‘Don’t File!’: Rehabilitating Unauthorized Practice of Law-Based Policies in the Credit Counseling Industry

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"Don't File!": Rehabilitating Unauthorized Practice of Law-Based Policies in the Credit Counseling Industry

by

Lea Krivinskas*

The credit counseling industry is a formidable player in the country’s debt resolution services market: nearly nine million Americans seek the services of a credit counselor every year. As creditors protest bankruptcy’s popularity, many legislators endorse credit counseling and debt management plans (DMPs) as an alternative to Chapter 7 or Chapter 13 bankruptcy. Critics of the credit counseling industry charge credit counselors with engaging in abusive practices, ranging from the indiscriminate placement of consumers into DMPs to credit counseling agencies’ misuse of their non-profit status. It is unclear whether credit counselors serve the interests of debt-strapped consumers, of creditors who fund credit counseling operations, or of credit counseling agencies’ own for-profit affiliates, and to what extent simultaneous representation of multiple groups undermines the quality of the advice credit counselors provide to their customers. These abuses and conflicting interests have exposed the deficiencies of regulations currently governing the credit counseling industry.

The credit counseling industry debate continues to embolden critics and industry supporters, but one question has escaped scrutiny: have credit coun-

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1Although the phrase “credit counseling” generally encompasses both educational services and debt management plan administration, credit counselors are also known as budget planners, debt adjusters, debt poolers, and debt consolidators.


3See, e.g., American Bankers Association, Bankruptcy Reform, http://www.aba.com/Industry+Issues/Bankruptcy_Reform_Main_Menu.htm (last visited May 25, 2005) (arguing that abuses under the current bankruptcy system lead to an excessive number of filings every year and “rais[e] the cost of credit to millions of responsible borrowers who pay their bills”).

4See infra notes 29-30 and accompanying text.
selors, by directly or indirectly providing consumers with advice about the proper timing of a bankruptcy filing, engaged in the unauthorized practice of law? If so, rehabilitating unauthorized practice of law-based policies in existing laws governing the industry—policies that would prevent credit counselors from providing consumers with advice about the proper timing of a bankruptcy petition—will help to maintain a clearer line between bankruptcy and credit counseling, distinct competitors in the debt resolution business.

Part I of this Article discusses the current controversy surrounding the credit counseling industry. Part II concentrates on the industry's history and regulation. Part III discusses credit counselors' frequently scrutinized conflict of interest and provides examples of ways in which this conflict has affected credit counselors' recommendations to consumers about alternatives to DMPs—such as Chapter 13 bankruptcy.

Part IV discusses several cases in which courts evaluated statutes restricting debt adjustment to lawyers, or in which courts found that non-lawyers engaged in the unauthorized practice of law by performing activities related to debt adjustment. The Article concludes that, because of credit counselors' ingrained conflict of interest, states must consider imposing more rigorous restrictions on credit counseling agencies, ones that provide substantive guidance on the extent to which credit counselors may provide consumers with formal and informal recommendations about bankruptcy. Statutes regulating the credit counseling industry can integrate unauthorized practice of law-inspired policies to prevent credit counselors from providing consumers with advice about bankruptcy, a continuing threat to credit counselors and their creditor sponsors.

I. CREDIT COUNSELING: THE NEED FOR REFORM

The credit counseling industry has changed dramatically over the past several years, and, in turn, has generated considerable controversy. Creditors—the primary source of funding for non-profit credit counseling agencies (CCAs)—have decreased their "Fair Share" contributions, and often have

See, e.g., Shari Storm, Editorial, Financial Solutions; Consumer Credit Counseling Service Helps Resolve Problems, SEATTLE POST-INTELLIGENCER, Aug. 19, 1997, at A9 (creditors' voluntary contributions represent approximately 75 percent of CCCS funding).

See, e.g., David Lander, Developments Imperil Those Debt Counseling Agencies That Provide Effective Education and Counseling, 4 NORTON BANKR. L. ADVISER 7 (2001); Consumer Federation of America & National Consumer Law Center, Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants (2003), http://www.consumerfed.org/credit_counseling_report.pdf, at 10 [hereinafter Credit Counseling in Crisis]. "Fair Share" contributions are voluntary payments made by creditors to credit counselors. Under "Fair Share" programs, creditors remit to credit counselors a percentage of all payments made to creditors under debt management plans. See id. at 6. The FTC first required CCAs to disclose to consumers credit counseling agencies' financial
placed new conditions upon these voluntary payments. Additionally, the entry of new, aggressive market players, which are often affiliated with for-profit corporations, has inspired increased competition and cost-cutting measures. As a result of this race to the bottom, credit counseling agencies today offer less face-to-face, educational "counseling" services to their financially overextended customers.

Increasingly, CCAs that do business nationwide via telephone and the internet have instead placed many debtors in debt management plans without regard to debtors' unique financial situations. In a debt management plan, a consumer makes a monthly payment to the credit counseling agency, which subsequently disburses a predetermined portion of the payment to each unsecured creditor participating in the plan. The purpose of the DMP is to satisfy a credit counseling client's debts with future earnings, while allowing the debtor to retain enough income to pay for living expenses. In exchange, creditors may offer limited concessions, such as a reduction in interest rates, a longer payout period, or a waiver of late fees or over-the-limit fees. Many CCAs do not include all of a debtor's unsecured debt in a


9See Credit Counseling in Crisis, supra note 6, at 7-9.

10See id. at 18-19; Non-Profit Credit Counseling Organizations: Hearing Before the Subcomm. on Oversight of the Comm. on Ways and Means, 108th Cong. 77 (2003) [hereinafter Hearing] (statement of Michael Barnhart, Coalition for Responsible Credit Practices) ("Many traditional CCAs have been slow to meet new customer demands because they are revenue bound by declining 'fair share' contributions from the largest creditors."). Some credit counselors have described the abandonment of face-to-face interviews as a means of accommodating the hectic lives of busy consumers. See, e.g., Tom Shean, As Debt Counseling Groups Grow, Their Practices Come Under Attack, The VIRGINIAN PILOT (Norfolk), Sept. 14, 2003, at D1 ("Face-to-face interviews no longer meet the needs of many individuals who need help but cannot take time off from work to meet with a counselor . . . .").
DMP, and secured debt is not included at all. In addition to the more frequent placement of debtors into DMPs, highly publicized abuses by certain CCAs—unfair and deceptive business practices, excessive fees, and abuse of non-profit status—have prompted vigorous criticism by consumer groups, heightened scrutiny by federal regulators, and calls for reform from within the industry itself. For example, several credit counseling agencies, which are generally organized as non-profits under the Internal Revenue Code (IRC), have recently been accused of circumventing IRC regulations, prompting numerous investigations by the Internal Revenue Service (IRS). The IRS has threatened to revoke the § 501(c)(3) privileges of approximately fifty CCAs that may have abused their non-profit status. Several CCAs have entered into contracts with for-profit affiliates that transfer control over nearly all of the substantive operations of the non-profit CCAs to these affiliates. The CCAs retain authority only over customer enrollment and counseling functions.

