IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 111

WILLIAM M. FERGUSON, Attorney General for the State of Kansas, and KEITH SANBORN, County Attorney, for the County of Sedgwick, State of Kansas,

Appellants,

v.

FRANK C. SKRUPA, d/b/a Credit Advisors,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MOTION FOR LEAVE TO FILE ATTACHED BRIEF FOR NATIONAL BETTER BUSINESS BUREAU, INC., AS *AMICUS CURIAE*

National Better Business Bureau, Inc., a Delaware nonprofit membership corporation, respectfully moves for leave to file the attached brief as *amicus curiae* in support of appellants in this cause, pursuant to Rule 42(3) of the Rules of this Court. Both appellants have consented to such filing. Consent was also requested of the attorneys for the appellee by the undersigned by airmail letter mailed January 8, 1963, but by letter dated January 15, 1963 they refused to execute the consent,

—at least in the absence of information as to the "nature" of our client (of whose identity they had been informed by us) and as to the reasons why the case would not be "adequately presented to the court by the specific parties involved". Obviously, further correspondence on this matter with them would be fruitless.

The first objective for which the applicant was organized, as stated in its by-laws, is: "To aid in establishing and maintaining the highest possible standards of business practice as they affect the public interest; to combat and to help reduce unsound business practices, * * *."

For a number of years, local Better Business Bureaus have been opposing "debt pooling" or "debt adjusting" by non-lawyers because it has led to grave abuses and serious losses in their respective communities. National Better Business Bureau, Inc., which is organized separately from the local Better Business Bureaus, has joined in their efforts on a national basis. The interest of National Better Business Bureau, Inc. in the present appeal lies in the fact that the decision below would nullify the substantial efforts which the applicant and the local Better Business Bureaus have made and are making to combat the evils and abuses which have been prevalent where debt adjusting operations by laymen are permitted. Affirmance of the decision below would nullify the statutes of thirteen States (including Kansas) which have outlawed debt pooling by laymen and would put in jeopardy the statutes of seven additional states which have sought to regulate (with unsatisfactory results) such debt pooling in lieu of prohibiting them.

The broad interests which support such statutes are shown by the statement made by Governor Harriman of New York in signing into law the New York statute outlawing debt pooling by laymen:

> "This bill has the approval of the Better Business Bureau, United Neighborhood Houses, New York State Citizens Council, National Legal Aid Association, Brooklyn Bureau of Social Service, Conference on Personal Finance Law, The Empire State Chamber of Commerce, The New York State Bar Association, the Special Assistant to the Governor on Consumer Problems, the Banking Department and many other reliable organizations." (New York State Legislative Annual—1956, p. 452)

The Kansas statute which has been held below to violate the Federal Constitution and therefore to be invalid prohibits "debt adjusting" other than incidentally in the practice of law, and defines "debt adjusting" as follows (R. 2):

> "For the purpose of this act, 'debt adjusting' means the making of a contract, express, or implied with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon."

The questions of law involved in this appeal are whether the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution and the clause of the Federal Constitution prohibiting impairment of obligation of contracts require that this Kansas statute prohibiting debt adjusting by laymen be held invalid. The attached brief of the applicant is addressed to these important constitutional questions on which the decision of this appeal must turn.

In the three-judge Court below, the Attorney General of the State of Kansas (one of the two defendants) took the position that he was not properly a defendant; therefore,

he did not address himself to the merits below. Furthermore, the case was tried and argued primarily on testimony as to what the plaintiff claimed he did in conducting his particular debt adjusting activities, not against the background of the evils which debt adjusting activities have generated on a nationwide basis. While the applicant understands that a brief will be submitted on behalf of appellants in this Court, the appellants' interest relates to their local Kansas statute. On the other hand, applicant has a broader interest which includes the evils of debt adjusting generally found in other parts of the country, and also includes the statutes of the numerous other states which have prohibited or which regulate the business of debt pooling by laymen as well as the power of the remaining states to legislate in this area in the future. The applicant respectfully suggests that such broader, national aspect warrants consideration by this Court.

The applicant, therefore, respectfully moves that it be granted leave to file the accompanying brief.

Respectfully submitted,

January 23, 1963.

WILKIE BUSHBY,
JOSEPH SCHREIBER,
40 Wall Street,
New York 5, N. Y.
Attorneys for applicant amicus curiae, National Better Business Bureau, Inc.

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD,
40 Wall Street,
New York 5, N. Y.
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 111

WILLIAM M. FERGUSON, Attorney General for the State of Kansas, and KEITH SANBORN, County Attorney, for the County of Sedgwick, State of Kansas,

Appellants,

v.

FRANK C. SKRUPA, d/b/a Credit Advisors,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF FOR NATIONAL BETTER BUSINESS BUREAU, INC., AS *AMICUS CURIAE*

WILKIE BUSHBY,
JOSEPH SCHREIBER,
40 Wall Street,
New York 5, New York,
Attorneys for amicus curiae,
National Better Business Bureau, Inc.

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD,
40 Wall Street,
New York 5, New York,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes Prohibiting Debt Adjusting by Laymen

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 111

WILLIAM M. FERGUSON, Attorney General for the State of Kansas, and KEITH SANBORN, County Attorney, for the County of Sedgwick, State of Kansas,

Appellants,

v.

FRANK C. SKRUPA, d/b/a Credit Advisors,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF FOR NATIONAL BETTER BUSINESS BUREAU, INC., AS *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

The interest of the *amicus curiae* is set forth in the foregoing motion for leave to file this brief. The long-standing interest of the *amicus* in this matter is shown by the bulletin concerning debt adjusting activities which it issued in 1955 (when such activities mushroomed) and which is printed in the Appendix hereto (p. A-1). The bulletin grew out of the many complaints against such activities which were received by the *amicus* and by the local Better Business Bureaus. The bulletin had wide-

spread circulation (about 22,000) which went mainly to organizations cooperating with or supporting the activities of the Better Business Bureaus (local and national); it formed the basis of an article criticizing debt adjusting activities which appeared in "Business Week" for August 6, 1955 (p. 96).

Proceedings to Date

The proceedings in the three-judge District Court will be set forth in the briefs of the parties and will not be repeated here. The pertinent part of the Kansas statute (Senate Bill No. 366, effective June 30, 1961; Kan. Gen. Stat. Ann. §21-2464 (Supp. 1961)) is quoted in the footnote below.* The majority opinion and the dissenting opinion in the District Court are reported in 210 F. Supp. 200 (D. Kansas 1961). The jurisdictional statement was filed May 9, 1962. The motion to affirm was filed June 7, 1962, and this Court noted probable jurisdiction on October 8, 1962.

---

* AN ACT concerning the business of debt adjusting; making certain acts unlawful and prescribing penalties therefor.

Be it enacted by the Legislature of the State of Kansas:

Section 1. For the purpose of this act, "debt adjusting" means the making of a contract, express, or implied with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon. Whoever engages in the business of debt adjusting shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500), or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment: Provided, That the provisions of this act shall not apply to those situations involving debt adjusting as herein defined incurred incidentally in the lawful practice of law in this state.

Summary of Argument

The majority of the three-judge District Court were clearly wrong in holding that the Kansas statute prohibiting debt adjusting by laymen was a violation of the due process clause of the Fourteenth Amendment.

The statute was a valid exercise of the police power of the State to correct the notorious multitude of evils and abuses attendant upon the debt adjusting activities of laymen. The statute also was the valid exercise of the power of the State of Kansas to regulate and confine to lawyers activities either constituting or closely akin to the practice of law.

Thirteen states (including Kansas) and a province of Canada have passed statutes prohibiting debt adjusting by laymen. Two states and the Province of Quebec have done so by declaring debt adjusting to constitute practice of the law. Seven additional states have regulated debt adjusting by laymen. This action by twenty states and a province of Canada in relation to debt adjusting would seem virtually conclusive that there are evils and abuses attendant upon debt adjusting by laymen which justify remedial legislative action.

The majority opinion below, although conceding (R. 129-30) that (a) "Debt adjustment by its very nature may lend itself to great abuses" and (b) "No doubt, the state can * * * even limit the business to certain classes of qualified persons.", held the statute unconstitutional in reliance on a decision of a court of intermediate appeal in Pennsylvania (*Commonwealth* v. *Stone,* 191 Pa. Super. 117, 155 A. 2d 453 (1959), *allocatur* refused by Pa. Sup. Ct.), which struck down a similar Pennsylvania statute and, in doing so, relied primarily on the majority opinion

in *Adams* v. *Tanner,* 244 U. S. 590 (1917). We submit that *Adams* v. *Tanner* was incorrectly decided and has since been overruled.

The majority opinion below rejected a later New Jersey decision upholding a similar New Jersey statute, *American Budget Corp.* v. *Furman,* 67 N. J. Super. 134, 170 A. 2d 63 (Ch. 1961), *aff'd per curiam,* 36 N. J. 192, 175 A. 2d 622 (1961). The New Jersey decision questioned the present validity of the holding of the majority in *Adams* v. *Tanner, supra,* and therefore refused to follow it. The minority opinion below rested on the New Jersey decision.

