

BANKRUPTCY & THE STATUTE OF LIMITATIONS

PacWest Student Financial Services Conference
Loews Coronado Bay Resort, CA
May 14, 2015

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Disclaimer

- ❖ This presentation should be construed as an overview of the issues discussed. The presentation is not legal advice to anyone attending this presentation, or reading the accompanying handout. Specific legal questions regarding these concepts and their application to any institution of higher education or other presentation participant should be directed to a participant's legal counsel.

Partnership



Bankruptcy Presentation

- ❖ What do you know about bankruptcy today?
- ❖ What are some of the basic principles?
- ❖ What needs to be done to protect my institution's debt from being discharged?
- ❖ What are the current issues and cases relating to bankruptcy and student loans?
- ❖ Title IV refunds, the resulting AR, and how can this type of debt be addressed (this is an important issue that in the aggregate has an impact across higher education)?

New Legislation

IN THE SENATE OF THE UNITED STATES

Mr. DURBIN (for himself, Mr. WHITEHOUSE, Mr. FRANKEN, Mr. BLUMENTHAL, Mrs. MURRAY, Mr. REED, Ms. WARREN, Mr. WYDEN, Mrs. BOXER, Mr. KAINE, Mr. SCHATZ, Mrs. GILLIBRAND, and Ms. HIRONO) introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend title 11, United States Code, with respect to certain exceptions to discharge in bankruptcy.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fairness for Strug-
5 gling Students Act of 2015”.

The Overall View of Student Debt

Beauchamp, Brenda and Cooper, Jason R. (2014) "Survey 2014: Bankruptcy + Student Loan Debt Crisis," *Touro Law Review*: Vol. 30: No. 3, Article 4.

Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol30/iss3/4>

SURVEY 2014: BANKRUPTCY + STUDENT LOAN DEBT CRISIS

*Brenda Beauchamp**
*Jason R. Cooper***

INTRODUCTION

In 2014, a college degree is a must. With the rising cost of tuition, to get that college degree you will likely need a loan. Lucky for you, private lenders will almost always give you AS MUCH AS YOU WANT! Now you have your degree. For some reason you still cannot quite avoid being underemployed, despite having said degree. Unfortunately, that student loan debt is truly beginning to weigh on you and your family. You cannot make your mortgage payments for fear of missing a student loan payment or two. You struggle to make your car payments, too. Alas, you seek the relief of the Bankruptcy Court. Mortgage discharge? Check. Auto loan discharge? Check. Student loan discharge? Probably not. Your “fresh start” under the Bankruptcy Code is not looking so fresh anymore.

The student loan burden in America has caught the attention of politicians, economists, professors, and reporters. Second only to home mortgages, student loan debt remains one of the largest forms of consumer debt in America.¹ The Bankruptcy Code’s unwavering

Bankruptcy

- ❖ The most recent significant legislation in this area is the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005” (BAPCA – S. 256)
- ❖ Passed – April 14, 2005
- ❖ Signed – April 20, 2005



Bankruptcy Basics

- ❖ Article I, Section 8 of the U.S. Constitution grants Congress the power to create “uniform Laws on the subject of Bankruptcies throughout the United States.”
- ❖ The US Constitution completely preempts states from handling bankruptcy issues and therefore all bankruptcy laws are federal and cases are handled by the federal courts.
- ❖ The bankruptcy code is found at 11 U.S.C. § 101, *et seq.*
- ❖ Fundamentally bankruptcy is to give debtors a “fresh start” and to place creditors in an appropriate priority for re-payment.

