GUIDEBOOK TO
CHANCERY PRACTICE
IN NEW JERSEY

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FOREWORD

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In his 25 years on the Law Division, Chancery Division, and Appellate Division bench, Judge Dreier has had approximately 380 judicial opinions officially reported. Since 1983 he has co-authored *Guidebook to Chancery Practice in New Jersey*. He is also an author of *New Jersey Products Liability and Toxic Tort Law*, annual editions 1977 to date, *New Jersey Arbitration Handbook*, annual editions 2013 to date, and books on Secured Transitions, as well as numerous articles published in various law reviews and journals. Judge Dreier has lectured extensively for NJICLE, the ALI-ABA Committee for Continuing Professional Education, the National Judicial College, and the New Jersey Judicial College, as well as numerous bar and judicial organizations nationwide.

In 2015, Judge Dreier was the recipient of the Lifetime Achievement Award from the *New Jersey Law Journal*. For his educational endeavors, NJICLE awarded him the 1993 Alfred C. Clapp Award for Excellence in Continuing Legal Education. He also received the New Jersey Bar Foundation's Medal of Honor in 2008, and the ADR Practitioner of the Year Award from the NJSBA's Dispute Resolution Section in 2010. He was the first recipient of the William A. Dreier Award for Excellence in Product Liability Law in 2009 from the NJSBA Product Liability Section.

Judge Dreier is a member (Emeritus) of the Columbia Law School Board of Visitors, the American Bar Association's Judicial Administration Division, the *New Jersey Law Journal* Editorial Board, the NJSBA's Dispute Resolution Section, the Marie L. Garibaldi ADR American Inns of Court, the American Bar Foundation, and the American Law Institute. He is also a Fellow of the College of Commercial Arbitrators and is a member of the New Jersey Panel of Distinguished Neutrals, International Institute for Conflict Prevention and Resolution, the National Academy of Distinguished Neutrals, and the AAA National Panels of Mediators and Commercial, Complex Cases, Class Actions, and Wireless Telecommunications Arbitrators.

Judge Dreier has been regularly included in the Alternative Dispute Resolution section of *The Best Lawyers in America*© and *New Jersey Super Lawyers*. He was named the *Best Lawyers*' Arbitration "Lawyer of the Year" in the Woodbridge, New Jersey Metro Area in 2018 and 2016 and is also listed in *Who's Who in America*.

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Mr. Rowe's practice has been limited exclusively to litigation for nearly five decades. The practice has involved all forms of business litigation. He has tried to conclusion numerous cases involving trade secrets, antitrust, stock fraud, real estate brokerage, corporate and partnership disputes, and numerous Chancery matters of the type described in this book. His trial practice has been in both state and federal courts in New Jersey and other states throughout the country.

In addition to being a co-author of the *Guidebook to Chancery Practice in New Jersey*, Mr. Rowe is the original author of *New Jersey Business Litigation* and is the co-author with Andrea J. Sullivan of the 2014 edition and all subsequent editions.

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Ms. Sullivan's litigation practice encompasses the representation of individuals and business entities in commercial, estate, matrimonial, and chancery litigation, and alternative dispute resolution. She has significant experience in handling contract and partnership disputes, actions involving closely held companies, oppressed minority shareholder litigation, hiring and termination of senior employees, non-compete issues, and other "business divorce" matters. Ms. Sullivan has represented professionals including attorneys, accountants, and dentists in various actions, ranging from professional malfeasance to claims of fraud and alleged professional malpractice. She has appeared before professional boards, including those in the fields of accountancy, dentistry, and mortuary science. In the areas of estate litigation and matrimonial law, Ms. Sullivan's practice concentrates primarily on the representation of high net-worth individuals, including the resolution of matters requiring sophisticated business valuations.

Ms. Sullivan serves on the Board of Trustees of the New Jersey State Bar Association, and is a Member of the Family Law and Business Sections and Co-Chair of the Equity Jurisprudence Committee. She is the Immediate Past President of the Middlesex County Bar Association and the Chair of its Chancery Practice Committee. She also serves as the Chair of the NJSBA Middlesex County Judicial & Prosecutorial Appointments Committee. She is also a Board Member and Past President of the Middlesex County Bar Foundation. She serves as a member of the New Jersey Supreme Court Committee on Mandatory Continuing Legal Education and is the Treasurer and Past President of the Board of Trustees of Central Jersey Legal Services.

Ms. Sullivan is the recipient of the Middlesex County Bar Association Chancery Practice Award and was recognized as one of the Top 50 Women in Business by *NJBIZ.* Ms. Sullivan has been listed in *The Best Lawyers in America*© in the Commercial Litigation practice area and in *New Jersey Super Lawyers* in the Business Litigation practice area. She is Peer Review Rated AV® Preeminent by Martindale-Hubbell®.

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by Hon. Irwin I. Kimmelman [1]

Fog everywhere. Fog up the river, fog down the river . . . Fog on the Essex marshes, fog on the Kentish heights. Fog creeping into the cabooses of collier-brigs; fog lying out on the yards and hovering in the rigging of great ships; fog drooping on the gunwhales of barges and small boats. Fog in the eyes and throats of ancient Greenwich pensioners . . . Chance people on the bridges peeping over the parapets into a nether sky of fog, with fog all round them . . .

The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation, Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog sits the Lord High Chancellor in his High Court of Chancery.

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds this day in the sight of heaven and earth.

. . . This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give — who does not often give — the warning, "Suffer any wrong that can be done you rather than come here!"

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[1]Judge, Superior Court of New Jersey, Appellate Division, and Former Attorney General of the State of New Jersey. This article appeared under the title of "Chancery: Introduction and Perspective," in the *State Bar Journal*, Summer 1977. Reprinted with permission.

HISTORICAL FOREWORD

Those pungent phrases are the opening salvos fired by Charles Dickens against the High Court of Chancery in his classic novel, *Bleak House*. What prompted Dickens in the year 1853, as one of the great social reformers of his day, to take on this ". . . most pestilent of hoary sinners . . . ."? Interminable delays, obfuscation of issues, cases dragging on for decades at a time and estates all but consumed by costs and fees had become the standard bill of fare for the hapless chancery litigant of that time. As a court reporter, Dickens was acquainted firsthand with the deplorable conditions encountered by the chancery litigant. He used his pen and skill as a novelist to help rectify the disrepute into which he had seen chancery fall.

TRACING HISTORICAL ROOTS

A major factor contributing to this scandalous state of affairs was the existence of separate courts of law and equity where the jurisdiction of each was jealously guarded against intrusion by the other. The development and growth of the two distinct bodies of law, coexisting separate and apart in different court systems, was something, which, historically, need not have occurred. A brief look backward in the search for some answers may gain a better understanding and appreciation of why and where we are today.

By the original system of English jurisprudence, the whole judicial authority of the Crown was exercised by the King in person sitting in his royal court. He was the "Fountain of Justice." The King redressed grievances of which complaints were made to him by petition. In time, portions of this authority were delegated to courts of law, which courts were soon brought closer to the people by judges riding circuit and holding court throughout the kingdom.

That portion of the royal authority which was not delegated to the courts of law remained in the sovereign as a branch of his kingly prerogative to insure that justice was done to his subjects and finally was naturally entrusted to the Lord Chancellor as we shall see.

KEEPER OF CONSCIENCE

The office of Chancellor was very ancient, existing before the Norman Conquest (Battle of Hastings, 1066). After the Conquest, the Chancellor became the most important functionary of the King's government. He was probably the most learned man in the King's court. Although initially he lacked any judicial functions or powers, he was nevertheless the King's personal advisor on most every matter. The early Chancellors were invariably ecclesiastics who served as both secretary and chaplain to the King; and therefore, because of the Chancellor's very personal relationship with the King, he was the "Keeper of the

King's conscience." He was the one upon whom the King increasingly relied as the burdens of the sovereignty became more complex.

The early common law courts developed into an arbitrary and ritualistic form for securing relief. Every right had to fit into one of the fixed forms of writs, such as ejectment replevin, trover, conversion, detinue, assumpsit and the various forms of trespass against person and property, in order to be enforced. There was little regard for the abstract right. Adherence to the writ system brought on a complexity and rigidity which often combined to produce injustice. Had the law courts not been so unyielding, there would have been no need for the development of a separate branch of equity law. Flexibility and invention in meeting new situations, a hallmark of equity, was never the distinction of the law courts. If the facts of a particular case where such that there was no appropriate form of action, the injured party was without ordinary legal remedy and his only mode of redress was by an application made directly to the King seeking relief from an injustice caused by strict adherence to the technical form of writs. This led to a search for new remedies, provided initially by the King through means of pleas to the Crown and eventually by the Chancellor whose particular role was channeled to administer a separate system of equity to cure the deficiencies and defects of the common law.

NATURAL JUSTICE

There were no fixed rules governing pleas to the Crown, and they were dealt with as a matter of conscience in accordance with what was thought to be natural justice, fairness and Christian morality.[2]

Although the King sought the advice of his secretary, the Chancellor, in dealing with these pleas to the Crown, ultimately the procedure became burdensome and the handling of these pleas was completely delegated to the Chancellor. Since this relief was dispensed according to the conscience of the Chancellor and his notion of natural justice, the granting of relief was regarded as a matter of grace and wholly within his discretion. Hence, all equitable relief was and still is said to be discretionary with the Chancellor or judge as the case may be.

This jurisdiction of the Chancellor to grant relief because of the occasional inadequacy of the remedy at law or its inability to enforce a right generally existed in the following areas:

[2]Administering a system of law on the basis of that which is good and fair and just and equitable was not unique to the English. It existed in the ancient Greek and Roman law although not as separate and distinct functions.

1. To enforce the performance of contracts, trusts and fiduciary obligations;

2. For completion of gifts according to the donor's intention;

3. For relief against penalties and forfeitures such as mortgages;

4. To re-execute or correct instruments lost or erroneously drafted;

5. To set aside transactions which were illegal or fraudulent or which had been made or carried on in ignorance or mistake of material facts;

6. For injunctions against irreparable torts;

7. For the protection of infants, idiots, lunatics or persons under a mental incapacity.

In time, the Chancellor was unable to manage these functions himself and he was authorized to appoint subordinates which included Masters of the Rolls and later, Vice-Chancellors.

Friction had developed between the Crown and the Pope, so much so, that during the reign of Henry VIII (1509-1547) England broke away from Rome and established its own church. This led, in 1529, to the downfall of Cardinal Wolsey, the last ecclesiastical Chancellor.

DECISIVE INFLUENCE

Sir Thomas More, a common lawyer with a deep respect for precedent, succeeded Wolsey. Later Chancellors were likewise trained in the common law and their influence on the development of the future course of equity was decisive.

Up to this point, equity was not considered a rival system to the common law. Wolsey, however, had exhibited an arrogant behavior towards the common law judges and had aroused the hostility of the common lawyers by his frequent use of the injunction. Following Wolsey, the Chancellors now steeped in the traditions of the common law and its adherence to precedent, directed their own court in the same manner.

MOUNTING STRUGGLE

The sixteenth and seventeenth centuries saw a mounting struggle between chancery and the common lawyers. Injunctions were issued so as to prohibit a plaintiff at law from bringing an action or enforcing a judgment thought by the Chancellor to be offensive to conscience. The judgments of one

court were interfered with or nullified by the courts of the other. Lawyers who sought relief in chancery against common law judgments were threatened with indictment and prosecution in the law courts for attempting to impeach the judgment of a royal court.

The controversy culminated between Lord Chancellor Ellesmere and Lord Chief Justice Coke. When Coke declared that he would give no hearing to any counsel who had participated in the presentation of a bill in equity seeking relief against the judgments of the common law courts, Ellesmere appealed to James I for assistance. James I referred the dispute to Sir Francis Bacon, his Attorney General, and a group of lawyers. Bacon — who personally disliked Coke — and the lawyers decided in favor of the supremacy of chancery and on July 14, 1616, James I ordered that the Chancellor need not refrain from giving relief in equity in any cause. Coke was dismissed as Chief Justice and in due course, Bacon became Chancellor.

IMPENDING DOWNFALL

Thereafter, chancery flourished and although equity "followed the law," it did not hesitate to correct the defects of the common law and to supplement its remedies. But, equity itself began to develop and become directed more and more in terms of precedent and procedure. The ascendancy of the common lawyers to the office of Chancellor, the preeminence of equity over law, and its newfound tendency to adhere to form over substance were all seeds contributing to chancery's coming downfall as a separate and distinct jurisdiction.

Again, Dickens in *Bleak House* tells it best:

> Equity sends questions to Law. Law sends questions back to Equity; Law finds it can't do this, Equity finds it can't do that; neither can so much as say it can't do anything, without this solicitor instructing and this counsel appearing . . . (and the case) drones on. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it.

Thus, Parliament in the 1850s enacted measures allowing a defendant at law to set up equitable defenses and allowing chancery to award monetary damages to a plaintiff such as where he had been refused specific performance of a contract. Formerly, in such a case, the plaintiff would have been obliged to bring another action, this time at common law for the recovery of damages. With monetary relief now available, the case load of chancery dramatically increased. Finally, the Judicature Acts of 1873 and 1875 were adopted. Equity and law as

separate court systems were abolished, and the substance and procedure of both were merged.

The merger of law and equity into a single unified court system did not occur in New Jersey for another 75 years. The annals of the Constitutional Convention of 1947 will attest that it did not happen easily.

The goal was to enable a single judge in the same action to have the right to apply both legal and equitable principles in order to completely and finally adjudicate an entire controversy. Of course, a separate Chancery Division of the Superior Court was created. It was designed to insure flexibility — expedition — and have available the expertise of an experienced competent judge . . .

BIBLIOGRAPHY

1. 1 Pomeroy's *Equity Jurisprudence*, (5th Ed. 1941), Section 1.
2. 1 Story's *Equity Jurisprudence*, (14th Ed. 1918), Chapter 2.
3. Bispham's *Principles of Equity*, (6th Ed. 1902), Chapter 1.
4. Ralston, *The Doctrine of Equity*, (8th Ed. 1890).
5. Curzon, *English Legal History*, 1968

CHAPTER I

EQUITABLE MAXIMS & EQUITABLE DEFENSES

A. THE MAXIMS

The various equitable maxims are stated by courts or litigants as pronouncements possessing some magical quality, or at least as rules to be accorded a majesty little less than constitutional mandates. In truth, these principles are general guides, and the seeds from which the substantive equitable rules have grown. As noted in 2 Pomeroy, Equity Jurisprudence § 360, p. 5 (Symons 5th ed. 1941) (hereafter cited as "Pomeroy"):

> . . . These maxims are in the strictest sense the principia, the beginnings out of which has been developed the entire system of truth known as equity jurisprudence . . . They do not exclusively belong either to the department which treats of equitable estates, property, and other primary rights, nor to that which deals with equitable remedies; their creative and molding influence is found alike throughout both of these departments. . .

These maxims are therefore a shorthand used to describe the equitable mindset — the starting point upon which a chancery judge's application of substantive rules will be based. In the early development of chancery jurisprudence, these principles served to differentiate the equitable proceeding from its legal counterpart and to provide a basis to correct omissions or inequities in the law by granting rights or remedies that the chancellor felt were necessary, applying his own sense of right and justice. 1 Pomeroy § 48-50, pp. 62-65. Although such individualized justice has settled over the years into a precedential system, the maxims remain to aid practitioner and court in discovering the meaning and basis of substantive and procedural equitable rules. The pure case-by-case determination of the chancellor had to give way to the constitutional guarantees of equal protection and due process, which require that litigants in similar situations receive similar equitable relief. Even though much of equity is still discretionary, the application of equity jurisprudence must be based upon established principles. *Hague v. Warren*, 142 N.J. Eq. 257, 263 (E. & A. 1948). As noted by Judge Muir, the conscience of which equity speaks is not the personal conscience of the judge, but rather a common standard of civil right and expediency combined, based upon general principles and limited by the established doctrines of equity by which it tests the conduct and rights of the litigants. *Matter of Quinlan*, 137 N.J. Super. 227, 255-256 (Ch. Div. 1975), *mod. on other grounds*, 70 N.J. 10 (1976), *cert. denied sub nom. Garger v. N.J.*, 429 U.S. 922 (1976).

These maxims are the underlying framework for equity jurisprudence and have been applied in a considerable body of New Jersey equity cases. The subject headings that follow adhere to the New Jersey statement of the various maxims rather

than that of Pomeroy for the ease of the practitioner in using New Jersey authorities. There are other authorities that explore this subject, but none is principally based upon New Jersey law. The best in this area is the article by Professor Howard L. Oleck, *Maxims of Equity Reappraised,* 6 RUTGERS L. REV. 528 (1952), citing national law, but with little reference to New Jersey precedents. *See* Appendix A. As a general note, be aware that "the power of the court to use equity can only be exercised when the court has proper jurisdiction." *Johnson v. Bradshaw*, 435 N.J. Super. 100, 115 (Ch. Div. 2014).

1. EQUITY SUFFERS NO RIGHT TO BE WITHOUT A REMEDY

This maxim has been alternatively expressed by Pomeroy as "wherever a legal right has been infringed a remedy will be given" (2 Pomeroy § 423); it is more usually cited now as "equity will not suffer a wrong without a remedy." *Crane v. Bielski*, 15 N.J. 342, 349 (1954). The maxim is explained to mean that where there is civil wrong, there ought to be a remedy; if the law provides none, equity may take jurisdiction in order to correct the injustice. *Britton v. Supreme Council, R.A.*, 46 N.J. Eq. 102, 112 (Ch. Div. 1889), *aff'd sub nom. Royal Arcanum v. Britton*, 47 N.J. Eq. 325 (E. & A. 1890). An absence of precedent does not preclude an equity court from granting such relief as the circumstances require. *Briscoe v. O'Connor*, 115 N.J. Eq. 360, 364-65 (Ch. Div. 1934); *Brown v. Fidelity Union Trust Co.*, 10 N.J. Misc. 555, 558 (Ch. Div. 1932). As noted by Justice Heher in *Sears Roebuck & Co. v. Camp*, 124 N.J. Eq. 403, 411-12 (E. & A. 1938):

> Equitable remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances and the natural rules which govern their use. There is in fact no limit to their variety in application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties. [1 Pomeroy, Equity Jurisprudence, §109 (5th ed. 1941).]

"A lack of precedent, or mere novelty in incident, is no obstacle to the award of equitable relief, if the case presented is referable to an established head of equity jurisprudence — either of primary right or of remedy merely." *Sears Roebuck & Co.*, 124 N.J. Eq. at 412.

This language was later quoted by Justice (then Judge) Francis in *Roach v. Margulies*, 42 N.J. Super. 243, 246 (App. Div. 1956), in upholding Chancery's right to appoint a fiscal agent for a corporation — a remedy newly devised, but necessary to avoid the adverse financial impact of the appointment of a statutory receiver. *See also New Jersey Realty Concepts, LLC v. Mavroudis*, 435 N.J. Super. 118, 123 (App. Div. 2014).

This principle has even been extended to a situation where an elderly widow lost her home in a foreclosure sale, but contended she had been misinformed concerning the time of the sale, and would have taken action to redeem. The Court in *Crane v. Bielski*, 15 N.J. at 349, noted:

> If the court was swayed by the dilemma of an aged and distraught widow whose only asset, the roof over her head, was about to be taken from her by a process apparently quite beyond her comprehension, allegedly without notice of the time of the sale, we think in equity it was rightly influenced.
>
> 'Equity is equality,' and if the facts here presented were as a matter of law insufficient to move the court, in its discretion, to set aside the sale, then a most stolid quality has crept surreptitiously into our equity jurisprudence, whose primary function over the many years has been the administration of essential and fundamental justice.
>
> We find nothing in the record warranting a reversal of the relief granted upon the ground that it was 'a mistaken exercise of judicial discretion.' In fact, we are convinced that the trial court recognized and acted upon the maxim lying at the very foundation of equitable jurisprudence, that equity 'will not suffer a wrong without a remedy.' The court considered the problem encountered with reason and conscience to a just and equitable result.

In *Connecticut Gen. Life Ins. Co. v. Punia*, 884 F. Supp. 148, 151 (D. N.J. 1995), the court extended New Jersey's statutory fair market credit rule to protect guarantors of commercial loans, by ruling that the guarantors were entitled to have their obligation reduced by the fair market value of the property securing the loan, and not simply by the $100 that the mortgage lender had successfully bid for the property at a foreclosure sale. *Id.* In *Mooney v. Provident Savings Bank*, 308 N.J. Super. 195, (Ch. Div. 1997), *aff'd*, 318 N.J. Super. 257 (App. Div. 1999), the court held that the reverse of the maxim is also true, "where there is no wrong, there is no basis for equitable relief." *Id*. at 205. *See also Graziano v. Grant*, 326 N.J. Super. 328 (App. Div. 1999); *In re Mossavi*, 334 N.J. Super. 112 (Ch. Div. 2000). "A court of equity should not permit a rigid principle of law to smother the factual realities to which it is sought to be applied."

2. EQUITY REGARDS SUBSTANCE RATHER THAN FORM

This maxim has both substantive and procedural elements, and is applied to disregard the corporate form, *Fortugno v. Hudson Manure Co.*, 51 N.J. Super. 482, 500-01 (App. Div. 1958); to pierce the corporate veil (*infra*), *Telis v. Telis*, 132 N.J.

Eq. 25, 29-30 (E. & A. 1942), *overruled in part on other grounds by Frank v. Frank's, Inc.*, 9 N.J. 218 (1952); *Stochastic Decisions v. DiDomenico*, 236 N.J. Super. 388, 393-95 (App. Div. 1989), *certif. denied*, 121 N.J. 607 (1990); *Trachman v. Trugman*, 117 N.J. Eq. 167, 170 (Ch. Div. 1934); *see also State Dept. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 500-01 (1983); *OTR Associates v. IBC Services, Inc.*, 353 N.J. Super. 48, 52 (App. Div. 2002), *certif. denied*, 175 N.J. 78 (2002); to uphold the validity of a meeting where a decision was made by a religious group to affiliate itself with the Roman Catholic Church, despite a minor procedural infraction, particularly where the will of the majority was expressed, *Ardito v. Bd. of Trustees, Our Lady of Fatima*, 281 N.J. Super. 459, 468 (Ch. Div. 1995); to determine family corporate realities, *Kleinberg v. Schwartz*, 87 N.J. Super. 216 (App. Div. 1965), *aff'd o.b.*, 46 N.J. 2 (1965); in election cases, to look behind the labels parties have given to transactions, *Cavanagh v. Morris Cty. Democratic Committee*, 121 N.J. Super. 430, 436 (Ch. Div. 1972); to regard joint tenants as tenants in common, *Brodzinsky v. Pulek*, 75 N.J. Super. 40, 47-48, 56 (App. Div. 1962), *certif. denied*, 38 N.J. 304 (1962); to convert a conveyance to a husband and his wife as tenants in common into a conveyance to the wife as the sole owner, *Luebbers v. Luebbers*, 97 N.J. Eq. 172, 173 (Ch. Div. 1925); to disregard strict terms requiring deposit upon the execution of an option on a land lease when landlord allowed deadline to pass to avoid lease renewal, *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assocs.*, 182 N.J. 210 (2005); to disregard labels of agreements of consignment as opposed to sale on account, *Shapiro v. Marzigliano*, 39 N.J. Super. 61, 65 (App. Div.), *certif. denied*, 21 N.J. 549 (1956); or to deeds as opposed to mortgages, *Applestein v. United Board & Carton Corp.*, 60 N.J. Super. 333, 348 (Ch. Div. 1960), *aff'd o.b.*, 33 N.J. 72 (1960). As Judge Kilkenny noted in *Applestein*:

> It is a fundamental maxim of equity that 'Equity looks to the substance rather than the form.' For example, a deed absolute on its face, if in truth a mortgage, will be treated in equity as a mortgage. The court of conscience never pays homage to the mere form of an instrument or transaction, if to do so would frustrate the law or place justice in chains. The courts of equity in New Jersey, and elsewhere, have never hesitated to look behind the form of a particular corporate transaction and find that it constituted a corporate merger, if in fact and in substance it was a merger, regardless of its deceptive outward appearance.

Id. at 348-49.

In looking to substance rather than form, equity views the parties' intentions as "the dominant test for evaluating the legal effect of a particular instrument."

Bruenn v. Switlik, 185 N.J. Super. 97, 103 (App. Div. 1982), *certif. denied*, 91 N.J. 536 (1982) (*citing Papsco v. Novak*, 94 N.J. Eq. 642, 644 (Ch. Div. 1923), *Antonucci v. Gravina*, 134 N.J. Eq. 79, 81 (Ch. Div. 1943)). However, equity may not disregard statutory law. *In re Quinlan*, 137 N.J. Super. 227, 255 (Ch. Div. 1975), *modified and remanded*, 70 N.J. 10 (1976), *certif. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976).

Technical or procedural form may also be subordinated to the substance of justice under this maxim. *Fidelis Factors Corp. v. Du Lane Hatchery Limited*, 47 N.J. Super. 132, 138 (App. Div. 1957); *N.J. Highway Authority v. Renner*, 18 N.J. 485, 494-95 (1955). With respect to pleadings, Judge Jayne noted that ". . . proceedings in equity are and should be conducted with less regard to mere matters of form and technical objections than proceedings at law. . ." *Trenton v. Howell*, 132 N.J. Eq. 125, 130 (Ch. Div. 1942).

In *Monmouth County Div. of Social Services v. C. R.*, 316 N.J. Super. 600, 608 (Ch. Div. 1998), the court cited the maxim, but also instructed that "while equity may not disregard statutory law, it looks to intent, rather than merely its form."

3. EQUITY REGARDS THAT AS DONE WHICH OUGHT TO BE DONE

As noted in *Martindell v. Fiduciary Counsel*, 133 N.J. Eq. 408, 414 (E. & A. 1943):

> [This maxim] is intimately related to the maxim that equity regards the substance and intent rather than the form; and it has been termed the foundation of all distinctively equitable property rights, estates and interests. . . . The doctrine of the specific performance of contracts for the sale of lands derives in the main from this principle. . . . And the fundamental principles which govern a court of equity in decreeing the specific performance of contracts are in essence the same whether the contract concerns realty or personalty.

The court in *Goodell v. Munroe*, 87 N.J. Eq. 328, 335 (E. & A. 1916) also noted:

> Where an obligation rests on a party to perform a certain act, a court of equity will treat the party in whose favor the act should have been performed as having the same interest and right as if the act had actually been performed.

As an example of this principle, the courts will regard a purchaser under a contract for the sale of lands as the equitable owner thereof, who is deemed to hold the purchase money in trust for the vendor, provided there is no breach of the

agreement. *Delancey & Stockton Corp. v. Reliable Improvement Co.*, 134 N.J. Eq. 71, 75 (E. & A. 1943). The court in *Delancey* explained that when land is condemned during the pendency of a contract of sale, the condemnation award will be divided between the seller and purchaser such that the seller will be apportioned an amount equal to the selling price and the purchaser will be paid the balance. *Id.* at 75. However, where the purchaser breaches the contract of sale or is barred by laches, he is not entitled to any portion of the condemnation award because equity no longer regards him as the owner of the land. *See also Jacobs v. Great Pacific Century Corp.*, 197 N.J. Super. 378, 383 (Law Div. 1984), *aff'd*, 104 N.J. 580 (1986).

This principle has also been applied to requests for change of beneficiaries on insurance policies, *Prudential Insurance Co. of America v. Reid*, 107 N.J. Eq. 338, 341 (Ch. Div. 1930); construction of title insurance policies, *Summonte v. First American Title Ins. Co.*, 180 N.J. Super. 605 (Ch. Div.), *aff'd*, 184 N.J. Super. 96 (App. Div. 1981), *certif. denied*, 89 N.J. 418 (1982) (finding title insurance company's refusal to remove judgment lien unacceptable by application of the maxim); settlement of estates, *Rusch v. Melosh*, 133 N.J. Eq. 502, 505 (Ch. Div. 1943), *aff'd o.b.*, 134 N.J. Eq. 409 (E. & A. 1943) (defeasance clause triggered by the neglect of a husband's executors in settling his estate before the wife's death held to be overcome by this maxim); and even correction of procedural errors in election matters, *Reed v. lndependence Township*, 93 N.J.L. 101, 102 (Sup. Ct. 1919) (stating the applicability of this maxim to both law and equity); *Ladenheim v. Klein*, 330 N.J. Super. 219 (App. Div. 2000) (where court explained that equitable liens are based on this maxim); *Wohlegmuth v. 560 Ocean Club*, 302 N.J. Super. 306, 312 (App. Div. 1997); *Graziano v. Grant*, 326 N.J. Super. 328, 342 (App. Div. 1999).

4. EQUITY IMPUTES AN INTENTION TO FULFILL AN OBLIGATION

This principle bears some similarity to the preceding maxim, but as noted in 2 Pomeroy § 420-422, pp. 182-184, it applies in situations where a person has a legal obligation to perform a specific act, and later performs the act without indicating whether the motivation for the performance was the discharge of the legal obligation. The example given in Pomeroy (§ 421) is a situation where a decedent agreed in an antenuptial agreement to purchase land producing an annual income of 200 pounds, to settle the income upon his wife for her life, and then upon his first- born son in tail. Lands having a greater value were purchased by the decedent during his lifetime, but he made no express settlement of these lands upon his wife and eldest son as provided in the agreement. The maxim, however, was applied, and it was determined that the land purchased by the father should be regarded as a satisfaction of the

covenant. *See also* 27 Am. Jur. 2d § 128 and 6 RUTGERS L. REV. 528, 545 (1952).

5. EQUALITY IS EQUITY

This proposition is a general rule to be applied by a court of equity to creditors of similar classifications. *Smith v. Whitman*, 39 N.J. 397, 402 (1963). Therefore, a common fund subject to control of the court, absent other circumstances, will be equally divided among claimants. *Monmouth Lumber Co. v. Indemnity Insurance Co. of No. America*, 21 N.J. 439 (1956); *see also D&K Landscaping Co. v. Great American Insurance Co.*, 191 N.J. Super. 448, 452-53 (App. Div. 1983). This maxim was explained by Justice Vanderbilt to apply, not only to general creditors, but "even where claims have been reduced to judgment; the doctrine of equality of treatment is applied where justice requires it to prevent the unseemly scramble for preferences at the expense of the pursuit of orderly business methods . . ." *Monmouth Lumber Co.* at 451. Note, however, that where there is a levying judgment creditor, the applicable statute, *N.J.S.A.* 2A:17-39, grants such judgment a priority, and in such an instance "equity will follow the law." *Pulawski S. & L. Assoc. v. Aguiar*, 174 N.J. Super. 42, 45-46 (Ch. Div. 1980) (see the discussion of this maxim, below.) This proposition, however, must be read in apposition to the next two maxims, which are here noted not as exceptions or subsidiary statements to the general maxim that "equality is equity," but rather as rules that apply to conflicting, as opposed to coequal, claims.

6A. WHERE EQUITIES ARE EQUAL THE FIRST IN TIME WILL PREVAIL

6B. WHERE EQUITIES ARE EQUAL THE LAW WILL PREVAIL

These rules are applied only to parties with equitable claims as to a subject matter, and must be balanced against the "equality is equity" rule and each other. *Burke v. Hoffman*, 28 N.J. 467, 474-75 (1958). As noted in 2 Pomeroy § 413-417, pp. 160-168, they "form the source of the doctrine, in their entire scope, concerning priority, notice, and purchasers for a valuable consideration and without notice." *Id.* at p. 166. The earlier-quoted "equality is equity" rule is applied to situations of pro rata distributees, contribution among joint debtors or tortfeasors (except where modified by statute), creditors' claims from a common fund, common ownership, settlement of insolvent estates, abatement of legacies, etc. *See* 2 Pomeroy § 405-512, pp. 144-159. These two modified rules apply, however, to persons asserting adverse equitable interests, but where these interests are in all other respects equal. For example, if only one of the two claims can prevail (such as successive assignments of the same fund where neither of the assignees had given notice of his assignment), and if a court has excluded all other bases under the law that may differentiate the equitable claims, preference may be given to the first in time. *See* 2

Pomeroy § 414 at p. 162.

As to the second of these principles, if two parties have equitable claims, a priority is granted to the one who also holds a legal interest, even if his interest is later in time. Pomeroy gives the example of the transfer of legal title to land to one of two contract purchasers of real estate (thus each held an equitable claim to the land). The party who receives the deed, and thus holds legal as well as equitable title, would be entitled to priority, notwithstanding the claim (whether first in time or not) of the other contract purchaser. 2 Pomeroy § 417, pp. 166-168. We see, therefore, that this maxim is similar to, but yet different from, the following maxim that equity follows the law. In the next maxim, the word "law" means principles of law; in this maxim, the word "law" means legal estate or title.

7. EQUITY FOLLOWS THE LAW

Under this maxim, a court of equity will generally follow the legislative and common law regulations of rights, and also obligations of contract. *Dunkin' Donuts of America Inc. v. Middletown Donut Corp.*, 100 N.J. 166, 183-85 (1985); *Impink ex rel. Baldi v. Reynes*, 396 N.J. Super. 553, 561 (App. Div. 2007); *In re Estate of Shinn*, 394 N.J. Super. 55, 68 (App. Div. 2007); *Natovitz v. Bay Head Realty Co.*, 142 N.J. Eq. 456, 463-64 (E. & A. 1948) (differentiating the application of this maxim from that of "he who seeks equity must do equity"). This rule, however, is not slavishly followed, *Gilbert v. Pennington Trap Rock Co.*, 135 N.J. Eq. 587, 588 (Ch. Div. 1944), and, as noted by Chief Justice Vanderbilt in *Monmouth Lumber Co. v. Indemnity Insurance Co. of No. America*, 21 N.J. 439, 451 (1956), "must yield if extraordinary circumstances or 'countervailing equities' call for relief." (*citing Camden Trust Co. v. Handle*, 132 N.J. Eq. 97, 108 (E. & A. 1942)). *See also Seavey v. Long*, 303 N.J. Super. 153, 156 (App. Div. 1997) (action involving claims by both a first and second wife to pension benefits). This maxim will be more rigorously applied with respect to statutes. *Giberson v. 1st Nat'l Bank of Spring Lake*, 100 N.J. Eq. 502, 507 (Ch. Div. 1927). The Giberson court noted: "And where the Legislature has prescribed a rule of law which governs the rights of parties, equity, equally with courts of law, is bound and cannot disregard such provisions . . ." The requirements of the Statute of Wills, *N.J.S.A.* 3B:3-2, 3B:3-3, supercedes equitable principles and the non-conforming will cannot be given validity under the "substantial compliance" doctrine. *In the Matter of the Probate of the Alleged Will of Ferree*, 369 N.J. Super. 136, 150 (Ch. Div. 2003), *aff'd*, 369 N.J. Super. 1 (App. Div. 2004). The substantial compliance doctrine "… does not allow or the studied disregard of the formalities (or the informalities permitted with holographic wills) still required by statute." *Id.*

As to enforcement of contractual rights, however, the *Giberson* court

concluded:

> Acting on more liberal principles, equity often softens the rigors of the law, and although a party's legal rights are, apparently, clear on the face of a written instrument, that does not preclude a court of equity from inquiring into the circumstances under which the document was executed or procured in order to determine whether or not the instrument should be given the effect which at law would necessarily follow from its terms. Such inquiry might indicate a situation which would make it inequitable to enforce legal rights.

Giberson, 100 N.J. Eq. at 507. In other areas equitable doctrines may modify certain common law rules. The best known example is the difference between legal fraud and equitable fraud, wherein equity has removed the element of scienter, *Jewish Center of Sussex Cty. v. Whale*, 86 N.J. 619, 625 (1981); s*ee also Liebling v. Garden State Indem.*, 337 N.J. Super. 447, 453 (App. Div. 2001), *certif. denied*, 169 N.J. 606 (2001) (discussing the difference between equitable fraud and legal fraud), or as otherwise stated: ". . . courts of equity relax the established rule of law to the effect that moral delinquency is an essential element of deceit or fraud. . ." *Brownback v. Spangler*, 101 N.J. Eq. 388, 391 (Ch. Div. 1927); *Graziano v. Grant*, 326 N.J. Super. 328 (App. Div. 1999).

8. EQUITY ACTS IN PERSONAM NOT IN REM

This is an ancient maxim that in the early days of the Court of Chancery differentiated that court from law courts, which had the power to determine legal title and damages. *See* 2 Pomeroy § 428, p. 196. Originally a chancery court would declare only that a plaintiff was an equitable owner of certain land and direct the defendant to convey the same to plaintiff. If the defendant failed to comply, a fine or imprisonment could follow, but legal title remained with the defendant, and no one could have been ordered to convey the title in defendant's name to plaintiff. This limitation waned until, as noted by Justice (then Judge) Haneman in *Leek v. Wieand*, 7 N.J. Super. 501, 506 (Ch. Div. 1950): "In the development of equity jurisdiction. . . the great bulk of litigation became what might be classified as quasi in rem [citing cases]." In addition, the court's enforcement powers now extend not only to the declaration of equitable estates and direction to a defendant to execute appropriate documentation, but also to the appointment of a third party to perform the act on behalf of the defaulting defendant. *R.* 4:59-2(a), Judgment for Specific Acts, now provides:

> If a judgment or order directs a party to perform a specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of such defaulting party by

> some other person appointed by the court, and the act when so done shall have like effect as if done by the defaulting party.

See also N.J.S.A. 2A:16-7, providing for judicial orders effecting transfer of real property.

The chief use of this maxim today, therefore, is not to differentiate between in personam and in rem actions, but rather to differentiate between actions at law wherein damages or possession may be awarded, or one of the ancient legal writs issued (including in New Jersey a form of prerogative writ), and those equitable actions that seek in personam relief, with damages only as an incidental remedy. *See U.S. Pipe & Foundry Co. v. United Steel Workers of America*, 59 N.J. Super. 240, 264 (App. Div. 1960). This maxim survives, therefore, as a reflection of the first maxim that "equity suffers no right to be without a remedy," or the more general proposition that "equity will entertain jurisdiction when there is no adequate remedy at law." Since only equity can direct the actions of an individual (outside of the specific areas of the ancient writs), equity leaves to the law matters where the principal claims are for relief such as damages, declarations of legal title, or the legal claims for which solely legal remedies exist.

9. EQUITY AIDS THE VIGILANT, NOT THOSE WHO SLEEP ON THEIR RIGHTS

In one aspect, this maxim is the positive statement of what is usually expressed as the defense of laches. *Norfolk & New Brunswick Hosiery Co. v. Arnold*, 49 N.J. Eq. 390, 397-98 (Ch. Div. 1892); *Fox v. Haddon Twp.*, 137 N.J. Eq. 394, 398-99 (Ch. Div. 1945). In *Stout v. Seabrook's Executors*, 30 N.J. Eq.187, 190-91 (Ch. Div. 1878), *aff'd o.b.*, 32 N.J. Eq. 826 (E. & A. 1880), after noting that "great delay is a great bar in equity," the court stated:

> The justice of this doctrine is obvious. He who delays asserting his rights until the proof in vindication of them is so indeterminate that it is very difficult to decide whether what seems to be justice to him is not injustice to his adversary, ought to lose all right to the aid of a court of conscience, for, by his laches, the path of justice has become so obscure that it cannot be traced with certainty. The law assists those who are vigilant, not those who sleep upon their rights.

This proposition has otherwise been stated that "equity favors the vigilant," *Thompson v. Monteiro*, 58 N.J. Super. 302, 305 (Ch. Div. 1959); "equity does not aid one whose indifference contributed materially to the injury complained of," *Harrington v. Heder*, 109 N.J. Eq. 528, 534 (E. & A. 1931); or that "equity does not

ordinarily aid one whose indifference was the sole cause of the injury of which he complained." *Moro v. Pulone*, 140 N.J. Eq. 25, 30 (Ch. Div. 1947).

It should be noted that in this latter case, the lack of vigilance was not in failing to act before the expiration of time, but rather the lack of care in reviewing the agreement in question. In finding the defendants guilty "of positive neglect" the Moro court noted:

> The failure of the defendants affirmatively and adequately to convince me that the mistake was in reality mutual deprives them of their desired reformation and rectification of the contract. But was the omission of a covenant concerning the payment of interest even a unilateral mistake in its substantive legal quality and significance, or was it a feature of the transaction concerning which the defendants were inadvertent and heedless not only in the preparation but as well at the execution of the contract? Equity does not ordinarily aid one whose indifference was the sole cause of the injury of which he now complains.

Moro, 140 N.J. Eq. at 29-30.

"Vigilance," therefore, in its other aspect, diligent inspection, can be as important as timely action. *See also Brick Plaza, Inc. v. Humble Oil & Refining Co.*, 218 N.J. Super. 101, 104-05 (App. Div. 1987).

10. HE WHO SEEKS EQUITY MUST DO EQUITY

This often-quoted maxim is a general guiding principle in the administration of equity, rather than an exact rule governing specific cases. *Hudson Bldg. & Loan Assoc. v. Black*, 139 N.J. Eq. 88, 96 (E. & A. 1946). As noted in *Natovitz v. Bay Head Realty Co.*, 142 N.J. Eq. 456, 463-64 (E. & A. 1948), this maxim must be read together with the maxim "equity follows the law"; therefore, if parties have legal rights, either statutory or contractual, a court of equity cannot require that the parties give up these rights under the guise of asking that the prevailing party "do equity." The Natovitz court noted:

> The maxim simply obliges the party seeking equitable relief to do what is required by conscience and good faith. It demands the enforcement of the equities of the adversary party. It applies only where the principles of equity may thereby be served. But courts of equitable cognizance may not create new substantive rights under the guise of doing equity. The equities which the moving party may be required to concede must exist in fact and be cognizable in

> law. The party seeking relief is not required to sacrifice his own rights. Equity may not, under this principle, alter the contract of the parties, but must enforce it according to its terms. . . . There is also a maxim that equity follows the law; and equity and courts of law alike are bound by legislative regulation of the rights of the parties, not to mention the obligation of the contract.

Natovitz, 142 N.J. Eq. at 463-64. In 2 Pomeroy § 385 at p. 52, the author explains this maxim as follows:

> The meaning is, that whatever be the nature of the controversy between two definite parties, that whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy. It says, in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject-matter of the suit.

This statement of the rule has been partially quoted in *Barry Inc. v. BAF Limited*, 3 N.J. Super. 355, 360-61 (Ch. Div. 1949) and *Fidelity Union Trust Co. v. Multiple Realty & Construction Co.*, 131 N.J. Eq. 527, 539-40 (Ch. Div. 1942) (quoting from an earlier edition of Pomeroy).

Examples of the application of this maxim are: requiring a mortgagee to recompute the actual balances due notwithstanding mistakes in amortization schedules, *Totowa Savings & Loan Assoc. v. Crescione*, 144 N.J. Super. 347, 351-52 (App. Div. 1976); adjustment of discounted interest at the time of a foreclosure, *Spiotta v. Wm. H. Wilson, Inc.*, 72 N.J. Super. 572, 579 (App. Div.), *certif. denied*, 37 N.J. 229 (1962); agreement by tenant to pay increased heating costs in suit to compel landlord to continue to provide the heat, *Lincoln Rug Co. v. East Newark Realty Corp.*, 142 N.J. Eq. 743, 745 (E. & A. 1948); requiring payment due to a mortgagee before the mortgagee would be required to release as security additional land not originally contemplated by the parties' agreement, *N.J. Franklinite Co. v. Ames*, 12 N.J. Eq. 512, 513 (E. & A. 1859); requiring highest bidder at foreclosure sale to reinstate the bid made with all costs, as a condition to reopening that earlier sale (after his and a second sale had been declared invalid), *N.J. Title Guaranty & Trust Co. v. Croydon Holding Corp.*, 138 N.J. Eq. 459, 462 (Ch. Div. 1946);

requiring that a creditor who purchased attached real property for far less than its actual value (and then had a fraudulent conveyance of that property set aside) be limited to payment of the amount due on his debt and not receive the property in question, *Bourgeois v. Risley Real Estate Co.*, 82 N.J. Eq. 211, 215-18 (Ch. Div. 1911); and requiring foreclosing mortgagee to withhold delivery of Sheriff's deed until resolution of the mortgagor's pending action against insurer, *Sovereign Bank, FSB v. Kuelzow*, 297 N.J. Super. 187 (App. Div. 1997). We see, therefore, that the application of this maxim is broad, and notwithstanding the statements that legal rights will not be affected, from time to time they are — especially where great hardship would result, as in the last cited case.

11. HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS

This statement is more often cited than any other equitable maxim. The maxim applies to conduct both prior to the proceeding and during the proceeding itself. *A. Hollander & Son, Inc. v. Imperial Fur Blending Corp.*, 2 N.J. 235, 246 (1949). The rule is discretionary, and the effect of the alleged inequitable conduct on the entire transaction before the court must be analyzed before the maxim should be applied. *Untermann v. Untermann*, 19 N.J. 507, 518 (1955). *See also Faustin v. Lewis*, 85 N.J. 507, 511 (1981); *Pellitteri v. Pellitteri*, 266 N.J. Super. 56, 65 (App. Div. 1993); *Murray v. Lawson*, 264 N.J. Super. 17, 37 (App. Div. 1993), *aff'd as modified*, 138 N.J. 206 (1994), *cert. denied*, 515 U.S. 1110 (1995); *American Dream at Marlboro, LLC v. Planning Bd. of the Twp. of Marlboro*, 209 N.J. 161, 170 (2014).

The doctrine is applied only against one who claims equitable relief (whether by complaint, counterclaim, etc.), and is not applied against one defending such claim. *Merchants Indemnity Corp. v. Eggleston*, 37 N.J. 114, 132 (1962). The doctrine applies in many areas, such as annulments, where the per se bar was relaxed to a discretionary rule in *Faustin v. Lewis*, 85 N.J. 507, 511-12 (1981) (but note that unclean hands has been abolished as a defense to divorce under *N.J.S.A.* 2A:34-7); foreclosure actions, *N.J. Nat'l Bank v. Azco Realty Co., Inc.*, 148 N.J. Super. 159, 166 (App. Div. 1977), *certif. denied*, 74 N.J. 280 (1977); *Leisure Technology-Northeast Inc. v. Klingbeil Holding Co.*, 137 N.J. Super. 353, 356-57 (App. Div. 1975); specific performance suits, *American Plaster Drill Co. v. Francisco*, 108 N.J. Eq. 323, 326 (E. & A. 1931); suits seeking to void union elections, *Reich v. Local 843*, 869 F. Supp. 1142, 1152-53 (D.N.J. 1994); and restrictive covenant cases, *Newark Cleaning & Dye Works v. Gross, Inc.*, 102 N.J. Eq. 362, 367 (Ch. Div. 1928). The doctrine is not applicable to bar a claim seeking legal as opposed to equitable remedies. *Miller v. Beneficial Management Corp.*, 855 F. Supp. 691, 716-17 (D.N.J. 1994); *see also Taylor v. International Maytex Tank Terminal Corp.*, 355 N.J.

Super. 482, 496-98 (App. Div. 2002) (finding that plaintiff's claims for non-economic and punitive damages arising out of both common law and statutory allegations of discrimination were not limited by the after-acquired evidence doctrine); *see also Hageman v. 28 Glen Park Assoc. L.L.C.*, 402 N.J. Super. 43 (Ch. Div. 2008).

In applying this doctrine to any of these matters it must be remembered that the maxim is based upon public policy, and may be relaxed in the interest of fairness. *Rasmussen v. Nielsen*, 142 N.J. Eq. 657, 661 (E. & A. 1948). In fact, as noted in *A. Hollander & Sons v. Imperial Fur Blending Corp.*, 2 N.J. at 247:

> The doctrine, however, is not so rigid nor should it be so construed as to allow or permit an unconscionable gain to the wrongdoer at the complainant's expense. In cases of this kind the court should not invoke the principle where there has been no misrepresentation or fraud and the suitor has acted upon the advice of counsel. To permit such a windfall to the wrongdoer would do violence to equity and good conscience . . .

This maxim need not be raised by a party to the case; either a trial court or an appellate court on its own initiative can recognize this doctrine and apply the maxim where the circumstances so justify in the interest of justice and public policy. *Trautwein v. Bozzo*, 39 N.J. Super. 267, 268 (App. Div. 1956).

Although the cases describing the nature of various types of unconscionable conduct are collected in the New Jersey Digest (at Equity, Key Number 65(2)), the discretionary application of this maxim, requiring a balancing of the plaintiff's conduct with all other factors in the case, makes it difficult to summarize the specific acts for which this maxim will be invoked. The scores of cases noted do no more than apply the basic principles described above.

In short, as Pomeroy notes (§ 397 at pp. 31 to 93):

> . . . Whenever a party, who, as actor seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principles, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

In *Board of Education, Twp. of Middletown v. Middletown Teachers Educ. Ass'n*, 365 N.J. Super. 419, 427 (Ch. Div. 2003), teachers sought expungement of all records relating to their incarceration when 216 teachers were incarcerated for failing to comply with an injunction entered in connection with an illegal work

stoppage. The court denied their request for several reasons and noted specifically that "even if such equitable authority exists, the court would decline to exercise it in favor of applicants. The applicants here willfully disobeyed a court order and, as such, were found in violation of same." *Id.* In *Joe D'Egidio Landscaping, Inc. v. Apicella*, 337 N.J. Super. 252 (App. Div. 2001), while the court did not cite the maxim verbatim, it held that the defendant was not entitled to the protections afforded by the consumer fraud act when his own conduct caused the violation. *Id.* at 257. The court found "[w]e consider such a result unacceptable; one who induces the alleged wrongdoing should not benefit as a result of it." *Id. See also Craft v. Stevenson Lumber Yard, Inc.*179 N.J. 56,
75-76 (2004) (applying the doctrine of the area of Construction Lien Law).

In *Heuer v. Heuer*, 152 N.J. 226 (1998), the Court found that the doctrine of unclean hands "may be considered simultaneously with estoppel to help ensure justice and to protect the integrity of the courts." *Id.* at 238. The Court also cautioned that the maxim has limitations:

> It does not repel all sinners from courts of equity, nor does it apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action; but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought.

Heuer, 152 N.J. at 238 (citing *Neubeck v. Neubeck*, 94 N.J. Eq. 167, 170 (E. & A. 1922). Additionally, the Court also noted that the Court has discretion in applying the maxim. *Id*.

12. WHERE A LOSS MUST BE BORNE BY ONE OF TWO INNOCENT PERSONS EQUITY WILL IMPOSE THE LOSS ON THAT PARTY WHOSE ACT FIRST COULD HAVE PREVENTED THE LOSS

This maxim is closely related to the last quoted principle, but is of limited application. It has been cited in several cases over the years. *See Cambridge Acceptance Corp. v. American Nat'l Motor Inns, Inc.*, 96 N.J. Super. 183 (Ch. & Law Div. 1967), *aff'd*, 102 N.J. Super. 435 (App. Div. 1968), *certif. denied*, 53 N.J. 81 (1978), and *Zucker v. Silverstein*, 134 N.J. Super. 39, 52 (App. Div. 1975). As noted in *Cambridge Acceptance Corp.*, this maxim is akin to a rule of equitable estoppel, and has its principal application in cases of legal, equitable, or actual fraud, and should not be applied without such a finding. *See also Kuhn v. Tumminelli*, 366

N.J. Super. 431 (App. Div.), *certif. denied*, 180 N.J. 354 (2004); *First Union Nat. Bank v. Nelkin*, 354 N.J. Super. 557, 568 (App. Div. 2002).

13. EQUITY ABHORS A FORFEITURE

Forfeitures may appropriately be labeled an equitable remedy of last resort. Traditional notions of fairness have steered equity courts from such a one-sided result. Instead, drawing on their inherent balancing power, courts have fashioned more equitable remedies by maintaining that forfeiture clauses will be strictly construed against the parties seeking their enforcement. *See*, e.g., *Walle v. Board of Adj. of Twp. of So. Brunswick*, 124 N.J. Super. 244 (App. Div. 1973) (conditional variance was not forfeited upon violation because a just result could be obtained by enforcing the provision as a condition); *JCRA v. Tug & Barge Urban Renewal*, 228 N.J. Super. 88 (Law Div. 1987), *aff'd*, 228 N.J. Super. 24 (App. Div. 1988) (instrument purporting to create a fee simple determinable would be strictly construed against rather than in favor of a forfeiture). Forfeitures, however, remain an available remedy due to recent concerns regarding legal contract rights. A softening of the court's reaction to forfeiture suits was evidenced in *Dunkin' Donuts of America v. Middletown Donut Corp.*, 100 N.J. 166 (1985), where the New Jersey Supreme Court cited another equitable maxim, "equity follows the law," when it denied a franchisee any remedy because of his intentional wrongdoing. *See also Simmons v. Gen. Motors Corp.*, 180 N.J. Super. 522, 543 (App. Div.), *certif. denied*, 88 N.J. 498 (1981) (holding that the trial court erred in enjoining termination of franchise where franchisee was in substantial breach of the franchise contract and had transferred ownership without complying with the Franchise Practices Act). As the court in *Dunkin' Donuts* observed, "[E]quity's jurisdiction in relieving against a forfeiture is to be exercised with caution lest it be extended to the point of ignoring legal right. Thus, if parties choose to contract for a forfeiture, a court of equity will not interfere with that contract term in the absence of fraud, accident, surprise or improper practice." *Id.* at 182 (citations omitted); *see also Rosen v. Smith Barney, Inc.*, 393 N.J. Super. 578, 587 (App. Div.), *certif. denied*, 192 N.J. 481 (2007).

14. EQUITY WILL NOT ORDER THE DOING OF AN IMPOSSIBLE ACT

The basic premise underlying this popular maxim is that a court cannot compel a party to do that which is impossible. Furthermore, a court of equity has no desire to place its imprimatur upon a decree that would prove to be in vain and ineffective. *See Mountain Management Corp. v. Hinnant*, 200 N.J. Super. 129 (Law Div. 1984), *aff'd*, 201 N.J. Super. 45 (App. Div. 1985) (court would not require a landlord to conduct a futile search for comparable housing); *Bonnet v. State*, 141 N.J. Super. 177 (Law Div. 1976), *aff'd*, 155 N.J. Super. 520 (App. Div.), *aff'd*, 78

N.J. 325 (1978); *Fiedler, Inc. v. Coast Finance Company, Inc.*, 129 N.J. Eq. 161, 168-69 (E. & A. 1941).

15. EQUITY WILL NOT KNOWINGLY BECOME AN INSTRUMENT OF INJUSTICE

This oft-quoted maxim is closely related to the "clean hands" doctrine. *See Warner v. Giron*, 141 N.J. Eq. 493, 498 (Ch. Div. 1948). Equity courts are said to balance the rights of the parties before them in order to reach just and fair results. To adhere to this principle equity courts have not hesitated to refuse to lend their hand to any injustice. *See, e.g., Weisbrod v. Lutz*, 190 N.J. Super. 181 (App. Div. 1983); *Brower v. Glen Wild Lake Co.*, 86 N.J. Super. 341, 350 (App. Div.), *certif. denied*, 44 N.J. 399 (1965) ("courts of equity are not wont to enforce contracts where 'enforcement . . . will be attended with great hardship or manifest injustice to the defendant.'") (citations omitted); *Aarvig v. Aarvig*, 248 N.J. Super. 181 (Ch. Div. 1991) (contract provisions will not be enforced unless as of that date they are fair and equitable); *Sheridan v. Sheridan*, 247 N.J. Super. 552, 556 (Ch. Div. 1990) ("A court of equity, as a court of conscience, can never permit itself to become party to the division of tainted assets nor can it grant the request for an admitted wrong-doer to arbitrate such a distribution . . . a court of equity can never allow itself to become an instrument of injustice."). In *In the Matter of Niles*, 176 N.J. 282 (2003), counsel fees incurred by an estate for representation of the trust beneficiary that are normally paid by the estate, were recoverable from individuals who wrongly claimed to be successor trustees. This case creates an exception to the American Rule, "which generally does not permit a prevailing party to recover counsel fees from a losing party." *Id.* at 297-98. A tortfeasor should be prevented from shifting the burden of his misdeeds to his victims. *Id.*; *see also Rolnick v. Rolnick*, 262 N.J. Super. 343, 362 (App. Div. 1993), *appeal after remand*, 290 N.J. Super. 35 (App. Div. 1996).

16. MISCELLANEOUS MAXIMS

a. "Equity Will Not Permit Double Satisfaction." *Henderson v. Weber*, 131 N.J.L. 299, 302 (E. & A. 1944), *appeal dismissed*, 322 U.S. 713 (1944); *Johnson v. Lentini*, 66 N.J. Super. 398, 409 (Ch. Div. 1961); *Hillside Nat'l Bank v. Silverman*, 116 N.J. Eq. 463, 465 (Ch. Div. 1934).

b. "Where One of Two Innocent Parties Must Suffer He Through Whose Agency the Loss Occurred Must Bear It; 'The One Whose Conduct, Act, or Omission Occasions the Loss Must Stand the Consequences' . . . He Who Trusts Most Must Lose Most." 2 Pomeroy § 363, p. 9.

c. "A Man Must Be Just Before He Is Generous." *Merchants' &*

Miners' Transp. Co. v. Borland, 53 N.J. Eq. 282, 287 (Ch. Div. 1895); *Coe v. N.J. Midland Railway Co.*, 27 N.J. Eq. 37, 40 (Ch. Div. 1876); *In the Matter of the Estate of Passoff*, 359 N.J. Super. 112, 118-19 (Ch. Div. 2002).

d. There are four additional maxims noted in 27 AM. JUR. 2d, Equity § 119, p. 646: "Equity Prevents Mischief." "Equity Delights in Amicable Adjustments." "A Court of Equity Seeks To Do Justice, and Not Injustice." "A Court of Equity Ought To Do, or Delights in Doing, Justice Completely, and Not By Halves." (footnotes omitted).

B. EQUITABLE DEFENSES

Closely related to the equitable maxims are the equitable defenses of estoppel, laches, and unclean hands. In fact, the last of these defenses is nothing more than a restatement of the equitable maxim that "he who comes into equity must come with clean hands." Other defenses, such as undue influence, duress, mistake, fraud or misrepresentation, incapacity, or the like, are applicable to both legal and equitable claims. Some of these defenses are treated elsewhere in this volume ("mistake" and "fraud" under Reformation of Instruments). Others, such as undue influence, duress, and incapacity are covered here. All these defenses are affirmative defenses, which must be specifically pleaded under *R.* 4:5-4. Unless such defenses are asserted in the original or an amended answer, they are deemed waived. *See R.* 4:6-2 and *R.* 4:6-7; *Winans-Carter Corp. v. Jay & Benisch*, 107 N.J. Super. 268, 272-73 (App. Div. 1959), *aff'd*, 107 N.J. Super. 268 (App. Div. 1969).

1. ESTOPPEL

a. Equitable Estoppel

"Equitable estoppel" and "estoppel in pais" are synonymous terms. *McSweeney v. Equitable Trust Co.*, 127 N.J.L. 299, 306 (E. & A. 1941), *appeal dismissed*, 315 U.S. 785 (1942). The doctrine has been expressed on occasion as an equitable maxim: "He who is silent when conscience requires him to speak will not be permitted to speak when conscience requires him to be silent." *Besson v. Eveland*, 26 N.J. Eq. 468, 472 (Ch. Div. 1875). "The essential principle of the policy of estoppel here invoked is that one may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct." *Gastime, Inc. v. Director, Div. of Taxation*, 20 N.J. Tax 158, 164 (2002), quoting *Middletown Twp. Policemen's Benevolent Ass'n v. Twp. of Middletown*, 162 N.J. 361, 367 (2000). Stated another way, equitable estoppel operates to prevent a party from disavowing its previous conduct if such repudiation would violate the demands of justice and good conscience. *Carlsen v. Masters, Mates and Pilots Pension Plan Trust*, 80 N.J.

334, 339 (1979); *Connell v. American Funding Ltd.*, 231 N.J. Super. 409, 416 (Ch. Div. 1987); *Segal v. Lynch*, 211 N.J. 230, 254 (2012).

The terms "equitable estoppel" and "estoppel" are often used interchangeably, but it should be noted that estoppel is the general term under which the more narrow concept of equitable estoppel is classified. The doctrine of equitable estoppel may be distinguished from other forms of estoppel such as collateral estoppel (issue preclusion), estoppel by judgment (*res judicata*), and estoppel by deed or mortgage, discussed *infra*. Equitable estoppel can arise from any type of "conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything." *State v. U.S. Steel Corp.*, 22 N.J. 341, 358 (1956) (quoting 3 Pomeroy on Equity Jurisprudence § 802 (5th ed. 1941); *Royal Associates v. Concannon*, 200 N.J. Super. 84, 92 (App. Div. 1985) (landlord's express permission to allow tenant to obtain and keep dog was sufficient to bind landlord).

The doctrine of equitable estoppel must be distinguished from that of unclean hands. Estoppel and unclean hands are similar in that both focus on the "total situation" of the parties and turn on the "relative innocence or culpability of the plaintiff and defendant, for the law may aid the one who is comparatively the more innocent." *Untermann v. Untermann*, 43 N.J. Super. 106, 109 (App. Div. 1956), *certif. denied*, 23 N.J. 363 (1957). As noted in the section in which the "clean hands" maxim was discussed, that doctrine focuses upon the bona fides of the actor. Estoppel, on the other hand, looks more at the party who justifiably relies upon the acts of another, which acts need not be malevolent. *See Summer Cottagers' Ass'n of Cape May v. Cape May*, 19 N.J. 493, 503-04 (1955), where plaintiffs were deemed estopped to vacate the municipality's sale of certain lots on the city tax map because they had failed to take action until after the construction of a motel on the lots. Similarly, in *Middletown Twp. Policemen's Benevolent Ass'n*, 162 N.J. 361, the Court held that a municipality was estopped from terminating a retired police officer's health insurance benefits after the municipality learned that the officer did not complete the requisite years of service in order to qualify for continued benefits because the officer relied on promises by municipal officers that upon his retirement he would be entitled to continued health insurance benefits and had been provided such benefits for approximately 10 years.

Equitable estoppel is frequently confused with, but must be distinguished from, waiver, although waiver may work an equitable estoppel. Estoppel, unlike waiver, requires the reliance of one party on another. *Knorr v. Smeal*, 178 N.J. 169 (2003). Waiver is an intentional relinquishment of a known right. *West Jersey Title & Guaranty Co. v. Industrial Trust Co.*, 27 N.J. 144, 152 (1958). "A waiver

presupposes a full knowledge of the right and intentional surrender." *Id.* at 153. *See also Columbia Savings & Loan v. Easterlin*, 191 N.J. Super. 327, 342 (Ch. Div. 1983), *aff'd*, 198 N.J. Super. 174 (App. Div. 1984). An equitable estoppel would be accomplished if one party changed its position in reliance upon another party's waiver of a right, when the repudiation of the latter's waiver would violate the demands of justice and good conscience, working prejudice and injury upon the party so relying. *Id.* In short, estoppel is a bar to the assertion of a right, whereas waiver is a voluntary relinquishment of that right. *Aron v. Rialto Realty Co.*, 100 N.J. Eq. 513, 517 (Ch. Div. 1927), *aff'd*, 102 N.J. Eq. 331 (E. & A. 1928).

Equitable estoppel also must be distinguished from laches, which "involves more than mere delay, mere lapse of time. There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and has been prejudicial to the other party." *West Jersey Title and Guaranty Co.*, 27 N.J. at 153. The result, however, of the application of the doctrine of laches is estoppel. In *Hernandez v. Stella*, 359 N.J. Super. 415 (App. Div. 2003), the court held for plaintiff noting that defendants were equitably estopped from asserting plaintiff's non-compliance with requirements of the Automobile Insurance Cost Reduction Act (AICRA). However, in this case the court actually described laches as the defendant's bar to assertion of plaintiff's non-compliance. (Defendants failed to raise this point until after arbitration of the claims.) *Id.*

The elements of equitable estoppel were stated by Justice (then Judge) Pashman in *Clark v. Judge*, 84 N.J. Super. 35, 54 (Ch. Div. 1964), *aff'd o.b.*, 44 N.J. 550 (1965):

(1) Conduct amounting to a representation or a concealment of material facts.

(2) Facts known to the party allegedly estopped, or at least the circumstances must be such that knowledge of them can be necessarily imputed to him.

(3) The truth concerning the facts must be unknown to the party claiming the estoppel at the time when acted upon by him.

(4) The conduct must be done with the intention that it be acted upon by the other party; [*see also Gen. Accident Insurance Co. v. N.Y. Marine and Gen. Ins. Co.*, 320 N.J. Super. 546, 557 (App. Div. 1999) (This element is open to question. *See* B1c. Governmental Agency Application, *infra*).]

(5) The conduct must be relied upon by the other party, and he must be led to act upon it.

(6) He must in fact act upon it in such a manner as to change his position for the worse.

Not only must a party seeking relief under the doctrine of equitable estoppel have detrimentally relied upon the alleged tortfeasor's conduct, but that reliance must be reasonable. *Lesniewski v. W.B. Furze Corp.*, 308 N.J. Super. 270, 286 (App. Div. 1998).

It should be noted that these same elements also constitute the basic elements of legal fraud, *see*, e.g., *Foont-Freedenfeld Corp. v. Electro-Protective Corp.*, 126 N.J. Super. 254, 257 (App. Div. 1973), *aff'd o.b.*, 64 N.J. 197 (1974), as opposed to equitable fraud, where the element of knowledge of the falsity of the fact asserted is not required. *Id.*; *Jewish Ctr. of Sussex County. v. Whale*, 86 N.J. 619, 624-25 (1981); *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 609 (1989).

Equitable estoppel is used only as a defense to a claim seeking enforcement, rescission, or reformation of an agreement. *See Connell v. American Funding Ltd.*, 231 N.J. Super. 409, 416 (Ch. Div. 1987). The required element of imputed scienter (i.e., constructive knowledge of the misrepresented facts) falls between the essentials of legal and equitable fraud. Justice Pashman, in *Clark v. Judge*, cited earlier, noted that if it cannot be shown that the facts were known to the party allegedly stopped, it must at least be shown that "knowledge of them can be necessarily imputed to him." 84 N.J. Super. at 54. In *Carlsen v. Masters, Mates and Pilots Pension Plan Trust*, 80 N.J. at 339, Justice Handler required "conduct amounting to a misrepresentation or concealment of material facts, known to the party allegedly estopped and unknown to the party claiming estoppel, done with intention or expectation that it will be acted upon by the other party and on which the other party does in fact rely in such a manner as to change his position for the worse. . . ." Although Justice Handler does not state that constructive knowledge would be sufficient, he does cite *Clark v. Judge* as authority for the quoted proposition. As noted in *Widmer v. Mahwah Township*, 151 N.J. Super. 79, 85 (App. Div. 1977), "an estoppel does not require that a fraudulent intent be shown." "'If the conduct works an unjust or inequitable result to the person it was designed to influence, the doctrine is applicable.'" *Id.* (quoting *N.J. Suburban Water Co. v. Harrison*, 122 N.J.L. 189, 196 (E. & A. 1939)); *see also Schmidt v. Schmidt*, 220 N.J. Super. 46, 52 (Law Div. 1987). As further noted in *Dambro v. Union Cty. Park Commission*, 130 N.J. Super. 450, 457 (Law Div. 1974):

> [E]stoppel is conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law. Such estoppel is grounded not on subjective intent but rather on the objective

impression created by the actor's conduct.

There appears to be a split among the authorities regarding scienter and whether it is an essential element of equitable estoppel. The second element of equitable estoppel as set forth in *Clark v. Judge*, 84 N.J. Super. 35, 54 (Ch. Div. 1964), *aff'd o.b.*, 44 N.J. 550 (1965), requires either actual knowledge or imputed knowledge of material facts. In *Schmidt* , 220 N.J. Super. at 52, the court explained that equitable estoppel may be invoked in order to prevent an unjust result even where fraudulent intent has not been shown. *See also Miller v. Teachers Pension and Annuity Fund*, 179 N.J. Super. 473, 477 (App. Div. 1981), *certif. denied*, 88 N.J. 502 (1981). However, the reader should also see *O'Malley v. Dep't of Energy*, 109 N.J. 309, 317-18 (1987), where the Court held that an essential element of equitable estoppel is a knowing and intentional misrepresentation.

Klein v. Dep't of Transp., 264 N.J. Super. 285 (App. Div.), *certif. denied*, 134 N.J. 481 (1993), concerned an inverse condemnation claim regarding plaintiff's loss of use of his private railroad track. The private track connected to a railroad spur which crossed a highway to a railroad. After building the track, the plaintiff entered into an agreement with the railroad regarding its maintenance. Ownership of the railroad spur was later transferred to the Department of Transportation ("DOT"). The DOT later widened the highway, making plaintiff's use of his private track impossible.

The trial court granted DOT's summary judgment motion, noting that without a physical invasion or an express easement, plaintiff's loss of his best use of his property did not constitute a compensable taking. *Id.* at 290. On appeal, plaintiff argued that DOT was equitably estopped from raising the takings issue because, prior to widening the highway, it had offered plaintiff money for any ownership interest he may have had in the highway or the adjoining roadway. The Appellate Division, however, held that DOT was not estopped from raising the issue because DOT's appraisal and offer did not constitute an admission. Plaintiff also failed to prove any detrimental reliance on the offer. *Id.* at 290-91.

An additional inconsistency is evident regarding the fourth element set forth in *Clark*, which requires conduct to be done with the intention that the party claiming estoppel rely upon it. Notwithstanding *Clark's* requirement of an intent to induce reliance, the Court in *Miller v. Miller*, 97 N.J. 154, 163 (1984), applied a less onerous standard whereby the party claiming estoppel need only "show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action." More recently, the New Jersey Supreme Court reaffirmed that a litigant claiming estoppel "must prove that the opposing party 'engaged in conduct, either intentionally or under circumstances that induced reliance.'" *Berg v. Christie*, 225 N.J. 245, 279

(2016) (quoting *Knorr v. Smeal* 178 N.J. 169, 178 (2003)).

If both the party allegedly estopped and the party asserting the estoppel were misled as to a material fact, then a cause of action for reformation or rescission of a contract or instrument on the grounds of mutual mistake can be asserted. *Rego Industries, Inc. v. American Modern Metals Corp.*, 91 N.J. Super. 447, 456 (App. Div. 1966); *Beachcomber Coins, Inc. v. Boskett*, 166 N.J. Super. 442, 445 (App. Div. 1979). (The subjects of reformation and rescission are generally treated elsewhere in this volume.)

The party who asserts a claim of equitable estoppel has the burden of proving it. *C.R. v. J.G.*, 306 N.J. Super. 214, 235 (Ch. Div. 1997); *Davin, LLC v. Daham*, 329 N.J. Super. 54, 67 (App. Div. 2000). Equitable estoppel may also arise from silence or omission, if one has an affirmative duty to speak or act. *Davin*, 329 N.J. Super. at 68-69. It has to do with the inducement of conduct to action or non-action. *Gastime, Inc. v. Director, Div. of Taxation*, 20 N.J. Tax 158, 167 (2002) (citing *Middletown Twp. Policemen's Benevolent Ass'n v. Middletown Twp.*, 162 N.J. 361, 367 (2000)).

While the doctrine of equitable estoppel may be applied where the interests of justice, morality, and common fairness clearly dictate that course, it is applied only in very compelling circumstances. *State v. King*, 340 N.J. Super. at 399 (holding that the State was not equitably estopped from seeking to vacate expungement of defendant's conviction even though motion to vacate was filed more than five years after entry of expungement order); *see also Parkway Insurance Co. v. N.J. Neck & Back*, 330 N.J. Super. 172, 189 (Law Div. 1998) (discussing assignment of insurance policy rights); *Hirsch v. Amper Financial Services, LLC*, 215 N.J. 174, 198 (2013) (barring application of equitable estoppel as use of a basis to compel arbitration of claims against non-signatories, in the absence of proof that such entity detrimentally relied on the plaintiff's conduct).

b. Promissory Estoppel

One type of estoppel whose elements are different from those of fraud (either legal or equitable) is promissory estoppel. *See Fairken Associates v. Hutchin*, 223 N.J. Super. 274, 283 (Law Div. 1987) (comparing the legal requirements of promissory and equitable estoppel). The doctrine is discussed generally in *Friedman v. Tappan Development Corp.*, 22 N.J. 523, 536-37 (1956). The Supreme Court noted there that promissory estoppel was "not a true estoppel, but a departure from the classic doctrine of consideration." *Id.* "The doctrine has been generally confined to charitable subscriptions, where difficulty has been encountered in sustaining the promise under the conventional theories of consideration, and to certain promises between individuals for the payment of money, enforced as informal contracts created

without a manifested mutual assent or consideration." *Id.* There are situations where promises as to future acts will estop the promisor. Relying on Williston on Contracts § 139, the Court noted:

> It is generally held that the principle of estoppel is applicable to in futuro promises, if subject to estoppel at all, only where they relate to an intended abandonment of an existing right, and are made to influence others who in fact are induced thereby to act or to forbear: e.g., where one who has induced his creditor to forbear to bring action upon his claim by a promise of payment or a promise not to plead the statute of limitations as a defense, even though such forbearance was not requested as consideration for the promise, and though the new promise (because not in writing or for some other reason) was not binding as such. In those cases, 'no new right is created. The court does not sustain an action on the promise; it reaches the desired result by allowing a defense to an action or allowing an original right to be enforced by merely prohibiting the interposition of a defense.'

Id. at 537. The *Friedman* analysis has been expanded in *E. A. Coronis Assoc. v. M. Gordon Construction Co.*, 90 N.J. Super. 69, 74-80 (App. Div. 1966); *Malaker Corp. Stockholders Protective Committee v. First New Jersey Nat'l Bank*, 163 N.J. Super. 463, 479-84 (App. Div. 1978), *certif. denied*, 79 N.J. 488 (1979); *Royal Associates v. Concannon*, 200 N.J. Super. 84, 91 (App. Div. 1985); *Ballard v. Schoenberg*, 224 N.J. Super. 661, 666 (App. Div.), *certif. denied*, 113 N.J. 367 (1988); and *East Orange Bd. of Educ. v. New Jersey Schools Const. Corp.*, 405 N.J. Super. 132, 148 (App. Div. 2009). These cases noted that:

> Four separate factual elements must be proved *prima facie* to justify the application of the doctrine. They are: (1) a clear and definite promise by the promisor; (2) the promise must be made with the expectation that the promisee will rely thereon; (3) the promisee must in fact reasonably rely on the promise; and (4) detriment of a definite and substantial nature must be incurred in reliance on the promise.

Ballard, 224 N.J. Super. at 666.

In addition, such promise must be of "sufficient definition." *Dluhos v. Strasberg*, 321 F.3d 365 (3d Cir. 2003). In *Malakar Corp.*, the court found that an implied promise to lend an unspecified amount of money was not "a clear and definite promise" that could justify the application of promissory estoppel. *Malakar*, 163 N.J. Super. at 478-81.

In the appropriate case, a "clear and definite promise" can be substituted for a "representation or concealment of a material fact" in the usual statement of the requirements for an estoppel. The court in *Malaker Corp.* noted that:

> [T]oo liberal an application of the concept will result in an unwitting and unintended undermining of the traditional rule requiring consideration for a contract. This is particularly true where the promise is the loan of money . . . A determination declaring such a deviation from presently accepted contract principles should only come from a confrontation with that issue, and not as an unintended consequence of the loose application of promissory estoppel to promises to lend money.

Malaker, 163 N.J. Super. at 484.

An alleged oral promise of a right of first refusal to purchase land cannot be enforced under a doctrine of promissory estoppel if one fails first to prove the existence of a contract by clear and convincing evidence. *LoBiondo v. O'Callaghan*, 357 N.J. Super. 488 (App. Div.), *certif. denied*, 177 N.J. 224 (2003).

The essential justification for invoking promissory estoppel is to avoid extreme hardship or injustice that would arise if promises were not enforced. *Pop's Cones, Inc. v. Resorts International Hotel, Inc.*, 307 N.J. Super. 461, 468-69 (App. Div. 1998) (*prima facie* claim for promissory estoppel where casino hotel withdrew offer to allow yogurt franchise to relocate to its property and owners had relied thereon).

New Jersey courts have generally found that the mere detriment furnished by an employee in leaving one position and taking another does not constitute sufficient consideration to create a contract of permanent employment or one terminable for cause only. *Swider v. Ha-Lo Industries, Inc.* 134 F. Supp. 2d 607, 619 (2001) (*citing Peck v. Imedia, Inc.*, 293 N.J. Super. 151, 165 (App. Div. 1996). Because promises of employment are generally promises of at-will employment only, reliance thereon does not typically give rise to a cause of action. *Id.*; *see also Bonczek v. Carter Wallace, Inc.*, 304 N.J. Super. 593, 600-01 (App. Div. 1997), *certif. denied*,153 N.J. 51 (1998). However, where there are losses incident to reliance upon the job offer itself, a claim for promissory estoppel may lie, regardless of the fact that the employer can terminate the relationship at any time. *Swider*, 134 F. Supp. 2d at 620 (holding that plaintiff's claim failed for lack of evidence of detrimental reliance where plaintiff never informed defendant that he was considering another job offer or that he turned down that offer in favor of his position with defendant).

Employer's conduct of revoking job offer after applicant resigned from existing job did not give rise to cause of action for promissory estoppel, where offer was unambiguously contingent on character verification. *Bonczek v. Carter Wallace, Inc*., 304 N.J. Super. 593, 600-01 (App. Div. 1997), *certif. denied* 153 N.J. 51 (1998).

c. Governmental Agency Application

Estoppel is applicable as a defense against the claim of a governmental entity as well as a private party, but "is not applied as readily against the public as against private persons." *Skulski v. Nolan*, 68 N.J. 179, 198 (1975); *see also Gastime, Inc. v. Director, Div. of Taxation*, 20 N.J. Tax.158, 164 (2002) (wherein the court stated that the doctrine rarely applied against a government agency, particularly in the area of taxation); *Kaufmann v. Mayor and Council of North Haledon*, 229 N.J. Super. 349, 361 (Law Div. 1988); *Klein v. Department of Transp.*, 264 N.J. Super. 285, 291 (App. Div.), *certif. denied* 134 N.J. 481. The party seeking the benefit of estoppel has the burden of establishing that an officer of the State, conscious of the State's true interest and aware of the private [party's] misapprehension, stood by while the private [party] acted in detrimental reliance. *Gastime, Inc.*, 20 N.J. Tax at 164.

Where estoppel would frustrate essential governmental functions, the doctrine is rarely invoked against a public body. *O'Malley v. Dept. of Energy*, 109 N.J. 309, 316 (1987); *see also Citizens for Equity v. Department of Envtl. Protection*, 126 N.J. 391 (1991). However, estoppel may be applied against a public body "where the interests of justice, morality and common fairness clearly dictate that course." *Gruber v. Raritan Twp.*, 39 N.J. 1, 13 (1962). In *Summer Cottagers' Ass'n of Cape May v. Cape May*, 19 N.J. 493 (1955), the Court noted:

> There is a distinction between an act utterly beyond the jurisdiction of a municipal corporation and the irregular exercise of a basic power under the legislative grant in matters not in themselves jurisdictional. The former are ultra vires in the primary sense and void; the latter, ultra vires only in a secondary sense which does not preclude ratification or the application of the doctrine of estoppel in the interest of equity and essential justice. [citations omitted] But there cannot be such relaxation of the conditions laid down in the grant of the power as to defeat the public policy intended to be served. The question is essentially one of legislative intention. Are the conditions made prerequisite to the very existence of the power — a limitation of the power itself?

Id. at 504-05. *See also Bridge v. Neptune Twp. Zoning Bd. of Adjustment*, 233 N.J.

Super. 587, 597 (App. Div. 1989) (equitable estoppel applied against a municipality in interest of equity and essential justice even though "irregular exercise of basic power possessed by municipality was technically ultra vires"); *but see City of Jersey City v. Roosevelt Stadium Marina, Inc.*, 210 N.J. Super. 315, 329-30 (App. Div. 1986) (stating that equitable defenses including estoppel and laches do not apply to contracts which are ultra vires and void). *See* discussion of the doctrine of *nullum tempus* at page 32, *infra.*

Similar rules apply to estoppel claims against the State government, with the same limitation as to ultra vires acts. *Cipriano v. Civil Service Dept.*, 151 N.J. Super. 86, 91 (App. Div. 1977). Public policy questions must also be considered. For example, the State may not be estopped by delay or inaction from asserting its title to tidelands. *See O'Neill v. State H'way Dept.*, 50 N.J. 307 (1967), decided under the N.J. Const. (1947), Art. VIII, § V, par. 2. (But note that this section was amended on November 3, 1981, and now requires a timely claim by the State.) These rules even apply with respect to the State's claim against a subsidiary governmental unit. *See Housing Authority of Atlantic City v. State*, 188 N.J. Super. 145, 153-54 (Ch. Div. 1983), *aff'd*, 193 N.J. Super. 176 (App. Div. 1984); *but see Bd. of Ed. of Twp. of Fairfield v. Kean*, 188 N.J. Super. 244, 250 (Ch. Div. 1982) (the court determined that "equitable rules of estoppel simply are not applicable in this [school financing appropriation] area of intergovernmental relationship.") In addition, the Court in *W.V. Pangborne & Co. v. N.J. Dept. of Transportation*, 116 N.J. 543, 554 (1989), noted that the Tort Claims Act, *N.J.S.A.* 59:1-1, *et seq*., does not prohibit the application of equitable estoppel.

The defense of estoppel is subject to the application of the various equitable maxims and thus may be barred if interposed to protect an active wrongdoer. *See Gould & Eberhardt v. Newark*, 6 N.J. 240, 244 (1951), applying the maxim that he who comes into equity must come with clean hands.

Estoppel cannot be used to circumvent Civil Service statutes and afford tenure or seniority rights. *DeLarmi v. Borough of Fort Lee*, 132 N.J. Super. 501, 509-10 (App. Div.), *certif. denied*, 68 N.J. 135 (1975).

Equitable estoppel has special application for government entities, and is rarely invoked, unless the Court deems it necessary. *State v. King*, 340 N.J. Super. 390, 399 (App. Div. 2001) (the doctrine is rarely invoked against a governmental entity, although it may be applied in very compelling circumstances in order to prevent manifest injustice); *Wood v. Borough of Wildwood Crest*, 319 N.J. Super. 650 (App. Div. 1999) (equitable estoppel may be invoked against a municipality where interests of justice, morality, and common fairness clearly dictate it); *HIP of New Jersey v. State Dept. of Banking and*

Insurance, 309 N.J. Super. 538 (App. Div. 1998) (equitable estoppel is only invoked against a government agency where it is necessary to prevent manifest injustice); *County of Morris v. Fauver*, 153 N.J. 80 (1998) (equitable considerations are relevant to assessing governmental conduct, and may be invoked if justice demands it); *Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown*, 162 N.J. 361 (2001) (court has duty to invoke equitable estoppel against municipality when occasion arises which demands it). As the court recognized in *State v. King*, the doctrine should not be freely applied so as to thwart or compromise the legislative will. 340 N.J. Super. at 399.

d. Judicial Estoppel

The doctrine of judicial estoppel prevents a party from advocating a position contrary to a position it successfully asserted in the same or a prior proceeding. *Ramer v. N.J. Transit Bus Operations, Inc.*, 335 N.J. Super. 304, 311 (App. Div. 2000); *Chattin v. Cape May Greene, Inc.*, 243 N.J. Super. 590 (App. Div. 1990), *aff'd*, 124 N.J. 520 (1991). The "same or prior proceeding" means a prior judicial proceeding. *Id*. *But see Winters v. North Hudson Regional Fire and Rescue*, 212 N.J. 67, 88 (2012) (plaintiff who litigated an employment retaliation claim in a civil service disciplinary proceeding was barred from filing a subsequent CEPA claim).

The purpose of the judicial estoppel doctrine is to protect the "integrity of the judicial process." *Puder v. Buechel*, 362 N.J. Super. 479, 492 (App. Div. 2003), *rev'd on other grounds*,183 N.J. 428 (2005); *Kimball International Inc. v. Northfield Metal Products*, 334 N.J. Super. 596, 606 (App. Div. 2000) *certif. denied*,167 N.J. 88 (2001) quoting *Cummings v. Bahr*, 295 N.J. Super. 374, 387 (App. Div. 1996). *See also McAlpine v. City of Garfield*, 25 N.J. Misc. 477 (Cty. Ct. 1947), *aff'd*, 137 N.J.L. 197 (E. & A. 1948) (judicial estoppel is based on "justice and fair play"); *see also Ramer v. N.J. Transit Bus Operations, Inc.*, 335 N.J. Super. 304, 311 (App. Div. 2000) (judicial estoppel does not bar employee's complaint under the Law Against Discrimination). The integrity of the judicial process is only deemed threatened when a party advocates a position contradictory to a position it successfully asserted in the same or a previous action. *Kimball*, 334 N.J. Super. at 606. *See also Commercial Insurance Co. of Newark v. Steiger*, 395 N.J. Super.109, 114-115 (App. Div. 2007); *Ali v. Rutgers*, 166 N.J. 280, 287-88 (2000); *Kress v. LaVilla*, 335 N.J. Super. 400, 412-13 (App. Div. 2000), *certif. denied*,168 N.J. 289 (2001).

A party is not barred from taking an inconsistent position when the first action was concluded by settlement. In *Kimball*, the court held "if a court has not accepted a litigant's prior position, there is no threat to the integrity of the

judicial system in allowing the litigant to maintain an inconsistent position in subsequent litigation or at a later stage of the same litigation, and thus the doctrine of judicial estoppel does not apply." *Kimball*, 334 N.J. Super. at 610. This proposition overrules the previous law of judicial estoppel discussed in *Levin v. Robinson, Wayne & LaSala, Esqs.*, 246 N.J. Super. 167 (Law Div. 1990). *See also Guido v. Duane Morris LP*, 202 N.J. 79, 94 (2010) ("the existence of a prior settlement is not a bar to the prosecution of a legal malpractice claim arising from such settlement").

Moreover, Federal courts have also adopted the doctrine. The Third Circuit held in *Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773, 782 (3d Cir. 2001), "judicial estoppel is inappropriate unless the earlier position was accepted by a court or agency." *Montrose Medical Group* found that *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, (1999), mandated this conclusion. *Id.* Accordingly, there is no conflict between State and Federal law.

For a fuller treatment of the doctrine of judicial estoppel, see *Comment Precluding Inconsistent Statement: The Doctrine of Judicial Estoppel*, 80 NW. U.L. REV. 1244 (1986); Pressler, CURRENT NEW JERSEY COURT RULES, Comment 15.2 on *R.* 4:5-4 (2018).

e. Estoppel by Deed or Mortgage

For a discussion of estoppel by deed, *see Main Assocs., Inc. v. B. and R. Enterprises, Inc.*, 74 N.J. Super. 483 (Ch. Div. 1962); *Borough of Wildwood Crest v. Smith*, 210 N.J. Super. 127 (App. Div.), *certif. denied*,107 N.J. 51 (1986). (owners of beach property and not borough acquired title to adjoining land under doctrine of estoppel by deed), and for a discussion of estoppel by mortgage, *see Robinson-Shore Development Co. v. Gallagher*, 43 N.J. Super. 430 (Ch. Div.), *aff'd*, 45 N.J. Super. 507 (App. Div. 1957), *rev'd on other grounds*, 26 N.J. 59 (1958).

Judicial estoppel is distinguishable from equitable estoppel. *C.R. v. J.G.*, 306 N.J. Super. at 238. Judicial estoppel precludes a party from assuming a position in a legal proceeding which is inconsistent with one successfully asserted in a judicial proceeding, and looks at the connection between the litigant and the judicial system. *Id*. Equitable estoppel, conversely, focuses on the relationship of the parties prior to litigation. *Id*.

2. LACHES

The doctrine of laches is derived from several equitable maxims, namely: "nothing can call equity into activity but conscience, good faith and diligence;"

"equity aids the vigilant, not those who slumber on their rights;" "he who seeks equity must do equity;" and "he who comes into equity must come with clean hands." *Trapp v. Schaefer*, 133 N.J. Eq. 39, 42 (Ch. Div. 1943) (quoting from 30 C.J.S., Equity, § 113, p. 524). The validity of the defense depends on a case-by-case factual analysis and will be applied in an individualized manner. *Urban League v. Mayor & Council*, 115 N.J. 536, 554 (1989); *Donnelly v. Ritzendollar*, 14 N.J. 96, 107 (1953).

In addition, laches can be asserted as "an equitable defense that may be interposed in the absence of the statute of limitations," *Northwest Covenant Medical Center v. Fishman*, 167 N.J. 123, 140 (2001), and has been defined as an "inexcusable delay in asserting a right." *City of Atlantic City v. Civil Service Comm'n*, 3 N.J. Super. 57, 60 (App. Div. 1949) (quoting 30 C.J.S. Equity, §112). The policy behind the doctrine is to discourage stale claims. *See Gladden v. Pub. Emp. Retirem. Sys. Trustee Bd.*, 171 N.J. Super. 363, 370-71 (App. Div. 1979), where Judge Matthews restated a simple formulation of the rule: "Laches is a defense when there is delay, unexplained and inexcusable, in enforcing a known right, and prejudice has resulted to the other party because of that delay. . . ." *See also Matter of Adoption of a Child of Indian Heritage*, 111 N.J. 155, 190 (1988); *Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 448 (Ch. Div. 1948), *aff'd o.b.*, 1 N.J. 508 (1948).

The doctrine has several components:

(a) To be chargeable with laches, a party must have freedom of action. Implicit in the concept of inexcusable delay is the ability of the party against whom laches is asserted to perform the act or to have asserted the claim which is now alleged to be barred. *Matarese v. Matarese*, 142 N.J. Eq. 226, 232 (E. & A. 1948). *See also Berkeley Dev. Co. v. The Great Atlantic & Pacific Tea Co.*, 214 N.J. Super. 227, 243 (Law Div. 1986).

(b) Such party also must be shown to have had knowledge of his rights, *Donnelly v. Ritzendollar*, 14 N.J. 96, 108 (1954), although a party cannot assert ignorance of the facts if such ignorance is a result of his own culpable neglect. *Giehrach v. Rupp*, 112 N.J. Eq. 296, 302-03 (E. & A. 1933). As further noted in *Cameron v. Penn Mutual Life Ins. Co.*, 116 N.J. Eq. 311, 314 (Ch. Div. 1934), the test to determine whether the doctrine is applicable is not always the actual knowledge of the party but may also be what the party "might have known by the use of the means of information within his reach with the vigilance which the law requires of him."

(c) The chief element in a claim of laches is delay, but a delay without more does not constitute laches. *Metropolitan Life Ins. Co. v. Tarnowski*, 130 N.J. Eq. 1, 4 (E. & A. 1941). In *Stroebel v. Jefferson Trucking & Rigging Co.*, 125 N.J.L. 484,

487 (E. & A. 1940). Justice Heher generally noted that:

> [L]aches involves more than mere delay, mere lapse of time. To deserve that category, the delay must be for a length of time which, unexplained and unexcused, is altogether unreasonable under the circumstances, and has been prejudicial to the party asserting it or renders it very doubtful that the truth can be ascertained and justice administered . . . .

The length of time that has elapsed may, however, be considered by the court, and may by itself result in laches. The court in *Urban League v. Mayor & Council*, 115 N.J. 536, 555 (1989), found that a 12-year delay in bringing a claim for attorney's fees was unreasonable and amounted to unfair surprise. In denying the plaintiff's claim, the court explained that a shorter than normal period of time may constitute laches in an action for attorney's fees. *Id.*

(d) "The length of delay, reasons for delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs . . . The length of the delay alone or in conjunction with the other elements may result in laches . . . It is because the central issue is whether it is inequitable to permit the claim to be enforced, that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant. This is why some courts have stated that the mere lapse of time is insufficient, though, as indicated above, that is an overstatement of the principle. Inequity, more often than not, will turn on whether a party has been misled to his harm by the delay . . ." *Lavin v. Hackensack Bd. of Ed.*, 90 N.J. 145, 152, 153 (1982); *Knorr*,178 N.J. 169, 181 (2003) ("The core equitable concern in applying laches is whether a party has been harmed by the delay"). *State by Comm'n of Transp. v. Weisswasser*, 287 N.J. Super. 287, 300 (App. Div.), *aff'd* 149 N.J. 320 (1996). *See also DeHay v. West New York*, 189 N.J. Super. 340, 344-47 (App. Div. 1983), *certif. denied*, 94 N.J. 591 (1983); *Fed. Dep. Insur. Corp. v. Rosen*, 188 N.J. Super. 230, 236-38 (App. Div. 1983); *County of Morris v. Fauver*, 153 N.J. 80 (1998) (equitable defense of laches did not bar county's contract action against state for failure to follow contract payment provisions); *In re Keitur*, 332 N.J. Super. 18 (App. Div. 2000) (laches did not bar claim for reimbursement for Medicaid payments made by Division of Medical Assistance for minor).

If the delay is unexplained, it may give rise to a presumption against plaintiff's rights or in favor of an adverse right of defendant. The court in *Atlantic City v. Civil Service Com.*, 3 N.J. Super. at 60, quoted from 30 C.J.S. § 116b, p. 538 to explain the presumptions that may arise from an unexplained lengthy lapse of time:

> [A] presumption that, if plaintiff was ever possessed of a right, it

> has been abandoned or waived, or has been in some manner satisfied; or that plaintiff has assented to, or acquiesced in, the adverse right of defendant; or a presumption that the evidence of the transaction in issue has been lost or become obscured, or that conditions have changed since the right accrued; or a presumption that the adverse party would be prejudiced by the enforcement of plaintiff's claim.

