SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 424 (Stone)
Version: June 25, 2021
Hearing Date: July 6, 2021
Fiscal: No
Urgency: No
CK

SUBJECT

Private Student Loan Collections Reform Act: collection actions

DIGEST

This bill establishes protections for borrowers with private student loan debt, including requirements for creditors to have certain documentation before collection and before initiating civil actions to collect on such debt.

EXECUTIVE SUMMARY

The Fair Debt Buying Practices Act (FDBPA) places obligations and restrictions on debt *buyers*, including prohibiting them from making a written statement to collect consumer debt without possessing specific information. The FDBPA also requires a complaint in an action to collect on a consumer debt to include specific allegations, and prohibits a debt buyer from bringing suit if the applicable statute of limitations has expired.

Student loan debt has become a pressing issue of our time, with millions of Americans defaulting on student loans nationwide. There have been several documented reports of systemic abusive practices inflicted upon student loan borrowers. In response to these problematic collection practices in connection with the massive private student loan market, this bill steps in to provide basic protections for borrowers, heavily modeled on the FDBPA. The bill establishes minimum evidentiary standards for private education lenders or loan collectors filing a lawsuit against borrowers; requires lenders and collectors to provide specified records, which will be made available at the request of the borrower; and allows a borrower to pursue avenues of enforcement if a lender or collector fails to comply with provisions of this bill.

The bill is sponsored by Consumer Reports, NextGen California, the Student Borrower Protection Center, Student Debt Crisis, and Young Invincibles and supported by dozens of other organizations, including the Western Center on Law and Poverty and the California Federation of Teachers. The bill is opposed by the California Association of

Collectors and the Consumer Bankers Association. The bill passed out of the Senate Banking and Financial Institutions Committee on a 7 to 2 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides the Student Borrower Bill of Rights, which imposes requirements and prohibitions on student loan servicers intended to promote meaningful access to affordable repayment and loan forgiveness benefits and to ensure that California borrowers are protected from predatory student loan industry practices. (Civ. Code §§ 1788.100 – 1788.101.)

2) Requires, under the Student Loan Servicing Act, student loan servicers to obtain a license from the Department of Financial Protection and Innovation unless they meet specified exemptions. (Fin. Code §§ 28100 - 28182.)

3) 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.)

4) 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).)

5) 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).)

6) 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(c).)

This bill:

1) Establishes the Private Student Loan Collections Reform Act.

2) Defines "private education loan" as an extension of credit to a consumer expressly for postsecondary educational expenses, that is not made, insured, or guaranteed under federal law. This does not include open-end credit or any loan that is secured by real property or a dwelling. It also excludes certain credit extension from the educational institution, as provided.

3) Defines "private education lender" as a person or entity that engages in the business of securing, making, or extending private education loans or a holder of a private education loan.

4) Defines "private education loan collector" as a person, other than a private education lender, collecting or attempting to collect on a defaulted private education loan.

5) Prohibits a private education lender or a private education loan collector from making any written statement to a debtor in an attempt to collect a private education loan unless the private education lender or private education loan collector possesses certain specified information, including:

a) the name of the owner of the private education loan;

b) the creditor's name at the time of default, if applicable;
c) the amount due at default and an itemization of interest and fees, if any, claimed to be owed and whether those were imposed by the original creditor or any subsequent owners of the private education loan;
d) relevant dates regarding the loan and payments on it;
e) documentation establishing that the creditor is the owner of the specific individual private education loan at issue;
f) a copy of all pages of the contract, application, or other documents evidencing the debtor's liability for the private education loan, stating all terms and conditions applicable to the private education loan;
g) a log of all collection attempts made in the last 12 months, including date and time of all calls and letters;
h) statements as to whether there is a willingness to renegotiate the loan terms and whether the loan is eligible for an income-based repayment plan; and
i) copies of all settlement letters made in the prior 12 months, or, in the alternative, a statement that the creditor has not attempted to settle or otherwise renegotiate the debt prior to suit.

6) Requires a private education lender or private education loan collector, in addition to any other required information, to provide the information laid out above in the first written collection communication with a debtor and after default and acceleration, and upon the debtor's request after default and acceleration, provided that the debtor has not requested or received such information within the last 12 months.

