

MINUTES OF COMMISSION MEETING

April 17, 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 Andrew Bunn and Commissioner Virginia Long (participating by telephone). Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner John J. Farmer, Jr.; Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon; and Professor Ahmed I. Bulbulia, of Seton Hall Law School, attended on behalf of Commissioner Patrick Hobbs.

Richard J. Mirra, Esq., of Hoagland, Longo, Moran, Dunst, & Doukas, LLP, and Cynthia J. Borrelli, Esq., of Bressler, Amery, & Ross were also in attendance.

Minutes

The Minutes of the March meeting were unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Bulbulia.

Equine Activities Liability Act

Vito Petitti began the discussion of the Revised Tentative Report (Report) by introducing Richard J. Mirra, Esq., who submitted an amicus brief on behalf of the New Jersey Horse Council in the Supreme Court case, *Hubner v. Spring Valley Equestrian Center*, 203 N.J. 184 (2010). Mr. Mirra stated that the Commission's proposed revisions to the Equine Act should go further to effectuate the Legislature's intent to promote equine sports and activities by protecting equine facility operators from civil liability. Mr. Mirra recommended adding language to the assumption of inherent risks provision, N.J.S. 5:15-3, explaining that the subsection is to be "liberally construed to protect and promote equine activities and to limit liability in accordance with the purposes of this act". Mr. Mirra asserted that the Equine Act was enacted to remedy the insufficiencies of the common law to address the modern costs to equine operators resulting from tort liability and insurance expenses. Mr. Mirra added that the Commission's proposed changes to N.J.S. 5:15-9, "Responsibilities of operators; exceptions to limitations on operator liability", could override the assumption of risk doctrine contemplated by the Legislature.

Mr. Petitti followed by noting that, in addition to the proposals provided by Mr. Mirra, the Report generated feedback from several commenters. In particular, the Rutgers Equine Science Center (RESC) which requested that the Commission include in the assumption of risk provision a clause to address weather conditions. The RESC also provided statistical data to update the introduction of the Report.

The Commission was satisfied that the proposed language identified by Mr. Pettiti in N.J.S. 5:15-3.3 of the Report adequately addressed the issue involving weather conditions. The Commission approved the replacement of paragraph 2 of the Report's Introduction, to: (1) include the updated equine industry statistics, and (2) emphasize the critical role of the horse industry to the growth and land-use strategy of the state.

The Commission approved the first proposal to change the Report's title to "Equestrian Activities Liability Act". The Commission then considered changes to the Legislative findings and declarations. The Commission declined to revise the Legislative findings and declarations because historically, they have been deemed outside of the scope of proposed revisions recommended by the NJLRC.

At Justice Long's suggestion, the Commission voted to include in N.J.S. 5:15-5 the assumption of risk language currently found in both New Jersey's Ski and Roller Skating Rink Acts.

Finally, the Commission approved changing the header of N.J.S. 5:15-9 to read, "Duties and responsibilities of operators," and to strike the reference to "exceptions to limitations on operator liability" to avoid confusion.

The Chairman requested that Staff prepare a Draft Final Report with all changes incorporated for the next Commission meeting.

New Jersey Property-Liability Insurance Guarantee Association Act

Frank Ricigliani explained that the potential project arose out of Staff's review of the Appellate Division's decision in *Oyola v. Xing Lan Liu* and the language of the New Jersey Property-Liability Insurance Guaranty Association Act (PLIGA). In that case, the plaintiff was severely injured in a motor vehicle crash. Oyola's claim against Chen and Liu was settled by a payment by Chen's liability insurance carrier in the amount of the policy's maximum of \$15,000, but Oyola's own insurance carrier (Consumer First Insurance Company) was declared insolvent during the proceedings and dismissed by stipulation. Consumer First should have paid out \$85,000 to the injured insured, but the insolvency prevented recovery, so the plaintiff amended his complaint to include the Association.

