Is Your Law Firm a Collection Agency? How the Current Interpretation of the Washington Collection Agency Act Threatens to Regulate the Practice of Law

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ABSTRACT

The Washington Collection Agency Act ("WCAA") governs the conduct and internal procedures of persons or entities meeting the statutory definition of "collection agency." The definition of "collection agency" includes an exemption that appears to exempt law firms. Currently, however, there is no binding authority interpreting the attorney exemption to the WCAA. The majority of federal court opinions interpreting the exemption have held attorneys are exempt from the WCAA only when they are collecting their own debts owed for services rendered. Attorneys collecting debts for clients in these federal cases are deemed "collection agencies" subject to the WCAA. Although the attorney-defendants in these cases are law firms specializing in debt collection, the federal courts' narrow interpretation of the attorney exception to the WCAA has the potential to subject nearly all attorneys to the requirements of the WCAA.

This article examines the cases interpreting the attorney exemption and explains how federal courts, by viewing the WCAA through the prism of the Fair Debt Collection Practices Act, have narrowed the exemption far beyond what the Washington Legislature intended. The rules of statutory interpretation and Washington's long-standing principle that the Washington Supreme Court has sole authority to regulate the practice of law in Washington demonstrate that attorneys who are collecting debts on behalf of their clients through the practice of law are not collection agencies.

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TABLE OF CONTENTS

I. INTRODUCTION

The Washington Collection Agency Act ("WCAA") regulates collection agencies, requiring them to obtain a license, follow certain internal procedures, and adhere to a code of conduct when collecting or attempting to collect debts. The statutory language and its sole remedy under the Washington Consumer Protection Act ("WCPA") indicate the Washington Legislature's intent to exempt attorneys collecting debts on behalf of their clients. Nevertheless, in recent years, consumers have increasingly claimed the WCAA applies not only to traditional debt collectors, but also to attorneys.[1] No Washington State case

1. *See, e.g.*, Druther v. Hamilton, No. C09-5503-FDB, 2009 WL 4667376 (W.D. Wash., Dec. 3, 2009); Gray v. Suttell & Assocs., No. CV-09-251-EFS, 2012 WL 1067962 (E.D. Wash., Mar. 28, 2012); Heib v. Arches Fin., No. CV-08-155-FVS, 2008 WL 4601602 (E.D. Wash., Oct. 14, 2008); Lang v. Daniel N. Gordon, P.C., No. C10-819RSL, 2011 WL

has definitively determined whether the WCAA applies to attorneys and, if so, to what extent.

Federal courts examining this question have repeatedly held the WCAA exempts lawyers from its requirements only when they are collecting their own debts.[2] The reasoning of these courts fails to adequately account for the differences between the WCAA and the Fair Debt Collection Practices Act ("FDCPA"), to consider the definition of "collection agency" within the statutory scheme of the WCAA, or to adequately consider settled state and federal law regarding the regulation of the practice of law.

Because the federal courts' interpretation of the WCAA would require nearly every Washington attorney to obtain a debt collection license before filing a breach of contract claim or attempting to collect on a judgment, it is critical that either the Legislature amend the WCAA to clarify its intent or that a Washington appellate court rule on the issue in a published decision.[3]

62141 (W.D. Wash., Jan. 6, 2011); LeClair v. Suttell & Assocs., No. C09-1047-JCC, 2010 WL 417418 (W.D. Wash. 2010); Mandelas v. Daniel N. Gordon, P.C., 785 F. Supp. 2d 951 (W.D. Wash. 2011); McLain v. Daniel N. Gordon, P.C., No. C09-5362BHS, 2010 WL 3340528 (W.D. Wash., Aug. 24, 2010); Moritz v. Daniel N. Gordon, P.C., No. C11-1019JLR, 2012 WL 222955 (W.D. Wash., Jan. 25, 2012); Motherway v. Daniel N. Gordon, P.C., No. 09-05605-RBL, 2010 WL 2803052 (W.D. Wash., July 15, 2010); Paris v. Steinberg & Steinberg, 828 F. Supp. 2d 1212 (W.D. Wash. 2011); Sprinkle v. SB & C Ltd., 472 F. Supp. 2d 1235 (W.D. Wash. 2006); Harper v. Collection Bur. of Walla Walla, Inc., No. C06-1605-JCC, 2007 WL 4287293 (W.D. Wash., Dec. 4, 2007); Campion v. Credit Bur. Servs., Inc., No. CS-99-0199-EFS, 2000 WL 33255504 (E.D. Wash., Sept. 20, 2000); Semper v. JBC Legal Group, No. C042240L, 2005 WL 2172377 (W.D. Wash., Sept. 6, 2005).

2. *See, e.g.*, *Lang*, 2011 WL 62141, at *2; *LeClair*, 2010 WL 417418, at *6; *Mandelas*, 785 F.Supp 2d at 960-61; *McLain*, 2010 WL 3340528.

3. Law firms who fail to license as a collection agency also risk liability under the FDCPA. The Eleventh Circuit has held a failure to register as required by state law may give a plaintiff a cause of action under 15 U.S.C. § 1692e. In *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185 (11th Cir. 2010), the plaintiff alleged a third party debt collector had violated the FDCPA's prohibition against threatening to take legal action it could not legally take when it sent a letter to the plaintiff threatening to file suit in Florida if the matter was not resolved. The Florida Consumer Collection Protection Act (FCCPA) requires debt collectors to register with the state before conducting business in Florida as a consumer collection agency. Unifund had not done so. The trial court concluded that Unifund had violated the FDCPA by threatening to take action it could not legally take without first registering as a collection agency and the circuit court affirmed. Under the *LeBlanc* court's reasoning, if the WCAA does apply to attorneys collecting debts through litigation, a law firm could be liable under both the WCAA and the FDCPA if it fails to register as a collection agency. It is, therefore, critical that the Washington Supreme Court or Legislature provide direction as to whether an attorney collecting debts on behalf of his or her clients through the practice of law is a "collection agency" under the WCAA.

II. WCAA BASICS

State laws regulating the practice of consumer debt collection fall into three categories: (1) states that license collection agencies; (2) states that proscribe certain unfair conduct; and (3) states that do both. States that regulate collection agencies or debt collectors through a licensing scheme generally exempt attorneys.[4] States that only regulate conduct without requiring a license do not include an attorney exemption.[5] The WCAA includes both a licensing scheme and a code of conduct.

Persons and entities falling within the WCAA's definition of a collection agency must obtain a license from the Washington Department of Licensing, abstain from enumerated unprofessional conduct, follow statutory requirements governing name changes and assignability of licenses, maintain a bond, follow prescribed accounting and recordkeeping requirements, and provide financial statements to the state.[6] Thus, under the general rule, one would expect the WCAA to include an exemption for attorneys. And it does.

