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STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN OPPOSITION OF HOUSE BILL 182

Presented by Jeffrey J. Fanger, Esq.
Before the House Financial Institutions, Housing and Urban Development Committee
Jonathan Dever, Chair
December 12, 2017

Chairman Dever, vice-chair Sprague, ranking member Smith, and members of the House Financial Institutions, Housing and Urban Development 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 182.

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 182 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 182 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 illusionary, 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 182 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 182 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.

A vote for House Bill 182 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, in addition to the clear statement of the Ohio Supreme Court staff (attached) concerning Senate Bill 120, the Senate's version of this bill, 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.

The Supreme Court of Ohio

Senate Bill 120 – Interested Party written testimony
Senate Insurance Committee

Tuesday, October 3, 2017

Chairman Hottinger, Vice-Chair Hackett, Ranking Member Brown, and members of the committee:

I want to thank you for the opportunity to provide written testimony as an interested party on Senate Bill 120. My testimony reflects the opinion of the staff of the Supreme Court of Ohio and should not be interpreted as expressing the views of the Chief Justice or Justices of the Court as to the constitutionality of the bill. However, having reviewed Senate Bill 120, we believe that the current language, with respect to debt collection services, would likely intrude upon the Court's exclusive authority to regulate the practice of law in Ohio and, by extension, its authority to prevent the unauthorized practice of law.

This bill involves authorizing nonattorneys to engage in certain debt collection activities. The activities authorized by the bill include such actions as . . . .

Article IV, Section 2(B)(1)(g) of the Ohio Constitution grants original jurisdiction to the Supreme Court of Ohio over all matters pertaining to the practice of law. On several occasions in the past, the Court has addressed the application of this constitutional provision in the context of debt collection activities. For example, in *Ohio State Bar Assn. v. Kolodner*, 103 Ohio St. 3d 504, 2004-Ohio-5581, ¶15, the Court held that the unauthorized practice of law "includes representation by a nonattorney who advises, counsels, or negotiates on behalf of an individual or business in the attempt to resolve a collections claim between debtors and creditors." And, in *Cincinnati Bar Assn. v. Jansen*, 138 Ohio St.3d 212, 2014-Ohio-512, ¶8, the Court reaffirmed this holding, finding that "the practice of law includes making representations to creditors on behalf of third parties, and advising persons of their rights, and the terms and conditions of settlement."

We understand that the bill includes uncodified language declaring that nothing contained in the legislation shall be deemed to permit the unauthorized practice of law. While this language is certainly a welcomed clarification, it does not address the underlying concern. As noted, the Ohio Constitution gives to the Supreme Court exclusive authority to regulate the practice of law. A bill declaring that a particular practice would not constitute the practice of law does not make the practice so. In effect, this declaration in uncodified language can be read to produce only one of two possible outcomes: (1) it is, in fact, authorizing the practice of law by nonattorneys contrary to the exclusive constitutional authority of the Supreme Court; or (2) it is

nullifying the very activities that it is authorizing. If the declaration is read to achieve the first outcome, then the uncodified language and the law itself are constitutionally suspect. If the declaration is read to achieve the second outcome, then any acts authorized by the law are nullified by the uncodified language since the Supreme Court has already determined that those activities by nonattorneys constitute the unauthorized practice of law.

We believe the Senate Bill 120 would authorize the practice of law by nonattorneys, declarations to the contrary notwithstanding. Thank you for the opportunity to testify as an interested party regarding Senate Bill 120.