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Am I a “Debt Buyer?”

Understanding the New Wave of Debt Buyer Statutes and Their Impact on Servicing Non-Performing Mortgage Debt

The financial goal of every debt buyer is uniform – maximize your return on investment. As the debt buying marketplace expands, states are enacting laws to regulate the industry and protect consumers. The only thing more damaging to your bottom line than a poorer than expected return on a purchased debt is finding yourself in a lawsuit where your exposure is in the tens of thousands of dollars because you unknowingly violated a new state law. California and Texas are two states who have recently passed “debt buyer statutes” aimed at companies purchasing charged-off debt on the secondary market. This article explores the impact of those laws on debt buyers, the potential applicability to residential mortgage debt and things to be on the lookout for.

California Fair Debt Buyers Practices Act:

On January 1, 2014, California’s Fair Debt Buying Practices Act (“FDBPA”), *Civil Code* § 1788.50, et seq. took effect. Under this law, “debt buyer” means 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. “Charged-off consumer debt” means a consumer debt that has been removed from a creditor’s books as an asset and treated as a loss or expense.

This new law sets new requirements to be mindful of when attempting collection on a charged-off loan.

• **Cal. Civ. Code 1788.52:**

This section fairly painstaking tells you what must be included in your communication with the borrower and should be followed to the letter.

• **Cal. Civ. Code 1788.54:**

This section ensures if you reach a settlement or workout with the borrower that it is reduced to writing and if they make payments under that agreement, that within 30 days of receipt, they must be sent a statement that shows the amount paid, remaining balance, among other things.

• **Cal. Civ. Code 1788.56:**

This section states that you cannot sue a borrower if the statute of limitations has expired. If you do, the section gives the borrower the right to recover damages, as discussed more below.

• **Cal. Civ. Code 1788.58:**

This section creates a template for what must be included in the creditor’s complaint.

• **Cal. Civ. Code 1788.60:**

This section is a roadmap for how and when you can default the borrower when they fail to respond to your lawsuit.

• **Cal. Civ. Code 1788.61:**

This section gives borrowers who are defaulted, fairly wide latitude to seek to set aside default judgments.

• **Cal. Civ. Code 1788.62:**

This section lays out all the different categories of damages a borrower might sue for violations of the foregoing sections.

At this point, there does not appear to be clear guidance on whether the California law will apply to mortgage loans. The laws itself doesn’t purport to but is essentially silent. Because the laws is relatively new, there are no appellate level cases that have evaluated the issue yet, but the expectation is that before long, someone will challenge it and an appellate Court will come down with a decision. The conservative approach is to make sure you

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comply anyway, however, the law seems to have a greater impact on older, consumer debt with poor documentation and most real estate loans hopefully will include most of, if not all of the information and documentation needed to comply with the law. The other requirements are probably best practices anyway when seeking to enforce a charged-off loan in CA. We are seeing more and more cases where the borrower files suit to avoid a HELOC or 2nd loan that they thought was charged-off years ago. The last thing the collecting creditor wants is an actual violation of the FDBPA turning an investment into a loss.

Texas Debt Buyer Statute:

Texas has also enacted a law that pretty closely follows the California equivalent. This law is even newer than CA – it has only been around since 2019, so at this point, we just don't know how Texas Courts will interpret the law and whether Courts will conclude it applies to residential mortgage debt.

On June 14, 2019, Texas amended Chapter 392 of the Texas Finance Code dealing with debt collection. The amendments are effective September 1, 2019.

- The bill defines a “debt buyer” as “a person who purchases or otherwise acquires a consumer debt from a creditor or other subsequent owner of the consumer debt, regardless of whether the person collects the consumer debt, hires a third party to collect the consumer debt, or hires an attorney to pursue collection litigation in connection with the consumer debt.”
- Excluded from this definition is “a person who acquires in-default or charged-off debt that is incidental to the purchase of a portfolio that predominantly consists of consumer debt that has not been charged off.” “Charged-off debt” is defined as “a consumer debt that a creditor has determined to be a loss or expense to the creditor instead of an asset.”

