To: **New Jersey Law Revision Commission**
From: **Staff**
Re: **Proposed Revision to Title 2A Causes of Action**
Date: **January 11, 2010**

MEMORANDUM

As part of the broader revision of Title 2A, Staff has undertaken a revision of Subtitle 6 of Title 2A, which contains the civil causes of action established by the Legislature. Subtitle 6 is a collection of widely varying causes of action, including those concerning alcohol beverage servers' liability, negligence and various causes related to mortgages and property. Some of the causes of action were drafted relatively recently, while others were drafted over a century ago.

This goal of this revision is to modernize the statutes by updating the language consistent with other Commission projects. This memorandum also explains changes that Staff elected not to make.

A. N.J.S. 2A:22A-5 Alcoholic beverage servers' liability

The following is the existing language of the statute and no change is recommended.

N.J.S. 2A:22A-5 (Alcohol Beverage Servers' Liability; Conditions for recovery of damages)

a. A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from a licensed alcoholic beverage server only if:

(1) The server is deemed negligent pursuant to subsection b. of this section; and

(2) The injury or damage was proximately caused by the negligent service of alcoholic beverages; and

(3) The injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.

b. A licensed alcoholic beverage server shall be deemed to have been negligent only when the server served a visibly intoxicated person, or served a minor under circumstances where the server knew, or reasonably should have known, that the person served was a minor.

COMMENT

The Commission is cognizant of the holding of *Bauer v. Nesbitt*, 198 N.J. 601 (2009), in which the New Jersey Supreme Court determined that a server of alcoholic beverages owes no duty to an intoxicated person who: (a) was not visibly intoxicated while in the server's presence and (b) the server did not serve. The Supreme Court, in *Bauer*, indicated that the statute's language was "carefully crafted" and "precise," *id.* at 612-13, and the tone of its analysis of the Appellate Division's decision suggests that the Appellate Division erred in finding otherwise. *See id.* at 610-11. Because the Supreme Court found the statute's language unambiguous and based its holding on a straightforward application of the statute, no revision of the statute was undertaken.

B. N.J.S.A. 2A:23-1 to -7 - Alienation of affections, etc.

The sections immediately below contain the existing language of the statute, the proposed statutory language follows.

Current:

2A:23-1. Rights of action abolished

The rights of action formerly existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are abolished from and after June 27, 1935.

2A:23-2. No rights of action in future

No act done in this state after June 27, 1935, shall operate to give rise, either within or without this state, to any of the rights of action abolished by this chapter. No contract to marry made or entered into in this state after June 27, 1935, or made or entered into hereafter, shall operate to give rise, either within or without this state, to any action or right of action for the breach thereof.

2A:23-3. Filing or service of process prohibited

It shall be unlawful for any person, either as a party or attorney, or an agent or other person in behalf of either, to file or serve, cause to be filed or served or threaten to file or serve, or to threaten to cause to be filed or served, any process or pleading, in any court of this state, setting forth or seeking to recover a sum of money upon any cause of action abolished or barred by this chapter, whether such cause of action arose within or without this state.

2A:23-4. Contracts, instruments, etc., in payment, etc., of claims or abolished causes of action void; actions on contracts, etc., unlawful

All contracts and instruments of every kind, nature or description, which have been executed after June 27, 1935, or which hereafter may be executed within this state in payment, satisfaction, settlement or compromise of any claim or cause of action abolished or barred by this chapter, whether such claim or cause of action arose within or without this state, are hereby declared to be contrary to the public policy of this state and absolutely void.

It shall be unlawful to cause, induce or procure any person to execute such a contract or instrument, or cause, induce or procure any person to give, pay, transfer or deliver any money or thing of value in payment, satisfaction, settlement or compromise of any such claim or cause of action, or to receive, take or accept any such money or thing of value as such payment, satisfaction, settlement or compromise.

It shall be unlawful to commence or cause to be commenced, either as party or attorney, or as agent or otherwise in behalf of either, in any court of this state, any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same shall have been executed within or without this state.

This section shall not apply to the payment, satisfaction, settlement or compromise of any causes of action which are not abolished or barred by this chapter, or any contracts or instruments executed prior to June 27, 1935, or to the bona fide holder in due course of any negotiable instrument executed since that date.

