



State of New Jersey

# N J L R C

## New Jersey Law Revision Commission

**ANNUAL REPORT**

**2004**

Report to the Legislature of the State of New Jersey  
as provided by ~~C.~~ 1:12A-9.

February 1, 2005

**APPENDIX C**

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## I. MEMBERS AND STAFF OF THE COMMISSION IN 2004

The members of the Commission are:

**Albert Burstein**, Chairman, Attorney-at-Law

**Vito A. Gagliardi, Jr.**, Vice-Chairman, Attorney-at-Law

**Peter A. Buchsbaum**, Attorney-at-Law, until June 2004

**Daniel F. Becht**, Attorney-at-Law, until November, 2004

**Hon. Sylvia Pressler**, P.J.A.D., Retired, from December, 2004

**John Adler**, Chairman, Senate Judiciary Committee, Ex officio

**Linda R. Greenstein**, Chairman, Assembly Judiciary Committee, Ex officio

**Patrick Hobbs**, Dean, Seton Hall Law School, Ex officio  
Represented by **William Garland**, Professor of Law

**Stuart Deutsch**, Dean, Rutgers Law School - Newark, Ex officio  
Represented by **Bernard Bell**, Professor of Law

**Rayman Solomon**, Dean, Rutgers Law School - Camden, Ex officio,  
Represented by **Grace Bertone**, Attorney-at-Law

The staff of the Commission is:

John M. Cannel, Executive Director

John J. A. Burke, Assistant Executive Director

Laura C. Tharney, Counsel

Judith Ungar, Counsel

## II. HISTORY AND PURPOSE OF THE COMMISSION

New Jersey has a tradition of law revision. The first Law Revision Commission was established in 1925 and it produced the Revised Statutes of 1937. The Legislature, however, intended the work of revision and codification to continue after the enactment of the Revised Statutes. As a result, the Law Revision Commission continued in operation. After 1939, its functions passed to a number of successor agencies, most recently the Legislative Counsel.<sup>1</sup>

In 1985, the Legislature transferred the functions of statutory revision and codification to the newly created<sup>2</sup> New Jersey Law Revision Commission,<sup>3</sup> which commenced work in 1987. Since that time, the Commission has filed 60 reports with the Legislature, 29 of which have been enacted into law. In addition to the reports already considered by the Legislature, several recommendations are now pending, including a comprehensive revision of New Jersey's election law prepared in an effort to update the law and to comply with recent federal mandates.

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<sup>1</sup> N.J.S.A. 52:11-61.

<sup>2</sup> The Law Revision Commission was created by L.1985, c.498, and charged with the duty to:

a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to

(1) Remedy the defects, (2) Reconcile conflicting provisions found in the law, and (3) Clarify confusing and excise redundant provisions found in the law;

b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;

c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and

d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.

<sup>3</sup> L.1985, c. 498.

The objective of the Commission is to simplify, clarify and modernize New Jersey statutes. Pursuant to that objective, the Commission conducts an ongoing review of the statutes in order to identify areas that require revision. The scope of the revision performed by the Commission includes the correction of inconsistent, obsolete and redundant statutes, as well as comprehensive modifications of select areas of the law.

Before choosing an area of the law for revision, the Commission considers recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and public officers. Once a revision project begins, the Commission extensively examines local law and practices, and the law of other jurisdictions. The Commission also consults with experts in the particular area of the law, and seeks input from individuals and organizations familiar with the practical operation and impact of the existing statutes. The Commission continues its efforts to obtain input from these various sources throughout the drafting process. When a revision is completed, it is submitted to the New Jersey Legislature.

The Commission's work has been published in law journals, cited by the New Jersey Courts in several reported opinions, and has been used by law revision commissions in other states and foreign countries.

The meetings of the Commission are open to the public and the Commission actively solicits public comment on its tentative reports, which are widely distributed to interested persons and groups. In 1996, the Commission established a website where its current projects and its reports are available to the public on the Internet at <http://www.lawrev.state.nj.us>.

### III. LEGISLATIVE SUMMARY

Since its beginnings in 1987, the New Jersey Legislature has enacted XXXXXX bills based upon the Final Reports and Recommendations of the New Jersey Law Revision Commission:

- Anatomical Gift Act (L. 2001, c.87)
- Cemeteries (L. 2003, c.261)
- Civil Actions - Service of Process (L. 1999, c.319)
- Civil Penalty Enforcement Act (L. 1999, C.274)
- Court Names (L. 1991, c.119)
- Court Organization (L. 1991, c.119)
- Criminal Law, Titles 2A and 24 (L. 1999, c.90)
- Statute of Frauds (L. 1995, c.36)
- Intestate Succession (L. 2001, c.109)
- Evidence (L. 1999 c.319)
- Juries (L. 1995 c.44)
- Lost or Abandoned Property (L. 1999, c.331)
- Material Witness (L. 1994, c.126)
- Municipal Courts (L. 1993, c.293)
- Parentage Act (L. 1991, c.22)
- Recordation of Title Documents (L. 1991, c.308)
- Repealers (L. 1991, c.59, 93, 121, 148)
- Replevin (L. 1995, c.263)
- Service of Process (L.1999 c.319)
- Surrogates (L. 1999, c.70)
- Tax Court (L. 1993, c.403)
- Title 45 -Professions (L. 1999, c.403)
- Uniform Commercial Code 2A -Leases (L. 1994, c.114)
- Uniform Commercial Code 3 - Negotiable Instruments (L. 1995, c.28)
- Uniform Commercial Code 4 - Bank Deposits (L. 1995, c.28)
- Uniform Commercial Code 4A - Funds Transfers (L. 1994, c.114)
- Uniform Commercial Code 5 - Letters of Credit (L. 1997, c.114)
- Uniform Commercial Code 8 - Investment Securities (L. 1997, c.252)
- Uniform Commercial Code 9 - Secured Transactions (L. 2001, c.117)
- Uniform Electronic Transactions Act (L. 2001, c.116)
- Uniform Foreign Money Claims Act (L. 1993, c.317)

In 2004, the New Jersey Legislature enacted two additional bills based upon Final Reports and Recommendations of the Commission:

- Child Custody Jurisdiction and Enforcement Act (L. 2004 c.147)
- Uniform Mediation Act (L. 2004 c.157)

#### **IV. FINAL REPORTS AND RECOMMENDATIONS**

A final report contains the decision of the Commission on a particular area of the law. The report contains an analysis of the subject, proposed statutory language and appropriate commentary. A final report is approved and adopted after the public has had an opportunity to comment on tentative drafts of the report, and is filed with the Legislature. After filing, the Commission and its staff work with the Legislature to draft the report in bill form and to facilitate its enactment.

In 2004, the New Jersey Law Revision Commission published three final reports and recommendations to the Legislature.

##### **A. Motor Vehicle Liens**

In 2004, the Commission published a Final Report and Recommendations Relating to Motor Vehicle Liens. (See Appendix A.)

This project was begun in response to the opinion of the Appellate Division in *General Electric Capital Auto Lease v. Violante*, 358 N.J. Super. 171 (App. Div. 2003), which indicated "that the Legislature might wish to study the impact of certain language in *N.J.S.A. 2A:44-21*, bearing upon the garage keepers' lien, in the face of contemporary transactional realities." That case held that a lien for service to a motor vehicle was not effective against the lessor of the vehicle. In affirming the lower court's decision, Judge Kestin explicitly stated that the Appellate Court is bound by "three cases from the third decade of the last century" though it might wish otherwise.

In 1994, The New Jersey Law Revision Commission examined in detail the six New Jersey artisans' liens statutes. These statutes establish liens for storage of, or

work done on, goods which one person (owner) entrusts to another (lienor) who performs the service. The focus of the Commission's Report was to correct procedural defects in these statutes. Two of the six statutes require rather than allow sales in the absence of payment, and both were held unconstitutional. The Garage Keepers Lien Act provides for mandatory public sale of an automobile if the indebted owner does not post either the full amount of the disputed garage bill or a double bond, with court costs. The mandatory public sale procedure was held "unconstitutional under the Fourteenth Amendment in failing to afford all automobile owners the opportunity to be heard judicially prior to divestment of title." *Whitmore v. N.J. Div. Of Motor Vehicles*, 137 N.J. Super. 492, 500 (Ch. Div. 1975). (The other mandatory sale lien statute, the Stableman's Lien Act, was held unconstitutional in *White Birch Farms v. Garritano*, 233 N.J. Super. 553, 557-558 (L. Div. 1987).

The 1994 Commission Report on Distraint and Artisans' Liens proposed a single artisan's lien statute to replace most of the current statutes dealing with particular trades. However, as the Introduction to the report stated:

The one statute not replaced by this proposal is Garage Keepers and Automobile Repairmen. The Commission recommends repeal of the current statute and amendment of the Abandoned Motor Vehicles laws, N.J.S. 39:10A-8 through 39:10A-20. Change in ownership of motor vehicles and boats requires adherence to certificate of title requirements, which the proposal does not encompass. Motor vehicles and boats are excluded from the proposal for this reason.

The 1994 recommendations provide a context for drafting a statute on liens for service to motor vehicles, but none of those recommendations addresses the issue of the extent to which these liens should be enforceable against lessors of motor vehicles or holders of a security interest in motor vehicles. There is little financial difference between a lease, a conditional sale and a chattel mortgage. While distinctions can be made among them, all provide methods of financing a car. Under current law, all are treated the same, and the Commission finds no reason to change that.

In some other respects, the proposed statute would change current law and practice. Current law makes a lessor or secured lender immune from the effects of



the lien. However, in practice, a lessor or secured lender usually has to satisfy the lien to gain possession of the vehicle. Making lessors and secured lenders totally immune from these liens does not provide a fair result. If a lessor can reclaim a car that has been repaired without paying for the repair, he is unjustly enriched at the expense of the repair shop. But it is wrong to force a lessor to pay for months of storage of the car when he was not notified that the car was incurring these charges nor given a chance to claim the car and avoid the cost.

A fair statute requires careful balancing of the legitimate interests of repair, car towing and storage businesses, lessors, secured parties, and owner-drivers. The proposed statute attempts this balance. In general, liens for service to a vehicle are made enforceable against all parties. Liens for vehicle storage are made enforceable against a party after that party is notified and given a chance to reclaim the car. To assure that the rules set out in the statute apply in practice, a claimant is given a simple court remedy to reclaim a vehicle quickly, leaving the decision on the lawful amount of the lien until afterward. But a deposit of the asserted lien amount is required so that the lien holder is protected.

## **B. Enforcement of Judgments**

In 2004, the Commission published a Final Report and Recommendations Relating to Enforcement of Judgments (See Appendix B). This report combines several reports filed by the Commission in past years. The report has been updated to reflect changes in law since the original reports were filed. The Commission also made a few substantive changes to balance the interests of debtors and creditors.

### JUDGMENTS

The Commission's review of statutes concerning judgments continues the effort begun in 1989 to revise Title 2A provisions concerning the courts and the administration of civil justice. The current 32 sections include many which are outdated, unclear and superseded in practice by newer, more detailed rules. Moreover, even taken together the statutes and rules do not reflect the totality of current practice.

The Commission proposal states the processes by which a judgment or order is recorded and the process by which information concerning subsequent events that affect the judgment are added to the record.

#### NOTICE OF PENDING ACTION

The *lis pendens* procedure permits a party who institutes an action seeking to affect title to real property to provide constructive notice of the pendency of the action to potential bona fide purchasers, thus preserving the subject matter of the action until final judgment may be obtained.

The statutory *lis pendens* procedure enacted in New Jersey in the early nineteenth century regularized the common law *lis pendens* procedure, requiring the filing of a separate notice in the land records. The United States District Court for the District of New Jersey declared the statute constitutionally defective because it did not provide for a prompt hearing upon the filing of a notice of *lis pendens*. *Chrysler v. Fedders Corp.*, 519 *F.Supp.* 1252 (D. N.J. 1981), rev'd, 670 *F.2d* 1316 (3d Cir. 1982).

Although the district court decision was overturned on appeal to the federal circuit court, the legislature nevertheless approved an amendment to the *lis pendens* statute, to provide for an immediate preliminary hearing upon the filing of a notice of *lis pendens*. L. 1982, c. 200. Subsequent United States Supreme Court decisions have called the circuit court decision into question, making it desirable to retain the substance of the 1982 amendments in order to assure that the statute is constitutional. See *Connecticut v. Doehr*, 501 *U.S.* 1 (1991).

This proposed revision retains the substance of the existing statute, while greatly simplifying its provisions. The term "notice of pending action" has been substituted for the archaic Latin term "lis pendens."

#### COLLECTION OF JUDGMENTS

The current law on collection of judgments includes many sections that are outdated, unclear or superseded in practice by newer more detailed rules. As a whole, they fail to reflect current practice. The current law does not give proper guidance

or assistance to a party trying to collect a judgment. The proposed law is a comprehensive statement of the law relating to collection of judgments.

In addition to clarifications brought about by revisions in terminology, the commission proposes three substantive changes. First, the commission proposes that the collection procedure be driven by written collection instructions from the judgment creditor to the collection officer. This innovation conforms the statutes to recent case law and practice. At one time, a sheriff armed with a writ of execution might be presumed to know the nature and location of every debtor's assets within the county. This obviously is no longer the case; the collection officer relies on the creditor for instructions, and the courts have held that the officer must follow the reasonable instructions of the creditor in satisfying a judgment. The commission proposal formalizes transmission of these instructions to the officer and establishes the guidelines for determining priorities among claimants and the time when the collection order must be returned.

Second, the Commission proposes some modification of the current inadequate \$1,000 personal property exemption in line with recommendations made in the 1993 Report of the Supreme Court Committee on Post Judgment Collection Procedures. It also revises the unworkable system of appraisal that accompanies present exemption procedures. The commission proposes that when neither party objects the collection officer's informal evaluation of items of personal property be accepted as the basis for claiming exemptions.

Last the Commission adjusts the current requirement that personal property be executed on before real property. The Report would make it possible for a creditor to collect against realty if he shows that he cannot find sufficient assets to satisfy the judgment otherwise. Moreover, the current requirement that personal property actually be exhausted before collection against real property makes it difficult, if not impossible, to insure the title to real property acquired through a public sale.

## FORECLOSURE

The Commission's proposed revision of mortgage foreclosure statutes arises from the serious problems afflicting the State's homeowners and commercial community under current mortgage foreclosure law. The chief criticism of New Jersey mortgage foreclosure practice is its slowness. Most delay occurs in connection with the sale of foreclosed property. Some causes of delay are beyond the scope of this project to correct: paucity of personnel, lack of computerization, periodic market swings. The Commission's proposal on foreclosure addresses areas amenable to statutory improvement.

The Commission proposal includes a number of new substantive provisions to simplify and expedite the foreclosure process. For example, this proposal dispenses with the writ of execution currently required, and allows sale of property upon a judgment of foreclosure. Most significant, the Commission proposes that if the sheriff cannot conduct the sale within 45 days after the judgment of foreclosure, if the debtor agrees or if the debtor has abandoned the property, the court may order that the sale be conducted by someone other than the sheriff. Other new provisions are derived from the recently enacted Fair Foreclosure Act, L.1995, c.244. The most important of these provisions are those relating to "cure" of default by a debtor. These provisions promote the policy of helping homeowners retain their homes by reinstating their mortgages after missed payments.

Several of the Commission proposals explicitly mandate existing practices which now are based on Court Rule and case law and lack statutory authority. These include a statutory foundation for the debtor's right of redemption and the ability of a bona fide purchaser at a foreclosure sale to perfect title through strict foreclosure.

The Commission considered proposals that under certain circumstances would allow a creditor to take property after default on a mortgage without judicial action. It decided not to recommend nonjudicial foreclosure because of concerns about the lack of a mechanism to determine whether or not a default had actually occurred. The Commission also rejected provisions that under certain circumstances would allow a creditor to take property without sale after a judgment of foreclosure. Here the Commission's concern was that sale was necessary to protect the rights of junior

creditors. The Commission determined that changes recommended by this project and the companion project on public sale were sufficient to improve the ability of creditors to foreclose mortgages expeditiously without these problematic provisions.

## PUBLIC SALES

The Commission's review of statutes concerning sales under execution continues the effort begun in 1989 to revise Title 2A provisions governing the courts and the administration of civil justice. Both the current sections and the Commission proposal apply to all sales conducted by sheriffs and other officers, whether pursuant to enforcement orders on money judgments or mortgage foreclosure. However, the current law includes many sections that are outdated, unclear, and superseded in practice by newer more detailed rules. Current law also fails to regulate certain aspects of sales, allowing a variety of local practices.

The Commission proposals involve a codification of current practice, as well as some significant changes to simplify and shorten the process of public sale. For example, the Commission proposal requires that the sale be advertised in newspapers only one time. That change and the inclusion of an example of a sufficient advertisement should reduce both the time and cost of advertisement. The proposal also reduces the length of the adjournments that the sheriff may grant the debtor from a month to 14 days. In addition, on issues where practice varies, the Commission proposal establishes a standard.

The Commission proposal also attempts to deal with the constitutional issues raised in the case of *New Brunswick Savings Bank v. Markouski*, 123 N.J. 402 (1991) which requires that notice be given to holders of subordinate liens before property is sold to satisfy a prior lien. Under current law, the effect of the case is to require the creditor or foreclosing party to conduct searches up to the date of actual sale and to notify creditors of the sale. The proposed provisions require filing notice of the sale in the land records and notices to interest holders based on a single search before the first scheduled date of sale. This solution balances the constitutional rights of interest holders with the practical burden of multiple searches.

### **C. School Background Checks**

In 2004, the Commission published a Final Report and Recommendations Relating to School Background Checks (See Appendix C)

Current law requires all school employees who will have regular contact with pupils to undergo a criminal history record check when they are hired. This requirement was first enacted in 1986 and has been expanded and tightened in a number of amendments since that time. The latest of these was enacted last year. The purpose of these provisions is to protect school pupils. While these laws appear to function well in general, two related problems with the administration of them have been brought to the Commission's attention.

The first of these problems concerns volunteer school employees, including those employees whose only compensation is reimbursement for out-of-pocket expenses. Some of these employees have regular contact with pupils. A volunteer athletic coach may work with students in the same way as a paid coach. If a school can use criminal history record checks to screen paid coaches, it should be able to use them to screen volunteer coaches. But while it may be appropriate to screen some volunteers, it may be completely unnecessary for others. Each school system is the best judge of when background checks are advisable. As a result, the Commission recommends giving school systems discretion as to when to require them.

The second problem concerns payment for criminal history record checks. Even though it may be necessary for some volunteers to undergo these checks, it seems wrong to require the volunteers to pay for them. Volunteers are already giving time and effort to assist their local schools. It is not appropriate to ask volunteers to pay for the privilege of helping their communities. The Commission recommends that when a school system asks that a volunteer have a criminal history record check, the school system, not the volunteer should pay for it. The fact that the school system will be paying for record checks further supports the conclusion that the decision of when they are necessary must be left to the school system.

However, the problem of payment for record checks is broader. Some school systems now reimburse new employees for the cost of a criminal history record check.

Other school systems believe that current law makes reimbursement improper. The Commission concluded that current law is not clear on this issue. It decided that there is no reason to restrict a school system in deciding to reimburse the cost to some or all applicants. The local school authority is in the best position to decide what is necessary to attract the most qualified applicants for employment.

## **V. TENTATIVE REPORTS**

A tentative report represents the first settled attempt of the Commission to revise an area of law. It is the product of lengthy deliberations, but it is not final. A tentative report is distributed to the general public for comment. The Commission considers these comments and amends its report.

In 2004, the Commission published four tentative reports.

### **A. School Background Checks**

In 2004, the Commission published its Tentative Report relating to School Background Checks. (Appendix D) See above Final Report and Recommendations.

### **B. Uniform Commercial Code Revised Article 1**

In 2004, the Commission published its Tentative Report relating to the Uniform Commercial Code Revised Article 1. (Appendix E)

In 2001, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) promulgated a Revised Uniform Commercial Code Article 1 for adoption in all states. The New Jersey Law Revision Commission has examined the Official Text of Revised Article 1 and recommends that the State of New Jersey adopt it in its entirety ~~except~~ for the provision regarding choice of law contained in Revised Article § 1-301. The Commission recommends retention of existing law on this subject contained in UCC Article 1 § 1-105 and codified at *N.J.S.A. 12A:1-105*.

Article 1 of the Uniform Commercial Code (UCC) contains definitions and general provisions. In the absence of conflicting provisions, the Article 1 default

provisions apply to the transactions and matters governed by the various different articles of the UCC. In the last decade, NCCUSL and ALI have revised or amended nearly every major article of the Uniform Commercial Code to accommodate changing business practices and developments in law. The revision to Article 1 is an integral part of the Code's revision to reflect market developments and to achieve consistency with the specific subject matter articles of the Code.

Article 1 contains many changes of a technical, non-substantive nature, such as reordering and renumbering sections, and adding gender-neutral terminology.

Certain substantive changes were made as well. Section 1-102 now expressly states that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the UCC. The statute of frauds requirement aimed at transactions beyond the coverage of the UCC has been deleted. Section 1-103 clarifies the application of supplemental principles of law, with clearer distinctions about where the UCC is preemptive. The definition of "good faith" found in 1-201 is revised to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing"; a change which conforms to the definition of good faith that applies in all of the recently revised UCC articles except Revised Article 5. Finally, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

The modification to Article 1 not recommended by the Commission, however, involves the default choice-of-law provisions found in 1-301, which was designed to replace previous 1-105. Under the current law, parties to a transaction have the freedom to choose the law of any jurisdiction bearing a reasonable relation to that transaction. The Revised Article 1 provides a different basic rule, applicable to nearly all transactions, that lets the parties choose the law governing their transaction even if the jurisdiction selected has no connection to the transaction. The Commission does not recommend permitting parties to choose a governing law bearing no relation to the parties or the transaction.

### **C. Title 51 - Weights and Measures**

In 2004, the Commission published its Tentative Report relating to Title 51 - Weights and Measures. (Appendix F) The purpose of the title is consumer protection.



Title 51 comprises 13 chapters regulating the sale, transportation and licensing of commodities. Administrative regulations (*N.J.A.C. 13:47C-1.1 et seq.*) further delineate the statutory provisions, and state, county and municipal authorities enforce the system of controlling the trade of commodities. The mosaic of law and regulations governing weights and measures developed gradually over more than a century, undergoing periodic, though sporadic, amendment. As a result, the title contains many overlapping and inconsistent provisions. There are also provisions that are overly specific and deal in detail with particular subjects that are no longer of central importance.

The Report recommends replacing most of Title 51 with general and comprehensive provisions to provide a coherent and flexible basis for weights and Measures enforcement. The proposed new law also tracks the federal Fair Packaging and Labeling Act, 15 *U.S.C.A. Sect. 1451 et seq.*

#### **D. Uniform Commercial Code Article 7 - Documents of Title**

In 2004, the Commission published its Tentative Report relating to Uniform Commercial Code Article 7 - Documents of Title. (Appendix G)

In October of 2003, NCCUSL and ALI promulgated for adoption in the states a Revised Uniform Commercial Code Article 7. Article 7 of the UCC pertains to documents of title.

As of December 5, 2004, eight states have adopted the Revised Article 7: Alabama, Connecticut, Delaware, Hawaii, Idaho, Maryland, Minnesota and Virginia. The Revised Article 7 alters existing law in two primary ways. It allows the use of electronic documents of title and it updates its provisions to reflect current and emerging trends at the state, federal and international levels.

Adoption of Revised Article 7 requires making conforming amendments to several other Code sections and the language of Revised Article assumes that the enacting state has enacted Revised Article 1, although it does provides alternative amendments for state law based on the original Article 1.

"Revised Article 7 supplies a domestic legal framework [for documents of title] that conforms to international standards." William F. Savino and David S. Widenor, *2002-2003 Survey of New York, Commercial Law*, 54 *Syracuse L. Rev.* 855 (2004).

The Revised Article 7 provides for both tangible and electronic documents of title. Electronic documents of title are not currently the norm, but it is anticipated that their use will become more standard. Revised Article 7-106 sets forth the criteria for electronic documents of title by substituting the concept of control for the endorsement and possession of a tangible instrument. The rule allows parties to reissue the document of title from one medium to another, that is, a person properly holding an electronic document of title can request a substitute tangible document and vice-versa.

In recognition of the fact that documents of title may be impacted by federal and international law, Revised Article 7 has amended existing law "in light of state, federal and international developments." *Prefatory Note to Official Text* (2003). Revised Article 7 has also deleted obsolete references to tariffs, classifications and regulations that no longer track modern commercial practice. Revised Article 7 also deals with other important issues, including: (1) permissible contractual limitations of liability, (2) negotiation and transfer, (3) lien of the carrier or warehousemen on the goods and right to enforce lien in a commercially reasonable manner, (4) altered, lost and stolen instruments and (5) the effects on holders resulting from insolvency of the bailee.

While adoption of Revised Article 7 is limited to eight states, the literature does not indicate the presence of substantial opposition to its provisions. Because it uses modern statutory language, has updated provisions to reflect commercial practice, interfaces with state federal and international regulation and provides explicit rules for electronic documents of title, it is recommended that New Jersey enact Revised Article 7.

## **VI. WORK IN PROGRESS**

### **A. Title 39 - Motor Vehicles**

A new project begun by the Commission staff in late 2003 and continued in 2004 concerns the law pertaining to motor vehicles. After reviewing this area of the law, the Commission determined that the three volumes of the statute that comprise Title 39 are appropriate candidates for revision.

The basic statutory provisions concerning motor vehicles were drafted in the 1920s. Periodic modifications and accretions over time have resulted in a collection of layered statutes containing overlapping, contradictory and obsolete provisions.

The scope of Title 39 is very broad. It includes registration and licensing requirements, motor vehicle equipment requirements, and numerous provisions regarding the regulation of traffic, including requirements pertaining to bicycles, roller skates, horses and horse-drawn vehicles, snowmobiles, all terrain vehicles, machinery and equipment of unusual size or weight, pedestrians, the law of the road and right-of-way, traffic signals, accidents and reports, parking, highway and traffic signs, and the powers of municipal, county and state officials. Title 39 also includes provisions regarding automobile insurance, vehicle inspections, the purchase, sale and transfer of vehicles, abandoned and unclaimed vehicles, junk yards, driving schools and auto body repair facilities.

As a result of the scope of Title 39, it has a significant impact on a large number of residents of the State of New Jersey, and on those who drive on the many roadways in this State. The Commission would like to improve the language, the

structure and the accessibility of the law pertaining to motor vehicles so that those who are impacted by various provisions of the law can more readily locate and understand the requirements, responsibilities and restrictions imposed upon them.

The goal of this revision is not to modify the substance of the law significantly, but to consolidate and, where appropriate, restructure the law so that it is consistent, organized and accessible. There may, however, be sections of the law where substantive revision is appropriate, including outdated and inconsistent penalty provisions. In those cases, the Commission will be responsive to the input from those who work with Title 39, including the Motor Vehicle Commission, municipal court judges, attorneys who regularly practice in municipal court, police officers and others whose work with Title 39 has afforded them the opportunity to identify the instances in which the current law does not adequately address the problems posed by its day-to-day application, and to propose practical solutions.

## **B. Medical Peer Review Privilege**

Medical peer review is a process whereby doctors evaluate the quality of work done by their colleagues, in order to determine compliance with accepted health care standards. This self-regulatory procedure provides quality assurance for the medical community by fostering standardization of appropriate medical procedures and by policing caregivers who could pose risks to patients. A peer review committee typically performs two functions: the initial process of credentialing (reviewing a doctor's qualifications and recommending whether or not the doctor should be granted privileges at the hospital), and ongoing review of a doctor's work within the hospital. Peer review is one of three chief means of monitoring the quality of doctors' work; the other two are state licensing board disciplinary action and tort law medical malpractice. Doctors, courts and critics recognize the review process as an efficient means of professional self-regulation. To counter doctors' reluctance to engage in peer review, most State legislatures have enacted laws that protect peer reviewers from liability, and their work product from discovery. Unlike other states, New Jersey does not offer statutory protection for peer review materials.

The Commission considered the ramifications of protecting the evaluative and deliberative materials of hospital peer review committees regarding the health care provided any patient. It was of concern to the Commission that a statute protecting peer review materials would affect the balancing process courts now employ case by case. The Commission was mindful of the reluctance of the courts and the Legislature to expand privileges; and concerned that codification of this area of the law could be counter-productive and could limit the development of case law. The Commission agreed to issue a Tentative Report stating that it does not recommend codification of current practice.

### **C. Title 1 - Acts Laws and Statutes**

Since its inception, the Commission has continually considered whether it would be desirable to recompile all of New Jersey's statutory law. The Commission has never approved such a project because the most important problems with the statutes are substantive. There are still many subjects on which the statutes are anachronistic, contradictory or substantively deficient. None of these problems can be addressed by technical recompilation. Notwithstanding that judgment, the Commission has always recognized that there are areas of the statutes that would benefit from rearrangement or renumbering. As a result, the Commission began this project to determine whether there was a way that could be created to allow statutes to be rearranged and renumbered administratively.

This project has been broadened since its inception. Examination of Title 1 of the statutes revealed other problems. Much of the material needs modernization. Current provisions are centered on printing of the annual volume of laws. While that publication remains important, the legislative public internet site has become equally important in publication of the law. Some revision is needed to reflect that change. Where substance does not need change, language can be simplified and clarified.

Current Commission drafts give the Office of Legislative Services the authority to recompile statutes. The concept is new, although, there have been instances in the past when statutes were assigned new compilation numbers. The proposed

section requires concurrence by the Attorney General (as in statutory corrections) and provides for a system of recording that a statute has been recompiled. Drafts also continue the authority of OLS to correct statutes, but provides for a system to record correction; that provision is new. Last current Commission drafts create a simplified system for citing statutes. The current system requires three different forms of citation depending on when and in what form the statute was enacted. No policy considerations support the current system; its complications are merely a matter of history.



