

1998

Collection Agencies and the Unauthorized Practice of Law: The Divorce of Function from Form in *Alco Collections, Inc. v. Poirier*, 680 So. 2d 735 (La. Ct. App. 1996)

Kathryn D. Folts

University of Nebraska College of Law

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Kathryn D. Folts, *Collection Agencies and the Unauthorized Practice of Law: The Divorce of Function from Form in Alco Collections, Inc. v. Poirier*, 680 So. 2d 735 (La. Ct. App. 1996), 77 Neb. L. Rev. (1998)
Available at: <https://digitalcommons.unl.edu/nlr/vol77/iss2/6>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Collection Agencies and the Unauthorized Practice of Law: The Divorce of Function from Form in *Alco Collections, Inc. v. Poirier*, 680 So. 2d 735 (La. Ct. App. 1996)

TABLE OF CONTENTS

I. Introduction	365
A. An Historical Overview	365
B. Justifications for Rules Against the Unauthorized Practice of Law	368
II. Background	372
A. The Assignment Theory in UPL Cases	374
B. The Agency Theory in UPL Cases	379
III. Analysis	381
A. The Marriage of Logic and Function in <i>DeBenedictis v. Hagen</i>	382
B. Trustees and Assignees for Collection: Unlikely Bedfellows?	386
C. Form Following Function: Collection Agencies and the Unauthorized Practice of Law in Nebraska	388
IV. Conclusion	394

I. INTRODUCTION

A. An Historical Overview

As the American legal system has developed, the courts, attorneys, and bar associations have worked vigorously to demarcate the practice of law,¹ to limit the practice of law to those with the requisite qualifications,² and to penalize the unauthorized practice of law (UPL) by

Copyright held by the NEBRASKA LAW REVIEW.

1. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 181-87, 191-97.
2. See *id.* at 168-69.

those who lack the necessary education and training.³ The first legislation restricting the practice of law was enacted in the 1640s and was meant to regulate the activities of all "attorneys" who had not been trained as barristers in England, which, practically speaking, applied to nearly all of the early practitioners.⁴ The first real campaign against UPL was launched in the mid-eighteenth century by the members of fledgling bar associations⁵ "seeking to disassociate [themselves] from the untrained practitioners with whom they had previously shared both the practice of law and the title 'attorney.' . . ."⁶ In an attempt to suppress the activities of untrained practitioners, the bar associations established standards governing an attorney's education and training as well as requirements for admission to practice in the courts.⁷

In the century following the Revolutionary War, most of the efforts to regulate the practice of law were abandoned. The legal profession experienced a decentralization and deprofessionalization which reopened the courts to scores of untrained laymen.⁸ The pendulum, however, continued to swing. Around 1870, the bar associations reemerged with greater organization and influence than ever before and gradually reestablished control over the admission to law practice.⁹ Although one of their goals was to lessen perceived "overcrowd-

3. See *id.* at 187.

4. See *id.* at 163; see also JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 251 (1950). Indeed, these early attorneys had no formal legal training but often worked in and around the courts in other capacities, usually as bailiffs, deputies, clerks, or justices. See CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 5 (1911); see also Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 3-6 (1981). Their interest in other people's litigation appears to have been derived primarily from the court fees they could collect. See HURST, *supra*, at 5. Thus, the first UPL laws sought to prevent the stirring up of litigation, the charging of excessive fees, and injuries caused by attorneys' incompetence, including injury to clients' causes and interference with the courts. See Christensen, *supra* note 1, at 162-63.

5. Although bar associations appeared on the scene in the mid-1700s, they experienced a decline in both status and power in the years following the Revolutionary War. See Christensen, *supra* note 1, at 169; see also HURST, *supra* note 4, at 285-86 (noting that, in the first two generations after the war, most local bar associations disappeared or became merely social in nature).

6. Christensen, *supra* note 1, at 166.

7. See *id.* at 168.

8. See *id.* at 169-75. Interestingly, one legal historian suggests that the impetus behind that era's hostility towards lawyers was the fact that "[t]he chief law business . . . was the collection of debts and the enforcement of contracts; and the jails were filled to overflowing with men imprisoned for debt under the rigorous laws of the times." WARREN, *supra* note 4, at 214.

9. See Christensen, *supra* note 1, at 175-77; see also HURST, *supra* note 4, at 276-77.

ing at the bar,”¹⁰ competition from within was not the only catalyst for their efforts.

Beginning in the mid- to late-1800s, competition for “law business”¹¹ by nonlawyers triggered¹² what one scholar has called “the modern unauthorized practice movement.”¹³ The primary source of lay competition and, therefore, the primary source of concern, was not the individual nonlawyer but the business corporation.¹⁴ Indeed, “the business corporation posed a threat to lawyers both because corporate business tended to develop legal needs that lawyers seemed not yet able to meet, and because corporations had, or could develop, the capacity to compete effectively with lawyers in providing traditional kinds of legal services.”¹⁵ It is no coincidence, then, that the first significant wave of legislation and litigation against UPL closely followed the rise of the corporation.¹⁶ While the bar associations were unsuccessful in entirely preventing lay competitors from engaging in law business, the spread of broadly-drafted UPL legislation ensured that the activities of nonlawyers would be strictly restrained and regulated.¹⁷

A body of statutory and common law prohibiting UPL developed during the mid-eighteenth and early-nineteenth centuries to pave the way for the explosion of litigation which occurred from 1920 to 1960.¹⁸ Beginning in 1920, bar associations intensified their efforts against unlicensed practitioners, this time targeting business corporations. They opposed the corporate “menaces” through the combined strength of four hundred standing committees on UPL, which were actively in-

-
10. Christensen, *supra* note 1, at 177. *But see* HURST, *supra* note 4, at 314-19 (citing a report which suggested that “there was nothing more than opinion to support the belief that the bar was ‘overcrowded’”).
 11. “Law business” included activities such as conducting real estate transactions, searching titles, collecting debts, creating and overseeing trusts and estates, drafting of wills, giving tax advice, and adjusting property damage claims. *See* HURST, *supra* note 4, at 319-20; CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 825 (1986).
 12. *See* Christensen, *supra* note 1, at 177; *see also* HURST, *supra* note 4, at 319 (noting that “[c]ompetition from outside the profession began to figure as a material element in the economic situation of the bar in the 1880’s”).
 13. Christensen, *supra* note 1, at 175.
 14. *See id.* at 187. *See generally* HURST, *supra* note 4, at 319-20 (identifying businesses with specialized knowledge as the lay competitors for law business).
 15. Christensen, *supra* note 1, at 178.
 16. Scholars disagree about what role, if any, the bar associations played during this period in either the enactment of legislation against UPL or in the suits brought against nonlawyers. *Compare* HURST, *supra* note 4, at 320-22, *with* Christensen, *supra* note 1, at 179-86.
 17. *See* Christensen, *supra* note 1, at 180-81.
 18. *See id.* at 189-97.

volved in local campaigns to encourage attorneys to aid in the unauthorized practice battle.¹⁹

B. Justifications for Rules Against the Unauthorized Practice of Law

As the body of law against UPL emerged and evolved, proponents of the regulations offered four primary justifications for rules against UPL: protecting clients and the public from harm, preventing harm to the legal system, providing a framework for regulating attorneys, and maintaining control over the legal system.²⁰

Protecting clients from harm involves two areas of concern. First, UPL rules are meant to prevent clients from being harmed by the incompetence of untrained practitioners. One who has not been admitted to practice law is generally regarded as more likely to cause harm when he attempts to represent another person or to aid him in legal matters than one who has received formal education and training in the law.²¹ The second area of concern is one that many courts cite, particularly in the context of collection agency activities. Proponents of UPL rules argue that clients are more likely to suffer harm when licensed attorneys perform legal services for a business corporation

-
19. See *id.* at 189; see also Rhode, *supra* note 4, at 7-9 (pointing to the Great Depression as the primary trigger for the intensified efforts). One writer actually cast the efforts in the discourse of war:

The legal profession finally awakened from its lethargy when the problem [of UPL] became too acute to be longer ignored. The lawyer became aware of the fact that he was no longer faced with isolated cases of lay encroachment, but that his field had been invaded by well organized corporations and lay agencies which, if they were not curbed, would soon destroy his profession. As a result of this awakening[,] the Bar associations of practically every state and community have united in an aggressive campaign to stamp out the evil of unauthorized practice of the law.

Russell M. Struthers, Note, *Unauthorized Practice of Law*, 15 NEB. LAW BULLETIN 164, 164 (1936)(footnote omitted).

20. See WOLFRAM, *supra* note 11, at 828-34 (calling proponents' desire to maintain control over the legal system a desire to enhance the economic position of lawyers); see also Christensen, *supra* note 1, at 187-89 (identifying the same justifications but noting that lawyers' self-interest was an unabashed justification until the early 20th century).
21. See WOLFRAM, *supra* note 11, at 829-30. Wolfram suggests that concerns about incompetence are overstated. He raises the question of the difference in levels of competence among attorneys themselves or between a recent law school graduate conducting his first real estate transaction and an experienced lay real estate agent with years of experience. He states: "The proposition that the client is better off paying the lawyer than the agent is hardly obvious at an intuitive level." *Id.* at 829.

Other scholars agree, expressing doubt about the extent of actual injury to the public. See Rhode, *supra* note 4, at 33-34 (reporting that, in 1979, out of 1,188 injuries, investigations, and complaints reported by officials of the various bars, only 2% of the complaints came from clients who had been injured); Christensen, *supra* note 1, at 203.

because the attorney's loyalties are divided between the client and the corporation, and the corporation controls the attorney's professional judgment.²² For example, numerous courts have found that when an attorney is retained by a collection agency, the true client is not the collection agency but the creditor. Consequently, if conflicts of interest arise between the creditor and the collection agency, the attorney's loyalties will be impermissibly divided between the true client—the creditor—and the collection agency that pays his fee.²³

The attorney-client relationship . . . cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant.²⁴

In this kind of situation, the collection agency is regarded as an intermediary which has placed itself between the attorney and the creditor and, by that act, has committed two wrongs. First, it "absorb[s] and destroy[s] the relation of direct personal confidences and responsibility which ought to exist between attorney and client."²⁵ Second, the collection agency holds itself out as providing legal services to the clients and makes a profit on the attorney's services.²⁶

The second main justification for rules against UPL is that they protect the legal system itself from the incompetence and unregulated conduct of laymen. "It is thought that nonlawyers, because they are ignorant of law and unskilled in legal matters, would clog the courts with unfounded claims and defenses; . . . create litigation and confusion with ineffective deeds, wills, and other legal instruments; and generally throw the legal system into chaos."²⁷

The third justification for rules against UPL arises out of the desire to protect the legal system. In order to protect the legal system, a framework for regulating attorney conduct must exist. In most states, attorneys are required to comply with certain ethical and practical

22. See Christensen, *supra* note 1, at 188-89; see, e.g., *Nelson v. Smith*, 154 P.2d 634, 641-42 (Utah 1944) (stating that an attorney should hold his client's best interest over all other considerations except his duty as an officer of the court, but where a collection agency hires an attorney, his interests are divided between the collection agency and the creditor, who is his true client); *State ex rel. State Bar v. Bonded Collections, Inc.*, 154 N.W.2d 250, 256 (Wis. 1967) (noting that, where the collection agency directs the services of a lawyer, the duty and allegiance of the lawyer is diverted from the true client).

