



NEW JERSEY LAW REVISION COMMISSION
Draft Tentative Report
Relating to Books and Records of Account (N.J.S. 14A:5-28)

January 13, 2020

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **March 13, 2020**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Executive Summary

In *Feuer v. Merck & Co., Inc.*,¹ the Appellate Division considered the definition of “books and records of account” in the context of whether a shareholder is entitled to all records pertaining to a transaction of a corporation or only the financial records.

The Court found that the statute in question, N.J.S. 14A:5-28, does not allow the shareholder to inspect all records from a corporate transaction; rather, only those limited to *financial* records.²

Relevant Statutes

The relevant portion of N.J.S. 14A:5-28(1) states the following:

Books and records; right of inspection.

Each corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any. Unless otherwise provided in the bylaws, such books, records and minutes may be kept outside this State.

[...]

And N.J.S. 14A:5-28(4) states the following:

Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose, irrespective of the period of time during which the shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation. The court may, in its discretion prescribe any limitations or conditions with reference to the inspection, or award any other or further relief as the court may deem just and proper. The court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon whatever terms and conditions as the order may prescribe. In any action for inspection the court may proceed summarily.

Background

In N.J.S. 14A:5-28, subsection one lays out the record keeping obligations of a corporation. The statute uses the terms “books and records of account” and “books” as if they are identical. In

¹ *Feuer v. Merck & Co., Inc.*, 455 N.J. Super. 69 (App. Div. 2018).

² *Id.* at 73.

subsection four, the statute uses “books and records of account” in the context of financial or accounting transactions. The term “books and records of account” is not defined in this subsection. The term, however, is also used in another subsection of this statute.

A shareholder of a corporation may petition a court to compel the production of the “books and records of account” and other documents pursuant to N.J.S. 14A:5-28(4). A court may add any limitations or conditions in allowing the examination of the requested documents or may allow further relief that it may deem just and proper.³ Much like the subsection that precedes it, N.J.S. 14A:5-28(4) does not define the phrase “books and records of account.” The phrase is not referenced elsewhere in the statute and there is no legislative history addressing the definition of “books and records of account.” The absence of a statutory definition led to litigation centered around the meaning of these terms.

In *Feuer v. Merck & Co., Inc.*, the plaintiff who was the owner of 288 shares of Merck stock, sought the production of twelve broad categories of documents from Merck.⁴ The Plaintiff intended to search for evidence that Merck acted wrongfully when it rejected his previous demand that Merck's Board of Directors (the “Board”) commenced suit against itself and senior management responsible for Merck's acquisition of another pharmaceutical firm.⁵

In response to Plaintiff’s demands, the Board appointed a “Working Group” to evaluate these demands, retain counsel, conduct an investigation, and recommend a response related to the acquisition of the pharmaceutical firm.⁶ Four month’s later, the Working Group informed the Plaintiff that it had rejected all of his demands, pursuant to its business judgment rule.⁷

In a subsequent letter to the Board, the Plaintiff demanded the documents that became the focus of this appeal.⁸ He described twelve categories of “Merck's ‘Books and Records’” pertaining generally to the Working Group's activities, communications, and formation; documents provided to the Board regarding Cubist and two of its drugs before Merck's tender offer; and the Board's consideration of Plaintiff’s Demands and the Working Group's recommendations.⁹

The trial court held that Plaintiff had a “proper purpose” under N.J.S. 14A:5–28 in seeking the documents. The documents Plaintiff sought, however, fell outside “books and records of account.”¹⁰ Plaintiff appealed the trial courts decision arguing that N.J.S. 14A:5-28(4) entitled him to the documents Merck withheld.¹¹

³ See N.J.S. 14A:5-28(4).

⁴ *Feuer v. Merck & Co., Inc.*, at 73.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 74.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 75.

¹¹ *Id.* at 76.

Analysis

In *Feuer*, the Appellate Division examined N.J.S. 14A:5-28 to determine whether the shareholder was entitled to twelve categories of documents pertaining to the Working Group's investigation into a pharmaceutical acquisition. The Appellate Division reviewed secondary sources including a legal dictionary and the case law from other jurisdictions to ascertain the definition of the term "books and records of account" in subsection four.

In addition, the Appellate Division examined subsection one to determine whether the phrase "books and records of account" had a different meaning in that section. In subsection one, the Court determined that the phrase was used to obligate a corporation to maintain record-keeping for "books and records of account" which the Court defined as "consisting of accounting or financial documents."¹²

The Court determined that subsection four gives the shareholder [the right of] "inspection of a significantly narrower universe of corporate records than Feuer demanded."¹³

The Court examined the way in which other courts had defined "books and records of account", noting that the Supreme Court of Alaska defined the term as consist[ing] of "accounting or financial documents."¹⁴ The Court observed that Pennsylvania also used the phrase "books and records of account"¹⁵, and that its Eastern District found that "'books and records of account' does not encompass any and all records, books, and documents of a corporation."¹⁶ A review of the use of the phrase in Missouri revealed that its use there was narrower than the shareholder argued. The Court in Missouri ruled that the phrase did not connote "inter-office communications."¹⁷

In addition, the Appellate Division consulted *Black's Law Dictionary* to establish the regular definition of "books and records of account." *Black's Law Dictionary* defines the phrase "books of account" with "shop books," which are "[r]ecords of original entry maintained in the usual course of a business by a shopkeeper, trader or other business person."¹⁸

The Court also examined the structure of the New Jersey statute. The Court noted that the phrase appears in both the first paragraph and the fourth of N.J.S. 14A:5-28. The Court noted, that if the Legislature used the phrase in one subsection then the phrase should equate the same meaning

¹² *Id.* at 78.