In essence, the new CCAs resemble “dummy” credit counseling organizations, stripped of their DMP processing functions and contractually obligated to pay for-profit affiliates and their owners large fees for these services—fees ultimately obtained from the financially strapped consumers who enroll in DMPs. These contractual entanglements between CCAs and for-profit

16Credit Counseling in Crisis, supra note 6, at 24 (noting that many CCAs fail to explain to consumers that DMPs include only unsecured debt).
17Id. at 21; Michelle Singletary, Make Sure Credit Counseling Lives Up to Its Name, WASH. POST, Oct. 23, 2003, at E3.
18See REPORT, supra note 8, at 5.
20REPORT, supra note 8, at 5. A corporation may qualify as a non-profit if it is organized and operated exclusively to accomplish permissible charitable, religious, scientific, or educational purposes. See 26 U.S.C. § 501(c)(3) (2000).
23See, e.g., Caroline E. Mayer, Debt-Relief Firms to Pay $6 Million in FTC Settlement; Agency Cites Lies About Fees, Services, WASH. POST, Mar. 31, 2005, at E6.
24See REPORT, supra note 8, at 3.
25See id.
affiliates have jeopardized the non-profit status of CCAs and, more significantly, have eroded the "discretion and judgment" of credit counselors who aggressively market their non-profit status to consumers as a "seal of approval." Despite this controversy, the credit counseling industry has tripled in size over the past decade. Credit counseling has been endorsed in recently passed bankruptcy reform legislation as a viable bankruptcy alternative. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 prevents a debtor from filing a petition under the Bankruptcy Code unless the debtor first receives "an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outline[s] the opportunities for available credit counseling and assist[s] such individual in performing a related budget analysis." The bankruptcy legislation imposes great demands on a "largely unregulated and unknown" credit counseling industry, which will have to grow another forty percent to fulfill the requirements of the new law. The Coalition for Responsible Credit Practices, an organization representing CCAs and supporting businesses, acknowledges that "the industry in its current form cannot accommodate [the] one million new clients" who will require assistance under the legislation.

Credit counselors' conflict of interest—their simultaneous representation of the interests of consumers who seek maximum debt forgiveness and of unsecured creditors who seek full recoveries—has long been recognized. Historically, many states prohibited commercial debt adjustment on the ground that credit counselors perform tasks traditionally relegated to the legal profession: reaching agreements with creditors, attempting to procure releases of wage assignments or garnishments, and advising debtors of their

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26Id. at 20.
28See Hearing, supra note 10, at 77 (statement of Michael Barnhart).
30Id.
32Hearing, supra note 10, at 77 (statement of Michael Barnhart).
33See id.
34See, e.g., HomER KRIPEK, CONSUMER CREDIT 330 (1970); Abby Sniderman Milstein & Bruce C. Ratner, Consumer Credit Counseling Service: A Consumer-Oriented View, 56 N.Y.U. L. REV. 978, 986 (1981) ("Rather than acting as a neutral intermediary or a debtor's advocate, CCCS is primarily a creditor-sponsored agency that performs functions that benefit creditors."); Carl Felsenfeld, Consumer Credit Counseling, 26 BUS. LAW. 925, 928 (1971) ("While many [debt] adjusters are responsible and do advise debtors in terms of their financial status, their budgeting, and how best to manage their financial affairs, this definitely takes second place . . . to the business of collecting and paying out.").
legal rights against creditors. In these states, attorneys were permitted to administer debt pooling plans "in large part based on the premise that debt adjusting is so close to lawyering that only a trained lawyer can properly advocate the debtor's position." In effect, legislators incorporated unauthorized practice of law-based policies in statutes directly regulating the debt pooling industry to minimize the likelihood that the advice debt pooling consumers receive would be influenced by a credit counselor's conflict of interest. Because of the delicate balance of interests between creditors and debtors, only lawyers were permitted to administer debt pooling plans.

During the 1960s and 1970s, non-profits were exempted from these prohibitory statutes because legislators were confident that these entities—like lawyers—could provide financially troubled debtors with disinterested advice. Today, however, state statutes that either impose licensing requirements or completely ban debt adjustment generally exempt both lawyers and non-profits.

As many consumers seek protection from creditors through bankruptcy and credit counseling, the work of attorneys and credit counselors continues to converge. Increased competition and cost-cutting in the credit counseling industry and credit counseling agencies' frequent affiliation with for-profit corporations accentuate credit counselors' conflict of interest. Because creditors have decreased their "Fair Share" contributions, credit counselors must increasingly look to consumers to support credit counseling agencies' operations. As a result, CCAs are more likely to place debtors indiscriminately in DMPs, which are credit counseling agencies' primary source of revenue. This financial pressure has also caused CCAs to abandon more expensive, diversified service offerings in favor of "DMP-only" business structures.

As a result of credit counselors' creditor origins and pro-creditor bias, debtors may receive insufficient or misleading information about alternatives to DMPs—such as Chapter 7 or Chapter 13 bankruptcy. Many credit counselors portray bankruptcy as a less desirable, more expensive, and more em-

36Milstein & Ratner, supra note 14, at 984 n.34.
37Id. at 984-85.
38Credit Counseling in Crisis, supra note 6, at 38-39.
39Id. at 10.
40REPORT, supra note 8, at 1.
41Credit Counseling in Crisis, supra note 6, at 1.
42Id. at 7.
43Id. at 20.
barrassing alternative to credit counseling.\textsuperscript{44}

Although this portrayal of bankruptcy could be dismissed as aggressive marketing—and is defended by creditors and legislators who wish to decrease bankruptcy filings—it raises unauthorized practice of law concerns. Even though unauthorized practice regulations are notoriously ambiguous and vary in substance,\textsuperscript{45} several courts have held that non-attorneys may not provide debtors with advice about the proper timing of bankruptcy petitions.\textsuperscript{46} Credit counselors' subtle—and not so subtle—recommendations to consumers about when—or if—to file for bankruptcy do not merit attention because lawyers' hegemony in the debtor-creditor context is threatened. Rather, these developments are troubling because the services being offered by credit counselors through DMPs and by bankruptcy attorneys represent two substantially different debt resolution regimes. Credit counselors and bankruptcy attorneys "each have a service to provide,"\textsuperscript{47} and these services are not interchangeable. Many credit counselors are erroneously treating bankruptcy and credit counseling as overlapping alternatives by suggesting to a debtor when—or if—she should file for bankruptcy, and by encouraging a debtor to pursue credit counseling instead.

The number one service offered by credit counselors—DMP administration—resembles a Chapter 13 bankruptcy plan in several respects.\textsuperscript{48} Nevertheless, while both attempt to provide an orderly means of satisfying

\textsuperscript{44}A survey of credit counselor advertisements and "question and answer" websites reveals an oversimplified, sensational portrayal of bankruptcy. These advertisements capitalize on the stigma associated with bankruptcy by encouraging debtors to "avoid the catastrophe of bankruptcy," identifying bankruptcy as a "ten-year mistake," and emphasizing post-bankruptcy ramifications ("A bankruptcy can also prevent you from opening a bank account, getting insurance, or getting a better job."). See, e.g., Money Management International, Ask Susan Responses, at http://www.moneymanagement.org/Education/DearSusan/KB_Details.asp?Q_KnowledgeBaseTopicID_E_2 (last visited May 25, 2005); CCCS of the Gulf Coast Area Inc., Dear Susan & Co. Bankruptcy, at http://www.cccsintl.org/susan/ban.htm (last visited May 25, 2005).

\textsuperscript{45}See, e.g., Quintin Johnstone, Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution, 39 WILLAMETTE L. REV. 795, 796, 806-09. Professor Johnstone has described several problems characteristic of states' unauthorized practice regimes: "[t]he extensive variation from state to state in what constitutes the unauthorized practice of law; the frequent ambiguity as to who and what are being regulated; the variety of professions and occupations subject to unauthorized practice restrictions; and the widespread lack of the law's enforcement." \textit{Id.} at 796.

\textsuperscript{46}See infra Part IV.B.

\textsuperscript{47}See David A. Lander, Recent Developments in Consumer Debt Counseling Agencies: The Need for Reform, 21 AM. BANKR. INS. J. 14, 19 (2002).