23. See, e.g., *Nelson v. Smith*, 154 P.2d 634, 641-42 (Utah 1944); *State ex rel. Frieson v. Isner*, 285 S.E.2d 641, 653-54 (W. Va. 1981); *State ex rel. State Bar v. Bonded Collections, Inc.*, 154 N.W.2d 250, 256 (Wis. 1967).

24. Christensen, *supra* note 1, at 189 (quoting *In re Co-operative Law Co.*, 92 N.E. 15, 16 (N.Y. 1910)).

25. *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n*, 189 S.E. 153, 159 (Va. 1937).

26. See *J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 597 (D.C. 1973); *Bump v. Barnett*, 16 N.W.2d 579, 583 (Iowa 1944); *Nelson v. Smith*, 154 P.2d 634, 641-42 (Utah 1944).

27. WOLFRAM, *supra* note 11, at 833.

rules of conduct, usually established and enforced by the state bar association or the courts. If nonlawyers have not been admitted to the bar or admitted to practice in the courts, they are subject neither to the regulations and restrictions which govern attorney conduct, nor to discipline by the courts.²⁸ Without UPL rules, then, there is no way to control nonlawyer conduct because there is no incentive to abide by the rules governing licensed attorneys.²⁹

The final justification for rules against UPL is that these rules protect the profession from unrestrained competition.³⁰ Of course, this reason is rarely articulated by either attorneys or the courts, except to deny that it exists. One court rejected the implication that either the legal profession or the courts were motivated by self-interest in enforcing UPL rules. In its interpretation of the plaintiff's original petition, which claimed that the suit was "on behalf of plaintiffs as practicing attorneys and of others similarly situated,"³¹ the court found that

[t]he allegation, properly interpreted is proper. It does not mean that the purpose is to protect lawyers from unwanted competition. It refers rather to the duty, as well as the right, of attorneys to preserve the integrity of their profession, in the interest not merely of its members but of the public generally, against assaults from without as well as from unfaithfulness within. The performance of this duty is frequently made especially difficult because the motives back of such performances are so easily misunderstood or misrepresented.³²

History suggests, however, that attorneys' private interests were openly acknowledged during the emergence of the bars. This forthrightness, however, began to disappear around the turn of the century.³³ That these private interests were at work—at least unconsciously—can be seen in the widespread use of "Statements of Principles" between the 1920s and the 1960s.³⁴ These statements were agreements between bar associations and representatives of various professions (usually those which presented a competitive threat³⁵), identifying activities which the parties "agreed" constituted the practice of law.³⁶ Courts used these agreements in their opinions to help them define precedentially the practice of law in a particular

28. *See id.*

29. *But see State ex rel. Wright v. Barlow*, 131 Neb. 294, 300, 268 N.W. 95, 98-99 (1936) (holding that the supreme court has the inherent power to use its contempt power to punish any person who practices law without a license).

30. *See WOLFRAM, supra* note 11, at 833-34.

31. *Bump v. Barnett*, 16 N.W.2d 579, 584 (Iowa 1944).

32. *Id.*

33. *See Christensen, supra* note 1, at 187.

34. *See id.* at 195-96; *WOLFRAM, supra* note 11, at 826.

35. For example, collection agencies, trust companies, insurance companies, real estate brokerages, and title companies all signed Statements of Principles. *See Christensen, supra* note 1, at 195-96.

36. *See id.*; *see also WOLFRAM, supra* note 11, at 826.

jurisdiction.³⁷ Then, in the late 1970s, bar associations began voluntarily rescinding their Statements of Principles under the threat of antitrust charges.³⁸

Whether any of these justifications can be taken at face value is uncertain. One thing is sure: the actual motives behind UPL rules will always be subject to questioning in light of the fact that the rules have always been "defined, articulated, promulgated, and enforced . . . by the legal profession" even though they have been asserted to be in the public interest.³⁹

During the height of unauthorized practice litigation from 1920 to 1960, a number of state bar associations brought suit against collection agencies.⁴⁰ Whether these suits were motivated by anti-competitive fervor,⁴¹ by an altruistic desire to protect the public from unscrupulous collection practices,⁴² 15 U.S.C. § 1692⁴³ or by a combination of both will probably never be known. It is clear, however, that although the bar associations' organized campaigns against UPL have ended,⁴⁴ collection agencies continue to face charges that they are en-

37. See Christensen, *supra* note 1, at 196; see also *J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 598 (D.C. 1973) (citing at length the Statement of Principles applicable to collection agencies in support of its reasoning in the case).

38. See Christensen, *supra* note 1, at 200; WOLFRAM, *supra* note 11, at 826.

39. Christensen, *supra* note 1, at 201.

40. See *id.* at 192-93; see also *Bay County Bar Ass'n v. Finance Sys., Inc.*, 76 N.W.2d 23 (Mich. 1956); *Bump v. Barnett*, 16 N.W.2d 579 (Iowa 1944); *Nelson v. Smith*, 154 P.2d 634 (Utah 1944); *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n*, 189 S.E. 153 (Va. 1937); *Washington State Bar Ass'n v. Merchants' Rating & Adjusting Co.*, 49 P.2d 26 (Wash. 1935).

41. See WOLFRAM, *supra* note 11, at 825. See generally HURST, *supra* note 4, at 319-20 (noting the substantial growth in the business of debt collection).

42. The excesses of some collectors have been well-documented in numerous cases which have come before the courts. One court characterized their methods as designed to terrorize the individual . . . and to present to him as a monster of retribution the law, the courts of justice, and various and sundry processes, some legal and judicial, and some extrajudicial, and unknown to the law, and all claimed by [debt collectors] to be subservient to [them] in carrying out their threats.

Bump v. Barnett, 16 N.W.2d 579, 584 (Iowa 1944); see also *Housh v. Peth*, 135 N.E.2d 440 (Ohio Ct. App. 1955) (holding that collection agent was liable for invasion of right of privacy where he deliberately and maliciously harassed a teacher by calling her numerous times every day for three weeks, sometimes late at night, by calling her superiors and informing them of the debt, and by calling the teacher away from her classroom three times within fifteen minutes). The abuses of some debt collectors and collection agencies during this century, particularly in the years following the Great Depression, ultimately led to the Congressional enactment of the Fair Debt Collection Practices Act

43. Fair Debt Collection Practices Act (FDCPA) in 1977. 15 U.S.C. § 1692 (1994).

44. The bars' campaigns against UPL came to an end under the threat of antitrust suits by the Justice Department for "conspiracy to monopolize and restrain trade." WOLFRAM, *supra* note 11, at 827 & n.22.

gaged in UPL, particularly when their collection efforts include suing on assigned debts.

*Alco Collections, Inc. v. Poirier*⁴⁵ confronted the question of whether a collection agency which sues on assigned debts in its own name is engaged in UPL. In answering this question, the court employed a traditional method of analysis, which this Note will discuss at length. Not surprisingly, the *Poirier* court reached the equally traditional conclusion that, because the collection agency was not the real party in interest, it was representing the interests of another in court and was thereby engaged in UPL.⁴⁶

This Note first discusses the facts of *Poirier* and identifies and explores the traditional theories used to analyze the issues in UPL cases involving collection agencies. Next, the Note analyzes the functional approach used in non-UPL cases involving collection agencies and their creditor-clients, explaining why this method is preferable to the traditional UPL theories and why it should be applied in noncreditor cases. The Note then analogizes the relationship between a collection agency and creditor to the relationship between a trustee and the beneficiary of a trust. Finally, this Note explores the current state of UPL law in Nebraska as it applies to collection agencies and recommends that the Nebraska Supreme Court employ the functional approach when called on to decide this issue.

II. BACKGROUND

Alco Collections, Inc. v. Poirier (*Poirier I*)⁴⁷ began as an action brought by a licensed collection agency (Alco) and its president (Allen) to recover a debt allegedly owed by Poirier to her former landlord (Savoy Apartments). The federal companion case was *Poirier v. Alco Collections, Inc.*, (*Poirier II*)⁴⁸ in which Poirier sued Alco and Allen pursuant to the Fair Debt Collection Practices Act (FDCPA).⁴⁹ Only one section, 15 U.S.C. § 1692e(5), is relevant to this discussion.⁵⁰ The decision in *Poirier II*⁵¹ relied upon the court's holding in *Poirier I*⁵² that Alco and Allen were engaged in UPL.

45. 680 So. 2d 735 (La. Ct. App. 1996).

46. *See id.* at 744.

47. 680 So. 2d 735 (La. Ct. App. 1996).

48. 107 F.3d 347 (5th Cir. 1997).

49. Poirier alleged that Alco had violated two sections of the FDCPA.

50. Section 1692e prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e (1994). Poirier claimed that Alco violated § 1692e(5) when it "threat[ened] to take any action that cannot legally be taken." *Id.* at § 1692e(5). If a debt collector fails to comply with any provision of the FDCPA, it is liable to the affected person for civil damages. *See id.* at § 1692k(a).

51. 107 F.3d 347, 350 (5th Cir. 1997).

52. 680 So. 2d 735, 744 (La. Ct. App. 1996).

In 1993, Poirier allegedly defaulted on her lease, owing Savoy Apartments three months back rent and late fees.⁵³ Savoy Apartments assigned Poirier's debt to Alco on February 8, 1994.⁵⁴ Nine days later, Alco, which was represented only by Allen and not by an attorney, filed suit in the small claims division⁵⁵ of the Baton Rouge City Court.⁵⁶ Poirier answered, alleging, *inter alia*, that the assignment to Alco was invalid and that Alco's suit on the assigned claim constituted UPL under Louisiana law.⁵⁷ Poirier also requested a transfer from the small claims division to the regular city court docket.⁵⁸ Upon transfer, Alco retained a licensed attorney to represent it in the action.⁵⁹

Following discovery, Poirier filed a peremptory exception of no cause of action.⁶⁰ She argued that, because the assignment authorized Alco to take action which constituted UPL, it was null; therefore, Alco lacked the interest necessary to enforce its claim.⁶¹ On November 21, 1995, the trial judge denied Poirier's exception, and Poirier appealed the decision to the Louisiana Appellate Court. The question on appeal was whether the trial court erred in allowing a collection agency to sue in its own name on debts assigned to it on a contingency fee basis.⁶²

The appellate court reversed the trial court's decision to allow the suit, holding that a collection agency that sues on an assigned debt in

53. *See id.* at 737.

54. *See id.* The court cited the relevant portion of the assignment as follows:
SAVOY PLAZA APARTMENTS, (hereinafter "Client"), hereby assigns unto Alco Collections, Inc. (hereinafter "Alco"), the following debt, presently owed to Client: DIXIE V. POIRIER #264 [sic].

