

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 760

SPONSOR: Senator Laurent

SUBJECT: Consumer Collection Practices

DATE: February 1, 2000

REVISED: 03/08/00 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Forgas</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill amends ss. 559.72, 559.77, and 559.78, F.S., which are part of the Florida Consumer Collection Practices Act (FCCPA.) Section 559.72, F.S., is amended to add additional activities in which debt collectors are prohibited from engaging. Section 559.77, F.S., which provides civil remedies for violations of the FCCPA, is amended to increase the amount of additional statutory damages from \$500 to \$1,000, allow class action plaintiffs to recover \$1,000 per named plaintiff and an aggregate award not to exceed the lesser of \$500,000 or 1 percent of the defendant's net worth, and eliminate the recovery of punitive damages. Additionally, a bona fide error affirmative defense and a 1 year statute of limitation is added to s. 559.77, F.S. Finally, the term "debt collector" replaces the word "person" in ss. 559.72 and 559.78, F.S.

The bill has an effective date of July 1, 2000.

The bill substantially amends the following sections of the Florida Statutes: 559.72, 559.77, and 559.78

II. Present Situation:

Florida Consumer Collection Practices Act

Sections 559.55-559.785, F.S., are known as the Florida Consumer Collection Practices Act (FCCPA.) This act provides a series of measures designed to regulate consumer collection agencies and protect Florida citizens from certain debt collection practices which involve fraud, harassment, threats and other activities. The provisions apply to debts of a consumer arising out of a transaction which is primarily for personal, household, or family purposes.

The FCCPA also provides in s. 559.77, F.S., for a civil action by a debtor against a person violating the debt collection provisions in s. 559.72, F.S., which currently enumerates 17 prohibited activities. Section 559.77, F.S., provides that upon adverse adjudication, the defendant

is liable for actual damages or \$500, whichever is greater, together with court costs and attorney's fees. The statute also provides for punitive damages in the court's discretion and for equitable relief, including enjoining the defendant from further violations. Section 559.77, F.S., also provides for reasonable attorney's fees and costs to be awarded to the defendant in the event the court finds the suit failed to raise a justiciable issue of law or fact.

A large portion of the FCCPA pertains to collection agencies and their licensing, regulation and control by the Department of Banking and Finance and Division of Consumer Services (ss. 559.53-559.65; 559.725-559.730, F.S.) However, the prohibited practices contained in s. 559.72, F.S., may not apply only to collection agencies and debt collectors. Section 559.72, F.S., mandates that "...no person shall" engage in the prohibited activities. In *Cook v. Blazer Financial Services, Inc.*, 332 So.2d 677 (Fla. 1st D.C.A. 1976), and *Williams v. Streeps Music Company, Inc.*, 333 So.2d 65 (Fla. 4th D.C.A. 1976), the Florida appellate courts ruled that s. 559.72, F.S., allows debtors to bring actions against all persons, including creditors. However, a federal trial court in the Middle District of Florida ruled in the case of *Seibel v. Society Lease, Inc.*, 969 F.Supp. 713, 716 (M.D. Fla. 1997), that the defendant was not liable for an alleged violation of s. 559.72, F.S., because the defendant was not a "debt collector" as defined in s. 559.55(6), F.S.

III. Effect of Proposed Changes:

The bill amends three sections of the FCCPA. Section 559.72, F.S., which pertains to prohibited practices, is amended to replace the word "person" with the term "debt collector." The change in terminology would arguably only prohibit debt collectors from engaging in the enumerated prohibited practices. Section 559.55(6), F.S., defines a debt collector as 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. Creditors who do not use other entities to collect debts are not considered debt collectors. The bill's change from "person" to "debt collector" would arguably provide a statutory reversal of Florida case law which has held that s. 559.72, F.S., applies to all persons and not just debt collectors and collection agencies.

The bill also adds two new paragraphs to the list of prohibited practices contained in s. 559.72, F.S. New paragraph (18) prohibits a debt collector from communicating with a debtor if the debt collector knows the debtor is represented by an attorney and the debt collector has knowledge of, or can readily ascertain, such attorney's name and address. The debt collector is not prohibited from contacting a represented debtor if the debtor's attorney fails to respond within a reasonable period of time or the attorney consents to direct communication with the debtor. The bill does not provide any parameters for determining what a reasonable period of time is before a debt collector can contact a debtor whose attorney has failed to respond to a debt collector's communication. This change mirrors a similar provision in the federal version of the FCCPA. *See*, 15 U.S.C.A. s. 1629(f).

New paragraph (19) to s. 559.72, F.S., prohibits a debt collector from causing 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. This change mirrors the federal version of the FCCPA. *See*, 15 U.S.C.A. s. 1629(f).

The second section of the FCCPA amended by the bill is s. 559.77, F.S., which provides civil remedies for violations of the act. The bill changes the word “person” to “debt collector,” in conformance with the change made in s. 559.72, F.S., so that debtors can bring civil actions only against debt collectors who engage in any of the prohibited debt collecting activities in s. 559.72, F.S. The amount of damages which a prevailing debtor can recover is increased from the greater of actual damages or \$500 to actual damages and additional statutory damages of up to \$1,000. In determining liability for any additional statutory damages, the court shall consider the nature of the defendant’s noncompliance with s. 559.72, F.S., the frequency and persistence of such noncompliance, and the extent to which such noncompliance was intentional. However, the bill would no longer allow punitive damages to be awarded.

The bill further provides in s. 559.77, F.S., a specific damages provision for class action lawsuits. In any class action lawsuit, the court may award additional statutory damages of up to \$1,000 for each named plaintiff. Also, there may be an aggregate award of additional statutory damages not to exceed the lesser of \$500,000 or 1 percent of the defendant’s net worth for all remaining class members. This change mirrors a similar provision in the federal version of the FCCPA. *See*, 15 U.S.C.A. s. 1692k(a)(2)(B).

The bill adds the “bona fide error” affirmative defense to s. 559.77, F.S. It provides that a debt collector shall not be held liable if the debt collector shows by a preponderance of the evidence that the violation of s. 559.72, F.S., was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. This mirrors the similar federal provision in 15 U.S.C.A. s. 1692(k)(c). Federal courts have construed this provision to mean that the debt collector must prove the act was unintentional and it occurred despite having preventative operations and procedures in place. *See e.g., Adams v. Law Office of Stuckert & Yates*, 926 F. Supp. 521 (E.D. Pa. 1996).

The bill also includes a statute of limitation in s. 559.77, F.S. The bill provides that an action brought under s. 559.77, F.S., must be commenced within 1 year after the date on which the alleged violation occurred. This change likewise mirrors the statute of limitation provision in the federal version of the FCCPA. *See*, 15 U.S.C.A. s. 1692(k)(d).

Finally, the bill amends s. 559.78, F.S., which provides for judicial enforcement of penalties provided in the FCCPA. The bill changes the word “person” to “debt collector” to conform with the changes in ss. 559.72 and 559.77, F.S. Accordingly, this section would now allow state attorneys to apply for a temporary or permanent injunction restraining any debt collector from violating any provision of the FCCPA.

The bill takes effect on July 1, 2000, and applies to any cause of action accruing on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that the FCCPA currently allows a debtor to bring a cause of action against any “person” who violates s. 559.72, F.S., and the bill would restrict actions only against “debt collectors” who violate the act, the bill could have an adverse impact upon debtors who suffer from abusive debt collection practices conducted by creditors and others who are not defined as debt collectors under s. 559.55, F.S. However, the precise impact cannot be determined at this time.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