\textsuperscript{48}See infra Part IV.C. A debtor might choose to pursue either Chapter 7 or Chapter 13 bankruptcy in lieu of entering into a debt management plan. This Article, however, compares DMPs to Chapter 13 and not to Chapter 7 because Chapter 13 and DMPs are more structurally similar than are Chapter 7 and DMPs. For example, Chapter 13 and DMPs are best suited to consumers with a regular source of income. Additionally, in both Chapter 13 and in DMPs, debtors pay creditors over an extended period of time. Practitioners and academics have frequently explored the similarities and differences between Chapter 13 and DMPs. See, e.g., Hoffman, supra note 13, at 1637-41; Symposium, supra note 35, at 372-88; George R. Kennedy, Debt Pooling Arrangements vs. Chapter XIII Proceedings, 46 I.E.L. B.J. 816 (1958).
creditors’ claims, the two systems diverge in important ways. These differences might not be obvious to the average debtor. If consumers who are prime candidates for bankruptcy enter into DMPs after receiving inaccurate or insufficient information about bankruptcy — i.e., without full knowledge of the important differences between the two debt resolution regimes — their financial problems may needlessly intensify.

Although it is unrealistic to place severe restrictions on DMP administration, states should consider rehabilitating unauthorized practice of law-based policies in the credit counseling context. In the past, debt adjustment was frequently limited to lawyers and was therefore defined as the “practice of law” because of the perceived inability of anyone other than a debtor’s attorney to represent dispassionately a debtor’s financial interests. While these prohibitory statutes may have been overinclusive, they properly concentrated on the most significant barrier to effective legal and non-legal counseling of consumers: a conflict of interest. Although it may be impractical to limit the practice of debt adjustment to the legal profession, this skepticism was well placed. The law governing the credit counseling industry has become too lenient in light of credit counselors’ heightened conflict of interest and the likelihood that credit counselors will improperly influence the timing of a debtor’s bankruptcy petition — generally considered the unauthorized practice of law.

The content of credit counselors’ recommendations to consumers about bankruptcy must be closely scrutinized because credit counselors possess a heightened pro-creditor bias, bankruptcy’s stigma continues to deter consumers (including those who are prime candidates for Chapter 13) from filing, and Congress has unwisely treated credit counseling and bankruptcy as largely interchangeable in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Rehabilitating unauthorized practice of law-based policies in state statutes governing the credit counseling industry can target credit counselors’ preexisting antagonism toward their creditor sponsors’ pri

See infra Part IV.C.

See infra note 129 and accompanying text.

See Milstein & Ratner, supra note 14, at 984 n.34.

For a general discussion of credit counselors’ pro-creditor bias, see id. at 986-94.


See supra text accompanying notes 29-30.
mary adversary: bankruptcy. This approach may be superior to imposing on CCAs more rigorous licensing requirements, more closely policing restrictions on non-profits’ affiliation with for-profit corporations, or requiring would-be bankruptcy filers to seek credit counseling only from agencies that satisfy minimum requirements under the new bankruptcy law. Because CCAs will likely continue to evolve to circumvent rules that only indirectly address the substance of credit counselors’ recommendations to consumers about bankruptcy, credit counselors’ conflict of interest threatens the proper placement of consumers in appropriate debt resolution programs.

II. HISTORY AND REGULATION OF THE CREDIT COUNSELING INDUSTRY

Beyond recent highly publicized scandals, the credit counseling industry has long been a subject of controversy. From the 1930s through the early 1970s, when the debt pooling industry was dominated by for-profit entities, the industry fell into disrepute. In the most egregious cases, debt poolers charged exorbitant fees, failed to remit payments to creditors, established infeasible payment plans, and assured debtors that all obligations would be settled by the plan, even though the debt poolers had failed to secure the participation and cooperation of all creditors. State legislatures responded to these problems with legislation that either prohibited or regulated for-profit debt pooling.

In the early 1960s, under the leadership of credit industry representatives, the National Foundation for Credit Counseling (NFCC)—a non-profit trade organization—organized agencies that combined credit counseling and debt management services. These non-profit agencies—called Consumer Credit Counseling Services (CCCS)—generally required consumers to

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55See infra text accompanying note 96.
56See supra notes 21-23 and accompanying text.
58Milstein & Ratner, supra note 14, at 979-80; Symposium, supra note 35, at 381 (“The ignorant debtor is easy prey to the debt adjuster advertising freedom from financial worries, and the opportunities for unscrupulous practices are numerous . . . . The debt pooler may count on the fact that the debtor is too poor and too ignorant of his rights to bring any legal action. Many debt adjusters operate reputable businesses but the opportunities for chicanery are so numerous that several states have enacted legislation regulating or prohibiting debt adjustment.”).
59Milstein & Ratner, supra note 14, at 980.
60See id; Memorandum from the Drafting Committee for the Consumer Debt Counseling Act, to the NCCUSL Committee of the Whole, http://www.law.upenn.edu/bll/ulc/UCDC/2004AnnMtgMemo.pdf (June 14, 2004) [hereinafter NCCUSL Memorandum].
61The National Foundation for Credit Counseling was previously known as the National Foundation for Consumer Credit. See Hearing, supra note 10, at 44 (statement of W. Patrick Boisclair, Chairman, Board of Trustees, National Foundation for Credit Counseling, Inc.).
62See Milstein & Ratner, supra note 14, at 980-81.
pay an administrative fee for debt pooling services.\textsuperscript{63}

Traditional credit counseling agencies offered face-to-face counseling sessions in neighborhood offices and provided a range of services, including budget counseling, community education, and debt management plans.\textsuperscript{64}

These counseling sessions were traditionally one-on-one meetings in which an educated counselor performed a detailed analysis of an individual’s income, expenses, debts, and other budget requirements. A consumer would meet with a counselor more than once and for significant periods of time, often over an hour. After a budget analysis, the counselor might recommend that the consumer readjust his or her budget, utilize a debt management plan, or seek legal assistance, possibly to declare bankruptcy.\textsuperscript{65}

CCCS agencies were organized by creditors in part to stem the increasing number of personal bankruptcy filings.\textsuperscript{66}

During the 1960s and 1970s, legislators began to exempt non-profit debt poolers from the prohibitory statutes.\textsuperscript{67} Legislators distinguished between for-profit and non-profit debt poolers and granted statutory concessions to the latter: “Apparently [legislators] were convinced that the not-for-profit character of CCCS was sufficient to protect the consumer and in some states were content to let CCCS charge a fee to consumer clients, even though the commercial practice of debt pooling was so abusive as to require its prohibition.”\textsuperscript{68}

In the 1980s and early 1990s, with the growth of consumer debt, the credit counseling industry expanded.\textsuperscript{69} As more debtors filed for bankruptcy, more sought the help of credit counselors.\textsuperscript{70} The industry grew increasingly competitive, and many new entrants aggressively targeted financially strapped debtors via internet and television advertisements.\textsuperscript{71} Although creditors traditionally paid a “Fair Share” contribution of twelve to fifteen percent of the funds that agencies collected from their customers,\textsuperscript{72} creditors decreased this contribution to an average of nine percent during the 1990s.\textsuperscript{73}

\textsuperscript{63}Id. at 981.
\textsuperscript{64}Credit Counseling in Crisis, supra note 6, at 1, 7.
\textsuperscript{65}REPORT, supra note 8, at 4.
\textsuperscript{66}See Milstein & Ratner, supra note 14, at 986.
\textsuperscript{67}Id. at 984-85.
\textsuperscript{68}Id.
\textsuperscript{69}See Lander, supra note 47, at 14-15.
\textsuperscript{70}See id.
\textsuperscript{71}Credit Counseling in Crisis, supra note 6, at 7.
\textsuperscript{72}REPORT, supra note 8, at 4, 35.
\textsuperscript{73}Credit Counseling in Crisis, supra note 6, at 10.
In 1994, a group of independent CCAs sued the NFCC and its member agencies under the Sherman Act, alleging that the NFCC entered into unlawful agreements with creditors to limit competitive entry into the credit counseling market. The parties eventually entered into a settlement agreement under which creditors were prohibited from serving on the NFCC's national board of directors. This antitrust suit opened up the credit counseling market to other trade organizations, including the American Association of Debt Management Organizations (AADMO) and the Association of Independent Consumer Credit Counseling Agencies (AICCCA).