2A:23-5. Violations of chapter, misdemeanor; fine or imprisonment

Any person who shall violate any of the provisions of this chapter shall be guilty of a misdemeanor, which shall be punishable by a fine not exceeding $1,000, or by imprisonment for not more than 1 year, or by both such fine and imprisonment.

2A:23-6. Construction of chapter

This chapter shall be liberally construed to effectuate the objects and purposes thereof and the public policy of the state as hereby declared.

2A:23-7. Laws not affected

Nothing contained in this chapter shall be construed as a repeal of any of the provisions of the penal law or the criminal procedure law or of any other law of this state relating to criminal or quasi-criminal actions or proceedings.

Proposed:

N.J.S. 2A:23A-1. Certain causes of action abolished

a. The rights of action formerly existing to recover damages for the alienation of affections, criminal conversation, seduction or breach of contract to marry were abolished from June 27, 1935. No act done after that date shall give rise to any of the rights of action abolished. Contracts and instruments executed after June 27, 1935, in payment, satisfaction, settlement or compromise of a claim or cause of action abolished are contrary to the public policy of this state and absolutely void.

b. It shall be unlawful for any person, either as a party or attorney, or an agent or other person in behalf of either, to cause to be filed or served any process or pleading seeking to recover damages on any cause of action barred by this section. It shall also be unlawful for any person to threaten to take any of those prohibited actions. It shall be unlawful to induce any person to execute a contract or instrument, or to give, pay, transfer or deliver any money or thing of value in payment, satisfaction, settlement or compromise of a prohibited claim or cause of action, or to receive, take or accept any such money or thing of value as such payment, satisfaction, settlement or compromise.

c. Any person who violates any of the provisions of this section shall be liable for damages caused and to an additional penalty of not more than $1,000 for each offense.

COMMENT

These causes of action have been abolished and Staff recommends that all but a single statute combining the prohibitions and sanctions of the other statutes in the section be repealed. *N.J.S.* 2A:23-2 states that "[n]o act done in this state after June 27, 1935" will give rise to any of the rights of action abolished by this chapter, nor will any "contract to marry made or entered into in this state after June 27, 1935" give rise to any action or right of action for the breach thereof. Even if one was married before 1935, no act by a person today could give one a right to sue for alienation of affections, breach of contract to marry, or criminal conversation and seduction.

This makes the old causes of action nullities but later statutes in this section make it unlawful to serve process on someone for one of the abolished causes of action, *N.J.S.* 2A:23-3, or to extract a settlement from someone based on one of these causes of action *N.J.S.* 2A:23-4. Under *N.J.S.* 2A:23-5, those who do serve process or extract settlements using one of these abolished causes of action are guilty of a misdemeanor and punishable "by a fine not exceeding $1,000, or by imprisonment for not more than 1 year, or by both such fine and imprisonment." Because the state has an interest in preventing harassment with frivolous litigation and in preventing fraudulent inducements to make settlements, deterrent provisions arguably remain necessary. *See e.g., McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. 546 (1993).

The Commission has long taken the view that the criminal code and the offenses therein should remain separate from civil causes of action so, in this section, a penalty equal to the old criminal penalty was retained, but decriminalized. If the Commission wishes to retain the criminal penalty, the phrase "disorderly persons offense" should replace "misdemeanor" in the statute.

C. N.J.S. 2A:32-1 – Debts or obligations fraudulently incurred

The existing language of the statute is followed by the proposed language.

Current:

N.J.S. 2A:32-1 Debts or Obligations Fraudulently Contracted or Incurred

Whenever there is fraud in the execution or consideration of a contract, the person defrauded at any time thereafter may institute a civil action, to recover the money owing on such contract although, by its terms, the debt contracted or the money secured to be paid thereby is not then due or payable; and the person defrauded may, upon discovery of the fraud, either rescind the contract entirely and recover the money or property obtained by the fraud, or, sue on the contract to recover thereon.

The plaintiff in such an action shall have all rights to which he would be entitled if the debt or obligation was due and payable at the time of the commencement of the action.

Proposed:

a. Whenever there is fraud inducing a person to enter into a contract or fraud in the performance of a contract, the person defrauded may institute a civil action to recover the money owed on the contract. The action may be instituted even if the debt contracted or the money secured by the contract is not yet due or payable. The person defrauded may, upon discovery of the fraud, either rescind the contract entirely and recover the money or property obtained by the fraud or sue on the contract to recover damages for the fraud inflicted.

b. The plaintiff in such an action shall have all rights to which the plaintiff would be entitled if the debt or obligation was due and payable at the time of the commencement of the action.

