

STORAGE NAME: h0109s1.sgc.doc
DATE: March 28, 2001

HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: CS/CS/HB 109
RELATING TO: Collection of Consumer Debts
SPONSOR(S): Council for Smarter Government, Committee on Banking, and Representative Cantens
TIED BILL(S): none

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

- (1) JUDICIAL OVERSIGHT YEAS 9 NAYS 2
 - (2) BANKING YEAS 6 NAYS 1
 - (3) COUNCIL FOR SMARTER GOVERNMENT YEAS 10 NAYS 0
 - (4)
 - (5)
-

I. SUMMARY:

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 for minimum statutory damages of \$500 for violation of the Act, plus court costs and attorney's fees.

This bill expands the prohibited activities for a person collecting consumer debts; eliminates the \$500 minimum statutory damages; provides that a prevailing debtor is to be awarded actual damages and additional statutory damages, determined at the court's discretion, of up to \$1000; limits damages in class action suits; provides a two year statute of limitations for bringing a cause of action under the Act; provides for a "bona fide error" defense; and requires that a Florida court give great weight to federal court interpretations of the similar Fair Debt Collection Practices Act.

This bill does not appear to have a fiscal impact on state or local government.

SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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 consumers with a course of action against any "person" who commits any of the 17 prohibited acts. 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

Use or threaten force or violence;⁴

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.

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

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

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 must 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

⁴These activities may be punishable as assault or battery.

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

⁶*Id.*

⁷The 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 industry wide 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 willful violations of the protective

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

⁹*Id.*

¹⁰Section 559.55(2), F.S., defines "debtor" or "consumer" as "any natural person obligated or allegedly obligated to pay any debt."

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 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 industry wide. 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 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. Rev. 892, 915 (1978).

Federal Fair Debt Collection Practices Act

A federal law known as the "Fair Debt Collection Practices Act" contains provisions 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 bill, 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 lawsuit to \$500,000 or one percent of the defendant's net worth.

Imposes a one-year statute of limitations.

In many of the analogous violations, does not require a debtor to show that a debt collector intentionally violated the law, as Florida law does.¹³

C. EFFECT OF PROPOSED CHANGES:

Who is Regulated

This bill maintains current law, which makes the Florida Consumer Collection Practices Act (Act) applicable to all persons collecting a consumer debt.

What is Prohibited

This bill adds two additional restrictions upon a person collecting a consumer debt:

A person may not communicate with a debtor if the person 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 from the person, the debtor's attorney consents to direct communication with the debtor, or a communication is initiated by the debtor with the person.¹⁴

¹³*Fair Debt Collection Practices: Analysis of Florida and Federal Law*, Terri Jayne Salt, 30 U. Fla. L. Rev. 892, 915 (1978).

¹⁴The same restriction is in federal law at 15 U.S.C. § 1692c(a)(2) except for "communications initiated by a debtor with the person."

A person 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”.¹⁵

Penalties and Enforcement - Lawsuit by an Individual

This bill deletes the mandatory penalty of \$500 or actual damages, whichever is greater. In its place, this bill provides that a debt collector is liable for actual damages plus statutory damages of up to \$1,000.¹⁶ 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.

Penalties and Enforcement - Class Action Lawsuit

This bill limits the additional statutory damages (damages payable in addition to the actual damages suffered by the plaintiff) awarded in a class action lawsuit to the lesser of \$500,000 or 1 percent of the defendant’s net worth.¹⁷ In no event may the aggregate award in a class action suit provide an individual class member with additional statutory damages in excess of \$1,000.

Defenses

This bill provides that a person will not be held liable in any action under the Act if the person 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.”¹⁸

Statute of Limitations

This bill changes the statute of limitations for bringing an action under the Act from four years to two years after the alleged violation occurs.¹⁹

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

¹⁶The damages provisions are the same as in federal law at 15 U.S.C. § 1692k(a). In *Harris v. Beneficial Finance Company of Jacksonville*, 338 So.2d 196, 200 (Fla. 1976), the court stated that the “minimum damage award and the civil suits it encourages constitute the only means by which the legislative purpose may be vindicated.”

¹⁷The same limitation is found in federal law at 15 U.S.C. § 1692k(a)(2)(B).

¹⁸The same defense is found in federal law at 15 U.S.C. § 1692k(c).

¹⁹The statute of limitations for a violation of the Federal Fair Debt Collection Practices Act is one year. 15 U.S.C. § 1692k(d).

Interpretation of State Law

This bill provides that, in applying and construing the civil remedies provisions at s. 559.77, F.S., a court must give due consideration and great weight to the interpretations of the Federal Trade Commission and decisions of the federal courts relating to the federal Fair Debt Collection Practices Act.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes".

II. 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

III. 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.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None

B. RULE-MAKING AUTHORITY:

None

C. OTHER COMMENTS:

None.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Judicial Oversight heard this bill on February 6, 2001. No amendments were offered.

On March 7, 2001, the Committee on Banking adopted the following amendment and favorably reported the HB 109 bill as a Committee Substitute. The CS differs from the bill in that it allows a consumer debt collector to communicate with a debtor when the debtor initiates the communication.

On March 22, 2001, the Council on Smarter Government adopted two amendments to this bill:

1. This amendment provides that an individual class action plaintiff may not receive an award of additional statutory damages in excess of \$1,000.
2. This amendment provides that, in applying and construing the civil remedies provision of the Florida Consumer Collection Practices Act, a court must give "due consideration and great weight . . . to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act."

The bill was then reported favorably as a council substitute.

VI. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Nathan L. Bond, J.D.

Staff Director:

C. Lynne Overton, J.D.

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AS REVISED BY THE COMMITTEE ON BANKING:

Prepared by:

Warren A. "Drew" Crawford

Staff Director:

Susan F. Cutchins

AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

Nathan L. Bond, J.D.

Council Director:

Don Rubottom
