

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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SENATE BILL 1198

Short Title: Regulate Debt Settlement. (Public)

Sponsors: Senators Clodfelter; and Berger of Rockingham.

Referred to: Commerce, Small Business and Entrepreneurship.

March 26, 2007

1 A BILL TO BE ENTITLED
2 AN ACT TO REGULATE THE PRACTICE OF DEBT SETTLEMENT BY THE
3 STATE BANKING COMMISSION.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. Chapter 23 of the General Statutes is amended by adding a
6 new Article to read:

"Article 9.

"Debt Settlement.

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8
9 **"§ 23-50. Definitions.**

10 The following definitions apply in this Article:

11 (1) "Commissioner" means the Commissioner of Banks.

12 (2) "Debt settlement provider" means any person or entity engaging in or
13 holding itself out as engaging in the business of debt settlement for
14 compensation. The term shall not include any of the following:

15 a. Attorneys-at-law, escrow agents, accountants, broker-dealers in
16 securities, or investment advisors in securities while performing
17 services during the course of the practice of their professions.

18 b. Any person, partnership, association, or corporation doing
19 business under, and as permitted by, any law of this State or any
20 federal law relating to banks, consumer finance businesses,
21 consumer loan companies, trust companies, mutual savings
22 banks, savings and loan associations, building and loan
23 associations, credit unions, crop credit associations,
24 development credit corporations, industrial development
25 corporations, title insurance companies, or insurance
26 companies.

27 c. Persons who, as employees on a regular salary or wage of an
28 employer not engaged in the business of debt adjusting, perform
29 credit services for their employer.

- 1 d. Public officers while acting in their official capacities and
2 persons acting under court order.
3 e. Any person while performing services incidental to the
4 dissolution, winding up, or liquidating of a partnership,
5 corporation, or other business enterprise.

- 6 (3) "Debt settlement service" means the negotiation, adjustment, or
7 settlement of a consumer's debt with the consumer's creditor without
8 holding or receiving the debtor's funds or property and without paying
9 the debtor's funds to, or distributing the debtor's property among,
10 creditors.

11 **"§ 23-51. License required.**

12 (a) No person shall engage in the business of debt settlement in this State without
13 a license. An applicant for a license to engage in the business of debt settlement shall
14 file an application with the Commissioner in writing and under oath that includes all of
15 the following:

- 16 (1) The name and exact address of the applicant and the name and address
17 of each of the following, as applicable:

- 18 a. If the applicant is a corporation, its officers and directors.
19 b. If the applicant is an association, its officers and directors.
20 c. If the applicant is a partnership, its partners.
21 d. If the applicant is a limited liability company, its manager or
22 managers.
23 e. If the applicant is any other legal entity, its manager or other
24 person designated to control the operation of that legal entity.

- 25 (2) A copy of a certificate of an assumed name, if applicable.

- 26 (3) One or more of the following, as applicable:

- 27 a. If the applicant is a corporation, a copy of the articles of
28 incorporation.
29 b. If the applicant is an association, a copy of the organizational
30 documents of the association.
31 c. If the applicant is a partnership, a copy of the partnership
32 agreement.
33 d. If the applicant is a limited liability company, a copy of the
34 articles of organization.

- 35 (4) The telephone number, e-mail address, and Web site URL of the
36 applicant.

- 37 (5) The address of each office in this State, if any, where the applicant will
38 provide debt settlement services.

- 39 (6) A description or sample forms of the applicant's budget analysis and
40 initial budget plan, including any form or electronic model, that are
41 used to evaluate the financial condition of the debtors.

- 42 (7) A copy of the agreement form that the applicant will use with the
43 debtor.

- 44 (b) When filing the application, the applicant shall do all of the following:

1 (1) Pay to the Commissioner an initial license fee of one hundred dollars
2 (\$100.00).

