

# The Collector Chronicle

NORTH AMERICAN RECOVERY

APRIL 2010

UTAH'S COLLECTION AUTHORITY

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## LAST MONTH'S LUCKY WINNER

The lucky winner of our client drawing for March is CentraCom Interactive in Fairview, Utah! Leslie handles the collections for CentraCom. They've been a client of ours for over four years. We will be sending Leslie a gift certificate for dinner to P.F. Chang's China Bistro. Congratulations and enjoy!



## THIS MONTH'S PRIZE

This month we will be giving away a \$100 gift certificate to the Gateway shopping center in Salt Lake City. Each client who sends new accounts during the month of April will have their name entered into a drawing. At the end of the month we will draw a name, and if it's yours, you'll win the prize.

***Don't miss out on your chance to win; send new accounts in April!  
Good luck!!***



## UTAH'S COLLECTION FEE LAW

**By David J. Saxton**

President, NORTH AMERICAN RECOVERY

*Disclaimer: The opinions and ideas expressed in this article are based on the experiences of the author. He is not an attorney and is not rendering legal advice. This article is for informational purposes only. Please consult your attorney if you have questions regarding the interpretation and/or application of any law.*

This month's newsletter was supposed to be part II of *The Dynamics of a Collection Call*. However, the 2010 Legislative Session proved to be historic for the collection industry. I wanted to share with you what happened and how it will affect your business and mine. (Part II of *The Dynamics of a Collection Call* will be in next month's newsletter.)

The 2010 Legislative Session saw the passing of a new law that allows a creditor to charge a consumer for the costs associated with using a collection agency to collect an account.

While many of our clients have already been doing this for years, some judges in certain jurisdictions have been denying the addition of a collection fee, regardless of what was in the written contract. This law takes that option away from the judges.

Passing this law is good for consumers and businesses alike. It allows a company to pass on the cost of collections associated with non-paying accounts to the individuals who aren't paying their bill. This helps keep the overall costs of all goods and services down.

However, just like any other law, it is not 100% perfect, and there are a few requirements that must be met before a client can add a collection fee. I'm not an attorney, and I'm not giving legal advice, but let me share with you the text of the law and some information based on my own observations and advice from my attorneys.

### **TEXT OF THE NEW LAW**

#### **12-1-11. Collection fee**

(1) As used in this section:

- (a) "Creditor" is as defined in 15 U.S.C. Sec. 1692a.
- (b) "Debt" means an obligation or alleged obligation to

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pay money arising out of a transaction for money, property, insurance, or services.

(c) "Debtor" means a person obligated or allegedly obligated to pay a debt.

(d) "Third party debt collection agency" means:

(i) a debt collector as defined in 15 U.S.C. Sec. 1692a; or

(ii) a person who would be a debt collector under 15 U.S.C. Sec. 1692a, except that the person does not use an instrumentality of interstate commerce or the mail.

(2) A creditor may require a debtor to pay a collection fee in addition to any other amount owed to the creditor for a debt if:

(a) imposing a collection fee on the debtor or in relation to the debt is not prohibited or otherwise restricted by another federal or state law;

(b) the creditor contracts with a third party debt collection agency or licensed attorney to collect the debt;

(c) the third party debt collection agency with which the creditor contracts is registered under this title;

(d) there is a written agreement between the creditor and the debtor that:

(i) creates the debt; and

(ii) provides for the imposition of the collection fee in accordance with this section; and

(e) the obligation to pay the collection fee is imposed at the time of assignment of the debt to a third party debt collection agency or licensed attorney in accordance with an agreement described in Subsection (2)(d).

(3) The creditor shall establish the amount of the collection fee imposed under this section, except that the amount may not exceed the lesser of:

(a) the actual amount a creditor is required to pay a third party debt collection agency or licensed attorney, regardless of whether that amount is a specific dollar amount or a percentage of the principal amount owed to the creditor for a debt; or

(b) 40% of the principal amount owed to the creditor for a debt.

(4) An obligation to pay a collection fee imposed under this section is in addition to any obligation to pay attorney fees that may otherwise exist.

Whew!! Okay. So that's the law... How does it apply to your business in the real world? Let's take a look.

## Key Points

Let's review four very important items. It's critical that you understand these in order to make the law work for you. **First**, in order to add a collection fee to an account, there must have been a collection fee provision in the contract that the debtor signed. If the debtor did not expressly agree to pay a collection fee, then you can't add one.

