

## **MINUTES OF COMMISSION MEETING**

**January 19, 2012**

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 Bunn, and Commissioner Albert Burstein. Professor Bernard Bell of Rutgers School of Law attended on behalf of Commissioner John J. Farmer, Jr. and Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Also in attendance were: Philip D. Stern, Esq., Philip D. Stern & Associates, LLC; Connie Pascale, Esq., Legal Services of New Jersey; Nicholas J. Kikis, the New Jersey Apartment Association; Bruce E. Gudin, Esq., Ehrlich, Petriello, Gudin & Plaza, P.C., Donald M. Legow, Legow Management Company, LLC.; Roger Antao, Esq. and Enna Chuang, Esq., Antao & Chang; Phyllis Salowe-Kaye, New Jersey Citizen Action; Ellen Harnick, Center for Responsible Lending; David McMillin, Legal Services of New Jersey; Wesley Young, American Fair Credit Counsel (formerly TASC); Edward Harvath, Esq. of Tomes & Harvath; Alan Franklin, American Credit Alliance, Inc.; Trisha Connors, Esq., Trisha Connors Law, LLC; Ron LeVine, Esq., Ronald I. LeVine, Attorneys; and Doug Miskew, CareOne.

### **Minutes**

Commissioner Bunn said that the reference to the Executive Director as “John” on the second page of the Minutes should be amended to say “Mr. Cannel” consistent with the remainder of the document. The minutes had been approved by the Commission.

### **Landlord Tenant**

Ms. Brown stated that she sought release of the final report but needed the Commission to consider four separate issues that had been identified in the materials submitted along with written comments. Ms. Brown said she would discuss each section separately and that additional comments on each issue might be forthcoming from commenters present at the meeting. Chairman Gagliardi confirmed that rather than hear all of the issues and then permit discussion, the Commission would hear each issue, one at a time, giving commenters an opportunity to discuss each issue separately.

The first issue raised concerned Section 46A:4-4 and the truth-in-renting statement. Ms. Brown explained that the Commission may recall that at the request of tenant representatives, Staff previously had modified this section to give tenants a direct cause of action against a landlord who violated the statute and a right of recovery of any

penalty imposed. Ms. Brown said that, although she would not speak for the New Jersey Apartment Association because Nick Kikis would do that on the NJAA's behalf, she understood that the NJAA objected to this change, arguing that it would create a perfect nuisance lawsuit. The tenant groups felt this provision should remain as written in the most current version of the report. Ms. Brown noted one correction from her memorandum submitted for the meeting: i.e., she may have misrepresented that one of the penalties imposed in another penalty provision was not recoverable by the tenant. Based on the language, one would have to assume that the penalty imposed in 46A:21-4c. would have to go to the tenant, at least in part, because part of the penalty is based on the loss or expenses incurred by the tenant. Section 46A:10-3, although not specifying who may recover the penalty, also appears to permit the tenant to recover, since no one else has the authority to commence the action.

Chairman Gagliardi stated that we should be clear about this and Commissioner Bunn also suggested that the final report should revise those sections to clarify who may recover the penalties imposed. Ms. Brown said that she would make the clarifications. Nick Kikis stated that the truth and renting act changes made by the report alter the availability of the document by permitting access of it online. It was the NJAA view that because of modern technology, and the availability of the document online, the harm to a tenant for a landlord's failure to provide the document is reduced. Permitting all tenants to be able to commence an action for failure to provide the document, however, exacerbates the number of actions brought and the volume of penalties that could be imposed. Since it would be more costly for the landlords to defend the actions brought against them than to pay any penalties imposed, there was no public policy argument for making the amendment the tenants seek.

Mr. Kikis pointed out to the Commission that NJAA suggests a compromise proposal, appearing at the top of page 3 of Ms. Brown's memorandum. This proposal imposes a \$100 penalty that is recoverable by the tenant, provided that the tenant gives the landlord a 30-day right to cure the violation of the act. This would work if there are no actual damages to the tenant. Connie Pascale said that he had submitted written comments and stands by those. Giving tenants a right of action could prevent harm to the tenant and the landlord has numerous ways to serve notice but not all tenants have access to the internet. By imposing the right of action and tenant recovery of the penalty, this makes sure that the tenants will get the notice to which they are entitled under the statute.

