AMENDED IN SENATE MARCH 24, 2011

SENATE BILL No. 890

Introduced by Senator Leno

February 18, 2011

An act *to add Title 1.6C.5 (commencing with Section 1788.50) to Part 4 of Division 3 of the Civil Code, and to amend Sections 700.010, 706.103, 706.104, 706.108, and 706.122 of, and to add Sections 581.5 to, the Code of Civil Procedure,* relating to debt ~~collection~~ *buyers*.

LEGISLATIVE COUNSEL'S DIGEST

SB 890, as amended, Leno. Debt ~~collection.~~ *buyers.*

~~Existing~~

(1) Existing state and federal law regulate the practice of debt collection. Existing state law prohibits a debt collector from engaging in specified conduct, including the use of threats or causing a telephone to ring repeatedly to annoy the person called. Existing law prohibits a debt collector from obtaining an affirmation from a debtor of a consumer debt that has been discharged in bankruptcy, without clearly and conspicuously disclosing to the debtor, in writing, the fact that the debtor is not legally obligated to make such affirmation.

This bill would ~~state the intent of the Legislature to enact legislation to require a debt collector when suing to provide documentation that evidences that the debt collector is attempting to collect from the right person, for the right amount, on a debt that the he or she can lawfully recover~~ *enact the Fair Debt Buyers Practices Act, which would regulate the activities of a person who has bought consumer debt and the circumstances in which the person may bring suit. The bill would prohibit a debt buyer, as defined, from making any written statement in an attempt to collect a consumer debt, including bringing suit, unless* *the debt buyer has valid documentation that the debt buyer is the sole owner of the specific debt at issue and reasonable verification of the amount of the debt allegedly owed. The bill would require the debt buyer to make this documentation available to the debtor, without charge, upon request, within 5 days. The bill would require a debt buyer who receives a payment on a debt to provide an original receipt containing specified information. The bill would prohibit a debt buyer from initiating a suit to collect a debt if the statute of limitations on the cause of action has expired. The bill would prescribe penalties for a violation of the act and would provide that its provisions may not be waived. The bill would prohibit an entry of judgment in favor of a plaintiff debt buyer unless properly authenticated business records relating to the debt and ownership of it, among other things, are properly in evidence, and would require a court to enter a judgment against the plaintiff debt buyer if this information is not provided or if he or she fails to appear or is not prepared on the date scheduled for trial.*

(2) Existing law establishes a process for the enforcement of money judgments and requires a levying officer to provide certain documents and information to a judgment debtor and to a designated employer in connection with wage garnishment. Existing law permits a process server also to serve an earnings withholding order on an employer and requires that the process server also serve certain documents at this time. Existing law requires an employer who is served with an earnings withholding order to provide certain documents to an employee who is a judgment debtor.

This bill would require, in the circumstances described above, that a copy of the form that the judgment debtor may use to make a claim of exemption and a copy of the form used to provide a financial statement also be provided.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Title 1.6C.5 (commencing with Section 1788.50) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 1.6C.5. FAIR DEBT BUYERS PRACTICES ACT

1788.50. (a) As used in this title, “debt buyer” means a person who, in the ordinary course of business, regularly engages in purchasing delinquent, charged-off consumer loans, or consumer credit accounts, or other delinquent consumer debt. “Debt buyer” includes a person acting on behalf of a debt buyer.

(b) Terms defined in Title 1.6C (commencing with Section 1788) shall apply to this title.

1788.51. The requirements and remedies of this title are cumulative to those in Title 1.6C (commencing with Section 1788) as well as any other law.

1788.52. A debt buyer shall not make any written statement in an attempt to collect a consumer debt, including bringing suit or initiating another type of proceeding, unless the debt buyer has in his or her possession valid documentation that the debt buyer is the sole owner of the specific debt or account at issue and reasonable verification of the amount of the debt allegedly owed by the debtor. Reasonable verification shall include documentation of the name of the original creditor, the name and address of the debtor as it appeared on the original creditor’s records, the original creditor’s account number associated with the debt, a copy of the contract or other document evidencing the debtor’s agreement to the debt, and an itemized accounting of the amount claimed to be owed, including all fees and charges. Upon a request from the debtor to whom the debt purportedly applies, the debt buyer shall make this information available, without charge, to the debtor within five business days.

