

To: New Jersey Law Revision Commission
From: Alyssa Brandley, Leg. Law Clerk; Samuel M. Silver, Dep. Dir.
Re: Definition of “Inhabitants” as Used in N.J.S. § 10:5-3 and discussed in
***Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38 (App. Div. 2019)**
Date: April 05, 2021

MEMORANDUM

Executive Summary

The practices of discrimination against members of protected classes are matters of concern to the government of New Jersey.¹ To protect the “inhabitants” of the State from such discrimination, the Legislature enacted the “Law Against Discrimination.”²

The term “inhabitants” as used in the preamble of the New Jersey Law Against Discrimination (NJLAD) is not defined anywhere in the Act.³ Moreover, the use of the term is inconsistent with the language used in other provisions of the statute, namely N.J.S. 10:5-5(a), which defines the term “person,” and which does not limit the definition to New Jersey residents or employees.

The breadth of protection provided by the NJLAD was the subject of *Calabotta v. Phibro Animal Health Corp.*⁴ The *Calabotta* Court noted that the more restrictive language used in the preamble created “a potential interpretive ambiguity about the statute’s coverage.”⁵ The Appellate Division found 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 Court in *Calabotta* did not address what constitutes a preamble. Several questions regarding the distinction between “preambles” and “legislative findings” were raised by the Commissioners at the February 2021 Commission meeting.⁶ Additional research concerning this subject addressed in the section of the Memorandum entitled *Preambles*.⁷

Statute Considered

N.J.S. 10:5-3 provides, in relevant part:

The Legislature finds and declares that practices of discrimination against any of its *inhabitants*, because of race, creed, color, national origin, ancestry, age, sex,

¹ N.J. STAT. ANN. § 10:5-3 (West 2021).

² N.J. STAT. ANN. §§ 10:5-1 – 10:5-49 (West 2021).

³ See N.J. STAT. ANN. § 10:5-3 and § 10:5-10 (West 2021).

⁴ *Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38 (App. Div. 2019).

⁵ *Id.* at 62. Based on precedent, the Court held that the preamble shall make way to the other provisions of the statute.

⁶ See N.J. LAW REV. COMM’N (2021) ‘Definition of Inhabitants.’ *Minutes of NJLRC meeting 18 Feb. 2021*, Newark, New Jersey.

⁷ See discussion *infra* “Preambles” p. 4.

gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the *inhabitants* of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by federal law or otherwise necessary to promote the national interest.

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, disability or nationality of that person or that person's , partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, in order that the economic prosperity and general welfare of the *inhabitants* of the State may be protected and ensured. (Emphasis added).

* * *

Background

In *Calabotta v. Phibro Animal Health Corp.*, the Plaintiff brought suit against his New Jersey-based former employer⁸ for failure-to-promote and wrongful discharge, alleging associational discrimination in violation of New Jersey Law Against Discrimination (NJLAD).⁹ At the time of the alleged incidents, the Plaintiff, a resident of Illinois, was an employee at Prince Agri Product Incorporated, a subsidiary of Phibro, located in Quincy, Illinois. The Plaintiff's claim of "associational discrimination" against him was based on the fact that his wife was terminally ill with cancer at the time the incidents occurred.¹⁰ In its defense, the Defendant claimed that the Plaintiff never applied for the promotion, and that it rightly discharged him for inappropriate conduct at a trade show.¹¹

From 2008 to 2016, the Plaintiff worked for the Defendant as Vice President of Marketing and Technology Deployment. Upon being hired, the Plaintiff signed three employment agreements which all provided, in relevant part, the following:

This agreement will be governed by the laws of the state of New Jersey without regard for conflicts of law principles. I expressly consent to venue in, and the

⁸ The Defendant is a corporation headquartered in Teaneck, New Jersey that develops and sells animal food additives.

⁹ *Id.* at 44.

¹⁰ *Id.* at 44-45.

¹¹ *Id.* at 45.

personal jurisdiction of, the state and federal courts located in New Jersey for any lawsuit arising from or relating to this agreement.¹²

The trial court dismissed the Plaintiff's complaint, finding that the "NJLAD does not apply to employees whose employment is based outside of New Jersey."¹³

Analysis

On appeal, the Appellate Division considered whether the NJLAD is intended to protect nonresident workers and job applicants, notwithstanding that the statute's preamble, N.J.S. 10:5-3, refers specifically to "inhabitants" of this State.¹⁴ To ascertain the scope of the NJLAD, and the intent of the Legislature, the Appellate Division examined the entirety of the Act.

