



Jana R. Vawter

*Bill Analysis*  
*Legislative Service Commission*

## **Sub. H.B. 420**

125th General Assembly

(As Reported by H. Banking, Pensions and Securities)

**Reps. T. Patton, Otterman, Strahorn, Wilson, Allen, Reidelbach, Miller, Hughes**

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### **BILL SUMMARY**

- Eliminates current law regulating debt pooling companies and instead provides for state regulation of persons engaging in debt adjusting on behalf of debtors.
- Specifies, with respect to debt counseling and debt adjusting, requirements relating to timely disbursement of funds from debtor accounts, separate account maintenance for funds from debtors, contribution limits, annual auditing, and insurance coverage.
- Provides civil remedies and a criminal penalty for violating the debt counseling and debt adjusting provisions.
- Reduces the amount a debtor may recover from a creditor that violates the Secured Transactions Law, regardless if any deficiency in the value of the collateral securing the debtor's debt is reduced or eliminated.
- Requires that the notice given to persons, including a debtor, identifying the place of a public sale or transfer of collateral securing a nonconsumer-good transaction provide information identifying or reasonably describing the location where the collateral will be sold or transferred publicly.
- Requires that a written affidavit seeking to garnish a judgment debtor's personal earnings or other property, specify that the employer or garnishee "may have" personal earnings or other property, neither of which is exempt from garnishment.

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## CONTENT AND OPERATION

### DEBT COUNSELING AND DEBT ADJUSTING

#### Existing law; overview

Currently, persons who assist debtors in the management of debts are regulated as debt pooling companies under R.C. Chapter 4710. Generally, existing law specifies that debt pooling companies must have been incorporated prior to November 15, 1962 and must be licensed and regulated by the legislative authority of the political subdivision in which the person was operating prior to incorporation. Any person that violates this provision is subject to a civil fine of between \$50 and \$1,000 and may be imprisoned for between 30 days and six months.

The bill eliminates the current licensure and regulatory requirement and the penalty and provides instead for Ohio 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 auditing, and requiring insurance coverage, and includes civil remedies and a criminal penalty for a violation.

#### Application

(secs. 4710.01(A) and (B) and 4710.03)

Similar to the current law applicable to debt pooling companies, provisions of the bill relating to the regulation of debt counseling and debt adjusting apply to persons, which the bill defines to include individuals, partnerships, associations, corporations, trusts, and other legal entities, that engage in debt adjusting. "Debt adjusting" is defined in the bill 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, which include (1) effecting an adjustment, compromise, or discharge of any account, note, or indebtedness of the debtor, or (2) receiving from a debtor and disbursing to a debtor's creditors any money or other thing of value.

The bill 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, the bill provides that 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 (OCC), Office of Thrift Supervision (OTS), Federal Reserve, Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), or Division of Financial Institutions, or (4) subsidiaries of any of these entities.

### **Debtor account requirements and contribution limits**

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

The bill requires a person engaging in debt adjusting (1) to disburse to the appropriate creditors all funds received from a debtor, less any contributions authorized by the bill, within 30 days of receipt of the funds from a debtor (unless instructed otherwise by the debtor), and (2) to 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 bill 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 bill specifies that it 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 bill, "residing" means to live in a particular place on a temporary or a permanent basis.)

### **Auditing and insurance requirements**

(sec. 4710.02(D) and (E))

Under the bill, any person engaging in debt adjusting, annually, must 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 bill also requires that a person engaging in debt adjusting obtain and maintain at all times insurance coverage for employee dishonesty, depositor's forgery, and computer fraud. This coverage must 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**

#### **Civil remedies**

(sec. 4710.04)

Under the bill, a person that violates the annual auditing or insurance coverage requirements may be fined not more than \$10,000 for each violation. The bill 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) the contribution limits is deemed an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act (CSPA) prohibiting unfair or deceptive acts or practices (see R.C. 1345.01 to 1345.13). The bill provides that a person injured by a violation of the requirements described in (1) to (3) a cause of action and is entitled to bring a civil action under the CSPA, and that all the powers and remedies available to the Attorney General to enforce the CSPA are available to the Attorney General to enforce a violation of these requirements. (Under the CSPA, the Attorney General may investigate violations, seek a declaratory judgment, an injunction or other equitable relief, or organize and bring a class action.)

#### **Criminal penalty**

(sec. 4710.99)

In addition to the civil penalties discussed in the preceding paragraph, any violation of the bill is a third degree misdemeanor for the first offense and second degree misdemeanor in subsequent offenses.

## SECURED TRANSACTIONS LAW

### Debtor remedies; notice of location for disposition of collateral

(secs. 1309.625 and 1309.613)

Under continuing law, a debtor may bring a civil action against a creditor that violates the Secured Transactions Law (Chapter 1309.). Continuing law also specifies collectable damages by a debtor but limits these damages if a "deficiency" (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 bill adds that, *regardless* if the debtor's deficiency has been eliminated or reduced under the Secured Transactions Law, recoverable damages by the debtor from the creditor for a violation of that law are to be reduced by the amount that the secured obligation and creditor expenses and attorney's fees exceed the creditor's proceeds of collection, enforcement, disposition, or acceptance of the debtor's debt.

The Secured Transactions 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 collateral used in a consumer-good, secured transaction. Existing law specifies that the notice include the time and place of a public sale or transfer. The bill adds that in identifying the *place* of a public sale or transfer, the notice must provide information identifying or reasonably describing the location where the collateral will be sold or transferred publicly.

## GARNISHMENT LAW

### Information in a garnishment affidavit

(secs. 2716.03 and 2716.11)

Under the existing 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. Currently, information in the affidavit seeking garnishment of *personal earnings* must include a statement that the employer of a 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 must include a statement that the person named in the affidavit as the garnishee (*i.e.* holder) of property not exempt from garnishment "has" such property.



The bill modifies both of these provisions to require a written affidavit seeking to garnish a judgment debtor's personal earnings or other property state that the employer or garnishee (whichever applies) "may have" (as opposed to "has") personal earnings or other property, neither of which is exempt from garnishment.

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## **HISTORY**

ACTION	DATE	JOURNAL ENTRY
Introduced	3-04-04	p. 1656
Reported, H. Banking, Pensions & Securities	04-22-04	p. 1792

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