In *Adams* v. *Tanner, supra,* the majority struck down, as violative of the due process clause, a statute of the State of Washington prohibiting employment agencies from receiving fees from workers for finding them employment. There was a strong dissent by four Justices, Brandeis, Holmes, Clarke and McKenna.

In subsequent decisions this Court has expressly criticized the majority view in *Adams* v. *Tanner, e.g., Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525 (1949); *Breard* v. *Alexandria,* 341 U. S. 622 (1951).

A review of the decisions of this Court, both before and after *Adams* v. *Tanner, supra,* relating to the due process clause and state police power, beginning with *Powell* v. *Pennsylvania,* 127 U. S. 678 (1888) through *Williamson* v. *Lee Optical Company,* 348 U. S. 483 (1955), will show that it is the reasoning in the dissent by Mr. Justice Brandeis in *Adams* v. *Tanner* which represents the law rather than that of the majority opinion, *i.e.,* that the issue is not whether the statute is characterized as prohibitory or regulatory, but whether the legislature could rationally have deemed its enactment to be appropriate to meet evils which it might believe to exist.

The majority in the District Court attempted to rest on the distinction between regulation and prohibition and said debt adjusting could be regulated but not prohibited. As stated above, the dissent in *Adams* v. *Tanner* rejects the distinction, 244 U. S., at p. 599. Many decisions of this Court also indicate the distinction is without foundation, *e.g., Nebbia* v. *New York,* 291 U. S. 502 (1934), where this Court, by Mr. Justice Roberts, said (p. 528): "Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned." However, the Kansas statute does not prohibit, but is regulatory, in that it permits the more than 3,000 lawyers in Kansas to engage in debt adjusting activities incident to the practice of the law.

The majority opinion below obviously proceeded on the unsound premise that the burden of establishing constitutionality was on the parties attempting to uphold the Kansas statute. This is contrary to well-settled doctrines of this Court enunciated from the *Sinking-Fund Cases,* 99 U. S. 700 (1878) to *Goldblatt* v. *Town of Hempstead,* 369 U. S. 590 (1962).

The plaintiff debt adjuster also claimed that the Kansas statute deprived him, a layman, of equal protection of the laws within the prohibition of the Fourteenth Amendment, presumably on the ground that lawyers were permitted to engage in debt adjusting activities as incidental to the practice of the law. Neither opinion below adverted to this contention of the plaintiff. It has long been held by this Court that a state may make reasonable classifications as to who may engage in specified activities based on its judgment as to the dangers to be guarded against. This is particularly so in cases relating to professional activities, *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608 (1935).

The plaintiff also contended in his complaint that the statute impaired the obligation of contracts already entered into by him in violation of Article I, Section 10 of the Constitution. Neither opinion below mentioned this contention. It is well settled that if a state passes a statute in the proper exercise of the police power, then any impairment of the obligation of contracts incident thereto cannot invalidate the statute. An early such holding is *Manigault* v. *Springs,* 199 U. S. 473 (1905).

The Kansas statute is supported by another independent ground, that is, that it regulates activities which constitute or are akin to the practice of the law. A statute of Massachusetts declaring debt adjusting to be the practice of the law was upheld by the Supreme Judicial Court, *Home Budget Service* v. *Boston Bar Assn.,* 335 Mass. 228, 139 N. E. 2d 387 (1957). The opinion by Mr. Chief Justice Wilkins describes the activity of debt adjusting point by point and shows how such activity is a phase of the practice of the law. The Kansas courts have passed upon similar activities and held them to constitute the practice of the law, *Depew* v. *Wichita Association of Credit Men,* 142 Kan. 403, 49 P. 2d 1041 (1935), *cert. denied,* 297 U. S. 710 (1936). Furthermore, the record shows that the plaintiff debt adjuster was in effect held by a Kansas court to be engaged in the unauthorized practice of the law in February, 1961 (R. 124-5). In *McCloskey* v. *Tobin,* 252 U. S. 107 (1920), this Court upheld a Texas statute prohibiting laymen from soliciting employment to prosecute, defend, present or collect any claim. The Court, through Mr. Justice Brandeis, said (p. 108): "Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable."

ARGUMENT

Statement of Background

Following World War II and the Korean conflict, with the mounting volume of consumer installment credit,* many individuals, particularly in urban areas, contracted debts beyond their ability to pay. This resulted in the mushroom growth of an activity known by various names, such as "debt adjusting", "debt pooling", "prorating", "debt managing", "credit counseling", "budget assistance" and "funding agencies". The activity was almost invariably engaged in by laymen. It consisted of the debt adjuster soliciting the business of overextended individuals and having them contract to pay to the debt adjuster a stipulated sum of money periodically, out of what was estimated to be left over from the individual's income after paying living expenses, for distribution by the debt adjuster to creditors shown on a list furnished by the individual, after deducting the consideration to be paid by the individual to the debt adjuster, according to such schedule as the debt adjuster works out with the creditors of the individual.

Any individual, corporation or partnership could engage in debt adjusting activities, whether of good or bad or no reputation. The debt adjuster could furnish his client with no protection against creditors who would not accept the program adopted and who, notwithstanding the program, could bring legal proceedings against the client, garnishee his wages or repossess any chattel under conditional sale or chattel mortgage. So far as the creditors of the client were concerned, there was no assurance that they were treated equitably in accordance with their secured interests or pro rata in accordance with unsecured claims.

* The tremendous increase in the amount of outstanding consumer credit in the United States is shown in an article in the Wall Street Journal of January 21, 1963, p. 1, last column. Whereas the amount of such credit was $5,700,000,000 in 1945, it had increased to $38,800,000,000 in 1955 and to $61,500,000,000 in 1962.

The debt adjuster could not legally advise regarding the validity of claims, secured or unsecured, nor whether other methods of arranging and settling their debts would be more advantageous, such as recourse to debtor and creditor statutes or to wage earner adjustments under Chapter XIII of the Bankruptcy Act. If there were any attempt to give such advice, it would clearly constitute the unauthorized practice of the law by laymen.

Nevertheless, the forms of advertising used implied to nonprofessional people (mostly wage earners of small means who are unacquainted with legal procedures) that there was some legal status for the debt adjusting plans, such as "Forget your debts", "Rid yourself of the worries and troubles of all your creditors", "Pay us what you can afford", "Embarrassing calls, unpleasant letters, first-of-the-month worries are all a thing of the past", "We will prove to you that we can get you out of debt at a price you can afford and that will satisfy your creditors", "Stop garnishments", and "Confidentially we restore credit", all over-optimistic promises which could ordinarily lead only to further distress on the part of the impecunious debtor who was beguiled by them.

Further, there were advertising statements falsely implying the debt adjuster furnished financial assistance, such as "Bills paid for you", "We pay them for you", "Do you need financial assistance and have no collateral?", "Pay your bills without borrowing with a single payment", and "No interest, no co-signers, no security needed, no reference check".* Some of the advertisements appeared in classified columns under the heading "Loans". Yet debt adjusters provide no financial assistance and make no advances to their clients. On the contrary, their clients often finance the debt adjusters through payment of the fees charged. The agreement between the debt adjuster and his client often permits the debt adjuster to deduct his fee from the client's initial payments, thus postponing

* The advertising of the plaintiff in the present case has the same incorrect implications (see R. 23).

payments received by the creditors. Frequently under these contracts, if a client drops the program before completion, the debt adjuster keeps his full fee and nothing, or very little, is paid to the creditors. Usually the debt adjustment scheme simply increases the debts of the client without protecting him from his creditors.

There is, of course, absent regulation no limitation on the fees a debt adjuster may charge. Some make charges up to 35% or more of total indebtedness and there is often a charge for each creditor or charges for checks written. Studies indicated that a very small percentage of clients of debt adjusters carried through their programs. There have been a number of cases of embezzlement by debt adjusters, fly-by-nighters who would operate in one area for a short time, shut up shop, and move somewhere else, probably under another name. Obviously evils will spring up when any persons, without discrimination, regulation or prescribed ethical standards, are permitted to handle and disburse the funds of others.

The material showing the foregoing background facts is cited below and is in small part reproduced in the Appendix hereto.

In February 1955 the St. Louis Better Business Bureau made public a study through questionnaires submitted to several hundred members in the financial, or retail selling, field and reported the following results (App. pp. A-9, A-10):

	Yes	No
Do Debt Adjusters Serve a Useful Purpose?	10%	90%
Do You Accept Agreements From Debt Adjusters?	30%	70%
Do Debt Adjusters Pay Promptly?	12½%	87½%
Do Debt Adjusters Usually Pay Off the Entire Amount?	0	100%
Are Clients Excessively Debt Ridden?	67%	33%

Another survey from the standpoint of creditors was made in March 1962 by the Kansas City Better Business Bureau (16 Personal Finance L.Q. Report 116 (1962)). The questionnaire was sent to banks, installment sales firms and merchants. One hundred and nine answered as follows:

> Question 1: In your opinion, have the services of debt pro-raters or adjusters been useful or beneficial?—95% replied no.
>
> Question 2: Do you accept agreements to represent your debtors, from all of them? If not, which do you refuse?—96% declined to accept such arrangements.
>
> Question 3: In your experience, do they pay you as promptly as they collect from their debtors?—70% replied no.
>
> Question 4: When and if you deal with them, do they usually continue the payment schedule until the entire balance is paid?—98% replied no.

