

**REPORT AND RECOMMENDATIONS  
RELATING TO DISTRAINT/ARTISANS' LIENS**

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NEW JERSEY LAW REVISION COMMISSION  
153 Halsey Street, 7th Fl., Box 47016  
Newark, New Jersey 07101  
973-648-4575  
(Fax) 973-648-3123  
Email: [njlr.com](mailto:njlr.com)  
Web site: <http://www.njlr.com>

## Preamble

### I. Distress

Distress, the act of distraining (seizing) a tenant's goods to satisfy an arrears of rent, is a common law right of the landlord exercised in a nonjudicial proceeding. New Jersey statutes have regulated distraint since 1795. The current statutes, N.J.S. 2A:33-1 to -23, derive from the 1877 compilation with one exception: 2A:33-1 was amended in 1971 to prohibit distrains for money owed on residential property.

New Jersey distress statutes violate federal constitutional standards protecting ownership of property. Callen v. Sherman's, Inc., 92 N.J. 114 (1983). (Conduct of a landlord distraining commercial tenant's goods for nonpayment of rent in conjunction with constable's locking of the tenant's store constituted state action and deprivation of property under the Fourteenth Amendment; statute lacked requirement of notice and hearing before distraint.) Although the Court stated that reading the statute in conjunction with R. 4:52-1(a) governing an order to show cause would satisfy due process requirements, the distress statutes have never been amended to cure their constitutional defects. It is inappropriate to rely on court rules to make the statutes constitutional as applied. The proposed provisions provide constitutionally required pre-judgment notice and hearing and a procedure for self-help in extraordinary circumstances. R. 4:52-1 through -6, which govern injunctions, can then serve their appropriate function or providing detailed procedural guidance.

The proposed revisions encompass two additional statutes regarding hotels and lofts which, like the distress statutes, allow landlords to distraint and sell property of lessees who owe rent without judicial hearing. From a policy standpoint, it is appropriate that all distraint be governed by a single set of rules.

The scope of the proposed provisions does not extend to premises used solely as a residence, nor to goods in leased spaces which are covered by other statutes. Specific examples are: self-service storage facilities (N.J.S. 2A:44-187 through -192), safe deposit boxes (N.J.S. 2A:30B-45 through -67), motor vehicles (N.J.S. 2A:44-20 through -31), and boats (N.J.S. 2A:44-57 through -63).

### II. Artisans Liens

Six New Jersey statutes establish liens for storage of, or work done on, goods which one person (owner) entrusts to another (lienor) who performs the service: N.J.S. 2A:44-19.1 through -19.9, Dry Cleaning, Laundering and Tailoring Businesses; N.J.S. 2A: 44-20 through -31, Garage Keepers and Automobile Repairmen; N.J.S. 2A:44-51 through -52, Livery Stables, and Boarding and Exchange Stable Keepers; N.J.S. 2A:44-157 through -164, Processors of Goods; N.J.S. 2A:44-169 through -173, Processors of Motion Picture Films; N.J.S. 2A:44-174 through -177, Watch and Jewelry Repairmen.

Four of the statutes allow the lienor to detain or retain the goods if the fee for the service has not been paid. One statute allows seizure of already released goods. Four of the statutes (including two not specifying detention) allow the lienor to sell goods which are not paid for after they are ready. The statutes vary regarding how notice of sale is given to the owner and to the public, the type of sale, when a sale may occur, and distribution of proceeds remaining after lien, expenses and owner are paid.

Two of the statutes require rather than allow sales. Both have been held unconstitutional. The Garage Keepers Lien Act provides for mandatory public sale of an automobile if the indebted

owner does not post either the full amount of the disputed garage bill or a double bond, with court costs. The mandatory public sale procedure was held "unconstitutional under the Fourteenth Amendment in failing to afford all automobile owners the opportunity to be heard judicially prior to divestment of title." Whitmore v. N.J. Div. of Motor Vehicles, 137 N.J. Super. 492, 500 (Ch. Div. 1975). The other mandatory sale lien statute, the Stableman's Lien Act, was held unconstitutional in White Birch Farms v. Garritano, 233 N.J. Super. 553, 557-558 (Law Div. 1987).