COMMENT

The source statute originally began "[w]henever there is fraud in the execution or consideration of a contract." A fair understanding of this wording is that a plaintiff may sue for what is commonly known as fraud in the inducement—fraud which led the plaintiff to execute a contract with the defendant—and fraud in the performance—fraud in the performance of the consideration required. The growth in acceptance of the economic loss doctrine—that one cannot recover in tort for purely economic loss—has, however, led federal courts in New Jersey to rule that a plaintiff cannot recover for breach of contract and fraud in the performance, even though plaintiffs can still recover in federal court for fraud in the inducement. The statute's language has been altered to be more explicit about a plaintiff's ability to recover for breach of contract and *either* fraud in the performance or fraud in the inducement.

That a plaintiff could sue, in addition to breach of contract, for either fraud in the inducement or fraud in the performance has long been the law of New Jersey. For example, in *Seidel v. Peckshaw*, 27 *N.J.L.* 427, 427 (Sup. Ct. 1859). In *Seiden v. Fishtein*, 44 *N.J. Super*. 370, 376 (App. Div. 1957), one of the first cases to consider a claim of fraud in the performance of a contract after the 1947 reorganization of the New Jersey courts, the Appellate Division sustained the attachment of the assets of a partner who knowingly withheld his share of a partnership's revenues while also falsely denying the existence of said revenues. *See also Fidelis Factors Corp. v. Du Lane*

Hatchery, Ltd., 47 *N.J. Super*. 132 (App. Div. 1964) (holding corporate officer personally liable for fraud in the performance based on his actions in an ongoing loan transaction); *Hamilton v. Schwadron*, 82 *N.J. Super*. 493, 497 (App. Div. 1964) (holding that fraud arose, not from the defendant jeweler's "initial representations", but from his "fraudulent conversion arising out of a bailment contract" where he valued a ring for more than he knew it to be worth); *Allied Financial Corp. v. Steel Panel Sales Corp.*, 86 *N.J. Super*. 65, 75 (App. Div. 1964), *certif. den*. *Allied Financial Corp. v. Financial Associates, Inc.*, 44 *N.J*. 411 (N.J. 1965) ("Contrary to the law in some other states construing similar language, it need not be shown that the original consensual agreement was contemporaneous with the fraudulent design of the defendant, as might appear from a cursory reading of the statutory language and as was held in some of our earlier cases.").

In *First Valley Leasing, Inc. v. Goushy*, the federal court allowed a fraud in the performance claim to be pleaded alongside a breach of contract claim "because of the difference between the remedy provided for in a fraud cause of action and the remedy available in a breach of contract case." 795 F.Supp. 693, 699-700 (D. N.J. 1992). The Appellate Division lent further credence to the reasoning and holding of *First Valley Leasing* by holding in *D'Angelo v. Miller Yacht Sales* that, under *N.J.S.A.* 12A:1-103, the U.C.C. "preserves non-Code claims for fraud." 261 *N.J. Super*. 683 (App. Div. 1993). The apparent clarity that *First Valley Leasing* and *D'Angelo* provided, however, was short-lived.

In *Lo Bosco v. Kure Eng'g Ltd.*, the federal court took the position that what mattered was whether the alleged fraudulent conduct was "extraneous" to the contract. 891 *F. Supp*. 1020, 1032 (D.N.J. 1995). The court in *LoBosco* read *First Valley Leasing* as endorsing a view that judges should determine whether a dispute is "essentially contractual in nature," even where the elements of fraud also exist. 891 *F.Supp*. at 1032. Recent cases on the subject have only perpetuated the reliance of the federal courts on federal precedent and state cases that allow fraud in the inducement claims as evidence that fraud in the performance claims are barred. *See Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co.*, 226 *F.Supp.2d* 557, 563 (D.N.J. 2002).

