

MINUTES OF COMMISSION MEETING

March 20, 2014

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Chairman Vito A. Gagliardi, Jr., Commissioner Albert Burstein, and Commissioner Andrew Bunn. Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner John J. Farmer, Jr.

Harvey Fruchter, Esq. representing the Garden State Towing Association, Inc., Lawrence J. McDermott, Esq. from Pressler and Pressler, LLP, David McMillin, Esq., of Legal Services of New Jersey, and Jessica Miles, Esq., Assistant Clinical Professor, Seton Hall University Law School, were also in attendance.

Minutes

The February Minutes were unanimously approved, with the correction to the fourth line of the last paragraph on the first page to change the word “Commissioner” to “Commissioners”, on motion of Commissioner Bell, seconded by Commissioner Bunn.

Towing Contracts

Mr. Petitti introduced the proposed legislation submitted by Mr. Harvey Fruchter, Esq., who represents the Garden State Towing Association (GSTA). Mr. Petitti explained that the GSTA requested the Commission’s consideration of a statutory scheme which would provide compensation for towing companies that clear and recover vehicles following a highway accident or emergency. Mr. Petitti highlighted three issues of concern raised by the GSTA: (1) law enforcement’s limited discretion at an accident scene; (2) the lack of assurance that towing operators will be paid for services rendered; and (3) the current state of motor vehicle liability insurance, which does not cover removal and cleanup costs at an accident scene.

Mr. Petitti stated that the objective of the proposed legislation is to “create a fair and alternate method to compensate those engaged in motor vehicle cleanup and recovery activities.” Mr. Petitti also outlined four ways in which the proposed legislation would be a significant departure from current law: (1) it would create an alternate method of compensation for towing operators based on mandatory no-fault insurance coverage; (2) it would give more discretion to law enforcement and fire department officials at accident scenes; (3) it would mandate the purchase of additional insurance in motor vehicle, home owner, and renter policies to cover removal and cleanup costs; and (4) it would establish a new strict liability standard to make owners of motor vehicles, cargo, and other property responsible for removal and cleanup after an accident or natural disaster. Mr.

Petitti then introduced John Tumino and Rick Malanga, members of the Garden State Towing Association, Inc., Board of Directors, represented at the meeting by Mr. Fruchter.

Mr. Fruchter presented to the Commission several issues confronting towing companies to illustrate why members of the GSTA fail to receive compensation after responding to highway emergencies involving tractor trailers. Mr. Fruchter recounted specific accidents and provided data to demonstrate the need for legislation. The GSTA requested the Commission draft an Infrastructure Disaster and Recovery Act. One of the key components of this proposal expands the current statutory scheme to mandate compulsory motor vehicle insurance coverage for towing.

Commissioner Burstein asked whether any other state has adopted the recommended measure. Mr. Fruchter indicated that other states are considering similar measures, but none have been enacted.

Chairman Gagliardi acknowledged that Mr. Fruchter effectively presented the issue for consideration, but explained that the proposal requires a policy determination which falls outside of the Commission's mandate. Chairman Gagliardi emphasized that the Commission was not taking a position on the wisdom or the strength of the argument presented, but instead was required to determine whether the project was within the scope of the Commission's statutory mandate. Commissioner Burstein followed by stating that the role of the Commission is established by statute and that, since no other state has adopted the proposed legislation, the need for the State Legislature to weigh and decide this matter is heightened. Commissioner Bunn stated that the statutory mandate limits the matters the Commission may consider. Commissioner Bunn added that the NJLRC is not mandated to consider policy issues the Legislature has not addressed.

Professor Bell said that he takes a broad view of the Commission's role, but added that since the proposed legislation will require the State to incur costs, it must be considered first by the Legislature. Chairman Gagliardi called for a vote to determine whether the project was appropriate for Commission consideration and the Commission voted unanimously to decline the project.

Judgments and Enforcements

The Commissioners first asked John Cannel to report on his findings regarding other states' statutes removing the requirement of levy for perfection of a judgment lien. Mr. Cannel responded that some states make recorded judgment liens automatically perfected and some, like New Jersey, do not. He briefly reviewed the issues that would be affected by removing the requirement that a creditor levy to perfect a lien, adding that a bankruptcy trustee may avoid an unperfected lien, but cannot avoid a perfected lien. Mr. Cannel noted that the statute would need to be revised whether the Commission decided to maintain the current rule in New Jersey or change it.