Most significantly, laches also requires that prejudice result from the delay. *State v. Weisswasser*, 287 N.J. Super. at 300 ("length of time alone may result in laches, but the real question is whether the delay has resulted in prejudice to the other party"); *See In re Meadowlands Communications Systems, Inc.*, 175 N.J. Super. 53, 63 (App. Div.), *certif. denied*, 85 N.J. 455 (1980); *Fairken Associates v. Hutchin*, 223 N.J. Super. 274, 279 (Law Div. 1987). This prejudice can take the form of loss of evidence, *Fox v. Haddon Twp.*, 137 N.J. Eq. 394, 398 (Ch. Div. 1945); loss of a witness's memory, *Lutjen v. Lutjen*, 64 N.J. Eq. 773, 781 (E. & A. 1902); *Reeves v. Weber*, 111 N.J. Eq. 454, 455-56 (E. & A. 1932); death of a witness, *Pine v. Gardner*, 103 N.J. Eq. 69, 73-74 (E. & A. 1928); *In re Koehler's Estate*, 43 N.J. Super. 585, 594-95 (App. Div. 1957); or change in position by an innocent third party, *Trusdell v. Lehman*, 47 N.J. Eq. 218 (Ch. Div. 1890) [conversely, lack of prejudice to such a third party can be a basis for denial of the defense of laches, *Morse v. Hackensack Savings Bank*, 47 N.J. Eq. 279, 291 (E. & A. 1890)]; inability to develop property and involvement in expensive litigation, *Fed. Dep. Insur. Corp. v. Rosen*, 188 N.J. Super. 230, 237 (App. Div. 1983). Without prejudice, however, there will be no laches; *Monmouth County Division of Social Services v. C.R.*, 316 N.J. Super. 600 (Ch. Div. 1998); *Amir v. D'Agostino*, 328 N.J. Super. 141 (Ch. Div. 1998), *aff'd*, 328 N.J. Super. 103 (App. Div. 2000).

(d) There are recognized bars to the defense of laches. For example, the delay may generally be excused if the claimant is an infant, *Rothenberg v. Franklin Washington Trust Co.*, 129 N.J. Eq. 361, 366 (E. & A. 1941), or an incompetent, *Kidder v. Houston*, 47 A. 336 (Ch. 1900). But, if an incompetent is restored to reason and thereafter is informed of all facts upon which he can act, but then delays for an unreasonable length of time, his claim will be barred. *Doughty v. Doughty*, 7 N.J. Eq. 643, 650 (E. & A. 1850). Similarly, fraud perpetrated by the person claiming laches will bar the defense, *Gallagher v. New England Mutual Life Ins. Co. of Boston*, 19 N.J. 14, 23 (1955). This is merely one application of the general proposition that laches may not be asserted by one whose actions have contributed to or caused the delay. *Bergen Cty. Welfare Bd. v. Cueman*, 164 N.J. Super. 401, 407-08 (J. & D.R. Ct. 1978). In addition, laches will not be found where the delay was occasioned by a party pursuing his or her legal remedies, *Comins v. Culver*, 35 N.J. Eq. 94, 96

(Ch. Div. 1882), or resulted from negotiations between the parties, *Kline v. Cutter*, 34 N.J. Eq. 329, 331-32 (Ch. Div. 1881), *rev'd on other grounds sub nom. Cutter v. Kline*, 35 N.J. Eq. 534 (E. & A. 1882), or from consensual extensions of time, *Vliet v. Cowenhoven*, 83 N.J. Eq. 234, 238 (Ch. Div. 1914). Also, the defense of laches is not favored when a confidential relationship exists between the parties. *See In re Estate of Mosery*, 349 N.J. Super. 515, 523 (App. Div. 2002), *certif. denied*, 174 N.J. 191 (2002); *Weisberg v. Koprowski*, 17 N.J. 362, 378 (1955) (citing *Mataresse v. Mataresse*, 142 N.J. Eq. 226 (E. & A. 1948)). Recoupment may also be a defense to laches. *See Knight v. City of Hoboken Rent Leveling and Stabilization Bd.*, 332 N.J. Super. 547, 552-54 (App. Div. 2000).

(e) There is a question whether laches can run against the State. Generally, laches is not applied against the State to the same degree as it is against private parties. *Kauffmann v. North Haledon Borough*, 229 N.J. Super. 349, 362 (Law Div. 1988) (citing *O'Neil v. State Highway Dept.*, 50 N.J. 307, 319 (1967)). Given the Supreme Court's decisive abrogation of the doctrine that the statute of limitations cannot run against the State, *N.J. Educational Facilities Authority v. Gruzen Partnership*, 125 N.J. 66, 69 (1991), it is now more likely that the doctrine will apply to official inaction. It is clear that with regard to actions mandated by the Constitution "acquiescence for no length of time can legalize a clear violation of duty where the people have plainly expressed their will in the Constitution and have appointed judicial tribunals to enforce it." *Asbury Park Press Inc. v. Woolley*, 33 N.J. 1, 14 (1960) (an apportionment case). However, in less onerous cases, the doctrine of laches may be invoked against the State or its sub-divisions, *Springfield Twp. v. Bensley*, 19 N.J. Super. 147, 161-63 (Ch. Div. 1952), although some earlier cases have indicated to the contrary. It appears to be clear that where the State is exercising a proprietary, as opposed to a public right, laches (or a statute of limitation) may be involved. *Trenton & Mercer Co. Trac. Corp. v. Ewing, Twp.*, 90 N.J. Eq. 560, 563 (E. & A. 1919); *Bd. of Trustees of Bergen Comm. College v. J.P. Fyfe*, 188 N.J. Super. 288, 293-98 (Law Div. 1983), *aff'd*, 192 N.J. Super. 433 (App. Div. 1983), *certif. denied*, 96 N.J. 308 (1984). There should be no reason, however, why the same rules as were noted above with respect to equitable estoppel should not apply to laches, since under the cases cited earlier, laches is merely a specialized form of estoppel. This principle is important in light of the former, but now abrogated, general rule that a statute of limitation does not run against the State (or any political subdivision thereof). *Id.* at 293. Therefore, the laches argument may be the only bar that may be urged against a stale claim, unless the State is specifically named in the limitation provision of a statute, or (as in the cited case) the governmental unit is exercising mixed proprietary and governmental functions.

(f) A statute of limitations does not by its terms apply to courts of equity. However, the New Jersey Supreme Court clarified guidance on the interplay between laches and statutes of limitations in *Fox v. Millman,* 210 N.J. 401 (2012). In matters of equity, if there is no statute of limitations that is directly applicable, courts "first look to see whether there is an analogous statute that might appropriately fix the timeliness as to the equitable remedy." *Id.* at 422 (citing *Lavin v. Hackensack Bd. of Educ.*, 90 N.J. 145, 153 n.1 (1982)). If there is such a statute, then that period would apply, unless there was an "overriding reason why the application would be inequitable." *Id.* However, it is inappropriate to "broadly extend" laches to cases "governed by statutes of limitations." *Id.* at 423. The Supreme Court observed that "[s]ubstituting the equitable doctrine of laches for the clear guidance expressed in statutes of limitations would create a chaotic and unpredictable patchwork in which the only certainty would be the inconsistency of outcomes as different judges, or, as in this matter, juries, evaluated timeliness individually." *Id.* The Supreme Court acknowledged that in *Chance v. McCann*, 405 N.J. Super. 547 (App. Div. 2009), laches was applied to a case where a statute of limitations governed. *Id.* at 421-423. There, the *Chance* court used laches to "bar prosecution of an otherwise- timely lawsuit between a lawyer and the estate of his deceased partner that arose out of their agreement concerning the dissolution of their partnership." *Fox*, 210 N.J. at 421. However, the Supreme Court stated that the *Chance* case was an example of "the rarest of circumstances" and "overriding equitable concerns." *Id.* at 422. Thus, after the *Fox* decision, it appears that the general rule to be applied now is where there is a statute of limitations on point, laches may not be invoked as an equitable defense.

The doctrine of *nullum tempus* (time does not run against the King), providing that a statute of limitations will not run against the State, is no longer applicable to many governmental claims. *Devins v. Borough of Bogota*, 124 N.J. 570 (1991) (*nullum tempus* does not bar adverse possession of municipally-owned land not used for public purposes). *See also N.J. Educational Facilities Auth. v. Gruzen Partnership,* 125 N.J. 66 (statute of limitations applies to State contractual claims). The *Gruzen* Court abrogated the *nullum tempus* doctrine and specifically noted that the decision would not be applicable to claims made by the State or its agencies prior to December 31, 1991. In 1991, the Legislature enacted *N.J.S.A.* 2A:14-1.2, which provides for a uniform 10-year limitations period for actions commenced by governmental entities formerly protected by the doctrine of *nullum tempus.* This 10-year statute of limitations does not apply if another limitations period expressly and specifically applies to actions commenced by the State, or where a longer limitations period would otherwise apply. *N.J.S.A.* 2:14-1.2; *State v. Cruz Const. Co., Inc.*, 279 N.J. Super. 241 (App. Div. 1995); However, the New Jersey Supreme Court clarified guidance

on the interplay between laches and statutes of limitations in *Fox v. Millman*, 210 N.J. 401 (2012). In matters of equity, if there is no statute of limitations that is directly applicable, courts "first look to see whether there is an analogous statute that might appropriately fix the timeliness as to the equitable remedy." *Id.* at 422 (citing *Lavin v. Hackensack Bd. of Educ.*, 90 N.J. 145, 153 fn1 (1982)). If there is such a statute, then that period would apply, unless there was an "overriding reason why the application would be inequitable." *Id.* However, it is inappropriate to "broadly extend" laches to cases "governed by statutes of limitations." *Id.* at 423. The Supreme Court observed that "[s]ubstituting the equitable doctrine of laches for the clear guidance expressed in statutes of limitations would create a chaotic and unpredictable patchwork in which the only certainty would be the inconsistency of outcomes as different judges, or, as in this matter, juries, evaluated timeliness individually." *Id.* The Supreme Court acknowledged that in *Chance v. McCann*, 405 N.J. Super. 547 (App. Div. 2009), laches was applied to a case where a statute of limitations governed. *Id.* at 421-423. There, the *Chance* court used laches to "bar prosecution of an otherwise- timely lawsuit between a lawyer and the estate of his deceased partner that arose out of their agreement concerning the dissolution of their partnership." *Fox*, 210 N.J. at 421. However, the Supreme Court stated that the *Chance* case was an example of "the rarest of circumstances" and "overriding equitable concerns." *Id.* at 422. Thus, after the *Fox* decision, it appears that the general rule to be applied now is where there is a statute of limitations on point, laches may not be invoked as an equitable defense. *Yurecko v. Port Authority Trans-Hudson Corp.*, 279 F. Supp. 2d 606, 612-613 (2003).

In *Holloway v. State*, 125 N.J. 386 (1991), decided prior to both *Gruzen* and the enactment of *N.J.S.A.* 2A:14-1.2, the Court held that the State's claim was time-barred due to principles governing the equitable remedy of subrogation. Subrogation is based on the common law concept that the burden for the ultimate discharge of an obligation ought to rest upon the one who in good conscience ought to pay for it. *Culver v. Insurance Co. of North America*, 221 N.J. Super. 493 (App. Div. 1987), *rev'd on other grounds*, 115 N.J. 451 (1989). *See* discussion on Equitable Subrogation, *infra*.

In *Holloway*, a prisoner sued the State for damages resulting from an injury sustained in a swimming pool accident. Any potential claims the prisoner had against the pool manufacturer or distributor were time-barred. The State, however, asserted claims against the manufacturer and distributor for indemnification and contribution, as well as a direct claim for reimbursement of expenses the State incurred while treating the prisoner. The Court had noted that allowing the State to maintain a claim against third-party defendants without "due regard to the legal and equitable rights of others" would not be fair and equitable." *Holloway,* 125 N.J. at

399 (citing *Standard Accident Ins. Co. v. Pellecchia*, 15 N.J. 162, 172 (1954)). Therefore, the Court held that the State could not bring a direct claim against the pool manufacturer and the distributor because the prisoner's claims against the same parties were time-barred.

Laches is inappropriate in criminal prosecutions where the safety and welfare of the community are of primary importance. *State v. McCague*, 314 N.J. Super. 254, 265 (App. Div.), *certif. denied*, 157 N.J. 542 (1998) (prosecution of defendants for furnishing hypodermic needles to addicts).

3. UNCLEAN HANDS

The defense of unclean hands is no more than the application of the equitable maxim that "he who comes into equity must come with clean hands," and has been treated in detail in the section under equitable maxims. The doctrine of unclean hands may bar recovery of otherwise viable claims. *Leeds v. Chase Manhattan Bank, N.A.*, 331 N.J. Super. 416, 420 (App. Div. 2000) (knowingly accepting stolen funds constitutes unclean hands).

4. UNDUE INFLUENCE

The defense of undue influence may arise in several settings, commonly in will contests, In re Estate of Stockdale, 196 N.J. 275, 302-03 (2008); *In re Blake's Will*, 21 N.J. 50 (1956); charitable gifts, *In re Dodge*, 50 N.J. 192 (1967); inter vivos gifts to friends, *Seylaz v. Bennett*, 5 N.J. 168 (1950); imposition of constructive trusts, *Trustees of Client Security Fund v. Yucht*, 243 N.J. Super. 97, 132 (App. Div. 1989), *D'Ippolito v. Castoro*, 51 N.J. 584, 589 (1986); and even trustee- beneficiary, *In re Niles*, 176 N.J. at 297, and attorney-client relationships (where the Rules of Professional Conduct and requirements for independent representation provide the standards), *In re Hurd*, 69 N.J. 316 (1976). Both the attorney and a trustee act as officer of the court when acting on behalf of clients and beneficiaries. *In re Niles*, 176 N.J. at 297.

"[U]ndue influence is a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets[,]"Estate of Stockdale, 196 N.J. 275, 302-03 (2008), and forces the testator to "accept[] instead the domination and influence of another." quoting *Haynes v. First National Bank*, 87 N.J. 163, 176 (1981) ("undue influence is a pernicious tort that has been referred to as a "species of fraud") (quoting In re Estate of Neuman, 133 N.J. Eq. 532, 534 (E. & A. 1943); *In re Niles*, 176 N.J. 282, 296 (2003); *Pascale v. Pascale*, 113 N.J. 20, 30 (1988). When undue influence affects only a portion of a document, and the affected portion can be identified, then the affected portion can

be severed and the unaffected portion can be enforced. *In re Landsman*, 319 N.J. Super. 252, 267 (App. Div), *certif. denied*, 162 N.J. 127 (1999).

a. Inter Vivos Gifts

In the usual case the proof of an inter vivos gift requires the elements of "(1) an unequivocal donative intent on the part of the donor; (2) an actual or symbolical delivery of the subject matter of the gift; and (3) an absolute and irrevocable relinquishment by the donor of ownership and dominion over the subject matter of the gift, at least to the extent practicable or possible, considering the nature of the articles to be given." *In re Dodge*, 50 N.J. at 216. The intention of the donor is therefore paramount, *Czoch v. Freeman*, 317 N.J. Super. 273, 284 (App. Div.), *certif. denied*, 161 N.J. 149 (1999) (listing elements necessary to prove inter vivos gift).

The standard of proof in the gift cases is "clear and convincing." *In re Dodge*, 50 N.J. at 228 ("explicit and convincing evidence that the donor intended to make a present gift and unmistakably intended to relinquish permanently the ownership of the subject of the gift"). If the donor has died or become incompetent, the transaction, of course, must be proven by clear and convincing evidence under *N.J.S.A.* 2A:81-2. It is not necessary that the donee occupy a dominant position if the relationship between the donor and donee is one "in which confidence is naturally inspired, is presumed, or in fact, reasonably exists." In such a case the burden of proof shifts to the donee. 50 N.J. at 227. *See* also *Bronson v. Bronson*, 218 N.J. Super. 389, 392 (App. Div. 1987).

In *Pascale v. Pascale*, 113 N.J. 20 (1988), the Court was faced with the question of whether certain inter vivos stock transfers from a father to his son should be set aside based upon an allegation of undue influence. The court found that because a confidential relationship existed between the father and son, a rebuttable presumption of undue influence had been created. *Id.* at 34. However, the son was successful in rebutting the presumption although the father had not had the benefit of competent and disinterested counsel in a transaction that involved the transfer of a substantial portion of the father's assets. *Id.* at 39. The Court based its decision on the father's full knowledge and understanding of the consequences associated with the transfer and noted that the only mistake he made was in misjudging his ability to control his son after placing him in a position of power. *Id.*

b. Improvident Gifts

A slightly different situation exists if there is an allegation of an improvident gift. *See Petruccio v. Petruccio*, 205 N.J. Super. 577, 580-81 (App. Div. 1985); *see also Estate of Ostlund v. Ostlund*, 391 N.J. Super. 390, 401 (App. Div. 2007). To sustain the gift in such a case, there must be a showing not only of the intention to

make the gift (of all or a substantial part of the donor's assets) and relinquish permanently the ownership of the subject of the gift, but also of the advice of competent and disinterested counsel and full understanding of such advice by the donor. As noted in *Seylaz v. Bennett*, 5 N.J. at 173:

> When a person under the influence of and dependent upon another makes an improvident gift to the other stripping himself of virtually all his assets, a presumption of undue influence will arise from the facts and the gift will be declared invalid unless the donor has had the benefit of competent and disinterested counsel and it is shown he fully understood and intended the consequences of his act . . . . When the donee is the dominant partner in the relationship, the burden is upon him to show by clear and convincing proof the gift was the voluntary and intelligent act of the donor. . . .

When the donor is not dependent on the donee, "independent advice is not a prerequisite to the validity of an improvident gift even though the relationship between the parties is one of trust and confidence." Id. In *Pascale v. Pascale*, 113 N.J. 20 (1988), the Court was faced with the question of whether certain inter vivos stock transfers from a father to his son should be set aside based on the theory of undue influence. The Court found that since a confidential relationship existed between the father and son, a presumption of undue influence had been created. *Id.* at 34. However, the son was successful in rebutting the presumption even where his father had not had the benefit of competent and disinterested counsel in a transaction that involved the transfer of a substantial portion of the father's assets. *Id.* at 39. The Court based its decision on the father's full knowledge and understanding of the consequences associated with the transfer and noted that the only mistake he made was in misjudging his ability to control his son after placing him in a position of power. *Id.*

It is important to note that not every transfer of property is an improvident gift. The court in *Seylaz* found:

> The situation is quite different, however, when there is no evidence that the donor is dependent upon or servient to the donee. In such case, independent advice is not a prerequisite to the validity of an improvident gift even though the relationship between the parties is one of trust and confidence. . . . If it appears the donee was not the dominant party in the relationship, then the presumption is in favor of the validity of the gift and the complainant has the burden of proving circumstances which make it voidable. . . .

See also Podkowicz v. Slowineski, 44 N.J. Super. 149 (App. Div. 1957), *certif.*

denied, 25 N.J. 43 (1957); *Seylaz*, 5 N.J. at 173.

c. Wills Application

Similarly, in the Wills Act, *N.J.S.A.* 3B:1-1, *et seq*., the intention of the testator is paramount. In order to determine the probable intent of the testator, the court will examine "the entire will," study "competent extrinsic evidence" and attribute "common human impulses" to him. *Lansing v. Division of Taxation*, 6 N.J. Tax 137, 143, *aff'd*, 95 N.J. 139 (1983), quoting *Engle v. Siegel*, 74 N.J. 287, 290 (1977)). In the wills setting, undue influence involves the destruction of the free will of the testator so as to constrain him to do what is against his will — he is unable to refuse. *In re Gotchel's Estate*, 10 N.J. Super. 208, 212 (App. Div. 1950); *In re Newman's Estate*, 133 N.J. Eq. 532, 534 (E. & A. 1943); *In re Catelli*, 361 N.J. Super. 478 (App. Div. 2003); *Pivnick v. Beck*, 165 N.J. 670 (2000); *In re Zahn*, 305 N.J. Super. 260 (App. Div. 1997). "The coercion may be mental, moral or physical, or all three, but it must be such as to pre-empt the testator from following the dictates of his own mind and will and accepting instead the domination and influence of another." *Neuman* at 534. "Where the will benefits one who enjoyed a confidential relationship with the testator, and where there are suspicious circumstances surrounding the will, the law presumes undue influence and the burden is upon the proponent of the will to disprove the presumption." *In re Catelli*, 361 N.J. Super. at 486. "Suspicious circumstances" need be no more than slight to shift the burden of proof to the proponent to overcome them. *Haynes v. First National Bank of N.J.*, 87 N.J. 163, 176 (1981). Without proof of suspicious circumstances, a confidential relationship will not give rise to the presumption in the testamentary context. *In the Matter of Mosery*, 349 N.J. Super. at 522. Once the burden has shifted, the will proponent must overcome that presumption by a preponderance of the evidence. *In re Catelli*, 361 N.J. Super. at 487.

"Ordinarily, the burden of proving undue influence falls on the [W]ill contestant." *In re Estate of Stockdale*, *supra*, 196 N.J. at 303; *see also In re Will of Rittenhouse*, 19 N.J. 376, 378-79 (1955). However, certain circumstances may create a presumption of undue influence. In re Will of Rittenhouse, supra, 19 N.J. at 379. This presumption arises when two conditions are met: first, "the [W]ill benefits one who stood in a confidential relationship to the [testator]"; and, second, "there are additional circumstances of a suspicious character present which require explanation." Id. at 378-79. Once the opponent of the Will shows a "confidential relationship" that is "coupled with suspicious circumstances, undue influence is presumed and the burden of proof shifts to the [W]ill proponent to overcome the presumption." In re Estate of Stockdale, supra, 196 N.J. at 303.

As a first step, the opponent of the Will must prove a confidential

relationship by a preponderance of the evidence. *Estate of Ostlund v. Ostlund*, 391 N.J. Super. 390, 402 (App. Div. 2007). The "preponderance of the evidence" standard requires the Will opponent to establish that the existence of a confidential relationship is "more probable than not." Id. at 403. A confidential relationship exists if the testator either "`by reason of . . . weakness or dependence,' reposes trust in the particular beneficiary, or if the parties occupied a `relation[ship] in which reliance [was] naturally inspired or in fact exist[ed]."' In re Estate of Stockdale, supra, 196 N.J. at 303 (quoting In re Estate of Hopper, 9 N.J. 280, 282 (1952)).

In *In re Blake's Will*, 21 N.J. at 66, the Supreme Court noted specifically that no particular standard of proof would be set down, but rather the standard established on a case-by-case basis, depending upon the mental state of the testator. It is also clear from this opinion that where the attorney or his family is named as beneficiary, such gifts will be reviewed with great scrutiny unless the will is "drawn by some other lawyer of the testator's choosing." 21 N.J. at 67. Cf. *In re Hurd*, 69 N.J. at 329-30 (in the business transaction setting).

d. Post Mortem Tax Planning

Under certain circumstances, the doctrine of probable intent may be used to modify the will of a decedent who fails to take full advantage of changes in federal tax laws. *In re Branigan*, 129 N.J. 324 (1992). In *Branigan*, the Court noted that determining whether a will may be so modified is a fact sensitive inquiry requiring a "full appreciation" of both the provisions of the particular will and the tax laws involved. *Id.* at 327-328. Finding that "[t]ax consequences were very much in the forefront of consideration by decedent and those who assisted in the preparation and drafting of the will," the *Branigan* Court allowed a change in the number of trust funds created by the will. *Id*. at 329, The Court classified that modification as a "technical alteration relating to an aspect of estate administration that does not otherwise appear to have any material bearing on the decedent's testamentary plan." The Court, however, refused the executors' request to change the trustees' limited powers of appointment to general ones because the change would necessarily alter the will's dispository provisions. *Id.* at 336-337.

Under the doctrine of probable intent, the court may ascribe to the testator those impulses common to human nature, and will construe a will to effectuate those impulses. *In re Zahn*, 305 N.J. Super. at 271; *In re Baker*, 297 N.J. Super 203, 209 (App. Div. 1997). *See also In re Flood*, 417 N.J. Super. 378 (App. Div. 2010) (the doctrine of probable intent cannot be used to create a testamentary disposition when a decedent dies intestate).

A thorough discussion of post mortem tax planning is contained in 8A

Alfred C. Clapp and Dorothy G. Black, NEW JERSEY PRACTICE, WILLS AND ADMINISTRATION FORMS, Sections 4501-4538 (3d ed. 1978).

5. DURESS

The defense of duress is similar to the defense of undue influence. It was historically based upon a threat of physical injury, *see Zink v. Zink*, 109 N.J. Eq. 155, 156 (Ch. Div. 1931), but today derives from a moral or mental coercion as well. *See Giacobbi v. Anselmi*, 18 N.J. Super. 600, 613 (Ch. Div. 1952). Such duress is often called "undue influence," and must be sufficient to destroy the actor's free agency, overpower his volition, and constrain the actor to do that which the actor would not otherwise have done. *Campana v. Angelini*, 132 N.J. Eq. 285, 289 (Ch. Div. 1942).

In *Shanley & Fisher, P.C. v. Sisselman*, 215 N.J. Super. 200, 212 (App. Div. 1987), the court found that the New Jersey Supreme Court recognized that "when there is a moral compulsion sufficient to overcome the will of a person otherwise competent to contract, any agreement made under the circumstances is lacking in voluntary consent and therefore, is invalid." (citing *Rubenstein v. Rubenstein*, 20 N.J. 359 (1956)).

In discussing the claim of duress, the court in *Smith v. Estate of Kelly*, 343 N.J. Super. 480, 499 (App. Div. 2001), recognized that "within certain limits, a prospective defendant's coercive acts and threats may rise to such a level of duress as to deprive the plaintiff of his freedom of will and thereby toll the statute of limitations." *Id.* In order to overcome the statute of limitations defense on a claim of duress, "both a subjective and objective standard must be satisfied in order for the plaintiff to prevail. Specifically, the duress and coercion exerted by the prospective defendant must have been such as to have actually deprived the plaintiff of his freedom of will to institute suit in a timely fashion, and it must have risen to such a level that a person of reasonable firmness in the plaintiff's situation would have been unable to resist." *Id.* quoting *Jones v. Jones*, 242 N.J. Super. 195 208-09 (App. Div. 1990). Today, the doctrine of duress is largely utilized in the area of economic duress, which, as noted by the Supreme Court, "has significantly developed and expanded, in recognition of the ever-increasing complexity of the business world." *Continental Bank of Pa. v. Barclay Riding Academy*, 93 N.J. 153, 175, *cert. denied*, 464 U.S. 994 (1983). The Court quoted Williston regarding the extent of coercion needed for a finding of duress [from Williston, Contracts §1617 at 7704 (3d Jaeger Ed. 1970)]:

> While there is disagreement among the courts as to what degree of coercion is necessary to a finding of economic duress, there is general agreement as to its basic elements:

> 1. The party alleging economic duress must show that he has been the victim of a wrongful act or threat, and
>
> 2. Such act or threat must be one which deprives the victim of his unfettered will.

Id. at 176.

As the Court recognized in *Siegel v. Norwegian Cruise Line*, 2001 WL 1905983, 4 (2001), the 'decisive factor' is the wrongfulness of the pressure asserted. In this context, the term 'wrongful' encompasses more than criminal or tortious acts, as conduct may be legal but still oppressive." *Siegel v. Norwegian Cruise Line*, 2001 WL 1905983, 4 (2001) (*citing Continental Bank*, 93 N.J. at 177). As the Appellate Division observed in *Wolf v. Marlton Corp.*, 57 N.J. Super. 278, 287 (App. Div. 1959): "[w]e have come to deal, in terms of the business compulsion doctrine, with acts and threats that are wrongful, not necessarily in a legal, but a moral or equitable sense." [See also *Continental Bank*, 93 N.J. at 177]; *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252, 263 (App. Div.), *certif. denied*, 165 N.J. 527 (2000).

The *Continental Bank* Court disabuses us of the notion that putting pressure on one in financial difficulty in order to obtain favorable financial returns is "duress."

> One point has tended to become more certain: Where there is adequacy of consideration, there is generally no duress....Whenever a party to a contract seeks the best possible terms, there can be no rescission merely upon the grounds of 'driving a hard bargain.' Merely taking advantage of another's financial difficulty is not duress. Rather, the person alleging financial difficulty must allege that it was contributed to or caused by the one accused of coercion. . . . Under this rule, the party asserting pressure is scored only for that for which he alone is responsible. *Continental Bank*, 93 N.J. at 177 citing 13 S. Williston, Contracts, § 1617 at 708 (3d ed. 1970)

Although the Supreme Court does not expressly reject the additional traditional element of an economic duress claim [the injured party has no immediate and adequate remedy in the court to resist the wrongful pressure, *Ross Systems v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 335 (1961)] several citations given in Continental Bank indicate that this element is only a minor factor. *See West Park Ave., Inc., v. Ocean Twp.*, 48 N.J. 122, 129 (1966), and *S.P. Dunham & Co. v. Kudra*, 44 N.J. Super. 565, 570-71 (App. Div. 1957). After the discussion in Continental Bank, the "no immediate and adequate remedy" requirement would appear to have little, if any, remaining viability.

At this point we do not know whether the allegedly oppressed party's reactive conduct should be viewed from a subjective or objective standpoint. The matter appeared to be settled in *Rubenstein v. Rubenstein*, 20 N.J. 359, 367-68 (1956); after extensive analysis, the Court concluded that a subjective standard should be applied. In *Continental Bank*, however, the Court apparently reopened the issue by stating that it "need not reach the delicate issue of whether" the victim's response to the conduct "should be analyzed from an 'objective' or a 'subjective' standard," comparing the *Rubenstein* case with *King v. Margolis*, 133 N.J. Eq. 617 (E. & A. 1943), which applied an objective standard. (93 N.J. at 179, n.13) We are left only with the Supreme Court's cryptic statement: "We leave that doctrinal debate to another day." *Id. But see Shanley & Fisher*, 215 N.J. Super. 200, 212 (App. Div. 1987), where the Appellate Division applied a subjective test to determine the existence of duress. A finding of duress may bar enforcement of agreements. *Hawxhurst v. Hawxhurst*, 318 N.J. Super. 72, 80 (App. Div. 1998) (finding of duress barred enforcement of prenuptial agreement).

6. INCAPACITY (INFANTS AND INCOMPETENTS)

The general New Jersey rule is that a contract of an infant is voidable at the infant's election unless the obligation is ratified by the infant upon the infant attaining majority. *Bancredit, Inc. v. Bethea*, 65 N.J. Super. 538, 549 (App. Div. 1961). This rule rests on the premise that one who lacks capacity to contract cannot bind oneself irrevocably to anyone. *Id.* at 547. Furthermore, ratification cannot effectively be made until the infant attains majority. *Id.* at 550. This rule of law had been codified in the Uniform Sales Act, R.S. 46:30-8, but was not specifically carried into the Uniform Commercial Code, except as to the statement in *N.J.S.A.* 12A:1-103 stating that principles of law and equity, including "capacity to contract," shall supplement the provisions of the Code. *See also N.J.S.A.* 12A:3-305(2)(a)(1), preserving "infancy of the obligor to the extent that it is a defense to a simple contract" and as defenses against the right to enforce the obligation of a party to pay an instrument; *In re Jacobs*, 315 N.J. Super. 189, 195 (Ch. Div. 1998) (incompetent persons are generally incapable of making major life decisions).

When, however, an infant misrepresents his or her age, and this misrepresentation is reasonably relied upon by a lender, infancy will not be a defense if the other contracting party cannot be made whole. *Manasquan S. & L. Ass'n v. Mayer*, 98 N.J. Super. 163, 164-65 (App. Div. 1967).

When an infant purchases a "necessary" (which may include an automobile used to drive to and from work), the infant may be liable for the reasonable value of that which was purchased. *Bancredit* 65 N.J. Super 549. A necessary is defined as goods suitable to the condition in life of the infant and to the infant's actual

requirements. *Id.* at 548.

If an infant fails to disaffirm a contract made during his minority within a reasonable time after reaching majority, such lack of action is deemed a ratification of the contract and will deprive the infant of power to avoid it. *Mechanics Finance Co. v. Paolino*, 29 N.J. Super. 449, 455-56 (App. Div. 1954). A disaffirmance need not take any prescribed form. *Id.* at 456; *Bancredit, Inc.*,65 N.J. Super. at 551.

The law in regard to incompetents is that contracts with lunatics and insane persons are invalid, subject to the qualification that a contract made in good faith, for full consideration, and without knowledge of the insanity, or such information that would lead a prudent person to the belief of the incapacity, will be sustained. *Manufacturers Trust Co. v. Podvin*, 10 N.J. 199, 207 (1952). Although adjudication of incompetency is sufficient to cause a contract to be voided due to legal incapacity to enter into the contract, *In re Estate of Bechtold*, 150 N.J. Super. 550, 556 (Ch. Div. 1977), *aff'd o.b.*, 156 N.J. Super. 194 (App. Div.), *certif. denied*, 77 N.J. 468 (1978), one may also be found incompetent to enter into a particular contract, as opposed to all contracts. *See, e.g., In re Schiller*, 148 N.J. Super. 168, 180 (Ch. Div. 1977), where Judge Dwyer held that one may be incompetent to deal with giving or refusing consent to a surgical procedure. The general test of mental capacity is that the individual "...shall have ability to understand, in a reasonable manner, the nature and effect of the act in which he is engaged and the business he is transacting..." *Campana v. Angelini*, 132 N.J. Eq. at 289, (concerning the capacity to execute a deed).

In other respects, however, the rules governing incapacity based upon incompetency parallel those governing the lack of capacity based upon infancy.

N.J.S.A. 3B:1-2 was amended by L.1997, c. 379, § 3, effective January 19, 1998, to change the term of art "incompetent" to "incapacitated." *N.J.S.A.* 3B:1-2. However, following this change, the Appellate Division recognized that "incapacity" has a "substantially broader meaning" than "incompetence." *Bumbaco v. Board of Trustees of Public Employees' Retirement System*, 325 N.J. Super. 90, 96 (App. Div. 1999), *certif. denied*, 163 N.J. 75 (2000). Incapacity was interpreted by that court embracing both "physical and emotional burdens and preoccupations." *Id.* In 2013, the definition of "incapacitated individual" was amended from an individual "who is impaired by reason of mental illness or mental deficiency" to one who is "impaired by reason of mental illness or intellectual disability." "Intellectual disability" was defined for the first time, and it was defined as: "a significant subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which are manifested during the development period." P.L. 2013, c. 103, §21, eff. Aug. 7, 2013.

7. FRAUD

Fraud may be either "legal" or "equitable." Within equitable fraud a further distinction is made when the statement relied on is a response to a question, depending on whether the question is objective or subjective. *Liebling v. Garden State Indem.*, 337 N.J. Super. 447, 453 (App. Div.), *certif. denied*, 162 N.J. 606 (2001).

The elements of a prima facie claim of legal fraud are as follows: (1) a material misrepresentation of a presently existing or past fact; (2) made with knowledge of its falsity and with the intention that the other party rely on the misrepresentation; and (3) actual detrimental reliance by that other party on the misrepresentation. *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 624 (1981); *New Jersey Economic Development Authority v. Pavonia Restaurant, Inc.*, 319 N.J. Super. 435 (App. Div. 1998); *Simpson v. Widger*, 311 N.J. Super. 379, 392 (App. Div. 1998); *United Jersey Bank v. Kensey*, 306 N.J. Super. 540, 550 (App. Div. 1997), *certif. denied*, 153 N.J. 402 (1998).

In order to maintain a claim of equitable fraud, a plaintiff must demonstrate: (1) a material misrepresentation of a presently existing or past fact; and (2) actual detrimental reliance on the misrepresentation. *Liebling v. Garden State Indem.*, 337 N.J. Super. at 453 (*citing Jewish Center of Sussex County*, 86 N.J. at 625). The elements of scienter, i.e., knowledge of the misrepresentation and an intention to obtain an unfair advantage therefrom, are not essential to a claim of equitable fraud. *Id.*; *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 609 (1989) (citing *Jewish Center*, 86 N.J. at 625). "Even an innocent misrepresentation can constitute equitable fraud justifying rescission." *Liebling v. Garden State Indem.*, 337 N.J. Super. at 453. As then Chief Justice Weintraub noted in *Johnson v. Metro. Life Ins. Co.*, 53 N.J. 423,437 (1969), "[e]quitable fraud is obscured by its label. Fraud connotes an intent to do wrong. When one misrepresents innocently, there is no such intent."

In *Formosa v. Equitable Life Assurance Society*, 166 N.J. Super. 8 (App. Div.), *certif. denied*, 81 N.J. 53 (1979), the Appellate Division held that responses to subjective questions, on an insurance application, designed to probe the applicant's state of mind, cannot be the basis of an equitable fraud claim simply because the responses are at odds with reality. In order to prevail on a claim of equitable fraud based on answers to subjective questions contained on an insurance application, an insurer must prove that the applicant falsely represented his belief about his physical and/or mental conditions — it is insufficient to argue only that the answer itself misrepresents an applicant's actual physical and/or mental condition. *Id.* at 15; *see*

also Mass. Mutual Life Insurance Co. v. Manzo, 122 N.J. 104, 111 (1991).In an action for a declaratory judgment brought by an insurance carrier against insured law firm and their clients, the Supreme Court of New Jersey held that due to fraud and misrepresentations in applications, the policy was void as to firm and any defalcating partners, but not as to an innocent partner. *First American Title Insurance Company v. Lawson*, 177 N.J. 125 (2003).

Legal fraud provides a basis for a claim seeking either monetary damages or rescission or reformation of a document. *Merchants Indus. Corp. v. Eggleston*, 37 N.J. 114, 130 (1962). A party establishing equitable fraud, however, may only obtain rescission or reformation of the agreement; plaintiffs able to establish only equitable fraud do not have the option of seeking monetary damages. *Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990); *Jewish Center*, 86 N.J. at 625; *Foont-Freedenfeld v. Electro-Protective Corp.*, 126 N.J. Super. 254, 257 (App. Div. 1973), *aff'd*, 64 N.J. 197 (1974); *Daibo v. Kirsch*, 316 N.J. Super. 580, 588 (App. Div. 1998).

As previously referenced in the discussion on estoppel, the components of the doctrine of equitable fraud are similar to the components of equitable estoppel. The doctrines, however, are put to different uses. Equitable fraud is a basis for rescission or reformation of an agreement while equitable estoppel is a defense to a claim seeking enforcement, rescission or reformation of an agreement.

A party asserting equitable fraud must prove all required elements by clear and convincing evidence. *Stochastic Decisions v. DiDomenico*, 236 N.J. Super. 388, 395 (App. Div. 1989), *certif. denied*, 121 N.J. 607 (1990), citing *Albright v. Burns*, 206 N.J. Super. 625, 636 (App. Div. 1986) and *Schmidt v. Schmidt*, 220 N.J. Super. 46, 50 (Ch. Div. 1987); *Firemen's Fund. Ins. Co. v. Nicholson*, 103 N.J. Eq. 32 (Chan.), *aff'd*, 103 N.J. Eq. 375 (E. & A. 1928); *Connelly v. Weisfield*, 142 N.J. Eq. 406 (E. & A. 1928). Legal fraud, however, need only be proved by a preponderance of the evidence. *See Fishetto Paper Mill Supply, Inc. v. Quigley Co., Inc.*, 3 N.J. 149, 155-156 (1949); *Armel v. Creewick*, 71 N.J. Super. 213, 218 (App. Div. 1961); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1183 (3d Cir. 1993) (because plaintiff alleged fraud to recover monetary damages it was required to prove that defendant acted with scienter, but it was held only to the preponderance standard as to all the elements of fraud). *But see Post v. Gerson Bacher, Torrid K-9, Inc.*, 48 N.J. Super. 518, 520-522 (App. Div. 1957) (questioning the requirement for clear and convincing evidence but assuming that standard to be required). Determining the likelihood of success of any given fraud claim is necessarily a fact-sensitive venture; however, the following observations may prove useful:

• A failure to disclose certain facts may constitute material misrepresentation.

Bonnco Petrol, 115 N.J. at 610-11.

• The misrepresentation complained of must concern a presently existing or past fact. *Jewish Center*, 86 N.J. at 624.

• A party's failure to perform a contractual obligation does not constitute fraud unless the plaintiff can prove that the promisor had no intention of fulfilling his obligation at the time he entered into the agreement. *Stochastic Decisions*, 236 N.J. Super. at 395-96; *Van Dam Egg Co. v. Allendale Farms, Inc.*, 199 N.J. Super. 452, 457 (App. Div. 1985); *Barry v. State Highway Auth.*, 245 N.J. Super. 302, 310 (Ch. Div. 1990). *See also Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003) wherein lower court was reversed to allow claim of consumer fraud under Consumer Fraud Act, *N.J.S.A.* 56:8-1 to -109, to be brought against Franchisor. Note that the claim should be brought for legal rather than equitable fraud. The Third Circuit, however, has disproved the Appellate Division's interpretation of the Consumer Fraud Act and has held that the Consumer Fraud Act does not apply to the sale of franchises. *See Yogo Factory Franchising, Inc. v. Ying*, 2014 U.S. Dist. LEXIS 61968, *32-33 (D.N.J. May 5, 2014) (citing and quoting *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259, 1274 (3d Cir. 1994)).

• A party asserting fraud must demonstrate detrimental reliance upon the material misrepresentation. *Jewish Center*, 86 N.J. at 625. In *DSK Enterprises. v. United Jersey Bank*, 189 N.J. Super. 242, 250-51 (App. Div.), *certif. denied*, 94 N.J. 598 (1983), the Appellate Division noted "[i]f a party to whom representations are made nevertheless chooses to investigate the relevant state of facts for himself, he will be deemed to have relied on his own investigation [rather than the misrepresentation complained of]." However, the Supreme Court of New Jersey has also observed that "[o]ne who engages in fraud...may not urge that [his] victim should have been more circumspect or astute." *Jewish Center*, 86 N.J. at 626.

• A plaintiff claiming fraud must prove damage as a result of the reliance on the misrepresentation. *Jewish Center*,86 N.J. at 624. The Supreme Court of New Jersey has held that in certain cases, i.e. those involving egregious conduct, proof of compensatory or actual damages is not an essential element of the claim of legal fraud. *Nappe v. Anschelwitz, Barr, Ansell & Bonello*, 97 N.J. 37, 48 (1984). In such instances, the element of damage is satisfied if the party proves that he has suffered any loss as a result of reliance upon the misrepresentation; the loss need not be compensable. *Id.* at 47-48. A fact-finder may provide nominal damages to a party who proves that he has suffered a loss as a result of the reliance upon the misrepresentation but fails to prove that the loss is compensatory. *Id.* A party may successfully assert a claim of equitable fraud without suffering financial damages.

Jewish Center, 86 N.J. at 626.

Jewish Center is a frequently cited case for numerous concepts, but most consistently in support of an applicant for relief who has purportedly elected to accept representations of sometimes incredible absurdity. *Jewish Center* tends to support the position that the recipient of the representation need make no investigation. This case is commonly found in plaintiff's briefs defending against summary judgment motions.

Practitioners should note that a claim or defense of fraud is distinguishable from the Statute of Frauds, *N.J.S.A.* 25:1-5 *et seq.*

The Statute of Frauds, *N.J.S.A.* 25:1-5, was adopted based upon the English statute entitled, "An Act for the Prevention of Fraud and Perjuries." The primary purpose of the statute was to prevent fraud in the enforcement of obligations depending for their evidence upon the memory of witnesses. Accordingly, the Statute of Frauds required that certain enumerated contracts and transactions be evidenced by a writing signed by the parties. *See Weber v. De Cecco*, 1 N.J. Super. 353, 358 (Ch. Div. 1948).

In the 200 years since New Jersey adopted the Statute of Frauds, courts, using their equitable powers, had carved out various exceptions to the Statute, such as "part performance" or "detrimental reliance," that would allow a party to enforce certain oral contracts. The Statute, however, was substantially amended in January, 1996. In addition to other significant changes the Statute now provides that certain agreements may now be demonstrated by "clear and convincing evidence" rather than a specific contractual writing.

The amendments include:

1. A contract for the sale of real estate or any interest therein (including a lease for more than three years) need no longer necessarily be in writing in order to be enforceable - it may be oral, provided that its existence is proved by "clear and convincing evidence." N.J.S.A. 25: 1-13(b). In *Morton v. 4 Orchard Land Trust*, 180 N.J. 118, 129 (2004), the Court reasoned that although parole evidence is now admissible for the purpose of establishing an enforceable agreement, the facts of this case demonstrate no agreement to be bound by oral contract. In *LoBiondo v. O'Callaghan*, 357 N.J. Super. 488, 496-7 (App. Div.), *certif. denied*, 177 N.J. 224 (2003), a Plaintiff purchaser was denied specific performance of an oral agreement exercising a right of first refusal because he failed to meet the threshold of "clear and convincing evidence" demonstrating that vendor had apparent authority of his wife (co-owner of property) to bind the contract.

2. The requirement for the authority of a real estate broker to be in writing in order to collect a commission from his principal has now been expanded to include a lessor, lessee and purchaser. Under the old statute the written authority was only required with respect to an owner of real estate — there could be an enforceable oral commission arrangement with a landlord, tenant, or purchaser of land. That is no longer the case. The "five-day" rule applies to all of these commission arrangements.

3. There must be a written commission arrangement for the sale of a business; however, again, an oral agreement will be enforceable if proven by "clear and convincing evidence."

4. The requirement for a writing to enforce a promise by an estate executor or administrator to pay damages out of his or her estate has been deleted from the statute. This situation is covered by Title 3B (Probate). The amendments also delete the provision requiring a writing to enforce an agreement upon consideration of marriage. That situation is addressed in the State's 1988 adoption of the Uniform Premarital Agreement Act.

5. The requirement for a written contract for agreements that will not be performed within one year is deleted.

The Uniform Commercial Code also contains Statute of Frauds provisions. See *N.J.S.A.* 12A: 2-201.

CHAPTER II

EQUITABLE REMEDIES

Rule 4:3-1(a)(1) states:

> Actions in which the plaintiff's primary right or the principal relief sought is equitable in nature, except as otherwise provided by subparagraphs (2) and (3), shall be brought in the Chancery Division, General Equity, even though legal relief is demanded in addition or alternative to equitable relief.

The following remedies are properly sought in Chancery.

A. MORTGAGE FORECLOSURE (PROCEDURES & PRIORITIES)

The subject of mortgage foreclosures (as well as the general subject of mortgages) is treated in detail and with great accuracy by Professor Roger A. Cunningham and the late Judge Saul Tischler, formerly Standing Master of the New Jersey Supreme Court, in their treatise Law of Mortgages, Volumes, 29, 30, 30A and 30B, New Jersey Practice (Second Edition), updated and revised by Myron C. Weinstein (hereafter cited as Weinstein). The discussion here is not meant to be a complete review of the field, and it is recommended that the reader consult the authoritative multi-volume work.

1. PROCEDURES

The purpose of this section is to review some of the procedures for the foreclosure of real estate mortgages. The present rules governing such procedures are referred to herein.

In 1991, New Jersey's Statute of Frauds was amended to provide that promises to pay sums in excess of $100,000 in business loan agreements are unenforceable unless such agreements are in writing. *N.J.S.A.* 25:1-5(f). The amendment also provides that any agreement by a creditor to forbear from exercising any remedy pursuant to such a business loan agreement must also be in writing to be enforceable. *N.J.S.A.* 25:1-5(g).

Rule 1:34-6 establishes an "Office of Foreclosure within the Administrative Office of the Courts." This office recommends the entry of many types of orders in uncontested cases, which are then entered in the name of a Superior Court Judge.

The broad statutory framework set out in *N.J.S.A.* 2A:50-1, *et seq*., is the basis for the foreclosure of mortgages. The court procedures, however, are governed by *R.* 4:64-1, *et seq*. (except insofar as some general rules of procedure apply, such as rules governing the filing of a complaint, service of process, etc.). Before beginning the foreclosure action, the mortgagee's attorney should obtain and review the following documents and information:

- original note or bond or certified true copy of the note or bond (the certification must be completed by an attorney admitted to practice in New Jersey);
- original or certified true copy of recorded mortgage;
- original or certified true copy of any recorded assignment of mortgage;
- mortgage title insurance policy if any;
- names of all occupants residing at the mortgaged premises;
- default information, including date of default, amount of last payment, late charges, date from which interest accrues, and escrow deficit, if applicable;
- current title search (including county liens, upper court judgments and liens, corporate franchise tax search if record owner is a corporation, and municipal liens if applicable).

N.J.S.A. 2A:50-3 provides the means to establish the fair market value of the mortgaged premises. For any bond or note that falls under *N.J.S.A.* 2A:50-2, the obligor may file an answer in the action for deficiency in order to dispute the deficiency amount. The court (with or without a jury) will determine the amount of the deficiency upon presentation of evidence of the fair market value of the property at the time of the sale in the foreclosure action.

In 1995, the Legislature enacted the "Fair Foreclosure Act," *N.J.S.A.* 2A:50-53 *et seq.* The Act governs residential foreclosure practice, *N.J.S.A.* 2A:50-62, and establishes uniform procedures with respect to the conduct of a sheriff's sale. *N.J.S.A.* 2A:50-64.

In sum, the Act requires residential mortgage lenders to provide the mortgagor with at least 30 days' notice prior to taking any legal action for possession. The Act sets forth with particularity the required content of the notice. *N.J.S.A.* 2A:50-56. The Act also gives mortgagors the right to cure a default by paying all sums due (including attorney's fees and costs). *N.J.S.A.* 2A:50-57. Note that the Act requires that the Complaint allege compliance with the Act. *N.J.S.A.* 2A:50-56(c)(11)(f). While the notice requirement will be enforced by the courts, if the notice is deficient because it identifies a loan servicing agency rather than the bank, our courts have found that unless the mortgagors show excusable neglect or other justification under *R.* 4:50-1, and the bank re-issues the notice with its own name (since the doctrine of substantial compliance does not apply), the mortgagors will be found to have been informed of the existence of a court process requiring a legal response and in the event of a

default judgment, it will not be vacated. *See US Bank Nat'l Ass'n v. Guillaume*, 209 N.J. 449, 457-58 (2012).

If the property is vacant, the Fair Foreclosure Act may not apply. *See Sturdy Sav. Bank v. Roberts*, 427 N.J. Super. 27, 38-39 (Ch. Div. 2012) (finding that compliance with the Fair Foreclosure Act was not required where the debtor or debtor's family vacated the property with no intent to return as of the date that the foreclosure complaint was filed). However, the Fair Foreclosure Act does have an optional, accelerated procedure for abandoned or "underwater" properties, where the aggregate amount of liens on the property is more than 92% of the Fair Market Value of the mortgaged property. *See N.J.S.A.* 2A:50-31; *see also Wilmington Sav. Fund Soc'y, FSB v. Zimmerman*, 450 N.J. Super. 415, 423-24 (Ch. Div. 2017) (discussing the optional procedure for abandoned or "underwater" properties). The Court Rules were amended in 2014 to add *R.* 4:64-1A, which addresses "Foreclosure of Vacant and Abandoned Residential Property." This Rule requires that a Verified Complaint set forth facts demonstrating that the property is vacant and abundance if a Foreclosure Complaint is filed in connection with vacant or abandoned residential property. In addition, this rule sets forth the procedure for motions to proceed summarily, the procedure to enter judgment and the entry of judgment. See *R.* 4:64-1A.

It is essential that plaintiff demand all relief sought, because if judgment by default is entered against a defendant, the relief granted is limited to that prayed for in the demand for judgment. No general relief need be demanded, because the plaintiff may obtain all the relief he is legally or equitably entitled to except from a party against whom a default judgment was entered. The essential elements of a foreclosure complaint, as noted in 30A Weinstein § 30.11, pp.24-26.

> 1. The creation of the indebtedness, i.e., the allegation of the execution of the obligation, bond or note, the amount and other details thereof.
>
> 2. The execution of the mortgage, the parties to it, and the recording data.
>
> 3. The description of the mortgaged premises and any releases of portions of the same.
>
> 4. Special clauses in the obligation or mortgage which give the plaintiff the right to accelerate the debt.
>
> 5. Plaintiff's title to the obligation and mortgage.
>
> 6. The subordinate interest of the various defendants.

> 7. Defaults upon which the right of the plaintiff to foreclose is based, and the election to require payment.
>
> 8. A general allegation that the interests of the defendants are subordinate to the lien of the plaintiff's mortgage.
>
> 9. Demands for judgment: (a) for appointment of a receiver (if desired), (b) to fix the amount due on the obligation and mortgage, (c) directing payment thereof, (d) adjudging that the lands be sold in payment, and (e) barring and foreclosing the defendants from all equity of redemption.
>
> 10. A statement of compliance with *N.J.S.A.* 2A:50-56 e.g., "In accordance with the Fair Foreclosure Act (*N.J.S.A.* 2A:50-53 *et seq.*), a written notice of intention to foreclose was mailed to the debtor at least 30 days prior to the filing of the complaint."

A prudent attorney will add a second count for the possession of the lands. This count should reiterate the paragraphs of the first count for foreclosure which grant the plaintiff the right of possession and then state when the right to possession accrued, name the persons in possession, and demand judgment for (a) possession of the lands and (b) mesne profits. If the plaintiff plans to seek the appointment of a receiver, this request should be set up in a separate count of the complaint. The New Jersey Court Rules also allow a separate count to foreclose a security interest in personal property located on or about the mortgaged premises. *R.* 4:64-1(g). *See also, N.J.S.A.* 12A:9-504; *Lenape State Bank v. Winslow Corp.*, 216 N.J. Super. 115 (App. Div. 1987).

In light of the backlog of residential foreclosures, in 2010 there were significant amendments to *R.* 4:64-1(a). Specifically, the Legislature added the requirement that a plaintiff's attorney file a "certification of diligent inquiry" in all residential foreclosure actions, *R.* 4:64-1(a)(2) (the requirements as to what must be included in the certification of diligent inquiry are listed in *R.* 4:64-1(a)(2)(A) and (B)). In addition, to avoid the filing of frivolous pleadings, plaintiff's attorneys are also required to "annex to the complaint a certification, executed by the attorney, attesting that the complaint and all documents annexed thereto comport with the requirements of R. 1:4-8(a)." *R.* 4:64-1(a)(3).

All those with a potential interest in the property being foreclosed should be joined as party defendants to the foreclosure action. Prior mortgagees and other prior lienholders whose liens are not contested by the foreclosing mortgagee are not proper parties to a foreclosure action. 30 Weinstein §§ 29.1-3. This may include one or more of the following:

a. The present owner of record and all others with a possessory

interest in the property, e.g., tenants.

b. All parties liable on the debt including the original mortgagor, obligor and any guarantors. Failure to name a party in this category will preclude a subsequent deficiency action against that party. *See River Edge Sav. & Loan Ass'n v. Clubhouse Assocs., Inc.*, 178 N.J. Super. 177 (App. Div.), *certif. denied*, 87 N.J. 383 (1981).

c. Junior encumbrances and lien holders.

d. The State of New Jersey and the United States if there are unpaid taxes or other State liens.

e. Any other person or entity who has an interest in the subject property.

In an action for foreclosure on a commercial loan, the mortgagor has the burden of demonstrating that late fees, default interest, prepayment fees and attorneys' fees are unreasonable and unwarranted. *Lopresti v. Wells Fargo Bank, N.A.*, 435 N.J. Super. 311, 324 (App. Div.), *certif. denied*, 219 N.J. 629 (2014) (finding that where the loan transaction involved sophisticated parties, who freely negotiated the terms of the loan, and the prepayment provision was "clearly spelled out," the mortgagor had to overcome the "presumptive reasonableness of the prepayment fee."); *Westmark Commercial Mortgage Fund IV v. Teenform Assocs., L.P.*, 362 N.J. Super. 336, 340-41 (App. Div. 2003) (holding "that the burden of establishing a particular clause as unreasonable rests upon the party challenging it as such," which in the context of foreclosure actions, is generally the mortgagor); *see also MetLife Capital Fin. Corp. v. Washington Ave. Assocs., L.P.*, 159 N.J. 484, 495-96 (1999) (the New Jersey Supreme Court addressed the question of whether certain late charges and default interest rates included in the terms of a mortgage and promissory note were reasonable stipulated damages and found that they were enforceable, noting that the default rate and payment of collection costs are "valid measure[s] of liquidated damages").

However, where a mortgagee requires relief other than foreclosure, in his complaint he should set up the facts justifying his claim and request such relief in demands for judgment, e.g., for reformation of the description in the mortgage, and/or the description in a prior deed or other terms of the mortgage; for partition, where the mortgage covers only a partial undivided interest in lands; for setting aside a cancellation or discharge of a mortgage and for reinstatement of the mortgage; for foreclosure of a chattel mortgage or other chattel security interest along with foreclosure of the real estate mortgage; for subrogation; for an injunction against waste; or for a sale of the land *pendente lite*. The Appellate Division held

that relief was properly denied to mortgagee, Chase, because it failed to file for relief (from a tax foreclosure judgment under *R.* 4:50-l and a stay in bankruptcy) within a reasonable time. *Bascom Corp. v. Chase Manhattan Bank*, 363 N.J. Super. 334 (App. Div. 2003), *certif. denied*, 178 N.J. 453 (2004), *cert. denied*, 542 U.S. 938 (2004).

As in any action which can affect title to real estate, upon receiving a docket number and filing date, the plaintiff should promptly file a notice of *lis pendens* in the appropriate county office where real estate documents are recorded. (See discussion of *lis pendens* procedures, *infra*.)

Service of a foreclosure complaint is governed by *R.* 4:4-4 and *R.* 4:4-5. Failure to properly serve a defendant may result in a defendant not being a party to a foreclosure action and its interest not being foreclosed by entry of final judgment. *Heinzer v. Summit Fed. Sav. & Loan Ass'n.*, 87 N.J. Super. 430, 439 (App. Div. 1965). However, New Jersey courts have found that, under certain factual scenarios, actual knowledge of a foreclosure action is sufficient to bar a belated attack on the judgment. *See Rogan Equities Inc. v. Santini*, 289 N.J. Super. 95, 112-13 (App. Div.), *certif. denied*, 145 N.J. 375 (1996) (applying *Heinzer*, held that defendant was barred by estoppel and laches from attacking the judgment of foreclosure on the grounds that she was not properly served. Defendant had actual knowledge of the foreclosure action based on the mortgagee's service of notice upon her in her official capacity as trustee of a trust that owned a fifty percent interest in the mortgaged property; defendant waited more than two years after the foreclosure judgment and for two months after the property was sold to a third party to assert her rights as an individual, fifty percent owner of the land; defendant's preoccupation with bankruptcy proceedings during this period did not excuse her from her lack of diligence in asserting her rights). In addition, if the mortgagor has filed for bankruptcy protection, a default judgment in a foreclosure action obtained without first obtaining an exception to the automatic bankruptcy stay will be void. *See Bank v. Kim*, 361 N.J. Super. 331 (App. Div. 2003) (noting that in a foreclosure action in which the mortgagor brought a motion to vacate a default judgment, the Appellate Division reversed and remanded holding that: (1) the automatic stay provisions of the bankruptcy code rendered the default judgment void; (2) additional proof beyond the certification of counsel was required regarding the amount secured by the mortgage; and (3) the mortgagee's notice of foreclosure to the mortgagors was insufficient [for other reasons]) .

Two types of answers are filed in foreclosure cases — contesting and uncontesting. If the answering defendant denies the priority of plaintiff's lien over his own, or, in the case of the mortgagor, denies the money claimed is due to plaintiff, the answer is contesting, and the case belongs in the Chancery Division. If the answers filed in the case do not dispute the fact that plaintiff is owed the money it claims and

is prior to all other liens, they are uncontesting and the case will simply be processed by the Office of Foreclosure pursuant to R.4:64-1(c) and R.4:64-1(d). The Office of Foreclosure examines all answers and sends the contested cases to the appropriate Chancery judge. All uncontested cases remain at the Office of Foreclosure. As an example, if Swimming Pool Company, a second mortgagee, disputes plaintiff's priority (perhaps because of a subrogation agreement), it will file a contesting answer; otherwise it will file an uncontesting answer, simply asking that its lien be reported on and included in the foreclosure judgment, *i.e*., that it be paid out of the surplus of the sheriff's sale after plaintiff is paid. The Swimming Pool Company also may not answer at all in which event a default will eventually be taken against it.

Uncontested foreclosures are governed by the rules of procedure, which will be discussed later in detail. Contested foreclosures may raise the same equitable or legal issues as any other case before the court. As noted in 30A Weinstein §32.2-32.10, defenses which may be raised include: incapacity, forgery, lack of delivery, failure of consideration, fraud, misrepresentation, mistake, duress, undue influence, illegality, discharge of the mortgage, statutes of limitation, laches, presumption of payment, fraudulent conveyance, preference, usury, waste by the mortgagee in possession, lack of default or estoppel. Some of these defenses are discussed elsewhere in this volume and need not be repeated here. In addition, as further noted in 30A Weinstein § 32.2-32.10, there may be defenses peculiar to foreclosures, such as those concerning the sale of the premises and requesting: (a) that the property be sold in separate parcels or as a whole, (b) that property retained by the mortgagor be sold before property conveyed to a subsequent owner or encumbrancer and that such property be sold in the inverse order of alienation, or (c) that the foreclosing mortgagee be required to exhaust additional security before selling the mortgaged premises. *See, e.g., Meadowlands Nat'l Bank v. Court Dev., Inc.*, 192 N.J. Super. 579 (App. Div. 1983), *certif. denied*, 96 N.J. 303 (1984) (a junior mortgagee unsuccessfully raised such defenses). Other defenses, such as the capacity of the plaintiff to sue or lack of jurisdiction over the subject matter or person, may be raised and will cause the case to be marked "contested," as will a defense challenging the priority of plaintiff's mortgage.

Often the defense will be raised asserting an oral promise by the mortgagee to forebear from foreclosure; the consideration for such promise is the mortgagor's oral undertaking to make a specific payment by a date certain. Such an oral agreement not to foreclose a mortgage is unenforceable as within the statute of frauds. *George v. Meinersmann*, 119 N.J.L. 460, 463 (E. & A. 1937).

A defendant may also raise a germane counterclaim, which will render the matter contested. *Rule* 4:64-5, effective September 1, 1992, defines germane and non-germane claims in foreclosure actions. The rule notes that "[n]on-germane claims shall

include, but not be limited to, claims on the instrument of obligation evidencing the mortgage debt, assumption agreements and guarantees." *R.* 4:64-5. Therefore, the "entire controversy doctrine" does not apply in such actions, except as to germane counterclaims. If a counterclaim or cross-claim raises extraneous issues, it may be severed by the court. *See Delacruz v. Alfieri*, 447 N.J. Super. 1, 12-21 (Law Div. 2015) (discussing germane counterclaims and the impact of the entire controversy doctrine if such counterclaims are not raised); *see also Luppino v. Mizrahi*, 326 N.J. Super. 182, 184-85 (App. Div. 1999) (holding that a claim for unpaid rent cannot be joined in a mortgage foreclosure action and will not be barred by the entire controversy doctrine in a subsequent action); *Leisure Technology-Northeast, Inc. v. Klingbeil Holding Co.*, 137 N.J. Super. 353 (App. Div. 1975) (holding that a defense based on the mortgagee's breach of contract is a "germane" counterclaim). *And see In re Mullarkey*, 536 F.3d 215, 229-30 (3d Cir. 2008) (noting that "the entire controversy doctrine has a narrower application to foreclosure proceedings, extending only to 'germane' counterclaims" and refusing to apply the doctrine in a bankruptcy proceeding that was filed subsequent to a foreclosure action).

If the defenses raised are insufficient as a matter of law (e.g., defendant does not dispute its default on the mortgage payments but questions the amount plaintiff claims is due), plaintiff may make a motion for summary judgment or to strike defendant's answer. If such a motion is successful, the matter may be referred to the Office of Foreclosure to be processed on an uncontested basis (assuming the stricken answer was the only contesting answer in the case). Or, the Chancery judge may allow plaintiff to present its proofs pursuant to *R.* 4:64-1(b) and (d) and enter judgment. *See also Assocs. Home Equity Serv., Inc. v. Troup*, 343 N.J. Super. 254 (App. Div. 2001) (wherein the court permitted homeowners to assert recoupment defense as germane to foreclosure action notwithstanding expiration of controlling statute of limitations because defense was not intended to invalidate debt, but rather was asserted to reduce amount that lender could recover on claim); *Sun NLF Ltd. P'ship v. Sasso*, 313 N.J. Super. 546, 560-61 (App. Div.), *certif. denied*, 156 N.J. 424 (1998) (finding in mortgage foreclosure proceeding that the allegation of a bank's breach of a material term of the transaction may be regarded as a germane claim.

An uncontested foreclosure is defined as one to foreclose a mortgage or condominium lien where every defendant has: defaulted by failure to plead or otherwise defend; has filed an answer which does not contest plaintiff's right to foreclose or the priority of his lien; or had his contesting answer stricken or otherwise rendered non-contesting. *R.* 4:64-1(c).

This rule, originally encaptioned "Default Judgment," was substantially revised effective January 1989. The default judgment category was too narrow since the rule, as a matter of both intent and practice, applies to all foreclosure judgments

in which the mortgagor's rights to foreclose is not a matter of dispute even though there may be other issues in dispute among mortgagor, mortgagee and other lienholders.

An answer merely leaving the plaintiff to its proofs will not be deemed a contesting answer. The answer must specifically contest plaintiff's right to foreclose. *R.* 4-64:1(c)(3). The mortgagor's challenge to the asserted amount due is not a contesting answer for the purposes of this rule. *See MetLife Capital Fin. Corp. v. Washington Ave. Assocs., L.P.*, 159 N.J. 484 (1999) (holding that the late fee and judicially modified interest rate were not proscribed penalties; however, the mortgagee, under an assignment of rents, was obliged to give the mortgagor an accounting thereof). These issues are usually resolved in surplus money proceedings. *R.* 4:64-3. *R.* 4:64-3 requires all named defendants, even those who defaulted, to be noticed in any surplus money proceeding.

In addition to defining an uncontested action to which the default judgment process is applicable, *R.* 4:64-1(d): specifies who must be given notice of an application for judgment in an uncontested matter and how; prescribes the manner in which the default judgment may provide for payment to subsequent encumbrances; provides procedures for strict mortgage foreclosure and in personam foreclosure of tax sale certificates; and deals with problems of infant or incompetent defendants and defendants in the military service.

Once a case has been deemed uncontested it will proceed to judgment in the Office of Foreclosure. The plaintiff will simply send in its proofs, as may any defendant who filed an uncontesting answer to report its lien in an attempt to be included in the final judgment and to be paid by the sheriff from the proceeds of the sale. The Office of Foreclosure then examines the proofs and, if they are satisfactory, will issue a final judgment (signed by the Superior Court Clerk), which cuts off the rights of all named defendants, as well as all holders of unrecorded liens or claims. *N.J.S.A.* 2A:50-30; *see Borough of Pitman v. Monroe Sav. Bank, SLA*, 425 N.J. Super. 245, 256 (App. Div. 2012) (noting that a holder of an unrecorded interest is bound by the foreclosure judgment as if it had been a party to the foreclosure action); *Borden v. Cadles of Grassy Meadows II, LLC*, 412 N.J. Super. 567, 587 (App. Div. 2010) (noting that that subsequent lienholders were bound by the foreclosure judgment pursuant to *N.J.S.A.* 2A:50-30). The Office of Foreclosure will also issue a Writ of Execution directing the sheriff to sell the property, pay off the plaintiff (and possibly certain defendants) from the proceeds, and pay any remaining surplus into the Clerk of the Superior Court. Writs of Execution directed to sheriffs throughout the State are, as a matter of form, witnessed by the Chancery Division judge sitting in Trenton. Although his name is stamped on the Writ by the Superior Court Clerk, such judge may not have had any involvement in the case. The surplus,

if any, will remain in the hands of the Clerk until an application for surplus monies pursuant to *R.* 4:64-3 is made by a defendant having a claim thereto. Surplus money proceedings are brought by notice of motion before the Chancery judge under the original foreclosure docket number.

Effective September 1, 2014, *R.* 4:64-1 was amended to include a new subparagraph (d)(1) "Application for Judgment," which requires that in uncontested cases, the application for entry of judgment is to be accompanied by the proofs required by *R.* 4:64-2, including the original mortgage and note, with plaintiff's proofs or a copy of a recorded or filed document which is certified as true by the recording or filing officer, or by a New Jersey attorney, evidence of indebtedness, assignments, claim of lien and proof of the amount due. The Rule also requires that, if there is an objection to the calculation of the amount due, then the Office of Foreclosure is to refer the matter to the judge in the county of venue, who will schedule any further proceedings and so notify the parties. *R.* 4:64-1(d)(3) [as amended as of September 1, 2014]. Rule 4:64-9 was also amended as of September 1, 2014, and is now split into three subparts. This Rule now sets forth specifically what must be included in a notice of motion filed with the Office of Foreclosure (*R.* 4:64-9(a)), and specifically sets forth language to be included about the right to object to the calculation of the amount due, *R.* 4:64-9(b), and to object to the motion, *R.* 4:64-9(c).

A plaintiff in a foreclosure action will often settle the case, e.g., by agreeing with the mortgagor to reinstate the mortgage. The action may be dismissed at any time before the service of an answer (contesting or uncontesting) by a subsequent lienholder or of a notice of motion for summary judgment. After service of such an answer or notice of motion, a defendant, who is a subsequent lienholder, may apply to the court, pursuant to *R.* 4:64-4, for an order permitting it to proceed to final judgment and execution in the action. An answering party which holds a second mortgage may very well wish to foreclose its mortgage, and this rule permits such party to become, in effect, the plaintiff. *See Citizens First Nat'l Bank of Ridgewood v. Grull*, 122 N.J. Super. 562 (Ch. Div. 1973).

A junior lien will only be reported in a final judgment if there are no intervening liens or questions of priority. *R.* 4:64-1(e). The 1992 amendment of *R.* 4:64-1(e)(5), cross-referencing the reader to new *R.* 4:64-5, allows a mortgagor, judgment creditor or junior encumbrancer to challenge the priority or balance due a second mortgagee by filing a cross-claim against the encumbrancer.

Under New Jersey law, a guarantor of a non-commercial loan is entitled to have his or her obligation reduced by the fair market value of the real property securing the loan. Equitable reasons justify extending this fair market value credit rule to protect a guarantor of a commercial loans as well. *Connecticut Gen. Life Ins. Co. v. Punia*,

884 F. Supp. 148, 151 (D.N.J. 1995) *Nat'l Cmty. Bank v. Seneca-Grande, Ltd.*, 202 N.J. Super. 303, 311 (App. Div. 1985).

Equity, however, is still paramount in fashioning relief in the foreclosure context. *E.g., Sovereign Bank, F.S.B. v. Kuelzow*, 297 N.J. Super. 187 (App. Div. 1997). In *Kuelzow*, the mortgagee began a foreclosure action for non-payment. There was no dispute that the mortgagor was in default because the mortgaged premises had been severely damaged by a storm and the insurance carrier had denied coverage. While the mortgagor was in litigation with the insurance carrier over the coverage denial, the premises were foreclosed upon. The trial court had denied the mortgagors' request to enjoin the delivery of a deed or to set aside the sheriff's sale. The lower court had also denied the mortgagors' request for an order compelling a fair market value hearing to establish the excess value.

The Appellate Division reversed and ordered that the deed be withheld pending a resolution of the insurance litigation, stating that, despite a foreclosure judgment, a foreclosure action "is not totally concluded until the defendants' equity of redemption is cut off by the delivery of the sheriff's deed," *Kuelzow*, 297 N.J. Super. at 196 (*citing Hardyston Nat'l Bank v. Tartamella*, 56 N.J. 508, 513 (1970)). The court further found foreclosure is a discretionary remedy and that as long as the matter was still pending before the court, equitable principles govern. *Id.*; *see also Sanguigni v. Sanguigni* 197 N.J. Super 505, 509, (Ch. Div. 1984) (noting that "the remedy of foreclosure is equitable in nature and as such is not automatically available to a creditor in the face of every type of contractual breach"). In *Kuelzow*, the Appellate Division stated: "[s]uch equitable restraint on the part of [mortgagee] is not too great a demand as a condition for the equitable remedy of foreclosure." *Kuelzow*, 297 N.J. Super. at 198; *see also Mercury Capital Corp. v. Freehold Office Park, Ltd.*, 363 N.J. Super. 235, 239 (Ch. Div. 2003), ("there is no question but that, during the ten days following a sheriff's sale, and without the need for court approval, the mortgagor has an absolute right to redeem the property by tendering the full amount due on the mortgage") (internal citation omitted).

Lastly, the court, because of its holding, found it unnecessary to rule upon the issue of whether a residential mortgagee must account for its profits if it buys in at a foreclosure sale for a nominal cost and does not seek a deficiency judgment against the mortgagor. *Kuelzow*, 297 N.J. Super. at 198. *Cf. Nat'l Cmty. Bank v. Seneca-Grande, Ltd.*, 202 N.J. Super. 303 (App. Div. 1985) (in commercial setting, court found that fair market value hearing was required).

N.J.S.A. 2A:61-5 and *R.* 4:65-4 empower the sheriff, in his discretion, to adjourn the sale. *N.J.S.A.* 2A:17-36 restricts the power to two adjournments by request of the homeowner, not exceeding fourteen calendar days for each

adjournment. The court may, however, for cause, order further adjournments. *See Bankers Trust Co. of Cali., N.A. v. Delgado*, 346 N.J. Super. 103, 105-06 (App. Div. 2000) (noting that the purpose of the statute is to protect the judgment creditor from unjustified sale adjournments in an effort to frustrate satisfying the judgment). An adjournment request by a creditor, whether or not agreed to by the property owner, is to be granted by the Sheriff. *Wells Fargo Home Mortg., Inc. v. Stull*, 378 N.J. Super. 449, 454-55 (App. Div.), *certif. denied* 185 N.J. 267 (2005). The homeowner seeking an adjournment should apply directly to the sheriff. If a stay is denied, the homeowner may apply to the Chancery judge on Order to Show Cause.

A properly drawn foreclosure complaint will recite a demand for possession of the mortgaged premises. The final judgment and writ of execution will then expressly award possession of the property to the purchaser at the sheriff's sale. The purchaser is entitled, upon application to the Clerk, to a writ of possession as a matter of course, which will be directed to the sheriff. *R.* 4:59-2(b). If the final judgment does not expressly award possession to the purchaser, the latter must apply to the court for an order for possession. Notice of the motion must be given to the person in possession, and the purchaser must prove that the person in possession has failed for 10 days to comply with a written demand to deliver possession.

If it is found that the subject property will decrease in value during the pendency of the proceeding (e.g., unfinished tract housing), all parties will frequently consent to a sale *pendente lite*. By court order, the property will be sold and the rights of all parties transferred to the proceeds of sale. Such relief may also be sought on notice of motion. Such sales are authorized by *N.J.S.A.* 2A:50-31.

A mortgagor's right to cure a default on a mortgage is governed by *R.* 4:65-5. A mortgagor may "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." *E. Jersey Sav. & Loan Ass'n. v. Shatto*, 226 N.J. Super. 473, 475-76 (Ch. Div. 1987) (*quoting Hardyston*, 56 N.J. at 513). New Jersey courts have recognized, the "'ultimate question is one of policy,' that the right of redemption is an equitable remedy devised to protect a mortgagor from the forfeiture of his title, and for that reason is a favored right.'" *Mercury Capital Corp. v. Freehold Office Park, Ltd.*, 363 N.J. Super., 235, 240 (Ch. Div. 2003) (*citing Hardyston*, 56 N.J. at 513). Case law has established that the time allowed to cure a default is extended until the sheriff's deed has actually been delivered. *See Union County Sav. Bank v. Johnson*, 210 N.J. Super. 589, 593-94 (Ch. Div. 1986) ("a defaulting mortgagor has 10 days following the sale or until the delivery of the deed to take affirmative action (by motion on notice to all parties in interest) in objection to the sale"). *See also In re Randall*, 263 B.R. 200 (D.N.J. 2001) (finding that the mortgagor's right to cure had not been extinguished; a deed of sale was not delivered before the mortgagors had filed their Chapter 13 petition to cure their default under

the mortgage contract for a private residence and to reinstate the loan contract).

The Court Rules provide for taxed costs and attorneys' fees, but the calculation of the attorneys' fees requires reference to *R.* 4:42-9(a)(4) as to mortgages, or (5) as to tax sale certificates. However, recoupment is not permitted of attorney's fees incurred during the time period between notice of intent to foreclose and commencement of the actions; and if the property owner cures the default prior to the commencement of the action, no attorney's fees are awardable. *Spencer Sav. Bank, SLA v. Shaw*, 401 N.J. Super. 1, 9-10 (App. Div. 2008).

R. 4:42-9 reads as follows:

> (a) Actions in Which Fee Is Allowable. No fee for legal services shall be allowed in the taxed costs or otherwise, except . . .
>
> (4) *In an action for the foreclosure of a mortgage,* the allowance shall be calculated as follows: on all sums adjudged to be paid the plaintiff amounting to $5,000 or less, at the rate of 3.5% provided, however, that in any action a minimum fee of $75 shall be allowed; upon the excess over $5,000 and up to $10,000 at the rate of 1.5%; and upon the excess over $10,000 at the rate of 1%, provided that the allowance shall not exceed $7,500. If, however, application of the formula prescribed by this rule results in a sum in excess of $7,500, the court may award an additional fee not greater than the amount of such excess on application supported by affidavit of services. In no case shall the fee allowance exceed the limitations of this rule.
>
> (5) *In an action to foreclose a tax certificate or certificates,* the court may award attorney's fees not exceeding $500 per tax sale certificate in any in rem or in personam proceeding except for special cause shown by affidavit. If the plaintiff is other than a municipality no attorney's fees shall be allowed unless prior to the filing of the complaint the plaintiff shall have given not more than 120 nor fewer than 30 days' written notice to all parties entitled to redeem whose interests appear of record at the time of the tax sale, by registered or certified mail with postage prepaid thereon addressed to their last known addresses, of intention to file such complaint. The notice shall also contain the amount due on the tax lien as of the day of the notice. A copy of the notice shall be filed in the office of the municipal tax collector.

Rule 4:42-9(a)(4) was amended effective September 1990 to clarify the

provision permitting a fee in excess of $7,500 on special application because of the disagreement between two trial courts in published opinions from which no appeals were taken. *Levine v. Levine*, 210 N.J. Super. 585 (Law Div. 1985), had held that the rule's provision for an excess fee is operative only when application of the percentage formula results in a calculation exceeding $7,500. This conclusion was, however, disagreed with by *Farmers & Merchants National Bank of Bridgeton v. Cotler*, 225 N.J. Super. 160 (Ch. Div. 1988), which held that on an appropriate affidavit of services, the court may allow a fee in excess of $7,500, regardless of the amount adjudicated in the mortgagee's favor. The Civil Practice Committee recommended the adoption of the Levine holding and the Supreme Court concurred. As the court in *Stewart Title Guaranty Co. v. Lewis*, 347 N.J. Super. 127, 135 (Ch. Div. 2001), recognized, the intent of the rule, consistent with the *Levine* holding, allows for the exercise of discretion only when the fee derived from an application of the formula exceeds $7500. *See also Regency Sav. Bank, F.S.B. v. Morristown Mews, L.P.*, 363 N.J. Super. 363, 367-68 (App. Div. 2003) (discussing the adoption of the holding in *Levine* and its application).

In addition to these fees allowed as part of the taxed costs, fees for certain searches may be also included pursuant to *R.* 4:42-10(a). Under *R.* 4:42-10(b), however, such fees may be included only if, prior to taxing the costs, "the plaintiff or plaintiff's attorney has filed an affidavit setting forth an itemized statement of the fees and charges for which taxation is asked." These fees are also permitted in actions for partition and sale of real estate.

It is well established that the rule regarding attorney's fees overrides provisions in the loan documents which would allow attorneys' fees in excess of the amount fixed by Court rule. *Barrows v. Chase Manhattan Mortgage Corp.*, 465 F. Supp. 2d 347, 357 (D.N.J. 2006); *Bank of Commerce v. Markakos*, 40 N.J. Super. 31, 32 (Ch. Div.), *aff'd*, 41 N.J. Super. 246 (App. Div.), *appeal denied*, 22 N.J. 428 (1956).

In a significant change to long established principles regarding a foreclosing mortgagee's right to evict a tenant, Justice Stein, writing for the Court, held that the 1986 amendments to the Anti-Eviction Act (*N.J.S.A.* 2A:18-61.1-61.12) apply to foreclosing mortgages and protects tenants from eviction irrespective of whether the tenancy was established before or after the execution of the mortgage. *Franklin Tower One, LLC v. N.M.*, 157 N.J. 602, 618-19 (1999) ("Although the Anti-Eviction Act 'is in derogation of the landlord's common-law rights of ownership . . . landlord rights must to some extent and on general welfare grounds defer to the needs of the tenant population in this state'") (citation omitted). In other words, an owner who takes title to property through a foreclosure cannot evict a residential tenant without proving a ground for eviction pursuant to *N.J.S.A.* 2A:18-61.1. *Chase Manhattan Mortg. Corp. v. Hunt*, 364 N.J. Super. 587, 590 (Law Div. 2003). "The purpose of the Anti-

Eviction Act is to protect residential tenants from the effects of what the Legislature has deemed to be a severe shortage of rental housing in this state." *Edward Gray Apartments/Region Nine Hous. Corp. v. Williams*, 352 N.J. Super. 457, 465 (App. Div. 2002) (citing *Franklin Tower One*, 157 N.J. at 614).

2. PRIORITIES

The priorities of various claimants in a foreclosure proceeding may be determined in one of three ways: (1) the complaint, answer, or other pleadings may bring the question of priorities before the court for adjudication; (2) the priorities may be left to the surplus money proceedings in which the priorities may be agreed upon, or, if disputed, referred back to the court for resolution; (3) if priority questions would affect bidding at the foreclosure sale, any party may move before the court for an adjudication of the priorities prior to the sale. Similar determinations may be sought by any party where the only matter in dispute is the amount due on a party's obligation (rather than a question of either right to foreclosure or priority), since, again, this may affect a potential bidder's ability to make a reasoned choice as to whether or how much to bid at the foreclosure sale.

An example of this third situation is as follows: Assume an acknowledged first mortgagee with an undisputed indebtedness commences a foreclosure action and joins a subsequent mortgagee and judgment creditors. Because the property in question has a value in excess of the first mortgage, the subsequent mortgagee and judgment creditors wish to know whether or not to bid at the sale. They know they must bid at least the amount of the first mortgage indebtedness and costs; but in order to know what amount to bid in excess of such amount, they have to know the balance properly due the second mortgagee and the relative priorities of the judgment creditors. If the debtor disputes the amount of the second mortgage, or if there is a question of priority among the junior lienholders, there can be no reasoned decision as to the amount to be bid by such disputants at the foreclosure sale. Technically, the foreclosure would still be considered an uncontested matter, since the foreclosing mortgagee's rights are not disputed; yet the matter would have to be referred to the Chancery judge for resolution of these issues. If no party moves for a judicial determination of such disputes prior to sale, there is little chance that the sheriff will realize the fair market value of the property at the sale.

Putting to one side factual disputes as to the balances due on the various liens, the legal priorities between or among the claimants may also be dependent upon the claimant's status, i.e., fee owner, owner of a leasehold or life estate, purchase money or construction mortgagee, federal tax lien holder, executing judgment creditor, or the like. In this volume we cannot attempt to give a comprehensive review of all priority problems with respect to mortgage foreclosures. *See*

29 Weinstein § 10.1-10.23. Generally, the parties' priorities will be determined by the dates of recording of the mortgages or docketing of the judgments or other liens. However, as between or among judgments, *N.J.S.A.* 2A:17-39 "grants to a levying judgment creditor a super-priority over senior non-levying judgment creditors, but not over senior mortgagees." *Pulawski Sav. & Loan Ass'n. v. Aguiar*, 174 N.J. Super. 42, 46 (Ch. Div. 1980). This statute creates a circuity problem which was resolved in the last-cited case. The problem exists since the recorded priorities may show, in order of time, judgment A (not levying), mortgage B, and judgment C (levying). In such a situation, judgment C by virtue of the statute would have priority over judgment A which in turn has priority over mortgage B, which in turn has priority over judgment C. This circuity problem was resolved in *Pulawski Savings & Loan Association*, which adopted an approach suggested in 29 Weinstein § 10.23 pp 740-741:

> 1. Set aside from the fund the amount of A's claim;
>
> 2. Pay the amount of A's claim so set aside to
>
> > (a) C, to the amount of his claim, and then to
> >
> > (b) A, to the extent of any balance remaining after C's claim is satisfied;
>
> 3. Pay B the amount of any balance remaining after the amount of A's claim has been set aside and paid out as indicated in 2, above.
>
> 4. If any balance remains in the fund after A's claim has been set aside and B's claim has been satisfied, distribute the balance to
>
> > (a) C, if not fully satisfied out of the amount set aside as indicated in 2, above; and then to
> >
> > (b) A, if any balance still remains.

Pulawski Sav. & Loan Ass'n., 174 N.J. Super. at 48 (quoting 29 Weinstein § 10.23)

Other priority problems may exist with respect to unrecorded mortgages (*see Howard Sav. Bank v. Brunson*, 244 N.J. Super. 571 (Ch. Div. 1990), holding that in order to provide effective constructive notice to subsequent purchasers and creditors, a mortgagee must ensure that a mortgage is both properly recorded and properly indexed), advance money mortgages (whether construction mortgages or "side collateral" mortgages taken in commercial loan situations) and purchase money mortgages. *See also Manchester Fund, Ltd. v. First Am. Title Ins. Co.*, 332 N.J. Super. 336, 346 (Law Div. 1999) (finding that grantor-grantee indices are part of the public record). Purchase money mortgages have a super-priority, insofar as the mortgage is taken either by the seller or a third-party lender. *Boorum v. Tucker*, 51 N.J. Eq.

135 (Ch. Div. 1893), *aff'd o.b.*, 52 N.J. Eq. 587 (E. & A. 1894). The priority of a purchase money mortgage extends over all other claims. *See* 29 Weinstein § 10.12. Advance money mortgages may be given to secure construction costs or general business loans (made either to the mortgagor or for which the mortgagor has entered into a guarantee agreement). If the advance of funds is obligatory on the part of the mortgagee, the advance money mortgage has priority stemming from the date of its recording. *Lincoln Fed. Sav. & Loan Ass'n v. Platt Homes, Inc.*, 185 N.J. Super. 457, 461 (Ch. Div. 1982). If, however, the advances are discretionary and the loan is a construction mortgage, the mortgagee should make a run-down search before each advance since an intervening lien can affect priority. *Id.* at 466-67. If the mortgage is taken in a general commercial setting, according to dictum (*Id.* at 467, note 5), such an advance money mortgage would be given priority in accordance with its terms. But the court there suggests that "the Legislature may well wish to re-study the interrelationship of our real and personal property priority systems to bring our real property priorities in conformity with modern commercial practice." *Id.*; *see also* 29 Weinstein § 10.23; *Cox v. RKA Corp.*, 164 N.J. 487 (1998) (holding that the priority of an unrecorded vendee's lien does not extend to those payments voluntarily made by the vendee after the lender properly records its mortgage; unlike in *Lincoln*, plaintiff in *Cox* case made unrecorded advances and defendant had no notice, actual or constructive, of those intended advances. Any search by the defendant of the public records for those interests would have yielded no result).

The Appellate Division has applied the doctrine of equitable subrogation and held that "a refinancing mortgagee is ordinarily entitled to the same priority as the original mortgagee even though it negligently failed to discover the lien of an intervening judgment creditor before closing." *Investors Sav. Bank v. Keybank Nat'l Ass'n*, 424 N.J. Super. 439, 441 (App. Div. 2012). Stated differently, the holder of a new mortgage that was used to pay off a prior mortgage may step into the shoes of the original mortgagee and will have priority over other secured creditors who may have filed a judgment between the time of the original mortgage and the refinancing mortgage. *Id.* at 443-44. This is true even if the new mortgagee was negligent in failing to discover intervening liens. *Id.* at 446-47.

Foreclosure actions are quasi in rem; therefore, no personal judgment may be granted over and above the proceeds of the sale of the mortgaged premises. *N.J.S.A.* 2A:50-1. *See also Borden v. Cadles of Grassy Meadows II, LLC*, 412 N.J. Super. 567, 580-81 (App. Div. 2010) (discussing *N.J.S.A.* 2A:50-1). In fact, there may be no action on the debt instrument until after the mortgage is foreclosed and the proceeds of the sale applied to the debt. Such a deficiency action, which is properly brought in the Law Division, must be commenced within three

months from the date of the sale or confirmation (if confirmation was required). *N.J.S.A.* 2A:50-2. This section was amended effective April 14, 1980, to include deficiencies on notes as well as bonds, except in situations as set forth in *N.J.S.A.* 2A:50-2.3. This statute applies generally to business loans where the security is other than a four or fewer family dwelling in which the owner or his family resides, or where the mortgage is not the primary collateral for the note or is not a first mortgage. In such cases there is no statutory requirement to initially foreclose the mortgage. In a deficiency action the obligor is entitled to have the fair market value of the real estate deducted from the amount of the indebtedness, notwithstanding the amount actually realized at the foreclosure sale. *N.J.S.A.* 2A:50-3. Further, the right of redemption in favor of the foreclosed mortgagor is revived for six months after the entry of judgment for the balance of the debt, *N.J.S.A.* 2A:50-4, unless the defendant had disputed the amount of the deficiency in the original foreclosure proceeding, and that dispute was there resolved, in which case no new right of redemption is established by bringing the deficiency action. *N.J.S.A.* 2A:50-5.

It should be noted that a contractor who accepts a mortgage waives his right to assert a mechanics' lien claim. *Nat'l Cmty. Bank v. Seneca-Grande, Ltd.*, 202 N.J. Super. 303, 308 (App. Div. 1985). Such a mortgage would ordinarily be subordinate to a subsequent construction mortgage, either through a specific or a general subordination clause. The unanticipated effect of this is that the contractor would lose whatever right it would otherwise have had to collect under a mechanics' lien, and it can only assert a claim as a mortgagee. *Id*. at 308. In addition, the contractor would lose whatever priority over the other contractors, who had neither lien claims nor mortgages, but who were paid from the proceeds of any subsequent construction mortgage that was granted by the mortgagor, since the use of the proceeds from any subsequent mortgage is entirely proper as long it doesn't involve any diversion of funds away from the project. *Id.* at 308-09.

Thus, in a situation in which there is no surplus in a subsequent foreclosure sale from which to pay junior lien holders or mortgagees, the contractor could find itself not being paid at all in spite of the fact that its claim is secured by a recorded mortgage. *Id.* at 311. Furthermore, there is no inequity in the construction mortgagee making a nominal bid at a foreclosure sale and later making a profit through a subsequent sale of the property even though the contractor with the subordinated claim was never paid. *Id.* at 311. It is the responsibility of the contractor, not the construction mortgagee, to ensure that there are a sufficient number of interested bidders at the foreclosure sale so as to increase the likelihood of there being surplus funds from which to pay junior lien holders. *Id.*

In the bankruptcy context, a creditor whose loan is in default and who follows all of the proper foreclosure procedures for sales or appropriate actions for the

disposal of collateral under the UCC may nevertheless find itself vulnerable to an action by a trustee or the debtor in possession. *See* 11 U.S.C. § 101, *et seq*.

B. CANCELLATION OF MORTGAGE

An action may be brought in the Chancery Division by any mortgagor or party in interest to direct the County Clerk or Register of Deeds and Mortgages to cancel or discharge a mortgage. Such an action is governed by *N.J.S.A.* 2A:51-1, *et seq*., which requires that plaintiff: (i) present satisfactory proof that all sums due on the mortgage have been paid in full; or (ii) deposit with the Clerk of the Superior Court in the County in which the mortgage is of record any balance due on the mortgage (principal and/or interest); or (iii) present "special circumstances" sufficient to satisfy the Court that the mortgagee has no further interest in the mortgage or the debt secured thereby. This type of action may be brought summarily in accordance with *R.* 4:67-1(a) and 4:67-2(a) (which Rules are discussed infra).

Although the definition of "special circumstances" in *N.J.S.A.* 2A:51-1(c) has not been judicially construed, in an unpublished 2011 Appellate Division case, the appellate court referred to this provision and directed the Chancery Division to either enter an order compelling the mortgagee to cancel the mortgage of record, or directing the County Clerk to cancel the mortgage of record, on the basis that there was insufficient evidence to prove a modification of the mortgage. *See Garruto v. Cannici*, 2011 N.J. Super. Unpub. LEXIS 1436 (App. Div. June 6, 2011).

Courts may also revive a lien of a previously extinguished mortgage in order to reverse what would otherwise bring an inequitable and unconscionable result. This remedy is equitable in nature and may be afforded on two bases. First, the lien may be revived because of fraudulent conduct by the property owner. Secondly, the lien may be revived because of a breach of a formal covenant made by the property owner. In both instances, revival is triggered by the "reacquisition of title by the property owner after its apparent loss (as well as extinguishment of the lien sought to be revived by a final judgment in foreclosure of a superior mortgage and sheriff's sale of the property)." *Mooney v. Provident Sav. Bank*, 308 N.J. Super. 195, 203 (Ch. Div. 1997), *aff'd*, 318 N.J. Super. 257 (App. Div. 1999).

C. PARTITION

Partition actions are governed by *N.J.S.A.* 2A:56-1, *et seq*., and *R.* 4:63. *See also* New Jersey Practice, Vol. 4A, Civil Practice Forms §76.1, *et seq*.

Partition is an equitable remedy by which property (real or personal), held as a tenancy in common or joint tenancy, may be divided. As a practical matter, literal partition is rarely ordered; instead the court more often will direct a sale of the

property and a division of the proceeds pursuant to the authority granted to it by *N.J.S.A.* 2A:56-2.

The complaint for partition must describe the land (or the personalty), sufficient to identify the property, and the respective interests of the parties therein. The complaint should seek either partition or sale (the latter if partition is not feasible, as in the case of a home on a small lot). If the action is brought by a guardian of an infant or incompetent, the complaint must show, and it must also appear by the proofs, that the partition will operate to the benefit of the infant or incompetent.

The plaintiff should file a notice of *lis pendens* (see *infra*) to eliminate the need to join persons subsequently acquiring an interest in the property, in order to bar their claims. *N.J.S.A.* 2A:15-6. All persons having any interest in the property (including dower or curtesy) should be joined as defendants. Other defendants may also include mortgagees, judgment creditors, or other creditors holding liens against any undivided interest. *N.J.S.A.* 2A:56-17.

An answer might dispute plaintiff's right to seek partition because, e.g., partnership property is involved, or a prior agreement waived the right to partition. If the answer sets up a defense against the plaintiff's right to sue, the action will be assigned for trial before a Chancery judge. A factual dispute as to partitionability, however, precludes summary judgment on that issue. *Swartz v. Becker*, 246 N.J. Super. 406 (App. Div. 1991).

If the court determines that the plaintiff is entitled to maintain the action, it will then determine the respective shares and interests of the parties in the property and whether the property is capable of a fair division. The judgment may order physical division of the property, or its sale and a division of the proceeds.

Typically, no valid answer is filed. In fact, if the plaintiff fails to prosecute the action diligently, any defendant may file a notice of motion for leave to proceed.

