

**MINUTES OF COMMISSION MEETING**  
**July 20, 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 and Vito Gagliardi, Jr. Grace Bertone attended on behalf of Commissioner Rayman Solomon and Professor William Garland attended on behalf of Commissioner Patrick Hobbs.

Minutes

The Commission approved the Minutes of June 14, 2000 as submitted.

Uniform Electronic Transactions Act (UETA)

Ms. Garde noted that President Clinton had signed the federal "Electronic Signatures in Global and National Commerce Act" (federal E-sign) thereby giving legal effect to electronic signatures and contracts in interstate and international commerce.

Federal E-sign preempts the State law unless the State enacts the Uniform Electronic Transactions Act (UETA). UETA is presently pending in the New Jersey Legislature (S1183). Ms. Garde informed the Commission that she was in the process of drafting a report on the subject matter. She noted that the New Jersey Attorney General had expressed concerns on whether New Jersey adoption of UETA was the best alternative to take. Consequently, Ms. Garde reformulated her draft report. Interested persons are not in agreement as to the relationship between E-sign and UETA. Ms. Garde stated that in her view, the optimum approach is to adopt UETA with the consumer protection provisions and other amendments that the Commission had previously considered.

The Commission asked staff to prepare the Final Report and Recommendations on UETA and submit it to the Commissioners for review and approval prior to the September 2000 meeting. That report would recommend amendments to the official text of UETA, consistent with the provisions of federal E-sign.

UCITA

Ms. Garde referred to her memorandum sent to the Commission and stated that she would like to emphasize certain points. She referred to prior discussions regarding the respective roles of the American Law Institute and the National Conference of Commissioners on State Laws (NCCUSL) in the

development of the UCC, and NCCUSL's withdrawal of proposed Article 2B of the UCC (now UCITA) because of ALI opposition to it. With respect to the issue of scope and the relationship between the scope of UCITA and the scope of Article 2 of the UCC, she noted that there continues to be disagreement between the American Law Institute and NCCUSL over the scope of the respective proposals. Although at the ALI meeting in the spring of this year there had been a "sense of house" motion to revise the current draft of Revised Article 2 to make clear that certain forms of software remain within Article 2, that had not been done in the draft of Article 2 being considered by the National Conference in July. In Ms. Garde's opinion, it appeared that NCCUSL, the proponent of UCITA over the objections of the ALI, was attempting to circumvent the role of the ALI in the development of the UCC.

Ms. Garde stated that the contract formation rules are essential to UCITA and that the Commission's project is more radical than UCITA. She noted that not just consumers, but other groups object to UCITA on contract formation and other grounds.

Ms. Garde clarified that the vendor controls the agreement; the vendor can state that the transaction is not a license, which is the UCITA default rule. Mr. Cannel stated that the question of whether a transaction is a sale under the federal copyright act is a question of federal, not state, law.

Ms. Garde drew an example of a consumer going to a store and buying a book, an audio cassette tape and a software product on a related topic from the same shelf. If the official version of UCITA was enacted, she pointed out, the legal rules applicable to the software would differ from those that apply to the book and the audio cassette tape even though each one of the items was in the form of a good and contained intellectual property. One way in which they would differ is that the default rule applying to the computer software would prohibit it from being lent or re-sold, unlike the rule applicable to the book and the audio cassette tape. In her view, this would be contrary to the expectations of an ordinary purchaser.

Professor Garland asked whether law should treat differently transactions that are similar from the consumer's viewpoint. Mr. Cannel used the example of a garage sale and raised the concern that a consumer cannot sell a boxed piece of software. UCITA suggests that a person may not.

Commissioner Gagliardi brought up the subject of a book on tape. This item can be readily reproduced; so the law should not make a distinction between books and computer software. If that distinction is unavailable, is there another rationale for UCITA? Mr. Burke stated that if the Commission were going to amend UCITA, there were several provisions the Commission might want to consider preserving, such as the special warranty provisions.

Ms. Garde stated that many amendments the Commission was considering were dancing around the core of UCITA, *e.g.*, choice of law, choice of forum. If the Commission is uncomfortable with the core provisions, the amendments discussed so far would not alter them. Mr. Ring and Mr. Nimmer were mainly concerned with the core provisions.

Mr. Cannel stated that there were three approaches: (1) recommend the Official Text of UCITA, (2) recommend no enactment and (3) recommend it with major amendments.

Ms. Garde stated that in her view the proponents of UCITA could probably live with the exclusion of mass-market "boxed" transactions, as they are ultimately most concerned with on-line transactions in software and other types of computer information. She stated that differences in the legal rules applicable to on-line transactions and ordinary retail transactions could be justified as the differences would be less likely to defeat the expectations of ordinary end-users.

Mr. Burstein stated that by the September meeting, the Commission would like to make decision on UCITA. The initial approach is to recommend enactment of UCITA with certain amendments. Ms. Garde noted that the Commission had taken a vote on choice of forum and the vote was split. The Commission asked for a Tentative Report for the September meeting.

#### Games of Chance

Mr. Cannel stated that the current draft concerned raffles and bingo. The draft report contained changes pertaining to organization and arrangement. Completely new material was underlined; material to be deleted was struck through. Mr. Cannel asked the Commission if more were to be done.

Mr. Gagliardi had one concern. Section 2-39(a) gives the Commission power to search without a warrant, raising a constitutional issue. Mr. Cannel

stated that the section was limited to games while they were going on. But the section also covered equipment kept for use. There was no disagreement that the provision allowing for inspection without warrant during games probably meets constitutional standards. Game time is narrowly restricted. Professor Garland proposed that for searches at other times, the Commission should get a warrant. The Commission decided to divide the subsection into two sentences, one for places where games are in operation and the other for places where equipment is kept for use.

#### Status of Children

Mr. Cannel stated that he began to work on this project by looking at the Uniform Law originally titled "Children of the New Biology," but that law deals almost totally with surrogacy. In re Estate of William J. Kolacy, 332 N.J. Super. 593 (Ch. Div. 2000), raises two problems: (1) the effect of changes in technology on legal time limits associated with determining parent-child relationships, and (2) the effect of changes in technology on determining who is a parent of a child. The second problem is more complicated.

The Commission directed staff to start with the narrow issue of time limits.

#### UCIOA

The project is out in Tentative Report. The Department of Community Affairs has published its own proposed bill version on specific controversial issues. The Tentative Report has been sent to Governor's Counsel, legislators and other interested parties.

#### Miscellaneous

The next meeting was scheduled for September 14, 2000.