Commissioner Bunn asked Mr. Pascale if he had looked at the compromise language proposed by the NJAA. He said that the condition that the tenant prove the landlord violation had been materially detrimental to the tenant was meaningless because it would be too late by that time. The purpose of the notice is to prevent actual damages

to the tenant. Commissioner Bunn asked Mr. Pascale about the idea of providing the landlord an opportunity to cure. Mr. Pascale replied that the problem is that the actual damage is usually not curable or is hard to cure. He explained that a lack of knowledge cannot be cured. Commissioner Bunn asked what should be done if there is a curable scenario and Mr. Pascale stated that in that case, the landlord would not have a reason to ever serve notice. Commissioner Bunn asked Mr. Pascale whether his view is that a tenant who suffered no harm can still commence an action and the landlord cannot then cure the failure to provide the notice. Mr. Pascale said that that the focus is on the notice and function of the notice.

Chairman Gagliardi asked whether Mr. Pascale believed that tenants genuinely read the notice and took action in accordance with the information in the notice. Or was it similar to a tag on a mattress and not really important to the tenant. Mr. Pascale said that this notice goes to the real protections of tenants, the tenants who do read this realize they have a right. It could be better, but the notice is useful because it sets forth the basic rights of tenants as tenants. Phyllis Salowe-Kaye, who stated that she was a former president of the New Jersey Tenants Association, said that she had helped draft the truth-in-renting statement/notice and that she knew how important it is that tenants get the notice. Her former organization trains tenants to make sure they ask for the notices required to be provided by the law. She expressed her support for the position taken by Legal Services that tenants need to have the right to commence actions to enforce this law. She suggested that the language remain as written in the current version.

Mr. Kikis said that if a tenant is sophisticated enough to initiate the law suit, the tenant should be able to find the rights online. He stated again that there are plenty of ways that this information is available and accessible. In addition, the Commissioner of DCA and the attorney general can enforce the bigger penalty. Commissioner Bunn said that the law requires the statement be distributed and there are good policy reasons for doing so. The threat of the penalty needs to be real. He said he was satisfied with the current language. Commissioner Bell concurred. The rest of the Commission agreed and Chairman Gagliardi said that also the language should remain as written which provides the tenant with the right of action and recovery of any penalty.

Ms. Brown raised the second point concerning 46A:14-1 and the legislative findings to the amendment to the Anti Eviction Act pertaining to condo conversions. Staff had first removed the finding, and then put it back in at the request of the tenant groups. The issue is whether it should remain in light of the fact that the provision dates from 1986 and is an expression of the intent of the legislature at that time. Landlord commentators said that the conditions no longer mirror 1986, and the legislative findings should be altered to reflect current conditions. Ms. Brown provided draft language

accommodating the concerns about change in housing conditions, appearing on page 4 of her memo. Another option is not to put in any legislative findings.

Chairman Gagliardi stated that he was not certain of the accuracy of the data submitted and said that he finds the data to have little relevance. Commissioner Bunn agreed and said that a lawyer can use the current language to explain what happened back then. The legislative history should not be imported wholesale to this new section. Commissioner Bell stated that he felt it is important to include prior legislative findings, and that some portions are as true now as they were. He would not get into the details of the current housing situation, but there are universal, timeless characteristics of the legislative history that should remain. Chairman Gagliardi asked whether Commissioner Bell was advocating that the Commission leave sections (a) through (c), as they appear on page 4 of the memo, or was it important to preserve section (a) alone. Commissioner Bell said that he was impressed with the language in section (b) and that may be sufficient so far as legislative findings because it focuses on the displacement aspect.

Mr. Pascale said that the language proposed by Ms. Brown pays attention to old findings and realizes that conditions are similar today. He said that he liked subsection (b); it is important so people know how important the tenant laws are. He also said that he has no problem with compromise language as proposed. Chairman Gagliardi said that he does not think that subsection (a) poses the same problems as do subsections (b) and (c) because (a) is timeless and in the public interest of the State of New Jersey and it references hardship while subsections (b) and (c) rely on events from the 1980's and they are not appropriate for our work here. They provide no analysis. Commissioner Burstein said that they should also look at the generic impact of the legislative findings. The findings are based on studies made about the ills that are addressed. The Commission should not make findings without having a statistical basis to do so. He said he was uncomfortable with any revisions recommended. The Legislature is in the position of making findings but not this Commission. He suggested that the findings not be touched.