- Thus, it appears that the “debt buyer” definition is intended only to cover purchasers of portfolios of charged-off debt rather than purchasers of portfolios consisting primarily of current debts.
- The bill prohibits a debt buyer from commencing an action against or initiating arbitration with a consumer for the purpose of collecting a consumer debt after the statute of limitations has expired. It provides that if a collection action is barred by this prohibition, the cause of action is not revived by a payment or oral or written affirmation of the consumer debt.
- If a debt buyer is attempting to collect a debt for which a collection action is barred, the debt buyer or a debt collector acting on the debt buyer's behalf must provide a specified notice in the initial written communication with the consumer. The content of the notice varies depending on whether the FCRA time period for reporting the debt at issue has expired and whether the debt buyer furnishes information about the debt to a consumer reporting agency.

Oregon Debt-Buyer Statute:

Oregon is another state that has enacted a debt-buyer law that similarly follows the California and Texas statutes. The Oregon law passed in 2017, just three years after the California equivalent took effect. Like the newer Texas statute, Oregon courts have not had long to interpret the law with regard to residential mortgage debt.

On August 10, 2017, Oregon amended Chapter 646 of the Oregon Revised Statutes dealing with debt collection. The amendments became operative January 1, 2018.

- The Oregon law shares with California and Texas similar definitions for “debt buyer” and “charged-off debt.” It also similarly excludes persons who acquire charged-off debt as an incidental part of acquiring a portfolio of debt that is predominantly not charged-off debt.

- The Oregon law also prohibits a debt buyer from bringing an action against or initiating arbitration with a consumer for the purpose of collecting a consumer debt after the statute of limitations has expired. The law specifies the notice that a debt buyer must give to a debtor as well as the documents the buyer must give upon request.
- The law requires those who engage in debt buying in the state to obtain a license from the Director of Department of Consumer and Business Services. The director has authority to order a debt buyer to cease and desist from violating this law, impose civil penalty or take other action to remedy such a violation.

Washington Debt-Buyer Statute:

Washington state has also enacted a debt-buyer law. The Washington law passed in 2020, so it is the most recently passed debt-buyer statute of the four discussed in this article. Since the law just took effect in the middle of last year, Washington courts have had even less time to interpret the law with regard to residential mortgage debt.

On March 18, 2020, Washington amended Chapter 19.16 of the Revised Code of Washington Annotated (“RCWA”) dealing with collection agencies. The amendments became effective June 11, 2020.

- The Washington law defines “debt buyer” similarly as the three previous states except that it explicitly states that an entity may also be a debt buyer.
- Unlike the previous debt-buyer laws, the Washington statute does not exclude from the definition buyers who acquire charged-off debt as an incidental part of acquiring a portfolio of debt that is predominantly not charged-off debt. The law also does not define “charged-off debt.”
- Therefore, a person that acquires charged-off debt, regardless of whether the charged-off debt is incidental to

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or the primary focus of the acquired portfolio, may fall under the Washington statute definition of a “debt buyer.”

- Like all previous debt-buyer statutes, the Washington law prohibits debt buyers from bringing an action against or initiating arbitration with a consumer for the purpose of collecting debt after the statute of limitations has expired.
- The law prohibits debt buyers from commencing legal action against a debtor without attaching to the complaint a copy of the contract or other writing evidencing the original debt that contains the debtor’s signature. The law also lists a number of disclosures a debt buyer must give to the debtor when commencing legal action.
- Washington also prevents debt buyers from seeking default judgments on the debt unless they establish that they are owners of the debt amongst several other conditions.

The Oregon, Texas, and Washington statutes are all remarkably similar to the California law. The expectation is that Court’s will soon clarify the applicability to residential mortgage debt, which will allow debt buyers to revise their due diligence and collection processes. The bigger question is whether even more states will follow California’s lead, as they so often do, and establish their own Debt Buyer statute.

Takeaways:

1. Prior to buying a pool that consists predominantly of charged-off consumer debt, consult an attorney to determine whether any of the states where the debt is located have debt buyer statutes; and
2. Prior to reaching out to collect any newly purchased charged-off consumer debts, consult counsel to make sure you are complying with the applicable debt buyer laws.

If you have any questions regarding these debt buyer statutes or how they may apply

to a specific loan, please do not hesitate to contact Robert Finlay at rfinlay@wrightlegal.net.

Disclaimer: The above information is intended for information purposes alone and is not intended as legal advice. Please consult with counsel before taking any steps in reliance on any of the information contained herein. 🌐

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