

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1039 Assignment of Consumer Debt
SPONSOR(S): Commerce Committee, Insurance & Banking Subcommittee, Latvala
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 2 N, As CS	Hinshelwood	Luczynski
2) Commerce Committee	20 Y, 1 N, As CS	Hinshelwood	Hamon

SUMMARY ANALYSIS

Debt collection efforts can include calls, letters, emails, filing lawsuits, and other methods to collect alleged debts from consumers. In the course of attempting to collect debts, debt collectors must adhere to a variety of laws and regulations. The primary federal law that governs the conduct of debt collectors is the Fair Debt Collection Practices Act (FDCPA). In Florida, the collection of consumer debts is primarily governed by the Florida Consumer Collection Practices Act (FCCPA). The Office of Financial Regulation (OFR) regulates third-party debt collectors under the FCCPA.

Industry representatives and the OFR have indicated that there is apparent conflict between the notice of assignment requirement of the FCCPA and certain provisions of the FDCPA. Although the FCCPA's notice of assignment requirement provides the debtor with a 30-day period of no collection activities, the federal law requires the debt collector to disclose in the initial communication that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose; this is often referred to as the "mini Miranda notice." Federal law also requires the debt collector to give, in the initial communication or within five days thereafter, the debtor information related to the debtor's right to validate the debt. Such federally mandated communications and disclosures would appear to be debt collection activities that must occur within the 30-day time period in which Florida law prohibits debt collection activities. Furthermore, industry representatives have indicated that, as a result of the prohibition on collection activities for 30 days, debt collectors will not communicate with debtors during that time, even when a debtor initiates contact with the debt collector to make a payment or negotiate the debt. In turn, the debtor is left incurring interest and fees during such time.

Currently, when the owner of a debt assigns the right to collect the debt to a third-party, such third-party must provide a debtor notice of the assignment as soon as practical after the assignment is made. The bill clarifies that the notice requirement and associated limitations apply to the assignee, not the creditor. For a debt in default, the assignee must provide the notice of assignment at least 30 days before the assignee takes any action to collect the debt. Notwithstanding such 30-day period wherein actions to collect the debt are prohibited, for a debt that is in default, the assignee may:

- Provide the disclosure required by 15 U.S.C. s. 1692e(11).
- Provide the notice required by 15 U.S.C. s. 1692g.
- Accept payment from the debtor so long as the debtor initiates the payment.

Additionally, the bill specifies that the assignee's legal action to collect a debt is prohibited within the first 30 days after the notice of assignment.

The bill will have no fiscal impact on the state or local governments and will have an indeterminate fiscal impact on the private sector.

The bill provides an effective date of July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Consumer Debt Collection

Consumer debt covers non-business debt such as mortgages, credit cards, medical debts, and other debts mainly for personal, family, or household purposes.¹ Debt collection is an \$11.5 billion industry that employs nearly 118,500 people across approximately 7,700 collection agencies in the United States.² Debt collection efforts can include calls, letters, emails, filing lawsuits, and other methods to collect alleged debts from consumers.³ In the course of attempting to collect debts, debt collectors must adhere to a variety of laws and regulations, which govern topics as diverse as telephone communications (e.g., the Telephone Consumer Protection Act) and furnishing information to credit reporting agencies (e.g., the Fair Credit Reporting Act) as well as various state statutes.⁴ The primary federal law that governs the conduct of debt collectors is the Fair Debt Collection Practices Act (FDCPA).⁵ In Florida, the collection of consumer debts is primarily governed by the Florida Consumer Collection Practices Act (FCCPA).⁶

Federal Fair Debt Collection Practices Act

In 1977, Congress enacted the FDCPA to “eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”⁷ The FDCPA establishes consumer protections in the debt collection process, including the rights to dispute an alleged debt and instruct a collector to stop communication about an alleged debt.⁸ The FDCPA prohibits debt collectors from engaging in certain types of conduct in connection with the collection of a debt and imposes certain affirmative obligations on collectors.⁹ The FDCPA empowers the Consumer Financial Protection Bureau and the Federal Trade Commission to enforce its provisions and establishes a private right of action against any debt collector who fails to comply with the FDCPA.¹⁰

Among the specific provisions of the FDCPA is a requirement that a debt collector disclose in the initial communication with the consumer, whether written or oral, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.¹¹ This notice is often referred to as a “mini-Miranda notice.” A debt collector must disclose in subsequent communications, other than in a formal pleading made in connection with a legal action, that the communication is from a debt collector.¹² Additionally, the debt collector must provide the following information to the consumer, either in the initial communication with the consumer or within five days after the initial communication with the consumer:

- The amount of the debt;

¹ S. 559.55(6), F.S.

