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AB-1405 Debt settlement practices. (2021-2022)

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Assembly Bill No. 1405

CHAPTER 454

An act to add Title 1.6C.17 (commencing with Section 1788.300) to Part 4 of Division 3 of the Civil Code, relating to consumer debt.

[Approved by Governor October 04, 2021. Filed with Secretary of State October 04, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1405, Wicks. Debt settlement practices.

Existing law regulates various practices related to debt, including its sale and collection. Existing law, for purposes of debt collection, defines "consumer debt" as, among other things, money due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction. Existing law, the Check Sellers, Bill Payers and Proraters Law, prohibits a person from engaging in the business of acting as a prorater without first obtaining a license from the Commissioner of Financial Protection and Innovation and defines a "prorater" as, among other things, a person who, for compensation, engages in the business of receiving money for the purpose of distributing the money among creditors in payment or partial payment of the obligations of the debtor. Under existing law, the Consumers Legal Remedies Act, specified unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that result in the sale or lease of goods or services to any consumer are unlawful.

This bill would enact the Fair Debt Settlement Practices Act. The bill would define "debt settlement provider" as a person who, for compensation and on behalf of a consumer, provides debt settlement services, as defined. The bill would define a payment processor as a person who provides payment processing services, as defined.

This bill would prohibit a debt settlement provider from engaging in false, deceptive, or misleading acts or practices, as specified, when providing debt settlement services. The bill would require a debt settlement provider to provide a consumer with certain disclosures along with an unsigned copy of the proposed written contract between the debt settlement provider and the consumer. The bill would prescribe requirements for the contents of these contracts.

This bill would prohibit certain unfair, abusive, or deceptive practices in connection with debt settlement provider and payment processor activities, some of which would apply to both a debt settlement service provider and a payment processor, and some of which would only apply to a debt settlement service provider, or a payment processor. The bill would authorize a consumer to terminate a contract for debt settlement services at any time without a fee or penalty of any sort by notifying the debt settlement provider. The bill would make the notice of termination effective immediately when the notice is made electronically or orally. The bill would make the notice effective upon receipt if the notice is sent via certified mail and would make the notice effective 7 calendar days from the date of mailing if the notice is sent by noncertified mail. The bill would specify requirements for the debt settlement provider upon effective notice of termination, including immediately canceling the contract and notifying the payment processor, as provided. The bill would require a payment processor, upon notice of cancellation from the consumer or debt settlement provider, to stop accumulating service fees, close the settlement account, and deliver to the consumer the balance of

the settlement account within 7 days. The bill would require the debt settlement provider to immediately forward any notice of a lawsuit or settlement agreement to the consumer, as provided. The bill would specify the application of its provisions, excluding certain parties.

This bill would authorize a consumer to bring a civil action for violation of these provisions. The bill would authorize statutory damages of not more than \$5,000, actual damages, injunctive relief, and other relief the court deems proper. The bill would require that a court award costs of the action and reasonable attorney's fees for any successful cause of action. The bill would specify that reasonable attorney's fees may be awarded to a prevailing debt settlement provider or prevailing payment processor upon a finding by the court that the consumer's prosecution of the cause of action was not in good faith. The bill would specify that a debt settlement provider or a payment processor would not be civilly liable under specified circumstances. The bill would require a cause of action to be brought within 4 years of specified dates. The bill would provide that a waiver of its provisions is contrary to public policy and that its provisions are severable.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Title 1.6C.17 (commencing with Section 1788.300) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 1.6C.17. Fair Debt Settlement Practices

CHAPTER 1. General Provisions

1788.300. This title may be cited as the Fair Debt Settlement Practices Act.

1788.301. For purposes of this title:

(a) "Debt settlement provider" means a person who, for compensation and on behalf of a consumer, provides debt settlement services.

(b) "Debt settlement services" means any of the following:

(1) Providing advice, or offering to act or acting as an intermediary, including, but not limited to, offering debt negotiation, debt reduction, or debt relief services between a consumer and one or more of the consumer's creditors, if the primary purpose of that advice or action is to obtain a settlement for less than the full amount of the debt.

(2) Advising, encouraging, or counseling a consumer to accumulate funds in an account for future payment of a reduced amount of debt to one or more of the consumer's creditors.

(c) "Settlement account" means a depository account established and used for the purpose of holding funds of a consumer to be distributed to a creditor in the event of a settlement of a consumer's debt with the creditor.

(d) "Consumer" means a person who is allegedly legally responsible for a debt.

(e) "Person" means a natural person or entity, whether a corporation, partnership, association, trust, limited liability company, cooperative, or other organization.

(f) "Creditor" means the person who originated the debt or is assigned, or has purchased for collection, a debt for which a consumer is allegedly legally responsible.