If no answer is filed, or if such answer as has been filed does not dispute plaintiff's rights, then the court will proceed to hear the necessary proofs ex parte on application of the plaintiff.

Often the plaintiff or an answering defendant wants the court, in calculating shares; to take into account the value of improvements and taxes paid; to determine that the value of another party's occupancy of the property be subtracted from its share; or to hold a co-tenant guilty of waste chargeable for the value of the damage to the property. In such instances an accounting is ordered to achieve an equitable division. A demand for an accounting may be made subsequent to the entry of judgment of partition or of sale, with a plenary hearing to be held to resolve any objections thereto.

A receiver may be appointed, on motion supported by affidavits, to receive rents and income from a property when one co-tenant is denied his share of such income by the other. The receiver will eventually report and account to the court, applying on notice of motion to confirm the accounting. The order approving the accounting will direct payment of the receiver's fees and distribution of the balance of the monies in the receiver's hands to each of the co-tenants according to their proportionate shares. *Smith v. Smith*, 138 N.J. Eq. 463 (Ch. Div. 1946). No such appointment will be made if it would subject co-tenants to inconvenience or expense without corresponding benefit to the plaintiff.

If actual physical partition is appropriate, the court will appoint one or more commissioners, who will report to the court on a proposed division of the property. *R.* 4:63-1. Exceptions to this report take the form of a notice of motion to suppress the return of the commissioner's report. Historically, such motions were valid only if the report was found to be the result of corruption, favor or clear mistake. *Bentley v. Long Dock Co.*, 14 N.J. Eq. 480 (Ch. Div. 1862); *Hay v. Estell*, 19 N.J. Eq. 133 (Ch. Div. 1875); *Haulenbeck v. Cronkright*, 26 N.J. Eq. 159 (Ch. 1875). *Prostak v. Prostak*, 257 N.J. Super. 75 (App. Div. 1992), however, altered the standard for determining the validity of such motions.

The *Prostak* commissioner assigned different values to two equal parcels of land because he believed that the defendants' parcel could be easily subdivided. *Id.* at 79. The defendants submitted a notice of motion to suppress the report based on the theory that proposed changes in the zoning laws would make subdivision of their parcel impossible. *Id.* The defendants also requested an evidentiary hearing on the valuation issue. The notice of motion was accompanied by the affidavit of a planning consultant who predicted that the zoning laws would change in the very near future. In response, the commissioner emphasized that the planning board had not yet voted on the proposed changes and that the proposals may never become effective. Since the defendants did not argue that the commissioner's valuation of the property was based on corruption, favor or clear error, the trial judge accepted the entire commissioner's report without responding to the defendant's request for an evidentiary hearing. *Id.* at 82.

The Appellate Division, however, held that a commissioner's report may be subject to challenge even if it is not based on fraud, favor, or grievous error. Portions of a commissioner's report may be disputed if they have been placed in "legitimate dispute by an offer of contrary proof or demonstrated internal weakness." *Prostak*, 257 N.J. Super. at 82. The case was reversed and remanded to the Chancery Division for an evidentiary hearing on the valuation issue.

When awarding actual physical shares of land, the court can adjust minor

differences by awarding money ("owelty") which becomes a lien upon the interest of the party receiving property with a value greater than his proportionate share. *See Ierrobino v. Megaro*, 108 N.J. Super. 556, 561-63 (Ch. Div. 1970). Interest is calculated on any delay in owelty payment ordered by the court. *Prostak*, 257 N.J. Super. at 83.

The court may continue a Special Fiscal Agent's appointment in a partition dispute in order to avoid a waste of assets, but must set a termination date for the Agent's services. *Kassover v. Kassover*, 312 N.J. Super. 96, 100 (App. Div. 1998). The *Kassover* court recognized that it is common for courts to appoint a receiver for a business or land "only for the short period of time required to protect assets pending a final resolution of litigation or a dissolution of the business enterprise." *Id.; see also In re N.J. Refrigerating Co.*, 95 N.J. Eq. 215, 222-23 (E & A 1923); *Roach v. Marguiles*, 42 N.J. Super. 243, 246 (App. Div. 1956).

If the court finds that an actual partition cannot be made without great prejudice to the parties, it may order a sale of the property. The party alleging the necessity and advisability of a partition sale, rather than a physical partition in kind, bears the burden of proof. *Swartz v. Becker*, 246 N.J. Super. 406, 411 (App. Div. 1991). A sale may be public or private. "The power to direct partition of property by sale and division of the proceeds is statutory, and the circumstances under which it can be exercised depend upon the statutes in force in the different jurisdictions." *Zudiak v. Szuryk*, 93 N.J. Eq. 559, 561 (Ch. 1922). If a public sale is ordered, the judgment will direct the sheriff of the particular county (or the commissioners, pursuant to *N.J.S.A.* 2A:61-1, *et seq*.) to sell the property, give a deed to the purchaser, and either distribute the money to the parties as specified in the judgment or to pay the proceeds to the Clerk of the Superior Court, there to await an order for distribution from the court. The sheriff (or commissioner holding the sale) subsequently reports on the sale to the court, and the sale is confirmed if the court is satisfied that the price is within the range established by two appraisers' reports.

A private sale (infrequently ordered) is accomplished by a contract of sale being submitted for court approval, on notice to the other parties and supported by the affidavits of two independent appraisers. Objections will be successful only if a bona fide offer is produced, or if it can be demonstrated that the value of the property greatly exceeds the proposed contract price.

The costs of the partition action may be paid from the proceeds of the sale (or apportioned upon an actual partition) since the action is viewed as having benefited all of the co-tenants. Counsel fees may also be awarded from the proceeds of the sale, which represent a "fund in court" within the meaning of *R.* 4:42-9(a)(2). *See Smith v. Smith*, 78 N.J. Super. 28, 35-36 (Ch. Div. 1963); *Baird v. Moore*, 50 N.J. Super. 156, 176 (App. Div. 1958). Taxed costs, which may include search fees,

are also permitted under *R.* 4:42-10(a) and (b).

A partition action may not be brought by a tenant by the entirety. *Newman v. Chase*, 70 N.J. 254 (1976). Upon divorce, however, such tenancy becomes a tenancy in common and, as such, is subject to partition. *DiSanto v. Adase*, 116 N.J. Super. 226 (App. Div. 1971). Several cases illustrate the fashioning of an equitable remedy within the context of an action to partition a former tenancy by the entirety:

In *Newman v. Chase*, 70 N.J. 254 (1976), plaintiff purchased the husband's interest in a home held by husband and wife as tenants by the entirety. The Court held that plaintiff acquired a tenancy in common with the wife for the joint lives of the husband and wife, as well as the husband's right of survivorship. Although it has been held that a tenant in common has an absolute right to partition [*Goodpasture v. Goodpasture*, 115 N.J. Super. 189, 195 (Ch. Div. 1971)], the language of the statute is permissive rather than mandatory. Thus, equity may preclude partition in light of the particular circumstances of the case, as here, where the property is the marital home and the value of the plaintiff's interest is speculative and likely to bring only a low price. However, when the wife remained in possession and refused plaintiff's demands for access, her conduct constituted ouster; thus she was held accountable to plaintiff for one-half the imputed rental value of the home, less any payments made to preserve the property. *Newman*, 70 N.J. at 267.

ESB, Inc. v. Fischer, 185 N.J. Super 373 (Ch. Div. 1982), extended the holding in *Newman v. Chase* to a situation where plaintiff was the judgment creditor of a husband who held the marital home as tenant by the entirety with his wife. The court directed that a writ of execution issue in favor of the plaintiff as against the debtor-husband's interest in the property, with sheriff's levy upon the husband's tenancy to be deemed continuously effective without the requirement of a sale of the property. Thus, the plaintiff was protected as a levying judgment creditor and, as long as the family occupied the property, the wife was required to pay plaintiff one-half the imputed rental value of the property (less applicable expenses), to be credited against the unpaid amount of the judgment. The writ of execution was to be discharged if the judgment should be satisfied or if the wife should outlive her husband, thereby succeeding, by virtue of her right of survivorship, to full title in the property, free of plaintiff's interest. Conversely, if the debtor-husband outlives his wife, plaintiff may then initiate an execution sale of the premises.

In *Colucci v. Colucci*, 251 N.J. Super. 73 (Ch. Div. 1990), the parties' divorce judgment provided for resale of the marital premises upon the wife's remarriage. After the divorce, the husband conveyed his interest in the property to his wife in partial satisfaction of a bankruptcy obligation. Following the wife's remarriage, the plaintiff moved to compel the sale of the premises pursuant to the

divorce judgment. *N.J.S.A.* 46:3-13 provides that "[e]very deed conveying lands shall, unless an exception be made therein, be construed to include all the estate, right, title, interest, use, possession, property, claim and demand whatsoever, both in law and equity . . . ." *Colucci*, 251 N.J. Super. at 81 (quoting *N.J.S.A.* 46:3-13). Therefore, "in New Jersey, every deed conveys the entire estate of the grantor unless an exception is included in the document itself." *Id.* The court held that the deed conveyed the entire estate and extinguished any rights the grantor may have had to the property under a divorce judgment. The court rejected plaintiff's argument that his payment of mortgage, tax and insurance on the marital premises for seven years after conveying his interest entitled him to an equitable interest in the premises. *Id.* at 83.

The courts will not allow a partition action to avoid applicable subdivision requirements. *Mount Laurel Township v. Barbieri*, 151 N.J. Super. 27 (App. Div. 1977), held that although *N.J.S.A.* 40:55D-7 provides a broad court-ordered subdivision exemption to the municipal subdivision procedures, such exemption did not apply to a partition judgment which was contrived by co-tenants of a tract for the sole purpose of avoiding municipal subdivision controls. *See also Prostak,* 257 N.J. Super. at 81.

The court may also hear partition actions in the Family Part of the Chancery Division. *Olson v. Stevens*, 322 N.J. Super. 119 (App. Div. 1999), held that a case for partition of real estate jointly owned by unmarried cohabitants should be transferred to the Family Part from General Equity when a palimony action between the same parties was pending in the Family Part. *Id.* at 121. The court found the Family Part to be the most appropriate forum and held that the interests of judicial economy were best served by having the partition action resolved in conjunction with the palimony action. *Id.* at 123.

Yet, partition actions between unmarried cohabitants may or may not be properly brought in the Family Part. *Compare Larocco v. Gardella*, 352 N.J. Super. 234, 239 (Ch. Div. 2002) ("Unless the plaintiff can establish cohabitation with the defendant, he does not present a principal claim which qualifies as a "family-type" relationship"); *Dey v. Varone*, 333 N.J. Super. 616, 619 (Ch. Div. 2000) (determining that the absence of a marriage license does not preclude the Family Part's jurisdiction over property disputes) and *Olson v. Stevens*, 322 N.J. Super. 119 (App. Div. 1999) (transferring a partition action involving real estate held jointly by unmarried cohabitants whose union had lasted for 16 years and produced a child, to the Family Part where it was consolidated with pending custody and palimony actions).

D. QUIET TITLE

Actions for quiet title are governed by *N.J.S.A.* 2A:62-1 *et seq.*, and by *R.* 4:62-1. *See also*, NEW JERSEY PRACTICE Vol. 4A, Civil Practice Forms § 93:1, *et*

seq. The purpose of this procedure is to allow one who is in peaceful possession of realty to compel any other person or entity who asserts a hostile right or claim, or who is reputed to hold such a right or claim, to submit it to judicial determination. *See Brookdale Park Homes, Inc. v. Twp. of Bridgewater,* 115 N.J. Super. 489, 496 (Ch. Div. 1971); *see also Suser v. Wachovia Mortgage, FSB,* 433 N.J. Super. 317, 324 (App. Div. 2013).

The complaint for quiet title must describe the property and recite the manner in which plaintiff either acquired title or the right to possession. *R.* 4:62-1. Plaintiff must allege that he is in peaceable possession and that no action is pending to test the validity of defendant's claim. As in a partition action, plaintiff should then file a notice of *lis pendens.* Defendants in quiet title actions are often unknown, being "heirs, devisees, and personal representatives" of a long-deceased interest-holder. After an inquiry to determine the names and whereabouts of such unknown parties, which inquiry must include a 60-year title search, service of unknown defendants may be made by publication, with notice thereof posted upon the property in question. *R.* 4:26-5(c); *R.* 4:4-5(a)(3).

Any defendant who claims an interest in the property must specify in his answer the value of the claim and the manner and sources through which it was derived. In the event of a default, or if defendant files a disclaimer of any interest in the property, plaintiff may prove his case by affidavit. *R.* 4:62-4.

The final judgment should expressly state that the losing party has no interest in the property in question, should describe the property, and should adjudge that the prevailing party has an estate in fee simple. *Wilomay Holding Co. v. Peninsula Land Co.*, 36 N.J. Super. 440 (App. Div.), *certif. denied*, 19 N.J. 618 (1955).

Plaintiff may seek to quiet title to property claimed through adverse possession. To sustain such a claim, plaintiff must establish that possession has been actual and exclusive, visible and notorious, and continued and uninterrupted for the statutory period, pursuant to *N.J.S.A.* 2A:14-30 to -34. *See Wilomay Holding Co.*, 36 N.J. Super. at 443. Possession need not be accompanied by an intentional "hostility" (formerly required). *Mannillo v. Gorski*, 54 N.J. 378, 386-87 (1969). "[O]ne criterion of adverse possession is that the use must be so open and notorious that an ordinarily prudent person would be put on notice that the land is in actual possession of another." *Patton v. North Jersey District Water Supply Comm'n,* 93 N.J. 180, 186 (1983). Knowledge of a minor encroachment onto an owner's property is not presumed. The true owner will not be charged with knowledge "unless or until it takes on characteristics of acts of dominion over the land." *Stump v. Whibco*, 314 N.J. Super. 560, 567 (App. Div. 1998) (when fencing is the only evidence upon which an adverse possession claim is made, the fencing must be so

open and notorious as to charge the true owner with notice); *see also Yellen v. Kassin*, 416 N.J. Super. 113, 122 (App. Div. 2010) (no prescriptive easements existed where the evidence failed to establish the requisite element of hostility).

In *Devins v. Borough of Bogota*, 124 N.J. 570, 579 (1991), the Court held that a claim for adverse possession may lie against municipally-owned property where such property is not used for a public purpose. *Devins v. Borough of Bogota*, 124 N.J. 570 (1991), has been distinguished by *J&M Land Co. v. First Union Nat'l Bank*, 166 N.J. 493 (2001). In *J &M Land Co.*, the New Jersey Supreme Court undertook a reconciliation "of *N.J.S.A.* 2A:14-6 and -7 with *N.J.S.A.* 2A:14-30 and -31 . . . *N.J.S.A.* 2A:14-6 and -7 with *N.J.S.A.* 2A:35-1." *J & M Land Co. v. First Union Nat'l Bank*, 166 N.J. 493, 496-522 (2001). This case abrogates *Braue v. Fleck*, 23 N.J. 1 (1956); *Spottiswoode v. Morris & Essex R.R. Co.*, 61 N.J.L. 322 (Sup. Ct. 1898); *Mayor of Newark v. Watson*, 56 N.J.L. 667 (E. & A. 1894); *Johnston v. Fitzgeorge*, 50 N.J.L. 470 (Sup. Ct. 1888); *Den ex dem. Johnson v. Morris*, 7 N.J.L. 6 (Sup. Ct. 1822); *Den ex dem. Van Wickle v. Aplaugh*, 3 N.J.L. 446 (Sup. Ct. 1808); and *Den ex dem. Cain v. McCann*, 3 N.J.L. 31 (Sup. Ct. 1808). In *J & M Land Co.*, a landowner brought an action stating that he had acquired an adjoining tract of land through adverse possession. *J & M Land Co*, 166 N.J. at 498. The landowner had used this tract to erect billboards and derived income by renting the billboards. *Id.* at 497. The adjoining landowner (whose land had been allegedly adverse possessed) counterclaimed for the rents from the use of the billboard. *Id*. The plaintiff had occupied the land for 39 years. *Id*. at 497-98. Prior decisions had created uncertainty regarding the applicability of the two potentially available statutes. *Id.* at 499-500. Specifically, *N.J.S.A.* 2A:14-6 and -7 "bar a landowner's right of entry or action for real estate if those actions are not brought within twenty years of the accrual of such right, title of entry, or cause of action." *Id.* at 506. *N.J.S.A.* 2A:14-30 and -31 provide "that an adverse possessor's title to land vests either after thirty years or sixty years, depending on the character of land at issue and the way in which the adverse possession began." *Id.* at 507. Neither statute addresses the status of title "between expiration of the twenty-year limitations period and satisfaction of the thirty- or sixty-year adverse possession period." *Id*. The trend of past case law was to allow title to vest after 20 years of adverse possession, thereby ignoring the thirty/sixty-year rule. *Id.* at 508. *See Kruvant v. 12-22 Woodland Ave. Corp.*, 138 N.J. Super. 1, 16 (Law Div. 1975), *aff'd*, 150 N.J. Super. 503 (App. Div. 1977).

N.J.S.A. 2A:14-30 allows successors in title who carry on the adverse use to tack the periods of the adverse uses of their predecessors in order to comply with the statute. *See Kruvant v. 12-22 Woodland Ave. Corp.*, 138 N.J. Super. 1 (Law Div. 1975); *see also Stump v. Whibco*, 314 N.J. Super. 560, 567 (App. Div. 1998). "When ownership during the statutory period involves more than one adverse

possessor, each owner who acquires title must satisfy all the elements of adverse possession." *Stump*, 314 N.J. Super. at 568. The meaning of "continuous possession" is contingent upon the nature of the land. For example, some property is only used seasonally. *Id*. Yet, for the most part, only intermittent acts of ownership will not fulfill the requirements of adverse possession. *Id.*

In *J&M Land Co.*, 166 N.J. at 496-497, the Supreme Court held that the title did not vest by adverse possession until the passage of either 30 years or 60 years (in the case of woodlands or uncultivated lands). The Court found that since the land was uncultivated, the 60-year statute of limitations had to be satisfied. *Id.* at 518. Since the defendant interrupted plaintiff's possession of the land in the 39th year of possession, thereby destroying the continuity requirement, plaintiff could not claim to have adversely possessed the land. *Id.* at 519. The court determined, however, not to apply this decision retroactively so as not to create confusion or cloud title attained by adverse possession under the 20-year statute. *Id.* at 522. The Court emphasized that the decision would only be applied to the present case and cases that have not been decided by the trial courts. *Id.*

A jurisdictional prerequisite to plaintiff's maintaining an action for quiet title is an allegation of peaceable possession of the property in question. If defendant has interfered with such peaceable possession, plaintiff's remedy lies in law, formerly with a common-law action for possession of land (ejectment), now codified at *N.J.S.A.* 2A:35-1, *et seq*. *See Garden of Memories, Inc. v. Forest Lawn Memorial Park Assn.*, 109 N.J. Super. 523, 531 (App. Div.), *certif. denied*, 56 N.J. 476 (1970).

If the property is wooded or unimproved, peaceable possession will be presumed when the person claiming ownership under a duly recorded deed (or the immediate grantors) has been assessed and paid the taxes on such land for five consecutive years immediately prior to the commencement of the action and no other person is in actual possession. *N.J.S.A.* 2A:62-2; *Harvey v. Orland Properties, Inc.*, 108 N.J. Super. 493 (Ch. Div. 1970), *aff'd*, 118 N.J. Super. 104 (App. Div. 1972).

In *O & Y Old Bridge Dev. Corp. v. Continental Searchers, Inc.*, 120 N.J. 454, 458-459 (1990), the Court held that although the property owner's immediate grantor's quiet title judgment from 1958 was given in error, due to the fact that the peaceable possession requirements had not been satisfied, the heir hunters who had obtained a quitclaim deed from the missing heir were merely entitled to a constructive trust in the amount paid for the quitclaim deed.

N.J.S.A. 2A:62-4 provides that actions to quiet title may be tried by a jury, upon application of either party.

E. DECLARATION OF INCAPACITY; CONSERVATORSHIPS; SPECIAL MEDICAL GUARDIANS; GUARDIANS FOR CHILDREN

1. INCAPACITY PROCEEDINGS

In 2000, the Supreme Court issued a new Model Judgment for Use in these types of proceedings. The language of the judgment provides that the proper terminology is "incapacitated persons." Accordingly, the older cases use the language "incompetent" while the more recent cases utilize the language "incapacitated." Incapacity proceedings are appropriate when, as a result of mental or physical disabilities, chronic alcoholism or drug abuse, or other causes, an individual is unable to govern himself and manage his affairs. *In re Lindsley*, 43 N.J. Eq. 9 (Ch. Div. 1887), *aff'd*, 44 N.J. Eq. 564 (E. & A. 1888); *In re Perrine*, 41 N.J. Eq. 409, 411 (Ch. Div. 1886). Incapacity proceedings must be brought in the county where the alleged mentally incapacitated person is domiciled. If, however, the alleged mentally incapacitated person has no domicile in New Jersey, the action may be brought in any county in which the alleged mentally incapacitated person has property. *R.* 4:83-4(b).

"The court possesses and retains broad powers and maintains far-reaching discretion in guardianship appointments and the oversight of incompetency matters." *Matter of Mason*, 305 N.J. Super. 120, 128 (Ch. Div. 1997). Specifically, *N.J.S.A.* 3B:12-36 states:

> If a guardian has been appointed as to the person of a minor or an incapacitated person, the court shall have full authority over the ward's person and all matters relating thereto; and if a guardian has been appointed to the estate of a minor or an incapacitated person, the court shall have authority over the ward's estate, and all matters relating thereto.

Further, *N.J.S.A.* 3B:12-49 provides,

> The court has, for the benefit of the ward, the ward's dependents and members of his household, all the powers over the ward's estate and affairs which he could exercise, if present and not under a disability, except the power to make a will, and may confer those powers upon a guardian of the estate…

In *In re Tierney*, 175 N.J. Super. 614 (Law Div. 1980), *aff'd*, 177 N.J. Super. 245 (App. Div. 1981), the court appears to find that "mere strangers," *i.e.*, persons not related to the alleged mentally incapacitated person, may not initiate incapacity proceedings. In *Tierney*, the court held that a childhood friend of the alleged mentally incapacitated person lacked standing to bring an incapacity proceeding. (*R.*

4:86-10, however, notes that proceedings concerning an adult recipient of services from the Division of Developmental Disabilities may be initiated by the Commissioner of Human Services.) The *Tierney* court cited *In re Schiller*, 148 N.J. Super. 168, 179 (Ch. Div. 1977), where the court found that "the complainant [in an incapacity proceeding] must be a relative, creditor, or perhaps have a relationship founded upon contract, trust or confidence, but a stranger may not [make an application]." However, while the *Tierney* court, on the facts before it, determined that the non-relative applicant was a "mere stranger" to the alleged mentally incapacitated person, thus having no standing to bring the application, the *Schiller* court appears to find that if a relationship between the alleged mentally incapacitated person and the applicant is established, the applicant will have standing. *Schiller, supra*, 148 N.J. Super. at 179. *See also*, *In re Nova*, 2011 N.J. Super. Unpub. LEXIS 946 (Ch. Div. April 12, 2011) (dismissing Complaint for guardianship finding that attorneys in fact lack standing). *But see*, *In re Bennett*, 180 N.J. Super. 406 (Law Div. 1981) (holding that guardianship applications do not mandate any different standing requirements than any other application and granted standing to the local social service agency, apparently overlooking the affirmance in *Tierney*).

Incapacity proceedings are usually initiated by the person seeking to be appointed guardian of the alleged mentally incapacitated person and/or estate. *N.J.S.A.* 3B:12-25 creates a presumption of entitlement to guardianship in the alleged mentally incapacitated person's next of kin. *See also*, *R.* 4:86-6(c). *But see*, *In re Queiro*, 374 N.J. Super. 299, 310-311 (App. Div. 2005), rejecting a kinship-hierarchy standard for adult incapacitated persons and, instead, applying a best interests standard giving due regard for testamentary guardians. If someone other than the alleged mentally incapacitated person's next of kin is seeking guardianship, he should obtain letters of renunciation from those individuals prior to the hearing.

The Office of the Public Guardian for Elderly Adults may serve as guardian of the person or estate of any elderly mentally incapacitated person in New Jersey who has no family members or friends who are capable and willing to serve as the elderly person's guardian or conservator. *See N.J.S.A.* 52:27G-21, *et seq.* (Conservatorship is discussed infra.)

Rule 4:86-1, *et seq.* (supported by *N.J.S.A.* 3B:12-24 - 29), sets forth the procedures which must be followed to obtain a judicial determination of an individual's mental incapacity and to secure the appointment of a guardian for the mentally incapacitated person. (These procedures do not apply to actions involving veterans, which are governed by *R.* 4:86-9 and *N.J.S.A.* 3B:13-1, *et seq.*, and actions involving persons receiving services from the Division of Developmental Disabilities, which are governed by *R.* 4:86-10.) The complaint must state the following:

a) name, age, domicile and address of plaintiff;

b) relationship of plaintiff to incompetent, and plaintiff's interest in the action;

c) name, age, domicile and address of alleged mentally incapacitated person

d) name, age, domicile and address of spouse of alleged mentally incapacitated person;

e) names, ages and addresses of alleged mentally incapacitated person's children;

f) names and addresses of alleged mentally incapacitated person's parents and nearest of kin;

g) names and addresses of person or institution having current care or custody of alleged mentally incapacitated person;

h) periods of time alleged mentally incapacitated person has lived in any institution, and if the alleged mentally incapacitated person has been confined thereto, the date of confinement and by what authority; *R.* 4:86-1.

i) name and address of any person named as attorney-in-fact in any power of attorney executed by the alleged mentally incapacitated person;

j) name and address of any person named as health care representative in any health care directive executed by the alleged mentally incapacitated person; and

k) name and address of any person acting as a trustee under a trust for the benefit of the alleged mentally incapacitated person.

The complaint must be accompanied by affidavits from two reputable physicians or the affidavit of one such physician and one licensed practicing psychologist as defined in *N.J.S.A.* 45:14B-2. *R.* 4:86-2(b). If the alleged mentally incapacitated person is confined in a public institution, one of the affidavits must be from the chief executive officer, the medical director or the chief of service of the institution, if that person is also the physician having overall responsibility for the institution's program of care and treatment. *Id.* If the alleged incapacitated person is domiciled in New Jersey, but resident elsewhere, the affidavits may be made by persons who are residents of the jurisdiction of the alleged incapacitated person's residence. *R.* 4:86-2(b). The physicians submitting affidavits must not be related by

blood or marriage to the alleged mentally incapacitated person or to a proprietor, director or chief executive officer of any private institution where the alleged mentally incapacitated person is living or will be placed. *R.* 4:86-3.

The physicians' affidavits must state:

a) that the affiant has made a personal examination of the alleged mentally incapacitated person within 30 days prior to the filing of the complaint, and indicate the date and place of the examination[3];

b) whether the physician is a treating or examining physician;

c) whether the physician is disqualified under *R.* 4:86-3;

d) the diagnosis and prognosis and factual basis therefor;

e) for purposes of ensuring that the alleged mentally incapacitated person is the same individual who was examined, a physical description of the person examined, including but not limited to sex, age, and weight;

f) the affiant's opinion that the alleged mentally incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs, setting forth with particularity the circumstances and conduct of the alleged mentally incapacitated person upon which this opinion is based, including a history of the alleged mentally incapacitated person's condition; and

g) an opinion whether the alleged mentally incapacitated person is capable of attending the hearing and if not, the reason for the individual's inability. *R.* 4:86-2(b).

In lieu of the physicians' affidavits, the plaintiff may submit the affidavit of one qualified affiant stating that he or she has attempted to make a personal examination of the alleged incapacitated person not more than 30 days prior to the complaint but that the alleged incapacitated person "or those in charge of him or her" have "refused or are unwilling to" have the alleged incapacitated person examined. *R.* 4:86-2(c).

The complaint must also be accompanied by an affidavit describing and evaluating the alleged mentally incapacitated person's real and personal property,

[3] The 30-day time period may be relaxed on an ex parte showing of good cause. *R.* 4:86-2(c).

including the value and amount of any income which may be payable to the alleged mentally incapacitated person. *R.* 4:86-2(a). This affidavit is customarily provided by the plaintiff. "If the plaintiff is unable to secure such information, the complaint shall so state and give the reasons therefore." *R.* 4:86-2(a). The complaint must be verified. *R.* 4:86-2.

If the court is satisfied with the sufficiency of the complaint and supporting affidavits, the court will appoint counsel for the alleged mentally incapacitated person, *R.* 4-86:4(b), and will enter an order fixing a hearing date. *R.* 4:86-4(a). This order generally requires that at least 20 days' notice of the hearing date be given to the alleged mentally incapacitated person, the spouse, adult children, parents, the person having care or custody of the alleged mentally incapacitated person, and any other person the court directs. *Id.*

Pursuant to *N.J.S.A.* 3B:12-24.1(c), whenever a complaint for guardianship is filed, the plaintiff may also seek the appointment of a temporary guardian of the person or estate, or both, *pendente lite*. Notice of this application shall be given to the alleged incapacitated person or the alleged incapacitated person's attorney or the attorney appointed by the court to represent the alleged incapacitated person. *Id.*

Pending a hearing for the appointment of a guardian, the court may make such an appointment if it finds that there is a critical need or risk of substantial harm to the physical or mental health, safety, and wellbeing of the alleged incapacitated person; the property or business affairs of the person; or it is the best interest of the alleged incapacitated person to have a temporary guardian appointed. *N.J.S.A.* 3B:12-24.1(c)(2).

A temporary guardian shall be authorized to act, and provide only those services determined by the court to be necessary to deal with critical needs or risk of substantial harm pending the appointment of a guardian. *N.J.S.A.* 3B:12-24.1(c)(4). Such an appointment shall not have the effect of an adjudication of incapacity or affect the legal rights of the individual other than those specified in the court order. *N.J.S.A.* 3B:12-24.1(c)(6). The temporary guardian is allowed to receive reasonable fees for his services as well as reimbursement for reasonable expenses which shall be payable from the estate. *N.J.S.A.* 3B:12-24.1(c)(9).

A copy of the notice of hearing, the complaint and the supporting affidavits must be served upon the alleged mentally incapacitated person personally. *R.* 4:86-4(b). The notice of hearing must inform the alleged mentally incapacitated person that he may appear, in person or through an attorney, to oppose the action and may demand a jury trial. *Id.* (Prior to the hearing date, the plaintiff must file proof of service of these items and submit an affidavit stating: (1) that the alleged mentally incapacitated person was informed of the opportunity to appear at the hearing; and

(2) that the alleged mentally incapacitated person has been offered assistance to communicate with friends, relatives or attorneys regarding the hearing. *R.* 4:86-5.)

If the alleged mentally incapacitated person, or any person receiving notice, is to appear at the hearing through an attorney, an answer must be filed no later than five days prior to the hearing. *R.* 4:86-5. Counsel for the alleged mentally incapacitated person may file a report, in lieu of an answer, no later than three days prior to the hearing. *R.* 4:86-4(b). The court-appointed counsel's report is very important to the process because it details the attorneys' information developed by counsel's inquiry; makes recommendations concerning the court's determination on the issue of incapacity, including the suitability of less restrictive alternatives such as a conservatorship or limited guardianship; and states whether the alleged mentally incapacitated person has expressed dispositional preferences and, if so, counsel shall argue for their inclusion in the judgment of the Court. *R.* 4:86-4(b). The *Rule* requires the court to appoint counsel for an alleged mentally incapacitated person for the hearing.

The *Rule* requires counsel to:

(1) Personally interview the alleged incapacitated person;

(2) Make inquiry of persons having knowledge of the alleged mentally incapacitated person's circumstances, his or her physical and mental state, and his or her property; and

(3) Make reasonable inquiry to locate any will, powers of attorney, or health care directives previously executed by the alleged mentally incapacitated person or to discover any interests the alleged mentally incapacitated person may have as beneficiary of a will or trust. *R.* 4:86-4(b)(1).

Based on this information, the appointed counsel files a report with the court, with a copy served on plaintiff's attorney, and the other parties who have made formal appearances.

"The court-appointed attorney in an incompetency matter represents the client's wishes as an attorney would represent a client in any particular legal dispute. The individual, the subject of the incompetency hearing, has rights, preferences, and desires that are not wholly usurped because of the action concerning his or her alleged incompetency." *Matter of Mason*, 305 N.J. Super. 120 (Ch. Div. 1997). *The Guidelines for Court-Appointed Attorneys in Incompetency Matters*, published by the Supreme Court's Judiciary-Surrogates Liaison Committee (1995), recommend that the attorney "advocate for decisions made by such persons (alleged mentally incapacitated individuals) unless the decisions are patently absurd or pose an undue risk of harm." *See Matter of Mason*, 305 N.J. Super. 120 (Ch. Div. 1997). As

the court in *Matter of M.R.* noted, "[t]he attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes." 135 N.J. 155, 176 (1994).

The plaintiff shall produce the alleged mentally incapacitated person at the hearing unless the court orders otherwise. *R.* 4:86-5. Unless the alleged mentally incapacitated person, or someone acting on the mentally incapacitated person's behalf, demands a jury trial, the issue of incapacity will be determined by the court. *R.* 4:86-6(a). Testimony may be taken from one of the physicians whose affidavit accompanied the complaint, from the alleged mentally incapacitated person (assuming the alleged mentally incapacitated person is present and able to testify), and from any other person who received notice of the hearing and is present. "[I]f there is no jury, the court, with consent of counsel for the mentally incapacitated person, may take testimony of a physician by telephone, or dispense with oral testimony and rely on the affidavit submitted." *R.* 4:86-6(a).

Regardless of whether the parties agree to rely on the reports of the examining doctors, the court still must independently consider all of the evidence, including the report of the court-appointed attorney, and must make findings, by clear and convincing evidence, as to whether the person is incapacitated. *In re Macak*, 377 N.J. Super. 167, 175-176 (App. Div. 2005). It therefore follows that an incapacitated person cannot enter into a consent order declaring him or her to be incapacitated, nor can he or she consent to the appointment of a plenary guardian. *Id*. at 175. Moreover, once the court finds that the person is incapacitated, the court must then independently determine whom to appoint as the guardian, taking into consideration the recommendations of the court-appointed attorney and the wishes of the incapacitated person. *Id.* at 176.

Following the determination of incapacity, the court will render an appropriate judgment and appoint a guardian. The court usually appoints one person to act as guardian of both the person and property of the mentally incapacitated person. The court may, however, appoint one person as guardian of the person of the mentally incapacitated person and another as guardian of the estate. *See Matter of Quinlan*, 137 N.J. Super. 227, 269-70 (Ch. Div. 1975), *modified and remanded*, 70 N.J. 10, 53 (1976), *cert. den. sub nom. Garger v. New Jersey*, 429 U.S. 922 (1977). The appointed guardian is required to file a bond as assurance that the duties will properly be fulfilled unless waived by the court. *R.* 4:86-6(c).

Where special circumstances exist, prior to the entry of judgment, the court may also appoint a guardian *ad litem* for the alleged mentally incapacitated person. *R.* 4:86-4(d). The court-appointed attorney and the guardian *ad litem* play different roles during incapacity proceedings. *Rule* 4:86-4 distinguishes these two roles. The court-appointed attorney acts as an advocate for the client's interests,

while the guardian *ad litem* acts as the "eyes of the court" to further the alleged mentally incapacitated person's best interests. *Matter of Mason*, *supra*, 305 N.J. Super. at 127.For a general discussion on the distinction between a law guardian and a guardian *ad litem*, *see Division of Youth and Family Services v. Robert M.*, 347 N.J. Super. 44, 69-70 (App. Div.), *certif. denied*, 174 N.J. 39 (2002).

N.J.S.A. 3B:12-57 governs the duties and powers of a guardian of a person deemed mentally incapacitated. The guardian "shall take custody of the ward and establish the ward's place of abode in or outside of this state." *N.J.S.A.* 3B:12-57(f). Additionally, the guardian provides for the care, and maintenance of his ward, including responsibility for his clothing, furnishing, and personal effects. Further, the guardian consents to medical treatment for his ward, and receives money otherwise payable to the ward, to be used for the ward's support. *See Matter of Labis*, 314 N.J. Super. 140 (App. Div. 1998). The guardian may apply to the court for permission to make such gifts "as the ward might have been expected to make." *N.J.S.A.* 3B:12-58. In approving such an application, the court must find that the requested gift is in the ward's best interest. *N.J.S.A.* 3B:12-50. In so doing, the court must consider the factors adopted by the Supreme Court in *In re Keri*, 181 *N.J*. 50, 63 (2004). The *Keri* factors are as follows:

(1) the condition of the incapacitated person is as such that the possibility of restoration to capacity is virtually non-existent;

(2) the assets remaining after the proposed gifts are adequate to meet the incapacitated person's need in the style and comfort in which she has been maintained;

(3) the donees constitute the natural objects of the bounty of the incapacitated person;

(4) the transfer will benefit the estate of the incapacitated person by a reduction of death taxes;

(5) there is no substantial evidence that the incapacitated person, as a reasonably prudent person would, if competent, not make the gifts proposed.

Keri,181 *N.J.* at 59 (*quoting In re Trott*, 118 N.J. Super. 436, 442-43 (Ch. Div. 1972).

The *Keri* Court addressed the legitimacy of Medicaid spend-down plans in preparation for Medicaid eligibility. In *Keri*, an alleged incapacitated person's son sought to spend down his mother's assets to accelerate her Medicaid eligibility. *Id.* at 55. Mildred Keri, 90 years old, had been placed in a nursing home by her children due to dementia. *Id.* at 54. Her son sought guardianship of Mildred's

person and property, and submitted for court approval a proposed Medicaid "spend-down" plan. *Id.* at 55. In the plan, the proposed guardian sought authority to sell his mother's house and transfer a significant portion of the proceeds to himself and his brother in equal shares. *Id*.

The trial court denied the request to proceed with the spend-down plan, "refusing to approve strategies designed to '[pauperize] human beings and citizens in the United States solely to make them [wards] of the taxpayers.'" *Id.* at 56. The Appellate Division also rejected the spend-down proposal, finding the plan to be "nothing other than self-imposed impoverishment to obtain, at taxpayers' expense, benefits intended for the truly needy." *Id.* at 69 (*quoting In re Keri*, 356 N.J. Super. 170, 174 (App. Div. 2002)). The Appellate Division held that approval of Medicaid spend-down plan required evidence that the alleged incapacitated person had indicated a preference for Medicaid planning before losing competency. *Id.* at 56.

The Supreme Court reversed, rejecting the lower courts' suspicion of spend-down plans, and adopting the New York approach to Medicaid planning "on the ground that a reasonable and competent person would prefer that the costs of his care be paid by the State, as opposed to his family." *Id.* at 63 (internal quotes omitted).

As a result, the Supreme Court found that legal guardians may make gifts from the estate, even when the guardians themselves may be the recipients, so long as there is substantial evidence that the incompetent would have made the gift proposed if competent. *Id*. at 62-63.

The test for mental incapacity was outlined by the court in the *Matter of Estate of Frisch,* 250 N.J. Super. 438 (Law Div. 1991). In *Frisch*, the court relied on *N.J.S.A.* 3B:1-2, and declared a "mental incompetent means a person who is impaired by reason of mental illness or mental deficiency to the extent that he lacks sufficient capacity to govern himself and manage his affairs." *Id*. at 447-448. *See Hackensack University Medical Center v. Rossi*, 338 N.J. Super. 139 (Law Div. 1998).

The trier of fact must determine incapacity by clear and convincing evidence. *In re Macak*, 377 N.J. Super. 167, 176 (App. Div. 2000). The party asserting incapacity has the burden of proof. *In re M.R.*, 135 N.J. 155 (1994); *In re Macak, supra*, 377 N.J. Super. 167.

Control over the person and estate may be returned to the mentally incapacitated person if the court later finds that the mentally incapacitated person has been restored to competency. *R.* 4:86-7. The court will not make such a ruling unless the mentally incapacitated person, or someone acting on the mentally

incapacitated person's behalf, files a complaint alleging the same. *Id.* If an individual was declared mentally incapacitated due to chronic alcoholism or drug use, the court will not return control over the mentally incapacitated person's person and estate to the mentally incapacitated person unless it is convinced that the individual has been sober for at least a year prior to the filing of the complaint. *N.J.S.A.* 3B:12-28.

In 2006, the guardianship statute was amended to provide for the use of "limited" guardianships. *See N.J.S.A.* 3B:12-24.1. The court may appoint a limited guardian if it finds that an alleged incapacitated person lacks the capacity in some areas, but not all. In appointing a limited guardian, the court must make specific findings about the individual's capacity with regard to such areas as residential, educational, medical, legal, vocational, and financial decision- making. *N.J.S.A.* 3B:12-24.1. A judgment naming a limited guardian may either specify limitations upon the guardian's authority or specify the specific decision- making areas retained by the incapacitated person. *N.J.S.A.* 3B:12-24.1b.

See Appendix C for Model Judgment in a Guardianship Proceeding.

2. CONSERVATORSHIPS

An alternative to an incapacity proceeding is an action for appointment of a conservator. *See R.* 4:86-11 and *N.J.S.A.* 3B:13A-1, *et seq*. An action to appoint a conservator may be preferable to incapacity proceedings. A conservator can be appointed to manage the property of an individual without affecting the latter's title to property, civil rights or status as a legally capable person. *N.J.S.A.* 3B:13A-16. A conservatee is one who has not been judicially declared incapacitated, but who is unable to care for or manage his or her property or to provide for himself or herself or his or her dependents, by reason of advanced age, illness or physical infirmity. *N.J.S.A.* 3B:13A-1. *See In the Matter of Farnkopf*, 363 N.J. Super. 382 (App. Div. 2003) for a full discussion of the Adult Protective Services Act as distinguished from appointment of a guardian or conservator. An interim conservator can also be appointed pursuant to *N.J.S.A.* 52:27D-406 *et seq.*, known as the Adult Protective Services Act.

Conservatorship proceedings may be instituted by the following:

a) the conservatee, *N.J.S.A.* 3B:13A-2;

b) his or her spouse;

c) adult children or, if none, the person or persons closest in degree of kinship to the conservatee;

d) any person concerned with the financial or personal well-being of the conservatee;

e) a public agency or social services official of the State or county in which the conservatee resides;

f) the chief administer of a State licensed hospital, school or institution in which the conservatee is a patient or from which services are received; or

g) the chief administrator of a non-profit charitable institution in which the conservatee is a patient or from which services are received. *N.J.S.A.* 3B:13A-5.

Such proceedings must be brought in the Superior Court. *R.* 4:86-11(a). A conservator will not be appointed if the conservatee objects to the appointment. *R.* 4:86-11(b). A court may appoint counsel to represent the potential conservatee if it believes it to be necessary to protect the interests of the potential conservatee. *Id.* Fees assessed by an interim conservator will not be paid by public agency who sought appointment of a conservator but by the objecting conservatee. *In the Matter of Farnkopf*, 363 N.J. Super. at 403.

If the court appoints a conservator, it will usually adhere to the following order of priority: (1) a person or financial institution nominated or designated by the conservatee; (2) the conservatee's spouse; (3) one or more of the conservatee's adult children (or other close relatives); and (4) some other person or financial institution. *N.J.S.A.* 3B:13A-8. A court, however, may deviate from this order of priority for good cause. *Id.*

A conservator must file a power of attorney with the court. *N.J.S.A.* 3B:13A-10. Additionally, the court may require that the conservator file a bond with the court. *N.J.S.A.* 3B:13A-13.

The appointment of a conservator shall not be evidence of the capacity or incapacity of a conservatee, operate to transfer title of the conservatee's real and personal property to the conservator, or deprive or modify any civil right of the conservatee. *N.J.S.A.* 3B:13A-16.

The conservator is required to expend or distribute some or all of the income or principal of the conservatee for the support, maintenance, education, general use and benefit of the conservatee and conservatee's dependents. *N.J.S.A.* 3B:13A-18. In doing so, the conservator must consider the following: (1) any recommendations concerning the appropriate standard of support, education and benefits offered by the conservatee's spouse and adult children (or close relatives) of the conservatee; (2) the size of the conservatee's estate; (3) the probable duration of the conservatorship; and (4) the accustomed standard of living of the conservatee and members of his household. *N.J.S.A.* 3B:13A-19 and 3B:13A-20.

The conservator is protected from personal liability for any sums paid to those actually furnishing support, education or care to the conservatee pursuant to the recommendations of a parent, spouse or heir of the conservatee, unless: (1) the conservator knows that the providers are deriving personal financial benefit from the payments; or (2) the recommendations resulting in the payments were, when made, clearly not in the best interests of the conservatee. *N.J.S.A.* 3B:13A-19. A conservator can be held individually liable for obligations arising from control of estate property or for any act or omission committed in the course of administration of the estate only if he is personally at fault. N.J.S.A. 3B:13A-29.

The conservatorship is to be terminated on application of the conservatee, *N.J.S.A.* 3B:13A-33, or upon the death or adjudication of incapacity. *N.J.S.A.* 3B:13A-34. The court may appoint a successor if the conservator dies, resigns or is removed. *N.J.S.A.* 3B:13A-35.

The **c**ourt may also appoint a conservator to protect the assets of an intestate decedent's estate. *See Attorney General v. Clavin*, 72 N.J. Eq. 642 (Ch. 1907). A court-appointed conservator serves two functions. First, the conservator has a duty to protect the assets of the decedent's estate for the next taker. Secondly, the conservator serves to remedy any conflict of interest which may arise between the Attorney General and future beneficiaries. *In re Volkmar*, 183N.J. Super. 512 (Ch. Div. 1982).

3. SPECIAL MEDICAL GUARDIANSHIPS

Sometimes the need for the appointment of a surrogate decision maker becomes necessary in an emergent situation. *Rule* 4:86-12 recognizes this and allows for the appointment of a special medical guardian to make decisions regarding an individual's medical treatment.

The court may appoint a special medical guardian if it finds that:

(1) the patient is mentally incapacitated, unconscious, underage or otherwise unable to provide informed consent to medical treatment;

(2) no general or natural guardian is immediately available who will consent to a rendering of medical treatment;

(3) the prompt rendering of medical treatment is necessary in order to deal with a substantial threat to the patient's life or health; and

(4) the patient has not designated a health care representative or executed a health care instruction directive pursuant to the New Jersey Advance Directives for Health Care Act, *N.J.S.A.* 26:2H-53

to 78, determining the treatment question in issue. *R.* 4:86-12(a).

An application for the appointment of a special medical guardian may be made by a hospital, a nursing home, a treating physician, a relative, or any other "appropriate person under the circumstances." *Id.* The application should be made to the Superior Court judge assigned to general equity in the vicinage in which the patient is located. *R.* 4:86-12(b). While normal notice and hearing requirements must be tailored to fit the particular medical exigency involved, *R.* 4:86-12(c) requires that the application and hearing procedures conform as "nearly as practicable" to the procedures followed in actions concerning the appointment of general guardians.

A determination of whether a patient is competent to make the medical decision at issue is necessary even if the patient already has been adjudicated a mentally incapacitated person and a general guardian has been appointed pursuant to *N.J.S.A.* 3B:12-25. *In re Conroy*, 98 N.J. 321, 382 (1985). The appointment of a general guardian does not necessarily mean that the incompetent individual cannot make an informed decision regarding a particular medical treatment. *Id.* at 382. *See also State v. Pelham*, 176 N.J. 448, 457 (2003), *cert. denied* 540 *U.S.* 909, 124 *S. Ct*. 284, 157 *L.Ed.2d* 198 (2003). ("Even incompetent persons have the right to refuse life-sustaining treatment through a surrogate decision maker.") If the patient already has a general guardian, the court must inquire about the guardian's knowledge of the patient and possible conflicts of interest in order to determine whether that person is capable of representing the patient regarding the particular medical decision involved. *Id.* at 383. In selecting a special medical guardian, the court will give preference to family members. *In re Schiller*, 148 N.J. Super. 168, 186 (App. Div. 1977).

An individual has the capacity to consent to medical treatment if he/she can "reasonably understand her[/his] condition, the effect of the proposed treatment, and the risks of both undergoing and refusing the treatment." *In re J.M.*, 416 N.J. Super. 222, 230 (Ch. Div. 2010); *In re Conroy*, 98 N.J. at 382. Because the competency required to make medical decisions is comparable to that required to enter into a contract, in order to establish incapacity, it is sufficient to show that he/she was mentally incompetent to deal with a particular contract. *In re Schiller*, 148 N.J. at 180. *See also, In re J.M*, 416 N.J. Super. at 232 (finding person competent to accept blood transfusion and execute a resuscitation order, but incompetent to make a determination regarding dialysis).

The jurisdiction of the court over guardianship proceedings is derived from its *parens patriae* power. *See In re J.M*., 292 N.J. Super. 225, 230 (Ch. Div. 1996); *In re Grady*, 85 N.J. 235, 239 (1981). Under the doctrine of *parens patriae*, the court may intervene in the management and administration of an incapacitated person's estate for the benefit of the incapacitated person and/or his estate. *See In*

re Keri, supra, 181 *N.J.* at 58; *see also In re Trott*, 118 N.J. Super. 436, 440 (Ch. Div. 1972) (wherein the court determined that even without statutory authority, the power to permit a guardian to make gifts on behalf of a ward "inheres in a court of chancery by virtue of its position as protector and general guardian of all persons under disability based on the principle of parens patriae").

4. GUARDIANS FOR CHILDREN

Letters of Guardianship may be issued by either the Superior Court or the Surrogate court in the county in which the minor resides, or in the county in which a nonresident minor's property is located. *N.J.S.A.* 3B:12-12. Guardianship over both the minor and the minor's estate is usually vested in the same person unless doing so will cause "great hardship." *In re Hoppe*, 32 N.J. Super. 460, 464 (Bergen County Ct., 1954), citations omitted.

Either parent of a minor, unmarried child may include a clause in their will appointing a testamentary guardian. *N.J.S.A.* 3B:12-13. If, however, one parent survives, the testamentary guardian will not be appointed unless the surviving parent consents to the appointment in writing. *N.J.S.A.* 3B:12-14. In determining whether to alter a testamentary guardianship, the child's preference is taken into consideration, with due regard given to the child's age, maturity and the relationship between all the parties involved. *Hoppe, supra*, 32 N.J. Super. at 463. A testamentary guardian must furnish a bond in accordance with *N.J.S.A.* 3B:15-1 unless the will of the parent appointing the guardian directs that no bond is required.[4] *N.J.S.A.* 3B:12-16. Even if the will directs that no bond is required, a testamentary guardian must still furnish a bond before exercising control over any property of the minor coming from a source other than that parent or a life insurance policy upon the life of that parent. *N.J.S.A.* 3B:12-16.

If a testamentary guardian is not selected, the court will appoint, in order of preference, the surviving parent, another relative, or a non-relative as guardian. In *In re Moran*, 116 N.J. Super. 238, 242-243 (App. Div. 1971), the Appellate Division noted that while determining the next of kin for guardianship purposes, courts look to the traditional table of consanguinity and not to statutes relating to descent and distribution of intestate property. Non-testamentary guardians are required to furnish a bond. *N.J.S.A.* 3B:15-16.

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[4] The section relieving a testamentary guardian from posting a bond by direction in the will does not apply to a testamentary guardian of a minor with a developmental disability. Such guardian shall be bonded pursuant to *N.J.S.A.* 3B:15-1(i)1, unless relieved from doing so pursuant to *N.J.S.A.* 3B:15-1(i). *SeeN.J.SA.* 3B:12-16.

The court may, either at the time of appointment or later, limit the powers conferred upon a guardian. *N.J.S.A.* 3B:12-37. In general, however, the guardian of a minor's person has all the powers and responsibilities of a parent, except that a guardian is not obligated to provide for the minor from his own funds. *N.J.S.A.* 3B:12-51 and 3B:12-52.

The guardian of a minor's estate serves as trustee of the estate, *N.J.S.A.* 3B:12-38.A guardian of the estate of a minor may distribute so much or all of the income or principal of this ward for the support, maintenance, education, general use, and benefit for the ward and his dependents in exercise of reasonable discretion taking into account the requirements of the *Prudent Investor Act*, *N.J.S.A.* 3B:20-11.1 *et seq.* In making expenditures, the guardian should pay due regard to:

a) The size of the [minor's] estate;

b) The probable duration of the guardianship and the likelihood that the [minor], at some future time, may be fully able to manage his affairs and the estate which has been conserved for him; and

c) The accustomed standard of living of the [minor]....

N.J.S.A. 3B:12-45. All expenditures should be paid out of the income and not the corpus of the estate, unless the income is insufficient. *Strawbridge v. Strawbridge*, 35 N.J. Super. 125, 131 (Ch. Div. 1955). Additionally, a guardian may not sell lands belonging to a minor unless the court determines such a sale to be in the minor's "best interests." *R.* 4:94-3.

A guardianship terminates once the minor marries or turns 18. *N.J.S.A.* 3B:12-55. Resignation of a guardian however, does not terminate the guardianship until it has been approved by the court. *N.J.S.A.* 3B:12-55. After meeting all prior claims and expenses of administration, the guardian must distribute all funds and properties over to the former ward as soon as possible. *N.J.S.A.* 3B:12-54. In the event that a minor is the intended beneficiary of funds from an estate where the decedent died without a will, the parent or guardian of a minor child or other minor beneficiary may apply to the court for permission to place those funds from the victim's estate into a trust that would authorize delayed distribution of the fund. *See N.J.S.A.* 3B:12-54.1.

5. PROTECTIVE ARRANGEMENTS

In some instances, a person may be vulnerable and require protection, but a guardianship or conservatorship may not be feasible or appropriate. In these instances, *N.J.S.A.* 3B:12-1 through 4 provides an alternative in the form of a "protective arrangement" for the property of a minor, an incapacitated person, or an unborn person. The standard to establish a protective arrangement is lower than

that required for determination of incapacity. *N.J.S.A.* 3B:12-1. A protective arrangement may therefore be useful for individuals who require some level of intervention in order to protect their assets, but are not sufficiently impaired to be deemed an incapacitated person.

A protective arrangement, unlike a guardianship, deals only with property. It can be as limited as involving a single transaction or may be expanded to protect the foreseeable needs of an individual. *N.J.S.A.* 3B:12-1. The elements necessary for imposition of protective arrangement include the following:

- a property interest that will be wasted or dissipated; or
- a basis exists for affecting the individual's property or interest or affairs; or
- funds are needed for the individual's support, care, and maintenance.

N.J.S.A. 3B:12-1. *N.J.S.A.* 3B:12-2 enumerates some of the many matters that can be the subject of a protective arrangement, but does not provide an exhaustive list. These transactions include:

- payment, deposit, or retention of funds;
- mortgage, sale, lease, or any other transfer of real property;
- entry into annuity contracts, contracts for life care, deposit contracts, contracts for training, and education;
- establishment of trusts; and
- managing investment accounts.

See N.J.S.A. 3:12-2. The court may also direct or ratify any transaction relating to the individual's affairs if it determines that the transaction is in the best interest of that person. Pursuant to *N.J.S.A.* 3B:12-2, the court must consider the interest of creditors and dependents before approving a protective arrangement. The court must also consider whether the nature of the individual's disability requires the continuing protection of a guardian. *Id.*

The court may appoint a special guardian to assist in accomplishing any protective arrangements or other transactions. A special guardian is entitled to receive reasonable fees for his services as well as reimbursement of reasonable expenses from the court. *N.J.S.A.* 3B:12-4.

F. AUTHORIZATION AND SUPERVISION OF LIFE SUPPORT PROCEDURES

New Jersey has been in the forefront of recognizing an individual's right to refuse medical treatment. *State v. Pelham*, 176 *N.J.* 448, 457, *cert. denied*, 540 *U.S.* 909, 124 *S. Ct.* 284, 157 *L.Ed.*2d 198 (2003). *In re Quinlan*, 70 N.J. 10, *cert. denied, Granger v. New Jersey*, 429 U.S. 922 (1976), the New Jersey Supreme Court established a patient's right, as expressed through his or her guardian, to choose to terminate medical treatment rather than continue to live in an irreversible noncognitive state. While *Quinlan* concerned an incompetent patient, the Court referred to the right of a competent, terminally ill patient to direct that he or she should not be put on a respirator. This dictum proved helpful in later cases.

In *Quinlan*, the Court held that a decision to withdraw life support systems from a comatose hospital patient would be respected only after the patient's family and guardian consulted with the hospital's ethics committee. Withdrawal could only occur after the hospital's ethics committee decided that the patient had no reasonable possibility of returning to a cognitive, sapient state. *Id.* at 54.

Quinlan concerned a patient in a chronic, persistent vegetative state. In *In re Conroy*, 98 N.J. 321 (1985), the New Jersey Supreme Court held that a feeding tube could be removed from an incompetent, elderly nursing home resident who would die within one year even with the feeding tube intact. *Conroy* establishes an incompetent individual's right, as expressed through his or her guardian, to decline life-sustaining medical treatment, not only when death is imminent, but also during the later stages of a prolonged dying process.

Sensitive to the particularly vulnerable position of incompetent elderly nursing home residents, the *Conroy* Court requires that the Ombudsman for the Institutionalized Elderly scrutinize all decisions to withhold or withdraw life-sustaining medical treatment from such individuals. (The Ombudsman for the Institutionalized Elderly was established to guard against abuse of nursing home patients. *N.J.S.A.* 52:27G-1. The Ombudsman has responsibility for persons 60 years of age or older who are patients, residents or clients of public or private facilities or institutions offering health or health related services for the institutionalized elderly that are subject to regulation, visitation, inspection or supervision by any government agency. *N.J.S.A.* 52:27G-2(f),(i).)

The Ombudsman may approve a surrogate's decision to decline or withdraw life-sustaining treatment only if one of the following three tests is satisfied:

1. It is clear that the patient would have refused the treatment. *Conroy, supra*, 98 N.J. at 360-64;

2. There is some trustworthy evidence indicating that the patient would have refused the treatment, and the pain and suffering of the patient's continued treatment markedly outweigh any physical pleasure, emotional enjoyment or intellectual

satisfaction that the patient may be able to experience out of a life sustained by the treatment. *Id.* at 365-66; or

3. The pain and suffering experienced during the patient's life with the treatment clearly and markedly outweighs the benefits that the patient derives from such a life, and the patient is suffering so much pain that prolonging life would be inhumane. *Id.* at 367.

Evidence concerning the patient's condition must be furnished to the Ombudsman by the attending physicians and nurses. Two other physicians, unaffiliated with the nursing home and the attending physicians, must be appointed to confirm the patient's medical condition and prognosis. *Id.* at 360.

The Conroy tests reflect the need to balance an individual's right to "die with dignity" with the right to expect that a life will not be shortened against a person's will. *Id.* at 343. The tests were designed to ensure that the decision made by the patient's surrogate effectuates, insofar as possible, the decision that the patient would make if the patient were able to make an informed decision. *Id.* at 360.

In re Jobes, 108 N.J. 394 (1987), concerned a husband's request that a life-sustaining nutrition system be removed from his wife, a 31-year-old comatose resident of a nursing home. The Court noted that since Mrs. Jobes was not elderly, the Ombudsman for the Institutionalized Elderly had no jurisdiction over any decision to terminate the feeding system. *Id.* at 422.

The *Jobes* Court also confirmed that cases involving surrogate decision making for once competent patients in persistent vegetative states are dealt with differently than cases dealing with incompetent but conscious individuals. *Id.* at 413. Any decision made concerning the treatment given to the persistently vegetative patient must effectuate, as much as possible, the decision that the patient would make if he or she were competent. The other Conroy tests do not apply. *Id.*

In making a decision regarding life-sustaining treatment, the surrogate must consider all facets of the patient's personality. *Id.* at 414-15. Echoing *Quinlan*, the Jobes opinion indicated that family members or friends close to the patient are in the best position to make surrogate decisions, especially when the patient's views concerning the issue have not been clearly expressed. *Id.* at 415.

In *In re Moorhouse*, 250 N.J. Super. 307 (App. Div. 1991), the Appellate Division held that any decision to withdraw life-sustaining treatment from a never competent and currently comatose individual must be based on clear and convincing evidence that the patient is unlikely to reach a cognitive and sapient life. The court, citing *In re Jobes*, 108 N.J. 394, 449 (1987) (Pollack, J., concurring), reasoned that it would be impossible to accurately ascertain what decision a never competent

individual would make if he were indeed competent.

As previously referenced, *Quinlan* recognized the right of a competent terminally ill patient to decide not to be connected to a respirator. The New Jersey Supreme Court however, did not specifically address the issue of a competent terminally ill individual's right to decline life-sustaining treatment until 1987, when it decided *In re Farrell*, 108 N.J. 335 (1987). In Farrell, the Court held that a competent terminally ill woman did indeed have the right to request withdrawal of a life-sustaining respirator. Thus, in a right-to-die case, "a competent patient's right to exercise his or her choice to refuse life-sustaining treatment does not vary depending on whether the patent is in a medical institution or at home." *Id.*

In *In re Requena*, 213 N.J. Super. 443 (App. Div. 1986), the issue before the Appellate Division was whether a hospital could force a patient to transfer to another hospital, 17 miles away, in order to exercise her right to die because of their policy not to withhold artificial feeding or fluids. The court balanced the right of the hospital to enforce its regulations against the fundamental rights of the patient. The court concluded that forcing the elderly patient to transfer would be a hard psychological blow that outweighed the hospital's right to enforce their regulation.

The cases described above all deal with patients in either persistently vegetative states or the later stages of a prolonged dying process. These cases do not address the right of a competent patient to refuse to consent to life-sustaining treatment, e.g., blood transfusions or amputations which, once rendered, would allow the individual to live a healthy life.

In *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576 (1971), a pre-*Quinlan* case, the Court held that a hospital had the right to perform a blood transfusion despite the fact that the treatment was against the wishes, as expressed by her guardian, of the 22-year-old unconscious patient. Chief Justice Weintraub resolved the case by noting: "When the hospital and staff are thus involuntary hosts and their interests are pitted against the belief of the patient, we think it reasonable to resolve the problem by permitting the hospital and its staff to pursue their functions according to their professional standards." *Id.* at 583.

The *Quinlan* Court distinguished *Heston*, noting that a blood transfusion is a minimal bodily intrusion and the patient had the potential to live a long and healthy life. *Quinlan, supra*, 70 N.J. at 39. Overruling *Heston*, the *Conroy* Court noted:

> [A] young, generally healthy person, if competent, has the same right to decline life-saving medical treatment as a competent elderly person who is terminally ill. Of course a patient's decision to accept or reject medical treatment may be influenced by his medical condition, treatment and prognosis; nevertheless, a competent

> person's common-law and constitutional rights [to decline life-sustaining treatment] do not depend upon the quality or value of his life.

Conroy, supra, 98 N.J. at 355.

The doctrine of informed consent protects the general right of a competent adult to decline to have any medical treatment initiated or continued. *Id.* at 347-348. The notion of informed consent presupposes that the patient has been provided with all the information necessary to evaluate the risks and benefits of the available options. *Id.* at 348. When a patient is incompetent, a surrogate decision-maker may assert the patient's right to make decisions regarding medical treatment. *In re Peter*, 108 N.J. 365 (1987), 377-378; *Conroy, supra*, 98 N.J. at 368. A surrogate decision-maker must determine and effectuate, insofar as possible, the decision the patient would make if competent. *Conroy, supra*, 98 N.J. at 360. In *In re Hughes*, 259 N.J. Super. 193 (App. Div. 1992), the Appellate Division noted that a surrogate decision-maker should exercise "extreme caution" in determining the patient's intent and should not approve the withholding of medical treatment unless "manifestly satisfied" that the patient would have made the same decision if able to do so. *Id.* at 201.

Hughes concerned the propriety of the appointment of a hospital administrator as guardian of an unconscious Jehovah's Witness to consent to a blood transfusion despite the fact that prior to undergoing surgery, the patient signed a form indicating that she did not want to receive blood. The form, however, gave no indication that the consequences of the refusal to accept a blood transfusion had been explained to the patient. The Appellate Division affirmed the appointment of a guardian because under the circumstances, it was unclear whether the patient would choose to accept a blood transfusion if she knew it would save her life. In doing so, the Appellate Division emphasized that the case arose in the context of elective surgery and not in an emergency situation where the doctor and patient do not have the time to fully discuss the risks of surgery and the depths of the patient's religious beliefs.

In *Muhlenberg Hospital v. Patterson*, 128 N.J. Super. 498 (Law Div. 1974), the court extended the right of the government to intervene in instances where there is the threat of imminent danger of severe and irreparable brain damage. Here, parents refused, on religious grounds, to allow the hospital to perform a blood transfusion on their infant son. In ordering the transfusion, the court reasoned that society had an equal interest in protecting infants in instances containing a threat of imminent danger and irreparable brain damage as in instances containing the threat and danger of death.

The New Jersey Advance Directives for Health Care Act. *N.J.S.A.* 26:2H-53

to 78 was enacted in 1991. The Act recognizes the fundamental right of individuals to make health care decisions regarding life-prolonging treatment. The Act establishes a mechanism — the advance directive — through which an individual can maintain the right to make such decisions even if the individual lacks decision making capacity at the time the treatment issue arises.

In its findings, the legislature declared:

> This State recognizes, in its law and public policy, the personal right of the individual patient to make voluntary, informed choices to accept, to reject, or to choose among alternative courses of medical and surgical treatment.

N.J.S.A. 26:2H-54a.

An adult (deemed the declarant) may execute an advance directive at any time. The directive should be signed and dated by the declarant and two adult witnesses. Alternatively, the directive may be signed by the declarant and a notary public or an attorney. *N.J.S.A.* 26:2H-56. Advance directives are activated when the patient's attending physician and an additional physician determine that the patient lacks decision making capacity. *N.J.S.A.* 26:2H-60(b).

There are two types of advance directives. An instruction directive provides information regarding the declarant's wishes regarding the provision, withholding or withdrawal of any form of life-sustaining treatment. *N.J.S.A.* 26:2H-55. A proxy directive designates the individual(s) (deemed a health care representative) that the declarant desires to make decisions regarding the declarant's health care. *Id.* The role of a health care representative is to make the health care decisions a patient would make if the patient possessed the decision-making capacity to do so at the time the treatment issue arises. If the patient's desires cannot be determined, the health care representative should make decisions that are in the best interests of the patient. *N.J.S.A.* 26:2H-61(f).

The Act also sets forth the penalties to be imposed upon a health care provider who intentionally disregards the information contained in a patient's advance directive. *See N.J.S.A.* 26:2H-78.

Fifteen years after *Quinlan* was decided, the New Jersey Legislature enacted the New Jersey Declaration of Death Act, *N.J.S.A.* 26:6A-1 to 6A-8, which establishes a definition of death, including brain death. According to *N.J.S.A.* 26:6A-3:

> [A]n individual whose circulatory and respiratory functions can be maintained solely by artificial means, and who has sustained irreversible cessation of all functions of the entire brain, including

the brain stem, shall be declared dead.

An individual will not be declared dead on the basis of the criteria cited above if the physician authorized to declare death has reason to believe that such a declaration would violate the individual's religious beliefs, *N.J.S.A.* 26:6A-5. In such instances, death shall be declared solely on the basis of the traditional cardio-respiratory criteria spelled out in *N.J.S.A.* 26:6A-2.

G. SPECIFIC PERFORMANCE OF A CONTRACTUAL OBLIGATION

"[S]pecific performance is a discretionary remedy resting on equitable principles and requiring the court to appraise the respective conduct and situation of the parties." *Friendship Manor, Inc. v. Greiman*, 244 N.J. Super. 104, 113 (App. Div. 1990), *certif. denied*, 126 N.J. 321 (1991). *See Barry M. Dechtman, Inc. v. Sidpaul Corp.*, 89 N.J. 547, 551 (1982). Thus, as explained in *Stehr v. Sawyer*, 40 N.J. 352, 357 (1963):

> [T]he party asking the aid of the court must stand in conscientious relation to his adversary; his conduct in the matter must have been fair, just and equitable, not sharp or aiming at unfair advantage. The relief itself must not be harsh or oppressive. In short, it must be very plain that his claim is an equitable one.

There is no automatic right to specific performance. The court must make a complete evaluation of the claims asserted, the defenses raised, the hardships imposed on the parties, the fairness and reasonableness of both parties' conduct, and the availability of other remedies before determining whether to grant equitable relief. *See,* e.g., *Marioni v. 94 Broadway, Inc.*, 374 N.J. Super. 588, 598-99 (App Div. 2005), *certif. denied*, 183 N.J. 591 (2005) ("In general, to establish a right to the remedy of specific performance, a plaintiff must demonstrate that the contract in question is valid and enforceable at law…and that an order compelling performance of the contract will not be harsh or oppressive") (internal citations and quotations omitted). *Estate of Cohen ex rel. Perelman v. Booth Computers*, 421 N.J. Super. 134, 149-150 (App. Div.) ("To establish a right to specific performance, the party seeking the relief must demonstrate that the contract in question is valid and enforceable at law, and that the terms of the contract are clear"), *certif. denied*, 208 N.J. 370 (2011). For example, in *Kingsdorf v. Kingsdorf*, 351 N.J. Super. 144, 157 (App. Div. 2002), the court was called upon to determine whether to enforce certain terms of a divorce settlement agreement allegedly reached prior to the husband's death. Recognizing its inherent equitable jurisdiction, the court stated that the mere fact that an agreement may have been reached prior to the husband's death does not necessarily require that the agreement be specifically enforced, "if reflective application of equitable consideration and principles

suggest a different remedy." *Id.*

The requirement of mutuality of remedy was repudiated in *Fleischer v. James Drug Stores*, 1 N.J. 138, 149 (1948), which departs from such established precedents as *United Automobile, et al. v. Elastic Stop Nut Corp. of America*, 140 N.J. Eq. 177, 179 (E. & A. 1947). Justice Heher distinguished between mutuality of obligation and mutuality of remedy, noting that:

> The modern view is that the rule of mutuality of remedy is satisfied if the decree of specific performance operates effectively against both parties and gives to each the benefit of a mutual obligation. . . .
>
> The fact that the remedy of specific enforcement is available to one party to a contract is not in itself a sufficient reason for making the remedy available to the other; but it may be decisive when the adequacy of damages is difficult to determine and there is no other reason for refusing specific enforcement. It is not necessary, to serve the ends of equal justice, that the parties shall have identical remedies in case of breach.

Fleischer, 1 N.J. at 149 (citations omitted).

Generally, specific performance is invoked only when the remedy at law is inadequate. *Id.* at 146-47. Specific performance is granted where the subject matter of the contract is of such a "special nature" or of such a "peculiar value" that legal remedies "would not be a just and reasonable substitute for or representative of that subject-matter in the hands of the party who is entitled to its benefit." *Id.* at 146 (quoting Pomeroy, EQUITY JURISPRUDENCE §1401 (5th ed.1941)). For example, "[t]here is a virtual presumption, because of the uniqueness of land and the consequent inadequacy of monetary damages, that specific performance is the buyer's appropriate remedy for the vendor's breach of the contract to convey." *Friendship Manor, Inc.*, 244 N.J. Super. at 113 (citation omitted). *See Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assoc.*, 182 N.J. 210 (2005); *In re Nickels Midway Pier, LLC*, 341 B.R. 486, 500 (D.N.J. 2006). *See also Marioni v. Broadway, Inc.*, 374 N.J. Super. 588,598-99 (App. Div.), *certif. denied*, 183 N.J. 591 (2005) (awarding specific performance to purchaser of real property against seller who entered into a second agreement to sell same property to a second buyer where second buyer had actual notice of the original contract). Specific performance has been granted to a potential buyer even though seller was within the "three day review" period. *Romano v. Chapman*, 358 N.J. Super. 48, 55 (App. Div.), *certif. denied*, 178 N.J. 431 (2003). In *Romano*, the court noted:

> [once] the attorney has the opportunity to review the agreement

> and consult with the client, the agreement is approved, with or without changes, the client cannot back out of the agreement, even within the three-day period.

Romano, 358 N.J. Super. at 55. *See also Gordon Development Group, Inc. v. Bradley*, 362 N.J. Super. 170, 179 (App. Div. 2003). However, the Court does not compel specific performance from a seller if cancellation is within the three-day attorney review period. *Id.* Specific performance is also granted where "it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law." *Fleischer*, 1 N.J. at 147 (quoting Pomeroy, EQUITY JURISPRUDENCE §1401).

Specific performance will not be decreed where performance of the contract is legally or factually impossible, *Robinson-Shore Development Co. v. Gallagher*, 26 N.J. 59, 72 (1958), *Bluffs at Ballyowen, LLC v. Toll Bros.*, 2010 N.J. Super. Unpub. LEXIS 2853, 29-30 (App. Div. Nov. 30, 2010), or where a third party's discretion or interests will be affected (including a governmental unit). *See*, e.g., *Iavicoli v. DiMarco*, 142 N.J. Eq. 699, 700-01 (E. & A. 1948); *Leoncavello v. Rigat*, 104 N.J. Eq. 437, 438-39 (E. & A. 1929); *Popular Refreshments, Inc. v. Fuller's Milk Bar, et al.*, 85 N.J. Super. 528, 540 (App. Div. 1964), *certif. denied*, 44 N.J. 409 (1965). Nor will a contract which is incomplete, uncertain, or indefinite in its material terms be specifically enforced in equity. *Ginsburg v. White*, 139 N.J. Eq. 271, 273 (E. & A. 1947).

However, the agreement sought to be specifically enforced need not be in writing, provided it does not fall within the statute of frauds requirements. *Williams v. Vreeland*, 32 N.J. Eq. 135 (Ch. Div. 1880), *aff'd sub nom., Vreeland v. Williams*, 32 N.J. Eq. 734 (E. & A. 1880); *Galloway v. Eichells*, 1 N.J. Super. 584, 589-90 (Ch. Div. 1948). See revision to Statute of Frauds, *N.J.S.A.* 25:1-5 *et seq.*, which allows for specific performance of contracts within the ambit of the Statute of Frauds, but requires clear and convincing proof of the existence of a contract. *LoBiondo v. O'Callaghan*, 357 N.J. Super. 488 (App. Div.), *certif. denied*, 177 N.J. 224 (2003). *See also Morton v. Orchard Land Trust*, 180 N.J. 118 (2004) discussed *supra* under B. Equitable Defenses, Statute of Frauds.

Specific performance of a contract will not be awarded "where the execution of its decree for specific performance would entail continuing and constant superintendence over a considerable period of time." *Fleischer*, 1 N.J. at 148. For instance, courts generally will not grant specific performance of building or construction contracts. *See, e.g., Lester's Home Furnishers v. Modern Furniture Co.*, 1 N.J. Super. 365, 368 (Ch. Div. 1948). *See also Centex Homes Corp. v. Boag*, 128 N.J.

Super. 385, 389-93 (Ch. Div. 1974) (in a transaction involving the sale of a condominium, the court found that a condominium was not "unique" and refused to order specific performance). However, in *Becker v. Sunrise at Elk Ridge*, 226 N.J. Super. 119, 128-129 (App. Div.), *certif. denied*, 113 N.J. 356 (1988), the Appellate Division held that specific performance in the construction context was an appropriate remedy because: (1) the plans were sufficiently definite; (2) the developer was able and willing to complete the project, albeit at a higher purchase price; and (3) the purchasers' remedy at law would not be as adequate, complete or efficient as specific performance.

In theory, a court may not order specific performance unless the terms of the contract are definite and certain enough so the court may order what the parties must do with precision. *Satellite Entm't Ctr., Inc. v. Keaton*, 347 N.J. Super. 268, 276-77 (App Div. 2002); *Graziano v. Grant*, 326 N.J. Super. 328 (App. Div. 1999). Yet, even if an agreement seems indefinite, it may still be specifically enforced. *Onderdonk v. Presbyterian Homes of New Jersey*,85N.J. 171, 183 (1981); *Kas Oriental Rugs, Inc. v. Ellman*, 394 N.J. Super. 278, 285 (App. Div. 2007), *certif. denied*, 192 N.J. 74 (2007) ("where fairness and justice require, even though the parties to a contract have not expressed an intention in specific language, the courts may impose a constructive condition to accomplish such a result when it is apparent that it is necessarily involved in the contractual relationship") (internal quotations and citations omitted); *Barry M. Dechtman, Inc. v. Sidpaul Corp.*, 89 N.J. 547, 552 (1982). In these instances, the judge must consider the parties' situations and attendant circumstances to ascertain the meaning of the agreement and if specific performance would be possible. *Id.* at 552. "Reasonable certainty of the terms is all that is required." *Id.*

"Traditionally, courts have been reluctant to grant specific performance of agreements to lend or borrow money, inasmuch as money is intrinsically fungible." *First Nat'l State Bank of N.J. v. Commonwealth Federal Savings and Loan Ass'n*, 610 F.2d 164, 171 (3d Cir. 1979). However, the First National court, applying New Jersey law, granted specific performance, finding that specific performance can be justified in cases involving agreements to pay money, such as construction loans or contracts for the financing of shopping centers because such agreements are unique in that "the subject matter itself is unavailable in similar form." *Id.* at 172 (*citing First Nat'l State Bank of New Jersey v. Commonwealth Fed. Sav. and Loan Ass'n of Norristown, Pa.*, 455 F. Supp. 464, 470 (D.N.J. 1978), *aff'd*, 610 F.2d 164 (3d Cir. 1979).

In appropriate cases, a contract calling for the transfer of real property will be enforced by specific performance, but only if title to the realty is free from substantial doubt and is marketable. *Mazzola v. Malley*, 5 N.J. Super. 562, 564 (Ch. Div. 1949). *See also Paradiso v. Mazejy*, 3 N.J. 110, 117 (1949); *Pruitt v. Graziano*,

215 N.J. Super. 330 (App. Div. 1987) (specific performance available to enforce contract for purchase of condominium unit, like any real property, without special proof of uniqueness of unit).

Time is not deemed to be of the essence in contracts for the sale of real estate, unless the terms of the contract itself or the nature and circumstances of the transaction evidence the parties' intent that the time of performance is central to the agreement. *King v. Ruckman*, 21 N.J. Eq. 599, 604 (Ch. Div. 1870). Specific performance is not an available remedy, therefore, until time is made of the essence and one party defaults. A court of equity is bound by any time of the essence clause contained in the contract. *Gorrie v. Winters*, 214 N.J. Super. 103 (App. Div. 1986), *certif. denied*, 107 N.J. 114 (1987). In *Gorrie*, the Appellate Division cited *Doctorman v. Schroeder*, 92 N.J. Eq. 676, 676-677 (E & A 1921), in which the Court of Errors and Appeals noted:

> [I]n the absence of a waiver, it seems to me that a court of equity is powerless to come to the relief of a purchaser of property who has failed to pay at the time specified in the agreement, when the agreement distinctly and clearly provides that [ ] time is essential and that the purchasers' rights as purchasers shall cease and become void unless payment is made at the time stipulated.

In *Bartlet v. Frazer*, 218 N.J. Super. 106 (App. Div. 1987), the Appellate Division distinguished *Gorrie* and held that *Gorrie* did not apply to a situation where a time of the essence provision was unilaterally set by one of the parties to a contract. *Id.* at 109. The Appellate Division affirmed the lower court's grant of specific performance to the purchaser because although the purchaser arrived late to the closing, the seller was aware that the purchaser was ready, willing and able to purchase the property, thus the seller could not evade performance on a technicality. *Id.* at 110-111.

In contracts for the sale of real property, the long established rule is that the party who "seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt and eager to perform the contract on his part." *Ridge Chevrolet-Oldsmobile, Inc. v. Scarano*, 238 N.J. Super. 149, 156 (App. Div. 1990) (quoting *Stamato v. Agamie*, 24 N.J. 309, 316 (1957)). In contrast, a party who is substantially unable to perform its obligations under a contract for the conveyance of land cannot obtain an award for specific performance. *Id.*

In *Ridge Chevrolet*, the plaintiff-buyer contracted with the defendant-seller to purchase certain land. The contract contained several conditions precedent, including the obligation of the buyer to obtain site plan and variance approvals. At the time the seller terminated the contract the buyer had yet to meet all of the

conditions precedent contained in the contract. The buyer sued the seller and sought specific performance.

The trial court found that the seller had wrongfully terminated the contract and granted the buyer the relief sought. Ordinarily, where no time limit is set forth in the contract for its completion, a reasonable time limit is implied. *Becker v. Sunrise at Elkridge*, 226 N.J. Super. 119, 129 (App. Div. 1988), *certif. denied*, 113 N.J. 356 (1988). The court held that the only restriction placed upon the seller in this regard was that the new date be "reasonable" and bear a "reasonable relation to the time already elapsed." *Ridge Chevrolet*, 238 N.J. Super. at 156 (*citing Paradiso v. Mazejy*, 3 N.J. 110, 111 (1949)). The Appellate Division reversed the trial court on the basis that "specific performance will not be decreed where compliance rests upon the will of an uncontrolled third party, particularly a governmental body." *Id.* at 156-57 (*citing Dworman v. Mayor & Bd. of Aldermen, Governing Body of Town of Morristown*, 370 F. Supp. 1056, 1077-78 (D.N.J. 1974)). While the court determined that the seller had waived his right to terminate the agreement, it also recognized that a seller had a right to demand the buyer's performance by another date. The court thus vacated the trial court's award of specific performance and remanded the matter for a determination of what constituted a reasonable time in which the seller would be required to meet its obligations under the contract.

Personal service contracts are not generally specifically enforceable, although they may be so enforced under exceptional circumstances. *See Endress v. Brookdale Community College*, 144 N.J. Super. 109, 130 (App. Div. 1976); *American Ass'n of University Professors v. Bloomfield College*, 136 N.J. Super. 442, 448 (App. Div. 1975) (holding that the remedy of specific performance was appropriate where plaintiff's employment was improperly terminated because of her exercise of First Amendment rights).

Option contracts, although unilateral in form, may be specifically enforced. *Keppler v. Terhune*, 88 N.J. Super. 455, 466 (App. Div. 1965).

"[I]t is settled law that specific performance may not be granted to enforce the performance of a contract to assign or transfer a liquor license, or to otherwise control a licensee in the use of his license." *Kalogeras v. 239 Broad Ave., L.L.C.*, 202 N.J. 349, 362 (2010); *B & G Corp. v. Municipal Council of Wayne Twp.*, 235 N.J. Super. 90, 95 (App. Div. 1989); *Rt. 73 Bowling Center, Inc. v. Aristone*, 192 N.J. Super. 80, 83-84 (App. Div. 1983); *Rawlins v. Trevethan*, 139 N.J. Eq. 226, 230-31 (Ch. Div. 1947). The underlying reasoning behind these cases is that "the local Alcoholic Beverage Control Board should have unfettered discretion as to whether to approve or deny a transfer without having to consider possessory rights of a third party." *Kalogeras v. 239 Broad Ave., L.L.C.*, 202 N.J. at 362; *Rt. 73 Bowling Center, Inc.*, 192 N.J. Super. at 83. *Cf. Darrah Food Services v. Lambertville*

House, 202 N.J. Super. 447 (App. Div.), *certif. denied*, 102 N.J. 329 (1985), where the court held that specific performance may be ordered to compel a licensee to continue a liquor license transfer process which had been agreed to under a settlement.

A provision in a contract either for liquidated damages or computation of actual damages will not defeat a claim for specific performance. *See Atlantic Refining Co. v. Kelly*, 107 N.J. Eq. 27, 29 (E. & A. 1930); *Cohen v. Cohn*, 102 N.J. Eq. 245, 248 (E. & A. 1928); *Hamilton v. Memorial Hosp.*, 16 N.J. Super. 405, 407 (Ch. Div. 1951). The court must inquire as to the intention of the parties in including the liquidated damage clause. *Hamilton*, 16 N.J. Super. at 407. If the purchaser was given the option either to accept title or pay liquidated damages, he may pay and be free from the obligation to perform. *Id.*

As in other equitable matters, there is no right to a jury trial in a suit for specific performance. *Ballard v. Schoenberg*, 224 N.J. Super. 661, 668 (App. Div.), *certif. denied*, 113 N.J. 367 (1988); *Eckerd Drugs of N.J. Inc. v. S.R. 215*, 170 N.J. Super. 37, 40 (Ch. Div. 1979). *In re Environmental Ins. Declaratory Judgment Actions*, 149 N.J. 278 (1997), N.J. Const. Art. 1, par. 9.

As to separation agreements between spouses, full explanation of the specific enforceability of such agreements is beyond the scope of this chapter. Briefly, the Court has held that courts have the ability to direct specific enforcement of separation agreements to the extent that they are "just and equitable." *Schlemm v. Schlemm*, 31 N.J. 557, 582 (1960). *See also Konzelman v. Konzelman*, 158 N.J. 185, 194 (1999). The Court has also held that the alimony and child support payment provisions in these agreements may be changed or modified upon a showing of changed circumstances whether or not the agreement has been incorporated into the divorce decree. *Lepis v. Lepis*, 83 N.J. 139, 145-149 (1980). Orders for support "may be revised and altered by the court from time to time as circumstances may require." *N.J.S.A.* 2A:34-23. Upon a motion to modify child support, the moving party has the burden to make a prima facie showing of changed circumstances warranting relief. *Isaacson v. Isaacson*, 348 N.J. Super. 560, 579 (App. Div. 2002), *certif. denied*, 174 N.J. 364. (2002); *Lissner v. Marburger*, 394 N.J. Super. 393, 399 (Ch. Div. 2007). Only if such a showing is made does the court have the right to order full discovery regarding the financial circumstances of the other spouse. *Isaacson*, 348 N.J. Super. at 579. Determining the impact and magnitude of "changed circumstances" necessarily entails knowing the starting point before the change; that is, the point from which the change can be measured. *Foust v. Glaser*, 340 N.J. Super. 312, 316 (App. Div. 2001). Examples of changed circumstances include, but are not limited to: an increase in the cost of living; an increase or decrease in the supporting spouse's income; illness, disability or infirmity arising after the original judgment; the dependent spouse's loss of a house or apartment; the

dependent spouse's cohabitation with another; subsequent employment by the dependent spouse; and changes in federal income tax law. *Lepis*, 83 N.J. at 151; *N.J.S.A.* 2A:34-23. Modifications are not made "based on circumstances which are only temporary or which are expected but have not yet occurred."*Lepis*, 83 N.J. at 151.

Provisions dealing with equitable distribution are not modifiable due to changed circumstances. *Rosen v. Rosen*, 225 N.J. Super. 33 (App. Div.), *certif. denied*, 111 N.J. 649 (1988); *Larbig v. Larbig*, 384 N.J. Super. 17, 29 (App. Div. 2006). Such provisions are binding absent a showing of mistake, fraud or fundamental unfairness underlying the agreement. *Rosen*, 225 N.J. Super. at 36-37.

In *Smith v. Smith*, 261 N.J. Super. 198 (Ch. Div. 1992), the Chancery Division held that "anti-*Lepis*" clauses — those prohibiting modification of settlement agreements despite any future change in circumstances — are void under New Jersey law and public policy. In *Smith*, 261 N.J. Super. at 199-200, the court specifically declined to follow *Finckin v. Finckin*, 240 N.J. Super. 204 (Ch. Div. 1990), wherein that court held that parties can bargain away their rights to modify the terms of a settlement agreement due to changed circumstances.

In an effort to reconcile the apparent conflict between *Smith* and *Finckin*, the Appellate Division, in *Morris v. Morris*, 263 N.J. Super. 237, 245 (App. Div. 1993), concluded that the question of the enforceability of anti-*Lepis* clauses can only be answered equivocally. The Morris Court found that a settlement agreement is always subject to modification when it ceases to be fair and equitable. *Id.* at 241-242. Therefore, as noted in Smith, parties cannot bargain away the court's equitable powers to modify a property settlement agreement when it becomes unjust. *Id.* at 241. The *Morris* Court, however, held that the "changed circumstances" formula for determining whether a settlement agreement has become unjust does not apply if the parties have established different standards. *Id.* at 243.

According to *Morris*, the "changed circumstances" standard announced in *Lepis* "presupposes that the parties have established an alimony payment based upon both of the parties' needs and incomes." *Id.* at 243. The alimony payment schedule at issue in *Morris*, however, was not based upon the parties' needs and incomes. *Id.* at 243. In fact, the alimony payments were similar to equitable distribution because they were not to be terminated upon the remarriage or cohabitation of the wife. *Id.* at 239. As a result, the "changed circumstances" standard did not apply. *Id.* at 243. Additionally, because the Agreement allowed for modification in the event the husband became physically disabled, the Court held that it was enforceable despite a drastic decrease in the husband's income. *Id.* at 243. *See also Savarese v. Corcoran*, 311 N.J. Super. 240, 252 (Ch. Div. 1997), *aff'd*, 311 N.J. Super. 182 (App. Div. 1998) (discussing the *Morris* Court's

reconciliation of the conflict between *Smith* and *Finckin*).

In *Borzillo v. Borzillo*, 259 N.J. Super. 286 (Ch. Div. 1992), the Chancery Division, applying *Lepis*, fashioned a remedy for a plaintiff confronted with large legal fees after she was forced to defend her right to continued support payments in both Bankruptcy and Superior Court proceedings. The *Borzillo* court held that the fact that plaintiff was forced to defend her right to support payments in actions stemming from her former spouse's bad faith constituted sufficient "changed circumstances" warranting an increase in support payments to cover her legal fees. *Accord Siegel v. Siegel*, 243 N.J. Super. 211 (Ch. Div. 1990).

Prior to 2010, express or implied contracts for support between unmarried cohabitants, commonly known as "palimony" claims, were enforced in equity insofar as they were not based on a meretricious relationship or on a promise to marry. *See Devaney v. L'Esperance*, 195 N.J. 247, 253 (2008); *In re Estate of Roccamonte*, 174 N.J. 381, 397 (2002); *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979).

However, in 2010, the Legislature amended the statute of frauds to preclude claims based on "[a] promise by one party to a non-marital relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination" unless such a promise is in writing. *N.J.S.A.* 25:1-5(h). In so doing, the Legislature "'intended to overturn recent 'palimony' decisions by New Jersey courts,' specifically referring to *Devaney*, *Roccamonte* and *Kozlowski*." *See Botis v. Estate of Kudrick*, 421 N.J. Super. 107, 116 (App. Div. 2011) (*citing Senate Judiciary Committee, Statement to S.2091* (February 9, 2009)). Thus, a claim for palimony will only be upheld if the parties have a signed agreement in writing that sets forth what the support will be and the reasoning for the support. Independent counsel for each party is also required.

Actions for specific performance frequently arise when an employer seeks injunctive relief to enforce a restrictive covenant (a covenant not to compete) against a former employee. These cases are discussed, *infra*, in the section on Prevention of Unfair Competition.

H. REFORMATION OF INSTRUMENTS

Reformation is the means by which an instrument is made to conform to the intentions of the parties. *Toth v. Vazques*, 8 N.J. Super. 289, 293 (App. Div. 1950), *certif. denied*, 7 N.J. 76 (1951); *Scult v. Bergen Valley Builders, Inc.*, 76 N.J. Super. 124, 130-31 (Ch. Div. 1962), *aff'd*, 82 N.J. Super. 378 (App. Div. 1964). The remedy derives from the maxim that equity looks to substance rather than to form. Most instruments are subject to reformation — contracts to convey land, mortgages,

deeds, leases, bonds and notes, insurance policies, bills of sale, guaranty contracts, franchise agreements, royalty agreements — so long as one of the following traditional grounds for reformation is present:

• scrivener's error. *Paz v. DeSimone*, 139 N.J. Super. 102 (Ch. Div. 1976), allowed reformation of a title insurance policy to include an exception for liability under the Farmland Assessment Act. The inclusion of such an exception was clearly part of the basis of the bargain, but the intention of the parties was subverted by reason of mistake or inadvertence on the part of the draftsman or scrivener.

• mistake of law. *Brodzinsky v. Pulek*, 75 N.J. Super. 40 (App. Div. 1962), *certif. denied*, 38 N.J. 304 (1962), determined that bonds and mortgages held by husband and wife were intended to be held by them as tenants in common, without right of survivorship. Thus, despite failure to express that intention, as well as the parties' mutual mistake as to legal consequence of form in which mortgages were cast (creating a joint tenancy), the court reformed the instruments to reflect the parties' intentions and desires.

• mistake of fact. *Metropolitan Life Insurance Co. v. Levy*, 133 N.J. Eq. 77 (Ch. Div. 1943), held that an insurer was entitled to reformation of life insurance policies to reflect the true age of the insured.

"Mistake" sufficient to permit reformation may arise through inadvertence or ignorance, but not through inexcusable negligence. Further, the mistake must be mutual, or, if unilateral, must be accompanied by fraud or other unconscionable conduct of the other party. *See Phillips v. Metlife Auto & Home/Metro. Group Prop. And Cas. Ins. Co.*, 378 N.J. Super. 101, 104 (App Div. 2005) (reformation will only be granted where there is mutual mistake or where a mistake on the part of one party is accompanied by fraud or other unconscionable conduct of the other party); *State v. East Shores, Inc.*, 131 N.J. Super. 300 (Ch. Div. 1974), (mutual mistake); *Volker v. Connecticut Fire Ins. Co.*, 22 N.J. Super. 314 (App. Div. 1952) (mistake and fraud). S*tephenson v. Spiegle*, 429 N.J. Super. 378, 383 (App. Div. 2013) (no reformation for unilateral mistake). The doctrine of mutual mistake applies when a mistake was "mutual in that both parties were laboring under the same misapprehension as to [a] particular, essential fact." *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 608 (1989) (citing *Beachcomber Coins, Inc. v. Boskett*, 166 N.J. Super. 442, 446 (App. Div. 1979)).

Reformation based upon mutual mistake requires that both parties are in agreement at the time they attempt to reduce their understanding to writing but that the writing fails to express such understanding. *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 608-09 (1989); *St. Pius X Home of Retreats v. Camden Dioc.*, 88 N.J. 571, 579 (1982). The party seeking reformation must demonstrate by clear and convincing evidence that the contract in its reformed, and not original, state is the one that the

contracting parties intended. *Id.* at 580-81; *Central State Bank v. Hudik- Ross Co.*, 164 N.J. Super. 317, 323 (App. Div. 1978); *see also Marino v. Marino*, 200 N.J. 315, 343 (2009).