The Third Circuit has said very little about the issue of pleading fraud in the performance where contractual remedies exist in New Jersey. When it has faced the issue, it has opted not to certify the question to the state Supreme Court for a final answer. In *Gleason v. Norwest Mortgage, Inc.*, 243 F.3d 130 (3d Cir. 2001), the court stated that the "New Jersey District Courts still hold that fraud claims not extrinsic to underlying contract claims are not maintainable as separate causes of action. New Jersey courts have not agreed with the District Courts' interpretation of *Spring Motors*. The New Jersey Supreme Court has not decided the issue. We will avoid predicting New Jersey law by deciding the fraud issue on its merits…" 243 *F.3d* at 144 (citations omitted).

Between the district courts of New Jersey and the Third Circuit, the issue of whether fraud in the performance can be pleaded alongside breach of contract has been decided overwhelmingly on the basis of federal precedent. Where state cases have been used, they have been used largely to demonstrate that the presence of court opinions allowing fraud in the inducement claims where a contractual or warranty remedy existed necessarily meant that the courts of New Jersey opposed claims for fraud in the performance. The federal courts have not taken into account the binding and persuasive state cases to the contrary. Thus, clearer language in the statute giving rise to the cause of action for fraud arising from a contract is appropriate.

D. N.J.S. 2A:38-1 – Fire alarm system damages

The following language is the current language. Staff recommends deletion of this section but will revise the language if the Commission wished to maintain civil liability for tampering with municipally-owned fire alarm systems, such as those in schools or city halls.

Current:

N.J.S. 2A:38-1 (Liability for Damages Caused to Fire Alarm Systems)

Any person who wrongfully damages, tampers, or interferes with a municipal or other public fire alarm system, or any part thereof, shall be liable for the damages directly or indirectly caused thereby, recoverable in a civil action by the person injured or damaged.

COMMENT

This section should be repealed. Drafted in 1898, the reference to "municipal or other public fire alarm system" had a specific meaning that is no longer relevant in most communities today. In the nineteenth and early twentieth centuries, municipalities in New Jersey installed fire alarm boxes around their towns so that people who spotted a fire could ring the alarm and summon aid. The boxes were installed at a time when most people did not have telephones. Over time, nearly every home had a telephone and, by the 1980s, the 9-1-1 emergency system was developed and implemented everywhere in New Jersey as the primary means of communicating a fire or other emergency. In many towns, the fire alarm boxes remain, but are often mere relics that do not function. In other towns, such as Millburn, in Essex County, the boxes had functioned as a recently as March, 2009, but were removed once the fire department determined that they had long since passed their usefulness. *See, e.g.,* "Town Fire Boxes Going Away," MILLBURN-SHORT HILLS PATCH, Feb. 23, 2009. Because the day of the public fire alarm is long gone nearly everywhere in New Jersey, the statute no longer has much of a purpose.

Additionally, the more recently drafted Criminal Code makes tampering with fire systems owned by a municipality a crime. *N.J.S.* § 2C:33-3 (false public alarms) and *N.J.S.* § 2C:17-3 (criminal mischief). This may indicate a desire on the part of the legislature to make such tampering a criminal penalty only and, since a judge in a criminal matter can order restitution where damage to property is done, the purpose of the civil statute can be achieved with the criminal statutes alone. Thus, even if the statute can be reworded to more relevant to the modern reality of fire alarms, it is still preferable to repeal the entire statute.

E. N.J.S. 2A:41-1 – Arrest or detention of mentally incapacitated persons

The current statutory language is followed by proposed language.

Current:

N.J.S. 2A:41-1 Idiots and Lunatics; Discharge from Arrest on Civil Process

No idiot or lunatic, during the time of his lunacy, shall be committed or detained in prison for want of bail, or his body taken in execution in any civil action, or in any action for a penalty. In case any idiot or lunatic shall be arrested and detained in custody in any civil action, contrary to this section, he shall be discharged, on motion, by the court out of which the process on which he is so held issued, or upon a writ of habeas corpus.

Proposed:

No mentally incapacitated person, during the time of the incapacity, shall be committed or detained in custody in any civil action, or in any action for a penalty. If any mentally incapacitated person is arrested and detained in custody in any civil action, contrary to this section, the person shall be discharged by the court on motion or upon a writ of habeas corpus.

COMMENT

This statute, though it explains a basic legal principle (i.e., that the mentally incapacitated should not be jailed in civil actions), contains terms that are considered pejorative. Consistent with the Commission's DRAFT REPORT RELATING TO REPLACEMENT OF PEJORATIVE TERMS REGARDING MENTAL CAPACITY, "idiot or lunatic" was changed to "mentally incapacitated" and "lunacy" to "mental incapacity."

