

STORAGE NAME: h0467p1.rpp
DATE: March 20, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
ANALYSIS**

BILL #: PCS/HB 467
RELATING TO: Consumer Collection Practices
SPONSOR(S): Committee on Real Property & Probate and Representative Goodlette
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY & PROBATE
 - (2) FINANCIAL SERVICES
 - (3)
 - (4)
 - (5)
-

I.

The Florida Consumer Collection Practices Act (Act) restricts the collection activities of persons, whether collecting a debt in their own name or acting as a debt collector for another. The Act provides a minimum statutory penalty of \$500 for violation of the Act, plus court costs and attorney's fees.

This proposed committee substitute deregulates collection activities by a person collecting a debt in his or her or its own name, while expanding the prohibited activities of a collection agency. This proposed committee substitute also replaces the \$500 statutory penalty with a penalty to be determined in the court's discretion, limited to \$1000 in addition to actual damages; prohibits punitive damages; limits damages in class action suits; provides a one year statute of limitations; and provides a "bona fide error" defense.

Proponents state that this proposed committee substitute corrects some of the defects in the Florida Consumer Collection Practices Act, and conforms Florida law to the provisions of the federal Fair Debt Collection Practices Act.

Opponents state that this proposed committee substitute eliminates long standing protections for Florida residents because this bill would only regulate collection activities by collection agencies, not all persons.

This proposed committee substitute does not appear to have a fiscal impact on state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Florida Consumer Collection Practices Act - In General

Sections 559.55-559.785, F.S., are known as the Florida Consumer Collection Practices Act (Act). The Act, passed in 1972, regulates consumer collection practices.

Who is Regulated

The Act provides that any "person" that commits any of the 17 prohibited acts may be sued by the consumer. The Act applies to any person collecting a debt, whether for the person's own benefit or for the benefit of another. In rejecting a claim that the Act only applies to collection agencies, the First District Court of Appeal states:

It is clear that the legislature intended the prohibited practices to be applicable to persons generally and not just to collection agencies. The word 'person' as defined by s 1.01(3), Florida Statutes, includes all corporations¹

What is Prohibited

Section 559.72, F.S., provides that, in collecting consumer debts, no person may

- Simulate in any manner a law enforcement officer² or a representative of any governmental agency;³

¹ *Cook v. Blazer Financial Services, Inc.*, 332 So.2d 677, 679 (Fla. 1st DCA 1976). Blazer Financial Services, Inc. is "a small loan company which was attempting to collect its own claim from Cook." *Id.* at 678.

² Simulating a law enforcement officer may be punishable as a third degree felony, s. 843.08, F.S.

³ Simulating a representative of any government agency may be punishable as a third degree felony, s. 843.0855(2), F.S.

- Use or threaten force or violence;⁴
- Tell a debtor who disputes a consumer debt that she or he or any person employing her or him will disclose to another, orally or in writing, directly or indirectly, information affecting the debtor's reputation for credit worthiness without also informing the debtor that the existence of the dispute will also be disclosed;
- Communicate or threaten to communicate with a debtor's employer prior to obtaining final judgment against the debtor, unless the debtor gives her or his permission in writing to contact her or his employer or acknowledges in writing the existence of the debt after the debt has been placed for collection, but this shall not prohibit a person from telling the debtor that her or his employer will be contacted if a final judgment is obtained;
- Disclose to a person other than the debtor or her or his family information affecting the debtor's reputation, whether or not for credit worthiness, with knowledge or reason to know that the other person does not have a legitimate business need for the information or that the information is false;
- Disclose information concerning the existence of a debt known to be reasonably disputed by the debtor without disclosing that fact. If a disclosure is made prior to such reasonable dispute having been asserted and written notice is received from the debtor that any part of the debt is disputed and if such dispute is reasonable, the person who made the original disclosure shall reveal upon the request of the debtor within 30 days the details of the dispute to each person to whom disclosure of the debt without notice of the dispute was made within the preceding 90 days;
- Willfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family;⁵
- Use profane, obscene, vulgar, or willfully abusive language in communicating with the debtor or any member of her or his family;⁶
- Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate or assert the existence of some other legal right when such person knows that the right does not exist;
- Use a communication which simulates in any manner legal or judicial process or which gives the appearance of being authorized, issued or approved by a government, governmental agency, or attorney at law, when it is not;⁷

⁴ These activities may be punishable as assault or battery.

⁵ As to telephone communications, obscene or harassing telephone calls may be punishable as a second degree misdemeanor, s. 365.16(1), F.S.

⁶ Id.

⁷ The use of simulated process may be punishable as a first degree misdemeanor, ss. 817.38 and 817.39, F.S., and may also constitute obstruction of justice, a third degree felony, s. 843.0855(1)(a), F.S.

