

## **MINUTES OF COMMISSION MEETING**

**February 20, 2014**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey, were Chairman Vito A. Gagliardi, Jr., Commissioner Andrew Bunn, and Commissioner Virginia Long (participating via telephone). Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner John J. Farmer, Jr. and Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Lawrence J. McDermott, Esq. and Gerard J. Felt, Esq. from Pressler and Pressler, LLP, were also in attendance.

### **Minutes**

The January Minutes were unanimously approved with Staff's proposed modification (on page 4, in the last line of the second-to-last paragraph, "from current law" to be changed to "from the draft") on motion of Commissioner Bunn, seconded by Commissioner Bertone.

### **Judgments and Enforcements**

After John Cannel presented the context for the current discussion, he focused on whether or not the debtor should face a penalty, such as the burden of costs, when the debtor has refused to allow a creditor in to investigate whether there is personal property available in his or her home. Commissioner Bunn asked what the current law is, and Mr. Cannel responded that there was no penalty in current law. The idea of a penalty comes instead from the Uniform Commercial Code. Commissioner Long commented that she would prefer not to have a penalty and that she believed that the Court got it right when it said that creditors should bear that burden. Commissioner Bunn said that he would prefer to follow current law unless there was a compelling reason to change it.

Next, Mr. Cannel raised the issue of whether sheriffs could enter people's homes only with a specific order to look for a particular item, or whether they could enter to look more generally. Chairman Gagliardi stated that he wanted the Commission to focus on the question of whether any Commissioner have a problem with allowing the sheriff to access a dwelling place to obtain a particular piece of property. There was consensus that no one objected to that. There was then an extensive discussion about whether this initial visit was to take place after a judge had issued instructions and it was determined that, in fact, the levy instructions in these situations are provided by the creditor's attorney, and can be either specific or general. At this point, two attorneys from the firm

of Pressler and Pressler, LLP, Mr. McDermott and Mr. Felt, were recognized to speak on these issues.

Mr. McDermott stated that the case of *Spiegel v. Taylor* dictated that no one can forcibly enter a home without a court order or permission and, therefore, sheriffs may not enter any home without permission or an order. Commissioner Bunn asked whether the debtor was ever held liable for the costs of the extra journey to the debtor's home occasioned by the refusal to admit the sheriff initially. Mr. McDermott replied that he had no knowledge of any such instance. Commissioner Bell asked whether there was any law on this topic at all, and Mr. McDermott said that there was not but that he has never heard of anyone being held financially liable for refusing to admit the collector. Mr. Felt then suggested that Legal Services' objection to the dwelling place investigation in this context stems from their concern that debtors would feel threatened by the sheriff, and by the potential that they would have to pay costs if they turn the sheriff away. Mr. McDermott said that it was his understanding that once inside, the sheriff may look into and open anything, including locked things. Commissioner Bunn then stated that if the sheriff is going to be able to destroy property, the sheriff should be doing so subject to a court order like a warrant. Commissioner Bertone asked whether a court order in this context usually specified whether the sheriff could search or open or break things. Commissioner Long said that it would seem that if you need permission to enter the home, then the search should also be limited by the scope of the consent. Commissioner Bell said that the individual should therefore have revocable consent.

Mr. Cannel asked whether that same rule or protection would apply to businesses as well as dwellings. Commissioner Bunn said that if the sheriff wants to enter someone's property, no matter the use, either consent or a court order should be required. Chairman Gagliardi stated that he thought we were focusing on dwellings because of the constitutional distinction between dwelling homes and other property. It was noted that there may be case law making distinctions as well. Commissioner Long pointed out that (c)(12) addresses non-dwellings. Commissioner Bell noted that there are different privacy concerns between dwellings and commercial structures, adding that he believed that Commissioner Bunn had identified a "floor", or lower threshold, of protections, but that perhaps the Commission should add more protections for homeowners (such as requirement that homeowners be informed of their rights). Commissioner Bunn said that the Commission should also consider the impact on rental properties, residencies, and storage units, because of the many different issues associated with the rights of those who own versus rent.

Mr. Felt raised a variety of other specific issues, including changes to (c)(2)(b), (3)(b), 8(d), and also a recommendation that c(16)(a) should be combined with (d). The next issue raised by Mr. Felt was whether the order of the different provisions could be changed so that all personal-property related issues were grouped together, and the

subsequently issues like garnishment. The Commission agreed that this could and should be done.

