

HOUSE BILL NO. 140
INTRODUCED BY PARKER

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING A MONTANA CONSUMER DEBT MANAGEMENT SERVICES ACT; REQUIRING LICENSURE OF CREDIT COUNSELING SERVICES; ESTABLISHING REQUIREMENTS FOR DEBT MANAGEMENT PLANS ENTERED INTO BETWEEN CONSUMERS AND CREDIT COUNSELING SERVICES; DESIGNATING PROHIBITED PRACTICES FOR CREDIT COUNSELING SERVICES; PROVIDING THE DEPARTMENT OF ADMINISTRATION WITH RULEMAKING AUTHORITY; AND PROVIDING REMEDIES AND PENALTIES; REPEALING CERTAIN DEBT ADJUSTMENT LAWS; AND AMENDING SECTION 5, CHAPTER 125, LAWS OF 2005; REPEALING SECTIONS 31-3-201, 31-3-202, AND 31-3-203, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 7] may be cited as the "Montana Consumer Debt Management Services Act".

NEW SECTION. Section 2. Scope. (1) The provisions of [sections 1 through 7] apply to any person that provides or offers to provide debt management plans to residents of this state.

(2) The provisions of [sections 1 through 7] do not apply to:

(a) banking institutions, as defined in 32-1-601, building and loan associations, credit unions, escrow businesses, as defined in 32-7-102, or title companies;

(b) the services of an attorney licensed to practice law in this state if providing credit counseling services is incidental to and not the principal business of the attorney; ~~and~~

(c) the services of a certified public accountant licensed to practice accounting in this state if providing credit counseling services is incidental to and not the principal business of the certified public accountant; AND

(D) DEBT COLLECTORS THAT DO NOT ADVERTISE OR HOLD THEMSELVES OUT AS A CREDIT COUNSELING SERVICE.

NEW SECTION. Section 3. Definitions. As used in [sections 1 through 7], the following definitions apply:

(1) "Consumer" means an individual who, singly or jointly with another individual, owes money to one

or more creditors for personal, family, or household purposes.

(2) "Credit counseling service" means a person that provides or offers to provide debt management plan services to consumers for consideration.

(3) "Credit counselor" means a person who is an employee or agent of a credit counseling service and who designs debt management plans and provides consumers with budget, basic financial planning, and consumer education services.

(4) "Debt management plan" means a written agreement under which a credit counseling service is to receive money from a consumer for the purpose of distributing that money to one or more creditors of the consumer as full or partial payment of the consumer's obligation to the creditor or creditors.

(5) "Department" means the department of administration provided for in 2-15-1001.

(6) "Person" means an individual, sole proprietorship, firm, partnership, corporation, limited liability partnership or company, or other entity and includes a nonprofit organization exempt from taxation under 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3).

(7) "Trust account" means an account:

- (a) established by a credit counseling service in a federally insured financial institution;
- (b) designated as a trust account or other appropriate designation indicating that the funds in the account are not funds of the credit counseling service or its directors, officers, employees, or agents;
- (c) used exclusively for funds paid by consumers to the credit counseling service for disbursement to creditors of the consumers; and
- (d) that is unavailable to creditors of the credit counseling service.

NEW SECTION. Section 4. Requirements for licensure -- fees -- rulemaking authority -- refusal to grant license -- suspension or revocation of license -- rules. (1) A credit counseling service may not provide or offer to provide debt management plans or other consumer credit counseling services to the consumers of this state without first being licensed by the department.

(2) In order to obtain a license or annually renew a license, an applicant shall pay the required license fee as established by the department by rule. The fee must be in an amount commensurate with the cost of administering [sections 1 through 7], and the applicant shall provide evidence:

- (a) that it maintains a trust account for handling consumer funds;
- (b) (i) that it has been accredited by a bona fide third-party accreditation provider that ensures compliance with industry standards and best practices; and

(ii) that its credit counselors have been certified by a bona fide third-party certification provider as possessing the competence to provide consumer credit counseling services;

(c) that a majority of its owners, principals, officers, board of directors, or employees are not persons who have a conflict of interest with the applicant's mission. Persons with a conflict of interest include creditors, creditors' representatives, bankruptcy attorneys, and other persons having a direct stake in the outcome of the consumer credit counseling process.

~~—(d) that it maintains an office in the state with a credit counselor on the premises;~~

~~(e)(D)~~ that it has obtained a surety bond for the benefit of consumers harmed by a violation of the provisions of [sections 1 through 7] in an amount, form, and duration as required by the department by rule, EXCEPT THAT AN APPLICANT THAT DOES NOT MAINTAIN AN OFFICE IN THIS STATE WITH A CREDIT COUNSELOR ON THE PREMISES SHALL POST A SURETY BOND IN THE AMOUNT OF \$50,000; and

~~(f)(E)~~ that it has contracted at its own expense for annual audits by an independent certified public accountant to be conducted within 6 months of the close of each of its fiscal years.

