



National
Consumer Law
Center

*Fighting Together
for Economic Justice*

Model Family Financial Protection Act

By Robert J. Hobbs, April Kuehnhoff,
and Chi Chi Wu

National Consumer Law Center®

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ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services; and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state governments and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

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BACKGROUND

The myriad abuses by lenders, banks, and other members of the financial services industry over the past few decades have been well documented. Predatory and exotic mortgages pitched to unsophisticated borrowers caused millions of foreclosures, stripped billions in wealth, and precipitated the worst economic downturn since the Great Depression. Payday lenders proliferated across the country, trapping consumers on debt treadmills through triple digit APR loans.

Some of the worst abuses were perpetrated by the credit card industry. Lenders imposed sky-high interest rates on struggling consumers, and charged them enormous and excessive penalty fees using hair-trigger tactics. They flooded the mailboxes of American consumers with applications, recklessly offering credit cards to students and other consumers who did not have means to repay their debts.

Congress responded to protect consumers in 2009, passing the Credit Card Accountability, Responsibility and Disclosures (CARD) Act. The Credit CARD Act addressed several of the abuses surrounding credit cards, such as retroactive rate increases and sky-high penalty fees. However, the Act did not address critical issues, including:

- The imbalance of power between credit card lenders and consumers, based in part on contracts that allow the lender (but not the consumer) to unilaterally modify the contract at the lender's whim, and to pick the most favorable state law.
- Abuses in the collection of credit card and other consumer debt.

These abuses are exacerbated by the failure of most states to shield essential assets from creditors, exposing families to prolonged economic vulnerability. In many states, a creditor that sues a consumer and wins a judgment can seize income, personal property, and residential property that is essential to the basic economic wellbeing of the debtor and the debtor's family. Most current state laws have dangerous gaps in exemptions, and many have not been updated in decades.

Title I of the Model Family Financial Protection Act protects consumers from the most common abuses in the credit and collections industries, restoring balance to an increasingly lopsided system of justice. While Title I ensures that consumers receive basic protections as creditors pursue judgments, Title II modernizes the personal and residential property shielded from debt collectors once a judgment has been obtained, allowing families a chance to get back on their feet after a period of financial hardship.

A. Imbalance of power between credit card lenders and consumers

One of the fundamental problems with credit cards is that the lender has the absolute power not only to impose terms at the outset, but to change those terms unilaterally at its whim. Lenders draft the contracts and offer them to consumers on a "take it or leave it" basis. These contracts often give the lender the power to change the terms, and the consumer is considered to have "accepted" the changes if s/he merely uses the credit card again. While a savvy consumer can comparison shop for the initial terms, s/he has no such ability when the lender changes the terms of the existing contract.

The Credit CARD Act addressed this imbalance of power in one critical area – the APR for an account. Now a creditor cannot change the APR and impose it retroactively unless the consumer is over 60 days late. However, this imbalance still exists for all other terms of the contract.

B. Abuses in the Collection of Consumer Debts

The Great Recession has put enormous financial stress on consumers as millions lost their jobs and homes and suffered other losses. Historically, about 4.4 percent of consumers have been behind on their credit cards (one to six months late); this jumped to 6.6 percent by early 2009. By the end of 2009, banks charged off delinquencies over 180 days as uncollectible for 9.1 percent of their credit card loans, nearly triple the 3.4 percent rate from 2006.¹

As consumers fell behind on their credit cards and other debts, this created an enormous explosion in the collection of these debts. In California alone, collection lawsuits have increased by twenty percent statewide over the past five years.² Debt collectors filed over 450,000 lawsuits in New York City alone from 2006 to 2008, obtaining an estimated \$1.1 billion in judgments and settlements.³ In 2007, the debt collection industry employed 217,000 collectors and posted annual revenues of \$58 billion.

With this tremendous growth in debt collection, there has also been an increase in a number of abuses, most notably by debt buyers who purchase defaulted consumer debts for pennies on the dollar. These abuses have become so widespread and egregious as to prompt the Federal Trade Commission to conclude that “the system for resolving disputes about consumer debts is broken.”⁴ Millions of consumers have been the victims of abusive debt collection, resulting in faulty judgments against them, wage or benefit garnishments, frozen bank accounts, and ruined credit records that could prevent them from obtaining insurance, housing or even employment.

1. The Growth of the Debt Buying Industry

In the last decade, an entire industry has sprung up that feeds on defaulted consumer debts. These “debt buyers” purchase consumer debts, most often credit card debts that have been written off by the original lender. They usually pay only pennies on the dollar for these debts. Despite buying the debt at a deeply discounted rate, they aggressively seek to collect the full amount, as well as adding interest, penalty fees, and attorney’s fees. The debt-buying industry has enjoyed remarkable growth, with the amount of the face value of their receivables – the debts that the debt buyers purchased - increasing from \$6 billion in 1993 to \$110 billion in 2005.⁵

Debt buyers purchase accounts in bulk, typically obtaining only an electronic spreadsheet with minimal information about the debt. Most of the time, they do not purchase the underlying documentation of the debt, including the credit application, account agreement, monthly statements, payment records, and customer service records that would reflect customer disputes.⁶ While debt buyers often have the ability to go back to the creditor and request documentation of the debt for a fee, in the vast majority of cases filed by debt buyers in court, they do not have this documentation in hand. Their business model depends on making claims without validation and obtaining judgments by the default of confused and overwhelmed consumer defendants. In addition to lacking the

¹ See Robert Hobbs and Rick Jurgens, National Consumer Law Center, [The Debt Machine](#), at 5 (July 2010), [hereinafter “The Debt Machine”].

² *Id.* at 12-16 (citing statistics on growth in debt collection in other states).

³ Claudia Wilner and Nasoan Sheftel-Gomes, New Economy Project *sub nom.* Neighborhood Econ. Dev. Advocacy Project and Urban Justice Center, [Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers](#) 1 (May 2010), [hereinafter New Economy Project, Debt Deception].

⁴ Federal Trade Commission, [Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration](#) (July 2010) at I (Executive Summary), [hereinafter “FTC, Repairing a Broken System”].

⁵ NCLC, *The Debt Machine*, at 18.

⁶ FTC, *The Structure and Practices of the Debt Buying Industry* (Jan. 3, 2013).

documentation to determine liability for the account, the debt buyers are also more persistent in seeking payments for a much longer time on very old debts.

As a result of this lack of documentation for sometimes very old debts, debt buyers frequently pursue flawed claims. The FTC has concluded that “the information received by debt collectors is often inadequate and results in attempts to collect from the wrong consumer or to collect the wrong amount.”⁷ Some of the claims go into collection when they have already been settled or paid in full, others were someone else’s debt, and some were created by an identity thief. Still others are beyond the statute of limitations, were discharged by the consumer in bankruptcy, or were disputed with the original credit card company years before by the consumer for fraud, nonperformance, or another problem. A report by several New York City nonprofit and legal services organizations found that 35% of debt buyer lawsuits were clearly meritless.⁸

Other tactics used by debt buyers include flipping consumers into new credit accounts to create a new liability and refresh the debt, or putting purchased debts (often very old) onto consumers’ credit reports, ruining their credit records and scores. Debt buyers press financially stressed families to pay the bills of parents, children and ex-spouses even when they are not legally liable for the debt.

The debt buyers’ claims are sometimes inflated with interest and fees compounding monthly over a great number of years without any accounting for that huge growth in the balance. By getting a court default judgment or an arbitration award, or by transferring the debt to a new credit card account, the debt buyer no longer has to worry about consumer defenses that would weaken its claim if the case were scrutinized. The debt buyer can obtain a payment order, attachment or garnishment that forces the consumer to pay the claim whether that claim was originally valid or not.

2. *Robo-Signing in Debt Collection*

An especially egregious practice by debt buyers is “robo-signing,” the practice by which debt buyers’ employees blithely sign affidavit after affidavit to support debt collection lawsuits against consumers without making any effort to review or analyze the validity of the claim. For example, deposition testimony in one case⁹ revealed that a debt buyer’s employee signed affidavits used to file lawsuits against consumers *en masse*, about 400 each day, without any personal knowledge about the amount claimed, owed, or the ownership the claim. These affidavits falsely stated that the employee had personal knowledge regarding the consumer’s debt and was involved with the decision or act of hiring the law firm to pursue legal action.

3. *Collection of stale debts*

A fundamental principle in American law is that a legal claim does not last forever. That is why every state has laws called “statutes of limitations” that require that a lawsuit to enforce a legal claim be brought in a certain amount of time.

However, many states have extremely long statutes of limitations. Others recognize that a much shorter statute of limitations is in order for claims that are undocumented and dependent on individuals’ memory. Moreover, in many states, a different statute of limitations may apply to a debt

⁷ Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change*, A Workshop Report, at 24 (Feb. 2009).

⁸ New Economy Project, *Debt Deception* at 2.

⁹ See *Midland Funding L.L.C. v. Brent*, 644 F. Supp. 2d 961 (N.D. Ohio 2009); see also *Vassalle v. Midland Funding, LLC*, 2011 WL 3557045 (N.D. Ohio, 2011).

collection lawsuit, depending on the legal theory upon which it is based. The FTC has noted that uncertainty about the applicable statute of limitations can harm consumers and collectors.¹⁰

More importantly, creditors and debt buyers are permitted to continue collection of a debt even though it is past the statute of limitations – in some cases, by decades. Unfortunately, some courts have held it is not unlawful under the federal Fair Debt Collection Practices Act for debt collectors to dun consumers for these extremely stale debts. Thus, it is up to the states to protect consumers by prohibiting collection of stale debts that are past the statute of limitations.

C. The Need for Action by States to Protect Consumers

As the Federal Trade Commission has noted, the current system of debt collection fails to provide adequate protection for consumers, and significant reforms are necessary to ensure that the system is fair and efficient. The FTC has called on states to pass laws that better protect consumers in the debt collection process, including:

- adopting measures to make it more likely that consumers receive adequate notice so that they will defend themselves in litigation;
- requiring collectors to include more information about the debt in their complaints; and
- taking steps to address lawsuits on time-barred debts.¹¹

This Model Act includes several provisions in response to that call. In some states, many of these provisions can be adopted by the state supreme court or court system. In other states, these provisions will need to be enacted by the legislature.

Reforming the collection of consumer debt can be tricky because of federal preemption, *i.e.*, the ability of federal law to override state law. In particular, federal banking laws sometimes preempt state laws that govern the terms of credit offered by federally chartered banks. The Federal Arbitration Act preempts state laws that attempt to limit the practice of forcing consumers into arbitration over their disputes, even if the state laws were enacted to protect consumers.

The provisions of this Model Act have been carefully drafted to avoid preemption issues by focusing on issues that the courts have often held are left to the states - basic contract law and debt collection.¹² Furthermore, the scope of federal banking law preemption has been recently narrowed by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, §§ 1041–1048, 1083 (2010). However, if any of the provisions are held to be preempted by a court, the Model Act provides that those provisions can be severed and the rest of the Act will still be effective.