**STATE OF NEW JERSEY**

**N J L R C**

NEW JERSEY LAW REVISION COMMISSION

**FINAL REPORT**

relating to

**MOTOR VEHICLE LIENS**

APRIL 2004

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**APPENDIX C**

## LIENS FOR MOTOR VEHICLE SERVICE

### Introduction

This project was begun in response to the opinion of the Appellate Division in *General Electric Capital Auto Lease v. Violante*, 358 N.J. Super. 171 (App. Div. 2003), which indicated “that the Legislature might wish to study the impact of certain language in *N.J.S.A. 2A:44-21*, bearing upon the garage keepers’ lien, in the face of contemporary transactional realities.” That case held that a lien for service to a motor vehicle was not effective against the lessor of the vehicle. In affirming the lower court’s decision, Judge Kestin explicitly stated that the Appellate Court is bound by “three cases from the third decade of the last century” though it might wish otherwise.

In 1994, The New Jersey Law Revision Commission examined in detail the six New Jersey artisans’ liens statutes. These statutes establish liens for storage of, or work done on, goods which one person (owner) entrusts to another (lienor) who performs the service. The focus of the Commission’s Report was to correct procedural defects in these statutes. Two of the six statutes require rather than allow sales in the absence of payment, and both were held unconstitutional. The Garage Keepers Lien Act provides for mandatory public sale of an automobile if the indebted owner does not post either the full amount of the disputed garage bill or a double bond, with court costs. The mandatory public sale procedure was held “unconstitutional under the Fourteenth Amendment in failing to afford all automobile owners the opportunity to be heard judicially prior to divestment of title.” *Whitmore v. N.J. Div. Of Motor Vehicles*, 137 N.J. Super. 492, 500 (Ch. Div. 1975). (The other mandatory sale lien statute, the Stableman’s Lien Act, was held unconstitutional in *White Birch Farms v. Garritano*, 233 N.J. Super. 553, 557-558 (L. Div. 1987).

The 1994 Commission Report on Dstraint and Artisans’ Liens proposed a single artisan’s lien statute to replace most of the current statutes dealing with particular trades. However, as the Introduction to the report stated:

The one statute not replaced by this proposal is Garage Keepers and Automobile Repairmen. The Commission recommends repeal of the current statute and amendment of the Abandoned Motor Vehicles laws, N.J.S. 39:10A-8 through 39:10A-20. Change in ownership of motor vehicles and boats requires adherence to certificate of title requirements, which the proposal does not encompass. Motor vehicles and boats are excluded from the proposal for this reason.

The 1994 recommendations provide a context for drafting a statute on liens for service to motor vehicles, but none of those recommendations addresses the issue of the extent to which these liens should be enforceable against lessors of motor vehicles or holders of a security interest in motor vehicles. There is little financial difference between a lease, a conditional sale and a chattel mortgage. While distinctions can be made among them, all provide methods of financing a car. Under current law, all are treated the same, and the Commission finds no reason to change that.

In some other respects, the proposed statute would change current law and practice. Current law makes a lessor or secured lender immune from the effects of the lien. However, in practice, a lessor or secured lender usually has to satisfy the lien to gain possession of the vehicle. Making lessors and secured lenders totally immune from these liens does not provide a fair result. If a lessor can reclaim a car that has been repaired without paying for the repair, he is unjustly enriched at the expense of the repair shop. But it is wrong to force a lessor to pay for months of storage of the car when he was not notified that the car was incurring these charges nor given a chance to claim the car and avoid the cost.

A fair statute requires careful balancing of the legitimate interests of repair, car towing and storage businesses, lessors, secured parties, and owner-drivers. The proposed statute attempts this balance. In general, liens for service to



a vehicle are made enforceable against all parties. Liens for vehicle storage are made enforceable against a party after that party is notified and given a chance to reclaim the car. To assure that the rules set out in the statute apply in practice, a claimant is given a simple court remedy to reclaim a vehicle quickly, leaving the decision on the lawful amount of the lien until afterward. But a deposit of the asserted lien amount is required so that the lien holder is protected.

## **Section 1. Lien for motor vehicle repair**

a. A person who repairs a motor vehicle owned by another, has a lien on the vehicle repaired and its contents while the vehicle is in the lienor's possession.

b. The amount of the lien is equal to the unpaid balance of the price agreed for the repair plus the reasonable cost of storage of a vehicle not reclaimed within two days after notification that repair is completed.

c. "Repair" includes improvement or modification of a motor vehicle or the replacement of parts or accessories of the motor vehicle, but does not include the cost of storage of the motor vehicle nor towing of the motor vehicle unless the towing is done to bring the vehicle to a place where other repair is performed.

### **COMMENT**

This provision creates a lien for auto repair. It does not create a lien for storage not connected to repair nor for supply of fuel. There is no similar provision in the Abandoned Vehicle Act (39:10A-8 through 20). The equivalent provision of the existing garage keeper's lien is part of 2A:44-21:

A garage keeper who shall store, maintain, keep or repair a motor vehicle or furnish gasoline, accessories or other supplies therefor, at the request or with the consent of the owner or his representative, shall have a lien upon the motor vehicle or any part thereof for the sum due for such storing, maintaining, keeping or repairing of such motor vehicle or for furnishing gasoline or other fuel, accessories or other supplies therefor, and may, without process of law, detain the same at any time it is lawfully in his possession until the sum is paid. A motor vehicle is considered detained when the owner or person entitled to possession of the motor vehicle is advised by the garage keeper, by a writing sent by certified mail return receipt requested to the address supplied by the owner or person entitled to possession of the motor vehicle, that goods or services have been supplied or performed, and that there is a sum due for those goods or services.

This section specifically provides that the lien extends to the contents of the vehicle. There is no similar provision in current law, but 2A:44-21, quoted above, gives a garage keeper the right to detain the vehicle which may include the right to detain the contents. Extending the lien to contents obviates problems of distinguishing between equipment that is fairly considered part of the vehicle and items merely stored in it. The lien on contents is limited in that it is subject to claims of third parties. See Section 2(e) below.

Subsection (b) addresses the amount of the lien. There are two separate amounts that may be involved, repair and storage. The cost of repair is set as the amount agreed between the parties. The Commission was informed that when a car is left for service during business hours there is always an agreement as to the price. When a car is towed or left when the shop is closed, there is agreement as soon as possible. In any event, auto mechanics always obtain authorization for a repair before beginning work. This approach differs from existing law. Both the Abandoned Vehicle Act and the Garage Keepers' Lien Act are based on reasonable rather than agreed cost. 39:10A-14; 2A:44-23. The Commission decided that it was preferable for the amount of the lien to be definite and so to avoid disputes and litigation.

Cost of storage is a harder issue. A repair shop should have a lien for storage when, after a significant period of time, the vehicle is not claimed nor the repairs paid for. The Commission was informed that the custom among repair shops is to charge for storage beginning two days after the repairs are completed. However, amounts claimed for storage should not be excessive when compared with local parking charges. Storage charges could be left to agreement of the parties, but most repair shops are not in the business of storing cars, so there will not be any established rate. As a result, an "agreed storage cost" will be set by form contract language that is likely not to be read or understood. The provision restricts the cost of storage to what is reasonable. The provision also begins storage charges two days after notification that the car is ready.

### **APPENDIX A**

## **Section 2. Priority of lien; limitation as against lessors and secured parties; limitation regarding contents.**

a. A lien on a motor vehicle for repair shall have priority over other liens and interests except as provided in this section.

b. A lien for repair is enforceable against the holder of a security interest indicated on the title document for the vehicle or against the lessor of a vehicle leased for a term of one year or more only to the extent provided by this section.

c. A lien for the price of service is enforceable against the holder of a security interest or a lessor if the holder of a security interest or lessor has agreed to the service and its price. Otherwise, the lien shall be enforceable against the holder of a security interest or lessor only to a maximum amount of \$2000.

d. A lien for the cost of storage of a vehicle not paid for and taken after repair is completed is enforceable against the holder of a security interest indicated on the title document or a lessor to the extent that the cost is for storage beginning two days after the holder of a security interest or lessor has been notified by the lienor that the vehicle has not been paid for and taken.

e. A lien on the contents of a vehicle shall be subordinate to claims of owners of the contents who are not owners or habitual drivers of the vehicle.

### **COMMENT**

This section limits the cases in which secured parties and lessors will be bound by the lien for repair. The Commission decided that secured creditors and lessors should be treated equally. As a basic rule, the Commission decided that the cost of repair adds to the value of the car and should be enforceable against any kind of financing party. There was discussion as to whether the secured party or lessor should be consulted before work is done that could result in a lien. Consultation was found unnecessary for ordinary repairs. The Commission was advised that the cost of repair rarely exceeds \$2000. However, where the cost of service will be more than that amount, advance approval was found appropriate. In the absence of advance approval, only \$2000 of the lien is enforceable against a secured party or lessor. The section also limits a secured party or lessor's liability for the cost of storage. It was considered unfair to charge for storage that occurred before the secured party or lessor was notified and had an opportunity to reclaim the vehicle.

The lien on the contents of a vehicle is limited differently from that on the vehicle itself. Repair of the vehicle benefits the vehicle and so benefits anyone with a claim to it. Items that happen to be in the vehicle that are not owned by owners or habitual drivers of the vehicle are not benefited by the repair. The phrase "habitual driver" is not defined. It is intended to encompass anyone who drives the car frequently enough that he can be considered benefited by the repair. The lien extends to these drivers as a matter of convenience. As a result, it is appropriate to make the lien subject to the claims of third party owners.

## **Section 3. Lien for towing and storage**

a. A person who tows and stores a motor vehicle at the direction of a law enforcement officer or a person on whose property the motor vehicle is found has a lien on the motor vehicle and its contents while the vehicle is in the lienor's possession for the towing and storage. The amount of the lien shall be the price of towing and storage established by municipal ordinance or by contract between the municipality and the lienor. If no price has been set by ordinance or contract, the amount of the lien shall be the reasonable cost of towing and storage.

b. A lien for towing and storage shall have priority over other liens and interests except as provided in this subsection. A lien for storage is enforceable against the holder of a security interest indicated on the title document for the vehicle or a lessor of a vehicle leased for a term of one year or more only to the extent that the cost is for storage beginning two days after the holder of a security interest or lessor has been notified by the lienor that the vehicle has been impounded. A lien on the contents of a vehicle shall be subordinate to claims of owners of the contents who are not owners or habitual drivers of the vehicle.

c. The amount of the lien for towing and storage enforced against the holder of a security interest or a lessor shall include the cost of identifying the holder of a security interest or lessor.

### **APPENDIX A**

#### COMMENT

Subsection (a) establishes a lien for towing and storage not associated with repair. Current statutes establish a lien for storing a motor vehicle but do not provide specifically for towing. See 2A:44-21 quoted above. In practice, when a vehicle is towed and impounded, it is not released until charges are paid. The section also limits the amount of the lien to the price set by municipal ordinance or contract. If an amount is not set by ordinance or contract, or where the ordinance or contract does not apply, as where a vehicle is towed from private property, the amount is the “reasonable cost of towing and storage.”

Subsection (b) limits the cases in which secured parties and lessors will be bound by the lien for storage. For the same reasons as in the lien for motor vehicle service, the Commission decided that secured creditors and lessors should be treated equally. The Commission found that charges for storage present the most serious problems and must be subject to the most strict limitations. Some drivers who decide that they cannot make car payments abandon their cars on the street. These cars are towed and impounded. The lessor or secured party often is not informed of that until several months pass. By the time notice is given, storage charges are substantial. It is unfair for the secured party or lessor to be responsible for storage charges incurred before he was able to reclaim the vehicle. Because the lienor may incur cost in identifying the holder of a security interest or a lessor, subsection (c) provides that the party who incurs that cost may include it as part of the lien. As for liens for repair, the lien against items in the vehicle is limited and affects only owners and habitual drivers of the vehicle. The phrase “habitual driver” is not defined. It is intended to encompass anyone who drives the car frequently enough to be considered benefited by the repair.

### **Section 4. Retention and release of motor vehicle subject to lien**

a. A person who has possession of a motor vehicle and has a lien on it under this act may hold that vehicle and shall release it to any person who has a right to possession of the vehicle who tenders the amount of the lien as provided by this act.

b. If a person claims the vehicle and disputes the amount asserted as a lien, the person may bring a summary action in Superior Court to determine the amount due. If the person deposits in court the amount asserted as a lien, the court shall immediately order the vehicle released and after determining the amount due, shall order it paid from the deposit in court and order the balance of the deposit returned.

c. On payment of the lien amount, the person in possession of the motor vehicle may release it to any person who claims the vehicle and appears to have the right to its possession. If more than one person claims the motor vehicle, after the lien amount is paid, the person with possession of the vehicle shall release the vehicle to the person listed on the title document as owner or immediately bring an action in Superior Court to determine who has the right to possession of the vehicle.

#### COMMENT

Subsection (a) gives the lien holder the right to enforce the lien by holding the vehicle. Such a right is inherent in any possessory lien. Subsection (b) is an attempt to solve the problem of vehicles being held when the amount claimed as a lien is disputed. It is an alternative to a penalty provision which would be hard to enforce and might raise its own problems. While a summary action in court with a deposit of the amount in dispute is not convenient, it does serve the purpose of allowing the immediate release of the vehicle to preserve its value.

Subsection (c) allows the release of the vehicle to any person who appears to have a right to the vehicle. In most cases, the person who retrieves the car is the person who left it for service. That person may not be the owner of the car as shown on title documents, but the habitual driver raises the issue of disputed claims to ownership. While this problem was not raised in presentations to the Commission, it may deserve consideration.

### **Section 5. Disposition of unclaimed motor vehicle**

a. If a person has possession of a motor vehicle and has a lien on it under this act, and the vehicle has not been claimed for more than 60 days after notice of the vehicle’s possession has been given to the owner of the vehicle and to any person whose security interest is filed with the Director of the Division of Motor Vehicles, and the amount of the lien is not known to be the subject of a dispute, the lien holder may:

- (1) sell the motor vehicle at public or private sale, or

#### APPENDIX A

(2) if the motor vehicle is incapable of being operated safely or of being put in safe operational condition except at a cost in excess of its value, apply to the Director of the Division of Motor Vehicles for a title certificate allowing the vehicle to be disposed of as junk.

b. Prior to the sale of a motor vehicle pursuant to this section the lien holder shall give the owner of the motor vehicle or the holder of any security interest in the motor vehicle filed with the Director of the Division of Motor Vehicles and the Director of the Division of Motor Vehicles:

(1) at least 30 days written notice of the intent to sell the motor vehicle, and

(2) at least five days written notice of the date, time, place and manner of the proposed sale.

c. If a lien holder determines that the motor vehicle is incapable of being operated safely or of being put in safe operational condition except at a cost in excess of its value, the lien holder shall so certify to the Director of the Division of Motor Vehicles, on an application, and the Division of Motor Vehicles shall, without further certification or verification, issue for a fee of \$10.00, a junk title certificate for the vehicle; but no title certificate shall be issued unless the motor vehicle service facility first gives 30 days notice of its intention to obtain a junk title certificate to the owner of the motor vehicle or other person having a legal right to it and to the holder of any security interest in the motor vehicle filed with the Director of the Division of Motor Vehicles.

d. At any time prior to the sale of the motor vehicle or the issuance of a junk title certificate for it, the owner of the motor vehicle may reclaim possession of the motor vehicle from the motor vehicle repair facility or other person with whom the motor vehicle is stored pursuant to this act, upon payment of the reasonable costs of removal and storage of the motor vehicle, the expenses incurred pursuant to the provisions of this act, and the charges for the servicing or repair of the motor vehicle.

#### COMMENT

This section is based on parts of 39:10A-9, 39:10A-11, 39:10A-12, and 39:10A-14.

#### APPENDIX A



State of New Jersey

**N J L R C**  
**New Jersey Law Revision Commission**

**FINAL REPORT**

relating to

**JUDGMENTS AND THEIR ENFORCEMENT**

June 2004

NEW JERSEY LAW REVISION COMMISSION

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## INTRODUCTION

### JUDGMENTS

The Commission's review of statutes concerning judgments continues the effort begun in 1989 to revise Title 2A provisions concerning the courts and the administration of civil justice. The current 32 sections include many which are outdated, unclear and superseded in practice by newer, more detailed rules. Moreover, even taken together the statutes and rules do not reflect the totality of current practice.

The Commission proposal states the processes by which a judgment or order is recorded and the process by which information concerning subsequent events that affect the judgment are added to the record. First, a copy of the whole text of the judgment or order is kept by the court. See Section 1. That assures that the detail of a judgment or order will always be available. Entry is made in the Case Docket each time a judgment or order is entered. See Section 2. The docket entry serves as notice to all parties of the existence of the judgment or order and makes the decree effective against them. A judgment or order that is for a sum of money or that affects title to real estate is recorded on the Judgment Docket. See Section 3. That docket provides notice to all persons and makes a judgment a lien against real property. See Sections 7 and 8. "While the decretal provisions of a judgment take effect ... when the judgment is entered on the civil docket, the judgment would not constitute a lien until entered on the civil judgment and order docket ...." Pressler, Current N.J. Court Rules, Comment R. 4:101. Documents constituting the subsequent history of a judgment such as executions or assignments are also indicated on the docket with the judgment. See Sections 5 and 6.

The Commission has begun a related project to revise the statutes relating to the execution of judgments. The recommendations of that project will complement the proposed revised statutes on judgments.

### NOTICE OF PENDING ACTION

The lis pendens procedure permits a party who institutes an action seeking to affect title to real property to provide constructive notice of the pendency of the action to potential bona fide purchasers, thus preserving the subject matter of the action until final judgment may be obtained.

The statutory lis pendens procedure derives from the common law doctrine that the mere filing of a lawsuit seeking to affect title to real property was constructive notice of the claim of the plaintiff in the lawsuit to the property. Statutory provisions enacted in New Jersey in the early nineteenth century regularized the common law lis pendens procedure, requiring the filing of a separate notice in the land records. In the 1970's, the evolution of constitutional doctrines

limiting the availability of pre-judgment remedies called the constitutionality of New Jersey's lis pendens statute into question; it was recognized that the mere filing of a notice of lis pendens significantly impaired the ability of a property owner to convey marketable title. In 1981, the United States District Court for the District of New Jersey declared the statute constitutionally defective because it did not provide for a prompt hearing upon the filing of a notice of lis pendens. Chrysler v. Fedders Corp., 519 F.Supp. 1252 (D. N.J. 1981), rev'd, 670 F.2d 1316 (3d Cir. 1982). Although the district court decision was overturned on appeal to the federal circuit court, the legislature nevertheless approved an amendment to the lis pendens statute, to provide for an immediate preliminary hearing upon the filing of a notice of lis pendens. L. 1982, c. 200. Subsequent United States Supreme Court decisions have called the circuit court decision into question, making it desirable to retain the substance of the 1982 amendments in order to assure that the statute is constitutional. See Connecticut v. Doeher, 501 U.S. 1 (1991).

This proposed revision retains the substance of the existing statute, while greatly simplifying its provisions. The term "notice of pending action" has been substituted for the archaic Latin term "lis pendens."

## **COLLECTION OF JUDGMENTS**

The current law on collection of judgments includes many sections that are outdated, unclear or superseded in practice by newer more detailed rules. As a whole, they fail to reflect current practice. The current law does not give proper guidance or assistance to a party trying to collect a judgment. The proposed law is a comprehensive statement of the law relating to collection of judgments.

In addition to clarifications brought about by revisions in terminology, the commission proposes three substantive changes. Foremost among these changes is the abandonment of the current requirement that personal property be executed on before real property. This personal property priority has little foundation in today's society. Moreover, the requirement that personal property be exhausted before collection against real property makes it difficult, if not impossible, to insure the title to real property acquired through a public sale.

Second, the commission proposes that the collection procedure be driven by written collection instructions from the judgment creditor to the collection officer. This innovation conforms the statutes to recent case law and practice. Today's collection officer is in a situation different from that which existed when the present statutes were enacted. At one time, a sheriff armed with a writ of execution might be presumed to know the nature and location of the debtor's assets within the county. This obviously is no longer the case; the collection officer normally relies on the creditor for instructions, and the courts have held that the officer must follow the reasonable instructions of the creditor in satisfying a judgment. The commission proposal formalizes transmission of these instructions to the officer and establishes the guidelines for determining priorities among claimants and the time when the collection order must be returned.

Third, the commission proposes modification of the current inadequate \$1,000 personal property exemption in line with recommendations made in the 1993 Report of the Supreme Court Committee on Post Judgment Collection Procedures. It also revises the unworkable system of appraisal that accompanies present exemption procedures. The commission proposes that when neither party objects the collection officer's informal evaluation of items of personal property be accepted as the basis for claiming exemptions.

## **FORECLOSURE**

The Commission's proposed revision of mortgage foreclosure statutes arises from the serious problems afflicting the State's homeowners and commercial community under current mortgage foreclosure law. The chief criticism of New Jersey mortgage foreclosure practice is its slowness. Most delay occurs in connection with the sale of foreclosed property. An October, 1994 survey of all sheriffs' offices disclosed that over a third of the counties have foreclosure sale backlogs; there are scheduling backlogs of six months. Some causes of delay are beyond the scope of this project to correct: paucity of personnel, lack of computerization, periodic market swings. The Commission's proposal on foreclosure addresses areas amenable to statutory improvement. Others are addressed in the companion project, "Public Sales."

The Commission proposal includes a number of new substantive provisions to simplify and expedite the foreclosure process. For example, this proposal dispenses with the writ of execution currently required, and allows sale of property upon a judgment of foreclosure. Most significant, the Commission proposes that if the sheriff cannot conduct the sale within 45 days after the judgment of foreclosure, if the debtor agrees or if the debtor has abandoned the property, the court may order that the sale be conducted by someone other than the sheriff. Other new provisions are derived from the recently enacted Fair Foreclosure Act, L.1995, c.244. The most important of these provisions are those relating to "cure" of default by a debtor. These provisions promote the policy of helping homeowners retain their homes by reinstating their mortgages after missed payments.

Several of the Commission proposals explicitly mandate existing practices which now are based on Court Rule and case law and lack statutory authority. These include a statutory foundation for the debtor's right of redemption and the ability of a bona fide purchaser at a foreclosure sale to perfect title through strict foreclosure.

The Commission considered proposals that under certain circumstances would allow a creditor to take property after default on a mortgage without judicial action. It decided not to recommend nonjudicial foreclosure because of concerns about the lack of a mechanism to determine whether or not a default had actually occurred. The Commission also rejected provisions that under certain circumstances would allow a creditor to take property without sale after a judgment of foreclosure. Here the Commission's concern was that sale was necessary to protect the rights of junior creditors. The Commission determined that changes recommended by this project and the companion project on public sale were sufficient to improve the ability of creditors to foreclose mortgages expeditiously without these problematic provisions.



## **PUBLIC SALES**

The Commission's review of statutes concerning sales under execution continues the effort begun in 1989 to revise Title 2A provisions governing the courts and the administration of civil justice. Both the current sections and the Commission proposal apply to all sales conducted by sheriffs and other officers, whether pursuant to enforcement orders on money judgments or mortgage foreclosure. However, the current law includes many sections that are outdated, unclear, and superseded in practice by newer more detailed rules. It also fails to regulate certain aspects of sales, allowing a variety of local practices. As a whole the current law fails to reflect present practice.

The Commission proposals involve a codification of current practice, as well as some significant changes to simplify and shorten the process of public sale. For example, the Commission proposal requires that the sale be advertised in newspapers only one time. That change and the inclusion of an example of a sufficient advertisement should reduce both the time and cost of advertisement. The proposal also reduces the length of the adjournments that the sheriff may grant the debtor from a month to 14 days. These adjournments are routinely given; shortening them will shorten the foreclosure process. In addition, on issues where practice varies, the Commission proposal establishes a standard. See, for instance, the section on conditions of sale.

The Commission proposal also attempts to deal with the constitutional issues raised in the case of New Brunswick Savings Bank v. Markowski, 123 N.J. 402 (1991). That case requires that notice be given to holders of subordinate liens before property is sold to satisfy a prior lien. Under current law, the effect of the case is to require the creditor or foreclosing party to conduct searches up to the date of actual sale and to notify creditors of the sale. The Commission considered limiting the lien effect of judgments to obviate the pre-sale searches but rejected the solution as worse than the problem. The provisions proposed require filing notice of the sale in the land records and notices to interest holders based on a single search before the first scheduled date of sale. This solution balances the constitutional rights of interest holders with the practical burden of multiple searches. These provisions will reduce the difficulties faced by a creditor in conducting a valid public sale, and the Commission is confident that they meet constitutional standards.

## **JUDGMENTS**

### **J-1. Records**

The Clerk of the Superior Court shall keep indexed copies of every judgment and order, and any other instrument in a civil action which the Administrative Director with the approval of the Chief Justice shall require, in a form acceptable to them.

Source: 2A:16-12.

#### COMMENT

This section clarifies the meaning of the source provision which requires the recording of judgments and orders. The difficulty is that judgment practice, case law, statutes and rules present confusing terminology, and the term "recording" is used inconsistently. The section avoids old terminology and focuses on the process required to keep records of the full text of judgments and orders. "It must be borne in mind that there are not only distinctions between signing and entering judgments, but also between filing, recording and docketing. Such distinctions must be kept clearly in focus when considering the laws of conveyancing and real property so that there will be no improper impairment of titles." Brescher v. Gern, Dunetz, Davison Etc., 245 N.J. Super. 365, 371 (App. Div. 1991).

This proposal deletes description of the methods of recording documents specified in the source provision. The mode of recording chosen may vary with technological advances so long as copies are kept and indexed.

### **J-2. Case docket**

a. The Clerk of the Superior Court shall keep a Case Docket and shall make a dated entry in it of every civil action in the Superior Court, other than in the Law Division, Special Civil Part, and every judgment, order and execution of process, and of any other instrument which the Administrative Director with the approval of the Chief Justice shall require. The entry shall state where a copy of the full judgment or order is kept.

b. The dated entry shall constitute the record of the judgment or order.

c. A judgment or order takes effect only upon entry in the Case Docket, unless the court directs otherwise in the judgment or order.

Source: New

#### COMMENT

This new section fills a statutory void. Law 1991, c.119, sec.4, repealed 2A:2-12 which required the Clerk of the Superior Court to "keep a book known as the civil docket..." Judgments take effect only upon entry in the civil docket, but there is no statute or rule requiring its existence. Because the "entry required by this rule [R. 4:101-3.] shall constitute the record of the judgment or order..." and because the civil docket is referred to in statutes providing for the civil judgment and order docket, a statute mandating it is desirable. The proposal changes the name from "civil docket" to "case docket."

### **J-3. Judgment docket**

The Clerk of the Superior Court shall keep a Judgment Docket and upon request and receipt of any required fee shall make a dated entry in it of the parties and their addresses and amount of the following judgments and orders:

a. Any judgment or order for payment of a fixed total amount of money entered from the Superior Court except from the Special Civil Part, including

(1) a judgment or order to pay a fixed total amount of money for counsel fees and other fees or costs; and

(2) a judgment or order to pay a fixed total amount of money as arrearages resulting from failure to make periodic payments.

b. Any judgment or order affecting title to or a lien upon real or personal property or for conveyance or release of real property.

c. Upon filing of a statement required by 2A:18-32 et seq., any judgment of the Special Civil Part of the Law Division.

d. Upon written request pursuant to 2B:12-26, any municipal court judgment assessing a penalty .

e. Any certificate or lien filed by a State or county officer or agency required by law to be docketed.

Source: 2A:16-11, R. 4:101-4.

#### COMMENT

This section brings together the vital functions of the civil judgment and order docket in current practice without repeating the details listed in the relevant court rules. The proposal changes the name of the docket from "civil judgment and order docket" to "judgment docket." Subsection (a) retains the additions of the 1981, 1982 and 1983 amendments concerning counsel fees, periodic payments and arrearages. As a result, the subsection covers any kind of judgment for a sum certain. It does not include a judgment ordering future periodic payments, but it does include a judgment for a specific amount due immediately even if the amount is the result of overdue periodic payments. Subsections (c) and (d) add judgments of the Special Civil Part and the municipal court in accordance with their respective statutes. Subsection (e) reflects the requirement that certain agencies file statutory liens with the Superior Court. Examples of statutes encompassed by the subsection are 30:4C-29.2 (Division of Youth and Family Services lien) and 2A:158A-17 (Public Defender lien). See also Rule 4:101-4.

### **J-4. Address of judgment holder**

The Clerk shall enter the address of the holder of a judgment with each judgment entered in the Judgment Docket. A judgment holder shall file a new address with the Clerk promptly after each change in address.

Source: New

#### COMMENT

While this section is new, with section 8(b) below, it enacts the substance of Section 13 of the Fair Foreclosure Act, L. 1995 c.244.

### **J-5. Attachments and execution of process**

The Clerk shall enter in the Judgment Docket, if the judgment is entered there, and otherwise in the Case Docket:

a. Any attachments, giving the names of plaintiff and defendant; and the time when, and amount for which, writ of attachment issued; and

b. Notation of any return showing execution of process resulting in full or partial satisfaction of the judgment.

Source: 2A:16-11

#### COMMENT

Rule 4:101-2.(b) contains the same requirements as those in subsection (a). The Commission adds this provision because docketing of attachments as searchable records should be statutorily required.

#### **J-6. Assignment, subordination or release of the lien, warrant to satisfy, satisfaction**

The Clerk shall enter in the Judgment Docket, if the judgment is entered there, and otherwise in the Case Docket, notation of any assignment of, subordination or release of the lien of, warrant to satisfy, and satisfaction of, any judgment.

a. Assignment. An assignment of a judgment shall be in writing, and acknowledged or proved as required for conveyance of real estate.

b. Subordination or release of lien of judgment. A subordination or release of the lien of judgment shall contain a description of the property as to which the judgment lien is to be subordinated and shall be acknowledged or proved as required for conveyance of real estate.

c. Satisfaction. Satisfaction shall be (1) by order of the court on motion after receipt of money paid into court; (2) upon receipt from the satisfied party of an acknowledged satisfaction or warrant directing entry of satisfaction; (3) upon the filing of a warrant or the satisfied return by the sheriff or other officer of an execution issued on a judgment; or (4) upon order of the court on motion of the party making satisfaction. A creditor that receives full satisfaction of a judgment shall enter satisfaction on the record or deliver a warrant to satisfy to the debtor. A creditor that fails to enter satisfaction or deliver a warrant within 30 days after written request by the debtor shall be liable to the debtor for \$100 and, in addition, for any loss caused to the debtor by the failure.