F. N.J.S. 2A:47-1 – Lost or destroyed instruments

The current statutory language is followed by proposed language.

Current:

N.J.S. 2A:47-1 Lost or Destroyed Instruments

The existence of any lost or destroyed deed or other instrument relating to title or real or personal property may be established by judgment in the superior court in an action brought in a summary manner or otherwise.

Proposed:

The existence of any lost or destroyed deed or other instrument relating to title or real or personal property may be established by judgment, proved by clear and convincing evidence, in the superior court in an action brought in a summary manner or otherwise.

COMMENT

This statute was revised to include the "clear and convincing" standard as the burden of proof. This addition was made consistent with the case law regarding missing or destroyed instruments, which require clear and convincing evidence. *See Zuckermandel v. Zuckermandel,* 135 *N.J. Eq*. 598 (Ch. 1944). Such a standard is also consistent with the Legislature's requirement of clear and convincing evidence to prove oral leases and real estate transfers under the revised Statute of Frauds. *See, e.g., N.J.S.* 25:1-12(b) and -13(b).

G. N.J.S. 2A:48-1 and 2A:48:8 – Injury of loss from mob violence or riots

The current statutory language of these two sections is followed by proposed language for a single consolidated section.

Current:

N.J.S. 2A:48-1 Property Loss from Mob Violence or Riots in General

When, by reason of a mob or riot, any property, real or personal, is destroyed or injured, the municipality if it has a paid police force, in which the mob congregates or riot occurs, or, if not in such a municipality, the county in which such property is or was situate, shall be liable to the person whose property was so destroyed or injured for the damages sustained thereby, recoverable in an action by or in behalf of such person, in an amount not to exceed $10,000.00 for the aggregate of damage done to all such property, both real and personal, at each separate location within a municipality; provided, however, that no person, and no subrogee of such person, having insurance coverage in whole or in part for the said destruction or injury, shall have a cause of action against such municipality or county at common law or pursuant to the provisions of this act. For the purpose of this section, insurance coverage means insurance obtained through any source whatsoever, including insurance purchased through any insurance pool, placement facility, plan of operation, or any other plan established pursuant to Federal or State law.

N.J.S.A. 2A:48-8 Injury to Property or Person or Loss of Life from Mob Violence

Any person who, by reason of the action of a collection of individuals--five or more in number--assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of the violation of a law, or for the purpose of exercising correctional powers or regulative powers over any person, by violence and without lawful authority, suffers material damage to his property or injury to his person, shall be entitled to recover his damages in an action brought for such purpose against the municipality in which such damage

is suffered or injury inflicted, if the municipality has a paid police force, or, if not in such municipality, then, against the county in which such damage is suffered or injury inflicted, but not in excess of $5,000. Where the provisions of article 1 of this chapter are also applicable and allow a recovery for the damage to property, the person entitled to such damages may elect to maintain his action for damages to his property under either this article or under article 1 of this chapter, but he may not recover under both articles for the same damages to property.

Proposed:

a. When any real or personal property is destroyed or injured by reason of a mob or riot, in a municipality that has a paid police force, the municipality shall be liable for an amount not to exceed $10,000 for the aggregate of damage done to all property to persons whose property was so destroyed or injured.

b. When any real or personal property is destroyed or injured by reason of a mob or riot, in a municipality that does not have a paid police force, the county in which the property was located shall be liable for an amount not to exceed $10,000 for the aggregate of damage done to all property to persons whose property was so destroyed or injured.

c. No person, and no subrogee of a person whose real or personal property is destroyed or injured as described in this section, who has insurance coverage in whole or in part for the destruction or injury, shall have a cause of action against a municipality or county at common law or pursuant to the provisions of this Act. For the purpose of this section, insurance coverage means insurance obtained through any source whatsoever, including insurance purchased through any insurance pool, placement facility, plan of operation, or any other plan established pursuant to Federal or State law.

d. Any person who suffers personal injury by reason of a mob or riot, shall be entitled to recover damages, up to $10,000, in an action:

1) against the municipality in which such damage is suffered or injury inflicted, if the municipality has a paid police force; or

2) against the county in which such damage is suffered or injury inflicted where the municipality does not have a paid police force.

