

SENATE INSURANCE AND FINANCIAL INSTITUTIONS COMMITTEE

Senate Bill 112

Wednesday, January 22, 2020

Chairman Hackett and members of the Committee:

I act as an Attorney representing the American Fair Credit Council and was asked by the bill sponsor Sen. John Eklund to weigh in on Senate Bill 112. My comments do not relate to the debt settlement industry per se, but rather will focus on the ongoing discussion and debate over whether debt settlement constitutes the unauthorized practice of law.

I have prepared a brief memo discussing the question of whether or not this bill seeks to permit debt settlement companies to operate in Ohio in violation of Ohio Supreme Court rules and existing case law regarding the unauthorized practice of law. The legal memo before you seeks to explain the Ohio Supreme Court's view of what defines the practice of law. This view is based on a review of all of the relevant case law in this area. At the same time, my memo attempts to explain how the activities of debt settlement companies should not constitute the practice of law—any more than the negotiations entered into by realtors, nonprofit debt counseling groups, sports agents or other persons engaged in the general transactions of commerce constitute the practice of law.

Case law—both within this state and at the United States Supreme Court—has given us some direction when trying to determine whether or not certain behaviors constitute the practice of law.

The *Kolodner case (2004)* is used as the benchmark for determining this in Ohio and speaks to unauthorized practice of law in general terms. In my view, this case is easily distinguished from the present bill before you in that in the *Kolodner case*, Mr. Kolodner had already been enjoined in Florida for similar behavior, and then came to Ohio to do exactly the same thing—namely holding himself out as an attorney without having ever attended law school or being admitted to the state bar. Given the stipulated facts submitted, there was no doubt that, in holding himself out as an attorney and charging clients for his work, he was engaged in the unauthorized practice of law.

In fact, just recently the Court in a per curiam decision in the *Century Negotiations, Inc.* case (2017) relied on *Kolodner* again in deciding whether or not a debt settlement company was practicing law. Again, however, this case is distinguishable. Without attempting to make today's committee hearing an appellate argument—with too many lawyers arguing about how many angels could fit on the head of a pin—the Court did not hear evidence and independently determine the facts; rather, the respondent, *Century Negotiations, Inc.*, admitted in stipulated facts to the Board of Commissioners on the Unauthorized Practice of Law that its actions rose to the level of the practice of law. Staff at Century Negotiations will tell you the cost of arguing the case had become too burdensome for the company and they simply sought a settlement to end the matter, and—by cooperating—avoid potential costly fines.

Because this is a legal dispute, let me refer the committee to the very important case involving the Workers' Compensation system here in Ohio. In the *Cleveland Bar Association v. Compmanagement, Inc. et al* (2004) the Ohio Supreme Court, when deciding whether employee representatives, union representatives and third-party administrators were involved in the unauthorized practice of law stated, having reviewed a record of the extensive discovery and hearing held before the Board of Commissioners on the unauthorized practice of law, overruled the finding of that Board. The Court determined that the third-party administrators in that case relied on the value of the claim and prior experience in dealing with claimants. Further, the Court determined these activities did not require the specialized training and skill of an attorney. This decision squarely and more properly describes the activities of the debt settlement industry—as well as the non-profit debt counselors, realtors, sports agents, etc.

In this bill, the legislature is permitting debt settlement companies to operate in Ohio. Private enterprise would be generally doing what the nonprofit credit counseling agencies have been authorized to do here in Ohio for many decades—I should note without any objections by the bar. And, private enterprise would be doing what realtors and many other business people do when working daily in the commercial world—also without objections from the bar.

Mr. Chairman, members of the committee, currently the debt settlement industry generally cannot operate in Ohio without incurring a potential legal challenge alleging it is engaged in the unauthorized practice of law. This bill

provides an opportunity for both clarity and fairness: Should this bill pass and the industry begins engaging with business in Ohio, it undoubtedly will be challenged once again by the legal profession. The industry will then have an opportunity to have full hearings, presenting persuasive evidence and argument to the Ohio Supreme Court, the proper forum for clarification regarding whether or not the debt settlement industry is engaged in the unauthorized practice of law. Please note that the workers compensation case I just discussed clearly demonstrates that the Court can and does overrule findings of the Board of Commissioners on the unauthorized practice of law when presented with a complete record of the facts.

Additionally, this bill offers an opportunity for fairness. It will permit fair and equitable treatment among all parties who conduct themselves in a similar manner. Whether they are debt settlers, realtors, debt counselors or businesses engaged in normal commercial activity requiring negotiations as to price or other details in a transaction, they will have an opportunity to be treated equally—with fairness under the law.

We ask the Committee to consider this opportunity for both clarity and for fairness when voting on this legislation.

Thank you, Mr. Chairman, members of the Committee.

Respectfully submitted,

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