

Supreme Court No. 84858-1

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

IN

CHAD M. CARLSEN and SHASTA CARLSEN, husband and wife; and
BARBARA HULSE; each individually and on behalf of a Class of
similarly situated Washington residents,

Plaintiffs,

vs.

FREEDOM DEBT RELIEF, LLC, a Delaware limited liability company;
FREEDOM FINANCIAL NETWORK, LLC, a Delaware limited liability
company; ANDREW HOUSSEY, a resident of California; and
BRADFORD STROH, a resident of California; JOHN DOES 1-5; and
JANE DOES 1-5,

Defendants.

OPENING BRIEF

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I. INTRODUCTION

Exacting economic times have forced many American families into shouldering heavy unsecured credit card debt. These families are especially vulnerable to debt settlement companies who promise to cure consumers' debt problems, but whose rapacious up-front fees only worsen those families' predicament.

Washington, like other states, has adopted legislation to protect consumers from unfair practices of for-profit businesses that purport to assist consumers in managing, settling, or otherwise satisfying their debts. In that regard, RCW 18.28.080(1) places restraints on the fees such for-profit companies may charge. Total fees may not exceed fifteen percent (15%) of the indebtedness subject to debt adjustment. To safeguard against "front-loading" of fees, initial fees are limited to twenty-five dollars (\$25.00) and the fee retained by the debt adjuster from any one payment made by the debtor over the course of the debt management program may not exceed fifteen percent (15%) of the payment.¹

¹ The continuing need for effective public measures to prevent unscrupulous debt settlement activities was recently underscored by the Federal Trade Commission's ("FTC") promulgation of new rules governing the debt adjusting industry through amendment of the Telemarketing Sales Rule ("TSR"). *See generally* Telemarketing Sales Rule, 16 C.F.R. pt. 310 (Nov. 12, 2010). 16 C.F.R. § 310.2(m) broadly defines "debt relief service" as "any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the

Washington's fundamental public policy of protecting its residents from predatory debt adjuster fees is made plain in RCW 18.28.090:

If a debt adjuster contracts for, receives or makes any charge in excess of the maximums permitted by this chapter, except as the result of an accidental and bona fide error, the debt adjuster's contract with the debtor shall be void and the debt adjuster shall return to the debtor the amount of all payments received from the debtor or on the debtor's behalf and not distributed to creditors.

Washington's strong public policy is further reinforced by RCW 18.28.185, which declares that any violation of chapter 18.28 RCW constitutes an unfair or deceptive business practice under chapter 19.86 RCW, and by RCW 18.28.190, which makes violation of the statute a misdemeanor crime.

The questions certified to this Honorable Court present an opportunity to address, for the first time, core provisions of the Debt Adjusting act animating this strong public policy.

terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." A central provision of the new rules prohibits the charging of up-front fees. *See* 16 C.F.R. §§ 310.4(a)(5)(i)(A)-(B) (Nov. 12, 2010). The new rules, however, contain no provisions guarding against predatorily high fees.

II. STATEMENT OF FACTS

A. **Procedural Background.**

Plaintiffs Chad M. and Shasta Carlsen, husband and wife, (“Carlsen”) and Barbara Hulse (“Hulse”) are Washington residents. On February 27, 2009, the Carlsons commenced this action in the Federal Court for the Eastern District of Washington, on behalf of themselves and a Class of similarly situated Washington families. Hulse subsequently joined in the action through an amended complaint as an additional proposed class representative. **Ct. Rec. 30** (*Second Amended Complaint*).

The Court certified the matter as a class action pursuant to Fed. R. Civ. P. 23(b)(3) on March 26, 2010, on behalf of a class composed of all Washington residents who executed a “Debt Reduction Agreement” with Freedom Debt Relief (“FDR”) and/or Freedom Financial Network (“FFN”). **Ct. Rec. 87** (*Class Certification Order*).

