Ballard Spahr LLP

Consumer Finance Monitor (Season 6, Episode 17): Recent Federal and State Debt Collection Developments

Speakers: Alan Kaplinsky, John Culhane, Lisa Lanham, and Abigail Pressler

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, former Practice Group Leader for 25 years and now Senior Council of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program.

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Today's podcast will be a repurposing of a recent webinar that we conducted. So turning to our program today, we're going to be talking about recent developments pertaining to consumer debt collection, both first-party debt collection by creditors and third-party debt collection by debt collectors. There's been a lot going on in that area. A lot of private litigation continues as it has for years. We're going to be talking about compliance and licensing issues under District of Columbia, New York, and California debt collection laws. We're going to be talking about the Wyoming debt buyer law licensing requirement, the interplay between the Minnesota debt collection law translation requirement, and the Regulation F disclosure requirements. The impact of the CFPB's most recent rulemaking agenda on debt collectors. We'll be providing you with some statistics of debt collection, litigation, and state law developments related to the collection of student debts.

Well, I'm joined today by three of my colleagues, first John Culhane, then Lisa Lanham, who is our specialist in the area of state law licensing. And then, last but certainly not least, Abigail Pressler, who is a specialist in the area of consumer debt collection. So let me turn the program now over to Abigail.

Abigail Pressler:

Thanks, Alan. And we'll go ahead and get started with a look into the future, things to look forward to in 2023 and beyond. The CFPB's rulemaking agenda for this year was published late last year, and as you can see, they've got a lot of things on their to-do list, some of their favorite topics in the pre-rule stage. Of course, we've got the CFPB working on some rules about overdraft fees, insufficient funds, so your NSF fees. Credit reporting is always a favorite topic of theirs. And then, they are looking into personal financial data rights, requirements to disclose certain information to consumers upon request. We don't have a lot of details about those because they are in that pre-rule stage, but we are expected, based on this agenda, to receive updates sometime this year.

In the proposed rule stage, we have several other items that they are looking at. Some of these you may have heard before. There's been a lot of buzz about the registration of standard form contract terms and conditions and enforcement orders for non-banks. Credit card penalty fees, a continuation of the CFPB's interest in fees in general, and then some amendments to FIRREA concerning automated valuation models.

But, of course, the big news is the present we all received at the end of last month, the final rule for section 1071 on small business lending. And there are some pretty big changes between the final rule and the proposed rule that we were all looking at last year. So if you haven't taken a look at that, I would definitely encourage you to do so.

And here's a quick key dates for implementation complying with that new rule. There's definitely some lead time. Your obligation to begin collecting the required data doesn't even begin until October of 2024, and that's assuming you're in tier

one. Those are institutions that are originating 2500 or more cover transactions, tier two being between 500 and 2499, and then tier three is 100 to 499, 100 being the threshold now. It was 25 cover transactions to be covered by this rule. They raised it to 100, which is a nice change, something good for the industry.

All right, so everybody's been talking about the DC Debt Collection Act. It took effect on January 1 of this year, and it has very broad application. It applies to any person, including an original creditor, a servicer, first-party collector, third-party collector, debt buyer, whoever you are, any person attempting to collect a consumer debt that is more than 30 days past due. That is pretty early out, you guys.

Lisa Lanham:

And also then, real quickly here, Abigail, the interesting part about this is that there's actually no licensing component to it. It's all substantive requirements. And the definition of what a debt collector is includes people like debt buyers. And in my end of the world, what we're more concerned about is, does that definition encompass a securitization trust. And I'll let you run through all the substantive requirements, but it's going to be hard for people like that to meet these requirements.

Abigail Pressler:

Yeah, absolutely. Thanks, Lisa. There are a lot of questions floating around there. These rules are really not one size fits all as much as regulators try to make them. And so, to the extent anybody has any questions about things like that, I would definitely encourage you to reach out to Lisa. She's our licensing guru. She's awesome.

So I'm sure you guys are already aware since compliance is in full swing on this one, but I'll cover it real quickly. Some of the requirements that DC has imposed. Before attempting to collect, debt collectors must have immediate access to a whole bunch of information. This is easy for you creditors and servicers. You probably already have all this, but for debt collectors, this is something that they need to be talking to their clients about and make sure that they do have access.

And I will point out the original version that was in effect before this took effect actually required debt collectors to have this information in their possession. So the fact that they loosened this to just say immediate access is a plus. It's a bonus. And then they need to provide this information within 15 days after a validation request.

