



Sub. H.B. 420

125th General Assembly
(As Passed by the General Assembly)

Reps. T. Patton, Otterman, Strahorn, Wilson, Allen, Reidelbach, Miller, Hughes, Barrett, Beatty, Blasdel, Brown, Carmichael, Cates, Chandler, Cirelli, Clancy, Collier, Core, Daniels, DeGeeter, Domenick, Driehaus, C. Evans, D. Evans, Flowers, Gibbs, Gilb, Hagan, Harwood, Key, Martin, Mason, Niehaus, S. Patton, Perry, Price, Redfern, Schmidt, Seitz, Setzer, S. Smith, D. Stewart, Taylor, Willamowski, Wolpert, Yates

Sens. Harris, Carey, Hottinger, Spada, Armbruster, Brady, DiDonato, Randy Gardner, Robert Gardner, Goodman, Miller, Mumper, Padgett, Roberts, Schuler, Austria

Effective date: *

ACT SUMMARY

- Eliminates the law regulating debt pooling companies and instead provides for state regulation of persons engaged in "debt adjusting" on behalf of debtors.
- With respect to debt adjusting, specifies requirements relating to timely disbursement of debtor funds to creditors, maintenance of separate accounts for debtor funds, contribution limits, annual audits, and insurance coverage.
- Provides civil remedies and a criminal penalty for violating the debt adjusting provisions.
- Reduces the amount a debtor may recover from a creditor that violates the Secured Transactions Law, regardless of whether any deficiency in

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.*

the value of the collateral securing the debtor's debt is reduced or eliminated.

- Requires that the notice given to persons, including the debtor, of the public sale or transfer of collateral securing a nonconsumer-good transaction provide specific information identifying or reasonably describing the location of the disposition.
- Requires that a written affidavit seeking to garnish a judgment debtor's personal earnings or other property state that the garnishee "may have" (rather than "has") personal earnings or other property of the judgment debtor, neither of which is exempt from garnishment.
- Prohibits the unauthorized use of the name or logo of a financial institution in connection with the sale or advertising of any product or service if such use is misleading or deceptive.

CONTENT AND OPERATION

Debt pooling companies; debt adjusting

Prior law; overview

Formerly, persons who, for a fee, assisted debtors in the management of their debts were regulated as debt pooling companies under R.C. Chapter 4710. Generally, the law specified that debt pooling companies had to have been incorporated no later than November 15, 1962, and be licensed and regulated by the legislative authority of the political subdivision in which the person was operating prior to incorporation. Any person that violated this provision was subject to a civil fine of between \$50 and \$1,000 and could be imprisoned for between 30 days and six months.

The act eliminates the licensure and regulatory requirement for debt pooling companies and provides instead for state regulation of businesses engaging in "debt adjusting" on behalf of debtors. This regulation includes specifying "contribution" limits, requiring timely disbursement to creditors of funds received from debtors, maintaining separate trust accounts for debtor funds, requiring annual audits, and requiring insurance coverage. It also includes civil remedies and a criminal penalty for a violation.

Application of the act

(R.C. 4710.01(A) and (B) and 4710.03)

Similar to the prior law applicable to debt pooling companies, provisions of the act relating to the regulation of debt adjusting apply to "**persons**," which the act defines to include individuals, partnerships, associations, corporations, trusts, and other legal entities, that engage in "debt adjusting." "**Debt adjusting**" is defined in the act as doing business in debt adjusting, budget counseling, debt management, or debt pooling service, or holding oneself out, by words of similar import, as providing services to debtors in the management of their debts, for the purpose of (1) effecting an adjustment, compromise, or discharge of any account, note, or other indebtedness of the debtor or (2) receiving from a debtor and disbursing to the debtor's creditors any money or other thing of value.

