

Model Family Financial Protection Act

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By

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National Consumer Law Center[®]

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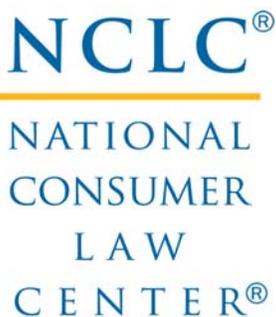
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ABOUT THE NATIONAL CONSUMER LAW CENTER

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, including older adults, 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 government and courts across the nation to stop exploitive practices, to 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, 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. 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 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.”⁶ 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.⁷

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 proceed with obtaining a payment order, attachment or garnishment forcing the consumer to pay its 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," *i.e.*, the practice in 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 case⁸ 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, different statute of limitations may apply to a debt 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.⁹

More importantly, creditors and debtors 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.¹⁰

This Model Act includes several provisions in response to that call. In some states, 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.¹¹ 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.

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 amount 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 this 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 1988,¹² 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.

Appendix A is a summary of property protected in financial emergencies, by state.

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 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.

(c) “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.

(d) “Debt collector” means any person who regularly collects or attempts to collect, directly or indirectly, consumer debts 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.

(e) “Debt buyer” means a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent 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.

(f) “Original creditor” means the last entity to extend credit to the consumer for the purchase of goods or services, for the lease of goods, or as a loan of money. The original creditor shall be identified by the name that it 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 described in paragraph (b) must be agreed to by the consumer by affirmative consent that is in writing or electronically signed in compliance with Section 101(c) of 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 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 [applicable consumer protection laws];
- (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 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.

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 amended 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 expensive of filing an action in a distant jurisdiction.

Section 1-104. Requirements for Debt Collection

(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 provides 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 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 containing the above documentation shall be provided to the consumer, upon request, within 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 5;
- (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;
- (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 years and shall be made available to any affected debtor without a fee within five 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 10 days of payment.

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 will be owing after the payment is made, the receipt shall state clearly and conspicuously the balance due after payment is credited.

Copies of all receipts issued pursuant to this section shall be kept by the debt collector for three years.

(e) A debt collector shall confirm in writing to the consumer, within five business days, any debt payment schedule or settlement agreement reached regarding a consumer debt.

(f) In all communications concerning a consumer debt, the debt collector shall list a telephone number for which a call to that number shall be either: (1) answered by a natural person qualified to address consumer inquiries concerning communications the debt collection agency has with consumers; or (2) routed to such a natural person within 60 seconds after the call is linked to the collector's telephone line for such number and that shall be answered by such natural person within 60 seconds after the call is routed.

The required call-back number shall be answered by a natural person during all times when the collector conducts business with consumers.

(g) Notwithstanding [cite contrary state law], a consumer may 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.

(h) Notwithstanding [any contrary law of more general applicability], a debt collector shall not seek a warrant for the arrest of a debtor [or other applicable term such as “capias” or “body attachment”] for any action or failure to act that arises or relates to a civil lawsuit, unless the debtor has committed a violation of the Criminal Code.

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.¹³ 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 3(b) 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 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 prohibits debt collectors from seeking a warrant for the arrest of the consumer that arises out of a civil collection lawsuit. In most cases, the arrest warrant is not issued simply because the consumer owes a debt, but because the consumer has failed to show up to a court-mandated hearing, such as the debtor's examination in which the debtor is required to reveal his or her assets to pay a judgment. Despite being ostensibly issued as a form of civil contempt, such arrest warrants are often actually used as an in terrorem tactic by collectors to coerce payment. The Act prohibits collectors from seeking these warrants; however, the court always has the inherent authority to issue them.

Section 1-105. Limitations on Actions for Consumer Debts

(a) Any action for the collection of a consumer debt shall be commenced within three years of the accrual of the cause, which shall be the earlier of the date of charge-off, placement for collection, or 180 days after the last regular payment. This period shall apply whether 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 paragraph shall apply to all claims brought after the date of enactment of this Act.