The six New Jersey lien statutes pertain to a variety of goods and provide disparate procedures for dealing with common issues. This proposed statute replaces all but one of these statutes and provides a uniform method for dealing with all similar situations which may arise in the future. In allowing rather than requiring, sale of marketable goods, the proposed statute avoids state action which could trigger Fourteenth Amendment concerns, and permits either party in dispute to bring an action involving notice and an opportunity to be heard judicially prior to divestment. The one statute not replaced by this proposal is Garage Keepers and Automobile Repairman. The Commission recommends repeal of the current statute and amendment of the Abandoned Motor Vehicles laws, N.J.S. 39:10A-8 through 39:10A-20. Change in ownership of motor vehicles and boats requires adherence to certificate of title requirements which the proposal does not encompass. Motor vehicles and boats excluded from the proposal.

Distress and lien statutes are distinguishable in terms of the legal nature of the parties' relationship, subject of the relationship, use of space involved, and expectation and behavior of the parties.

The legal basis of distraint is a landlord-tenant relationship. Real property must be leased by a landlord to a tenant and rent charged before an arrears of rent can ever occur. The subject of the lease is the landlord's real property. The tenant leases the landlord's space to use for the tenant's purposes. A tenant could lease space and do nothing within it, or as is more likely, lease space, bring in stock, supplies or equipment, and engage in some enterprise. But unless the landlord leases space to the tenant, no relationship arises which could lead to the process of distress. And, once the lease is signed, rent is due whether or not the tenant uses the space.

An artisan's lien arises when a customer brings personal property owned by the customer to an artisan to be serviced (including stored) and does not pay the agreed upon amount at the agreed upon time. The legal basis is contractual between the owner and the lienor. The subject of the contract is the customer's personal property without which the lienor can perform no service. No opportunity for non-payment can arise unless the customer first entrusts personal property to the lienor.

Distress can occur only after rent has not been paid for rented premises. A lien for unpaid services, however, may arise irrespective of the premises where the services are performed. For example, a launderer may send shirts out to another location to be washed and ironed. The servicing of the shirts entrusted to the launderer, not the location at which the servicing occurs, is at issue in the lien situation. This contrasts with a distress situation in which the leased real property belonging to the landlord is the subject of the legal relationship.

The parties' expectation and behavior differ in distress and lien situations. In distress, the leased property is for the tenant's exclusive use. The parties expect the tenant to carry on whatever activity occurs within the leased property without the interference of the landlord. While a landlord (as in a hotel) may have access to the leased space, use of the space is limited to the tenant. The landlord collects rent for leasing space to the tenant who uses the space for the tenant's purposes.

In an artisan's lien situation, the parties expect the customer to temporarily give possession of personal property to the lienor who performs specified services. The customer does not have access to the property while it is being serviced.

The proposed statute deals with Distress in sections 1 through 6 and with Artisans Liens in section 7 through 13.

## Distress

### **Section 1. Exclusions**

This chapter does not apply to:

- a. premises used solely as a residence, or
- b. goods stored in leased space covered by another statute, including: self-service storage facilities (N.J.S. 2A:44-187 through -192), safe deposit boxes (N.J.S. 46:30B-45 through -67), motor vehicles (N.J.S. 2A:44-20 through -31), and boats (N.J.S. 2A:44-57 through -63).

Source: New

#### COMMENT

The limitation on use of distraint in residential premises, subsection (a) follows existing law. The limitations of subsection (b) recognize that the particular situations listed are unusual, and the Legislature has provided special provisions to deal with the particular problems involved.

### **Section 2. Lien of creditor upon debtor's property**

a. A creditor who is owed rent for any leased realty including a room in a hotel or space for storage, other than premises used solely as a residence shall have a lien upon the debtor's property in an amount equivalent in value to the rent past due.

b. Liened property shall be limited to property that:

- 1) is located within the leased premises, or
- 2) has been removed from the leased premises by the debtor to evade seizure.

