LEGAL UPDATES

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Debt Collectors Facing Heat on New State Medical Debt Collection Laws

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As those living in the southwestern United States enter the dog days of summer, debt collectors are especially feeling the heat. As if complying with the myriad of state and federal regulations covering the debt collection industry wasn't hard enough, debt collectors in Arizona and Nevada are now facing even bigger challenges as it relates to recent state law changes on the collection of medical debt.

Nevada medical debt collection notice

First, to Nevada. In June 2021, in response to the COVID-19 pandemic, Nevada enacted Senate Bill 248 (SB248) which required debt collectors to provide written notification to medical debtors 60 days before taking "any action to collect on a medical debt." The notice requires the collector to identify the name of the medical facility or provider that provided the goods or services that led to the debt, the date on which the debt arose, and the amount of the debt. Additionally, the law requires the notice to state that the medical debt was assigned to the collection agency for collection or that the collection agency otherwise obtained the medical debt for collection.

After SB248 became law—but before its effective date—debt collectors filed suit in federal court in Nevada seeking to enjoin the law on the basis that, among other arguments, it was preempted by the Fair Debt Collection Practices Act (FDCPA), as well as the Fair Credit Reporting Act (FCRA). But the court rejected the FCRA preemption argument, finding that SB248 did not specifically address investigatory duties.

Turning to the FDCPA, the collectors argued that SB248 put them in a position where they had to choose between complying with SB248 and complying with the FDCPA; both could not be done at once. Under the FDCPA, a debt collector must—in any communication that is an attempt to collect a debt, including in

the "initial communication" sent to the consumer—advise the consumer that the communication is from a debt collector who is attempting to collect a debt (the "mini-Miranda" warning). The collectors argued that SB248 prevented them from giving the mini-Miranda warning to the consumer in the 60-day notice, which could be construed as a collection letter due to the required SB248 language on the debt being assigned for collection, therefore leading to a charge that they violated the FDCPA.

The court rejected this argument, reasoning that, among other things, the SB248 notice clearly could not qualify as an attempt to collect a debt; rather, SB248 required debt collectors to advise consumers that the 60-day notice was not a demand for payment.

Nevertheless, the plaintiff's bar will likely claim that a SB248 notice sent by a debt collector, that includes the amount of the debt, the identity of the creditor to whom the debt is owed, and a statement that a medical debt "has been assigned to the collection agency **for collection**," constitutes a "communication" subject to the FDCPA. The theory will likely be that by not including the mini-Miranda requirement in the SB248 notice, which SB248 would prohibit, the collector violated §1692e(11). On the flip side, another theory might be that by sending the SB248 notice, the debt collector violated §1692g either by sending an incomplete validation notice, or by sending no validation notice at all within five days of that communication, which it must refrain from doing given the 60-day window under SB248.

Unfortunately, this would not be the first time, as courts have recognized, that debt collectors have been placed in a Catch-22 situation, where fulfilling the requirements of one law leads to potentially breaking another.

Arizona medical debt collection lawsuits

Debt collectors in Arizona are currently challenging a similar law that was enacted during the 2022 general election and that includes an interest-rate cap for medical debts. Collectors in Arizona are hoping that the state's appellate courts will not put them in the same position that the Ninth Circuit put Nevada debt collectors.

The law—Proposition 209 (Prop 209)—creates problems because its applicability is unclear. For example, take the scenario of a contract for medical services that was entered into before the effective date, and a debt collector obtained a judgment on that contract before the effective date, but the collector filed a garnishment action after the effective date. Would the debt collector have violated Prop 209 if it sought the pre-Prop209 interest rate? What about when a collector sues on a contract entered into before the effective date but obtains a judgment after the effective date. Does Prop 209 apply then?

Not only have different counties in Arizona applied Prop 209 differently, but sometimes, different courts within the same county have reached different conclusions about the law's applicability. One court in the largest court system in Arizona, Maricopa County, even held that Prop 209 applied where the contract was entered into, the judgment obtained, and the garnishment action was initiated all before the effective date, but the collector applied for a continuing lien during the garnishment action after the effective date. Meanwhile, the Arizona Administrative Office of the Courts even published guidance informing litigants that they would be subject to non-uniform application of the new law depending upon who heard the case. For what should be a bright-line procedural rule, collectors were left to guess as to how the new law impacted one of the most significant functions of their operations.

Due to the chaos that ensued, a group of debt collectors filed an action seeking to declare Prop 209 invalid. Like in Nevada, the collectors argued that it was a violation of their constitutional rights to face potential FDCPA liability based solely upon on whether their guess on how the new law was to be applied was correct or not. As an alternative, the collectors asked the court for a declaration providing guidance as to when Prop 209 applies.

After the collectors had initial success (and order was temporarily restored), the trial court eventually ruled against the collectors. The collectors appealed to the Arizona Court of Appeals, where the case is currently pending an oral argument likely later this year.

Just like in Nevada, collectors that use the courts in Arizona to collect unpaid medical debts face a perilous situation. As identified above, debt collectors are going to have to guess as far as when Prop 209 applies. The wrong guess could have dire consequences. Given the volume of debt collection suits filed in Arizona, there are likely to be at least thousands of consumers who fall into a potential class definition of those who had their debts collected in violation of Prop 209, and therefore in violation of the FDCPA, potentially for litigation that occurred even before Prop 209 was enacted.

Perhaps the most disheartening scenario is that even if the debt collectors obtain a favorable ruling in the appellate courts, by continuing to file and prosecute actions during the pendency of the litigation, it is possible that some cases will still end up having been filed or prosecuted in violation of Prop 209 due to the host of different scenarios relating to the contract date, the judgment date, and the date of and various actions taken in a post-judgment proceeding.

What this means to you

Between these pitfalls and the recent changes by consumer reporting agencies on the reporting of medical debt, medical collection has become quite a bit more challenging for those in the industry. Collectors should consult experienced counsel to examine collection practices for medical debt subject to these laws.

Contact us

If you have questions regarding Nevada SB248 or Arizona Prop 209, please contact Scott Helfand, Brandon Stein, or your Husch Blackwell attorney.