Initial notices require certain disclosures in DC. And the scary thing is these disclosures need to be in both English and Spanish or English and another language that was used in the contract or the initial communication with the consumer or phone call. And that's a tricky thing, as you all know, to be translating disclosures. It's very technical, and you've got to worry about things like, for our third-party friends, Reg F, and their rule saying that you cannot have partial translations. If you're going to translate one thing, you got to translate it all.

Fortunately, this is only required for that initial notice in DC, but it is still a hurdle for everyone to overcome. Good news for original creditors. You are exempt from this requirement, so good for you. You do not have to worry about this. But for my third-party debt collector friends and my servicer friends, this is something that, if you're not already doing it, you need to be looking into it. And again, let us know if you have any questions. We're happy to help.

Written communications, of course, must include the Mini Miranda. It's also got to have your name, address, phone number, all that good stuff. That's pretty standard.

Rules for electronic communications. Again, this is probably not really an issue for creditors and servicers. You probably have consent to be sending these messages. But for third-party debt collectors, this is a little bit more tricky. They are totally prohibited before the initial notice with those disclosures are mailed. And after that, they require direct consent, so not passed on from the creditor to the agency or the servicer but direct from the consumer to you.

Contact attempts are limited, and it's more than Reg F limits them. Four calls per seven days per account or one conversation. Five electronic communications per seven days per account. And electronic communications is anything in that bucket, whether it's an email, a text message, a web chat, an app message. Pick any five. You don't get five each. Pick any five from that bucket, and that's what you get for seven days.

No contact during public health emergencies for 60 days after. That's been going on since April 2020. And then, they bring in the FDCPA's rule about the permissible time to call and communicate, text, email, any permissible time to communicate with the consumer. And that is measured by when it is sent, not when it is received.

All right. A couple of other quick items. Payment schedules are required to be confirmed in writing within seven days. This applies to everybody who is covered. Collection lawsuits, there's a whole bunch more evidence that you need to provide, and you need to provide it at multiple stages, not just the complaint but also your motions for default, your motions for summary judgment. All that stuff needs to have additional information included in your pleading or your motion. Statute of limitations is three years, and it can no longer be revived by payment or acknowledgment. That is a change to the rule. That's pretty significant for those of you, again, who are collecting later on down the line.

We talked about the public health emergency. All communications from debt collectors are prohibited during this period of time, but not original creditors. So you all are exempt from the prohibition during this period. But anybody else, servicers, first-party, third-party, you are going to have limited contact with consumers when DC is in the state of public health emergency.

And then, the big whammy here is DC has joined California and Maryland in making it a violation of DC law, state law if you violate the FDCPA. So they are incorporating the federal FDCPA into state law by reference and saying if you violate these rules, even if you're exempt at the federal level, you've violated state law, and the damages are pretty significant. Plaintiffs can recover $500 to $4,000 per violation, not per lawsuit filed like the FDCPA, $500 to $4,000 per violation. This is reminiscent of the TCPA and the old West Virginia rule. These are pretty significant damages, and we're on the lookout for litigation trends in the near future. Hopefully, we don't see them, but I suspect that we will.

All right, this is one we've been waiting on for a while. This has been a long process. And Lisa, I don't know if you want to cover the first half of this since it's licensing-specific.

Lisa Lanham:

Yeah, I'll just cover this first bullet point real quick. So I think we've all known California enacted a debt collection licensing act, which has just been so much fun for all of us to deal with. Long application timelines, reviewers that are asking for very persnickety things, and all of this is going on at the same time as they're trying to enact new regulations to clarify some of the points that are really important, like, do I even need a license? Is there an exemption that's actually available to me?

The one high-level point that I would make here is that if you believe based on the laws and if you need our help, please feel free to reach out. But if you believe that you are subject to this licensing requirement based on how broad the actual laws and the requirements are that are enacted in there, submit an application. Because at this point in time, you're sort of getting a pass on being unlicensed if you've submitted an application while these regulations are pending.

And Abi, I'll kick it back over to you because, really, a lot of these are super significant for our debt collection clients.

Abigail Pressler:

Yeah, absolutely. I think that the second rulemaking that was proposed in July of last year is a response or a reaction to some of the confusion that ensued when this technically took effect in January of 2022. They realized that people just weren't sure if they needed this license or not. And there were a lot of questions that arose as to, "Okay, but how do I comply?" And, "Am I included? Am I not? Should I?" So they are looking to amend their original set of rules to clarify these things. But the comment period ended in August of last year, and it's been kind of radio silence since then.