Source: New (based on N.J.S. 2A:33-1, 2A:44-47 and -48, 2A:44-165 and -166)

#### COMMENT

The use of the words "creditor" and "debtor" rather than "landlord" and "tenant" expands the scope of the chapter beyond the current distress statutes (N.J.S. 2A:33-1 through -23). This new section encompasses two additional statutes: "Hotel Keepers" (N.J.S. 2A:44-47 through -50), and "Loft Act" (N.J.S. 2A:44-165 through -168).

### **Section 3. Order for enforcement of lien through seizure; satisfaction of judgment**

a. The Superior Court may enter an order for enforcement of the lien through seizure of the debtor's property by the creditor if the Court finds that:

1) the debtor has received notice of the application and of the date of the hearing,  
or

2) a creditor probably will suffer immediate or irreparable damage before notice to the debtor and a hearing can occur.

b. If the creditor obtains judgment for rent, the property ordered seized may be used to satisfy the judgment.

Source: New (based on R. 4:52-1(a) and N.J.S. 2A:33-10, 2A:44-49, 2A:44-167)

#### **COMMENT**

By requiring that notice and hearing occur prior to distraint, subsection (a) of this new section based on R. 4:52-1(a) corrects the deficiencies of the current statutes. This section was codified to a limited extent in N.J.S. 2A:33-10 which requires a minimum level of public notice prior to sale.

### **Section 4. Self-help by creditor**

a. In the extraordinary case where the creditor reasonably believes that the debtor is likely to remove or destroy the property before a court order can be obtained, the creditor may seize the debtor's property before obtaining a court order.

b. At the time the creditor seizes the property, the creditor shall leave notice for the debtor at the leased premises, and shall file notice of the seizure with the court within 48 hours.

c. Upon the debtor's request, the court, within 10 days, shall hold a hearing to determine whether an order allowing the creditor to continue to hold the seized property should be entered.

Source: New

#### **COMMENT**

This new section detailing permissible self-help in limited instances is based on Callen v. Sherman's Inc., 92 N.J. 114, 137 (1983):

"In the extraordinary case, e.g., where the landlord learns that a tenant is loading his goods onto a truck to avoid a just claim, the landlord may still resort to self-help. The need for relief in these circumstances is so compelling that a landlord need not seek judicial approval before availing himself of the statute. A post-deprivation hearing ... will satisfy the need for due process. ..."

(Citations omitted)

### **Section 5. Reclaiming seized property**

a. A debtor may apply to the court to reclaim seized property that is exempt by law from execution on a judgment or is otherwise wrongly seized.

b. A third party may apply to the court to reclaim seized property:

- 1) which belongs to the third party, or
  - 2) in which the third party has rights superior to those of the creditor.
- c. Reclaimed property may not be used to satisfy the creditor's judgment.

Source: New

#### COMMENT

The purpose of allowing a creditor to seize property is to provide the creditor with security for the rent owed. As a result, it is important to provide a mechanism for the debtor or other parties to reclaim property which should not be used for this purpose. Subsection a. allows the debtor to reclaim property which could not be used to satisfy a judgment. Subsection b. allows third parties, including secured creditors whose rights may be superior to that of a landlord, to enforce their rights.

### **Section 6. Limitation of seizure for rent**

A creditor may seize property as security for payment of no more than one year's unpaid rent accrued as of the date of seizure.

Source: 2A:33-7

#### COMMENT

This section continues the substance of its source; distraint may be used to provide security for no more than one year's rent.

## **Artisans Liens**

### **Section 7. Definitions**

- a. "Goods" means tangible personal property not subject to a certificate of title statute of this state.
- b. "Merchantable goods" are goods which can be sold in a recognized market in goods of that kind, provided that the sale is likely to yield the amount of the lien created by this chapter.
- c. "Good faith" is honesty in fact and the observance of reasonable commercial standards of fair dealing.
- d. "Notice" is given by one person to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not the other actually comes to know of it.

Source: New

#### COMMENT

The definition of four key terms results in streamlined provisions. The concepts are drawn from the Uniform Commercial Code and the terms should be read consistent with Code language.