Today, several creditors no longer pay a flat rate to all credit counselors, and instead have implemented "pay for performance programs," whereby creditors evaluate credit counselors according to several restrictive criteria. These programs calculate "Fair Share" contributions based upon the success rates of the DMPs, often determined by a combination of the following: the volume of payments made under the DMPs, the frequency of default by CCAs, and the age of consumers' credit accounts. Additionally, to be eligible for creditors' "Fair Share" programs, CCAs must often meet certain "minimum standards," including agency accreditation, counselor certification, and non-profit status.

It is disingenuous, however, to portray creditors as "regulator[s] of credit counseling practices." While creditors may be in a unique position to police the industry through the imposition of rigorous criteria, in a climate of aggressive debt collection, creditors have no major incentive to do so. Creditors might seek basic improvement in credit counseling industry standards to prevent the industry's regulation (by avoiding scathing publicity), and, quite possibly, to prevent bankruptcy from becoming a preferred method of debt resolution. Because of their financial interest in maximizing debt recoveries, creditors have only a superficial interest in promoting reforms that might contribute to a decrease in DMP enrollment and an increase in bankruptcy filings. Likewise, creditors may have difficulty monitoring compliance with any standards imposed on CCAs.

In an interview with the U.S. Senate Permanent Subcommittee on Investigations, creditors explained the decrease in contributions and the establish-

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75 REPORT, supra note 8, at 35.
76 See Credit Counseling in Crisis, supra note 6, at 8.
77 Id. at 12.
78 REPORT, supra note 8, at 37.
79 Id. at 36-37.
80 See id. at 36.
81 See id. at 34.
82 See id. at 38.
ment of these minimum standards as an attempt to offset an increase in creditors' collection department expenses resulting from rising “Fair Share”
costs.\textsuperscript{83} Creditors may have also withdrawn financial support because they believe that many consumers enrolling in DMPs do not need creditor conces-
sions (such as a reduction in interest rates) to be able to pay their debts in full.\textsuperscript{84}

Alternatively, it is possible that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005— which requires debtors to seek pre-bank-
ruptcy credit counseling at their own expense\textsuperscript{85}— has affected creditors’ will-
ingness to support the industry. Because, under the law, consumers are funneled to credit counselors before consumers can qualify as “debtors” under
the Bankruptcy Code,\textsuperscript{86} creditors may question the necessity of making contributions as large as fifteen percent to maintain the business of credit
 counselors.

Today, the credit counseling industry is insufficiently and inconsistently regulated at the state level. In states that lack legislation directly applicable
to the credit counseling industry, consumers are generally protected only by
laws prohibiting fraud and false advertising\textsuperscript{87}. Those states’ laws that
directly address the credit counseling industry usually either 1) exempt non-
profits from a general prohibition on debt adjustment or 2) exempt non-pro-
fits from mandatory requirements (like fee limits, bond rules, and written con-
tract requirements).\textsuperscript{88}

As the IRS has threatened to revoke the non-profit status of several CCAs that may have violated IRC rules,\textsuperscript{89} credit counselors have pressured state legislatures to allow the entry of for-profits into the credit counseling
market.\textsuperscript{90} Decreasing creditor “Fair Share” contributions and agencies’ failure
to diversify their funding sources\textsuperscript{91} have jeopardized the traditional non-
profit CCA model: “[T]he non-profit model is no longer viable. It is being

\textsuperscript{83}See id. at 35.
\textsuperscript{84}See NCCUSL Memorandum, supra note 60.
\textsuperscript{86}See id. § 106(a) (to be codified at 11 U.S.C. § 109(h)(1)).
\textsuperscript{87}Report, supra note 8, at 40.
\textsuperscript{88}See id.
\textsuperscript{89}See, e.g., Caroline E. Mayer, Consumer Debt-Service Firms Settle FTC Charges, WASH. PoST, Mar. 30, 2005.
\textsuperscript{90}Recently, Virginia eliminated the requirement that credit counseling agencies be non-profit and tax-
\textsuperscript{91}See Credit Counseling in Crisis, supra note 6, at 20.
rejected by consumers and suffocated by creditors who are investing less and less." As a result, CCAs will likely continue to pressure states to remove restrictions on the entry of for-profit CCAs into the credit counseling industry.

Additionally, there are currently no laws actively enforced that govern credit counselors' advice to consumers about bankruptcy—including recommendations about the proper timing of a bankruptcy petition. Unauthorized practice of law statutes are generally poorly enforced due to a lack of state resources to combat the problem and states' ambiguous definitions of the "practice of law." These laws may be especially neglected in the credit counseling area for several reasons. The demand for low-cost legal assistance that has resulted in the proliferation of non-lawyer services is likely particularly strong among financially strapped consumers. This demand may have given regulators an incentive to overlook possible abuses. Secondly, legislators' desire to stem the tide of bankruptcy filings with the intervention of credit counselors promises to fuel the growth and, perhaps, the legitimacy, of the industry. Finally, the stigma associated with filing for bankruptcy remains strong and may have sustained consumer demand for bankruptcy alternatives.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Consumer Federation of America (CFA) and the National Consumer Law Center (NCLC) have drafted model laws to encourage states to impose uniform bonding, registration, records retention, and business practice requirements on CCAs. Both the Uniform Consumer Debt Counseling Act and the Model Consumer Debt Management Services Act would require CCAs to provide consumers with a written document providing that DMPs are not suitable for all individuals and that consumers may request information about other ways, including bankruptcy, to deal with indebtedness.

While these disclosures emphasize the limitations of credit counseling as a means of debt resolution, they do not provide guidance to CCAs about the

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92Hearing, supra note 10, at 78 (statement of Michael Barnhart).
95See, e.g., Warren & Tyagi, supra note 53, at 72-75.
97See Uniform Consumer Debt Counseling Act § 17(e)(1), at 35 (Draft Mar. 21, 2005); Model Consumer Debt Management Services Act § 7(a)(1)(H)(i).
specific advice counselors may provide to consumers about alternatives to DMPs—like bankruptcy. Under these model laws, credit counselors would be prohibited from refusing to provide information about bankruptcy to consumers (upon a consumer’s request), and possibly would be prevented from refusing to refer credit counseling clients to bankruptcy attorneys. Both model laws, however, although requiring CCAs to disclose important facts about DMPs, do not prevent credit counselors from providing their clients with insufficient or misleading information about bankruptcy. Credit counselors’ characterization of bankruptcy as a “last resort”—their influence over a consumer’s decision when to file a bankruptcy petition—would be unaffected by the acts.

III. CREDIT COUNSELORS’ CONFLICT OF INTEREST

A. Effect on Bankruptcy Recommendations

Fundamentally, “properly serving a financially distressed debtor frequently requires a debt pooler to act in ways that contravene the financial interests of the creditor.”98 Credit counselors have been accused of having a pro-creditor bias that restricts their ability to provide fully disinterested advice to their customers.99 Because credit counselors are compensated with a percentage of all payments made to creditors under DMPs, credit counselors have an incentive to encourage debtors to enter into these programs, even when another course of action might better serve consumers’ interests.100 By participating in a DMP and submitting to a credit counselor’s intermediary function, a debtor substitutes a credit counselor’s leverage for his own: 

When the debtor turns his problem over to [a credit counselor], he turns over his bargaining power as well. It is apparent that the true motivation of [a credit counselor] in seeking [full disclosure of the debtor’s financial information to creditors] is not to maximize the bargaining position of its

98 Milstein & Ratner, supra note 14, at 985.

Can a counselling organization with creditor interests so heavily influential exercise a proper judgment in advising debtors whether to work out an extended payment program or to wipe out the debts through bankruptcy?