The WCAA broadly defines a collection agency as "[a]ny person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person."[7] It then goes on to exclude certain categories of persons, including "[a]ny person whose collection activities are carried on in his, her, or its true name and are confined and are directly related to the operation of a business other than that of a collection agency, such as but not limited to: . . . lawyers."[8]

Additionally, the WCAA forbids collection agencies from "[p]erform[ing] any act or acts, either directly or indirectly, constituting the practice of law."[9] Although some state collection agency acts limit their attorney exemptions to

4. *See, e.g.*, ALASKA STAT. § 08.24.090(b)(1) (2011); ARIZONA REV. STAT. § 32-1004(1) (2012); COLORADO REV. STAT. § 12-14-103(5)(e)(II) (2011); CONN. GEN. STAT. § 36a-800(1)(D) (2013); DEL. CODE § 2301(11) (2013); FLA. STAT. § 559.553(4)(b) (2012); HAW. REV. STAT. § 443B-1; 225 ILCS § 2.03(5) (2012); IND. CODE 25-11-1-2 § 2 (2012); ME. REV. STAT. § 11003(6) (2012); MD. CODE § 7-102(b)(9) (2012); MASS. GEN. LAWS Title XV Ch. 93 § 24(g) (2013); MINN. STAT. § 332.13(2)(c)(1) (2012); NEB. REV. STAT. § 45-191.10 (2012); NEV. STAT. § 649.020(2)(g) (2011); N.C. GEN. STAT. § 58-70-15 (2013).

5. CAL. CIV. CODE § 1788.2 (2012); IOWA CODE § 37.7102(5) (2013); MICH. COMP. LAWS § 445.251(1)(b) (2012); N.H. LAWS § 358-C:1 VIII (2013); N.Y. GEN. BUS. LAW § 600-603 (2013); OHIO REV. CODE § 1319.12 (2012); OKLA. STAT. tit. 14A, § 5-107 (2012).

6. WASH. REV. CODE § 19.16.100 (2012) et seq.

7. § 19.16.100(2)(a).

8. § 19.16.100(3)(c).

9. § 19.16.250(5).

the statutory scheme's licensing requirements,[10] Washington's exemption does not.

Like state laws regulating only the conduct of debt collectors, the FDCPA does not include a licensing requirement or an exemption for attorneys. The FDCPA, as enacted in 1977, contained an exemption for attorneys collecting debts on behalf of their clients.[11] At the time, attorneys were only incidentally involved in debt collection activities.[12] After an increasing number of attorneys began entering the consumer debt collection industry, Congress amended the FDCPA, removing the exemption for attorneys.[13]

The FDCPA, therefore, subjects attorneys who regularly collect debts on behalf of their clients to the same code of conduct non-attorney debt collectors are required to follow. The line between a law firm that "regularly" collects consumer debts for its clients and one that does not is not always clear. Whether an attorney is a "debt collector" is determined on a case-by-case basis by looking to the volume of collection activity performed, whether the attorney has an ongoing relationship with a creditor, the percentage of an attorney's practice that is taken up with debt collection, the frequency and pattern of debt collection activities, and whether the attorney has systems or personnel in place to facilitate debt collection.[14] Nevertheless, because the FDCPA does not require debt collectors to obtain a license or govern their internal business procedures and practices, the uncertainty for those attorneys who may or may not "regularly" collect consumer debts is relatively manageable.

The WCAA, however, does not limit its application only to persons who "regularly" collect debts, but applies to any persons and entities "collecting or attempting to collect claims owed or due or asserted to be owed or due another person."[15] And, unlike a "debt" under the FDCPA, a "claim" under the WCAA is not limited to consumer debts.[16]

To temper its broad application, the WCAA includes an exemption for attorneys where the collection activity is "carried on in his or her . . . true name and [is] confined and directly related to the operation of a business other than

10. *See, e.g.*, ARIZ. REV. STAT. § 32-1004(A)(1) (2012); FLA. STAT. § 559.553(4)(b) (2012).

11. Fair Debt Collection Practices Act, PUB. L. NO. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692 et seq. (1982)).

12. H.R. REP. NO. 405 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1759.

13. *Id*.

14. Crossley v. Lieverman, 868 F.2d 566, 570 (3d Cir. 1989); Fox v. Citicorp, Inc., 15 F.3d 1507, 1512-13 (9th Cir. 1994); Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 60 (2d Cir. 2004); Garrett v. Derbes, 110 F.3d 317, 318 (5th Cir. 1997).

15. WASH. REV. CODE § 19.16.100(2)(a) (2012).

16. 15 U.S.C. § 1692a(5) (2006); WASH. REV. CODE § 19.16.100(5).

that of a collection agency, such as . . . lawyers."[17] Unlike Congress, the Washington Legislature did not remove this exemption in response to the number of law firms entering the collection field. Nor did the Legislature remove other provisions, illustrating its intent to not include law firms within the WCAA's definition of "collection agency." The WCAA continues to prohibit collection agencies from "[p]erform[ing] any act or acts, either directly or indirectly, constituting the practice of law."[18] In addition, the WCAA does not merely regulate conduct, as does the FDCPA, but requires those who meet the definition of a collection agency to obtain a license, comply with a host of rules regarding internal practices and procedures, and subject themselves to the authority of the Washington State Collection Agency Board.[19]

In considering whether those law firms that clearly are debt collectors under the FDCPA are also collection agencies under the WCAA, federal courts have failed to adequately consider these important differences. There has been little, if any, consideration of the ramifications of the WCAA's licensing requirements. Moreover, the federal courts appear to view the WCAA through the prism of the FDCPA, assuming that because the attorney-defendants before them regularly engage in debt collection, they are also necessarily collection agencies as well. For instance, in *Snyder v. Daniel N. Gordon, P.C.*, the court found Daniel N. Gordon, P.C. ("Gordon") to be a "collection agency," based upon Gordon's statement in a communication with the debtor identifying itself as a "debt collector" under the FDCPA.[20] Thus, federal courts consistently view debt collection on behalf of a client through the practice of law as proof that the law firm is primarily a collection agency.[21] The logic behind these opinions appears to be as follows: if a law firm regularly collects debts, it is a debt collector. If it is a debt collector, it is also a collection agency. If it is a collection agency, its collection activities are not carried on and directly related to a business other than that of a collection agency, and the exemption under RCW 19.16.100(3) does not apply.

17. WASH. REV. CODE § 19.16.100(3)(c) (2012).

18. § 19.16.250(5).

19. §§ 19.16.351, 18.235.030 (2012).

20. Snyder v. Daniel N. Gordon, P.C., No. C11-1379 RAJ, 2012 WL 3643673, at *6 (Aug. 24, 2012).

21. *See, e.g.*, LeClair v. Suttel & Assocs., No. C09-1047-JCC, 2010 WL 417418 (W.D. Wash. 2010); Lang v. Daniel N. Gordon, P.C., No. C10-819RSL, 2011 WL 62141 (W.D. Wash., Jan. 6, 2011) Mandelas v. Daniel N. Gordon, P.C., 785 F. Supp. 2d 951 (W.D. Wash. 2011); McLain v. Daniel N. Gordon, P.C., No. C09-5362BHS, 2010 WL 3340528 (W.D. Wash.; Aug. 24, 2010); *Snyder*, 2012 WL 3643673.