COMMENT

This section consolidates 2A:48-1 and 2A:48-8, both of which were in need of modification for the sake of clarity. Subsections (a) and (b) now state the two contexts in which suit may be brought; i.e., where property is in a municipality with a paid police force or where it is in a municipality without one. Subsection (c) states a condition of suit that is common to both subsection (a) and (b).

If the Commission decides to retain these statutes, it may wish to consider raising the monetary limit since properties are worth far more now than they were when the bill was enacted in 1969.

Subsection (d) is the former 2A:48-8. The language was modified to use the same language as the more recently drafted 2A:48-1 "mob or riot" rather than the language currently found in 2A:48-8, which reads: "Any person who, by reason of the action of a collection of individuals--five or more in number--assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of the violation of a law, or for the purpose of exercising correctional powers or regulative powers over any person, by violence and without lawful authority…" The dollar limit is $5,000 in the current statute and was also modified, and raised to match the limit in 2A:48-1 since it did not appear rational that an individual would receive a lesser amount

for personal injuries than for an injury to property. But, as with 2A:48-1, 2A:48-8 was drafted in 1923 and last amended in 1934 and $5,000 at that time is about $80,000 today.

H. N.J.S. 2A:48-1 and 2A:48:8 – Recovery of money or property of municipality or school district

The current language is followed by the proposed language below.

Current:

N.J.S. 2A:49-1 Money or Property of Municipality or School District; Recovery

If moneys, funds or other property held or owned by any municipality or school district, or held or owned officially or otherwise for or on behalf thereof, have been or shall be, without right, obtained, received, paid, converted or disposed of, action for the recovery thereof or to recover damages or other compensation for such wrongful obtaining, receiving, paying, conversion or disposition, or both, may be maintained in any court of competent jurisdiction thereof, by 10 freeholders of such municipality or district who have paid taxes on real estate in such municipality or school district, within 1 year, in the name of and for and on behalf of such municipality or school district. Before any such action shall be maintained, such freeholders shall file with the clerk of such municipality or school district, a bond to the municipality or school district conditioned for the payment of the costs, if any, assessed against such municipality or school district, in said action, approved as to form and amount by a judge of the court in which such action is brought.

Proposed:

a. Where money or other property held or owned by any municipality, local government entity or school district are wrongfully obtained, received, paid, converted or disposed of, an action for recovery or to recover damages for the wrongful acts may be maintained by ten or more residents or property owners of the municipality or district.

b. Any property owner maintaining an action against a municipality, local government entity or school district under this section must have paid taxes on real estate in the municipality or school district within one year.

c. Before any such action is maintained, the residents or property owners shall file with the clerk of the municipality, local government entity or school district, a bond conditioned for the payment of the costs, if any, assessed in said action, approved as to form and amount by a judge of the court in which the action is brought.

COMMENT

This statute was revised largely for clarity. A single paragraph was broken into three subsections and repetitive and unnecessary language was removed. The term "freeholder" was replaced with "resident or property owner" to ensure that all residents, not merely those owning property in the municipality, could maintain a cause of action. Freeholder, aside from being an antiquated term for landholder, is confusing since New Jersey has boards of "chosen freeholders" in counties that act as local legislators. The term "local government entity" was added to ensure that cross-municipality entities, like sewer districts, were included in the group of entities that could be sued.

I. N.J.S. 2A:48-1 and 2A:48:8 – Change of name

The following language is the current language although the final sentence of the section has been deleted as explained below.

Current/Proposed:

N.J.S. 2A:52-1 Action for change of name; complaint; contents; service

Any person may institute an action in Superior Court, for authority to assume another name. The complaint for a change of name shall be accompanied by a sworn affidavit stating the applicant's name, date of birth, social security number, whether or not the applicant has ever been convicted of a crime, and whether any criminal charges are pending against him and, if such convictions or pending charges exist, shall provide such details in connection therewith sufficient to readily identify the matter referred to. The sworn affidavit shall also recite that the action for a change of name is not being instituted for purposes of avoiding or obstructing criminal prosecution or for avoiding creditors or perpetrating a criminal or civil fraud. If criminal charges are pending, the applicant shall serve a copy of the complaint and affidavit upon any State or county prosecuting authority responsible for the prosecution of any pending charges.

