

MINUTES OF COMMISSION MEETING

October 21, 2021

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Commissioner Andrew O. Bunn; Commissioner Louis Rainone; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

In Attendance

Professor Jon Romberg of Seton Hall University School of Law, and David McMillin, Esq., Director of New Jersey Legal Services, were in attendance.

Minutes

Commissioner Bell stated that there was a typographical error in the last paragraph of page eight. He asked that the word “factional” be corrected to the word “factual” in the statement attributed to Commissioner Long. The Minutes of the September 16, 2021, subject to Commissioner Bell’s modification, were unanimously approved by the Commission on the motion of Commissioner Bertone, seconded by Commissioner Bunn.

Inhabitant

Samuel Silver discussed with the Commission a Draft Final Report proposing modifications N.J.S. 10:55-(a). Mr. Silver explained that this project was brought to the Commission’s attention by *Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38 (App. Div. 2019), in which the plaintiff brought a civil rights action against his New Jersey based former employer.

The NJLAD is designed to protect “inhabitants” of New Jersey from discrimination. The term “inhabitant” is not defined in the NJLAD, and where it appears in the NJLAD, it may be read as inconsistent with other provisions of the Act. N.J.S. §10:5-5(a) defines person and does not limit it to New Jersey residents or employees.

The Court in *Calabotta* determined that the restrictive language used in the legislative findings created a potential interpretive ambiguity about the scope and coverage of the statute. The Court further determined that the Legislature did not intend for the NJLAD to apply solely to the inhabitants of New Jersey, and extended protection to an Illinois resident who worked for a New Jersey-based company.

The New Jersey courts have long recognized that the NJLAD is intended to eradicate “the cancer of discrimination” and protect employees while deterring employers from engaging in

discriminatory practices. New Jersey courts have long said that the NJLAD should be liberally construed to advance its beneficial purposes.

After an extensive examination of the legislative history and the text of the statute, the *Calabotta* Court found no expression of a legislative intent to limit the statute's protections to job applicants who live in New Jersey or to those employees who perform all their employment functions in New Jersey. The Court concluded that despite the inclusion of the term "inhabitants" in the legislative findings, the Legislature did not intend to confine the scope of the statute's protections solely to plaintiffs and claimants who reside in this State.

Mr. Silver explained that he conducted outreach for comments from the Office of the Attorney General, counsel for the parties in *Calabotta* case, and other potentially interested individuals and organizations, and that Staff received comments from the Academy of New Jersey Management Attorneys, Inc. (ANJMA) on October 15, 2021.

The ANJMA advised the Commission that they oppose any amendment to the NJLAD that fails to make it clear that non-resident plaintiffs seeking relief must have significant contacts with New Jersey to establish a claim under the NJLAD. Mr. Silver discussed the ANJMA's proposed modifications with the Commission. Preliminarily, the ANJMA suggested that the definition of the word "person" in N.J.S. 10:5-5(a) be amended to include a significant contacts requirement. A "person," pursuant to this recommendation, would include persons with residence within the State, if employed or seeking employment within the State; employment within the State; an application for employment in a posted position within the State; or extensive business dealings within the State. Alternatively, the ANJMA suggested that the NJLRC's proposed modifications to the NJLAD's legislative findings, N.J.S. 10:5-3, be altered to include persons with significant contacts to the State of New Jersey or persons domiciled, employed, or seeking employment within the State.

The ANJMA's detailed discussion of the choice-of-law issues, discussed at length by the *Calabotta* Court, exceeded the scope of the project and was not discussed with the Commission.

With the guidance of the Commission, Staff's proposed modifications closely followed the determination of the *Calabotta* Court and the intent of Legislature. Mr. Silver noted that the focus of the Legislature's activity in this area has been to strengthen the NJLAD, adding more protections and more classes of individuals. He expressed concern that adopting the ANJMA's proposed language would narrow the term "person" to require "significant contacts" as they pertain to employment, and that doing so might limit the scope of the NJLAD, a remedial act that requires a broad interpretation.

Commissioner Bunn inquired whether there was a distinction among the commenters between significant contacts and minimum contacts in a constitutional sense. Mr. Silver stated that that the comments dealt solely with significant contact. Commissioner Bunn further inquired whether the commenter had provided a proposed definition for significant contact. Mr. Silver said that the ANJMA set forth four employment-related factors to denote significant contacts. Commissioner Bunn then confirmed with Mr. Silver that the language in the Appendix was

identical to the language set forth in the Tentative Report. Commissioner Rainone asked whether the plaintiff in *Calabotta* would have qualified for relief under the language proposed by the ANJMA. Mr. Silver responded that it was likely that the Court would have reached the same result.