(b) Any waiver by any consumer of any protection provided by or any right of the consumer under this section is void, and may not be enforced by any Federal or State court or any other person.

(c) If a consumer debt has been charged-off or placed for collection, or there has not been any payment on the debt for over 180 days, any subsequent payment toward the debt shall not extend the three-year limitations period, nor shall it bar the consumer from asserting any defenses to the collection of a consumer debt. If a payment on a defaulted or charged-off debt completely cures the default and pays off any

delinquency, then a new cause of action may accrue upon a subsequent default or charge-off.

(d) When the period within which an action may be commenced under this section has expired, the right to collect the consumer debt is extinguished as well as the remedy. No person shall attempt to collect a consumer debt after the three-year period described in paragraph (a) has expired.

(e) 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. This provision does not preclude the consumer's right to raise a defense based upon the reasonable value of services provided.

Commentary

This section provides a single uniform, reasonable statute of limitations for consumer debts. This statute of limitations cannot be voluntarily given up or "waived" by a consumer, preventing boilerplate language in consumer form contracts which would deprive consumers of this important protection.

The section would extinguish the debt after the statute of limitation passes. This would prevent any collection activities for stale debt. A less protective option would be to require that collectors pursuing debts beyond the statute of limitations should be required to disclose to the consumer that the debt is time barred and the consumer cannot be sued:

Alternative Section 5(d)

(d) Any person attempting to collect a consumer debt after the three-year period described in paragraph (a) must clearly and conspicuously disclose the following:

- (i) that the statute of limitations has passed on the debt; and*
- (ii) the consumer cannot be sued on the debt.*

Indeed, the FTC has suggested that collectors are required to make disclosures such as the ones above when dunning on a time-barred debt to prevent creating a misleading impression in violation of the FDCPA.¹⁴

This section also prohibits the practice of deeming partial payment as restarting the clock on the statute of limitations or reviving the legal viability of a debt that was beyond the statute of limitations. The law would prohibit the use of the account stated cause of action to collect credit card debts.

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 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 and 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 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, 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 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.

(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 30 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 4 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 3(b) 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.¹⁵ 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.¹⁶ 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 with the clerk of the 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, in clear type of no less than twelve-point in size, in both English and Spanish:

NOTICE OF LAWSUIT

(DATE)

(NAME OF COURT)

(COUNTY)

(STREET ADDRESS, ROOM NUMBER)

(CITY, STATE, ZIP CODE)

(NAME OF DEFENDANT)

(ADDRESS OF DEFENDANT)

PLAINTIFF: _____

DEFENDANT: _____

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 are permitted in the state, *e.g.*, "delivered by a sheriff's deputy or by certified mail"]. You should go to the court clerk's office at the above address as soon as possible to respond [in writing] to the lawsuit. 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 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 _____ 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 go to the court clerk's office listed above and bring this notice with you. 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 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.¹⁷

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.¹⁸ 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.

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;
- (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:

- (i) an affidavit by the original creditor that authenticates the attached contract of sale and exhibits, and that states the facts constituting the debt, the default in payment, the sale or assignment of the debt, and the amount due at the time of sale or assignment;
- (ii) for each subsequent assignment or sale of the debt to another entity, an affidavit authenticating the attached contract of sale and exhibits of the debt by the debt seller, completed by the seller or assignor; and
- (iii) an affidavit of a witness for the plaintiff, which includes a chain of title of the debt.

(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 year after entry of default on grounds of mistake, inadvertence, surprise or excusable neglect;
- (2) Two 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; or

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 4 and 6 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 consumer when this situation occurs, and recommended that state courts take measures to deter it.¹⁹ 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.²⁰

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 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.
- (2) compliance with Sections 3 through 6 of this Act
- (3) whether the consumer debt involved interest that exceeded [the state usury cap].

[If the state has a law governing arbitration service providers, then add:

- (4) compliance with (state arbitration service providers law)]

(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
 - (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.