FDR is a for-profit business that markets “debt reduction services” to consumers having substantial credit card debt. FFN is the current parent company of FDR and predecessor for-profit company engaged in the same consumer debt management activities. Bradford Stroh (“Stroh”) and Andrew Housser (“Housser”) are co-founders, principals, and primary

moving agents behind FDR and FFN. **Ct. Rec. 30** (*Second Amended Complaint at ¶25*).²

The Second Amended Complaint alleges that Class Members, including Carlsens and Hulse, executed standardized “Debt Reduction Agreements” with FDR and/or FFN which impermissibly provided for an initial fee exceeding twenty-five dollars (\$25.00), impermissibly provided for fees exceeding fifteen percent (15%) of any one payment made by the Class Member, and impermissibly provided for a total fee exceeding fifteen percent (15%) of the total debt listed on the contract. **Ct. Rec. 30** (*Second Amended Complaint at p. 11*). Defendants have generally challenged the applicability of Washington’s Debt Adjusting statute to their business activities. *See e.g. Ct. Rec. 31 (Answer to Second Amended Complaint)* and **Ct. Rec. 60 (Defendants’ Response in Opposition to Plaintiffs’ Motion for Summary Judgment)**.

² The Federal Court for the Eastern District of Washington has also certified questions to this Court in a related case, *Carlsen v. Global Client Solutions*, CV-09-246-LRS. **Ct. Rec. 87**. Global Client Solutions, LLC (“GCS”), in partnership with Rocky Mountain Bank and Trust (“RMBT”), establishes, maintains, and manages the debt settlement accounts intrical to FDR’s “debt reduction program.” GCS, as custodian, receives and holds the specified payments of FDR’s customers in its custodial account for purposes of securing and paying FDR’s fees and for purposes of ultimately distributing residual funds among consumer’s creditors, should settlements actually be achieved by FDR.

As a consequence of motions for dismissal by defendants and motion for summary judgment by plaintiffs, the Honorable Judge Lonny R. Suko, Chief United States District Judge, on July 23, 2010, issued an order of Certification to the Washington State Supreme Court with respect to three questions of local law. **Ct. Rec. 137.**

B. Factual Allegations Underlying the Questions Certified.

The Carlsens, residents of Spokane County, Washington, responded to marketing solicitations by FDR on July 21, 2007, which sought their participation in FDR's "Debt Reduction Program." **Ct. Rec. 30** (*Second Amended Complaint at ¶4*); **Ct. Rec. 51** (*Declaration of Shasta Carlsen in Support of Summary Judgment at ¶2*). On November 20, 2008, Hulse, a resident of Grant County, Washington, similarly responded to marketing solicitations by FDR. **Ct. Rec. 30** (*Second Amended Complaint at ¶5*); **Ct. Rec. 52** (*Declaration of Barbara Susie Hulse in Support of Summary Judgment at ¶2*). In excess of 1,000 other Washington families have similarly engaged themselves in FDR's "Debt Reduction Program" by executing FDR's standardized "Debt Reduction Agreement."

Participation in FDR's Debt Reduction Program involves specified automatic monthly payments by the debtor into a debt settlement account established, managed, and maintained by FDR's business associate,

Global Client Services (“GCS”). FDR’s up-front fees and periodic fees are automatically paid from the debt settlement account, as are additional fees charged by GCS. For the first several months of participation in FDR’s Debt Reduction Program, FDR’s fees substantially consume the debtor’s debt settlement payments. In the event the debt settlement account accumulates funds sufficient to attempt a negotiated settlement of one of the debtor’s scheduled credit card debts, FDR (or some business on its behalf) attempts to secure a settlement involving partial payment of a debt. If settlement is secured, the debt settlement is paid from the debt settlement account. *See Ct. Rec. 54-3 (Attach. 1 to Statement of Material Facts - Hulse Class Cert. Decl. ¶¶ 8-11); and Ct. Rec. 54-5 (Attach. 3 to Statement of Material Facts - Carlsen Class Cert. Decl. ¶¶ 8-11).*

