
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 HOUSSER, a resident of California; and
BRADFORD STROH, a resident of California; JOHN DOES 1-5; and
JANE DOES 1-5,

Defendants.

ANSWERING BRIEF (DEFENDANT)

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I. INTRODUCTION

The issues presented to this Court relate to the scope of a narrow statutory scheme, RCW 18.28 (the “Debt Adjusting statute”), that was originally enacted in 1967 to address a specific type of business activity. Now, nearly half a century later, Plaintiffs Chad Carlsen, Shasta Carlsen and Barbara Hulse (collectively, “Plaintiffs”) argue that the statute should be read to encompass an entirely different type of business: “debt reduction,” by which financially constrained consumers can retain an independent advocate to act as an intermediary for the purpose of negotiating with creditors (and securing proposed resolutions of those debts at substantial discounts). As discussed below, the relatively recent “debt reduction” model presents none of the perceived dangers that served as the impetus for the enactment of RCW 18.28 and, more importantly, plainly falls outside the statutory definition of “debt adjusting.”

At the time the Washington Legislature enacted RCW 18.28, an account of the debt adjusting industry noted that “[d]ebt adjusters, also known as budget planners, credit counselors, debt poolers or consolidators, financial managers or proraters, attempt to gain time for the debtor by formulating a plan whereby whatever weekly or monthly sum the debtor can afford is distributed among the creditors by the debt adjuster.” Lawrence T. Bench, *Commercial Debt Adjustment: An*

Alternative to Consumer Bankruptcies?...., 9 B.C.L. Rev. 108, 108 (1967).

In other words, a “debt adjuster” is one who takes money from a consumer, holds the money in its accounts and then distributes the money to the creditors of the consumer in payment of the consumer’s debt.

In recognition of the inherent dangers of a business model where the debt adjuster has control over consumer funds, states, like Washington, drafted statutes which built in safe guards to protect against possible misuse of those funds. Bench, *supra* at 112-16. For example, the Debt Adjusting statute requires, among other things, trust accounts to prevent commingling of funds, regular accountings to the consumer of amounts disbursed to creditors, permanent records of all payments by consumers and disbursements to creditors, as well as distribution of funds on a regular basis to creditors. See e.g., RCW 18.28.150; RCW 18.28.110(1),(4),(5). See also State of Wash. Leg. Budget Comm., Performance Audit - Debt Adjusting, Licensing and Regulatory Activities, Rep. No. 77-13, at 3 (1978) (on file with Wash. State Archives, H.B. 86 (Wash. 1979)) (describing “debt adjusting” as “the act of distributing an overburdened debtor’s available income among outstanding creditors”). Indeed, a perusal of the entire statute and available legislative history make clear that the Debt Adjusting statute was meant to regulate only those companies who receive funds from the debtor for purposes of

disbursal to creditors. In other words, under the debt adjusting model, the debt adjuster is the one who effectuates the settlement, not the consumer.

By contrast, defendant Freedom Debt Relief, LLC (“FDR”) provides a distinctly different service – negotiation with creditors to attempt to reduce the amount owed by the consumer (“debt reduction” services). Plaintiffs themselves concede that FDR’s services are limited exclusively to negotiating settlements with its clients’ creditors. Once FDR’s negotiations result in a settlement offer from the creditor, the settlement is *authorized by the client* and *paid by the clients (not FDR)*, from third-party bank accounts wholly owned and *controlled by the clients* (again *not FDR*).

Because FDR merely acts as an intermediary and has no authority to effectuate settlements for clients or make payments on their behalf, it does not meet the statutory definition of “debt adjusting.” Furthermore, because it never controls or distributes client funds, FDR’s debt reduction model avoids the pitfalls associated with the debt adjusting business. Thus, the plain meaning of the Debt Adjusting statute and the legislative history make clear that the statute is inapplicable to FDR and its business. Plaintiffs’ arguments to the contrary are premised on mischaracterizations of the record and sweeping legal conclusions that are devoid of statutory authority.

II. STATEMENT OF FACTS

A. Parties and Other Relevant Entities

1. The Freedom Defendants

Freedom Financial Network, LLC (“FFN”), which is headquartered in San Mateo, California, is the parent of FDR. FFN employs over 500 people, and has been recognized by both the San Francisco Business Times and the Phoenix Business Journal as one of the Bay Area’s and the Phoenix area’s “Best Places to Work” in both 2008 and 2009. **Ct. Rec. 68** (Declaration of Andrew Houser in Opposition to Pls.’ Mot. for Class Certification and Summary Judgment (“Houser Decl.”), ¶¶ 11, 20). FFN was founded by Stanford Business School graduates Andrew Houser and Bradford Stroh, recipients of Ernst & Young’s 2008 “Entrepreneur of the Year” awards for Northern California. *Id.* ¶¶ 4-5, 21.

FDR, a wholly owned subsidiary of FFN, provides debt reduction services to financially constrained clients who can no longer afford to make minimum monthly payments on their unsecured debt (usually credit cards), but who wish to avoid bankruptcy. **Ct. Rec. 68** (Houser Decl., ¶ 6). FDR negotiates with creditors and collection agencies on behalf of its clients to resolve their outstanding credit balances. FDR is able to secure offers from creditors to resolve outstanding debt balances at substantial

discounts, often 50 percent or better. *Id.* ¶ 28. Since 2003, FFN and FDR have provided debt reduction services to over 70,000 clients throughout the United States. By early 2010, FDR was negotiating approximately 5,000 to 6,000 credit card accounts on behalf of its clients each month, resolving over \$30 million in debt balances per month. *Id.* ¶ 12.

2. Plaintiffs

Plaintiffs Chad and Shasta Carlsen (husband and wife) are Washington residents and former customers of FDR. **Ct. Rec. 30** (SAC ¶ 4); **Ct. Rec. 54-6** (Ex. A to Declaration of Shasta Carlsen in Support of Mot. for Class Certification (“Carlsen Decl., Ex. A - Carlsen Debt Reduction Agreement”)). Plaintiff Barbara Hulse is also a Washington resident and a former customer of FDR. **Ct. Rec. 30** (SAC ¶ 5); **Ct. Rec. 54-4** (Ex. A to Declaration of Barbara Susie Hulse in Support of Mot. for Class Certification (“Hulse Decl., Ex. A - Hulse Debt Reduction Agreement”)). They represent a class of Washington customers who paid fees to FDR for debt reduction services. **Ct. Rec. 87** (Order Granting Mot. for Class Certification (“Class Certification Order”) at 20).