The act specifies that it does not apply to debt adjusting incurred in the practice of law in Ohio; to a person that incidentally engages in debt adjusting to adjust the indebtedness owed to that person; to a registered second mortgage lender; or to a registered mortgage broker or licensed loan officer under the Mortgage Broker Law. In addition, it does not apply to (1) the Federal National Mortgage Association (Fannie Mae), (2) the Federal Home Loan Mortgage Corporation (Freddie Mac), (3) a bank, bank holding company, trust company, savings and loan association, credit union, savings bank, or credit card bank, that is regulated by the office of the Comptroller of Currency, Office of Thrift Supervision, Federal Reserve, Federal Deposit Insurance Corporation, National Credit Union Administration, or Division of Financial Institutions, or (4) subsidiaries of any of these entities.

Debtor account requirements and contribution limits

(R.C. 4710.01(C) and 4710.02(A) to (C))

The act requires a person engaged in debt adjusting to (1) disburse to the appropriate creditors all funds received from a debtor, less any contributions not prohibited by the act, within 30 days of receipt of the funds from the debtor (unless instructed otherwise by the debtor) and (2) maintain a separate trust account for the receipt of any funds from debtors and the disbursement of the funds to creditors on behalf of the debtors.

If contributions are accepted, directly or indirectly, for engaging in debt adjusting, the act prohibits a person engaging in debt adjusting from (1) accepting a contribution exceeding \$75 from a debtor residing in Ohio for an *initial consultation* or *set up*, (2) accepting a *consultation contribution* exceeding \$100 per calendar year from a debtor residing in Ohio, or (3) accepting a *periodic*



contribution from a debtor residing in Ohio that exceeds 8.5% of the amount paid by the debtor each month for distribution to the debtor's creditors or \$30, whichever is greater. However, the act does not prohibit charging a debtor residing in Ohio a reasonable fee for insufficient funds transactions that is in addition to these contribution amounts. (For purposes of the act, "**residing**" means to live in a particular place on a temporary or a permanent basis.)

Audit and insurance requirements

(R.C. 4710.02(D) and (E))

Under the act, any person engaging in debt adjusting must annually arrange for and undergo an audit conducted by an independent, third party, certified public accountant of the person's business, including any trust funds deposited and distributed to creditors on behalf of debtors. In accordance with this requirement, (1) the person must file the results of the audit and the auditor's opinion with the Consumer Protection Division of the Ohio Attorney General's Office and (2) the Attorney General must make available a summary of the results of the audit and the auditor's opinion upon written request of a person and payment of a fee not exceeding the cost of copying the summary and opinion.

The act also requires that a person engaged in debt adjusting obtain and maintain at all times insurance coverage for employee dishonesty, depositor's forgery, and computer fraud. This coverage is to be in the amount of 10% of the monthly average for the immediate preceding six months of the aggregate amount of all deposits made with the person by all debtors. In addition, the insurance coverage must (1) be not less than \$100,000, (2) include a deductible that does not exceed 10% of the face amount of the policy coverage, (3) be issued by an insurer rated at least "A-" or its equivalent by a nationally recognized rating organization, and (4) provide that 30 days advance written notice be given to the Consumer Protection Division of the Attorney General's Office before coverage is terminated.

Penalties

(R.C. 4710.02(F), 4710.04, and 4710.99)

Under the act, a person that violates the annual audit or insurance coverage requirement is to be fined not more than \$10,000 for each violation. The act also specifies that a violation of the requirement relating to (1) the 30-day disbursement of funds to creditors, (2) the maintenance of separate accounts for debtors, or (3) contribution limits, is deemed an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act (CSPA) (see R.C. 1345.01 to 1345.13). The act provides that a person injured by a violation of any of the requirements described

in (1) to (3), above, has a cause of action and is entitled to bring a civil action under CSPA, and that all the powers and remedies available to the Attorney General to enforce CSPA are available to the Attorney General to enforce these requirements. (Under CSPA, the Attorney General may investigate violations, seek a declaratory judgment, an injunction or other equitable relief, or organize and bring a class action.)

In addition, any violation of the act is a third degree misdemeanor for the first offense and a second degree misdemeanor for any subsequent offense.