1788.54. A debt buyer who receives payment on a debt shall provide an original receipt or an exact copy of the receipt to the individual from whom payment is received within 10 days of payment. A receipt provided in this regard shall:

(a) Show the amount and date paid, the name of the entity paid, the current account number, the name of the original creditor, and the account number issued by the original creditor. If the debt buyer is in possession of the names of any prior purchasers of the debt and the account numbers issued by those purchasers, this information shall also be included.

(b) State clearly and conspicuously if the payment is accepted as payment in full or as a full and final compromise of the debt.

If any part of the debt will be owing after the payment is made, the receipt shall state clearly and conspicuously the balance due after payment is credited.

1788.56. A debt buyer shall not bring suit, initiate another proceeding, or take any other action to collect a consumer debt if the applicable statute of limitations on the cause of action has expired.

1788.58. In an action brought by a debt buyer on a consumer debt:

(a) The plaintiff shall disclose clearly and conspicuously on the face of the complaint that he or she is a debt buyer.

(b) All of the following shall be attached to the complaint:

(1) A copy of the contract or other writing evidencing the original debt and agreement of the debtor to be responsible for that debt, and establishing that each defendant debtor is, in fact, responsible for the original account.

(2) A copy of the writing establishing that the debt buyer is the sole current owner of the debt. If the debt has been sold more than once, admissible written evidence shall be provided to establish an unbroken chain of ownership interests. Each writing shall contain the original account number of the debt sold or purchased, which shall be redacted for security purposes to show only the last four digits, and shall clearly show the debtor's correct name associated with the original account number.

(3) A statement of calculation of liability that separately states the amount of the original debt, each fee and charge added to the debt, and each payment credited to the debt after the earliest of charge off or the delinquency closest in time to the sale of the debt.

1788.60. (a) In an action initiated by a debt buyer prior to the entry of a judgment, including a default judgment, against a debtor, the plaintiff shall clearly and conspicuously disclose to the court that he or she is a debt buyer and shall provide admissible evidence to establish the amount and nature of the debt and the identity of the debtor, including all of the information described in subdivision (b).

(b) For the purpose of this section, the only evidence sufficient to establish the amount and nature of the debt shall be properly authenticated business records that satisfy the requirements of Sections 1271 and 1272 of the Evidence Code. The authenticated business records shall include the following items:

(1) A copy of the contract or other writing evidencing the original debt and agreement of the debtor to be responsible for that debt.

(2) The original account number.

(3) The name of the original creditor.

(4) The original charge-off balance.

(5) An itemization of charges and fees claimed to be owed.

(6) An itemization of post charge-off additions, if applicable.

(7) The date of last payment.

(8) The amount of interest claimed and the basis for the interest charged.

(c) If a plaintiff who is a debt buyer seeks a default judgment and has not complied with the requirements of this section, the court shall not enter a default judgment for the plaintiff and shall instead dismiss the action with prejudice.

1788.62. (a) Except as otherwise provided by this section, a debt buyer who violates any provision of this title with respect to any person is liable to the person in an amount equal to the sum of the following:

(1) Any actual damage sustained by the person.

(2) The amount established pursuant to either subparagraph (A) or (B):

(A) The case of any action by an individual, such additional damages as the court may allow, but not less than five hundred dollars ($500) per violation and not more than five thousand dollars ($5,000) per violation.

(B) In the case of a class action, the amount for each named plaintiff as could be recovered under subparagraph (A), and an amount as the court may determine for each other class member, not exceeding the amount per person that could be recovered under subparagraph (A).