Noting that Commissioner Burstein had served in the Legislature for ten years, Chairman Gagliardi asked for a motion to not alter the legislative findings and not make them a part of the revision process. Commissioner Bell said that he would leave it in as a statement of history. Commissioner Burstein said that would be unusual. Any change that is made must be based on a ground. Ms. Brown asked whether a statement should be included in the introduction that the legislative findings continue to exist. Commissioner Bunn said that this just brings up the same problem that Commissioner Burstein describes and that there should be no comment on the viability of the findings because this Commission is not really competent to do so. Chairman Gagliardi confirmed that it would be unusual for this Commission to tell the Legislature what it has found. Commissioner

Bell said that if it is true that the Commission does not include legislative findings in its reports, then he would add that to the comment too. He suggests that the introduction say something to the effect that “it is not our practice.” Commissioner Burstein said that he is not disputing the bottom line objections but what is first needed is a study which the Commission cannot do, but he has no problem if the consensus is to put in a comment.

Mr. Pascale said that the Legislative findings are part of the current law. The findings are still true today. It is presumptuous to take it out. They inform the courts of what the purpose is. It is not appropriate to take them out. Chairman Gagliardi said that the Commission is not the Legislature. It has never been our practice to include findings. We cannot tell the Legislature what it already did. Commissioner Bunn added that we are not disputing what Mr. Pascale says. We are just not in a position to conduct the study. Commissioner Burstein added that we are not advocating repeal of the findings, just not making them part of the revision.

Chairman Gagliardi asked for a motion to leave the findings as drafted by the Legislature 26 years ago in the statute but not make them part of the revision. Commissioner Burstein so moved, seconded by Commissioner Bulbulia. The motion was passed unanimously.

Ms. Brown said that the next section about which there is dispute is section 16-5e, pertaining to the adequacy of service. Tenants asked that the word “undisputed” be put in subsection e, and the NJAA does not want to include the word. Staff does not take a position on this. In every case Ms. Brown read, however, there was no dispute whether the tenant received notice.

Commissioner Burstein said that “undisputed” is a mischievous word. Perhaps the standard should be “clear and convincing” but there are no other such standards in the statutes pertaining to landlord and tenant and therefore the standard should not be there. Mr. Pascale said that the word “undisputed” is important if the landlord fails to comply with service by certified mail. The goal is to make sure notice is served. “Undisputed” means that if the tenant says I got it, the landlord does not have to comply. If they say they did not, the landlord cannot ignore the requirements. Mr. Gudin said that a court must find a tenant received notice before it enters judgment. The word “undisputed” only adds confusion. Mr. Kikis added that resolving disputes is what courts do. The term “undisputed” unravels how this is supposed to work. Typically the claims regarding service are undisputed anyway. Mr. Pascale said that the statutory draft says that landlords must follow the law, except if it is undisputed that the tenant got the notice. If the landlord says I did not send certified mail, and tenant says he did not get it, then we need a hearing. The law says send it certified mail. We don’t want a swearing contest

every time there is a difference of opinion. Mr. Legow said that Mr. Pascale is afraid to let the person who is supposed to decide these things – the judge – decide it. He agrees with Mr. Gudin. The word will just confuse things. The courts can make these decisions.

Commissioner Bell said that “undisputed” is too high a standard. It is not even the standard in criminal matters. It is unrealistic and puts courts in positions where people will disrespect them. Commissioner Burstein made a motion that the phrase related to “undisputed” be excised from the section, i.e., “it is undisputed that” be removed. Commissioner Bunn seconded the motion and it was passed.

Ms. Brown said that the final issue concerns section – 18-4, orders for orderly removal. She explained that this new section was specifically requested by Judge Fast. The concept of orderly removal already appears in the court rules. The issue is really twofold: First, should orderly removal be in the statutes at all, and second, whether orderly removal should be permitted after the execution of the warrant of possession in light of the fact that rent is not required to be paid when orderly removal is used. There is a court rule that requires directions be given to tenants with regard to their remedies after warrants of removal are issued, and the appendix in the court rules says that the court may grant or deny an application for orderly removal even after the actual eviction of the tenant.

Mr. Antao said that he does not agree that the court rules allow for orderly removal after execution of the warrant, because removal has already occurred. Staff is correct that courts do this, but the problem is that they don’t follow the court rules properly, which would require R. 4:50-1 to be followed, and that requires a motion with briefs. But the landlord/tenant court does not require that. In response, courts take a short-cut, and the landlord is short changed. Mr. Antao said he had a case where a landlord did not get notice of the orderly removal order. In court, he was informed he would be in violation of the order, and he told the landlord to let the tenant retake possession. The landlord did not have the opportunity to explain anything to the judge. It is the interplay between two court rules that is the cause of this problem. We should clarify whether the order can be made after or before the warrant is executed.