3. RMBT and GCS

Rocky Mountain Bank and Trust (“RMBT”) is a Colorado bank at which many FDR clients opened FDIC-insured accounts for the purpose of saving funds to settle their debts. **Ct. Rec. 68** (Housser Decl., ¶ 47).

Global Client Solutions, LLC (“GCS”) is an Oklahoma company which has been retained by RMBT (and other banks) as an agent to provide payment processing services (i.e., accepting deposits on behalf of debt reduction customers and remitting settlement payments from those customers to their creditors). *Id.* ¶¶ 46-47, 61. GCS is not an agent for FFN, FDR or any of the other Freedom Defendants. *Id.* ¶ 61; *see also Ct. Rec. 63* (Declaration of Bradford Stroh in Opposition to Pls.’ Mot. for Class Certification and Summary Judgment (“Stroh Decl.”), ¶ 12); *Ct. Rec. 83, Ex. A* (Declaration of Robert E. Merrick (“Merrick Decl.”), ¶ 9). Moreover, FFN, FDR, Housser and Stroh have no financial interest in GCS or RMBT, nor do they receive any consideration from GCS or RMBT. *Ct. Rec. 68* (Housser Decl., ¶¶ 47, 61); *Ct. Rec. 63* (Stroh Decl., ¶ 12); *Ct. Rec. 83, Ex. A* (Merrick Decl., ¶ 10). GCS and RMBT are not defendants in this case, but have been sued by the Carlsens in a separate action. *See Carlsen v. Global Client Solutions, LLC*, Case No. 09-CV-00246-LRS (E.D. Wash. 2009).

B. Facts Underlying the Questions Certified.

1. FDR’s Debt Reduction Business

FDR negotiates with creditors and collection agencies on behalf of clients who are experiencing financial hardship and can no longer afford to make monthly payments on their unsecured debts. By acting as an

advocate for consumers in negotiations with creditors and collection agencies, FDR offers these consumers a path to get out of debt while striving to avoid personal bankruptcy. **Ct. Rec. 68** (Housser Decl., ¶ 6).¹

Unlike credit counseling firms, FDR does not receive compensation from creditors. Rather, FDR is paid exclusively by those customers for whom services are performed, acting as an independent consumer advocate without any conflict of interest. **Ct. Rec. 68** (Housser Decl., ¶ 15). Throughout the class period, FDR's fees were calculated based on the amount of debt enrolled by the customer. *Id.* ¶ 49.²

Contrary to Plaintiffs' characterizations, the record establishes that FDR does not "undertake settlement" of a client's debts, (Plaintiffs' Opening Brief ("Br.") at 7), rather FDR's services are narrow in scope and *expressly limited to negotiating* proposed debt resolution for its clients. FDR does not have authority to make payments to customers' creditors. Nor does it receive, handle, or otherwise control client funds, either

¹As Commissioner J. Thomas Rosch of the FTC has noted, a debt reduction company such as FDR can provide "real benefits to consumers" by acting as an effective advocate and taking a "holistic" approach to addressing "all of the consumer's unsecured debt owed to several creditors." J.T. Rosch, "*Consumer Protection and the Debt Settlement Industry: A View From the Commission*," (Apr. 2, 2009).

² After the class period, the FTC promulgated new rules governing the fees that can be charged by debt settlement companies. *See* 16 C.F.R. § 310, et seq. Those new rules, which went into effect in October 2010, do not affect the claims asserted in this suit; nonetheless, it is significant that by adopting rules regulating the industry, the FTC has recognized the value provided to consumers by debt reduction companies.

directly or indirectly. **Ct. Rec. 68** (Houser Decl., ¶ 44).

Each client signs a “Debt Reduction Agreement” in which he or she is told – and acknowledges – the narrow scope of FDR’s services. The agreements signed by the class representatives illustrate the point.

Each agreement states:

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.

Ct. Rec. 54-6 (Carlsen Decl., Ex. A – Carlsen Debt Reduction Agreement § 2) (emphasis added); **Ct. Rec. 54-4** (Hulse Decl., Ex. A – Hulse Debt Reduction Agreement § 2) (emphasis added). *See also Ct. Rec. 68* (Houser Decl., ¶ 44). Every class member has signed a customer agreement containing similar language. *Id.*

Each client grants FDR limited authority to contact creditors and secure a settlement offer on a client’s behalf – nothing more.³ **Ct. Rec. 68** (Houser Decl., ¶¶ 54-55; Ex. 2). At no time have customers ever been asked to provide FDR with authority to make payment to a client’s creditors. *Id.* As discussed below, payments to creditors are made by the

³ FDR’s Washington customers signed a document entitled “Limited Power of Attorney” which gives FDR limited authority to negotiate with creditors to secure a settlement offer for the client. **Ct. Rec. 68** (Houser Decl., ¶¶ 54-55; Ex. 2).

client through a bank account that the client exclusively owns and controls. *Id.* ¶ 45.⁴

2. Funds Saved By Clients in Their Own Bank Accounts

FDR's debt reduction program requires the client to save money for settlement payments in the client's own personal bank account. FDR's clients may choose the bank where they save money to pay settlements with creditors. **Ct. Rec. 68** (Housser Decl., ¶¶ 46-47). The account is solely owned and controlled by the client. *Id.* ¶ 62. The amount that the client agrees to save monthly is significantly less than the minimum payments required by creditors or traditional debt counseling programs. *Id.* ¶ 26.

After a client has saved sufficient funds, FDR negotiates with a creditor for a settlement offer that will allow the client to resolve the entire debt owed to that creditor. This process is labor-intensive, especially inasmuch as each customer, debt, and creditor presents unique circumstances affecting the settlement process. **Ct. Rec. 68** (Housser

⁴Plaintiffs insinuate, without providing citation to the record, that FDR requires participants to stop payments to their creditors. *See* Br. at 9. This is flatly contradicted by the record. FDR's Debt Reduction Agreement expressly requires each client to certify that the client "is currently in a verifiable state of financial hardship" and is "now unable to pay or unable to continue to pay minimum monthly payments ... to Creditors without extreme severe hardship, if at all." *See, e.g., Ct. Rec. 54-6* (Carlsen Decl., Ex. A – Carlsen Debt Reduction Agreement § 11).

