

## **MINUTES OF COMMISSION MEETING**

March 17, 2005

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, Vito A. Gagliardi, Jr., and Sylvia Pressler. Professor William Garland of Seton Hall Law School, attended on behalf of Commissioner Patrick Hobbs and Grace Bertone of McElroy, Deutsch & Mulvaney, attended on behalf of Commissioner Rayman Solomon.

Also present were Ray Szpond and John McGuire of PBA Local # 269, Weights and Measures; Betty Greitzer, Esq., Attorney for the New Jersey Food Council; Gerard J. Felt, Esq. of Pressler and Pressler, and Arthur J. Raimon, of Morgan Melhuish, both representing the New Jersey Creditors Bar; and Louis Greenleaf, New Jersey Weights and Measures, representing the Attorney General's office.

### Minutes

The Minutes of the February meeting were accepted as submitted.

### Enforcement of Judgments

John Cannel noted that throughout the draft "collection order" had been changed to "writ of execution." Chairman Burstein said that the revised document contained references to "collection officer," an undefined term, and asked if it is a constable. Arthur J. Raimon said that the officer is now called a Special Civil Part Officer.

Commissioner Pressler pointed out an errant semicolon in Section S-7 and asked why the term *lis pendens* had been eliminated. Mr. Cannel said that the more descriptive term, "notice of pending action," would be more helpful since not everyone knows the meaning of "*lis pendens*." Commissioner Pressler said that it is a term of art and that researching the law without using that term would be difficult. Mr. Cannel said that the draft could define the notice as that which was "formerly known as *lis pendens*." Chairman Burstein asked that this be done.

Commissioner Pressler also noted that the court rules refer to the relevant dockets as the civil judgment and order docket and the civil docket, terminology different from that used in the draft statute. She asked if a link could also be used in this situation so that the statute would use the same terms as the court rules. Mr. Cannel will make this change.

Professor Garland pointed out that in Section N-1(b), page 11, the draft language states that a notice of pending action shall not be filed in an action to enforce a construction lien, but that construction lien law requires one to be filed. Mr. Cannel responded that the construction lien law reference could be eliminated from this section, in which case, the construction lien law would control.

Mr. Cannel asked if the Commissioners were satisfied that in Section S-7 the draft gives the judge unfettered discretion. Professor Bell (absent) feels that the draft language provides insufficient protection to the debtor and that it should allow the source of the debt to be relevant. The Commission disagrees with this position and is satisfied with the language pertaining to judicial discretion.

Commissioner Pressler asked if the language of Section S-7 makes sufficiently clear that public sales do not apply to foreclosures. The phrase in Subsection (a), "pursuant to a writ of execution," will be removed. Language will be added to clarify that the section does not apply to foreclosures. The entire section will be moved and retitled since it is not an adjournment, but a stay of the sale. Commissioner Pressler said that the section would be more appropriately placed in the Collection section of the statute. Chairman Burstein said that "family" should be added to the end of the first sentence in S-7(a). Professor Garland pointed out that in Section S-7, under adjournments, the language refers to principal residence, while in the introduction, page two, paragraph two, the language refers only to "residence." Mr. Cannel said that would be clarified to mean "principal residence." Chairman Burstein directed Mr. Cannel to look at everything and then decide where the section should go.

Gerard J. Felt said that one should be able to levy on real estate without first having to exhaust personalty. Mr. Cannel explained that this was addressed by the lack of a provision requiring the exhaustion of personal property. Mr. Raimon said that without specific language, a judge will look to the prior statute and prior case law and find that one must exhaust personal property. Professor Garland suggested that Section C-2(a) include "any non-exempt property" after "judgment from the." Commissioner Pressler suggested adding the phrase "whether real or personal" and a section regarding how to levy against real property. Commissioner Bertone said that it involves publication and a posting on the property. Mr. Cannel will add a section telling how to levy against real property. Commissioner Bertone explained that priority is established from the date of the delivery of the levy to the Sheriff.

Mr. Felt observed that Section C-3(b) refers to "personal property" and Section C-6 refers to "goods." Mr. Cannel acknowledged the difference, and added that there was a further issue because Section C-6(a)(3) refers to "goods" since that section distinguishes between financial property and other personal property.

