

CALIFORNIA PRACTICE GUIDE

ENFORCING JUDGMENTS AND DEBTS

2008 UPDATE

This Update covers another active year of case law, statutory and rules developments in the field of debt collection and enforcing judgments.

There was, of course, the usual array of federal court decisions interpreting and applying the Federal FDCPA; one of those cases creates a split of authority whether the Federal FDCPA limitations period may be equitably tolled. And a flurry of decisions resulted in a split of authority whether, in an appropriate case, the Civ.C. §47(b) litigation privilege applies as a bar to State FDCPA claims.

New California Rules of Court govern limited civil “collection cases”; among other things, the rules establish special service requirements and a deadline for obtaining a default judgment.

Additionally, the new Uniform Foreign-Country Money Judgments Recognition Act, effective January 1, 2008, replaces and expands upon the former Uniform Foreign Money-Judgments Act.

These and many other pertinent developments are summarized in this Highlights Pamphlet and treated in detail in the enclosed revision pages.

Cut-Off Date—March 15, 2008: Some of the new cases cited were not final as of our March 15, 2008 cut-off date. Therefore, be sure to check the subsequent histories before relying on them.

Thank You! We appreciate your comments and suggestions regarding this Practice Guide. *Please keep them coming!*

JUDGE ALAN M. AHART
U.S. Bankruptcy Court
Central Dist., Calif.

2008 UPDATE HIGHLIGHTS

These Highlights summarize the most significant developments affecting debt collection and enforcing judgments over the past year. References are to Chapters and paragraphs in your *California Practice Guide: Enforcing Judgments and Debts*, where the material is discussed in depth.

CHAPTER 2

LIABILITY FOR UNFAIR DEBT COLLECTION PRACTICES

Federal Fair Debt Collection Practices Act

“Debt”

- [2:9.5] **Federal criminal restitution not “debt” under Federal FDCPA:** See *Geiger v. Federal Bureau of Prisons* (CD CA 2007) 487 F.Supp.2d 1155, 1159.

“Debt collectors”

- [2:15.1] **No common law litigation immunity for attorneys:** See *Sayyed v. Wolpoff & Abramson* (4th Cir. 2007) 485 F3d 226, 230-232; *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich* (ND OH 2007) 502 F.Supp.2d 686, 697.

Limitations on debt collectors’ communications

- [2:48.1] **“Actual knowledge” of consumer’s attorney-client relationship required:** A debt collector had sufficient information to be on notice that the debtor was represented by counsel, despite the fact the attorney’s letter to the collector referenced an individual with a different first name than the debtor, where the letter contained the debtor’s address and account number and the collector’s notice to the debtor was attached. [*Tong v. Capital Management Services, Inc.* (ND CA 2007) 520 F.Supp.2d 1145, 1148]

Prohibition on harassment and abuse

- [2:77] **Repeated telephone calls:** Debt collectors violated 15 USC §1692d(5) where, in less than seven months, they called the debtor approximately 54 times at work and left approximately 24 answering machine messages, including 17 calls to the debtor or her family in one month and six calls in one day. [*Sanchez v. Client Services, Inc.* (ND CA 2007) 520 F.Supp.2d 1149, 1160-1161]

Prohibition on false or misleading representations

- [2:82b] **False statements re credit report:** A debt collection letter stating that late payments, missed payments or other defaults “may be reflected on your credit report” violated the

Federal FDCPA: The debtor's defaulted status was reported to credit bureaus before the letter was sent and the debt collector had no intention or ability to report late or missed payments or additional defaults to credit bureaus, regardless of whether the debtor paid any or all of the demanded amount. [*Fainbrun v. Southwest Credit Systems, L.P.* (ED NY 2007) 246 FRD 128, 131-132]

