



**STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN OPPOSITION OF HOUSE BILL 131**

Presented by Jeffrey J. Fanger, Esq.
Before the House Financial Institutions Committee
Representative Kris Jordan, Chair
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Chairman Jordan, vice-chair Hillyer, ranking member Smith, and members of the House Financial Institutions Committee. My name is Jeffrey Fanger. I am an attorney in Cleveland and I am a member of the OSBA Unauthorized Practice of Law Committee. I am here on behalf of the Ohio State Bar Association to testify in opposition to House Bill 131.

I have litigated numerous cases involving these types of debt negotiation firms. I have obtained sanctions against companies involved in this activity and have first hand spoken to the victims harmed by these types of debt negotiation firms. Often these people are desperate, have very little money and would not have reasonable access to legal advice. Furthermore, these companies generally operate outside of the state of Ohio making it difficult to pursue them should they simply take the money and do nothing – which unfortunately based on my first-hand experience seems to be the overwhelming result.

Black’s law dictionary defines a novation as “The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party.” It is the act of renegotiating a contract and entering into a new contract.

A Novation has been held to be “the emerging and transfer of a prior debt into another obligation either civil or natural, that is, the constitution of a new obligation in such a way as to destroy a prior one.”

House Bill 131 essentially is setting up a process by which non-attorneys are being authorized to negotiate terms of a contract, enter into the new contractual agreement, establish new payment plans and payment arrangements and even discharge debt (which has tax implications) and presumably either advise the party on the terms of the new contract (including the tax implications) or not advise the party on the terms of the new contract – thereby leaving the debtor without the relevant information necessary to make an informed decision.

The Ohio Supreme Court in *Ohio State Bar Assn. v. Kolodner*, 103 Ohio St. 3d 504, 2004-Ohio-5581, found that the **negotiation and drafting of debt settlement agreements is the unauthorized practice of law**. There is no requirement that those agreements be in writing – ANY negotiation and entering into a debt settlement agreement is by definition negotiation of a contract and a novation and therefore constitutes the unauthorized practice of law in Ohio.

Adding a sentence to the bottom of the bill that says that the bill is not intending to authorize activities that constitutes the unauthorized practice of law – while in fact authorizing activities that constitute the unauthorized practice of law does not save the bill. It makes the bill entirely ineffective.

There have been multiple cases before the Supreme Court and multiple debt negotiation firms that have entered into stipulations before the Ohio Supreme Court on charges of engaging in the Unauthorized Practice of Law for doing EXACTLY what House Bill 131 directs – effectuating the adjustment, compromise or discharge of any account, note or other indebtedness of a debtor.

There is absolutely no way in which to achieve the bill's goals without negotiating and entering into a settlement agreement which has been specifically found by the Ohio Supreme Court to constitute the unauthorized practice of law.

The bill provides:

- (1) (a) An adjustment of an interest rate on a debt – this is a negotiation of a new rate and a substituting of that rate for the old rate. This is a novation and the formation of a new contractual agreement between the debtor and the creditor. It is practicing law.
- (1) (b) A waiver or reduction of fees or charges – this again is a negotiation of an agreement, i.e. the waiver and a negotiation of fees or charges. In order for it to be anything but illusory, there must be some memorialization of the agreement and it must be agreed to by both the creditor and the debtor – therefore it is a contract. It is again practicing law.
- (1) (c) A discharge of a debt by reducing the principle balance of the debt. Again for this to be effectuated, it by definition would require the negotiation process to take effect and would require some type of agreement being reached between the debtor and creditor. It is again the clear practice of law and the negotiation and preparation of a settlement agreement.

The discharge of debt has hidden consequences that many debtors are unaware of, the most important being the fact that there may be tax consequences. A debtor that has obtained a large reduction of the debt will likely receive a 1099 from the creditor. This then converts a portion of that debt to income. As income, it is subject to taxation, and is now non-dischargeable in bankruptcy.

For example, a debtor that has obtained a \$70,000 reduction in a credit card bill through House Bill 131 would receive a 1099 for \$70,000 in discharged debt at the end of the year – well after the debt adjusting firm is out of the picture in most cases. Presuming for purposes of this example a 15% tax on that amount the debtor is now liable for taxes in the amount of \$10,500, which is non-dischargeable in bankruptcy.

