

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1414 (Kalra)
Version: April 26, 2023
Hearing Date: July 6, 2023
Fiscal: No
Urgency: No
CK

SUBJECT

Civil actions: consumer debt

DIGEST

This bill prohibits the use of common counts in actions for collection of consumer debt. The bill excludes consumer debt from the definition of “book account.”

EXECUTIVE SUMMARY

Federal and state laws place various documentation and notification requirements and protections for borrowers related to the practices of debt collection and debt purchasing. For instance, the federal Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from engaging in abusive, unfair, or deceptive practices to collect debts. Under the FDCPA, a debt collector must send a debtor written validation letters containing information such as the amount of debt and the name of the creditor to whom the debt is owed. The California Legislature has also seen borrower protections as vitally important. The Rosenthal Act places reasonable limits on the kinds of activities that creditors and debt collectors can employ when collecting payments. The Fair Debt Buying Practices Act (FDBPA) provides protections to consumers whose debts were sold to a debt buyer.

Concerns have arisen that despite these laws, creditors, debt buyers, and debt collectors are using procedural mechanisms in state court to subvert the protections provided by those laws. This bill prohibits the use of common counts in actions for the collection of consumer debt and provides that a “book account” does not include consumer debt, which is initially payable on the face of a note or contract. Creditors alleging book accounts for debts that are not so initially payable, must provide specified documentation. This bill is sponsored by the California Low-Income Consumer Coalition and Public Counsel. It is supported by the California Nurses Association and a coalition of legal services entities, including the Western Center on Law and Poverty. The bill is opposed by the California Association of Collectors.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Rosenthal Act with the purpose to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts. (Civ. Code § 1788 et seq.)
- 2) Defines, for purposes of the Rosenthal Act, “debt collection” as any act or practice in connection with the collection of consumer debts. (Civ. Code § 1788.2(b).) It defines “debt collector” as any person who, in the ordinary course of business, regularly, on behalf of that person or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection. (Civ. Code § 1788.2(c).)
- 3) Defines “consumer debt” to mean money, property, or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction. (Civ. Code § 1788.2(e), (f).)
- 4) Establishes the FDBPA, which defines “debt buyer” as a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation. (Civ. Code § 1788.50 et seq.) “Charged-off consumer debt” means a consumer debt that has been removed from a creditor’s books as an asset and treated as a loss or expense. (Civ. Code § 1788.50.)
- 5) Prohibits, under the FDBPA, a debt buyer from making any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer possesses the following information:
 - a. that the debt buyer is the sole owner of the debt at issue or has authority to assert the rights of all owners of the debt;
 - b. the debt balance at charge off and an explanation of the amount, nature, and reason for all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt. This paragraph shall not be deemed to require a specific itemization, but the explanation shall identify separately the charge-off balance, the total of any post-charge-off interest, and the total of any post-charge-off fees;
 - c. the date of default or the date of the last payment;
 - d. the name and an address of the charge-off creditor at the time of charge off, and the charge-off creditor’s account number associated with the debt.

- The charge-off creditor's name and address shall be in sufficient form so as to reasonably identify the charge-off creditor;
- e. the name and last known address of the debtor as they appeared in the charge-off creditor's records prior to the sale of the debt. If the debt was sold prior to January 1, 2014, the name and last known address of the debtor as they appeared in the debt owner's records on December 31, 2013, shall be sufficient;
 - f. the names and addresses of all persons or entities that purchased the debt after charge off, including the debt buyer making the written statement. The names and addresses shall be in sufficient form so as to reasonably identify each such purchaser; and
 - g. the California license number of the debt buyer. (Civ. Code § 1788.52(a).)
- 6) Prohibits a debt buyer from making any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer has access to a copy of a contract or other document evidencing the debtor's agreement to the debt. If the claim is based on debt for which no signed contract or agreement exists, the debt buyer shall have access to a copy of a document provided to the debtor while the account was active, demonstrating that the debt was incurred by the debtor. For a revolving credit account, the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed sufficient to satisfy this requirement. (Civ. Code § 1788.52(b).)
- 7) Requires a debt buyer to provide this information or documents to the debtor without charge within 15 calendar days of receipt of a debtor's written request for information regarding the debt or proof of the debt. (Civ. Code § 1788.52.)
- 8) Establishes, pursuant to federal law, the Fair Debt Collection Practices Act (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. (15 U.S.C. § 1692.)
- 9) Provides that the term "book account" means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner. (Code Civ. Proc. § 337a.)

