

MINUTES OF COMMISSION MEETING
June 24, 2004

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Commissioners Albert Burstein and Vito Gagliardi, Jr. Professor Bernard Bell of Rutgers Law School, Newark, attended on behalf of Commissioner Stuart Deutsch.

Also in attendance were: Karen S. Ali, Assistant In-House Counsel, New Jersey Hospital Association; Lorelei Mottese, Wakefern Food Corporation; and Betty Greitzer, Esq., Linda Doherty and Bill Sumas of the New Jersey Food Council.

Minutes

Professor Bell noted his dissent from Section 3c½b of the Enforcement of Judgments project. He explained that he dissented from the deletion of the language in the report requiring creditors to diligently attempt to find personalty to satisfy a judgment before resorting to enforcing the judgment against realty. Professor Bell noted that he did support the balance of the report. The minutes were accepted as amended.

Resignation of Commissioner Buchsbaum

Chairman Burstein announced that Commissioner Peter Buchsbaum had tendered his resignation from the Commission upon his nomination to the Superior Court.

U.C.C., Article 2

John Burke briefly reviewed his section-by-section comparison of the statutory changes proposed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). He noted that many significant changes are in the definitions; the definition of "goods," for example, excludes computer programs. Mr. Burke also noted that "information" is not defined in Article 2, but is defined in UETA. He explained that if the revised Article 2 were adopted, computer programs would be excluded from the statute, so the limited common law in that area would control, or the concepts underlying Article 2 would be used by analogy.

Other significant changes include the incorporation of UETA and E-sign concepts to reflect the realities of purchases made on-line, the elimination of the concept of the "battle of the forms," modification of the disclaimer of warranty sections, and removal of obsolete terms.

The Commission asked Mr. Burke to provide them with the sections of the statute in which there are proposed changes in addition to any relevant comments. Chairman Burstein will ask Barry Evenchick what the prospects for the project are nationally. Mr. Burke said that no state has introduced a bill to implement it yet. Staff should continue working and show language to the Commissioners at the next meeting.

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Weights and Measures

John Cannel said that he had incorporated into the draft many of Professor Garland's corrections. He suggested, and the Commission agreed, that review should wait until Professor Garland was present.

Linda Doherty of the New Jersey Food Council (NJFC) explained to the Commission that she and other Council members met previously with Mr. Cannel. Uniformity and consistency in enforcement is a priority for the Council. The Council represents members of one of the most highly regulated industries. Most issues of concern pertain to 51A:10-1., Prohibited Acts. Betty Greitzer, NJFC, said that the penalties proposed by the draft statute effectively double the penalties. This is of significant concern to the Council because most of what the member organizations sell is prepackaged; it is weighed and packaged by outside vendors. She noted that many products (sugar, for example) tend to lose weight through loss of moisture while on store shelves.

Any citation issued by Weights and Measures Inspectors is issued to the store and possibly the store manager, not the outside vendor. Chairman Burstein asked what remedy was available to the individual stores. Ms. Greitzer said that in some counties, a violation may be paid by mail. The store may mail the notice of violation directly to the company responsible with a request that the company send a payment directly to the court. Other counties, such as Bergen and Morris, require an appearance in these matters, which complicates the resolution. Chairman Burstein asked if statewide uniformity would be preferable. Ms. Greitzer said that it would. Mr. Cannel said that Staff would include suitable draft language in the statute.

Chairman Burstein asked how damage to a consumer could be remedied without penalties to the individual stores. Ms. Greitzer said that the penalties should fit the crime. A Weights and Measures Inspector inspecting for short weights identifies the entire lot and tests the veracity of the contents declaration by opening and checking each item in the lot. The National Conference of Weights and Measures Protocol ("Handbook 133") states that there will be variation within a given lot, with some individual packages over- and some under-weighted, but that the average of the lot as a whole must be correct pursuant to the content declaration. In New York State, the Handbook 133 protocol is followed and, if there is an overall deviation for a particular lot, the lot itself is deemed to be in violation, which constitutes *one* violation. In New Jersey, if six of the 12 items in a lot are of incorrect weight, the Inspector counts it as *six* violations, not one for the lot as a whole. In addition, until recently, New Jersey Courts would impose court costs for each of the six alleged violations.

Professor Bell asked if a change in the number of penalties imposed per lot would

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offset an increase in the penalties. Ms. Greitzer responded that if there were a change in New Jersey to impose penalties per lot rather than per package, that should offset an increase in penalties. Citations should issue to the lot, not to the package.

Commissioner Gagliardi asked how deli goods are tested. Ms. Greitzer said that an Inspector will sometimes order cold cuts and then weigh them, but more commonly the Inspector will open items packaged by the store. Scales in the store are generally only tested at scheduled inspections for scales. The Commission discussed whether it was possible to modify the penalties to differentiate between store-packaged items and manufacturer-packaged items. Chairman Burstein asked whether calibration of scales should be dictated by statute or by regulation. Ms. Greitzer said that creating another classification of records that must be kept at the store level is not desirable. Scales are calibrated in the morning and evening; this should be done by prudent operators. Commissioner Gagliardi asked if violations are posted in the store. Ms. Greitzer said they are not.

