

## **MINUTES OF COMMISSION MEETING**

**November 18, 2010**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioner Andrew O. Bunn, and Commissioner Albert Burstein. Grace C. Bertone, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon, Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr., and Brad Arlen attended on behalf of Senator Nicholas Scutari.

Also in attendance were: Meredith L. Grocott, Esq., Schenck, Price, Smith & King, LLP and Sharon Rivenson Mark, Esq., on behalf of the National Academy of Elder Law Attorneys (NAELA).

### **Miscellaneous**

Commissioner Burstein was acknowledged for having received the Chevalier of the French Legion of Honor, France's highest civilian award.

### **Minutes**

The Minutes of the October 21st meeting were approved, with one typographical correction on page 11, on motion of Commissioner Bunn, seconded by Commissioner Burstein.

### **Uniform Adult Guardianship Act**

Marna Brown stated that a draft tentative report had been prepared but there were a few issues requiring commenters' input. The Greater New Jersey and Delaware Valley Chapters of the Alzheimer's Association advised they supported the report.

Meredith Grocott stated that the Commission had done an excellent job trying to shoehorn the uniform law into existing New Jersey law. However, there were a few issues that needed further revision. The definition of "conservator" is too narrow and it should not be limited to out-of-state appointments. The term should be broad enough to include New Jersey's own defined version of conservator as it exists in current law. If the definition is changed in this law, it will conflict with the current definition in 3B:13A-1. Also, the definition of "protected person" should not be stricken. The terms "guardian", "conservator" and "protected person" should remain in the draft and defined consistent with New Jersey law. She expressed the need to make sure the umbrella of the uniform law covers all situations that may arise in New Jersey. Ms. Grocott also stated that she agrees with the recommendations of repeal of the statutes as proposed.

Sharon Rivenson Mark commented that there is a fourth category of persons to be protected which is “vulnerable adults” – generally resulting in at least the appointment of a temporary guardian. She also believes that some tweaking to the current report is necessary and is working with her colleagues to come up with some appropriate language. She explained that Connecticut law, for example, provides for a guardian of property and a conservator of the person and its law has managed to fit those concepts, which are quite different from other states, within the parameters of the uniform act. California’s statute is even more confusing. She proposed providing in time for the next meeting some appropriate language for the definitions of the key terms.

Ms. Brown asked the Commission whether it wished to hold the release of the tentative report pending receipt and incorporation of the proposed language. Upon hearing from the commenters that they could have proposed changes submitted within a week’s time, Chairman Gagliardi asked that the commenters please submit them to Ms. Brown so that the matter could be on the agenda for December. Ms. Brown further clarified with the commenters that, as had been suggested in the draft tentative report, repeal of 66.1 and 66.2 was not required; instead, amendment of those sections, so that they applied only to minors, was the appropriate course. She also confirmed that the *Winberry* issues had been addressed appropriately in the draft report.

### **Door-to-Door Retail Installment Sales**

Richard Angelo explained that this project arose as a result of a case in which a gentleman bought a Kirby vacuum for \$1,600 plus interest from a door-to-door salesman. When the assignee of the seller initiated an action to collect on the amount of the sales contract, the purchaser counterclaimed alleging violations of New Jersey’s Door-to-Door Retail Installment Sales Act and other consumer protection acts. Both the New Jersey law and the federal law require that a customer be given notice regarding his or her right to rescind. Presently, however, there is a disparity between the right to rescind under New Jersey law, and the right to rescind as set forth in the federal regulations. Federal law provides a three-day right of rescission ending at midnight on the third day. New Jersey also provides a three-day right to rescission, but it ends at 5:00 p.m. on the third day. Mr. Angelo explained that his research regarding preemption law indicated that the only circumstances under which New Jersey law would not be preempted is if New Jersey law offered the same or more protection than the federal law; and it does not.

Chairman Gagliardi asked if the language regarding the use of telegrams for notification is federal law. Mr. Angelo indicated that it is, and that New Jersey law is more strict because it requires a certified mailing. He recommended the inclusion of a reference to electronic communications, without limiting it to fax or email. Chairman Gagliardi agreed.

Commissioner Burstein asked how door-to-door sales are defined and Mr. Angelo explained that they include any retail installment sale entered into at a place other than the place of business of the retail seller, with exceptions for the sale of motor vehicles, boats, or purchases below \$25.

Mr. Angelo was directed to proceed with the project as guided by the Commission.

### **Pejorative Terms Regarding Mental Capacity**

Ms. Brown referred to the Commission's 2008 pejorative terms project that was derived from the constitutional amendment pertaining to the removal of the terms "idiot" and "insane". Sometime after the Commission's final report on this project, and without consideration of the final report, the organization ARC became involved in an effort to change all terminology in the statutes pertaining to the use of the terms "mental retardation" (and its variations) that were deemed pejorative. The legislation that derived from this effort was enacted. This new project proposes a supplemental report to cover those statutes that were in the final report but not included in the recent legislation.