As consideration for the above assignment, ALCO hereby agrees to make a good faith effort to collect this debt, including the filing of suit in the appropriate court of law in order to enforce that debt, and remit to client 50.00% of all sums collected through suit or otherwise on said debt.

Id. at 737-38.

55. Louisiana state law allows plaintiffs to bring actions pro se in its small claims division. *See* LA. REV. STAT. ANN. § 13:5200 (West 1942).

56. *See* Alco Collections, Inc. v. Poirier, 680 So. 2d 735, 738 (La. Ct. App. 1996).

57. *See* LA. REV. STAT. ANN. § 37:212 A and C (West 1942).

58. *See* Alco Collections, Inc. v. Poirier, 680 So. 2d 735, 738 (La. Ct. App. 1996).

59. *See id.*

60. *See* LA. CODE CIV. PROC. ANN. art. 927(5) (West 1984). This procedure "tests whether the plaintiff has any interest in judicially enforcing the right asserted." Alco Collections, Inc. v. Poirier, 680 So. 2d 735, 738 (La. Ct. App. 1996).

61. *See* Alco Collections, Inc. v. Poirier, 680 So. 2d 735, 738 (La. Ct. App. 1996).

62. *See id.* The court in *Poirier I* did not reach the question of whether Alco's actions would have been legal if it had been represented by an attorney from the outset. The court did not reach this question presumably because Alco was not represented by counsel when the action was first brought or when Poirier answered, alleging the UPL violation. Alco retained an attorney only after Poirier successfully removed the action from the small claims division to the regular docket of the Baton Rouge City Court.

its own name is engaged in UPL.⁶³ The court based its holding upon the effect of the assignment from Savoy Apartments to Alco.⁶⁴ This assignment theory centers upon an analysis of who constitutes the real party in interest in the suit: the collection agency or the creditor. A number of other jurisdictions which have addressed UPL issues have also used the assignment theory as the primary vehicle for their reasoning. The results in these cases demonstrate a clear split of opinion. Some courts hold that the collection agency is the real party in interest and may therefore sue in its own name on the assignment; others hold that, although the collection agency is the real party in interest, the assignment is merely a subterfuge for an illegal purpose⁶⁵ and is therefore void.

A. The Assignment Theory in UPL Cases

Those courts upholding a collection agency's right to sue in its own name generally rely upon either case law or a state statute that authorizes an assignee to maintain a suit in its own name as the real party in interest.⁶⁶ In *Cohn v. Thompson*,⁶⁷ the defendant debtor claimed that, although the collection agency had employed an attorney, it was nonetheless engaged in UPL. The defendant claimed that the collection agency was not the real party in interest because it had not purchased the claims; therefore, when it sued in its own name, it was actually representing someone else's interests, which it could not do because it was not a licensed attorney.⁶⁸ The defendant also claimed that the collection agency was trying to sell legal services for profit.⁶⁹

63. *See id.* at 744. The court did not reach the question of whether the presence of a licensed attorney would have cured the UPL defect. Its particular holding, however, suggests that attorney representation would have made no difference: Alco simply did not have the right to bring suit in its own name. *See id.* at 745. A defect of party is not likely to be cured by the addition of an attorney.

64. *See id.* at 739-41.

65. The illegal purpose is authorizing a person or entity not licensed as an attorney to represent the interests of the creditor in court. Although most of these courts do not state this proposition directly, it is implied in their reasoning and their conclusions. *Nelson v. Smith*, 154 P.2d 634, 639-40 (Utah 1944), is one of the few courts to spell out the argument.

66. *See Cruz v. Lusk Collection Agency*, 580 P.2d 1210, 1212-13 (Ariz. Ct. App. 1978); *Smith v. Nat'l Cashflow Sys., Inc.*, 827 S.W.2d 146, 147-48 (Ark. 1992); *LeDoux v. Credit Research Corp.*, 125 Cal. Rptr. 166, 168 (Cal. Ct. App. 1975); *Cohn v. Thompson*, 16 P.2d 364, 365 (Cal. App. Dep't Super. Ct. 1932); *Thibodeaux v. Creditors Servs., Inc.*, 551 P.2d 714, 715-16 (Colo. 1976); *Washington State Bar Ass'n v. Merchants' Rating & Adjusting Co.*, 49 P.2d 26, 28 (Wash. 1935); *DeBenedictis v. Hagen*, 890 P.2d 529, 532 (Wash. Ct. App. 1995).

67. 16 P.2d 364 (Cal. App. Dep't Super. Ct. 1932).

68. *See id.* at 365.

69. *See id.* The selling of legal services has been held in other cases to be a violation of the rules against UPL. *See Nelson v. Smith*, 154 P.2d 634, 639-40 (Utah 1944). Reading between the lines in *Cohn* suggests that the same would be true in Cali-

The court's first step in analyzing the issue was to cite the general rule provided in California's real party in interest statute: "[W]hoever holds the legal title to a demand is the real party in interest, and may sue thereon in his own name."⁷⁰ The court then observed that the effect of the assignment is to vest legal title in the assignee, and that legal title is "sufficient to enable [the assignee] to recover, although the assignor retains an equitable interest in the thing assigned."⁷¹ Next, the court turned to the collection agreement⁷² between the creditor and collection agency. Based upon its interpretation, the court found that the collection agency had not agreed to furnish legal services to the creditor but had

merely agree[d] to do that which [it] can legally do without any agreement, by virtue of the assignment. Provided the assignment is absolute, so as to vest the apparent legal title in the assignee, the latter is entitled to sue in [its] own name, whatever collateral arrangements have been made between [it] and the assignor respecting the proceeds.⁷³

Under the analysis of the *Cohn* court, the inquiry ends once it is found that the assignment vests legal title in the assignee.⁷⁴ From that point, the result follows logically: when the collection agency holds legal title, it is the real party in interest.⁷⁵ Therefore, it may hire an attorney to represent its interests in court, and it may maintain an action in its own name because it is acting to enforce its own interest and not the interest of another. Thus, the collection agency is not engaged in UPL.⁷⁶

fornia. See *Cohn v. Thompson*, 16 P.2d 364, 365 (Cal. App. Dep't Super. Ct. 1932)(being careful to explain that the collection agency was not furnishing legal services, nor had it agreed to).

70. *Cohn v. Thompson*, 16 P.2d 364, 365 (Cal. App. Dep't. Super. Ct. 1932).

71. *Id.*

72. The court cited the relevant portions of the agreement as found by the trial court:

[I]t was contracted and agreed by and between the said plaintiff, [an individual doing business as the California Claim Service], and the [creditor], in consideration of said assignment, that the plaintiff would endeavor to collect the account described in the complaint from the defendant at plaintiff's expense, if possible . . . , but in the event that the said account could not be collected from the defendant without suit, then in that event, plaintiff would sue in his (plaintiff's) own name, and hire an attorney at his own expense to bring said suit and prosecute same to judgment, and if successful, and a collection was made, plaintiff was to deduct the costs and a certain percentage of the account collected from the amount collected for his services, and then remit the balance due to plaintiff's assignors

Id. at 364.

73. *Id.* at 365. The *Cohn* court noted specifically that, where an assignment is made for the purpose of collection, it is not necessary that the assignee pay any consideration in order for the legal title to vest in the assignee. See *id.*

74. See *id.* at 365-66.

75. See *id.* at 365.

76. Other jurisdictions have followed the *Cohn* analysis. See *Cruz v. Lusk Collection Agency*, 580 P.2d 1210, 1212-13 (Ariz. Ct. App. 1978); *Smith v. National Cashflow*

The *Poirier I* court analyzed the assignment differently. Its approach is fairly uncommon even among other jurisdictions finding against collection agencies. The difference arises from common and statutory law unique to the particular jurisdiction. In Louisiana, an assignment is a type of sale which requires a fixed price to be valid.⁷⁷ The assignment from Savoy Apartments to Alco did not recite a fixed monetary consideration; instead, the court noted, "it appears that the payment of consideration was contingent upon the success of Alco's collection efforts."⁷⁸ Without a valid sale, the assignment was insufficient to transfer the complete ownership necessary to make Alco the real party in interest.⁷⁹ Consequently, when Alco sued in its own name on the assigned debt, it acted in a representative capacity to enforce the interests of the creditor, an act which the court characterized as providing legal services.⁸⁰ Since Alco was not a licensed attorney, the court held that it was engaged in UPL.⁸¹

A similar approach was used in *Bump v. Barnett*.⁸² The court held that where one makes a business of collecting and suing on assigned claims, the claims must be purchased in order for the assignment to transfer ownership to the assignee.⁸³ Then, the assignee can be regarded as litigating his own case in court.⁸⁴ Where the claims are not purchased, however, the assignee is not "dealing in property on his own account, . . . [rather], he is selling [legal] service and merely adopting the guise of an investor to conceal the real nature of his operations."⁸⁵ The court then distinguished the "business" of suing on claims for the purpose of collection⁸⁶ from the general right of an as-

Sys., Inc., 827 S.W.2d 146, 147-48 (Ark. 1992); *LeDoux v. Credit Research Corp.*, 125 Cal. Rptr. 166, 168-69 (Cal. Ct. App. 1975); *Thibodeaux v. Creditors Serv., Inc.*, 551 P.2d 714, 715-16 (Colo. 1976); *Washington State Bar Ass'n v. Merchants' Rating & Adjusting Co.*, 49 P.2d 26, 28 (Wash. 1935); *DeBenedictis v. Hagen*, 890 P.2d 529, 532 (Wash. Ct. App. 1995); cf. *Messmer v. Carter*, 578 P.2d 788, 789 (Or. 1978) (implying a real party in interest analysis by upholding a collection agency statute which provided that "[a] collection agency shall have a property right in any account assigned to it for billing and collection").

77. See *Alco Collections, Inc. v. Poirier*, 680 So. 2d 735, 739 (La. Ct. App. 1996).

78. *Id.* at 741.

79. See *id.*

80. See *id.* at 743.

81. See *id.* at 744; see also LA. REV. STAT. ANN. §§ 37:212 A (defining the practice of law) and 37:213 (prohibiting the practice of law by corporations and unlicensed natural persons) (West 1984).

82. 16 N.W.2d 579 (Iowa 1944). Citations to *Barnett* appear frequently in decisions holding against collection agencies, even though most of them do not actually follow the approach used in the case.

83. See *id.* at 582.

84. See *id.*

85. *Id.*

86. See *id.* at 583 for a discussion of what constitutes a "business." In addition, the fact that the court objects only to the business of collection is suggestive of the private interest motive discussed in Part I of this Note.

signee to obtain assignments for the procedural convenience of a group of creditors. Citing *Carson Pirie Scott & Co. v. Long*,⁸⁷ the court explained:

Take first the right of assignment and of the assignee to bring action in his own name on the assigned chose. The Carson, Pirie Scott [sic] case fairly illustrates an exercise of these rights. It did not involve in any way a practice by plaintiff of soliciting claims for litigation or collection, of holding itself out as able to repossess property, or of contracting for the conduct of litigation. Plaintiff in that case was one of several creditors of the defendant. The claims of the others were assigned to plaintiff so all could be sued on in one action.⁸⁸

So long as the assignee is not engaged in the business of obtaining assignments for collection, the assignments need not be purchased,⁸⁹ a conclusion which differs from that reached by the court in *Poirier I*.