Source: 2A:16-15, 2A:16-41, 2A:16-44, 2A:16-45, 2A:16-46, 2A:16-47, 2A:16-48.

#### COMMENT

In subsection (b) subordination of the lien of judgment more accurately describes the practice whereby a judgment creditor agrees that the lien against the debtor's real property will be inferior to a loan taken by the debtor and secured by a mortgage covering the same property than does the current term "postponement of lien of judgment."

In subsection (c) the proposal streamlines the four source provisions. The procedural details are in Rules 4:48-3 and 4:48-2. The subsection makes clear the duty of a creditor that receives full satisfaction to act to assure that the docket shows that the judgment has been satisfied. The penalty for failing to act is based on 12A:9-404 which penalizes failure to remove security interests under the Uniform Commercial Code.

#### **J-7. Judgment lien; judgment as conveyance**

a. A Superior Court judgment or order for the payment of a fixed total amount of money shall be a lien on real estate from the time it is entered in the Judgment Docket.

b. When the party against whom a Superior Court judgment is entered for conveyance or release of real estate or an interest in it, does not comply by the time specified in the judgment, or within 15 days after entry of judgment if no time is specified, the judgment shall act as the conveyance or release without further order of the Court.

Source: 2A:16-1, 2A:16-7.

COMMENT

Subsection (a) is based upon 2A:16-1.: "No judgment of the superior court shall affect or bind any real estate, but from the time of the actual entry of such judgment on the minutes or records of the court." The proposal, written in the affirmative, reflects contemporary practice by substituting "Judgment docket" for "minutes or records of the court." Liens resulting from "judgments and orders for the payment of money" take effect only when the judgment or order is entered upon the civil judgment and order docket in Trenton. "While the decretal provisions of a judgment take effect pursuant to R. 4:47 when the judgment is entered on the civil docket, the judgment would not constitute a lien until entered on the civil judgment and order docket pursuant to this rule." Pressler, Current N.J. Court Rules, Comment R. 4:101.

Subsection (b) streamlines the language of its source provision.

**J-8. Judgment Docket as notice**

a. Entry of an instrument in the Judgment Docket serves as notice to all persons of that instrument.

b. Entry of the address of a judgment holder in the Judgment Docket serves as notice to all persons of the proper address for which notification of matters concerning the judgment.

Source: New

COMMENT

While subsection (a) is new, the current provisions present this crucial function of the Judgment Docket in a generalized manner. Section 2A:16-42 states that "The record of an assignment of a judgment shall, from the time the assignment is left for record, be notice to all persons concerned that such a record is so assigned...." This subsection explicitly states that the notice applies to all instruments entered in the Judgment Docket. This subsection, like its source, makes docketing alone a prerequisite to notice. While the next section requires that a docketed judgment be indexed, a mistake in indexing does not affect the power of a docketed judgment. Cf. Howard Sav. Bank v. Brunson, 244 N.J. Super. 571 (Ch.Div. 1990).

Subsection (b), with Section 4 above, enacts the substance of Section 13 of the Fair Foreclosure Act, L. 1995 c.244.

**J-9. Indexes**

The Clerk shall maintain an alphabetical debtor index of the Judgment Docket and other suitable alphabetical indexes of judgments, assignments of judgments, subordinations or releases of the liens of judgments, or warrants to satisfy judgments, in accordance with the Rules of Court.

Source: 2A:16-16

COMMENT

The proposal streamlines the source provision.

**J-10. Security for payment of judgment; order discharging real estate from lien**

a. If a person, in appealing a Superior Court judgment, deposits with the Clerk of the Court an amount which the Court deems sufficient as security for payment of the amount finally to be determined to be due, the Court, by order, may discharge appellant's real estate from the lien of the appealed judgment.

b. The deposited amount shall be subject to the lien of the appealed judgment and of any later judgment recovered. The Clerk shall retain the deposit until final determination of the action.

c. When the order has been entered in the Case Docket and the deposit made, the Clerk shall enter the order following the judgment entry in the Judgment Docket.

Source: 2A:16-3.

COMMENT

Subsection (c) changes the entry in the docket from a phrase and a date to the order of discharge itself.

**J-11. Offset against judgment of taxes, etc., due municipality**

When a person recovers a judgment against a municipality to which the person is or becomes personally indebted before satisfaction of the judgment, the municipality may apply for an order to offset the personal indebtedness against the judgment.

Source: 2A:16-8.

COMMENT

2A:16-8. became effective on January 1, 1952. Through 1980, our courts did not deal with the statute, but had construed the predecessor statute, R.S. 2:27-255, authorizing an offset only when the taxpayer "is indebted to the municipality for taxes." "A tax against real estate is not a debt of the owner; it is not founded on a contract express or implied but is an imposition against the property and no personal liability attaches." Francis Realty Co. v. Newark, 16 N.J. Misc. 328, 330 (Essex Co. Cir. Ct. 1938). "The current statute may be regarded as having adopted the holding of Francis Realty Co. v. Newark, *supra*." Garden State Racing Ass'n v. Tp. of Cherry Hill, 1 N.J. Tax 569, 578 (Tax Ct. 1980). In 1982, the Tax Court concluded that as the "Legislature has provided the municipality with the procedure whereby it can collect unpaid property taxes ... it would be improper to expand such procedures to include the right of offset." Seatrains Lines v. Edgewater, 4 N.J. Tax 378, 385 (Tax Ct. 1982), *aff'd* 192 N.J. Super. 535 (App. Div. 1983). The appellate judgment was summarily reversed, 94 N.J. 548 (1983), following passage of Senate Bill No. 3037, L.1983, c.137, which authorized a municipality to offset a refund of real property taxes against delinquent taxes owed on the same property. The Committee Statement emphasized that the "bill is intended to apply solely to property taxes, and does not include other local assessments or charges which may also be recovered through civil action against a property owner personally." A new section was added to Title 54 stating that real property taxes generally do not constitute "a personal debt of the owner of the property against which the taxes are assessed and levied." 54:4-135.

The proposal applies only to personal indebtedness, thereby excluding property taxes. Examples of "municipal charges or assessments for which the owner of the lands assumes a personal liability" include

sewerage service charges and water and sewage disposal charges. "The basis for such liability is that the municipal service rendered is founded on contract." Garden State Racing Ass'n, supra at 576-577.

## **J-12. Ex parte entry of judgment on written settlement agreement**

a. A judgment may be entered on a written agreement which consents to the entry of judgment only as provided in this section. Notice of the application for entry of judgment shall be given to the defendant in the form required by the Rules of Court for notice of application for entry of default judgment.

b. The written agreement consenting to entry of judgment may be executed only after the acts or omissions of defendant have created a cause of action against the defendant for the amount of the judgment.

c. The application for entry of judgment shall be supported by an affidavit of the facts on which the judgment is based.

d. The agreement shall authorize entry of judgment for a specific sum or for a sum to be calculated in a manner provided in the agreement.

e. The agreement may authorize immediate entry of judgment or it may impose new obligations on the defendant and condition entry of judgment upon failure to comply with its terms.

### **COMMENT**

Judgment by confession has existed in New Jersey practice for 175 years. It occurs when a debtor permits a creditor to enter judgment against the debtor by a written statement without institution of legal proceedings. Historically, statutes regulated confession of judgment practice. Judge Brennan stated that judgments "by bond and warrant of attorney, without institution of suit, derive all their efficacy from statutory law and strict compliance with statutory requirements is necessary." Hickory Grill, Inc. v. Admiral Trading Corp., 14 N.J. Super. 1, 5 (App. Div. 1951). However, the concept of confession of judgment was not created by statute, and over the years, many of the statutes regulating confessions of judgment were not re-enacted. Vestiges remain in Title 2A (2A:16-6, -9, -13); most statutes outside Title 2A which mention confession of judgment prohibit or restrict their use. 39:6-72 (Settlement of actions against motorist); 12A:3-112 (Terms and omissions not affecting negotiability of an instrument); 2A:50-6 (Bonds or notes where a mortgage on real estate may be given for the same debt; notice of proposed judgment by confession or action); 38:23C-16 (Sale of property during period of military service); 42:1-9 (Uniform Partnership Law).

Since 1969, the most important regulation of confessions of judgment has been by court rule. The Rule requires that before judgment is entered, the debtor must receive notice of the date that the confession will be entered and the creditor must produce proof of the amount due. "While the 1969 rule did not wholly eliminate judgments by confession, it did eliminate their most objectionable feature by requiring notice to be given to the defendant before entry of the judgment." Comment, R. 4:45-2. The confession of judgment no longer operates as a waiver to the debtor's defenses; that was its original appeal to creditors. There is scant case law since the 1969 rule revision, but the cases show a continued reluctance to allow confessions of judgment to be used to foreclose defenses to a claim. First Mutual Corp. v. Gramercy & Maine, Inc., 176 N.J. Super. 428, 441 (Law Div. 1980), United Pacific Ins. Co. v. Lamanna's Estate, 181 N.J. Super. 149, 160 (Law Div. 1981).

The classic confession of judgment situation is one in which the debtor executes a confession of judgment along with a promissory note. This "cognovit note" allows the creditor to have judgment entered against the debtor if he misses a payment without notice to the debtor or any defense by him. This kind of confession of judgment rarely occurs now because of the 1969 revision of R. 4:45-2; they may be invalid as violations of the "due process" clause of the Fourteenth Amendment to the Constitution. See, D.H.

Overmyer Co. v. Frick Co., 405 U.S. 174, 178 (1972). The Commission found that use of confession of judgment is legitimate in the limited context of settlements of litigation. In such a situation, a person settles a claim with an agreement in which the defendant admits liability and provides that if the defendant does not fulfill his obligations under the settlement, the plaintiff may use the confession to have judgment entered without proof of the claim. This kind of confession of judgment was found constitutional in D. H. Overmyer Co. v. Frick Co., *supra*. This section allows the use of judgment by consent on settlement agreement but regulates it strictly. It permits execution of an agreement only after there has been a default or other action by the debtor that would form the basis for a judgment. It eliminates the use of a warrant of attorney by requiring that the defendant make a written agreement supported by an affidavit of the facts on which the judgment consented to is based. However, the Commission proposal allows the most common and appropriate current use of confessions of judgment. It permits a person to settle a claim by reaching an agreement that confesses liability and allows a judgment to be entered if the debtor does not make certain future payments. Such an agreement complies with subsection (b) since it is executed after the acts that formed the basis of the claim have occurred. There may be disputes as to whether the debtor has failed to comply with the agreement and therefore whether the creditor may seek judgment on the confession. Those disputes do not involve the basis of the claim but are relevant in determining whether the application for judgment on the confession should be granted. The debtor will have a fair opportunity to raise these issues; the section requires that notice be given to the debtor of the application for entry of the judgment.

The approach taken by the section differs from that taken by Court Rules. Court Rules distinguish between confessions of judgment controlled by R. 4:45-2 and consent judgments controlled by R. 4:42-1. The Rules place severe restrictions on the entry of a judgment based on a confession of judgment. While these restrictions are not identical to those in Section 13, they serve the same purposes. However, where a complaint has been filed, there are no restrictions on the use of a signed consent judgment. State v. Cruse, 275 N.J. Super. 324 (App.Div. 1994). Notice need not be given to the defendant by service of the complaint or otherwise. R. 4:42-1(d). While both R. 4:42-1 and Cruse seem to contemplate that the consent judgment be executed after the accrual of the cause of action, neither requires it. The same document that would involve notice, hearing, and affidavits if used as a confession of judgment under R. 4:45-2 would suffice alone as a basis for judgment as a consent judgment under R. 4:42-1. The Commission decided that whether a document was used alone, as a confession of judgment, or coupled with a complaint, as a consent judgment, the same issues were involved, and the same restrictions should apply. Section 13 reflects that unitary approach.

## **NOTICE OF PENDING ACTION**

### **N-1. Written notice of pending action concerning real estate**

a. A notice of pending action may be filed by a party in any action instituted in a court of this State or in the United States District Court for the District of New Jersey in which the party filing the notice:

- (1) seeks to enforce a lien on real estate; or
- (2) seeks to affect the title to real estate; or
- (3) seeks to affect the ownership of a lien or an encumbrance on real estate.

b. A notice of pending action shall not be filed under this chapter in an action to enforce a construction lien, a mechanic's lien or in an action to recover a judgment for money or damages only.



c. The notice of pending action shall be filed after the filing of the party's pleading in the action, in the office of the county clerk or register of deeds and mortgages of the county in which the affected real estate is located.

Source: 2A:15-6

#### COMMENT

This section has been rewritten for clarity, and to incorporate the ruling in Schwartz v. Grunwald, 174 N.J. Super. 164 (Ch. Div. 1980), that a notice of pending action may be filed by any party in an action, not only by a plaintiff filing a complaint. In this section and elsewhere in this proposed statute the references to "the plaintiff" and "the complaint" have been generalized to refer to "the party" and "the action." Subsection (b) combines the two exceptions in the existing statute which exclude actions to enforce a mechanic's lien and actions only for money or damages from the categories of actions as to which a pending action may be filed.

### **N-2. Contents of notice of pending action**

a. A notice of pending action shall include the complete caption of the pending action, a brief description of the claim of the party filing the notice, and a description of the subject real estate which is sufficient to identify it.

b. In an action in which a claim is made for the foreclosure of a recorded or registered mortgage or the foreclosure of a recorded certificate of tax sale, the notice of pending action shall also specify the book and page of the record or registration of the mortgage or of the record of the certificate of tax sale.

Source: 2A:15-6; 2A:15-9

#### COMMENT

This section combines the provisions from the source sections which specify the contents of a notice of pending action. Subsection (a) specifies that all notices must contain the caption of the pending action, a brief description of the claim being asserted in the pending action which pertains to the subject property, and a description of the property sufficient to identify it. In addition, subsection (b) requires that when the notice of pending action pertains to a mortgage foreclosure or a tax sale, additional information must be contained in the notice of pending action.

### **N-3. Record and index of notices**

a. The county clerk or register of deeds and mortgages shall record and index notices of pending action separately from other filings, and shall record the date of filing of each notice.

b. If a notice of pending action is filed in an action for the foreclosure of a recorded or registered mortgage or the foreclosure of a recorded certificate of tax sale, the date of the filing of the notice shall be noted on the record of the mortgage, the abstract of the record of the mortgage, or the record of the certificate of tax sale.

Source: 2A:15-9; 2A:15-12

#### COMMENT

This provision continues the substance of the source sections.

#### **N-4. Effect of notice of pending action**

a. Any person who acquires an interest in, or lien on, the property between the time the notice of pending action is filed and the time it is discharged or expires shall be considered to have had notice of the pendency of the action and shall be bound by any judgment entered in the action.

b. If a notice is not filed as provided in this chapter with respect to a pending action, the filing of the action shall not constitute constructive notice to a bona fide purchaser or to a person who acquires a mortgage or a lien on real estate which is the subject matter of the action.

Source: 2A:15-7; 2A:15-8

#### **COMMENT**

Subsection (a) of this section restates and generalizes the provisions of 2A:15-7 of the source statute which establish the effect of the filing of a notice of pending action. Subsection (b) of this section is substantially similar to 2A:15-8 of the source section; it states the converse principle that if a notice of pending action is not filed, any action in which the notice might have been filed does not constitute notice of the pendency of the action to third parties.

#### **N-5. Expiration and extension of notice of pending action**

a. A notice of pending action shall expire after three years from the date it is filed, unless an extension notice is filed pursuant to this section.

b. A notice of pending action may be extended for periods of one year if an extension notice is filed prior to the expiration of the original notice or any previous one year extension of the original notice. The extension notice shall contain all of the information required by this chapter for an original notice, and shall also include a certification by the party filing the notice that the subject action is still pending or that an appeal has been filed and is still pending.

Source: 2A:15-11

#### **COMMENT**

Subsection (a) of this proposed section is substantially similar to the source section. The provision in proposed subsection (b) for the filing of an extension of a notice of pending action has been added to address those situations in which an action affecting real property may still be pending three years after the original notice is filed. The provision for successive one-year extensions of the notice of pending action allows for the unusual situation in which litigation would be protracted over an extended period of time.

#### **N-6. Service of notice of pending action**

Within three days after filing of a notice of pending action, the party who filed it shall send a copy of the notice by registered or certified mail, return receipt requested to any person who held an interest in or lien on the property on the date of the filing of the notice. Except when the pending action is a mortgage or tax foreclosure, the party who filed the notice of pending action shall also serve a copy of the notice to all other parties in the action against whom a claim is being made. The notice shall be mailed to the current address of the person, if it is known or reasonably ascertainable, or to the party's last known address of record.

Source: 2A:15-7

#### COMMENT

This section continues the provisions of subsection 2A:15-7(b), which require that a party who files a notice of pending action serve a copy of the notice, and of the pleading in the action, upon all parties to the action within three days of the filing of the notice. The exception to the notice requirement for parties in foreclosure actions, embodied in 2A:15-7(a) of the source statute, is also continued. The requirement that the notice also be sent to any person who has an interest in the property or a lien on it is new. It is intended to allow such a person to act to protect his interest.

### **N-7. Hearing**

a. Any party who is served with a notice of pending action pursuant to this chapter, and who claims an interest in the subject real estate may file a motion for discharge of the notice with the court that has jurisdiction of the action. After hearing and within 10 days, the court shall enter a determination on the motion.

b. The party who filed the notice of pending action shall bear the burden of establishing that there is a probability that final judgment will be entered in that party's favor, and that the probability of success on the merits is sufficient to justify the continuation of the notice.

c. If the court fails to find that there is a probability that final judgment will be entered in favor of the party filing the notice of pending action, and that the probability of success on the merits is sufficient to justify the continuation of the notice, the court shall immediately order the notice of pending action discharged.

Source: 2A:15-7

#### COMMENT

This proposed section continues the provision in 2A:15-7(b) of the source statute which permits an affected party who has been served with a notice of pending action to obtain immediate review of the claim against the subject real estate. The standard which the person filing the notice of pending action has the burden of establishing, continued from the source statute, is that "there is a probability that final judgment will be entered in [the claimant's] favor sufficient to justify the continuation of the notice." In Fravega v. Security Savings and Loan Association, 192 N.J. Super. 213 (Ch. Div. 1983), the court held that this language embodied a legislative judgment that a higher standard than mere "possibility" of success on the merits must be met by the claimant, and that the strengths of the claimant's case must be weighed against the detriment which may be suffered by the property owner. The requirement that the motion be heard within ten days implements the constitutional requirement for prompt review of pre-judgment seizures of property.

### **N-8. Discharge of notice of pending action by court**

A notice of pending action shall be ordered discharged by the court that has jurisdiction of the action as to which the notice of pending action has been filed:

a. if the party who filed a notice of pending action abandons the underlying action or fails to prosecute it diligently; or

b. in an action for the enforcement against real estate of a claim for the payment of money, except for the foreclosure of a mortgage or tax sale certificate, if the party against whom a claim is being made gives sufficient security to pay the claim; or

c. upon dismissal of the pending action; or

d. upon the entry of final judgment in the pending action in the judgment docket.

Source: 2A:15-10; 2A:15-14; 2A:15-15; 2A:15-16; 2A:15-17

COMMENT

This proposed section collects and harmonizes various source sections of the existing chapters which specify when a notice of pending action may be discharged.

**N-9. Filing of order or judgment discharging notice of pending action**

A copy of the order discharging a notice of pending action shall be filed with the county clerk or register of deeds and mortgages. A statement of the substance of the order shall be entered on the record of the notice of pending action.

Source: 2A:15-14; 2A:15-16; 2A:15-17

COMMENT

This proposed section continues the substance of the filing requirements of the source sections.

**N-10. Effect of discharge**

Upon the filing of an order discharging a notice of pending action with the county clerk or register of deeds, the binding effect of the notice shall end, unless:

- a. the order or judgment provides otherwise; or
- b. the party who filed the notice of pending action obtains a stay pursuant to the Rules of Court in connection with the filing of a notice of appeal or a motion for relief from the judgment or order discharging the notice.

Source: 2A:15-10; 2A:15-14; 2A:15-15; 2A:15-16; 2A:15-17

COMMENT

This proposed section states the effect of the filing of a judgment or order discharging a notice of lis pendens. The exception in subsection (b) changes the current rule in the case of appeals. Under the present statute, upon the filing of an appeal or the institution of proceedings for relief from the judgment or order discharging the notice of lis pendens a party may automatically file another notice of lis pendens. The proposed statute would require the party who wishes to continue the effect of a notice of pending action during the pendency of an appeal or a motion for reconsideration to obtain a stay from the appropriate court.

**N-11. Fee for recording notice a taxable cost**

The fee for recording a notice of pending action shall be taxable as a part of the costs in the action.

Source: 2A:15-13

COMMENT

The proposed section is substantially identical to the source section.

**COLLECTION OF JUDGMENTS**

**Part 1. GENERAL PROVISIONS**

## **C-1. Definitions**

As used in this chapter:

"Earnings" means payment for personal services performed, whether described as wages, salary, commission, fees, bonus, tips, pension and retirement benefits or otherwise.

"Collection order" means a court order, formerly called a writ of execution, directing the collection officer to satisfy a money judgment from the property of a judgment debtor.

"Property of the judgment debtor" means all interests in real property, all forms of personal property, including rights and credits, and all earnings.

Source: New

### **COMMENT**

The purpose of these definitions is to make clear at the outset the categories that are used in later proposed subsections concerning the issuance of specific kinds of collection orders. The commission has adopted the more common phrase "collection order" to replace "writ of execution." Courts, lawyers and citizens already commonly refer to these procedures as "collection" of judgments. See, the August 17, 1993 "Report of the Supreme Court Committee on Post-Judgment Collection Procedures in the Special Civil Part;" the handbook produced by the N.J. Institute on Continuing Education, "Collection Practice in New Jersey;" and John David Healy, "Collection of Judgments," 20 N.J. Practice 30 (John Lichtenberger, Skills and Methods) (3rd ed. 1994). The phrase "property of the judgment debtor" is defined to include all kinds of property. As defined, it includes anything of value that can be taken for the benefit of the creditor.

## **Part. 2. COLLECTION ORDERS**

### **C-2. Issuance of collection orders**

a. At the request of a judgment creditor and upon receipt of any required fee, the clerk of the court shall issue a collection order directing the satisfaction of a money judgment from the property of the judgment debtor.

b. A collection order may be issued only within 20 years after entry of the judgment to be collected, or if the judgment has been revived, a collection order may be issued only within 20 years after the date of the revival of the judgment.

Source: 2A:17-3

### **COMMENT**

Subsection (a) of this proposed section states a general rule that is implied but not stated in the source sections, and is expressed in Court Rule 4:59-1(a). The fees for issuing writs of execution are established in 22A:2-7. Subsection (b) continues the rule of source section 2A:17-3 that places a 20-year limit on the issuance of a writ of execution, unless the judgment is revived. Note that there are no current statutory provisions concerning revival of a judgment.

### **C-3. By whom issued**

a. A collection order against any property of the judgment debtor may be issued by the Clerk of the Superior Court if the judgment is recorded in the judgment docket of the Superior Court.

b. A collection order against personal property or earnings may be issued by the Clerk of the Special Civil Part if the judgment is recorded in the case records of the Superior Court, Law Division, Special Civil Part but not in the judgment docket of the Superior Court.

c. A clerk may issue as many collection orders with respect to a particular judgment as the judgment creditor requests, and may issue a collection order to more than one county at the same time.

Source: 2A:17-4; 2A:17-17

#### COMMENT

Subsection (a) of this proposed section continues the rule in current law that if a judgment is docketed in the Superior Court, the clerk of that court issues the collection order, even if the judgment originally was obtained in the Special Civil Part. In addition, subsection (b) continues the rule under current law that the clerk of the Special Civil Part issues a collection order on judgments that have been obtained in that Part but not docketed in the Superior Court. Subsection (c) restates 2A:17-4. It also makes it clear that successive orders may issue after the return of the order or its expiration. See Vitale v. Hotel California, Inc., 184 N.J. Super. 512, 520-21 (Law. Div. 1982), aff'd 187 N.J. Super. 464.

Note that the Clerk of the Superior Court may issue a collection order against any kind of property, including real property, while collection orders issuing from the Special Civil Part are limited to personal property and earnings. This distinction is consistent with the current statutes; see 2A:17-17.

### **C-4. To whom issued**

a. Collection orders for judgments recorded in the judgment docket of the Superior Court may be directed to the sheriff of any county.

b. Collection orders for judgments recorded in the case records of the Superior Court, Law Division, Special Civil Part but not in the judgment docket of the Superior Court shall be directed to the officer responsible for enforcing judgments of the Law Division, Special Civil Part in any county.

Source: 2A:17-4

#### COMMENT

Subsection (a) continues the provision in 2A:17-4 permitting simultaneous collections in more than one county.

### **C-5. Form and contents of collection orders**

a. A collection order shall specify in its title whether it is directed at the property, or the earnings, of the judgment debtor.

b. A collection order shall include such information concerning the judgment, the judgment creditor and the judgment debtor as Court Rules require.

Source: New

#### COMMENT

Proposed subsection (a) provides that a collection order must specify on its face the kind of property at which it is directed. This specificity is required because of the different treatment provided each

of the ~~two~~ kinds of collection order, one against property, whether real or personal, and one against earnings.

Proposed subsection (b) is consistent with R. 4:59-1 in specifying the information required to be contained in a collection order. Errors in this information that do not prejudice a party should not be a ground for attacking a collection order.

### **Part 3. EXEMPTIONS FROM COLLECTION**

#### **C-6. Exemptions**

a. The following property of a judgment debtor, who is either a natural person resident in the State of New Jersey or the estate of a decedent who was resident in the State of New Jersey, shall be exempt from a collection order pursuant to this chapter:

(1) property that federal or other state statute forbids taking to satisfy a state judgment;

(2) wearing apparel of the judgment debtor other than furs and jewelry; and

(3) goods whose value does not exceed either \$2,000 or, the amount determined pursuant to subsection (b) of this section; and

(4) cash, bank deposits and similar financial property collectible as cash whose aggregate value does not exceed \$1,000 or, the amount determined pursuant to subsection (b) of this section. Banks and financial institutions may assess a fee of no more than \$25 per levy against the judgment debtor.

b. The Governor, in consultation with the Department of the Treasury, not later than March 1 of each odd-numbered year, shall adjust the exemption amounts set forth in subsection (a) of this section, or subsequent to 1997 the exemption amount resulting from any adjustment under this subsection, in direct proportion to the rise or fall of the Consumer Price Index for all urban consumers in the New York City and Philadelphia areas as reported by the United States Department of Labor. The Governor, no later than June 1 of each odd numbered year, shall notify the Clerk of the Superior Court of the adjustment. The adjustment shall become effective on July 1 of each odd-numbered year.

c. The exemptions provided in this section shall not apply if the judgment being enforced:

(1) arises from the purchase of the same property against which collection is sought; or

(2) is for child support; or

(3) is for the collection of taxes or assessments.

Source: 2A:17-19



## COMMENT

The purpose of this section is to simplify the provisions of the source statute which specifies the property of a judgment debtor that is exempt from collection and levy. Proposed subsection (a)(1) is a reference to the fact that numerous statutes exempt various kinds of property, often of public and quasi-public entities, from collection and levy. See, e.g., 5:12-168 (property of Casino Reinvestment Development Authority exempt from levy and collection); 27:19-33 (property of bridge commissions); 33:1-25 (alcoholic beverage licenses). With respect to individuals, there are numerous statutory provisions which exempt pensions from collection and levy. See generally Title 43 Pensions and Retirement and Unemployment Compensation.

The current personal property exemption is updated in proposed subsections (a)(3) and (a)(4). Wearing apparel of the judgment debtor, other than furs and jewelry, is exempt. At present, there is a general exemption for \$1,000 worth of personal property. The \$1000 amount has not been revised since 1973 and covers far less property than it did when written. Subsections (a)(3) and (a)(4) follow the recommendation of the August 17, 1993 "Report of the Supreme Court Committee on Post-Judgment Collection Procedures in the Special Civil Part." The committee, chaired by the Hon. Nicholas G. Mandak, A.J.S.C., judged that the amounts given in subsections (a)(3) and (a)(4) are "required to ensure that debtors are not deprived of bare necessities to exist for one month and maintain a minimal household." Post-Judgment Collection Procedures Report at 47. Inherently, any specific dollar amount is affected by inflation. To obviate the need for periodic revision of the section, subsections (a)(3) and (a)(4) provide that the exemption amounts are to be adjusted for inflation. Subsection (b) sets out the method for the adjustment. This method is now used to adjust other statutory limits, such as the threshold for awarding without bids public school contracts (N.J.S.A. 18A:18A-3), local public contracts (N.J.S.A. 40A:11-3), and state contracts (N.J.S.A. 52:34-7).

Proposed subsection (c)(1) continues the provision in the current statute which removes the exemption from collection and levy from property which was purchased with funds which gave rise to the debt underlying the collection action, i.e. a "purchase money debt." See Stoutenburgh v. Konkle, 15 N.J. Eq. 33 (1862).

Subsection (c)(2) is new; it codifies the principle enunciated in Redick v. O'Brien, 191 N.J. Super. 614 (Ch. Div. 1983), which held that the policy behind the exemption provision, i.e., the protection of the debtor and his family from destitution, precluded the judgment debtor's use of the exemption in cases where the judgment being enforced was for support of the debtor's dependents.

Subsection (c)(3) continues the exception in the source section for the collection of taxes and assessments.

