



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final Report Relating to**

### **Modifications to the New Jersey Partnership and Trade Name Statutes (N.J.S. 56:1-1 through 56:1-7).**

**May 30, 2018**

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## Executive Summary

Originally enacted in the early 20<sup>th</sup> Century to protect persons from extending credit to fictitious entities the New Jersey Trade Name statutes no longer represent the State's view of corporate entities. These statutes require the filing of partnership<sup>1</sup> and trade name<sup>2</sup> certificates with both County Clerks and the Secretary of State.<sup>3</sup> In addition, the statutes mandate that the required documents be filed in every county in which the entity transacts business.<sup>4</sup> Presently, non-resident entities are compelled to appoint the County Clerk as their registered agent for service of process in every county in which they conduct or transact business.<sup>5</sup> Finally, these statutes make it a misdemeanor for an entity to conduct or transact business in New Jersey if it has not filed the appropriate paperwork with the County Clerk's Office.<sup>6</sup>

Updating the partnership trade name statutes would reflect New Jersey's current approach to business associations and would eliminate the duplicative and fragmentary filing of documents while simultaneously preserving the original purpose of the statute – the protection of creditors.

## Discussion

### *Origin and History*

The foundation for New Jersey's partnership trade name statute can be traced back to the New York statute entitled, “[a]n act to prevent persons from transacting business under fictitious names.”<sup>7</sup> Enacted in 1833, this statute prohibited partnerships from transacting business in the name of a non-existent partner. The statute required the designation “and Company,” or “& Co.,” when referring to partners whose names did not appear on the partnership masthead.<sup>8</sup> As a punishment, those found guilty of violating this act were deemed to be guilty of a misdemeanor and could be punished by a fine not to exceed \$1,000.<sup>9</sup> This statute underwent judicial construction in December of 1884.

In *Gay et al. v. Seibold*<sup>10</sup> the New York Court of Appeals reviewed the statute entitled, an “Act to prevent persons from transacting business under fictitious names.” The plaintiffs,

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<sup>1</sup> N.J.S. 56:1-1 addresses partnership certificates.

<sup>2</sup> N.J.S. 56:1-2 addresses trade name certificates.

<sup>3</sup> See N.J.S. 56:1-1, N.J.S. 56:1-2. When the statutes are referred to collectively, Staff has chosen to refer to the unit transacting business as an “entity” for ease of reference and to minimize confusion.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> N.J.S. 56:1-4.

<sup>7</sup> Chapter 281 of the Laws of 1833.

<sup>8</sup> Chapter 281 of the Laws of 1833 §1.

<sup>9</sup> Chapter 281 of the Laws of 1833 §2. A \$1,000 fine in 1883, adjusted for inflation, is presently equal to a fine of \$23,140.17. See [www.in2013dollars.com/1883-dollars-in2017?amount=1000](http://www.in2013dollars.com/1883-dollars-in2017?amount=1000) (last visited Nov. 16, 2017).

<sup>10</sup> 97 N.Y. 472 (Ct. App. 1884).

booksellers, sought to enforce their contractual obligation with the defendant.<sup>11</sup> As an affirmative defense to his bonded obligation, the defendant contended that the plaintiffs were carrying on their business in an illegal manner.<sup>12</sup> The illegality relied upon by the defendant was that Gay Brothers & Co. was only operated by two brothers – John Gay and Charles Gay, Jr. According to the defendant, the brother’s designation of their partnership, “& Co.,” was no more than a corporate fiction. This fiction served as the defendant’s basis to avoid his contractual obligation to repay the brothers for books he received, and sold, on consignment. He contended that use of the moniker, “& Co.” violated the “fictitious name statute” and therefore voided his contractual obligation to the brothers. The Court, however, disagreed.

In rendering its decision, the Court of Appeals identified the purpose of the statute. The Court noted, “[t]he purpose of the statute was obviously to **protect persons giving credit** to the fictitious firm on the faith of the fictitious designation. It could have had no other purpose.”<sup>13</sup> In reversing the decision of the trial court, the Court of Appeals found, “...although the transaction should be held to be within the letter of the statute, it is clearly not within the purpose and intention of the statute, and hence is outside of the statute.”<sup>14</sup> The decision of the trial court was reversed and a new trial granted to the plaintiffs.<sup>15</sup>

The litigants in *Gay v. Seibold* were not the only parties interested in the outcome of this case. Across the Hudson, the New Jersey Legislature awaited the judicial interpretation of New York’s statute before adopting a similar statute.<sup>16</sup> On May 17, 1906, New Jersey enacted “[a]n act to regulate the use of business names.”<sup>17</sup> The Act, drafted in seven sections addressed: partnership names<sup>18</sup>; assumed names<sup>19</sup>; filing requirements<sup>20</sup>; index of certificates<sup>21</sup>; effect of the Act on corporations<sup>22</sup>; non-compliance, a misdemeanor<sup>23</sup>; and, the effective date of the Act.<sup>24</sup> Three years after enactment, the New Jersey judiciary would be called upon to examine and interpret this newly adopted partnership statute.

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<sup>11</sup> *Id.* at 474.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 476, (emphasis added).

<sup>14</sup> *Id.* at 477.

<sup>15</sup> *Id.* at 478.