The rights and liabilities of the lienor and of the owner of goods are patterned on the rights and liabilities of the secured creditor and of the debtor under Article 9 of the Uniform Commercial Code. The term "merchantable goods" defines those goods for which established markets exist for sale, lease or other disposition of the goods. There are two components: (1) a recognized market for disposition of the goods exists and (2) the sale or other disposition is likely to yield, at least, the value of the lien. For example, a used Rolex watch left at the jewelry repair

store is a merchantable good because the merchant with the lien may sell or otherwise dispose of the watch either to another merchant or to the public, and the disposition will produce the agreed cost of repair of the watch. Non-merchantable goods are those goods for which established markets for disposition likely to maximize the value of the good do not exist. For example, a market is unlikely to exist either privately among merchants or publicly by auction for the sale of three used shirts left at the dry-cleaners. In addition the costs of holding an auction for the sale of three used shirts would exceed the value of the goods. Therefore, such goods are "non-merchantable" within the meaning of this term.

The term "good faith" collapses two distinct Code concepts into one definition. N.J.S. 12A:1-201(19) and UCC 3-103(a)(7). The term embraces both the subjective "honesty in fact" standard and the objective commercial reasonableness standard. It is not further defined since the Code relies on judicial development of both concepts, and the Code definition applies here.

The term "notice" also follows the Code definition. N.J.S. 12A:1-201(26). As defined, notification does not require receipt by the owner of the goods, since often this may be impossible due to change of address. It would be commercially unreasonable to impose a duty of actual notification of an owner of goods prior to disposition. Hence, the lienor must only make reasonable attempts at notification. Specific methods of notice are not required as the concept is deliberately left flexible to adjust to changing circumstances.

## **Section 8. Exclusions**

This chapter does not apply to goods covered by another statute, including:

- a. motor vehicles,
- b. boats, or
- c. warehoused goods governed by Article 7 of the Uniform Commercial Code, N.J.S. 12A:7

Source: New

### **COMMENT**

The limitations provided by this section recognize that the particular situations listed are unusual, and the Legislature has provided special provisions to deal with the particular problems involved.

## **Section 9. Right of lien; retention of liened goods**

a. A person who receives possession of goods owned by another under contract to service or store them during which time the owner does not have access to the goods, has a lien on:

(1) the goods serviced or stored by the lienor while those goods are in the lienor's possession, and

(2) any other goods of the owner in the lienor's possession.

b. The amount of the lien is equal to the unpaid balance of the amount agreed between the owner and the lienor for the services or storage provided.

c. The lienor may retain the liened goods until the owner pays the amount of the lien.

### **COMMENT**

This section is a continuation of existing law

## Section 10. Disposition of marketable goods

a. If the amount of the lien remains unpaid for 90 days after the amount is due to be paid, the owner is in default.

b. After default by the owner, the lienor may dispose of marketable goods if:

(1) the lienor gives notice of the intended disposition to the owner and to any other secured party of whom the lienor has actual knowledge; and

(2) the owner or secured party fails within 30 days after notice is given, either to pay, dispute, or arrange to pay, the indebtedness.

c. Disposition of the lienor goods may be public or private. Every aspect of the disposition of the goods including the method, manner, time, place and term, shall be undertaken in good faith.

d. When a lienor disposes of goods after default, the disposition transfers to a purchaser for value all of the owner's rights, and discharges the lien and any subordinate security interest in the goods. If the lienor fails to comply with the requirements of this chapter, a purchaser acting in good faith nevertheless acquires all of the owner's rights and takes free of any subordinate security interest in the goods.

e. An owner of lienor goods may redeem the goods at any time prior to disposition of the lienor goods by paying the amount of the lien.

f. If the lienor, after default and notice, determines that the goods are non-marketable, the lienor may dispose of them as non-marketable goods without further notice.

Source: N.J.S. 2A:44-19.3, -19.5; 2A:44-52; 2A:44-160, -161; 2A:44-172; 2A:44-175, 2A:44-176; and 12A:9-504, 12A:9-506.

### COMMENT

This new provision allows, but does not require, sale or other disposition of goods following default and notice. Notice (to owner and any other secured party of whom lienor has knowledge), disposition and rights of parties are derived from UCC 9-504(3) and (4). Subsection (e) derives from UCC 9-506, the right of a debtor to redeem collateral after default. Subsection (f) is based on N.J.S. 44-19.5 which concerns dry-cleaning, laundering and tailoring: "If after reasonable effort the goods cannot be sold as provided by this act, they may be given away or otherwise disposed of as the holder thereof shall determine."

