COLLECTOR'S ink

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Data privacy laws:
Is your business ready for what's coming?

CAC 102ND ANNUAL CONFERENCE
OCTOBER 7-8, 2019

THE GARLAND HOTEL – NORTH HOLLYWOOD, CA

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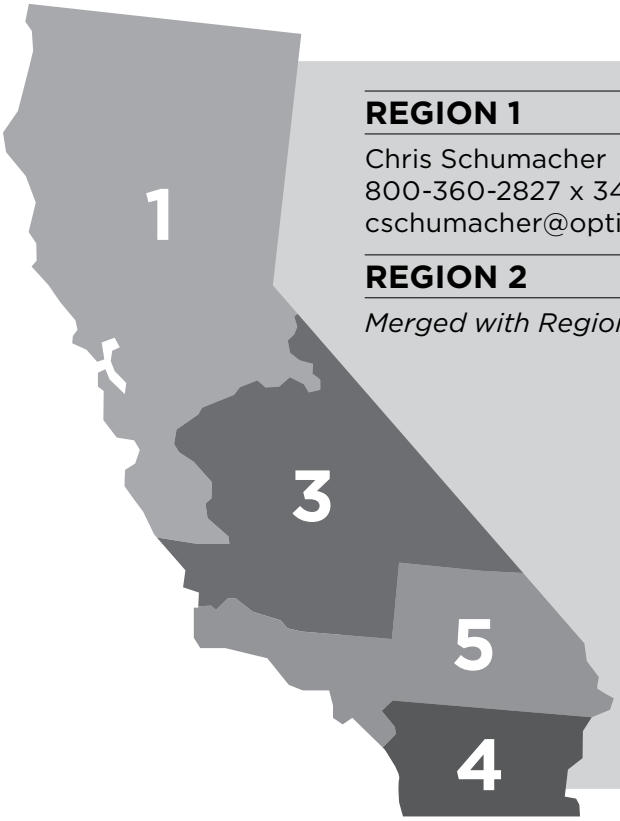

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CAC
California Association Of Collectors, Inc.™
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The Association of Collection Professionals in California

Excitement for what's to come

Courtney Reynaud
President

As my year as CAC president is coming to a close, I find myself reflecting on this past year with fondness and excitement for what's to come.

With the conclusion of this year's Legislative session, I also find myself considering the amazing feats that the association and its members have achieved this year. The association has managed to pull off some major successes, in spite of the interesting political and legislative climate here in California.

CAC successfully introduced its Credit Repair Bill (AB 699) and continues to prepare that bill for a vote in 2020. We also have had success in opposing Senator Wieckowski's collection agency licensing bill. That bill would impose business-killing restrictions and other unnecessary and unworkable requirements upon collection agencies operating in California. Based on the efforts of CAC, this bill did not come up for hearing and was extended into a two-year bill. These are incredible successes for the members of CAC.

Over the past year, I have seen first-hand, the hard work and tireless nature of the Legislative Committee. CAC's legislative chair, Cindy Yaklin, has been integral in the successes and wins of the association. Without her input and support, along with CAC's lobbyist, Cliff Berg, and General Counsel, Tom Griffin, we would not be where we are today. Thank you to all the members who tirelessly serve on the Legislative Committee; while you work behind the scenes, the association and its members would not be where we are today without each of you.

While we are on the topic of CAC successes, CAC's Executive Director, Kim Andosca, and the entire AMG staff have been incredible and have been fundamental to our successes this past year and in prior years.

Also, I welcome our new PAC Chair, Joei Conwell. Many of you will be meeting with, and hearing from, Joei in the coming months and I implore you to answer her calls and consider giving to CAC's PAC. We would not have achieved any of our legislative successes without the much-needed donations from members to CAC's PAC.

The issues that we are facing as an industry are massive and we don't have the time to sit on the sidelines and wait. As an industry, we are in the midst of ground breaking and all-encompassing regulatory change. Right now, CAC and ACA members are dealing with an influx of form letters and CRA direct disputes that are inundating staff and are undermining the spirit of the real consumer dispute process; the FCC and its handling of the cellular telephone database, improper call blocking and mislabeling of legitimate business calls; the TCPA and the definition of an ATDS; recent legislation and the TRACED act; and most importantly, the CFPB's Proposed Rules and the rule making process. This list identifies just a few of the issues that we are facing as an industry.

There is no tougher place to do business across the nation than right here in California. You are not alone! Here in the Golden State, we have the most aggressive legislature nationwide, which is made up of a democratic supermajority that does not generally support the business community. During my time on the Executive Committee for CAC and on the Legislative Committee, I have learned that ***it is possible to make a difference*** in our California political climate. When CAC members meet and speak with their legislators, we change minds and opinions of those legislators. By putting a positive face to their image of "big bad debt collectors", we are consistently successful in moving our California legislators to our side of the fence.

Although the philosophies of the accounts receivable industry do not typically align with the philosophies of some of our more progressive democrat leaders, there are many pro-business democrats that are willing to support the business community and the accounts receivable industry. Now more than ever, it is very important for every member to reach across the aisle and capture the support of these pro-business democratic leaders at the state and national level so that we can continue to grow and thrive as an industry.

I implore each of you to donate to CAC's PAC, attend CAC's Legislative Day in Sacramento, attend and participate at CAC's Annual Conference and to consider serving on a CAC committee or on the Board of Directors…I promise you will not regret participating! ink

Photo by StockSnap from Pixabay

Data privacy laws: Is your business ready for what's coming?

By Casey Stanley – VP, Product Management and Marketing for Ontario Systems

On July 11 in Washington, D.C., the U.S. Chamber of Commerce hosted #DataDoneRight, a one-day summit highlighting the policy issues surrounding businesses' use of consumer data. It was an engaging, eye-opening event that drew together a variety of stakeholders and speakers.

The day's presentations offered many important takeaways, but the bottom line was clear. If your business or customers rely on consumer data to provide good service, make strategic decisions, and ultimately make a profit, you should be focused on preparing for data privacy legislation that's heading your way.

As a member of the Chamber's Technology Engagement Center (C_TEC) and on behalf of Ontario Systems, I've had the distinct privilege of helping develop the Chamber's proposed federal legislation addressing the need for a national data privacy framework. We at Ontario Systems understand that the businesses in the industries we serve are passionate about protecting consumer data, while at the same time are dedicated to providing data-driven innovation. Working toward establishing appropriate rules, as well as sufficient time to implement those rules is of utmost importance, thus we jumped at the chance to represent our industries to ensure their voice is heard in the hopes of preventing a far more painful scenario: a tsunami of conflicting state laws that could overwhelm businesses and upend our digital economy.

Why Is a National Regulatory Framework in Businesses' Best Interest?

In 2018, California was the first state to pass sweeping data privacy laws (the California Consumer Privacy Act, or CCPA). As of February 2019, 11 more states had introduced their own data privacy legislation. In the absence of comprehensive federal law (and with no promising signs that Congress will act soon), more and more state legislatures will be forced to address this issue.

A patchwork of 50 state laws will not only create mass confusion among consumers and businesses, but also hit small and midsize businesses particularly hard. Staying compliant and fighting red tape across state lines will be complex, costly endeavors requiring significant resources. This new legal minefield could simultaneously create a chilling effect and open the door to countless lawsuits, thus hampering or endangering small to medium-sized enterprises' (SME) ability to conduct business.

The CCPA and the EU's General Data Protection Regulation (GDPR) are contrasting studies in data privacy legislation. In terms of how they were developed and how they're impacting businesses, both of these models offer lessons we hope lawmakers will take to heart.

The California Consumer Privacy Act (CCPA): A Blueprint for State Action?