While some credit card issuers have dropped collection by arbitration after the NAF scandal, at least one issuer (American Express) has not done so. 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, the plaintiff shall be entitled to interest on the judgment at a maximum rate of interest equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. No other rate of interest on the judgment shall be permitted, including the rate provided for in the contract.

(b) 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 6.

(c) If the debtor is the prevailing party in any action to collect a consumer debt, the debtor shall be entitled to collect any attorney's fees that the plaintiff would have been entitled to collect if the plaintiff had been the prevailing party.

Commentary

This section 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 allows the debt

collector an interest rate that is the same as permitted under federal law for civil judgments, 28 U.S.C. § 1961. 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 a post-judgment interest law, creditors may seek to impose the contract interest rate, which may be much higher.

This section also 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) Prior to a dispute arising, a written agreement shall not require or have 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 rights 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.

(c) 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.

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

(b) "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. With regard to a joint bank or similar account, the debtor's interest is based on the debtor's contributions to the account, as determined by the tracing rules in § 10

(c) "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.

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

(e) "Dependent" means a person who relies in whole or in significant part on the debtor for support and maintenance.

(f) "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.

(g) "Disposable 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 retirement account.

(h) "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.

(i) “Creditor” includes a party that obtains a prejudgment attachment, levy, garnishment, or other seizure of property of a debtor; a judgment creditor; or a person exercising a setoff or other self-help claim process.

(j) “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.

(k) Each person with an interest in property has his or her own right to the full exemption amount applicable to that type of property.

Section 2-104. Applicability of this Act

The exemptions of this Act shall be available to all residents of this state. 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

The following property shall be exempt.

(a) *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 the debtor’s and the debtors’ dependents’ jewelry (up to two pieces of jewelry per person), 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.

(b) *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.

(c) *Tools of the Trade.* Tools, books, instruments, 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 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.

(d) *Burial Plot.* A burial plot for the debtor or the debtor's family.

(e) Child support payments paid or payable to or on behalf of the debtor.

(f) 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.

(g) All health insurance, disability insurance, and long-term care insurance policies and medical expense accounts, and payments or benefits therefrom.

(h) 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.

(i) *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.

(j) *Annuities, pensions.*

(i) Up to \$1,500,000 in annuities, 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 per 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.

(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.

(k) Amounts in educational expense accounts and similar types of educational savings accounts not to exceed \$240,000 per beneficiary whether paid or payable.

(l) Exempt benefits and funds deposited into an account, without a dollar limitation.

(m) In addition to the funds exempt under subsection 2-105(k), ten thousand dollars (\$10,000) in cash, in a bank account, in accrued interest, in dividends, or in the loan or redemption value of a life insurance policy, or other account of the debtor. In the case of a joint account only the amount contributed by the debtor to the account in excess of this \$10,000 is available to a creditor.

(n) Proceeds from a student loan are exempt unless the creditor provided educational services to the student. Proceeds from a small business loan are exempt from preexisting debts unless the loan was intended to pay that debt.

(o) Up to \$10,000 in other funds or 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.

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

Commentary

These exemptions are written broadly often without money caps to make the exemption more self enforcing.

*Forty-three states and territories use a dollar amount to exempt household and personal possessions such as the ones listed. The mean amount these states exempt is \$5,125 and the median amount is \$4,000 with the lowest being Pennsylvania at \$300 and the highest being Texas at \$30,000. See *Property Protected in Financial Emergencies, By State*, National Consumer Law Center.*

Forty-six states and territories use a dollar amount to exempt a car. The mean amount these states exempt is \$4,587 and the median amount is \$3,362 with the highest being Kansas at \$20,000 (provided that the car is for work) and the lowest being Pennsylvania at \$300. See id.

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) A debtor's disposable earnings for any week that are less than eighty times the greater of the federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 of the United States Code or the state minimum hourly wage provided by [state minimum wage statute] in effect at the time are exempt and not subject to garnishment. This exemption shall be adjusted pro rata for any pay period other than weekly.