This bill:

- 1) Provides that the term “book account” does not include consumer debt.
- 2) Provides that if an obligation incurred on or after January 1, 2024, is not initially payable on the face of a note or contract, a creditor alleging a book account shall have in the creditor’s possession records of all debits and credits forming each and every transaction used to determine the amount alleged to be due.
- 3) Prohibits the use of common counts in an action for collection of consumer debt. For purposes of this section, a “common count” includes a claim for recovery of any of the following:
 - a) An open book account for money due.
 - b) An account stated in writing by and between plaintiff and defendant in which it was agreed that defendant was indebted to plaintiff.
 - c) Money had and received by defendant for the use and benefit of plaintiff.
 - d) Work, labor, services, and materials rendered at the special instance and request of defendant and for which defendant promised to pay plaintiff.
 - e) Goods, wares, and merchandise sold and delivered to defendant and for which defendant promised to pay plaintiff.
 - f) Money lent to plaintiff to defendant and defendant’s request.
 - g) Money paid out, laid out, and expended to or for defendant at defendant’s special instance and request.
- 4) Defines “consumer debt” to mean any obligation or alleged obligation, incurred on or after January 1, 2024, of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes and that is initially payable on the face of a note or contract.

COMMENTS

1. Consumer protection laws in connection with consumer debt

In federal law, the Fair Debt Collection Practices Act seeks 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. (15 U.S.C. § 1692.) The federal act specifically provides that it does not affect or exempt any person subject to it from complying with applicable state laws with respect to debt collection practices, except to the extent state law is inconsistent. (15 U.S.C. § 1692n.) However, a state law is not deemed inconsistent if it affords greater protections to consumers.

Existing law regulates the collection of consumer debt under the Rosenthal Fair Debt Collections Practices Act. The purpose of the Act is to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts. (Civ. Code Sec. 1788 et seq.) The Act generally prohibits deceptive, dishonest, unfair, and unreasonable debt collection practices by debt collectors and regulates the form and content of communications by debt collectors to debtors and others. The law also provides a private right of action for harmed consumers, though nothing in the Rosenthal Act provides that the debt collector prove they have the right to collect the debt.

The Fair Debt Buying Practices Act (FDBPA) places obligations and restrictions on debt *buyers*. Debt buyers are companies that purchase delinquent or charged-off debts from a creditor for a fraction of the face value of the debt. After these companies became subject to increased scrutiny due to numerous complaints on behalf of consumers, SB 233 (Leno and Correa, Ch. 64, Stats. 2013), sponsored by Attorney General Kamala Harris, established the FDBPA. It requires a person who buys delinquent or charged-off consumer debt to maintain certain documentation and requires a debt buyer to provide disclosures to consumers when the buyer attempts to collect debts that are beyond the applicable statute of limitations. Relevant here, a debt buyer may provide “[an]other document” as opposed to a contract to meet its documentary requirement.

2. Consumer concerns in the debt collection industry

The last few decades have seen a significant increase in the amount of consumer debt-related actions in state courts. With that rise, has come increased concerns about whether there are adequate protections for consumer debtors, who are often unrepresented and usually subject to default judgments. A recent report by Pew stated the stark numbers:

- **Debt claims grew to dominate state civil court dockets in recent decades.** From 1993 to 2013, the number of debt collection suits more than doubled nationwide, from less than 1.7 million to about 4 million, and consumed a growing share of civil dockets, rising from an estimated 1 in 9 civil cases to 1 in 4. In a handful of states, the available data extend to 2018, and those figures suggest that the growth of debt collections as a share of civil dockets has continued to outpace most other categories of cases.
- **People sued for debts rarely have legal representation, but those who do tend to have better outcomes.** Research on debt collection lawsuits from 2010 to 2019 has shown that less than 10 percent of defendants have counsel, compared with nearly all plaintiffs. According to studies in multiple jurisdictions, consumers with legal representation in a debt claim are more likely to win their case outright or reach a mutually agreed settlement with the plaintiff.