7) Requires all settlement agreements between a private education lender or private education loan collector and a debtor to be documented in open court or otherwise reduced to writing. The private education lender or private education loan collector shall ensure that a copy of the written agreement is provided to the debtor.

8) Provides that a private education lender or private education loan collector that accepts a payment as payment in full, or as a full and final compromise of a private education loan, shall provide, within 30 calendar days, a final statement that shall clearly and conspicuously show the amount and date paid, the name of the entity paid, the current account number, the name of the private education lender or private education loan collector, the account number issued by the private education lender or private education loan collector, the name of the owner of the private education loan, and that a zero balance is owing. The statement may be provided electronically if the parties agree.

9) Prohibits a private education lender or private education loan collector from bringing suit or initiating an arbitration or other legal proceeding to collect a private education loan if the statute of limitations for the claim has expired.

10) Requires the complaint in an action brought by a private education lender or private education loan collector to collect a private education loan to allege, or to have attached, most of the information laid out above. The complaint must further allege that collection of the debt is not time barred and that the plaintiff has complied with the provision above regarding proper documentation.

11) Prohibits, in an action initiated by a private education lender or private education loan collector, a default or other judgment from being entered against a defendant unless documents are submitted by the plaintiff to the court to establish certain facts required to be alleged above. The documents must be properly authenticated and each must be in a form that would be admissible as a business record under Section 1271 of the Evidence Code.

12) Provides that in the above actions, if a plaintiff seeks a default judgment and has not complied with the requirements of this bill, the court shall not enter a default judgment for the plaintiff and may, in its discretion, dismiss the action.

13) Provides that, notwithstanding Section 473.5 of the Code of Civil Procedure, if service of a summons has not resulted in actual notice to a person in time to defend an action brought by a private education lender or a private education loan collector and a default or default judgment has been entered against the person in the action, the person may serve and file a notice of motion and motion to set aside the default or default judgment and for leave to defend the action utilizing the procedures set forth in Section 1788.61.

14) Authorizes a person to bring a cause of action against a creditor, private education lender, or private education loan collector for a violation of any provision of this act in order to recover or obtain any of the following:

    a) actual damages and statutory damages in an amount as the court may allow, which shall not be less than $500 per violation;

    b) damages pursuant to Section 3294;

    c) an order vacating any default judgment entered against that person;

    d) restitution of all moneys taken from or paid by that person after a default judgment was entered in favor of the private education lender or private education loan collector;

    e) an order directing the private education lender or private education loan collector to request that a consumer reporting agency correct a consumer report that it issues; request that a consumer reporting agency remove derogatory information furnished to it after default; or furnish correct information to a consumer reporting agency;

f) costs of the action, together with reasonable attorney's fees as determined by the court; or

g) any other relief that the court deems proper.

15) Allows for reasonable attorney's fees to be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the cause of action was not in good faith.

16) Provides that, in a class action, a defendant that violates any provision of this title shall be liable for any statutory damages for each named plaintiff as provided. If the court finds that the defendant engaged in a pattern and practice of violating any provision of this title, the court may award additional damages to the class in an amount not to exceed the lesser of $500,000 or 1 percent of the net worth of the defendant.

17) Immunizes a private education lender or private education loan collector from civil liability for damages if it establishes by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, and occurred notwithstanding the maintenance of procedures reasonably adopted to avoid any error.

18) Provides that a cause of action to enforce any liability created by this title shall be brought within one year from the date of the discovery by the plaintiff of the last violation, or, in the event a default judgment is entered against the debtor, one year from the date the borrower first receives a writ, notice, or order, as provided, whichever is later.

19) Deems waiver of these provisions void and unenforceable.

COMMENTS

1. The current private student loan debt industry

Over the last few years, the student loan debt crisis has been well documented, with millions of Americans steeped in debt with dim prospects of clawing their way out and establishing financial independence. This has led to widespread clamor for the federal government to forgive such debts. However, the private student loan crisis stands apart:

> Like those who took on subprime mortgages, many people with private student loans end up shouldering debt that they never earn enough to repay. Borrowing to finance higher education is an economic decision that often pays off, but federal student loans — a much larger market, totaling $1.3 trillion — are directly funded by the government and come with consumer protections like income-based repayment options.