I know Lisa, and I have both attended some of the meetings that the DFPI has had, the group that's working on these regs, and there's just not a whole lot of detail out there. We don't know if they're going to eventually pass them as is, if they're considering changes. I suspect that they are if it's still pending, but we just don't know. So I did go ahead and summarize some of the highlights of the changes in the proposed second rulemaking, but I'm not going to go over them in great detail. You've got this here. And bottom line, we don't know if these are the final rules or not. We don't know what those are going to look like when they're going to come, but when they do, you can be sure we'll have a webinar about it, and we'll walk you through it.

All right, Lisa, this is very interesting. Please tell us about it.

Lisa Lanham:

Yeah, absolutely. Well, I focused on the good news first, right? Interestingly enough, Utah, the governor just signed HB 20, which repeals the statutory requirement for collection agencies to register with the division of corporations and keep on file a $10,000 bond. Candidly, my initial reaction was, "Hey, Utah, why didn't you get rid of a harder license to maintain?" But at the same time, there's also some really helpful things in here for collection agencies. So now you no longer need to register. Also, you no longer need to keep that bond.

HB 20 also repealed provisions of Utah law that stipulated bond terms and required certain records relating to registrations and bonds be maintained with the division and open to public inspection, relate to violations and penalties, and specify that any person, member of a partnership or officer of any association or corporation who fails to comply with any provision of this title is guilty of a class A misdemeanor. Outlining exceptions, governing assignments of debts involving collection agencies, and limiting the activities as to those assignments. Specifying that information about a consumer's credit rating or creditworthiness is sent to a CRA is void if the collection agency has a bond on file and requires certain registration forms and application fees for the collection agency of registrants. So all of these changes take effect on May 3rd.

Okay, so just briefly, then, what remains? The limitations and terms of collection fees and convenience fees imposed by creditors or third-party debt collection agencies will remain unchanged by the amendment. So just a bit of good news for the industry.

Wyoming, just really briefly, under its new law, its collection agency law, there's now a new term, debt buyer, that's defined as any person that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether the person collects the debt, hires a third-party for collection of the debt, or hires an attorney for collection litigation. The bill that brought this into law explicitly provides that debt buyers did not have to be licensed in the state prior to July 1st, 2023, and protects the validity of any civil action or arbitration filed or commenced by a debt buyer or any judgment entered for a debt buyer before that effective date. So reading between the lines here, it's very clear that if you are a debt buyer within the definition in Wyoming's new law, you are required to be licensed, and the effective date is July 1st, 2023. So there is that on the horizon.

And Abigail, I'll kick it back over to you.

Abigail Pressler:

All right, something to look forward to on the licensing front. Who doesn't love applying for those? Collect them all, you guys.

All right, so New York is still working on their proposed rules for debt collection. This has also been an ongoing process. New York initially proposed some amendments. I want to say it was maybe in 2021. The industry responded to those with comments, and New York went back to the drawing board. Actually, made some pretty significant changes, some good, some bad, but I would say, on the whole, mostly good. But there were still a few problems that needed to be addressed. Here's kind of an overview of the most recent set of proposed rules.

They are opening up the ability to communicate via email and text message. Previously it required direct written consent Before you were allowed to do that. You were pretty much limited to calls and letters. But New York is interested in getting rid of that direct consent rule and allowing debt collectors to rely on assumed consent or consent given over the phone to email or text consumers about their debt. Some of the bad developments, they were looking to impose a statewide limit of three call attempts per seven days or one conversation. Again, much more limited than Reg F, but actually a little bit more permissive than New York City. That's two communications per seven days.

Preferred language disclosures and record-keeping requirements, that's something that they're borrowing from New York City and looking to make into New York State law or rules, anyway. Debt substantiation response, the time was decreased from 60 to 45 days. All of these were proposed. They are not final. And I suspect that New York is going back to the drawing board again. And I say that because these rules recently reached their expiration date. They were meant to be finalized by, gosh, I can't remember the deadline. It was recently. It was last month. They were not. And so they are still pending.

Again, don't worry about this too much. It's just kind of a heads-up. Here's where New York seems to be going, but we do expect some changes because they did not just implement them as is. So stay tuned. We'll let you know when the next set of proposed rules come out, but it's really nice to see the regulators listening to the industry, taking the comments into

consideration, and reacting to them. They want to make sure these things are workable. Whether we like them or not, a bright-line rule is helpful.