D. Protections for Essential Income and Property Are Outdated

Personal and residential exemption laws date back to colonial days when they protected such items as cows and oxen. These laws are updated by legislation, usually during depressed economic times, as more people realize the risks inherent in economic cycles and the importance of these protections.

¹⁰ FTC, *Repairing a Broken System* at 24.

¹¹ *Id.* at iii-iv.

¹² See *Capital One Bank (USA), N.A. v. Denboer*, 791 N.W.2d 264, 272 (Iowa Ct. App. 2010) (state law that mandated that certain information be included in complaints for collection on consumer credit transactions only incidentally affected the bank's right to collect debts and was, therefore, exempt from preemption).

Most states' laws have dangerous gaps in their protections or have protections that have not been updated in decades. Massachusetts provides a good example of a state with an outdated exemption law. Prior to the passage of a new exemptions law in March of 2011, Massachusetts law protected two cows, 12 sheep, two swine, and four tons of hay from creditors but only exempted a vehicle worth up to \$750 from seizure. In 2011, the law was updated to protect a broader array of items and raised the cap on vehicles.

In other states, consumers are still vulnerable. Computers, cars, mobile phones, and other essentials to participating in a modern economy may not be exempt from seizure by a creditor. Individuals and families may find themselves stripped of resources that would allow them to become self-sustaining. The Model Act not only updates the types of property that is exempt, but it also includes a mechanism that will adjust the dollar amounts exempted based on changes to the Consumer Price Index, ensuring that protections will not lag behind the times.

E. Dangerous Gaps in Protections

Many states have dangerous gaps in protections. State laws may include a homestead exemption, for example, but may not exempt resources that would enable an individual or family to keep their homestead. In some states, creditors are permitted to seize the funds in a bank account, draining money saved for mortgage or rent payments to apply to a less important debt. This Model Act protects household and personal possessions, vehicles, tools necessary for employment, burial plots, life insurance, and bank accounts, subject to specific restrictions, among other items.

This model law aims to encourage and protect savings so that consumers can reliably set aside funds to buy a car or a house, and save for medical, college, and retirement expenses. These funds are not discretionary and should not be counted as available to lenders at the time credit is extended. Otherwise, the credit markets get drawn into reckless lending practices and have to be bailed out by the taxpayers or liquidated by the bankruptcy courts. While an improved exemptions law will not by itself stop credit bubbles from arising, it is an important step in that direction.

The current economic recession and its aftermath have made matters much worse for millions of American families and recent graduates. Millions of families lost their homes and their good credit ratings when the mortgage bubble burst. The value of retirement funds and homes have plummeted. High unemployment has left recent graduates without career opportunities and forced older Americans into early retirement if they lose their jobs. This Model Act establishes a springboard to help these distressed individuals and families get back on their feet. For example, this Model Act will protect the family car and computer so people can engage in job searches.

Title II of the Model Act is based in part on the approaches of the Uniform Exemptions Act that was approved by the National Conference of Commissioners on Uniform State Laws in 1976, amended in 1979 by the National Conference, and adopted by Alaska in 1988,¹³ as well as the federal Bankruptcy Act and the best of state exemption laws. This model law has not been considered by the National Conference of Commissioners on Uniform State Laws.

¹³ See Alaska Stat. § 09.38.010, et seq.

TITLE I: CONSUMER CONTRACT AND COLLECTION PROTECTIONS

Section 1-101. Title and Scope

(a) Title. This Act shall be known and cited as the "Family Financial Protection Act." This Act shall be liberally and remedially construed to effectuate its purpose. The purpose of the Act is to protect consumers, and this Act is to be construed as a consumer protection statute for all purposes.

(b) Scope. No business (including any officer, agent, employee, or representative) may individually or in conjunction or cooperation with another solicit the execution of, receive, or rely upon a consumer form contract, including reliance upon the contract as a basis for a suit or claim, unless the person has complied with the provisions of this Act and the contract is in compliance with this Act. The provisions of this Act shall apply to, *inter alia*, any person who attempts to evade its applicability by any device, subterfuge, or pretense whatsoever.

(c) Should a court decide that any provision of this Act is unconstitutional, preempted, or otherwise invalid, that provision shall be severed and such decision shall not affect the validity of the Act other than the part severed.

Commentary

Subsection (a) sets the stage for the remainder of the Act by clearly announcing that the legislature intends that the Act must be liberally construed to effectuate its purpose; it enunciates a specific purpose; and it is a consumer protection law. Subsection (b) defines a broad scope of coverage for the Act, and makes clear that the scope includes, among others, those who attempt to evade the Act by use of a subterfuge or pretense. These directives will give guidance to the courts when the Act's provisions are applied and interpreted.

Section 1-102. Definitions

The following definitions apply in this Title:

- (a) "Consumer" means a natural person.
- (b) "Consumer debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.
- (c) "Consumer form contract" means a contract in writing between a business and a consumer involving goods and services, including credit or financial services, primarily for personal, family, or household purposes, which contract has been drafted by the business for use with more than one consumer, unless a second consumer is the spouse of the first consumer.
- (d) "Debt buyer" means a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer debt for collection purposes, whether it collects the debt itself or hires a third party for collection or an attorney-at-law for litigation in order to collect such debt. A debt buyer is considered to be a debt collector for all purposes.

- (e) “Debt collector” means any person who regularly collects or attempts to collect, directly or indirectly, consumer debts originally owed or due or asserted to be owed or due another. The term does not include any officer or employee of a creditor who, in the name of the creditor, collects debts for such creditor, but it does include any creditor who, in the process of collecting its own debts, uses any name other than its own which would indicate that a third person is collecting or attempting to collect such debts.
- (f) “Original creditor” means the entity to whom the consumer originally owed money before the debt was sold to a debt buyer or any other entity. When this Act requires the original creditor to be identified, the name shall be that which was used in its dealings with the consumer.

Commentary

There are a number of critical definitions in the Act. One of the most important is the concept of the “consumer form contract.” Almost all contracts offered to consumers in modern America are form contracts that the consumer must accept on a “take-it-or-leave it” basis. There is no ability for the consumer to negotiate the terms of the contract, except perhaps the price. The inability to negotiate is especially true for those legal provisions that a consumer is unlikely to understand, much less negotiate over. These contracts are often called “contracts of adhesion” in the law, and unbeknownst to the consumer, they usually contain provisions that are favorable to the business that drafted them, such as mandatory arbitration clauses that deprive consumers of their right to seek justice in a court of law. The Act recognizes the reality of consumers’ lack of negotiating power in these contracts by creating a special category of “consumer form contracts” and creating specific protections for consumers entering into such contracts for personal, family or household purposes.

The definition of “consumer debt” is also important, in that the Act’s protections apply only to debts for personal, family or household purposes. The definition is the same as that of a “debt” under the Fair Debt Collection Practices Act (FDCPA).

The Act includes definitions for both “debt collectors” and “debt buyers.” The definition of debt collector is a simplified version from the FDCPA. Debt buyers are defined as a subset of debt collectors who purchase delinquent or charged-off consumer debt. The definition of “debt buyer” is taken from the North Carolina Consumer Economic Protection Act of 2009.

Section 1-103. Requirements for Consumer Form Contracts

- (a) A choice of law provision in a consumer form contract which provides that the contract is to be governed or interpreted pursuant to the laws of another state is void if the contract is signed by the consumer or otherwise formed while the consumer resides in this state. Enforcement and interpretation of such a contract shall be governed by the laws of this state if enforcement of the contract is sought in a court of this state.
- (b) A forum selection provision in a consumer form contract which provides that any claims or actions related to the contract must be litigated in a forum outside of this state is void, if the contract is signed by the consumer or otherwise formed while the consumer resides in this state.
- (c) All consumer form contracts involving a loan, extension of credit, deposit account, or other financial services shall be signed by the consumer in writing or electronically in compliance with Section 101(c) of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(c).

(d) Any change of terms to a consumer form contract must be agreed to by the consumer by affirmative consent, signed by the consumer in writing or electronically in full compliance with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(c).

(e) A consumer form contract shall not contain:

- (1) A provision that the consumer will hold the other party harmless, or that otherwise relieves the other party of liability, for any harm or damage caused to the consumer arising from the contract;
- (2) A confession of judgment clause;
- (3) A waiver of the right to a jury trial, if applicable, in any action brought by or against the consumer;
- (4) Any assignment of or order for payment of wages or other compensation for services;
- (5) A provision in which the consumer agrees not to assert any claim or defense arising out of the contract, or to seek any remedies pursuant to any consumer protection law;
- (6) A waiver of any provision of this Act or any other consumer protection statute. Any such waiver shall be deemed null, void and of no effect; or
- (7) A provision requiring or having the practical effect of requiring that any aspect of a resolution of a dispute between the parties to the agreement be kept confidential. This provision shall not affect the right of the parties to agree that certain specified information is a trade secret or otherwise confidential or to later agree, after the dispute arises, to keep a resolution confidential.

(f) Any consumer form contract or provision thereof violating this Act shall be void and unenforceable. If only one provision of a consumer form contract violates this Act, a court may refuse to enforce other provisions of the contract as equity may require.

(g) Any consumer credit transaction entered into by a consumer with a person who is required to be licensed but is not licensed is void, and neither the obligee nor any assignee of the obligation shall have any right to collect, receive, or retain any principal, finance charge, or other fees in connection with the transaction.

(h) If a consumer debt was created by or based upon a consumer form contract, any action for collection of that consumer debt shall be based on only a claim for breach of contract and not on an open account, account stated, quantum meruit or other cause of action and shall not allege that the contract is an instrument or contract under seal. Regardless of the cause of action asserted, a consumer may raise a defense based upon the reasonable value of goods or services provided.

Commentary

The Model Act protects consumers of a state by requiring that consumer form contracts involving financial services (loans, extensions of credit, or deposit [bank] accounts) be signed in writing by the consumer. More importantly, any changes to a consumer form contract involving financial services must be agreed to by the consumer in writing. Currently, some states permit a business to amend or change a contract unilaterally without the consumer's consent, or by using the fiction that a consumer has "consented" to a change by continuing to use the services of the business (e.g., by continuing to use a credit card or bank account). These state laws lead to abuses by lenders who unilaterally amend credit card agreements to increase interest rates and/or penalty fees, or add mandatory

arbitration clauses. The Act protects consumers by prohibiting such lopsided power on the part of financial services businesses to change a contract without the consumer's knowing and affirmative agreement.

The Act also protects consumers by prohibiting certain one-sided provisions from being included in a consumer form contract. In particular, it prohibits "choice of law" provisions in consumer form contracts that select laws of states other than the consumer's home state. This is because the laws of the other state (the business's home state) usually are more favorable to the business. Furthermore, such "choice of law" provisions add needless complexity to the contract as few local lawyers or judges will be familiar with the other state's laws. The Act also prohibits "forum selection" provisions which require that all lawsuits related to the contract be brought in a certain state, which makes it impossible for the consumer to bring a claim at all given the expense of filing an action in a distant jurisdiction.

The Act provides that any consumer credit obligation is void if the entity extending the credit did not have a license required by state law. For example, if a state requires payday lenders to be licensed, a loan by an unlicensed lender is void and unenforceable.

