

## MINUTES OF COMMISSION MEETING

March 16, 2023

Present at the meeting of the New Jersey Law Revision Commission were: Chairman Vito A. Gagliardi, Jr.; Vice-Chairman Andrew O. Bunn; Professor Bernard W. Bell, attending on behalf of Dean Rose Cuison-Villazor; Professor Edward Hartnett, attending on behalf of Interim Dean John Kip Cornwell; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Dean Kimberly Mutcherson.

### In Attendance

Ann DeBellis, Director, Workers Compensation Legal Department of NJM Insurance Group, and Raquel Romero, of the Law Office of Raquel Romero, were in attendance.

### Minutes

The Minutes of the February 16, 2023, Commission Meeting were unanimously approved on the motion of Commissioner Bertone, seconded by Commissioner Bell.

### Recreational or Social Activities

Whitney Schlimbach discussed with the Commission a Draft Final Report addressing the exception in the Workers Compensation Act (WCA) in N.J.S. 34:15-7, that excludes workplace injury or death arising from “recreational or social activities” from coverage.

Ms. Schlimbach explained that the term “recreational or social activities” is not defined in the WCA. The Supreme Court, however, addressed the scope of the defense in two cases, *Lozano v. Frank DeLuca Construction*, 178 N.J. 513 (2004) and *Goulding v. N.J. Friendship House Inc.*, 245 N.J. 157 (2021).

In *Goulding*, the claimant’s employer hosted a “Family Fun Day” event for clients and their families. The claimant was a chef who volunteered to cook at the event and was injured while doing so. The Workers’ Compensation Court determined that the recreational and social activities defense applied and denied the claim. The Appellate Division affirmed the decision of the Workers’ Compensation Court. The New Jersey Supreme Court reasoned that volunteering to facilitate the event by cooking rendered the activity non-recreational as to the claimant. The Court determined that the compensation claim was not barred by the recreational or social activities defense.

In *Lozano*, an employee was injured driving a go-cart after his employer told him to “get in” when he initially refused to drive the go-cart. Ultimately, the Supreme Court determined that *compelled* participation in an activity that is generally considered recreational or social removes it from the scope of the recreational or social activities defense in N.J.S. 34:15-7.

Several other states have codified a recreational or social activities defense. Most of these statutes include a requirement that the activity, or the employee’s participation in it, is “voluntary.” These statutes are consistent with the New Jersey Supreme Court’s decision in *Lozano*. There are two states with statutory requirements similar to those set forth by the *Goulding* Court. For

example, in Montana the recreational or social activities defense does not apply when the employer asks the employee to “assume duties for the activity.” Similarly, in Nevada, there is an exception to the social and recreational activities defense when an employee is participating “at the request” of an employer” and their participation “enables the event to take place.”

Ms. Schlimbach advised the Commission that outreach was conducted to several interested and knowledgeable individuals and organizations. Support for the Commission’s modifications was received from Raquel Romero who represented the appellant in *Lozano*. She provided the Commission with alternate language to be used in subsection (b)(4)(B) - which codifies the holding in *Goulding*. Ms. Romero suggested replacing the language “facilitate other participant’s enjoyment of the activity” with “facilitate the purpose of the activity” or “facilitate other participants’ engagement in the activity.” She reasoned that the word “enjoyment” is a subjective term and noted that qualifying activities are not necessarily universally “enjoyed” by participants. Ms. Romero also suggested removing the language “even if the employee volunteers to take on such a role” from subsection (b)(4)(B) because she considered it unnecessary and potentially too narrow in a factual scenario different from *Goulding*.

Richard Rubenstein, Esq., who practices law in the area of workers’ compensation, opposed the Commission’s proposed modifications. Mr. Rubenstein opposed the codification of the New Jersey Supreme Court’s holdings in *Goulding* and *Lozano*. He opined that “no statute can adequately capture” the nuance of the workplace and workplace relationships. Mr. Rubenstein added that the decisions are “consistent with the idea that compulsion by an employer is a concept best decided by the trial court after hearing all the evidence.”

