

SB0170S01 compared with SB0170

~~{deleted text}~~ shows text that was in SB0170 but was deleted in SB0170S01.

inserted text shows text that was not in SB0170 but was inserted into SB0170S01.

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Senator Peter C. Knudson proposes the following substitute bill:

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.

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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~~

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

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

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

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

ENACTS:

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

~~Utah Code Sections Affected by Revisor Instructions:~~

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

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

Section 1. Section ~~{70C-1-202}~~ 70C-7-103 is amended to read:

~~{70C-1-202. Exempted transactions.~~

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

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

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

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

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

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

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- ~~_____ (c) [any] a transaction in securities or commodities accounts in which credit is extended by a broker-dealer registered with the:~~
 - ~~_____ (i) Securities and Exchange Commission; or~~
 - ~~_____ (ii) Commodity Futures Trading Commission;~~
 - ~~_____ (d) [any] except in the case of an education loan that is alleged to be unconscionable pursuant to Section 70C-7-106, an extension of credit:~~
 - ~~_____ (i) not secured by:~~
 - ~~_____ (A) real property; or~~
 - ~~_____ (B) personal property used or expected to be used as the principal dwelling of the consumer; and~~
 - ~~_____ (ii) (A) in which the amount financed exceeds \$25,000; or~~
 - ~~_____ (B) in which there is an express written commitment to extend credit in excess of \$25,000;~~
 - ~~_____ (e) [any] a transaction under public utility or common carrier tariffs if a subdivision of this state or the United States regulates:~~
 - ~~_____ (i) the charges for the services involved;~~
 - ~~_____ (ii) the charges for delayed payment; and~~
 - ~~_____ (iii) [any] a discount allowed for early payment;~~
 - ~~_____ (f) [any] the sale of insurance by an insurer except as otherwise provided in Chapter 6, Insurance;~~
 - ~~_____ (g) [any] a transaction with a party acting as a pawnbroker and licensed by any governmental authority in this state;~~
 - ~~_____ [(h) (i) a loan made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965, 20 U.S.C. Sections 1070, et seq.; or]~~
 - ~~_____ [(ii) a loan:]~~
 - ~~_____ [(A) that finances tuition and other expenses:]~~
 - ~~_____ [(I) charged in connection with enrollment:]~~
 - ~~_____ [(Aa) at a public or proprietary preprimary, secondary, vocational, or postsecondary school; or]~~
 - ~~_____ [(Bb) in any tutorial, continuing education, test preparation, distance-learning, or similar program; and]~~

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- ~~—— [(H) including;]~~
- ~~—— [(Aa) tuition;]~~
- ~~—— [(Bb) fees;]~~
- ~~—— [(Cc) books;]~~
- ~~—— [(Dd) housing; and]~~
- ~~—— [(Ee) other expenses;]~~
- ~~—— [(B) that is:]~~
- ~~—— [(f) made, insured, or guaranteed under a state program; or]~~
- ~~—— [(H) made by a federally insured depository institution; and]~~
- ~~—— [(C) including a loan that consolidates or refinances a loan described in this Subsection (2)(h)(ii); and]~~
- ~~—— (h) an education loan, unless the defense that the education loan is unconscionable pursuant to Section 70C-7-106 is raised in a collection action, legal garnishment procedure, or administrative garnishment procedure; and~~
- ~~—— (i) a rental purchase agreement as defined in Section 15-8-3.~~
- ~~—— Section 2. Section 70C-1-302 is amended to read:~~
- ~~—— 70C-1-302. Definitions.~~
- ~~—— As used in this title:~~
- ~~—— (1) "Agreement" means the bargain of the parties in fact as stated in a written contract or otherwise as found in the parties' language or by implication from other circumstances, including:~~
- ~~—— (a) course of dealing;~~
- ~~—— (b) usage of trade; or~~
- ~~—— (c) course of performance.~~
- ~~—— (2) "Contract" means a document containing written terms and conditions of a credit agreement.~~
- ~~—— (3) (a) "Creditor" means:~~
- ~~—— (i) a party:~~
- ~~—— (A) who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments, not including a down payment; and~~