- [2:82c] **Letters signed by top executives:** Collection letters signed by the firm's top executives ("President of MCM" or "Executive Vice President and General Manager of Consumer Debt") violated 15 USC §1692e's broad prohibition against false and misleading representations: The executives had no involvement in collecting these debts; nor were they aware that collection letters were being sent to these particular debtors. [*Campuzano-Burgos v. Midland Credit Management* (ED PA 2007) 497 F.Supp.2d 660, 665]
- [2:82p] **Offer to settle:** A collection letter offering to settle the outstanding debt at a discount and requesting payment by cashier's check or money order, even though personal checks were acceptable for payment of the entire debt, did *not* violate the Federal FDCPA where the letter did not state that personal checks were not acceptable and the debt collector was not required to offer a discount for payment by any other means. [*Mebane v. GC Services Ltd. Partnership* (SD NY 2007) 481 F.Supp.2d 249, 252]
- [2:92.7-92.8] **Threatening unintended or unlawful action:** Letters sent by a collection agency stating it would seek information about the debtor's assets to determine further collection action if the debt was not paid violated 15 USC §1692e(5), even if the letters did not imply that legal action would be taken, where the agency had no intention of acting and had the account for four years without taking any action. [*In re Cambron* (MD AL 2007) 379 BR 371, 377-379; *see also* 12:82b]

And a collection agency's letter stating "Upon receipt of the settlement amount and clearance of funds, and if we are reporting the account, the appropriate credit bureaus will be notified that this account has been settled" violated 15 USC §1692e(5) where the debt, having been charged off more than seven years earlier, could not legally be reported and the agency never intended to report it. [*Gonzales v. Arrow Fin'l Services LLC* (SD CA 2007) 489 F.Supp.2d 1140, 1150-1152]

- [2:104.3] **False business name transmitted via caller identification device:** A debtor stated a Federal FDCPA claim against a debt collector for using a false name where the alias "Jennifer Smith" was transmitted via the debtor's telephone caller identification device, masking the fact that a debt collector was calling. [*Knoll v. Allied Interstate, Inc.* (D MN 2007) 502 F.Supp.2d 943, 948]

Right to validation notice

- [2:123.5; 2:123.17] **Contradictory language prohibited:** Collection letters advising debtors of their outstanding debt and offering a credit card to which they could transfer the debt overshadowed the required validation notice in violation of the Federal FDCPA. Although the required notices were in rectangular boxes and “This is an attempt to collect a debt” was bolded, the credit card preapproval language was in substantially larger font than the rest of the letter, the credit card logo was prominently displayed, the letters began with “Good news!” in bold font, the words “Invitation Code” followed by a unique number gave the impression the letter was an invitation for credit, and the envelope reinforced the impression of junk mail. [*Voris v. Resurgent Capital Services, L.P.* (SD CA 2007) 494 F.Supp.2d 1156, 1171-1172]

But letters sent to the debtor at the same two addresses he gave the original creditor (home and post office box), containing the same social security identifier, balance, original creditor and last payment date, and identical account and file identifiers except for the designation “A” on the first letter and “B” on the second, were *not* confusing in violation of the Federal FDCPA; they would not mislead the least sophisticated debtor into believing the debt collector was attempting to collect on two accounts. [*Guerrero v. RJM Acquisitions LLC* (9th Cir. 2007) 499 F3d 926, 934]

Statute of limitations for civil liability

- [2:143.10] **Equitable tolling?** Creating a split of authority, one court held that the Federal FDCPA statute of limitations “is subject to equitable tolling in appropriate circumstances.” [See *Somin v. Total Community Management Corp.* (ED NY 2007) 494 F.Supp.2d 153, 158]

Debt collectors’ defenses to civil liability

- [2:156.2a] **Unintended violations:** Sending dunning letters for a debt discharged in bankruptcy was deemed a “bona fide error” because the debt collector had reasonable procedures in place: a computerized search of bankruptcies (that did not reveal this bankruptcy because the account name was not the name under which the debtor declared bankruptcy); an understanding with firms that sold it debts that they would not knowingly sell discharged debts and would notify the debt collector if they later discovered the debt had been discharged or otherwise become unenforceable; the affiliate’s promise to notify the debt collector if the affiliate received a notice of discharge; and prompt cessation of attempts to collect a debt upon notification of its discharge. [*Ross v. RJM Acquisitions Funding LLC* (7th Cir. 2007) 480 F3d 493, 496-497]

