MINUTES OF COMMISSION MEETING

October 20, 2011

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Commissioner Andrew O. Bunn and Commissioner Edward J. Kologi. Grace C. Bertone, Esq. of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon, Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, and Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr. Commissioner Bunn presided over the meeting.

Also in attendance were Ellen Harnick, from the Center for Responsible Lending; Ronald I. LeVine, Esq.; Robert Linderman, General Counsel, Freedom Financial Network, LLC; David McMillin, from Legal Services of New Jersey; Doug Miskew on behalf of CareOne Services; Phyllis Salowe-Kaye, Executive Director, Citizen Action; Wesley Young, Legislative Director, American Fair Credit Council (formerly TASC); and Jeffrey A. Warsh, Partner, MBI GluckShaw.

Minutes

The minutes of the September 15, 2011 meeting were approved unanimously on motion of Commissioner Bulbulia, seconded by Commissioner Bertone.

Payment of Tax Pending Appeal

After explaining that no comments had been received on this project since it was released as a tentative report, Laura Tharney asked the Commission to authorize the report’s release in final form. The Commission unanimously agreed to release the report in final form, on motion of Commissioner Bulbulia, seconded by Commissioner Bunn.

Uniform Collaborative Law Act

Marna Brown explained that this uniform law had been adopted in only three states since its promulgation in 2009. It was amended in 2010 as noted in the memorandum submitted to the Commission. She said in New Jersey there has been support for the uniform law in the family law area. A recent New Jersey ethics opinion approved of collaborative law practice as a reasonable limitation on law practice in conformance with the New Jersey Rules of Professional Conduct. Ms. Brown said that certain aspects of the uniform law might not be suitable in New Jersey, but parts could be recommended for adoption here.

Commissioner Bunn asked whether the uniform act was consistent with the ethics opinion and Ms. Brown replied that it was except perhaps for one provision that permitted a collaborative arrangement without a participation agreement. She believed that this may conflict with the informed consent and full disclosure requirements imposed by the ethics opinion. Commissioner Bunn asked whether Staff needed input from bar associations and Mr. Cannel and Ms. Brown both agreed such input would be needed. The Commission unanimously approved proceeding with the project.

Uninsured Motorist

Keith Ronan, explained that the recent New Jersey Supreme Court decision in *Aronberg v. Tolbert* case, concerned the interpretation of the Automobile Reparation Reform Act, the Wrongful Death Act and the Survivorship Act. *N.J.S.* 39:6A-4.5 provides that a person required to maintain insurance coverage who fails to do so does not have a cause of action for economic or noneconomic losses sustained as a result of an automobile accident resulting in injuries to that person. The Court in *Aronberg* held that the survivors of a deceased motorist had no ground for filing their cause of action because the decedent had not complied with the compulsory insurance law and so would not have had a cause of action if he had survived. This project would modify *N.J.S.* 39:6A-4.5 by adding in the word “heirs” to the statute, thus making heirs likewise barred and clarifying the statute in accordance with the recent Supreme Court decision.

Ms. Tharney said that one reason Staff considered this as a potential project was that the Appellate Division had ruled that heirs were not barred by the failure of the injured or deceased party to maintain the required insurance and could collect pursuant to the Wrongful Death Act. Modifying the statute could clarify the statute in accordance with the Supreme Court mandate.

Commissioner Bunn asked whether there were any causes of action available to the heirs that are not derivative, and whether modifying the statute would deprive the heirs of a cause of action they would otherwise be entitled to. Commissioner Kologi suggested that the proposed language be revised to state “the heirs of a person or any other person acting on that person’s behalf.” This change would address situations in which a person acting on behalf of the injured or deceased party may not necessarily be an heir (e.g., an executor). Professor Bell said that it was not clear to him why the Commission needed to undertake this project because the Supreme Court had made an authoritative determination.

Commissioner Bunn asked whether the Supreme Court requested that the Legislature reexamine the language. Mr. Ronan said that it did not. Commissioner Kologi said that the Supreme Court had addressed the issue as one of first impression. Commissioner Bunn asked whether there had been any criticism of the statute as being ambiguous but said that he was fine with an effort to conform the statute to the Court's opinion. Professor Bell said he did not have a strong objection to taking up the project and the Commission unanimously approved doing so. Staff will have revised language for the next meeting.

