

**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.)

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Prepared By: The Professional Staff of the Committee on Banking and Insurance

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BILL: SB 562

INTRODUCER: Senator Stargel

SUBJECT: Consumer Debt Collection

DATE: January 15, 2016

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	<b>Pre-meeting</b>
2.			CM	
3.			FP	

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**I. Summary:**

SB 562 amends a provision of the Florida Consumer Collection Practices Act (act), which regulates consumer collection agencies and prohibits many of the same debt collection practices prohibited by the federal Fair Debt Collection Practices Act (FDCPA). The bill provides that, when the person collecting a debt knows that the debtor is represented by an attorney with respect to the debt, such person would only be prohibited from contacting the debtor when the person *“has knowledge of”* the name and address of the debtor’s attorney. The bill removes the requirement that the person collecting the debt is attributed with knowledge of the consumer’s attorney if they are able to *“readily ascertain”* the name and address of the debtor’s attorney. The bill also provides that the prohibition against contacting the debtor does not apply if:

- The debtor’s attorney fails to provide notice of representation to the person collecting the debt at the address designated by the person collecting the debt.
- The debtor or his or her attorney fails to send the notice by certified mail to the person collecting the debt at the address designated by the person that the debtor is represented by an attorney. The bill also allows the Office of Financial Regulation to adopt rules for notice of representation and receipt of response

**II. Present Situation:**

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, then the charged-off debt is 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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> Approximately 2 percent of these complaints related to a consumer being contacted directly, instead of the debt collector contacting their attorney.<sup>4</sup>

### **State and Federal Debt Collection Regulations**

State and federal 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.

#### **Federal Regulation**

**Federal *Fair Debt Collection Practices Act*** - The Federal Trade Commission (FTC)<sup>5</sup> and the Consumer Financial Protection Bureau<sup>6</sup> are the primary federal enforcement agencies of the Fair Debt Collection Practices Act (FDCPA).<sup>7</sup> 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 collectors, which includes contingency agencies, collection law firms, and debt buyers. Each violation of the FDCPA carries a penalty of at least \$1,000 per violation.

#### **State Regulation**

At the state level, the Florida Consumer Collection Practices Act (act)<sup>8</sup> prohibits many of the same debt collection practices prohibited by the FDCPA, and gives regulatory oversight authority to the Office of Financial Regulation (OFR). The OFR is responsible for the registration of consumer collection agencies (CCAs) unless specifically exempted from

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

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

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

<sup>4</sup> *Id.*

<sup>5</sup> 15 U.S.C. s. 41 *et seq.*

<sup>6</sup> 12 U.S.C. s. 5481 *et seq.*

<sup>7</sup> 15 U.S.C. s. 1692 *et seq.*

<sup>8</sup> Part VI of ch. 559, F.S.

registration.<sup>9</sup> Further, the act authorizes the Attorney General to initiate enforcement actions against out-of-state consumer debt collectors that violate the act.<sup>10</sup>

The act defines “consumer collection agency” as “any debt collector or business entity engaged in the business of soliciting consumer debts for collection or of collecting consumer debts, and which is not otherwise expressly exempted under the act. 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 collections or attempts to collect, directly or indirectly, debts owed or due to asserted to be owed or due another.<sup>11</sup> Both the federal and state acts define “debt collector” narrowly, and exclude persons such as original creditors and their in-house collectors and persons serving legal process in connection with the judicial enforcement of any debt. Both acts also provide private civil remedies to debtors for violations; if successful, the consumer may recover actual and statutory damages and reasonable attorney’s fees and costs.<sup>12</sup> If the court finds that the suit fails to raise justiciable issue of law or fact, the consumer is liable for court costs and reasonable attorney’s fees incurred by the defendant.

Florida law and the federal act prohibit certain collection practices. The prohibited acts under s. 559.72, F.S., apply to any person, rather than only debt collectors, as provided under FDCPA. For example, Florida law and the FDCPA generally prohibit a debt collector from contacting a consumer the debt collector knows is represented by an attorney.<sup>13</sup> The FDCPA prohibits direct communication with a borrower when “the debt collector knows the consumer 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 attorney fails to respond within a reasonable period of time to a communication from the debt collector.” Section 559.72(18), F.S., prohibits *any person* in 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.

Therefore, current law contains three exceptions to this prohibition, thus allowing the aforementioned 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.

Any person collecting a debt is required to comply with the requirement of s.559.715, F.S., which provides:

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<sup>9</sup> Persons exempt from registration include original creditors, Florida Bar members, financial institutions authorized to do business in Florida and their wholly owned subsidiaries and affiliates, and insurance companies that are authorized to do business in this state. [Section 559.553(3), F.S.]

<sup>10</sup> Section 559.565, F.S.

<sup>11</sup> Section 559.55(7), F.S.

<sup>12</sup> 15 U.S.C. s. 1692j and Section 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.

<sup>13</sup> 15 U.S.C. 1692c.

this part does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt. However, the assignee must give the debtor written notice of such assignment as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt. The assignee is a real party in interest and may bring an action to collect a debt that has been assigned to the assignee and is in default.

### III. Effect of Proposed Changes:

**Section 1** amends s. 559.72(18), F.S., to provide that, when the person collecting the debt knows that the debtor is represented by an attorney with respect to the debt, such person would only be prohibited from contacting the debtor when the person *actually "has knowledge of"* the name and address of the debtor's attorney. The bill would remove the prohibition on contacting a debtor under circumstances in which 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.

The bill also provides that a person collecting a debt is not liable for violating the requirements of the subsection if the debtor or the debtor's attorney fails to provide the person collecting the debt with notice by certified mail. The notice must be sent to the address the person collecting the debt designates. The notice must state that the debtor is represented by an attorney with respect to such debt and disclose the attorney's name and address. The OFR is authorized to adopt rules for notice using means other than certified mail.

The current FDCPA, 15 U.S.C. s. 1692c, provides that a debt collector is prohibited from communicating with a consumer in connection with the collection of any debt if the debt collector knows the consumer 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 attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer.

**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 use certified mail to provide the notice of attorney representation. Debt collectors and creditors may benefit by having notice of attorney representation delivered by certified mail, which will ensure the notice is received at the proper address; thus they will be less likely to violate the statute and incur associated fines.

**C. Government Sector Impact:**

The OFR would incur an insignificant cost associated with rulemaking.<sup>14</sup>

**VI. Technical Deficiencies:**

The Financial Services Commission, rather than the OFR, is authorized to adopt rules for the OFR. [s. 20.121, F.S.]

**VII. Related Issues:**

The current law being amended by the bill, s. 559.72(18), F.S., is largely verbatim from the federal Fair Debt Collection Practices Act (FDCPA)<sup>15</sup>. While the FDCPA does not entirely preempt state law in the area of consumer debt collection, it does create a floor by providing that,

This subchapter does not annul, alter or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency...a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.<sup>16</sup>

Federal preemption could apply if the proposed changes to act are determined to provide less protections for consumers and are determined to conflict with the FDCPA.

**VIII. Statutes Affected:**

This bill substantially amends section 559.72 of the Florida Statutes.

<sup>14</sup> Office of Financial Regulation, *Senate Bill 562 Fiscal Analysis* (October 30, 2015) (on file with Senate Committee on Banking and Insurance).

<sup>15</sup> 15 U.S.C. s. 1692c

<sup>16</sup> 15 U.S.C. s. 1692o.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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

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