

# CAN'T LIVE WITH THEM, CAN'T LIVE WITHOUT THEM: HOW MINI-CFPAS AND SURETY BONDS COULD MAKE A WORLD WITH DEBT SETTLEMENT COMPANIES MORE BEARABLE

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## ABSTRACT

Debt settlement companies can offer a simple and valuable means of resolving consumer debt. However, many debt settlement companies choose to engage in unfair, deceptive, or abusive acts and practices at the expense of desperate debt-ridden consumers, making it an unrealistic option of debt relief. Due to the unfair, deceptive, and abusive acts and practices by some debt settlement companies, the regulatory regime has been trending towards increased regulation. However, the lack of enforcement and severity of existing regulations causes persistent problems in the debt settlement industry, resulting in increased consumer debt instead of consumer debt relief. This Note advocates for enhanced enforcement and permanent penalties in the form of mini Consumer Financial Protection Acts and surety bonds. Higher penalty costs will effectively deter the unfair, deceptive, and abusive acts and practices of debt settlement companies, and make debt settlement a safer option for debt-ridden consumers.

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## INTRODUCTION

We are in a time of financial distress: approximately 18% of Americans with debt will not be able to repay it in their lifetimes.<sup>1</sup> As of 2013, the 14 million American families with the lowest net worth owe debts equal to about 156% of their pretax incomes.<sup>2</sup> Over-indebted Americans have limited options for seeking relief—debt settlement is one of them.<sup>3</sup>

Debt settlement can provide an effective solution to over-indebtedness, and a myriad of companies offer this service to debt-ridden consumers. First, the consumer provides a debt settlement company with the names of his creditors and the amounts he owes to each.<sup>4</sup> At that time, the debt settlement company will likely instruct the

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1. See Martha C. White, *The Most Completely Depressing Stat About Americans' Debt*, TIME (Dec. 11, 2014), <http://time.com/3627010/americans-debt/> [<http://perma.cc/L5QB-45BH>].

2. See Mark Whitehouse, *America's Poor, Deeper in Debt Than Ever*, BLOOMBERG VIEW (Sept. 12, 2014, 11:02 AM), <http://www.bloombergvew.com/articles/2014-09-12/america-s-poor-deeper-in-debt-than-ever> [<http://perma.cc/9TSF-5GKA>]. As of October 2015, the total U.S. outstanding consumer debt was approximately \$3.5 trillion and the total U.S. outstanding revolving debt was approximately \$923 billion. See <http://www.federalreserve.gov/releases/g19/current/default.htm> [<http://perma.cc/8X2V-U2MF>].

3. See FED. TRADE COMM'N, COPING WITH DEBT 1 (2012), <http://www.consumer.ftc.gov/articles/pdf-0037-coping-with-debt.pdf> [<http://perma.cc/JQ85-LDBM>].

4. LaToya Irby, *The Dangers of Debt Settlement*, ABOUT.COM, <http://credit.about.com/od/debtmanagementsolutions/qt/debtsettlement.htm> [<http://perma.cc/H6DB-JCN8>].

consumer to cease payments to his creditors<sup>5</sup> and to instead make monthly payments to a designated savings account.<sup>6</sup> When the debt settlement company determines that this account has accumulated sufficient funds in proportion to the debt the consumer owes to a particular creditor, the company will attempt to negotiate and settle the debts on behalf of the consumer.<sup>7</sup> The debt settlement company usually demands a settlement amount below the full balance owed by the consumer, but to be paid in lump sum to the creditor so that the agreement is mutually beneficial.<sup>8</sup> When the debt settlement company successfully reaches a settlement, a lump sum is then paid from the consumer's savings account to the creditor, and the company will attempt to reach a settlement with the next creditor.<sup>9</sup>

On its face, debt settlement is an attractive option: consumers are promised a debt-free future by these companies.<sup>10</sup> Their services enable a weary debtor to engage a third party to act as the middleman between him and pressing creditors.<sup>11</sup> It is a way out of what might otherwise be a lifetime of over-indebtedness for consumers willing to make a single, albeit lesser, payment on the total amount of debt they owe.<sup>12</sup> In addition, the potential savings realized from debt settlement programs can be significant when compared with the alternatives, such as

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5. See Stephen Franklin, *Desperate Debtors Are Ripe Targets*, CHI. TRIB. (Aug. 3, 2008), [http://articles.chicagotribune.com/2008-08-03/news/0808030051\\_1\\_debt-settlement-credit-card-consumers](http://articles.chicagotribune.com/2008-08-03/news/0808030051_1_debt-settlement-credit-card-consumers) [<http://perma.cc/JY7G-ZBWW>].

6. See FED. TRADE COMM'N, *supra* note 3.

7. See National Association of Attorneys General, Comment Letter on the Proposed Rulemaking to Amend the FTC's Telemarketing Sales Rule 2-3 (Oct. 23, 2009) [hereinafter NAAG Comment], [http://www.ftc.gov/sites/default/files/documents/public\\_comments/2009/10/543670-00192.pdf](http://www.ftc.gov/sites/default/files/documents/public_comments/2009/10/543670-00192.pdf) [<http://perma.cc/YE4B-FF94>].

8. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-593T, DEBT SETTLEMENT: FRAUDULENT, ABUSIVE, AND DECEPTIVE PRACTICES POSE RISK TO CONSUMERS 4 (2010) [hereinafter GAO Report], <http://www.gao.gov/new.items/d10593t.pdf> [<http://perma.cc/BHA6-NEKC>].

9. See *Debt Settlement Companies*, BALANCE, <http://www.balancepro.net/education/publications/debtsettlement.html> [<http://perma.cc/RL8Q-GH36>].

10. See N.Y.C. BAR ASS'N, PROFITEERING FROM FINANCIAL DISTRESS: AN EXAMINATION OF THE DEBT SETTLEMENT INDUSTRY 6 (May 2012), <http://www2.nycbar.org/pdf/report/uploads/DebtSettlementWhitePaperCivilCtConsumerAffairsReportFINAL5.11.12.pdf> [<http://perma.cc/JP3K-M3ND>].

11. Franklin, *supra* note 5.

12. See Derek S. Witte, *The Bear Hug That Is Crushing Debt-Burdened Americans: Why Overzealous Regulation of the Debt-Settlement Industry Ultimately Harms the Consumers It Means to Protect*, 14 TEX. REV. L. & POL. 277, 287-88 (2010).

struggling to make minimum payments on debt.<sup>13</sup> Indeed, these benefits can provide a lifeline to consumers in significant debt, but only when the process is effectuated without unfair, deceptive, or abusive practices.<sup>14</sup>

In practice, debt settlement companies effectively accomplish their purpose so rarely that the industry has become a dangerous option for debt relief.<sup>15</sup> The problem begins at the root, as a consumer only becomes a client if he is so financially distressed<sup>16</sup> that he has already defaulted on his debt.<sup>17</sup> Defaulting on debt carries inevitable financial impacts, such as increased interest rates,<sup>18</sup> and commencing settlement negotiations does not protect a consumer from incurring greater debt, or even from being sued for payment.<sup>19</sup> In addition, debt settlement comes with inherent risks<sup>20</sup> such as high costs in service fees,<sup>21</sup> income tax liability,<sup>22</sup> and declining consumer credit scores.<sup>23</sup> These effects together

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13. The Association of Settlement Companies, Comment on the Proposed Rulemaking to Amend the FTC's Telemarketing Sales Rule 9 n.6 (Oct. 26, 2009) [hereinafter TASC Comment], [http://www.ftc.gov/sites/default/files/documents/public\\_comments/2009/10/543670-00202.pdf](http://www.ftc.gov/sites/default/files/documents/public_comments/2009/10/543670-00202.pdf) [<http://perma.cc/NN2N-J6QA>].

14. See Franklin, *supra* note 5.

15. See *Should I Use a Debt Settlement Service to Help Me Deal with My Debt and Debt Collectors?*, CONSUMER FIN. PROT. BUREAU (June 18, 2014), <http://www.consumerfinance.gov/askcfpb/1459/should-i-use-debt-settlement-service-help-me-deal-my-debt-and-debt-collectors.html> [<http://perma.cc/5CVU-DH9Z>] (warning against the use of services provided by debt settlement companies).

16. See generally N.Y.C. BAR ASS'N, *supra* note 10 (discussing how debt settlement companies target financially distressed consumers).

17. See ELLEN HARNICK & LESLIE PARRISH, CTR. FOR RESPONSIBLE LENDING, A ROLL OF THE DICE: DEBT SETTLEMENT STILL A RISKY STRATEGY FOR DEBT-BURDENED HOUSEHOLDS 5, (Nov. 2013), <http://www.responsiblelending.org/other-consumer-loans/debt-settlement/research-analysis/CRL-Debt-Settlement-Research-Paper-and-Appendix.pdf> [<http://perma.cc/JH8G-JXJP>]; see also Michelle Singletary, *Debt Settlement is Rarely a Done Deal*, WASH. POST (Oct. 20, 2012), [http://www.washingtonpost.com/business/debt-settlement-is-rarely-a-done-deal/2012/10/18/d9abe54e-1881-11e2-8bfd-12e2ee90dcf2\\_story.html](http://www.washingtonpost.com/business/debt-settlement-is-rarely-a-done-deal/2012/10/18/d9abe54e-1881-11e2-8bfd-12e2ee90dcf2_story.html) [<http://perma.cc/AE85-BAMU>].

18. See HARNICK & PARRISH, *supra* note 17, at 5.

19. *Id.*

20. See First Amended Complaint at 2-3, Chase Bank USA v. Allegro Law, LLC, No. 08-CV-04039 (PKC), 2013 WL 3149461 (E.D.N.Y. 2013) (identifying the inherent risks of debt settlement programs and their consequences to consumers).

21. See *Debt Settlement Companies*, *supra* note 9.

22. See HARNICK & PARRISH, *supra* note 17, at 13.

23. See Eleanor Laise, *Debt-Relief Firms Attract Complaints*, WALL ST. J. (Oct. 14, 2008, 12:01 AM), <http://www.wsj.com/articles/SB122394458494631223> [<http://perma.cc/NN2N-J6QA>].

make it unlikely that consumers will greatly benefit from enrolling in a debt settlement program.<sup>24</sup>

Beyond these inherent risks, other widespread industry practices cause further harm to consumers. For example, debt settlement companies often charge advance fees before settling any debts, which places consumers in further financial distress before obtaining any sort of debt relief.<sup>25</sup> In addition, many companies lull consumers into a false sense of security by guaranteeing settlement, despite their inability to control the outcome of negotiations, as well as minimum reductions to final payments from the principal debt owed.<sup>26</sup>

The federal government<sup>27</sup> and many state governments have taken steps to eradicate this behavior.<sup>28</sup> Even still, debt settlement companies continue to cause harm to consumers who are desperate for debt relief.<sup>29</sup> Short of eliminating the debt settlement industry altogether, what more can be done to make debt settlement fair and beneficial to consumers?<sup>30</sup>

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cc/T7N5-TH46].

24. See, e.g., N.Y.C. BAR ASS'N, *supra* note 10, at 63 (explaining that typically less than 10% of consumers successfully settle all their debt as part of the debt settlement program).

25. See GAO Report, *supra* note 8, at 7.

26. *Id.* at 13.

