

# AN ACT

To amend sections 1309.47 and 1309.49 and to enact section 1301.21 of the Revised Code to provide for the enforceability of commitments to pay attorneys' fees in certain commercial contracts of indebtedness.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That sections 1309.47 and 1309.49 be amended and section 1301.21 of the Revised Code be enacted to read as follows:

Sec. 1301.21. (A) As used in this section:

(1) "Contract of indebtedness" means a note, bond, mortgage, conditional sale contract, retail installment contract, lease, security agreement, or other written evidence of indebtedness, other than indebtedness incurred for purposes that are primarily personal, family, or household.

(2) "Commitment to pay attorneys' fees" means an obligation to pay attorneys' fees that arises in connection with the enforcement of a contract of indebtedness.

(3) "Maturity of the debt" includes maturity upon default or otherwise.

(B) If a contract of indebtedness includes a commitment to pay attorneys' fees, and if the contract is enforced through judicial proceedings or otherwise after maturity of the debt, a person that has the right to recover attorneys' fees under the commitment, at the option of that person, may recover attorneys' fees in accordance with the commitment, to the extent that the commitment is enforceable under divisions (C) and (D) of this section.

(C) A commitment to pay attorneys' fees is enforceable under this section only if the total amount owed on the contract of indebtedness at the time the contract was entered into exceeds one hundred thousand dollars.

(D) A commitment to pay attorneys' fees is enforceable only to the extent that it obligates payment of a reasonable amount. In determining the amount of attorneys' fees that is reasonable, all relevant factors shall be considered, including but not limited to, the nature of the services rendered, the time expended in rendering the services, the amount of money and the value of the property affected, and the professional skill and expertise of the

attorney or attorneys rendering the services. Unless a court has been requested to make a determination of the amount of attorneys' fees that is reasonable and finds to the contrary by a preponderance of the evidence, the following are deemed reasonable amounts:

(1) If the commitment to pay attorneys' fees is based upon a specific percentage of the total principal, interest, and other charges owed on the contract of indebtedness, the percentage of the total so owed as specified in the contract of indebtedness;

(2) If the commitment to pay attorneys' fees is not based upon a specific percentage of the total principal, interest, and other charges owed on the contract of indebtedness, an amount equal to the attorneys' fees customarily charged by the attorney or attorneys rendering the services.

Sec. 1309.47. (A) A secured party after default may sell, lease, or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to Chapter 1302. of the Revised Code. The proceeds of disposition shall be applied in the order following to:

(1) The reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing, and the like, and, to the extent provided for in an agreement with the secured party and not prohibited by section 1301.21 of the Revised Code, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(2) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(3) The satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest ~~must~~ shall seasonably furnish reasonable proof of ~~his~~ the holder's interest, and unless ~~he~~ the holder does so, the secured party need not comply with ~~his~~ the holder's demand.

(B)(1) If the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(2)(a) If the security interest secures an indebtedness, the secured party ~~must~~ shall account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency.

(b) If the secured party in disposing of collateral pursuant to this section has complied with the requirements of division (C) of this section, the amount of the deficiency, if any, to which the secured party is entitled shall be based on the actual proceeds of the disposition.

(c) If the secured party in disposing of collateral pursuant to this section has failed to comply with the requirements of division (C) of this section, the amount of the deficiency, if any, to which the secured party is entitled shall be based on the appropriate value of the collateral as provided in division (B)(2)(d) or (e) of this section.

(d) The appropriate value of the collateral under division (B)(2)(c) of this section shall be presumed to equal the secured indebtedness. The secured party may rebut this presumption by introducing some credible evidence of a lower appropriate value of the collateral. Evidence of the amount of the actual proceeds of the disposition is not, of itself, sufficient to rebut the presumption.

(e) If the secured party rebuts the presumption described in division (B)(2)(d) of this section, the appropriate value of the collateral shall be deemed to equal the actual proceeds of the disposition, unless the debtor establishes that a greater amount would have been realized had the secured party complied with the requirements of division (C) of this section, in which case, the greater amount established by the debtor shall be deemed the appropriate value of the collateral. The debtor bears the burden of establishing the amount that would have been realized had the secured party complied with the requirements of division (C) of this section.

(C) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels, and at any time and place, and on any terms, but every aspect of the disposition, including the method, manner, time, place, and terms ~~must~~, shall be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor if ~~he~~ the debtor has not signed after default a statement renouncing or modifying ~~his~~ the debtor's right to notification of sale. In the case of consumer goods, no other notification need be sent. In other cases, notification shall be sent to any other secured party from whom the secured party has received, before sending ~~his~~ notification to the debtor or before the debtor's renunciation of ~~his~~ the debtor's rights, written notice of a claim of an interest in the collateral. The secured party may buy at any public sale, and, if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations ~~he~~, the secured party may buy at a private sale.

(D) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights ~~therein in the collateral~~, and discharges the security interest under which it is made and any security interest or lien subordinate ~~thereto to it~~. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of sections 1309.44 to 1309.50 of the Revised Code or of any judicial proceedings:

(1) In the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if ~~he~~ the purchaser does not buy in collusion with the secured party, other bidders, or the person conducting the sale; or

(2) In any other case, if the purchaser acts in good faith.

(E) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement, or the like and who receives a transfer of collateral from the secured party or is subrogated to ~~his~~ the secured party's rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this chapter.

(F) This section is subject to the limitations of section 1317.16 of the Revised Code.

Sec. 1309.49. At any time before the secured party has disposed of collateral or entered into a contract for its disposition under section 1309.47 of the Revised Code or before the obligation has been discharged under division (B) of section 1309.48 of the Revised Code, the debtor or any other secured party may, unless otherwise agreed in writing after default, redeem the collateral by tendering fulfillment of all obligations secured by the collateral ~~as well as~~, the expenses reasonably incurred by the secured party in retaking, holding, and preparing the collateral for disposition, in arranging for the sale, and, to the extent provided for in an agreement with the secured party and not prohibited by section 1301.21 of the Revised Code, the reasonable attorneys' fees and legal expenses incurred by the secured party.

SECTION 2. That existing sections 1309.47 and 1309.49 of the Revised Code are hereby repealed.

SECTION 3. Section 1301.21 of the Revised Code applies only to commitments to pay attorneys' fees that are included in contracts of indebtedness that are enforced, through judicial proceedings or otherwise, on and after the effective date of this act.

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*Speaker* \_\_\_\_\_ *of the House of Representatives.*

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*President* \_\_\_\_\_ *of the Senate.*

Passed \_\_\_\_\_, 20\_\_\_\_

Approved \_\_\_\_\_, 20\_\_\_\_

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*Governor.*

Sub. H. B. No. 292

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The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

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*Director, Legislative Service Commission.*

Filed in the office of the Secretary of State at Columbus, Ohio, on the  
\_\_\_\_ day of \_\_\_\_\_, A. D. 20\_\_\_\_.

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*Secretary of State.*

File No. \_\_\_\_\_ Effective Date \_\_\_\_\_