Finally, the law would prohibit the use of the account stated cause of action to collect credit card debts.

Section 1-104. Requirements for Debt Collection; No Imprisonment for Debt

(a) No person shall attempt to collect on a consumer debt without obtaining reasonable verification that the debtor owes the debt in the amount claimed, which shall include:

- (1) Complete, authenticated documentation that the person attempting collection is the owner of the specific debt instrument or account at issue; and
- (2) Reasonable verification of the debtor's liability and the amount of the debt allegedly owed by the debtor. For purposes of this subparagraph, reasonable verification shall include:
 - (i) documentation of the name of the original creditor;
 - (ii) the name, last address, date of birth, and last four digits of the Social Security Number of the debtor as it appeared on the original creditor's records;
 - (iii) the debtor's last account number with the original creditor;
 - (iv) the date that the debt was incurred, and the date and amount of the last payment by the consumer toward the debt; in the case of credit, the date that the debt was incurred shall be the last extension made for the purchase of goods or services, for the lease of goods, or as a loan of money;
 - (v) a copy of the signed contract, signed application, or other documents that provide evidence of the consumer's liability and the terms thereof; and
 - (vi) an itemized accounting of the amount claimed to be owed, including the amount of the principal; the amount of any interest, fees or charges; and whether the charges were imposed by the original creditor, a debt collector, or a subsequent owner of the debt. If the debt arises from a credit card, the account shall include copies of the last twenty-four (24) periodic statements required by the Truth in Lending Act, 15 U.S.C. § 1637(b), that evidence the transactions, purchases, fees and charges that comprise the debt.

Copies of actual business records of the original creditor and any debt collector or subsequent owner of the debt containing the above documentation shall be provided to the consumer, upon request and without fee, within twenty (20) days of such request.

(b) Any seller of a consumer debt, whether the original creditor or a debt buyer, shall provide the following to the buyer or assignee when selling the debt:

- (1) the documentation listed in subsection (a); and
- (2) a statement disclosing:
 - (i) whether the consumer has disputed or asserted any defenses to any portion of the debt, and notes or recordings of all related communications;
 - (ii) any validation, or lack thereof, that the seller has provided the consumer pursuant to the federal Fair Debt Collection Practices Act [and if applicable, any state or local debt collection practices act], or has received from the original creditor or previous seller in response to a dispute or request for validation by the consumer;
 - (iii) whether any settlement has been reached concerning any portion of the debt;
 - (iv) whether the debt is within the limitation period set forth in Section 1-105;
 - (v) whether the consumer is or has been represented by an attorney and the attorney's contact information;
 - (vi) whether the consumer has informed the collector that a time or place is inconvenient to the consumer for communication or has requested that collection contacts cease;
 - (vii) whether the debt has been discharged or listed in bankruptcy;
 - (viii) any illness or disability claimed by the consumer or known to the seller of the debt;
 - (ix) whether the consumer has a disability, is over age 62, or is a limited English speaker;
 - (x) whether the consumer is or has been a service member at any time since the formation of the contract; or
 - (xi) whether the consumer is known to receive income that is exempt from garnishment or attachment.

(c) No debt collector that is a debt buyer or acting on behalf of a debt buyer shall make any written statement in connection with any attempt to initiate or pursue the collection of a debt unless that statement is supported by the evidence set forth in Paragraph (a) which has been reviewed by the debt buyer. The documentary evidence shall be retained on file by the debt buyer for a period of at least five (5) years and shall be provided to any affected debtor without a fee within ten (10) business days of a request. An affidavit or other sworn statement referring to documents not attached or included as part of that statement is not sufficient to meet this requirement.

(d) Whenever a payment is received by a debt collector, including a debt buyer, toward payment of a consumer debt, an original receipt or an exact copy thereof shall be furnished to the person from whom payment is received within ten (10) days of payment. Copies of all receipts issued pursuant to this section shall be kept by the debt collector for three (3) years. All receipts shall:

- (1) show the amount and date paid, the name of the debt buyer, the account number assigned by the debt buyer, the name of the original creditor, and the account number issued by the original creditor (redacted for security purposes to show only the last four digits). 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.
- (2) state clearly and conspicuously whether the payment is accepted as payment in full or as a full and final compromise of the debt. If any part of the debt is owed after the payment is made, the receipt shall state clearly and conspicuously the balance due after payment is credited.

(e) A debt collector shall provide written confirmation to the consumer, within five (5) business days, of any debt payment schedule or settlement agreement reached regarding a consumer debt.

(f) In all written communications concerning a consumer debt, the debt collector shall list a telephone number for the purpose of addressing consumer inquiries concerning communications between the debt collector and consumers. During all times when the collector conducts business with consumers, that number shall be answered by natural person(s) qualified to address such consumer inquiries. When a natural person is unavailable, the call shall be routed to the voicemail of a natural person who will return the phone call within two (2) business days.

(g) Notwithstanding any other law, it is lawful for a consumer to record any telephone conversation between the consumer and a debt collector or debt buyer, without the knowledge or consent of the collector. Any such recording shall be admissible in federal and state courts or other legal proceedings respecting debt collection practices or seeking collection of a consumer debt.

Subsections (h), (i), and (j) relate to the misuse of civil arrest warrants (also known in some jurisdictions by a term such as “capias” or “body attachment” in lawsuits arising from consumer debts. The procedures for civil arrest warrants and the proceedings that lead up to them vary widely from state to state. Subsections (h), (i), and (j) are based on proposed reforms in Massachusetts but will need to be adapted for other states. For additional recommendations about reforms to civil arrest warrants, see the ACLU’s 2018 report, [A Pound of Flesh: The Criminalization of Private Debt](#).

(h) Notwithstanding any other law or court rule, for matters arising from a consumer debt, a plaintiff who has obtained a judgment shall provide written notice to a consumer at least 30 days prior to any subsequent proceeding, judicial or otherwise, that relates to the judgment and at which the consumer’s presence is required. The notice shall inform the consumer of the opportunity to submit a financial affidavit in a form prescribed by the court and signed under the penalties of perjury. If the consumer indicates through the financial affidavit that all income and assets are exempt and files it as directed by the court, the court shall acknowledge receipt and inform both parties that the hearing or proceeding is cancelled. Once a signed financial affidavit form indicating that all income and assets are exempt is on file in that case, no further proceedings at which the consumer’s presence is required, may be scheduled unless the judgment creditor presents evidence of the consumer’s non-exempt income or assets. The court may then determine that there is a reasonable basis to believe

that there are non-exempt assets or income warranting the scheduling of a new proceeding to determine what income or assets are not exempt and what, if any, payments are required of the consumer.

(i) Notwithstanding any other law or court rule, no civil warrant for arrest to compel the attendance of a consumer shall be issued for failure of the consumer to appear at any judicial proceeding related to the collection of a consumer debt without a hearing for the court to determine whether such warrant should issue. No such warrant shall issue unless evidence is presented at the hearing that notice of the hearing was served on the consumer either by a return receipt signed by the consumer or a sworn return of personal service.

(j) Notwithstanding any other law or court rule, a consumer who is compelled to attend pursuant to a civil arrest warrant shall be brought before the court the same day. The consumer shall be given the opportunity to complete the financial affidavit described in paragraph (h). The *capias* or other warrant shall be satisfied by the consumer's appearance in court or completion of the financial affidavit.

(k) Notwithstanding any other law or court rule, no person shall be imprisoned or jailed for failure to pay a consumer debt, nor shall any person be imprisoned or jailed for contempt of court or otherwise for failure to comply with a court order to pay a consumer debt in part or in full.

Commentary

As discussed above, debt buyers do not typically possess the underlying documentation of the debt, including the contract, account statements, detailed payment records, and customer service records that would reflect customer disputes. The FTC has noted the problems that arise from this lack of documentation.¹⁴ For example, debt collectors sometimes file lawsuits against the wrong consumer or seek the wrong amount. Consumers are sometimes sued multiple times by different debt buyers over the same debt.

The Model Act attempts to reform the practice of debt buying by requiring adequate documentation of the history of the consumer debt. It protects consumers by requiring both debt buyers and other debt collectors to possess certain basic information about the debt before initiating collection efforts, including proof of indebtedness by the consumer, date of the debt, identity of the original creditor, and itemization of all fees, charges, and payments. Most importantly, the Act prohibits the collection of consumer debt by any party not in possession of at least a copy of the original contract, or other documentation evidencing the consumer's liability (while Section 1-103(c) of the Model Act requires a signed contract for credit or financial services, there are other consumer debts such as medical bills that might not involve a contract; also this provision covers accounts that pre-date the Act). This section of the Act espouses a simple and fundamental principle of fairness—no debt collection activity should be permitted unless the collector possesses basic information to verify the debt and to resolve disputes.

Another stronger, more straightforward alternative is to simply ban the sale of consumer debt:

Alternative Section 4. Prohibition on selling of defaulted or charged-off consumer debt

No person shall sell, assign, or transfer any consumer debt that has been charged off or for which the consumer is in default except in connection with the liquidation of the transferor or a merger.

In addition to adequate documentation of the debt, the Act also requires disclosure of critical

¹⁴ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010) at 14-17.

information when a debt is sold. The creditor and each subsequent holder of the debt must retain and pass on to the next holder all communications from the consumer concerning the debt and information about all known disputes and defenses. Debt collectors should not be permitted to launder the debt of claims and defenses simply by selling it to another collector.

The Act permits consumers to record abusive telephone calls by debt collectors. Many states criminalize or prohibit the recording of telephone calls unless both parties to the call consent to the recording. These laws have the unintended consequence of preventing consumers from recording debt collection calls that are abusive. The Act creates an exception to these laws, allowing the consumer to record a telephone conversation with a debt collector without the debt collector's consent, and providing that such recording shall be admissible in court.

Finally, the Act protects consumers from arrest or imprisonment for failure to pay a consumer debt. In particular, civil arrest warrants (also known as *capias* or bench warrants) can be used as a way of imprisoning a consumer for failure to pay a debt. Ostensibly these warrants are issued because the consumer has failed to show up to a court-mandated hearing, such as a debtor's examination in which the debtor is required to reveal his or her assets to pay a judgment. However, such arrest warrants are often actually used as an *in terrorem* tactic by collectors to coerce payment.

The Act introduces steps that courts must follow before they issue civil arrest warrants in a consumer debt collection matter. Subsections (h), (i), and (j) are an adaptation of reforms proposed in Massachusetts in 2019. The procedures for civil arrest warrants and the proceedings that lead up to them vary widely from state to state, so these subsections will need to be adapted for other states. For additional recommendations about reforms to civil arrest warrants, see the ACLU's 2018 report, [A Pound of Flesh: The Criminalization of Private Debt](#).

Recognizing that courts will be hesitant to give up their power to compel consumers to appear before them in proceedings, the model law does not try to revoke that power but creates procedural safeguards before a civil arrest warrant can be issued.

To ensure adequate notice, subsection (h) provides for 30 days' notice prior to any post judgment proceeding, judicial or otherwise, at which the consumer will have to appear, and allows consumers to submit an affidavit to a court requiring their presence asserting that their income and assets are exempt from collection – thereby avoiding the need to attend court.

