

MINUTES OF COMMISSION MEETING
April 24, 2003

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Commissioners Albert Burstein and Peter A. Buchsbaum. Professor Bernard Bell of Rutgers Law School, Newark, attended on behalf of Commissioner Stuart Deutsch, Professor William Garland of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs and Grace Bertone, McElroy, Delvaney & Deutsch, attended on behalf of Rayman Solomon.

Also present was David Ewan, Consultant to the New Jersey Land Title Association.

Minutes

The March minutes were accepted as submitted.

Election

John Cannel provided a status update on the Election Law project, advising that Senator Furnari is leaving the Legislature, as a result of being selected for a judgeship. As a result, the Election Law project lacks a Senate sponsor. In response to this development, Commissioner Gagliardi spoke with Senator Kean, who is now examining the bill and will consider sponsoring it. Chairman Burstein suggested that bipartisan sponsors in both houses would be advisable.

Title Recordation

Mr. Cannel indicated that he was provided with additional revisions prior to this evening's meeting by Professor Garland and Mr. Ewan. Some of those revisions are minor, some are simply corrections, and others are more substantive. In addition, a question remains regarding whether, and in what form, to require marginal notations.

Professor Garland noted that that would allow them to be electronically entered. Mr. Cannel suggested that this would be particularly useful since the mortgage document will be an image file. Mr. Ewan said that the current indexing scheme utilized by the counties will allow notations in the index, that some counties are actually doing this now and that it eliminates the step of printing out a copy of the underlying document, notating it, and then reimaging it. Mr. Cannel said that he will have a revised Title Recordation document for the next meeting, and will include in that revision Professor Garland's comments and the new comments received from Mr. Ewan.

Mr. Ewan mentioned one additional issue not yet addressed, that stems from the fact that presently, all recording fees are calculated on a per page basis. With electronic recording, there are not any pages. He suggested that we need to know what a 'page' is. He mentioned that Philadelphia County has shifted to a flat fee per document and that a

county in Wisconsin is proposing a change from a per page calculation to a proposal that any electronic document is one page. This will need to be addressed for New Jersey. In the meantime, the Title Recordation draft in its present incarnation has met with a very favorable reception from the groups that have reviewed it so far.

Transportation

Mr. Cannel reviewed the history of the Transportation law project, noting that it needs to be revised to reflect legislative changes since the Commission's last report, and that it is not a small job. Chairman Burstein indicated that this is something the Commission should focus on and that they are pleased with the Aviation section and will await the next installment. He suggested that the various topics within Transportation be done one at a time, and then merged together when more of them have been completed.

Title 39

Mr. Cannel explained that Staff anticipated having an initial section of the Title 39 project for the Commission to look at for the next meeting.

Sports Law Symposium

Mr. Cannel provided a short summary of the Sports Law Symposium co-sponsored by the Commission and explained that the initial lack of interest in the Uniform Act may have been misplaced. He indicated that there is general support for the Act even though it was described as a band-aid. He explained that transcripts of the symposium are being prepared, and that Staff will provide transcript excerpts to the Commission with a recommendation. Chairman Burstein indicated that the Commission will wait to receive the excerpts and then consider the Act.

Garage keepers' Lien

Mr. Cannel explained the communication received from Judge Kestin regarding the garage keepers' lien issue, reminding the Commission that work had been done in this area years ago but that it didn't really deal with the issue raised by the Judge. He explained that normally, a person performing work is thought to have a superior lien to a secured creditor because the person performing work is putting value into the property. With regard to cars, the secured creditor is superior to a garage keeper. Economically, a lessor is equivalent to a secured creditor. A difficulty in this area is that the secured creditor owns a fixed amount of vehicle, and the rest is left over for garage keeper.

Professor Garland suggested that we treat the lease as a financing arrangement. Mr. Cannel noted, however, that the Uniform Commercial Code treats it as a lease, and to construe it differently goes against Article 2A of UCC. Mr. Cannel explained that we could analyze the lease the way a lessor analyzes it, segregating the capital cost and interest, and

then looking to see if there is money left over which can be used to pay the garage keeper. Professor Garland suggested that one can use the rationale that one is protecting the value of the article by doing so, which protects the interests of all of the parties. Mr. Cannel explained, however, that there was probably no surplus value for a number of years and asked what a garage keeper can do if a car is the subject of a lease other than asking for payment in advance. Professor Garland suggested that the garage keeper obtain the permission of the owner bank, but it was noted that the owner bank is likely to be an out-of-state entity that will not respond to the garage keepers' inquiries.