27. The Federal Trade Commission has the ability to prohibit “unfair or deceptive acts or practices” for non-banks while the Consumer Financial Protection Bureau may prohibit “unfair, deceptive, or abusive” acts or practices in connection with consumer financial products or services. See 15 U.S.C. § 45(a)(1) (2012) and 12 U.S.C. § 5531(a) (2012) for the above language, respectively. The Federal Trade Commission and the Consumer Financial Protection Bureau divide jurisdiction over debt settlement companies to ensure that their “services are fair, transparent and competitive” and that their business practices are not “anticompetitive, deceptive, or unfair to consumers.” See Memorandum of Understanding Between the Consumer Fin. Prot. Bureau and the Fed. Trade Comm’n [hereinafter Memorandum of Understanding], <http://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf> [<http://perma.cc/49KQ-JZEH>].

28. See, e.g., CONN. GEN. STAT. ANN. § 42-110g (West, Westlaw through 2015 Sess.); GA. CODE ANN. § 10-1-399 (West, Westlaw through 2015 Sess.); N.Y. GEN. BUS. LAW § 349 (McKinney, Westlaw through 2015 Sess.).

29. See, e.g., Stipulated Final Judgment and Consent Order, Consumer Fin. Prot. Bureau v. Meracord LLC, No. 3:13-cv-05871 (W.D. Wash. Oct. 4, 2013), [http://files.consumerfinance.gov/f/201310\\_cfpb\\_meracord-proposed-stipulated-final-judgment-and-consent-order.pdf](http://files.consumerfinance.gov/f/201310_cfpb_meracord-proposed-stipulated-final-judgment-and-consent-order.pdf) [<http://perma.cc/MJ2Z-CZAM>]; see also N.Y.C. BAR ASS'N, *supra* note 10, at 77-94 (discussing the new attorney model of debt settlement).

30. Witte, *supra* note 12, at 293-95 (arguing that the debt settlement industry is a necessary middle ground debt-relief option for some consumers).

This Note proceeds in three parts. Part I examines the harmful practices of debt settlement companies and evaluates the effectiveness of current federal and state regulatory schemes that are meant to deter those practices. Part II describes the ongoing harmful practices of debt settlement companies notwithstanding the regulations. Finally, in Part III, this Note recommends: (1) further regulatory action in the form of mini Consumer Financial Protection Acts (“mini-CFPAs”) within every state that would empower state attorneys general and individual consumers with the right to impose high civil penalties against debt settlement companies that continue any harmful practices; and (2) surety bonds to ensure that debt settlement companies do not avoid penalties associated with mini-CFPAs by dissolving their businesses with the intent to continue harmful practices under a different name.

## **I. THE DEBT SETTLEMENT INDUSTRY AND THE REGULATORY EFFORTS OF THE FEDERAL AND STATE GOVERNMENTS**

### **A. THE UNFAIR, DECEPTIVE, AND ABUSIVE PRACTICES OF DEBT SETTLEMENT COMPANIES**

Although debt settlement may seem like an attractive debt-relief option for many consumers, its benefits can only be realized if debt settlement companies engage in good faith practices.<sup>31</sup> Several business and government entities have made inquiries into the debt settlement industry, and regrettably, almost all of these investigations have yielded troublesome discoveries.<sup>32</sup> In 2005, the National Consumer Law Center (“NCLC”)<sup>33</sup> issued a report questioning the value of debt settlement services.<sup>34</sup> The NCLC accused companies of operating under a business

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31. See generally DEANNE LOONIN, NAT’L CONSUMER LAW CTR., AN INVESTIGATION OF DEBT SETTLEMENT COMPANIES: AN UNSETTLING BUSINESS FOR CONSUMERS (2005), [http://www.nclc.org/images/pdf/debt\\_settlement/report\\_investigation\\_debt\\_settle\\_co.pdf](http://www.nclc.org/images/pdf/debt_settlement/report_investigation_debt_settle_co.pdf) [<http://perma.cc/XHB7-LS3N>]; GAO Report, *supra* note 8 (summarizing the harmful practices of debt settlement companies).

32. See *infra* notes 33-48 and accompanying text.

33. The NCLC is a non-profit consumer advocacy group that provides research assistance for consumer attorneys, writes manuals on law, and works with lawmakers to adopt laws and regulations that benefit and protect consumers. *For Consumers*, NAT’L CONSUMER LAW CTR., <http://www.nclc.org/for-consumers/for-consumers.html> [<http://perma.cc/8395-EG53>].

34. See generally LOONIN, *supra* note 31 (summarizing problems with debt settlement practices and recommending better enforcement of existing laws).

model that is “inherently harmful to consumers.”<sup>35</sup> According to the NCLC, debt settlement companies actively target consumers who are insolvent or unable to afford their debts, but who are still able to pay something.<sup>36</sup> Ultimately, these targeted consumers spend the little money they have on hefty monthly payments and other administrative fees that the debt settlement companies charge for their services.<sup>37</sup> Meanwhile, the debt settlement companies provide no tangible services that justify those fees.<sup>38</sup> The NCLC reported that 43% of consumers cancelled their debt settlement programs after incurring such high fees, while only 1.4% of consumers were able to complete the program by paying off all of their debts.<sup>39</sup> The NCLC also found that debt settlement companies are rarely upfront about the consequences of settling debts and often make false promises regarding the amount of debt reduction that they will reasonably be able to negotiate.<sup>40</sup> In addition, the companies require consumers to stop paying creditors, but do not counsel them on the consequences of delinquency.<sup>41</sup> The NCLC classified debt settlement as an abusive practice and ultimately recommended that any new laws should prohibit this business model entirely.<sup>42</sup>

The Government Accountability Office (“GAO”) reached similar conclusions when the United States Senate Committee on Commerce, Science, and Transportation asked it to investigate debt settlement companies in 2010.<sup>43</sup> The GAO, like the NCLC, found that these companies charged advance fees before settling any debts,<sup>44</sup> mandated consumers to stop paying creditors,<sup>45</sup> falsely claimed that a large number of consumers completed their debt settlement programs,<sup>46</sup> and guaranteed minimum reductions in principal amounts of debt.<sup>47</sup> Due to the fraudulent, abusive, and deceptive nature of these acts, the GAO

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35. *Id.* at 1.

36. *Id.* at 3-4.

37. *Id.* at 7.

38. *Id.* at 9-11.

39. *Id.* at 5.

40. *Id.* at 12-13.

41. *Id.* at 6-7.

42. *Id.* at 21.

43. GAO Report, *supra* note 8, at 7.

44. *Id.* at 7-9.

45. *Id.* at 9-10.

46. *Id.* at 10-13.

47. *Id.* at 13.

voiced concerns about the risk to consumers already in difficult financial situations.<sup>48</sup>

Even consumers of these services have noticed that they have not been treated fairly: individuals have filed a substantial number of complaints against debt settlement companies in several states, and that number is only increasing.<sup>49</sup> These individuals claimed that they did not obtain relief from their debts and that, as a result of engaging a debt settlement company for its services, ended up in worse financial circumstances than when they dealt with their debt on their own.<sup>50</sup>

#### B. FEDERAL REGULATORY EFFORTS

The federal government has attempted to eradicate corrupt debt settlement<sup>51</sup> through the efforts of two federal agencies.<sup>52</sup> They are the Federal Trade Commission (“FTC”) and the Consumer Financial Protection Bureau (“CFPB”), each of which is primarily tasked with consumer protection, but play different roles in the regulation process.<sup>53</sup> The FTC is empowered to regulate “unfair or deceptive acts or practices” (“UDAP”) of non-banks,<sup>54</sup> while the CFPB may prohibit an “unfair, deceptive, or abusive act or practice” (“UDAAP”) in connection with consumer financial products or services.<sup>55</sup> The division of jurisdiction between the FTC and the CFPB works to ensure that debt settlement companies’ “services are fair, transparent, and competitive,” and that their business practices are not “anticompetitive, deceptive, or unfair to consumers.”<sup>56</sup> Both the FTC and CFPB have taken regulatory steps against many debt settlement companies.<sup>57</sup>

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48. *Id.* at 7.

49. *See* NAAG Comment, *supra* note 7, at 1.

50. GAO Report, *supra* note 8, at 1.

51. *See infra* Section I.B.

52. *See infra* notes 54-55 and accompanying text.

53. *See infra* notes 54-55 and accompanying text.

54. *See* 15 U.S.C. § 45(a)(2) (2012).

55. *See* 12 U.S.C. § 5531(a) (2012).

56. *See* Memorandum of Understanding, *supra* note 27, at 1; *see also* 12 U.S.C. § 5581(b)(5) (detailing the authority of CFPB and FTC in relation to each other).

57. *See infra*, Part I.C.1-2; *see also* Complaint for Permanent Injunction and Other Equitable Relief, Fed. Trade Comm’n v. DebtPro 123 LLC, No. SACV 14-00693 JLS (ANx) (C.D. Cal. May 2, 2014), <http://www.ftc.gov/system/files/documents/cases/140603debtprocmt.pdf> [<http://perma.cc/Y69T-BKF8>]; Stipulated Final Judgment and Order, Consumer Fin. Prot. Bureau v. Premier Consulting Grp. LLC, No. 1:13-cv-3064



### I. *The FTC*

Congress created the FTC in 1914 under the Federal Trade Commission Act (“FTCA”).<sup>58</sup> However, the FTC did not receive authority to protect consumers until 1938 when the Wheeler-Lea Act amended the FTCA.<sup>59</sup> The Wheeler-Lea Act authorized the FTC to declare acts or practices in, or affecting, commerce to be unlawful on the grounds that they are either unfair or deceptive.<sup>60</sup> The FTCA defines unfair acts or practices as those that cause substantial injury to, cannot be reasonably avoided by, and are not outweighed by countervailing benefits to consumers.<sup>61</sup> Although “deception” is not defined by the FTCA, deceptive acts or practices are understood to be any material representation or omission that is likely to mislead a reasonable consumer.<sup>62</sup>

Using its enforcement authority,<sup>63</sup> the FTC has initiated many actions against debt settlement companies for engaging in practices it considered unfair or deceptive.<sup>64</sup> For instance, in May 2004, the FTC

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(JLC) (S.D.N.Y. Dec. 4, 2014), [http://files.consumerfinance.gov/f/201412\\_cfpb-cfpb-v-premier-consulting-group-et-al-proposed-stipulated-final-judgment-and-order.pdf](http://files.consumerfinance.gov/f/201412_cfpb-cfpb-v-premier-consulting-group-et-al-proposed-stipulated-final-judgment-and-order.pdf) [<http://perma.cc/J58E-NT82>].

58. Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41-58).

59. Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 2, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45).

60. See 15 U.S.C. § 45(a)(2).

61. See *id.* § 45(n).

62. See Letter from James C. Miller III, Chairman, Fed. Trade Comm’n, to John D. Dingell, Chairman, Comm. on Energy & Commerce, FTC Policy Statement on Deception (Oct. 14, 1983), <http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> [<http://perma.cc/2QRT-7K47>].

63. 15 U.S.C. § 45(a)(2).