Professor Bell asked what the Council wants regarding uniformity. Ms. Doherty said that there is no direct authority at the state level for each county. Ms. Greitzer said that the county people are responsible to their Boards of Freeholders. She said that if the Council members had a wish list, it would include centralized enforcement. It is not unusual to have a county Inspector one day, and a State Inspector the next, as a result of problems with uniformity.

Ms. Doherty said that frequency of inspections is an issue. In some states, inspections take place once a year and are viewed as a compliance issue. In New Jersey, inspections do not take place on a regular, predictable basis, and they are viewed as enforcement issues with an adversarial approach taken. In addition, unlike health inspections, there are no warnings before a citation is issued.

The Council would like Weights and Measures to have the ability to cite manufacturers directly, and thereby take the middlemen, the stores, out of the process. Professor Bell raised the issue of jurisdiction over an out-of-state manufacturer. Ms. Doherty said that some other states cite the manufacturer directly; she will provide the Commission a list of states which avoid middlemen.

Ms. Greitzer raised the issue of "subsequent offenses." To qualify as a subsequent offense, the offense should involve an SKU number identical to the item listed as the first offense so that, for example, Nabisco gingersnaps would not count as a subsequent offense for Nabisco vanilla wafers. Professor Bell raised the question of what happens with store-packaged items when one month it may be chicken and another month, cheese, suggesting that this might reflect a pattern that deserves attention. Commissioner Gagliardi said that if there is a problem in one area of store-packaged goods then perhaps there is a duty of care to check other areas of store-packaged items, but that this does not apply to prepackaged items. He is persuaded that an increase in

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penalties is harsh as applied to prepackaged items. Lorelei Mottese, Wakefern Food Corporation, said that the manufacturer should pay the fine. The Commission will look at language used in Wisconsin law.

Medical Peer Review

Judith Ungar said that Staff has not drafted anything yet because it lacks sufficient information about the sentiments of physicians in the State.

Karen S. Ali, Assistant In-House Counsel of the New Jersey Hospital Association, which represents 109 hospitals, said the issue of medical peer review confidentiality is significant to hospitals. Her organization participated in many of the cases cited in the Staff memo. She noted that New Jersey and Kentucky are the only two states that afford virtually no protection to the peer review materials, and that even Kentucky offers more protection than New Jersey. Ms. Ali explained that the goal of peer review is to improve health care and that it is not designed to be used by plaintiffs' attorneys to make their cases.

When asked about the peer review process by Professor Bell, Ms. Ali explained that she had not participated in peer review, but that based on the limited information available to her as a result of the *Christie* case, it was her understanding that peer review involves a review of the actions of all of the individuals involved in the care of an injured patient. In the *Christie* case, the plaintiff's attorney tried to subpoena the information resulting from the peer review process. The Court decided that the factual information was to be released, as well as one sentence from the report of the deliberative process that may have suggested the whereabouts of a missing record, but that otherwise the Court withheld the information characterized as deliberations because of its opinion that divulging such information would impair the process and negatively impact the willingness of physicians to participate. In response to a question from Chairman Burstein about the importance of statutory protection for the healthy use of peer review, Ms. Ali said that it is critical.

Commissioner Gagliardi expressed concerns about whether this was an appropriate topic for Commission consideration. Chairman Burstein suggested that in order to make an intelligent assessment as to where the Commission may wish to go with the project, a letter brief summarizing the New Jersey cases and the status of laws elsewhere in the United States would be helpful to the Commission.

Ms. Ali said that her organization would gladly assist by providing information pertaining to peer review that they have gathered and also by putting Staff in touch with Harold J. Bressler, General Counsel of the Joint Commission on Accreditation of Health Care Organizations. She suggested that rather than a new statute, this project appeared to be a modification of the privilege contained in 2A:84A-22.10. She noted that the Missouri law contained in the Staff memorandum is a good model because it protects the

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materials generated as a result of peer review, but makes them available to the licensing board, and in other appropriate situations.

Professor Bell suggested that the issue might very well fall within the scope of the Commission's charge because of the number of other states who provide protection. He suggested that when looking at the legal background, Staff should look at the deliberative process used in FIOA cases, which appears to be very similar to the analysis used in the *Christie* matter: the facts may not be protected, but the discussions and deliberations are afforded protection. Commissioner Gagliardi suggested that it might also be worth looking at cases involving self-critical analysis. Chairman Burstein agreed that although there was no longer a privilege for self-critical analysis, later case law discusses the concept and might be useful to review.

Miscellaneous

The next meeting of the Commission is scheduled for July 15th. The September meeting is scheduled for September 9th, at which time the remainder of the fall meetings will be reviewed to see if changes need to be made to accommodate the schedules of the Commissioners.