¹³ *Id.*

¹⁴ *Id.* Citing *Pederson v. Arctic Slope Reg'l Corp.*, 331 P.3d 384, 397 (Alaska 2014).

¹⁵ *Feuer v. Merck & Co., Inc.*, at 78.

¹⁶ See *Susquehanna Corp. v. Gen'l Refractories Co.*, 250 F.Supp. 797, 801 (E.D. Pa. 1966) (applying Pennsylvania law and stating "books or records of account" excludes "records of another corporation whose acquisition is contemplated" and "the proposed contract").

¹⁷ See *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 778 (Mo. 1962) (holding that statutory right to inspect corporation's "books" did not include "analyses or tentative studies," which were "in the nature of confidential inter-office communications" and prepared solely for management's information).

¹⁸ *Black's Law Dictionary* at 362 (9th ed. 2009).

in the other subsection.¹⁹

The Court stated that “[r]eading the statute sensibly, [...] does not impose such a vaguely defined record-keeping obligation on corporations, nor does it grant courts the power to grant an equally vague scope of inspection to shareholders.”²⁰ Since the Legislature used “books” and “records” in subsection four’s third sentence and does not include “of account” like in the first sentence, the Court held that this must be taken as a purposeful decision by the Legislature.²¹

Ultimately, the Court noted that it would not expand the scope of the meaning of “books and records of account” and concluded that the Legislature omitted “of account” purposefully.

Legislative History

The first amendment, to the statute was in 1968. This amendment concerned Title 14A but did not address N.J.S. 14A:5-28. In 1972-73 the Corporation Commission inserted additional language regarding inspection of documents in the first subsection of the statute. These revisions eliminated the burdensome requirement that small publicly held corporations, headquartered or with transfer agents outside of New Jersey, keep duplicate shareholder records. The revisions did not define “shareholder records” and this term is used interchangeably with “records” in the subsection one.

In 1988, Section 14A:5-28 was revised to clarify that “shareholder's right of access to the shareholders list is conditioned upon his having a proper purpose.” The Commission was particularly concerned about a shareholder obtaining a mailing list to sell it or use it for a purpose otherwise unrelated to the business of the corporation.²²

Finally, in 2018 the statute was amended once more with the addition of subsection six. This new subsection did not address the differences or clarification between “books and records” and “books and records of account.”

Pending Legislation

Staff reviewed S2462.²³ This bill was introduced during the 2018-2019 legislative session and if provided that “corporations may utilize electronic networks, including distributed electronic networks, in order to meet recordkeeping requirements. The bill also stated that “corporate records of shares may be kept on an electronic network” and provided that corporations may use electronic transmissions from electronic networks to meet with certain notice provisions of existing law.²⁴

¹⁹ *Feuer v. Merck & Co., Inc.*, at 79.

²⁰ *Id.*

²¹ *Id.*

²² *Feuer v. Merck & Co., Inc.*, (Editor’s Notes) (Commissioner’s Comments).

²³ See S.B. 2462, 2018 Leg., 218th Sess. (NJ. 2018).

²⁴ *Id.*

Conclusion

In its current form, N.J.S 14A:5-28 does not define the meaning of “books and records of account.” In order to help clarify the definition for both corporate individuals and members of the general public, this statute may benefit from the addition of a statutory definition.

The addition on the following page proposes a definition for “books and records of account” to reflect the principles set out in *Feuer v. Merck & Co., Inc.*

Appendix

The proposed modifications to **N.J.S. 14A:5-28** (books and records of account; right of inspection) are shown with ~~strike through~~ and underlining are as follows:

N.J.S. 14A:5-28. Books and records of account; right of inspection

The relevant portion of N.J.S. 14A:5-28 states the following:

Books and records; right of inspection.

(1) Each corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any. Unless otherwise provided in the bylaws, such books, records and minutes may be kept outside this State. For purposes of this statute, the term “books and records of account” shall be limited to accounting and financial documents. It does not encompass other records, books, and documents of a corporation.

[...]

And N.J.S. 14A:5-28(4) states the following:

(a) Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose, irrespective of the period of time during which the shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation.

(b) The court may, in its discretion prescribe any limitations or conditions with reference to the inspection, or award any other or further relief as the court may deem just and proper. The court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon whatever terms and conditions as the order may prescribe. In any action for inspection the court may proceed summarily.

Comments

The first paragraph of subsection (1) has been amended to conform with *Feuer v. Merck & Co., Inc.*, 455 N.J. Super. 69 (App. Div. 2018). The newly amended paragraph in subsection (1), defines the term “books and records of account” as it pertains to the subsection 1 through 4 of N.J.S. 14A:5-28. In addition, subsection (1) defines the term “books and records of account” as discussed in *Feuer v. Merck & Co., Inc.*

The introductory paragraph gives a definition on “books and records of account” to allow the reader a clearer understanding of the Legislator’s intent. Subsection 4 has been divided into two subsections to allow a clearer and more concise reading of the statute.

The language from the introductory paragraph of subsection (1) was derived from *Feuer v. Merck & Co., Inc.* in which the Court utilized the definition of *Pederson v. Arctic Slope Reg'l Corp.*, 331 P.3d 384, 397 (Alaska

2014). The Feuer court further utilized the ordinary meaning from *Black's Law Dictionary* as well as the definitions from *Susquehanna Corp. v. Gen'l Refractories Co.*, 250 F.Supp. 797, 801 (E.D. Pa. 1966) and *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 778 (Mo. 1962), therefore the new language in the first subsection is consistent with the Court's opinion.