

**MINUTES OF COMMISSION MEETING**  
**February 24, 2000**

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Commissioners Albert Burstein, Peter Buchsbaum, Vito Gagliardi, Jr., and Hugo Pfaltz, Jr. Grace Bertone and Professor William Garland attended on behalf of Commissioners Rayman Solomon and Patrick Hobbs, respectively.

Also attending were: Riva Kinstlick, Prudential; Kris Ann Capelluti, Riker Danzig; and Richard Stokes, Insurance Council of America.

Minutes

The Commission approved the Minutes of the January 27, 2000 meeting as submitted.

Uniform Common Interest Ownership Act

John Cannel stated that Commissioner Buchsbaum, Professor Garland and he had met and had made several changes on the draft report. Professor Garland later made additional corrections, incorporated into the proposal. Substantive issues were left for Commission consideration.

Commissioner Burstein asked whether the proposal is matched against existing law. Mr. Cannel stated that there was no full commentary on the differences between the proposal and existing law. In most cases, where an old act is cited, the proposal is close to it, and in many cases commentary explains the differences.

Mr. Cannel confirmed that existing acts covering the subject matter would be recommended for repeal when the proposal is submitted to the Legislature. He stated that there are references to them in the applicability section. Chairman Burstein questioned whether there would be a carry over provision for existing law to allow some associations to opt out of new law except where the proposal contains mandatory provisions.

The issue arose that some associations would be governed by the repealed acts because they opt out of the new law. Mr. Cannel said associations would amend their master deeds to state what provisions they are opting out of and what provisions they adopt or are bound by. Chairman Burstein asked whether this approach was not a source of confusion. Professor Garland stated that if associations were still going to operate under the old acts, the acts had to be

preserved for those associations. The assumption is that most associations will accept the new proposal. As to how to reserve statutes without repealing them, Professor Garland suggested the proposal could provide that these acts are preserved for pre-existing associations. When corporate law was replaced (Title 14A), corporations were subject to most old Title 14 provisions.

Commissioner Gagliardi asked if Title 14 took a similar position on pre-existing corporations. In terms of continued existence would there be an impact if laws are repealed. Mr. Cannel stated there would be no problem because anything an association did under prior law is valid. The integrity of an existing association remains intact. In fact, as Commissioner Buchsbaum noted, the new corporation law contains an opt-in clause, leaving corporations the choice to be governed under prior law, though repealed. The opt-out clause minimizes instability of the transition. The Commission decided that there had to be commentary dealing with the issue of opting-out and the effect of repealing existing law under which existing associations were organized.

Professor Garland addressed an issue in Section 106. Instead of the word "identical", the word "similar" was used in relation to actual property matching the description of property. The notice issue in Section 107 was taken care of by reference to other law that may require notice of the proposal does not do so explicitly. In the comment to Section 202, cross-references would be added to other sections dealing with master deed. Professor Garland raised an issue with Section 208. A contract or lease made by the sponsor can be terminated by the association at any time without liability. Assume sponsor control ends January 1, 2000, and on November 15, 1999, sponsor made contract for snow removal. The person performs when it snows, and later the association says the contract is terminated without liability. Quantum merit at least should apply, but the statute can be read explicitly to require a different result.

Commissioner Burstein stated that he understood what mischief the section was designed to cover, but it appears absolute in its terms. Professor Garland proposed that the association be required to pay the reasonable value of services or goods actually received. Professor Garland does not dispute the right to terminate the contract but to include a qualification to pay reasonable value performed. Commissioner Burstein asked what would happen if a vendor, relying on the contract, purchases equipment; should there be some requirement of payment. Commissioner Gagliardi mentioned the possibility of lost profits.

Commissioner Pfaltz noted that a sponsor's brother-in-law would not always be an affiliate of the sponsor and covered by this provision. The term "affiliate" is a defined term. For example, if a sponsor made a lifetime contract for his brother-in-law to provide legal services, the contract may not be terminable. To address the problem of long-term contracts, Commissioner Gagliardi proposed setting a time limit on sponsor-made contracts. For example, sponsor contracts would remain effective for six months or one year, after which the association has the right to terminate. Commissioner Buchsbaum proposed termination at any time but in any event the sponsor contract cannot last more than one year after association take-over. Under these proposals, if terminated, a vendor would be paid reasonable value; if not terminated, and there is performance, then the association would pay contract price.

Commissioner Burstein maintained that the definition of "affiliate" makes this section narrow. The language was taken straight from uniform law. Commissioner Pfaltz suggested giving the association the right to terminate any contract inexistence before take-over, subject to quantum meruit.