The Carlsens agreed to participate in FDR’s Debt Reduction Program through execution of FDR’s standardized “Debt Reduction Agreement.” **Ct. Recs. 54-5 and 54-6** (*Carlsen Class Cert. Decl. ¶6 and Ex. A attached thereto (Debt Reduction Agmt.)*). Similarly, following receipt by Hulse of a notice from FDR congratulating her on having been “approved” to participate in FDR’s Debt Reduction Program, Hulse executed FDR’s standardized “Debt Reduction Agreement.” **Ct. Recs. 54-3 and 54-4** (*Hulse Class Cert. Decl. ¶6 and Ex. A attached thereto (Debt Reduction Agmt.)*). Under the terms of the respective Debt Reduction

Agreements, FDR agreed to undertake settlement of the Carlsens' specified credit card debts, totaling \$41,064.00, and undertake settlement of Hulse's specified credit card debts, totaling \$35,298.00. **Ct. Recs. 54-3 and 54-5** (*Hulse and Carlsen Class Cert. Decls. at ¶ 9*); and **Ct. Recs. 54-4 and 54-6** (*Exs. A. to Hulse and Carlsen Class Decls. (Debt Reduction Agmts)*).

Pursuant to FDR's standardized fee schedule set forth in FDR's Debt Reduction Agreement, Carlsen and Hulse each agreed to pay an upfront five percent (5%) "retainer fee" and a ten percent (10%) "service fee" calculated on the total value of credit card debt subject to settlement by FDR. FDR's "retainer fee" was "due in full upon delivery of signed Agreement to FDR . . ." *Id. at ¶ 8 and Exs. A.*

On this fee basis, FDR's Debt Reduction Agreement specified that the Carlsens pay \$684.40 each month for the first three months in payment of the "Retainer Fee" and pay \$273.76 each month for the following fifteen (15) months in payment of the "Service Fee," until a total of fifteen percent (15%) of the scheduled debt had been paid. **Ct. Rec. 54-5** (*Carlsen Class Cert Decl. at ¶ 9*). Similarly, FDR's Debt Reduction Agreement with Hulse specified that Hulse pay FDR \$441.23 each month for the first four months in payment of the "Retainer Fee" and thereafter pay each month \$235.32 as a "service fee" for the next fifteen (15) months

until a total of fifteen percent (15%) of the scheduled debt had been paid.

Ct. Rec. 54-3 (*Hulse Class Cert. Decl.* at ¶ 9).

To secure payment of FDR's fees and funds with which to pay debt settlements, the Debt Reduction Agreement with the Carlsens specified that a "Special Purpose Account" managed by GCS would be established into which the Carlsens authorized automatic transfers each month of \$837.00 from their personal Washington bank account. The Debt Reduction Agreement specified that FDR's monthly retainer fees and service fees would be automatically paid to FDR from the Special Purpose Account. *See Ct. Rec. 51* (*Carlsen SJ Decl.* at ¶ 3). Payment to FDR of \$684.40 in Retainer Fees constituted 81.77 percent of each monthly payment made by the Carlsens during the first three months of participation in FDR's Debt Reduction Program. FDR's "service fee" of \$273.76 constituted 32.71 percent of each monthly payment made thereafter. *Id.* at ¶ 4; *see also Ct. Rec. 54-17* (*Bergland Class Cert. Decl., Ex. F*).

In like fashion, to secure payment of FDR's fees and funds with which to pay debt settlements, the Debt Reduction Agreement with Hulse specified that a "Special Purpose Account" managed by GCS would be established into which Hulse would authorize automatic transfers each month of \$600.00 from her personal Washington bank account. The Debt

Reduction Agreement specified that FDR's monthly retainer fees and service fees would be automatically paid to FDR from the Special Purpose Account. *See Ct. Rec. 52 (Hulse SJ Decl. at ¶ 3)*. Payment of FDR's Retainer Fees consumed 73.54% of each monthly payment made by Hulse during the first four months of her participation in FDR's Debt Reduction Program. FDR's "service fee" consumed 39.22 percent of each monthly payment to be made thereafter. *Id.* at ¶ 4; *see also Ct. Rec. 54-15 (Ex. G to Declaration of Kristy L. Bergland filed in Support of Motion for Class Certification)*. Freedom Debt Relief's debt settlement efforts depend on participants stopping their payments to creditors.