Mr. McDermott next discussed a variety of issues, emphasizing the recurring issue in the draft which referred to writs of execution as if they were court orders. He suggested that they are not really court orders but are instead “process.” This will be corrected in the next draft. The Commission next discussed with the commenters whether it would be necessary to docket a judgment to enforce a levy. Current law does not require property to be docketed. It was suggested that docketing would improve the ability to obtain good title to a parcel of real estate. Chairman Gagliardi asked the commenters what the primary issue would be in requiring docketing and the response was that docketing takes three months and that can slow down enforcement. It was proposed that one could backdate the docketing to the date the request was filed. The Chairman concluded by stating the Commission’s position that the Commission does not have a policy position, but that the resolution must clear. Mr. Cannel was directed to work with the commenters to come up with a proposal that clarifies the issue. Commissioner Bunn advocated maintaining the current law if no other consensus could be reached, and Commissioner Long pointed out that dispositive current law does not exist on this topic. Mr. McDermott explained that most of the law in this area stems from the 19th century and does not adequately address current issues.

Mr. McDermott then discussed the provision that would require a creditor to go back to court before being able to enforce against real property, which he objected to. In particular, he advocated adding in a provision that if the creditor goes back to court to ask to proceed against real property, the debtor should have an obligation to come forward and explain what other personal property exists that could be taken instead. Mr. McDermott recommended that if the debtor does not take that opportunity, then the sheriff can proceed. Commissioner Bertone asked how often the commenters saw this issue arise in their practice. The commenters explained that it is actually quite common for creditors to proceed quickly against real property. If they fail to do so, they risk being placed later in the line in a bankruptcy proceeding under New Jersey law. In New Jersey, if one does not levy before bankruptcy filing, the lien can be avoided by the trustee. Commissioner Bell suggested that Legal Services would probably have a perspective to offer on this issue. The Commission and commenters discussed the issue of perfection of the judgment lien and whether it would be appropriate to remove the requirement of levy for perfection. Commissioner Bunn asked whether other states require it. The Chairman asked Mr. Cannel to see what other states do on this topic and report back to the Commission, and to work with the commenters on the various issues raised at this meeting.

There was then a discussion about requirement of exhaustion of personal property before levy on real property and whether that the personal property considered should be

only that within the county. Mr. Cannel noted that the Commission had removed the county limitation because the relevance of county borders simply is not the same now as it was in 1840. Chairman Gagliardi confirmed that the Commission does not have an interest in maintaining county lines as a limitation.

At the request of the Chairman, the commenters will discuss issues further with Mr. Cannel.

### **Underground Facility Protection Act**

Jayne Johnson presented a Revised Tentative Report concerning the Underground Facility Protection Act (UFPA), N.J.S. 48:2-73, et seq. In that case, the Supreme Court considered subsection N.J.S. 48:2-80 d. of the UFPA, which compels parties seeking property damages in underground facilities disputes to submit their claims to the Dispute Settlement Office (DSO) without preserving their right to a jury trial, and held the statute unconstitutional. *Jersey Cent. Power & Light Co. v. Melcar Utility Co.*, 212 N.J. 576 (2013).

Ms. Johnson explained that Staff had prepared draft language in response to the Supreme Court's holding, and had distributed the report to the named parties in the action. Informal or formal comments were received from all but one. Counsel for Melcar Utility Company provided informal comments approving the draft language. The Director of the Dispute Settlement Office (DSO) provided formal comments, which were forwarded to the Commission from the N.J. State Attorney General's office, and were before the Commission, along with the formal comments provided by counsel representing Jersey Central Power & Light Company (JCP&L). Staff incorporated the changes recommended to subsection d. of the UFPA into the draft language of the report.

In addition to the revisions to subsection d. that are the current focus of the Report, the DSO requested that the draft language include a provision allowing DSO to adopt interim rules for procedures and fees. Justice Long questioned the reason for this request. Ms. Johnson provided some brief background regarding the rules proposed by the DSO in 2013, and then turned to the nature of JCP&L's additional requests. Commissioner Bunn observed that the issues raised by JCP&L seem to focus on the costs associated with binding arbitration, as well the additional costs inherent in a mandatory trial *de novo* provision. Ms. Johnson replied that Staff was seeking guidance from the Commission regarding whether it approved expanding the scope of the revisions to address these concerns. Ms. Tharney asked whether the Commission would like more information before making a determination, specifically regarding how the recommendations offered may impact the statute as a whole. Chairman Gagliardi said that that more information would be helpful. The Report was held to allow Staff time for additional research and outreach. Staff will integrate the language resulting from the

additional outreach and research in to the Report, present a Revised Report to the Commission at an upcoming meeting for further consideration.