Decl., ¶¶ 67-68). In many cases, the eventual settlement offer may be less than half of the principal owed. *Id.* ¶ 28. This process is repeated on a creditor-by-creditor basis until the client is debt-free, which may take three years or more. *Id.* ¶¶ 9, 67-68.

Historically, many FDR clients have opened a new FDIC-insured bank account (called a “Special Purpose Account”) with RMBT. **Ct. Rec. 68** (Housser Decl., ¶ 46). As noted, RMBT retained GCS as its agent to provide payment processing services for those accounts. *Id.* ¶ 61.⁵ None of the Defendants has a financial interest in GCS or RMBT, or receives compensation of any sort from GCS or RMBT. *Id.* ¶ 61; **Ct. Rec. 63** (Stroh Decl., ¶ 12).

Regardless of whether a client chooses to save money in a bank account at RMBT or another bank, the following facts are uncontroverted and apply to *every client* who has enrolled in FDR’s debt reduction program *at all times* relevant to Plaintiffs’ claims:

- The bank account and deposited funds are the client’s *sole and exclusive property*.
- The account is opened in the *name of the client only*; FDR has no interest in or control over the bank account.
- Each client must *authorize every transaction* in the account.

⁵ GCS is not an agent of FFN or FDR. **Ct. Rec. 68** (Housser Decl., ¶ 61).

- Upon opening a bank account with RMBT, *the client provides authorizations to execute a transaction to GCS* (as an agent of the RMBT), not to the Defendants.
- *None of the Freedom Defendants has authorization to access the funds in a client's bank account.*
- Each client may *withdraw funds* from his or her bank account for any reason or close the bank account at any time and for any purpose without penalty.
- Each client may *cancel, revoke, or rescind any transfer from his or her account or any authorization for a transaction for any reason.*
- Each client has *full access* to the account, including the ability to check activity and authorize transactions via phone, the Internet, or customer service representative.
- Each *client's creditors can attach funds and levy liens* on funds in the account.

Ct. Rec. 51-2 (Ex. A to Declaration of Shasta Carlsen in Support of Pls.' Mot. for Summary Judgment ("Carlsen Special Purpose Account Application")); **Ct. Rec. 52-2** (Ex. A to Declaration of Barbara Susie Hulse in Support of Pls.' Mot. for Summary Judgment ("Hulse Special

Purpose Account Application”)); **Ct. Rec. 68** (Housser Decl., ¶¶ 62-65). In short, there is no difference between an account opened in connection with the FDR program and any other bank account; the client has complete control over the account and the funds in it.

3. Payments Are Made By Clients From Their Bank Accounts to Creditors

Throughout the class period, when FDR secured a favorable settlement offer for a client with an RMBT bank account, FDR sent the proposed settlement terms to both the client and GCS, including the account number at issue, settlement amount, and payment terms. **Ct. Rec. 68** (Housser Decl., ¶¶ 72-73). Payment of the settlement was never handled or controlled by FDR. *Id.* Rather, payments have been handled by GCS pursuant to authorizations expressly provided by its customers. *Id.* ¶ 73.

Notably, after a client has authorized GCS to execute transactions from his or her RMBT bank account, the client may revoke the authorization at any time, including after it receives notice from FDR of the terms of a particular settlement. **Ct. Rec. 68** (Housser Decl., ¶¶ 72-73). This is a key point that Plaintiffs assiduously avoid in their brief. All FDR does is negotiate a proposed settlement. It is up to the client to effectuate any proposed settlement and make the necessary payment,

either directly or by authorizing a transaction processor (*i.e.*, GCS) to pay the creditor. *Id.*

C. Procedural History

The Carlsens filed this class action in the Federal Court for the Eastern District of Washington in February 2009. Plaintiff Hulse subsequently joined the action and a Second Amended Complaint (“SAC”) was filed in November 2009. **Ct. Rec. 30** (SAC). In the SAC, Plaintiffs allege that Defendants have violated Washington’s Debt Adjusting statute, RCW 18.28, and/or aided and abetted a violation of the same, and that these violations constitute a violation of Washington’s Consumer Protection Act (“CPA”), RCW 19.86. *Id.* ¶¶ 24-58. Defendants deny Plaintiffs’ allegations, including allegations that Defendants acted as debt adjusters pursuant to the Debt Adjusting statute, RCW 18.28, allegations that Defendants are liable under either the Debt Adjusting statute or Washington’s Consumer Protection Act, RCW 19.86, allegations that Defendants aided and abetted any of these alleged violations, and allegations that the Carlsens, Hulse or any member of the class were harmed by the conduct alleged in the SAC, or incurred any damages therefrom. **Ct. Rec. 31** (Defs.’ Answer to SAC (“Answer”) ¶¶ 24-58).

Plaintiffs filed a Motion to Certify Class in December 2009. Dkt.

No. 36. On March 26, 2010, the District Court certified a class pursuant to Fed. R. Civ. P. 23(b)(3) and designated the Carlsens and Hulse as class representatives. **Ct. Rec. 87** (Class Certification Order at 20). The certified class consists of “all State of Washington residents who have executed a Debt Reduction Agreement with FDR and/or FFN.” *Id.*

In January 2010, prior to the District Court’s determination of the class certification motion, Plaintiffs prematurely filed a Motion for Summary Judgment. **Ct. Rec. 47** (Pls.’ Mot. for Summary Judgment as to Consumer Protection Act Liability and Final or Prelim. Injunctive Relief). In its Class Certification Order, the District Court stayed the disposition of Plaintiffs’ Motion for Summary Judgment pending class notice and expiration of the “opt-out” period. **Ct. Rec. 87** (Class Certification Order at 21).

In its Class Certification Order, the District Court also stated that it would consider “whether questions should be certified to the state supreme court, including whether Defendants are ‘debt adjusters’ subject to Washington’s Debt Adjusting statute.” **Ct. Rec. 87** (Class Certification Order at 21 n.7). On July 23, 2010, after a round of briefing by the parties, the District Court certified three questions to this Court. Dkt. No.

