

MINUTES OF COMMISSION MEETING

March 15, 2012

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioner Andrew Bunn and Commissioner Albert Burstein. Professor Bernard Bell of Rutgers School of Law attended on behalf of Commissioner John J. Farmer, Jr., Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs and Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were: Russell Graves of the Association of Credit Counseling Professionals; Ellen Harnick, Center for Responsible Lending; David McMillin, Legal Services of New Jersey; and Wesley Young, American Fair Credit Counsel (formerly TASC).

Minutes

The Minutes of the February meeting were approved on Motion of Commissioner Bunn, which was seconded and unanimously approved.

New Jersey Debt Management Services Act

Laura Tharney explained that the Commission had been working on this project since January of 2010 and that, as a result of recent changes, the project had lost the support of for-profit, not-for-profit, and consumer protection group commenters. Since changes were made after filing day, Ms. Tharney explained that she prepared and distributed at the meeting a seven page Memorandum detailing all 10 proposed changes to be discussed at the meeting.

The first proposed change was to the definition of “credit counseling” in Section 2 on page one of the Memorandum. The Commission approved the modification to the language so that credit counseling activity is not limited to not-for-profit providers.

The second language change is found in Section 4b., also located on page one of Memorandum. The Commission approved the removal of the word “providing” in the first sentence and the replacement of that word with “engaging in” as well as the inclusion of the word “solely” in the last sentence of the section. Ms. Tharney noted that recent case law held that a single telecommuting employee residing in New Jersey would expose the business entity to New Jersey taxation. Commissioner Bunn asked whether, in light of that issue, the last sentence of the section should begin “For purposes of this act...” Ms. Tharney said that language would be incorporated.

In Section 4f., Ms. Tharney explained that a decision had been made early in the project that the Act should apply to secured and unsecured debt, but not to mortgages. She explained that the information that Staff learned as the project developed caused her to be concerned about the inclusion of secured debt in debt-management plans. When the project began, debt-settlement plans were discussed as lump-sum payoffs or payments over three months. Since the business model now involves payment over a period of three years, the inclusion of secured debt is dangerous for the consumer since secured creditors can avail themselves of self-help remedies and repossess the debt rather than waiting for payment. There is also a risk posed by the fact that even a conscientious provider may not be able to determine that a debt is secured debt. In addition, even business entities who engage in the classic debt-management model of full-balance repayment are leery about including secured debt in plans because they cannot monitor or maintain the collateral for the five year period of debt repayment.

Commissioner Bunn asked whether the language change in subsection f. was sufficient and Ms. Tharney replied that, at a minimum, the modification identifies that secured debts are not supposed to be included in plans. Commissioner Bunn asked how the consumer or provider could apply the new language if they don't know about the secured status of the debt. John Cannel said that to some degree, the issue is handled by the fact that there is no penalty imposed on a company who inadvertently includes secured debt. He said that a bright line rule merely says "don't do this" and that the alternative is to have the statutory language remain silent. Since the language at least flags the problem, the Commission directed that it be retained and that the consumer warnings include a reference to secured debt and a definition.

In Section 5, Ms. Tharney explained that language had been added in subsections a.(13) and a.(15) to make it clear to the consumer when fees are due and when they must be paid. The language was acceptable to the Commission.

In Section 10, Ms. Tharney suggested the inclusion of the warning that secured debts are not appropriate for inclusion in a debt-management plan and the Commission approved. She also explained that she had again received comments suggesting that the mandatory consumer warnings concerning the tax consequences of less-than-full-balance repayment and the increased likelihood of a lawsuit by a creditor were not really applicable to consumers enrolled in a full-balance-repayment plan so the requirement for those warnings should be moved so that the warnings are only given in appropriate circumstances, less-than-full-balance repayment, to avoid consumer confusion. The Commission approved.

In Section 12, Ms. Tharney addressed issues regarding arbitration. She said that two concerns had been raised. The first pertained to the possibility that New Jersey consumers would be compelled to resolve disputes in distant forums, and the second was

that requiring arbitration could favor the provider. Ms. Tharney acknowledged that federal law controls the area of arbitration, and that if a state tries to preclude arbitration, such an effort will itself likely be precluded by federal law. The language pertaining to arbitration was removed by Staff in an effort to make the strongest statement that limiting the rights of New Jersey consumers was disfavored. The Commission discussed the issue and, while there were mixed opinions about arbitration, the general consensus was that it was not preferential to one party or another. The Commission determined that subsection f.(2) should make no reference to arbitration. With regard to the location for resolving disputes, the Commission asked that Ms. Tharney draft language clarifying that an agreement could not require a New Jersey consumer to resolve a dispute in any jurisdiction other than New Jersey, but that the consumer could agree to do so after a dispute has arisen.

