HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 713 Consumer Debt Collection
SPONSOR(S): Insurance & Banking Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 562

REFERENCE	**ACTION**	**ANALYST**	**STAFF DIRECTOR** or **BUDGET/POLICY CHIEF**
Orig. Comm.: Insurance & Banking Subcommittee		Bauer	Luczynski

SUMMARY ANALYSIS

Consumer debt covers non-business debt such as mortgages, credit cards, medical debts, and other debts mainly for personal, family, or household purposes. If a borrower defaults on a consumer debt, the lender will initiate collection efforts, usually through the sale or assignment of the asset to a third-party debt collector. State and federal debt collection laws provide consumer protection against deceptive, unfair, or abusive collection practices that can occur before the debtor is sued, as well as during the litigation process.

At the state level, the Florida Consumer Collection Practices Act (the Act) regulates consumer collection agencies and prohibits many of the same debt collection practices prohibited by the federal Fair Debt Collection Practices Act. The Act gives primary oversight authority to the Office of Financial Regulation (OFR). Both acts contain civil remedies for debtors, providing that any person who commits a prohibited practice is liable for up to $1,000 in statutory damages and attorney's fees and costs.

Both federal and Florida law prohibit communications 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, subject to certain exceptions. However, while the federal law only applies to third-party debt collectors, Florida law prohibits "any person" from engaging in certain collection practices such as knowingly communicating with represented debtors. As a result, original creditors in Florida have asserted that they have been exposed to litigation after sending invoices to debtors and without receiving clear and adequate notice of the debtor's representation by legal counsel.

The proposed committee substitute (PCS) clarifies how a debtor or his or her attorney may provide notice of representation by legal counsel by:

- Providing that the *debtor*, individually, may notify such person (i.e., the original creditor or debt collector) of the legal representation by way of any reasonable means, including verbal notices.
- Providing that the *debtor's attorney* may notify the original creditor that he or she represents the debtor with respect to such debt through one of three means: service of pleadings in a filed action, written notice by certified mail to the original creditor's registered agent, or other written notification means designated by an original creditor in a bill statement.

Secondly, the PCS prohibits any person from using false representation or deceptive or unfair means to collect or attempt to collect any debt or to obtain information concerning a consumer. Similar prohibitions currently exist in the federal Act.

The PCS has no impact on local governments, and an indeterminate impact on state governments and the private sector. The extent of administrative fines that could be assessed and civil cases initiated as a result of the new prohibited practice is unknown

The PCS has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Consumer debt covers non-business debt such as mortgages, credit cards, medical debts, and other debts mainly for personal, 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 records.[1] Typically, the charged-off debt is then either assigned or sold as part of a portfolio to a third-party collection agency or collection law firm, which can in turn 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 non-repayment by borrowers, and help ensure the availability and affordability of consumer credit.

Among all consumer debt types, medical debt dominates the list. Nationally, 52 percent of all collection accounts on credit reports are medical, compared to unclassified debt (17.3 percent), cable or cellular debt (8.2 percent), utilities debt (7.3 percent), and retail debt (7.2 percent). An estimated 43 million consumers with a credit report at a nationwide consumer reporting agency have one or more medical accounts in collection.[2] Based on 2013 statistics from U.S. bankruptcy courts, one study estimated medical bankruptcy rates to be 57.1 percent of U.S. bankruptcies. California, Illinois, and Florida account for over a quarter of those living in medical-related bankruptcy.[3]

State and federal debt collection laws provide consumer protections against certain abusive, harassing, and intrusive collection practices that may occur before the debtor is sued, as well as during the litigation process. Both federal and Florida law define "debt collector" 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 to asserted to be owed or due another.[4] The definition of "debt collector" under both federal and Florida law excludes persons such as original creditors and their in-house collectors and persons serving legal process in connection with the judicial enforcement of any debt.

Since September 2013, debt collection has been the top consumer complaint at the federal Consumer Financial Protection Bureau (CFPB), the primary federal agency which enforces the federal Fair Debt Collection Practices Act.[5] Among the CFPB's data on consumer complaints regarding debt collection, the most common type of debt collection complaint is about continued attempts to collect a debt that the consumer reports is not owed (37 percent), followed by communications tactics, particularly phone calls (20 percent). One of the least common complaints received by the CFPB relates to consumers reporting that they are contacted directly, instead of the debt collector contacting their attorney (2 percent).[6]

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[1] The Uniform Retail Credit Classification and Account Management Policy, set forth by the Federal Financial Institutions Examination Council, established uniform guidelines for issuers of retail credit regarding the charge-off timeframes for open-end and closed-end credit. 65 Fed. Reg. 36,903 (Jun 12, 2000). It should be noted that a "charge-off" does not mean the debtor is discharged from repaying the loan; in fact, a charge-off is reported as an adverse event to credit reporting agencies.

[2] CONSUMER FINANCIAL PROTECTION BUREAU, *Here's how medical debt hurts your credit report*, at http://www.consumerfinance.gov/blog/heres-how-medical-debt-hurts-your-credit-report/ (last visited Jan. 28, 2016).