If a consumer debtor does not submit an affidavit or appear in court as ordered, instead of an arrest warrant automatically being generated, a hearing must be scheduled to determine whether a warrant is necessary (subsection (i)). If the consumer does not appear at that hearing, an arrest warrant may be issued if evidence of service upon the consumer is presented.

If an arrest warrant is issued, the consumer must be brought before a court that same day, so that no one is imprisoned. The warrant is satisfied by the consumer's appearance in court or completion of a financial affidavit (subsection (j)).

Finally, subsection (k) makes clear that no person shall be imprisoned or jailed for failure to pay a consumer debt, nor shall any person be imprisoned or jailed for contempt of or failure to comply with a court order to pay a consumer debt in part or in full.

Section 1-105. Limitations on Actions for Consumer Debts

(a) Any action for the collection of a consumer debt shall only be commenced within three (3) years of accrual. This period shall apply whether the legal basis of the claim sounds in contract, account stated, open account or other cause, and notwithstanding the provisions of any other statute of limitations unless that statute provides for a shorter limitations period. This time period also applies to

contracts under seal. This paragraph shall apply to all claims brought after the date of enactment of this Act.

(b) No person shall attempt to collect a consumer debt, threaten legal action, or file legal action after the three-year period described in Paragraph (a) has expired. Any violation of this section shall also be a violation of [insert citation to state UDAP law].

(c) Once the cause of action on the consumer debt has accrued, any subsequent payment toward the debt or any oral or written affirmation of the debt shall not extend the three-year limitations period, nor shall it bar the consumer from asserting any defenses to the collection of the debt. If a payment on a defaulted debt completely cures the default, then a new cause of action may accrue upon a subsequent default.

(d) A consumer debt of a resident of this state that arose in another jurisdiction or may otherwise have been governed by another jurisdiction's laws shall be governed by Paragraph (a) or the other state's limitations period, whichever is shorter.

(e) Any actions, proceedings, or executions upon a judgment or decree on a consumer debt must be commenced within five (5) years after the entry of the judgment or decree.

(f) No judgment whose enforcement has been barred by the running of the limitations period may be revived or renewed by any means.

(g) The time period specified in Paragraph (e) applies to actions, proceedings, or executions in this state upon judgments rendered in other jurisdictions as well as judgments rendered in this state, except that, if the judgment was rendered in a foreign jurisdiction where the period of time specified in Paragraph (e) is shorter than five (5) years, the shorter period shall control.

(h) Any waiver of any protection provided by or any right of the consumer under Section 1-105 is void and shall not be enforced by any court or any person.

Commentary

Paragraph (a) provides a single uniform, reasonable statute of limitations for consumer debts. Sixteen states already provide a three-year statute of limitations for written contracts, oral contracts, or both, so this model law's choice of a three-year period is not an unusual departure from existing practice.¹⁵

Paragraph (b) extinguishes the debt after the statute of limitation passes. This would prevent any collection activities for stale debt. This provision is based on similar statutes in Wisconsin¹⁶ and Mississippi.¹⁷ This section also clarifies that both collecting and suing on a debt whose statute of limitations has passed is prohibited and provides a private remedy for collection efforts in violation of this provision.

Paragraph (c) prohibits the practice of deeming partial payment or acknowledgment of the debt as restarting the clock on the statute of limitations where the cause of action has already accrued. For

¹⁵ National Consumer Law Center, Collection Actions, § 3.6.4.2 (3d ed. 2014) (showing that the limitations period for oral contracts, written contracts, or both, is two years in one state, three years in sixteen states, four years in seven states, five years in six states, six years in seventeen states, and more than six years in three states).

¹⁶ Wis. Stat. § 893.05 ("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.").

¹⁷ Miss. Code § 15-1-3 ("The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy.").

example, if a consumer makes a partial payment one year after the debt was charged-off, the statute of limitations would not restart.

Alternatively, Paragraph (c) can be written to prohibit the statute of limitations from restarting after the statute of limitations has expired. Maine recently adopted a statute with this approach, which states:

Notwithstanding any other provision of law, when the applicable limitations period expires, any subsequent payment toward, written or oral affirmation of or other activity on the debt does not revive or extend the limitations period.¹⁸

Notably, the language adopted in Maine would prohibit the statute of limitations from restarting at any time after limitations period has run, but would permit restarting the statute of limitations when a partial payment is made after the cause of action has accrued but before the statute of limitations has run. Thus, this approach provides consumers with more limited protections.

Paragraph (d) specifies that even if another state's laws may apply to the legal claims at issue, the statute of limitations in Paragraph (a) will apply and govern collection efforts in the state adopting this provision.

Paragraph (e) provides that judgments for consumer debts last for five years. This five-year limitation provides ample time for collection on a judgment while guaranteeing to consumers that they will not face collection efforts indefinitely on debts that they are unable to repay.

Paragraph (f) makes it clear that the five-year period cannot be extended.

Paragraph (g) applies the five-year period in Paragraph (a) to enforcement actions in this state on judgments obtained in foreign jurisdictions unless that jurisdiction specifies a limitation on actions upon judgments or decrees shorter than five years, in which case the shorter limitations period controls.

Paragraph (h) ensures that the consumer protections in this statute cannot be voluntarily given up or "waived" by a consumer, preventing boilerplate language in consumer form contracts which would deprive consumers of these important protections.

Section 1-106. Requirements for Lawsuits Involving Consumer Debts

(a) No debt collector shall bring suit or initiate an arbitration proceeding against a consumer to collect on a consumer debt without first giving the consumer debtor written notice of the intent to file a legal action at least thirty (30) days in advance. The written notice shall include the name, address, and telephone number of the debt collector, the name of the original creditor, the original creditor's last account number (redacted for security purposes to show only the last four digits), a copy of the contract or other document evidencing the consumer debt, and an itemized accounting of all amounts claimed to be owed.

(b) In any action brought by a debt collector to collect a consumer debt, all of the following materials must be attached to the complaint:

- (1) A copy of the contract or other writing evidencing the original debt, which must contain a written signature of the defendant or evidence of the debtor's agreement by electronic means in compliance with Section 101(c) of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(c). If the debt arises from a credit card and no document signed by the consumer to evidence liability ever existed, then reasonable verification shall

¹⁸ ME ST T. 32 § 11013(8).

include copies of documents generated when the credit card was actually used, including the disclosures required by 15 U.S.C §§ 1637(a) and (b).

- (2) An itemization of the amount sought, by (i) the amount owed for goods or services or for the lease of goods, or the amount of credit extended; (ii) interest, fees, and charges imposed by the original creditor; (iii) interest, fees, and charges imposed by any debt buyer or other assignee of the debt, if applicable; (iv) attorney's fees; (v) any other fees, costs, or charges sought or imposed; (vi) the amount and date of the last payment by the consumer before default or charge-off, whichever is earlier, and (vii) each payment credited to the debt after default or charge-off.
- (3) If the action is brought by a debt buyer or other assignee of the debt, a complete copy of the assignment or other writing establishing that the debt buyer or assignee is entitled to collect the debt. If the debt has been assigned more than once, each assignment or other writing evidencing transfer of the interest in the debt must be attached and authenticated to establish an unbroken chain of ownership or assignment. Each assignment or other writing evidencing transfer of ownership or the right to collect must contain the original creditor's account number (redacted for security purposes to show only the last four digits) of the debt purchased or otherwise assigned, the date of purchase and assignment, and must clearly show the debtor's correct name associated with the original account number. The assignment or other writing attached shall be that by which the debt buyer or other assignee acquired the debt, not a document prepared for litigation.

(c) In any action to collect a consumer debt, a debtor's failure to respond to a request for admissions shall not be deemed an admission unless the request is served in accordance with [applicable law or Rule of Civil Procedure] upon an attorney for the debtor.

[If the state or locality requires debt collectors to be licensed:

(d) In any action by a debt collector, the complaint shall allege as part of the cause of action that the plaintiff is duly licensed under this Article [or cite to local licensing requirements] and shall contain the name and number, if any, of the license and the governmental agency that issued it. A debt collector that has failed to obtain the proper license shall be prohibited from bringing any action in the courts of this state to collect a consumer debt.]

Commentary

The Model Act gives consumers an opportunity to settle debts, resolve disputes, or raise any errors by providing them with a notice thirty days before being faced with a legal action or arbitration proceeding. If the debt is no longer owned by the original creditor, it requires the debt buyer to give the consumer adequate information about the debt so that the consumer can understand which debt s/he is being sued over. Otherwise, a consumer sued by a debt buyer may have no idea why s/he is being sued.

The Model Act also requires that any party taking legal action or initiating arbitration to collect a debt must provide adequate documentation about that debt, similar to the documentation required in Section 1-104 for debt collection in general. Thus, debt collectors or buyers must provide a copy of the original contract or other documentation that the consumer actually incurred the debt (while a signed contract is required for credit or financial services per Section 1-103(c) of the Act, there may be accounts that pre-date the Act, especially for credit card accounts). It also requires debt buyers to show that they own the debt they are seeking to collect. This provision is based in part upon the North Carolina Consumer Economic Protection Act of 2009, which requires debt buyers to include with the collection complaint a copy of the original contract and the assignment(s) to show ownership

of the debt. In credit card cases, such documentation could arguably be required by the Truth in Lending Act, 15 U.S.C. § 1643(b), which provides that in any action by a creditor to enforce liability for the use of a credit card, the burden of proof is upon the creditor to show that the use was authorized. At least one state supreme court has held that this section of TILA requires creditors to provide evidence that the consumer signed the account application, a copy of the account agreement, and a copy of billing statements.¹⁹ If creditors are required to provide such evidence, debt collectors should be required to as well.

An alternative to requiring the documentation specified in this Section is to require the debt buyer or collector to include certain information in the complaint to document the debt. The FTC has recommended that such information should include the name of the original creditor; the last four digits of the original account number; the date of default or charge-off (another alternative is the date of the last payment before default) and amount due at the time; name of the current owner of the debt; the total amount sought; and a breakdown of the total amount currently due by principal, interest, and fees.²⁰ If this alternative is used, debt collectors should also be required to certify that they possess admissible, authenticated evidence of the essential facts concerning the debt.

Finally, this section addresses the use of Request for Admissions by debt collectors as a tactic to take advantage of pro se debtors' lack of legal training. Debt collectors sometimes will send a Request for Admissions to an unrepresented consumer, who will not understand the significance of this particular discovery tactic and fail to respond. By failing to respond, the consumer will be deemed to have admitted to facts establishing liability for the debt, despite the fact that he or she may not really owe the debt or may have other defenses. This tactic is unfair to pro se debtors as it exploits their lack of knowledge of arcane discovery rules which the average layperson would not be expected to understand.