Can one draw a clear-cut distinction between a debt counselling service frankly operated for profit and one organized on a non-profit basis without broad community representation and charging fees for running expenses which include a handsome salary to the director?

Id. at 981 (quoting H. Kripke, Consumer Credit 331 (1970)). See also lain Ramsay, Mandatory Bankruptcy Counseling: The Canadian Experience, 7 Fordham J. Corp. & Fin. L. 525, 532 (2002) (discussing the conflict of interest of Canadian bankruptcy trustees, who must both administer debtors’ bankruptcies and provide mandatory credit counseling).

99 See Milstein & Ratner, supra note 14, at 985-86.

100 Id. at 987-88.
debtor-clients. Rather, the goal is the full repayment of the outstanding debt.101

As a result, credit counselors are unlikely to seek concessions that a consumer could individually extract from a creditor under the threat of a bankruptcy petition (e.g., negotiating a reduction in the amount of the claim).102 Additionally, credit counselors may be unlikely to recommend that clients file for bankruptcy—a course of action scorned by the creditors that sponsor debt management services.103

Traditionally, NFCC credit counselors were not permitted to discuss bankruptcy with clients,104 presumably because creditors aimed to reduce the number of bankruptcy filings through the establishment of debt adjustment services.105 Today, many credit counseling agencies recommend bankruptcy only to their most overextended clients, a group that has ranged from approximately six to twelve percent of credit counseling customers.106 Some credit counselors choose never to refer clients to bankruptcy attorneys.107

Of course, many credit counseling agencies recognize that bankruptcy is a necessary course of action for numerous debt-strapped consumers. Many CCAs—particularly those of the "older generation" that charge reasonable fees and preserve traditional, face-to-face counseling—recommend bankruptcy to credit counseling clients when appropriate108 and provide meaningful budgeting recommendations to financially overburdened consumers.109

101Id. at 989.
102Id. at 990.
103Id. at 992-93; see also Scott Barancik, Counselor, Collector, St. Petersburg Times (Florida), Apr. 14, 2002, at 1H.
104See Sheryl Harris, Credit Counseling Crunch, Cleveland Plain Dealer, June 22, 2003, at G1.
105See Milstein & Ratner, supra note 14, at 986; NCCUSL Memorandum, supra note 60 ("Formed and supported primarily by the credit card industry, most counseling agencies never recommended bankruptcy, and many never even mentioned it as a possibility.").
107See, e.g., Tanya Somaroo, Credit Counseling Helps Fill Bill for Consumers Who Overspend, News-Press (Florida), Jan. 2, 2001, at 1A; Sharon E. White, As Economy Tumbles, the Jobless Lose Homes, Charlotte Observer, Mar. 31, 2003, at 5B.
108See, e.g., Kathleen Pender, Group Aids You in Paying Off Debts, S.F. Chron., May 2, 1994, at D1 (quoting CCCS credit counselor whose office recommends bankruptcy to one-third of clients).
109See generally Michael E. Staten, Gregory Elliehausen & E. Christopher Lundquist, The Impact of Credit Counseling on Subsequent Borrower Credit Usage and Payment Behavior, at 1-4, 24-36, http://
Credit counselors can potentially serve a unique function by reducing the transaction costs associated with organizing DMPs, securing the cooperation of creditors in extending payment terms, and monitoring the actions of the debtor and creditors during the course of the DMP. Unfortunately, however, a race to the bottom will continue to dictate the prevailing standards in the industry, and, absent intervention, the new generation of “bad actors” may continue to gain market share—to the detriment of both reputable CCAs and consumers.

Credit counselors acknowledge that their reluctance to refer consumers to bankruptcy attorneys is at least partially attributable to the conflict of interest created as a result of the credit counseling industry’s reliance on creditor funding: “[One credit counselor] acknowledged that bankruptcy is anathema to the credit card companies that underwrite his work. It’s a legitimate criticism. Obviously, we’re not going to refer someone to a bankruptcy except in dire circumstances.” Credit counselors who never recommend bankruptcy to consumers explain this as a way for debtors to avoid bankruptcy’s harsh impact on their credit ratings or as an attempt to encourage debtors to learn necessary budgeting skills: “[Consumers] don’t have a money problem. [Consumers] have an attitude problem about money.”

Although many credit counseling agencies are reluctant to discuss bankruptcy—which generates no profits for CCAs—with consumers, some credit counseling agencies’ business model appears to involve actively dissuading individuals from filing for bankruptcy. One CCA claims to communicate a simple message to consumers: “Don’t File!” Indeed, even the NFCC—a trade association for over 130 credit counseling agencies and over 1000 offices nationwide—in its “best practice” suggestions to member

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111See, e.g., Tom Shean, As Debt Counseling Groups Grow, Their Practices Come Under Attack, VIRGINIAN PILOT (Norfolk), Sept. 14, 2003, at D1 (discussing traditional credit counseling agencies’ decreased revenues resulting from the entry of CCAs that employ aggressive advertising campaigns and that have abandoned face-to-face counseling services).
112Barancik, supra note 103, at 1H; see also Christine Dugas, Getting Out from Under Debt, USA TODAY, Apr. 18, 2003, at 3B.
113Pamela Yip, Pile of Debt Leaves Woman in Financial Peril, DALLAS MORNING NEWS, July 1, 2003, at 6.
114See, e.g., Somaroo, supra note 107, at 1A.
115See Credit Counseling in Crisis, supra note 6, at 25.
116Id.
agencies identified the referral of CCA customers to bankruptcy attorneys as a "last resort."\textsuperscript{118}

Credit counseling agencies generally are careful to include in consumer contracts and advertising literature a disclaimer that, although credit counselors may answer basic questions about bankruptcy, they are not lawyers and do not provide legal advice.\textsuperscript{119} By providing consumers with guidance about bankruptcy, however (specifically, dissuading consumers from filing for bankruptcy), credit counselors may be crossing the line into the unauthorized practice of law.

B. BANKRUPTCY-RELATED ACTIVITIES AS THE UNAUTHORIZED PRACTICE OF LAW

Despite states' vague, often circular definitions of the "practice of law," some bankruptcy-related activities have been held by courts to constitute the practice of law. These activities include recommending to a debtor which chapter of bankruptcy to file, preparing a debtor's bankruptcy petition and schedules, and recommending to a debtor which exemptions to claim.\textsuperscript{120} Additionally, several courts have held that providing advice to a debtor about when he should file for bankruptcy constitutes the unauthorized practice of law.

For example, in In re Gabrielson, an Arizona bankruptcy judge held that a bankruptcy petition preparer engaged in the unauthorized practice of law by determining when the debtor should file a bankruptcy petition, recommending to the debtor the exemptions he should claim, and advising the debtor whether to file for Chapter 7 or Chapter 13 bankruptcy.\textsuperscript{121} The court concluded that the act of determining when the debtor should file the

\textsuperscript{118}Standards, supra note 7, at 2, 5.

\textsuperscript{119}See, e.g., Money Management International, MMI Debt Management Agreement (on file with author) ("I understand that though a counselor may answer general questions about bankruptcy or other issues, MMI does not provide legal or tax advice. If legal or tax advice is needed, I will seek the appropriate assistance."); Consumer Credit Counseling Service of Southern New England, Agreement (on file with author) ("I understand that, although CCCS-SNE may answer questions about bankruptcy, CCCS-SNE does not provide legal advice. If legal advice is needed, I recognize that it is my responsibility to seek appropriate assistance."); Lisa Fickenscher, Credit Industry, Advocates Display Rare Cooperation on Brochure for Customers, AM. BANKER, vol. 160, issue 10, Jan. 17, 1995.