The final method employed under the assignment theory is used more frequently and turns on the effect of the assignment: a separation of legal title from equitable title in the claim. Jurisdictions following this approach do not regard consideration for the assignment as an issue.⁹⁰ The only issue to be determined is whose interests are actually being asserted in the suit. In *State ex rel. State Bar v. Bonded Collections, Inc.*,⁹¹ the Wisconsin Supreme Court found that

87. 268 N.W. 518 (Iowa 1936).

88. *Bump v. Barnett*, 16 N.W.2d 579, 582 (Iowa 1944).

89. *See id.* at 582-83.

90. Of the jurisdictions finding against collection agencies, most of them clearly state that valuable consideration (purchase) for the assignment is not necessary. Some indicate that partial consideration or contingent consideration in the form of a promise is sufficient to transfer interest in the debt. *See, e.g., J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 595 (D.C. 1973)(finding that the assignment was valid even though the collection agency purported to have acquired only a contingent one-third interest in the claim by virtue of its promise to "effect collection . . . and/or to file suit"); *State ex rel. State Bar v. Bonded Collections, Inc.*, 154 N.W.2d 250, 255 (Wis. 1967)(finding that an assignee is the real party in interest even if it only receives part of the proceeds and is to account to the assignor for the residue, or if the absolute transfer is made conditional upon recovery).

Others cite the general rule that an assignee may sue in its own name to recover a debt even though the assignment was made solely for the purpose of collecting the debt. *See, e.g., State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 514 P.2d 40, 45 (N.M. 1973)(citing the proposition that an assignee is the real party in interest even though the assignment is only for the purposes of suit); *State ex rel. Frieson v. Isner*, 285 S.E.2d 641, 651 (W. Va. 1981)(finding that a debtor cannot defend an action brought by an assignee on the ground that the assignment was made solely for the purpose of collecting a debt). Although these courts do not directly address the question of consideration, the implication is that, if there has been any consideration beyond a promise to collect the debt, such consideration is merely nominal.

Finally, at least one court has held that an assignee may sue in its own name, regardless of consideration for the assignment. *See Bay County Bar Ass'n v. Finance Sys., Inc.*, 76 N.W.2d 23 (Mich. 1956).

91. 154 N.W.2d 250 (Wis. 1967).

[f]or procedural purposes[,] an assignee of a claim for collection is, indeed, the real party in interest, but his interest is a limited one. The assignment confers upon him only a naked legal title, but the beneficial or equitable interest remains in the assignor. Thus, the beneficial owner of the chose in action is not the collection agency but the creditor. It is most inappropriate for the defendants to gain procedural standing to sue by complying with . . . what is somewhat inappropriately in this context known as the real-party-in-interest statute and then assert that because the assignee is the real party in interest in the procedural sense[,] it stands in all respects in the shoes of the creditor. This is not the fact.⁹²

Rather, the creditor remains the beneficial owner because it retains the entire interest in the proceeds of the suit, minus the collection agency's costs and fees.⁹³ The collection agency asserted that its ownership or equity interest in the debt was the amount of its fees and costs, but the court refused to entertain this argument, calling it "sheer hypocrisy."⁹⁴ The court held that, because the collection agency lacked a true interest in the debt, it was therefore conducting a suit on behalf of another, a violation of the rules against UPL.⁹⁵ Since the assignment purported to authorize this unlawful action, it was void.⁹⁶

Whether the collection agency is represented by an attorney adds little to the analysis under the assignment theory. Collection agencies acknowledge the general rule that a collection agency cannot represent itself in court because it is an entity.⁹⁷ This rule does not by itself, however, answer the question. Rather, the answer proceeds naturally under the assignment theory. In those jurisdictions where the assignment is held sufficient to make the collection agency the real party in interest, the presence of an attorney is not an issue.⁹⁸ Since the collection agency is the real party in interest, the attorney will be representing his or her client's interests in court, the situation which is normally contemplated in a complex legal system. In contrast,

92. *Id.* at 255 (citation omitted). For other jurisdictions which follow this reasoning, see *Martinez v. Albuquerque Collection Servs., Inc.*, 867 F. Supp. 1495, 1503 (D.N.M. 1994); *Kolker v. Duke City Collection Agency*, 750 F. Supp. 468, 471-72 (D.N.M. 1990); *J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 595 (D.C. 1973); *Bay County Bar Ass'n v. Fin. Sys., Inc.*, 76 N.W.2d 23, 25-26, 29 (Mich. 1956); *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 514 P.2d 40, 45-46 (N.M. 1973); *State ex rel. Frieson v. Isner*, 285 S.E.2d 641, 651-52 (W. Va. 1981).

93. See *State ex rel. State Bar v. Bonded Collections, Inc.*, 154 N.W.2d 250, 255-56 (Wis. 1967).

94. *Id.* at 256.

95. See *id.*

96. See *id.*

97. See *Nelson v. Smith*, 154 P.2d 634, 641 (Utah 1994) (citation omitted); *State ex rel. State Bar v. Bonded Collections, Inc.*, 154 N.W.2d 250, 257 (Wis. 1967) (quoting *In re Otterness*, 232 N.W. 318, 319 (Minn. 1930)).

98. Unless, of course, the collection agency has appeared pro se in violation of the general rule.

where courts find that the assignment is a mere sham,⁹⁹ they apply the agency theory discussed next in Part II.B to hold that the presence of an attorney cannot remove the taint of UPL.¹⁰⁰

B. The Agency Theory in UPL Cases

The assignment theory is not the only analytical vehicle courts have used to decide whether collection agencies are engaged in UPL. The agency theory is also a popular approach in light of the relationship between the creditor and the collection agency. If the shorthand description of the assignment theory is "who is the real party in interest," then the shorthand description of the agency theory is "who is the real party in control." Thus, the central issue to be determined under this theory is whether the collection agency or the creditor controls the attorney. The results flow from this finding.

Although the court in *Poirier I* did not examine the question from the agency perspective, some courts have used the agency theory exclusively. This approach is often used in cases where the collection agency has retained an attorney to bring suit,¹⁰¹ but the creditor has not assigned the debts to the collection agency, thereby precluding a true real-party-in-interest analysis.¹⁰² As the first step in their analysis, courts initially find that the collection agency is the agent of the creditor.¹⁰³ Most courts agree that, where authorized by the creditor, an agent has the power to select an attorney to represent the credi-

99. See, e.g., *State ex rel. Frieson v. Isner*, 285 S.E.2d 641, 651 (W. Va. 1981).

100. See *id.*

101. To avoid begging the question, no assumptions should be made regarding the party for whom the attorney is retained.

102. See, e.g., *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n*, 189 S.E. 153, 155 (Va. 1937). Such is not always the case, however. Some courts which employ the agency theory have simply ignored the fact of assignment. See *United Radio, Inc. v. Cotton*, 22 N.E.2d 532, 533 (Ohio Ct. App. 1938) (apparently ignoring the assignment altogether). Other courts appear to reject the assignment due to a lack of valuable consideration although they never actually state their reasoning. See *Divine v. Watauga Hosp., Inc.*, 137 F. Supp. 628, 630 (M.D.N.C. 1956) (observing that the contract forms were not under seal and no consideration was cited to support them).

103. See *State ex rel. Porter v. Dun & Bradstreet, Inc.*, 352 F. Supp. 1226, 1230 (N.D. Ala. 1972), *aff'd*, 472 F.2d 1049 (5th Cir. 1973); *State ex rel. McKittrick v. C.S. Dudley & Co., Inc.*, 102 S.W.2d 895, 899 (Mo. 1937); *Med Controls, Inc. v. Hopkins*, 573 N.E.2d 154, 155 (Ohio Ct. App. 1989); *United Radio v. Cotton*, 22 N.E.2d 532, 533 (Ohio Ct. App. 1938); *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n*, 189 S.E. 153, 156 (Va. 1937); *DeBenedictis v. Hagen*, 890 P.2d 529, 532 (Wash. Ct. App. 1995). See generally *In re Shoe Mfrs. Protective Ass'n, Inc.*, 3 N.E.2d 746, 747 (Mass. 1936) (implying an agency relationship in its discussion of the facts).

tor.¹⁰⁴ In order to avoid triggering the rules against UPL, however, the attorney must actually represent the principal and not the agent:

[i]t is not necessary that this employment of an attorney should be made by the client in person, but like other contracts, may be made through a duly authorized agent, and if the agent acts in accordance with his authority, the attorney will be the attorney of the client and not of the agent.¹⁰⁵

Courts determine whom the attorney represents by examining who controls the attorney's actions and the conduct of the suit. Where the creditor is in control, the collection agency is regarded merely as an agent, and no UPL violation has occurred.¹⁰⁶ Examples of permissible collection agency activities under this theory include: collection without resort to legal proceedings and without advising the creditor when to begin proceedings;¹⁰⁷ retaining an attorney at the request of the creditor;¹⁰⁸ and forwarding accounts to attorneys.¹⁰⁹ Where the collection agency controls the actions of the attorney or the course of the litigation, however, it has acted as an intermediary between the attorney and creditor, destroying the attorney-client relationship and thereby violating UPL rules.¹¹⁰

The agency analysis is not limited to nonassignment cases. It is also common in those cases where the collection agency has actually taken an assignment of the debts and sued on them in its own name.¹¹¹ In this situation, it is difficult to escape the conclusion that

104. See, e.g., *State ex rel. McKittrick v. C.S. Dudley & Co., Inc.*, 102 S.W.2d 895, 899 (Mo. 1937). This general rule may be subject to restrictions in some jurisdictions. For example, the creditor must choose which attorney it wants the agency to retain. See *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n*, 189 S.E. 153, 156 (Va. 1937) (noting that, although the creditor gave the collection agency the express authority to employ a lawyer, the creditor apparently did not even know the name of the attorney selected and engaged to represent him).

105. *State ex rel. McKittrick v. C.S. Dudley & Co., Inc.*, 102 S.W.2d 895, 899 (Mo. 1937) (citation omitted).

106. See *State ex rel. Porter v. Dun & Bradstreet, Inc.*, 352 F. Supp. 1226, 1229-30 (N.D. Ala. 1972).

107. See *State ex rel. McKittrick v. C.S. Dudley & Co., Inc.*, 102 S.W.2d 895, 899 (Mo. 1937); see also *State ex rel. Porter v. Dun & Bradstreet, Inc.*, 352 F. Supp. 1226, 1228-29 (N.D. Ala. 1972).