Commissioner Bunn inquired whether the changes would level the playing field and conform to the body of the statute. Mr. Silver said yes, and stated that the preamble and legislative findings used both the terms “inhabitants” and “person”. Commissioner Cornwell stated that he was in support of revising the statute so that it removed any ambiguity regarding the persons that were protected by the NJLAD.

Commissioner Bell suggested that the second reference to the term inhabitant in N.J.S. 10:5-3 be modified to include “persons and all others within the State’s jurisdiction.” He recommended a similar modification to the language in the second paragraph of the statute. Commissioner Bunn asked whether the proposed modification, “these persons”, is too narrow, noting that the second paragraph of the statute describes the individuals that the NJLAD seeks to protect. Commissioner Rainone concurred with Commissioner Bunn, suggesting that when a person from Philadelphia applies for a position in New Jersey and is discriminated against, that discrimination also hurts the people of New Jersey. Commissioner Rainone agreed with Commissioner Bell’s modification to the first paragraph of the statute. Commissioner Bell concurred with the reasoning of both Commissioners Rainone and Bunn to maintain the second statutory use of the term inhabitant, rather than changing it.

With the changes approved by the Commission and on the motion of Commissioner Bell, seconded by Commissioner Cornwell, the Commission unanimously voted to release the project as a Final Report.

Reasonable Cause

In *State v. Hemenway*, 239 N.J. 111 (2019), the New Jersey Supreme Court considered the use of the statutorily prescribed “reasonable cause” standard when ordering the search for, and seizure of, weapons pursuant to a temporary restraining order pursuant to N.J.S. 2C:25-28(j).

Mr. Silver explained that the Fourth Amendment to the U.S. Constitution and Article I, Paragraph 7 of the New Jersey Constitution, in virtually identical language, provide that no warrant shall issue, but on probable cause. These warrant and probable cause requirements apply to criminal, civil, and administrative searches of homes. Further, the physical entry of the home by a government actor is described as the chief evil against which the wording of the Fourth Amendment is directed.

In the *Hemenway* case, the New Jersey Supreme Court indicated that the statute should conform to the probable cause requirement, requiring probable cause to believe that: an act of domestic violence was committed by the defendant; a search and seizure of weapons is necessary to protect the life, health, and well-being of the victim; and probable cause to believe weapons are located in a place to be searched.

In May of 2021 the Commission released a Tentative Report that replaced reasonable cause with probable cause. Mr. Silver advised the Commission that comments were sought from knowledgeable individuals and organizations with an interest in this area of law. Further, he informed the Commission that Staff had not received any objections to the proposed statutory modifications set forth in the Appendix to the Report.

Commissioner Cornwell questioned whether reasonable cause appears in any other statutes in New Jersey's Code of Criminal Justice and noted that the reasonable cause can easily be confused with the reasonable suspicion standard. Mr. Silver stated that the term reasonable cause appears in statutes pertaining to the search for explosive devices, alcohol and beverage control, and a health care professional's duty to warn. He added that Staff conducted a search for the term "reasonable cause" in New Jersey's statutes generally, and that each statute in which the term appears is set forth in the Appendix to the Report with a proposed modification.

On the motion of Commissioner Cornwell, seconded by Commissioner Bertone, the Commission unanimously voted to release the Final Report.

Receivership Act

New Jersey's Receivership Act, N.J.S. 2A:42-117, governs the power of a court to appoint a receiver when certain conditions are met. Whitney Schlimbach explained that within N.J.S. 2A:42-117, there is a question regarding whether a court has the discretion to appoint a receiver if one of the enumerated conditions exists, or whether a court is required to appoint a receiver under such conditions. This issue was discussed by the Appellate Division in *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP*, 2019 WL 5395937 (App. Div. 2019).

The dispute in *Mfrs. and Traders Tr. Co.* involved complex litigation over senior citizen housing damaged as a result of Superstorm Sandy. The tenants involved in the litigation requested the appointment of a receiver. The trial court denied the tenant's request. On appeal, the tenants argued that the language of the Receivership Act mandated the appointment of a receiver. The Appellate division considered the language of N.J.S. 2A:42-117 and determined that it was ambiguous. After an examination of the legislative history of the statute, as well as separate receivership statutes contained within the Act, the court concluded that the Legislature intended to give trial courts broad discretion when appointing a receiver.