The California Consumer Privacy Act (CCPA), which will go into effect next year, was conceived as a David vs. Goliath effort to protect consumers from Big Tech data abuses. The CCPA was developed over a short period of time and without enough business input. According to #DataDoneRight presenter and Californians for Consumer Privacy Board Chair Alastair Mactaggart, the law is largely a rebuke of two leading tech giants—whose combined 2018 revenues of $192 billion were earned, he says, "on the backs of others' data and information."

But most businesses are not tech giants, and many use customer data in helpful, important ways.

For example, #DataDoneRight attendees learned that Thompson Reuters, through responsible data sharing, has helped solve crimes such as shootings, sex trafficking, and Medicare Fraud. There are many more businesses, both B2C and B2B, who use customer data every day to make the customer experience more personalized, convenient, and valuable.

By introducing private rights of action, the CCPA has made it possible for consumers with privacy claims to sue any of these companies at will. Individual lawsuits favor lawyers over consumers, as they tie up businesses without effecting meaningful change.

Developed without input from California's diverse business community, the CCPA may have severe unintended consequences for SMEs. In addition, companies will have less than six months to update their compliance programs for the new sweeping comprehensive privacy regime. Whether forthcoming amendments will help achieve the right balance between consumer and business interests remains to be seen.

EU's General Data Protection Regulation (GDPR): A Blueprint for Federal Action?

The EU's GDPR, adopted in April 2016, reflects the distinct philosophies and needs of European businesses and consumers. It was developed over a longer period of time-based on in-depth research and wide-ranging input. The GDPR addresses both data privacy and data security, requiring customer consent regarding use of data and security measures that protect data. Unlike the CCPA, the GDPR granted businesses a period of two years to prepare compliance.

The GDPR is a comprehensive legislative framework, albeit substantially different from what U.S. legislators might come up with to drive innovation and economic growth here at home. The process that led to the GDPR was methodical, inclusive, and patient, and our legislators would do well to emulate it.

Yet even without the added complexity of patchwork laws, smaller companies with business interests in the EU bear an inordinate burden.

Larger U.S.-based firms have spent nearly $150 billion to ensure compliance with the GDPR, and Microsoft alone has assigned 1,600 engineers to the task. Unable or unwilling to bear the costs of ensuring compliance, many businesses have simply pulled out of the European market.

State and Federal Lawmakers Should Proceed with Caution

States' rush to enact data privacy legislation is driven in part by a

Photo by Markus Spiske temporausch.com from Pexels

common perception among consumers that data privacy and data security are largely the same. But privacy (preventing unauthorized or undisclosed data sharing by a business) and security (preventing data theft by outsiders) are largely separate issues.

According to a recently released data privacy report from the C_TEC group, despite a dramatic increase in data breach incidents and volumes since 2005, fraud losses have dropped from $35 billion to under $15 billion during the same period. This suggests consumers are far more affected by cybersecurity and fraud prevention measures than they are by having their data exposed.

Don't get me wrong: consumers have every reason and every right to be concerned about data privacy. But too hasty or heavy-handed an approach on the part of legislators in an attempt to ease constituents' concerns may bring significant harm to businesses, consumers, and the economy.

If Congress is to act on this issue, any legislative proposals must reflect a thorough understanding and careful consideration of all stakeholders' interests.

A Call to Action for Business Leaders: Get Ready, Get Involved

Data privacy legislation is inevitable. It's also a mission-critical issue for businesses of all sizes. Small and midsize businesses in particular have a lot of decisions to make and work to do to ensure compliance using the resources they have (or with investments they'll need to make).

I encourage you to educate yourself on the issues involved in the data privacy debate. Follow legislative developments. Go a step further, and become an influencer. Let your congressional representatives know where you stand. Remind them the General Accounting Office endorses a national data privacy law; even the FTC commissioner has publicly expressed support. This is a bipartisan issue, and federal legislation is a solution both parties can get behind.

We joined to U.S. Chamber to advocate for our clients, vendor partners, and similar businesses whose concerns need to be heard on Capitol Hill. By speaking out on behalf of a national data privacy law that benefits and protects both businesses and consumers, you can make a lasting impact. To learn more about what C_TEC is doing on data privacy and technology issues, visit www.americaninnovators.com.

This article originally appeared on the Ontario Systems Blog, which also includes other ARM-related content, and is republished here with permission. ink

California Association of Collectors honored with coveted award at ACA International Annual Convention

MINNEAPOLIS, July 23, 2019 — In recognizing outstanding organizations and individuals who have demonstrated excellence in the accounts receivable management industry, ACA International presented the California Association of Collectors (CAC) with the All In™ Award for significant work advocating on behalf of the industry. The award was presented during ACA International's 2019 Convention & Expo in San Diego.

Through the All In™ program, members document and share information they collect while advocating within state capitols and on Capitol Hill as part of ACA International's annual Washington Insights Fly-In.

"As a world-class trade association representing the accounts receivable management industry, ACA international relies heavily on the volunteer spirit and dedication of its state units and their members," said Mark Neeb, ACA International's CEO. "Our annual awards celebration is aimed at recognizing association members and state units that have embraced our mission to educate, advocate and promote the accounts receivable management industry as a necessary and vital part of a healthy economy. The California Association of Collectors and its members embody all of these qualities and represent the best of the industry."

The CAC has been heavily engaged in state activity over the past 18 months to include important work directed at combatting mass robo-dispute letters. Golden State members are also credited with working alongside a coalition of industry representatives to amend the California Consumer Privacy Act.

ACA International (ACA), the association of credit and collection professionals, is the largest membership organization in the accounts receivable management industry. Founded in 1939, ACA brings together third-party collection agencies, law firms, asset buying companies, creditors and vendor affiliates, representing tens of thousands of industry professionals. ACA produces a wide variety of products, services and publications, including educational and compliance-related information; and articulates the value of the credit and collection industry to businesses, policymakers and consumers. www.acainternational.org. ink

CALIFORNIA ASSOCIATION OF COLLECTORS

CAC 102ND ANNUAL CONFERENCE & EXPO

The CAC 2019 Convention will be held October 7-8, 2019, at The Garland Hotel, an urban oasis. The hotel is very close to Universal City attractions and the Burbank Airport. This event is designed to provide a platform for education, information, and networking opportunities.

The Garland Hotel, an urban oasis!
Bright sun pours in from floor to ceiling windows. An open fireplace warms cool California nights. Artisanal cocktails and farm fresh eats await your request. Welcoming and warm, yet distinctively retro, this is the California dream come true. Every design detail has been handpicked to evoke the whimsy and thoughtful aesthetic of a bygone era. This is your urban oasis, secluded within seven lush acres, yet minutes from excitement and thrills of LA and that includes Universal City and Universal Studios..

Hotel Reservations
Our special group rate is $195. To make your reservation you can call 800-238-3759, email them at reservations@thegarland.com or click on this link - The Garland Special Rate: CA Assn of Collectors 2019 Annual Conference. Be sure to ask for the CA Assn of Collectors rate. The group rate expires at 5:00pm on September 13, 2019. However, the room block set aside for CAC is subject to sellout prior to that date. We encourage you to make your reservations early.

Airport Details
There are two convenient airports near The Garland Hotel with the closest airport being Burbank. Burbank (Bob Hope) Airport is approximately 5 miles from the hotel. Los Angeles International (LAX) Airport, is approximately 25 miles from the hotel.

Schedule – Check the CAC website for last minute updates and to review the full conference schedule when it becomes available. Schedule is subject to change without notice.