The NJLAD is remedial in nature, and thus should be liberally construed to "advance its beneficial purposes."¹⁵ Certain provisions of the Act contain language supporting a broad application. The NJLAD recognizes that "[a]ll persons shall have the opportunity to obtain employment...without discrimination" and declares that to be a civil right.¹⁶ Additionally, N.J.S. 10:5-5(a) defines the term "person" as "one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries."¹⁷ What is *not* contained in the definition of "person," is a limitation of this term to New Jersey residents or employees. Similarly, N.J.S. 10:5-12(a) prohibits the discriminatory refusal to hire or employ, as well as to discriminatory discharge, "any individual" and does not limit the definition of "any individual" to New Jersey residents or employees.¹⁸

The Court also examined the language of the preamble to the Act, which contains more restricted language. Read narrowly, the preamble may limit those protected by the NJLAD.¹⁹ Although the preamble uses the term "inhabitants" in its text, the term is not defined anywhere in the Act.²⁰ In its analysis, the Court referred to N.J.S. 1:1-2 to determine a definition of inhabitants, noting that the Legislature intended the NJLAD to, at a minimum, protect New Jersey residents.²¹ The Court acknowledged that the extent of the Act's protection, however, is still unclear based on

¹² *Id.* at 47. The Defendant argued that these employment agreements regarded only discrete subjects and thus were not applicable to the alleged discrimination claims at hand. *Id.* at 51-52.

¹³ *Id.* at 51.

¹⁴ *Id.* at 45.

¹⁵ *Id.* at 61 (internal citation omitted).

¹⁶ *Id.* (citing N.J. STAT. ANN. § 10:5-4).

¹⁷ *Id.*

¹⁸ *Id.* at 62.

¹⁹ *Id.*

²⁰ *See id.* Further at issue is that the preamble does not even use the term "inhabitants" consistently throughout its text. Specifically, the second paragraph states the Legislature's "opposition to such practices of discrimination when directed against *any person*," not solely against inhabitants, while the third paragraph declares that, due to discrimination, "*people*," not solely inhabitants, suffer personal hardships. *Id.* at 63 (emphasis added).

²¹ *Id.* at 63.

the preamble.²² Ultimately, the Court concluded that where a preamble is inconsistent with the clear language of the statute, “the preamble must give way.”²³

Thus, after considering the remainder of the NJLAD’s text, as well as its legislative history, the Court determined that the Legislature did not intend the protections of the NJLAD to be limited only to job applicants who live in New Jersey or to employees who perform all of their employment functions in this State.²⁴

Preambles²⁵

The NJLAD uses the word “inhabitants” three times in the legislative findings portion of the Act.²⁶ Although the term is undefined in the Act, the *Calabotta* Court determined that under certain circumstances the NJLAD includes plaintiffs who reside or work outside of New Jersey.²⁷ In this case of first impression, however, the Court did not discuss the difference between a “preamble” and a “legislative finding” in its decision.²⁸

• Preambles v. Legislative Findings

A statute may contain a section, or sections, entitled “legislative findings” or “purpose.” These sections may appear either before, or after, the enacting clause. “These clauses are generally called *preambles* when they precede the enacting clause and *findings, purpose, or policy clauses* ... when they follow the enacting clause.”²⁹

The principles of statutory interpretation provide that the body of a statute is composed only of the material following the enacting clause.³⁰ Further, they suggest that the preamble should not be given any weight, especially when the preamble conflicts with the clear, unambiguous terms of the statute.³¹

²² *Id.*

²³ *Id.* at 62.

²⁴ *Id.* at 64. Therefore, because NJLAD was found to extend to certain out-of-state plaintiffs, the Court next had to examine New Jersey law should apply, or whether choice-of-law principles weigh in favor of applying Illinois law instead. *Id.* at 45. Based upon a weighing of the choice-of-law factors set forth in Restatement (Second) of Conflicts of Laws, Section 6, the Court reversed the trial court’s application of Illinois law as to the failure-to-promote claim and vacated and remanded the wrongful discharge claim for further analysis based on the factors. *Id.* at 45-46.

²⁵ See generally N.J. LAW REV. COMM’N (2021) ‘Definition of Inhabitants.’ *Minutes of NJLRC meeting 18 Feb. 2021*, Newark, New Jersey.

²⁶ N.J. STAT. ANN. § 10:5-3 (West 2021). The term “inhabitants” is also found in N.J. STAT. ANN. § 10:5-10c. ¶ 1 (West 2021).

²⁷ *Id.*

²⁸ *Calabotta*, 460 N.J. Super. 38, 52 n.4.

²⁹ LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 154-155 (2d ed. 2013). See WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 213 (2006) (defining preamble as the language in a statute which usually precedes the official text of the law, before the “be it enacted” or “be it resolved” clause). See *PRB Enterp., Inc. v. S. Brunswick Planning Bd.*, 105 N.J. 1, 5-6 (1987).

³⁰ 2A Sutherland Statutory Construction § 47:4 (7th ed.) (West 2021); 2A Sutherland Statutory Construction § 20:7 (7th ed.) (West 2021) (“The action part, sometimes called the ‘enacting part,’ of a statute is comprehensively termed its purview...[and] includes all matter following the enacting clause.”).