Current law has no provision on this subject. The problem appears to be narrow. Professor Garland suggested taking out the term "without liability" and letting the court determine the question of liability. Commissioner Buchsbaum asked whether any court would read the statute as providing for no liability and then impose damages. Commissioner Pfaltz described the following hypothetical: sponsor hires landscaper to put property into perfect condition, in return giving a 5 year service contract, in effect repaying excess costs of development. Should this contract be terminable? If so, on what condition. Commissioner Buchsbaum raised another hypothetical: installation of security system (free) conditioned on service contract for defined period of time. If left to quantum meruit, the seller of the equipment if not made whole, loss of continuing services. Mr. Cannel suggested leaving it to the courts. This approach would impose liability for services or goods already rendered. Mischief should be addressed in the commentary.

Professor Garland asked whether under Section 210(c), the board should have the ability to regulate behavior without amending the master deed or by-laws. Common areas may be regulated simply by rule. However, anything affecting behavior in own unit has to be done through formal process and must be contained in the master deed or by-laws. Professor Garland suggested putting in language allowing rules to regulate disruptive or disorderly conduct and to allow limited function for rules. Professor Garland proposed "unless

behavior has demonstrable effects beyond the unit, then process must be followed.”

Commissioner Buchsbaum suggested that the association be allowed to have separate documentation for rules and regulations. Ms. Bertone stated that she preferred leaving the proposed text requiring master deed amendment. To amend the master deed would require substantial involvement of the community. If the rule changes are left to board discretion, the potential for abuse is created.

The Commission decided to control in-unit behavior by master deed amendment.

Section 216 raised the question of whether a buyer who finds out that the property description does not match the actual property must close. Commissioner Pfaltz read the provision as indicating that you are struck with what you got, but are entitled to recover damages. The question does not relate to taking of title. In construction law, one might be required to take something if deviations are not minor. The Commission decided to leave the question to the courts. Staff should expand the comment to state that the Commission deliberately left to the court the question of major versus minor deviation and the right to refuse to close.

Professor Garland raised problems with Section 218(f). The section provides that one cannot challenge an amendment one year after recorded; a person may not know about the amendment. Professor Garland suggested requiring a copy of the amendment to be given to unit owners. The reason for the rule is that the notice requirement may create title problems because of proof of notice. The Commission decided that the provision was satisfactory as written.

Mr. Cannel noted that the provisions were not re-numbered and that the proposal contains numbering mistakes that will be corrected later. The Commission also noticed a number of typos.

Mr. Cannel stated that Professor Garland, Commissioner Buchsbaum and he would get together soon on the remaining sections. He stated that the Commission should have a complete draft by the next meeting.

Uniform Computer Information Transactions Act (UCITA)

Maureen Garde stated that the staff had prepared three memoranda. Ms. Garde informed the Commission that the Legislature of the State of Virginia had passed UCITA. The Legislature changed the choice of law provision; in the absence of a contractual provision, Virginia law applies. This rule approximates UCC Article 1 choice of law rule. The effective date of UCITA in Virginia is July 2001, and legislation directed a committee to prepare a study measuring the legal and economic impact of UCITA and recommend amendments to it.

Mr. Cannel noted that the Commission avoided the choice of law issue in its Standard Form Contract project. He noted that the drafter of the contract usually chooses the law of his own jurisdiction, not an unusual jurisdiction. The Standard Form Contract Act would enforce any choice of law provision provided the law of a U.S. jurisdiction were chosen. Ms. Garde stated that, under common law, a person cannot opt out of the consumer law of his jurisdiction, but a legislative adoption of UCITA might change that rule.

Commissioner Burstein asked what to do in a non-negotiated contract. Mr. Burke stated that the law already exists to address this problem. The provision is subject to duty of good faith and unconscionability. There are rules to protect over-reaching and to invalidate choice of law provisions that are unfair. Mr. Burke could not find a case where the consumer was subject to the law of another jurisdiction. Ms. Garde stated that Article 1 choice of law (replicated by Virginia), i.e., UCC, applies.

Commissioner Buchsbaum said that he was happy with Article 1. Ms. Garde stated that Article 1 does not do anything regarding mandatory law. The Commission voted to adopt something like Article 1.

Commissioner Burstein asked whether it was valuable to continue to pursue the study of UCITA. If it is not worthy of adoption, the Commission can state so. The memoranda raise more questions than they answer. Is UCITA proposal worth tinkering with? Ms. Garde stated that there might be provisions worth preserving. Commissioner Burstein stated he was not suggesting abandoning the project and asked staff to identify the best UCITA provisions and test out possibility of amending UCC Article 2.

Status of Bills

The Commission discussed the Bar Association's opposition to the Standard Form Contract Act and Revised UCC Article 9. Commissioner Buchsbaum suggested contacting the Bar Association and asking for an opportunity to speak on the two projects.

Richard Stokes, the attorney representing the Insurance Council of New Jersey, stated that his organization was following the UCITA developments.

Miscellaneous

The next meeting is scheduled for March 23, 2000.