> Private loans lack that flexibility, and they often carry interest rates that can reach double digits. Because of those steep rates, the size of the loans can quickly balloon, leaving borrowers to pay hundreds and, in some cases, thousands of dollars each month.
>
> Others are left with debt for degrees they never completed, because the for-profit colleges they enrolled in closed amid allegations of fraud. Federal student borrowers can apply for a discharge in those circumstances, but private borrowers cannot.[1]

Furthermore, "while executive action to cancel student debt could provide substantial relief to millions of people, private loan borrowers could be excluded."[2] In addition, "[p]rivate student loans have also been excluded from federal relief programs such as the CARES Act, which suspended federal student loan payments, interest, and collections in response to the COVID-19 pandemic. Under current law, there is no mechanism to convert a purely private student loan into a federal student loan."[3]

A study by the National Consumer Law Center's Student Loan Borrower Assistance Project provided a pointed assessment of practices in this industry: "Predatory private student lending has shattered the dreams of many individuals who sought to better their lives through education. These loans have become a curse, rather than an opportunity, for a large and growing number of private student loan borrowers who are defaulting on their loans."[4] Driving the scope of the devastation are an onslaught of litigation to collect on these loans, which have been rife with abuses:

> The plaintiffs in [private student loan] lawsuits are not typically original lenders, such as financial institutions or for-profit colleges. Rather, the loans at issue have usually been transferred, sometimes multiple times, to one or more other entities. Plaintiffs therefore commonly include subsequent transferees or entities that have purchased a portfolio of student loans, such as holders of securitized loan pools or guarantors. They may also be entities that have merged with or acquired loan holders,

---

[1] Stacy Cowley & Jessica Silver-Greenberg, *As Paperwork Goes Missing, Private Student Loan Debts May Be Wiped Away* (July 17, 2017) The New York Times, https://www.nytimes.com/2017/07/17/business/dealbook/student-loan-debt-collection.html. All internet citations are current as of June 30, 2021.

[2] Adam S. Minsky, *Can Biden Cancel Private Student Loans? 3 Options* (February 5, 2021) Forbes, https://www.forbes.com/sites/adamminsky/2021/02/05/can-biden-cancel-private-student-loans/?sh=449706fa358d.

[3] *Ibid.*

[4] Robyn C. Smith & Emily G. Caplan, *Going to School on Robo-signing: How to Help Borrowers and Stop the Abuses in Private Student Loan Collection Cases* (April 2014) National Consumer Law Center's Student Loan Borrower Assistance Project, https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/robo-signing-2014.pdf.

> as well as entities such as loan servicers or debt collection agencies that have been assigned student loan debts for the purpose of collection.
>
> In many of these lawsuits, although the plaintiff may claim to be the holder of the loan at issue, it may not possess or produce admissible evidence that this is in fact the case. Indeed, the plaintiffs in these cases sometimes fail to provide the promissory note between the borrower and original lender, and they often do not provide documentation demonstrating that they have been assigned the borrowers' loans. Based on our review of affidavits and evidence provided in these cases, in repeated instances the plaintiffs' affidavits in support of judicial relief have been "robo-signed" – they often contain misleading or even outright incorrect information and reveal a lack of personal knowledge essential to prove an assignment of the subject loan.

A series of articles in the New York Times identifies the issues that have arisen in the industry, and highlight one particular entity:

> At the center of the storm is one of the nation's largest owners of private student loans, the National Collegiate Student Loan Trusts. It is struggling to prove in court that it has the legal paperwork showing ownership of its loans, which were originally made by banks and then sold to investors. National Collegiate's lawyers warned in a recent legal filing, "As news of the servicing issues and the trusts' inability to produce the documents needed to foreclose on loans spreads, the likelihood of more defaults rises."
>
> National Collegiate is an umbrella name for 15 trusts that hold 800,000 private student loans, totaling $12 billion. More than $5 billion of that debt is in default, according to court filings. The trusts aggressively pursue borrowers who fall behind on their bills. Across the country, they have brought at least four new collection cases each day, on average — more than 800 so far this year — and tens of thousands of lawsuits in the past five years.
>
> Last year, National Collegiate unleashed a fusillade of litigation against Samantha Watson, a 33-year-old mother of three who graduated from Lehman College in the Bronx in 2013 with a degree in psychology.
>
> Ms. Watson, the first in her family to go to college, took out private loans to finance her studies. But she said she had trouble following the fine print. "I didn't really understand about things like interest rates," she said. "Everybody tells you to go to college, get an education, and everything will be O.K. So that's what I did." . . . When National Collegiate sued her,

> the paperwork it submitted was a mess, according to her lawyer, Kevin Thomas of the New York Legal Assistance Group. At one point, National Collegiate presented documents saying that Ms. Watson had enrolled at a school she never attended, Mr. Thomas said.