² Bureau of Consumer Financial Protection, *Fair Debt Collection Practices Act: BCFP Annual Report 2019* (March 2019), available at https://files.consumerfinance.gov/f/documents/cfbp_fdcpa_annual-report-congress_03-2019.pdf (last visited Mar. 23, 2019).

³ *Id.*

⁴ *Id.*

⁵ *Id.*; 15 U.S.C. § 1692 et seq.

⁶ Ss. 559.55 - 559.785, F.S.

⁷ 15 U.S.C. § 1692(3).

⁸ Bureau of Consumer Financial Protection, *supra* note 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 15 U.S.C. § 1692e(11).

¹² *Id.*

- The name of the creditor to whom the debt is owed;
- A statement that unless the consumer, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- A statement that if the consumer notifies the debt collector in writing within the 30-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- A statement that, upon the consumer's written request within the 30-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.¹³

If, within the 30-day period described above, the consumer notifies the debt collector in writing that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector must cease collection of the debt until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.¹⁴

Florida Consumer Collection Practices Act

A person may not engage in the business as a consumer collection agency in Florida without first registering in accordance with the FCCPA.¹⁵ Each consumer collection agency doing business in Florida must register with the Office of Financial Regulation (OFR) and renew such registration annually.¹⁶ The term “consumer collection agency” is synonymous with “debt collector”, which is defined 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 owed or due another.”¹⁷ Thus, “debt collector” refers to a third-party, non-owner of the debt that is engaged in attempting to collect the debt. However, the term “debt collector” does include the owner of a debt “who, in the process of collecting her or his own debts, uses any name other than her or his own which would indicate that a third person is collecting or attempting to collect such debts.”¹⁸

Although the prohibited collection practices under the FCCPA apply to *any person* collecting a consumer debt, not just third-party debt collectors,¹⁹ the OFR’s regulation under the FCCPA extends

¹³ 15 U.S.C. § 1692g(a).

¹⁴ 15 U.S.C. § 1692g(b).

¹⁵ S. 559.553(1), F.S.

¹⁶ S. 559.553(2), F.S.

¹⁷ S. 559.55(3) and (7), F.S.

¹⁸ S. 559.55(7), F.S. The following are expressly excluded from the definition of “debt collector: Any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor; any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person is acting as a debt collector for persons to whom it is so related or affiliated and if the principal business of such persons is not the collection of debts; any officer or employee of any federal, state, or local governmental body to the extent that collecting or attempting to collect any debt is in the performance of her or his official duties; any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt; any not-for-profit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; or any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent that such activity is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; concerns a debt which was originated by such person; concerns a debt which was not in default at the time it was obtained by such person; or concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor. *Id.*

¹⁹ S. 559.72, F.S.

only to third-party debt collectors.

When a creditor²⁰ assigns the right to bill and collect a debt to a third-party debt collector, the FCCPA requires that notice of such assignment be provided to the debtor followed by a 30-day period of no actions to collect the debt. That provision states:

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.²¹

Industry representatives and the OFR have indicated that there is apparent conflict between the notice of assignment requirement of the FCCPA and certain provisions of the FDCPA. Although the FCCPA's notice of assignment requirement provides the debtor with a 30-day period of no collection activities, the federal law requires the debt collector to give the debtor the "mini-Miranda notice" in the initial communication and to give, in the initial communication or within five days thereafter, the debtor information related to the debtor's right to validate the debt. Such federally mandated communications and disclosures would appear to be debt collection activities that must occur within the 30-day time period in which Florida law prohibits debt collection activities. Furthermore, industry representatives have indicated that, as a result of the prohibition on collection activities for 30 days, debt collectors will not communicate with debtors during that time, even when a debtor initiates contact with the debt collector to make a payment or negotiate the debt. In turn, the debtor is left incurring interest and fees during such time.

The FCCPA contains the following statement regarding the relationship of the FCCPA and the FDCPA: Nothing in this part shall be construed to limit or restrict the continued applicability of the federal Fair Debt Collection Practices Act to consumer collection practices in this state. This part is in addition to the requirements and regulations of the federal act. In the event of any inconsistency between any provision of this part and any provision of the federal act, the provision which is more protective of the consumer or debtor shall prevail.²²

However, it is not clear what result is more protective of the consumer or debtor: that the consumer or debtor receive the federally required notices within the 30-day period following the notice of assignment under s. 559.715, F.S., or that the consumer or debtor have a 30-day reprieve from anything appearing to be debt collection activities.

Courts have held that providing the notice of assignment pursuant to s. 559.715, F.S., is not a condition precedent to filing suit²³ and that failure to provide the notice of assignment does not create a private

²⁰ "Creditor" is defined as "any person who offers or extends credit creating a debt or to whom a debt is owed, but does not include any person to the extent that they receive an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." s. 559.55(5), F.S.

²¹ S. 559.715, F.S.

²² S. 559.552, F.S.