Reformation is precluded where the "mistake" is the result of the complaining party's own negligence. *Millhurst Milling & Drying Co. v. Automobile Ins. Co.*, 31 N.J. Super. 424, 434 (App. Div. 1954) (insured's negligence in failing to read insurance policies until after fire prevented equitable relief). However, reformation is not necessarily precluded where a party is negligent in failing to discover facts about which both parties are mistaken. *Edgerton v. Edgerton*, 203 N.J. Super. 160, 173 (App. Div. 1985), *certif. denied*, 101 N.J. 293 (1985) (property settlement agreement reformed to reflect applicable law); *Beachcomber Coins, Inc. v. Boskett*, 166 N.J. Super. 442, 445 (App. Div. 1979).

Equitable or legal fraud, coupled with mistake, will warrant reformation. Actually, facts supporting a finding of legal or equitable fraud will always support a finding of mistake — a party who reasonably relies upon the material misrepresentation of another necessarily believes that the misrepresentations are true. Legal fraud always involves a unilateral mistake: a plaintiff who reasonably relies on a material misrepresentation misapprehends an essential element of the agreement. This same misapprehension regarding the same element cannot be shared by a defendant who intentionally misled the plaintiff. Facts supporting a finding of equitable fraud, however, are likely to result in a finding of mutual mistake. A party may be "guilty" of equitable fraud without even being aware of his misrepresentation. Therefore, the parties can easily share the same misapprehensions regarding the same material element. In order to recover based on equitable fraud, the plaintiff must prove he reasonably relied on a material misrepresentation of fact. *Daibo v. Kirsch*, 316 N.J. Super. 580 (App. Div. 1998).

Parol evidence is admissible to reform an instrument for fraud or mistake. *Harker v. McKissock*, 12 N.J. 310 (1953); *Central State Bank v. Hudik-Ross Co., Inc.*, 164 N.J. Super. 317, 322-23 (App. Div. 1978) (mistake). The court will not write a new contract, but will examine all evidence to determine if a valid contract existed which is subject to reformation. *Driscoll Constr. Co., Inc. v. State, Dep't of Transp.*, 371 N.J. Super. 304, 316-17 (App Div. 2004) (extrinsic evidence is admissible in a contract dispute only for the purpose of interpreting the writing and aiding in the determination of its significance and meaning, but not for the purpose of modifying, enlarging or curtailing its terms).

Once a party becomes aware of a mistake in an instrument, if he acquiesces in the instrument as written, he is deemed to have ratified it and is estopped from seeking reformation. *Knight v. Electric Household Utilities Corp.*, 133 N.J. Eq. 87

(Chan.), *aff'd*, 134 N.J. Eq. 542 (E. & A. 1943).

Reformation is not available against a bona fide purchaser without notice. *Scult v. Bergen Valley Builders, Inc.*, 76 N.J. Super. 124 (Ch. Div. 1962), *aff'd*, 82 N.J. Super. 378 (App. Div. 1964). But where a purchaser is chargeable with constructive notice, any right of reformation of a lease which a tenant has against a landlord may similarly be enforced against the purchaser. *Schnakenberg v. Gibraltar Savings and Loan Assn.*, 37 N.J. Super. 150 (App. Div. 1955).

In Pivnick v. Beck, 326 N.J. Super. 474 (App. Div. 1999), *aff'd*, 165 N.J. 670 (2000), the court found that one seeking reformation of a testator's revocable trust on the basis of mistake of fact must prove its case by clear and convincing evidence, citing *N.J.S.A.* 2A:81-2.

Equity has no jurisdiction to reform a bail bond. *Alterac v. Bushko*, 99 N.J. Eq. 213 (Ch. Div. 1926).

Both rescission and reformation are available remedies in an action for equitable fraud. *See Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599 (1989).

If rescission rather than reformation is sought, please see Chapter II, section I, *infra*.

I. RESCISSION OF A CONTRACT

The power to rescind contracts, or to cancel instruments, has traditionally been lodged in equity. Thus, courts of chancery have entertained actions for the rescission (or cancellation) of:

• automobile insurance, *see Menichelli v. Massachusetts General Life Ins. Co.*, 152 N.J. 194 (1997), *Massachusetts Mut. Life Ins. Co. v. Manzo*, 122 N.J. 104 (1991); *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125 (2003);

• insurance policies, *see Metropolitan Life Insurance Co. v. Kaiser*, 137 N.J. Eq. 95 (Ch. Div. 1945) (life insurance); *New Amsterdam Casualty Co. v. Mandel*, 116 N.J. Eq. 48 (E. & A. 1934) (automobile insurance);

• contracts for the sale of personal property, *see Schoenfeld v. Winter*, 76 N.J. Eq. 511 (Ch. Div. 1909), *aff'd*, 79 N.J. Eq. 219 (E. & A. 1911);

• mortgages, *see Real Estate Finance Co. v. Joseph H. Chamberlin, Inc.*, 118 N.J. Eq. 56 (Ch. Div. 1935);

• deeds, *see Miller v. Miller*, 138 N.J. Eq. 225 (E. & A. 1946);

• negotiable instruments, *see Canon v. Ballard*, 62 N.J. Eq. 383 (Ch. Div. 1901), *aff'd in part*, 63 N.J. Eq. 797 (E. & A. 1902);

• settlement of partnership affairs, *see Menzenhauer v. Schmidt*, 65 N.J. Eq.

402 (E. & A. 1903). *But see, Notch View Assocs. v. Smith*, 260 N.J. Super. 190 (Law Div. 1992) (Breach of a partnership agreement does not warrant rescission unless a breach of fiduciary duty has also occurred).

The power of an equity court to rescind or cancel an instrument is considered exceptional in character. This power is sparingly exercised because equity abhors a forfeiture. *See* The Maxims. Forfeitures are not favored and "if they can be avoided on a fair and reasonable interpretation of the instrument involved, a court of equity will undertake to do so." *Feighner v. Sauter*, 259 N.J. Super. 583, 590 (App. Div. 1992) (*quoting Tizard v. Eldrege*,25 N.J. Super. 477, 481 (App. Div. 1953)); *see also Rosen v. Smith Barney, Inc.*,393 N.J. Super. 578, 587 (App. Div. 2007), *certif. denied*, 192 N.J. 481 ("equity abhors forfeiture"); *Orange Motors, Inc. v. Meyer*, 107 N.J. Eq. 461 (E. & A. 1930); *Town of Kearny v. Discount City of Old Bridge, Inc.*, 205 N.J. 386, 413 (2011) ("our law abhors a forfeiture").

The usual grounds for rescission or cancellation are fraud (see discussion of legal v. equitable fraud under Reformation of Instruments), mutual mistake, undue influence, duress, lack of mental capacity, intoxication, or inadequacy of consideration. Rescission may also be granted for unilateral mistakes if some rather exacting criteria are met, including the requirement that the rescission not seriously prejudice the other party. *See Hamel v. Allstate Ins. Co.*, 233 N.J. Super. 502, 507 (App. Div. 1989) S*tephenson*, 429 N.J. Super. at 385. The remedy is discretionary and should not be granted where there has been substantial performance of the contract. *Center 48 Ltd. Partnership v. May Dept. Stores Co.*, 355 N.J. Super. 390, 412 (App. Div. 2002). The consequence of such relief being granted is the restoration of the aggrieved party to his original position, with reestablishment of his title to, or possession of, property. *County of Morris v. Fauver*, 296 N.J. Super. 26, 28 (App. Div. 1996), *aff'd in part, rev'd in part*, 153 N.J. 80 (1998); *Intertech Associates, Inc. v. City of Paterson*, 255 N.J. Super. 52, 59 (App. Div. 1992); *East Newark Realty Corp. v. Dolan*, 15 N.J. Super. 288 (App. Div. 1951); *Hilton Hotels Corp. v. Piper Co.*, 214 N.J. Super. 328 (Ch. Div. 1986); *Snider v. Freehold Theater Co.*, 9 N.J. Misc. 85 (Ch. Div. 1930).

Where, however, an adequate remedy at law exists, equity will decline to exercise its inherent power of rescission. *Downs v. Jersey Central Power and Light Co.*, 117 N.J. Eq. 138, 140 (E. & A. 1934); *see also First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 143 (2003) ("Rescission is an equitable remedy, which properly depends on the totality of circumstances in a given case and resides within a court's discretion."). For example, money damages might suffice to compensate the plaintiff or, if the rescinding party seeks only return of property, an action for replevin would be appropriate. Finally, the plaintiff may unilaterally rescind the contract

and bring an action to recover monies paid thereunder.

Moreover, rescission of a contract is not warranted unless the breach of the contract is material. *Herbstman v. Eastman Kodak Co.*, 68 N.J. 1 (1975); *see also Center 48 Ltd. P'ship v. May Dep't Stores Co.*, 355 N.J. Super. 390, 411-12 (App. Div. 2002) ("contracts may be rescinded where there is original invalidity, fraud, failure of consideration, or material breach or default"). Further, *see Ramapo Bank v. Bechtel*, 224 N.J. Super. 191, 198 n. 3 (App. Div. 1988), where the court noted that fraud was a basis for the rescission of various types of contracts, including: employment contracts, *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 626 (1981); commercial contracts, *Rego Industries, Inc. v. American Modern Metals Corp.*, 91 N.J. Super. 447, 456 (App. Div. 1966); marriage contracts, *Costello v. Porzelt*, 116 N.J. Super. 380, 383 (Ch. Div. 1971); and contracts for the sale of real property, *Weintraub v. Krobatsch*, 64 N.J. 445, 455 (1974). The court in *New Jersey Manufacturers. v. O'Connell*, held that a subsequent change in the law were not a sufficient reason to rescind a settlement agreement. 300 N.J. Super. 1, 4 (App. Div. 1997), *certif. denied*, 151 N.J. 75, 697 A.2d 547 (1997); *Zuccarelli v. State, Dep't of Envtl Prot.*, 326 N.J. Super. 372, 381 (App. Div. 1999), *certif. denied*, 163 N.J. 394 (2000).

N.J.S.A. 2A:14-1 establishes the statute of limitations for "recovery upon a contractual claim or liability, express or implied" at six years. The six-year limit has been applied to rescission claims based on fraud. *See Nester v. O'Donnell*, 301 N.J. Super 198 (App. Div. 1997) (parties were precluded from seeking rescission of a contract due to fraud because the statute of limitations had run).

In the context of the contract regarding real property, the Supreme Court has held that when the concealment or defect is truly significant, rescission is justified. *Weintraub v. Krobatsch*, 64 N.J. 445, 455 (1974). *See also Perth Amboy Iron Works v. American Home Insurance Co.*, 226 N.J. Super. 200, 216-217 (App. Div. 1988), *aff'd o.b.*, 118 N.J. 249 (1990), where the court found that the *Weintraub* case stood for the proposition that materiality is necessary for the remedy of rescission.

In *Hilton*, 214 N.J. Super. at 336, the court found that "in order to grant rescission, the court must also be able to return the parties to the 'ground upon which they originally stood,'" *quoting Driscoll v. Burlington Bristol Bridge Co.*, 28 N.J. Super. 1, 4 (App. Div. 1953).

Moreover, if a court finds that a delay is "unexplained and unexcused" and "prejudicial to the party asserting it," the remedy of rescission is not available. *Stroebel v. Jefferson Trucking and Rigging Co.*, 125 N.J.L. 484, 487 (E. & A. 1940). Delay in rescinding a contract is evidence of an election to treat the contract as valid. *Am. Container Corp. v. Hanley Trucking Corp.*, 111 N.J. Super. 322, 333 (Ch. Div. 1970); *see also Notch View Assocs. v. Smith*, 260 N.J. Super. at 205-208.

Additionally, "[e]ven where grounds for rescission exist,…the remedy is discretionary and will not be granted where the offended party has not acted within a reasonable time." *Hilton Hotels*, 214 N.J. Super. at 336 (*citing Redrow v. Sparks*, 76 N.J. Eq. 133, 135 (Ch. Div. 1909)). Further, the remedy is not available where there has been substantial performance of the contract. *Hilton*, 214 N.J. Super. at 336.

The Uniform Commercial Code, *N.J.S.A.* 12A:2-101, *et seq*., has done away with the equitable remedy of rescission in those transactions which the Code covers. Rather, the UCC speaks of rejection (*N.J.S.A.* 12A:2-602) and revocation of acceptance (*N.J.S.A.* 12A:2-608). Revocation of acceptance occurs after the buyer accepts the goods but "is intended to provide the same relief as rescission of contract of sale of goods." *Cuesta v. Classic Wheels, Inc.*, 358 N.J. Super. 512, 518 (App. Div. 2003) (*quoting Ramirez v. Autosport*, 88 N.J. 277, 288 (1982) (*citing N.J.S.A.* 12A:2-608)). Thus, an action by a purchaser to reject or revoke acceptance, and to recover the purchase price, brought under the provisions of the UCC, is properly cognizable in the Law Division. *Sudol v. Rudy Papa Motors*, 175 N.J. Super. 238, 241 (Passaic Cty. Dist. Ct. 1980); *see also Ramirez v. Autosport*, 88 N.J. 277 (1982), and *Columbia Can Co. of New Jersey, Inc. v. Africa- Middle E. Mktg., Inc*.,188 N.J. Super. 45, 54 (App Div. 1983).

If reformation rather than rescission is sought, see Chapter II, section H.

The victim of a misrepresentation has a choice of either rescinding or affirming the contract. *Daibo v. Kirsch*, 316 N.J. Super. 580, 590-91 (App. Div. 1998). If he/she rescinds, the monies received under the contract must be returned, but restitution is still an available remedy. *County of Morris v. Fauver*, 296 N.J. Super. at 38.

The remedies available to the buyer who justifiably revokes acceptance of the goods are set forth in *N.J.S.A.* 12A:2-711. One of the remedies is cancellation of the contract and recovery of "so much of the price as has been paid." *N.J.S.A.* 12A:2-711(1). The Code also permits the seller to cure imperfect tenders. *N.J.S.A.* 12A:2-508. The UCC gives a seller the right to cure as a means to encourage parties to communicate with each other. *Ramirez v. Autosport*, 88 N.J. 277, 285 (1982). A seller is under a duty to deliver goods that conform to the contract, and the buyer has a right to reject goods that do not conform, however, rejection by a buyer does not automatically terminate a contract because the seller may still effect a cure so as to preclude undue rejection and cancellation by a buyer. *Id.* at 283-84. If the seller fails "to cure the defects, whether substantial or not, the balance shifts again in favor of the buyer, who has the right to cancel or seek damages." *Cuesta v. Classic Wheels, Inc.* 358 N.J. Super. 512, 519 (App. Div. 2003).

J. RECEIVERSHIPS[5]

1. CUSTODIAL RECEIVERSHIPS

A court of equity has the inherent power to appoint a custodial receiver to manage a corporation's affairs and preserve its assets. Such power is to be exercised *pendente lite* for remedial purposes incidental to an independent action over which the court has jurisdiction. *Kaufman v. 53 Duncan Investors, L.P.*, 368 N.J. Super. 501, 506 (App. Div. 2004). *See also Lippmann v. Hydro-Space Technology, Inc.*, 77 N.J. Super. 497, 506 (App. Div. 1962). Unlike a statutory receiver, whose function will be discussed *infra*, a custodial receiver generally does not take title to the corporate assets, nor is he cloaked with the authority to liquidate those assets and dissolve the corporation. *Rothman v. Harmyl Inn, Inc.*, 61 N.J. Super 74, 87 (App. Div. 1960). The custodial receiver is appointed to maintain the status quo to preserve the corporate assets for a definitive period (usually pending litigation). *State v. East Shores, Inc.*, 131 N.J. Super. 300, 309-10 (Ch. Div. 1974), 154 N.J. Super. 57 (Ch. Div. 1977), *aff'd on other grounds*, 164 N.J. Super. 530 (App. Div. 1979); *Culp v. Culp*, 242 N.J. Super. 567 (Ch. Div. 1990) (Once a court has appointed a custodial receiver to collect rents to be applied to court-ordered support payments, those rents are beyond the reach of judgment creditors). *See also, N.J.S.A.* 14A:12-7 with regard to the rights of minority shareholders. For a further discussion on the rights of minority shareholders, *see* Chapter K, Shareholder Actions.

In *State v. East Shores, Inc.*, *supra*, 131 N.J. Super. at 310-13, the Court determined that under certain circumstances a custodial receiver may be vested with legal title to discrete corporate assets for purposes of liquidation (as, in that case, to provide funds for improvements ordered by the Public Utilities Commission). Likewise, under the courts' supervision, the power of a custodial receiver can include the authority to sell assets of the company or, if necessary, the company itself. *In re Valley Road Sewerage Co.*, 295 N.J. Super. 278, 292-93 (App. Div. 1996) *aff'd*, 154 N.J. 224, 239-41 (1998); S*ee also Wilmington Sav. Fund Soc'y FSB v. Zimmerman* (450 N.J. Super. 415, 418 (Ch. Div. 2017).

It is not essential that a corporation be insolvent for a custodial receiver to be appointed. *Roach v. Margulies*, 42 N.J. Super. 243, 245 (App. Div. 1956); *Gillies v. Pappas Brothers*, 138 N.J. Eq. 202, 205 (Ch. Div. 1946). A receiver may be

[5] This discussion involves the receivership of for-profit corporations. There are similar rules for non-profit corporations under *N.J.S.A.* 15A:4-2, *et seq.* Such proceedings may be brought by the corporation, its creditors, or the Attorney General (who, in any case, must be named as a party).

appointed on grounds of gross or fraudulent mismanagement of corporate affairs, or abuse of trust or dereliction of duty on the part of the officers or directors. *Ravin, Sarasohn, Cook, Baumgarten, Fish & Rosen, P.C.*,365 N.J. Super. 241, 249 (App. Div. 2003); *Roach v. Margulies, supra*, 42 N.J. Super. at 245; *Riddle v. Mary A. Riddle Co.*, 140 N.J. Eq. 315, 318, 320 (Ch. Div. 1947). Chancery also has the inherent equitable power, which it has used sparingly, to appoint a custodial receiver for a corporation unable to function as a result of internal dissension. *In re N.J. Refrigerating Co.*, 95 N.J. Eq. 215, 221-23 (E. & A. 1923). In the latter situation as well (deadlocked corporation), the custodial receiver is charged with protecting and preserving corporate assets pending ultimate dissolution of the corporation. *In re Collins-Doan Co.*, 3 N.J. 382 (1949); *Freidus v. Kaufman*, 35 N.J. Super. 601 (Ch. Div.), *aff'd o.b.*, 36 N.J. Super. 321 (App. Div. 1955). Such drastic action as the appointment of a receiver should be avoided if possible and when the relief can be afforded by lesser means. *Roach v. Margulies*, 42 N.J. Super. 243, 245 (App. Div. 1956).

Further, "[o]ur courts have long recognized that a court should generally appoint a receiver of a business or of land held in common only for the short period of time required to protect assets pending a final resolution of litigation or a dissolution of the business enterprise." *Kassover v. Kassover*, 312 N.J. Super. 96, 100 (App. Div. 1998).

In fashioning a novel remedy in a matrimonial action in which a husband violated a permanent injunction by opening a competing store near the wife's store, the chancery court appointed an attorney to act as the receiver with the authority to seize and control all of the shares of the company's stock and step into the shoes of the husband as an officer and director of the company. *D'Atria v. D'Atria*,242 N.J. Super. 392, 408-409 (Ch. Div. 1990).

Equity also has the power to appoint a receiver where a fiduciary, such as a trustee/attorney, is violating a fiduciary duty. In the circumstances involving an attorney, it is in the public interest to have a receiver take prompt charge of files in order to contact clients and otherwise preserve rights against statutes of limitations and other defenses. *Trustees of the Clients' Security Fund of the Bar of New Jersey v. Yucht*, 243 N.J. Super. 97, 114 (Ch. Div. 1989).

2. STATUTORY CUSTODIAN OR PROVISIONAL DIRECTOR

N.J.S.A. 14A:12-7 (1) to (7) provides for the appointment and delineates the powers of a "custodian" (e.g., a custodial receiver) or a provisional director in specified situations of corporate dissension (deadlock) and, in closely-held corporations, where the actions of those in control are illegal, fraudulent, or oppressive. This remedy is provided as an alternative to dissolution — the custodian

is given the authority to exercise the powers of the board and officers for the purpose of continuing the business of the corporation. The court, however, on its own determination (which may take into consideration any recommendation of the custodian) may order dissolution. If it does so, the court may continue the appointment of the custodian for the purpose of winding up the corporation's affairs, or it may appoint a statutory receiver. *See Brenner v. Berkowitz*, 134 N.J. 488, 515 (1993); *See also Sipko v. Koger, Inc.*, 214 N.J. 364, 382-384 (2013) (affirming *Brenner* holding that *N.J.S.A.*14A:12-7(1)(c) does not limit the chancery courts' ability to fashion appropriate equitable remedies, even when the court finds no oppression of the minority shareholder occurred).

3. STATUTORY RECEIVERSHIPS

Chancery's power to appoint a receiver for a corporation in financial difficulties, to liquidate its assets and wind up its affairs is purely statutory. *Kaufman v. 53 Duncan Investors, L.P., supra*, 368 N.J. Super at 506 (App. Div. 2004); *Booream v. Washington Casualty Ins. Co.*, 110 N.J. Eq. 164, 166 (Ch. Div. 1932). Unlike a custodial receiver, the statutory receiver acquires legal title to corporate assets and is empowered to dissolve the corporation. *N.J.S.A.* 14A:14-4 and 5; *State v. East Shores, Inc., supra*, 131 N.J. Super. at 309-10.

N.J.S.A. 14A:14-2 provides that an application for such receivership must be brought by: (1) a creditor whose claim is for a sum certain or for a sum capable of being made certain; (2) a shareholder or shareholders owning individually or in combination at least ten percent of the outstanding stock of any class of the corporation; or (3) the corporation itself, pursuant to resolution of the board.

At least one of the following grounds must be alleged for the appointment of a statutory receiver: (1) insolvency, as defined in *N.J.S.A.* 14A:14-1(f) (*see State v. East Shores, Inc., supra*, 131 N.J. Super. at 311, for a discussion of "equitable insolvency"); (2) suspension of ordinary corporate business for lack of funds; or (3) the business is being conducted at a great loss and at great prejudice to the interests of its creditors or shareholders. *N.J.S.A.* 14A:14-2(2).

Even when the statutory prerequisites for appointment of a receiver exist, the Chancery Court as a court of equity, nevertheless, has the discretionary power to deny a request for such an appointment. Appointment of a receiver is not an absolute legal right; rather, it emanates from the exercise of sound judicial discretion. *Moore v. Splitdorf Electrical Co.*, 114 N.J. Eq. 358, 360 (E. & A. 1933); *Neff v. Progress Building Materials Co.*, 139 N.J. Eq. 356, 357 (Ch. Div. 1947); *see also Wilmington Sav. Fund. Soc'y, FSB v. Zimmerman*, 450 N.J. Super 415, 418 (Ch. Div. 2017). An order appointing a statutory or liquidating receiver is considered final for purposes of appeal. *R.* 4:53-1. *Moon v. Warren Haven Nursing Home and*

County of Warren, 182 N.J. 507 (2005).

Title to the property vests with the receiver from the date of the filing of the complaint and the entry of the appointing order. Thereafter, the property of the entity is in a custodia legis and is inalienable without the knowledge and consent of the court. *Wilzig v. Sisselman*, 209 N.J. Super. 25, 31 (App. Div.), *certif. denied*, 104 N.J. 417 (1986); See also *New Jersey Realty Concepts, LLC v. Mavroudis*, 435 N.J. Super. 118, 124 (App. Div. 2014). Furthermore, the appointing court has the power to hear and determine all questions regarding the title, possession and control of the subject property. No other court but the appointing court has jurisdiction over the receiver's property. *Riedinger v. Mack Machine Co., Inc.*, 117 N. J. Eq. 334 (Ch. Div. 1934).

Caution, however, should be exercised where only one creditor petitions for the appointment of a receiver even though the statutory requirements are satisfied. In *Neff v. Progress Building Materials Co., supra*, 139 N.J. Eq. 356, the court recognized that in such instances the appointment of a receiver is not consistent with the goal of protecting the public interest. Where only one creditor petitions for appointment of a receiver, such an appointment may protect the interests of only that creditor.

4. FISCAL AGENTS

The appointment of a receiver is a drastic remedy which should be avoided whenever the necessary relief can be achieved through less burdensome means. *Kassover*, 312 N.J. Super. at 100. *See also Advance Residential Communities v. Hamilton,*2009 N.J. Super. LEXIS 2042, *13-15 (N.J. Super. App. Div. July 31, 2009). A receivership signals to creditors and the general public that a corporation is foundering; thus such an application will be denied unless brought by one having a substantial interest to protect, and is necessary to protect the interests of the corporation's creditors and shareholders and of the general public. *Tachna v. Pressed Steel Car Co.*, 112 N.J. Eq. 411, 414-415 (E. & A. 1932).

To avoid the disruptive effect of the appointment of a receiver, yet to afford protection to the plaintiff, courts have created the concept of special fiscal agent. *Roach v. Margulies, supra*, 42 N.J. Super. 243, 246 (App. Div. 1956); *see also New Jersey Realty Concepts, LLC v. Mavroudis*, 435 N.J. Super., supra, at 126 (holding that in order to avoid more stringent measures of appointing a receiver, the fiscal agent with circumscribed powers should be appointed). Fiscal agents are appointed pendente lite, with powers circumscribed according to the exigencies of the particular case. Their role is primarily investigative and protective—to advise the court as to the status of the corporation and its prospects for survival, and to preserve its assets and oversee its operations in the interim. Fiscal agents may also

play a conciliatory role in resolving the problems which gave rise to the litigation so that corporate operations may continue without further judicial interference. Additionally, a fiscal agent may be appointed to represent minority shareholders in an oppressed minority shareholder situation. *Kelley v. Axelsson*, 296 N.J. Super 426, 437 (App. Div. 1997).

Fiscal agents may not be appointed for an indefinite period of time. "Our courts have long recognized that a court should generally appoint a receiver of a business or of land held in common only for the short period of time required to protect assets pending a final resolution of litigation or a dissolution of the business enterprise." *Kassover v. Kassover***,** 312 N.J. Super. 96, 100 (App. Div. 1998). In *Kassover*, the court affirmed the appointment of the fiscal agent, but remanded the matter to the trial court to fix a termination date for the Special Fiscal Agent. *Id.* at 101.

5. ANCILLARY MATTERS

Fraudulent Conveyances: Often times corporate transactions immediately preceding the appointment of a receiver are scrutinized by the corporation's creditors and/or receiver for invalidation because of fraud, insolvency at time of transfer, or lack of consideration. Such an analysis requires application of the Uniform Fraudulent Transfer Act, *N.J.S.A.* 25:2-20, *et seq.*, 11 *U.S.C.A.* § 548. *See Roxbury State Bank v. Clarendon*, 123 N.J. Super. 400 (Ch. Div. 1973), *modified*, 129 N.J. Super. 358, 368 (App. Div.), *certif. denied*, 66 N.J. 316 (1974). For a fuller discussion of fraudulent conveyances, see Chapter II, Section U, *infra*.

Powers of Receiver: A statutory receiver may modify a pension plan notwithstanding a requirement in the plan that modification be approved by directors of the corporation. Further, such actions of the receiver are not in conflict with ERISA. *Chait v. Bernstein*, 645 F. Supp. 1092, 1098-1100 (D.N.J. 1986), *aff'd*, 835 F. 2d 1017 (3d Cir. 1987).

Compensation of Receiver: Guidance for fixing compensation may be gleaned from the compensation provisions of the Probate Reform Act which codified, in a non-business context, the common law "reasonableness" standard. *Bank of New Jersey v. Abbott*, 207 N.J. Super. 29, 38 (App. Div. 1986).

A court appointed receiver need not obtain prior authority of the court to employ an attorney for purposes of carrying out tenancy actions. However, fees must be reasonable. *Kaufman v. Duncan Investors, L.P.*, 368 N.J. Super. 501 (App. Div. 2004).

A court-appointed receiver's primary responsibility is to manage the assets of the property. Also note that a negligence claim against the receiver must be brought in the receivership action. *See J.L.B. Equities, Inc. v. Dumont*, 310 N.J.

Super. 366, 372-73 (App. Div. 1998), cert. denied 156 N.J. 406 (1998).

6. PROCEDURES

The Chancery Division may not appoint a receiver without meeting certain procedural requirements. *New Jersey Realty Concepts, LLC v. Mavroudis*, 435 N.J. Super., *supra*, at 125.

Rule 4:53-1, *et seq*., governs receivership actions and receivers.

Receivership applications are brought by complaint verified to the plaintiff's personal knowledge and order to show cause seeking the appointment of a statutory receiver on the return date, i.e. a summary action pursuant to *R.* 4:67-2(a). [*N.J.S.A.* 14A: 14-2(3) specifically authorizes the court to proceed in a summary manner.] If the plaintiff seeks protection as of the date of the initial application, he will also seek such interim relief as a temporary restraining order (e.g. freezing corporate accounts except for payment of day-to-day operating expenses, restraining the alienation and transfer of assets, or enjoining the defendant to remove inventory) or the immediate appointment of a custodial receiver.

The venue will lie where the principal place of business of the corporation is located. *R.* 4:53-2.

"A court has the authority in appropriate circumstances to appoint a special fiscal agent or rent receiver to manage the property of a supporting spouse to assure compliance with *pendente lite* support obligations." *Maragliano v. Maragliano*, 321 N.J. Super. 78, 82 (App. Div. 1999). *See also Culp v. Culp*, 242 N.J. Super. 567, 570-71 (Ch. Div. 1990). Note, however, that *N.J.S.A.* 2A:34-23 (the Divorce Act), does not authorize "a court to delegate judicial powers to a receiver." *Maragliano*, 321 N.J. Super. at 82. Thus, in *Maragliano*, the court vacated a receiver's orders when the court determined that the husband in a divorce action had withdrawn his consent to the receiver's appointment to manage the business properties of the marriage. *Id.*at 83-84. *See also Julius v. Julius*, 320 N.J. Super. 297 (App. Div. 1999), *certif. denied*, 161 N.J. 332 (1999).

It is prudent to frame the request for relief broadly (e.g., "and such other relief as may be appropriate") so as to allow the court room to exercise its equitable powers and appoint a custodial receiver or a fiscal agent, should the appointment of a statutory receiver for purposes of corporate dissolution not be warranted in a particular case.

A statutory receiver may not be appointed without giving the corporation notice of the application and an opportunity to be heard. A custodial receiver may be appointed upon ex parte application only if ". . . it clearly appears from specific

facts shown by affidavit or by the verified complaint that immediate and irreparable damage will result . . ." before notice and a hearing can be provided, or as a result of notice being given to the defendant. *R.* 4:53-1.

Unlike most other types of cases, the bulk of the activity in statutory receivership matters occurs subsequent to final judgment which appoints the receiver, with the receiver conducting the corporation's affairs, liquidating its assets, tracing hidden or diverted assets, prosecuting or defending legal claims, receiving creditors' claims and determining their priority, filing intermediate accountings and an inventory, and filing a final accounting. (See discussion on Accountings by Fiduciaries, infra.) After the final accounting, the court will usually enter judgment dissolving the corporation. *N.J.S.A.* 14A:14-22.

In tracing diverted corporate assets, the receiver may proceed summarily within the receivership action against persons named as defendants in the original receivership complaint. However, strangers to the record must be proceeded against by independent plenary suit, usually in the Law Division. *See Cohen v. Miller*, 5 N.J. Super. 451, 459 (Ch. Div. 1949); *Grobholz v. Merdel Mortgage Investment Co.*, 115 N.J. Eq. 411 (E. & A. 1934). Thus, attorneys for plaintiffs are well advised to include all principals of corporations as nominal defendants when filing receivership actions. In determining the priority of the claims against the debtor, the receiver should follow the principles of the Bankruptcy Act. *Trustees of the Clients' Security Fund of the Bar of New Jersey v. Yucht*, 243 N.J. Super. 97 (Ch. Div. 1989).

The receiver serves under a bond (*N.J.S.A.* 14A:14-2) and must file intermediate and final accountings. *R.* 4:53-7(a) requires the receiver to file an initial inventory within three months of his appointment, and semi-annual accountings (on April 1 and October 1). Accounts will be settled pursuant to *R.* 4:87 (see *infra*) on proceedings in the action in which the receiver was appointed. The order approving any intermediate accounting will provide for the continuation of the receivership; the order approving the final accounting will provide for the discharge of the receiver. *R.* 4:53-7(d).

A court of equity has both inherent and statutory power to dissolve a partnership or a joint venture, appoint a receiver, distribute assets, and require an accounting. *See* discussion of these topics, infra. Such actions are within the court's sound discretion, and may be taken only when necessary to protect the parties. *Nathan v. Bacon*, 75 N.J. Eq. 401, 404 (Ch. Div. 1909).

A foreclosing mortgagee may seek the appointment of a receiver *pendente lite* to collect rents and turn them over to the mortgagee, to keep the property in repair, to pay municipal liens and assessments, and/or to keep tax and insurance payments current. *Stonebridge Bank v. NITA Properties*, 2011 U.S. Dist. LEXIS

59078 (D.N.J. June 1, 2011). This remedy is available only upon proof that the security for the mortgage debt is uncertain or precarious. *See Barclays Bank v. Davidson Ave. Assocs.*, 274 N.J. Super. 519 (App. Div. 1994); *Camden Trust Co. v. Handle*, 132 N.J. Eq. 97, 110 (E. & A. 1942), and *Trust Co. of New Jersey v. Lusbie Realty Co.*, 124 N.J. Eq. 265, 268 (E. & A. 1938). *See* also Cunningham and Tischler "Law of Mortgages," 30 N.J. PRAC. §§ 261-281 (1975 ed.). In the alternative, a foreclosing mortgagee may choose to act, in effect, as receiver for itself, and become a mortgagee in possession by taking physical control of the premises, with or without court approval. Before such a procedure is followed, counsel should both examine the mortgage instrument (which often defines the mortgagee's power to enter into possession) and also determine if the mortgagee can safely take possession without incurring potential liability. *See Cunningham and Tischler*, §§ 183, 195). A mortgagee may not be required to act as a mortgagee in possession, even after it has obtained judgment, but before the sale. *City Fed. S. & L. Assn. v. Jacobs*, 188 N.J. Super. 482, 485-86 (App Div. 1983).

Finally, an arbitrator is not, without contractual authority, empowered to appoint a receiver. *See Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C.*, 365 N.J. Super. 241, 252 (App. Div. 2003).

K. SHAREHOLDER ACTIONS

1. DERIVATIVE SUITS

"The right of a corporate stockholder to prosecute a derivative action on behalf of the corporation does not rest in contract; it is not a personal right of action but rather a proceeding, essentially equitable in nature, to redress a breach of fiduciary duty by the officers and directors of the corporation." *Pomeroy v. Simon*, 17 N.J. 59, 64 (1954). By instituting an action, the stockholder sets in motion the prosecution on behalf of the corporation. *Id.* at 64. As the New Jersey Supreme Court explained, "[A] shareholder derivative action permits a shareholder to bring suit against wrongdoers on behalf of the corporation, and it forces those wrongdoers to compensate the corporation for the injury they have caused….[T]he cause of action actually belongs to the corporation, but a shareholder is permitted to assert the cause of action where the corporation has failed to take action for itself." *In re PSE&G Shareholder Litigation*, 173 N.J. 258, 277-78 (2002) (citation omitted). *See also Johnson v. Glassman*, 401 N.J. Super. 222, 227-28 (App. Div. 2008).

Accordingly, a shareholder may derivatively recover losses sustained by the corporation caused by acts of the directors. *Pomeroy*, 17 N.J. at 64. *See also In re PSE&G Shareholder Litigation*, 173 N.J. at 277. *Schulman v. Wolff & Samson, PC*, 401 N.J. Super. 467, 481 (App. Div. 2008). *68th St. Apts., Inc. v. Lauricella*, 142 N.J.

Super. 546, 557 (Law Div. 1976), *aff'd*, 150 N.J. Super. 47 (App. Div. 1977). *See also N.J.S.A.* 14A:6-14.

Shareholder derivative suits generally require plaintiffs to make a pre-suit demand that the board of directors bring suit on behalf of the corporation. *In re PSE&G Shareholder Litigation*, 173 N.J. at 278. The demand requirement serves two purposes. First, it allows corporate managers to address shareholders' claims and, if it finds those claims meritorious, to remedy the situation or embrace the litigation. *Id.* Second, if managers disagree with the shareholders' concerns, the demand requirement allows them the "opportunity to reject the demand and, if necessary, seek early dismissal of the suit." *Id.*

In *PSE&G Shareholder Litigation*, the New Jersey Supreme Court adopted the Delaware exception to this rule known as the demand futility standard. *Id.* at 278. *See also In re Merck & Co. Sec., Derivative & ERISA Litig.*, 493 F.3d 393, 399 (3d Cir. 2007). Under this exception, a plaintiff is excused from making a demand if "(1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Id.* (adopting the test as set forth in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)). The test's second prong does not apply to situations in which the board has not taken action or made any relevant business decision. *PSE&G Litigation*, 173 N.J. at 281-82 (*citing In re Prudential Ins. Derivative Litigation*, 282 N.J. Super. 256 (Ch. Div. 1995)). *See also Fagin v. Gilmartin*, 432 F.3d 276, 282 (3rd Cir. 2005).

This test, which has been characterized as a "modified business judgment rule," puts on the corporation rejecting the demand the initial burden of demonstrating that, in the decision to reject, the directors "(1) were independent and disinterested, (2) acted in good faith and with due care in their investigation of the shareholder's allegations, and that (3) the board's decision was reasonable." *See PSE&G Shareholder Litigation*, 173 N.J. at 286; *Fagin v. Gilmartin*, 432 F.3d at 284. "All three elements must be satisfied." *PSE&G Shareholder Litigation*, 173 N.J. at 286. Shareholders in a dispute with the corporate managers regarding demand futility must be permitted access to corporate documents and other discovery "'limited to the narrow issue of what steps the directors took to inform themselves of the shareholder demand and the reasonableness of the decision.'" *Id. (citation omitted).*

Given that New Jersey law governs internal corporate affairs under New Jersey choice-of-law rules, federal courts will apply the *PSE&G Shareholder Litigation* standard. *See Fagin v. Gilmartin*, 432 F.3d at 282.

See N.J.S.A. 14A:3-6.1 *et seq.* regarding standing (*N.J.S.A.* 14A:3-6.2),

attorney's fees and expenses of suit (*N.J.S.A.* 14A:3-6.8). *See also Pogostin v. Leighton*, 216 N.J. Super. 363, 371 (App. Div.), *certif. denied*, 108 N.J. 583 (1987), *cert. denied, Leighton v. Uniroyal, Inc.*, 484 U.S. 964 (1987).

See R. 4:32-3 and note that the compromise and dismissal provisions of *R.* 4:32-2(e) apply to derivative actions.

See Valle v. North Jersey Auto Club, 125 N.J. Super. 302 (Ch. Div. 1973), *modified*, 141 N.J. Super. 568 (App. Div. 1976), *aff'd as modified*, 74 N.J. 109 (1977) (derivative actions in the non-profit corporation setting); *see also Siller v. Hartz Mountain Assoc.*, 93 N.J. 370 (1983), *cert. denied*, 464 U.S. 961 (1983) (derivative actions and the rights of condominium owners).

In *Brown v. Brown*, 323 N.J. Super. 30 (App. Div.), *certif. denied*, 162 N.J. 199 (1999), the court determined that a shareholder had standing to bring a derivative action against a closely-held corporation, even though she was no longer a shareholder in the corporation. In *Brown*, a wife had transferred her shares in a closely-held corporation to her husband as part of their divorce. Prior to her transfer, she had instituted suit against the corporation, alleging the chief operating officer had diverted corporate opportunities. The trial court found that the former shareholder did not have standing. The Appellate Division reversed, holding that the former shareholder's action could be treated as a direct action since there was no risk of multiple suits and because the husband had consented to the wife's continuance of the action in the judgment of divorce. *Id.* at 36. Additionally, the court held that it was inappropriate to "invariably treat what would otherwise be derivative actions as direct actions whenever a closely held corporation is involved." *Id*. at 37. Instead, the Appellate Division found that a flexible application of § 7.01 of the American Law Institute's Principles of Corporate Governance: Analysis and Recommendations (1992) was most appropriate. *Id.*

In *In re PSE&G Shareholder Litigation*, 315 N.J. Super. 323 (Ch. Div. 1998), *aff'd*, 173 N.J. 258 (2002) (relating to C-160-96 and C-188-96), the trial court determined the burden of proof necessary to establish that the faction of the Board of Directors which advised against a derivative action acted within the business judgment rule. Per *Rule* 4:32-3, the derivative suit may not proceed unless the shareholder can show that the board refused to bring a suit on the corporation's behalf. "A board's decision to reject the demand will not be overturned unless it is wrongful." *Id.* at 327. The business judgment rule "is a rebuttable presumption." *Maul v. Kirkman*, 270 N.J. Super. 596, 614 (App. Div. 1994). It places an initial burden on the person who challenges a corporate decision to demonstrate the decision-maker's "'self-dealing or other disabling factor.'" *In re PSE&G Shareholder Litigation*, 173 N.J. at 277 (citation omitted). "If a challenger sustains

that initial burden, then the presumption of the rule is rebutted, and the burden of proof shifts to the defendant or defendants to show that the transaction was, in fact, fair to the corporation." *Id*. (*citation omitted).*

See also Schulman v. Wolff & Samson, PC, 401 N.J. Super. 467, 478-81 (App. Div. 2008) (dismissing breach of fiduciary duty claim brought by minority shareholders against corporation's former law firm for allegedly aiding and abetting the majority shareholders and furthering their self-interests to the corporation's detriment; holding that such a claim is a derivative claim, not an individual claim made by a particular shareholder).

2. RIGHTS OF OPPRESSED MINORITY SHAREHOLDERS

Prior to the passage of the *N.J.S.A.* 14A:12-7 ("the Act") in 1968, the common law equitable remedy of the appointment of a receiver in a non-insolvency situation was limited to situations where the conduct of the business was directly affected by the misconduct of the management. *Laurel Springs Land Co. v. Fougeray*, 50 N.J. Eq. 756 (E. & A. 1893); *In re N.J. Refrigerating Co.*, 95 N.J. Eq. 215 (E. & A. 1923); *Sternberg v. Wolff*, 56 N.J. Eq. 555 (Ch. Div. 1898); *Hollander v. Breeze Corporations, Inc.*, 131 N.J. Eq. 585 (Ch. Div. 1941), *aff'd*, 131 N.J. Eq. 613 (E. & A. 1942). Today's "oppressed shareholder" is a litigant created by the legislature through the enactment of *N.J.S.A.* 14A:12-7. *Exadakitilos v. Cinnaminson Realty Co., Inc.*, 167 N.J. Super. 141 (Law Div. 1979), *aff'd*, 173 N.J. Super. 559 (App. Div. 1980), *certif. denied*, 85 N.J. 112 (1980).

N.J.S.A. 14A:12-7 provides, in relevant part:

> (1) The Superior Court, in an action brought under this section, may appoint a custodian, appoint a provisional director, order a sale of the corporation's stock as provided below, or enter a judgment dissolving the corporation, upon proof that:
>
> ***
>
> (c) In the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more of the minority shareholders in their capacities as shareholders, directors, officers, or employees.
>
> ***
>
> (8) Upon motion of the corporation or any shareholder who is a party to the proceeding, the court may order the sale of all shares of the corporation's stock held by any other shareholder who is a

> party to the proceeding to either the corporation or the moving shareholder or shareholders, whichever is specified in the motion, if the court determines in its discretion that such an order would be fair and equitable to all parties under all the circumstances of the case.
>
> (a) The purchase price of any shares so sold shall be their fair value as of the date of the commencement of the action or such earlier or later date deemed equitable by the court, plus or minus any adjustments deemed equitable by the court if the action was brought in whole or in part under paragraph 14A:12-7(1)(c).
>
> ***
>
> (e) The purchase price shall be paid by the delivery of cash, notes, or other property, or any combination thereof within 30 days after the court has determined the fair value of the shares. The court shall, in its discretion, determine the method of payment of the purchase price. . . .

In 1972, paragraph (1)(c) of the Act was amended to permit an action in the case of a corporation having 25 or fewer shareholders. *See* Commissioners' Comment - 1972, *N.J.S.A.* 14A:12-7.

In 1988, the Act was further amended to permit any shareholder who is a party to a proceeding brought pursuant to the Act to move to purchase, or to have the corporation purchase, shares owned by any other shareholder who is a party to that proceeding. Previously, the Act limited the motion to purchase stock to the corporation and shareholders possessing 50 percent of the voting stock. *See* Commissioners' Comment - 1988 Amendments, *N.J.S.A.* 14A:12-7. Moreover, the 1988 amendments allow the purchase price, in the event of a mandatory sale, to be paid over a period of time in cash, notes, or other property. The previous section had required that the price be paid entirely in cash within thirty days after the determination of fair value. *Id.* In the context of a bankruptcy, the remedies found in *N.J.S.A.* 14A:12-7 (a buyout of an oppressed minority shareholder) are not available and while the Chancery Court considered expansion of the interpretation of available remedies to include personal liability of a majority shareholder, the court concluded that such expansion was beyond what the court was persuaded to direct. *Weil v. Express Container Corp.*, 360 N.J. Super. 599, 611 (App. Div.), *certif. denied*, 177 N.J. 574 (2003).

Unlike analogous statutes in other states, in determining the existence of oppression, the Act allows the court to examine the effects of the corporate conduct on a minority shareholder in his guise of shareholder, director, officer or employee.

Statutes elsewhere tend to limit the inquiry to the effect on the minority shareholder in his role as shareholder only. *Exadakitilos*, 167 N.J. Super. at 153. The present statutory language embodies a legislative determination that "freeze-out" maneuvers in close corporations constitute an abuse of corporate power. *Id.* at 154.

Section (1)(c) of the Act is designed to solve a problem peculiar to close corporations. This problem arises in shareholder "freeze out" situations. Shareholder "freeze out" has been defined as:

> . . . a manipulative use of corporate control or inside information to eliminate minority shareholders from the enterprise, or to reduce to relative insignificance their voting power or claims on corporate earnings and assets or otherwise deprive them of corporate income or advantages to which they are entitled.

2 O'Neal, CLOSE CORPORATIONS § 8.07, at 43 (2d ed. 1971).

The oppression remedy is available only to individuals participating in corporations with fewer than 25 shareholders. This is so because the market place already provides a remedy for those shareholders oppressed by a large corporation, i.e., their stock can be sold. This market place remedy is not generally available to minority shareholders in close corporations.

An important distinction in New Jersey's version of the Act is that the power of the court to order the sale of stock is discretionary rather than mandatory. Moreover, note that the 1988 amendments to the Act provide that the court may order the sale of all the stock in the corporation held by any other shareholder who is a party to the proceeding, not merely the plaintiff's stock. *N.J.S.A.* 14A:12-7(8). *See* Commissioners' Comment - 1988 Amendments, *N.J.S.A.* 14A:12-7.

In *Berger v. Berger*, 249 N.J. Super. 305 (Ch. Div. 1991), the court defined the term "minority shareholder." The Berger court included the nominal owner of 98% of the corporation's stock in the class of minority shareholders because plaintiff's stock was held in a voting trust controlled by the defendant. In reaching this result, the court stated:

> [A] "majority shareholder" is one who has control of the voting stock in the corporation. Thus, arguably, this approach can be used to deem any shareholder, regardless of his percentage of ownership interest, to be a "minority shareholder" if such an interest does not have control of the corporate shares with respect to voting rights.

Id. at 317.

In *Bonavita v. Corbo*, 300 N.J. Super. 179, 187 (Ch. Div. 1996), a 50 percent stockholder, was, for the purposes of the Statute, also considered a minority

shareholder. The Court found:

> If the statute is otherwise applicable, it is not rendered inapplicable simply because plaintiff owns 50% of the . . . stock rather than, hypothetically 40% or 49%. Indeed, while defendants deny any oppressive or wrongful conduct, they do not claim that the statute is inapplicable simply because plaintiff owns one-half of the corporation's stock rather than a numerical minority. Clearly, such a distinction would make no sense and would be inconsistent with what *N.J.S.A.* 14A:12-7 is designed to accomplish.

Further, in *Balsamides v. Protameen Chems., Inc.*, 160 N.J. 352, 371 n.7 (1999), for purposes of N.J.S.A. 14A:12-7, each of two 50 percent shareholders was considered a minority shareholder because a 50 percent shareholder cannot direct an outcome as a 51 percent shareholder can and therefore lacks control of the corporation. *See also Sipko v. Koger, Inc.*, 214 N.J. 364, 382 n.7 (2013).

In *Brenner v. Berkowitz*, 134 N.J. 488 (1993), the Court held that courts of equity have inherent power to fashion remedies in shareholder disputes — thus, permitting courts to alter and/or enlarge upon the remedies set forth in *N.J.S.A.* 14A:12-7. *See also Walensky v. Jonathan Royce Int'l*, 264 N.J. Super. 276, 279 (App. Div.), *certif. denied*, 134 N.J. 480 (1993) (where statutory remedies are inadequate, court has authority to fashion alternative relief, including money damages).

In fact, in *Muellenberg v. Bikon Corp.*, 143 N.J. 168 (1996), the Court went so far as to order a minority buy-out of the majority. The Supreme Court stated that the remedy was authorized by *N.J.S.A.* 14A:12-7(8), and was consistent with decisions holding that the courts are not limited to statutory remedies, but have a wide variety of equitable remedies also available to them. *Id.* at 183.

In *Brenner*, a minority shareholder of a closely held business sued the majority, alleging mismanagement, illegality, unfairness and oppression. B*renner,* 134 N.J. at 492. At trial, the Chancery judge found that plaintiff was not an oppressed minority shareholder, but did find that she was wrongfully removed from the Board of Directors and ordered her reinstatement. The Appellate Division reversed, finding that plaintiff had established a *per se* cause of action by proving wrongful conduct — even though the wrongful conduct had ceased before trial. The Supreme Court reversed and, in large part, reinstated the judgment of the Chancery court. However, the Court agreed with the finding of the Appellate Division that proof of fraudulent and/or illegal conduct was sufficient to establish a *prima facie* case under *N.J.S.A.* 14A:12-7. The Court discussed at length the plaintiff's "reasonable expectations" — that she never intended to be involved in the company's management. Accordingly, the Court found

that the plaintiff was not entitled to a buy-out — finding that relief too great under the circumstances.

VALUATION: In ordering the sale of a party's stock interest, the Court will determine the value of the selling stockholder's interests. Importantly, a valuation formula set forth in a shareholder's agreement will not be binding in an action brought pursuant to the oppression stature. *See Bostock v. High Tech Elevator Industries, Inc.*, 260 N.J. Super. 432, 446 (App. Div. 1992); *Hughes v. Sego Int'l, Ltd.*, 192 N.J. Super. 60, 68 (App. Div. 1983), certif. denied, 96 N.J. 272 (1984). The court, while considering the shareholders' agreement, may make adjustments to the value of the shares, to reflect the equities of the case, after the court determines "fair value" under *N.J.S.A.* 14A:12-7(8)(a).

In 1999, the Supreme Court issued two opinions concerning valuations of closely held corporations, *Balsamides v. Protameen Chems.*, 160 N.J. 352 (1999) and *Lawson Mardon Wheaton Inc. v. Smith*, 160 N.J. 383 (1999). In *Balsamides*, the Court discussed the various methods by which to value the shares of a corporation. These valuation methods include: a) the "excess earnings" method, also known as the "formula" method, which is cited and described in Revenue Ruling 68-609; b) the "discounted cash flow/earnings" or "income" method; this method determines the value of a company by calculating the present value of its future cash flows; and c) the "market" approach; which requires an analysis of comparable companies. *See also* Jay W. Eisenhofer and John L. Reed, *Valuation Litigation*, 22 DEL. J. CORP. L. 37 (1997).

In determining fair value, the judge will consider proof of value by any technique or method which is generally acceptable in the financial community and otherwise admissible in court. *Torres v. Schripps, Inc.*, 342 N.J. Super.419, 434 (App. Div. 2001). The judge may use any acceptable method to calculate the value, but she/he must determine that the chosen method yields the fair value of the shares. *Id.* In calculating fair value, generally, the purchase price of any shares sold is the "fair value" as of the date of commencement of the litigation, plus or minus any adjustment deemed equitable by the Court. *N.J.S.A.* 14A:12-7(8)(a). Generally, the date of commencement of the action is the presumptive date of valuation. *Torres*, 342 N.J. Super. at 437. Considerable debate continues over what is meant by "fair value" when determining price. The Appellate Division opinion in *Balsamides*, 313 N.J. Super. 7, 20 (App. Div. 1998), *aff'd in part, rev'd in part on other grounds*, 160 N.J. 352 (1999), found that the court must not merely look at a corporation's book value, but also at the realities of good will, actual profit and the possible discounting of the minority interest.

Fair value is not synonymous with fair market value. *Casey v. Brennan*, 344 N.J. Super. 83, 111 (App. Div. 2001), *aff'd*, 173 N.J. 177 (2002). The

distinction between "fair value" and "fair market value" is raised in connection with appraisal rights invoked by dissenting shareholders in larger corporations. "Fair value" is intended to fairly compensate shareholders, not to represent the market value.

Both *Balsamides* and *Lawson* discuss at some length the various discounts which may apply, including marketability and minority interest. While a minority discount adjusts for lack of control over the business entity, a marketability discount adjusts for a lack of liquidity in one's interest in an entity. *Casey*, 344 N.J. Super. at 111.

In *Balsamides*, the oppressor was ordered to sell his stock to the oppressed shareholder. The Court found that a marketability discount applied because, when the oppressed shareholder eventually sold those shares of the corporation, he would suffer the full effect of the "market." In *Lawson*, the Supreme Court found that there were no extraordinary circumstances warranting the application of a marketability discount, finding that a dissenting shareholders' stock should not be bought by the company at a discounted price.

Regarding minority discounts, equitable considerations hold that, as with marketability discounts, minority discounts cannot be used to the detriment of the minority shareholder when his interest is being purchased.

Lawson and *Balsamides* preclude any bright line tests to determine when discounts will be applied. *See also Steneken v. Steneken*, 183 N.J. 290, 297 (2005) (citing *Lawson* for the proposition that "[f]lexibility must be the byword in determining which approach is best suited in a particular instance because '[t]here is no inflexible test for determining fair value, as valuation is an art rather than a science [that] . . . requires consideration of proof of value by any techniques or methods which are generally acceptable in the financial community and otherwise admissible in court'"). However, these cases were decided on the same principle: discounts may not be used by the oppressing shareholders to the detriment of the oppressed. As the Court in *Cap City Products Co., Inc. v. Louriero*, 332 N.J. Super. 499, 507 (App. Div. 2000), found:

> there is no simple answer to the question of whether a marketability discount should be employed when valuing stock in a closed corporation. The answer depends in part upon the purpose for which the stock is being appraised. It also depends on the policy underlying any applicable statute, and the "equities" of the case, which may include the identification of one party as an oppressor and another as an oppressed victim, or one as a dissenting stockholder subject to being "squeezed-out" by a dominant majority.

See also Musto v. Vidas, 333 N.J. Super.52, 76 (App. Div.), *certif. denied*, 165 N.J. 607 (2000), and *Torres v. Schripps, Inc.*, 342 N.J. Super. 419, 437 (2001) (finding that *N.J.S.A.* 14A:12-7(8)(a) also empowers the Court to make adjustments to fair value to achieve equity.).

A court of equity will look beyond the Act itself to assure the fairness of the challenged corporate action. *See Berkowitz v. Power/Mate Corp.*, 135 N.J. Super. 36 (Ch. Div. 1975) (court issued temporary injunction preventing merger in order to determine if proposed merger was "fair" to minority shareholder, despite finding that merger complied with the Business Corporation Act). *See also Kelley v. Axelsson*, 296 N.J. Super. 426, 432 (App. Div. 1997) (maintaining an accounting system which has the effect of substantially preventing minority shareholders from ascertaining and verifying the corporation's income may constitute unfairness and oppression toward minority shareholders, entitling them to relief under *N.J.S.A.* 14A:12-7).

The business judgment rule will not shield close corporations from the court's scrutiny in connection with a shareholder's claim of oppression under the statute. *Exadakitilos*, 167 N.J. Super. at 154.

NOTE: In some situations, courts of equity, independent of statutory authority, may appoint a receiver and cause the dissolution of a corporation. *See In re Collins-Doan Co.*, 3 N.J. 382, 393 (1949); *Roach v. Margulies*, 42 N.J. Super. 243, 245 (App. Div. 1956); *Freidus v. Kaufman*, 35 N.J. Super. 601, 612 (Ch. Div.), *aff'd*, 36 N.J. Super. 321 (App. Div. 1955), *see also R.* 4:53-1.

The oppression statute also permits the Court to award counsel fees and costs to any party, if the action is brought pursuant to *N.J.S.A.* 14A:12-7, if the other party has acted arbitrarily, vexatiously, or otherwise not in good faith." *Belfer v. Merling*, 322 N.J. Super. 124, 146 (App. Div.), *certif. denied*, 162 N.J. 196 (1999); *Musto*, 333 N.J. Super. at 72; see also *Savona v. DiGiorgio Corp.*, 360 N.J. Super. 55, 60 (recognizing that *N.J.S.A.* 2A:15-59.1 allows for an award of attorney's fees for frivolous litigation). In addition, if an action is brought pursuant to *N.J.S.A.* 14A:12-7(1)(c), the court may award counsel fees and costs to a selling shareholder incurred in selling the shares of the company. *Musto*, 333 N.J. Super. at 71-72.

L. PREVENTION OF UNFAIR COMPETITION

Chancery will intervene, through its injunctive power, to prevent such unfair business practices as breach of non-competition agreements, solicitation of an employer's personnel and customers (where legally and equitably appropriate), and disclosure of trade secrets and confidential information. This area of equity jurisprudence is dominated by several key cases.

1. NON-COVENANT SITUATIONS

In non-covenant situations, absent fraud or breach of trust, the court will not enjoin an employee, after termination of his employment, from honest competition with his former employer, even to the extent of soliciting customers of the former employer. *Abalene Extermination Co. Of N.J. v. Elges*, 137 N.J. Eq. 1 (Ch. Div. 1945).

United Board and Carton Corp. v. Britting, 63 N.J. Super. 517 (Ch. Div.), *aff'd*, 61 N.J. Super. 340 (App. Div. 1960), *certif. denied*, 33 N.J. 326 (1960), considered the case of individual employees of plaintiff, bound by no employment contract or restrictive covenant, who secretly created a rival corporation and diverted a large part of a plaintiff's business to this rival, all while still in plaintiff's employ. The defendants then resigned en masse, leaving plaintiff bereft of key personnel and principal customers. The court found this conduct to be a breach of the duty of loyalty owed to an employer, and imposed a two-year restraint on defendants' soliciting or dealing with customers to whom they sold while in plaintiff's employ. *See Lamorte Burns & Co., Inc., v. Walters*, 167 N.J. 285 (2001); *see also Cameco, Inc. v. Gedicke*, 157 N.J. 504, 516 (1999) ("Assisting an employer's competitor can constitute a breach of the employee's duty of loyalty. Similarly, an employee's self-dealing may breach that duty." (citations omitted)).

As the court recognized in *Tatarian v. Aluf Plastics*, 2002 WL1065880, 13 (D.N.J. 2002), there is a distinction "between former employees 'honestly' competing with the old employer for the latter's customers and the 'pirating' of the former employer's business by dishonorable and disloyal means." As such, the *United Board & Carton* situation should be contrasted with that in *Auxton Computer Enterprises, Inc. v. Parker*, 174 N.J. Super. 418 (App. Div. 1980). There it was determined that an employee, not bound by a restrictive covenant and in absence of breach of a confidential relationship with the employer, may, while still employed, make arrangements for future employment with a competitor or for future establishment of his own business in competition with his employer, but may not solicit employer's customers for his own benefit before he has terminated his employment. *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 260-61 (2010); *Trico Equipment, Inc. v. Manor*, 2009 U.S. Dist. LEXIS 50524, * 16-18 (D.N.J. June 15, 2009). But see *State v. Saavedra*, 433 N.J. Super. 501, 507 (App. Div. 2013) (holding that "a criminal court judge is not required to perform a Quinlan analysis to decide a motion to dismiss an indictment charging a defendant with official misconduct predicated on an employment-related theft of public documents").

The problem of "raiding" was dealt with in *Wear-Ever Aluminum, Inc. v.*

Townecraft Industries, Inc., 75 N.J. Super. 135 (Ch. Div. 1962). There it was held that the wholesale pirating of plaintiff's managerial and sales staff by a rival corporation amounted to malicious interference with plaintiff's existing contractual and advantageous relationships with such personnel, and entitled plaintiff to a permanent injunction restraining the rival corporation from thereafter recruiting plaintiff's employees, and to an accounting and damages. But the court refused to enjoin the rival corporation from employing those former personnel of plaintiff who had already been recruited. *See also Cameco, Inc. v. Gedicke*, 157 N.J. 504, 517-18 (1999); *Subcarrier Commc'ns, Inc. v. Day*, 299 N.J. Super. 634 648-49 (App. Div. 1997) (vacating an injunction restraining defendants' use of information contained on plaintiff's customer lists for failure to demonstrate that the defendants were in possession of such lists or that information on such lists was a trade secret). *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 269-71 (2010) (adopting totality of circumstances approach to balancing rights of employers and employees).

The Supreme Court in *Cameco*, 157 N.J. at 518 also referenced that "[d]epending on the facts of the case an employee's breach of the duty of loyalty can give rise to either equitable or legal relief." *See also Vibra-Tech Eng'rs, Inc. v. Kavalek*, 849 F. Supp. 2d 462, 489-91 (D.N.J. 2012).

As to duties owed by the new employer, see *Fox v. Millman*, 210 N.J. 401 (2012). There, an employee was terminated and began working for a competitor. The employee provided a customer list to the new employer. The prior employer sued, naming both its former employee and its competitor. The Court found that there was a genuine issue of material fact as to whether the defendants were aware that the list was proprietary information as opposed to a personal contact list that the employee had developed over the years. Notably, the Court also found: "Nor do we find a basis on which to impose on defendants, as plaintiff requests, an affirmative duty to undertake an inquiry, independent of the information given to them by [employee], as to the source of the customer list….".

2. NON-DISCLOSURE

Equity will enjoin an employee from the use or disclosure of trade secrets or confidential information acquired from a former employer. *Abalene Exterminating Co., Inc. v. Oser*, 125 N.J. Eq. 329 (Ch. Div. 1939), found a beach of the common-law duty of nondisclosure of confidential information when customer information obtained in the course of employment was subsequently used to compete with a former employer. *See also Lamorte Burns & Co., Inc. v. Walters*, 167 N.J. 286, 298-99 (2001) (holding that customer lists of service businesses have been afforded protection as trade secrets (*citing AYR Composition, Inc. v. Rosenberg*, 261 N.J. Super. 495, 504 (App. Div. 1993))), and

noting that information need not rise to the level of a trade secret to be protected); *Platinum Management, Inc. v. Dahms*, 285 N.J. Super. 274 (1995). *But see* Fox *v. Millman*, 210 N.J. 401, 426-27 (2012). In *Fox*, plaintiff filed suit against its competitor after it hired its former employee, alleging that it had wrongfully benefitted from the former employee's use of a list of customers in her employment with the competitor. The defendant claimed that the employee implied that the list was created by her throughout her years in the business. While the Court recognized the holding in *Lamorte* that customer lists are protected confidential information belonging to the employer, the Court in *Fox* upheld the denial of summary judgment, holding that "there remained a genuine issue of material fact concerning whether . . . defendants were aware that [the employee's] list was [plaintiff's] proprietary information as opposed to a personal contact list that she had developed over the years." *Fox*, 210 N.J. at 426. The Supreme Court in *Fox* further held that there are no grounds to impose a "duty of independent inquiry upon an employer . . . faced with an otherwise unremarkable representation by a prospective employee . . . that a list of contacts is her own." *Id.* at 427.

Sun Dial Corp. v. Rideout, 16 N.J. 252 (1954), set forth the classic definition of a trade secret as a "formula, process, device or compilation which one uses in his business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Id.* at 257. The standards by which a trade secret is determined are as follows:

- the subject matter must not be matter of public knowledge or general knowledge in industry; however, secrecy need not be absolute -- the information may be disclosed to those employees involved in its use;
- the employer should have taken steps to retain the confidentiality of the subject matter;
- novelty and invention are not essential (unlike patents);
- the fact that every ingredient may be known to the industry is not controlling if method of combination produces a unique or superior product (e.g. Coca Cola). *Id.*

The Court in *Sun Dial* makes an important distinction between an employee's right to leave his job and use elsewhere the skills and knowledge of the trade acquired from his former employment, and the improper use of trade secrets imparted to him in confidence. *Id.* at 261. *See also Adolph Gottscho, Inc. v. American Marking Corp.*, 35 N.J. Super. 333 (Ch. Div. 1954), *aff'd*, 18 N.J. 467 (1955), *cert. denied*, 350 U.S. 834 (1955); *Arthur Murray Dance Studios, Inc. v. Witter*, 105 N.E.2d 685 (Ohio 1952). *Quinlan v. Curtiss-Wright Corp.*, 204

N.J. 239, 260-61 (2010); *Thomas & Betts Corp. v. Richards Mfg. Co.*, 342 Fed. Appx. 754, 759-60 (3d Cir. 2009).

In *Ingersoll Rand Co. v. Ciavatta*, 110 N.J. 609 (1988), the Court recognized that employers have "legitimate interests in protecting information that is not a trade secret or proprietary information, but highly specialized, current information not generally known in the industry, created and simulated by the research environment furnished by the employer, to which the employee has been 'exposed' and 'enriched' solely due to his employment." *Id.* at 638.

In *National Starch & Chemical Corp. v. Parker Chemical Corp.*, 219 N.J. Super. 158 (App. Div. 1987), the Appellate Division affirmed the Chancery court's grant of a preliminary injunction barring a former employee of an envelope adhesive manufacturer from disclosing trade secrets or accepting any job responsibilities that "in any way relate to or involve envelope adhesives." *Id.* at 159. In support of the request for a preliminary injunction, representatives of the former employee testified that the process used for combining ingredients used in envelope adhesives was "highly confidential" and "almost impossible" for a competitor to duplicate using a reverse engineering process. *Id.* at 160. Representatives of the former employee also testified that while employed by the Company, the former employee had been "intimately associated" with the development of many envelope adhesives. *Id.* at 161.

While affirming the grant of the preliminary injunction, the Appellate Division noted that an order granting preliminary injunction will be affirmed if the "circumstances give rise to an inference that [a] substantial threat of disclosure exists." *Id.* at 163, (*citing B.F. Goodrich v. Wohlgemuth*, 192 N.E.2d 99, 104, 106 (Ohio Ct. App. 1963)). The Appellate Division also cited with approval the Chancery court's observation that "[d]amages will not be an adequate remedy when the competitor has [already] obtained the secrets. The cat [would be] out of the bag and there [would be] no way of knowing to what extent their use . . . caused damage or loss." *Id.* at 163.

On January 5, 2012, the New Jersey state legislature enacted the New Jersey Trade Secrets Act ("Act") *N.J.S.A.* 56:15-1, *et seq.*, and was signed into law on January 9, 2012. New Jersey joins 46 other states and the District of Columbia. The Act is based upon the Uniform Trade Secrets Act, but also reflects New Jersey's long-established common law. The Act applies only to new claims arising on or after its enactment. It specifically does not apply to a continuing misappropriation that began prior to the effective date.

The Act defines "misappropriation" as the acquisition of a trade secret by improper means or improper disclosure or use of a trade secret and provides for the following remedies for the misappropriation of trades secrets: damages for actual

loss and for any unjust enrichment caused by the misappropriation; a reasonable royalty for unauthorized disclosure or use; injunctive relief; punitive damages for willful and malicious misappropriation; and counsel fees where the misappropriation was willful and malicious, a claim was made in bad faith, or a motion to terminate an injunction is made or resisted in bad faith. *N.J.S.A.* 56:15-2 to -6.

Significantly, actual or threatened misappropriation may be enjoined. *N.J.S.A.* 56:15-3(a). Injunctive relief will terminate when the trade secret ceases to exist. However, the injunction may be extended "an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation." *N.J.S.A.* 56:15-3(a). Upon a showing of exceptional circumstances, an injunction may require the misappropriating party to pay a reasonable royalty for future use of the trade secret for a longer period of time than could have been prohibited. *N.J.S.A.* 56:15-3(b). "Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable." *N.J.S.A.* 56:15-3(b). The statute expressly provides that the defense that "proper means to acquire the trade secret existed at the time of the misappropriation" is not available. *N.J.S.A.* 56:15-5

The statute of limitations on a misappropriation claim under this Act is three (3) years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. *N.J.S.A.* 56:15-8. The Act expressly states that a continuing misappropriation is a single claim. *N.J.S.A.* 56:15-8.

3. RESTRICTIVE COVENANTS

Restrictive covenants (covenants not to compete) arise most often in employment contracts and contracts for the sale of a business. In the former situation, such a covenant will be enforced to the extent it is reasonable in view of all the circumstances of the particular case. *Solari Industries, Inc. v. Malady*, 55 N.J. 571, 576 (1970); *Graziano v. Grant*, 326 N.J. Super. 328 (App. Div. 1999). The court must make a fact-sensitive analysis to determine the validity and enforceability of the covenant. *Graziano*, 326 N.J. Super. at 343.

Solari, the seminal case, establishes a three-prong test of reasonableness: the covenant must: a) protect a legitimate interest of the employer; b) impose no undue hardship on the employee; and c) not impair the public interest. *Solari*, 55 N.J. at 576, 585; *see also Maw v. Advanced Clinical Commc'ns, Inc.*, 179 N.J. 439 (2004).

In *Solari*, the employment contract of a corporate executive prohibited his dealing with any customers of his former employer, anywhere in the world, for one year after termination of the employment relationship. The New Jersey Supreme Court remanded the case for a finding on the "reasonableness" of the covenant, applying the three-prong test. The *Solari* analysis will be applied to a restrictive covenant in any or all of the three restrictive aspects which the covenant may include, namely: (1) geographical area, (2) time, and (3) scope of activity. Formerly, if the covenant failed the test in any respect, it was stricken in its entirety; after *Solari*, it is to be redefined by the court so that its restrictions meet the "reasonableness" standard. In *Maw*, the New Jersey Supreme Court held that an "… employee's private dispute over terms of do-not-compete provision did not implicate violation of a 'clear mandate of public policy' as contemplated by CEPA [Conscientious Employee Protection Act] provision prohibiting retaliation against employees who objected to employer conduct that they reasonably believed was incompatible with clear mandate of public policy." *Maw*, 179 N.J. at 439.

Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25 (1971), applied the *Solari* test in a construction business context. The Court recognized that an employer has a legitimate interest in protecting trade secrets, confidential information, and customer relationships by means of a restrictive covenant. However, no preliminary injunction would issue when it was doubtful that the business information possessed by the former employee was confidential, and when there was little likelihood that the defendant could impair his former employer's customer relationships.

Ingersoll Rand Co. v. Ciavatta, 110 N.J. 609 (1988), in applying its prior holdings in *Solari* and *Whitmyer*, held that an employee invitation holdover agreement was unenforceable with respect to the employer's post-termination invention. Under a holdover agreement, and employee promises to assign his right, title and interest in any invention created within a one-year period following his termination if the invention is "conceived as a result of and is attributable to work done during such employment," *Id.* at 622. The Court cautioned that holdover agreements will be enforced only where it is demonstrated that they are reasonable in accordance with the three-prong test of reasonableness enunciated in *Solari/Whitmyer. Id.* at 634.

In *Ingersoll Rand*, the Court cited, with approval, the following Appellate Division decisions addressing the issue of restrictive covenants in employee contracts: *Coskey's T.V. & Radio Sales and Services, Inc. v. Foti*, 253 N.J. Super. 626 (App. Div. 1992); *A.T. Hudson &Co., Inc. v. Donovan*, 216 N.J. Super. 426 (App. Div. 1987); *Raven v. A. Klein & Co., Inc.*, 195 N.J. Super. 209 (App. Div. 1984); *Dwyer v. Jung*, 137 N.J. Super. 135 (App. Div. 1975) (agreement restricting partner from doing business with client of another parent for 5 years void as against

public policy); *Mailman, Ross, Toyes and Shapiro v. Edelson*, 183 N.J. Super. 434 (Ch. Div. 1982); *see also Subcarrier Commc'ns, Inc. v. Day*, 299 N.J. Super. 634 (App. Div. 1997).

The enforceability of restrictive post-employment covenants does not depend on their embodiment in a written employment contract. In *Ellis v. Lionikis*, 162 N.J. Super. 579, 583-85 (App. Div. 1978), the covenant was contained in profit-sharing plan; violation of the covenant resulting in forfeiture of benefits. In *Hogan v. Bergen Corp.*, 153 N.J. Super. 37 (App. Div. 1977), the covenant was contained in a policy statement circulated to all employees, who were requested to sign a letter of acknowledgment.

In *Subcarrier*, an independent consultant, who also served as a vice president of plaintiff corporation, and her new employer, could not be preliminarily enjoined from dealing with specific customers of former employer. Plaintiff could not meet standards required for injunctive relief having failed to make a showing of a reasonable probability of ultimate success on the merits. *Subcarrier Commc'ns, Inc*, 299 N.J. Super. at 638 (*citing Crowe v. DeGioia*, 90 N.J. 126, 133 (1982)). Even in the absence of a noncompetition agreement an employer has a legitimate interest in protecting trade secrets and confidential information, there are countervailing factors including the general accessibility of the information and whether the customers are obvious or known in a given industry. *Id.* at 643 (*citing Coskey's*, 256 N.J. Super. at 629). Additionally, weight must be given to arguments in support of free enterprise as well as an interest in not restricting an individual to benefit from experience in an industry as a basis for earning a living. *Id.*

In *A.T. Hudson & Co., Inc. v. Donovan*, 216 N.J. Super. 426 (App. Div. 1987), the court upheld a post-employment restrictive covenant and enforced a two-year restriction on competition because the employer had a legitimate interest in protecting customer relationships and caused no undue hardship on the former employee who had formed his own competitive consulting firm. *But see Coskey's*, 256 N.J. Super. at 629 (denying injunctive relief where the employer seeks to prevent the use of "general skills in an industry which have been built up over the employee's tenure with the employer").

In *Raven v. A. Klein & Co., Inc.*, 195 N.J. Super. 209 (App. Div. 1984), the Appellate Division held that in order to enforce a restrictive covenant, the covenant must be directed at protecting an employer's legitimate interests rather than primarily directed at lessening competition. *See also Auxton Computer Enter., Inc. v. Parker*, 174 N.J. Super. 418, 424 (App. Div 1980); *Maw v. Advanced Clinical Commc'ns, Inc.* 359 N.J. Super. 420, 434 (App. Div. 2003), rev'd on

other grounds, 179 N.J. 439, 446-47 (2004). *Marinelli v. Medco Health Solutions, Inc.*, 951 F. Supp. 2d 303, 315 (D. Conn. 2013) (applying New Jersey law) (finding that stifling competition is not a "legitimate interest that can justify the use of a covenant not to compete"). A court will not enforce a covenant not to compete if it imposes an "undue hardship" on the employee. *See Solari Indus., Inc. v. Malady*, 55 N.J. 571, 576 (1970); *Karlin v. Weinberg*, 77 N.J. 408, 423 (1978); *Marinelli v. Medco Health Solutions, Inc.*, 951 F. Supp. 2d 303, 320 (D. Conn. 2013) (applying New Jersey law).

4. SPECIAL RULES

a. Physicians

In *The Community Hospital Group, Inc. v. More*, 183 N.J. 36 (2005), a non-profit hospital sought a preliminary injunction to enforce a restrictive covenant against one of its former neurosurgeons. The employment agreement included, among other things, restrictive covenants prohibiting the defendant from practicing neurology within a 30-mile radius of the hospital for two years. Within days of the doctor's resignation from the plaintiff hospital, the defendant doctor began to practice in a group with privileges at a hospital that was only 13 miles from his former employer. This newest in a line of cases specifically concerning medical doctors follows *Karlin v. Weinberg*, 77 N.J. 408 (1978) (discussed *infra*) wherein the Court refused to adopt a per se rule declaring such a restrictive covenant as invalid between physicians, adopts the three-part test enunciated in *Karlin* which provides for a balancing of equities:

1) does it protect a legitimate interest of the employer;
2) does it impose an undue hardship on the physician; and
3) is there a detriment or injury to the public.

The Supreme Court held that (1) a restrictive covenant in an employment contract between a hospital and a physician is not per se unreasonable; (2) the hospital established it had a legitimate protectable interest in enforcing a restrictive covenant contained in its employment contract with the surgeon; (3) the restrictions at issue were reasonable; (4) the hospital demonstrated that enforcement of its non-compete would not impose undue hardship on the surgeon; and (5) the geographic restriction was in fact injurious to the public interest and a narrowing of restriction was required. *The Cmty. Hosp. Grp., Inc. v. More*, 183 N.J. at 58-62. *See also Pierson v. Med. Health Ctrs., P.A.*, 183 N.J. 65 (2005).

In *Karlin*, the covenant prohibited the employee from engaging in the practice of dermatology within a ten-mile radius of his former employer's office for a period of five years. The Court refused to adopt a per se rule declaring such a

restrictive covenant invalid between physicians, but rather would enforce the covenant if reasonable under the *Solari* criteria. 77 N.J. at 421-23 (1978). Whereas the *Dwyer* covenant forbade the former employee from maintaining any professional relations with any client of his ex-employer, the *Karlin* covenant permitted a patient to maintain an on-going relationship with the physician of his choice so long as the physician's place of practice was reasonably removed from the former employer's office. *Id.* at 423. Thus, no impairment of the public's right to select a doctor was found. *See also*, *Schuhalter v. Salerno*, 279 N.J. Super. 504, 509 (App. Div. 1995), *certif. denied*, 142 N.J. 454 (1995) (rejecting an argument that professionals' agreements that effectively restrict the public's choice of professionals are unenforceable).

The court in *Graziano v. Grant*, 326 N.J. Super 328, 344 (App. Div. 1999), followed the *Karlin* rationale and noted that "a restrictive covenant ancillary to an employment contract between physicians is enforceable to the extent that it protects a legitimate interest of the employer, imposes no undue hardship on the employee, and is not injurious to the public." Here, the court found that a physician who had purchased a retiring physician's practice was reasonable in his expectation that the physician would retire. *Id.* The court held that if the selling physician changed his mind and continued to practice, the purchasing physician had a right to protect the patient list he had acquired. *Id.* By using its equitable powers, a court may fashion an appropriate remedy, which protects both parties' rights, but still complies with the three factors laid out in *Karlin*. *Id.*

b. Psychologists

An employer attempted to enforce a post-employment restrictive covenant contained in an employment agreement with a psychologist employee. *Comprehensive Psychology Sys., P.C. v. Prince*, 375 N.J. Super. 273 (App. Div. 2005). The employer erroneously relied on the principles of *Karlin v. Weinberg*, 77 N.J. 408 (1978), discussed at length *supra*. The Appellate Division disagreed, holding that where a regulatory agency, here the State Board of Psychological Examiners, has adopted a regulation prohibiting restrictive covenants, such covenants are unenforceable. *Comprehensive Psychology Sys., P.C. v. Prince*, 375 N.J. Super. at 376. Thus, the rule for psychologists' is that which applies to attorneys.

c. Law Firms/Legal Profession

The Rules of Professional Conduct 5.6 ("RPC") states in pertinent part that:

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights

> of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement. *R.P.C.* 5.6.

In *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10 (1992), the Supreme Court struck down a termination agreement as an indirect restriction on post-departure competition:

> Financial-disincentive provisions differ from direct restrictive covenants. They do not impose a blanket or geographical ban on the practice of law nor do they directly prohibit an attorney from representing former clients. By selectively withholding compensation, however, such provisions strongly discourage 'competitive' activities.
>
> *Jacob*, 128 N.J. at 22.

Jacob found that *R.P.C.* 5.6 was violated by the selective withholding of compensation after termination of the relationship in order to discourage competitive activities. *Id.* The Supreme Court's precise holding was summarized in the penultimate sentence of Justice Garibaldi's opinion: "Plaintiffs [withdrawing attorneys who compete] are entitled to the same compensation as those attorneys whose departure is non-competitive." *Id* at 36.

The *Jacob* decision not only announced what law firms cannot do (*i.e.*, discriminate against former partners who compete), but also established what law firms can do: viz., enter into agreements which accord "the same compensation" to those who compete as to those who do not. This is because the proscribed evil in *Jacob* was not *inadequate* departure compensation, but *inequality* of compensation based upon post-departure competitive activities. After *Jacob*, law firms (a) may not discriminate against former partners who compete and (b) may enter into agreements which accord "the same compensation" to those who compete as to those who do not.

Following *Jacob*, the Supreme Court decided two restrictive covenant cases involving law firms: *Weiss v. Carpenter, Bennett & Morrissey*, 143 N.J. 420 (1996), and *Heher v. Smith, Stratton, Weiss, Hehrer and Brennan*, 170 N.J. 213 (2001). In *Weiss*, the court found that the provision of a firm's partnership agreement which prohibited the withdrawing attorney from receiving distribution of his capital account if he was withdrawing for any reason other than retirement, death or disability, violated *R.P.C.* 5.6. *Id* at 444-45. The Court also found that the withdrawing attorney was not estopped from challenging the "forfeiture" provision of the agreement even though the withdrawing attorney had benefited when the provision had been enforced against other withdrawing attorneys. *Id* at 447. The Court noted its view in *Jacob* that: "equitable principles might bar a plaintiff's recovery if the plaintiff had been a senior partner instrumental in drafting a restrictive agreement, imposing it on his or her

fellow partners or employees, and then sought to have the provision declared unenforceable when he or she decided to leave," but cautioned that "[t]he estoppel doctrine should not apply to the ordinary senior partner who merely participated in the partnership decisions to adopt and enforce the provision." *Weiss*, 143 N.J. at 446-47 (*quoting Jacob*, 128 N.J. at 36).

The Court in *Katchen v. Wolff & Samson*, 258 N.J. Super. 474 (App. Div.), *certif. denied*, 130 N.J. 599 (1992), held that the agreement executed by attorney and law firm providing for the forfeiture of his equity interest upon his voluntary withdrawal from the firm violated Rules of Professional Conduct and was unenforceable. *Id* at 482. That agreement created an indirect restraint on the free practice of law and has the same outcome as direct restraints. *Id.* at 480. The Court further follows *Jacob* and states that where "the financial disincentive has the effect of discouraging 'competitive' activities, albeit indirectly, such a provision violate[s] both the language and the spirit of *R.P.C.* 5.6. *Id.* at 482 (*citing Jacob*, 128 N.J. at 22).

In *Heher v. Smith, Stratton, Wise, Heher & Brennan*, 170 N.J. 213 (2001), the withdrawing partner contested a provision in the partnership agreement which allowed a withdrawing partner to collect a "stated benefit" and a "supplemental benefit," if the partner did not compete in any way with the firm following withdrawal. *Id* at 216. The court held that the law firm was estopped from contesting the timeliness of plaintiff's arbitration request. *Id* at 221. The court reasoned that to do so would allow the firm the benefits of a covenant that was clearly contrary to public policy and unenforceable. *Id.*

In *Leonard & Butler, P.C. v. Harris*, 279 N.J. Super. 659, 668 (App. Div.), *certif. denied*, 141 N.J. 98 (1995), the Appellate Division, applying the *Jacob* ruling, invalidated a provision in an employment agreement that could act as a financial disincentive to a departing attorney, finding that such disincentive has the effect of limiting a client's free choice of counsel in contravention of the Supreme Court's interpretation of the underlying purpose of R.P.C. 5.6. The *Leonard* court explicitly rejected an attempt by the firm to distinguish attorney's employment contracts for a firm with significant contingent fee matters, due to the interest a firm has in protecting its investment in contingent cases. *Id.* at 671. The court found that the paramount consideration is not whether the firm has a greater or lesser interest in protecting its fees, but whether its actions result in restricting a client's choice of counsel in contravention of *R.P.C.* 5.6. *Id.* at 666-68.

However, in *Groen, Laveson, Goldberg & Rubenstone v. Kancher*, 362 N.J. Super. 350 (App. Div.), *certif. denied*, 178 N.J. 35 (2003), a law firm brought suit against its former partner and partner's new law firm, seeking contingent fees in the

cases taken by former partner upon his withdrawal from his former firm and seeking 50% of any future attorney fees in such cases. Finding that the provision did not create a financial disincentive for the former partner to continue to work on pending cases and did not impact clients' freedom to choose their counsel, the Court rendered the fee-division provision enforceable. *Id* at 363.

In *Apfel v. Budd Larner Gross Rosenbaum Greenberg & Sade*, 324 N.J. Super. 133 (App. Div.), *certif. denied*, 162 N.J. 485 (1999), the court relying upon the decisions in *Weiss*, *Jacob*, and *Katchen* found the agreement unenforceable. In *Apfel*, the law firm had adopted a Shareholders Agreement which proved that a shareholder of more than 10 years who retired was to receive payments of deferred income. Per the agreement, a shareholder would be considered "retired" once he had discontinued the practice of law within New Jersey, New York and Pennsylvania. *Id.* at 135. Appointment to the judiciary, or full time-employment as an attorney within an organization other than a law firm would also be deemed "retirement." *Id.* The agreement also provided that if a shareholder returned to the practice of law within two years of his retirement date, all payments received as deferred income would have to be returned to the company. *Id.* at 135-136.

RPC 5.6, upon which the court relied, states:

> A lawyer shall not participate in offering or making:
>
> (a) A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.

The trial court, focusing on the meaning of "retirement," held that the Budd Larner shareholder agreement violated *RPC* 5.6. The court determined that whether or not a shareholder was "retired" depended on whether or not he was competing with the Budd Larner firm. The court found this provision anti-competitive because "the definition of retirement is specifically geared to drawing a distinction between competing shareholders and non-competing retiring shareholders." *Id*. at 136. The Appellate Divisions affirmed, and held that "it is the effect of the Agreement that is determinative, regardless of whatever subjective motivation might be ascribed to one or another of the participants. And the effect of the Agreement here is clear: it is anti-competitive and void . . . ." *Id*. at 144.

In *Borteck v. Riker, Danzig, Scherer, Hyland & Perretti LLP*, 179 N.J. 246 (2004), the New Jersey Supreme Court reversed the Appellate Division, which found early retirement and notice provisions of a partnership agreement anti-competitive and in violation of *RPC* 5.6. *See Bortek v. Riker, Danzig, Scherer, Hyland & Perretti, LLP*, 362 N.J. Super. 284 (App. Div. 2003). The Supreme Court

reversed and remanded stating "Our holding is influenced in large measure by our view that defendant's agreement facially is consistent with the safe harbor provision of *RPC* 5.6. Absent greater specificity in the rule itself, it would be unfair to hold defendant to requirements or standards not embodied in the rule's present text." *Bortek*, 179 N.J. at 259.

In 2013, the New Jersey Supreme Court in *Nostrame v. Santiago*, 213 N.J. 109 (2013) announced that a claim for tortious interference by an attorney against a successor attorney must be pled with specificity and particularity. *Id.* at 129. The opinion contains a review of what means are improper and wrongful in the unique context of successor attorneys. *Id.* at 123-26. The Court held that in addition to the traditional improper and wrongful means such as defamation, violence, fraud, misrepresentation, intimidation and deceit, other acts that constitute a violation of a Rule of Professional Conduct would also qualify. *Id.* at 126. In mandating the heightened pleading requirement, the Court rationalized:

> Our analysis of the well-established elements that are required to state a claim for tortious interference is informed by our recognition that the attorney-client relationship is terminable at will and by our strong protections for clients who exercise their free will to retain and to discharge counsel. It is further guided by the recognition that competition among attorneys, although not precisely the same as competition found in other business pursuits, is not prohibited as long as it is conducted in adherence to the *RPCs* and is not otherwise wrongful or improper. In that context, we are confident that there will be only rare circumstances in which an attorney will behave in a manner that could translate into a claim by another attorney for tortious interference.

Id. at 128-29. In *Nostrame*, the plaintiff's complaint "did not assert . . . that the means employed [by the successor attorney] were improper or wrongful" in inducing the client to terminate its relationship with her first lawyer. *Id.* at 127. Not only did the complaint fail to assert any improper means, the plaintiff conceded that it was unaware of any further facts. Therefore, the Court affirmed dismissal of the Complaint with prejudice to prevent a "fishing expedition, a remedy that would raise the specter of chilling any client's exercise of the free choice to select counsel." *Id.* at 128; *but see Cieka v. Rosen*, 908 F. Supp. 2d 545, 559-60 (2012). While *Cieka* is pre-*Nostrame* and the new heightened pleading requirement, the District Court denied defendants' motion to dismiss plaintiff's tortious interference with prospective advantage claim where plaintiff had pled that defendant attorneys misrepresented to the client that after firing his first attorney, plaintiff, and retaining

defendants, he could not return to plaintiff despite his desire to do so and dissatisfaction with defendants. However, the Court granted defendants' motion to dismiss as to plaintiff's claims that the defendants improperly induced the client to discharge plaintiff in the first place. *Id.* at 559.

d. Accountants

Mailman, Ross, Toyes and Shapiro v. Edelson, 183 N.J. Super. 434 (Ch. Div. 1982), considered a restrictive post-employment covenant between accountants. The covenant barred the former employee from offering services to, or soliciting or accepting employment from, any client of the employer for a period of two years, with no geographical limitation. *Id.* at 443. Such a covenant was held enforceable only insofar as it prohibited the employee's interference with the present clientele of his former employer. *Id.* at 442. Any greater restriction would impermissibly limit the right of the public to select a professional for a confidential business relationship. *Id.* at 443. *But see Schuhalter v. Salerno*, 279 N.J. Super. 504, 510-11 (App. Div.), *certif. denied*, 142 N.J. 454 (1995) (disagreeing with *Mailman* to the extent that it held "that covenants restricting professionals in their practice are necessarily so 'injurious to the public' that they should rarely, if ever, be enforced").

e. Sale of a Business

As to cases of covenants not to compete ancillary to the sale of a business, *see Heur v. Ruben*, 142 N.J. Eq. 792 (Ch. Div. 1948), *aff'd*, 1 N.J. 251 (1949). There, sellers of a fruit and vegetable business covenanted not to engage in a similar business in the same city. The covenant, which was contained in a schedule annexed to the bill of sale, was held to be enforceable. *Id* at 796. Although it was unlimited as to time, the court found its territorial limitation to be reasonable. *Id* at 795. The court further found that a transfer of good will, to which a covenant not to compete is ancillary, is sufficient to support such a covenant, even though the value of the good will is very slight. *Id.* Covenants not to compete ancillary to the sale of a business are accorded far more latitude than such covenants ancillary to employment contracts. *Coskey's T.V. & Radio Sales and Service, Inc. v. Foti*, 253 N.J. Super. 626, 633-634 (App. Div. 1992).

The tangential impact of a restrictive covenant was considered by the Appellate Division in *Balsamides v. Perle*, 313 N.J. Super. 7, 33 (App. Div. 1998), *modified on other grounds*, 160 N.J. 352 (1999), when the court concluded that the duration or lack of restrictive covenant may be factors in the valuation of a business.

The seller of a business who has entered into non-compete agreements with his employees may assign the non-compete agreements to the purchaser of his

business. *J.H. Renarde, Inc. v. Sims*, 312 N.J. Super. 195, 199 (Ch. Div. 1998).

f. Land Interests/Leases

In a significant change to the law regarding restrictive covenants, the New Jersey Supreme Court overruled the longstanding prohibition against covenants not to compete involving land interests and successors to those land interests. In *Davidson Bros, Inc. v. D. Katz & Sons, Inc.*, 121 N.J. 196 (1990), *appeal after new trial*, 274 N.J. Super. 159 (App. Div.), *certif. denied*, 139 N.J. 186 (1994), *cert. denied*, 514 U.S. 1064 (1995), the Court rejected the "touch and concern" test in favor of the "reasonableness" test for determining the enforceability of a restrictive non-competition covenant in a commercial land transaction. *Id* at 210. In determining whether a non-competition covenant in a deed is reasonable, the courts must consider such factors as the intention of the parties when the covenant was executed; the impact of the covenant on the consideration; the express restrictions of the covenant; whether the covenant was in writing, recorded and whether the subsequent grantee had notice; the reasonableness of the covenant with respect to area, time and duration; whether the covenant imposes an unreasonable restraint on trade or creates a monopoly; whether the covenant interferes with the public interest; and whether changed circumstances render the covenant unreasonable. *Id*. at 211-12. The Court remanded the case for further findings regarding the reasonableness of the restrictive covenant in the deed. *Id* at 219-20. *See Cox v. Simon*, 278 N.J. Super. 419, 431 (App. Div. 1995), for a case involving the reasonableness of a restrictive covenant in a commercial lease in a strip mall in which the court reiterated the fact that the analysis of any restrictive covenant is fact sensitive and remanded to the lower court for a plenary hearing on the reasonableness of the covenant.

Similar rules apply with respect to restrictive covenants contained in leases. *Renee Cleaners, Inc. v. Good Deal Supermarkets of N.J.*, 89 N.J. Super. 186, 190 - 91 (App. Div. 1965), *certif. denied*, 46 N.J. 216 (1966); and *Barr and Sons, Inc. v. Cherry Hill Center, Inc.*, 90 N.J. Super. 358, 374 (App. Div. 1966), both uphold the validity of covenants against competition in shopping center leases. Note, however, that where the lessee has not moved promptly to protect its interests, it may be estopped from seeking specific performance as opposed to damages as an appropriate remedy.

