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AB-430 Debt collection: identity theft. (2021-2022)

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Assembly Bill No. 430

CHAPTER 265

An act to amend Sections 1788.18, 1788.61, 1798.92, and 1798.93 of the Civil Code, and to amend Section 530.8 of the Penal Code, relating to debt collection.

[Approved by Governor September 23, 2021. Filed with Secretary of State September 23, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

AB 430, Grayson. Debt collection: identity theft.

Existing law requires a debt collector to cease collection activities until completion of a specified review if it receives a copy of a police report filed by the debtor alleging that the debtor is the victim of an identity theft crime and it receives a written statement from the debtor that the debtor claims to be the victim of identity theft, with respect to the specific debt being collected by the debt collector.

This bill, instead, would require a debt collector to cease collection activities until completion of a review if it receives a copy of a Federal Trade Commission (FTC) identity theft report and a written statement from the debtor. The bill would authorize a debtor to choose to send a copy of a police report, as specified, but prohibit a debt collector from also requiring a police report if the debtor submits an FTC identity theft report.

Existing law specifies that if service of a summons has not resulted in actual notice to a person in time to defend an action brought by a debt buyer and a default or default judgment has been entered against the person in the action, the person may serve and file a notice of motion and motion to set aside the default or default judgment and for leave to defend the action. Existing law requires the notice of motion to be served and filed, in the case of identity theft, within a reasonable time, but in no event exceeding 180 days of the first actual notice of the action. Existing law also requires, in the case of identity theft, that the person alleging that they are a victim of identity theft provide the court with either a copy of a Federal Trade Commission Identity Theft Affidavit or a copy of a police report.

This bill, instead, would require the person alleging that they are a victim of identity theft to provide the court with either a copy of a Federal Trade Commission identity theft report or a copy of a police report. The bill would make other nonsubstantive changes.

Existing law authorizes a person to bring an action against a claimant to establish that the person is a victim of identity theft, in connection with the claimant's claim against that person; if the claimant has brought an action to recover on its claim against the person, existing law authorizes the person to file a cross-complaint to establish that the person is a victim of identity theft in connection with the claimant's claim. Existing law defines a "victim of identity theft" for purposes of these provisions as a person who has filed a police report alleging a crime, as specified. In order for a person to recover actual damages or attorney's fees in an action or cross-complaint filed by a person alleging that they are a victim of identity theft, existing law requires that the person show that they provided the claimant, upon written request of claimant, a valid copy of a police report or a Department of Motor Vehicles investigative report before filing the action, or within their cross-complaint, as specified.

This bill would change the definition of the phrase "victim of identity theft" for purposes of these provisions to also include a person who has submitted an FTC identity theft report. This bill would require, in order for a person to recover actual damages or attorney's fees in an action or cross-complaint filed by a person alleging that they are a victim of identity theft, that the person, upon written request of the claimant, provided the claimant a valid, signed FTC identity theft report before filing the action or within their cross-complaint, as specified. The bill would authorize a person to provide a valid copy of a police report or a Department of Motor Vehicles investigative report, as specified, but prohibit the claimant from also requiring a DMV or police report if the person submits an FTC identity theft report.

Existing law authorizes a person to receive information relating to an application or account that was filed with any person or entity by an unauthorized person upon presenting the person or entity with which the application was filed or the account was opened a copy of a police report and identifying information, as specified.

This bill would also authorize a person to receive this information upon presenting the person or entity with which the application was filed or the account was opened a copy of a signed and submitted FTC identity theft report and identifying information, as specified. The bill would make other conforming changes.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1788.18 of the Civil Code is amended to read:

1788.18. (a) Upon receipt from a debtor of all of the following, a debt collector shall cease collection activities until completion of the review provided in subdivision (d):

(1) A copy of a Federal Trade Commission (FTC) identity theft report, completed and signed by the debtor. The debtor may choose, instead, to send a copy of a police report filed by the debtor alleging that the debtor is the victim of an identity theft crime, including, but not limited to, a violation of Section 530.5 of the Penal Code, for the specific debt being collected by the debt collector; however, the debt collector shall not also require a police report if the debtor submits an FTC identity theft report.

(2) The debtor's written statement that the debtor claims to be the victim of identity theft with respect to the specific debt being collected by the debt collector.

(b) The written statement described in paragraph (2) of subdivision (a) shall consist of any of the following:

(1) A written statement that contains the content of the Identity Theft Victim's Fraudulent Account Information Request offered to the public by the California Office of Privacy Protection.