III. QUESTIONS PRESENTED AND SUMMARY OF

ANSWERS

Question 1: Does the term "debt adjusting," as defined in RCW 18.28.010(1), apply to a debt settlement company which, on behalf of client debtors, negotiates proposed settlements of amounts owed by the client debtors to their creditors, where: (a) the settlement must be authorized or approved by the client debtors, and (b) the debt settlement company does not make any payment to the creditors?

ANSWER: Yes. A debt settlement company is engaged in "managing, counseling, settling, adjusting, prorating, or liquidating of the indebtedness of a debtor," within the meaning of RCW 18.28.010(1) when it solicits debtors' participation in a debt settlement program involving periodic payments by debtors in amounts specified by that business and consequent efforts by the business to secure compromise

settlements of debtors' debts using the funds accumulated through those specified payments. The fact that negotiated settlements may involve debtors' consent is immaterial to the statute's purpose and operation. Similarly, whether the debt settlement company itself acts as custodian of the specified payments is a non-essential factor.

Question 2: In determining the amount of fees that may be charged by a "debt adjuster" to a debtor, what is the meaning of the term "payment" as found in RCW 18.28.080(1)?

ANSWER: The term "payment," as used in RCW 18.28.080(1), includes periodic debt settlement payments specified by a debt settlement company for participation in its debt reduction program. Whether the specified payments by debtors are directed to the debt settlement company itself or to a third-party custodian with whom the debt settlement company collaborates, is immaterial to the consumer protection aims underlying the fee limitations set forth in RCW 18.28.080(1).

Question 3: Where a debt adjuster's contract with a debtor is void under RCW 18.28.090 because the debt adjuster has charged a fee in excess of that permitted by RCW 18.28.080(1), and the debt adjuster is required to return to the debtor the amount of all payments received from the debtor, does RCW 18.28.090 permit an equitable offset be applied against those payments in recognition of any reduction in the debt negotiated by the debt adjuster?

ANSWER: No. RCW 18.28.090 unambiguously effectuates a remedy of full disgorgement as against a debt adjuster whose misconduct is other than accidental or bona fide error. Equitable considerations do not alter the remedy specified in RCW 18.28.090 because equity follows the law.

IV. ARGUMENTS

The overarching “aim of statutory interpretation is ‘to discern and implement the intent of the legislature.’” *Sheehan v. Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). In this regard, Courts “assume the legislature means exactly what it says . . .[.]” *In re Wissink*, 118 Wn. App. 870, 874, 81 P.3d 865 (2003), and will “evaluate a statute’s plain language to determine legislative intent.” *Greenen v. Bd. of Accountancy*, 126 Wn. App. 824, 830, 110 P.3d 224 (2005), *rev. denied* 156 Wn.2d 1030 (2006). *See also Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

Four factors guide the Court in determining a term’s plain meaning: “[1] the ordinary meaning of the language at issue, [2] the context of the statute in which that provision is found, [3] related provisions, and [4] the statutory scheme as a whole.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). *See Sheehan*, 155 Wn.2d at 797 (“A provision’s plain meaning may be ascertained by an ‘examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found.’”) (quoting *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)); *C.J.C. v. Corp. of the*

Catholic Bishop of Yakima, 138 Wn.2d 699, 708, 985 P.2d 262 (1999) (“Related statutory provisions are interpreted in relation to each other and all provisions harmonized.”).

Courts will not, however, endeavor to interpret an unambiguous statute. *In re Wissink*, 118 Wn. App. at 874 (citing *Frazier v. Dep’t of Labor & Indus.*, 101 Wn. App. 411, 418, 3 P.3d 221 (2000)). If the statute’s meaning is clear, the court must give effect to its language regardless of the “rules of statutory construction.” *In re Wissink*, 118 Wn. App. at 874. *See also Sheehan*, 155 Wn.2d at 797 (“Only when the plain, unambiguous meaning cannot be derived through such an inquiry will it be ‘appropriate [for a reviewing court] to resort to aids to construction.’”) (quoting *Campbell & Gwinn*, 146 Wn.2d at 12). “A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.” *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001) (emphasis added). When a court is faced with multiple meanings, it is most important to remember that the paramount principles are to “examine the statute as a whole and . . . not create an absurd result.” *Greenen*, 126 Wn. App. at 830 (citing *Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep’t of Ecology*, 146 Wn.2d 778, 791, 51 P.3d 744 (2002)).