The exact same debtor had they either 1) filed for bankruptcy or 2) set forth a basis in law as to why they were not liable for the \$70,000 debt (as opposed to it simply being reduced) may well avoid the \$10,500 in tax liability completely. The resolution of the debt therefore and the reduction

of the debt requires at times multiple levels of evaluation as to what is in the parties over all best interest. All of this requires legal analysis and legal document preparation. There is no question such actions constitute the practice of law.

Of course the proponents of the bill want to claim that they don't enter into settlement agreements. Well if that was true then they are basically playing a shell game to earn fees for no actual service. Debtors are believing that they are entering into a binding agreement with the creditor. If they are not entering into a binding agreement with the creditor they are offered zero protection and there is nothing preventing the creditor for reaching an agreement with the debtor through a debt adjustor service, then, once they have received those payments, ignore the agreement entirely and seek the balance still owed.

Ohio citizens have been harmed substantially with credit debt, foreclosures and a host of other financial damages. Setting up a system that provides false hope, fake promises and bad advice as to how to deal with the very real impact of these financial problems – often caused as a result of job loss or medical issues – is not serving the people of Ohio.

There simply is no way that a third party can engage in the activities set forth in House Bill 131 without practicing law. The legal profession, legal aid and the court's need to do more to provide affordable legal services to the poor – substituting those services with third party “quasi-lawyer” debt adjustment firms is not a viable solution. Multiple states have tried the “quasi-lawyer” debt adjustment route. Hundreds of Ohio citizens have repeatedly been the victims of these firms and their attempts to settle debt for debtors resulting in multiple UPL filings and sanctions issued by the Ohio Supreme Court.

It would be a grave error for Ohio to bring this problem into our state through legislation. The cases already have made it clear that debtors ultimately are harmed by these services and the proper focus is to provide debtors better access to affordable legal service such as legal aid or appropriate debt counseling services that are designed to counsel debtors on a no fee basis. It is very different to provide a debtor with information and debt counseling as opposed to providing them with negotiation and settlement services.

Giving Ohio's debtor's false hope – and creating a financial incentive to third party businesses to pander that false hope – a system that has been tried in multiple other states and that Ohio has repeatedly had to police and prosecute – is not in our state's interest or even the interest of our debtors.

The OSBA is authorized to file complaints with the Ohio Supreme Court's Board on the Unauthorized Practice of Law by Gov. Bar. R. VII. The OSBA opposes House Bill 131 because it seeks to directly authorize activities that the Board has clearly held constitute the unauthorized practice of law. The Board has repeatedly found that settling accounts with creditors for purposes of affecting debtors' relationship with creditors constitutes the practice of law (most recently in *Ohio State Bar Assn. v. Century Negotiations, Inc.*, 152 Ohio St.3d 64, 2017-Ohio-9110).

While supporters of the bill claim that the OSBA is treating debt settlement companies differently because the OSBA has not filed complaints alleging that the negotiation of a real estate purchase contract and nonprofit credit counseling constitute the practice of law, the Ohio Supreme Court's Board on the Unauthorized Practice of Law has not directly held that such activities constitute the practice of law. Accordingly, the OSBA does not advocate for changes in the law to prohibit those activities because the Supreme Court of Ohio, the constitutionally delegated authority over the regulation of the practice of law, has not found those activities to constitute the practice of law.

In contrast, House Bill 131 seeks to authorize activities that have clearly been found to constitute the practice of law. As a result, the OSBA continues to oppose this legislation.

A vote for House Bill 131 is simply a vote to authorize third party businesses to engage in the practice of law without being properly licensed to do so. It will result in multiple unauthorized practice of law prosecutions in Ohio and will ultimately serve to simply harm our citizens. Based on the significant amount of case law already established before the Ohio Supreme Court in this area passage of this bill will have no actual benefit to the people of Ohio. In fact it is likely that any entity that engages in these activities is at significant risk of ending up before the Ohio Supreme Court on charges of engaging in the unauthorized practice of law – a sentence at the end of the bill does nothing to prevent that. The substance of the bill itself and the actions that the bill outlines and theoretically authorizes constitute the unauthorized practice of law. Ohio's constitution squarely places the regulation of the practice of law outside of the legislature and exclusively with the Ohio Supreme Court. A footnote at the bottom does not trump that fundamental constitutional prohibition – it only unnecessarily sets up a conflict between our legislature and our Ohio Supreme Court. Such a conflict is unnecessary and a waste of both bodies time and public monies.

I would be happy to answer any questions.