\textsuperscript{120}See, e.g., In re ICLNDS Notes Acquisition, LLC, 259 B.R. 289, 294 (Bankr. N.D. Ohio 2001) (finding that the practice of law includes counseling clients on bankruptcy-related financial matters, such as recommending whether a client would benefit from a bankruptcy filing or preparing a client's bankruptcy schedules); In re Soulisak, 227 B.R. 77, 81 (Bankr. E.D. Va. 1998) (holding that a non-lawyer financial adviser engaged in the unauthorized practice of law by, among other things, discussing the differences between bankruptcy chapters with clients, counseling on exemptions, and discussing the effect of the reaffirmation of debts).

bankruptcy petition in and of itself constitutes the practice of law.122

Similarly, in In re Herren, the Wyoming Bankruptcy Court held that a
manager of a document center engaged in the unauthorized practice of law by
assisting a Chapter 7 debtor in preparing and completing a bankruptcy peti-
tion and schedules with financial information obtained from the debtor, advis-
ing the debtor about available exemptions, providing the debtor with
definitions of legal terms, and advising potential clients in advertising material
that a bankruptcy filing should not be delayed.123 The court identified each
activity as the unauthorized practice of law.124 Providing advice about the
timing of an anticipated bankruptcy filing requires legal expertise, because
"from that date flows numerous consequences including the dischargeability
of certain debts such as student loans and taxes, entitlement to discharge,
recoverability of preferences, and maximization of exemptions."125

The Herren court noted, however, that rendering typing services by
merely transcribing written information provided by clients and selling
printed material purporting to explain bankruptcy practice and procedure to
the public did not constitute the unauthorized practice of law.126 Although
the debtor signed a contract with the document center indicating that she
understood that the center did not offer legal advice and did not employ any
attorneys, the court found that the disclaimer did not insulate the center
from liability.127

Because courts generally look to the facts of each case to determine
whether a party has violated unauthorized practice laws,128 it is misleading to
suggest that the activities of credit counselors—a diverse group—regularly
encroach on the "practice of law." By counseling debtors about the merits of
filing for bankruptcy, however, or by refusing to refer debtors to bankruptcy
attorneys altogether, credit counselors may be providing debtors with im-
plicit or explicit advice about the proper timing of a bankruptcy filing.

C. COMPARISON BETWEEN DEBT MANAGEMENT PLANS AND
CHAPTER 13 BANKRUPTCY

These observations about credit counselors' recommendations to consum-
ers are not important because they identify a threat to lawyers' historic he-

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122Id. at 826.
advertising material the statement: "[p]lease . . . don’t delay . . . your debt problem will not go away . . .
unless you act NOW." The court concluded that this appeal alone constituted the practice of law. Id. at
992.
124Id. at 994-95.
125Id. at 995.
126Id. at 994.
127Id. at 993, 996.
gemony in the debtor-creditor area. Resistance to overzealous enforcement of unauthorized practice laws may be warranted for several reasons. Encouraging out-of-court debt resolution may free up precious judicial resources and save consumers money that would otherwise be expended on attorneys’ fees. Likewise, consumers may rightfully insist upon non-lawyer alternatives in the marketplace.129

Rather, the advice consumers receive in the credit counseling context merits attention because of the inherent differences between a debt management plan and its main competitor—Chapter 13 bankruptcy. Unlike bankruptcy petition preparers and other non-attorney legal service providers,130 credit counselors do not offer consumers access to the same legal remedies as do their lawyer competitors. Credit counselors through DMP administration do not offer a “generic,” low-cost version of the same services being offered by bankruptcy attorneys—nor do they represent the same debt resolution regime. As a result, questions of the relative competence of lawyer and non-lawyer service providers that dominate the unauthorized practice of law debate,131 while important, are secondary. Instead, the advice consumers receive regarding the suitability of each debt resolution regime to their unique financial situations becomes a tremendous concern.

Credit counselors’ characterization of bankruptcy as a last resort—in advertisements and in individual counseling sessions with debtors—is troubling because of the central differences between the two debt resolution regimes. The “implicit endorsement” of credit counseling by Congress rests on the assumption that credit counseling is an “adequate substitute” for a bankruptcy filing.132 A comparison of the central features of credit counseling and Chapter 13 bankruptcy will help to highlight the problems associated with allowing credit counselors to advise consumers—implicitly or explicitly—about the proper timing of a bankruptcy filing.

In both a DMP and a Chapter 13 repayment plan, a debtor agrees to make payments to creditors with future income.133 Additionally, both credit counselors and trustees provide an administrative function, ensuring that creditors are timely paid.134

129See Rhode, Professionalism, supra note 94, at 704 (listing the public’s desire for non-lawyer alternatives as a contributor to the growth of lay competition).

130Many professionals occasionally engage in quasi-legal activities, which makes it difficult to devise a workable definition of the practice of law. Seitzinger v. Cmty. Health Network, 676 N.W.2d 426, 450 (Wis. 2004) (Abrahamson, C.J., dissenting). These groups include financial advisers, investment advisers, accountants, bankers, mediators, arbitrators, trust officers, engineers, geologists, realtors, paralegals, land planners, bankruptcy petition preparers, and notaries. See id.

131See Rhode, Professionalism, supra note 94, at 707-08.

132See Hoffman, supra note 13, at 1637.

133Id.

134Id.
The similarities end there, however. Credit counselors will only ask un-
secured creditors to participate in DMPs. Debtors must continue to deal
individually with secured creditors, who may foreclose upon a mortgage on a
debtor’s house—a consumer’s most essential, and most frequently encum-
bered, asset—after default. In contrast, a Chapter 13 bankruptcy petition
may protect a debtor who faces imminent foreclosure of the mortgage on his
principal residence. Subsequently, a Chapter 13 debtor has the ability to
cure defaults on long-term home mortgage debts by bringing the payments
current over a period of time not exceeding five years.

Unsecured creditors are not obligated to participate in a DMP, yet are
required to participate in a debtor’s Chapter 13 repayment plan in order to
receive any recovery. Credit counselors must rely on creditors’ coopera-
tion for the success of a DMP: “[a credit counselor] rarely makes a contract
with the creditors, operating instead by informal agreement, relying on his
reputation among the creditors of the community, and appealing to their in-
tegrity in persuading them to refrain from legal proceedings once they have
agreed to a plan.”

Additionally, debtors are protected in Chapter 13 bankruptcy by an au-
tomatic stay that generally prohibits creditors from commencing or pursuing
judicial actions, enforcing judgments, or attempting to exercise control over
property of the estate. In contrast, although credit counselors attempt to
negotiate with creditors individually to encourage them to cease collection
activities, debtors who participate in DMPs are still subject to creditors’
collection actions, including foreclosure. If a creditor does not agree to
participate in a DMP, a debtor must continue dealing with the creditor indi-
vidually, which defeats the primary advantage of a DMP.

Furthermore, the debtor is protected in bankruptcy by the “constant sur-
veillance” of the bankruptcy court. Most significantly, at the end of a
successful Chapter 13 plan, the bankruptcy court will grant the debtor a
discharge. While debtors’ repayment promises vary significantly by local
legal culture, and actual payments made under confirmed Chapter 13 plans
are generally difficult to determine, it is clear that Chapter 13 payments to
unsecured creditors are much smaller than creditors’ DMP recoveries. A

123See Credit Counseling in Crisis, supra note 6, at 24.
125See Hoffman, supra note 13, at 1637.
126Symposium, supra note 35, at 385.
128See Hoffman, supra note 13, at 1638.
129See Credit Counseling in Crisis, supra note 6, at 24-25.
130See Symposium, supra note 35, at 386.
132See, e.g., Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, The Persistence of Local
study of a sample of Chapter 13 cases filed in the Southern District of Mississippi showed that nearly one-half of debtors who filed Chapter 13 petitions proposed to pay unsecured creditors fifteen percent or less of allowed claims. Those debtors who received a discharge proposed to pay unsecured creditors an average of forty percent of allowed claims. In contrast, creditors who participate in DMPs almost always require 100 percent payment of all debts. These differences may not be apparent to a consumer who consults a credit counselor. For many consumers, the benefits of bankruptcy outweigh its costs.