Mr. Cannel noted that if the garage keeper is subordinated to the secured creditor (and that he was not sure that it should be so), we should also subordinate the garage keeper to the lessor. Chairman Burstein observed that clearly the garage keeper is the most vulnerable party in the situation described and that there was something inherently inequitable about a situation that leaves the most vulnerable party without protection. He noted that the Commission had to think in terms of policy.

Mr. Cannel proposed a that only the reasonable value of the services provided is a lien, or in which only the sum of the labor and the parts is the lien. Professor Bell suggested that there should also be some reasonable amount of time for which the garage keeper can be paid for storage. Professor Garland suggested that under the current law, if the police find an abandoned car and have it towed to a garage, the lessor may go to garage and pick up the car without paying for it. Mr. Cannel observed that there is no guidance in the law with the exception of the old case relied upon by the Court. In response to Professor Garland's observation that there are lots of other things, including pieces of machinery, etc., that are repaired in the same manner as cars, Mr. Cannel noted that all of those other items have liens under the common law superior to the individual or entity with the perfected security interest. Professor Garland asked if there was any principled reason to distinguish between the auto and the other forms of equipment, or whether we should make a generic rule for all similar items upon which repairs are performed.

Chairman Burstein asked Staff to clarify for next meeting the benefits and detriments of the various possibilities. Chairman Burstein noted that there has been very substantial growth in the leasing of cars, and that such a change has raised this issue to a substantial dimension that causes garage keepers problems that perhaps did not arise before. He indicated that the Commission would take a more careful look at this issue at the next meeting. Professor Bell observed that to the extent that garage owners become aware of this, it may be difficult to have leased cars repaired.

Holder in Due Course

Mr. Cannel explained the holder in due course (HIDC) issue, and the context in which it arose, and indicated since the law did not match the expectations of the parties to the transaction, he would like for the Commission to be able to do something, but that he did not think there is anything that could be done that will not make the situation a great

deal worse.

Commissioner Buchsbaum noted that HIDC status was denied to credit card companies, and that that he was not at all sure that it would be a problem to deny HIDC status to another group of individuals or entities. Mr. Cannel noted that HIDC law is firmly rooted in the law of the 1840s, and that in the best of all possible worlds, the law pertaining checks could be rewritten to reflect the way that banks actually practice, and the way people actually use checks.

Commissioner Buchsbaum asked why the law could not cut off the rights of an assignee of a check that has been dishonored. Mr. Cannel responded that one could cut off the rights of that party, but then the check cashing companies would have to go out and hire lawyers who will sue on these matters. That would change the players without changing the ultimate outcome. Chairman Burstein also noted that trying to make a change in this area is are tinkering with a banking system, which may be dangerous.

Commissioner Buchsbaum asked that Staff send this issue to NCCUSL to request their consideration as this issue is beyond the Commission's scope. He noted ing that he can understand the reluctance to tinker with Articles 3 and 4 of the UCC, but that maybe NCCUSL might wish to pursue the issue. Chairman Burstein said that he did not see anything wrong with forwarding the matter to NCCUSL, and that a response to Judge Kestin is in order, letting him know that we find a number of difficulties in considering this at the State level, but that we are trying to pursue it at a national level.

Status of Other Projects

At the conclusion of the meeting, Chairman Burstein inquired about the status of ongoing projects and was advised that Staff were presently working on Transportation, Title 39, and Weights and Measures, and that Distressed Property is out as a report.

Commissioner Buchsbaum suggested that it may be worth inquiring as to status of the Distressed Property project. Mr. Cannel said that maybe the thing to do is send out a list of available projects that are ripe for legislative action, explaining that this is something we have done before. He suggested including Distressed Property, Judgments and Enforcement, Election Law, and some of the other outstanding projects and bringing these items to the attention of the Legislative leadership.

Commissioner Buchsbaum suggested that if the competition to the Distressed Properties piece is not moving any faster than it had been, it may be appropriate to see if the Commission's project can be made to move, and that if there was concern about the impact on abandoned properties, maybe we could remove those properties from the piece. Mr. Cannel noted that it may be worth sending the Distressed Property project to League of Municipalities. The Commission agreed that this would be appropriate.

Chairman Burstein advised all present that the Commission would have a gathering for former Commissioner Pfaltz after the meeting in June.

Miscellaneous

The next meeting is scheduled for May 15, 2003.