Ms. Schlimbach explained that the proposed modifications to N.J.S. 34:15-7 set forth in the Report’s Appendix incorporate the holdings of *Goulding* and *Lozano* in new subsections (b)(4)(A) and (B). In addition, the Appendix contains two options for proposed statutory language for subsection (b)(4)(B). The first option retains the proposed modifications set forth in the Commission’s Tentative Report. The second contains the language proposed by Ms. Romero.

Commissioner Long submitted written comments in which she suggested the removal of the words “the” and “a” in subsections (b)(2) and (3). In addition, Commissioner Long expressed a preference for option one. Finally, she noted that the words “engagement in” were missing from this subsection.

Commissioner Harnett expressed concern about the structure of the statute. He explained that the holdings in *Goulding* and *Lozano* do not address the recreational or social activities, but rather on the employee’s activity and whether it is recreational or social. In subsection (b)(4), Commissioner Harnett suggested removing the language “This subsection does not apply to a recreational or social activity that is natural and proximate cause of the employee’s injury or death if” and replace it with “An employee’s activity is not recreational or social within the meaning of this subsection if...”

Commissioner Bertone and Commissioner Bell indicated that they prefer the first option with the modifications proposed by Commissioner Long. Chairman Gagliardi agreed with both Commissioner Bertone and Bell and suggested that option one mostly closely codifies the New Jersey Supreme Court's decision in *Goulding*.

Raquel Romero, Esq., who represented the *Lozano* appellant, agreed with the Commission's substitution of the language "engagement in" in subsection (b)(4)(B). Ann DeBellis, Director, Workers Compensation Legal Department of NJM Insurance Group, commented that in her experience Workers' Compensation cases are fact sensitive. She agreed with Mr. Rubenstein, Esq., that whether or not the activities that injured the employee were something "beyond improvement in employee health and morale" is a sensitive question for a judge of compensation to decide.

With the modifications suggested by Commissioners Long and Harnett, and on the motion of Commissioner Bell, which was seconded by Commissioner Bertone, the Commission unanimously released the Final Report.

### **Misrepresentation**

Samuel Silver discussed with the Commission a Draft Final Report addressing the statutes of limitation for tax return assessments in the New Jersey Gross Income Tax Act ("GITA"). After a review of *Malhotra v. Director Division of Taxation*, 32 N.J. Tax 443 (2021), the Commission authorized Staff to examine the phrase "misrepresentation of a material fact" as used in the limitations statute.

Pursuant to N.J.S. 54A:9-4(c)(1)(B), assessments must be made within three years after a taxpayer has filed a tax return. If the taxpayer has filed a false or fraudulent return with the intent to evade tax, there is no statute of limitations on assessments. Likewise, N.J.S. 54A:9-4(c)(4) addresses assessments when there has been a refund and imposes a three-year statute of limitations, which the statute extends to five years if the taxpayer has induced the taxing authority to issue the refund through fraud or misrepresentation.

Mr. Silver stated that the proposed modifications, set forth in the Appendix, use contemporary statutory drafting practices to make the statute more accessible and remove the five-year statute of limitations on assessments for erroneous refunds induced by fraud. Mr. Silver explained that this modification eliminates the apparent conflict between N.J.S. 54A:9-4(c)(1)(B) and (c)(4). Finally, the modifications replace the undefined phrase "misrepresentation of a material fact" from (c)(4) with "false or fraudulent return" since that term is already used elsewhere in the statute. Two options were provided in the Appendix with respect to subsection (c)(4).

Outreach was conducted to various organizations and individuals, including the New Jersey Attorney General's Office; the New Jersey Department of the Treasury; the New Jersey Division of Taxation; the Tax Section of the New Jersey State Bar Association; Legal Services of New Jersey; the New Jersey Tax Management Office; and private attorneys practicing in the area of tax. No objections were received with respect to the proposed modifications.

Jaime Zug, of McCarter and English, informed Mr. Silver that he supported the proposed modifications, as the statute contains two unusual distinctions: (1) between refunds and assessments; and (2) between ordinary information, misrepresented information, and fraudulent information. Mr. Zug indicated that there is no policy justification for a special limitations period that applies only to refunds and opined that the second distinction is simply “bad policy.” Further, Mr. Zug explained that because refunds almost always arise in the context of filing returns, eliminating the five-year limitations period, or changing the language to “false or fraudulent,” would have the same “welcome” effect of making the five-year statute of limitations irrelevant.