Section 1-107. Service; Additional Mailing of Notice in an Action

- (a) Immediately prior to commencing a legal action to collect a consumer debt, the plaintiff shall undertake a reasonable investigation to verify the defendant's current address for service of process.
- (b) In any action to collect a consumer debt, the plaintiff shall, at the time of filing proof of service of the summons and complaint, submit to the clerk an envelope properly addressed to the defendant, with first-class postage affixed, together with a written notice. This notice is in addition to the requirement in [applicable Rule of Civil Procedure] requiring service of the complaint and summons on the defendant. This additional notice shall consist exclusively of the following language, or language prescribed by the [state supreme court or court rules committee] that addresses the same topics, in clear type of no less than twelve-point in size, in both English and Spanish:

BEFORE ENACTMENT, THIS NOTICE MUST BE CUSTOMIZED SO THAT IT ACCURATELY DESCRIBES THE PARTICULAR STATE'S PROCEDURES.

¹⁹ Danner v. Discover Bank, 99 Ark. App. 71 (Ark. Ct. App. 2007).

²⁰ Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration (July 2010), at iii, 17.

NOTICE OF LAWSUIT

(DATE)

(NAME OF COURT)
(COUNTY)
(STREET ADDRESS, ROOM NUMBER)
(CITY, STATE, ZIP CODE)

(NAME OF DEFENDANT)
(ADDRESS OF DEFENDANT)

PLAINTIFF (person suing): _____
DEFENDANT (person sued): _____
NAME OF ORIGINAL CREDITOR, UNLESS
SAME: _____
CASE NUMBER: _____

ATTENTION: A lawsuit has been filed against you claiming that you owe money for an unpaid credit card, medical, student loan, or other debt. You should expect to get a copy of a document called a “complaint” [Insert description of all forms of service that are permitted in the state, e.g., “delivered by a sheriff’s deputy or by certified mail”]. You should go to the courthouse at the above address as soon as possible to respond [in writing] to the lawsuit. [Or insert other instructions for how to respond.] You can ask the clerk’s office for a copy of the complaint if you have not received it within one week of this notice.

You may wish to contact an attorney. [For courts that provide assistance by a volunteer attorney or have other pro se assistance: If you do not have an attorney, help may be available at the court.][Insert a reference to legal services organization, www.consumeradvocates.org, or bar association referral service if applicable.]

If you do not respond [in writing] to the lawsuit, the court may enter a judgment against you. Once entered, a judgment can be used against you for five (5) years, and your money, including a portion of your paycheck and/or bank account, may be taken. A judgment will hurt your credit score and can affect your ability to rent a home, find a job, or take out a loan.

There can be other very serious consequences for you if a judgment is entered against you. [If applicable: See [brochure or website] for details.]

It is important that you [insert necessary response: mail a written response to the clerk; appear at the time and place stated above, etc.]. Additional information can be found at the court system website at: _____

(b) The face of the envelope set forth in subsection (a) shall be addressed to the defendant at the address at which process was served, and shall contain the defendant's name, address (including

apartment number), and zip code. The face of the envelope also shall state the appropriate clerk's office as its return address. The face of the envelope shall not contain any other markings, including any indication it is an attempt to collect a debt or the name of the plaintiff or original creditor.

(c) The clerk promptly shall mail to the defendant the envelope containing the additional notice set forth in subsection (a). No default judgment based on the defendant's failure to answer shall be entered unless there has been compliance with this section, and at least twenty (20) days have elapsed from the date of mailing by the clerk. No default judgment based on the defendant's failure to answer shall be entered if the envelope containing the additional notice is returned as undeliverable.

Commentary

A party initiating a lawsuit is required to provide "service" of the lawsuit by having the summons and complaint mailed or physically delivered to the address of the person being sued. One of the most problematic practices by debt buyers and debt collectors is "sewer service," in which the summons and complaint are never delivered but the individual paid to complete service claims to have done so. The FTC has noted problems with inadequate or improper service in debt collection litigation.²¹

The Model Act addresses these problems by requiring verification of the address and providing for an additional notice of the lawsuit to be mailed to the consumer-defendant by the clerk of the court. This additional notice is modeled in part on a similar additional notice required by the New York City Civil Courts.²² This additional notice ensures that the consumer-defendant has proper notification of the lawsuit and is afforded the opportunity to defend him/herself in court. The additional notice also includes information about the consequences if the court issues a judgment against the consumer. States will need to customize the notice so that it accurately reflects the state's procedures.

Section 1-108. Default Judgment

(a) Prior to entry of a default judgment or summary judgment against a consumer in any action initiated by a debt collector to collect a consumer debt, the plaintiff shall file:

- (1) evidence with the court to establish the amount and nature of the consumer debt. The only evidence sufficient to establish the amount and nature of the debt shall be properly authenticated business records that satisfy the requirements of [cite state Rules of Evidence]. The authenticated business records shall include at least all of the following items:
 - (i) the original creditor's last account number (redacted for security purposes to show only the last four digits);
 - (ii) the name of the original creditor;
 - (iii) the amount of the original debt;
 - (iv) an itemization of interest, charges, and fees claimed to be owed;
 - (v) the original charge-off balance, or, if the balance has not been charged off, an explanation of how the balance was calculated;
 - (vi) an itemization of post charge-off interest, charges, or fees, where applicable;
 - (vii) the date of last payment by the consumer;

²¹ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010), at 8-11.

²² N.Y. City Civ. Ct. Unif. Rules § 208.6.

- (viii) a statement of the applicable limitations period and the filing date of the case;
- (ix) the amount of interest claimed and the contractual or legal basis for the interest charged; and
- (x) sufficient information to indicate whether the interest rate exceeded [cite to state usury cap] at any point.

(b) If the plaintiff is a debt buyer, the plaintiff shall file one or more affidavits authenticating the documents listed in Section 1-106(b), signed by a person or persons qualified to authenticate the documents.

(c) In any case involving consumer debt, if the defendant debtor appears for trial on the scheduled trial date, but the debt collector fails to appear or is not prepared to proceed to trial and there is not good cause for a continuance, judgment shall be entered for the debtor dismissing the action with prejudice. The court may award the debtor's costs of preparing for trial, including lost wages, transportation expenses, and attorney's fees.

(d) In any case involving collection of a consumer debt, in addition to the grounds set forth in [applicable Rule of Civil Procedure], the defendant debtor shall be permitted to move to set aside a default judgment under [applicable Rule of Civil Procedure] within the following:

- (1) One (1) year after entry of default on grounds of mistake, inadvertence, surprise or excusable neglect;
- (2) Two (2) years after entry of default on grounds of deception, fraud or misrepresentation by a debt collector or its attorney to a *pro se* consumer, including a false representation that the case would be dismissed;
- (3) At any time after a void judgment is granted, if the motion is made within a reasonable time. For a default judgment, this may be a reasonable time after the discovery of the existence of the judgment or order. For purposes of this provision, a void judgment in a case involving consumer debt shall include a case in which the consumer is not the person obligated to pay the debt or is the victim of mistaken identity, identity theft, or fraud by another person who incurred the debt;
- (4) At any time for lack of personal jurisdiction, if the debtor was not properly served with notice of the action.

(e) If the provisions of [applicable Rule of Civil Procedure] provide for a time period to set aside a default judgment on a particular basis that is different than the time periods set forth in this section, the longer time period shall apply.

Commentary

Debt collectors and debt buyers most often obtain judgments against consumers by default, i.e., they win because the consumer never appears to defend him or herself. Oftentimes in such cases, the debt collector or buyer is not required to provide any evidence it is actually entitled to the judgment, including that the consumer really owes the debt, the correct amount of the debt, and that the debt buyer really has ownership of the debt.

The Model Act requires that any party seeking a judgment for a consumer debt provide the court with sufficient documentation as to the amount and nature of the debt, similar to the documentation required in Sections 1-104 and 1-106 for initiating a lawsuit and debt collection in general. It also

requires a breakdown of the debt so that it is clear what is the original principal and original charge-off amount versus fees added post-charge-off. Debt collectors or buyers must provide a copy of the original contract or other documentation that the consumer actually incurred the debt. This also requires debt buyers to show that they actually own the debt they are seeking to collect, in order to prevent a second judgment from being issued for the same debt.

This provision also gives consumers the right to obtain a default judgment if they appear for trial to defend themselves and the collector does not show up. The FTC has cited the unnecessary costs imposed on consumers when this situation occurs and recommended that state courts take measures to deter it.²³ Massachusetts small claims courts have established similar rules requiring dismissal of a lawsuit if the defendant-consumer shows up for trial and the plaintiff-collector does not appear or is unprepared for trial for no good reason.²⁴

Finally, it gives consumers certain amounts of time to ask the court to remove or set aside a default judgment. These time periods are based on a combination of federal and California law. If the consumer is not actually liable for the debt, because s/he was the wrong consumer being sued or the victim of identity theft or fraud committed by someone else, this provision gives consumers the ability to set aside the default judgment at any time.

Section 1-109. Confirmation of Arbitration Awards

(a) In any proceeding to confirm an arbitration award to collect a consumer debt, the party seeking to confirm the award shall plead:

- (1) the actual terms and conditions of the agreement to arbitrate; and
- (2) compliance with Sections 1-103 through 1-106 of this Act.

(b) The party seeking to confirm the award shall attach to its petition:

- (1) the agreement to arbitrate;
- (2) the demand for arbitration or notice of intention to arbitrate, with proof of service; and
- (3) written evidence of the arbitration award, with proof of service.

(c) If the arbitration award does not contain a statement of the claims submitted for arbitration, of the claims ruled upon by the arbitrator, and of the calculation of figures used by the arbitrator in arriving at the award, then the petition shall contain a statement setting forth such items.

(d) The court shall not grant confirmation of an arbitration award based on a consumer credit transaction unless:

- (1) the party seeking to confirm the award has complied with this section; and
- (2) the party against whom an arbitration award is sought to be confirmed either
 - (i) attended a hearing before the arbitrator;
 - (ii) signed a writing after the submission to the arbitrator of the claim that is the basis for the arbitration award, agreeing to submit the claim to the arbitrator; or

²³ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010), at 21-22.

²⁴ Mass. Ann. Laws Unif. Small Claims Rules 7(c). Pennsylvania's "Credit Card Court" similarly dismisses cases if the plaintiff does not appear at an initial mandatory conciliation conference. Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010), at 22.

- (iii) was the subject of a court order compelling arbitration as provided by [applicable rule provision].

(e) A party may seek to confirm an arbitration award in the courts of this state within one year after the award is made. A party against whom an arbitration award is made may seek to vacate the award in the courts of this state within one year after the award is made.

Commentary

One of the most troublesome practices is the use of mandatory binding arbitration to collect consumer debts. These arbitration proceeds are often extremely lopsided. For example, in cases handled by the National Arbitration Forum (NAF), the creditor or business prevailed over the consumer in 94.7% of the cases. The Minnesota Attorney General shut down NAF's consumer debt arbitration business in 2009 for bias and deception, including the fact that NAF was owned by the same corporation that owned Mann Bracken, a large national debt collection law firm that filed debt collection claims with NAF.