**III. QUESTIONS PRESENTED AND
SUMMARY OF ANSWERS**

Question No. 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: No. The term “debt adjusting,” as defined in RCW 18.28.010(1), does not apply to a company which, on behalf of client debtors, merely negotiates with creditors, but does not have the power to authorize or approve the settlement and does not make any payments to creditors.

Question No. 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: If, and only if, the Debt Adjusting statute applies to companies such as FDR (which it does not), the term “payment,” as found in RCW 18.28.080(1), would necessarily mean any payment made by the debtor. Thus, the permissible fee of 15 percent would pertain to *any* payment made by the debtor as part of his or her debt reduction program irrespective of whether the debtor is making the payment to the

⁶ The District Court also certified four separate questions to this Court in the related case, *Carlsen v. Global Client Solutions, LLC*, Case No. 09-CV-00246-LRS (E.D. Wash. 2009). These certified questions have already been briefed and oral argument is currently set for March 15, 2011, the same day as oral argument is set for this case.

alleged debt adjuster or into a debtor-controlled bank account maintained for the purpose of satisfying settlements negotiated by the company.

Question No. 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: Yes. Because a consumer only has a private right of action for violations of the Debt Adjusting statute through the Washington Consumer Protection Act ("CPA"), a consumer is limited to the remedies provided by the CPA – actual damages and injunctive relief. Thus, a consumer's right to recovery of fees under the statute must take into account debt reduction benefits received by that consumer. Allowing recovery of all fees without taking into account benefits received would improperly award consumers recovery in excess of the "actual damages" permitted by the CPA.

IV. STANDARDS OF STATUTORY INTERPRETATION

In interpreting a statutory provision, "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). To ascertain the plain meaning of the statute, courts will not look

at the term to be interpreted in isolation; rather, “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, ... is appropriate as a part of the determination whether a plain meaning can be ascertained.” *Id.* at 10. *See also C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999) (where statutory language is clear and unambiguous, its meaning is derived from its language alone; court construes an act as a whole, giving effect to all the language used, with related statutory provisions interpreted in relation to one another); *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) (a term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole; statutory provisions must be read in their entirety and construed together, not by piecemeal).

“All of the language in the statute must be given effect so that no portion is rendered meaningless or superfluous.” *Bauer v. State Employment Sec. Dep’t*, 126 Wn. App. 468, 474, 108 P.3d 1240 (2005). Moreover, statutes should be interpreted “to avoid strained or absurd results.” *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007); *see also Bauer*, 126 Wn. App. at 474; *Mortell v. State*, 118 Wn. App. 846, 849, 78 P.3d 197 (2003).

V. ARGUMENTS

A. **A Debt Reduction Company is Not Acting Within the Scope of RCW 18.28.010(1) When it Merely Attempts to Negotiate with a Client's Creditors, But Has No Authority to Either Consent to or Fund the Settlement**

The first issue presented to this Court is whether the Debt Adjusting statute applies to debt reduction companies, such as FDR. The plain meaning of the statute and what little legislative history is available clearly indicate that the Debt Adjusting statute was intended to apply only to companies who receive debtor's funds for the purpose of distributing them to creditors. The Debt Adjusting statute does not apply to companies, who, like FDR, merely negotiate with a client's creditors but who do not receive and disburse client funds to creditors.

RCW 18.28.010(1) defines "debt adjusting" as:

[T]he 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). While Plaintiffs pay lip service to the principle that the Court must apply an unambiguous statutory provision according to its terms (Br. at 11-12), they ask this Court to ignore the plain language of the statute in favor of Plaintiffs' own contrived definition of "debt adjusting."

Without any supporting argument, Plaintiffs unilaterally decree that:

“[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.

Br. at 15. Thus, Plaintiffs would rewrite the statutory definition of “debt adjusting” to include companies like FDR who merely negotiate with creditors on behalf of debtors, but who do not have authority to ultimately effectuate the settlement itself. In order to bridge the logical chasm separating their version of “debt adjusting” with the statute, Plaintiffs are forced to embrace two faulty premises: (1) that client consent to a settlement is “unremarkable and immaterial”; and (2) that receipt of funds by the alleged debt adjuster for the purpose of disbursement to creditors is a “sufficient but non-necessary activity constituting ‘debt adjusting.’” Br. at 16-17. Both of these propositions are flatly contrary to the plain meaning of the statute, which clearly requires that a debt adjuster be in a position to effectuate the settlement.

Contrary to Plaintiffs’ contentions – client authorization and effectuation of the settlement are hardly “unremarkable and immaterial.” Br. at 16-17. Rather, the Debt Adjusting statute was designed to protect consumers who cede control of funds to debt adjusters for payment to

creditors. Because the record demonstrates unequivocally that FDR's clients do not cede control of their funds to FDR, the Debt Adjusting statute is simply inapplicable. *See Ct. Rec. 62* (Figliuolo Decl., ¶¶ 20-30).

**1. FDR Does Not Engage in "Settling" Debts
Within the Plain Meaning of the Statute**

Although Plaintiffs make broad and conclusory allegations that FDR is engaged in "debt adjusting," they do not expressly allege that FDR is a credit counselor, a prorater, or someone engaged in managing or liquidating debt. Moreover, Plaintiffs never claim that FDR "receiv[ed] funds for the purpose of distributing said funds among creditors." RCW 18.28.010(1). Rather, the only term they specifically focus on is "settling."

To "settle" means "to close (as an account) by payment often of less than is due" and "settlement" means "an agreement composing differences".⁷ *Merriam-Webster Collegiate Dictionary* 1072 (10th ed. 1996). Thus, "settling" a debt plainly requires *both* the entering into an agreement with the creditor *and* the act of payment to effectuate the settlement.

Plaintiffs concede that the only service that FDR provides is "*attempting to negotiate* with creditors of Client with the intent of

⁷ Courts may look to a dictionary definition to aid in the interpretation of the plain meaning of a statute. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976).

reducing Debts to an amount that will enable the Client to pay the reduced balance as full settlement of all debt” and endeavoring to “*deliver to Client a settlement offer* from Client’s creditors.” Br. at 15 (quoting Debt Reduction Agreement) (emphasis added). In other words, FDR’s service is expressly limited to negotiating settlement of a client’s debts. FDR does not have authority to accept the settlement terms nor does it accomplish the monetary fulfillment of any settlement. Such activity does not fall within the scope of the definition of “settling.”