(g) "Debt" means money, whether in principal, interest, fees, or other charges, which is due or owing or alleged to be due or owing from a natural person to another person and incurred primarily for personal, family, or household purposes.

(h) "Payment processor" means a person who provides payment processing services.

(i) "Payment processing services" means accepting, maintaining, holding, or distributing funds, or facilitating the acceptance, maintenance, holding, or distribution of funds, on behalf of a consumer for the purpose of facilitating debt settlement services.

1788.302. (a) A debt settlement provider shall not engage in false, deceptive, or misleading acts or practices when providing debt settlement services. Without limiting the general application of the foregoing, an act or practice is false, deceptive, or misleading, in connection with providing debt settlement services, if the act or practice consists of any of the following:

(1) Making or permitting another entity to publicly make on behalf of the debt settlement provider, a statement or representation that is false, deceptive, or misleading.

(2) Posting directly, or indirectly causing to be posted, an online review or ranking on an internet website if the debt settlement provider, or its agent, provided anything of value in exchange for favorable treatment in that review or ranking.

(3) Omitting any material information.

(b) A debt settlement provider shall provide to the consumer the following disclosures along with an unsigned copy of the written contract proposed to be entered into between the debt settlement provider and the consumer no less than three calendar days prior to the execution of that contract by the consumer. A fully executed copy of the contract shall be delivered to the consumer by the debt settlement provider immediately after the debt settlement provider receives the contract.

(1) The contract shall be preceded by a disclosure that contains all of the following information in conspicuous boldface type that is larger than the typeface provided in the contract typeface:

(A) There is no guarantee that any particular debt or all of the consumer's enrolled debts will be reduced, eliminated, or otherwise settled.

(B) The deposits made pursuant to the contract will not be distributed to the creditor until a settlement is obtained. This may take months to achieve.

(C) If the consumer stops paying any creditor, any of the following may occur:

(i) The creditors may still try to collect.

(ii) The creditors may sue.

(iii) If a creditor obtains a judgment against the consumer, the creditor may garnish the consumer's wages or levy the consumer's bank account or accounts, or both garnish the consumer's wages and levy the consumer's bank account or accounts.

(iv) The consumer's credit score or credit rating may be negatively impacted.

(D) Failing to pay debts on time may adversely affect the consumer's credit rating or credit scores.

(E) Specific results cannot be predicted or guaranteed, and the debt settlement provider cannot require a creditor to negotiate or settle a debt.

(F) A consumer may cancel the debt settlement contract at any time without any penalty.

(G) Debt settlement services may not be suitable for all individuals.

(H) Bankruptcy may provide an alternative to debt settlement.

(I) Canceled debt may be counted as income under federal tax law, and the consumer may have to pay income taxes on the amount of forgiven or reduced debt.

(J) Many sources of income may be protected from debt collection. Common sources of protected income include disability insurance benefits, life insurance benefits, military benefits, pension plans, retirement benefits, public assistance, social security benefits, supplemental security income (SSI), unemployment benefits, veterans benefits, workers compensation, and student aid. See form EJ-155 from the Judicial Council for a complete list.

(K) The number of months estimated to enter into settlement agreements that completely resolve all enrolled debts.

(L) All conditions that the consumer must satisfy before the debt settlement provider will make a settlement offer to a creditor.

(M) Whether the debt settlement provider pays or receives referral fees.

(2) Each contract between a consumer and debt settlement provider:

(A) Shall list each debt to be serviced, including, for each debt, the name of the creditor and the total amount of the debt. The total amount of the debt may be based on either a billing statement for the debt or information in the consumer's consumer report, as that term is defined under the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681 et seq.). The billing statement or consumer report must have been issued within 30 calendar days of the date of the contract.

(B) Shall provide the estimated period of time it will take the consumer to accumulate in a settlement account the amount of money estimated to be required to settle all debts.

(C) Shall provide the amount of time necessary to achieve the represented results.

(D) Shall provide, in terms easily understood by the least sophisticated consumer, the method that the debt settlement provider will use to calculate the charges and fees for debt settlement services.

(E) Shall provide the name and mailing address of the debt settlement provider and of the consumer.

(F) Shall provide a telephone number at which the consumer may speak, during normal business hours, with a live representative of the debt settlement provider during normal business hours who is able to access information about the consumer's account.

(G) Shall be provided to the consumer in English and in the language in which it was negotiated or in which the debt settlement services were offered, if that language is one of the languages set forth in Section 1632.

(H) Shall not require a compulsory agreement with any other party. A debt settlement provider may require that the consumer obtain a dedicated settlement account and provide a list of preferred vendors, however a payment processor who receives compensation from the consumer for payment processing services must supply its own contract to the consumer for engagement.