- **Debt lawsuits frequently end in default judgment, indicating that many people do not respond when sued for a debt.** Over the past decade in the jurisdictions for which data are available, courts have resolved more than 70 percent of debt collection lawsuits with default judgments for the plaintiff. Unlike most court rulings, these judgments are issued, as the name indicates, by default and without consideration of the facts of the complaint – and instead are issued in cases where the defendant does not show up to court or respond to the suit. The prevalence of these judgments indicates that millions of consumers do not participate in debt claims against them.
- **Default judgments exact heavy tolls on consumers.** Courts routinely order consumers to pay accrued interest as well as court fees, which together can exceed the original amount owed. Other harmful consequences can include garnishment of wages or bank accounts, seizure of personal property, and even incarceration.¹

It is because of these issues that many of the laws discussed in the previous section were passed and subsequently strengthened. In fact, a recent report by the Center for Responsible Lending (CRL) points to modest success in certain areas of concern. However, the report also found that the above issues affecting the nation are just as omnipresent in California:

[D]efault judgment rates, rates of representation, and the lack of documentation provided in collections cases still show that the decks remain stacked in favor of debt buyers and against consumers. Debt buyers in California continue to abuse the court system to pursue likely document-unsupported debts, and California borrowers are still at risk of default judgments and garnishments that will force them to pay debts they may not owe. On the one hand, the CFDBPA may have been one factor contributing to the decline in the total number of case filings and the decline in filings by top debt collectors, and the legislation likely led to a modest increase in cases that were supported by minimum required documentation. On the other hand, case filings were likely down for macroeconomic reasons, filings have been inching upwards in more recent years, and case documentation remains insufficient in the majority of all cases.

¹ *How Debt Collectors Are Transforming the Business of State Courts* (May 6, 2020) Pew Charitable Trusts, <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts>. Emphasis in original. All internet citations are current as of June 26, 2023.

Among the key findings of the report:

- **Consumer complaints continue to highlight debt collection in California as a major problem.** Complaints about debt collection still represent one in five complaints submitted to the Consumer Financial Protection Bureau (CFPB), and thousands of complaints are submitted each year on the topic. Analysis of the complaints reveals that one in every four complainants allege that the debt is not theirs, indicating serious and persistent documentation problems.
- **Almost two out of every three cases that were resolved resulted in default judgments in favor of the plaintiff.** For resolved cases not subject to the CFDBPA, the default judgment rate was 63.7%, and for those cases subject to the CFDBPA, the default judgment rate was 66.3%. Collections after a default judgment occur both voluntarily and involuntarily, and 27% of all cases ended in wage garnishment, an involuntary payment that is taken directly from a person's wages. Almost one-third of cases were dismissed, and failure to provide notice was the most common reason for dismissal. Cases were dismissed for lack of proper documentation only 4% of the time, and consumers mounted successful defenses in only 2% of cases.
- **Defendants are almost never represented in court.** Over 98% of defendants did not have representation by an attorney. In the small number of cases where defendants had attorneys, the case was dismissed 100% of the time. When consumers represented themselves, their cases were dismissed 70% of the time, a worse outcome than for those who were represented by attorneys, but a better outcome than for those who never appeared in court.
- **Debt buyers continue to win cases without sufficient documentation.** A majority of cases (61%) were filed without the minimum documentary evidence required by statute. Furthermore, the evidence provided in some cases was insufficient to establish proof of debt. Almost one in four default judgments were granted in cases where the minimum required documentation was not provided, suggesting that evidentiary requirements were not reliably enforced even for cases subject to the CFDBPA. Required documentation was less likely to be filed when cases were processed by clerks of court.
- **Documentary evidence is insufficient to establish the validity and ownership of debt.** Although many cases were filed without evidence tying the current person to the correct debt in the correct amount, dismissals due to insufficient documentation are uncommon, representing only 4% of dismissals. Many cases end in default judgment despite their lack of documentation: for cases that were subject to the CFDBPA, almost 25% of all default judgments were for cases lacking legally required documentation.

In response to these findings, the call from many consumer advocates has been for stronger documentation requirements, to ensure a fairer debt collection industry. This bill seeks to do that by reforming the use of common counts in California.

3. Common counts and book accounts

The term “book account” means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of either a contract or a fiduciary relationship, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner, as provided.