- Communicate with a debtor under the guise of an attorney by using the stationery of an attorney or forms or instruments which only attorneys are authorized to prepare;⁸
- Orally communicate with a debtor in such a manner as to give the false impression or appearance that such person is or is associated with an attorney;⁹
- Advertise or threaten to advertise for sale any debt as a means to enforce payment except under court order or when acting as an assignee for the benefit of a creditor;
- Publish or post, threaten to publish or post, or cause to be published or posted before the general public individual names or any list of names of debtors, commonly known as a deadbeat list, for the purpose of enforcing or attempting to enforce collection of consumer debts;
- Refuse to provide adequate identification of herself or himself or her or his employer or other entity whom she or he represents when requested to do so by a debtor from whom she or he is collecting or attempting to collect a consumer debt;
- Mail any communication to a debtor in an envelope or postcard with words typed, written, or printed on the outside of the envelope or postcard calculated to embarrass the debtor. An example of this would be an envelope addressed to "Deadbeat, Jane Doe" or "Deadbeat, John Doe"; or
- Communicate with the debtor between the hours of 9 p.m. and 8 a.m. in the debtor's time zone without the prior consent of the debtor.

Penalties and Enforcement - Lawsuit by an Individual

A "debtor"¹⁰ may bring an action against any person for a violation of the Act, and if the debtor prevails, the court must award the debtor \$500 or actual damages, whichever is greater, plus court costs and reasonable attorney's fees. Punitive damages are specifically allowed in addition to statutory damages.

In rejecting a challenge to the Act alleging that the damages provisions were unconstitutional, the Florida Supreme Court states:

[T]he minimum award reasonably can be construed as providing a penalty designed to dissuade consumer collection agencies from engaging in the conduct proscribed, even where the legal standard of malice is not met. In enacting Section 559.72(4), supra, the Legislature prohibited a course of conduct which until then apparently was widely followed by consumer finance companies and collection agencies. The existence of this industrywide standard of practice would ordinarily be a defense against the imposition of punitive damages based on malicious intent. In the exercise of its police powers the Legislature chose this method of deterring wilful violations of the protective legislation it had enacted. The fact that the Act also authorizes a punitive damage recovery for the traditional case involving malice does not alter characterization of the \$500 minimum award as punitive. Had the Legislature failed to include a traditional punitive damages

⁸ Practicing law without a license may be punishable as a first degree misdemeanor, s. 454.23, F.S.

⁹ *Id.*

¹⁰ "Debtor" is defined as "any natural person obligated or allegedly obligated to pay any debt."

measure, aggrieved consumers might well have been precluded from receiving any award of punitive damages where malice is evident. [citation omitted] We believe that the Legislature intended to preserve common-law punitive remedies while expanding the type of damages available to injured parties under the Act so as to include the separate, statutory measure of damages at issue here.

In short, the minimum award afforded by the statute exhibits aspects of both liquidated and punitive damages. It clearly appears to have been the intent of the Legislature to provide a remedy for a class of injury where damages are difficult to prove and at the same time provide a penalty to dissuade parties such as Beneficial from engaging in collection practices which may have been heretofore tolerated industrywide. Neither objective is without the purview of proper legislative action. The Consumer Collection Practices Act is a laudable legislative attempt to curb what the Legislature evidently found to be a series of abuses in the area of debtor-creditor relations. The legislation provided neither criminal penalties nor administrative enforcement. The minimum damage award and the civil suits it encourages constitute the only means by which the legislative purpose may be vindicated. We decline to strip the [Act] of the only self-enforcing mechanism it possesses.¹¹

Penalties and Enforcement - Class Action Lawsuit

A class action lawsuit on behalf of debtors is not limited, but may be prosecuted as in any other civil action.

Defenses

No defenses are specifically set forth by statute, although many of the 17 enumerated offenses “require the plaintiff to show the collector’s willful intent to commit the violation”, which “places the burden of proving bad faith on the plaintiff”.¹²

Statute of Limitations

No specific statute of limitations is set forth, accordingly, the four year statute of limitations at s. 95.11(3)(p), F.S., applies.

Injunction

Section 559.78, F.S., provides that state attorneys and their assistants are authorized to seek temporary or permanent injunctive relief against any person violating the Act.

¹¹ *Harris v. Beneficial Finance Company of Jacksonville*, 338 So.2d 196, 200 (Fla. 1976).

¹² *Fair Debt Collection Practices: Analysis of Florida and Federal Law*, Terri Jayne Salt, 30 U.Fla.L.R. 892, 915 (1978).