### **C-7. Selection of exempt personal property**

a. In consultation with the collection officer, the judgment debtor may select any item or items of personal property whose aggregate value is not greater than the values allowed under section E-6(a)(3). The selected item or items shall be exempt from levy.

b. The collection officer shall prepare an inventory of the items of personal property selected for exemption by the judgment debtor and shall include an impartial and honest evaluation of each item inventoried. The value of an item shall be the price judged to be that for which the item would be sold at public sale. Copies of the inventory shall be given to the debtor, creditor and their counsel.

c. Within 10 days after receipt of the inventory, either the debtor or the creditor may dispute the value of any item in the inventory by notice to the other party by submitting a written statement under oath concerning the value and applying to the court to make a determination of

the value of the items in dispute. The court may receive or require testimony or evidence, including expert appraisals as necessary to make its determination.

d. If neither party disputes the values in the inventory, the judgment debtor, on the basis of the inventory values, shall select items whose aggregate value is not greater than the values allowed under section C-6(a)(3). These items shall be exempt from levy. If either party disputes the values in the inventory, the judgment debtor, on the basis of the values determined by the court, shall select items whose aggregate value is not greater than the values allowed under section C-6(a)(3). These items shall be exempt from levy.

Source: 2A:17-20 through -28.

#### COMMENT

The section provides for the selection of exempt personal property in a process of informal consultation with the collection officer. The source statutes required appointment of three expert appraisers to assess the value of all personal property, but N.J.S.A. 22A:2-41 allows a fee of only \$1.00 for each appraiser. In practice, appraisals have been carried out rarely. The proposed section requires the collection officer to prepare an inventory only of the items of the judgment debtor's personal property to be levied against.

### **Part 4. LEVY**

#### **C-8. Receipt of collection orders**

The collection officer shall record on a collection order the date and time it was received.

Source: 2A:17-11

#### COMMENT

This provision continues the requirement to record the date and time a collection order is received, which affects priority of claims to debtor's property. But it abandons the earlier requirement that the officer levy against property in the order that collection orders were received, because the officer has no way of knowing whether or not orders have been filed elsewhere and is obligated to proceed to levy immediately rather than to make a probably unproductive inquiry.

Note that the provision in source section 2A:17-12 which gives priority to support orders over other orders received on the same day has been eliminated as having only minor remedial effect.

#### **C-9. Judgment creditor's collection instructions**

a. A judgment creditor who obtains a collection order shall submit written instructions to the collection officer with the order.

b. The collection instructions shall contain a description of personal property to be levied against, by item, type or location sufficient to identify it for levy. If all property at particular premises occupied by the debtor is to be levied against, instructions stating that shall be sufficient. The collection instructions shall contain a description of real property to be levied against sufficient to identify it. The instructions shall state whether the property is located in a dwelling.

c. The officer shall record on the collection instructions the date they were received.

d. The officer shall comply with the lawful written collection instructions of the judgment creditor, except that the officer shall not levy against more items of property than necessary, in the judgment of the officer, to satisfy the judgment and pay costs.

e. The officer may levy against property of the judgment debtor subject to the collection order but not identified in the collection instructions of the judgment creditor, unless the instructions of the judgment creditor state otherwise.

Source: New

#### COMMENT

There is no current statutory provision which authorizes or requires the judgment creditor to provide the enforcing officer with instructions for collecting the judgment, although it is common practice for the judgment creditor to do so. This proposed provision conforms with the principles enunciated in Vitale v. Hotel California, Inc., 184 N.J. Super. 512, (Law Div. 1982), *aff'd*, 187 N.J. Super. 464, in which the court stated that the collection officer must follow the judgment creditor's lawful instructions regarding the time and manner of making a levy. Subsection (d) requires the officer to comply with the lawful written instructions of the judgment creditor. It limits the levy to items sufficient to satisfy the judgment, protecting the judgment debtor from creditor's instructions that might bind more items of property than necessary.

Subsection (a) provides that the judgment creditor's written instructions must be transmitted to the levying officer along with the collection order. This subsection must be read in conjunction with the proposed section on returns, C-24(a)(1), which provides that the levying officer is required to make a return of the collection order if no written instructions are received. Taken together, these proposed provisions make the collection officer's obligation to act dependent upon the receipt of reasonable written instructions from the judgment creditor. If no instructions are received, the collection order may be returned. This provision gives the levying officer a clear rule.

### **C-10. Levy against personal property in possession of judgment debtor**

a. A collection officer may levy against personal property in the possession of the judgment debtor in any of the following ways:

- (1) by removing the property to a place of safekeeping;
- (2) by installing a custodian in the place where the property is located to maintain custody over the property; or
- (3) by any other reasonable means of obtaining possession or control of the property.

b. If the creditor agrees, the collection officer, in place of making a levy, may leave the property in the custody of the debtor until the sale. The officer shall list each item of property left in the custody of the debtor and give a copy of the list to the debtor and to the creditor. The debtor shall not intentionally damage or dispose of property left by the collection officer. This action by the collection officer shall be considered equivalent to a levy for the purpose of establishing the rights of the creditor as against other judgment creditors, but it shall not affect the rights of a person who, not knowing that the property is held pending public sale, purchases the property or acquires a lien for fair value.

Source: New; 2A:17-14

#### COMMENT

This section provides for collection against personal property by taking it into custody, or by other means of obtaining possession or control of the property. Under current law, some of these means are regarded as effectuating a "constructive levy." It is very uncertain, however, what constitutes an constructive levy under current law, and for what purposes a constructive levy is equivalent to a true levy. There are cases which state that property may be left in the hands of a judgment debtor until the day of sale, upon the judgment debtor's voluntary acceptance of the obligation to keep them as bailee. *See, e.g., Nelson v. Van Gazelle Valve Mfg.*, 45 N.J. Eq. 594 (1889). *But see Cumberland Bank v. Hann*, 19 N.J.L. 166 (1842) which stipulated that goods left with the defendant as bailee were at the risk of the sheriff who was liable to the judgment creditor for waste, loss or destruction. If however, the goods were left with the judgment debtor at the direction of the judgment creditor or with the judgment creditor's consent, the risk of loss was shifted from the sheriff to the judgment creditor. The judgment debtor's consent is a necessary condition to the creation of a bailment in such cases, and consent is unlikely. Hence, this section does not adopt a bailment approach; it imposes on the judgment debtor only the obligation of not intentionally damaging or destroying items of personal property left in the judgment debtor's possession under this provision for a limited equivalent of levy.

### **C-11. Levy against personal property in a dwelling**

a. If the judgment creditor instructs the officer to levy against personal property located in the judgment debtor's dwelling place, the officer shall demand access to the property at the dwelling place where the property is located. At the time the demand is made the officer shall inform the judgment debtor that the judgment debtor may be liable for costs incurred in any further proceedings to obtain access to the property. If the judgment debtor does not allow access to the property upon demand of the collection officer, the officer shall promptly notify the judgment creditor of the failure to obtain custody of the property.

b. Whether or not a demand has been made pursuant to subsection (a), the judgment creditor may apply to the court which issued the collection order for an order directing the officer to levy against a judgment debtor's property located in a dwelling place. An application for an order to seize property shall describe with particularity sufficient to identify them, both the property sought to be levied against, and the place where it is to be found, according to the best knowledge and belief of the judgment creditor. The court may not issue the order unless the judgment creditor establishes that there is probable cause to believe that the property to be levied against is located in the place described. At the time delivery of the property is demanded, the officer shall make known his or her purpose and authority, and shall announce that persons interfering with officers enforcing the order are subject to arrest for obstructing an officer.

Source: New

#### COMMENT

Subsections (a) and (b) of this proposed provision specify the measures a collection officer is required to take in obtaining access to property of a judgment debtor which is in a dwelling place if the judgment debtor or other person refuses to allow access to the dwelling. These subsections are based upon current judicial precedents. *Spiegel, Inc v Taylor*, 148 N.J. Super. 79 (Bergen Cty Ct. 1977) requires the judgment creditor to identify non-exempt personal property of the judgment debtor by supplementary proceedings, and then to instruct the levying officer to levy against the discovered assets. It forbids entering the judgment debtor's dwelling place on "fishing expeditions."

Subsection (a) of the proposed section permits the enforcing officer to make an attempt to gain access to a dwelling place, but if access is not voluntarily allowed, the officer must notify the judgment creditor of the attempt. The judgment creditor may then proceed under subsection (b) to obtain an order

authorizing access to the dwelling to levy against the property. Subsection (b) requires the judgment creditor to establish "probable cause" to believe that the identified property is at the location specified. In contrast to the provisions for levying against property in an inaccessible place given in the following section (C-12), the officer is not authorized to enter a dwelling place by force. Forcible entry of a dwelling in aid of collection of a judgment has generally been considered a violation of the constitutional rights of the property owner; see Silverman v. Stein, 217 N.W. 785 (Mich. 1928), Trainer v. Saunders, 113 Atl. 681 (Pa. 1921), Hillman v. Edwards, 745 S.W. 787 (Tex. Civ. App. 1902) and other cases collected at 57 ALR 209. Note that the judgment creditor need not make an initial demand under subsection (a), but may choose to proceed under subsection (b) in the first instance.

### **C-12. Levy against property in an inaccessible place**

a. If the judgment creditor instructs the officer to levy against personal property located in a place inaccessible to the collection officer, which is other than a dwelling place, the officer shall demand access to the property at the place where the property is located. At the time access to the property is demanded, the officer shall make known his or her identity, purpose, and authority, and shall announce that persons interfering with officers enforcing the order shall be subject to arrest for obstructing an officer.

b. If access to the property is not given, the officer may use force to obtain access to the property and may cause the place where the property is believed to be located to be opened in the manner that the collection officer reasonably believes will cause the least damage.

Source: New

#### **COMMENT**

This proposed section applies to those situations in which property is located in a place which is inaccessible to the collection officer, and makes it clear that the collection officer may use force to enter and may risk violence in doing so. A "place inaccessible to the collection officer" is a place from which the officer in a manner similar to the public in general is or may be excluded by means of locks, security personnel or other devices, as, for example, a locked or inner room, closet or storage facility, etc. Vitale v. Hotel California, Inc., 184 N.J. Super. 512 (Law Div. 1982) establishes that under current law a levying officer risks amercement for failure to use the full powers of the levying officer's powers, including physical force, to carry out the judgment creditor's particularized instructions to levy. The Vitale case makes it clear that common sense and prudence dictate obtaining police assistance in such situations.

### **C-13. Levy against personal property in the custody of a third party**

a. If the judgment creditor instructs the collection officer to levy against personal property in the possession of a person other than the judgment debtor, the officer shall serve a copy of the collection order personally on the person who has possession of the property.

b. The service of the collection order shall be effective against:

(1) any personal property of the judgment debtor in the custody of the third party at the time of service; and

(2) any additional personal property which the judgment debtor becomes entitled to receive from the time of the levy to the time of the order directing that the property be turned over to the collection officer.

c. Service of the collection order on any office of a business shall be effective against any personal property of the judgment debtor in the custody of the business.

d. During the time the levy is in effect, the third party holding custody of personal property subject to the collection order shall hold the property pending order of the court and shall not honor any other demand for the property.

e. Any time within 30 days after levy, the creditor may make a motion pursuant to the Rules of Court for an order directing that the property be turned over to the collection officer.

Source: 2A:17-58; 2A:17-63

COMMENT

This proposed provision is intended to generalize the current law concerning collection against rights and credits.

**C-14. Service and mailing of notice of levy**

a. At the time the collection officer levies against property of a judgment debtor, the officer shall serve a copy of the order on the person who has custody of the property levied against; and

b. The collection officer shall mail a copy of the collection order and notice of levy on the same day:

(1) to the judgment debtor, if the order and notice have not been served upon the judgment debtor;

(2) to any person whom the officer actually knows may have an interest in the property described in the notice; and

(3) to the attorneys for the judgment debtor and creditor.

c. A notice that specific property has been levied against shall contain a description of the specific property levied against, a statement of the debtor's right to exempt property from collection, and any other information required by the Rules of Court.

Source: New

COMMENT

This draft provision is consistent with the current court rules providing for notice to the judgment debtor of levy and collection. Subsection (b)(2) requires the officer to serve notice on persons the officer actually knows to have made a claim to the property, knowledge that may have been obtained, for example, in the course of making the levy.

**Part 5. COLLECTION AGAINST EARNINGS**

**C-15. Collection orders against earnings; earnings subject to collection orders**

a. At the request of a judgment creditor, the Superior Court shall issue either a collection order directing an employer to withhold a portion of a debtor's earnings, or a collection order to the debtor to make periodic payments to the creditor from earnings.

b. A collection order, other than a support order, against the earnings of a judgment debtor shall provide that 10% of gross earnings be taken unless the court finds that the needs of the debtor require that a lesser percentage be taken or allow a greater percentage to be taken.

The amount to be withheld shall not exceed the amount allowed under section 303 of the Federal Consumer Credit Protection Act (15 U.S.C. sec. 1673).

Source: 2A:17-50; 2A:17-56.

#### COMMENT

Subsection (a) restates the source statute; 2A:17-50 was interpreted in Great Bay Hotel & Casino v. Guido, 249 N.J.Super. 301 (App. Div. 1991), which held that issuance of a collection order against earnings was not a matter of discretion even if the judgment debtor's earnings precluded setting an amount at the time the order was issued. As collection orders are satisfied one at a time, and sequentially in the order issued, Great Bay Hotel held it critical for the first applicant to gain priority over creditors who might subsequently apply; upon a showing of changed circumstances, the creditor who had applied first would seek a modification of the order. Id. at 304. Subsection (a) also allows the issuance of an order to a debtor ordering payments from earnings. This provision is new, but its substance is in accord with current practice. It distinguishes collection orders directed to the employer from those directed to the debtor. Orders that direct the debtor to pay are used when the debtor works for an employer outside of the state, beyond the jurisdiction of a collection order. It restates the inherent power of the courts to fashion orders to enforce judgments.

Current section 2A:17-50 specifies that wage collections may be ordered only if the debtor has income exceeding \$48.00 week; 2A:17-56 allows orders for more than 10% if annual earnings exceed \$7500. These amounts have not been changed for more than twenty years to reflect inflation. This section adopts the basic wage percentage subject to collection at the 10% level as found in current statutes but avoids specific dollar amounts. In place of specific amounts, the section allows a court flexibility to determine the collection percentage that balances the legitimate needs of the debtor against the claim of the creditor. Thus, if the family expenses of the debtor could not be met if 10% of wages were deducted, a lesser percentage can be specified. On the other hand, if the debtor can afford more, more can be ordered. The percent that can be taken from a debtor's earnings without interfering with family necessities is not determined solely by the amount of earnings.

The source statutes for this section apply to collections against "wages, debts, earnings, salary, income from trust funds, or profits due and owing to the debtor." This section applies only to "earnings," but "earnings" are defined as "compensation payable by an employer for personal services performed by an employee, whether defined as wages, salary, commission, bonus or otherwise." See Section 1. Definitions. To the extent that this section is narrower than its source, Section 15 (b)(2) fills the gap. It allows collection against any personal property in the custody of a third party including debts, income from trust funds and profits.

### **C-16. Priorities among collection orders against earnings**

a. If more than one collection order against the earnings of a judgment debtor is served on an employer,

(1) only one collection order against earnings shall be satisfied at one time;

(2) support orders shall be satisfied before other collection orders; and

(3) orders, other than support orders, shall be satisfied in the order in which they were served on the employer.

b. If a judgment debtor is subject to more than one collection order against earnings other than a support order, upon application by the debtor the court shall modify the amount of the later order so that the amount to be collected at any time on both orders other than support orders is not greater than 10% of gross earnings.

c. For purposes of sections 14 through 16:

(1) a collection order against the earnings of a judgment debtor includes any court order that requires that payments be made from the earnings of the judgment debtor whether the payments are to be made by the employer or by the judgment debtor;

(2) a support order is any order for the support of a child, spouse or former spouse or any order based on a claim for unpaid support for a child, spouse or former spouse.

Source: 2A:17-52

COMMENT

Subsection (a) restates the source statute. Subsection (b) incorporates the holding of In Re Household Finance Corporation v Clevenger, 141 N.J. Super 53 (App. Div. 1976) that one manner of reaching wages has no priority over another. So long as payments are to be made from the same stream of earnings, a collection order to pay in installments under 2A:17-64 is governed by the same priorities as a collection order against wages under 2A:17-52. The court held that the legislative intent was to limit collections from earnings; subsection (b) codifies this intent. Subsection (a)(2) provides that collection orders for support take precedence regardless of the time they were served on an employer. This precedence is now provided by 2A:17-56.7.

**C-17. Payments under collection orders against earnings**

a. Any employer to whom a collection order against earnings is presented shall deduct from earnings owed the judgment debtor the amount prescribed in the order and pay the amount prescribed to the officer presenting the order. The employer may deduct a fee of no more than 5% or \$5, whichever is less, from each payment, to compensate the employer for expenses. The judgment debtor shall bear the expense of the fee.

b. Any employer who fails to make payments required by a collection order against earnings shall be liable to the judgment creditor for the payments.

Source: 2A:17-53; 2A:17-54.

COMMENT

This section continues the substance of its sources.

**Part 6. DISPOSITION OF PROPERTY**

**C-18. Collection order, lien on personal property**

a. A judgment creditor who files a collection order with a collection officer shall have a lien on any property of the debtor levied against by that officer from the time of levy.

b. A judgment creditor who has caused a levy to be made against the proceeds of the collection or sale of debtor's property levied against for another creditor shall have a lien on that property from the time of levy on the proceeds.

c. If more than one lien established by this section is applicable to an item of property, priority among the liens shall be governed by the same rules as those governing distribution of the proceeds of property which has been levied against to enforce a judgment.



d. A lien established by this section shall prevail over any subsequent transfer of an interest in the property.

Source: 2A:17-10

#### COMMENT

This section updates the source section and the case law arising from it by specifying the conditions under which a creditor's collection prevails against other claimants to property levied against. Whereas the source section placed a lien on property and goods from the time the collection order was delivered to the sheriff, subsections (a) and (b) place the lien from the time of levy unless the creditor has specifically identified the property in collection instructions. This follows the rule that the lien was not perfected until a levy was made, Regan v Metropolitan Haulage Co., 127 N.J.Eq. 487 (1940), as well as the intent of the new chapter which places primary importance on the creditor's written collection instructions. Subsection (c) provides that where more than one lien has been established, priority among them is determined by the same rules as govern distribution of proceeds in section C-22. Subsection (d) establishes the priority of these liens in the event of subsequent transfers.

### **C-19. Sale or other disposition of property**

a. Cash shall be collected and applied to the satisfaction of the judgment as so much money collected, unless it has a value exceeding its face value, in which case it shall be sold.

b. The following property of a judgment debtor shall be collected and reduced to cash and applied to the satisfaction of the judgment in accordance with the instructions of the judgment creditor:

- (1) instruments payable within the term of the collection order;
- (2) any other rights to the payment of money.

c. Other property of a judgment debtor that has been levied against pursuant to a collection order shall be sold as provided in this chapter and the proceeds applied to the payment of the judgment.

Source: 2A:17-15; 2A:17-16; 2A:17-17; 2A:17-19; 2A:17-61

#### COMMENT

Proposed subsection (a) continues the rule of the source statute, which provides that cash is not sold but is merely collected and applied to the satisfaction of the judgment. Under current law, this means that a sheriff who seizes cash receives no fee, because there is no sale held, while a Special Civil Part officer, whose fee is calculated on the amount applied toward the judgment regardless of whether there is a sale or not, receives a fee for the seizure of cash. See International Brotherhood of Electrical Workers, Local No. 1470 v Gillen, 174 N.J. Super. 326 (App. Div. 1980).

Note that the general language of this proposed provision includes the separate categories of property identified in the source provisions, i.e., 2A:17-16 (shares of stock).

The Commission has not dealt with the issue of fees due sheriffs and officers in the Special Civil Part, matters covered in Title 22A. While Special Civil Part officers receive a commission on the total receipts collected, including cash collected, sheriffs receive no commission on cash collected.

## **C-20. Property sold, manner**

a. Property that has been levied against may be sold by any method specified in a court order or agreed upon by the judgment creditor, the judgment debtor and any other party having an interest in the property.

b. In the absence of an order or agreement, that property shall be sold as follows:

(1) Personal property that has a readily ascertainable current value and that is normally sold in an established public market shall be sold in that market.

(2) All other property shall be sold by auction, pursuant to provisions governing public sales.

Source: New

### **COMMENT**

Proposed subsection (a) is new; it permits the sale of property in a manner agreed upon by the judgment creditor and the judgment debtor. This would permit property to be sold in the manner that will obtain the best price in those situations in which an auction sale would not accomplish that purpose, provided that the judgment creditor and judgment debtor agree.

Proposed subsection (b) covers those situations in which the judgment creditor and judgment debtor do not agree on a method of sale. Proposed subsection (b)(1) is new. It requires that property which has a ready market shall be sold in that market, the purpose being to obtain the highest price. Subsection (b)(2) states the principle of existing law that property shall be sold by public auction. In this proposed section, an auction sale is the last resort.

This report does not deal with the implications of these changes on the manner in which the sheriff's fees are calculated. The language in Title 22A concerning sheriff's fees for sale is broad enough to include any form of sale subsequent to collection by the sheriff. It is our view that it might be wise to propose modifications in the language in Title 22A to make it clear that the intent is that once the sheriff has executed against particular property, he receives his percentage fee for the ultimate sale, even if the sale is not by sheriff's auction but by agreement between the parties or by negotiation in some other market.

## **C-21. Objections to sale or disposition of property**

a. Any person who claims an interest in property which has been levied against or who objects to the sale or other disposition of property which has been levied against may file a written objection to the sale or disposition with the clerk of the court which issued the collection order and deliver a copy of the objection to the collection officer.

b. The clerk shall notify the collection officer, the judgment creditor, and the attorney for the judgment creditor of any objections that have been received to the sale or other disposition. Upon receipt of notification of the objections, the collection officer shall not sell or dispose of the property until further order of the court.

Source: 2A:17-29, 2A:17-31

### **COMMENT**

This proposed provision modifies and simplifies the source provisions by providing that notice of objections to sale or disposition shall be given to the clerk of the court, with the clerk obliged to notify the collection officer of the objections. Once objections are received, the collection officer shall not act until further order of the court.

## **C-22. Priorities in Distribution of proceeds**

The proceeds of property which has been levied against to collect a judgment shall be distributed in the following order:

- a. to the judgment creditor for whom the property was levied against and sold;
- b. if the sale is of personal property, to other judgment creditors who have levied against the proceeds of the sale;
- c. to junior lienholders whose liens are extinguished by the sale;
- d. to the debtor.

Source: New

### **COMMENT**

While there is no current statute dealing with this subject, the proposed section is in accord with caselaw and practice.

## **C-23. Disputes over distribution of proceeds**

If a dispute arises concerning the application of either money collected or proceeds of a sale to the satisfaction of a judgment, the officer or any party with a right to the property to be distributed may apply to the court, on notice to the other parties whose property rights will be affected by resolution of the dispute, for an order directing the distribution of the money or proceeds.

Source: 2A:17-6

### **COMMENT**

While much of this section is new, it continues the current practice.

## **C-24. Return of collection order**

a. The collection officer shall file a return with the court which issued the collection order at the earliest of the following times:

- (1) immediately after receipt of the collection order, if no written instructions have been received from the judgment creditor.
- (2) 30 days after notice to the judgment creditor unless directed otherwise.
- (3) immediately after a request in writing for a return by the judgment creditor.
- (4) 12 months after the date of the issuance of the collection order against property.
- (5) immediately after a collection order is satisfied.

b. The return filed by the levying officer shall include:

- (1) A statement of the amount collected, if any, and the time when it was collected and remitted to the judgment creditor; and

(2) An itemized bill of costs and fees.

Source: 2A:17-9; 2A:18-27

COMMENT

Subsections (a)(1) and (a)(2) provide for situations in which a creditor instructs the levying officer to make further collection efforts after a seizure and sale of personal property. This obviates the necessity to obtain the issuance of a new collection order if the judgment has not yet been fully satisfied. N.J.S. 2A:18-23, governing county district courts, now repealed, required that the levying officer report to the party or the party's attorney and request further instructions before returning the collection order marked "no levy" or "unsatisfied". Vitale v. Hotel California, Inc., 184 N.J. Super. 512, 520-21 (Law. Div. 1982), *aff'd* 187 N.J. Super. 464, held that statutory authority for successive levies under one order before the return date, is universally recognized. The court referred to 2A:17-23 as evidence for the rule that more than one levy may be requested; the court also held that if property levied against is insufficient to satisfy a collection order, a return should not be made without a showing that another levy would be fruitless. The rule recognized in Vitale, that the sheriff must follow the judgment creditor's reasonable instructions regarding the time and manner of making a levy and must abide by any special instructions of the judgment creditor, is reflected in subsections (a)(1), (a)(2), and (a)(3), each of which gives priority to written instructions from the judgment creditor.

## FORECLOSURE

### F-1. Notice of intention to foreclose a residential mortgage

a. As used in this chapter, a "residential mortgage" means a mortgage of a one-, two-, three-, or four-family dwelling in which the owner or the owner's immediate family resides when the notice of intention to foreclose is sent.

b. Before a plaintiff may commence foreclosure of a residential mortgage, the plaintiff shall give the debtor written notice of intention to foreclose at least 30 days in advance.

c. Notice of intention shall be sent by registered or certified mail, return receipt requested, to the debtor's last known address, and, if different, to the address of the mortgaged property. If the return receipt is not returned to the sender within 15 days, notice shall be made by ordinary first class mail.

d. The notice of intention shall state:

(1) the mortgage obligation;

(2) the nature of the default claimed, and the name and address of the mortgage holder and telephone number of the mortgage holder's representative whom the debtor may contact to dispute the claimed default or the amount required to cure the default;

(3) the debtor's right to cure the default;

(4) what action the debtor must take to cure the default;

(5) the date, at least 30 days after notice is given, by which the debtor shall cure the default to avoid commencement of foreclosure, and the name, address and telephone number of the person to receive payment;

(6) that upon the debtor's failure to cure default by the specified date, the mortgage holder may commence foreclosure;

(7) that the debtor may also have the right to cure a default prior to entry of final judgment;

e. Compliance with this section shall be stated in a foreclosure action complaint.

Source: New, based upon the "Fair Foreclosure Act"

#### COMMENT

The "Fair Foreclosure Act" would provide additional protection for homeowners at risk of foreclosure on their homes because of defaults in the mortgage payments. The bill requires residential mortgage lenders to provide residential mortgage debtors with a notice at least 30 days prior to taking any legal action to take possession of the mortgaged property and by giving mortgage debtors a statutory right, not currently available, to cure a default by paying all amounts due under the mortgage payment schedule and, if applicable, other court costs and attorneys' fees in an amount not to exceed the amount permitted pursuant to the Rules Governing the Courts of New Jersey." Statement, Assembly Bill No. 1064, introduced by Assemblywoman Vandervalk, January 24, 1994.

## **F-2. Notice of right to cure default**

a. If an action to foreclose a mortgage is uncontested, a mortgage holder shall apply for entry of final judgment and provide the debtor with a notice mailed at least 16 days before submission of proofs for entry of a foreclosure judgment advising that:

(1) absent a response from the debtor, the mortgage holder will submit proof for entry of final judgment; and

(2) that upon entry of final judgment, the debtor will lose the right to cure the default.

b. Within 8 days of receiving notice, the debtor may send the mortgage holder by registered or certified mail, return receipt requested, and file with the court, a statement certifying that there is a reasonable likelihood of the debtor's curing the default within 45 days of the date the notice was received, or if the notice was sent by ordinary mail, the date the notice was mailed.

c. A mortgage holder who receives a statement from the debtor shall not submit proofs for entry of final judgment in foreclosure with a return date earlier than 46 days after the notice was received, or if the notice was sent by ordinary mail, the date the notice was mailed.

Source: New, based on the "Fair Foreclosure Act"

#### COMMENT

This provision pertains to uncontested foreclosure actions as defined in R. 4:64-1(a). It gives the debtor one last opportunity to avoid foreclosure.

### **F-3. Curing default**

a. At any time before entry of final judgment, not later than 30 days after mailing of the notice of default, the debtor shall have the right to cure a default by:

(1) paying all sums which would have been due in the absence of default at the time of payment, any court costs and attorney's fees, and contractual late charges; and

(2) performing any obligation which the debtor would have been bound to perform in the absence of default.

b. If default is cured prior to the filing of a foreclosure action, the mortgage holder shall not bring a foreclosure action. If default is cured after the filing of a foreclosure action, the mortgage holder shall give written notice of the cure to the court which shall dismiss the action without prejudice.

c. A debtor does not have the right to cure a default after an action for foreclosure has been filed:

(1) on a residential mortgage if the default occurs within 18 months of the previous cure unless the cure occurs within 30 days after service of the notice of intention; and

(2) on a commercial mortgage if the default occurs within 24 months of the previous cure unless the cure occurs within 30 days after the mortgage holder has notified the debtor in writing that default has occurred.

Source: New, based upon the "Fair Foreclosure Act" and the "Commercial Mortgage Non-Judicial Foreclosure Act"

#### **COMMENT**

Under the "Fair Foreclosure Act" bill, "a debtor would have the statutory right to 'cure' a mortgage default and reinstate a mortgage at any time after default and up to a time just prior to entry of final judgment of foreclosure. The debtor would be able to cure the default and reinstate the mortgage by paying all sums in arrears, performing any other obligation the debtor would have been required to perform under the mortgage, paying the lender's court costs and attorneys' fees, ... and pay[ing] all contractual late charges as provided for in the note or security agreements." The proposed provision extends the right to cure to commercial foreclosures, but not in the context of a power of sale.