In Section 15, the Commission approved the modification to subsection a., but Commissioner Bell expressed concerns about the fee cap of 30%. Commissioner Bunn asked for clarification of the questioned amount and Mr. Cannel said that the only discussion of this issue in the NCCUSL context was whether it was too high, not whether it was too low. Commissioner Bell suggested that it might not be sufficient to bring providers into the State, but said that the Commission could try that language.

In Section 16, Ms. Tharney explained that the information required to be provided to the administrator was revised to limit it to a provider's activities in New Jersey and its work with New Jersey residents to avoid a situation in which a provider that operates in many states is required to provide detail from those states which might skew the analysis of whether the provider should be allowed to operate in New Jersey. With regard to subsection e.(8), it was suggested that the language be modified to require information about the number and amount of debts enrolled in the plan as well as the amount of each debt settled. Commissioners Bunn and Burstein also pointed out the need for privacy and asked that Ms. Tharney incorporate language like that included in the Court Rules which calls for the omission of all identifying information and, also that the language allow the administrator to determine the form in which the data should be presented.

Ms. Tharney next discussed Section XX, the partial indemnification provisions. She explained that, pursuant to the request of the Commission, this provision had been drafted to provide a disincentive for providers to enroll consumers in less-than-full-balance-repayment plans when such a plan was not appropriate for the consumers. In doing so, Ms. Tharney explained that she was mindful that consumers drop out or fail to complete debt-management, debt-settlement and Chapter 13 bankruptcy at a rate of 65-70%. Commenters suggested that the use of the a Chapter 7 means test is not as clear a standard as Staff might have hoped. Commenters also said that much of the information available to the providers when they are determining what debt-reduction mechanism might be most appropriate for a given consumer is within the control of the consumer, as

is the execution of the plan.

Commissioner Bunn questioned the language “due to the acts or omissions of the provider” and suggested that suitability should be a jury question. Mr. Cannel said that was too draconian a remedy. Ms. Tharney said that for the states that follow the FTC Rule, there may be incentive for unscrupulous debt-settlement companies to act in bad faith since their entire fee for a given debt is due and payable immediately after the consumer makes the first payment to a creditor pursuant to an agreement. Under the proposed fee structure in New Jersey, that is not the case because the provider is paid a portion of the entire fee due at the time each monthly or other payment is made by the consumer, so the risk of failure rests not only on the consumer, but the provider. Mr. Cannel said that “fault” is a difficult concept in situations like these. Commissioner Bell expressed concern that approximately 10% of consumers participating in plans will be sued and left to fend for themselves regardless of fault. Ms. Tharney said that the argument had been made that being sued was not necessarily the death knell for a plan. Commissioner Bunn asked whether it would be useful to include a sentence that said that recommending an unsuitable debt-settlement plan is a violation of the Consumer Fraud Act. Mr. Cannel said that Ms. Tharney had tried to create a bright-line test so that the risk is articulated and the providers know what to look for. Chairman Gagliardi said that since the Act does not supplant the Consumer Fraud Act, a lawyer is certainly not precluded from pleading a violation as described by Commissioner Bunn. Ultimately, the Commission approved the language in the form in which it appeared in the draft.

The Commission also approved the language of Section 30 regarding the termination of for-profit operations and the limitation of the language to for-profit less-than-full-balance-repayment plans.

Chairman Gagliardi asked for comment section-by-section.

There were no comments on Section 2.

Wesley Young, of the American Fair Credit Counsel (formerly TASC), raised comments about Section 4, suggesting that it will make companies leave the State. He said that the same was true of Section 10, subsection e.(4), and added that removing flexibility will hurt private services.

There were no comments on Section 5.

Mr. Young indicated that the arbitration provisions in Section 12f. were problematic.

There were no comments on Section 15a. Mr. Young commented on Section 15i., explaining that the 15% rate was not feasible for his company and would be detrimental

to consumers and companies alike. He mentioned that both Colorado and Utah had recently considered this issue and the bills they put forward contained no fee caps. Russell Graves of the Association of Credit Counseling Professionals said that he was pleased with Section 15a, that the administrator would be able to adjust the cap as appropriate and that any fee between 25% and 30% is probably acceptable.

David McMillin, of Legal Services of New Jersey, indicated that there is no need for for-profit companies in New Jersey. He explained that the federal Comptroller of the Currency does not feel that debt-settlement is a legitimate method of satisfying debts. Mr. McMillin provided a memorandum and suggested that creditors' lawsuits are a risk that the provider should undertake.