Although judges throughout the country have been tossing out lawsuits by entities such as National Collegiate, ruling they have not sufficiently proven they own the debts they are trying to collect, "[t]he trusts win many of the lawsuits they file automatically, because borrowers often do not show up to fight. Those court victories, which can be used to garnish paychecks and take federal benefits like Social Security from bank accounts, can haunt borrowers for decades."

These default judgements are more common when borrowers are unrepresented and are not aware of their rights to push back. According to a study conducted by the Consumer Law Clinic (CLC) at the University of California, Irvine, School of Law of the debt collection cases filed each year in California, 90 percent of student loan lawsuit defendants in 2018 were unrepresented, 94 percent in 2019, and 89 percent in 2020. The clinic writes:

> Unrepresented consumers are vastly more likely than those represented by an attorney to have a judgment entered against them. Unrepresented borrowers generally do not know when they have evidentiary defenses to student loan collection cases, which results in entry of judgment and in settlement agreements in which the borrower agrees to repay the entire balance of the loan, often on an unaffordable payment plan.

This bill seeks to respond to these issues and implement stronger borrower protections, borrowing heavily from the FDBPA.

2. <u>Extending FDBPA-like protections to the world of private student loan debt</u>

The author lays out the issues that exist in current law warranting the bill:

> As of June 2020, more than 650,000 Californians owed $10.3 billion in private student loan debt. Banks, for-profit colleges, and other private lenders provide these loans without the involvement of the federal government. Consequently, private student loans often have higher interest rates and offer fewer consumer protections than federal student loans.
>
> When a borrower falls behind on loan payments, student loan lenders and debt collectors pursue aggressive litigation, characterized as an "assembly line of lawsuits" against the borrower. Trusts, lenders, or debt collectors may claim to be the holder of the loan, yet routinely fail to prove they own

> the loan, file lawsuits within the statute of limitations, or comply with court requests for more information.
>
> Nevertheless, lenders and collectors automatically win many of these lawsuits because borrowers are unfamiliar with the judicial system, and often are unable to afford legal representation. Court rulings in favor of debt collectors result in garnished wages or seizure of federal benefits deposited in bank accounts.
>
> AB 424 will protect private student loan borrowers from unsubstantiated lawsuits and collection on illegitimate debts. The bill requires private student loan lenders and debt collectors to comply with common sense evidentiary standards when bringing debt collection lawsuits against borrowers.

This bill seeks to level the playing field for unrepresented borrowers and to establish baseline protections for them through clear evidentiary standards.

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. The law made numerous changes relating to debt *buyers*, including requiring a complaint in an action to collect on a consumer debt to include specific allegations, and prohibiting a debt buyer from bringing suit if the applicable statute of limitations has expired.

Many of the provisions of this bill are simply applying requirements that are already provided for in the FDBPA to creditors and debt collectors in the private student loan industry. Under the former, a debt buyer is prohibited from making any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer possesses the following information:

- 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;
- 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;
- the date of default or the date of the last payment;
- 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;
- 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;
- 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;
- the California license number of the debt buyer. (Civ. Code § 1788.52(a).)

The debt buyer must provide the information to a debtor without charge within 15 calendar days of receipt of a debtor's written request. (Civ. Code § 1788.52(c).)

