

The Perils of Attempting to Collect Time-Barred Debt

March 8, 2022 | [Anastasia V. Caton](#)

A case in New Mexico highlights how careful creditors must be when attempting to collect debts that are more than a couple of years old.

A mother and daughter, Debra and Debbie Agosto, bought a used car from a dealership, and their finance agreement was assigned to Wells Fargo Bank, N.A. After the Agostos defaulted in 2008, Wells Fargo repossessed and sold the car, but a \$9,000 deficiency remained. Wells Fargo assigned its interest in the finance agreement to Autovest, L.L.C., which referred the deficiency balance to a collection agency. The collection agency obtained a payment of \$1,000 from Debra in February 2011.

Autovest sued for the remaining deficiency in June 2014, more than four years after the original default but less than four years after Debra's last payment. Debbie asserted that the complaint was barred by the 4-year statute of limitations in Article 2 of New Mexico's version of the Uniform Commercial Code and counterclaimed for violations of New Mexico's Unfair Practices Act and tortious debt collection. Autovest moved for summary judgment on the counterclaims, arguing that its lawsuit was not barred by the statute of limitations because Debra's \$1,000 payment revived the limitations period under New Mexico's general statute of limitations law, and the complaint was filed within four years of her payment.

The trial court dismissed the complaint, finding that the revival provision of New Mexico's general statute of limitations requires both a partial payment and a writing to revive the limitations period, and Autovest had not provided evidence that Debra's payment was accompanied by an admission in writing or a new promise to pay. In a similar case, the trial court concluded that a payment revived the statute of limitations and entered judgment for Autovest against Maria Estrada. The Court of Appeals of New Mexico consolidated the two cases for appeal, affirmed the trial court's judgment in the first case, and reversed the trial court's judgment in the second case.

Consistent with the model UCC and most other states, Article 2 of New Mexico's UCC provides that an action for breach of any contract of sale must be brought within four years after the cause of action accrues. Although it is clear that Autovest sued more than four years after each defendant breached her finance contract by failing to pay, Autovest claimed that Article 2, which expressly does not alter the law on tolling of the statute of limitations or apply to causes of action that have accrued before it became effective, incorporates the revival provision of the general statute of limitations. Under the revival

provisions of the general statute of limitations, causes of action founded on a contract will be revived by the making of any partial or installment payment or by an admission that the debt is unpaid, as well as by a new promise to pay the same, if the admission or new promise is in writing and signed by the debtor.

The defendants countered that the text of the general statute of limitations is clear that none of its provisions (including the revival provision) apply to any action or suit which, by any particular state statute, is limited to be commenced within a different time, and, in those cases, the limitation is as provided by the separate statute. The appellate court agreed with the defendants, noting that the New Mexico Supreme Court has found that the provisions of the general statute of limitations do not apply whenever an action is governed by any particular statute of limitations outside of the general statute of limitations. Because the actions in these two cases are governed by the specific statute of limitations in Article 2, the revival provision of the general statute of limitations did not apply to a claim subject to the limitations period in Article 2, and the court found that the statute of limitations had run by the time Autovest sued for payment of the remaining deficiency balance.

This case shows how difficult it can be to determine whether a debt is outside the statute of limitations. However, perhaps more significant for a creditor or debt collector trying to craft a compliance strategy, a finding that a debt is time-barred has implications beyond simply the debtor's defense. Additional collection restrictions may apply when a creditor or debt collector is trying to collect a time-barred debt. For example, New Mexico requires persons collecting time-barred debt to provide a specific disclosure in collection communications concerning the time-barred status of the debt. Further, debt collection attorneys are subject to the federal Fair Debt Collection Practices Act's prohibition on threats to sue and lawsuits on time-barred debt. Therefore, any threats of litigation on time-barred debt—whether implicit or explicit—could be construed as deceptive because, presumably, an attorney would not bring the lawsuit on the debt holder's behalf.

Autovest, L.L.C. v. Agosto, 2021 N.M. App. LEXIS 22 (N.M. App. March 31, 2021).

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