III. FEDERAL CASES EXAMINING WHETHER THE WCAA APPLIES TO ATTORNEYS COLLECTING DEBTS FOR CLIENTS THROUGH THE PRACTICE OF LAW HAVE BROADENED THE DEFINITION OF COLLECTION AGENCY TO POTENTIALLY INCLUDE ANY LAW FIRM COLLECTING A DEBT FOR A CLIENT

Carter v. Suttell & Associates,[22] an unpublished opinion, is the only Washington case examining whether the WCAA applies to attorneys collecting debts for clients through the practice of law. The *Carter* court noted that the WCAA "does not entirely exclude lawyers from ever qualifying as a 'collection agency.' It merely excludes those who are collecting debts 'directly related to the operation of a business other than that of a collection agency.'"[23] The court reasoned lawyers may act as collection agencies, but a law firm does not become a collection agency "merely [by] engaging in litigation related to the collection of debts on behalf of a client."[24] To do so "would essentially render every law firm taking part in collection litigation a 'collection agency.' Such a result is not what the statute compels."[25] Federal courts have reached a different conclusion.

Although the United States District Court for the Western District of Washington initially held that a law firm collecting debts on behalf of a client fell within the RCW 19.16.100(3)(c) exception, most decisions from that court have held unless a law firm is collecting debts owed to itself and not debts owed a client, it is a collection agency under the WCAA.

In *Campion v. Credit Bureau Services, Inc.*, the plaintiff sued a collection agency and its attorney, Thomas J. Miller, for violations of the WCAA.[26] The court ruled on summary judgment that Miller was not subject to the WCAA because he fell within the exception to the WCAA's definition of "collection agency." That is, Miller's collection activities were carried on in his true name and were confined and directly related to the operation of his legal practice.[27] Although Miller's legal practice consisted of providing legal assistance to debt collectors, he himself was not a collection agency.[28]

The attorney exemption began to narrow in *Semper v. JBC Legal Group*. There, the Western District examined whether the exemption applied to a law

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22. No. 63628-6-I, 2011 WL 396038 (Wash. App. 2011).

23. *Id.*, at *7.

24. *Id.*

25. *Id.*

26. Campion v. Credit Bureau Servs., Inc., No. CS-99-0199-EFS, 2000 WL 3325 5504 *3 (E.D. Wash. 2000).

27. *Id.* at *16; *see also* WASH. REV. CODE § 19.16.100(3)(c) (2012).

28. *Campion*, 2000 WL 33255504, at *16.

firm attempting to collect a debt owed to its affiliated company.[29] The affiliate had purchased the debt from a third party for the sole purpose of collecting on the debt.[30] JBC Legal argued it was not a collection agency under the WCAA because it fell within the RCW 19.16.100(3)(c) exception.[31] The district court disagreed,[32] holding "[w]hen read as a whole and in light of the interpreting case law, [the WCAA] applies to entities such as JBC which seek to collect *debts* that are unrelated to JBC's (or its affiliated company's) non-debt collector business."[33] Taking an example from *Berry v. Fleury*, Judge Lasnik commented that if JBC Legal was attempting to collect debts owed to the law firm for legal services rendered, those activities would not make JBC Legal a collection agency.[34] Because the debt was owed to JBC's collection agency affiliate, JBC was also a collection agency.[35] Thus, by shifting the focus from the business related to the collection activity to the business related to the debt itself, the federal court broadened the scope of the WCAA to apply to any law firm collecting a debt on behalf of a client.

In *Berry*, the Washington Court of Appeals considered whether a law firm falls within the WCAA when it collects its own debt.[36] Berry claimed a collection fee his attorney charged when he failed to pay his bill was a violation of the WCAA and, therefore, a per se violation of the WCPA.[37] The *Berry* court found the WCAA did not apply because the "[a]pplication of the statute is expressly limited to collection agencies, which do not include a person or firm whose collection activities are carried on in his, her, or its true name and are directly related to a business other than collections."[38] Therefore, the attorney's attempt to collect his own fees did not fall within the WCAA.[39]

Following *Semper*, federal courts have extended Judge Lasnik's analysis of *Berry* to hold a law firm as a collection agency for purposes of the WCAA

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29. Semper v. JBC Legal Grp., No. C042240L, 2005 WL 2172377, at *3 (W.D. Wash., Sept. 6, 2005).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (emphasis added).

34. *Id.* (citing Berry v. Fleury, No. 48571-7-I, 111 Wash. App. 1048 (May 20, 2002) (unpublished opinion). Judge Settle adopted *Semper*'s reasoning five years later in *McLain v. Daniel N. Gordon, P.C.*, C09-5362BHS, 2010 WL 3340528, at *8 (W.D. Wash., Aug. 24 2010) (rejecting Gordon's argument on summary judgment that a law firm was not subject to the WCAA and finding Gordon was acting as a collection agency for its client).

35. *See Semper*, 2005 WL 2172377, at *3.

36. *Berry*, 111 Wash. App. 1048, at *3.

37. *Id.*

38. *Id.*

39. *Id.*

unless it is collecting monies owed the firm by its clients.[40] In *LeClair v. Suttell & Associates, P.S.*, Judge Coughenour ruled Suttell & Associates, a law firm specializing in the collection of consumer debt, was acting as a collection agency for its client.[41] On behalf of Midland Funding, LLC, Suttell sent a demand letter to the plaintiff, filed a lawsuit, served the plaintiff, and responded to questions and protests from the plaintiff.[42] LeClair failed to respond to Suttell's argument on summary judgment that the WCAA does not apply to lawyers collecting debts as part of the practice of law.[43] Nevertheless, Judge Coughenour held the RCW 19.16.100(3)(c) exception did not apply.[44] Citing *Semper*, Judge Coughenour found Suttell was acting as a collection agency because it was not collecting debts owed to it by a client for legal services.[45] With no additional analysis, the *LeClair* court ruled Suttell's activities were not directly related to the operation of a business other than a collection agency and, therefore, Suttell was a collection agency under the WCAA.[46]

Six years after his ruling in *Semper*, Judge Lasnik held in *Lang v. Daniel N. Gordon, P.C.*,[47] that the statutory exemption for lawyers under RCW 19.16.100(3) *only* applies to lawyers who are attempting to "collect their own debts."[48] In *Campion*, the court had held an attorney was collecting debts in his true name because he was conducting business in his own name and not holding himself out as anything other than the attorney of his collection agency client.[49] In *Lang*, however, Judge Lasnik interpreted the requirement that business be carried on in the entity's "true name" to exclude any activities conducted on behalf of a client.[50] Thus, even if the nature of an entity or person's business is primarily the practice of law, the exemption does not apply

40. *See, e.g.*, Lang v. Daniel N. Gordon, P.C., No. C10-819RSL, 2011 WL 62141, at *2 (W.D. Wash., Jan. 6, 2011); LeClair v. Suttel & Assocs., No. C09-1047-JCC, 2010 WL 417418, at *6 (W.D. Wash. 2010); Mandelas v. Daniel N. Gordon, P.C., 785 F. Supp. 2d 951, 960 (W.D. Wash. 2011); McLain v. Daniel N. Gordon, P.C., No. C09-5362BHS, 2010 WL 3340528, at *8 (W.D. Wash., Aug. 24, 2010).

41. *LeClair*, 2010 WL 417418, at *6.

42. *Id.* at *1-2.

43. *Id.* at *6.

