

Date of Hearing: April 24, 2023

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Timothy Grayson, Chair

AB 1414 (Kalra) – As Amended April 12, 2023

SUBJECT: Civil actions: consumer debt

SUMMARY: Prohibits the use of common counts in consumer debt cases where the alleged debt obligation arose from a breach of contract.

Specifically, **this bill:**

- 1) Clarifies that the term “book account” does not include consumer debt.
- 2) Defines “consumer debt” as 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 and that is initially payable on the face of a note or contract.
- 3) Prohibits the use of common counts in an action for collection of consumer debt, as defined.
- 4) Defines “common count” as including a claim for recovery of any of the following:
 - a) An open book account for any 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.

EXISTING LAW:

- 1) Defines “book account” as a detailed statement that is the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation. (Code of Civil Procedure Section 337a.)
- 2) Establishes that book accounts show the debits and credits in connection with the transaction described in 1). (*Ibid.*)

- 3) Establishes that book accounts are entered in the regular course of business by the creditor or the fiduciary and is kept in a reasonably permanent form and manner.
- 4) Establishes that a “reasonably permanent form and manner” is (1) in a bound book, (2) on a sheet or sheets fastened in a book or to the 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. (*Ibid.*)
- 5) Establishes a cause of action for the common count of money had and received, by plaintiff establishing that (1) defendant received money that was intended to be used for the benefit of plaintiff; (2) the money was not used for the benefit of plaintiff; and (3) defendant has not given money to the defendant. (California Civil Jury Instruction No. 370.)
- 6) Recognizes the common law cause of action for the common count of goods and services rendered, by plaintiff establishing that: (1) they were acting pursuant to either an express or implied request for services from the defendant; (2) the services provided were intended to, and did benefit the defendant; and (3) defendant has not paid for the services/goods. (California Civil Jury Instruction No. 371.)
- 7) Recognizes the common law cause of action for the common count of an open book account, by plaintiff establishing that: (1) plaintiff and defendant had financial transactions with each other; (2) plaintiff kept an account of the debits and credits involved in these transactions; (3) defendant owes plaintiff money on the account; and (4) the amount of money owed. (California Civil Jury Instruction No. 372.)
- 8) Recognizes the common law cause of action for the common count of account stated, by plaintiff establishing that: (1) plaintiff and defendant had financial transactions with each other; (2) an agreement, either express or implied, on the amount due from the debtor to the creditor existed by the parties; and (3) that defendant made an express or implied promise to pay the amount due. (California Civil Jury Instruction No. 373.)
- 9) Prohibits a debt buyer from bringing suit, initiating another proceeding, or taking any other action to collect a consumer debt if the applicable statute of limitations on the cause of action has expired. (Civil Code Section 1788.56.)
- 10) Requires specific information regarding the underlying debt, the debt buyer, the debtor, and charge-off creditors to be so stated in any action brought by a debt buyer on a consumer debt. (Civil Code Section 1788.58.)
- 11) Provides that in an action initiated by a debt buyer, no default of other judgment may be entered against a debtor unless the following authenticated documents have been submitted by the debt buyer to the court:
 - a) Business records establishing facts about the debt, debtor, and charge-off creditors that are required by this act to be alleged in the complaint; and
 - b) A copy of a contract or other document evidencing the debtor's agreement to the debt, or if no signed contract exists, demonstrating that the debt was incurred by the debtor. (Civil Code Section 1788.60.)

FISCAL EFFECT: None. This bill is keyed nonfiscal by Legislative Counsel.

COMMENTS:

1) Purpose.

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.

2) Background on laws related to debt purchasing and debt collection.

Federal and state laws place various documentation and notification requirements and protections for borrowers related to the practices of debt collection and debt purchasing. Specifically:

- The federal Fair Debt Collection Practices Act (FDCPA). In 1977, the federal government established the FDCPA to prohibit debt collectors from engaging in abusive, unfair, or deceptive practices to collect debts. Violations of the FDCPA are enforceable through a private right of action or class action, or through administrative action. 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 Rosenthal Act. The Legislature passed the Rosenthal Act in 1977 to place reasonable limits on the kinds of activities that creditors and debt collectors can employ when collecting payments. The Rosenthal Act, like the FDCPA, prohibits deceptive, dishonest, unfair, and unreasonable debt collection practices, and many of the law’s provisions govern how debt collectors can interact and communicate with consumers. 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). The Legislature passed the FDBPA in 2013 to provide protections to consumers whose debts were sold to a debt buyer. 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. While

the FDBPA applies only to instances when the transfer of collection is structured as a sale, it also contains stronger validation requirements than the Rosenthal Act and the federal FDCPA. Relevant to AB 1414, a debt buyer may provide “[an]other document” as opposed to a contract to meet its documentary requirement.

