Jennifer A. Parker *Legislative Service Commission*

Bill Analysis

Sub. H.B. 420*

125th General Assembly
(As Reported by S. Finance & Financial Institutions)

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

BILL SUMMARY

- Eliminates current 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 disbursal of funds from debtor accounts, separate account maintenance for funds from debtors, 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 whether 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, of the public sale or transfer of collateral securing a nonconsumer-good transaction provide information identifying or reasonably describing the location of the disposition.

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* *This analysis was prepared before the report of the Senate Finance and Financial Institutions Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Requires that a written affidavit seeking to garnish a judgment debtor's personal earnings or other property specify 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

Existing law; overview

Currently, persons who, for a fee, assist debtors in the management of their debts are regulated as debt pooling companies under R.C. Chapter 4710. Generally, existing law specifies that debt pooling companies must have been incorporated no later than 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 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 bill

(R.C. 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 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, 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 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, 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 bill requires a person engaged 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.)

Audit and insurance requirements

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

Under the bill, 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 bill 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 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

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

Under the bill, a person that violates the annual audit or insurance coverage requirement 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 disbursal 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) (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), 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 a violation of 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 bill 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 current law, a debtor may bring a civil action against a creditor that violates the Secured Transactions Law (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 bill adds that, *regardless* 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 and 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.

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 a consumer-good, secured transaction. The 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 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 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) "has" property of the judgment debtor that is not exempt from garnishment.

The bill 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 bill prohibits any person from using the name or logo of any 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 bill, '**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 bill).

A violation of this prohibition is a misdemeanor of the first degree. In addition, a financial institution is permitted under the bill 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 bill states, however, that--despite the above provisions--the only remedies that are available for a violation of the bill's prohibition, or 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 bill) or otherwise provided by statute or common law. It also states that the provisions of the bill 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	---	---

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