

EDUCATION LOAN AMENDMENTS

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Peter C. Knudson

House Sponsor: _____

LONG TITLE

General Description:

This bill modifies the Utah Consumer Credit Code to address education loans.

Highlighted Provisions:

This bill:

- ▶ modifies definition provisions;
- ▶ modifies exempt transactions;
- ▶ addresses limitation on garnishments;
- ▶ amends provisions related to unconscionability;
- ▶ addresses application to ongoing garnishments;
- ▶ provides for severability;
- ▶ modifies statute of limitations provisions; and
- ▶ makes technical and conforming amendments.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.

This bill provides revisor instructions.

Utah Code Sections Affected:

AMENDS:

70C-1-202, as last amended by Laws of Utah 2006, Chapter 161



28 70C-1-302, as last amended by Laws of Utah 2009, Chapter 72

29 70C-7-103, as enacted by Laws of Utah 1985, Chapter 159

30 70C-7-106, as enacted by Laws of Utah 1985, Chapter 159

31 70C-7-205, as enacted by Laws of Utah 1985, Chapter 159

32 ENACTS:

33 70C-7-108, Utah Code Annotated 1953

34 **Utah Code Sections Affected by Revisor Instructions:**

35 70C-7-108, Utah Code Annotated 1953



37 *Be it enacted by the Legislature of the state of Utah:*

38 Section 1. Section 70C-1-202 is amended to read:

39 **70C-1-202. Exempted transactions.**

40 (1) Notwithstanding the exceptions in Subsection (2), parties to a credit transaction that
41 is otherwise exempt from this title may explicitly agree in writing that the transaction is subject
42 to this title. The agreement shall specifically reference Title 70C, Utah Consumer Credit Code.

43 (2) This title does not apply to any of the following:

44 (a) [any] an extension of credit:

45 (i) primarily for business, commercial, or agricultural purposes; or

46 (ii) to other than a natural person including a government [~~agencies or~~
47 ~~instrumentalities~~] agency or instrumentality;

48 (b) [any] a closed-end extension of credit secured by a first lien or equivalent security
49 interest on a dwelling or building lot;

50 (c) [any] a transaction in securities or commodities accounts in which credit is
51 extended by a broker-dealer registered with the:

52 (i) Securities and Exchange Commission; or

53 (ii) Commodity Futures Trading Commission;

54 (d) [any] except in the case of an education loan that is alleged to be unconscionable
55 pursuant to Section 70C-7-106, an extension of credit:

56 (i) not secured by:

57 (A) real property; or

58 (B) personal property used or expected to be used as the principal dwelling of the

59 consumer; and

60 (ii) (A) in which the amount financed exceeds \$25,000; or

61 (B) in which there is an express written commitment to extend credit in excess of
62 \$25,000;

63 (e) ~~[any]~~ a transaction under public utility or common carrier tariffs if a subdivision of
64 this state or the United States regulates:

65 (i) the charges for the services involved;

66 (ii) the charges for delayed payment; and

67 (iii) ~~[any]~~ a discount allowed for early payment;

68 (f) ~~[any]~~ the sale of insurance by an insurer except as otherwise provided in Chapter 6,
69 Insurance;

70 (g) ~~[any]~~ a transaction with a party acting as a pawnbroker and licensed by any
71 governmental authority in this state;

72 ~~[(h) (i) a loan made, insured, or guaranteed pursuant to a program authorized by Title
73 IV of the Higher Education Act of 1965, 20 U.S.C. Sections 1070, et seq.; or]~~

74 ~~[(ii) a loan:]~~

75 ~~[(A) that finances tuition and other expenses:]~~

76 ~~[(I) charged in connection with enrollment:]~~

77 ~~[(Aa) at a public or proprietary preprimary, secondary, vocational, or postsecondary
78 school; or]~~

79 ~~[(Bb) in any tutorial, continuing education, test preparation, distance-learning, or
80 similar program; and]~~

81 ~~[(H) including:]~~

82 ~~[(Aa) tuition;]~~

83 ~~[(Bb) fees;]~~

84 ~~[(Cc) books;]~~

85 ~~[(Dd) housing; and]~~

86 ~~[(Ee) other expenses;]~~

87 ~~[(B) that is:]~~

88 ~~[(f) made, insured, or guaranteed under a state program; or]~~

89 ~~[(H) made by a federally insured depository institution; and]~~

90 [~~(C) including a loan that consolidates or refinances a loan described in this Subsection~~
91 ~~(2)(h)(ii); and]~~

92 (h) an education loan, unless the defense that the education loan is unconscionable
93 pursuant to Section 70C-7-106 is raised in a collection action, legal garnishment procedure, or
94 administrative garnishment procedure; and

95 (i) a rental purchase agreement as defined in Section 15-8-3.