Objecting to the increase in the exemption, Mr. Raimon noted that the Commission should bear in mind that it is not market value that is in question with the existing \$1000 limit, but the forced sale value. He also mentioned that if there is a spouse, and the spouse has an interest in shared property, a \$500 refrigerator, the value of which is \$35 at a forced sale value, becomes even less, perhaps \$15, because of the shared interest from the non-debtor. It was noted that even with the increase, the amount of the exemption is very small and that if it had been adjusted for inflation, it would be

considerably more than the increase provided in the draft statute. Professor Garland observed that if a consumer is faced with considerable debt, and has no money, the consumer could always proceed under the bankruptcy code, which offers much more generous exemptions.

Professor Garland said that he had evaluated exemptions in other states, and that New Jersey, even with the increased limits, is not particularly generous. It was agreed that the limits would be set at \$2000 for goods, and \$1000 for cash.

Concerns were raised regarding the escalator clause in C-6(b). The language had been included to address the fact that the last time the statute was touched was more than 30 years ago. If the consumer price index is used for the escalator, it was possible that the exemption amount would increase faster than the rate of interest on deposits in Superior Court, or would increase when that interest rate was going down. Commissioner Gagliardi suggested that the Commission had made a significant step in going from a total exemption of \$1000 to a combined \$1000/\$2000 exemption and that a detailed debate on the appropriate escalator may not be warranted. Chairman Burstein said that the CPI should not be in this statute, and said that as a way to address the varying concerns in this area, language be included in the statute requiring a review of this section every five years to determine whether a change is needed.

Professor Garland suggested that in Section C-6(c), where it says the exemptions shall not apply, it should be clarified that the exemptions for wearing apparel should still apply. Mr. Felt said that in Section C-7, the language should say that if the debtor fails to select property for exemption, the officer would select property for the debtor, since that is what is done now. Mr. Cannel indicated that he would revise that language.

In Section C-11(b), the reference to “delivery of property” will be eliminated, since not all property is delivered, and the language will instead read “at the time of the service of the writ.”

The language in Section C-14(b)(3) requires the collection officer to provide notice to the attorneys for the judgment debtor and creditor, and language will be added to indicate that these parties must be notified “if known” since the attorney is not necessarily known to the officer.

Although the court rules require notice to the debtor of a bank levy, the officer may not know the amount of the levy at the time he is required to notify the debtor. The notice of levy and the writ of execution will continue to be served in accordance with the court rules, and that the fact that the debtor receives the notice is notice to the debtor that the amount in that bank is subject to the levy even though the debtor is not sent a copy of the documentation in advance of the levy.

The language of Section C-16(a) will be revised to make it clear that both a support order and a collection order may apply at the same time, that the limit is 10% on both, and that the federal limit also applies. Commissioner Pressler said that Subsection (a) must incorporate the federal limit on child support. See R. 4:59. Subsection (b) will be removed.

Commissioner Pressler said that there is a problem with the entire priority section. The draft would be better without a priority section, because the Rules apply. Mr. Cannel will give the Commission his memorandum regarding federal bankruptcy issues and priority at the next meeting.

With regard to Section C-24(a)(4) there has been a change in the court rule and the time limit is now 24 months after issuance of the writ, rather than 12 months. Mr. Felt said that in C-24(b)(1) the word "time" should be plural and that the court officer should record the time the document is remitted. In Section C-17(a), "employer may deduct a fee" will be changed to "assess a fee" to clarify that the fee is paid by the employee, not by the creditor.

There was general discussion on section J-12 regarding stipulations of settlement. The Commission reached no conclusion on the subject.

Mr. Felt favored allowing collection attorneys to choose their own collection officers. After discussion, the Commission decided not to privatize the collection process.

#### Weights and Measures

Mr. Cannel, summarizing the correspondence that Staff had received, said that the most contentious issue is under what circumstances multiple offenses and multiple penalties can be charged.

New Jersey is more restrictive than other states and if a package is short, a fine is imposed on the party who sells to the public, not on the wholesaler. Louis Greenleaf, representing the Attorney General's Office, said that usually the retailer and wholesaler settle the matter by a payment from the wholesaler to the retailer. The State's position is that the retailer should be charged for each package that is short, even if all packages are part of the same shipment. Mr. Greenleaf noted that these days packages come to retailers from overseas, and he asked how one would obtain service on such a manufacturer. Ray Szpond said that for each individual package, there are legal tolerances and that with the magnitude of allowable variation, manufacturers are given considerable leeway on each package.

