

## **MINUTES OF COMMISSION MEETING**

**May 24, 2018**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Chairman Vito A. Gagliardi, Jr., Commissioner Andrew O. Bunn, and Commissioner Louis N. Rainone. Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen, and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Michael T. Cahill.

### **Minutes**

The word “provide” in the first sentence in the first paragraph on page two was amended to “provided.” With this change, the Minutes of the April 19, 2018, Commission meeting were unanimously approved on the motion of Commissioner Bunn, seconded by Commissioner Bell.

### **Partnership and Trade Name Statutes**

Samuel Silver discussed a Draft Final Report relating to modifications to New Jersey’s partnership and trade name statutes. This project, according to Mr. Silver, originated after the anachronistic term misdemeanor was noted during a review of the New Jersey partnership statutes. A Draft Tentative Report presented at the December 21, 2017, Commission meeting recommended the removal of the anachronistic term and suggested modifications to the existing statutes based on the limited liability statutes. With guidance from the Commission, a Revised Draft Tentative Report was discussed during the Commission meeting of January 8, 2018. This Report recommended modernization of the partnership statutes while maintaining the purposed of the statute – the protection of creditors.

Mr. Silver briefly reviewed with the Commission the comments that had been received from members of the public and attendees of the April 24, 2018 Commission meeting. Barry Gartenberg, Esq. and Jeffrey Shapiro, Esq. both provided Staff with comments in support of amending Title 56. Mr. Gartenberg suggested that the exception set forth in N.J.S. 56:1-5 be expanded to cover limited liability companies and limited partnerships in addition to corporations. In addition, he recommended that partnerships whose sole act was a decision to become a limited liability partnership be exempt from the statutory recording requirements of N.J.S. 56:1-5. Mr. Silver advised the Commission that Staff reviewed both of Mr. Gartenberg’s suggestions and incorporated them into the Draft Final Report.

During the April 19, 2018, meeting of the Commission, opposition to Staff’s proposed modification of Title 56 was interposed by two organizations. According to Mr. Silver, the Constitutional Officers Association of New Jersey (COANJ), represented by Joanne Rajoppi,

advised the Commission that the County Clerks provide new businesses with both accessibility and personal service that would be lost if partnerships were permitted to register their business electronically. Ms. Rajoppi indicated that COANJ took no position on the Commission's recommendation to excise the word misdemeanor from the present statutory scheme. Allen Weston, Esq., representing the New Jersey Association of Counties (NJAC), also opposed the Commission's Draft Final Report. During his April 19, 2018, statement to the Commission, Mr. Weston expressed general concern about the loss in revenue that would be experienced by the counties if partnerships and trade names were solely registered with the Division of Commercial Recording.

With guidance from the Commission, Staff drafted two proposed approaches addressing the concerns raised by COANJ and NJAC. The first option includes a state-wide filing option, pursuant to which a partnership would file a statement with the clerk of the county within which its principal place of business is located. This filing would be effective state-wide and would be accompanied by one filing fee. The second approach also contemplates a filing with the clerk of the county within which the partnership is located. In addition, the partnership would be required to list each of the counties in which it conducts, or wishes to conduct, its business. Under this approach, a filing fee would be paid to the clerk for each county in which the partnership conducts or wishes to conduct business.

Commissioner Rainone supported the state-wide filing option and noted that an "a la carte" filing could be cost prohibitive for new businesses. He also observed that an "a la carte" filing scheme would allow a business to register six different business names in six different counties. Chairman Gagliardi and Commissioner Bunn concurred with Commissioner Rainone. Commissioner Bunn added that such the county-by-county filing requirement appears to be contrary to the intent of the statute.

Commissioner Bell asked for clarification of the filing fees required by each proposed amendment. Mr. Silver noted that under the statewide filing option (option #1) the entity would be required to pay one filing fee of \$50 in order to obtain a statewide filing while under the "a la carte" option (option #2) the filer would be required to tender a \$50 filing fee for each selected county or \$1,050 if the statement is filed in all twenty-one counties.

Commissioner Bunn addressed the statutory requirement of providing the clerk with the name and addresses of all persons who are members of a firm or partnership. He noted that a firm or partnership may add, or subtract, individuals over the course of time. The statute, according to Commissioner Bunn, should reflect that the names and addresses of all persons who are members should only be required "at the time of filing", suggesting that it should not be necessary for a firm or partnership to be required to constantly amend its statement upon the addition or subtraction of partners from the entity.