All right, litigation statistics. You guys, I'm a huge data nerd, and I think this stuff is interesting. So bear with me here. Just looking back to 2022, here's your year-to-date for that last year. As you can see, FCRA claims are up. FDCPA claims have been steadily trending downward, and that has been going on for years. It used to be kind of the reverse. FDCPA was top dog when it came to debt collection. But with the advent of Reg F and compliance lawyers working with their clients closely to react to absurd trends, that has kind of gone down, and FCRA has taken its place. It's moving on up and become the new go-to for litigators. It's higher damages. And the Metro 2 Guide is pretty confusing, so not a huge surprise.

TCPA claims also trending steadily downward. I remember the heyday back in 2016 when TCPA claims were coming in the door left and right, but not so much these days with the advent of your click-to-call and other manual solutions. And, certainly, the Facebook decision was a big help, although there's a little bit of backlash on that one, but I won't go down that rabbit hole right now.

So here's some litigation trends over time. I've actually been tracking this stuff since 2013, you guys. It's been 10 years, and this is so interesting to me. Look at this trend. 2013 FDCPA codes were 71% of everything we saw. Now, they're only 39%. FCRA is almost half. It used to be 16%. Now it's almost half. And it's expected to continue to rise because, again, that stuff is confusing, and the damages are higher, so these things tend to drag on. Unfortunately, that applies to a lot more people. It's not just third-party debt collectors like the FDCPA. This is anybody who's furnishing data. So just something to kind of keep an eye on. I think it's interesting to look at these trends.

Some notable FDCPA opinions in 2022. First-party guys stick with me. I know that the FDCPA maybe doesn't apply to you, but it certainly applies to your third-party debt collector partners. And it gives you kind of a window into where these kinds of claims are going. And I will point out to the extent you are collecting in states like California, Maryland, and DC that apply the FDCPA more broadly at the state level. Some of this stuff could be relevant to creditors and servicers, first-party collectors. So some interesting stuff. A lot of letter claims, convenience fees have always been an issue. And that Fourth Circuit opinion is what brought Maryland into the fold and clarified that those rules do apply to creditors and servicers.

We've got some concerning statements about a plausible FDCPA claim based on inaccurate amounts in monthly mortgage statements. That's something for you residential people to be paying attention to. Mortgage statements, obviously, they need to be accurate, but here people are starting to get dragged into FDCPA claims, and this is kind of on trend with the moves regulators have been making. We see a lot of scope creep, where, even if they're not applying the federal FDCPA, they're starting to interpret state rules in ways that are very similar to the FDCPA. So they're looking to expand coverage to more covered entities. So just something to keep an eye on to the extent you can voluntarily comply. Always a good idea. But understanding that sometimes it just doesn't make sense in context, right? You're not going to tell somebody you're collecting a debt before their first payment's ever due.

So to the extent we have any questions about that, we're always happy to help. It's not always clear when these apply, when they trigger, how to navigate some of these gray areas, and that's what we do. All right, I'm going to kick this over to John Culhane to cover student loans. I know that this is his bread and butter.

John Culhane:

Thanks, Abigail. I'm going to close our discussion today by talking a little bit about some of the developments that are making collecting student loans much more harder than they have been in the past. And basically, this is a trend where the laws and restrictions that we saw put in place for mortgage loans following the crisis of, gee, this seems so long ago, 2008, 2009, and issues that arose about robo-signing have basically spread into other asset classes. They got credit cards first, and now they're moving into the student loan space.

So I'm going to talk mostly about the Private Student Loan Collections Reform Act that was enacted in California and took effect July 1 of last year because it looks like it could very well be the model for legislation in other states. And in fact, there are two similar bills now pending in Maryland. I guess the good news since we got started on this is that although the Maryland bill passed the House, it looks like this legislation may have stalled out in the Senate, at least temporarily, in that the Maryland Senate Judiciary Committee objected to moving forward with the bill.

So turning back to what kind of requirements we're seeing come into place, they're really quite onerous, and they're requirements for extensive documentation. And you have to have that information before initiating any collection. And then, you have to make it available as you go through the collection process. We'll say a little bit more about that and make it available on request.

So what all do you have to have? Oh, actually, before I start into this, I should note that California's taken a new tact with providing exemptions for depository institutions. Rather than having a flat exemption for banks and savings and loans and credit unions, there's a exemption that's lost if you litigate too much.

So under this California law, depository institutions are exempt, but only to the extent that the institution is a plaintiff in 35 or fewer private student loan collection actions in the current calendar year. Once you get up to number 36, you're stuck with all of this. And what all are you stuck with? Well, as I said, you have to have this detailed information about the loan before initiating collection. You have to have the name of the owner. You have to have the creditor's name at the time of default. You have to have the creditor's account number at the time of default if the original creditor had an account number, the amount due at default, an itemization of interest that's accrued, an itemization of fees, if any, that are claimed to be owed, the exact date that the private education loan was incurred. And it just goes on from there.