64. See, e.g., Complaint For Injunctive and Other Equitable Relief, Fed. Trade Comm’n v. Edge Solutions, Inc., No. CV-07-4087 (JG) (AKT) (E.D.N.Y. Oct. 1, 2007), <http://www.ftc.gov/sites/default/files/documents/cases/2007/10/071001edgesolutionscmplt.pdf> [<http://perma.cc/EAL9-2HC9>]; Complaint For Injunctive and Other Equitable Relief, Fed. Trade Comm’n v. Debt Set, Inc., 1:07-cv-00558-RPM (D. Colo. Mar. 20, 2007), <http://www.ftc.gov/sites/default/files/documents/cases/2007/03/070327cmp0623140.pdf> [<http://perma.cc/QPA3-KQGM>]; Complaint For Injunctive and Other Equitable Relief, Fed. Trade Comm’n v. Connelly, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Aug. 3, 2006), <http://www.ftc.gov/sites/default/files/documents/cases/2006/09/060921cmp0523091.pdf> [<http://perma.cc/M3VA-C2AJ>]; Complaint For Injunctive and Other Equitable Relief, Fed. Trade Comm’n v. Innovative Sys. Tech., No. CV04-0728 (GAF) (C.D. Cal. Feb. 6, 2004), <http://www.ftc.gov/sites/default/files/documents/cases/2004/02/040213comp0323006.pdf> [<http://perma.cc/Z73D-3A9B>].

filed a complaint against a group of debt settlement companies that made over \$84 million using UDAP.<sup>65</sup> The complaint alleged that the defendants (1) falsely promised free debt counseling but then charged consumers excessive fees to enroll in their programs; (2) deceptively promised that the programs were certain to eliminate consumers' debts; (3) failed to disclose that very few existing customers had been able to reduce their debts using their programs; and (4) failed to disclose that consumers would face financial consequences, such as late fees and lower credit ratings, as a result of enrolling in their programs.<sup>66</sup> Each of the defendants agreed to settle the claims against them, and the FTC ordered them to make clear disclosures in all future transactions regarding their fees and the possible consequences clients might face if they followed a debt settlement program.<sup>67</sup> The settlements also required the defendants to pay \$1 million in consumer redress and a total of \$3.821 million for equitable relief purposes.<sup>68</sup>

The FTC filed a subsequent complaint in November 2004 against Better Budget Financial Services, a debt settlement company, and its principals.<sup>69</sup> The FTC alleged that the defendants (1) charged consumers a monthly fee of \$29.95 to \$39.95, plus 25% of the difference between the principle amount owed and the settlement amount the company was able to negotiate; (2) advised consumers to stop paying their creditors and instead collect their savings in an account designated for eventual negotiated debt settlement, which was also the same account from which defendants withdrew their monthly fees; (3) promised to reduce consumer debt by 50% to 70% and shorten the time period necessary to pay off the debt; (4) promised to settle consumers' debts with creditors once the consumers saved enough money in their accounts; (5) promised

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65. Press Release, Fed. Trade Comm'n, Debt Services Operations Settle FTC Charges (Mar. 30, 2005) [hereinafter Debt Services Operations Settle], <http://www.ftc.gov/news-events/press-releases/2005/03/debt-services-operations-settle-ftc-charges> [<http://perma.cc/N6DJ-J7EG>]; see also Settlement Agreement and [Proposed] Final Order for Permanent Injunction with Receivership Defendants, Fed. Trade Comm'n v. Nat'l Consumer Council, No. SA CV04-0474 (CJC) (JWJx) (C.D. Cal. Mar. 29, 2005), <http://www.ftc.gov/sites/default/files/documents/cases/2005/03/050330receivership0323185.pdf> [<http://perma.cc/W3RS-3C56>].

66. Debt Services Operations Settle, *supra* note 65. In fact, only 638 of 44,844 consumers actually completed a program. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

consumers that they could stop debt collection attempts by creditors; and (6) were, in reality, only able to settle the debts of very few consumers in their programs.<sup>70</sup> The defendants made approximately \$12 million in profit from these practices.<sup>71</sup> Pursuant to a stipulated final order, the defendants were barred from fraudulently guaranteeing that a consumer's debt could be reduced, settling with creditors once consumers accumulated specific amounts of money, and misrepresenting that they were able to stop collection efforts by creditors when, in fact, they were not.<sup>72</sup> Defendants were also ordered to turn over approximately \$1.3 million in assets for the purpose of consumer redress.<sup>73</sup> Better Budget Financial Services has since ceased all operations of its debt settlement business.<sup>74</sup>

In March 2006, the FTC filed a complaint against another company, Debt Solutions, Inc., and its affiliates, alleging that they falsely promised that participating consumers would (1) save thousands of dollars in a short time; (2) have their credit card and loan interest rates reduced substantially; (3) pay off their debt substantially faster without increasing monthly payments; (4) pay substantially reduced monthly payments to creditors; and (5) receive a guaranteed full refund if they did not save at least \$2500 from their principal amount owed.<sup>75</sup> Consumers paid \$399 to \$629 for the program,<sup>76</sup> and it is believed that

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70. *Id.*

71. Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief Against All Defendants at 16, Fed. Trade Comm'n v. Better Budget Fin. Serv., Inc., No. 04-CV-12326 (WGY) (D. Mass. Feb. 25, 2005), <http://www.ftc.gov/sites/default/files/documents/cases/2005/03/050330ord0412326.pdf> [<http://perma.cc/S2PL-6NA6>].

72. *Id.* at 10-11.

73. Debt Services Operations Settle, *supra* note 65.

74. The date of Better Budget Financial Services' involuntary dissolution was May 31, 2007. Business Entity Summary: Better Budget Financial Services, Inc., SEC'Y COMMONWEALTH MASS., [http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=043528837&SEARCH\\_TYPE=1](http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=043528837&SEARCH_TYPE=1) [<http://perma.cc/8J62-A39U>]. The fact that the company is no longer operating its debt settlement business is not much of a consolation for consumers because individual companies may always re-emerge under an altered name or different business model. *See* Franklin, *supra* note 5.

75. Complaint for Permanent Injunction and Other Relief at 7-9, Fed. Trade Comm'n v. Debt Solutions, Inc., No. CV06-0298 (JLR) (W.D. Wash. Mar. 6, 2006), <http://www.ftc.gov/sites/default/files/documents/cases/2006/03/060306cmplt0523002.pdf> [<http://perma.cc/R3HP-E2MT>].

76. *Id.* at 6.

the defendants made approximately \$23 million from their activities.<sup>77</sup> Pursuant to a stipulated settlement, two principals of the defendant companies were permanently barred from engaging in the business of the debt-relief industry.<sup>78</sup> In addition, all defendants were prohibited from engaging in any of the violations alleged in the complaint.<sup>79</sup> However, no monetary redress was ordered because the defendants represented that they were unable to pay.<sup>80</sup> Curiously, Debt Solutions, Inc. has managed to continue its operations as a debt settlement company, but today it is known under a different name: DSI Financial, Inc.<sup>81</sup>

After years of addressing the UDAP of debt settlement companies on a case-by-case and company-by-company basis,<sup>82</sup> the FTC's concerns about the harm that debt settlement plans caused consumers persisted.<sup>83</sup> In response, the FTC undertook regulatory measures against the debt settlement industry.<sup>84</sup> In 2009, the FTC exercised its authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act<sup>85</sup> to amend the Telemarketing Sales Rule.<sup>86</sup> Amendments to the

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77. See Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to All Defendants at 11, *Fed. Trade Comm'n v. Debt Solutions, Inc.*, No. CV06-0298JLR (W.D. Wash. May 22, 2007), <http://www.ftc.gov/sites/default/files/documents/cases/2007/05/070522debtsolustipfnljdgmnt.pdf> [<http://perma.cc/6KXQ-5EZJ>].

78. *Id.* at 6.

79. See *id.* at 7-10.

80. Press Release, Fed. Trade Comm'n, Debt Elimination Defendants Settle FTC Charges (May 23, 2007), <http://www.ftc.gov/news-events/press-releases/2007/05/debt-elimination-defendants-settle-ftc-charges> [<http://perma.cc/WZ67-NSL5>].

81. See Business Information Report: DSI Financial, Inc., PALM BEACH CTY. GOV'T, <http://www.pbcgov.com/pubSafety/Consumer/asps/BusinessInformationReport.asp?hrfBusSeq=500581&hrfBusName=DSI%20Financial,%20Inc.&hrfProductSeq=0> [<http://perma.cc/TR67-NBJY>].

82. The FTC identifies twenty-three enforcement actions against debt relief companies leading up to the finalization of its amended Telemarketing Sales Rule. See Telemarketing Sales Rule, 75 Fed. Reg. 48,457, 48,509 (Aug. 10, 2010) (codified at 16 C.F.R. pt. 310). But the FTC only brought seven actions against debt settlement companies between 2001 and 2009. See Telemarketing Sales Rule, 74 Fed. Reg. 41,988, 41,996 (Aug. 19, 2009).

83. Telemarketing Sales Rule, 74 Fed. Reg. at 41,995.

84. *Id.*

85. Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (2012) (authorizing the FTC to propound rules governing abusive telemarketing activities); see Telemarketing Sales Rule, 74 Fed. Reg. at 41,989

Telemarketing Sales Rule are meant to increase the agency's ability to prevent debt settlement companies from engaging in UDAP.<sup>87</sup> The amendments (1) prohibit debt settlement companies from charging fees before settling or reducing a consumer's debt;<sup>88</sup> (2) require companies to make four specific disclosures to consumers;<sup>89</sup> (3) prohibit misrepresentation;<sup>90</sup> and (4) expand the rule to cover calls made by consumers to companies.<sup>91</sup> Until the amended Telemarketing Sales Rule became effective in 2010, no federal regulation specifically addressed the UDAP of debt settlement companies.<sup>92</sup>

## 2. *The CFPB*

The CFPB, which was created in 2010 under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),<sup>93</sup> has

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(explaining that the Telemarketing and Consumer Fraud and Abuse Prevention Act directs the FTC to issue rules defining and prohibiting deceptive and abusive telemarketing acts or practices).

86. The Telemarketing Sales Rule was promulgated in 1995 pursuant to the FTC's authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act. Michael Thurman & Michael L. Mallow, *"Hid[ing] Elephants in Mouseholes": The FTC's Unwarranted Attempt to Regulate the Debt-Relief-Services Industry Using Rulemaking Authority Purportedly Granted by the Telemarketing and Consumer Fraud and Abuse Prevention Act*, 14 TEX. REV. L. & POL. 301, 318 (2010) (discussing how the FTC used its rulemaking authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act to promulgate the Telemarketing Sales Rule on August 16, 1995).

87. *Id.* at 327.

88. *See* Telemarketing Sales Rule, 75 Fed. Reg. at 48,469.

89. *Id.* at 48,491 (requiring companies to disclose "(1) the amount of time necessary to achieve the represented results; (2) the amount of savings needed before the settlement of a debt; (3) if the debt relief program includes advice or instruction to consumers not to make timely payments to creditors, that the program may affect the consumer's creditworthiness, result in collection efforts, and increase the amount the consumer owes due to late fees and interest; and (4) if the debt relief provider requests or requires the consumer to place funds in a dedicated bank account at an insured financial institution, that the consumer owns the funds held in the account and may withdraw from the debt relief service at any time without penalty, and receive all funds in the account").

90. *Id.* at 48,497.

91. *Id.* at 48,495.

92. *See* N.Y.C. BAR ASS'N, *supra* note 10, at 96.

93. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §2(4), 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301 (2012)).

jurisdiction to regulate the activities of debt settlement companies.<sup>94</sup> The CFPB's chief purpose is to prohibit any UDAAP related to "a consumer financial product or service," through enforcement actions and rulemaking.<sup>95</sup> The Consumer Financial Protection Act of 2010 ("CFPA")<sup>96</sup> defines "unfair acts or practices" in the same way as does the FTCA.<sup>97</sup> But again, the term "deceptive" is not statutorily defined. For the purposes of its statutory authority, the CFPB considers any material misrepresentation, omission, act, or practice that misleads, or is likely to mislead, a consumer to be deceptive, provided that the consumer's interpretation is reasonable under the circumstances.<sup>98</sup> The Dodd-Frank Act does, however, define the term "abusive"<sup>99</sup> as any act or practice that either (1) materially interferes with the consumer's ability to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of the consumer's lack of understanding of the material risks, costs, or conditions of the product or service, his inability to protect his interests in selecting or using the product or service, or his reasonable reliance on the company to act in his or her interest.<sup>100</sup>

The CFPB has initiated over forty-six enforcement actions under its UDAAP authority since its inception.<sup>101</sup> These enforcement actions

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94. See generally Memorandum of Understanding, *supra* note 27 (agreement between FTC and CFPB to coordinate efforts to protect consumers and to avoid duplicative enforcement or regulatory efforts).

95. See 12 U.S.C. §§ 5531(a)-(b).

96. Consumer Financial Protection Act of 2010, tit. X, Pub. L. 111-203, 124 Stat. 1955 (codified at 12 U.S.C. § 5511).

97. Compare 15 U.S.C. § 45(n) (2012), with 12 U.S.C. § 5531(c) (both defining unfair acts or practices as those likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or to competition).

98. See CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL, at UDAAP 5-8 (2012), [http://files.consumerfinance.gov/f/201210\\_cfpb\\_supervision-and-examination-manual-v2.pdf](http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf) [<http://perma.cc/BU95-BE59>].

99. See Adam D. Maarec & John C. Morton, *A Survey of Activities Identified as Unfair, Deceptive or Abusive by the CFPB*, 68 CONSUMER FIN. L. Q. REP. 19, 20 (2014).

100. See 12 U.S.C. § 5531(d).

101. See Maarec & Morton, *supra* note 99, at 20 (noting that up until January 1, 2014, the CFPB entered sixteen enforcement actions based on allegations of UDAAP). Since January 1, 2014, the CFPB has brought more than thirty enforcement actions under its UDAAP authority. See *Newsroom: Enforcement*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/newsroom/?topic=enforcement> [<http://perm>

mainly targeted marketing, debt collection, and mortgage loan servicing<sup>102</sup> rather than debt-relief services or debt settlement, specifically.<sup>103</sup> However, the CFPB has not ignored the issues created by this industry entirely and has brought a few enforcement actions against debt settlement companies.<sup>104</sup> These actions addressed the UDAAP of debt settlement companies under the CFPA,<sup>105</sup> in addition to the acts or practices that the Telemarketing Sales Rule define as per se unfair or deceptive.<sup>106</sup> For instance, the CFPB has commenced actions alleging that (1) knowingly charging monthly fees from consumers that the consumers were unable to afford is an abusive practice;<sup>107</sup> (2)

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a.cc/6NRV-XEVH], for a listing of the CFPB's enforcement actions. The CFPB has targeted a multitude of different practices under this authority. *See, e.g.*, Stipulated Final Judgment and Consent Order 5-8, *Consumer Fin. Prot. Bureau v. Nat'l Corrective Group, Inc.*, No. 1:15-CV-899 (RDB) (D. Md. Mar. 30, 2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_proposed-order-national-corrective-group.pdf](http://files.consumerfinance.gov/f/201503_cfpb_proposed-order-national-corrective-group.pdf) [<http://perma.cc/E4P5-A2CN>] (enjoining defendants from UDAAP, including masquerading as district attorneys to threaten consumers with criminal charges to deceive them into paying extra fees for financial education class); Complaint at 5, *Consumer Fin. Prot. Bureau v. All Fin. Serv., LLC*, Case No. 1:15-CV-00420-JFM (D. Md. Feb. 12, 2015) (alleging that defendant disseminated deceptive and misleading advertisements suggesting that it was affiliated with government agency); Stipulated Final Judgment and Order, *Consumer Fin. Prot. Bureau v. Freedom Stores, Inc.*, No. 2:14CV643 (ANA)(TEM) (E.D. Va. Dec. 18, 2014) (enjoining defendants from unfair and abusive practices, including illegally filing lawsuits in Virginia for out-of-state contracts to obtain default judgments and illegally debiting bank accounts of consumers' family and friends).

102. *See* Maarec & Morton, *supra* note 99, at 20.

103. The CFPB has only recently begun to accept complaints against debt settlement companies. *See CFPB Begins Accepting Consumer Complaints on Prepaid Cards and Additional Nonbank Products*, CONSUMER FIN. PROT. BUREAU (Jul. 21, 2014), <http://www.consumerfinance.gov/newsroom/cfpb-begins-accepting-consumer-complaints-on-prepaid-cards-and-additional-nonbank-products/> [<http://perma.cc/8U6M-FU3G>]. For a list of the CFPB's latest priorities, see *Fall 2015 Statement of Regulatory Priorities*, CONSUMER FIN. PROT. BUREAU, [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement\\_3170.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_3170.html) [<http://perma.cc/2SHU-MW4J>] (excluding debt settlement companies as a priority).

104. *See, e.g.*, Complaint, *Consumer Fin. Prot. Bureau v. Am. Debt Settlement Sols., Inc.*, No. 9:13-cv-80548-DMM (S.D. Fla. May 30, 2013), [http://files.consumerfinance.gov/f/201305\\_cfpb\\_complaint\\_adss.pdf](http://files.consumerfinance.gov/f/201305_cfpb_complaint_adss.pdf) [<http://perma.cc/NDD4-JVR8>].

105. *See infra* notes 107-09 and accompanying text.

106. *See* Telemarketing Sales Rule, 75 Fed. Reg. 48,457, 48,458 (Aug. 10, 2010) (summarizing the amendments to the Telemarketing Sales Rule that apply to debt settlement practices, including ban on advanced fees, requirement of specific disclosures, and prohibition of specific misrepresentations about debt settlement programs).

107. *See* Complaint, *supra* note 104, at 13-15.

representing that the company is affiliated with the government is a deceptive practice;<sup>108</sup> and (3) preventing consumers from learning about the risks, costs, and conditions associated with debt settlement programs by concealing fees or dodging questions is an unfair practice.<sup>109</sup>

### C. STATE REGULATORY EFFORTS

Unfortunately, the federal government's stance against debt settlement companies has allowed for many regulatory loopholes.<sup>110</sup> Since the FTC's rulemaking authority under the Telemarketing Sales Rule is limited to telemarketing,<sup>111</sup> the Rule, as amended in 2010, only covers debt settlement companies' transactions through telemarketing services.<sup>112</sup> In addition, the CFPB heavily relies on consumers to report the UDAAP of debt settlement companies in order to undertake enforcement actions.<sup>113</sup> States have tried to protect their citizens against debt settlement companies by filling in these loopholes with their own consumer protection laws and enforcement actions.

Although every state has an interest in protecting its consumers from debt settlement companies, each state varies in its method of protection.<sup>114</sup> For example, a few states regulate debt settlement

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108. See Complaint at 10-11, *Consumer Fin. Prot. Bureau v. Mission Settlement Agency*, No. 13 CV 3064 (S.D.N.Y. May 7, 2013), [http://files.consumerfinance.gov/f/201305\\_cfpb\\_complaint\\_mission-settlement.pdf](http://files.consumerfinance.gov/f/201305_cfpb_complaint_mission-settlement.pdf) [<http://perma.cc/6Z4A-YHM2>].

109. *Id.* at 7-9.

110. See Elizabeth Ody, *Debt Settlement Firms Outfox the Regulators*, BLOOMBERGBUSINESS (Nov. 3, 2011), <http://www.bloomberg.com/bw/magazine/debt-settlement-firms-outfox-the-regulators-11032011.html> [<http://perma.cc/B87X-C6Z7>].

111. See Thurman & Mallow, *supra* note 86, at 320. The FTC's jurisdiction over debt settlement companies is limited to those companies that make outbound calls to solicit consumers and receive inbound calls from consumers responding to general media advertisements. See Telemarketing Sales Rule, 75 Fed. Reg. at 48,495.

112. See Telemarketing Sales Rule, 75 Fed. Reg. at 48,466; N.Y.C. BAR ASS'N, *supra* note 10, at 95.

113. See Justin P. Nelson, Note, *Federal Oversight of the Debt Relief Industry: A More Effective Means of Deterring Illegal Debt Settlement Schemes*, 75 OHIO ST. L. J. FURTHERMORE 42, 57 (2014).

114. See GAO Report, *supra* note 8, at 6. For further information on state legislation regarding the debt relief industry, see the National Conference of State Legislatures, which tracks the statutory citations and policies of each state, at <http://www.ncsl.org/research/financial-services-and-commerce/credit-counseling-debt-management983and-settle-m983.aspx> [<http://perma.cc/ATK5-YPFS>].



companies through legislation that bans UDAP,<sup>115</sup> while others ban debt settlement companies altogether.<sup>116</sup> Some states require debt settlement companies to obtain licenses,<sup>117</sup> and some states cap the amount debt settlement companies may charge for their services.<sup>118</sup> States may also

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115. See, e.g., CAL. BUS. & PROF. CODE § 17200 (West, Westlaw through 2015 Sess.) (prohibiting unfair competition, including “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”); FLA. STAT. ANN. § 501.204 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (“Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”); MINN. STAT. ANN. § 325F.69 (West, Westlaw through 2015 legislation) (prohibiting fraud, misrepresentation, and deceptive practices); N.Y. GEN. BUS. LAW § 349 (McKinney, Westlaw through 2015 Sess.) (“Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”).

116. See, e.g., ARK. CODE ANN. § 5-63-302(a) (West, Westlaw through 2015 legislation) (“A person shall not engage in, or offer to or attempt to engage in, the business or practice of debt adjusting in this state.”); HAW. REV. STAT. ANN. § 446-2 (West, Westlaw through 2015 Sess.) (“Any person who acts or offers to act as a debt adjuster in this State shall be fined . . . or imprisoned . . . .”); LA. STAT. ANN. § 14:331 (Westlaw through 2015 Sess.) (“Except as otherwise provided herein, no person shall engage in the business of debt adjusting.”); N.J. STAT. ANN. § 17:16G-2(a) (West, Westlaw through 2015 Sess.) (“No person other than a nonprofit social service agency or a nonprofit consumer credit counseling agency shall act as a debt adjuster.”); WYO. STAT. ANN. § 33-14-102(a) (West, Westlaw through 2015 Sess.) (“It shall be unlawful for any person to engage in the business of debt adjusting.”).

117. See, e.g., CONN. GEN. STAT. ANN. § 36a-671(b) (West, Westlaw through 2015 Sess.); IDAHO CODE ANN. § 26-2223 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.); N.D. CENT. CODE ANN. § 13-11-02 (West, Westlaw through 2015 Sess.); VT. STAT. ANN. tit 8, § 2752 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.).