(3) An applicant for a license or license renewal shall provide any additional information that the department requires. The department shall adopt rules to implement the provisions of this section. The department shall designate by rule acceptable third-party accreditation and certification providers for purposes of subsection (2)(b).

(4) The department may refuse to grant a license to or suspend or revoke the license of any credit counseling service that fails to comply with the provisions of subsections (1) through (3) or any rules adopted pursuant to this section.

NEW SECTION. Section 5. Requirements for debt management plans -- RULEMAKING AUTHORITY.

(1) A credit counseling service may not require or accept any consideration from a consumer for the provision of services or the offer to provide services unless a written and dated debt management plan meeting the requirements of this section has been signed by the consumer. A copy of the debt management plan must be provided to the consumer.

(2) The debt management plan must include the following:

(a) the name and principal business address of the credit counseling service and the name and address of the consumer;

(b) a full and detailed description of the services to be performed by the credit counseling service for the consumer;

(c) a clear statement of the costs to the consumer, including contributions or fees, highlighted in bold type;

(d) ~~a statement that the debt management plan may be terminated for any reason by the consumer and that the consumer is not obligated to continue the arrangement unless satisfied with the services provided~~ A STATEMENT, IN A PROMINENT LOCATION IN THE PLAN IN AT LEAST 10-POINT BOLD TYPE, THAT EITHER PARTY MAY CANCEL THE AGREEMENT WITHOUT PENALTY AT ANY TIME UPON 10 DAYS' NOTICE AND THAT A CONSUMER WHO CANCELS AN AGREEMENT IS ENTITLED TO A REFUND OF ALL UNEXPENDED FUNDS THAT THE CONSUMER HAS PAID TO THE CREDIT COUNSELING SERVICE AS OF THE DATE OF THE NOTICE;

(e) a complete list of the obligations of each party that are subject to the terms of the agreement; and

(f) an indication of how disputes are to be resolved; AND

(G) A STATEMENT THAT THE CREDIT COUNSELING SERVICE HAS A FIDUCIARY DUTY TO THE CONSUMER WHO IS A PARTY TO A DEBT MANAGEMENT PLAN DUTY TO ADVOCATE THE INTERESTS OF THE CONSUMER WHO IS A PARTY TO THE DEBT MANAGEMENT PLAN AND NOT PROMOTE THE INTERESTS OF ANY THIRD PARTY THAT IS IN CONFLICT WITH THE PRIMARY OBLIGATION OF ADVOCATING THE INTERESTS OF THE CONSUMER.

(3) A credit counseling service shall provide each consumer who is a party to a debt management plan with a report that shows the funds received from the consumer since the last report and the disbursement of those funds made to each creditor of the consumer. The credit counseling service shall provide the reports to consumers on at least a quarterly basis.

(4) (A) A CREDIT COUNSELING SERVICE MAY NOT IMPOSE ANY FEES OR OTHER CHARGES ON A CONSUMER OR RECEIVE ANY PAYMENT FROM A CONSUMER OR OTHER PERSON ON BEHALF OF A CONSUMER EXCEPT AS ALLOWED BY THIS SECTION.

(B) THE FEES OR CHARGES REFERRED TO IN THIS SUBSECTION (4) INCLUDE VOLUNTARY CONTRIBUTIONS AND ANY OTHER FEES CHARGED TO OR COLLECTED FROM A CONSUMER OR ON BEHALF OF A CONSUMER.

(C) A CREDIT COUNSELING SERVICE MAY NOT CHARGE AN INITIAL CONSULTATION FEE THAT EXCEEDS AN AMOUNT SET BY THE DEPARTMENT BY RULE. THE FEE OR PORTION OF THE FEE MAY NOT BE CHARGED UNTIL THE CREDIT COUNSELING SERVICE HAS COMPLIED WITH THE PROVISIONS OF THIS SECTION.

(D) A CREDIT COUNSELING SERVICE MAY CHARGE A MONTHLY MAINTENANCE FEE. IN THE ABSENCE OF EXCEPTIONAL CIRCUMSTANCES AS DEFINED IN THE DEPARTMENT'S RULES, A CREDIT COUNSELING SERVICE MAY NOT HAVE A TOTAL MONTHLY FEE IN AN AMOUNT THAT EXCEEDS THE AMOUNT SET BY THE RULES.

(E) A CREDIT COUNSELING SERVICE MAY NOT, AS A CONDITION OF ENTERING INTO A DEBT MANAGEMENT PLAN, REQUIRE A CONSUMER TO PURCHASE FOR A FEE A COUNSELING SESSION, AN EDUCATIONAL PROGRAM, OR MATERIALS AND

SUPPLIES.