A common count is not a specific cause of action; rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory.² For context, various forms of common counts require the following elements:

Common Count: Money Had and Received

Plaintiff must prove that the defendant received money that was intended to be used for the benefit of plaintiff; the money was not used for the benefit of plaintiff; and defendant has not given the money to plaintiff.³

Common Count: Goods and Services Rendered

Plaintiff must prove that defendant requested, by words or conduct, that plaintiff perform services/deliver goods for the benefit of defendant; plaintiff performed the services/delivered the goods as requested; defendant has not paid for the services/goods; and the reasonable value of the goods/services that were provided.⁴

Common Count: Open Book Account

Plaintiff asserts that there was an open book account in which financial transactions between the parties were recorded and that defendant owes money on the account. The plaintiff must prove that the plaintiff and defendant had financial transactions with each other; plaintiff, in the regular course of business, kept a written or electronic account of the debits and credits involved in the transactions; defendant owes plaintiff money on the account; and the amount of money owed.⁵

² See *McBride v. Boughton* (2004) 123 Cal. App. 4th 379, 394-95; *Zumbrun v. University of Southern California* (1972) 25 Cal. App. 3d 1, 14-15;

³ 1 CACI 370 (2023).

⁴ 1 CACI 371 (2023).

⁵ 1 CACI 372 (2023).

Common Count: Account Stated

An account stated is an agreement between the parties, based on prior transactions between them establishing a debtor-creditor relationship, that a particular amount is due and owing from the debtor to the creditor. The agreement may be oral, in writing, or implied from the parties' words and conduct. To establish this claim, the plaintiff must prove that defendant owed plaintiff money from previous financial transactions; plaintiff and defendant, by words or conduct, agreed that the amount that plaintiff claimed to be due from defendant was the correct amount owed; the defendant, by words or conduct, promised to pay the stated amount to the plaintiff; the defendant has not paid plaintiff the amount owed under this account; and the amount of money owed.⁶

4. Reforming the use of common counts and book accounts

This bill seeks to address problematic practices in the consumer debt collection industry by reforming the use of common counts and limiting the use of book accounts in this context.

The bill prohibits the use of common counts in actions for collection of consumer debt. This includes, but is not limited to, the common counts discussed above. Consumer debt is defined to include any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes. This applies prospectively only to debt incurred on or after January 1, 2024.

Consumer debt only includes specified debts that are initially payable on the face of a note or contract. Therefore, common counts remain available if there is no written agreement at the outset of the relevant financial relationship.

The bill also excludes consumer debt from what can be considered a book account. Additionally, if the obligation is not initially payable by note or contract, a creditor alleging a book account must possess records of all debits and credits forming each and every transaction used to determine the amount alleged to be due. This requirement means that in the case of a small business bringing a claim against a homeowner for an unpaid balance, they must bring forward supporting documentation, for instance, that shows the payment history, so that the balance due is properly substantiated.

These changes bolster the documentation requirements for consumer debt collection and apply equally to original creditors, debt buyers, and debt collectors.

⁶ 1 CACI 373 (2023).

According to the author:

The COVID-19 pandemic has exacerbated financial hardships for many low-income individuals resulting in missing bill payments with stacked on late fees that inflate debt burdens and increase their exposure to debt buyers. These debt collectors then bring tens of thousands of lawsuits based on outdated causes of action called “common counts” such as “account stated” and “open book account” that can lead to wages and bank accounts being seized without the plaintiff creditor ever having to produce a contract in court. Such practices have only further driven people into poverty and have allowed debt buyers to evade modern consumer protection standards.

AB 1414 would protect consumers against predatory debt collection lawsuits by requiring debt collectors to produce and sue on a contract rather than “common counts.” In doing so, this bill simply puts the same burden on debt collectors as any other business.

The bill is co-sponsored by the California Low-Income Consumer Coalition and Public Counsel, who explain the need for the bill:

Current law allows debt collectors to bring lawsuits based on outdated causes of action like “account stated” and “open book account.” These archaic “common counts” allow debt collectors to seize people’s wages and bank accounts – without ever having to prove there was actually a contract for the debt.