118. See, e.g., GA. CODE ANN. § 18-5-2 (West, Westlaw through 2015 Sess.) (limiting fees to “7.5 percent of the amount paid monthly by such debtor to such person for distribution to creditors of such debtor.”); 225 ILL. COMP. STAT. ANN. 429/125 (West, Westlaw through 2015 Sess.) (limiting fees to one-time enrollment fee of \$50 and settlement fee of 15% of the savings); ME. REV. STAT. tit. 32, § 6174-A (Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (limiting fees to one-time initial fee of \$75 and either a \$40 monthly fee or a reasonable settlement fee of 15% of the savings); N.D. CENT. CODE ANN. § 13-11-21 (West, Westlaw through 2015 Sess.) (prohibiting enrollment fees, and limiting settlement fees to thirty percent of the savings); W. VA. CODE ANN. § 61-10-23 (West, Westlaw through 2015 legislation) (limiting fees to two percent of total amount of money deposited into account for purpose of distributing the funds to creditors).

provide a combination of injunctive relief, civil penalties, and criminal implications for any violations of their consumer protection laws.<sup>119</sup>

Although the general trend has been increased regulation of debt settlement companies by states, Pennsylvania is one of the few that has relaxed restrictions on debt settlement companies in the last few years.<sup>120</sup> Before November 1, 2014, debt settlement companies operating in Pennsylvania were subject to the Debt Management Services Act, which prohibited fees other than a \$50 initial consultation fee, a \$50 total monthly fee, and a \$50 penalty fee for insufficient funds.<sup>121</sup> Today, those companies are subject to the Debt Settlement Services Act, which allows companies to charge fees as long as they have settled at least one account in a consumer's debt settlement plan, that consumer has made at least one payment in the plan, and the fee per debt settled is a proportion of the total fee for settling the debt as required by the law, or is a percentage of the amount saved.<sup>122</sup> Although debt settlement companies are free to charge more fees for their services, they are still subject to specific disclosure requirements and prohibited from misrepresentations.<sup>123</sup>

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119. See, e.g., FLA. STAT. ANN. § 501.207 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (providing injunctive relief); *id.* § 501.2075 (imposing a penalty of up to \$10,000 for each violation of Florida Deceptive and Unfair Trade Practices Act); HAW. REV. STAT. ANN. § 446-2 (West, Westlaw through 2015 Sess.) (“Any person who acts or offers to act as a debt adjuster in this State shall be fined not more than \$500 or imprisoned not more than sixth months, or both.”); N.D. CENT. CODE ANN. § 13-11-27 (West, Westlaw through 2015 Sess.) (imposing civil money penalty of \$5000 per violation and class C felony charge); S.C. CODE ANN. § 37-7-117 (Westlaw through 2015 Sess.) (“A person who violates [the consumer credit counseling chapter] is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than six months, or both.”); VT. STAT. ANN. tit 8, § 2764 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (“Any person . . . who shall violate . . . any of the provisions of this chapter, shall be imprisoned not more than two years or fined not more than \$1500.00, or both.”).

120. Debt Management Services Act, 2008 PA. LEGIS. SERV. 2008-117 (West) (requiring stricter regulation of debt management services), *repealed by* Debt Settlement Services Act, 2014 PA. LEGIS. SERV. 2014-118 (West) (relaxing the regulation of debt settlement providers).

121. 63 PA. STAT. AND CONS. STAT. ANN. § 2415 (West, Westlaw through 2015 Sess.), *held unconstitutional by* U.S. Orgs. for Bankr. Alts., Inc. v. Dep’t of Banking, 991 A.2d 370, 375 (Pa. Commw. Ct. 2010).

122. 63 PA. STAT. AND CONS. STAT. ANN. § 2552(c) (West, Westlaw through 2015 Sess.).

123. *Id.* § 2552(a).

Using the enforcement authority delegated by these state consumer protection laws, state attorneys general and other state authorities have brought enforcement proceedings against debt settlement companies nationwide.<sup>124</sup> For example, in 2009, the Colorado Attorney General brought enforcement actions against eleven debt settlement companies after receiving twenty-seven consumer complaints.<sup>125</sup> These companies violated the Colorado consumer protection laws by failing to be registered, charging illegal fees, withholding necessary disclosures, and refusing consumers the right to cancel contracts.<sup>126</sup> The eleven companies settled, refunding \$923,370 in program fees to 912 Colorado customers.<sup>127</sup> Since the adoption of the Colorado Debt Management Services Act in 2007, the Colorado Attorney General has initiated at least fifteen enforcement proceedings against debt settlement companies.<sup>128</sup>

In January 2010, the Vermont Attorney General successfully obtained an assurance of discontinuance against Debt Settlement America, Inc.<sup>129</sup> The Texas-based company earned at least \$69,000 from

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124. In Georgia, the Governor's Office of Consumer Protection enforces the Debt Adjustment Act. *See Statutes We Enforce*, GA. DEP'T OF L., <http://consumer.georgia.gov/about-us/statutes-we-enforce> [<http://perma.cc/AA2Y-CLEL>]. In South Carolina, the Department of Consumer Affairs enforces the South Carolina Consumer Protection Code. *See About SCDCA*, S.C. DEP'T OF CONSUMER AFF., <http://www.consumer.sc.gov/AboutUs/Pages/default.aspx> [<http://perma.cc/S5J2-26ND>]. In North Dakota, both the Commissioner and Attorney General have the power to enforce the statute regulating debt settlement providers. N.D. CENT. CODE ANN. §§ 13-11-26 to 13-11-27 (West, Westlaw through 2015 Sess.).

125. *See* Marija Vader, *Eleven Debt Management Companies Settle with A.G.*, COLO. SPRINGS BUS. J. (Mar. 12, 2009), <http://www.csbj.com/2009/03/12/eleven-debt-management-companies-settle-with-ag/> [<http://perma.cc/52L8-M4PV>].

126. *Id.*

127. *Id.*

128. *See, e.g., Annual Report 2011*, COLO. ATT'Y GEN., <http://coag.gov/sites/default/files/contentuploads/ago/AnnualReport/2011%20Annual%20Report.pdf> [<http://perma.cc/7KKM-QM98>]; *Annual Report 2012*, COLO. ATT'Y GEN., <http://coag.gov/sites/default/files/contentuploads/ago/AnnualReport/2012%20Annual%20Report.pdf> [<http://perma.cc/W8TK-ECPZ>]; *Annual Report 2013*, COLO. ATT'Y GEN., <http://coag.gov/sites/default/files/contentuploads/ago/AnnualReport/2013%20Annual%20Report%20Annual%20FINAL.pdf> [<http://perma.cc/7YCA-UN4S>]; *Annual Report 2014*, COLO. ATT'Y GEN., [http://coag.gov/sites/default/files/contentuploads/ago/AnnualReport/2014\\_DOL\\_Annual\\_Report.pdf](http://coag.gov/sites/default/files/contentuploads/ago/AnnualReport/2014_DOL_Annual_Report.pdf) [<http://perma.cc/T5LW-24GP>].

129. Assurance of Discontinuance, *In re Debt Settlement Am., Inc.*, No. 56-1-10WNCV (Vt. Super. Ct. Jan. 27, 2010), <http://ago.vermont.gov/assets/files/Debt%20S>

twenty-five Vermont consumers.<sup>130</sup> The company violated the state's Consumer Fraud Act prohibitions on unfair and deceptive consumer acts and practices by charging customers upfront fees, making false representations, and failing to give customers the right to cancel contracts.<sup>131</sup> Debt Settlement America, Inc. agreed to comply with the state's Consumer Fraud Act, refund all Vermont customers, pay \$2000 to any customer who was sued by a creditor while enrolled in the company's program, and pay \$50,000 in civil penalties and costs.<sup>132</sup> Since February 2009, the Vermont Attorney General has initiated fourteen enforcement actions against all debt adjusters, including debt settlement companies.<sup>133</sup>

In June 2011, the Florida Attorney General settled the case against Specialized Funding, Inc.<sup>134</sup> Consumers complained that the company misled them about the true cost and length of the company's debt settlement program, and charged fees before settling any debts; the Florida Attorney General's office found both actions to be a violation of the Florida Deceptive and Unfair Trade Practices Act.<sup>135</sup> The company, in addition to being restrained from any further violations of the Florida Deceptive and Unfair Trade Practices Act and the FTC's Telemarketing Sales Rule, was ordered to cease all operations, refund \$70,000 to seventy-three Florida consumers, and pay \$20,000 for investigative costs.<sup>136</sup> Since January 2011, the Florida Attorney General has initiated numerous consumer protection-related enforcement proceedings.<sup>137</sup>

State statutory regulations and enforcement actions by state attorneys general may have helped regulate some debt settlement

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ttlement%20America%20AOD%20-%202010-1-27.pdf [http://perma.cc/K2GB-T8SQ].

130. *Id.* at 1.

131. *Id.* at 2.

132. *Id.* at 3-4.

133. *See Debt Adjusters*, VT. OFFICE OF THE ATT'Y GEN., <http://ago.vermont.gov/focus/consumer-info/money-and-credit/debt-adjusters.php> [http://perma.cc/QJ6K-NQXQ].

134. *See Assurance of Voluntary Compliance, In re Specialized Funding, Inc.*, L08-3-1208 (June 14, 2011), [http://www.myfloridalegal.com/EC\\_Edoc.nsf/0/FFF05906658FAF2C85257B10006E9CB2/\\$file/Specialized+Funding.pdf](http://www.myfloridalegal.com/EC_Edoc.nsf/0/FFF05906658FAF2C85257B10006E9CB2/$file/Specialized+Funding.pdf) [http://perma.cc/8R75-WVM6].

135. *See id.* at 2.

136. *Id.* at 5-9.

137. Settlements, Final Judgments, and Filed Complaints, FLA. OFFICE OF THE ATT'Y GEN., [http://www.myfloridalegal.com/EC\\_Edoc.nsf/Enforcement](http://www.myfloridalegal.com/EC_Edoc.nsf/Enforcement) [http://perma.cc/AY5T-HCH9].

companies, but the overall impact has been negligible.<sup>138</sup> Most debt settlement companies are national and impact consumers from multiple states.<sup>139</sup> As illustrated above, state attorneys general only have the ability to enforce state consumer protection laws on behalf of the citizens of their own state.<sup>140</sup> With the limited reach of every state attorney general, and the variations in methods of consumer protection within each state, debt settlement companies are able to slip through the cracks of state legislative regimes.<sup>141</sup>

#### D. PRIVATE REGULATORY EFFORTS

Private actions by individual consumers can be a way to fortify the regulatory efforts of state and federal legislatures against the UDAAP of debt settlement companies.<sup>142</sup> For example, in *Davis v. Global Client*

138. See Nelson, *supra* note 113, at 50-53.

139. See, e.g., *About CuraDebt*, CURADEBT.COM, <http://www.curadebt.com/about.asp> [<http://perma.cc/24F7-LZVF>] (CuraDebt is a debt settlement company located in Florida, but services consumers nationwide); *All About Debtmerica*, DEBTMERICA.COM, <http://debtmerica.com/about-us> [<http://perma.cc/24F7-LZVF>] (Debtmerica is a California debt settlement company that works with consumers nationwide); *Who We Are: About Freedom Debt Relief*, FREEDOMDEBTRELIEF.COM, [http://www.freedomdebtrelief.com/about?utm\\_medium=organic&utm\\_source=fdrsited&utm\\_campaign=freedomdebtrelief.com](http://www.freedomdebtrelief.com/about?utm_medium=organic&utm_source=fdrsited&utm_campaign=freedomdebtrelief.com) [<http://perma.cc/DZ6A-T84S>] (Freedom Debt Relief is a debt settlement company with 80,000 customers “spread widely across the United States.”); see also N.Y.C. BAR ASS’N, *supra* note 10, at 169-70 (according to the complaints received by the New York Attorney General and the New York Department of Consumer Affairs, debt settlement companies from at least 28 states have conducted business with New York citizens).