Commissioner Bunn raised the question of whether or not any particular person was clamoring for a change in the rule requiring the creditor levy to perfect a lien. Mr. Cannel reported that New Jersey is almost unique in having liens that are not limited by county, like in other states. The only other such state is Maryland. Mr. Bunn asked what the possible negative aspects were of automatically perfected liens, and Mr. Cannel replied that the New Jersey rule rewarded creditors who had the interest and did the work of enforcing a lien.

Commissioner Burstein asked Mr. Cannel to discuss the twenty-year rule. Mr. Cannel stated that creditors lose a lien against a debtor if they do not enforce the lien in twenty years, and that New Jersey's rule is relatively longer compared other states. Mr. Cannel raised the issue of a homeowner's inability to offer unencumbered title to the property when there is a lien on it. He mentioned the difficulty that plagues homeowners with common names. Mr. Cannel reasoned that a creditor that holds a lien against a debtor's real property normally does not want to sell a property, but simply wants to enforce a judgment. The Commissioners then indicated their tentative preference for maintaining the current rule in New Jersey.

The Commissioners next considered whether or not a creditor should be required to receive court approval before levying on the debtor's property. Lawrence McDermott suggested that requiring a creditor to seek court approval to levy would indeed change the current rule. Mr. Cannel noted that title to property cannot be insured if the title is based on a sheriff sale to enforce a lien, and that the process to enforce a lien may give rise to a claim years later that the sale was not proper. Commissioner Bunn approved the requirement of mandating a hearing and court approval before a creditor can levy, due to his concerns for the debtor's rights, including procedural due process. He recognized that a junior lienholder might go through the process of organizing a sale and obtaining court approval for a levy only to have senior lienholders benefit from the junior creditor's efforts. Mr. Cannel stated that that is a consequence of having a system based on seniority of debt, and that a mandatory court order before levying would have positive and negative consequences for creditors but the rule would be more definitive, suggesting that no one benefits from uninsurable title.

David McMillin suggested that there were circumstances in which even a perfected lien may be avoided, such as when the lien conflicts with exemptions. Mr. McMillin mentioned that perfection is an issue only with regard to the strong arm powers of a bankruptcy trustee. He said that avoidance because of impairment of exemptions is not affected, but that the issue has been known to confuse judges. Mr. Cannel said he could include information in the comment of the Report noting that the effect of perfection is limited to the strong arm power and not to other grounds for avoidance. Mr. McMillin said that automatic perfection would have some effect in bankruptcy, and that there would be a slight advantage to automatic perfection in avoidance of unnecessary

levies. Mr. McDermott concurred. Chairmen Gagliardi stated that he believed that the Commission did not yet have sufficient information to make a decision on the issue.

Mr. Cannel then explained that he had investigated every state's exemption laws and discovered no discernible pattern, other than the fact that New Jersey is one of the least debtor-friendly states. He requested guidance from the Commission on the issue of exemptions. Commissioner Burstein asked if there is a uniform act on exemptions. Mr. Cannel replied that there was, but that only Alaska enacted it, and it was reframed as a model act. New Jersey does not have a homestead exemption, although most states do. New Jersey has a general \$1000 exemption, but debtors that lack a home will likely lose their next rent payment, and then their car, and then their job. Commissioner Bunn said that banks would be displeased with increased exemptions, and that there could be implications to the availability of credit. Mr. Cannel responded that most banks make credit decisions on a national basis, and that more New Jersey exemptions would probably not affect the availability of most kinds of credit.

Commissioner Burstein suggested that the competing interests should be presented in the Report's exemptions section, but that a balanced report would suggest that the Legislature consider action regarding exemptions. Commissioner Bunn said the Commission's Report could indicate the national average for exemptions, and that the Commission's suggestions for exemptions could be tied to the national average. He requested that information regarding a national median be produced by Mr. Cannel to address potential concerns of Legislators. Professor Bell expressed concern over the fact that cost-of-living expenses are so much higher in New Jersey than in the rest of the country, so the median might not be appropriate as a benchmark. He suggested that the Report should include sufficient detail that the Legislature could exercise its own judgment on the issue. Chairmen Gagliardi suggested the preparation of a Report regarding other states' exemptions rules that would allow the Legislature to make the decision. Mr. Cannel pointed out that the law on exemptions in New Jersey had not been changed since 1973 and any proposed changes would seem somewhat exaggerated as a result. An adjustment for inflation, for example, would produce a 428% increase of the current \$1000 exemption. Commissioner Bunn suggested that the Commission's report include the national median and inflation data for the period since 1973. Commissioner Burstein suggested presentation of the national median only, and Professor Bell seconded that motion.