- Debt Collection Licensing Act, SB 908 (Wieckowski), Chapter 163, Statutes of 2020, establishes a program within the Department of Financial Protection and Innovation (DFPI) to license and oversee debt collectors and debt buyers in California. While this licensing program does not add significant new requirements for these entities, the new licensing program adds a layer of regulatory oversight over them. Under the Act, a debt collector and debt buyer must obtain a license and must comply with both the Rosenthal Act and FDBPA. A licensee must pay an annual fee and requires DFPI to examine a licensee for compliance.

3) Debt collection trends and the impact on courts and debtors

Reforming debt collection processes remains an area of active interest in California and across the country. One reason for this has been the dramatic rise in debt collection-related matters in state civil courts over the last few decades. According to a May 2020 report from the Pew Charitable Trusts evaluating lawsuit trends across a selection of state courts, between 1993 and 2013 the number of debt collection suits more than doubled, from 1.7 million to 4 million, and represented a growing share of civil dockets.¹ And, the Pew Study found that more than 70% of debt collection lawsuits resulted in a default judgment for the plaintiff, meaning that the judgment was issued because the defendant did not appear to respond to the suit. As the authors note, “the prevalence of these judgments indicates that millions of consumers do not participate in debt claims against them.”

In California, the trends appear to be similar. For example, a Center for Responsible Lending (CRL) study specific to California highlights the scale of debt collection efforts in the last decade. From 2012 to 2017, the top 20 debt buyers in California filed nearly 440,000 collection cases in the 10 largest counties in the state.² The CRL report highlights a myriad of ways the collection industry have worked around the FDPA, describes some debt buyer operations as “lawsuit factories” who bring unsubstantiated legal actions or win cases without the minimum documentary evidence. These findings, on top of showing significant harm for debtors, suggest that the FDBPA and other statutory requirements are not adequately enforced. As the author’s office notes, these trends have a disproportionate impact on marginalized populations, with people of color far more likely to be contacted about a debt in collection.

4) Common counts versus breach of contract.

The statutes discussed in Comment #2 give mistreated debts a way to seek redress and place guardrails on the debt collection and debt purchasing process. However, they do not

¹ <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts>

² <https://www.responsiblelending.org/media/new-crl-report-debt-collectors-california-may-have-seized-700m-often-based-scant-evidence>

necessarily address the appropriate legal remedy for the collection of a debt, which is the focus of AB 1414's reforms.

AB 1414 focuses on "common counts," which is a general pleading that seeks recovery of money without specifying the nature of the claim. As the California Courts website explains, a common counts cause of action "tells the court and the other side that you contend that the other side owes you money based on one or more of several common business practices." AB 1414 supporters note that a common counts claim was historically used to recover money paid by mistake or some other unfair advantage. Supporters provided committee staff the following simple scenario: if a contract called for the payment of \$400 for a horse, but the defendant was accidentally paid \$4,000, the plaintiff could recover the \$3,600 overpayment via common counts because there was no remedy at law for recovery.

There are different types of common counts, including the following:

- A common count of open book account: Under an open book account, a debt buyer or collector or creditor must establish the following: Plaintiff and defendant had financial transactions with each other; Plaintiff kept an account of the debits and credits involved in these transactions; Defendant owes plaintiff money on the account; and the amount of money owed.
- A common count for account stated: With a common count for account stated, a debt buyer or collector or creditor must establish the following: the plaintiff and defendant had financial transactions with each other; An agreement, either express or implied, on the amount due from the debtor to the creditor existed by the parties; That defendant made an express or implied promise to pay the amount due.

In contrast, a breach of contract claim, requires a plaintiff to establish that: there was a valid contract; the plaintiff performed their part of the contract; the defendant failed to perform their part of the contract; the plaintiff sustained damages caused by the defendant's breach.

As the Assembly Judiciary Committee notes, the requirement in a breach of contract case to prove that a valid contract exists can be onerous, and means that if a written contract was entered into, the written contract generally must be produced. **For a deeper analysis of these legal concepts, please refer to the Assembly Judiciary Committee analysis.**

5) How will this affect debt collectors, debt buyers, and creditors?

Opponents argue that AB 1414 will hinder efforts to collect legally owed debts. Meanwhile, supporters contend that AB 1414 will eliminate the special treatment that debt collectors, debt buyers, and creditors receive in court by subjecting them to the same evidentiary standards as other lawsuits.