44. *Id.*

45. *Id.*

46. *Id.*

47. The author has represented Daniel N. Gordon, P.C.

48. Lang v. Daniel N. Gordon, P.C., No. C10-819RSL, 2011 WL 62141, at *2 (W.D. Wash., Jan. 6, 2011).

49. Campion v. Credit Bureau Servs., Inc., No. CS-99-0199-EFS, 2000 WL 33255504, at *16 (E.D. Wash. 2000).

50. *Lang*, 2011 WL 62141, at *2 n.3.

if the law firm is conducting collection activities on behalf of its clients.[51] The *Lang* court does not explain the redundancy created by its interpretation of the "true name" requirement and the existing statutory definition of a "collection agency" as someone collecting a debt *for another*.[52] Clearly, a law firm collecting its own debts would not be captured in that original definition, and would need no exemption for collection activities conducted in its true name.[53]

In *Mandelas v. Daniel N. Gordon, P.C.*, Gordon sought summary judgment on Mr. Mandelas' WCAA and WCPA claims, arguing law firms are not subject to the WCAA because the WCAA excluded the practice of law.[54] Judge Robart rejected Gordon's argument, reasoning if the legislature had wished to include a blanket exception for law firms, it could have included one.[55] The court likewise rejected Gordon's argument that the WCAA violates the separation of powers doctrine to the extent it purports to regulate the practice of law, concluding the WCAA was "no different than applying other generally applicable statutes, such as criminal laws to attorneys."[56] Judge Robart did not address the licensing requirements of the WCAA.[57] Nor did he explain how a statutory scheme that applied only to collection agencies is a generally applicable statute.[58]

In *Snyder*, Gordon again argued it was not required to obtain a collection agency license under the WCAA because it is a law firm engaged in the practice of law.[59] Again, RCW 19.16.100(3)(c) exception excludes "[a]ny person whose collection activities are carried on in his, her, or its true name and are confined and are directly related to the operation of a business other than that of a collection agency."[60] As did the court in *Semper*, the *Snyder* court interpreted this to require that the *debt* being collected must be "directly related to the operation of a business other than that of a collection agency."[61] Because

51. *Id.*

52. *See Id.;*WASH. REV. CODE § 19.16.100 (2012).

53. *Semper*, 2005 WL 2172377, at *3 (citing Berry v. Fleury, No. 48571-7-I, 111 Wash. App. 1048 (May 20, 2002) (unpublished opinion)).

54. 785 F. Supp. 2d 951, 959 (W.D. Wash. 2011).

55. *Id.* at 961.

56. *Id.*

57. *See id.*

58. *See id.*

59. Snyder v. Daniel N. Gordon, P.C., No. C11-1379 RAJ, 2012 WL 3643673, at *6 (W.D. Wash. Aug. 24, 2012).

60. WASH. REV. CODE § 19.16.100(3)(c).

61. *Snyder*, 2012 WL3643673, at *6 (citing *Mandelas*, 785 F. Supp. 2d at 960).

Gordon's letters to Snyder made it clear that the law firm was collecting a debt on behalf of American Express, the exception did not apply.[62]

The *Snyder* court also relied on Gordon's own statement in the law firm's communications with Snyder, which clearly stated the communications were from a "debt collector."[63] Importantly, the FDCPA requires law firms that regularly collect consumer debts to include in all communications to consumers a notice that the communication is from a debt collector.[64] The FDCPA's definition of "debt collector" is not synonymous with the WCAA's definition of "collection agency."[65] Nevertheless, the court relied on Gordon's statement to hold the law firm was a collection agency, stating Gordon "cannot argue in one instance that they acted as debt collectors, and in another that they acted as lawyers."[66]

In *Moritz v. Daniel N. Gordon, P.C.*, Judge Robart again held the exception for law firms did not apply to Gordon and the exception did not apply to out-of-state collection agencies.[67] The court found Gordon to be an out-of-state collection agency because Gordon's activities in Washington were limited to collecting debts from Washington debtors by means of interstate communications.[68] Gordon argued its activities were not solely attempts to collect a debt through interstate commerce because it had filed a complaint in Whatcom County and pursued it to judgment.[69] Judge Robart rejected this reasoning, noting that even in filing suit, Gordon used interstate communications.[70] "That some of [Gordon's] debt collection activities included litigation does not change the basic fact that all of [Gordon's] activities were taken in an attempt to collect the debt owed [its client]."[71] The court, therefore, held Gordon was an out-of-state collection agency required to be licensed under the WCAA.[72] The court went on, however, to hold that because it was not a licensee, Gordon, P.C. was not liable for violating the prohibited

62. *Id.*
63. *Id.*
64. 15 U.S.C. § 1692e(11) (2006).
65. *Compare* § 1692a(6) *with* WASH. REV. CODE § 19.16.100(2) (2012).
66. *Snyder*, 2012 WL3643673, at *6.
67. Moritz v. Daniel N. Gordon, P.C., No. C11-1019JLR, 2012 WL 3985823, at *11 (W.D. Wash. 2012).
68. *Id.*
69. *Id.* at *12.
70. *Id.*
71. *Id.* at *11.
72. *Id.* at *12.

practices provisions under RCW 19.16.250, which by its plain language imposed its requirement only on licensees.[73]

Motherway v. Daniel N. Gordon, P.C. is an exception to the federal courts' interpretation of RCW 19.16.100(3)(c). There, Judge Leighton held that the law firm of Daniel N. Gordon, P.C. was not a collection agency, even though 95% of its practice was devoted to credit card debt collection.[74] Gordon had sent a collection letter to the debtor and had contacted the debtor by telephone in an effort to arrange payment on the debt prior to filing suit.[75] Nonetheless, Judge Leighton found "Gordon's collection activities are confined and directly related to the operation of another business: a law firm."[76] Even this initial letter advised the debtor of the potential for litigation.[77] Because it found Gordon engaged in only the legal aspects of debt collection, the *Motherway* court held RCW 19.16.100(3) did exclude Gordon from the definition of a collection agency.[78] "Gordon's collection activities are confined and directly related to the operation of another business: a law firm. . . . Gordon's business is the practice of law through which it often engages in debt collection activities."[79]

Although it is definitely in the minority, the *Motherway* opinion is consistent with the WCAA's statutory scheme, its language, and Washington's tradition of leaving the regulation of the practice of law to the courts.

IV. RULES OF STATUTORY INTERPRETATION DICTATE THAT THE WCAA NOT APPLY TO LAW FIRMS COLLECTING DEBTS ON BEHALF OF CLIENTS THROUGH THE PRACTICE OF LAW

Many of the courts interpreting the attorney exemption to the WCAA have ignored the rules of statutory interpretation. Rules of statutory interpretation require Washington courts to give "effect to the plain meaning of the statute."[80] The plain meaning is determined "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision

73. *Id.* at *13.

74. Motherway v. Daniel N. Gordon, P.C., No. 09-cv-05605-RBL, 2010 WL 2803052, at *1 (2010); *see also* Lacell v. 2010-2 SFR Venture, LLC, No. CV-12-3007-JPH, 2012 WL 5493999, *5 (E.D. Wash., Nov. 9, 2012) (citing *Motherway* and finding attorney was not a collection agency where she primarily acted as trustee for nonjudicial foreclosures).

75. *Id.* at *1.

76. *Id.* at *4.

77. *Id.*

78. *Id.* at *5.

79. *Id.* at *4.