3 (2) Provide evidence of insurance in the amount of two hundred fifty
4 thousand dollars (\$250,000) against the risks of dishonesty, fraud,
5 theft, and other misconduct on the part of the applicant or a director,
6 employee, or agent of the applicant. The insurance shall be issued by
7 an insurance company authorized to do business in this State and rated
8 at least by a nationally recognized rating organization. The insurance
9 shall have no greater than a ten thousand dollar (\$10,000) deductible
10 and shall be payable to the applicant, the individuals who have
11 agreements with the applicant, and this State, as their interests may
12 appear. The insurance shall not be subject to cancellation by the
13 applicant without a replacement policy in place.

14 (c) Unless surrendered, revoked, or suspended, a license issued under this Article
15 expires on December 31 of the year for which it is issued. A licensee may renew a
16 license before the expiration date as provided in this Article.

17 (d) A licensee shall create, maintain, and preserve accurate and complete books
18 and records relating to the licensee's business. A licensee shall maintain the books and
19 records according to generally accepted accounting principles. A licensee or an
20 applicant shall notify the Commissioner in writing of the address where the books and
21 records are kept. If a licensee changes the location of the books and records, the licensee
22 shall notify the Commissioner in writing within 10 business days after the change. The
23 Commissioner may prescribe by rule or order the form and contents of books and
24 records relating to a licensee's business.

25 (e) An applicant shall file a financial statement with an application for a debt
26 settlement license. The Commissioner may require an audit or review of the financial
27 statement by an independent certified public accountant.

28 (f) If a licensee has a board of directors or the equivalent, the Commissioner
29 shall not require that the licensee provide information concerning a member of the
30 board of directors or the equivalent, nor require that the member satisfy the examination
31 provisions of this Article, if that member does not receive a salary, stock dividend, or
32 other financial benefit from that corporation other than reimbursement of the actual
33 expenses incurred in carrying out the duties of a director of that corporation.

34 (g) Upon receiving the application and determining that the applicant has
35 complied with subsection (b) of this section, the Commissioner shall investigate the
36 applicant's responsibility, experience, character, and general fitness. If after
37 investigation, the Commissioner believes that the business will be operated fairly and
38 honestly within the provisions of this Article, the Commissioner shall issue a license to
39 the applicant. The investigation of the applicant shall at least include investigation of the
40 following, as applicable:

41 (1) If the applicant is a corporation, its officers and directors.

42 (2) If the applicant is a partnership, its partners.

43 (3) If the applicant is an association, its officers.

- 1 (4) If the applicant is a limited liability company, its manager or
2 managers.
- 3 (5) If the applicant is any other legal entity, its manager or other person
4 designated to control the operation of that legal entity.
- 5 (h) A license shall not be issued if the investigation reveals one or more of the
6 following:
- 7 (1) That an individual investigated did any of the following:
- 8 a. Was ever convicted of a crime involving moral turpitude,
9 including forgery, embezzlement, obtaining money under false
10 pretenses, larceny, extortion, conspiracy to defraud, or any
11 other similar offense.
- 12 b. Violated or failed to comply with this Article or a rule adopted
13 pursuant to this Article.
- 14 c. Had a license to engage in the business of debt settlement
15 revoked or suspended for any reason other than failure to pay
16 licensing fees in this State or another state.
- 17 d. Defaulted in the payment of money collected for others,
18 including the discharge of debts through bankruptcy
19 proceedings. The Commissioner may, at the Commissioner's
20 discretion, waive this restriction if provided with evidence of
21 justifiable cause for the bankruptcy, plus convincing evidence
22 of the fitness of the bankrupt party to carry out that party's
23 duties and responsibilities pursuant to this Article.
- 24 (2) An individual applicant is not at least 18 years of age and a citizen of
25 the United States.
- 26 (3) An applicant that is a partnership, corporation, limited liability
27 company, association, or other legal entity required by law to obtain
28 authority to do business in this State has not been granted authority to
29 do business in this State.