A study made by the Chairman of the Department of Business Administration of Upsala College which was published in the official organ of the National Retail Credit Association concluded that debt adjusters should be outlawed entirely "as a social and economic malignancy that no amount of legislation can make benign" (Pearson, *Pro-Rater Plague,* Credit World, November 1955, at p. 13).

A study of debt pooling activities by New York Attorney General Javits resulted in a recommendation to outlaw the activity except when conducted by non-profit agencies or members of the Bar (10 Personal Finance L. Q. Report 36 (1956)).

Governor Harriman of New York condemned the activity of debt pooling in his official memorandum when he

signed the New York statute making the practice a misdemeanor. New York State Legislative Manual, 1956, p. 451 (reprinted in Appendix hereto, p. A-15).

Debt pooling or adjusting has been officially condemned by the principal labor unions. An article in the AFL-CIO American Federationist for September 1961 (Perlis, *The Debt-Pool Sharks*), quotes (p. 13) from a statement adopted by the Executive Council of the AFL-CIO on February 21, 1961 declaring "the debt adjustment business, regulated or unregulated, is not economically or socially desirable as a commercial activity and should be eliminated." The full AFL-CIO statement appears in the Appendix hereto, p. A-17).

An article condemning debt pooling appears in other publications of labor organizations: *e.g.* Margolis, *Beware Debt Poolers; Use your Credit Union,* Labor's Daily, May 13, 1955; The Machinist, May 19, 1955; The C.I.O. News, June 6, 1955.

The practice of debt pooling has been denounced in the official publication of the National Legal Aid Association, Bloom, *Debt Adjustment—Meanest Racket Out,* 13 Brief Case 99 (1955).

Debt adjustment has also been condemned in general periodicals. *Those Schemes to Help you Pay Your Bills,* Changing Times, September 1955, p. 29; *Debt Consultants, a New Phenomenon of the Boom,* Time Magazine, March 5, 1956, p. 96; *Warning: The Debt "Adjusters" are Back,* Good Housekeeping, February 1959, p. 121; *Debt-Pooling; How not to get out of Debt,* Coronet, October 1961.

Debt pooling or adjusting by laymen has also been condemned by the New York State Bar Association, not merely as unauthorized practice of the law, but for the evils attendant upon the activity (21 Unauthorized Prac-

tice News 63, December 1955, a publication of the American Bar Association).

A study of the activity of debt adjusting by Dale Tooley of the University of Colorado School of Law concludes that the State of Colorado should outlaw debt adjusters because of the evils to the public attendant on their activities (22 Unauthorized Practice News 29, December 1956).

Consequently, as will appear below, thirteen states and the Province of Quebec have outlawed debt adjusting by laymen. Seven additional states have licensed debt adjusting and thereby "regulate" the activity. This latter method of restraint has been ineffectual because it has given debt adjusting standing in the eyes of the public and regulation has not stopped the abuses (American Federationist, September 1961, p. 13; Statement of New York Attorney General Javits, 10 Personal Finance L. Q. Report 36 (1956); Statement by New York Governor Harriman, Appendix hereto, p. A-15).

Not only would the evils and dangers to the public set forth above seem amply to warrant exercise of the police power of the states, or at least furnish a rational basis for such action, but there is a separate ground supporting the legislation, namely, the regulation by the states of the practice of the law or activities closely related thereto.

The debt adjuster receives confidential information regarding the financial affairs of his client. He looks over the list of the various categories of his debts with a view to analyzing what can be done about them, he negotiates with his client's creditors, at least to the extent of attempting to persuade them to agree to a

schedule of payments. He even negotiates with lawyers representing creditors.

The debt adjuster either advises his client regarding the legality of the various claims against him and the validity of any security therefor under the statutes of the state* and regarding the possibility of employing debtor-creditor laws of the state or the debt adjustment provisions of the Bankruptcy Act, particularly wage earner adjustments under Chapter XIII, or does not advise him regarding any of these things. If he does advise him, then clearly he is practicing law. If he does not advise him, the client is not receiving the advice he should have.

In this situation it would seem to be clearly within the power of the state through the legislature or the courts to confine such activities to members of the bar. As a consequence of doing so, those performing debt adjustment services being lawyers are subject to all the restrictions against solicitation, advertisement, commingling of funds and other proscribed unprofessional conduct contained in the Canons of Ethics.

The Kansas statute has limited debt adjustment not only to lawyers but to lawyers incidentally to the practice

* There are complicated statutes in all the states which must be complied with in order to make various types of claims and security therefor valid. Kansas statutes on this subject include: Kan. Gen. Stat. Ann. §§16-401 to -426 (Supp. 1961) (Consumer Loan Act which regulates the making of installment loans aggregating less than $2,100); §§16-501 to -514 (Supp. 1961) (Sales Finance Act regulating the retail installment sale of goods); §§58-301 to -318 (Supp. 1961) (regulates Chattel Mortgages and Conditional Sales); §§8-126, 135 (Supp. 1961) (Motor Vehicle Registration Act which, among other things, regulates liens or encumbrances on motor vehicles); §§60-3504 to -3505 (1949) (list the exempt property of families and of individuals).

of the law. The effect of the other statutes prohibiting debt adjustment by laymen is substantially the same (except for Oklahoma), although some of them do not limit the debt adjusting activities of lawyers to those incidental to the practice of the law.

In his complaint, the plaintiff also contended that the Kansas statute violated the Kansas Constitution because, as he claimed, the subject of the statute was not clearly expressed in its title. While this contention also does not appear to us to be sound (the title refers to debt adjusting and the statute deals only with debt adjusting), it is outside the area of this brief which will discuss only the issues relating to the Federal Constitution and we shall accordingly leave it to the appellants to deal with this contention relating to the Kansas Constitution.

POINT I

The burden of proof is on those claiming unconstitutionality of a statute.

A basic error of the majority in the District Court is the assumption obviously made by them that the burden of establishing constitutionality was on the parties attempting to uphold the Kansas statute. This is contrary to well-settled principles. One of the early authorities to the contrary is the *Sinking-Fund Cases,* 99 U. S. 700 (1878) where the Court said (p. 718):

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Perhaps the leading case on this subject is *O'Gorman & Young* v. *Hartford Ins. Co.,* 282 U. S. 251, 257 (1931), in which the Court upheld a New Jersey statute regulating the compensation of insurance agents. Justice Brandeis wrote for the majority (pp. 257-258):

> "[T]he presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness."

In a case involving the reasonableness of legislative action, *i.e.,* a zoning ordinance (*Goldblatt* v. *Town of Hempstead,* 369 U. S. 590 (1962)), the Court recently said, by Mr. Justice Clark (p. 596):

> "Our past cases leave no doubt that appellants had the burden on 'reasonableness'. *E.g., Bibb* v. *Navajo Freight Lines,* 359 U. S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg* v. *Maryland,* 346 U. S. 545, 553 (1954) (the presumption of reasonableness is with the State); *United States* v. *Carolene Products Co.,* 304 U. S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it)."

POINT II

The statute does not violate the due process clause of the Fourteenth Amendment.

In deciding that the Kansas statute was unconstitutional, as a violation of the due process clause of the Fourteenth Amendment, the majority in the District Court relied on a decision of a court of intermediate appeal of the Commonwealth of Pennsylvania (*Commonwealth* v. *Stone,* 191 Pa. Super. 117, 155 A. 2d 453 (1959), *allocatur* refused by Pa. Sup. Ct.). That decision struck down as violative of the Fourteenth Amendment a Pennsylvania statute very similar to the Kansas statute in question here. The Pennsylvania court relied primarily on *Adams* v. *Tanner,* 244 U. S. 590 (1917) which case held violative of the due process clause a statute of the State of Washington prohibiting employment agencies from receiving fees from workers for finding them employment. There was a strong dissent in *Adams* v. *Tanner* by four Justices, Brandeis, Holmes, Clarke and McKenna. In a separate dissenting opinion (p. 597) Mr. Justice McKenna stated:

> "that under the decisions of this court—some of them so late as to require no citation or review—the law in question is a valid exercise of the police power of the State, directed against a demonstrated evil."

The case was criticized at the time outside the Court (Note, 27 Yale L. J. 134-135, 1917).

It will be shown that the reasoning of the dissenting opinion, rather than that of the majority opinion, in the

Adams case is the applicable law today. Since this is so, the Pennsylvania case is plainly wrong and the majority opinion below, resting explicitly on the Pennsylvania case, is likewise plainly wrong. We submit that the collapse of *Adams* v. *Tanner* as an authority should be determinative of this appeal in that it removes the basis on which the Pennsylvania decision and, in turn, the decision below rested and therefore leaves the decision below without support in law.