80. Estate of Bunch v. McGraw Residential Ctr., 275 P.3d 1119, 1122 (Wash. 2012).

in question."[81] Courts may not place a narrow, literal, and technical construction upon a single part of a statute and ignore other relevant parts.[82] The language must be construed consistent with the general purpose of the statute.[83] Statutes should not be interpreted to create an absurd result.[84] Cases interpreting the WCAA have, however, ignored the plain meaning of the several provisions, failed to consider them within the context of the act as a whole, and have failed to consider whether the courts' interpretations were consistent with related statutes.

The WCAA defines a collection agency to include, "[a]ny person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person;[85] It is not clear from this definition alone that collecting a claim includes filing an action on behalf of a client and pursuing post-judgment collection procedures. The legislature's use of "claim" in the definition of "collection agency" indicates, however, it did not intend the WCAA to apply to the collection of judgments. "Claim" means any obligation for the payment of money or thing of value arising out of any agreement or contract, express or implied.[86] Because a judgment debt does not arise from an agreement, it is not a claim under the WCAA.[87] Under the plain meaning of the statute an attorney collecting on a judgment for a client is not a collection agency.

The Western District of Washington in *Lang*, interpreted the term "true name" in the RCW 19.16.100(3)(c) exemption to mean that an exempt person or entity may not collect a debt on behalf of another.[88] In addition to making the requirement that a collection agency be collecting claims "owed . . . another" superfluous,[89] this interpretation fails to consider the WCAA's intent to include as collection agencies those persons or entities who use fictitious or third person's names to collect debts, even if the debts are their own. The definition of "collection agency" includes those persons or entities who are collecting their own claims but are doing so using a "fictitious name or

81. *Id.*

82. In re Washington State Bar Ass'n, 548 P.2d 310, 313 (Wash. 1976).

83. *Id.*

84. State v. Bunker, 238 P.3d 487, 491 (Wash. 2010).

85. WASH. REV. CODE § 19.16.100(2)(a) (2012).

86. § 19.16.100(5).

87. *See* Panag v. Farmers Ins. Co. of Washington, 204 P.3d 885, 897 (Wash. 2009) (holding subrogation claims are not "claims" under the WCAA).

88. Lang v. Daniel N. Gordon, P.C., No. C10-819RSL, 2011 WL 62141, at *2 n.3 (W.D. Wash., Jan. 6, 2011).

89. WASH. REV. CODE § 19.16.100(2)(a); *Bunker*, 238 P.3d at 490-91 (quoting Chadwick Farms Owners Ass'n v. FHC LLC, 207 P.3d 1251, 1255 (Wash. 2009)) (explaining the rules that guide the court's statutory interpretation).

any name other than his or her own which would indicate to the debtor that a third person is collecting or attempting to collect such claim."[90] Similarly, the statutory exemption for individuals collecting claims for their employer includes a requirement that "all collection efforts [be] carried on in the name of the employer."[91] The *Lang* court's interpretation of the "true name" requirement to mean the person or entity may not be collecting a debt on behalf of another, rather than simply barring a person from collecting a debt under a fictitious or third party name, ignores the other definitions of "collection agency" and exemptions within RCW 19.16.100. In addition, it makes the requirement that the collection agency collect claims "owed . . . another person" superfluous.

The *Semper* and *Snyder* courts ignored rules of statutory interpretation when they interpreted "collection activities . . . directly related to a business other than a collection agency" to mean "collection activities *to collect a debt* directly related to a business other than a collection agency."[92] As stated, the identity of its client determines whether a law firm is a collection agency. The full text of RCW 19.16.100(3)(c) exemption reads:

> Any person whose collection activities are carried on in his, her, or its true name and are confined and are directly related to the operation of a business other than that of a collection agency, such as but not limited to: Trust companies; savings and loan associations; building and loan associations; abstract companies doing an escrow business; real estate brokers; property management companies collecting assessments, charges, or fines on behalf of condominium unit owners associations, associations of apartment owners, or homeowners' associations; public officers acting in their official capacities; persons acting under court order; lawyers; insurance companies; credit unions; loan or finance companies; mortgage banks; and banks . . . .[93]

If the *Semper* and *Snyder* courts were correct in their interpretation, a law firm (or any other person) would not be a collection agency and would not be required to license or follow any of the requirements of the WCAA if its client were a trust company, a savings and loan association, a real estate broker, or a credit union. This is clearly not what the legislature intended.

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90. WASH. REV. CODE § 19.16.100(2)(c) (2012).

91. § 19.16.100(3)(b) (2012).

92. Semper v. JBC Legal Grp., No. C042240L, 2005 WL 2172377, at *3-4 (W.D. Wash., Sept. 6, 2005); Snyder v. Daniel N. Gordon, P.C., No. C11-1379 RAJ, 2012 WL 3643673, at *6 (Aug. 24, 2012).

93. WASH. REV. CODE § 19.16.100(3)(c) (2012).

Federal courts have also erred in discounting the WCAA's prohibition against the practice of law by licensees.[94] The text of the WCAA reveals that the legislature was concerned about collection agencies leading debtors to believe they could take legal action against them that they were not authorized to take. The subsection immediately preceding the prohibition against the practice of law prohibits the use of badges, uniforms, or statements that would lead the debtor to believe a government entity is involved in the collection of the debt.[95] Licensees are likewise prohibited from communicating with debtors using forms that simulate judicial process or government documents.[96] The prohibition against the practice of law also reflects an obvious concern that collection agencies will engage in the unauthorized practice of law.[97] The WCAA does account for the fact that attorneys and former attorneys may be working for, or as, collection agencies.[98] Nonetheless, the statute clearly prohibits those persons from "[p]erform[ing] any act or acts, either directly or indirectly, constituting the practice of law."[99]

Despite the attorney exemption and the prohibition against the practice of law, and despite other provisions which indicate the legislature's intent, federal courts have asserted that if the legislature had wished to include an exemption for attorneys, it could have included one in the WCAA.[100] Yet, these same courts have fashioned an exemption that is nowhere found in the WCAA, i.e.,

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94. WASH. REV. CODE § 19.16.250(5) (2012); Mandelas v. Daniel N. Gordon, P.C., 785 F. Supp. 2d 951, 961 (W.D. Wash. 2011).

95. § 19.16.250(4) (2012).

96. § 19.16.250(13) (2012).

97. This appears to be a nationwide concern. *See, e.g.*, Bump v. Barnett, 16 N.W.2d 579, 582-83 (Iowa 1944); State Bar of Wisconsin v. Bonded Collections, Inc., 154 N.W.2d 250, 256 (Wis. 1967); Nelson v. Smith, 154 P.2d 634, 639 (Utah 1944) (holding that a layman cannot circumvent the statutes prohibiting the unauthorized practice of law by taking an assignment and proceeding in his own name); State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 514 P.2d 40, 45, 48-9 (N.M. 1973) (granting an injunction after holding that practice of law included management of litigation, providing and hiring counsel; therefore collector violated state law by taking an assignment of claims and filing suit even though it hired counsel); J. H. Marshall & Assoc. v. Burleson, 313 A.2d 587, 597 (D.C. 1973) (holding that contingent fee contract which also called for hiring and directing of counsel violated laws against the unauthorized practice of state law); State v. James Sanford Agency, 69 S.W.2d 895, 899 (Tenn. 1934).