Credit card issuers dropped collection by arbitration after the NAF scandal. However, there are no laws or regulations that explicitly prohibit them from taking up the practice again. The Model Act would prohibit state courts from confirming an arbitration award unless certain conditions were met, including compliance with other parts of the law. This section also includes a provision based on Pennsylvania law that, in order for the court to confirm the arbitration award, it must find that the consumer actually participated in the arbitration, was compelled to participate but did not do so, or agreed to arbitration after the claim arose.

Section 1-110. Interest; Attorney's Fees

(a) If the plaintiff is the prevailing party in any action to collect a consumer debt, any pre- or post-judgment interest the court awards the plaintiff shall be limited to the rate of interest equal to the weekly average 1-year constant maturity treasury yield, but not less than 2 per cent per annum nor more than 5 per cent per annum, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. A higher rate of interest on the judgment, including the rate provided for in the contract, shall not be permitted.

(b) Any pre or post-judgment interest awarded by the court shall not be compounded.

(c) If the plaintiff is the prevailing party in any action to collect a consumer debt, the plaintiff shall be entitled to collect attorney's fees only if the contract or other document evidencing the indebtedness sets forth an obligation of the consumer to pay such attorney's fees, and subject to the following provisions:

- (1) if the contract or other document evidencing indebtedness provides for attorney's fees in some specific percentage, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of the amount of the debt excluding attorney's fees and collection costs.
- (2) if a contract or other document evidencing indebtedness provides for the payment of reasonable attorney's fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean the lesser of fifteen percent (15%) of the amount of the debt, excluding attorney's fees and collection costs, or the amount of attorney's fees calculated by a reasonable rate for such cases multiplied by the amount of time reasonably expended to obtain the judgment.

- (3) the documentation setting forth a party's obligation to pay attorney's fees shall be provided to the court before a court may enforce those provisions. Such documentation must include all of the materials specified in Section 1-106.

(d) If the debtor is the prevailing party in any action to collect a consumer debt, the debtor shall be entitled to an award of reasonable attorney's fees. The amount of the debt that the creditor sought shall not be a factor in determining the reasonableness of the award. In the alternative, at the debtor's election, a prevailing debtor shall be awarded the amount of attorney's fees that the plaintiff would have been entitled to collect if the plaintiff had been the prevailing party.

Commentary

Paragraph (a) limits the amount of interest that can be assessed to a consumer debtor when a debt collector prevails in a collection lawsuit against the consumer debtor. The section says that the maximum interest rate that a court can award the debt collector is the same as the interest rate permitted under federal law for civil judgments, 28 U.S.C. § 1961, though with a minimum of 2% interest and a maximum of 5%. This section is necessary because in some states, post-judgment interest laws were passed during times of high inflation, and can be as high as 12%, which essentially doubles the amount of the debt after five years. Also, without these limits, creditors may seek to impose the contract interest rate, which may be much higher. Paragraph (b) prohibits the court from compounding any pre- or post-judgment interest it awards. Pre-judgment interest here is intended to refer only to interest that accrues after the maturity of a credit obligation, i.e., after the date the final payment is due, either under the original contract terms or after acceleration.

This section prohibits seeking attorney's fees from a consumer in a collection lawsuit to only those instances in which the underlying contract or other document obligates the consumer for such fees. This section also limits these fees to a reasonable percentage of the amount owed by the consumer. Finally, this section gives the consumer the right to collect attorney's fees if s/he prevails, to the same extent the collector could have collected them, i.e., 15% of the amount of the debt or a reasonable hourly rate, if the contract provides for attorney's fees for the collector.

Section 1-111. Preservation of Legal Rights

(a) Prior to a dispute arising, a written agreement shall not waive or have the practical effect of waiving the rights of a party to that agreement to resolve that dispute by obtaining:

- (1) Injunctive, declaratory, or other equitable relief;
- (2) Relief on a class-wide basis;
- (3) Punitive damages;
- (4) Multiple or minimum damages as specified by statute;
- (5) Attorney's fees and costs as specified by statute or as available at common law; or
- (6) A hearing at which that party can present evidence in person.

(b) Any provision in a written agreement violating this section shall be void and unenforceable. A court may refuse to enforce other provisions of the agreement as equity may require.

(c) Any person who is a party to an agreement that violates this section can bring an action in court to reform such an agreement so that it complies with this Act. The party or parties responsible for drafting the offending provisions shall be liable for the reasonable attorney's fees and costs of the

person or entity bringing the action if that action prevails or where, after the action is commenced, the parties reform the contract voluntarily.

Commentary

This provision reaffirms the state's policy of using private litigants to effectuate justice for all of a state's citizens. Written agreements should not waive, prior to a dispute arising, individual rights that benefit the justice system as a whole. For example, the threat of punitive damages deters misconduct aimed at others. State authorization of class actions, statutory minimum or multiple damages, and statutory attorney's fees all encourage private litigation to remedy law violations where law enforcement would otherwise be impractical. Injunctive relief can provide protections for other citizens. The state also has an interest in court orders being publicized so that other citizens can be better informed, and for litigants to be allowed to appear in person to present their grievances in public.

The Model Act does not in any way prevent parties, after a dispute arises, from settling the manner with a confidentiality clause or without providing for statutory remedies. Nor does the model in any way limit the ability of parties to agree, prior to a dispute arising, to settle the matter via arbitration. The model law just prevents waiver of certain individual rights whose preservation is important for the operation of the justice system, whether the dispute is resolved in court, in arbitration, or otherwise. Such waivers are present both in arbitration clauses and elsewhere in contracts, and the state has an interest in prohibiting such waivers wherever they appear.

This model law is not targeted at arbitration agreements, but requires courts to void any contractual provision (in an arbitration clause or elsewhere in a contract) that waives, prior to a dispute, enumerated individual rights that implicate important state interests. Because it sets general standards and does not target arbitration, the Model Act should not run afoul of the Federal Arbitration Act (FAA). The FAA specifically allows courts to refuse to enforce provisions "upon such grounds as exist at law or equity for the revocation of any contract."

*Because the Model Act applies to any contract involving any person, not just consumer form contracts, it is written to avoid court rulings that preempt state statutes whose scope is more limited. At least four circuits interpret very literally "any contract" in the above quoted FAA language, and find FAA preemption even where a state statute specifies grounds to revoke any contract, but the scope of the statute is limited to contracts involving only consumers or only franchisees. See *Ting v. AT & T*, 319 F.3d 1126 (9th Cir. 2003); *Saturn Distribution Corp. v. Paramount Saturn, Ltd.*, 326 F.3d 684 (5th Cir. 2003); *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001); *OPE Int'l Ltd. P'ship v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001); *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999); *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998); see also *Mgmt. Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997).*

TITLE II: PROPERTY EXEMPT FROM CREDITORS

Section 2-101. Purposes of this Title

The purposes of this Title are:

- (a) To provide for the protection of debtors' and their families' income and assets at a level permitting them to provide for their necessary expenses and needs and to maintain employment while recognizing the rights of creditors to be paid for debts lawfully owed to them from discretionary income and undedicated assets;
- (b) To encourage individuals and families to save assets and earnings for educational expenses, the purchase and maintenance of a home, medical needs, emergencies, and retirement security;
- (c) To afford debtors an opportunity to achieve financial rehabilitation for the benefit of themselves, their families and their creditors; to protect children and other family members from impoverishment and homelessness, and to reduce the burden upon society of supporting impoverished debtors and their families;
- (d) To update the laws of this state relating to debtors' exemptions and make those protections self-enforcing to the maximum feasible extent; and
- (e) To discourage predatory, unaffordable, and improvident lending practices dependent on taking or threatening to take property of debtors necessary for daily living and work.

Section 2-102. Construction

This title shall be liberally construed to accomplish its purposes while giving effect to the plain meaning of its provisions.

Section 2-103. Definitions

For purposes of this title, the following definitions shall apply:

- (a) "Creditor" is a person to whom a debt is owed and includes a judgment creditor and any other person that obtains an execution on a debt.
- (b) "Dependent" means a person who relies in whole or in significant part on the debtor for support and maintenance.
- (c) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, payment for skilled, personal or professional services, or otherwise, whether earned as an employee or as an independent contractor, and also includes alimony.
- (d) "Executing officer" means the official, creditor, or other person who issues or implements an execution.
- (e) "Execution" includes an attachment, levy, garnishment, or other disablement, freeze, or seizure of property, whether pre- or post-judgment, to satisfy a debt. Except for purposes of Section 2-112, it also includes a creditor's exercise of a right of setoff to collect a debt. It does not include self-help repossession of collateral.
- (f) "Exempt" means, unless otherwise specified, not subject to execution, levy, attachment,

garnishment, setoff, self-help, seizure, or any other form of process, court order, creditor or other action for the purpose of debt collection or restitution or other equitable claim. Funds that are exempt remain exempt when they are paid or transferred to the debtor, the debtor's spouse, partner, beneficiary, or dependent or to an account for the benefit of the debtor, the debtor's spouse, partner, beneficiary, or dependent.

(g) "Garnishment" means any legal or equitable procedure through which the earnings, property, or funds of any person are required to be withheld by another person for payment of any debt to a creditor.

(h) "Garnishable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld such as taxes, social security or alternative pension and Medicare withholdings, and after further deduction of up to fifteen percent of the remainder for contributions for health insurance, a medical expense account, a pension, or a retirement account.

(i) "Necessary" means reasonably essential to or needed for everyday living, including any special needs by reason of health or physical or mental infirmity.

(j) "Payroll card account" means an account that is directly or indirectly established through an employer or another entity that pays earnings and to which electronic fund transfers of the employee or person's wages, salary, employee compensation (such as commissions), or other earnings are made on a recurring basis, whether the account is operated or managed by the employer or other entity that pays earnings, a third-party payroll processor, a depository institution, or any other person. The term "payroll card account" also means any other payroll card account as defined in regulations issued under the Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq.

(k) "Prepaid account" means a prepaid account as defined under regulations issued pursuant to the Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq., and also includes (1) an account for distributing needs-tested benefits; (2) a loyalty, award, or promotional gift card if used to pay or receive earnings; (3) a general-use prepaid card, payment code, or other device as defined in the Electronic Fund Transfer Act, 15 U.S.C. § 1693i-1 and regulations thereunder, if the card, code, or device is not labeled as a gift card, and (4) a health savings account, flexible spending account, medical savings account, or a health reimbursement arrangement.

(l) "Residence" includes real or personal property, including a share in a residential cooperative, a beneficial interest in a trust applying to the property, or a manufactured home, that is owned individually or in any form of joint ownership by the debtor, the debtor's dependent, spouse, or domestic partner.

(m) "Resident" means a person living in this state temporarily or permanently.

(n) "Value" means current fair market value of accounts, goods, or property less the amount of any liens or security interests in the accounts, goods, or property, based on the price that would be paid, assuming a willing buyer and a willing seller, for accounts, goods, or property of similar age and condition. A debtor's testimony as to the value of property the debtor owns or as to the advertised value of property similar to that claimed as exempt shall be admissible as evidence of an item's value.

Section 2-104. Applicability of this Act

The exemptions of this Act shall be available to all residents of this state and shall apply regardless of where the property is located. In the case of a non-resident, the courts of the state shall apply the exempt property laws of the state of the non-resident debtor's most significant contacts.

