

Legal Update

Debt Collection During and After the Pandemic: Do Certain US Legislators and Agencies Seek a Debt Collection Ice Age?

As the COVID-19 pandemic rages on, state and federal lawmakers have taken aggressive measures to protect the health and economic security of their citizens, including legislative and regulatory measures limiting or proposing to limit certain debt collection practices. On Friday, May 15, 2020, the U.S. House of Representatives passed H.R. 6800, the [Health and Economic Recovery Omnibus Emergency Solutions Act \(the "Heroes Act"\)](#). The Heroes Act is a \$3 trillion package that revives, among other things, many of the severe debt collection-related restrictions House Democrats have been pushing since the start of the pandemic.

Senate Republicans consider the Heroes Act to be "dead on arrival" in the Senate, and President Trump has promised to veto it. Despite this, the Heroes Act, combined with other federal and state debt collection proposals and emergency regulations, may inform future legislative and regulatory proposals as temporary financial services relief programs come to an end and the Consumer Financial Protection Bureau ("CFPB") finalizes its rulemaking under the Fair Debt Collection Practices Act ("FDCPA"). While the Heroes Act expands and extends many protections already in place under the CARES Act, the economic fallout of the pandemic will continue for years to come. If there is another stimulus package enacted by Congress, Democrats likely will try to "cut and paste" some of the provisions from the Heroes Act into a blended bill. Additionally, should Democrats gain control of the House and additional seats in the Senate this fall, they may try to usher in a debt collection "ice age" of sorts, freezing many of the types of activities debt collectors have relied on for decades. Below, we analyze the various federal and state debt collection-related actions that may offer a glimpse into the future of debt collection as we know it.

Federal Legislation

HOUSE HEROES ACT

On May 15, 2020, the House passed the Heroes Act, which contains a number of debt collection-related provisions that House Democrats have been pushing since first proposing the Take Responsibility for Workers and Families Act ([H.R. 6379](#)) in March 2020.

Eviction, Foreclosure, and Repossession Protections: Section 110203 amends the CARES Act to extend foreclosure protections to six months after the date of enactment of the Heroes Act, and imposes a moratorium on repossessions of personal property for the same period.

The section also imposes an eviction moratorium that prevents: (i) any lessor of a tenant-occupied dwelling from initiating any legal action to recover possession of the dwelling for nonpayment of rent, fees, or charges for the 12 months following enactment of the Heroes Act, or to require the tenant to vacate the property for nonpayment of rent, fees, or other charges after the end of the eviction moratorium until the expiration of a 30-day period beginning with the lessor's provision of a Notice to Vacate; and (ii) any mortgage borrower that receives a forbearance under Section 110203 from evicting a tenant solely for nonpayment of rent, fees, or charges or charging late fees, penalties, or other charges for late payment of rent during the term of the forbearance.

While the eviction provisions do not provide express relief from the tenant's underlying contractual obligation to pay rent, they have the potential for creating additional delinquent or defaulted debt subject to new FDCPA provisions to the extent that they incentivize non-payment of rent through the protections collectively offered by the Heroes Act. Moreover, when combined with the Heroes Act's FDCPA amendments described below, they have the potential for turning landlords into involuntary creditors for a large class of consumers for a substantial period of time after the current COVID-19 crisis.

Credit Reporting: Section 110401 of the Heroes Act amends the Fair Credit Reporting Act ("FCRA") to impose a moratorium on furnishing adverse information during the COVID-19 emergency period and other declared emergencies and for 120 days thereafter. The Act prohibits the furnishing of adverse consumer information that is the "result of any action or inaction" that occurred during the pandemic or other declared emergency. Additionally, consumer reporting agencies ("CRAs") are similarly prohibited from making consumer reports containing any adverse item of consumer information that is a consequence of the pandemic. This is an expansion of the existing CARES Act requirements, which requires furnishers to report borrowers as "current" if the borrower has entered into some type of "accommodation" such as a deferral, forbearance, or modification.