30 **"§ 23-52. Contract fees.**

31 By contract, a debt settlement provider shall not charge fees in an aggregate amount
32 exceeding twenty percent (20%) of the principal amount of the debt. In the event of
33 cancellation of the contract by the debtor prior to its successful completion, the debt
34 settlement provider shall refund fifty percent (50%) of any collected fees associated
35 with the amount of debt remaining unsettled at the time of the termination of the
36 contract.

37 **"§ 23-53. Debt settlement contract requirements.**

38 Every contract between a debt settlement provider and a debtor shall:

- 39 (1) List every debt to be handled with the creditor's name and disclose the
40 approximate total of all known debts.
- 41 (2) Provide fees charged by the debt settlement provider for services.
- 42 (3) Disclose the approximate number and amount of savings required to
43 pay the debts in full.

- 1 (4) Disclose the name and address of the debt settlement provider and of
2 the debtor.
- 3 (5) State that the debt settlement provider shall notify the debtor, in
4 writing, within five days of notification to the debt settlement provider
5 by a creditor that the creditor refuses to negotiate with the debt
6 settlement provider pursuant to the contract.
- 7 (6) Contain the following notice within the contract or agreement to
8 engage the services of the debt settlement provider:
9 'NOTICE TO DEBTOR:
10 Do not sign this contract before you read it.
11 Do not sign this contract if any spaces intended for the agreed terms
12 are left blank.
13 You are entitled to a copy of this contract at the time you sign it.
14 You may cancel this contract within three days of signing the contract
15 by sending notice of cancellation by certified mail, return receipt
16 requested, to the debt settlement provider at his or her address shown
17 on the contract, which notice shall be posted not later than midnight of
18 the third day (excluding Sundays and the holidays) or by fax following
19 your signing of the contract.'
- 20 (7) Contain any other provision or disclosure that is necessary for the
21 protection of the debtor and the proper conduct of business by the debt
22 settlement provider.

23 **"§ 23-54. Debt settlement provider; functions required to be performed.**

24 Every debt settlement provider shall perform the following functions:

- 25 (1) Make a permanent record of all payments by debtors. The record may
26 be in an electronic format. No person shall intentionally make any
27 false entry in any record or intentionally mutilate, destroy, or
28 otherwise dispose of any record. Records shall at all times be open for
29 inspection by the Attorney General or the Attorney General's
30 authorized agent and shall be preserved (i) as original records, (ii) in
31 an electronic format, or (iii) in a form of duplication, for at least six
32 years after making the final entry therein.
- 33 (2) Sign and deliver a completed copy of the contract between the debt
34 settlement provider and a debtor to the debtor immediately after the
35 debtor executes the contract.
- 36 (3) Notify the debtor of any offer of settlement made by the creditor no
37 later than five days of receiving the offer.

38 **"§ 23-55. Debt settlement provider; prohibited acts.**

39 A debt settlement provider shall not:

- 40 (1) Take any contract or other instrument which has any blank spaces
41 when signed by the debtor.
- 42 (2) Receive or charge any fee in the form of a promissory note or other
43 promise to pay.

- 1 (3) Receive or accept any mortgage or other security for any fee, whether
2 as to real or personal property.
- 3 (4) Lend money or credit.
- 4 (5) Take any confession of the judgment or power of attorney to confess
5 judgment against the debtor or appear as the debtor in any judicial
6 proceeding.
- 7 (6) Take, concurrent with the signing of the contract or as a part of the
8 contract or the application for the contract, a release of any obligation
9 to be performed on the part of the debt settlement provider.
- 10 (7) Advertise, display, distribute, broadcast, or televise services or permit
11 services to be displayed, advertised, distributed, broadcasted, or
12 televised in any manner in which a false, misleading, or deceptive
13 statement or representation is made with regard to either (i) the
14 services to be performed by the debt settlement provider or (ii) the fees
15 to be charged by the debt settlement provider.
- 16 (8) Receive any cash, fee, gift, bonus, premium, reward, or other
17 compensation from any person other than the debtor or a person in the
18 debtor's behalf in connection with that person's activities as a debt
19 settlement provider.
- 20 (9) Disclose to anyone the debtors who have contracted with the debt
21 settlement provider other than a debtor's own creditors or the
22 provider's agents. The debt settlement provider shall not disclose the
23 creditors of a debtor to anyone other than the debtor or another creditor
24 of the debtor and then only to the extent necessary to secure the
25 cooperation of the creditor in a debt settlement plan.