MONDAY, OCTOBER 7, 2019

7:30AM-5:00PM

Registration & Information Desk

9:00AM-12:00PM

CAC Training – Data Security and Privacy 1

Data security breaches affect millions of consumers and businesses—are you prepared? Learn about notification laws and strategies for establishing effective policies and procedures, implementing essential safeguards, and practical considerations for notifying consumers in the event of a data security breach. You will take home an extensive list of resources to consider when building your own data security compliance program. (3 hours)

Presented by: Dennis Barton, The Barton Law Group

12:30PM – 1:30PM

Welcome Luncheon

Join CAC for our kickoff event with Roger Weiss, ACA International President with the Keynote address.

Presented By: Roger Weiss, President, ACA International

CONCURRENT SESSIONS

1:45PM – 3:15PM

Maximize Collections and Minimize Compliance Risk

This session will address agency marketing, best practices and tools readily available in the marketplace to grow business and reduce compliance risk.

Presented by: Michelle Jeffers & Albert Rookard, Applied Innovation

1:45PM – 3:15PM

Cybersecurity for Debt Collectors: Protecting Your Clients and Your Business.

This session will cover trends in data security, the regulator environment, financial implications, insurance implications, and more.

Presented by: Steve Turner, Sean Hoar, Patrik Johansson & Larissa Nefulda, Lewis Brisbois

3:45PM – 5:15PM

Electronic Communications with Consumers - How to Launch your Email and Text Communications Programs and Comply with the Law

The electronic communication age is here. As the CFPB is poised to allow certain electronic methods as new modes of communication with consumers, confusion abounds. How can you send emails? How do you send texts? Which regulations and statutes apply to both? What will be the E-sign law's impact on communications? This session covers steps to inform attendees as to the state of the law, how to move your letter campaigns to electronic delivery, and what must to be considered when launching an electronic communications program.

Presented by: David Kaminski, Carlson & Messer LLP

Shawn Suhr, Continental Credit Control

6:00PM – 8:00PM

PAC Dinner

Included in the Conference Registration Spouse Package. The evening will include dinner and the excitement of the horse track all while raising money for the PAC.

8:00PM - 9:30PM

Night at the Races Fundraiser

TUESDAY, OCTOBER 8, 2019

7:30AM-3:30PM

Registration & Information Desk

8:00AM – 9:00AM

Breakfast with Exhibitors & Sponsor Spotlight – Please sit with your regions.

CONCURRENT SESSIONS

9:15AM – 10:15AM

A Magical Shield in the Forest of Dread - How to Qualify for the Bona Fide Error Defense

The bona fide error defense is one of the most important yet misunderstood opportunities the FDCPA provides. It can be a complete (a.k.a., magical) shield to liability. This session educates members on how to equip themselves to use this defense.

Presented By: Dennis Barton, The Barton Law Group

9:15AM – 10:15A

Culture Matters

Creating and maintaining a culture of trust, empathy and invention can have a significant impact on the performance and stability of any organization. When your team thrives so will your company.

Presented by: Matthew Hill, InterProse

10:30AM – 11:45AM

CAC Legislation Panel

Join CACs legislative team to hear about the incredible efforts made on your behalf in 2019 and to get up-to-the-minute details on what we face in 2020. This is your chance to hear firsthand how the decisions made at the capitol will be effecting your business now and in the future.

Presented by: Cliff Berg, Governmental Advocates Inc., Tom Griffin, Hefner, Start and Marois, Cindy Yaklin, States Recovery Systems Inc.

11:45AM – 1:30PM

Annual Membership Meeting & Luncheon

1:30PM – 2:30PM

CFPB, CCPA and Other Federal Updates

Attend this session to hear about the new rules and regulations constantly being pushed out by the CFPB and CCPA. CCPA is one of the strictest compliance requirements for California businesses. Join industry experts who will offer the details you must know and strategies to comply.

Presented by: Andy Madden, ACA International, June Coleman Carlson & Messer LLP

2:45PM – 4:00PM

CAC Legal Panel

This is your opportunity to have your legal questions addressed by the experts in the collection industry. The panelists will discuss the most recent legal developments facing collection agencies, the current tactics employed by consumers' lawyers and updated regulatory matters.

Presented by: Tom Griffin, Hefner, Stark, and Marois, June Coleman, Carlson & Messer LLP,

Amanda Griffith, Berman, Berman, Berman Scheinder & Lowary LLP, Stephen Turner, Lewis

Brisbois Bisgaard & Smith LLP, Llyod Dix, Dix & Associates

5:00PM – 7:00PM

Annual Installation, Reception & Foundation Essay Contest

9:30AM – 11:00PM

President's Toast

CAC
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CALIFORNIA ASSOCIATION OF COLLECTORS

CAC 102ND ANNUAL CONFERENCE & EXPO

October 7-8, 2019 • The Garland Hotel, 4222 Vineland Avenue, North Hollywood, CA 91602

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2 CONFERENCE PACKAGE

Includes conference materials, all educational sessions for each day, welcome reception and PAC fundraiser dinner on Monday, breakfast, lunch and closing reception on Tuesday and refreshment breaks.

MEMBERS	(by 9/2)	(after 9/2)
First Registrant	$525	$575
Add'l Staff from Same Agency	$395	$450
NONMEMBERS		
First Registrant	$675	$725
Add'l Staff from Same Agency	$495	$550

Conference Package Fee: $ _____

3 SPOUSE/GUEST

You are invited to bring your spouse/guest.
Registration includes meal functions only (welcome reception, PAC fundraiser dinner, breakfast, lunch and closing reception on Tuesday)
Spouse/Guest Fee: $375 $ _____
Name: _____
❑ Vegetarian ❑ Special Dietary Needs _____

4 PAC FUNDRAISER

Included in your registration.
❑ I plan to attend

5 ACA TRAINING -

Topic to be Determined

Pre-conference/Monday morning. _____x $149 (per attendee)

6 PAYMENT

Please total 2, 3 and 5 $ _____
❑ First time attendee? TOTAL DUE$ _____
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Received by September 9 - 75%
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PHONE: (916) 929-2125

9th Circuit holds no FCRA violation by CRA when dispute did not come 'directly' from consumer

By: Jeff Karek – Senior Counsel – Maurice Wutscher, LLP

The U.S. Court of Appeals for the Ninth Circuit held that where a company sent dispute letters to a credit reporting agency on behalf of a consumer, but the consumer did not identify the items to be disputed, review the letters, or otherwise play any role in preparing the letters, the letters did not come "directly" from the consumer, and the CRA was not required to conduct a reinvestigation under section 1681i of the federal Fair Credit Reporting Act (FCRA).

As a result, the Ninth Circuit held that the CRA did not violate section 1681i, and also did not act unreasonably and therefore did not violate section 1681e(b).

Accordingly, the Ninth Circuit affirmed the trial court's order granting summary judgment in favor of the defendant CRA.

A copy of the opinion in Warner v. Experian Information Solutions, Inc. is available here.

A consumer hired a credit repair organization ("company") to perform "credit repair services." The company thereafter sent a letter to a credit reporting agency asserting that several items in the consumer's credit file were inaccurate, and asking the CRA to conduct a reinvestigation to verify the items' accuracy.

The consumer had no input on the preparation of the letter and did not review the letter before it was sent.

After receiving the letter, the CRA sent a letter to the consumer stating that it had "received a suspicious request in the mail" and "determined that it was not sent by [the consumer]." The CRA further informed the consumer that it would "not be initiating any disputes based on the suspicious correspondence." Finally, the CRA explained that the consumer could call the CRA or visit its website if he believed the information in his credit file was inaccurate or incomplete.

The consumer did neither. Instead, the company sent several more letters to the CRA on the consumer's behalf. However, the consumer again had no input on the drafting of the letters, and did not review them before they were sent. The CRA did not initiate a reinvestigation after receiving the letters.

The consumer thereafter filed a complaint alleging that by failing to take action in response to the letters, the CRA supposedly violated two provisions of FCRA. Specifically, section 1681i, which requires consumer reporting agencies to reinvestigate disputed items, and section 1681e(b), which requires CRAs to use reasonable care in preparing consumer reports.