A. A Debt Settlement Company is Engaged in “managing, counseling, settling, adjusting, prorating, or liquidating” the Indebtedness of a Debtor, Within the Meaning of RCW 18.28.010(1) When it Solicits Debtors’ Participation in a Debt Reduction Program Involving Specified Periodic Payments by Debtors and Efforts to Secure Settlements of Debtors’ Specified Debts Using Funds Accumulated Through Those Payments.

Washington’s Debt adjusting statute is plainly aimed at protecting Washington consumer debtors from a range of unfair business practices that have historically proven endemic to the “for-profit” industry engaged in assisting consumers in managing their debts. *See Performance Audit of Debt Adjusting, Licensing and Regulatory Activities*, Report No. 77-13, Jan. 20, 1978 at p. 11 (on file with Wash. State Archives, H.B. 86 (Wash. 1979)). Chief among those practices the statute seeks to curb is burdening already indebted consumers with predatory or heavily frontloaded fees. *See RCW 18.28.090.*

As a remedial statute, the Debt Adjusting statute should be broadly construed to achieve its purposes. *See, e.g., State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992) (“As a remedial statute, the [Automotive Repair Act] is to be liberally construed to further this legislative purpose.”); *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 882, 154 P.3d 891 (2007) (“[T]he prevailing wage act is remedial legislation designed to protect the employees of government contractors in this state

from substandard earnings and to preserve local wage standards. (citation omitted) As such, the act and regulations promulgated thereunder are to be liberally construed in favor of the beneficiary of the act, the worker.”); *see also* RCW 18.28.185 (violation of the Washington debt adjusting statute “constitutes an unfair or deceptive act or practice” under the Washington Consumer Protection Act).

RCW 18.28.010 defines key terms used in the Debt Adjusting statute, including the collective term embracing those business activities subject to the statute, and from which the statute derives its name, viz “debt adjusting”:

Unless a different meaning is plainly required by the context, the following words and phrases as hereinafter used in this chapter shall have the following meanings:

- (1) “Debt adjusting” means the managing, counseling, settling, adjusting, prorating, or liquidating of the indebtedness of a debtor, or receiving funds for the purpose of distributing said funds among creditors in payment or partial payment of obligations of a debtor.

RCW 18.28.010(1).

The term “debt adjusting” is, thus, broadly, inclusively, and disjunctively defined, employing common language. Consistent with the consumer protection goals served by the statute, the term encompasses a range of debt relief activities.

The first question posed by the Federal District Court, and the factual allegations underlying its formulation, do not require the Court to explore the outermost reaches of the term “debt adjusting.” A business is plainly engaged in “managing, counseling, settling, adjusting, prorating, or liquidating” the indebtedness of a debtor, within the ordinary meaning of those words when it solicits debtors’ participation in a “Debt Reduction Program” involving periodic specified payments by debtors and efforts to secure settlements of debtors’ debts using the funds accumulated through those specified payments.

FDR’s own characterization of its services fall squarely within the broadly defined term, “debt adjusting:” “FDR will act as an intermediary between Client and Client’s creditors (the “Creditors”) for the express purpose of attempting to negotiate with creditors of Client with the intent of reducing Debts to an amount that will enable the Client to pay the reduced balance as full settlement of all debt.” FDR’s Debt Reduction Agreement, further, provides that “FDR guarantees that it will, during the Client’s plan period, negotiate, reduce, and deliver to Client a settlement offer from Client’s creditors” **Ct. Rec. 54-6** (*Ex. A. to Carlsen Class Cert. Decl. (Debt Reduction Agmt.)*). In performing its functions, FDR issues cease and desist letter to its clients’ creditors and FDR requests that its client-debtors submit change of phone number and address forms to

their creditors so that all creditor contact is with FDR instead of the debtor. See **Ct. Rec. 54-4** (*Ex. C to Carlsen SJ Decl. (FDR Solicitation materials)*).

