DREHER TOMKIES SCHEIDERER LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES SCHEIDERER LLP

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OREGON COURT RULES SIX-YEAR (NOT THREE-YEAR) STATUTE OF LIMITATIONS APPLIES TO DEBTS

The Court of Appeals of Oregon recently held that Oregon's six-year statute of limitations, rather than Delaware's three-year statute, applied to the credit card debts of Oregon residents arising from credit card agreements governed by Delaware law. *Unifund CCR Partners v. Porras,* 2012 WL 1033577 (Or. Ct. App. Mar. 28, 2012) and *Unifund CCR Partners v. Deboer,* 2012 WL 1066511 (Or. Ct. App. Mar. 28, 2012); *see CACV of Colorado, LLC v. Stevens,* 2012 WL 839259 (Or. Ct. App. Mar. 14, 2012).

The trial courts in *Porras* and *Deboer* had ruled in favor of the debtors, finding that the claims were barred by Delaware's three-year statute of limitations under the governing law provisions of the relevant credit card agreements. On appeal, the Court of Appeals reversed and remanded in each case.

The Court of Appeals applied its earlier decision in *Stevens*. In *Stevens,* as in *Porras* and *Deboer,* the court considered the credit card debt of an Oregon resident arising from an agreement governed by Delaware law. Under Section 12.430 of the Oregon Uniform Conflict of Laws – Limitations Act (UCLLA), the court noted, a claim brought in Oregon that is based on the substantive law of another state, is to be governed by the other state's limitations period. Additionally, Section 12.440 of the UCLLA provides that the claim is to be governed by the other state's tolling and accrual policies. As set forth in the credit card agreement, Delaware's substantive law governed the plaintiffs' claims, including Delaware's tolling and accrual law.

To calculate the three-year limitations period, the court looked to the Delaware tolling statute, which tolls the limitations period as to defendants who are (i) located outside Delaware and (ii) not subject to service of process in Delaware at the time the cause of action accrues. The defendant-debtors argued that because the federal Fair Debt Collection Practices Act (FDCPA) precluded the debt collector from bringing its action in Delaware until such time, if ever, that the defendant moves there, Delaware's tolling statute could indefinitely toll the limitations period – an "unreasonable and absurd" result, which the defendants argued weighed against applying the Delaware tolling statute. The court rejected this argument (adopted by courts in various states under older Delaware precedent) based on a more recent Delaware Supreme Court opinion, concluding that notwithstanding the federal FDCPA, because the defendant *could* be sued in Delaware at some time in the future if she became a Delaware resident, the plain language of the tolling statute, as interpreted by the recent Delaware court, required that the applicable statute of limitations be tolled. The court thus rejected the alternative reasoning of courts in California and Florida.

Because the Delaware statute of limitations would be tolled, the court turned its attention to whether Section 12.450 of the UCLLA would compel the use of Oregon's statute of limitations, instead of Delaware's statute.

The court concluded that the difference between Oregon's six-year statute of limitations, which would not be tolled because the defendants are Oregon residents, and Delaware's three-year statute, which could be tolled indefinitely, is indeed "substantial." Additionally, the court found that an "unfair burden" (*i.e.,* the inability to use the statute of limitations defense) is imposed on the defendant where the limitations period may be tolled indefinitely. Thus, the Court determined that under Section 12.450, it must apply Oregon's six-year statute of limitations, rather than Delaware's three-year statute. *Accord Unifund CCR Partners v. Sunde,* 260 P.3d 915 (Wash. Ct. App. Sept. 7, 2011); *see also Avery v. First Resolution Mgt. Corp.,* 568 F.3d 1018 (9th Cir. 2009) (finding that under Section 12.450 of the UCLLA, New Hampshire's three-year statute of limitations is replaced by Oregon's six-year statute).

Much attention has been focused in recent years on issues surrounding statutes of limitations in the context of debt collection. *See e.g.,* our ALERTS dated February 16, 2012, April 20, 2011, December 16, 2010 and March 17, 2009. This case illustrates the complexity that can arise in cases involving statutes of limitations and the need to examine carefully potential time-barred debt defenses. ❑

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MASSACHUSETTS EXTENDS VALIDATION REQUIREMENT TO CREDITORS AND

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OTHER ONEROUS REQUIREMENTS

Effective March 2, the Massachusetts Attorney General's Office revised its Debt Collection Regulations to impose a number of onerous requirements on creditors, greatly expanding prior regulations. The stated purpose of the Regulations is to establish standards for the collection of debts from persons within Massachusetts by defining unfair or deceptive acts or practices and to modernize the regulations, purportedly to be consistent with other state and federal agencies. The regulations were subject to public hearing in early 2011 but subsequently revised based upon comments from the Boston Bar Association (BBA), the Association of Credit and Collection Professionals [ACA], consumer advocates, the Office of Consumer Affairs and Business Regulation and others. The original proposal did not contain a creditor validation requirement as found in the final regulation and so many in the industry were caught unaware.

