



Comment of the Commercial Law League of America
Submitted to the United States Senate
in Opposition to S.3565

May 12, 2020

Introduction

The Commercial Law CLLA of America (“CLLA”), founded in 1895, is the nation’s oldest organization of attorneys and other experts in credit and finance actively engaged in the fields of commercial law, bankruptcy and reorganization. The CLLA has long been associated with the representation of creditor interests, while seeking fair, equitable and efficient treatment of all parties in interest. CLLA members can be found in every state across America and in many foreign countries. The CLLA regularly submits policy papers to Congress and CLLA members have testified on numerous occasions before Congress as experts in fields related to creditor interests.

S.3565 IS OVERBROAD AND FRAUGHT WITH UNINTENDED AND DANGEROUS CONSEQUENCES

In this time of economic confusion and uncertainty, S.3565 (the “Bill”) was crafted and introduced with intentions to ease pressure on those faced with economic hardship. While the CLLA supports this intent, the Bill would unfortunately cause more harm and uncertainty to the commerce of our nation than the relief it proposes to those in need. The following are just a few examples:

I. S.3565 WRONGLY AND UNNECESSARILY BROADENS THE FDCPA TO PROTECT COMMERCIAL DEBTORS

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et. seq. (“FDCPA”) protects unsophisticated consumers from violations by debt collectors. The Bill improperly expands the FDCPA to include debt collection restrictions against small businesses and imposes fines and penalties against debt collectors who pursue collection activities against small businesses. The FDCPA was not designed to govern inquiry and collection of business debt, as businesses are held to a higher standard than consumers, and business transactions are generally negotiated at arm’s length between merchants. The Bill would add another layer of regulation and uncertainty to private businesses dealings and open the flood gates to a sea of unintended litigation. Any regulation against small business should not be incorporated into the FDCPA.

II. S.3565 WILL FURTHER IMPAIR AND SUSPEND FUNDAMENTAL PRINCIPLES OF COMMERCE

The Bill will impair and effectively rewrite previously negotiated credit terms and contracts between businesses, by suspending legitimate accounts receivable and collection inquiries and eliminating existing federal and state laws that provide relief and certainty to



businesses and business transactions. The commerce of our country is built upon credit. Industry and commerce thrive because banks and other businesses extend credit to enable transactions and business growth. When one business loses its normal operating capacity, the resulting loss of production, revenue and lag in receipt and payment of receivables, sets off a chain of events that affects the production, payment of receivables and receipt of revenue for other businesses. In such instances, businesses may attempt to manage and collect receivables on their own or hire attorneys or collection agencies to resolve issues associated with outstanding receivables. Such efforts are critical to the foundation and continuation of credit-based transactions and business relationships. Very simply, the Bill will disrupt the normal operations of businesses by halting all collection efforts, garnishments, evictions and foreclosures against individuals and small businesses during a state of emergency declaration. Any legislation that disrupts business operations at this time should not be considered by Congress because of the hardships that businesses all over the country are currently encountering.

III. THE DURATION OF S.3565 IS AMORPHOUS AND PROVIDES THE PRESIDENT WITH SOLE AUTHORITY TO EXTEND CREDIT AGREEMENTS AND STAY ENFORCEMENT REMEDIES FOR EVERY BUSINESS

S.3565 takes effect upon the President declaring the need for emergency relief under the Stafford Act, 42 U.S.C. § 5121 et. seq., and continues to be enforceable for 120 days after the President dissolves the state of emergency. This would be a dangerous precedent to set, by Congress ceding authority to the Executive and allowing a President to impair business rights and access to courts and extending credit terms for a minimum of 120 days between businesses across the entire nation. The duration of the stay is arbitrary and simply too long to withstand the resulting economic impact. Due to COVID-19's divergent impact on different regions of the country, commerce would be better served with States imposing their own restrictions rather than the Bill's country-wide blanket stay on collection activity. The Stafford Act is typically invoked in instances of weather-related natural disasters and thereby addresses economic issues impacting specific regions and local areas. The Stafford Act was invoked by President Obama during the H1N1 pandemic in 2009 and lasted 14 months. If the Bill passes and a stay on collection activities is invoked for 14 months, the resulting effect on the U.S. economy will be devastating.

IV. S.3565 WILL HARM SMALL BUSINESSES THAT IT WAS DESIGNED TO HELP

The following is one example of how S.3565 would harm a small business and chain of events that would ensue:

A chain of grocery stores hires a cleaning company to sanitize its stores once a day. The cleaning company bills its client at the end of the month. The grocery store fails to pay for the cleaning services. If the cleaning company is not allowed to engage in collection efforts against the grocery store, the cleaning company may fail when it is unable to pay its bills and employees. If the cleaning company's employees are not being paid, then they will not be able to pay their rents/mortgages, utility bills and car payments, thereby causing economic distress and failure of



other companies. As illustrated above, by simply eliminating the collection rights of one small business, the passage of S.3565 would create an endless domino effect resulting in a significant collapse of the country's businesses and commerce.

V. S.3565 CONTAINS OVERBROAD AND UNREALISTIC RESTRICTIONS ON SPEECH

S.3565 further provides that without prior consent, any communication with a debtor concerning a debt, constitutes a violation imposing monetary sanctions on the creditor. This prohibition is overbroad and completely chills and restrains all creditor inquiries, including but not limited to, an offer of modification or forbearance of debt payment. The Bill provides the debtor with power to control regular business communications and penalize businesses seeking to collect receivables and engage in legitimate business activity. This is an unrealistic business proposition.

VI. S.3565 DISCOURAGES THE VOLUNTARY RESOLUTION OF DEBT

The Bill, as written, empowers those who are not able to pay their obligations to maintain the status quo and incur more debt without consequence, while discouraging those who can and want to resolve their debts from paying them.

VII. S.3565 IMPROPERLY EMPOWERS THE BANKRUPTCY COURT TO RESOLVE DISPUTES

The Bill proposes to vest exclusive jurisdiction in the U.S. Bankruptcy Courts to resolve disputes between debt collectors and debtors and for declaratory actions seeking a determination of the constitutionality of the Bill if passed into law. The Bill gives the Bankruptcy Court the power to enter a final judgment. Notwithstanding that fact that the financial crisis brought on by the pandemic will likely result in an overwhelming number of bankruptcy filings and a strain on the Bankruptcy Courts, imposing the additional burden of a non-Article III court presiding over these types of unfamiliar cases may cause a disruption in the true purpose of the Bankruptcy Courts. Additionally, the power to enter final judgments provided in the Bill is inconsistent with the powers afforded an Article III Bankruptcy Court.

Conclusion

For the above reasons, S.3565 should be withdrawn. At the very least, Congress should delve into these issues with caution and through careful analysis, and not act prematurely by including major policy changes to FDCPA in any COVID-19 response legislation, or end of the year omnibus.

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