(b) If the debtor's disposable earnings exceed the amount provided by the preceding subsection, no more than 10% of disposable income in excess of the amount exempt under the preceding subsection shall be subject to garnishment unless the gross income of the debtor exceeds an annual rate of \$70,000, in which case no more than 15% of disposable income is subject to garnishment. The amount not subject to garnishment is exempt.

(c) The amount of a debtor's disposable income that can be garnished for the support of a person is governed by other law.

(d) 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 disposable income that is available for garnishment under the preceding subsections, then no part of the debtor's disposable earnings shall be garnished pursuant to the garnishment with lower priority.

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 first or second 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, and such a waiver 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 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 months while in the debtor's hands, 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 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:

- (i) 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;
- (ii) 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
- (iii) 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:

- (i) 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
- (ii) 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.

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.*

- (i) Upon entry of a judgment for damages, the clerk shall mail a notice to the current 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. If the current address of the judgment debtor is not available, the notice shall be mailed to the last address, and that fact shall be noted in the record as shall the nondelivery of the notice.
- (ii) At the time the creditor obtains a levy, execution, garnishment, or other remedy in connection with a judgment for damages, 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, 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 levy, execution, garnishment, or other remedy, this notice shall be included with those documents, but otherwise it shall be given by first class mail.
- (iii) 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.
- (iv) 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 exemption of property depends on its value, it is presumed to be fully exempt unless the creditor obtains a hearing and establishes that the property includes significant value in excess of the amount exempt. 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, and the court shall consider such a statement as evidence.

(d) *Relief from seizure of exempt property.* If a creditor obtains a levy, execution, garnishment, or other remedy in connection with a judgment for damages against a person, the person is entitled to a prompt hearing to claim exemptions, to contest the seizure of exempt property or seek to set aside the judgment.

(e) *Relief from seizure of necessary nonexempt property.* If a creditor obtains a levy, execution, garnishment, or other remedy against property of a person in connection with a judgment for damages, 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.

(g) *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.

(h) 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

An employee may not be discharged or disciplined because of any garnishment.

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:

(i) actual damages, including emotional distress damages;

(ii) statutory damages up to \$2000 per exempt item;

(iii) a reasonable attorney fee 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.

ENDNOTES

- ¹ See Robert Hobbs and Rick Jurgens, National Consumer Law Center, *The Debt Machine*, at 5 (July 2010), available at http://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf [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, 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), available at http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf [hereinafter NEDAP, *Debt Deception*].
- ⁴ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010) at I (Executive Summary), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf> [hereinafter “FTC, *Repairing a Broken System*”].
- ⁵ NCLC, *The Debt Machine*, at 18.
- ⁶ Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change*, A Workshop Report, at 24 (Feb. 2009).
- ⁷ NEDAP, *Debt Deception* at 2.
- ⁸ 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).
- ⁹ FTC, *Repairing a Broken System* at 24.
- ¹⁰ *Id.* at iii-iv.
- ¹¹ 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).
- ¹² See Alaska Stat. § 09.38.010, et seq.
- ¹³ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010) at 14-17.
- ¹⁴ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010), at 26.
- ¹⁵ *Danner v. Discover Bank*, 99 Ark. App. 71 (Ark. Ct. App. 2007).
- ¹⁶ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010), at iii, 17.
- ¹⁷ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010), at 8-11.
- ¹⁸ N.Y. City Civ. Ct. Unif. Rules § 208.6.
- ¹⁹ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010), at 21-22.
- ²⁰ 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.