As discussed above, each FDR client saves money to pay creditors in a bank account that is exclusively owned and controlled by the client. **Ct. Rec. 68** (Housser Decl., ¶¶ 62-65). FDR never touches, receives, manages or controls those funds. *Id.* ¶¶ 7, 62-65. Because the client saves money in his or her own bank account, the client has full access to his or her money and can withdraw that money or close the account at any time, without penalty or termination fee. *Id.* ¶ 7; **Ct. Rec. 62** (Figliuolo Decl., ¶ 25); **Ct. Rec. 83, Ex. A** (Merrick Decl., ¶¶ 18-24). The *only transactions that are made from the account are those that are expressly authorized by the client*, and the client can revoke that authorization at any time. **Ct. Rec. 68** (Housser Decl., ¶¶ 10, 72-73). After FDR negotiates a settlement on behalf of a client, *the client must pay the settlement from his or her bank account directly to the creditor*, at which point that debt obligation

is considered settled in full. *Id.* ¶ 9. If a client chooses not to do so, then there is no settlement. *Id.* ¶ 73. Because the settlement can only be authorized and effectuated by the client, FDR's activities do not fall within the meaning of "settling."⁸

Recognizing that FDR does not actually "settle" debts, Plaintiffs are forced to fall back on the spurious argument that FDR must engage in "debt adjusting" because it has stated that it "settles" debt. Br. at 16. However, the terms "debt settlement," "debt reduction" and "debt negotiation" are used interchangeably in the industry. **Ct. Rec. 68** (Housser Decl., ¶ 8); **Ct. Rec. 63** (Stroh Decl., ¶ 7). This casual use does not in any way relate to the definition of "settling" under the Debt Adjusting statute, which plainly requires the debt adjuster to effectuate the settlement through disbursal of client funds.

⁸ In tacit acknowledgment that the plain meaning of the statute requires the debt adjuster to receive and distribute client funds, Plaintiffs attempt to argue that companies like FDR are in constructive receipt of client funds. *See* Br. at 18 (arguing that if their unsupported and overly broad definition of "debt adjusting" is not embraced by this court, companies may attempt to "secure immunity from the statute . . . 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"). Not only is this reading of the statute entirely contrary to the statute's plain meaning, it is also a false premise based on overt misstatements of the record. GCS and RMBT are not agents of FFN or FDR. **Ct. Rec. 68** (Housser Decl., ¶ 61). Moreover, the client retains control over his or her funds – FDR, GCS and RMBT do not have any control over the client's bank account. *Id.* ¶¶ 62-65. Finally, it is the client who must authorize and fund the settlement, not FDR, GCS or RMBT. *Id.* ¶¶ 10, 72-73. Thus, as established above, without control of and the ability to disburse client funds to creditors, FDR does not fall within the plain meaning of the statute.

By way of analogy, lawyers routinely make reference to “settling” cases. However, only the lawyer’s client can actually settle the case by agreeing to the terms of settlement and paying any money required to fund the settlement. When a lawyer claims to have “settled” a case, he or she usually is referring to the process of negotiating a proposed settlement on the client’s behalf. Similarly, a company who merely negotiates on behalf of a client but does not have authority to approve or fund the settlement does not “settl[e]” debts within the meaning of the Debt Adjusting statute. Put another way, use of colloquial or imprecise nomenclature cannot override plain statutory language. Only the legislature can rewrite the statute. *State v. Pickett*, 95 Wn. App. 475, 480, 975 P.2d 584 (1999) (“The failure of the statute to address [a] situation can only be resolved by the Legislature.”); *see also Di Pietro Trucking Co. v. Dep’t of Labor and Indus.*, 135 Wn. App. 693, 721, 145 P.3d 419 (2006), *review denied*, 161 Wn.2d 1006 (2007) (courts should not “create legislation under the guise of interpreting a statute”).

2. Other Provisions of RCW 18.28 Make Clear That Negotiation With Creditors, Without More, Is Not Sufficient to Make FDR a Debt Adjuster, Rather, the Receipt and Disbursal of Client Funds to Creditors Is a Necessary Activity

To the extent that the term “settling” (or any other term in RCW 18.28.010(1)) is ambiguous when viewed in isolation, other provisions in

the statute confirm that “settling” requires receipt and disbursement of client funds by the debt adjuster to the creditor. *ITT Rayonier*, 122 Wn.2d at 807 (a term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole; statutory provisions must be read in their entirety and construed together, not by piecemeal). For example, the statute sets forth a number of “functions” that debt adjusters must perform. These *mandatory functions* clearly and necessarily contemplate a receipt of client funds by the debt adjuster and disbursal of those funds to creditors:

- RCW 18.28.110(1) requires debt adjusters to “[m]ake a permanent record of all *payments by debtors, or on the debtors’ behalf, and of all disbursements to creditors of such debtors.*” RCW 18.28.110(1) (emphasis added).
- RCW 18.28.110(3) requires debt adjusters to “deliver a receipt to a debtor for each payment within five days after receipt of such payment.” RCW 18.28.110(3).
- RCW 18.28.110(4) requires debt adjusters to “[d]istribute *to the creditors* of the debtor at least once each forty days after receipt of payment during the term of the contract *at least eighty-five percent of each payment received from the debtor.*” RCW 18.28.110(4) (emphasis added).

- RCW 18.28.110(5) requires an *accounting* by the debt adjuster *reflecting amounts received from debtor and amounts paid to each creditor*. RCW 18.28.110(5).

Moreover, provisions regarding fees, excess charges and required contract terms also contemplate that a debt adjuster receives and distributes client funds:

- RCW 18.28.080(1) requires that “[t]he *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.*” RCW 18.28.080(1) (emphasis added).
- RCW 18.28.090 requires debt adjusters to “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 (emphasis added).
- RCW 18.28.100(6) requires debt adjusters to *notify the debtor if the creditor refuses “to accept payment pursuant to the contract* between the debt adjuster and the debtor.” RCW 18.28.100(6) (emphasis added).

Because FDR simply does not receive client funds for disbursement among creditors, the Debt Adjusting statute has no conceivable application to FDR and its business. **Ct. Rec. 62** (Figliuolo Decl., ¶¶ 20-30).

Tellingly, Plaintiffs' Brief makes no effort to address these provisions or square them with their effort to shoehorn FDR into the statutory definition of "debt adjusting."

