**BOSTON BAR ASSOCIATION**

**FIRST REPORT OF CONSUMER FINANCE WORKING GROUP**
January 15, 2010 (Revised)[1]

The Consumer Finance Working Group of the Boston Bar Association submits this first report of its activities and its first recommendations for revisions to consumer finance regulations.

## I. Background

In the Spring of 2008, the chairs of the Bankruptcy Law Section of the Boston Bar Association ("BBA") sought to form a working group to evaluate what the BBA could do with respect to consumer finance products, and in particular with respect to the problems that have arisen in some of these products. The Bankruptcy Law Section invited the Business Law Section, Health Law Section, Real Estate Section, Senior Lawyers Section, and Solo & Small Firm Section all to send members. The impetus for this effort was a meeting that the Bankruptcy Law Section co-chairs had with Professor Elizabeth Warren of Harvard Law School, who has written extensively about the safety of consumer financial products.

The first meeting of the Consumer Finance Working Group ("Working Group") took place in the Summer of 2008, and meetings have taken place approximately every two months since then. The Working Group has heard presentations regarding such topics as the proliferation of deceptive "loan modification programs" on the radio and the Internet, the explosion in consumer medical debt and the specific issues in its collection, and the many programs and resources of the Federal Reserve Bank of Boston with respect to consumer finance. Through these meetings and presentations, the Working Group has sought to determine those areas in which the expertise of a local bar association would be helpful with respect to consumer finance.

In the Fall of 2008, a few members of the Working Group met with members of the Consumer Protection Division ("CPD") of the office of the Massachusetts Attorney General. The CPD members explained that one of the things the Attorney General was in the process of doing was updating its regulations in a number of areas. They suggested that if the BBA were to provide recommendations as to specific updates in a regulatory area, that area might get a greater priority in the update process. One specific area in which they mentioned they were looking to update regulations was the collection of consumer debt.

The tactics used in the collection of consumer debt were the subject of a Spotlight Series entitled *Debtors' Hell* by *The Boston Globe* in July and August 2006, and debt collector harassment has continued to draw the attention of both the media (a Fox25 Special Report aired in May 2009) and the courts (the Supreme Judicial Court

[1] This Report is revised from an earlier version of this Report dated September 30, 2009.

implemented changes to the Trial Court's Uniform Rules on Small Claims, effective October 1, 2009, that are expected to have a major impact on debt collection cases). A proposal to update Attorney General regulations appeared to the Working Group to be something ideally suited to the talents of the BBA membership, and so the Working Group started focusing on such regulations, beginning with those involving debt collection.

## II. Debt Collection Regulation

Mass. General Laws c.93A, § 2(a) declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" to be unlawful. Mass. General Laws c.93A, § 2(c) authorizes the Attorney General to "make rules and regulations interpreting the provisions of subsection 2(a)." Pursuant to this authority, the Attorney General has enacted regulations, codified at 940 C.M.R. §§ 7.00 – 7.11 (the "Attorney General Regulations"), that "establish standards, by defining unfair or deceptive acts or practices, for the collection of debts from persons within the Commonwealth of Massachusetts." The Working Group understands that no comprehensive update of the Attorney General Regulations has occurred in some time.

Mass. General Laws c.93, § 24A(a) requires anyone who engages in Massachusetts "in the business of a debt collector" to obtain a license from the Commissioner of Banks, and Mass. General Laws c.93, § 24A(b) requires anyone who engages in Massachusetts "in the business of a third party loan servicer" to register with the Commissioner of Banks. Mass. General Laws c.93, § 24A(d) authorizes the Commissioner of Banks to "establish regulations pertaining to the conduct of the business of a debt collector or a third party loan servicer." Pursuant to this authority, the Commissioner of Banks has enacted regulations, codified at 209 C.M.R. §§ 18.00 – 18.24 (the "Commissioner of Banks Regulations") that, among other things, "establish standards, by defining unfair or deceptive acts or practices, for the collection of debts from persons within the Commonwealth of Massachusetts by debt collectors and third party loan servicers." The Commissioner of Banks Regulations were substantially amended in 2004. The Working Group understands that one of the purposes of such amendment was to have the Commissioner of Banks Regulations track the Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. § 1692 et seq.