Commissioner Bell asked whether the rule on order of orderly removal has a notice requirement. Mr. Antao suggested that the Commission put in a notice requirement. Mr. Cannel said that if the rule is valid, a statute that limits it is invalid. Commissioner Bunn asked whether a notice provision was in the statutory proposal and Ms. Brown said that there was not. Commissioner Bunn suggested that a notice provision be added. Mr. Cannel said that it would be good to bring in the notice requirement. Commissioner Bunn said that there is a responsibility to clarify the statute with the

addition of a notice requirement. Commissioner Burstein said that in the past, there was coordination between rule and statute due to the committee makeup between here and civil practice. Mr. Cannel said that the fact it is rule based should not stop the Commission from recommending a statute.

Mr. Gudin said, when a tenant appears before the judge, locked out, and needs to get back in, and there is no notice provision in the rule, then, generally what happens is the tenant calls, gets the order to show cause, the attorney for the landlord gets the message/notice later because it is an emergency application, and the attorney has no opportunity to oppose it because it is on an emergent basis. Commissioner Bunn said that will happen in any emergent application or due process. In other situations there should be notice. We cannot handle all emergent matters.

Mr. Pascale said that he agrees with Judge Fast. This was designed to help people and help tenants, the way it is should be left alone. Mr. Gudin said that in weighing the equities, granting the tenant additional time is nice, but it totally ignores the landlord's rights. Judge Fast also said the landlord's rights should be considered. Most judges include in the order, however, the quid pro quo that any personal items left at the property will be deemed abandoned and the landlord's obligation under the abandoned property provisions should not apply. This requirement is not in a court rule or statute—that's Judge Fast's condition for orderly removal. Some judges do this, some judges do not. The compliance with the Abandoned Property Act is treated differently. This should be attached as a uniform condition. If anything is left behind it should be deemed abandoned as a condition and should be statutory. Commissioner Bunn said that the Commission is not here to address the different types of disparate judicial treatments. He would move to adopt this language with the amendment that it says "upon notice to landlord"; otherwise the proposed section should be adopted without further changes. Commissioner Bunn's proposal is unanimously approved.

A motion to release the report in final form, with the suggested changes, was made by Commissioner Bunn, seconded by Commissioner Bell, and unanimously approved. Chairman Gagliardi said that this is one of the more important and substantial projects the Commission has done and thanked Staff. Commissioner Bunn thanked the commenters for their passionate comments.

#### **DMSA**

Laura Tharney said that she hoped that the Commission will release this project as a Final Report at this meeting. She advised that Assemblywoman L. Grace Spencer had introduced a version of the ULC Uniform Act as A601 on January 10, 2012. Ms. Tharney contacted Assemblywoman Spencer's office to alert them to the existence of the

Commission project and to let them know of the changes made to the Uniform Act to add additional consumer protections.

Ms. Tharney explained that there are four specific modifications to the report that were made since the last meeting, two of which were included at the request of the Commission, and two additional changes. In addition, the two issues remain that the Commission reserved for consideration at this meeting – the question of whether to permit for-profit provider participation in New Jersey and, if so, whether limitations should be imposed on the fees that may be charged by for-profit providers.

A definition of “credit counseling” was recently included on page six of the draft report since the term was used in the report, but not previously defined. The definition used is the one currently included in New Jersey law. CareOne brought to Staff’s attention that it engages in credit counseling (in the states in which it lawfully operates) and it is a for-profit entity. Doug Miskew, on behalf of CareOne, asked that the definition be revised so that it is not limited to non-profit entities.

Chairman Gagliardi asked if it did violence to the statutory scheme to leave in the terms “social service agency” and “credit counseling agency”. Mr. Miskew said he did not believe that would cause a problem, noting that those terms are not defined in the act. Commissioner Bell said that since he was not aware of any for-profit social service agencies, the term non-profit could be removed there as well. Commissioner Bunn moved to approve the language as modified by the Commission and, the motion was seconded by Commissioner Bell, and passed unanimously.

Alan Franklin of American Credit Alliance, Inc. said that the term currently used in New Jersey for credit counseling agencies is “debt adjuster” and recommended that phrase be included. John Cannel said that multiple terms could be included, joined by an “or”. Commissioner Bunn suggested the use of the term “provider”, which is defined in paragraph a.(15). Ms. Tharney asked whether retaining the term “debt adjuster” could lead to unnecessary confusion since this act is designed to replace the current debt adjuster law in its entirety and a reference to “debt adjuster” could be misconstrued as incorporating or referring to the existing law. Commissioner Bunn recommended defining “provider” as “a person who is or should be licensed pursuant to this act”. Chairman Gagliardi said that he approved, including the use of the word “person” given the broad definition of that term which includes all entities under consideration. Commissioner Bunn modified his original motion to include the input of the Chairman and Commissioner Bell again seconded the motion, which was approved unanimously.