Mr. Silver advised the Commission that on April 5, 2018, Senator Patrick Diegnan, Jr., introduced S2440 entitled, “An Act Concerning Partnership Trade Name Certifications and Revising Parts of the Statutory Law.” This legislation appears to be based upon the work of the Commission but it does not reflect the latest proposed modifications to the statutory language suggested by Mr. Gartenberg or the Commission.

On the motion of Commissioner Bunn, which was seconded by Commissioner Rainone, the Commission unanimously voted to release the project as a Final Report reflecting the state-wide filing option and incorporating the suggestion of Commissioner Bunn regarding the “time of filing” identification of members.

### **Definition of “Material” in the Insurance Fraud Statute**

The term “material” is not, according to Samuel Silver, defined in the New Jersey Insurance Fraud Statutes. In *State v. Goodwin*, the New Jersey Supreme Court considered whether an insurance carrier was required to rely, to its detriment, upon a defendant’s material misrepresentation of fact for criminal liability to attach under the insurance fraud statute. The definition of material formed the basis of Mr. Silver’s discussion with the Commission on this topic.

After discussing the facts of the case, Mr. Silver stated that at the trial court level the defendant was found not guilty of each crime with the exception of insurance fraud. The State then appealed the trial court decision. The Appellate Division reversed the defendant’s conviction for insurance fraud, holding that because the insurance company did not rely upon the material misrepresentation proffered by the defendant, there was no actual harm. After receiving the decision of the Appellate Division, the State filed a petition for certification with the New Jersey Supreme Court.

The Supreme Court of New Jersey focused its decision on the meaning of the word “material” and examined the definition of this word in the following contexts: dictionary definition, the perjury statute, the federal false statement statute and the model jury charge on this subject. Mr. Silver noted that the lack of a definition for the term material is contrary to the legislative intent to aggressively confront insurance fraud and punish the individuals who engage in such behavior. He advised the Commission that the Supreme Court directed all future litigants to the Model Jury Charge for clarification of the word material as it appears in the insurance fraud statute. The language of the model jury charge, therefore, is reflected in the proposed clarification to this statute.

During the April 19, 2018 meeting of the Commission, John Cannel observed that the words used to define “material” appeared to be broader than those used in other statutes and do not include a reference to a fraud perpetrated to obtain a lower premium from an insurance company. Mr. Silver noted that with guidance from the Commission and with the assistance of Mr. Cannel, Staff had the opportunity to re-draft the language that would define the term “material” in the insurance fraud statute.

Commissioner Bunn expressed concern about the phrase “in connection with” as set forth in the proposed statutory language, suggesting that this phrase is vague. He suggested amending the phrase “in connection with” to read “with respect to” in the first sentence of the definition of material.

Commissioner Bell opined that material should be defined *in relation to* a specific issue and should be material to those particular allegations of fraud. Laura Tharney asked Commissioner Bell if someone lied on the policy application whether that could prevent it from being material. Commissioner Bell responded that if the claim is for insurance fraud then it is not a question of lying on the application. Commissioner Bunn added that it might make sense to add language that addressed the behavior, “as charged” by the prosecutor.

Chairman Gagliardi acknowledged the significance of Commissioner Bell’s modification of the proposed language. He further recognized that it would be difficult to fully comprehend without seeing this modified language in writing. Commissioner Bell indicated that he would provide his comments to Staff so that Staff could incorporate them into the proposed statutory language.

It is anticipated that, with the addition of the suggested language, this Report will again be discussed during the June 2018 meeting of the Commission.

### **“Residence” for purposes of Sex Offender Registration**

Timothy Prol summarized a Revised Draft Tentative Report discussing whether modification of N.J.S. 2C:7-2 is appropriate to clarify that individuals subject to registration must register a “secondary” residence with the requisite authorities. Mr. Prol advised the Commission that the *Halloran* Court concluded that the address of a secondary residence must be registered with the appropriate authorities and that the failure to do so is not a *de minimis* violation of the law.