The CRA moved for summary judgment, and the trial court granted the motion ruling that section 1681i only required the CRA to reinvestigate disputes that came from the consumer directly. The trial court also determined that the agency did not violate section 1681e(b) because, in its view, that statute did not apply to reinvestigation procedures at all.

The matter was then appealed.

On appeal, the Ninth Circuit first analyzed the application of section 1681i, which provides in relevant part that CRAs must "conduct a reasonable reinvestigation" when an item in the consumer's file "is disputed by the consumer and the consumer notifies the agency directly . . . of such dispute."

The Ninth Circuit observed that the question therefore was "whether those letters came 'directly' from [the consumer]."

In concluding that they did not, the Court considered the "unambiguous meaning of the word 'directly,'" which it noted is defined by Merriam-Webster's Third New International Dictionary as "without any intervening agency or instrumentality or determining influence."

Thus, the Ninth Circuit determined that "to notify a consumer reporting agency of a dispute 'directly,' a letter must come from the consumer and be sent to the agency."

However, in this case, the consumer "played almost no part in submitting the dispute letter to [the CRA]." Specifically, he "did not identify the items to be disputed," and "did not review the letter [the company] drafted before it sent it to [the CRA]." Moreover, he testified that he had "absolutely no input" into the contents of the letter at all.

Under those facts, the Ninth Circuit held that "the letters did not come directly from [the consumer]." However, the Court cautioned that its "holding is limited to the facts before us," and "[w]e only hold that, in this case, where [the consumer] played no role in preparing the letters and did not review them before they were sent, the letters sent by [the company] did not come directly from [the consumer]."

The Ninth Circuit, therefore, affirmed the ruling of the district court granting the CRA's motion for summary judgment on the section 1681i claim.

The Court next reviewed the claim under section 1681e(b), which provides in relevant part that CRAs must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom [a consumer report] relates."

The appellant argued that even if section 1681i did not require the agency to conduct a reinvestigation, its refusal to reinvestigate nevertheless violated section 1681e(b) because it was unreasonable.

The Ninth Circuit disagreed, stating that "it would make little sense to use Section 1681e(b) to impose liability on [the CRA] for conduct that satisfied Section 1681i," because "Section 1681i represents Congress's determination that a consumer reporting agency is only required to initiate a reinvestigation if a consumer notifies the agency of a dispute directly."

Thus, "[i]t cannot be unreasonable for agencies to follow that guidance." The Ninth Circuit, therefore, held that the agency "did not act unreasonably and, as a result, did not violate Section 1681e(b)."

Accordingly, the Ninth Circuit affirmed the trial court's order granting summary judgment in favor of the CRA. ink

The Legislature – No Offseason

Tom Griffin
CAC General Counsel

The Legislature is officially on break and will not formally reconvene until 2020. Since the Legislature is on break, most people would think that CAC can also take a break in its legislative efforts. That is not the case. CAC's legislative effort is year-round. There is no offseason.

CAC continues to work on behalf of its members at the Capitol.

The Bills

SB 616 (Wieckowski)

This bill, which failed in its prior iterations in 2017 and 2018, unfortunately passed and is awaiting the Governor's review. Authored by Senator Bob Wieckowski, this bill will eliminate bank levies against many consumers. As introduced, this bill sought to exempt from bank levies the first $2,000 in a consumer's bank account. As in prior years, CAC and a number of like-minded groups formed a coalition to oppose this bill.

In 2018, Senator Wieckowski introduced a similar bill which came up for vote on the Assembly floor eight times (having passed the Senate) and it lost each time. The last version of the prior bill had reduced the amount of the automatic exemption to $1,200, and it still failed. The coalition's efforts proved successful.

In this legislative session, SB 616 passed the Senate early in the year and the fight moved to the Assembly. With a supermajority of Democrats in that chamber, the coalition had an uphill battle from the start. Recognizing that the coalition's efforts had gained traction, Senator Wieckowski added amendments to the bill, which were not heard in committee, to tie the amount of the automatic exemption to an amount set forth in Welfare & Institutions Code Section 11452. That code section, based on a welfare index, sets a minimum basic standard of adequate care for families that varies by family size and county of residence. Region 1, comprised of the most urban counties, currently sets the minimum standard for a family of four at $1,724.50. This amount is subject to cost-of-living adjustments as set forth in the statute.

As amended on September 6, 2019, the amount of the automatic exemption was tied to the minimum basic standard of adequate care for a family of four for Region 1. In other words, SB 616, if signed by the Governor, will automatically exempt the first $1,724.50 in a consumer's bank account from a bank levy. And, this amount will periodically adjust upward with inflation.

CAC and the coalition members will meet with a legislative aid to the Governor in the hope of seeking a veto based on policy and statutory construction grounds. The chances of obtaining a veto, however, are not realistic.

The automatic nature of the exemption, the dollar amount of the exemption and the fact that it effectively applies to all of a consumer's accounts make the bill unworkable. The bill's lack of any means-testing is especially frustrating.

AB 699 (Grayson)

This bill, sponsored by CAC and authored by Assembly Member Timothy S. Grayson, will substantially revise the 1984 Credit Services Act and will impose new requirements and restrictions on credit repair agencies such as Lexington Law. Introduced this year, this bill has been extended to a two-year bill.

This additional time has worked to CAC's benefit. CAC continues to work with various consumer groups to garner their support. These efforts are promising. Also, after the bill was introduced, Lexington Law hired a Sacramento-based law firm to lobby against the bill. The law firm went on the offensive and flooded the Capitol with written opposition to the bill claiming that the bill is anti-consumer and that collection agencies sought only self-preservation.

Then, three things occurred that turned the tables on Lexington Law and other credit repair agencies.

First, the CFPB moved to shut down a California credit repair agency and it issued a warning to consumer about engaging these companies. Second, the CFPB filed a lawsuit against Lexington Law asserting that it is engaging, and has engaged, in a substantial number of deceptive practices toward consumers. Three, a Texas jury awarded a consumer damages of $2,500,000 against Lexington Law for a myriad of improper actions.

These three events and other examples of the improper conduct of credit repair companies have definitely caught the attention of consumer groups and legislators.

SB 750 (Wieckowski)

In this bill, Senator Wieckowski seeks to impose a state-licensing requirement on collection agencies in California. CAC was able to turn this into a two-year bill.

In the meantime, Senator Wieckowski has announced his intent to run for a seat on the Alameda County Board of Supervisors. While we certainly hope that Senator Wieckowski earns enough votes in March of 2020 to avoid a November run-off, CAC will stay closely engaged on this bill. ink

LEGISLATIVE ADVOCATE UPDATE

Cliff Berg
Governmental Advocates

The California Legislature ended it's 2019 session on September 13. CAC was successful so far in avoiding consideration of licensing legislation introduced by Senator Bob Wieckowski to enact a licensing law for collection agencies in California.