The Debt Adjusting statute must be interpreted to give meaning and effect to each of those provisions. *See C.J.C.*, 138 Wn.2d at 708-09 (court must construe an act as a whole, giving effect to all the language used, with related statutory provisions interpreted in relation to one another). If a person does not disburse client funds to creditors in order to effectuate a settlement, then that person has plainly not engaged in "debt adjusting" within the meaning of the statute. Thus, contrary to Plaintiffs' contentions, receipt of client funds for the purpose of disbursement to creditors is a *necessary* and *essential* activity. Any other reading would render key provisions meaningless and lead to absurd results. *Bauer*, 126 Wn. App. at 474; *Tingey*, 159 Wn.2d at 663-64.⁹

In support of their argument that receipt and disbursement of funds by the debt adjuster is a "non-necessary activity," Plaintiffs cite a number of statutes from other states which Plaintiffs argue are "consonant and

⁹ Plaintiffs' argument that the Debt Adjusting statute is a remedial statute and should be "broadly construed to achieve its purposes" is a non-starter. *See Br.* at 13. Regardless of whether a statute is "remedial" or not, the statute cannot apply if Defendants' actions simply do not fall within the statute's plain meaning. *Dep't of Ecology*, 146 Wn.2d at 9-10. To hold otherwise would be to contravene the intent of the legislature. *Id.*

comparable” to the Washington debt adjuster statute. Br. at 17-18. Many of these statutes, however, make exactly the opposite point – that mere negotiation with creditors, without more, was not in the original contemplation of such statutes and now amendments are necessary to bring those practices within their scope. A number of statutes cited by Plaintiffs were recently amended to specifically address the debt reduction business model.¹⁰ Concurrent or subsequent amendments to these statutes have also added provisions to take into account the fact that debt reduction companies do not receive or distribute client funds to creditors.¹¹ If the Washington Legislature wanted to amend its “comparable and consonant” Debt Adjusting statute to include mere negotiation without receipt and disbursement of funds, then it would follow the lead of states like Iowa,

¹⁰ *See, e.g.*, Iowa Code § 533.A.1(2) (amended in 2009 to expand statute to include “[a]rranging or negotiating, or attempting to arrange or negotiate, the amount or terms of debt owed by a debtor to a creditor”); Ky. Rev. Stat. Ann. § 380.010(3) (amended in 2010 to expand statute to include “debt modification or settlement” and “acting or offering, or attempting to act as an intermediary between a debtor and his or her creditors”); Me. Rev. Stat. Ann. tit. 32 § 6172(2) (2003 amendments repealed former section in order to expand “debt management service” to include “[a]cting or offering to act as an intermediary between a consumer and one or more creditors of the consumer for the purpose of adjusting, settling, discharging reaching a compromise or otherwise altering the terms of payment of the consumer’s obligations”).

¹¹ *See, e.g.*, Iowa Code § 533.A.9 (amended in 2009 to include fee provisions covering situation where debt management provider did not receive or disburse client funds); Ky. Rev. Stat. Ann. § 380.040 (1),(2) (fee section amended in 2010 to reflect inclusion of debt adjusters who do not hold or disburse client funds); Me. Rev. Stat. Ann. tit. 32 § 6174-A (fee section amended in 2007 to include alternative fee arrangements for debt management providers who do not hold and disburse client funds).

Kentucky and Maine. *See Pickett*, 95 Wn. App. at 480.

3. The Legislative History of RCW 18.28 and the History of the Debt Adjusting and Debt Reduction Industries Shows that Debt Adjusting Statutes Were Not Meant to Apply to the Debt Reduction Industry

The legislative history of the Debt Adjusting statute also confirms that Plaintiffs' interpretation of "debt adjusting" is without basis. *First*, although Plaintiffs recognize that this Court must "discern and implement the intent of the legislature" (Br. at 11), they ignore that intent. The Legislature's description of what it considered a "debt adjuster" makes clear that RCW 18.28 was meant to regulate only those businesses that exercised control over a client's funds:

Basic Method of Operation – Debt Adjusters Debt adjusters, through referral, advertising or other means, endeavor to make contact with those individuals having substantial and overdue personal bills. They then endeavor to establish a contractual relationship between themselves and the debtor, under terms of which the debtor transmits to the debt adjuster the maximum monthly payment possible. In return, the debt adjuster endeavors to work out a repayment plan, under terms of which the debtor's payment is divided among his outstanding creditors. *Monthly checks representing portions of the debtor's payment to the debt adjuster are written by the debt adjuster to the creditors. For this service, the debt adjuster charges a usual fee of 15 percent of all payments made to him by the debtor.*

State of Wash. Leg. Budget Comm., Performance Audit - Debt Adjusting, Licensing and Regulatory Activities, Rep. No. 77-13, at 8 (1978)

(emphasis added).¹² FDR's business model is clearly at odds with the model the Washington Legislature had in mind when it drafted the Debt Adjusting statute. *See Ct. Rec. 62* (Figliuolo Decl., ¶¶ 20-30); *Ct. Rec. 68* (Housser Decl., ¶¶ 83-84).

Second, recognizing the need to regulate the brand new debt reduction industry, many states have recently amended their debt adjusting statutes to either include provisions covering debt reduction,¹³ or have adopted debt reduction specific statutes such as the Uniform Debt Management Services Act ("UDMSA").¹⁴ By contrast, there is no dispute

¹² This report also describes debt adjusting as "the *act of distributing* an overburdened debtor's available income among outstanding creditors." Rep. No. 77-13, at 3 (emphasis added). Moreover, the Office of Financial Management's Program and Fiscal Review of the Debt Adjusting statute, appended as Appendix V to the report, notes that "debt adjusters *handle considerable amounts of their clients' money* and should therefore be regulated similarly to other fiduciaries" and that "all people who engage in debt adjusting on a regular basis *[should] be bonded* to protect the financial interests of their clients" and that "[t]he *amount of bond required should be related to the amount of money handled.*" *Id.* at 33 (emphasis added). Thus, the Legislature clearly viewed the Debt Adjusting statute as regulating those companies who received and disbursed client funds to creditors.

¹³ For example, many of the statutes *cited by Plaintiffs* have recently been amended to encompass regulation of debt reduction companies. *See* footnote 11 *supra*; *see also* N.C. Gen. Stat. § 14-423(2) (amended in 2005 to include situations where debt adjuster does not receive debtor funds).