Adams v. *Tanner* has not merely been overruled *sub silentio*. In *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525 (1949), Mr. Justice Black writing for the majority said (p. 535): "Our holding and opinion in *Olsen* v. *Nebraska* [313 U. S. 236 (1941)] clearly undermined *Adams* v. *Tanner*."

Again, in *Breard* v. *Alexandria,* 341 U. S. 622 (1951), the Court, by Mr. Justice Reed, said (pp. 631-2) that *Adams* v. *Tanner* was not in as strong a position today as it was earlier, citing the *Olsen* and *Lincoln Union* cases.

The majority opinion in *Adams* v. *Tanner* was further criticized in a recent three-judge District Court decision upholding a Federal statute prohibiting trading in onion futures against an attack from the standpoint of the due process clause, *Chicago Mercantile Exchange* v. *Tieken,* 178 F. Supp. 779 (N. D. Ill. 1959). The Court said (p. 785):

> "Nor does it suffice to argue, as the plaintiffs do, that the due process clause proscribes the prohibition of a business which is lawful, useful, and essentially harmless, even though it is attended by abuses. This argument might have been forceful in a bygone era of constitutional interpretation. See *Adams* v. *Tanner,* 1917, 244 U. S. 590, 37 S. Ct.

> 662, 61 L. Ed. 1336, criticized, 27 Yale L. J. 134 (1917). However, it is without force today. *Lincoln Federal Labor Union, etc.* v. *Northwestern Iron & Metal Co.,* 1949, 335 U. S. 525, 529, 69 S. Ct. 251, 93 L. Ed. 212."

The minority opinion in the Court below also calls attention to the fact that the Pennsylvania decision relied on by the majority in turn relies on *Adams* v. *Tanner* and that that case does not represent the present law, saying (R. 132-3):

> "I am more impressed by the reasoning of the Superior Court of New Jersey in *American Budget Corp.* v. *Furman, supra,* than by that of the Superior Court of Pennsylvania in *Commonwealth* v. *Stone,* 191 Pa. Super. 117, 155 A. 2d 453. The Pennsylvania court leans heavily on *Adams* v. *Tanner,* 244 U. S. 590. As the New Jersey court points out, quoting *Staten Island Loaders, Inc.* v. *Waterfront Commission,* 117 F. Supp. 308 (D.C. S.D. N.Y. 1953), * * * the U. S. Supreme Court has withdrawn from this extreme [fol. 223] view of the Fourteenth Amendment '* * * and has made it increasingly clear that it is not for the judiciary to decide whether the legislature has chosen that best remedy to meet an evil * * *.'"

The reasoning of the New Jersey case relied on in the dissenting opinion below, upholding a statute similar in effect to the Pennsylvania statute and the Kansas statute, is clearly on a more sound basis than that of the Pennsylvania Superior Court in the Pennsylvania case of *Commonwealth* v. *Stone, supra.* The New Jersey decision points out that the majority opinion in *Adams* v. *Tanner* does not represent the law today. *American Budget Corp.* v. *Furman,* 67 N. J. Super. 134, 170 A. 2d 63 (Ch. 1961), *aff'd per curiam,* 36 N. J. 129, 175 A. 2d 622 (1961).

The majority opinion in the instant case was criticized in a recent law review note and the author stated his opinion that it should be reversed (University of Kansas Law Review, Volume 10, p. 447 (1962)).

The holding in *Adams* v. *Tanner* was to the effect that a statute could prohibit a business or an activity only if it was inherently vicious and harmful; that otherwise evils which might develop in many or most situations involving the prosecution of a business or activity could be dealt with only by regulating the business and activity and not by prohibiting it. In the present case, limitation of debt adjusting to lawyers is a regulation of the activity and not a prohibition of it.

However, if the statute be assumed to be a prohibition, the authorities establish beyond question that the law now is that, when a legislature determines that substantial evils exist in connection with the pursuit of a business or activity, it is for the legislature to determine whether such evils should be dealt with by regulation of the business or activity or by the prohibition thereof. If it appears that the legislature reasonably could have thought that prohibition was the desirable remedial method, then that was a permissible exercise of the police power of the state whether or not the courts agree with the wisdom of the measure adopted by the legislature. Under such legal principles, the legislature of Kansas had the right to legislate as it did and its action could not be found to be in violation of the due process clause of the Fourteenth Amendment.

A review of the cases on this subject shows that *Adams* v. *Tanner* is out of line with the fundamental principles which have been enunciated by this Court both before and after that decision and that the dissent by Mr. Justice Brandeis in that case represents the view which the Court has since followed.

Since at least as early as 1888 this Court has upheld, against a challenge from the standpoint of the due process clause, state statutes prohibiting carrying on of selected activities where there was shown or could be assumed to be a reason for doing so in the public interest. The prohibition may have been absolute or limited under the statutes passed on by the Court.

Powell v. *Pennsylvania,* 127 U. S. 678 (1888). (Upheld Pennsylvania statute prohibiting manufacture or sale of oleomargarine.)

The Court, by Mr. Justice Harlan, said (p. 686):

> "The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition * * * will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary."

Booth v. *Illinois,* 184 U. S. 425 (1902). (Upheld Illinois statute making it a crime to sell or buy grain futures.)

The Court, by Mr. Justice Harlan, said (p. 429):

> "The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly con-

ducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler* v. *Kansas,* 123 U. S. 623, 661; *Minnesota* v. *Barber,* 136 U. S. 313, 320; *Brimmer* v. *Rebman,* 138 U. S. 78; *Voight* v. *Wright,* 141 U. S. 62."

Otis v. *Parker,* 187 U. S. 606 (1903). (Upheld California statute declaring void all margin sales of corporate shares.)

The Court, by Mr. Justice Holmes, said (p. 609):

"If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.' *Booth* v. *Illinois,* 184 U. S. 425, 429."

Murphy v. *California,* 225 U. S. 623 (1912). (Upheld ordinance prohibiting commercial billiard halls, except those maintained solely for use of guests in a hotel of more than 25 rooms.)

Rast v. *Van Deman & Lewis Co.,* 240 U. S. 342 (1916). (Upheld Florida statute imposing prohibitory license tax on use of profit sharing coupons and trading stamps.)

The Court said, by Mr. Justice McKenna (p. 364):

> "It is trite to say that practices harmless of themselves may, from circumstances, become the source of evil or may have evil tendency. *Murphy* v. *California,* 225 U. S. 623."

And again at page 368:

> "* * * we have shown that the business schemes described in the bill are not protected from regulation or prohibition by the Constitution of the United States."

Roschen v. *Ward,* 279 U. S. 337 (1929). (Upheld a New York statute making it unlawful to sell eyeglasses, unless a physician or optometrist is in charge and in personal attendance, the expense of which effectively prohibited plaintiff's business.)

Mr. Justice Holmes, speaking for a unanimous Court, said (p. 339):

> "Moreover, as pointed out below, wherever the requirements of the Act stop, there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil. A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it intends to produce."

Nebbia v. *New York,* 291 U. S. 502 (1934). (Upheld a New York law establishing minimum prices for milk.)

The Court, by Mr. Justice Roberts, said (p. 528):

> "Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned."

There follows in the above opinion a footnote listing cases upholding statutes prohibiting businesses and limiting businesses to qualified persons. It is noteworthy that in this case it was the *dissenting* opinion by Mr. Justice McReynolds which cited *Adams* v. *Tanner* (291 U. S. at p. 546).

> *Daniel* v. *Family Insurance Co.,* 336 U. S. 220 (1949). (Upheld a South Carolina statute prohibiting undertakers from serving as life insurance agents, and vice versa.)

Mr. Justice Murphy, speaking for a unanimous Court, said (p. 224):

> "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop."

> *Breard* v. *Alexandria,* 341 U. S. 622 (1951). (Upheld ordinance prohibiting door-to-door solicitation of magazine subscriptions or purchases of merchandise without invitation from the home owner.)

While this ordinance did not prevent solicitation of magazine subscriptions or sales of merchandise by publishers or wholesalers by mail and other means, it effectively put out of business the individuals employed in door-to-door solicitation. Mr. Justice Reed, delivering the

majority opinion, said as to this aspect of excluding these individuals from the business (p. 631):

> "All regulatory legislation is prohibitory in that sense."

and again, referring to *Adams* v. *Tanner* and another case (p. 632):

> "Furthermore, neither case is in as strong a position today as it was * * *."

Staten Island Loaders v. *Waterfront Commission,* 117 F. Supp. 308 (S.D.N.Y. 1953), *aff'd sub nom., Linehan* v. *Waterfront Commission,* 347 U. S. 439 (1954). (Upheld New York and New Jersey statutes prohibiting the occupation of public loaders in New York Harbor.)

Williamson v. *Lee Optical Company,* 348 U. S. 483 (1955). (Upheld an Oklahoma statute making it unlawful for anyone except optometrists and ophthalmologists to fit, duplicate or replace eyeglass lenses without prescription.)

Chicago Mercantile Exchange v. *Tieken,* 178 F. Supp. 779 (N. D. Ill. 1959). (Upheld a federal statute prohibiting trading in onion futures against attack under the Fifth Amendment.)