This bill prohibits a private education lender or a private education loan collector from making any written statement to a debtor in an attempt to collect a private education loan unless the private education lender or private education loan collector possesses certain specified information, including:
- the name of the owner of the private education loan;
- the creditor's name at the time of default, if applicable;
- the amount due at default and an itemization of interest and fees, if any, claimed to be owed and whether those were imposed by the original creditor or any subsequent owners of the private education loan;
- relevant dates regarding the loan and payments on it;
- documentation establishing that the creditor is the owner of the specific individual private education loan at issue;
- a copy of all pages of the contract, application, or other documents evidencing the debtor's liability for the private education loan, stating all terms and conditions applicable to the private education loan;
- a log of all collection attempts made in the last 12 months, including date and time of all calls and letters;
- statements as to whether there is a willingness to renegotiate the loan terms and whether the loan is eligible for an income-based repayment plan; and
- copies of all settlement letters made in the prior 12 months, or, in the alternative, a statement that the creditor has not attempted to settle or otherwise renegotiate the debt prior to suit.

This bill requires a private education lender or private education loan collector to provide this information in the first written collection communication with a debtor and after default and acceleration and upon the debtor's request after default and acceleration, provided that the debtor has not requested or received such information within the last 12 months.

The bill thereby puts the onus on the lender or collector to ensure that they have all the proper documentation they should, even before collections begin, rather than relying on a borrower either having representation or knowing their rights when it eventually makes its way to the courts. It works to ensure that student loan creditors only collect on loans for which they have evidence establishing they hold the debt and the exact amount at issue.

When collections enter the judicial system, the bill establishes procedural safeguards for borrowers, again modeled off of the FDBPA. When a private education lender or private education loan collector files suit to collect a private education loan, the bill requires the underlying complaint to allege:

- the name of the owner of the private education loan;
- the creditor's name at the time of default, if applicable;
- the creditor's account number used to identify the private education loan at the time of default, if the original creditor used an account number to identify the private education loan at the time of default;
- the amount due at default;
- an itemization of interest and fees, if any, claimed to be owed and whether those were imposed by the original creditor or any subsequent owners of the private education loan;
- the date that the private education loan was incurred;
- the date of the first partial payment or the first day that a payment was missed, whichever is earlier;
- the date and amount of the last payment, if applicable;
- any payments, settlement, or financial remuneration of any kind paid to the creditor by a guarantor, surety, or other party not obligated on the loan as compensation under a separate contract that provides coverage for financial losses incurred as a result of default, if applicable; and
- the names of all persons or entities that owned the private education loan after the time of default, if applicable, and the date of each sale or transfer.

The complaint must also assert that the collection of the debt is not time-barred and that the plaintiff has complied with the documentation requirement detailed above. The plaintiff must also attach a log of all collection attempts made in the last 12 months, including date and time of all calls and letters; a statement as to whether the creditor is willing to renegotiate the terms of the private student loan; and copies of all settlement letters made in the last 12 months, or, in the alternative, a statement that the creditor has not attempted to settle or otherwise renegotiate the debt prior to suit. These provisions also include protection for the privacy of the borrower.

These basic requirements establish a safeguard at the door of the courthouse, encouraging student loan creditors to do their due diligence and properly document the path of these loans.

To address the all too common circumstance, where borrowers are unrepresented and do not show up to respond to suit, the bill implements straightforward evidentiary standards in these cases before a default judgment can be entered in favor of plaintiff lenders or collectors. In an action initiated by a private education lender or private education loan collector, a default or other judgment cannot be entered against a defendant unless the plaintiff submits documents to the court to establish the facts required to be alleged and submits the documents discussed above.

To address concerns about faulty or fabricated evidence being submitted in the worst cases, the bill requires all of these documents to be properly authenticated and each must be in a form that would be admissible as a business record pursuant to the Evidence Code. If the plaintiff seeks a default judgment without complying with these requirements, the court is restricted from entering such judgment and may dismiss the action entirely.

Bolstering the due process protections for these private student loan borrowers, the bill provides that if service of a summons does not result in actual, timely notice to the defendant, and a default judgment has been entered against them, the person may file a motion to set aside the default judgment and for leave to defend the action.

3. Enforcing these rights

The bill seeks to deter noncompliance and to provide a mechanism for debtors to exercise their rights by authorizing a cause of action against a creditor, private education lender, or private education loan collector in violation of the bill's provisions.