The fact that settlements invariably involve a debtors' consent, whether directly or implicitly, is both unremarkable and immaterial to the statute's purposes and operation. That the ordinary meaning of the term "settling," as found in RCW 18.28.010(1), includes negotiating settlements, is made plain in FDR's own candid characterizations of its business activity: "Freedom Debt Relief Surpasses \$500 Million Mark in Settlements," **Ct. Rec. 81-6** (*Freedom Debt Relief Press Release, Ex. F to the Declaration of Rachel Rodriguez in Support of Plaintiffs' SJ Reply*); "the company settled 32.6 million in consumer debt [in October]" *Id.*; "Freedom Debt Relief ... settled a record 28.6 million in consumer debt during September" **Ct. Rec. 81-5** (*Freedom Debt Release press release, Rodriguez Decl. Ex. E*); "FDR has settled \$152 million in consumer debt" **Ct. Rec. 81-3** (*Freedom Debt Relief press release, Rodriguez Decl. Ex. C*); "FDR's Debt Reduction Program, also known as Debt Negotiation or Debt Settlement, is an aggressive approach to becoming debt free" **Ct. Rec. 81-2** (*Freedom Debt Relief Web site, Rodriguez Decl. Ex. B*).

RCW 18.28.010(1), finally, clearly contemplates that a business engaged in managing, counseling, settling, adjusting, prorating, or

liquidating of the indebtedness of a debtor is engaged in “debt adjusting” for purposes of the statute, without regard for whether the business also acts as the custodian of the funds used to pay the debts. RCW 18.28.010(1), in this regard, is written in the disjunctive.³ Receiving funds for the purpose of distributing said funds among creditors in payment or partial payment of creditors, thus, is a sufficient but non-necessary activity constituting “debt adjusting.” Washington’s disjunctive debt adjusting statute, in this regard, is consonant with comparable statutes of sister jurisdictions. *See, e.g.*, GA. CODE ANN. § 18-5-1(1); HAW. REV. STAT. § 446-1(2); IOWA CODE § 533A.1(2); KAN. STAT. ANN. § 50-1117(d); KY. REV. STAT. ANN. § 380.010(2); LA. REV. STAT. ANN. § 14:331(B)(2); ME. REV. STAT. ANN. Tit. 32, § 6172(2); MASS. GEN. LAWS Ch. 180, §4A; MISS. CODE ANN. § 81-22-3(b); MONT. CODE ANN. § 30-14-2101(1)(a);

³ The legislature aptly distinguished between the terms “and” and “or” as conjunctive and disjunctive terms elsewhere within RCW 18.28.010(1) and in other sections of chapter 18.28 RCW. *See, e.g.*, RCW 18.28.090(1) (making void any contract and requiring the return of the debtor’s payments when a debt adjuster “contracts for, receives *or* makes any charge” in excess of the maximums allowed by Washington law) (Emphasis added); RCW 18.28.130(1) (debt adjusters shall not “Prepare, advise, *or* sign a release of attachment *or* garnishment, stipulation, affidavit for exemption, compromise agreement *or* other legal *or* court document.”) (emphasis added); RCW 18.28.010(2)(b) (setting forth a list of entities that may be exempt from the statute, including entities “doing business under and as permitted by any law of this state *or* of the United States relating to banks, ... title insurance companies, *or* insurance companies...” (emphasis added).

N.H. REV. STAT. ANN. § 399-D:2(IV); N.J. STAT. ANN. § 17:16G-1(c)(1) and N.J. Admin. Code Tit. 3, § 3:25-1.1; N.C. GEN. STAT. § 14-423(2); N.D. CENT. CODE § 13-06-01(1); OHIO REV. CODE ANN. § 4710.01(B); OR. REV. STAT. § 697.602(2); S.D. CODIFIED LAWS § 37-34-1; TENN. CODE ANN. § 47-18-104(a)(39)(C); TEX. FIN. CODE ANN. § 394.202(6); VT. STAT. ANN. Tit. 8, § 4861(2); RCW 18.28.010(1); WYO. STAT. ANN. § 33-14-101(a)(ii).⁴