COMMENT

This statute has been revised to excise the last sentence regarding the knowing giving of false information to the court which currently reads: "A person commits a crime of the fourth degree if he knowingly gives or causes to be given false information under this section." The Commission has long taken the view that the criminal code and the offenses therein should remain separate from civil causes of action. Moreover, the provision in this statute making the giving of false information to the court a crime of the fourth degree has been superseded by the criminal code. The crimes of perjury, *N.J.S.* 2C:28-1(a), or false swearing, *N.J.S.* 2C:28-2, cover the offense stated in the final sentence of this statute. Perjury in New Jersey includes the making of "a false statement under oath or equivalent affirmation" where the statement is material and the affiant does not believe the statement to be true. False swearing includes any material statement made under oath or equivalent affirmation where the affiant "does not believe the statement to be true." Perjury is a crime of the third degree, while false swearing is a crime of the fourth degree. Because either crime would include a person knowingly giving, or causing to be given, any materially false information to a judge for the purpose of a name change, those statutes are better suited to meting out criminal sanctions for misuse of this cause of action. As such, the final sentence of this statute was struck.

J. N.J.S.A. 2A:48-1 and 2A:48:8 – Naturalization

The following language is the current language. Staff recommends deletion of these sections for the preemption issue explained below.

Current:

N.J.S. 2A:53-1

The Superior Court shall have jurisdiction of declarations of intention, and of applications of aliens to become citizens of the United States.

N.J.S. 2A:53-2

No person shall be naturalized or admitted to be a citizen of the United States by any such court within 30 days next preceding any national, state, municipal, general, special, local or charter election.

An applicant who may become eligible to citizenship during such period of 30 days, shall not be prevented from receiving a certificate of naturalization and citizenship on the proper day during such period, if the application shall have been made and allowed prior to the commencement of the period of 30 days.

N.J.S.A. 2A:53-3

No political committee or committee of any political party, and no person who has received or accepted a nomination for a political office, shall pay or promise to pay any money to or on behalf of a person for fees for the declaration or application for naturalization, for services as attorney or counsel or otherwise assisting or enabling a person to make the declaration or application.

Any person convicted of violating the provisions of this section shall, upon conviction thereof, be punished by a fine of not less than $500 nor more than $1,000.

N.J.S.A. 2A:53-4

Any clerk or other person who records or files a declaration or application in any case of naturalization, or issues a certificate in any such case in violation of the provisions of this chapter, shall be punished by a fine of $100.

COMMENT

This set of statutes on naturalization has been preempted by federal law. The "power to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica,* 424 *U.S.* 351, 353 (1976). Through the Immigration and Nationality Act ("INA"), 8 *U.S.C.* § 1101 to § 1537, Congress has delegated the administration and enforcement of the immigration and naturalization laws to the Attorney General of the United States. *See Public Serv. Elec. & Gas Co. v. Werline*, 322 *N.J.Super*. 216, 220 (App.Div.1999) (citing 8 *U.S.C.* § 1103).Under 8 *U.S.C.* § 1421(a), the "sole authority to naturalize citizens is conferred upon the [United States] Attorney General." The naturalization process is streamlined in 8 *C.F.R.* § 310, with 8 *C.F.R.* § 310.2 stating that applicants for citizenship shall apply through the United States Citizenship and Immigration Service.

To the extent the Superior Court has any jurisdiction, it lies in the ability to swear in new citizens once the Attorney General approves their application. 8 *U.S.C.* § 1421(b). While state courts may interpret and enforce federal immigration statutes, *see, e.g., In re Jose C.*, 198 *P.3d* 1087, 1097 (Cal. 2009), *cert. den. sub nom Jose C. v. California*, 129 *S.Ct*. 2804 (2009) and state legislatures may enact laws that regulate immigrants in certain ways, *Graham v. Richardson*, 403 *U.S*. 365, 372-373 (1971), the legislative ability to determine who can and cannot become a citizen is not within the authority of the state legislature. *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*, 352 *N.J.Super*. 44, 76 (App. Div. 2002); *accord Nyquist v. Mauclet*, 432 *U.S.* 1, 10 (1977) (holding that control over immigration is entrusted to the federal government and a state has no power to interfere). Because these statutes regulate who can and cannot become a citizen, they are preempted by Federal law and need to be repealed.