(I) Shall not be entered into by a consumer who is not already allegedly legally responsible for all the debt that will be enrolled in the debt settlement services. In the event multiple consumers engage in a single contract for debt settlement services, if any consumer is not proficient in English and speaks a language set forth in Section 1632, a translated copy of the disclosures and contract shall be provided to the consumer in that language and in a manner that complies with this subdivision.

(3) A debt settlement provider shall not communicate with any of a consumer's creditors until five calendar days after full execution of a contract for debt settlement services.

(c) A debt settlement provider and a payment processor shall not engage in unfair, abusive, or deceptive acts or practices when providing debt settlement services or payment processing services. Without limiting the general application of the foregoing, in connection with providing debt settlement services and payment processing services, an act or practice is unfair, abusive, or deceptive if the act or practice consists of any of the following:

(1) For a debt settlement provider and payment processor, offering to lend money or extend credit to the consumer, or purchase an enrolled debt.

(2) For a debt settlement provider requesting or receiving payment of any fee or consideration for debt settlement services, unless and until all of the following occur:

(A) The debt settlement provider has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement approved and executed by the consumer.

(B) The consumer has made at least one payment pursuant to that settlement agreement between the consumer and the creditor.

(C) To the extent that debts enrolled in a debt settlement service are negotiated, settled, or modified individually, the fee or consideration must either:

(i) Bear the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount. The individual debt amount and the entire debt amount are those owed at the time the debt was enrolled in the service.

(ii) Represent a percentage of the amount saved as a result of the renegotiation, settlement, reduction, or alteration. The percentage charged cannot change from one individual debt to another. The amount saved is the difference between the amount owed at the time the debt was enrolled in the service and the amount agreed pursuant to the settlement agreement between the consumer and the creditor to satisfy the debt.

(3) Beginning July 1, 2022, for a payment processor, facilitating the distribution of payment of any fee or consideration for debt settlement services before the requirements set forth in paragraph (2) have been met.

(4) For a payment processor, failing to distribute a statement of accounting to a consumer at least once a month while the consumer is engaged with the payment processor, as well as on or before the fifth business day after a consumer requests a statement of accounting.

(A) When an accounting is available to the consumer online, the payment processor must make prominent and ongoing the ability for a consumer to opt in to a paper accounting to be mailed to the consumer under the terms of this section.

(B) The statement of accounting must contain the following information to the extent applicable:

- (i) A list of deposits made into, and withdrawals from, the consumer's settlement account during the previous month.
- (ii) The fees that the debt settlement provider has billed and collected in connection with each of the debts settled during the previous month.
- (iii) The fees that the payment processor has billed and collected in connection with payment processing services during the previous month.
- (iv) The amount of money that the consumer holds in the consumer's settlement account.

(C) Within five business days of a consumer's request, a payment processor shall provide a consolidated statement of accounting containing all of the following:

- (i) A list of deposits made into, and withdrawals from, the consumer's settlement account starting from the outset of the contract.
- (ii) A list of fees that the debt settlement provider has billed and collected in connection with each of the debts settled starting from the outset of the contract.
- (iii) A list of fees that the payment processor has billed and collected in connection with payment processing services starting from the outset of the contract.
- (iv) The amount of money that the consumer holds in the consumer's settlement account.

(5) For a debt settlement provider, failing to distribute a statement of accounting to a consumer at least once a month while the contract for debt settlement services is in effect, as well as on or before the fifth business day after a consumer requests a statement of accounting.

(A) When an accounting is available to the consumer online, the debt settlement provider must make prominent and ongoing the ability for a consumer to opt in to a paper accounting to be mailed to the consumer under the terms of this section.

(B) The statement of accounting must contain the following information to the extent applicable:

- (i) The amounts, dates, and creditors associated with each settlement obtained by the debt settlement provider on behalf of the consumer.
- (ii) The fees that the debt settlement provider has billed and collected in connection with each of the debts settled.
- (iii) With respect to any debt settled by the debt settlement provider on behalf of the consumer, all of the following information:
 - (I) The total amount of money that the consumer paid or will pay to the creditor to settle the debt.
 - (II) The amount of the debt at the time the debt settlement provider and the consumer entered into the contract.
 - (III) The amount of the debt at the time the creditor agreed to settle the debt.
 - (IV) The amount of compensation that the debt settlement provider received, or may receive, to settle the debt.

(d) (1) A consumer may terminate a contract for debt settlement services at any time without a fee or penalty of any sort by notifying the debt settlement provider in writing, electronically, or orally.

(2) The notice described in paragraph (1) shall be deemed effective immediately upon being sent if made electronically, including via text message or orally. When the notice is sent via certified mail, notice shall be deemed effective upon receipt. When written notice is sent via noncertified mail, notice shall be deemed effective seven calendar days from the date of mailing.