5. MISCELLANEOUS OTHER UNFAIR TRADE PRACTICE

a. The Fair Trade Act, *N.J.S.A.* 56:4-1, *et seq*., which prohibits the misappropriation of the name, brand, trade-mark, reputation or good-will of another's product. *See Columbia Broadcasting System, Inc. v. Melody Recordings*, 134 N.J. Super. 368 (App. Div. 1975), in which the court authorized an injunction

prohibiting defendants from "pirating" plaintiff's tapes and records.

b. The Consumer Fraud Act, *N.J.S.A.* 56:8-1, *et seq*., which permits the Attorney General to obtain in a summary action an injunction restraining violations of the provisions of the Act. The statute was amended in 1971 to provide for a private cause of action. *See D'Agostino v. Maldonado*, 216 N.J. 168 (2013) (for a general discussion of the history and requirements of the Consumer Fraud Act in New Jersey).

c. The New Jersey Anti-Trust Act, *N.J.S.A.* 56:9-1, et seq., which outlaws contracts, combinations, and conspiracies in restraint of trade, as well as monopolies and attempts or conspiracies to monopolize, and authorizes such penalties as an injunction, fine, and/or treble damages to be imposed upon violators. *See Allstate New Jersey Ins. Co. v. Lajara*, 433 N.J. Super. 20, 36, 42 (App. Div. 2013) (holding that the New Jersey Anti-Trust Act does not create a right to a jury trial and the Constitution does not provide such a right).

d. The Franchise Practices Act, *N.J.S.A.* 56:10-1, *et seq*., which regulates the rights and obligations of franchisors and franchisees, authorizes injunctive relief and damages.

e. New Jersey Trademark Registration and Protection, *N.J.S.A.* 56:3-13a *et seq.*

The protection of trade names, trademarks, and service marks is governed by *N.J.S.A.* 56:3-13.1, *et seq.* In general, the New Jersey trademark registration and protection scheme is designed to be substantially consistent with the Federal system of trademark registration and protection established under the Federal Trademark Act of 1946. The New Jersey system provides the framework under which a trademark is eligible for registration. *N.J.S.A.* 56:3-13.2.

The registration of a mark is effective for five years from the date of registration, and is renewable for successive five year periods upon application filed under *N.J.S.A.* 56:3-13.5. Liability for trafficking or attempting to traffic in counterfeit marks is set forth under *N.J.S.A.* 56:3-13.16 and 13.17.

The owner of a mark which is famous is entitled, subject to the principles of equity, to an injunction against another's use of the mark which causes a dilution of the distinctive quality of the owner's mark, in addition to being entitled to obtain any other relief provided by statute. *N.J.S.A.* 56:3-13.20. The owner of a famous mark is entitled, however, only to injunctive relief unless a subsequent user willfully intended to trade on the owner's reputation or to cause dilution of the owner's mark. *Id.* If willful intent is proven, the owner is also entitled to any other remedies allowable by statute subject to the discretion of the court and the principles of equity. *Id. See Am. Home Mortgage Corp. v. Am. Home Mortgage Corp.*, 357 N.J. Super. 273, 280

(App. Div. 2003) wherein two companies involved in the same industry had the same name, the court found no infringement holding for defendant New York corporation due to the parties' different geographic areas of concentration and that the New Jersey company is not afforded protection against an out-of-state company because there was no evidence of any secondary meaning or intent to cause dilution.

M. PIERCING THE CORPORATE VEIL

In New Jersey, it is a fundamental principle that a corporation is an entity wholly separate and distinct from the individuals who compose and control it, and in general, the corporate entity may not be disregarded. *State, Dep't of Envtl. Prot. v. Ventron Corp.*, 94 N.J. 473, 500 (1983) (there is a "fundamental proposition that a corporation is a separate entity from its shareholders"); *Mueller v. Seaboard Commercial Corp.*, 5 N.J. 28, 34 (1950); *Irving Inv. Corp. v. Gordon*, 3 N.J. 217, 223 (1949); *Verni ex rel. Burstein, v. Harry M. Stevens, Inc*., 387 N.J. Super.160,198 (App. Div. 2006), *certif. denied*, 189 N.J. 429 (2007); *Yacker v. Weiner*, 109 N.J. Super. 351, 356 (Ch. Div. 1970), *aff'd o.b.*, 114 N.J. 526 (App. Div. 1971). However, equity will penetrate the corporate veil when the party seeking to disregard the separate entity of the corporation demonstrates the misuse of the corporate form and the necessity of disregarding the corporate form to do equity. *Verni ex rel. Burstein*, 387 N.J. Super. at 199; *Schmid v. First Camden Nat'l Bank & Trust Co.*, 130 N.J. Eq. 254, 260 (Ch. Div. 1941). As the court stated in *OTR Associates v. IBC Services, Inc*., "[t]he purpose of the doctrine of piercing the corporate veil, is to prevent an independent corporation from being used to defeat the ends of justice,…to perpetrate fraud, to accomplish a crime, or otherwise to evade the law." 353 N.J. Super. 48, 52 (App. Div. 2002), *certif. denied*, 175 N.J. 78 (2002) (*quoting State, Dep't of Envtl. Prot. v. Ventron Corp.*, 94 N.J. at 500).

The test in New Jersey for piercing the corporate veil is stringent. The court in *Yacker,* summarized the standard by stating: "In *Irving Investment Corp. v. Gordon*, the Court said 'It is where the corporate form is used as a shield behind which injustice is sought to be done by those who have control of it that equity penetrates the veil.'" 109 N.J. Super. at 356-57 (*quoting Macfadden v. Macfadden*, 49 N.J. Super. 356, 360 (App. Div. 1958), *certif. denied*, 27 N.J. 155 (1958)).

The *Macfadden* court found that the concept articulated in *Irving Investment* connotes that there must be fraud present to permit the court of equity to pierce the veil. *Macfadden,* 49 N.J. Super. at 360. Further, the court stated that fraud, "in the sense of a court of equity, includes all acts, omissions or concealments which involve a breach of a legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another." *Id.* (*citing Howard v. W. Jersey & S.S.R. Co.*,102 N.J. Eq. 517 (Ch. 1928),

aff'd sub nom Howard v. W. Jersey & Seashore R. Co., 104 N.J. Eq. 201 (1929); *Riverside Trust Co. v. Collin,*114 N.J. Eq. 157 (E. & A. 1933)).

Mueller v. Seaboard Commercial Corp., 5 N.J. 28, 34-35 (1950), held that a finding of "mere instrumentality" alone is not a sufficient basis to pierce the veil — there must also be a finding of injustice or fraud. A two-prong test has emerged that must be satisfied for equity to pierce the corporate veil: (1) that there be such unity of interest in ownership that the separate personalities of the corporation and the individual no longer exist; and, (2) that if the acts are treated as those of the corporation alone, an inequitable result will follow. Barber, "Piercing the Corporate Veil," 17 Willamette L.R. 371, 376 (1981) (hereinafter Barber); *see also Verni ex rel Burstein,* 387 N.J. Super. at 199-200 (*citing State, Dep't of Envtl Prot. v. Ventron Corp*, 94 N.J. 473, 500-01 (1983)). Federal court interpretations of New Jersey piercing law suggest that the State has continued to follow this relatively orthodox two-part test. *See Bd. Of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 171-72 (3d Cir. 2002); *Major League Baseball Promotion Corp. v. Colour-Tex, Inc.*, 729 F. Supp. 1035, 1046 (D.N.J. 1990).

The first prong of the test is usually evidenced by a disregard of the corporate formalities, such as the failure to keep separate books and records for the corporation, failure to issue stock, commingling of funds, etc. *See, e.g. Verni ex rel. Burstein,* 387 N.J. Super. at 199-200. This test is stated by the courts in such terms as the corporation is the dominant or sole shareholder's "alter ego" or that a total "unity of ownership and interest" exists between the shareholders and the corporation or the corporation is the "mere instrumentality" of the shareholder. *Barber,* at 377. The second prong is a finding of fraud or injustice. Several cases have stated that the corporate form may not be disregarded except in the case of fraud. Further, the fraud must be in the misuse of the corporate form. *Shotmeyer v. New Jersey Realty Title Ins. Co.*, 195 N.J. 72, 86-87 (2008). *Ventron,* 94 N.J. at 501; *Mueller,* 5 N.J. at 34-35; *Verni ex rel. Burstein,* 387 N.J. Super. at 200; *Matter of Maple Contractors, Inc.*,172 N.J. Super 348, 355 (Law Div.1979); *Mingin v. Cont'l Can Co.*, 171 N.J. Super. 148, 151-52 (Law Div. 1979); *Yacker,* 109 N.J. Super. at 356. When the corporation is used to perpetrate a fraud, or to defeat justice, the courts will find reason to pierce it. *Karo Mktg. Corp., Inc. v. Playdrome Am*, 331 N.J. Super 430, 442 *certif. denied*, 165 N.J. 603; *see also Trachman v. Trugman*, 117 N.J. Eq. 167, 170 (Ch. 1934) (App. Div. 2000). Additionally, when a corporation is a mere "instrument of a parent corporation so dominated that it has no separate existence and the subsidiary is used to perpetrate 'a fraud or injustice, or otherwise circumvent the law', then the corporate veil may be pierced." *Karo Mktg. Corp., Inc.*, 331 N.J. Super. at 442-43 (*quoting Ventron,* 94 N.J. at 500-01). *See also OTR Assocs.*, 353 N.J. Super. at 48 (piercing the corporate veil to hold parent corporation liable for debts of subsidiary). It is important to note that courts have held that the "mere fact that the

corporation was closely held by members of a family is not sufficient reason standing alone to ignore the corporate form." *Giambri v. Gov't Employees Ins. Co.*, 170 N.J. Super. 140, 142 (Law Div. 1979), *aff'd*, 174 N.J. Super. 162 (App. Div. 1980). *See also Stochastic Decisions, Inc. v. DiDomenico*, 236 N.J. Super. 388 (App. Div. 1989), *certif. denied*, 121 N.J. 607 (1990), *cert. denied*, 510 U.S. 945 (1993).

In *Stochastic*, the Appellate Division affirmed the trial court's piercing of the corporate veil of closely held corporations, based on evidence that all the corporations had identical owners, there was commingling of assets between the corporations, that one of the corporations did not pay rent for use of another's garage, corporate bills were paid from whichever corporate checking account had the funds at the time, and the corporations operated in each other's names. 236 N.J. Super. at 393-95.

In *Mueller*, the Court relied on the language in *Irving Investment Corp. v. Gordon*, 3 N.J. 217 (1949), where an argument was made that two corporations were but mere instrumentalities of each other and set up to serve the personal interests of the principals. 5 N.J. at 34-35. The *Irving* Court had found that the individuals operated through the corporate structure in order to have the resulting advantages, one of which is the freedom of separate personal assets from corporate liabilities. *Irving Inv.*, 3 N.J. at 223. The Court stated, "it is where the corporate form is used as a shield behind which injustice is sought to be done by those who have control it, that equity penetrates the veil." *Id*.

In order for a finding of fraud, injustice, and the like to be made, there must be a finding that the fraud was committed by the parent through its misuse of the corporate form and that this was done in order to limit its own liability. *See Ventron*, 94 N.J. at 500-01; *Mueller*, 5 N.J. at 34-35; *Irving Inv.*, 3 N.J. at 223.

A review of case law indicates that the courts may be more likely to pierce the corporate veil in an environmental or other context where the public welfare is at issue. *See Allied Corp. v. Frola*, 701 F. Supp. 1084 (D.N.J. 1988); *Sendar v. State, Dep't of Human Servs.*, 230 N.J. Super. 537 (App. Div. 1989). *But see State, Dep't of Envtl. Prot. v. Arky's Auto Sales*, 224 N.J. Super. 200 (App. Div. 1988).

N. DISSOLUTION OF PARTNERSHIP AND JOINT VENTURE

A court of equity has both inherent and statutory power to dissolve a partnership, distribute its assets, and order an accounting. *Fishman v. Raphael & Fishman*, 141 N.J. Eq. 576 (Ch. Div. 1948). Partnerships in New Jersey are governed by the Revised Uniform Partnership Act (RUPA), *N.J.S.A.* 42:1A-1, *et seq.*, enacted in December 2000 (formerly the Uniform Partnership Act, *N.J.S.A.*

42:1-1 to -49), which effectuated some significant changes to traditional precepts of New Jersey Partnership law.[6] The dissolution of a partnership is governed by Article VIII of the RUPA, *N.J.S.A.* 42:1A-39, *et seq*.

Unlike the prior partnership statute which deemed a dissolution to occur each time a partner withdrew from a partnership, under the RUPA, dissolution results only under specific circumstances, such as when an event makes it unlawful for the partnership business to be continued or a partner applies for and receives a judicial determination that the economic purpose of the partnership is likely to be unreasonably frustrated. *N.J.S.A.* 42:1A-39(d) & (e)(1). Additional events triggering dissolution may be provided for in the partnership agreement. *N.J.S.A.* 42:1A-39(c).

Generally, dissolution affects only future transactions and the partnership continues until all past transactions are concluded. *See N.J.S.A.* 42:1A-40(a) and *N.J.S.A.* 42:1A-41(c); *see also Wilzig v. Sisselman*, 182 N.J. Super. 519 (App. Div. 1982), *certif. denied*, 104 N.J. 417 (1986); *Statewide Realty Co. v. Fid. Mgmt. and Research Co., Inc.*, 259 N.J. Super. 59, 68-69 (Law Div. 1922). A partnership may be dissolved at any time by the express will of all the partners, and the partnership will terminate upon the winding up of the partnership affairs. *See N.J.S.A.* 42:1A-39(a); *see also Scaglione v. St. Paul-Mercury Indem. Co.*, 46 N.J. Super. 363 (App. Div. 1957), *rev'd on other grounds*, 28 N.J. 88 (1958).

For the causes of dissolution see Section 39 of the RUPA. Section 39(e) of the RUPA sets forth the dissolution of a partnership by court order. On the application of a partner, the court shall enter judgment in the following situations:

a. when the economic purpose of the partnership is likely to be unreasonably frustrated;

b. when another partner has engaged in conduct relating to the partnership business which makes it unreasonable to carry on the business of the partnership with that partner; and

c. it is not otherwise practicable to carry on the partnership business in conformity with the partnership agreement.

Under *N.J.S.A.* 42:1A-39(f), the transferee of a partner's interest can also

[6] It should be noted that the Revised Uniform Partnership Act contains a savings clause which provides that it shall not affect any proceeding pending or right accrued prior to its effective date on December 8, 2000. *N.J.S.A.* 42:1A-56; L. 2000, c. 161, § 56. Thus, practitioners should use caution when determining the law applicable to a potential partnership dispute.

apply to the court for dissolution after termination of a specified time or completion of a specified undertaking, in a partnership for a definite term or a particular undertaking, or at any time in a partnership at will. It should be noted that this ability to apply to the court for dissolution applies only to transferees of a partnership interest who obtained their interest by purchase. Judgment creditors are specifically prohibited from: 1) interfering with the management of the partnership, 2) seeking to force dissolution, or 3) requiring a foreclosure sale of the transferable interest. *N.J.S.A.* 42:1A-30.

Neither the dissociation of a partner nor the dissolution of a partnership alone discharges a partner's liability for the partnership. *See N.J.S.A.* 42:1A-36(a) and *N.J.S.A.* 42:1A-45(b). A dissociating partner is generally not liable for a partnership obligation incurred after dissociation. *See N.J.S.A.* 42:1A-36(a). Further, a dissociating partner may be discharged from liability for a pre-existing debt by express agreement among himself, the person continuing the partnership and the creditor; or by the agreement of the creditor who has notice of the partner's dissociation to a material alteration in the nature or time of payment of a partnership obligation. *See N.J.S.A.* 42:1A-36(c) and (d). Moreover, the estate of a deceased partner remains liable for debts incurred while he was a partner. *N.J.S.A.* 42:1A-45(e).

A court of equity has the power to supervise the dissolution of a partnership. Although New Jersey statutory law specifically provides for the appointment of a receiver in the case of dissolution of a partnership, *see N.J.S.A.* 42:4-7, a court of equity may, in its discretion, appoint a receiver to take control of the assets whenever it appears to be necessary to protect the interest of the parties. *See Hamilton v. Hood*, 138 N.J. Eq. 485, 487 (E. & A. 1946) (declining to appoint a receiver but noting "[t]hat Chancery has the jurisdiction in proper case to appoint a temporary receiver is beyond question."); *Local No. 11 of Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers v. McKee*, 114 N.J. Eq. 555, 565-66 (Ch. 1933) ("Chancery, under its general equity powers, can appoint a receiver for such local to hold and preserve its assets and operate its business in a legal manner . . . . [S]uch power extends to the conduct and operation of unincorporated associations and partnerships."). A receiver has the authority to sue to recover assets and damages on behalf of the partnership. *Silverman v. Kolker*, 149 N.J. Super. 162 (Ch. Div. 1977). Appointment of a receiver may be employed as a remedy to counteract minority oppression in the dissolution of both general and limited partnerships. *See Muscarelle v. Castano*, 302 N.J. Super. 276, 285 (App. Div. 1997).

A joint venture is a partnership that is formed for a limited purpose. A court of equity has inherent power to supervise the dissolution of a joint venture.

Ditscher v. Booth, 13 N.J. Super. 568, 571 (Ch. Div. 1951). Moreover, the rules of law which apply to partnerships also apply to joint ventures. *Kozlowski v. Kozlowski*, 164 N.J. Super. 162, 171 (Ch. Div. 1978), *aff'd*, 80 N.J. 378 (1979); *Chiron Corp. v. Dir., Div. of Taxation*, 21 N.J. Tax 528, 541 (Tax 2004) ("Generally, the courts have drawn little distinction between partnerships and joint ventures under New Jersey Law.").

One significant change to the law governing partnerships effectuated through the enactment of the Revised Uniform Partnership Act is the elimination of the former prohibition against legal actions among partners under New Jersey's predecessor statute and common law. The RUPA liberally permits a partner to bring suit against a partnership or another partner to enforce rights conferred either by the partnership agreement or the act. *N.J.S.A.* 42:1A-25(b). Under the RUPA, an accounting is no longer a prerequisite to the availability of other remedies against the partnership or the other partners. *Compare N.J.S.A.* 42:1A-25(b) *with Notch View Assoc. v. Smith*, 260 N.J. Super. 190, 198 (Law Div. 1992) (discussing requirement of accounting under prior partnership statute). As such, the RUPA eliminates the revival of claims formerly available by virtue of a partner's right to an accounting upon dissolution. *See N.J.S.A.* 42:1A-25(c). Partners must litigate claims against other partners or the partnership during the existence of the partnership or risk forfeiting these claims. *See* Comment to ULA Partnership 1997, § 405, #4.

O. LIMITED LIABILITY COMPANY

The limited liability company ("LLC") is a business organization that combines aspects of corporations and partnerships within a single entity. Members of LLCs are shielded by a limitation on personal liability similar to those limitations afforded to corporate shareholders and to the limited partners of limited liability partnerships. LLCs also enjoy the "pass-through" tax status of partnerships, and are permitted greater statutory flexibility in their structure than their corporate counterparts. *See N.J.S.A.* 42:2C-1 *et seq.*

Despite the absence of a meaningful body of case law, the LLC continues to be the entity of choice amongst many transactional lawyers. One of the reasons that New Jersey courts have published few decisions in this area is likely that the LLC statute permits the internal affairs of an LLC to be structured by its owners, subject to only a handful of mandatory statutory provisions. *See N.J.S.A.* 42:2C-11; *see also Kuhn v. Tumminelli*, 366 N.J. Super. 431, 440 (App. Div.), *certif. denied*. 180 N.J. 354 (2004) ("[T]he LLC Act contemplates that its provisions will control unless the members agree otherwise in an operating agreement. When executing an operating agreement . . . the members are free to structure the company in a variety of ways and are free to restrict and expand the rights, responsibilities and authority

of its managers and members.")[7]

The LLC Act permits the members to limit their authority to bind the LLC when dealing with third parties. It provides that members are not agents of the LLC simply by virtue of their being members and specifically permits the LLC to file a statement specifically setting forth and limiting the authority of a person to bind the entity. *N.J.S.A.* 42:2C-27, 28.

The LLC Act also provides significant avenues of equitable relief to an LLC member that has been oppressed or frozen out by other members. The statute permits a court to enter an order dissolving an LLC not only when it becomes not reasonably practicable to carry on the entity's business, but also "on the grounds that the managers or those members in control of the company: (a) have acted, are acting, or will act in a manner that is illegal or fraudulent, or (b) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant." *N.J.S.A.* 42:2C-48. In such situations, the Act also permits the court to provide equitable relief short of dissolution, such as ordering a buy out or appointing a custodian or one or more provisional managers. *Id.* This is substantially the same relief available to an oppressed minority shareholder in a closely held corporation.

When a member dissociates from a limited liability company, a court should value the dissociated member's interest as of the date of dissociation for purposes of the purchase of his interest by other members. *DeNike v. Cupo*, 394N.J. Super. 357, 379-81 (App. Div.), *rev'd on other grounds*, 196 N.J. 502 (2008). This is the same approach used for valuation purposes when a member resigns from a limited liability company under *N.J.S.A.* 42:2C-45.

P. LABOR STRIKE INJUNCTIONS (ANTI-INJUNCTION ACT)

The issuance of Chancery injunctions in labor disputes is governed by the Anti-Injunction Act, *N.J.S.A.* 2A:15-51, *et seq.* (the "Act"). The Act was enacted in 1941 to prohibit the issuance of such injunctions except to restrain "illegal picketing." Illegal picketing is defined under the Act as violence, blocking of ingress and egress from the employer's premises, and mass picketing. *See Pebble Brook, Inc. v. Smith*, 140 N.J. Super. 273, 278 (Ch. Div. 1976). The picketing must be free from duress, fraud, intimidation and coercion. *See Westinghouse Elec. Corp. v. United Elec., Radio and Mach. Workers of Am., Local 410*, 139 N.J. Eq. 97 (1946). In *K-T Marine, Inc. v. Dockbuilders Local Union 1456 of NY and NJ*, 251N.J. Super. 107

[7] Although the LLC Act has been significantly revised since *Kuhn* was decided, the *Kuhn* court's description of this fundamental aspect of LLC law remains accurate.

(App. Div. 1991), the court held that union picketing of the corporate president's residence was coercive and thus not protected under the Act when the picketing was merely to inform the public that the corporation had hired non-union labor and the residence had no connection with the labor controversy.

The Act does not apply to strikes by public employees because such strikes are illegal in New Jersey and, hence, may be enjoined completely. *See Delaware River & Bay Authority v. International Organization of Masters, Mates & Pilots*, 45 N.J. 138 (1965); *See also Board of Education of Middletown v. Middletown Twp. Education Association*, 352 N.J. Super. 501, 505-506 (Ch. Div. 2001) ("It has long been well-established in this nation, either by judicial decision or statute, that public employees may not strike unless expressly authorized by law"). Also discussed under equitable principles. *See N.J. Tpk. Auth. v. Am. Fed'n of State, Cnty and Mun. Emp.*, Council 73, 150 N.J. 331 (1997). *See also South Jersey School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*, 150 N.J. 575 (1997) (finding that lay teachers at a private Catholic school have the right to organize); *In re City of Newark*, 346 N.J. Super. 460 (App. Div. 2002) (finding that city attorneys were not barred from organizing and joining a union).

Historically, courts of equity were empowered to issue injunctions against labor disputes on the basis that there was no adequate remedy available in the common law courts. *Westinghouse Elec. Corp.*, 139 N.J. Eq. 97 (1946). The Act does not impair the inherent power of the Chancery court to issue injunctions. Rather, it prescribes the procedure to be utilized in obtaining an injunction and limits the scope of any such injunction issued. *Bellemeade Devel. Corp. v. Schneider*, 193 N.J. Super. 85 (Ch. Div. 1983), *aff'd*, 196 N.J. Super. 571 (App. Div. 1984), *certif. denied*, 101 N.J. 210 (1985). In view of the fact that the issuance of an injunction in the early phases of a labor strike can critically sway the balance of the economic struggle, the intent of the Act was to prevent the issuance of an injunction unless it is preceded by procedural safeguards. *U.S. Pipe & Foundry Co. v. United Steelworkers of Am., C.I.O.-A.F.L., Local No. 2026*, 59 N.J. Super. 240 (App. Div. 1960); *Isolantite, Inc., v. United Elec., Radio and Mach. Workers of Am., C.I.O.*, 132 N.J. Eq. 613 (1943).

An application by Order to Show Cause ("OSC") for a temporary restraining order ("TRO") to restrain a labor strike must strictly comply with the requirements of the Act. The following documents are required: (1) verified com- plaint; (2) recital (for signature by the judge) of the findings of fact; (3) affidavits based upon personal knowledge as to the violence or illegal nature of the picketing; (4) affidavit that the moving party has comported itself as required by *N.J.S.A.* 2A:15-54; and (5) form of OSC-TRO. In addition, a bond is required of plaintiff sufficient to secure the persons enjoined their court costs and counsel fees in the event that the injunctive relief is denied or such relief is thereafter reversed by an appellate court (customarily the amount is $1,000).

Notice of the application for a TRO must be given (telephone notice is sufficient) unless irreparable harm would likely occur before notice could be given. *See N.J.S.A.* 2A:15-53. A hearing on the record is required, including witness testimony and the opportunity for cross-examination.

The TRO, if granted, cannot restrain the following actions: (1) refusing to work; (2) being a union member; (3) giving or keeping strike benefits; (4) aiding persons in a labor dispute in court; (5) picketing without violence or fraud; (6) peaceful assembly; (7) advising people of the intention to do such acts; (8) agreeing to do or not do such acts; (9) advising or urging others to do such acts; (10) requiring membership in a particular labor organization as a condition of employment; and (11) advertising or publicizing the facts of any labor dispute. *N.J.S.A.* 2A:15-51.

The TRO (and any interlocutory and permanent injunction issued in such an action) can restrain only the particular acts specified in the complaint, *N.J.S.A.* 2A:15-55, which are generally violence, mass blocking of ingress and egress at the place of business, threats to customers and other personnel, and physical damage to plant facilities. The duration of a TRO is limited to five days, thus requiring a short return date. The Act also limits the term of an interlocutory or permanent injunction to 6 months.

N.J.S.A. 2A:15-56 governs contempt proceedings for refusal to obey an injunction. The procedure is by OSC, signed by and returnable before a judge other than the one who heard the original application, with a right to a jury and otherwise conforming to the provisions of *R.* 1:10-2.

Q. TRUSTS

1. CONSTRUCTIVE TRUSTS

A constructive trust is a remedial device through which the "conscience of equity" is expressed. *Stewart v. Harris Structural Steel Co., Inc.*, 198 N.J. Super. 255, 266 (App. Div. 1984) (*citing Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380 (Ct. App. 1914)). Where the holder of legal title has acquired property under circumstances that will not allow the retention of the beneficial interest in good conscience, equity converts the title holder into a trustee. *Id.*

New Jersey courts have found the imposition of constructive trusts to be proper in a variety of circumstances. *See D'Ippolito v. Castoro*, 51 N.J. 584 (1968) (imposition of a constructive trust upon co-guarantor for non-payment of a proportionate share of the debt); *Hirsch v. Travelers Insurance Co.*, 134 N.J. Super. 466, 471 (App. Div. 1975) (finding the wrongful diversion and manipulation of insurance policies for the benefit of the deceased's widow to be sufficient grounds

for imposition of a constructive trust); *Hyland v. Simmons*, 152 N.J. Super. 569, 575 (Ch. Div. 1977), *aff'd*, 163 N.J. Super. 137 (App. Div. 1978), *certif. denied*, 79 N.J. 479 (1979) (constructive trust imposed in the amount of alleged bribes accepted by local officials); *McCarthy v. McCarthy*, 319 N.J. Super. 138, 140 (App. Div. 1999) (finding that constructive trust was improperly imposed where second wife had no financial obligation to ex-wife); *Flannigan v. Murson*, 175 N.J. 597 (2003) (finding that constructive trust was properly imposed upon children of deceased mother's assets where widower was unjustly enriched by receipt of insurance proceeds).

Constructive trusts have been imposed by courts under several different theories. A finding of wrongful conduct in the acquisition of property will support the establishment of a constructive trust. *Stewart*, 198 N.J. Super. at 266. The attempt to redress unjust enrichment, even when the acquisition of the property was lawful, is also a valid reason to impose a constructive trust. *Id. See also Flannigan*, 175 N.J. at 608 ("The act, however, need not be fraudulent to result in a constructive trust; a mere mistake is sufficient for these purposes.") In fact, a constructive trust may be imposed to recover property that was acquired lawfully but not used for the purposes intended by the beneficiary. *Tr. of Client's Sec. Fund v. Yucht*, 243 N.J. Super. 97, 131 (Ch. Div. 1989).

The fairness notion on which courts have imposed constructive trusts has also been balanced with the need of the parties in question. *In re Estate of Bilse*, 329 N.J. Super. 158, 169 (Ch. Div. 1999). In *Bilse*, the heirs of a husband were not entitled to pursue his statutory elective share of his wife's estate in absence of any need for support. *Id.* at 158.

Recently, the area of marriage and divorce has also been a popular and fertile ground for issues involving imposition of constructive trusts. *See Seavey v. Long*, 303 N.J. Super. 153, 156 (App. Div. 1997) (holding that decedent's first wife was not entitled to receive widow's benefits and thus constructive trust was improperly imposed on these benefits); *McCarthy v. McCarthy*, 319 N.J. Super. 138, 144-45 (App. Div. 1999) (imposing a constructive trust on property of second wife to secure payment by ex-husband to ex-wife was only appropriate upon finding of fraudulent conveyance); *Raynor v. Raynor*, 319 N.J. Super. 591, 608-09 (App. Div. 1999) (court right to impose constructive trust on pension proceeds of second wife for benefit of first wife and children, where funds used to meet decedent's college cost obligation).

New Jersey courts generally require that a constructive trust be established by clear and convincing evidence. *Dessel v. Dessel*, 122 N.J. Super 119, 121 (App. Div. 1972), *aff'd*, 62 N.J. 141 (1973). *See also Massa v. Laing*, 160 N.J. Super. 443, 447 (App. Div. 1977), *aff'd*, 77 N.J. 227 (1978).

The case most often cited for the proposition that a constructive trust may

be impressed based on a finding of wrongful conduct is *D'Ippolito v. Castoro*, 51 N.J. 584, 588 (1968). In *D'Ippolito*, the Court imposed a constructive trust for the benefit of the guarantor where a co-guarantor, in contravention of the guaranty agreement, failed to pay one-half of a debt owed to the principal creditor. *Id.* at 589. The co-guarantor's failure to pay his share of the debt was considered by the Court to be a "wrongful act." *Id.* The Court explained that a "wrongful act" includes, but is ". . . not limited to, fraud, mistake, undue influence, or breach of a confidential relationship which has resulted in the transfer of property." *Id. See also Hyland v. Simmons*, 152 N.J. Super. 569, 575 (Ch. Div. 1977), *aff'd*, 163 N.J. Super. 137 (App. Div. 1978), *certif. denied*, 79 N.J. 479 (1979).

The court in *Stewart v. Harris Structural Steel Co., Inc.*, 198 N.J. Super. 255 (App. Div. 1984), set forth the general principle that a showing of unjust enrichment, even in the absence of wrongful conduct, may support the establishment of a constructive trust. The defendant in Stewart had been unjustly enriched without committing a wrongful act. *Id.* at 269. The court found that a constructive trust was warranted and held that "[t]here may be a constructive trust where the retention of the property or the beneficial interest would constitute an unconscionable advantage by the holder of legal title, even though its acquisition was not wrongful." *Id.* at 268 (*citing Stretch v. Watson*, 5 N.J. 268, 279 (1959)).

A breach of contract, by itself, does not qualify as a wrongful act sufficient to warrant the imposition of a constructive trust. *Presten v. Sailer*, 225 N.J. Super. 178, 195 (App. Div. 1988). The court refused to impose a constructive trust in the *Presten* case because the breach of an oral partnership agreement was not accompanied by fraud or some other wrongful conduct. *Id.*

Courts have also declined to impose constructive trusts where the record show an absence of unjust enrichment. *Sasco 1997 NI. LLC v. Zudkewich*, 166 N.J. 579 (2001).

2. RESULTING TRUSTS

Assets placed in a resulting trust revert to the settlor. *In re Voorhees*, 93 N.J. Super. 293, 298 (App. Div. 1967). Like a constructive trust, a resulting trust is an equitable remedy designed to prevent unjust enrichment. However, while a constructive trust is imposed without regard to the intent of the settlor, a resulting trust is designed to effectuate the settlor's intent. *In re Kovalyshyn*, 136 N.J. Super. 40, 45 (Hudson Cnty. Ct. 1975) (*citing* 1 SCOTT ON TRUSTS Section 23 (3d. ed. 1967)).

A resulting trust may be imposed if:

(1) an express trust fails in whole or in part;

(2) an express trust has been fully performed without exhausting the trust; or

(3) property is purchased and the purchase price is paid by a person who directs the vendor to convey the property to another person.

See 5 William F. Fratcher, SCOTT ON TRUSTS Section 404.1 (4th ed. 1989). In those situations, trust assets revert to the settlor unless the settlor intended a different disposition. *Id.* A court may look at parol evidence in order to determine the settlor's intent. *In re Gonzalez*, 262 N.J. Super. 456, 461-462 (Ch. Div. 1992) (*citing* Restatement of Trusts, Second § 412, comment h (1959)). If a purchase of property is involved, the relationship between the parties becomes a key element in determining the purchaser's intent. In many instances, the relationship between the parties indicates that the purchaser intended the property to be a gift. If the purchaser intended the property to be a gift, no resulting trust arises. *Weisberg v. Koprowski*, 17 N.J. 362, 371-373 (1955); *see also Bhagat v. Bhagat*, 217 *N.J.* 22 (2014).

The Chancery Division addressed the issue of what should happen to surplus funds in trusts funded by public donations once it becomes clear that the purpose of the fund cannot be established. In *In re Gonzalez*, 262 N.J. Super. at 457, the co-trustee of a fund established to pay for his wife's bone marrow transplant sought permission to withdraw the balance of the account after his wife had died. The co-trustee husband argued that no resulting trust should be imposed — i.e., the money should not be returned to the donors — because such a disposition of the funds would be contrary to the intent of many of the contributors. In support of his argument, the co-trustee husband offered certifications of several donors indicating that had they known the woman would die before the operation could occur, they would have wanted the surplus funds to be distributed to surviving family members. The Chancery Division, however, decided that since the newspaper articles prompting the donations focused on the health of the wife rather than the financial situation of the family, the surplus funds would be placed in a resulting trust and distributed pro rata to all identifiable donors. *Id.*

R. COMPELLING AN ACCOUNTING

Typically, actions to compel an accounting involve probate matters. *See* generally, Probate Practice, *infra*. However, courts have compelled an accounting in other situations. For example, in *Wear-Ever Aluminum, Inc. v. Townecraft Industries, Inc.*, 75 N.J. Super. 135 (Ch. Div. 1962), the court held that the defendant, a competitor corporation which maliciously interfered with the existing business and contractual relations of another corporation by recruiting many of their personnel, was compelled to make an accounting to the plaintiff corporation. The accounting

was to include the lost profits attributable to defendant's improper pirating of personnel from the plaintiff corporation.

Compelling an accounting is an age-old equitable remedy, and was popular in the courts many years ago. *See Lippincott v. Barton*, 42 N.J. Eq. 272 (Ch. 1886) (equity has no jurisdiction to compel an accounting for waste); *Hartson v. Elden*, 58 N.J. Eq. 478 (Ch. 1899) (establishing a limited statutory right of succeeding administrators to sue their predecessors to compel an accounting); *Holcomb v. Coryell*, 12 N.J. Eq. 289 (1857) (court may require security for trust fund where trustee refuses to account); *Van Imwegen v. Van Imwegen*, 4 N.J. 46 (1950) (Chancery court may compel husband to make an accounting when he has received wife's money).

S. ESCHEAT

By escheat the State takes title to property having no owner or an unknown owner. *Kutner Buick, Inc. v. Strelecki*, 111 N.J. Super. 89 (Ch. Div. 1970). Escheat derives from the right of the sovereign as original and ultimate proprietor of all property within its jurisdiction. *Commonwealth of Penna. v. Kervick*, 114 N.J. Super.1 (Ch. Div. 1971), *rev'd on other grounds*, 60 N.J. 289 (1972). The purpose of escheat laws is not only to enrich the State but also to put into active use funds that are unclaimed and lying dormant. *Id.* The Chancery division has jurisdiction to enter a judgment of escheat. *In re Somoza*, 186 N.J. Super. 102, 106 (Ch. Div. 1982).

The escheat of real property is governed by *N.J.S.A.* 2A:37-1, *et seq*. The Uniform Unclaimed Property Act (1981), *N.J.S.A.* 46:30B-1, *et seq.*, controls the escheat of all other property. Because an escheat is a forfeiture, the law is strictly construed. *State v. Kugler*, 120 N.J. Super. 21 (App. Div. 1972).

The Uniform Act provides that any unclaimed intangible property is payable to the State of the last known address of the owner. If that information is unknown or that State does not assert a claim to the property, it is payable to the State of the holder's domicile. Title to the property does not vest in the State, but remains in the owner. The State takes custody until the owner or his successors assert a claim. Until a successful claim is made, the State has full use of the property. For a discussion of the validity of contracts to locate, deliver, recover or assist in the recovery of abandoned property *see Haven Savings Bank v. Zanolini*, 416 N.J. Super 151 (App. Div. 2010) (discussing the application of *N.J.S.A.* 46:30B-106).

There has been debate over what constitutes the government's "holding" of funds. *See Clymer v. Summit Bancorp*, 171 N.J. 57, 67-68 (2002) (holding that the proceeds of public agency bonds in the hands of a private entity are effectively held by a governmental unit and the one-year dormancy period of the Uniform

Unclaimed Property Act, applies to such proceeds).

When an intestate estate heir's whereabouts are unknown, the funds are held by the government rather than distributed to decedent's other heirs. *In re Estate of Peterson*, 316 N.J. Super. 549, 552-53 (Ch. Div. 1998).

The State is also permitted to accept reimbursement for its costs and legal fees incurred in conducting inquiries that lead to the discovery and location of next-of-kin in escheat proceedings. *See In re Volkmar*, 183 N.J. Super. 512, 513-14 (Ch. Div. 1982).

As to the priority of a pending escheat action over a subsequently attempted surrogate's administration, and the propriety of consolidating the two, *see In re Somoza*.

The U.S. Supreme Court has held that, primarily, unclaimed corporate debts escheat to the state of each creditor's last known address. If a creditor's last known address is unavailable, a secondary rule provides that the property escheats to the debtor's state of incorporation. *Texas v. New Jersey*, 379 U.S. 674, 681 (1965). In the case where unclaimed securities distributions are held by intermediary brokers and banks for beneficial owners who cannot be identified or located, the intermediary is the "debtor" and the property escheats to the intermediary's state of incorporation. *Delaware v. New York*, 507 U.S. 490 (1992). In 2012, the Third Circuit partially upheld a preliminary injunction enjoining the application of *N.J.S.A.* 46:30B-42.1(c). *N.J.S.A.* 46:30B-42.1(c) requires that the balance of abandoned gift cards, in the absence of a last known address of the card's owner, escheat to the State where the gift card was purchased, known as "place-of-purchase presumption." The court held that this provision of the statute is likely unconstitutional and preempted by the rule set forth in *Texas v. New Jersey. N.J. Retail Merchants Ass'n. v. Sidamon- Eristoff*, 669 F.3d 374, 392-93 (3d Cir. 2012). However, the Court upheld the injunction regarding the collection of data requirements of the statute.

The courts also have discretion in determining what constitutes intangible personal property subject to escheat per *N.J.S.A.* 46:30B. For example, in *In re November 8, 1996 Determination of the State of New Jersey Unclaimed Property Office*, 309 N.J. Super. 272, 278 (App. Div. 1998), *aff'd*, 156 N.J. 381 (1998), the court determined that unclaimed hotel gift certificates were not subject to escheat, since they were not redeemable for money, and therefore the Legislature could not have intended for them to be categorized as "intangible personal property" subject to escheat.

T. EXHUMATION

Pursuant to *N.J.S.A.* 40A:9-50, the Superior Court may authorize a county

medical examiner to disinter a body for examination or autopsy. Apart from any statutory authority, the traditional equitable jurisdiction of a court enables it to grant permission to disinter. *Petition of Sheffield Farms Co.*, 22 N.J. 548, 553 (1956); *Sherman v. Sherman*, 330 N.J. Super. 638, 646 (Ch. Div. 1999) (denial of injunction request by decedent's children to enjoin burial planned by his allegedly estranged wife since decedent's children could not satisfy the *Crowe v. DeGioia* factors for the grant of injunctive relief); *Harris v. Borough of Fair Haven*, 317 N.J. Super. 226, 234 (Ch. Div. 1998) (holding that municipality was not obligated to act affirmatively to protect abandoned graveyard)." In England, the ecclesiastical courts had exclusive jurisdiction over the dead. *Sheffield Farms*, 22 N.J. at 555. Accordingly, early common law refused to recognize property rights in the body of the deceased person. *Id.* With the repudiation of the ecclesiastical courts in the American colonies, jurisdiction over these matters passed to the temporal courts. *Id.*

Under the New Jersey Cemetery Act of 2003, *N.J.S.A.* 45:27-1 to 38, remains may be disinterred without court order if (1) "the surviving spouse, adult children and the owner of the interment space authorize removal in writing;" (2) a disinterment permit is issued and (3) "the cemetery finds that removal is feasible." *N.J.S.A.* 45:27-23(a); *Marino v. Marino*, 200 N.J. 315 (2009) (while the internment statute, *N.J.S.A.* 45:27-22, may allow a surviving spouse sole discretion in deciding the manner of internment, the disinterment statute, *N.J.S.A.* 45:27-23, requires the authorization of the "surviving spouse, adult children and the owner of the interment space" to disinter remains without court order). When seeking a court order to disinter remains, by tradition, the law does not favor removal or disturbance of a decedent's remains based upon a private right. *Camilli v. Cemetery*, 244 N.J. Super. 709, 712 (Ch. Div. 1990); *Lascurian v. City of Newark*, 349 N.J. Super. 251, 281 (App. Div. 2002) (finding that decades after decedent's burial, decedent's daughter no longer had entitlement to decedent's remains). Simply put, "a family's property interest in a deceased family member's body is restricted and ceases upon burial." *In re the Estate of Thomas*, 431 N.J. Super 22, 37 (App. Div. 2013) (courts should first explore evidentiary and scientific alternatives to disinterment).

Instances where courts may order disinterment include criminal investigations, investigations into the cause of death, the sale of lands upon which bodies have been buried, or the removal of bodies to other locations. *Camilli*, 244 N.J. Super. at 713; *Acevedo v. Essex County*, 207 N.J. Super. 579, 586 (Law Div. 1985) (after interment, father has no rights in son's body); *Sherman*, 330 N.J. Super. at 646. Exhumation is considered by courts to be a serious act which the court will not order without a showing of exceptional circumstances. *See Bruning v. Eckman Funeral Home*, 300 N.J. Super. 424, 432 (App. Div. 1997). The *Bruning* court held that, despite authority of court to ultimately decide disposition of decedent's remains, decedent's directions

are entitled to respectful consideration and are allowed great weight. *Id.* at 429. The *Bruning* court also points out, however, that special consideration is required in cases that would require exhumation to comply with the decedent's express desires. *See id.* at 432 (*citing* Frank D. Wagner, Annotation, *Enforcement of Preference Expressed by Decedent as to Disposition of His Body After Death*, 54 A.L.R.3d 1037, 1044 (1974)). This is true despite the fact that a prosecutor can obtain a court order for the disinterment of a body without giving next of kin notice. *N.J.S.A.* 40A:9-50.

U. SETTING ASIDE FRAUDULENT CONVEYANCES

At common law, a court of equity would set aside transfers made to defraud creditors. *See Smith v. Whitman*, 75 N.J. Super. 228, 236 (App. Div. 1962), *modified on other grounds*, 39 N.J. 397 (1963). *See also Del Mastro v. Grimado*, 2010 N.J. Super. LEXIS 2315 *15 (March 8, 2010) (while common law claims of a fraudulent transfer repose in the Chancery Division, if the issue is ancillary, the Law Division may take such issue from the jury and sit in equity to decide the issue)." This is true even if the conveyance was not fraudulent at its inception because equity will intervene to prevent the subsequent fraudulent use. *Baker v. Josephson*, 137 N.J. Eq. 377 (Ch. Div.), *rev'd in part on other grounds*, 138 N.J. Eq. 107 (E. & A. 1946). Neither judgments nor corporate entity can prevent equity from setting aside a fraudulent conveyance perpetrated by legal means. *Goldberg v. Yeskel*, 129 N.J. Eq. 404, 408 (Ch. Div.), *aff'd*, 129 N.J. Eq. 410 (E. & A. 1941). Today, fraudulent conveyances are governed by the Fraudulent Conveyances Act, *N.J.S.A.* 25:2-1 to -6 and the Uniform Fraudulent Transfer Act, *N.J.S.A.* 25:2-20 to -33. *See Trus Joist Corp. v. Treetop Associates, Inc.*, 97N.J. 22, 30 (1984) (Uniform Fraudulent Conveyance Act controls inconsistencies between Fraudulent Conveyances Act and the Uniform Act).

The Uniform Fraudulent Transfer Act, effective January 1, 1989, concerns fraudulent transfers of real and personal property. The law declares that a transfer made or obligation incurred with the intent to hinder, delay, or defraud present and future creditors is fraudulent. *N.J.S.A.* 25:2-25 sets forth the factors utilized in determining fraudulent intent.

N.J.S.A. 25:2-25, entitled "Transfers fraudulent as to present and future creditors," provides:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, [broadly defined] whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or

b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due.

N.J.S.A 25:2-26 also sets forth a non-exhaustive list of eleven factors, referred to as "badges of fraud," that a court may consider in determining whether a party has established actual intent to hinder, delay, or defraud under *N.J.S.A.* 25:2-25(a). *Banco Popular North America v. Gandi*, 184 N.J. 161, 176 (2005); *Firmani v. Firmani*, 332 N.J. Super. 118, 121 (App. Div. 2000); *Gilchinsky*, 159 N.J. at 476. Badges of fraud represent circumstances that so frequently accompany fraudulent transfers that their presence gives rise to inferences of intent. *Id.* The presence of a single "badge" may be enough to stamp a transaction as fraudulent. *Id. at 476.* Several "badges" found in the same transaction give rise to a strong inference of fraudulent intent. *Id. See also The Guarantee Co. of North America USA v. SBN Enterprises*, 2011 U.S. Dist. LEXIS 82093 (D.N.J. July 27, 2011) (invalidating transfer of property as fraudulent based upon finding that five statutory indicators of fraud were present).The badges of fraud as set forth in *N.J.S.A.* 25:2-26 are as follows:

a. The transfer or obligation was to an insider;

b. The debtor retained possession or control of the property transferred after the transfer;

c. The transfer or obligation was disclosed or concealed;

d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

e. The transfer was of substantially all the debtor's assets;

f. The debtor absconded;

g. The debtor removed or concealed assets;

h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

i. The debtor was insolvent or became insolvent shortly after the transfer was

made or the obligation was incurred;

j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and

k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

A constructively fraudulent transfer/obligation is voidable only by a creditor in existence at the time the transfer is made or obligation incurred.

The new Act eliminates the transferee's or obligee's good faith as an issue in determining whether there was sufficient consideration. However, a showing by the transferee or obligee that sufficient consideration has been given in good faith is a complete defense. *N.J.S.A.* 25:2-30(a). This is so even if the debtor is proven to have intended to hinder, delay, or defraud creditors. A transferee or obligee who has acted in good faith, but, nevertheless, has given less than sufficient consideration, is permitted a reduction in liability to the extent of the value given. Sufficient consideration is determined as the reasonably equivalent value.

Preferential transfers made when insolvent to an insider to satisfy an antecedent debt are invalid when the insider had reason to believe the debtor was insolvent. Here too, however, only an existing creditor may void this type of transaction.

Fraudulent conveyance claims allow a creditor to undo a debtor's wrongful transaction so as to bring the property within the ambit of collection. *Banco Popular*, 184 N.J. at 177; *Gilchinsky*, 159 N.J. at 475; *Jecker v. Hidden Valley., Inc.*, 422 N.J. Super. 155, 164 (App. Div. 2011). This serves the purpose of the Fraudulent Transfer Act, which is to prevent a debtor from placing his or her property beyond a creditor's reach. *See Gilchinsky*, 159 N.J. at 475 (*citing In re Wintz Companies*, 230 B.R. 848, 859 (8th Cir. 1999)). "A debtor cannot deliberately cheat a creditor by removing his property from the jaws of execution." *Barsotti v. Merced*, 346 N.J. Super. 504, 515 (App. Div. 2002).

In determining whether a transfer constitutes a fraudulent conveyance, there are two relevant inquiries. *See Gilchinsky*, 159 N.J. at 475-76. The first is "'whether the debtor [or person making the conveyance] has put some asset beyond the reach of creditors which would have been available to them at some point in time but for the conveyance.'" *Id.* at 475 (*citations omitted*); *Rowen Petrol. Properties v. Hollywood Tanning Sys., Inc.*, 2011 U.S. Dist. LEXIS 147886 (D.N.J. December 23, 2011). The second is whether the debtor transferred property with an intent to defraud, delay, or hinder the creditor. *Id.* Transfers calculated to hinder, delay, or defeat collection of a known debt are deemed fraudulent because of the debtor's intent to withdraw the assets from the reach of process. *See id., citing Klein*, 251

F. Supp. at 2; *In re Joel Kimmel*, 131 B.R. at 229. The individual who seeks to set aside the conveyance bears the burden of proving actual intent. *Barsotti*, 346 N.J. Super. at 515-16.

Pursuant to *N.J.S.A.* 25:2-29, defrauded creditors have various remedies. The creditor may request that the court do any of the following:

a. set aside the transfer to the extent necessary to satisfy his claim;

b. enjoin the transferee or debtor against further disposition of the asset or property;

c. appoint a custodian of the property; or

d. any other equitable relief that the circumstances require.

The time limitations for creditors to bring such an action are set forth in *N.J.S.A.* 25:2-31.

NOTE: For fraudulent transfers in the non-profit corporation setting, see *N.J.S.A.* 15A:14-10, *et seq*.

NOTE: Under the provisions of 11 U.S.C. § 548, (the Bankruptcy Act), the trustee is permitted to avoid a transfer occurring within two years prior to the date of filing, if the transfer violated a proscription of the statute.

V. INJUNCTIVE RESTRAINT OF A NUISANCE

A private nuisance is an unreasonable interference with the use and enjoyment of land. The determination of a private nuisance is made on a case-by-case basis and requires the court to balance competing property interests. *Sans v. Ramsey Golf and Country Club*, 29 N.J. 438 (1959); *Ruiz v. Kaprelian*, 322 N.J. Super. 460, 472 (App. Div. 1999); *Smith v. Jersey Cent. Power & Light Co.*, 421 N.J. Super. 374, 392 (App. Div.), *certif. denied*, 209 N.J. 96 (2011) (negligence is not an essential element of the nuisance tort). *See also* 4 Restatement, Torts 2d at 85 (defines a private nuisance as "a non-trespassing invasion of another's interest in the private use and enjoyment of land").

In *Sans*, the Supreme Court held that "[t]he elements are myriad. . . . The utility of the defendant's conduct must be weighed against the quantum of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of a neighbor's land. . . ." *Sans*, 322 N.J. Super. at 448-49; s*ee S. Camden Citizens in Action v. N.J. Dept. of Envtl. Prot.*, 254 F. Supp. 2d 486 (D.N.J. 2003) (operation of cement grinding facility in an area zoned industrial did not constitute private nuisance).

Nuisance occurs where the "character, volume, frequency, duration, time and locality of the noise[]" unreasonably interferes with the use of a neighbor's land. *Traetto v. Palazzo*, 436 N.J. Super. 6, 12-13 (App. Div. 2014).

Noise may, under the principles of unreasonable use, constitute an actionable private nuisance. *See, e.g., Benton v. Kernan*, 130 N.J. Eq. 193, 197-98 (E. & A 1941); *Lieberman v. Saddle River Twp.*, 37 N.J. Super. 62, 67 (App. Div. 1955); *Rose v. Chaikin*, 187 N.J. Super. 210, 217 (Ch. Div. 1982).

The use of one's land cannot be a nuisance per se, and accessory uses are impliedly permitted, even where they are not expressly described or allowed in the zoning ordinance. *Colts Run Civic Ass'n v. Colts Neck Twp. Zoning Bd. of Adjustment*, 315 N.J. Super. 240, 249 (Law Div. 1998) (holding that maintenance of pigeon coop as hobby was permitted accessory use), *citing Boublis v. Garden State Farms, Inc.*, 122 N.J. Super. 208, 216-17 (Law Div. 1972) (heliport is incidental to corporate property use). Moreover, "private nuisance may exist even where there is compliance with controlling governmental regulations." *Traetto*, 436 N.J. Super. at 13 (playing drums may constitute a nuisance despite no violation of noise ordinance). However, the usual judicial rule is that a use that is not expressly provided for is prohibited. *See Colts Run Civic Ass'n*, 315 N.J. Super. at 249, *citing Sun Co., Inc. v. Zoning Bd. of Adjustment of Borough of Avalon*, 286 N.J. Super. 440 (App. Div. 1996); *Dapurificacao v. Zoning Bd. of Adjustment of the Twp. of Union*, 377 N.J. Super. 436, 442-43 (App. Div. 2005) (maintenance of a pigeon coup is not a permitted accessory use in a residential zone).

In determining whether nuisance is present in a given situation, the focus should be on the actual problems that a particular activity poses, and not whether a use may be considered categorically "normal." *See id., citing Shim v. Washington Twp. Planning Bd.*, 298 N.J. Super. 395, 404 (App. Div. 1997). It is inappropriate to use a primarily subjective standard in determining whether something is a nuisance. *State v. Friedman*, 304 N.J. Super. 1, 7 (App. Div. 1997) (wrong for trial court to use a purely subjective standard in determining whether a dog's barking constituted a nuisance). A qualitative analysis of the factors adopted by the Restatement, as explained above, is the appropriate means of determining nuisance. *Paternoster v. Shuster*, 296 N.J. Super. 544, 557 (App. Div. 1997).

In *Rose v. Chaikin*, 187 N.J. Super. 210 (Ch. Div. 1982), the adjoining property owners obtained a temporary restraining order restricting the use of their neighbor's privately owned windmill. The plaintiffs' alleged that the energy producing windmill, located 10 feet from the property line, was a private nuisance, producing offensive noise levels and prohibiting plaintiffs' use and enjoyment of their property.

The Chancery court held that noise may be an actionable private nuisance

entitling a party to injunctive relief where the following elements are present: (1) injury to the health and comfort of ordinary people in the area, and (2) the unreasonableness of the injury under all circumstances. *Id.* at 217. Here, the court held that the windmill constituted actionable nuisance since the utility of the windmill was outweighed by the harm it created.

NOTE: In *Sheppard v. Twp. of Frankford*, 261 N.J. Super. 5 (App. Div. 1992), the Appellate Division held that in an appropriate instance, a permanent injunction may be issued to abate an activity found to be a continuing nuisance even if a jury has determined that the plaintiff has suffered only nominal damages. The Sheppard court then listed the factors that must be considered by any court resolving an application for injunctive relief. They are as follows:

> (1) the character of the interest to be protected; (2) the relative adequacy of the injunction to the plaintiff as compared with other remedies; (3) the unreasonable delay in bringing suit; (4) any related misconduct by plaintiff; (5) the comparison of hardship to plaintiff if relief is denied, and hardship to defendant if relief is granted; (6) the interests of others, including the public; and (7) the practicality of framing the order or judgment.

Id. at 10, *citing* Restatement (Second) of Torts Section 936 (1977).

For a discussion of the law of nuisance and trespass (and strict liability implications), *see Burke v. Briggs*, 239 N.J. Super. 269 (App. Div. 1990).

W. ESTABLISHMENT OF A LOST TITLE DOCUMENT

Courts of equity have jurisdiction to establish lost documents. *Motley v. Darling*, 86 N.J. Eq. 185 (E. & A. 1916); *Farber v. Plainfield Trust Co.*, 136 N.J. Eq. 183 (Ch. Div. 1945). Courts have been divided over which standard should be applied in establishing lost title documents. *See Borough of Sayreville v. Bellefonte Insurance Co.*, 320 N.J. Super. 598, 602 (App. Div. 1998). Some decisions apply the clear and convincing evidence standard, while others use the standard of preponderance of the evidence. *Id.* In the case of a lost business contract, the Chancery Court elected to apply the clear and convincing evidence standard, stating that the reason for the high standard was that the policy itself was central to the parties' obligations. *Id.* at 602-3, *citing Zuckermandel v. Zuckermandel*, 135 N.J. Eq. 598, 599 (Ch. Div. 1944). In the case of a missing life insurance policy, however, the court elected to apply a preponderance of evidence standard so long as no claims of fraud existed. *Id.* at 604.

If an instrument merely serves as evidence of an underlying obligation, such as a contract, bond, or note, then the underlying obligation represented by the

document does not change if the document is lost or destroyed, and such documents may therefore be established by judicial declaration. *Karafa v. New Jersey State Lottery Commission*, 129 N.J. Super. 499, 505 (Ch. Div. 1974). Conversely, when the surrender of a document is required to surrender the debt or obligation, as in the case of a lottery ticket, such document may not be established by the courts. *Id. See also Ryan v. New Jersey Racing Commission*, 336 N.J. Super. 237, 240 (App. Div. 2001) (restricting payment to persons who physically possessed a winning ticket).

N.J.S.A. 2A:47-1, *et seq*., permits an action to establish the existence of any lost or destroyed deed or other instrument relating to title or other real or personal property to be brought in a summary fashion. *See also Petak v. City of Paterson*, 291 N.J. Super. 234, 242-43 (App. Div. 1996), *certif. denied*, 146 N.J. 566 (1996).

X. COMPELLING AN ARBITRATION/ALTERNATIVE DISPUTE RESOLUTION

The Uniform Arbitration Act, *N.J.S.A.* 2A:23B-1, *et seq.*, and the New Jersey Alternative Procedure for Dispute Resolution Act, *N.J.S.A.* 2A:23A-1, *et seq.*, governs arbitration and arbitration proceedings in New Jersey. A provision in a written contract to settle a controversy by arbitration is valid, enforceable and irrevocable except as such grounds as exist in law or in equity for the revocation of a contract. *N.J.S.A.* 2A:23B-6; *N.J.S.A.* 2A:23A-2.

Courts do retain some discretion as to arbitration and determining whether certain disputes are subject to arbitration. *See Gloucester City Bd. of Educ. v. Am. Arbitration Ass'n,* 333 N.J. Super. 511, 520 (App. Div. 2000). The question whether a contract required a particular dispute to be submitted to arbitration is an issue to be determined by the courts, not arbitrators. *See id.* at 520-21. However, it is within the discretion of the arbitrator to determine whether the conditions precedent to arbitration have been met. *Commerce Bank v. DiMaria Constr., Inc.*, 300 N.J. Super. 9, 15 (App. Div. 1997), *certif. denied*,151 N.J. 73 (1997), *cert. denied*, 522 U.S. 1116 (1998). Where the parties dispute whether a given issue is arbitrable, the party desiring arbitration should seek an order from the Superior Court compelling arbitration. *Trentacost v. City of Passaic*, 327 N.J. Super. 320, 323 (App. Div. 2000), *citing Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 153-54 (1978); s*ee also Curtis v. Cellco P'ship*, 413 N.J. Super. 26, 37 (App. Div. 2010) (enforcing arbitration of a statutory claim where the clause was "unambiguous, highlighted, and easily understood"). An order compelling arbitration, regardless of whether the court stays or dismisses the action, is a final judgment appealable as of right. *Wein v. Morris*, 194 N.J. 364, 380 (2008). If the court holds that the dispute is subject to arbitration, then all procedural matters should be decided by the arbitrator. *See id.* at 325, *citing John Wiley and Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1984);

Mahony-Troast Constr. Co. v. Supermarkets Gen. Corp., 189 N.J. Super. 325, 331 (App. Div. 1983). In determining whether the parties have agreed to arbitrate, state contract law principles apply. *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252, 270 (App. Div. 2000), *certif. denied*, 165 N.J. 527 (2000), *citing First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Caruso v. Ravenswood Developers, Inc.*, 337 N.J. Super. 499, 505 (App. Div. 2001); *Parker v. Hahnemann Univ. Hosp.*, 234 F. Supp. 2d 478 (D.N.J. 2002); *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 85-86 (2002).

The duty to arbitrate and the scope of arbitration are dependent solely on the agreement of the parties. *Quigley*, 330 N.J. Super. at 270-71. In the absence of a consensual understanding, however, neither party is entitled to force the other to arbitrate their dispute, and subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be. *Id.* at 271, *citing In re Arbitration Between Grover and Universal Underwriters Ins. Co.*, 80 N.J. 221, 228-29 (1979); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") However, a non-signatory to an arbitration agreement may be compelled to arbitrate where there is an agency relationship with a signatory. *Hirsch v. Amper Financial Services, LLC*, 215 N.J. 174, 192-93 (2013).

As the court stated in *Grasser v. United Healthcare Corp.*, 343 N.J. Super. 241, 249 (App. Div. 2001), "a purported waiver of the right to judicial enforcement of statutory rights and the substitution of an exclusive arbitration remedy will be enforced only if it is clear and explicit." *See also Garfinkel v. Morristown Obstetrics & Gynecology Assoc., P.A.*, 168 N.J. 124, 132 (2001) (finding an employment agreement's arbitration clause insufficient to constitute a waiver of plaintiff's remedies under LAD); *Gras v. Associates First Capital Corp.*, 346 N.J. Super. 42 (App. Div. 2001), *certif. denied*, 171 N.J. 445 (2002). (finding waiver of rights in arbitration clause to be sufficiently notorious and specific to be enforceable).

In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of clear and unmistakable evidence to the contrary). *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2407 (2003). In deciding whether a particular dispute may be subject to arbitration, courts should consider whether compelling arbitration under the circumstances would be unfair or inequitable, and whether it would deprive either party of any fundamental or substantive rights. *Littman v. Witter*, 337 N.J. Super 134, 146 (App. Div. 2001), *citing Singer v. Commodities Corp.*, 292 N.J. Super. 391, 407 (App. Div. 1996); *see also Ameristeel Corp. v. Int'l Bhd. of Teamsters*, 267 F.3d 264 (3d

Cir. 2001) (non-consenting successor employer was not required to arbitrate under collective bargaining agreement's arbitration provision); *Moore v. Woman to Woman Obstetrics & Gynecology, LLC*, 416 N.J. Super 30, 45 (App. Div. 2010) (finding a medical malpractice arbitration agreement unconscionable where the patient was not given a copy of the agreement, the agreement was one-sided, and it sought to additionally bind both the patient's spouse and her unborn child). However, procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide. *Howsam*, 573 U.S. at 84; *Fawzy v. Fawzy*, 199 N.J. 456, 482-83 (2009) (declining to enforce an arbitration agreement because the parties failed to understand the consequences of removing custody dispute to arbitration but finding that, with certain protections, *i.e.*, transcripts of proceedings, custody may be subject to arbitration). "So, too, the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability." *Howsam*, 573 U.S. at 84. Courts in New Jersey consider numerous factors in a totality of the circumstances review when determining whether a party waived its right to arbitration. *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265, 280-81 (2013) (finding waiver where the parties litigated for 21 months and then sought to invoke arbitration three days before trial).

To be bound to arbitrate, however, the parties must expressly provide for an arbitration clause in their contract. *Gloucester City Bd. of Educ.*, 333 N.J. Super. at 523. Contract language giving the power to compel arbitration should be unambiguous. *Padovano v. Borough of East Newark*, 329 N.J. Super. 204, 212 (App. Div. 2000); *see also Gen. Elec. Co. v. Deutz Ag.*, 270 F.3d 144, 154 (3d Cir. 2001); *Alamo Rent A Car, Inc. v. Galarza*, 306 N.J. Super. 384, 389 (App. Div. 1997) (employees may agree to arbitrate claims under Law Against Discrimination); *N.J.S.A.* 2A:23A-1 *et seq.*, the New Jersey Alternative Dispute Resolution Act. In New Jersey, even a manifest disregard of the law is not a ground for overturning an arbitration award, unless the agreement so provides. *See Tretina Printing, Inc. v.Fitzpatrick & Associates, Inc.*,135 N.J. 349 (1994). In *Tretina*, the New Jersey Supreme Court partially overturned *Perini v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479 (1992), and quoted the concurring opinion in *Perini*, stating:

> Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They can be corrected or modified only for very specifically defined mistakes as set forth in *N.J.S.A.* 2A:24-9]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award. For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, I would hold that

> the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that the arbitrators shall render their decision only in conformance with New Jersey law, and that such awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that. I doubt if many will. And if they do, they should abandon arbitration and go directly to the law courts.

Tretina, 35 N.J. at 359 (*quoting Perini*, 129 N.J. at 548-49).

In *Kalman Floor Co., Inc. v. Joseph L. Muscarelle, Inc.*, 196 N.J. Super. 16 (App. Div.), *aff'd*, 98 N.J. 266 (1984), the court found that an agreement to arbitrate on demand of a general contractor was enforceable even though the sub-contractor had no reciprocal right to compel such an arbitration.

Arbitration is generally favored by the courts. *Public Utility Const. and Gas Appliance Workers v. Public Ser. Elec.& Gas Co.*, 44 N.J. Super. 316 (Law Div. 1957), *rev'd on other grounds*, 26 N.J. 145 (1958); *See also Garfinkel*, 168 N.J. at 132 ("Because of the favored status afforded to arbitration, an agreement to arbitrate should be read liberally in favor of arbitration."); *Caruso*, 337 N.J. Super. at 504. *Marchak v. Claridge Commons, Inc.*, 134 N.J. 275, 281 (1993); *Young v. Prudential Ins. Co. of Amer.* 297 N.J. Super. 605, 617 (App. Div. 1997), *certif. denied*, 149 N.J. 408 (1997); *Singer v. Commodities Corp.*, 292 N.J. Super. 391, 401 (App. Div. 1996); *Alamo*, 306 N.J. Super. at 389; *see also Quigley*, 330 N.J. Super. at 262; *Martindale*, 173 N.J. at 84-85.

However, as a result of a growing concern that large companies are using arbitration provisions as a weapon to foreclose consumers from filing certain lawsuits, specifically class actions, there have been efforts by courts to restrict arbitration clauses by focusing on contractual language and principles of contract formation, such as mutual assent. *See Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 294 (2016) ("Under the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16, state law governs whether parties to a consumer contract have agreed to arbitrate their disputes"); *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 85 (2002) (quoting 9 U.S.C.A.§ 2) (stating the FAA "permits states to regulate . . . arbitration agreements under general contract principles," and a court may invalidate an arbitration clause "'upon such grounds as exist at law or in equity for the revocation of any contract.'"); *Noble v. Samsung Elecs. Am., Inc.*, 682 F. Appx 113, 116 (3d Cir. 2017) (declining to enforce an arbitration clause and compel the arbitration of a consumer claim when the document in which the clause was in a warranty booklet for the product

and the terms were buried in such a manner that failed to give the consumer reasonable notice of its existence).

The New Jersey Supreme Court has held that an arbitration provision in a consumer contract that fails to clearly and unambiguously explain that arbitration is a waiver of a consumer's common-law and/or constitutional right to pursue relief in a court of law is unenforceable. *Atalese v. U.S. Legal Servs. Grp.*, 219 N.J. 430, 436 (2014), *cert. denied*, __ U.S. __, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015). This is because mutual assent requires that the parties have an understanding of the terms to which they have agreed and since an average member of the public may not know - without some explanatory comment - that arbitration is a substitute for the right to seek judicial relief, the provision must be clear this right is being waived. It should be noted, however, that the "clarity" requirement set forth in *Atalese* may not apply in all circumstances, and may be limited to situations such as those involving a consumer contract of adhesion where one party, like a large corporation, possesses superior bargaining power in relation to an individual consumer.

NOTE: As to the authority of an arbitrator to resolve a given dispute, *see Commc'n Workers of Am., Local 1087 v. Monmouth County Bd. of Soc. Services*, 96 N.J. 442 (1984). *Office & Prof'l Employees Int'l Union Local 32, AFL-CIO v. Camden County Mun. Utilities Auth.*, 362 N.J. Super. 432 (App. Div. 2003); *Port Auth. Police Sergeants Benevolent Ass'n, Inc. v. Port Auth. of N.Y. and N.J.*, 340N.J. Super. 453 (App. Div. 2001).

Since 2003, New Jersey has had parallel statutes governing arbitration. *N.J.S.A.* 2A:23B-1, *et seq.*, is a modified version of the revised *Uniform Arbitration Act* ("the Arbitration Act")and *N.J.S.A.* 2A:23A-1,*et seq.*, the *Alternative Procedure for Dispute Resolution Act* (APDRA), in which the arbitrator is called an "umpire." The APRDA was enacted, in part, to expand the ability of parties to seek review of an award which had been previously limited. The APDRA provides a general ground for reversal that is not generally found in other acts.

The Arbitration Act specifically permits the parties to choose to expand judicial review of the arbitration award. It provides: "[N]othing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record." *N.J.S.A.* 2A:23B-4e(c). ("Record" is defined as in a writing or information that is electronically stored and retrievable. *N.J.S.A.* 2A:23B-1.) Since the enactment of the Arbitration Act in 2003, the APDRA has fallen into disuse. Note that where the parties have provided for appellate review, the initial review of the arbitration award is made to the Chancery Division. *See Hogoboom v. Hogoboom*, 393 N.J. Super. 509, 515 (App. Div. 2007).

N.J.S.A. 2A:23B-6(b) provides: "The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an Agreement to arbitrate." Thus the arbitrability of an issue is settled if arbitration provision shows a clear intent of the parties to present the question of arbitrability to the arbitrators. An agreement to arbitrate is a contract and "'only those issues may be arbitrated which the parties have agreed shall be.'" *Curtis v. Cellco P'ship*, 413 N.J. Super. 26, 35 (App. Div.) (*quoting Garfinkel*, 168 N.J. at 132), *certif. denied*, 203 N.J. 94 (2010); *Waskevich v. Herold Law, P.A.*, 431 N.J. Super 293, 298 (App. Div. 2013).

Under the New Jersey Arbitration Act there are four statutory bases for vacating an arbitrator's award:

1. Where the award was procured by corruption, fraud or undue means;
2. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
4. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

N.J.S.A. 2A:24-8. Further, an award may also be vacated if "it is contrary to existing law or public policy." *Borough of E. Rutherford v. E. Rutherford PBA Local 275*, 213 N.J. 190 (2013).

NOTE: *See N.J.S.A.* 2A:23B-22 regarding the confirmation of an award and *N.J.S.A.* 2A:23B-23 regarding the vacation of an award.

Where the terms of an arbitration agreement governed by the Federal Arbitration Act do not clearly preclude class arbitration, the arbitrator may interpret the agreement and determine whether it bars class arbitration.

Y. EQUITABLE SUBROGATION

The right of subrogation may arise by way of an express contractual agreement, by statute, or through the judicial device of equity to compel such a discharge of an obligation. *See Perreira v. Rediger*, 330 N.J. Super. 455, 460 (App.

Div. 2000), *rev'd on other grounds*, 169 N.J. 399 (2001). "[S]ubrogation is a device of equity to compel the ultimate discharge of an obligation by the one who in good conscious ought to pay it [and] ... to serve the interests of essential justice between the parties." *Culver v. Ins. Co. of N. Am.*, 115 N.J. 451, 455-56 (1989); *see also Chem. Bank of N.J. v. Bailey*, 296 N.J. Super. 515 (App. Div. 1997).

Under the remedy, a surety, upon performance, is placed in the position of a creditor with respect to that creditor's rights and available securities. *Montefusco Excavating & Contracting Co. v. Middlesex Cty.*, 82 N.J. 519, 523 (1980). Moreover, equity will afford subrogation beyond the conventional case of one who, having existing rights in property, pays the debt of another to protect his own rights. The remedy also will be extended to one who supplies funds to discharge an old lien when the new security, by fraud or mistake, turns out to be defective. *Kaplan v. Walker*, 164 N.J. Super. 130, 138 (App. Div. 1978). The remedy of subrogation is highly favored in the law. *Stevlee Factors, Inc. v. State*, 136 N.J. Super. 461 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 346 (App. Div. 1976); *see also First Fidelity Bank, Nat'l Ass'n, S. v. Travelers Mortgage Services, Inc.*, 300 N.J. Super. 559, 565 (App. Div. 1997).

The right of subrogation may arise by way of an express contractual agreement, by statute, or through the judicial device of equity to compel such a discharge of an obligation. *See Perreira v. Rediger*, 330 N.J. Super. 455, 460 (App. Div. 2000), *rev'd on other grounds*, 169 N.J. 399 (2001).

The doctrine of equitable subrogation is prevalent in insurance disputes. *See M & B Apartments, Inc. v. Teltser*, 328 N.J. Super. 265 (App. Div. 2000); *Perreira v. Rediger*, 169 N.J. 399 (2001). *Carducci v. Aetna US Healthcare*, 247 F. Supp. 2d596 (D.N.J. 2003), *reversed on other grounds sub nom. Levine v. United Healthcare Corp.*, 402 F.3d 156 (3d Cir. 2005). Under the doctrine of equitable subrogation, the duty owed to the insurer is identical to the duty owed to the insured. *See M & B Apartments*, 328 N.J. Super. at 271; *County of Bergen Employee Benefit Plan v. Horizon Blue Cross Blue Shield of N.J.*, 412 N.J. Super. 126, 134-35 (App. Div. 2010). Further, although courts have identified an implied right of subrogation under certain contracts of insurance, such an implied equitable right has not been recognized with respect to all forms of insurance. *See Perreira*, 169 N.J. at 411-12. Thus, while insurance for property damage includes an implied right of subrogation, personal insurance such as health insurance does not. *Id.*

NOTE: For an action for exoneration (action by surety to compel principal to pay debt), *see Atlantic Seaboard Co. v. Borough of Seaside Park*, 36 N.J. Super. 142, 155 (App. Div.), *certif. denied*, 19 N.J. 619 (1955).

Z. LIENS

1. MECHANIC'S LIENS AGAINST PUBLIC FUNDS ARISING FROM MUNICIPAL CONTRACTS

Lien statutes are "remedial and are designed to guarantee effective security to those who furnish labor or materials used to enhance the value of the property of others, and, where the terms of the statute reasonably permit the law should be construed to effect this remedial purpose." *AEG Holdings, LLC v. Tri- Gem's Builders, Inc.*, 347 N.J. Super. 511, 514 (App. Div. 2002).

The procedures involved in the creation and enforcement of mechanic's liens against public funds are codified at *N.J.S.A.* 2A:44-125, *et seq*. A mechanic must file a verified notice of lien claim with the head officer, secretary or clerk of the public agency within 60 days after the work to be performed by the contractor for the agency is either completed or accepted by resolution of the agency. *N.J.S.A.* 2A:44-132.

The mechanic may then bring an action in superior court to enforce the lien. *N.J.S.A.* 2A:44-137. The contractor and all subcontractors referred to in the mechanic's claim must be made parties to the suit. *N.J.S.A.* 2A:44-139. In order for the lien to be enforced, this action must be brought within 60 days after the work to be performed by the contractor for the agency is either completed or accepted by resolution of the agency. The public agency with whom the contract was made must also be made party to the suit under *N.J.S.A.* 2A:44-139. *N.J.S.A.* 2A:44-138. The superior court will then determine the validity and priorities of the liens filed by all the parties. *N.J.S.A.* 2A:44-140. (Alternatively, any contractor, subcontractor or public agency involved, may bring an action to terminate any improperly filed liens).

N.J.S.A. 2A:44-128 defines who may obtain a municipal mechanic's lien. It states that any person, including a mechanic or subcontractor who has a contract for public improvement with a public agency, and who performs any labor or furnishes any materials for the completion of the contract, shall have a lien for the value of the labor or materials.

All mechanic's lien laws should be strictly construed. *Township of Parsippany-Troy Hills v. Lisbon Contractors, Inc*., 303 N.J. Super. 362, 368 (App. Div. 1997), *citing Morris County Indus. Park v. Thomas Nichol Co.*, 35 N.J. 522, 526 (1961). If a party seeking protection has failed to avail itself of statutory protections by filing the appropriate mechanic's lien, then this party is not permitted to achieve the same result through a common law claim. *F. Bender, Inc. v. Joseph L. Muscarelle, Inc*., 304 N.J. Super. 282, 284 (App. Div. 1997); *see also W. Va. Steel Corp. v. Sparta Steel Corp*., 356 N.J. Super. 398 (App. Div. 2003) (where claimant forfeited all right to enforce lien for failure to bring action in county in which real property was located, as explicitly mandated by construction lien

law).

NOTE: *N.J.S.A.* 2A:44-143, *et seq*., provides an additional means of recourse for mechanics who are not paid for materials or labor supplied to a contractor. When the State or any county, municipality or school district enters into a contract for the construction, alteration or repair of any public building or public works, a surety for the contractor must file an additional bond to be used for the payment of any claims for unpaid labor, material and supplies that may be made against the State by any mechanics. *N.J.S.A.* 2A:44-143(a). The surety's obligation under this bond does not extend to any claim against the contractor for damages based on alleged negligence resulting in personal injury, wrongful death or property damage. *N.J.S.A.* 2A:44-143(b). The mechanic seeking reimbursement from the surety bond must furnish the surety with a statement of the amounts due within 90 days after the State accepts the contracted work. *N.J.S.A.* 2A:44-145. In the case of a material supplier, the mechanic seeking reimbursement from the surety bond must furnish the surety with a statement of the amounts due at any time before the expiration of one year from the last date upon which such beneficiary shall have performed actual work or delivered materials to the project. The mechanic must initiate any action against the bond within one year from the date of the State's acceptance of the work. *N.J.S.A.* 2A:44-146. For a detailed discussion of this provision, *see, e.g.*, *D & K Landscaping Co. v. Great American Ins. Co.*, 191 N.J. Super. 448 (App. Div. 1983).

NOTE: The Trust Fund Act, *N.J.S.A.* 2A:44-148, provides additional security to unpaid mechanics. *See Hiller & Skoglund, Inc. v. Atlantic Creosoting Co., Inc.*, 40 N.J. 6 (1963). The Act imposes a trust in favor of unpaid mechanics upon all payments made by the State or any county, municipality, school district or public agency to a contractor pursuant to a contract for any public improvement. The Act reflects a legislative intent that payments received for a project should be applied to cover debts incurred during the project. *Hiller*, 40 N.J. at 21.

In *D & K Landscaping Co. v. Great American Ins. Co.*, 191 N.J. Super. 448 (App. Div. 1983), the Appellate Division addressed the question of whether a similar trust was imposed upon payments made by the State to the surety of a bankrupt contractor. The court noted that the Trust Fund Act itself did not apply because the Act refers only to money paid to a contractor. *Id.* at 451. However, the court recognized that a similar trust, arising out of a common law trust fund theory, may be imposed upon funds paid to a surety. *Id.* at 452. Obviously, the surety, and not the bankrupt contractor, would act as trustee of any such funds.

NOTE: Construction Liens in the private sector are governed by *N.J.S.A.* 2A:44A-1, *et seq*. For a full discussion of the New Jersey Construction Lien Law, see the New Jersey Chapter of Construction Publications, Inc., Lien Law Online © 2012 at www.lienlawonline.com

2. OTHER LIENS

NOTE: *See Ferrante Equipment Co. v. Foley Machinery Co.*, 49 N.J. 432 (1967) (recognizing a common law artisan's lien); *N.J.S.A.* 2A:44-1, *et seq.* (Aircraft Lien Act); *N.J.S.A.* 2A:44-20, *et seq.* (Garagekeeper's Lien Act) (portions of the Garagekeeper's Lien Act have been held unconstitutional, *see*, e.g., *Associates Commercial Corp. v. Wallia*, 211 N.J. Super. 231 (App. Div. 1986)); *N.J.S.A.* 2A:42-1, *et seq.* (landlord's lien for rent); *N.J.S.A.* 2A:44-165, *et seq.* (renter's lien concerning mills, factories or lofts leased for commercial purposes); N.J.S.A. 12A:7-209 (warehousemen's lien). *See also N.J.S.A.* 12A:9-310, *et seq.*, regarding priority of statutory liens; *N.J.S.A.* 2A:44-36,*et seq.* (Hospital Lien Act); *N.J.S.A.* 2A:44-47,*et seq.* (Hotel Keepers Lien Act).

NOTE: For a discussion of the imposition of an equitable lien, *see Yeck v. Rietzke*, 33 N.J. Super. 371 (App. Div. 1954).

Attorney liens are another area where equitable liens are frequently asserted. *See Steigler v. Armellino*, 315 N.J. Super. 176 (Ch. Div. 1998); *Martin v. Martin*, 335 N.J. Super. 212 (App. Div. 2000); *Morrone v. Thuring*, 334 N.J. Super. 456 (Law Div. 2000). An attorney's right to impress a lien on client property derives from the common law and is governed by *N.J.S.A.* 2A:13-5. However, there is no authority to impose a lien for post-judgment legal services. *Schepisi & McLaughlin, P.A. v. Loforo*, 430 N.J. Super. 347, 355-56 (App. Div.), *certif. denied*, 215 N.J. 486 (2013) (lien not valid where attorney failed to follow proper procedure). Also, where there is no recovery, there is nothing upon which to attach a lien. *Id.*; *Sauro v. Sauro*, 425 N.J. Super. 555, 575, 577 (App. Div. 2012), *certif. denied*, 213 N.J. 389 (2013) (no recovery upon which to attach an attorney lien where remaining marital assets were placed into educational trust accounts).

An attorney's statutory lien attaches broadly to any "verdict, report, decision, award, judgment or final order in his or her client's favor, and the proceeds thereof in whosoever hands they may come." *N.J.S.A.* 2A:13-5. *See Musikoff v. Jay Parrino's The Mint, LLC*, 172 N.J. 133, 138-39 (2002) (holding *N.J.S.A.* 2A:13-5 does not require attorneys to file a petition to acknowledge and enforce an attorney's lien before settlement or judgment in the matter where the lien arose out of). The purpose of an attorney's lien is to protect the attorney who does not have actual possession of assets against clients who may not pay for services rendered. *Martin*, 335 N.J. Super. at 222. Courts often uphold the priority of attorneys' liens over the liens of competing creditors, even if a contrary conclusion could be reached if other factors were considered to determine priority. *Morrone*, 334 N.J. Super. at 466. For a discussion of the proper procedure for instituting an attorney lien, *see H & H Ranch Homes, Inc. v. Smith*, 54 N.J. Super.

347, 353 (App. Div. 1959) and *R.* 1:20A-6. Also note that, effective April 1, 2013, R.P.C 1.16(d) was amended to provide that: "[n]o lawyer shall assert a common law retaining lien" on client files.

NOTE: Priority of liens is also a topic given judicial consideration. *See Les Realty Corp. v. Hogan*, 314 N.J. Super. 203 (Ch. Div. 1998). Judgments may not become liens until they are properly docketed. *Id.* at 207. This rule works in conjunction with the "first in time" rule, which states that once a judgment is docketed, it serves as constructive notice of the lien to subsequent purchasers and encumbrances. *Id.*

AA. PROBATE

Probate is governed by *N.J.S.A.* 3B:3-17, *et seq*. The original probate rules for carrying out the statutory mandate, *R.* 4:80 to 4:99, were substantially revised effective September,1990. Further revisions of many of these rules occurred again between 1992 and 2000. Notably, the revisions of 1996, based on the results of a pilot project within four counties a few years earlier, expanded the powers of the Surrogate in uncontested matters. The rules that were expanded as a result of this project include *Rules* 4:80-1(a), 4:82, 4:83-1, 4:85-3, 4:89-4, 4:57-2(b), 4:95-1, and 1:13-3(c). Pressler, CURRENT NEW JERSEY COURT RULES, Comment, *R.* 4:80 *et seq.* (April 1, 2001). Historically, both the County Courts and the Superior Court, Chancery Division, had concurrent jurisdiction over probate matters. *N.J.S.A.* 3B:2-1, *et seq.* In 1978, the County Courts were abolished by constitutional amendment. By Court Rule adopted at that time, *R.* 1:1A-2(b), probate jurisdiction was transferred to the Law Division, Probate Part, designating the Surrogate as Deputy Clerk of the Superior Court for such matters. However, after 1978 and until the 1990 rule revisions, the Chancery Division retained its traditional power to exercise jurisdiction over probate matters. Consequently, during this period probate jurisdiction continued to lie in both the Law Division and the Chancery Division. See *D'Angelo v. D'Angelo*, 208 *N.J. Super.* 729, 732 (Ch. Div. 1986) (finding on a motion to enforce a property settlement against a deceased defendant's co-executors that "[w]hile the [Superior Court,] Law Division/Probate Part has full authority to hear and determine controversies over will, trusts, and estates, it was not the intent of the Legislature to permit that court to encroach upon the general jurisdiction of the Superior Court, Chancery Division/Family Part given to it by the Constitution"). In 1990, this dual track system was abolished by eliminating the Law Division, Probate Part and placing jurisdiction over probate matters solely with the Chancery Division, Probate Part, to be served by the Surrogate as Deputy Clerk of the Superior Court. Pressler& Verniero, CURRENT N.J. COURT RULES (GANN), *R.* 4:80-1, *et seq*.; see also Report of the Civil Practice Committee, 125 N.J.L.J. 423 (1990). The term "spouse" used in *R.* 4:80-1(a) should be understood as including a civil union partner. Comment *R.* 4:80-1 (citing *N.J.S.A.* 37:1-33).

For a fuller discussion of Probate procedures, *see* Chapter V, Section C.

BB. ANCILLARY MATTERS AFFECTING ALTERNATIVE DISPUTE RESOLUTION

Parties in a matrimonial matter may designate whether the arbitration will be pursuant to the Alternative Procedure for Dispute Resolution Act ("APDRA"), *N.J.S.A.* 2A:23A-1, *et seq.*, or the Uniform Arbitration Act, *N.J.S.A.* 2A:23B-1, *et seq*. *Manger v. Manger*, 417 N.J. Super. 370, 374 (App. Div. 2010). Without an express designation, the Arbitration Act governs the proceeding. *Id.* at 376 (award upheld where the arbitrator properly exercised broad authority to fashion new discovery and case management procedures.)

The Chancery Division hears enforcement of arbitration subpoenas, *N.J.S.A.* 2A:23B-17(a).

Applications for review under the APDRA may be filed in either the Law or Chancery Divisions. *N.J.S.A.* 2A:23A-19.

CHAPTER III

REMEDIES IN EQUITY OR AT LAW

The following actions may be brought either in the Chancery Division or in the Law Division. The appropriate designation — chancery or law — depends upon some of the factors discussed below.

A. INJUNCTIVE RELIEF

Attorneys frequently assume that if a complaint seeks injunctive relief it automatically should be filed in the Chancery Division. However, if the primary relief sought is legal in nature, and any restraints sought are merely ancillary, then the matter properly belongs in the Law Division, which has the power to afford equitable relief as well. Injunctive relief is available in a prerogative writs action. *Dolan v. De Capua*, 16 N.J. 599, 613-14 (1954).

The section on Orders to Show Cause, referenced earlier, concerns some of the procedures for obtaining injunctive relief. The standards which must be met before such relief will be granted are discussed herein.

1. TEMPORARY RESTRAINING ORDERS

A temporary restraining order ("TRO") grants temporary injunctive relief on an emergency basis. Its purpose is to preserve the status quo until both parties can more fully present their positions to the court. A TRO may not issue without notice to the party being restrained unless it appears that irreparable damage will result to the moving party before such notice can be given. *R.* 4:52-1(a). The harm shown must be immediate and irreparable, and it must be shown from specific facts showed by affidavit or verified complaint. *Id. See also, Crowe v. DeGioia*, 90 N.J. 126 (1982). If an order to show cause includes a TRO which was issued without notice to the defendant, the defendant has leave to move for the dissolution or modification of the order on two days' notice. *R.* 4:52-1(a). The order may provide for the continuation of the restraint until further court order, but the temporary restraint may not be in place for more than 35 days after the date of issuance unless, within that time frame, the court finds good cause shown to extend the time or the defendant consents to an extension of the time period. *R.* 4:52-1(a). Violation of a temporary restraining order may bring about criminal contempt charges, even if no permanent restraining order is issued; the State only needs to prove that the restraining order was in place at the time of the alleged violation. *State v. Sanders*, 327 N.J. Super. 385, 387 (App. Div. 2000), citing *State v. Washington*, 319 N.J. Super. 681 (Law Div. 1998).

For rules governing temporary restraining orders issued in conjunction with domestic violence allegations, *see N.J.S.A.* 2C:25-17, *et seq.*; *see also J.D. v. M.D.F.*, 207 N.J. 458 (2011) (analyzing the imposition of restraints pursuant to New Jersey's Prevention of Domestic Violence Act).

2. PRELIMINARY OR INTERLOCUTORY INJUNCTIONS

On the return date of the order to show cause granting the TRO, the plaintiff may apply for a preliminary injunction, which may endure until the matter is fully litigated or until the defendant successfully applies to the court for its dissolution. The court may, in its discretion, require oral testimony at this time, or may grant or deny a preliminary injunction on the basis of the parties' affidavits alone. "The power to issue injunctions is the strongest weapon at the command of a court of equity, and its use, therefore, requires the exercise of great caution, deliberation and sound discretion." *Light v. National Dyeing and Printing Co.*, 140 N.J. Eq. 506, 510 (Ch. 1947). *See also Waste Mgmt. of New Jersey, Inc. v. Union County Utils. Auth.*, 399 N.J. Super. 508, 538 (App. Div. 2008); *J. H. Renarde, Inc. v. Sims*, 312 N.J. Super. 195, 201 (Ch. Div. 1998); *see also Waste Mgmt. of New Jersey Inc. v. Morris County Utils. Auth.*, 433 N.J. Super. 445. The facts upon which such a decision is made must be sufficient in number and uncontroverted, and must not be dependent on conclusory statements. *Ispahani v. Allied Domecq Retailing USA*, 320 N.J. Super. 494, 498-99 (App. Div. 1999). Furthermore, the presence of a restrictive covenant in a contract can be grounds sufficient to trigger an interlocutory injunction. *J.H. Renarde*, 312 N.J. Super. at 200.

The purpose of the restraint is to allow the court to investigate and deliberate the merits of the matter while maintaining the status quo. *Peters v. Public Service Corp. of N.J.*, 132 N.J. Eq. 500, 511 (Ch. Div. 1942), *aff'd*, 133 N.J. Eq. 283 (E. & A. 1943); *Subcarrier Communications, Inc. v. Day*, 299 N.J. Super. 634, 638-39 (App. Div. 1997). Because it is a drastic remedy, several criteria must be met before a preliminary injunction will issue.

• Plaintiff must have no adequate remedy at law. *Green v. Piper*, 80 N.J. Eq. 288 (Ch. Div. 1912); s*ee also Waste Mgmt. of New Jersey, Inc. v. Union County Utils. Auth.*, 399 N.J. Super. 508, 519-20 (App. Div. 2008).

• Plaintiff must be threatened with substantial, immediate, and irreparable harm if the injunction does not issue. *Citizens Coach Co. v. Camden Horse R.R. Co.*, 29 N.J. Eq. 299, 303-04 (E. & A. 1878); *Crowe v. DeGoia*, 90 N.J. 126, 132-33 (1982). Destruction or significant impairment of the subject matter of the litigation has been held to constitute such "irreparable harm." *Coleman v. Wilson*, 123 N.J. Super. 310 (Ch. Div. 1973). Irreparable harm also means that monetary damages are insufficient to right the wrong that is alleged. If monetary damages will provide adequate protection or resolution, then an injunction is not proper. *See Princeton Insurance Co. v. 349 Associates, LLC*, 147 N.J. 337, 340 (1997).

• Plaintiff must demonstrate that there is a reasonable probability of eventual

success on the merits of his claim. *Zoning Bd. of Adj. v. Service Electric Cable Television*, 198 N.J. Super. 370, 378-79 (App. Div. 1985); *New Chancellor Cinema, Inc. v. Town of Irvington*, 169 N.J. Super. 564, 572 (Law Div. 1979); *see also J.H. Renarde, Inc. v. Sims*, 312 N.J. Super. 195, 198 (Ch. Div. 1998). A similar principle is also expressed in *Citizens Coach Co.*, 29 N.J. Eq. at 304-05, where the Court held that a preliminary injunction shall not issue if the law on which plaintiff bases his claim is doubtful or unsettled. *See also Accident Index Bureau, Inc. v. Male*, 95 N.J. Super. 39, 50 (App. Div. 1967), *aff'd*, 51 N.J. 107 (1968), *appeal dismissed*, 393 U.S. 530 (1969). Nor will a preliminary injunction issue where defendant controverts under oath the facts alleged by plaintiff. *Anders v. Greenlands Corp.*, 31 N.J. Super. 329, 338 (Ch. Div. 1954). Note, however, that although an interlocutory injunction should not issue if plaintiff's rights are not clear as a matter of law or equity, an exception exists where the subject matter of the litigation would be destroyed without the protection of such injunction. *General Electric Co. v. Gem Vacuum Stores*, 36 N.J. Super. 234, 237 (App. Div. 1955). Furthermore, the requirement that plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits is "tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo." *Crowe v. De Gioia*, 90 N.J. 126, 133 (1982).

The court must balance the equities involved and, should it determine that the possible harm to defendant resulting from the issuance of an injunction outweighs that threatening plaintiff should the injunction not issue, then plaintiff's request for injunctive relief should be denied. *Zon. Bd. of Adj. v. Service Elec. Cable T.V.*, 198 N.J. Super. 370, 379 (App. Div. 1985); *Crowe*, 90 N.J. at 134; *Suenram v. The Society of the Valley Hospital*, 155 N.J. Super. 593, 597 (Law Div. 1977); *Subcarrier*, 299 N.J. Super. at 639; *Sherman v. Sherman*, 330 N.J. Super. 638, 642 (Ch. Div. 1999).

The court should also consider the public interest in deciding whether to issue an injunction. This facet is related to the balancing test, as the Court must balance the harm to the public if the injunction issues against the impact if the injunction is denied. *J.H. Renarde*, 312 N.J. Super. at 206.

If the party for whom the injunction is sought can demonstrate likelihood that the act or policy in question may be found unconstitutional, then this may constitute a demonstration of irreparable harm, such that an injunction would be warranted. *Davis v. New Jersey Department of Law and Public Safety*, 327 N.J. Super. 59, 68-69 (Law Div. 1999) (finding that black state police troopers were rightfully granted a preliminary injunction to enjoin state police from enforcing policy of disclosure of information to the public during pendency of racial discrimination action), citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

3. PERMANENT INJUNCTIONS

At the final hearing, when all issues have been fully litigated, a preliminary injunction will be made permanent when it appears that the defendant intends to do some act that would be a nuisance to the public or an injury to plaintiff. *Attorney General v. Steward*, 21 N.J. Eq. 340 (Ch. Div. 1871). A permanent injunction will not issue without the taking of testimony, however; affidavits alone will not suffice. *Lopez v. N.J. Bell Telephone Co.*, 54 N.J. 129 (1969). *But see by Paternoster v. Shuster*, 296 N.J. Super. 544, 557 (App. Div. 1997) (denial of permanent injunction reversed because motion judge relied solely on plaintiff's certification and defendants prior testimony).