Section 2-105. Personal Property Exempt

(a) The following property shall be exempt.

- (1) *Household & Personal Possessions*. All household goods, including but not limited to the debtor's and the debtor's dependents' eating and cooking utensils, bedding, furniture, books, refrigerator, stove, microwave oven, kitchen appliances, necessary provisions, washing machine, clothes dryer, vacuum cleaner, television, yard equipment, and household equipment and tools, and all personal possessions, including but not limited to clothing, pets, personal health aids, toys, recreational items, medications, computers or similar electronic devices, and telephones, except that a creditor may obtain court permission to levy on any item of furniture, appliance, electronic device, yard equipment, recreational item, or precious item, utensil or set of utensils exempt under this subsection that has a value of more than \$3000, unless that item is exempt under another subsection. The debtor may exempt one piece of jewelry without regard to value, and additional jewelry up to a value of \$3000.
- (2) *Motor Vehicle*. The debtor's interest in a motor vehicle up to \$15,000 in value, or \$25,000 in value in the case of a motor vehicle that has been adapted for special use because of the disability of the debtor or a dependent of the debtor. A levy may be ordered on the debtor's motor vehicle if the creditor establishes with probative evidence to the satisfaction of the court that the debtor's interest in the motor vehicle significantly exceeds \$15,000 in value, or \$25,000 in value in the case of a debtor, or a dependent of the debtor, with impaired mobility.
- (3) *Tools of the Trade*. Tools, books, software, websites, social media accounts, electronically stored data, instruments, motor vehicles, and machines which are or may be used by the debtor in the course of an occupation or in search for employment, except that levy may be ordered if the creditor establishes with probative evidence that the value of the debtor's tools of the trade exceed \$50,000 in the case of farm tools, equipment, crops, and animals, or \$30,000 in the case of other tools of the trade. The debtor may designate which tools of the trade of less than the applicable amount are exempt.
- (4) *Burial Plot*. A burial plot for the debtor or the debtor's family.
- (5) Child support payments paid or payable to or on behalf of the debtor.
- (6) All public assistance benefits, unemployment compensation benefits, amounts paid pursuant to the federal earned income tax credit and similar state programs, disability benefits, and workers' compensation paid or payable.
- (7) All health insurance, disability insurance, and long-term care insurance policies and medical expense accounts, and payments or benefits therefrom.
- (8) Insurance proceeds, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was a dependent, spouse, or domestic partner, paid or payable to a beneficiary, spouse, domestic partner or dependent.
- (9) *Life Insurance*. Life insurance benefits paid or payable to each beneficiary to the extent of \$1,000,000. If a life insurance policy exceeds the limits provided under this subsection, the debtor-insured's creditors may collect against that part of the debtor-insured's interest in the policy which is paid or payable in proportion to the excess over the limit. Additionally, up to \$10,000 of the loan or redemption value of a life insurance policy shall be exempt.

- (10) *Annuities, pensions.*
 - (i) Up to \$1,500,000 in any interest of a debtor or beneficiary in annuities, retirement accounts, including inherited individual retirement accounts, pension funds, stock bonuses, profit-sharing plans, or similar plans or contracts providing benefits by reason of age, illness, disability, or length of service, and an additional \$1,500,000 for each of the debtor's dependents, reduced by such amounts as are held by or due the dependents from other sources for maintenance and support, including the proceeds of a life insurance policy. The exemption provided by this section shall be available whether such debtor's or beneficiary's interest arises by inheritance, designation, appointment, or otherwise.
 - (ii) Income from retirement accounts, pensions, educational expense accounts, stock bonus, profit-sharing, tax refunds, and annuity benefits paid or payable to a debtor as an insured or a beneficiary.
- (11) Amounts in educational expense accounts and similar types of educational savings accounts not to exceed \$240,000 per beneficiary whether paid or payable.
- (12) Amounts in Achieving a Better Life Experience (ABLE) accounts and similar types of savings accounts for individuals with disabilities not to exceed \$1,500,000 per beneficiary whether paid or payable.
- (13) Exempt benefits and funds, including the exempt portion of earnings, that are deposited into an account at a financial institution, a prepaid account, or a payroll card account, without a dollar limitation.
- (14) Proceeds from a loan issued for education expenses, except to the extent allowed by 20 U.S.C. § 1095a(d).
- (15) Proceeds from a small business loan, unless the loan was intended to pay that debt.
- (16) In addition to the funds exempt under subsections 2-105(a)(5)-(15), \$12,000 in cash, in a deposit account or other account of the debtor. A garnishment order issued against a bank or other account shall instruct the garnishee that it is to garnish only the amount exceeding \$12,000, unless the judgment creditor has established through a hearing as described in Section 2-112(c) that the debtor has already claimed this exemption for a different account for this debt.
- (17) Up to \$10,000 in other property of any sort designated by the debtor, including additional interests in property already exempted in part under other provisions of this Act or other law.

(b) Property exempt under federal and other state law shall also be treated as exempt under this title.

(c) Only the debtor's interest in property is subject to garnishment, attachment, disablement, freeze, seizure, or other creditor's remedy. If a creditor is on notice, or is placed on notice by an objection, that another person claims an interest in property along with or instead of the debtor, the creditor must establish through a hearing as described in Section 2-112(c) that the debtor's share exceeds the amount protected by this section. The name in which the property is titled or maintained shall not be dispositive as to ownership or interests in the property. A debtor's interest in a joint bank or similar account is based on the debtor's contributions to the account, as determined by the tracing rules in Section 2-110, in order to protect the nondebtor's interest in the account. Each person with an interest in property has his or her own right to the full exemption amount applicable to that type of property.

(d) Where a depository institution or other entity is holding funds belonging to a judgment debtor and is maintaining the account in this state, the judgment creditor may not evade the protections provided by this section by serving a garnishment order on an out-of-state office or branch of the depository institution or other entity.

Commentary

Paragraph (a) provides a list of different types of exempt property. These exemptions are written broadly often without money caps to make the exemption more self-enforcing.

Current state life insurance and pension and retirement laws in some states provide an exemption without regard to the amount involved. Those may be substituted for the provisions in this proposal regarding those assets. This model proposes a very high cap instead, in order to create greater parity with the rules governing personal property, wages, and bank accounts. That approach is recommended in the absence of more generous protection of these assets.

Section 2-106. Earnings Exempt

(a) All earnings of a debtor who receives any means-tested public assistance benefits, unemployment compensation benefits, federal earned income tax credit or [insert name of similar state program providing earned income tax credit], disability benefits, or workers' compensation are exempt from garnishment.

(b) A debtor's garnishable earnings for any week that are less than \$1000 are exempt and not subject to garnishment. This exemption shall be adjusted pro rata for any pay period longer than weekly.

(c) If the debtor's garnishable earnings exceed the amount provided by the preceding subsection, no more than 10% of garnishable earnings in excess of the amount exempt under the preceding subsection shall be subject to garnishment unless the weekly garnishable earnings of the debtor exceed \$1200, in which case no more than 15% of the amount in excess of amount provided by subsection (b) is subject to garnishment. The amount not subject to garnishment is exempt.

(d) The amount of a debtor's garnishable earnings that can be garnished for the support of a person is governed by [insert citations for state's child support statute, alimony statute, and any other relevant laws].

(e) If more than one garnishment is served on a garnishee with respect to the same debtor, the garnishment served earliest shall take priority, except that a garnishment for support of a person shall take priority over any other garnishment regardless of the date of service. If a garnishment with greater priority consumes the garnishable earnings that are available for garnishment under the preceding subsections, then no part of the debtor's garnishable earnings shall be garnished pursuant to the garnishment with lower priority.

(f) Notwithstanding Section 2-104 of this Act, the protections for earnings set forth in this section apply to all debtors whose physical place of employment is in this state, notwithstanding that the debtor's employer may have corporate offices or other places of business located outside this state.

(g) Any person seeking an order of garnishment of earnings, after obtaining a judgment, shall serve the judgment debtor, in a manner complying with [cite state rule of civil procedure], at least fifteen (15) days and not more than forty-five (45) days before the order is sought with a notice substantially the following form, with dollar amounts adjusted for inflation as provided by section 2-111:

**IMPORTANT INFORMATION FOR [INSERT NAME OF JUDGMENT DEBTOR]:
[Insert Name of Judgment Creditor] Will Ask Court for Permission to Take
Money from Your Paycheck**

[Insert name of judgment creditor or assignee that will file the wage garnishment action (“judgment creditor”)] will ask a judge to order your employer(s), [insert name of employer(s)], to take money from your paycheck and send it to [insert name of judgment creditor] to pay a debt. This is called a wage garnishment [or insert correct term in state if different].

[Insert name of judgment creditor] says that you owe it \$[insert amount of the claimed debt]. [If the judgment creditor is not the original creditor, insert the following sentence: This amount comes from a debt you originally owed to [insert name of original creditor].] Look below for more information about the debt.

If the judge grants [insert name of judgment creditor]’s request to garnish your wages, the law says that [insert name of employer(s)] must take money out of your paycheck and send it to [insert name of judgment creditor] to pay this debt. [If state is a continuous garnishment state: Your employer will continue making the deduction until the debt is paid in full.]

The amount deducted from your pay depends on how much money you make. If your pay is less than \$1000 a week, nothing can be deducted.

Nothing will be deducted from your wages if you are receiving any means-tested public assistance benefits, unemployment compensation benefits, federal earned income tax credit or [insert name of similar state program providing earned income tax credit], disability benefits, or workers’ compensation. **On the other side of this page, there is a form that you can return to the court to let them know that you receive one or more of these forms of public assistance.**

If you do not think that you owe this money, you may want to talk to an attorney to see if you have additional legal rights. Free legal help may be available from [insert list of legal aid programs].

Information About the Debt

Original Creditor’s Name:
Current Creditor’s Name:
Current Creditor’s Contact Information:

Court that Decided You Owe [insert name of judgment creditor] Money
Court Name:
Case No:

Date of Judgment:
Judgment Amount: \$_____

Current Amount Owed*: \$_____

* The Current Amount Owed may be different from the Judgment Amount because it may include interest and court costs and it may grant credit for amounts you have already paid.

[Insert a page break]

SOURCE OF INCOME

Information to Be Completed by Debtor

Name:
Address:
Date of Birth:

I currently receive one or more of the following (circle all that apply):

[insert list of all forms of means-tested public assistance]

Signature:
Date:

Information to Be Completed by Creditor

For the current garnishment proceeding, identify:

Plaintiff(s):
Defendant(s):
Court:
Docket Number:

Please return this form to:

[Insert name and address of court].

Commentary

Subsection (c) allows a higher percentage of a worker's earnings to be garnished if a worker's net earnings exceed \$1200 per week, which would be \$62,400 in net earnings a year (assuming no variation in weekly earnings). Median household income in 2019 was \$68,703, so this would subject families whose income is close to or above median income to a higher level of garnishment. All dollar amounts in this section are subject to adjustment due to inflation pursuant to section 2-111.

