

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1212

SPONSOR: Commerce, Economic Opportunities, and Consumer Services Committee and Senator Aronberg

SUBJECT: Bankruptcy/Personal Customer Information

DATE: March 27, 2003 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kruse	Maclure	CM	Favorable/CS
2.	_____	_____	CP	_____
3.	_____	_____	JU	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

The committee substitute prohibits a person in bankruptcy from selling or transferring a database with personal customer information if the bankrupt person has agreed by contract or published privacy policy not to disclose such customer information. A violation of the committee substitute's provisions constitutes a deceptive and unfair trade practice under the Florida Deceptive and Unfair Trade Practices Act, part II of ch. 501, F.S. Local exchange telecommunications companies are exempt from this prohibition.

This committee substitute creates an unnumbered section of the Florida Statutes.

## II. Present Situation:

### Bankruptcy

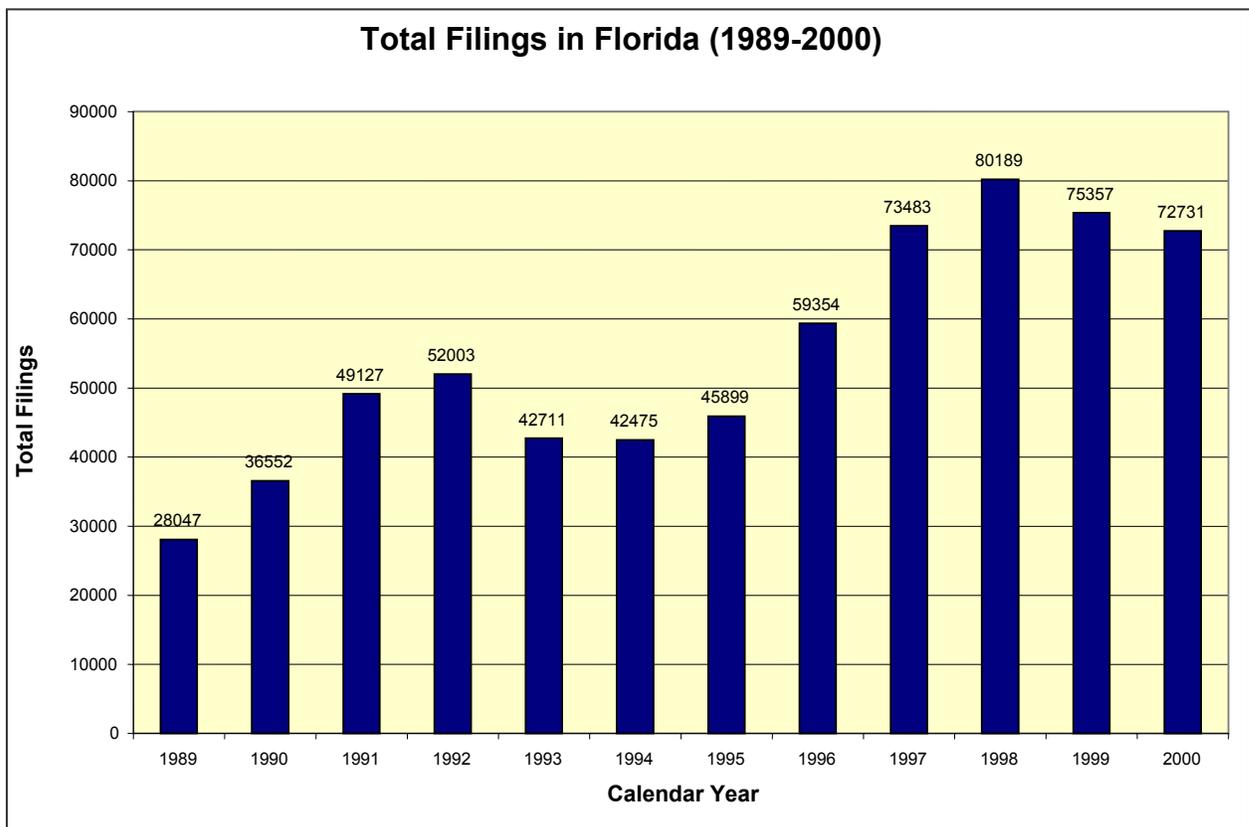
The Federal Bankruptcy Code appears in title 11 of the United States Code beginning at 11 U.S.C. s. 101. The word "person" is specifically defined and includes an individual, partnership, or corporation.<sup>1</sup> Four of the code's principal chapters (7, 11, 12, and 13) are briefly outlined below:

- Chapter 7 bankruptcy is a liquidation proceeding available to consumers and businesses. The debtor's assets that are not exempt from creditors are collected and liquidated (reduced to money), and the proceeds are distributed to creditors. A consumer debtor receives a complete discharge from debt under Chapter 7, except for certain debts that are prohibited from discharge by the Bankruptcy Code.

<sup>1</sup> 11 U.S.C. s. 101(41).

- Chapter 11 bankruptcy provides a procedure by which an individual or a business can reorganize its debts while continuing to operate. The vast majority of Chapter 11 cases are filed by businesses. The debtor, often with participation from creditors, creates a plan to repay part or all of its debts.
- Chapter 12 allows a family farmer to file for bankruptcy, reorganize the farm’s business affairs, repay all or part of the farm’s debts, and continue operating.
- Chapter 13, often called wage-earner bankruptcy, is used primarily by individual consumers to reorganize their financial affairs under a repayment plan that must be completed within three or five years. To be eligible for Chapter 13 relief, a consumer must have regular income and may not have more than a certain amount of debt, as set forth in the Bankruptcy Code.<sup>2</sup>

Florida law defines “person” to include, among other things, individuals, partnerships, estates, trusts, corporations, and all other groups or combinations.<sup>3</sup> Florida has several provisions found in ch. 222, F.S., addressing specific exemptions from a bankruptcy proceeding, including the homestead, personal property, and wages.<sup>4</sup> An additional bankruptcy provision is found in s. 55.145, F.S., which describes how a debtor may petition the court to have the bankruptcy discharged. Bankruptcy filings in Florida have increased significantly over the past decade.



<sup>2</sup> United States Trustee Program, Bankruptcy Fact Sheets & Consumer Notices, *Overview of Bankruptcy Chapters*, available at <http://www.usdoj.gov/ust/pdfs/fs01.pdf> (last visited March 20, 2003).

<sup>3</sup> Section 1.01(3), F.S.

<sup>4</sup> Section 222.01, F.S., Designation of homestead by owner before levy; s. 222.061, F.S., Method of exempting personal property; inventory; s. 222.11, F.S., Exemption of wages from garnishment.

The bar chart above shows total bankruptcy filings in Florida for calendar years 1989 to 2000. Filings in the state rose by 159 percent during this period.<sup>5</sup>

### Privacy Laws

Federal law provides some privacy protections to individuals. The Gramm-Leach-Bliley Act covers privacy considerations for customers' personal financial information. Companies involved in financial activities must send their customers privacy notices, including:<sup>6</sup>

- Banks, savings and loans, and credit unions,
- Insurance companies,
- Securities and commodities brokerage firms,
- Retailers that directly issue their own credit cards (such as department stores or gas stations),
- Mortgage brokers,
- Automobile dealerships that extend or arrange financing or leasing,
- Check cashers and payday lenders,
- Financial advisors and credit counseling services, and
- Sellers of money orders or travelers checks.

The company must disclose how or whether it intends to share personal financial information. Federal privacy laws also give a person the right to stop (opt out of) some sharing of personal financial information. These laws balance the right to privacy with a financial company's need to provide information for normal business purposes. A person has the right to opt out of some information sharing with companies that are:

- Part of the same corporate group as your financial company (or affiliates), or
- Not part of the same corporate group as your financial company (or non-affiliates).