<sup>16</sup> *Rutkowsky v. Bozza*, 77 N.J. Eq. 724, 725 (E. & A. 1909).

<sup>17</sup> P.L. p. 513 (1906). Chapter 240 of New Jersey Laws, Session of 1906, is commonly referred to as an “An Act to regulate the use of business name,” or the “Act.”

<sup>18</sup> *Id.* at 513.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 514.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

In June of 1909, the New Jersey Court of Errors and Appeals decided the matter of *Rutkowski v. Bozza*.<sup>25</sup> Stephen Rutkowski, doing business as Stephen Kelly, filed suit to recover the value of items sold to Michael Bozza.<sup>26</sup> Mr. Rutkowski did not deny that he transacted business with the defendant under the name of “Stephen Kelly.”<sup>27</sup> Furthermore, he did not deny that he failed to file the trade name certificate required by the Act.<sup>28</sup> At the close of the plaintiff’s case, the defendant moved to dismiss plaintiff’s cause of action. This application was predicated upon plaintiff’s failure to file a trade name certificate.<sup>29</sup> The defendant’s motion was denied.<sup>30</sup> The defendant appealed the trial court’s decision.

The decision of the New Jersey Court of Errors and Appeals echoed the holding in *Gay v. Seibold*, decided a quarter of a century earlier. In passing upon the purpose of the New Jersey statute, the Court of Errors held, “[i]ts manifest intention is to protect persons giving credit to one doing business under a fictitious name....”<sup>31</sup> The Court went on to find that the New Jersey statute, “...follows in substance a similar statute of the State of New York, adopted in this state after it had received judicial construction in New York, which it will be presumed was accepted by the Legislature of this state to be the true interpretation of the act so adopted.”<sup>32</sup> The Court went on to hold that a debtor “cannot escape payment because the creditor has rendered himself liable to *indictment*.”<sup>33</sup> It would be 52 years before the trade name statutes would be amended by the New Jersey Legislature.

#### *The “Mid-Century” and “Turn of the Century” Amendments*<sup>34</sup>

For almost one half of a century, New Jersey’s Act to Regulate the Use of Business Names designated each individual county as the sole repository of information concerning partnership or trade name information. To this day, the statute requires each person or partnership to file a sworn statement, “...in the office of the clerk of the county within which business is transacted or conducted...”<sup>35</sup> Where a person or partnership transacts or conducts business in every county, they are required to file a separate statement in every county, twenty-one in total. By the middle of the 20<sup>th</sup> century, the Legislature would expand the situs for recording this information. By the 21<sup>st</sup> century business organizations, such as limited liability partnerships, would be required to file

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<sup>25</sup> 77 N.J. Eq. 724, 725 (E. & A. 1909).

<sup>26</sup> *Id.* at 725.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 725.

<sup>33</sup> *Id.* at 726 (emphasis added).

<sup>34</sup> In 1951, the Legislature amended Chapter 240, entitling it Title 56, Chapter 1.

<sup>35</sup> P.L. p. 513 (1906).

statements of qualification exclusively with the Division of Commercial Recording in the Department of the Treasury.<sup>36</sup>

*The New Jersey Secretary of State*<sup>37</sup>

Since 1906, the County Clerks have been required to keep an alphabetical index of all persons filing certificates under this Act.<sup>38</sup> In 1951, the Legislature amended both N.J.S. 56:1-1 and 56:1-2. The amended statutes retained the county-by-county filing requirement for persons and partnerships. In addition, the statutes required that a duplicate statement be made, "...for filing in the office of the Secretary of State..."<sup>39</sup> No longer would the filing of these documents be limited to the geographic region in which the entity conducted or transacted business. A copy of each filing would now be sent to the Secretary of State.<sup>40</sup> It would, however, take another decade and a half, before the Secretary of State would be required to file the information received from each County and maintain it in a specific order.<sup>41</sup>

In 1965, the Legislature again amended Title 56, Chapter 1. The amendment addressed the indexing of certificates by the Secretary of State.<sup>42</sup> Since the mid-1960s the Secretary of State has been required to maintain an alphabetical index of all persons filing the statements, or certificates, provided for by N.J.S. 56:1-1 and 56:1-2.<sup>43</sup> No longer would these parochial filings serve as a source of aggravation for aggrieved plaintiffs attempting to locate a partnership or person using a trade name. Beginning in 1965, the information contained in sections 56:1-1 and 56:1-2 could be obtained from one central source – the Division of Commercial Recording in the Department of the Treasury.<sup>44</sup>

The statutory amendments of 1965 began the process of modernizing what was formerly known as the "Act to Regulate the Use of Business Names." The evolution of the Act continued with the recognition that a business may originate as a partnership in which "all partners are liable jointly and severally for all obligations of the partnership"<sup>45</sup> and develop into a more sophisticated, more complex operation and where individuals wished to limit partnership liability. In 2000, New

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<sup>36</sup> See generally N.J.S. 42:1A-47 Statement of Qualification.

<sup>37</sup> See generally N.J.S. 52:16-8.1 Construction of Laws Regarding Filing and Certification wherein statutory references to the filing with the Secretary of State are to be construed to mean a filing with the State's commercial recording program maintained by the Secretary of the Treasury.

<sup>38</sup> P.L. p. 514 (1906).

<sup>39</sup> N.J.S. 56:1-1, N.J.S. 56:1-2.

<sup>40</sup> *Id.*

<sup>41</sup> See N.J.S. 56:1-3 as amended in 1965 to require this index to be kept by the Secretary of State.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See N.J.S. 52:16-8.1

<sup>45</sup> N.J.S. 42:1A-18(a).

Jersey adopted the Uniform Partnership Act (UPA).<sup>46</sup> That law includes provisions regarding limited liability partnerships (LLPs) and provides complete, limited liability for partners.

By filing a one page *statement of qualification* with the Division of Commercial Recording, a New Jersey partnership may now become a limited liability partnership.<sup>47</sup> The conversion of a partnership to a LLP also eliminates the statutory requirement of filing a certificate in every county in which it transacts or conducts business. Instead, the LLP must file an annual report with the Division of Commercial Recording in the Department of the Treasury.<sup>48</sup> Furthermore, all partnership obligations arising *after* the “conversion” of a partnership to an LLP would be solely those of the partnership.<sup>49</sup>

The filing of pedigree information exclusively with the Division of Commercial Recording is not unprecedented in this state. An LLP is responsible for filing a statement of qualification<sup>50</sup> and an annual report<sup>51</sup> solely with the Division of Commercial Recording. The passage of the LLP statutes makes it clear that it is no longer necessary to collect partnership and trade name data on a county-by-county basis. The filing of documents with the Division of Commercial Recording permits entities to record their partnership or trade names with one filing that is accessible with a single search. The filing of a single document in a single locale removes the need for these entities to pay up to 21 separate filing fees to record their documents. Further, statewide filing eliminates the duplication of work that is currently undertaken by each County and the Secretary of State in creating and maintaining the required indexes.<sup>52</sup> Finally, the elimination of the county-by-county filing requirement brings New Jersey’s partnership statutes in line with the statutory requirements for similar business organizations such as LLPs.

#### *Office and Agent for Service of Process*

Historically, the laws set forth in Title 56, Chapter 1 reflected the “aggregate theory” of partnership.<sup>53</sup> Under this theory, a partnership was viewed as a collection of the individual partners.<sup>54</sup> Although the statute provided sufficient information to locate each of the partners, it failed to designate an agent for service of process for domestic or foreign partnerships.

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<sup>46</sup> 200 N.J. LAWS ch.161.

<sup>47</sup> N.J.S. 42:1A-47.

<sup>48</sup> N.J.S. 42:1A-49.

<sup>49</sup> N.J.S. 42:1A-18(c).

<sup>50</sup> N.J.S. 42:1A-47.

<sup>51</sup> N.J.S. 42:1A-49.

<sup>52</sup> See also County Outreach section *infra*.

<sup>53</sup> 1 JOHN R MACKAY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.04[2] (MATTHEW BENDER & CO. 2016).

<sup>54</sup> *Id.*

Among the 1951 amendments was the addition of a provision that designated an agent for service of process for both partnership and trade name entities.<sup>55</sup> Though still silent regarding a designated agent for domestic service of process, the amendment specifically set forth the requirements that nonresidents appoint the County Clerk as their “attorney” for service of process.<sup>56</sup> All nonresident partnership or trade name certificates were required, by statute to:

...contain a power of attorney constituting the County Clerk of the county, his successors in office, the true and lawful attorney of said nonresident person or persons, upon whom all original process in an action or legal proceeding against said person or persons for any debt, damages or liability, contracted or incurred by them in, or growing out of, the conduct or transaction of said business, may be served and therein he or they shall agree that such original process which may be served on the county clerk shall be of the same force and validity as if served upon said nonresident person or persons and that the authority thereof shall continue in force so long as the person or persons conduct or transact said business in this State.<sup>57</sup>

In addition, the amended statutes also set forth the procedure for effectuating process by serving the clerk<sup>58</sup> as well as the duties of the clerk when served as an “attorney-in-fact.”<sup>59</sup> The turn of the century passage of the UPA, however, brings with it the possibility of modernizing the service of process portion of this statute.

One need only look as far as the limited liability partnership statute for a solution to updating this portion of the Act. In 2000, the limited liability partnership statute contained a provision for effectuating service of process upon these newly created entities.<sup>60</sup> The statute provides, in relevant part, that, “[t]he agent of a limited liability partnership for service of process shall be an individual who is a resident of this State or other person authorized to do business in this State.”<sup>61</sup> No distinction is made between domestic or foreign limited liability partnerships. The statute merely requires that the individual upon whom process is to be served must be a resident of the State; or, is authorized to do business in New Jersey.

The only difference between a partnership and a limited liability partnership lies in the assessment of “liability.” In a partnership, all the partners are jointly and severally liable for all obligations of the partnership.<sup>62</sup> Under the Uniform Partnership Act (UPA), limited liability

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<sup>55</sup> N.J.S.56:1-1, *N.J.S.* 56:1-2.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> N.J.S. 56:1-2.1.

<sup>59</sup> N.J.S.. 56:1-2.2.

<sup>60</sup> N.J.S. 42:1A-47.

<sup>61</sup> *Id.*

<sup>62</sup> N.J.S. 42:1A-18(a).

partnerships (LLPs) are granted complete, limited liability for partners.<sup>63</sup> All partnership obligations arising *after* the “conversion” of a partnership to an LLP are solely those of the partnership.<sup>64</sup> Otherwise, the entities are virtually identical.

It is an inconsistency without an apparent basis to have two statutes that provide two different methods to serve process upon a partnership entity where the only difference lies in how liability is assessed against that entity. If modifications are to be made to the partnership statute, it appears to be appropriate to update that same partnership statute to provide for service of process consistent with the provisions set forth in the limited partnership statute. The remaining aspect of the Act that requires review sets forth criminal penalties for an entity’s failure to properly file a partnership or trade name certificate with a County Clerk’s office.

### *Punitive Aspects of Title 56; Chapter 1.*

The name of a domestic, or foreign, partnership may not always include the names of every partner. Often, the name may include the designation “and company” or “& Co.” in its title. In either event, the partnership **must** file a “trade name certificate” in duplicate with the County Clerk in each county in which the partnership does business.<sup>65</sup> A “trade name certificate” is also referred to as a “true name certificate” or an “assumed name certificate.”<sup>66</sup> Whether it is called a “trade name,” “true name,” or an “assumed name” certificate Title 56 mandates that the certificate contain certain information.<sup>67</sup>

The failure of any person to file a “partnership” or “trade name” certificate before conducting or transacting business in New Jersey is not without its consequences. Title 56:1-4 provides that “[a]ny person conducting or transacting business contrary to the provisions of either section 56:1-1 or 56:1-2 of this title shall be guilty of a **misdemeanor**. (Emphasis added).” Regardless of whether the failure to file the “certificate of trade name” or to include all of the compulsory information was knowing, or accidental, those responsible are subject to criminal punishment.

A rare case involving trade names was decided by the Chancery Division of the Superior Court on June 10, 1970.<sup>68</sup> In *Kugler v. Romain*, proceedings were brought against the defendant by the Attorney General for violations of the Consumer Fraud Act. As part of this action, the Attorney General sought to enjoin the defendant from conducting business in New Jersey until

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<sup>63</sup> 200 N.J. LAWS ch.161.

<sup>64</sup> N.J.S. 42:1A-18(c).

<sup>65</sup> *Id.* See also, 1 JOHN R MACKAY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.05[2] (MATTHEW BENDER & CO. 2016).

<sup>66</sup> 1 JOHN R MACKAY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.05[2], FOOTNOTE 3 (MATTHEW BENDER & CO. 2016).

<sup>67</sup> See generally N.J.S. 56:1-1, N.J.S. 56:1-2.

<sup>68</sup> *Kugler v. Romain*, 110 N.J. Super. 470 (Ch. Div. 1970).



registration of his “trade name” was filed in accordance with N.J.S. 56:1-2.<sup>69</sup> The defendant admitted that he had not complied with the filing requirements set forth in the statute.<sup>70</sup> The Court, however, refused to grant injunctive relief based upon a violation of the trade name statute.

In addressing the defendant’s failure to file a trade name certificate, the Court recognized that a violation of this statute is a misdemeanor.<sup>71</sup> As a matter of law, equity courts do not enjoin violations of a criminal statute.<sup>72</sup> The Court stated, “[s]uch violations are left to agencies charged with the enforcement of the criminal law.”<sup>73</sup> Where a grievance is subject to indictment, equity courts will interfere only to prevent a very serious public injury.<sup>74</sup> The court reasoned, “[t]he remedy by indictment, if invoked, appears to be sufficient to rectify the situation.”<sup>75</sup> The successful prosecution of the trade name violation, however, does not appear in any published New Jersey court decision.

The classification of an offense, for sentencing purposes, as a misdemeanor is anachronistic. In New Jersey crimes are set forth in Title 2C. In its current incarnation, crimes are classified into four degrees.<sup>76</sup> The statute, N.J.S. 2C:43-1(a) refers to crimes of the first degree, second degree, third degree, and fourth degree.<sup>77</sup> The New Jersey Criminal Code does recognize that other statutes may define criminal activity and that the designation of these crimes may not follow the schema set forth in N.J.S. 2C:43-1(a).<sup>78</sup>

Misdemeanors are addressed in the criminal code in Subtitle 3, Chapter 43, Section 1, subsection b. Regarding misdemeanors, subsection b. provides that “...notwithstanding any other provision of law, a crime defined by any statute of this State other than this code and designated as a misdemeanor shall constitute for purpose of sentence, a crime of the fourth degree.”<sup>79</sup>

For the past 111 years, N.J.S. 56:1-4 has provided that a violation of the statute is a misdemeanor and there is no determinate sentence stated in the statute. Thus, a violation of the statute is a fourth-degree offense.<sup>80</sup> Those found in violation of this section are subject to eighteen months of incarceration<sup>81</sup> and up to a \$10,000 fine.<sup>82</sup> This portion of the statute clearly reflects the aggregate theory of liability under which individuals can be isolated and punished for transgressing

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<sup>69</sup> *Kugler v. Romain*, 110 N.J. Super. at 478.

<sup>70</sup> *Id.* at 488.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 488, citing *Baird v. Board of Recreation Comm’rs, South Orange*, 110 N.J. Eq. 603, 605 (E. & A. 1932).

<sup>73</sup> *Id.* at 488, citing *Trisolini v. Meltsner*, 23 N.J. Super. 204, 92 A.2d 832 (App.Div.1952).

<sup>74</sup> *Id.* at 488.

<sup>75</sup> *Id.* at 488.

<sup>76</sup> N.J.S. 2C:43-1(a).

<sup>77</sup> *Id.*

<sup>78</sup> N.J.S. 2C:43-1(b).

<sup>79</sup> *Id.*

<sup>80</sup> CANNEL, CRIMINAL CODE ANNOTATED, *Comment N.J.S. 2C:43-1(b)*, (Gann 2017).

<sup>81</sup> N.J.S. 2C:43-6.

<sup>82</sup> N.J.S.. 2C:43-3(b)(2).

statutory requirements. Since the turn of the century, however, this theory of partnership liability is no longer followed in the State of New Jersey. The presence of criminal penalties in an Act to regulate the use of business names is inapposite in the 21<sup>st</sup> Century. This should not be construed to suggest that the failure to file required documents should be without consequence; rather, a consequence more consistent with the prevailing view of the seriousness of the offense and the treatment of similar violations could be adopted to address statutory violations.

It would be inconsistent with the language and the underlying goals of the statutory scheme to allow an existing partnership to convert to an LLP if it has not first complied with the requirements of the partnership statutes. To allow a partnership that has not met the requirements of the partnership trade name statute to convert into an LLP would render meaningless the protections in the statute currently provided to lenders and financiers. Further, it would provide nefarious partnerships with a method of limiting future liability while simultaneously allowing them to conceal from the public record the names of liable partners who were responsible for past transactions.

Modifying N.J.S. 56:1-4 would serve three purposes. First, the amended language would prohibit non-compliant entities from becoming LLPs until they have met their statutory filing requirements.<sup>83</sup> Next, new language would permit these entities to easily become LLPs by filing the required statutory certificate with the Secretary of State and thereafter refile a *statement of qualification*. Finally, the revisions to the statute would honor the original intent of the statute - protecting the rights of partnership creditors – by allowing them to easily locate the members of these entities.

### *Outreach*

To ascertain the efficacy of the present statute, Staff had the opportunity to speak with representatives from various County Clerk's Offices, a representative from the Division of Commercial Recording; and, an attorney who concentrates in corporations and other business entities.<sup>84</sup>

### *County Clerks*

If a partnership or trade name certificate is not filed with a County Clerk's Office there is no way that the Clerk's will know of this defalcation. According to a representative from a County Clerk's office, the only way they would know of a partnership's existence is if it *filed* a certificate

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<sup>83</sup> See *Appendix, infra*.

<sup>84</sup> Jeffrey Shapiro, Esq. is the Chairman and Member of the Board of Directors of the Business Law Section of the New Jersey Bar Association; a member of the American Bar Association and Co-Chair of the Governance of Private and Family-Controlled Entities Subcommittee, Committee on Corporate Governance, Committee on Mergers and Acquisitions; Counsel to the New Jersey Corporation and Business Law Study Commission; and, co-author of New Jersey Corporations and other Business Entities.

along with the filing fee. Under the current statutes, these entities can operate without ever filing the statutorily required documents with a County Clerk's Office. Despite having the ability to clandestinely operate a partnership in New Jersey, there is an important reason for registering an entity with the local clerk. According to the Clerk's Office, most financial institutions require a certified copy of a firm name registration before they will allow an entity to open a business bank account.<sup>85</sup> Once filed, the County Clerk must forward the duplicate copy of the certificate to the Division of Commercial Recording.<sup>86</sup>

The dual filing requirement was also discussed with a representative from a County Clerk's Office. The clerk confirmed that when certificates are filed by partnerships and individuals, a copy of the filed documents are transmitted to the Division of Commercial Recording. A filing fee of \$50 is received when a partnership or trade name certificate is filed with a County Clerk's Office. At the end of each month, the documents are sent to the Division of Commercial Recording along with a \$15 fee.<sup>87</sup> Informal feedback from several Clerks did not indicate objections to having partnership and trade name certifications filed exclusively with the Division of Commercial Recording. Since that time, Staff has received a formal response on behalf of the New Jersey Clerks and Registers of Deeds.<sup>88</sup>

Staff received a formal response to this Report from the Constitutional Officers Association of New Jersey ("COANJ"). The New Jersey County Clerks and Registers of Deeds have advised Staff that, "County Clerks provide personal service to new business owners who come in person to the County Clerk's Office to have their Business Trade Name forms notarized and filed."<sup>89</sup> Further, "[u]pon filing their Business Trade Names, these individuals immediately take with them proof of their business entity to their financial institution to open an account for their new business."<sup>90</sup> In addition, it is the position of COANJ that "first time business owners appreciate getting help and direction from [the Clerk's Office] regarding where to go for mercantile licenses and about business resources available to them locally."<sup>91</sup> COANJ, therefore, "[does not] recommend the statutes be amended to remove the duty of filing of "Business Trade Name Certificates," simple partnership agreements, their amendments and dissolutions from the County Clerks."<sup>92</sup>

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<sup>85</sup> See generally <http://www.co.burlington.nj.us/577/Business-Trade-Name-Registration>; and, <http://www.mercercounty.org/government/county-clerk-/office-services/business-trade-name> (last visited November 25, 2017).

<sup>86</sup> N.J.S. 56:1-1, N.J.S. 56:1-2.

<sup>87</sup> Multiple clerks confirmed that a \$15 fee was sent to the Division of Commercial Recording for each document filed with the Division pursuant to N.J.S. 56:1-1 or 56:1-2. A request for the statutory citation for this \$15 fee was made to each clerk with negative results. Staff was unable to locate the statutory code section for this fee.

<sup>88</sup> Letter from Paula Sollami Covello, Esq., Mercer County Clerk, New Jersey County Clerk's Section Chief, COANJ (April 5, 2018) (on file with the New Jersey Law Revision Commission).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

### *Department of the Treasury*

The New Jersey Department of Treasury (“Treasury”) recognizes that partnerships are not required to file organizational documents with the State of New Jersey.<sup>93</sup> The Treasury also recognizes that partnerships must register the business name with the County Clerk’s Office.<sup>94</sup> Partnerships, like all other businesses, are also subject to registration for tax and employer responsibilities.<sup>95</sup> The Secretary of the Treasury currently maintains a website where an individual may search for registered trade names.<sup>96</sup>

According to Treasury, a partnership that does not comply with the statutory requirements may receive a visit from an investigator. A warning will be given to a partnership that has not complied with its statutory requirements. In addition, the non-compliant entity is given time within which to cure these violations. Failure to heed the first warning is typically met with a second warning and additional time within which to remedy the violation. Staff was advised that if a partnership is thoroughly recalcitrant, the Treasury may seek to shutter the business and seize its assets. Treasury, however, has never sought to prosecute a partnership for failure to file a trade name certificate with the County Clerk’s Office.

### *Stakeholders*

The penal aspect of Title 56, Chapter 1, was discussed with Jeffrey Shapiro, Esq., who has considerable experience in this area of the law. Mr. Shapiro commented that he has no knowledge of anyone ever being criminally prosecuted for their failure to file a partnership trade name certificate with a County Clerk’s Office. According to Mr. Shapiro, the penalty set forth in this statute is anachronistic.<sup>97</sup> Historically, there have been several attempts to modernize this statute.<sup>98</sup> The statute, however, has remained unchanged since the mid-1960s, and the fact that the statute has not been enforced in recent history does not mean that the proper confluence of circumstances could not lead to its enforcement.

Staff also received comments from Barry F. Gartenberg, Esq., a business attorney and a member of the New Jersey State Bar Association Business Law Section Board of Directors.<sup>99</sup> Mr. Gartenberg advised Staff that in his experience some confusion exists in the lay-community

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<sup>93</sup> <http://www.state.nj.us/treasury/revenue/taxreg.shtml> (last visited November 25, 2017).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> <http://www.nj.gov/treasury/revenue/searchtrade.shtml> (last visited January 05, 2018).

<sup>97</sup> I JOHN R MACKAY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.05 (MATTHEW BENDER & CO. 2016).

<sup>98</sup> *Id.*

<sup>99</sup> Electronic mail from Barry F. Gartenberg, Esq., Barry F. Gartenberg, L.L.C., New Jersey State Bar Association Business Law Section, Board of Directors (April 3, 2018) (on file with the New Jersey Law Revision Commission).

regarding the registration requirements for certain business entities. He suggested, therefore, that in addition to clarifying the inapplicability of N.J.S. 56:1-5 to corporations that this statute could clarify that it is inapplicable to limited liability corporations and limited partnerships. Proposed language setting forth this recommendation has been included in the Appendix to this Report.

Mr. Gartenberg advised Staff that it, “seems reasonable to require a general partnership that has engaged in business file a trade name certificate before it can file a “Statement of Qualification” (“SOQ”).”<sup>100</sup> He noted, however, that “...many general partnerships ‘convert’ to LLPs prior to engaging in any substantive business.”<sup>101</sup> Mr. Gartenberg points out, “[a]lthough, technically, they have created a general partnership by virtue of ‘associating’ to operate as co-owners a business for profit, they have not undertaken any business or other than having decided to file an SOQ. In that case, the requirement to file a trade name certificate would seem to be an unnecessary step.”<sup>102</sup> Therefore, in an effort to further clarify this statutory requirement, he recommends that the proposed modification to N.J.S. 56:1-4 include language which exempts from the filing requirements those partnerships whose sole act was to file an SOQ and become an LLP.<sup>103</sup> Proposed language setting forth this recommendation has been included in the Appendix to this Report.

## Conclusion

Originally enacted in the early 20<sup>th</sup> Century to protect persons from extending credit to fictitious entities the New Jersey Trade Name statutes: require the filing of trade name certificates with both the County Clerks and the Secretary of State; mandate that the required documents be filed in every county in which the entity transacts business and compel non-resident entities to appoint the County Clerk their registered agent for service of process in every county in which they conduct or transact business; and, make it a misdemeanor for a partnership to conduct or transact business in New Jersey if it has not filed the appropriate paperwork with the County Clerk’s Office. These statutory requirements are inconsistent with New Jersey’s current approach to business associations.

In their present form, the trade name statutes are predicated upon a theory of partnerships that is no longer followed in the State of New Jersey. In addition, the statutes impose fragmented and duplicative filing requirements upon the entities they govern. Finally, anachronistic penalties for non-compliance, which have rarely – if ever – been imposed, remain in the statutes. Modifying the statutes in this chapter would ameliorate the aforementioned problems and conform the statute to the requirements imposed upon similar business associations.

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

The Appendix on the following pages proposes changes to the statutes consistent with the original statutory goal of protecting partnership creditors. The proposed modifications are based on the language and principles contained in the New Jersey statutes for similar business organizations.

## Appendix

The full text of each statute, including proposed modifications (proposed additions are shown with underline, and proposed deletions with ~~strikethrough~~), follows.

### N.J.S. 56:1-1

Filing names of members of firm or partnerships; requirements; appointment by ~~nonresidents of agent county clerk as attorney~~ for service of process

a. Any person conducting or transacting business and using the designation “and company,” or “& Co.,” as a part of a firm or partnership name, shall file a statement in the office of the clerk of the county within which ~~such business is conducted or transacted~~ the principal place of such business is located, and a duplicate thereof for filing by the clerk with the Division of Commercial Recording in the Department of the Treasury office of the Secretary of State, as provided in section 56:1-3 of this Title.

b. Such statement shall be duly executed and sworn to before a ~~some~~ person authorized by the laws of this State to administer oaths, and shall state:

(1) the name of the firm or partnership;

(2) the nature of the business; and

(3) the full names and residences of all persons who are members of such firm or partnership at the time of filing; and, if the members of said firm or partnership or any of them are or is not resident in this State, such statement shall contain a power of attorney constituting the county clerk of the county, his successors in office, the true and lawful attorney of said nonresident partner or partners upon whom all original process in an action or legal proceeding against said firm or partnership may be served and therein he or they shall agree that such original process, which may be served on the county clerk, shall be of the same force and validity as if served upon said nonresident partner or partners and that the authority thereof shall continue in force so long as the firm or partnership does business in this State under said name.

(4) the address of the principal place of business.

c. The agent of a firm or partnership for service of process shall be an individual who is a resident of this State or other person authorized to do business in this State.<sup>104</sup>

d. Upon filing with the Division of Commercial Recording, the statement shall be valid in each county as if the original statement was filed therein.

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<sup>104</sup> See N.J.S. 42:1A-47(d).

## N.J.S. 56:1-2

Certificates of true names when assumed names used; contents; filing; appointment by nonresidents of agent county clerk as attorney for service of process

a. ~~No~~ Any person shall conducting or transacting business under any assumed name, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business unless such person shall file a certificate in the office of the clerk of the county or counties in which such person conducts or transacts, or intends to conduct or transact such business within which the principal place of such business is located, together with a duplicate thereof for filing by the clerk in the office of the Secretary of State with the Division of Commercial Recording in the Department of the Treasury office of the Secretary of State, as provided in section 56:1-3 of this Title.

b. Such certificate shall be duly executed by the person or persons conducting or transacting, or intending to conduct or transact such business and sworn to before a person authorized by the laws of this State to administer oaths, and shall state:

(1) the name under which such business is conducted or transacted, or is to be conducted or transacted; and

(2) the true name or names of the person or persons conducting or transacting the same at the time of filing; and,

(3) the with his or their post-office address or addresses, of the person or persons conducting or transacting, or intending to conduct or transact such business. and shall be duly executed and sworn to by the person or persons conducting or transacting, or intending to conduct or transact, such business, before some person authorized by the laws of this State to administer oaths, and if any person or persons conducting or transacting business as aforesaid is or are not resident in this State, such statement shall contain a power of attorney constituting the county clerk of the county, his successors in office, the true and lawful attorney of said nonresident person or persons, upon whom all original process in an action or legal proceeding against said person or persons for any debt, damages or liability, contracted or incurred by them in, or growing out of, the conduct or transaction of said business, may be served and therein he or they shall agree that such original process which may be served on the county clerk shall be of the same force and validity as if served upon said nonresident person or persons and that the authority thereof shall continue in force so long as the person or persons conduct or transact said business in this State.

c. For service of process, an individual or entity set forth in subsection a. shall be



an individual who is a resident of this State or other person authorized to do business in this State.<sup>105</sup>

d. Upon filing with the Division of Commercial Recording, the statement shall be valid in each designated county as if the original statement was filed therein.

### **N.J.S. 56:1-2.1**

~~Service of process on county clerk~~

~~Whenever any person or persons shall have constituted the county clerk of any county his or their attorney for service of any process by any certificate filed pursuant to chapter one of Title 56 of the Revised Statutes, any such original process in any action or legal proceeding against such person or persons may be served on the county clerk by leaving a copy of such process in his office with a fee of five dollars (\$5.00) to be taxed in the plaintiff's costs.~~

### **N.J.S. 56:1-2.2**

~~County clerk's duties when served as attorney~~

~~When any such original process is served upon any county clerk as herein provided, he shall forthwith notify the person or persons upon whom service is intended to be made through him by letter directed to the post office address given in the certificate and shall, within two days after such service, forward to such person or persons, in the same manner, a copy of the process served on him and such service shall be deemed sufficient service upon such person or persons. The county clerk shall keep a record of all such processes showing the day and hour of such service.~~

### **N.J.S. 56:1-3**

~~Index of certificates; filing fees; copies as evidence~~

The several county clerks and the ~~Secretary of State~~ Division of Commercial Recording in the Department of the Treasury shall each keep alphabetical indexes of all persons filing the statements or certificates provided for by sections 56:1-1 and 56:1-2 of this Title, and for the indexing and filing of such statements or certificates they shall each receive a fee of \$5.00 from the person who presents the same for filing. Every person who presents for filing any such statement or

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<sup>105</sup> See N.J.S. 42:1A-47(d).

certificate in the office of the county clerk shall present therewith a duplicate of such statement or certificate for filing with and indexing by the ~~Secretary of State~~ Division of Commercial Recording in the Department of the Treasury. The county clerk shall, at the time of the filing such statement or certificate ~~with him~~, collect from the person presenting the same, in addition to the fee payable to him, the fee payable to the ~~Secretary of State~~ Division of Commercial Recording in the Department of the Treasury for filing and indexing such duplicate statement or certificate, and shall forward to the ~~Secretary of State~~ Division of Commercial Recording in the Department of the Treasury such duplicate statement or certificate together with the fee collected for the ~~Secretary of State~~ Division of Commercial Recording in the Department of the Treasury as aforesaid.

A copy of any such statement or certificate, duly executed and sworn to before a person authorized by the laws of this State to administer oaths certified by the county clerk in whose office the same shall have been filed or by Division of Commercial Recording in the Department of the Treasury ~~the Secretary of State~~, shall be presumptive evidence in all courts of law in this State of the facts therein contained.

#### **N.J.S. 56:1-4**

Violations of section 56:1-1 or 56:1-2; ~~misdemeanor~~

a. Any person, or partnership, conducting or transacting business contrary to the provisions of either section 56:1-1 or 56:1-2 of this title, shall be ~~guilty of a misdemeanor~~, ineligible to become a limited liability partnership as set forth in N.J.S. 42:1A-47.

b. The State Treasurer may reject the statement of qualification submitted by a partnership that has failed to file a certificate required by either 56:1-1 or 56:1-2.

c. A rejection pursuant to subsection b. is not an event of dissolution of the partnership.

d. A partnership whose statement of qualification has been rejected may immediately apply to the Division of Commercial Recording in the Department of the Treasury for qualification. The application shall state:

- (1) the name of the partnership and the effective date of the rejection; and
- (2) that the ground for rejection either did not exist or has been corrected.

e. Acceptance of the statement of qualification under subsection d. of this section relates back to and takes effect as of the effective date of the rejection, and the

partnership's status as a limited liability partnership continues as if the rejection had never occurred.

f. A partnership whose sole conduct or transaction as a partnership is the passage of a resolution to file a statement of qualification shall be exempt from the application of this section.

### **N.J.S. 56:1-5**

Corporations, ~~or~~ partnerships, *limited liability company*  
*and limited partnerships not affected*

Sections 56:1-1 to 56:1-4 of this title shall in no way affect or apply to any corporation, *limited liability company or limited partnership* duly organized under the laws of this state, or any corporation *limited liability company or limited partnership* organized under the laws of any other state and lawfully doing business in this state, nor shall they be construed to prevent the lawful use of a partnership name or designation, if such partnership name or designation shall include the true or real names of all members of such partnership.

### **N.J.S. 56:1-6**

Recording dissolution of trade-name

a. When any partnership which has filed the statement or certificate provided for by sections 56:1-1 and 56:1-2 of this Title shall be dissolved it shall file a certificate of dissolution in the office of the clerk of the county in which the statement or certificate above referred to shall have been filed together with a duplicate thereof for filing, by the Clerk, with the Division of Commercial Recording in the Department of the Treasury who shall file such certificate and record the dissolution.

b. A certificate of dissolution shall contain the following information:

- (1) ~~and a certificate setting forth~~ the name under which the trade-name has been carried on;
- (2) the business which has been conducted or transacted;
- (3) the true or full name of the person or persons who have conducted or transacted the same, with the post-office addresses of such person or persons; and
- (4) a statement setting forth the facts showing such dissolution.

c. A certificate shall be duly executed and sworn to by the person or persons who

have conducted or transacted business as such trade-name. ~~is filed in the office of the clerk of the county wherein the statement or certificate above referred to shall have been filed, together with a duplicate for filing in the office of the Secretary of State, the county clerk shall file such certificate and record the dissolution.~~

### **N.J.S. 56:1-7**

Place and manner of recording dissolution of trade-name; fees

a. The record of dissolution provided for by section 56:1-6 of this Title shall be made by the county clerk and by the ~~Secretary of State~~ office of the Division of Commercial Recording in the Department of the Treasury by writing the word “dissolved,” together with the date of the certificate of dissolution, in the margin of the book or books used for filing trade-name certificates, at or near the place where such trade-name certificate shall have been indexed.

b. For the filing of such certificates and recording the dissolution of the trade-name the county clerk and the ~~Secretary of State~~ shall each office of the Division of Commercial Recording in the Department of the Treasury receive a fee of \$1.00. The county clerk, at the time of filing such certificate, shall collect from the person presenting the same, in addition to the fee payable to him, the fee payable to the ~~Secretary of State~~ office of the Division of Commercial Recording in the Department of the Treasury for filing and recording the same, and shall immediately forward to the ~~Secretary of State~~ office of the Division of Commercial Recording in the Department of the Treasury the duplicate of such certificate together with such fee collected for the ~~Secretary of State~~ office of the Division of Commercial Recording in the Department of the Treasury as aforesaid.