The purpose of the PLIGA is generally "to minimize financial loss to claimants or policyholders because of the insolvency of an insurer, [and to] administer and pay claims asserted against the Unsatisfied Claim and Judgment Fund." The Association's obligation extends only to the statutory maximum of \$300,000 and the PLIGA addresses the concept of exhaustion and requires that the amount of a covered claim be reduced by the amount of any applicable credits. The Court in *Oyola* looked to the case of *Thomsen v. Mercer-Charles*, 187 N.J. 197 (2006) when making its decision. The Court in *Thomsen* had

explained that “when an insured is covered by both a solvent and an insolvent insurer and the solvent insurer has paid the insured an amount exceeding the Act’s maximum payment, but which falls short of the insured’s total damages, the insured may seek compensation from the Association.”

The Legislature amended the PLIGA in 2004. The 2004 amendments moved the phrase at issue in *Oyola* and *Thomsen* from one statutory section to another, and reworded the phrase from “[a]n amount payable on a covered claim” (pre-amendment and controlling phrase in *Thomsen*) to the current phrase “the amount of a covered claim payable” (post-amendment and controlling phrase in *Oyola*).

In *Oyola*, the Association argued that the Legislature’s amendments in 2004 had altered the rule in *Thomsen*, and compelled the result that the N.J. Supreme Court had rejected in *Thomsen*. The *Oyola* Court, however, suggested that the two phrases are “virtually indistinguishable,” and that the statutory amendments in 2004 were not intended to overrule *Thomsen* because “the legislative history does not mention *Thomsen*.” Mr. Ricigliani noted that *Thomsen*—though applying the pre-2004 statutory text—was not decided until 2006, so the Legislature could not have been cognizant of *Thomsen* while drafting or considering the 2004 amendments.

Cynthia Borrelli, Esq., attended the meeting in an informational capacity, to provide some background and context regarding the issues under consideration by the Commission. She explained that it was the understanding of the Association’s that the Legislative intent in amending the Act was to clarify that the Association’s obligation would be offset in cases like *Oyola*. By way of background, Ms. Borrelli briefly discussed the purpose of the Association and its role as a payor of last resort. She indicated that, as a result, it appears that the obligation of the Association should be calculated based on maximum liability, rather than total damages. Doing otherwise can result in an insured party being in a better position as a result of the insolvency of their insurer than they would have been without the insolvency. Such a result may be contrary to the limited role the Association was created to play. According to Ms. Borrelli, if the project goes forward, a drafter’s note or comment should accompany any recommended changes in order to clarify the issue. In response to questions from the Commission, Ms. Borrelli explained that the language of the PLIGA did not “track” the model Act’s language because New Jersey’s Act lacks a definition of “exhaust” and she briefly touched on the issue of subrogation.

The Commission agreed to move forward with the project and requested that Staff, include, as a part of the work in this area, research regarding the practices of other states, the subrogation issue, and any other issues about which the Legislature should be made aware.

Juvenile Sentencing

Mr. Ricigliani proposed a project to the Commission based on Staff's review of *In re Interest of K.O.*, 217 N.J. 83, 86 (2014), where the Supreme Court considered the conditions under which an extended-term sentence may be imposed on a juvenile pursuant to N.J.S. 2A:4A-44 subsection d.(3). Mr. Ricigliani proposed a project to clarify this subsection in response to the Court's determination in *In re Interest of K.O.*

Subsection d.(3) identifies the circumstances under which the court is authorized to impose an extended-term sentence to a juvenile. The issue before the Court was whether subsection d.(3) "requires two previous adjudications" in order for an extended-term sentence to be imposed "or whether the adjudication for which the juvenile presently is being sentenced may itself count as the second predicate offense." The issue arises from the language which permits a court to sentence a juvenile defendant to an extended term: "if [the court] finds that the juvenile was adjudged delinquent on at least two separate occasions. . . and was previously committed to an adult or juvenile facility."