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**Chart A: SUMMARY
OF PROPERTY PROTECTED
IN FINANCIAL EMERGENCIES, BY STATE¹**

	Wages	Home	Household Goods (HHG)	Car	Tools	Bank Account	Pensions
Model Law	80 x min. wage, 90% to \$70,000 annual, 85% if more	Median price in metro or rural area	Most HHG up to \$3000/item, & \$10,000 wildcard	\$15,000, or \$25,000 for disabled	\$30,000, \$50,000 farm	\$10,000	Up to \$1,000,000 /individual & dependents
AL	75%	\$ 5000 per spouse	\$3000	Included in HHG	Included in HHG	Included in HHG	
AK	\$2860/mo.	\$70,200, TBE ²	\$3900	\$3900	\$3640	\$1400	Yes
AZ	75% or 85% if hardship	\$150,000	\$4000	\$5000; \$10,000 disabled	\$2500 plus \$2500 farm	\$150	Yes
AR	\$25/wk	Homestead on ¼ acre in city or 80 rural acres	\$800, or \$1250 married ³	\$1200 in bankruptcy	\$750 in bankruptcy	\$200, \$500 married wild card	Yes
CA	75% or 30 x fed. min. wage, more if necessary	\$75,000; \$100,00 married; \$175,000 if 55 yrs. and low-income; \$175,000 if 65+ yrs. or disabled	\$550, up to \$21, 825 for nonhome owners	\$2725	\$7175 per spouse, includes commercial vehicle up to \$4850 per spouse	75% of wages or \$1425 to \$4300 of gov't. benefits	Yes
CO	Greater of 30 x CO min. wage, 75%, or by court	\$60,000; \$90,000 if 60+ yrs.	\$3,000	\$5,000; \$10,000 if elder	\$20,000 or \$50,00 farm	NA	Yes
CT	Greater of 40 x CT or US min. wage or 75%	\$75,000, \$125,000 for hospital debt	Necessary, \$1000 wildcard	\$3,500	Necessary tools	Rental deposit, \$ 1000 wildcard	Yes
DE	85%	None; \$125,000 in Bankr., TBE	Apparel, bedding; \$25,000 in Bankr.	None; \$15,000 car & tools in Bankr.	\$50 - 75; \$15,000 car & tools in Bankr	College Investment Plan Account	Yes
DC	75% or 30 x fed. min. wage	All	\$8,625, wildcard \$850 or \$8075 if no homestead	\$2,575	\$1625, plus \$300 desk & library	NA	Public and \$400 of private payments
FL	\$750/wk	½ acre in city, or 160	\$1,000; \$4000 wild-	\$1,000	wildcard	6 mos. exempt	Yes

¹ See National Consumer Law Center, *Collection Actions* Appx. G (2nd Ed. 2011) and William H. Brown, *Bankruptcy Exemption Manual* (2011-2012 Ed.)

² Tenancy by the entirety protects home of spouses from one spouse's creditors.

³ In re Holt, 894 F.2d 1005 (8th Cir. 1990) held that the \$500 maximum exemption in the Ark. Constitution set the ceiling for personal property. Cf. Boellner v. Clinical Study Centers, 2011 WL 66186 (Ark. 2011) where the court did not rule on the lower court's holding that the Constitutional personal property exemption set a floor, not a ceiling.