Mr. Angelo explained that when sections contained pejorative terms in addition to "mental retardation", those other terms were also modified, but statutes including other pejorative terms that do not include the term "mental retardation" in any form were not included in the ARC bill. Ms. Brown explained that statutes addressed in the Commission's report from which pejorative terms were removed by the ARC-inspired bill, in some cases also contained other language that was clarified and made gender neutral in the Commission Report. Because the legislators did not have the benefit of the Commission's work, the new legislation does not reflect the revision of those sections other than to remove the pejorative terms. Ms. Brown asked whether the Commission wished this new project to include the clarifications that were in the Commission's final report for those statutes already addressed by the recent legislation. The Commission agreed that these clarifications should be part of the project. Chairman Gagliardi stated that the clarification process should be explained and included with the reasons for the project.

### **Effect of Abstentions**

Chairman Gagliardi said that the issue of abstentions frequently arises when there is a tie vote at a meeting of a public body and the attorney for the body is asked to decide which side wins the vote. He explained that both he and Commissioner Kologi suggested that the statute be drafted to cover any local public body that is covered by the Open Public Meetings Act ("OPMA"). School boards, municipalities, county governing bodies,

planning boards, zoning boards, and other similar entities should all be covered. Mr. Cannel said that a definition would be needed and Chairman Gagliardi said that a definition for “public body” is contained in the OPMA and in the case law; a reference to that definition would suffice. Ultimately, the draft should apply to any local public body that can take action affecting a citizen. The draft will also be revised to make it gender neutral.

Commissioner Burstein asked about the effect of Robert’s Rules of Order on public meetings. He asked if attorneys generally follow them and said that, if so, the result would be contrary to that contained in the draft because, under Robert’s Rules, an abstention counts as a “no” vote. Mr. Cannel explained that there is case law relying on ancient common law contrary to the result that would be reached under Robert’s Rules. Mr. Cannel suggested that this issue should be easy to clear up and that a revised draft would be provided for the next meeting.

#### **Title 39 – *State v. Moran***

Laura Tharney explained that the last issue to be resolved on this project pertains to language included in the draft to address concerns about uniformity and consistency of results. She explained that it was her understanding that, at the last meeting, the Commission determined that it would address those concerns by making the language calling for consideration of penalties imposed in prior cases discretionary, rather than mandatory. Commissioner Bunn said that the change to the language addressed his concern and Ms. Tharney said that she thought that the revised language of the draft was acceptable to Professor Bell as well. The Commission authorized the inclusion of the revised language in the Final Report on Title 39.

#### **New Jersey Debt Management Services Act**

Ms. Tharney explained that the Commission had received a number of comments since the last meeting and that the written comments had been distributed at the meeting. She indicated that she would briefly summarize both the written comments and those that had been provided during telephone discussions with commenters so that the Commission had the benefit of the input received by Staff. Comments were received from The Association of Settlement Companies (TASC), Legal Services of New Jersey, New Jersey Citizen Action (NJCA), Ronald LeVine, Esq., a New Jersey attorney with a substantial bankruptcy practice who has done debt-settlement for his clients, and Gail Hillebrand of Consumer Union.

TASC, in its written comments, thanked the Commission for allowing its participation. It stated that the rate of completion for a Chapter 13 bankruptcy plan was 33%, the rate of completion of debt-settlement for TASC members was approximately

34%, and the success rate for not-for-profit debt relief was 21-26%. TASC reiterated its concern that not-for-profit entities cannot meet increased consumer demand. With regard to the issue of fees, TASC suggested that fees be set by statute, not regulation, and explained that Illinois is not a good statutory model because TASC is anticipated that debt-settlement companies will not be able to operate there since the fees allowed are much less than those allowed for not-for-profits and do not even cover the costs of providing the service. The materials supplied by TASC provided a breakdown of complaints made against debt-settlement companies and explained that: (1) debt-settlement clients are not usually low income individuals; (2) consumers cannot negotiate their own deals as effectively as a third party can; (3) debt-settlement does not cause timely payers to default on debt; and (4) there are consumers who are helped by debt-settlement. TASC also provided a number of specific comments regarding the draft statutory language, which Staff will review in detail.

David McMillin, Esq., from Legal Services of New Jersey, submitted comments in writing to raise some new points and to develop comments made previously. He provided citations to source material which were reviewed by Staff in advance of the meeting, and he made contact with Ronald LeVine, Esq., who then discussed various issues with Staff. Mr. McMillin made a number of specific comments regarding the draft statutory language, and stressed that it was vitally important to prevent for-profit entities from doing business in New Jersey. He explained that because it has limited resources, Legal Services of New Jersey can only deploy its people on issues and projects it considers particularly problematic and this is one such project. He suggested that something that he anticipated seeing more of in New Jersey was a lawyer referral model of debt-settlement in which firms that engage exclusively in debt-settlement act through New Jersey attorneys. Finally, he recommended that the draft clarify the power of the Department of Banking and Insurance to enforce the act outside of New Jersey.

