

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 Fiscal Policy

BILL: CS/CS/CS/SB 562

INTRODUCER: Fiscal Policy Committee; Commerce and Tourism Committee; Banking and Insurance Committee; and Senator Stargel and others

SUBJECT: Consumer Debt Collection

DATE: February 24, 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>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/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.

The bill provides that a creditor collecting a debt is not liable for communicating with a debtor if the debtor or debtor's attorney fails to provide notification of representation. A debtor's attorney provides notice of representation to a creditor with respect to such debt by:

- Service of pleadings in a filed action;
- Providing written notice of representation to a location or person according to a prior agreement between the creditor and the debtor's attorney which states the debtor is represented by an attorney and discloses the attorney's name and address;
- Providing written notice of representation by certified mail to the registered agent of the creditor which states that the debtor is represented by an attorney and discloses the attorney's name and address; or
- Providing written notice of representation by mail, facsimile, email, or other electronic format designated by the creditor on a billing statement or other written communication pertaining to the debt which states that the debtor is represented by an attorney and discloses the attorney's name and address.

The bill requires a creditor to designate, on a billing statement or other written communication pertaining to the debt, a method for communicating notice of representation.

A debtor may notify the creditor that he or she is represented by an attorney, including oral notice, in response to a communication initiated by the creditor with respect to such debt.

A creditor must cease direct communication with the debtor within 5 business days upon receiving notice of representation from the debtor's attorney.

The bill does not have a fiscal impact on state government.

The bill is effective July 1, 2016.

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 incurred 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.¹ 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.² Typically, the charged-off debt is then either assigned or sold to a third-party collection agency or collection law firm, which uses 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.³

Between 2001 and 2013, on average, 10.1 percent of outstanding credit card debt was reported as being more than 90 days delinquent. For the same period, 8 percent of student loans and 3.8 percent of mortgage loans were reported as being more than 90 days delinquent.⁴ 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.⁵

In 2014, the federal Consumer Financial Protection Bureau processed over 88,300 debt collection complaints, making debt collection the leading source of consumer complaints.

¹ Consumer Financial Protection Bureau, Debt Collection, *Are there laws that limit what debt collectors can say or do?* (September 15, 2014), available at <http://www.consumerfinance.gov/> (last visited February 5, 2016).

² A debt "charged-off" is generally a debt that is deemed uncollectible by the reporting firm and subsequently written off. Investopedia, *Charge-off*, available at <http://www.investopedia.com/terms/c/chargeoff.asp> (last visited February 5, 2016).

³ *Supra* note 1 at *What is a debt collector?*

⁴ Viktor Fedaseyev, Working Papers Research Department, *Working Paper NO. 15-23 Debt Collection Agencies and the Supply of Consumer Credit*, p. 1, (June 19, 2015).

⁵ Viktor Fedaseyev and Robert Hunt, Working Papers Research Department, *Working Paper NO. 15-43 The Economics of Debt Collection: Enforcement of Consumer Credit Contracts*, p. 1, (November 2015).

Approximately 2 percent of these complaints related to a consumer being contacted directly, instead of the debt collector contacting the attorney.⁶

Federal Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act (FDCPA) protects consumers from harmful debt collection practices and to protect ethical collectors from an unfair competitive disadvantage. The Federal Trade Commission and the Consumer Financial Protection Bureau are the primary federal enforcement agencies of the FDCPA. 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 include contingency agencies, collection law firms, and debt buyers. A violation of the FDCPA carries a penalty of up to \$1,000 per violation.⁷

Florida Consumer Collection Practices Act

In Florida, consumer debt collection practices are regulated by the FDCPA and the Florida Consumer Collection Practices Act (FCCPA).⁸ The FCCPA gives regulatory oversight authority to the Office of Financial Regulation and authorizes the Attorney General to initiate enforcement actions against out-of-state consumer debt collectors that violate the act.⁹

Both acts provide private civil remedies to debtors for violations and if successful, the debtor may recover actual and statutory damages and reasonable attorney's fees and costs.¹⁰ The FCCPA also provides that a person cannot be held liable if the person shows that the violation was not intentional and resulted from a bona fide error. 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.¹¹

The FCCPA prohibits many of the same debt collection practices prohibited by the FDCPA but also provides additional requirements and regulations.¹² For instance, the FDCPA excludes creditors from its provisions while the FCCPA has been construed to apply to both debt collectors and creditors.¹³ The FCCPA provides greater protection than the FDCPA because it forbids *a person*, rather than only debt collectors, from practicing certain consumer debt collection practices.¹⁴

⁶ Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act, CFPB Annual Report 2015*, pp. 2 and 15, (March 2015) available at http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf (last visited February 5, 2016).