On page ten, in Section 4b., language that had been marked with strikeouts in an earlier version of the draft was inappropriately included in the draft forwarded to the Commission without the strikeouts. As a result, a clean copy of the language was distributed at the beginning of the meeting for Commission consideration. In addition to showing the language that should be removed from this section, the clean copy draft included a new sentence, added at the suggestion of CareOne, clarifying that “a provider is not deemed to have an office in this state because an employee of the provider presides here”. This sentence would address the issue of telecommuting employees who work for a company that is not licensed in New Jersey and does not provide services to New Jersey residents but that has an employee that lives in New Jersey and may occasionally work from home. Commissioner Burstein suggested the inclusion of the word “solely” before “because an employee” to limit the scope of the exception.

Commissioner Bell confirmed that under such circumstances, the provider would not have to be licensed in New Jersey and Mr. Cannel confirmed that the exception addressed only a narrow issue and concerned only foreign companies dealing with foreign customers (foreign meaning “non-New Jersey”). Commissioner Burstein suggested that the phrase “provider providing” in the fourth sentence of the subsection should be changed to “provider engaged in debt management”. Commissioner Bell suggested “a provider offering debt management”. David McMillin of Legal Services of New Jersey said that the word “offering” would literally mean that marketing directed at New Jersey residents would not be subject to the provisions of this act and that saying “engaging in” would be more effective.

Commissioner Bell asked what law the phrase “state law applicable to that transaction” refers to. Ms. Tharney explained that originally, Staff had included “law of the individual’s state of residence” but modified the language to address the fact that there may be times when the law governing the transaction is not that of the individual’s state of residence. The goal was to emphasize that the law of some jurisdiction would be applicable to every transaction. Commissioner Bunn asked if a choice of law provision could be included that selects a state. Ms. Tharney explained that the way the language was structured did not allow for a choice of law when a provider is dealing with a New Jersey resident – in that circumstance, New Jersey law would apply. Mr. Cannel explained that if a consumer is based in Illinois, it may be difficult or impossible to comply with both New Jersey and Illinois law; and it makes more sense in that situation to comply with Illinois law. He added that other states may employ different approaches to the determination of which law applies to interstate transactions. Some may base it on choice of law provisions, some on the home state of the consumer, others on something else. Ms. Tharney explained that Staff’s solution was to create a tiered system. When there is a New Jersey consumer involved, New Jersey law applies. When there is no New

Jersey consumer, and the consumer's home state has applicable law, that law applies. When there is apparently no law applicable to the transaction, then New Jersey law applies as a default just so that there is some protection for the consumer and some law applicable to the transaction. Commissioner Bell said that it appeared that the provision in issue was inserted to insure that New Jersey did not become a haven state for scofflaws, and that it is less complex than dividing up the act's provisions to say that some are or are not applicable depending on the provider's and consumer's locations. Ms. Tharney said that was the case and added that if the Commission wishes, Staff can revisit this issue and add more detail, but the general objective was to make sure that the law of New Jersey protected New Jersey consumers and that the law of some state applied to every transaction. Chairman Gagliardi said that no further modification is required and the Commission determined that the current approach is acceptable in its current form as modified pursuant to the discussion.

On page 31, in Section 15a., the language of the draft allows the Commissioner of the Department of Banking and Insurance to modify fees and changes by regulation. Some commenters have suggested that this is not appropriate. Does the Commission want to permit modification by regulation? Commissioner Bell said that DOBI should have the power to modify the fees, but that the statute should incorporate guidance for doing so. He suggested that there be standards for adjustment or a list of considerations that must be addressed, things like an analysis of the state of competition, the affordability of the service if fees are allowed to increase, the potential tax consequences, and the experiences of other states. Commissioner Bunn pointed out that in the insurance area of the statute, there was historically language that required DOBI to insure that rates are not unreasonable, while acknowledging that the State can't force companies to operate at a loss. He added that there is a body of case law developed around the relevant phrase that might be of assistance to Staff in drafting language. Some relevant language is included in *State Farm Mutual Auto Insurance Co. v. State*, 124 N.J. 32 (1991). Ellen Harnick of the Center for Responsible Lending said that some states, including Maryland, have certain data reporting requirements that would provide information that would form a basis on which to determine the best interests of the consumer. Ms. Tharney said that she had seen that language and would review it again to see how it could best be incorporated in this situation.