New Jersey Citizen Action explained that it is the largest citizen watchdog coalition in New Jersey and that it works to expand and protect the rights of individuals and families. It claims 60,000 individual members and 100 affiliate organizations and said that it is the largest provider of foreclosure prevention counseling. It conducts seminars and peer mentoring, and sponsors counseling and education programs and multimedia campaigns. The NJCA representatives who spoke with Staff during a telephone conference indicated that for-profit entities are notorious for wide-spread abuses and that, since 2007, debt-settlement and debt-management companies generated the most complaints received by the BBB. The NJCA representatives expressed concern with the FTC Rule because it did not limit the fees that could be charged, nor did it tie the fees to any financial benefit on the part of the consumer. They suggested that New Jersey

law protects its citizens by banning for-profit entities and that DMSA would remove that protection.

Ronald LeVine, Esq., an attorney since 1972, has a practice that focuses on bankruptcy, but includes the provision of other services as well. Mr. LeVine, during a telephone conference with Ms. Tharney, said that he sees about 1,000 clients a year in his practice and that 10-20% of them have dealt with a debt-settlement company without any success. Based on the information available to him, it was a uniformly bad experience for all. He explained that there is a fairly active consumer debtors' bar that will do debt-settlement on the rare occasions on which it is warranted. Mr. LeVine opined that there will be no legitimate attorney doing debt-settlement as a significant part of their practice because the business model is inherently predatory. It cannot be implemented in a non-predatory way since mass-merchandisers have to spend so much on advertising and there is a very narrow sliver of people for whom it is the best option though it is marketed to everyone. Mr. LeVine said that attorneys who are serious bankruptcy practitioners do debt settlement work as an adjunct to that practice because there is a percentage of the population for whom it is the best solution. One benefit of an attorney providing the service is that the attorney can challenge the basis for the debt, which may be determined not to be legally enforceable. Attorneys also look to the "charge off" balance as a starting point in order to get the best outcome for their clients. Mr. LeVine said that most consumers are not emotionally equipped to negotiate for themselves, so there is a benefit to working with an intermediary. He said that there are ethics rules that are very well enforced to control the attorneys who engage in debt-settlement. He added that New Jersey is a progressive state that offers legal protections to citizens that are not offered in other states. Mr. LeVine said that we protect our people and should not expose them to predatory debt-settlement companies. He suggested that if the law is to be changed, it should allow an increase in criminal prosecutions for the bad actors, suggesting that if some people actually went to jail, it might make an impression.

Gail Hillebrand, the Senior Attorney in the West Coast office of Consumer Union, who manages the credit and financial advocacy team and was involved in the FTC rulemaking process, explained that if New Jersey allowed for-profit entities to operate, the provisions proposed by this project -- such as the layering of protections and incorporating the requirements imposed by the FTC and other states -- would offer protection to consumers. As it stands now, however, New Jersey consumers have some of the best protection in the nation because New Jersey is one of the few states that does not allow for-profit entities to do business. Ms. Hillebrand, during her telephone conference with Ms. Tharney, recommended retaining the not-for-profit requirement for a few years, suggesting that states that allow for-profits to operate, like Maine and Illinois, are imposing stricter limits and that the FTC rule change might result in more limitations

being imposed by other states. She explained that she has not yet seen a happy customer of a for-profit entity. Ms. Hillebrand recognized that, theoretically, debt-settlement is a beneficial model, but the segment of consumers for whom it is suitable is small and it is marketed to everyone, including people for whom it is completely inappropriate and financially dangerous. She said New Jersey should not expose 100% of its consumer population to predatory practices when only something like 3% of them would benefit from the debt-settlement model. She acknowledged that it is true when for-profit entities say “no one will do this if we don’t” but suggested that they hurt far more people than they help, so a cost-benefit assessment does not support allowing them in the state.

Ms. Tharney mentioned that less than a decade ago, not-for-profits were considered bad actors in this area and that, starting in 2002, the IRS intensified its scrutiny of claims for tax-exempt status by not-for-profits. Between 2004 and 2006, the IRS audited 63 credit counseling agencies representing one-half of the revenue in the industry. In the audits of the 41 of those entities representing more than 40% of the industry revenue, all audits resulted in the revocation, proposed revocation or other termination of the entities’ tax exempt status. The Pension Protection Act of 2006 included section 501(q) of the Code to impose additional requirements on credit counseling organizations.