Workers Compensation Attorney Fees

Mr. Ronan explained that the Commission had asked Staff to find out whether it would be appropriate to refer the matter of workers compensation fees to the Supreme Court's Civil Rules Committee. He said that Staff determined that the matter would not be an issue for the Civil Rules Committee because of the statutory provisions controlling the imposition of fees under *N.J.S.* 34:15-28. The Commission unanimously agreed to proceed with the project. Professor Bell suggested that in the draft on page 3, adding the phrase "reflecting actual cost" to the sentence concerning liability for reasonable legal fees might create ambiguity. Commissioner Bunn agreed. Mr. Ronan explained that this language came directly from the court decision. Commissioner Kologi said that the issue of fees is routinely left to the discretion of the court. Commissioners Kologi and Bunn recommended that Staff use the customary language found in similar statutes, such as "reasonable costs and attorneys' fees", and leave the determination of reasonableness to the discretion of the workers compensation court.

Recording of Mortgage Assignments

Mr. Cannel said that he had received some limited feedback since the last meeting. He asked the Commission whether to hold this for another month in order for Staff to get further responses. Commissioner Bunn asked whether anyone is pushing for adoption of this and Mr. Cannel said no. Commissioner Bunn said that he saw no reason to fix a problem that no one complained about. Mr. Cannel said that it really is a significant problem and the case law shows that it is getting worse. He noted that the problems do tend to occur more frequently in cases involving foreclosure than assignments, per se. Commissioner Bunn asked whether there were mortgage foreclosure reforms percolating through the Legislature and Mr. Cannel said there were not. Commissioner Bunn asked whether Staff would get more of a response if the report was released as a tentative and Mr. Cannel said that he would prefer to wait a month to see if he could get more informal feedback.

Commissioner Bertone suggested that Mr. Cannel contact Myron Weinstein. Commissioner Bunn asked Staff to make a recommendation on the issue of whether this project should be combined with a project on foreclosure reform.

Debt-Management Services Act

Ms. Tharney asked if the Commission would like to hear from the guest speakers first, since some of them had travel constraints and could not stay for the entire meeting. The Commission agreed to do so and Commissioner Bunn asked each speaker to please identify him or herself before testifying.

First to speak was Wesley Young of the American Fair Credit Council (formerly known as TASC). He explained that the AFCC has traditionally been very supportive of regulation of this industry and noted that this year, AFCC supported Maryland, Colorado, and Texas bills that regulate businesses like those which are members of AFCC. Mr. Young said that the disparity between fees allowed to non-profit credit counseling entities and to for-profit entities is the primary issue. He said that non-profit entities can earn three to four times more than debt settlement entities would earn pursuant to the Commission's proposed language. The proposal, as drafted, does not cover AFCC members' costs to conduct business. Mr. Young suggested that the pressure impose restrictions on fees results from a misunderstanding of the impact of the FTC rule on fees. Under the new FTC rule, according to Mr. Young, the ultimate decision to pay a for-profit entity, and how much the client will pay, is now up to the client. When members of AFCC go to work for a client, they bring the client a settlement offer from a creditor. The consumer client has the opportunity to review that offer and decide whether or not to accept it. Only if the consumer accepts the offer and makes a payment pursuant to the offer can a for-profit entity subject to the FTC rule charge a fee to that consumer. Contracts between the for-profit entity and the consumer are terminable at will and the consumer can walk away at any time. Mr. Young said that the FTC determined that this provides adequate protection for consumers and that it is not necessary to regulate or legislate the amount of the fee that may be collected since consumers only pay for debt settlements that they accept.

Mr. Young also said that the total amount that people pay for debt counseling services exceeds the amount that they pay for debt settlement services. In addition, he said that if debt settlement providers are not allowed to operate, then the needs of a certain group of consumers, for whom debt settlement is the best option, will be neglected. Given the millions of dollars worth of debts that have been settled by AFCC member companies, there is clearly a consumer demand for debt settlement services. For some individuals or families, credit counseling provided by non-profit entities may be too expensive and bankruptcy may not be an appealing option for those who have homes they wish to protect. Mr. Young said that AFCC members, are, in certain cases, the only affordable option since it is sometimes a more significant benefit to the consumer to obtain reduction in the principal amount of the debt, not just interest and finance charges, and that is what AFCC members can provide.