³¹ *Id.*

In *PRB Enterprises, Inc. v. S. Brunswick Plan. Bd.*, the New Jersey Supreme Court considered the location of the “purpose” clause of a zoning ordinance.³² The Court noted that “ordinarily, the contents of the preamble are not given substantive effect, particularly where the enacting portion of the ordinance is expressed in clear and unambiguous terms.”³³ Conversely, those sections of an Act that follow the enacting clause are considered to be substantive.³⁴ The “purpose clause” in *PRB* appeared after the enacting clause.³⁵ The Court therefore determined that the clause “was intended to be a part of the body of the ordinance and should be so construed.”³⁶

• *New Jersey’s Law Against Discrimination*

When the NJLAD was enacted in 1945, it contained a subsection that described the Act as intended to “prevent and eliminate practices of discrimination in employment and otherwise against persons because of race, creed, color, national origin or ancestry; to create a division in the Department of Education to effect such prevention and elimination; and making an appropriation therefor....”³⁷ As originally enacted, this language preceded the “enacting clause.”³⁸

The current version of the NJLAD contains three separate statutory sections entitled “findings and declarations.”³⁹ The first, N.J.S. 10:5-3, is entitled “Legislative Findings and Declarations.”⁴⁰ The second, N.J.S. 10:5-3.1, is titled “Findings, Declarations, and Intent Regarding Workplace Discrimination of Women Who are Pregnant or Recovering from Childbirth.”⁴¹ The third, N.J.S. 10:5-44, provides legislative findings and declarations as they pertain to the Genetic Privacy Act.⁴² Each of these “findings” sections appears after the Act’s enacting clause. The location of each of these sections suggests that the Legislature intended them to be a part of the body of the Act and that they should be so construed.⁴³

Pending Legislation

Two bills were introduced in the current session of the New Jersey Legislature that pertain

³² *PRB Enterprises, Inc. v. S. Brunswick Plan. Bd.*, 105 N.J. 1, 5 (1987).

³³ *Id.*

³⁴ See discussion *supra* “Preambles v. Legislative Findings” p. 4.

³⁵ *PRB Enterprises, Inc. v. S. Brunswick Plan. Bd.*, 105 N.J. at 6.

³⁶ *Id.*

³⁷ See L.1945, c. 169, p. 589 then entitled N.J.S. § 10:5-1.

³⁸ See also N.J.S. 10:5-3 and L.1945, c. 169, p. 589, § 3. Amended by L.1951, c. 64, p. 419, § 2; L.1962, c. 37, § 2; L.1970, c. 80, § 8, eff. June 2, 1970; L.1977, c. 96, § 1, eff. May 19, 1977; L.1990, c. 12, § 1; L.1991, c. 519, § 1, eff. Jan. 19, 1992; L.1992, c. 146, § 1, eff. Nov. 20, 1992; L.2003, c. 180, 3, eff. Jan. 1, 2004; L.2006, c. 100, § 2, eff. June 17, 2007; L.2019, c. 436, § 1, eff. Jan. 21, 2020.

³⁹ N.J. STAT. ANN. § 10:5-3 (West 2021). See N.J. STAT. ANN. § 10:5-3.1 (entitled “Findings, Declarations, and Intent Regarding Workplace Discrimination of Women Who are Pregnant or Recovering from Childbirth”); and N.J. STAT. ANN. § 10:5-44 (Legislative findings and declarations regarding the Genetic Privacy Act).

⁴⁰ N.J. STAT. ANN. § 10:5-3 (West 2021).

⁴¹ See N.J. STAT. ANN. § 10:5-3.1 (entitled “Findings, Declarations, and Intent Regarding Workplace Discrimination of Women Who are Pregnant or Recovering from Childbirth”).

⁴² See N.J. STAT. ANN. § 10:5-44 (Legislative findings and declarations regarding the Genetic Privacy Act).

⁴³ See *supra* discussion of Preambles and *PRB Enterprises, Inc. v. S. Brunswick Plan. Bd.*, 105 N.J. 1, 5 (1987).

to N.J.S. 10:5-3,⁴⁴ but they do not address the issue raised in this Memorandum.

Conclusion

The New Jersey Law Against Discrimination was enacted to protect against discrimination. The case of *Calabotta v. Phibro Animal Health Corp.* addressed a potential interpretive ambiguity concerning the scope of the Act's protection. Staff requests authorization to conduct additional research and outreach to determine whether it would be useful to address the issue that the Court identified in N.J.S. 10:5-3.

⁴⁴ See A.B. 4289, 219th Leg., 1st Sess. (N.J. 2020) (seeking to codify protections for persons suffering discrimination on grounds of disparate impact); New Jersey Intern Protection Act, A.B. 3563, 219th Leg., 1st Sess. (N.J. 2020) (identical bill S.100, 219th Leg., 2020 Sess. (N.J. 2020)) (seeking to provide protections and remedies for interns).