²³ In the case of Bank of Am., N.A. v. Siefker, 201 So. 3d 811 (Fla. 4th DCA 2016), Bank of America was the successor by merger to BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP. The court addressed the question of whether the notice of assignment requirement in s. 559.715, F.S., operates as a condition precedent to bringing a mortgage foreclosure suit. If so, then failure to comply with such notice requirement would be a valid defense to the foreclosure suit. The court in Siefker held that, under the facts of the case, the notice requirement of s. 559.715, F.S., does apply to the mortgage foreclosure suit brought by the bank; however, the court concluded that the notice of assignment requirement is not a condition precedent to bringing a mortgage foreclosure suit. *Id.* at 818. Quoting the Second District Court of Appeal, the court noted that "the Legislature knows how to condition the filing of a lawsuit on a prior occurrence 'Because the Legislature declined to be more specific when enacting section 559.715, we will not expand the statute to include language the Legislature did not enact.'" *Id.* at 816 (quoting Brindise v. U.S. Bank Nat'l Ass'n, 183 So. 3d 1215, 1219 (Fla. 2d DCA 2016)). In Brindise, the Second District Court of Appeal certified to the Florida Supreme Court the following question as one of great public importance: "Is the provision of written notice of assignment

right of action.²⁴ Thus, the only consequence of violating the notice of assignment provision is potential administrative discipline by the OFR against a debt collector.

Effect of the Bill

Currently, when the owner of a debt assigns the right to collect the debt to a third-party, such third-party must provide a debtor notice of the assignment as soon as practical after the assignment is made. The bill clarifies that the notice requirement and associated limitations apply to the assignee, not the creditor. For a debt in default, the assignee must provide the notice of assignment at least 30 days before the assignee takes any action to collect the debt. Notwithstanding such 30-day period wherein actions to collect the debt are prohibited, for a debt that is in default, the assignee may:

- Provide the disclosure required by 15 U.S.C. s. 1692e(11).
- Provide the notice required by 15 U.S.C. s. 1692g.
- Accept payment from the debtor so long as the debtor initiates the payment.

Additionally, the bill specifies that the assignee's legal action to collect a debt is prohibited within the first 30 days after the notice of assignment and makes other technical changes.

The bill takes effect July 1, 2019.

B. SECTION DIRECTORY:

Section 1. Amends s. 559.715, F.S., relating to assignment of consumer debts.

Section 2. Provides an effective date of July 1, 2019.

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.

under section 559.715 a condition precedent to the institution of a foreclosure lawsuit by the holder of the note?" Brindise, 183 So. 3d at 1221. The Florida Supreme Court denied review. Brindise v. U.S. Bank Nat. Ass'n, SC16-300, 2016 WL 1122325, at *1 (Fla. Mar. 22, 2016).

²⁴ The FCCPA does not create a private right of action for failure to serve the notice of assignment required by s. 559.715, F.S. Valle v. First Nat'l Collection Bureau, Inc., 252 F. Supp. 3d 1332, 1344 (S.D. Fla. 2017); Wright v. Dyck-O'Neal, Inc., 215CV249FTM38MRM, 2015 WL 6560444, at *2 (M.D. Fla. Oct. 27, 2015).

STORAGE NAME: h1039c.COM

DATE: 4/12/2019

PAGE: 5

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The impact on the private sector is indeterminate. The bill may provide a consumer the opportunity to pay or negotiate the debt within the first 30 days after assignment to a debt collector, which industry representatives allege is prohibited under current law.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 26, 2019, the Insurance & Banking Subcommittee considered a strike-all amendment, which was adopted, and reported the bill favorably as a committee substitute. The committee substitute clarifies an apparent conflict between Florida law, which prohibits collection activities for 30 days following an assignment of the debt to a third-party debt collector, and federal law, which requires that third-party debt collectors provide a debtor certain disclosures in the initial communication or within five days thereafter. The committee substitute is broad enough to permit the third-party debt collector to provide a debtor, during the 30-day period following the notice of assignment, any communication or disclosure that is required by law. Additionally, the committee substitute clarifies that during the 30-day period following the notice of assignment the third-party debt collector may communicate with or take payment from a debtor where the communication or payment is initiated by the debtor. The committee substitute conforms the House bill to the Senate bill.

On April 10, 2019, the Commerce Committee considered a strike-all amendment, which was adopted, and reported the bill favorably as a committee substitute. The committee substitute clarifies that the notice requirement and associated limitations apply to the assignee, not the creditor. Specifically, the committee substitute:

- Requires an assignee to provide the notice of assignment at least 30 days before the assignee takes any action to collect the debt.
- Specifies certain actions that the assignee may take within the first 30 days after the notice of assignment.
- Specifies that the assignee's legal action to collect a debt is prohibited within the first 30 days after the notice of assignment.

The staff analysis has been updated to reflect the committee substitute.