Bankruptcy Statistics

Source: www.uscourts.gov

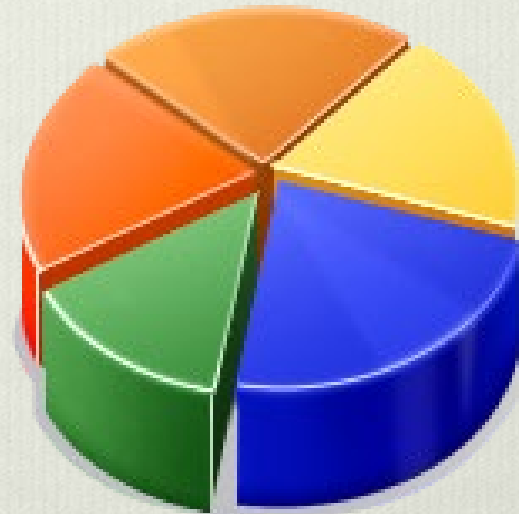
Table F.
U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated and Pending
During the 12-Month Periods Ending December 31, 2013 and 2014

Circuit and District	Filings			Terminations			Pending		
	2013	2014	Percent Change ¹	2013	2014	Percent Change ¹	2013 ²	2014	Percent Change ¹
TOTAL	1,071,932	936,795	-12.6	1,178,167	1,074,261	-8.8	1,490,866	1,353,497	-9.2

Bankruptcy Statistics

❖ The typical filer is a white, married homeowner who works full-time, with a household income of less than \$30,000 and an average debt of \$47,000. (Not including home mortgage).
(bankruptcylawinformation.com)

❖ Oct. 2005 prior to new law – 619,322 cases filed, Nov. 2005 – 13,758 cases filed; and monthly filing have risen each month since – CNN Money.com, June 12, 2006



Bankruptcy Terms

- ❖ **Petition** – A bankruptcy begins when a **voluntary** or **involuntary** petition for relief is filed in bankruptcy court.
- ❖ **Automatic stay** – 11 U.S.C. § 362 – prohibits “all entities” from “any act to collect” a debt during the bankruptcy.
- ❖ **Trustee** – Appointed by the court as the fiduciary of the consumer. They either convert assets to cash and distribute the money, or manage the consumer’s repayment plan under Chapter 13.

VCIS

- ❖ The Voice Case Information System is a FREE way to find out the status of a student's bankruptcy. You may need to simply need to locate the appropriate Bankruptcy Court to obtain the phone number.



VCIS



- ❖ (866) 222-3034
- ❖ Any courts not using the general phone number list their number at: pacer.gov/phone_access.html

Bankruptcy Chapters

- ❖ **Chapter 7 – Liquidation**
- ❖ Chapter 11 – Business Reorganization
- ❖ Chapter 12 – Farm Protection
- ❖ **Chapter 13 – Individual Reorganization**

Chapter 7 - Liquidation

- ❖ Most common
- ❖ Liquidation – there are asset and no asset cases
- ❖ Individual may only file once every 8 years. This is an increase from every 6 years and became effective Oct. 17, 2005.
- ❖ Priority of payment is established in the code and basically reads that expenses are paid, then secured creditors and finally unsecured creditors.
- ❖ Roughly 3-6 months to receive a discharge

Chapter 13 – Wage Earner

- ❖ Debtor, with the Trustee, sets up a re-payment plan through Bankruptcy Court.
- ❖ Debtor has some regular income.
- ❖ There are limits on the amounts of secured and unsecured debt a consumer can have to file under Ch. 13.
- ❖ The plan must provide for all future earnings to be subject to the supervision and control of the Trustee and must provide for full payment of all secured claims.
- ❖ Nondischargeable student debt remaining unpaid following the discharge survives the bankruptcy and is collectible with allowable interest. See *Leeper v. Pa. Higher Educ. Assistance*, 49 F.3d 98 (3rd Cir. 1995), *Educational Credit Management Corp. v. Kielisch*, 252 BR 338 (E.D. Va. 2000).
- ❖ Roughly 3-5 years to receive a discharge.

