



October 5, 2021

Department of Financial Protection and Innovation
Attn: Sandra Sandoval
300 S. Spring Street, Suite 15513
Los Angeles, California 90013

RE: PRO 05-21 Comments

I am writing on behalf of the American Resort Development Association (ARDA). ARDA is the trade association representing the interests of the timesharing and vacation ownership industry. Founded in 1969, ARDA represents more than 1,000 timeshare development and related service corporations. It is the mission of ARDA to foster and promote the growth of the timeshare and vacation ownership industry and to serve its members through education, public relations and communications, legislative advocacy, membership development and ethics enforcement.

ARDA supports the protection of consumers and reasonable licensure and regulation of debt collection activity. ARDA appreciates this opportunity to comment on the Department of Financial Protection and Innovation's (DFPI) efforts to promulgate clear regulations related to implementation of the newly passed California Debt Collection Licensing Act (DCLA).

ARDA's concerns with the proposed rules and the underlying legislation primarily focus on the definitions of terms and the scope of certain requirements. A clear understanding of these provisions will be essential in determining the applicability of the new law and the actions which a covered entity must take to comply. We will address each of these in turn.

1. Applicability

ARDA represents timeshare owners' associations and managing entities in California and across the country. The applicability of the licensing requirements of the DCLA for owners' associations and managing entities providing services to those associations hinges on whether association dues assessments are consumer credit transactions as defined.

The DCLA only requires licensure where an entity is attempting to collect a debt arising from a "consumer credit transaction." A "consumer credit transaction" is a transaction in which "property, services or money is acquired on credit." Whether a debt is based on an "extension of credit" is a matter of judicial interpretation in California. Given that the DCLA was recently passed and does not take effect until January 1, 2022, there are no cases interpreting the DCLA.

However, the DCLA shares an almost identical definitional structure with the Rosenthal Act and there are a number of informative decisions interpreting the Rosenthal Act that ARDA believes provide grounds to clarify the status of association assessments under the DCLA.

- In *Gouskos v. Aptos Vill. Garage, Inc.*, 94 Cal. App. 4th 754 (2001), the California Court of Appeal concluded that there is a meaningful distinction between services or property *acquired on credit* as opposed to goods and services provided *in advance of payment*. The court concluded that the former would constitute a “consumer credit transaction” and the latter would not.
- In *Davidson v. Seterus, Inc.*, 21 Cal. App. 5th 283, 296–97 (2018), the California Court of Appeal clarified that a “consumer credit transaction” is not simply a transaction where services are paid for after they are rendered, instead, it is a transaction where property and services are acquired without immediate payment and based on a promise to pay in the future.
- Similarly, in *Durham v. Cont'l Cent. Credit*, 2009 WL 3416114, at *6–7 (S.D. Cal. Oct. 20, 2009), the District Court for the Southern District of California dismissed a Rosenthal Act claim on the grounds that “HOA assessments for ongoing maintenance and general services do not constitute a ‘consumer credit transaction’”.
- The *Durham* ruling is in accord with other California opinions that hold that a consumer’s failure to pay a debt when due does not create an on-credit relationship between the creditor and the debtor. See e.g., *Yatooma v. OP Prop. Mgmt. LP*, 2017 WL 3120259, at *3 (C.D. Cal. July 20, 2017) and, *Phillips v. Archstone Simi Valley LLC*, 2016 WL 7444550, at *5 (C.D. Cal. Dec. 15, 2016), *aff’d*, 740 F. App’x 603 (9th Cir. 2018) (holding that unpaid rent obligations did not arise from “consumer credit transactions” and that “[a] credit transaction is not retroactively created by virtue of the consumer’s ... later failure to pay.”).

Based on the foregoing, ARDA does not believe that association assessments are considered “consumer credit transactions” under current law nor should they be under the similarly constructed DCLA. As a result, ARDA asks that DFPI include clarification within the final rules implementing the DCLA stating the collection of association assessments does not constitute a “consumer credit transaction”.

2. Surety Bond

ARDA also requests that DFPI provide additional clarification regarding the basis on which it will evaluate required surety bond amounts. Any entity which is required to be licensed pursuant to the DCLA will be required to maintain a surety bond in a minimum amount of \$25,000. The commissioner, at its discretion, may require a higher bond amount for a licensee based on the number of affiliates under the license and the volume of regulated debt collection in any given

year. The DFPI's proposed rules would require licensees to file directly with the commissioner information on their regulated debt collection activities as of the prior calendar year to determine whether the licensee is required to post a bond in excess of \$25,000. There is, however, no published guidance on how the DFPI and/or the commissioner will evaluate debt-collection activity reports in connection with determining the appropriate bond amount that should be posted by any licensee.

A timeshare association due to the nature of shared ownership may include many thousands of individual ownership interests potentially resulting in a higher total annual dues assessments than a similar whole ownership association. Timeshare owners' associations, like all owners' associations, are typically not for profit corporations that derive their operating revenue from owner/member assessments. ARDA asks that if DFPI determines that association assessments are consumer credit transactions under DCLA, additional guidance be provided regarding how it will determine the need for a surety bond in excess of \$25,000 and that it consider both the cost and availability of such bonds. Should DFPI develop a formula that requires a surety bond of a sufficiently high value, an association could be unable to secure such bond putting it in violation of the DCLA with no viable option for compliance. Alternatively, the lack of certainty regarding how DFPI will determine the required bond is particularly problematic for owners' associations which are limited in the manner they may fund the expense.

ARDA, again, strongly encourages DFPI to provide additional clarification to the proposed rules and appreciates the opportunity to provide comments through this important rulemaking process.

Respectfully,

/s/

Chris Stewart
Vice President, State Affairs
American Resort Development Association