A contrary reading of the Washington statute is not reconcilable with the statute's purposes or with the principles of statutory interpretation governing remedial statutes. The for-profit industry engaged in managing, counseling, settling, adjusting, prorating, or liquidating consumer debt could secure immunity from the statute, while promulgating the very evils the statute sought to reign in, through the simple act of securing a third-party associate to act as custodian of the debt reduction payments the debtors are required to pay. Such a reading of the term "debt adjusting," thus, would gut Washington's Debt Adjusting statute of its public policy value.

⁴*Compare with* ILL. COMP. STAT. 205/665-2 ("Debt management service' means the planning and management of the financial affairs of a debtor for a fee *and the receiving of money from the debtor* for the purpose of distributing it . . .") (emphasis added).

B. The Term “Payment,” as Used in RCW 18.28.080(1), Includes Debt Settlement Payments Specified by a Debt Settlement Company for Participation in its Debt Settlement Program.

A core provision protecting Washington consumers from unfair debt adjusting activities is RCW 18.28.080(1), which prohibits predatory fees, including excessive up-front fees, fees that consume a disproportionately high percentage of the debtor’s periodic payments, or fees that are excessive in relation to the total debt being adjusted.

In this regard, RCW 18.28.080(1) provides:

(1) By contract a debt adjuster may charge a reasonable fee for debt adjusting services. The total fee for debt adjusting services may not exceed fifteen percent of the total debt listed by the debtor on the contract. The fee retained by the debt adjuster from any one payment made by or on behalf of the debtor may not exceed fifteen percent of the payment. The debt adjuster may make an initial charge of up to twenty-five dollars which shall be considered part of the total fee. If an initial charge is made, no additional fee may be retained which will bring the total fee retained to date to more than fifteen percent of the total payments made to date. No fee whatsoever shall be applied against rent and utility payments for housing.

RCW 18.28.080(1).

Certain of the limitations set forth in RCW 18.28.080(1) are made in respect of “payments.” The context of these provisions make evident that the limitations are imposed in respect of payments being made by the debtor under the subject debt-adjusting plan. The statute draws no distinction between payments directed to the debt adjuster versus those

directed to a third-party custodian with whom the debt adjuster has collaborated. Moreover, such a distinction would not serve the purposes of the statute. The overarching aim of RCW 18.28.080(1), as declared in its opening sentence, is to ensure fairness in the fees charged by the debt adjuster. The limitation set forth with respect to “any one payment made by or on the behalf of a debtor” serves this beneficial purpose without limitation as to whom the debtor’s payments happened to be directed. Likewise, the limitation on fees as to “payments made to date” serves its public policy purpose without limitation as to whom the debtor is directed to make his payments.

RCW 18.28.080(1), therefore, liberally construed to achieve its legislative purpose, must be read to include debt settlement payments specified by a debt settlement company for participation in its debt settlement program, without regard to whom the debtor is directed to make those payments.

C. RCW 18.28.090 Unambiguously Effectuates a Remedy of Full Disgorgement; Equitable Consideration Cannot Controvert the Statutory Remedy Set Forth in RCW 18.28.090.

Where a debt adjuster’s contract with a debtor is void under RCW 18.28.090 because the debt adjuster has charged a fee in excess of that permitted by RCW 18.28.080(1), the debt adjuster is required to return to the debtor the amount of all payments received from the debtor. RCW

18.28.090 does not permit an equitable offset be applied against those payments in recognition of any reduction in the debt negotiated by the debt adjuster. This conclusion is entailed in a plain reading of RCW 18.28.090 and in established equitable rules governing the relationship between law and equity.

RCW 18.28.090 provides: "If a debt adjuster contracts for, receives or makes any charge in excess of the maximums permitted by this chapter, except as the result of an accidental and bona fide error, the debt adjuster's contract with the debtor shall be void and the debt adjuster shall return to the debtor the amount of all payments received from the debtor or on the debtor's behalf and not distributed to creditors."