108. See *State ex rel. Porter v. Alabama Ass'n of Credit Executives*, 338 So. 2d 812, 815 (Ala. 1976) (citing *State ex rel. Porter v. Dun & Bradstreet, Inc.* 352 F. Supp. 1226 (N.D. Ala. 1972); *State ex rel. McKittrick v. C.S. Dudley & Co., Inc.*, 102 S.W.2d 895, 899 (Mo. 1937); see also *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n*, 189 S.E. 153, 156 (Va. 1937) (implying that the collection agency could retain an attorney with express authorization so long as the creditor specifically selected the attorney).

109. See *State ex rel. Porter v. Alabama Ass'n of Credit Executives*, 338 So. 2d 812, 816 (Ala. 1976).

110. See *State ex rel. McKittrick v. C.S. Dudley & Co., Inc.*, 102 S.W.2d 895, 900 (Mo. 1937); *Med Controls, Inc. v. Hopkins*, 573 N.E.2d 154, 155 (Ohio Ct. App. 1989); *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n*, 189 S.E. 153, 158 (Va. 1937).

111. See, e.g., *State ex rel. State Bar v. Bonded Collections, Inc.*, 154 N.W.2d 250 (Wis. 1967).

the attorney is controlled by the collection agency and not the creditor. Indeed, the collection agency's arguments become something of a catch-22 in this situation. On the one hand, the collection agency wants to argue that the assignment is valid and operates to make it the real party in interest.¹¹² To demonstrate this status, the collection agency will argue that it controls the course of the suit entirely to show that the creditor's interest in the assigned debt is minimal.¹¹³ But after the court finds against the collection agency on the assignment issue, it uses the argument the collection agency made in that context to defeat it in the agency context.¹¹⁴

In determining whether the principal-creditor or the agent-collection agency is controlling the attorney, the court reminds the collection agency of its assertion that all decisions regarding the suit lay entirely within its discretion. At this point, the conclusion that the agent rather than the principal controls the attorney is foregone. The consequence of the collection agency's control is that the attorney is found, in turn, to be its agent.¹¹⁵ Then, because the agent-attorney's acts cannot exceed the scope of his principal's acts,¹¹⁶ the defect of the principal is imputed to the agent. The court explains the defect by reciting the oft-quoted syllogism that "one cannot do through an employee or agent that which he cannot do himself."¹¹⁷ Since the collection agency cannot itself represent the creditor in court, the collection agency's attorney cannot represent the creditor in court. Thus, under this line of reasoning, a collection agency will be held to engage in UPL if it sues on assigned debts in its own name even if it is represented in court by a licensed attorney.

III. ANALYSIS

As the cases discussed above demonstrate, the law on this question varies from state to state, both in terms of result and method, and is always dependent upon the particular state's common and statutory law. Therefore, in a jurisdiction where the issue is one of first impression, a court should not be willing to merely "count cases" to reach a decision. Rather, the court should engage in a meaningful critical inquiry and analyze the transaction and relationships involved from a functional rather than formal perspective.

112. See *State ex rel. Frieson v. Isner*, 285 S.E.2d 641, 651 (W. Va. 1981).

113. See *State ex rel. State Bar v. Bonded Collections, Inc.*, 154 N.W.2d 250, 256 (Wis. 1967).

114. See *id.*

115. See, e.g., *Nelson v. Smith*, 154 P.2d 634, 640 (Utah 1944).

116. See *State ex rel. State Bar v. Bonded Collections, Inc.*, 154 N.W.2d 250, 256 (Wis. 1967).

117. *J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 597 (D.C. 1973); see also *Nelson v. Smith*, 154 P.2d 634, 640 (Utah 1944).

A functional analysis of this issue in the context of Nebraska law reveals that a collection agency which sues on assigned debts in its own name is not engaged in UPL so long as it is represented by a licensed attorney. An assignment from the creditor to the collection agency performs a dual function: first, it vests legal title in the agency and establishes it as the real party in interest for purposes of the suit; second, it operates to create a principal-agent relationship between the creditor and collection agency. Although an attorney-client relationship does not exist between the creditor and the attorney, the creditor derives ample protection from the fiduciary duties inherent in the principal-agent relationship between it and the collection agency. The presence of a licensed attorney also protects the legal system and the debtor from incompetence and unethical behavior since the attorney is subject to the court's requirements and restrictions. Thus, by virtue of the assignment and the presence of an attorney, the applicable rules against UPL are rendered functionally unnecessary.

A. The Marriage of Logic and Function in *DeBenedictis v. Hagen*¹¹⁸

The failure of *Poirier I* and its predecessors, including those courts which found in favor of collection agencies, is that the courts' analyses never proceed beyond the formalistic application of labels: a collection agency is either a real party in interest, or it is not; a collection agency is either an agent, or it is an intermediary. Certainly, the courts reasoned fairly soundly according to the labels, but the decisions remained lacking in substance from a functional perspective.¹¹⁹ The courts finding against collection agencies actually came the closest to examining why they applied particular labels, but the rationales they gave were little more than recycled truisms which gradually gained the status of "rules," the most common of which is the litany "one cannot do through an employee or agent that which he cannot do himself,"¹²⁰ or variations thereon. One court, however, has broken from the entrenched arguments discussed above¹²¹ to formulate a rule which is based upon the function of both the assignment theory and the agency theory.

In 1935, the Supreme Court of Washington held in *Washington State Bar Ass'n v. Merchants' Rating & Adjusting Co.*¹²² that collec-

118. 890 P.2d 529 (Wash. Ct. App. 1995).

119. Cf. WOLFRAM, *supra* note 11, at 835 ("The courts have often reached conclusions that a particular activity is unauthorized practice only after the most superficial examination of the activity, of precedent, and of the rationale for the doctrine.").

120. *J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 597 (D.C. 1973); *see also Nelson v. Smith*, 154 P.2d 634, 640 (Utah 1944).

121. *See supra* Parts II.A-B.

122. 49 P.2d 26 (Wash. 1935).

tion agencies could sue in their own names on debts assigned solely for the purpose of collection and not be engaged in UPL.¹²³ This holding was subject to the requirement that collection agencies retain attorneys to represent them in court.¹²⁴ Sixty years later, the hypothetical conflict of interest between the creditor and the collection agency which so concerned other courts¹²⁵ was played out in *DeBenedictis v. Hagen*.¹²⁶ although, significantly, the case did not involve the issue of UPL.

In *Hagen*, the owner of a collection agency (DeBenedictis)¹²⁷ brought an action against its creditor-client (Novak) for breach of contract based upon the assignment of a debt.¹²⁸ Novak hired DeBenedictis to collect a substantial debt owed to him by a "long-time friend" (Hagen), believing that DeBenedictis could motivate Hagen more effectively than he could.¹²⁹ On the day Novak hired DeBenedictis, he signed a form assignment at DeBenedictis's request.¹³⁰ DeBenedictis then began collection efforts which continued for approximately three weeks. When these efforts were unsuccessful, DeBenedictis informed Novak that he wanted to turn the matter over to his attorney.¹³¹ DeBenedictis testified that Novak agreed at that time but later instructed him to stop work because Hagen was going to pay Novak.¹³² Novak testified that he objected immediately when DeBenedictis mentioned giving the account to his attorney and told him to cease all work.¹³³ About three weeks later, Novak settled the debt privately with Hagen.¹³⁴ DeBenedictis argued that, when Novak assigned him the debt, the assignment effected a complete sale,

123. *See id.* at 28.

124. *See id.*

125. *See, e.g., Med Controls, Inc. v. Hopkins*, 573 N.E.2d 154, 155 (Ohio Ct. App. 1989).

126. 890 P.2d 529 (Wash. Ct. App. 1995).

127. DeBenedictis was doing business as Interstate Collection Services (ICS).

128. *See DeBenedictis v. Hagen*, 890 P.2d 529, 530 (Wash. Ct. App. 1995)(assignment from Novak to DeBenedictis).

129. *See id.*

130. The court quoted the relevant portion of the assignment as follows:

For the purpose of collection, I/WE hereby assign, transfer, set over and sell all my right, title, and interest in this claim with full authority to sue, compromise, or adjust the same and authorize reassignment. . . . Recovered monies may be applied first to advanced costs of suit, including attorneys fees, and the assignee is accountable for the obligation to the extent of the principal amount only.

Id. (footnote omitted). The court also noted that the assignment did not indicate the nature of the relationship or DeBenedictis's compensation. *See id.*

131. Among other things, the parties disagreed about whether DeBenedictis simply wanted to turn the account over to the attorney or whether Hagen told him outright that he was not going to pay the bill. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

thereby transferring Novak's entire interest to him.¹³⁵ Because Novak had no interest in the debt, he could not legally settle with Hagen.¹³⁶

The *Hagen* court first articulated a distinction which was implied by the Washington Supreme Court in 1935. In that case, the court had held that "there [is no] need for a specified consideration for the assignments. 'An assignment for the purpose of collection is an assignment for a valuable consideration.'"¹³⁷ The court in *Hagen* interpreted this statement to mean that other kinds of assignments exist:

[W]e distinguish between two kinds of assignments. On the one hand, a creditor/assignor can assign his or her claim against a debtor in such a way as to effect a complete sale of the claim. An example is the business that sells a group of accounts receivable; frequently, it will convey its entire ownership interest in exchange for a cash payment.

On the other hand, a creditor/assignor can assign his or her claim against a debtor for purposes of collection. Such an assignment transfers legal title to the claim so the assignee can sue in his or her own name. . . . [T]his leaves equitable ownership with the creditor/assignor.¹³⁸

Here, the court clearly employed the traditional assignment theory.¹³⁹ It agreed with the trial court that the assignment did not effect a sale but was intended solely for the purpose of collection, observing in particular that the only consideration from DeBenedictis was the promise to attempt to collect the debt.¹⁴⁰ The form of the consideration was not a fatal flaw, though only in light of the holding in *Merchants' Rating* that a specified consideration was not necessary in an assignment for collection.¹⁴¹

At this point, however, the court seemed to recognize the weakness in the traditional reasoning. If it held that Novak could unilaterally rescind the assignment because he still retained equitable ownership of the debt, such a holding would cut against Washington's rule that, as the holder of the legal title, DeBenedictis was the real party in interest and was entitled to sue in his own name and control the course of the litigation.¹⁴² To avoid this result, the court would be forced to hold that Novak was liable for breach of contract. But holding Novak liable for breach of contract would elevate form above substance, pro-

135. *See id.* at 531-32.

136. *See id.* at 532.

137. Washington State Bar Ass'n v. Merchants' Rating & Adjusting Co., 49 P.2d 26, 28 (Wash. 1935) (citing *McDaniel v. Pressler*, 29 P. 209, 210 (Wash. 1892)).

138. DeBenedictis v. Hagen, 890 P.2d 529, 532 (Wash. Ct. App. 1995) (citations omitted).

139. *See supra* Part II.A.

140. *See* DeBenedictis v. Hagen, 890 P.2d 529, 533 (Wash. Ct. App. 1995).