The date of the first partial payment. Well, actually, this is the date of the payment that, when missed, precipitated the default. Then you need the date. Which presumably is the same, or no, might not be the same, but the date and amount of the last payment that was made on the loan. You have to provide any payments, settlements, or financial information of any kind that came in from a guarantor, a surety, a co-signer, any other party obligated on the loan, including obligations that arise under separate contracts that might provide coverage for loss. So in the case of some private education loans where there is some insurance that comes into play, that has to be noted as well.

Then there's a lot of information required to enable the tracking of loans through their history, the names of all persons or entities that owned the loan after default, if applicable, the date of each sale or transfer. You have to go back and have a copy of the self-certification form obtained under the Truth and Lending Act and Regulation Z in connection with the origination of the private education loan. If you don't have that or didn't get that, you also have to provide any needs analysis that was conducted prior to origination.

And then, as I mentioned, a lot of documentation tracking the history of the loan transfers. If it was assigned more than once, each assignment or other writing evidence in the transfer of ownership. You have to establish an unbroken chain of ownership, beginning with the original creditor and up to the first subsequent creditor and each additional creditor. And you've got to provide a lot of additional details and documentation in connection with this. And that documentation essentially has to be the original documentation. You can't use something that was prepared just for litigation.

But it keeps going on. You have to provide a copy of all pages of the contract, not just the contract but also the application and any other documents evidencing the borrower's liability, stating all terms and conditions. So this may include all co-signer notices to the extent there are separate documentations or documents regarding benefits. They have to be included. A list of all collection attempts made in the last 12 months, including the date and time of all calls and written communications, a statement as to whether the creditor is willing to renegotiate terms, copies of all written settlement communications in the last 12 months, or a statement that the creditor hasn't attempted to settle or otherwise renegotiate. And a statement as to whether the private education loan is eligible for an income-based repayment plan, which is probably in most cases going to be no.

You have to have all of that information before you started communicating about the debt. You have to provide all of that information in the first written communication to the borrower. You have to disclose all of that information, and you also have to provide all of that information whenever the borrower requests it.

Now, you can't sue without providing all of this information to the court. California requires that the information will be provided to the court with a complaint, as does Colorado. Maine requires that it be introduced as evidence, which probably means it will be presented to the court with the complaint.

Further requirements here, all settlement agreements have to be documented in open court or reduced to writing. There are specific disclosures that are required when a creditor or debt collector accepts a payment as payment in full. They're fairly detailed. They have to be provided within 30 calendar days of receipt of the payment. They can be provided electronically, which may help somewhat. And all of these statutes address statute of limitations issues, although they do so in somewhat

different ways. California purports to prohibit suit arbitration or any other legal proceeding if the statute of limitations has run. Colorado sets up a special six-year statute of limitations running from the date the borrower failed to make a required payment. And Maine specifically requires the court to find that the applicable statute of limitations has not run.

These statutes, as they're evolving, are fairly onerous. You are prohibited from getting a default judgment unless you've provided the authenticated documents to the court. The borrower has a private right of action that he or she can bring, or they can bring against the lender or collector. And in that action, it's possible to recover actual damages, statutory damages of not less than $500 per violation, punitive damages for acting with fraud or malice in California. The section goes on to say that the default judgment can be vacated, restitution has to be provided, consumer reports have to be corrected. And then, in the case of a class action, all of the named plaintiffs get statutory damages, and the rest of the recovery to the class is capped at a figure that you'll recognize from federal consumer financial services laws, the lesser of $500,000 or 1% of a creditor's net worth.

Some of the other actions that are going on at the state level. We're seeing states start to limit the circumstances under which a default can be declared, limiting that to a payment default. And we're also seeing a lot of activity around release or discharge in the case of death or disability of the borrower or co-signer, death or total and permanent disability.

Alan Kaplinsky:

So I want to thank our presenters today, my colleagues, John Culhane, Lisa Lanham, and Abigail Pressler. To make sure that you don't miss our future episodes, subscribe to our show on your favorite podcast platform, be it Apple Podcasts, Google Play, Spotify, or wherever you listen. Don't forget to also check out our blog and subscribe to our blog, which also goes by the name of Consumer Finance Monitor. In that blog, we have daily insights about the consumer financial services industry, including the topic that we covered during today's podcast. And if you have any questions or suggestions for our show, please email us at podcast@ballardspahr.com. And stay tuned each Thursday for a new episode. And thank you very much for listening, and have a good day.