



## **NEW JERSEY LAW REVISION COMMISSION**

### **Draft Final Report Concerning the Interpretation Of New Jersey's Receivership Act (N.J.S. 2A:42-117)**

**February 7, 2022**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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## Project Summary<sup>1</sup>

In New Jersey, the Multifamily Housing Preservation and Receivership Act (Receivership Act),<sup>2</sup> governs the grounds, procedures, and requirements for appointing a receiver to rehabilitate certain multifamily buildings that have fallen into disrepair. N.J.S. 2A:42-117 provides that when one of two statutory conditions is met, “a building shall be eligible for receivership,” and also that a court “shall appoint a receiver.”<sup>3</sup>

In *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP*,<sup>4</sup> the Appellate Division considered whether the trial court had discretion to deny the appointment of a receiver after it found that at least one of the statutory conditions was satisfied. The Appellate Division suggested that the statutory language “seems internally inconsistent.”<sup>5</sup> The Court additionally noted the “apparent ambiguity within N.J.S. 2A:42-117,” resulting from the statute’s provision that, if certain conditions are satisfied, a building “shall be eligible for receivership,” while also stating that the court “shall appoint a receiver.”<sup>6</sup> Despite the mandatory language found in part of N.J.S. 2A:42-117, a related statute in the Act states that a court “may appoint a receiver” if it determines that the grounds for relief have been established.<sup>7</sup> Finding the statute “susceptible to different interpretations,” the Court considered the Legislature’s intent in enacting the Receivership Act and its legislative history, and determined that the trial court acted within its discretion to deny the appointment of a receiver.<sup>8</sup>

To maintain consistency with the legislative history and intent of the Receivership Act, as well as the language employed elsewhere in the Act, the Commission recommends a change to N.J.S. 2A:42-117 so the language is permissive, rather than mandatory.

## Statutes Considered

The relevant portion of N.J.S. 2A:42-117 states:

\* \* \*

A building shall be eligible for receivership if it meets one of the following criteria:

- a. The building is in violation of any State or municipal code to such an extent as to endanger the health and safety of the tenants as of the date of the filing of the complaint with the court, and the violation or violations have persisted, unabated, for at least 90 days preceding the date of the filing of the complaint with the court; or

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<sup>1</sup> Preliminary work on this project was conducted by Arshiya M. Fyazi during her tenure as Counsel with the NJLRC.

<sup>2</sup> N.J.S. 2A:42-114 to -142.

<sup>3</sup> N.J.S. 2A:42-117 (“[s]ummary action to appoint receiver”) (emphasis added).

<sup>4</sup> 2019 WL 5395937 (N.J. Super. Ct. App. Div. Oct. 22, 2019)

<sup>5</sup> *Id.* at \*28.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (quoting N.J.S. 2A:42-123a.) (emphasis added).

<sup>8</sup> *Id.* at \*29 - \*30.

- b. The building is the site of a clear and convincing pattern of recurrent code violations, which may be shown by proofs that the building has been cited for such violations at least four separate times within the 12 months preceding the date of the filing of the complaint with the court, or six separate times in the two years prior to the date of the filing of the complaint with the court and the owner has failed to take action as set forth in section 9 of P.L. 2003, c. 295 (C.2A:42-122).

A court, upon determining that the conditions set forth in subsection a. or b. of this section exist, based upon evidence provided by the plaintiff, shall appoint a receiver, with such powers as are herein authorized or which, in the court's determination, are necessary to remove or remedy the condition or conditions that are a serious threat to the life, health or safety of the building's tenants or occupants.<sup>9</sup>

### **The History of the Receivership Act**

Prior to the enactment of the current Receivership Act, three separate statutes governed receiverships of real property.<sup>10</sup> Local officials were empowered, by two previous receiver statutes, to bring an action to appoint a “receiver ex officio of the rents and income” of property that was not in compliance with local ordinances or orders.<sup>11</sup> These ex officio receivers could collect the rental income generated by the property, and redirect it toward remedying the harmful conditions which led to the instatement of the receivership.<sup>12</sup> Neither of these statutes required the appointment of a receiver.<sup>13</sup>

Historically, pursuant to these two statutes, a receiver could “petition the courts to permit some course of action,” but the statutes “provided no direction to either the receiver or to the courts.”<sup>14</sup> As a result, “the underlying financial and physical circumstances of the property as well as those of the landlord [we]re not materially changed” by the receivership.<sup>15</sup> With the Receivership Act, legislators sought to improve upon what they described as “a short-term solution to a longer term problem.”<sup>16</sup>

The prior receivership statutes were revised and consolidated to “make receivership a more workable tool for the improvement and preservation of affordable housing and the elimination of

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<sup>9</sup> N.J.S. 2A:42-117 (emphasis added).

<sup>10</sup> N.J.S. 2A:42-79; N.J.S. 40:48-2.12h; N.J.S. 54:5-53.1 (the Receivership Act did not amend or repeal N.J.S. 54:5-53.1, which applies only when a municipality has purchased property at a tax sale).

<sup>11</sup> N.J.S. 2A:42-79; N.J.S. 40:48-2.12h.

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

<sup>13</sup> *Id.*

<sup>14</sup> Sponsor’s Statements to A.B. 2539, 2003 Leg., 210<sup>th</sup> Sess. (2003) (identical to S.B. 1676), later codified as L. 2003, c. 295.

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

<sup>16</sup> *Id.*

neighborhood blight.”<sup>17</sup> To achieve this, the Receivership Act vests a court with “broad discretion to appoint the most appropriate entity to act as receiver” based on the circumstances that gave rise to the receivership action.<sup>18</sup> The Act also provides a court with “broad discretion to act to further the purposes of the statute, where necessary.”<sup>19</sup>

The legislative findings and declarations contained in N.J.S. 2A:42-115 incorporate the goals set forth in the Sponsors’ Statements. That section provides that “[i]n order to ensure that the interests of all parties are adequately protected, it is essential that State law provide clear standards and direction to guide the parties with respect to all aspects of receivership.”<sup>20</sup>

## Background

In *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP*, the Appellate Division considered, for the first time, a statutory inconsistency found in the Receivership Act – one provision that mandates the appointment of a receiver and another that affords the trial court discretion to appoint a receiver under the same circumstances.<sup>21</sup>

In the City of North Wildwood, the State of New Jersey and two of its agencies were parties to a suit that involved an income-restricted senior citizen housing project that was “built with the assistance of several sources of governmental funding”<sup>22</sup> and complex financing agreements.<sup>23</sup>

In October 2012, the housing project suffered significant damage as a result of Superstorm Sandy, and the estimated repair cost exceeded \$11 million.<sup>24</sup> Litigation ensued between the owner of the building and the insurance carrier.<sup>25</sup> In August 2014, a group of tenants in the building (Litigating Tenants) filed an Order to Show Cause and a “Petition for Receivership, Verified Complaint for Specific Performance and for Declaratory and Injunctive Relief” in the Superior Court, Chancery Division.<sup>26</sup> The Litigating Tenants alleged habitability problems and repeated code violations for which the owner had been cited by enforcement officials.<sup>27</sup> In addition to other relief, the Litigating Tenants “sought the appointment of a receiver, pursuant to the Multifamily Housing Preservation and Receivership Act.”<sup>28</sup>

In November of 2014, approximately three months after the Litigating Tenants filed the receivership petition, the trustee for the company that purchased the bonds issued by the Essex

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<sup>17</sup> *Id.*

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

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

<sup>20</sup> N.J.S. 2A:42-115h.

<sup>21</sup> *Mfrs. and Traders Tr. Co.*, 2019 WL 5395937 at \*29.

<sup>22</sup> *Id.* at \*1.

<sup>23</sup> *Id.* at \*2-\*6. The details of these financing agreements exceed the scope of this Memorandum. The Appellate Division noted that, “this case is one of novelty and complexity, involving fourteen days of abstruse financial detail and literally dozens of motions, conferences and meetings with the parties over more than two years.” (Internal quotation marks omitted). *Id.* at \*3.

<sup>24</sup> *Id.* at \*7.

<sup>25</sup> *Id.*

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

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

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

County Improvement authority to help finance the project filed a foreclosure action.<sup>29</sup> The foreclosure complaint set forth a number of allegations, including 135 storm-damaged units, 50 uninhabitable units, and damage to major building systems, and proclaimed that “extraordinary legal costs” from litigation with the City had left the owner “woefully and inadequately capitalized.”<sup>30</sup> As a result, the trustee “sought a judgment directing that it be paid the amounts due, that the project be sold to satisfy the bondholders, and that it be granted possession of the premises.”<sup>31</sup>

The Chancery Division approved a plan to “restructure and rehabilitate” the housing project and denied the appointment of a receiver.<sup>32</sup> The trial court’s determination that it had the discretion to deny the appointment of a receiver raised the issue of apparent inconsistencies in the language of the Receivership Act.<sup>33</sup>

### Analysis

The Appellate Division determined that the statutory language in N.J.S. 2A:42-117 was “internally inconsistent” and looked “for guidance to a separate portion of the Receivership Act, section 123.”<sup>34</sup> The Court also reviewed the legislative history of the Receivership Act to resolve the statutory ambiguity.<sup>35</sup>

The Appellate Division explained that the inconsistency arose from the use of both mandatory and permissive language.<sup>36</sup> Specifically, the statute provides “that a building ‘shall be eligible for receivership’ if either of the two criteria are met, but then provides that if a court determines that either of the conditions exist, it ‘shall appoint a receiver.’”<sup>37</sup> The Appellate Division noted that another statute in the Receivership Act grants a court discretion to deny or appoint a receiver, stating “[i]f the court determines, after its summary hearing, that the grounds for relief...have been established, the court may appoint a receiver.”<sup>38</sup>

The mandatory language of a portion of N.J.S. 2A:42-117, and the permissive language found in that section and in N.J.S. 2A:42-123, led the Court to examine the legislative history of the Receivership Act.<sup>39</sup> The Court found “nothing in the legislative history of the Act that suggest[ed] an intent by the Legislature to require appointment of a receiver.”<sup>40</sup> The Court explained that the Sponsors’ Statements “indicate that the Act was intended to give broad discretion to trial judges” and that the laws that were replaced by the revised Act “did not mandate

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<sup>29</sup> *Id.* at \*1 and \*7.

<sup>30</sup> *Id.* at \*7.

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

<sup>32</sup> *Id.* at \*1.

<sup>33</sup> *Id.* at \*27 - \*28.

<sup>34</sup> *Id.* at \*28.

<sup>35</sup> *Id.* at \*29.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at \*28.

<sup>38</sup> *Id.* (quoting N.J.S. 2A:42-123a.).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*29.

the appointment of a receiver.”<sup>41</sup> The Court said that it makes “eminent sense that trial judges should be given discretion to determine if the appointment of a receiver would serve the interests” of the parties involved.<sup>42</sup>

The Court concluded “[i]n sum, given the contradictory language contained within the statute, the legislative history favors reading N.J.S. 2A:42-117 as permissive rather than mandatory” and, therefore, that the trial court did not abuse its discretion in denying a receiver.<sup>43</sup>

### **Review of the Remaining Language in the Receivership Act**

In the absence of any additional case law addressing the scope of a court’s discretion to appoint or deny a request for a receiver under N.J.S. 2A:42-117, and in light of the Court’s analysis in *Manufacturers*, the remaining language in the Receivership Act was reviewed for additional indications of the Legislature’s intent. Throughout the Act, a court’s powers to institute, manage, alter, and terminate a receivership are described permissively, with very few exceptions.

As recognized by the Appellate Division in *Manufacturers*, N.J.S. 2A:42-123, the statute within the Receivership Act that directly addresses a court’s power to appoint a receiver provides the most persuasive guidance on the issue.<sup>44</sup> That statute, entitled “Appointment of receiver. . .” instructs that a court “may appoint a receiver and grant such other relief as may be determined to be necessary and appropriate” if it finds, after a summary hearing, that grounds for such relief were established.<sup>45</sup>

Most of the statutes that make up the Receivership Act provide a court with broad discretion to fashion relief as it deems appropriate. Even N.J.S. 2A:42-117, authorizes a court to grant the receiver any powers “which, in the court’s determination, are necessary” to accomplish the purpose of the receivership.

The provision that sets forth the grounds for dismissing a receivership action says “the court may dismiss the complaint” if it finds certain facts.<sup>46</sup> Similarly, a court “may remove[ ]” a receiver “at any time upon the request” of an interested party or the receiver, and “may hold a hearing prior to removal.”<sup>47</sup> A court also “may terminate the receivership” if certain facts have been established, and is permitted to “impose such conditions on the owner or other entity taking control of the building. . . that the court deems necessary and desirable.”<sup>48</sup> Also, the court “may

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<sup>41</sup> *Id.*

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

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

<sup>44</sup> *Id.* at \*28 (citing N.J.S. 2A:42-123).

<sup>45</sup> N.J.S. 2A:42-123a. (“[a]ppointment of receiver; abatement plan; payment of taxes, liens and maintenance expenses”) (emphasis added).

<sup>46</sup> N.J.S. 2A:42-122a. – c. (“[g]rounds for dismissal of complaint”) (emphasis added).

<sup>47</sup> N.J.S. 2A:42-126 (“[b]ond; possession of building; removal of receiver”) (emphasis added).

<sup>48</sup> N.J.S. 2A:42-140 (“[t]ermination of receivership”) (emphasis added). In a separate statute which addresses the circumstances in which an *owner* may petition for termination of the receivership and reinstatement of his rights, almost identical language is used to describe the court’s discretion: “the court may grant the owner’s petition,” “may waive the requirement for a bond or other security for good cause,” and “may establish additional requirements as conditions of reinstatement . . . as it determines reasonable and necessary.” N.J.S. 2A:42-138 and -138h (“[g]rounds

order the sale of the building” if certain conditions are satisfied.<sup>49</sup>

In addition to placing within a court’s control substantive determinations regarding receivership, the Receivership Act also leaves many of the procedural and technical aspects of receivership to the discretion of the court. For example, it is only “[a]t the discretion of the court” that a “party in interest may intervene in the proceeding and be heard.”<sup>50</sup> The court “may require the owner to post a bond,”<sup>51</sup> or “may in its discretion deny a lienholder or mortgage holder of any or all rights or remedies” if it finds a special relationship with the building owner.<sup>52</sup>

Further, many of the receiver’s powers are subject to court approval, must be determined by the court, or are permissible only if authorized by the court. A receiver must “submit such reports as the court may direct,”<sup>53</sup> must obtain court approval to incur certain types of indebtedness,<sup>54</sup> must have court authorization to sell the building free and clear of encumbrances,<sup>55</sup> and may only be reimbursed for expenses and “a reasonable fee,” as determined by the court.<sup>56</sup>

There are few instances in the Receivership Act in which the power of the court to administer the receivership is curtailed. The court is instructed that it “shall act upon any complaint. . . in a summary manner.”<sup>57</sup> When the court is considering whether to reinstate the owner’s rights and what conditions to impose upon reinstatement, it “shall” seek the recommendation of the receiver and “shall schedule a hearing.”<sup>58</sup> The court “shall” adhere to the order of priority for distributing the proceeds of the sale of the property,<sup>59</sup> it “shall exclude” certain facilities from the scope of the receivership “absent[t] . . . justification,”<sup>60</sup> and *if* the court chooses to fix a minimum duration for the receivership, it “shall not exceed one year.”<sup>61</sup>

Finally, there are three statutes within the Receivership Act which contain mandatory language (“shall”) that, when read in conjunction with qualifying phrases, do not actually restrict the court’s discretion. When considering the plan submitted by the receiver, the court “shall approve or disapprove the plan with or without modifications.”<sup>62</sup> In another statute, the court is directed that it “shall select as the receiver the mortgage holder, lienholder or a qualified entity,” *unless* a receiver cannot be identified, and then, “the court may appoint any party who, in the

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for granting petition”) (emphasis added). However, in this circumstance, the court is required to hold a hearing and to request the recommendations of the receiver. N.J.S. 2A:42-137 (“[p]etition for termination of receivership and reinstatement of owner’s rights”).

<sup>49</sup> N.J.S. 2A:42-133 (“[o]rder for sale of building”).

<sup>50</sup> N.J.S. 2A:42-121b. (“[s]ummary proceeding; intervention”).

<sup>51</sup> N.J.S. 2A:42-123b.

<sup>52</sup> N.J.S. 2A:42-124 (“[l]ienholders and mortgage holders; denial of rights and remedies”).

<sup>53</sup> N.J.S. 2A:42-129d. (“[m]aintenance of building; revenue; report to court”).

<sup>54</sup> N.J.S. 2A:42-130b. (“[a]uthorization to borrow money and incur indebtedness”).

<sup>55</sup> N.J.S. 2A:42-135b. (“[o]wner or party in interest may seek dismissal of application to sell property; authorization to sell free and clear of liens, claims and encumbrances”).

<sup>56</sup> N.J.S. 2A:42-131a. (“[e]xpenses and fees; liability”).

<sup>57</sup> N.J.S. 2A:42-121a.

<sup>58</sup> N.J.S. 2A:42-137.

<sup>59</sup> N.J.S. 2A:42-136 (“[d]istribution of proceeds from sale”).

<sup>60</sup> N.J.S. 2A:42-118c. (“[c]omplaint”).

<sup>61</sup> N.J.S. 2A:42-137.

<sup>62</sup> N.J.S. 2A:42-125 (“[p]lan submitted by receiver”) (emphasis added).

judgment of the court” is otherwise qualified.<sup>63</sup> Lastly, if a new owner (one who took ownership during the pendency of the receivership) brings a petition for reinstatement of the owner’s rights, that owner “shall be subject” to all the statute’s provisions, “unless the court finds compelling grounds that the public interest will be better served by a modification of any of these provisions.”<sup>64</sup>

A review of the Receivership Act revealed a preference for language that preserves and expands the court’s discretion to manage receiverships, and also that the Legislature sometimes used mandatory language despite a clear intent to permit the court to exercise its discretion.

### **Outreach**

In connection with this Report, Staff sought comments from knowledgeable individuals and organizations including: South Jersey Legal Services, who represented the Litigating Tenants in *Manufacturers*; New Jersey Department of Community Affairs; Housing and Community Development Network of New Jersey; New Jersey State Bar Association, Real Property/Trust and Estate Section; Professor David Listokin, Director of the Center for Urban Policy Research at Rutgers University; Professor Paula Franzese of Seton Hall University School of Law; and several private practitioners, including the plaintiff’s attorney in another New Jersey receivership case, *City of Union City v. Tadros*.<sup>65</sup>

To this time, there has not been any response to the outreach conducted.

### **Legislation**

Currently, there are no bills pending that involve the issue addressed by the Court in *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP*, regarding N.J.S. 2A:42-117.

### **Conclusion**

N.J.S. 2A:42-117 directs that a court “shall appoint a receiver” if certain conditions listed in the statute are found to exist. The Appellate Division in *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP*, pointed out the inconsistency of language within that section, as well as its inconsistency with a related section in the Receivership Act, which grants the court discretion to deny the appointment of a receiver.<sup>66</sup>

The legislative history of the Receivership Act, and its language, support a permissive reading of N.J.S. 2A:42-117. The Appendix that follows sets forth a proposed modification to change the statute’s language from mandatory to permissive, and a non-substantive updating of the statute’s format to improve accessibility.

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<sup>63</sup> N.J.S. 2A:42-123a. (emphasis added).

<sup>64</sup> N.J.S. 2A:42-138i. (“[g]rounds for granting petition”) (emphasis added).

<sup>65</sup> 2020 WL 3055641 (N.J. Super. Ct. App. Div. June 9, 2020).

<sup>66</sup> *Mfrs. and Traders Tr. Co.*, 2019 WL 5395937, at \*28.

## Appendix

The proposed modifications to N.J.S. 2A:42-117, Action to Appoint Receiver, (shown with ~~strike through~~, and underlining), follow:

- a. A summary action or otherwise to appoint a receiver to take charge and manage a building may be brought by a party in interest or qualified entity in the Superior Court in the county in which the building is situated. Any receiver so appointed shall be under the direction and control of the court and shall have full power over the property and may, upon appointment and subject to the provisions of P.L.2003, c. 295 (C.2A:42-114 et al.), commence and maintain proceedings for the conservation, protection or disposal of the building, or any part thereof, as the court may deem proper.
- b. A building shall be eligible for receivership if it meets one of the following criteria:
  - ~~a.~~(1) The building is in violation of any State or municipal code to such an extent as to endanger the health and safety of the tenants as of the date of the filing of the complaint with the court, and the violation or violations have persisted, unabated, for at least 90 days preceding the date of the filing of the complaint with the court; or
  - ~~b.~~(2) The building is the site of a clear and convincing pattern of recurrent code violations, which may be shown by proofs that the building has been cited for such violations at least four separate times within the 12 months preceding the date of the filing of the complaint with the court, or six separate times in the two years prior to the date of the filing of the complaint with the court and the owner has failed to take action as set forth in section 9 of P.L. 2003, c. 295 (C.2A:42-122).
- c. A court, upon determining that the conditions set forth in subsection ~~a.~~ b.(1) or ~~b.~~ b.(2) of this section exist, based upon evidence provided by the plaintiff, ~~shall~~ may appoint a receiver, with such powers as are herein authorized or which, in the court's determination, are necessary to remove or remedy the condition or conditions that are a serious threat to the life, health or safety of the building's tenants or occupants.

### COMMENT

The statute as written requires the court to appoint a receiver if either condition in the statute is found to exist. The proposed language modifies the mandatory “shall” contained in the last paragraph to the permissive “may” for consistency within the section and the Receivership Act as a whole, in keeping with the statute’s legislative history and the Legislature’s intent.

The language is also consistent with the Appellate Division’s finding in *Mfrs. and Traders Tr. Co. v. Marina Bay Towers Urban Renewal II, LP*, that the Legislature did not intend to “require [the] appointment of a receiver if certain conditions were met.”<sup>67</sup>

The text has also been divided into lettered and numbered sections and subsections to improve accessibility.

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<sup>67</sup> *Mfrs. and Traders Tr. Co.*, 2019 WL 5395937, at \*30.