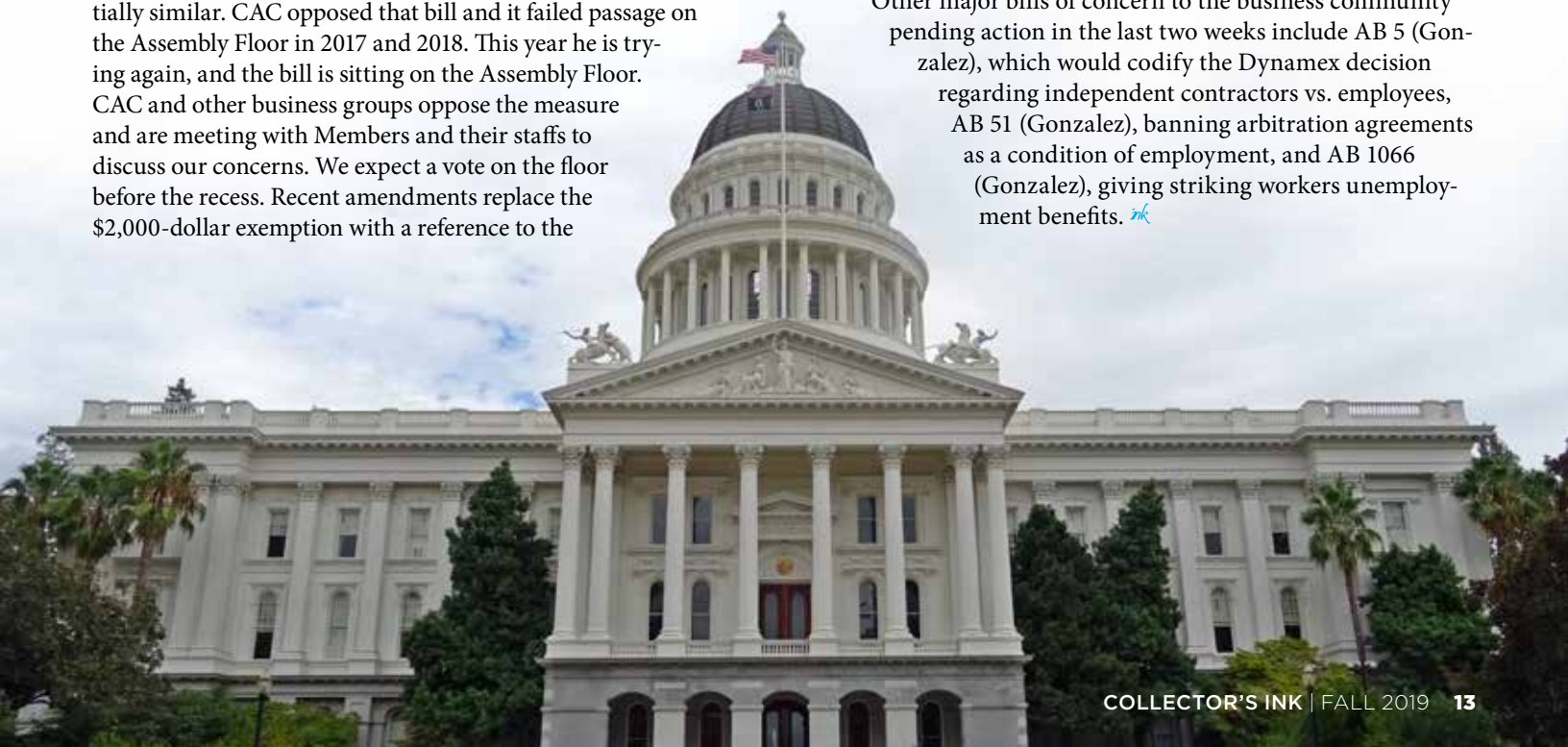
SB 750 (Wieckowski) was introduced by the Senator with no advance notice and no discussions with the industry. It was not clear how he put together a mish mash of onerous requirements in a bill that was full of questionable provision, unclear language and ill-defined governmental oversight. The bill was held in the Senate Banking Committee with its hearing cancelled due to the fact that it was so poorly drafted. While the author's office indicated at the time of the scheduled hearing that they would try to bring it back later this year, it is looking like it will be considered next January.

Meanwhile, CAC was successful in getting legislation introduced to try to update California's consumer protection laws to prevent abuses by the credit repair industry. The bill is AB 699 (Grayson), Assemblyman Grayson is a Democrat from Concord. He joined us at the CAC's Legislative Day in Sacramento to discuss concerns with the credit repair industry. The bill is in the Assembly Banking Committee and we will be working with the Committee, author, and stakeholders to prepare for a hearing in January.

The end of this year's session focused on trying to stop the passage of SB 616 (Wieckowski), which is this year's attempt to create a new, automatic cash exemption to bank levees. Senator Wieckowski sponsored legislation last year, SB 298, which was substantially similar. CAC opposed that bill and it failed passage on the Assembly Floor in 2017 and 2018. This year he is trying again, and the bill is sitting on the Assembly Floor. CAC and other business groups oppose the measure and are meeting with Members and their staffs to discuss our concerns. We expect a vote on the floor before the recess. Recent amendments replace the $2,000-dollar exemption with a reference to the Welfare and Institutions Code that would result in an exemption of somewhere around $1,700 dollars. Other amendments added to the bill take away a financial institution's liability in implementation, which got the bankers to remove their opposition. We hear new amendments maybe forthcoming as the author tries to figure out how to get the votes. Our job is that much more difficult because of the bankers dropping their opposition and going neutral and because there are now 61 Democrats in the Assembly, up from 53 last session.

Other major issues still before the Legislature include privacy clean up legislation sponsored by the business community. The Legislature passed a comprehensive privacy law last year - AB 375 (Chau) that was rushed through the Legislature in less than ten days to head off a ballot measure that was quite a bit worse. The business community pretty much went along to avoid the ballot measure with the understanding that the Legislature would be open to cleaning up language and definitions this year. However, privacy battles broke out as some privacy advocates such as State Senator Hannah-Beth Jackson, Chair of the Senate Judiciary Committee tried to expand last year's law, they sought to create a new private right of action, and to change the law from opt-out to opt-in. Those bills were defeated by the business community but in response, Senator Jackson led efforts to weaken or kill many of the clean-up bills that had to go through Judiciary. Privacy discussions continue.

Other major bills of concern to the business community pending action in the last two weeks include AB 5 (Gonzalez), which would codify the Dynamex decision regarding independent contractors vs. employees, AB 51 (Gonzalez), banning arbitration agreements as a condition of employment, and AB 1066 (Gonzalez), giving striking workers unemployment benefits. ink



Has California once again defeated class action waivers?

By June Coleman - Carlson & Messer LLP

California courts have generally had a hate-hate relationship with class action waivers found in arbitration provisions. And arbitration has been a hot topic over the last decade since the U.S. Supreme Court issued *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Now there are a trio of recent Ninth Circuit decisions which bring arbitration clauses to the forefront, following a California Supreme Court case regarding public injunctive relief and arbitration provisions. By way of background, in 2005, the California Supreme Court issued a ruling against Discover Bank that class action waivers in arbitration provisions made the arbitration provisions unconscionable and unenforceable, the *Discover Bank* rule. The *Discover Bank* Rule invalidated many arbitration provisions, and no one was arbitrating in California after this case. In 2011, the U.S. Supreme Court in the *Concepcion* case, struck down the *Discover Bank* rule, holding that such a state rule or statute was preempted by the Federal Arbitration Act ("FAA") because it treated arbitration clauses differently and "stands as an obstacle to the accomplishment and execution of the full purposes and objective" of the FAA. The *Concepcion* Court further explained that this ruling did not preclude parties to an arbitration provision from using "generally applicable contract defenses, such as fraud, duress, or unconscionability." This ruling was particularly important because class action waivers gave defendants another defensive strategy to use. The *Concepcion* case also raised the question of how to handle public injunctive relief given that the California Supreme Court had ruled that contract provisions limiting claims for public injunctive relief to arbitration were unconscionable and unenforceable. (*Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal.4th 303 (2003); *Broughton v. Cigna Healthplans of Cal.*, 21 Cal.4th 1066 (1999) (called the *Cruz-Broughton* rule).)