Dismissal

- ❖ Trustee or a creditor may petition the Bankruptcy Court for a dismissal.
- ❖ Being dismissed means the debtor does not qualify, under the code, as bankrupt.
- ❖ Bankruptcy Court may also dismiss a debtor for “substantial abuse” of the Bankruptcy Code.
- ❖ **The KEY – Dismissal ≠ Discharge**

Discharge

- ❖ Generally a debtor receives a discharge from Bankruptcy Court when they have met the requirements of the Code under the Chapter in which their bankruptcy was governed. All **dischargeable** debts are effectively discharged and are no longer owed.
- ❖ IMPORTANT – Whether or not a debt is discharged is governed by the Bankruptcy Code and by case law, but not by the debtor or the creditor.
- ❖ Have the student look at their Discharge Order with you. Show them that the court has not discharged the student debt owed to your institution.

Standard Order

DISCHARGE OF JOINT DEBTORS

It appearing that the debtors are entitled to a discharge,

IT IS ORDERED:

The debtor is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

BY THE COURT

Dated: _____

United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

Standard Order - Back

Debts That are Not Discharged

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

- a. Debts for most taxes;
- b. Debts incurred to pay nondischargeable taxes (in a case filed on or after October 17, 2005);
- c. Debts that are domestic support obligations;
- d. Debts for most student loans;
- e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;
- g. Some debts which were not properly listed by the debtor;
- h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;
- i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts; and
- j. Debts owed to certain pension, profit sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans (in a case filed on or after October 17, 2005).

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

Exceptions to Discharge

- ❖ 11 U.S.C. § 523(a)(8).
- ❖ This definition changed under the law that became effective Oct. 17, 2005. The change was an important factor that leading to increased private lending in the student loan market.

Pre-2005 11 U.S.C. § 523(a)(8)

- ❖ “(a) A discharge under ... this title does not discharge an individual debtor from any debt—
 - ❖ (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents”

11 U.S.C. § 523(a)(8)

- ❖ “(a) A discharge under ... this title does not discharge an individual debtor from any debt—
 - ❖ (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for
 - ❖ (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution; or

11 U.S.C. § 523(a)(8) – cont.

- ❖ (A)(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
- ❖ (B) any other educational loan that is a **qualified education loan**, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.”
- ❖ The difference is the addition of the term “**qualified education loan**” as defined under federal law and whether this definition will clear some of the current questions in our industry about what type of debt is discharged.

Internal Revenue Code § 221(d)(2)

- ❖ “qualified higher education expense” is defined to mean –
 - ❖ “the cost of attendance (as defined in section 472 of the Higher Education Act of 1965 as in effect on the day before the date of enactment of this Act) as an eligible educational institution...”

Section 472 of the HEA

20 U.S.C. 108711

- ❖ Cost of Attendance =
- ❖ Tuition/Fees normally assessed a student including materials and equipment for students in the same course of study.
- ❖ Books/Supplies/Misc. Personal Expenses
- ❖ Room & Board

It is important to understand that this slide does **NOT** mean these things are nondischargeable. It does mean that “student loans” used for these things are not subject to discharge.

The Precedent re: 523(a)(8)

- ❖ What does the case law say about institutional debt?:
 - ❖ *In re Chambers*, 348 F.3d 650 (7th Cir. 2003)
 - ❖ *In re Mehta*, 310 F.3d 308 (3rd Cir. 2002)
 - ❖ *In re Renshaw*, 222 F.3d 82 (2nd Cir. 2000)
- ❖ Basically – Funds need to have changed hands or there should be a signed agreement whereby the school provides services and the student is allowed to pay for the services at a later date.

The Chambers case

- ❖ Although the term “loan” can be construed broadly under various dictionary definitions, we look to the common law definition of “loan” as articulated in *In re Grand Union Co.*, 219 F. 353, 356 (2d Cir.1914), and as paraphrased in *Renshaw*, 222 F.3d at 88. Under this interpretation, nonpayment of tuition qualifies as a loan “in two classes of cases”: “‘where funds have changed hands,’ or where ‘there is an agreement ... whereby the college extends credit.’ ” *Mehta*, 310 F.3d at 314 (quoting *Renshaw*, 222 F.3d at 90). The agreement to transfer educational services in return for later payment “must be reached prior to or contemporaneous with the transfer” of those educational services. *Renshaw*, 222 F.3d at 88. This existence of a separate agreement acknowledging the transfer and delaying the obligation for repayment distinguishes a loan from a mere unpaid debt.