AB 1414 will make it more cumbersome to sue on consumer debt because that is precisely the point of the bill. A breach of contract case is more complex, which will impose costs on debt buyers and similar actors, but supporters make a compelling argument that such a claim is far more likely to produce fairer and more appropriate outcomes for debtors. The Legislature has shown repeatedly that it remains concerned about the tactics employed by some in the debt collection and debt buying industries, and AB 1414 is consistent with prior legislative efforts to ensure fairness for debtors. Because the deck has become so stacked

against debtors over the years, it is appropriate for the Legislature to revisit the “ways things have always been done” in order to recalibrate the process by which a company buys or collects a debt.

However, there remain questions about how AB 1414 would play out in practice. Opponents argue that federal law requires financial institutions keep records for only 25 months after the date that a creditor receives an application from the applicant, though importantly this requirement does not apply to litigation where evidentiary requirements are much broader. Moreover, it may be possible for a debt buyer to purchase a debt without obtaining the original contract because the FDBPA allows for “other documents” evidencing the debt to be used by a debt buyer in order for the debt buyer to meet its documentation requirements. Thus, there may be situations where a debt buyer, who is otherwise complying with the FDBPA, does not have the contract and cannot get one because the creditor is not legally obligated to provide one. These situations are likely uncommon, but they speak to some of the uncertainties introduced by AB 1414, especially for debts already purchased or incurred.

Making AB 1414 apply prospectively will allow all parties to modify their documentation retention practices to prepare for the bill’s requirements moving forward.

6) Support

AB 1414 is sponsored by Public Counsel and the California Low-income Consumer Coalition (CLICC), which argue that 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. Their letter states:

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.

A coalition of legal aid groups, such as Bet Tzedek Legal Services, Public Law center, and Riverside Legal Aid, also supports AB 1414, arguing:

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 the actual contract 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 evidentiary standards than all other lawsuits. They allow evasion of modern consumer protection standards. They give debt collectors special treatment in court.

7) Oppose

The California Creditors Bar Association opposes AB 1414, arguing:

The state purpose for AB 1414 is to limit collections because of an unfounded fear that consumers are unfairly being attacked and default judgments are being sought and obtained using common counts. Every California Superior Court judge and clerk staff review each filing to ensure that the judgment creditor has a fundamental right to seek collection, whether on the filing occurred by common counts, open books, or breach of contract. If a consumer feels they have been unfairly harmed, the consumer already has existing rights to challenge such collections, and routinely do so. AB 1414 restricts not only our members' ability to collect on a debt that is fairly owed. Further, this bill will impact the rights of Californians to seek redress and impose impossible requirements by requiring contracts in everyday life for minor items.

The California Bankers Association, California Credit Union League, and the California Community Banking Network also write in opposition. In their letter, the groups articulate the additional complexity introduced by breach-of-contract pleading:

This measure...requires a breach of contract pleading, in which a plaintiff must prove: 1.) The existence and terms of the contract; 2.) That the defendant breached the contract and that the plaintiff did not breach; 3.) That the plaintiff suffered damages; and 4.) That the defendant's breach was the cause of the plaintiff's damages. The more complicated the pleading and the more complicated the proof required could exponentialize the number of potential issues that those seeking to collect will have to address at trial. It is also worth noting that we additionally anticipate that current debt evasion websites will be revised and new services will likely proliferate to offer advice on how to defeat any collections attempts at trial. This will negatively impactful California's broader economy and will hurt its communities.

8) Amendments

As a result of a clerical error, the following amendment agreed to in Assembly Judiciary Committee was not included in the latest version of the bill:

The term "book account" does not include ~~consumer credit accounts.~~ consumer debt where the obligation is initially payable on the face of a note or contract. If an obligation is not initially payable on the face of a note or contract, a creditor alleging a book account must have in its possession records of all debits and credits forming each and every transaction used to determine the amount alleged to be due.

The committee recommends adopting these amendments to honor the agreement made in the previous policy committee, as well as amendments to make the bill's provisions apply prospectively. In sum, the committee recommends the following amendments:

- Amend Section 337a as follows:

337a. (a) 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. The term “book account” does not include consumer debt. *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 must have in its possession records of all debits and credits forming each and every transaction used to determine the amount alleged to be due.*

(b) For purposes of this section, “consumer debt” means 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.

- Amend Section 425.30 (b) as follows:

(b) For purposes of this section, “consumer debt” means 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.

REGISTERED SUPPORT / OPPOSITION:

Support

Bay Area Legal Aid
Bet Tzedek Legal Services
California Low-income Consumer Coalition
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 Aid Society of San Diego
Legal Assistance for Seniors
National Consumer Law Center, INC.
Neighborhood Legal Services of Los Angeles County
OneJustice
Open Door Legal
Public Counsel
Public Law Center
Riverside Legal Aid
Senior Advocacy Network-senior Law Project
Senior Citizens Legal Services

Watsonville Law Center
Western Center on Law & Poverty

Oppose

California Creditors Bar Association
California Credit Union League
California Bankers Association
California Community Banking Network

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