Commissioner Bunn asked whether debt settlement services have been approved by the FTC and Mr. Young said that the FTC does not provide licensing. Commissioner Bunn also asked whether the AFCC uses the same contract in every state. Mr. Young said that it does not, because the laws of each state differ, but that he could provide the Commission with sample contracts. Mr. Young said that several of the sources that the Commission has relied on for fee cap information (the Center for Responsible Lending (CRL), for example) offer misleading information and contain false presumptions. He also suggested that reliance on the experiences of two other states (Maine and Illinois) is misplaced. According to Mr. Young, those states have the lowest fee caps, but the fee caps are so low that AFCC companies cannot operate there. One company that is a member of AFCC is licensed in Maine because a regulator determined it was a Maine-based company, but the company does not offer services to Maine consumers because it cannot afford to do so. No AFCC member is licensed in Illinois.

Commissioner Bell asked Mr. Young about the particular segment of the public that would benefit from debt settlement rather than credit counseling. Mr. Young replied that an AFCC member had collected demographic data and explained that it is a misconception that debt-settlement clients are low income individuals and families. To be an appropriate customer for debt settlement services, the consumer needs either assets or an income stream. The average income for a family who uses AFCC member's services is $70,000 or more, and, as a result, is not likely to meet the means test for bankruptcy. Mr. Young explained that 60% of those who use AFCC's services have a college education, and most range in age from their late 20s to early 40s. Commissioner Bell asked whether these consumers are generally unemployed or still employed. Mr. Young replied that the consumers AFCC serves are suffering some hardship as a result of lost income, lost jobs, medical problems or going through a divorce. In order to benefit from AFCC member's services, however, they need to be able to afford the program.

Commissioner Bunn asked how AFCC members determine the sufficiency of income to qualify for debt settlement services. Mr. Young explained that there is no fixed program or formula; the analysis is personalized. Generally, however, debt-settlement companies look at income, expenses and how much the consumer owes to creditors. The debt-settlement companies then do the best they can to estimate how much a consumer will need to save to begin to settle with their creditors and then base a conclusion on that. Ms. Tharney asked whether there was any way that Mr. Young could determine what percentage of people are the best candidates for debt settlement services. Mr. Young replied that it really is impossible.

Bob Linderman, General Counsel for Freedom Debt Relief, which he described as the largest debt settlement company, said that his organization accepts roughly 1 out of 22 applicants. The 21 applicants not accepted by FDR are advised to continue to pay debts or referred to a credit counseling entity or a bankruptcy attorney. Mr. Linderman explained that last month, his company settled about 42 million dollars of unsecured debt. He said that the settlement amounts generally represented payments equal to about 41 cents on the dollar of debt owed and that including fees, the consumer payment amounts to roughly 62 cents on the dollar of debt owed. He explained that a 20% accretion rate is considered normal; that a $10,000 debt will, during the course of the debt settlement program, grow to $12,000. Debt settlement with FDR, then provides debt elimination at a cost to the consumer of $6,200 for every $12,000 of indebtedness. At FDR, acceptance into the debt settlement program is driven by financial analysis and an individual's circumstances. Mr. Linderman explained that he has seen literature by CRL (the Center for Responsible Lending) which says there is no discernible benefit from debt settlement, but he does not believe the facts bear out this assertion.

Mr. Linderman said that his chief concerns involved fees and fee caps. He explained that he spent time with the FTC and FTC staff to the draft telemarketing sales rules. Mr. Linderman said that the FTC takes the position that since the new rules provide the consumer with economic authority over the transactions, a fee cap is irrelevant and unnecessary. He said that it is in the best interests of FDR to bring settlements to consumers that they will be happy with, and FDR works hard to do that. Mr. Linderman explained that FDR fully supports strong regulation of debt settlement companies and all forms of debt settlement but that the regulation of the bankruptcy and attorney models is also necessary. He said that the draft act, in its current form, embodies a philosophy of fee capping and mechanisms for charging fees that bear no relation to how services are provided. Mr. Linderman said that giving settlement companies a percentage of the monies saved provides an incentive for a quick transaction rather than the right transaction. He said that consumers should have the right to choose a "success fee" model or a "fixed fee" model and added that, in his experience, consumers overwhelmingly prefer the fixed fee model. If a "success fee" model is used, the consumer does not know how much they will be charged until the transaction is completed. Consumers do not like not knowing how much they will be changed. Mr. Linderman challenged the commentary in the report stating that the services provided by debt settlement are the equivalent of credit counseling, stating that credit counseling is not as labor-intensive as debt settlement services.