In re Chambers, 348 F.3d 650, 657 (7th Cir. 2003)

The only way out!!

- ❖ When you are holding a non-dischargeable student loan, the only way for the debtor to have that debt discharged is to petition the court for an adversary hearing and then to receive from a judge a finding of “undue hardship.”
- ❖ There is the possibility for a partial discharge based on case law, but this is the minority rule and appears to be a judicially created remedy.

Undue Hardship

- ❖ The Majority Test – See *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395 (2d Cir. 1987).
 - ❖ Three elements must be proven by a preponderance of the evidence.
 - ❖ Based on current income and expenses the debtor cannot maintain a minimal standard of living.
 - ❖ This situation is likely to persist for the duration of the repayment period.
 - ❖ A good faith effort has been made to repay the loans.
- ❖ Often you will see an intervening circumstance that has dramatically affected the debtor's earning potential.

Update on the *Brunner* Test

<http://www.bakermanock.com/abi-journal-student-loan-discharge-decisions-poke-holes-brunner-test-j-jackson-waste-and-michael-j>

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

Feature

BY MICHAEL J. FLETCHER AND J. JACKSON WASTE

Student Loan Discharge Decisions Poke Holes in the *Brunner* Test



Michael J. Fletcher
Wanger Jones Helsley
PC, Fresno, Calif.

The conventional wisdom regarding student loans is that they are in effect nondischargeable. While the Bankruptcy Code allows discharge of student loans upon a showing of “undue hardship,” judicial interpretation of that term has set the bar exceptionally high. Specifically, nine circuits evaluate “undue hardship” via the *Brunner* test, named after the 1987 case.¹ In the world of *Brunner-*

employed graduates, has led to growing public awareness, as well as a few abortive attempts at legislative action. Congress proposed student loan relief bills in 2010, 2011 and 2013 that sought to unwind a 2005 amendment that excepted *private* student loans from discharge.⁶ None of the bills, however, have survived committee. Given the present congressional gridlock, there is little hope of a legislative band-aid

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

- ❖ Passed by Congress on April 14, 2005 and signed by President Bush on April 20, 2005.
- ❖ Became effective on October 17, 2005.
- ❖ Overhauls many portions of the current bankruptcy code and provides some additional protection for creditors.
- ❖ Many in the “consumer bar” remain displeased with the 2005 changes.
- ❖ The first major revision to the Bankruptcy Code since 1987.

BAPCA Highlights

- ❖ Creditor may challenge a debtor's eligibility under Chapter 7.
- ❖ A dismissal may result from debtor abuse.
- ❖ Debtors under Ch. 7 must meet the median income test and the means test. Failure to do so creates a presumption of abuse.
- ❖ Credit counseling is mandated.
- ❖ Broader exemptions for retirement savings.
- ❖ Years increased from 6 to 8 for following a Ch. 7 with another Ch. 7.

Transcripts



- ❖ Does bankruptcy impact our policy of placing holds on transcripts?
- ❖ This is specific to the jurisdiction of the bankruptcy and the case law should be reviewed to make an informed decision.

Transcript Cases

- ❖ *In re Hernandez*, 2005 WL 1000059 (Bankr.S.D.Tex.)
- ❖ *In re Mu 'min*, 374 B.R. 149 (E.D. Pa. 2007).
- ❖ These cases provides a clear explanation of the issue and support the majority rule.

AR after a Title IV Refund

- ❖ I have found that many schools are struggling with an increase in ARs resulting from the requirement that the school refund the full amount of a loan when the student withdraws and the student remains obligated for the difference between the amount the school retained to pay tuition and the full amount of the loan.
- ❖ This is a unique type of debt that as an industry we need to work together to recover. A final determination is going to be the result of an individual or collective effort to test the dischargeability of the this debt in court.