Aggrieved borrowers can seek actual damages sustained as a result of the violation, in addition to statutory damages as provided by the court, but which must not be less than $500 per violation. They can also seek restitution of monies taken from them after a default or even seek punitive damages pursuant to Section 3294. The bill also specifically contemplates orders of the court that direct the lender or collector in violation to clean up their mess by ordering them to request that a consumer reporting agency correct a consumer report or remove derogatory information furnished to it after default. If successful, the court shall award costs of the action, together with reasonable attorney's fees as determined by the court.

The bill also provides for a class action that provides for statutory damages for each named plaintiff as provided, and if the court finds that the defendant engaged in a pattern and practice of violating the law, the court is authorized to award additional damages to the class in an amount not to exceed the lesser of $500,000 or 1 percent of the net worth of the defendant.

The statute of limitation is one year from the date of the discovery by the plaintiff of the last violation, or, where there is a default judgment entered against the debtor, one year

from the date the borrower first receives a writ, notice, or order, as specified, whichever is later.

The bill also places some protections against frivolous actions, in addition to those already existing, and establishes a safe harbor for good faith creditors. It authorizes an award of reasonable attorney's fees to a prevailing defendant where it is found that the plaintiff's prosecution of the cause of action was not in good faith. It also insulates a lender or collector from any civil liability if they can establish by a preponderance of evidence that the violation was unintentional and resulted from a bona fide error, and occurred notwithstanding the maintenance of procedures reasonably adopted to avoid any error.

4. Stakeholder positions

A wide coalition of organizations, from the Student Borrower Protection Center, to Consumer Reports, to SEIU California, to the California Dental Association, writes in support of the bill:

> Borrowers with private student loans face a wide range of unique challenges when managing student debt. These loans often have extremely high interest rates and lack the flexible or affordable repayment options that federal student loans enjoy, leaving borrowers with little recourse when faced with a financial shock or a bout of unemployment. When borrowers fall behind on this debt, they often face aggressive debt collection tactics and lawsuits, all without the benefit of the type of bankruptcy protection available to consumers with other types of consumer debt. These abuses add insult to injury for borrowers pushed into high-rate debt by for-profit colleges and predatory lenders. Low-income and students of color are more likely to hold private student loans and are far too often subject to predatory lending practices that increase their debt burden and decrease their likelihood of payoff.
>
> Trusts, loan servicers and debt collectors, or creditors, often lack documentation to prove they have the legal right to pursue private student loan debt by seeking wage garnishment orders in court. Despite this, creditors are dragging borrowers into court across the country, including in California, to try and collect on these debts. This involves misrepresenting to the courts along the way by claiming they have the right to collect on these debts. Many times, debt collectors win these frivolous lawsuits because borrowers are unfamiliar with the judicial system and usually are unable to afford legal representation. These court rulings in favor of debt collectors result in devastating impacts on these student borrowers -- many of whom are already economically

> disadvantaged -- wage garnishments or seizure of federal benefits deposited in bank accounts.
>
> AB 424 is critical to tackling the abusive collections practices by creditors and debt collectors. The bill bans the use of mass-produced documentation, also known as "robo-signing," by prohibiting creditors from obtaining judgements against borrowers without accurate, personalized loan records and documentation. This protection will prevent creditors from obtaining court orders to garnish wages and seize assets to repay defaulted student loans that creditors cannot prove borrowers owe.
>
> AB 424 also provides borrowers with avenues of enforcement if a lender or collector fails to comply with the bill's provisions.
>
> Student borrowers shouldn't be unnecessarily and under false pretenses dragged into court for debt they may not even owe, especially during the current economic and health crisis, and this bill would help prevent these false lawsuits from occurring in the first place.

The California Association of Collectors writes in opposition:

> The bill prohibits a debt collector from initiating written communication with a private student loan borrower unless the debt collector provides the borrower with a laundry list of unnecessary documentation and information with the first writing, which will inundate the borrower. The list includes a complete itemization of the interest that has accrued on the loan and all payments made, call logs, prior communications that the borrower already has, and a statement regarding the ability of the borrower to discharge that loan in bankruptcy.
>
> AB 424 would impose strict liability damages of $500 per violation. With the substantial documentation and information required by this bill, a strict liability penalty of $500 per violation will unnecessarily punish those who make honest mistakes and represents a substantial shift from the strict liability damages that are available under the other statutes that govern debt collection. In the other debt collection statutes, the strict liability damages are limited to $1,000 per lawsuit. When facing actual damages, punitive damages, attorneys' fees and costs, strict liability damages of $1,000 per lawsuit are more than sufficient to encourage debt collectors to correct their behavior and to compensate the borrower for any damages or losses sustained. While this change may seem insignificant to those not familiar with the collection industry, the proposed change in the strict liability calculation will cause serious and

substantial unintended consequences for the well-intentioned debt collector who mistakenly failed to abide by this highly technical statute.