It thus seems clear that the Kansas statute in prohibiting the activity of debt adjusting to laymen is well within the area of permissible exercise of the police power as determined by this Court over the years, with few exceptions which no longer represent the law.

It should be noted that the rigid distinction attempted by the majority in the District Court between regulation and prohibition is unsound and has today no validity. Mr. Justice Brandeis pointed this out in his dissent in *Adams*

v. *Tanner, supra.* After citing cases upholding prohibition of businesses, some of which have been cited above, he said (244 U. S. p. 599):

> "These cases show that the scope of the police power is not limited to regulation as distinguished from prohibition."

However, the Kansas statute does not prohibit, but is regulatory in that it leaves the opportunity to the lawyers in Kansas to engage in debt adjusting activities incident to the practice of the law. There are over 3,000 lawyers in Kansas (1961 Lawyer Statistical Report of American Bar Foundation). Hence the legislature limited those who may participate in the activities to those that it believed qualified.

Certainly the evils and dangers to the public set forth in the statement of background above are ample justification for a state legislature to determine that it was necessary in the public interest to enact a statute prohibiting laymen from the activity and limiting it to activities incident to the practice of the law. The majority opinion below concedes (and the concession should be decisive in this case):

> "Debt adjustment by its very nature may lend itself to great abuses and because of this the state has power to regulate it to the end that its citizens may not be overreached by unscrupulous persons. No doubt, the state can, by proper regulations, set up standards and qualifications, *and even limit the business to certain classes of qualified persons.*" (Italics added) (R. pp. 129-130).

The dissenting opinion below points out "that debt adjustment is a business affecting the public interest is not

questioned. It has been the subject of legislation in many states."*

The existence of similar legislation in other states is a strong, if not conclusive, indication that there are evils justifying the legislation, *e.g.,* the Court stated in *Daniel* v. *Family Insurance Co.,* 336 U. S. at p. 223:

> "The South Carolina legislature is not alone in seeing evils in this kind of insurance, and in invoking its police powers to combat them. See the similar provisions in N. Y. Insurance Law, §165(c); Fla. Stat. (1941), §639.02; Ga. Code Ann. §56-9920; Page's Ohio General Code, §666 (1946) (see *Robbins* v. *Hennessey,* 86 Ohio St. 181, 99 N.E. 319); Md. Ann. Code, Art. 48A, §110 (1939). And see the summary of critical arguments in Business Week, October 20, 1945, pp. 48, 51."

Again, in *Tanner* v. *Little,* 240 U. S. 369 (1916), the Court, in upholding a prohibitory license tax on the use of profit sharing coupons and trading stamps, said, through Mr. Justice McKenna (pp. 385-6):

> "Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature. *McLean* v. *Arkansas,* 211 U. S. 539. Such belief has many examples in state legislation and, we have seen, it has persisted against adverse judicial opinion. If it may be said to be a judgment from experience as against a judgment from speculation, certainly, from its generality, it cannot be declared to be made in mere wantonness."

---

* The Pennsylvania court in *Commonwealth* v. *Stone, supra,* relied upon the incorrect statement made in the brief of the defendant in that case "that it appears that the statute is unique and original in its prohibition." 155 A. 2d at p. 456.

Twelve states in addition to Kansas have laws prohibiting the activity of debt adjusting. They are Florida, Georgia, Maine, Massachusetts, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Virginia, West Virginia and Wyoming; also the Province of Quebec.*

Massachusetts, Virginia and Quebec prohibit debt pooling by laymen by declaring that it constitutes the practice of the law. In the other jurisdictions (except for Oklahoma) lawyers are exempted from the prohibition of the statute or are permitted to engage in the activity incident to the practice of the law. Several of the jurisdictions make a few other exceptions for nonprofit or welfare agencies. The statute of West Virginia is not a prohibition on its face, but is a prohibition in fact since it permits the activity only where the fee is less than 2% of the money collected and where there is no solicitation.

Seven other states have laws attempting to license and regulate the activity of debt pooling, although it is believed ineffectively.** However the existence of the statutes in these seven states shows their recognition of the need for corrective measures.

The fact that the plaintiff debt adjuster in the present case claimed that he did not engage in some of the evils

---

* Fla. Stat. Ann. §§559.10-.13 (1962); Ga. Code Ann. §§84-3601-3603 (Supp. 1961); Me. Rev. Stat. Ann. ch. 137, §§51-53 (Supp. 1961); Mass. Ann. Laws ch. 221, §46 C (Supp. 1961); N. J. Stat. Ann. 2A:99 A-1 to -4 (Supp. 1962); N. Y. Penal Law §§410-412; Ohio Rev. Code Ann. §§4710.01-.99 (1958); Okl. Stat. Ann. tit. 24, §§15-18 (Supp. 1962); Pa. Stat. Ann. tit. 18, §4899 (Supp. 1961); Va. Code Ann. §54-44.1 (1958); W. Va. Code Ann. §6112(4) (1961); Wyo. Stat. Ann. §§33-190 to -192 (1957); Que. Stat. 2 & 3 Eliz. 2, c. 59, §§95, 100, 102 (1954).

** Cal. Fin. Code Ann. §§12200-12331; Ill. Ann. Stat. ch. 16½, §§251-272 (Supp. 1962); Mich. Stat. Ann. §§23.630 (1)-(18) (Supp. 1961); Minn. Stat. Ann. §§332.04-.11 (1947 and 1961 Supp.); Ore. Rev. Stat. §§697.610-992 (1961); R. I. Gen. Laws §§5-42-1 to -9 (Supp. 1962); Wis. Stat. Ann. §218.02 (1957).

found in debt adjusting activities is beside the point.* If the evils often attend debt adjusting activities, the legislature may exercise the police power even though there are some individuals or organizations engaged in the activities which may be subject to less criticism than others (see *Powell* v. *Pennsylvania,* 127 U. S. 678, 684-5 (1888)). As shown by the references to the record appearing in the footnote to the first sentence of this paragraph, the plaintiff's testimony and his solicitation material demonstrate the existence of various of the evils hereinbefore mentioned. For example, the solicitation material implies that the plaintiff has some official status to remove "debt worries". He does not disclose that he requires "no security" and "no co-signers" because he lends no money. Nor does he disclose that he cannot remove "debt worries" except to the extent that creditors agree to the proposals he makes, and that he can furnish no "peace of mind" to the debtor without agreement of the creditors. The hard-pressed wage earner must inevitably be misled by the rosy implications of this solicitation material as to what the plaintiff would do for him to remove his "debt worries" and give him "peace of mind".

* However, the record shows the plaintiff's activities included many of the evils objected to: He discusses claims against his client with creditors' attorneys (R. 14); sometimes discusses reduction in the claim (R. 15); payments are not made pro rata to creditors, but depend on pressure (R. 15); he assumes the validity of any conditional sales agreements (R. 16); he does not discuss with his client any advantages of the use of state statutes or the Bankruptcy Act (R. 21); he gives no advice as to usury or other possible defenses (R. 30); the plans do not prevent garnishment (R. 96); many plans failed before they were performed (R. 106); his advertisements were among the type constituting evils sought to be prevented, *e.g.:* "Bills pressing?" "If installment payments or past due bills are troubling you, let us consolidate and arrange to pay all your bills, past due or not, with one low payment you can afford." "No security—no co-signer." "Debt worries???" (R. 23); "You have only one payment to make." "Your credit improves with regular payments." "Regular payments avoid garnishments and wage assignments." "Most important—you have peace of mind." (R. 118).

POINT III

The statute does not violate the equal protection clause of the Fourteenth Amendment.

The plaintiff debt adjuster claimed that the Kansas statute deprived him, a layman, of equal protection of the laws within the prohibition of the Fourteenth Amendment, presumably on the ground that it permits lawyers to engage in debt adjusting activities as incidental to the practice of the law. Neither the majority nor the minority opinion below adverted to this contention of the plaintiff. There is plainly nothing to it because it was well within the province of the Kansas legislature to make the classification which it did.

It has long been held by this Court that a state legislature may make reasonable classification as to who may engage in activities based on its judgment as to dangers to be guarded against.

> *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61 (1911). (Upheld a New York statute which prohibited pumping carbonic acid gas *from certain wells.*)

The plaintiff attacked the statute as denying equal protection because such gas could be pumped from other wells without violating the statute. The Court, through Mr. Justice Van Devanter laid down in this leading case the rules which demonstrate that the plaintiff has no equal protection argument in the present case. The Court said, in rejecting the equal protection contention (pp. 78-79):

> "The rules by which this contention must be tested, as is shown by repeated decision of this court, are these: 1. The equal protection clause

> of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

McGowan v. *Maryland,* 366 U. S. 420 (1961). (Upheld a Maryland statute prohibiting generally the sale on Sunday of merchandise, but *excepting a number of types of merchandise.*)

The classification was assailed as a violation of the equal protection clause. The Court, through Mr. Chief Justice Warren, said (pp. 425-6):

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statu-

tory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Semler v. *Oregon State Board of Dental Examiners,* 294 U. S. 608 (1935). (Upheld an Oregon statute providing for revocation of licenses of *dentists* who advertise in a specified unethical manner.)