Section 110401 requires the CFPB to create a website for consumers to report economic hardship as a result of the pandemic or other major disaster, and the Bureau must maintain a database containing this information for CRAs to access and then delete adverse information reported during the covered period. Consumers can request deletion of adverse information that was the result of an action or inaction that took place during the covered period or 270 days after. These proposals may create challenges with respect to implementation, accuracy, and confidentiality.

Fair Debt Collection Practices:

Scope: Sections 110402 and 110601 of the Heroes Act add a new provision to the FDCPA to impose additional pandemic-related restrictions on the collection of consumer,¹ small business,² and 501(c)(3) non-profit organization debts from the period of enactment to 120 days after the end of the "incident period" for the March 13, 2020, COVID-19 emergency declaration ("FDCPA covered period"). The restrictions do not apply to residential or multi-family mortgage loans (as defined under the CARES Act), which are subject to other servicing restrictions in the Heroes Act, and apply only to debts that are or become due during the FDCPA covered period.

The pandemic-specific restrictions apply to more than just third-party debt collectors who would normally be subject to the FDCPA; for the purpose of Heroes Act amendments, the term "debt collector" means "a creditor and any other person or entity that engages in the collection of debt, including the Federal Government and a State government, irrespective of whether the applicable debt is allegedly owed to or assigned to such creditor, person, or entity" and "creditor" includes, any person "who offers or extends credit creating a debt or to whom a debt is owed [or] to whom any obligation for payment is owed." Based on the definitions and express scope expansions in Sections 110402 and 110601, their protections would apply to a

substantially broader set of debts—including business-purpose debts owed by individuals and debts owed by small business entities or non-profit organizations—than the current FDCPA’s scope of consumer-purpose debts owed by natural persons. Note that these scope expansions **only** apply with respect to the pandemic-related relief provisions being added to the FDCPA, and not to the FDCPA more broadly.

Practice Restrictions: During the FDCPA covered period, no debt collector may take or threaten to take any of the following actions with respect to consumer, small business, and non-profit debts:

- Enforce a security interest through repossession, limitation of use, or foreclosure;
- Action to deprive an individual of their liberty as a consequence of nonpayment of or nonappearance at any hearing relating to an obligation owned by a consumer; or
- Collect any debt, by way of garnishment, attachment, assignment, deduction, offset, or other seizure from: wages, income, benefits, bank prepaid or other asset accounts; or any assets of, or other amount due to, a consumer;
- Commence or continue an action to evict a consumer from real or personal property for nonpayment; or
- Disconnect or terminate service from a utility service, including electricity, natural gas, telecommunications or broadband, water, or sewer, for nonpayment.

Sections 110402 and 110601 prohibit debt collectors from adding additional interest on unpaid interest, imposing a higher rate of interest due to the nonpayment of debt, or imposing a fee for the nonpayment of debt prior to the end of the FDCPA covered period.

Notably, unlike past House debt collection proposals and certain recent state restrictions, the Heroes Act does not limit debt collectors’ communications to written communications.

Repayment Requirements: Sections 110403 and 110602 of the Heroes Act amends the FDCPA to require debt collectors to extend the time period for repayment by one payment period plus one additional payment period for each missed payment for debts arising from credit with a defined payment period. For open-end credit plans, debt collectors would be required to permit the debtor to repay under methods permitted for changing the payment requirements for credit cards subject to the CARD Act (which permit methods not less beneficial to the debtor than a 5-year amortization period or a required minimum payment that is not more than twice the percentage of the outstanding balance that was required before the change in payment). Finally, for other debt (including, but not necessarily limited to, credit without a defined term),³ debt collectors would be required to allow the consumer to repay the debt in substantially equal payments over time and to permit repayment periods at least as long as certain thresholds tiered by debt balance (12 months for balances of \$2,000 or less, 24 months for balances between \$2,001 and \$5,000, and 36 months for balances greater than \$5,000). These provisions do not preempt state laws that provide greater consumer protections.