The California Supreme Court has reviewed arbitration clauses since the *Concepcion* case, often times finding that arbitration provisions which contained some fee shifting, or arbitration appeals processes in limited cases, or exceptions for self-help options to be permissible, concluding that these provisions in the arbitration clause were not unconscionable. The California Supreme Court left unanswered the question about how to address public injunctions, a state law remedy in some consumer protection statutes, which can be pursued without a class action by an individual for the benefit of the public. Would not a class action waiver prevent such a remedy? Is a class action waiver unenforceable in such situations or unconscionable and void? Many courts answered these questions in California by staying the public injunction issue, referring the case to arbitration, letting the arbitrator determine if there was liability, and then the state court could determine whether a public injunction was appropriate.

The *McGill* case would provide these answers. The McGill trial court initially held that all the claims other than the public injunctive relief could be heard in arbitration, with the public injunctive relief being heard by the court after the arbitration was done. After all, the California Supreme Court had established in the *Broughton* and *Cruz* cases that agreements to arbitrate claims for public injunctive relief are not enforceable in California. Citibank filed an appeal in 2012, arguing that the *Broughton-Cruz* rule prohibiting arbitration of the public injunctive relief was preempted by the FAA, as established by the 2011 *Concepcion* case. Following the 2011 *Concepcion* decision, in 2013, the Ninth Circuit held that this *Broughton-Cruz* rule invalidating arbitration of public injunctive relief claims was preempted by the FAA. (*Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 934 (9th Cir. 2013).) In 2014, the *McGill* Court of Appeal agreed that the *Broughton-Cruz* rule was preempted by the FAA and ordered that the entire case to be heard in arbitration. In 2015, the California Supreme Court granted review of the *McGill* case specifically to consider the appellate court's decision that the *Broughton-Cruz* rule was preempted as decided in *Ferguson*.

Then, in 2017, the California Supreme Court issued its decision in *McGill v. Citibank*, N.A., 2 Cal. 5th 945 (2017), which addressed the issue of contractual waiver of the right to seek public injunctive relief, bypassing the FAA preemption argument. The *McGill* Court noted that this was not a case of FAA preemption and that the *Broughton-Cruz* rule was not at issue in this case. Rather, public injunctive relief is a type of relief that is afforded by several California statutes, especially consumer protection statutes. California Civil Code section 3513 provides that a private agreement cannot circumvent a law established for a public reason, or in other words, parties cannot agree through a contract to waive public injunctive relief. The *McGill* Court concluded that the contractual provision to waive public injunctive relief was not enforceable. The California Supreme Court also held that Section 3513 as it applied in the *McGill* case was not preempted by the FAA, and that the U.S. Supreme Court's *Concepcion* case supported this conclusion.

The California Supreme Court then reviewed the language of the arbitration clause as a first step to determining whether the entire arbitration provision would be unenforceable. The specific language in the *McGill* arbitration clause stated that "[i]f any portion of the arbitration provision is deemed invalid or unenforceable, the entire arbitration provision shall not remain in force." Given that the parties had not briefed or argued how to interpret this contractual language if a portion of the arbitration clause was stricken, the *McGill* Court remanded the case back to the Court of Appeal to address that issue.

It is against this judicial landscape that three arbitration cases were decided in the Ninth Circuit on June 28. In *Blair v. Rent-A-Ctr., Inc.*, No. 17-17221, 2019 WL 2701333 (9th Cir. June 28, 2019), the Ninth Circuit conducted an in-depth analysis and agreed that the *McGill* rule that

prohibits an agreement to waive public injunctive relief was not preempted by the FAA. After all, the *McGill* rule applies without regard to whether the provision is in an arbitration clause or in some other contractual provision. The *Blair* Court also noted that Section 3513 was a long-standing provision of California law that had been invoked repeatedly to invalidate portions of contracts unrelated to arbitration. Thus, the *Blair* contract term that waived public injunctive relief was invalidated, and the *Blair* Court also held that public injunctive relief can be arbitrated. The *Blair* Court rejected arguments by Rent-A-Center that arbitrating public injunctive relief might lead to multiple, conflicting injunctions; that public injunctive relief is too complex for arbitration; that arbitrators would find it difficult to conduct ongoing monitoring or modification of the injunctive relief; and that arbitrating a public injunctive relief issue would require expansive discovery that would be difficult to address in arbitration. Having concluded that the parties could not waive the public injunctive relief and that such relief could be arbitrated, the *Blair* Court followed the *McGill* Court's analysis and reviewed the arbitration agreement language to determine if the entire arbitration clause should be struck. The arbitration provision provided that if a court precluded enforcement of the arbitration provisions limitations as to a particular claim for relief, "that claim (and only that claim) must be severed

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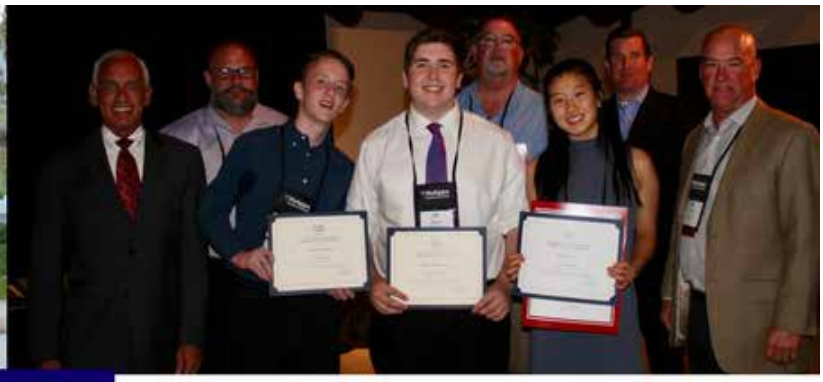


The future of student lending: What debt forgiveness could mean for the ARM industry

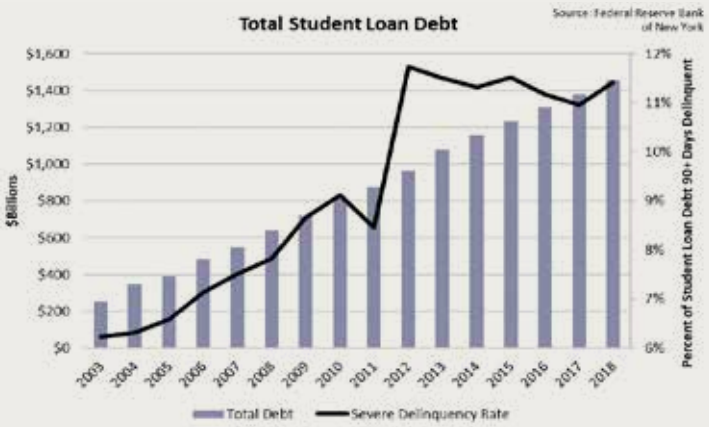
By Kaulkin & Ginsberg

While the news of low employment, solid consumer spending, and record-breaking stock market gains suggest strong economic conditions for most Americans, many college students and recent graduates struggle with the burden of overwhelming student debt. Experts and policymakers alike are increasingly wary of what they consider to be a crisis in college affordability, and have proposed solutions ranging from expanding current federal relief programs to blanket debt forgiveness and free college. The implementation of these plans, particularly those that are more progressive, may greatly reduce the amount of collection opportunities available to accounts receivable management (ARM) companies in the student loan space.

Student loan debt has skyrocketed in recent years, growing from $252.9 billion in 2003 to nearly $1.5 trillion in 2018. The vast majority of those loans – roughly $1.3 trillion – were originated and serviced by the Department of Education (ED) and its affiliated entities, while the rest fall under the purview of private lenders like Navient and Wells Fargo. Student loan delinquencies grew as well over that span, with the severe delinquency rate – i.e., the percentage of debt at least 90 days past due – climbing to 11.4 percent in 2018 from 6.2 percent in 2003 (the spike from 2011 to 2012 was caused by an alteration in calculation methodology). Bloomberg Global data estimates that, as of October 2018, more than 10.0 percent of student borrowers are severely delinquent on at least one of their loans. Both the explosion in overall debt levels and the rise in delinquencies are in part due to the increasing cost of education along with the relatively stagnant real wages for many workers.