(2) A written statement that certifies that the representations are true, correct, and contain no material omissions of fact to the best knowledge and belief of the person submitting the certification. A person submitting the certification who declares as true any material matter pursuant to this subdivision that they know to be false is guilty of a misdemeanor. The statement shall contain or be accompanied by the following, to the extent that an item listed below is relevant to the debtor's allegation of identity theft with respect to the debt in question:

(A) A statement that the debtor is a victim of identity theft.

(B) A copy of the debtor's driver's license or identification card, as issued by the state.

(C) Any other identification document that supports the statement of identity theft.

(D) Specific facts supporting the claim of identity theft, if available.

(E) Any explanation showing that the debtor did not incur the debt.

(F) Any available correspondence disputing the debt after transaction information has been provided to the debtor.

(G) Documentation of the residence of the debtor at the time of the alleged debt. This may include copies of bills and statements, such as utility bills, tax statements, or other statements from businesses sent to the debtor, showing that the debtor lived at another residence at the time the debt was incurred.

(H) A telephone number for contacting the debtor concerning any additional information or questions, or direction that further communications to the debtor be in writing only, with the mailing address specified in the statement.

(I) To the extent the debtor has information concerning who may have incurred the debt, the identification of any person whom the debtor believes is responsible.

(J) An express statement that the debtor did not authorize the use of the debtor's name or personal information for incurring the debt.

(K) The certification required pursuant to this paragraph shall be sufficient if it is in substantially the following form:

"I certify the representations made are true, correct, and contain no material omissions of fact.

_____ (Date and Place) _____ (Signature) _____ "

(c) If a debtor notifies a debt collector orally that they are a victim of identity theft, the debt collector shall notify the debtor, orally or in writing, that the debtor's claim must be in writing. If a debtor notifies a debt collector in writing that they are a victim of identity theft, but omits information required pursuant to subdivision (a) or, if applicable, the certification required pursuant to paragraph (3) of subdivision (b), if the debt collector does not cease collection activities, the debt collector shall provide written notice to the debtor of the additional information that is required, or the certification required pursuant to paragraph (3) of subdivision (b), as applicable, or send the debtor a copy of the Federal Trade Commission's identity theft form.

(d) Within 10 business days of receiving the complete statement and information described in subdivision (a), the debt collector shall, if it furnished adverse information about the debtor to a consumer credit reporting agency, notify the consumer credit reporting agency that the account is disputed, and initiate a review considering all of the information provided by the debtor and other information available to the debt collector in its file or from the creditor. The debt collector shall send notice of its determination to the debtor no later than 10 business days after concluding the review. The debt collector may recommence debt collection activities only upon making a good faith determination that the information does not establish that the debtor is not responsible for the specific debt in question. The debt collector's determination shall be made in a manner consistent with the provisions of subsection (1) of Section 1692 of Title 15 of the United States Code, as incorporated by Section 1788.17 of this code. The debt collector shall notify the debtor in writing of that determination and the basis for that determination before proceeding with any further collection activities. The debt collector's determination shall be based on all of the information provided by the debtor and other information available to the debt collector in its file or from the creditor.

(e) No inference or presumption that the debt is valid or invalid, or that the debtor is liable or not liable for the debt, shall arise if the debt collector decides after the review described in subdivision (d) to cease or recommence the debt collection activities. The exercise or nonexercise of rights under this section is not a waiver of any other right or defense of the debtor or debt collector.

(f) The statement and supporting documents that comply with subdivision (a) may also satisfy, to the extent those documents meet the requirements of, the notice requirement of paragraph (5) of subdivision (c) of Section 1798.93.

(g) A debt collector who ceases collection activities under this section and does not recommence those collection activities shall do all of the following:

(1) If the debt collector has furnished adverse information to a consumer credit reporting agency, notify the agency to delete that information no later than 10 business days after making its determination.

(2) Notify the creditor no later than 10 business days after making its determination that debt collection activities have been terminated based upon the debtor's claim of identity theft.

(h) A debt collector who has possession of documents that the debtor is entitled to request from a creditor pursuant to Section 530.8 of the Penal Code is authorized to provide those documents to the debtor.

(i) Notwithstanding subdivision (h) of Section 1788.2, for the purposes of this section, "debtor" means a natural person, firm, association, organization, partnership, business trust, company, corporation, or limited liability company from which a debt collector seeks to collect a debt that is due and owing or alleged to be due and owing from the person or entity. The remedies provided by this title shall apply equally to violations of this section.

SEC. 2. Section 1788.61 of the Civil Code is amended to read:

1788.61. (a) (1) Notwithstanding Section 473.5 of the Code of Civil Procedure, if service of a summons has not resulted in actual notice to a person in time to defend an action brought by a debt buyer and a default or default judgment has been entered against the person in the action, the person may serve and file a notice of motion and motion to set aside the default or default judgment and for leave to defend the action.

