MINUTES OF COMMISSION MEETING
November 17, 2005

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Commissioners Albert Burstein, Vito Gagliardi Jr., and James Woller. Professor William Garland of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Also in attendance were Patrick DeDeo, of Horizon Blue Cross Blue Shield New Jersey ("HBCBSNJ") and David Ewan of the New Jersey Land Title Association ("NJLTA").

Minutes

The Minutes of the September 15, 2005 meeting were accepted as submitted.

U.C.C. Articles 1 and 7

John Burke reported that 15 states have accepted the uniform revision of both Articles 1 and 7. The proposed revisions of Articles 2 and 2A are acknowledged to be failures. Only four states have <*pursued the adoption of* > the amended Articles 3 and 4.

Referring to his chart setting forth the state adoption and non-adoption of the official text with respect to four of the sections of the Revised Article 1 of the Uniform Commercial Code, Mr. Burke said that the Commission's draft report retained the "old version" of the choice of law provisions. Section 1-102, the "scope" section, has been adopted by everyone who adopted the official text and is "self-evident". The adoption of section 1-201, the "good faith" section, has been more varied. In New Jersey, the current definition of "good faith" is "honesty in fact". The revised definition of "good faith" contains an exception for Article 5, then says that good faith "means honesty in fact and the observance of reasonable commercial standards of fair dealing". This definition is found in other sections of the U.C.C., and has been incorporated into New Jersey's case law, so adopting it as part of Article 1 would not be a significant change. If New Jersey does not adopt the new language, it can, like other states that have declined to adopt the new standard, simply retain the original version.

Mr. Burke explained that no state favors the change of law provisions. He also explained that Section 1-303, the course of performance section, was added as a technical matter.

If New Jersey adopts the changes to Articles 1 and 7, it will be the sixteenth state to do so, and it is unclear what the future holds for those sections in other states. Chairman Burstein said that adopting minor changes would do no harm. Mr. Burke explained that the Article 7 changes are very technical and are consistent with both UETA and federal law.

The Commission thanked Mr. Burke for his tenacity on this project and moved to adopt the changes. Staff was requested to send Articles 1 and 7 to the Legislature with an explanation of the actions taken by the Commission and the reasons for those actions in the form of an executive summary.

Hospital Law

John Burke reminded the Commission that Judge LeFelt had asked the Commission to look at *N.J.S.A.* 17:48E-10(a)(2) in the context of the Appellate Division decision in *Rahway Hospital v. Horizon Blue Cross Blue Shield of New Jersey*, 374 *N.J. Super.* 101, *cert. den.* --- *N.J.* --- (2005).

The statutory section in issue governs the termination of agreements between health services corporations and providers of health care services pursuant to the Health Service Corporations Act ("HSCA"). The question in issue is whether the statutory provision, viewed in conjunction with state and 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.

In the *Rahway* case, Rahway Hospital terminated its contract with Horizon pursuant to the applicable 90-day notice provisions. Rahway provided health care services to all Horizon subscribers during the subsequent four months. Under its view of the agreement between the parties, however, Rahway believed that it was responsible for continuing coverage at the rate applicable as of the date of the termination of the agreement only for those clients receiving care at the time of the termination. Rahway expressed the opinion that all others would have to pay the out-of-network rate. Horizon and Rahway disputed the amounts to be paid and the enforcement and interpretation of the termination clause.

The dispute was first heard by the Commissioner of Banking and Insurance for an interpretation of the termination clause. The Commissioner's interpretation was that the hospital would have to accept network rates for all subscribers during the 120 day period. Rahway Hospital appealed.

The Appellate Division found that the Commissioner had essentially rewritten the contractual agreement between the parties, borrowing law from the Health Services Corporation Act and applying it to an HMO. The Appellate Division found that the hospital would have to accept the negotiated rates for those individuals receiving treatment at the time of the termination, while all other subscribers could, in fact, be required to pay the out-of-network rates. Apparently, there was approximately $2 million in dispute.

Judge Lefelt, whose Appellate Division opinion is being examined, asked the Law Revision Commission to review whether the matter was appropriate for legislative review in light of the changes in the industry and in light of the fact that there may be policy issues that need to be addressed to make it clear what rule should be applicable in a case such as this one.

John Cannel added that the existing rule is anachronistic and assumes factors no longer in issue today. Mr. Burke explained that the federal statute limits the circumstances under which health care may be terminated, but that it assumes that a coverage agreement may expire, when, in fact, it is effectively permanent. He added that this area of the law is extremely complicated, as is the vocabulary and explained that it was Staff's impression that the actions of the Commissioner were reasonable under the circumstances from a policy perspective. Effectively, under the Commissioner's determination, there would be a four month freeze at the time of a termination of a contract, during which time the hospital would have to accept the rate in effect during the period of the contract. This four month period was borrowed from the HMO Act (*N.J.S.A.* 26:2J-11.1), which states that if the hospital and the HMO were unable to agree on the terms of an agreement, they would be bound by the effective rates of the last agreement for a period of four months.