98. WASH. REV. CODE § 19.16.120(4)(c) (2012) (defining unprofessional conduct to include having an applicant for a license, owner, officer, director, or manager who has his or her license to practice law suspended or revoked within the past two years).

99. WASH. REV. CODE § 19.16.250(5) (2012).

100. Mandelas v. Daniel N. Gordon, P.C., 785 F. Supp. 2d 951, 961 (W.D. Wash. 2011); Lang v. Daniel L. Gordon, P.C., No. C10-819RSL, 2011 WL 62141, at *2-3 (W.D. Wash., Jan. 6, 2011).

an exemption limited to attorneys collecting debts owed to themselves for legal services performed.[101] Because this interpretation appears to be gaining ground, the legislature should amend the WCAA to make its intent to exclude the practice of law harder to ignore.

V. APPLICATION OF THE WCAA TO THE COLLECTION OF DEBTS THROUGH THE PRACTICE OF LAW IS CONTRARY TO CASE LAW INTERPRETING THE WCPA

The Washington Legislature's intent can also be seen in its decision to make the WCPA the sole private remedy for violation of the WCAA.[102] Because the WCAA should be interpreted in light of related statutes, one would expect that if the Legislature intended for the WCAA to regulate the practice of law, the WSCPA would apply to the practice of law as well. It does not.

Violations of the WCAA are per se unfair acts or practices in the conduct of trade or commerce for purposes of the WCPA, satisfying the first three elements of a WCPA claim.[103] "Trade or commerce" as used by the [WCPA] includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided."[104] Claims directed at the competence and strategies used by a professional are allegations of negligence that do not fall within the scope of the WCPA.[105]

Only the entrepreneurial aspects of law (and not the actual practice of law) are considered part of trade and commerce subject to the WCPA.[106] The WCPA applies to how the prices of legal services are determined, billed, and collected, and to the way a law firm obtains, retains, and dismisses clients.[107] This is directly contrary to the holdings that the attorney exemption under the WCAA applies only to those collection activities directed toward an attorney's own clients. The holdings of *Semper*, *LeClair*, *Lang*, *Mandelas*, *McLain*, and *Snyder* would enable a plaintiff to get around the entrepreneurial aspect

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101. Arkansas does have such an exemption. ARK. CODE § 17-24-102(a)(8) (1987) ("Attorneys at law who use their own names or the names of their law firms to collect or attempt to collect claims, accounts, bills, or other forms of indebtedness owed to them individually or as a firm").

102. WASH. REV. CODE § 19.16.440 (2012); Paris v. Steinberg & Steinberg, 828 F. Supp. 2d 1212, 1218 (W.D. Wash. 2011).

103. WASH. REV. CODE § 19.16.440 (2012); Cuevas v. Montoya, 740 P.2d 858, 862 (Wash. Ct. App. 1987).

104. Michael v. Mosquera-Lacy, 200 P.3d 695, 699 (Wash. 2009) (citing Ramos v. Arnold, 169 P.3d 482, 486 (Wash. 2007).

105. *Id.*

106. Short v. Demopolis, 691 P.2d 163, 168 (Wash. 1984).

107. *Id.*

limitation under the WCPA by simply filing his or her claim under the WCAA. This cannot be what the legislature intended.

Additionally, an attorney's exercise of professional judgment is not subject to the WCPA.[108] Events that occur after a lawsuit is filed are not "within the sphere of trade and commerce" and are therefore outside the purview of the WCPA. Once a lawsuit is filed, the matter is "under the aegis of and subject to the control of the courts," and as such, is a private dispute.[109] Thus, in *Jeckle v. Crotty*, the Washington Court of Appeals held that allowing a plaintiff to sue her adversary's attorney under a consumer theory infringes on the attorney-client relationship.[110] Notably, in WCAA claims, a debtor plaintiff often sues her creditor adversary and its attorney.

The *Jeckle* court cited with approval the Connecticut Supreme Court's holding in *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*,[111] agreeing that a consumer protection action does not lie in a case involving the attorney's execution of a judgment against the plaintiff because doing so would compromise the attorney's duty of undivided loyalty to the client and would thwart the exercise of the attorney's independent judgment.[112] Based on this reasoning, the *Jeckle* court found that a WCPA claim did not lie where an attorney was alleged to use a doctor's patient list to solicit new clients for a class action against the doctor.[113]

In *Suffield*, the Connecticut Supreme Court reviewed a case in which the plaintiff attempted to hold adverse counsel liable under the Connecticut Unfair Trade Practices Act for its attempts to collect on a judgment.[114] The *Suffield* court held that while all lawyers are subject to the prohibition against unfair trade practices, "most of the practice of law is not."[115] Like Washington, Connecticut law holds only the entrepreneurial aspects of the practice of law are subject to Connecticut's version of the WCPA.[116] Specifically, "[o]btaining an execution to collect on a court judgment is the heart of an attorney's representation of a client because it is a means by which the attorney secures actual compensation for the judgment obtained by the client," and is not subject

108. Haberman v. Wash. Public Power Supply Sys., 74 P.2d 1032, 1071(Wash. 1987).

109. Blake v. Federal Way Cycle Ctr., 698 P.2d 578, 584 (Wash. Ct. App. 1985).

110. Jeckle v. Crotty, 85 P.3d 931, 937 (Wash. Ct. App 2004).

111. Suffield Dev. Assocs. Ltd. P'ship v. Nat'l Loan Investors, L.P., 802 A. 44, 54 (Conn. 2002).

112. *Jeckle*, 85 P.3d at 937 (citing *Suffield*, 802 A. at 54).

113. *Id.* at 937.

114. *Suffield*, 802 A. at 46.

115. *Id.* at53.

116. *Id.*

to statutes governing trade and commerce.[117] Under this reasoning, activities to collect on a debt owed a client through judicial and post-judicial proceedings are not subject to the WCPA.

As the *Carter* court observed, however, this does not mean that attorneys can never be collection agencies.[118] When an attorney goes outside the practice of law to engage in a commercial enterprise, he or she may be liable under the WCPA.[119] In *Stryk v. Cornerstone Invs., Inc.*, a jury found an attorney liable under the WCPA based upon activities arising out of his activities as an escrow agent.[120] Thus, an attorney who is acting as a collection agency, but not collecting debts through the legal process i.e., is not engaged in the practice of law, may be subject to the WCAA. But an attorney cannot become subject to the WCPA (or the WCAA) by merely "engag[ing] in bona fide collection activities on behalf of clients."[121]

Based upon the law of Washington and a majority of other jurisdictions,[122] a WCAA claim against opposing counsel for failing to follow the requirements of the WCAA during litigation is not actionable under the WCPA. The legislature is presumed to be aware of the case law interpreting the WCPA.[123]Therefore, the fact that a private right of action for WCAA violations is only through the WCPA—which provides a remedy only for entrepreneurial

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117. *Id.* at 53.

118. Carter v. Suttell & Assocs., PS, No. 63628-6-1, 2011 WL 396038, at *1, 7 (Wash. App. Jan. 13, 2011).

119. Stryk v. Cornerstone Invs., Inc., 810 P.2d 1366, 1370-71 (Wash. App. 1991).

120. *Id.* at 1371.