ED currently offers a variety of loan repayment options with monthly payment plans that may be capped at the borrower's discretionary income, with varying maximum repayment periods. The standard payment plan available to all loan types consists of monthly payments of at least $50 with a maximum repayment period of 10 years. There are also income driven repayment plans that are capped at 10-20% of a borrowers discretionary income, such as the Revise Pay As You Earn (REPAYE) plan, which is capped at monthly payments at 10% of the borrower's discretionary income available to subsidized, unsubsidized, consolidation, and PLUS loans, with a maximum repayment period to 20 to 25 years for undergraduate and professional study, respectively.

In addition to these repayment plans, ED offers two career-related loan forgiveness programs. The Public Service Loan Forgiveness Program (PSLF) forgives the remaining loan balance on Direct Loans after 120 qualifying monthly payments have been made. Those employed under government organizations, tax-exempt or public service not-for-profit organizations,



and AmeriCorps or Peace Corps qualify for this program. The Teacher Loan Forgiveness Program (TLF) forgives up to $17,500 in student loans for those who teach five consecutive years at qualifying schools or agencies that serve low-income families.

Experts analyzing possible solutions to the student loan crisis offer different suggestions and approaches. One such expert, Michael Hansen, the Director of the Brown Center on Education Policy, discussed his proposal regarding student loan forgiveness at a Brookings Institute forum on June 10. Hansen focused on two major issues: college affordability and teacher strikes driven by low wages. Hansen's solution is to offer generous loan forgiveness (tailored to each individual's amount of debt accrued) for teachers so that they are unburdened by loan payments while working, thereby allowing most to become debt-free in five to eight years. As roughly 3.7 million people (adjusted for seasonality) are employed full-time in education services as of June 2019, according to the latest Bureau of Labor Statistics estimates, this proposal would drastically reduce the obligations imposed on a great deal of student loan borrowers. Stagnant wages, coupled with increasing healthcare costs and retirement contributions, have led to shrinking paychecks for teachers in many states. Hansen's plan would counter the aforementioned forces that limit teachers' real income.

Hansen puts forth the idea of expanding upon federal programs and 26 state loan forgiveness programs, which is more modest than other more progressive proposals such as free college or large increases in teacher salary. He believes that focusing on teachers and those in a public service occupation is more imperative than helping those going into law and medical fields because they will not need as much loan forgiveness. A report by the Center for American Progress found that student loan forgiveness programs helped to increase the proportion of teachers of color, which historically leads to improved test scores, college graduation rates, and behavioral outcomes for students of color.

If Hansen's proposal was to go into effect, collection agencies may see

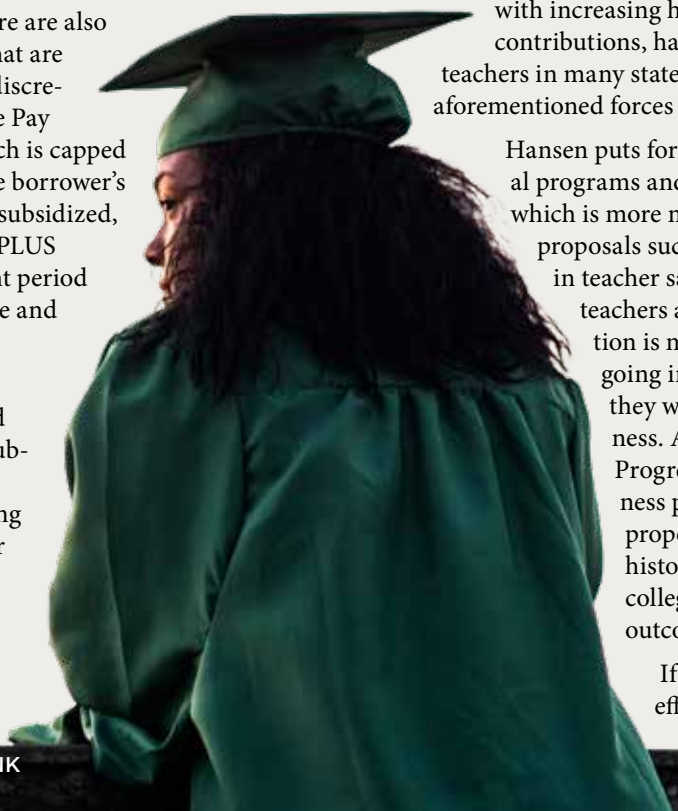


Photo by Andre Hunter on Unsplash

THANK YOU for your membership in the California Association of Collectors!

Kimberly Andosca
CAC Executive Director

As you read the updates from your CAC leadership, please consider adding your additional support to the CAC PAC fund for 2019.

A pledge of $500 will go a long way to win decisively for our industry. Here's where the money will go:

- **First priority:** The Legislature is in a constant state of change. Members leave, new Members get elected … a record number in California's recent election. Before California passed term limits, that was not the case. A small interest group like CAC must move quickly to educate new Members on our industry, and probably defuse long-held incorrect impressions of the collection industry. Your contributions assure we will meet them even before they arrive in Sacramento early next year.
- **Second priority:** A small group like ours needs to have the leadership of both Houses know us and our issues. We do not have the capacity to be a major player with the Legislators, so we are left to be known by those Legislators who can influence others to help us. This means the Leadership of both Houses as well as Committee Chairs and Vice Chairs.

These are real, tangible benefits that will help each and every collection agency in California!

By providing just $500 to CAC's PAC Fund you will become an integral part of the history-making team that continues to protect the California Collection Industry.

We are asking you and all of your colleagues in the industry to write a check for $500 (or any amount you can provide) to the CAC PAC Fund. You know where the money will go and what it will do. Now, it's up to you.

Contributions in any amount may also be made by credit card at: https://www.efundraisingconnections.com/c/CalifAssoofCollectorsPAC/

Thank you for your generous help! ink

decreased opportunities from future teacher borrowers as they would be eligible for more loan forgiveness programs. However, student loan debt should continue to grow strongly in the future as a larger ratio of jobs require higher education, showing promising signs for collection opportunities.

Solving the student loan crisis is a hot topic for presidential candidates as well. Elizabeth Warren, a Senator from Massachusetts and candidate for the Democratic presidential nomination, proposed a plan earlier this year to significantly reduce the amount of student loans. The initiative would include eliminating the cost of tuition and fees at public colleges, creating a minimum fund of $50 billion for Historically Black College and Universities (HBCUs), and barring for-profit colleges from receiving federal funding so that they do not take advantage of student financial aid to increase revenues. In an April blog post on Medium, Sen. Warren explained that the first step would be to cancel up to $50,000 in student loan debt for 42 million Americans, which would stimulate economic growth through increased home purchases and growth of small businesses, especially for middle-class families. Funding for this plan would be covered through Sen. Warren's proposed Ultra-Millionaire Tax, a 2.0 percent annual tax on families with $50.0 million or more in wealth.

The cancellation of the large amount of outstanding student debt and the elimination of the cost of tuition and fees at public colleges would greatly limit collection opportunities for ARM companies, particularly those contracted with ED. As ED's relationship with private collectors is already fractious, the cancelling of most public school loans would likely be devastating for firms operating in the ED space.

Senator Bernie Sanders, another candidate to become the Democratic nominee for president, introduced the College for All proposal in 2019. This legislation would implement free tuition at public colleges, cancel all $1.5 trillion of outstanding student debt for all 45 million borrowers, and cap the student loan interest rate at 1.88 percent. A Wall Street speculation fee – 50 cents for every $100 of stock, a 0.1% fee on bonds, and a 0.005% fee on derivatives – would fund this plan. If this plan were to go into effect, the ARM industry would have virtually no collection opportunities in the student loan space.