Debtor remedies under the Secured Transactions Law; notice of location for disposition of collateral

(R.C. 1309.613 and 1309.625)

Under ongoing law, a debtor may bring a civil action against a creditor that violates the Secured Transactions Law (R.C. Chapter 1309.). The law also specifies collectable damages by a debtor but limits these damages if a "deficiency" (which generally occurs if the value of the collateral used in the secured transaction is *less* than the amount that the debtor owes the creditor) that is owed by the debtor is reduced or eliminated under the Secured Transactions Law.

The act adds that, *regardless* of whether the debtor's deficiency has been eliminated or reduced under the Secured Transactions Law, damages recovered by the debtor from the creditor for a violation of that law are to be reduced by the amount that the sum of the secured obligation, creditor expenses, and attorney's fees exceeds the creditor's proceeds of collection and enforcement actions and of the disposition or acceptance of the collateral.

Ongoing law also specifies information to be included in a notice given to persons, including the debtor, scheduling the disposition (by sale or transfer) of collateral used in a secured transaction other than a consumer-good, secured transaction. The law specifies that the notice include the time and place of the public sale or transfer. The act adds that in identifying the *place* of a public sale or transfer, the notice must state the place of business or address or provide other information that reasonably describes the location.

Information in a garnishment affidavit

(R.C. 2716.03 and 2716.11)

Under continuing Garnishment Law, after a judgment is rendered, a judgment creditor may proceed to garnish personal earnings or other property of a judgment debtor by filing a written affidavit that includes specified information. Formerly, information in the affidavit seeking garnishment of *personal earnings*



had to include a statement that the employer of the judgment debtor "has" personal earnings of the judgment debtor that are not exempt from garnishment. Similarly, an affidavit seeking garnishment of property *other* than personal earnings had to include a statement that the person named in the affidavit as the garnishee (*i.e.* holder) "has" property of the judgment debtor that is not exempt from garnishment.

The act modifies both of these provisions to instead require that a written affidavit seeking to garnish a judgment debtor's personal earnings or other property state that the employer "may have" personal earnings of the judgment debtor, or the garnishee "may have" property of the judgment debtor, neither of which is exempt from garnishment.

Wrongful use of the name or logo of a financial institution

(R.C. 1329.71, 1349.45, and 1349.99)

The act prohibits any person from using the name or logo of a financial institution in connection with the sale, offering for sale, distribution, or advertising of any product or service without the express written consent of the financial institution, if such use is misleading or deceptive as to the source of origin or sponsorship of, or the affiliation with, the product or service. For purposes of the act, "**financial institution**" is defined as any bank, savings and loan association, savings bank, or credit union; any affiliate or subsidiary of a bank, savings and loan association, savings bank, or credit union; or any registrant under the Mortgage Loan Law (R.C. 1321.51 to 1321.60, not in the act).

A violation of this prohibition is a misdemeanor of the first degree. In addition, a financial institution is permitted under the act to proceed by suit to enjoin such use of its name or logo. A court of competent jurisdiction may grant injunctions as the court considers just and reasonable and may require the defendants to pay to the financial institution all profits derived from and all damages suffered by reason of the wrongful use of the name or logo.

The act states, however, that--despite the above provisions--the only remedies that are available for the wrongful use of a financial institution's name or logo by a registered mortgage broker or licensed loan officer under the Mortgage Broker Law are those set forth in that law (R.C. 1322.10, not in the act) or otherwise provided by statute or common law. It also states that the provisions of the act are not intended to be exclusive remedies and do not preclude the use of any other remedy provided by law.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	3-04-04	p. 1656
Reported, H. Banking, Pensions & Securities	04-27-04	p. 1792
Passed House (96-0)	05-05-04	pp. 1844-1845
Reported, S. Finance & Financial Institutions	05-26-04	pp. 2006-2007
Passed Senate (31-0)	05-26-04	pp. 2052-2053
House concurred in Senate amendments (98-0)	05-26-04	pp. 2082-2084

04-hb420-125.doc/kl