Commissioner Bunn asked how the flat fee figure is determined in a “flat fee” model of payment for debt settlement services. Mr. Linderman said the fee is usually 15% of the enrolled debt which is paid upfront versus 21% of debts which are settled. He explained that most debt settlement providers charge a flat fee of 20 to 25% depending on the amount of the debt. For lower debt amounts, however, the fees are often higher. Mr. Linderman explained that the recent FTC rule prohibited advance fees. As a result the provider needs to negotiate a settlement figure with the creditor, and bring the proposed settlement to the consumer. The consumer is then free to accept or reject the settlement. If the consumer accepts the settlement and makes at least one payment, then the settlement provider can collect a fee. Mr. Linderman explained that debt settlement providers are exposed, and work without a fee, until the consumer makes at least one payment toward completion of the settlement arrangement.

Commissioner Bell asked what percentage of consumers rejects the settlements. Mr. Linderman said that it was a small percentage, adding that it was unusual for a consumer to reject a settlement if that settlement fits the consumer’s stated parameters. He emphasized, however, that there is considerable consumer contact, and that he will sometimes make six calls to a given consumer in a month. As a result, by the time of the settlement, the consumer is well aware of the terms. Since it is detrimental to FDR’s business to do the work to settle a matter and bring the consumer a settlement that the consumer will not accept, the communication between the provider and consumer is constant and much less than 5% of settlements are rejected. Mr. Linderman said that, based on his calculations, at a fee cap of 30% of savings it takes 26 years to break even.

Commissioner Kologi said that it was his experience that sometimes the smaller cases -- the $3,500 cases—are the ones you can spend 70 hours on, and sometimes you get a good settlement in a $70,000 case without much effort. There is often no correlation between the amount of work and the amount of the payout. Mr. Linderman agreed and added that some creditors that are harder to work with than others. Target, for example, may have half a million delinquent accounts distributed over 150 collection agencies, each of which approaches the collection of the debt in a different way. You might think that it is easy to settle small accounts cheaply and quickly, but it takes longer because the creditor wants more for the smaller accounts. There is a saying that if you owe a bank a $100, you have a problem, but if you owe the bank $100 million dollars, then the bank has a problem. It is easier to strike a deal on a larger account over a period of time. Mr. Linderman said that you also have to take into account the creditor, the debtor and where in the “delinquency funnel” the debt is. If a debt is delinquent more than two cycles, it is easier to settle because the bank does not want a “balance sheet event”. They want the debt off their books before the end of a quarter. Debt settlement is not a simple business like credit counseling, but rather requires careful balancing of a large number of factors.

Doug Miskew, said that CareOne, which operates in 42 states, is the largest for-profit debt management provider. He explained that CareOne is the for-profit version of a nonprofit credit counseling company. Mr. Miskew said that there are increasing numbers of consumers who cannot afford payment of their debts according to a debt management plan. With regard to the demographics, he explained that CareOne speaks to about 70,000 consumers and about one-third of those may just need a budget plan, which CareOne will provide for free. About a third of the consumers qualify for debt management, and about one-third of those qualified actually enroll. Approximately 10-12% of the consumers are candidates for bankruptcy, and they get referred to an attorney. The remaining group, about 17-20% of the consumers who contact CareOne, are candidates for debt settlement.