THE STATUTE OF LIMITATIONS

Statute of Limitations Presentation

- ❖ Today we will cover:
 - ❖ What is the statute of limitations (“SOL”);
 - ❖ What is an affirmative defense;
 - ❖ When does the SOL begin to run;
 - ❖ What does it mean to toll the SOL;
 - ❖ What does it mean to re-start the SOL;
 - ❖ How is the meaning changing in certain states;
 - ❖ How are federal regulators getting involved; and
 - ❖ What to do next?

State Specific

- ❖ One of the difficulties with issues surrounding the statute of limitations is the result of it being, in most cases, a state by state issue. Therefore, many answers to potential questions would require a review of the applicable state laws, conflict of laws issues, and the applicable case law.

Federal Debt

- ❖ As I am confident you are well aware, Congress has removed the statute of limitations for federal student loans.
- ❖ The Higher Education Technical Amendments of 1991 eliminated all statutes of limitations for the collection of federal loan programs. This provision specifically preempts state laws, other federal laws, and any regulations. The provision is codified at 20 U.S.C. § 1091a.

The Statute of Limitations

- ❖ A statute establishing a time limit for suing in a civil case based on the date when the claim accrued (as when the injury occurred or was discovered). The purpose of such a statute is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.
- ❖ See *Black's Law Dictionary* (Bryan A. Garner ed., 7th ed., West 1999).

SOL & the FDCPA

- ❖ As you are aware, your partnering agencies are governed by the Fair Debt Collection Practices Act. 15 U.S.C. § 1691, et seq. One way the consumer attorneys are attacking the collection of debt is using provisions in the FDCPA to increasingly narrow the collectability of debts that are past the applicable SOL.
- ❖ The best example of this issue is the decision out of the 7th Circuit Court of Appeals called the *McMahon/Delgado* decision.
- ❖ Of note, the court followed the CFPB and FTC rather than the other two appellate courts that previously ruled on the issue.

Breach of Contract

- ❖ There are often different statutes of limitations for different types of causes of action. The statutes of limitations that we are discussing today concern claims for breach of contract. Breach of contract is the cause of action that your institution, as the creditor, would be bringing against a student for failing to pay a debt to the school.

State Specific Statutes – The Range

- ❖ Kentucky;
 - ❖ Oral Contract – 5 years;
 - ❖ Written Contract – 15 years.

- ❖ South Carolina;
 - ❖ Oral Contract – 3 years;
 - ❖ Written Contract – 3 years.

- ❖ There is a wide variation across the country. You should, at a minimum, be aware of the statutes of limitations in the state where you are located and probably the neighboring states where many of your students will be located.

Affirmative Defense



Affirmative Defense

- ❖ An affirmative defense is a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's claim, even if all allegations in the complaint are true. See *Black's Law Dictionary* (Bryan A. Garner, ed., 7th ed. West 1999).
- ❖ Historically, the statute of limitations was simply an affirmative defense. If someone was sued in South Carolina 4 years after a material breach of contract, then regardless of the truth of the allegations the defendant could assert the statute of limitations as an affirmative defense and have the complaint dismissed.

When does the statute begin
to run?



When does the statute begin to run?

- ❖ As a general rule, the statute of limitations on a contract claim begins to run on the date of the breach. The date of the breach is the first day the action accrues. If students are required to pay in full by the last day of the semester, then a student that owes money at the end of the semester could be sued on the first day after the end of the semester because they are in breach of the terms of the agreement.

Tolling the Statute of Limitations

- ❖ The tolling period varies by statute and by state, but generally this is a period of time when the running of the statute of limitations is interrupted by action or inaction of the person subject to the statute of limitation. In South Carolina for instance (3 year SOL), if the student has not paid for one year and enters active military duty for three years, then upon his/her return to South Carolina as a regular citizen, the creditor would have two more years to bring an action against the consumer.