In response to Commissioner Hartnett’s inquiry during the April 2018 Commission meeting, Mr. Prol stated that he conducted outreach in an attempt to ascertain whether individuals subject to Parole Supervision for Life (PSL) and the “Sex Offender Monitoring Act”

(SOMA) would be subject to additional burdens by virtue of having to register secondary addresses with the local authorities and concluded that these individuals would not be disproportionately impacted by the proposed registration requirements recommended by the Commission. Mr. Prol also noted that the Report included a new proposed revision to the statutory language to reflect the recent decision of the New Jersey Supreme Court in *State in the Interest of C.K.*, 2018 WL 1915104 (2018) regarding adjudications of delinquency.

Commissioner Bunn stated that the Commission's focus is on the registration of offender residences. The purpose of this statutory provision, he continued, is so that the police are aware that a sex offender resides at a particular address. The initial registration and classification of an offender is beyond the purview of the Commission. Chairman Gagliardi concurred and noted that the Commission has now defined what addresses are to be registered with local law enforcement and when this registration must occur. Commissioner Bertone indicated her agreement that this was the scope of the Commission's mandate.

On the motion of Commissioner Bunn, seconded by Commissioner Bell, the Commission unanimously voted to release this project as a Tentative Report.

### **Standard Form Contracts**

John Cannel discussed a Draft Tentative Report proposing updates to the Commission's 1998 Report on the subject of Standard Form Contracts. According to Mr. Cannel, the 1998 Report recognized that the overwhelming majority of contracts are not negotiable or negotiated. The 1998 Report also recommended the replacement of the current law applicable to those contracts with language that more accurately reflected their true nature.

During his presentation, Mr. Cannel asked the Commission to focus on three areas in the report in which he believed the proposed language was vague and problematic. These areas were brought to his attention during a conversation with David G. McMillin, Esq., of Legal Services of New Jersey. The sections of concern were: Section 6. Primary and Secondary Terms; Section 8. Secondary Terms: Default Rule; and, Section 9. Secondary Terms: Risk of Loss.

In Section 8, Mr. Cannel raised a question concerning the necessity of the word "options" in Section 6, paragraph b., subsection 1. He noted that as drafted the word is vague and is covered by the phrase "product specifications" that immediately precedes the word "options" in this subsection. The Commission discussed the nature of this word and agreed to its removal.

In Section 8, Mr. Cannel focused upon paragraph a., subsection 2. According to Mr. Cannel a secondary term would be enforceable unless the term was prohibited by statute. He asked the Commission to consider expanding this subsection with the use of language that would

prohibit secondary terms that violated “explicit state policy.” Mr. Cannel provided the Commission with examples of state policies such as not enforcing a contract for the payment of illegal gambling debts. Commissioner Bunn noted that this deals with issues of “unconscionability.” Commissioner Bertone expressed concern that the addition of such language would bring this area of the law back to where it was in 1998, prior to the proposed changes. Commissioner Bell observed that the term “explicit state policy” is not contained in the penalty section of the proposed changes. Commissioner Bunn suggested that the language be amended to read that a secondary term is enforceable unless, “...it would cause a statute or regulation to be violated....”

Mr. Cannel also recommended that the word “only” be added to the first sentence of Section 9. He observed that the revised language would read, “[a] secondary term placing a risk of loss on the consumer is enforceable only if....” The Commission concurred with this recommendation.

The Commission was then asked to consider the viability of the “economic loss doctrine” as set forth in Section 10, paragraph a., subsection 3. Chairman Gagliardi suggested that the doctrine, as set forth in subsection 3, was correct. Commissioners Bertone and Bunn concurred with the Chairman’s reading of this section. Mr. Cannel observed that the section, as written, seems to be correct but may be unduly restrictive. Without modification, the Commission approved the language concerning the economic loss doctrine as set forth in this section.

Finally, Commissioner Bell asked Mr. Cannel whether a party can choose a forum after a cause of action has accrued. Mr. Cannel stated that the standard set forth in the Uniform Commercial Code was the model for these types of actions. He further noted that this deals only with standard form contracts and that arbitration has been excised from the statute. Commissioner Bunn suggested that the entire statute would be vulnerable to “preemption” if arbitration had not been removed from the proposed statute.

Laura Tharney advised the Commission that there are bills currently pending in both houses of the New Jersey Legislature which address standard form contracts. On the motion of Commissioner Bell, seconded by Commissioner Bunn the Commission unanimously agreed to release the work as a Tentative Report with the changes agreed upon during the discussion.