Ms. Schlimbach explained that, historically, the receivership of dilapidated buildings was possible under three different statutes of limited scope. The Receivership Act consolidated two of these three statutes. She added that the Legislature took the position that protecting everyone's interests in this area required a detailed framework within which the courts would work when instituting and managing receiverships. Ms. Schlimbach indicated that the sponsor's statements for the Receivership Act indicate that the statute was intended to provide the court with broad discretion.

The statutory language governing receiverships can be divided into three categories: permissive, mandatory, and situations in which mandatory language is used but additional

language within the same statutory section makes it clear that the court’s discretion is not restricted. The majority of the court’s power over a receivership is described permissively within the statutes, with few instances where the court’s discretion is restricted.

In the Appendix to the Draft Tentative Report, the language of N.J.S. 2A:42-117 has been reformatted in an effort to improve the statute’s clarity and accessibility, and the subsections have been re-lettered and re-numbered. The substance of subsection a. and subsection b. remains unchanged.

In subsection c., the proposed language addresses the court’s power to appoint a receiver if one or both of the conditions set forth in subsection b. are met, changing the language describing the court’s power to appoint a receiver from mandatory to permissive.

Ms. Schlimbach also advised the Commission that she corrected an errant omission and an erroneous statutory cross-reference that appeared in the Appendix to the Draft Tentative Report when it was distributed in advance of the meeting.

Commissioner Bunn confirmed with Ms. Schlimbach that the substantive modification – changing the word “shall” to “may” appears in subsection c. of the Appendix and said that the modification appears to capture the holding of the Court.

On the motion of Commissioner Bell, which was seconded by Commissioner Bertone, the Commission unanimously voted to release the work as a Tentative Report.

Eminent Domain

Angela Febres and Lauren Haberstroh, Legislative Law Clerks, discussed a proposal for a new project that would address the “just compensation interest rate” in eminent domain actions.

Ms. Febres explained that the Eminent Domain Act of 1971 was enacted to establish uniformity in condemnation actions. The “general repealer” contained within the Act applies to all entities having the power of eminent domain unless they are otherwise exempt. In addition, the Act contains a provision that vests courts with broad discretion when setting the interest rate to be paid in condemnation actions. Title 27, which pertains to highways, also contains a provision regarding the interest rate for just compensation awards. The interest rate in Title 27 is fixed at six percent.

In *State by Comm’r of Transp. v. St. Mary’s Church Gloucester*, 464 N.J. Super. 579 (App. Div. 2020), property belonging to the church was condemned for use in a Camden County highway construction project. The Commissioner of the Department of Transportation deposited \$1,865,000 in the Superior Court’s trust fund as “just compensation.” Following a trial, the church was awarded \$2,960,000, and the dispute between the parties focused on the applicable interest rate for the balance of the funds in excess of the amount previously deposited. The Commissioner argued that the Eminent Domain Act impliedly repealed the Title 27 interest rate provision so the trial court had discretion to set a lower interest rate amount. St. Mary’s argued for the six percent interest rate pursuant to Title 27. The trial court held that the Eminent Domain Act did not repeal

Title 27's interest rate provision and awarded St. Mary's the six percent rate. On appeal, the Appellate Division held that the Eminent Domain Act did impliedly repeal the Title 27 interest rate provision.

Ms. Haberstroh explained that that the issue on appeal was whether the Eminent Domain Act or Title 27 controls the fixed interest rate for just compensation. The Appellate Division found that the plain language of the Act, at N.J.S. 20:30-50, directly contradicted the plain language of Title 27, so the Court examined the legislative history of the Act. The Court noted that the Act was once conditionally vetoed with a recommendation that it explicitly repeal any act that was inconsistent with the new eminent domain law. Additionally, the Legislature had previously rejected a six percent fixed interest rate for all condemnations conducted pursuant to the Act.

Ms. Haberstroh explained that the Appellate Division examined the dates of enactment of the Act and Title 27, and determined that the Eminent Domain Act, enacted after Title 27, clearly intended to repeal Title 27. The Court determined that the trial court erred in applying the Title 27 fixed interest rate and concluded that N.J.S. 20:3-50 acts as a general, implied repealer to Title 27 and any additional provisions that contradict its language. Ms. Haberstroh stated that the confusion at the trial level in *St. Mary's* implies that the Act is still difficult for affected parties to interpret and apply.

