

## **Does the Litigation Privilege Shield a Debt Collector from Liability Under California's Rosenthal Act?**

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In *Komarova v. National Credit Acceptance, Inc.*, the California Court of Appeal grappled with this exact issue – unfortunately, ruling that the Litigation Privilege does not protect the acts of the debt collector. Specifically, the Court of Appeals addressed: (1) whether conduct violating the Rosenthal Fair Debt Collection Practices Act is shielded by the litigation privilege; and (2) whether the continuing violation doctrine allows for recovery for violations of the Act.

### **Background**

National Credit Acceptance's predecessor-in-interest, MBNA, issued a Visa card to Christopher Propper in 2001. At the time of the application, Propper requested an additional card for "Anastasia Komarova" and identified her as his fiancée on the credit application. The account became delinquent and was charged off by MBNA in 2004, with an unpaid balance of \$7,872.98. National began collecting on the unpaid debt based upon a credit report, which misspelled Anastasiya Komarova's name adding the letter "y." Anastasiya told National's debt collectors, who refused to identify themselves, that she had no idea about the debt and asked National to send her additional information showing that the debt was hers. National purportedly ignored Anastasiya's concerns and were persistent and rude, calling every other day and threatening her by saying things such as, "A judge has already decided you're guilty", "We know you can pay" and "We know about your savings account." Anastasiya continued to protest, requesting confirmation of the debt. National finally provided that information, but only *after* it took the matter to arbitration in March 2005 (without her knowledge) and was awarded \$11,214.33, which included interest and attorneys' fees. When she finally received documentation about the debt, she realized that the debt actually belonged to Anastasia. April 5, 2006, entries to National's collection log stated that their own investigation concluded that plaintiff was not the correct Komarova. However, National continued to try to collect the debt even after concluding they had the wrong Komarova. Eventually, Anastasiya filed suit on October 12, 2006.

### **The Litigation Privilege and the Rosenthal Act**

The litigation privilege in California covers communications made in connection with litigation, even though the communication occurs outside the courtroom. It is generally designed to cover such things as libel and defamation. While the Rosenthal Act generally prohibits debt collectors from harassing debtors. The trial court found that National violated the Rosenthal Act while it attempted to collect the debt. On appeal National argued that once the suit was filed, its debt collection communications were protected by the litigation privilege and could not have violated the Rosenthal Act. National argued that any phone calls made to collect a debt after litigation commenced is immunized by the litigation privilege and not subject to the Rosenthal Act because the debt is the subject of the litigation. However, the Court disagreed that the litigation privilege could be used to usurp the Rosenthal Act. If that were the

case, then unfair debt collection practices could be immunized simply by filing suit on the debt, rendering the Rosenthal Act inoperable. In other words, the litigation privilege cannot be used as a shield from violations of the Rosenthal Act.

### **The Continuing Violation Doctrine**

The test for use of the continuing violation doctrine is whether the violations constitute “a continuing pattern and course of conduct” or “unrelated discrete acts.” National contended that the harassing phone calls placed before the suit was filed could not be part of the current case because the applicable statute of limitations for the Rosenthal Act had run. National based this argument upon the idea that each phone call was a separate incident, rather than part of the same ongoing behavior. The court disagreed and ruled that even though the initial conduct occurred before the statute of limitations had run it was part of the same course of conduct. As a result, National was liable for violations of the Rosenthal Act that occurred after the statute of limitations had run because these actions were part of its continuing pattern of conduct. There are two takeaway lessons from *Komarova*. Debt collection practices that violate the Rosenthal Act and after litigation commences are not protected by the litigation privilege. Any attempts to collect the debt must still comply with the Rosenthal Act. Also, debt collection practices that fall within the category of a continuing pattern and course of conduct violates the Rosenthal Act, even if the last incident occurred before the statute of limitations expired.

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