### **Revised Uniform Unclaimed Property Act (RUUPA)**

John Cannel discussed his Memorandum updating the Commission regarding a meeting held to obtain input on the Commission’s work in the area of unclaimed property. On May 11, 2018, Mr. Cannel met with individuals representing the Department of the Treasury, Unclaimed Property Administration. He relayed to the Commission that the Unclaimed Property

Administration (UPA) did not support the enactment of the RUUPA, suggesting that the existing New Jersey structure ensures greater protections and coverage to consumers. There was, however, support from the UPA for proposals made by the Commission that diverged from the RUUPA.

Mr. Cannel noted that the UPA is amenable to further discussions related to unclaimed safekeeping repositories and real property. Large financial institutions, according to Mr. Cannel, currently use New Jersey law when it comes to the disposition of the contents of a safe deposit box. An issue arises when real property is left to a person who cannot be located by the administrators for the estate. The property, according to Mr. Cannel, will be delivered to the UPA and eventually sold to satisfy any outstanding tax liens. Commissioner Rainone asked Mr. Cannel to check into the impact of the tax sale law, suggesting that the State should not have a superior right in such cases, but should have the right to money owed to the owner of the property.

The Commission authorized Staff to abandon work on the RUUPA and prepare a report on a smaller project consisting of the work done by the Commission that was not contained in the RUUPA, while adding a provision regarding the tax sale law as requested by Commissioner Rainone.

### **Sidewalk Tort Liability**

Laura Tharney discussed a Memorandum prepared by Erik Topp, a Legislative Law Clerk with the Commission, on the topic of sidewalk tort liability. This project focuses on properties that have a hybrid form of ownership, such as condominium associations which can be considered residential or commercial properties, and considered whether the statutory provisions in this area could be revised to provide greater clarity. The Memorandum sought guidance from the Commission regarding the future of this project.

Ms. Tharney advised the Commission that scholarly articles in this area suggest that the law is problematic. Decisions of the various courts, however, suggest that the law is clear, and that any area of ambiguity is small and fact sensitive. She expressed concern that this area of the law may be reasonably well-developed and understood by practitioners, and that attempting to engraft fact-sensitive determinations on to the body of statutes may cause more problems than it is likely to solve.

Commissioner Rainone commented that this area of law is extremely “fact-sensitive” and is largely addressed and controlled by the development of the case law and not the statutes. He further observed that the area of the law seemed to be reasonably well-settled at this time, noting that there has not been any particular upheaval in this area in decades.

Ms. Tharney recommended that the Commission not proceed with further work in this area at this time, and the Commission agreed to conclude the project that it had begun without issuing any recommendation for change.

### **Miscellaneous**

Chairman Gagliardi formally welcomed Commissioner Louis N. Rainone to the New Jersey Law Revision Commission. In addition, the Chairman congratulated Commissioner Bunn on being named as Associate General Counsel at BDO USA, LLP. Finally, on behalf of the Commission, the Chairman thanked Timothy J. Prol, for his service to the New Jersey Law Revision Commission and wished him well in his new position.

Laura Tharney advised the Commission that in June the NJLRC is scheduled to begin its Summer Student Program. She noted that the NJLRC will welcome six new students to this program including: two, unpaid undergraduate students and four law students. In addition, Ms. Tharney has confirmed that in August the Commission will welcome its first “Fellow” as a part of its new annual fellowship program. Additionally, she advised the Commission that an attorney is being sought to fill a fourteen hour per week permanent part-time Staff position.

Ms. Tharney also indicated that meetings with legislators and legislative staff members are ongoing.

Ms. Tharney also updated the Commission regarding bills based on Commission work, noting that A1050, which revises the equine animal activities law in accordance with the recommendations of the New Jersey Law Revision Commission to clarify responsibility and liability issues, was unanimously reported out of Assembly Committee on May 10, 2018. Ms. Tharney also reported that an identical bill, S2037, had been introduced in the Senate.

### **Adjournment**

The meeting was adjourned on the motion of Commissioner Bunn which was seconded by Commissioner Bell. The next Commission meeting is scheduled to be held on June 21, 2018, at 4:30p.m.