State Fair Debt Collection Practices Act

Defenses to liability

- [2:244.5] **Statutory “litigation privilege” defense?** There is a split of authority whether, in an appropriate case, the Civ.C. §47(b) “litigation privilege” (¶2:383) applies as a bar to State FDCPA claims. [See *Lopez Reyes v. Kenosian & Miele, LLP* (ND CA 2007) 525 F.Supp.2d 1158, 1163-1165 (collecting cases)—State FDCPA *not exempt* from litigation privilege; *Nickoloff v. Wolpoff & Abramson, L.L.P.* (CD CA 2007) 511 F.Supp.2d 1043, 1045 (same); *Taylor v. Quall* (CD CA 2006) 458 F.Supp.2d 1065, 1067-1068 (same); compare *Butler v. Resurgence Fin’l, LLC* (CD CA 2007) 521 F.Supp.2d 1093, 1095-1097—State FDCPA *overrides* litigation privilege; *Mello v. Great Seneca Fin’l Corp.* (CD CA 2007) 526 F.Supp.2d 1024, 1030-1031 (same); *Oei v. N. Star Capital Acquisitions, LLC* (CD CA 2006) 486 F.Supp.2d 1089, 1101 (same)]

Tort Liability

Statutory litigation privilege

- [2:383] **Statements absolutely privileged:** An affidavit submitted after a state collection action was initiated in response to the debtor’s request for proof of the debt and as support for a settlement offer was protected by Civ.C. §47(b) litigation privilege. [See *Sengchanthalangsy v. Accelerated Recovery Specialists, Inc.* (SD CA 2007) 473 F.Supp.2d 1083, 1089]
- [2:383.1] **Application to prelawsuit communications:** Notwithstanding the statutory language “in” a judicial proceeding, Civ.C. §47(b) also extends to certain prelawsuit communications that were preliminary to a proposed judicial (or quasi-judicial) proceeding and relate to litigation *contemplated in good faith and under serious consideration*. [See *Action Apt. Ass’n, Inc. v. City of Santa Monica* (2007) 41 C4th 1232, 1251-1252, 63 CR3d 398, 414-415]
- [2:383.3] **Application to State FDCPA claims?** See ¶2:244.5 of these *Highlights*.

CHAPTER 3

PREJUDGMENT COLLECTION

Guarantors and Sureties

- [3:104.5] **Guarantor liability revived:** Although a guarantor’s or surety’s liability generally is discharged by payment of the debt, liability may be revived where the creditor is forced to refund a payment to a primary obligor. [See *In re SNTL Corp.* (9th Cir. BAP 2007) 380 BR 204, 213-215—creditor’s return of payment to debtor’s af-

filiates as part of preference avoidance action settlement was not “voluntary” and, thus, revived creditor’s guaranty claim against debtor for amount of payment]

Late Charges

[3:310.1] **Liquidated damages:** A promissory note’s 10% late charge provision that amounted to \$614.67 for an interest-only installment and \$77,614.67 for the final balloon payment was not a reasonable estimate of lender’s actual administrative costs. [*Poseidon Develop., Inc. v. Woodland Lane Estates, LLC* (2007) 152 CA4th 1106, 1115-1116, 62 CR3d 59, 65-66]

Uniform Fraudulent Transfer Act

[3:322.1a] **“Actual fraud” test:** A bankruptcy trustee was entitled, under California’s fraudulent conveyance statute, to avoid a transfer made pursuant to a marital settlement agreement that gave the debtor’s estranged wife \$1 million in nonexempt bank deposits and the debtor \$1.1 million in exempt pension funds. The agreement, negotiated by the debtor in anticipation of a large judgment against him and that stripped him of nonexempt funds that could have been used to satisfy the judgment, was made with actual intent to hinder, delay or defraud creditors, and circumstantial evidence supported five “badges of fraud.” [*In re Beverly* (9th Cir. BAP 2007) 374 BR 221, 236-238]