Patrick DeDeo, of HBCBSNJ, indicated that when he spoke with the HBCBS attorney today, he confirmed that the Rahway case is back in court regarding the damages issue, but that certification had been denied. He explained that HBCBSNJ agrees that the law should be amended, but that there is a concern with the four month coverage period after termination and with the length of the notice period for termination. HBCBSNJ advised that a 30 day notice period, as found in the draft language, is not a workable time period and would put them at a disadvantage in comparison to other plans in which there is a 90 day notice period. A 30 day notice period is not enough time within which to renegotiate an agreement if there is a multiple system, or a dialysis group, or a similar situation since negotiation is a complicated issue, without 'cookie-cutter' solutions.

John Burke suggested that if the primary concern is the time period, we could borrow language from the HMO Act. John Cannel suggested that if the Commission wishes to move forward, it makes sense for John Burke to work out and discuss some language with the attorney for the Association of Health Plans ("AHP") and HBCBSNJ.

The Commission took notice to two letters received on this subject, one from HBCBSNJ dated November 17, 2005 and one from AHP dated November 15, 2005. Chairman Burstein expressed concern that that the Commission was, at present, working in the dark since it did not know if there is a basis for the current distinctions in the statutes distinguishing between HMOs and health services corporations. He indicated that it appeared that this might be an appropriate project for the Commission but that first the Commission needed more information about the two types of entities so that we understand the history and whether there exists a current basis for a difference. Mr. Burke agreed that more information was needed about how the business actually works, and why the decisions are made, and the practical impact of the decisions. Staff was instructed to go ahead, make the necessary contacts, and begin some analysis of this issue.

Title 39

Laura Tharney advised that individuals from the Motor Vehicle Commission would attend the December meeting, and have asked if the Commission wanted those individuals

to prepare to discuss any particular topics. She indicated that the MVC attendees would receive a packet on filing day so they would have an opportunity to review the materials in advance of the meeting.

Uniform Mortgage Satisfaction Act

David Ewan of NJLTA, indicated that the association had circulated the Commission's Draft Tentative Report and received comments, including some from Larry Feinberg and some from individuals outside of the State of New Jersey saying that if New Jersey is going to change the law, why not go for a Cadillac rather than a horse and buggy. States such as Illinois and Minnesota basically have what they call a "one-touch" system, in which complying with the payoff statement and the instructions contained with it gives the agent the authorization to discharge the mortgage. The general consensus is that commercial mortgages are not the problem but that it is the residential area in which there is a problem with stale mortgages on the books. Mr. Cannel said that the Commission should consider whether or not it likes the idea of a one-touch system. Chairman Burstein noted that he was trying to envision some of the closings that he has attended which have been rather chaotic, and judge whether a one-touch system would have mattered.

Mr. Ewan explained that Illinois has an interesting statute, which provides that even if the closing agent doesn't do what he or she is supposed to do, as long as title insurance is issued, the closing agent at a subsequent closing can just go ahead and issue a satisfaction. Effectively, this provides a "mop-up" provision and no need for penalties imposed on the bank for failing to discharge. Also, while it does not appear in the uniform act, but in the Minnesota Act there are provisions for a partial satisfaction.

Commissioner Woller asked if there had been input from mortgage bankers on this project since it was his impression that one problem is that these days, mortgages and banks are sold/assigned so frequently, without actual assignments, that it becomes very complicated. Mr. Cannel indicated that mortgage bankers were involved in the drafting of the uniform act, but to the extent that we deviate from that, they need to be consulted.

Mr. Ewan said that there has been some discussion at NCCUSL about modifying the uniform act to accommodate a one-touch system and that part of the uniform act is a provision indicating that once a payoff letter is issued, everyone has a right to rely on it unless notified that there are changes. Mr. Cannel noted that Professor Garland had raised issues which a payoff letter should deal with so you have only one document to worry about. Mr. Ewan added that having some indication as to the status of an escrow account on the payoff letter would be helpful, but it was noted that there are often separate entities servicing the mortgage and the escrow, etc. so that might not be practical.