26 **"§ 23-56. Legal services; prohibited actions.**

27 (a) Without limiting the generality of this Article and other applicable laws, the
28 debt settlement provider, manager, or an employee of the debt settlement provider shall
29 not do any of the following:

- 30 (1) Prepare, advise, or sign a release of attachment or garnishment,
31 stipulation, affidavit for exemption, compromise agreement, or other
32 legal or court document, nor furnish legal advice or perform legal
33 services of any kind.
- 34 (2) Represent that the debt settlement provider is authorized or competent
35 to furnish legal advice or perform legal services.
- 36 (3) Communicate with the debtor or creditor or any other person in the
37 name of any attorney or upon the stationery of any attorney or prepare
38 any form or instrument which only attorneys are authorized to prepare.

39 (b) This section does not apply to a licensed attorney who provides legal services
40 in an attorney-client relationship or who is otherwise authorized to practice law in this
41 State.

42 **"§ 23-57. Violations and sanctions.**

43 (a) Notwithstanding any other actions which may be brought under the laws of
44 this State, the Attorney General or the prosecuting attorney of any county within the

1 State may bring an action in the name of the State against any person to restrain and
2 prevent any violation of this Article.

3 (b) The Attorney General may accept an assurance of discontinuance of any act
4 or practice deemed in violation of this Article in the enforcement thereof from any
5 person engaging in, or who has engaged in, the act or practice. The assurance shall be in
6 writing and be filed with and subject to the approval of the superior court of the county
7 in which the alleged violator resides or has a principal place of business or, in the
8 alternative, in Wake County.

9 (c) Any person who violates an injunction issued pursuant to this Article shall
10 forfeit and pay a civil penalty of not more than five thousand dollars (\$5,000). The clear
11 proceeds of civil penalties assessed pursuant to this subsection shall be credited to the
12 Civil Penalty and Forfeiture Fund established in G.S. 115C-457.1.

13 **"§ 23-58. Saving prior contracts.**

14 The provisions of this Article shall not invalidate or make unlawful contracts
15 between debt settlement providers and debtors executed lawfully prior to October 1,
16 2007."

17 **SECTION 2.** G.S. 14-423(2) reads as rewritten:

18 "(2) The term "debt adjusting" shall mean the entering into or making of a
19 contract, express or implied, with a particular debtor whereby the
20 debtor agrees to pay a certain amount of money periodically to the
21 person engaged in the debt adjusting business and who shall for a
22 consideration, agree to distribute, or distribute the same among certain
23 specified creditors in accordance with a plan agreed upon. The term
24 "debt adjusting" is further defined and shall also mean the business or
25 practice of any person who holds himself out as acting or offering or
26 attempting to act for a consideration as an intermediary between a
27 debtor and his creditors for the purpose of ~~settling, compounding,~~
28 compounding or in ~~anywise~~ any way altering the terms of payment of
29 any debt of a debtor, and to that end receives money or other property
30 from the debtor, or on behalf of the debtor, for the payment to, or
31 distribution among, the creditors of the debtor. The term "debt
32 adjusting" shall not include the practice of debt settlement service as
33 defined in G.S. 23-50."

34 **SECTION 3.** G.S. 14-426(6) reads as rewritten:

35 "(6) ~~An attorney at law licensed to practice in this State who is not~~
36 ~~employed by a debt adjuster. A licensed attorney who provides legal~~
37 services in an attorney-client relationship or who is otherwise
38 authorized to practice law in this State."

39 **SECTION 4.** Sections 1 and 2 of this act become effective October 1, 2007,
40 and apply to acts occurring and contracts entered into on or after that date. The
41 remainder of this act is effective when it becomes law.