Section 2-107. Waivers of Personal Property Exemptions and Security Interests in Exempt Personal Property

The exemptions provided in Sections 2-105 and 2-106 may not be waived in an executory contract or prospectively. Security interests, other than for the purchase price, repair or improvement of the property, or as a bona fide pawn transaction in which the pawnbroker takes physical possession of the pawned item, may not be taken in exempt property except that listed in Sections 2-105(b) and (c) or any other single item of personal property valued at \$3000 or more at the time the security interest is granted. Any purported waiver or grant of a security interest in violation of this section is void and unenforceable.

Section 2-108. Homestead Exemption

- (a) A debtor is entitled to a homestead exemption in his or her residence at the time the residence is acquired.
- (b) The homestead exemption may be waived by clear language only in a mortgage [or deed of trust] agreed to by all the owners of the residence and by the debtor's spouse or domestic partner whether or not the spouse or domestic partner has an ownership interest in the home. It may not be waived in any other transaction. A waiver not permitted by this Act is void and unenforceable.
- (c) The amount of the homestead exemption is the debtor's interest in the residence up to the value of \$ [enter the median house price] in [metropolitan county names] and \$ [enter the median house price] in [rural county names]. The debtor may assert an additional homestead exemption for 50% of that amount for the debtor's spouse as well as for each dependent of the debtor who resides in the homestead, whether or not such spouse or dependent has an ownership interest in the homestead.
- (d) The homestead shall attach to a residence, without declaration or recordation, upon its acquisition, whether by purchase, gift, devise, inheritance or other means. If a debtor has more than one residence, the homestead exemption shall attach to the first one acquired, unless the debtor designates a different residence as the debtor's homestead, in which case the homestead exemption transfers to the designated residence upon designation.

Section 2-109. Scope of Exemptions

- (a) A transferee of property obtained by fraud or theft may not assert that the property is exempt against the transferor or the transferor's heirs, devisees, and assigns.
- (b) The restrictions of this title do not apply in the case of any order for the support of any child or dependent of the debtor or any decree regarding the division of property between spouses or former spouses or domestic partners issued by a court of competent jurisdiction in accordance with an

administrative or civil procedure, which is established by state or federal law, which affords substantial due process, and which is subject to judicial review.

Section 2-110. Tracing Exempt Property

(a) Money received from the sale or transfer of property that is exempt under this Act or other law shall remain exempt for a period of eighteen (18) months while in the debtor's possession, in a bank or similar account, in a savings account, in a certificate of deposit with a term that does not extend past the eighteen-month period, or otherwise held in a manner whereby the money is regularly available to the debtor and is traceable and may be converted into another type of exempt property.

(b) If property, or a part thereof, that could have been claimed as exempt has been sold or taken by condemnation, or has been lost, damaged, or destroyed and the owner has been indemnified therefor, the traceable proceeds of that property are exempt for eighteen (18) months after the proceeds are received, and may be converted into another type of exempt property.

(c) Money or other property and proceeds that are exempt under this Act or other law are traceable under this section by application of the first-in, first-out rule.

Section 2-111. Adjustment of Dollar Amounts

(a) The dollar amounts in this Act change, as provided in this section, according to and to the extent of changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers: U.S. City Average, All Items, compiled by the Bureau of Labor Statistics, United States Department of Labor, and hereafter referred to as the Index. The Index for December of the year preceding the year in which this Act becomes effective is the Reference Base Index.

(b) The dollar amounts change on July 1 of each even-numbered year if the percentage of change, calculated to the nearest whole percentage point, between the Index for December of the preceding year and the Reference Base Index, is 10 percent or more, but:

- (1) the portion of the percentage change in the Index in excess of a multiple of 10 percent is disregarded and the dollar amounts change only in multiples of 10 percent of the amounts appearing in this Act on the date of enactment;
- (2) the dollar amounts do not change if the amounts required by this section are those currently in effect as a result of earlier application of this section; and
- (3) changes in dollar amounts are to be rounded to the nearest whole dollar.

(c) If the Index is revised, the percentage of change is calculated on the basis of the revised Index. If a revision of the Index changes the Reference Base Index, a revised Reference Base Index is determined by multiplying the Reference Base Index applicable by the rebasing factor furnished by the Bureau of Labor Statistics. If the Index is superseded, the Index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for consumers.

(d) The [appropriate state official] shall adopt a rule announcing:

- (1) on or before April 30 of each year in which dollar amounts are to change, the changes in dollar amounts required by subsection (b); and
- (2) promptly after the changes occur, changes in the Index required by subsection (c) including, if applicable, the numerical equivalent of the Reference Base Index under a

revised Reference Base Index and the designation or title of any index superseding the Index.

(e) All printed and on-line versions of this statute published or distributed by any agency or department of the state shall be updated to include the new amounts no later than their effective date.

Section 2-112. Procedures Relating to Property Exempt from Levy

(a) No levy, garnishment, attachment, disablement, freeze, or seizure of property that may be exempt shall be made by a creditor, custodian, court officer, sheriff or similar officer without a court order reasonably identifying the property and the manner of levy.

(b) *Notices required.*

- (1) Upon entry of a judgment for damages, the clerk shall mail a notice to the last known address of each judgment debtor stating that the judgment debtor is responsible for paying the judgment but that the court will not require it to be paid with exempt income, assets or property. The address to which the notice is mailed shall be noted in the record. If the notice is returned undelivered, that fact shall also be noted in the record.
- (2) At the time the creditor obtains an execution, the clerk [or sheriff or other officer] shall give a notice to the judgment debtor who is the subject of the remedy, to any person in possession of the property involved, and to any person known to the creditor after reasonable inquiry to have an ownership claim to the property involved. The notice shall state the person's right to a hearing to claim exemptions that are not self-executing, to contest the seizure of exempt or necessary property, or to seek to set aside the judgment, and the steps the person may take to assert these rights. If documents are served upon the person in connection with the execution, this notice shall be included with those documents, but otherwise it shall be given by first class mail.
- (3) At the time a creditor notifies a person of a debtor's examination [supplementary process, or deposition on the debtor's financial affairs], the creditor shall also provide a notice that the debtor is responsible for paying the judgment, that the court will not require it to be paid with exempt income, assets or property, and that the person has the right to a hearing to claim exemptions, to contest the seizure of exempt or necessary property, or to seek to set aside the judgment.
- (4) The notices required by this section shall list the most common federal and state exemptions, give examples of income, assets, and property that are commonly exempt, and list sources of additional related information, such as the state's law libraries or the court's website. The notice shall also state that the judgment debtor may file a motion to set aside the judgment and shall list the most common grounds for such a motion, including improper service or active duty military service at the time of the suit.

(c) *Hearings required.* If an item of property falls into a category that is fully exempt or for which the exemption depends on its value, or an exemption depends on the judgment debtor's designation of the property to which the exemption will apply but the exemption appears to the executing officer to be sufficient to exempt all of the judgment debtor's property, the executing officer shall so report to the court and the judgment creditor, and shall not execute upon it. The property is presumed to be fully exempt unless the creditor requests and obtains a hearing and establishes that the property does not fall into a fully-exempt category or includes significant value in excess of the amount exempt, or that the exemption is not sufficient to exempt all of the judgment debtor's property. The

creditor must request the hearing within seven (7) days after the executing officer's report. Notice of the hearing shall be mailed to the debtor and shall describe the steps the debtor may take to contest the creditor's claim as to the value of the property. The debtor may contest the creditor's claim either by appearing in person or through a representative at the hearing, or by filing a written response stating the debtor's belief of the amount that the property is worth and certifying the existence and amount of any liens or security interests against it. The court shall consider such a statement as evidence.

(d) If an exemption depends on the judgment debtor's designation of the property to which the exemption will apply, and the exemption does not appear to the executing officer to be sufficient to exempt all of the judgment debtor's property, the executing officer shall provide the judgment debtor a form and written instructions for designating the property to which the exemption will apply. If the debtor fails to file the designation with the court within seven (7) days, the executing officer shall designate the items that will be exempt. If the debtor files a designation, the clerk shall notify the judgment creditor. The items designated by the judgment debtor are presumed to be exempt unless the creditor requests a hearing within seven (7) days after the clerk's notice and establishes at the hearing that the value of the property exceeds the exemption. The hearing shall be conducted as set forth in subsection (c) of this section.

(e) The [state supreme court or court rules committee] shall prescribe notices to garnishees that describe the exemptions applicable to particular types of garnishment. The forms shall instruct the garnishee not to turn over funds or other property that that garnishee can reasonably identify as exempt, but instead to report back that the funds or property are exempt.

(f) *Relief from seizure of exempt property.* If a creditor obtains an execution against a person, the person is entitled to a prompt hearing to claim exemptions, to contest the seizure of exempt property, or to seek to set aside the judgment.

(g) *Relief from seizure of necessary nonexempt property.* If a creditor obtains an execution against property of a person, the person is entitled to a prompt hearing to claim that property levied upon, while not exempt, is of such value to the financial rehabilitation or future support of the debtor or the debtor's dependents that it should be declared exempt by the court. The court may also order a greater exemption if other exceptional circumstances such as illness, injury, unemployment, death of a family member, disability, or old age make a greater exemption equitable.

(h) *Discovery in aid of execution.* A judgment creditor may serve a subpoena duces tecum, or invoke other discovery procedures provided in the [Rules of Civil Procedure] upon a person believed to be holding income, assets or property of the debtor to determine the nature, value and the availability or exemption of the income, assets or property for satisfaction of the judgment. Upon a showing of reasonable grounds to believe that the debtor's residence contains nonexempt items of significant value, the court may order the debtor to make the residence available to the Sheriff to levy upon such nonexempt items or to an appraiser to conduct an appraisal of the property.

(i) Costs incurred in making, or proposing to make, a levy on property shall be paid out of the proceeds of a sale of the property if a sale occurs. If the proceeds of a sale of the property are insufficient to cover the costs incurred in the levy, garnishment, or attachment, the creditor shall pay the costs and may not recover them from the debtor or the garnishee, notwithstanding any agreement of the parties to the contrary.

Section 2-113. Protection from discharge

(a) No person may discipline, suspend, terminate, or discharge an employee or a person under an independent contract for personal services, or refuse to hire or contract with any person because of a garnishment for a consumer debt or because of any obligation such garnishment imposes.

(b) Any person who violates this section shall be liable for:

- (1) all wages, earnings, and employment benefits lost by the employee, independent contractor, or person denied employment or a contract from the time of the unlawful discipline, suspension, refusal to hire, or discharge to the period of reinstatement;
- (2) an additional penalty of up to \$1000; and
- (3) reasonable attorney's fees and costs incurred by the employee, independent contractor, or person denied employment or a contract.

Section 2-114. Remedies for Wrongful Seizure of Exempt Property

(a) In the case of seizure of property made exempt from seizure by this Title, the debtor and his dependents may recover:

- (1) actual damages, including emotional distress damages;
- (2) statutory damages up to \$2000 per exempt item;
- (3) reasonable attorney's fees in connection with the establishing of the exemption and the damages of the debtor.

(b) It is a defense to liability under this section if the person shows that the violation was not intentional and resulted from a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid such error.



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