Mr. Ricigliani explained that the Court in *In re Interest of K.O.* construed the statute to require two previous adjudications in order to impose an extended-term sentence. The Court further stated that to the extent the statute is ambiguous the rules of lenity provide the same result.

Commissioner Long suggested that it would not hurt to clarify the language of the statute, and the Commission agreed to move forward with a project to add the word "previously" to subsection d.(3), as follows: "if [the court] finds that the juvenile was previously adjudged delinquent on at least two separate occasions". Staff will draft accordingly for an upcoming meeting.

New Jersey Franchise Practices Act

Laura Tharney explained that Seton Hall law student extern Alexandra Kutner had researched the New Jersey Franchise Practices Act issue and prepared the Memorandum under consideration by the Commission, before concluding her time with the Commission. Ms. Tharney said that the potential project was brought to the attention of Commission Staff by the decision of the District Court in *Navraj Rest. Group, LLC v. Pancho's Franchise Corp.*, which reiterated the holding of the New Jersey Supreme Court in *Kubis & Perszyk Assocs. v. Sun Microsystems*. *Kubis* held, in 1996, that while the New Jersey Franchise Practices Act (NJFPA) voids certain choice of forum clauses specifically for motor vehicle franchises, the applicable restrictions on forum selection and choice of law provisions apply to all types of franchises. Despite the earlier *Kubis* decision, the courts have still addressed this issue in the absence of changes to the statute to reflect the court's decisions. Revising N.J.S. 56:10-7 to reflect these court decisions might clarify this area of the law.

Ms. Tharney explained that it appeared that the potential confusion caused by the statute was structural in nature. The NJFPA consists of nearly 50 sections of statute (N.J.S. 56:10-1 to N.J.S. 56:10-31), with the original sections enacted in 1971. The Act applies to franchises generally if they meet the statutory criteria set forth in N.J.S. 56:10-4 and also (as the result of later amendments) makes specific reference to the application of the Act to franchises for the sale of motor vehicles. Some of the approximately 50 sections of the Act apply generally to all franchises, but others refer specifically to motor vehicle franchises.

N.J.S. 56:10-7, which was included in the original statutory sections in 1971, identifies prohibited practices for all (not only motor vehicle) franchises. The language prohibiting forum-selection clauses is not currently present in N.J.S. 56:10-7. It dates to 1989 and was added to the statute with other motor vehicle franchise additions.

Commissioner Bunn observed that the issues under this Act come up a lot and that New Jersey is considered, by those who focus in the franchise area, to be a very pro-franchisee state.

In response to Ms. Tharney's question regarding whether it would be worthwhile to pursue the project, Justice Long asked if the forum selection clauses are presumptively invalid. She asked also whether the proposed draft language, preliminarily included for Commission consideration in the Memorandum, was broader than the Court's determination in *Kubis*. Ms. Tharney said that Staff would certainly make sure that the language provided by Staff in the next draft did not exceed the scope of the opinion on which it is based.

Commissioner Bunn expressed concern about making a near-universal contract provision into a statutory violation. The Commission agreed with his concern, and requested that Staff instead follow the Court's determination in *Kubis* and draft a statutory provision making a forum-selection clause presumptively unenforceable, following any other relevant *Kubis* case language, but not expanding the proposed statutory language beyond the Court's determination in *Kubis*. Staff will draft accordingly for an upcoming meeting.

Base Salary

Laura Tharney explained that while the research and drafting of the Memorandum had been done by Jocelyn Donald, an intern here for the semester from NJIT, Ms. Donald was unable to attend the meeting to make the presentation to the Commission as a result of a scheduling conflict.

The potential project came to Staff's attention as a result of the decision of the Appellate Division of the Superior Court in *New Jersey in Paterson Police PBA Local 1*

v. City of Paterson. The arbitration award giving rise to that case determined that the police officers would make contributions toward health insurance coverage in the amount of 1.5% of their base salary.