Ellen Harnick, of the Center for Responsible Lending, said that the indemnification provisions should be amended to include accretion of interest. She also recommended that with regard to the retention and submission of records, the significant figures are: the percentage of consumers successfully completing plans and the percentage of individual debts that are actually settled. She said that that this should not be aggregated data, but listed anonymously by consumers. The draft was modified in response to this comment regarding data.

Russell Graves said that if a debtor declares bankruptcy, providers should not be liable for bankruptcy filings and other legal fees because it would create too much pressure and require excessive collection and verification of data during the enrollment process. He also expressed concerns about whether a provider is engaging in the unlicensed practice of law if required to determine who would satisfy the bankruptcy means test.

Wesley Young suggested that the sunset provision should not be automatic, but should only require the Legislature to enact changes if the reporting data indicates that the statutory scheme is problematic.

Commissioner Bunn moved to release the project as a Final Report with the modifications approved by the Commission during the meeting. The motion was seconded by Commissioner Bertone and approved unanimously.

UCC Article 9

John Cannel advised that this project is currently in the hands of the Legislature and is in bill drafting based on the Commission's Tentative Report. He recommended that the report be released as a Final Report. Commissioner Bunn made a motion to release the project as a Final Report, which was seconded by Commissioner Bulbulia and approved unanimously.

General Repealer

Mr. Cannel told the Commission that the Governor's Red Tape Commission approved of the General Repealer project suggestions that he had passed along on behalf of the Commission and included them in the Red Tape Commission annual report. This project is also in bill drafting based on our tentative report. Commissioner Bunn pointed out a typographical error which indicates that the Commission discussed this project during a meeting held in September of 2012 and then moved to release the General Repealer project as a Final Report, which was seconded by Commissioner Bertone and approved unanimously.

Title 2C Sexual Offenses

Keith Ronan explained that this project had been divided in half. The half presented to the Commission pertains to forcible sexual offenses. The other half of the project contains provisions concerning lewdness and the sexual "contact" achieved by touching oneself. He explained that the two major cases in the area of forcible sexual offenses are *M.T.S.* and *Triestman*. Both cases effectively read the concept of consent back into a statute that merely uses the word "force." According to the case law, the only "force" necessary to commit these offenses is that required to effect penetration or the sexual contact itself. As a result, Staff has redrafted the statute to reflect these judicial determinations. Staff also clarified the elements of sexual offenses that are not related to consent, e.g., statutory rape. The language used in the draft statutes was derived from the court's decisions. By way of example, "force" is an act that a reasonable person would see as unauthorized. Staff employed a reasonable person standard for the defendant so that the focus is on the defendant, not on the victim's state of mind.

Commissioner Bunn said that if a reasonable person standard is used, then a drunken defendant isn't excused and if a victim is under the age of 13, the defendant is guilty no matter what. He pointed out that the language of the statute requires a victim that is under the age of 13 and a defendant that is four years older than the victim. Mr. Cannel explained that sexual assault is distinguished from sexual contact and that this is, unfortunately, a convoluted statute. He clarified that Staff did not upgrade or downgrade any existing offenses but merely divided them into the categories of statutory and forcible rape. Staff then carefully defined what "forcible" means, in an effort to make the statute's meaning self-evident without requiring a detailed review of the case law.

Commissioner Bunn said that Section a.(3), on the bottom of page 5, refers to a handicapped person and asked if married people with down syndrome would both be guilty of sexual assault. Mr. Cannel said that this is a serious problem, but that the Legislature's view was affected by the Glen Ridge case, with the result that the statutory language is problematic.

Commissioner Bell pointed out that in Section 14-2 concerning sexual assault, section b.(4), requires that a severe personal injury sustained and asked if the injury had to be physical or whether an emotional injury could also qualify. Mr. Cannel said that an Appellate Division case said that the injury had to be physical. He asked if the Commission wished to incorporate the language of that case in the statute.

Commissioner Burstein asked how close the project is to completion and Mr. Cannel said that Staff was hoping for April, but that it could go until May.

Uniform Military and Overseas Voters Act

Marna Brown said that Staff has not received any comments since the release of the Draft Tentative Report. She explained that, since the report was drafted, five state legislatures have introduced bills in this area and she said that Staff has added references to other laws to clarify that the purpose of this project is consistency with other New Jersey laws. Commissioner Bunn moved to release the report as a Final Report and Commissioner Bulbulia seconded the motion, which was approved unanimously.

Annual Report

After a clarification that the Durable Power of Attorney project dated to the prior year, the Commission unanimously approved the release of the Annual Report.

Miscellaneous

Ms. Brown advised that the Durable Power of Attorney project and the Adult Guardianship project had both been introduced in the Legislature and that there is a possibility that Staff will meet with a possible legislative sponsor for the Landlord-Tenant project.

The meeting was adjourned on motion of Commissioner Bunn, seconded by Commissioner Bulbulia.