While both the Attorney General Regulations and the Commissioner of Banks Regulations define unfair or deceptive acts or practices in debt collection, the key distinction is in the coverage of the regulations. The Commissioner of Banks Regulations cover those debt collectors required to be licensed by the Division of Banks and third party loan servicers, and hence not creditors themselves. *See* Division of Banks Opinion 06-060 ("Passive" debt buyer exempt from debt collection license). The current Attorney General Regulations, on the other hand, for the most part concern the actions of "creditors", a term the regulations define broadly to mean an entity "engaged in collecting a debt owed or alleged to be owed to him by a debtor" as well as the entity's "agents, servants, employees, or attorneys." 940 C.M.R. § 7.03, Excluded from the definition of "creditor", however, are entities whose "activities are solely for the purpose

of repossessing any collateral or property of the creditor securing such a debt", and "debt" is further defined to include only things arising "for personal, family, or household purposes" and to exclude "money which is, or is alleged to be, owing as a result of a loan secured by a first mortgage on real property, or in an amount in excess of $25,000." 940 C.M.R. § 7.03. While, as noted above, the Attorney General Regulations, by virtue of their definition of "creditor", also cover the activities of an attorney for a creditor, 940 C.M.R. §7.03, the Commissioner of Banks Regulations specifically exclude attorneys collecting a debt on behalf of a client, 209 C.M.R. § 18.02(g).

## III. Recommendations for Revisions to Attorney General Regulations

The 2004 amendments to the Commissioner of Banks Regulations substantially updated those regulations to introduce new concepts and practices that had developed over the years through interpretation of the FDCPA. No similar update has occurred to the Attorney General Regulations. Because both the Commissioner of Banks Regulations and the Attorney General Regulations address the same conduct, namely acts and practices to collect consumer debt, with the only difference being the entity that is trying to collect the debt (i.e. the creditor itself or a third party debt collector or loan servicer), the Working Group believes it would be beneficial if the Attorney General Regulations were updated in the same way as the Commissioner of Banks Regulations have been.

The Working Group, in accordance with its mandate to address problems with consumer finance, also discussed a variety of substantive areas involving debt collection from consumers. The Working Group identified several areas where regulatory language not currently in either the Attorney General Regulations or the Commissioner of Banks Regulations would provide clarification or other benefit.

Attached hereto as Exhibit A is the Working Group's recommendation for revised Attorney General regulations. Attached hereto as Exhibit B is a color-coded version of the recommendation, setting forth how the recommendations differ from the Commissioner of Banks Regulations (text in purple denotes a difference arising from the different parties being regulated, text in blue denotes a difference arising from existing policy differences between the current Attorney General Regulations and the Commissioner of Banks Regulations, and text in green denotes a difference arising from a specific addition to the regulations as discussed below). Attached hereto as Exhibit C is the current Attorney General Regulations, and attached hereto as Exhibit D is the current Commissioner of Banks Regulations.

Included in the recommendation are the following specific changes or additions to the Attorney General Regulations:

A. Definition of Debt: The Attorney General Regulations (but not the Commissioner of Banks Regulations) exclude from the definition of "debt" obligations that are secured by a first mortgage on real estate and obligations of more than $25,000 in amount. The Working Group believes the exclusion for first mortgages should have language making clear that it does not apply to any deficiency balance once the mortgage

has been foreclosed and the debt is no longer secured by real property. The Working Group further believes the exclusion for obligations of more than $25,000 in amount betrays the age of the Attorney General Regulations (the Working Group understands this particular provision to date from the 1970's) and is not appropriate in today's world of high credit card balances, where because of inflation a $25,000 obligation would barely cover the cost of a low-end car. The Working Group does not believe any dollar limitation is appropriate, as such a limitation would likely become obsolete just as the $25,000 limitation has.

B. Definition of Creditor: The Attorney General Regulations (but not the definition of "debt collector" in the Commissioner of Banks Regulations) exclude from the definition of "creditor" entities acting solely for the purpose of repossessing collateral. The Working Group does not believe this exclusion is appropriate. In addition, the definition of "debt collector" in the Commissioner of Banks Regulations excludes persons serving legal process in connection with enforcement of a debt. While the Working Group believes this exclusion is appropriate, it also believes that language should be included making clear that constables and process servers are excluded from the Attorney General Regulations when they serve process but are covered by the Attorney General Regulations when they engage in other debt collection activities as an agent of the creditor.