Mr. Miskew explained that CareOne has been supportive of the uniform act and it operates under the act in six states. He explained that the uniform act, and the Commission draft, contain important components like the regulation of debt settlement and debt management pursuant to the same statutory structure. When a consumer initially contacts CareOne, it is not immediately clear where along the spectrum of necessary assistance they fall, so it is useful to have a single law apply to all of the entities. Mr. Miskew also suggested that the timing of this project is appropriate since the FTC rule change occurred about a year ago and the Uniform Law Commission made updates to its report in July. CareOne strongly supports the incorporation of the FTC rules in the state law and Mr. Miskew suggested that it made sense for states to incorporate those provisions in their statutes. He thinks that New Jersey's current law focuses on regulating businesses based on tax status (for-profit vs. non-profit) which is not fair since there is no factual support for the argument that only non-profit entities are the ones that should be providing these services. The trend nationwide is to allow for-profit entities to provide the services and not distinguish between companies solely on the basis of tax status. Tax status should not be dispositive, the key is a strong regulatory structure. CareOne supports the licensing component and would like to be licensed here. Mr. Miskew does not think there are more than 150 licensed for-profit entities nationwide. There are, however, many organizations that do not bother to conform to licensing or registration requirements. New Jersey consumers are dealing right now with unlicensed companies that do not follow the rules and are not operating in consumers' best interests. The proposed licensing structure would protect the interests of New Jersey consumers.

CareOne provides both debt management and debt settlement services in other states, and, based on its experiences, he can say that debt settlement services are more expensive to provide. As a result, he shares the concern of Mr. Linderman regarding the fee level set by the draft report. Mr. Miskew said that providing the debt settlement services cost four or five times as much as providing debt management services. At this time, CareOne operates under a fee structure which limits its fee for debt settlement services to 30% of savings in every state in which it does business. CareOne cannot afford to do business in Maine, Illinois, or Connecticut. Of the states that enact modern debt settlement law, 80% or more have fee levels equivalent to 30% of savings or higher. Mr. Miskew said that it is important to look at whether consumers are getting value for their money. If consumers did not believe that they were getting value from the services provided by CareOne, they would be telling the better business bureau, or seeking other remedies, and Mr. Miskew does not see that happening. He expressed concerns however, about the fact that when fees are strictly limited, consumers lose service because the companies reduce the services they provide. Consumers call the companies and no one is there to pick up the phone and help them. Mr. Miskew likes the draft act but prefers the fee level where the model act put it, which is a fee cap of 30%.

Ron LeVine, an attorney with an office in Hackensack, New Jersey, represents clients in bankruptcy. He explained that a Chapter 7 does not require a debtor to lose his or her house and that it is the very rare for an individual to do so. Mr. LeVine explained that the income cap safe harbor in New Jersey is the second highest in the country. For a four-person household in New Jersey, the cap is $100,000, meaning that a four person household can have $100,000 of income and go through bankruptcy. The income cap captures very few debtors. Mr. LeVine said that he may see about 500 debtors over the course of a year and he does not file bankruptcy for all of them. He explained that while he does debt settlement work, he does very little of it, perhaps two cases per year at most, because in the majority of cases, bankruptcy is more appropriate. A person wishing to protect an asset that is not exempt can go through payment plan under Chapter 13. Such a plan calls for payment of debts without interest, and a discharge of the amounts not paid.

Another factor Mr. LeVine wanted to bring to the Commission's attention was that there is a significant income tax on debt settlement that can be very expensive for a consumer. He speaks to maybe a dozen clients a year who go through the debt settlement process and, in his experience, they are not advised they have to pay taxes on debt settlement. The Bankruptcy Code requires that an individual go to mandatory credit counseling, which is available online or in person, before filing either Chapter 7 or Chapter 13. Since, in Mr. LeVine's experience, debt settlement benefits so few people, perhaps the Commission should consider a requirement that people be counseled as part of all debt-reduction alternatives without undue weight, before being sold a service. Credit counselors are trained and accredited by the United States credit counseling program and there is a list of approved credit counselors. Mr. LeVine said that it costs 75 cents on the dollar to settle debts and, when the taxes that must be paid are calculated in, this makes debt adjustment less desirable.

Commissioner Bell asked whether bankruptcy eliminates credit card debt. Mr. LeVine said that it does, that it will get rid of everything except for 19 categories of debt that have moral aspects attached to them. He explained that bankruptcy will not discharge alimony, child support, student loans, or fraudulent activity, but will discharge most typical credit card debts. Commissioner Bell confirmed that so long as a debtor does not commit fraud, bankruptcy generally discharges all the debt except for debt falling into one of those 19 categories. Mr. LeVine said that it did and that bankruptcy is free of negative tax consequences.