140. See *supra* notes 124-37 and accompanying text.

141. See *supra* notes 138-40 and accompanying text.

142. Many states authorize their citizens to file lawsuits against debt settlement companies under their consumer protection statutes. See, e.g., ALASKA STAT. ANN. § 45.50.531 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (“A person who suffers an ascertainable loss of money or property as a result of another person’s act or practice declared unlawful by AS 45.50.471 may bring a civil action to recover for each unlawful act or practice . . . .”); FLA. STAT. ANN. § 501.211 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (allowing consumers to bring action to obtain declaratory judgment or injunction against any act or practice that violates the Florida Deceptive and Unfair Trade Practices Act); 225 ILL. COMP. STAT. ANN. 429/155(b) (West, Westlaw through 2015 Sess.) (providing consumers the ability to bring a civil action in accordance with the Consumer Fraud and Deceptive Business Practices Act); KY. REV. STAT. ANN. § 380.110 (West, Westlaw through 2015 Sess.) (“Any person who enters into a debt-adjusting transaction and thereby suffers any ascertainable loss of money or property, real or personal, as a result of a violation of

*Solutions, LLC*,<sup>143</sup> two Kentucky residents sued an account managing company that worked in conjunction with debt settlement companies for violations of Kentucky's Debt Adjustment Act<sup>144</sup> and Consumer Protection Act.<sup>145</sup> Unfortunately, the financial circumstances of consumers dealing with debt settlement companies make it difficult for them to sue companies for harmful practices.<sup>146</sup>

In addition to suing debt settlement companies for violating consumer protection statutes using a private right of action, consumers in financial distress have also fought against debt settlement companies by claiming fraudulent transfers in bankruptcy proceedings.<sup>147</sup> Under section 548 of the Bankruptcy Code, a bankruptcy trustee may avoid any transfer of a debtor's property made within two years of filing for bankruptcy if the debtor "received less than a reasonably equivalent value in exchange for such transfer."<sup>148</sup>

For example, in the bankruptcy proceeding of Leonard W. May and Judith L. May, the debtors engaged the services of Legal Helpers Debt Resolution, LLC around February 15, 2010.<sup>149</sup> The debtors paid the debt settlement company approximately \$6500 in fees, but the company performed no services in consideration.<sup>150</sup> Since the debtors received less than a reasonably equivalent value in exchange for the payment

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this chapter, may bring an action . . . to recover actual damages."); N.Y. GEN. BUS. LAW § 349(h) (McKinney, Westlaw through 2015 Sess.) (providing a private right of action for consumers injured by deceptive acts or practices).

143. See *Davis v. Glob. Client Sols., LLC*, 765 F. Supp. 2d 937 (W.D. Ky. 2011). Although the consumers initiated this case in federal court, the case was dismissed because the court recognized that the consumers agreed to arbitrate any claims against the debt settlement companies. *Id.* at 942.

144. KY. REV. STAT. ANN. §§ 380.010-990 (West, Westlaw through 2015 Sess.).

145. *Id.* §§ 367.110-360.

146. See N.Y.C. BAR ASS'N, *supra* note 10, at 72 n.397 (noting the few number of cases in Westlaw that are brought by consumers, either individually or as class action).

147. See Steve Rhode, *Are You at Risk of Refunds Back Two Years if Your Debt Settlement Clients File Bankruptcy? Legal Helpers Debt Resolution Judgment Says Yes.*, GETOUTOFDEBT.ORG (Mar. 19, 2011), <http://getoutofdebt.org/26906/are-you-at-risk-of-refunds-back-two-years-if-your-debt-settlement-clients-file-bankruptcy-legal-helpers-debt-resolution-judgment-says-yes> [<http://perma.cc/FZX6-NCQW>] (discussing liabilities for debt settlement companies who are vulnerable to bankruptcy trustees who can recover money for debt relief services within two years of debtor's bankruptcy filing).

148. 11 U.S.C. § 548(a)(1)(B)(i) (2012).

149. See Rhode, *supra* note 147.

150. *Id.*

provided to the debt settlement company, the court found that the \$6500 was recoverable by the bankruptcy trustee and entered judgment in favor of the debtors in the amount of \$6500, plus costs of the suit.<sup>151</sup> In contrast, in an Eighth Circuit case where a trustee sought to recover \$1708.37 on the basis of fraudulent transfer, the court held that even though the debt settlement company was engaged in prohibited debt adjusting under North Dakota law (making the contract void or illegal), there was value to the contract and the debt settlement company's services; therefore, recovery was unwarranted.<sup>152</sup> Individual consumers, just like the FTC, CFPB, and state attorneys general, are limited in their ability to fight against debt settlement companies.<sup>153</sup>

## II. PERSISTENT PROBLEMS IN THE DEBT SETTLEMENT INDUSTRY DESPITE REGULATORY EFFORTS

Despite the enforcement actions and regulatory efforts by the FTC, the CFPB, states, and individual consumers to temper the unfair or deceptive practices of debt settlement companies, these companies continue to commit harmful practices.<sup>154</sup> While the FTC's amended Telemarketing Sales Rule has prevented some debt settlement companies from engaging in these practices, some companies have ignored the Rule by making misrepresentations or continuing to charge large upfront fees before any debts are settled.<sup>155</sup>

For example, in May 2013, almost three years after the amendments took effect,<sup>156</sup> the CFPB brought an enforcement action

151. *Id.*; see also Order for Default Judgment, *In re May*, No. 10-74328 (Bankr. N.D. Ill. Jan. 31, 2011).

152. See *In re Kendall*, 440 B.R. 526, 528, 530, 534 (B.A.P. 8th Cir. 2010) (holding that there is value as long as "there is some chance that a contemplated investment will generate a positive return at the time of the disputed transfer.").

153. See *supra* notes 142-52 and accompanying text.

154. Cf. Nelson, *supra* note 113, at 51 (arguing that the reason debt settlement companies continue to disregard regulations is because consumers rarely file lawsuits against them).

155. See *Debt Settlement Agencies Create Far More Consumer Problems Than They Solve*, CONSUMER FED'N OF AM. (Nov. 10, 2014), [http://consumerfed.org/press\\_release/debt-settlement-agencies-create-far-more-consumer-problems-than-they-solve/](http://consumerfed.org/press_release/debt-settlement-agencies-create-far-more-consumer-problems-than-they-solve/) [<http://perma.cc/B3QV-9HRH>] (recommending that State and Federal Agencies should take further action beyond enforcing the Telemarketing Sales Rule in order to curb debt settlement companies that are continuing harmful practices).

156. The amended Telemarketing Sales Rule that defines debt relief services, prohibits debt relief providers from collecting upfront fees, require disclosures of

against American Debt Settlement Solutions, Inc. (“ADSS”) and its owner for violating the Telemarketing Sales Rule, among other regulatory rules.<sup>157</sup> ADSS charged consumers an initial enrollment fee, a monthly service fee, and represented that it could eliminate unsecured debt unreasonably quickly.<sup>158</sup> In May 2014, the FTC took action against DebtPro 123 LLC and its affiliates for similar indiscretions.<sup>159</sup> The defendants had made false promises to resolve 30% to 70% of the original debt amount within, at most, thirty-six months, and charged upfront fees of 10% of the consumers’ total debt in clear violation of the Telemarketing Sales Rule.<sup>160</sup>

While these and other debt settlement companies are blatantly ignoring statutory prohibitions, others are trying to find loopholes to evade state and federal regulations.<sup>161</sup> The business models of debt settlement companies have been adapting to regulators’ efforts to check fraud and deception, and to protect consumers.<sup>162</sup> Some companies have tried to affiliate with lawyers in order to charge upfront fees<sup>163</sup> in states that exempt lawyers from their debt settlement statutes.<sup>164</sup> This strategy is especially popular because the amended Telemarketing Sales Rule

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material information, etc., took effect on September 27, 2010, except for Section 310.4(a)(5), which became effective on October 27, 2010. *See* Telemarketing Sales Rule, 75 Fed. Reg. 48,457, 48,458 (Aug. 10, 2010).

157. *See* Complaint at 1, *Consumer Fin. Prot. Bureau v. Am. Debt Settlement Sols., Inc.*, No. 9:13-cv-80548-DMM (S.D. Fla. May 30, 2013), [http://files.consumerfinance.gov/f/201305\\_cfpb\\_complaint\\_adss.pdf](http://files.consumerfinance.gov/f/201305_cfpb_complaint_adss.pdf) [<http://perma.cc/KZW5-F6LC>].

158. *Id.* at 4-6.

159. *See* Complaint for Permanent Injunction and Other Equitable Relief at 1-2, 4-6, *Fed. Trade Comm’n v. DebtPro 123 LLC*, No. SACV 14-00693 JLS (ANx) (C.D. Cal. May 2, 2014), <http://www.ftc.gov/system/files/documents/cases/140603debtprocmt.pdf> [<http://perma.cc/C92V-MHFS>].

160. *Id.* at 9, 12.

161. *See* Connie Prater, *States, Feds Target Debt Settlement Legal Firms Over Upfront Fees*, CREDITCARDS.COM (Apr. 12, 2012), [http://www.creditcards.com/credit-card-news/debt\\_settlement-upfront-fees-banned-law-firms-1282.php](http://www.creditcards.com/credit-card-news/debt_settlement-upfront-fees-banned-law-firms-1282.php) [<http://perma.cc/YP3E-SJ8X>].

162. *See* N.Y.C. BAR ASS’N, *supra* note 10, at 95.

163. *See* Ody, *supra* note 110; Prater, *supra* note 161.

164. *See, e.g.*, GA. CODE ANN. § 18-5-3 (West, Westlaw through 2015 Sess.) (creating exemptions for “those situations involving debt adjusting incurred in the practice of law in this state”).



includes no specific prohibition for lawyers.<sup>165</sup> Other creative business practices targeted at evading state and federal regulations are: (1) meeting with clients face to face when signing documents;<sup>166</sup> (2) web-based marketing;<sup>167</sup> and (3) changing company names to start on a clean slate.<sup>168</sup>

The efforts by consumers and enforcement officials to sue debt settlement companies that conducted unfair or deceptive business practices have been inadequate to curb these predatory practices in the industry.<sup>169</sup> Despite the current civil penalties for violating the Telemarketing Sales Rule,<sup>170</sup> the CFPA,<sup>171</sup> and individual state regulations,<sup>172</sup> the penalties for engaging in these practices are often substantially smaller than the total amount of fees a company can collect from consumers by using these practices.<sup>173</sup> For example, the California Attorney General sued Freedom Debt Relief, LLC and its two

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165. See Ody, *supra* note 110; see generally Telemarketing Sales Rule, 75 Fed. Reg. 48,457 (Aug. 10, 2010) (providing no prohibition against lawyers charging upfront fees in relation to debt settlement services).

166. See Ody, *supra* note 110; Prater, *supra* note 161.

167. Prater, *supra* note 161.

168. In some cases, once a state attorney general or the FTC has taken enforcement action to enjoin UDAP of individual companies, they re-emerge as another company under a different name. See *id.*

169. N.Y.C. BAR ASS'N, *supra* note 10, at 75.

170. Debt settlement companies must pay a civil penalty of \$16,000 for each violation. See *Complying with the Telemarketing Sales Rule*, FED. TRADE COMM'N, <http://www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule#penalties> [<http://perma.cc/L3ZU-7SLF>].