Mr. McMillin offered a point of clarification regarding the \$1000 exemption. He suggested that a comprehensive re-examination of the exemption scheme would be appropriate considering the ease with which creditors could now enforce a judgment. An increase in the \$1000 exemption would be offset by a lack of a homestead exemption, and expressed his colleagues' desire that an exemption scheme be adopted that met the

concerns of all New Jersey citizens. Professor Bell requested that the Report comprehensively cover Mr. McMillin's concerns.

Chairman Gagliardi requested that Mr. Cannel investigate and analyze homestead and automobile exemptions, for the purpose of either including such research in the Commission's Report, or amending the Report later to include the findings with the Commission's own suggestion for a change to the homestead exemption. He requested that Mr. Cannel first report his research to the Commission, and then the Commission would determine whether the research was sufficient to support a recommendation to the Legislature. Mr. Cannel indicated that he will provide this information to the Commission in May.

Mr. McDermott raised his concerns with the prospect of recommending increased exemptions. He argued that creditors are essential to the flow of commerce and that exemptions do not come without cost. New Jersey is one of the few states that require a creditor to prove a default case. Mr. McDermott opposed any automobile exemption. Professor Bell suggested that the historical debate between the role of bankruptcy and the relative favoritism of debtors and creditors has been sufficiently addressed by statutory exemptions in the past, and suggested that the Commission's best choice would be to present to the Legislature Mr. Cannel's future research on all issues raised with regard to statutory exemptions.

Underground Facility Protection Act

Jayne Johnson requested an informal circulation of the most recent proposals offered by JCP&L and the DSO to companies subject to the UFPA Arbitration Program. She was pleased to report additional input from both the DSO and JCP&L, and said that she would like to focus on obtaining input from other companies subject to the UFPA Arbitration Program.

Commissioner Bunn suggested that the Report should be considered again by the Commission after the additional input was received before being formally released. Chairman Gagliardi informed Staff that the Commission encouraged sharing the Report at this stage with the targeted commenters.

Prevention of Domestic Violence Act

Frank Ricigliani proposed a project to the Commission based on Staff's review of the Appellate Division ruling in *S.P. v. Newark Police Dept.*, 428 N.J. Super 210 (App. Div. 2012), in which the court interpreted N.J.S. 2C:25-17, *et seq.*, the Prevention of Domestic Violence Act (PDVA). The issue before the court was whether the defendant, who, like the plaintiff, was a resident of a boarding house, could satisfy the statutory definition of "household member" under the PDVA. The court found that the defendant

was a “household member” under the Act. Mr. Ricigliani identified several cases in which courts considered what constitutes a “dating relationship” or whether the perpetrator was a “current or past household member” under the PDVA. Mr. Ricigliani proposed a project to clarify the threshold definitions of the PDVA using a “factors-based” approach like that used in other states, and including criteria in the statute based on the criteria that has been identified by the courts in recent years.

Professor Jessica Miles, a Seton Hall clinical law professor specializing in family law and domestic violence, expressed grave concerns over the inconsistent application of the PDVA. She briefly mentioned *S.K. v. J.H.*, 426 N.J. Super. 230 (App. Div. 2012), as a recent case in which a victim was denied protection because the court found the relationship between the victim and the perpetrator did not constitute a dating relationship. The plaintiff in that case petitioned the court for a restraining order under the PDVA following a group trip to Israel where the defendant brutally assaulted the plaintiff shortly after their initial meeting. Professor Miles also identified other examples in which the test employed by the court failed to protect victims of violent offenses. She added that there were several states in which the statutes result in more consistent protection for victims.

