



**STATE OF NEW JERSEY**

**LAW REVISION COMMISSION**

**Tentative Report**

Relating to

**Title 2A – Civil Causes of Action**

**April 15, 2010**

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JUNE 15, 2010.**

Please send comments concerning this tentative report or direct any related inquiries, to:

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## Title 2A – Civil Causes of Action

### I. Introduction

As part of the broader revision of Title 2A begun in 2009, Staff revised certain sections of Subtitle 6 of Title 2A, which contains the civil causes of action established by the Legislature.

Subtitle 6 is a collection of widely varying causes of action, including those concerning alcohol beverage servers' liability, negligence and various causes related to mortgages and property. Some of the causes of action were drafted relatively recently, while others were drafted over a century ago. This goal of this revision was to modernize the statutes by selecting those sections most in need of updated language and revising them and also by identifying sections appropriate for deletion and recommending that course of action.

The changes made to this draft are: (1) the inclusion of additional language in the Comment to the Alcohol Beverage Servers' Liability section regarding the manner in which other states have addressed relevant issues; and (2) the modification of both the draft statutory language and the Comment to the Remedies for Persons Defrauded section to reflect additional research conducted by Staff in response to the direction of the Commission.

### II. Statutory Provisions

#### A. *N.J.S. 2A:22A-5 Alcoholic beverage servers' liability*

The following is the existing language of the statute with one exception which is shown with a strikeout of a single word in the first line of *N.J.S. 2A:22A-5*. While no other change is recommended by the Commission at this time, the Commission brings to the attention of the Legislature the fact that this statute does not cover a number of situations in which coverage may be appropriate. Significantly, the statute is not readily applicable to the service of alcohol at mass gatherings, like sporting events or concerts at stadiums.

Since the statute specifically states that it is the exclusive civil remedy for personal injury or property damage resulting from the negligent service of alcoholic beverages, the Legislature may wish to revisit this area in light of the case law developments subsequent to its enactment.

#### **N.J.S. 2A:22A-4. Exclusive civil remedy for personal injury or property damage resulting from negligent service**

This act shall be the exclusive civil remedy for personal injury or property damage resulting from the negligent service of alcoholic beverages by a licensed alcoholic beverage server. Nothing contained herein shall be deemed to limit the criminal, quasi-criminal, or regulatory penalties which may be imposed upon a licensed alcoholic beverage server by any other statute, rule or regulation.

## **N.J.S. 2A:22A-5 Alcohol Beverage Servers' Liability; Conditions for recovery of damages**

a. A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from a licensed alcoholic beverage server only if:

(1) The server is deemed negligent pursuant to subsection b. of this section; and

(2) The injury or damage was proximately caused by the negligent service of alcoholic beverages; and

(3) The injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.

b. A licensed alcoholic beverage server shall be deemed to have been negligent only when the server served a visibly intoxicated person, or served a minor under circumstances where the server knew, or reasonably should have known, that the person served was a minor.

### **COMMENT**

The New Jersey Licensed Alcoholic Beverage Server Fair Liability Act, *N.J.S. 2A:22A-1*, et seq., was “designed to protect the rights of persons who suffer loss as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server while at the same time providing a balanced and reasonable procedure for allocating responsibility for such losses.” *N.J.S. 2A:22A-2*.

In *Bauer v. Nesbitt*, 198 N.J. 601 (2009), the New Jersey Supreme Court determined that a server of alcoholic beverages owes no duty to an intoxicated person who: (a) was not visibly intoxicated while in the server's presence and (b) the server did not serve. The Supreme Court, in *Bauer*, indicated that the statute's language was “carefully crafted” and “precise,” *id.* at 612-13, and the tone of its analysis of the Appellate Division's decision suggests that the Appellate Division erred in finding otherwise. *See id.* at 610-11. Because the Supreme Court found the statute's language unambiguous and based its holding on a straightforward application of the statute, no revision of the statute was undertaken. It is noted, however, that the Supreme Court's decision left questions unresolved as to the statute's effect on other aspects of liability, including the general premises liability of a commercial establishment. Although the Court determined that a commercial establishment has an affirmative duty to assist “where a patron passed out drunk on the floor or fell ill or injured himself in the presence of the owner or an employee”, it is unclear if the statute imposes such a duty where the business did not serve the patron a drink. *Id.* at 615-616.

In addition, while only a single change is recommended by the Commission at this time (removing the term “negligent” from the first line of the statute), the Commission does wish to bring to the attention of the Legislature case law decided subsequent to the enactment of this statute discussing situations that the Act does not cover but in which coverage may be appropriate. Significantly, the statute is not readily applicable to the service of alcohol at mass gatherings, like sporting events or concerts at stadiums. *See, Verni ex rel. Burstein v. Harry M. Stevens, Inc.* 387 *N.J. Super.* 160 (App. Div. 2006). In addition, the statutory requirement that a server served a visibly intoxicated person, does not contemplate the self-service of alcohol at a public gathering, such as a picnic. *See, Mazzacano v. Kinnerman*, 197 N.J. 307 (2009) (although declining to accept the recommendation of the Appellate Division's dissenting judge to impose a separate duty to monitor alcohol consumption, the Court effectively replaced the statutory word “served” with “allowed the self-service of”).

Staff reviewed the statutes of other states in order to determine whether and how other states have addressed the issue of alcohol servers' liability. Staff examined the available statutes to see how they addressed three specific issues: (1) the word used to describe the providing of alcohol (in New Jersey, “only when the server served”, *N.J.S. 2A:22A-5*); (2) the standard for intoxication (in New Jersey, “a state of intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication”, *N.J.S. 2A:22A-3*); and (3) alternative approaches for balancing recovery by injured persons and the liability of alcohol servers (e.g., allowing for recovery in more instances while imposing a cap on aggregate damages).

The wording of New Jersey's statute, requiring that an intoxicated patron be "served", is not as broad as the language used by other states. *See, Mazzacano v. Kinnerman*, 197 N.J. 307 (2009) (the Court effectively replaced the statutory "served" with "allowed the self-service of"). California allows recovery from a licensee who "sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage". *Cal. Bus. & Prof. Code* 25602.1. Utah also uses broader language, and imposes liability on one who "directly gives, sells, or otherwise provides" alcohol "as part of the commercial sale, storage, service, manufacture, distribution, or consumption of alcoholic products". *Utah Code* 32A-14a-102.

New Jersey's definition use of the phrase "visible intoxication" has also been a source of confusion, especially where monitoring consumption is difficult, as at stadium sporting events. *See, Verni v. Stevens*, 387 N.J. Super. 160 (App. Div. 2006). Some states have handled the issue by using language describing a clearer or even a subjective standard for a server's knowledge of a patron's intoxication. Texas, for example, requires that it be "apparent to the provider" that a patron was "obviously intoxicated to the extent that he presented a clear danger to himself and others". *See, Tex. Alco. Bev. Code* 2.02. Utah, on the other hand, employs a standard adaptable to a variety of circumstances, imposing liability where either: (a) the patron was "apparently under the influence of intoxicating alcoholic products or drugs", or (b) the vendor "knew or should have known from the circumstances [that the patron] was under the influence of intoxicating alcoholic beverages or products or drugs". *Utah Code* 32A-14a-102.

Finally, with regard to the allocation of liability, other state legislatures have used approaches different from that implemented in New Jersey. Two jurisdictions, Illinois and Utah, impose a limit on the total recovery of damages per plaintiff of \$132,937 (which is required to be adjusted for inflation) and \$1,000,000, respectively. 235 *Ill. Comp. Stat.* 5/6-21; *Utah Code* 32A-14a-102. Both of those statutes also distinguish between potential defendants, limiting the liability of the server, while imposing no limit on a recovery against the intoxicated person. *Id.* In addition, Minnesota, which does not impose an outright cap, effectively limits liability by forbidding insurance company's subrogation claims against a liquor vendor. *Minn. Stat.* 340A.801.

In sum, the Act states that it is the exclusive civil remedy for personal injury or property damage resulting from the negligent service of alcoholic beverages. Cases decided subsequent to its enactment, however, suggest that the statute deals only with a narrow part of the problem that it was designed to address. As mentioned briefly above, other states have drafted language that might merit consideration in light of the case law development in New Jersey. While the Legislature may not have foreseen the substantial issues identified by cases decided after the enactment of the law in this area, it may wish to revisit this area of the law in light of those issues.

## ***B. N.J.S.A. 2A:23-1 to -7 - Alienation of affections, etc.***

The sections immediately below contain the existing language of the statute, the proposed statutory language follows.

### ***Current:***

#### **2A:23-1. Rights of action abolished**

The rights of action formerly existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are abolished from and after June 27, 1935.

#### **2A:23-2. No rights of action in future**

No act done in this state after June 27, 1935, shall operate to give rise, either within or without this state, to any of the rights of action abolished by this chapter. No contract to marry made or entered into in this state after June 27, 1935, or made or entered into hereafter, shall operate to give rise, either within or without this state, to any action or right of action for the breach thereof.

**2A:23-3. Filing or service of process prohibited**

It shall be unlawful for any person, either as a party or attorney, or an agent or other person in behalf of either, to file or serve, cause to be filed or served or threaten to file or serve, or to threaten to cause to be filed or served, any process or pleading, in any court of this state, setting forth or seeking to recover a sum of money upon any cause of action abolished or barred by this chapter, whether such cause of action arose within or without this state.

**2A:23-4. Contracts, instruments, etc., in payment, etc., of claims or abolished causes of action void; actions on contracts, etc., unlawful**

All contracts and instruments of every kind, nature or description, which have been executed after June 27, 1935, or which hereafter may be executed within this state in payment, satisfaction, settlement or compromise of any claim or cause of action abolished or barred by this chapter, whether such claim or cause of action arose within or without this state, are hereby declared to be contrary to the public policy of this state and absolutely void.

It shall be unlawful to cause, induce or procure any person to execute such a contract or instrument, or cause, induce or procure any person to give, pay, transfer or deliver any money or thing of value in payment, satisfaction, settlement or compromise of any such claim or cause of action, or to receive, take or accept any such money or thing of value as such payment, satisfaction, settlement or compromise.

It shall be unlawful to commence or cause to be commenced, either as party or attorney, or as agent or otherwise in behalf of either, in any court of this state, any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same shall have been executed within or without this state.

This section shall not apply to the payment, satisfaction, settlement or compromise of any causes of action which are not abolished or barred by this chapter, or any contracts or instruments executed prior to June 27, 1935, or to the bona fide holder in due course of any negotiable instrument executed since that date.

**2A:23-5. Violations of chapter, misdemeanor; fine or imprisonment**

Any person who shall violate any of the provisions of this chapter shall be guilty of a misdemeanor, which shall be punishable by a fine not exceeding \$1,000, or by imprisonment for not more than 1 year, or by both such fine and imprisonment.

**2A:23-6. Construction of chapter**

This chapter shall be liberally construed to effectuate the objects and purposes thereof and the public policy of the state as hereby declared.

**2A:23-7. Laws not affected**

Nothing contained in this chapter shall be construed as a repeal of any of the provisions of the penal law or the criminal procedure law or of any other law of this state relating to criminal or quasi-criminal actions or proceedings.

***Proposed:***

**N.J.S. 2A:23A-1. Certain causes of action abolished**

There shall be no cause of action for alienation of affections, criminal conversation, seduction or breach of contract to marry and it shall be unlawful for any person to cause to be

filed or served, or to threaten to file or serve, any process or pleading based on any cause of action barred by this section.

#### COMMENT

These causes of action have been abolished and Staff recommends that all but a single statutory section combining the prohibitions and sanctions of the other statutes in the section be repealed. *N.J.S. 2A:23-2* states that “[n]o act done in this state after June 27, 1935” will give rise to any of the rights of action abolished by this chapter, nor will any “contract to marry made or entered into in this state after June 27, 1935” give rise to any action or right of action for the breach thereof. Even if one was married before 1935, no act by a person today could give one a right to sue for alienation of affections, breach of contract to marry, or criminal conversation and seduction.

The existing statutory language makes the old causes of action nullities, makes it unlawful to serve process on someone for one of the abolished causes of action (*N.J.S. 2A:23-3*) or to extract a settlement from someone based on one of these causes of action (*N.J.S. 2A:23-4*). Under *N.J.S. 2A:23-5*, those who do serve process or extract settlements using one of these abolished causes of action are guilty of a misdemeanor and punishable “by a fine not exceeding \$1,000, or by imprisonment for not more than 1 year, or by both such fine and imprisonment.” The penalty/damage provision was not retained by the Commission.

The Commission has retained the single sentence to avoid any confusion about whether removing the language rendering the causes of action a nullity means that the heart balm statutes are once again viable. It does not, but the Commission wished to avoid confusion on this issue.

#### **C. *N.J.S. 2A:32-1 – Remedies for persons defrauded***

The existing language of the statute is followed by the proposed language.

##### ***Current:***

#### **N.J.S. 2A:32-1 Remedies for Persons Defrauded**

Whenever there is fraud in the execution or consideration of a contract, the person defrauded at any time thereafter may institute a civil action, to recover the money owing on such contract although, by its terms, the debt contracted or the money secured to be paid thereby is not then due or payable; and the person defrauded may, upon discovery of the fraud, either rescind the contract entirely and recover the money or property obtained by the fraud, or, sue on the contract to recover thereon.

The plaintiff in such an action shall have all rights to which he would be entitled if the debt or obligation was due and payable at the time of the commencement of the action.

##### ***New Proposed:***

a. Whenever there is fraud involved in inducing a person to enter into a contract, the person defrauded may:

1. Institute a civil action to recover the money or debt owed; and

2. Either:

(i) rescind the contract entirely and recover the money or property obtained by the fraud; or

(ii) sue on the contract for damages.

b. The plaintiff in an action instituted pursuant to this section shall have all rights to which the plaintiff would be entitled if the debt or obligation was due and payable according to the terms of the contract at the time of the commencement of the action.

#### COMMENT

The utility of this statutory section, which has been cited only once in a reported case (a bankruptcy matter from February 2010 in which the Court determined simply that the customers of the Chapter 7 debtor had stated a cause of action pursuant to the statute) is unclear. The meaning of the statute is likewise unclear.

The initial review conducted by Staff led to the conclusion that the language of the source statute, which begins, “[w]henver there is fraud in the execution or consideration of a contract”, referred to both fraud in the inducement—fraud which led the plaintiff to execute a contract with the defendant—and fraud in the performance—fraud in the performance of the consideration required. A review of the limited available case law seemed to support that position. See, *Seiden v. Fishtein*, 44 N.J. Super. 370, 376 (App. Div. 1957) (the Appellate Division sustained the attachment of the assets of a partner who knowingly withheld his share of a partnership’s revenues while also falsely denying the existence of said revenues); *Fidelis Factors Corp. v. Du Lane Hatchery, Ltd.*, 47 N.J. Super. 132, 135 (App. Div. 1964) (holding corporate officer personally liable for fraud in the performance based on his actions in an ongoing loan transaction); *Hamilton v. Schwadron*, 82 N.J. Super. 493, 497 (App. Div. 1964) (holding that fraud arose, not from the defendant jeweler’s “initial representations”, but from his “fraudulent conversion arising out of a bailment contract” where he valued a ring for more than he knew it to be worth); *Allied Financial Corp. v. Steel Panel Sales Corp.*, 86 N.J. Super. 65, 75 (App. Div. 1964), *certif. den.* 44 N.J. 411 (N.J. 1965) (“Contrary to the law in some other states construing similar language, it need not be shown that the original consensual agreement was contemporaneous with the fraudulent design of the defendant, as might appear from a cursory reading of the statutory language and as was held in some of our earlier cases.”); *Perlmutter v. DeRowe*, 58 N.J. 5, 10 (1971) (where a plaintiff sued to recover \$50,000 paid by the plaintiff for stock in the defendant’s corporation that was never delivered, the Court determined issuance of a *capias* writ founded on fraud was “warranted, especially in light of the view in this state that it need not be shown that the original consensual agreement was contemporaneous with the fraudulent design of the defendant.”; but *cf. Q Capital Corp. v. Wilmington Trust Co.*, 2007 WL 93231, at \*3 (App. Div. 2007) (noting that whether a plaintiff “may seek to recover economic losses resulting from the performance of a contract based on breach of contract remedies and tort remedies, including fraud, is an open question”).

It appears, however that the initial interpretation of the statutory language by Staff may have been in error. There is some evidence that where the statutory language reads “fraud in the execution or consideration of a contract” the meaning can be read **solely** as “fraud in the inducement of a contract.” See *McDonald v. Cent. R.R. Co.*, 89 N.J.L. 251, 253-54 (E. & A. 1916). While not dispositive, the case seems to consider both fraud in the execution and consideration as fraud in a pre-contractual sense—a fraud meant to induce a person to enter into a contract prior to any kind of performance. It is plausible that the Legislature, in originally drafting 2A:32-1, was guided by the *McDonald* reasoning. The language initially proposed by Staff, on the other hand, separated out another type of fraud—fraud in the performance—as a basis for a civil action even when contractual remedies are available. Additional detailed research by Staff revealed that this interpretation is neither explicitly addressed in New Jersey case law nor is it accepted by the Federal District Court for New Jersey.

As the District Court recently pointed out, “no New Jersey Supreme court case holds a fraud claim cannot be based on the same facts as an underlying contract claim.” *Touristic Enters. Co. v. Trane, Inc.*, 2009 WL 3818087, at \* 2 (D.N.J. 2009). Accepting the District Court’s assertion that the New Jersey Supreme Court “has yet to define exactly what types of fraud claims may be brought in conjunction with breach of contract claims,” *id.*, then the language contained in the initial Comment suggesting that the State level decisions support an amendment to the statute is incorrect.

The language contained in the original Comment was, however, correct in its assertion that the federal courts in New Jersey have allowed plaintiffs to recover under both breach of contract *and* fraud in the inducement. See *Touristic, supra*, at \*2; *Gleason v. Norwest Morg., Inc.*, 243 F.3d at 130, 144 (3d Cir. 2001); *D&D Assoc. v. Bd.*

of Educ., 2007 U.S. Dist. LEXIS 93867, 88-89 (D.N.J. 2007). The federal courts acknowledge a key distinction between the two types of fraud here at issue. *Lo Bosco v. Kure Eng'g Ltd.*, 891 F. Supp., 1020, 1032 (D.N.J. 1995) (affirming “the conceptual distinction between a misrepresentation of a statement of intent at the time of contracting, which then induces detrimental reliance on the part of the promisee, and the subsequent failure of the promisor to do what he has promised.”). Accordingly, the federal courts do permit a fraud claim of inducement along with a breach of contract claim where the claims arise out of pre-contractual misrepresentations. However, “mere subsequent failure of the promisor to do what he has promised is not recoverable in tort.” *D&D Assoc.*, *supra*.

At the District Court level, *First Valley Leasing, Inc. V. Goushy* seems to accord with the proposed modification to the statute because it allowed a fraud in the performance claim to be *pleaded* alongside a breach of contract claim, “because of the difference between the remedy provided for in a fraud cause of action and the remedy available in a breach of contract case.” 795 F.Supp. 693, 699-700 (D. N.J. 1992). *First Valley*, however, appears most likely to be an outlier decision, as its language implies that the decision was based heavily on the specific facts at hand. *First Valley Leasing, supra*, 795 F. Supp. at 699 (citing no face-to-face negotiations nor bargain for rights or remedies upon breach as reasons for allowing a tort claim). Indeed, *Lo Busco* found that, notwithstanding *First Valley* and a subsequent New Jersey Appellate Division decision that was similar, the distinction between the frauds is not negated and that that judges should determine whether a dispute is “essentially contractual in nature,” even where the elements of fraud also exist. *Lo Busco, supra*, 891 F. Supp. at 1032. Recent cases on the subject have continued to allow fraud in the inducement claims and bar fraud in the performance claims when contract claims are also pleaded. *See Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co.*, 226 F.Supp.2d 557, 563 (D.N.J. 2002). *See also, Slim CD, Inc. v. Heartland Payment Systems, Inc.*, No. 06-2256, 2007 WL 2459349 at \*9 (D.N.J. 2007) (citing *Bracco* and other federal cases to support denial of fraud in the performance claim).

The Third Circuit has said little about the issue of pleading fraud in the performance where contractual remedies exist in New Jersey. It has, however, said that “[t]he question of the continuing validity of fraud claims in cases involving frustrated economic expectations...is very complex and troublesome.” *Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 144 (3d Cir. (N.J.) 2001). The Third Circuit has read the New Jersey Supreme Court’s holding in *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555 (1985), as stating that “as among commercial parties...contract law...provides the more appropriate system [as compared to tort law] for adjudicating disputes arising from frustrated economic expectations.” 243 F.3d at 144 (internal citations omitted).

The problem thus remains that “[n]o New Jersey court...has explicitly considered whether these [tort] claims are barred by *Spring Motors*.” *Vanguard Telecommunication, Inc. v. Southern New England Tel. Co.*, 900 F.2d 645, 654 (3d Cir. 1990). Describing its hesitation to impose its view on the New Jersey courts on this issue, the *Vanguard* court “decline[d] to wade into this morass.” *Id.*

In 2001, the Third Circuit noted that “[t]he same morass exists today” but declined to certify the question to the State Supreme Court for a final answer. *See, Gleason v. Norwest Mortg., Inc.*, 243 F.3d at 144. The *Gleason* Court stated that the “New Jersey District Courts still hold that fraud claims not extrinsic to underlying contract claims are not maintainable as separate causes of action. New Jersey courts have not agreed with the District Courts’ interpretation of *Spring Motors*. The New Jersey Supreme Court has not decided the issue. We will avoid predicting New Jersey law by deciding the fraud issue on its merits...” 243 F.3d at 144 (citations omitted).

As noted in *Vanguard*, Staff’s recent searches did not uncover any mention of breach of contract along with fraud in the performance in any New Jersey case. The New Jersey Supreme Court has discussed the issue of rescission of a contract after fraud, but does not differentiate or specify if it is referring to fraud in the inducement. *See First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125 (2003). There, the Court found that “[t]he law is well settled that equitable fraud provides a basis for a party to rescind a contract,” arguably supporting at least part of 2A:32-1. *Id.* at 136. The Court’s survey of case law pointed to a “clear right to rescind” a contract “in the face of...misrepresentations”, adding that rescission acts as an equitable remedy and falls within a court’s discretion as a matter of law. *Id.* at 140.

In light of the foregoing, Staff has revised the statutory language in a conservative manner, following the available case law closely.



**D. N.J.S. 2A:38-1 – Fire alarm system damages**

The following language is the current language and no change is recommended.

***Current:***

**N.J.S. 2A:38-1 (Liability for Damages Caused to Fire Alarm Systems)**

Any person who wrongfully damages, tampers, or interferes with a municipal or other public fire alarm system, or any part thereof, shall be liable for the damages directly or indirectly caused thereby, recoverable in a civil action by the person injured or damaged.

**COMMENT**

Initially, it was recommended that this section be repealed. In the nineteenth and early twentieth centuries, municipalities in New Jersey installed fire alarm boxes around their towns so that people who spotted a fire could ring the alarm and summon aid. The boxes were installed at a time when most people did not have telephones. Over time, nearly every home had a telephone and, by the 1980s, the 9-1-1 emergency system was developed and implemented everywhere in New Jersey as the primary means of communicating a fire or other emergency. Additionally, the more recently drafted Criminal Code makes tampering with fire systems owned by a municipality a crime. *N.J.S. § 2C:33-3* (false public alarms) and *N.J.S. § 2C:17-3* (criminal mischief).

It must be noted, however, that some towns and cities still retain fire boxes and that a number of municipalities still have and use fire whistles, which are arguably a component of a public fire alarm system. As a result, Staff no longer recommends that this section be repealed, and instead recommends retention of the section without alteration.

**E. N.J.S. 2A:41-1 – Arrest or detention of mentally incapacitated persons**

The current statutory language is followed by proposed language.

***Current:***

**N.J.S. 2A:41-1 Idiots and Lunatics; Discharge from Arrest on Civil Process**

No idiot or lunatic, during the time of his lunacy, shall be committed or detained in prison for want of bail, or his body taken in execution in any civil action, or in any action for a penalty. In case any idiot or lunatic shall be arrested and detained in custody in any civil action, contrary to this section, he shall be discharged, on motion, by the court out of which the process on which he is so held issued, or upon a writ of habeas corpus.

***Proposed:***

With the exception of a commitment proceeding, no mentally incapacitated person, during the time of the incapacity, shall be committed or detained in custody in any civil action, or in any action for a penalty. If any mentally incapacitated person is arrested and detained in custody in any civil action, contrary to this section, the person shall be discharged by the court on motion or upon a writ of habeas corpus.

#### COMMENT

This statute, though it explains a basic legal principle (i.e., that the mentally incapacitated should not be jailed in civil actions), contains terms that are considered pejorative. Consistent with the Commission's REPORT RELATING TO REPLACEMENT OF PEJORATIVE TERMS REGARDING MENTAL CAPACITY, "idiot or lunatic" was changed to "mentally incapacitated" and "lunacy" to "mental incapacity." The initial language was added to clarify that the penalty would not apply to someone who is the subject of a commitment proceeding.

#### ***F. N.J.S. 2A:47-1 – Lost or destroyed instruments***

The current statutory language is followed by proposed language.

#### ***Current:***

#### **N.J.S. 2A:47-1 Lost or Destroyed Instruments**

The existence of any lost or destroyed deed or other instrument relating to title or real or personal property may be established by judgment in the superior court in an action brought in a summary manner or otherwise.

#### ***Proposed:***

The existence of any lost or destroyed deed or other instrument relating to title or real or personal property may be established by judgment, proved by clear and convincing evidence, in the Superior Court in an action which may be brought in a summary manner.

#### COMMENT

This statute was revised to include the "clear and convincing" standard as the burden of proof. This addition was made consistent with the case law regarding missing or destroyed instruments, which require clear and convincing evidence. *See Zuckerman v. Zuckerman*, 135 N.J. Eq. 598 (Ch. 1944). Such a standard is also consistent with the Legislature's requirement of clear and convincing evidence to prove oral leases and real estate transfers under the revised Statute of Frauds. *See, e.g., N.J.S. 25:1-12(b) and -13(b)*. The language regarding bringing the action in a summary manner was also revised for clarity at the request of the Commission.

#### ***G. N.J.S. 2A:48-1 and 2A:48:8 – Injury or loss from mob violence or riots***

The two sections pertaining to injury or losses resulting from mob violence or riots are recommended for repeal in their entirety.

#### ***Current:***

#### **N.J.S. 2A:48-1 Property Loss from Mob Violence or Riots in General**

When, by reason of a mob or riot, any property, real or personal, is destroyed or injured, the municipality if it has a paid police force, in which the mob congregates or riot occurs, or, if not in such a municipality, the county in which such property is or was situate, shall be liable to the person whose property was so destroyed or injured for the damages sustained thereby, recoverable in an action by or in behalf of such person, in an amount not to exceed \$10,000.00 for the aggregate of damage done to all such property, both real and personal, at each separate location within a municipality; provided, however, that no person, and no subrogee of such person, having insurance coverage in whole or in part for the said destruction or injury, shall have a cause of action against such municipality or county at common law or pursuant to the provisions of this act. For the purpose of this section, insurance

coverage means insurance obtained through any source whatsoever, including insurance purchased through any insurance pool, placement facility, plan of operation, or any other plan established pursuant to Federal or State law.

#### **N.J.S.A. 2A:48-8 Injury to Property or Person or Loss of Life from Mob Violence**

Any person who, by reason of the action of a collection of individuals--five or more in number--assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of the violation of a law, or for the purpose of exercising correctional powers or regulative powers over any person, by violence and without lawful authority, suffers material damage to his property or injury to his person, shall be entitled to recover his damages in an action brought for such purpose against the municipality in which such damage is suffered or injury inflicted, if the municipality has a paid police force, or, if not in such municipality, then, against the county in which such damage is suffered or injury inflicted, but not in excess of \$5,000. Where the provisions of article 1 of this chapter are also applicable and allow a recovery for the damage to property, the person entitled to such damages may elect to maintain his action for damages to his property under either this article or under article 1 of this chapter, but he may not recover under both articles for the same damages to property.

#### **COMMENT**

The above statutory sections have been in existence since 1877 and 1923 respectively and were last modified in 1969 and 1934. As a result of their age, the statutes contain dollar limitations on damage recoveries that are substantially out of date (\$5,000 in 1934 is the approximate equivalent of \$80,000 today). In addition, the statutes as currently drafted allow a lesser recovery for personal injuries than they do for injuries to property. When considering modifications that might be appropriate in light of the age of the statutes, the Commission raised the question of whether or not the Tort Claims Act (*N.J.S. 59:1-1 et seq.*), enacted in 1972, operated as an implied repealer of the these provisions since the earlier sections are inconsistent with the provisions of the Tort Claims Act.

A preliminary review of the Tort Claims Act and the case law decided since its enactment suggests that the Act is, in fact, an implied repealer of these earlier statutory sections. “ ‘The New Jersey Tort Claims Act, *N.J.S.A. 59:1-1, et seq.*, effective July 1, 1972, is dispositive, with respect to causes of action in tort accruing on and after that date, of the nature, extent and scope of state and local tort liability and the procedural requisites for prosecuting tort claims against governmental agencies.’ Pressler, *Current N.J. Court Rules*, comment 17.1 on *R. 4:5-4* (2001).” *Wright v. State*, 169 *N.J.* 422, 435 (2001). In the earlier decision in *Pico v. State*, 116 *N.J.* 55, 59 (1989), the Court began its analysis by “affirming the now-familiar principle that the public policy of this State is that public entities shall be liable for their negligence only as set forth in the Tort Claims Act.” “The Legislature intended the TCA to reestablish ‘the general rule of the immunity of public entities from liability for injuries to others’ and to ‘supersede the patchwork of statutory provisions providing for the defense and indemnification of state employees.’” *Chasin v. Montclair State University*, 159 *N.J.* 418, 425 (1999). Even the earliest of the cases interpreting the TCA recognized that the “Act circumscribes state tort liability, whatever the decisional law preceding it.” *Danow v. Penn Central Transp. Co.*, 153 *N.J.Super.* 597, 599 (L. Div. 1977).

Recent case law makes it clear that broad immunity protection was provided for public entities pursuant to the Tort Claims Act because “ ‘the area within which the government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done.’ *N.J.S.A. 59:1-2.*” *Ogborne v. Mercer Cemetery Corp.* 197 *N.J.* 448, 459 (2009). The *Ogborne* case also described it as “obvious that the Legislature intended public entities to receive broad immunity protection under the Act. As a result, this Court has held that an immunity provision of the Act will trump an applicable liability provision.” *Id.*

In light of the foregoing, Staff recommends the repeal of the above sections of the statute.

#### **H. *N.J.S. 2A:49-1 – Recovery of money or property of municipality or school district***

This section is recommended for repeal in its entirety.

#### ***Current:***

## **N.J.S. 2A:49-1 Money or Property of Municipality or School District; Recovery**

If moneys, funds or other property held or owned by any municipality or school district, or held or owned officially or otherwise for or on behalf thereof, have been or shall be, without right, obtained, received, paid, converted or disposed of, action for the recovery thereof or to recover damages or other compensation for such wrongful obtaining, receiving, paying, conversion or disposition, or both, may be maintained in any court of competent jurisdiction thereof, by 10 freeholders of such municipality or district who have paid taxes on real estate in such municipality or school district, within 1 year, in the name of and for and on behalf of such municipality or school district. Before any such action shall be maintained, such freeholders shall file with the clerk of such municipality or school district, a bond to the municipality or school district conditioned for the payment of the costs, if any, assessed against such municipality or school district, in said action, approved as to form and amount by a judge of the court in which such action is brought.

### **COMMENT**

Upon review, it appears that the statutory provisions does not afford a resident or property owner any rights that party does not otherwise have. In fact, this section of the statute makes it *more* difficult for such an individual to institute litigation against a local government entity because the suit can only be instituted if ten or more individuals are willing to act as plaintiffs.

As a result, the section is recommended for repeal in its entirety.

### **I. N.J.S. 2A:52-1– Change of name**

Since the Rules of Court contain the details of the procedure for a change of name, the current language is substantially revised to simply refer to the Rules in order to avoid duplication and inconsistency.

#### ***Current/Proposed:***

### **N.J.S. 2A:52-1 Action for change of name; complaint; contents; service**

Any person may institute an action in Superior Court, for authority to assume another name in accordance with the Rules of Court. ~~The complaint for a change of name shall be accompanied by a sworn affidavit stating the applicant's name, date of birth, social security number, whether or not the applicant has ever been convicted of a crime, and whether any criminal charges are pending against him and, if such convictions or pending charges exist, shall provide such details in connection therewith sufficient to readily identify the matter referred to. The sworn affidavit shall also recite that the action for a change of name is not being instituted for purposes of avoiding or obstructing criminal prosecution or for avoiding creditors or perpetrating a criminal or civil fraud. If criminal charges are pending, the applicant shall serve a copy of the complaint and affidavit upon any State or county prosecuting authority responsible for the prosecution of any pending charges.~~

### **COMMENT**

As explained above, since the Rules of Court, at *Rule* 4:72-1 et seq., contain the details of the procedure for a change of name, the current language was substantially revised to simply refer to the Rules in order to avoid duplication and inconsistency.

### **J. N.J.S.A. 2A:53-1to 53-4 - Naturalization**

The following language is the current language. Staff recommends deletion of these sections in their entirety as a result of the preemption issue explained in the Comment below.

***Current:***

**N.J.S. 2A:53-1**

The Superior Court shall have jurisdiction of declarations of intention, and of applications of aliens to become citizens of the United States.

**N.J.S. 2A:53-2**

No person shall be naturalized or admitted to be a citizen of the United States by any such court within 30 days next preceding any national, state, municipal, general, special, local or charter election.

An applicant who may become eligible to citizenship during such period of 30 days, shall not be prevented from receiving a certificate of naturalization and citizenship on the proper day during such period, if the application shall have been made and allowed prior to the commencement of the period of 30 days.

**N.J.S. 2A:53-3**

No political committee or committee of any political party, and no person who has received or accepted a nomination for a political office, shall pay or promise to pay any money to or on behalf of a person for fees for the declaration or application for naturalization, for services as attorney or counsel or otherwise assisting or enabling a person to make the declaration or application.

Any person convicted of violating the provisions of this section shall, upon conviction thereof, be punished by a fine of not less than \$500 nor more than \$1,000.

**N.J.S.A. 2A:53-4**

Any clerk or other person who records or files a declaration or application in any case of naturalization, or issues a certificate in any such case in violation of the provisions of this chapter, shall be punished by a fine of \$100.

**COMMENT**

In general, field preemption will arise where “[i]n the absence of explicit statutory language . . . Congress implicitly . . . indicate[s] an intent to occupy a given field to the exclusion of state law.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). This “purpose properly may be inferred where . . . the federal interest in the field is sufficiently dominant.” *Id.* Furthermore, lower courts have inferred that “Congress has fully occupied the field of immigration regulation through enactment and implementation of the INA.” *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 775 (C.D. Cal. 1995).

Although not every state regulation dealing with immigration is “per se pre-empted,” *De Canas v. Bica*, 424, U.S. 351, 355 (1976), the “Federal Government has broad constitutional powers in determining . . . regulation of [aliens’] conduct before naturalization, and the terms and conditions of their naturalization.” *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948). States can “neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens.” *Id.*

In light of the foregoing, it this set of statutes on naturalization is proposed for deletion in their entirety as a result of preemption by federal law. The “power to regulate immigration is unquestionably exclusively a federal power.” *DeCanas v. Bica*, 424 U.S. 351, 353 (1976). Through the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 to § 1537, Congress has delegated the administration and enforcement of the immigration and naturalization laws to the Attorney General of the United States. *See Public Serv. Elec. & Gas Co. v. Werline*, 322 N.J.Super. 216, 220 (App.Div.1999) (citing 8 U.S.C. § 1103). Under 8 U.S.C. § 1421(a), the “sole authority to

naturalize citizens is conferred upon the [United States] Attorney General.” The naturalization process is streamlined in 8 *C.F.R.* § 310, with 8 *C.F.R.* § 310.2 stating that applicants for citizenship shall apply through the United States Citizenship and Immigration Service.

To the extent the New Jersey Superior Court has jurisdiction, it lies in the ability to swear in new citizens once the Attorney General approves their application. 8 *U.S.C.* § 1421(b). While state courts may interpret and enforce federal immigration statutes, *see, e.g., In re Jose C.*, 198 *P.3d* 1087, 1097 (Cal. 2009), *cert. den. sub nom Jose C. v. California*, 129 *S.Ct.* 2804 (2009), and state legislatures may enact laws that regulate immigrants in certain ways, *Graham v. Richardson*, 403 *U.S.* 365, 372-373 (1971), the legislative ability to determine who can and cannot become a citizen is not within the authority of the state legislature. *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*, 352 *N.J.Super.* 44, 76 (App. Div. 2002).