Violations and Invalidity of Arbitration Agreements for Defined Disputes: Persons violating the new FDCPA provisions would be subject to liability as though they were debt collectors under the FDCPA in an amount equal to 10 times the liability that would otherwise apply (*i.e.*, actual damages, statutory damages of up to \$1,000 in an individual action and up to the lesser of \$500,000 or 1% of the net worth of the debt collector in class actions, and attorney’s fees and costs). Notably, for violations and disputes arising out of Sections 110402 and 110601, pre-dispute arbitration agreements and joint-action waivers *are not valid or enforceable*.

Credit Facility: Sections 110404 and 110603 also amend the FDCPA by instructing the Board of Governors of the Federal Reserve to establish a credit facility to make long-term, low-cost loans to debt collectors as a way to temporarily compensate them for losses due to forbearances. Accordingly, debt collectors would not have

to begin making payment on the loans until consumers begin to resume payment on their debts. This credit facility would only apply to debt collectors, as defined in the Heroes Act.

Every debt collector that makes use of such credit facility is required to establish a forbearance program for debts available during the FDCPA covered period, effectively creating a forbearance program for non-mortgage debts. Upon request of a consumer who is experiencing COVID-19-induced hardship, the debt collector is required to grant forbearance and is prohibited from imposing fees, penalties or interest in connection with such forbearance, beyond the amounts of such fees or interest scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the loan contract (though the protections against additional fees, charges, or interest are largely duplicative of the protections already provided by Section 110401 during the covered period, even absent a forbearance).

Student Loans: The Heroes Act contains a number of provisions regarding private education loans that supplement existing CARES Act student loan requirements. With respect to debt collection, Section 110501 requires the holders of private education loans to halt all involuntary collection related to the loan until the end of September 2021. Section 110502 prohibits private education loan collectors and creditors from pressuring borrowers to apply student loan relief payments to their private education loans, and makes such actions a violation of the CFPB's prohibition on unfair, deceptive, and abusive acts and practices.

SENATE PROPOSALS

On April 21, 2020, Senators Elizabeth Warren (D-Mass.) and Sherrod Brown (D-Ohio) [published](#) a post to Medium with six proposals to provide immediate relief to consumers amid the pandemic. The Senators are pushing for the proposals to be included in the next aid package. The proposals include, among others:

1. Preventing debt collectors from collecting stimulus payments from consumers;
2. Allowing consumers to put a "pause" on all debt payments with no accrued interest, late fees, or other penalties for nonpayment of a debt, providing additional time to catch up on the missed payments, and prohibiting debt collectors from using "predatory and intrusive" measures to collect a debt;
3. Ensuring consumers do not take an "unfair hit" to their credit due to negative entries on their credit reports during the crisis; and
4. Broadly canceling student loan debt and extending the CARES Act protections for all student loan borrowers and allowing all borrowers to suspend payments without fees or consequences, halting wage garnishment and other involuntary debt collection, and expanding loan modification and affordable repayment options.

The Senators' proposals mirror some of the recent executive and regulatory measures taken by states.

Example State Restrictions and Approaches on Debt Collection During the Pandemic

Over the past two months, several states have introduced various temporary debt collection restrictions, either through executive order or through legislative action. These actions fall on a broad spectrum, from limiting nearly all debt collection activities, to recommending debt collectors re-consider how they communicate with borrowers in light of the pandemic, to proactively encouraging more communications with borrowers to offer assistance. These actions have further complicated the work of debt collectors and, in at least one case, have been subject to legal scrutiny. Below, we discuss a few state restrictions.