(2) Except as provided in paragraph (3), the notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of:

(A) Six years after entry of the default or default judgment against the person.

(B) One hundred eighty days of the first actual notice of the action.

(3) (A) Notwithstanding paragraph (2), in the case of identity theft or mistaken identity, the notice of motion shall be served and filed within a reasonable time, but in no event exceeding 180 days of the first actual notice of the action.

(B) (i) In the case of identity theft, the person alleging that they are a victim of identity theft shall provide the court with either a copy of a Federal Trade Commission identity theft report or a copy of a police report filed by the person alleging that they are the victim of an identity theft crime, including, but not limited to, a violation of Section 530.5 of the Penal Code, for the specific debt associated with the judgment.

(ii) In the case of mistaken identity, the moving party shall provide relevant information or documentation to support the claim that they are not the party named in the judgment or is not the person who incurred or owes the debt.

(b) A notice of motion to set aside a default or default judgment and for leave to defend the action shall designate as the time for making the motion a date prescribed by Section 1005 of the Code of Civil Procedure, and it shall be accompanied by an affidavit stating under oath that the person's lack of actual notice in time to defend the action was not caused by their avoidance of service or inexcusable neglect. The person shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action. Either party may introduce, and the court may consider, evidence in support of its motion or opposition, including evidence relating to the process server who appears on the proof of service of the summons and complaint.

(c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that the person's lack of actual notice in time to defend the action was not caused by their avoidance of service or inexcusable neglect, the court may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action. If the validity of the judgment is not challenged, the court may select an appropriate remedy other than setting aside the default or default judgment.

(d) This section shall apply to a default or default judgment entered on or after January 1, 2010, except in the case of identity theft or mistaken identity, in which case this section shall apply regardless of the date of the default or default judgment.

(e) This section shall not limit the equitable authority of the court or other available remedies under law.

SEC. 3. Section 1798.92 of the Civil Code is amended to read:

1798.92. For the purposes of this title:

(a) "Claimant" means a person who has or purports to have a claim for money or an interest in property in connection with a transaction procured through identity theft.

(b) "Identity theft" means the unauthorized use of another person's personal identifying information to obtain credit, goods, services, money, or property.

(c) "Personal identifying information" means a person's name, address, telephone number, driver's license number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, or credit card number.

(d) "Victim of identity theft" means a person who had their personal identifying information used without authorization by another to obtain credit, goods, services, money, or property, and did not use or possess the credit, goods, services, money, or property obtained by the identity theft, and has submitted a Federal Trade Commission identity theft report. In the alternative, the person may have filed a police report in this regard pursuant to Section 530.5 of the Penal Code.

SEC. 4. Section 1798.93 of the Civil Code is amended to read:

1798.93. (a) A person may bring an action against a claimant to establish that the person is a victim of identity theft in connection with the claimant's claim against that person. If the claimant has brought an action to recover on its claim against the person, the person may file a cross-complaint to establish that the person is a victim of identity theft in connection with the claimant's claim.

(b) A person shall establish that they are a victim of identity theft by a preponderance of the evidence.

(c) A person who proves that they are a victim of identity theft, as defined in Section 530.5 of the Penal Code, as to a particular claim, shall be entitled to a judgment providing all of the following, as appropriate:

(1) A declaration that they are not obligated to the claimant on that claim.

(2) A declaration that any security interest or other interest the claimant had purportedly obtained in the victim's property in connection with that claim is void and unenforceable.

(3) An injunction restraining the claimant from collecting or attempting to collect from the victim on that claim, from enforcing or attempting to enforce any security interest or other interest in the victim's property in connection with that claim, or from enforcing or executing on any judgment against the victim on that claim.

(4) If the victim has filed a cross-complaint against the claimant, the dismissal of any cause of action in the complaint filed by the claimant based on a claim which arose as a result of the identity theft.

(5) Actual damages, attorney's fees, and costs, and any equitable relief that the court deems appropriate. In order to recover actual damages or attorney's fees in an action or cross-complaint filed by a person alleging that they are a victim of identity theft, the person shall show that they provided written notice to the claimant that a situation of identity theft might exist, including, upon written request of the claimant, a valid, signed Federal Trade Commission (FTC) identity theft report completed at least 30 days before filing the action, or within their cross-complaint pursuant to this section. In the alternative, the person may provide a valid copy of a police report or of a Department of Motor Vehicles (DMV) investigative report, filed pursuant to Section 530.5 of the Penal Code, at least 30 days before filing the action or within their cross-complaint pursuant to this section. For the purposes of this paragraph, if the person submits an FTC identity theft report, the claimant shall not also require a DMV or police report.