A permanent injunction is granted to prevent a continuing, irreparable injury. *McCullough v. Hartpence*, 141 N.J. Eq. 499, 502 (Ch. Div. 1948). The terms of such injunction must be narrowly tailored, and no more extensive than is reasonably required to protect the interest of the party in whose favor it is granted. *Sunbeam Corp. v. Windsor-Fifth Avenue*, 14 N.J. 222, 232-33 (1954). A permanent injunction may be issued against conduct that does not violate any criminal laws and does not constitute a tort. *Murray v. Lawson*, 138 N.J. 206 (1994), *cert. denied*, 515 U.S. 1110 (1995) (permanent injunction against picketing within 100 feet of doctor's home was necessary to protect his "significant right" to residential privacy). *See also Sheppard v. Twp. of Frankford*, 261 N.J. Super. 5, 9 (App. Div. 1992) ("Permanent injunctive relief is an appropriate remedy to abate a continuing nuisance," such a township's disposal of storm water runoff onto a resident's property).

The court will decline to issue a permanent injunction when to do so would injure the rights and property of innocent parties not parties to the suit, but may attempt instead to compensate plaintiff by an award of money damages. *Drenkowski v. Goodman and Cook*, 43 N.J. Super. 206 (Ch. Div. 1957). An injunction will not be granted that directly affects the rights of persons who are not parties, and who have no representation in the action. *Markwardt v. New Beginnings*, 304 N.J. Super. 522, 537 (App. Div. 1997). However, in rare occasions, permanent injunctions have been found to be broad enough to encompass nonparties, provided that they have actual notice of the contents and substance of the injunction. *Horizon HealthCenter v. Felicissimo*, 317 N.J. Super. 521, 525 (App. Div. 1999) (non-party priest was found to be subject to injunction in which family planning clinic filed to enjoin activities of anti-abortion organization), citing *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. All persons subject to the injunction can also be bound by modifications deemed necessary to respond to the violations. *Id.* at 526-27.

Furthermore, a permanent injunction will not be granted when a change in conditions pending a hearing rendered the injunction unnecessary to protect plaintiff's

rights. *General Leather Products Co. v. Luggage and Trunk Makers Union, Local No. 49*, 119 N.J. Eq. 432 (Ch. Div.), *appeal dismissed*, 121 N.J. Eq. 101 (E. & A. 1936).

In determining whether to grant an order for permanent injunctive relief, the following non-exclusive list of factors, set forth in the RESTATEMENT (SECOND) OF TORTS § 936 (1977), are utilized by our courts as a guideline:

(1) the character of the interest to be protected;

(2) the relevant adequacy of the injunction to the plaintiff as compared with other remedies;

(3) the unreasonable delay in bringing suit;

(4) any related misconduct by plaintiff;

(5) the comparison of hardship to plaintiff if relief is denied, and hardship to defendant is relief is granted;

(6) the interests of others, including the public; and

(7) the practicality of framing the order or judgment.

Paternoster v. Shuster, 296 N.J. Super. 544, 556 (App. Div. 1997) (citing RESTATEMENT (SECOND) OF TORTS § 936).

REMEMBER:

• No injunction may issue to restrain another action in the Superior Court. *R.* 4:52-6.

• No injunction will issue to stay an administrative proceeding unless a substantial constitutional question is raised and sufficient irreparable harm demonstrated. *Mutual Home Dealers Corp. v. Comm. of Banking & Ins.*, 104 N.J. Super. 25 (Ch. Div. 1968), *aff'd*, 55 N.J. 82 (1969).

• A mandatory injunction (i.e., one that requires some affirmative action, whether or not it is so phrased) will rarely issue prior to final judgment. For exceptions to this rule, *see Hoffman Hardware Co. v. Naame*, 18 N.J. Super. 234 (Ch. Div. 1952) (preserving rights to an easement); *Pennsylvania Railroad Co. v. Kelley*, 77 N.J. Eq. 129 (Ch. Div. 1910) (to prevent imminent threat to public safety). A party who seeks mandatory preliminary injunctive relief must satisfy a "particularly heavy" burden. *Rinaldo v. RLR Inv., LLC*, 387 N.J. Super. 387, 396 (App. Div. 2006) (quoting *Punnet v. Carter*, 621 F.2d 578, 582 (3rd Cir. 1980)) ("If a property owner's construction of improvements unreasonably causes flooding or other damage to a neighboring property, a court may grant mandatory injunctive relief to abate or ameliorate the effects of that damage") . *See also Guaman v. Velez*,

421 N.J. Super. 239, 247 (App. Div. 2011) (discussing the "particularly heavy burden" that must be satisfied by an applicant seeking mandatory preliminary injunctive relief).

• The factors enumerated in *Crowe* are applicable regardless of whether a litigant is seeking preliminary or final injunctive relief. *Samaritan Center v. Englishtown*, 294 N.J. Super. 437, 445 (Law Div. 1996).

B. REPLEVIN

This ancient common-law remedy is now governed entirely by statute. *See N.J.S.A.* 2B:50-1; *R.* 4:61. An action for replevin is properly brought in the Law Division, with one exception. When the goods whose return is sought have a peculiar artificial value, so that a replevin bond in any amount would be inadequate to protect the claimants, an action for equitable replevin will lie. Such action may be brought in Chancery; nonetheless, the procedures set forth in the above-cited statute and rule must be followed. For example, in *Burr v. Bloomsburg*, 101 N.J. Eq. 615 (Ch. Div. 1927), plaintiff sought to replevy a diamond ring, arguing that adequate compensation at law could not be had because of the peculiar sentimental value of the ring. Equitable jurisdiction was established by the plaintiff's proof that the ring, apart from its intrinsic value, had a special, artificial value which derived from her affection for the object itself and for the person from whom she obtained it. *See also Desiderio v. D'Ambrosio*, 190 N.J. Super. 424, 429 (Ch. Div. 1983) (discussion of equitable replevin arising out of a bailment).

In *Ho v. Rubin*, 333 N.J. Super. 599, 606 (Ch. Div. 1999), *aff'd*, 333 N.J. Super. 580 (App. Div. 2000), a replevin action arose in the Chancery Division over money allegedly left on a doorstep. The court, while specifically acknowledging that this type of action should properly have been brought in the Law Division, it would retain jurisdiction in the interest of efficiency.

C. DECLARATORY JUDGMENT

This is another common type of complaint misfiled in Chancery. The usual rationale behind such a choice of jurisdiction is that injunctive relief is also sought, e.g., a claim for a declaration of unconstitutionality of a statute accompanied by a request for a temporary injunction against its enforcement. Such an action clearly belongs in the Law Division, which has jurisdiction to issue the declaratory judgment and also to issue a TRO, if needed. On rare occasions a declaratory judgment action will belong in Chancery, this is where inherently equitable rights (e.g., under a trust, as to an easement, in a corporation's stock) are involved; although actions for declaratory judgment may be brought in both the Law and Chancery Divisions of the Superior Court. *Abbott v. Beth Israel Cemetery Assn.*, 13 N.J. 528, 539 (1953). The Declaratory Judgment Act, *N.J.S.A.* 2A:16-50, *et seq*.,

provides that: "All courts of record in this state shall within their respective jurisdictions, have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed. . . ." *N.J.S.A.* 2A:16-52.

Declaratory relief is "neither equitable [n]or legal in itself, but takes on the color of either, depending upon the issues involved." *Chiacchio v. Chiacchio*, 198 N.J. Super. 1, 5 (App. Div. 1984), quoting *Gov't Employees Ins. Co. v. Butler*, 128 N.J. Super. 492, 495 (Ch. Div. 1974); *see Paul v. Ohio Cas. Ins. Co.*, 196 N.J. Super. 286 (App. Div. 1984), *certif. denied*, 99 N.J. 228 (1985); *Utility Blade & Razor Co. v. Donovan*, 33 N.J. Super. 566 (App. Div. 1955); *see also Iafelice ex rel. Wright v. Arpino*, 319 N.J. Super. 581, 586 n. 3 (App. Div. 1999) ("In determining whether the right to a jury trial attaches to a declaratory judgment action, we look to whether the underlying claim is legal or equitable in nature.") *And see Wood v. New Jersey Mfrs. Ins. Co.*, 206 N.J. 562, 575 (2011); *In re Envtl. Ins. Declaratory Judgment Actions*, 149 N.J. 278, 292 (1997); *Arthur Andersen LLP v. Federal Ins. Co.*, 416 N.J. Super. 334, 348 n. 2 (App. Div. 2010) ("The right to a jury trial in a declaratory judgment action depends upon whether the relief sought is primarily legal or equitable in nature").

The Vice Chancellor in *Township of Ewing v. Trenton*, 137 N.J. Eq. 109, 111 (Ch. Div. 1945), held that an action seeking a declaration of contractual rights should have been brought in an action at law: "A declaration of legal rights may be had only in the courts of law." The 1947 reorganization of the court structure later gave both Divisions of the new Superior Court plenary jurisdiction to render both legal and equitable relief in a given case. *O'Neill v. Vreeland*, 6 N.J. 158, 166 (1951). Despite this partial joining of law and equity jurisdictions, it is clear that some right of relief primarily equitable in nature must be present in order to bring an action within Chancery jurisdiction. *R.* 4:3-1(a)(1).

That the requested relief is declaratory in nature does not suffice to bring an action involving primarily legal rights or remedies into Chancery. *Thrillo, Inc. v. Scott*, 15 N.J. Super. 124, 131 (Atlantic City Ct. 1951); *Paterson v. North Jersey Dist. Water Supply Comm'n.*, 124 N.J. Eq. 344 (Ch. Div. 1938). *See also Union Trust Co., v. Georke Co.*, 103 N.J. Eq. 159 (1928), *modified on other grounds*, 105 N.J. Eq. 190 (E. & A. 1929); *Springdale Corp. v. Fidelity Union Trust Co.*, 121 N.J.L. 536 (E & A 1939).

In *Government Employees Ins. Co.*, 128 N.J. Super. at 495, the Chancery Division ordered a complaint seeking a declaratory judgment to resolve a question of coverage by an insurance policy to be transferred to the Law Division. The court noted:

> No doubt counsel at times tend to gravitate to the Chancery Division motivated by the desire to secure the more individualized

> attention of a trial judge which occurs when he lives with a case from its inception, coupled with the hope of obtaining a more expeditious final decision. For some reason, experienced counsel, as a matter of practice, generally bring actions for declaratory relief in the Chancery Division.

Gov't Employees Ins. Co., supra, 128 N.J. Super. at 495.

The court further stated that "[t]he construction of a contract and a determination of the rights of the parties thereunder is within the province of a court of law . . . [h]ence, an action for the declaration of the parties' rights under an insurance policy is basically an action for construction of a contract which has been held to be cognizable before the law courts." *Gov't Employees Ins. Co.*, 128 N.J. Super. at 496 (internal citations and quotations omitted).

Contra see Carolina Casualty Ins. Co. v. Belford Trucking Co., 116 N.J. Super. 39, 42 (Ch. Div. 1971), *aff'd*, 121 N.J. Super. 583 (App. Div. 1972), *certif. denied*, 63 N.J. 502 (1973), wherein the court states: "The question of subject matter jurisdiction of this court under the Declaratory Judgment Act in suits to determine the liability of an insurer is hardly open to dispute." The court cited as authorities *Condenser Service v. American Ins. Co.* 45 N.J. Super. 31 (App. Div.), *certif. denied*, 24 N.J. 547 (1957), and *Ohio Casualty Ins. Co. v. Flanagin*, 44 N.J. 504 (1965). However, the former case does not address the issue, and in fact does not even state whether or not the case therein was appealed from Law or Chancery.

The latter citation similarly does not mention the issue of equity jurisdiction over declaratory judgment actions, being merely a review of such an action tried in the Chancery Division.[8]

[8] Portions of this section are excerpted from a letter opinion by the Hon. Samuel D. Lenox, Jr., former Chancery Division and Assignment Judge in Mercer County.

CHAPTER IV

SOME EFFECTS OF FILING IN CHANCERY

Although equity and law were merged in New Jersey under the Constitution of 1947, in some ways they remain distinct.

A. JURY TRIALS IN THE CHANCERY DIVISION

Contrary to popular belief, jury trials are available in the Chancery Division. *See O'Neil v. Vreeland*, 6 N.J. 158, 168 (1951). However, in practice the use of juries in the Chancery Division is virtually nonexistent. This situation exists because, although the 1947 Constitution enabled both the Law and Chancery Divisions to render both legal and equitable relief (*see N.J. Const.* Art. VI, § 3, ¶ 4), it continued the Chancery's historic jurisdiction over primarily equitable issues which are not triable to a jury.

The principles governing the right to jury trial in New Jersey are set forth at length in *Shaner v. Horizon Bancorp.*, 116 N.J. 433 (1989) (wherein the Supreme Court rejected the right to a jury trial in the context of a claim for discriminatory termination on the basis of age under the New Jersey Law Against Discrimination, which holding was superseded by legislative enactment). *See N.J.S.A.* 10:5-13 (amended in 1990 to grant a right to a jury trial in LAD cases); *see generally* Bruce D. Greenberg and Gary K. Wolinetz, *The Right to a Civil Jury Trial in New Jersey*, 47 RUTGERS L. REV. 1461 (1995). Given that the Seventh Amendment is not binding on the states, *see Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916); *In re LiVolsi*, 85 N.J. 576, 587 n.7 (1981), any right to trial by jury in New Jersey must arise by statute or from Article I, par. 9 of the New Jersey Constitution. *Shaner, supra*, 116 N.J. at 446-55. This provision states that "[t]he right of trial by jury shall remain inviolate." However, in construing this language, the New Jersey Supreme Court has consistently denied a right to a jury trial unless that right existed prior to the adoption of the State Constitution. *Id.* at 447. (The Court has not resolved whether the relevant Constitution is that of 1776, 1844 or 1947.) *Id.* Accordingly, the central issue is whether a common law right to trial by jury existed in a cause of action cognizable in Chancery.

Chancery jurisdiction has never been limited to equitable claims. Prior to the 1947 Constitution, in contrast to other states, the jurisdiction of our Chancery Court expanded, principally in the area of ancillary jurisdiction. *See* Schnitzer and Wildstein, New Jersey Court Rules Service at 1262.

Under the doctrine of ancillary jurisdiction, once Chancery assumes jurisdiction over a complaint seeking equitable relief, it has the ability to adjudicate all legal claims and award damages. *Mantell v. Int'l Plastic Harmonica Corp.*, 141 N.J. Eq. 379, 393 (1947); *Borchert v. Borchert*, 361 N.J. Super. 175, 179 (Ch. Div. 2002). This is true whether the damages sought were in addition to equitable relief

sought, e.g., *Buttinghausen v. Rappaport*, 131 N.J. Eq. 252, 256 (Ch. Div.1942), or in lieu of equitable relief sought, *Mantell*, 141 N.J. Eq. at 393 (plaintiffs had abandoned equitable claim). If the principal relief, however, is legal, a court may transfer the case to the Law Division *sua sponte* or on a party's motion. *R.* 4:3-1(b). This, however, is discretionary with the Chancery Court, and different chancery judges have differing views on the need or their obligation to transfer. *See Butsee Larocco v. Gardella*, 352 N.J. Super. 234, 244 (Ch. Div. 2002) (the court transferred the matter to the Law Division where the principal relief sought was legal in nature).

The presence of legal issues in a primarily equitable case does not automatically give rise to a jury trial. Rather, any jury demand is subject to Chancery's jurisdiction to adjudicate ancillary legal issues. *Fleischer v. James Drug Stores, Inc.*, 1 N.J. 138, 150 (1948). Legal issues are ancillary if they are "germane to or grow out of the subject matter of the equitable jurisdiction." *Id.* at 150. Since the adoption of the 1947 Constitution, New Jersey courts have applied the doctrine in a variety of situations. *See Ebling Brewing Co., Inc. v. Heirloom, Inc.*, 1 N.J. 71,76-77 (1948) (defendant's counterclaims for breach of contract and federal price regulations ancillary to insolvent corporation's action for the appointment of a receiver); *Fleischer*, 1 N.J. at 150 (claims for conspiracy, breach of contract and tortious interference ancillary to suit for specific performance); *Steiner v. Stein*, 2 N.J. 367, 379 (1949) (attorney's counterclaim for his legal fee ancillary to former client's challenge to his attorney's lien); *Weintraub v. Krobatsch*, 64 N.J. 445, 455 (1974) (damage claims for fraud incidental to purchaser's equitable action for rescission); *Garrou v. Teaneck Tryon Co.*, 11 N.J. 294, 300-01 (1953) (damages incurred prior to injunction ancillary to injunction); *Beekwilder v. Beekwilder*, 29 N.J. Super. 351, 358 (App. Div. 1953) (summary award of money damages incidental to equitable action in which bond was posted); *Apollo v. Kim Anh Pham*, 192 N.J. Super. 427, 432 (Ch. Div. 1983), *aff'd. o.b.*, 224 N.J. Super. 89 (App. Div. 1987) (wife's allegations that husband promised to support her and her children ancillary to husband's palimony suit).

Furthermore, the Chancery Court's jurisdiction to adjudicate legal issues without a jury will not be defeated even if equitable relief becomes moot and the only relief remaining is legal in nature. *Mantell*, 141 N.J. Eq. at 393; *O'Neill*, 6 N.J. at 166; *Associated Metals & Minerals Corp. v. Dixon Chem. & Research, Inc.*, 82 N.J. Super. 281, 297-99 (App. Div. 1963), *certif. denied*, 42 N.J. 501 (1964); *Kaplan v. Cavicchia*, 107 N.J. Super. 201, 205-06 (App. Div. 1969). This rule is necessary to prevent a party from invoking the benefits of the Chancery Division by seeking equitable relief and then strategically abandoning those prayers for relief to obtain a jury trial.

Notwithstanding the doctrine of ancillary equitable jurisdiction, issues such

as easements and rights of way remain triable by jury notwithstanding the equitable context in which these cases evolved. *See O'Brien v. Baldwin*, 2 N.J. Super. 134, 137 (App. Div. 1949); *Trzeciakiewicz v. Zukoski*, 6 N.J. Super. 577, 578-79 (Ch. Div. 1949); Schnitzer and Wildstein, New Jersey Court Rules Service at 1269. Lastly, the court may empanel an advisory jury to provide assistance when appropriate. *See R.* 4:35-2; *see also In re Estate of Kirschenbaum*, 44 N.J. Super. 391, 395-96 (App. Div.), *certif. denied*, 25 N.J. 51 (1957); *Hyland v. Simmons*, 152 N.J. Super. 569, 577-78 (Ch. Div. 1977), *aff'd*, 163 N.J. Super. 137 (App. Div. 1978), *certif. denied*, 79 N.J. 479 (1979).

These principles were confirmed in *Lyn-Anna Properties, Ltd. v. Harborview Development Corp.*, 145 N.J. 313 (1996) and *Boardwalk Properties, Inc. v. BPHC Acquisition, Inc.*, 253 N.J. Super. 515 (App. Div. 1991). In *Lyn-Anna Properties*, plaintiffs filed suit in the Chancery Division against their partners in a failed real estate development project seeking damages and equitable relief. Though plaintiffs filed suit in Chancery, they demanded a jury trial. Pursuant to the entire controversy doctrine, defendants filed a legal counterclaim and also demanded a jury.

Defendants' motion for a jury trial was denied by the trial court. The Appellate Division affirmed, concluding that the counterclaim was ancillary to plaintiff's equitable claims, and thus subject to the Chancery Court's general jurisdiction to consider and dispose of ancillary issues without a jury.

Relying on the long history of the ancillary jurisdiction doctrine, the Supreme Court affirmed. The Court specifically rejected defendants' assertion that the doctrine of ancillary jurisdiction should be reversed or modified in light of the evolving entire controversy doctrine. According to the Court, the doctrine of ancillary jurisdiction and the entire controversy doctrine are really "two sides of the same coin" because they both require parties to litigate all claims in a single proceeding. *Id.* at 329. Analyzing the facts in *Lyn-Anna*, the Court concluded that the "initial core of the controversy centered on the fiduciary duties of the parties." *Id.* at 331. Accordingly, because this was a traditional Chancery dispute, a jury trial was unnecessary.

Similarly, in *Boardwalk*, plaintiff sought specific performance of several real estate contracts. Defendants filed a counterclaim seeking equitable relief and also asserted a $2 billion damage claim under the New Jersey Anti-Trust Act. Defendants demanded a jury trial. The trial court denied defendants' application for a jury trial pursuant to the doctrine of ancillary jurisdiction. Thereafter, defendants amended their pleadings to remove all demands for equitable relief and moved for reconsideration of the trial court's order. The trial court again denied defendants' jury demand.

The Appellate Division affirmed, concluding that a party's right to a jury trial must be determined at the inception of the case. Notably, however, the Appellate Division also held that the defendants did not have an independent right

to a jury trial under the New Jersey Anti-Trust Act.

In *Brennan v. Organ*, 145 N.J. 282 (1996), the Supreme Court held that marital torts arising in a matter pending in the Family Part should not generally be triable to a jury. However, a Family Part judge may order a jury trial if "society's interest in vindicating a marital tort through the jury process is the dominant interest in the matter." *Id.* at 302. In such cases, in light of the difficulty empaneling a jury in the Family Part, the marital tort action should be severed and transferred to the Law Division.

In *Ward v. Merrimack Mutual Fire Insurance Co.*, 312 N.J. Super. 162, 165-66 (App. Div. 1998), the insured party brought action against defendant, its property insurer, for declaratory judgment and breach of contract after insurer refused to pay on a binder allegedly issued without authority by defendant's agent. Plaintiff's request for a jury trial was initially denied. In relying upon *Lyn-Anna Properties*, 145 N.J. at 331, the *Ward* Court opined that the Chancery Division has ancillary jurisdiction over legal issues to the extent that those issues are essential to making a determination on an equitable question. *Ward*, 312 N.J. Super. at 166. If the Chancery judge finds that the relief is truly predominantly equitable in nature, and that any legal issues that need to be decided are merely ancillary, then the judge may decide all issues, including the ancillary legal issues, without involving a jury. *Id.* However, if the legal issue at hand is not merely incidental to an equitable issue, and may be separated from the equitable issues, then the legal claims must be separated and transferred to the Law Division for a jury trial. *Id.* This reasoning seems to suggest that jury trials would not be accepted or allowed in the Chancery Division, reaffirming the initial statement of this section that jury trials are essentially unheard of in Chancery. Notably, the Law and Chancery Divisions often have co-equal and often concurrent jurisdiction. *Id.* at 170 ("'Subject to the rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require.'" (*quoting N.J. Const.* Art. VI, § 3, ¶ 4)).

B. EQUITY ACTS IN PERSONAM, NOT IN REM

Generally, equity acts in personam rather than in rem. The exception to this rule is found in those actions which affect title to real property-foreclosure, partition, quiet title, specific performance of contract to convey realty, and cancellation of mortgage, all of which have been discussed earlier.

- Equity can grant a judgment affecting title to out-of-state property. Such judgment does not operate in rem, but affects foreign land as a result of the in personam operation of the judgment on the defendant. *Clark v. Judge*, 84 N.J.

Super. 35, 59 (Ch. Div. 1964), *aff'd*, 44 N.J. 550 (1965).

- If a party fails to comply with a judgment or order directing that party to perform a specific act within a specified time, e.g., execute a deed or a note and mortgage, the court may direct that the act be done by another appointed by the court, with the same effect as if done by the defaulting party. *See R.* 4:59-2, *N.J.S.A.* 2A:16-7.

- An equitable decree which has been recorded can operate in rem to convey or otherwise affect title to real property located in New Jersey. *N.J.S.A.* 46:16-1.1; *N.J.S.A.* 2A:16-7; *see also King v. Greene*, 30 N.J. 395, 398 (1959), which held that a recorded equitable decree, ordering a wife to convey property to herself and her husband as tenants by the entirety, was self-operative. Thus, even though the conveyance was never made, the husband and wife became seized of the premises as tenants by the entirety

- From the time of its entry upon the civil docket, every Chancery judgment and order shall have the force and effect of a Law Division judgment, and execution may issue thereon. *N.J.S.A.* 2A:16-18; *see also R.* 4:59-1; *Biddle v. Biddle*, 150 N.J. Super. 185 (Ch. Div. 1977). Furthermore, Chancery judgments now become a lien against real property from the time of their actual entry on the minutes or records of the court. *See N.J.S.A.* 2A:16-1, as amended.

C. SINGLE JUDGE, SPEEDY TRIAL

One advantage of filing in the Chancery Division is that the case will ordinarily remain with a single judge, who will be familiar with every aspect of the matter. Because of this involvement in and control over the case by one judge, a large percentage of contested Chancery actions settle prior to trial. And for those cases which do not settle, an early trial date is usually obtainable as the Chancery docket is generally less crowded than that of the Law Division.

CHAPTER V

SELECTED CHANCERY PROCEDURES

A. ORDERS TO SHOW CAUSE

Orders to Show Cause ("OSC"s) must be submitted to the court accompanied by supporting affidavits. An OSC requires the party against whom it is entered to show cause on the return date why a particular requested action of the court should not occur — e.g., why an interlocutory injunction should not issue, why a special fiscal agent should not be appointed, why final judgment should not be rendered. The OSC itself may or may not grant some form of interim relief — e.g., a preliminary injunction, appointment of a temporary guardian. No notice of the initial application for an OSC need be given unless temporary restraints or a receivership is sought. *See* discussion, *supra*, concerning Injunctive Relief.

There are three types of OSCs:

1. OSCs brought under *R.* 4:67-1(a) are framed as summary proceedings. On the return date, the plaintiff requests final judgment of all or some portion of the claim contained in the complaint. *R.* 4:67-1(a) applies only to those actions "in which the court is permitted by rule or by statute to proceed in a summary manner." (A list of the most frequently used summary proceedings authorized by statute and court rule may be found in Appendix B-3.)

A summary proceeding permits a speedy adjudication of the case. *See Washington Commons v. Jersey City*, 416 N.J. Super. 555, 564 (App. Div. 2010), *certif. denied*, 205 N.J. 318 (2011); *Grabowsky v. Township of Montclair*, 221 N.J. 536, 549 ("Rule 4:67-1 is designed 'to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment while at the same time giving the defendant an opportunity to be heard at the time plaintiff makes his application…'"). Where the litigant wants to proceed summarily but no rule or statute so permits, a litigant can make an appropriate motion pursuant to *R.* 4:67-2(b) to proceed summarily. The notice of motion is served with the complaint and summons, and is made returnable after the time for answer shall have expired. (Another way to obtain a speedy adjudication might be to bring a motion for summary judgment served and made returnable in the same manner, *see R.* 4:46-1, but this is feasible only where no dispute as to material fact will be present.) The summary proceeding OSC is submitted to the judge with a complaint verified to the plaintiff's personal knowledge. The terms of the OSC must fully inform the defendant of the substance of the judgment sought. It is advisable also, although not required, that the OSC include language similar to that of *R.* 4:67-4(a), namely: "...[D]efendants shall, not later than three days before the return date, or within such further time as the court may allow, serve and file either an answer, an answering affidavit, or a motion returnable on the return day; in default thereof, the action may proceed ex parte." The judge will fix the return date, indicate by what date the

above mentioned responding papers must be filed, and specify the time allowed for and manner of service. If the judge determines that briefs are necessary, the judge will direct their submission and fix a date for their receipt.

Where the OSC issues under *R.* 4:67-1(a), it may be presented to the court *ex parte* and no summons need issue. Process shall be a copy of the OSC (certified by plaintiff's attorney to be a true copy), served together with copies of the complaint and affidavits (similarly certified), pursuant to *R.* 4:67-3.

The court shall try the matter on the return date, either on the pleadings and affidavits or after taking testimony as to contested issues. *R.* 4:67-5. At the conclusion of the summary proceeding, the court must make findings of fact. Pressler &Verniero, CURRENT N.J. COURT RULES (GANN), Comment *R.* 4:67-5 (*citing Tractenberg v. Twp. of West Orange*, 416 N.J. Super. 354, 365 (App. Div. 2010)).

2. OSCs brought under *R.* 4:52 seek injunctive relief, either immediately or on the return date. Such OSCs may be sought at the inception of a case, *R.* 4:52-1(a), or during the pendency of an action, *R.* 4:52-2. *See, e.g., DE River Bay Auth. v. Hunter Const.*, 344 N.J. Super. 361, 364 (Ch. Div. 2001); *see* section dealing with Injunctive Relief, *supra*.

In the former situation, simultaneously with the filing of a complaint, the plaintiff applies for an order requiring defendant to show cause on the return date why an interlocutory injunction should not issue pending final disposition of the action. The complaint must be verified to the plaintiff's personal knowledge (not merely to the best of the plaintiff's knowledge and belief). Verified complaint or affidavits should not contain words of conclusion such as "insolvency" or "fraudulently," nor may they be based upon hearsay. If the OSC includes temporary restraints, reasonable notice (even on-the-spot telephone notice may suffice) must be given to defendant unless it appears from the verified complaint or accompanying affidavits that "immediate and irreparable damage" is likely to result to plaintiff before notice can be given (or because notice is given). *See Sherman v. Sherman*, 330 N.J. Super. 638, 643-44 (Ch. Div. 1999) (court denied plaintiff's application seeking to enjoin a burial, where *Crowe v. DeGioia* factors were not satisfied. *See also Sagi v. Sagi*, 386 N.J. Super. 517, 524 (App. Div. 2006); *In re Adoption of Child*, 444 N.J. Super. 83, 90-91 (App. Div. 2016) (litigants should be on notice that *ex parte* applications which seek temporary restraints are extraordinary requests for relief, and are reserved for those rare circumstances that temporary injunctive relief must be issued without notice to prevent irreparable harm prior to a noticed hearing). If temporary restraints are imposed without notice to defendant, then the order must provide that defendant may move to dissolve or modify such restraints on two days' notice. *R.* 4:52-1(a).

Pursuant to *R.* 4:52-4, an Order granting an injunction and every restraining order must specifically set forth the reasons for its issuance, describe in detail the act or acts to be restrained, and is binding only upon such parties to the action and upon such persons in active concert or participation with them as receive actual notice of the order by personal service or otherwise. *R.* 4:52-4.

The terms of the OSC may continue the restraint until further order of the court, but it shall be returnable within 35 days. The OSC must provide the time within which the defendant shall serve and file an answer, and give notice to the defendant that if he fails to timely serve and file an answer, default judgment may be entered against him for the relief requested in the complaint. *R.* 4:52-1(b). Briefs must be submitted in support of an application for an interlocutory injunction. *R.* 4:52-1(c). It is helpful to include language to this effect in the OSC.

Pursuant to *R.* 4:52-1(b), the OSC itself may serve as process if it contains the information required by the rule. Unless the court otherwise orders, the OSC, complaint, and supporting affidavits shall be served upon defendant at least 10 days prior to the return date and in the manner prescribed by *R.* 4:4-3 and 4:4-4. Once again, it is helpful to include this language in the OSC.

Either party may apply by OSC for temporary restraints or an interlocutory injunction during the pendency of an action. *R.* 4:52-2. Such application must be in accord with the provisions of *R.* 4:52-1, insofar as applicable.

The process adopted in the court rules for seeking injunctive relief applications does *not* allow for the entry of an order to show cause for the entry of a *permanent* injunction; rather, it permits only the entry of an order requiring a party to show cause why a temporary restraint or an interlocutory injunction should not issue. *Waste Mgmt. of N.J., Inc. v. Union County Utility Auth.*, 399 N.J. Super. 508, 516 (App. Div. 2008) (citing *R.* 4:52-1 and -2).

OSCs are not to be used in actions where the primary goal is to recover a money judgment. *Solondz v. Kornmehl*, 317 N.J. Super. 16, 20 (App. Div.1998). In *Solondz*, the Plaintiff's attorney drafted and improperly submitted an OSC which required Defendants to show why the final judgment amount should not be entered on the return date. *Id.* The court found this to be a misuse of the OSC, and frowned upon the extra burden it unfairly placed on the courts. *Id. See also City of Orange Twp. Bd. of Educ. v. City of Orange Twp.*, 451 N.J. Super. 310, 320 (Ch. Div. 2017).

The above-mentioned rules and procedures do not apply to labor strike injunctions, which are governed by *N.J.S.A.* 2A:15-51, *et seq.*, and are discussed *supra*. *R.* 4:52-7.

REMEMBER:

• If an appeal from a final decision or action of a state administrative agency is involved, the matter belongs before the Appellate Division. *R.* 2:2-3(a)(2).

• If an appeal from an action of a municipal body is involved, it is an action in lieu of prerogative writs and belongs in the Law Division. *R.* 4:3-1(a)(1); *R.* 4:69-6.

• If a receivership OSC is sought, notice of the application for an OSC must be given to the corporation, even if no TRO is involved. The reason is that the mere issuance of such an OSC may economically devastate the corporation. *Tachna v. Pressed Steel Car Co.*, 112 N.J Eq. 411 (E. & A. 1932); *Rosenfeld v. Roebling Coal Co., Inc.*, 124 N.J. Eq. 487 (Ch. Div. 1938), *aff'd*, 125 N.J. Eq. 348 (E. & A 1939). *See* discussion of Receiverships, *supra*.

• When a TRO may result in damage to defendant, the court may condition its issuance upon the filing by plaintiff of an indemnity bond. *R.* 4:52-3.

• If a TRO application is denied (whether or not the OSC is signed), the judge must mark the original complaint or the affidavit "TRO denied" and sign and date it. *R.* 4:52-5.

• The court may take testimony at the return date of the OSC and the OSC may require the appearance of witnesses. *R.* 4:52-1(c).

• Chancery's injunctive power should not be invoked to enforce municipal ordinances and State penal statutes. *In re Resolution of State Com. of Investigation*, 108 N.J. 35, 41 (1987); *Egg Harbor v. Colasunno*, 182 N. J. Super. 110, 116 (Ch. Div. 1981). However, such complaints are usually framed to abate a nuisance and are thus cognizable in Chancery.

3. OSCs brought to punish for contempt of court or to enforce litigant's rights are governed by *R.* 1:10-2 and *R.* 1:10-3, respectively. There is a tremendous distinction between these two procedures, which are often confused. Briefly, a contempt OSC is sought in order to punish a party for having disobeyed an order of the court; an OSC in aid of litigant's rights is sought in order to compel compliance with an order of the court. Where the same conduct can support both the charge of contempt pursuant to *R.* 1:10-2 and an application for aid in litigant's rights under *R.* 1:10-3, the two actions should be tried separately. *Lusardi v. Curtis Point Property Owners Association*, 138 N.J. Super. 44, 50 (App. Div. 1975), *modified on other grounds*, 86 N.J. 217 (1981).

Aggrieved parties, faced with the refusal of their adversary to comply with a directive of the court, frequently seek an OSC contempt. However, there is a strict and lengthy procedure required by *R.* 1:10-2 for contempt (jury trial, a different

judge, special caption, bail, and appointment of a prosecutor who is generally the Attorney General or the County Prosecutor). Usually the applicant, who only wants the adversary to comply with the order, could instead seek an OSC in aid of litigant's rights under *R.* 1:10-3. Rule 1:10-3 permits the court to award counsel fees for services rendered on a successful application.

A typical situation involving a contempt OSC is the refusal of a striking labor union to comply with a court order forbidding violence on the picket line. The union will be required by the OSC to show cause why it should not be held in contempt of court.

A typical example of when an OSC in aid of litigant's rights is appropriate is where defendant was ordered to dig a drainage ditch in order to safeguard plaintiff's property but has refused to do so. Although this may be a contempt of court, the interests of plaintiff will be better served by an OSC requiring defendant to show cause why defendant should not be jailed or subjected to a daily fine until he complies with the previous order of the court.

On the distinction between *R.* 1:10-2 and *R.* 1:10-3 proceedings generally, *see Lusardi v. Curtis Point Property Owners Association.*, 138 N.J. Super. 44 (App. Div. 1975), *modified on other grounds*, 86 N.J 217 (1981). Note that the term "civil contempt" has been disapproved. *New Jersey Dept. of Health v. Roselle*, 34 N.J. 331 (1961). *See also In re Lynch*, 369 N.J. Super. 93, 97 (App. Div. 2004) (explaining the summary contempt procedure under *R.* 1:10 and noting that "in effect, there is no such thing as civil contempt … [e]very contempt is criminal or quasi-criminal").

Also see Wolfe v. Malberg, 334 *N.J. Super.* 630, 636 (App. Div. 2001), which discusses the guidelines set forth in *R.* 1:10-1, explaining when a judge may adjudicate contempt summarily without an OSC. A *R.* 1:10-2 contempt proceeding can be brought only by OSC, whereas a *R.* 1:10-3 proceeding may be brought either by OSC or by notice of motion.

A trial court has jurisdiction to entertain a proceeding to enforce an order or judgment which has been appealed from, so long as such order or judgment has not been stayed. *See R.* 2:9-1(a). *See Busch v. Busch*, 91 N.J. Super. 281, 285 (Ch. Div. 1966); *Morrison v. Morrison*, 93 N.J. Super. 96, 100-02 (Ch. Div. 1966). (Trial court had jurisdiction to award attorney fees and costs despite pendency of appeal from child custody judgment.) *But see Kiernan v. Kiernan*, 355 N.J. Super. 89 (App. Div. 2002) (affirming trial court's ruling that it lacked jurisdiction to hear reconsideration motion of husband since underlying divorce action was on appeal). *Gordon v. Rozenwald*, 380 N.J. Super. 55, 64 n. 2 (App. Div. 2005) (explaining that a party who seeks reconsideration by the trial court while an

appeal is pending must apply to the Appellate Division for an order remanding the matter) (*citing Kiernan v. Kiernan*, 355 N.J. Super. 89, 92 (App. Div. 2002)); *Van Horn v. Van Horn*, 415 N.J. Super. 398, 410 (App. Div. 2009) (affirming trial court's decision that it had jurisdiction to consider a cross-motion to disqualify counsel while other issues in the case were pending on appeal "because the cross-motion could not 'affect, impair or destroy the subject matter of the appeal'") (*citing Carlucci v. Carlucci*, 265 N.J. Super. 333, 344 (Ch. Div.1993)).

B. *LIS PENDENS*

Notice of *lis pendens* must be filed in any suit brought for the purpose of enforcing a lien, except a mechanic's lien, upon real estate or which affects title to real estate. *N.J.S.A.* 2A:15-6. Such notice of *lis pendens* is filed with the county clerk or register of deeds and mortgages in the county where the affected property is located.

No *lis pendens* can be filed, however, in an action at law seeking recovery of money or damages only. *Polk v. Schwartz*, 166 N.J. Super. 292, 298 (App. Div. 1979). *See B.J.I. Corp. v. Larry W. Corp.*, 183 N.J. Super. 310, 314 (Ch. Div. 1982), wherein the purchasers of real property brought suit to compel specific performance of the contract of sale and subsequently filed a notice of *lis pendens*. The plaintiffs later abandoned their claim for specific performance and took a default judgment against the builder and landowner, recovering $21,700. *Id.* at 315. In a subsequent mortgage foreclosure action against the property in question, the validity of the purchasers' notice of *lis pendens* was challenged. *Id.* at 315-16. The court held that when a notice of *lis pendens* is based on a legitimate claim for specific performance of a contract to convey realty, such notice is properly grounded in an "action . . . the object of which is to . . . affect title to real estate. . . ." *Id.* at 316, *citing N.J.S.A.* 2A-15-6. Therefore the effectiveness of the *lis pendens* is not defeated should the plaintiff later abandon its equitable claim and accept money damages. *Id.* at 320-21.

NOTE: A *lis pendens* may be filed in a matrimonial action where the filing party seeks to protect an interest in property potentially subject to equitable distribution. *Di Iorio v. Di Iorio*, 254 N.J. Super. 172 (Ch. Div. 1991).

The statute provides that the notice of *lis pendens* shall set forth the title of the cause, the general object thereof, and a description of the lands or real estate to be affected by the *lis pendens*, so as to enable a prospective purchaser to identify the property. In a proceeding for the foreclosure of a recorded mortgage or tax sale certificate, the *lis pendens* must also specify the book and page of the record or registration of the mortgage or tax sale certificate. *N.J.S.A.* 2A:15-9.

The purpose of the filing is to provide notice of the pendency of an action involving the realty, so that the interest of any subsequent purchaser or lienor will be

subject to the outcome of the litigation. *Wendy's of South Jersey, Inc. v. Blanchard Mgmt. Corp*., 170 N.J. Super. 491, 496 (Ch. Div. 1979). In order to protect its interests, therefore, a plaintiff should file a notice of *lis pendens* in mortgage foreclosure actions, partition actions, and actions to compel specific performance of a contract for the sale of real estate.

N.J.S.A. 2A:15-6 does not provide a time period within which the notice of *lis pendens* must be filed after the filing of the bill or complaint. Until the *lis pendens* is filed, and before entry of the final judgment or decree, a bona fide purchaser or mortgagee, or any party acquiring a lien on the property, will be deemed not to have had constructive notice of the suit, and, thus, will not be affected by the outcome of the action. *N.J.S.A.* 2A:15-8; *Sorg v. Tower*, 119 N.J. Eq. 109 (1935).

A *lis pendens* will not be effective if it is prematurely filed, i.e., prior to filing of the bill or complaint, as it will be deemed not to give constructive notice to a purchaser of plaintiff's claims. *Schwartz v. Grunwald*, 174 N.J. Super. 164 (Ch. Div. 1980). *Schwartz* has been called into doubt by *Howard Savings Bank v. Brunson*, 244 N.J. Super. 571 (Ch. Div. 1990) (in order to provide proper constructive notice to subsequent purchasers and creditors, a mortgagee must ensure that a mortgage is both properly recorded and properly indexed).

Any person claiming to have acquired an interest or lien upon the affected property after the date the *lis pendens* is filed is deemed to have acquired the interest or lien with notice and, thus, is bound by the judgment rendered in the suit as if a party to the suit. *N.J.S.A.* 2A:15-7(a); *see also Manzo v. Shawmut Bank, N.A.*, 291 N.J. Super. 194 (App. Div. 1996). The subject interest or lien must arise through a named defendant in the suit. *See Spyco, Inc. v. Demenus*, 226 N.J. Super. 482 (Ch. Div. 1988) (notice of *lis pendens* could not be filed against the property interest of a mortgagee who had not been named as a defendant in the underlying suit).

Because the filing of a *lis pendens* prevents the owner of the affected property from conveying marketable title if the litigant has a possibility of success, *Fravega v. Sec. Sav. & Loan Ass'n*, 192 N.J. Super. 213, 218 (Ch. Div. 1983), due process concerns are implicated. *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316 (3d Cir. 1982); *Trus Joist Corp. v. Treetop Associates, Inc.*, 97 N.J. 22, 32 (1984). In response to this concern, the Legislature amended *N.J.S.A.* 2A:15-7 in 1982 to provide procedural protection for any person with an interest in the property which is the subject of a *lis pendens*. *N.J.S.A.* 2A:15-7(b) requires prompt post-filing service of a notice of *lis pendens* upon the defendant and further provides an expedited opportunity for a rapid hearing to remove the burden on defendant's title if the court determines that there is insufficient probability of final judgment in favor of the plaintiff. The motion for hearing may be brought

in accordance with *R.* 4:63A.

In deciding whether a *lis pendens* should be continued of record, Judge Gibson in *Fravega v. Sec. Sav. & Loan Ass'n,* determined that: (1) "the court must engage in a weighing process regarding the persuasiveness of the proofs presented," 192 N.J. Super. at 218; (2) "probability," as used in the statutory amendment, means that it is "more likely than not that judgment will be entered for the plaintiff," *Id.* at 219; but (3) the court still must "weigh the strengths of plaintiffs' case against the detriment imposed on defendant by reason of the filing of the notice of *lis pendens*." *Id.* This weighing process requires a case-by-case evaluation similar to that employed in the issuance of a preliminary restraining order.

A *lis pendens* is considered part of the public records of the county. *New Jersey Land Title Ass'n v. State Records Comm., Div. of Archives & Records Mgmt. in the New Jersey Dep't of State*, 315 N.J. Super. 17, 23-25 (App. Div. 1998). As such, the State Records Committee has been empowered by the Legislature to direct their destruction and removal, as necessary, pursuant to *N.J.S.A.* 47:3-9. *Id*. at 25.

Similarly, when a notice of *lis pendens* is improperly indexed, it is not considered to be part of the public records, and subsequently does not provide the necessary constructive notice, which is the purpose of filing a *lis pendens. Manchester Fund, Ltd. v. First American Title Ins. Co*., 332 N.J. Super. 336, 346 (Law Div. 1999) (*lis pendens* did not provide constructive notice where improperly indexed under the government's name).

The filing of a *lis pendens* is absolutely privileged and cannot serve as a basis for any defamation action, including slander of title, at least where the notice accurately mirrors the complaint (which is separately privileged). *See Lone v. Brown*, 199 N.J. Super. 420, 428-29 (App. Div.), *certif. granted*, 102 N.J. 336 (1985), *appeal dismissed*, 103 N.J. 480 (1986).

The *lis pendens* statute provides the methods by which a *lis pendens* may be discharged of record. A *lis pendens* can only be discharged as provided in the statute. *Harvey v. Randall*, 99 N.J. Eq. 859 (E. & A. 1926) (interpreting an earlier act). Now while the same rule applies, the discharge statute has been broadened and a court may order the discharge of a notice of *lis pendens* for lack of diligent prosecution of the action or for other good cause. *N.J.S.A.* 2A:15-10; *see also Gage v. Wells Fargo Bank, N.A.*, No. 12-777(FLW), 2013 U.S. Dist. LEXIS 95347, at*19 (D.N.J. July 9, 2013) (granting a motion to discharge the lis pendens where the Court determined that the lis pendens no longer served a legitimate purpose). In any event, the *lis pendens* becomes ineffective five years from the date of filing. *N.J.S.A.* 2A:15-11. Once a *lis pendens* is properly filed, it serves as notice to "any person claiming an interest or lien upon the lands through any defendant in the suit."

Cox v. RKA Corp., 164 N.J. 487, 499 (2000).

Where tenants enter into a tenancy after a *lis pendens* has been filed on a given property, the tenants are considered to have notice of the *lis pendens*, and may be subject to ejectment as a result. *Davin, LLC v. Daham*, 329 N.J. Super. 54, 66 (App. Div. 2000). Such action against residential tenants, however, may be subject to the Anti-Eviction Act.

C. PROBATE

1. PROBATE OF WILLS AND ADMINISTRATION OF ESTATES

Under the revised rules, all routine non-adversarial probate matters are to be handled by the Surrogate's Court. Such non-adversarial matters include the probate of a will and the issuance of letters of administration. Non-adversarial actions now filed in the Surrogate's Court are to be instituted by application rather than complaint. *R.* 4:80 and 4:81. The word "Complaint" has been reserved for the initial pleading filed in those matters which require adjudication by a Superior Court Judge. *See R.* 4:83, *et seq*. Matters in which the Surrogate's Court may not act are enumerated in R. 4:82 and include matters in which: (1) a caveat has been filed; (2) a doubt appears on the face of a will or a will has been lost or destroyed; (3) the application is to admit to probate a writing intended as a will as defined by *N.J.S.A.* 3B:3-2(b) or *N.J.S.A.* 3B:3-3; (4) the applicant seeks the appointment of an administrator pendent lite or other limited administrator; (5) a dispute arises in the Surrogate's Court; or (6) the Surrogate certifies the case to be one of doubt or difficulty.

All probate matters not falling within the limited jurisdiction of the Surrogate's Court are cognizable in the Superior Court, Chancery Division, Probate Part pursuant to *R.* 4:83, *et seq*. The Superior Court, Chancery Division has original probate jurisdiction. *R.* 4:84-1. The prior practice of proceeding on motion, rather than by complaint in the case of the Superior Court review of a will probated by the Surrogate's Court, has been eliminated under the revised rules. The revised rules have also done away with the prior practice of initiating an action in the Superior Court for probate "in common form," where no notice was required and the proceeding was ex parte. *See* prior *R.* 4:80-1. All probate actions in the Superior Court, are now to be brought in a summary manner by the filing of a complaint and the issuance of an order to show cause pursuant to *R.* 4:67. *R.* 4:83-1. The new procedure is similar to the Superior Court practice under the old rules for filing probate actions "in solemn form." Prior *R.* 4:84-3(b). Since all probate actions are now filed either in the Surrogate's Court or by issuance of an order to show cause by the Superior Court, all references to probate "in common form" and "in solemn form" have been eliminated under the revised rules.

The complaint filed in the Superior Court is to be verified by the plaintiff upon oath that the allegations are true to the best of the plaintiff's knowledge and belief. *R.* 4:83-5. A copy of the order to show cause, together with a certified copy of the complaint shall be served in accordance with the rules prescribed under *R.* 4:67-3. *R.* 4:83-1. All papers relating to probate matters are to be filed with the Surrogate of the county as Deputy Clerk of the Superior Court, Chancery Division. *R.* 4:83-2. Moreover, the contested probate action is to be brought in the county where that Surrogate Court sits. *R.* 4:83-4. *See*, e.g., *In re Estate of Roccamonte*, 324 N.J. Super. 357 (App. Div. 1999) (finding that a palimony claim brought against the estate of a decedent was transferred from the family part to the probate part was also appropriately transferred to the county in which the estate was administered).

In actions commenced in which, under *R.* 4:82, the Surrogate's Court may not act, any person in interest may file a complaint and apply for issuance of an order to show cause. *R.* 4:84-1. The order to show cause is to be issued to "all interested parties." It is not clear whether all interested parties include those persons who are entitled to notice of probate under *R.* 4:80-6. Under the prior rules, the parties were often limited to the plaintiff (i.e. the proponent of the will) and the disputant, as well as any persons affected by doubtful provisions in the will. *See*, prior *R.* 4:84(c). Under *R.* 4:84-2, discovery is available under *R.* 4:10, *R.* 4:12 through *R.* 4:19, and *R.* 4:21 and 4:23 for proving a will. If the will is then admitted to probate, the Superior Court will direct that the will be filed with and recorded by the Surrogate's Court. Letters of appointment will then be issued by the Surrogate's Court. In contested administration matters, the judgment of the Superior Court granting administration shall direct the Surrogate's Court to issue and record letters of administration. *R.* 4:84-3.

The Superior Court may review actions by the Surrogate's Court pursuant to *R.* 4:85-1. Such review is instituted by complaint brought by any person aggrieved by an action in the Surrogate's Court where a will has been admitted to probate or where letters have been granted. The complaint must be filed within four months after the probate of a will or of the grant of letters. If the aggrieved person lives outside the State, the complaint shall be filed within six months of probate or of the grant of letters. If the relief, however, involves a fraud upon the court, based upon the standards of *R.* 4:50-1(d), (e), or (f) or *R.* 4:50-3, a complaint must be filed within a reasonable time under the circumstances. The order to show cause and a copy of the complaint is to be served on the personal representative of the estate. Other parties in interest may, on their own motion, apply to intervene. The revised *R.* 4:85-1 closely parallels the prior *R.* 4:80-7, which provided that the order to show cause be served on the plaintiff. Under the prior rule the plaintiff was the person who initially filed the complaint with the Surrogate's Court in an action for probate or for the grant of letters. *See* prior *R.* 4:80-7.

In cases involving contested wills, practitioners should be aware of the Doctrine of Probable Intent. *See Fidelity Union Trust Co. v. Robert*, 36 N.J. 561 (1962); *see also In the Matter of the Estate of Bonardi*, 376 N.J. Super. 508 (App. Div. 2005) wherein decedent's will established two trusts with income from one of the trusts designated for the surviving spouse. Decedent's daughters were to receive any remainder. The mother filed an action and the daughters executed a waiver of their remainder interest so that the corpus could be distributed to their mother. The Appellate Division reversed even though the daughters willingly waived their rights because "… one of the conditions which must exist before a trust will be accelerated or terminated, even upon application of all the parties in interest, is that every reasonable ultimate purpose of the trust's creation and existence has been accomplished and that no fair and lawful restriction imposed by the testator will be nullified or disturbed by such a result." *Estate of Bonardi* at 516, *quoting Fidelity Union Trust Co. v. Margetts*, 7 N.J. 556, 566, 82 A.2d 191 (1951).

In *Fidelity Union Trust Co. v. Robert*, 36 N.J. 561 (1962), the Supreme Court abolished the presumption that permitted a court to rely on the purported plain meaning of a will or trust. Instead, the Court found that it should "strain" to "ascertain the subjective interest of the testator" and read and consider the will or trust "in light of the surrounding facts and circumstances." *Id.* at 564-65. *See also In re Burke's Estate*, 48 N.J. 50, 64 (1966). *In re Trust Created by Agreement Dated December 20, 1961, ex rel. Johnson*, 194 N.J. 276, 282-84 (2008) (discussing the admissibility of opinion testimony of the scrivener to shed light on testator's probable intent); *In re Probate of Will & Codicil of Macool*, 416 N.J. Super. 298, 308-10 (App. Div. 2010) (discussing the relaxation of the requirements for will execution and holographic wills as set forth in *N.J.S.A.* 3B:3-3); *but see In re Estate of Flood*, 417 N.J. Super. 378, 382 (App. Div. 2010) *certif. denied*, 206 N.J. 64 (2011) (holding that the doctrine of probable intent has no application where no will has been executed). Thus, the essential endeavor the court must undertake "is to put itself in the testator's position insofar as possible in the effort to accomplish what he would have done had he envisioned the present inquiry." *Robert*, 36 N.J. at 565-66. Consequently, a clearly ascertained probable intent can be effectuated by the court even if it means the deletion from, substitution of or insertion in the verbiage used in the will. *In re Estate of Tateo*, 338 N.J. Super. 121, 127 (App. Div. 2001) (applying the doctrine of probable intent), *certif. denied*, 168 N.J. 295 (2001); s*ee also In re Estate of Passoff*, 359 N.J. Super. 112, 119-20 (Ch. Div. 2002); *In re Estate of Gabrellian*, 372 N.J. Super. 432, 441 (App. Div. 2004), *certif. denied*, 182 N.J. 430 (2005) ("In attempting to determine the probable intent of the testator, where that doctrine applies, courts must consider the

entirety of the will in light of the circumstances surrounding the execution of the will.").

The doctrine of probable intent has been consistently reaffirmed — and expanded upon — over the past 35 years. In *In re Estate of Mable Baker*, 297 N.J. Super. 203 (App. Div. 1997), the Appellate Division held that a trial court erred by failing to permit discovery or consideration of extrinsic evidence in interpreting a will. The Appellate Division held that even where a will is ambiguous on its face, a trial court is required to examine and consider extrinsic evidence to determine first if there is a latent ambiguity in the will and, second to resolve that ambiguity. *Baker*, 297 N.J. Super. at 212. *See also Engle v. Siegel*, 74 N.J. 287, 291-94 (1977); *Wilson v. Flowers*, 58 N.J. 250, 263 (1971). In the case of *In re Estate of Payne*, 186 N.J. 324, 327 (2006), the Supreme Court relied on the doctrine of probable intent in determining whether the testator intended to bequeath his New Jersey property to his partner debt-free. In determining the testator's probable intent, the court considered a letter that the testator sent to his attorney a few months prior to his death regarding the wording of his will. *Id.* at 330-31. The court held that the letter was "a clear and unambiguous expression" of the testator's intentions that his beneficiaries receive their real-estate free and clear of mortgage debts and subsequently reversed and remanded to the trial court for further proceedings. *Id.* at 337-38. *See also In the Matter of the Estate of Reininger*, 388 N.J. Super. 289 (Ch. Div. 2006); *In the Matter of the Estate of Richard D. Ehrlich*, 427 N.J. Super. 64, 76 (App. Div. 2012) (holding that an unexecuted document was properly admitted to probate because it "meets all the intent-serving benefits of Section 2's formality").

The doctrine of probable intent, as thus judicially framed, is codified by *N.J.S.A.* 3B:3-33.1(a): The intention of a testator as expressed in his will controls the legal effect of his dispositions, and the rules of construction expressed in *N.J.S.A.* 3B:3-33 through *N.J.S.A.* 3B:3-48 apply, unless the probable intention of the testator, as indicated by the will and relevant circumstances, is contrary. *N.J.S.A.* 3B:3-33.1(a).

For a discussion of the effect of revoking a codicil without re- executing the original will or without preparing a new codicil, *see In re the Estate of LaGreca*, 297 N.J. Super. 67 (App. Div. 1997). In *LaGreca*, the testator executed a codicil to her will revoking certain provisions. She later destroyed the codicil, but failed to either re-execute the original will or execute a new codicil expressing an intent to revive the earlier provisions as required by *N.J.S.A.* 3B:3-15. The Appellate Division, affirming the Chancery Judge's decision, found that a revocation of the revoking instrument (the codicil) does not revive the original instrument. The court, quoting *In re Estate of Peters*, 107 N.J. 263, 281 (1987), held: "that strict, if not literal, adherence to statutory requirements is required in order to validate a will..."

The technical requirements for wills are set forth in *N.J.S.A.* 3B:3-2. However, a document that does not comply with such requirements may still be admitted to probate as a will under *N.J.S.A.* 3B:3-3 if its proponent can establish "by clear and convincing evident that the decedent intended the document to constitute the decedent's will." *See In the Matter of the Estate of Richard D. Ehrlich*, 427 N.J. Super. 64 (App. Div. 2012). In *Ehrlich*, the issue on appeal was whether an unexecuted document sufficiently represented the decedent's testamentary intent, such that it was proper to admit to probate under *N.J.S.A.* 3B:3-3. The Court explained that while *Section 3* relaxes the requirements under Section 2, it "imposes evidential standards and safeguards appropriate to satisfy the fundamental mandate that the disputed instrument correctly expresses the testator's intent." *Id.* at 74. In *Ehrlich*, the Appellate Division reviewed the undisputed facts of the record and determined that the unexecuted document was drafted by the testator, expressed his intent and was assented to by the testator. *Id.* The dispositive facts in *Ehrlich* were: a handwritten notation in the decedent's handwriting on the cover page of the document that the original had been sent to the executor and the trustee named in the document; decedent executed a power of attorney and a health care directive on the same day; and repeated oral acknowledgement and confirmation of the contents of the document. Therefore, the Appellate Division held that the document was properly admitted to probate despite its non-compliance with the formalities set forth in *N.J.S.A.* 3B:3-2.

2. NON-ADVERSARIAL PROCEEDINGS

Judgment admitting a will to probate may not be signed until 10 days after the testator's death. *N.J.S.A.* 3B:3-22. However, the necessary papers may be submitted earlier. *Id.* Applications for probate of a will, and for the various forms of letters of administration, are filed with the Surrogate's Court of the county in which the decedent was domiciled at death, or if the decedent is outside of the State, the county where the decedent left property or into which any property belonging to the decedent's estate may have come. *R.* 4:80-1(a) and (c). The application must state:

1. the applicant's residence;

2. the name and date of death of decedent, his domicile at the date of his death, and the date of the will;

3. the names and addresses of the decedent's spouse, heirs, next-of-kin and any other persons entitled to letters and their relationships to decedent, identifying to the best of the applicant's knowledge and belief those whose names and addresses are unknown, and stating that there are no other heirs or next of kin; and

4. the ages of any minor heirs or next-of-kin, and, in the application for probate of a will, whether the testator had issue living when the will was made and whether he or she left any child born or adopted thereafter or issue of such child and their names and the names of afterborn or adopted children since the date of the will or other issue, if any. *R.* 4:80-1(a).

The applicant must verify under oath that the statements made in the application are true to the best of the applicant's knowledge and belief. *R.* 4:80-1(a). The application should be accompanied by:

• the original will (which the Surrogate will examine for doubt on its face), *R.* 4:80-1(a),

• a death certificate (or other competent proof of death, unless dispensed with for good cause), *R.* 4:80-1(b),

• in actions where a bond is required of the person applying for letters, an affidavit of the value of the personal estate, *R.* 4:80-1(b).

Pursuant to *N.J.S.A.* 3B:3-19, a will executed according to the statute governing the execution of wills may be proved upon the deposition [see *R.* 4:80-2(a)] or testimony in court of one of the subscribing witnesses or by such other person as may have knowledge of the facts relating to the proper execution and attestation of a will. If any of the subscribing witnesses are out of the State, the Surrogate may authorize the taking of the witness' deposition in the form of a witness-proof. *R.* 4:80-2(a). If all witnesses are deceased, the signatures of each witness may be proved by one person and the same person may prove all signatures. *R.* 4:80-2(b). Under *N.J.S.A.* 3B:3-19, a "self-proving" will (i.e., a will executed and acknowledged as provided in *N.J.S.A.* 3B:3-4 or *N.J.S.A.* 3B:3-5) may be admitted to probate unaccompanied by further proof. Strict adherence to the statutory requirements for executing a "self-proving" will is not essential. A will executed in such a manner may be admitted to probate if it is shown by clear and convincing evidence that its execution substantially complies with the statutory requirements. *Matter of Will of Ranney*, 124 N.J. 1 (1991). *But see In re Will of Ferree*, 369 N.J. Super. 136, 153 (Ch. Div. 2003), *aff'd, In re Will of Ferree*, 369 N.J. Super. 1 (App Div. 2004) (holding substantial compliance doctrine was not applicable to holographic wills). *See also In re Estate of Gerhardt*, 336 N.J. Super. 157 (Ch. Div. 2000); Senate Judiciary Committee Statement, Senate, No. 3540-L. 1991, c. 255 (reporting favorably on Senate bill 3540 and explaining that "this bill would amend [*N.J.S.A.*] 3B:3-4 to provide that any will executed on or after September 1, 1978, shall be deemed validly executed and self-proved by the testator's and witnesses' signing of the self-proved affidavit. A separate attestation clause would not be required"). For information regarding authentication of witnesses' signatures under *N.J.S.A.* 3B:3-19, see *N.J.R.E.* 503, set out in Appendix A following Chapter 84A of

Title 2A.

In an application for any of the various forms of letters of administration (except letters testamentary), *R.* 4:80-3 requires that renunciations be obtained from all those persons who have a prior or equal right to letters of administration to that of the applicant. The applicant is required to give at least 10 days' notice to all such persons who do not renounce. *R.* 4:80-3(b). Sixty days' notice is required in the case of persons who live outside the State. *R.* 4:80-3(b). Generally, persons who have a prior or equal right to letters of administration include all those persons entitled under the Statute of Intestate Succession to share in the decedent's estate. *In re Estate of Mellett*, 108 N.J. Super. 181 (Hudson County Ct. 1969). In the case of an application for letters of administration, with the will annexed, persons having a prior or equal right to letters of administration would include the residuary legatees under the will. 6 Clapp, New Jersey Practice, Wills and Administration, § 707 at 337; *see also In re Stewart*, 117 N.J. Eq. 256 (Prerog. Ct. 1934).

If satisfied with the proofs presented, the Surrogate will sign a judgment admitting the will to probate. In the case of an uncontested administration, the Surrogate will sign a judgment granting letters so long as the renunciation and notice requirements under *R.* 4:80-3 are complied with. Thereupon the executor, or administrator, must execute a qualification. This is merely an oath wherein the fiduciary swears that he will faithfully discharge his duties. *R.* 4:96-1.

A bond will be required when the executor is a non-resident or, if a resident, where the will does not waive the bond. *N.J.S.A.* 3B:15-1(e). A bond is also required for an administrator appointed under any of the forms of administration except: 1) administration *ad litem*, which may be granted with or without bond; or 2) administration granted to a surviving spouse where decedent's entire estate is payable to the surviving spouse. *N.J.S.A.* 3B:15-1(c). The statute governing such bonds, *N.J.S.A.* 3B:15-1, leaves the determination of the amount to judicial discretion. The general rule is to fix the bond at double the gross value of the estate (i.e., the personal estate and the real estate of which the executor has power of sale) coming into the hands of a fiduciary.

N.J.S.A. 3B:14-47 requires every fiduciary relating to an estate, whether a resident of the State or not, to file a power of attorney at the time he is granted letters. The power of attorney makes the Surrogate granting the letters the attorney of the fiduciary for purposes of receiving process effecting the estate.

Under the revised rules, the executor or administrator, must, within 60 days after the will is admitted to probate, give notice thereof to all beneficiaries and all persons designated by *R.* 4:80-1(a)(3), which include the spouse, heirs, next-of-kin and other persons entitled to letters. Such notice must consist of a statement in writing

that the will has been probated, the place and date of probate, the name and address of the personal representative and a statement that a copy of the will shall be furnished upon request. Proof that notice has been mailed must be filed with the Surrogate within 10 days of mailing. When the names and addresses of the persons entitled to notice are not known or cannot by reasonable inquiry be determined, then notice of probate of the will must be published in a newspaper of general circulation in the county naming or identifying those persons as having a possible interest in the probate estate. This notice must name or identify those persons having a possible interest in the estate. Where a charity is a named beneficiary, notice must be given to the Attorney General. *R.* 4:80-6.

3. TRUST ADMINISTRATION

If a trustee is named in a will or if a successor trustee is appointed, the trustee must accept the trusteeship pursuant to *R.* 4:96-1 (Qualification; Acceptances) before exercising any authority. *R.* 4:80-9 (Testamentary Trustee). The acceptance must recite the names and addresses of the trustees and the persons interested in the trust and shall identify their interests. *Id.* In addition, a letter of trusteeship must be issued by the Surrogate Court. *Id.* The statute was amended effective September 5, 2000, and reflects the principle that a substituted trustee is appointed by the court, and a successor trustee is named by the testator in the will.

An action for the appointment of a substituted trustee of an *inter vivos* or testamentary trust must be brought pursuant to *R.* 4:84-4. *Rule* 4:84-4 specifies that the complaint must include a copy of the trust instrument and the acceptance of the person seeking appointment. The order to show cause must be served upon those interested in the trust and upon any trustees then serving. Letters of trusteeship are issued by the Surrogate Court following judgment. The statute was amended effective September 5, 2000, and is intended to make *R.* 4:84-4 consistent with the change made in *R.* 4:80-9 to clarify that a substituted trustee is not one named by the will, thus requiring court appointment. A successor trustee who is named in the will is entitled to appointment.

4. SUBSTITUTION OF A TRUSTEE

When a duly qualified trustee resigns, and the trust instrument does not designate a successor, the trust cannot be allowed to lapse. Rather, the court must appoint a substitute. Such an action may proceed summarily, pursuant to *R.* 4:67-2. *See R.* 4:84.

The complaint should briefly set forth the terms of the trust, summarize its previous history, identify the present trustees and all *cestuis que* trust (vested or contingent), state those trust provisions which are applicable to the trustees, give the dates of any previous accountings and the amount of any compensation taken, and state that the present trustee seeks to resign and that the proposed substitute trustee

is qualified.

The relief sought is typically:

• approval of the trustee's resignation and appointment of his successor;

• direction that the resigning trustee file an accounting for approval by the court;

• determination that no bond be required of the successor trustee (if the trust instrument waived any bond from the original trustee);

• award of counsel fees for the application from the trust principal;

• issuance of an Order to Show Cause why judgment should not enter in a summary manner.

For cases relating to trust administration see *In re Koretzky's Estate*, 19 N.J. 352 (1955) (summary appointment or substitution of trustee); *Clark v. Judge*, 84 N.J. Super. 35, 62 (Ch. Div. 1964), *aff'd*, 44 N.J. 550 (1965) (removal of a trustee); *Trustees of Rutgers College in N.J. v. Richman*, 41 N.J. Super. 259, 285-86 (Ch. Div. 1956) (trustee's bill for instructions of court); *see also N.J.S.A.* 3B:26-1, *et seq.* (appointment of trustee for absent person).

5. ACCOUNTINGS BY FIDUCIARIES

Actions to settle fiduciaries' accounts (typically those of guardians, executors, administrators, or trustees) are brought under *R.* 4:87. A complaint, the account, and an order to show cause for a *R.* 4:67-2 summary proceeding is mandated. *R.* 4:87-1.

The complaint may seek either an intermediate or a final accounting. Certain charitable trusts may be perpetual and involve an intermediate accounting every 20 or 30 years; even a normal testamentary trust may last for 50 years and involve several intermediate accountings. (The fiduciary may prefer to submit an intermediate account rather than awaiting the final account at the termination of his responsibilities because he cannot be paid for his services except upon such an accounting.) The complaint:

• must contain names and addresses of all persons interested in the account, specifying whether any are infants or incompetents, and listing the names and addresses of any guardians or parents or persons standing in loco parentis to such infants or incompetents, *R.* 4:87-2(a);

• must specify the period of the accounting, *R.* 4:87-2(b);

• must contain a summary of the account, as prescribed by *R.* 4:87-2, *R.*

4:87-2b;

• must have annexed to it the account, which must be dated, *R.* 4:87-2(c);

• must ask for allowance of the account, and also for allowance of commissions and attorneys' fees if any are sought (the complaint need not specify the amount requested), *R.* 4:87-2(d);

• must be filed 20 days prior to the date on which the account is to be settled, *R.* 4:87-2(e);

• must be verified to the best of the accountant's knowledge and belief, *R.* 4:87-4. *R.* 4:83-5.

If the complaint represents a first accounting respecting the res, a new docket number will have to be obtained from the Clerk and the complaint filed with the appropriate fee; if a subsequent accounting, the complaint is filed under the same docket number as its predecessor and the filing fee is reduced.

Notice of hearing must be by Order to Show Cause. The accountant will submit an Order to Show Cause for a summary proceeding, which is authorized by *R.* 4:87-1. The order to show cause:

• must state the amounts of any fees and commissions requested;

• must notice all interested persons as to the hearing;

• must contain the service language provided for service of a complaint by *R.* 4:67-2. Typically service of the complaint and Order to Show Cause is allowed by registered mail, return receipt requested. *R.* 4:67-3;

• must have a return date at least 20 days from the date of the filing of the complaint; if an infant or incompetent is interested the return date must be set several months hence, to allow time for the report of the guardian *ad litem.* Note that if interested parties reside outside the State, 30 days' notice is required, and that 60 days' notice of the hearing is required where a resident of a foreign territory is interested.

As to the form of the account itself, *R.* 4:87-3(a) requires that charges and allowances as to principal and income be stated separately, and further requires that the following statements be annexed to each account:

• list of all investments and assets in the accountant's hands, where and in what name they are kept, and their value both on the day of acquisition by the accountant and on the day the account is drawn;

• statement of changes made (and the dates of such changes) in the investments and assets since the date of acquisition or the date of the previous

account;

• statement showing apportionment of items between principal and income;

• statement of apportionments with respect to transfer inheritance or estate taxes;

• statement of allocation where administration expenses (including fees and commissions) have been paid from corpus, and the tax benefits of such deductions have been allocated to income beneficiaries;

• statement showing how commissions requested with respect to corpus are computed.

The account will be audited by the Clerk of the Superior Court, who will report to the court prior to the hearing date, specifying any derelictions or errors in the accounting. *R.* 4:87-6. *See,* e.g., *Matter of the Will of Grassman,* 235 N.J. Super. 258 (Ch. Div. 1989) (finding that if the Attorney General requests a separate and independent audit of the account because of the interest of the charitable beneficiary, the attorney general may have it, but at his or her expense, not the estate's). A page fee and an audit fee will be charged for this service.

If an infant or incompetent person is interested in the account, such will be represented in the action by a duly appointed guardian. If none has been previously appointed, or if a conflict of interest exists between ward and guardian, a guardian *ad litem* will be appointed. *R.* 4:26-2(a).

Where an infant is under 17, his next friend (usually a parent) may submit a verified petition to the court pursuant to *R.* 4:26-2(b)(2). (The infant may submit the petition himself if he is 17 or older.) If the petition conforms to the requirements of the rule and no countervailing objection surfaces, the court will appoint a guardian *ad litem* on the basis of the petition. If the court does not grant the petition (usually because of a conflict of interest between ward and nominee), the petitioner receives the opportunity to file another petition within 10 days of the adverse decision. If the court finally does not grant the petition and appoints another person as guardian *ad litem*, it must state for the record its reasons for denying the petition. Only one guardian *ad litem* may be appointed for all infants unless a conflict of interest exists. If no petition by a next friend is filed, the court must appoint a guardian *ad litem*, either on motion of a party to the action or on its own motion. *R.* 4:26 2-(b)(3)-(4).

The guardian *ad litem* must file a written report at least seven days prior to the date on which the account is settled. Further, if a fee in excess of $1,000 is to be applied for, an affidavit of services as well as a notice of application for allowances of fee must be filed. *See R.* 4:86-7; *R.* 4:26-2(c).

NOTE: *R.* 4:26-3 permits appointment of a virtual representative in actions affecting property in which a minor or incompetent has a future interest greater than a life estate. Use of this procedure, when applicable, will obviate the need for a guardian *ad litem*. *R.* 4:26-2(a) provides that a guardian *ad litem* should be appointed to represent minor beneficiaries wherever there is a conflict of interest between the guardian and the ward. *In re Maxwell*, 306 N.J. Super. 563, 581 (App. Div. 1997), c*ertif. denied*, 153 N.J. 214 (1998).

If the accounting fiduciary intends to apply for a commission on the corpus, an affidavit of services must be filed 20 days prior to the hearing. *R.* 4:88-1. *See* also *N.J.S.A.* 3B:18-14 (replaced the former *N.J.S.A.* 3B:18-1, which was repealed). Under *N.J.S.A.* 3B:18:14, the Chancery Division has the power to reduce the amount of an executor's corpus commissions from a testator's estate, notwithstanding a provision in a will directing that the executor's commissions not be reduced by the amount paid for professional services. *In re Estate of Summerlyn*, 327 N.J. Super. 269, 273 (App. Div. 2000), *citing N.J.S.A.* 3B:18-14. Pursuant to *N.J.S.A.* 3B:18-14, "such commissions may be reduced by the court having jurisdiction over the estate only upon application by a beneficiary adversely affected upon an affirmative showing that the services rendered were materially deficient or that the actual pains, trouble and risk of the fiduciary in settling the estate were substantially less than generally required for estates of comparable size."

If the accountant is an executor, administrator, or fiduciary for the property of an absentee (relatively "short-term" fiduciaries), the formula for calculating allowable corpus commissions depends upon the size of the corpus and the number of fiduciaries involved (e.g. a single fiduciary may take a commission of 5% on all corpus that comes into his hands where corpus receipts do not exceed $200,000). *See N.J.S.A.* 3B:18-14. *See In re Estate of Summerlyn*, 327 N.J. Super. 269 (App. Div. 2000) (finding that the statute that governs commission payments on the settlement of account of one fiduciary sets forth the maximum percentages for calculating the base amount of corpus commissions that are permitted for a fiduciary, including an executor. The statute governing allowance of commissions on a corpus that is greater than $200,000 establishes the factors that are taken into consideration by the court when it exercises its discretion as to the amount permitted for corpus commissions. These factors include the fiduciary's actual pain, trouble and risk in settling the estate). If, however, the fiduciary is a guardian or a testamentary trustee (deemed "long-term" appointments), the amount of corpus commission depends upon the date of the distribution of corpus and the number of fiduciaries involved. *N.J.S.A.* 3B:18-28. *N.J.S.A.* 3B:18-2 governs corpus commissions of non-testamentary trustees. It is advisable to study carefully the statutes cited herein (and reprinted in Appendix B-2) to determine the proper formula.

NOTE: All fiduciaries are allowed a commission of 6% on all income

received. Such income commissions may be taken without application to the court. *See N.J.S.A.* 3B:18-13 and 3B:18-24. In addition, executors and administrators may take a certain percentage of the value of the corpus annually, without court allowance, "on account" of corpus commissions. Such advance commissions are subject to disallowance (and repayment) at subsequent intermediate and final accountings. *N.J.S.A.* 3B:18-17 and 3B:18-20. Testamentary trustees and guardians may also take annually, without court allowance, a prescribed percentage of the corpus value as corpus commissions, which commissions also are subject to later review and repayment. *N.J.S.A.* 3B:18-25 and 3B:18-27.

The statutory formulae for corpus commissions are predicated upon final accountings. Problems arise when corpus commissions are sought on an intermediate accounting. Logically, the intermediate award (for perhaps half the total years of administration) must be less than the final award, which will be calculated for the entire period of the fiduciary's administration. Despite this logic, the usual practice of accounting fiduciaries on an intermediate accounting is to seek the full amount of commissions permitted under the statute. This cannot be allowed for it will eventually result in the fiduciary obtaining, for example, at least two 5% commissions on the first $100,000 of corpus — once on the interim accounting and again at the final accounting. *In re Estate of Moore*, 50 N.J. 131 (1967), holds that it is incorrect to calculate the intermediate award of corpus commissions by applying the statutory formulae to the corpus value at the close of any particular period of administration. Rather, on an interim accounting, the judge must attempt to calculate a probable final award, and then determine what share of that total award will be due to the accounting fiduciary for that period of administration covered by the intermediate accounting. *See also In re Bessemer Trust Company*, 147 N.J. Super. 331, 352, 392-94 (Ch. Div. 1976), *aff'd*, 165 N.J. Super. 76 (App. Div. 1979), which applies the principles enunciated in Moore and sets forth the standards to the employed by the court in determining a fiduciary's commissions.

If the attorney for the fiduciary is applying for a fee, he too must file with the court an affidavit of services at least 20 days prior to the hearing. Such affidavit must set forth the information required by *R.* 4:42-9(b) and indicate whether and how any fee awarded will be shared. *R.* 4:88-4. In cases involving probate of will, attorney fees may be awarded to both proponent and contestant, under *R.* 4:42-9(a)(3). *In re Reisen*, 313 N.J. Super. 623, 634 (Ch. Div. 1998). Under *R.* 4:42-9(3), fees may be awarded out of the estate, if probate is refused, or if probate is granted, if it appears that the contestant had reasonable cause to contest the will's validity. *In re Landsman*, 319 N.J. Super. 252, 272 (App. Div. 1999), c*ertif. denied*, 161 N.J. 335 (1999).

Exceptions to an accounting must be served upon the accountant (and upon

the court) in writing at least five days prior to the hearing. *R.* 4:87-8.

As a checklist for the hearing to settle an account, the following documents must have been filed with the court (those marked with an asterisk may not be required in a particular accounting):

- complaint
- order to show cause
- proof of service of order to show cause
- account
- audit by Clerk of Superior Court
- *• order appointing guardian *ad litem*
- *• notice of application for fee by guardian *ad litem*
- *• affidavit of services by guardian *ad litem*
- *• order appointing virtual representative(s)
- *• affidavit of accountant's services (if corpus receipts have exceeded $200,000)
- *• notice of apportionment of commissions among co-fiduciaries (required by *R.* 4:88-3 where one co-fiduciary does not appear at hearing)
- *• affidavit of services by attorney

NOTE: A complaint seeking to compel an accounting by a fiduciary or by one unjustly enriched is a separate chancery action. *See R.* 4:87-1(b), *supra*. The actions for the settlement of accounts are governed by *R.* 4:87-1 to -9. *In re Maxwell*, 306 N.J. Super. 563, 584 (App. Div. 1997), *certif. denied*, 153 N.J. 214 (1998).

NOTE: The 1990 Rule revisions deleted the Notice of Settlement Procedure, thus all actions regarding accountings must proceed by OSC.

NOTE: Pursuant to *R.* 4:87-9 all parties in interest (of full age and competent) may dispense with a formal accounting by agreement.

NOTE: *See N.J.S.A.* 3B:19B-1, *et seq*. (Uniform Principal and Income Act of 2001, L. 2001 c. 212—effective January 1, 2002) regarding powers of fiduciaries with respect to ascertainment or allocation of income and principal.

D. BONDS (APPROVAL OF FORM BY THE COURT)

Before a bond (by a receiver, guardian, etc.) can be filed with the Clerk, it must be approved as to form and sufficiency by a judge, except that a surrogate may

accept a bond approved by himself and, in the absence of a judge, the clerk may accept a bail bond approved by himself. *R.*1:13-3. The original bond must expressly state that:

(1) the principal and surety submit themselves to the jurisdiction of the court;

(2) the principal and surety irrevocably appoint the Clerk of the court as their agent upon whom service affecting their liability on the bond may be served;

(3) the principal and surety waive any right to a jury trial;

(4) the liability of the principal and surety may be enforced by motion in the action without the necessity of an independent action;

(5) the motion may be served upon the principal and surety by ordinary mail to the Clerk, who shall forthwith mail copies thereof by ordinary mail to the principal and surety at the address stated on the bond.

R. 1:13-3(b).

Only if the bond contains the foregoing (and many "form" bonds do not), and both principal and surety have executed the bond, will the judge approve the bond. The original bond is then filed with the Clerk of the Superior Court. It should, therefore, contain a proper caption, including docket number, so that it may be filed.

A surrogate's refusal to accept and file a bond does not void any contractual obligation thereon. *In re Polevski's Estate*, 186 N.J. Super. 246, 252 (App. Div. 1982). Further, the usual manner of enforcing a bond is by a summary proceeding on motion. *R.* 4:67-4(b); *R.* 1:13-3(b).

The posting of a bond by a guardian is meant to assure the guardian's performance as fiduciary. *Matsumoto v. Matsumoto*, 335 N.J. Super. 174, 187 (App. Div. 2000), a*ff'd in part and mod. in part*, 171 N.J. 110 (2002). After final judgment has been entered, the guardian is entitled to the return of the amount he posted as the security deposit. *Id.*

NOTE: As to the special requirements for a supersedeas bond, *see R.* 2:9-6, and as to the special requirements for a bail bond and any forfeiture thereof, *see R.* 3:26.

A supersedeas bond is a "device to protect a party who has been successful at trial but has been forestalled from proceeding during an appeal." *Courvoisier v. Harley Davidson of Trenton, Inc*., 162 N.J. 153, 158 (1999). Supersedeas bonds are conditioned on the satisfaction of judgment in full. *R.* 2:9-6(a).

E. TRANSFER TO LAW DIVISION

Chancery's jurisdiction is determined by "the facts existing at the inception of the suit." *Mantell v. International Plastic Harmonica Corp.*, 141 N.J. Eq. 379, 393 (E. & A. 1947). Accordingly, each new complaint filed in Chancery will be scrutinized by the Chancery Division judge for chancery jurisdiction.

Attorneys often are under the mistaken impression that if they are seeking injunctive relief they must necessarily file in the Chancery Division. However, the "test" to determine whether an action is properly in the Chancery Division is if the plaintiff's primary right or the principal relief sought is equitable or probate in nature, as mandated by *Rule* 4:3-1(a)(1). If the underlying relief sought is legal in nature, the action is proper in the Law Division. Both the Law and Chancery Divisions are empowered to grant injunctive relief. If the plaintiff's primary right or the principal relief sought is not equitable or probate in nature (as mandated by *Rule* 4:3-1(a)(1)), the court will *sua sponte* order transfer to the Law Division. The court will notify the plaintiff's attorney of the transfer.

Rule 4:3-1(b) further provides for transfer from Chancery to Law Division upon motion made within 10 days after the time prescribed for service of the last permissible responsive pleading or, in the case of summary actions, on or before the return date. Once a matter is transferred between divisions of the Superior Court, it may not be retransferred. *R.* 4:3-1(a)(2); *Steiner v. Stein*, 2 N.J. 367, 377-78 (1949).

If a Chancery Division judge has invested a substantial amount of time in a case, it should not be transferred to the Law Division. *See Steiner*, 2 N.J. at 377 ("Were the trial judge in whichever division he is sitting not to hear the entire case once he has assumed jurisdiction, all of the confusion and waste of judicial effort which the framers sought to eliminate would reappear"). This is true even if "the equitable phases of the cause have been fully disposed of, leaving only purely legal issues remaining for determination." *Id.* at 378. *See also Mayflower Indus. v. Thor Corp.*, 15 N.J. Super. 139, 175 (Ch. Div. 1951), *aff'd o.b.*, 9 N.J. 605 (1952) (Chancery Division cannot transfer legal claims even though all equitable claims are dismissed). Even if an action should properly have been brought in the Law Division, the Chancery Division may choose to retain jurisdiction in the interest of efficiency. *Ho v. Rubin*, 333 N.J. Super. 599, 606 (Ch. Div. 1999) (retaining jurisdiction over a replevin action that should have been brought in the Law Division).

However, this general practice is not absolute. *See Brennan v. Orban*, 145 N.J. 282 (1996) (decision as to where jury trial of marital tort action, if warranted, will take place — in the Chancery Division, Family Part or in the Law Division — rests within the sound discretion of the chancery judge); *Chiaccio v. Chiaccio*, 198 N.J. Super. 1, 6 (App. Div. 1984), *overruled in part by Brennan v. Orban*, 145 N.J. 282 (1996). (*Brennan* held that the Family Part judge has discretion

to decide whether a marital tort claim should be resolved in connection with the parties' matrimonial action or be resolved by a jury trial. Where a Family Part judge determines that a jury trial of the marital tort is warranted, the court also has the discretion to transfer the trial of that claim to the Law Division.); *The May Stores v. Hartz Mountain Free Zone Center*, 162 N.J. Super. 130, 135-36 (Ch. Div. 1978) ("the decision to retain or to transfer a claim properly cognizable in the Law Division still rests in the sound discretion of the Chancery judge even though he is no longer required to make such a transfer when all the equitable issues are resolved"). Alternatively, counterclaims that are considered germane or ancillary should not be transferred to the Law Division. *Leisure-Technology Northeast, Inc. v. Klingbeil Holding Co.*, 137 N.J. Super. 353, 357-58 (App. Div. 1975).

F. SERVICE OF PROCESS

Service of complaints involving in personam jurisdiction is governed by *Rule* 4:4-4. Generally, service upon individuals must be by personal service, since no default can be taken against individuals if service is made by mail alone. The only exception to this rule is substituted service pursuant to *Rule* 4:4-4(b).

Pursuant to *Rule* 4:52-1(b) and *Rule* 4:67-3, if an order to show cause ("OSC") issues upon the filing of a complaint seeking injunctive relief or a summary disposition of the action, the OSC shall constitute process and shall be served, along with the complaint and any supporting affidavits, at least 10 days prior to the return date and in the manner prescribed by *Rule* 4:4-3 and *Rule* 4:4-4. An OSC under *Rule* 4:52-1(b) should contain the name and address of plaintiff's attorney, the time within which defendant must file and serve his answer, and notice to defendant that if he fails to so file and serve his answer, default judgment may be rendered against him for the relief demanded in the complaint. In the case of an OSC issued under *Rule* 4:67-1(a), the order should advise the defendant that he must, within a time specified by the court, file and serve an answer, an answering affidavit, or a motion returnable on the return day, or else the action may proceed ex parte.

Service of process need not be perfect. *Citibank, N.A. v. Russo*, 334 N.J. Super. 346, 352 (App. Div. 2000); *Sobel v. Long Island Entertainment Productions, Inc.*, 329 N.J. Super. 285, 293 (App. Div. 2000). Technical defects in the service of process do not automatically entitle a defendant to vacate a default judgment against him. *Russo*, 334 N.J. Super. at 352; *ATFH Real Property, LLC v. Winberry Realty Partnership*, 417 N.J. Super. 518, 525 (App. Div. 2010). "Where due process has been afforded a litigant, technical violations of the rule concerning service of process do not defeat the court's jurisdiction." *Id. (citing Rosa v. Araujo*, 260 N.J. Super. 458, 463, *certif. denied*, 133 N.J. 434 (1993)). Not every defect in the manner in which process is served renders the judgment upon which the action is brought void

and unenforceable. *Sobel*, 329 N.J. Super. at 293. However, even without a violation of due process, a default judgment will be set aside for a substantial deviation from the service of process rules. *Id.*

Even if a defect in service of process exists, if defendant's silence about it led plaintiffs to believe that there was no defect in service at a time when they could have re-served defendant or preserved proofs of defendant's culpability in transaction, defendant may be estopped or barred from challenging the service of process or the allegedly void judgment itself. *Wohlegmuth v. 560 Ocean Club*, 302 N.J. Super. 306, 314 (App. Div. 1997).

Service of process by mail may occur under two circumstances, as provided by *Rule* 4:4-4(c). First, a plaintiff may attempt initial service of process by mail, in which case the service is valid, and a default may only be entered if the defendant answers or otherwise appears. *Russo*, 334 N.J. at 352 (*citing R.* 4:4-4(c)). Second, if a plaintiff's first attempt to make personal service is unsuccessful after "diligent effort and inquiry," then service may be made by mail, with the document sent simultaneously by regular mail and certified mail, return receipt requested. *Id.*

Service of complaints involving in rem or quasi in rem jurisdiction is governed by *Rule* 4:4-5. Briefly, in any action "affecting specific property, or any interest therein," service is permitted by mail, publication, posting, etc., as specified by *Rule* 4:4-5. No order is necessary to authorize these alternate forms of service, although one is frequently submitted, usually in quiet title actions. All that the attorney need do is file the affidavit of diligent inquiry described in *Rule* 4:4-5.

G. MOTIONS

Motions in the Chancery Division are heard regularly either each Friday or on Law Division motion days at the discretion of the particular Chancery judge, except as otherwise required by the judge or by the demands of the calendar. *Rule* 1:6-4 requires the original notice of motion ("N/M") to be filed with the Clerk of the Superior Court in accordance with local filing rules, and a copy with the Chancery judge. *See R.* 1:6-2(b). Attorneys sometimes neglect the latter requirement, with the result that the parties will appear for the motion to the total surprise of the Court. *Rule* 1:6-3 requires N/M's to be served and filed not later than 16 days before the time specified for the hearing unless otherwise provided by rule or court order.

Opposing affidavits and cross-motions must be served and filed eight days prior to the return date, with answers and responses thereto served and filed four days prior to the return date. *Rule* 1:6-3 states that service is complete only on receipt at the office of adverse counsel or the address of a pro se party. If service is by ordinary mail, receipt will be presumed on the third business day after mailing.

Every notice of motion must state the time and place when it is to be

presented to the court. It must also state the grounds upon which it is made and the nature of the relief sought and must be accompanied by a proposed form of order. The proposed form of order must note whether the motion was opposed or unopposed. *R.* 1:6-2(a).

Where a movant requests oral argument on non-calendar or non-discovery motions, oral argument is granted as of right. *R.* 1:6-2(d).

Further, all motions will be deemed uncontested unless responsive papers, detailing the legal and/or factual bases for opposition, have been timely filed and served. *R.* 1:6-2(a).

Some Chancery judges similarly will deem all motions to be "on the papers" unless oral argument is specifically requested by either party. The court itself, however, may always direct oral argument, either with the attorneys appearing in person, or with one or more of the parties arguing by telephone pursuant to *Rule* 1:6-2(e).

The judge decides all motion adjournment requests. Generally, motions will not be adjourned without consent of all the parties noticed, even if it is the party who originally submitted the N/M that is seeking the adjournment. When an adjournment is requested because of conflicts with other court appearances, the court may suggest a "ready-hold" time (e.g., 10:30 AM) so that the motion will not be heard before that time. To obtain a ready-hold time, the applicant for the delay should obtain consent of all parties.

If the particular dispute underlying the motion settles, the attorneys should call the judge's chambers and state either that the motion is withdrawn without prejudice or that a consent order will be submitted.

If the motion is argued, and the judge does not sign a previously submitted proposed form of order, one of the attorneys will be directed to prepare a new form of order reflecting the decision on the motion. Pursuant to *Rule* 4:42-1(c), the form of order is then sent to the court for signature on five days' notice to all other parties not in default. (Alternatively, counsel may submit a consent order which need not be held for five days.) The court, upon receipt of the form of order, holds it for five court days from date of receipt, and sometimes for a few more days (in case objections are delayed in the mails) and, if no objections are received, the judge may sign the order. If specific written objections addressed to the form of the order are received (i.e., the question is whether or not the order accurately reflects the judge's decision), the law clerk will usually call the attorneys and attempt to resolve the dispute. If this procedure is unsuccessful, a telephone conference with the judge or an in-court hearing to resolve the form of order will be scheduled, and the court will

so notify the parties.

H. PRETRIALS

Rule 4:25, which governs pretrial conferences, states that such conferences shall be held in all contested Chancery actions. Matters are scheduled to be pretried to distill out those factual and legal issues actually in dispute so as to limit the controversy for trial.

At least 30 days' notice of the pretrial conference shall be given to all parties. *R.* 4:25-2. The attorneys involved shall confer prior to the conference to reach agreement on as many matters as possible. *R.* 4:25-7(a). Each party shall then prepare a pretrial memorandum, to be submitted to the court and served upon all other parties at least three days prior to the conference, and which shall include the following items:

(1) A concise descriptive statement of the nature of the action.

(2) The admissions or stipulations of the parties with respect to the cause of action pleaded by plaintiff or defendant-counterclaimant.

(3) The factual and legal contentions of the plaintiff as to the liability of the defendant.

(4) The factual and legal contentions of the defendant as to non-liability and affirmative defenses.

(5) All claims as to damages and the extent of injury, and admissions or stipulations with respect thereto, and this shall limit the claims thereto at the trial. Where such claims have been disclosed in answers to interrogatories they may be incorporated by reference.

(6) Any amendments to the pleadings made at the conference and, where necessary, the time fixed within which such amended pleadings shall be filed. Except when ordered on the court's own motion, no amendments of pleadings shall be granted at the conference which would justify an adverse party in demanding additional time for investigation and further discovery, and result in delay of the trial.

(7) A specification of the issues to be determined at the trial, including all special evidence problems to be determined at trial and issues not raised by the pleadings, which occur to the trial judge, with an appropriate notation if the attorney concerned does not wish to advance such issues.

(8) A specification of the legal issues raised by the pleadings which are abandoned or otherwise disposed of. No legal issue shall be ruled upon at the pretrial conference as to which there is any doubt or reasonably arguable question. If a ruling is sought on any such legal issue, the matter should be set forth with directions that

formal motion be made thereon at a later time and before the pretrial judge if possible.

(9) A list of the exhibits marked in evidence by consent.

(10) Any limitation on the number of expert witnesses.

(11) Any direction with respect to the filing of briefs. A request by the court for briefs should be included where the resolution of any general legal problem is not clear, or where special problems of evidence exist, as noted by the attorneys or on inquiry by the pretrial judge.

(12) In special circumstances, the order of opening and closing to the jury at the trial.

(13) Any other matters which have been agreed upon in order to expeditethe disposition of the case.