### **F-4. Action necessary for foreclosure; sale pending foreclosure**

a. A mortgage may be foreclosed only by a civil action.

b. If the court determines that the mortgage is valid and that the plaintiff has the right under the mortgage to foreclose, it shall enter judgment ordering the property sold in whole or in sufficient part and stating the amount due on the debt secured by the mortgage.

c. The court shall enter summary judgment of foreclosure, if: (1) the mortgage is not a residential mortgage as defined in this chapter, (2) the debtor has not made a payment of principal or interest when due under the terms of the mortgage as recorded, and (3) the debtor has not cured the default as allowed by this chapter. The debtor's defenses or counterclaims shall not affect the creditor's right to summary judgment of foreclosure.

d. A foreclosure judgment shall be a binding determination of the amount due on the debt secured by the mortgage but it may be enforced only by sale of the mortgaged property and not as a money judgment.

e. When mortgaged property is likely to deteriorate in value pending determination of the action, the court, before judgment, upon application of any party, may order the sale of the property, and the deposit in court of the proceeds to be distributed after judgment.

f. The owner of the property that is the subject of a foreclosure judgment may redeem the property by paying the amount due on the debt secured by the mortgage plus applicable fees and costs:

(1) at any time up to ten days after the sale; or

(2) if objections to the sale are filed until an order confirming the sale.

Source: New, 2A:50-1; 2A:50-31; 2A:50-36

#### COMMENT

Subsection (a) requires a court action for foreclosure. Some states allow a mortgage holder to determine that the mortgage is in default and to take and sell the property without judicial proceedings. While no case or statute forbids such nonjudicial foreclosures in this state, they are unknown in practice. This subsection continues the current practice.

Subsection (b) is a new and explicit statement of judicial foreclosure. "The purpose of a foreclosure action is to determine the right to foreclosure and the amount due on the mortgage ... and to give the purchaser at the foreclosure sale the title and estate acquired by the mortgagee, as well as the estate of the mortgagor at the time the mortgage was executed, free from subsequent encumbrances." Central Penn Nat'l Bank v. Stonebridge Ltd., 185 N.J. Super. 289, 302 (Ch. Div. 1982). Source provision 2A:50-36 permits the court to order the sale of less than the entire property if doing so will be sufficient to discharge the mortgage or encumbrances.

Subsection (c) is new. It provides that if a commercial debtor misses a payment that is due under the mortgage as written, the creditor is entitled to foreclosure irrespective of any defense or counterclaim. Unless the debtor claims to have made the payments in question, foreclosure proceeds by summary judgment. See F-7. Sale which allows the creditor to sell the property privately if a commercial mortgage so provides. The proposal simplifies the adjudication and sale procedures.

Subsection (d) derives from N.J.S. 2A:50-1, which forbids a personal deficiency judgment in a foreclosure action. A foreclosure proceeding is an action quasi in rem; the relief granted is against the land itself. Ushe B. & L. Assn v. Ocean Pier Realty Corp., 112 N.J. Eq. 580, 582 (Ch. 1933). An action on a note [or bond] is in personam. Ehnes v. King, 41 N.J. Super. 429, 433 (App. Div. 1956). A foreclosure judgment is res judicata as to the amount of the debt, 79-83 Thirteenth Ave., Ltd. v. DeMarco, 79 N.J. Super. 47, 55 (Law Div. 1963), aff'd 83 N.J. Super. 497 (App. Div. 1964), aff'd 44 N.J. 525 (1965), but not as to the defendant's liability for any deficiency. Weiss v. Pelton, 132 N.J. Eq. 248, 249-250 (Ch. 1942).

Subsection (e) retains the substance of the source provision, 2A:50-31.

The right to redemption in New Jersey is not primarily statutory; it is created by Rule and case law. Subsection (f)(1) and (2) reflect the prevailing practice allowing a redemption period based upon R. 4:65-5 as interpreted in case law. See Hardyston Nat. Bank v. Tartamella, 56 N.J. 508, 513 (1970). ("...the just course is to permit the mortgagor to redeem within the ten-day period fixed by R. 4:65-5 for objections to the sale and until an order confirming the sale if objections are filed under the rule." Weintraub, C.J.) In the sole case "clarifying the Hardyston language," the mortgagors "sought to take advantage of a period of 'time-out' between motion [objecting to the sale] and ultimate decision, thereby extending the time for redemption in a fashion never contemplated...." The court found that the objection was filed only for purposes of delay and

stated that "once notice of objection to the sale has been duly served and filed in accordance with R. 4:65-5, no further redemption or tender of the same may be made until the motion is decided favorably to the objector." East Jersey Sav. & Loan v. Shatto, 226 N.J. Super. 473, 481-482 (Ch. Div. 1987).

#### **F-5. When foreclosure is required before action on debt**

a. A holder of a residential mortgage may bring an action to collect the debt secured by the mortgage only by foreclosure. After foreclosure, the mortgage holder may bring an action for a deficiency. However, a residential mortgage holder is not bound by this subsection if:

- (1) the residential mortgage is subject to a prior mortgage held by a different person, or,
- (2) the mortgage is not the primary security for the debt.

b. A mortgage holder may enforce a contract of a surety or guarantor to pay the debt and mortgage other than one that is subject to a prior mortgage held by a different person only by bringing an action for foreclosure that joins the surety or guarantor. After foreclosure, a mortgage holder may bring an action against the surety or guarantor for the deficiency.

c. A mortgage holder who is not required by this section to foreclose the mortgage before bringing an action to collect the debt may:

- (1) use the procedure of this section, or
- (2) bring an action to collect the debt before, or joined with, a foreclosure action.

Source: 2A:50-2; 2A:50-2.3; 2A:50-22.

#### **COMMENT**

At common law a mortgagee could sue at law on the bond or other obligation before foreclosing the mortgage. Knight v. Cape May Sand Co., 83 N.J.L. 597, 601 (E. & A. 1912). Later, by statute, when a bond and mortgage were given for the same debt, foreclosure of the mortgage had to take place before an action on the bond was allowed. N.J.S. 2A:50-2. If a promissory note secured the mortgage, the mortgagee, upon default of the note, could enforce the personal obligation first; the statute did not apply. Gloucester City Trust Co. v. Goodfellow, 124 N.J.L. 118, 119 (E. & A. 1940).

Since 1980, "foreclosure of the mortgage is required before any action to recover a personal judgment can be commenced, whether the mortgage debt is evidenced by a bond or by a note N.J.S.A. 2A:50-2." Central Penn Nat'l Bank v. Stonebridge Ltd., 185 N.J. Super. 289, 304 (Ch. Div. 1982). The purpose of the 1980 amendment is clearly set out in the accompanying legislative statement: "This bill eliminates the difference between bonds and notes secured by residential real estate mortgages. It extends present law to allow a mortgagor to dispute the amount of a deficiency in a foreclosure case where a note is involved as well as those where a bond is involved."

Subsection (a) concisely restates several provisions of 2A:50-2.3. Note that "residential mortgage" is defined in proposed Section 1(a). In practice, "[e]ven without a statute, if the mortgage has previously been extinguished by foreclosure of a superior mortgage or other lien by a tax sale, by condemnation or in some other manner, obviously a mortgagee cannot be required to first foreclose the mortgage." Central Penn Nat'l Bank v. Stonebridge Ltd., *supra*, 185 N.J. Super. at 305.

Subsection (b) derives from 2A:50-22, which is analyzed in River Edge S. & L. Assn v. Clubhouse Associates, 178 N.J. Super. 177, 184 (App. Div. 1981): "It is clear that even a party who has no title interest in the subject property is a proper party in a foreclosure action, and a necessary party if there is any



intention to pursue a deficiency judgment against that party. N.J.S.A. 2A:50-22 clearly casts the burden of joinder on the party seeking the deficiency judgment."

## **F-6. Deficiency action**

a. A deficiency action on a debt secured by mortgage that has been foreclosed:

(1) may be brought by the mortgage holder only within three months after the foreclosure sale or confirmation of sale;

(2) may be brought against a person answerable on a bond or note only if the person was a party in the foreclosure action.

b. A deficiency action on a debt secured by mortgage that has been extinguished by the foreclosure of a prior mortgage:

(1) may be brought by the mortgage holder only within one year after the foreclosure sale or confirmation of sale; and

(2) shall not open the foreclosure and sale of the mortgaged premises nor result in a right of redemption.

c. If a defendant in the deficiency action disputes the amount of the deficiency, the court shall determine the amount of deficiency by deducting the fair market value of the mortgaged property at the time of the foreclosure sale from the amount of the debt, interest and costs. The court shall determine the fair market value from evidence submitted by the parties, or, upon agreement of all parties, the court may accept the value which three appraisers fix as the fair market value.

Source: 2A:50-2; 2A:50-2.1; 2A:50-3; 2A:50-8; 2A:50-9

### **COMMENT**

This section combines and streamlines numerous related source provisions. Its requirements are applicable when a mortgage holder uses foreclosure followed by a deficiency action. While that course is required in certain cases, in others the creditor may choose to sue on the debt. In such cases, the requirements of this section are inapplicable although general legal and equitable principles may have some similar effects. See Citibank, N.A. v. Errico, 251 N.J. Super. 236, 246-247 (App. Div. 1991), which allows a credit for fair market value of the property.

Subsection (a) derives from 2A:50-2.

In subsection (a)(2) the purpose of the joinder requirement is threefold: to make the foreclosure judgment *res judicata* regarding the mortgage debt amount, to afford protection to an obligor who has sold the property, and to permit named original obligors or guarantors in the foreclosure action to redeem or bar equity of redemption. Central Penn Nat'l Bank v. Stonebridge Ltd., *supra*, 185 N.J. Super. at 305-306.

Subsection (b) combines source provisions 2A:50-8 and 2A:50-9. It applies to actions wherein the mortgage lien has been extinguished by foreclosure of a prior mortgage, and requires that action begin within a year after sale. The proceedings neither open foreclosure or result in right of redemption.

Subsection (c) derives from source provision 2A:50-3

Under current law, a person who disputes the amount of the deficiency may redeem the property within six months after the deficiency judgment is entered. 2A:50-4, 2A:50-5. That provision originated as an attempt to protect a person who gave a bond and mortgage, sold the property subject to the mortgage,

had no notice of foreclosure nor opportunity to redeem and was compelled to pay a deficiency even though the premises might have a market value greater than the debt. Pennsylvania Co. for Insurance of Lives v. Marcus, 89 N.J.L. 633, (1917). The right to redeem ends ten days after the sale unless objection is made pursuant to R. 4:65-5. The right of the judgment debtor to redeem for six months derives only from this statute and is conditioned on recovering a deficiency judgment. Current notice requirements make this provision unnecessary.

## **F-7. Sale**

a. Without further court order, a judgment of foreclosure shall authorize sale of the property.

b. If the judgment does not specify otherwise, the sale shall be conducted by the sheriff of the county in which the property is located. If the sheriff cannot effect the sale within 45 days after receiving the judgment, or if there is other good cause, the court may appoint a special referee to conduct the sale. If the sheriff is restrained from conducting the sale by bankruptcy proceedings or court order, the time of restraint shall not be counted in determining the 45-day period.

c. Whether the sale is conducted by the sheriff, or a special referee, the terms of sale and the fees and costs chargeable for the sale shall be those provided by law for public sales.

d. If the mortgage debtor agrees, or if the mortgage is not a residential mortgage and the mortgage provides for private sale, or if the court finds from affidavits submitted that the mortgage debtor has abandoned the mortgaged property or that the amount of the plaintiff's judgment is at least 92% of the current value of the property, the court shall order that the plaintiff may sell the property privately in any commercially reasonable manner. After sale, the plaintiff shall pay the part of the proceeds that exceeds the judgment and the cost of sale into court for distribution as provided in this chapter.

e. The interests in the property that shall be sold are the interests of the mortgage debtor and of the mortgage holder. The property shall be sold free of any liens that are: (1) subordinate to the lien of the mortgage holder, and (2) that were held by defendants in the foreclosure action or that attached to the property after the commencement of the foreclosure action and the filing of the notice of pending action. The property shall also be sold free of any liens or interests that could have been recorded in the office of the register of deeds or county clerk but were not recorded there.

Source: New, 2A:50-19, 2A:50-30, 2A:50-37

### **COMMENT**

Subsection (a) of this section is new. At present, a writ of execution is required before sale and foreclosure. Since a judgment orders the sale, a requirement of a writ serves no purpose.

Subsection (b) clarifies current law. In practice, the sheriff now conducts almost all execution sales. However, it has been held that a judge has the authority to appoint a referee to conduct a sale and should do so if the sheriff cannot sell the property without delay. Galaxy Towers v. Elsis, 262 N.J. Super. 92 (Ch. Div. 1993). Subsection (c) specifies that the terms of sale be the same, irrespective of who conducts the sale.

Subsection (d) is new in allowing for sale by a private party in the specified circumstances. The provision adopts the policy of the "Fair Foreclosure Act."

Subsection (e) reflects current law. See 2A:50-30, 2A:50-37 and Powell v. Giddens, 231 N.J. Super. 49 (App. Div. 1989).

## **F-8. Proceeds**

- a. After sale of the property, the proceeds shall be applied as follows:
- (1) to pay the fees and costs of sale;
  - (2) to pay the amount specified in the judgment of foreclosure as due on the mortgage foreclosed;
  - (3) to pay the amount necessary to satisfy any other liens that were on the property at the time of the commencement of the foreclosure action and were extinguished by the foreclosure;
  - (4) to pay the amount necessary to satisfy any other liens extinguished by the foreclosure;
  - (5) to the owners of the property in proportion to their interests in the property;
  - (6) to the debtor.

b. If there is more than one owner of the property and there are liens that affect the interests of only certain of the owners, the payment of the amounts necessary to satisfy those liens shall not reduce the proceeds paid to the other owners.

Source: 2A:50-34, 2A:50-37

### COMMENT

This section is a continuation of current law. See the source statutes and Morsemere Fed. Sav. & Loan Assn. v. Nicolaou, 206 N.J. Super. 637 (App. Div. 1986).

## **F-9. Strict foreclosure**

A good faith purchaser at a foreclosure sale may bring an action to compel a person holding a lien subordinate to the foreclosed lien to redeem its mortgage or be foreclosed of the equity of redemption, if the subordinate lien would not have entitled the lienholder to any proceeds even if joined in the original foreclosure action and if through inadvertence, it was not extinguished by the foreclosure.

Source: New

### COMMENT

This new provision derives from Citicorp Mortg. Inc. v. Pessin, 238 N.J. Super. 606, 611 (App. Div. 1990), certif. den. 122 N.J. 141 (1990).

Historically, strict foreclosure, the usual procedure in New Jersey during the colonial period and until 1820, has been an equitable action to force parties entitled to an equitable right of redemption to exercise it by paying the entire mortgage debt within a time set by the court, or, upon defaulting in the payment, to be forever barred and foreclosed from equity of redemption in the premises without any sale. Strict foreclosure now is used to perfect the title of a person who, having purchased in good faith at a foreclosure sale, then discovers that someone having an interest in the property was not joined in the

foreclosure, through inadvertence or mistake, and was not concluded by the foreclosure and sale. 30  
Cunningham and Tischler (Mortgages) N.J. Prac. Sect. 201.

Currently there is no statutory authority for strict foreclosure of mortgages in New Jersey.

Strict foreclosure is now a viable modern proceeding which establishes title in the successful plaintiff and is remedially comparable, thereby to foreclosure by sale. The statutory form of remedy, however, is inapplicable to mortgages and is authorized in New Jersey only for in personam tax sale certificate foreclosure actions [N.J.S. 54:5-85 et seq.]....

Myron C. Weinstein, "Foreclosure and Deficiency Actions in New Jersey", 118 N.J.L.J. 1, 26  
(December 11, 1986).

## **PUBLIC SALES**

### **S-1. Public sales; authority**

Where a public sale is ordered or required by statute, the sheriff or other person to whom the order is directed shall make the sale pursuant to this chapter and court order, and shall execute, as the case requires, a deed or certificate of title for the property sold.

Source: 2A:50-19; 2A:50-37

#### **COMMENT**

This section establishes that the provisions of this chapter govern all public sales, for whatever cause they arise except when a court otherwise directs.

### **S-2. Statement of prior encumbrances**

The sheriff or other person authorized shall not conduct a public sale of real property before receipt of the affidavit required by N.J.S. 46:15-6.1 listing all liens and encumbrances that will affect the property after the sale and the current balance of each. The sheriff shall make contents of the affidavit available to any person requesting it.

Source: 46:15-6.1

#### **COMMENT**

This section implements the requirement of the source statute which is not recommended for repeal. It further requires the sheriff to make the affidavit available for potential bidders.

### **S-3. Notice of pending sale**

a. A person who has obtained an order directing a public sale of real property, in an action as to which no notice of pending action has been filed, shall file a notice of pending sale in

the office of the county clerk or register of deeds and mortgages of the county in which the property is located.

b. A notice of pending sale filed in the office of the county clerk or register of deeds and mortgages of the county in which the property is located shall be notice of the pendency of a public sale of the property to any person who acquires an interest in, or lien on, the property after the filing of the notice.

c. Notices of pending sale of real property shall be filed and indexed in the office of the county clerk or register of deeds and mortgages in the same manner as notices of pending action, and the fee for filing such notices shall be the same as the fee for filing a notice of pending action.

d. A notice of pending sale filed or posted pursuant to this section shall expire one year from the date of the issuance of the order directing the public sale, or upon the return of the enforcement order by the officer to the court that issues the order, whichever is earlier. A notice of pending sale may be extended for periods of one year if an extension notice is filed prior to the expiration of the original notice or any previous one year extension of the original notice.

Source: New

#### COMMENT

This section is part of the effort to meet the constitutional requirement established in New Brunswick Savings Bank v. Markonski, 123 N.J. 402 (1991), that judgment creditors and other holders of an interest in a debtor's real property have a right to be notified of the pending sale of the property to satisfy another judgment creditor's lien. It directs that notices of pending sales of real property be filed in the office of the county clerk or register of deeds, in the same manner as notices of pending proceeding. Time limit for the effectiveness of the notice in subsection (d) is the same as the time limit on an enforcement order, or earlier if the enforcement order is returned by the officer. The filed notice provides notice to any person who acquires an interest in the property of the pendency of an execution sale. While the subsection establishes notice as a matter of law, in the overwhelming majority of cases the notice is real rather than constructive. In some situations, notice in land records, like notice by publication, is not well designed to give actual notice, and so does not meet constitutional standards. However, notice in the land records is the method most likely to reach persons who acquire an interest in the property. A person who takes a conveyance of an interest in property, almost invariably does so after a search of the records in the office of the county clerk or register of deeds and mortgages. A search of those records will reveal the notice filed pursuant to this chapter. Filed notice of an interest in the property will reach a potential purchaser before the purchase is completed and will be more useful than a mailed notice, which cannot reach a person until the interest has been acquired.

The exception in this section relating to matters in which a notice of pending action has been filed recognizes that a notice of pending action has the same effect as a notice of pending sale. The exception has the effect of excluding mortgage foreclosure actions from the compass of this section.

#### **S-4. Contents of notice of pending sale**

A copy of the order directing the public sale of real property shall be appended to the notice of pending sale. The notice shall contain:

a. a statement that the property is subject to sale at any time after the expiration of 30 days from the date of filing and mailing the notice;

- b. a description of the property sufficient to identify it; and
- c. a statement of the approximate amount of the judgment or order to be satisfied by the sale.

Source: New

COMMENT

This section specifies the contents of the notice of pending sale.

**S-5. Advertisement of sales; publication**

a. The sheriff or other person authorized to conduct a public sale shall:

(1) post a notice of the sale in the office of the sheriff at least 10 days before the sale date;

(2) in the case of real property, publish the notice of sale once, between 10 and 20 days before first date scheduled for the sale, in two newspapers:

(A) both published in the county where the property is located, and one published in the county seat or the municipality with the largest population in the county if a newspaper is published in either such municipality; or

(B) both circulating in the county, and one published in the county, if only one newspaper is published in the county; or

(C) both circulating in the county, if no newspapers are published in the county; and

(3) make copies of notices of sale available to members of the public on request.

b. The notice of sale in the case of real property shall:

(1) state the terms of sale;

(2) state the amount of the judgment or order to be satisfied by the sale;

(3) include either a diagram or concise statement describing the property, and if practicable, the street and number of the property; and give the location of the full legal description of the property; and

c. The following form may be used as notice of sale of real property:

PUBLIC AUCTION OF PREMISES

shall occur at the Office of the \_\_\_\_\_ County Sheriff,  
 \_\_\_\_\_ (address & phone)  
 at \_\_\_\_\_ (time), on \_\_\_\_\_ (date), of the following premises:  
 Address: \_\_\_\_\_  
 Municipality: \_\_\_\_\_ Tax lot number: \_\_\_\_\_  
 Nearest cross street: \_\_\_\_\_  
 Concise characterization (Approx. dimensions, number of rooms,  
 etc.): \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 By order of the Superior Court, \_\_\_\_\_ Division, in the case of:

\_\_\_\_\_, v. \_\_\_\_\_,  
Case number: \_\_\_\_\_ ; approximate amount due: \$ \_\_\_\_\_  
plus Sheriff's fees.  
At sale, the purchaser must pay a 10% deposit. Within 30 days after sale,  
the purchaser must pay the balance due. Both payments must be in cash or  
certified or cashier's check.  
Copies of the full legal description of the property and Conditions of Sale,  
set by statute (N.J.S. ) are available in the Sheriff's Office.  
The Sheriff may adjourn this sale without further notice by publication.  
Attorney for Plaintiff: (name, address, telephone) \_\_\_\_\_  
\_\_\_\_\_

d. The notice of sale in the case of personal property shall:

- (1) state the terms of sale;
- (2) state the amount of the judgment or order to be satisfied by the sale;
- (3) include a description of the property sufficient to identify it; and

(4) if the property to be sold requires a certificate of title, give the registration number and legal description of the property along with the location of the office where the certificate is registered.

e. The sheriff or other person authorized to conduct a public sale may advertise the sale in any manner reasonably calculated to increase the price of the property to be sold. The cost of advertisements authorized by this subsection shall not be charged against the sale price as a cost of sale.

Source: 2A:17-33; 2A:17-34, 2A:61-1

#### COMMENT

Source statute 2A:61-1 was amended in 1979 to allow publication of an abridged description of the property. The purpose was "to lower the cost of publishing the notice of sale." Assembly Municipal Government Committee Statement, Assembly, No. 3624 - L. 1979, c. 364. The proposal decreases the number of times the notice is published from four to one, further reducing costs. Subsection (b) streamlines the specifications regarding choice of newspapers and is consistent with 35:1-2.2 and 35:1-2.2a governing publication in county newspapers.

While subsection (c) provides a form newspaper advertisement that a sheriff may use, its use is not mandatory. Any form that meets the requirements of subsection (b) will be sufficient.

This section requires advertisement of a public sale only in the form of certain notices posted in the sheriff's office or placed in newspapers. However, subsection (e) allows the sheriff or other person authorized to conduct a sale to post other notices or to advertise the sale further in any appropriate manner.

## **S-6. Notice of date, time and place of public sale**

a. At least 10 days before a public sale of real property, a creditor for whose benefit the property is to be sold shall send notice of the date, time and place of the sale by registered or certified mail, return receipt requested to any person who had an interest or lien in the subject property that was of record 14 days before the date first scheduled for the sale. If the creditor knows that a person who is sent notice is represented by an attorney, the creditor also shall send a copy of the notice to the attorney by ordinary mail. If the sale is adjourned more than 30

days from the date first scheduled for the sale, the creditor shall also send notice to any person who had an interest or lien in the subject property that was of record 14 days before the new date scheduled for the sale.

b. At least 20 days before a public sale of personal property, a creditor for whose benefit the property is to be sold shall send notice of the date, time and place of the sale by registered or certified mail, return receipt requested to any person whom the creditor knows had an interest or lien in the subject property on the date the notice of pending sale was filed. If the creditor knows that a person who is sent notice is represented by an attorney, the creditor also shall send a copy of the notice to the attorney by ordinary mail.

c. The notice shall be mailed to the current address of the person, if it is known or reasonably ascertainable, or to the party's last known address of record. The notice shall include a description of the property sufficient to identify it; and a statement of the approximate amount of the judgment or order to be satisfied by the sale.

d. Notice need not be sent to a public entity.

Source: New

#### COMMENT

Notice of the date, time and place of a public sale of real property need be given only to those persons who have interests or liens that were of record 14 days before the date scheduled for the sale. If the sale is adjourned 30 days or less, notices need not be sent to anyone whose interest arose after the original cut-off point, 14 days before the first scheduled date. As a result, the grant of a short adjournment will not require the creditor to conduct new searches and to send new notices. However, if the adjournments total more than 30 days, a new search is required and if the search reveals new interest holders, those persons must be notified. In addition, any person to whom an interest is conveyed after the notice of sale is filed will take the interest with knowledge of the pending sale. See Section 3.1.

Notice of the date, time and place of a public sale of personal property need be given only to those persons whom the creditor knows have interests.

Notices must be mailed to the current address or the person's last known address. Notice must be sent if an interest holder's address is "reasonably ascertainable" according to the standard set in New Brunswick Savings Bank v. Markouski, 123 N.J. 402 (1991). In addition to the particulars of the sale, the content of a notice is similar to the content of a notice of pending sale.

## **S-7. Adjournments**

a. The sheriff or other person authorized to make the sale may allow two adjournments of sale of no more than 14 days each at the judgment debtor's request.

b. The sheriff or other person authorized to make the sale may allow adjournments of sale at the judgment creditor's request.

c. The sheriff or other person authorized to make the sale may charge a fee authorized by law for adjournments.

Source: 2A:17-36, 2A:61-5, 2A:61-6.

#### COMMENT

Subsection (a) reduces adjournments from the current maximum of two adjournments, each not to exceed one month. All counties now routinely grant these two one-month adjournments. Subsection (b) allows adjournments at the creditor's request. While there is no provision of current law that specifically



authorizes them, these adjournments are now granted on request. Subsection (c) allows the sheriff to charge a fee for adjournments if that fee is later enacted.

The effect of the reduction in the length of adjournments at the debtor's request should be to reduce the delay between a judgment of foreclosure and the sale. However, sales are often delayed by matters other than adjournments. Bankruptcy and other court-ordered stays are unaffected by this section.

Adjournment of a sale does not require re-advertisement since the newspaper advertisement need only be published between 10 and 20 days before the first scheduled sale date. Grant of the two adjournments permitted by this section does not require new searches for persons who may have an interest in the property and notification of those persons. See Section S-6.

## **S-8. Conditions of sale of real property**

a. The following conditions shall apply in all public sales of real property:

(1) The property shall be sold subject to interests and restrictions of record, rights of tenants, rights of redemption of the debtor or of the federal government, unpaid taxes, assessments or condominium charges, and any facts that an accurate survey or an inspection of the property would disclose.

(2) The property shall be sold at auction to the highest bidder. The person conducting the sale shall accept, in addition to oral bids, written bids for a fixed amount accompanied by the required purchaser's deposit and a signed agreement to comply with all conditions of sale. If dispute arises regarding who has made the highest bid, the property will be resold immediately.

(3) At the close of sale, the purchaser shall

(A) pay 10% of the purchase price in cash or by certified, cashier's or treasurer's, check, unless the purchaser is the foreclosing party in a foreclosure procedure; and

(B) sign an agreement to comply with all conditions of sale and deliver the agreement to the person conducting the sale.

(4) If the purchaser is required to pay the 10% deposit, and does not pay it, or if the purchaser does not sign the Conditions of Sale, the person conducting the sale shall immediately resell the property without further public advertisement.

(5) Within 30 days after sale, the purchaser shall pay the balance of the purchase price and interest at the lawful rate on the balance due, from the 11th day after sale, until the balance is paid.

(6) The fees and commissions of the person conducting the sale are included in the amount bid and will be deducted to determine the purchase price.

b. If the purchaser fails to pay the balance of the sale price within 30 days and the time for payment has not been extended by the creditor, the property shall be sold a second time.

c. The purchaser may decline to complete the sale and may reclaim the deposit if there is a lien or encumbrance on the property that was not listed in the affidavit required to be filed before the sale by N.J.S. 46:15-6.1. Otherwise, a purchaser who fails to pay the balance of the sale price within 30 days shall be responsible for expenses of the second sale and any difference

between the first and second sale price, and the sheriff or other authorized person shall retain the deposit to be disbursed by court order.

Source: New

#### COMMENT

The provision mandates statewide conditions of sale. Presently they vary from county to county. "After centuries of conducting execution sales, there is no clear-cut legislative mandate fixing the obligation to pay the sheriff's fees." Howard Sav. Bank v. Sutton, 246 N.J. Super. 482, 484 (Ch. Div. 1990).

"Once again, the failure of the Legislature to regulate the terms and conditions under which Sheriffs are to conduct execution sales, leads to unnecessary litigation as well as lack of statewide uniformity in the conduct of such sales.

...The legislature has done nothing to standardize conditions of sale among the 21 counties since enacting the predecessor of N.J.S.A. 2A:61-1 in 1799."

Investors & Lenders v. Finnegan, 249 N.J. Super. 586, 587, 596 (Ch. Div. 1991).

Following the March 20, 1991, decision in Investors & Lenders v. Finnegan, *supra*, the foreclosure unit of the New Jersey Sheriff's Association, established uniform conditions in August, 1991, which the Association adopted in September, 1991. The conditions of sale would "be used by the sheriff's departments throughout the State of New Jersey, effective January 1992." Letter, January 8, 1992, from Lynn M. Adams, Chief Clerk, Gloucester County Sheriff's Office, to John M. Cannel, Executive Director, New Jersey Law Revision Commission.

A survey taken in December, 1994, of all counties' written Conditions of Sale shows that the sheriffs' efforts at self-regulation has not resulted in uniformity:

- most counties require a 10% deposit from the purchaser, but at least one requires 20%;
- the balance of the purchase price is usually due within 30 days after sale; in a few counties it is due in two weeks, in several, 60 days;
- several counties require a minimum bid of \$100. with additional bids at \$100. increments;
- a few counties require that any assignment is to be made at the time of sale; etc.

The proposal requires certain conditions of sale.

The first sentence of subsection (c) is a new and explicit statement which releases a purchaser from completing the sale and allows return of the deposit in the special case of an unlisted lien or encumbrance.

