



Senate Fiscal Agency
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BILL



ANALYSIS

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Senate Bill 385 (as enacted)
Sponsor: Senator Jim Stamas
Senate Committee: Regulatory Reform
House Committee: Regulator Reform

PUBLIC ACT 197 of 2017

Date Completed: 1-9-18

RATIONALE

Evidently, Michigan is one of two states that does not allow collection agencies to employ in-house attorneys. An in-house attorney is one employed internally by a company. While attorneys in private law firms may have many clients, an in-house attorney's client is the company. In addition to working on a wide range of legal issues, an in-house attorney also must be familiar with and understand all aspects of the company's business, and is expected to foresee legal problems even before they might occur. Because collection agencies in Michigan are prohibited from employing in-house attorneys, some people believe that they are at a competitive disadvantage to out-of-State collections agencies that are permitted to have in-house counsel to perform legal services on behalf of a creditor client. It was suggested that Michigan law be changed to allow collection agencies to employ in-house attorneys.

CONTENT

The bill amends the Occupational Code to revise restrictions pertaining to collection agencies' employment of attorneys to collect claims.

The bill will take effect on March 13, 2018.

Article 9 of the Code governs collection agencies and provides for their licensure. A licensee under Article 9 is prohibited from employing or retaining an attorney to collect a claim. A licensee may exercise authority on behalf of a creditor to employ the service of an attorney if the creditor has specifically authorized the collection agency in writing to do so and the licensee's course of conduct is at all times consistent with a true relationship of attorney and client between the attorney and the creditor. After referral to an attorney, the creditor is not allowed to be the client of the attorney, and the licensee is not allowed to represent the client in court. The licensee may act as an agent of the creditor in dealing with the attorney only if the creditor has specifically authorized the licensee to do so in writing.

Under the bill, a licensee is prohibited from employing or retaining an attorney to collect a claim, unless the claim is owned by the licensee or an affiliate of the licensee. "Affiliate" means that term as defined in Section 776 of the Business Corporation Act (a person that directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with a specific person).

In addition, Article 9 prohibits a licensee from listing the name of an attorney in a written or oral communication, collection letter, or publication. The bill prohibits a licensee from doing so in an attempt to collect a debt on behalf of a person other than the licensee or an affiliate of the licensee, unless the attorney is an employee of the licensee and is engaged in collecting a claim owned by the licensee or an affiliate of the licensee.

A licensee also currently is prohibited from furnishing legal advice, or otherwise engaging in the practice of law, or representing that the person is competent to do so, or to institute a judicial proceeding on behalf of another. The bill prohibits a licensee from instituting a legal action on behalf of another person. These provisions will not apply to an attorney who is an employee of the licensee and is furnishing legal advice to or representing the interests of the licensee or an affiliate of the licensee. However, an attorney who is an employee of a licensee may not institute a legal action to collect a claim unless the claim is owned by the licensee or an affiliate of the licensee.

Additionally, Article 9 prohibits a licensee from sharing quarters or office space, or having a common waiting room with a practicing attorney or a lender. The bill, instead, would prohibit a licensee from sharing office space with a lender or with a practicing attorney who was not an employee of the licensee. The proposed provision would not prohibit a licensee from occupying a separate space in the same building in which a practicing attorney had office space or sharing a common waiting area with a practicing attorney.

The bill specifies that Section 915a (the section that the bill amends) may not be construed as creating an exception to Section 1 of Public Act 354 of 1917, which prohibits a corporation or voluntary association from engaging in the practice of law, or Section 916 of the Revised Judicature Act, which prohibits the unauthorized practice of law.

MCL 339.915a

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Prohibiting a collection agency from employing in-house counsel is antiquated and unnecessarily hinders creditors, consumers, and small businesses from quickly resolving debt obligations. This costs all parties extra time, energy, and money to all parties. There is no rational reason for denying collection agencies the opportunity to choose between retaining an outside law firm or hiring an in-house attorney to pursue claims. It should be left to each Michigan business to determine which option is better for the business's efficiency, profitability, and reputation management.

Opposing Argument

The bill weakens consumer protections against abusive and deceptive collection practices by debt collection agencies. Under Federal law, the Fair Debt Collection Practices Act (FDCPA) prohibits the "false representation or implication that any individual is an attorney or that any communication is from an attorney", and Michigan collection practices laws prohibit misleading communications in connection with the collection of debts. Michigan statute also prohibits "communicating with a debtor in a misleading or deceptive manner, such as using the stationery of an attorney...unless the regulated person is an attorney" (MCL 445.252(a)). Because both the FDCPA and Michigan law specifically prohibit communications claiming to be from an attorney that are not actually communications from that attorney, allowing a debt collection agency to add an attorney's name to its letterhead, share an office space with an attorney, and retain an attorney as an "employee" contravene Federal and State debt collection laws.

Response: The Federal Trade Commission and Consumer Financial Protection Bureau closely regulate the debt collection industry, which also is subject to numerous Federal laws. In-house attorneys will reduce the likelihood of improper acts of a third-party collection agency. The bill also will ensure meaningful involvement by in-house attorneys, which means that agencies will have better quality control over collection efforts. Allowing collection agencies to employ in-house attorneys will result in greater control over litigation policies, procedures, and processes, which will lead to greater compliance with consumer protection laws.

Opposing Argument

Only the State Bar of Michigan, the Michigan Supreme Court, and the Michigan Rules of Professional Conduct (MRPC) can govern the practice and conduct of lawyers licensed in Michigan. Under the bill, lawyers will be subject to the direction of a licensee. Allowing an in-house attorney to sue a debtor on behalf of a collection agency that is attempting to collect a debt on behalf of a third-party creditor will constitute the unauthorized practice of law, which is prohibited by the MRPC. The Michigan Rules also prohibit nonattorneys from directing or regulating a lawyer's professional judgment in rendering legal services. Allowing a collection agency to direct its attorney employee to sue a debtor also will violate this Rule.

Response: Any in-house counsel for a Michigan collection agency will be subject to the same standards as every other Michigan lawyer, including in-house counsel for all other Michigan companies. The bill will not increase the risk of unauthorized practice of law, weaken the ethics standards imposed on attorneys by the MRPC, or undermine the oversight powers of the Michigan Supreme Court or the State Bar of Michigan.

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.