Recent amendments to the bill address a number of the concerns raised by the collectors. For instance, the requirement to state whether the debt arising from the private education loan is dischargeable in bankruptcy has been removed from the bill. The author has also agreed to the following amendments arising out of suggestions from the debt collectors that clarify certain requirements of the bill:

Amendments

Amend the definition of "private education loan collection action" to read: "'Private education loan collection action' means any judicial action in a suit, arbitration, or other legal proceeding in which a claim is asserted to collect a private education loan."

Amend Section 1788.202(a)(5)-(7) to read as follows:

(5) An itemization of interest, if any, that has accrued on the private education loan.

(6) An itemization of fees, if any, claimed to be owed on the private education loan and whether those fees were imposed by the original creditor or any subsequent owners of the private education loan.

(7) The date that the private education loan was incurred.

(8) The date of the first partial payment or the first day that a payment was missed, whichever is earlier, that precipitated default.

Amend Section 1788.205(a)(2) to read: "(2) That the applicable statute of limitations has not expired."

Additional clarifying and conforming amendments

SUPPORT

Consumer Reports (co-sponsor)
Nextgen California (co-sponsor)
Student Borrower Protection Center (co-sponsor)
Student Debt Crisis (co-sponsor)
Young Invincibles (co-sponsor)
California Association for Micro Enterprise Opportunity
California Association of Nonprofits

California Dental Association
California Federation of Teachers
California Low-Income Consumer Coalition
California Student Aid Commission
Californians for Economic Justice
Center for Public Interest Law University of San Diego School of Law
The Century Foundation
Consumer Federation of California
Friends Committee on Legislation of California
Housing and Economic Rights Advocates
Improve Your Tomorrow, Inc.
The Institute for College Access & Success
Public Counsel
Public Law Center
SEIU California State Council
Student Senate for California Community Colleges
University of California Student Association
Western Center on Law and Poverty

OPPOSITION

California Association of Collectors, Inc.
Civil Justice Association of California
Consumer Bankers Association

RELATED LEGISLATION

Pending Legislation:

SB 531 (Wieckowski, 2021) requires certain notices to be provided to debtors in connection with the sale or assignment of delinquent consumer debt. It also establishes certain documentation requirements for debt collectors and a right to request certain information from those collecting on sold or assigned delinquent debt. This bill is in the Assembly Banking and Finance Committee.

AB 1020 (Friedman, 2021) applies certain requirements from the FDBPA to the Hospital Fair Pricing Act, including communications requirements and pleading and evidentiary standards. This bill is currently in this Committee.

Prior Legislation:

AB 376 (Stone, Ch. 154, Stats. 2020) established the Student Borrower Bill of Rights, which prohibits a person from engaging in abusive acts or practices when servicing a student loan in this state, as provided. It imposes requirements on student loan

servicers doing business in this state and places responsibility with the Department of Business Oversight (DBO) for administering these requirements; provides judicial enforcement mechanisms for violations of the aforementioned requirements by student loan servicers; requires DBO to collect information about and report on the activities of student loan servicers in this state; and requires DBO to designate a Student Loan Ombudsman, as specified.

AB 2251 (Stone, Ch. 824, Stats. 2016) enacted the Student Loan Servicing Act, which establishes a new licensing law applicable to student loan servicers, administered by the DBO, as specified. The bill was sponsored by Attorney General Kamala Harris.

SB 233 (Leno, Ch. 64, Stats. 2013) *See* Comment 2.

PRIOR VOTES:

Senate Banking and Financial Institutions Committee (Ayes 7, Noes 2)
Assembly Floor (Ayes 56, Noes 20)
Assembly Appropriations Committee (Ayes 12, Noes 4)
Assembly Judiciary Committee (Ayes 8, Noes 2)
Assembly Banking and Finance Committee (Ayes 9, Noes 3)

****