Ellen Harnick of the Center for Responsible Lending, briefly explained that CRL is affiliated with the Center for Community Self-Help, and federal and state credit unions. CRL goes to blighted areas and tries to bring back business through investment. CRL was formed to provide an opportunity for nonpartisan research. Although some of its numbers had been called in to question during this meeting, CRL is very careful and conservative with its numbers because the credibility of its research is its stock and trade. CRL looks for business solutions for consumer problems. The debt settlement industry has been widely documented to engage in abuses. The point was made people unhappy with debt reduction services would go to the Better Business Bureau, and in fact they have. Ms. Harnick explained that the BBB deems debt settlement an inherently dangerous business. She said that the acknowledged accretion of debt during the debt settlement process is a huge problem for consumers because to participate in a debt settlement program, the consumer is advised to default on the debt in order for the debt settlers to do their work. Ms. Harnick said that when we hear how many millions of dollars of debt are settled, the real question is for what percentage of consumers were debts settled. The debt that remains unsettled is not being discussed. Reduction of consumer debt could be better addressed between the creditor and a debtor with the imposition of a hardship payment rate for the consumer. Based on the research done in this area, CRL feels it is better for consumers to call creditors rather than ignore them. Once a consumer goes into default on a debt, the consumer is subject to increasing penalties and aggressive collection efforts by debt buyers.

CRL has looked at the publicly available data which contains admissions about the limitations of the debt settlement industry by the participants in the industry. TASC (now the American Fair Credit Council), for example, submitted a survey of its own members to see what percentage of consumers complete a debt settlement program. Only 33% of consumers were able to settle 75% of debts during a period of three years. The BBB advised the industry that although it had been deemed inherently problematic, if the industry met certain standards, the BBB would remove that designation. One standard to be met was that a debt settlement company show that at least 50% of clients had successfully completed a debt settlement program and the fees charged did not exceed the principal of the debt. TASC members responded that this was an unrealistic standard. Ms. Harnick said that it is true that TASC members are settling debts, but what is missed in an assessment of their effectiveness is how much consumers' debt is growing. It is true that there is an enormous consumer need in the area of debt relief, but the issue is how the need is to be met. Ms. Harnick said that the goal should be "let's not take these consumers who are extremely vulnerable and make them worse off". It may well be that companies cannot earn a profit without putting people in a worse situation than they already are, if that is true, they should not be operating here.

Ms. Harnick said that the New Jersey law last 30 years was right - for-profits should not do debt settlement in New Jersey. Companies call CRL research inaccurate, but to determine whether a consumer is benefitting from debt settlement, one must ask the following questions: 1) what percentage of a person's debts are settled; 2) what is the fee paid to the debt settlement company; and 3) what is the consumer paying in tax liability. The latest data available to CRL is that about 50% of the debt settlement companies get 75% of the debts settled. Until that number is better, no consumer is going to come out ahead. Commissioner Bunn said that there are a couple of variables in play here. First is the idea of reducing principal and second is the concept of profit versus non-profit companies providing the debt-reduction service. He said he is not sure he has a total understanding of whether one is necessarily indispensible to the other. Commissioner Bunn said that the reduction of principal is attractive. He asked Ms. Harnick whether she has come across a way to do this without the negative aspects currently associated with debt-settlement. Ms. Harnick said that it is her understanding that non-profit credit counselors do negotiate down principal when they can, but that creditors do not like to write down principal. If debt is accreting at 21%, it is not clear that the consumer is better off even if the principal is reduced. And even if the principal "shrinks", the imposition of tax will also hurt the consumer's final savings. Principal reduction through debt settlement may be a service that someone can do better in the future, but the current industry does not do it in a way that serves consumers. Ms. Harnick thanked Staff for its transparency and its welcome of differing views on this subject.

Ms. Tharney said that commenters on this project have said that nonprofit entities are precluded from reducing principal. Non-profits have told her that they would like to be able to reduce principal, but some of them do not do so now because they are actually precluded from doing so by limitations imposed on them by federal law. An alternative explanation provided by a commenter that could not attend the meeting is that banks will not pay a fee to nonprofits that reduce principal. Part of the fee received by nonprofit entities for debt management services is a "fair share" payment that they receive directly from the creditors. Ms. Tharney was advised that even if the federal law does not preclude nonprofits from engaging in principal reduction, the banks will refuse to pay those that do so.