141. *See* Washington State Bar Ass'n v. Merchants' Rating & Adjusting Co., 49 P.2d 26, 28 (Wash. 1935).

142. *See id.*; accord *Cohn v. Thompson*, 16 P.2d 364, 366 (Cal. App. Dep't Super. Ct. 1932), followed by *LeDoux v. Credit Research Corp.*, 125 Cal. Rptr. 166, 168 (Cal. Ct. App. 1975).

protecting the holder of the legal title and harming the holder of the equitable title, which would seem to be a ludicrous consequence.

The court, though, had done its homework. Given the prevalence with which other courts had applied the agency theory, it is not surprising that the *Hagen* court employed agency principles in its next analytical step. Yet it did not merely resort to labeling; it articulated the rationale behind the labels. The court found that "the relationship [between assignor and an assignee for collection] generally is one of principal-agent,"¹⁴³ and that the split in ownership which resulted from the assignment created a fiduciary relationship between the assignor and assignee.¹⁴⁴ This finding of a fiduciary relationship is the functional step which nearly every court addressing UPL issues has failed to take, but it would seem to be a rather elementary one. That a fiduciary relationship exists between a principal and an agent is a generally-accepted legal principle: "An agent is a fiduciary with respect to matters within the scope of his agency."¹⁴⁵ In addition, an

143. *DeBenedictis v. Hagen*, 890 P.2d 529, 532 (Wash. Ct. App. 1995)(footnote omitted).

144. *See id.* Other jurisdictions also recognize that fiduciary duties arise from an assignment for collection. *See, e.g.,* *Cross v. Bonded Adjustment Bureau*, 55 Cal. Rptr. 2d 801, 806 (Cal. Ct. App. 1996)(finding that a fiduciary relationship exists between an assignee and assignor); *Elam v. Arzaga*, 10 P.2d 805, 807 (Cal. Ct. App. 1932)(finding that a fiduciary relationship existed between the creditor and the collection agency).

145. RESTATEMENT (SECOND) OF AGENCY § 13 (1958); *accord* REUSCHLEIN & GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 67, at 125-26 (2d ed. 1990) ("[A]n agent is under [a] duty to act solely and entirely for the benefit of his principal in every matter connected with his agency.")(footnote omitted).

In a case where a collection agency has taken assignments from more than one creditor, it necessarily will have fiduciary duties to all of them. Obviously, this fact could raise conflicts of interest concerns which have previously characterized courts' objections to an attorney's apparent representation of both the creditor and the collection agency.

A possible answer to this concern is that the collection agency, as part of its fiduciary duty to each creditor, has the duty to disclose the fact of its relationship with other creditors although it must take care not to provide information regarding a debtor's particular obligations; this would trigger FDCPA liability. *See* 15 U.S.C. § 1692c(b) (1994). Perhaps the appropriate time for this disclosure is when the creditor and the collection agency enter into their relational agreement (as opposed to the individual assignments). In addition, if the creditor believes that the collection agency is not acting in its best interests, it is always free to revoke the agency's authority at any time. *See DeBenedictis v. Hagen*, 890 P.2d 529, 533 (Wash. Ct. App. 1995); RESTATEMENT (SECOND) OF AGENCY § 118 (1958).

Finally, it should be asked, is this concern one which arises for the creditor, or does it arise for the collection agency who may have more fiduciary duties than it can handle? Concern for the creditor seems a bit misplaced since its interests are already amply protected by the fiduciary duty itself. If, on the other hand, it is concern for the collection agency which may have "over-extended" itself duty-wise, the simple answer is that the collection agency chose to enter into these relationships and is chargeable with the knowledge of the duties they entail. That the agency made an unwise choice is no reason to relieve it of its obligations.

assignee is an agent "[i]f the assignee is to account for the proceeds [of an assignment] to the assignor,"¹⁴⁶ and a collection agency is specifically an independent contractor-agent of the creditor.¹⁴⁷ As a result of this holding, DeBenedictis would be answerable to Novak without the court's having to modify the rule regarding an assignee's status as real party in interest.

Indeed, the court's decision evidences a rational balancing of the interests involved. First, it held that, as principal, Novak had the power to revoke DeBenedictis's authority on the assigned debt¹⁴⁸ and found that he had in fact revoked DeBenedictis' authority before settling with Hagen.¹⁴⁹ The court further observed that it did not matter whether the revocation was wrongful¹⁵⁰ because, as principal, Novak had the power to revoke his agent's authority at any time.¹⁵¹ But DeBenedictis was not left without remedy; there was, after all, a contract between the parties, and Novak's revocation of DeBenedictis' authority constituted a breach of that contract.¹⁵² Novak was not liable for the amount of DeBenedictis' contingent fee as if had he collected the debt; rather, Novak was liable only for the value of DeBenedictis' services up until the time of the breach.¹⁵³ This result is consistent with the court's use of the assignment theory in that it protects the assignee's status as the real party in interest and allows him to recover the value of his services in the event of a breach by the assignor. It is also consistent with the court's use of the agency theory in that it protects the principal-assignor from losing complete control over property in which he has a beneficial interest. Had the court not examined the function of the assignment and agency rules, it could not have balanced the parties' interests, and injustice would have resulted.

B. Trustees and Assignees for Collection: Unlikely Bedfellows?

That the court's approach in *Hagen* was logical is further demonstrated by analogizing the duties of an assignee for collection to those of a trustee. As with an assignment for collection, legal title is separated from equitable title in a trust; the trustee holds the legal title

146. RESTATEMENT (SECOND) OF AGENCY § 14G cmt. a (1958).

147. See *id.* at § 14N cmt. a.

148. See *DeBenedictis v. Hagen*, 890 P.2d 529, 533 (Wash. Ct. App. 1995); see also RESTATEMENT (SECOND) OF AGENCY § 118 (1958).

149. See *DeBenedictis v. Hagen*, 890 P.2d 529, 534 (Wash. Ct. App. 1995).

150. See *id.*

151. See *id.* at 533; see also RESTATEMENT (SECOND) OF AGENCY § 118 cmt. b (1958) ("The principal has [the] power to revoke and the agent has power to renounce, although doing so is in violation of a contract between the parties . . .").

152. See *DeBenedictis v. Hagen*, 890 P.2d 529, 534 (Wash. Ct. App. 1995).

153. See *id.*

while the beneficiary retains the equitable title.¹⁵⁴ In addition, the trustee as legal title holder is regarded as the real party in interest and may sue in his or her own name on behalf of the trust,¹⁵⁵ just like the assignee of a claim. Finally, the beneficiary of a trust generally may not maintain a suit in equity against a third party,¹⁵⁶ a rule which is apparently followed by a majority of jurisdictions.¹⁵⁷

The rule prohibiting equity suits by the beneficiary of a trust also holds true for a creditor after he assigns the debt. Usually, the creditor may not maintain a suit in equity against a debtor once the debt is assigned.¹⁵⁸ Of course, the other distinctive feature of a trust is the fiduciary duty which exists between the trustee and the beneficiary: "[A] trustee owes beneficiaries of a trust his undivided loyalty and good faith, and all his acts as such trustee must be in the interest of the cestui que trust and no one else."¹⁵⁹

Given the obvious and striking similarity between trustees and beneficiaries, agents and principals, and assignees and assignors for collection, it is not surprising that courts have applied the principles underlying these relationships in actions arising between the creditor and the collection agency, as discussed above.¹⁶⁰ What is most interesting, however, is that few, if any, courts have ever applied these principles in cases where the collection agency has been accused of violating the rules against UPL,¹⁶¹ a situation in which these principles make perfect sense. Perhaps the courts simply have not been interested in making the analogy. After all, a good number of the UPL

154. See *Apollinari v. Johnson*, 305 N.W.2d 565, 567 (Mich. Ct. App. 1981); see also *Karpf v. Karpf*, 240 Neb. 302, 310, 481 N.W.2d 891, 896 (1992); *Anderson v. Dean Witter Reynolds, Inc.*, 841 P.2d 742, 745 (Utah Ct. App. 1992).

155. See *Anderson v. Dean Witter Reynolds, Inc.*, 841 P.2d 742, 744 (Utah Ct. App. 1992); accord *Larson v. Sylvester*, 185 N.E. 44, 46 (Mass. 1933) (A trustee does not act "as representative or agent of another. He [acts] for himself, but with fiduciary obligations to others.").

156. See RESTATEMENT (SECOND) OF TRUSTS § 282(1) (1976).

157. See *Anderson v. Dean Witter Reynolds, Inc.*, 841 P.2d 742, 745 (Utah Ct. App. 1992).

158. See *Cohn v. Thompson*, 16 P.2d 364, 366 (Cal. App. Dep't Super. Ct. 1932) ("The services performed by the attorney were for the assignee alone, who was the real party in interest and exercised entire control of the action; the assignor having no power to exercise any control whatsoever either over the action or the attorney in the performance of his services.") (emphasis added), quoted with approval in *LeDoux v. Credit Research Corp.*, 125 Cal. Rptr. 166, 168 (Cal. App. 1975).

159. *Karpf v. Karpf*, 240 Neb. 302, 311, 481 N.W.2d 891, 897 (1992) (quoting *State ex rel. Ebke v. Board of Educ. Lands & Funds*, 154 Neb. 244, 249, 47 N.W.2d 520, 523 (1951)); accord *Larson v. Sylvester*, 185 N.E. 44, 46 (Mass. 1933).

160. See *supra* Part III.A and notes therein.

161. An extensive search unearthed only one case in which both a collector's fiduciary duty and the unauthorized practice of law were even mentioned. See *Ulberg v. Seattle Bonded, Inc.*, 626 P.2d 522, 524 (Wash. Ct. App. 1981) (holding on other grounds and not reaching the questions of fiduciary duty or whether the collection agency was engaged in UPL).

cases arose at a time when collection agencies were beginning to compete significantly with attorneys for the collection business¹⁶² and when prosecutions for UPL were at their peak.¹⁶³ If courts had applied the analogy in UPL cases, they would have been forced to acknowledge the existence of a fiduciary duty between the creditor and the collection agency. The existence of this duty would then have undercut their primary argument against collection agencies: without the protection of an attorney-client relationship,¹⁶⁴ the creditor is left vulnerable to self-interested actions by the collection agency. The fiduciary duty arising under the assignment and agency theories, however, would play the same role as the fiduciary duty between an attorney and his or her client. Whether or not the courts have been improperly influenced, the failure to apply these principles should highlight the problem with courts asserting exclusive jurisdiction over the UPL issue,¹⁶⁵ given "the natural tendency of all professions to act in their own self interest."¹⁶⁶

C. Form Following Function: Collection Agencies and UPL in Nebraska

The Nebraska Supreme Court has not yet had occasion to answer the question of whether collection agencies which sue in their own names on assigned debts are engaged in UPL. When the question is presented, the court will have a relevant body of Nebraska law upon which it can draw, both statutory and common law. When the court examines Nebraska law, it will find precedents which readily lend themselves to the kind of functional analysis discussed above.¹⁶⁷

The Nebraska legislature has enacted statutes addressing procedure rules for parties: the real party in interest statute, § 25-301;¹⁶⁸

162. See Christensen, *supra* note 1, at 182-83, 187-88 (observing that it was about this time that courts began offering the public interest as the motivation for attempting to prevent UPL, rather than attorneys' private interests); see also WOLFRAM, *supra* note 11, at 825-26.