96 Section 2. Section 70C-1-302 is amended to read:

97 **70C-1-302. Definitions.**

98 As used in this title:

99 (1) "Agreement" means the bargain of the parties in fact as stated in a written contract
100 or otherwise as found in the parties' language or by implication from other circumstances,
101 including:

- 102 (a) course of dealing;
- 103 (b) usage of trade; or
- 104 (c) course of performance.

105 (2) "Contract" means a document containing written terms and conditions of a credit
106 agreement.

107 (3) (a) "Creditor" means:

108 (i) a party:

109 (A) who regularly extends consumer credit that is subject to a finance charge or is
110 payable by written agreement in more than four installments, not including a down payment;
111 and

112 (B) to whom the obligation is initially payable, either on the face of the note or
113 contract, or by agreement when there is no note or contract;

114 (ii) an issuer of a credit card that extends either open-end credit or credit that:

115 (A) is not subject to a finance charge; and

116 (B) is not payable by written agreement in more than four installments; and

117 (iii) an issuer of a credit card that extends closed-end credit that:

118 (A) is subject to a finance charge; or

119 (B) is payable by written agreement in more than four installments.

120 (b) (i) For purposes of this Subsection (3), a party is considered to extend consumer

121 credit regularly only if the party extends credit in the preceding calendar year:

122 (A) more than 25 times; or

123 (B) more than five times for a transaction secured by a dwelling.

124 (ii) If a person does not meet the numerical standards described in Subsection (3)(b)(i)
125 in the preceding calendar year, the numerical standards shall be applied to the current calendar
126 year.

127 (4) "Dwelling" means a residential structure attached to real property that contains one
128 to four units including any of the following if used as a residence:

129 (a) a condominium unit;

130 (b) a cooperative unit;

131 (c) a manufactured home; or

132 (d) a house.

133 (5) "Earnings" means compensation paid or payable to an individual or for the
134 individual's account for personal services rendered or to be rendered by the individual whether
135 denominated as wages, salary, commission, bonus, or otherwise, and includes periodic
136 payments pursuant to a pension, retirement, or disability program.

137 (6) "Education loan" means:

138 (a) a loan made, insured, or guaranteed pursuant to a program authorized by Title IV of
139 the Higher Education Act of 1965, 20 U.S.C. Sec. 1070, et seq.; or

140 (b) a loan:

141 (i) that finances tuition and other expenses:

142 (A) charged in connection with enrollment at a public or proprietary preprimary,
143 secondary, vocational, or postsecondary school, or in a tutorial, continuing education, test
144 preparation, distance-learning, or similar program; and

145 (B) including tuition, fees, books, housing, and other expenses;

146 (ii) that is:

147 (A) made, insured, or guaranteed under a state program; or

148 (B) made by a federally insured depository institution; and

149 (iii) including a loan that consolidates or refinances a loan described in this Subsection

150 (6).

151 [~~(6)~~] (7) "Installment" means a payment upon a debt that is part of a series of

152 payments, each of which is less than the original amount of the debt and scheduled as to a
153 specific amount and due date by agreement of the parties for the purpose of repaying the debt.

154 ~~[(7)]~~ (8) "Party" means an individual and any other entity legally capable of entering
155 into a binding contract.

156 Section 3. Section 70C-7-103 is amended to read:

157 **70C-7-103. Definitions -- Limitation on garnishment.**

158 (1) As used in this part:

159 (a) "Disposable earnings" means that part of the earnings of an individual remaining
160 after the deduction from those earnings of amounts required by law to be withheld.

161 (b) "Garnishment" means ~~[any]~~ a legal or equitable procedure through which the
162 earnings of an individual are required to be withheld for payment of a debt.

163 (2) The maximum part of the aggregate disposable earnings of an individual for any
164 pay period ~~[which]~~ that is subjected to garnishment to enforce payment of a judgment arising
165 from a consumer credit agreement may not exceed the lesser of:

166 (a) 25% of ~~[his]~~ the individual's disposable earnings for that pay period; ~~[or]~~

167 (b) 10% of the individual's disposable earnings for that pay period on an education loan
168 described in Subsection 70C-1-302(6)(b);

169 (c) 0% of the individual's disposable earnings for that pay period on an education loan
170 described in Subsection 70C-1-302(6)(b) found by a court to be unconscionable pursuant to
171 Section 70C-7-106;

172 (d) the percentage of the individual's disposable earnings for that pay period allowed by
173 federal law for an education loan described in Subsection 70C-1-302(6)(a); or

174 ~~[(b)]~~ (e) the amount by which ~~[his]~~ the individual's disposable earnings for that pay
175 period exceed 30 hours per week multiplied by the federal minimum hourly wage prescribed by
176 Section 6 (a) (1) of the Fair Labor Standards Act of 1938, 29 U.S.C.~~[-Section]~~ Sec. 206(a)(1),
177 in effect at the time the earnings are payable.