171. See 12 U.S.C. § 5565(c)(2) (2012) (setting forth civil penalties depending on the type of violation: \$5000 per day for violations of written law, rule or final order; \$25,000 per day for reckless violations of consumer financial law; and \$1 million per day for knowing violations of consumer financial law).

172. See, e.g., CONN. GEN. STAT. ANN. § 36a-665 (West, Westlaw through 2015 Sess.) (imposing a civil penalty of not more than \$1000 for violations of a statute regulating debt adjusters and debt negotiation); GA. CODE ANN. § 18-5-4 (West, Westlaw through 2015 Sess.) (“Any person who engages in debt adjusting . . . shall further be liable for a civil fine of not less than \$50,000.00; and . . . shall further be liable to the debtor in an amount equal to the total of all fees, charges, or contributions paid by the debtor plus \$5000.00.”); 225 ILL. COMP. STAT. ANN. 429/80 (West, Westlaw through 2015 Sess.) (imposing civil penalty of \$10,000 per violation of Debt Settlement Consumer Protection Act); N.D. CENT. CODE ANN. § 13-11-27 (West, Westlaw through 2015 Sess.) (granting the commissioner power to impose a civil penalty up to \$5000 per violation); *id.* § 13-11-29 (consumers may recover the greater of actual restitution or \$2000, plus costs, expenses, and reasonable attorney’s fees).

173. See N.Y.C. BAR ASS'N, *supra* note 10, at 73.

founders.<sup>174</sup> The company made approximately \$150 million from illegal practices, and even though the court found in favor of the plaintiff, Freedom Debt Relief was only ordered to pay \$950,000 in penalties—a pittance in comparison to its illegal earnings.<sup>175</sup> Freedom Debt Relief, LLC continues its operations today and is even advertised as the second-ranking debt settlement company,<sup>176</sup> having helped approximately 250,000 consumers through its debt settlement programs.<sup>177</sup> Even so, the company continues to attract complaints from consumers.<sup>178</sup>

Despite having been sued on multiple occasions by the CFPB and individual consumers for harmful practices, the company Global Client Solutions, LLC has also been undeterred by judgments against it.<sup>179</sup> Notwithstanding an order to pay millions of dollars in civil penalties,<sup>180</sup> Global Client Solutions continues its business operations in account management services.<sup>181</sup> The problem is that the enforcement of federal

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174. *Id.* (discussing the complaint in *California v. Freedom Debt Relief*, No. CIV477991 (Cal. Super. Ct. Oct. 30, 2008)).

175. *Id.* (discussing the consent judgment in *California v. Freedom Debt Relief*, No. CIV477991 (Cal. Super. Ct. Dec. 16, 2009)). For further examples, see *supra* Part I.C.1.

176. See *2016 Best Debt Settlement Review*, TOPTENREVIEWS.COM, <http://debt-settlement-review.toptenreviews.com/> [<http://perma.cc/82E5-MT9T>].

177. See *Who We Are: About Freedom Debt Relief*, FREEDOMDEBTRELIEF.COM, [http://www.freedomdebtrelief.com/about?utm\\_medium=organic&utm\\_source=fdrsited&utm\\_campaign=freedomdebtrelief.com](http://www.freedomdebtrelief.com/about?utm_medium=organic&utm_source=fdrsited&utm_campaign=freedomdebtrelief.com) [<http://perma.cc/FHM3-WSNS>].

178. See *BBB Business Review: Freedom Debt Relief, LLC*, BETTER BUSINESS BUREAU, <http://www.bbb.org/greater-san-francisco/business-reviews/credit-debt-consolidation-services/freedom-debt-relief-in-san-mateo-ca-65019/complaints#breakdown> [<http://perma.cc/S9U6-UPTD>].

179. See, e.g., *Complaint, Consumer Fin. Prot. Bureau v. Glob. Client Sols., LLC*, No. 2:14-CV-6643 (C.D. Cal. Aug. 25, 2014), [http://files.consumerfinance.gov/f/201408\\_cfpb\\_complaint\\_global-client-solutions.pdf](http://files.consumerfinance.gov/f/201408_cfpb_complaint_global-client-solutions.pdf) [<http://perma.cc/X3QG-XXBV>]; *Estrella v. Freedom Fin. Network, LLC*, 2012 WL 4645012 (N.D. Cal. Oct. 1, 2012) (No. 09-CV-3156); *Guidotti v. Legal Helpers Debt Resolution, LLC*, 866 F. Supp. 2d 315 (D.N.J. 2011).

180. See, e.g., *Stipulated Final Judgment and Consent Order at 14, 16, Consumer Fin. Prot. Bureau v. Glob. Client Sols., LLC*, No. 2:14-cv-06643-DDP-JPR (C.D. Cal. Aug. 25, 2014), [http://files.consumerfinance.gov/f/201408\\_cfpb\\_consent-order\\_global-client-solutions.pdf](http://files.consumerfinance.gov/f/201408_cfpb_consent-order_global-client-solutions.pdf) [<http://perma.cc/8JPC-CGV9>] (ordering Global Client Solutions to pay \$6,099,000 in redress to consumers plus \$1,000,000 in civil penalty to the CFPB); *Estrella v. Freedom Fin. Network, LLC*, 2012 WL 4645012, at \*1 (N.D. Cal. Oct. 1, 2012) (No. 09-CV-3156) (noting that Global Client Solutions and a co-defendant settled claims against them for \$500,000).

181. See *GLOB. CLIENT SOLS.*, <http://www.globalclientsolutions.com> [<http://perma.cc/CU6Q-56QF>].

or state regulations has not effectively eliminated the profit motive in illegal debt-relief practices.<sup>182</sup> Unfortunately, this ensures that companies will adopt business models to continue to prey on vulnerable and economically distressed consumers.<sup>183</sup>

### III. A PROPOSAL FOR ENHANCING REGULATORY EFFORTS AND IMPOSING PERMANENT PENALTIES TO BETTER DETER THE UNFAIR, DECEPTIVE, AND ABUSIVE PRACTICES OF DEBT SETTLEMENT COMPANIES

The current conditions of the debt settlement industry are unquestionably harmful,<sup>184</sup> and the debt settlement companies' collective tenacity in circumventing any and all protections to consumers has thwarted efforts to extinguish the threat.<sup>185</sup> Nevertheless, many American consumers still seek the help of debt settlement companies, and understandably so, as there is little other recourse to over-indebtedness.<sup>186</sup> For example, a consumer alternatively could seek credit counseling, but he would ultimately have to pay in full the principal amount that he owes.<sup>187</sup> Consumers may also file for

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182. See N.Y.C. BAR ASS'N, *supra* note 10, at 95, 105.

183. *Id.*

184. *Id.* at 121 (noting that the debt settlement service model is inherently flawed); HARNICK & PARRISH, *supra* note 17, at 4 (noting that inherent dangers of debt settlement make it a risky debt relief option despite the FTC's 2010 Telemarketing Sales Rule); Loonin, *supra* note 31, at 21 (recommending that all states ban debt settlement because of the harm these companies cause vulnerable consumers).

185. See *supra* notes 154-83 and accompanying text.

186. Fifty-six thousand consumers have enrolled in debt settlement plans between September 2010 and December 2012 in "several of the nation's largest debt settlement providers" who are American Fair Credit Council ("AFCC") members. See *Options for Consumers in Crisis: An Economic Analysis of the Debt Settlement Industry*, HEMMING MORSE LLP 1, 7 tbl. 4.1 (Feb. 28, 2013), <http://www.americanfaircreditcouncil.org/wp-content/uploads/2014/08/Options-for-Consumers-in-Crisis-as-of-Dec-12.pdf> [<http://perma.cc/8KL4-GH6E>]. The AFCC is an association of debt settlement companies that claims to provide memberships only to those debt settlement companies that are in full compliance with the FTC's Telemarketing Sales Rule. *Our Members*, AM. FAIR CREDIT COUNCIL, <http://www.americanfaircreditcouncil.org/our-members/> [<http://perma.cc/WF D3-D2RA>].

187. Credit counseling agencies create personalized debt management plans for consumers, which may offer consumers pre-negotiated reductions of minimum payments and interest rates and the waiver of previously-imposed or ongoing fees, but rarely offer any reduction in the principal amount owed. See TASC Comment, *supra* note 13, at 7.

bankruptcy relief, but many express concerns about the associated social stigma.<sup>188</sup> These alternatives are even more disappointing given that debt settlement companies can offer real value when they are able to successfully and fairly negotiate a reduction in a consumer's principal debt amount.<sup>189</sup> Therefore, debt settlement companies should continue to exist in the debt-relief market as an option for consumers.<sup>190</sup>

However, regulation of these companies must undergo considerable change before they can provide a viable and valuable debt-relief option for consumers.<sup>191</sup> Current federal and state consumer protection laws are enforced and do provide penalties for UDAAP, but they are a weak deterrent against the substantially larger profits realized by companies engaging in these harmful practices.<sup>192</sup>

A simple cost-benefit analysis will demonstrate that, when the expected penalty for an illegal act is greater than the expected profit associated with that act, companies will avoid that act because of its perceived unprofitability.<sup>193</sup> Current federal and state regulations have yet to influence debt settlement companies' economic decision-making.<sup>194</sup> Companies are not deterred from harmful practices because the prescribed penalties do not tip the scales such that profits from illegal activities are rendered insufficient to bear the costs of an unfavorable verdict in an enforcement action.<sup>195</sup> To effectively temper

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188. Some consumers are concerned about the social stigma attached to bankruptcy. See Witte, *supra* note 12, at 282. Consumers who file for bankruptcy may view themselves as failures, or they may be labeled by society as "deadbeats who 'rip off the system.'" *Id.* at 283.

189. See *People v. Nationwide Asset Servs., Inc.*, 888 N.Y.S. 2d 850, 867, 870 (N.Y. Sup. Ct. 2009).

190. See *supra* notes 186-89 and accompanying text.

191. See *supra* Part II discussing how continued UDAAP of debt settlement companies in the face of federal and state regulations make debt settlement a dangerous option for consumers in debt.

192. See Nelson, *supra* note 113, at 56; see also *supra* Part II, discussing how, despite increased regulation of debt settlement companies, the lack of effective enforcement of existing regulations allows debt settlement companies to engage in UDAAP.

193. See Nelson, *supra* note 113, at 56; see also *Cost-Benefit Analysis: Deciding, Quantitatively, Whether to Go Ahead*, MIND TOOLS, [http://www.mindtools.com/pages/article/newTED\\_08.htm](http://www.mindtools.com/pages/article/newTED_08.htm) [<http://perma.cc/7FXB-SXJK>] (discussing the cost-benefit analysis process and examples).

194. Debt settlement companies are choosing to violate consumer protection laws and face the penalties for doing so rather than choosing to comply. See *supra* Part II.