### **S-9. Conditions of sale of personal property**

The following conditions shall apply in all public sales of personal property:

- a. The property shall be sold as it is at the time of sale and subject to interests and restrictions of record.
- b. The property shall be sold at auction to the highest bidder. The person conducting the sale shall accept, in addition to oral bids, written bids for a fixed amount accompanied by the required purchaser's deposit and a signed agreement to comply with all conditions of sale. If dispute arises regarding who has made the highest bid, the property will be resold immediately.

c. At the close of sale, the purchaser shall pay the purchase price immediately in cash or by certified, cashier's or treasurer's, check unless the creditor agrees to another schedule or mode of payment. If the creditor allows another schedule or mode of payment, the creditor shall be responsible for payment if the purchaser fails to pay as agreed.

d. If there is no agreement that allows another schedule or mode of payment and the purchaser does not pay the purchase price at the close of sale, the person conducting the sale shall immediately resell the property without further public advertisement.

e. The fees and commissions of the person conducting the sale are included in the amount bid and will be deducted to determine the purchase price.

Source: New

#### COMMENT

This section establishes the conditions of sale for personal property. It is based on the previous section which governs sale of realty, but it differs in several respects. Most important, the section provides that generally the purchaser pays for the property and takes it immediately. That is in accord with present practice. Second, personal property is sold "as is." Again, that reflects current practice.

### **S-10. Objections to sale; confirmation of sale**

a. A person who objects to a public sale of real property shall file that objection with the Superior Court and with the person who conducted the sale within 10 days after the sale or any time thereafter before delivery of the deed.

b. If the sale was not conducted by the sheriff, the person who conducted the sale shall apply to the Superior Court for confirmation of the sale.

c. If the court approves the sale, it may confirm the sale as valid and direct the sheriff or clerk of the court to deliver a deed.

Source: R. 4:65-5, R. 4:65-5.

#### COMMENT

"Prior to September 15, 1948, the subject of confirmation was controlled by statute, R.S. 2:65-12. The statute was then amended to commit the subject to our Rules of Court." Hardyston Nat Bank v Tartamella, 56 N.J. 508, 511 (1970). The Court "eliminated the motion to confirm and the order of confirmation, not to change the rights of the parties..., but only to eliminate the paper work of a formal motion and order confirming a sheriff's sale which had become routine and of no practical value." Hardyston, *supra*, at 511.

The proposal fills a statutory void in stating that objection to a sale may be brought and in providing a time limit. The section also continues the Rule requirement that if the sale is conducted by someone other than the sheriff, the sale must be confirmed by court.

### **S-11. Delivery by deed**

a. In the case of a public sale of real property, the purchaser shall prepare a deed to the property sold and present it to the sheriff if the property was sold by the sheriff and otherwise to the clerk of the court under which authority the property was sold. The sheriff or clerk shall execute the deed if, after examination, the sheriff or clerk determines;

(1) that the purchaser has paid the balance of the purchase price and interest on the balance due, from the 11th day after sale;

(2) that the deed complies with this section;

(3) that the sale has not been set aside by a court and no objection to the sale is pending;

(4) that, if the sale was not conducted by the sheriff, the sale was confirmed by the court; and

(5) if redemption of the property is permitted by law, that the time for redemption has passed and that the property has not been redeemed.

b. The deed shall state the person whose interest in the real estate was sold and the execution or other legal proceeding for which the real estate was sold.

c. The purchaser shall pay the cost of preparing and recording the deed and any realty transfer tax.

d. The sheriff shall attach a copy of the affidavit required by N.J.S. 46:15-6.1 to the deed.

e. A deed executed pursuant to this section shall transfer all interests of the execution defendant in the same manner as a deed by that person to a purchaser for value. The deed shall extinguish any lien resulting from the judgment executed and any lien subordinate to that lien.

Source: 2A:17-40; 2A:17-41; 2A:50-37.

COMMENT

Subsection (a) is new. While the practice is that the purchaser is responsible for preparing the deed, statutes appear to put that duty on the sheriff. See 2A:50-37. No specific provision delays execution of a deed until the time for objections to the sale and redemption of the property is passed, but such a delay is fairly implied by statutes and rules on those subjects.

Subsection (b) is substantially similar to 2A:17-40. Subsection (c) is new but reflects consistent statewide practice. Subsection (d) implements the requirements the requirement of 46:15-6.1. See also Section 2.

Subsection (e) is substantially similar to 2A:17-41 and to relevant parts of 2A:50-37. See also, 2A:61-9.

**S-12. Form of sheriff's deed**

A sheriff's deed may be substantially in the following form:

DEED

Prepared by: \_\_\_\_\_

From: \_\_\_\_\_ Sheriff of \_\_\_\_\_ County, New Jersey

To: \_\_\_\_\_

Address: \_\_\_\_\_

Dated: \_\_\_\_\_

In compliance with an order of the New Jersey Superior Court, \_\_\_\_\_  
Division,

\_\_\_\_\_ County, dated \_\_\_\_\_ in the case of \_\_\_\_\_, Plaintiff  
v. \_\_\_\_\_, Defendant.

Docket number: \_\_\_\_\_

By this deed, I, \_\_\_\_\_, Sheriff of \_\_\_\_\_  
County, New Jersey, transfer ownership of all interest of the following parties:

\_\_\_\_\_

in premises described as:

[insert legal description]

constituting block \_\_\_\_\_, lot \_\_\_\_\_  
in the municipality of \_\_\_\_\_, county of \_\_\_\_\_  
including any property attached to the premises or rights to related to it, and subject to  
restrictions of record or restrictions that would be disclosed by a survey of the premises and  
the following restrictions: \_\_\_\_\_

\_\_\_\_\_

for the sum of \_\_\_\_\_ which I have received.  
This sale which occurred on \_\_\_\_\_ was advertised and conducted  
in accordance with law.

\_\_\_\_\_, Sheriff,  
\_\_\_\_\_ County  
\_\_\_\_\_ date

State of New Jersey :  
County of \_\_\_\_\_:

On \_\_\_\_\_, \_\_\_\_\_, Sheriff of \_\_\_\_\_ County,  
New Jersey personally appeared before me and acknowledged that this deed was executed  
voluntarily as the sheriff's own act and swore that the facts alleged in it are true.

Source: New

COMMENT

This form deed is new. It is in plain English and includes only what is necessary.

**S-13. Delivery by certificate of title**

a. In the case of a public sale of personal property which is required by law to be registered under a certificate of title, the sheriff or officer authorized to conduct the sale shall, prior to the time of the sale:

(1) forward a copy of the order authorizing the sale to the office where the certificate of title is registered; and

(2) request a certificate authorizing the sheriff or officer to transfer title by public sale.

b. Upon payment of the full purchase price, the sheriff or officer shall endorse the certificate to assign ownership to the purchaser and deliver it to the purchaser.

c. A certificate executed pursuant to this section shall transfer all interests of the judgment creditor in the same manner as a certificate of ownership endorsed by that person to a purchaser for value. It shall extinguish any lien resulting from the judgment enforced by the public sale and any lien subordinate to that lien.

Source: New

COMMENT

Current statutes require registration under a certificate of title for motor vehicles and boats. N.J.S. 39:10-1 et seq. and N.J.S. 12:7A-1 et seq. This provision is intended to cover these and any other items of personal property for which similar requirements may be imposed.

**S-14. Delivery of personal property not requiring certificate of title**

In the case of a public sale of personal property which does not require a certificate of title, after payment of the full purchase price, the sheriff or officer authorized to conduct the sale shall allow the purchaser to take possession of the property.

Source: New

COMMENT

This provision covers all personal property not requiring a certificate of title. In current procedure payment is made immediately and the goods are immediately delivered.



**STATE OF NEW JERSEY**

**NJLRC**

**NEW JERSEY LAW REVISION COMMISSION**

**FINAL REPORT**

relating to

**CRIMINAL HISTORY RECORD CHECKS FOR SCHOOL EMPLOYEES**

SEPTEMBER, 2004

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**APPENDIX C**

## **Introduction**

Current law requires all school employees who will have regular contact with pupils to undergo a criminal history record check when they are hired. This requirement was first enacted in 1986 and has been expanded and tightened in a number of amendments since that time. The latest of these was enacted last year. The purpose of these provisions is to protect school pupils. While these laws appear to function well in general, two related problems with the administration of them have been brought to the Commission's attention.

The first of these problems concerns volunteer school employees, including those employees whose only compensation is reimbursement for out-of-pocket expenses. Some of these employees have regular contact with pupils. A volunteer athletic coach may work with students in the same way as a paid coach. If a school can use criminal history record checks to screen paid coaches, it should be able to use them to screen volunteer coaches. But while it may be appropriate to screen some volunteers, it may be completely unnecessary for others. Each school system is the best judge of when background checks are advisable. As a result, the Commission recommends giving school systems discretion as to when to require them.

The second problem concerns payment for criminal history record checks. Even though it may be necessary for some volunteers to undergo these checks, it seems wrong to require the volunteers to pay for them. Volunteers are already giving time and effort to assist their local schools. It is not appropriate to ask volunteers to pay for the privilege of helping their communities. The Commission recommends that when a school system asks that a volunteer have a criminal history record check, the school system, not the volunteer should pay for it. The fact that the school system will be paying for record checks further supports the conclusion that the decision of when they are necessary must be left to the school system.

However, the problem of payment for record checks is broader. Some school systems now reimburse new employees for the cost of a criminal history record check. Other school systems believe that current law makes reimbursement improper. The Commission concluded that current law is not clear on this issue. It decided that there is no reason to restrict a school system in deciding to reimburse the cost to some or all applicants. The local school authority is in the best position to decide what is necessary to attract the most qualified applicants for employment.

To implement these findings, the Commission recommends the following amendments to current law:

### **18A:6-7.1. Criminal record check in public school employment**

A facility, center, school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18 shall not employ ~~for pay~~ or contract for the ~~paid~~ services of any teaching staff member or substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school law enforcement officer, school secretary or clerical worker or any other person serving in a ~~paid~~ position which involves regular contact with pupils unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification which would disqualify that individual from being employed or utilized in such capacity or position. An individual employed by a board of education or a school bus contractor holding a



contract with a board of education, in the capacity of a school bus driver, shall be required to meet the criminal history record requirements pursuant to section 6 of P.L.1989, c.104 (C.18A:39-19.1). ~~This section shall not apply to any individual who provides services on a voluntary basis. A facility, center, school, or school system under the supervision of the Department of Education or a board of education which cares for, or is involved in the education of children under the age of 18 may, but need not, require criminal history record checks for individuals who, on an unpaid voluntary basis, provide services that involve regular contact with pupils.~~

An individual, except as provided in subsection g. of this section, shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or

\* \* \*

### **18A:6-7.2 Finger printing**

An applicant for employment or service in any of the positions covered by this act shall submit to the Commissioner of Education his or her name, address and fingerprints taken in accordance with procedures established by the Commissioner. The Commissioner of Education is hereby authorized to exchange fingerprint data with and receive criminal history record information from the federal Bureau of Investigation and the Division of State Police for use in making the determinations required by this act. No criminal history record check shall be performed pursuant to this act unless the applicant shall have furnished his or her written consent to such a check. The applicant shall bear the cost for the criminal history record check, including all costs for administering and processing the check. ~~In cases where a school board has required a criminal history record check for an unpaid volunteer, the school board shall reimburse the applicant for its costs. A school board may also reimburse these costs to applicants for paid positions.~~



**STATE OF NEW JERSEY**

**N J L R C**

**NEW JERSEY LAW REVISION COMMISSION**

**TENTATIVE REPORT**

relating to

**CRIMINAL HISTORY RECORD CHECKS FOR SCHOOL EMPLOYEES**

APRIL 6, 2004

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN JUNE 1,  
2004.

Please send comments concerning this tentative report or direct any related inquiries, to:

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**APPENDIX D**

## Introduction

Current law requires all school employees who will have regular contact with pupils to undergo a criminal history record check when they are hired. This requirement was first enacted in 1986 and has been expanded and tightened in a number of amendments since that time. The latest of these was enacted last year. The purpose of these provisions is to protect school pupils. While these laws appear to function well in general, two related problems with the administration of them have been brought to the Commission's attention.

The first of these problems concerns volunteer school employees, including those employees whose only compensation is reimbursement for out-of-pocket expenses. Some of these employees have regular contact with pupils. A volunteer athletic coach may work with students in the same way as a paid coach. If a school can use criminal history record checks to screen paid coaches, it should be able to use them to screen volunteer coaches. But while it may be appropriate to screen some volunteers, it may be completely unnecessary for others. Each school system is the best judge of when background checks are advisable. As a result, the Commission recommends giving school systems discretion as to when to require them.

The second problem concerns payment for criminal history record checks. Even though it may be necessary for some volunteers to undergo these checks, it seems wrong to require the volunteers to pay for them. Volunteers are already giving time and effort to assist their local schools. It is not appropriate to ask volunteers to pay for the privilege of helping their communities. The Commission recommends that when a school system asks that a volunteer have a criminal history record check, the school system, not the volunteer should pay for it. The fact that the school system will be paying for record checks further supports the conclusion that the decision of when they are necessary must be left to the school system.

However, the problem of payment for record checks is broader. Some school systems now reimburse new employees for the cost of a criminal history record check. Other school systems believe that current law makes reimbursement improper. The Commission concluded that current law is not clear on this issue. It decided that there is no reason to restrict a school system in deciding to reimburse the cost to some or all applicants. The local school authority is in the best position to decide what is necessary to attract the most qualified applicants for employment.

To implement these findings, the Commission recommends the following amendments to current law:

### **18A:6-7.1. Criminal record check in public school employment**

A facility, center, school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18 shall not employ for pay or contract for the paid services of any teaching staff member or substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school law enforcement officer, school secretary or clerical worker or any other person serving in a paid position which involves regular contact with pupils unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification which would disqualify that individual from being employed or utilized in such capacity or position. An individual employed by a board of education or a school bus contractor holding a contract with a board of education, in the capacity of a school bus driver, shall be required to

meet the criminal history record requirements pursuant to section 6 of P.L.1989, c.104 (C.18A:39-19.1). ~~This section shall not apply to any individual who provides services on a voluntary basis. A facility, center, school, or school system under the supervision of the Department of Education or a board of education which cares for, or is involved in the education of children under the age of 18 may, but need not, require criminal history record checks for individuals who, on an unpaid voluntary basis, provide services that involve regular contact with pupils.~~

An individual, except as provided in subsection g. of this section, shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or

\* \* \*

### **18A:6-7.2 Finger printing**

An applicant for employment or service in any of the positions covered by this act shall submit to the Commissioner of Education his or her name, address and fingerprints taken in accordance with procedures established by the Commissioner. The Commissioner of Education is hereby authorized to exchange fingerprint data with and receive criminal history record information from the federal Bureau of Investigation and the Division of State Police for use in making the determinations required by this act. No criminal history record check shall be performed pursuant to this act unless the applicant shall have furnished his or her written consent to such a check. The applicant shall bear the cost for the criminal history record check, including all costs for administering and processing the check. ~~In cases where a school board has required a criminal history record check for an unpaid volunteer, the school board shall reimburse the applicant for its costs. A school board may also reimburse these costs to applicants for paid positions.~~



**STATE OF NEW JERSEY**

**N J L R C**

**NEW JERSEY LAW REVISION COMMISSION**

**TENTATIVE REPORT**

relating to

**UNIFORM COMMERCIAL CODE ARTICLE 1 (2001)**

APRIL 2004

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN JUNE 1, 2004.

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## Introduction

In 2001, the National Conference of Commissioners on Uniform State Laws and the American Law Institute adopted Revised Uniform Commercial Code Article 1 for adoption in all states. The New Jersey Law Revision Commission has examined the Official Text of Revised Article 1 and recommends that the State of New Jersey adopt it in its entirety except for the provision regarding choice of law contained in Revised Article § 1-301. The Commission recommends retention of existing law on this subject contained in UCC Article 1 § 1-105 codified at N.L.S.A. 12A:1-105.

“Article 1 of the Uniform Commercial Code (UCC) provides definitions and general provisions that, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the UCC.”<sup>4</sup> In the intervening decade, NCCUSL and ALI have virtually revised or amended every major article of the Uniform Commercial Code to accommodate changing business practices and developments in law. The revision to Article 1 is an integral part of the Code’s revision to reflect market developments and to achieve consistency with the specific subject matter articles of the Code.

Article 1 contains many changes of a technical, non-substantive nature, such as reordering and renumbering sections, and adding gender-neutral terminology. However, certain substantive changes were made as well. First, section 1-102 now expressly states that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the UCC. This clarification improves its more ambiguously worded predecessor. Second, the statute of frauds requirement aimed at transactions beyond the coverage of the UCC has been deleted. Third, section 1-103 clarifies the application of supplemental principles of law, with clearer distinctions about where the UCC is preemptive. Fourth, the definition of "good faith" found in 1-201 is revised to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing". This change conforms to the definition of good faith that applies in all of the recently revised UCC articles except Revised Article 5. Finally, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

However, the most important change to Article 1 involves the default choice-of-law provisions found in 1-301, designed to replace previous 1-105. Under the latter section, parties to a transaction had the freedom to choose the law of any jurisdiction bearing a reasonable relation to that transaction. Revised Article 1 provides a different basic rule, applicable to all transactions except certain consumer transactions, that lets the parties choose the law of their transaction without reference to whether the transaction bears a reasonable relationship to the selected legal regime. It is party autonomy *par excellence*. In the commercial context, the only restraint is that the parties’ choice of law cannot override the mandatory law of the forum of adjudication, meaning the law related to that state’s fundamental social policies. In consumer transactions, an exercise of such a choice cannot deprive the consumer of the protection afforded by the consumer law of the consumer’s residence, or of the consumer law where the consumer took delivery of the goods.

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<sup>4</sup> NCCUSL Legislative Summary available at <http://www.nccusl.org> (last visited 10 March 2004).

## Matters of Controversy: Choice of Law

While the scope for disagreement with Revised Article 1 is broad, the most serious reservations were expressed over the new “choice of law” rule.<sup>5</sup> In a Memorandum dated 10 February 2004, the Commission analyzed the issue and, after discussion and deliberation, decided that, due to potential objections against Revised Article 1 in its entirety based on the perceived problems of the new rule, it was appropriate to retain existing law in this area. The pertinent portion of that Memorandum follows for sake of clarity and convenience.

### ***The New Choice of Law Rule***

Revised Article 1-301 provides a choice of law rule that allows commercial parties in domestic transactions to select the law of any state and in international transactions (defined as a transaction that bears a reasonable relation to a country other than the United States) to select the law of any state or country. The new rule does not require that the law selected by the parties bear any relationship to that state or country. Hence, with one caveat, the new rule provides for almost total party autonomy in a commercial transaction. The one caveat: the application of the selected law would not apply if it would violate a fundamental policy of the law of the state that would apply in the absence of the agreement.

A special rule is created for consumer transactions. In that context, the choice of law must bear a reasonable relation to the law of the state or country designated and the agreed choice of law cannot deprive the consumer of the mandatory rules of the jurisdiction where the consumer resides, or if the contract and delivery are made outside the consumer’s state of residence, the place where the contract and delivery took place.

In addition, there are eight specific exceptions identifying UCC substantive articles specifying the applicable law.

### ***The Controversy***

There is little doubt that Revised Section 1-301 is more complicated than existing Section 1-105, adopted in New Jersey and part of the original text. There are several groups opposed to the new rule: academics, banks and some commercial parties. In general, the arguments raised are: the new rule creates problems of interpretation by disturbing a settled and known rule supported by precedent, threatens consumers and promotes forum shopping.<sup>6</sup> The banks maintain that the new rule constricts their autonomy to select the law governing consumer agreements.

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<sup>5</sup> For example, consumer groups, such as Consumers Union of California, object to the new definition of a “conspicuous” term in the definitions contained in §1-201; they also maintain that Revised Article 1 should contain a general “unconscionability” provision applicable to any transaction covered by the Code. These objections do not amount to a reason justifying a wholesale rejection of the revision.

<sup>6</sup> No attempt is made here to duplicate the nuances of the arguments made against Section 1-301. The latter, which consists of barely more than 2 pages, has generated a law review article in opposition consisting of 87 pages. William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. Rev. 697 (2001).

The most serious argument is that the rule authorizes the unprincipled use of forum shopping, encouraging the party authoring the contract to seek out any jurisdiction providing a perceived advantage to that party. In effect, the rule would result in a competition among jurisdictions to provide the best rules for predatory contract drafters. With respect to software contracts, skeptics of the new rule, even large institutions that, without compunction, impose standard form contracts on their own customers, claim that it provides a back door to the Uniform Computer Information Transactions Act, since the contract can make the law of Virginia or Maryland applicable: the only two states that have adopted UCITA. These institutions maintain that certain companies, notably Microsoft, will take advantage of this loophole. This fear of UCITA rests presumably upon the major reasons set forth in opposition to that uniform law: enlargement of contract law, infringement of federal copyright law, codification of constructive consent<sup>7</sup> and electronic self-help. In addition, an author has argued that allowing parties to choose their own law deprives government of its authority to regulate the standards of its society.<sup>8</sup>

No doubt that the critics' arguments have merit. Revised Article 1-301 is more complicated than the existing rule and would have to be interpreted over time. The rule may, but not necessarily, lead to forum shopping. The latter assumes expertise in law in a variety of jurisdictions. The rule may, but not necessarily, lead jurisdictions to compete in a race to the bottom. Arguments made in an analogous context, corporate law and the Delaware effect, are unsubstantiated hypotheses. Moreover, in the corporate context, the economic incentive is obvious for states – collection of fees; the economic incentive in choice of law is not so obvious since law and forum are separate matters.

Removing Revised Article 1-301 and retaining the existing rule would mean that the choice of law must bear a reasonable relationship to the parties or their transaction. However, the authoring party can escape the rules of any particular legal regime simply by putting an arbitration clause in the contract, or, by identifying a non-legal code, as permitted under Revised Article 1-302.<sup>9</sup>

#### Revised Definition of “Good Faith”

The revised definition of “good faith” contained in §1-201 states, “Good faith” except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.” This definition is not revolutionary, already having been incorporated in the revision process for other articles except for letters of credit.<sup>10</sup> Many letters of credit are governed by international rules established by the International Chamber of Commerce under the Uniform Customs and Practices for Documentary Credits (UCP 500) thereby subjecting credits to internationally recognized standards in the absence of an expanded “good faith” definition in Article 5. The definition of “good faith” in Revised Article 1 conforms to local New Jersey norms and to internationally accepted norms such as Article 1.7 of the

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<sup>7</sup> For a history of constructive consent and the legal attempts to deflect misuse in the context of standard form contracts, see John J.A. Burke, *Reinventing Contract*, E Law Murdoch Univ. (2003).

<sup>8</sup> Id. This argument is a familiar one in standard form contract theory. *E.g.*, W. David Slawson, *Standard Form Contracts and Democratic Control of Law Making Power*, 84 Harv. L. Rev. 529 (1971). The argument has been raised against the process of developing the Uniform Commercial Code under the auspices of the National Conference of Commissioners on Uniform State Law.

<sup>9</sup> The Official Comment cites as an example the UNIDROIT Principles of International Commercial Transactions. It is highly unlikely that a dominant contracting party would ever use the latter, given its validity and other provisions favoring the weaker party to the contract and giving the court virtually *carte blanche* to rewrite the terms of a perceived abusive contract.

<sup>10</sup> See, Articles 2A 3, 4, 4A, 8 and 9.



UNIDROIT Principles of International Commercial Contracts, a model to serve as a guide for domestic legislation. Given the broad use of the revised definition in other articles, such as 2A, 3, 4, and 8, there is every reason for consistency's sake to incorporate the revised definition in Revised Article 1.

#### Conclusion

The Commission recommends the adoption in New Jersey of the Official Text version of Revised Article 1 of the Uniform Commercial Code, except for § 1-301 containing the new choice of law rule. In that regard, the Commission recommends retention of the existing rule, requiring that the transaction bear a reasonable relationship to the legal regime selected by the parties, as now codified in § 1-105. The Commission also recommends technical amendments to conform to New Jersey's style requirements.



**STATE OF NEW JERSEY**

**N J L R C**

**NEW JERSEY LAW REVISION COMMISSION**

**TENTATIVE REPORT**

relating to

**TITLE 51 – WEIGHTS AND MEASURES**

SEPTEMBER, 2004

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN JANUARY 15, 2005.

Please send comments concerning this tentative report or direct any related inquiries, to:

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# WEIGHTS AND MEASURES LAW

## CHAPTER 1 - DEFINITIONS

### 51A:1-1. Definitions

As used in this title:

a. "Weight and measure" or "weights and measures" means all weights and measures of every kind, instruments and devices for weighing and measuring, and any appliance and accessories associated with any or all such instruments and devices;

b. "Weight" when used in connection with any commodity or service means net weight. When a commodity is sold by drained weight the term means net drained weight;

c. "Correct" when used in connection with weights and measures means in conformance to all applicable requirements of this Act;

d. "Primary standards" means the physical standards of the State serving as the legal reference from which all other standards for weights and measures are derived;

e. "Secondary standards" means the physical standards that are traceable to the primary standards through comparisons, using acceptable laboratory procedures, and used in the enforcement of weights and measures laws and regulations;

f. "Superintendent" means the State Superintendent of Office of Weights and Measures in the Department of Law and Public Safety;

g. "Local superintendent" means county or municipal superintendent of Weights and Measures;

h. "Weights and measures officer" includes the Superintendent, deputies, metrologists, assistants, officers and inspectors, local superintendents, deputies, assistants, officers and inspectors;

i. "Sale from bulk" means the sale of commodities when the quantity is determined at the time of sale;

j. "Package" means a standard package or random-weight package of any commodity:

(1) enclosed in a container or wrapped in any manner in advance of wholesale or retail sale;

(2) weight or measure of which has been determined in advance of wholesale or retail sale; or

(3) as an individual item or in a lot on which there is marked a selling price based on an established price per unit of weight or of measure;

k. "Net weight" means the weight of a commodity excluding any materials, substances, or items not part of the commodity, including containers, conveyances, bags, wrappers, packaging materials, labels, individual piece coverings, decorative accompaniments, and coupon except where the service of shipping includes the weight of packing materials.

l. "Random weight package" means a package that is one of a lot, shipment, or delivery of packages of the same commodity with no fixed pattern of weights;

m. "Standard package" means a package that is one of a lot, shipment, or delivery of packages of the same commodity with identical net contents declarations;

n. "Commercial weighing and measuring equipment" means weights and measures and weighing and measuring devices commercially used or employed in establishing the size, quantity, extent, area, time, or measurement of quantities, things, produce, or articles for distribution or consumption, purchased, offered, or submitted for sale, hire, or award, or in computing any basic charge or payment for services rendered on the basis of weight or measure. However, the term shall not include any meter, measure or scale used by a public utility subject to the jurisdiction of the Board of Public Utility Commissioners of this State for measuring any commodity or service furnished or sold by such public utility.

o. "Commodity" means any kind of good, service or amusement that is sold or intended to be sold.

Source: Uniform weights and measures law and 51:1-2.

#### COMMENT

The uniform law was followed for the definition's section with the exception of subsections (g) and (h), which were added to incorporate New Jersey's leadership structure. Definitions for "food" or "foods," and "physical property" are eliminated. The terms "gross weight;" "net weight;" and "tare weight" are now encompassed by the terms "net mass" or "net weight." The term "commodity in package form" has been renamed "package." Newly defined terms include: "weight;" "correct;" "primary standards;" "secondary standards;" "superintendent;" "person;" "sale from bulk;" "random weight package;" "standard package;" and "commercial weighing and measuring equipment."

An example of subsection (m) is a follows: 1 L bottles or 12 fl oz cans of carbonated soda; 500 g or 5 lb bags of sugar; 100 m or 300 ft packages of rope.

## CHAPTER 2 – STANDARDS

### 51A:2-1. Systems of weights and measures

The International System of Units (SI) and the system of weights and measures in customary use in the United States are jointly recognized, and either one or both of these systems shall be used for all commercial purposes. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the National Institute of Standards and Technology (NIST) are recognized and shall govern weighing and measuring equipment and transactions.

Source: Uniform weights and measure law and 51:1-3.

#### COMMENT

This section is substantially identical to the uniform law. New Jersey currently has a similar section that conveys the intent of the Legislature for the use of the SI within the State.

The "International System of Units" means the modernized metric system as established in 1960 by the General Conference on Weights and Measures and interpreted or modified for the United States by the Secretary of Commerce. [See Metric Conversion Act of 1975 (Public Law 94-168, § 3(1) and § 4(4), and NIST Special Publication 814 - Metric System of Measurement; Interpretation of the International System of Units for the United States, or the Federal Register of December 20, 1990, (FR 90-21913).]

### **51A:2-2. Physical standards**

Weights and measures that are traceable to the U.S. prototype standards supplied by the Federal Government, or approved as being satisfactory by the National Institute of Standards and Technology, shall be the primary standards of weights and measures, and shall be maintained in such calibration as prescribed by the National Institute of Standards and Technology. All secondary standards may be prescribed by the Superintendent and shall be verified as deemed necessary by the Superintendent.

Source: Uniform weights and measures law and 51:1-4 through 51:1-9.

#### **COMMENT**

This section was derived from the uniform law. The current law was replaced by use of federal standards. The replaced sections include: (51:1-4) yard; (51:1-5) chain measurement of land; (51:1-6) Steel measuring tapes used by professional land surveyors and engineers; annual test of electronic distance measuring device; report; forms; (51:1-7) standard ton; (51:1-8) pound; avoirdupois; troy; and (51:1-9) gallon; quart.

### **51A:2-3. Technical requirements for weighing and measuring devices**

The specifications, tolerances, and other technical requirements for commercial, law enforcement, data gathering, and other weighing and measuring devices as adopted by the National Conference on Weights and Measures, published in the National Institute of Standards and Technology Handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices," and supplements or revisions, shall apply to weighing and measuring devices in the State, except by regulation from the Superintendent.

Source: Uniform weights and measures law.

#### **COMMENT**

This section is substantially similar to the uniform law.

### **51A:2-4. Requirements for Packaging and Labeling**

The Fair Packaging and Labeling Act shall apply to all packages kept for the purpose of sale, or offered or exposed for sale. Any weights and measures officer has the authority to enforce its provisions.

Source: New.

