

AMENDED IN ASSEMBLY JULY 16, 2015

AMENDED IN ASSEMBLY JULY 8, 2015

SENATE BILL

No. 641

Introduced by Senator Wieckowski

February 27, 2015

An act to add Section 1788.61 to the Civil Code, relating to debt buying.

LEGISLATIVE COUNSEL'S DIGEST

SB 641, as amended, Wieckowski. Debt buying: default judgment.

(1) Existing law, the Fair Debt Buying Practices Act, regulates the practice of buying charged-off consumer debt, as defined, sold or resold on or after January 1, 2014, for collection purposes and prescribes the circumstances pursuant to which the debt buyer may bring suit. The act prohibits a court from entering a default or other judgment in an action initiated by a debt buyer against a debtor unless business records, authenticated through a sworn declaration, are submitted by the debt buyer to the court to establish the facts required to be alleged, as specified.

This bill would permit a ~~debtor~~ *person* to serve and file a notice of motion and motion to set aside a default or default judgment and for leave to defend an action relating to debt, if service of a summons did not result in actual notice to the ~~debtor~~ *person* in time to defend an action brought by a debt buyer and a default or default judgment has been entered against the ~~debtor~~ *person* in the action. The bill would require a ~~debtor~~ *the person* to make this service and filing within 6 years after entry of the default judgment or 180 days of the first actual notice of the action, whichever is ~~earlier~~ *earlier, except in cases of identity theft or mistaken identity, in which case the service and filing is to be*

made within 180 days of the first actual notice of the action. The bill would prescribe requirements for the filing, which would include an affidavit submitted to the court under oath ~~and showing that the party's~~ *person's* lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect. By expanding the crime of perjury, the bill would impose a state-mandated local program. The bill would permit a court to set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action. The bill would apply to a judgment entered on and after ~~January 1, 2010~~, *1, 2010, except as specified.*

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1788.61 is added to the Civil Code, to
2 read:

3 1788.61. (a) (1) Notwithstanding Section 473.5 of the Code
4 of Civil Procedure, if service of a summons has not resulted in
5 actual notice to a ~~debtor~~ *person* in time to defend an action brought
6 by a debt buyer and a default or default judgment has been entered
7 against the ~~debtor~~ *person* in the action, the ~~debtor~~ *person* may
8 serve and file a notice of motion and motion to set aside the default
9 or default judgment and for leave to defend the action. ~~The~~

10 (2) *Except as provided in paragraph (3), the notice of motion*
11 *shall be served and filed within the earlier of:*

12 ~~(1) Six a reasonable time, but in no event exceeding the earlier~~
13 *of:*

14 (A) *Six years after entry of the default or default judgment*
15 *against the ~~debtor~~ person.*

16 ~~(2) Within 180~~

17 (B) *One hundred eighty days of the first actual notice of the*
18 *action.*

19 (3) *Notwithstanding paragraph (2), in the case of identity theft*
20 *or mistaken identity, the notice of motion shall be served and filed*

1 *within a reasonable time, but in no event exceeding 180 days of*
2 *the first actual notice of the action.*

3 (b) A notice of motion to set aside a default or default judgment
4 and for leave to defend the action shall designate as the time for
5 making the motion a date prescribed by Section 1005 of the Code
6 of Civil Procedure, and it shall be accompanied by an affidavit
7 showing under oath that the ~~party's~~ *person's* lack of actual notice
8 in time to defend the action was not caused by his or her avoidance
9 of service or inexcusable neglect. The ~~party~~ *person* shall serve and
10 file with the notice a copy of the answer, motion, or other pleading
11 proposed to be filed in the action. *In contesting the motion to set*
12 *aside the judgment or default judgment, a debt buyer may*
13 *introduce, and the court may consider, evidence relating to the*
14 *document retention policies of the process server who appears on*
15 *the proof of service of the summons and complaint.*

16 (c) Upon a finding by the court that the motion was made within
17 the period permitted by subdivision (a) and that ~~debtor's~~ *the*
18 *person's* lack of actual notice in time to defend the action was not
19 caused by his or her avoidance of service or inexcusable neglect,
20 the court may set aside the default or default judgment on whatever
21 terms as may be just and allow the party to defend the action. *If*
22 *the validity of the judgment is not challenged, the court may select*
23 *an appropriate remedy other than setting aside the default or*
24 *default judgment.*

25 (d) This section shall apply to a default or default judgment
26 entered on or after January 1, ~~2010~~ *2010*, *except in the case of*
27 *identity theft or mistaken identity, in which case this section shall*
28 *apply regardless of the date of the default or default judgment.*

29 (e) *This section shall not limit the equitable authority of the*
30 *court or other available remedies under law.*

31 SEC. 2. No reimbursement is required by this act pursuant to
32 Section 6 of Article XIII B of the California Constitution because
33 the only costs that may be incurred by a local agency or school
34 district will be incurred because this act creates a new crime or
35 infraction, eliminates a crime or infraction, or changes the penalty
36 for a crime or infraction, within the meaning of Section 17556 of
37 the Government Code, or changes the definition of a crime within

- 1 the meaning of Section 6 of Article XIII B of the California
- 2 Constitution.

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