt sellers will have to coordinate transmission of substantial additional information and some documentation in every portfolio.

“Chain of ownership” must be provided, and suit must be filed before the statute of limitation expires. Complaints must contain detailed information, and include a copy of any underlying written agreement with the debtor.

### **Economic Implications of the FDBPA**

The market value of CA portfolios bought or sold after 1/1/14 that do not have the requisite information and documentation may be substantially impaired. Because the FDBPA will not apply to portfolios bought and sold prior to 1/1/14, debt buyers should attempt to close transactions before the FDBPA's effective date. In addition, proof should be readily available to be able to forestall subsequent liability claims.

The marketability of portfolios without the requisite documentation will most likely lessen over time. CA claims are generally between 8-12% of many national portfolios. A debtor moving from another state to CA would be protected by the FDBPA. Therefore, debt buyers will probably demand detailed information for entire acquired portfolios.

It is probable CA judges will assume that this level of documentation will be required and is readily available in *all* purchased transactions, and CA courts could require the same level of documentation and disclosures in many other consumer transactions. The FDBPA will require that debt buyers implement requisite new procedures and confirm compliance.

### **New Potential Liability**

If actual damages cannot be determined, statutory damages will be a minimum \$100 – maximum \$1,000, plus attorney's fees. In a class action suit, damages are not to exceed the lesser of \$500,000 or one percent of the net worth of the debt buyer.

A debt buyer can obtain attorney's fees upon a finding by the court that the plaintiff's prosecution of the action was not in good faith, a bona fide error defense is available, and recovery is precluded if sought under [FDCPA](#) or [California Rosenthal Fair Debt Collection Practices Act](#). Civil Code § 1788.62

### **New Requirements and Documentation**

The FDBPA defines a “Debt buyer” as “... a person or entity that is regularly engaged in the business of purchasing charged-off 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. “Debt buyer” does not mean a person or entity that acquires a charged-off consumer debt incidental to the purchase of a portfolio predominantly consisting of consumer debt that has not been charged off.” Civil Code § 1788.50(a)(1)

A debt buyer cannot make any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer possesses the following information:

- That the debt buyer is the sole owner of the debt at issue or has authority to assert the rights of all owners of the debt.
- The debt balance at charge off and an explanation of the amount, nature, and reason for all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt.
- The date of default or the date of the last payment.

- The name and an address of the charge-off creditor at the time of charge off, and the charge-off creditor's account number associated with the debt. The charge-off creditor's name and address shall be in sufficient form so as to reasonably identify the charge-off creditor.
- The name and last known address of the debtor as they appeared in the charge-off creditor's records prior to the sale of the debt. If the debt was sold prior to 1/1/14, the name and last known address of the debtor as they appeared in the debt owner's records on 12/31/13, shall be sufficient.
- The names and addresses of all persons or entities that purchased the debt after charge off, including the debt buyer making the written statement. The names and addresses shall be in sufficient form so as to reasonably identify each such purchaser. Civil Code § 1788.52(a)

#### Documentation Required before initial Demand, and New Notices Required

A debt buyer shall not make 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. For a revolving credit account, the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed sufficient to satisfy this requirement. Civil Code § 1788.52(b)

The FDBPA adds a new notice to be added to the initial demand letter:

"You may request records showing the following: (1) that [insert name of debt buyer] has the right to seek collection of the debt; (2) the debt balance, including an explanation of any interest charges and additional fees; (3) the date of default or the date of the last payment; (4) the name of the charge-off creditor and the account number associated with the debt; (5) the name and last known address of the debtor as it appeared in the charge-off creditor's or debt buyer's records prior to the sale of the debt, as appropriate; and (6) the names of all persons or entities that have purchased the debt. You may also request from us a copy of the contract or other document evidencing your agreement to the debt. A request for these records may be addressed to: [insert debt buyer's active mailing address and email address, if applicable]." Civil Code § 1788.52(d)(1)

If collecting on a time-barred debt, the following notices must be included in the initial demand letter: "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." Civil Code § 1788.52(d)(1)

"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." Civil Code § 1788.52(d)(2)

All settlement agreements must be in open court or in writing. Civil Code § 1788.54(a)

Detailed receipts must be provided for all payments including settlements or full payment. Civil Code §§ 1788.54(b) & (c)

No suit or arbitration may be filed if the statute of limitation has expired. Civil Code § 1788.56.

#### Filing Suit:

The complaint shall allege all of the following:

- That the plaintiff is a debt buyer.
- The nature of the underlying debt and the consumer transaction or transactions from which it is derived, in a short and plain statement.
- That the debt buyer is the sole owner of the debt at issue, or has authority to assert the rights of all owners of the debt.
- The debt balance at charge off and an explanation of the amount, nature, and reason for all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt. This paragraph shall not be deemed to require a specific itemization, but the explanation shall identify separately the charge-off balance, the total of any post-charge-off interest, and the total of any post-charge-off fees.
- The date of default or the date of the last payment.
- The name and an address of the charge-off creditor at the time of charge off, and the charge-off creditor's account number associated with the debt. The charge-off creditor's name and address shall be in sufficient form so as to reasonably identify the charge-off creditor.

- The name and last known address of the debtor as they appeared in the charge-off creditor's records prior to the sale of the debt. If the debt was sold prior to 1/1/14, the debtor's name and last known address as they appeared in the debt owner's records on 12/31/13, shall be sufficient.
- The names and addresses of all persons or entities that purchased the debt after charge off, including the plaintiff debt buyer. The names and addresses shall be in sufficient form so as to reasonably identify each such purchaser.
- That the debt buyer has provided the initial notices in their demand letter.
- A copy of the contract or other document described in subdivision (b) of Section 1788.52, shall be attached to the complaint. Civil Code § 1788.58

No default without authentication of the debt, including a copy of the contract Civil Code § 1788.60

### Trial

If the defendant debtor appears for trial on the scheduled trial date, and the plaintiff debt buyer either fails to appear or is not prepared to proceed to trial, the court may dismiss the action with or without prejudice. The court may also award the defendant debtor's costs of preparing for trial, including, but not limited to, lost wages and transportation expenses.

### Conclusion

The days of collecting debt based on a disk containing merely the debtor's name, social security number, address, account number, amount owing are gone in California.

The FDBPA will make debt collection more expensive and difficult. The FDBPA creates new potential liability, as debtors may carefully evaluate every single receipt for payment to confirm compliance. The FDBPA will adversely affect the marketability of existing portfolios that do not contain the requisite information. In addition, even portfolios that are not subject to the FDBPA (purchased prior to 1/1/14) may give rise to liability with debtors inaccurately assuming that the debt is subject to the FDBPA. Compliance and training will continue to be a major factor in all competent creditors' operations.

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