[3:325.3] Likewise, the ex-wife could not assert a “good faith for reasonably equivalent value” defense to the fraudulent transfer claim where she was fully aware at the time of the marital settlement agreement transfers that her former husband structured the agreement to strip himself of nonexempt funds that could be used to satisfy a large judgment expected to be entered against him. [*In re Beverly*, supra, 374 BR at 239-240]

Filing Superior Court Limited Civil Cases

[3:396.1-396.3; 3:396.5; 3:396.10] **Special rules for limited civil “collection cases”:** Special Rules of Court that took effect July 1, 2007 govern “collection cases,” defined as actions for “recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney fees, arising from a transaction in which property, services, or money was acquired on credit.” [CRC 3.740(a)]

These rules establish service requirements for complaints in a “collection case.” [CRC 3.740(d)] “Collection cases” are exempt from the CRC 3.110(b) time-for-service requirement and “fast track”/case management rules applicable to general civil cases (CRC 3.712-3.715 and 3.721-3.730) unless defendant files a responsive pleading. [CRC 3.740(c); see CRC 3.712(d), 3.721]

Additionally, the rules impose a deadline for obtaining a default judgment; failure to comply exposes plaintiff to a potential sanctions

penalty. [CRC 3.740(f)] And where the plaintiff or other party seeking affirmative relief in a “collection case” files a notice of settlement under CRC 3.1385, including a conditional settlement, the court must vacate all hearing, case management conference and trial dates. [CRC 3.741]

[3:412.5] **Stipulation to judgment bars subsequent malicious prosecution action:** Compare *Siebel v. Mittlesteadt* (2007) 41 C4th 735, 743, 62 CR3d 155, 161—postjudgment settlement dismissing pending appeals was “favorable termination” where it did not give up any portion of underlying judgment in defendant’s (malicious prosecution plaintiff’s) favor.

CHAPTER 4

PROVISIONAL REMEDIES

Exception to Attachment Requirements

[4:19] **Actions for damages pursuant to Welf. & Inst.C. §15657.5 for financial abuse of elder or dependent adult:** See new Welf. & Inst.C. §15657.01.

Renewed Application for RTAO

[4:298] **Reconsideration on court’s own motion:** A court’s inherent authority to reconsider its prior rulings on its own motion applies even when sua sponte reconsideration is prompted by a party motion filed in violation of CCP §1008. [*Marriage of Barthold* (2008) 158 CA4th 1301, 1303-1304, 70 CR3d 691, 692]

CHAPTER 5

BANKRUPTCY CONSIDERATIONS

Discharge and Dischargeability of Debts

[5:53c] **Denial of discharge:** A debtor was denied a discharge under 11 USC §727(a)(2)(A) where he had transferred his interest in \$1 million of nonexempt property to his former wife as part of a prebankruptcy marital settlement agreement. [*In re Beverly* (9th Cir. BAP 2007) 374 BR 221, 242-243, discussed at ¶3:322.1a of these Highlights]

Avoiding Powers of Bankruptcy Trustee

[5:95.20] **Guarantee claim against debtor revived after preference avoidance action settlement:** See *In re SNTL Corp.* (9th Cir. BAP 2007) 380 BR 204, 213-215, discussed at ¶3:104.5 of these Highlights.