Commissioner Bunn asked whether the *St. Mary's* decision had been appealed to the New Jersey Supreme Court. In addition, he asked that the citation in footnote number two be corrected to reflect that *St. Mary's* is an Appellate Division decision. Ms. Tharney indicated that Staff has not seen any indication that the decision was appealed but will confirm and correct the citation. Absent the granting of a petition for certification, Commissioner Bunn expressed support for the project, stating that there was an ambiguity that required some deep analysis to untangle, and that facilitating the calculation of proper interest would be beneficial to those who employ these statutes. Commissioners Rainone, Bertone, and Bell agreed.

Commissioner Bell noted that the statute appears to grant each judge the discretion to select an interest rate. He added that the New Jersey Rules of Court set forth the means of calculating the current interest rate and suggested that the statutory revisions include a reference to the court's power to set the interest rate and reference either the method the courts are currently using or the Court Rules. Commissioner Bunn stated that the New Jersey Rules of Court set forth the post-judgment interest rate but do not set forth a rate for pre-judgment interest. He said that the project should be grounded in the actual mechanics of the Rule to make settlement of these cases more predictable. Commissioner Bell provided the citation to Rule 4:42 and Rule 4:42-11, which address the interest of post-judgment interest only.

Commissioner Rainone asked whether the "just compensation" issue raised in the *St. Mary's* case might extend to other instances of eminent domain actions initiated by entities other than the Department of Transportation. Commissioner Rainone questioned whether the reference to the New Jersey Rules of Court would create an ambiguity in non-DOT eminent domain cases. He added that the Rules of Court may only reference post-judgment interest calculations because not every case allows for pre-judgment interest.

Commissioner Bunn stated that the decision of the Appellate Division in the *St. Mary's* case was consistent with the idea that the Act was meant to establish a uniform system for awarding interest in these cases. He agreed with Commissioner Rainone that Staff should examine other eminent domain cases to determine whether the holding of *St. Mary's* can properly be applied to these cases. Commissioner Rainone noted there are several eminent domain authorizations in the body of statutes, but said that the provision for utilities might suffer from the same problem as the DOT statutes.

The Commission authorized additional research and outreach to determine whether work in this area would be of use.

Standard Form Contract

John Cannel discussed with the Commission a Revised Draft Final Report that updated the Commission's earlier work in the area of Standard Form Contracts. As a preliminary matter, Mr. Cannel thanked the commentors for their tremendous help throughout the course of this project. He noted that with the assistance of the commentors, Staff was able to make changes that improved the prior version of this project. Mr. Cannel advised the Commission that no substantive changes have been made to the Revised Draft Final Report since they had last seen it.

Professor Jon Romberg thanked the Commission for consideration of his previously-submitted written comments, and stated that he has a fundamentally different view from the Commission on what it is wise to do in this area of law. In his opinion, the current Report is more anti-consumer and more pro-business than the work of the American Law Institute's (ALI), which has received considerable criticism from those in opposition.

Professor Romberg stated that the manner in which the Report deals with the issue of "consent" significantly curtails New Jersey's current law and it does not represent the state of the law in any jurisdiction. According to Professor Romberg, the ALI has chosen a pro-business method of dealing with consent, while providing the consumer with a reasonable opportunity to inspect the item that is the subject of the standard form contract. He said that the Commission's treatment of the issue of consent weakens consumer protection.

Next, Professor Romberg discussed the concept of "unconscionability." He stated that the Commission's work does not permit unconscionability to be fully raised as a defense and is therefore anti-consumer and contrary to the current state of the law. He added that the Commission's work in the area of "unconscionability" weakens consumer protections by splitting the discussion into primary and secondary terms. He questioned the enforceability of these new terms and indicated that he was unsure how a court would interpret them. Finally, he advised the Commission that the Report conceptually undercuts contract law developed over several centuries and undercuts consumer rights.

Mr. McMillin thanked the Commission and Staff for considering his comments and for their willingness to discuss these issues with him throughout the process. He concurred with

Professor Romberg's comments and stated that the issue of consent raises broader questions. Mr. McMillin's concerns focused on "unconscionability." He explained that, since 1992, there have been more than 100 cases that cited the seminal case of *Rudbart v. North Jersey District Water Supply Commission*, 127 N.J. 344 (1992) and its four-part test on unconscionability. He stated that those cases would be wiped out overnight if the Legislature were to enact the Commission's Report. Mr. McMillin explained that the four-part test in *Rudbart* provides protections for low-income consumers and that the Commission's work in this area has removed the court's examination of the equity and bargaining power of the parties. He stated that the Report takes 100 years of common law regarding unconscionability and consent and makes it unavailable to low-income consumers.