121. *Carter*, 2011 WL 396038, at *5.

122. *See, e.g.*, Cripe v. Leiter, 703 N.E.2d 100, 104 (Ill. 2d 1998) ("legislature did not intend to include the furnishing of legal services to clients within the [Consumer Fraud] Act."); Jackson v. Adcock, No. Civ.A. 03-3369, 2004 WL 1900484, at *5 (E.D. La. Aug. 23, 2004) ("LUPTA does not regulate the practice of law."); Tetrault v. Mahoney, Hawkes & Goldings, 681 N.E.2d 1189, 1195 (Mass. 1997) (attorneys were not engaged in "trade or commerce" subject to consumer protection act); Macedo v. Dello Russo, M.D., 840 A.2d 238, 242 (N.J. 2004) (professionals are beyond the reach of the Consumer Fraud Act); Reid v. Ayers, 531 S.E.2d 231, 235-36 (N.C. App. 2000) (recognizing "learned profession" exemption to unfair trade practices act); Burke v. Gammarino, 670 N.E.2d 295, 298 (Ohio App. 1995) (Ohio Consumer Sales Practices Act "does not apply to transactions between attorneys and their clients"); Kessler v. Loftus, 994 F.Supp. 240, 242-43 (D. Vt. 1997) (claim based upon lawyer's professional judgment not actionable under consumer fraud act); Quinn v. Connelly, 821 P.2d 1256, 1261 (Wash. App. 1992) (element of consumer protection act requiring that the act occur in trade or commerce "cannot be satisfied by claims directed at the competence or strategy of an attorney"); Ikuno v. Yip, 912 F.2d 306, 312-13 (9th Cir. 1990) (dismissal of CPA claim against attorney was proper since claim was based on competence and strategy of attorney).

123. Averill v. Cox, 761 A.2d 1083, 1089-90 (N.H. 2000); *Macedo*, 840 A.2d at 242.

aspects of the practice of law—strongly indicates the legislature did not intend to hold attorneys liable for WCAA violations occurring within the practice of law.[124]

VI. THE DEPARTMENT OF LICENSING DOES NOT HAVE AUTHORITY TO REGULATE THE PRACTICE OF LAW UNDER SETTLED WASHINGTON CASE LAW AND CONSTITUTIONAL PRINCIPLES

The *Mandelas* court rejected the argument that the application of the WCAA to the practice of law would violate separation of powers principles.[125] The court did not consider, however, the extent to which the WCAA's regulations and, by extension, the Uniform Regulations of Business and Professions Act ("URBPA") would encroach on the Washington Supreme Court's exclusive power to regulate the practice of law in Washington.

"The uniform regulation of business and professions act, chapter 18.235 RCW, governs unlicensed practice, the issuance and denial of licenses, and the discipline of licensees under [the WCAA]."[126] The URBPA is designed to provide a uniform disciplinary act with standardized procedures for the regulation of business and professions.[127] The URBPA applies only to businesses and professions licensed under the chapters identified in RCW 18.235.020.[128] That statute does not identify the practice of law as a profession licensed under the URBPA, or the state bar as a board or commission authorized under the URBPA.[129]

Disciplinary boards and commissions authorized under the URBPA, such as the Washington State Collection Agency Board, may discipline licensees and may grant or deny licenses based upon criteria in the URBPA and the chapters it identifies.[130] The disciplinary authority has the authority to revoke or suspend professional or business licenses for misconduct.[131] The URBPA defines unprofessional conduct at RCW 18.235.130. This definition is incorporated into the WCAA.[132]

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124. *Macedo*, 840 A.2d at 242.

125. Mandelas v. Daniel N. Gordon, P.C., 785 F. Supp. 2d 951, 961 (W.D. Wash. 2011).

126. WASH. REV. CODE § 19.16.510 (2012).

127. § 18.235.005.

128. § 18.235.020.

129. § 18.235.020.

130. § 18.235.020(2)(b)(ii), (3).

131. § 18.235.110(1).

132. § 19.16.120.

Title 18 RCW, Businesses and Professions, includes no statutes regulating the practice of law. If, as federal courts have ruled, the WCAA does regulate attorneys who are collecting debts through litigation, the scope of the URBPA, by extension, regulates the practice of law as well. This is contrary to settled Washington law and the State Bar Act.

The State Bar Act authorizes the board of governors of the Washington State Bar Association to adopt rules governing membership, admission to practice, discipline, suspension, and disbarment, subject to approval by the Washington Supreme Court.[133] RCW 2.48.220 identifies its own grounds for disbarment or suspension. Chapter 2.48 RCW is not incorporated into the URBPA or Title 18. The regulation of the practice of law is entirely separate from the URBPA, which governs the regulation of collection agencies. The Legislature's decision to place the licensing and discipline of licensees under the purview of the URBPA therefore supports a finding that the Legislature did not intend the WCAA to apply to the practice of law, which is exclusively regulated by the Washington Supreme Court.

The application of the WCAA through the WCPA to the practice of law would invade the jurisdiction of the Washington Supreme Court and its power to regulate the practice of law, contrary to Article 4, Section 1 of the Washington Constitution. "The Supreme Court has an exclusive, inherent power to admit, enroll, discipline, and disbar attorneys."[134] Based upon Article 4, Section 1 and separation of powers principles, the Supreme Court has resisted attempts by other branches to regulate the practice of law.[135] Whether in or out of the courtroom, Washington courts have inherent power to control and supervise the practice of law, including all stages of litigation, legal advice and counsel, and the preparation of legal instruments.[136] While law firms may lawfully be required to obtain a business license, this is only true where the purpose of the license is revenue production.[137] Licensing requirements may not impinge on the Washington Supreme Court's power to regulate the Bar.[138] The WCAA is concerned with far more than revenue production.

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133. § 2.48.050-060.

134. Short v. Demopolis, 691 P.2d 163, 169 (Wash. 1984).

135. Wash. State Bar Ass'n v. State, 890 P.2d 1047, 1051 (Wash. 1995) ("The practice of law is so intimately connected with the exercise of judicial power in the administration of justice that the right to define and regulate the practice naturally and logically belongs to the judicial department of the state government."); City of Seattle v. Ratliff, 667 P.2d 630, 632 (Wash. 1983) ("judicial formulation of rules and regulations [regarding the practice of law] is to proceed unhampered by encroachment from other branches of government.").

136. *Ratliff*, 667 P.2d at 632.