RCW 18.28.090 unambiguously mandates a remedy of full disgorgement. To this end, the debt adjuster's contract is void (not merely voidable). The "amount" that "shall" be refunded to the debtor is all payments received from the debtor not paid to a creditor. The statutory language of RCW 18.28.090 is irreconcilable with the debt adjuster also retaining fees to the extent the debt adjuster may have successfully settled, adjusted, prorated, or liquidated a debt. Such a reading would financially reward and encourage the business misconduct the statute seeks to prevent by permitting the party who unsuccessfully committed a business crime to, worst case, receive fees for work performed.

Equity cannot alter the outcome called for by statute. Equity follows the law; it does not controvert it. “[W]herever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.” *Magniac v. Thomson*, 56 U.S. 281, 299, 15 How. 281, 14 L. Ed. 696 (1853). As explained by the United States Supreme Court:

Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and [w]here the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof.

Hedges v. Dixon County, 150 U.S. 182, 192, 14 S. Ct. 71, 37 L. Ed. 1044 (1893).

In the case *sub judice*, RCW 18.28.090 specifies the rights and duties and obligations of the parties. An equitable offset, were the maxims of equity otherwise favorable to such an offset, would work to controvert both the remedy specified in RCW 18.28.090 and the purposes underlying that remedy.

Finally, even were equity empowered to act, violations of the Debt Adjusting statute are acts singularly unsuited to equitable offset.

Violations of the act, such as charging of excessive fees, are a misdemeanor and a per se unfair and deceptive business practice. RCW 18.28.190; RCW 18.28.185. One who seeks equity must do equity and one who comes into equity must come with clean hands. *See generally* Roger Young and Stephen Spitz, *Suem-Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. Rev. 175 (2003). "Basic to equity is the proposition that a court of equity will not intervene on behalf of a party whose conduct has been unconscientious, unjust, or marked by a lack of good faith." *King County v. Taxpayers of King County*, 133 Wn.2d 584, 644, 949 P.2d 1260 (1997), *cert. denied*, 523 U.S. 1076 (1998) (citing *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 265 P.2d 1045 (1954); *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 101 P.2d 973 (1940)).

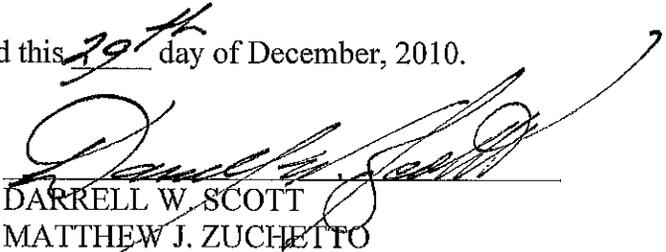
Indeed, "[e]quity requires that those seeking its protection shall have acted fairly and without fraud or deceit as to the controversy in issue." *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985). "[T]he equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the [opposing

party].” *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 65 S. Ct. 993, 89 L. Ed. 1381 (1945), *reh’g denied*, 325 U.S. 893 (1945). RCW 18.28.090, therefore, is not subject to an equitable offset for fees relating to debts actually settled.

V. CONCLUSION

Plaintiffs, therefore, respectfully request that this Court answer the questions posed by the District Court in the manner set forth in this Brief.

Respectfully submitted this 29th day of December, 2010.



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CERTIFICATE OF FILING AND SERVICE

I, Samantha Simatos-Baeschlin hereby certify that on the 29th day of December, 2010, I caused to be sent for filing one original and one copy of the Plaintiffs' Opening Brief via U.S. mail to:

Supreme Court State of Washington
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

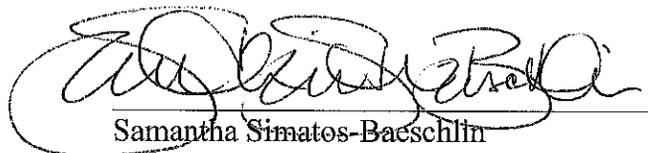
I also caused to be served true and correct copies of the same to the following persons via U.S. mail:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 29th day of December, 2010, at Spokane,
Washington.


Samantha Simatos-Baeschlin