The Court, by Mr. Chief Justice Hughes, said (p. 610):

"Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each."

Clarke v. *Deckebach,* 274 U. S. 392 (1927). (Upheld a Cincinnati ordinance prohibiting the issuance *to aliens* of licenses for pool and billiard rooms.)

Dillingham v. *McLaughlin,* 264 U. S. 370 (1924). (Upheld a state statute forbidding any person, *except a corporation,* from engaging in the business of receiving deposits or payments of money in installments of less than $500 for mutual loan, savings or investment purposes.)

Patsone v. *Pennsylvania,* 232 U. S. 138 (1914). (Upheld a Pennsylvania statute making it unlawful for an *unnaturalized foreign born resident* to kill any wild bird or animal except in self-defense.)

POINT IV

The statute does not violate the prohibition against the impairment of the obligation of contracts.

The plaintiff has also contended in his complaint that the Kansas statute impaired the obligation of contracts entered into by him with debtors and therefore was in violation of Article I, Section 10, of the United States Constitution. Again, neither the majority opinion nor the minority opinion below paid any attention to this contention. It obviously is unsound under the circumstances of this case. Nothing is better settled than that, if a state legislature, having reasonably concluded that there are evils to be dealt with under the police power of the state, enacts a statute based on exercise of such police power which enactment is permissible under the due process clause of the Fourteenth Amendment, then any impairment of the obligation of contracts incident to the exercise of such police power cannot be permitted to invalidate the statute.

In *Manigault* v. *Springs,* 199 U. S. 473 (1905), the Court, through Mr. Justice Brown, said (p. 480):

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general wel-

> fare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are, where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment or continuance of such traffic;—in other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."

Again, in *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372 (1919), the Court, through Mr. Justice Clarke, said (p. 375):

> "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court."

In *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935), the Court, through Mr. Chief Justice Hughes, said (p. 610):

> "Plaintiff is not entitled to complain of interference with the contracts he describes, if the regulation of his conduct as a dentist is not an unreasonable exercise of the protective power of the State. His contracts were necessarily subject to that authority. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 363; *Union Dry Goods Co.* v. *Georgia Public Service Comm'n*, 248 U. S. 372, 375, 376; *Sproles* v. *Binford*, 286 U. S. 374, 391; *Stephenson* v. *Binford*, 287 U. S. 251, 276."

To similar effect is *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 531-2 (1949).

POINT V

The statute is a proper control of an activity which constitutes, or is akin to, the unlawful practice of the law.

The Kansas statute is supported by another independent ground, that is that it regulates activities which are akin to the practice of the law if not actually the practice of the law itself. As pointed out above, three jurisdictions (including Quebec) have passed statutes expressly limiting the activities to members of the Bar as a part of the practice of the law. Such a statute of Massachusetts was challenged and upheld by the Supreme Judicial Court. *Home Budget Service* v. *Boston Bar Association,* 335 Mass. 228, 139 N. E. 2d 387 (1957). The activity of debt adjusting or debt pooling as described by the court in that case is entirely similar to the activity described in the Kansas statute and the court found that it constituted the practice of the law. The case has such an important bearing on this phase of the present case that the key paragraph from the opinion of the Court by Mr. Chief Justice Wilkins (139 N. E. 2d, at p. 390) appears below:

> "The conduct of the plaintiffs presents features of the practice of law, and viewed as a whole amounts substantially to that. An important difference between their conduct and that of lawyers is in the inception of the relationship, which arises in a manner not permitted to the legal profession. The distressed debtor unable to look out for his financial affairs is importuned through the public press to engage for a consideration the services of a skilled handler. If he responds, there then comes into being a basic relationship of trust and confidence. To the hired negotiator the debtor makes a complete

disclosure of his financial secrets, his income, and an account of his indebtedness to the last detail. Entrusted with such information, the debt pooler evolves a program which it advises the debtor to accept as one which under its administration might free him from financial embarrassment. Authorized in writing, the debt pooler enters into direct negotiation at the sources of the debtor's distress, dealing indiscriminately with creditors or their attorneys, undeterred by judgments, pending suits, or attachments. Indeed the greater the pressure, legal and otherwise, the greater the percentage of the entrusted fund the debt pooler will in its own discretion allocate to the reduction of a given claim. In a situation of insolvency—for the debtor is unable to pay his debts as they mature—the debt pooler is engaged to develop and carry out a series of compromises, which, irrespective of litigation, will ward off bankruptcy. The antagonists may be members of the bar subject to the ethical standards and discipline of their profession. The plaintiffs, according to their own contention, are not subject to similar regulation, because they are business men engaged in arm's length dealings in the commercial arena. That the debt pooler neither enters the court room nor prepares legal documents does not save its conduct from classification as the practice of law. Nor is there escape in the fact that it does not advise as to the validity of claims; for, quite to the contrary, its omission to do so may be a surrender to some demands which a member of the bar perhaps ought to question and advise the debtor to contest. The debt pooler's plan and its administration thus exclude the debtor from skilled professional legal advice. So, where there is a conditional sale contract, the creditor may be paid, even in full, notwithstanding that there may have been no compliance with the applicable statutes. In this field

> the rules of law are most stringent and the condition of the sale may be lost because of some departure in the contract from the prescribed statutory language."

The Kansas courts have passed upon similar activities and held them to be a phase of the practice of the law. As a corollary they have held that they could be prohibited to laymen without violation of the Fourteenth Amendment and Section 10 of Article I of the Constitution. *Depew* v. *Wichita Association of Credit Men,* 142 Kan. 403, 49 P. 2d 1041 (1935), *cert. denied,* 297 U. S. 710 (1936).

In fact plaintiff debt adjuster was in effect held by a Kansas court to be conducting the unauthorized practice of the law in February 1961 (R. 124-5). In that case the same plaintiff sued to enjoin a former employee from working for another in a similar type of business. In the course of the case the Court held that the plaintiff did not come into Court with clean hands, saying (R. 125):

> "In addition to that I am of the opinion that the plaintiff's business as conducted here in Wichita smacks of the unauthorized practice of law, and for these reasons the demurrer to the evidence will be sustained,"

and again,

> "Therefore I am of the opinion that this plaintiff's conduct of business in the City of Wichita is bordering on the unlawful practice of law and that he is not entitled to come into this community and practice law."

Of interest in this connection is *McCloskey* v. *Tobin,* 252 U. S. 107 (1920) where this Court upheld a Texas

statute which prohibited laymen from soliciting employment to prosecute, defend, present or collect any claim. The statute was attacked on the ground that the prohibition of this business violated the Fourteenth Amendment. The Court, through Mr. Justice Brandeis, held that the statute constituted regulation rather than prohibition and continued (p. 108):

> "Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable."

Similarly, to regulate debt adjusting, an activity so closely related to the practice of the law, by limiting this activity to lawyers or, to put it another way, to prohibit this activity except as performed as part of the practice of the law, is the exercise by the Legislature of a power which, as was held in the *McCloskey* case, does not violate the Fourteenth Amendment.

Conclusion

Accordingly, the Kansas statute should be upheld on each of two grounds. One, as the proper exercise of the police power to correct and guard against evils reasonably known to or assumed by the legislature; the other,

as the proper regulation of an activity constituting, or akin to, the practice of the law.

January 23, 1963.

Respectfully submitted,

WILKIE BUSHBY,
JOSEPH SCHREIBER,
40 Wall Street,
New York 5, New York,
Attorneys for amicus curiae,
National Better Business Bureau, Inc.

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD,
40 Wall Street,
New York 5, New York,
Of Counsel.

APPENDIX

NATIONAL BETTER BUSINESS BUREAU, INC.

405 Lexington Avenue, New York 17, N. Y.

Affiliated with Local Better Business Bureaus from Coast to Coast

July, 1955

DEBT ADJUSTERS—BOON OR BURDEN??

Unregulated Pro-Rating Companies Are Subject of Many Complaints

Debt adjusters are individuals or companies engaged in the business of pro-rating the income of a debtor to his creditors for a fee or service charge.

Ideally, the service they render to debt-laden members of society would include setting up a budget on a workable basis. It would allocate a definite amount of income to debt retirement purposes, including payment of the adjuster's fee as defined by contract. The adjuster would then prepare a plan for distributing the available income periodically to the various creditors on a pro-rata basis. This would usually require obtaining substantial concessions from some creditors. However, if satisfactory arrangements could be effected, the debtor would make regular payment of the total amount budgeted for debt retirement to the adjuster who would then disburse it to himself and the creditors in accordance with the agreed formula. The ultimate objective would be final emancipation of the family from its debts and the re-establishment of its credit.

Appendix

Complaints Accompany Growth

The business is not a new one. Known variously as pro-raters, debt poolers, debt managers, credit counsellors, budget systems, funding agencies, etc., this type of company has functioned in some cities for more than two decades. Within the past year or two, however, their number has multiplied and the geographic scope of their operations has increased at a prodigious rate.