137. City of Seattle v. Campbell, 661 P.2d 1347, 1349 (Wash. App. 1980).

138. *Id.*

The WCAA: (1) defines what is considered unprofessional conduct;[139] (2) dictates accounting and payment procedures between collection agencies and their clients;[140] (3) requires a trust account;[141] (4) requires submission of a financial statement showing a net worth of at least $7,500.00;[142] (5) prohibits the practice of law;[143] (6) requires proof of licensing and a bond before filing suit;[144] and (7) makes the WCAA the exclusive regulatory scheme relating to the licensing and regulation of collection agencies, in direct contradiction of the Washington Supreme Court's exclusive authority to regulate the practice of law.[145]

The WCAA's licensing system is administered by the Washington Department of Licensing with the administrative assistance of a board that is authorized to conduct hearings.[146] The WCAA provides remedies for customers and clients as well as for debtors, potentially blurring the line between malpractice claims and WCAA violations.[147] The WCAA governs the internal procedures of collection agencies as well as their conduct while collecting or attempting to collect debts.[148] These requirements go beyond the payment of a bond and licensing fee. If they apply to law firms that collect debts through the practice of law, they invade the courts' exclusive power to regulate the practice of law.[149]

In examining whether a consumer protection act regulated the practice of law in New Jersey, that state's supreme court reasoned that the practice of law is regulated "in the first instance, if not exclusively" by that state's supreme court.[150] Therefore, "[h]ad the Legislature intended to enter the area of attorney regulation, it surely would have stated with specificity that attorneys were covered by the Consumer Fraud Act."[151] Washington law vests exclusive

139. WASH. REV. CODE § 19.16.120 (2012).

140. § 19.16.210-220.

141. § 19.16.240.

142. § 19.16.245.

143. § 19.16.250(5).

144. § 19.16.260.

145. § 19.16.950.

146. § 19.16.110-.360.

147. § 19.16.200.

148. § 19.16.170-.250; WAC 308-29-020 et seq.

149. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.4 (defining misconduct), R. 1.5 (regulating fee arrangements), R. 1.15 (regulating trust accounts), and R. 5.5 (prohibiting the unauthorized practice of law); Short v. Demopolis, 691 P. 2d 163, 169 (Wash. 1984) (holding the supreme court has the exclusive power to regulate and license the practice of law).

150. Vort v. Hollander, 607 A.2d 1339, 1342 (N.J Super. 1992).

151. *Id.*

authority to regulate the practice of law in Washington in its Supreme Court. Yet, the WCAA, like New Jersey's consumer protection act, does not specifically state that it regulates the practice of law. The Washington legislature's failure to do so supports finding the legislature did not intend for the WCAA to regulate the practice of law.

VII. INTERPRETATION OF THE WCAA TO NOT REGULATE THE PRACTICE OF LAW IS CONSISTENT WITH FEDERAL CASE LAW INTERPRETING THE APPLICATION OF SIMILAR STATUTES TO THE PRACTICE OF LAW

Application of the attorney exemption to all attorneys collecting debts for their clients through the practice of law is also consistent with federal antitrust law. The purpose of the WCPA is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive and fraudulent acts and practices in order to protect the public and foster fair and honest competition."[152] Its use as a remedy for WCAA violations should, therefore, be consistent with federal fair trade case law.

Just as does Washington case law interpreting the WCPA, case law applying the Sherman Act to the practice of law by attorneys holds only the entrepreneurial aspects of the practice of law are subject to that Act. For example, in *Goldfarb v. Virginia State Bar*, the Virginia Supreme Court held price fixing by a local bar association was subject to the Sherman Act.[153] The Court was careful to point out that the activity at issue—the examination of land titles in exchange for a charge set by a fee schedule—was a business aspect of the practice of law.[154] The Court noted there was no specific exemption for learned professions in the Sherman Act.[155] Moreover, the Court clarified that "[i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions."[156]

In *American Bar Association v. Federal Trade Commission*, the Court of Appeals for the District of Columbia also weighed federalism concerns regarding the regulation of attorneys in concluding the Gramm-Leach-Bliley Act ("GLBA") did not regulate attorneys engaged in the practice of law.[157] The Court of Appeals found the Federal Trade Commission's ("FTC") claim that attorneys were "financial institutions" for purposes of the GLBA was not

152. WASH. REV. CODE § 19.86.920 (2012).
153. Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975).
154. *Id.* at 787-88.
155. *Id.* at 787.
156. *Id.* at 793.
157. 430 F.3d 457, 471-72 (D.C. Cir. 2005).

reasonable.[158] The GLBA defined "financial institution" as "an institution the business of which is engaging in financial activities."[159] Neither the statutory nor the regulatory definition described the GLBA as regulating the practice of law.[160] Nevertheless, the Director of the Bureau of Consumer Protection issued a letter to the American Bar Association, claiming the GLBA authorized the FTC to regulate attorneys engaged in the practice of law.[161] Before the Court of Appeals, the FTC argued the GLBA defined financial institution broadly to include entities engaged in a broad spectrum of financial activities, including real estate settlement services and tax planning and preparation.[162]

The Court of Appeals skeptically viewed the implication that Congress would undertake the regulation of the practice of law—"a profession never before regulated by 'federal functional regulators'"—without specifically stating so in the statute.[163]

> To find this interpretation deference-worthy, we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence.[164]

The Court of Appeals found the statutory definition of "financial institution," combined with the language empowering the FTC to regulate them, "makes an exceptionally poor fit with the FTC's apparent decision that Congress, after centuries of not doing so, has suddenly decided to regulate the practice of law."[165]

Similarly here, Washington's settled case law vesting authority to regulate the practice of law in the Supreme Court is an exceptionally poor fit with the federal courts' decision to interpret the WCAA in such a way as to give regulation of aspects of the practice of law over to the Collection Agency Board. As the Court of Appeals observed in *American Bar Association*, the practice of law is traditionally the province of the states, and if Congress

158. *Id.* at 471.
159. *Id.* at 465; 15 U.S.C. §6809(3)(A) (2006).
160. *American Bar Ass'n*, 430 F.3d at 465.
161. *Id.* at 466.
162. *Id.* at 467.
163. *Id.* at 469.
164. *Id.*
165. *Id.* at 470.

intends to alter the traditional balance, "it must make its intention to do so 'unmistakably clear in the language of the statute.'"[166]

Like the GLBA, the WCAA broadly defines the entities it regulates, but does not state the Legislature's intent to regulate the practice of law.[167] Similar to the definition of "financial institution," "collection agency" under the WCAA includes entities that perform at least some of the activities regularly performed by law firms, such as collecting debts for third parties.[168] Although the practice of law is exclusively regulated by the Washington Supreme Court, the Legislature made no clear statement of its intent to alter this traditional balance between the judicial and legislative branch. To the contrary, the WCAA forbids the practice of law by collection agencies.[169] Thus, under the reasoning of *American Bar Association*, and to keep the CPA consistent with federal antitrust law, the WCAA should be interpreted to exempt attorneys engaged in the practice of law.

VIII. CONCLUSION

The WCAA is more internally consistent when read to exempt attorneys engaged in the practice of law. This interpretation is consistent with its sole private remedy through the WCPA and its regulatory and licensing authority under the URBPA. Defining attorneys collecting debts through litigation as collection agencies, so that they are subject to the regulation and licensing requirements of the WCAA, is contrary to Washington case law holding the Supreme Court has the sole power to regulate the practice of law in Washington. It is also inconsistent with federal law applying similar fair trade laws to the practice of law. More importantly, the federal courts' narrowing of the exemption under the WCAA threatens to subject nearly all attorneys to the regulatory provisions of the WCAA. Although this interpretation ensures attorneys who regularly collect debts for their clients are subject to the WCAA, just as they are to the FDCPA, it is contrary to the language and purpose of the WCAA.

166. *Id.* at 471-72 (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989)).

167. *See* WASH. REV. CODE § 1916.100(2)-(4) (2012).

168. § 19.16.100(2)(a).

169. § 19.16.250(5).