Partial Payments/Promises to Pay

- ❖ One issue of great importance to understand in your area is the effect of a partial payment or promise to pay. In some states a partial payment tolls the statute of limitations while in other states a partial payment re-starts the statute of limitations.
- ❖ Often a written acknowledgement signed by the party to be charged or a partial payment will serve to re-start the statute of limitations if the statute has already run. There are states where seeking the required acknowledgment can create liability if certain steps are not taken. See N.C. Gen. Stat. 75-55(1) (this applies to creditors).

Change is coming!

- ❖ New Mexico; Connecticut;
- ❖ Mississippi; West Virginia; and
- ❖ New York City; New York (Mar. 3, 2015).
- ❖ Wisconsin;
- ❖ Massachusetts;
- ❖ North Carolina;

Change is coming!

The logo for the Consumer Financial Protection Bureau (CFPB) features the lowercase letters 'cfpb' in a bold, green, sans-serif font. The letters are slightly overlapping, with the 'c' and 'f' on the left and the 'p' and 'b' on the right.

Consumer Financial
Protection Bureau



The New View of the SOL

- ❖ States and federal regulators are now using the statute of limitations to make it increasingly difficult to collect older debt obligations.
- ❖ This trend is, in my opinion, being driven by the purchase and collection of older debt that is completely unrelated to higher education. Nevertheless, this niche' of the collection industry will be directly impacted. These changes will require specific action to prevent a great deal of debt from becoming virtually uncollectable.

New Mexico

New Mexico Settles Case Against Debt Collection Agency

Patrick Lunsford August 29, 2008 (Be the first to respond)

The New Mexico attorney general announced Thursday a settlement in a year-old lawsuit with an Illinois collection agency over the collection of out-of-statute debt.

Attorney General Gary King's office said in a press release that it reached an agreement with Merchants' Credit Guide, a 110-year old accounts receivable management firm based in Chicago.

King filed suit against Merchants' in August 2007, alleging that the company had tried to collect on time-barred debt in New Mexico ("[New Mexico AG Sues Merchants Credit Guide](#)," Aug. 30, 2007). King's suit additionally stated that Merchants' was not properly licensed to collect the state when it attempted to collect some debts. Merchants' became licensed to collect in New Mexico on April 1, 2005, according to King's statement.

As part of the settlement, Merchants' has agreed to stop collecting all debt that is unenforceable due to the running of the statute of limitation



New Mexico

- ❖ As of December 15, 2010, the New Mexico Attorney General has required debt collectors to provide certain disclosures when collecting debt in New Mexico that is past the New Mexico statute of limitations.

New Mexico – model language

- ❖ We are required by New Mexico Attorney General Rule to notify you of the following information. This is not legal advice: This debt may be too old for you to be sued on it in court. If it is too old, you can't be required to pay it through a lawsuit. You can renew the debt and start the time for the filing of a lawsuit against you to collect the debt if you do any of the following: make any payment of the debt; sign a paper in which you give up (“waive”) your right to stop the debt collector from suing you in court to collect the debt.

Mississippi

- ❖ Miss. Code Ann. § 15-1-3(1):
- ❖ The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the **right as well as the remedy**. However, the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.
- ❖ Exception for monies owed to the state of Mississippi or subdivisions thereof. See Miss. Const. Art. 4, § 104.

New York City



New York City



New York City New Debt Collection Rules

Final rules released implementing changes to Local Law No. 15.

The New York City Department of Consumer Affairs recently promulgated final rules implementing changes to the City's debt collection laws. **The rules are effective April 24, 2010.** If you are collecting debt in New York City, please read this alert carefully.

Background

In the Spring of 2009, the New York City Council passed Local Law No. 15 which significantly amended licensing and debt collection requirements for debt collectors and asset buyers operating in New York City. The Department of Consumer Affairs subsequently issued proposed rules implementing Local Law No. 15. However, these rules were not officially published in the New York City register until late March 2010.

This compliance alert provides an overview of Local Law No. 15 and summarizes the rule recently adopted by the NYC Department of Consumer Affairs.