### **Special Election**

Jordan Goldberg began by noting that the Commission had approved a project to revise N.J.S. § 40A:4-45.14 to eliminate extraneous language characterized as having “no discernible meaning” by the Appellate Division in *Roseff et al. v. Byram Township et al.*, 432 N.J. Super. 8 (App. Div. July 10, 2013). The case addressed other issues related to municipal budget cap laws, but the court noted that there was some language in N.J.S. 40A:4-45.14 that no longer had any meaning as a result of amendments to other related statutes. Ms. Goldberg explained that her statutory research indicated that, over the years, the municipal budget caps laws had expanded and contracted to include and then exclude a range of exceptions. The language in issue related to whether a special election could be paid for under an exception and had apparently been overlooked in an amendment process that had removed relevant operative language from a related statute. Ms. Goldberg added that she had reached out to the New Jersey League of Municipalities, which has no objection to removing the sentence in question and approved of the simple and straightforward project. Given the simplicity of the project, and the fact that the Commission had already received all anticipated input, the Commission agreed to release this as Tentative Report with a 30 day time frame for additional comments on motion of Commissioner Bunn, seconded by Commissioner Long.

### **Skateboard Act**

Vito Petitti presented a Memorandum discussing whether there was a need for a Skate Park Act in New Jersey. Mr. Petitti stated that, based on his research, it appeared that the existing New Jersey statutes adequately cover this area of law.

Mr. Petitti explained that skateboarding is addressed in Title 39, Motor Vehicles and Traffic Regulation, which applies the same rights and duties of motor vehicle drivers to skaters and skateboarders; establishes rules for the operation of skates and skateboards on public roadways; and requires skateboarders, skaters, and bicyclists age 17 and under to wear helmets. Title 39 also requires the sellers of skates and skateboards to post helmet warning notices. Mr. Petitti identified, based upon preliminary research, at least 58 operational skate parks in New Jersey, the majority of which are publicly operated and fall under Title 59, which addresses public entity tort liability.

Mr. Petitti explained that privately owned skate parks are concerned with liability and rely on liability waivers and insurance coverage. He added that while the New Jersey statutes are silent as to the duties and obligations of skate park participants (i.e., facilities not considered roller skate rinks under Title 5’s New Jersey Roller Skating Rink Safety and Fair Liability Act), tort and contractual laws would seem to address the issues raised

in this area. Mr. Petitti did, however, identify at least nine other states that have enacted legislation encouraging and regulating skateboarding activities.

While some states have addressed skateboarding with legislation similar to our Ski Act and Roller Skate Rink Act, Staff knows of no force external to the Commission requesting that the Commission work in this area. Aside from the fact that most skate park facilities are on public property, the biggest difference between skateboarding, roller skating in a rink, and skiing, may be in the economic impact associated with the latter two recreational activities. While public policy seems to be served by setting aside special public areas for use by skateboarders in order to draw them away from other, inappropriate areas, preliminary research does not reveal a public policy need to similarly protect or encourage the private skate park industry.

When asked by Commissioner Bunn whether there are cases relating to skate park liability, Mr. Petitti summarized the *Hojnowski* case, which involved a waiver signed by a parent on behalf of a minor child who was injured at a New Jersey skate park. *Hojnowski v. Vans Skate Park*, 375 N.J.Super.568 (2005). Mr. Petitti noted that New Jersey courts enforce liability waivers at skate parks and other recreational activities if they do not violate public policy.

When asked for Staff's recommendation, Mr. Petitti responded that, at this time, in light of Title 59 and other existing contractual protections in our state statutes, it was not necessary to work in this area of the law. The Commission accepted Staff's recommendation that no action in this area was needed at this time, but agreed with Ms. Tharney's suggestion that Staff continue to monitor this area of law for developments that may generate a need to revisit the project.

### **New Jersey Servicemembers' Civil Relief Act**

The Commission decided to take no further action on this project in light of Ms. Johnson's mention of the January 2014 introduction of Bill S210, which repeals the New Jersey Soldiers' and Sailors' Civil Relief Act, N.J.S. 38:23C-1 et seq. and establishes a New Jersey Servicemembers' Civil Relief Act. Staff will continue to monitor the progress of this bill, and any further developments in this area of the law.

### **Miscellaneous**

The Commission meeting was adjourned on motion of Commissioner Bunn, seconded by Commissioner Bertone.