A person, however, cannot opt out and completely stop the flow of all personal financial information. The law permits financial companies to share certain information without giving the person the right to opt out. Among other things, the financial company can provide to non-affiliates:

- Information about you to firms that help promote and market the company's own products or products offered under a joint agreement between two financial companies;
- Records of your transactions – such as your loan payments, credit card or debit card purchases, and checking and savings account statements – to firms that provide data processing and mailing services for your company;
- Information about you in response to a court order; and
- Your payment history on loans and credit cards to credit bureaus.<sup>7</sup>

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<sup>5</sup> United States Trustee Program, Bankruptcy Filings-State Charts, Total Bankruptcy Filings by State, *Florida*, available at <http://www.usdoj.gov/ust/statistics/Bank-Stats/States/01/1fl.htm> (last visited March 20, 2003)(data compiled by the Administrative Office of the United States Courts).

<sup>6</sup> Federal Trade Commission, *Privacy Choices for Your Personal Financial Information*, available at <http://www.ftc.gov/bcp/conline/pubs/credit/privchoices.htm> (last visited March 20, 2003).

The Florida Constitution provides a right to privacy solely from governmental intrusion.<sup>8</sup> The only statute found on the subject of protecting database-like information is s. 626.9651, F.S. Under this statute, the privacy of an insurance consumer's nonpublic personal financial and health information is protected by rules based on the Privacy of Consumer Financial and Health Information Regulation, adopted September 26, 2000, by the National Association of Insurance Commissioners and adopted by the Florida Department of Insurance, now the Florida Department of Financial Services. These rules must be consistent with, and not more restrictive than, the standards contained in Title V of the Gramm-Leach-Bliley Act of 1999. The rule adopted by the department describes an insurance company's privacy obligation to the consumer and how the consumer may opt-out of certain disclosures by an insurance company to affiliated and non-affiliated third parties, but it does not address the sale or transfer of the nonpublic personal financial and health information.<sup>9</sup>

### **Deceptive and Unfair Trade Practices Act**

The Florida Deceptive and Unfair Trade Practices Act is designed to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.<sup>10</sup> A willful violation of this act may incur a civil penalty of not more than \$10,000. Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive.<sup>11</sup> Individuals aggrieved by a violation of this act may seek to obtain a declaratory judgment that an act or practice violates this act and to enjoin a person from continuing the deceptive or unfair act. An individual harmed by a person who has violated this act may also seek actual damages from that person, plus attorney's fees and court costs.<sup>12</sup>

### **III. Effect of Proposed Changes:**

This committee substitute prohibits a person who files for bankruptcy from selling or transferring any database with personal customer information if the person contractually, or through a published privacy policy, agreed not to share the information. A customer may affirmatively waive this provision at any time.

The committee substitute also provides that a violation of its provisions constitutes a violation of the Florida Deceptive and Unfair Trade Practices Act, part II of ch. 501, F.S., and provides a cause of action under the act.

Local exchange telecommunications companies are exempt from the committee substitute's prohibition against selling or transferring a personal customer information database. However, the language in this section appears to allow a court or commission to order a bankrupt local exchange telecommunications company not to sell or transfer a personal customer information database.

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<sup>7</sup> *Id.*

<sup>8</sup> Section 23, Art. I, State Constitution.

<sup>9</sup> Chapter 4-128, F.A.C., Privacy of Consumer Financial and Health Information.

<sup>10</sup> Section 501.202(2), F.S.

<sup>11</sup> Section 501.2075, F.S.

<sup>12</sup> Section 501.211(1) and (2), F.S.

The committee substitute takes effect July 1, 2003.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The committee substitute will prevent Florida citizens' personal customer information from being sold by a person in bankruptcy.

A prohibition on the sale or transfer of a database with personal customer information may pose challenges for a business attempting to reorganize under the Federal Bankruptcy Code. The bankrupt business may wish to sell the database to another business to raise cash to pay off creditors. Unless a bankrupt business is able to obtain a waiver from the customers in its personal customer information database, its ability to emerge from bankruptcy may be affected.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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