(3) Upon effective notice of request for cancellation of the contract, the debt settlement provider shall do all of the following:

- (A) Immediately cancel the contract.

(B) Immediately notify the payment processor that the consumer has canceled the debt settlement services and transmit to the payment processor the consumer's instruction to close the settlement account and deliver the balance in the settlement account to the consumer.

(C) Provide, within three business days, a detailed accounting of any amounts received or expected to be received by the debt settlement provider from the consumer's settlement account after the debt settlement provider received effective notice of request for cancellation. The detailed accounting shall include an explanation of how the amounts were calculated in accordance with the requirements of paragraph (2) of subdivision (c).

(D) Provide within three business days copies of all documents, notices, or other communications it has received from any creditor on behalf of the consumer.

(4) The items in subparagraphs (C) and (D) of paragraph (3) shall be sent by United States mail or by electronic means reasonably calculated to reach the consumer.

(5) Upon receipt of notice of cancellation of the contract from the consumer or debt settlement provider, the payment processor shall stop accumulating service fees, close the settlement account, and deliver to the consumer the balance in the settlement account within seven days. The payment processor shall provide, within 10 business days, a detailed accounting of the amount refunded and any amounts sent to the debt settlement provider after or upon the payment processor receiving notice of the cancellation of the contract.

(e) A debt settlement provider shall immediately forward the following notices to the consumer, either by United States mail or by electronic means reasonably calculated to reach the consumer:

(1) Any notice of a lawsuit on an enrolled debt from any person other than the consumer.

(2) Any settlement agreement that a debt settlement provider has negotiated on the consumer's behalf.

CHAPTER 2. Application of the Fair Debt Settlement Practices Act

1788.303. This title applies to persons providing payment processing services, debt settlement services, and persons purporting to engage in debt settlement services.

1788.304. This title does not apply to any of the following:

(a) Any person, or the person's authorized agent, doing business under license and authority of the Commissioner of Financial Protection and Innovation under Divisions 1.1 (commencing with Section 1000), 2 (commencing with Section 5000), and 5 (commencing with Section 14000) of the Financial Code or under any law of this state or of the United States relating to banks or credit unions.

(b) Any nonprofit business organization that is certified as tax-exempt by the Internal Revenue Service and that does not receive compensation from the consumer for providing debt settlement services.

(c) Attorneys and law firms that meet all of the following criteria:

(1) The attorney or law firm does not charge for services regulated by this title.

(2) The fees and disbursements are not charges or costs shared, directly or indirectly, with a debt settlement provider.

(3) Any of the following is true:

(A) The attorney or law firm is retained by a consumer for the purpose of legal representation in consumer debt litigation.

(B) The attorney or law firm provides debt settlement services pursuant to representation by retainer for a debt collection matter that does not involve consumer debt.

(C) The attorney or law firm is retained by the consumer primarily for purposes other than the settlement of consumer debt.

(d) A merchant-owned credit or creditors association, or a member-owned, member-controlled, or member-directed association whose principal function is that of servicing the community as a reporting agency.

CHAPTER 3. Enforcement of the Fair Debt Settlement Practices Act

1788.305. (a) A debt settlement provider and a payment processor shall comply with this title.

(b) A consumer may bring a cause of action against a debt settlement provider and a payment processor for violation of any provision of this title in order to recover or obtain any of the following:

(1) Damages in an amount equal to the sum of the following:

(A) Statutory damages in an amount to be determined by the court of no less than one thousand dollars (\$1,000) and no more than five thousand dollars (\$5,000) per violation of this title.

(B) Any actual damages sustained by the consumer as a result of the violation.

(2) Injunctive relief.

(3) Any other relief that the court deems proper.

(c) (1) In the case of any successful cause of action under this section, the court shall award costs of the action, together with reasonable attorney's fees as determined by the court.

(2) Reasonable attorney's fees may be awarded to a prevailing debt settlement provider and a prevailing payment processor upon a finding by the court that the consumer's prosecution of the cause of action was not in good faith.

(d) A debt settlement provider or a prevailing payment processor shall have no civil liability for damages under this section if the debt settlement provider or a prevailing payment processor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, and occurred notwithstanding the maintenance of procedures reasonably adopted to avoid any error.

(e) A cause of action brought under this section shall be brought within four years of the latter of the following dates:

(1) The last payment by or on behalf of the consumer.

(2) The date on which the consumer discovered or reasonably should have discovered the facts giving rise to the consumer's claim.

1788.306. Any waiver of the provisions of this title is contrary to public policy, and is void and unenforceable.

1788.307. The provisions of this title are severable. If any provision of this title or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.