The provision works as follows. If payment of the agreed charges on goods is overdue for 90 days, the lienor may declare the owner of the goods in default. The lienor may then satisfy the lien by disposing of the goods in the market. To do so, the lienor first must notify the owner of the goods, and any secured creditor of which it has knowledge, of the default and of the lienor's intention to dispose of the goods. If within thirty days, the owner does not respond to the notice, then the lienor may dispose of the goods. Like the secured creditor, the lienor must conduct every aspect of the disposition in a commercially reasonable manner. Like the Code, the provision does not specify the method of sale and allows both public auctions and private markets. The standard of commercial reasonableness functions as a post-disposition audit of the method chosen.

If, as a result of an attempted disposition, the lienor determines that the goods are non-marketable, then the merchant may dispose of the goods in any manner without further notice to the owner. This provision is intended to protect the lienor who has difficulty classifying the category of goods.



## **Section 11. Proceeds of disposition of liened goods**

a. The proceeds of disposition of liened goods shall be applied in the following order:

(1) payment of the amount of the lien under which the disposition is made;

(2) payment of the reasonable expenses of the disposition; and

(3) payment of any indebtedness secured by a subordinate security interest in the goods, provided that the lienor has actual knowledge of the subordinate security interest.

b. Any proceeds of the disposition of liened goods remaining after the payments provided in subsection a. are made, shall be paid to the owner. If the owner cannot be found, the lienor shall forward the proceeds to the Treasurer of the State of New Jersey, as Administrator of the Uniform Unclaimed Property Act, N.J.S. 30B-1 et seq.

c. The owner is liable to the lienor for the amount of the lien which remains unpaid after application of the proceeds of disposition.

Source: N.J.S. 12A:9-504(1), (2)

### **COMMENT**

Subsection (a), the proceeds of disposition, is patterned on UCC 9-504(1). Subsection (c), owner's liability to lienor for deficiency, is based on UCC 9-504(2). The current lien statutes provide variously that the balance of the proceeds remaining after payment of the lien and expenses shall go to the treasurer of the municipality in which the business premises are located, for the support of the poor or for general purposes. Subsection (b) of the proposal uses the Uniform Act which has a well-structured scheme for managing such monies.

## **Section 12. Disposition of non-marketable goods**

a. If the amount of the lien on non-marketable goods remains unpaid for 90 days after the amount is due to be paid, the lienor may presume that the goods have been abandoned, provided that the lienor has given the owner prior notice of this policy. Notice of the policy may be given by prominent posting in the business premises, by printing on claim tickets or equivalent receipts, or by other reasonable means.

b. The lienor acting in good faith may dispose of abandoned non-marketable goods in any manner, unless the owner pays, disputes, or arranges to pay the amount of the lien.

Source: New

### **COMMENT**

This section seeks to balance the property rights of the owner with the commercial realities (time, space, expense) of the lienor. A shoe repairman should not have to store unclaimed shoes forever, nor notify each overdue owner by certified mail.

Any communication from the owner to the lienor will eliminate the presumption of abandonment. Either party may bring an action to deal with a disputed transaction.

### **Section 13. Lienor's liability for failure to comply**

a. If the lienor does not proceed in accordance with the requirements of this chapter, a court may order or restrain disposition of the liened goods. If disposition has occurred, and the lienor has failed to comply with this chapter, the owner or other person affected has a right to recover from the lienor any loss caused by a failure to comply with the requirements of this chapter.

b. The person claiming that the lienor failed to comply has the burden of persuasion.

Source: New

#### **COMMENT**

This new provision is derived from UCC §9-507. It provides the owner with a cause of action in damages against the lienor for failure to comply with the statute. Like the debtor, the owner bears the burden of proving that the lienor failed to comply with the technical requirements of this statute and of proving the unreasonableness of the disposition. Evidence that the disposition yielded the fair market value of the goods establishes the reasonableness of the disposition.