¹⁴ For example, Plaintiffs cite to Tennessee's now repealed debt adjuster law, (Br. at 18), which was replaced by the Uniform Debt Management Services Act in 2009, an act specifically designed to deal with the new debt settlement industry. *See* Tenn. Code Ann. § 47-18-5502(10) (regulating a company who acts as "an intermediary between an individual and one (1) or more creditors of the individual for purpose of obtaining concessions"). A number of other states have also adopted the UDMSA, including Colorado, Delaware, Nevada, Rhode Island and Utah. Other

that FDR's debt reduction model did not exist when RCW 18.28 was enacted. **Ct. Rec. 68** (Housser Decl., ¶ 84). Obviously, the Legislature did not intend to regulate an industry that did not exist until decades after enactment of the statute.

B. If, and Only If the Debt Adjusting Statute Is Interpreted So As to Apply to FDR, Then the Term "Payment" in RCW 18.28.080(1) Should Be Read to Apply to Any Payment Made by the Debtor

The second issue certified by the District Court assumed that the Debt Adjusting statute applied to debt reduction companies, such as FDR, and asked what the term "payment" meant as used in the fees provision of the statute, RCW 18.28.080(1). While FDR submits that the statute does not apply to its business model (as set forth above), if the statute were to apply, the only reasonable interpretation of the term "payment" would include any payment made by the debtor. Thus, the permissible fee of 15 percent would pertain to *any* payment made by the consumer as a part of his or her debt reduction program.

RCW 18.28.080(1) states that:

By contract a debt adjuster may charge a reasonable fee for

states are considering adoption of the UDMSA. For example, Ohio (which has a debt adjusting statute already on its books) is currently considering legislation which would "establish licensing and regulation of debt settlement industries." H.B. 549, 128th Gen. Assem., Reg. Sess. (Ohio 2009-10). The Washington Legislature itself has been considering enactment of the UDMSA. *See* H.B. 1213, 61st Leg., Reg. Sess. (Wash. 2009-10).

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).

Plaintiffs argue that this provision “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.” Br. at 20. To the extent that Plaintiffs imply that the meaning of the term “payment” somehow pulls FDR within the scope of the Debt Adjusting statute, they are wrong. As discussed above, the Debt Adjusting statute was not meant to apply to debt reduction companies such as FDR. *See* Section IV.A *supra*.

Nonetheless, assuming *arguendo* the Debt Adjusting statute could be interpreted to regulate FDR’s debt reduction business model, then Defendants agree with Plaintiffs that “payment” would necessarily mean any payments made by the debtor irrespective of whether the debtor is making the payment to the alleged debt adjuster or into a debtor-controlled

bank account maintained for the purpose of satisfying settlements negotiated by the company. In other words, the permissible fee would be 15 percent of every payment made by the consumer pursuant to the debt reduction program.

C. Consumers Are Limited to Actual Damages in an Action Brought Pursuant to the CPA; As Such, A Consumer's Recovery For Alleged Violations of the Debt Adjusting Statute Must Take Into Account Debt Reduction Benefits Received by the Consumer

In the third issue certified to this Court, the District Court asked whether an equitable offset is available under RCW 18.28.090 for any reduction in the debt negotiated by the alleged debt adjuster. Because a consumer only has a private right of action for violations of the Debt Adjusting statute through the CPA, a consumer is necessarily limited to the remedies permitted by the CPA – actual damages and injunctive relief. *See* RCW 18.28.185; RCW 19.86.090. As such, a consumer's right to recovery under the statute must take into account debt reduction benefits received by that consumer. Allowing recovery of all fees would improperly award consumers recovery in excess of the “actual damages permitted by the CPA. *See* RCW 19.86.090.

Plaintiffs posit that, under RCW 18.28.090, clients are entitled to a return of all fees irrespective of the benefits they received while participating in FDR's debt reduction program and that no “equitable

offset” should be allowed for any reduction in debt negotiated by the company. Br. at 20-22. However, their reliance on 18.28.090 in isolation and without reference to other statutory provisions is misguided. *ITT Rayonier*, 122 Wn.2d at 807 (holding that a statutory provision should not be interpreted in isolation, rather it must be read to harmonize with provisions in the statute as well as with related statutes).

First, a consumer’s right to recovery for violations of the Debt Adjusting statute arises solely under the Washington Consumer Protection Act (“CPA”). See RCW 18.28.185 (“A violation of this chapter constitutes an unfair or deceptive act or practice in the conduct of trade or commerce under chapter 19.86 RCW.”). Plaintiffs acknowledged this limitation when they brought suit under the CPA rather than the Debt Adjusting statute itself. **Ct. Rec. 30** (SAC ¶¶ 23, 52-55). As such, Plaintiffs are constrained by the requirements for bringing an action under the CPA, including the requirement that the consumer must be *injured* by the conduct of which they are complaining. RCW 19.86.090 (“[a]ny person who is injured in his or her business or property by a violation . . . may bring a civil action”).¹⁵

Far from being injured, many debt reduction clients receive

¹⁵ An “injury” is defined as “harm or damage.” *Black’s Law Dictionary* 789 (7th ed. 1999).

substantial benefits from a company's debt reduction services. For example, for clients who complete the debt reduction program, FDR negotiates settlements of all enrolled debts. **Ct. Rec. 63** (Stroh Decl., ¶ 23). For those clients who do not complete the program, many receive a reduction in debt in excess of the fees they are charged. *Id.* ¶ 24. Given that the CPA only envisions compensating "injured" plaintiffs, those clients whose enrolled debts were fully settled and those clients who received benefits in excess of the fees charged do not have any right of action under the CPA for the simple reason that they were not injured. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 784-85, 719 P.2d 531 (1986) (listing injury to the plaintiff in his business or property as a required element for bringing a private action under the CPA). Attempting to apply RCW 18.28.090 to clients who are not injured by violations of the Debt Adjusting statute would render RCW 19.86.090 a nullity. *See Bauer*, 126 Wn. App. at 474.