Commissioner Bunn asked Professor Miles which state, in her opinion, has the most well-written statute in this area. Professor Miles suggested that Maryland’s statute was quite effective in protecting victims of violence. In Maryland, a “peace order” may be requested against an individual who has previously committed a crime against the plaintiff. The plaintiff does not have to demonstrate a dating or family relationship to obtain the order, and law enforcement may immediately enforce the order once it is issued. Professor Miles said that this type of peace order is particularly effective in situations involving stalking or other circumstances where no underlying relationship exists between the parties.

Chairman Gagliardi stated the project was worthy of consideration and thanked Professor Miles for her willingness to comment on the project and her insightful perspective. The Commission voted unanimously to approve work by Staff in this area.

Newspersons’ Shield Law

Alexandra Kutner explained that this potential project resulted from the New Jersey Supreme Court decision in *In re January 11, 2013 Subpoena By the Grand Jury of Union County*, in which the Court indicated that the Legislature has the ability, should they wish, to more clearly define the newsperson’s privilege in the face of ever-evolving news media. The goal of this proposed project is to review the law and determine whether any ambiguity can be resolved.

Ms. Kutner explained that the case involved an author's motion to quash a subpoena to testify before a grand jury regarding information referenced in blog posts concerning alleged misuse of county-owned generators by county employers during Hurricane Sandy. She added that as digital news outlets continue to increase, issues have begun to arise regarding not *what* the law protects, but rather *whom* the Legislature intended to cover with an absolute privilege.

New Jersey law has been the forerunner in the development of the journalist privilege. Briefly, Ms. Kutner explained that the newsperson's privilege in New Jersey was first enacted in 1933, and protected only the source of information. In the decades since, the Legislature has expanded the scope of the privilege to cover the entire newsgathering process. Currently, the New Jersey law provides an absolute privilege, protecting journalists from revealing information or sources obtained during professional newsgathering.

The seminal case concerning the applicability of the Newspaper's Privilege in New Jersey is *Too Much Media, LLC v. Hale*, decided in 2011. In that case, Ms. Kutner explained, the New Jersey Supreme Court found that any hearing to determine the applicability of the newsperson's privilege would require the claimant to make a prima facie showing that (1) they have the requisite connection to news media, (2) they have the necessary purpose to gather or disseminate news, and (3) the materials sought were obtained in the course of professional newsgathering activities. This was to ensure that the privilege does not apply to every self-appointed newsperson.

Ms. Kutner added that digital news outlets, particularly blogs, are increasingly present and vital to the delivery of news to the public in our modern age. This delivery shift has resulted in an increasing number of bloggers – most of whom have no formal ties to traditional media entities – who have actively assumed the role of news media and now perform a watchdog function on the media itself. She added that if the Commission authorizes a project in this area, Staff would continue research and engage in outreach in order to determine whether changes to the definition of news or news media in accordance with the case law could be of assistance in this area.

Chairman Gagliardi asked whether Staff was asking the Commission to revise the law so as to match case law or as a matter of policy. Ms. Tharney responded that policy is not the motivation, but rather that the court has hinted strongly that the Legislature could act to clarify this area. Commissioner Bunn cited examples of recent changes in the law regarding news media and pointed out that this might be a way to address innovations in technology and media and where cases are going. Professor Bell, who has taught in this area, said that, while this is a very interesting area of the law, it is also a highly charged area that continues to evolve at a rapid pace and, as a result, may not be something for the Commission to work on at this time. Although the Commission could draft in order to

define *who* constitutes the media, he was not sure that doing so fit within the scope of the Commission's role.

Chairman Gagliardi expressed misgivings regarding whether this was an area in which the Commission should be working because the case law is still evolving so significantly. He indicated the Commission would carry the project until the next meeting to allow Commissioners who could not attend this meeting to provide their thoughts on the issue.

Obsolete Special Election Law in Local Budget Cap Statute

Laura Tharney requested that the Commission release a Final Report, concluding the Commission's work on this project. She explained that no additional comment had been received after the New Jersey League of Municipalities indicated approval of the Commission's proposal in response to the release of the Tentative Report.

Ms. Tharney noted that the time to comment on this project did not conclude until the day after the Commission meeting, and asked if the Commission would consider a motion to release the Final Report at the close of business on that day if no further comments were received in the interim. The Commission did so unanimously on motion of Commissioner Bell, seconded by Commissioner Bunn.

Miscellaneous

Ms. Tharney advised the Commission of the bills introduced so far this legislative session based on the work of the Commission.

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