195. See, e.g., *supra* note 175 and accompanying text.

UDAAP, both state and federal regulations<sup>196</sup> must demand harsher penalties for consumer protection violations.<sup>197</sup>

The CFPA penalty is a propitious contender as an effective deterrence mechanism that weighs heavily against the profit motive in UDAAP.<sup>198</sup> The CFPA currently imposes the greatest civil penalty for violations of regulatory provisions.<sup>199</sup> In particular, the CFPA imposes up to \$25,000 for each day of a reckless violation, and up to \$1 million for each day of a knowing violation, of “any provision of Federal consumer financial law,” including the CFPA.<sup>200</sup> In comparison, the FTC levies only up to \$16,000 in civil penalties for each violation of its consumer financial protection provisions,<sup>201</sup> and some states provide penalties as low as \$500 for the violation of its consumer protection laws.<sup>202</sup>

Before the CFPA’s civil money penalty can be used to effect real change, two significant obstacles must be overcome. First, the power to impose the CFPA civil money penalty is currently limited to enforcement actions brought by the CFPB.<sup>203</sup> Second, debt settlement companies are able to avoid high civil penalties by dissolving their business under one name and business model, and continuing UDAAP under a different name or business model.<sup>204</sup>

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196. Federal, state, or private regulatory efforts individually are not enough to deter the UDAAP of debt settlement companies. *See supra* Part I.

197. *See supra* note 193 and accompanying text.

198. *See supra* note 193 and accompanying text.

199. *See* 12 U.S.C. § 5565(c) (2012) (setting forth civil penalty amounts for violating “any provision of Federal consumer financial law” depending on the type of violation: civil penalty of \$5000 per day for violation of written law, rule or final order; \$25,000 per day for reckless violation of consumer financial law; \$1 million per day for knowing violation of consumer financial law).

200. *Id.*

201. *See Complying with the Telemarketing Sales Rule, supra* note 170.

202. *See, e.g.,* S.C. CODE ANN. § 37-7-117 (Westlaw through 2015 Sess.).

203. Despite the fact that 12 U.S.C. § 5552(a)(1) allows state attorneys general to enforce the CFPA, further research of the fifty states’ debt settlement regulations indicates that none of the states have adopted the CFPA.

204. Individual companies may always re-emerge under an altered name or different business model. *See, Franklin, supra* note 5. Debt Solutions, Inc., after representing that they could not pay the penalties associated with the enforcement action brought by the FTC, operates today as DSI Financial, Inc. *See supra* notes 75-81 and accompanying text.

## A. ENHANCING REGULATORY EFFORTS THROUGH MINI-CFPAS

The first obstacle to using CFPA's civil money penalty as an effective deterrent against debt settlement companies' UDAAP is that only violations subject to the CFPB's purview are currently subject to the CFPA's penalty.<sup>205</sup> However, this restriction is not statutorily imposed: the CFPA expressly allows any state attorney general to bring civil actions to enforce and benefit from its provisions, including the civil penalty of \$1 million per day for knowing violations.<sup>206</sup> Each state has the ability to statutorily award its attorney general the power to attack predatory companies through CFPA provisions, in effect, creating a mini-CFPA.<sup>207</sup> State legislators need only amend their consumer protection laws to say that the state attorney general (or their equivalent) has the power expressly delegated to him by the CFPA to enforce the provisions of, and seek remedies under, the CFPA.<sup>208</sup>

Several states have taken similar action, but instead of incorporating the CFPA, they have amended their consumer protection laws to look like mini-FTCAs.<sup>209</sup> These amendments generally require state attorneys general to construe the state's prohibition of UDAP consistently with the FTC.<sup>210</sup> Though this is a step in the right direction, these amendments cannot effect significant change because the FTCA expressly preserves all enforcement powers and remedies for the FTC.<sup>211</sup>

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205. See *supra* note 203 and accompanying text.

206. 12 U.S.C. § 5552(a)(1) (“[T]he attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law.”).

207. *Id.* States’ adoptions of the FTC Act into their own consumer protection acts have allowed them to follow FTC precedent. See *infra* note 210 and accompanying text. This Note proposes that states adopt the CFPA into their own consumer protection acts in the same way.

208. See *infra* note 210 and accompanying text.

209. *Id.*

210. See, e.g., FLA. STAT. ANN. § 501.204 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (“[D]ue consideration and great weight shall be given to the interpretations of the Federal Trade Commission . . . .”); IDAHO CODE ANN. § 48-618 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (“[I]t shall be an absolute defense to show that the challenged practices . . . comply with statutes administered by the federal trade commission . . .”).

211. Compare 12 U.S.C. § 5552(a)(1), with 15 U.S.C. § 45 (2012).

In addition, the civil money penalties provided by the FTCA are significantly less than the penalties provided by the CFPA.<sup>212</sup> Effecting mini-CFPAs would have a drastically different and far-reaching effect because of the CFPA's express allowance for its enforcement by other authorities.<sup>213</sup> Instead of merely asking state attorneys general to give credence to federal policy interpretations (as is the limitation of the FTCA), states can better protect consumers by empowering attorneys general through mini-CFPAs.<sup>214</sup>

Mini-CFPAs are an aggressive approach to fraud protection, particularly in states that provide citizens with a private right of action under their consumer protection laws.<sup>215</sup> In those states, individual consumers may bring civil actions of their own authority to recover damages for violations of consumer protection laws.<sup>216</sup> If states were to adopt the CFPA and private right of action provisions, consumers themselves could enforce the CFPA against debt settlement companies that continue any UDAAP.<sup>217</sup> States should earnestly consider enacting such provisions since they not only act as an extra deterrent to debt settlement companies, but they would also incentivize injured consumers with colorable claims to take legal action against debt settlement companies, even those consumers who are in disadvantageous financial situations.<sup>218</sup>

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212. See *supra* notes 199-201 and accompanying text.

213. See 12 U.S.C. § 5552(a)(1).

214. See *id.*

215. This proposal is based on the fact that states with mini-FTC acts that provide individual consumers with the private right of action allow those consumers to sue under FTC precedent. See, e.g., FLA. STAT. ANN. § 501.211 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (providing individual consumers with the right to sue companies that violate the FTCA).

216. See, e.g., CONN. GEN. STAT. ANN. § 42-110g (West, Westlaw through 2015 Sess.); IND. CODE ANN. § 24-5-0.5-4 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.); WASH. REV. CODE ANN. § 19.86.090 (West, Westlaw through 2015 legislation).

217. See *supra* note 215 and accompanying text.

218. See *supra* note 146 and accompanying text. Although some states, such as Colorado, limit the amount of civil money penalties an individual consumer may seek in enforcement actions, states should allow consumers to seek the full civil money penalty, or a comparable penalty, available under the CFPA. See, e.g., COLO. REV. STAT. §§ 6-1-112(1)(a), 6-1-113 (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.) (allowing attorney general to seek \$2000 for each violation of the consumer protection statute while consumers may recover the greater of actual damages, \$500, or "three times the amount of actual damages sustained.").

## B. IMPOSING PERMANENT PENALTIES THROUGH SURETY BONDS

Empowering state attorneys general and individual consumers to enforce the CFPB's civil penalty would present a real and prominent threat against the profit motives behind UDAAP.<sup>219</sup> In the past, however, enforcement authorities have failed to collect huge civil penalties on debt settlement companies when, instead of paying imposed penalties, the companies simply closed their business.<sup>220</sup> This is the second hurdle to expanding the province of the CFPB.<sup>221</sup> Today's regulatory regime leaves a loophole for a debt settlement company to evade legal responsibility by dissolving its business and simply resuming abusive practices under a new company name.<sup>222</sup> The implications of this are twofold: not only are companies avoiding the repercussions of their actions, and in doing so, cheating consumers of dearly needed cash, but they are also cheating the system by repeating the predatory cycle on more innocent citizens.<sup>223</sup> This massive regulatory oversight should be proactively remedied.

To address these concerns, all states should require debt settlement companies operating in their states to post a surety bond.<sup>224</sup> These surety bonds should be conditioned on the debt settlement companies complying with all consumer protection laws, both state and federal, and should be used automatically to pay the penalties associated with

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219. See *supra* note 193 and accompanying text.

220. See, for example, Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief Against All Defendants, Fed. Trade Comm'n v. Better Budget Fin. Servs., Inc., No. 04-CV-12326 (WGY) (D. Mass. Feb. 25, 2005), which is discussed in more detail in Part I.C.1.

221. See *supra* note 204 and accompanying text.

222. Individual companies may always re-emerge under an altered name or different business model. See *e.g.*, Franklin, *supra* note 5.

223. *Id.*

224. Some states already require debt settlement companies to provide a surety bond in exchange for providing debt settlement services within their states. See, *e.g.*, 225 ILL. COMP. STAT. ANN. 429/20 (West, Westlaw through 2015 Sess.) (requiring a \$100,000 bond to operate as a debt settlement provider in Illinois); N.D. CENT. CODE ANN. § 13-11-04 (West, Westlaw through 2015 Sess.) (requiring surety bond of \$50,000 for all debt settlement providers); 63 PA. STAT. AND CONS. STAT. ANN. § 2525 (West, Westlaw through 2015 Sess.) (requiring a penal bond of \$25,000 to operate debt settlement services in Pennsylvania).



violations of the consumer protection laws.<sup>225</sup> These bonds should be structured to provide sufficient protection from the large CFPA fines.<sup>226</sup> At the time the bond is posted, the debt settlement company should also be required to represent, by submitting an affidavit sworn under oath, that it has not operated a similar business under any other name within the last five years.<sup>227</sup> The combination of these requirements, which ensure that companies actually pay for the consequences and suffer the long-term effects of engaging in UDAAP, will further tip the scales against the attractiveness of violating consumer protection laws.

### CONCLUSION

The debt settlement industry, as it is today, is dangerous to consumers who are in financial distress. However, debt settlement can be a viable and valuable debt-relief option for consumers if the industry is regulated properly such that the profits associated with engaging in UDAAP is heavily outweighed by the penalties for violating any consumer protection laws.

In order to properly deter debt settlement companies from engaging in UDAAP in violation of current federal and state consumer protection laws, the states must adopt the CFPA, which provides the highest civil penalty costs against noncompliant debt settlement companies. These mini-CFPAs will fortify regulatory efforts against UDAAP in the debt settlement industry and increase the risk that the companies will face high penalty costs for UDAAP.

Furthermore, to ensure that debt settlement companies do not evade the penalty costs by dissolving their companies in order to continue their harmful practices under a different name, states should require debt

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225. For example, Illinois requires a surety bond of \$100,000 to incentivize debt settlement companies to comply with the state's consumer protection laws and to be used to pay penalties in the instance of any violations of the laws. *See* 225 ILL. COMP. STAT. ANN. 429/20 (West, Westlaw through 2015 Sess.).

226. The CFPA can impose fines up to \$1 million for *each day* during which a violation of the Act continues, which is the highest of any penalties associated with engaging in UDAP or UDAAP. *See* 12 U.S.C. § 5565(c) (2012). This Note does not purport to know what surety bond amount would be both fair to debt settlement companies and sufficient to recompense injured consumers.

227. The representation that the company has not operated under a different name in the last five years is best suited to extinguish concerns related to the fact that companies may continue their UDAAP under a different guise. *See supra* note 222 and accompanying text.

settlement companies to post surety bonds and swear in an affidavit that they have not operated a similar business under any other name in the past five years. The surety bonds will act as an insurance against UDAAP, and the affidavit will create long-term consequences for companies that have engaged in UDAAP in the past.

Mini-CFPAs, together with surety bond requirements, will temper the UDAAP of debt settlement companies. As such, consumers will be able to seek debt relief with debt settlement companies with the confidence that these companies will comply with consumer protection laws. In turn, these consumers will realize the full benefits that debt settlement can offer. With debt settlement as a realistic option for resolving debt, hopefully the number of American consumers living with debt and the amount of outstanding consumer debt in the United States will perpetually decrease.