		acres, TBE	card if no homestead			wages, wildcard	
GA	75% or 30 x fed. min. wage	\$10,000; up to \$20,000 in Bankr.	\$5,000	\$3,500 in Bankr.	\$1500 in Bankr.	NA	Yes, paid treated as wages
HI	95% of \$100; 90% of next \$100; 80%	\$20,000; \$30,000 head of hsltd. or elder	Necessary furniture, appliances, books	\$2,575	Necessary tools	NA	yes
ID	75% or 30 x fed. min. wage	\$100,000	\$7500	\$7,000	\$2500	NA	yes
IL	85% or 45 x fed. min. wage	\$15,000 to \$30,000 co-owned, TBE	\$4,000 wildcard	\$7,000	\$1500	Wildcard; state college plan	Yes
IN	75% or 30 x fed. min. wage	\$17,600 or \$17,600 per spouse	\$9350 wildcard	wildcard	wildcard	\$350	Yes
IA	90% or less	Residence on ½ acre in city, or 40 acres, TBE	\$7,000	\$7,000	\$10,000	\$1000 wildcard	Yes
KS	75% or 30 x fed. min. wage	Residence on 1 acre in town, or 160 acres	Necessary household goods	\$20,000 or more if disabled	\$ 7500	NA	Yes payable, yes pubic pension paid
KY	75% or 30 x fed. min. wage	\$5,000; \$6000 in Bankr., TBE	\$3,000	\$2,500	\$300, \$3000 for farm, \$1000 office, \$2500 vehicle	\$1000 wild card in Bankr.	Yes
LA	75% or 30 x fed. min. wage	\$35, 000	household goods	\$7,500 of equity; 2d car for disabled	Tools, trailer, some livestock	NA	Yes
ME	75% or 40 x fed. min. wage	\$47,500 to \$190,000	Household goods up to \$200 per item	\$5000	\$5,000, 5 ton fishing boat, farm equipment	NA	Yes
MD	75% or \$ 145 per week	\$6,000 “wildcard”; \$11,000 in Bankr., TBE	\$1,000; \$6,000 in Bankr.	\$6,000 “wild-card”	\$5000	wildcard	Yes
MA	85% gross wages or 50 x min. wage	\$125,000 to \$1,000,000, TBE	Household goods, & wildcard \$1000 to \$6000	\$7500; \$15,000 if elder or disabled	\$5000, \$5000 stock in trade, \$1500 boat and tackle	\$2500 & wildcard	Yes
MI	60%	\$3,500, TBE	\$1,000	Business vehicle	\$1000	\$2500	Yes
MN	75% or 40 x fed. min. wage	\$360,000, or \$900,000 farm, TBE	\$9,900	\$4,400, or \$44,000 for disabled	\$10,500; \$13,000 farm implements	20 days of wages; 60 days of public benefits	Yes to \$66,000
MS	75% or 30 x fed. min. wage exempt for 30 days	\$75,000, \$150,000 if married in Bankr., \$30,000 mfg. home	\$10,000 wild card, \$50,000 for elders	Included in goods wildcard	Included in goods wildcard	Cash included in goods wildcard, bank accounts included in elder wildcard	Yes
MO	90% head of family,	\$15,000; \$5000 mfg.	\$3,000, \$600 wild-	\$3,000	\$3000	\$600 wildcard	Yes, neces-

	or 75%	home	card, \$1250 head of hsl. wildcard plus \$350 per child or disabled dependent				sary standard limits paid
MT	75% or 30 x fed. min. wage	\$250,000	\$4,500	\$2,500	\$4500, \$600 max. per item	\$500 in coop. assoc.	IRA's
NE	85% head of hshld. for 60 days; 75% or 30 x fed. min. wage	\$60,000 for head of hsl. or elder	\$1,500	\$2400 or tools of trade, \$2500 wildcard	\$2400 plus wildcard per spouse	NA	Necessary pension plans and annuities up to \$100,000 and public pensions
NV	75% or 50 x fed. min. wage	\$550,000	\$12,000, \$1000 wildcard	\$15,000 per person; one vehicle for disabled	\$10,000; \$4500 mining; \$4500 farming	wildcard	Yes, to \$500,000
NH	50 x fed. min. wage	\$100,000 & wildcard	\$3,500, wildcard of \$1000 and up to \$7000 of unused exemptions	\$4,000 & wildcard	\$5000 & wildcard	wildcard	Yes
NJ	\$48/week, or 90% if under 250% of the poverty level	None, except tenancy by entireties	\$1,000 wildcard	wildcard	wildcard	wildcard	Yes
NM	75% or 40 x fed. min. wage	\$60,000, or \$120,000 if jointly owned	Furniture & books, up to \$500 wildcard and up to \$5000 if no homestead	\$4,000 & wildcard	\$1500 & wildcard	wildcard	Yes
NY	90% or 30 x min. wage	\$75,000 to 150,000	\$5,000	\$4000, \$10,000 for disabled	\$3000	\$1000 in bank or other property	Yes, paid and payable
NC	To the extent needed	\$35,000, \$70,000 joint, \$60,000 for some elders, TBE	\$5,000 & up to \$4,000 for four dependents; up to \$5,000 wildcard for unused homestead	\$3,500 & wildcard	\$2000 & wildcard	wildcard	Yes
ND	75% or 40 x fed. min. wage & \$20/dependent	\$100,000, mfg. home	\$1,000/ hsl., \$3750 individual wildcard, \$7500 head of hsl. wildcard,	\$2950, up to \$32,000 for disabled, wildcard	\$1500, \$4500 farm equipment, wildcard	wildcard	Yes public, private up to \$200,000
OH	75% or 30 x fed. min. wage	\$53,375, \$100,000 married unlimited for medical debts, TBE	\$10,775, \$525 per item	\$ 5,350	\$1,600	\$425	Yes payable, necessary for paid

