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CFPB Issues Time-barred Debt Collection Advisory*

On May 1, the CFPB issued an Advisory Opinion affirming that debt collectors attempting to collect on time-barred mortgage debt may violate the Fair Debt Collection Practices Act (FDCPA) and its implementing Regulation F. 88 FR 26475. The advisory opinion took effect on May 1, 2023.

The FDCPA and Regulation F prohibit a debt collector from suing or threatening to sue to collect a time-barred debt. The CFPB's Advisory Opinion focused on recent instances of debt collectors seeking to collect on time-barred mortgage loans, particularly "piggyback" second mortgages originated prior to the 2008 financial crisis which have been dormant for a number of years. The CFPB discussed how many second mortgage holders of piggyback loans charged off their defaulted loans as uncollectible and ceased communicating with the borrowers, with some selling the loans to debt buyers. However, in recent years, as home prices have increased, borrowers have begun to hear from companies that claim to own or have the right to collect on these long dormant second mortgages. Given the amount of time that has lapsed on these loans, the CFPB noted that some have likely become time-barred under State law.

The Advisory Opinion affirmed that: (1) the FDCPA and its implementing Regulation F prohibit a debt collector from suing or threatening to sue to collect a time-barred debt; and (2) this prohibition applies even if the debt collector neither knows nor should know that the debt is time-barred (in other words, strict liability). Accordingly, the CFPB stated that an FDCPA debt collector who brings or threatens to bring a state court foreclosure action to collect a time-barred mortgage debt may violate the FDCPA and Regulation F. The CFPB also noted that a broad range of non-foreclosure debt collection related activity, such as communicating with consumers about defaulted mortgages, can be covered by the FDCPA. FDCPA debt collectors undertaking such activity are subject to the other requirements and prohibitions of the FDCPA and Regulation F when collecting on this debt.

It is important to remember that although the FDCPA's coverage generally excludes a creditor collecting on its own debt, California's Rosenthal Act, California Civil Code Section 1788 *et seq.*, defines debt collectors more broadly than under federal law. This definition specifically includes persons who collect debts on their own behalf, as well as those who collect debts on behalf of others. Moreover, debt collectors as defined under Rosenthal are generally required to comply with the provisions of the federal FDCPA (with limited exceptions), in addition to the provisions of the Rosenthal Act itself. Civil Code Section 1788.17. Thus, in addition to needing to comply with the Rosenthal Act itself, financial institutions and anyone else that meets the definition of a debt collector under the Rosenthal Act, must comply with the bulk of the federal FDCPA even though they may not meet the federal definition of a debt collector. The CFPB's Advisory Opinion would therefore apply to lenders in California even if they are collecting on their own debt.

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For a more in depth discussion of the FDCPA and Rosenthal Act, please refer to Section III.K. of BCG Standard Procedures Manual #12, *Loan Workouts and Collections*. Contact Mark Aldrich at **MAldrich@ABLAWYERS.COM** or Harry Khalsa at **HKhalsa@ABLAWYERS.COM** for more information on the FDCPA.