#### **COMMENT**

This section is new and replaces the need for sections 51:1-10 through 51:1-14; 51:1-16; 51:1-18 through 51:1-29.1; 51:1-31.1 through 51:1-34; and 51:1-56. These sections include regulations for milk, bread, fruits and vegetables, hydrate sodium tetraborate, flour, ice cream, and farm products.

### **51A:2-5. Net Weight Standards**

a. The Superintendent shall adopt and enforce regulations on tare and tolerances based on the net weight standards in Handbook 133.

b. The Superintendent may adopt regulations on testing procedures for determining net weight that need not be based on Handbook 133.

Source: New and 51:1-29.2.

#### **COMMENT**

This section was added to incorporate into New Jersey law the current practice of using Handbook 133 concerning net weight. The Department of Agriculture, the Federal Trade Commission and the Food and Drug Administration enforce the regulations in Handbook 133. Current law, section 51:1-29.2 applies Handbook 133 only to flour.

### **51A:2-6. Method of Sale**

a. Except as otherwise provided by the superintendent or by established trade custom and practice,

1) commodities in liquid form shall be sold by liquid measure or by weight, and

2) commodities not in liquid form shall be sold by weight, by measure, or by count.

b. The method of sale shall provide accurate and adequate quantity information that permits the buyer to make price and quantity comparisons.

Source: Uniform weights and measure law; 51:1-15 and 51:1-17.

#### **COMMENT**

This section is identical to the uniform law. Subsection (a)(1) is similar to section 51:1-15. Subsection (a)(2) differs from section 51:1-17 by simplifying the sale of dry commodities and eliminating the penalties section.

### **51A:2-7. Sale from Bulk**

All bulk sales in which the buyer and seller are not both present to witness the measurement, all deliveries of heating fuel, and all other bulk sales specified by regulation of the Superintendent shall be accompanied by a delivery ticket containing the following information:

a. the name and address of the buyer and seller;

b. the date delivered;

c. the quantity delivered and the quantity upon which the price is based, if this differs from the delivered quantity for example, when temperature compensated sales are made;

d. the unit price, unless otherwise agreed upon by both buyer and seller;

e. the identity of the product in the most descriptive terms commercially practicable, including any quality representation made in connection with the sale; and

f. the count of individually wrapped packages, if more than one, in the instance of commodities bought from bulk but delivered in packages.

Source: Uniform weights and measures law.

COMMENT

This section is identical to the uniform law. This section eliminates the need for a separate provision on laundry tickets (51:1-35).

**51A:2-8. Declarations of Unit Price on Random Weight Packages**

Any package being one of a lot containing random weights of the same commodity at the time it is offered or exposed for sale at retail, shall bear on the outside of the package a plain and conspicuous declaration of the price per net weight and the total selling price of the package.

Source: Uniform weights and measures law.

COMMENT

This section is identical to its source.

**51A:2-9. Advertising Packages for Sale**

Whenever a packaged commodity is advertised in any manner with the retail price stated, there shall be closely and conspicuously associated with the retail price a declaration of quantity as is required by law or regulation to appear on the package.

Source: Uniform weights and measures law.

COMMENT

This section is identical to its source.

**51:2-10. Misrepresentation of Price, Quantity**

No person shall misrepresent the price or quantity of any commodity sold, offered, exposed, or advertised for sale by weight, measure, or count, nor represent the price in any manner calculated or tending to mislead or in any way deceive a person.

Source: Uniform weights and measures law.

COMMENT

This section is identical to its source.

**CHAPTER 3 – OFFICE OF WEIGHTS AND MEASURES**

**51A:3-1. Weights and Measures Office; County and Municipal Superintendents**

a. There shall be an Office of Weights and Measures within the Division of Consumer Affairs. The Superintendent of Weights and Measures shall be the head of that Office. The governor, with the advice and consent of the Senate, shall appoint a Superintendent who is qualified by training and at least five year's weights and measures, or comparable, experience for a term of five years.

**APPENDIX F**

b. The Superintendent may appoint deputy and assistant superintendents, and inspectors all of whom shall devote full time to their duties. The Superintendent may also appoint clerical and other necessary staff.

c. The governing bodies of each county shall appoint a County Superintendent of Weights and Measures. The governing body of any municipality having a population of sixty thousand or more shall, and the governing body of any other municipality may, provide for the office of Municipal Superintendent of Weights and Measures by ordinance, and appoint a municipal superintendent. The clerk of the municipality shall file a certified copy of the ordinance and appointment with the Superintendent.

d. The governing body of each county and municipality shall fix the numbers of assistant local superintendents and officers and by resolution may authorize the local superintendent to appoint them. The governing body of each county and municipality may provide for the position of a local deputy superintendent and by resolution may authorize the local superintendent to appoint one assistant as deputy superintendent. The local superintendent, the deputy, and all assistant superintendents and officers shall devote full time to their duties. The local deputy superintendent and assistants shall be under the direct control of their respective local superintendents, and shall have all the powers and duties of the local superintendent in making inspections, tests and measurements.

Source: 51:1-42; 51:1-43; 51:1-44; and 51:1-45.

COMMENT

This section is substantially similar to its sources.

### **51A:3-2. Duties of the Office of Weights and Measures**

The Office of Weights and Measures shall:

a. assure that weights and measures in commercial service within the State are suitable for their intended use, properly installed, accurate, and are properly maintained by their owner or user;

b. prevent unfair or deceptive dealing by weight or measure in any commodity or service advertised, packaged, sold, or purchased within the State;

c. make available to all users of physical standards or weighing and measuring equipment the precision calibration and related metrological certification capabilities of the weights and measures facilities of the Office;

e. to the extent practicable and desirable, promote uniformity between weights and measures requirements of the State and those of other States and Federal agencies and international standards; and

f. encourage desirable economic growth while protecting the consumer through the adoption by rule of such weights and measures requirements necessary to assure equity among buyers and sellers.

g. maintain the state standards and test them periodically to assure that they reflect standards maintained by the federal government.

h. test the standards used by local superintendents for accuracy.



Source: Uniform weights and measures law.

COMMENT

This section is added to outline the function of the Office of weights and measures.

**51A:3-3. Powers and duties of the Superintendent**

The Superintendent of Weights and Measures shall:

a. maintain traceability of the State standards to the national standards in the possession of the National Institute of Standards and Technology;

b. issue reasonable regulations for the enforcement of this Act, which regulations shall have the force and effect of law;

c. grant any exemptions from the provisions of this Act or any regulations promulgated pursuant to it when appropriate to the maintenance of good commercial practices within the State;

d. prescribe, by regulation, the appropriate term or unit of weight or measure to be used, whenever the Superintendent determines that an existing practice of declaring the quantity of a commodity or setting charges for a service by weight, measure, numerical count, time, or a combination of those methods, does not facilitate value comparisons by consumers, or creates a risk of consumer confusion;

e. allow reasonable variations from the stated quantity of contents, including those caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice;

f. provide for the training of weights and measures personnel, and may establish minimum training and performance requirements to then be met by all weights and measures personnel, whether county, municipal, or State. The Superintendent may adopt the training standards of the National Conference on Weights and Measures' National Training Program.

Source: 51:1-54; 51:1-55; 51:1-58; 51:1-59; 51:1-60; 51:1-61; 51:1-62; 51:1-66; 51:1-67; and 51:1-69.

COMMENT

This section is substantially similar to its sources.

**51A:3-4. Powers and duties of the Weights and Measures Officers**

Weights and Measures officers shall:

a. enforce the provisions of this Act;

b. conduct investigations to ensure compliance with this Act;

c. test annually the standards for weights and measures used by any city or county within the State, and approve those found to be correct;

d. inspect and test commercial weights and measures kept, offered, or exposed for sale;

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e. inspect and test, to ascertain if they are correct, weights and measures commercially used:

1) in determining the weight, measure, or count of commodities or things sold, or offered or exposed for sale, on the basis of weight, measure, or count, or

2) in computing the basic charge or payment for services rendered on the basis of weight, measure, or count;

f. test all weights and measures used in State funded institutions;

g. approve for use, and may mark, commercial weights and measures found to be correct, and reject and order to be corrected, replaced, or removed commercial weights and measures found to be incorrect. Rejected weights and measures may be seized if not corrected within the time specified or if used or disposed of in a manner not specifically authorized. The Superintendent shall remove from service and may seize the weights and measures found to be incorrect that are not capable of being made correct;

h. weigh, measure, and inspect packaged commodities kept, offered, or exposed for sale, sold, or in the process of delivery, to determine whether they contain the amounts represented and whether they are kept, offered, or exposed for sale in accordance with this Title or regulations promulgated pursuant to.

i. verify advertised prices, price representations, and point-of-sale systems to determine:

(1) the accuracy of prices and computations and the correct use of the equipment; and

(2) if a system uses scanning or coding means in lieu of manual entry, the accuracy of prices printed or recalled from a database.

j. In carrying out the provisions of this section:

(1) a Weights and Measures officer shall employ recognized sampling procedures, such as are adopted by the National Conference on Weights and Measures and are published in the National Institute of Standards and Technology Handbook 133, "Checking the Net Contents of Packaged Goods" and shall not weigh, measure, or inspect more packages of commodities in a manner that makes them unsaleable than is reasonably necessary to assure compliance with this act; and

(2) the Superintendent shall:

(A) issue necessary rules and regulations regarding the accuracy of advertised prices and automated systems for retail price charging (referred to as "point-of-sale systems") for the enforcement of this section; and

(B) conduct investigations to ensure compliance.

Source: 51:1-54; 51:1-55; 51:1-58; 51:1-59; 51:1-60; 51:1-61; 51:1-62; 51:1-63; 51:1-66; 51:1-67; and 51:1-69.

#### COMMENT

This section is substantially similar to its sources.

### **51A:3-5. Salaries**

a. Salaries of assistant superintendents and other staff shall be in accordance with the schedules provided by the state civil service commission.

b. The governing body of a county or municipality shall fix the salaries of the local superintendents and their assistants.

Source: 51:1-49 and 51:1-50.

#### COMMENT

This section is substantially similar to its sources except the amount of the Superintendent's salary has been omitted.

### **51A:3-6. Civil service; tenure of office; hearing prior to discharge**

a. County and municipal superintendents in counties and municipalities operating under the Civil Service Act shall be in the classified service.

b. The county superintendents and municipal superintendents and the secretaries and assistant superintendents appointed by county or municipal governing bodies or by county or municipal superintendents upon resolution of the governing bodies, shall hold office during good behavior. In counties not operating under subtitle 3 of the Civil Service Act, they shall not be removed, discharged or reduced in pay or position, except for just cause after hearing by the governing body of the respective county or municipality. Reasonable notice of the hearing and the reasons for the proposed action shall be given to the person charged who may be represented at the hearing by counsel and offer testimony of witnesses or any other evidence in his own behalf.

Source: 51:1-52 and 51:1-53.

#### COMMENT

This section is identical to its sources.

### **51A:3-7. Special police powers**

When necessary for the enforcement of this Act or regulations promulgated under it, any weights and measures officer may:

a. enter any commercial premises during normal business hours, except that if the premises are not open to the public, the officer shall first present credentials and obtain consent before entry, unless a search warrant has previously been obtained;

b. issue stop-use, hold and removal orders with respect to any weights and measures commercially used, stop-sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale;

c. seize, for use as evidence, without formal warrant, any incorrect or unapproved weight measure package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of this Act or regulations promulgated pursuant to. Any weights and measures officer, his employer, or the State shall not be liable for damages by reason of that seizure;

d. stop any commercial vehicle and, after presentation of credentials, require the driver to proceed with the officer to a location for inspection; and

e. exercise special police powers with respect to the enforcement of this Act and arrest any violator of this Act without formal warrant.

Source: 51:1-54.1 and 51:1-106.

COMMENT

This section is substantially similar to its sources.

**51A:3-8. Powers and duties of local officials**

a. Any local superintendent shall have the duties and powers enumerated in this Act, excepting those duties reserved to the State by law or regulation.

b. The powers and duties of local weights and measures officers shall extend to their respective jurisdictions, except that the jurisdiction of a county official shall not extend to any municipality for which a weights and measures officer has been appointed.

c. A local weights and measures officer may act outside of the officer's jurisdiction with approval of the State Superintendent. Any fines resulting from acts outside of the officer's jurisdiction shall be paid to the State.

Source: 51:1-45; 51:1-63; 51:1-65; and 51:1-68.

COMMENT

This section is substantially similar to its sources.

**51A:3-9. Weights and measures officers; training; badges or identification device**

a. Each weights and measures officer shall successfully complete a course of instruction in weights and measures before assuming duties.

b. Each weights and measures officer shall be issued a badge or a similar identification device displaying an official number and shall exhibit the badge or identification on demand during the performance of official duties. The Superintendent shall design, number, register and issue badges or identification devices.

Source: 51:1-64.

COMMENT

This section is substantially identical to its source.

**51A:3-10. Record keeping**

a. A local superintendent shall keep a complete record of all inspections conducted by weights and measures officers and of all weights and measures examined by officers under that superintendent's authority.

b. Every local superintendent shall, not later than the fifth day of each month, send to the Superintendent, a report containing:

- (1) a list of each business inspected and the date of the inspection;
- (2) the number of tests made since the preceding report;
- (3) the number of weights or measures found to be correct;
- (4) the number of weights or measures found to be false;
- (5) the number of prosecutions instituted since the preceding report, together with the name and address of the accused, the name of the court where proceedings were instituted, and the disposition; and
- (6) other matters the Superintendent has prescribed.

c. Every municipal and county superintendent shall also make an annual report of work, in writing, to the Superintendent within ten days after the last day of the state fiscal year.

d. Within 30 days after the end of the state fiscal year, the Superintendent shall make a report to the Legislature, which shall contain recommendations or suggestions and a digest of the reports of the municipal and county superintendents.

Source: 51:1-70 through 51:1-72.

COMMENT

This section is substantially similar to its sources.

### **51A:3-11. Registration of commercial weighing and measuring devices required**

a. All weighing and measuring devices located within the State and operated or used for commercial purposes shall be registered with the Superintendent, except for timing devices used in clothes dryers by the residents of a building or complex of buildings in which the clothes dryers are located.

b. An applicant for registration shall submit an application on a form provided by the Superintendent and pay the appropriate registration and inspection fee to the Superintendent.

c. A weighing and measuring device registration shall expire one year from the effective date of the registration.

d. A registration may be renewed annually for an additional one-year term upon submission of a properly completed renewal application on a form provided by the Superintendent and payment of the registration fee.

e. The Superintendent shall issue a registration seal for each weighing and measuring device registered in the State which shall be affixed to the instrument or device.

f. The owner of a registered weighing and measuring device shall notify the Superintendent if the device is sold, transferred or moved to a new location.

Source: 51:1-54.2.

COMMENT

This section is substantially identical to its source.

### **51A:3-12. Fee for regulation of measuring and weighing devices**

a. The Superintendent shall establish, by regulation, a fee schedule for the regulation of weighing and measuring devices.

b. The fee schedule shall include an additional fee for late registration.

c. The fees established shall be sufficient to fully defray the cost of regulating weighing and measuring devices except that:

(1) the fee charged for scales which measure weights of less than 1,000 pounds shall not exceed \$25 per scale;

(2) the fee charged for fuel pump dispensers shall not exceed \$25 per hose, and

(3) the fee charged for retail vehicle tank meters shall not exceed \$50 per meter.

d. The fees established under subsection a. of this section shall be deposited into the "Weights and Measures Fund" for the purpose of fully defraying the cost of regulating weighing and measuring devices.

Source: 51:1-54.3.

#### **COMMENT**

This section is substantially identical to its source.

### **51A:3-13. Weights and measures fund**

a. There is established the "Weights and Measures Fund" as a non-lapsing revolving fund in the Department of Law and Public Safety into which shall be deposited all fees and penalties collected by the Superintendent under this Act.

b. The fund shall be administered by the Superintendent and shall be used to pay all expenses incurred by the Superintendent in connection with the regulation of weighing and measuring devices pursuant to this Act.

c. All counties and municipalities which have established departments of weights and measures shall be eligible to receive reimbursement from the fund established under this section for an amount certified by the Superintendent to defray all or part of the costs incurred in connection with the regulation of weighing and measuring devices pursuant to this Act. If the amount certified is to defray part of the costs, each eligible county and municipality shall receive an amount equal to the same percentage of the costs incurred.

Source: 51:1-54.4.

#### **COMMENT**

This section is substantially identical to its source.

## CHAPTER 4 – WEIGHMASTER

### 51A:4-1. Definitions

As used in this chapter:

a. “Public Weighing” means the weighing, measuring, or counting, upon request, of vehicles, property, produce, commodities, or articles other than those that the weigher or the weigher’s employer is either buying or selling.

b. “Public Weighmaster” means any person who performs public weighing.

c. “Private Weighmaster” means any person, not engaged in the business of weighing for hire, used by a firm, corporation, or individual after application to the Superintendent;

c. “Vehicle” means any device (except railroad freight cars) in, upon, or by which any property, produce, commodity, or article is or may be transported or drawn.

Source: Uniform weights and measures law and 51:1-73.

#### COMMENT

This section is similar to its source but is taken from the uniform law that is more comprehensive. The definition for “Private Weighmaster” is not found in the uniform law.

### 51A:4-2. Qualifications for weighmaster

a. To receive authorization to act as a weighmaster, a person must receive a license from the Superintendent. To qualify for a license, a person must:

(1) be able to weigh or measure accurately;

(2) be able to produce correct certificates; and

(3) possess other qualifications required by the Superintendent.

b. The Superintendent may determine the qualifications of the applicant based on the results of an examination of the applicant’s knowledge.

Source: Uniform weights and measures law and 51:1-75.

#### COMMENT

This section was added to provide a guideline for the procedures to becoming a weighmaster.

### 51A:4-3. Issuance and records of licenses

The Superintendent shall:

a. grant licenses as public or private weighmasters to qualified applicants;

b. keep a record of all applications submitted and of all licenses issued; and

c. issue licenses for a term of three years.

Source: 51:1-74

#### COMMENT

This section is substantially similar to paragraph one of its source.

#### **51A:4-4. License fees**

For issuance of a new or renewal license as a public weighmaster, the applicant shall pay a fee of \$150 to the Superintendent, who shall deposit the money into the "Weights and Measures Fund".

Source: 51:1-74

#### **COMMENT**

This section is substantially similar to paragraph two of its source.

#### **51A:4-5. Certificate; required entries; prima facie evidence**

- a. A certificate is a statement of weight or measure certified by a public weighmaster.
- b. The design of and the information to be furnished on a weight certificate shall be prescribed by the Superintendent and shall include:
  - (1) the name and license number of the public weighmaster;
  - (2) the kind of commodity weighed, measured, or counted;
  - (3) the name of the owner, agent, or consignee of the commodity;
  - (4) the name of the recipient of the commodity, if applicable;
  - (5) the date the certificate is issued;
  - (6) the consecutive number of the certificate;
  - (7) the identification, including the identification number, if any, of the carrier transporting the commodity, and the identification number or license number of the vehicle;
  - (8) other information needed to distinguish or identify the commodity from a like kind;
  - (9) the number of units of the commodity, if applicable;
  - (10) the measure of the commodity, if applicable;
  - (11) the weight of the commodity and the vehicle or container (if applicable) broken down as follows:
    - (A) the gross weight of the commodity and the associated vehicle or container;
    - (B) the tare weight of the unladen vehicle or container; or
    - (C) both the gross and tare weight and the resultant net weight of the commodity; and
  - (12) signature of the public weighmaster who determined the weight, measure, or count.
- c. The certificate, when properly completed and signed by a public weighmaster shall be prima facie evidence of the accuracy of the measurements shown.



Source: 51:1-77; 51:1-102 and the Uniform weights and measures law.

COMMENT

This section is substantially identical to its source. Subsections (b)(1), (b)(4), (b)(10), (b)(11)(a)-(c) and (b)(12) are new and derived from the uniform law.

**51A:4-6. Copies of certificates**

A public weighmaster shall keep a copy of each certificate issued for six years. Certificates shall be available for inspection by any weights and measures officer during normal business hours.

Source: 51:1-79.

COMMENT

This section is substantially identical to its source.

**51A:4-7. Reciprocal acceptance of certificates**

The Superintendent may recognize and accept certificates issued by licensed public weighmasters of other States that recognize and accept certificates issued by licensed weighmasters of this State.

Source: Uniform weights and measures law.

COMMENT

This section was added to allow for reciprocity between states.

**51A:4-8. Weighing on scales outside State authorized**

The Superintendent may designate any weighmaster licensed under the provisions of this title, to weigh commodities on approved scales at points located not more than one mile outside of the state, and certificates of weight issued by them shall have the same force and effect as certificates issued under the provisions of sections 51:2-10 to 51:2-14.

Source: 51:1-80.1.

COMMENT

This section is substantially identical to its source except that the residence requirement has been broadened to allow a place of business rather than a residence in New Jersey.

**51A:4-9. Vehicles transporting construction materials; certification of tare weight**

A public weighmaster shall certify the tare weight of a vehicle used for the transportation of construction materials upon request by the operator of that vehicle. The weight of a commodity transported by such a vehicle shall be determined by subtracting the certified tare weight of the vehicle from its gross weight. The tare weight of the vehicle may be certified no more than seven days immediately prior to the date the gross weight of the vehicle is determined. If the tare weight of the vehicle has not been certified during the seven-day period, the tare weight may be certified by a public weighmaster, provided that the certification was

within one year prior to the date the gross weight is determined, and if there is a subsequent weighing, the subsequent tare weight of the vehicle is no greater than 105 per cent or less than 95 per cent of the tare weight certified during the one year period. A certificate issued pursuant to this section certifying the tare weight of a vehicle shall contain the wording “stored tare.” A “stored tare” certificate shall not supersede a certificate displaying the weight of record from weighing the vehicle on certified scales.

Naturally occurring aggregates used as construction materials, including crushed stone, gravel, sand, clay and clean fill that are not sold or intended for sale to an entity distinct from the seller shall not be considered a commodity for purposes of this Title. Vehicles carrying such construction materials may have only the gross vehicle weight certified.

Source: 51:1-77.1

COMMENT

This section is substantially identical to its source.

#### **51A:4-10. Reweighing on complaint**

When the correctness of the net or gross weight of any commodity for which a certificate of weight or measure has been issued by a public weighmaster is questioned, the owner, agent, or consignee may, upon complaint to a weights and measures officer have the commodity reweighed by them without charge. A public weighmaster designated by the Superintendent may reweigh the commodity.

Source: 51:1-78.

COMMENT

This section is substantially identical to its source.

#### **51A:4-11. State-owned scales; weighmasters**

The Superintendent, under the approval of the Attorney General, may appoint weighmasters within the Division of Weights and Measures for official weighing and certification regarding the operation of State-owned scales.

Source: 51:1-82.1.

COMMENT

This section is identical to its source.

#### **51A:4-12. Fraudulent report of weight**

No weighmaster shall certify or report false weight. A weighmaster who certifies or reports false weight shall be answerable to any party injured in double damages to be collected in an action at law. This section shall not apply to interstate common carriers by railroad subject to regulation by federal authority.

Source: 51:1-82.

COMMENT

This section is substantially identical to its source.

### **51A:4-13. Suspension and revocation of license**

The Superintendent may suspend or revoke the license of any public weighmaster who is:

- a. found to have violated any provision of this Act or any regulation under this Act;
- b. convicted in any court of violating any provision of this Act or any regulation under this Act; or
- c. convicted of any crime.

Source: Uniform weights and measures law and 51:1-80.

#### **COMMENT**

This section adds to the existing law subsection (c).

### **51A:4-14. Enforcing officer; rules and regulations**

The Superintendent may issue regulations to enforce of this chapter including regulations specifying measurement practices that must be followed by a weighmaster, including the measurement or recording of tare.

Source: Uniform weights and measures law.

#### **COMMENT**

This new provision was added to outline the duties of the Superintendent.

## **CHAPTER 5 – WEIGHTS AND MEASURES: INSPECTION, TESTING AND SEALING**

### **51A:5-1. Test of weights and measures**

a. Except as provided in subsection (c), all weights and measures used in commerce shall be tested and sealed at least once a year. Upon the request of any interested party, a weights and measures officer shall test any weight or measure. If it is found correct or is made correct the officer shall properly seal it. The officer shall cause it to conform as nearly as possible to the standard before sealing. Otherwise, it shall not be used and shall be disposed of as provided in this Act.

b. The Office of Weights and Measures shall collect a fee for the testing of a weight or measure established by regulation. All money collected by the Superintendent shall be deposited into the Weights and Measures Fund.

c. These weights and measures devices need not be tested and sealed:

(1) timing devices used in clothes dryers by the residents of a building or complex of buildings in which the clothes dryers are located; and

(2) any other devices exempted by the Superintendent by regulation.

Source: 51:1-84.

COMMENT

This section is substantially identical to its source. A reference to the Weights and Measures Fund was added.

**51A:5-2. Only sealed weights and measures to be used**

a. A device not tested and sealed according to this chapter shall not be used in the purchase or sale of goods based on weight or measurement. However, no contract is to be voided unless one of the contracting parties is injured by the use of the weight or measurement.

Source: 51:1-83.

COMMENT

This section is substantially similar to its source but omits the penalty provision. There is a single, general penalty provision for the whole Weights and Measures Law.

**51A:5-3. Tests**

a. Any inspection of a weight or measure made at the request of the owner, found not to conform to the legal standard, shall result in a weights and measures official serving the owner with a notice in writing that further use is illegal. Within 15 days, the owner shall deliver the defective weight or measure to the weights and measures officer for confiscation or have the weight or measure corrected or another substituted, and notify the superintendent in writing of the action taken.

b. Except where an inspection is made at the request of the owner, if the first official inspection of any weight or measure deviates from the legal standard and the nature of the deviation is not easily ascertainable by the owner, the owner may correct it. Upon failure to do so within 2 days, the weights and measures officer may take possession of and destroy the weight or measure. If the deviation is easily ascertainable by the owner, the officer shall immediately take possession of and destroy the weight or measure.

Source: 51:1-85 and 51:1-86.

COMMENT

This section is substantially identical to its sources but omits the penalty provision. There is a single, general penalty provision for the whole Weights and Measures Law

**51A:5-4. Refusal to seal weight or measure constructed to defraud**

A weights and measures officer shall not seal any weight or measure that is constructed to facilitate fraud. The officer shall report the matter to the Superintendent or to the local superintendent who, if satisfied upon investigation that its use is prejudicial to the best interests of the public, shall order that the weight or measure be treated as an unlawful one.

Source: 51:1-87.

COMMENT

This section is substantially similar to its source.

**51A:5-5. Refusal to exhibit weights, container, documents, etc.**

No person shall:

a. refuse to exhibit any weights, measures, packages, containers, weight certificates, delivery tickets, invoices or any other documents setting forth the quantity or value of any commodity or service to a weights and measures officer for the purpose of inspection and examination;

b. refuse to admit to a place of business, during usual hours of business.

Source: 51:1-88.

COMMENT

This section is similar to its source but eliminates duplicative language and the penalty provision. There is a single, general penalty provision for the whole Weights and Measures Law.

**CHAPTER 6 – SECONDHAND WEIGHING DEVICES**

**51A:6-1. Definitions**

As used in this chapter:

a. “Repair” means to engage in the business of partial or complete constructing or reconstructing, repairing, altering, installing or adjusting of any commercial weighing or measuring equipment used in trade and commerce in this State.

b. “Adjustment” and “adjusting” means any movement of any part of a weighing or measuring device except to obtain a correct zero indication.

Source: 51:1-113.

COMMENT

The definitions in this section are substantially similar to their source. Other definitions have been deleted as duplicating general definitions for the title or as unnecessary.

**51A:6-2. License and registration to engage in business**

No person may engage in the business of selling, trading-in, receiving, installing or repairing condemned, rebuilt or used commercial weighing or measuring equipment in this State without first obtaining a license from the Superintendent.

Application for a license shall be made to the Office of Weights and Measures on the form prescribed and furnished by the Superintendent, and shall be verified by the applicant under oath, or if the applicant is a partnership, association, or corporation, under the verification and oath of an officer or official representative.

Source: 51:1-114 and 51:1-115.

COMMENT

This section is substantially identical to its source.

### **51A:6-3. Examinations; qualifications; and licenses**

a. Upon application, the Superintendent shall issue a license to engage in the business of repairing any equipment subject to this chapter to any person who passes an examination on technical qualifications to engage in that business. Any weights and measures officer designated by the Superintendent may conduct examinations.

b. The Superintendent shall issue regulations governing the examination of applicants for licenses to repair weighing and measuring equipment, the qualifications for limited and unlimited licenses, and the conditions for suspending or revoking licenses.

c. The Superintendent may issue an applicant a license to repair limited classes and kind of weighing and measuring equipment.

d. Licenses shall be issued for a term of one year from the date of issue and shall be renewable. Each license issued shall state the name, business address of the person to whom it is issued, whether it is a limited or unlimited license, and if limited, the classes or kinds of weighing or measuring equipment the licensee is authorized to repair.

e. The Superintendent may revoke or suspend the license of any person convicted of any violation of this act or for any of the following reasons:

- (1) willful fraud or misrepresentation practiced in procuring any license;
- (2) dishonesty;
- (3) incompetence;
- (4) conduct of a character likely to deceive or defraud the public;
- (5) lending a license by the licensee to any other person;
- (6) obtaining a fee or compensation by fraud or misrepresentation;
- (7) willful advertising or publishing of false, fraudulent or misleading statements of the licensee's business, skill, knowledge or methods of operation; and
- (8) conduct or practice at variance with this chapter.

No certificate of license shall be revoked or suspended until after a hearing. The Superintendent shall give at least ten days notice of the hearing.

Source: 51:1-116; 51:1-117; 51:1-118; 51:1-119; 51:1-120; 51:1-121 and 51:1-122.

#### **COMMENT**

This section is substantially similar to its sources.