(3) In the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

(b) In determining the amount of liability under paragraph (2) of subdivision (a), the court shall consider, among other relevant factors, the following:

(1) In any individual action under subparagraph (A) of paragraph (2) of subdivision (a), the frequency and persistence of

noncompliance by the debt buyer, and the nature of the noncompliance.

(2) In any class action under subparagraph (A) of paragraph (2) of subdivision (a), the frequency and persistence of noncompliance by the debt buyer, the nature of the noncompliance, the resources of the debt buyer, and the number of persons adversely affected.

(c) A debt buyer shall not be held liable in any action brought under this title if the debt buyer shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) An action to enforce any liability created by this title may be brought within two years from the date of discovery of the violation occurs.

1788.64. Any waiver of the provisions of this title is contrary to public policy, and is void and unenforceable.

SEC. 2. Section 581.5 is added to the Code of Civil Procedure, to read:

581.5. In a case involving consumer debt, as defined in Section 1788.2 of the Civil Code, and as regulated under Title 1.6C.5 (commencing with Section 1788.50) of Part 4 of Division 3 of the Civil Code, 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, and the court does not find a good cause for continuance, judgment shall be entered for the debtor. Notwithstanding any other law, in this instance, the court may award the defendant debtor's costs of preparing for trial, including, but not limited to, lost wages and transportation expenses.

SEC. 3. Section 700.010 of the Code of Civil Procedure is amended to read:

700.010. (a) At the time of levy pursuant to this article or promptly thereafter, the levying officer shall serve a copy of the following on the judgment debtor:

(1) The writ of execution.

(2) A notice of levy.

(3) If the judgment debtor is a natural person, a copy of the form listing exemptions prepared by the Judicial Council pursuant to subdivision (c) of Section 681.030 ~~and~~, the list of exemption

amounts published pursuant to subdivision ~~(d)~~ *(e)* of Section 703.150, *a copy of the form that the judgment debtor may use to make a claim of exemption pursuant to Section 703.520, and a copy of the form the judgment debtor may use to provide a financial statement pursuant to Section 703.530*.

(4) Any affidavit of identity, as defined in Section 680.135, for names of the debtor listed on the writ of execution.

(b) Service under this section shall be made personally or by mail.

SEC. 4. Section 706.103 of the Code of Civil Procedure is amended to read:

706.103. (a) The levying officer shall serve upon the designated employer all of the following:

(1) The original and one copy of the earnings withholding order.

(2) The form for the employer's return.

(3) The notice to employee of earnings withholding order.

(4) A copy of the form that the judgment debtor may use to make a claim of exemption.

(5) A copy of the form the judgment debtor may use to provide a financial statement.

(b) At the time the levying officer makes service pursuant to subdivision (a), the levying officer shall provide the employer with a copy of the employer's instructions referred to in Section 706.127. The Judicial Council may adopt rules prescribing the circumstances when compliance with this subdivision is not required.

(c) No earnings withholding order shall be served upon the employer after the time specified in subdivision (b) of Section 699.530.

SEC. 5. Section 706.104 of the Code of Civil Procedure is amended to read:

706.104. Any employer who is served with an earnings withholding order shall:

(a) Deliver to the judgment debtor a copy of the earnings withholding order ~~and~~, the notice to employee of earnings withholding, *a copy of the form that the judgment debtor may use to make a claim of exemption, and a copy of the form the judgment debtor may use to provide a financial statement* within 10 days from the date of service. If the judgment debtor is no longer employed by the employer and the employer does not owe the employee any earnings, the employer is not required to make such delivery. The employer is not subject to any civil liability for failure to comply with this subdivision. Nothing in this subdivision limits the power of a court to hold the employer in contempt of court for failure to comply with this subdivision.

(b) Complete the employer's return on the form provided by the levying officer and mail it by first-class mail, postage prepaid, to the levying officer within 15 days from the date of service. If the earnings withholding order is ineffective, the employer shall state in the employer's return that the order will not be complied with for this reason and shall return the order to the levying officer with the employer's return.