C. Ceasing Communication: The Commissioner of Banks Regulations generally prohibit a debt collector from communicating with a consumer after receiving written notice from the consumer not to do so. The Working Group believes the Attorney General Regulations should not have such a general prohibition against creditors, given that a creditor may have a more extensive relationship with a consumer, but the Working Group does believe the Attorney General Regulations should prohibit such communications by telephone or electronic means and with respect to the debt if the consumer so requests in writing.

D. Harassing and Abusive Messages: The Commissioner of Banks Regulations prohibit repeatedly or continuously "causing a telephone to ring or engaging any person in telephone conversation" and "engag[ing] any consumer in communication via telephone" more than twice in a seven-day period, but do not prohibit leaving numerous messages on voice mail and answering machines, a common practice. The Attorney General Regulations currently contain prohibitions on "contact" rather than "communication." There is potential ambiguity about whether a voice mail message or answering machine message or text message or the like constitutes "contact". The Working Group believes that the Attorney General Regulations should have a specific provision that leaving such messages repeatedly or excessively constitutes harassment and abuse.

E. Disclosure of First Name and Surname: The Commissioner of Banks Regulations contain a provision requiring any individual making a phone call on behalf of a debt collector to disclose his or her "personal name". The Working Group believes the term "personal name" could be ambiguous and that the Attorney General Regulations

should require an individual making a phone call on behalf of a creditor to disclose a first name and surname. There remains a provision that an individual can use an alias as long as the usage is consistent and only one such alias is used by any individual.

F. Documents in the Possession of Creditors: The Working Group understands that the Attorney General Regulations have been read by creditors to permit them to refuse to provide documentation to consumers when the creditor has assigned the debt to a debt collector or has sold the debt. The Working Group believes that in those circumstances a creditor should still be required upon the consumer's request to provide to the consumer a history of payments and charges, any documents signed by the consumer, the name of the original creditor (which may be different from the current owner of the debt) and a copy of any judgment against the consumer, to the extent the creditor still has such documents in either paper or electronic form. The Attorney General Regulations currently require consumers to come to the creditor's place of business, after notice, in order to obtain copies of documents in the possession of the creditor. In addition to the inconvenience to both the consumer and the creditor this arrangement can cause, many creditors are not located in Massachusetts, so that, as a practical matter, obtaining the documents this way is impossible in many cases. The Working Group also believes that the Attorney General Regulations, like the Commissioner of Banks Regulations, should require documents requested by the consumer to be mailed to the consumer and not permit the creditor to insist that the consumer pick up the documents in person. Providing copies of documents on request of the consumer alleviates these concerns.

G. Rules of Professional Conduct of Attorneys: Both the Attorney General Regulations and the Commissioner of Banks Regulations contain references to the Canons of Ethics governing attorneys. Because the Supreme Judicial Court in 1997 adopted the Rules of Professional Conduct to replace the Canons of Ethics, the Working Group believes the language of the Attorney General Regulations should reflect such replacement.

H. Hospital Safety Net Eligible Services Regulations: The Hospital Safety Net Eligible Services Regulations of the Division of Health Care Finance and Policy include various specific protections for consumers with regard to medical debt. The Working Group believes the Attorney General Regulations should be clear that they are not limiting such rights and protections.

I. Fair Debt Collection Practices Act: Much of the 2004 amendments to the Commissioner of Banks Regulations were based on the language of the FDCPA, for which a large body of law has been developed over the years through interpretation by the federal courts. The Working Group believes that upon the revision of the Attorney General Regulations, the Attorney General Regulations should expressly state that, where the language of the Attorney General Regulations tracks the language of the FDCPA, the Attorney General Regulations should be interpreted consistently with the FDCPA.

J. Utilities: The Attorney General Regulations currently exclude from much of their coverage the activities of gas and electric utilities. The Working Group believes that the Attorney General Regulations should not contain such exclusions because utilities collecting their own accounts or debt collectors hired by them should not be permitted to commit acts that are unlawful for other creditors or for debt collectors.

## IV. Conclusion

The Working Group believes that an updating of the Attorney General Regulations in the manner set forth herein would be beneficial to consumers and creditors, and recommends that the BBA endorse such a proposal.

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