(F) FEES CHARGED FOR SERVICES OTHER THAN CREDIT COUNSELING SERVICES MUST BE FAIR AND REASONABLE.

(G) IF THE CREDIT COUNSELING SERVICE IMPOSES ANY FEE OR OTHER CHARGE OR RECEIVES ANY FUNDS OR OTHER PAYMENTS NOT AUTHORIZED BY THIS SECTION, EXCEPT AS A RESULT OF A BONA FIDE ERROR, THE DEBT MANAGEMENT PLAN IS VOID AND THE CREDIT COUNSELING SERVICE SHALL RETURN TO THE CONSUMER ALL FEES RECEIVED FROM OR ON BEHALF OF THE CONSUMER.

(5) CREDIT COUNSELING SERVICES ARE PROHIBITED FROM USING HOLD HARMLESS CLAUSES, CONFESSIONS OF JUDGMENT, AND WAIVERS OF THE RIGHT TO JURY TRIALS IN DEBT MANAGEMENT PLANS.

(6) THE DEPARTMENT MAY PROMULGATE RULES AS NECESSARY TO IMPLEMENT THE PROVISIONS OF [SECTIONS 1 THROUGH 7], INCLUDING SETTING FEES.

NEW SECTION. Section 6. Prohibited practices. (1) A credit counseling service may not:

- (a) purchase any debt or obligation of a consumer;
- (b) lend money or provide credit to a consumer;
- (c) obtain a mortgage or other security interest in any property of a consumer;
- (d) operate as a collection agency;
- (e) structure a debt management plan in a way that at the debt management plan's conclusion any debts of the consumer that are subject to the debt management plan are not fully amortized;
- (f) charge for or provide credit insurance; ~~or~~
- (g) cause or attempt to cause a consumer to waive or forego any right or benefit that the consumer has under the provisions of [sections 1 through 7]; OR

(H) OPERATE IN THIS STATE WITHOUT A LICENSE.

(2) (a) A credit counseling service may not advertise its services in any manner in this state without first being licensed by the department.

(b) A credit counseling service or any person on a credit counseling service's behalf may not misrepresent any material fact or make a false promise intended to induce a consumer into entering a debt management plan.

NEW SECTION. Section 7. Remedies -- PENALTY. (1) The remedies provided in this section are cumulative and apply to licensees and unlicensed persons to whom [sections 1 through 7] apply.

(2) Any violation of [sections 1 through 7] constitutes an unfair or deceptive trade practice and is a

violation of 30-14-103.

(3) A person found to have violated [sections 1 through 7] is liable to the person harmed for actual and consequential damages or \$500, whichever is greater, for each violation, plus costs and attorney fees.

(4) A person harmed by a violation of [sections 1 through 7] may sue for injunctive and other appropriate equitable relief.

(5) A person harmed by a violation of [sections 1 through 7] may bring a class action suit.

(6) The remedies provided in this section are not intended to be the exclusive remedies available to a consumer for a violation of [sections 1 through 7].

(7) The department, the attorney general, or a county attorney, on behalf of state residents who have suffered a loss or harm as a result of a violation of [sections 1 through 7], may seek any remedy provided by Title 30, chapter 14, part 1.

(8) A PERSON ENGAGED IN CREDIT COUNSELING IN THIS STATE WITHOUT A LICENSE, A PERSON WHO FAILS TO MAINTAIN A SEPARATE TRUST ACCOUNT FOR CONSUMER FUNDS, OR A PERSON WHO FAILS TO MAINTAIN ANY RECORDS REQUIRED BY THE PROVISIONS OF [SECTIONS 1 THROUGH 7] OR BY DEPARTMENT RULE SHALL BE FINED AN AMOUNT NOT TO EXCEED \$5,000 FOR EACH VIOLATION.

SECTION 8. SECTION 5, CHAPTER 125, LAWS OF 2005, IS AMENDED TO READ:

"Section 5. Retroactive applicability -- applicability. (1) Except as provided in subsection (2), [This this act] applies retroactively, within the meaning of 1-2-109, to loans subject to [this act] made on or after October 1, 1985, the effective date of Chapter 406, Laws of 1985.

(2) [This act] does not apply to loans that are the subject of a lawsuit filed prior to [the effective date of this act]."

NEW SECTION. SECTION 9. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT] IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

NEW SECTION. SECTION 10. REPEALER. SECTIONS 31-3-201, 31-3-202, AND 31-3-203, MCA, ARE REPEALED.

NEW SECTION. **Section 11. Codification instruction.** [Sections 1 through 7] are intended to be codified as an integral part of Title 30, chapter 14, and the provisions of Title 30, chapter 14, apply to [sections 1 through 7].

NEW SECTION. SECTION 12. EFFECTIVE DATE. [THIS ACT] IS EFFECTIVE ON PASSAGE AND APPROVAL.

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