In the past we recommended specifying the collection fee percentage in your contracts, but that is no longer necessary. My attorneys are recommending language along the lines of this sample: *"I agree to pay interest at the rate of 18% annually on all past due balances from the original due date, plus court costs and reasonable attorneys' fees, with or without suit, incurred in collecting any past due balance, and a collection fee if my account is assigned to a collection agency."*

**Second**, if you choose to draft your own language for your contract, our attorneys strongly recommend that you always use the exact term contained in the statute, "collection fee," to describe the fee the debtor agrees to pay. Not one of the variations we sometimes see such as "collection costs," "collection commission," "agency fee," "collection agency commission," etc. By the way, I am told that under no circumstances should you use the word "costs" when describing the collection fee, as that is a term of art which is construed by the courts to refer to "court costs" such as the filing and service fees.

**Third**, the collection fee is limited to the lesser of 40% of the principal balance owed, or the actual amount you would pay us if we collected the account the day you assigned it. The way the law is worded makes it complicated to come up with an exact calculation for each account from each client. Fortunately, for almost 99% of our clients who add collection fees, the 40% collection fee is what you should charge. (If the wording in your agreement has been verified as is appropriate according to the new law.) We've taken the liberty of determining which clients are okay to add the 40% amount and since you're reading this, it means that you are one of those clients. That makes it very simple for you. We will be contacting each client individually if they must

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add an amount that is less than the 40% collection fee. We will work with them to calculate the correct amount they should add to keep them in compliance with the law.

**Fourth**, the collection fee must be added to the account prior to your assigning it to our office. This is self explanatory, but the balance assigned to us must already include the collection fee. I suggest making a last charge to the account called "collection fee." That way, when you print the itemized statement, the collection fee will be included in the total amount owed.

## **Best Practice Suggestions**

**Contract Review and Implementation:** This law goes into effect on May 1<sup>st</sup>. Please review your contracts immediately and make any necessary changes without delay.

**Calculating the collection fee:** This is actually the easiest part. If you're receiving this newsletter, we've determined that our up-front effective commission rate is lower than the 40% maximum, so you can simply calculate what 40% of the principal balance would be, and add that amount. For example, if a debtor owed \$1000 before you assigned the account, you add \$400 (40% of \$1,000). You then send us the account with a total owed of \$1,400.

**Training:** Make sure your staff understands the requirements and processes before May 1st.

## **Existing Agreements**

As I mentioned above, this law is not 100% perfect. That is manifest in the fact that the law does not address how existing agreements, especially those which specify a collection fee in excess of the new 40% cap, will be

handled. For example, many of our client's agreements specify a collection fee of 50%. Our attorneys believe that the new law will apply to any accounts assigned on or after May 1<sup>st</sup>, the date the new law goes into effect. If you assign an account with a contractual 50% collection fee prior to May 1<sup>st</sup>, we will be able to collect it; no matter how long it takes. *However, we will not be able to collect any collection fee amount if the contractual rate is above 40% and it's assigned after May 1<sup>st</sup>, 2010. NO EXCEPTIONS.* For this reason, it's important that you change your agreement as soon as possible if it has language regarding a 50% collection fee, or any amount in excess of 40%.

In summary there are two very important things to remember about existing agreements:

1. If you have an agreement that allows a collection fee in excess of 40%, you must assign the account to us before April 30th or we won't be able to collect any collection fee amount for that account ever.
2. Change your contract wording if it specifies an amount in excess of 40%. We also recommend that all clients reevaluate their collection fee wording as outlined in this newsletter.

Now, don't worry, we will work with you if your agreement needs modifying. Our attorneys have offered to provide advice on this matter for a reasonable fee. And as I said earlier, every agreement should be analyzed to ensure compliance with the new law. If you are interested in having our attorneys review your agreement just give us a call. We will put you in touch with the right people.

In the long run—once everyone has their agreements appropriately modified—I believe that this law will be a benefit for Utah businesses.

Well, that's it for this month. Thanks for reading. Have a great month!

The *Collector Chronicle* is published monthly by NORTH AMERICAN RECOVERY for prospective and current clients. Direct questions or comments to David J. Saxton at the address or number listed below.

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