Some operators extend or transfer their activities from one city to another. In February, a Federal grand jury in Chicago indicted several companies and individuals charging fraud by radio advertisement, mail fraud and conspiracy in the operation of a debt adjustment scheme. Two of these individuals were formerly identified with a pro-rata business in Columbus, Ohio, which had been the subject of numerous complaints to the Columbus Better Business Bureau. During the past year, criminal warrants have likewise been issued in Detroit, Michigan against one "budget system" operator who had previously promoted similar businesses in a number of Eastern cities. The charges resulted from numerous complaints to the Detroit Better Business Bureau and the authorities alleging "bait" advertising and failure of this promoter to perform promised debt adjustment services after collecting his fees in advance.

There are debt adjusters who have operated in some communities for many years, free of justified criticism or complaint to the Better Business Bureau. Certainly, it would be unfair to condemn a newcomer solely on the grounds of newness. It is nevertheless true that those who have swarmed into the debt adjustment field recently

have included a large proportion of unscrupulous or incompetent opportunists whose activities have spread misery throughout the land. They have used extravagant and deceptive advertising to claim far more than they were in position to deliver. They have made false promises to persons whom they knew, or should have known, were beyond redemption, credit-wise. They have withheld their own fees from the debtors' payments but have failed promptly to make agreed payments to creditors or to obtain creditors' accession to the pro-rata plan devised. The net result of their activities, in many cases, has been to leave already desperate people more hopelessly mired in debt and litigation than before.

Situation Serious in Many Cities

That these practices do not exist in isolated cases only is indicated by a survey which the National Better Business Bureau recently made of Better Business Bureau experience with pro-raters in forty cities in all sections of the United States. In seven of these cities, pro-raters have been operating, mostly on a limited scale, without serious complaint to the Bureaus. In five others, sufficient time had not elapsed to permit a significant accumulation of customer experience in Bureau files. In the remaining twenty-eight cities, Better Business Bureau experience with pro-raters has been, on the whole, unfavorable. Most of the larger cities are included in this category and, in more than half, complaints have increased so rapidly within the past year as to create serious problems.

It should not be inferred that every pro-rater in each of these cities has been the subject of justified criticism,

but the tactics employed by a majority of the pro-raters have made the complaint picture so black that some Bureaus have been forced to the conclusion that continued uncontrolled operation of these services in their communities would not be in the public interest.

Misleading Advertisements

Many complaints have their inception in printed or broadcast advertising claims such as "Forget Your Debts," "Rid yourself of the worries and troubles of all your creditors," "Pay Us What You Can Afford," and similar representations calculated falsely to imply that, once the debt adjustment company is employed, the debtor has no further responsibility or obligation to his creditors.

Other advertising statements—"Bills Paid For You," "We Pay Them For You," "Do you need financial assistance and have no collateral?", "Pay your bills without borrowing with single payment," etc.—have had the capacity to deceive as to the true and limited service which the debt adjuster can offer. Some advertising has misled debtors to believe that they can get a loan or credit which the pro-rater will use to pay off all their debts. The Cleveland Better Business Bureau reports the case of one company using the word "Finance" as part of its title. Some debt adjustment services have even advertised in classified columns under the heading of "Loans." Of course, the pro-rater performs no such function, a truth which some complainants have not discovered until after they have signed agreements which they did not understand, and paid fees for non-existent loans.

Appendix

Limitations of Service

At best, the pro-rater offers a means whereby an individual may retire his total indebtedness, although automatically increased to the extent of the pro-rater's fees, in regular amounts over a period of time which will be consistent with his capacity to pay. The complete success of such an expedient would depend upon the honesty of the pro-rater and his qualifications to analyze his client's financial and budgetary problems, the character of the client and his ability to carry through on the agreement reached, and the willingness of creditors to accept proffered plans for reduced or extended payments, among other factors. The experience of Better Business Bureaus suggests that the proportion of cases in which these circumstances ideally co-exist may be very small.

Taking All Comers

Advertisements of some debt adjustment companies have implied an ability to solve the problems of any or all debt ridden persons regardless of their circumstances, character or reputation.

On the contrary, it is generally recognized by informed sources that the proportion of over-indebted persons who can be helped by a debt adjustment service is limited. A mid-west firm which has operated without complaint to the local Better Business Bureau for many years, has advised NBBB that it finds it necessary to turn down six out of every ten applications, "mainly because of (1) a desire to keep some item that is entirely out of proportion, such as an expensive automobile or other luxury item that could be turned back or, (2) reduced income to

the point where it barely does more than cover the living budget or, (3) lack of the feeling that they are in serious trouble and determination to live on a meager budget to pull themselves out." A west coast organization, whose record is equally free of complaint, has stated that it will accept as clients only those over-indebted persons whose income allows monies to be applied toward the liquidation of their obligations over an extended period of time. This organization takes the position that no pro-rate office has the moral right to accep' persons who can pay off their obligations by liquidating assets or by securing a loan, or those whose earnings are currently insufficient to do more than meet barest living expenses regardless of the nature of their debts.

It has been the experience of many Better Business Bureaus that there are other pro-raters who do not concern themselves with the fitness of applicants for service. In many cases, the only test applied appears to have been the applicant's ability to pay the debt adjuster's fee.

Agreements Favor Pro-Raters

"No interest. No co-signers. No security needed. No reference check," is an advertising theme employed by many pro-raters. What is not disclosed is that while interest is not charged, there are substantial service charges, often as high as 35% of total indebtedness, added to the debtor's already overwhelming financial burden. Nor is it disclosed that references, co-signers and security are not required because the debt pooling company assumes no financial risk.

Customarily, the debtor is induced to sign a contract legally binding on him. If, because of non-fulfillment

of promises or other cause of dissatisfaction, the disillusioned client seeks to withdraw from a pro-rating plan, he frequently finds that he can do so only at the sacrifice of most, if not all, of the money that he has paid in. He may even face supplementary collection proceedings by the pro-rater. Many such complainants do not have a copy of the agreement that they signed, but investigation by a Better Business Bureau has generally developed that the document is weighted in favor of the pro-rater's receiving the full amount of his fees at the expense of the client and creditors. There is no uniformity in the amount of fees charged by debt adjustment companies or in the method of their exaction. The same company may charge different rates to different clients. In many cases, however, the pro-rater demands the full amount of fees contemplated for the entire life of the agreement, regardless of how long it may be in effect.

Generally, the fee is based on a percentage of the client's total indebtedness which may be augmented by "bookkeeping charges" based on the number of accounts involved. Total charges may amount to from 10% to 35%, or more, of the total indebtedness. They may be considerably more than what prospective clients may anticipate. A New York company, for example, has represented that its fees are 10% of the total indebtedness. An analysis by the Better Business Bureau of New York City of complaints from dissatisfied clients who withdraw from the plan showed that, to these people, charges actually ranged from 16% to 58%.

Piling Debt on Debt

The agreement has sometimes permitted the pro-rater to deduct all or most of his fee from the client's initial

payments. In other cases, a percentage is to be deducted from each payment during the life of the agreement, but, under these circumstances, some pro-raters have set up "reserve funds" by the expedient of postponing payments to creditors. If a client cancels the agreement before it has run its course, the pro-rater applies the "reserve" toward the satisfaction of the total fees he would have collected had the agreement been completed. If sufficient funds are not on hand for this purpose, the client is presented with a bill for the balance. If he fails to pay, the debt adjuster may institute legal proceedings to collect. There is the example of an Ohio company which induced its clients to sign *cognovit* notes for the full amount of its fees. Such notes are, in effect, a confession of judgment and the Better Business Bureau of Akron recently reported that 21 judgments, totalling $1,896.83, had been taken against one debt adjuster's clients who had signed such notes. Similar judgments totalling $497.13 were reported as to five customers of another debt pooling firm. In many cases, where judgments are taken, the holder of the note may garnishee the debtor's wages.

There is a strong suspicion that some pro-raters so conduct their operations as deliberately to encourage clients to withdraw from agreements during the early life thereof. In such cases, the unfortunate client discovers that, at considerable expense to himself, he has not only failed to improve his position *vis a vis* his creditors, but has acquired a new creditor, i.e., the pro-rater.

Relation to Creditors Misrepresented

Many complaints have arisen from sales representations in advertising and at interviews calculated to lead the

debtor to believe that all of the sales credit organizations, banks, loan companies and others to whom he is indebted will automatically agree to whatever plan for payment the pro-rater may devise. The Boston Better Business Bureau, which has pioneered in educating the public on this subject, has pointed out that creditors are under no requirement so to soften the contractual obligations of their debtors and many creditors decline to accept agreements offered by debt adjustment companies.

These facts are not disclosed to prospective customers by the unscrupulous debt adjuster. It is not explained that some creditors, whether accepting the pro-rata arrangement or not, may add additional finance or interest charges, if their accounts are not paid according to the original terms. If legal action has been or is instituted by a creditor against a debtor, only an attorney can provide legal service, if required. A debt adjustment plan does not preclude nor prevent a creditor from taking his usual action to collect, including legal action.