On page 47, in Section 30, Staff drafted simple language to incorporate the sunset provision recommended by Commissioner Bell. Initially, Commissioner Bell had recommended a sunset provision of five years. Ms. Tharney said that she was concerned that five years may not be enough time since most debt settlement agreements run for three years, and there would undoubtedly be some lead time required to obtain customers and put them in a plan. Ms. Tharney said that after drafting the provision, she heard from

Robert Linderman of Freedom Debt Relief who said that a five year sunset would be sufficient since in that period, plans would be up and running, some might be completed, and the State would also have an opportunity to judge the nature and extent of the consumer complaints that have arisen. Mr. Linderman pointed out that Maryland had adopted a sunset provision of three years, eight months and that the for-profit providers were happy to have the opportunity to demonstrate the benefit that they could provide to Maryland consumers in that period of time. Ms. Tharney said that she will include a sunset period of five years if that is acceptable to the Commission. Commissioner Bell said five years is a good length of time and seven years is too long. There was Commission consensus on this issue and the provision will be redrafted accordingly.

Wesley Young, of the American Fair Credit Counsel, pointed out that Maryland has no fee cap and that the Commission would not obtain enough data if a fee cap on for-profit activity was set too low because there will not be any providers doing business in the State. Alan Franklin of American Credit Alliance, Inc. said that one real difficulty with a sunset provision is that the for-profit providers will enter the State, squeeze out the not-for-profit providers, and then when the sunset occurs, there will not be anyone left to assist consumers in New Jersey. Mr. Franklin explained that, if for-profit providers are allowed into the State, there is no competitive product that not-for-profits can offer under the current law. The not-for-profit business is about one-fifth of the size that it was three years ago. If a sunset provision is used to determine how for-profits will work out, no current non-profits will be in existence in five years. Mr. Franklin said that for-profits can capitalize their business, non-profits cannot. Non-profits cannot advertise, since they don't have sufficient revenue. He expressed his concern that the whole point of this enterprise is to protect consumers.

Doug Miskew said that the provision of debt-management vs. debt-settlement should not be equated with for-profit vs. non-profit companies. CareOne does both. Debt-management plans are provided by both profit and non-profit entities in states other than New Jersey. He added that non-profits may be able to adopt alternative models to continue to do business. Mr. Miskew said that "fair share" payments, contributed by creditors, are going down, and creditors' standards as to which debtors are eligible for plans are getting tighter. The tightening of the market is all driven by creditors' own policies concerning debt-management plans. Mr. Miskew said that there should be language to ensure that debtors are placed on proper plans.

Trisha Connors, a bankruptcy practitioner in New Jersey said that for-profits should not be allowed to operate in New Jersey. She said that the fundamental business model is the problem. She explained that a client of hers, who was making a good income and the ability to purchase a vacation home and other high-end accessories, decided that

he and his wife wished to pay down their credit card debts. They heard an ad for a debt settlement entity, which said that their debt would be paid off in three years, which was sooner than they could accomplish it on their own. The debtor and his wife entered a plan, the plan did not work, they were sued, no legal assistance was provided. The for-profit company had deducted an exorbitant fee from the payments made by the debtor and his wife. The debtor had to file a Chapter 13 bankruptcy. Ms. Connors said that this is not an exceptional case, that in a short period of time, she had 20 clients from 12 different debt settlement companies and that none of them were able to complete their debt-settlement plans. She explained that in the cases she has seen, no analysis was performed to determine if the debtor's income was sufficient. She added that the debtors often get sued, or their wages are garnished, and they cannot complete the plan. Many end up filing Chapter 7 bankruptcies. Ms. Connors said that for-profit companies will charge the entire fee after only settling with one credit card. The misleading refund provisions that debtors are told about initially only kick in if and when the plan is completed, which is an end-run around rules designed to protect consumers. She suggested leaving New Jersey law as it is, since it protects consumers.

Bruce Truesdale, a bankruptcy practitioner in New Jersey said that he has had similar experiences and that debt settlement agencies have provided him a plethora of clients. He pointed out that the interest rates charged on credit card debt tend to double upon a debtor's default, and default is required by a debt-settlement plan. Late payment penalties, finance charges and over-limit fees also accrue. Mr. Truesdale indicated that it takes 6-10 months before there is any communication with creditors. When creditors file suit, clients are told that the debt settlement company cannot provide legal counsel. They end up filing for bankruptcy. 20% to 30% of clients have dabbled in debt settlement before ultimately filing for bankruptcy. This does not do any justice to the consumer.