V. THE UNAUTHORIZED PRACTICE OF LAW APPLIED TO THE CREDIT COUNSELING INDUSTRY

An analysis of the following cases helps to illuminate courts' and legislators' early perceptions of the credit counseling industry. Debt adjustment was historically characterized as the practice of law. As a result, non-lawyer credit counselors were alleged to have engaged in the unauthorized practice of law by organizing debt pooling plans. While state legislators' impulse to limit debt pooling to lawyers may have been overzealous, their response accurately identified debt poolers' conflict of interest as a significant impediment to debtors' financial rehabilitation through debt pooling plans. Indeed, this prohibitory legislation more successfully protected debtors than do current statutes precisely because the legislation targeted debt poolers' pro-creditor bias—albeit with a concomitant decrease in the availability of non-lawyer-administered bankruptcy alternatives.

Courts' and legislators' early perceptions of the debt pooling industry are instructive to states that plan to revise statutes regulating credit counselors. An analysis of unauthorized practice of law-based judicial decisions can help legislatures fashion the appropriate boundaries of credit counseling activity—in particular, credit counselors' recommendations to consumers about the wisdom and proper timing of bankruptcy filings. The problems highlighted by these decisions—which all stem from a credit counselor's conflict of interest—have not been ameliorated by the current regulatory framework. Although the following cases generally resulted in a prohibition on lay debt adjustment—an impractical outcome today—legislators' early guarded at-
titude toward the industry was justified.

In *Ferguson v. Skrupa*, the Supreme Court upheld a Kansas statute\(^{150}\) making it a misdemeanor to engage in the business of debt adjustment except as an incident to the lawful practice of law.\(^{151}\) Reversing the Kansas District Court’s determination that the statute was an unreasonable and unwarranted regulation of a lawful business,\(^{152}\) the Supreme Court held that the statute, in limiting the business of debt adjustment to lawyers, did not deny equal protection to non-lawyers:

The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster’s client may need advice as to the legality of the various claims against him, remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act—advice which a nonlawyer cannot lawfully give him.\(^{153}\)

The Kansas District Court had held that the statute was prohibitory and not regulatory, and was therefore an abuse of the state’s police power.\(^{154}\) Because the law permitted a lawyer to adjust debts only as an incident to his general law practice, no lawyer could lawfully work full-time as a debt adjuster.\(^{155}\) The district court concluded that the statute went too far in effectively prohibiting anyone from engaging in the business of debt adjustment.\(^{156}\)

In dissent, one judge identified the statute as the Kansas legislature’s effort to “impose reasonable and necessary regulations on a business affecting the financial stability of the citizens of Kansas.”\(^{157}\) The judge noted that a lawyer who engaged in the business of debt adjustment only as an incident to

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\(^{150}\) The Kansas legislature has since amended the statute to exempt any person registered as a credit services organization under the Kansas credit services organization act. See KAN. STAT. ANN. § 21-4402 (2005).

\(^{151}\) *Ferguson v. Skrupa*, 372 U.S. 726, 731-33 (1963). Cf. Commonwealth v. Stone, 155 A.2d 453, 455 (Pa. Super. 1959) (striking down a statute prohibiting budget planning on the ground that “practically every business and profession affords an opportunity for those engaging in it to perform reprehensible acts but this is no reason why persons should be denied the opportunity to engage in a lawful business”). Stone’s precedential value, however, is in question after *Ferguson*.


\(^{153}\) *Ferguson*, 372 U.S. at 732.

\(^{154}\) *Sanborn*, 210 F. Supp. at 202, 203.

\(^{155}\) Id. at 203.

\(^{156}\) See id.

\(^{157}\) Id.
his general law practice is likely to “explore all avenues open to his client.” According to the lawyer would “inquire as to the possibility of defenses to the claims, consider the applicability of exemption laws, explain the advantages and disadvantages of bankruptcy, and might or might not suggest the initiation of a debt adjustment scheme.” In contrast, a lawyer who specialized as a debt adjuster was unlikely to provide clients with dispassionate advice: the lawyer “would not be expected to advise his client to seek relief through another means than that in which he specialized exclusively.”

In In re Pilini, the Vermont Attorney General alleged that a non-attorney engaged in the unauthorized practice of law by organizing a debt pooling plan for each of three debtors. At the defendant’s suggestion, the debtors either assigned their wages to the defendant or turned over their wages to him in exchange for the defendant’s promise to resolve the debtors’ financial problems and keep the debtors’ creditors at bay. The defendant subsequently paid the debtors’ creditors, and, in two of the three cases, retained a fifteen percent commission on all money disbursed.

Although, at the time of the decision, Vermont had no statute governing debt pooling plans, the Vermont Supreme Court, while choosing not to decide whether debt pooling generally constitutes the unauthorized practice of law, held that the defendant had illegally engaged in the practice of law. The court described a debt pooler’s conflict of interest as a “well-founded criticism”: “[A] debt pooler owes his undivided loyalty to the debtor who retains his services and he cannot therefore at the same time properly be an agent for creditors. He cannot serve two masters.” The court also recognized that when a debtor in financial difficulty seeks advice from a debt pooler, there is a large probability that the debt pooler will engage in the unauthorized practice of law: “The latent danger in such a program is that there is . . . a strong likelihood of legal services or advice being involved where debtors find themselves in financial difficulties, or are defendants in various types of litigation and then seek assistance from a debt pooler . . . .”

Acknowledging that the practice of law is difficult to define, the Pilini court nevertheless described it as encompassing “the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving

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158 See id.
159 Id. at 204.
160 Id.
162 Id. at 828-30.
163 See id.
164 Id. at 830.
165 Id. at 830-32.
166 Id. at 830.
167 Id.
of such advice or rendition of such service requires the use of any degree of
legal knowledge or skill."168 The defendant provided such legal advice when
he recommended that the debtors assign to him their wages to ward off credi-
tors: "[The debtors] were in effect told that they did not have to go into
bankruptcy."169 By providing this advice for compensation, and without "the
restraint of professional standards," the defendant was held to have illegally
practiced law.170

In Home Budget Service, Inc. v. Boston Bar Ass'n, the Massachusetts Su-
preme Judicial Court rejected the plaintiff debt poolers' constitutional chal-
lenge to a state statute making it illegal for non-lawyers to provide services in
connection with debt pooling.171 The statute provided that non-lawyers
who furnish advice or services to a debtor under a debt pooling plan,
whereby the debtor deposits funds with the debt pooler to allow distribu-
tions to be made to the debtor's creditors, constitutes the practice of law.172
Although the plaintiffs did not prepare legal documents, make court appear-
ances, or challenge the validity of creditors' claims, the court found that the
plaintiffs nevertheless engaged in the unauthorized practice of law.173 The
court attributed the debt poolers' failure to challenge creditors' claims to a
conflict of interest not shared by members of the bar: "[The debt poolers']
omission to do so may be a surrender to some demands which a member of
the bar perhaps ought to question and advise the debtor to contest. The
debt pooler's plan and its administration thus exclude the debtor from skilled
professional legal advice."174

Ferguson, Pilini, and Home Budget all illustrate credit counselors' deeply
rooted conflict of interest and legislators' attempt to neutralize this pro-credi-
tor bias through unauthorized practice laws. While imposing similar restric-
tions today on credit counselors' administration of DMPs may be infeasible,175
unauthorized practice regulations may provide a model for ad-
ressing a related problem: credit counselors' temptation to provide consum-
ers with advice about the proper timing of a bankruptcy filing.