New York City – **required disclosure** – I have placed this text in red to highlight the obvious negative effect on collections that placing the required notice in a contrasting color will have. Not to mention the increase in cost of two color letters.

“WE ARE REQUIRED BY LAW TO GIVE YOU THE FOLLOWING INFORMATION ABOUT THIS DEBT. The legal time limit (statute of limitations) for suing you to collect this debt has expired. However, if somebody sues you anyway to try and make you pay this debt, court rules REQUIRE YOU to tell the court that the statute of limitations has expired to prevent the creditor from obtaining a judgment. Even though the statute of limitations has expired, you may CHOOSE to make payments. However, BE AWARE: If you make a payment, the creditor's right to sue you to make you pay the entire debt may START AGAIN.”

The above notice must be provided in at least 12 point type and set off in a sharply contrasting color from all other type on the permitted communication. The language must also be placed adjacent to the identifying information about the amount claimed to be due or owed on the debt.

Wisconsin

- ❖ W.S.A. § 893.05 states:
 - ❖ When the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy.

Wisconsin – FDCPA

The case of *Klewer v. Cavalry Investments, LLC*, 2002
WL 2018830

The language of the statute is even more unequivocal than the FDCPA. Defendant's attempt to collect plaintiff's time-barred debt clearly constitutes an attempt to enforce a right that defendant should have known did not exist. As indicated above, plaintiff need not demonstrate that defendant's error of law was intentional. Accordingly, defendant has violated the WCA.

For all of the foregoing reasons, plaintiff's motion for summary judgment on the issue of liability under the FDCPA and the WCA is granted, and defendant's cross-motion is denied.

ORDER

IT IS ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is GRANTED.

Massachusetts

Mass.gov

State Agencies

State A-Z Topics

Skip to main content

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Martha Coakley

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MARTHA COAKLEY
ATTORNEY GENERAL

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For Immediate release - March 01, 2012

Updated Debt Regulations Provide Stronger Protections

Part of AG Coakley's Effort to Modernize All Consumer Protection Act Regulations; Brings Regulations Up To Date with Evolving Technology

BOSTON – Revised debt collection regulations designed to provide stronger consumer protections by addressing changing technology go into effect tomorrow, Attorney General Martha Coakley announced. The regulations, which were the subject of public hearings last spring, guide the industry in its collection practices and are more consistent with existing state and federal laws.

"Given the industry's recent advances in technology, we concentrated on how we could bring our regulations up-to-date and streamline them to be consistent with other state and federal agencies," AG Coakley said. "These amendments ensure that the playing field is level for both creditors and consumers so that all parties are better protected."

Massachusetts

(a) A creditor who makes the following disclosure shall be deemed to have complied with the requirements of this section:

WE ARE REQUIRED BY REGULATION OF THE MASSACHUSETTS ATTORNEY GENERAL TO NOTIFY YOU OF THE FOLLOWING INFORMATION. THIS INFORMATION IS NOT LEGAL ADVICE: THIS DEBT MAY BE TOO OLD FOR YOU TO BE SUED ON IT IN COURT. IF IT IS TOO OLD, YOU CANNOT BE REQUIRED TO PAY IT THROUGH A LAWSUIT. TAKE NOTE: YOU CAN RENEW THE DEBT AND THE STATUTE OF LIMITATIONS FOR THE FILING OF A LAWSUIT AGAINST YOU IF YOU DO ANY OF THE FOLLOWING: MAKE ANY PAYMENT ON THE DEBT; SIGN A PAPER IN WHICH YOU ADMIT THAT YOU OWE THE DEBT OR IN WHICH YOU MAKE A NEW PROMISE TO PAY; SIGN A PAPER IN WHICH YOU GIVE UP OR WAIVE YOUR RIGHT TO STOP THE CREDITOR FROM SUING YOU IN COURT TO COLLECT THE DEBT. WHILE THIS DEBT MAY NOT BE ENFORCEABLE THROUGH A LAWSUIT, IT MAY STILL AFFECT YOUR ABILITY TO OBTAIN CREDIT OR AFFECT YOUR CREDIT SCORE OR RATING.