Chairman Burstein said that the work done for this meeting appears to be consistent with the issues discussed at the last meeting. Mr. Cannel indicated that he had tried to flag the open issues for the Commission. In Section 104, for example, it is not clear whether a mortgage holder can file a document of recission in response to a satisfaction. He said that he assumed that it should be clear that only the person who filed a document can say that it

is erroneous. Section 202, includes the concept of reasonable opportunity to act. He asked the Commission if the section was sufficiently clear. Mr. Ewan said that more clarification might be helpful, adding that if you tell a mortgage company to issue a payoff letter for the 15th of the month, and they do, but later find an error, and send a corrected statement by that morning at 10:00 a.m. for a noon closing - is that sufficient? He followed up by asking what if you get the correction after the closing - at 4:00 p.m. on the day of the closing. Chairman Burstein suggested that the language is vague, and should remain so because there will always be unusual situations that arise and, with the programs available today, you are able to make modifications fairly close in time to the actual closing.

Mr. Ewan also raised a concern on the part of the mortgage companies that if the mortgage company does everything it is supposed to do, and the county is six months behind in recording documents, the mortgage company should not be penalized. IT was suggested that there are so many things that can happen, that the language will have to leave room for that as does language throughout the area of contract law. Mr. Ewan said that he proposed compromise language that requires mortgage companies to do everything that they are supposed to do, but leaves room for them to avoid the penalty if something beyond their control prevents the filing of the satisfaction of the mortgage

Mr. Cannel pointed out the question of "erroneously" in Section 307. Mr. Ewan said that this language was deliberately ambiguous. One of the salient features of the one-touch system, according to Mr. Ewan, is that it helps to narrow down the scope of what is erroneous. An individual is only authorized to enter the satisfaction for the mortgage for which you have received the payoff funds. Mr. Cannel suggested that it may be appropriate to include language clarifying that if the agent's satisfaction is erroneous but s/he has exercised due care, that is acceptable; but if it is erroneous and s/he is negligent, that is not okay.

Chairman Burstein said that the Commission will take the opportunity to review the document for the next meeting. Professor Garland raised the issue of who is entitled to a payoff statement. Anyone with a junior interest who is interested in protecting that interest should be able to find out what the outstanding amount due is if they wish to protect their own interest by paying it off. In a foreclosure situation, a junior lienholder should be able to get payoff information; in fact, in his view, anyone with an interest in the property should be able to get a payoff and a per diem. Mr. Cannel suggested that a bank might reasonably ask how it is supposed to know that you have an interest in the property. Professor Garland said that it could be limited by requiring the person to identify his or her interest in the property or limit it to recorded interests in the property. Chairman Burstein added that perhaps there should be a penalty provision for someone who misrepresents an interest in the property to obtain the information. Mr. Cannel will add "interest of record" to the next draft, as well as a penalty provision.

Books

Mr. Cannel proposed that the NJLRC Staff office cease buying hard-bound volumes of the court reports, but continue to purchase the statutes and uniform laws in

book form for a savings of up to $1000 annually. Case law would be accessed by Staff on the internet. The Commission will consider this for the next meeting.

Elections

Mr. Cannel reported that he was approached by a Justice of the New Jersey Supreme Court who inquired about election law and said that it really needed to be revised. In response, he explained that the Commission had completed a project in this area. Chairman Burstein said that there were bits and pieces of election law that were adopted, purportedly to comply with HAVA. He requested that Staff prepare a summary of the legislation that has been adopted, referencing the Commission's report, and, focusing on some key areas that not been done yet, including centralization, the creation of an agency, etc. Commissioner Gagliardi noted that the Commission has an opportunity to advise the Legislature that the current law does not appear to comply with HAVA and that the New Jersey Supreme Court does not believe that it is compliant either.

Poor Law

Judith Ungar explained to the Commission that she and John Cannel met with several people from legal services, who were able to answer most of Staff's questions in this area, confirming the value of networking with individuals who work in the field when embarking on a new project. She advised that Senator Bryan <*name*> presently has a bill in the Legislature to address with one of the really hot issues in this area, that of "work first". Mrs. Ungar explained that Staff would like to continue to work on the provisions in the administration area of the law since she has identified areas in which there is significant duplication that can be reduced by revision of the statute.

The individuals who met with Commission Staff appear to support the work Staff has done so far and the direction in which the Commission is moving. Those individuals stressed the need to maintain a catch-all provision to protect those who might otherwise fall between the cracks, explaining that a municipality has to be able to take care of people who do not fit in either of the categories currently available. In any completed draft, Staff will include a section with findings to make it clear that there is common law that is not being tampered with.

Mr. Cannel added that what the Commission had for this meeting looks very small, assuring the Commission that it was not easy to arrive at that small piece. He explained that a completed draft of the entire Poor Law would be available in December or January, including some privacy provisions such as those found in HIPAA <*stat?*> since the information is presently treated as confidential, but that confidentiality language was not found anywhere in the statute.

Miscellaneous

The next meeting is scheduled for December 15, 2005.