Doug Miskew said that CareOne does not operate in New Jersey because, in its view, the law prohibits it. He said that he believes that the draft would effectively regulate those companies who currently operate in New Jersey in contravention of the law and those are the companies who result in the stories presented to the Commission. Ms. Tharney said that perhaps the most compelling argument for allowing the participation of for-profit entities in New Jersey is the near universal agreement that consumers derive a benefit from debt relief that includes a reduction of principal. As with all forms of debt relief, it is not appropriate for every consumer, but some consumers simply cannot afford to repay the full balance owed. Ms. Tharney added that the Commission has heard at this meeting that for-profits are now operating in the State - in contravention of New Jersey law which creates, as Commissioner Bell once described it "an oligopoly of the scofflaws". The draft would introduce legal, regulated competition. In addition, the current law provides absolutely no protection for consumers

against the “attorney model” – the situations in which a New Jersey attorney operates as a front for a company located out of state in an effort to evade both New Jersey law generally and any protections against advance fees such as the Telemarketing Sales Rule. Our proposal deals with those issues; current New Jersey law offers no protection.

Commissioner Bunn said that he is troubled by the anecdotal descriptions of the consequences that might result from allowing for-profits to operate in the State. He suggested that it makes sense to fashion a law that allows for a civil action or an obligation to indemnify debtors who suffer negative consequences, like being sued by creditors, while on plan. Such recourse would mean that companies have a stake in ensuring that a debt-settlement plan is legitimate and well suited to a debtor. Commissioner Burstein said that he is skeptical about there being a need to allow for-profit entities to operate in the State, adding that he is not sure that it would result in consumers having more choices, as is intended. He expressed concern about whether the Illinois law including a fee cap to reduce the burden on consumers is too freshly adopted to be able to evaluate its effects. Commissioner Bulbulia said that something needs to be done to protect consumers and that allowing a failed business model, which forces consumers to default on their debts and suffer the consequences, is a problem.

Commissioner Bell said that he too, is anxious about allowing for-profit companies into the State, since those companies require consumers to default on their debts. He said that he has not heard huge numbers of success stories but he added that there does seem to be a significant group of people for whom principal reduction would be beneficial. Commissioner Bell said that it is problematic to declare, as a matter of law, that an option best suited for a particular segment of New Jersey consumers is not permitted in this state and, that as a result, he is inclined to allow for-profit companies to participate here. He said that there should be provisions to impose liability on those companies where consumers suffer consequences not of their own making. Commissioner Bell also said that the Commission would need to address fees, which, if liability is to be imposed on the for-profit companies, may not be able to be as limited as the current proposal. He suggested that the draft should instead establish a fee cap high enough to allow more than a few companies to do business in the State. Commissioner Bell said that he did not believe that the draft should contain indemnification provisions, although the goal of such provisions is laudable. Instead, the law should rely on competition to drive down fees and the administrator would keep an eye on the competitive nature of the market.

Chairman Gagliardi asked Commissioner Bunn if it would be acceptable to him to adopt a model without indemnification but with control over the fees charged by for-profit entities. Commissioner Bunn said that he did not disagree with Commissioner

Bell's approach, and he understood that indemnity might not be the right option, but it is an attractive option since it is cleaner than requiring debtors to pursue Consumer Fraud Act litigation against the offending companies. He suggested that it was necessary to be sure that the for-profit companies have a vested interest, and to encourage them to propose plans to consumers in good faith. Commissioner Bunn said that there should be an enforceable obligation, whether under the Consumer Fraud Act or a DOBI-enforced assessment, for wrongdoing by the company; some sort of safety measure in addition to fee caps. He said that the Commission should marry the fee cap approach with some risk imposed on the provider, in circumstances in which a consumer defaults while operating under an unrealistic debt-settlement plan.

Chairman Gagliardi said that his views were most closely aligned with those of Commissioner Bunn. He added that 4/5 of the Commission is willing to say that there is a role for for-profits in the State of New Jersey, but the anecdotes are troubling. Staff was directed to draft language that allows for the for-profit model, but incorporate the sort of incentives and penalties for the bad behavior described. Chairman Gagliardi added that a delayed report is better than a flawed report, noting the potential negative effect of moving forward without further contemplation in light of the issues raised.

Commissioner Burstein said that he did not disagree but suggested that the sunset provision have a standard written into it, an evaluation to be performed at the end of the finite sunset period based on data collected so that the Legislature has a basis for making any determination about whether for-profit participation could continue. Ms. Tharney explained that Maryland and Colorado had provisions that may be of assistance to Staff in drafting such language.