The New Jersey Division of Taxation expressed support for the proposed modifications because the proposed amendments bring consistency to the fraud provision. Mr. Silver added that he recently met with Patrick Ryan, Chief of the Conference and Appeals Division at the Division of Tax. Chief Ryan reiterated the Division’s position with respect to the proposed modifications in the Report.

Mr. Silver also conveyed to the Commission comments sent to Staff by Commissioner Long. Commissioner Long noted that the word “of” had been inadvertently omitted from subsection (c)(1)(B), and also indicated that she preferred option one in the Appendix. Mr. Silver requested guidance from the Commission regarding whether the proposed language “regardless of whether the filed return results in a refund to the taxpayer,” in subsection (b)(1)(C), is necessary.

Commissioner Bell stated that he was inclined to select option one. Commissioner Bertone, Commissioner Hartnett, and Chairman Gagliardi agreed. Commissioner Hartnett inquired whether the cross-reference in (c)(1)(B) that reads “subject to the provisions in subsection (c)(6)” was necessary. He proposed replacing that language, and the similar cross-reference in (c)(4)(B), with “as defined in subsection (c)(6).” The Commission also agreed to modify subsection (c)(6) to include the phrase “the filing of a false and fraudulent return.” Commissioner Bell then agreed with Chairman Gagliardi that the language in subsection (b)(1)(C) - “regardless of whether the filed return results in a refund to the taxpayer” - should remain.

On the motion of Commissioner Bell, seconded by Commissioner Bertone, with the modifications directed by the Commission, the report was unanimously released as a Final Report.

### **Uniform Commercial Code – 2022 Amendments**

Laura Tharney discussed with the Commission the 2022 Amendments to the Uniform Commercial Code (“UCC”). She explained that significant updates to the UCC were released to address “emerged and emerging technologies.” These updates were intended to “bring the UCC into the digital age by providing commercial law rules for a new category of transactions” which involve “the transfer and leveraging of virtual currencies and certain other digital assets.”

The UCC Amendments reflect the work of both the American Law Institute and the Uniform Law Commission. These entities received input from approximately 350 knowledgeable advisors and stakeholder observers who met several times over a three-year period to reach

consensus on updates to this area of state law. Ms. Tharney noted that the New Jersey law pertaining to the UCC is – for the most part – consistent with the Uniform Acts.

She explained that the Commission’s practice with regard to UCC amendments has been to prepare a report that summarizes the proposed changes and the reasons for the changes, and then indicates whether or not the Commission recommends enactment of the changes. In most cases, the Commission has recommended enactment.

The Draft Final Report provided for Commission consideration summarizes the goal of the 2022 Amendments and provides information to allow a reader to quickly understand what areas of New Jersey law will be impacted by the Amendments, and how broadly and substantively. The Report indicates which statutory sections in New Jersey are impacted by the Amendments and whether the Amendments impact the substance of the statutory language or change explanatory material that appears in the comments to the UCC.

Ms. Tharney advised the Commission that the ULC does not keep track of the differences between its work and each state’s enactments. She noted, however, that Westlaw provides a service that identifies the differences between the enactments in each state and the ULC provisions. Using this information, the Commission’s Report identifies for the reader areas in the New Jersey statutes deviate in some way from the ULC’s text so that particular attention can be paid in those areas when layering the Amendments into the existing law.

According to the ULC, the 2022 Amendments have not yet been enacted in any jurisdiction. They have been introduced in twenty-two jurisdictions, but not New Jersey. Ms. Tharney noted that there are bills pending in the current legislative session that pertain to some of the concepts addressed in the Amendments. As with other changes to the law in areas covered by the UCC, Ms. Tharney stated that it would seem to be advantageous for the law in this area to remain consistent with the UCC provisions in other states. She suggested that there may be benefits to incorporating provisions that have been extensively vetted by a broad cross-section of interested parties.