David McMillin expressed his appreciation to Staff and the Commission for its careful review of data, and noted that the data continues to be collected. He said that it occurred to him that although industry representatives are in attendance, there are no consumers from New Jersey here demanding services from debt settlement companies. Mr. McMillin said that the non-profit companies and the bankruptcy attorneys are both robust groups of service providers that meet the consumer need in New Jersey. He said he appreciates the industries' identifying the limited portion of consumers for whom debt settlement is the most appropriate method of debt reduction. Mr. McMillin stressed that another factor to be considered is the impact on the consumer's credit record. He said that it is common for debt settlement companies to advertise that the consumer does not want bankruptcy and should come to the debt settlement entity instead. He explained that in fact, the credit score consequences for debt settlement are no better than those for bankruptcy. Mr. McMillin said that with bankruptcy, especially Chapter 7, rehabilitation of a credit record begins immediately. He said that the credit default in debt settlement is far, far worse, and the rebuilding process takes much longer. Bankruptcy is almost always an option with better results and less cost for the consumer. A well-informed consumer will choose bankruptcy over debt settlement.

Mr. McMillin said a question to consider is whether the industry will look different after the FTC rule and he added that he has not seen evidence of that. Several debt companies use an attorney model, referring consumers to attorneys who offer them no real protection and no real attorney services. He said that CareOne refers consumers to a law firm that then hires CareOne to do the vast majority of the work. He said that he has seen an increasing use of the "attorney model" in several cases in which debt settlement entities affiliate with attorneys in an effort to avoid the restrictions imposed by the law, effectively renting the law license to avoid consumer protections. Mr. McMillin urged the Commission not to go forward with this project. He explained that the debt settlement industry has a long record of abuse and there is a lack of consumer demand for these services. He said that there are good provisions in the proposal as it stands, but that the proposal is still vulnerable. Mr. McMillin suggested that the law needs to expand to apply to all attorneys. He said that it has only been eleven months since the effective date of the FTC rule and the Commission should wait and see the impact of the rule. Mr. McMillin said that the Fair Debt Collections Practices Act, the provisions of which the Commission looked to for this draft act, offers some protection against attorneys who do not comply with the law, but it is partial protection because it only applies to attorneys who engage repeatedly in debt collections work. The practice of hiring a local attorney in the debt settlement area is a problem in New Jersey and Legal Services is concerned with the potential increase in the "rent an attorney" model. He gave an example of a company called Debt Helpers, in Illinois. The Illinois Attorney General and the Illinois Banking Department have initiated a case against this Chicago company, which is being fined for operating without a license. They used lawyers as a front, an illustration of the danger of the attorney model.

Mr. McMillin also expressed concerns regarding fees. The FTC rule does not provide that consumers get all of their money back if they decide not to go forward. He explained that a debt settlement company may be prohibited from retaining a fee before the first debt is settled, but it is not prohibited thereafter. He added that there is a considerable amount of compulsion for the consumer to go forward based on the amount of the fee paid that won't be refunded. Commissioner Bunn asked what Mr. McMillin thought about a credit counselor giving the consumer advice before using any form of debt settlement or discharge, as Mr. LeVine had suggested and not just for bankruptcy, as is now required by law. Mr. McMillin suggested that what is needed is legal advice from bankruptcy attorneys about bankruptcy, not mandatory counseling from credit counselors. The legal issues that come up may be simple or may be complex.

Mr. McMillin said he believed that the proposed law will enhance the problem rather than solve it. Commissioner Bell asked whether anyone was aware of any studies that discussed the consequences to consumer credit of bankruptcy and debt settlement situations. Mr. McMillin said that he would be attending a Federal Reserve conference in Philadelphia on credit report consequences of workouts for mortgages where this issue would be addressed and that he will share any information that comes out of the conference. Ms. Harnick noted that data from a GAOC study in 2010 reports that the people who go into debt settlement that were current and then stop making payments had reductions in their credit scores by 65-120 points for 7 years.

Miscellaneous

Ms. Brown advised that the pejorative terms final report was in bill drafting, sponsored by Senator Weinberg and the trade secrets bill has now passed the Senate with an amendment on one point. The bill now had to return to the Assembly for vote but Staff had been assured that the vote will happen before the end of the year.

The meeting was adjourned on motion by Commissioner Bunn which was seconded by Commissioner Bell.