(14) In the event that a particular member or associate of a firm is to try a case or if outside trial counsel is to try the case, the name must be specifically set forth. No change in such designated trial counsel shall be made without leave of court if such change will interfere with the trial schedule. If the name of trial counsel is not specifically set forth, the court and opposing counsel shall have the right to expect any partner or associate to proceed with the trial of the case when reached on the calendar.

(15) The estimated length of the trial.

(16) When the case shall be placed on the weekly call.

(17) The date the attorneys for the parties conferred and the matters then agreed upon.

(18) A certification that all pretrial discovery has been completed or, in lieu thereof, a statement as to those matters of discovery remaining to be completed.

(19) A statement as to which parties, if any, have not been served and which parties, if any, have defaulted.

R. 4:25-3.

In actual practice, many Chancery judges have developed their own forms of pretrial memoranda. The Chancery judges have been given wide latitude to utilize innovative procedures. *See* Notice to the Bar from the Chief Justice, 106 N.J.L.J. 534 (Dec. 25, 1980).

At the conclusion of the pretrial conference, the judge shall dictate in open court a pretrial order, which shall be signed immediately by the judge and all

attorneys. Such order, which covers items 1 through 16 enumerated above, becomes part of the record, supersedes any pleadings inconsistent therewith, and controls the subsequent course of the action. Issues not presented in the pretrial order are deemed to be waived. *See Lertch v. McLean*, 18 N.J. 68, 72-73, (1955); *Spaulding v. Hussein*, 229 N.J. Super. 430 (App. Div. 1988); *Muntz v. Newark City Hospital*, 115 N.J. Super. 273, 276-77 (App. Div. 1971), *overruled in part on other grounds by, Tonelli v. Bd. of Ed.*, 185 N.J. 438 (2005), for statements on the purpose and effect of pretrial orders. *See also Wilkins v. Hudson County Jail*, 217 N.J. Super 39 (App. Div.), *certif. denied*, 109 N.J. 520 (1987) (amendments of pre-trial orders in the interest of justice).

Pretrial conferences are also held on the issue of joinder of parties. *Olds v. Donnelly*, 150 N.J. 424, 462 (1997). At the pretrial conference in this instance, the judge would attempt to identify those parties whose joinder is contemplated by *Rule* 4:28, and enter a scheduling order to establish a timetable for the joining of additional parties. *Id.* This enables the judge at an early stage to identify the omitted parties whose joinder would be constructive and consistent with the judge's requirement for party joinder. *Id.* at 468.

See Appendix C for sample forms relating to Case Management and Pretrial Conferences.

I. SETTLEMENT

Parties to an action frequently resolve their differences before trial and enter into a settlement agreement, either on the record or in writing. Such agreement is a contract, enforceable by motion in the cause, subject to the discretion of the court. *Jannarone v. W. T. Co.*, 65 N.J. Super. 472, 476-77 (App. Div. 1961), *certif. denied*, 35 N.J. 61 (1961). Thus, barring fraud or other compelling circumstances, policy favors the settlement of litigation and the honoring of the agreements thereby reached. *Borough of Haledon v. Borough of North Haleden*, 358 N.J. Super. 289 (App. Div. 2003); *Aponte v. Williard*, 229 N.J. Super 490, 493 (App. Div. 1989); *Honeywell v. Bubb*, 130 N.J. Super. 130, 136 (App. Div. 1974). *See also DeCaro v. DeCaro*, 13 N.J. 36, 41-42 (1953), wherein the court held an agreement enforceable where the appellant failed to establish fraud, mutual mistake, undue haste, or pressure or unseemly conduct in settlement negotiations.

Some degree of consideration is required in order for the court to enforce a settlement agreement. *Cedar Ridge Trailer Sales, Inc. v. National Community Bank of New Jersey*, 312 N.J. Super. 51, 63 (App. Div. 1998). For example, forbearance from suit is adequate consideration to support a settlement agreement and bind the proposed defendant by its terms. *Id.* Moreover, courts will not ordinarily inquire into the adequacy or inadequacy of the consideration underlying a compromise settlement fairly and deliberately made. *DeCaro*, 13 N.J. at 44; *Honeywell*, 130 N.J. Super.

136; *Clarkson v. Kelly*, 49 N.J. Super. 10, 18 (App. Div. 1958). Nevertheless, there is authority to support the proposition that where the inadequacy of the consideration is so gross as to shock the conscience of the court, specific performance of a settlement agreement will be withheld on the ground that such inadequacy is conclusive evidence of fraud or that the remedy is discretionary and will not be used to enforce harsh or unfair contracts. *DeCaro*, 13 N.J. at 44. *See also Pascerella v. Bruck*, 190 N.J. Super. 118, 124-27 (App. Div.), *certif. denied*, 94 N.J. 600 (1983).

In *Aponte*, 229 N.J. Super. at 495, the Appellate Division found that when no release had been signed and delivered, or no payment of settlement funds had been made and a timely motion had been made by a party to be relieved from the effect of an order of dismissal or settlement, the trial court, in its discretion, may enforce or set aside the agreement as the facts may warrant.

Once settlement is attained, the parties should submit a consent judgment or a stipulation to the court. If such stipulation does not provide for a dismissal, the court will enter an order of dismissal based upon the settlement. A consent judgment may direct one or both of the parties to perform certain obligations. (Example: "It is Ordered that judgment in the amount of $10,000 be entered in favor of Plaintiff, and further Ordered that Defendant construct a culvert to replace that damaged by construction, and further Ordered that Plaintiff build a retaining wall. . . .") If such judgment is violated by either party's noncompliance, the aggrieved party may apply to the court, either by order to show cause or by notice of motion, for an order in aid of litigant's rights, pursuant to *Rule* 1:10-3. (See discussion of Orders to Show Cause, *supra*.)

When a case is settled on the record but no closing papers are submitted to the court, the case will be dismissed on the court's own motion, pursuant to *R.* 1:13-7. (See discussion of Dismissals, *infra*.) To enforce such a settlement, either party may move to vacate dismissal, then move to enter judgment confirming settlement (based on the transcript of the settlement agreement, if placed on the record, or on the terms of a written or oral settlement agreement), and then move to enforce the judgment. The better practice is to place the terms of settlement on the record or to prepare and have executed a settlement agreement.

A change in law subsequent to the parties entering into a settlement agreement is not sufficient reason to rescind a settlement agreement. *Zuccarelli v. State Dept. of Environmental Protection*, 326 N.J. Super. 372 (App. Div. 1999), *certif. denied*, 163 N.J. 394 (2000).

Although parties are free to agree on terms of a settlement as they see fit, settlements do not imply any judicial endorsement of either party's claims or theories, and do not provide the prior success necessary for judicial estoppel. *Kimball*

International, Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 607-08 (App. Div. 2000), *certif. denied*, 167 N.J. 88 (2001).

Settlement agreements do not automatically prevent a prevailing plaintiff's claim for attorney fees, in an instance where a civil rights case ends in a settlement conferring the relief sought. *Warrington v. Village Supermarkets, Inc*., 328 N.J. Super. 410, 422 (App. Div. 2000) (*citing Ashley v. Atlantic Richfield Co.*, 794 F.2d 128, 132 (3d Cir. 1986)).

EARLY SETTLEMENT: Middlesex County has instituted an early settlement program whereby the Chancery judges select cases which may be suitable for early settlement and refer such cases to an early settlement panel for non-binding resolution. Volunteer attorneys (members of the Middlesex County Bar Association Chancery Practice Committee) serve as early settlement panelists. The Chancery Practice Committee reports that the program has been successful and has been helpful in easing the chancery caseload. *See* Appendix C, *infra*, for early settlement panel information.

J. DEFAULTS AND PROOF HEARINGS

Upon failure to file a responsive pleading within the required time, or if such pleading is stricken, the Clerk of the Superior Court will enter default as to such party (upon formal request and affidavit of the other party). Such request and affidavit must be filed within six months of the actual default. Default shall not be entered thereafter save on application to the court and notice pursuant to *Rule* 4:43-1. Note that no default may be entered against an individual when service was by mail only. *R.* 4:4-4(c).

Once default has been entered, final judgment by default may be sought, pursuant to *Rule* 4:43-2.

The Office of Foreclosure handles judgments by default in foreclosure cases. (See Mortgage Foreclosure, *supra*.) Similarly, if the plaintiff's claim is for a sum certain, the Clerk of the Superior Court is empowered to enter judgment upon application of plaintiff supported by affidavit. In all other cases, the party seeking default judgment must apply to the court therefor. Notice of such application must be given to the defaulting party if the defaulting party has appeared in the action, e.g., by a motion to quash service of process on some jurisdictional ground. *R.* 4:43-2(b). Even if there has been a technical defect in the service of process, a debtor is not entitled to vacate a default judgment against him, where he does not seek to vacate within a reasonable time. *Citibank, N.A. v. Russo*, 334 N.J. Super. 346, 352 (App. Div. 2000). If a plaintiff entitled to judgment by default does not apply for it within four months of the entry of default, the Court shall issue a written notice in accordance with *Rule* 1:13-7(a). *R.* 4:43-2(d).

A proof hearing will be scheduled, if it is necessary, in order to enable the court: to enter judgment; to take an account; to determine the amount of damages; or to establish the truth of any allegation by evidence. Proof hearings are waived in quiet title actions where the procedure is for the plaintiff to submit to the court competent proof (affidavits, deeds, wills, records) of the allegations of the complaint, as well as the form of judgment. *R.* 4:62-4. Proof hearings in uncontested foreclosures, i.e., where no answer has been filed disputing the mortgage or the default thereon, are conducted by the Office of Foreclosure.

At a proof hearing the plaintiff must prove its case. Whether witnesses should be brought to the hearing is for plaintiff's attorney to decide.

Pursuant to *Rule* 1:5-7 and Federal and State statutes, an affidavit of non-military service must be filed before entry of default judgment as to each defaulting defendant.

Affidavits of non-military service are a special category, serving to protect the rights of persons serving in the military. *PNC Bank, N.A. v. Kemenash*, 335 N.J. Super. 124, 127 (App. Div. 2000). The Federal Soldiers' and Sailors' Relief Act provides that, before a default judgment is entered, the plaintiff must file an affidavit setting forth facts serving to show that defendant is not serving in the military. *Id.* (*citing* 50 U.S.C. App. § 520(1)). This concept is also codified in *N.J.S.A.* 38:23C-4.

K. DISMISSALS

Pursuant to *Rule* 1:13-7, any cases which have been pending for six months "without a required proceeding having been taken therein" will be placed on the dismissal list. Usually these will be cases in which a complaint was filed but never served or, if served, not answered but in which a default was never entered. See also *Stanley v. Great Gorge Country Club*, 353 N.J. Super. 475, 479 (Law Div. 2002) (recognizing that *Rule* 1:13-7(a) dismissals usually occur because process is not served). The notice of the court's motion for dismissal for lack of prosecution will advise the plaintiff that dismissal will result unless an affidavit, explaining the delay and why the action should not be dismissed, is filed with the court not later than five days before the return date. The affidavit should state exactly what the attorney is planning to do with the case and, if it is reasonably satisfactory, the case will be taken off the dismissal list. Adjournments, time extensions, motions, or other applications to the court are not "required" proceedings sufficient to remove a case from the dismissal list.

The court will always dismiss without prejudice unless either (1) the issues of the case have been litigated, or (2) the parties consent. Thus, where a case has been

settled and the court so notified but closing papers were never sent in, the court will dismiss with prejudice; where the parties fail to appear at a pretrial conference, the court will dismiss without prejudice. *See* Order of Dismissal, Appendix C.

Notices of the impending dismissal are sent to defendants in foreclosure actions where such defendants have filed non-contesting answers — these defendants may wish to proceed with the action pursuant to *Rule* 4:64-4.

The above discussion deals only with dismissals on the court's own motion. Voluntary dismissals, i.e., by plaintiff's filing a notice of dismissal or a stipulation of dismissal or by order of the court upon plaintiff's application, are governed by *Rule* 4:37-1. Involuntary dismissals, e.g., for failure to issue a summons within 10 days of the filing of a complaint or to comply with the court rules or a court order, may issue upon defendant's motion, and are generally governed by *R.* 4:37-2.

A rebuttal presumption exists that good-cause has been shown if restoration is sought within one year of the involuntary dismissal. *Stanley v. Great Gorge Country Club,* 353 N.J. Super. at 485.

Where a plaintiff files an amended complaint within the allowable time period, the dismissal deadline runs from the filing of the amended complaint and not the original complaint. *Rivera v. Atlantic Coast Rehabilitation and Health Care Center,* 321 N.J. Super. 340, 347 (App. Div. 1999).

Cases may be dismissed with or without prejudice. *Cornblatt, P.A. v. Barow*, 153 N.J. 218, 243 (1998), *abrogated in part on other grounds by Ferreira v. Rancocas Ortho. Assoc.*, 178 N.J. 144 (2003). A dismissal with prejudice constitutes an adjudication on the merits, and acts as if the order had been entered after trial. *Id.* (*citing Velasquez v. Franz*, 123 N.J. 498 (1991)). A dismissal without prejudice, conversely, signals that there has been no adjudication of the merits of the claim, and as such the dismissal will not bar a subsequent timely complaint alleging the same cause of action. *Id. See also Watts v. Canaligan*, 344 N.J. Super. 453, 467 (App. Div. 2001) (*citing Print Mart v. Sharp Electronics*, 116 N.J. 739, 772 (1989)) ("'barring any other impediment such as statute of limitations,' a dismissal without prejudice should ordinarily be granted in response to a successful motion for failure to state a claim.") A dismissal that deals with the merits of a claim is generally with prejudice, but a case that is dismissed because of the court's procedural inability to decide it is without prejudice. *Id.* (*citing Watkins v. Resorts International Hotel & Casino, Inc*., 124 N.J. 398, 415-16 (1991)). Dismissal for failure to comply with procedural requirements should be without prejudice, absent extraordinary circumstances. *Id*. at 246.

Moreover, a judge is not bound to wait until the close of the entire case to dismiss the case. *Cameco, Inc. v. Gedicke*, 157 N.J. 504, 509 (1999). A case may be

dismissed at the close of a plaintiff's case. *Id.* However, the dismissal at the close of a plaintiff's case is subject to more stringent review, and the appellate court in that case will accept plaintiff's evidence as true, and should draw any legitimate inferences that such evidence supports. *Id*. (*citing R.* 4:37-2(b)); *see also Zappasodi v. State Dept. of Corrections, Riverfront State Prison*, 335 N.J. Super. 83 (App. Div. 2000).

CHAPTER VI

FREQUENT MISFILINGS IN GENERAL EQUITY

The following remedies, taken alone, must be sought in an action at law.

A. EJECTMENT

Action for possession of land. *R.* 4:59-2. *N.J.S.A.* 2A:35-1, *et seq*. *See Marder v. Realty Construction Co.*, 84 N.J. Super. 313 (App. Div.), *aff'd*, 43 N.J. 508 (1964). *See also N.J.S.A.* 2A:18-53 (summary dispossess action to remove tenants) and *Aeon Realty Co. v. Arth*, 144 N.J. Super. 309 (App. Div. 1976) (distinguishes between summary dispossess actions and possessory actions under *N.J.S.A.* 2A:35-1); *see also World Traditions, Inc. v. DeBella*, 316 N.J. Super. 537 (Ch. Div. 1998); *Davin, LLC v. Daham*, 329 N.J. Super. 54 (App. Div. 2000). Because *N.J.S.A.* 2A:35-1 contains no specified time in which proceedings must be instituted thereunder, its practical effect is to supercede those provisions in *N.J.S.A.* 2A:14-6 and -7 that create repose for common-law ejectment actions after 20 years. *J & M Land Co. v. First Union National Bank*, 166 N.J. 493 (2001).

B. ACTIONS IN LIEU OF PREROGATIVE WRITS

For example, seeking review of an action of a municipal body. *R.* 4:3-1(a)(1); *R.* 4:69-6 and 4:69-7. *See Theodore v. Dover Bd. of Education*, 183 N.J. Super. 407, 412-13 (App. Div. 1982), *distinguished by In re G.S.*, 330 N.J. Super. 383 (Ch. Div. 2000).

Examples:

• prohibition—restraint against parties or body acting in unauthorized assumption or in excess of jurisdiction. *Gloucester Twp. v. Board of Education of Black Horse Pike Regional School District*, 50 N.J. Super. 437 (Law Div. 1958).

• *quo warranto*—the testing of an official's right to hold state, municipal, or private corporate office. *N.J. State Lodge—Fraternal Order of Police v. Aaron*, 39 N.J. Super. 423 (App. Div.), *certif. denied*, 22 N.J. 138 (1956).

• *mandamus*—direction to a person, corporation, or inferior tribunal to perform a ministerial act pertaining to the office and the duty of the office; compels an affirmative act. *Joseph v. Passaic Hospital*, 26 N.J. 557 (1958). Mandamus is the proper remedy either to compel specific action when the duty is ministerial and wholly free from doubt, or to compel the exercise of discretion, but not in a specific manner. *Loigman v. Township Committee of the Township of Middletown*, 297 N.J. Super. 287, 299 (App. Div. 1997). In *Loigman*, a taxpayer filed a complaint in lieu of prerogative writ in an attempt to enforce a clause in the collective negotiation agreement between the township and the police officers' union. *Id.* The Appellate Division found this to be a misapplication of the common law writ of mandamus since the suit sought to compel the township to exercise its discretion in a specific

manner. *Id. See also Vas v. Roberts*, 418 N.J. Super. 509, 523 (App. Div. 2011) (mandamus was the proper remedy for an order directing the Clerk of the New Jersey General Assembly to pay the withheld portion of the salary of plaintiff, a former member of the New Jersey General Assembly.)

• *certiorari*—review of the proceedings of an inferior tribunal (including municipal corporations) for jurisdictional defects or errors of law revealed in the record. *Fischer v. Twp. of Bedminister*, 5 N.J. 534, 539-40 (1950), *distinguished by In re PSE&G*, 167 N.J. 377 (2001). For a discussion of the difference between mandamus and certiorari, *see McKenna v. N.J. Highway Authority*, 19 N.J. 270, 274-76 (1955) and *Trenkamp v. Twp. of Burlington*, 170 N.J. Super. 251, 258-59 (Law Div. 1979) (". . . it is through the writ of *certiorari* that matters are brought before the court for review, while it is through the issuance of a writ of mandamus that relief is afforded to a litigant.")

Pretrial conferences are mandatory in all actions in lieu of prerogative writs. *Hirth v. City of Hoboken*, 337 N.J. Super. 149, 157-58. (App. Div. 2001); *Willoughby v. Planning Board of Twp. of Deptford*, 306 N.J. Super. 266, 274 (App. Div. 1997).

C. MATRIMONIAL ACTIONS

These are cognizable in the Chancery Division, but are filed separately from General Equity cases under an "FM" docket number. These matters are heard in the Chancery Division, Family Part, of the Superior Court. Occasionally, complaints seeking equitable relief within a matrimonial context, e.g., partition of the former joint tenancy of divorced spouses or enforcement of a separation agreement are filed in General Equity (with a "C" docket number). Such filing is improper. *Rule* 5:1-2(a) vests jurisdiction in the Family Part for all civil actions in which "the principle claim is unique to and arises out of a family or family-type relationship." As courts have recognized, Family Part judges have developed a special expertise in dealing with family and family-type matters. *In re Estate of Roccamonte*, 174 N.J. 381, 399 (2002). For example, an unmarried and childless couple undergoing a breakup had a family or family-type relationship. Accordingly, such an action properly should be brought in the Chancery Division, Family Part. *Dey v. Varone*, 333 N.J. Super. 616, 618 (Ch. Div. 2000).

D. PALIMONY ACTIONS

These are not matrimonial actions. *See Crowe v. DeGioia*, 90 N.J. 126 (1982). Under the Family Law Committee's recommendations, however, these cases are also heard in the Chancery Division, Family Part, of the Superior Court. (*See* discussion of palimony under Specific Performance of Contracts, *supra*.) The Chancery Division, Family Part is the appropriate forum for resolving palimony and partition issues between former unmarried cohabitants. *Olson v. Stevens*, 322 N.J. Super. 119, 122-123 (App. Div. 1999); *See also In re Estate of Roccamonte*, 174

N.J. 381, 399 (2001) ("Because palimony claims typically are unique to family-type relationship, the Family Part is where they should be brought, and the Appellate Division has indeed so held.")

In 2010, the Statute of Frauds was amended to include palimony agreements among the types of agreements that must be in writing and signed by the parties in order to be enforceable. *N.J.S.A.* 25:1-5(h). Additionally, no written palimony agreement is binding unless it was made with the independent advice of counsel for both parties. *Id.*

APPENDIX A

MAXIMS OF EQUITY REAPPRAISED[1]

Howard L. Oleck[2]

Basic to our system of jurisprudence, almost as the "conscience" of our legal system, is the body of law known as "Equity." And fundamental in equity jurisprudence itself is the group of principles usually denominated as the "maxims of equity." These maxims represent the crystallization of our concepts of morality and righteousness, which aim rather at the achievement of justice than the elaboration of a code of rules. These principles represent, in distilled form, the vital element in this portion of our system of law.

A maxim "is an established principle or proposition; a principle of law universally admitted, as being a correct statement of the law, or as agreeable to reason; . . . 'a conclusion of reason' (Coke); 'a proposition to be of all men confessed and granted without proof, argument, or discourse' (Coke).'"[1]

Once it is understood that the function of a maxim is to provide general principles as points of departure, and not to capsule answers to specific problems, their inherent value becomes apparent. Once grasped, the maxims of equity provide a broad, general view of equity as a working system of jurisprudence. They must be understood to be generalities, not ordinarily intended for direct, literal application. They are few in number today, as compared with the almost sixty important maxims cited by Blackstone in his Commentaries.[2] The principal maxims employed in modern practice are those which are set forth herein below.

FIRST MAXIM: WHERE THERE IS A RIGHT, THERE IS A REMEDY

Ubi jus, ibi remedium, means that wherever there is a civil, legal right, there also is a legal remedy available.[3] This is the basis of the development of equity — to fill gaps in the law.

Take as an example the right to inspect a corporation's records. The right of inspection may be clear, while the method of enforcing the right may be uncertain. Equity will cure this defect of law. For instance, when a former officer and director of a corporation sued the corporation, regarding certain stock of that corporation, it was held that, to ascertain the book value of the stock, equity would enable the right of inspection to be enforced.[4] Equally characteristic is the situation in which a legislature prescribes a certain right but provides no specific corresponding remedy. In such a situation, one entitled to the benefit of the statute may invoke the aid of equity.[5]

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[1] Reprinted with permission of *Rutgers Law Review*, Vol. 6, No. 3, 1952.

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This maxim is also found in the common law, but is more significant in equity because of the greater ability of equity to suit the remedy to the situation. This characteristic is the very basis of equity jurisdiction.[6] Historically, it was the lack of appropriate remedies for certain rights that gave impetus to the rise of chancery.[7] The interpretation of statutes and the provision of remedies where they do not exist are among the most important functions of equity jurisprudence.[8] In brief, "where a legal relief is inadequate, or not full, equity will intervene."[9]

However, the limitations of even this first principal maxim must be recognized at once. It does not apply to criminal matters as such, although it may apply to a part thereof, such as a nuisance which also happens to be a crime.[10] It does not apply to "merely moral" rights, although some day in the future it may.[11] As yet, for example, a party's insolvency alone, in the absence of other factors, generally does not give equity jurisdiction.[12] But in support of such moral rights as are closely analogous to legal rights, which already have been recognized as entitled to legal redress, relief may be obtained from equity.[13] For example, along this line it has been ruled that "a contract in agreed language, which both parties understood to have legal effect, different from that given it by law, may be reformed."[14] This implies much more than mere mechanical correction of an error in draughtsmanship.

This maxim will not be extended to permit equity to usurp the legislative function.[15] It does not apply simply because there is no existing remedy at law, unless there also actually is present an existing right which is recognized by the principles of equity.[16] But, on the other hand, the mere absence of precedent will not prevent the granting of relief by equity.[17]

Equity will not provide a remedy when it is in conflict with a sound and settled rule of law. This sometimes is stated as a separate maxim, i.e.: Equity follows the law.[18] Yet equity will afford a remedy for the violation of a purely legal right when the court of law has no available procedure suited to the situation.[19] The principle that equity will avoid conflict with express rules of law formerly was considered to be a distinct maxim in itself.

Aequitas sequitur legem, or, equity follows the law, was and is a closely limited principle.[20] It should be restricted primarily to the field of property rights and interests which are governed by statutes or well-settled rules of law; equity will follow these rules.[21] "As regards estates and interests the common law of the land is the model."[22] Even so, it is also true that "equity has permitted the creation of equitable estates and interests, which, so far as regards their transmissible and inheritable quality, are copies of legal estates and interests."[23] But it may not go so far as to make an invalid deed or lien valid, nor supply a lack of recording which a statute requires.[24] Nevertheless, this minor maxim should not be extended to infer that equity is ousted of jurisdiction when the law court adopts a remedy which is equitable in nature.[25]

SECOND MAXIM: EQUITY ACTS IN PERSONAM

"Equity cannot presume to interfere with or to control the action of the common law courts. It acts upon the person who is inequitably suing in those courts."[26]

Before the courts of equity had become firmly established, they sought to avoid conflict with the "law" courts, by restricting the jurisdiction of equity to in personam decrees, and altogether refusing in rem proceedings. The chancellor limited himself to issuing a mandate, ordering an individual to do, or not to do, specific acts, on pain of punishment for contempt in case of disobedience.[27] If the party chose to lie in prison rather than to obey, the other party was without remedy, since the chancellor claimed no power to declare void an obligation which was valid at law.[28] It was said that the authority of the chancery was only to regulate a man's conscience, not his estate.[29] The ecclesiastic and regal origin of chancery in England, as well as the avoidance of conflict with the common law courts, was the cause of the adoption of this maxim, which has been the source of some confusion.[30]

The decree of the old courts of chancery could be put into effect only by the personal action of the defendant. The court could compel his action only by fine or imprisonment. The decree itself, for example, could not convey title, in place of a conveyance by the defendant. It could (and can) enjoin his prosecution of an action at law in another court, by service of an order on him.[31] But when, by statute, law and equity today are separately administered by the same tribunal, an injunction against prosecution at law issued by another court does not divest the first court of jurisdiction. Such an injunction merely operates against the plaintiff there, who is in contempt if he continues to press that action.[32] And in some states, today, by statute, equity may, without service, prevent a non-resident defendant in its jurisdiction from continuing suits at law commenced by the non-resident against the plaintiff in equity.[33] Of course, the element of coercion of the person is obvious in such cases.[34]

It is easy to see that if equity can act only in personam, the person involved may attempt to avoid its authority by fleeing its jurisdiction. To prevent such flight, and flaunting of its authority, chancery had the writ of *ne exeat*, under which the defendant might be arrested when his contemplated departure threatened to render ineffectual the decree or order of the equity court.[35] This power is retained today, but the federal and some state courts have replaced the writ of ne exeat by statutes.[36] The parties thus being kept under control, equity can grant relief even though the property in question is situated in another jurisdiction or state. A classic example is the case in which the English Chancery Court decreed the specific performance of an agreement between the proprietary governors concerning the boundaries of the America colonies of Maryland and Pennsylvania.[37] And so, today, a decree directing the conveyance of land in a foreign jurisdiction is valid, and is enforced as a

matter of comity.[38]

At the same time, it should be understood that though equity act in personam, its orders and decrees usually affect things. In this sense its jurisdiction is in rem.[39] Usually, the authority of equity is called upon to settle interests in specific parcels of land, or specific goods or choses.[40] As far back as Queen Elizabeth's time, there began to be used writs of assistance, which gave to a successful plaintiff actual possession of land which a stubborn defendant refused to convey as ordered, where the defendant preferred fines or imprisonment to obedience of an equity decree.[41] Another old method of enforcement which is palpable in rem in nature is the writ of sequestration.[42] Under this writ, a sheriff or other person acting as a sequestrator, could seize (and later, also could sell) chattels, and rents and profits of real property belonging to the defendant.[43] In connection with in personam jurisdiction, notice also should be taken of the writ of prohibition, issued by a superior court and directed to the judge and parties of a suit in an inferior court, ordering them to desist from the prosecution of a suit, because the cause originally, or some collateral matter arising therein, did not belong to that jurisdiction, but lay in the jurisdiction of some other court.[44]

Of ever-increasing importance as modern society becomes ever more complex is the fact that equity acts in personam. This is one of the bases on which equity rests its jurisdiction over multi-party cases. While common law courts, largely because of the limitations imposed by the jury system, could accept only two-sided cases, equity was not so limited. For this reason the equity side of our courts can take jurisdiction to prevent a multiplicity of suits. "Bills of Peace" may be granted by equity generally to any party, to settle an issue common to several suits or threatened actions.[45] Similarly, "interpleader" (whereby a party ready to perform an obligation, or to deliver property, asks the court to decide which of several parties is entitled properly to claim such performance or delivery) stems from this capacity of equity.[46]

Today, few will seriously argue against the power of equity to act in rem.[47] The chancellors certainly could have acted in rem in medieval England had they not been desirous of avoiding conflict with the common law courts. The chancellors were powerful, and moreover the common law courts did not oppose such in rem jurisdiction, in fact. Today equity may frame its decrees in personam, or in rem, whichever is more appropriate to make these decrees effective.[48] In addition, almost all of the states now have statutes expressly vesting such in rem power in equity courts.[49] Today when we say that equity acts in personam, we must carefully limit the scope and effect of this maxim. Even today in personam jurisdiction should not attempt to order the doing of acts which equity cannot enforce.[50] But the possibilities of in personam operation of equity have not yet been fully explored. It has been suggested, for example, that certain equity powers be used to enforce civil rights.[51] The wisdom or unwisdom of such a suggestion should not be decided by any one

individual. Probably this field is best left to the discretion of the legislative branch of our government.

THIRD MAXIM: EQUITY LOOKS TO SUBSTANCE RATHER THAN FORM

The common law used to lay great emphasis on the form of transactions, while equity always was more concerned with the true inherent nature of a matter than with its form.[52] Interests in property, ever today, are transferable only by means of certain prescribed procedure or forms. While livery of seisin no longer is required, formal conveyance still is in most cases, or transfer by a will, or technically adequate adverse possession, and so forth. But if, for example, the parties to a transaction actually intend to create what amounts to a mortgage equity will not be bound by the fact that the agreement is in the form of a deed.[53]

Today courts of law also look to the real nature of a matter rather than to its form, and this is due to the acceptance by the law courts of the principles of equity.[54] Seals, as binding technical forms, have lost much of their force, and have been abolished in New York and else where, but equity often used to ignore the legal effect of a seal.[55] For instance, where the law considered a gratuitous promise binding because made under seal, equity disregarded the form and refused to enforce the promise.[56]

Of tremendous importance is the fact that equity will not be constrained by the formal, technical nature of a corporation, partnership or association, if that form is employed as a shield for improper purposes.[57]

The same refusal to be misled by outward form is a vital element in equity's treatment of analogous misuse of form. For example, one who is a nominal payor of taxes (a gasoline service station owner) but who actually pays money collected from his customers, cannot equitably recover taxes delivered to the state when the tax statute is found to be unconstitutional or otherwise void.[58] There equity refuses to treat as a veritable payor one who nominally is a payor but who actually is only an agent making delivery of moneys paid by others.[59] In the same vein, equity considers a mortgage to be only a security form in a loan transaction, and foreclosure a penalty, and considers repayment of the loan to be the real intent of the paper, and forfeiture of the land a harsh, formal side result of the form. Therefore, to protect the real purpose of this transaction, the penalty or forfeiture will be relieved, although binding at law, if the real damages of the lender can be repaired.[60] This is the basis of the well-known rules providing an equity of redemption for mortgagors, which cannot be given up by concurrent stipulation or agreement.[61] If a mortgagor pays the debt, plus interest and costs, after foreclosure at law, he can redeem the property after thus forfeiting it.[62] In this way equity protects the true debtor-creditor relationship, despite the legal form of forfeiture. Today, equity of redemption is reinforced by statutes in many jurisdictions.[63]

The modern tendency is to employ this maxim freely to prevent the use of

forms or statutes for improper purposes. The fundamental importance of the principle it expresses is widely accepted. It is fast becoming a universally accepted principle. For example, in a recent case in India, it was employed to prevent a statute from being used to work a fraud.[64]

FOURTH MAXIM: EQUITY REGARDS AS DONE THAT WHICH OUGHT TO BE DONE

Analogous to the maxim that equity looks to the substance rather than to the form is the maxim that equity regards as done that which, in good morals and conscience, ought to be done.

The true meaning of this maxim is, that equity will treat the subject matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as the parties might have executed them. But equity will not thus consider things in favor of all persons, but only in favor of such as have a right to pray that the acts might be done.[65]

It will not employ this maxim to defeat the interests of third parties.[66] Neither will the maxim be employed against the actual intent of the parties.[67] It is employed principally in controversies regarding agreements. In such cases, the party entitled to performance, for good consideration, will be entitled to deem the performance done, even though in fact it has not been done. This is true with regard to such varied elements as the contemplated time of performance and also the collateral consequences connected with the agreement.[68] Money paid for purchase of land, as of the date when delivery should have been made, is treated as though it were realty, for purposes of descent, and so forth.[69] Conversely, land which was to have been transferred for money payment, as of the date when payment should have been made, is treated as though it were money.[70] This is now known as the doctrine of "Equitable Conversion."[71]

Subsidiary to the principal maxim is the minor maxim that equity imputes an intention to fulfill an obligation. For example, if a mortgagor agrees to insure property for the benefit of a mortgagee, and actually names himself as the beneficiary of the insurance, equity will impress an equitable lien on the insurance in favor of the mortgagee.[72]

FIFTH MAXIM: EQUITY AIDS THE VIGILANT

Vigilantibus et non dormientibus aequitas subvenit means that equity will aid those who are vigilant and who do not sleep on their rights. This maxim is equity's equivalent of the common law statutes of limitations, and is intended to discourage unreasonable delay in presentation of claims and enforcement of rights.[73] Claims which have been delayed unreasonably in being brought forward may be rejected, without regard to the statute of limitations.[74] The laches meant by this

maxim are those which are "unreasonable" under the particular circumstances.[75] Delays which have caused no harm to the other party to the proceedings are not such "unreasonable" delays, within the meaning of this maxim.[76] Only if the delay has changed the situation so that such late enforcement of rights will be unfair, will equity consider it to be laches.[77] This requires exercise of sound judicial discretion.[78]
In a proper case, laches will be a bar, even though the applicable statute of limitations has not run.[79] One example of such a bar would be a situation in which market fluctuations have caused a great change in price or market value, particularly when the plaintiff was in a position to benefit by delay.[80]

The bar of laches is paralleled by the bar of estoppel.[81] To constitute an estoppel there must be some act or statement by the party to be estopped, followed by a claim inconsistent with that act or statement, which so strongly influences the conduct of the other party as to preclude the estopped party from disclaiming or disproving the effect of his own act or statement.[82]

The first statutes of limitations were applicable only to acts at law, but equity tended to employ these same limitations as yardsticks for equity cases also.[83] In general, today, equity will follow the statutory periods except where real equity laches is present.[84] In the majority of the states, which follow the New York Code, there are definite periods of limitation applicable to certain types of cases in equity, but even these may be by-passed if equity laches is present.[85] For all cases not thus specifically limited, the equity period of limitations is ten years.[86] The federal courts follow the state statutes in cases involving rights based on state law.[87] In *Lawson v. Haynes*,[88] the court said,

> When it appeared that the action was commenced within the time fixed by the analogous statute of limitations, in accord with the generally prevailing rule of the state courts, the defendant was required to show either from the face of the bill or by his answer the circumstances calling for the application of the doctrine of laches, or, as it was often said, to plead and prove laches.[89]

If the case is one arising out of federal law, the federal courts apply their own statutes of limitations or rules of laches.[90] In federal procedure, a state statute of limitations is no bar to an equity suit under a federal law.[91]

SIXTH MAXIM: ONE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS

The "Clean Hands" maxim means that any party who desires the assistance of equity will receive no help from equity unless he himself is free of iniquity.[92] If he himself has done something, by action or omission, which is contrary to the principles of equity, he will be barred thereby from receiving the benefits of equity.[93] This maxim concerns and applies to the active, or moving party in the matter being presented, i.e., usually, but not always, the plaintiff, or the one who is seeking

the relief regarding which this maxim would apply.[94] Despite its seeming finality, in a few special situations this maxim is not enforced. For example, clean hands were not required for a bigamy annulment.[95] In another recent case, the doctrine was held to be inapplicable despite the violation of a fiduciary duty.[96]

Equity requires parties who are defending to be fair and just, even forcing them to be so; it therefore also demands fair and just dealing on the part of suitor parties.[97] But, even so, the requirement of ". . . good faith will not justify interference with contractual relations."[98] Reasonably fair dealing, not saintliness, is what is required.[99] The "clean hands" requirement generally is applicable only to the transaction or cause which is being considered.[100] The tendency today seems to be to apply this principle even to situations which are not inextricably bound up with the issue itself. In *In re Weinstein*,[101] a bankruptcy court, a court of law with equitable powers, applied the rule to a somewhat remote aspect of a discharge from bankruptcy.[102]

The maxim expresses a principle of inaction rather than one of action. It means that equity will refuse its aid in any manner to one seeking its active interposition, if he has been guilty either of unlawful or inequitable conduct respecting the subject matter of the litigation.[103] In the celebrated case of *Carmen v. Fox Film Corp*., the plaintiff, a motion picture actress, sought to have contracts she had made with the defendants during her minority declared void, they having been disaffirmed by her with reasonable diligence after she reached her majority. She also prayed that an injunction be issued restraining the defendant from asserting that the contracts were valid, and from interfering with her contract relations with any other company or individual. As a matter of fact, she had entered into other contracts while a minor and, upon reaching her majority, sought to employ the incapacity of infancy to nullify all but the most lucrative one. The court said:

> The conduct of the plaintiff has been such as entitles her to no relief in this court. According to her own allegations in her complaint, she was a minor when she entered into the contract with Keeney (another company), and she misled him into making the contract by representing that she was free to make it, when in fact she was morally not free to make the contract, and there was doubt whether she was legally free to make it. If the contracts with the defendants were valid, she was under a legal and moral obligation not to make the contract with the Keeney corporation. And if the contracts were voidable because of her infancy, then, while she was under no legal obligation to recognize them, she was under a moral obligation to abide by them, and good faith required her to continue to render the services she had agreed to give. In either case her action in repudiating her pledged word was misconduct of which no person of honor and conscience would have been guilty. That no action could

> be brought against her at law because of what she did does not alter the moral character of her act. And when she comes into a court of conscience and asks its affirmative aid to assist her in carrying into effect the inequitable arrangement into which she unfaithfully entered, the appeal falls on deaf ears. One who comes into equity must come with clean hands, and her hands are not clean.[104]

The clean hands doctrine is a concept which is constantly expanding and growing, and is being applied to an ever-increasing variety of situations.[105]

SEVENTH MAXIM: HE WHO SEEKS EQUITY MUST DO EQUITY

This maxim is the other side of the coin figuratively represented by the preceding maxim. A party who seeks the aid of equity may be required, as a condition of receiving such aid, to do some act, or refrain from some act, which otherwise he could not be constrained to do or to omit.[106] For instance, "A diversion of irrigating waters from leased remises, in violation of the terms of the lease, will not work a forfeiture where, owing to the destruction of a canal, they could not be utilized, and their use upon other lands was permitted by the lessee in good faith, and in consideration of a repair of the canal by the user."[107] The required action or omission must be such as will assure fair and just treatment to the other party.[108] For example, when a tenant seeks equity's aid to avoid eviction for non-payment of rent, he may be required to pay all the back rent before equity will aid him, even though part of it is technically barred by the statute of limitations.[109] In other words, one who seeks equity's aid cannot soundly object to his being required first to do or refrain from doing some act which ordinarily he need not do or refrain from doing.[110]

Yet, some other default on the part of the other party may, in a proper case, induce the equity court to omit this requirement from the party seeking its aid.[111] Of course, if the moving party (i.e., usually, but not always, the plaintiff) bases his claim on a purely "at law" basis, this maxim is not applicable.[112] But this must notbe taken to mean that the "law" will be followed blindly. As already demonstrated, equity will not allow the "law" nor a statute to be used to further a fraud.[113]

This maxim is truly fundamental in equity. It hardly would be equitable for a party to retain some unfair advantage or unjust enrichment while at the same time he claims the aid of equity. He must be willing to do justice, to be entitled to receive justice.[114] But the action on his part must be connected directly with the subject of his claim; he may not be thus obliged with regard to a different transaction or matter, on the basis of this maxim.[115] Coercion with regard to separate transactions may be based on the "clean hands" maxim, but not on this particular maxim.[116]

EIGHTH MAXIM: WHERE EQUITIES ARE EQUAL THE LAW PREVAILS

This maxim represents an affirmation of the basic impartiality of equity. It

is a negative principle, in effect. As between or among equal moral rights, equity jurisprudence is not actually brought into play; the balance of moral rights being level, the dogmas of law can apply without hindrance from equity.[117] Unless one of the contending parties has some superiority of moral right, equity will not interfere; the normal rules of law will apply and determine the matter.[118] The maxim applies when the party seeking equity's aid fails to establish a superiority of equitable rights. A frequently encountered situation in which this maxim takes effect is that in which the legal rights of a bona fide purchaser for value prevail over purely equitable prior rights.[119] Recent Supreme Court decisions have shaken the old rules of equitable servitudes and restrictive covenants established in *Tulk v. Moxhay*, at least as regards racial restrictions,[120] but have not overturned these old rules.

A bona fide purchaser for value who acquires an equitable right without notice of another pre-existing equitable right stands in equality with that other claimant. Then, if one of the claimants also acquires some legal title, he will not be stripped of it by equity.[121] In other words, equitable right plus a legal right must outweigh equitable right standing alone.

The maxim that the law prevails when equities are equal must be distinguished from another minor principle: "between equal equities, the one which is prior in time will prevail." (*Qui prior est tempore, potior est jure, i.e., aequitate.*)[122] This minor maxim, while important and effective in proper cases, is not as authoritative as the maxim that "where equities are equal the law prevails." [123]

Thus, under this latter maxim, it has been said that

> Where a judgment creditor, between the time of an execution and sale of the debtor's undivided interest in certain land, was made a party defendant to a partition suit, and after the execution sale the purchaser thereat voluntarily appeared in the action as substituted lienor (or the judgment creditor), it is held that the right of the latter to share in the proceeds of the sale to the extent of his bid was not lost to him because of the expiration before the partition sale of the limitation period from the docketing of the judgment under which he claimed.[124]

This means that the latter maxim governs in situations to which both maxims might apply.[125] Some basis of legal title is more effective than some basis of priority in time, as a general rule.[126] While the relative morality of this rule is debatable, the rule itself seems to be firmly established.

NINTH MAXIM: EQUALITY IS EQUITY

This maxim sometimes is expressed in another phrase: Equity delights in equality. It is particularly applicable to cases involving more than two parties, as in cases of distribution of assets of an insolvent debtor among his creditors.[127] It is

basic doctrine of equity in the absence of any clearly applicable firm rule of law.

The basis of pro rata distribution or liability among a class or among a group of claimants, now the general rule in such matters as insolvency and debtor-creditor relationships (although it was not always so), is this maxim.[128] It is also generally accepted as the basis of the now deflated doctrine of mutuality of contracts, although there are several schools of thought on this doctrine. Fry, on Specific Performance of Contracts,[129] upheld the old theory, saying

> A contract, to be specifically enforced by the court, must be mutual — that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.[130]

It should be understood that the old rule that contracts must be mutual did not mean that in every case each party must have the same remedy for a breach by the other.[131] In some modern contracts, such as advertising contracts, the applicability of the doctrine of mutuality is very questionable.[132]

The cases which have held that leases (or other contracts) which confer upon one party the right to terminate the lease (or contract) are void for lack of consideration or mutuality and, therefore, terminable also at the option of the other party are numerically in the minority.[133]

Mutuality of equitable remedies now has been rejected by a number of jurisdictions, and, at most, is confined to cases seeking specific performance of contracts.[134]

In the distribution of the assets of debtors among creditors, pro rata payment satisfies the requirement of equality. Equity will not allow one creditor to gain an inequitable or undue advantage or preference over others.[135] This principle is found in equity receivership and in statutory elaborations of equity, such as state debtor-creditor statutes, and the federal bankruptcy act.[136] But pro rata payment is not the sole alternative. For example, insolvency has been held to be good ground for equitable relief by specific performance.[137]

TENTH MAXIM: EQUITY IMPUTES AN INTENTION TO FULFILL AN OBLIGATION

This maxim is rather specific in nature and application despite its apparently broad scope. It means that if one is under some obligation to do some act, if he does some other act which is susceptible to being considered to have been intended as performance of the obligation, he may be deemed to have intended this

action to be such performance, whether or not such was his actual purpose. Equity will impute the intention, whether or not, in fact, it was his intention.[138] For example, if a man has contracted to obtain certain property for another, but obtains it for his own use, this property will be deemed by equity to have been obtained for the fulfillment of the contract.[139] This maxim applies to who is responsible under a contract, a trust, an agency, a partnership or corporate officer's liability, a fiduciary, executor, guardian or administrator responsibility, and the like.[140] It provides, for situations involving a fiduciary or quasi-fiduciary relationship, a rule analogous he more general provision that equity regards as done that which ought to be done. The continued importance of trust and quasi-trust relationships warrants the maintenance of this special maxim as an underlying principle in such cases.

ELEVENTH MAXIM: EQUITY ACTS SPECIFICALLY

One of the maxims of equity frequently quoted today is that equity acts specifically; it gives not compensation or damages but specific relief.[141] While it is true that equity sometimes does award compensation instead of specific relief, this still is the exception rather than the rule.[142] Fundamentally, equity seeks to place the parties in the positions in which they should be, rather than to compensate them for the loss of their proper relative positions or rights. For example, the remedy of specific performance of contracts is within the exclusive jurisdiction of equity, even though legal rights also stem from such contracts, and courts of law will award damages for breach of contract.[143] Other examples of the specific relief granted by equity, in distinction from relief by the method of compensation, are injunctions, receiverships, and interpleader.[144]

Another minor maxim, somewhat analogous in its application, is the maxim that equity delights to do justice and not by halves. Under this maxim, equity will award damages in lieu of specific performance, when necessary.[145] For example, damages in lieu of specific performance (or partially in lieu thereof) have been awarded in cases involving building contracts. The tendency in this direction clearly is to make even more liberal the granting of relief by specific performance, even when this will involve protracted supervision by the courts.[146] Equity also can enjoin a trespass and, at the same time, grant money damages for the injury already caused by that trespass.[147] But these exceptional cases of the granting of damages should not be permitted to obscure the essentially specific nature of equitable remedies.

MINOR MAXIMS

Several minor maxims, analogous to, or subsidiary to, the principal maxims of equity have been mentioned hereinabove. In addition, three other minor maxims are still worthy of notice today.

"Equity does not stoop to pick up pins" means that equity will not concern itself with trifles.[148] If the amount of injury, or the subject matter in dispute, is so

small as to be trivial, it would be more of a burden to the defendant to grant equity relief than that relief would be worth to the complaining party. In such a case, the granting of equitable relief would be inequitable, because its effects would be disproportionate.[149] Minimum amounts to permit the acceptance of jurisdiction have been adopted in several states, usually ranging between twenty and a hundred dollars.[150]

"Equity will not decree a vain thing" means that the courts will not waste time on impractical, useless action which will accomplish nothing in fact.[151] For example, equity generally still will not grant specific performance of a contract which it would have to supervise to enforce, and which would raise many problems of compliance and administration.[152] But there are several broad exceptions to this rule, and the rule itself seems destined to become subject to so many exceptions as to cease to be important.[153]

Equity will not issue a decree which the defendant is incapable of obeying for other than financial or physical reasons.[154] Nor will it order the commission of acts forbidden by law.[155] Neither will it attempt to enjoin an act after the act has been committed.[156] But the finality of an equity decree must be based on consideration of possible subsequent events.[157]

Finally, there is the minor maxim that "equity will not be ousted because law courts have adopted an equitable remedy."[158] As a result of this principle there are many instances in which the jurisdiction of law and of equity is concurrent.[159] In this connection, it is interesting to recall that the early chancellors did handle criminal matters for a time, and then ceased to do so. Today a criminal act, besides being punishable as a crime, also may be the subject of equity injunction, as in the case of a labor dispute attended by violence, or a crime which also constitutes a nuisance.[160]

Yet, it must not be forgotten that labor dispute injunctions are unpopular and are limited by statute in many jurisdictions, including the federal.[161] Firm rules regarding labor dispute injunctions have not as yet crystallized, and the ultimate effects of such statutes as the Taft-Hartley law are yet to be seen. It seems certain that this area of jurisprudence will remain fluid for years to come.

CONCLUSION

Equity is today, as it has been since ancient times, an element joined with, and yet necessarily apart from, the various specific subdivisions of the law. It affects all, yet is lost in none of them, because it is a system of principles rather than a system of rules. Its function still is the correction of civil law where that law is deficient by reason of its universality, i.e., its tendency to establish rigid rules.[162] It has existed, as a system of legal morality, at least since the days of Hammurabi, and was basic in the system of law set forth in the Bible.[163]

APPENDIX A – MAXIMS OF EQUITY REAPPRAISED

Since the maxims of equity represent the very essence of the principles of equity, it seems the merest common sense that these maxims should not be allowed to fall into neglect. If equity is important to modern jurisprudence, even as mere background, its principles should be studied and developed continually. Its close connection with morality and religion should be acknowledged, so that these vital elements be not divorced from it, lest it degenerate into a barren system of rules and statutes. Such a loss is one which our troubled civilization simply cannot afford.

The correlation of the highly moral principles of equity and other principles of like origin, and the extraction from them of ever-more-clearly-enunciated principles, is a task which has been sorely neglected this century. How many of the woes of our generation are traceable to our neglect of basic principles in the law, and in other fields, is a question which cannot safely be left to the research of historians of future generations. If we wish our way of life to survive, we must remedy our defects before they become the cause of our destruction.

END NOTES

1. BLACK, LAW DICTIONARY (3rd ed. 1933).

2. BLACKSTONE, index (4th ed., Chase, 1938 reprint).

3. *Drucklieb v. Harris*, 155 App. Div. 83 (N.Y. 1913).

4. *John L. Steinbugler v. William C. Atwater & Co*., 289 N.Y. 818, 47 N.E.2d 432 (1943).

5. *Englehart's Estate v. Larimer*, 211 Ind. 218, 5 N.E.2d 304 (1936). See also OLECK, CREDITOR'S RIGHTS AND REMEDIES, p. 10 (1949 ed.).

6. 2 POMEROY, EQUITY JURISPRUDENCE § 423, 4 (5th ed. 1941).

7. *Wardell v. Wardell*, 71 Neb. 774, 99 N.W. 674 (1904); de Funiak, Nature and Origin of Equity, 23 TULANE L. REV. 54 (1948); Oleck, Historical Nature of Equity Jurisprudence, 20 FORD. L. REV. 23 (1951).

8. *Calmer v. Calmer*, 15 N.D. 120, 106 N.W. 684 (1906). "Complexity of proof may give equity jurisdiction in a case in which it otherwise would not assume jurisdiction, but is not a determinative test of jurisdiction; or of adequacy of legal remedy." *State ex rel. Lien v. House*, 144 Ohio St. 238, 58 N.E.2d 675 (1944). But see McCaffrey, Equity of the Statute, Ancient and Modern, 111 N.Y.L.J. 2242, 2262, 2282 (June, 1946).

9. *Ibid*.

10. *Davis v. American Society for Prevention of Cruelty to Animals*, 75 N.Y. 362 (1875); Broadus, Equity: Enjoining Criminal Prosecutions, 37 CALIF. L. REV. 685 (1949); *Amusement Enterprises, Inc. v. Benjamin Fielding, as Commissioner of Licenses of the City of New York*, 272 App. Div. 917, 63 N.Y.S.2d 661 (1947); *Orloff v. Los Angeles Turf Club*, 30 Cal.2d 110, 180 P.2d 321 (1947).

11. *Preston v. Sturgis Milling Co*., 183 Fed.1 (6th Cir. 1910); *Warrenville State Bank v. Farmington*, 81 F. Supp. 101 (S.D. Mich. 1948).

12. *Zuern v. Peoples Trust Co*., 13 NORTHUMB. L.J. 145, (Pa. Com. Pl. 1937). But see Note, Insolvency as Ground for Equitable Relief by Specific Performance in Massachusetts, 28 B.U.L. REV. 60 (1948).

13. *Forest Lake State Bank v. Ekstrand*, 112 Minn. 412, 128 N.W. 455 (1910); *Engenmoen v. Lutroe*, 153 Minn. 409, 190 N.W. 894 (1922).

14. *Mudd v. Lanier*, 247 Ala. 363, 24 So.2d 550 (1945).

15. *Roberson v. Rochester Folding Box Co*., 171 N.Y. 538, 64 N.E. 442 (1902); NEW YORK CIVIL RIGHTS LAW § 51; *Elmhurst v. Shoreham Hotel*, 58 F. Supp. 484 (D.D.C. 1945); *Fisher v. Murray M. Rosenberg, Inc*., 175 Misc. 370, 23 N.Y.S.2d 677 (N.Y. 1940).

16. *Wickwire v. Warner*, 174 N.Y. Supp. 811 (1920); *Baltimore Transit Co. v. Flynn*, So. F. Supp. 382 (D. Md. 1943).

17. *Laun v. Kipp*, 155 Wisc. 347, 5 A.L.R. 655 (1914); *Hitt v. Carr*, 77 Ind. App. 448, 130 N.E. 1 (1921); *Latham v. Father Divine*, 299 N.Y. 22, 85 N.E.2d 168 (1949); *Deckert v. Independence Shares Corp*., 311 U.S. 282 (1940).

18. *Falk v. Hoffman*, 233 N.Y. 199, 135 N.E. 243 (1922); *Latham v. Father Divine*, 299 N.Y. 22, 85 N.E.2d 168 (1949); *Deckert v. Independence Shares Corp*., 311 U.S. 282 (1940).

19. *Gavin v. Curtin*, 171 Ill. 640, 49 N.E. 523 (1898); *Connor v. Thornton*, 207 Ark. 1113, 184 S.W.2d 589 (1945); *Beliveau et al. v. Beliveau et al*., 217 Minn. 235, N.W.2d 360 (1944).

20. *Depue v. Miller*, 65 W. Va. 120, 64 S.E. 740 (1909); *Felsenheld v. Bloch Bros. Tobacco Co*., l 10 W. Va. 167, 192 S.E. 545 (1937); and *Gilley v. Nidermaier*, 176 Va. 32, 10 S.E.2d 484 (1940).

21. *Birch v. Baker*, 81 N.J. Eq. 264, 86 Atl. 932 (Ch. 1913); *Paruch v. Rasiewicz*, 124 N.J.L. 356, 12 A.2d 141 (Sup. Ct. 1940); *Camden Trust Co. v. Handle*, 132 N.J. Eq. 97, 26 A.2d 865 (Ct. Err. & App. 1942).

22. MAITLAND, EQUITY 31 (1910 ed.).

23.*Id.* at 1 14.

24. *Trigg v. Vermillion*, 113 Mo. 230, 20 S.W. 1047 (1892); *Barth v. Haase*, 139 S.W.2d 1058 (Mo. 1940); *U.S. Hoffman Machinery Corp. v. Lauchli*, 150 F.2d 301 (8th Cir. 1945).

25. *Fanchier v. Gammil*, 148 Miss. 723, 114 So. 813 (1927); *Clubb v. Clubb*, 402 Ill. 340, 84 N.E.2d 366 (1949); *Thones v. Thones*, 185 Tenn. 124, 203, S.W.2d 597 (1947). Also, Note 23 COL. L. REV. 59 (1923).

26. MAITLAND, LECTURES ON EQUITY 258 (1910 ed.); Stringfellow, Note, 2 ALA. LAWYER 230 (1910).

27. Anonymous, Common Pleas (1626), Littleton 37, CHAFFEE AND SIMPSON, CASES ON EQUITY 14 (2d. ed. 1946).

28. *J. R. v. M. P., Common Pleas* (1459), Year Book, 37 Henry VI, folio 13, pl. 3. CHAFFEE, *supra* note 27, p. 12. See also *Drakesley v. Roots*, 2 Root 138 (Conn. 1794), CHAFFEE at p. 24.

29. *Arglasse v. Muschamp* (1682), 1 Vern. 75, 23 Eng. Rep. 322.

30. Pound, Maxims of Equity, 34 HARV. L. REV. 809 (1921).

31. *Platt v. Woodruff*, 61 N.Y. 378 (1875); *Kloka v. Brake*, 318 Mich. 87, 27 N.W.

2d 507 (1947).

32. *Ibid*. Also Note, 25 MICH. L. REV. 302 (1927).

33. *Union Assurance Soc., Ltd. v. Buono*, 223 Mich. 336, 193 N.W. 827 (1923).

34. Validity of Service Upon an Attorney, 23 COL. L. REV. 765 (1923).

35. *Murphy v. Paris*, 16 F.2d 515 (D.C. Cir. 1926).

36. 28 U.S.C.A. § 376; also NEW YORK CIVIL PRACTICE ACT § 827 (1950).

37. *Penn v. Lord Baltimore*, I Ves. Sen. 444, 27 Eng. Rep. 1132 (1750). See also Cook, 15 COL. L. REV. 128 (1915); *Steele v. Bryant*, 132 Ky. 569, 116 S.W. 755 (1909) *Layne v. Ruth Elkhorn Coals, Inc*., 307 Ky. 481, 211 S.W.2d 158 (1948); *United States v. 14.99 Acres, More or Less, of Land, Situate in Meade County, Ky*., 27 Supp. 843 (D.C. Ky. 1939).

38. *Davis v. Headley*, 22 N.J. Eq. 115 (Ch. 1871).

39. *Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N.E.2d 241 (1946).

40. *Schmaltz v. York Mfg. Co*., 204 Pa. St. 1, 53 Atl. 522 (1902); *Johnson v. Morris*, 129 Fla. 543, 177 So. 286 (1937); *Pendley v. Tumlin*, 181 Ga. 808, 184 S.E. 28 (1936).

41. *Manning v. Mercantile Securities Co*., 242 Ill. 584, 90 N.E. 238 (1909); *United States Fidelity & Guaranty Co. v. Vangilder*, 119 W. Va. 211, 193 S.E. 342 (1937) *Newcomer v. Miller*, 166 Md. 675, 172 Atl. 242 (1934); WALSH ON EQUITY 45 (1930)

42. *Schenck v. Conover*, 13 N.J. Eq. 220, 78 Am. Dec. 95 (Ch. 1860).

43. LANGDELL, EQUITY PLEADING 35 (2d ed. 1883).

44. BLACK, LAW DICTIONARY (3rd ed. 1933); *City of Bethany v. District Court*, 19 OKLA. B.A.J. 179 (1948).

45. FED. R. CIV. P. 18-21 (1950); *Earl of Bath v. Sherwin* (1706), Proc. in Ch. 261, CHAFFEE & SIMPSON, CASES ON EQUITY 1124 (2d ed. 1946); C. &*S.F. Ry. v. Pearlstone Mill & Elev. Co*., 53 S.W.2d 1001 (Texas 1946); NEW YORK CIVIL PRACTICE ACT § 209 *et seq*., 258 (1950).

46. *Post v. Emmet*, 40 App. Div. 477 (N.Y. 1899) 58 N.Y. Supp. 129; Cohen. Note, 33 COL. L. REV. 1147 (1933); Note, Federal Interpleader Act, 41 ILL. L. REV.

286 (1947); also *C. F. Duke Storage Warehouse, Inc. v. Keller*, 141 N.J. Eq. 43, 55 A.2d 901 (Ch. 1947), CHAFFEE & SIMPSON, CASES ON EQUITY, c. 20 (2d ed. 1946).

47. *Tennant's Heirs v. Fretts*, 67 W.Va. 569, 68 S.E. 387 (1910); *Baird-Gatzmer*

Corp. v. Henry Clay Co., 131 W. Va. 793, 50 S.E.2d 673 (1948); *Cable v. Cable*, 53 S.E.2d 637 (W.Va. 1949).

48. *McMillan v. Barber*, 151 Wis. 48, 138 N.W. 94 (1912); *Fraser v. Cohen*, 159 Fla. 253, 31 So.2d 463 (1947); *Hart v. Sansom*, 110 U.S. 151 (1884); *James H. Rhodes v. Chausorsky*, 137 N.J.L. 459, 60 A.2d 623 (Sup. Ct. 1948); *Robinson v. Kind*, 23 Nev. 330, 47 Pac. 1 (1896); *Young Inv. Co. v. Reno Club*, 66 Nev. 216, 208 P.2d 297, (1949).

49. NEW YORK CIVIL PRACTICE ACT § 232, 235, 979 (1950); *Garfein v. McInnis*, 248 N.Y. 261, 162 N.E. 73 (1928); *Feingold v. Ornoff*, 57 N.Y.S.2d 68 (1945); *Paprin v. Bitker*, 64 N.Y.S.2d 289 (1946).

50. *Huntington v. Attrill*, 146 U.S. 657 (1892); *Walker v. Gilman*, 25 Wash.2d 557, 171 P.2d 797 (1946); *Schaubach v. Anderson*, 184 Va. 795, 36 S.E.2d 539 (1946).

51. Note, 7 U. OF CHI. L. REV. 710 (1940).

52. *Baxter v. Deneen*, 98 Md. 181, 57 Atl. 601 (1903); *Schill v. Remington-Putnam Book Co*., 179 Md. 83, 31 A.2d 467 (1943); *Hertz v. Mills*, 10 F. Supp. 979 (D.C. Md., 1935)

53. *Horn v. Keteltas*, 46 N.Y. 605 (1871); *Scheeper v. Inmar Estates, Inc.* 270 App. Div. 845, 60 N.Y.S.2d 423 (1946); *Ross v. Midelburg*, 129 W. Va. 851, 42 S.E.2d 185 (1947); *Zeiser v. Cohn*, 207 N.Y. 407, 101 N.E. 184 (1913); *Rochester Savings Bank v. Stoeltzen v. Tapper*, 176 Misc. 140, 26 N.Y.S.2d 718 (1941).

54. *Hooper v. Central Trust Co*., 81 Md. 559, 32 Atl. sos (1895); *County Corp. of Maryland v. Semmes*, 169 Md. 501, 182 Atl. 273 (1936); *Kosters v. Hoover*, 98 F.2d 595 (D.C. Cir. 1938).

55. *Jefferys v. Jefferys, Craig and Ph. 138*, 41 Eng. Rep. 443 (1841), also CHAFFEE AND SIMPSON, CASES ON EQUITY 595 (2d ed. 1946).

56. *Lacey v. Hutchinson*, 5 Ga. App. 865, 64 S.E. 105 (1909); *Trustees of JessieParkerWilliamsHospital v. Nisbet*, 189 Ga. 807, 7 S.E.2d 737 (1940).

57. *State v. Standard Oil Co*., 49 Ohio St. 137, 30 N.E. 279 (1892); *Hart v. Guardian Trust Co*., 148 Ohio St. 456, 75 N.E.2d 570 (1945); *United States v. Timkin Roller Bearing Co*., 83 F. Supp. 284 (N.D. Ohio 1949); *Anthony v. American Glucose Co*., 146 N.Y. 407, 41 N.E. 23 (1895); *Gardiner v. Burrill*, 225 Mass. 355, 114 N.E. 617 (1916); *Gregg v. Electri-Craft Corp*., 175 Misc. 964, 25 N.Y.S.2d 920 (Sup. Ct. 194) [sic]; *Segal v. Davis*, 166 Minn. 265, 207 N.W. 620 (1926); *Brown County Bank v. Freie Presse Printing Co*., 174 Minn. 143, 218 N.W. 557 (1928); *Hatch v. Morosco Holding Co*., 50 F.2d 138 (2d Cir. 1931).

58. *Richardson Lubricating Co. v. Kinney*, 337 Ill. 122, 168 N.E. 886 (1929); *Cook v. Sears-Roebuck & Co*., 212 Ark. 308, 206 S.W.2d 20 (1947); *Walgreen Co. v.*

State Board of Equalization, 62 Wyo. 288, 166 P.2d 960 (1946).

59. Note, Equity Maxims-Clean Hands 24 ILL. L. REV. 904 (1930).

60. *Peachy v. Duke of Somerset*, 1 Strange 447, 93 Eng. Rep. 626 (1721).

61. 1 POMEROY, EQUITY JURISPRUDENCE § 381, 382 (4th Ed. 1918), KENTS COMMENTARIES 459 (12th ed. 1873).

62. *Ebelharr v. Tennelly*, 118 Ky. 43, 80 S.W. 459 (1904); *Narveson v. Nock*, 214 S.W.2d 842 (1948); *Wilson v. Ryan*, 163 S.W.2d 448 (1942); *Higgs v. McDuffee*, 81 Ore. 256, 158 Pac. 953 (1916); *United States Plywood Corp. v. Alexander*, 180 Ore., 175 P. 2d 460 (1946).

63. NEW YORK CIVIL PRACTICE ACT § 724 *et seq*. (1950).

64. *Bannister v. Bannister*, 2 All India Rep. 133 (1948), cited in Potter, 11 MOD. L. REV. 477 (1948).

65. 1 STORY, EQUITY JURISPRUDENCE, par. 64(g) (13th ed. 1886).

66. *Wells v. Dean*, 211 La. 132, 29 So.2d 590 (1947); *Muhleman & Kayhoe, Inc. v. Brown*, 4 Terry 207, 45 A.2d 521 (Del. 1945).

67. *Craig v. Leslie*, 3 Wheat. 563 (U .S. 1818) .

68. For a good modern example of equitable conversion, see Note, Conflict of Laws, 49 HARV. L. REV. 994 (1936).

69. *McCaughna v. Bilhorn*, 10 Cal. App. 674, 52 P.2d 1025 (1936); *Wells Fargo Bank & Union Trust Co. v. Superior Court*, 32 Cal.2d 13, 193 P.2d 721 (1948).

70. *Craig v. Leslie, supra*, n. 67; 1 STORY, op. cit. supra n. 70. § 69.

71. *Siesel v. Mandeville*, 140 N.J. Eq. 490, 55 A.2d 167 (Ch. 1947); *Oscsenda v. Oscenda*, 2 N.J. Super. 353, 63 A.2d 897 (Ch. Div. 1949); *Horton v. Horton*, 1 N.J. 13, 62 A.2d 503 (1948); See CLARK, EQUITY § 448 (1919); also Note, Specific Performance-Equitable Conversion, 61 HARV. L. REV. 718 (1948); Miller, 26 KY. L.J. 56; and Note, Hinnegan, 23 TEMP. L.Q. 85 (1950).

72. *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N.Y. 42 (1870); *City of Utica v. Park-Mill Corp*., 41 N.Y.S.2d 248 (1943); *Boden v. Renihan*, 299 Mich. 226, 300 N.W. 53 (1941).

73. *Kubel v. Plummer*, 130 Wash. 135, 226 Pac. 273 (1924); *McKnight v. Basilides*, Wash. 391, 143 P.2d 307 (1943); *Luellen v. City of Aberdeen*, 20 Wash.2d 594, 8 P.2d 849 (1944).

74. *Ellison v. Moffatt*, 1 Johns. 46 (N.Y. Ch. 1809).

75. *United States v. National Rockland Bank*, 35 F. Supp. 912 (D. Mass. 1940);

Ramirez, 29 GEO. L.J. 1074 (1941).

76. *Chase v. Chase*, 20 R.I. 202, 37 Atl. 804 (1897).

77. *Schmidt v. Reed*, 132 N.Y. 108, 30 N.E. 373 (1892); *D'Onfro v. State*, 270 App. Div. 9, 59 N.Y.S.2d 205 (1945); *Jones v. Jenkinson*, 316 Ill. 264, 147 N.E. 128 (1925).

78. *Conrads v. Kasch*, 26 S.W.2d 732 (Texas 1930); *Oliver v. Corzelius*, 215 S.W.2d 231 (Texas 1948); *Lenhart v. Lenhart Wagon Co*., 211 Minn. 164, 298 N.W. 37 (1941); *Groosbeck v. Morgan*, 206 N.Y. 385, 99 N.E. 1046 (1912); *Feldman v. Metropolitan Life Ins. Co*., 259 App. Div. 123, 18 N.Y.S.2d 285 (1940).

79. *Green v. Reder*, 199 Mich. 594, 165 N.W. 807 (1917); *Hardin v. Adair*, 140 Ga. 263, 78 S.E. 1073 (1913); *Pruden v. Middleton*, 182 Ga. 687, 186 S.E. 732 (1936).

80. *De Huy v. Osborne*, 96 Fla. 435, 118 So. 161 (1928); *Thrasher v. Ocala Mfg. Co*., 153 Fla. 488, 15 So.2d 32 (1943).

81. *Pospishil, Equitable Estoppel*, 10 NEB. L. BULL. 222 (1940).

82. *Erickson v. Wiper*, 33 N.D. 193, 157 N.W. 592 (1916); *Beckman v. Schroeder*, 224 Minn. 370, 28 N.W.2d 629 (1947); *State v. McClelland*, 72 N.D. 665, 10 N.W.2d 798 (1943); *George v. Ford*, 183 Ky. 808, 211 S.W. 438 (1919); *Graves County v. Sullivan*, 283 Ky. 130, 140 S.W.2d 636 (1940); *Ackerman v. True*, 175 N.Y. 353 (1903); *Mallary, Inc. v. City of New Rochelle*, 184 Misc. 66, 53 N.Y.S.2d 643 (Sup. Ct. 1944).

83. Spiegelberg, N.Y. Statute of Limitations Applicable to Actions in Equity Based on Legal Rights, 18 N.Y.U.L.Q. REV. 182 (1941).

84. *Keys v. Leopold*, 241 N.Y. 189, 149 N.E. 828 (1925); *Wojtkowiak v. Wojtkowiak*, 85 N.Y.S.2d 198 (1947); *Bernstein v. N.V. Nederlandsche- Amerikaansche Stoomvaart-Maatschappij*, 76 F. Supp. 335 (S.D.N.Y. 1948).

85. *Peters v. Delaplaine*, 49 N.Y. 362 (1872); *Metropolitan Life Ins. Co. v. Otto Oseas*, 261 App. Div. 768, 27 N.Y.S.2d 655 (1941); *Hawley v. Von Lanken*, 75 Neb. 597, 106 N.W. 456 (1906); *Kozina v. J. B. Watkins Lumber Co*., 146 Neb. 594, 20 N.W.2d 606 (1945); *Bend v. Marsh*, 145 Neb. 780, 18 N.W.2d 106 (1945).

86. *Ibid*.; *State of Rio de Janeiro v. E. H. Rollins & Sons Inc*., 299 N.Y. 363, 87 N.E.2d 299 (1949).

87. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Black Diamond Steamship Corp. v. Robert Stewart & Sons*, 336 U.S. 386 (1949); *Pepper v. Truitt*, 158 F.2d 246 (10th Cir. 1946); Bennett, Application of a Statute of Limitations in a Federal Diversity Suit, 33 CORNELL L.Q. 142 (1947).

88. 170 F.2d 741 (10th Cir. 1948).

89. *Ibid*., and 173 A.L.R. 367 (See Green v. Terwillinger).

90. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); See also *General Minnesota Utilities Co. v. Carlton County Cooperative*, 221 Minn. 510, 22 N.W.2d 673 (1946); *American Cities Power & Light Corp. v. Williams*, 74 N.Y.S.2d 374 (1947).

91. *Ibid*.

92. *Smith v. Smith*, 135 S.W.2d 679 (Ark. 1940); L.J.H., Clean Hands Doctrine, 18 TEXAS L. REV. 506 (1939); 4 A.L.R. 44 (1919).

93. *Union Central Life Ins. Co. v. Drake*, 214 Fed. 536 (8th Cir. 1914); *United States v. Cathcard*, 70 F. Supp. 653 (D. Neb. 1946); *Hankin v. Spilker*, 72 A.2d 45 (Munic. Ct. App. D.C. 1950); *Gaines v. Sawyer*, 248 Mass. 368, 143 N.E. 326 (1924).

94. 2 POMEROY, EQUITY JURISPRUDENCE § 397 (5th ed. 1941); *Weaverling v. McLennan*, 116 Neb. 466, 217 N.W. 956 (1928); *Fritz v. Jungbluth*, 141 Neb. 770, 4 N.W.2d 911 (1942); Note, 26 MINN. L. REV. 276 (1942).

95. *Townsend v. Morgan*, 192 Md. 168, 63 A.2d 743 (1949); *Simmons v. Hansen*, 117 F.2d 49 (8th Cir. 1941); Note, 10 MD. L. REV. 84 (1949).

96. *Walsh v. Atlantic Research Associates*, 321 Mass. 57, 71 N.E.2d 580 (1947); Note, Equity, 60 HARV. L. REV. 980 (1947); see also *Chaplain v. Dugas*, 323 Mass. 91, 80 N.E.2d 9 (1918); *Deutschmann v. Board of Appeals of Canton*, 325 Mass. 297, 90 N.E.2d 313 (1949).

97. *Carmen v. Fox Film Corp*., 269 Fed. 928 (2d Cir. 1920), 15 A.L.R. 1209 (1920).

98. 84 A.L.R. 82 (See Sec. B.)

99. *Prince Mfg. Co. v. Prince's Metallic Paint Co*., 135 N.Y. 24, 31 N.E. 969 (1892); *Meisner v. Meisner*, 29 N.Y.S.2d 342 (1941); *Lyman v. Lyman*, 90 Conn. 399, 97 Atl. 312 (1916); *Mobley v. Mobley*, 245 Ala. 90, 16 So.2d 5 (1943); *Shatford v. Shatford*, 214 Ark. 612, 217 S.W.2d 917 (1949).

100. *Mills v. Susanka*, 394 Ill. 439, 68 N.E.2d 904 (1946); *Evangeloff v. Evangeloff*, 403 Ill. 118, 85 N.E.2d 709 (1949); *Shadden v. Zimmerlee*, 411 Ill. 118, 81 N.E.2d 477 (1948); *West v. Washburn*, 153 App. Div. 460 (N.Y. 1912); *Coopersmith v. City of New York*, 92 N.Y.S.2d 684 (1949); *Chicago & N.W. Ry. v. Railroad Comm*., 175 Wisc. 534, 185 N.W. 632 (1921); *Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co*., 95 F.2d 978 (6th Cir. 1937); *Shaver v. Heller*, 108 Fed. 821 (8th Cir. 1901), 65 L.R.A. 878; *Omag Optik und Mechanik A.G. v. Weinstein*, 85 F. Supp. 631 (S.D.N.Y. 1949); Note, 33 VA. L. REV. 207 (1947).

101. 34 F.2d 964 (S.D. Cal. 1929).

102. See also: *In re Pine*, 40 F. Supp. 287 (E.D.N.Y. 1941); *In re Sideman*, 32 F. Supp. 574 (E.D.N.Y. 1940); and OLECK, CREDITOR'S RIGHTS AND REMEDIES 191, 127 (1949 ed.). But in *Buck v. Gallagher*, the Sherman Act was used as a clean hands defense. 36 F. Supp. 405 (W.D. Wash. 1940); Note, Sherman Act as a Clean Hands Defense, 50 YALE L.J. 114 (1941).

103. *Carmen v. Fox Film Corp*., 269 Fed. 928 (2d Cir. 1920); 84 A.L.R. 82 § (b), Good Faith (1919).

104. *Ibid*.; See also Chaffee, 47 MICH. L. REV. 877 (1949); Note 44 YALE L.J. 351 (1935); Note, 47 HARV. L. REV. 117 (1934); 9 TEMP. L.Q. 220 (1935); *Keystone Driller Co. v. General Excavator Co*., 290 U.S. 240 (1933); *Alden-Rochelle Inc. v. American Society of Composers, Authors, and Publishers*, 80 F. Supp. 888 (S.D.N.Y. 1948); *Woolridge Mfg. Co. v. R. G. La Tourneau, Inc*., 79 F. Supp. 908 (N.D. Calif. 1948).

105. Black, The Clean Hands Defense, etc., 51 YALE L.J. 1012 (1942); *Ford v. Buffalo Eagle Colliery Co*., 122 F.2d 555 (4th Cir. 1941); D.C.H., Note, 40 W. V.A. L.Q. 172 (1934).

106. *Semidey v. Central Aguirre Co*., 239 Fed. 610 (1st Cir. 1917).

107. 3 A.L.R. 676; *Oregon Growers' Co-op Ass'n v. Riddle*, 116 Ore. 562, 241 Pac. 1011 (1926).

108. *Kinney v. Smith*, 58 Ore. 158, 113 Pac. 854 (1911); *Investors Syndicate v. Smith*, 105 F.2d 611 (9th Cir. 1939).

109. *People v. Freeman*, 110 App. Div. 605, 97 N.Y. Supp. 343 (1906); *The Continental Bank & Trust Co. v. Tanager*, 193 N.Y. Misc. 245, 84 N.Y.S.2d 55 (1948); Comstock v. Johnson, 46 N.Y. 615 (1871).

110. *Olivero v. Rosano*, 42 Cal. App. 2d 740, 109 P.2d 976 (1941); *Givens v. Johnson*, 73 Cal. App.2d 139, 166 P.2d 67 (1946); *Roselip v. Raisch*, 73 Cal. App.2d 125, 66 P.2d 340 (1946).

111. *Ramiller v. Ramiller*, 236 Iowa 323, 18 N.W.2d 622 (1945); *Jennings v. Schmitz*, 237 Iowa 580, 20 N.W.2d 897 (1945).

112. *Manufacturers Finance Co. v. McKey*, 294 U.S. 442 (1935); *Maggio v. Zeitz*, 333 U.S. 56 (1947); *Rock-Ola Corp. v. Filben*, 168 F.2d 919 (8th Cir. 1948); Note, 19 MINN. L. REV. 307 (1935).

113. *Bannister v. Bannister*, 2 All India Rep. 133 (1948); Potter, Note,11 MOD. L. REV. 477 (1948).

114. *Mack v. Hill*, 28 Mont. 99, 72 Pac. 307 (1903); *Frisbee v. Coburn*, 52 P.2d 882 (1935). The antiquity and persistence of this moral concept may be seen from

its presence in ancient Assyria-Babylonian Law, as well as in modern law. Oleck, Historical Nature of Equity Jurisprudence, 20 FORD. L. REV. 27 (1951).

115. *MacKenna v. Fidelity Trust Co*., 184 N.Y. 411, 77 N.E. 721 (1906); *Albany Savings Bank v. Fairchild*, 276 App. Div. 297, 94 N.Y.S.2d 342 (1950); *Malcolm v. Talley*, 89 W. Va. 531, 109 S.E. 613 (1921); *National Life Ins. Co. v. Hanna*, 122 W. Va. 36, 7 S.E.2d 52 (1940).

116. *Ibid*.

117. *Stoddard v. Gabriel*, 234 Iowa 1366, 14 N.W.2d 737 (1944); *Mead v. City National Bank*, 232 Iowa 1276, 8 N.W.2d 417 (1943); *Frink v. Commercial Bank*, 195 lowa 1011, 191 N.W. 513 (1923).

118. *First National Bank of Stockton v. Pomona Tile Mfg. Co*., 82 Cal. App.2d 592, 186 P.2d 693 (1948).

119. *Tulk v. Moxhay* (Ch. 1848) 2 Phil. 774, 41 Eng. Rep. 1143; Newman, 42 MICH. L. REV. 293 (1944).

120. McGovney, 33 CALIF. L. REV. 5 (1945); *Shelley v. Kraemer*, 334 U.S. 1, 3 A.L.R.2d 441 (1948).

121. *Morrill v. Everett*, 83 Me. 290, 22 Atl. 172 (1891); *Brown v. Lawton*, 87 Me. 83, 32 Atl. 733 (1894); *Neagle v. McMullen*, 334 Ill. 168, 165 N.E. 605 (1929); *Wood v. Armstrong*, 401 Ill. 111, 81 N.E.2d 468 (1948); *Grip-Nut Co. v. Sharp*, 150 F.2d 192 (7th Cir. 1945).

122. *Oppenheim Collins & Co. v. Beir*, 187 N.Y. Misc. 428, 64 N.Y.S.2d 19 (1946); *Reisman v. Independence Realty Corp*., 195 N.Y. Misc. 260, 89 N.Y.S.2d 763 (1949).

123. *Hulbert v. Hulbert*, 216 N.Y. 430, 111 N.E. 70 (1916).

124. 166 A.L.R. 795, § (4); see 73 lowa 70, 35 N.W. 145 (1887).

125. *Ballard Bros. v. Stephenson*, 49 F.2d 581 (4th Cir.), *cert. denied*, 283 U.S. 864 (1931). *Burke v. Sweeloy*, 177 Va. 47, 12 S.E.2d 763 (1941); *Bourn v. City of Roanoke*, 122 Va. 227, 1 S.E.2d 279 (1939).

126. *Johnson v. Hayward*, 74 Neb. 157, 103 N.W. 1058 (1905); *East and West Coast Service Corporation v. Papahagis*, 364 Pa. 183, 25 A.2d 339 (1942); *Kinert v. Wright*, 81 Cal. App.2d 919, 185 P.2d 364 (1947). But see *Franz v. Buder*, 82 F. Supp. 379 (E.D. Mo. 1932); *Francisco v. Francisco*, 121 Mont. 468, 191 P.2d 317 (1948); and *Hulbert v. Hulbert*, 216 N.Y. 430, 111 N.E. 70 (1916).

127. *InterstateLand& Invest. Co. v. Logan*, 196 Ala. 196, 72 So. 36 (1904); *Des Moines Joint Stock Land Bank v. Allen*, 220 Iowa 448, 261 N.W. 912 (1935); *Ewing v. Bay Minette Land Co*., 232 Ala. 22, 166 So. 409 (1936).

128. *Smith v. Floyd*, 140 N.Y. 337, 35 N.E. 606 (1893); Application of Schussel, 195 N.Y. Misc. 166, 89 N.Y.S. 2d 47 (1949); *Markham v. Tibberts*, 79 F. Supp. 47 (S.D.N.Y. 1947); OLECK, CREDITOR'S RIGHTS AND REMEDIES 162 (1949 ed.).

129. § 440 3rd Amer. ed. 1884.

130. *Federal Oil Co. v. Western Oil Co*., 121 Fed. 674 (7th Cir. 1902).

131. *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 51 Atl. 973, 58 L.R.A. 227 (1902); *Mission Independent School Dist. v. Diserens*, 144 Texas 107, 188 S.W.2d 108 (1945); *Bach v. Friden Calculating Mach. Co*., 155 F.2d 361 (6th Cir. 1946); *United States v. Wyoming*, 331 U.S. 440 (1947); *Superior Oil Co. v. Dabney*, 147 Texas 51, 211 S.W.2d 563 (1948).

132. Oleck, Advertising Contracts, 120 N.Y.L.J. 24, 34, 44 (Editorials July 6, 7, 8, 1948) points out that in case of breach by the advertiser, the face amount of the contract is the only practicable measure of damages.

133. 137 A.L.R. 382; see esp. 186 Ky. 561, 217 S.W. 666 (1920).

134. *Adkin v. Indiana Employment Security Division*, 117 Ind. App. 132, 70 N.E.2d 31 (1946); *Motor Credit Corp. v. Ray Guy's Trailer Court, Inc.*, 6 N.J. Super. 563, 70 A.2d 102 (Law Div. 1949); *Horton v. Horton*, 2 N.J. Super. 155, 62 A.2d 503, (Ch. Div. 1948); *Burlew v. Hepps*, 2 N.J. Super. 336, 63 A.2d 827 (Ch. Div. 1949); Schofield, Note, 2 ILL. L. REV. 217 (1907); Walsh, Note, 36 GEO. L.J. 220 (1948); Silverstein, Note, 21 TEMP. L.Q. 149 (1950).

135. *Block v. Shaw*, 78 Ark. 511, 95 S.W. 806 (1906); *McAllister v. Patton*, 214 Ark. 293, 215 S.W.2d 701 (1948).

136. OLECK, CREDITOR'S RIGHTS AND REMEDIES pp. 35-43, 24, 162 (1949); and see NEW YORK DEBTOR AND CREDITOR LAW; U.S. Bankruptcy Act, U.S.C., Title 11.

137. Note, Insolvency as Ground for Equitable Relief by Specific Performance in Massachusetts, 28 B.U.L. REV. 60 (1948).

138. *Wilcocks v. Wilcocks*, 2 Vern. 558, 23 Eng. Rep. R. (1681-1719).

139. *Ibid*.; also *City of Utica v. Park Mill Corp*., 41 N.Y.S.2d 248 (1943); *Boden v. Renihan*, 299 Mich. 226, 300 N.W. 53 (1941).

140. 1 POMEROY, EQUITY JURIS. § 442, n. 1 (4th ed. 1941); *Hughes v. Heltzer*, Ore. 182 205, 185 P.2d 537 (1947); *Picciano v. Miller*, 64 Idaho 759, 137 P.2d 788 (1943); *Ferris v. Van Vechten*, 73 N.Y. 113 (1878); *Morris v. Smith*, 51 Tex. Civ. App. 357, S.W. 130 (1908); *Forrest v. Burns*, Tex. Civ. App., 57 S.W.2d 1111 (1933); *Traders & General Ins. Co. v. Linlecum*, 81 S.W.2d 549 (Tex. Civ. App. 1935).

141. *Kilmer v. Dr. Kilmer & Co*., 154 N.Y. Supp. 977 (1915); *Dr. David Kennedy. v. David Kennedy*, 165 N.Y. 353, 59 N.E. 133 (1901).

142. *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949); *Crawford v. Carter*, 37 N.W.2d 241 (1949); Note, Specific Performance, 15 MICH. L. REV. 182 (1917); Note, Award of Damages as a Condition of Specific Performance, 43 YALE L.J. 1020 (1934). Oleck, Specific Performance of Builders' Contracts, 125 N.Y.L.J. 22 (Jan. 3, 1951).

143. *McIsaac v. McMurray*, 77 N.H. 466, 93 Atl. 115 (1915); *Petersen v. Kemper*, 70 S.D. 427, 18 N.W.2d 294 (1945); *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757 (2d Cir. 1946).

144. *Smith v. United States*, 142 Fed. 225 (D. Ore. 1905); *United States v. Fairbanks*, 171 Fed. 337 (8th Cir. 1909).

145. *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908); *Shreeve v. Greer*, 65 Ariz. 35, 173 P.2d 641 (1946); *Neary v. Markham*, 155 F.2d 485 (10th Cir. 1946); *McLennan v. Church*, 163 Wis. 411, 158 N.W. 73 (1916); *Wussow v. Gaida*, 251 Wis. 328, 29 N.W.2d 42 (1947); *Wheeler v. Standard Oil Co. of N.Y.*, 263 N.Y. 34, 188 N.E. 148 (1933); *Pollack v. Viele*, 273 App. Div. 871, 76 N.Y.S.2d 904 (1948).

146. Oleck, Specific Performance of Builders' Contracts, 125 N.Y.L.J. 22 (Jan. 3, 1951).

147. *Maier v. Publicker Commercial Alcohol Co*, 62 F. Supp. 161 (E.D. Pa. 1945); *Keppel v. Lehigh Coal Co*., 200 Pa. 649, 50 Atl. 302 (1901); *Sklarsky v. Great A. & P. Tea Co*., 47 Fed. 2d 662 (S.D.N.Y. 1931); *State of Maryland, to Use and Benefit of Wood, v. Robinson (Ourslev, Third-Party Defendants)*, 74 F. Supp. 279 (D. Md. 1947); Note, 30 MICH. L. REV. 467 (1932).

148. *Harris v. Ingleside Bldg. Corp*., 370 Ill. 617, 19 N.E.2d 585 (1939); *Woodward v. Ruel*, CountyJudge, 355 Ill. 163, 188 N.E. 911 (1933); *Martin v. McCall*, 247 Ill. 484, 93 N.E. 418 (1910); Note, Veech & Moon, 45 MICH. L. REV. 537 (1947).

149. *United States v. Causby*, 328 U.S. 256 (1946); *Moore v. Lyttle*, 4 Johns Ch. 83 (1819); *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278 (1897).

150. 44 A.L.R. 168, 171, De Minimis; see *Purdy v. Manhattan Elev. R. Co.*, 13 N.Y. Supp. 295 (1891).

151. *Theisen v. Hoey*, 51 A.2d 61 (1947); *Jones v. Maxwell Motor Co*., 13 Del.Ch. 6, 115 Atl. 312 (1921); *Arhart v. Thompson*, 75 N.D. 189, 26 N.W.2d 523 (1947); *Kennedy v. Hazelton*, 128 U.S. 667 (1888).

152. *Moran v. Hammersla*, 188 Md. 378, 52 A.2d 727 (1947); *Ward v. Newbold*,15 Md. 689, 81 Atl. 793 (1911); *Shubert v. Woodward*, 167 Fed. 47 (8th Cir.

1909); *Orth v. Transit Inv. Corporation*, 132 F.2d 938 (3rd Cir. 1942).

153. See notes 145 and 146, *supra*.

154. *Martin v. South Bluefield Land Co*., 81 W. Va. 62, 94 S.E. 493 (1917); *Geo. E. Warren Co. v. A. L. Black Coal Co*., 85 W. Va. 684, 102 S.E. 672 (1920).

155. *Ibid*.; Also *Danforth v. Phila. Ry*., 30 N.J. Eq. 12 (Ch. 1878).

156. *Barrett v. Union Bridge Co*., 117 Ore. 220, 243 Pac. 93 (1926); *Petition of Burnquist, Atty. Gen*., 22 Minn. 48, 19 N.W.2d 394 (1945).

157. Note, 59 HARV. L. REV. 957 (1946).

158. CLARK, PRINCIPLES OF EQUITY § 16 (1937 ed.); *Thones v. Thones*, 185 Tenn. 24, 203 S.W.2d 597 (1947); *Fanchier v. Gammill*, 148 Miss. 723, 114 So. 813 (1927); Note, 41 HARV. L. REV. 798 (1928).

159. *Vaughan v. Hill*, 154 Ark. 528, 242 S.W. 826 (1922).

160. *In re Debs*, 158 U.S. 564 (1895); *Ex parte Foster*, 144 Tex. 65, 188 S.W.2d B2 (1945); *State v. Ricks*, 215 La. 602, 41 So.2d 232 (1949); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Hanke v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 309*, 33 Wash.2d 646, 207 P.2d 206 (1949), *aff'd*, 339 U.S. 470 (1950); *Fashioncraft v. Halpern*, 313 Mass. 385, 48 N.E.2d (1943); *Wilbank v. Chester & Delaware Counties Bartenders, Hotel & Restaurant Employees Union, Local 677 — A. F. of L*., 360 Pa. 48, 60 A.2d 21 (1948); also *State v. Publix Theatre Corp*., 37 S.W.2d 248 (Tex. 1931); *City of Odessa v. Halbrook*, 103 S.W.2d 223 (Tex. Civ. App. 1937); and Note, 10 TEXAS L. REV. 104 (1932).

161. Clayton Act, 38 STAT. 730, 29 U.S.C. § 52 (1914); Note, 53 YALE L.J. 553 (1944); *Dinny & Robins, Inc. v. Davis*, 290 N.Y. 101, 48 N.E.2d 280, *cert. denied*, 319 U.S. 774 (1943); *In re Edwards' Will*, 196 N.Y. Misc. 997, 92 N.Y.S.2d 780 (1949); *Sanitary Automatic Candy Corporation v. Lederfine*, 91 N.Y.S.2d 706 (1949). "It should be pointed out that an employee may contend in the first instance that the Norris-La Guardia Act and similar state anti-injunction statutes are altogether inapplicable . . . [if] . . . there exists no labor dispute within the meaning of these statutes. 150 A.L.R. 825 (1944). See 47 STAT. 72, 29 U.S.C. § 108 (1932).

162. Oleck, Historical Nature of Equity Jurisprudence, 20 FORD. L. REV. 23 (1951) citing 1 Aristotle, Ethics, Lib. 5, Ch. 14; Cicero, de Oratore, Lib. 1, sec. 57; Justinian, Pandects, Lib. 50, title 17, L. 85; Bracton, de legibus et consuetudinibus Angliae, Lib. 1, Ch. 4, sec. 5 (1569); Grotius (Huig de Groot), de Aequitatae, Ch. 1, sec. 2 (1689) ("Haec Aequitas suggerit, etsi jure deficiamur"); 5 PUFFENDORF, LAW OF NATURE, c. 12, § 21 (Oldfathers transl. 1934); 1 STORY, EQUITY JURISPRUDENCE 3 (14th ed. 1918).

163. 1 WILLIAMS, HISTORIAN'S HISTORY OF THE WORLD, c. 7 (1907); SALMOND, JURISPRUDENCE 24 (7th ed. 1924); See also Old Testament: Exodus, Leviticus, Numbers, Deuteronomy, 1 Proverbs 3, et passim.

APPENDIX B

SELECTED NEW JERSEY STATUTES AND RULES OF COURT GOVERNING CHANCERY PRACTICE

COMMENCEMENT OF ACTION IN CHANCERY

COURT RULES

Rule 4:3. Divisions; Venue; Transfer of Actions

4:3-1 Divisions of Court: Commencement and Transfer of Actions

(a) Where Instituted.

(1) Chancery Division — General Equity. Actions in which the plaintiff's primary right or the principal relief sought is equitable in nature, except as provided by subparagraphs (2) and (3), shall be brought in the Chancery Division, General Equity, even though legal relief is demanded in addition or alternative to equitable relief.

(2) Chancery Division — Probate Part. All actions brought pursuant to *R.* 4:83 et seq.

(3) Chancery Division — Family Part. All civil actions in which the principal claim is unique to and arises out of a family or family-type relationship shall be brought in the Chancery Division, Family Part. Civil family actions cognizable in the Family Part shall include all actions and proceedings provided for in Part V of these rules; all civil actions and proceedings formerly cognizable in the juvenile and domestic relations court; and all other actions and proceedings unique to and arising out of a family or family-type relationship.

(4) Law Division. All actions in the Superior Court except those encompassed by subparagraphs (1), (2) and (3) hereof shall be brought in the Law Division or Law Division, Special Civil Part.