### **51A:6-4. Report of repair work done by licensee**

a. Any person licensed to repair weighing or measuring equipment shall report work to the Office of Weights and Measures or to the weights and measures officer of the county or municipality. The report shall contain the name and address of the person for whom the work was done, identification of the weighing or measuring equipment, nature of the work performed and the date the work was completed.

b. Within ten days, after the making of a repair, or the sale and delivery of repaired, rebuilt, exchanged, or used weighing or measuring equipment, written notice must be given to the appropriate weights and measures officer giving the name and address of the person for whom the repair was made or to whom the repaired, rebuilt, exchanged, or used weighing or measuring equipment was sold or delivered. Also within ten days, a statement shall be made by the licensee that the weighing and measuring equipment has been altered, rebuilt, or repaired conforming to the standard specifications and regulations of the Office of Weights and Measures.

Source: 51:1-123 and 51:1-124.

COMMENT

This section is substantially similar to its sources.

### **51A:6-5. Comparison and calibration of testing equipment**

All persons engaged in any business covered by the provisions of this act shall submit their testing equipment at least once a year to a weights and measures officer for comparison and calibration. The weights and measures officer shall issue to that person a statement or a certificate of findings.

Source: 51:1-126.

COMMENT

This section is identical to its source.

### **51A:6-6. Record or register**

a. Every person licensed pursuant to of this chapter shall maintain a record or register containing the following:

(1) The name and address of every person for whom weighing or measuring equipment is repaired.

(2) The name and address of every person to whom a repaired, rebuilt, exchanged, or used weighing or measuring apparatus or equipment has been sold or delivered.

b. These records shall be open for inspection by any weights and measures officer.

Source: 51:1-127.

COMMENT

This section is identical to its source.

### **51A:6-7. Fees; use**

a. Every person who is in the business of selling, trading, receiving, or engaging in the repairing of condemned, rebuilt, or used commercial weighing and measuring equipment shall pay a license fee of \$150 per year.

b. Every person engaging only in the repairing of weighing and measuring equipments shall pay a fee of \$20 per year.

c. These fees shall be paid to the Superintendent who will turn over to the funds to the State Treasurer for deposit into the Weights and Measures Fund.

Source: 51:1-128.

COMMENT

This section is identical to its source.

**51A:6-8. Administration of Act; rules and regulations**

The Superintendent shall administer this chapter and shall make regulations necessary for its enforcement. All weights and measures officers are charged with enforcement of this Act.

Source: 51:1-129 and 51:1-130.

COMMENT

This section is identical to its sources.

**51A:6-9 Exceptions to application of chapter**

This chapter shall not apply to any bona fide employee of a business who repairs or installs any weighing or measuring equipment used in that business in the sale of commodities.

Source: 51:1-133.

COMMENT

This section is substantially identical to its source.

**CHAPTER 7-STANDARD MERIDIAN LINE; LAND DESCRIPTIONS**

**51A:7-1. Official survey base established; plane co-ordinates**

The official survey base for New Jersey shall be a system of plane co-ordinates known as the "New Jersey system of plane co-ordinates", which shall be a transverse Mercator projection of the Geodetic Reference System of 1980, having a central meridian 74° 30' west from Greenwich on which meridian the scale is set at one part in 10,000 too small. All co-ordinates are expressed in meters, the x co-ordinate being measured easterly along the grid and the y co-ordinate being measured northerly along the grid, the origin of the co-ordinates being on the meridian 74° 30' west from Greenwich at the intersection of the parallel 38° 50' north latitude, this origin being given the co-ordinates x=150,000 meters; y=0 meters. The precise position of this system shall be as marked on the ground by triangulation or traverse stations established in conformity with the standards adopted by the National Geodetic Survey, formerly the United States Coast and Geodetic Survey for first and second-order work, whose geodetic positions have been rigidly adjusted on the North American Datum of 1983 or the most recently published adjustment by the National Geodetic Survey, and whose plane co-ordinates have been computed on the system defined. Standard conversions from meters to feet shall be the adopted standards of the National Oceanic and Atmospheric Administration.

Source: 51:3-7.



COMMENT

This section is identical to its source.

**51A:7-2. Connecting property surveys with system of coordinates**

Any triangulation or traverse station established as described in section 51:7-1 of this title shall be used in establishing a connection between a property survey and the above-mentioned system of rectangular coordinates.

Source: 51:3-8.

COMMENT

This section is identical to its source.

**CHAPTER 8-LIGHTERS**

**51A:8-1. Certain sales of lighters prohibited**

a. No lighter shall be sold, offered for sale, given, transferred, or otherwise made available in the State of New Jersey unless its design and construction conforms with the child resistant standards of this section.

b. "Child resistant lighter" means a lighter that is designed and constructed in a manner so that it is significantly difficult for a child under the age of 5 years to operate the device so as to produce a flame or to emit a flammable liquid, vapor, or gas. "Lighter" means a mechanical flame producing device, be it of a disposable or refillable nature, designed for the purpose of lighting a fire, cigarette, cigar, or pipe, provided, however, that the term shall not include those mechanical flame producing devices that are refillable and have a gross fueled weight of at least 35 grams.

c. The Bureau of Fire Safety in the Department of Community Affairs shall promulgate regulations to effectuate the purposes of this section, including standards for the design and construction of child resistant lighters.

Source: 51:13-1; Source: 51:13-3.

COMMENT

This section is substantially identical to its sources.

**CHAPTER 9 – PENALTIES**

**51A:9-1. Prohibited Acts**

a. A person who violates any provision of this act or regulations promulgated under it shall be liable for the first offense to a civil penalty of not less than \$100 nor more than \$250; for a second offense to a civil penalty of not less than \$250 nor more than \$500, and for each subsequent offense to a civil penalty of not less than \$500 nor more than \$750.

b. A person who unlawfully hinders a weights and measures officer in the performance of official duties or who knowingly uses false weights or measures shall be liable for the first

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offense to a civil penalty of not less than \$250 nor more than \$500; for a second offense to a civil penalty of not less than \$500 nor more than \$750, and for each subsequent offense to a civil penalty of not less than \$750 nor more than \$1000.

c. At the discretion of the weights and measures officer, each instance of violation of may be charged separately and shall be the basis for a separate penalty, except that all packages from the same inspection lot which exceed the Maximum Allowable Variation (MAV) set forth in Handbook 133 shall comprise one instance of violation, and shall be subject to a single penalty.

d. No person shall be convicted of or assessed a civil penalty for a second or subsequent offense pursuant to this section unless the previous violations occurred:

(1) within one year prior to the occurrence of the second or subsequent offense;

and

(2) at the same store or outlet as the second or subsequent offense.

e. This section shall not authorize the imposition of penalties for a second or subsequent offense:

(1) in conjunction with an adjudication of guilt based upon multiple counts or complaints arising from the same inspection,

(2) if one of the offenses was for incorrect weight of a product that was packaged and marked by a person other than the person charged with the violation;

(3) if, in the discretion of the court, the imposition of a penalty for a first offense would be just and proper;

f. This section shall not authorize the imposition of a penalty against a seller for understating the quantity of commodity sold, charging a lower price than that marked, or other actions that benefit of the consumer.

g. An action to assess a penalty shall be brought pursuant to the "Penalty Enforcement Law" in proceeding in the Superior Court or a municipal court. Actions shall be brought in the name of the State by any weights and measures officer. A person who does not contest the penalty and pays it before the date set for the court hearing need not appear unless ordered to appear by the court.

h. Nothing in this section shall prevent prosecution of acts constituting violations of this chapter as crimes or offenses under the Criminal Code.

Source: New.

#### COMMENT

This section replaces penalties scattered throughout current Title 51. The Commission considered and rejected a provision requiring enforcement of penalties against a manufacturer rather than the retailer where the package was weighed and labeled by the manufacturer. However, subsection (e)(2) limits the use of violations based on such circumstances to justify higher fines for subsequent offenses. It also should be noted that when the manufacturer causes the violation, the retailer has a cause of action against the manufacturer.

### **51A:9-2. Injunction**

The Superintendent may apply to the Superior Court for an injunction restraining any person from violating this act.

Source: 51:1-103.1.

#### COMMENT

This section is substantially similar to its source.

### **51A:9-3. Presumptive Evidence**

A rebuttable presumption exists that:

- a. when a weighting or measuring device is located in any place where buying or selling is commonly carried on, the device is regularly used for the business purposes of that place; and
- b. when a certificate is produced indicating that a standard weight or measure has been tested and found accurate, that the standard weight or measure is accurate.

Source: 51:1-101.

#### COMMENT

This section is substantially similar to its source.

### **51A:9-4. Disposition of penalties**

Penalties, when imposed or recovered in an action brought:

- a. by a weights and measures officer employed by the Office of Weights and Measures shall be deposited into the Weights and Measures Fund;
- b. by a county or municipal weights and measures officer shall be paid to the treasurer of the locality.

Source: 51:1-109.

#### COMMENT

This section is substantially similar to its source.

### **51A:9-5. City attorney or county prosecutor to aid in prosecution**

The city attorney and municipal prosecutor of any municipality where a violation of this act occurred shall assist in the prosecution of any proceedings, unless such municipality has no municipal superintendent, in which case the public prosecutor of the county where the violation occurred shall assist in the prosecution.

Source: 51:1-111.

#### COMMENT

This section is substantially identical to its source.

## CHAPTER 10 – GOLD AND SILVER

### **51A:10-1 Sale of gold articles with false quality marks**

a. No person shall sell, or possess with intent to sell, any article made in whole or in part of gold or an alloy of gold, marked on the article, or upon its tag, label or package, designed to indicate that the gold or alloy of gold is of a greater degree of fineness than it is.

b. In any test of the fineness of the gold or its alloy to determine compliance with subsection (a), the part of the gold or its alloy taken for the test, shall not contain any solder or alloy of inferior fineness used for uniting the parts of the article.

c. The article shall be considered not to be in violation of subsection (a) if the metal tested is not less than the fineness indicated by the mark by more than one karat.

Source: 51:5-1; 51:5-2.

#### COMMENT

This section is a simplified version of its sources.

### **51A:10-2. Sale of silver articles, marked "sterling" or "coin" where articles less than certain fineness**

No person shall sell, or possess with intent to sell, any article made in whole or in part of silver or of an alloy of silver, marked on the article, or upon its tag, label or package, designed to indicate:

(1) "sterling silver" or "sterling" or any colorable imitation of these, unless nine hundred and twenty-five one-thousandths of the metal purporting to be silver, is pure silver;

(2) "coin" or "coin silver" or any colorable imitation of these, unless nine hundred one-thousandths of the metal purporting to be silver is pure silver; or

(3) Any mark or word, other than the word "sterling" or the word "coin" designed or intended to indicate, that the silver or alloy of silver is of a greater degree of fineness than it is.

b. In any test of the fineness of silver or its alloy to determine compliance with subsection (a), the part of the silver or its alloy taken for the test, shall not contain any solder or alloy of inferior fineness used for uniting the parts of the article.

c. The article shall be considered not to be in violation of subsection (a) if the metal tested is not less than the fineness indicated by the mark by more than ten one-thousandths parts than the fineness indicated,.

Source: 51:5-3; 51:5-4.

#### COMMENT

This section is a simplified version of its sources.

### **51A:10-3. Sale of gold or silver plated articles without indicating they are plated**

No person shall sell, or possess with intent to sell, any article made in whole or in part of inferior metal, plated or covered gold, or of any alloy of gold, or silver or an alloy of silver marked on the article, or upon its tag, label or package, designed to indicate that the with any word or mark usually employed to indicate the fineness of gold or silver, unless accompanied by other words plainly indicating that the article, or some part of it is gold or silver plated, or is gold or silver filled, as the case may be.

Source: 51:5-5; 51:5-6.

#### **COMMENT**

This section is a simplified version of its sources.

### **51A:10-4. Buyer on basis of bulk value; duties; serialized receipts; bond**

Any person in the business of buying precious metals who buys, attempts to buy or offers to buy precious metals on the basis of bulk value from any person who is not in the business of selling precious metals shall:

a. clearly and prominently display at the point of purchase (1) the buyer's name and address; and (2) the price being offered or paid by the buyer expressed as price per standard measure of weight and fineness as prescribed by the Superintendent of Weights and Measures.

b. Include the buyer's name and address in all advertisements concerning precious metals.

c. Weigh the precious metals in plain view of the seller on State certified scales with the certificate of inspection clearly and prominently displayed.

d. Test the fineness of precious metals, if any test is so performed, in plain view of the seller.

e. Issue to the seller and keep for not less than 1 year, a serialized receipt for each purchase of precious metals containing the following:

(1) The name and address of the buyer;

(2) Date of the transaction;

(3) The names of the precious metals purchased, if known;

(4) The finenesses of the precious metals purchased;

(5) The weights of the precious metals purchased;

(6) The prices paid for the precious metals at the standard measures of weight and fineness prescribed by the superintendent;

(7) The name, address and signature of the seller of the precious metals.

f. Obtain proof of identity from each person who sells precious metals to him.

g. Retain any precious metals in the form in which they were purchased for at least two business days.

h. Upon reasonable request, allow the inspection of the serialized receipts or precious metals provided for in subsections e. and g. of this section by any law enforcement officer or weights and measures official.

i. If the buyer is transient, obtain a bond in an amount and form prescribed by regulations of the Superintendent, obtained from a surety company authorized by law to do business in this State. The bond shall run to the State for the benefit of any person injured by the wrongful act, default, fraud or misrepresentation of the buyer of precious metals. The bond shall contain a provision that it shall not be cancelled for any cause unless notice of intention to cancel is filed in the Office of Weights and Measures at least 30 days before the day upon which cancellation shall take effect.

j. Before buying, or offering to buy any precious metals, register with the police of the municipality in which the person intends to conduct business and give his name and address. A transient buyer of precious metals shall, in addition to the information required of a buyer of precious metals, provide the address at which the buyer intends to do business in the municipality and shall reregister on change of location of doing business or on resumption of business after discontinuing business for more than 20 days in the municipality.

Source: 51:6A-1; . 51:6A-2

COMMENT

This section is substantially identical to its sources.

**51A:10-5. Inapplicability of act to government agencies, banks, or commodity markets**

This chapter is not applicable to government agencies, State or Federally chartered banks or Federally regulated commodity markets.

Source 51:6A-6.

COMMENT

This section is substantially identical to its sources.

**51A:10-6. Right of municipalities to enact more restrictive ordinances or resolutions**

A municipality may enforce ordinances more restrictive than this act or any rules or regulations promulgated under it.

Source 51:6A-7.

COMMENT

This section is substantially identical to its sources.

## CHAPTER 11 – LIQUID FUELS

### 51:11-1. Definition

As used in this chapter "liquid fuels" means fuel in liquid form, which can be used for heating purposes except for oil that has a flash point of one hundred five degrees Fahrenheit or less, as determined by the Tagliabue closed cup tester or has a Saybolt Universal Viscosity at one hundred degrees Fahrenheit higher than fifty-five seconds.

Source: 51:9-1.

#### COMMENT

This section is substantially identical to subsection (a) of 51:9-1. The other definition in the source section, weights and measures officer, has been deleted as duplicative of a general definition.

### 51:11-2. Sale of liquid by volume

a. All liquid fuel shall be sold by volume.

b. Deliveries of liquid fuel exceeding 50 gallons but not exceeding 10,000 gallons shall be measured by means of a positive displacement liquid flow meter tested and sealed as to its adjusting and recording elements by a weights and measures officer; but this requirement shall not apply to liquid fuel:

(1) in containers conspicuously marked with quantity in terms of liquid measure;

(2) delivered by the entire railroad tank car or cargo direct from the vessels, railroad tank cars or bulk tank trucks or compartments of them consigned to one person and accepted by the purchaser on the original bill of lading or invoice; or

(3) which the Superintendent determines does not lend itself to metered measurement by reason of viscosity or other characteristics

c. Deliveries of quantities in excess of 10,000 gallons may be measured by a meter or from compartments that have been calibrated and whose indicators have been sealed by a weights and measures officer.

d. Any measuring device used in the sale of liquid fuel shall be of a type and construction approved by the Superintendent and calibrated, tested and sealed annually by a weights and measures officer.

e. A certificate shall be issued by a weights and measures official after the approval and sealing of a measuring device. The certificate shall be carried on the vehicle to which it applies at all times that liquid oil is delivered or possessed with intent to deliver.

f. If the volume of liquid fuel is calculated by weight, the net weight shall be determined by means of a scale of approved type and capacity, tested and sealed by a weights and measures officer. For the conversion of weight to volume and for temperature corrections, the National Standard Petroleum Oil Tables as approved by the federal government shall be used.

Source: 51:9-2; 51:9-3; 51:9-4; 51:9-5; 51:9-6.

COMMENT

Subsection (a) is substantially identical to the first sentence of 51:9-3. The other part of 51:9-3, which requires measurement in gallons, has been deleted as unnecessary. Subsection (b) is substantially identical to 51:9-5. Subsection (c) is substantially identical to 51:9-6. Subsection (d) and (e) are substantially identical to 51:9-2. Subsection (f) is substantially identical to 51:9-4.

**51:11-3. Delivery tickets**

a. A delivery ticket and duplicate of it shall be issued upon the completion of delivery of liquid fuel exceeding 10 gallons. If the sale or delivery exceeds 50 gallons and is of a type of liquid fuel which is required to be measured by meter, the ticket shall be printed by means of an automatic printing device attached to and coordinated with the operating mechanism of a meter approved for the measurement of liquid fuels. One of the tickets shall be given to the purchaser and the other shall be retained by the seller for one year. The retained tickets shall be subject to inspection by any weights and measures officer.

b. On each ticket there shall be legibly expressed;

- (1) the date,
- (2) the name and address of the seller,
- (3) the name and address of the purchaser,
- (4) the quantity delivered,
- (5) the grade of liquid fuel, and
- (6) the signature of the person who made delivery or his agent.

c. Delivery tickets shall be serially numbered. No duplicate or unused ticket shall be destroyed but may be voided and kept on file.

d. This section shall not apply where there is a meter permanently attached and properly security sealed in the consuming apparatus of the consumer with the recording elements always available to the consumer. In this situation, in lieu of a delivery ticket, the seller shall provide to the consumer, a periodical statement of the amount of fuel delivered as indicated on the meter attached to the consuming apparatus. On notice to the seller, a consumer may at any time elect to discontinue use of a meter attached to the consuming apparatus and to receive delivery tickets as provided by this section.

Source: 51:9-7.

COMMENT

This section is substantially identical to 51:9-7.

**51:11-4. Residential oil fill pipe**

a. The owner of any residential dwelling served by a home heating oil tank shall provide that the cap of any exterior heating oil fill pipe be colored green or that the tank fill pipe be equipped with a fill tightness system with a fill cap stamped or engraved in clear letters with the words "Fuel Oil."



b. No person may pump, pour, or otherwise place home heating oil into any exterior heating oil tank fill pipe of a residential dwelling unit that does not comply with this section.

c. A person who violates this section is subject to a civil penalty not to exceed \$500 which may be collected in a summary proceeding brought pursuant to "the penalty enforcement law." The Superior Court and a municipal court shall have jurisdiction to enforce a penalty under this section.

Source: 51:9-9.1.

COMMENT

This section is substantially identical to 51:9-9.1.

### **51:11-5. Regulations**

The Superintendent shall adopt regulations to prevent the perpetration of fraud in the sale of liquid fuel governing

a. the types of measuring devices and equipment that may be used in the delivery of liquid fuel;

b. the manner of approval, testing, or calibrating of measuring devices and equipment; and

c. the mailing and preserving of the periodical statements of meter readings sent to purchasers having meters on their consuming apparatus.

Source: 51:9-10.

COMMENT

This section is substantially identical to 51:9-10.



**STATE OF NEW JERSEY**

**N J L R C**

**NEW JERSEY LAW REVISION COMMISSION**

**TENTATIVE REPORT**

relating to

**UNIFORM COMMERCIAL CODE REVISED ARTICLE 7 – DOCUMENTS OF TITLE**

**DECEMBER 2004**

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN FEBRUARY 5, 2005.

Please send comments concerning this tentative report or direct any related inquiries, to:

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## Introduction

The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) promulgated for adoption in the states Revised Article 7 – Documents of Title in October 2003. Eight states have adopted the Revised Article as of 05 December 2004: Alabama, Connecticut, Delaware, Hawaii, Idaho, Maryland, Minnesota and Virginia.<sup>11</sup> The Revised Article alters existing law in two primary ways: (1) allowance of electronic documents of title and (2) updated provisions to reflect trends at the state, federal and international levels. Adoption of the Revised Article requires the making of conforming amendments to several other Code sections and the Revised Article assumes for purposes of cross-references that the enacting state has enacted Revised Article 1, though it provides alternative conforming amendments for state law based on the original Article 1.<sup>12</sup>

“Revised Article 7 supplies a domestic legal framework [for documents of title] that conforms to international standards.” William F. Savino and David S. Widenor, *2002-2003 Survey of New York, Commercial Law*, 54 Syracuse L. Rev. 855 (2004). A “document of title”, defined in Revised Article 1, but not altered from the prior definition, is defined as:

“Document of title” includes bill of lading, dock warrant, dock receipt, warehouse receipt, or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee’s possession which are either identified or are fungible portions of an identified mass.”

The definition is framed in terms of function to capture equivalent documents not yet used in commerce but that possibly may arise in the future. Revised Article 7 also uses the term “bailee” as a “blanket term to designate carriers, warehousemen, and others who normally issue documents of title on the basis of goods which they have received.” *Official Comment*, Rev. Art. 7-102.

Two important sub-classifications of documents of title exist: negotiable and nonnegotiable documents. *Rev. Art. 7-104*. Article An example of a nonnegotiable document of title is a straight bill of lading, that is, a bill of lading made out to a named consignee. It specifically represents the title document assigned only for the consignee. It cannot be transferred to a third person. An example of a negotiable document of title is a bill of lading issued by an ocean carrier upon receipt of goods in which it is stated that the goods will be delivered to bearer or to the order of a named person.<sup>13</sup> In the case of a tangible document, it is negotiated by indorsement; in the case of an electronic document, it is negotiated by transfer of control. The negotiable bill of lading performs an important role in trade and finance. For example, assume a ship carrying crude oil and that oil is represented by a negotiable bill of lading. The person entitled under the document can trade the paper (in effect the goods) several times over prior to the carrier’s delivery to the final holder entitled to receive the goods. In addition, if the transaction is to be financed through a letter of credit, the bank may hold the bill of lading as security. As in Article 3 commercial paper, a holder in due course of a negotiable document of title may acquire greater rights than its transferor had. *Revised Article 7-502*.

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<sup>11</sup> According to the NCCUSL Web site, no 2004 introductions are listed. The site was last visited on 05 December 2004.

<sup>12</sup> As of 29 August 2004, seven states and one territory have adopted Revised Article 1: Alabama, Delaware, Hawaii, Idaho, Minnesota, Texas, U.S. Virgin Islands and Virginia. Bills are pending in Massachusetts and West Virginia in 2004; information is based on NCCUSL Web site last visited 05 December 2004.

<sup>13</sup> It serves three purposes: (1) receipt for the goods, (2) evidences the contract of carriage, and (3) document of title.

Revised Article 7 provides for both tangible and electronic documents of title. While electronic documents of title are not now the norm, their use inevitably will proliferate. Revised Article 7 derives its rules for electronic documents of title from the Uniform Electronic Transactions Act § 16 on transferable records and from Article 9-105 concerning control of electronic chattel paper. Revised Article 7-106 sets forth the criteria for electronic documents of title substituting the concept of control for endorsement and possession of a tangible instrument. The rule reflects third party registration systems although it does not preclude the development of different systems. In addition, it allows parties to reissue the document of title from one medium to another, that is, an entitled person holding an electronic document of title can request a substitute tangible document and vice-versa. Specific rules pertaining to electronic versus tangible documents of title are clearly marked.

In recognition of the fact that other law regulates documents of title, Revised Article 7 has amended existing law “in light of state, federal and international developments.” *Prefatory Note to Official Text* (2003). For example, revised Article 7 has deleted obsolete references to tariffs, classifications and regulations that no longer track modern commercial practice. Documents of title may interface with federal and international law. For example, bills of lading are governed by the United States enactment of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315, which is a statutory codification, with slight variations of the “Hague Rules” and the Federal Bill of Lading Act (Pomerene Act).<sup>14</sup>

Revised Article 7 also deals with important other issues, for example: (1) permissible contractual limitations of liability, though the duty of care is not subject to party autonomy, (2) negotiation and transfer, (3) lien of the carrier or warehousemen on the goods and right to enforce lien in a commercially reasonable manner, (4) altered, lost and stolen instruments and (5) the effects on holders resulting from insolvency of the bailee. Revised Article 7 codifies rules for documents of title, very few mandatory, within the context of contract law. It does not deal with tort liability of bailees and does not deal with criminal liability for conversion of goods.

Adoption of Revised Article 7 requires adoption of conforming amendments to Articles 1 (General Provisions), 2 (Sales), 2A (Leases), 4 (Bank Deposits and Collections), 5 (Letters of Credit), 8 (Investment Securities) and 9 (Secured Transactions). Where applicable, the appendix of conforming amendments contains alternatives depending upon whether the state has adopted recent revisions of other code articles.

While adoption of Revised Article 7 is limited to eight states, the literature does not indicate the presence of substantial opposition to its provisions. Because it uses modern statutory language, has updated provisions to reflect commercial practice, interfaces with state federal and international regulation and provides explicit rules for electronic documents of title, it is recommended that New Jersey enact Revised Article 7. Based on an earlier memorandum, it also is recommended that New Jersey adopt Revised Article 1 (either including or excluding the new choice of law clause, but including the new definition of good faith) and the necessary conforming amendments to other articles.<sup>15</sup>

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<sup>14</sup> 49 U.S.C. §§ 80101-80116.

<sup>15</sup> Revised Article 7 includes the expanded definition of good faith, that is, “observance of reasonable commercial standards of fair dealing.” The only article that does not contain that definition is Article 5. Opposition to the expanded definition of good faith in Revised Article 1 is not based on sound arguments.

## Existing and Revised Article 7: Main Differences

The language of the Official Text is gender neutral and is clearer than existing law. In addition, the provisions have been extensively rewritten. The Official Text also contains several new provisions, dealing mainly with electronic documents of title. As already noted, these changes accommodate the emergence of electronic documents of title and are technologically neutral to permit marketplace development. The Revised Article 7 adopts the new definition of good faith – “honesty in fact and observance of reasonable commercial standards of fair dealing.” This change is not revolutionary and reflects the standard of “good faith” adopted in most countries with advanced legal systems. These changes are explained below.

Revised 7-102 (definitions) is an example of a provision with new subsections not contained in New Jersey law that could appear to be substantive changes. The following subsections were added: “carrier” in 7-102(a)(2); “good faith” in 7-102(a)(6); “person entitled under the document” in 7-102(a)(9) [moved from 7-403]; “record” in 7-102(a)(10); “sign” in 7-102(a)(11) and “shipper” in 7-102(a)(12). Revised Article 7 deletes the definition of “document of title” found in existing New Jersey law at 7-102(1)(e). That definition has been moved to Revised Article 1. With the exception of the definition of “good faith,” the effects of which have already been discussed, the substantive differences are insignificant. The terms “shipper” and “carrier” are clarifications; the terms “record” and “sign” are accommodations to electronic systems.

Revised 7-103 “Relation of Article to Treaty or Statute” illustrates a difference based upon style changes to language and additional references to E-SIGN and UETA that are germane to electronic document of title systems. While a comparison shows that the Revised section and existing law differ substantially in textual language, there is nothing objectionable about the changes. In effect, they state the obvious - Article 7 is subject to treaties, Federal law and relevant state law and regulation. Article 7 does not alter law imposing requirements on the form or content of documents of title; Revised Article 7 modifies E-Sign and, if there is a conflict between UETA and Revised Article 7, the latter prevails. The latter is simply an expression of the principle *lex specialis*.

Revised 7-104 “Negotiable and Nonnegotiable Document of Title” illustrates a reworded provision containing new subsections but does not result in important substantive changes. This section lays out the basic rules: a negotiable document of title is one by whose terms the goods are to be delivered to bearer or to order of a named person. The same rule is found in existing law. A document of title that does not meet these requirements is nonnegotiable. The default rule is that a document of title is not negotiable unless it meets the foregoing prerequisites. Subsection (c) of Revised Article 7-104, derived from section 3-104(d), provides that an issuer may place a legend on a document that it is not negotiable, even if it otherwise meets the requirements of negotiability. In that case, it is not negotiable. Once issued, negotiable documents cannot be made nonnegotiable. Likewise, nonnegotiable documents of title cannot be made negotiable by placing a stamp that the document is negotiable.

Revised Articles 7-105 “Reissuance in Alternative Medium” and 7-106 “Control of Electronic Document of Title” are new articles not found in existing law as they pertain to the phenomenon of electronic documents of title, a format that did not exist when the original article was adopted. They do not raise controversial issues. The rules of Revised 7-106 to establish control derive from UETA section 16. Control of an electronic document is a substitute for possession and indorsement of a tangible document of title. A person with an electronic document of title transfers the document by voluntarily relinquishing control of the document. These transactions are likely to occur in third part registry systems that maintain a single, authoritative, and unalterable, copy of the document of title. A record consisting of information stored in an electronic medium evidences the electronic document of title.

Revised 7-501 and 502 continue the rules applicable to due negotiation and its effects, except that they comprehend electronic documents of title. In general, a transferee may obtain greater rights than its transferor if the purchase is made for value, in good faith and without notice of defenses or claims unless the negotiation is not in the regular course of business.

Part 7 of Revised Article 7 contains no counterpart in existing law. Part 7 contains miscellaneous provisions dealing with when the revision becomes applicable to a transaction, a statement that the former law is repealed, and a savings clause. In addition, Revised Article 7 contains several conforming amendments to other statutes.

## Conclusion

The Commission recommends the adoption in New Jersey of the Official Text version of Revised Article 7 of the Uniform Commercial Code, with applicable conforming amendments. The Commission also recommends the adoption of Revised Article 1 except for § 1-301 containing the new choice of law rule. In that regard, the Commission recommends retention of the existing rule, requiring that the transaction bear a reasonable relationship to the legal regime selected by the parties, as now codified in § 1-105. For expediency, the two articles are recommended for consideration as single bill.