Though these proposals present a daunting prospect for the industry, there still remains many barriers to implementation before any of them come to fruition. Many conservatives, including policymakers like ED Secretary Betsy DeVos, oppose student debt forgiveness on principle. That said, ARM companies should closely monitor the political landscape, particularly in the run-up to the 2020 presidential election, as increased student loan forgiveness may harm future collection opportunities.

This article was originally published by Kaulkin & Ginsberg. To learn more, visit https://www.kaulkin.com/. ink

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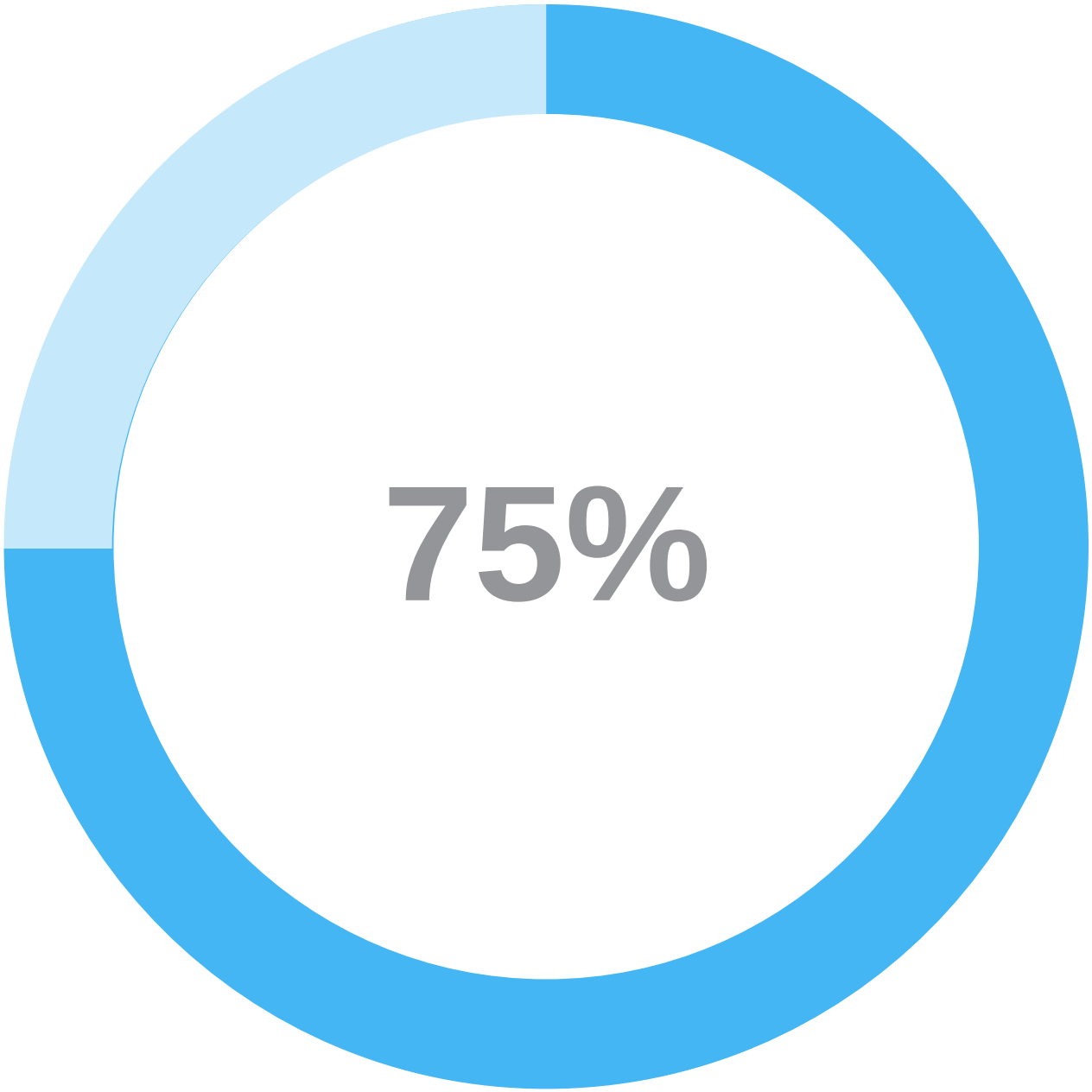

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from the arbitration" to be heard in the court. Rent-A-Center argued that the language meant that the injunctive relief *only* would be heard by the Court, but the *Blair* Court used a strict reading of the clause to hold that the *claims* that gave rise to the public injunctive relief would be heard by the District Court, not just the injunctive relief portion. The *Blair* court noted that parties are welcome to agree to split decision making between a court and an arbitrator as to various relief available for a cause of action, but the parties did not do so in the *Blair* arbitration provision.

In *McArdle v. AT&T Mobility LLC*, No. 17-17246, 2019 WL 2718474 (9th Cir. June 28, 2019), the parties had been compelled to arbitration and received the arbitration award. Plaintiff sought to vacate the arbitral award, expecting that the McGill Court would issue its opinion shortly. When the McGill decision was issued, the court reconsidered its order compelling arbitration, rescinded the order and vacated the arbitration decision. AT&T Mobility appealed. The Ninth Circuit held that the agreement to waive the right to pursue public injunctive relief was void and unenforceable. The arbitration provision stated that "if this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void." As such, the District Court's decision was affirmed, the arbitral award remained vacated, and the case was remanded to be heard in the District Court. Similarly, in *Tillage v. Comcast Corp.*, No. 18-15288, 2019 WL 2713292 (9th Cir. June 28, 2019), the arbitration agreement contained a waiver of collective relief, i.e., relief for others in addition to the plaintiffs. And the arbitration agreement stated that "THIS WAIVER OF CLASS ACTIONS AND COLLECTIVE RELIEF IS AN ESSENTIAL PART OF THIS ARBITRATION PROVISION AND CANNOT BE SEVERED FROM IT. Therefore, the collective relief waiver was stricken, and thus, by the contract terms, the entire arbitration agreement was stricken.

California has been on the forefront of defeating class action waivers and class relief, even if called public injunctive relief, first with the 2005 *Discover Bank* rule, then with the *Cruz-Broughton* rule that was created in 1999 and 2003, and now with the 2017 *McGill* rule. The first two California rules were defeated by FAA preemption in federal court. But these three decisions from a California federal District Court reject the federal preemption argument to rule favorably for the *McGill* rule. This is a startling reversal for arbitration provisions and a blow to the ability of parties to waive class action relief through contract. This will put a kink in the long running use of class action waivers to force employees and consumers to resolve their disputes individually. The Plaintiff's bar will see this as an opportunity to increase the number of cases on which they can recover fees and increase the amount of fees that can be recovered. In California, if a case results in a public benefit or class relief, California law provides that plaintiffs can recover attorneys' fees. Although most of the cases in California against ARM industry players involve statutes that already have fee provisions, there are some cases where plaintiffs and their attorneys will benefit from public injunctive relief awards. However, these cases and the McGill rule actually support arbitrators determining public injunctive relief, if the contract terms do not invalidate the entire arbitration provision. This keeps alive the possibility of using class action waivers in arbitration provisions to defeat class claims and their associated class damages. And maintaining the viability of class action waivers will also help to decrease attorneys' fees awards to successful plaintiffs and the associated defense costs to defend class actions. It will be interesting to see if these cases make it to the U.S. Supreme Court and whether the U.S. Supreme Court will view the McGill rule as it did the *Discover Bank* rule. It took the U.S. Supreme Court 6 years to address the *Discover Bank* rule, so it might be a long wait. ink