Mr. Cannel said that the remaining issues pertain to the fee cap and indicated that the Uniform Law Commission set a fee cap of 30%, which many consider to be too high and others consider too low. He asked if the Commission was ready to make a determination as to fee cap. Commissioner Bunn said that if the draft includes the kind of enforcement ("hammer") provisions discussed at this meeting to deter bad behavior, he is comfortable accepting the ULC's recommendation, but we must include an enforcement mechanism. Commissioner Bell said that he was inclined to set the fee cap a little higher, solely on the basis that 30% may not encourage robust competition. Mr. Cannel said that the ULC chose this figure based on the fact at least two companies consented.

Ronald LeVine, a bankruptcy practitioner from New Jersey, said that the primary expense of operating a for-profit entity is really just marketing. He suggested that the fee cap should be lower, given the bankruptcy fee limitations. He added that in litigation, an

attorney may litigate for three years to earn a fee, but must win the case before doing so and cannot collect the fee up front. Ms. Tharney clarified that pursuant to the draft, the companies would only earn a portion of the fee each month, as debts are settled. Mr. LeVine urged the Commission to set as low a cap as possible, saying that this is not a competitive marketplace.

Mr. Young said that, with regard to the “hammer” referred to by Commissioner Bunn, there is already a significant hammer contained in the draft by way of protective provisions for consumers. The sort of provisions the Commission is considering would punish companies for factors over which they have no control. Commissioner Bunn said that the bad results that the Commission has heard about seem to be ultimately due to companies placing debtors in unrealistic plans. He clarified that the Commission is not proposing that debt settlement companies become the insurer for all bad results that befall consumers; instead, the result must be caused by the offending company in order to trigger indemnification. Ms. Tharney said that, for example, the draft would not impose liability in situations in which the consumer failed to advise the debt-settlement company of notices received by creditors. Commissioner Bunn said that the Commission is only contemplating consequences in circumstances in which the consumer faithfully follows the plan. Ms. Tharney said that it was her understanding that approximately 10% of consumers would be sued while participating in debt-settlement. Commissioner Bunn said that debt-settlement companies and consumers should share the risk of the consumer being sued by creditors. Commissioner Bell described this as a free market solution, but one which gives settlement companies an incentive to minimize the risk to consumers.

Mr. Young suggested that the existing incentive is that providers do not get paid if they cannot help the consumer, which gives the consumer the option to choose debt settlement. He said that the provider has no control over whether the creditor sues. Chairman Gagliardi asked if the providers who were members of Mr. Young’s association give consumers written disclosure in advance that consumers bear the risk of suit. Mr. Young said that they did so, and with strong language. He added that debt-settlement consumers can still complete a plan, even if sued. Chairman Gagliardi said that the Commission is not suggesting that if consumers get sued, it is the debt-settlement company’s fault. He said that consumers can make an informed decision, but it is not clear that they are under the circumstances that the Commission is hearing about. He wants to be sure that there is clear guidance being given. Chairman Gagliardi said that the Commission will balance the factors and that it understands that if it welcomes for-profits into the State, but under an unrealistic business model, none will enter.

Edward Harvath, bankruptcy attorney from New Jersey, said that he has run into for-profits quite a bit in his practice. He said that the current statute is good, clear, and

easy to understand, while the proposed legislation is not. Mr. Harvath added that there are already two systems of insolvency in New Jersey, a State court procedure and federal bankruptcy proceedings. He suggested that essentially, the for-profit companies are proposing a Chapter 13 bankruptcy plan without the protection of a federal judge to inform the parties of their rights and monitor all fees that are paid. He said that he has seen consumers given pro se forms by debt-settlement companies to respond to creditors' suits and added that with two separate systems in place, we don't need a third that does not provide a benefit to the consumer.

Ms. Tharney asked the Commission to clarify the sort of input being sought by commenters for the next meeting and whether or not the Commission was looking for comment only on the issue of statutory controls or penalties to limit bad behavior by for-profit entities. Commissioner Bell said yes, that the commenters should focus on the issue of creating incentives to reduce the number of failed plans. Chairman Gagliardi said that it is his expectation that this matter will not be on the February agenda, given the research and drafting to be done, but that it will be heard by the Commission in March, due to the Legislative interest in the issue.

### **Proposed Meeting Dates for 2012**

Chairman Gagliardi said that at the February meeting, to be held at 10:00 a.m., the property issues should be addressed first. The presentations by the Commission's legislative law clerks should follow. With regard to the proposed meeting dates, Chairman Gagliardi said that, generally, the November, January and February meetings will be morning meetings and the remaining meetings will be held in the afternoon.

### **Miscellaneous**

Mr. Cannel advised that both the Trade Secrets and Title Recording bills had been signed by Governor and that he anticipates that the revised LLC bill will move quickly in the new Legislature.