Federal Fair Debt Collection Practices Act

A federal law known as the “Fair Debt Collection Practices Act” contains laws similar to the Florida Consumer Collection Practices Act regarding collection activities. The significant differences between current Florida law and the Federal Fair Debt Collection Practices Act, as they relate to this proposed committee substitute, are that federal law

- Only applies to collection agencies.
- Does not include a \$500 minimum damage award; statutory damages are assessable in the court’s discretion in any amount up to \$1000.
- Prohibits punitive damage awards.
- Limits damages in a class action to \$500,000 or one percent of the defendant’s net worth.
- Makes proof of a violation easier because the analogous prohibited activities do not contain the intent requirements of Florida law.

C. EFFECT OF PROPOSED CHANGES:

Who is Regulated

This proposed committee substitute changes “person” to “debt collector” throughout the Florida Consumer Collection Practices Act (Act). Accordingly, the Act would not apply to a person collecting monies on their own behalf. A “debt collector” is “any person who uses any instrumentality of commerce within this state, whether initiated from within or outside this state, in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be due or owed to another.”¹³

*This change would affect the continued precedential effect of Cook v. Blazer Financial Services, Inc., where the court held that the portions of the Act other than registration of collection agencies apply to persons collecting debts in their own name.*¹⁴

What is Prohibited

This proposed committee substitute adds two additional restrictions upon the activities of a debt collector.

- A debt collector may not communicate with a debtor if the debt collector knows the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the debtor's attorney fails to respond within a reasonable period of time to a communication

¹³ Section 559.55(6), F.S.

¹⁴ *Cook v. Blazer Financial Services, Inc.*, 332 So.2d 677, 679 (Fla. 1st DCA 1976).

from the debt collector or unless the debtor's attorney consents to direct communication with the debtor.¹⁵

- A debt collector may not “cause charges to be made to any debtor for communications by concealment of the true purpose of the communication, including collect telephone calls and telegram fees”.¹⁶

Penalties and Enforcement - Lawsuit by an Individual

This proposed committee substitute deletes the mandatory penalty of \$500 or actual damages, whichever is greater. In its place, this proposed committee substitute provides that a debt collector is liable for actual damages plus statutory damages of up to \$1,000.¹⁷ In determining liability for additional statutory damages, the court is to consider the nature of the defendant’s noncompliance, the frequency and persistence of such noncompliance, and the extent to which such noncompliance was intentional. Punitive damages are prohibited. A lawsuit may not be brought against any “person”, but may only be brought against a “debt collector”.

This change would affect the continued precedential effect of Harris v. Beneficial Finance Company of Jacksonville, which case held that the “minimum damage award and the civil suits it encourages constitute the only means by which the legislative purpose may be vindicated.”¹⁸

Penalties and Enforcement - Class Action Lawsuit

This proposed committee substitute limits damages awarded in a class action lawsuit to the lesser of \$500,000 or 1 percent of the defendant’s net worth.¹⁹

Defenses

This proposed committee substitute provides that a debt collector will not be held liable in any action under the Act if the debt collector shows that the violation was not intentional and that the violation resulted from a “bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”²⁰

¹⁵ The same restriction is in federal law at 15 U.S.C. § 1692c(a)(2).

¹⁶ The same restriction is in federal law at 15 U.S.C. § 1692f(5).

¹⁷ The damages provisions are the same as in federal law at 15 U.S.C. § 1692k(a).

¹⁸ *Harris v. Beneficial Finance Company of Jacksonville*, 338 So.2d 196, 200 (Fla. 1976) (calling the minimum damage award the “only self-enforcing mechanism” in the Act).

¹⁹ The same limitation is found in federal law at 15 U.S.C. § 1692k(a)(2)(B).

²⁰ The same defense is found in federal law at 15 U.S.C. § 1692k(c).

Statute of Limitations

This proposed committee substitute changes the statute of limitations for bringing an action under the Act from four years to one year after the alleged violation occurred.²¹

Injunction

This proposed committee substitute changes “person” to “debt collector” in the section on enforcement of the Act by injunction.

D. SECTION-BY-SECTION ANALYSIS:

See “Present Situation” and “Effect of Proposed Changes”.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

none

2. Expenditures:

none

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

none

2. Expenditures:

none

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

none

D. FISCAL COMMENTS:

none

²¹ The statute of limitations for a violation of the Federal Fair Debt Collection Practices Act is one year. 15 U.S.C. § 1692k(d).