Gail Hillebrand indicated that debt-settlement is an inherently flawed business model in which the companies are not likely to be able to do what they promise. Companies sign up people who cannot meet the program and, if they cannot do so, the consumers are substantially harmed. The FTC Rule controls the timing of the initial payment, not the amount, and once the first payment is made, the company qualifies for a fee, so there is an incentive to put customers in a plan they cannot meet. Ms. Hillebrand added that once a debtor stops paying creditors, he or she is subject to increased and more vigorous enforcement actions. She said that the only way to make the for-profit model work is to limit fees by tying them to consumer savings, defined as the difference between what they brought to the table and what they paid to the creditor. For Ms. Hillebrand, a key question is whether any consumers actually “net” out ahead under a for-profit debt-settlement model, when the unsettled debts (which may have ballooned as a result of non-payment), the fees paid, and the payments made on debts settled are all considered.

Ms. Tharney explained that a critical decision remained to be made by the Commission, and that is whether or not to allow for-profit entities to do business in New Jersey. In any event, there are reasons that the project should continue to move forward. As the comments indicated, bad for-profit entities already victimize New Jersey consumers and the draft could help clarify the powers of enforcement against such

entities and increase the penalties. It is also recognized that debt-settlement is the best option for some segment of the consumer population. As long as there are consumers in need, it is anticipated that more, not less, debt-settlement will take place in this State, and this draft offers more protection than the current law.

Commissioner Burstein asked if there was any analysis available to Staff as to what portion of New Jersey's population is underserved by not having for-profits in the State. Ms. Tharney explained that she did not know if the 3% figure provided by Ms. Hillebrand was an actual figure, or simply one used to demonstrate how small a percentage of the consumer population would truly benefit from this service. Commissioner Bunn expressed concern about the percentage of the population that has no other optimal service available. Ms. Tharney explained that based on the information available to her, that would include people who have sufficient assets or an income stream such that they can accumulate funds for a lump sum payment, who do not qualify for a Chapter 7 bankruptcy because of the means test, and who have a house that they do not want to risk losing by pursuing a Chapter 13 bankruptcy.

Commissioner Burstein suggested that the burden should be on the for-profits to show the public need, and said he did not believe that they had done that. Ms. Tharney explained that the materials supplied by TASC attempted to do so. The Department of Banking and Insurance had also commented about exploding consumer demand, but Legal Services had suggested that it was not a problem.

Chairman Gagliardi said that if the project is viewed as based on consumer protection, the question is whether the consumer in New Jersey is better off without access to the for-profit entities or with access. Ms. Tharney mentioned that one of the key reasons for beginning with this project is that New Jersey's current law is more than 30 years old and DMSA provides more protections to consumers generally. Chairman Gagliardi asked if there was an entity other than TASC that encouraged the expansion of the law in New Jersey to include for-profit entities. Ms. Tharney said that both CareOne (a for-profit provider) and DoBI supported the inclusion of for-profits as well. Commissioner Bell expressed a concern that the current state of New Jersey law was a bar to entry to all for-profits except the scofflaws, and suggested that it may not be useful to restrict the people engaging in the activity to the "worst-of-the-worst".

Commissioner Bunn suggested that something should be done in this area of the law. In response to TASC's concern that treble damages would be applied to inconsequential offenses, Commissioner Bunn suggested that there is well-developed law under the Consumer Fraud Act, and that it could be used as the enforcement arm for violations. Ms. Tharney explained that Staff had tried to make the treble damages



provisions applicable to the most significant types of offenses, including those that are not “fraudulent” or that do not violate the other provisions of the CFA so as to trigger the provisions of that act but are nonetheless substantial violations of the DMSA.

Ms. Tharney said that the Commission would see a revised draft of this project in January.

#### **Title 46 – Property**

Mr. Cannel stated that certain Title 46 provisions that do not appear to have current significance were selected by Staff for distribution to the Commission to alert both the Commission and commenters to the fact that these provisions had been selected for revision or elimination. No input has been received to this time, although Staff wished to do some additional follow-up with individuals knowledgeable in this area. Once the outdated provisions are removed, Staff will be ready to start writing a new Title 46 that contains the necessary provisions from the current law but does not contain outdated material likely to lead the reader in the wrong direction.

#### **Miscellaneous**

The next meeting of the Commission is scheduled for December 16, 2010 and Chairman Gagliardi asked that the Commissioners consider the proposed meeting schedule for 2011 so that any necessary modifications can be discussed in December.

Ms. Brown advised that the construction lien law bills, A410/S1846, were scheduled for a vote by the Senate on Monday, October 22, 2010. She also advised that the trade secrets bill, A921, had passed the Assembly unanimously, and had been referred to the Senate Commerce Committee. Mr. Arlen stated that Senator Scutari was going to sponsor the bill in the Senate.