

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: CS/CS/SB 562

INTRODUCER: Commerce and Tourism Committee; and Banking and Insurance Committee; and Senators Stargel and Gaetz

SUBJECT: Consumer Debt Collection

DATE: February 1, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Little</u>	<u>McKay</u>	<u>CM</u>	<u>Fav/CS</u>
3.	_____	_____	<u>FP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 562 amends a provision of the Florida Consumer Collection Practices Act (FCCPA), which regulates consumer collection practices in order to protect consumers from deceptive, unfair, or abusive collection practices. The FCCPA prohibits a person collecting a consumer debt from communicating with a debtor if the person knows that a 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. However, current law contains three exceptions to this prohibition, thus allowing the communication under the following circumstances: 1) the debtor's attorney fails to respond within 30 days to a communication from the person; 2) the debtor's attorney consents to a direct communication with the debtor; or 3) the debtor initiates the communication.

The bill provides that an original creditor collecting a debt is not liable for communicating with a debtor, who is known to be represented by an attorney, if the debtor's attorney fails to provide notice of representation. A debtor's attorney may provide notice of representation by one of the following means:

- by service of pleadings in a filed action;
- by providing written notification by certified mail to the registered agent of the original creditor; or
- by providing notice of representation by mail, fax, email, or other electronic format, to a location designated by the creditor on a billing statement.

The bill requires the notice of representation to state that the debtor is represented by an attorney with respect to such debt and must also disclose the attorney's name and address. Under the bill, original creditors are required to designate at least one method of communication on a billing statement.

The bill also creates a requirement that an original creditor must cease direct communication with the debtor within 5 business days upon receiving notice of representation from the debtor's attorney.

II. Present Situation:

Federal and state debt collection laws provide consumer protection against deceptive, unfair, or abusive collection practices that may occur before the debtor is sued, as well as during the litigation process.

Consumer debt covers personal debt such as mortgages, credit cards, medical debts, and other debts mainly for individual, family, or household purposes. Depending on the terms of the loan, a grace period may be provided before a debt becomes delinquent. Generally, most credit issuers will attempt to collect on a delinquent debt between 120-180 days after delinquency, before it is deemed uncollectible and is "charged off" corporate accounts. Typically, the charged-off debt is then either assigned or sold to a third-party collection agency or collection law firm, which use a variety of collection methods and judgment remedies to recover the asset, subject to applicable statutes of limitations. These remedies enable creditors to minimize losses due to nonpayment by borrowers, and help ensure the availability and affordability of consumer credit.

Between 2001 and 2013, on average, 10.1 percent of outstanding credit card debt was reported as being more than 90 days delinquent. In contrast, for the same period, 8.0 percent of student loans and 3.8 percent of mortgage loans were reported as being more than 90 days delinquent.¹ In 2013, the proportion of American consumers with at least one account in third-party collections stood at 14 percent and the total amount collected from them by third-party debt collectors was approximately \$55 billion.²

In 2014, the federal Consumer Financial Protection Bureau processed over 88,300 debt collection complaints, positioning debt collection as the leading source of consumer complaints.³ Approximately 2 percent of these complaints related to a consumer being contacted directly, instead of the debt collector contacting their attorney.⁴

¹ Viktor Fedaseyeu, WORKING PAPER NO. 15-23, DEBT COLLECTION AGENCIES AND THE SUPPLY OF CONSUMER CREDIT (Federal Reserve Bank of Philadelphia 2014).

² Viktor Fedaseyeu and Robert Hunt, WORKING PAPER NO. 15-43 THE ECONOMICS OF DEBT COLLECTION: ENFORCEMENT OF CONSUMER CREDIT CONTRACTS, (Federal Reserve Bank of Philadelphia 2015).

³ Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act, Annual Report 2014* (March 2015).