Interestingly, the statute at issue in Ferguson addresses the risks associ-
ated with DMP administration by both lay credit counselors and attorneys
who specialize in debt pooling. A similar problem arises with respect to at-
torneys who operate bankruptcy "mills": these attorneys may be unlikely to

168Id. at 831.
169Id.
170See id.
172Id. at 388.
173Id. at 390.
174Id.
175See supra note 129 and accompanying text.
recommend credit counseling—or other non-bankruptcy alternatives—to their clients.\textsuperscript{176} While attorneys are ethically obligated to discuss all available options with their clients and to allow clients to make all substantive decisions,\textsuperscript{177} lawyers may not always comply with states' variations of the ABA Model Rules of Professional Conduct (Model Rules).\textsuperscript{178}

Ideally, attorneys should encourage clients to consider all debt resolution strategies: credit counseling, financial education, Chapter 7 and Chapter 13 bankruptcy, and individual negotiations with unsecured creditors. Likewise, credit counselors should provide clients with disinterested advice about bankruptcy—not as a "last resort," but as a means of dealing with staggering debt loads. Unfortunately, however, given fierce competition in the debt resolution industry, it is unlikely that attorneys and credit counselors will neutrally discuss with their clients the services of their counterparts.

Legislators' primary focus must be on encouraging consumers to pursue the appropriate form of debt resolution. Because of bankruptcy's stigma and consumers' general reluctance to seek financial help, consumers who seek any kind of financial counsel—either from attorneys or from credit counselors—are usually in dire straits.\textsuperscript{179} Additionally, bankruptcy—because of its discharge and automatic stay—is generally a more appropriate course of action than is credit counseling for consumers in serious financial trouble.\textsuperscript{180} Thus, it is possible that consumers who seek the help of bankruptcy attorneys are more suitable candidates for bankruptcy and that individuals who seek assistance from credit counselors are proper candidates for credit counseling. As a result, given Congress' endorsement of credit counseling as a substitute for bankruptcy\textsuperscript{181} and the absence of Model Rules equivalents in the credit counseling industry, credit counselors' conflict of interest appears to be the

\textsuperscript{176}See e.g., Sullivan, Warren & Westbrook, \emph{supra} note 144, at 850.

\textsuperscript{177}Under the Model Rules, a lawyer is expected to "exercise independent professional judgment and render candid advice" based both on the applicable law and "[m]oral, economic, social and political factors" relevant to the client's situation. \textit{American Bar Association, ABA Model Rules of Prof'l. Conduct} R. 2.1 (2003). Also, a lawyer must "abide by a client's decisions concerning the objectives of representation...and...shall consult with the client as to the means by which they are to be pursued." \textit{Id.} at R. 1.2.

\textsuperscript{178}See e.g., Susan Daicoff, \textit{(Oxymoron?) Ethical Decisionmaking by Attorneys: An Empirical Study}, 48 \textit{Fla. L. Rev.} 197, 244-45 (1996).

\textsuperscript{179}See e.g., Jane Brooks, \textit{Credit-Card Treadmill Easy to Jump Aboard}, News Trib. (Tacoma, Wash.), Aug. 19, 1996, at C8 (identifying debt-strapped consumers' reluctance to seek financial help); \textit{Getting Out from Under}, Tampa Trib., Nov. 5, 1997, at 7 (describing how "two-thirds of all people wait too long" to seek financial help from credit counselors).

\textsuperscript{180}See e.g., \textit{Credit Counseling in Crisis}, \emph{supra} note 6, at 25 (explaining that consumers with high debt burdens and limited financial resources may be more appropriate candidates for bankruptcy than for DMPs); \textit{Standards}, \emph{supra} note 7, at 9 (acknowledging that reduced creditor concessions have made "the DMP option less workable for clients closest to bankruptcy").

\textsuperscript{181}See \emph{supra} text accompanying notes 29-30.
most significant barrier to the proper placement of debtors in appropriate
debt resolution programs.

CONCLUSION

State bars likely do not have the resources to enforce unauthorized prac-
tice regulations effectively, and it is difficult to rely on an ambiguous defini-
tion of the “practice of law” in policing the activities of credit counselors.
Instead, states should consider adopting provisions that delineate what ad-
vice credit counselors may give to clients about alternatives to DMPs—like
bankruptcy. While lay practitioners often “cannot avoid giving advice that
implicates legal issues,”182 and while the mere marketing of credit counseling
and DMP services may affect consumers’ choices, credit counselors must not
be permitted to influence consumers’ decisions about when—or if—to file a
bankruptcy petition.

A permanent solution to the underlying causes of large numbers of bank-
ruptcy filings cannot be reached through restricting—directly or indirectly—
consumers’ access to bankruptcy. By legislatively confusing the differences
between bankruptcy and credit counseling, Congress is evading larger sys-

temic issues that have contributed to consumers’ inability to escape the insid-
ious effects of excessive interest rates, high late fees, skyrocketing medical
costs, family emergencies, and job losses.183

It is unreasonable to expect consumers to question the objectivity of
credit counselors’ advice about the merits of filing for bankruptcy—even af-

after consumers read the disclosures that would be mandated by model laws184
or are informed in CCA literature of contractual entanglements between
CCAs and their creditor sponsors.185 Understandably, consumers appear to
attribute to modern CCAs the same functions performed by the more well-
rounded CCAs of the past, which arranged comprehensive, one-on-one meet-
ings between debtors and counselors.186 These sessions were “viewed as
comparable to other social services . . . such as substance abuse or family

counseling.”187

In a survey of 2,030 adult Americans on the credit counseling industry,
the vast majority of those 473 respondents who said they knew a great deal
or something about CCAs “believe[d] that these agencies provide several

182See Rhode, Professionalism, supra note 94, at 709.
183See generally WARREN & TYAGI, supra note 53; David U. Himmelstein, Elizabeth Warren, Deborah
Thorne & Steffie Woolhandler, "MarketWatch: Illness and Injury as Contributors to Bankruptcy," HEALTH
184See supra text accompanying notes 96-97.
185See Federal Trade Commission, supra note 6.
186See REPORT, supra note 8, at 4.
187Id. at 34.
useful services—helping individuals pay off large credit card debts (86 percent), providing them with useful information about credit and debt management (86 percent), and helping them to learn how to manage their money more effectively (84 percent). Credit counseling clients expect comprehensive, holistic recommendations from credit counselors—a reputation that the credit counseling industry cultivates. Thus, the content of credit counselors' recommendations to consumers about bankruptcy must be closely scrutinized.

Because many credit counselors have adopted the predilections of their creditor sponsors, credit counselors cannot be expected to give consumers disinterested information about bankruptcy. Consumers may not be aware of credit counselors' financial dependence on creditors. Additionally, consumers have preexisting reservations about filing for bankruptcy, which still carries a powerful stigma. This stigma promises to sustain the popularity of bankruptcy alternatives, despite the possibility that credit counseling and other alternatives to bankruptcy may face increased regulation in the future. Because consumers may suffer serious financial consequences if a necessary bankruptcy is postponed, credit counselors must not be permitted to give debtors advice about the timing of a consumer's bankruptcy petition independent of the debt management services they are legally authorized to provide.

188See Consumer Federation of America & InCharge Institute, Lack of Understanding About Credit Counseling Leaves Consumers Open to Fraud and Abuse, http://www.consumerfed.org/ccounselingrelease.pdf (Dec. 1, 2003), at 1, 2.