Involuntary Bankruptcy

[5:175.17] **Constitutionality of §522(b)(3)(A) upheld:** The constitutionality of 11 USC §522(b)(3)(A), requiring that the debtor reside in a new state for 730 days prior to using that state's exemptions, has been upheld as consistent with the "uniformity clause," authorizing Congress to enact only uniform bankruptcy laws (U.S. Const. Art. 1, §8). [*In re Urban* (9th Cir. BAP 2007) 375 BR 882, 891]

[5:216.1] **Court-ordered joinder deadline:** Although joinder is generally allowed any time before an order for relief or a dismissal order has been entered (11 USC §303(c)), this merely sets an outside limit for qualifying creditors to join an involuntary petition. The court may impose an earlier joinder deadline based upon its case management authority. [*In re DSC, Inc.* (6th Cir. 2007) 486 F3d 940, 947-948]

Debtor's right to damages if petition dismissed

- [5:275.10] **Against one or more petitioners:** Liability for costs and attorney fees under 11 USC §303(i)(1) is joint and several. And, unless the court specifically apportions the award, a petitioner may seek contribution from other jointly and severally liable petitioners not joined in the debtor's motion. [*In re Maple-Whitworth, Inc.* (9th Cir. BAP 2007) 375 BR 558, 568-570]
- [5:276-276a] **Applicable to abstention dismissals; no set-off by petitioning creditor:** The court has discretion to award fees and costs under 11 USC §303(i)(1) where it determines suspension of all proceedings or dismissal of the case would better serve the interests of both the debtor and creditors (11 USC §305(a); *see* ¶5:292 *ff.*). [See *In re Macke Int'l Trade, Inc.* (9th Cir. BAP 2007) 370 BR 236, 248, 253]

And, according to the weight of authority, a creditor's prepetition claim against the debtor may not be offset against the debtor's §303(i) fees and costs award. [*In re Macke Int'l Trade, Inc.*, *supra*, 370 BR at 255-256]

CHAPTER 6

ENFORCEMENT OF JUDGMENTS

CHAPTER 6A

PRELIMINARY CONSIDERATIONS

Enforcing Federal Court Money Judgments

[6:3.1] **State EJM procedures applicable to proceedings supplementary to and in aid of judgment:** See *Carnes v. Zamani* (9th Cir. 2007) 488 F3d 1057, 1060—EJM applied to motion in federal court in California for attorney fees incurred in enforcing judgment.

ment in diversity case as supplementary proceeding where no federal statute applied.

Renewal of Judgment

[6:75.5] **Continuing jurisdiction to effectuate renewal:** See *Goldman v. Simpson* (2008) 160 CA4th 255, 263-264, 72 CR3d 729, 734-735—court that entered original judgment had continuing jurisdiction to enforce judgment through statutory renewal procedure even though debtor had moved out of state.

[6:79] **Motion to vacate renewed judgment:** See *Goldman v. Simpson*, supra, 160 CA4th at 261, 72 CR3d at 732-733—motion to vacate renewal filed almost six months after service of renewal motion was untimely.

Statute of limitations for independent action on judgment

- [6:99.1] **Stipulated judgments:** A stipulated judgment is generally final when entered. Thus, the 10-year statute of limitations for an independent action on a judgment runs from the date the court enters the stipulated judgment, rather than from the time the appeal period has expired, *unless* the parties agreed to the stipulated judgment to facilitate an appeal. [*Cadle Co. II, Inc. v. Sundance Fin'l, Inc.* (2007) 154 CA4th 622, 624, 64 CR3d 824, 826]

CHAPTER 6D

ENFORCEMENT OF JUDGMENT BY WRIT OF EXECUTION

“Turnover” Orders in Aid of Execution

[6:360a] **Not applicable to third parties:** A CCP §699.040 turnover order may only be directed to the judgment debtor; it cannot require third parties to transfer property to the levying officer. [*Office Depot, Inc. v. Zuccarini* (ND CA 2007) 488 F.Supp.2d 920, 922]

CHAPTER 6E

PROPERTY EXEMPT FROM ENFORCEMENT OF MONEY JUDGMENTS

Specific Exempt Property

[6:973.5] **Annuity:** An annuity was not exempt under CCP §704.115(a)(3) as a tax-qualified plan where the annuity was assignable by the debtor, the single premium was fixed, and the debtor's lump-sum premium payment exceeded the amount allowed by the Internal Revenue Code. [*In re Simpson* (9th Cir. 2007) 366 BR 64, 75-76]