Changes Made

The amendments make changes to certain definitions, including "communication or communicating," "creditor" and "debt." Among other things, "communication or communicating" no longer is limited to the oral conveyance of information; "creditor" now includes a buyer of delinquent debt who hires a third party or an attorney to collect such debt; and "debt" no longer excludes money owing as a result of a loan secured by a first mortgage on real property, or in an amount in excess of $25,000. Also, a definition has been added for the term "time-barred debt."

Among other changes, the revisions re-wrote and dramatically expanded the former document delivery provision (Section 7.08) for creditors, defined to include "any person and his agents, servants, employees, or attorneys engaged in collecting a debt owed or alleged to be owed him by a debtor." The new validation requirement is somewhat similar to but distinct from that required of third party collectors under the federal FDCPA.

The revisions address a number of other areas, including adding:

- Text messaging, recorded audio messaging and cell phones to call frequency restrictions;
- Text messaging, download fees, data usage fees and other similar charges to causing expense restrictions;
- Validation of debt requirements somewhat similar to federal law;
- Verification of debt requirements and ceasing of collections requirements if certain documents cannot be provided to the debtor; and
- Restrictions on collecting time-barred debts

Background

Many of the changes reflect suggestions of the BBA. According to the first report of Consumer Finance Working Group of the BBA (dated January 15, 2010), in the Spring of 2008, the chairs of the Bankruptcy Law Section of the BBA sought to form a working group to evaluate what the BBA could do with respect to perceived problems with some consumer finance products. The impetus for this effort was a meeting that the Bankruptcy Law Section co-chairs had with Professor Elizabeth Warren of Harvard Law School. The Bankruptcy Law Section invited the participation of the Business Law Section, Health Law Section, Real Estate Section, Senior Lawyers Section, and Solo & Small Firm Section, with the first meeting of the new "Consumer Finance Working Group" (Working Group) taking place in the Summer of 2008 and regularly thereafter. The Working Group heard a series of presentations on topics such as "the proliferation of deceptive loan modification programs" on the radio and the Internet and the explosion in consumer medical debt and specific issues in its collection. In the Fall of 2008, a few members of the Working Group met with members of the Consumer Protection Division ("CPD") of the Office of the Massachusetts Attorney General and offered to provide recommendations to update regulations for the collection of consumer debt. Tactics used in the collection of consumer debt were the subject of a Spotlight Series entitled *Debtors' Hell* by *The Boston Globe* in July and August 2006, and debt collector harassment has continued to draw the attention of both the media (a Fox25 Special Report aired in May 2009), and these media reports influenced the comments provided.

In its comment letter, the Cambridge Consumers' Council supported the validation provision stating: "This information will become particularly important for consumers who are contacted by multiple parties attempting to collect the same debt or to consumers that end up in court due to a lawsuit filed by a creditor." It is apparent that debt buyers were a focus of attention but originating creditors collecting their own debt as well as purchasers of non-delinquent debt fall within the broad definition of "creditors" subject the rules changes. The latter have not had to address validation issues with regard to delinquent installments on otherwise performing accounts.

As the regulations were effective immediately upon announcement, creditors have had no opportunity to prepare for the final regulations and, not surprisingly, the new and modified provisions raise a host of difficult compliance questions and concerns going forward. Unfortunately, given the lack of precedent (neither the federal FDCPA nor the FTC's previous interpretation of the Federal Trade Commission Act has imposed a validation requirement on regular creditors, and no other state has adopted similar provisions), creditors not adopting a most-conservative position do so at their potential peril. The significant involvement of nationally prominent consumer advocates and the "modernization" justification suggest the possibility that similar "reform" measures may be promoted elsewhere.

Creditors should carefully review their policies and procedures regarding Massachusetts consumers for current compliance with the revised Regulations. ❑

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