⁴ *Id.*

Federal Fair Debt Collection Practices Act

The Federal Trade Commission (FTC)⁵ and the Consumer Financial Protection Bureau⁶ are the primary federal enforcement agencies of the Fair Debt Collection Practices Act (FDCPA).⁷ The intent of the FDCPA is to protect consumers from harmful debt collection practices and to protect ethical collectors from an unfair competitive disadvantage. The FDCPA establishes standards of conduct for the collection industry by prohibiting abusive, deceptive, and unfair debt collection practices. The FDCPA applies to third-party debt collectors, which includes contingency agencies, collection law firms, and debt buyers. A violation of the FDCPA carries a penalty of up to \$1,000 per violation.⁸

Florida Consumer Collection Practices Act

In Florida, consumer debt collection practices are regulated by the FDCPA and the Florida Consumer Collection Practices Act (FCCPA).⁹ The FCCPA gives regulatory oversight authority to the Office of Financial Regulation (OFR). Further, the act authorizes the Attorney General to initiate enforcement actions against out-of-state consumer debt collectors that violate the FCCPA.¹⁰ Both acts provide private civil remedies to debtors for violations; if successful, the debtor may recover actual and statutory damages and reasonable attorney's fees and costs.¹¹ However, the FCCPA also provides that a person cannot be held liable under the act if the person shows, by a preponderance of the evidence, that the violation was not intentional and resulted from a bona fide error.¹² If the court finds that the suit fails to raise justiciable issue of law or fact, the debtor is liable for court costs and reasonable attorney's fees incurred by the defendant.¹³

The FCCPA prohibits many of the same debt collection practices prohibited by the FDCPA. However, the FCCPA was created to provide requirements and regulations in addition to the federal law in order to be more protective of consumers and debtors.¹⁴ For instance, the FDCPA excludes original creditors from its provisions while the FCCPA has been construed to apply to both debt collectors and original creditors.¹⁵ The FCCPA provides greater protection than the

⁵ 15 U.S.C. s. 41, *et seq.*

⁶ 12 U.S.C. s. 5481, *et seq.*

⁷ 15 U.S.C. s. 1692, *et seq.*

⁸ 15 U.S.C. s. 1692, *et seq.*

⁹ Part VI of ch. 559, F.S.

¹⁰ Section 559.565, F.S.

¹¹ Section 559.77(1), F.S., provides that any person who fails to comply with any provision of this section is liable for actual damages and additional statutory damages as the court may allow, but not exceeding \$1,000, together with court costs and reasonable attorney fees incurred by the plaintiff. In determining the defendant's liability for additional statutory damages, the court must consider the nature of the defendant's noncompliance, the frequency and persistence of the noncompliance, and the extent to which the noncompliance was intentional. Section 559.77(1), F.S., also addresses class action lawsuits.

¹² Section 559.77(3), F.S.

¹³ 15 U.S.C. s. 1692j and s. 559.77, F.S., respectively. Section 559.77(3), F.S., provides that a person is not liable in any action under this section if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid such errors.

¹⁴ Section 559.552, F.S.

¹⁵ *Craig v. Park Fin. of Broward County, Inc.*, 390 F. Supp 2d 1150, 1154 (M.D. Fla. 2005).

FDCPA because it forbids *any person*, rather than only debt collectors, from practicing certain consumer debt collection practices.¹⁶

Communication with Debtor Represented by Counsel

Both the federal and state laws generally prohibit a debt collector from communicating with a debtor when the debt collector knows the debtor is represented by an attorney.¹⁷ However, the FCCPA prohibits *any person* collecting consumer debts from communicating with a debtor if:

the person knows that 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 30 days to a communication from the person, unless the debtor's attorney consents to a direct communication with the debtor, or unless the debtor initiates the communication.¹⁸

Therefore, Florida law currently prohibits any person from knowingly communicating with a debtor who is represented by an attorney, unless: 1) the debtor's attorney fails to respond within 30 days to a communication from the person; 2) the debtor's attorney consents to a direct communication with the debtor; or 3) the debtor initiates the communication. If a person contacts a debtor known to be represented by an attorney and one of the listed exceptions does not apply, that person may be liable for a violation of s. 559.72(18), F.S., unless the person can show by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error.