(6) A civil penalty, in addition to any other damages, of up to thirty thousand dollars (\$30,000) if the victim establishes by clear and convincing evidence all of the following:

(A) That at least 30 days prior to filing an action or within the cross-complaint pursuant to this section, they provided written notice to the claimant at the address designated by the claimant for complaints related to credit reporting issues that a situation of identity theft might exist and explaining the basis for that belief.

(B) That the claimant failed to diligently investigate the victim's notification of a possible identity theft.

(C) That the claimant continued to pursue its claim against the victim after the claimant was presented with facts that were later held to entitle the victim to a judgment pursuant to this section.

SEC. 5. Section 530.8 of the Penal Code is amended to read:

530.8. (a) If a person discovers that an application in their name for a loan, credit line or account, credit card, charge card, public utility service, mail receiving or forwarding service, office or desk space rental service, or commercial mobile radio service has been filed with any person or entity by an unauthorized person, or that an account in their name has been opened with a bank, trust company, savings association, credit union, public utility, mail receiving or forwarding service, office or desk space rental service, or commercial mobile radio service provider by an unauthorized person, then, upon presenting to the person or entity with which the application was filed or the account was opened a copy of a police report prepared pursuant to Section 530.6 or a copy of a signed and submitted Federal Trade Commission (FTC) identity theft report and identifying information in the categories of information that the unauthorized person used to complete the application or to open the account, the person, or a law enforcement officer specified by the person, shall be entitled to receive information related to the application or account, including a copy of the unauthorized person's application or application information and a record of transactions or charges associated with the application or account. Upon request by the person in whose name the application was filed or in whose name the account was opened, the person or entity with which the application was filed shall inform them of the categories of identifying information that the unauthorized person used to complete the application or to open the account. The person or entity with which the application was filed or the account was opened shall provide copies of all paper records, records of telephone applications or authorizations, or records of electronic applications or authorizations required by this section, without charge, within 10 business days of receipt of the person's request and submission of the required copy of the police report or Federal Trade Commission (FTC) identity theft report and identifying information.

(b) Any request made pursuant to subdivision (a) to a person or entity subject to the provisions of Section 2891 of the Public Utilities Code shall be in writing and the requesting person shall be deemed to be the subscriber for purposes of that section.

(c) (1) Before a person or entity provides copies to a law enforcement officer pursuant to subdivision (a), the person or entity may require the requesting person to submit a signed and dated statement by which the requesting person does all of the following:

(A) Authorizes disclosure for a stated period.

(B) Specifies the name of the agency or department to which the disclosure is authorized.

(C) Identifies the types of records that the requesting person authorizes to be disclosed.

(2) The person or entity shall include in the statement to be signed by the requesting person a notice that the requesting person has the right at any time to revoke the authorization.

(d) (1) A failure to produce records pursuant to subdivision (a) shall be addressed by the court in the jurisdiction in which the victim resides or in which the request for information was issued. At the victim's request, the Attorney General, the district attorney, or the prosecuting city attorney may file a petition to compel the attendance of the person or entity in possession of the records, as described in subdivision (a), and order the production of the requested records to the court. The petition shall contain a declaration from the victim stating when the request for information was made, that the information requested was not provided, and what response, if any, was made by the person or entity. The petition shall also contain copies of the police report prepared pursuant to Section 530.6 or the FTC identity theft report and the request for information made pursuant to this section upon the person or entity in possession of the records, as described in subdivision (a), and these two documents shall be kept confidential by the court. The petition and copies of the police report or the FTC identity theft report and the application shall be served upon the person or entity in possession of the records, as described in subdivision (a). The court shall hold a hearing on the petition no later than 10 court days after the petition is served and filed. The court shall order the release of records to the victim as required pursuant to this section.

(2) In addition to any other civil remedy available, the victim may bring a civil action against the entity for damages, injunctive relief, or other equitable relief, and a penalty of one hundred dollars (\$100) per day of noncompliance, plus reasonable attorney's fees.

(e) For the purposes of this section, the following terms have the following meanings:

(1) "Application" means a new application for credit or service, the addition of authorized users to an existing account, the renewal of an existing account, or any other changes made to an existing account.

(2) "Commercial mobile radio service" means "commercial mobile radio service" as defined in Section 20.3 of Title 47 of the Code of Federal Regulations.

(3) "Law enforcement officer" means a peace officer as defined by Section 830.1.

(4) "Person" means a natural person, firm, association, organization, partnership, business trust, company, corporation, limited liability company, or public entity.