OK	75% or 30 x fed. min. wage, more for hardship	Residence and 1 acre or 160 acres not within the city	Necessary household goods	\$7,500	\$10,000	NA	Yes
OR	75% or 40 x fed. min. wage	\$40,000, \$50,000 married	\$3,000	\$3000 per person	\$5000 per person	\$400 wildcard	Yes, \$500/mo. annuity payments
PA	All with some exceptions	None except tenancy by entireties	\$300 wildcard	wildcard	wildcard	wildcard & exempt funds up to \$10,000	Yes
PR	75%	\$15,000	\$850	\$6,000 (one car)	\$300	\$500 in home-stead assoc.	Public pensions and up to \$1000/mo. private annuity
RI	\$50/wk	\$300,000 & tenancy by the entireties	\$9,600	\$12,000	\$1500	\$50 in coop. assoc., \$5000 wildcard in Bankr.	Yes
SC	All	\$53,375, or \$53,375 per spouse	\$4,275 & wildcard up to \$5350 of unused exemptions	\$5,350 & wildcard	\$1600 & wildcard	\$5,350 & wildcard	Yes
SD	80% or 40 x min. wage & \$25/dependent	Exempt	\$4,000, or \$6,000 head of hsl., wildcard	wildcard	wildcard	wildcard	Yes, up to \$1,000,000 private
TN	75% or 30 x min. wage & \$2.50/wk per dependent	\$5,000 for individual to \$50,000 if couple with child	\$10,000 wildcard	wildcard	\$1900	wildcard	Yes
TX	exempt	exempt	\$30,000 individual, \$60,000 family wildcard	wildcard	wildcard	NA	Yes
UT	75% or 30 x min. wage	\$20,000 individual, \$40,000 couple	\$1500 + appliances, food, bed, bedding	\$2,500	\$3500	NA	Reasonably necessary
VT	85% or more if needed	\$125,000, TBE	\$2,500, wildcard up to \$7000, appliances, livestock	\$2,500	\$5000, \$5000 in crops	\$700, plus wildcard	To the extent needed.
VI	90%	\$30,000	\$3,000	none.	all	NA	NA
VA	75% or 40 x min. wage	\$5,000 plus \$500 per dependant \$10,000 elder, TBE	\$5,000	\$6,000	\$10,000	NA	Yes
WA	75% or 30 x min. wage	\$125,000	\$6500, \$13,000 community, \$3000	\$3250, \$6500 community	\$10,000 each farm, tools, prof. equip-	\$200 & \$1500 wildcard cash	Yes

			wildcard, Not more than \$750/item		ment		
WV	80% or 30 x min. wage	\$5000, in Bankruptcy \$25,000, \$50,000 joint	\$8,000 & \$800 wildcard + unused homestead	\$5,000	\$3,000	wildcard	Yes
WI	80% or fed. poverty amount	\$75,000 per spouse	\$12,000 wildcard per spouse	\$4,000 per spouse + wildcard	\$15,000	\$5000 per spouse	Yes
WY	75% or 30 x min. wage	\$10,000 per occupant	\$2,000 per person	\$2,400	\$2000	NA	Yes