(b) In the case of written communications, the disclosures required by this subsection shall be clear and conspicuous by appearing in a type which is a minimum of eight-point type and said disclosures shall be placed on the front page of the communication;

(c) In the case of oral communications, the disclosures required by this subsection shall be made immediately before or immediately after the first statement requesting payment, or, if no request for payment is made, no later than immediately after reference to the debt is first made.

North Carolina

- ❖ N.C. Gen Stat. § 75-50:
- ❖ The following words and terms as used in this Article shall be construed as follows:
 - ❖ (1) “Consumer” means any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes.
 - ❖ (2) “Debt” means any obligation owed or due or alleged to be owed or due from a consumer.
 - ❖ (3) “Debt collector” means any person engaging, directly or indirectly, in debt collection from a consumer except those persons subject to the provisions of Article 70, Chapter 58 of the General Statutes.

North Carolina

- ❖ N.C. Gen. Stat. § 75-55:
- ❖ No debt collector shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:
 - ❖ (1) Seeking or obtaining any written statement or acknowledgment in any form containing an affirmation of any debt by a consumer who has been declared bankrupt, an acknowledgment of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver.

Federal Involvement



FEDERAL TRADE COMMISSION
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For Release: 01/30/2012

Under FTC Settlement, Debt Buyer Agrees to Pay \$2.5 Million for Alleged Consumer Deception

Firm Also Will Notify Consumers with "Time-Barred" Debt That It Will Not Sue to Collect

One of the nation's largest consumer debt buyers has agreed to pay a \$2.5 million civil penalty to settle Federal Trade Commission charges that it made a range of misrepresentations when trying to collect old debts. In addition, the company, [Asset Acceptance, LLC](#), has agreed to tell consumers whose debt may be too old to be legally enforceable that it will not sue to collect on that debt.

The proposed settlement order resolving the agency's charges also requires that when consumers dispute the accuracy of a debt, Asset Acceptance must investigate the dispute, ensuring that it has a reasonable basis for its claims the consumer owes the debt, before continuing its collection efforts. The proposed order also bars the company from placing debt on consumers' credit reports without notifying them about the negative report. The U.S. Department of Justice filed the proposed settlement order this week at the FTC's request.

"Most consumers do not know their legal rights with respect to collection of old debts past the statute of limitations," said David Vladeck, Director of the FTC's Bureau of Consumer Protection. "When a collector tells a consumer that she owes money and demands payment, it may create the misleading impression that the collector can sue the consumer in court to collect that debt. This FTC settlement signals that, even with old debt, the prohibitions against deceptive and unfair collection methods apply."

The FTC's action – alleging that Asset Acceptance violated the FTC Act, the [Fair Debt Collection Practices Act](#), and the [Fair Credit Reporting Act](#) – is part of the FTC's continuing efforts to protect consumers adversely affected by the struggling economy. The agency today also issued a new publication for consumers, "[Time-Barred Debts: Understanding Your Rights When It Comes to Old Debts](#)".

E-mail this News Release
If you send this link to someone else, the FTC will not collect any personal information about you or the recipient.

Vea este comunicado de prensa en español.

Related Items:

- [United States of America \(For the Federal Trade Commission\), Plaintiff, v. Asset Acceptance, LLC, Defendant](#)
(United States District Court for the Middle District of Florida)
Case No. 8:12-cv-182-T-27EAJ
FTC File No. 0523133

For Consumers:

- [Time-Barred Debts: Understanding Your Rights When It Comes to Old Debts](#)
- [Tick-Tock, Tick-Tock: Time-Barred Debts: What's that, and why should I care?](#)

For Businesses:

- [Watch what you're doing with time-barred debts](#)

Connecticut & West Virginia

- ❖ These two states have similar provisions that provide two different notifications depending upon the SOL for suing the consumer and the SOL for credit reporting. The operational aspects of this requirement are very difficult.

What is next?



Questions



Thank you for attending
today's presentation