[6:980.4] **ERISA preemption; statutory exceptions under MVRA:** The Mandatory Victims Restitution Act of 1996 (MVRA, 18 USC §3663A) authorizes the enforcement of restitution orders against retirement plan benefits notwithstanding ERISA’s anti-alienation provision. The government can *immediately* garnish the corpus of a debtor’s retirement plan (rather than obtain postretirement payments) *only if* the debtor is allowed under the retirement plan terms to demand a lump-sum payment at the present time. The government’s ability to cash out a debtor’s ERISA retirement plan may be limited in some circumstances where ERISA requires that lump-sum payments be made with spousal consent. [*United States v. Novak* (9th Cir. 2007) 476 F3d 1041, 1049, 1063-1064 (remanded to determine terms of debtor’s retirement plan)]

Property Exempt Without Making Claim

[6:1006] **Payable private disability payments:** A civil judgment for unpaid disability payments was exempt from execution by the U.S. where the government used state law to create and enforce its judgment lien. [*Paul Revere Ins. Group v. United States* (9th Cir. 2007) 500 F3d 957, 960-962]

Homestead Exemption

[6:1029] **Limited exemption where separated/former spouse controls homestead:** Where the judgment debtor is not currently residing in the residence, but his or her separated or former spouse continues to reside in or exercise control over possession of the homestead, the judgment debtor is entitled to an exemption until (1) entry of judgment or other legally enforceable agreement dividing the parties’ community property or (2) a later time as specified by court order. [New CCP §704.720(d) (applicable notwithstanding that CCP §704.710(d) excludes from definition of “spouse” legally separated persons who do not reside together in the same dwelling)]

However, nothing in CCP §704.720 entitles the separated or divorced judgment debtor to more than one exempt homestead. [CCP §704.720(d)]

CHAPTER 6G

SPECIAL ENFORCEMENT PROCEDURES

Judgment Debtor Examinations

[6:1301.2] **Motion to quash subpoena of documents:** See *Lee v. Swansboro Country Property Owners Ass’n* (2007) 151 CA4th 575, 582-583, 59 CR3d 924, 928-929—motion to quash subpoena filed seven days before debtor’s examination that did not raise new issues and gave judgment creditor ample time to respond was timely and “reasonably made” under CCP §1987.1.

Creditors Suit

[6:1394] **Where third person uncooperative:** A former wife could pursue a creditor's suit to enforce her ex-husband's right to impose a constructive trust where claims that the ex-husband and his sister induced their mother to change her will to allow the ex-husband to avoid support obligations were sufficient to allege a constructive trust. [*Cabral v. Soares* (2007) 157 CA4th 1234, 1242-1243, 69 CR3d 242, 249-250]

Enforcement Against Beneficiary's Trust Interests

[6:1579] **Exceptions to spendthrift trust limitation:** Compare *Young v. McCoy* (2007) 147 CA4th 1078, 1083-1084, 54 CR3d 847, 851-852—court not authorized by Prob.C. §15305.5(c) to order trustee to invade discretionary trust assets to pay restitution judgment creditor after trustee permissibly exercised its discretion to make no payments to trust beneficiary.

CHAPTER 6J

ENFORCEMENT OF SISTER STATE AND FOREIGN JUDGMENTS

Foreign-Country Money Judgments

[6:1850-1864] **Uniform Foreign-Country Money Judgments Recognition Act:** The Uniform Foreign-Country Money Judgments Recognition Act (new CCP §§1713-1724) is applicable to all actions commenced on or after January 1, 2008 and replaces the former Uniform Foreign Money-Judgments Recognition Act (former CCP §1713 et seq., which continues to govern actions commenced before the new Act's 1/1/08 effective). In addition to the provisions of the former Act, the new Act allocates the burden of proof for parties seeking or resisting recognition of a foreign-country judgment, provides procedures for recognition of a foreign-country judgment, and establishes a statute of limitations on an action to recognize a foreign-country judgment.

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Suite 630
Encino, CA 91436

Or, fax us at (818) 986-2180