At the time of the meeting, the New Jersey State Bar Association (“NJSBA”) had not yet taken a formal position on the adoption of the proposed UCC modifications. The NJSBA had, however, expressed concern regarding bills on this subject that have been introduced and are moving through the legislative process.

Commissioner Hartnett stated that at the federal level where there are no changes to the statute but there is new commentary, the government will not amend the comments. He inquired whether New Jersey follows the same procedure. Ms. Tharney indicated that she would be happy to ask the Office of Legislative Services how New Jersey treats ULC comments to the UCC. She later conveyed to the Commission that the comments to the UCC are not found on the New Jersey Legislature website and added that she would provide information from OLS at an upcoming meeting.

On the motion of Commissioner Bertone, seconded by Commissioner Bell, the Commission unanimously approved the release of the report as a Final Report.

### **Merger of Criminal Convictions**

Whitney Schlimbach explained that New Jersey provides for the merger of criminal convictions in certain circumstances pursuant to N.J.S. 2C:1-8 — including that the only difference between the offenses is that one is defined to prohibit a designated kind of conduct generally and the other prohibits a specific instance of the conduct. The offenses of leaving the scene of a motor vehicle accident, N.J.S. 2C:11-5.1, and endangering an injured victim, N.J.S. 2C:12-1.2, explicitly prohibit merger with certain offenses.

In *State v. Herrera*, 469 N.J. Super. 599 (App. Div. 2022), the defendant was convicted of leaving the scene of an accident and of endangering an injured victim after he struck a pedestrian and then left the scene. The court imposed concurrent sentences. The State and the defendant both appealed the defendant’s sentence. The State contested the sentences on the basis that they should have been consecutive, and the defendant argued that the convictions should have merged for the purposes of sentencing.

The Appellate Division analyzed the offenses using a “flexible multi-factor” approach developed by the Supreme Court. This approach focuses on the elements of the crimes, the intent of the Legislature, and the specific facts of the case. The Appellate Division noted that the Legislature has specified certain non-merger offenses in each statute; but neither statute prohibits merger with the other. The Court reviewed the interests protected by each statute and found that they are both intended to protect injured individuals with incentives to stay at the scene of an accident and penalties for absconding. The *Herrera* Court concluded that the statutes provide an alternative basis for punishing the same conduct and held that the convictions should merge.

Ms. Schlimbach advised the Commission that there are no pending bills involving any of the statutes that addresses the merger issue.

In a written statement Commissioner Long stated that she does not oppose this project but does not think the *Herrera* decision adds much to the merger statute. In addition, Commissioner Long noted that she prefers that these issues be addressed by the trial court on a case-by-case basis.

Chairman Gagliardi suggested conducting outreach to determine whether the statutes would benefit from modification. Commissioner Bertone agreed with Chairman Gagliardi and stated that she would like to hear what practitioners think about this statutory ambiguity. Commissioner Bell agreed with Commissioner Bertone and added that he is skeptical about trying to codify a very well-defined decision by the court in an area that will likely only be dealt with by legal professionals and not members of the public. Commissioner Harnett agreed with Commissioner Bell.

The Commission authorized Staff to engage in further research and outreach and provide an update to the Commission at a future meeting.

### **Joint Motion to Vacate Parole Ineligibility**

Pursuant to the New Jersey Comprehensive Drug Reform Act (“CDRA”) of 1987, a defendant may negotiate a plea that provides for a lesser sentence. In addition, after a trial a defendant may enter into a post-conviction agreement that calls for a lesser sentence, or period of parole ineligibility. The CDRA was New Jersey’s version of the “war on crime,” and was enacted to eradicate the drug problem through severe punishments which were designed to provide incentives for defendants to cooperate, via plea bargains. Almost immediately, the CDRA was subjected to constitutional challenges.

Samuel Silver explained that in the almost forty years that followed, the Attorney General promulgated a series of Directives to promote uniformity and avoid arbitrary or abusive exercises of discretionary power. This, combined with judicial oversight, was supposed to protect defendants from arbitrary and capricious prosecutorial decisions. In *State v. Brimage*, 153 N.J. 1 (1998), the New Jersey Supreme Court held that plea guidelines for N.J.S. 2C:35-12 must be consistent throughout the State to be constitutional.