Chairman Burstein said that the Commission finds considerable unfairness in the multiple penalty approach since a retailer will receive a bulk shipment not packed by the

retailer, and will be faced with multiple penalties for which it is not always able to obtain reimbursement from the manufacturer or distributor. Mr. Szpond stated that generally, for a manufacturer to have packages on a store shelf, it would have to enter into a contract saying it will pay for weights and measures violations.

Mr. Greenleaf said that the other issues he wished to address were set forth in his letter dated March 9, 2005. Limited statutory authority is afforded to State Superintendents to supervise county weights and measures offices, and as a result, considerable divergence exists throughout the state. Mr. Cannel said that the Commission provided the Superintendents with full regulatory power, but not supervisory powers, and that it has been suggested that the statute give supervisory powers to the superintendents based on the kind of powers the Attorney General's office has over local prosecutor's offices. See 3-3. Mr. Cannel noted that there had been no objection to such a modification in the law by other interested parties.

Mr. Greenleaf said that there are situations in which products are intentionally shorted to go to other states but not to New Jersey, because of its strict enforcement. He said that it was his opinion that if we could only fine for one package out of a group of packages, then there would be no disincentive for shorting the packages. He suggested that there are situations in which, with ice melt/rock salt, for example, packages are pounds short, which deprives the consumer of a significant amount of the product paid for.

Commissioner Gagliardi explained that the Commission was responding to a concern that smaller stores, stores that were not retail chains, lacked the clout to collect from the manufacturers. Mr. Greenleaf said that the smaller stores are generally not subject to the same kind of monitoring by the State as the larger stores are since there is limited manpower. Mr. Szpond said that historically, the smaller stores are a real minority as far as monitoring is concerned, and that the weights and measures personnel have discretion to have the product pulled from shelves without imposing a fine on the store.

Ms. Greitzer said that the Food Council represents both retailers and manufacturers and that its interest is not solely from a retailer's standpoint. She indicated that the Food Council has no problem with weights and measures personnel issuing a removal order to get nonconforming packages off the shelves. Food Council members do business in 21 counties. Some of those counties exercise discretion very fairly while there are others for which the weights and measures fines constitute a significant revenue generator. The lack of judicial discretion prevents merger of offenses. No option to plead to a lesser number of offenses exists; if 24 offenses are written, 24 have to be addressed. Ms. Greitzer said that a level playing field would be a good start, noting that if the State Superintendent is given the power to be in charge, it would probably clean up 75% of the problems.

Commissioner Pressler asked if forcing the removal of nonconforming products from the shelves is the most significant penalty facing the stores. Mr. Greenleaf said that such products might just be shipped to another state. He said that the State does not have many problems with the big chain stores, explaining that if those stores see that product is underweight, they will take it off of the shelves. He added that with the currently available measuring technology, a product should never be short weight.

In response to a question about available personnel, Mr. Greenleaf responded that while the State alone did not have enough personnel to cover the State, the State officers plus the county officers constituted a large enough group to handle the various establishments that needed to be reviewed. Mr. Greenleaf said that manufacturers and packagers were aware of the sort of shrinkage likely to occur during the shelf life of the product and could make allowances for that and package more product than required by the package weight to deal with the issue. In addition, the allowable tolerances provided by the statute are another way to deal with shrinkage.

Mr. Greenleaf stressed that the issue of “one package, one violation” is a serious issue and impacts the way the weights and measures personnel do business every day. Without such a policy, New Jersey would have more short-weighted packages that it presently does.

Mr. Greenleaf also noted that while he can presently make regulations, there is a real question about whether or not he has the authority to enforce them. Stores do not feel comfortable contacting him about problems in their counties. He periodically receives calls from stores in situations where the county officials are absolutely wrong on the law, but he does not have the statutory authority to do anything about the matter; the only thing he can do in those situations is testify on behalf of the stores if subpoenaed in a case. Ms. Greitzer reiterated that if the jurisdiction and authority of the State Superintendent were increased, that would address many of the problems in this area.

Chairman Burstein asked Mr. Cannel to redraft for the next meeting. Mr. Cannel said that perhaps the county people would attend that meeting.

#### Draft Annual Report

Chairman Burstein said that the Annual Report is comprehensive and easier to read than previous Reports.

Recompilation

Chairman Burstein asked that the issue of recompilation and the letter from Paul Axel-Lute of the Rutgers Law School be held to the next meeting.

Miscellaneous

The next meeting is rescheduled to Thursday, April 14<sup>th</sup>.