

Capoccia Litigation Poses Jurisdictional Questions

BY LAZAR EMANUEL

The litigation swirling around Albany attorney Andrew F. Capoccia raises issues of interest to the profession. The present litigation centers on a complaint by New York Attorney General Eliot Spitzer alleging fraud, false advertising and deceptive business practices by Mr. Capoccia. *People v. Law Offices of Andrew F. Capoccia*, Index no. 6424-99.

Mr. Capoccia has built a practice on the representation of consumer debtors. Debtors respond to ads placed by Mr. Capoccia in which he offers to help them reduce their debt by negotiating with creditors. The Attorney General alleges that Mr. Capoccia's claims that the debtors' credit ratings will not be damaged in the process are false and misleading. He alleges that the credit ratings of many debtors have indeed been damaged.

Mr. Spitzer has also alleged that Mr. Capoccia's tactics force his clients into unnecessary lawsuits and damages, leading ultimately to bankruptcy proceedings in which Mr. Capoccia continues to represent the debtor.

Mr. Capoccia has responded by challenging the jurisdiction of the Attorney General to regulate the content of lawyer advertising, which is regulated under DR 2-101 of the New York Code of Responsibility. *Capoccia v. Spitzer*, Index No. 86023.

Appellate Division To Decide Jurisdictional Question

The jurisdictional issue raised by the Spitzer-Capoccia litigation is this: does the Attorney General have jurisdiction under the General Business Law to discipline an attorney for the content of his advertising and the conduct of his practice, or is the attorney subject to discipline only by the courts and the disciplinary committees.

The matter is now before the Appellate Division, Third Department. The Court has denied Mr. Capoccia's application for a stay pending its determination of the jurisdictional question. In January, it heard expedited argument on the issue.

The Attorney General is proceeding under Article 22A of the Business Law. The Article was designed to protect consumers from deceptive acts and practices. It declares unlawful "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service..." It authorizes the Attorney General to proceed by injunction and by an action to obtain restitution of any money or property obtained by a person who violates the act.

Article 22A contains several sections dealing with consumer advertising. Section 350 makes unlawful all false advertising in the conduct of any business or in the furnishing of any service. Section 35-a. defines

“false advertising” as any advertising which is misleading in a material respect. Section 350-d. imposes a civil penalty of \$500 for each violation, but also accepts as a complete defense “that the advertising is subject to and complies with the rules and regulations of...any official department, division, commission or agency of the state...” Mr. Capoccia argues that only lawyer disciplinary committees and the Appellate Division have the authority to judge the propriety of his advertising.

Proceedings Pending Before Committee On Professional Standards

The proceedings before the Appellate Division are made especially timely by other actions which are also pending against Mr. Capoccia. Several judges have imposed sanctions against him for asserting sham defenses on behalf of his clients. Brooklyn Civil Court Judge Bruce M. Balter imposed sanctions of \$20,000 after repeated warnings against him for alleging meritless defenses. Supreme Court Judge Joseph C. Teresi ordered sanctions of \$25,000 for the assertion of “canned” defenses unsupported by legal argument. Finally, Albany City Court Judge Leslie E. Stein imposed sanctions of \$850,000 in 87 different actions brought by Capoccia’s firm against the law firm of Solomon and Solomon, alleging violations of the federal Fair Debt Collections Practices Act. Mr. Capoccia has appealed all the sanctions against him and his appeals are pending.

On the basis of these sanction awards, the Third Department’s Committee on Professional Standards has recommended that Mr. Capoccia be disciplined for his conduct in “repeatedly asserting frivolous and/or meritless defenses, counterclaims and cross-claims on behalf of his clients.” At Mr. Capoccia’s request, the disciplinary proceedings have been opened for participation by interested parties and the public.

The committee on Professional Standards has moved before the Appellate Division for summary judgment on its recommendations.

Amicus Brief By NCYCLU

Mr. Capoccia has argued that the Committee on Professional Standards has exceeded its authority by recommending disciplinary action before the appellate courts can rule on his appeal of the sanction orders. He is supported in this argument by the New York Civil Liberties Union, which has been permitted by the Appellate Division to file an amicus curiae brief.

The NYCLU asserts that it’s unfair to discipline Capoccia on the strength of judicial orders which are on appeal and may be overturned. It argues that Capoccia may be deprived of his livelihood before his rights have been adjudicated.

The defenses for which Mr. Capoccia has been sanctioned were asserted by him under the federal Fair Debt Collection Procedures Act and the Federal Truth in Lending Act. The FDCPA (15 U.S.C.A 1692 et.seq.) imposes strict requirements and restrictions on debt collectors. An attorney who acts to collect his clients’ outstanding consumer debts is clearly a debt collector subject to the Act.

In the defenses asserted by him on behalf of his debtor clients, Mr. Capoccia has asserted that the plaintiffs’ attorneys have violated the terms of the FDCPA. He insists that his defenses are fair and proper and intended only to protect his consumer clients against unreasonable collection actions by these attorneys.

The Drama Unfolds

The Capoccia drama is now center-stage. The court has before it at the same time Capoccia's appeal of the sanction orders against him; the Attorney General's petition under Article 22A against Capoccia; Capoccia's lawsuit against the Attorney General; and the recommendation of the Committee on Professional Standards to discipline Capoccia. The issues before the Appellate Division may be summarized as follows:

- Do the defenses asserted by Capoccia under the FDCPA have any merit;
- Does the Attorney General have jurisdiction over the content of a lawyer's advertising under Article 22A of General Business Law?
- Can the Attorney General proceed against an attorney under Article 22A at the same time as a disciplinary committee is investigating his conduct?
- What if the disciplinary committee and the Attorney General are proceeding under different allegations?
- Should a disciplinary committee recommend disciplinary action against an attorney while he appeals
- the very court order or decision relied upon by the committee?

It will be interesting to see how these issues are resolved by the Court.

[Editor's note: For a detailed discussion of the federal Fair Debt Collection Procedures Act, see NYPRR August 1999. The article was written by Stewart E. Wurtzel, partner, Deutsch, Tnae, Waterman & Wurtzel. See also Debt Collection Letter Ruled Deceptive, this issue, p.8]