The St. Louis Survey

In February, 1955, the St. Louis Better Business Bureau published the results of a questionnaire to several hundreds of its members in those fields of business most likely to be involved in any attempt by debt adjusters to represent creditors of business firms. Replies, of which 60% were from retail merchants selling on charge or installment plan, and 40% from banks, loan companies and sales finance and discount companies, are tabulated as follows:

	Yes	*No*
Do Debt Adjusters Serve a Useful Purpose?	10 %	90 %
Do You Accept Agreements From Debt Adjusters?	30 %	70 %
Do Debt Adjusters Pay Promptly?	12½%	87½%
Do Debt Adjusters Usually Pay Off the Entire Amount?	0	100 %
Are Clients Excessively Debt Ridden?	67 %	33 %

Returns from another questionnaire distributed by the Memphis Better Business Bureau indicated that approximately the same situation existed in that city. Recently, the Better Business Bureau of Baton Rouge, La., surveyed the principal firms doing an installment business in its area and discovered that less than 10% had any working arrangement with the debt adjustment company operating in that city.

In its bulletin, the St. Louis Bureau pointed out that respondents to its questionnaire did not rate all pro-raters in that city uniformly as to reliability; based on past experience, the creditors might negotiate more readily with a few of the existing debt adjustment companies than they would with others. However, the overall picture presented by the above tabulation is not such as to justify confidence in the employment of pro-raters generally as a means of extricating excessively debt-ridden persons from their financial difficulties.

Misery Compounded

Having been led to believe that through employment of a pro-rater, they had solved all problems relating to

their excessive accumulation of debts, some clients are encouraged to ignore direct demands for payment by creditors. Complainants to Better Business Bureaus include many whose sojourn in such a fool's paradise has been interrupted by the intrusion of lawsuits, garnishee proceedings, repossessions, or other legal steps taken by creditors who have lost patience. Similar denouements have sometimes followed failure of the pro-rater to make prompt payments to creditors as agreed, even though the client has faithfully met his obligations to the debt adjustment company.

Some short-lived debt adjustment companies have closed their doors after paying only a fraction of the amount collected to creditors, leaving their clients in worse financial straits than before. The Rochester Better Business Bureau reports a typical case where a now defunct prorating company collected $214.00 from one client, but made a lone payment of only $38.00 to a single creditor. If the operators are not bonded and leave no assets behind them, there is little that can be done for the victims in these cases.

Alternatives Available

There are many, including some Better Business Bureaus, who believe that there is no need or economic justification for the existence of the pro-rater, that he does not offer a service of genuine value to debtor and creditor, or that his functions are, or could be, performed more satisfactorily by some other kind of agency. These critics point out that there is much that the debtor can do for himself and that, in many cities, family welfare agencies, Legal Aid Societies and retail credit bureaus

are willing to assume the burden of debt adjustment for the deserving debtor at little or no expense to him.

Under an Ohio law, a debtor can set up a trusteeship through a municipal court which will pro-rate a portion of his income to his debtors at nominal cost. A recent Wisconsin statute enables wage earners to amortize their debts through the state courts. Chapter XIII of the Federal Bankruptcy Act permits wage earners earning less than $5,000 a year to establish trusteeships for the liquidation of their debts, without resort to bankruptcy, over a period of three years, if necessary. Nearly 10,000 such proceedings were filed during 1954.

Lack of Regulation

In Wisconsin, there is a licensing law supplemented by rules and regulations governing debt adjustment companies, only one of which operates in that state. Minnesota also has a licensing law. A recent Maine statute prohibits anyone other than an attorney from engaging in this business. In Pennsylvania, the courts have construed the collection agency law so as to prohibit debt adjusters from taking fees from debtors; hence, there are no pro-rate companies in Pennsylvania. So far as NBBB is aware, in other jurisdictions, any individual, however ill-qualified may set himself up in business as a pro-rater without any restriction or regulation of his operations whatever.

Legislation has been proposed in other states which would prohibit the operation of a debt adjustment business for profit or which would seek to license and regulate the business. The net effect of some of the proposed laws which NBBB has seen would appear to be to lend dignity

to debt adjusters as state-licensed organizations while affording little real protection to the public. That would seem to be true of any legislation which:

a) would permit unqualified or unscrupulous individuals to accept money from desperately involved debtors without obtaining the agreement of creditors to participate in a workable pro-rate plan;

b) would permit the adjuster to exact exhorbitant fees, openly or by subterfuge;

c) would permit the adjuster to deduct all or a substantial portion of his fees in advance rather than on a pro-rata basis as service is performed; or which

d) did not provide for competent supervision by a state agency adequately financed and staffed.

A National Scandal

In this bulletin, the sole purpose of the National Better Business Bureau has been to draw attention to a situation that is fast approaching a national scandal. We do not suggest that all debt adjusters are charlatans. Better Business Bureaus in those cities where debt adjusters have fulfilled their promises to the public to the satisfaction of debtors and the creditor community alike have not questioned the value of the service which this type of business offers.

It is for the lawmakers to decide whether the activities of pro-rate companies should be prohibited, whether they

should be regulated and whether the states should provide other facilities for performing debt adjustment services, as in Ohio and Wisconsin. Without presuming to decide these questions, the National Better Business Bureau offers the following observations:

In a vocation which offers any individual the opportunity to handle other peoples' money without regard to his reputation, financial responsibility, experience and other qualifications, and without regulation by or accountability to any public agency, the potentiality for evil is great. The evidence is more than ample to support the view that this potential has been realized by an alarmingly high proportion of debt adjusters under existing circumstances.

Appendix

NEW YORK STATE LEGISLATIVE MANUAL, 1956, pp. 451-2

(*Memorandum of Governor Harriman on Bill approved*)

Penal Law, budget planning prohibited
S. I. 44, Pr. 44, Williamson Ch. 31

This bill would amend the Penal Law by making it a misdemeanor to engage in the business of "budget planning." This practice, also known as "debt pooling," or "debt lumping," is defined in the bill as the making of a contract with a particular debtor whereby the debtor agrees to pay a sum of money periodically to the budget planner, who agrees to distribute it among certain specified creditors in accordance with a plan agreed upon, and the debtor further agrees to pay the planner for such services. The bill exempts members of the Bar of this State and does not apply to existing contracts. I have been informed by the Better Business Bureau of New York City "that there has been substantial justified complaint about the practices of some of the companies engaged in budget planning". The Attorney General reports that debt consultants lure the financially distressed by false and deceptive advertising; that they charge excessive fees; and that they derive the bulk of their revenue from the poorly educated and the people in the lower income groups.

It appears that these practices are so common and widespread in the area affected, that the only feasible way to control them is by prohibiting this type of business with the exception already noted.

Appendix

There is no absolute right to engage in a business that conflicts with the public interest. In my opinion "budget planning", as defined in this bill, is such a business.

This bill has the approval of the Better Business Bureau, United Neighborhood Houses, New York State Citizens Council, National Legal Aid Association, Brooklyn Bureau of Social Service, Conference on Personal Finance Law, The Empire State Chamber of Commerce, The New York State Bar Association, the Special Assistant to the Governor on Consumer Problems, the Banking Department and many other reliable organizations.

Appendix

AFL-CIO

Statement on Debt Adjustment Business

The debt adjustment or debt pooling business involves a procedure whereby an adjuster, without putting up any money of his own, takes regular deposits from a debtor with the understanding that he will contact the debtor's creditors and try to work out an arrangement with them for paying his bills. The type of arrangement has proven, in many cases, to be an abusive scheme whereby the debtor has been deceived and overcharged and his funds subjected to misappropriation.

The debt adjuster has frequently imposed a heavy economic burden on the already overloaded debtor by charging fees of 25 per cent or more, and frequently the debtor receives no effective relief because his property is seized or his salary attached notwithstanding his announced plan to pro-rate his income among his creditors.

However, even the best intentioned and most extensively regulated pro-rater is not in a position to render effective relief without the consent of the creditors.

Moreover, budget planning, advice and guidance is available through the consumer counselling program of the AFL-CIO Community Service Activities and other non-profit agencies and, in addition, overburdened debtors may obtain loans to consolidate debts through credit unions, small loan companies and other credit agencies together with free budget counselling and advice.

The AFL-CIO, therefore, is of the view that the debt adjustment business, regulated or unregulated, is not economically or socially desirable as a commercial activity and should be eliminated.

Approved AFL-CIO Executive Council
Bal Harbor, Fla.
February 21, 1961

Certificate of Service

I, Wilkie Bushby, one of the attorneys for National Better Business Bureau, Inc., as *amicus curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of January 1963 I served copies of the foregoing motion for leave to file the brief attached thereto for the *amicus curiae,* pursuant to Rule 33 of the Revised Rules of the Supreme Court, by causing copies thereof to be deposited in the United States Post Office, with airmail postage prepaid, addressed to appellant, William M. Ferguson, Attorney General for the State of Kansas, at Topeka, Kansas, to appellant Keith Sanborn, County Attorney for the County of Sedgwick, State of Kansas, at the Courthouse, Wichita, Kansas and to counsel of record for the appellee, Lawrence Weigand, c/o Weigand, Curfman, Brainerd, Harris and Kaufman, 830 First National Bank Building, Wichita 2, Kansas.