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- ~~—— (B) to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract;~~
- ~~—— (ii) an issuer of a credit card that extends either open-end credit or credit that:~~
 - ~~—— (A) is not subject to a finance charge; and~~
 - ~~—— (B) is not payable by written agreement in more than four installments; and~~
- ~~—— (iii) an issuer of a credit card that extends closed-end credit that:~~
 - ~~—— (A) is subject to a finance charge; or~~
 - ~~—— (B) is payable by written agreement in more than four installments:~~
 - ~~—— (b) (i) For purposes of this Subsection (3), a party is considered to extend consumer credit regularly only if the party extends credit in the preceding calendar year:~~
 - ~~—— (A) more than 25 times; or~~
 - ~~—— (B) more than five times for a transaction secured by a dwelling:~~
 - ~~—— (ii) If a person does not meet the numerical standards described in Subsection (3)(b)(i) in the preceding calendar year, the numerical standards shall be applied to the current calendar year:~~
 - ~~—— (4) "Dwelling" means a residential structure attached to real property that contains one to four units including any of the following if used as a residence:~~
 - ~~—— (a) a condominium unit;~~
 - ~~—— (b) a cooperative unit;~~
 - ~~—— (c) a manufactured home; or~~
 - ~~—— (d) a house.~~
 - ~~—— (5) "Earnings" means compensation paid or payable to an individual or for the individual's account for personal services rendered or to be rendered by the individual whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension, retirement, or disability program.~~
 - ~~—— (6) "Education loan" means:~~
 - ~~—— (a) a loan made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965, 20 U.S.C. Sec. 1070, et seq.; or~~
 - ~~—— (b) a loan:~~
 - ~~—— (i) that finances tuition and other expenses:~~
 - ~~—— (A) charged in connection with enrollment at a public or proprietary preprimary,~~

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~~secondary, vocational, or postsecondary school, or in a tutorial, continuing education, test preparation, distance-learning, or similar program; and~~

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

~~— (ii) that is:~~

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

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

~~— (iii) including a loan that consolidates or refinances a loan described in this~~

Subsection (6):

~~— [(6)] (7) "Installment" means a payment upon a debt that is part of a series of payments, each of which is less than the original amount of the debt and scheduled as to a specific amount and due date by agreement of the parties for the purpose of repaying the debt.~~

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

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

~~— }70C-7-103. Definitions -- Limitation on garnishment.~~

(1) As used in this part:

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

~~[(b)] (b) "Education loan" means a loan subject to this title, or notwithstanding~~

Subsection (2)(h)(ii)(B)(II) made by a depository institution that:

(i) is closed end;

(ii) is a qualified education loan as defined in 26 U.S.C. Sec. 221(d);

(iii) expressly states in the original loan documents that it is a qualified education loan or the proceeds will be used solely for qualified higher education expenses as defined in 26 U.S.C. Sec 221(d); and

(iv) in a bankruptcy filing, the loan or any indebtedness relating to the loan is subject to the provisions of 11 U.S.C. Sec. 523(a)(8).

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

(2) The maximum part of the aggregate disposable earnings of an individual for any

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pay period [which] that is subjected to garnishment to enforce payment of a judgment arising from a consumer credit agreement may not exceed the lesser of:

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

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

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

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

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

~~}; or~~

(c) 15% of the individual's disposable earnings for that pay period if the judgment relates to an education loan.

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

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

~~— 70C-7-106. Unconscionability.~~

~~— (1) (a) With respect to a consumer credit agreement, if the court finds the consumer credit agreement or any part of the consumer credit agreement to have been unconscionable at the time it was made, the court may refuse to enforce the consumer credit agreement, or it may enforce the remainder of the consumer credit agreement without the unconscionable clause if that will avoid any unconscionable result.~~

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

~~— (2) If it is claimed or appears to a court that a consumer credit agreement or any part~~

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~~of it may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination:~~

~~—— (3) For the purposes of this section, a charge or practice expressly permitted by this title is not in itself unconscionable:~~

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

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

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

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

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

~~—— (7) Nothing contained in Subsection (6) prevents the recovery of penalties by a debtor as provided in Subsection (4):~~