163. See Christensen, *supra* note 1, at 189-97.

164. Remember, these courts made the initial finding either that the attorney employed by the collection agency represented the collection agency and not the creditor, or that the attorney's loyalties had been impermissibly divided, giving rise to a potential conflict of interest.

165. See discussion *infra* Part III.C.

166. WOLFRAM, *supra* note 11, at 835 (quoting Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1189 (Fla. 1978)).

167. See discussion *supra* Parts III.A-B.

168. NEB. REV. STAT. § 25-301 (1995). The statute provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304." *Id.*

the statute for assignees, § 25-302;¹⁶⁹ and the parties to actions statute, § 25-304.¹⁷⁰ The Nebraska court has had the opportunity to construe these statutes on a number of occasions. The issues in *Archer v. Musick*¹⁷¹ (*Archer I*) are fairly analogous to the issues which are the subject of this Note. In *Archer I*, Archer sued his former employer, Musick, for unpaid overtime compensation,¹⁷² pursuant to the Fair Labor Standards Act of 1938.¹⁷³ Archer brought forty claims against Musick, one of which was his own, and thirty-nine of which had been assigned to him by Musick's other employees.¹⁷⁴ Musick demurred on the grounds that Archer's petition had misjoined causes of action.¹⁷⁵ The court interpreted § 25-302 (the assignee statute) as permitting a party to bring an action in his own name "when he has in fact become the owner of a thing in action by assignment."¹⁷⁶ The type of assignment the court appeared to have in mind was an assignment by sale, as in *Poirier I*.¹⁷⁷ The court found that, although Archer was an assignee, he was an assignee for collection and not a real party in interest since he was not the beneficial owner of the property assigned.¹⁷⁸ Thus, under the exception for assignees for collection in § 25-304, Archer had the authority to sue on the assignments in his own name.¹⁷⁹ However, because he was not the real party in interest in the other thirty-nine claims, judgment on those claims would not affect him or any of the other real parties in interest as required under

169. *Id.* at § 25-302. The statute provides: "The assignee of a thing in action may maintain an action thereon in his own name and behalf, without the name of the assignor." *Id.*

170. *Id.* at § 25-304. The statute provides:

An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way, and assignees of choses in action assigned for the purpose of collection, may sue on any claim assigned in writing, but such assignee shall be required to furnish security for costs as in case of nonresident plaintiffs.

Id. (emphasis added).

171. 147 Neb. 344, 23 N.W.2d 323 (1946), *vacated*, 147 Neb. 1018, 25 N.W.2d 908 (1947).

172. *See id.* at 347, 23 N.W.2d at 325.

173. 29 U.S.C. §§ 201-219 (1994).

174. *See Archer v. Musick*, 147 Neb. 344, 347, 23 N.W.2d 323, 325-26 (1946).

175. *See id.* at 346, 23 N.W.2d at 325.

176. *Id.* at 350-51, 23 N.W.2d at 327.

177. *See Alco Collections, Inc. v. Poirier*, 680 So. 2d 735, 739 (La. Ct. App. 1996).

178. *See Archer v. Musick*, 147 Neb. 344, 353, 23 N.W.2d 323, 328 (1946) (citing *Hoagland v. Van Etten*, 22 Neb. 681, 35 N.W. 869 (1888)).

179. *See id.*

§ 25-702 (joinder of causes),¹⁸⁰ so the court dismissed the assigned claims as improperly joined.¹⁸¹ Three justices dissented in the opinion.¹⁸²

In *Archer II*,¹⁸³ after hearing arguments on a motion for rehearing, the court vacated its opinion in *Archer I*.¹⁸⁴ The court repeated its findings that Archer was expressly authorized by statute to maintain an action in his own name as an assignee for collection of the other thirty-nine claims.¹⁸⁵ It also noted that the case¹⁸⁶ upon which *Archer I* had relied for its finding that an assignee for collection is not a real party in interest, was decided before the legislature amended § 25-304¹⁸⁷ to include assignees for collection, thereby suggesting that the legislature had intended to change that particular rule.¹⁸⁸ The court reasoned that the proper way to determine whether Archer was the real party in interest was to examine the function of that requirement.

In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end.¹⁸⁹

That is, if a judgment in an action brought by an assignee for collection will prevent the assignor from suing the defendant later on,¹⁹⁰ then the assignee is the real party in interest. Indeed, the court observed, an earlier case had held that, for the purpose of protecting a

180. NEB. REV. STAT. § 25-702 (1995). The statute provides: "The causes of action so united must affect all the parties to the action, and not require different places of trial." *Id.*

181. See *Archer v. Musick*, 147 Neb. 344, 353, 23 N.W.2d 323, 328 (1946).

182. See *id.* at 365, 23 N.W.2d at 335.

183. 147 Neb. 1018, 25 N.W.2d 908 (1947).

184. See *id.* at 1019, 25 N.W.2d at 909.

185. See *id.* at 1024, 25 N.W.2d at 911; accord *State Sec. Co. v. Federated Mut. Implement & Hardware Ins. Co.*, 204 F. Supp. 207, 217 (D. Neb. 1960), *aff'd*, 308 F.2d 452 (8th Cir. 1962); *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 704, 538 N.W.2d 756, 759-60 (1995); *Exchange Elevator Co. v. Marshall*, 147 Neb. 48, 67, 22 N.W.2d 403, 413 (1946).

186. See *Hoagland v. Van Etten*, 22 Neb. 681, 35 N.W. 869 (1888).

187. NEB. REV. STAT. § 25-304 (1995)(identifying exceptions to the real party in interest statute).

188. See *Archer v. Musick*, 147 Neb. 1018, 1026, 25 N.W.2d 908, 912 (1947).

189. *Id.*, 25 N.W.2d at 913 (quoting *State ex rel. Sorensen v. Nemaha County Bank*, 124 Neb. 883, 888-89, 248 N.W. 650, 653 (1933)(other citations omitted); accord *Archer v. Musick*, 147 Neb. 344, 361, 23 N.W.2d 323, 332 (1946)(Chappell, J., dissenting)("It is enough for defendant to know that plaintiff is the party in legal interest and that a recovery by him will be full protection against a subsequent suit by another.").

190. See RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982).

defendant from multiple suits, the other parties identified in § 25-304 were also real parties in interest.¹⁹¹ Based on this reasoning, the court held that, under Nebraska law, an assignee for collection is the real party in interest in a suit brought on the assignment.¹⁹²

The court also examined the precise nature of the assignee's interest. It recognized that the assignee took legal title of the assigned claim while the assignor was entitled to the proceeds as the holder of the equitable title.¹⁹³ Most notably, the dissenting opinion in *Archer I*, which was written by the author of the majority opinion in *Archer II*, also observed the existence of the fiduciary relationship between the assignee and assignor, similar to that of a trustee or agent,¹⁹⁴ although that observation was not repeated in *Archer II*. Clearly, the kind of analysis used by the court in *DeBenedictis v. Hagen*¹⁹⁵ is not without precedent in Nebraska.

The Nebraska legislature has also promulgated regulations for collection agencies doing business in this state. The Collection Agency Act¹⁹⁶ (Act) defines a collection agency as

[a]ll persons, firms, corporations, and associations directly or indirectly engaged in soliciting, from more than one person, firm, corporation, or association, claims of any kind owed or due or asserted to be owed or due such solicited person, firm, corporation, or association, and all persons, firms, corporations, and associations directly or indirectly engaged in asserting, enforcing, or prosecuting such claims¹⁹⁷

The language of the statute clearly contemplates that the collection agency will use more than just dunning procedures¹⁹⁸ to effect collection; the final clause indicates that those persons or entities which appear in court to assert, enforce, or prosecute their claims will be regulated as collection agencies. Perhaps more significant is the description of those persons and entities which are excluded from the definition: "Collection agency shall not mean or include . . . a person, firm, corporation, or association which, for valuable consideration, purchases accounts, claims, or demands of another and then, in such purchaser's own name, proceeds to assert or collect such accounts, claims, or demands."¹⁹⁹

191. See *Archer v. Musick*, 147 Neb. 1018, 1027, 25 N.W.2d 908, 913 (1947)(citing *Meeker v. Waldron*, 62 Neb. 689, 87 N.W. 539 (1901)).

192. See *id.*

193. See *id.*; see also *Archer v. Musick*, 147 Neb. 344, 361, 23 N.W.2d 323, 332 (1946).

194. See *Archer v. Musick*, 147 Neb. 344, 361, 23 N.W.2d 323, 333 (1946)(Chappell, J., dissenting)(citation omitted).

195. 890 P.2d 529, 532-33 (Wash. Ct. App. 1995).

196. NEB. REV. STAT. §§ 45-601 to -623 (1993).

197. *Id.* at § 45-602(2)(a) (emphasis added).

198. For example, "negotiating, adjusting and settling claims without threat of litigation, or seeking payment by written letter or oral request . . ." *J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 593-94 (D.C. 1973).

199. NEB. REV. STAT. § 45-602(3)(k) (1993).

Although the Act does not purport to prescribe how collection agencies should function, the legislature's understanding of how their business will be conducted is plain. If a person or an entity purchases a debt for valuable consideration,²⁰⁰ that person or entity does not come under the ambit of the Act and will not be regulated by state law. Under Nebraska law, the only other means available to assert, enforce, or prosecute the claim of another is through assignment, as discussed in *Archer II*.²⁰¹ Thus, only where collection agencies operate by means of assignment will such agencies be regulated by state law.

The regulations themselves are designed to protect collection agencies' clients and to make collection agencies accountable to a state board²⁰² with fairly broad oversight powers. The regulations require: licensure;²⁰³ a demonstration that the proprietor is trustworthy, honest, financially responsible, competent, and experienced in the collection business or other acceptable area of business;²⁰⁴ the furnishing of a corporate surety bond in an amount ranging from five thousand to fifteen thousand dollars;²⁰⁵ an accounting to each of its clients for the collections it obtains on a monthly basis;²⁰⁶ license renewal each year;²⁰⁷ and the submission of a verified financial statement if so required.²⁰⁸ The Act also prohibits the issuance of a license to anyone convicted of fraud or the failure to account to a client;²⁰⁹ provides for the revocation of a license for a conviction of fraud, embezzlement, or the failure to account;²¹⁰ authorizes the Collection Agency Board to hold a hearing for revocation on its own motion or on the sworn complaint of any client;²¹¹ and gives the Board subpoena power.²¹² Finally, the Act provides that "[n]othing in the Collection Agency Act shall be construed to authorize or permit the holder of a license or the

200. Cf. *Bump v. Barnett*, 16 N.W.2d 579, 583 (Iowa 1944) (holding collection agency is engaged in UPL unless claims were purchased); *Alco Collections, Inc. v. Poirier*, 680 So. 2d 735, 741, 745 (La. Ct. App. 1996) (holding that, for assignment of claim to be valid under Collection Agency Regulation Act, claim must be purchased).