Tens of thousands of lawsuits each year are filed using outdated common counts seeking remedies under a contract – a contract that the plaintiff debt collector does not show the court. Both original creditors and debt buyers use these common counts. Original creditors – retailers, credit card companies, service providers – should be able to produce the agreement. Debt buyers – which buy debt for pennies on the dollar – should make sure to obtain it when they purchase the borrower’s file. Common counts are a holdover from a different era. They make debt collection cases, which can cause extreme hardship for consumers, subject to lesser evidence standards than all other lawsuits. They allow evasion of modern consumer protection standards. They give debt collectors special treatment in court.

The Western Center on Law and Poverty writes in support:

Debt collectors are making money off the backs of the working poor and people of color despite lacking the most important evidence to prove their

claims. Research establishes that debt buyers – the most frequent users of common counts – are more likely to pursue people of color. A 2017 report from the Consumer Financial Protection Bureau established that while 29% of white respondents reported having been contacted about a debt in collection, 44% of people of color – a rate one-and-a-half times greater – reported the same. California should no longer tolerate special, outdated laws that make it easier for debt buyers to disproportionately target and drain the assets of communities of color.

The remedy here is simple: put the same burden on debt collectors as any other business. If collectors want to collect damages resulting from the breach of a contract, they must have the contract. If they cannot produce the contract, they – like everyone else – should not be able to sue on it.

5. Opposition concerns

Writing in opposition, the California Association of Collectors argues:

This bill is anti-consumer in a variety of ways, is confusing as written and will dramatically hurt small businesses in California who use open book accounts.

Open book accounts are typically used by small businesses to extend credit to customers, patients, and homeowners. Typical professions that extend credit through an open book account are everyone from dentists, doctors, dry cleaners, pool services, gardeners, landscapers, designers etc. They provide a service and bill monthly. This bill would stop their ability to collect on delinquent accounts. The net effect would be to drive them to require payment at the time the service is rendered. How does that help consumers? This bill would create chaos for small businesses.

It appears that the sponsors somehow believe collection of consumer debt should only be based on a written contract. For this unclear goal they would upset the business model of hundreds of thousands of California small businesses and erode the availability of credit.

SUPPORT

California Low-Income Consumer Coalition (co-sponsor)

Public Counsel (co-sponsor)

Bet Tzedek Legal Services

California Civil Liberties Advocacy

California Nurses Association

Centro Legal De LA Raza

Community Legal Services in East Palo Alto
Elder Law & Advocacy
Katharine & George Alexander Community Law Center
Legal Aid of Marin
Legal Aid Society of San Bernardino
Legal Assistance for Seniors
National Consumer Law Center
Open Door Legal
Public Law Center
Riverside Legal Aid
Santa Clara University, Alexander Community Law Center
Watsonville Law Center
Western Center on Law and Poverty

OPPOSITION

California Association of Collectors

RELATED LEGISLATION

Pending Legislation: AB 1119 (Wicks, 2023) establishes an alternative for judgment debtors in consumer actions to submit financial information concerning their claim of exemption and removes the threat of arrest upon a debtor's failure to comply. AB 1119 is currently in this Committee.

Prior Legislation:

SB 531 (Wieckowski, Ch. 455, Stats. 2021) required specified notices to be provided to debtors in connection with the sale or assignment of delinquent consumer debt. It also established certain documentation requirements for debt collectors and provided a right to request specified information from those collecting on sold or assigned delinquent debt.

AB 1526 (Kalra, Ch. 247, Stats. 2018) required debt collectors to provide certain notices to consumers when attempting to collect on time-barred debts. It also provided that the limitations period on commencing actions to collect on certain debts is an outright bar on initiating such proceedings, rather than allowing the expiration of the statute of limitations to serve simply as an affirmative defense.

AB 2825 (Jones-Sawyer, 2018) would have generally applied the protections of the Rosenthal Fair Debt Collections Practices Act and the Fair Debt Buying Practices Act to the collection of certain government debts and debts arising from the towing, impounding, and storing of vehicles. AB 2825 died in the Senate Appropriations Committee.

SB 233 (Leno, Ch. 64, Stats. 2013) established the Fair Debt Buying Practices Act.

PRIOR VOTES:

Assembly Floor (Ayes 53, Noes 18)

Assembly Banking and Finance Committee (Ayes 9, Noes 1)

Assembly Judiciary Committee (Ayes 8, Noes 3)