In 2021, the Attorney General issued its latest Directive in this area. The 2021 Directive instructed prosecutors statewide to end the imposition of mandatory parole ineligibility for non-violent crimes. A waiver of mandatory minimum sentences would occur in four contexts: (1) during plea negotiations; (2) after conviction at trial; (3) following violations of probation; and (4) in connection with a joint application to modify sentences of inmates currently incarcerated, which was the issue addressed by the Court in *State v. Arroyo-Nunez*, 470 N.J. Super. 351 (App. Div. 2022). In addition, the guidelines directed courts to use statutory authority or the Court Rules to correct injustices resulting from mandatory minimum drug sentences already imposed.

In 2019, the defendant in *Arroyo-Nunez* pled guilty to first degree possession of a controlled dangerous substance with the intent to distribute it. He was sentenced to an eleven year term of imprisonment with a twenty-four month period of parole ineligibility. The defendant, along with 600 similarly situated defendants, filed a joint application to modify his sentence. These motions were all assigned to a designated sentencing judge. The trial court held that the Attorney General’s Directive violated the separation of powers doctrine and thwarted the legislative intent underlying the CDRA.

The Appellate Division considered two issues. First, whether N.J.S. 2C:35-12 (“Section 12”) permits a court to vacate the mandatory parole ineligibility of a defendant sentenced to state prison pursuant to a guilty plea to a CDRA offense. The second issue examined was whether the Attorney General’s Directive permitting joint motions to vacate a mandatory period of parole ineligibility for non-violent drug offenses invalidated the statute and violated the separation of powers doctrine.

Mr. Silver noted that in its current form, Section 12 could be read to preclude post-conviction agreements for defendants who plead guilty rather than those who proceeded to trial.

The State maintained that limiting post-conviction agreements to only those defendants who elect to go to trial is “patently inequitable and unfair.”

The *Arroyo-Nunez* Court examined the legislative history of Section 12, the 2021 Directive, and the New Jersey Rules of Court. The Court determined that motions filed pursuant to the 2021 Directive and under the aegis of the Court Rule were permissible. Commentary to Section 12 provides that post-conviction agreements may be entered at any time after a guilty plea or the imposition of the sentence. Amendments to similar statutes confirm a legislative intent to reduce incarceration rates for certain non-violent drug offenses. Prospectively, the applications would require a judge to make individualized determinations as to whether good cause exists for the relief requested.

Commissioner Long, by way of written comments submitted to Staff, indicated that she would authorize a project to clarify this statute.

Commissioner Bell noted that the issue of the CDRA and concern over its aggressive approach to crime should be raised to the Legislature in addition to any proposed modifications to the statute. He said that the lack of consistency is the primary problem with this area of law. In addition, he stated that judges should be able to modify a sentence if the request is proffered by way of a joint motion. Chairman Gagliardi directed that Staff reach out to legislative staffers on this issue. Commissioner Bertone expressed her support for the project.

The Commission unanimously agreed to authorize further research and outreach on this project.

### **Miscellaneous**

Ms. Tharney advised the Commission that both Mr. Silver and Ms. Schlimbach were contacted by the New Jersey State Bar Association this week with respect to current projects and will engage as necessary moving forward.

She also indicated that Staff will soon begin the process of interviewing candidates for two summer legislative law clerk positions.

Ms. Tharney explained that, in February, she had submitted the letter – approved by the Commission – in support of an increase in the Commission’s annual appropriation and will be following up as appropriate.

Finally, Ms. Tharney added that she has been engaged in ongoing discussions regarding the installation of a reliable internet connection in the Commission’s office and hopes that some progress has been made toward that goal.

### **Adjournment**

The meeting was adjourned on the motion of Commissioner Bell, seconded by Vice-Chairman Bunn.

The next meeting of the Commission is scheduled for April 20, 2023, at 4:30 p.m., at the Commissions Office located at 153 Halsey Street, Newark, New Jersey 07102.