III. Effect of Proposed Changes:

Section 1 amends s. 559.72(18), F.S., to clarify that a debtor, individually, may provide notice of attorney representation. The bill also states that an original creditor collecting a debt is not liable for communicating with a debtor, who is known to be represented by an attorney, if the debtor's attorney fails to provide the original creditor with notice of representation by one of the following means:

- by service of pleadings in a filed action;
- by providing written notification by certified mail to the registered agent of the original creditor; or
- by providing notice of representation by mail, fax, email, or other electronic format, to a location designated by the creditor on a billing statement.

The bill requires the notice of representation to state that the debtor is represented by an attorney with respect to such debt and must also disclose the attorney's name and address. Under the bill, original creditors are required to designate at least one method of communication on a billing statement. The requirement ensures that notice of representation is provided to a location designated by the original creditor and that the original creditor will be provided information that allows the original creditor to communicate with the debtor's attorney, rather than the debtor.

¹⁶ Section 559.72, F.S.

¹⁷ 15 U.S.C. 1692c and s. 559.72(18), F.S.

¹⁸ Section 559.72(18), F.S.

The bill also creates a requirement that an original creditor must cease direct communication with the debtor within 5 business days upon receiving notice of representation from the debtor's attorney. The effect of this requirement is that an original creditor will not be able to be held liable for violations of the FCCPA that may occur even after the original creditor is given knowledge of attorney representation by a debtor, until 5 business days after the original creditor receives notice of representation from the debtor's attorney. However, an original creditor that continues to violate the FCCPA after the 5 business days may still be able to provide an affirmative defense under s. 559.77(3), F.S., if the original creditor is able to show any violation was not intentional and resulted from a bona fide error.

Section 2 provides the act is effective July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Debtors may incur additional costs associated with the requirement to provide the notice of attorney representation if the notice is sent by certified mail. Original creditors may benefit by requiring notice of attorney representation to be delivered by one of the means provided in the bill. If notice is received at the proper address, original creditors will be less likely to violate the statute and incur associated fines.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The term “original creditor” is not defined in part VI of ch. 559.72, F.S. The terms “creditor” and “debt collector” are defined.¹⁹

VIII. Statutes Affected:

This bill substantially amends section 559.72 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Commerce and Tourism on February 1, 2016:

The bill is amended to clarify that a debtor or a debtor’s attorney may provide notice of attorney representation. The bill creates a requirement that an original creditor must cease communication with a debtor within 5 business days of receiving notice of representation from the debtor’s attorney.

The bill also provides additional alternatives for a debtor’s attorney to provide notice of representation. A debtor’s attorney may provide notice of representation in any of the following ways:

- by service of pleadings in a filed action;
- by providing written notification by certified mail; or
- by providing notice of representation by mail, fax, email, or other electronic format, to a location designated by the creditor on a billing statement.

CS by Banking and Insurance on January 19, 2016:

The CS provides the following changes;

- Reinstates current law, which provides a prohibition on contacting a debtor when the person collecting the debt knows that the debtor is represented by an attorney with respect to the debt and, though lacking actual knowledge of the name and address of the debtor’s attorney, the person is otherwise able to “*readily ascertain*” the name and address of the debtor’s attorney.
- Provides that the prohibition against an original creditor contacting the debtor would also not apply if the debtor’s attorney fails to provide notice of representation by certified mail at the address designated on the billing statement by the original creditor or to the registered agent of the original creditor. A debtor’s attorney may also provide notice of representation to an original creditor by virtue of pleadings and other filings in a filed action.

¹⁹ A “debt collector” is generally defined as any person who uses any instrumentality of interstate commerce 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 owed or due another. A “creditor” is defined as “any person who offers or extends credit creating a debt or to whom a debt is owed,” but excludes persons that receives debt, through assignment or transfer, for the purpose of collecting the debt on behalf of another. See ss. 559.55(7) and 559.55(5), F.S.

- Eliminates the provision allowing the Office of Financial Regulation to adopt rules for notice of representation and receipt of response.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