201. 147 Neb. 1018, 25 N.W.2d 908 (1947).

202. See NEB. REV. STAT. § 45-605 (1993)(the "Collection Agency Licensing Board").

203. See *id.* § 45-606.

204. See *id.* § 45-607(1).

205. See *id.* § 45-608.

206. See *id.* This section also provides a specific remedy to any creditor who has not received the required accounting, or who "has been damaged by failure of the licensee to comply with all agreements entered into with such person . . ." *Id.* This remedy would most likely be in addition to any remedy at common law which the creditor would have for breach of fiduciary duty.

207. See *id.* § 45-611.

208. See *id.* § 45-619.

209. See *id.* § 45-607(2).

210. See *id.* § 45-612.

211. See *id.* § 45-613.

212. See *id.* § 45-614.

holder of a solicitor's certificate, as provided for in the act, to engage in the practice of law."²¹³ Under current Nebraska law, however, this provision²¹⁴ merely begs the question.

Nebraska also has a statute that generally prohibits UPL. Section 7-101 provides that anyone who is not an attorney may not

practice as an attorney . . . , or commence, conduct or defend any action or proceeding to which he is not a party, either by using . . . his own name, . . . or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. . . . It is hereby made the duty of the judges of such courts to enforce this prohibition.²¹⁵

Thus, the practice of law clearly includes court representation, as well as the preparation and filing of necessary papers.²¹⁶ In contrast, pro se representation is not prohibited as the unauthorized practice of law because the pro se litigant is himself a party to the action.²¹⁷ The UPL statute²¹⁸ does not, however, address whether or not a collection agency may sue in its own name without engaging in UPL.

Beyond the failure of section 7-101 to address the collection agency's status in the UPL debate, the UPL statute exhibits an even greater shortcoming in that it presents a perfect opportunity for misapplication. The potential problem lies in the word "party." Section 7-101 (the UPL statute) and section 25-301 (the real party in interest statute) both use the word "party"; the problem is that they each use the word for a different purpose. Section 7-101 uses the word "party" to specify who may "commence, conduct, or defend (an) action" without an attorney. In other words, it proscribes pro se litigation. In contrast, section 25-301 uses the word "party" in a more general sense, to require that persons or entities named as parties have actual interests at stake in the suit. The UPL statute²¹⁹ and the real party in interest statute²²⁰ plainly have different functions, and a court applying these provisions must observe the purpose for which the word "party" is used in each.

Thus, X Corporation may sue Y Corporation in its own name for breach of contract where X Corporation is a party to or otherwise has an interest in the contract. However, X Corporation may not represent itself in court pro se because it is an entity. Although X Corporation is not allowed to be a "party" for the purpose of pro se litigation, it

213. *Id.* § 45-622.

214. *See id.*

215. NEB. REV. STAT. § 7-101 (1991).

216. *See State ex rel. Johnson v. Childe*, 147 Neb. 527, 532-33, 23 N.W.2d 720, 722-23 (1946).

217. *See Waite v. Carpenter*, 1 Neb. App. 321, 325, 496 N.W.2d 1, 3-4 (1992).

218. NEB. REV. STAT. § 7-101 (1991).

219. *Id.*

220. NEB. REV. STAT. § 25-301 (1995).

is nonetheless a "party" for purposes of satisfying the real party in interest requirement.

Indeed, the Nebraska Supreme Court has already recognized a similar distinction. In *Back Acres Pure Trust v. Fahnlander*,²²¹ the court held that, although a trustee may properly sue in his own name on behalf of the trust, the trustee must be represented by an attorney in court "because *in this capacity* such trustee would be representing interests of others and would therefore be engaged in the unauthorized practice of law."²²²

This distinction would also hold true in the collection agency context. As the court in *Archer v. Musack*²²³ has already held, when a collection agency brings suit on an assigned debt, it is the real party in interest and may, therefore, sue in its own name. For the purpose of pro se representation, however, a collection agency may not represent itself in court as a party for two reasons: first, it is an entity and is simply not allowed to appear pro se;²²⁴ second, like a trustee, the collection agency does not hold the equitable interest and should be required to protect what is ultimately the creditor's property by hiring an attorney. When the real party in interest brings a suit through its attorney, however, the proper party is in court, represented by counsel and there simply is no UPL problem.

IV. CONCLUSION

The question, then, yet remains: Is a collection agency in Nebraska, which sues on assigned debts in its own name, engaged in UPL? The conclusion of this Note is that, so long as the collection agency is represented by a licensed attorney, UPL need not be a concern. When the Nebraska Supreme Court decides this question, it should first examine its common law precedents. Nebraska case law clearly tracks the principles of the assignment theory discussed in Part II.A. The dissent in *Archer I* also alludes to the similarity be-

221. 233 Neb. 28, 443 N.W.2d 604 (1989).

222. *Id.* at 29, 443 N.W.2d at 605 (emphasis added). This is a logical result. By requiring the trustee to be represented by a licensed attorney, (the attorney's client in this situation is the trustee), the court aids the trustee in upholding his or her fiduciary duties to the beneficiary. If a trustee were allowed to appear pro se, the possibility that the trustee could endanger the trust through his or her incompetence is a very real one; the trustee could then be held liable for breach of fiduciary duty. See *Karpf v. Karpf*, 240 Neb. 302, 309, 481 N.W.2d 891, 896 (1992) ("[T]he trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . .")(alteration in original) (quoting *In re Conservatorship of Martin*, 228 Neb. 103, 104, 421 N.W.2d 463, 464 (1988)).

223. 147 Neb. 1018, 25 N.W.2d 908 (1947).

224. See *Niklaus v. Abel Constr. Co.*, 164 Neb. 842, 849, 83 N.W.2d 904, 910 (1957).

tween collection issues, agency principles and trustees.²²⁵ Recent cases also demonstrate that, while trustees and functionally similar persons or entities cannot represent themselves in court, they remain the real parties in interest and are not engaged in UPL when they bring suit.²²⁶

The Nebraska statutes also support the conclusion that no UPL violation has occurred as long as the collection agency is represented by an attorney. Although the Nebraska Supreme Court claims for itself "the power to define and regulate the practice of law as an inherent power of the judiciary,"²²⁷ the Collection Agency Act²²⁸ does not purport to authorize any act which the court has deemed to be UPL. It does not authorize collection agencies to give legal advice,²²⁹ to prepare legal documents,²³⁰ or to appear in court pro se.²³¹ Instead, the Act's definition of "collection agency"²³² implicitly recognizes the effect of the real-party-in-interest statute,²³³ the statute for assignees,²³⁴ and the statute defining parties to actions,²³⁵ as well as the case law

225. See *Archer v. Musick*, 147 Neb. 344, 361, 23 N.W.2d 323, 333 (1946) (Chappell, J., dissenting). One point of interest is the timing of the *Archer* cases and *State ex rel. Johnson v. Childe*, (*Childe II*), 147 Neb. 527, 23 N.W.2d 720 (1946), a case dealing with layman representation which, along with its companion case, 139 Neb. 91, 295 N.W. 381 (1941), is often cited in UPL cases which have arisen during the past fifty years. *Archer I* was decided on June 7, 1946. *Childe II* was decided on July 12, 1946. *Archer II*, which vacated *Archer I*, was decided on Jan. 31, 1947. That is, when the court had before it the question of the ability of an assignee for collection to maintain an action as the real party in interest, it would have just decided a case in which a layman purporting to represent the interests of others was held to be engaged in UPL. That the court made no mention of the analogous issues involved in these cases is a rather telling omission.

226. See *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 29, 443 N.W.2d 604, 605 (1989); accord *Waite v. Carpenter*, 1 Neb. Ct. App. 321, 325-26, 496 N.W.2d 1, 4 (1992) (indicating that, although a personal representative cannot represent himself pro se, he is still the proper person to bring the suit).

227. *State ex rel. Johnson v. Childe*, 139 Neb. 91, 92, 295 N.W. 381, 382 (1941).

228. NEB. REV. STAT. §§ 45-601 to -623 (1993).

229. See *State ex rel. Wright v. Barlow*, 131 Neb. 294, 295-96, 268 N.W. 95, 96 (1936).

230. See *id.*; see also NEB. REV. STAT. § 7-101 (1991).

231. See *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 29, 443 N.W.2d 604, 605 (1989); *Niklaus v. Abel Constr. Co.*, 164 Neb. 842, 849, 83 N.W.2d 904, 909 (1957) (reciting the rule that a corporation cannot appear pro se); *Waite v. Carpenter*, 1 Neb. Ct. App. 321, 327-28, 496 N.W.2d 1, 5 (1992). Indeed, the act can be read as prohibiting collection agencies from appearing pro se under Nebraska Revised Statute section 45-622 if the court followed the reasoning in these cases.

232. See NEB. REV. STAT. § 45-602 (2)(a), (3)(k) (1993).

233. NEB. REV. STAT. § 25-301 (1995).

234. *Id.* § 25-302.

235. *Id.* § 25-304.

construing these statutes.²³⁶ It does not infringe upon the judicial function but merely follows the law established by the court itself.

At this point, all that is left for the court to do is to examine the function of the rules against UPL by asking the perennial question: "Why do we care?" If we care because we are concerned that collection agencies will file frivolous lawsuits which harass debtors and waste court time and resources, the answer is that the court has recourse to the attorney who filed the suit. Because an attorney is an officer of the court, the court may punish him for his misconduct.²³⁷ Moreover, the FDCPA provides the debtor with additional safeguards by strictly regulating the conduct of collection agencies. If we care because we are concerned that the creditor lacks the protection of the attorney-client relationship, the answer is that the creditor is amply protected by the fiduciary duties that arise out of the principal-agent relationship created by the assignment. The creditor is further protected by the applicable provisions of the Nebraska Collection Agency Act.²³⁸ If we care because other jurisdictions have historically ruled a particular way, the easy answer is that, in many cases, their laws are different. The more honest answer is that Nebraska should not join a tradition that has failed to examine the functions of and reasons for its rules. When examined critically and in the context of Nebraska law, the conclusion is plain: a collection agency which is represented by a licensed attorney and sues in its own name on assigned debts is not engaged in UPL.

Kathryn D. Folts '99

236. See *Archer v. Musick*, 147 Neb. 344, 359-64, 23 N.W.2d 323, 331-35 (1946)(Chappell, J., dissenting); *Archer v. Musick*, 147 Neb. 1018, 1023-28, 25 N.W.2d 908, 911-13 (1947).

237. See *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 287-88, 275 N.W. 265, 267-68 (1937).

238. NEB. REV. STAT. §§ 45-601 to -623 (1993).