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority the counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

none

B. RULE-MAKING AUTHORITY:

none

C. OTHER COMMENTS:

Pursuant to the proposed committee substitute, a creditor collecting its own debts will no longer be prohibited by Florida statutory law from doing the following:

- Tell a debtor who disputes a consumer debt that the creditor will disclose to another, orally or in writing, directly or indirectly, information affecting the debtor's reputation for credit worthiness.
- Communicate or threaten to communicate with a debtor's employer.
- Disclose to a person other than the debtor or her or his family information affecting the debtor's reputation, whether or not for credit worthiness.
- Disclose information concerning the existence of a debt known to be reasonably disputed by the debtor without disclosing that fact.
- Willfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or

willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family.²²

- Use profane, obscene, vulgar, or willfully abusive language in communicating with the debtor or any member of her or his family;²³
- Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate or assert the existence of some other legal right when such creditor knows that the right does not exist.
- Advertise or threaten to advertise for sale any debt as a means to enforce payment.
- Publish or post, threaten to publish or post, or cause to be published or posted before the general public individual names or any list of names of debtors, commonly known as a deadbeat list.
- Refuse to provide adequate identification of the employee or the creditor when requested to do so by a debtor.
- Mail a communication to a debtor in an envelope or postcard with words typed, written, or printed on the outside of the envelope or postcard calculated to embarrass the debtor. An example of this would be an envelope addressed to "Deadbeat, Jane Doe" or "Deadbeat, John Doe".
- Communicate with the debtor at any hour of the day or night.

Information Provided by Bill Proponents

The Association of Florida Foreclosure Attorneys supports this legislation.²⁴ To summarize the information they have provided:

In the "late 1970's", a number of federal consumer rights bills passed state and federal legislatures, including the federal Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act. These acts prohibit certain collection activities. Because actual damages may not result from some of these prohibited activities (i.e., a late night telephone call), the state and federal laws included "a mechanism to motivate private attorney's general to act as a policing mechanism . . . [so that] debtor's are entitled to recover attorney's fees, as well as some level of statutory damages, even if no actual damages can be proven." These acts "were intended to work as a 'fine-based' enforcement mechanism".

"[I]n the last few years, class action lawyers have taken an interest in these laws, and they have seized upon some significant defects in the Florida law to create what amounts to a 'mass tort' cause of action". "[I]nstead of imposing a

²² Except that abuse or harassment in a telephone call may be prohibited by s. 365.16(1), F.S.

²³ Except that obscene language in a telephone call may be prohibited by s. 365.16(1), F.S.

²⁴ Telephone conference with Warren Husband, Esquire, on behalf of the Association of Florida Foreclosure Attorneys, March 20, 2000.

'fine,' these defects multiply the statutory damages attendant to even the most inadvertent act and turn the Florida law into a potential death penalty for smaller financial institutions and debt collectors”.

This proposed committee substitute “corrects some of the defects in the Florida Act and conforms it to the provisions of the Federal Act, which would still keep Florida’s Act among the most consumer-friendly in the country.” “These changes will help re-balance a well-intended statute that we believe has run far afield of the original intent of the Florida Legislature.”²⁵

Information Provided by Bill Opponents

Florida Legal Services, Inc. opposes this legislation.²⁶ To summarize the information that they have provided:

This “[p]roposal eviscerates the Florida law by eliminating ‘persons’ and does not ‘conform’ Florida law to federal law as many of the ‘strict liability’ protections in the federal law are not included”. The proposed committee substitute “eliminates long standing protections provided to Florida debtors” by allowing creditors to engage in practices such as harassment, abuse, and the use of “abusive, vulgar and obscene language”. The persons whose collection activities would no longer be regulated include “aggressive door-to-door salespeople, telemarketers, shady home improvement contractors and others who target the elderly and infirm and convince them to buy things they can not afford and who then scare them into thinking they are going to jail if they do not pay.”

“By significantly reducing its application and not providing the reciprocal addition of the rights provided by federal Act the [proposed committee substitute] reverses the original intent of the Florida Legislature in enacting the Consumer Collection Practices Act. If the “concern is to avoid ‘mass tort’ types of lawsuits based upon ‘inadvertent’ acts, this proposal is going overboard. A creditor does not ‘inadvertently’ ‘use or threaten violence;’ or inadvertently ‘willfully harass a debtor or his or her family’ or inadvertently ‘use profane, obscene, vulgar, or willfully abusive language”.

“[A]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy. Most of the requests for bankruptcy services at the local legal services office have been the result of creditor harassment”; thus, this proposed committee substitute “insures” that bankruptcy filings will increase.²⁷

²⁵ Analysis on SB 760 (this proposed committee substitute is identical to CS/SB 760), undated but received March 8, 2000, from Warren Husband, Esquire.

²⁶ Telephone conference with Dorene Barker, of Florida Legal Services, Inc., March 16, 2000.

²⁷ Analysis on the proposed committee substitute for HB 467, March 17, 2000, from Lynn Drysdale, Esquire, of Florida Legal Services, Inc.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

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