⁷ 15 U.S.C. s. 1692, *et seq.*

⁸ Part VI of ch. 559, F.S.

⁹ Section 559.565, F.S.

¹⁰ 15 U.S.C. s. 1692k and s. 559.77, F.S.

¹¹ Section 559.77, F.S.

¹² Section 559.552, F.S.

¹³ *Craig v. Park Fin. of Broward County, Inc.*, 390 F. Supp. 2d 1150, 1154-1155 (M.D. Fla. 2005).

¹⁴ Section 559.72, F.S.

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.¹⁵ However, the FCCPA prohibits *a person* 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.¹⁶

There are three exceptions to this prohibition, thus allowing the communication if:

- Debtor's attorney fails to respond within 30 days to a communication from the person;
- Debtor's attorney consents to a direct communication with the debtor; or
- Debtor initiates the communication.¹⁷

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 violating 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.¹⁸

III. Effect of Proposed Changes:

Section 1 amends s. 559.72(18), F.S., to clarify when a creditor may contact a debtor.

The bill provides that a creditor collecting a debt is not liable for communicating with a debtor if the debtor or debtor's attorney fails to provide notification of representation.

A creditor has knowledge that a debtor is represented by an attorney if the debtor, individually, has provided notice of representation by any reasonable means, including oral notice to a creditor if such oral notice is provided in response to a communication initiated by the creditor with respect to such debt.

A creditor has knowledge that a debtor is represented by an attorney if the attorney representing the debtor has provided notice of such representation by:

- Service of pleadings in a filed action with respect to such debt;
- Providing written notice of representation to a location or person according to a prior agreement between the creditor and the debtor's attorney which states the debtor is represented by an attorney with respect to such debt and discloses the attorney's name and address;
- Providing written notice of representation by certified mail to the registered agent of the creditor which states that the debtor is represented by an attorney with respect to such debt and discloses the attorney's name and address; or
- Providing written notice of representation by mail, facsimile, email, or other electronic format designated by the creditor on a billing statement or other written communication

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

¹⁶ Section 559.72(18), F.S.

¹⁷ *Id.*

¹⁸ Section 559.77, F.S.

pertaining to the debt which states that the debtor is represented by an attorney with respect to such debt and discloses the attorney's name and address.

The bill requires a creditor to designate, on a billing statement or other written communication pertaining to the debt, at least one of the following communication methods for notice of representation:

- A mailing address;
- A facsimile;
- An email address; or
- Other electronic means.

The bill requires that a creditor to cease direct communication with the debtor within 5 business days upon receiving notice of representation from the debtor's attorney.¹⁹

Section 2 provides the bill 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:

A debtor may incur additional costs associated with the requirement to provide the notice of attorney representation if the debtor's attorney decides to give notice by certified mail. 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, creditors will be less likely to violate the statute and incur associated fines.

¹⁹ This allows the creditor avoid liability for violations of the FCCPA that may occur within 5 days business days upon receiving notice of attorney representation has occurred.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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/CS by Fiscal Policy on February 24, 2016:

The committee substitute:

- Clarifies that a creditor has knowledge that a debtor is represented by an attorney if:
 - The debtor has provided notice of the representation by any reasonable means, including oral notice if it is in response to a communication initiated by the creditor.
- Provides that a creditor has knowledge that the debtor is represented by an attorney if:
 - The attorney provided written notice to a location or person according to a prior agreement between the creditor and the debtor's attorney which states that the debtor is represented and states the attorney's name and address.

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 by:

- Service of pleadings in a filed action;
- Providing written notification by certified mail; or
- 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.
- Eliminates the provision allowing the Office of Financial Regulation to adopt rules for notice of representation and receipt of response

B. Amendments:

None.