Mr. Cannel acknowledged that the Commission's work takes a new approach by eliminating the concept of consent. He said that it is a fiction to believe that the boilerplate provisions of a standard form contract are ever consented to by the parties. Mr. Cannel noted that it is not necessary to demonstrate a difference in bargaining power between the parties. The work of the Commission in this area represents an improvement upon the 1998 work of the Commission, which was introduced in the current legislative session. This Report, he continued, is intended to represent a change in thinking, improved and softened by the effect of earlier comments, including those of Professor Romberg and Mr. McMillin.

Commissioner Bunn asked Mr. Cannel if he could clarify that the scope of this project because it was his understanding that the project was limited to standard form contracts and did not involve modifications to all contracts and common law principles that apply to other types of contracts, which will continue to exist. Mr. Cannel agreed, noting that certain contracts are negotiated, and those contracts need to be handled differently. He also added that this Report does not remove the protections afforded to consumers pursuant to the New Jersey Consumer Fraud Act.

Commissioner Rainone inquired about the status of the bill that is currently in the Legislature that embodies the Commission's 1998 Report. Mr. Cannel answered that it has not moved, but that it has been introduced in recent legislative sessions. Commissioner Rainone said that a bill that has been categorized as anti-consumer is unlikely to be considered by the Legislature. He added that although the Commission is always careful, he is concerned that this project might involve a policy issue.

Laura Tharney added that the Commission began working on an update of its older report in 2018 and it seems that there are no practical steps that the Commission can take in the direction that has previously been established on this project that will garner support for this project from the commenters. She said that, as indicated in the Report, efforts have been made to incorporate the comments received, but there is not much that the Commission can do in the way of drafting that will cause commenters to support the project. She asked whether the Commission would like Staff to continue this work or conclude this project by releasing an updated Report that makes substantive changes to the Commission's earlier work by way of improvements and additional protections not found in the original Report in response to the feedback provide by commenters.

Commissioner Bell asked Mr. Cannel to identify some of the improvements that had been made to the current draft. Mr. Cannel responded that a clearer distinction has been made between primary and secondary terms when it comes to a specific price. Also, unconscionability was added back in to the Report. Changes also include the deletion of the provisions on parole evidence because it was found to be too broad. Ms. Tharney added that changes were also made to Section five concerning the cancelation of standard form contracts based upon comments from stakeholders.

Commissioner Bell noted that several Commissioners had concerns about the arbitrariness of unconscionability and the vague approach to the doctrine. The current state of the law does not allow a litigant to predict the outcome of litigation and the outcomes may be considered to be arbitrary. The issue of unconscionability, he continued, was preserved in the Report and the Commission tried to define it in a way provided for predicable outcomes. Although the commenters believe that the Report denies consumers a remedy once they have received the product, the Report provides consumers with the ability to cancel the contract after they have access to the terms. Commissioner Bell acknowledged that the Commission has done all they can on this project.

Commissioner Cornwell noted the controversial nature of the project and recommended that the Commission not release a Final Report on this project. He added that he will not vote in favor of any project that is considered anti-consumer. Commissioners Bertone and Rainone likewise stated that they do not support the release of a Final Report on the project.

Commissioner Bell suggested that since there was a lot of work that went into this project it would be helpful for the public to be able to see all the work that the Commission has done over the past three years. He continued that the work should be released as a Final Report with no action recommended and note that the Commission decided to no longer work on this area. Commissioner Bell argued that as a public body the Commission has an obligation to explain why it discontinued work on the project. Commissioner Cornwell opposed Commissioner Bell's motion and Commissioner Rainone concurred.

On the motion of Commissioner Cornwell, seconded by Commissioner Rainone and supported by Commissioner Bertone, the Commission voted not to release a Final Report on this project, and to discontinue work in this area, which was opposed by Commissioner Bell and Commissioner Bunn.

Miscellaneous

Laura Tharney advised the Commission that the Governor recently appointed Jayne Johnson, former Counsel to the Commission, to lead a newly-created Office of Diversity, Equity, Inclusion & Belonging. Ms. Tharney indicated that she had been in contact with Ms. Johnson to congratulate her on her appointment.

Adjournment

The meeting was adjourned on the motion of Commissioner Bertone, seconded by Commissioner Cornwell. The next Commission meeting is scheduled for November 18, 2021, at 10:00 a.m.