The appeal arose out of the parties' dispute over the definition of "base salary". The City interpreted base salary as an officer's *base pensionable salary* and made deductions accordingly. The Union argued that "base salary" meant *base contractual salary* and excluded additional items of compensation such as longevity incentives, educational incentives, and night shift and detective pay differentials.

N.J.S. 40A:10-21(b) was added to the law in 2010 as part of the implementation of some of the recommendations of the Joint Legislative Committee on Public Employee Benefit Reform, including that all public employees pay some portion of the cost of their health insurance premiums. The statute states that "employees of an employer shall pay 1.5 percent of base salary [for] health care benefits coverage provided pursuant to N.J.S. 40A:10-17". Although defined in the Police and Fire Public Interest Arbitration Reform Act, "base salary" is not defined in N.J.S. 40A:10-21, which pertains to Employees Group Insurance Plans (specifically, "Payment of premiums; deduction of employee contributions").

Ms. Tharney explained that in the absence of a definition in the relevant statutory section, the Court turned to legislative history, dictionaries, and statutory context (including informal guidelines issued by the New Jersey Department of Community Affairs, Division of Local Government Services), in an effort to determine the intent of the Legislature. Ultimately, the Appellate Division determined that "the arbitration award must be enforced in a manner consistent with the definition of 'base salary' contained in *N.J.S.A. 34:13A-16.7(a)*", which included the base pay plus additional items of compensation.

Ms. Tharney said that Staff was seeking authorization to make a limited change to the statute, perhaps making reference to the statutory section containing the definition upon which the Court relied, such as "base salary as defined in N.J.S. 34:13A-16.7...".

Chairman Gagliardi, whose practice experience includes related areas of the law, explained that making such a modest change could be a useful thing to do and the Commission unanimously approved work by Staff on this project.

Newspersons' Shield Act

Ms. Tharney explained that, at the last meeting, the Commission considered, but did not decide, whether to undertake a project in the area of the Newspersons' Shield Act. She explained that the 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 that

case, as in others, the Court indicated that the Legislature has the ability, should it wish, to more clearly define the newsgroup's privilege in the face of changing news media. The goal of the potential project is to review the law and determine whether any ambiguity can be resolved by statutory drafting.

Ms. Tharney said that during its consideration of the issues, the Commission briefly discussed the changing nature of media (including the prevalence of blogging), and the fact that, as a result, this is a fluid area of the law with only a limited amount of case law providing guidance. Ms. Tharney also noted that Commissioner Bell, who has taught in this area, suggested that one way to address the issue would be to try to draft "ahead" of the existing body of case law to identify "who" constitutes "media", but that this was a highly charged area that continues to evolve at a rapid pace.

As a result of a difference of opinion among the Commission members present at the March meeting, the matter was carried to the April meeting to see if Commission members who were not present in March wished to be heard on the issue of whether to take up a project in this area. Commissioner Long, who was joined by Commissioner Bulbulia and Commissioner Bertone, expressed an interest in hearing more about what other states have done in this area, and whether there were any relevant model acts that the Commission could consider before making a determination.

Ms. Tharney said that Ms. Kutner, who conducted the initial research in this area of the law, had conducted a 50-state search for available law, and added that she would be happy to collect that information, supplement it with information regarding model acts, and present that material at an upcoming meeting for Commission consideration.

Miscellaneous

Ms. Tharney advised the Commission that: (1) a new attorney would be joining the Staff in May; (2) Commission Staff would be providing a continuing legal education panel discussion in June through the Office of Legislative Services; and (3) she would be attending the annual meeting of the American Law Institute again this year in May in Washington, D.C. She added that the Commissioners had before them Mr. Ricigliani's Memorandum concerning the origins of the statutory language common to the remaining law revision commissions in the United States and a brief letter that had been submitted in support of the proposed change to the Court Rules in response to the Commission's work on the Uniform Interstate Deposition and Discovery Act.

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