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

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

~~—— (i) the tuition and fees are exorbitant considering:~~

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

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

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- ~~—— (C) the preparation provided to education provider's graduates to enter the job market;~~
- ~~—— (ii) the enrollment process lacks rigor, as manifested by:~~
 - ~~—— (A) minimal standards for prerequisite training or education, particularly with an advanced degree;~~
 - ~~—— (B) payment of recruiters on a commission basis with significant incentives for securing enrollments;~~
 - ~~—— (C) a misrepresentation by a recruiter of the education provider's reputation, caliber of staff, infrastructure, graduation rates, placement rates, and income statistics for graduates actually placed in employment within their graduating specialty;~~
 - ~~—— (D) lack of concern for the prospect of the student being able to use a degree or certificate of completion to repay the education loan into which the educational provider directs the student; and~~
 - ~~—— (E) any other conduct constituting fraud in the inducement for a student to enroll and incur education loan debt for a program offered by the education provider; or~~
- ~~—— (iii) the education provider has a reputation for noncompliance with regulatory oversight requirements, as manifested by:~~
 - ~~—— (A) customarily low graduation rates;~~
 - ~~—— (B) customarily high default rates on education loans; or~~
 - ~~—— (C) routinely manipulated placement rates for graduates;~~
- ~~—— (b) regarding the actions of the lender and the terms of its agreement with the student borrower in comparison to that which is ordinary and customary in discharging the lender's legal duties to the student and to regulatory oversight agencies:~~
 - ~~—— (i) the agreement contains clauses that:~~
 - ~~—— (A) prohibit a class action;~~
 - ~~—— (B) mandate arbitration;~~
 - ~~—— (C) inform with insufficient detail that the debt is not dischargeable in bankruptcy;~~
 - ~~—— (D) specify an adjustable interest rate or a fixed rate significantly higher than for a federal education loan;~~
 - ~~—— (E) require no collateral or cosignors for a student who is financially unable to pay an adverse court decision awarding a sum of money to the lender while loaning \$1,000 or more unsecured from the private lender; and~~

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- ~~—— (F) capitalize accrued interest, fees, and costs;~~
- ~~—— (ii) the lender colludes with the education provider to provide an education loan:~~
- ~~—— (A) for a student who is not credit worthy by the lender's own internal standards;~~
- ~~—— (B) knowing at the time, unbeknownst to the student, that the lender never expects many of the education loans to be repaid in full because the lender had access to the actual default rates for students of the education provider or other similar education providers;~~
- ~~—— (C) the lender has disclosed publicly that a significant percentage of the education loans are predictably uncollectible; or~~
- ~~—— (D) under an opportunity pool or recourse loan arrangement with the education provider, the lender agrees to provide money for a private education loan, with interest rates and fees totaling more than 20% per year, to a financially needy student who normally would not qualify for the education loan because of the student's subprime credit scores;~~
- ~~—— (iii) the lender views an education loan as a loss leader to bear in exchange for becoming the exclusive provider of education loans for the education provider's subprime and non-subprime students;~~
- ~~—— (iv) the lender bundles predictably uncollectible education loans in securitized education loan investment instruments to pass on the risk to investors;~~
- ~~—— (v) the lender knows that the value of the education is being misrepresented to the student;~~
- ~~—— (vi) the lender knows that because the student will never be able to pay off the education loan in full, the loan balances would grow ever larger with the lender characterizing the accruing interest on the education loan as profit, artificially boosting the lender's own reported profits and stock prices; or~~
- ~~—— (vii) the lender valued corporate profits over knowingly consigning a student to a lifetime of debt and poor credit; and~~
- ~~—— (c) regarding the actions and relationships of the collection agency with the lender and the student borrower, the collection agency is:~~
 - ~~—— (i) owned by the lender at the time of the extension of the education loan;~~
 - ~~—— (ii) aware of the unconscionable conduct of the lender as described in Subsection (8)(b);~~
 - ~~—— (iii) routinely paying aggressive commissions to debt collection staff; or~~

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

~~— Section 5. Section 70C-7-108 is enacted to read:~~

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

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

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

~~— Section 6. Section 70C-7-205 is amended to read:~~

~~— **70C-7-205. Statute of limitations.**~~

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

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

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

~~— Section 7}. **Effective date.**~~

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

~~{ Section 8. **Revisor instructions.**~~

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

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

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

Legislative Review Note

~~———— as of 1-29-14 1:14 PM~~

~~———— Office of Legislative Research and General Counsel}~~