Second, because Plaintiffs' right of action arises solely under the CPA, they are restricted to the remedies available to a private litigant under the CPA – actual damages and injunctive relief. RCW 19.86.090 (private right of action available "to enjoin further violations, to recover the actual damages sustained by [plaintiff], or both, together with the costs of the suit, including a reasonable attorney's fee"). "Actual damages" are

synonymous with compensatory damages.” *Martini v. Boeing Co.*, 137 Wn.2d 357, 367, 971 P.2d 45 (1999) (quoting *Black's Law Dictionary* 35 (6th ed. 1990)); *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers Dist. No. 160*, 114 Wn. App. 80, 95, 55 P.3d 1208 (2002), *aff'd*, 151 Wn.2d 203 (2004). They are limited to compensation “for a proven injury or loss” and should “repay actual losses.” *Black's Law Dictionary* 394. Actual damages include “damages for injury in fact, as distinguished from exemplary, nominal or punitive damages.” *Ellingson v. Spokane Mortg. Co.*, 19 Wn. App. 48, 58, 573 P.3d 389 (1978).

What this means is that, to the extent consumers paid fees but also received economic benefits, those economic benefits should offset any recovery the consumer receives under the CPA. For example, if a consumer paid \$2,000 in fees but received a \$1,500 reduction in debt, his or her “actual damages” would be limited to \$500. Likewise, if a consumer paid \$2,000 in fees but received a \$6,000 reduction in debt, that consumer would have no “actual damages.”

By their own admission, Plaintiffs seek recovery in excess of any actual damages. Instead they seek disgorgement of all fees under RCW 18.28.090, irrespective of the actual loss suffered by each consumer. **Ct. Rec. 30** (SAC – Demand for Class Relief ¶ 5). This is directly at odds

with the CPA's provisions which allow only actual damages.¹⁶ RCW 19.86.090. As such, consumers bringing a CPA action for violations of the Debt Adjusting statute are limited to actual damages to compensate them for actual losses and RCW 18.28.090 is inapplicable in such actions.¹⁷

Finally, if this Court determines that a consumer can seek the

¹⁶ Plaintiffs ignore this issue entirely and pretend that the CPA (which they purportedly are bringing suit under) has no effect on the remedies available for any alleged underlying violation of the Debt Adjusting statute.

¹⁷ Other statutes that provide a private right of action through the CPA nonetheless expressly allow remedies in addition to those provided under the CPA. RCW 31.45.190 (providing for private right of action under CPA for violation of statute regulating check cashers and sellers; noting that “[r]emedies available under chapter 19.86 RCW shall not affect any other remedy the injured party may have”); RCW 18.44.450 (providing private right of action under CPA for violation of statute regulating escrow agents; noting that “[r]emedies provided by 19.86 RCW are cumulative and not exclusive”); RCW 49.12.310 (providing private right of action under CPA for violations of statute regulating house-to-house sales by minors; noting that “[t]he remedies and sanctions provided under chapter 19.86 RCW shall not preclude application of other available remedies and sanctions”); RCW 19.138.290 (providing private right of action under CPA for violations of statute regulating sellers of travel; noting that “[r]emedies provided by chapter 19.86 RCW are cumulative and not exclusive”). These statutes show that the Legislature knows how to expressly allow for remedies in addition to those under the CPA. If the Legislature had meant to allow the remedy set forth in RCW 18.28.090 to be recoverable in private suits brought under the CPA, then they presumably would have drafted the statute to say so. *See, e.g., Certification from U.S. Court of Appeals for Ninth Circuit v. Kachman*, 165 Wn.2d 404, 409, 198 P.3d 505 (2008) (agreeing with analysis that other statutes providing for use of “certified mail” prove that that the legislature knew how to use the term when it wished to, and that the failure to use the term “certified mail” in the statute at issue was significant); *State v. Flores*, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008) (“It is significant that when the legislature wants to protect children from the harmful effects of exposure to criminal activity, it knows how to do so.”).

remedy in RCW 18.28.090 in a private action brought under the CPA, this Court should allow an equitable offset to reduce recovery to reflect any reduction in debt negotiated by the company. This is the only way to apply RCW 18.28.090 without rendering the provision allowing only actual losses under RCW 19.86.090 meaningless. *C.J.C.*, 138 Wn.2d at 708-09 (courts should construe an act as a whole, giving effect to all the language used, with related statutory provisions interpreted in relation to one another).

Contrary to Plaintiffs' contention that the plain meaning of RCW 18.28.090 "does not permit an equitable offset" (Br. at 20-21), there is nothing in the language expressly prohibits either an equitable offset or any other type of exercise of judicial discretion in fashioning the appropriate remedy.¹⁸ Courts have the inherent discretion to tailor remedies to do justice.¹⁹ In this instance, it would be manifestly unfair and

¹⁸ RCW 18.28.090 provides that "[i]f 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.

¹⁹ For example, courts often allow parties to recover for services rendered under a void contract under a theory of quantum meruit. *Giedra v. Mount Adams School Dist. No. 209*, 126 Wn. App. 840, 850, 110 P.3d 232 (2005), *review denied*, 156 Wn.2d 1016 (2006) ("Even a party performing services under a void contract may recover for work actually done under quantum meruit, and the value of the services is measured by that 'fixed in

inequitable to allow consumers who actually benefited from FDR's debt reduction services to reap a windfall under 18.28.090 by a refund of all fees.²⁰

VI. CONCLUSION

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

the contract.”) (quoting *O'Donnell v. Sipprell, Inc.*, 163 Wash. 369, 375 (1931)).

²⁰ Much of Plaintiffs' argument in regards to RCW 18.28.090 is spent on vague, sweeping statements regarding the applicability of equitable principles. Br. at 22-24. These arguments are red herrings designed to muddy the waters and distract the Court. The crux of Plaintiffs' argument appears to be that allowing an equitable offset under RCW 18.28.090 “would financially reward and encourage the business misconduct the statute seeks to prevent.” Br. at 21; *see also id.* at 22. It is entirely illogical to suggest that a company will be encouraged to act in an improper manner where an “equitable offset” would be available only in instances where the consumer has benefitted from the company's debt reduction services. Likewise, Plaintiffs vague accusation of “unclean hands” is equally unavailing and is based on unfounded allegations of “unconscientious” and “unjust” conduct and “fraud or deceit.” Br. at 23. The “unclean hands” argument entirely misses the point of the certified question – the question is not whether an equitable offset is available in all cases, but whether an equitable offset is available under RCW 18.28.090 at all.

Respectfully submitted this 28th day of January, 2011.

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