[3] NerdWallet, *NerdWallet Health Finds Medical Bankruptcy Accounts for Majority of Personal Bankruptcy*, at http://www.nerdwallet.com/blog/health/medical-bankruptcy/ (last visited Jan. 28, 2016).

[4] Section 559.55(6), F.S., and 15 U.S.C. § 1692a(6).

[5] See footnote 2, *supra*.

[6] CONSUMER FINANCIAL PROTECTION BUREAU, *Fair Debt Collection Practices Act Annual Report* (2015) (pp. 12-15), at http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf.

Federal Regulation of Debt Collection

In 1977, Congress enacted the Fair Debt Collection Practices Act (the federal Act) to "eliminate abusive debt collection practices…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 Act is primarily enforced by the CFPB, in coordination with the Federal Trade Commission. The federal Act is also enforced by other federal agencies with respect to specific industries subject to other federal laws, such as financial institutions (e.g., banks, savings associations, and credit unions).[8] As a result of the federal Dodd-Frank Wall Street Reform Act of 2010, the CFPB was given rulemaking authority to define and supervise "larger participants" of certain nonbank consumer financial product and service markets, including debt collection. The CFPB test to define these "larger participants" means the covered person's annual receipts resulting from consumer debt collection exceed $10 million.

The federal Act prohibits third-party debt collectors from engaging in certain types of abusive, harassing, unfair, or deceptive conduct in collecting or attempting to collect a debt. However, the federal Act does not apply to original creditors.

State Regulation of Debt Collection

In 1972, Florida enacted the Florida Consumer Collection Practices Act (the Act), codified in part VI of ch. 559, F.S.[9] The Florida Act gives primary regulatory authority to the Florida Office of Financial Regulation (OFR), and some enforcement authority to the Office of the Attorney General over out-of-state consumer debt collectors.[10] The Act defines "*consumer collection agency*" (CCA) as any debt collector or business entity engaged in the business of soliciting consumer debts for collection or of collecting consumer debts. CCAs must register with the OFR, unless expressly exempted by the Act.[11] The OFR may also examine and investigate potential violations of the Act, and may impose administrative fines of up to $10,000 for each count or offense and up to $1,000 per day of unregistered activity; may deny, suspend, or revoke CCA registration; may impose reprimand, cease and desist orders, and emergency suspension orders.[12]

The Act prohibits many of the same debt collection practices prohibited by the federal Act, such as the use or threat to use force or violence, impersonating law enforcement or attorneys, communicating between 9 p.m. and 8 a.m. without the debtor's consent, and the disclosure of the debtor's debt except for legitimate purposes such as credit reporting agencies. However, Florida law does not specifically prohibit false, deceptive, or unfair practices the way the federal Act does.[13]

While the federal Act only applies to third-party debt collectors, Florida law provides that "no person shall" engage in the prohibited acts. As such, while the Florida act may exempt original creditors from registration with the OFR, original creditors may still be held liable (civilly and administratively) under Florida law for engaging in certain prohibited acts.

In terms of the federal Act's relation to Florida law, both acts were designed to work harmoniously, except to the extent state law conflicts with the federal Act.[14] The Act also provides that in the event of an inconsistency with the federal law, the provision which is more protective of the consumer or debtor shall prevail.[15] Finally, the Act provides that in construing its provisions, "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts

[7] 15 U.S.C. 1692(e). The FDCPA is codified at 15 U.S.C. §§ 1692-1692p.
[8] Pub. L. 111-201, 124 Stat. 1376.
[9] Ch. 72-81, Laws of Fla.
[10] s. 559.563, F.S.
[11] ss. 559.55(3) and 559.553, F.S.
[12] ss. 559.5541, 559.727, and 559.730, F.S.
[13] *See* 15 U.S.C. §§ 1692e and1692f.
[14] 15 U.S.C. § 1692n.
[15] s. 559.552, F.S.

relating to the federal Fair Debt Collection Practices Act."[16] The Act also does not preclude any person from pursuing remedies under the federal Act for any violation.[17]

Civil Remedies

The Act provides private civil remedies to debtors that are identical to those available under its federal counterpart.[18] Any person who violates the prohibited practices statute, s. 559.72, F.S., is liable to the consumer for actual and additional statutory damages up to $1,000 and reasonable attorney's fees and costs. In determining whether any additional statutory damages should be awarded to the debtor, the court may consider the nature of the defendant's noncompliance with s. 559.72, F.S., the frequency and persistence of the noncompliance, and the extent to which the noncompliance was intentional. The Act also permits class action suits and punitive damages in certain instances.

However, if the court finds that the debtor-plaintiff's suit fails to raise a justiciable issue of law or fact, the debtor-plaintiff is liable for court costs and reasonable attorney's fees incurred by the defendant.[19] Also, both acts provide a safe harbor for "bona fide errors," in that a person may not be held liable in any civil action under the acts if the person shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

Prohibited Communications with Represented Debtors

Florida law prohibits any 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. Federal law also prohibits such communication, although it applies only to debt collectors.[20] Courts have generally interpreted this provision as requiring *actual* knowledge by the debt collector of the debtor's representation by legal counsel in order for a communication with a debtor to constitute a violation.[21]

Both acts contain three identical exceptions to this prohibited communication:
- The debtor's attorney fails to respond within 30 days to a communication from the person,
- The debtor's attorney consents to a direct communication with the debtor, or
- The debtor initiates the communication.