On one extreme, **Nevada** issued an [emergency directive](#) deeming all Nevada licensed and certificate-holding collection agencies under Nevada Revised Statutes Chapter 649 *and* all out-of-state collection efforts with Nevada consumer and residents to be "non-essential businesses," effectively prohibiting

debt collection activities through May 15, 2020. This included collection activities, whether in-person or not, and regardless of whether the collection activities could be conducted in compliance with the “essential business” limitations by, for example, involving calls, emails, or letters initiated from a collection agency’s employee working from home or as part of an on-going automated script. However, when pressed, the Nevada Department of Business & Industry later [clarified](#) that if a consumer wants to pay, collection agencies may accept payment, but the consumer should have the choice to pause the collection. The Department also stated that collectors should not be charging for late or missed payments. Debt collectors in Nevada are now required to follow mandatory safety measures when resuming activities as part of Nevada’s “phase one” re-opening.

On March 26, 2020, **Massachusetts** Attorney General Maura Healy issued [940 CMR 35.00](#), the “Unfair and Deceptive Debt Collection Practices During the State of Emergency Caused by COVID-19” (“Massachusetts Emergency Regulations”) restricting certain debt collection activities and most outbound phone communications. The Massachusetts Emergency Regulations apply to creditors and debt collectors, which includes first- and third-party debt collectors, but do not apply to attempts to collect on mortgage loan debt or rent. Under the Massachusetts Emergency Regulations, it is an unfair or deceptive practice for any creditor or debt collector to, among other things, initiate, file, or threaten to file a new collection lawsuit; visit or threaten to visit the home or employer of a debtor; or threaten to initiate or act upon any legal or equitable remedy for the garnishment of wages or the repossession of any vehicle. It is also an unfair or deceptive practice for any debt collector to initiate a communication with any debtor via telephone, either in person or by recorded audio message, unless the debtor initiated communications to the debt collector. This prohibition does not apply to text messages or emails, effectively restricting all outbound verbal debt collection communications. On April 7, 2020, **Washington, DC** Attorney General Karl A. Racine announced nearly identical protections. However, the DC prohibitions on debt collection communications extends to written or electronic communications with borrowers, including text messages and emails.

The Massachusetts Emergency Regulations, representing one of the most restrictive approaches to debt collection in the pandemic, were swiftly challenged in court. On May 6, 2020, Massachusetts U.S. District Court Judge Richard Stearns entered a [temporary restraining order](#) enjoining the Massachusetts Attorney General from enforcing Sections 35.03 and 35.04 of the Massachusetts Emergency Regulations. Section 35.03 bars debt collectors from seeking legal recourse on any matter involving a debt and Section 35.04 bans telephonic communications initiated by debt collectors. The court found that debt collection outbound calls are commercial speech and thus protected by the First Amendment. The court also found that the Regulation is redundant of existing state and federal law (*e.g.*, the Federal Fair Debt Collection Practices Act) and does not “add[] anything to [consumer’s] protections that existing comprehensive scheme of law and regulation already affords to debtors, other than an unconstitutional ban on one form of communication.” Separately, the Massachusetts legislature has been considering proposed legislation that would, among other things, restrict communications with any consumer or any member of their household to collect a debt, other than in writing. It remains to be seen whether the other state restrictions will be similarly challenged.

Wisconsin, on the other hand, took a less restrictive approach. On April 13, 2020, the Wisconsin Department of Financial Institutions issued [Emergency Guidance](#) on prohibited debt collection practices for consumer credit transactions during the pandemic. Although the Wisconsin Emergency Guidance intentionally does not delineate between permitted and prohibited communications, the guidance indicates that communications with debtors will be viewed in the context of the pandemic. Per the guidance, “typical” or “customary” communication practices by debt collectors under normal conditions may be deemed harassment under the Wisconsin Consumer Act in light of the pandemic. As an example,

“telephone communications are far too vital to be wasted on futile debt-collection calls—a practice that leads people to ignore calls from unfamiliar numbers, missing some that may be critical.” The Wisconsin Emergency Guidance also distinguishes between “[s]olicited follow-up communication” from “unsolicited threats to sue” and “calls made in a good faith effort to compromise a debt” from “efforts to be the ‘squeakiest wheel’ about a debtor’s creditors.”

Finally, **Illinois** is encouraging debt collectors to proactively reach out to consumers to assist them during the pandemic. On April 14, 2020, the Illinois Department of Financial and Professional Regulation issued [“COVID-19 Best Practices”](#) directed to consumer credit licensees. The “Best Practices” includes expectations that during the crisis, licensees will work proactively and be flexible with borrowers. Illinois recommends an increase in communications with consumers and proactive outreach in order to assist borrowers in finding alternative payment arrangements.

Industry Impact

Additional COVID-19 relief discussions continue to rapidly evolve, and it remains to be seen what additional consumer protections will ultimately be adopted. The proposals and enacted relief described above would freeze numerous typical debt collection practices, both by severely restricting outreach to borrowers and by limiting the ability of holders of loans to recover unpaid amounts or take action on unpaid debts for an extended period of time. These restrictions may also require debt collectors and servicers to revise existing borrower communications, such as letters and scripts. Yet, in freezing the collection of debt in respect of the pandemic emergency, these efforts may unwittingly freeze the availability of credit.

While the Heroes Act contemplates some compensation for losses incurred as a result of limiting debt collection activities, state restrictions do not. Moreover, the House provisions would not necessarily align the amount or timing of receipts with those that would otherwise be achieved through application of normal collection approaches. Moreover, while payments received on the back end might compensate holders in part, they may not have satisfied holders’ broader commercial requirements tied to the receipt of payments, such as contractual commitments and default provisions triggered upon loan delinquency or default rates exceeding agreed-on limits. Overall, the bills provide insight into the types of FDCPA changes that many in Congress and the states may like to implement over the short or long term, particularly in the event of national emergencies.

These federal and state debt collection-related measures are part of an evolving COVID-19 government response. For information on other regulatory developments related to the pandemic, please visit our [COVID-19 Portal](#).

If you wish to receive regular updates on the range of the complex issues confronting businesses in the face of the novel coronavirus, please [subscribe](#) to our COVID-19 “Special Interest” mailing list.

And for any legal questions related to this pandemic, please contact the authors of this article or Mayer Brown’s COVID-19 Core Response Team at FW-SIG-COVID-19-Core-Response-Team@mayerbrown.com.

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Endnotes

- ¹ “Consumer” means, “any natural person obligated or allegedly obligated to pay any debt.” 15 U.S.C. § 1692a(3). The FDCPA is currently limited to consumer-purpose debts through its definition of “debt” as being limited to certain obligations arising out of transactions for “for personal, family, or household purposes,” but the current definition of “debt” is displaced, for the purposes of the Heroes Act provisions, by a new definition of “debt” that is not so limited. As a result, the Heroes Act provisions would appear to apply to debts owed by natural persons, whether or not such debts were incurred for consumer or business purposes.
- ² “Small business” takes the same meaning as “small business concern” under the Small Business Act. Importing this particular definition of small business implicates a substantial regulatory regime administered by the Small Business Administration (“SBA”) regarding size thresholds and associated calculation methodologies, affiliation rules, and other substantive standards that have proven challenging for parties not otherwise familiar with SBA financial assistance programs to implement in short order in other COVID-19 relief efforts, such as the SBA’s Paycheck Protection Program and, to an extent, the Federal Reserve’s Main Street Lending Program (which incorporated, among other standards, the SBA’s affiliation rules). In practice, this may mean that debt collectors would face the choice of developing otherwise-unnecessary expertise in SBA requirements rapidly or applying Heroes Act protections to a much broader set of businesses in order to stay away from the gray area in determining whether a particular obligor is a “small business” (a determination debt collectors may not be able to make using information typically available to them in the first place).
- ³ As currently drafted, there may be ambiguity as to the rules applicable to debt with a defined period arising from a non-credit transaction, such as a lease payable in up-front monthly installments. It is possible that such debt could be governed by the terms applicable to credit with a definite term, but the literal

text of the Heroes Act would appear to subject such debt to the rules applicable to credit without a definite term (since that is the ultimate catch-all bucket), notwithstanding that many leases will have defined terms.

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