SEC. 6. Section 706.108 of the Code of Civil Procedure is amended to read:

706.108. (a) If a writ of execution has been issued to the county where the judgment debtor's employer is to be served and the time specified in subdivision (b) of Section 699.530 for levy on property under the writ has not expired, a judgment creditor may deliver an application for issuance of an earnings withholding order to a registered process server who may then issue an earnings withholding order.

(b) If the registered process server has issued the earnings withholding order, the registered process server, before serving the earnings withholding order, shall deposit with the levying officer a copy of the writ of execution, the application for issuance of an earnings withholding order, and a copy of the earnings withholding order, and shall pay the fee provided by Section 26750 of the Government Code.

(c) A registered process server may serve an earnings withholding order on an employer whether the earnings withholding order was issued by a levying officer or by a registered process server, but no earnings withholding order may be served after the time specified in subdivision (b) of Section 699.530. In performing this function, the registered process server shall serve upon the designated employer all of the following:

(1) The original and one copy of the earnings withholding order.

(2) The form for the employer's return.

(3) The notice to the employee of the earnings withholding order.

(4) A copy of the form that the judgment debtor may use to make a claim of exemption.

(5) A copy of the form the judgment debtor may use to provide a financial statement.

~~(4)~~

(6) A copy of the employer's instructions referred to in Section 706.127, except as otherwise prescribed in rules adopted by the Judicial Council.

(d) Within five court days after service under this section, all of the following shall be filed with the levying officer:

(1) The writ of execution, if it is not already in the hands of the levying officer.

(2) Proof of service on the employer of the papers listed in subdivision (c).

(3) Instructions in writing, as required by the provisions of Section 687.010.

(e) If the fee provided by Section 26750 of the Government Code has been paid, the levying officer shall perform all other duties required by this chapter as if the levying officer had served the earnings withholding order. If the registered process server does not comply with subdivisions (b), where applicable, and (d), the service of the earnings withholding order is ineffective and the levying officer is not required to perform any duties under the order and may terminate the order and may release any withheld earnings to the judgment debtor.

(f) The fee for services of a registered process server under this section shall be allowed as a recoverable cost pursuant to Section 1033.5.

SEC. 7. Section 706.122 of the Code of Civil Procedure is amended to read:

706.122. The "notice to employee of earnings withholding order" shall contain a statement that informs the employee in simple terms of the nature of a wage garnishment, the right to an exemption, the procedure for claiming an exemption, and any other information the Judicial Council determines would be useful to the employee and appropriate for inclusion in the notice, including all of the following:

(a) The named employer has been ordered to withhold from the earnings of the judgment debtor the amounts required to be withheld under Section 706.050, or such other amounts as are specified in the earnings withholding order, and to pay these amounts over to the levying officer for transmittal to the person specified in the order in payment of the judgment described in the order.

(b) The manner of computing the amounts required to be withheld pursuant to Section 706.050.

(c) The judgment debtor may be able to keep more or all of the judgment debtor's earnings if the judgment debtor proves that the additional earnings are necessary for the support of the judgment debtor or the judgment debtor's family supported in whole or in part by the judgment debtor.

(d) If the judgment debtor wishes a court hearing to prove that amounts should not be withheld from the judgment debtor's earnings because they are necessary for the support of the judgment debtor or the judgment debtor's family supported in whole or in part by the judgment debtor, the judgment debtor shall file with the levying officer an original and one copy of the "judgment debtor's claim of exemption" and an original and one copy of the "judgment debtor's financial statement." ~~The notice shall also advise the judgment debtor that the claim of exemption form and the financial statement form may be obtained without charge at the office of the levying officer.~~

SEC. 8. The provisions of this act are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

~~SECTION 1. It is the intent of the Legislature to enact legislation that requires a debt collector to provide documentation that supports the debt collector's right to the debt when the debt collector is suing to collect that debt. The legislation shall require that documentation to evidence that the debt collector is attempting to collect from the right person, for the right amount, on a debt that the he or she can lawfully recover.~~

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