Original creditors and debt collectors in Florida have indicated that the Act's applicability to "any person" has resulted in abusive or frivolous litigation arising from alleged violations of this provision. Industry representatives have noted current problems in the industry:
- Some law firms send vague notices of representation via facsimile to creditors and debt collectors, which raise two concerns: (1) questions of receipt and (2) questions regarding to the scope of representation.[22]
- Original creditors, such as hospitals, have noted that the statute does not clearly state how the debtor is required to provide notification that he or she has retained an attorney, and has exposed them to litigation merely for sending an invoice to a debtor-patient.[23]

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[16] s. 559.77(5), F.S.
[17] s. 559.730(8), F.S.
[18] 15 U.S.C. §1692k.
[19] s. 559.77, F.S. and 15 U.S.C. § 1692k.
[20] 15 U.S.C. § 1692c(a)(2).
[21] *Erickson v. General Elec. Co.*, 854 F.Supp.2d 1178, 1181-1182 (M.D. Fla. 2012); *Bacelli v. MFP, Inc.*, 729 F.Supp.2d 1328, 1343 (M.D. Fla. 2010). In another industry context, "actual knowledge" of a person's representation by legal counsel is also the standard applied to Florida Bar lawyers who are otherwise generally prohibited from communicating with represented persons. Florida Bar Rule of Professional Conduct § 4-4.2 and Preamble: Terminology.
[22] FLORIDA COLLECTORS ASSOCIATION, *White Paper: Attorney Representation of Consumers Under the Florida Consumer Collection Practices Act – 559.72(18)*, on file with the Insurance & Banking Subcommittee staff.
[23] BAYCARE, *Proposed Florida Consumer Collection Practices Act (FCCPA) Reform* (Jan. 22, 2016) and Florida Hospital Government Relations, *Florida's Consumer Collection Practices Act* (Dec. 18, 2015), on file with the Insurance & Banking Subcommittee staff.

As such, proponents have advocated for statutory clarification of how debtors and their attorneys should communicate the legal representation to creditors and debt collectors so that they have the requisite "knowledge" of the representation. Consumer advocates argue that current law already provides substantial protections for persons collecting debts and that requirements such as certified mail notifications place a greater burden and cost on consumers, because it requires the consumer and his or her attorney to ascertain the address for the person collecting the debt (which is the address the person "designates to receive regarding the debt" and may be buried in fine print), and also requires notice by certified mail to this address, which is an additional cost to the consumer.[24]

Effect of the Proposed Committee Substitute (PCS)

The PCS amends s. 559.72(18), F.S., to clarify how a debtor or his or her attorney may provide notice of representation by legal counsel, by:

- Providing that the *debtor*, individually, may notify such person (i.e., the original creditor or debt collector) of the legal representation by way of any reasonable means, including verbal notices.
- Providing that the debtor's attorney may notify the original creditor that he or she represents the debtor with respect to such debt through one of three means:
  - Service of pleadings in a filed action,
  - Written notice of representation by certified mail to the original creditor's registered agent, which states that the debtor is represented by an attorney with respect to such debt and which discloses the attorney's name and address; or
  - Providing written notice of representation by mail, fax, email, or other electronic format in a manner designated on a billing statement which discloses the debtor's representation with respect to such debt and the attorney's name and mailing address.

While the PCS creates notification procedures giving rise to a creditor's "knowledge" of a debtor's representation, they do not toll the debt or prevent a creditor from reporting the debt to a credit reporting agency or pursuing legal remedies. However, these procedures should provide more clarity to creditors and debt collectors in avoiding liability and may reduce possible overreaching, interference, and uncounseled disclosure of information by creditors and debt collectors.

The PCS also retains the three exceptions in current law, regarding debtor-initiated communications, direct communications with the debtor consented to by the debtor's attorney, and communications to which the debtor's attorney does not respond within 30 days.

Secondly, the PCS creates s. 559.72(20), F.S., to prohibit any person from using false representation or deceptive or unfair means to collect or attempt to collect any debt or to obtain information concerning a consumer. As described above, similar prohibitions exist in the federal Act.

B. SECTION DIRECTORY:

Section 1. Amends s. 552.72, F.S., relating to prohibited practices generally.

Section 2. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Indeterminate. The extent of administrative fines that could be assessed and civil cases initiated as a result of the new prohibited practice is unknown.

2. Expenditures:

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[24] FLORIDA ALLIANCE FOR CONSUMER PROTECTION, *White Paper: Consumer Debt Collection* (Dec. 30, 2015), on file with the Insurance & Banking Subcommittee staff.

See above.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. The PCS's clarification of prohibited communications with represented debtors may result in positive impact to original creditors and debt collectors, and the new prohibition on false, deceptive, or unfair collection practices may provide greater protection for consumers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The PCS does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None provided by the PCS.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES