



State of New Jersey

N J L R C

New Jersey Law Revision Commission ANNUAL REPORT

2005

Report to the Legislature of the State of New Jersey
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I. MEMBERS AND STAFF OF THE COMMISSION IN 2005

The members of the Commission are:

Albert Burstein, Chairman, Attorney-at-Law

Vito A. Gagliardi, Jr., Vice-Chairman, Attorney-at-Law

Hon. Sylvia Pressler, P.J.A.D., Retired

John Adler, Chairman, Senate Judiciary Committee, Ex officio

Linda R. Greenstein, Chairman, Assembly Judiciary Committee, Ex officio

Patrick Hobbs, Dean, Seton Hall Law School, Ex officio
Represented by **William Garland**, Professor of Law

Stuart Deutsch, Dean, Rutgers Law School - Newark, Ex officio
Represented by Associate Dean **Bernard Bell**

Rayman Solomon, Dean, Rutgers Law School - Camden, Ex officio,
Represented by **Grace Bertone**, Attorney-at-Law

The staff of the Commission is:

John M. Cannel, Executive Director

John J. A. Burke, Assistant Executive Director

Laura C. Tharney, Counsel

Judith Ungar, Counsel

II. HISTORY AND PURPOSE OF THE COMMISSION

New Jersey has a tradition of law revision. The first Law Revision Commission was established in 1925 and it produced the Revised Statutes of 1937. The Legislature, however, intended the work of revision and codification to continue after the enactment of the Revised Statutes. As a result, the Law Revision Commission continued in operation. After 1939, its functions passed to a number of successor agencies, most recently the Legislative Counsel.¹

In 1985, the Legislature transferred the functions of statutory revision and codification to the newly created² New Jersey Law Revision Commission,³ which commenced work in 1987. Since that time, the Commission has filed 68 reports with the Legislature, 33 of which have been enacted into law. In addition to the reports already considered by the Legislature, several recommendations are now pending.

¹ *N.J.S.A.* 52:11-61.

² The Law Revision Commission was created by L.1985, c.498, and charged with the duty to:

a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to

(1) Remedy the defects, (2) Reconcile conflicting provisions found in the law, and (3) Clarify confusing and excise redundant provisions found in the law;

b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;

c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and

d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.

³ L.1985, c. 498.

The objective of the Commission is to simplify, clarify and modernize New Jersey statutes. Pursuant to that objective, the Commission conducts an ongoing review of the statutes in order to identify areas that require revision. The scope of the revision performed by the Commission includes the correction of inconsistent, obsolete and redundant statutes, and comprehensive modifications of select areas of the law.

Before choosing an area of the law for revision, the Commission considers recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and public officers. Once a revision project begins, the Commission extensively examines local law and practices, and the law of other jurisdictions. The Commission also consults with experts in the particular area of the law, and seeks input from individuals and organizations familiar with the practical operation and impact of the existing statutes. The Commission continues its efforts to obtain input from these various sources throughout the drafting process. When a revision is completed, it is submitted to the New Jersey Legislature.

The Commission's work has been published in law journals, cited by the New Jersey Courts in several reported opinions, and has been used by law revision commissions in other states and foreign countries.

The meetings of the Commission are open to the public and the Commission actively solicits public comment on its tentative reports, which are widely distributed to interested persons and groups. In 1996, the Commission established a website where its current projects and its reports are available to the public on the Internet at <http://www.lawrev.state.nj.us>.

III. LEGISLATIVE SUMMARY

Since it began work in 1987, the New Jersey Legislature has enacted 35 bills based upon the Final Reports and Recommendations of the New Jersey Law Revision Commission:

- Anatomical Gift Act (L. 2001, c.87)
- Cemeteries (L. 2003, c.261)
- Child Custody Jurisdiction and Enforcement Act (L. 2004 c.147)
- Civil Actions - Service of Process (L. 1999, c.319)
- Civil Penalty Enforcement Act (L. 1999, C.274)
- Court Names (L. 1991, c.119)
- Court Organization (L. 1991, c.119)
- Criminal Law, Titles 2A and 24 (L. 1999, c.90)
- Statute of Frauds (L. 1995, c.36)
- Intestate Succession (L. 2001, c.109)
- Evidence (L. 1999 c.319)
- Juries (L. 1995 c.44)
- Lost or Abandoned Property (L. 1999, c.331)
- Material Witness (L. 1994, c.126)
- Municipal Courts (L. 1993, c.293)
- Parentage Act (L. 1991, c.22)
- Recordation of Title Documents (L. 1991, c.308)
- Repealers (L. 1991, c.59, 93, 121, 148)
- Replevin (L. 1995, c.263)
- Service of Process (L.1999 c.319)
- Surrogates (L. 1999, c.70)
- Tax Court (L. 1993, c.403)
- Title 45 -Professions (L. 1999, c.403)
- Uniform Commercial Code 2A -Leases (L. 1994, c.114)
- Uniform Commercial Code 3 - Negotiable Instruments (L. 1995, c.28)
- Uniform Commercial Code 4 - Bank Deposits (L. 1995, c.28)
- Uniform Commercial Code 4A - Funds Transfers (L. 1994, c.114)
- Uniform Commercial Code 5 - Letters of Credit (L. 1997, c.114)
- Uniform Commercial Code 8 - Investment Securities (L. 1997, c.252)
- Uniform Commercial Code 9 - Secured Transactions (L. 2001, c.117)
- Uniform Electronic Transactions Act (L. 2001, c.116)
- Uniform Foreign Money Claims Act (L. 1993, c.317)
- Uniform Mediation Act (L. 2004 c.157)

IV. FINAL REPORTS AND RECOMMENDATIONS

A final report contains the decision of the Commission on a particular area of the law. The report contains an analysis of the subject, proposed statutory language and appropriate commentary. A final report is approved and adopted after the public has had an opportunity to comment on tentative drafts of the report, and is filed with the Legislature. After filing, the Commission and its staff work with the Legislature to draft the report in bill form and to facilitate its enactment.

In 2005, the New Jersey Law Revision Commission published five final reports and recommendations to the Legislature.

A. Enforcement of Judgments

In 2005, the Commission published a new Final Report and Recommendations Relating to Enforcement of Judgments. (See Appendix A.) This report combines several reports filed by the Commission in past years (Judgments, Notice of Pending Action, Collection of Judgments, Foreclosure, and Public Sales). The report was updated to reflect changes in law since the original reports were filed. The Commission also made some substantive changes to balance the interests of debtors and creditors.

Judgments

The Commission's review of statutes concerning judgments continues the effort begun in 1989 to revise Title 2A provisions concerning the courts and the administration of civil justice. The current 32 sections include many which are outdated, unclear and superseded in practice by newer, more detailed rules. Moreover, the statutes and rules do not reflect the totality of current practice.

The Commission proposal states the processes by which a judgment or order is recorded and by which information concerning subsequent events that affect the judgment are added to the record.

Notice of *lis pendens*

The *lis pendens* procedure permits a party who institutes an action seeking to affect title to real property to provide constructive notice of the pendency of the action to potential bona fide purchasers, thus preserving the subject matter of the action until final judgment may be obtained.

The statutory *lis pendens* procedure was enacted in New Jersey in the early nineteenth century. The United States District Court declared the statute constitutionally defective because it did not provide for a prompt hearing upon the filing of a notice of *lis pendens*. The district court decision was overturned on appeal to the federal circuit court, but the legislature approved an amendment to the *lis pendens* statute to provide for an immediate preliminary hearing upon the filing of a notice of *lis pendens*. Subsequent United States Supreme Court decisions called the circuit court decision into question, making it desirable to retain the substance of the 1982 amendments in order to assure that the statute is constitutional. The proposed revision retains the substance of the existing statute, while greatly simplifying its provisions.

Collection of judgments

The current law on collection of judgments includes many sections that are outdated, unclear or superseded in practice by newer more detailed rules. As a whole, they fail to reflect current practice. The current law does not give proper guidance or assistance to a party trying to collect a judgment. The proposed law is a comprehensive statement of the law relating to collection of judgments. In addition to clarifications brought about by revisions in terminology, the commission proposes three substantive changes.

First, the commission proposes that the collection procedure be driven by written collection instructions from the judgment creditor to the collection officer. This innovation conforms the statutes to recent case law and practice. The commission proposal formalizes transmission of these instructions to the officer and establishes the guidelines for determining priorities among claimants and the time when the collection order must be returned.

Second, the Commission proposes some modification of the current inadequate \$1,000 personal property exemption in line with recommendations made in the 1993 Report of the Supreme Court Committee on Post Judgment Collection Procedures. It also revises the unworkable system of appraisal that accompanies present exemption procedures.

Finally, the Commission adjusts the current requirement that personal property be executed on before real property. The Report would make it possible for a creditor to collect against realty but allows a court to delay the sale of a residence where the sale would cause a hardship.

Foreclosure

The Commission's proposed revision of mortgage foreclosure statutes arises from the serious problems afflicting the State's homeowners and commercial community under current mortgage foreclosure law. The chief criticism of New Jersey mortgage foreclosure practice is its slowness. Most delay occurs in connection with the sale of foreclosed property. Some causes of delay are beyond the scope of this project to correct: paucity of personnel, lack of computerization, periodic market swings. The Commission's proposal on foreclosure addresses areas amenable to statutory improvement.

The Commission proposal includes a number of new substantive provisions to simplify and expedite the foreclosure process. For example, the proposal dispenses with the writ of execution currently required, and allows sale of property upon a judgment of foreclosure. Most significantly, the

Commission proposes that when the sheriff cannot conduct the sale within 45 days after the judgment of foreclosure, if the debtor agrees or has abandoned the property, the court may order that the sale be conducted by someone other than the sheriff.

Several of the Commission proposals explicitly mandate existing practices which now are based on Court Rule and case law and lack statutory authority. These include a statutory foundation for the debtor's right of redemption and the ability of a bona fide purchaser at a foreclosure sale to perfect title through strict foreclosure.

Public sales

The Commission's review of statutes concerning sales under execution continues the effort begun in 1989 to revise Title 2A provisions governing the courts and the administration of civil justice. The current sections and the Commission proposal apply to all sales conducted by sheriffs and other officers, whether pursuant to enforcement orders on money judgments or mortgage foreclosure. The current law includes many sections that are outdated, unclear, and superseded in practice by newer more detailed rules and it fails to regulate certain aspects of sales, allowing a variety of local practices to flourish.

The Commission proposals involve a codification of current practice, as well as some significant changes to simplify and shorten the process of public sale. For example, the Commission proposal requires that the sale be advertised in newspapers only one time. The proposal also reduces the length of the adjournments that the sheriff may grant the debtor from a month to 14 days. In addition, on issues where local practice varies, the Commission proposal establishes a standard.

The Commission proposal also attempts to deal with the constitutional issues raised in the case of *New Brunswick Savings Bank v. Markouski*, 123 N.J.

402 (1991) which requires that notice be given to holders of subordinate liens before property is sold to satisfy a prior lien. Under current law, the effect of the case is to require the creditor or foreclosing party to conduct searches up to the date of actual sale and to notify creditors of the sale. The proposed provisions require filing notice of the sale in the land records and notices to interest holders based on a single search before the first scheduled date of sale. This solution balances the constitutional rights of interest holders with the practical burden of multiple searches.

B. Title 51 - Weights and Measures

In 2005, the Commission published a Final Report and Recommendations Relating to Weights and Measures (See Appendix B).

The purpose of this title is consumer protection. Title 51 comprises 13 chapters regulating the sale, transportation and licensing of commodities. Administrative regulations (*N.J.A.C.* 13:47C-1.1 et seq.) supplement the statutory provisions, and state, county and municipal authorities enforce the system of controlling the trade of commodities. The mosaic of law and regulations governing weights and measures developed gradually over more than a century. As a result, the title contains many overlapping and inconsistent provisions. There are also provisions that are overly specific and deal in detail with particular subjects that are no longer of central importance.

The Report recommends replacing most of Title 51 with general and comprehensive provisions to provide a coherent and flexible basis for Weights and Measures enforcement. The proposed new law also tracks the federal Fair Packaging and Labeling Act, 15 *U.S.C.A.* Sect. 1451 et seq.

C. Medical Peer Review

In 2005, the Commission published a Final Report and Recommendations Relating to Medical Peer Review. (See Appendix C)

Medical peer review is a process whereby doctors evaluate the quality of work done by their colleagues, in order to determine compliance with accepted health care standards. This self-regulatory procedure provides quality assurance for the medical community by fostering standardization of appropriate medical procedures and by policing caregivers who could pose risks to patients. A peer review committee typically performs two functions: the initial process of credentialing (reviewing a doctor's qualifications and recommending whether or not the doctor should be granted privileges at the hospital), and ongoing review of a doctor's work within the hospital. Peer review is one of three chief means of monitoring the quality of doctors' work; the other two are state licensing board disciplinary action and tort law medical malpractice. Doctors, courts and critics recognize the review process as an efficient means of professional self-regulation. To counter doctors' reluctance to engage in peer review, most State legislatures have enacted laws that protect peer reviewers from liability, and their work product from discovery. Unlike other states, New Jersey does not offer statutory protection for peer review materials.

The Commission considered the ramifications of protecting the evaluative and deliberative materials of hospital peer review committees regarding the health care provided any patient. It was of concern to the Commission that a statute protecting peer review materials would affect the balancing process courts now employ case by case. The Commission was mindful of the reluctance of the courts and the Legislature to expand privileges; and concerned that codification of this area of the law could be counter-productive and could limit the development of case law. The Commission issued a Report stating that it does not recommend codification of current practice.

D. U.C.C. Revised Article 1

In 2005, the Commission published a Final Report and Recommendations Relating to Uniform Commercial Code (UCC) Article 1. (See Appendix D)

In 2001, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) promulgated a Revised Uniform Commercial Code Article 1 for adoption in all states. The New Jersey Law Revision Commission has examined the Official Text of Revised Article 1 and recommends that the State of New Jersey adopt it in its entirety except for the provision regarding choice of law contained in Revised Article § 1-301. The Commission recommends retention of existing law on that subject.

Article 1 of the UCC contains definitions and general provisions which apply to the transactions and matters governed by the various UCC articles in the absence of conflicting provisions. In the last decade, NCCUSL and ALI have revised or amended nearly every major article of the UCC to accommodate changing business practices and developments in law. The revision to Article 1 is an integral part of the Code's revision to reflect market developments and to achieve consistency with the specific subject matter articles of the Code.

Article 1 contains many changes of a technical, non-substantive nature, such as reordering and renumbering sections, and adding gender-neutral terminology. Certain substantive changes were made as well. Section 1-102 now expressly states that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the UCC. Section 1-103 clarifies the application of supplemental principles of law, with clearer distinctions about where the UCC is preemptive. The definition of "good faith" found in 1-201 is revised to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing"; a change which conforms to the definition of good faith that applies in all of the recently revised UCC articles except Revised Article 5. Finally, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of

trade.

E. U.C.C. Article 7

In 2005, the Commission published a Final Report and Recommendations Relating to U.C.C. Article 7 - Documents of Title. (See Appendix E)

In October of 2003, NCCUSL and ALI promulgated for adoption in the states a Revised Uniform Commercial Code Article 7. Article 7 of the UCC pertains to documents of title. As of December 2004, eight states have adopted the Revised Article 7: Alabama, Connecticut, Delaware, Hawaii, Idaho, Maryland, Minnesota and Virginia. The Revised Article 7 alters existing law in two primary ways. It allows the use of electronic documents of title and it updates its provisions to reflect current and emerging trends at the state, federal and international levels. Adoption of Revised Article 7 requires making conforming amendments to several other Code sections and the language of Revised Article assumes that the enacting state has enacted Revised Article 1, although it does provides alternative amendments for state law based on the original Article 1.

The Revised Article 7 provides for both tangible and electronic documents of title. Electronic documents of title are not currently the norm, but it is anticipated that their use will become more standard.

In recognition of the fact that documents of title may be impacted by federal and international law, Revised Article 7 has amended existing law "in light of state, federal and international developments." *Prefatory Note to Official Text* (2003). Revised Article 7 has deleted obsolete references to tariffs, classifications and regulations that no longer track modern commercial practice and also deals with other important issues, including: (1) permissible contractual limitations of liability, (2) negotiation and transfer, (3) lien of the carrier or warehousemen on the goods and right to enforce lien in a commercially reasonable manner, (4) altered, lost and stolen instruments and (5) the effects on holders resulting from insolvency of the bailee.

While adoption of Revised Article 7 is limited to eight states, the literature does not indicate the presence of substantial opposition to its provisions. Because it uses modern statutory language, has updated provisions to reflect commercial practice, interfaces with state federal and international regulation and provides explicit rules for electronic documents of title, it is recommended that New Jersey enact Revised Article 7.

V. TENTATIVE REPORTS

A tentative report represents the first settled attempt of the Commission to revise an area of law. It is the product of lengthy deliberations, but it is not final. A tentative report is distributed to the general public for comment. The Commission considers these comments and amends its report.

In 2005, the Commission published two tentative reports.

A. Medical Peer Review

In 2005, the Commission published its Tentative Report relating to Medical Peer Review. (Appendix F) See above Final Report and Recommendations.

B. Article 1 - Acts, Laws and Statutes

In 2005, the Commission published its Tentative Report relating to Article 1 - Acts, Laws and Statutes. (Appendix G)

Since its inception, the Commission has periodically considered whether it would be desirable to recompile all of New Jersey's statutory law. The Commission has never approved such a project since the most important pressing statutory issues tend to have substantive aspects that rearrangement in a new compilation would not reach. There are still many subject areas in which the statutes are anachronistic, contradictory or substantively deficient. None of these problems can be addressed by technical recompilation. Notwithstanding that judgment, the Commission has always recognized that

there are areas of the statutes that would benefit from rearrangement or renumbering. As a result, the Commission began this project to determine whether there was a way that could be created to allow statutes to be rearranged and renumbered administratively.

This project has been broadened since its inception. Examination of Title 1 of the statutes revealed other problems. Much of the material needs modernization. Current provisions are centered on printing of the annual volume of laws. While that publication remains important, the legislative public internet site has become equally important in publication of the law. Some revision is needed to reflect that change. Where substance does not need change, language can be simplified and clarified.

Current Commission drafts give the Office of Legislative Services the authority to recompile statutes. The concept is new, although, there have are instances when statutes have been assigned new compilation numbers. The proposed section requires concurrence by the Attorney General (as in statutory corrections) and provides for a system of recording that a statute has been recompiled. Drafts also continue the authority of OLS to correct statutes, but provides for a system to record correction; that provision is new. Finally, the current Commission drafts create a simplified system for citing statutes. The current system requires three different forms of citation depending on when and in what form the statute was enacted. No policy considerations support the current system; its complications are merely a matter of history.

VI. WORK IN PROGRESS

A. Title 39 - Motor Vehicles

A project that was carried over from 2004 concerns the law pertaining to motor vehicles. After preliminarily reviewing this area of the law, the Commission determined that the three volumes of the statute that comprise

Title 39 were appropriate candidates for revision.

The basic statutory provisions concerning motor vehicles were drafted in the 1920s. Periodic modifications and accretions over time have resulted in a collection of layered statutes containing overlapping, contradictory and obsolete provisions.

The scope of Title 39 is very broad. It includes registration and licensing requirements, motor vehicle equipment requirements, and numerous provisions regarding the regulation of traffic, including requirements pertaining to bicycles, roller skates, horses and horse-drawn vehicles, snowmobiles, all terrain vehicles, machinery and equipment of unusual size or weight, pedestrians, the law of the road and right-of-way, traffic signals, accidents and reports, parking, highway and traffic signs, and the powers of municipal, county and state officials. Title 39 also includes provisions regarding automobile insurance, vehicle inspections, the purchase, sale and transfer of vehicles, abandoned and unclaimed vehicles, junk yards, driving schools and auto body repair facilities.

As a result of the scope of Title 39, it has a significant impact on a large number of residents of the State of New Jersey, and on those who drive on the many roadways in this State. The Commission would like to improve the language, the structure and the accessibility of the law pertaining to motor vehicles so that those who are impacted by various provisions of the law can more readily locate and understand the requirements, responsibilities and restrictions imposed upon them.

The goal of this revision is not to modify the substance of the law significantly, but to consolidate and, where appropriate, restructure the law so that it is consistent, organized and accessible. There may, however, be sections of the law where substantive revision is appropriate, including outdated and inconsistent penalty provisions. In those cases, the Commission

will be responsive to the input from those who work with Title 39, including the Motor Vehicle Commission, municipal court judges, attorneys who regularly practice in municipal court, police officers and others whose work with Title 39 has afforded them the opportunity to identify the instances in which the current law does not adequately address the problems posed by its day-to-day application, and to propose practical solutions.

B. Title 44 - Poor Law

Two main laws with confusingly similar names govern assistance to the needy in New Jersey.

One, the "Work First New Jersey" Act, *N.J.S. 44:10-55 et seq*, resulted from the federal "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," 42 *U.S.C.*, Section 601, et seq, which established a federal block grant for temporary assistance for needy families and enabled the states to design their own welfare programs. This Act replaced earlier programs including: aid to families with dependent children, general public assistance (GA), emergency assistance for recipients, and the Family Development Initiative. *N.J.S. 44:10-58(b)*. The two main relief programs established by this act are Temporary Aid for Needy Families (TANF) and General Assistance (GA). TANF is the successor to the federally funded categorical programs; GA is the continuation of municipal general public assistance for those people who do not fit within the categorical programs.

The Work First New Jersey General Public Assistance Act, *N.J.S. 44:8-107 et seq*, the second main law, replaced the State's General Public Assistance Law of 1947. The existing statutory language obfuscates the relationship between the two "Work First" laws. The Work First New Jersey General Public Assistance Act seems to establish a general assistance program to "needy, single adults and couples without dependent children" *N.J.S. 44:8-108*. In fact, the Act serves only to provide for municipal governance of the General

Assistance program established by the other "Work First" Act. A municipality may choose either to run the program itself or to cede authority to the county. In current practice, administration of the program is equally divided between municipal and county governance. The TANF program is administered by the county.

The goal of the Commission is to draft provisions establishing the programs which operate in this State, which sections will follow the 1997 laws closely.

C. Uniform Mortgage Satisfaction Act

The Law Revision Commission began this project with consideration of the Uniform Residential Mortgage Satisfaction Act, which was promulgated by the National Conference of Commissioners on Uniform State Laws in 2004. That Act requires mortgage holders to provide payoff statements, to file a satisfaction of mortgage when the mortgage is paid, and provides a mechanism to clear title when a mortgage holder fails to file the satisfaction of mortgage. The Commission compared the Uniform Law to current New Jersey statutes and found certain advantages to the Uniform Law. Although it is not identical to the Uniform Residential Mortgage Satisfaction Act, this report is based on that Act.

While the Commission was working with the Uniform Law, the New Jersey Land Title Association presented an idea for improvement of law based on an approach taken by the states of Minnesota and Illinois. This approach is uniquely well designed for situations where a piece of property is being sold or remortgaged and the current mortgage must be satisfied. The landowner requests a payoff statement and complies with its terms. The lawyer or title officer for the landowner then files an affidavit certifying that the mortgage has been paid. This "one touch" system allows a satisfaction agent to file an affidavit of satisfaction when he knows that the mortgage has been satisfied as

required by the payoff statement. The agent can pay the mortgage at closing and immediately satisfy it as of record, simplifying and expediting the settling of the matter.

The Commission is making a number of other changes to the Uniform Act. Provisions are being added to apply the Act where a mortgage covers more than one parcel of property and partial payment will satisfy the mortgage as to a particular parcel. The Act will allow, in addition to the landowner or his agent, anyone with a mortgage or lien on the property to request a payoff statement, but to provide a penalty where an unauthorized person requests one. The Commission is also adding a reference cancellation of a mortgage by endorsement on the original, a simple and convenient method, though unique to New Jersey. Finally, the Commission is simplifying and clarifying provisions of the Uniform Law, resulting in a proposal that is based on the Uniform Residential Mortgage Satisfaction Act, but will be significantly different, and improved.

D. Health Care Agreements

The project involves a review of *N.J.S.A. 17:48E-10(a)(2)* governing the termination of agreements between health service corporations and providers of health care services of the Health Service Corporations Act (HSCA).

The specific question is whether that statutory provision, in conjunction with related state statutory and administrative law as well as federal law, limits the freedom of contractual parties to establish rate terms subsequent to the termination of an agreement between an HMO and a hospital while adhering to the continuity of care provisions of the HSCA. The question arose in *Rahway Hospital v. Horizon Blue Cross Blue Shield of New Jersey*, 374 N.J. Super. 101, certif. denied, _ N.J._ (2005). HSCA, enacted in 1985, does not contain language that directly addresses the issues that arose in that case. In fact, it is unclear whether the statute applies to hospitals since it speaks in terms of physicians and was enacted at a time when New Jersey had a State

Hospital Rate Setting Commission.

Subsequent to its enactment in 1985, the legal regime governing health care changed significantly. The Health Insurance and Portability Act of 1996 (HIPPA) effectively eliminated the ability of insurers, such as Horizon, to terminate healthcare coverage. In addition, New Jersey abolished the rate setting commission. Therefore, a hospital would have to continue providing services at the contract rate to that subscriber indefinitely in accordance with a literal reading of *N.J.S.A. 17:48E-10(a)(2)*.

To avoid that result and to reject the argument that HIPPA impliedly repealed the HSCA, the Commissioner of Banking and Insurance interpreted *N.J.S.A. 17:48E-10(a)(2)* as providing a four month freeze period during which the terms of an existing contract between a Health Service Corporation and a Hospital Service Corporation, would continue in effect, though terminated, so that members of the health service plan could be informed of the termination and find an alternative source of care. While the Appellate Division found the method of statutory interpretation exercised by the Commission ran afoul of that executive's authority, nevertheless the solution is a reasonable one. Consequently, one legislative option is to amend *N.J.S.A. 17:48E-10(a)(2)* to state that a termination of an agreement subject to that Act is effective four months after the thirty day notice period is satisfied by the terminating party.



State of New Jersey

New Jersey Law Revision Commission

FINAL REPORT

relating to

JUDGMENTS AND THEIR ENFORCEMENT

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INTRODUCTION

JUDGMENTS

The Commission's review of statutes concerning judgments continues an effort begun in 1989 to revise Title 2A provisions concerning the courts and the administration of civil justice. Many of the current 32 sections are outdated, unclear and superseded in practice by newer, more detailed court rules. Moreover, even taken together the statutes and rules do not reflect the totality of current practice.

The Commission proposal articulates the processes by which a judgment or order is recorded and the process by which information concerning subsequent events that affect the judgment are added to the record. First, a copy of the whole text of the judgment or order is kept by the court. See Section 1. That assures that the detail of a judgment or order will always be available. Entry is made in the Case Docket each time a judgment or order is entered. See Section 2. The docket entry serves as notice to all parties of the existence of the judgment or order and makes the decree effective against them. A judgment or order that is for a sum of money or that affects title to real estate is recorded on the Judgment Docket. See Section 3. That docket provides notice to all persons and makes a judgment a lien against real property. See Sections 7 and 8. "While the decretal provisions of a judgment take effect ... when the judgment is entered on the civil docket, the judgment would not constitute a lien until entered on the civil judgment and order docket" Pressler, Current N.J. Court Rules, Comment R. 4:101. Documents constituting the subsequent history of a judgment such as executions or assignments are also indicated on the docket with the judgment. See Sections 5 and 6.

The Commission has begun a related project to revise the statutes relating to the enforcement of judgments. The recommendations of that project will complement the proposed revised statutes on judgments.

NOTICE OF LIS PENDENS

The lis pendens procedure permits a party who institutes an action to obtain an interest in real property or to affect title to real property to provide constructive notice of the pendency of the action to any person acquiring an interest in the property, thus preserving the subject matter of the action until final judgment may be obtained.

The statutory lis pendens procedure derives from the common law doctrine that the mere filing of a lawsuit seeking to affect title to real property was constructive notice of the claim of the plaintiff to the property. Statutory provisions enacted in New Jersey in the early nineteenth century regularized the common law lis pendens procedure,

ENFORCEMENT OF JUDGMENTS

Appendix A

requiring the filing of a separate notice in the land records. In the 1970's, the evolution of constitutional doctrines limiting the availability of pre-judgment remedies called the constitutionality of New Jersey's lis pendens statute into question; it was recognized that the mere filing of a notice of lis pendens significantly impaired the ability of a property owner to convey marketable title. In 1981, the United States District Court for the District of New Jersey declared the statute constitutionally defective because it did not provide for a prompt hearing upon the filing of a notice of lis pendens. Chrysler v. Fedders Corp., 519 F.Supp. 1252 (D. N.J. 1981), rev'd, 670 F.2d 1316 (3d Cir. 1982). Although the district court decision was overturned on appeal to the federal circuit court, the Legislature approved an amendment to the lis pendens statute to provide for an immediate preliminary hearing upon the filing of a notice of lis pendens. L. 1982, c. 200. Since subsequent United States Supreme Court decisions have called the circuit court decision into question, making it desirable to retain the substance of the 1982 amendments to assure that the statute is constitutional. See Connecticut v. Doehr, 501 U.S. 1 (1991).

This proposed revision retains the substance of the existing statute, while greatly simplifying its provisions.

COLLECTION OF JUDGMENTS

The current law concerning the collection of judgments includes many sections that are outdated, unclear or superseded in practice by newer more detailed court rules. As a whole, they fail to reflect current practice. The current law does not give proper guidance or assistance to a party trying to collect a judgment. The proposed law is a comprehensive statement of the law relating to collection of judgments.

In addition to clarifications brought about by revisions in terminology, the Commission proposes three substantive changes. Foremost among them is the abandonment of the current requirement that personal property be executed on before real property. The personal property priority has little foundation in today's society. Moreover, the requirement that personal property be exhausted before collection against real property makes it difficult, if not impossible, to insure the title to real property acquired through a public sale. In place of the priority, the Commission proposes allowing a stay of sale of a debtor's primary residence where the sale would cause undue hardship.

Second, the Commission proposes that the collection procedure be driven by written collection instructions from the judgment creditor to the collection officer. This innovation conforms the statutes to recent case law and practice. Today's collection officer is in a situation different from that which existed when the present statutes were enacted. At one time, a sheriff armed with a writ of execution might be presumed to know the nature and location of the debtor's assets within the county. This obviously is no longer the case; the collection officer normally relies on the creditor for instructions, and the courts have held that the officer must follow the reasonable instructions of the

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creditor in satisfying a judgment. The Commission proposal formalizes transmission of these instructions to the officer and establishes the guidelines for determining priorities among claimants and the time when the collection order must be returned.

Third, the Commission proposes modification of the current inadequate \$1,000 personal property exemption in line with recommendations made in the 1993 Report of the Supreme Court Committee on Post Judgment Collection Procedures. It also revises the unworkable system of appraisal that accompanies present exemption procedures. The Commission proposes that when neither party objects, the collection officer's informal evaluation of items of personal property be accepted as the basis for claiming exemptions.

FORECLOSURE

The Commission's proposed revision of mortgage foreclosure statutes arises from the serious problems afflicting the State's homeowners and commercial community under current mortgage foreclosure law. The chief criticism of New Jersey mortgage foreclosure practice is its slowness. Most delay occurs in connection with the sale of foreclosed property. An October, 1994 survey of all sheriffs' offices disclosed that over a third of the counties have foreclosure sale backlogs; there are scheduling backlogs of six months. Some causes of delay are beyond the scope of this project to correct: paucity of personnel, lack of computerization, periodic market swings. The Commission's proposal on foreclosure addresses areas amenable to statutory improvement. Others are addressed in the section of this report on "Public Sales."

The Commission proposal includes a number of new substantive provisions to simplify and expedite the foreclosure process. For example, the proposal dispenses with the writ of execution currently required, and allows sale of property upon a judgment of foreclosure. Most significant, the Commission proposes that if the sheriff cannot conduct the sale within 45 days after the judgment of foreclosure, and if the debtor agrees or if the debtor has abandoned the property, the court may order that the sale be conducted by someone other than the sheriff. Other new provisions are derived from the Fair Foreclosure Act, L.1995, c.244. The most important of these provisions are those relating to "cure" of default by a debtor. These provisions promote the policy of helping homeowners retain their homes by reinstating their mortgages after missed payments.

Several of the Commission proposals explicitly mandate existing practices which now are based on court rule and case law and lack statutory authority. These include a statutory foundation for the debtor's right of redemption and the ability of a bona fide purchaser at a foreclosure sale to perfect title through strict foreclosure.

The Commission considered proposals that under certain circumstances would allow a creditor to take property after default on a mortgage without judicial action. It decided not to recommend non judicial foreclosure because of concerns about the lack of a mechanism to determine whether or not a default had actually occurred. The

Commission also rejected provisions that under certain circumstances would allow a creditor to take property without sale after a judgment of foreclosure. Here the Commission's concern was that sale was necessary to protect the rights of junior creditors. The Commission determined that changes recommended by this project and the companion project on public sale were sufficient to improve the ability of creditors to foreclose mortgages expeditiously without these problematic provisions.

PUBLIC SALES

The Commission's review of statutes concerning sales under execution continues the effort begun in 1989 to revise Title 2A provisions governing the courts and the administration of civil justice. Both the current sections and the Commission's proposal apply to all sales conducted by sheriffs and other officers, whether pursuant to enforcement orders on money judgments or mortgage foreclosure. The current law includes many sections that are outdated, unclear, and superseded in practice by newer more detailed court rules. It also fails to regulate certain aspects of sales, allowing a variety of inconsistent local practices. As a whole the current law fails to reflect present practice.

The Commission proposals involve a codification of current practice, as well as some significant changes to simplify and shorten the process of public sale. For example, the Commission proposal requires that the sale be advertised in newspapers only one time. That change and the inclusion of an example of a sufficient advertisement should reduce both the time and cost of advertisement. The proposal also reduces the length of the adjournments that the sheriff may grant the debtor from a month to 14 days. These adjournments are routinely given; shortening them will shorten the foreclosure process. In addition, on issues where practice varies, the Commission proposal establishes a standard. See, for instance, the section on conditions of sale.

The Commission proposal also attempts to deal with the constitutional issues raised in the case of New Brunswick Savings Bank v. Markouski, 123 N.J. 402 (1991). That case requires that notice be given to holders of subordinate liens before property is sold to satisfy a prior lien. Under current law, the effect of the case is to require the creditor or foreclosing party to conduct searches up to the date of actual sale and to notify creditors of the sale. The Commission considered limiting the lien effect of judgments to obviate the pre-sale searches but rejected that solution as worse than the problem. Instead, the provisions proposed require filing notice of the sale in the land records and notices to interest holders based on a single search before the first scheduled date of sale. This solution balances the constitutional rights of interest holders with the practical burden of multiple searches. These provisions will reduce the difficulties faced by a creditor in conducting a valid public sale, and the Commission is confident that they meet constitutional standards.

JUDGMENTS

J-1. Records

The Clerk of the Superior Court shall keep indexed copies of every judgment and order, and any other instrument in a civil action which the Administrative Director with the approval of the Chief Justice, shall require, in a form acceptable to them.

Source: 2A:16-12.

COMMENT

This section clarifies the meaning of the source provision which requires the recording of judgments and orders. The difficulty is that judgment practice, case law, statutes and rules present confusing terminology, and the term "recording" is used inconsistently. The section avoids old terminology and focuses on the process required to keep records of the full text of judgments and orders. "It must be borne in mind that there are not only distinctions between signing and entering judgments, but also between filing, recording and docketing. Such distinctions must be kept clearly in focus when considering the laws of conveyance and real property so that there will be no improper impairment of titles." Brescher v. Gern, Dunetz, Davison Etc., 245 N.J. Super. 365, 371 (App. Div. 1991).

This proposal deletes description of the methods of recording documents specified in the source provision. The mode of recording chosen may vary with technological advances so long as copies are kept and indexed.

J-2. Case docket

a. The Clerk of the Superior Court shall keep a Civil Docket and shall make a dated entry in it of every civil action in the Superior Court, other than in the Special Civil Part of the Law Division, and every judgment, order and execution of process, and of any other instrument which the Administrative Director with the approval of the Chief Justice shall require. The entry shall state where a copy of the full judgment or order is kept.

b. The dated entry shall constitute the record of the judgment or order.

c. A judgment or order takes effect only upon entry in the Civil Docket, unless the court directs otherwise in the judgment or order.

Source: New

COMMENT

This new section fills a statutory void. Law 1991, c.119, sec.4, repealed 2A:2-12 which required the Clerk of the Superior Court to "keep a book known as the civil docket...." Judgments take effect only upon entry in the civil docket, but there is no statute or rule requiring its existence. Because the "entry required by this rule [R. 4:101-3.] shall constitute the record of the judgment or order..." and because the civil docket is referred to in statutes providing for the civil judgment and order docket, a statute mandating it is desirable.

J-3. Judgment docket

The Clerk of the Superior Court shall keep a Civil Judgment and Order Docket and upon request and receipt of any required fee shall make a dated entry in it of the parties and their addresses and amount of the following judgments and orders:

a. Any judgment or order for payment of a fixed total amount of money entered from the Superior Court except from the Special Civil Part, including

(1) a judgment or order to pay a fixed total amount of money for counsel fees and other fees or costs; and

(2) a judgment or order to pay a fixed total amount of money as arrearages resulting from failure to make periodic payments.

b. Any judgment or order affecting title to or a lien upon real or personal property or for conveyance or release of real property.

c. Upon filing of a statement required by NJS 2A:18-32 et seq., any judgment of the Special Civil Part of the Law Division.

d. Upon written request pursuant to NJS 2B:12-26, any municipal court judgment assessing a penalty .

e. Any certificate or lien filed by a State or county officer or agency required by law to be docketed.

Source: 2A:16-11, R. 4:101-4.

COMMENT

This section brings together the vital functions of the civil judgment and order docket in current practice without repeating the details listed in the relevant court rules. Subsection (a) retains the additions of the 1981, 1982 and 1983 amendments concerning counsel fees, periodic payments and arrearages. As a result, the subsection covers any kind of judgment for a sum certain. The fact that a judgment accrues interest does not mean that it is not for a sum certain. It does not include a judgment ordering future periodic payments, but it does include a judgment for a specific amount due immediately even if the amount is the result of overdue periodic payments. Subsections (c) and (d) add judgments of the Special Civil Part and the municipal court in accordance with their respective statutes. Subsection (e) reflects the requirement that certain agencies file statutory liens with the Superior Court. Examples of statutes encompassed by the subsection are 30:4C-29.2 (Division of Youth and Family Services lien) and 2A:158A-17 (Public Defender lien). See also Rule 4:101-4.

J-4. Address of judgment holder

The Clerk shall enter the address of the holder of a judgment with each judgment entered in the Civil Judgment and Order Docket. A judgment holder shall file a new address with the Clerk promptly after each change in address.

Source: New

COMMENT

While this section is new, with section 8(b) below, it enacts the substance of Section 13 of the Fair Foreclosure Act, L. 1995 c.244.

J-5. Attachments and execution of process

The Clerk shall enter in the Civil Judgment and Order Docket, if the judgment is entered there and otherwise in the Civil Docket:

- a. Any attachments, giving the names of plaintiff and defendant; and the time when, and amount for which, writ of attachment issued; and
- b. Notation of any return of writs of execution.

Source: 2A:16-11.

COMMENT

Rule 4:101-2.(b) contains the same requirements as those in subsection (a). The Commission adds this provision because docketing of attachments as searchable records should be statutorily required.

J-6. Assignment, subordination or release of the lien, warrant to satisfy, satisfaction

The Clerk shall enter in the Civil Judgment and Order Docket, if the judgment is entered there and otherwise in the Civil Docket, notation of any assignment of, subordination or release of the lien of, warrant to satisfy, and satisfaction of, any judgment.

a. An assignment of a judgment shall be in writing, and acknowledged or proved as required for conveyance of real estate.

b. A subordination or release of the lien of judgment shall contain a description of the property as to which the judgment lien is to be subordinated and shall be acknowledged or proved as required for conveyance of real estate.

c. Satisfaction shall be: (1) by order of the court on motion after receipt of money paid into court; (2) upon receipt from the satisfied party of an acknowledged satisfaction or warrant directing entry of satisfaction; (3) upon the filing of a warrant or the satisfied return by the sheriff or other officer of an execution issued on a judgment; or (4) upon order of the court on motion of the party making satisfaction. A creditor that receives full satisfaction of a judgment shall enter satisfaction on the record or deliver a warrant to satisfy judgment to the debtor. A creditor that fails to enter satisfaction or deliver the warrant within 30 days after written request by the debtor shall be liable to the debtor for \$100 and, in addition, for any loss caused to the debtor by the failure.

Source: 2A:16-15, 2A:16-41, 2A:16-44, 2A:16-45, 2A:16-46, 2A:16-47, 2A:16-48.

COMMENT

In subsection (b) subordination of the lien of judgment more accurately describes the practice whereby a judgment creditor agrees that the lien against the debtor's real property will be inferior to a loan taken by the debtor and secured by a mortgage covering the same property than does the current term "postponement of lien of judgment."

In subsection (c) the proposal streamlines the four source provisions. The procedural details are in R. 4:48-3 and 4:48-2. The subsection makes clear the duty of a creditor that receives full satisfaction to act to assure that the docket shows that the judgment has been satisfied. The penalty for failing to act is

based on 12A:9-404 which penalizes failure to remove security interests under the Uniform Commercial Code.

J-7. Judgment lien; judgment as conveyance

a. A Superior Court judgment or order for the payment of a fixed total amount of money shall be a lien on real estate from the time it is entered in the Civil Judgment and Order Docket.

b. When the party against whom a Superior Court judgment is entered for conveyance or release of real estate or an interest in it, does not comply by the time specified in the judgment, or within 15 days after entry of judgment if no time is specified, the judgment shall act as the conveyance or release without further order of the Court.

Source: 2A:16-1, 2A:16-7.

COMMENT

Subsection (a) is based upon 2A:16-1.: "No judgment of the superior court shall affect or bind any real estate, but from the time of the actual entry of such judgment on the minutes or records of the court." The proposal, written in the affirmative, reflects contemporary practice by substituting " Civil Judgment and Order Docket " for "minutes or records of the court." Liens resulting from "judgments and orders for the payment of money" take effect only when the judgment or order is entered upon the civil judgment and order docket in Trenton. "While the decrial provisions of a judgment take effect pursuant to R. 4:47 when the judgment is entered on the civil docket, the judgment would not constitute a lien until entered on the civil judgment and order docket pursuant to this rule." Pressler, Current N.J. Court Rules, Comment R. 4:101.

Subsection (b) streamlines the language of its source provision.

J-8. Civil Judgment and Order Docket as notice

a. Entry of an instrument in the Civil Judgment and Order Docket serves as notice to all persons of that instrument.

b. Entry of the address of a judgment holder in the Civil Judgment and Order Docket serves as notice to all persons of the proper address for notification of matters concerning the judgment.

Source: New

COMMENT

While subsection (a) is new, the current provisions present this crucial function of the Judgment Docket in a generalized manner. Section 2A:16-42 states that "The record of an assignment of a judgment shall, from the time the assignment is left for record, be notice to all persons concerned that such a record is so assigned...." This subsection explicitly states that the notice applies to all instruments entered in the Civil Judgment and Order Docket. This subsection, like its source, makes docketing alone a prerequisite to notice. While the next section requires that a docketed judgment be indexed, a mistake in indexing does not affect the power of a docketed judgment. Cf. Howard Sav. Bank v. Brunson, 244 N.J. Super. 571 (Ch.Div. 1990).

Subsection (b), with Section 4 above, enacts the substance of Section 13 of the Fair Foreclosure Act, L. 1995 c.244.

J-9. Indexes

The Clerk shall maintain an alphabetical debtor index of the Civil Judgment and Order Docket and other suitable alphabetical indexes of judgments, assignments of judgments, subordinations or releases of the liens of judgments, or warrants to satisfy judgments, in accordance with the Rules of Court.

Source: 2A:16-16.

COMMENT

The proposal streamlines the source provision.

J-10. Security for payment of judgment; order discharging real estate from lien

a. If a person appealing a Superior Court judgment deposits with the Clerk of the Court an amount which the Court, after notice to all parties and hearing, deems sufficient as security for payment of the amount finally to be determined to be due, the Court, by order, may discharge appellant's real estate from the lien of the appealed judgment.

b. The deposited amount shall be subject to the lien of the appealed judgment and of any later judgment recovered. The Clerk shall retain the deposit until final determination of the action.

c. When the order has been entered in the Civil Docket and the deposit made, the Clerk shall enter the order following the judgment entry in the Civil Judgment and Order Docket.

Source: 2A:16-3.

COMMENT

Subsection (c) changes the entry in the docket from a phrase and a date to the order of discharge itself.

J-11. Offset against judgment of taxes, etc., due municipality

When a person recovers a judgment against a municipality to which the person is or becomes personally indebted before satisfaction of the judgment, the municipality may apply for an order to offset the personal indebtedness against the judgment.

Source: 2A:16-8.

COMMENT

2A:16-8. became effective on January 1, 1952. Through 1980, our courts did not deal with the statute, but had construed the predecessor statute, R.S. 2:27-255, authorizing an offset only when the taxpayer "is indebted to the municipality for taxes." "A tax against real estate is not a debt of the owner; it is not founded on a contract express or implied but is an imposition against the property and no personal liability attaches." Francis Realty Co. v. Newark, 16 N.J. Misc. 328, 330 (Essex Co. Cir. Ct. 1938). "The current statute may be regarded as having adopted the holding of Francis Realty Co. v. Newark, supra."

Garden State Racing Ass'n v. Tp. of Cherry Hill, 1 N.J. Tax 569, 578 (Tax Ct. 1980). In 1982, the Tax Court concluded that as the "Legislature has provided the municipality with the procedure whereby it can collect unpaid property taxes ... it would be improper to expand such procedures to include the right of offset." Seatrain Lines v. Edgewater, 4 N.J. Tax 378, 385 (Tax Ct. 1982), aff'd 192 N.J. Super. 535 (App. Div. 1983). The appellate judgment in Seatrain was summarily reversed, 94 N.J. 548 (1983), following passage of Senate Bill No. 3037, L.1983, c.137, which authorized a municipality to offset a refund of real property taxes against delinquent taxes owed on the same property. The Committee Statement emphasized that the "bill is intended to apply solely to property taxes, and does not include other local assessments or charges which may also be recovered through civil action against a property owner personally." A new section was added to Title 54 stating that real property taxes generally do not constitute "a personal debt of the owner of the property against which the taxes are assessed and levied." 54:4-135.

The proposal applies only to personal indebtedness, thereby excluding property taxes. Examples of "municipal charges or assessments for which the owner of the lands assumes a personal liability" include sewerage service charges and water and sewage disposal charges. "The basis for such liability is that the municipal service rendered is founded on contract." Garden State Racing Ass'n, *supra* at 576-577.

J-12. Ex parte entry of judgment on written settlement agreement

a. A judgment may be entered on a written agreement that consents to the entry of judgment only as provided in this section. Notice of the application for entry of judgment shall be given to the defendant in the form required by the court rules for notice of application for entry of default judgment.

b. The written agreement consenting to entry of judgment may be executed only after the acts or omissions of defendant have created a cause of action against the defendant for the amount of the judgment.

c. The application for entry of judgment shall be supported by an affidavit of the facts on which the judgment is based.

d. The agreement shall authorize entry of judgment for a specific sum or for a sum to be calculated in a manner provided in the agreement.

e. The agreement may authorize immediate entry of judgment or it may impose new obligations on the defendant and condition entry of judgment upon failure to comply with its terms.

Source: New.

COMMENT

Judgment by confession has existed in New Jersey practice for 175 years. It occurs when a debtor permits a creditor to enter judgment against the debtor by a written statement without institution of legal proceedings. Historically, statutes regulated confession of judgment practice. Judge Brennan stated that judgments "by bond and warrant of attorney, without institution of suit, derive all their efficacy from statutory law and strict compliance with statutory requirements is necessary." Hickory Grill, Inc. v. Admiral Trading Corp., 14 N.J. Super. 1, 5 (App. Div. 1951). However, the concept of confession of judgment was not created by statute, and over the years, many of the statutes regulating confessions of judgment were not re-enacted. Vestiges remain in Title 2A (2A:16-6, -9, -13); most statutes outside Title 2A which mention confession of judgment prohibit or restrict their use. 39:6-72 (Settlement of actions against motorist); 12A:3-112 (Terms and omissions not affecting negotiability of an instrument); 2A:50-6 (Bonds or notes where a mortgage on real estate may be given for the same debt; notice of proposed

judgment by confession or action); 38:23C-16 (Sale of property during period of military service); 42:1-9 (Uniform Partnership Law).

Since 1969, the most important regulation of confessions of judgment has been by court rule. The Rule requires that before judgment is entered, the debtor must receive notice of the date that the confession will be entered and the creditor must produce proof of the amount due. "While the 1969 rule did not wholly eliminate judgments by confession, it did eliminate their most objectionable feature by requiring notice to be given to the defendant before entry of the judgment." Comment, R. 4:45-2. The confession of judgment no longer operates as a waiver to the debtor's defenses; that was its original appeal to creditors. There is scant case law since the 1969 rule revision, but the cases show a continued reluctance to allow confessions of judgment to be used to foreclose defenses to a claim. First Mutual Corp. v. Gramercy & Maine, Inc., 176 N.J. Super. 428, 441 (Law Div. 1980), United Pacific Ins. Co. v. Lamanna's Estate, 181 N.J. Super. 149, 160 (Law Div. 1981).

The classic confession of judgment situation is one in which the debtor executes a confession of judgment along with a promissory note. This "cognovits note" allows the creditor to have judgment entered against the debtor if he misses a payment without notice to the debtor or any defense by him. This kind of confession of judgment rarely occurs now because of the 1969 revision of R. 4:45-2; further, it may be invalid as a violation of the "due process" clause of the Fourteenth Amendment to the Constitution. See, D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 178 (1972). The Commission found that use of confession of judgment is legitimate in the limited context of settlements of litigation. In such a situation, a person settles a claim with an agreement in which the defendant admits liability and provides that if the defendant does not fulfill his obligations under the settlement, the plaintiff may use the confession to have judgment entered without proof of the claim. This kind of confession of judgment was found constitutional in D. H. Overmyer Co. v. Frick Co., *supra*. This section allows the use of judgment by consent on settlement agreement but regulates it strictly. It permits execution of an agreement only after there has been a default or other action by the debtor that would form the basis for a judgment. It eliminates the use of a warrant of attorney by requiring that the defendant make a written agreement supported by an affidavit of the facts on which the judgment consented to is based. However, the Commission proposal allows the most common and appropriate current use of confessions of judgment. It permits a person to settle a claim by reaching an agreement that confesses liability and allows a judgment to be entered if the debtor does not make certain future payments. Such an agreement complies with subsection (b) since it is executed after the acts that formed the basis of the claim have occurred. There may be disputes as to whether the debtor has failed to comply with the agreement and therefore whether the creditor may seek judgment on the confession. Those disputes do not involve the basis of the claim but are relevant in determining whether the application for judgment on the confession should be granted. The debtor will have a fair opportunity to raise these issues; the section requires that notice be given to the debtor of the application for entry of the judgment.

The approach taken by this section differs from that taken by court rules. Court rules distinguish between confessions of judgment controlled by R. 4:45-2 and consent judgments controlled by R. 4:42-1. The Rules place severe restrictions on the entry of a judgment based on a confession of judgment. While these restrictions are not identical to those in Section 13, they serve the same purposes. However, where a complaint has been filed, there are no restrictions on the use of a signed consent judgment. State v. Cruse, 275 N.J. Super. 324 (App.Div. 1994). Notice need not be given to the defendant by service of the complaint or otherwise. R. 4:42-1(d). While both R. 4:42-1 and Cruse seem to contemplate that the consent judgment be executed after the accrual of the cause of action, neither requires it. The same document that would involve notice, hearing, and affidavits if used as a confession of judgment under R. 4:45-2 would suffice alone as a basis for judgment as a consent judgment under R. 4:42-1. The Commission decided that whether a document was used alone, as a confession of judgment, or coupled with a complaint, as a consent judgment, the same issues were involved, and the same restrictions should apply. Section 13 reflects that unitary approach.

NOTICE OF LIS PENDENS

N-1. Written notice of lis pendens concerning real estate

a. A notice of lis pendens may be filed by a party in any action instituted in a court of this State or in the United States District Court for the District of New Jersey in which the party filing the notice:

(1) seeks to enforce a lien on real estate; or

(2) seeks to affect the title to real estate; or

(3) seeks to affect the ownership of a lien or an encumbrance on real estate.

b. A lis pendens shall not be filed under this chapter in an action to recover a judgment for money or damages only.

c. The notice of lis pendens shall be filed after the filing of the party's pleading in the action, in the office of the county clerk or register of deeds and mortgages of the county in which the affected real estate is located.

Source: 2A:15-6.

COMMENT

This section has been rewritten for clarity, and to incorporate the ruling in Schwartz v. Grunwald, 174 N.J. Super. 164 (Ch. Div. 1980), that a notice of lis pendens may be filed by any party in an action, not only by a plaintiff filing a complaint. In this section and elsewhere in this proposed statute the references to "the plaintiff" and "the complaint" have been generalized to refer to "the party" and "the action." Subsection (b) combines the two exceptions in the existing statute which exclude actions to enforce a mechanic's lien and actions only for money or damages from the categories of actions as to which a lis pendens may be filed.

N-2. Contents of notice of lis pendens

a. A notice of lis pendens shall include the complete caption of the pending action, a brief description of the claim of the party filing the notice, and a description of the subject real estate that is sufficient to identify it.

b. In an action in which a claim is made for the foreclosure of a recorded or registered mortgage or the foreclosure of a recorded certificate of tax sale, the notice of lis pendens shall also specify the book and page of the record or registration of the mortgage or of the record of the certificate of tax sale.

Source: 2A:15-6; 2A:15-9.

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This section combines the provisions from the source sections that specify the contents of a notice of lis pendens. Subsection (b) requires that when the notice of lis pendens pertains to a mortgage foreclosure or a tax sale, additional information must be contained in the notice of lis pendens.

N-3. Record and index of notices

a. The county clerk or register of deeds and mortgages shall record and index notices of lis pendens separately from other filings, and shall record the date and time of filing of each notice.

b. If a notice of lis pendens is filed in an action for the foreclosure of a recorded or registered mortgage or the foreclosure of a recorded certificate of tax sale, the date of the filing of the notice shall be noted on the record of the mortgage, the abstract of the record of the mortgage, or the record of the certificate of tax sale.

Source: 2A:15-9; 2A:15-12.

COMMENT

This provision continues the substance of the source sections.

N-4. Effect of notice of lis pendens

a. Any person who acquires an interest in, or lien on, the property on which a notice of lis pendens has been filed between the time the notice of lis pendens is filed and the time it is discharged or expires shall be considered to have had notice of the pendency of the action and shall be bound by any judgment entered in the action.

b. If a notice is not filed as provided in this chapter with respect to a pending action, the filing of the action shall not constitute constructive notice to a bona fide purchaser or to a person who acquires an interest, a mortgage or a lien on real estate that is the subject matter of the action.

Source: 2A:15-7; 2A:15-8.

COMMENT

Subsection (a) of this section restates and generalizes the provisions of 2A:15-7 of the source statute which establishes the effect of the filing of a notice of lis pendens. Subsection (b) of this section is substantially similar to 2A:15-8 of the source section; it states the converse principle that if a notice of lis pendens is not filed, any action in which the notice might have been filed does not constitute notice of the pendency of the action to third parties.

N-5. Expiration and extension of notice of lis pendens

a. A notice of lis pendens shall expire after three years from the date it is filed, unless an extension notice is filed pursuant to this section.

b. A notice of lis pendens may be extended for periods of one year if an extension notice is filed prior to the expiration of the original notice or any previous one year extension of the original notice. The extension notice shall contain all of the information required by this chapter for an original notice, and shall also include a certification by the

party filing the notice that the subject action is still pending or that an appeal has been filed and is still pending.

Source: 2A:15-11.

COMMENT

Subsection (a) of this proposed section is substantially similar to the source section. The provision in proposed subsection (b) for the filing of an extension of a notice of lis pendens has been added to address those situations in which an action affecting real property may still be pending three years after the original notice is filed. The provision for successive one-year extensions of the notice of lis pendens allows for the unusual situation in which litigation would be protracted over an extended period of time.

N-6. Service of notice of lis pendens

Within three days after filing of a notice of lis pendens, the party who filed it shall send a copy of the notice by registered or certified mail, return receipt requested to any person who held an interest in or lien on the property on the date of the filing of the notice. Except when the pending action is a mortgage or tax foreclosure, the party who filed the notice of lis pendens shall also serve a copy of the notice to all other parties in the action against whom a claim is being made. The notice shall be mailed to the current address of the person, if it is known or reasonably ascertainable, or to the party's last known address of record.

Source: 2A:15-7.

COMMENT

This section continues the provisions of subsection 2A:15-7(b), which require that a party who files a notice of lis pendens serve a copy of the notice, and of the pleading in the action, upon all parties to the action within three days of the filing of the notice. The exception to the notice requirement for parties in foreclosure actions, embodied in 2A:15-7(a) of the source statute, is also continued. The requirement that the notice also be sent to any person who has an interest in the property or a lien on it is new. It is intended to allow such a person to act to protect his interest.

N-7. Hearing

a. Any party who is served with a notice of lis pendens pursuant to this chapter, and who claims an interest in the subject real estate may file a motion for discharge of the notice with the court that has jurisdiction of the action. After a hearing and within 10 days, the court shall enter a determination on the motion.

b. The party who filed the notice of lis pendens shall bear the burden of establishing that there is a probability that final judgment will be entered in that party's favor, and that the probability of success on the merits is sufficient to justify the continuation of the notice.

c. If the court fails to find that there is a probability that final judgment will be entered in favor of the party filing the notice of lis pendens, and that the probability of success on the merits is sufficient to justify the continuation of the notice, the court shall immediately order the notice of lis pendens discharged.

Source: 2A:15-7

COMMENT

This proposed section continues the provision in 2A:15-7(b) of the source statute which permits an affected party who has been served with a notice of lis pendens to obtain immediate review of the claim against the subject real estate. The standard which the person filing the notice of lis pendens has the burden of establishing, continued from the source statute, is that "there is a probability that final judgment will be entered in [the claimant's] favor sufficient to justify the continuation of the notice." In Fravega v. Security Savings and Loan Association, 192 N.J. Super. 213 (Ch. Div. 1983), the court held that this language embodied a legislative judgment that a higher standard than mere "possibility" of success on the merits must be met by the claimant, and that the strengths of the claimant's case must be weighed against the detriment which may be suffered by the property owner. The requirement that the motion be heard within ten days implements the constitutional requirement for prompt review of pre-judgment seizures of property.

N-8. Discharge of notice of lis pendens by court

A notice of lis pendens shall be ordered discharged by the court that has jurisdiction of the action as to which the notice of lis pendens has been filed:

- a. if the party who filed a notice of lis pendens abandons the underlying action or fails to prosecute it diligently; or
- b. in an action for the enforcement against real estate of a claim for the payment of money, except for the foreclosure of a mortgage or tax sale certificate, if the party against whom a claim is being made gives sufficient security to pay the claim; or
- c. upon dismissal of the pending action; or
- d. upon the entry of final judgment in the pending action in the judgment docket.

Source: 2A:15-10; 2A:15-14; 2A:15-15; 2A:15-16; 2A:15-17.

COMMENT

This proposed section collects and harmonizes various source sections of the existing chapters which specify when a notice of lis pendens may be discharged.

N-9. Filing of order or judgment discharging notice of lis pendens

A copy of the order discharging a notice of lis pendens shall be filed with the county clerk or register of deeds and mortgages. A statement of the substance of the order shall be entered on the record of the notice of lis pendens.

Source: 2A:15-14; 2A:15-16; 2A:15-17.

COMMENT

This proposed section continues the substance of the filing requirements of the source sections.

N-10. Effect of discharge

Upon the filing of an order discharging a notice of lis pendens with the county clerk or register of deeds, the binding effect of the notice shall end, unless:

- a. the order or judgment provides otherwise; or
- b. the party who filed the notice of lis pendens obtains a stay pursuant to the court rules in connection with the filing of a notice of appeal or a motion for relief from the judgment or order discharging the notice.

Source: 2A:15-10; 2A:15-14; 2A:15-15; 2A:15-16; 2A:15-17.

COMMENT

This proposed section states the effect of the filing of a judgment or order discharging a notice of lis pendens. The exception in subsection (b) changes the current rule in the case of appeals. Under the present statute, upon the filing of an appeal or the institution of proceedings for relief from the judgment or order discharging the notice of lis pendens a party may automatically file another notice of lis pendens. The proposed statute would require the party who wishes to continue the effect of a notice of lis pendens during the pendency of an appeal or a motion for reconsideration to obtain a stay from the appropriate court.

N-11. Fee for recording notice a taxable cost

The fee for recording a notice of lis pendens shall be taxable as a part of the costs in the action.

Source: 2A:15-13.

COMMENT

The proposed section is substantially identical to the source section.

COLLECTION OF JUDGMENTS

Part 1. GENERAL PROVISIONS

C-1. Definitions

As used in this chapter:

"Earnings" means payment for personal services performed, whether described as wages, salary, commission, fees, bonus, tips, pension and retirement benefits or otherwise.

"Writ of execution" means a court order directing the collection officer to satisfy a money judgment from the property of a judgment debtor.

"Property of the judgment debtor" means all interests in real property, all forms of personal property, tangible and intangible, including rights and credits.

Source: New

COMMENT

The purpose of these definitions is to make clear at the outset the categories that are used in later proposed subsections concerning the issuance of specific kinds of writs of execution. The phrase "property of the judgment debtor" is defined to include all kinds of property. As defined, it includes anything of value that can be taken for the benefit of the creditor.

Part. 2. WRITS OF EXECUTION

C-2. Issuance of writs of execution

a. At the request of a judgment creditor and upon receipt of any required fee, the Clerk of the Court shall issue a writ of execution directing the satisfaction of a money judgment from the property of the judgment debtor. A writ may be issued directing the satisfaction from real property even though the judgment has personal property from which the judgment could be satisfied.

b. A writ of execution may be issued only within 20 years after entry of the judgment to be collected, or if the judgment has been revived, a collection order may be issued only within 20 years after the date of the revival of the judgment.

Source: 2A:17-3.

COMMENT

Subsection (a) of this proposed section states a general rule that is implied but not stated in the source sections, and is expressed in Court Rule 4:59-1(a). The fees for issuing writs of execution are established in 22A:2-7. Subsection (b) continues the rule of source section 2A:17-3 that places a 20-year limit on the issuance of a writ of execution, unless the judgment is revived. Note that there are no current statutory provisions concerning revival of a judgment.

C-3. By whom issued

a. A writ of execution against any property of the judgment debtor may be issued by the Clerk of the Superior Court if the judgment is recorded in the judgment docket of the Superior Court.

b. A writ of execution against personal property or earnings may be issued by the Clerk of the Special Civil Part if the judgment is recorded in the case records of the Superior Court, Law Division, Special Civil Part but not in the judgment docket of the Superior Court.

c. A clerk may issue as many writs of execution with respect to a particular judgment as the judgment creditor requests, and may issue a writ of execution to more than one county at the same time.

Source: 2A:17-4; 2A:17-17.

COMMENT

Subsection (a) of this proposed section continues the rule in current law that if a judgment is docketed in the Superior Court, the clerk of that court issues the writ of execution, even if the judgment originally was obtained in the Special Civil Part. In addition, subsection (b) continues the rule under current law that the clerk of the Special Civil Part issues a writ of execution on judgments that have been obtained in that Part but not docketed in the Superior Court. Subsection (c) restates 2A:17-4. It also makes it clear that successive writs may issue after the return of the writ or its expiration. See Vitale v. Hotel California, Inc., 184 N.J. Super. 512, 520-21 (Law. Div. 1982), aff'd 187 N.J. Super. 464.

Note that the Clerk of the Superior Court may issue a writ of execution against any kind of property, including real property, while writs of execution issuing from the Special Civil Part are limited to personal property and earnings. This distinction is consistent with the current statutes; see 2A:17-17.

C-4. Writ of execution against real property; perfected lien

A writ of execution against real property of the judgment debtor that is filed with a collection officer shall perfect the lien against the real property described in the writ or in the instructions to the collection officer from the time it is filed with the collection officer.

COMMENT

This section clarifies that the lien established by a judgment is perfected against a parcel of real property by filing a writ of execution with the collection officer.

C-5. To whom issued

a. Writs of execution for judgments recorded in the judgment docket of the Superior Court may be directed to the sheriff of any county.

b. Writs of execution for judgments recorded in the case records of the Superior Court, Law Division, Special Civil Part but not in the judgment docket of the Superior Court shall be directed to the officer responsible for enforcing judgments of the Law Division, Special Civil Part in any county.

Source: 2A:17-4.

COMMENT

Subsection (a) continues the provision in 2A:17-4 permitting simultaneous collections in more than one county.

C-6. Form and contents of collection orders

a. A writ of execution shall specify in its title whether it is directed at the property, or the earnings, of the judgment debtor.

b. A writ of execution shall include such information concerning the judgment, the judgment creditor and the judgment debtor as Court Rules require.

Source: New

COMMENT

Proposed subsection (a) provides that a writ of execution must specify on its face the kind of property at which it is directed. This specificity is required because of the different treatment provided each of the two kinds writ of execution, one against property, whether real or personal, and one against earnings.

Proposed subsection (b) is consistent with R. 4:59-1 in specifying the information required to be contained in a writ of execution. Errors in this information that do not prejudice a party should not be a ground for attacking a collection order.

Part 3. EXEMPTIONS FROM COLLECTION

C-7. Exemptions

a. The following property of a judgment debtor, who is either a natural person resident in the State of New Jersey or the estate of a decedent who was resident in the State of New Jersey, shall be exempt from collection pursuant to this chapter:

(1) property that a federal or state statute forbids taking to satisfy a state judgment;

(2) wearing apparel of the judgment debtor other than furs and jewelry;

(3) professional prescribed health aids of the debtor and family;

(4) goods whose aggregate value does not exceed \$2,000; and

(5) cash, bank deposits and similar financial property collectible as cash whose aggregate value does not exceed \$1,000.

b. Banks and financial institutions may assess a fee of no more than \$25 per levy against the judgment debtor for collection from the debtor's account.

c. The Legislature shall reexamine the amounts of exemptions set by this section every five years and determine whether the amounts should be adjusted to account for inflation.

d. The exemptions provided in this section, other than the one for wearing apparel, shall not apply if the judgment being enforced:

(1) arises from the purchase of the same property against which collection is sought; or

(2) is for child support; or

(3) is for the collection of taxes or assessments.

e. A judge of the Superior Court may stay the sale of the domicile of a debtor to enforce a judgment if after consideration of all of the circumstances, the judge finds that the sale would constitute an undue hardship to the debtor or the debtor's family. A judge may grant more than one stay if each is justified by this section. The creditor may move to vacate a stay at any time based on substantially changed circumstances.

Source: 2A:17-19.

COMMENT

The purpose of this section is to simplify the provisions of the source statute which specifies the property of a judgment debtor that is exempt from collection and levy. Proposed subsection (a)(1) is a reference to the fact that numerous statutes exempt various kinds of property, often of public and quasi-public entities, from collection and levy. See, *e.g.*, 5:12-168 (property of Casino Reinvestment Development Authority exempt from levy and collection); 27:19-33 (property of bridge commissions); 33:1-25 (alcoholic beverage licenses). With respect to individuals, there are numerous statutory provisions which exempt pensions from collection and levy. See generally Title 43 Pensions and Retirement and Unemployment Compensation.

The current personal property exemption is updated in proposed subsections (a)(3) and (a)(4). Wearing apparel of the judgment debtor, other than furs and jewelry, is exempt. At present, there is a general exemption for \$1,000 worth of personal property. The \$1000 amount has not been revised since 1973 and covers far less property than it did when written. Subsections (a)(3) and (a)(4) follow the recommendation of the August 17, 1993 "Report of the Supreme Court Committee on Post-Judgment Collection Procedures in the Special Civil Part." The Committee, chaired by the Hon. Nicholas G. Mandak, A.J.S.C., judged that the amounts given in subsections (a)(3) and (a)(4) are "required to ensure that debtors are not deprived of bare necessities to exist for one month and maintain a minimal household." Post-Judgment Collection Procedures Report at 47. Inherently, any specific dollar amount is affected by inflation. Subsection (c) provides that the Legislature reconsider these amounts periodically and adjust them for inflation..

Proposed subsection (d)(1) continues the provision in the current statute which removes the exemption from collection and levy from property which was purchased with funds which gave rise to the debt underlying the collection action, *i.e.* a "purchase money debt." See Stoutenburgh v. Konkle, 15 N.J. Eq. 33 (1862).

Subsection (d)(2) is new; it codifies the principle enunciated in Redick v. O'Brien, 191 N.J. Super. 614 (Ch. Div. 1983), which held that the policy behind the exemption provision, *i.e.*, the protection of the debtor and his family from destitution, precluded the judgment debtor's use of the exemption in cases where the judgment being enforced was for support of the debtor's dependents.

Subsection (d)(3) continues the exception in the source section for the collection of taxes and assessments.

Subsection (e) allows a judge to stay the sale of a debtor's principal residence if the sale would cause an undue hardship. It applies only where the sale is to enforce a judgment against the home owner. It does not affect foreclosure.

C-8. Selection of exempt personal property

a. In consultation with the collection officer, the judgment debtor shall make claims for exemption pursuant to section C-7(a) and select items of personal property for exemption pursuant to C-7(a)(4) and (5). If the debtor fails to select property within 10 days after levy, the collection officer shall do so. The selected item or items shall be exempt from levy.

b. The collection officer shall prepare an inventory of the items of personal property selected for exemption by the judgment debtor and shall include an impartial and honest evaluation of each item inventoried. The value of an item shall be the price judged to be that for which the item would be sold at public sale. Copies of the inventory shall be given to the debtor, creditor and their counsel.

c. Within 10 days after receipt of the inventory, either the debtor or the creditor may dispute the value of any item in the inventory by notice to the other party by submitting a written statement under oath concerning the value and applying to the court to make a determination of the value of the items in dispute. The court may receive or require testimony or evidence, including expert appraisals as necessary to make its determination.

d. If neither party disputes the values in the inventory, the judgment debtor, on the basis of the inventory values, shall select items whose aggregate value is not greater

than the values allowed under section C-6(a)(3). These items shall be exempt from levy. If either party disputes the values in the inventory, the judgment debtor, on the basis of the values determined by the court, shall select items whose aggregate value is not greater than the values allowed under section C-6(a)(3). These items shall be exempt from levy.

Source: 2A:17-20 through -28.

COMMENT

The section provides for the selection of exempt personal property in a process of informal consultation with the collection officer. The source statutes required appointment of three expert appraisers to assess the value of all personal property, but N.J.S.A. 22A:2-41 allows a fee of only \$1.00 for each appraiser. In practice, appraisals have been carried out rarely. The proposed section requires the collection officer to prepare an inventory only of the items of the judgment debtor's personal property to be levied against.

Part 4. LEVY

C-9. Receipt of writs of execution

The collection officer shall record on a writ of execution the date and time it was received.

Source: 2A:17-11.

COMMENT

This provision continues the requirement to record the date and time a writ of execution is received, which affects priority of claims to debtor's property. But it abandons the earlier requirement that the officer levy against property in the order that writs of execution were received, because the officer has no way of knowing whether or not orders have been filed elsewhere and is obligated to proceed to levy immediately rather than to make a probably unproductive inquiry.

Note that the provision in source section 2A:17-12 which gives priority to support orders over other orders received on the same day has been eliminated as having only minor remedial effect.

C-10. Judgment creditor's collection instructions

a. A judgment creditor who obtains a writ of execution shall submit written instructions to the collection officer with the writ.

b. If the judgment creditor seeks enforcement against real property, the instructions accompanying the writ shall contain a legal description of property. If the judgment creditor seeks enforcement against personal property, the instructions accompanying the writ shall contain a description of personal property to be levied against, by item, type or location sufficient to identify it for levy. If all property at particular premises occupied by the debtor is to be levied against, instructions stating that shall be sufficient. The instructions shall state whether the property is located in a dwelling.

c. The officer shall record on the instructions the date they were received.

d. The officer shall comply with the lawful written instructions of the judgment creditor, except that the officer shall not levy against more items of property than necessary, in the judgment of the officer, to satisfy the judgment and pay costs.

e. The officer may levy against property of the judgment debtor subject to the writ of execution but not identified in the instructions of the judgment creditor, unless the instructions of the judgment creditor state otherwise.

Source: New

COMMENT

There is no current statutory provision that authorizes or requires the judgment creditor to provide the enforcing officer with instructions for collecting the judgment, although it is common practice for the judgment creditor to do so, and enforcing officers generally will not proceed without instructions. This proposed provision conforms with the principles enunciated in Vitale v. Hotel California, Inc., 184 N.J. Super. 512, (Law Div. 1982), aff'd, 187 N.J. Super. 464, in which the court stated that the collection officer must follow the judgment creditor's lawful instructions regarding the time and manner of making a levy. Subsection (d) requires the officer to comply with the lawful written instructions of the judgment creditor. It limits the levy to items sufficient to satisfy the judgment, protecting the judgment debtor from creditor's instructions that might bind more items of property than necessary.

Subsection (a) provides that the judgment creditor's written instructions must be transmitted to the levying officer along with the writ of execution. This subsection must be read in conjunction with the proposed section on returns, C-24(a)(1), which provides that the levying officer is required to make a return of the writ of execution if no written instructions are received. Taken together, these proposed provisions make the collection officer's obligation to act dependent upon the receipt of reasonable written instructions from the judgment creditor. If no instructions are received, the writ of execution may be returned. This provision gives the levying officer a clear rule.

C-11. Levy against personal property in possession of judgment debtor

a. A collection officer may levy against personal property in the possession of the judgment debtor in any of the following ways:

(1) by removing the property to a place of safekeeping;

(2) by installing a custodian in the place where the property is located to maintain custody over the property; or

(3) by any other reasonable means of obtaining possession or control of the property.

b. If the creditor agrees, the collection officer, in place of making a levy, may leave the property in the custody of the debtor until the sale. The officer shall list each item of property left in the custody of the debtor and give a copy of the list to the debtor and to the creditor. The debtor shall not dispose of property left by the collection officer and shall be liable for damage to the property beyond reasonable wear and tear. This action by the collection officer shall be considered equivalent to a levy for the purpose of establishing the rights of the creditor as against other judgment creditors, but it shall not affect the rights of a person who, not knowing that the property is held pending public sale, purchases the property or acquires a lien for fair value.

Source: New; 2A:17-14.

COMMENT

This section provides for collection against personal property by taking it into custody, or by other means of obtaining possession or control of the property. Under current law, some of these means are regarded as effectuating a "constructive levy." It is very uncertain, however, what constitutes a constructive levy under current law, and for what purposes a constructive levy is equivalent to a true levy. There are cases which state that property may be left in the hands of a judgment debtor until the day of sale, upon the judgment debtor's voluntary acceptance of the obligation to keep them as bailee. See, e.g., Nelson v. Van Gazelle Valve Mfg., 45 N.J. Eq. 594 (1889). But see Cumberland Bank v. Hann, 19 N.J.L. 166 (1842) which stipulated that goods left with the defendant as bailee were at the risk of the sheriff who was liable to the judgment creditor for waste, loss or destruction. If however, the goods were left with the judgment debtor at the direction of the judgment creditor or with the judgment creditor's consent, the risk of loss was shifted from the sheriff to the judgment creditor. The judgment debtor's consent is a necessary condition to the creation of a bailment in such cases, and consent is unlikely. Hence, this section does not adopt a bailment approach; it imposes on the judgment debtor only the obligation of not intentionally damaging or destroying items of personal property left in the judgment debtor's possession under this provision for a limited equivalent of levy.

C-12. Levy against personal property in a dwelling

a. If the judgment creditor instructs the officer to levy against personal property located in the judgment debtor's dwelling place, the officer shall demand access to the property at the dwelling place where the property is located. At the time the demand is made the officer shall inform the judgment debtor that the judgment debtor may be liable for costs incurred in any further proceedings to obtain access to the property. If the judgment debtor does not allow access to the property during reasonable hours upon demand of the collection officer, the officer shall promptly notify the judgment creditor of the failure to obtain custody of the property.

b. Whether or not a demand has been made pursuant to subsection (a), the judgment creditor may apply to the court which issued the writ of execution for an order directing the officer to levy against a judgment debtor's property located in a dwelling place. An application for an order to seize property shall describe with particularity sufficient to identify them, both the property sought to be levied against, and the place where it is to be found, according to the best knowledge and belief of the judgment creditor. The court may not issue the order unless the judgment creditor establishes that there is probable cause to believe that the property to be levied against is located in the place described. At the time of service of the writ, the officer shall make known his or her purpose and authority, and shall announce that persons interfering with officers enforcing the order are subject to arrest for obstructing an officer.

Source: New

COMMENT

Subsections (a) and (b) of this proposed provision specify the measures a collection officer is required to take in obtaining access to property of a judgment debtor which is in a dwelling place if the judgment debtor or other person refuses to allow access to the dwelling. These subsections are based upon current judicial precedents. Spiegel, Inc. v. Taylor, 148 N.J. Super. 79 (Bergen Cty Ct. 1977) requires the judgment creditor to identify non-exempt personal property of the judgment debtor by supplementary proceedings, and then to instruct the levying officer to levy against the discovered assets. It forbids entering the judgment debtor's dwelling place on "fishing expeditions."

Subsection (a) of the proposed section permits the enforcing officer to make an attempt to gain access to a dwelling place, but if access is not voluntarily allowed, the officer must notify the judgment creditor of the attempt. The judgment creditor may then proceed under subsection (b) to obtain an order authorizing access to the dwelling to levy against the property. Subsection (b) requires the judgment creditor to establish "probable cause" to believe that the identified property is at the location specified. In contrast to the provisions for levying against property in an inaccessible place given in the following section (C-12), the officer is not authorized to enter a dwelling place by force. Forcible entry of a dwelling in aid of collection of a judgment has generally been considered a violation of the constitutional rights of the property owner; see Silverman v. Stein, 217 N.W. 785 (Mich. 1928), Trainer v. Saunders, 113 Atl. 681 (Pa. 1921), Hillman v. Edwards, 745 S.W. 787 (Tex. Civ. App. 1902) and other cases collected at 57 ALR 209. Note that the judgment creditor need not make an initial demand under subsection (a), but may choose to proceed under subsection (b) in the first instance.

C-13. Levy against property in an inaccessible place

a. If the judgment creditor instructs the officer to levy against personal property located in a place inaccessible to the collection officer, that is other than a dwelling place, the officer shall demand access to the property at the place where the property is located. At the time access to the property is demanded, the officer shall make known his or her identity, purpose, and authority, and shall announce that persons interfering with officers enforcing the order shall be subject to arrest for obstructing an officer.

b. If access to the property is not given, the officer may use force to obtain access to the property and may cause the place where the property is believed to be located to be opened in the manner that the collection officer reasonably believes will cause the least damage.

Source: New

COMMENT

This proposed section applies to those situations in which property is located in a place that is inaccessible to the collection officer, and makes it clear that the collection officer may use force to enter and may risk violence in doing so. A "place inaccessible to the collection officer" is a place from which the officer in a manner similar to the public in general is or may be excluded by means of locks, security personnel or other devices, as, for example, a locked or inner room, closet or storage facility, etc. Vitale v. Hotel California, Inc., 184 N.J. Super. 512 (Law Div. 1982) establishes that under current law a levying officer risks amercement for failure to use the full powers of the levying officer's powers, including physical force, to carry out the judgment creditor's particularized instructions to levy. The Vitale case makes it clear that common sense and prudence dictate obtaining police assistance in such situations.

C-14. Levy against personal property in the custody of a third party

a. If the judgment creditor instructs the collection officer to levy against personal property in the possession of a person other than the judgment debtor, the officer shall serve a copy of the writ of execution personally on the person who has possession of the property.

b. The service of the writ of execution shall be effective against:

(1) any personal property of the judgment debtor in the custody of the third party at the time of service; and

(2) any additional personal property which the judgment debtor becomes entitled to receive from the time of the levy to the time of the order directing that the property be turned over to the collection officer.

c. Service of the collection order on any office of a business shall be effective against any personal property of the judgment debtor in the custody of the business.

d. During the time the levy is in effect, the third party holding custody of personal property subject to the collection order shall hold the property pending order of the court and shall not honor any other demand for the property.

e. Any time within 60 days after levy, the creditor may make a motion pursuant to the court rules for an order directing that the property be turned over to the collection officer.

Source: 2A:17-58; 2A:17-63.

COMMENT

This proposed provision is intended to generalize the current law concerning collection against rights and credits.

C-15. Service and mailing of notice of levy

a. At the time the collection officer levies against property of a judgment debtor, the officer shall serve a copy of the writ of execution on the person who has custody of the property levied against; and

b. The collection officer shall mail a copy of the writ of execution and notice of levy on the same day:

(1) to the judgment debtor, if the order and notice have not been served upon the judgment debtor;

(2) to any person whom the officer actually knows may have an interest in the property described in the notice; and

(3) to the attorneys for the judgment debtor and creditor, if their identities are known.

c. A notice that specific property has been levied against shall contain a description of the specific property levied against, a statement of the debtor's right to exempt property from collection, and any other information required by the Rules of Court.

Source: New

COMMENT

This draft provision is consistent with the current court rules providing for notice to the judgment debtor of levy and collection. Subsection (b)(2) requires the officer to serve notice on persons the officer actually knows to have made a claim to the property, knowledge that may have been obtained, for example, in the course of making the levy.

Part 5. COLLECTION AGAINST EARNINGS

C-16. Collection orders against earnings; earnings subject to writs of execution

a. At the request of a judgment creditor, the Superior Court shall issue either a writ of execution directing an employer to withhold a portion of a debtor's earnings, or a writ of execution to the debtor to make periodic payments to the creditor from earnings.

b. A writ of execution, other than one enforcing a support order, against the earnings of a judgment debtor shall provide that 10% of gross earnings be taken unless the court finds that the needs of the debtor require that a lesser percentage be taken or allow a greater percentage to be taken. The amount to be withheld shall not exceed the amount allowed under section 303 of the Federal Consumer Credit Protection Act (15 U.S.C. sec. 1673).

Source: 2A:17-50; 2A:17-56.

COMMENT

Subsection (a) restates the source statute; 2A:17-50 was interpreted in Great Bay Hotel & Casino v. Guido, 249 N.J.Super. 301 (App. Div. 1991), which held that issuance of a writ of execution against earnings was not a matter of discretion even if the judgment debtor's earnings precluded setting an amount at the time the writ was issued. As writs of execution are satisfied one at a time, and sequentially in the order issued, Great Bay Hotel held it critical for the first applicant to gain priority over creditors who might subsequently apply; upon a showing of changed circumstances, the creditor who had applied first would seek a modification of the order. *Id.* at 304. Subsection (a) also allows the issuance of a writ to a debtor ordering payments from earnings. This provision is new, but its substance is in accord with current practice. It distinguishes collection orders directed to the employer from those directed to the debtor. Orders that direct the debtor to pay are used when the debtor works for an employer outside of the state, beyond the jurisdiction of a writ of execution. It restates the inherent power of the courts to fashion orders to enforce judgments.

Current section 2A:17-50 specifies that wage collections may be ordered only if the debtor has income exceeding \$48.00 week; 2A:17-56 allows orders for more than 10% if annual earnings exceed \$7500. These amounts have not been changed for more than twenty years to reflect inflation. This section adopts the basic wage percentage subject to collection at the 10% level as found in current statutes but avoids specific dollar amounts. In place of specific amounts, the section allows a court flexibility to determine the collection percentage that balances the legitimate needs of the debtor against the claim of the creditor. Thus, if the family expenses of the debtor could not be met if 10% of wages were deducted, a lesser percentage can be specified. On the other hand, if the debtor can afford more, more can be ordered. The percent that can be taken from a debtor's earnings without interfering with family necessities is not determined solely by the amount of earnings.

The source statutes for this section apply to collections against "wages, debts, earnings, salary, income from trust funds, or profits due and owing to the debtor." This section applies only to "earnings," but "earnings" are defined as "compensation payable by an employer for personal services performed by an employee, whether defined as wages, salary, commission, bonus or otherwise." See Section 1, Definitions. To the extent that this section is narrower than its source, Section C-15(b)(2) fills the gap. It allows collection against any personal property in the custody of a third party including debts, income from trust funds and profits.

C-17. Priorities among collection orders against earnings

a. If more than one writ of execution against the earnings of a judgment debtor is served on an employer,

(1) only one writ against earnings shall be satisfied at one time; a writ may be satisfied concurrently with a support order if the total amount does not exceed the amount allowed by law;

(2) support orders shall be satisfied before other collection orders writ of execution; and

(3) writs, other than support orders, shall be satisfied in the order in which they were served on the employer.

b. For purposes of sections C-14 through 16:

(1) a writ of execution against the earnings of a judgment debtor includes any court order that requires that payments be made from the earnings of the judgment debtor whether the payments are to be made by the employer or by the judgment debtor;

(2) a support order is any order for the support of a child, spouse or former spouse or any order based on a claim for unpaid support for a child, spouse or former spouse.

Source: 2A:17-52.

COMMENT

Subsection (a) restates the source statute. Subsection (b) incorporates the holding of In Re Household Finance Corporation v. Clevenger, 141 N.J. Super 53 (App. Div. 1976) that one manner of reaching wages has no priority over another. So long as payments are to be made from the same stream of earnings, a collection order to pay in installments under 2A:17-64 is governed by the same priorities as a collection order against wages under 2A:17-52. The court held that the legislative intent was to limit collections from earnings. Subsection (a)(2) provides that collection orders for support take precedence regardless of the time they were served on an employer. This precedence is now provided by 2A:17-56.7.

C-18. Payments under writs of execution against earnings

a. Any employer to whom a writ of execution against earnings is presented shall deduct from earnings owed the judgment debtor the amount prescribed in the order and pay the amount prescribed to the officer presenting the order. The employer may assess a fee of no more than 5% or \$5, whichever is less, from each payment, to compensate the employer for expenses. The judgment debtor shall bear the expense of the fee.

b. Any employer who fails to make payments required by a writ of execution against earnings shall be liable to the judgment creditor for the payments.

Source: 2A:17-53; 2A:17-54.

COMMENT

This section continues the substance of its sources.

Part 6. DISPOSITION OF PROPERTY

C-19. Collection order, lien on personal property

a. A judgment creditor who files a writ of execution with a collection officer shall have a lien on any personal property of the debtor levied against by that officer from the time of levy.

b. A judgment creditor who has caused a levy to be made against the proceeds of the collection or sale of debtor's personal property levied against for another creditor shall have a lien on that property from the time of levy on the proceeds.

c. If more than one lien established by this section is applicable to an item of property, priority among the liens shall be governed by the same rules as those governing distribution of the proceeds of property that has been levied against to enforce a judgment.

d. A lien established by this section shall prevail over any subsequent transfer of an interest in the property.

Source: 2A:17-10

COMMENT

This section updates the source section and the case law arising from it by specifying the conditions under which a creditor's collection prevails against other claimants to property levied against. Whereas the source section placed a lien on property and goods from the time the collection order was delivered to the sheriff, subsections (a) and (b) place the lien from the time of levy. This follows the rule that the lien was not perfected until a levy was made, Regan v. Metropolitan Haulage Co., 127 N.J.Eq. 487 (1940), as well as the intent of the new chapter which places primary importance on the creditor's written collection instructions. Subsection (c) provides that where more than one lien has been established, priority among them is determined by the same rules as govern distribution of proceeds in section C-22. Subsection (d) establishes the priority of these liens in the event of subsequent transfers.

C-20. Sale or other disposition of property

a. Cash shall be collected and applied to the satisfaction of the judgment as so much money collected, unless it has a value exceeding its face value, in which case it shall be sold.

b. The following property of a judgment debtor shall be collected and reduced to cash and applied to the satisfaction of the judgment in accordance with the instructions of the judgment creditor:

- (1) instruments payable within the term of the collection order;
- (2) any other rights to the payment of money.

c. Other property of a judgment debtor that has been levied against pursuant to a writ of execution shall be sold as provided in this chapter and the proceeds applied to the payment of the judgment.

Source: 2A:17-15; 2A:17-16; 2A:17-17; 2A:17-19; 2A:17-61.

COMMENT

Proposed subsection (a) continues the rule of the source statute, which provides that cash is not sold but is merely collected and applied to the satisfaction of the judgment. Under current law, this means that a sheriff who seizes cash receives no fee, because there is no sale held, while a Special Civil Part officer, whose fee is calculated on the amount applied toward the judgment regardless of whether there is a sale or not, receives a fee for the seizure of cash. See International Brotherhood of Electrical Workers, Local No. 1470 v. Gillen, 174 N.J. Super. 326 (App. Div. 1980).

Note that the general language of this proposed provision includes the separate categories of property identified in the source provisions, i.e., 2A:17-16 (shares of stock).

The Commission has not dealt with the issue of fees due sheriffs and officers in the Special Civil Part, matters covered in Title 22A. While Special Civil Part officers receive a commission on the total receipts collected, including cash collected, sheriffs receive no commission on cash collected.

C-21. Property sold, manner

a. Property that has been levied against may be sold by any method specified in a court order or agreed upon by the judgment creditor, the judgment debtor and any other party having an interest in the property. If the court orders it, the property may be sold free of liens on it.

b. In the absence of an order or agreement, that property shall be sold as follows:

(1) Personal property that has a readily ascertainable current value and that is normally sold in an established public market shall be sold in that market.

(2) All other property shall be sold by auction, pursuant to provisions governing public sales.

Source: New

COMMENT

Proposed subsection (a) is new; it permits the sale of property in a manner agreed upon by the judgment creditor and the judgment debtor. This would permit property to be sold in the manner that will obtain the best price in those situations in which an auction sale would not accomplish that purpose, provided that the judgment creditor and judgment debtor agree.

Proposed subsection (b) covers those situations in which the judgment creditor and judgment debtor do not agree on a method of sale. Proposed subsection (b)(1) is new. It requires that property which has a ready market shall be sold in that market, the purpose being to obtain the highest price. Subsection (b)(2) states the principle of existing law that property shall be sold by public auction. In this proposed section, an auction sale is the last resort.

This report does not deal with the implications of these changes on the manner in which the sheriff's fees are calculated. The language in Title 22A concerning sheriff's fees for sale is broad enough to include any form of sale subsequent to collection by the sheriff. It is our view that it might be wise to propose modifications in the language in Title 22A to make it clear that the intent is that once the sheriff has executed against particular property, he receives his percentage fee for the ultimate sale, even if the sale is not by sheriff's auction but by agreement between the parties or by negotiation in some other market.

C-22. Objections to sale or disposition of property

a. Any person who claims an interest in property which has been levied against or who objects to the sale or other disposition of property which has been levied against may file a written objection to the sale or disposition with the Clerk of the Court which issued the collection order and deliver a copy of the objection to the collection officer.

b. The Clerk shall notify the collection officer, the judgment creditor, and the attorney for the judgment creditor of any objections that have been received to the sale or other disposition. Upon receipt of notification of the objections, the collection officer shall not sell or dispose of the property until further order of the court.

Source: 2A:17-29, 2A:17-31.

COMMENT

This proposed provision modifies and simplifies the source provisions by providing that notice of objections to sale or disposition shall be given to the clerk of the court, with the clerk obliged to notify the collection officer of the objections. Once objections are received, the collection officer shall not act until further order of the court.

C-23. Priorities in Distribution of proceeds

The proceeds of property which has been levied against to collect a judgment shall be distributed in the following order:

- a. to pay the fees of the collection officers;
- b. if the property is ordered sold free of liens with priority over the judgment creditor, to the holders of those liens;
- c. to the judgment creditor for whom the property was levied against and sold;
- d. if the sale is of personal property, to other judgment creditors who have levied against the proceeds of the sale;
- e. to junior lien holders whose liens are extinguished by the sale;
- f. to the debtor.

Source: New.

COMMENT

While there is no current statute dealing with this subject, the proposed section is in accord with case law and practice.

C-24. Disputes over distribution of proceeds

If a dispute arises concerning the application of either money collected or proceeds of a sale to the satisfaction of a judgment, the officer or any party with a right to the property to be distributed may apply to the court, on notice to the other parties whose property rights will be affected by resolution of the dispute, for an order directing the distribution of the money or proceeds.

Source: 2A:17-6.

COMMENT

While much of this section is new, it continues the current practice.

C-25. Return of writ of execution

a. The collection officer shall file a return with the court that issued the writ of execution at the earliest of the following times:

(1) Immediately after receipt of the collection order, if no written instructions have been received from the judgment creditor.

(2) 30 days after notice to the judgment creditor unless directed otherwise.

(3) Immediately after a request in writing for a return by the judgment creditor.

(4) 24 months after the date of the issuance of the writ of execution against property; and

(5) Immediately after a writ of execution is satisfied.

b. The return filed by the levying officer shall include:

(1) A statement of the amount collected, if any, and the time when it was collected and remitted to the judgment creditor; and

(2) An itemized bill of costs and fees.

Source: 2A:17-9; 2A:18-27

COMMENT

Subsections (a)(1) and (a)(2) provide for situations in which a creditor instructs the levying officer to make further collection efforts after a seizure and sale of personal property. This obviates the necessity to obtain the issuance of a new writ of execution if the judgment has not yet been fully satisfied. N.J.S. 2A:18-23, governing county district courts, now repealed, required that the levying officer report to the party or the party's attorney and request further instructions before returning the writ of execution marked "no levy" or "unsatisfied". Vitale v. Hotel California, Inc., 184 N.J. Super. 512, 520-21 (Law. Div. 1982), aff'd 187 N.J. Super. 464, held that statutory authority for successive levies under one order before the return date, is universally recognized. The court referred to 2A:17-23 as evidence for the rule that more than one levy may be requested; the court also held that if property levied against is insufficient to satisfy a collection order, a return should not be made without a showing that another levy would be fruitless. The rule recognized in Vitale, that the sheriff must follow the judgment creditor's reasonable instructions regarding the time and manner of making a levy and must abide by any special instructions of the judgment creditor, is reflected in subsections (a)(1), (a)(2), and (a)(3), each of which gives priority to written instructions from the judgment creditor.

FORECLOSURE

F-1. Notice of intention to foreclose a residential mortgage

a. As used in this chapter, a "residential mortgage" means a mortgage of a one-, two-, three-, or four-family dwelling in which the debtor or the debtor's immediate family resides when the notice of intention to foreclose is sent.

b. Before a plaintiff may commence foreclosure of a residential mortgage, the plaintiff shall give the debtor written notice of intention to foreclose at least 30 days in advance.

c. Notice of intention shall be sent by registered or certified mail, return receipt requested, to the debtor's last known address, and, if different, to the address of the mortgaged property. If the return receipt is not returned to the sender within 15 days, notice shall be made by ordinary first class mail.

d. The notice of intention shall state:

(1) the mortgage obligation;

(2) the nature of the default claimed, and the name and address of the mortgage holder and telephone number of the mortgage holder's representative whom the debtor may contact to dispute the claimed default or the amount required to cure the default;

(3) the debtor's right to cure the default;

(4) what action the debtor must take to cure the default;

(5) the date, at least 30 days after notice is given, by which the debtor shall cure the default to avoid commencement of foreclosure, and the name, address and telephone number of the person to receive payment;

(6) that upon the debtor's failure to cure default by the specified date, the mortgage holder may commence foreclosure; and

(7) that the debtor may also have the right to cure a default prior to entry of final judgment.

e. Compliance with this section shall be stated in a foreclosure action complaint.

Source: New, based upon the "Fair Foreclosure Act"

COMMENT

The "'Fair Foreclosure Act' would provide additional protection for homeowners at risk of foreclosure on their homes because of defaults in the mortgage payments. The bill requires residential mortgage lenders to provide residential mortgage debtors with a notice at least 30 days prior to taking any legal action to take possession of the mortgaged property and by giving mortgage debtors a statutory right, not currently available, to cure a default by paying all amounts due under the mortgage payment schedule

and, if applicable, other court costs and attorneys' fees in an amount not to exceed the amount permitted pursuant to the Rules Governing the Courts of New Jersey." Statement, Assembly Bill No. 1064, introduced by Assemblywoman Vandervalk, January 24, 1994.

F-2. Notice of right to cure default

a. If an action to foreclose a mortgage is uncontested, a mortgage holder shall apply for entry of final judgment and provide the debtor with a notice mailed at least 16 days before submission of proofs for entry of a foreclosure judgment advising that:

(1) absent a response from the debtor, the mortgage holder will submit proof for entry of final judgment; and

(2) that upon entry of final judgment, the debtor will lose the right to cure the default.

b. Within 8 days of receiving notice, the debtor may send the mortgage holder by registered or certified mail, return receipt requested, and file with the court, a statement certifying that there is a reasonable likelihood of the debtor's curing the default within 45 days of the date the notice was received, or if the notice was sent by ordinary mail, the date the notice was mailed.

c. A mortgage holder who receives a statement from the debtor shall not submit proofs for entry of final judgment in foreclosure with a return date earlier than 46 days after the notice was received, or if the notice was sent by ordinary mail, the date the notice was mailed.

Source: New, based on the "Fair Foreclosure Act"

COMMENT

This provision pertains to uncontested foreclosure actions as defined in R. 4:64-1(a). It gives the debtor one last opportunity to avoid foreclosure.

F-3. Curing default

a. At any time before entry of final judgment, and not later than 30 days after mailing of the notice of default, the debtor shall have the right to cure a default by:

(1) paying all sums which would have been due in the absence of default at the time of payment, any court costs and attorney's fees, and contractual late charges; and

(2) performing any obligation which the debtor would have been bound to perform in the absence of default.

b. If default is cured prior to the filing of a foreclosure action, the mortgage holder shall not bring a foreclosure action. If default is cured after the filing of a foreclosure action, the mortgage holder shall give written notice of the cure to the court which shall dismiss the action without prejudice.

c. A debtor does not have the right to cure a default after an action for foreclosure has been filed:

(1) on a residential mortgage if the default occurs within 18 months of the previous cure unless the cure occurs within 30 days after service of the notice of intention; and

(2) on a commercial mortgage if the default occurs within 24 months of the previous cure unless the cure occurs within 30 days after the mortgage holder has notified the debtor in writing that default has occurred.

Source: New, based upon the "Fair Foreclosure Act" and the "Commercial Mortgage Non-Judicial Foreclosure Act"

COMMENT

Under the "Fair Foreclosure Act" bill, "a debtor would have the statutory right to `cure' a mortgage default and reinstate a mortgage at any time after default and up to a time just prior to entry of final judgment of foreclosure. The debtor would be able to cure the default and reinstate the mortgage by paying all sums in arrears, performing any other obligation the debtor would have been required to perform under the mortgage, paying the lender's court costs and attorneys' fees, ... and pay[ing] all contractual late charges as provided for in the note or security agreements." The proposed provision extends the right to cure to commercial foreclosures, but not in the context of a power of sale.

F-4. Action necessary for foreclosure; sale pending foreclosure

a. A mortgage may be foreclosed only by a civil action.

b. If the court determines that the mortgage is valid and that the plaintiff has the right under the mortgage to foreclose, it shall enter judgment ordering the property sold in whole or in sufficient part and stating the amount due secured by the mortgage.

c. The court shall enter summary judgment of foreclosure, if: (1) the mortgage is not a residential mortgage as defined in this chapter, (2) the debtor has not made a payment of principal or interest when due under the terms of the mortgage as recorded, and (3) the debtor has not cured the default as allowed by this chapter. The debtor's defenses or counterclaims that do not affect the validity of the mortgage shall not affect the creditor's right to summary judgment of foreclosure.

d. A foreclosure judgment shall be a binding determination of the amount due on the debt secured by the mortgage but it may be enforced only by sale of the mortgaged property and not as a money judgment.

e. When mortgaged property is likely to deteriorate in value pending determination of the action, the court, before judgment, upon application of any party, may order the sale of the property, and the deposit in court of the proceeds to be distributed after judgment.

f. The owner of the property that is the subject of a foreclosure judgment may redeem the property by paying the amount due on the debt secured by the mortgage plus applicable fees and costs:

(1) at any time up to ten days after the sale; or

(2) if objections to the sale are filed until an order confirming the sale.

Source: New; 2A:50-1; 2A:50-31; 2A:50-36.

COMMENT

Subsection (a) requires a court action for foreclosure. Some states allow a mortgage holder to determine that the mortgage is in default and to take and sell the property without judicial proceedings. While no case or statute forbids such non judicial foreclosures in this state, they are unknown in practice. This subsection continues the current practice.

Subsection (b) is a new and explicit statement of judicial foreclosure. "The purpose of a foreclosure action is to determine the right to foreclosure and the amount due on the mortgage ... and to give the purchaser at the foreclosure sale the title and estate acquired by the mortgagee, as well as the estate of the mortgagor at the time the mortgage was executed, free from subsequent encumbrances." Central Penn Nat'l Bank v. Stonebridge Ltd., 185 N.J. Super. 289, 302 (Ch. Div. 1982). Source provision 2A:50-36 permits the court to order the sale of less than the entire property if doing so will be sufficient to discharge the mortgage or encumbrances.

Subsection (c) is new. It provides that if a commercial debtor misses a payment that is due under the mortgage as written, the creditor is entitled to foreclosure irrespective of any defense or counterclaim. Unless the debtor claims to have made the payments in question, foreclosure proceeds by summary judgment. See Section F-7. Sale which allows the creditor to sell the property privately if a commercial mortgage so provides. The proposal simplifies the adjudication and sale procedures.

Subsection (d) derives from N.J.S. 2A:50-1 which forbids a personal deficiency judgment in a foreclosure action. A foreclosure proceeding is an action quasi in rem; the relief granted is against the land itself. Usbe B. & L. Assn v. Ocean Pier Realty Corp., 112 N.J. Eq. 580, 582 (Ch. 1933). An action on a note [or bond] is in personam. Ehnes v. King, 41 N.J. Super. 429, 433 (App. Div. 1956). A foreclosure judgment is res judicata as to the amount of the debt, 79-83 Thirteenth Ave., Ltd. v. DeMarco, 79 N.J. Super. 47, 55 (Law Div. 1963), aff'd 83 N.J. Super. 497 (App. Div. 1964), aff'd 44 N.J. 525 (1965), but not as to the defendant's liability for any deficiency. Weiss v. Pelton, 132 N.J. Eq. 248, 249-250 (Ch. 1942).

Subsection (e) retains the substance of the source provision, 2A:50-31.

The right to redemption in New Jersey is not primarily statutory; it is created by Rule and case law. Subsection (f)(1) and (2) reflect the prevailing practice allowing a redemption period based upon R. 4:65-5 as interpreted in case law. See Hardyston Nat. Bank v. Tartamella, 56 N.J. 508, 513 (1970). ("...the just course is to permit the mortgagor to redeem within the ten-day period fixed by R. 4:65-5 for objections to the sale and until an order confirming the sale if objections are filed under the rule." Weintraub, C.J.) In the sole case "clarifying the Hardyston language," the mortgagors "sought to take advantage of a period of 'time-out' between motion [objecting to the sale] and ultimate decision, thereby extending the time for redemption in a fashion never contemplated...." The court found that the objection was filed only for purposes of delay and stated that "once notice of objection to the sale has been duly served and filed in accordance with R. 4:65-5, no further redemption or tender of the same may be made until the motion is decided favorably to the objector." East Jersey Sav. & Loan v. Shatto, 226 N.J. Super. 473, 481-482 (Ch. Div. 1987).

F-5. When foreclosure is required before action on debt

a. A holder of a residential mortgage may bring an action to collect the debt secured by the mortgage only by foreclosure. After foreclosure, the mortgage holder may

bring an action for a deficiency. However, a residential mortgage holder is not bound by this subsection if:

(1) the residential mortgage is subject to a prior mortgage held by a different person, or,

(2) the mortgage is not the primary security for the debt.

b. A mortgage holder may enforce a contract of a surety or guarantor to pay the debt and mortgage other than one that is subject to a prior mortgage held by a different person only by bringing an action for foreclosure that joins the surety or guarantor. After foreclosure, a mortgage holder may bring an action against the surety or guarantor for the deficiency.

c. A mortgage holder who is not required by this section to foreclose the mortgage before bringing an action to collect the debt may:

(1) use the procedure of this section, or

(2) bring an action to collect the debt before, or joined with, a foreclosure action.

Source: 2A:50-2; 2A:50-2.3; 2A:50-22.

COMMENT

At common law a mortgagee could sue at law on the bond or other obligation before foreclosing the mortgage. Knight v. Cape May Sand Co., 83 N.J.L. 597, 601 (E. & A. 1912). Later, by statute, when a bond and mortgage were given for the same debt, foreclosure of the mortgage had to take place before an action on the bond was allowed. N.J.S. 2A:50-2. If a promissory note secured the mortgage, the mortgagee, upon default of the note, could enforce the personal obligation first; the statute did not apply. Gloucester City Trust Co. v. Goodfellow, 124 N.J.L. 118, 119 (E. & A. 1940). Since 1980, "foreclosure of the mortgage is required before any action to recover a personal judgment can be commenced, whether the mortgage debt is evidenced by a bond or by a note N.J.S.A. 2A:50-2." Central Penn Nat'l Bank v. Stonebridge Ltd., 185 N.J. Super. 289, 304 (Ch. Div. 1982). The purpose of the 1980 amendment is clearly set out in the accompanying legislative statement: "This bill eliminates the difference between bonds and notes secured by residential real estate mortgages. It extends present law to allow a mortgagor to dispute the amount of a deficiency in a foreclosure case where a note is involved as well as those where a bond is involved."

Subsection (a) concisely restates several provisions of 2A:50-2.3. Note that "residential mortgage" is defined in proposed Section 1(a). In practice, "[e]ven without a statute, if the mortgage has previously been extinguished by foreclosure of a superior mortgage or other lien by a tax sale, by condemnation or in some other manner, obviously a mortgagee cannot be required to first foreclose the mortgage." Central Penn Nat'l Bank v. Stonebridge Ltd., *supra*, 185 N.J. Super. at 305.

Subsection (b) derives from 2A:50-22, which is analyzed in River Edge S. & L. Assn. v. Clubhouse Associates, 178 N.J. Super. 177, 184 (App. Div. 1981): "It is clear that even a party who has no title interest in the subject property is a proper party in a foreclosure action, and a necessary party if there is any intention to pursue a deficiency judgment against that party. N.J.S.A. 2A:50-22 clearly casts the burden of joinder on the party seeking the deficiency judgment."

F-6. Deficiency action

a. A deficiency action on a debt secured by mortgage that has been foreclosed:

(1) may be brought by the mortgage holder only within three months after the foreclosure sale or confirmation of sale;

(2) may be brought against a person answerable on a bond or note only if the person was a party in the foreclosure action.

b. A deficiency action on a debt secured by mortgage that has been extinguished by the foreclosure of a prior mortgage:

(1) may be brought by the mortgage holder only within one year after the foreclosure sale or confirmation of sale; and

(2) shall not open the foreclosure and sale of the mortgaged premises nor result in a right of redemption.

c. If a defendant in the deficiency action disputes the amount of the deficiency, the court shall determine the amount of deficiency by deducting the fair market value of the mortgaged property at the time of the foreclosure sale from the amount of the debt,

interest and costs. The court shall determine the fair market value from evidence submitted by the parties, or, upon agreement of all parties, the court may accept the value which three appraisers fix as the fair market value.

Source: 2A:50-2; 2A:50-2.1; 2A:50-3; 2A:50-8; 2A:50-9.

COMMENT

This section combines and streamlines numerous related source provisions. Its requirements are applicable when a mortgage holder uses foreclosure followed by a deficiency action. While that course is required in certain cases, in others the creditor may choose to sue on the debt. In such cases, the requirements of this section are inapplicable although general legal and equitable principles may have some similar effects. See Citibank, N.A. v. Errico, 251 N.J. Super. 236, 246-247 (App. Div. 1991), which allows a credit for fair market value of the property.

Subsection (a) derives from 2A:50-2.

In subsection (a)(2) the purpose of the joinder requirement is threefold: to make the foreclosure judgment res judicata regarding the mortgage debt amount, to afford protection to an obligor who has sold the property, and to permit named original obligors or guarantors in the foreclosure action to redeem or bar equity of redemption. Central Penn Nat'l Bank v. Stonebridge Ltd., supra, 185 N.J. Super. at 305-306.

Subsection (b) combines source provisions 2A:50-8 and 2A:50-9. It applies to actions wherein the mortgage lien has been extinguished by foreclosure of a prior mortgage, and requires that action begin within a year after sale. The proceedings neither open foreclosure or result in right of redemption.

Subsection (c) derives from source provision 2A:50-3

Under current law, a person who disputes the amount of the deficiency may redeem the property within six months after the deficiency judgment is entered. 2A:50-4, 2A:50-5. That provision originated as an attempt to protect a person who gave a bond and mortgage, sold the property subject to the mortgage, had no notice of foreclosure nor opportunity to redeem and was compelled to pay a deficiency even though the premises might have a market value greater than the debt. Pennsylvania Co. for Insurance of Lives v. Marcus, 89 N.J.L. 633, (1917). The right to redeem ends ten days after the sale unless objection is made pursuant to R. 4:65-5. The right of the judgment debtor to redeem for six months derives only from this statute and is conditioned on recovering a deficiency judgment. Current notice requirements make this provision unnecessary.

F-7. Sale

a. Without further court order, a judgment of foreclosure shall authorize sale of the property.

b. If the judgment does not specify otherwise, the sale shall be conducted by the sheriff of the county in which the property is located. If the sheriff cannot effect the sale within 45 days after receiving the judgment, or if there is other good cause, the court may appoint a special referee to conduct the sale. If the sheriff is restrained from conducting the sale by bankruptcy proceedings or court order, the time of restraint shall not be counted in determining the 45-day period.

c. Whether the sale is conducted by the sheriff, or a special referee, the terms of sale and the fees and costs chargeable for the sale shall be those provided by law for public sales.

d. If the mortgage debtor agrees, or if the mortgage is not a residential mortgage and the mortgage provides for private sale, or if the court finds from affidavits submitted that the mortgage debtor has abandoned the mortgaged property or that the amount of the plaintiff's judgment is at least 92% of the current value of the property, the court shall order that the plaintiff may sell the property privately in any commercially reasonable manner. After sale, the plaintiff shall pay the part of the proceeds that exceeds the judgment and the cost of sale into court for distribution as provided in this chapter.

e. The interests in the property that shall be sold are the interests of the mortgage debtor and of the mortgage holder. The property shall be sold free of any liens that are: (1) subordinate to the lien of the mortgage holder, and (2) that were held by defendants in the foreclosure action or that attached to the property after the commencement of the foreclosure action and the filing of the notice of lis pendens. The property shall also be sold free of any liens or interests that could have been recorded in the office of the register of deeds or county clerk but were not recorded there.

Source: New, 2A:50-19, 2A:50-30, 2A:50-37.

COMMENT

Subsection (a) of this section is new. At present, a writ of execution is required before sale and foreclosure. Since a judgment orders the sale, a requirement of a writ serves no purpose.

Subsection (b) clarifies current law. In practice, the sheriff now conducts almost all execution sales. However, it has been held that a judge has the authority to appoint a referee to conduct a sale and should do so if the sheriff cannot sell the property without delay. Galaxy Towers v. Elsis, 262 N.J. Super. 92 (Ch. Div. 1993).

Subsection (c) specifies that the terms of sale be the same, irrespective of who conducts the sale. Subsection (d) is new in allowing for sale by a private party in the specified circumstances. The provision adopts the policy of the "Fair Foreclosure Act." Subsection (e) reflects current law. See 2A:50-30, 2A:50-37 and Powell v. Giddens, 231 N.J. Super. 49 (App. Div. 1989).

F-8. Proceeds

- a. After sale of the property, the proceeds shall be applied in the following order:
- (1) to pay the fees and costs of sale;
 - (2) to pay the amount specified in the judgment of foreclosure as due on the mortgage foreclosed;
 - (3) to pay the amount necessary to satisfy any other liens that were on the property at the time of the commencement of the foreclosure action and were extinguished by the foreclosure;
 - (4) to pay the amount necessary to satisfy any other liens extinguished by the foreclosure;
 - (5) to the owners of the property in proportion to their interests in the property;
 - (6) to the debtor.

b. If there is more than one owner of the property and there are liens that affect the interests of only certain of the owners, the payment of the amounts necessary to satisfy those liens shall not reduce the proceeds paid to the other owners.

Source: 2A:50-34, 2A:50-37.

COMMENT

This section is a continuation of current law. See the source statutes and Morsemere Fed. Sav. & Loan Assn v. Nicolaou, 206 N.J. Super. 637 (App. Div. 1986).

F-9. Strict foreclosure

A good faith purchaser at a foreclosure sale may bring an action to compel a person holding an interest subordinate to the foreclosed lien to redeem its interest or be foreclosed of the equity of redemption, if the subordinate interest would not have entitled the interest holder to any proceeds even if joined in the original foreclosure action, and if through inadvertence, it was not extinguished by the foreclosure.

Source: New.

COMMENT

This new provision derives from Citicorp Mortg. Inc. v. Pessin, 238 N.J. Super. 606, 611 (App. Div. 1990), certif. den. 122 N.J. 141 (1990).

Historically, strict foreclosure, the usual procedure in New Jersey during the colonial period and until 1820, has been an equitable action to force parties entitled to an equitable right of redemption to exercise it by paying the entire mortgage debt within a time set by the court, or, upon defaulting in the payment, to be forever barred and foreclosed from equity of redemption in the premises without any sale. Strict foreclosure now is used to perfect the title of a person who, having purchased in good faith at a foreclosure sale, then discovers that someone having an interest in the property was not joined in the foreclosure, through inadvertence or mistake, and was not concluded by the foreclosure and sale. 30 Cunningham and Tischler (Mortgages) N.J. Prac. Sect. 201. Currently there is no statutory authority for strict foreclosure of mortgages in New Jersey.

Strict foreclosure is now a viable modern proceeding which establishes title in the successful plaintiff and is remedially comparable, thereby to foreclosure by sale. The statutory form of remedy, however, is inapplicable to mortgages and is authorized in New Jersey only for in personam tax sale certificate foreclosure actions [N.J.S. 54:5-85 et seq.]....

Myron C. Weinstein, "Foreclosure and Deficiency Actions in New Jersey", 118 N.J.L.J. 1, 26 (December 11, 1986).

PUBLIC SALES

S-1. Public sales; authority

Where a public sale is ordered or required by statute, the sheriff or other person to whom the order is directed shall make the sale pursuant to this chapter and court order, and shall execute, as the case requires, a deed or certificate of title for the property sold.

Source: 2A:50-19; 2A:50-37.

COMMENT

This section establishes that the provisions of this chapter govern all public sales, for whatever cause they arise except when a court otherwise directs.

S-2. Statement of prior encumbrances

The sheriff or other person authorized shall not conduct a public sale of real property before receipt of the affidavit required by N.J.S. 46:15-6.1 listing all liens and encumbrances that will affect the property after the sale and the current balance of each. The sheriff shall make contents of the affidavit available to any person requesting it.

Source: 46:15-6.1.

COMMENT

This section implements the requirement of the source statute which is not recommended for repeal. It further requires the sheriff to make the affidavit available for potential bidders.

S-3. Notice of pending sale

a. A person who has obtained an order directing a public sale of real property, in an action as to which no notice of lis pendens has been filed, shall file a notice of pending sale in the office of the county clerk or register of deeds and mortgages of the county in which the property is located.

b. A notice of pending sale filed in the office of the county clerk or register of deeds and mortgages of the county in which the property is located shall be notice of the pendency of a public sale of the property to any person who acquires an interest in, or lien on, the property after the filing of the notice.

c. Notices of pending sale of real property shall be filed and indexed in the office of the county clerk or register of deeds and mortgages in the same manner as notices of lis pendens, and the fee for filing such notices shall be the same as the fee for filing a notice of lis pendens.

d. A notice of pending sale filed pursuant to this section shall expire one year from the date of the issuance of the order directing the public sale, or upon the return of

the enforcement order by the officer to the court that issues the order, whichever is earlier. A notice of pending sale may be extended for periods of one year if an extension notice is filed prior to the expiration of the original notice or any previous one year extension of the original notice.

Source: New.

COMMENT

This section is part of the effort to meet the constitutional requirement established in New Brunswick Savings Bank v. Markouski, 123 N.J. 402 (1991), that judgment creditors and other holders of an interest in a debtor's real property have a right to be notified of the pending sale of the property to satisfy another judgment creditor's lien. It directs that notices of pending sales of real property be filed in the office of the county clerk or register of deeds, in the same manner as notices of pending proceeding. Time limit for the effectiveness of the notice in subsection (d) is the same as the time limit on an enforcement order, or earlier if the enforcement order is returned by the officer. The filed notice provides notice to any person who acquires an interest in the property of the pendency of an execution sale. While the subsection establishes notice as a matter of law, in the overwhelming majority of cases the notice is real rather than constructive. In some situations, notice in land records, like notice by publication, is not well designed to give actual notice, and so does not meet constitutional standards. However, notice in the land records is the method most likely to reach persons who acquire an interest in the property. A person who takes a conveyance of an interest in property, almost invariably does so after a search of the records in the office of the county clerk or register of deeds and mortgages. A search of those records will reveal the notice filed pursuant to this chapter. Filed notice of an interest in the property will reach a potential purchaser before the purchase is completed and will be more useful than a mailed notice, which cannot reach a person until the interest has been acquired.

The exception in this section relating to matters in which a notice of lis pendens has been filed recognizes that a notice of lis pendens has the same effect as a notice of pending sale. The exception has the effect of excluding mortgage foreclosure actions from the compass of this section.

S-4. Contents of notice of pending sale

A copy of the order directing the public sale of real property shall be appended to the notice of pending sale. The notice shall contain:

- a. A statement that the property is subject to sale at any time after the expiration of 30 days from the date of filing and mailing the notice;
- b. A description of the property sufficient to identify it; and
- c. A statement of the approximate amount of the judgment or order to be satisfied by the sale.

Source: New.

COMMENT

This section specifies the contents of the notice of pending sale.

S-5. Advertisement of sales; publication

- a. The sheriff or other person authorized to conduct a public sale shall:

(1) post a notice of the sale in the office of the sheriff at least 10 days before the sale date;

(2) in the case of real property, publish the notice of sale once, between 10 and 20 days before first date scheduled for the sale, in two newspapers:

(A) both published in the county where the property is located, and one published in the county seat or the municipality with the largest population in the county if a newspaper is published in either such municipality; or

(B) both circulating in the county, and one published in the county, if only one newspaper is published in the county; or

(C) both circulating in the county, if no newspapers are published in the county; and

(3) make copies of notices of sale available to members of the public on request.

b. The notice of sale in the case of real property shall:

(1) state the terms of sale;

(2) state the amount of the judgment or order to be satisfied by the sale;

and

(3) include either a diagram or concise statement describing the property, and if practicable, the street and number of the property; and give the location of the full legal description of the property.

c. The following form may be used as notice of sale of real property:

PUBLIC AUCTION OF PREMISES

shall occur at the Office of the _____ County Sheriff,
_____ (address & phone)
at _____ (time), on _____ (date), of the following premises:
Address: _____
Municipality: _____ Tax lot number: _____
Nearest cross street: _____
Concise characterization (Approx. dimensions, number of rooms,
etc.):

By order of the Superior Court, _____ Division, in the case of:
_____, v. _____,
Case number: _____; approximate amount due: \$ _____
plus Sheriff's fees.

At sale, the purchaser must pay a 10% deposit. Within 30 days after sale,
the purchaser must pay the balance due. Both payments must be in cash
or certified or cashier's check.

Copies of the full legal description of the property and Conditions of
Sale, set by statute (N.J.S.) are available in the Sheriff's Office.
The Sheriff may adjourn this sale without further notice by publication.
Attorney for Plaintiff: (name, address, telephone) _____

d. The notice of sale in the case of personal property shall:

(1) state the terms of sale;

(2) state the amount of the judgment or order to be satisfied by the sale;

(3) include a description of the property sufficient to identify it; and

(4) if the property to be sold requires a certificate of title, give the registration number and legal description of the property along with the location of the office where the certificate is registered.

e. The sheriff or other person authorized to conduct a public sale may advertise the sale in any manner reasonably calculated to increase the price of the property to be sold. The cost of advertisements authorized by this subsection shall not be charged against the sale price as a cost of sale.

Source: 2A:17-33; 2A:17-34, 2A:61-1.

COMMENT

Source statute 2A:61-1 was amended in 1979 to allow publication of an abridged description of the property. The purpose was "to lower the cost of publishing the notice of sale." Assembly Municipal Government Committee Statement, Assembly, No. 3624 - L. 1979, c. 364. The proposal decreases the number of times the notice is published from four to one, further reducing costs. Subsection (b) streamlines the specifications regarding choice of newspapers and is consistent with 35:1-2.2 and 35:1-2.2a governing publication in county newspapers.

While subsection (c) provides a form newspaper advertisement that a sheriff may use, its use is not mandatory. Any form that meets the requirements of subsection (b) will be sufficient.

This section requires advertisement of a public sale only in the form of certain notices posted in the sheriff's office or placed in newspapers. However, subsection (e) allows the sheriff or other person authorized to conduct a sale to post other notices or to advertise the sale further in any appropriate manner.

S-6. Notice of date, time and place of public sale

a. At least 20 days before a public sale of real property, a creditor for whose benefit the property is to be sold shall send notice of the date, time and place of the sale by registered or certified mail, return receipt requested to any person who had an interest or lien in the subject property that was of record 14 days before the date first scheduled for the sale. If the creditor knows that a person who is sent notice is represented by an attorney, the creditor also shall send a copy of the notice to the attorney by ordinary mail. If the sale is adjourned more than 30 days from the date first scheduled for the sale, the creditor shall also send notice to any person who had an interest or lien in the subject property that was of record 14 days before the new date scheduled for the sale.

b. At least 20 days before a public sale of personal property, a creditor for whose benefit the property is to be sold shall send notice of the date, time and place of the sale by registered or certified mail, return receipt requested to any person whom the creditor knows had an interest or lien in the subject property on the date the notice of pending sale

was filed. If the creditor knows that a person who is sent notice is represented by an attorney, the creditor also shall send a copy of the notice to the attorney by ordinary mail.

c. The notice shall be mailed to the current address of the person, if it is known or reasonably ascertainable, or to the party's last known address of record. The notice shall include a description of the property sufficient to identify it; and a statement of the approximate amount of the judgment or order to be satisfied by the sale.

d. Notice need not be sent to a public entity.

Source: New.

COMMENT

Notice of the date, time and place of a public sale of real property need be given only to those persons who have interests or liens that were of record 14 days before the date scheduled for the sale. If the sale is adjourned 30 days or less, notices need not be sent to anyone whose interest arose after the original cut-off point, 14 days before the first scheduled date. As a result, the grant of a short adjournment will not require the creditor to conduct new searches and to send new notices. However, if the adjournments total more than 30 days, a new search is required and if the search reveals new interest holders, those persons must be notified. In addition, any person to whom an interest is conveyed after the notice of sale is filed will take the interest with knowledge of the pending sale. See Section 3.1.

Notice of the date, time and place of a public sale of personal property need be given only to those persons whom the creditor knows have interests.

Notices must be mailed to the current address or the person's last known address. Notice must be sent if an interest holder's address is "reasonably ascertainable" according to the standard set in New Brunswick Savings Bank v. Markowski, 123 N.J. 402 (1991). In addition to the particulars of the sale, the content of a notice is similar to the content of a notice of pending sale.

S-7. Adjournments

a. The sheriff or other person authorized to make the sale may allow two adjournments of sale of no more than 14 days each at the judgment debtor's request.

b. The sheriff or other person authorized to make the sale may allow adjournments of sale at the judgment creditor's request.

c. The sheriff or other person authorized to make the sale may charge a fee authorized by law for adjournments.

Source: 2A:17-36, 2A:61-5, 2A:61-6.

COMMENT

This section reduces adjournments from the current maximum of two adjournments, each not to exceed one month. All counties now routinely grant these two one-month adjournments. Subsection (b) allows adjournments at the creditor's request. While there is no provision of current law that specifically authorizes them, these adjournments are now granted on request. Subsection (c) allows the sheriff to charge a fee for adjournments if that fee is later enacted.

The effect of the reduction in the length of adjournments at the debtor's request should be to reduce the delay between a judgment of foreclosure and the sale. However, sales are often delayed by matters other than adjournments. Bankruptcy and other court-ordered stays are unaffected by this section.

Adjournment of a sale does not require re-advertisement since the newspaper advertisement need only be published between 10 and 20 days before the first scheduled sale date. Grant of the two adjournments permitted by this section does not require new searches for persons who may have an interest in the property and notification of those persons. See Section S-6.

S-8. Conditions of sale of real property

a. The following conditions shall apply in all public sales of real property:

(1) The property shall be sold subject to interests and restrictions of record, rights of tenants, rights of redemption of the debtor or of the federal government, unpaid taxes, assessments or condominium charges, and any facts that an accurate survey or an inspection of the property would disclose.

(2) The property shall be sold at auction to the highest bidder. The person conducting the sale shall accept, in addition to oral bids, written bids for a fixed amount accompanied by the required purchaser's deposit and a signed agreement to comply with all conditions of sale. If dispute arises regarding who has made the highest bid, the property will be resold immediately.

(3) At the close of sale, the purchaser shall

(A) pay 10% of the purchase price in cash or by certified, cashier's or treasurer's, check, unless the purchaser is the foreclosing party in a foreclosure procedure; and

(B) sign an agreement to comply with all conditions of sale and deliver the agreement to the person conducting the sale.

(4) If the purchaser is required to pay the 10% deposit, and does not pay it, or if the purchaser does not sign the Conditions of Sale, the person conducting the sale shall immediately resell the property without further public advertisement.

(5) Within 30 days after sale, the purchaser shall pay the balance of the purchase price and interest at the lawful rate on the balance due, from the 11th day after sale, until the balance is paid.

(6) The fees and commissions of the person conducting the sale are included in the amount bid and will be deducted to determine the purchase price.

b. If the purchaser fails to pay the balance of the sale price within 30 days and the time for payment has not been extended by the creditor, the property shall be sold a second time.

c. The purchaser may decline to complete the sale and may reclaim the deposit if there is a lien or encumbrance on the property that was not listed in the affidavit required to be filed before the sale by N.J.S. 46:15-6.1. Otherwise, a purchaser who fails to pay the balance of the sale price within 30 days shall be responsible for expenses of the second sale and any difference between the first and second sale price, and the sheriff or other authorized person shall retain the deposit to be disbursed by court order.

Source: New.

COMMENT

The provision mandates statewide conditions of sale. Presently they vary from county to county. "After centuries of conducting execution sales, there is no clear-cut legislative mandate fixing the obligation to pay the sheriff's fees." Howard Sav. Bank v. Sutton, 246 N.J. Super. 482, 484 (Ch. Div. 1990).

"Once again, the failure of the Legislature to regulate the terms and conditions under which Sheriffs are to conduct execution sales, leads to unnecessary litigation as well as lack of statewide uniformity in the conduct of such sales.

The legislature has done nothing to standardize conditions of sale among the 21 counties since enacting the predecessor of N.J.S.A. 2A:61-1 in 1799."

Investors & Lenders v. Finnegan, 249 N.J. Super. 586, 587, 596 (Ch. Div. 1991).

Following the March 20, 1991, decision in Investors & Lenders v. Finnegan, *supra*, the foreclosure unit of the New Jersey Sheriff's Association, established uniform conditions in August, 1991, which the Association adopted in September, 1991. The conditions of sale would "be used by the sheriff's departments throughout the State of New Jersey, effective January 1992." Letter, January 8, 1992, from Lynn M. Adams, Chief Clerk, Gloucester County Sheriff's Office, to John M. Cannel, Executive Director, New Jersey Law Revision Commission.

A survey taken in December, 1994, of all counties' written Conditions of Sale shows that the sheriffs' efforts at self-regulation has not resulted in uniformity:

- most counties require a 10% deposit from the purchaser, but at least one requires 20%;
- the balance of the purchase price is usually due within 30 days after sale; in a few counties it is due in two weeks, in several, 60 days;
- several counties require a minimum bid of \$100. with additional bids at \$100. increments;
- a few counties require that any assignment is to be made at the time of sale; etc.

The proposal requires certain conditions of sale.

The first sentence of subsection (c) is a new and explicit statement which releases a purchaser from completing the sale and allows return of the deposit in the special case of an unlisted lien or encumbrance.

S-9. Conditions of sale of personal property

The following conditions shall apply in all public sales of personal property:

a. The property shall be sold as it is at the time of sale and subject to interests and restrictions of record.

b. The property shall be sold at auction to the highest bidder. The person conducting the sale shall accept, in addition to oral bids, written bids for a fixed amount accompanied by the required purchaser's deposit and a signed agreement to comply with all conditions of sale. If dispute arises regarding who has made the highest bid, the property will be resold immediately.

c. At the close of sale, the purchaser shall pay the purchase price immediately in cash or by certified, cashiers or treasurers, check unless the creditor agrees to another schedule or mode of payment. If the creditor allows another schedule or mode of payment, the creditor shall be responsible for payment if the purchaser fails to pay as agreed.

d. If there is no agreement that allows another schedule or mode of payment and the purchaser does not pay the purchase price at the close of sale, the person conducting the sale shall immediately resell the property without further public advertisement.

e. The fees and commissions of the person conducting the sale are included in the amount bid and will be deducted to determine the purchase price.

Source: New.

COMMENT

This section establishes the conditions of sale for personal property. It is based on the previous section which governs sale of realty, but it differs in several respects. Most important, the section provides that generally the purchaser pays for the property and takes it immediately. That is in accord with present practice. Second, personal property is sold "as is." Again, that reflects current practice.

S-10. Objections to sale; confirmation of sale

a. A person who objects to a public sale of real property shall file that objection with the Superior Court and with the person who conducted the sale within 10 days after the sale or any time thereafter before delivery of the deed.

b. If the sale was not conducted by the sheriff, the person who conducted the sale shall apply to the Superior Court for confirmation of the sale.

c. If the court approves the sale, it may confirm the sale as valid and direct the sheriff or clerk of the court to deliver a deed.

Source: R. 4:65-5, R. 4:65-5.

COMMENT

"Prior to September 15, 1948, the subject of confirmation was controlled by statute, R.S. 2:65-12. The statute was then amended to commit the subject to our Rules of Court." Hardyston Nat. Bank v. Tartamella, 56 N.J. 508, 511 (1970). The Court "eliminated the motion to confirm and the order of confirmation, not to change the rights of the parties..., but only to eliminate the paper work of a formal motion and order confirming a sheriff's sale which had become routine and of no practical value." Hardyston, supra, at 511.

The proposal fills a statutory void in stating that objection to a sale may be brought and in providing a time limit. The section also continues the Rule requirement that if the sale is conducted by someone other than the sheriff, the sale must be confirmed by court.

S-11. Delivery by deed

a. In the case of a public sale of real property, the purchaser shall prepare a deed to the property sold and present it to the sheriff if the property was sold by the sheriff and otherwise to the clerk of the court under which authority the property was sold. The

sheriff or clerk shall execute the deed if, after examination, the sheriff or clerk determines;

(1) that the purchaser has paid the balance of the purchase price and interest on the balance due, from the 11th day after sale;

(2) that the deed complies with this section;

(3) that the sale has not been set aside by a court and no objection to the sale is pending;

(4) that, if the sale was not conducted by the sheriff, the sale was confirmed by the court; and

(5) if redemption of the property is permitted by law, that the time for redemption has passed and that the property has not been redeemed.

b. The deed shall state the person whose interest in the real estate was sold and the execution or other legal proceeding for which the real estate was sold.

c. The purchaser shall pay the cost of preparing and recording the deed and any realty transfer tax.

d. The sheriff shall attach a copy of the affidavit required by N.J.S. 46:15-6.1 to the deed.

e. A deed executed pursuant to this section shall transfer all interests of the execution defendant in the same manner as a deed by that person to a purchaser for value. The deed shall extinguish any lien resulting from the judgment executed and any lien subordinate to that lien.

Source: 2A:17-40; 2A:17-41; 2A:50-37.

COMMENT

Subsection (a) is new. While the practice is that the purchaser is responsible for preparing the deed, statutes appear to put that duty on the sheriff. See 2A:50-37. No specific provision delays execution of a deed until the time for objections to the sale and redemption of the property is passed, but such a delay is fairly implied by statutes and rules on those subjects.

Subsection (b) is substantially similar to 2A:17-40. Subsection (c) is new but reflects consistent statewide practice. Subsection (d) implements the requirements the requirement of 46:15-6.1. See also Section 2.

Subsection (e) is substantially similar to 2A:17-41 and to relevant parts of 2A:50-37. See also, 2A:61-9.

S-12. Form of sheriff's deed

A sheriff's deed may be substantially in the following form:

DEED

Prepared by: _____

From: _____ Sheriff of _____ County, New Jersey

To: _____
Address: _____
Dated: _____

In compliance with an order of the New Jersey Superior Court, _____
Division,
_____ County, dated _____ in the case of
_____, Plaintiff
v. _____,
Defendant.

Docket number: _____
By this deed, I, _____, Sheriff of _____
County, New Jersey, transfer ownership of all interest of the following parties:

in premises described as:

[insert legal description]

constituting block _____, lot _____
in the municipality of _____, county of _____
including any property attached to the premises or rights to related to it, and subject to
restrictions of record or restrictions that would be disclosed by a survey of the premises
and the following restrictions: _____

for the sum of _____ which I have received.
This sale which occurred on _____ was advertised and conducted
in accordance with law.

_____, Sheriff,

County
_____ date

State of New Jersey :
County of _____:

On _____, _____, Sheriff of _____ County,
New Jersey personally appeared before me and acknowledged that this deed was
executed voluntarily as the sheriff's own act and swore that the facts alleged in it are
true.

Source: New

COMMENT

This form deed is new. It is in plain English and includes only what is necessary.

S-13. Delivery by certificate of title

a. In the case of a public sale of personal property which is required by law to be registered under a certificate of title, the sheriff or officer authorized to conduct the sale shall, prior to the time of the sale:

(1) forward a copy of the order authorizing the sale to the office where the certificate of title is registered; and

(2) request a certificate authorizing the sheriff or officer to transfer title by public sale.

b. Upon payment of the full purchase price, the sheriff or officer shall endorse the certificate to assign ownership to the purchaser and deliver it to the purchaser.

c. A certificate executed pursuant to this section shall transfer all interests of the judgment creditor in the same manner as a certificate of ownership endorsed by that person to a purchaser for value. It shall extinguish any lien resulting from the judgment enforced by the public sale and any lien subordinate to that lien.

Source: New

COMMENT

Current statutes require registration under a certificate of title for motor vehicles and boats. N.J.S. 39:10-1 et seq. and N.J.S. 12:7A-1 et seq. This provision is intended to cover these and any other items of personal property for which similar requirements may be imposed.

S-14. Delivery of personal property not requiring certificate of title

In the case of a public sale of personal property which does not require a certificate of title, after payment of the full purchase price, the sheriff or officer authorized to conduct the sale shall allow the purchaser to take possession of the property.

Source: New.

COMMENT

This provision covers all personal property not requiring a certificate of title. In current procedure payment is made immediately and the goods are immediately delivered.



STATE OF NEW JERSEY

NJLRC

NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

relating to

TITLE 51 – WEIGHTS AND MEASURES

MAY, 2005

NEW JERSEY LAW REVISION COMMISSION

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WEIGHTS AND MEASURES LAW

CHAPTER 1 - DEFINITIONS

51A:1-1. Definitions

As used in this title:

a. “Weight and measure” or “weights and measures” means all weights and measures of every kind, instruments and devices for weighing and measuring, and any appliance and accessories associated with any or all such instruments and devices;

b. “Weight” when used in connection with any commodity or service means net weight. When a commodity is sold by drained weight the term means net drained weight;

c. “Correct” when used in connection with weights and measures means in conformance to all applicable requirements of this Act;

d. “Primary standards” means the physical standards of the State serving as the legal reference from which all other standards for weights and measures are derived;

e. “Secondary standards” means the physical standards that are traceable to the primary standards through comparisons, using acceptable laboratory procedures, and used in the enforcement of weights and measures laws and regulations;

f. “Superintendent” means the State Superintendent of Office of Weights and Measures in the Department of Law and Public Safety;

g. “Local superintendent” means county or municipal superintendent of Weights and Measures;

h. “Weights and measures officer” includes the Superintendent, local superintendents, supervisors, deputies, assistants, metrologists, officers and inspectors;

i. “Sale from bulk” means the sale of commodities when the quantity is determined at the time of sale;

j. “Package” means a standard package or random-weight package of any commodity:

(1) enclosed in a container or wrapped in any manner in advance of wholesale or retail sale; or

(2) weight or measure of which has been determined in advance of wholesale or retail sale.

k. “Net weight” means the weight of a commodity excluding any materials, substances, or items not part of the commodity, including containers, conveyances, bags, wrappers, packaging materials, labels, individual piece coverings, decorative accompaniments, and coupon except where the service of shipping includes the weight of packing materials.

l. “Random weight package” means a package that is one of a lot, shipment, or delivery of packages of the same commodity with no fixed pattern of weights;

m. “Standard package” means a package that is one of a lot, shipment, or delivery of packages of the same commodity with identical net contents declarations;

n. “Commercial weighing and measuring equipment” means weights and measures and weighing and measuring devices commercially used or employed in establishing the size, quantity, extent, area, time, or measurement of quantities, things, produce, or articles for distribution or consumption, purchased, offered, or submitted for sale, hire, or award, or in computing any basic charge or payment for services rendered on the basis of weight or measure. However, the term shall not include any meter, measure or scale used by a public utility subject to the jurisdiction of the Board of Public Utility Commissioners of this State for measuring any commodity or service furnished or sold by such public utility.

o. “Commodity” means any kind of good, service or amusement that is sold or intended to be sold.

Source: Uniform weights and measures law and 51:1-2.

COMMENT

The uniform law was followed for the definition’s section with the exception of subsections (g) and (h), which were added to incorporate New Jersey’s leadership structure. Definitions for “food” or “foods,” and “physical property” are eliminated. The terms “gross weight;” “net weight;” and “tare weight” are now encompassed by the terms “net mass” or “net weight.” The term “commodity in package form” has been renamed “package.” Newly defined terms include: “weight;” “correct;” “primary standards;” “secondary standards;” “superintendent;” “person;” “sale from bulk;” “random weight package;” “standard package;” and “commercial weighing and measuring equipment.”

An example of subsection (m) is a follows: 1 L bottles or 12 fl oz cans of carbonated soda; 500 g or 5 lb bags of sugar; 100 m or 300 ft packages of rope.

CHAPTER 2 – STANDARDS

51A:2-1. Systems of weights and measures

The International System of Units (SI) and the system of weights and measures in customary use in the United States are jointly recognized, and either one or both of these systems shall be used for all commercial purposes. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the National Institute of Standards and Technology (NIST) are recognized and shall govern weighing and measuring equipment and transactions.

Source: Uniform weights and measure law and 51:1-3.

COMMENT

This section is substantially identical to the uniform law. New Jersey currently has a similar section that conveys the intent of the Legislature for the use of the SI within the State.

TITLE 51 – WEIGHTS AND MEASURES

Appendix B

The "International System of Units" means the modernized metric system as established in 1960 by the General Conference on Weights and Measures and interpreted or modified for the United States by the Secretary of Commerce. [See Metric Conversion Act of 1975 (Public Law 94-168, § 3(1) and § 4(4), and NIST Special Publication 814 - Metric System of Measurement; Interpretation of the International System of Units for the United States, or the Federal Register of December 20, 1990, (FR 90-21913).]

51A:2-2. Physical standards

Weights and measures that are traceable to the U.S. prototype standards supplied by the Federal Government, or approved as being satisfactory by the National Institute of Standards and Technology, shall be the primary standards of weights and measures, and shall be maintained in such calibration as prescribed by the National Institute of Standards and Technology. All secondary standards may be prescribed by the Superintendent and shall be verified as deemed necessary by the Superintendent.

Source: Uniform weights and measures law and 51:1-4 through 51:1-9.

COMMENT

This section was derived from the uniform law. The current law was replaced by use of federal standards. The replaced sections include: (51:1-4) yard; (51:1-5) chain measurement of land; (51:1-6) Steel measuring tapes used by professional land surveyors and engineers; annual test of electronic distance measuring device; report; forms; (51:1-7) standard ton; (51:1-8) pound; avoirdupois; troy; and (51:1-9) gallon; quart.

51A:2-3. Technical requirements for weighing and measuring devices

The specifications, tolerances, and other technical requirements for commercial, law enforcement, data gathering, and other weighing and measuring devices as adopted by the National Conference on Weights and Measures, published in the National Institute of Standards and Technology Handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices," and supplements or revisions, shall apply to weighing and measuring devices in the State, except by regulation from the Superintendent.

Source: Uniform weights and measures law.

COMMENT

This section is substantially similar to the uniform law.

51A:2-4. Net Weight Standards

a. The Superintendent shall adopt and enforce regulations on tare and tolerances based on the net weight standards in Handbook 133 promulgated by the National Institute of Standards and Technology.

b. The Superintendent may adopt regulations on testing procedures for determining net weight based on widely recognized standards.

Source: New and 51:1-29.2.

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COMMENT

This section was added to incorporate into New Jersey law the current practice of using Handbook 133 concerning net weight. The Department of Agriculture, the Federal Trade Commission and the Food and Drug Administration enforce the regulations in Handbook 133. Current law, section 51:1-29.2 applies Handbook 133 only to flour. While subsection (a) provides that regulations on tare and tolerances must be based on Handbook 133, subsection (b) allows regulations on testing procedures to deviate from Handbook 133 so long as they are based on other widely recognized standards.

51A:2-5. Method of Sale

a. Except as otherwise provided by the superintendent or by established trade custom and practice,

1) commodities in liquid form shall be sold by liquid measure or by weight, and

2) commodities not in liquid form shall be sold by weight, by measure, or by count.

b. The method of sale shall provide accurate and adequate quantity information that permits the buyer to make price and quantity comparisons.

Source: Uniform weights and measure law; 51:1-15 and 51:1-17.

COMMENT

This section is identical to the uniform law. Subsection (a)(1) is similar to section 51:1-15. Subsection (a)(2) differs from section 51:1-17 by simplifying the sale of dry commodities and eliminating the penalties section.

51A:2-6. Sale from Bulk

All bulk sales in which the buyer and seller are not both present to witness the measurement, all deliveries of heating fuel, and all other bulk sales specified by regulation of the Superintendent shall be accompanied by a delivery ticket containing the following information:

a. the name and address of the buyer and seller;

b. the date delivered;

c. the quantity delivered and the quantity upon which the price is based, if this differs from the delivered quantity for example, when temperature compensated sales are made;

d. the unit price, unless otherwise agreed upon by both buyer and seller;

e. the identity of the product in the most descriptive terms commercially practicable, including any quality representation made in connection with the sale; and

f. the count of individually wrapped packages, if more than one, in the instance of commodities bought from bulk but delivered in packages.

Source: Uniform weights and measures law.

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COMMENT

This section is identical to the uniform law. This section eliminates the need for a separate provision on laundry tickets (51:1-35).

51A:2-7. Declarations of Unit Price on Random Weight Packages

Any package being one of a lot containing random weights of the same commodity at the time it is offered or exposed for sale at retail, shall bear on the outside of the package a plain and conspicuous declaration of the price per net weight and the total selling price of the package.

Source: Uniform weights and measures law.

COMMENT

This section is identical to its source.

51A:2-8. Advertising Packages for Sale

Whenever a packaged commodity is advertised in any manner with the retail price stated, there shall be closely and conspicuously associated with the retail price a declaration of quantity as is required by law or regulation to appear on the package.

Source: Uniform weights and measures law.

COMMENT

This section is identical to its source.

51:2-9. Misrepresentation of Price, Quantity

No person shall misrepresent the price or quantity of any commodity sold, offered, exposed, or advertised for sale by weight, measure, or count, nor represent the price in any manner calculated or tending to mislead or in any way deceive a person.

Source: Uniform weights and measures law.

COMMENT

This section is identical to its source.

CHAPTER 3 – OFFICE OF WEIGHTS AND MEASURES

51A:3-1. Weights and Measures Office; County and Municipal Superintendents

a. There shall be an Office of Weights and Measures within the Division of Consumer Affairs. The Superintendent of Weights and Measures shall be the head of that Office. The governor, with the advice and consent of the Senate, shall appoint a Superintendent who is qualified by training and at least five year's weights and measures or comparable, experience for a term of five years.

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b. The Superintendent may appoint deputy and assistant superintendents, and inspectors all of whom shall devote full time to their duties. The Superintendent may also appoint clerical and other necessary staff.

c. The governing bodies of each county shall appoint a County Superintendent of Weights and Measures. The governing body of any municipality having a population of sixty thousand or more shall, and the governing body of any other municipality may, provide for the office of Municipal Superintendent of Weights and Measures by ordinance, and appoint a municipal superintendent. The clerk of the municipality shall file a certified copy of the ordinance and appointment with the Superintendent.

d. The governing body of each county and municipality shall fix the numbers of assistant local superintendents and officers and by resolution may authorize the local superintendent to appoint them. The governing body of each county and municipality may provide for the position of a local deputy superintendent and by resolution may authorize the local superintendent to appoint one assistant as deputy superintendent. The local superintendent, the deputy, and all assistant superintendents and officers shall devote full time to their duties. The local deputy superintendent and assistants shall be under the direct control of their respective local superintendents, and shall have all the powers and duties of the local superintendent in making inspections, tests and measurements.

Source: 51:1-42; 51:1-43; 51:1-44; and 51:1-45.

COMMENT

This section is substantially similar to its sources.

51A:3-2. Duties of the Office of Weights and Measures

The Office of Weights and Measures shall:

a. assure that weights and measures in commercial service within the State are suitable for their intended use, properly installed, accurate, and are properly maintained by their owner or user;

b. prevent unfair or deceptive dealing by weight or measure in any commodity or service advertised, packaged, sold, or purchased within the State;

c. make available to all users of physical standards or weighing and measuring equipment the precision calibration and related metrological certification capabilities of the weights and measures facilities of the Office;

e. to the extent practicable and desirable, promote uniformity between weights and measures requirements of the State and those of other States and Federal agencies and international standards; and

f. encourage desirable economic growth while protecting the consumer through the adoption by rule of such weights and measures requirements necessary to assure equity among buyers and sellers.

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g. maintain the state standards and test them periodically to assure that they reflect standards maintained by the federal government.

h. test the standards used by local superintendents for accuracy.

Source: Uniform weights and measures law.

COMMENT

This section is added to outline the function of the Office of weights and measures.

51A:3-3. Powers and duties of the Superintendent

The Superintendent of Weights and Measures shall:

a. maintain traceability of the State standards to the national standards in the possession of the National Institute of Standards and Technology;

b. issue reasonable regulations for the enforcement of this Act, which regulations shall have the force and effect of law;

c. grant any exemptions from the provisions of this Act or any regulations promulgated pursuant to it when appropriate to the maintenance of good commercial practices within the State;

d. prescribe, by regulation, the appropriate term or unit of weight or measure to be used, whenever the Superintendent determines that an existing practice of declaring the quantity of a commodity or setting charges for a service by weight, measure, numerical count, time, or a combination of those methods, does not facilitate value comparisons by consumers, or creates a risk of consumer confusion;

e. allow reasonable variations from the stated quantity of contents, including those caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice;

f. provide for the training of weights and measures personnel, and may establish minimum training and performance requirements to then be met by all weights and measures personnel, whether county, municipal, or State. The Superintendent may adopt the training standards of the National Conference on Weights and Measures' National Training Program;

g. advise the county and municipal superintendents in matters relating to the duties of their offices; and

h. maintain general supervision over the county and municipal superintendents to obtain effective and uniform enforcement of the weights and measures laws throughout the state.

Source: 51:1-54; 51:1-55; 51:1-58; 51:1-59; 51:1-60; 51:1-61; 51:1-62; 51:1-66; 51:1-67; and 51:1-69.

COMMENT

Most of this section is substantially similar to its sources. Subsections (g) and (h) are new. They make it clear that the Superintendent of Weights and Measures has general supervisory power over the

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county and municipal offices. The wording of the subsections is derived from 52:17B-103 which gives the Attorney General supervisory power over the county prosecutors.

51A:3-4. Powers and duties of the Weights and Measures Officers

Weights and Measures officers shall:

- a. enforce the provisions of this Act;
- b. conduct investigations to ensure compliance with this Act;
- c. test annually the standards for weights and measures used by any city or county within the State, and approve those found to be correct;
- d. inspect and test commercial weights and measures kept, offered, or exposed for sale;
- e. inspect and test, to ascertain if they are correct, weights and measures commercially used:
 - 1) in determining the weight, measure, or count of commodities or things sold, or offered or exposed for sale, on the basis of weight, measure, or count, or
 - 2) in computing the basic charge or payment for services rendered on the basis of weight, measure, or count;
- f. test all weights and measures used in State funded institutions;
- g. approve for use, and may mark, commercial weights and measures found to be correct, and reject and order to be corrected, replaced, or removed commercial weights and measures found to be incorrect. Rejected weights and measures may be seized if not corrected within the time specified or if used or disposed of in a manner not specifically authorized. The Superintendent shall remove from service and may seize the weights and measures found to be incorrect that are not capable of being made correct;
- h. weigh, measure, and inspect packaged commodities kept, offered, or exposed for sale, sold, or in the process of delivery, to determine whether they contain the amounts represented and whether they are kept, offered, or exposed for sale in accordance with this Title or regulations promulgated pursuant to.
- i. verify advertised prices, price representations, and point-of-sale systems to determine:
 - (1) the accuracy of prices and computations and the correct use of the equipment; and
 - (2) if a system uses scanning or coding means in lieu of manual entry, the accuracy of prices printed or recalled from a database.
- j. In carrying out the provisions of this section:
 - (1) a Weights and Measures officer shall not weigh, measure, or inspect more packages of commodities in a manner that makes them unsaleable than is reasonably necessary to assure compliance with this act; and

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(2) the Superintendent shall:

(A) issue necessary rules and regulations regarding the accuracy of advertised prices and automated systems for retail price charging (referred to as “point-of-sale systems”) for the enforcement of this section; and

(B) conduct investigations to ensure compliance.

Source: 51:1-54; 51:1-55; 51:1-58; 51:1-59; 51:1-60; 51:1-61; 51:1-62; 51:1-63; 51:1-66; 51:1-67; and 51:1-69.

COMMENT

This section is substantially similar to its sources.

51A:3-5. Salaries

a. Salaries of assistant superintendents and other staff shall be in accordance with the schedules provided by the state civil service commission.

b. The governing body of a county or municipality shall fix the salaries of the local superintendents and their assistants.

Source: 51:1-49 and 51:1-50.

COMMENT

This section is substantially similar to its sources except the amount of the Superintendent’s salary has been omitted.

51A:3-6. Civil service; tenure of office; hearing prior to discharge

a. County and municipal superintendents in counties and municipalities operating under the Civil Service Act shall be in the classified service.

b. The county superintendents and municipal superintendents and the secretaries and assistant superintendents appointed by county or municipal governing bodies or by county or municipal superintendents upon resolution of the governing bodies, shall hold office during good behavior. In counties not operating under subtitle 3 of the Civil Service Act, they shall not be removed, discharged or reduced in pay or position, except for just cause after hearing by the governing body of the respective county or municipality. Reasonable notice of the hearing and the reasons for the proposed action shall be given to the person charged who may be represented at the hearing by counsel and offer testimony of witnesses or any other evidence in his own behalf.

Source: 51:1-52 and 51:1-53.

COMMENT

This section is identical to its sources.

51A:3-7. Special police powers

When necessary for the enforcement of this Act or regulations promulgated under it, any weights and measures officer may:

a. enter any commercial premises during normal business hours, except that if the premises are not open to the public, the officer shall first present credentials and obtain consent before entry, unless a search warrant has previously been obtained;

b. issue stop-use, hold and removal orders with respect to any weights and measures commercially used, stop-sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale;

c. seize, for use as evidence, without formal warrant, any incorrect or unapproved weight measure package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of this Act or regulations promulgated pursuant to. Any weights and measures officer, his employer, or the State shall not be liable for damages by reason of that seizure;

d. stop any commercial vehicle and, after presentation of credentials, require the driver to proceed with the officer to a location for inspection; and

e. exercise special police powers with respect to the enforcement of this Act and arrest any violator of this Act without formal warrant.

Source: 51:1-54.1 and 51:1-106.

COMMENT

This section is substantially similar to its sources.

51A:3-8. Powers and duties of local officials

a. Any local superintendent shall have the duties and powers enumerated in this Act, excepting those duties reserved to the State by law or regulation.

b. The powers and duties of local weights and measures officers shall extend to their respective jurisdictions, except that the jurisdiction of a county official shall not extend to any municipality for which a weights and measures officer has been appointed.

c. A local weights and measures officer may act outside of the officer's jurisdiction with approval of the State Superintendent. Any fines resulting from acts outside of the officer's jurisdiction shall be paid to the State.

Source: 51:1-45; 51:1-63; 51:1-65; and 51:1-68.

COMMENT

This section is substantially similar to its sources.

51A:3-9. Weights and measures officers; training; badges or identification device

a. Each weights and measures officer shall successfully complete a course of instruction in weights and measures before assuming duties.

b. Each weights and measures officer shall be issued a badge or a similar identification device displaying an official number and shall exhibit the badge or identification on demand during the performance of official duties. The Superintendent shall design, number, register and issue badges or identification devices.

Source: 51:1-64.

COMMENT

This section is substantially identical to its source.

51A:3-10. Record keeping

a. A local superintendent shall keep a complete record of all inspections conducted by weights and measures officers and of all weights and measures examined by officers under that superintendent's authority.

b. Every local superintendent shall, not later than the fifth day of each month, send to the Superintendent, a report containing:

(1) a list of each business inspected and the date of the inspection;

(2) the number of tests made since the preceding report;

(3) the number of weights or measures found to be correct;

(4) the number of weights or measures found to be false;

(5) the number of prosecutions instituted since the preceding report, together with the name and address of the accused, the name of the court where proceedings were instituted, and the disposition; and

(6) a copy of the report of each inspection conducted

(7) other matters the Superintendent has prescribed.

c. Every municipal and county superintendent shall also make an annual report of work, in writing, to the Superintendent within ten days after the last day of the state fiscal year.

d. Within 30 days after the end of the state fiscal year, the Superintendent shall make a report to the Legislature, which shall contain recommendations or suggestions and a digest of the reports of the municipal and county superintendents.

Source: 51:1-70 through 51:1-72.

COMMENT

This section is substantially similar to its sources.

51A:3-11. Registration of commercial weighing and measuring devices required

a. All weighing and measuring devices located within the State and operated or used for commercial purposes shall be registered with the Superintendent, except for timing devices used in clothes dryers by the residents of a building or complex of buildings in which the clothes dryers are located.

b. An applicant for registration shall submit an application on a form provided by the Superintendent and pay the appropriate registration and inspection fee to the Superintendent.

c. A weighing and measuring device registration shall expire one year from the effective date of the registration.

d. A registration may be renewed annually for an additional one-year term upon submission of a properly completed renewal application on a form provided by the Superintendent and payment of the registration fee.

e. The owner of a registered weighing and measuring device shall notify the Superintendent if the device is sold, transferred or moved to a new location.

Source: 51:1-54.2.

COMMENT

This section is substantially identical to its source.

51A:3-12. Fee for regulation of measuring and weighing devices

a. The Superintendent shall establish, by regulation, a fee schedule for the regulation of weighing and measuring devices.

b. The fee schedule shall include an additional fee for late registration.

c. The fees established shall be sufficient to fully defray the cost of regulating weighing and measuring devices except that:

(1) the fee charged for scales which measure weights of less than 1,000 pounds shall not exceed \$25 per scale;

(2) the fee charged for fuel pump dispensers shall not exceed \$25 per hose, and grade of fuel dispensed through that hose and

(3) the fee charged for retail vehicle tank meters shall not exceed \$50 per meter.

d. The fees established under subsection a. of this section shall be deposited into the "Weights and Measures Fund" for the purpose of fully defraying the cost of regulating weighing and measuring devices.

Source: 51:1-54.3.

COMMENT

This section is substantially identical to its source.

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51A:3-13. Weights and measures fund

a. There is established the "Weights and Measures Fund" as a non-lapsing revolving fund in the Department of Law and Public Safety into which shall be deposited all fees and penalties collected by the Superintendent under this Act.

b. The fund shall be administered by the Superintendent and shall be used to pay all expenses incurred by the Superintendent in connection with the regulation of weighing and measuring devices pursuant to this Act.

c. All counties and municipalities which have established departments of weights and measures shall be eligible to receive reimbursement from the fund established under this section for an amount certified by the Superintendent to defray all or part of the costs incurred in connection with the regulation of weighing and measuring devices pursuant to this Act. If the amount certified is to defray part of the costs, each eligible county and municipality shall receive an amount equal to the same percentage of the costs incurred.

Source: 51:1-54.4.

COMMENT

This section is substantially identical to its source.

CHAPTER 4 – WEIGHMASTERS

51A:4-1. Definitions

As used in this chapter:

a. “Public Weighing” means the weighing, measuring, or counting, upon request, of vehicles, property, produce, commodities, or articles other than those that the weigher or the weigher’s employer is either buying or selling.

b. “Public Weighmaster” means any person who performs public weighing.

c. “Private Weighmaster” means any person, not engaged in the business of weighing for hire, used by a firm, corporation, or individual after application to the Superintendent;

d. “Vehicle” means any device (except railroad freight cars) in, upon, or by which any property; produce, commodity, or article is or may be transported or drawn.

Source: Uniform weights and measures law and 51:1-73.

COMMENT

This section is similar to its source but is taken from the uniform law that is more comprehensive. The definition for “Private Weighmaster” is not found in the uniform law.

51A:4-2. Qualifications for weighmaster

a. To receive authorization to act as a weighmaster, a person must receive a license from the Superintendent. To qualify for a license, a person must:

- (1) be able to weigh or measure accurately;
- (2) be able to produce correct certificates; and
- (3) possess other qualifications required by the Superintendent.

b. The Superintendent may determine the qualifications of the applicant based on the results of an examination of the applicant's knowledge.

Source: Uniform weights and measures law and 51:1-75.

COMMENT

This section was added to provide a guideline for the procedures to becoming a weighmaster.

51A:4-3. Issuance and records of licenses

The Superintendent shall:

- a. grant licenses as public or private weighmasters to qualified applicants;
- b. keep a record of all applications submitted and of all licenses issued; and
- c. issue licenses for a term of three years.

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Source: 51:1-74

COMMENT

This section is substantially similar to paragraph one of its source.

51A:4-4. License fees

For issuance of a new or renewal license as a public weighmaster, the applicant shall pay a fee of \$150 to the Superintendent, who shall deposit the money into the “Weights and Measures Fund”.

Source: 51:1-74

COMMENT

This section is substantially similar to paragraph two of its source.

51A:4-5. Certificate; required entries; prima facie evidence

a. A certificate is a statement of weight or measure certified by a public weighmaster.

b. The design of and the information to be furnished on a weight certificate shall be prescribed by the Superintendent and shall include:

- (1) the name and license number of the public weighmaster;
- (2) the kind of commodity weighed, measured, or counted;
- (3) the name of the owner, agent, or consignee of the commodity;
- (4) the name of the recipient of the commodity, if applicable;
- (5) the date the certificate is issued;
- (6) the consecutive number of the certificate;
- (7) the identification, including the identification number, if any, of the carrier transporting the commodity, and the identification number or license number of the vehicle;
- (8) other information needed to distinguish or identify the commodity from a like kind;
- (9) the number of units of the commodity, if applicable;
- (10) the measure of the commodity, if applicable;
- (11) the weight of the commodity and the vehicle or container (if applicable) broken down as follows:
 - (A) the gross weight of the commodity and the associated vehicle or container;
 - (B) the tare weight of the unladen vehicle or container; or

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(C) both the gross and tare weight and the resultant net weight of the commodity; and

(12) signature of the public weighmaster who determined the weight, measure, or count.

c. The certificate, when properly completed and signed by a public weighmaster shall be prima facie evidence of the accuracy of the measurements shown.

Source: 51:1-77; 51:1-102 and the Uniform weights and measures law.

COMMENT

This section is substantially identical to its source. Subsections (b)(1), (b)(4), (b)(10), (b)(11)(a)-(c) and (b)(12) are new and derived from the uniform law.

51A:4-6. Copies of certificates

A public weighmaster shall keep a copy of each certificate issued for six years. Certificates shall be available for inspection by any weights and measures officer during normal business hours.

Source: 51:1-79.

COMMENT

This section is substantially identical to its source.

51A:4-7. Reciprocal acceptance of certificates

The Superintendent may recognize and accept certificates issued by licensed public weighmasters of other States that recognize and accept certificates issued by licensed weighmasters of this State.

Source: Uniform weights and measures law.

COMMENT

This section was added to allow for reciprocity between states.

51A:4-8. Weighing on scales outside State authorized

The Superintendent may designate any weighmaster licensed under the provisions of this title, to weigh commodities on approved scales at points located not more than one mile outside of the state, and certificates of weight issued by them shall have the same force and effect as certificates issued under the provisions of sections 51:2-10 to 51:2-14.

Source: 51:1-80.1.

COMMENT

This section is substantially identical to its source except that the residence requirement has been broadened to allow a place of business rather than a residence in New Jersey.

51A:4-9. Vehicles transporting construction materials; certification of tare weight

A public weighmaster shall certify the tare weight of a vehicle used for the transportation of construction materials upon request by the operator of that vehicle. The weight of a commodity transported by such a vehicle shall be determined by subtracting the certified tare weight of the vehicle from its gross weight. The tare weight of the vehicle may be certified no more than seven days immediately prior to the date the gross weight of the vehicle is determined. If the tare weight of the vehicle has not been certified during the seven-day period, the tare weight may be certified by a public weighmaster, provided that the certification was within one year prior to the date the gross weight is determined, and if there is a subsequent weighing, the subsequent tare weight of the vehicle is no greater than 105 per cent or less than 95 per cent of the tare weight certified during the one year period. A certificate issued pursuant to this section certifying the tare weight of a vehicle shall contain the wording “stored tare.” A “stored tare” certificate shall not supersede a certificate displaying the weight of record from weighing the vehicle on certified scales.

Naturally occurring aggregates used as construction materials, including crushed stone, gravel, sand, clay and clean fill that are not sold or intended for sale to an entity distinct from the seller shall not be considered a commodity for purposes of this Title. Vehicles carrying such construction materials may have only the gross vehicle weight certified.

Source: 51:1-77.1

COMMENT

This section is substantially identical to its source.

51A:4-10. Reweighing on complaint

When the correctness of the net or gross weight of any commodity for which a certificate of weight or measure has been issued by a public weighmaster is questioned, the owner, agent, or consignee may, upon complaint to a weights and measures officer have the commodity reweighed by them without charge. A public weighmaster designated by the Superintendent may reweigh the commodity.

Source: 51:1-78.

COMMENT

This section is substantially identical to its source.

51A:4-11. State-owned scales; weighmasters

The Superintendent, under the approval of the Attorney General, may appoint weighmasters within the Division of Weights and Measures for official weighing and certification regarding the operation of State-owned scales.

Source: 51:1-82.1.

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COMMENT

This section is identical to its source.

51A:4-12. Fraudulent report of weight

No weighmaster shall certify or report false weight. A weighmaster who certifies or reports false weight shall be answerable to any party injured in double damages to be collected in an action at law. This section shall not apply to interstate common carriers by railroad subject to regulation by federal authority.

Source: 51:1-82.

COMMENT

This section is substantially identical to its source.

51A:4-13. Suspension and revocation of license

The Superintendent may suspend or revoke the license of any public weighmaster who is:

- a. found to have violated any provision of this Act or any regulation under this Act;
- b. convicted in any court of violating any provision of this Act or any regulation under this Act; or
- c. convicted of any crime.

Source: Uniform weights and measures law and 51:1-80.

COMMENT

This section adds to the existing law subsection (c).

51A:4-14. Enforcing officer; rules and regulations

The Superintendent may issue regulations to enforce of this chapter including regulations specifying measurement practices that must be followed by a weighmaster, including the measurement or recording of tare.

Source: Uniform weights and measures law.

COMMENT

This new provision was added to outline the duties of the Superintendent.

CHAPTER 5 – WEIGHTS AND MEASURES: INSPECTION, TESTING AND SEALING

51A:5-1. Test of weights and measures

a. Except as provided in subsection (c), all weights and measures used in commerce shall be tested and sealed at least once a year. Upon the request of any interested party, a weights and measures officer shall test any weight or measure. If it is found correct or is made correct the officer shall properly seal it. The officer shall cause it to conform as nearly as possible to the standard before sealing. Otherwise, it shall not be used and shall be disposed of as provided in this Act.

b. The Office of Weights and Measures shall collect a fee for the testing of a weight or measure established by regulation. All money collected by the Superintendent shall be deposited into the Weights and Measures Fund.

c. These weights and measures devices need not be tested and sealed:

(1) timing devices used in clothes dryers by the residents of a building or complex of buildings in which the clothes dryers are located; and

(2) any other devices exempted by the Superintendent by regulation.

Source: 51:1-84.

COMMENT

This section is substantially identical to its source. A reference to the Weights and Measures Fund was added.

51A:5-2. Only sealed weights and measures to be used

a. A device not tested and sealed according to this chapter shall not be used in the purchase or sale of goods based on weight or measurement. However, no contract is to be voided unless one of the contracting parties is injured by the use of the weight or measurement.

Source: 51:1-83.

COMMENT

This section is substantially similar to its source but omits the penalty provision. There is a single, general penalty provision for the whole Weights and Measures Law.

51A:5-3. Tests

a. Any inspection of a weight or measure made at the request of the owner, found not to conform to the legal standard, shall result in a weights and measures official serving the owner with a notice in writing that further use is illegal. Within 15 days, the owner shall deliver the defective weight or measure to the weights and measures officer for confiscation or have the weight or measure corrected or another substituted, and notify the superintendent in writing of the action taken.

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b. Except where an inspection is made at the request of the owner, if the first official inspection of any weight or measure deviates from the legal standard and the nature of the deviation is not easily ascertainable by the owner, the owner may correct it. Upon failure to do so within 2 days, the weights and measures officer may take possession of and destroy the weight or measure. If the deviation is easily ascertainable by the owner, the officer shall immediately take possession of and destroy the weight or measure.

Source: 51:1-85 and 51:1-86.

COMMENT

This section is substantially identical to its sources but omits the penalty provision. There is a single, general penalty provision for the whole Weights and Measures Law

51A:5-4. Refusal to seal weight or measure constructed to defraud

A weights and measures officer shall not seal any weight or measure that is constructed to facilitate fraud. The officer shall report the matter to the Superintendent or to the local superintendent who, if satisfied upon investigation that its use is prejudicial to the best interests of the public, shall order that the weight or measure be treated as an unlawful one.

Source: 51:1-87.

COMMENT

This section is substantially similar to its source.

51A:5-5. Refusal to exhibit weights, container, documents, etc.

No person shall:

a. refuse to exhibit any weights, measures, packages, containers, weight certificates, delivery tickets, invoices or any other documents setting forth the quantity or value of any commodity or service to a weights and measures officer for the purpose of inspection and examination;

b. refuse to admit to a place of business, during usual hours of business.

Source: 51:1-88.

COMMENT

This section is similar to its source but eliminates duplicative language and the penalty provision. There is a single, general penalty provision for the whole Weights and Measures Law.

CHAPTER 6 – SECONDHAND WEIGHING DEVICES

51A:6-1. Definitions

As used in this chapter:

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a. “Repair” means to engage in the business of partial or complete constructing or reconstructing, repairing, altering, installing or adjusting of any commercial weighing or measuring equipment used in trade and commerce in this State.

b. “Adjustment” and “adjusting” means any movement of any part of a weighing or measuring device except to obtain a correct zero indication.

Source: 51:1-113.

COMMENT

The definitions in this section are substantially similar to their source. Other definitions have been deleted as duplicating general definitions for the title or as unnecessary.

51A:6-2. License and registration to engage in business

No person may engage in the business of selling, trading-in, receiving, installing or repairing condemned, rebuilt or used commercial weighing or measuring equipment in this State without first obtaining a license from the Superintendent.

Application for a license shall be made to the Office of Weights and Measures on the form prescribed and furnished by the Superintendent, and shall be verified by the applicant under oath, or if the applicant is a partnership, association, or corporation, under the verification and oath of an officer or official representative.

Source: 51:1-114 and 51:1-115.

COMMENT

This section is substantially identical to its source.

51A:6-3. Examinations; qualifications; and licenses

a. Upon application, the Superintendent shall issue a license to engage in the business of repairing any equipment subject to this chapter to any person who passes an examination on technical qualifications to engage in that business. Any weights and measures officer designated by the Superintendent may conduct examinations.

b. The Superintendent shall issue regulations governing the examination of applicants for licenses to repair weighing and measuring equipment, the qualifications for limited and unlimited licenses, and the conditions for suspending or revoking licenses.

c. The Superintendent may issue an applicant a license to repair limited classes and kind of weighing and measuring equipment.

d. Licenses shall be issued for a term of one year from the date of issue and shall be renewable. Each license issued shall state the name, business address of the person to whom it is issued, whether it is a limited or unlimited license, and if limited, the classes or kinds of weighing or measuring equipment the licensee is authorized to repair.

e. The Superintendent may revoke or suspend the license of any person convicted of any violation of this act or for any of the following reasons:

- (1) willful fraud or misrepresentation practiced in procuring any license;

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- (2) dishonesty;
 - (3) incompetence;
 - (4) conduct of a character likely to deceive or defraud the public;
 - (5) lending a license by the licensee to any other person;
 - (6) obtaining a fee or compensation by fraud or misrepresentation;
 - (7) willful advertising or publishing of false, fraudulent or misleading statements of the licensee's business, skill, knowledge or methods of operation;
- and
- (8) conduct or practice at variance with this chapter.

No certificate of license shall be revoked or suspended until after a hearing. The Superintendent shall give at least ten days notice of the hearing.

Source: 51:1-116; 51:1-117; 51:1-118; 51:1-119; 51:1-120; 51:1-121 and 51:1-122.

COMMENT

This section is substantially similar to its sources.

51A:6-4. Report of repair work done by licensee

a. Any person licensed to repair weighing or measuring equipment shall report work to the Office of Weights and Measures or to the weights and measures officer of the county or municipality. The report shall contain the name and address of the person for whom the work was done, identification of the weighing or measuring equipment, nature of the work performed and the date the work was completed.

b. Within ten days, after the making of a repair, or the sale and delivery of repaired, rebuilt, exchanged, or used weighing or measuring equipment, written notice must be given to the appropriate weights and measures officer giving the name and address of the person for whom the repair was made or to whom the repaired, rebuilt, exchanged, or used weighing or measuring equipment was sold or delivered. Also within ten days, a statement shall be made by the licensee that the weighing and measuring equipment has been altered, rebuilt, or repaired conforming to the standard specifications and regulations of the Office of Weights and Measures.

Source: 51:1-123 and 51:1-124.

COMMENT

This section is substantially similar to its sources.

51A:6-5. Comparison and calibration of testing equipment

All persons engaged in any business covered by the provisions of this act shall submit their testing equipment at least once a year to a weights and measures officer for

comparison and calibration. The weights and measures officer shall issue to that person a statement or a certificate of findings.

Source: 51:1-126.

COMMENT

This section is identical to its source.

51A:6-6. Record or register

a. Every person licensed pursuant to of this chapter shall maintain a record or register containing the following:

(1) The name and address of every person for whom weighing or measuring equipment is repaired.

(2) The name and address of every person to whom a repaired, rebuilt, exchanged, or used weighing or measuring apparatus or equipment has been sold or delivered.

b. These records shall be open for inspection by any weights and measures officer.

Source: 51:1-127.

COMMENT

This section is identical to its source.

51A:6-7. Fees; use

a. Every person who is in the business of selling, trading, receiving, or engaging in the repairing of condemned, rebuilt, or used commercial weighing and measuring equipment shall pay a license fee of \$150 per year.

b. Every person engaging only in the repairing of weighing and measuring equipments shall pay a fee of \$20 per year.

c. These fees shall be paid to the Superintendent who will turn over to the funds to the State Treasurer for deposit into the Weights and Measures Fund.

Source: 51:1-128.

COMMENT

This section is identical to its source.

51A:6-8. Administration of Act; rules and regulations

The Superintendent shall administer this chapter and shall make regulations necessary for its enforcement. All weights and measures officers are charged with enforcement of this Act.

Source: 51:1-129 and 51:1-130.

COMMENT

This section is identical to its sources.

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51A:6-9 Exceptions to application of chapter

This chapter shall not apply to any bona fide employee of a business who repairs or installs any weighing or measuring equipment used in that business in the sale of commodities.

Source: 51:1-133.

COMMENT

This section is substantially identical to its source.

CHAPTER 7-STANDARD MERIDIAN LINE; LAND DESCRIPTIONS

51A:7-1. Official survey base established; plane co-ordinates

The official survey base for New Jersey shall be a system of plane co-ordinates known as the "New Jersey system of plane co-ordinates", which shall be a transverse Mercator projection of the Geodetic Reference System of 1980, having a central meridian 74° 30' west from Greenwich on which meridian the scale is set at one part in 10,000 too small. All co-ordinates are expressed in meters, the x co-ordinate being measured easterly along the grid and the y co-ordinate being measured northerly along the grid, the origin of the co-ordinates being on the meridian 74° 30' west from Greenwich at the intersection of the parallel 38° 50' north latitude, this origin being given the co-ordinates $x=150,000$ meters; $y=0$ meters. The precise position of this system shall be as marked on the ground by triangulation or traverse stations established in conformity with the standards adopted by the National Geodetic Survey, formerly the United States Coast and Geodetic Survey for first and second-order work, whose geodetic positions have been rigidly adjusted on the North American Datum of 1983 or the most recently published adjustment by the National Geodetic Survey, and whose plane co-ordinates have been computed on the system defined. Standard conversions from meters to feet shall be the adopted standards of the National Oceanic and Atmospheric Administration.

Source: 51:3-7.

COMMENT

This section is identical to its source.

51A:7-2. Connecting property surveys with system of coordinates

Any triangulation or traverse station established as described in section 51:7-1 of this title shall be used in establishing a connection between a property survey and the above-mentioned system of rectangular coordinates.

Source: 51:3-8.

COMMENT

This section is identical to its source.

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CHAPTER 8-LIGHTERS

51A:8-1. Certain sales of lighters prohibited

a. No lighter shall be sold, offered for sale, given, transferred, or otherwise made available in the State of New Jersey unless its design and construction conforms with the child resistant standards of this section.

b. "Child resistant lighter" means a lighter that is designed and constructed in a manner so that it is significantly difficult for a child under the age of 5 years to operate the device so as to produce a flame or to emit a flammable liquid, vapor, or gas. "Lighter" means a mechanical flame producing device, be it of a disposable or refillable nature, designed for the purpose of lighting a fire, cigarette, cigar, or pipe, provided, however, that the term shall not include those mechanical flame producing devices that are refillable and have a gross fueled weight of at least 35 grams.

c. The Bureau of Fire Safety in the Department of Community Affairs shall promulgate regulations to effectuate the purposes of this section, including standards for the design and construction of child resistant lighters.

Source: 51:13-1; Source: 51:13-3.

COMMENT

This section is substantially identical to its sources.

CHAPTER 9 – PENALTIES

51A:9-1. Prohibited Acts

a. A person who violates any provision of this act or regulations promulgated under it for which another penalty is not specifically provided shall be liable for the first offense to a civil penalty of not less than \$100 nor more than \$250; for a second offense to a civil penalty of not less than \$250 nor more than \$500, and for each subsequent offense to a civil penalty of not less than \$500 nor more than \$750.

b. A person who unlawfully hinders a weights and measures officer in the performance of official duties or who knowingly uses false weights or measures shall be liable for the first offense to a civil penalty of not less than \$100 nor more than \$250; for a second offense to a civil penalty of not less than \$250 nor more than \$500, and for each subsequent offense to a civil penalty of not less than \$500 nor more than \$750.

c. At the discretion of the weights and measures officer, each instance of violation of may be charged separately and be the basis for a separate penalty. However, all packages from the same inspection lot which exceed the Maximum Allowable Variation (MAV) set forth in Handbook 133 that were not packaged and marked by the person charged with the violation may comprise one instance of violation, and be subject to a single penalty. The Superintendent shall establish standards regulating the exercise of

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discretion as to when instances of violation shall be charged separately and when instances of violation shall be grouped as a single charge.

d. No person shall be convicted of or assessed a civil penalty for a second or subsequent offense pursuant to this section unless the previous violations occurred:

(1) within one year prior to the occurrence of the second or subsequent offense; and

(2) at the same store or outlet as the second or subsequent offense.

e. This section shall not authorize the imposition of penalties for a second or subsequent offense:

(1) in conjunction with an adjudication of guilt based upon multiple counts or complaints arising from the same inspection,

(2) if one of the offenses was for incorrect weight of a product that was packaged and marked by a person other than the person charged with the violation;

(3) if, in the discretion of the court, the imposition of a penalty for a first offense would be just and proper;

f. This section shall not authorize the imposition of a penalty against a seller for understating the quantity of commodity sold, charging a lower price than that marked, or other actions that benefit of the consumer.

g. An action to assess a penalty shall be brought pursuant to the “Penalty Enforcement Law” in proceeding in the Superior Court or a municipal court. Actions shall be brought in the name of the State by any weights and measures officer. A person who does not contest the penalty and pays the penalty set by the court’s violation schedule before the date set for the court hearing need not appear unless ordered to appear by the court.

h. Nothing in this section shall prevent prosecution of acts constituting violations of this chapter as crimes or offenses under the Criminal Code.

Source: New.

COMMENT

This section replaces penalties scattered throughout current Title 51. The Commission considered and rejected a provision requiring enforcement of penalties against a manufacturer rather than the retailer where the package was weighed and labeled by the manufacturer. However, subsection (e)(2) limits the use of violations based on such circumstances to justify higher fines for subsequent offenses. It also should be noted that when the manufacturer causes the violation, the retailer has a cause of action against the manufacturer.

51A:9-2. Injunction

The Superintendent may apply to the Superior Court for an injunction restraining any person from violating this act.

Source: 51:1-103.1.

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COMMENT

This section is substantially similar to its source.

51A:9-3. Presumptive Evidence

A reputable presumption exists that:

a. when a weighting or measuring device is located in any place where buying or selling is commonly carried on, the device is regularly used for the business purposes of that place; and

b. when a certificate is produced indicating that a standard weight or measure has been tested and found accurate, that the standard weight or measure is accurate.

Source: 51:1-101.

COMMENT

This section is substantially similar to its source.

51A:9-4. Disposition of penalties

Penalties, when imposed or recovered in an action brought:

a. by a weights and measures officer employed by the Office of Weights and Measures shall be deposited into the Weights and Measures Fund;

b. by a county or municipal weights and measures officer shall be paid to the treasurer of the locality.

Source: 51:1-109.

COMMENT

This section is substantially similar to its source.

51A:9-5. City attorney or county prosecutor to aid in prosecution

The municipal prosecutor of the municipality where a violation of this act occurred shall assist in the prosecution of any proceedings in municipal court; the county counsel shall assist in the prosecution of any proceedings in Superior Court.

Source: 51:1-111.

COMMENT

This section is substantially identical to its source.

CHAPTER 10 – GOLD AND SILVER

51A:10-1 Sale of gold articles with false quality marks

a. No person shall sell, or possess with intent to sell, any article made in whole or in part of gold or an alloy of gold, marked on the article, or upon its tag, label or package, designed to indicate that the gold or alloy of gold is of a greater degree of fineness than it is.

b. In any test of the fineness of the gold or its alloy to determine compliance with subsection (a), the part of the gold or its alloy taken for the test, shall not contain any solder or alloy of inferior fineness used for uniting the parts of the article.

c. The article shall be considered not to be in violation of subsection (a) if the metal tested is not less than the fineness indicated by the mark by more than one karat.

Source: 51:5-1; 51:5-2.

COMMENT

This section is a simplified version of its sources.

51A:10-2. Sale of silver articles, marked "sterling" or "coin" where articles less than certain fineness

No person shall sell, or possess with intent to sell, any article made in whole or in part of silver or of an alloy of silver, marked on the article, or upon its tag, label or package, designed to indicate:

(1) "sterling silver" or "sterling" or any colorable imitation of these, unless nine hundred and twenty-five one-thousandths of the metal purporting to be silver, is pure silver;

(2) "coin" or "coin silver" or any colorable imitation of these, unless nine hundred one-thousandths of the metal purporting to be silver is pure silver; or

(3) Any mark or word, other than the word "sterling" or the word "coin" designed or intended to indicate, that the silver or alloy of silver is of a greater degree of fineness than it is.

b. In any test of the fineness of silver or its alloy to determine compliance with subsection (a), the part of the silver or its alloy taken for the test, shall not contain any solder or alloy of inferior fineness used for uniting the parts of the article.

c. The article shall be considered not to be in violation of subsection (a) if the metal tested is not less than the fineness indicated by the mark by more than ten one-thousandths parts than the fineness indicated,.

Source: 51:5-3; 51:5-4.

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COMMENT

This section is a simplified version of its sources.

51A:10-3. Sale of gold or silver plated articles without indicating they are plated

No person shall sell, or possess with intent to sell, any article made in whole or in part of inferior metal, plated or covered gold, or of any alloy of gold, or silver or an alloy of silver marked on the article, or upon its tag, label or package, designed to indicate that the with any word or mark usually employed to indicate the fineness of gold or silver, unless accompanied by other words plainly indicating that the article, or some part of it is gold or silver plated, or is gold or silver filled, as the case may be.

Source: 51:5-5; 51:5-6.

COMMENT

This section is a simplified version of its sources.

51A:10-4. Buyer on basis of bulk value; duties; serialized receipts; bond

Any person in the business of buying precious metals who buys, attempts to buy or offers to buy precious metals on the basis of bulk value from any person who is not in the business of selling precious metals shall:

a. clearly and prominently display at the point of purchase (1) the buyer's name and address; and (2) the price being offered or paid by the buyer expressed as price per standard measure of weight and fineness as prescribed by the Superintendent of Weights and Measures.

b. Include the buyer's name and address in all advertisements concerning precious metals.

c. Weigh the precious metals in plain view of the seller on State certified scales with the certificate of inspection clearly and prominently displayed.

d. Test the fineness of precious metals, if any test is so performed, in plain view of the seller.

e. Issue to the seller and keep for not less than 1 year, a serialized receipt for each purchase of precious metals containing the following:

(1) The name and address of the buyer;

(2) Date of the transaction;

(3) The names of the precious metals purchased, if known;

(4) The finenesses of the precious metals purchased;

(5) The weights of the precious metals purchased;

(6) The prices paid for the precious metals at the standard measures of weight and fineness prescribed by the superintendent;

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(7) The name, address and signature of the seller of the precious metals.

f. Obtain proof of identity from each person who sells precious metals to him.

g. Retain any precious metals in the form in which they were purchased for at least two business days.

h. Upon reasonable request, allow the inspection of the serialized receipts or precious metals provided for in subsections e. and g. of this section by any law enforcement officer or weights and measures official.

i. If the buyer is transient, obtain a bond in an amount and form prescribed by regulations of the Superintendent, obtained from a surety company authorized by law to do business in this State. The bond shall run to the State for the benefit of any person injured by the wrongful act, default, fraud or misrepresentation of the buyer of precious metals. The bond shall contain a provision that it shall not be cancelled for any cause unless notice of intention to cancel is filed in the Office of Weights and Measures at least 30 days before the day upon which cancellation shall take effect.

j. Before buying, or offering to buy any precious metals, register with the police of the municipality in which the person intends to conduct business and give his name and address. A transient buyer of precious metals shall, in addition to the information required of a buyer of precious metals, provide the address at which the buyer intends to do business in the municipality and shall reregister on change of location of doing business or on resumption of business after discontinuing business for more than 20 days in the municipality.

Source: 51:6A-1; 51:6A-2

COMMENT

This section is substantially identical to its sources.

51A:10-5. Inapplicability of act to government agencies, banks, or commodity markets

This chapter is not applicable to government agencies, State or Federally chartered banks or federally regulated commodity markets.

Source 51:6A-6.

COMMENT

This section is substantially identical to its sources.

51A:10-6. Right of municipalities to enact more restrictive ordinances or resolutions

A municipality may enforce ordinances more restrictive than this act or any rules or regulations promulgated under it.

Source 51:6A-7.

COMMENT

This section is substantially identical to its sources.

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CHAPTER 11 – LIQUID FUELS

51:11-1. Definition

As used in this chapter "liquid fuels" means fuel in liquid form, which can be used for heating purposes except for oil that has a flash point of one hundred five degrees Fahrenheit or less, as determined by the Tagliabue closed cup tester or has a Saybolt Universal Viscosity at one hundred degrees Fahrenheit higher than fifty-five seconds.

Source: 51:9-1.

COMMENT

This section is substantially identical to subsection (a) of 51:9-1. The other definition in the source section, weights and measures officer has been deleted as duplicative of a general definition.

51:11-2. Sale of liquid by volume

a. All liquid fuel shall be sold by volume.

b. Deliveries of liquid fuel exceeding 50 gallons but not exceeding 10,000 gallons shall be measured by means of a positive displacement liquid flow meter tested and sealed as to its adjusting and recording elements by a weights and measures officer; but this requirement shall not apply to liquid fuel:

(1) in containers conspicuously marked with quantity in terms of liquid measure;

(2) delivered by the entire railroad tank car or cargo direct from the vessels, railroad tank cars or bulk tank trucks or compartments of them consigned to one person and accepted by the purchaser on the original bill of lading or invoice; or

(3) which the Superintendent determines does not lend itself to metered measurement by reason of viscosity or other characteristics

c. Deliveries of quantities in excess of 10,000 gallons may be measured by a meter or from compartments that have been calibrated and whose indicators have been sealed by a weights and measures officer.

d. Any measuring device used in the sale of liquid fuel shall be of a type and construction approved by the Superintendent and calibrated, tested and sealed annually by a weights and measures officer.

e. A certificate shall be issued by a weights and measures official after the approval and sealing of a measuring device. The certificate shall be carried on the vehicle to which it applies at all times that liquid oil is delivered or possessed with intent to deliver.

f. If the volume of liquid fuel is calculated by weight, the net weight shall be determined by means of a scale of approved type and capacity, tested and sealed by a weights and measures officer. For the conversion of weight to volume and for temperature corrections, the National Standard Petroleum Oil Tables as approved by the federal government shall be used.

Source: 51:9-2; 51:9-3; 51:9-4; 51:9-5; 51:9-6.

COMMENT

Subsection (a) is substantially identical to the first sentence of 51:9-3. The other part of 51:9-3, which requires measurement in gallons, has been deleted as unnecessary. Subsection (b) is substantially identical to 51:9-5. Subsection (c) is substantially identical to 51:9-6. Subsection (d) and (e) are substantially identical to 51:9-2. Subsection (f) is substantially identical to 51:9-4.

51:11-3. Delivery tickets

a. A delivery ticket and duplicate of it shall be issued upon the completion of delivery of liquid fuel exceeding 10 gallons. If the sale or delivery exceeds 50 gallons and is of a type of liquid fuel which is required to be measured by meter, the ticket shall be printed by means of an automatic printing device attached to and coordinated with the operating mechanism of a meter approved for the measurement of liquid fuels. One of the tickets shall be given to the purchaser and the other shall be retained by the seller for six years. The retained tickets shall be subject to inspection by any weights and measures officer.

b. On each ticket there shall be legibly expressed;

- (1) the date,
- (2) the name and address of the seller,
- (3) the name and address of the purchaser,
- (4) the quantity delivered,
- (5) the grade of liquid fuel, and
- (6) the signature of the person who made delivery or his agent.

c. Delivery tickets shall be serially numbered. No duplicate or unused ticket shall be destroyed but may be voided and kept on file.

d. This section shall not apply where there is a meter permanently attached and properly security sealed in the consuming apparatus of the consumer with the recording elements always available to the consumer. In this situation, in lieu of a delivery ticket, the seller shall provide to the consumer, a periodical statement of the amount of fuel delivered as indicated on the meter attached to the consuming apparatus. On notice to the seller, a consumer may at any time elect to discontinue use of a meter attached to the consuming apparatus and to receive delivery tickets as provided by this section.

Source: 51:9-7.

COMMENT

This section is substantially identical to 51:9-7.

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51:11-4. Residential oil fill pipe

a. The owner of any residential dwelling served by a home heating oil tank shall provide that the cap of any exterior heating oil fill pipe be colored green or that the tank fill pipe be equipped with a fill tightness system with a fill cap stamped or engraved in clear letters with the words "Fuel Oil."

b. No person may pump, pour, or otherwise place home heating oil into any exterior heating oil tank fill pipe of a residential dwelling unit that does not comply with this section.

c. A person who violates this section is subject to a civil penalty not to exceed \$500 which may be collected in a summary proceeding brought pursuant to "the penalty enforcement law." The Superior Court and a municipal court shall have jurisdiction to enforce a penalty under this section.

Source: 51:9-9.1.

COMMENT

This section is substantially identical to 51:9-9.1.

51:11-5. Regulations

The Superintendent shall adopt regulations to prevent the perpetration of fraud in the sale of liquid fuel governing

a. the types of measuring devices and equipment that may be used in the delivery of liquid fuel;

b. the manner of approval, testing, or calibrating of measuring devices and equipment; and

c. the mailing and preserving of the periodical statements of meter readings sent to purchasers having meters on their consuming apparatus.

Source: 51:9-10.

COMMENT

This section is substantially identical to 51:9-10.

51:11-5. Deception as to quality of liquid fuel

a. No person shall possess or sell liquid fuel, motor oil or similar products in a manner that would tend to deceive a purchaser as to the identity or quality of the product by false representation, false labeling, substitution or adulteration.

b. A person who violates this section shall be subject to a penalty of not less than \$250 or more than \$1000 for a first offense, and not less than \$1000 nor more than \$5000 for a subsequent offense. These penalties shall be enforced in the same manner as others in this act.

Source: 51:4-1.

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COMMENT

This section is substantially identical to 51:4-1.

CHAPTER 12 – LIQUIFIED PETROLEUM GAS

51A:12-1 Sale of Liquefied Petroleum Gas.

Liquefied petroleum gas, any material composed predominantly of propane, propylene, butane, or butylene or a mixture of them, shall be sold or offered for sale by weight, by liquid measure, or by volume expressed in units employed by industry and accepted by the trade and approved by the Superintendent.

Source: 51:10-1; 51:10-2.

COMMENT

This section continues the substance of 51:10-2. The definition of liquefied petroleum gas is derived from 51:10-1.

CHAPTER 13 – LUMBER

51:13-1 Standards for grading and measuring lumber; other regulations

a. The Superintendent shall establish standards for the grading and measurement of lumber and wood products by regulation. The standards shall be in accord with applicable commercial standards of the United States Department of Commerce, the grading rules of approved grade rules writing agencies, and other industry standards and may deviate from these standards only with justifiable reasons or where standards do not exist. The superintendent may establish standards only after consultation with the manufacturers and dealers involved.

b. The superintendent may establish other regulations to implement the enforcement or administration of this chapter.

Source: 51:4-27; 51:4-31.

COMMENT

Subsection (a) contains the Superintendent's regulatory power over standards for lumber now found in 51:4-27. Subsection (b) contains the general regulatory power now found in 51:4-31.

51A:13-2. Sale of lumber in violation of regulations

No person shall sell, expose for sale, offer for sale, or manufacture for the purpose of resale in this State any lumber or wood product that

- a. deviates from the applicable regulations;
- b. is not labeled as required by regulations; or

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c. is misrepresented or mislabeled so as to mislead or deceive a purchaser.

Source: 51:4-27; 51:4-29; 51:4-30.

COMMENT

This section collects the penalty provisions now found in the source sections. The labeling requirement in 51:4-27 and the deviation from regulations provision in 51:4-30 contain no specific penalty and are presumably enforced by administrative penalty. Misrepresentation of lumber is now made a crime by 51:4-29. As such, it duplicates theft and fraud provisions of the Criminal Code. This section would make all of these prohibited acts subject to the general penalties found in 51A:9-1. Of course, in an appropriate case, any weights and measures violation can be prosecuted as a crime.



STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

Relating to

MEDICAL PEER REVIEW PRIVILEGE

FEBRUARY 2005

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Background

Medical peer review is a process whereby doctors evaluate the quality of work done by their colleagues, in order to determine compliance with accepted health care standards. This self-regulatory procedure provides quality assurance for the medical community by fostering standardization of appropriate medical procedures and by policing caregivers who could pose risks to patients. The rationale for the process is efficiency: working doctors are best situated to judge the competence of other working doctors because they regularly see each others' work and possess the relevant expertise to evaluate it.

A peer review committee typically performs two functions: the initial process of credentialing (reviewing a doctor's qualifications and recommending whether or not the doctor should be granted privileges at the hospital), and ongoing review of a doctor's work within the hospital. Peer review is one of the chief means of monitoring the quality of doctors' work. Ideally, effective peer review should decrease the number of medical malpractice events and improve overall health care. Doctors, courts and critics recognize the review process as an efficient means of professional self-regulation. "[P]eer review has become widely accepted as the primary means to weed out low quality physicians and to identify and offer assistance to physicians whose skills need to be enhanced in certain areas." Susan O. Scheutzow, "State Medical Peer Review: High Cost But No Benefit – Is it Time for a Change?", *25 Am. J. L. & Med.* 7, 15 (1999).

Statutory provisions and regulations require the use of peer review. All states have statutes mandating minimum monitoring for hospitals seeking state licensure. The federal government additionally requires that new applicants be credentialed and staff members be regularly evaluated for a hospital to be in the Medicare program. Despite mandates and altruistic motivations, doctors often are reluctant to take part in peer review. Jeanne Darricades, "Medical Peer Review: How is it Protected by the Health Care Quality Improvement Act of 1986?", *18 J. Contemp. L.* 263, 270 (1992). Their reluctance derives from hesitation to criticize their peers, lost pay for time spent in review, fear of losing patient referrals and most significantly, possible legal repercussions from adverse decisions, especially discovery and liability aspects of lawsuits. These disincentives chill candor and diminish effective peer review.

New Jersey is the only state that does not statutorily protect the confidentiality of hospital peer review committee materials. It was suggested to the Commission that this lack of protection inhibits full disclosure and discussion of medical failings and ultimately runs counter to the best interests of patients. This issue was brought to the attention of the Commission by a New Jersey physician, and the creation of statutory protection for peer review was supported by the New Jersey Hospital Association. Based upon Staff's preliminary research, the Commission accepted the issue as a project at its April 22, 2004 meeting.

At its January 20, 2005 meeting, the New Jersey Law Revision Commission voted to issue a Tentative Report relating to medical peer review. The Commission does not recommend the adoption of a statute protecting the confidentiality of medical peer review.

Current law

Peer review of hospital physicians was established to ensure high quality care by monitoring untoward results and deviations from standard patient treatment. Individual hospitals' bylaws establish procedures for conducting peer reviews.

To counter doctors' reluctance to engage in peer review, most State legislatures and Congress have enacted laws that protect peer reviewers from liability, and their work product from discovery. New Jersey protects peer reviewers from liability but does not have a statute that protects work product from discovery. In the struggle between litigation and peer review, statutory privileges and immunities generally are accorded the preferred status. George E. Newton II, Comment, "Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection", 52 *Ala. L. Rev.* 723, 728 (2001).

Statutory peer review protection comprises three closely related kinds of laws: 1) those granting immunity from lawsuits to persons and institutions; 2) those declaring peer review work products to be privileged and inadmissible in court; and 3) those allowing information related to peer review to remain confidential.

The first type of protection, immunity, exists to diminish an individual doctor's or an institution's apprehension of facing damages in cases involving defamation, antitrust or negligent credentialing claims. The majority of states provide peer reviewers immunity from civil liability. The strongest statutes give immunity to all peer review committee members, institutions and persons furnishing information to the committee; weaker statutes give immunity for only a few or specified people.

The second type of protection is the work product privilege which prevents information associated with the peer review process from discovery. Its premise is the belief that doctors are loath to candidly discuss a colleague's shortcomings if their statements later could be discovered in judicial proceedings. The typical state statute protects from discovery a range of documents pertaining to the committee's meetings. The statutes differ as to which documents are protected. The Kansas statute exemplifies those laws that very specifically limit protected documents: "The reports, statements, memorandum, [sic] proceedings, findings and other records of peer review committees or officers." *Kan. Stat. Ann. Sect.* 65-4950 (1993). Only records of the committees, not records given to the committees, receive protection under the statute. Similarly, the District of Columbia law allows discovery of materials produced out of sight of the peer review process. *D.C. Code Sect.* 32-505 (1981). At the other end of the continuum is Arizona law which protects information considered by the entity acting in a quality assurance process and which treats the records of such consideration as confidential.

Ariz. Rev. Stat. Sect. 36-2403 (1994).

The third protection, the confidentiality requirement, creates an affirmative duty incumbent on committee members to keep information involving peer review to themselves. Miscellaneous exceptions to peer review protection may occur regarding: 1) the fact that peer review took place, 2) whether licensing boards have access to peer review records, 3) waiver through release of peer review business to entities in an integrated health care delivery system (for example, a part of a centralized credentialing program), 4) applicability to criminal proceedings, and 5) court review and use of a balancing test. Elise Dunitz Brennan, Esq., Chair, Credentialing and Peer Review Substantive Law Committee American Health Lawyers Association, Introduction, 12-15, 50-State Survey on Peer Review Privilege, Spring, 1998. Note that Congress extends its own kind of protection (immunity) to medical review participants and to their work product through the Health Care Quality Improvement Act of 1986 (“HCQIA”). The Act attempted to address national components of the health care quality assurance problem. Charity Scott, “Medical Peer Review, Antitrust, and the Effect of Statutory Reform”, 50 *Md. L. Rev.* 316, 325 (1991).

For years New Jersey hospitals have had peer review committees composed of physicians (and sometimes a person from the Medical Records Department and a nursing supervisor). Patient charts were distributed and studied. If a chart indicated that a particular doctor had deviated from standard care in treating a patient, the doctor was advised and the committee also told the hospital’s Medical Executive Committee (composed of the chiefs of all departments and usually an Administration representative, such as a Trustee).

The New Jersey State Department of Health requires peer review procedures as a prerequisite for licensing a hospital. *N.J.A.C.* 8:43-G-2.12. The necessary elements of the program are set out in *N.J.A.C.* 8:43-G-27.5 and include monitoring patient care, evaluation of patient care, effective corrective actions, procedural changes, educational activities, etc. In *Reyes v. Meadowlands Hosp. Med. Ctr.*, 355 *N.J. Super.* 226, 233 (L. Div. 2001), however, the Court said that the “Code makes no provision for the results of such a process to be privileged. Therefore, those participating do so without any assurance of confidentiality.” New Jersey Evidence Rule 500 is the “General Rule” concerning privileges. Comment 3 to that Rule states that:

the New Jersey Supreme Court has expressly declined to adopt “as a full privilege, either qualified or absolute” the protections sought for self-critical analysis materials. *Payton v. New Jersey Turnpike Authority*, 148 *N.J.* 524, 545 (1997). Instead, the Court said that the concerns arising from the disclosure of “evaluative and deliberative materials,” while “deserving of substantial consideration,” could be amply accommodated by a case-by-case weighing process. *Id.* 548-549.

With the advent of Medicare, “utilization review committees” became necessary

for hospitals to qualify under the Social Security Act and to take part in state and federally funded programs. Utilization review committees attempt to find out whether patients' treatments were necessary and suitable.

Unlike its treatment of peer review committees, New Jersey currently protects, by statute, “[i]nformation and data secured by and in the possession of utilization review committees established by any certified hospital or extended care facility in the performance of their duties.” *N.J.S. 2A:84A-22.8(a)*. The Statement accompanying Senate Bill 559 (L. 1970, c. 313) explained that the New Jersey statute, in extending protection to committee members, encourages “willing participation” and effectively “implement[s] the provisions of Medicare and other health care measures.” New Jersey Rule of Evidence 507 adopts the language of *N.J.S. 2A:84A-22.8* verbatim. Rule commentary makes it clear, however, that “The protection afforded by the statute cannot be extended by implication to the records of other hospital committees...*There is no comparable statutory privilege for the information and data collected by a quality assurance or peer review committee....*” [emphasis added]

One additional New Jersey statute needs to be distinguished from those dealing with peer review. The Patient Safety Act, *N.J.S. 26:2H-12.23* through 12.25, requires health care facilities to report to the Department of Health and Senior Services “every serious preventable adverse event that occurs in that facility” (*N.J.S. 26:2H-12.25(c)*) and encourages health care professionals or other employees of a health care facility “to make anonymous reports to the department ... regarding near-misses, preventable events and adverse events that are otherwise not subject to mandatory reporting” (*N.J.S. 26:2H-12.25(e)(1)*). This statute is a variation of many states' laws that address “medical errors.” The statute outlines in detail the protections afforded communicants and documents, and concludes by stating (in *N.J.S. 26:2H-12.25(k)*) that “Nothing in this act shall be construed to increase or decrease the discoverability, in accordance with *Christy v. Salem*, [366 *N.J. Super.* 535 (App. Div. 2004)], of any documents, materials or information if obtained from any source or context other than those specified in this act.”

Christy v. Salem, decided in February 2004, analyzes earlier case law reasoning regarding peer review confidentiality. The plaintiff in *Christy* maintained that hospitals should not be entitled to maintain absolutely confidential peer evaluations. The court decided that plaintiff was entitled to information in one specific line of the report that might supply a critical element in his case, and also to some purely factual material. The court held that plaintiff was not entitled to the committee's “opinions, analysis, and findings of fact.” These “evaluative and deliberative materials” need not be disclosed. 366 *N.J. Super.* at 542.

Commission Deliberations

The Commission discussed the basic principles of peer review; federal and state peer review protections (immunity, privilege and confidentiality); and the law pertaining to self-critical analysis as applied by New Jersey courts. The Commission considered relevant statutes of other states, particularly those of Missouri, Ohio, Alabama, Arizona and Massachusetts. To understand how the statutes work in practice, Staff attempted to

contact two hospitals in each state and speak to their legal counsel or Risk Management Manager. Staff asked three questions regarding the extent of the protection afforded peer review materials. The responses, from attorneys and Risk Management Managers, were substantially uniform. 1) A government agency cannot obtain peer review committee materials work product from discovery; 2) A physician on the peer review committee or the committee as a whole never wishes to waive the protection; 3) Physicians would be more reluctant to discuss their peers without the protections afforded peer review materials. Most people Staff spoke with expressed surprise that New Jersey did not offer peer review materials statutory protection from disclosure and said they believe that the privilege is essential.

The Commission reviewed two drafts of a statute which proposed that “The evaluative and deliberative materials of hospital peer review committees concerning the health care provided any patient are privileged and not subject to discovery.” The Commission also considered the impact of the federal Health Insurance Portability and Accountability Act (HIPAA) upon New Jersey law.

Recommendation

After months of deliberation and drafting the Commission decided not to recommend the enactment of a statute protecting peer review materials.

The Commission decided that under case law, peer review materials are afforded sufficient protection. Deliberative materials are not disclosed. Even factual material presented to a peer review committee is not subject to discovery without a compelling reason. In attempting to draft a privilege statute, the Commission encountered substantial difficulty deciding what circumstances would justify exceptions to the privilege. The Commission found that exceptions were very fact-sensitive and would be decided better through the exercise of judicial discretion than with a more rigid statutory rule. The Commission decided that even codification of the current case-law rules could negatively affect the balancing process which the courts now employ on a case by case basis. The Commission also based its decision on reluctance to expand privileges. Finally, while recognizing that New Jersey is alone in declining to provide protection for peer review, the Commission observed that the most recent case law in this area seemed to very carefully weigh and consider the competing interests, and provide the same kind of protection that a proposed statute would provide.



STATE OF NEW JERSEY

NJLRC

**NEW JERSEY LAW REVISION COMMISSION
FINAL REPORT AND RECOMMENDATIONS**

Relating to

UNIFORM COMMERCIAL CODE ARTICLE 1 (2001)

DECEMBER 2005

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**UCC ARTICLE
Appendix D**

Introduction

In 2001, the National Conference of Commissioners on Uniform State Laws and the American Law Institute adopted Revised Uniform Commercial Code Article 1 for adoption in all states. The New Jersey Law Revision Commission has examined the Official Text of Revised Article 1 and recommends that the State of New Jersey adopt it in its entirety except for the provision regarding choice of law contained in Revised Article § 1-301. The Commission recommends retention of existing law on this subject contained in UCC Article 1 § 1-105 codified at N.J.S.A. 12A:1-105. As of 4 February 2006, fifteen jurisdictions have adopted Revised Article 1.⁴

“Article 1 of the Uniform Commercial Code (UCC) provides definitions and general provisions that, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the UCC.”⁵ In the intervening decade, NCCUSL and ALI have virtually revised or amended every major article of the Uniform Commercial Code to accommodate changing business practices and developments in law. The revision to Article 1 is an integral part of the Code’s revision to reflect market developments and to achieve consistency with the specific subject matter articles of the Code.

Article 1 contains many changes of a technical, non-substantive nature, such as reordering and renumbering sections, and adding gender-neutral terminology. However, certain substantive changes were made as well. First, section 1-102 now expressly states that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the UCC. This clarification improves its more ambiguously worded predecessor. Second, the statute of frauds requirement aimed at transactions beyond the coverage of the UCC has been deleted. Third, section 1-103 clarifies the application of supplemental principles of law, with clearer distinctions about where the UCC is preemptive. Fourth, the definition of "good faith" found in 1-201 is revised to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing". This change conforms to the definition of good faith that applies in all of the recently revised UCC articles except Revised Article 5. Finally, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

However, the most important change to Article 1 involves the default choice-of-law provisions found in 1-301, designed to replace previous 1-105. Under the latter

⁴ The jurisdictions are: Alabama, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Texas, U.S. Virgin Islands, and Virginia. See NCCUSL at <http://www.nccsul.org> last visited 4 February 2006. There are four 2006 introductions: Kansas, Massachusetts, New Hampshire, and West Virginia.

⁵ NCCUSL Legislative Summary available at <http://www.nccusl.org> last visited 4 February 2006.

section, parties to a transaction had the freedom to choose the law of any jurisdiction bearing a reasonable relation to that transaction. Revised Article 1 provides a different basic rule, applicable to all transactions except certain consumer transactions, that lets the parties choose the law of their transaction without reference to whether the transaction bears a reasonable relationship to the selected legal regime. It is party autonomy *par excellence*. In the commercial context, the only restraint is that the parties' choice of law cannot override the mandatory law of the forum of adjudication, meaning the law related to that state's fundamental social policies. In consumer transactions, an exercise of such a choice cannot deprive the consumer of the protection afforded by the consumer law of the consumer's residence, or of the consumer law where the consumer took delivery of the goods.

Matters of Controversy: Choice of Law

While the scope for disagreement with Revised Article 1 is broad, the most serious reservations were expressed over the new "choice of law" rule.⁶ In a Memorandum dated 10 February 2004, the Commission analyzed the issue and, after discussion and deliberation, decided that, due to potential objections against Revised Article 1 in its entirety based on the perceived problems of the new rule, it was appropriate to retain existing law in this area. The pertinent portion of that Memorandum follows for sake of clarity and convenience.

The New Choice of Law Rule

Revised Article 1-301 provides a choice of law rule that allows commercial parties in domestic transactions to select the law of any state and in international transactions (defined as a transaction that bears a reasonable relation to a country other than the United States) to select the law of any state or country. The new rule does not require that the law selected by the parties bear any relationship to that state or country. Hence, with one caveat, the new rule provides for almost total party autonomy in a commercial transaction. The one caveat: the application of the selected law would not apply if it would violate a fundamental policy of the law of the state that would apply in the absence of the agreement.

A special rule is created for consumer transactions. In that context, the choice of law must bear a reasonable relation to the law of the state or country designated and the agreed choice of law cannot deprive the consumer of the mandatory rules of the jurisdiction where the consumer resides, or if the contract and delivery are made outside

⁶ For example, consumer groups, such as Consumers Union of California, object to the new definition of a "conspicuous" term in the definitions contained in §1-201; they also maintain that Revised Article 1 should contain a general "unconscionability" provision applicable to any transaction covered by the Code. These objections do not amount to a reason justifying a wholesale rejection of the revision.

the consumer's state of residence, the place where the contract and delivery took place.

In addition, there are eight specific exceptions identifying UCC substantive articles specifying the applicable law.

The Controversy

There is little doubt that Revised Section 1-301 is more complicated than existing Section 1-105, adopted in New Jersey and part of the original text. There are several groups opposed to the new rule: academics, banks and some commercial parties. In general, the arguments raised are: the new rule creates problems of interpretation by disturbing a settled and known rule supported by precedent, threatens consumers and promotes forum shopping.⁷ The banks maintain that the new rule constricts their autonomy to select the law governing consumer agreements.

The most serious argument is that the rule authorizes the unprincipled use of forum shopping, encouraging the party authoring the contract to seek out any jurisdiction providing a perceived advantage to that party. In effect, the rule would result in a competition among jurisdictions to provide the best rules for predatory contract drafters. With respect to software contracts, skeptics of the new rule, even large institutions that, without compunction, impose standard form contracts on their own customers, claim that it provides a back door to the Uniform Computer Information Transactions Act, since the contract can make the law of Virginia or Maryland applicable: the only two states that have adopted UCITA. These institutions maintain that certain companies, notably Microsoft, will take advantage of this loophole. This fear of UCITA rests presumably upon the major reasons set forth in opposition to that uniform law: enlargement of contract law, infringement of federal copyright law, codification of constructive consent⁸ and electronic self-help. In addition, an author has argued that allowing parties to choose their own law deprives government of its authority to regulate the standards of its society.⁹

⁷ No attempt is made here to duplicate the nuances of the arguments made against Section 1-301. The latter, which consists of barely more than 2 pages, has generated a law review article in opposition consisting of 87 pages. William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. Rev. 697 (2001).

⁸ For a history of constructive consent and the legal attempts to deflect misuse in the context of standard form contracts, see John J.A. Burke, *Reinventing Contract*, E Law Murdoch Univ. (2003).

⁹ *Id.* This argument is a familiar one in standard form contract theory. *E.g.*, W. David Slawson, *Standard Form Contracts and Democratic Control of Law Making Power*, 84 Harv. L. Rev. 529 (1971). The argument has been raised against the process of developing the Uniform Commercial Code under the auspices of the National Conference of Commissioners on Uniform State Law.

No doubt that the critics' arguments have merit. Revised Article 1-301 is more complicated than the existing rule and would have to be interpreted over time. The rule may, but not necessarily, lead to forum shopping. The latter assumes expertise in law in a variety of jurisdictions. The rule may, but not necessarily, lead jurisdictions to compete in a race to the bottom. Arguments made in an analogous context, corporate law and the Delaware effect, are unsubstantiated hypotheses. Moreover, in the corporate context, the economic incentive is obvious for states – collection of fees; the economic incentive in choice of law is not so obvious since law and forum are separate matters.

Removing Revised Article 1-301 and retaining the existing rule would mean that the choice of law must bear a reasonable relationship to the parties or their transaction. However, the authoring party can escape the rules of any particular legal regime simply by putting an arbitration clause in the contract, or, by identifying a non-legal code, as permitted under Revised Article 1-302.¹⁰

Revised Definition of “Good Faith”

The revised definition of “good faith” contained in §1-201 states, “Good faith” except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.” This definition is not revolutionary, already having been incorporated in the revision process for other articles except for letters of credit.¹¹ Many letters of credit are governed by international rules established by the International Chamber of Commerce under the Uniform Customs and Practices for Documentary Credits (UCP 500) thereby subjecting credits to internationally recognized standards in the absence of an expanded “good faith” definition in Article 5. The definition of “good faith” in Revised Article 1 conforms to local New Jersey norms and to internationally accepted norms such as Article 1.7 of the UNIDROIT Principles of International Commercial Contracts, a model to serve as a guide for domestic legislation. Given the broad use of the revised definition in other articles, such as 2A, 3, 4, and 8, there is every reason for consistency's sake to incorporate the revised definition in Revised Article 1.

Analysis of State Adoptions: Dispositions of 4 key sections of Revised. Article 1

The law of the states that have enacted Revised Article 1 (General Provisions) of the Uniform Commercial Code were examined to determine what decisions those states have taken in four key sections: (1) § 1-102 [scope], (2) § 1-201(20) [good faith] and also amendments reflecting adoption of Revised Article 7 (Documents of Title), (3) § 1-301 [territorial applicability], and (4) § 1-303 [course of performance, course of dealing and

¹⁰ The Official Comment cites as an example the UNIDROIT Principles of International Commercial Transactions. It is highly unlikely that a dominant contracting party would ever use the latter, given its validity and other provisions favoring the weaker party to the contract and giving the court virtually *carte blanche* to rewrite the terms of a perceived abusive contract.

¹¹ See, Articles 2A 3, 4, 4A, 8 and 9.

usage of trade]. Bills related to Revised Article 1 introduced in Illinois and Massachusetts in 2005 also were analyzed. Conformity with and deviations from the language of the Official Text were tracked. The results of the analysis are set forth in the following table.

State adoption and non-adoption of Official Text with respect to four sections of Revised Article 1 of the Uniform Commercial Code

State Name	§ 1-102 Scope	§1-201 Good Faith	§1-201 R. Art. 7	§1-301 App.	§1-303 Cr. Perf.
Alabama ¹²	Yes	No	Yes	No	Yes
Arkansas ¹³	Yes	Yes	No	No	Yes
Connecticut ¹⁴	Yes	Yes	Yes	No	Yes
Delaware ¹⁵	Yes	Yes	Yes	No	Yes
Hawaii ¹⁶	Yes	No	Yes	No	Yes
Idaho ¹⁷	Yes	No	Yes	No	Yes
Minnesota ¹⁸	Yes	Yes	Yes	No	Yes
Montana ¹⁹	Yes	Yes	Yes	No	Yes
Nebraska ²⁰	Yes	No	No	No	Yes
Nevada ²¹	Yes	Yes	Yes	No	Yes
New Mexico ²²	Yes	Yes	Yes	No	Yes
Oklahoma ²³	Yes	Yes	Yes	No	Yes
Texas ²⁴	Yes	Yes	Yes	No	Yes
Virginia ²⁵	Yes	No	Yes	No	Yes
U.S. V.I. ²⁶	Yes	Yes	No	Yes	Yes
Illinois ²⁷	Yes	No	No	No	Yes
Massachusetts ²⁸	Yes	Yes	Yes	No	Yes

¹² Ala. Code § 7-1-101 et seq. (2004 Supplement)

¹³ Ark. Code Ann. §4-1-101 et seq. (Michie 2005 Supplement)

¹⁴ 2005 Conn. Legis. Serv. P.A. 05-109 (West)

¹⁵ Del Code Ann. Tit. 6, §1-101 et seq. (2004 Supplement)

¹⁶ Haw. Rev. Stat. Ann. § 490:1-101 et seq. (Michie 2004 Supplement)

¹⁷ Idaho Code §28-1-101 et seq. (Michie 2005 Supplement)

¹⁸ Minn. Stat. Ann. §336.1-101 et seq. (West 2005 Pocket Part)

¹⁹ Mont. Code Ann. §30-1-101 et seq.

²⁰ Neb. Rev. Stat. Ann. §1-101 et seq. (Michie 2005)

²¹ Nev. Rev. Stat. Ann. 104.1101 et seq. (Michie 2005)

²² N.M. Stat. Ann. §§55-1-101 et seq. (Michie 2005)

²³ Okla. Stat. Ann. Tit. 12A§1-101 et seq. (West 2005)

²⁴ Tex [Bus. & Com.] Code Ann. §1.101 et seq. (2005)

²⁵ Va. Code Ann. §8.1A-101 et seq. (Michie 2005 Supplement)

²⁶ VI. Stat. T. 11A§1-101 et seq.

²⁷ S.B. 1647

²⁸ H.B. 3731

The Official Text defines the term “good faith”: “Good faith, except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.” Rev. Art. 1 §1-201(b)(20). In its current version of Article 1, New Jersey defines “good faith” as “honesty in fact in the conduct or transaction concerned.” In the table above, the States that rejected the revised definition of “good faith” retained the original version of “good faith” found in the New Jersey statute.

As the Comment indicates, only Article 2, in its original redaction, provided that: “in this Article ... good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”²⁹ This definition combined subjective honesty with objective commercially reasonable behavior. However, it was limited to Article 2 transactions and to merchants. When the Code was substantially revised during the 1980’s and 1990’s, the broader definition of good faith was incorporated into Articles 2A, 3, 4, 4A, 8 and 9, but without the qualifying prepositional phrase “in the trade”. Only Article 5 retained the narrower definition and Article 7 does not contain a definition of good faith. Hence, given these developments, the revisers thought it appropriate to introduce the broader concept of “good faith” into the general provisions of Revised Article 1.

The subjective test of good faith embodied in the phrase “honesty in fact” often has been described as requiring only “a pure heart and an empty head”, and specifically excluding criteria such as “expectations of the parties”, “absence of negligence” or “standards of a reasonable and prudent person”. It is a narrowly circumscribed formulation of the obligation and differs from the common law doctrine of good faith and fair dealing implied in every contract. However, New Jersey courts do not treat UCC cases only under the Art. 1 definition of “good faith” limited to a subjective test. In New Jersey, a transaction governed by Article 1 does not exclude the application of the implied duty of good faith and fair dealing” found in the common law *E.g., Sons of Thunder v. Borden, Inc.*, 148 N.J. 396 (1997)(finding that in addition to the UCC Article 1 good faith requirement, “every contract in New Jersey contains an implied covenant of good faith and fair dealing”). The *Sons of Thunder* Court specifically stated, “Although the UCC governs this case, the obligation to perform in good faith found in our common law will also influence the result.” *Id.* at 421.

While it is difficult to define the parameters of “good faith”, the *Sons of Thunder* Court, quoting *Palisades Properties, Inc v. Brunetti*, 44 N.J. 117 (1965) remarked, “In every contract there is an implied covenant that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract’.” *Sons of Thunder, supra* at 420. This definition broadly accords with the two preeminent theories of good faith in American law: Professor Robert Summers’s “excluder analysis” adopted in the Restatement (Second) of Contracts §205 (1981) and Professor Steven Burton’s “foregone opportunities approach. *See, Emily M.S. Houh, The Doctrine of Good Faith in Contract Law: A (Nearly Empty Vessel?*, 2005 Utah L. Rev. 1. The Summer’s approach states that good faith is the negative corollary of bad faith. Its substance derives from “rul[ing] out radically heterogeneous forms of bad faith.” Robert S. Summers, *Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 204 (1968). The Burton approach, based on law and economics analysis, provides that bad faith constitutes a party’s attempt to recapture opportunities – “in the form of resources committed at the time of making the contract to particular uses in the future - foregone in the contracting process.” Houh, *supra* at 8. While the theories differ in approach and formulation, they are likely to produce no meaningful difference in practice.

²⁹ Note that adopting Revised Article 1 contains a conforming amendment to Article 2 to delete this definition of “good faith” contained in Article 2-103(1)(b).

The New Jersey approach to defining the implied covenant of good faith and fair dealing is open ended in terms of criteria. *Seidenberg v. Summit Bank*, 348 N.J. Super. 243 (App. Div. 2002)(finding that the court must consider the expectations of the parties and the purposes for which the contract was made, and finding that a party may not unreasonably frustrate the [contract's] purpose). Significantly, the *Seidenberg* Court stated, “In the final analysis, bad faith must be judged not only in light of the proofs regarding the defendants’ state of mind (*subjective test, JB*) but also in the context from which the claim arose (*objective test, JB*).” As *Seidenberg* clarified that requires the plaintiff to demonstrate a violation of “any commercially reasonable standard.” *Id.* at 263. Hence, the New Jersey approach to “good faith” does not deviate from the revised definition of that term contained in Revised Article 1 in looking to reasonable commercial standards of conduct. The expansion of the definition of “good faith” in Revised Article 1 conforms to existing New Jersey norms and would not adversely alter New Jersey law.

Conclusion

The Commission recommends the adoption in New Jersey of the Official Text version of Revised Article 1 of the Uniform Commercial Code, except for § 1-301 containing the new choice of law rule. In that regard, the Commission recommends retention of the existing rule, requiring that the transaction bear a reasonable relationship to the legal regime selected by the parties, as now codified in § 1-105. The Commission also recommends technical amendments to conform to New Jersey’s style requirements. The Commission also recommends the simultaneous adoption of Revised Article 7 – Documents of Title with relevant conforming amendments.

Attachment

The attachment contains the entire text of Revised Article 1 containing amendments required by Revised Article 7 and omitting the new provision for choice of law and retaining existing law on that issue. Brackets indicate material that should be omitted from the New Jersey text.



STATE OF NEW JERSEY

NJLRC

NEW JERSEY LAW REVISION COMMISSION
FINAL REPORT AND RECOMMENDATIONS

relating to

UNIFORM COMMERCIAL CODE REVISED ARTICLE 7
DOCUMENTS OF TITLE

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UCC ARTICLE 7

Appendix E

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Introduction

The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) promulgated for adoption in the states Revised Article 7 – Documents of Title in October 2003. The revision replaces the existing Uniform Commercial Code Article 7 – Documents of Title first promulgated in 1952 and adopted in New Jersey in 1961. The 1952 Article 7 replaced the Uniform Warehouse Receipts Act, the Uniform Bills of Lading Act, and Sections 27-40 of the Uniform Sales Act.³⁰ The 1952 Article contained important changes, but the continuity with prior law was more significant than were the changes. “[T]he overall picture [was] one of tidying up traditional concepts rather than of radical reform.”³¹

Likewise, Revised Article 7 does not make radical reforms to existing law. Rather, it has two primary objectives: (1) allowance of electronic documents of title, and (2) introduction of provisions to reflect trends at the state, federal and international levels. Adoption of the Revised Article requires the making of conforming amendments to several other Code sections and the Revised Article assumes for purposes of cross-references that the enacting state has enacted Revised Article 1, though it provides alternative conforming amendments for state law based on the original Article 1.³² Fifteen states have adopted the Revised Article as of 04 February 2006: Alabama, Connecticut, Delaware, Hawaii, Idaho, Maryland, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Texas and Virginia.³³

Key Features

“Revised Article 7 supplies a domestic legal framework [for documents of title] that conforms to international standards.” William F. Savino and David S. Widenor, *2002-2003 Survey of New York, Commercial Law*, 54 *Syracuse L. Rev.* 855 (2004). A “document of title”, defined in Revised Article 1, but not altered from the prior definition, is defined as:

“Document of title” includes bill of lading, dock warrant, dock receipt, warehouse receipt, or order for the delivery of goods, and also any other

³⁰ Robert Braucher, *The Uniform Commercial Code – Documents of Title*, 102 *U. Pa. L. Rev.* 831 (1954).

³¹ *Id.* at 870.

³² As of 04 February 2006, fourteen states and one territory have adopted Revised Article 1: Alabama, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Texas, U.S. Virgin Islands and Virginia. See NCCUSL Web site last visited on 04 August 2006 at <http://www.nccusl.org>. Seven 2005 introductions are listed: Arizona, Illinois, Kansas, Massachusetts, New Hampshire, North Dakota and West Virginia.

³³ NCCUSL Web site last visited on 04 February 2006 at <http://www.nccusl.org>. Five 2006 introductions are listed: Massachusetts, Mississippi, New Hampshire and Utah.

document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.”

The definition is framed in terms of function to capture equivalent documents not yet used in commerce but that possibly may arise in the future. The essence of the definition is: the document “in the regular course of business or financing ... is treated as adequately evidencing that the person in possession or control of the document is entitled to deal with the document and the goods it covers.”³⁴ A document of title is “issued by or to a bailee and covers goods in the bailee's possession”.³⁵ Examples of documents of title are bills of lading and warehouse receipts.

Revised Article 7 also uses the term “bailee” as a “blanket term to designate carriers, warehousemen, and others who normally issue documents of title on the basis of goods which they have received.” *Official Comment*, Rev. Art. 7-102. Documents of title are distinguished from non-documents of title primarily by their chief characteristic of “evidencing that the person in possession is entitled to receive, hold and dispose of the document and the goods it covers.” Consequently, an air waybill is not a document of title as it constitutes only a receipt of the goods and the terms of the contract of carriage.³⁶

Two important sub-classifications of documents of title exist: negotiable and nonnegotiable documents. *Rev. Art. 7-104*. Subsection (a) of that section provides that a document of title is “negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person.” It follows that a document of title stating that the goods are consigned to a named person is a nonnegotiable document. In addition, a document is nonnegotiable if at the time it was issued it contained a legend that it is nonnegotiable. The standard example of a negotiable document of title is a bill of lading made out to order.³⁷ It performs an important role in trade and finance by permitting goods to be sold in transit such as oil or grain that may be sold several times in a single day. In addition, if the transaction is to be financed through a letter of credit, the bank may hold the bill of lading as security. When the document of title is duly negotiated, the carrier loses certain defenses against a good faith holder of the document. *Revised Article 7-502*. Any other type of transfer, such as an assignment, does not clear the document of defects attached to the rights of an earlier holder. *Transcon Lines v. Lipo Chem, Inc.*, 193 N.J. Super. 456,

³⁴ William H. Henning and Linda J. Rusch, *Intersections of Articles 2, 7 and 9*, SK038 ALI-ABA 23, 25 (2004)

³⁵ *Id.*

³⁶ Drew L. Kershen, *Article 7: Documents of Title – 2001 Developments*, 57 Bus. L. 1733, 1734 n. 8 (2002).

³⁷ The bill of lading serves three purposes: (1) receipt for the goods, (2) evidences the contract of carriage, and (3) document of title.

466 (L. Div. 1983). A transferee of a document of title not duly negotiated acquires only the title and rights that the transferor had the authority to convey. Revised Article 7-504(a).

Revised Article 7 provides for both tangible and electronic documents of title to establish a legal framework for the development of the electronic marketplace. Revised Article 7 derives its rules for electronic documents of title from the Uniform Electronic Transactions Act § 16 on transferable records and from Article 9-105 concerning control of electronic chattel paper. Revised Article 7-106 sets forth the criteria for electronic documents of title substituting the concept of control for endorsement and possession of a tangible instrument. As Henning and Rusch state, “Revised Article 7 adopts the concept of control for electronic documents of title as the functional equivalent of possession and indorsement of a tangible document of title.”³⁸ The system employed must reliably establish that the person to whom the electronic document of title was issued or transferred has control of that document. Third party registration systems satisfy this requirement although Revised Article 7 does not preclude the development of different systems. The system simply must meet the requirements of §7-106. In addition, Revised Article 7 allows parties to reissue the document of title from one medium to another, that is, an entitled person holding an electronic document of title can request a substitute tangible document and vice-versa. In such cases, the person entitled under original document surrenders possession and warrants that he or she was the person entitled under the original document of title. The substitute document also bears a legend stating that it was issued in substitution of the original.

In recognition of the fact that other law regulates documents of title, Revised Article 7 has amended existing law “in light of state, federal and international developments.” *Prefatory Note* to Official Text (2003). For example, revised Article 7 has deleted obsolete references to tariffs, classifications and regulations that no longer track modern commercial practice. Documents of title may interface with federal and international law. For example, bills of lading are governed by the United States enactment of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315, which is a statutory codification, with slight variations of the “Hague Rules” and the Federal Bill of Lading Act (Pomerene Act).³⁹

Revised Article 7 also deals with important other issues, for example: (1) permissible contractual limitations of liability, though the duty of care is not subject to party autonomy, (2) negotiation and transfer, (3) lien of the carrier or warehousemen on the goods and right to enforce lien in a commercially reasonable manner, (4) altered, lost and stolen instruments and (5) the effects on holders resulting from insolvency of the bailee. Revised Article 7 codifies rules for documents of title, very few mandatory, within the context of contract law. It does not deal with tort liability of bailees and does not deal with criminal liability for conversion of goods.

Adoption of Revised Article 7 requires adoption of conforming amendments to

³⁸ William H. Henning and Linda J. Rusch, *supra* note 5 at 25.

³⁹ 49 U.S.C. §§ 80101-80116.

Articles 1 (General Provisions), 2 (Sales), 2A (Leases), 4 (Bank Deposits and Collections), 5 (Letters of Credit), 8 (Investment Securities) and 9 (Secured Transactions). Where applicable, the appendix of conforming amendments contains alternatives depending upon whether the state has adopted recent revisions of other code articles.

Existing and Revised Article 7: Main Differences

The language of the Official Text is gender neutral and is clearer than existing law. In addition, the provisions have been extensively rewritten. The Official Text also contains several new provisions, dealing mainly with electronic documents of title. As already noted, these changes accommodate the emergence of electronic documents of title and are technologically neutral to permit marketplace development. The Revised Article 7 adopts the new definition of good faith –“honesty in fact and observance of reasonable commercial standards of fair dealing.” This change is not revolutionary and reflects the standard of “good faith” adopted in most countries with advanced legal systems. These changes are explained below.

Revised 7-102 (definitions) is an example of a provision with new subsections not contained in New Jersey law that could appear to be substantive changes. The following subsections were added: “carrier” in 7-102(a)(2); “good faith” in 7-102(a)(6); “person entitled under the document” in 7-102(a)(9) [moved from 7-403]; “record” in 7-102(a)(10); “sign” in 7-102(a)(11) and “shipper” in 7-102(a)(12). Revised Article 7 deletes the definition of “document of title” found in existing New Jersey law at 7-102(1)(e). That definition has been moved to Revised Article 1. With the exception of the definition of “good faith,” the effects of which have already been discussed, the substantive differences are insignificant. The terms “shipper” and “carrier” are clarifications; the terms “record” and “sign” are accommodations to electronic systems.

Revised 7-103 “Relation of Article to Treaty or Statute” illustrates a difference based upon style changes to language and additional references to E-SIGN and UETA that are germane to electronic document of title systems. While a comparison shows that the Revised section and existing law differ substantially in textual language, there is nothing objectionable about the changes. In effect, they state the obvious - Article 7 is subject to treaties, Federal law and relevant state law and regulation. Article 7 does not alter law imposing requirements on the form or content of documents of title; Revised Article 7 modifies E-Sign and, if there is a conflict between UETA and Revised Article 7, the latter prevails. The latter is simply an expression of the principle *lex specialis*.

Revised 7-104 “Negotiable and Nonnegotiable Document of Title” illustrates a reworded provision containing new subsections but does not result in important substantive changes. This section lays out the basic rules: a negotiable document of title is one by whose terms the goods are to be delivered to bearer or to order of a named person. The same rule is found in existing law. A document of title that does not meet these requirements is nonnegotiable. The default rule is that a document of title is not

negotiable unless it meets the foregoing prerequisites. Subsection (c) of Revised Article 7-104, derived from section 3-104(d), provides that an issuer may place a legend on a document that it is not negotiable, even if it otherwise meets the requirements of negotiability. In that case, it is not negotiable. Once issued, negotiable documents cannot be made nonnegotiable. Likewise, nonnegotiable documents of title cannot be made negotiable by placing a stamp that the document is negotiable.

Revised Articles 7-105 “Reissuance in Alternative Medium” and 7-106 “Control of Electronic Document of Title” are new articles not found in existing law as they pertain to the phenomenon of electronic documents of title, a format that did not exist when the original article was adopted. They do not raise controversial issues. The rules of Revised 7-106 to establish control derive from UETA section 16. Control of an electronic document is a substitute for possession and endorsement of a tangible document of title. A person with an electronic document of title transfers the document by voluntarily relinquishing control of the document. These transactions are likely to occur in third part registry systems that maintain a single, authoritative, and unalterable, copy of the document of title. A record consisting of information stored in an electronic medium evidences the electronic document of title.

Revised 7-501 and 502 continue the rules applicable to due negotiation and its effects, except that they comprehend electronic documents of title. In general, a transferee may obtain greater rights than its transferor if the purchase is made for value, in good faith and without notice of defenses or claims unless the negotiation is not in the regular course of business.

Part 7 of Revised Article 7 contains no counterpart in existing law. Part 7 contains miscellaneous provisions dealing with when the revision becomes applicable to a transaction, a statement that the former law is repealed, and a savings clause. In addition, Revised Article 7 contains several conforming amendments to other statutes.

New Jersey Law

New Jersey does have an extensive history of litigation under existing Article 7. The most litigated provision of Article 7 is N.J.S.A. 12A:7-204 entitled “Duty of Care; contractual limitation of warehouseman’s liability”. In the context of consumer transactions, two recent cases have refused to enforce the warehouseman’s limitation of liability contained in the storage contract: *Jasphy v. Osinsky*, 364 N.J. Super. 13 (App. Div. 2003)(finding that limitation of liability to \$1 per garment was unconscionable when furs valued at approximately \$18,000 were destroyed in fire due to negligence of the warehouseman), and *Gonzalez v. A-1 Self-Storage, Inc.*, 350 N.J. Super. 403 (Law Div. 2000)(finding unconscionable a limitation of liability clause in storage contract when personal property was destroyed by water leak due to negligence of warehouseman). Both *Jasphy* and *Gonzalez* rely on theories of contract of adhesion, inequality of bargaining power and lack of effective notice of the limitation clause. In short, in a consumer transaction, unless the warehouseman puts the consumer specifically on notice of the limitation clause, offers and opportunity to declare a higher value and insurance, the limitation of liability is likely to be found unenforceable as unconscionable.

Revised Article 7-204 contains style but not substantive changes from the existing New Jersey statute. However, enactment should not result in a difference in case law opinion. In consumer transactions, there is nothing in the revision to compel New Jersey courts to interpret the provisions differently. The New Jersey judiciary will continue to maintain that a warehouseman may not exclude its duty of care and will continue to police limitation of liability clauses to determine whether they violate public policy to protect the inferior party. The case law under existing Article 7-204 is an extension of New Jersey's *Henningsen v. Bloomfield Motors*, 32 N.J. 358 (1960)(finding that limitations on liability clauses are generally unenforceable unless bargained for).

Conclusion

The adoption of Revised Article 7 in fifteen states indicates that there is a growing trend among the states to adopt this Revised Article. The literature does not indicate the presence of substantial opposition to its provisions. Because the revision uses modern statutory language, has updated provisions to reflect commercial practice, interfaces with state federal and international regulation and provides explicit rules for electronic documents of title, it is recommended that New Jersey enact Revised Article 7.

It also is recommended that New Jersey adopt Revised Article 1 (excluding the new choice of law clause, but including the new definition of good faith) and the necessary conforming amendments to other articles.⁴⁰ As to the former, the Commission recommends retention of the existing rule, requiring that the transaction bear a reasonable relationship to the legal regime selected by the parties, as now codified in § 1-105. The adoption of the two articles is logical as Revised Article 7 incorporates revisions made to Revised Article 1. Adoption of Revised Article 1 and 7 require conforming amendments to other parts of the Uniform Commercial Code.

Attachment

The attachment contains the entire text of Revised Article 7 containing amendments required by Revised Article 1. Brackets indicate material to be omitted from New Jersey text.

⁴⁰ Revised Article 7 includes the expanded definition of good faith, that is, "observance of reasonable commercial standards of fair dealing." The only article that does not contain that definition is Article 5. Opposition to the expanded definition of good faith in Revised Article 1 is not based on sound arguments.



STATE OF NEW JERSEY

NJLR C

NEW JERSEY LAW REVISION COMMISSION

TENTATIVE REPORT

Relating to

MEDICAL PEER REVIEW PRIVILEGE

FEBRUARY 2005

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 MUST BE RECEIVED BY THE COMMISSION NOT LATER
THAN JUNE 30, 2005.

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

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MEDICAL PEER REVIEW - TENTATIVE REPORT

Appendix F

Background

Medical peer review is a process whereby doctors evaluate the quality of work done by their colleagues, in order to determine compliance with accepted health care standards. This self-regulatory procedure provides quality assurance for the medical community by fostering standardization of appropriate medical procedures and by policing caregivers who could pose risks to patients. The rationale for the process is efficiency: working doctors are best situated to judge the competence of other working doctors because they regularly see each others' work and possess the relevant expertise to evaluate it.

A peer review committee typically performs two functions: the initial process of credentialing (reviewing a doctor's qualifications and recommending whether or not the doctor should be granted privileges at the hospital), and ongoing review of a doctor's work within the hospital. Peer review is one of the chief means of monitoring the quality of doctors' work. Ideally, effective peer review should decrease the number of medical malpractice events and improve overall health care. Doctors, courts and critics recognize the review process as an efficient means of professional self-regulation. "[P]eer review has become widely accepted as the primary means to weed out low quality physicians and to identify and offer assistance to physicians whose skills need to be enhanced in certain areas." Susan O. Scheutzow, "State Medical Peer Review: High Cost But No Benefit – Is it Time for a Change?", 25 *Am. J. L. & Med.* 7, 15 (1999).

Statutory provisions and regulations require the use of peer review. All states have statutes mandating minimum monitoring for hospitals seeking state licensure. The federal government additionally requires that new applicants be credentialed and staff members be regularly evaluated for a hospital to be in the Medicare program. Despite mandates and altruistic motivations, doctors often are reluctant to take part in peer review. Jeanne Darricades, "Medical Peer Review: How is it Protected by the Health Care Quality Improvement Act of 1986?", 18 *J. Contemp. L.* 263, 270 (1992). Their reluctance derives from hesitation to criticize their peers, lost pay for time spent in review, fear of losing patient referrals and most significantly, possible legal repercussions from adverse decisions, especially discovery and liability aspects of lawsuits. These disincentives chill candor and diminish effective peer review.

New Jersey is the only state that does not statutorily protect the confidentiality of hospital peer review committee materials. It was suggested to the Commission that this lack of protection inhibits full disclosure and discussion of medical failings and ultimately runs counter to the best interests of patients. This issue was brought to the attention of the Commission by a New Jersey physician, and the creation of statutory protection for peer review was supported by the New Jersey Hospital Association. Based upon Staff's preliminary research, the Commission accepted the issue as a project at its April 22, 2004 meeting.

At its January 20, 2005 meeting, the New Jersey Law Revision Commission voted to issue a Tentative Report relating to medical peer review. The Commission does

not recommend the adoption of a statute protecting the confidentiality of medical peer review.

Current law

Peer review of hospital physicians was established to ensure high quality care by monitoring untoward results and deviations from standard patient treatment. Individual hospitals' bylaws establish procedures for conducting peer reviews.

To counter doctors' reluctance to engage in peer review, most State legislatures and Congress have enacted laws that protect peer reviewers from liability, and their work product from discovery. New Jersey protects peer reviewers from liability but does not have a statute that protects work product from discovery. In the struggle between litigation and peer review, statutory privileges and immunities generally are accorded the preferred status. George E. Newton II, Comment, "Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection", 52 *Ala. L. Rev.* 723, 728 (2001).

Statutory peer review protection comprises three closely related kinds of laws: 1) those granting immunity from lawsuits to persons and institutions; 2) those declaring peer review work products to be privileged and inadmissible in court; and 3) those allowing information related to peer review to remain confidential.

The first type of protection, immunity, exists to diminish an individual doctor's or an institution's apprehension of facing damages in cases involving defamation, antitrust or negligent credentialing claims. The majority of states provide peer reviewers immunity from civil liability. The strongest statutes give immunity to all peer review committee members, institutions and persons furnishing information to the committee; weaker statutes give immunity for only a few or specified people.

The second type of protection is the work product privilege which prevents information associated with the peer review process from discovery. Its premise is the belief that doctors are loath to candidly discuss a colleague's shortcomings if their statements later could be discovered in judicial proceedings. The typical state statute protects from discovery a range of documents pertaining to the committee's meetings. The statutes differ as to which documents are protected. The Kansas statute exemplifies those laws that very specifically limit protected documents: "The reports, statements, memorandum, [sic] proceedings, findings and other records of peer review committees or officers." *Kan. Stat. Ann. Sect.* 65-4950 (1993). Only records of the committees, not records given to the committees, receive protection under the statute. Similarly, the District of Columbia law allows discovery of materials produced out of sight of the peer review process. *D.C. Code Sect.* 32-505 (1981). At the other end of the continuum is Arizona law which protects information considered by the entity acting in a quality assurance process and which treats the records of such consideration as confidential. *Ariz. Rev. Stat. Sect.* 36-2403 (1994).

The third protection, the confidentiality requirement, creates an affirmative duty incumbent on committee members to keep information involving peer review to themselves. Miscellaneous exceptions to peer review protection may occur regarding: 1) the fact that peer review took place, 2) whether licensing boards have access to peer review records, 3) waiver through release of peer review business to entities in an integrated health care delivery system (for example, a part of a centralized credentialing program), 4) applicability to criminal proceedings, and 5) court review and use of a balancing test. Elise Dunitz Brennan, Esq., Chair, Credentialing and Peer Review Substantive Law Committee American Health Lawyers Association, Introduction, 12-15, 50-State Survey on Peer Review Privilege, Spring, 1998. Note that Congress extends its own kind of protection (immunity) to medical review participants and to their work product through the Health Care Quality Improvement Act of 1986 (“HCQIA”). The Act attempted to address national components of the health care quality assurance problem. Charity Scott, “Medical Peer Review, Antitrust, and the Effect of Statutory Reform”, 50 *Md. L. Rev.* 316, 325 (1991).

For years New Jersey hospitals have had peer review committees composed of physicians (and sometimes a person from the Medical Records Department and a nursing supervisor). Patient charts were distributed and studied. If a chart indicated that a particular doctor had deviated from standard care in treating a patient, the doctor was advised and the committee also told the hospital’s Medical Executive Committee (composed of the chiefs of all departments and usually an Administration representative, such as a Trustee).

The New Jersey State Department of Health requires peer review procedures as a prerequisite for licensing a hospital. *N.J.A.C.* 8:43-G-2.12. The necessary elements of the program are set out in *N.J.A.C.* 8:43-G-27.5 and include monitoring patient care, evaluation of patient care, effective corrective actions, procedural changes, educational activities, etc. In *Reyes v. Meadowlands Hosp. Med. Ctr.*, 355 *N.J. Super.* 226, 233 (L. Div. 2001), however, the Court said that the “Code makes no provision for the results of such a process to be privileged. Therefore, those participating do so without any assurance of confidentiality.” New Jersey Evidence Rule 500 is the “General Rule” concerning privileges. Comment 3 to that Rule states that:

the New Jersey Supreme Court has expressly declined to adopt “as a full privilege, either qualified or absolute” the protections sought for self-critical analysis materials. *Payton v. New Jersey Turnpike Authority*, 148 *N.J.* 524, 545 (1997). Instead, the Court said that the concerns arising from the disclosure of “evaluative and deliberative materials,” while “deserving of substantial consideration,” could be amply accommodated by a case-by-case weighing process. *Id.* 548-549.

With the advent of Medicare, “utilization review committees” became necessary for hospitals to qualify under the Social Security Act and to take part in state and federally funded programs. Utilization review committees attempt to find out whether

patients' treatments were necessary and suitable.

Unlike its treatment of peer review committees, New Jersey currently protects, by statute, "[i]nformation and data secured by and in the possession of utilization review committees established by any certified hospital or extended care facility in the performance of their duties." *N.J.S. 2A:84A-22.8(a)*. The Statement accompanying Senate Bill 559 (L. 1970, c. 313) explained that the New Jersey statute, in extending protection to committee members, encourages "willing participation" and effectively "implement[s] the provisions of Medicare and other health care measures." New Jersey Rule of Evidence 507 adopts the language of *N.J.S. 2A:84A-22.8* verbatim. Rule commentary makes it clear, however, that "The protection afforded by the statute cannot be extended by implication to the records of other hospital committees...*There is no comparable statutory privilege for the information and data collected by a quality assurance or peer review committee....*" [emphasis added]

One additional New Jersey statute needs to be distinguished from those dealing with peer review. The Patient Safety Act, *N.J.S. 26:2H-12.23* through 12.25, requires health care facilities to report to the Department of Health and Senior Services "every serious preventable adverse event that occurs in that facility" (*N.J.S. 26:2H-12.25(c)*) and encourages health care professionals or other employees of a health care facility "to make anonymous reports to the department ... regarding near-misses, preventable events and adverse events that are otherwise not subject to mandatory reporting (*N.J.S. 26:2H-12.25(e)(1)*). This statute is a variation of many states' laws that address "medical errors." The statute outlines in detail the protections afforded communicants and documents, and concludes by stating (in *N.J.S. 26:2H-12.25(k)*) that "Nothing in this act shall be construed to increase or decrease the discoverability, in accordance with *Christy v. Salem*, [366 *N.J. Super.* 535 (App. Div. 2004)], of any documents, materials or information if obtained from any source or context other than those specified in this act."

Christy v. Salem, decided in February 2004, analyzes earlier case law reasoning regarding peer review confidentiality. The plaintiff in *Christy* maintained that hospitals should not be entitled to maintain absolutely confidential peer evaluations. The court decided that plaintiff was entitled to information in one specific line of the report that might supply a critical element in his case, and also to some purely factual material. The court held that plaintiff was not entitled to the committee's "opinions, analysis, and findings of fact." These "evaluative and deliberative materials" need not be disclosed. 366 *N.J. Super.* at 542.

Commission Deliberations

The Commission discussed the basic principles of peer review; federal and state peer review protections (immunity, privilege and confidentiality); and the law pertaining to self-critical analysis as applied by New Jersey courts. The Commission considered relevant statutes of other states, particularly those of Missouri, Ohio, Alabama, Arizona and Massachusetts. To understand how the statutes work in practice, Staff attempted to contact two hospitals in each state and speak to their legal counsel or Risk Management

Manager. Staff asked three questions regarding the extent of the protection afforded peer review materials. The responses, from attorneys and Risk Management Managers, were substantially uniform. 1) A government agency cannot obtain peer review committee materials work product from discovery; 2) A physician on the peer review committee or the committee as a whole never wishes to waive the protection; 3) Physicians would be more reluctant to discuss their peers without the protections afforded peer review materials. Most people Staff spoke with expressed surprise that New Jersey did not offer peer review materials statutory protection from disclosure and said they believe that the privilege is essential.

The Commission reviewed two drafts of a statute which proposed that “The evaluative and deliberative materials of hospital peer review committees concerning the health care provided any patient are privileged and not subject to discovery.” The Commission also considered the impact of the federal Health Insurance Portability and Accountability Act (HIPAA) upon New Jersey law.

Recommendation

After months of deliberation and drafting the Commission decided not to recommend the enactment of a statute protecting peer review materials.

The Commission decided that under case law, peer review materials are afforded sufficient protection. Deliberative materials are not disclosed. Even factual material presented to a peer review committee is not subject to discovery without a compelling reason. In attempting to draft a privilege statute, the Commission encountered substantial difficulty deciding what circumstances would justify exceptions to the privilege. The Commission found that exceptions were very fact-sensitive and would be decided better through the exercise of judicial discretion than with a more rigid statutory rule. The Commission decided that even codification of the current case-law rules could negatively affect the balancing process which the courts now employ on a case by case basis. The Commission also based its decision on reluctance to expand privileges. Finally, while recognizing that New Jersey is alone in declining to provide protection for peer review, the Commission observed that the most recent case law in this area seemed to very carefully weigh and consider the competing interests, and provide the same kind of protection that a proposed statute would provide.



STATE OF NEW JERSEY

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NEW JERSEY LAW REVISION COMMISSION

TENTATIVE REPORT

relating to

TITLE 1 - ACTS, LAWS AND STATUTES

APRIL, 2005

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 MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN AUGUST 1, 2005.

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

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Introduction

This draft of revised Title 1 retains most of the substance of the current provisions, but simplifies and clarifies the language. Oddities of legislative diction and verb forms were eliminated. The Commission chose not to make recommendations concerning the Legislative Commissions.

Certain provisions contain significant changes. Sections 5-1 and 5-2 contain clarifications regarding preparation of laws after enactment. Current provisions focus on the printing of the annual volume of laws. While that publication remains important, the legislative public internet site has become equally important in publication of the law. Revision is needed to reflect that change.

Section 5-3, dealing with the authority to correct statutes, also incorporates significant change. The section clarifies that, in accord with current practice, corrections can be made at any time. However, it also provides for a system to make and maintain a record of corrections; that provision is new. Section 5-4 gives the Office of Legislative Services the authority to recompile statutes. The concept is new, although there have been instances in the past when statutes were assigned new compilation numbers. The proposed section requires concurrence by the Attorney General (as in statutory corrections) and provides for a system of recording that a statute has been recompiled.

The last significant change is the creation of a simplified system for citing statutes. See, Section 1-7. The current system requires three different forms of citation depending on when and in what form the statute was enacted. No policy considerations support the current system; its complications are merely a matter of history.

Sections that were specific to the implementation of the Revised Statutes of 1937 or of Title 2A of the statutes (effective 1952) and that have no continuing importance have been deleted.

The sections concerning this Commission have been left unchanged. It seemed inappropriate to make any recommendation for changes that affect the Commission directly. The section on the Uniform Law Commissioners has also been left alone. It is one of those sections in limbo, saved from repeal but not compiled. Perhaps the Uniform Law on Uniform Law Commissioners should be considered.

Provisions Relating to Statutes Generally

1-1. Words and phrases defined

Unless it is otherwise expressly provided or there is something in the subject or context repugnant to the meaning, the following words and phrases, when used in any statute, shall have the meaning given to them by this section.

Affirmation; affirmed. See "Oath; sworn," infra, this section.

"Assessor" when used in relation to the assessment of taxes or water rents or other public assessments includes all officers, boards or commissions charged with the duty of making assessments unless a particular officer, board or commission is specified.

"Census" when used with reference to the population of this State, or of any subdivision, means the latest Federal census effective within this State.

"Collector" when used in relation to the collection of taxes or water rents or other public assessments, includes all officers charged with the duty of collecting such taxes, water rents or assessments, unless a particular officer is specified.

"Folio" or "sheet" consists of 100 words, and in all cases where an entry of any writing or copy is to be paid for, the sheet or folio shall consist of 100 words.

"General election" means the annual election held on the first Tuesday after the first Monday in November. Any statute that provides that a public officer be elected, or a public question be voted on at an election at which members of the General Assembly are elected, or words to that effect, shall mean "at a general election."

Month; year. The word "month" means a calendar month, and the word "year" means a calendar year.

"Municipality and municipal corporation" include cities, towns, townships, villages and boroughs, and any municipality governed by a board of commissioners or an improvement commission.

Oath; sworn. The word "oath" includes "affirmation" and the word "sworn" includes "affirmed."

"Person" includes a corporation, association, partnership or other entity, as well as a natural person, unless restricted by the context to a natural person or specifically restricted as to some entities.

"Personal property" includes goods and chattels, rights and credits, moneys and effects, evidences of debt, choses in action and all written instruments by which any right to, interest in, or lien or encumbrance upon, property or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, in whole or in part, and everything which may be the subject of ownership except real property as defined in this section.

"Population" means the population as shown by the latest Federal census effective within this State, and shall be construed as synonymous with "inhabitants."

"Property" and "other property," unless limited by the context to either real or personal property, includes both real and personal property.

"Real estate" and "real property," include lands, tenements and hereditaments and all rights thereto and interests therein.

"Registered mail" includes "certified mail" and any commercial courier service that provides similar services.

"Revision law" means a statute that is expressed in its title or body to be a revision of any part of the statutory law.

"State" includes any State, territory or possession of the United States and the District of Columbia.

"Taxing district" when used in a law relating to the assessment or collection of taxes, assessments or water rates or water rents, include every political division of the State, less than a county, whose inhabitants, governing body or officers have the power to levy taxes, assessments or rates.

"Term of court" means a stated session or stated sessions of that court.

"United States" includes every State, territory and possession of the United States, including the District of Columbia.

Source: 1:1-2; 1:1-25.

Comment

Most of this section is substantively identical with its source. However, the definitions of "sheet," "ship" and "territory" have been deleted as unnecessary and the definitions of "magistrate" and "Revised Statutes" have been deleted as anachronistic. The definition of "term of court" is derived from 1:1-25. The provision on number and gender has been moved to a separate section.

1-1½. Number; Gender

Number; gender. When a statute uses words importing the singular number or masculine gender, it shall include and apply to plural persons or things and to females and corporate bodies.

Source: 1:1-2.

Comment

This section is substantively identical with its source.

1-2. Effect of definitions on treaties, compacts, or agreements

Definitions of words and phrases applicable to statutes generally shall not be construed to limit or enlarge any provision in any treaty, compact or agreement between this State and any other state or the United States, including agreements resulting from reciprocal legislation.

Source: 1:1-3.

Comment

This section is substantially identical to 1:1-3.

1-3. Partial unconstitutionality

If any part of a statute is determined by a court to be unconstitutional, invalid or inoperative the statute shall be enforced to the extent that it is not unconstitutional, invalid or inoperative, and the determination shall not invalidate or make ineffectual any other statute.

Source: 1:1-10.

Comment

This section is substantially identical to 1:1-10.

1-4. Seal; sealed

Every instrument to which it is required or permitted by law that a seal be attached shall be deemed to be sealed when a mark or device indicating a seal is printed or marked on it or affixed to it. No instrument shall be questioned for lack of a wax seal. This section shall apply to sealings by corporations and individuals; but any sealing required or permitted by law of a public officer, or body having an official seal shall be by the impress of that official seal.

Source: 1:1-2.1.

Comment

Though simplified in language, this section is substantially identical to 1:1-2.1. The section may be unnecessary but is included as an act of caution.

1-5. Time; standard time

The standard time of this State shall be Eastern Standard Time, the time of the seventy-fifth meridian west from Greenwich, except that the standard time of this State shall be Eastern Daylight Time, 1 hour in advance of this prescribed time while daylight time is in effect.

Source: 1:1-2.3.

Comment

This section is substantially identical to 1:1-2.3 except that the specification of a particular period during which daylight time is in effect has been deleted.

1-6. Notice or communication required to be sent, taken, or transmitted out of United States; Acts of Congress to control

If there is a legal requirement that notice be sent or an action be taken outside of the United States, and federal law prohibits the notice or action or requires license or

consent as a condition for it, the requirement for the notice or action shall be dispensed with.

Source: 1:1-2.5.

Comment

This section is substantially similar to 1:1-2.5. That section was enacted in 1942 to deal with problems caused by World War II. It is retained because it may have continuing importance. The source statute dispensed with notice outside the United States that was prerequisite for “the granting of any relief, the holding of any meeting or the doing of anything under or pursuant to any such statute, law, ordinance, rule, regulation, requirement, practice, order, judgment, decree, charter, certificate of incorporation, by-law, resolution, contract, agreement, or undertaking.” This section dispenses with any notice or action outside the United States that is prevented by federal law.

1-7. Citation of statutes.

a. Every statute that has been assigned a compilation number and compiled within the New Jersey Statutes, whether the number was assigned as part of the Revised Statutes, or as part of a revision law, or by the Office of Legislative Services, may be cited for any purpose as N.J.S. followed by the compilation number. Any other statute may be cited by its year and chapter number.

b. The legislation contained within any title, subtitle, part, chapter, article, section or group of sections of the New Jersey Statutes may be cited by reference to the title, subtitle, part, chapter, article, section or group of sections. References to more than one title, subtitle, chapter, article, section or other division of statutes in series, shall be taken to include both the first and last numbers referred to.

c. If any statute or part of a statute, which is repealed or superseded by the enactment of a later statute, is re-enacted in substance in the later statute, a reference in any other statute to the repealed or superseded statute shall be deemed to be a reference to the part of the later statute that corresponds in substance to the repealed or superseded statute.

Source: 1:1-5.1; 1:1-7; 1:1-8; 1:1-9.

Comment

Subsection (a) is derived from 1:1-5.1 but has been changed to allow citation to any compiled in the form N.J.S. _____. Now, statutes in the 1937 Revised Statutes are referred to as R.S. ____, certain statutes enacted as revision laws as N.J.S. ____, and other statutes as P.L. ____, c. _____. The complication of this system makes citation to statutes in legislation more difficult than it needs to be and obscure to the general public. Mistakes in citation have caused mistakes in listing the sections to be repealed. The complication of the system has caused the courts to ignore the official system and require citations to the New Jersey Statutes Annotated, a proprietary publication. The only reason for the current system is historical; its distinctions serve no substantive purpose.

Subsection (b) is an amalgam of 1:1-7 and 1:1-8. However, the changes in subsection (a) make this subsection far more important. Under the current system, if one cites N.J.S. 2C, Chapter 20, the citation would not be held to include such sections as 2C:20-1.1, -2.1, -3.1, -7.1, -11.1, and -23 through -37 which were enacted after the criminal code and technically are not to be cited in the form N.J.S. _____. As a result, caution is now necessary in using cumulative citations. With the abolition of the trifurcated system, the use of cumulative citations becomes simpler and safer.

Subsection (c) is a simplification of 1:1-9.

1-8. Acts done, rights acquired, etc., under repealed acts not affected by repeal

The repeal, by the enactment of

- a. the Revised Statutes,
- b. the New Jersey Statutes, or
- c. any other revision law,

shall not affect or invalidate any act done or right or limitation vested or accrued, or any bonds issued, or taxes or assessments levied or imposed, or any tax sale had, or invalidate, limit, or affect any right, title, estate, privilege, immunity or power or conveyance of either real or personal property, acquired, had, made under, or validated by, the statutory provision that was repealed.

Source: 1:1-11.

Comment

Though simplified in language, this section is substantially identical to 1:1-11.

Construction of Statutes

2-1. General rules of construction

In construing statutes of this State, both civil and criminal, words and phrases shall be construed with their context, and, unless inconsistent with the manifest intent of the Legislature or unless another or different meaning is expressly indicated, shall be given their generally accepted meaning, according to the customary usage of the language. Technical words and phrases, and words and phrases having a technical or special meaning in the law shall be construed in accordance with that meaning.

Source: 1:1-1.

Comment

This section is substantially identical to 1:1-1.

2-2. Repeal of repealing statute

The repeal of a statutory provision that repealed an earlier statute or part of a statute shall not of itself revive the earlier statute or part.

Source: 1:1-3.2.

Comment

This section is substantially identical to 1:1-3.2.

2-3. Reference to revised statute

A reference in a statute to another statute that is revised by a revision law shall be construed to be a reference to the provisions of the revision law corresponding in substance to, or superseding, the statute revised.

Source: 1:1-3.3.

Comment

This section is substantially identical to 1:1-3.3.

2-4. Construction as continuation of heretofore existing laws

The provisions of a revision law not inconsistent with those of the laws revised shall be construed as a continuation of the prior laws.

Source: 1:1-4.

Comment

This section is substantially identical to 1:1-4.

2-5. Classification and arrangement; effect on construction

The classification and arrangement of the sections of the Revised Statutes of 1937 and the classification and arrangement of statutes compiled by the Office of Legislative Services have been made for the purpose of convenience, reference and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn from them.

Source: 1:1-5.

Comment

The portion of the section that refers to the Revised Statutes is substantially identical to 1:1-5. The section has been expanded to apply the same rule to those sections that are compiled by the Office of Legislative Services. In both cases, since the Legislature did not determine the arrangement of statutory sections, the arrangement is no indication of legislative intent.

2-6. Outlines, analyses and head notes not part of statutes

In the interpretation of a statute, an outline or analysis of the contents of a title, chapter or article, a cross reference or cross reference note and a head note or source note to a section shall not be deemed to be a part of the statute.

Source: 1:1-6.

Comment

This section is substantially identical to 1:1-6.

2-7. Construction and effect of statutes compiled or saved from repeal

Statutes and parts of statutes included in the Revised Statutes designated as "saved from repeal" shall have effect only to the extent that they were effective at the time the Revised Statutes took effect. Such statutes or parts of statutes shall not be deemed repealed except insofar as they are inconsistent with the provisions of the Revised Statutes but, insofar as they may have been repealed or superseded by legislation subsequent to their enactment, they shall remain superseded or repealed.

Source: 1:1-12.

Comment

Though simplified in language, this section is substantially identical to 1:1-13.

Technical Matters Relating to Statutes

3-1. Enacting clause of laws; numbering sections; engrossing of bills

All laws of this State shall begin in the following style: "Be it enacted by the Senate and General Assembly of the State of New Jersey" after which shall follow the sections numbered consecutively 1, 2, 3, et cetera, in Arabic numerals, each number being followed immediately by the significant words of the section, without the prefix of the word "that" or the words "and be it enacted" , or any other formal prefix whatsoever. The Legislature shall cause all bills to be engrossed in conformity to the provisions of this section and NJS 1:2-2.

Source: 1:2-1.

Comment

This section is substantially identical to 1:2-1.

3-2. Chapters designated by Arabic numerals

Arabic numerals shall be used to designate the numbers of the chapters of the laws in the order in which they are enacted.

Source: 1:2-2.

Comment

This section is identical to 1:2-2.

3-3. Effective date of public acts

A public law shall go into effect on the fourth day of July after its passage, unless otherwise specially provided in the law.

Source: 1:2-3.

Comment

This section is substantially identical to 1:2-3.

3-4. Format of bills, joint resolutions for Governor's signature.

Every bill and every joint resolution that has passed the Legislature shall be presented to the Governor in the same text as that in which it passed the Legislature. A bill or joint resolution in which material enclosed in bold-faced brackets is included shall, if it becomes law, be construed as though the material so enclosed was omitted from the bill. A legend shall be affixed to the bottom of the first page of the bill or joint resolution indicating that material so enclosed is intended to be omitted from the bill or joint resolution, when it becomes law.

Source: 1:2-3.1.

Comment

This section is substantially identical to the first part of 1:2-3.1. The material on summaries of appropriations has been deleted as unnecessary. That subject is covered by a later statute, 1:2-3.2, which has been retained.

3-5. Display of summaries of appropriations

Unless it is otherwise expressly provided, the following display, or a substantially similar display, of summaries of appropriations as may appear within an appropriations act shall not be deemed to be part of that act but shall be for the purpose of displaying summaries of the items of appropriations made elsewhere within that act:

Summary of Appropriations - Department of [Name of Department]

Appropriations by Category:

Direct State Services.....\$(subtotal)

Grants-in-Aid..... \$(subtotal)

State Aid.....\$(subtotal)

Appropriations by Fund:

General Fund.....\$(subtotal)

Property Tax Relief Fund.....\$(subtotal)

Casino Revenue Fund.....\$(subtotal)

Source: 1:2-3.2.

Comment

This section is identical to 1:2-3.2.

Enacted Bills and Resolutions

4-1. Delivery to Governor; signing by Governor and delivery to Secretary of State

On the passage of a bill or the adoption of a joint resolution by both Houses of the Legislature, the bill or resolution shall be delivered to the Governor.

If the Governor approves the bill or joint resolution, the Governor shall sign it and deliver it to the Secretary of State to be filed. The laws and joint resolutions of each session of the Legislature shall be kept separately according to the year in which they were passed. Bills and joint resolutions shall be kept safely in the Secretary of State's Office and not allowed to be removed from there for any purpose.

Source: 1:2-5.

Comment

This section has been shortened and simplified but is substantially identical to 1:2-5.

4-2. Bills not signed or vetoed by Governor; filing by Secretary of State

If a bill passes both Houses of the Legislature, and is presented to the Governor pursuant to Article V, Section I, paragraph 14, of the Constitution of this State, and the bill is not returned to the house in which it originated within the time limited by the Constitution, and as a result the bill has become a law, the Governor shall sign a certificate on the bill of the time the bill was presented and deliver the bill to the Secretary of State who shall endorse and sign a certificate on it of the time the bill was delivered and file the bill in the same manner as the other laws of the same session of the Legislature.

Source: 1:2-6.

Comment

Though simplified this section is substantially identical to 1:2-6.

4-3. Bills passed over Governor's veto; filing by Secretary of State

If a bill that is passed by both Houses of the Legislature and presented to the Governor, returned to the House in which it originated by the Governor with objections, and shall nevertheless afterwards become a law in the manner prescribed by the Constitution, the presiding officer of the House in which the bill originated shall deliver it to the Secretary of State, who shall file the bill in the same manner as the other laws of the same session of the Legislature.

Source: 1:2-7.

Comment

Though simplified this section is substantially identical to 1:2-7.

4-4. Certified copies of filed bills and resolutions; use as evidence

The Secretary of State shall give copies of any law or joint resolution filed pursuant to this title to any person requesting them. The copies, when certified by the Secretary of State to be true copies, shall be received in evidence in any court of the State, and shall have the same effect as if the originals were produced. The Secretary of State shall charge the fee set by law for furnishing copies.

Source: 1:2-8.

Comment

Though simplified this section is substantially identical to 1:2-8.

4-5. Printed laws as evidence

Laws printed by authority of this State shall be received in evidence before any court in this State.

Source: 1:2-4.

Comment

This section is identical to 1:2-4.

Publication

5-1. Preparation of laws.

a. Every bill enacted into law during the an annual session of a Legislature shall be given a chapter number as a law of that legislative year in the form: L.(year of law), ch.(chapter number of law). Chapter numbers shall be assigned sequentially in order of the time the bill became law.

b. As soon as practicable after any law is enacted, the Office of Legislative Services shall prepare the law for printing and for inclusion the public internet site established pursuant to NJS 52:11-78. The Office of Legislative Services shall:

(1) assign a compilation number to each section of a law that is part of the general and permanent law to govern its placement within the New Jersey Statutes;

(2) add a head note descriptive of a section's contents to the beginning of each section if the section was not enacted with a head note; and

(3) correct errors in the text of a law as provided by this chapter,

c. In preparing a law in the form for inclusion in the annual volume of laws and for compilation in the Laws of New Jersey, the Office of Legislative Services shall:

(1) omit from the text of a law all material that is enclosed in bold-faced brackets, together with the brackets and all related footnotes; and

(2) cause material appearing in the text as underlined or printed in italics to be printed in the same manner as other material is printed.

d. In preparing the annual appropriations act, the Office of Legislative Services shall include all summaries of appropriations that appear within the act and include a legend indicating that material included within the summaries is for the purpose of displaying summaries of the items of appropriations set forth elsewhere within that law and, while included within the text of the law, is not intended to be part of the law.

Source 1:3-1

Comment

This section contains the parts of 1:3-1 that are concerned with the processing of an enacted statute immediately after it becomes law. Other parts of 1:3-1 that directly relate to the annual printing of statutes enacted during the legislative year are in the next section. Subsection (a) is derived from parts of the first paragraph of 1:3-1 and from 1:3-3.1. Subsection (b) is also derived from the first paragraph of 1:3-1. Subsection (c) is derived from the same source. The distinction between the two subsections is that subsection (c) refers to preparation of the version of a statute that contains only the final version of a section and does not show the changes made during the legislative process, or in the case of an amendment to an existing section, the changes from prior law. Subsection (d) continues the special provisions on appropriation acts found in 1:3-1.

5-2. Annual volume of laws

a. The Legislative Services Commission, through the Office of Legislative Services, shall direct and superintend the printing an annual volume of laws containing:

(1) every law enacted during the annual session of a Legislature;

(2) every joint and concurrent resolution made during the annual session of a Legislature; and

(3) those proclamations of the Governor made during the previous year that are to be printed with the laws.

b. Every bill enacted into law during an annual session of a Legislature shall be printed in numerical order by chapter number. Every joint and concurrent resolution shall be numbered the date it was approved and printed in numerical order.

c. The laws enacted at each session of the Legislature shall be printed in the style established by the Legislative Services Commission, through the Office of Legislative Services. Preceding the first chapter of the pamphlet laws, shall be the legislative list of members' names arranged by Senate and General Assembly districts. Following the last chapter of the pamphlet laws, shall be the joint resolutions of the Senate and General Assembly arranged in numerical order, and those proclamations of the Governor made during the previous year that are to be printed with the laws.

Source: 1:3-2; 1:3-3; 1:3-3.1; 1:3-4.

Comment

The introductory language in subsection (a) is substantially identical to section 1:3-3. The numbered paragraphs of that subsection that govern the contents of the annual volume of laws are derived from 1:3-4. The same material is duplicated in 1:3-2. Though simplified in form, subsection (b) is

substantially identical to section 1:3-3.1. Subsection (c) is substantially identical to section 1:3-4. The reference in the source section to printing “in the same general style as heretofore” has been deleted as unnecessary given the power of the Legislative Services Commission to modify the style.

5-3. Correction of statutes.

a. The Office of Legislative Services, with the concurrence of the Attorney General, may correct errors in the text, but not the title, of a law which will not affect the substance of the law. Errors that may be corrected include:

- (1) errors in references to other laws,
- (2) errors in punctuation and spelling, and other obvious errors in form, and,
- (3) errors caused when two or more amendments to the same section of law inadvertently omit provisions of, and fail to refer to, one another.

b. If a correction is made before the annual volume of laws is printed that includes the law that was corrected, a note shall be appended to the law in the annual volume indicating the correction that was made. If correction was made at a later time, a note shall be made in the next annual volume of laws indicating the compilation number of the section corrected and the correction made.

Source: 1-3-1.

Comment

Subsection (a) is substantially identical to the parts of section 1:3-1 that provide for the correction of statutes. However, separating this material from the provision on preparation of statutes for printing makes it more clear that if an error is found after printing of the annual volume of laws, the error may be corrected. That is not a change in practice.

Subsection (b) is new. There is no current requirement that the substance of an error correction be published. Corrections are made internally within the Office of Legislative Services and parties known to be interested, such as law publishers, are notified. Most corrections are small and obvious in their cause and purpose. A few, however, may be puzzling to a person who compares the law as enacted to the law as compiled. Better practice would seem to provide a mechanism to record corrections and thereby obviate any possible problem. That is the purpose of subsection (b).

5-4. Change of compilation number assigned to statute

a. When the Office of Legislative Services determines that a change in the compilation numbers assigned to a section or group of sections would serve the convenience of users of the statutes, the Office may change the compilation numbers with the concurrence of the Attorney General.

b. When the Office of Legislative Services changes the compilation numbers assigned to a section or group of sections, a note shall be made in the next annual volume of laws and on the public internet site established pursuant to NJS 52:11-78 indicating the old and new compilation number of each section changed.

Source: new.

Comment

The authority to decide where to compile statutes is stated in 1:3-1 and is repeated in 52:11-61(g). The power to compile laws is stated in the context of the process that takes place immediately after enactment. As a result, the Office of Legislative Services has been hesitant to claim the power to change the compilation number assigned to a statute at a later time. In a number of instances the compilation numbers assigned to statutes have been changed. The most significant of these, where material was moved between titles of the statutes, occurred many years ago. But there have been some instances in the past few years where statutes have been renumbered, usually within the same chapter. While the Office of Legislative Services may now recognize a recompilation power, it has used it cautiously and in very limited cases.

Obviously, the power to recompile statutes would be useful. Not all decisions on compilation turn out to be right. Some may be errors, but others, while correct when made, become less appropriate with the passage of time and more legislation on related subjects. Minor arrangement problems and problems of numeration could be solved. As a matter of caution, the proposed section requires the concurrence of the Attorney General for any recompilation. That requirement is taken for current statutory provisions on correction of errors.

However, recompilation of a statute years after it was enacted can cause problems. A person who follows an old citation and looks for the statute is apt to find a blank without explanation. Certainly, some form of paper trail needs to be provided to prevent confusion. For that reason, subsection (b) requires that a note be made in the next annual volume of laws and on the Legislature's public internet site whenever a statute is recompiled.

6-1. Preparation of Senate Journal and Assembly Minutes

a. The Senate Journal and the Assembly Minutes shall be printed in the manner the Senate and General Assembly direct. The Senate Journal shall include the minutes of joint meetings of the Legislature. The Senate Journal and the Assembly Minutes shall each contain an index for the entire session

b. The Secretary of the Senate shall prepare the Senate Journal for printing. The clerk of the General Assembly shall prepare the Assembly Minutes for printing.

c. The Senate and General Assembly shall determine the number of copies of the Senate Journal and Assembly Minutes to be printed and distribution of the copies. The Office of Legislative Services shall supervise the printing, binding and distribution.

d. After the Senate Journal and Assembly Minutes have been prepared, the originals shall be deposited in the Office of the Secretary of State.

Source: 1:4-1; 1:4-2; 1:4-4; 1:4-5.

Comment

The first sentence of subsection (a) is derived from 1:4-1. The second sentence is derived from 1:4-2 and the third from 1:4-4. Though some detail has been deleted as unnecessary, subsections (b) and (d) are substantially similar to the balance 1:4-2. Subsection (c) is substantially identical to 1:4-5. The second sentence of the subsection also replaces 1:4-7.

6-2. Current legislative printing; subscriptions; cost; advance copies of laws

a. The Office of Legislative Services shall provide a complete set of the bills and resolutions introduced in any year in the Legislature, together with the usual index slips, daily memoranda, advance parts of the Senate Journal and the Assembly Minutes and advance copies of laws, to any person who requests them and pays the annual subscription fee in an amount to be set by the Legislative Services Commission. The bills and resolutions, slips, daily memoranda, advance parts of the Journal and Minutes and advance copies of laws shall be mailed to the person at the time they are mailed to members of the Legislature.

b. The Office of Legislative Services shall provide an advance copy of each law, prior to the printing of the annual edition of the laws, to any person who requests them and pays the annual subscription fee set by the Legislative Services.

Source: 1:4-6.

Comment

Though much shortened, this section is substantially identical to 1:4-6.

7-1. Acceptance filed with Secretary of State

When a statute is adopted or accepted by the voters of a county or municipality at an election, the clerk of the county or municipality shall make a return stating that fact to the Secretary of State within ten days after the result of the election is ascertained. The Secretary of State shall file the return.

Source: 1:5-1.

Comment

This section is substantially identical to 1:5-1.

7-2. Statement of adoption or acceptance published in volume of laws; effect

a. When a statute is adopted or accepted by the voters of the State, or a proposed statute becomes effective by action of the voters of the State, and when the clerk of a county or municipality makes a return as required by this chapter, the volume of laws enacted by the next ensuing Legislature shall include a statement setting forth the title of the act, the year of its enactment, its chapter number in the printed volume of laws and the date when it was adopted, accepted or made effective.

b. The statement published by the Secretary of State pursuant to this section shall be prima facie evidence of the fact that such statute has been adopted, accepted or made effective, and of the date when it was adopted, accepted or made effective.

Source: 1:5-2.

Comment

This section is substantially identical to 1:5-2.

7-3. Format of petition for referendum

When a petition is circulated within a county, municipality, school district, or special district for the purpose of gathering the signatures of registered voters to place a referendum question on the ballot, each page of the petition shall be arranged to contain, in addition to such other content required by law, double spacing between the signature lines of the petition so that each signer is afforded sufficient space to provide his or her printed name, address and signature.

Source: 1:5-3

Comment

This section is substantially identical to subsection (a) of 1:5-3. Subsection (b) of the source statute, which required notification of the content of the statute, has been deleted as executed.

8-1. Notice of application for passage of private, local or special bill; publication

a. When the Constitution requires notice of the intention to apply for the passage of a bill, the notice shall contain a correct statement of the general object of the bill, be signed by at least one of the parties intending to apply for its passage, and be published, except as provided by subsection (b), at least one week before the introduction of the bill, and after the first day of January preceding introduction, in at least one of the newspapers published in each county in which the bill is, or is likely, to take effect.

b. The notice of intention to apply for the passage of a bill to repeal the charter of a corporation, or bill to repeal the charter and dispose of the property of a corporation, shall publish it in a daily newspaper published in Trenton for at least six consecutive days prior to the introduction of the bill. A copy of the notice shall be served personally on the president, secretary, registered agent or a director of the corporation, if such officer or agent can be found within the State. If no officer or agent can be found within the State, by personal service of such copy upon them or one of them out of the State, or by mailing a copy to them or one of them, directed to the residence or post-office address of the officer or agent, if known.

c. Proof of the publications required by this section shall be by oath or affirmation in writing, made by the publisher, or authorized agent, of every newspaper in which publication was made. The proof shall contain a copy of the published notice, and shall be presented with the bill when introduced, and, after final vote on the bill, shall be filed and deposited by the officers of the Legislature the Office of the Secretary of State. After the adjournment of each Legislature, the Secretary of State shall record every proof of publication that relates to any bills that have become laws. Certified copies of recorded proof of publication shall be received in evidence for any purpose for which the original proof would be received.

d. The publication in the pamphlet laws published by the State of any law, as to which notice of intention to apply for its passage is required by the constitution, shall be prima facie evidence that the notice required by the Constitution has been given in the manner required by this chapter.

Source: 1:6-1; 1:6-3; 1:6-4; 1:6-5; 1:6-6.

Comment

Subsection (a) is substantially identical to 1:6-1. Subsection (b) is substantially identical to 1:6-3. Subsection (c) is substantially identical to 1:6-4 and 1:6-5. Subsection (d) is identical to 1:6-6. Section 1:6-7, which punished false statements of proof of publication, has been deleted as unnecessary.

8-2. Assessments on private, local and special acts

a. Each private, local or special act or supplement thereto, except those that refer to benevolent, religious, charitable or educational institutions shall be assessed the sum of twenty-five dollars, and, until the assessment is paid into the State Treasury, the act shall not have the force and effect of law. If a person interested in the act fails to pay the assessment before the first day of July after its passage, the act shall cease, and be void to all purposes as though it had not been passed.

b. The State Treasurer, during the month of July, shall report to the Governor every law, with its date of approval or passage, which has become inoperative or void by reason of nonpayment of the assessment levied pursuant to this section, and the Governor shall issue a proclamation under the Great Seal of the State, setting forth the particulars of the report. The proclamation shall be filed by the Secretary of State and be printed as required of other proclamations. A printed copy of the proclamation shall be evidence that the laws listed in it have become void, and no such law shall be received in evidence as a valid and operative law, unless proof is made to the satisfaction of the court that the assessment was in fact paid into the Treasury within the time prescribed by this section.

Source: 1:6-8; 1:6-9.

Comment

Subsection (a) is substantially identical to 1:6-8. Subsection (b) is substantially identical to 1:6-9.

8-3. Petition for passage of private, special local law

The governing body of a municipality or county may petition the Legislature for the passage of a private, special or local law regulating the internal affairs of the municipality or county when authorized by ordinance of the municipality or by resolution of the county, specifying the general nature of the law sought to be passed, adopted by the municipality or county.

Source: 1:6-10.

Comment

This section is substantially identical to 1:6-10.

8-4. Petition requesting filing of petition with Legislature

a. When a petition signed by at least 20% or 15,000, whichever is less, of the registered voters of the municipality or county requesting the Legislature for passage of a private, special or local law regulating the internal affairs of the municipality or county

and specifying the general nature of the law sought to be passed, is filed with the clerk of the municipality or county, the clerk shall examine the petition and ascertain whether or not it is signed by the required number of registered voters. Within ten days after the petition is filed, the clerk shall attach a certificate showing the result of the examination and submit the petition to the governing body of the municipality or county.

b. If the clerk certifies the sufficiency of the petition, the governing body, within 30 days after the filing of the petition, shall either adopt a resolution authorizing the filing of a petition with the Legislature for the passage of a private, special or local law of the general nature described in the petition, or adopt a resolution authorizing the submission of the proposal to file such a petition to the voters at the next general election, or if the resolution is adopted within 90 days preceding the election, then at the succeeding general election, in the case of a county or at the succeeding general or municipal election, whichever occurs first, in the case of a municipality.

c. If the resolution adopted provides for submission of the proposal to the voters of the municipality or county, the question shall be placed upon the official ballots at the election specified.

d. If a majority of all of the votes cast favors adoption, within 30 days after the election, the governing body shall adopt a resolution authorizing the filing of a petition with the Legislature for the passage of a private, special or local law of the general nature described in the petition.

e. If an ordinance or resolution authorizing the filing of a petition with the Legislature for the passage of a private, special or local law is adopted, it shall be the duty of the chief executive officer of the municipality or county, to cause a petition, describing the general nature of the private, special or local law sought to be passed, to be prepared and signed by the officer and attested by the clerk of the municipality or county, and to cause notice of the intention to apply for the passage of a bill to be published as required by this chapter at the next session of the Legislature at which the application can be made, and to prepare a private, special or local bill for the action of the Legislature.

f. The original of the petition for the passage of such a law, together with a certified copy of the ordinance or resolution authorizing the its filing, shall be presented and filed with the bill when the bill is introduced and, after final vote upon the bill, shall be filed in the office of the Secretary of State with the proof of publication of the notice of intention to apply for the passage of the bill.

g. A private, special or local law passed pursuant to a petition as provided in this section shall become operative in the municipality or county only when adopted by the voters of the municipality, unless otherwise prescribed in the law. The question of the adoption of the law shall be submitted to the voters of the municipality or county at the next general election succeeding the its passage unless it was passed within 25 days preceding that election, in which case it shall be submitted at the next general election, in the case of a county, or the next general or municipal election, whichever shall occur first, in the case of a municipality.

Source: 1:6-11; 1:6-12; 1:6-13; 1:6-14; 1:6-15; 1:6-17; 1:6-18.

Comment

Subsection (a) is substantially identical to 1:6-11. Subsection (b) is substantially identical to 1:6-12. Most of 1:6-13 relates to use of paper ballots; that part has been deleted; the remaining substance is continued as subsection (c). Subsection (d) is substantially identical to 1:6-14. Subsection (e) is substantially identical to 1:6-15. Subsection (f) is substantially identical to 1:6-16. Subsection (g) is substantially identical to 1:6-17 and 1:6-18. Sections 1:6-19 and 1:6-20 have been deleted as unnecessary.

9-1. Application to determine validity of statute or joint resolution

a. If, at any time within one year after any law or joint resolution has been filed with the Secretary of State, the Governor has reason to believe that the law or joint resolution was not duly passed by both Houses of the Legislature, or approved by the Governor or otherwise made effective as law in the manner required by the Constitution, the Governor may direct the Attorney General to apply to the Superior Court, to have the law or joint resolution adjudged void. Thereupon the Attorney General shall prepare, sign and prosecute the application.

b. Any two or more citizens of the State may, within the time prescribed by subsection (a), present to the Superior Court an application, of the kind authorized by that subsection to be presented by the Attorney General. The applicants may prosecute the application, and the Attorney General may, if required so to do by the Governor, defend on behalf of the State.

c. The court, on the application, shall inquire summarily into the circumstances and may, for that purpose, order witnesses to be subpoenaed and sworn or depositions taken. Any citizen of the State may appear before the court in defense and subpoena and examine and cross-examine witnesses.

d. After a full hearing the court may, if satisfied that the constitutional and statutory provisions relating to the enactment and approval of laws and joint resolutions have not been complied with, adjudge the law or joint resolution or any part thereof to be void.

e. If the court adjudges a law or joint resolution, or any part of it, to be void, the clerk of the court shall deliver a certified copy of the judgment to the Governor, who shall issue a proclamation under the great seal of the State, setting forth the judgment. The proclamation shall be filed, published and printed with the laws and shall be judicially noticed in courts of the State. After the entry of the judgment, a law or joint resolution adjudged void shall not be judicially noticed by the courts of the State.

f. When an application presented by citizens under subsection (b) of this section is dismissed, the court shall tax the costs and necessary expenses of the Attorney General, including a fee to the Attorney General not to exceed \$500 in any one case, and shall order payment by the citizens. Payment may be enforced by execution.

Source: 1:7-1; 1:7-2; 1:7-3; 1:7-4; 1:7-5; 1:7-6; 1:7-7.

Comment

Subsection (a) is identical to 1:7-1 except for minor changes in wording and the deletion of the reference to the Appellate Division rather than the Superior Court generally. Subsection (b) is substantially identical to 1:7-3. The first sentence of subsection (c) is substantially similar to 1:7-2 except that material

on notice has been deleted as unnecessary. The second sentence is substantially identical to 1:7-5. Subsection (d) is identical to 1:7-3. Subsection (e) 1:7-6. Subsection (f) 1:7-7.

Sections On Which No Recommendation Is Made

1:8-1. Appointment, powers and duties of commissioners

L.1909, c. 154, p. 229 [C.S. p. 4987, s.s. 79 to 82], entitled "An act to authorize the appointment of commissioners to represent this State in the commission for the promotion of uniform legislation in the United States," approved April seventeenth, one thousand nine hundred and nine, saved from repeal. [This act authorizes the appointment of three commissioners for three-year terms, without compensation, except traveling and other expenses incurred in the discharge of their official duties, whose duties are to examine certain subjects such as marriage and divorce, et cetera, as to which uniformity of legislation in the various states is desirable, to confer as to such legislation with commissioners appointed by other states for the same purposes, to consider and draft uniform acts to be submitted for approval by the several states, to devise and recommend such other and further course of action as will tend to promote uniformity of legislation, and to make annual and other reports to the Governor for transmission to the Legislature.]

1:12A-1. Law Revision Commission

There is created in the Legislative Branch of State Government a commission to be known as the New Jersey Law Revision Commission.

L. 1985, c. 498, s. 1, eff. Jan. 21, 1986.

1:12A-2. Membership

The commission shall consist of:

a. The chairman of the Senate Judiciary Committee, or its successor, who shall serve while chairman of that committee;

b. The chairman of the Assembly Judiciary, Law, Public Safety and Defense Committee, or its successor, who shall serve while chairman of that committee;

c. The Deans, or their designees, of Rutgers Law School, Newark; Rutgers Law School, Camden; and Seton Hall Law School; and

d. Four attorneys admitted to the practice of law in this State, two to be appointed by the President of the Senate, no more than one of whom shall be of the same political party, and two to be appointed by the Speaker of the General Assembly, no more than one of whom shall be of the same political party.

L. 1985, c. 498, s. 2, eff. Jan. 21, 1986.

1:12A-3. Terms

Of the members of the commission first appointed, two shall be appointed for terms of four years and two for terms of five years. Thereafter, members shall be appointed for terms of five years. Members shall serve until the appointment and qualification of their successors.

L. 1985, c. 498, s. 3, eff. Jan. 21, 1986.

1:12A-4. Vacancies

Vacancies shall be filled for the unexpired terms in the same manner as the original appointments were made.

L. 1985, c. 498, s. 4, eff. Jan. 21, 1986.

1:12A-5. No compensation

Members of the commission shall not receive any compensation, but they shall be reimbursed for expenses incurred in the performance of their duties.

L. 1985, c. 498, s. 5, eff. Jan. 21, 1986.

1:12A-6. Chairman

The commission shall elect one member thereof as chairman, who shall serve for a term of two years.

L. 1985, c. 498, s. 6, eff. Jan. 21, 1986.

1:12A-7. Employees

The commission may appoint employees and consultants as may, in its judgment, be necessary, prescribe their qualifications and duties, and fix their compensation within the availability of amounts appropriated for that purpose.

L. 1985, c. 498, s. 7, eff. Jan. 21, 1986.

1:12A-8. Functions; duties

The commission shall promote and encourage the clarification and simplification of the law of New Jersey and its better adaption to present social needs, secure the better administration of justice and carry on scholarly legal research and work. It shall further be the duty of the commission to:

a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it, for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to

(1) Remedy the defects,

(2) Reconcile conflicting provisions found in the law, and

(3) Clarify confusing and excise redundant provisions found in the law;

b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;

c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and

d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.

L. 1985, c. 498, s. 8, eff. Jan. 21, 1986.

1:12A-9. Annual report

The commission shall report annually to the Legislature on or before February first in each year.

L. 1985, c. 498, s. 9, eff. Jan. 21, 1986.

1:14-12. New Jersey Corporate and Business Law Study Commission

a. There is created in the Legislative branch of State Government a permanent commission to be known as The New Jersey Corporate and Business Law Study Commission.

b. The commission shall consist of three members who are admitted to practice law in New Jersey, and who are distinguished in the field of corporate and business law to be appointed as follows: one member shall be appointed by the Governor; one by the President of the Senate; and one by the Speaker of the General Assembly. All members shall serve for a term of three years and shall be eligible for reappointment.

c. Vacancies shall be filled in the same manner as the original appointment, but for the unexpired term only.

d. The members of the commission shall serve without compensation, but shall be reimbursed for necessary expenses actually incurred in the performance of their duties under this act.

L.1989,c.163,s.1.

1:14-13. Organization

The commission shall organize as soon after the appointment of its members as is practicable, shall choose a chairman from among its members and shall appoint a secretary who need not be a member of the commission.

L.1989,c.163,s.2.

1:14-14. Duties, powers

a. It shall be the duty of the commission to study and review all aspects of the statutes, legislation and decisions of the courts in this State and other states relating to business entities, including business corporations and partnerships and the issuance of ownership interests or securities thereby. In addition the commission shall study and review all aspects of the law governing non-profit corporations in this State and other states.

b. The commission shall have the power to call to its assistance and avail itself of the services of employees of any State, county or municipal department, board, bureau, commission or agency as it may require and as may be available to it for its purposes, to hold public hearings from time to time, and to employ counsel, stenographic and clerical assistants and incur traveling and other miscellaneous expenses as it may deem necessary in order to perform its duties, and as may be within the limits of funds appropriated or otherwise made available to it for its purposes.

L.1989,c.163,s.3.

1:14-15. Annual report; recommended legislation

The commission shall file annually with the Governor and the Legislature a report containing its findings and recommendations, accompanying its report with any proposed legislation which it may desire to recommend for enactment.

L.1989,c.163,s.4.

Statutes To Be Compiled in Other Places