178 (3) ~~[No]~~ A court may not make, execute, or enforce an order or process in violation of
179 this section.

180 Section 4. Section 70C-7-106 is amended to read:

181 **70C-7-106. Unconscionability.**

182 (1) (a) With respect to a consumer credit agreement, if the court finds the consumer

183 credit agreement or any part of the consumer credit agreement to have been unconscionable at
184 the time it was made, the court may refuse to enforce the consumer credit agreement, or it may
185 enforce the remainder of the consumer credit agreement without the unconscionable clause if
186 that will avoid any unconscionable result.

187 (b) A court may take an action described in Subsection (1)(a), if the court finds an
188 unconscionable action of an education provider, a lender, or a debt collector in relation to the
189 inducement to enroll with the education provider or pay for the educational services with an
190 education loan.

191 (2) If it is claimed or appears to a court that a consumer credit agreement or any part of
192 it may be unconscionable, the parties shall be afforded a reasonable opportunity to present
193 evidence as to its setting, purpose, and effect to aid the court in making the determination.

194 (3) For the purposes of this section, a charge or practice expressly permitted by this
195 title is not in itself unconscionable.

196 (4) If the court as a matter of law finds a consumer credit agreement or any part of the
197 consumer credit agreement to have been unconscionable, then in addition to the relief provided
198 for in Subsection (1), the party in violation of this section is liable and the debtor may recover
199 from it a penalty in an amount determined by the court of:

200 (a) not less than \$100 nor more than \$5,000; and

201 (b) the cost of the action together with [a] reasonable [~~attorney's fee~~] attorney fees.

202 (5) The penalties provided for in Subsection (4) may not be imposed upon an assignee
203 of the creditor's rights in a consumer credit contract found as a matter of law to be
204 unconscionable in whole or in part unless the debtor establishes by a preponderance of the
205 evidence that the assignee knew the agreement was a consumer credit contract at the time the
206 assignment occurred and also knew of the facts or circumstances on which the court based its
207 finding of unconscionability.

208 (6) [~~No~~] A class action may not be brought under this section except for injunctive or
209 declaratory relief.

210 (7) Nothing contained in Subsection (6) prevents the recovery of penalties by a debtor
211 as provided in Subsection (4).

212 (8) The court may rely, among other indicators, on the following indicators that may
213 singly, if particularly egregious, or cumulatively, support a finding that an education loan is

214 unconscionable:

215 (a) regarding the actions of the education provider in comparison to that which is
216 ordinary and customary in discharging an education provider's legal duties to the student and to
217 certification oversight agencies:

218 (i) the tuition and fees are exorbitant considering:

219 (A) the reputation of the education provider based on such things as infrastructure,
220 caliber of staff, or peer review;

221 (B) the value accorded by employers to the education provider's degrees or certificates
222 of completion; and

223 (C) the preparation provided to education provider's graduates to enter the job market;

224 (ii) the enrollment process lacks rigor, as manifested by:

225 (A) minimal standards for prerequisite training or education, particularly with an
226 advanced degree;

227 (B) payment of recruiters on a commission basis with significant incentives for
228 securing enrollments;

229 (C) a misrepresentation by a recruiter of the education provider's reputation, caliber of
230 staff, infrastructure, graduation rates, placement rates, and income statistics for graduates
231 actually placed in employment within their graduating specialty;

232 (D) lack of concern for the prospect of the student being able to use a degree or
233 certificate of completion to repay the education loan into which the educational provider directs
234 the student; and

235 (E) any other conduct constituting fraud in the inducement for a student to enroll and
236 incur education loan debt for a program offered by the education provider; or

237 (iii) the education provider has a reputation for noncompliance with regulatory
238 oversight requirements, as manifested by:

239 (A) customarily low graduation rates;

240 (B) customarily high default rates on education loans; or

241 (C) routinely manipulated placement rates for graduates;

242 (b) regarding the actions of the lender and the terms of its agreement with the student
243 borrower in comparison to that which is ordinary and customary in discharging the lender's
244 legal duties to the student and to regulatory oversight agencies:

- 245 (i) the agreement contains clauses that:
246 (A) prohibit a class action;
247 (B) mandate arbitration;
248 (C) inform with insufficient detail that the debt is not dischargeable in bankruptcy;
249 (D) specify an adjustable interest rate or a fixed rate significantly higher than for a
250 federal education loan;
251 (E) require no collateral or cosignors for a student who is financially unable to pay an
252 adverse court decision awarding a sum of money to the lender while loaning \$1,000 or more
253 unsecured from the private lender; and
254 (F) capitalize accrued interest, fees, and costs;
255 (ii) the lender colludes with the education provider to provide an education loan:
256 (A) for a student who is not credit worthy by the lender's own internal standards;
257 (B) knowing at the time, unbeknownst to the student, that the lender never expects
258 many of the education loans to be repaid in full because the lender had access to the actual
259 default rates for students of the education provider or other similar education providers;
260 (C) the lender has disclosed publicly that a significant percentage of the education
261 loans are predictably uncollectible; or
262 (D) under an opportunity pool or recourse loan arrangement with the education
263 provider, the lender agrees to provide money for a private education loan, with interest rates
264 and fees totaling more than 20% per year, to a financially needy student who normally would
265 not qualify for the education loan because of the student's subprime credit scores;
266 (iii) the lender views an education loan as a loss leader to bear in exchange for
267 becoming the exclusive provider of education loans for the education provider's subprime and
268 non-subprime students;
269 (iv) the lender bundles predictably uncollectible education loans in securitized
270 education loan investment instruments to pass on the risk to investors;
271 (v) the lender knows that the value of the education is being misrepresented to the
272 student;
273 (vi) the lender knows that because the student will never be able to pay off the
274 education loan in full, the loan balances would grow ever larger with the lender characterizing
275 the accruing interest on the education loan as profit, artificially boosting the lender's own

276 reported profits and stock prices; or

277 (vii) the lender valued corporate profits over knowingly consigning a student to a
278 lifetime of debt and poor credit; and

279 (c) regarding the actions and relationships of the collection agency with the lender and
280 the student borrower, the collection agency is:

281 (i) owned by the lender at the time of the extension of the education loan;

282 (ii) aware of the unconscionable conduct of the lender as described in Subsection

283 (8)(b);

284 (iii) routinely paying aggressive commissions to debt collection staff; or

285 (iv) capitalizing on aggressive collection costs and fees on top of the ever-increasing
286 loan balance.

287 Section 5. Section **70C-7-108** is enacted to read:

288 **70C-7-108. Application to education loans -- Severability.**

289 (1) This bill applies to an education loan that is the subject of ongoing garnishment on
290 the effective date of this bill, and any action after the effective date of this bill for judgment on
291 an education loan and garnishment.

292 (2) If any provision of this bill or its application to any person or circumstance is found
293 to be unconstitutional, or in conflict with or preempted by federal law pertaining to an
294 education loan, the remainder of this bill and the application of this bill to other persons or
295 circumstances, in particular a private loan, shall be given effect without the invalid provision.

296 Section 6. Section **70C-7-205** is amended to read:

297 **70C-7-205. Statute of limitations.**

298 ~~[No]~~ (1) An action under this title may not be brought more than one year after the date
299 of the occurrence of the violation. This section does not bar a person from asserting a violation
300 of this title in an action to collect the debt [which] that is brought more than one year after the
301 date of the occurrence of the violation as a matter of defense by recoupment or setoff to the
302 extent of the outstanding balance of the debt.

303 (2) (a) If a person asserts the defense that an education loan described in Subsection
304 [70C-1-302](#)(6)(b) is unconscionable, that defense survives the expiration of the statute of
305 limitations for the education enrollment agreement, promissory note, and associated
306 agreements in addition to the one-year statute of limitations under this chapter.

307 (b) If a court finds the education loan described in Subsection 70C-1-302(6)(b) to be
308 unconscionable, the court may order relief described in Section 70C-7-106 in addition to the
309 remedy described in Subsection (1).

310 Section 7. **Effective date.**

311 If approved by two-thirds of all the members elected to each house, this bill takes effect
312 upon approval by the governor, or the day following the constitutional time limit of Utah
313 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,
314 the date of veto override.

315 Section 8. **Revisor instructions.**

316 The Legislature intends that the Office of Legislative Research and General Counsel, in
317 preparing the Utah Code database for publication:

318 (1) replace the language in Section 70C-7-108, from "this bill" with the bill's
319 designated chapter number in the Laws of Utah; and

320 (2) replace the language in Section 70C-7-108, from "the effective date of this bill"
321 with the bill's effective date.

Legislative Review Note
as of 1-29-14 1:14 PM

Office of Legislative Research and General Counsel