(b) Transfer Between Law and Chancery Division. A motion to transfer an action from one trial division of the Superior Court or part thereof to another, except those actions governed by Part VI of these rules, shall be made within 10 days after expiration of the time prescribed by *R.* 4:6-1 for the service of the last permissible responsive pleading or, if the action is brought pursuant to *R.* 4:67 (summary actions), on or before the return date if the action is pending in the Law Division. Unless so made, objections to the trial of the action in the division specified in the complaint are waived, but the court on its own motion may thereafter order such transfer. Actions transferred shall not be retransferred. The order of transfer shall be filed in triplicate.

4:3-2 Venue in the Superior Court

(a) Where Laid. Venue shall be laid by the plaintiff in Superior Court actions as follows: (1) actions affecting title to real property or a possessory or other interest therein, or for damages thereto, or appeals from assessments for improvements, in the county in which any affected property is situate; (2) actions not affecting real property which are brought by or against municipal corporations, counties, public agencies or officials, in the county in which the cause of action arose; (3) except as otherwise provided by *R.* 4:44A-1 (structured settlements), *R.* 4:53-2 (receivership actions), *R.* 4:60-2 (attachments), *R.* 5:2-1 (family actions), *R.* 4:83-4 (probate actions), and *R.* 6:1-3 (Special Civil Part

actions), the venue in all other actions in the Superior Court shall be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served on a nonresident defendant;; and (4) actions on and objections to certificates of debt for motor vehicle surcharges that have been docketed as judgments by the Superior Court Clerk pursuant to *N.J.S.A.* 17:29A-35 shall be brought in the county of residence of the judgment debtor.

(b) Business Entity: For purposes of this rule, a business entity shall be deemed to reside in the county in which its registered office is located or in any county in which it is actually doing business.

(c) Exceptions in MulticountyVicinages. With approval of the Chief Justice, the assignment judge of any multicounty vicinage may order that in lieu of laying venue in the county of the vicinage as provided by these rules, venue in any designated category of cases shall be laid in any single county within the vicinage.

CANCELLATION OF MORTGAGE

N.J.S.A.:

2A:51-1 When authorized; proof required

Where a mortgage on real estate or chattels, or both, is recorded in the office of the county clerk or register of deeds and mortgages of any county, the Superior Court in a summary or other action brought by any mortgagor or party in interest may direct the county clerk or registrar to cancel the mortgage of record, provided the plaintiff shall:

a. Present satisfactory proof that the principal and interest due on the mortgage have been fully paid; or

b. Deposit with the clerk of the Superior Court in the county in which the mortgage is of record any balance of principal and interest due on the mortgage according to the terms thereof; or

c. Present such special circumstances as to satisfy the court that the mortgagee and his successors, if any, in right, title and interest have no further interest in the mortgage or the debt secured thereby.

PARTITION

COURT RULES:

4:63-1 Partition; Dower; Curtesy

If in an action for partition or for the admeasurement of dower or curtesy, the court shall be satisfied that a division of the real estate can be made without great prejudice to the owners thereof, it may appoint one or more persons as commissioners to ascertain and report in writing the metes and bounds of each share, if not so satisfied, it may direct a sale or, in its discretion, if the action is one for dower or curtesy, an assignment from the rents and profits.

N.J.S.A.:

2A:56-1 "Cotenant"; executor or administrator with will annexed; definition and construction

As used in this chapter:
"Court" means the Superior Court.
"Cotenant" means and includes a tenant in common, joint tenant or coparcener, but not a tenant by the entirety.
An executor or administrator with the will annexed, having, by the terms of the testator's will, power to sell any real estate or any undivided interest in any real estate of which his testator died seized, shall have the same power to bring an action to effect a partition of such real estate as such testator might have brought if living, and cotenant as used in this chapter shall include such an executor or administrator so far as may be requisite for such purposes.

2A:56-2 Partition through sale

The Superior Court may, in an action for the partition of real estate, direct the sale thereof if it appears that a partition thereof cannot be made without great prejudice to the owners, or persons interested therein.

2A:56-11 Proceeds of sale; disposition

The money arising from the sale pursuant to this chapter shall be paid to the parties interested in the real estate sold, their guardians or legal representatives, in proportion to their respective rights therein, deducting from their respective shares the costs and charges which may be allowed and ordered to be retained. If any party is absent from the state, without such legal representative in this state the proportion of the money due him shall be invested under the direction and control of the court, for the benefit of such absent person.
The court shall require the guardian of any person under the age of 21 years entitled to a proportion of the moneys arising from a sale pursuant to this chapter, to give such security by bond to the Superior Court as the court may deem sufficient, for the benefit of the minor, conditioned for the faithful discharge of the trust committed to the guardian.

ACTIONS TO QUIT TITLE

COURT RULES:

4:62-1 Complaint

The complaint in an action in the Superior Court authorized by statute to quiet and determine title and claims to property, real or personal, or any right of interest therein, shall state the manner in which plaintiff either acquired title or the right to possession and shall describe the property with such certainty that the defendant will be distinctly apprised of its location or character, and a judgment affecting the same may be entered according to that description.

4:62-2 Answer.

If a defendant to such an action claims any title, interest, estate, lien or other right

in the property, or any part thereof, the answer shall set forth such facts with specificity and also the manner in and the sources through which said claim is held and derived.

4:62-3 Tender; Deposit in Court

The Attorney General need not, on behalf of the State, make or offer to make any tender or payment into court either on or before filing a complaint seeking to settle the title to riparian lands or lands under water.

4:62-4 Judgment by Default or for Failure to Appear

If in any such action judgment is sought either for failure of the defendant to plead or appear at trial or upon the filing of a disclaimer or the withdrawal of an answer, the allegations of the complaint may, if the court permits, be proved by affidavit.

N.J.S.A.:

2A:62-1 By person in peaceable possession

Any person in the peaceable possession of lands in this state and claiming ownership thereof, may, when his title thereto, or any part thereof, is denied or disputed, or any other person claims or is claimed to own the same, or any part thereof or interest therein, or to hold a lien or encumbrance thereon, and when no action is pending to enforce or test the validity of such title, claim or encumbrance, maintain an action in the superior court to settle the title to such lands and to clear up all doubts and disputes concerning the same.

2A:62-2 Presumption of peaceable possession

If the lands are not, by reason of their extent or because they are wild, wood, waste, uninclosed or unimproved, in the actual peaceable possession of the owner or person claiming ownership, the owner or person claiming ownership in fee under a deed or other instrument, duly recorded in this state, who has paid taxes thereon and to whom or to whose grantors the taxes thereon have been assessed for 5 consecutive years immediately prior to the commencement of the action authorized by section 2A:62-1 of this title, shall, if no other person is in actual possession thereof, be presumed to be in peaceable possession thereof, and shall have all the rights and benefits of and be subject to all the provisions of this article and articles 2 and 4 of this chapter.

2A:62-6 Scope of adjudication by court

The court shall, upon the verdict of the jury taken pursuant to section 2A:62-4 of this title, or upon its own inquiry and determination as provided by section 2A:62-5 of this title, finally settle and adjudge whether a defendant to the suit has an estate, interest or right in or lien or encumbrance upon the affected lands, or any part thereof, and what the same is and in or upon what part of the affected lands it exists.

2A:62-7 Effect of final adjudication

The final determination and judgment shall fix and settle the rights of the parties in the affected land and shall, except as provided by sections 2A:62-8 to 2A:62-10 of this title, be binding and conclusive upon all the parties to the action.

2A:62-11 By person in peaceable possession; action in the Superior Court

Any person in the peaceable possession of lands in this state, and claiming ownership thereof, may, if it is alleged or claimed or it is reputed that his title is defective, in that some other person may, at some time, claim to own the same or a part thereof, or some interest therein, or to hold a lien or encumbrance thereon, and the person so in possession is unable to ascertain the name or identity of such other person from a search of the title of such lands, extending back 60 years from the time of the commencement of the suit herein authorized, maintain an action, in the superior court, to settle the title to such lands and clear up all doubts concerning the same.

2A:62-17 Persons entitled to maintain action

When a person claims to be entitled to a vested estate in remainder in lands in this state or to a remainder interest in personalty and his title thereto, or any part thereof, is denied or disputed, or another person claims or is claimed to own the same, or any part thereof or interest therein, or to hold a lien or encumbrance thereon, and no action to which he is a party is pending to enforce or test the validity of any alleged title, interest, claim, lien, or encumbrance, the person claiming to be entitled to the estate or in interest may maintain an action in the superior court to settle the title to the estate or interest and to clear up all doubts and disputes concerning the same.

2A:62-20 Persons entitled to maintain action

A person in the peaceable possession of lands in this state, claiming ownership thereof in fee simple under a deed therefor, or by or under descent or devise from the grantee thereof, which deed contains no covenants, conditions or agreements for the forfeiture and payment of money or penalties on breach thereof, or restrictions therein, may, when it is claimed or asserted by anyone that such lands are subject to covenants, conditions or agreements for the forfeiture and payment of money or penalties on breach thereof, or restrictions, contained in earlier deeds in the chain of title, and no action is pending to enforce or test the existence or validity of such covenants, conditions, agreements or restrictions, maintain an action in the superior court to settle the existence and validity thereof, and to clear up all doubts and disputes concerning the same.

2A:62-23 Action by attorney general

When a grant or conveyance in fee of riparian lands or lands under water, or both, has been or shall be made by the state, the riparian commission, the board of commerce and navigation, the division of navigation, in the department of conservation or the division of planning and development in the department of conservation and economic development to any person, who, or whose lessee or

grantee under an unexpired lease or an estate for years not terminated is in possession of the lands, or any part thereof, and the state denies the validity of the grant or conveyance of the fee and desires to contest it, the attorney general may maintain an action in the superior court on behalf of the state to determine and settle the title to the affected lands and to clear up all doubts concerning the same.

GUARDIANSHIPS

30:4-165.5. 30:4-165.5. Examination of minor admitted to functional or other services; need for guardian upon reaching majority; application and notice to family

Whenever a minor has been admitted to functional or other services provided by the Division of Developmental Disabilities on application as provided herein and has not been discharged therefrom, the commissioner shall, not less than six months nor more than 18 months prior to the 18th birthday of said person, cause him to be examined to ascertain whether it appears that such person will need a guardian on attainment of his majority.

If the commissioner anticipates that such person will need a guardian, the commissioner or his designated agent shall apply to the Superior Court in the same manner as provided in section 1 of P.L.1970, c.289 (C.30:4-165.7) for appointment of a guardian unless another application is pending.

In the event that no guardian has been appointed for a person who commences receiving functional or other services after the effective date of this amendatory and supplementary act and who has attained age 18, and if the commissioner has ascertained that such person appears to need a guardian, then the commissioner shall apply to the Superior Court in the same manner as provided in section 1 of P.L.1970, c.289 (C.30:4-165.7) for appointment of a guardian unless another application is pending.

The commissioner shall also promptly advise in plain language any parent, spouse, relative, or other interested person of his findings and of the parent's or person's right to participate in the process of an adjudication and to be considered for appointment as a guardian. The commissioner may offer to these persons assistance to facilitate their appointments as guardians unless he has reason to question their fitness to serve.

30:4-165.7. Motion to designate guardian of person over 18 years who is receiving functional or other services; service on county

The commissioner or any parent, spouse, relative, or interested party, on behalf of an alleged incapacitated person who is receiving functional or other services and is over 18 years of age, may file a complaint upon notice to the alleged incapacitated person with the Superior Court in the county furnishing the services or in which such parent, spouse, relative, or interested party resides, for a judgment designating a guardian. The county of settlement shall be served with a copy of the moving

papers, however, the county may waive service of the moving papers if it has no reason to oppose the action. If the county elects to oppose the action it shall do so within 30 days after being served with a copy of the moving papers. Unless filed by the commissioner, a complaint shall be served by the filing party upon the Division of Developmental Disabilities, to the attention of the Regional Director for the region in which the alleged incapacitated person is receiving functional or other services. The filing party shall likewise serve upon the Regional Director a copy of the Order Fixing Hearing Date and Appointing Attorney for Alleged Incapacitated Person, as well as a copy of any Judgment of Incapacity and Order Appointing Guardian.

RECEIVERSHIP

COURT RULES

4:53-1 Notice; Dismissal; Appeal

No order appointing a custodial receiver under the general equity power of the court shall be granted without the consent of or notice to the adverse party, unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable damage will result to the applicant before notice can be served and a hearing had thereon. Such an order granted without notice shall give the adverse party leave to move for the discharge of the receiver on not more than 2 days' notice; and shall direct a corporation or a partnership for whom a custodial receiver has been appointed to show cause why a receiver should not be appointed under the power conferred by statute. No statutory receiver shall be appointed for a corporation without giving it notice and an opportunity to be heard; and an order appointing a statutory receiver for a corporation shall give the stockholders and creditors of the corporation leave, at a specified time and place, to show cause why the receiver should not be continued. An action in which a receiver of a corporation has been appointed, or applied for shall not be dismissed except by order of the court. An order appointing a statutory or liquidating receiver shall be deemed final for the purposes of appeal.

4:53-2 Venue

The venue in actions in the Superior Court for the appointment of a receiver of a corporation or partnership shall be laid in the county where the principal place of business of the corporation or partnership is located.

4:53-3 Employment of Attorney or Accountant

A receiver may employ an attorney or accountant only if the court determines that such employment is necessary to the proper conservation and administration of the estate. No order authorizing such employment shall be entered until after a hearing on the fiduciary's sworn application setting forth facts to support the need therefor, except that where necessary to prevent immediate and irreparable damage such employment may be authorized by the court until an application for authorization of such employment can be made pursuant to this rule. Notice of the application together with a copy of affidavit shall be mailed by ordinary mail,

not less than 15 days prior to the date for hearing fixed thereon to all creditors or such of them as the court shall direct and, by certified mail, return receipt requested, to the District Director of Internal Revenue for the Internal Revenue District in which the proceedings are commenced, to the United State Attorney for the District of New Jersey, and to the Attorney General for the State of New Jersey. The court shall authorize such employment if satisfied of the necessity of the employment and that the attorney or accountant is not interested in the litigation or in any of the parties thereto in such a way as would disqualify the attorney or the accountant from properly serving the receiver as a fiduciary for all the stockholders and unsecured creditors of the estate. On request by an interested party, the court shall require the receiver to be examined under oath on these issues. The employment of more than one attorney may be authorized, but the total fees allowed them shall not be increased because of the number of attorneys employed.

4:53-4 Allowances to Receivers and Attorneys

(a) Fixing of Allowances. The court in making allowances to receivers shall consider the extent and value of the actual services rendered and the pains, trouble and risk incurred by them in the discharge of their duties relative to the conduct and settlement of the receivership, having regard also to the avails secured for the trust estate. In making allowances to attorneys, the court shall consider the extent and value of their actual services to the receiver, having regard to the avails secured for the receiver through their efforts. The court may examine the receiver or attorney on oath or otherwise, to ascertain the facts upon which the allowances should be made to depend.

(b) Sharing of Compensation. A receiver, attorney for receiver, appraiser, auctioneer or accountant appointed by the court in connection with dissolution, liquidation or insolvency proceedings, who seeks or received compensation for services rendered therein, shall file with the court an affidavit stating that the applicant shall not in any form or guise share and has not agreed to share any compensation with any person or firm, other than with partners and persons regularly employed by the applicant or by the firm by which the applicant is employed, without express approval of the court. If there is such an agreement or understanding as to such a sharing requiring such approval, the applicant shall set forth in the petition for allowance the name or names of the person or persons to share in the compensation and the general nature of the contributing services rendered.

4:53-5 Attorney for the Plaintiff

Unless a receiver applies for, and until the receiver obtains leave to employ, an attorney, the plaintiff's attorney may proceed with the conduct of the cause, but shall not be allowed by the court any compensation for services rendered after the appointment of the receiver unless thereafter appointed the receiver's attorney by the court.

4:53-6 Partnership Receivers and Liquidating Trustees

Receivers appointed or directed to wind up the affairs of a partnership or pay its

debts, and trustees in liquidation of trust estates, shall give notice of their appointment and notice to creditors to present their claims; and unless otherwise ordered by the court, the notices shall be similar to the notices required to be given by assignees by N.J.S. 2A:19-8 and published and mailed in the same manner. Except as otherwise ordered by the court, the receiver or trustee shall, at the expiration of 3 months from the time of appointment, file a list of the claims presented and proved; and the receiver or trustee, or any creditor or other person interested, may except to the allowance of the whole or any part of any claim presented, of which exception notice shall be given to the claimant, and thereupon such order shall be taken for adjudication upon the claim as the court directs. Unless otherwise directed by the court, this rule does not apply to receivers directed to continue a partnership business.

4:53-7 Inventory and Account; Audit

(a) Filing of Inventory and Periodic Accounts. Every receiver and trustee in liquidation appointed by the court shall, within three months after appointment, file with the Clerk of the Superior Court, a just and true inventory, under oath, of the whole estate committed to the appointee's care, and of the manner in which the funds under the appointee's care, belonging to the estate, are invested, stating the income of the estate, and the debts contracted and expenditures made on account thereof. The appointee shall on each April 1 and October 1 thereafter, so long as any part of the estate, or of the income or proceeds thereof, remains to be accounted for, file with the Clerk of the Superior Court an account, under oath, of the amount remaining or invested, and of the manner in which the same is invested. The accountant shall be charged with the balance shown in the last previous account (or with the amount of the inventory in the case of a first accounting) and with all amounts collected in addition thereto; state the expenditures and other credits and the balance remaining and the manner in which the same is invested; and set forth all changes (either by way of addition or diminution or change of form) in the assets with which the accountant is charged which have occurred during the period covered by the account.

(b) Audit by Clerk; Countersignatory. The deputy clerk of the Superior Court shall audit the account of the receiver or trustee unless the court appoints a countersignatory to make the audit. An appointed countersignatory shall also countersign the checks of the receiver or trustee, keep a record of the purpose of each check, obtain a duplicate monthly bank statement of all checking accounts in the receiver's name, and shall be allowed, except in special circumstances a fee for services not exceeding that allowed by law to the clerk or surrogate for auditing fiduciaries' accounts.

(c) Duties of Fiduciary's Attorney. The attorney authorized by court order to represent a receiver or trustee in liquidation and the clerk of the court shall report to the court in writing any failure of the fiduciary to file the inventory or account in accordance with this rule. The account shall be settled in accordance with R. 4:87 on proceedings in the action in which the receiver or trustee was appointed. (d) Order Approving Account. The order approving the account shall make a finding that the continuance of the receivership or trusteeship is necessary and shall continue it for a fixed period; but when a final account is approved by order, the

order shall provide for the discharge of the fiduciary.

N.J.S.A. 14A:12-7 Involuntary dissolution; other remedies

(1) The Superior Court, in an action brought under this section, may appoint a custodian, appoint a provisional director, order a sale of the corporation's stock as provided below, or enter a judgment dissolving the corporation, upon proof that

(a) The shareholders of the corporation are so divided in voting power that, for a period which includes the time when two consecutive annual meetings were or should have been held, they have failed to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors; or

(b) The directors of the corporation, or the person or persons having the management authority otherwise in the board, if a provision in the corporation's certificate of incorporation contemplated by subsection 14A:5-21(2) is in effect, are unable to effect action on one or more substantial matters respecting the management of the corporation's affairs; or

(c) In the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees.

(2) An action may be brought under this section by one or more directors or by one or more shareholders. In such action, in the case of appointment of a custodian or a provisional director, the court may proceed in a summary manner or otherwise.

(3) One or more provisional directors may be appointed if it appears to the court that such an appointment may be in the best interests of the corporation and its shareholders, notwithstanding any provisions in the corporation's by-laws, certificate of incorporation, or any resolutions adopted by the board or shareholders. A provisional director shall have all the rights and powers of a duly elected director of the corporation, including the right to notice of and to vote at meetings of directors, until such time as he shall be removed by order of the court or, unless otherwise ordered by the court, by a vote or written consent of a majority of the votes entitled to be cast by the holders of shares entitled to vote to elect directors.

(4) A custodian may be appointed if it appears to the court that such an appointment may be in the best interests of the corporation and its shareholders, notwithstanding any provisions in the corporation's by-laws, certificate of incorporation, or any resolutions adopted by the shareholders or the board. Subject to any limitations which the court imposes, a custodian shall be entitled to exercise all of the powers of the corporation's board and officers to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors, until such time as he shall be removed by order of the court or, unless otherwise ordered by the court, by the vote or written consent of a majority of the votes entitled to be cast by the holders of shares entitled to vote to elect directors. Such powers may be exercised directly or through, or in conjunction with, the corporation's board or officers, in the discretion of the custodian or as the

court may order. If so provided in the order appointing him, a custodian shall have the fact-determining powers of a receiver as provided in subsections 14A:14-5(e) and (f).

(5) Any custodian or provisional director shall be an impartial person who is neither a shareholder nor a creditor of the corporation or of any subsidiary or affiliate of the corporation.

(6) Any custodian or provisional director shall report from time to time to the court concerning the matter complained of, or the status of the deadlock, if any, and of the status of the corporation's business, as the court shall direct. In addition, he shall submit to the court, if so directed, his recommendations as to the appropriate disposition of the action. If, after the appointment of a custodian or provisional director, the court determines that a judgment of dissolution is in the best interests of the shareholders of the corporation, such a judgment shall be entered. The court may continue any custodian or provisional director in such office subsequent to the entry of a judgment of dissolution and until such time as the affairs of the corporation are wound up, or it may appoint such person or another as receiver, as provided in section 14A:12-15.

(7) In any proceeding under this section, the court shall allow reasonable compensation to the custodian or provisional director for his services and reimbursement or direct payment of his reasonable costs and expenses which amounts shall be paid by the corporation.

(8) Upon motion of the corporation or any shareholder who is a party to the proceeding, the court may order the sale of all shares of the corporation's stock held by any other shareholder who is a party to the proceeding to either the corporation or the moving shareholder or shareholders, whichever is specified in the motion, if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case.

(a) The purchase price of any shares so sold shall be their fair value as of the date of the commencement of the action or such earlier or later date deemed equitable by the court, plus or minus any adjustments deemed equitable by the court if the action was brought in whole or in part under paragraph 14A:12-7(1)(c).

(b) Within five days after the entry of any such order, the corporation shall provide each selling shareholder with the information it is required to provide a dissenting shareholder under section 14A:11-6, and within 10 days after entry of the order the purchasing party shall make a written offer to purchase at a price deemed by the purchasing party to be the fair value of the shares.

(c) If the parties are unable to agree on fair value within 40 days of entry of the order, the court shall make the determination of the fair value, and the provisions of sections 14A:11-8 through 14A:11-11 shall be followed insofar as they are applicable.

(d) Interest may be allowed at the rate and from the date determined by the court to be equitable, and if the court finds that the refusal of the shareholder to accept any offer of payment was arbitrary, vexatious, or otherwise not in good faith, no interest shall be allowed. If the court finds that the action was maintainable under paragraph 14A:12-7(1)(c), the court in its discretion may award to the selling shareholder or shareholders reasonable fees and expenses of counsel and of any

experts, including accountants, employed by them.

(e) The purchase price shall be paid by the delivery of cash, notes, or other property, or any combination thereof within 30 days after the court has determined the fair value of the shares. The court shall, in its discretion, determine the method of payment of the purchase price. Whenever practicable, the purchase price shall be paid entirely in cash. If the court determines that an all cash payment is not practicable, it shall determine the amount of the cash payment, the kind and amount of any property, whether any note shall be secured. and other appropriate terms, including the interest rate of any note.

(f) Upon entry of an order for the sale of shares under this subsection, and provided the corporation or the moving shareholders post a bond in adequate amount with sufficient sureties or otherwise satisfy the court that the full purchase price of the shares, plus whatever additional costs, expenses, and fees as may be awarded, will be paid when due and payable, the selling shareholders shall no longer have any rights or status as shareholders, officers, or directors, except the right to receive the fair value of their shares plus whatever other amounts as may be awarded. In such event, the court may remove any custodian or provisional director who may have been appointed.

(9) In determining whether to enter a judgment of dissolution in an action brought under this section, the court shall take into consideration whether the corporation is operating profitably and in the best interests of its shareholders, but shall not deny entry of such a judgment solely on that ground.

(10) If the court determines that any party to an action brought under this section has acted arbitrarily, vexatiously, or otherwise not in good faith, it may in its discretion award reasonable expenses, including counsel fees incurred in connection with the action, to the injured party or parties.

14A:14-1 Definitions

As used in this chapter, and unless the context requires otherwise. . .

(f) "insolvent": a corporation shall be deemed to be insolvent for the purposes of this chapter (1) when the aggregate of its property, exclusive of any property which it may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder or delay its creditors, shall not at a fair valuation be sufficient in amount to pay its debts; or (2) when the corporation is unable, by its available assets or the honest use of credit, to pay its debts as they become due;. . .

14A:14-2 Jurisdiction of the superior court; appointment of receiver

(1) A receivership action may be brought in the Superior Court by

(a) a creditor whose claim is for a sum certain or for a sum which can by computation be made certain; or

(b) a shareholder or shareholders who individually or in combination own at least ten per cent of the outstanding shares of any class of the corporation; or

(c) the corporation, pursuant to resolution of its board.

(2) The action shall be based upon at least one of the following grounds:

(a) the corporation is insolvent;

(b) the corporation has suspended its ordinary business for lack of funds;

(c) the business of the corporation is being conducted at a great loss and greatly prejudicial to the interests of its creditors or shareholders.

(3) The court may proceed in the action in a summary manner or otherwise. It shall have power to appoint and remove one or more receivers of the corporation from time to time, and to enjoin the corporation, its officers and agents, from exercising any of its privileges and franchises, and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its property, except to a receiver, and except as the court may otherwise order. The court shall have such further powers as shall be appropriate for the fulfillment of the purposes of this chapter.

(4) Every receiver shall, before assuming his duties, execute and file a bond in the office of the Clerk of the Superior Court, with such sureties and in such form as the court shall approve.

14A:14-4 Title to corporate property and franchise

(1) Upon his appointment, the receiver shall become vested with the title to all the property of the corporation, of every nature, including its franchises.

(2) For the purpose of avoiding encumbrances, transfers and preferences, the right and title of a receiver shall relate back to the date upon which the receivership action commenced.

14A: 14-5 Powers of receivers; general

Subject to the general supervision of the Superior Court and pursuant to specific order where appropriate, a receiver shall have power to

(a) take into his possession all the property of the corporation, including its books, records and papers;

(b) institute and defend actions by or on behalf of the corporation;

(c) sell, assign, convey or otherwise dispose of all or any part of the property of the corporation;

(d) settle or compromise with any debtor or creditor of the corporation, including any taxing authority;

(e) summon and examine under oath, which he may administer, or by affirmation, any persons concerning any matter pertaining to the receivership or to the corporation, its property and its transactions, and require such person to produce books, records, papers and other tangible things and to be examined thereon;

(f) take testimony within or without the State, and, if without the State, apply to courts of other jurisdictions for compulsory process to obtain the attendance of witnesses;

(g) continue the business of the corporation, and to that end, enter into contracts, borrow money, pledge, mortgage or otherwise encumber the property of the corporation as security for the repayment of the receiver's loans;

(h) do all further acts as shall best fulfill the purposes of this chapter.

14A:14-22 Judgment of dissolution

After distribution of the corporation's assets as provided in section 14A:14-21, the Superior Court may make a judgment dissolving the corporation and

declaring its charter forfeited and void.

LABOR STRIKE INJUNCTIONS

N.J.S.A.:

2A:15-51 Restraining order or interlocutory or permanent injunction in disputes concerning terms or conditions of employment prohibited

No court of the state of New Jersey, nor any judge or judges thereof, shall issue any restraining order or interlocutory or permanent injunction to prohibit any person or persons (as these terms are defined in this article) from doing, whether singly or in concert, any of the following acts:

a. Ceasing or refusing to perform any work or to remain in any relation of employment;

b. Becoming or remaining a member of any labor organization or of any organization of employers, regardless of any undertaking or promise hereafter made;

c. Paying or giving to, or withholding from any person or persons any strike or unemployment benefits or insurance or other moneys or things of value;

d. By all lawful means aiding any person or persons in any labor dispute who is or are being proceeded against in, or is or are prosecuting, any action in any court of this state;

e. Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, picketing, without fraud or violence, or by any other method not involving fraud or violence, and not in violation of any other law of the state of New Jersey;

f. Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

g. Advising or notifying persons of an intention to do any of the acts heretofore specified;

h. Agreeing with other persons to do or not to do any of the acts heretofore specified;

i. Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified regardless of any undertaking or promise hereafter made;

j. Requiring as a condition of employment that all employees of a particular employer or group of employers shall be members of a particular labor organization.

k. The aforesaid acts are hereby declared, as a matter of public policy of the state of New Jersey, to be lawful and in no wise to constitute a tort or a nuisance.

2A:15-52 Public policy in matter of injunctions in labor disputes

In the interpretation and application of this article, the public policy of the state of New Jersey is hereby defined and declared as follows:

Procedure that permits a complaining party, to obtain in any case involving or

growing out of a labor dispute, as hereinafter defined, sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is subject to abuse and contrary to the public policy of the state of New Jersey for the reason that:

a. The status quo cannot be maintained, but is necessarily altered by the injunction.

b. Determination of issues of veracity and of probability of fact from affidavits of the opposing parties that are contradictory and, under the circumstances, untrustworthy, rather than from oral examination in open court is subject to grave error.

c. Error in issuing the injunctive relief is usually irreparable to the opposing party, and

d. Delay incident to the normal course of appellate practice frequently makes ultimate correction of error in law or in fact unavailing in the particular case,

2A:15-53 Temporary or permanent injunctions in labor disputes; hearing and findings required; notice; duration of temporary restraining order; bond or undertaking

No court of the state of New Jersey nor any judge or judges thereof shall issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of all the following facts by the court or judge or judges thereof:

a. That unlawful acts have been committed and are likely to be continued unless restrained;

b. That substantial and irreparable injury to plaintiff's property will follow unless the relief is granted;

c. That as to each item of relief granted greater injury will be inflicted upon plaintiff by the denial thereof than will be inflicted upon defendants by the granting thereof;

d. That plaintiff has no adequate remedy at law.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought; provided, however, that if a plaintiff shall also allege that unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to plaintiff's property will be unavoidable, then in that case a temporary restraining order may be issued; provided, the plaintiff presents oral testimony under oath sufficient to justify the court in issuing a temporary injunction upon a hearing after notice.

Such temporary restraining order shall be effective for no longer than 5 days, and at the expiration of said 5 days shall become void.

No temporary restraining order or interlocutory injunction or permanent injunction shall be allowed, except upon condition that plaintiff shall first file

with the court a bond or undertaking, in favor of the person or persons enjoined or restrained, in an amount to be fixed by the court issuing the restraining order or injunction, sufficient to secure to the person or persons enjoined their court costs, attorney and counsel fees taxed against the plaintiff, in the event that the injunctive relief sought is subsequently denied by the court or in the event that the order or judgment granting such injunctive relief is thereafter reversed by an appellate court.

2A:15-55 Findings of fact as basis for restraining order or injunction; acts to be enjoined; duration of permanent injunction

a. No restraining order or interlocutory or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the complaint filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

b. No permanent injunction shall remain in full force more than 6 months from the date on which the judgment and order or either is filed; provided, however, that the duration of the injunction might be extended for another 6 months if after a further hearing initiated and conducted in the same manner as the original hearing, the court shall determine that the injunction shall be continued or modified in accordance with the findings of fact on the subsequent hearing.

2A:15-58 Definitions

For the purpose of this article:

a. A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in industry, trade, craft, employment. or occupation; or who are members of an affiliated organization of employers or employees; whether such dispute is (1) between 1 or more employees and 1 or more employers; (2) between 1 or more employees and an association or associations of employees or employers; (3) between an association or associations of employees and any other association or associations of employees; (4) between 1 or more associations of employees and 1 or more employers or associations of employers; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

b. A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs or has a direct or indirect interest therein, or is a member, officer, or agent of any association of employers or employees engaged in such industry, trade, craft, or occupation.

c. The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of

persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

d. The word "person" as used in this article shall include the plural thereof and shall include and be taken to mean any organization of such persons. Wherever used in this article, the words "plaintiff," "employer," "employee," and "proximate relation of employer and employee" shall include the plural thereof.

14A:14-13 Liens by legal process

(1) Every lien against the property of a corporation shall be void if

(a) such lien is obtained by attachment, judgment, levy or other legal process; and

(b) a receivership action against the corporation is commenced within four months after the date on which such lien was obtained, or if such lien is obtained after the commencement of the receivership action; and

(c) the assets of the corporation are distributed in the receivership action.

(2) The property affected by any such lien shall be discharged from such lien and shall pass to the receiver, but the court may order such lien to be preserved for the benefit of the corporation's creditors. The Superior Court may direct such conveyance of the property affected as may be proper or adequate to evidence title thereto of the receiver. The title of a bona fide purchaser of such property shall be valid, but, if such title is acquired otherwise than by a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property.

INJUNCTIONS AND ORDERS TO SHOW CAUSE

COURT RULES:

Rule 4:52 Injunctions

4:52-1 Temporary Restraint and Interlocutory Injunction — Application on Filing of Complaint

(a) Order to Show Cause With Temporary Restraints. On the filing of a complaint seeking injunctive relief, the plaintiff may apply for an order requiring the defendant to show cause why an interlocutory injunction should not be granted pending the disposition of the action. The proceedings shall be recorded verbatim provided that the application is made at a time and place where a reporter or sound recording device is available. The order to show cause shall not, however, include any temporary restraints or other interim relief unless the defendant has either been given notice of the application or consents thereto or it appears from specific facts shown by affidavit or verified complaint that immediate and irreparable damage will probably result to the plaintiff before notice can be served or informally given and a hearing had thereon. If the order to show cause includes temporary restraints or other interim relief and was issued without notice

to the defendant, provision shall be made therein that the defendant shall have leave to move for the dissolution or modification of the restraint on 2 days' notice or on such other notice as the court fixes in the order. The order may further provide for the continuation of the restraint until the further order of the court and shall be returnable within such time after its entry as the court fixes but not exceeding 35 days after the date of its issuance, unless within such time the court on good cause shown extends the time for a like period or unless the defendant consents to an extension for a longer period. The order to show cause may be in the form in Appendices XII-G and -H to the extent applicable.

(b) Order to Show Cause as Process; Service. If the order to show cause issues upon the filing of the complaint, no summons shall issue in the action if the order contains the name and address of plaintiff's attorney, if any, otherwise plaintiff's address; the time within which defendant shall serve and file an answer upon plaintiff or plaintiff's attorney as provided by these rules; and a notice to defendant that upon failure to so file and serve an answer, judgment by default may be rendered against the defendant for the relief demanded in the complaint. The order shall be served upon defendant together with a copy of the complaint and any supporting affidavits at least 10 days before the return date and in the manner prescribed by *R.* 4:4-3 and 4:4-4 for service of summons, unless the court orders a shorter or longer time or other manner of service.

(c) Hearing; Briefs. Oral testimony may be taken in the court's discretion on the return date of the order to show cause and on the return date of defendant's motion to dissolve or modify the temporary restraint. Briefs shall be submitted in support of the application for an interlocutory injunction.

4:52-2 Temporary Restraint and Interlocutory Injunction — During Pendency of Action

During the pendency of an action, either a temporary restraint or an interlocutory injunction may be applied for either by motion or by order to show cause. The order to show cause shall be applied for and proceeded with in accordance with the provisions of *R.* 4:52-1, insofar as applicable.

4:52-3 Security

The court, on granting a temporary restraining order or interlocutory injunction or at any time thereafter, may require security or impose such other equitable terms as it deems appropriate.

4:52-4 Form and Scope of Injunction or Restraining Order

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon such parties to the action and such of their officers, agents, employees, and attorneys, and upon such persons in active concert or participation with them as receive actual notice of the order by personal service or otherwise.

4:52-5 Denial of Application

A statement of the denial of an application for a temporary restraining order or an interlocutory injunction shall be made on the complaint or affidavit which shall then be filed.

4:52-6 Stay of Action in Superior Court

No injunction or restraint shall be granted in one action to stay proceedings in another pending action in the Superior Court, but such relief may be sought on counterclaim or otherwise in the pending action.

4:52-7 Labor Disputes

These rules do not supersede N.J.S. 2A:15-51 to 58 (Injunctions in Labor Disputes).

Rule 4:67 Summary Actions

4:67-1 Applicability

This rule is applicable (a) to all actions in which the court is permitted by rule or by statute to proceed in a summary manner, other than actions for the recovery of penalties which shall be brought pursuant to *R.* 4:70; and (b) to all other actions in the Superior Court other than matrimonial actions and actions in which unliquidated monetary damages are sought, provided it appears to the court, on motion made pursuant to *R.* 1:6-3 and on notice to the other parties to the action not in default, that it is likely that the matter may be completely disposed of in a summary manner.

4:67-2 Complaint; Order to Show Cause; Motion

(a) Order to Show Cause. If the action is brought in a summary manner pursuant to *R.* 4:67-1(a), the complaint, verified by affidavit made pursuant to *R.* 1:6-6, may be presented to the court ex parte and service shall be made pursuant to *R.* 4:52-1(b), except that if the action is pending in the Law Division of the Superior Court, it shall be presented to the Assignment Judge or to such other judge as the Assignment Judge designates. The proceeding shall be recorded verbatim provided that the application is made at a time and place where a reporter or sound recording device is available. The court, if satisfied with the sufficiency of the application, shall order the defendant to show cause why final judgment should not be rendered for the relief sought. No temporary restraints or other interim relief shall be granted in the order unless the defendant has either been given notice of the action or consents thereto or it appears from the specific facts shown by affidavit or verified complaint that immediate and irreparable damage will result to the plaintiff before notice can be served or informally given. The order shall be so framed as to notify the defendant fully of the terms of the judgment sought, and subject to the provisions of *R.* 4:52, it may embody such interim restraint and other appropriate intermediate relief as may be necessary to prevent immediate and irreparable damage. The order to show cause may be in the form set forth in Appendix XII-F through XII-H to the extent applicable.

(b) Motion for Order to Proceed Summarily. Actions referred to in *R.* 4:67-1(b)

shall be commenced, and proceedings taken therein, as in other actions, except as herein provided. The notice of motion to proceed summarily shall be supported by affidavits made pursuant to *R*. 1:6-6 and, if addressed to the defendant, may be served with the summons and complaint; but it shall not be returnable until after the expiration of the time within which the defendant is required to answer the complaint. If the court is satisfied that the matter may be completely disposed of on the record (which may be supplemented by interrogatories, depositions and demands for admissions) or on minimal testimony in open court, it shall, by order, fix a short date for the trial of the action, which shall proceed in accordance with *R*. 4:67-5, insofar as applicable.

4:67-3 Service of Order to Show Cause

If the order to show cause issues ex parte pursuant to *R*. 4:67-1(a), no summons shall issue unless the court otherwise orders. Process shall be a copy of the order to show cause, certified by the plaintiff's attorney to be a true copy. The order to show cause, together with a copy of the complaint and affidavits similarly certified, shall be served within this State at least ten days before the return day and in the manner prescribed by *R*. 4:4-3 and 4:4 for the service of a summons, unless the court orders shorter or longer service or some other manner of service. Service may be made outside this State, or by mail, publication, or otherwise, all as the court by order directs, provided the nature of the action is such that the court may thereby acquire jurisdiction.

4:67-4 Answers; Objections; Demand for Jury Trial

(a) Ex Parte Order to Show Cause. If the order to show cause is issued ex parte pursuant to *R*. 4:67-1(a), the defendant shall, not later than 3 days before the return date, or within such further time as the court may allow, serve and file either an answer, an answering affidavit, or a motion returnable on the return day; in default thereof, the action may proceed ex parte. No counterclaim or cross-claim shall be asserted without leave of court.

(b) Motion for Order to Proceed Summarily. A plaintiff proceeding pursuant to *R*. 4:67-1(b) shall be deemed to have waived any right to trial by jury to which plaintiff would otherwise have been entitled whether or not the motion is granted. A defendant entitled to trial by jury shall make demand therefor in accordance with *R*. 4:35, except that if the motion is returnable prior to the expiration of the time for demand therein provided, the demand shall be served and filed not later than 3 days before the return date of the motion and may be appended to any paper served and filed by the defendant in response to the motion. If the defendant has a right to and has demanded a trial by jury, the court, upon finding the existence of a genuine issue to a material fact, shall order the action to proceed as in a plenary action in accordance with *R*. 4:67-5.

4:67-5 Hearing; Judgment; Briefs

The court shall try the action on the return day, or on such short day as it fixes. If no objection is made by any party, or the defendants have defaulted in the action, or the affidavits show palpably that there is no genuine issue as to any material

fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon. If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment. At the hearing or on motion at any stage of the action, the court for good cause shown may order the action to proceed as in a plenary action wherein a summons has been issued, in which case the defendant, if not already having done so, shall file an answer to the complaint within 35 days after the date of the order or within such other time as the court therein directs. In contested actions briefs shall be submitted.

DECLARATORY JUDGMENTS

N.J.S.A.:

2A:16-52 Declaration of rights, status and other legal relations

All courts of record in this state shall, within their respective jurisdictions, have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed; and no action or proceeding shall be open to objection on the ground that a declaratory judgment is demanded.

The enumeration in other sections of this article of the questions determinable and rights declarable in a proceeding brought under the provisions of this article does not limit or restrict the exercise of the general powers conferred by this section in a proceeding for declaratory relief, in which a judgment will terminate the controversy or remove an uncertainty.

2A:16-53 Questions determinable and rights declarable

A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

2A:16-54 Contract construed

A contract may be construed either before or after a breach thereof.

2A:16-55 Declaration of rights or legal relations of interested parties in relation to estates, wills and other writings

A person interested as or through an executor, administrator, trustee, guardian, receiver, assignee for the benefit of creditors or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust or the estate of a decedent, a minor, a person who is mentally incapacitated, a person who is insolvent, or other person, may have a declaration of rights or legal relations in respect thereto, to:

a. Ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

b. Direct the executor, administrator, trustee, guardian, receiver, assignee for

the benefit of creditors or other fiduciary to do or abstain from doing any particular act in his fiduciary capacity; or

c. Determine any question arising in the administration of the estate, trust or guardianship, including the construction of wills and other writings.

REPLEVIN

COURT RULES:

4:61-1 Writ of Replevin

(a) Issuance of Writ of Notice. A writ of replevin shall issue only upon court order on motion of a party claiming the right to possession of chattels. Except as otherwise provided by paragraph (b) of this rule, the motion shall be heard on no less than three days' notice to the party in possession of the chattels, who shall file and serve any opposing affidavits or cross-motions at least one day prior to the hearing. The motion shall be granted only upon the court's finding, based on the moving papers, any opposing affidavits which may have been filed, and any testimony taken pursuant to *R.* 1:6-6, that there is a probability that final judgment will be rendered in favor of the movant. In lieu of ordering the issuance of the writ the court may order the party in possession of the chattels to give security for satisfaction of any judgment which may be rendered in the action, or order such other relief upon such terms as may be just in the circumstances.

(b) Issuance of Writ Ex Parte. An order for issuance of the writ of replevin without notice to the party in possession of the chattels may be entered by the court only after it finds from specific facts shown by affidavit or verified complaint that the party applying for the writ is probably entitled to possession and that, before notice can be served and a hearing had thereon, that party will probably suffer immediate and irreparable damage in that the party in possession of the chattels appears about to abscond or about to destroy, secrete or otherwise dispose of the chattels. In lieu of ordering the writ, the court may enter an order to show cause why the writ should not issue, including therein such temporary restraints as may be necessary and appropriate for preserving the chattels and fixing therein a short return date for hearing thereon in accordance with paragraph (a) of this rule.

(c) Service and Execution of Writ. The writ of replevin shall be signed in the name of the clerk of the court issuing the writ and shall be directed to the sheriff, or other officer authorized by law, of the county where the chattels are located and shall describe them with particularity. A copy of the writ shall be served upon the party in possession in the manner prescribed by *R.* 4:4-4 for the service of summons unless the court has otherwise provided in the order for issuance of the writ. Upon receipt of the writ of replevin and the delivery of a replevin bond or cash deposit pursuant to law, the sheriff or other officer shall forthwith cause the chattels to be replevied and delivered. The replevin bond shall be subject to the approval of the court in accordance with *R.* 1:13-3(a) and shall contain the terms set forth in *R* 1:13-3(b). A cash deposit taken by the sheriff in lieu of a bond shall forthwith be transmitted to the clerk of the court which ordered the writ.

(d) Issuance of Summons. A writ of replevin may be issued as initial or sole process in the action or as additional process. A summons against the same defendant and additional summonses against other defendants may issue in the same action before or after issuance of the writ. If a summons or writ of replevin is not issued within 10 days after the filing of the complaint, the action may be dismissed as provided by *R.* 4:37-2(a).

4:61-2 Allegations of Demand and Refusal; Title

If the action is for a wrongful detainer only, the plaintiff in an action for replevin shall allege a demand and refusal of possession before commencing the action. A plaintiff in replevin who claims possession as a secured creditor shall allege both in the complaint and the motion for the issuance of the writ the existence of the debt and the existence of a security interest, perfected or unperfected, in a chattel in the possession of the debtor. If the title to the goods or chattels of the plaintiff in replevin rests upon the title of a third person or upon a special property, those facts shall be alleged.

4:61-3 Defenses; Counterclaim

If the defendant in an action for replevin claims title to the goods and chattels or relies upon the title of a third person or upon a special property, the answer shall set forth those facts. All claims by the defendant for a return of the goods and chattels, for their value or for damages, or for a statutory lien, shall be made by counterclaim.

4:61-4 Judgment for Plaintiff

(a) Judgment for Damages. If the goods and chattels are delivered by the sheriff or other officer to the defendant upon the making of a claim thereto and the giving of a redelivery bond or cash deposit pursuant to law, the sheriff or other officer shall promptly make a return of the facts to the court, annexing the claim of the defendant to the writ of replevin, and return the same forthwith, and the action shall proceed as if such claim had not been made. If the plaintiff recovers, judgment shall be entered for the value of the goods and chattels and for damages sustained such as for taking and detaining them as well and may, in addition to a remedy on the redelivery bond or cash deposit, have execution against the defendant.

(b) Recovery of Possession by Plaintiff After Redelivery. If the goods and chattels have been delivered by the sheriff or other officer to the defendant and the taking is not a distress for rent, the plaintiff, instead of enforcing the judgment for damages or pursuing a remedy on the redelivery bond or cash deposit, may apply to the court upon written notice to the defendant or defendant's attorney of record for an order directing the sheriff or other officer to take possession of the goods and chattels and deliver them to the plaintiff.

(c) Recovery of Possession Where No Writ Issued. If judgment is entered for the plaintiff awarding the possession of the goods or chattels and any damages sustained and if plaintiff has not previously caused a writ of replevin to issue and had the goods delivered, the court may in the judgment direct the sheriff or other officer to take possession of the goods and chattels and deliver them in

accordance with the judgment. The judgment shall be a justification of the officer for their delivery.

(d) Judgment by Default. If the goods and chattels have been delivered to the plaintiff by the sheriff or other officer, and judgment by default is entered in favor of the plaintiff, there shall be no judgment for damages, except where the defendant has refused to deliver the goods and chattels pursuant to a written demand therefor made prior to the commencement of the action.

4:61-5 Judgment for Defendant

(a) Election of Remedies. If the goods and chattels have not been redelivered to the defendant and judgment is entered in defendant's favor, defendant shall, except if the goods or chattels were taken as a distress for rent or if defendant has made a counterclaim for a statutory lien, be entitled, at defendant's election, to the return thereof or a judgment against plaintiff for the value of the goods or chattels and damages.

(b) Judgment on Statutory Lien. If a defendant has counterclaimed for a statutory lien, a judgment in defendant's favor shall fix the amount due.

(c) Distress for Rent; Judgment. If the plaintiff has recovered the possession of goods or chattels taken as a distress for rent and judgment is entered for the defendant, defendant shall be entitled, at defendant's election, to the return thereof, or judgment against the plaintiff for the sum in arrears for such rent at the time the distress was taken, or for the value of the goods and chattels if such value is less than the arrearages.

(d) Costs; Execution. Upon the entry of a judgment for the defendant, defendant may, in addition to a remedy on the replevin bond or cash deposit, have execution against the plaintiff.

JUDGMENT FOR SPECIFIC ACTS

COURT RULES:

4:59-2 Judgment for Specific Acts; Writ of Possession

(a) Judgment for Specific Acts. If a judgment or order directs a party to perform a specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of such defaulting party by some other person appointed by the court, and the act when so done shall have like effect as if done by the defaulting party.

(b) Order and Writ of Possession. Where a party by virtue of any judgment or order, or any writ, sale or proceeding thereunder, claims possession of property, but the judgment or order does not provide therefor, the court on motion may make an order for the possession, provided notice of the motion is given to the person in possession and proof is made that such person has failed to deliver possession 10 days after a written demand. If an order or judgment is for the possession of real or personal property, the party in whose favor it is entered is, on application to the clerk, entitled as of course to a writ of possession directed to the sheriff (except as otherwise provided by R. 6:7-1(f)), which may include an

execution for costs.

N.J.S.A.:

2A:16-7 Judgment for conveyance of land; effect

When a judgment of the Superior Court is entered for a conveyance, release, or acquittance of real estate or an interest therein, and the party against whom the judgment is entered has failed to comply by the time specified in the judgment, or within 15 days after entry of the judgment if no time is specified therein, the judgment shall have the same operation and effect in all courts as if the conveyance, release, or acquittance had been executed in conformance with the judgment, notwithstanding any disability of the party because of not having reached the age of majority pursuant to section 3 of P.L.1972, c. 81 (C.9:17B-3), mental incapacity, or otherwise.

46:16-1.1 Decrees of former chancery court and final judgments affecting real estate; recording as deeds; Indexing

Repealed effective May 1, 2012.

CONTEMPT/LITIGANT'S RIGHTS

COURT RULES:

1:10-2 Summary Contempt Proceedings on Order to Show Cause or Order for Arrest

(a) Institution of Proceedings. Every summary proceeding to punish for contempt other than proceedings under *R.* 1:10-1 shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious. The proceedings shall be captioned "In the Matter of _____ Charged with Contempt of Court."

(b) Release Pending Hearings. A person charged with contempt under *R.* 1:10-2 shall be released on his or her own recognizance pending the hearing unless the judge determines that bail is reasonably necessary to assure appearance. The amount and sufficiency of bail shall be reviewable by a single judge of the Appellate Division.

(c) Prosecution and Trial. A proceeding under *R.* 1:10-2 may be prosecuted on behalf of the court only by the Attorney General, the County Prosecutor of the county or, where the court for good cause designates an attorney, then by the attorney so designated. The matter shall not be heard by the judge who instituted the prosecution if the appearance of objectivity requires trial by another judge. Unless there is a right to a trial by jury, the court in its discretion may try the matter without a jury. If there is an adjudication of contempt, the provisions of *R.* 1:10-1 as to stay of execution of sentence shall apply.

1:10-3 Relief to Litigant

Notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action. A judge shall not

be disqualified because he or she signed the order sought to be enforced. If an order entered on such an application provides for commitment, it shall specify the terms of release provided, however, that no order for commitment shall be entered to enforce a judgment or order exclusively for the payment of money, except for orders and judgments based on a claim for equitable relief including orders and judgments of the Family Part and except if a judgment creditor demonstrates to the court that the judgment debtor has assets that have been secreted or otherwise placed beyond the reach of execution. The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule. In family actions, the court may also grant additional remedies as provided by *R*. 5:3-7. An application by a litigant may be tried with a proceeding under *R*. 1:10-2(a) only with the consent of all parties and subject to the provisions of *R*. 1:10-2(c).

APPENDIX B-1

SELECTED FORECLOSURE RULES AND STATUTES

COURT RULE:

4:42-9 Attorney's Fees

(a) Actions in Which Fee Is Allowable. No fee for legal services shall be allowed in the taxed costs or otherwise, except

(4) *In an action for the foreclosure of a mortgage*, the allowance shall be calculated as follows: on all sums adjudged to be paid the plaintiff amounting to $ 5,000 or less, at the rate of 3.5%, provided, however, that in any action a minimum fee of $ 75 shall be allowed; upon the excess over $ 5,000 and up to $10,000 at the rate of 1.5%; and upon the excess over $ 10,000 at the rate of 1%, provided that the allowance shall not exceed $ 7,500. If, however, application of the formula prescribed by this rule results in a sum in excess of $ 7,500, the court may award an additional fee not greater than the amount of such excess on application supported by affidavit of services. In no case shall the fee allowance exceed the limitations of this rule.

(5) *In an action to foreclose a tax certificate or certificates*, the court may award attorney's fees not exceeding $ 500 per tax sale certificate in any *in rem* or *in personam* proceeding except for special cause shown by affidavit. If the plaintiff is other than a municipality no attorney's fees shall be allowed unless prior to the filing of the complaint the plaintiff shall have given not more than 120 nor fewer than 30 days' written notice to all parties entitled to redeem whose interests appear of record at the time of the tax sale, by registered or certified mail with postage prepaid thereon addressed to their last known addresses, of intention to file such complaint. The notice shall also contain the amount due on the tax lien as of the day of the notice. A copy of the notice shall be filed in the office of the municipal tax collector.

Note: Source - R.R. 4:55-7(a) (b) (c) (d) (e) (f), 4:55-8, 4:98-4(c). Paragraphs (a) and (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a)(1) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a)(1) and (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended January 19, 1989 to be effective February 1, 1989; paragraph (a)(4) amended June 29, 1990 to be effective September 4, 1990; paragraph (a)(5) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a)(1), (2) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(5) amended June 28, 1996 to be effective September 1, 1996; paragraph (a)(1) amended January 21, 1999 to be effective April 5, 1999; paragraph (a)(5) amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(3) amended July 27, 2006 to be effective September 1, 2006; caption amended and subparagraphs (a)(5) and (a)(8) amended July 23, 2010 to be effective September 1, 2010.

4:42-10 Search Fees

(a) Fees Allowable. In an action for the foreclosure of a mortgage or tax certificate or for partition and sale of realty, the court or the clerk may, as a matter of discretion, tax as part of the taxable costs all legal fees and reasonable charges necessarily paid or incurred in procuring searches relative to the title of the subject premises, provided that the minimum fee shall be $ 75 and the maximum fee shall be $ 500. If, however, 1% of the amount found due plaintiff is more than $ 75 and less than $ 500, such 1% shall be the maximum fee. In tax foreclosure actions brought to foreclose tax sale certificates on more than one parcel, the fees herein

prescribed shall apply to each separate parcel, except, however, that in in rem tax foreclosure actions pursuant to *R.* 4:64-7, the fee shall be $ 75 for each separate parcel, and the maximum fee herein prescribed shall not apply. The court or the clerk may also authorize inclusion of all legal fees and charges necessarily incurred for searches required for unpaid taxes or municipal liens and for searches required to enable the officer making public sale to insert in the notices, advertisements and conditions of sale, a description of the estate or interest to be sold and the defects in title and liens or encumbrances thereon, as authorized by law.

(b) Affidavit of Fees; Limitations. Fees for searches shall not be taxed, unless prior to the taxing thereof the plaintiff or plaintiff's attorney has filed an affidavit setting forth an itemized statement of the fees and charges for which taxation is asked, and including only such fees and charges as were actually and necessarily paid or incurred for the purpose of the action. Without court order no search fees shall be certified or taxed for searches respecting the state of the title or encumbrances thereon prior to the commencement of the co-tenancy in partition actions, or prior to the date of the mortgage in foreclosure actions. In tax foreclosures where the plaintiff is other than a municipality a notice similar to that required by *R.* 4:42-9(a)(5) shall be sent where search fees are to be applied for

Note: Source—R.R. 4:55-9(a) (b). Paragraph (a) amended November 27, 1974 effective April 1, 1975; paragraph (a) amended July 24, 1978 to be effective September 11, 1978; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994.

Rule 4:64 Foreclosure of Mortgages, Condominium Association Liens and Tax Sale Certificates

4:64-1 Foreclosure Complaint, Uncontested Judgment Other Than In Rem Tax Foreclosures

(a) Title Search; Certifications. (1) Prior to filing an action to foreclose a mortgage, a condominium lien, or a tax lien to which R. 4:64-7does not apply, the plaintiff shall receive and review a title search of the public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property that is subject to foreclosure and shall annex to the complaint a certification of compliance with the title search requirements of this rule.

(2) In all residential foreclosure actions, plaintiff's attorney shall annex to the complaint a certification of diligent inquiry:

(A) confirming that the attorney has communicated with an employee or employees of the plaintiff or of the plaintiff's mortgage loan servicer (i) who personally reviewed the complaint and confirmed the accuracy of its content, as mandated by paragraphs (b)(1) through (b)(10) and (b)(12) through (b)(13) of this rule, based on business records kept in the regular course of business by the plaintiff or the plaintiff's mortgage loan servicer, and (ii) who, if employed by the plaintiff's mortgage loan servicer, (a) identified the relationship between the mortgage loan servicer and the plaintiff, and (b) confirmed the authority of the mortgage loan servicer to act on behalf of the plaintiff; and

(B) stating the date and mode of communication employed and the name(s), title(s) and responsibilities in those titles of the plaintiff's or plaintiff's mortgage loan servicer's employee(s) with whom the attorney communicated pursuant to subparagraph (a)(2)(A) of this rule.

(3) Plaintiff's attorney shall also annex to the complaint a certification, executed by the attorney, attesting that the complaint and all documents annexed thereto comport with the requirements of R. 1:4-8(a).

(b) Contents of Mortgage Foreclosure Complaint. In an action in the Superior Court to foreclose a mortgage, the complaint shall state:

(1) the name of the obligor, mortgagor, obligee and mortgagee;

(2) the amount of the debt secured by the mortgage;

(3) the dates of execution of the debt instrument and the mortgage;

(4) the recording date, county recording office, and book and page recording reference of the mortgage securing the debt;

(5) whether the mortgage is a purchase money mortgage;

(6) a description of the pertinent terms or conditions of the debt instrument or mortgage and the facts establishing the default;

(7) the default date;

(8) if applicable, the acceleration of the debt's maturity date;

(9) if applicable, any prepayment penalty;

(10) if the plaintiff is not the original mortgagee or original nominee mortgagee, the names of the original mortgagee and a recital of all assignments in the chain of title;

(11) the names of all parties in interest whose interest is subordinate or affected by the mortgage foreclosure action and, for each party, a description of the nature of the interest, with sufficient particularity to give the court and parties notice of the transaction or occurrence on which the interest is based including recording date of the lien, encumbrance, or instrument creating the interest;

(12) a description of the subject property by street address, block and lot as shown on the municipal tax map and a metes and bounds description stating whether the recorded mortgage instrument includes that description; and

(13) if applicable, whether the plaintiff has complied with the pre-filing notice requirements of the Fair Foreclosure Act or other notices required by law.

When a married person who has not executed the mortgage is made a party defendant, the plaintiff shall set out the particular facts relied on to bar the married person’s rights and interest in the subject property, including whether the married person’s rights and interest in the property were acquired before or after the date of the mortgage.

(c) Definition of Uncontested Action. An action to foreclose a mortgage or to foreclose a condominium lien for unpaid assessments pursuant to N.J.S.A. 46:8B-21 shall be deemed uncontested if, as to all defendants,

(1) a default has been entered as the result of failure to plead or otherwise defend; or

(2) none of the pleadings responsive to the complaint either contest the validity or priority of the mortgage or lien being foreclosed or create an issue with respect to plaintiff's right to foreclose it; or

(3) all the contesting pleadings have been stricken or otherwise rendered

noncontesting.

An allegation in an answer that a party is without knowledge or information sufficient to form a belief as to the truth of an allegation in the complaint shall not have the effect of a denial but rather of leaving the plaintiff to its proofs, and such an allegation in an answer shall be deemed noncontesting to the allegation of the complaint to which it is responsive.

(d) Procedure to Enter Judgment in Uncontested Cases: Objections to Amount Due.

(1) *Application for Judgment.* The application for entry of judgment shall be accompanied by proofs as required by R. 4:64-2. In lieu of the filing otherwise required by R. 1:6-4, the application shall be filed with the Office of Foreclosure in the Administrative Office of the Courts.

(2) *Prejudgment Notices.* Notice of motion for entry of judgment in the form prescribed by R. 4:64-9 shall be served within the time prescribed by subparagraph (d)(4) of this rule on mortgagors, on all other named parties obligated on the debt, and on all parties who have appeared in the action, including defendants whose answers have been stricken or rendered noncontesting. The notice shall have annexed a copy of the affidavit of amount due filed with the court. Any other defaulting parties shall be noticed only if application for final judgment is made six months or more after the entry of default.

If the premises are residential, the notice of motion for entry of judgment shall be served on each tenant, by personal service or registered or certified mail, return receipt requested, accompanied by the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court. Said notice of tenants' rights shall be contained in an envelope with the following text in bold and in at least 14 point type: "Important Notice about Tenants Rights." If the name of the tenant is unknown, the notice may be addressed to Tenant.

(3) *Objections to Amount Due.* Any party having the right of redemption who disputes the correctness of the affidavit of amount due may file with the Office of Foreclosure an objection stating with specificity the basis of the dispute and asking the court to fix the amount due. On receipt of a specific objection to the calculation of the amount due, the Office of Foreclosure shall refer the matter to the judge in the county of venue, who shall schedule such further proceedings and notify the parties or their attorneys of the time and place thereof.

(4) *Entry of Judgment.* The court, on motion on 10 days notice if there are no other encumbrancers and on 30 days notice if there are other encumbrancers, and subject to paragraph (h) of this rule, may enter final judgment upon proofs as required by R. 4:64-2. The Office of Foreclosure may recommend entry of final judgment pursuant to R. 1:34-6.

(e) Priorities; Subsequent Encumbrances. A party holding a subsequent encumbrance for a sum certain and filing an uncontesting answer may have the encumbrance included for payment in the foreclosure judgment on the filing of proofs pursuant to R. 4:64-2. The judgment shall not order payment to a subsequent encumbrancer unless

(1) the priority of the encumbrance has been determined; and

(2) the encumbrancer has filed an affidavit stating that notice of the amount

claimed due on the encumbrance has been served on all defendants whose addresses are known or readily ascertainable and none of the defendants, whose names and addresses shall be listed in the affidavit, has, within 10 days after the date of service of the notice made written objection to the validity, priority or amount of the encumbrance; and

(3) all prior encumbrances of parties to the action, including answering and defaulting parties, have been previously satisfied or ordered paid; and

(4) the encumbrance extends to the entire interest being foreclosed; and

(5) no cross-claim pursuant to R. 4:64-5 has been filed.

No judgment by default shall be entered against a defendant postponing that defendant's rights or claims to those of any other defendant unless the priority of the right or claims of the latter and the facts upon which they depend are distinctly set forth in the pleadings. A controversy between such defendants may be settled upon application for surplus moneys pursuant to R. 4:64-3.

(f) Tax Sale Foreclosure; Strict Mortgage Foreclosures. If an action to foreclose or reforeclose a tax sale certificate in personam or to strictly foreclose a mortgage where provided by law is uncontested as defined by paragraph (c), the court, subject to paragraph (h) of this rule, shall enter an order fixing the amount, time and place for redemption upon proof establishing the amount due. The order of redemption in tax foreclosure actions shall conform to the requirements of N.J.S.A. 54:5-98 and R. 4:64-6(b). The order for redemption or notice of the terms thereof shall be served by ordinary mail on each defendant whose address is known at least 10 days prior to the date fixed for redemption. Notice of the entry of the order of redemption, directed to each defendant whose address is unknown, shall be published in accordance with R. 4:4-5(a)(3) at least 10 days prior to the redemption date and, in the case of an unknown owner in a tax foreclosure action joined pursuant to R. 4:26-5, a copy of the order or notice shall be posted on the subject premises at least 20 days prior to the redemption date in accordance with N.J.S.A. 54:5-90. The court, on its own motion and on notice to all appearing parties including parties whose answers have been stricken, may enter final judgment upon proof of service of the order of redemption as herein required and the filing by plaintiff of an affidavit of non-redemption. The Office of Foreclosure may, pursuant to R. 1:34-6, recommend the entry of both the order for redemption and final judgment.

(g) Security Interest Foreclosure. A plaintiff in the mortgage foreclosure action who also holds a security interest in personal property located on the subject real estate and who elects to have the personal property sold by the sheriff at public sale together with the real property may, by separate count, seek to foreclose the security interest in the mortgage foreclosure action, and the judgment of foreclosure shall direct a single public sale of the real estate and personal property. Notice of the sale of such personal property shall be given to the debtor and the secured creditors pursuant to N.J.S.A. 12A:9-504. If necessary the court shall apportion the proceeds of sale, and the proceeds allocated to the personal property shall be distributed pursuant to N.J.S.A. 12A:9-504 whether or not the persons entitled thereto are parties to the foreclosure action.

(h) Minors; Mentally Incapacitated Persons; Military Service. Except as otherwise provided by law or by R. 4:26-3 (virtual representation) no judgment

or order for redemption shall be entered under this rule against a minor or mentally incapacitated person who is not represented by a guardian or guardian ad litem appearing in the action. No judgment or order for redemption shall be entered against a defendant in military service of the United States who has defaulted by failing to appear unless that defendant is represented in the action by an attorney authorized by the defendant or appointed to represent defendant in the action and who has appeared or reported therein.

(i) Answer by United States and State of New Jersey. Rule 4:6-1(a) notwithstanding, the United States of America and the State of New Jersey, if a party defendant to a mortgage foreclosure action, shall have 60 days from the date of service of the complaint upon it to file and serve its answer.

Note: Source - R.R. 4:82-1, 4:82-2. Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; caption amended, paragraphs (a) and (b) caption and text amended, former paragraph (c) redesignated paragraph (e), and paragraphs (c), (d) and (f) adopted November 7, 1988 to be effective January 2, 1989; paragraphs (b) and (c) amended and paragraph (g) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (e) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (f) caption and text amended July 12, 2002 to be effective September 3, 2002; new paragraphs (a) and (b) adopted, and former paragraphs (a), (b), (c), (d), (e), (f), and (g) redesignated as paragraphs (c), (d), (e), (f), (g), (h), and (i) July 27, 2006 to be effective September 1, 2006; paragraph (b) caption and text amended September 11, 2006 to be effective immediately; paragraphs (d) and (f) amended October 10, 2006 to be effective immediately; paragraph (d) amended July 9, 2008 to be effective September 1, 2008; text of paragraph (d) deleted, new subparagraphs (d)(1) and (d)(2) captions and text adopted, and paragraph (f) amended July 23, 2010 to be effective September 1, 2010; caption amended, paragraph (a) caption amended, text of former paragraph (a) renumbered as subparagraph (a)(1), and new subparagraphs (a)(2) and (a)(3) added December 20, 2010 to be effective immediately; subparagraph (a)(2) amended June 9, 2011 to be effective immediately; paragraph (d) amended July 22, 2014 to be effective September 1, 2014

4:64-2 Proof

(a) Supporting Instruments. Proof required by R. 4:64-1 may be submitted by affidavit, unless the court otherwise requires. The moving party shall produce the original mortgage, evidence of indebtedness, assignments, claim of lien (N.J.S.A. 46:8B-21), and any other original document upon which the claim is based. In lieu of an original document, the moving party may produce a legible copy of a recorded or filed document, certified as a true copy by the recording or filing officer or by a New Jersey attorney, or a copy of an original document, if unfiled or unrecorded, certified as a true copy by a New Jersey attorney.

(b) Contents of Proof of Amount Due. If the action is uncontested, the plaintiff shall file with the Office of Foreclosure an affidavit of amount due, which shall have annexed a schedule as set forth in Appendix XII-J of these rules. The schedule shall state the principal due as of the date of default; advances authorized by the note or mortgage for taxes, hazard insurance and other stated purposes; late charges, if authorized by the note or mortgage, accrued to the date of the filing of the complaint; a computation of accrued interest; a statement of the per diem interest accruing from the date of the affidavit; and credit for any payments, credits, escrow balance or other amounts due the debtor. Prejudgment interest, if demanded in the complaint, shall be calculated on rate of interest provided by the instrument of indebtedness. A default rate of interest, if demanded in the complaint and

if reasonable, may be used to calculate prejudgment interest from the date of default to the judgment. The schedule shall include notice that there may be surplus money and the procedure for claiming it. The proof of amount due affidavit may be supported by computer-generated entries.

(c) Time: signatory. The affidavit prescribed by this rule shall be sworn to not more than 90 days prior to its presentation to the court or the Office of Foreclosure. The affidavit shall be made either by an employee of the plaintiff, if the plaintiff services the mortgage, on the affiant's knowledge of the plaintiff's business records kept in the regular course of business, or by an employee of the plaintiff's mortgage loan servicer, on the affiant's knowledge of the mortgage loan servicer's business records kept in the regular course of business. In the affidavit the affiant shall confirm:

(1) that he or she is authorized to make the affidavit on behalf of the plaintiff or the plaintiff's mortgage loan servicer;

(2) that the affidavit is made based on a personal review of business records of the plaintiff or the plaintiff's mortgage loan servicer, which records are maintained in the regular course of business;

(3) that the financial information contained in the affidavit is accurate; and

(4) that the default remains uncured.

The affidavit shall also include the name, title, and responsibilities of the individual, and the name of his or her employer. If the employer is not the named plaintiff in the action, the affidavit shall provide a description of the relationship between the plaintiff and the employer.

(d) Affidavit. Plaintiff's counsel shall annex to every motion to enter judgment in a residential mortgage foreclosure action an affidavit of diligent inquiry stating: (1) that the attorney has communicated with an employee or employees of the plaintiff or of the plaintiff's mortgage loan servicer who (A) personally reviewed the affidavit of amount due and the original or true copy of the note, mortgage and recorded assignments, if any, being submitted and (B) confirmed their accuracy; (2) the date and mode of communication employed; (3) the name(s), title(s) and responsibilities in those titles of the plaintiff's employee(s) or the employee(s) of the plaintiff's mortgage loan servicer with whom the attorney communicated pursuant to this rule; and (4) that the aforesaid documents comport with the requirements of R.1:4-8(a).

Note: Source - R.R. 4:82-3. Caption amended and paragraph (b) deleted July 7, 1971 to be effective September 13, 1971; amended November 27, 1974 to be effective April 1, 1975; amended November 7, 1988 to be effective January 2, 1989; amended July 13, 1994 to be effective September 1, 1994; text amended and designated as paragraph (a), paragraph (a) caption adopted, new paragraphs (b) and (c) adopted July 9, 2008 to be effective September 1, 2008; caption amended and new paragraph (d) added December 20, 2010 to be effective immediately; paragraphs (c) and (d) amended June 9, 2011 to be effective immediately; paragraph (c) amended July 22, 2014 to be effective September 1, 2014.

4:64-3 Surplus Moneys

(a) Applications Made by Parties Named in the Judgment of Foreclosure. Applications for withdrawal of surplus moneys in foreclosure actions may be presented at any time after the sale on motion, in accordance with R. 1:6-3, and notice to all parties, including defaulting defendants whose claims are not directed in the execution to be paid out of the proceeds of sale. Such motions made by a party named in the judgment of foreclosure shall be filed with the Office of Foreclosure. The Office of Foreclosure shall report on and recommend

the entry of orders for the withdrawal of surplus money provided the motion is unopposed. The report of the Office of Foreclosure shall list the priority of all lien claims and shall include the amounts due any lien holder who has filed a claim to surplus money supported by proofs required by Rule 4:64-2.

(b) Motions by Others. A motion made by a non-party to the judgment of foreclosure shall be filed in the vicinage. A motion for payment of surplus money prior to the delivery of the deed also shall be filed in the vicinage. The sheriff or other officer making the sale shall accept the receipt or order of the person to whom such surplus, or any part of it, is ordered to be paid, as payment to that extent of the purchase money, or may pay the same to such person. Payments shall be made in accordance with R. 4:57-2.

Note: Source-R.R. 4:82-4; amended July 29, 1977 to be effective September 6, 1977; amended July 16, 1981 to be effective September 14, 1981; amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998; former text amended and reallocated into paragraphs (a) and (b), and paragraph (a) and (b) captions adopted July 9, 2008 to be effective September 1, 2008.

4:64-4 Abandonment of Action by Plaintiff; Right of Defendants to Proceed

If the plaintiff makes prior or subsequent encumbrancers parties to the action to foreclose a mortgage, and they answer, and the plaintiff neglects or refuses to proceed, the defendants, or any of them, may make application to the court for an order permitting them to proceed with the action to judgment and execution. Plaintiff by such order shall not be allowed costs.

Notes: Source-R.R. 4:82-5; amended July 13, 1994 to be effective September 1, 1994.RULE RELAXATION ORDER: By Order dated Nov. 17, 2008, effective Jan. 5, 2009, the New Jersey Supreme Court, in implementation of the Residential Mortgage Foreclosure Mediation Program, relaxed and supplemented Rule 4:64-4 "so as to suspend the right of subordinate residential encumbrancers to prosecute abandoned foreclosure actions, if the primary mortgagee agrees to a workout in mediation."

4:64-5. Joinder of Claims in Foreclosure

Unless the court otherwise orders on notice and for good cause shown, claims for foreclosure of mortgages shall not be joined with non-germane claims against the mortgagor or other persons liable on the debt. Only germane counterclaims and cross-claims may be pleaded in foreclosure actions without leave of court. Nongermane claims shall include, but not be limited to, claims on the instrument of obligation evidencing the mortgage debt, assumption agreements and guarantees. A defendant who chooses to contest the validity, priority or amount of any alleged prior encumbrance shall do so by filing a cross-claim against the encumbrancer, if a co-defendant, and the issues raised by the cross-claim shall be determined upon application for surplus money pursuant to *R*. 4:64-3, unless the court otherwise directs.

Note: Former rule deleted September 5, 1969 to be effective September 8, 1969. New rule adopted July 14, 1992 to be effective September 1, 1992.

Rule 4:65 Sales of Property; In General

4:65-1 Compensation.

A sheriff, receiver or other person, ordered to sell real or personal estate in any action, shall be allowed the same fees which are allowed by law to a sheriff on sale by execution.

Note: Source—R.R. 4:83-1.

4:65-2 Notice of Sale; Posting and Mailing

If real or personal property is authorized by court order or writ of execution to be sold at public sale, notice of the sale shall be posted in the office of the sheriff of the county or counties where the property is located, and also, in the case of real property, on the premises to be sold, but need not be posted in any other place. If the premises are residential, the notice of sale shall have annexed thereto, in bold type of at least 14-point, the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court. The party who obtained the order or writ shall, at least 10 days prior to the date set for sale, serve a notice of sale by registered or certified mail, return receipt requested, upon (1) every party who has appeared in the action giving rise to the order or writ and (2) the owner of record of the property as of the date of commencement of the action whether or not appearing in the action, and (3) except in mortgage foreclosure actions, every other person having an ownership or lien interest that is to be divested by the sale and is recorded in the office of the Superior Court Clerk, the United States District Court Clerk or the county recording officer, and in the case of personal property, recorded or filed in pertinent public records of security interests, provided, however, that the name and address of the person in interest is reasonably ascertainable from the public record in which the interest is noted. The notice of sale shall include notice that there may be surplus money and the procedure for claiming it. The party obtaining the order or writ may also file the notice of sale with the county recording officer in the county in which the real estate is situate, pursuant to *N.J. S.A.* 46:26A-11, and such filing shall have the effect of the notice of settlement as therein provided.

Note: Source - R.R. 4:83-2; caption and rule amended July 13, 1994 to be effective September 1, 1994; amended July 3, 1995, to be effective immediately; amended July 9, 2008 to be effective September 1, 2008; amended July 23, 2010 to be effective September 1, 2010;amended July 19, 2012 to be effective September 4, 2012.

4:65-3 Advertisement of Diagram or Statement in Lieu

If real estate is to be sold at public sale, the sheriff, receiver or other person shall publish with the notice of the sale the actual description or a diagram of the premises or a concise statement indicating the municipality in which, and the street or road on which the premises are located, and specifying the tax lot and block, the number of feet to the nearest cross street, the dimensions of the premises, and the street number, if any. If the notice does not contain the full legal description, it shall state that the diagram or concise statement does not constitute a full description and shall also state where the full leg description can be found. An immaterial error in the diagram or statement shall not constitute ground for relieving the purchaser and ordering a new sale.

Note: Source—R.R. 4:83-3; amended June 29, 1990 to be effective September 4, 1990.

4:65-4 Place of Public Sale; Adjournments.

Unless the court otherwise orders, all public sales in any action shall be held at the place where the sheriff usually makes such sales, or at the premises to be sold. The sheriff, receiver or other person may continue such sale by public adjournment, subject to such limitations and restrictions as are provided specially therefor.

Note: Source—R.R. 4:83-4.

4:65-5 Sheriff's Sale; Objections

A sheriff who is authorized or ordered to sell real estate shall deliver a good and sufficient conveyance in pursuance of the sale unless a motion for the hearing of an objection to the sale is served within 10 days after the sale or at any time thereafter before the delivery of the conveyance. Notice of the motion shall be given to all persons in interest, and the motion shall be made returnable not later than 20 days after the sale, unless the court otherwise orders. On the motion, the court may summarily dispose of the objection; and if it approves the sale and is satisfied that the real estate was sold at its highest and best price at the time of the sale, it may confirm the sale as valid and effectual and direct the sheriff to deliver a conveyance as aforesaid.

Note: Source—R.R. 4:83-5; amended July 13, 1994 to be effective September 1, 1994.

4:65-6 Report and Confirmation of Sales

(a) Report of Sales. A sheriff, receiver, guardian, or a personal representative of decedent selling lands to pay debts or other person ordered to sell real estate shall file with the court a report of any sale made, verified by affidavit, stating the name of the purchaser and the price and terms of sale. If the sale was made by such guardian or personal representative, the report shall also state the names and addresses of all persons in interest. In case of a private sale, the report shall have annexed to it the affidavits of at least 2 persons, stating the fair market value of the property sold.

(b) Notice of Application for Confirmation. Any person making the sale, other than a sheriff, shall apply for the court's confirmation of the sale on 10 days' notice, given personally or by ordinary mail to all persons in interest who reside in the State and 20 days' notice similarly given to all persons in interest who reside outside this State; but the court may by order dispense with notice or make any other provision with respect thereto.

(c) Objections to Confirmation; Order Confirming Sale. Written objection to the confirmation of the sale and opposing affidavits shall be served upon the person making the sale not later than 3 days before the hearing unless the court permits service thereof at some other time. At the hearing the court may summarily dispose of the objection on affidavits. If the court approves the sale and is satisfied that the real estate was sold at its highest and best price at the time of the sale, it shall by order confirm the sale as valid and effectual and direct the person by whom it was made to deliver a good and sufficient conveyance in pursuance of the sale. If a private sale is submitted to the court for confirmation, the court may approve a better offer received after the tentative contract of sale.

(d) Sale by Fiduciary under a Will Within One Year of Decedent's Death. Where within one year after testator's death a fiduciary under the will sells real estate pursuant to a power of sale conferred either by the will or by *N.J.S.A.* 3B:14-23, the fiduciary shall have the power, but shall not be required, to report the sale to the court for approval.

Note: Source—R.R. 4:83-6, 4:83-7, 4:83-8; Paragraphs (a) and (d) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a) and (d) amended July 13, 1994 to be effective September 1, 1994.

N.J.S.A.:

2A:50-1 No personal deficiency judgment in foreclosure actions or execution thereon for balance due

No judgment shall be rendered in any action to foreclose a mortgage for any balance which may be due plaintiff over and above the proceeds of the sale of the mortgaged property, and no execution shall issue therein for the collection of any such balance.

2A:50-2 Order of proceedings; foreclosure; action on bond or note; limitations; parties

Except as otherwise provided, all proceedings to collect any debt secured by a mortgage on real property, shall be as follows:

First, a foreclosure of the mortgage; and

Second, an action on the bond or note for any deficiency, if, at the sale in the foreclosure proceeding, the mortgaged premises do not bring an amount sufficient to satisfy the debt, interest and costs.

The action for any deficiency shall be commenced within 3 months from the date of the sale or, if confirmation is or was required, from the date of the confirmation of the sale of the mortgaged premises. In such action judgment shall be rendered and execution issued only for the balance due on the debt and interest and costs of the action.

No action shall be instituted against any person answerable on the bond or note unless he has been made a party in the action to foreclose the mortgage.

Amended by L.1979, c. 286, § 1, eff. May 1, 1980.

2A:50-2.1 Time for bringing action on note for deficiency

In the case of a mortgage given to secure a debt evidenced by a note, where foreclosure proceedings are instituted within the time prescribed by the Statute of Limitations, action on the note for any deficiency may be commenced within the 3-month period provided by N.J.S. 2A:50-2, regardless of whether said action would otherwise be barred for lapse of time.

L.1979, c. 286, § 11, eff. May 1, 1980.

2A:50-2.2 Agreement to waive rights; invalidity

Any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewal of any loan secured by a mortgage, or thereafter, whereby the borrower agrees to waive the rights, or privileges conferred, upon him by chapter 50 of Title 2A of the New Jersey Statutes shall be void and of no effect.

L.1979, c. 286, § 12, eff. May 1, 1980.

2A:50-2.3 Application of act

This act shall not apply to proceedings to collect a debt evidenced by a note and secured by a mortgage on real property in the following instances:

a. Where the debt secured is for a business or commercial purpose other than a two-family, three-family or four-family residence in which the owner or his immediate family resides;

b. Where the mortgaged property is other than a one-family, two-family, three-family or four-family dwelling in which the owner or his immediate family resides at the time of institution of proceedings to collect the debt;

c. Where a banking institution, savings and loan association or building and loan association, operating pursuant to State or Federal law, is the lender or his assignee and the mortgage is not the primary security for the debt, as evidenced by (1) the financial condition of one or more persons directly or indirectly liableon the note, or (2) the giving of collateral in addition to the mortgage as security for the debt;

d. Where a banking institution, savings and loan association, building and loan association or licensed secondary mortgage lender, operating pursuant to State or Federal law, is the lender, and the mortgage is given to secure payment of a loan evidenced by a note, and where the mortgage so given is subject to the lien or liens of a prior mortgage or mortgages not held by such institution or association or by any holder in which such institution or association has an interest or with which such institution or association has an affiliation.

L.1979, c. 286, § 13, eff. May 1, 1980. Amended by L.1981, c. 333, § 1, eff. Dec. 14, 1981.

2A:50-2.4 Severability

If any provision or section of this act shall be held to be unconstitutional, said provision or section shall be exscinded and the remainder of the provisions and sections of the act as amended or supplemented shall be and remain valid with the same effect as if said provision so held to be unconstitutional had never been a part of the act.

L.1979, c. 286, § 14, eff. May 1, 1980.

2A:50-3 Answer disputing amount of deficiency; determination of amount

The obligor in any bond or note specified in section 2A:50-2 of this Title, with respect to any bond given after March 29, 1933, and with respect to any note given after the effective date of this amendatory act may file an answer in the action for deficiency, disputing the amount of the deficiency sued for. In that event both parties may introduce evidence as to the fair market value of the mortgaged premises at the time of the sale thereof in the foreclosure action, and the court, with or without a jury, shall determine the amount of such deficiency, by deducting from the debt secured the amount determined as the fair market value of the premises. If all parties to the action shall so agree, the court may accept as the fair market value of the mortgaged premises the value fixed by three appraisers, to be named by agreement of all the parties to the action, which

agreement shall be evidenced by a stipulation to be filed in the action.
Amended by L.1979, c. 286, § 2, eff. May 1, 1980.

2A:50-4 Judgment in action on bond or note as opening foreclosure and sale; right of redemption; time for bringing action to redeem

If, after the foreclosure and sale of mortgaged premises, the person entitled to the debt shall recover a judgment in an action on the bond or note for any balance of debt, such recovery shall open the foreclosure and sale of the premises, and the person against whom the judgment has been recovered may redeem the property by paying the full amount of money for which the judgment in the foreclosure action was granted, with interest to be computed from the date of the judgment in the foreclosure action, and all costs of the action for deficiency, and all reasonable expenses which the purchaser may have incurred in the meantime for taxes, assessments, other prior liens, necessary repairs upon the premises and interest on same, after deducting from the amount thereof such income as the holder may have derived from the possession of the premises, either as rent or otherwise.

An action for redemption of the premises shall be brought within 6 months after the entry of the judgment for the balance of the debt.
Amended by L.1979, c. 286, § 3, eff. May 1, 1980.

2A:50-5 Answer in deficiency action disputing amount of deficiency as termination of right to redeem; foreclosure and sale not to be opened

Where an action has been brought for a deficiency as provided by section 2A:50-2 of this Title, and where the party or parties liable for such deficiency shall have answered disputing the amount of the deficiency as provided by section 2A:50-3 of this Title, the effect of such answer shall be to terminate any right to redeem from foreclosure sale as provided by section 2A:50-4 of this Title, and the recovery for the deficiency shall not open the foreclosure and sale of the premises as provided by said section 2A:50-04.
Amended by L.1979. c. 286 § 4 eff. May 1, 1980.

2A:50-6 Bonds or notes; notice of proposed judgment by confession or action on

No judgment shall be entered by confession on any bond or note where a mortgage on real estate has been or may be given for the same debt or in any action on the bond or note, unless, prior to the entry of the judgment, if by confession, or prior to the commencement of the action, if the proceeding be by action, there shall be filed in the office of the clerk or register of deeds and mortgages as the case may be, of the county, in which the real estate described in the mortgage is situate a written notice of the proposed judgment or action, setting forth the court in which it is proposed to enter the judgment or begin the action, the names of the parties to the bond or note and to the judgment or action, the book and page of the record of the mortgage, together with a description of the real estate described therein.
Amended by L.1979, c. 286, § 5, eff. May 1, 1980.

2A:50-7 Record of notice of proposed judgment by confession or action on bond or note; fees

The county clerk or register of deeds and mortgages, as the case may be, shall forthwith record the notice required to be given by section 2A:50-6 of this Title, together with the time of the filing thereof, in the book by him kept for the record of notices of lis pendens.

For the filing and recording of such notice the clerk or register shall receive the fees provided by P.L.1965, c. 123, § 2 (C. 22A:4.1), which fees shall be included with the other costs to be taxed and recovered in the judgment or action for deficiency.

Amended by L.1979, c. 286, § 6, eff. May 1, 1980.

2A:50-8 Action on bond or note where lien or mortgage has been extinguished by foreclosure of prior mortgage

When any debt is evidenced by a bond or a note and is secured by a mortgage on real property and the lien of the mortgage has been or shall be extinguished by the foreclosure of a prior mortgage and sale of the mortgaged premises, action on the bond or note shall be commenced within 1 year of the sale or, if confirmation was or is required, from the date of confirmation of the sale. All such actions not commenced within said period shall be thereafter completely and forever barred for lapse of time. However, the time during which any application for surplus moneys arising from the foreclosure of such prior mortgage shall be in litigation shall not be taken or computed as part of any such period of 1 year.

Amended by L.1979, c. 286, § 7 eff. May 1, 1980.

2A:50-9 Judgment not to open foreclosure and sale; right of redemption

The recovery of a judgment in an action pursuant to section 2A:50-8 shall not open the foreclosure and sale of the mortgaged premises or result in any right of redemption.

Amended by L.1979, c. 286, § 8, eff. May 1, 1980.

2A:50-10 Record of notice

No judgment shall be entered by confession or in any action upon any bond or note pursuant to section 2A:50-8 unless prior to the entry of the judgment, if by confession, or prior to the commencement of the action on the bond or note, if the proceeding be by action, there shall be filed and recorded in the office of the clerk or register of deeds and mortgages as the case may be, of the county, in which the mortgaged premises are situate, a written notice to the same effect and in the same manner as is required by sections 2A:50-6 and 2A:50-7 of this Title.

Amended by L.1979, c. 286, § 9. eff. May 1. 1980.

2A:50-11 Penal sum of bond may be expressed in sum of debt; recovery for true amount

Whenever a bond secured by a mortgage shall be given for the same debt, the penal

sum of the bond may be expressed in the sum of the debt instead of in a sum double the amount of the debt. In any action upon such bond, recovery may be had for the true amount due including the debt, interest, charges, advances, costs, and any other obligation, secured and evidenced by the terms and conditions of the bond and mortgage, in the same manner and to the same effect as though the penal sum expressed in the bond was double the amount of the debt.

2A:50-12 Prior judgments by confession validated

L.1911 c. 354, p. 740 (R.S. 2:65-8), entitled "A supplement to an act entitled 'supplement to an act entitled "an act concerning proceedings on bonds and mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder" (which said act was approved March 12, 1880), and which supplement was approved May 28, 1907, approved May 2, 1911, saved from repeal. [This act is a validating act as to prior judgments by confession.]

2A:50-13 Parties to foreclosure action by trustee or fiduciary

From and after May 29, 1937, it shall not be necessary to make any cestui que trustent, ward, beneficiary, holder of bonds, certificates, shares or other interests in a mortgage, parties to any action brought by any trustee or fiduciary acting on their behalf to foreclose any mortgage or mortgages in which they may be interested, but any order or judgment entered therein shall be as binding and effective as though they had been made parties to such action.

Nothing in this section shall be deemed as indicating that, prior to the above date, it was necessary to make such cestui que trustent and the like parties.

2A:50-14 Validation of sales where cestuis que trustent not made parties to foreclosure proceedings

L.1938, c. 62, p. 168, entitled "An act validating the sale of certain lands, tenements, hereditaments or real estate made under any decree, judgment or order of any court of this state or any execution or other process issued thereon," approved April 4, 1938, saved from repeal. [This section validates sales of real estate where cestuis were not made parties to foreclosure proceedings.]

2A:50-15 Parties to foreclosure action against trustee or fiduciary

It shall not be necessary in any action to foreclose any mortgage or mortgages to join as party or parties defendant any cestui que trust or cestuis que trustent of any interest, right, claim, or title, held in, on or to the mortgaged premises by a trustee or fiduciary for the benefit of such cestui que trust or cestuis que trustent, but any order or judgment entered therein shall be as binding and effective as though they had been made parties to such action.

Nothing in this section shall be deemed as indicating that, prior to June 14, 1938, it was necessary to make such cestui que trust and the like parties.

2A:50-16 Action on bond secured by mortgage or by ejectment by mortgagee for possession; redemption by mortgagor; satisfaction and discharge of mortgage by court

Section 1 of an act entitled "An act concerning mortgages" (revision), approved

March 27, 1874 (Rev. 1877, p. 701, § 1; R.S. 2:65-9), saved from repeal. [The provisions of this section are indicated in the above section heading.]

2A:50-17 Suit to compel payment of amount due mortgagee or to foreclose equity of redemption; order or decree before hearing of cause

Section 2 of an act entitled "An act concerning mortgages" (revision), approved March 27, 1874 (Rev. 1877, p. 702, § 2; R.S. 2:65-10), saved from repeal. [The provisions of this section are indicated in the above section heading.]

2A:50-18 Exceptions to sections 2A:50-16 and 2A:50-17

Section 3 of an act entitled "An act concerning mortgages" (revision), approved March 27, 1874 (Rev.1877, p. 703, § 3; R.S. 2:65-11), saved from repeal. [The provisions of this section are indicated in the above section heading.]

2A:50-19 Sale of mortgaged premises by sheriff or other officer

In all foreclosure actions the sheriff or other officer directed to sell mortgaged premises shall make such sale and report thereof and execute such conveyance as the court shall order and direct.

2A:50-20 Title conveyed by sheriff's deed notwithstanding misnomer of certain defendants

R.S. 2:65-13 as am. L.1948, c. 378, p. 1557 § 3, saved from repeal. [This section provides that the sheriff's deed shall be valid despite the fact that any defendant who may have been made a party defendant in a foreclosure action has been misnamed in his representative capacity, provided that such person was actually named by his own proper name in the proceedings.]

2A:50-21 Bar of equity of redemption

If a mortgagee or those holding under him shall be in possession of the real estate specified in the mortgage, or any part thereof, for 20 years after a default of payment by the mortgagor, the right or equity of redemption in the mortgage shall be forever barred.

2A:50-22 Action against person assuming or guaranteeing payment of mortgage debt

Action against person assuming or guaranteeing payment of mortgage debt No action to enforce an agreement, express or implied, to assume or guarantee the payment of any mortgage, or of any bond or note secured by a mortgage, shall be maintained against a person making such agreement unless the mortgage shall have been first foreclosed, or extinguished by the foreclosure of a prior mortgage or lien, provided no such action may be maintained unless:

a. The person making such agreement was made a party defendant in the foreclosure action, and

b. The action is commenced within 3 months from the date of sale, or if confirmation was or is required, from the date of the confirmation of the sale of

the mortgaged premises, in the foreclosure action or in the case of the extinguishment of the mortgage lien by the foreclosure of a prior mortgage or lien, then within 12 months from the date of such extinguishments, and

c. A notice of intention to bring the action, is filed in the office of the register or the clerk as the case may be, of the county wherein the mortgaged premises are located, before the commencement of the action, and

d. The plaintiff shall in this complaint offer to credit upon the indebtedness the fair market value, which shall be specified, of the mortgaged premises as of the date of the sale in the foreclosure suit, in any case where the plaintiff was the purchaser of the mortgaged premises at such sale, and in such case the defendant may contest, in the action, the amount of such fair market value; and

e. The plaintiff shall join in the action any and all persons within the jurisdiction of the State of New Jersey alleged to be liable upon the note or as obligors upon the bond and upon any other agreement of assumption of payment of the same note or bond, express or implied, and upon any and all agreements or covenants to pay the same note or bond, or any moneys alleged to be due thereon, as principal, guarantor, surety or otherwise, whether such persons are alleged to be liable directly, indirectly, jointly, severally, or in the alternative.

Amended by L.1979, c. 286, § 10, eff. May 1, 1980.

2A:50-23 Retroactive effect

This article shall be applicable to all agreements, express or implied, to assume the payment of any bond secured by a mortgage, whether heretofore or hereafter made.

In the case of such agreements heretofore made, the time within which the action may be brought, unless previously barred by any provision of law, shall be not later than 3 months from the date of the accrual of the cause of action.

2A:50-24 Determination of fair value as prima facie evidence

In any action specified in section 2A:50-22 of this title wherein the fair value of the mortgaged premises is in issue and such fair value has been determined in any prior action or proceeding, such determination shall be prima facie evidence of such fair value.

2A:50-25 Determination of rights and interests of parties

In any action specified in section 2A:50-22 of this title the court shall by the judgment therein entered determine the respective rights and interests of all of the parties as between themselves and all of the other parties as to primary, secondary and other liability to the plaintiff and as to the direct, or indirect, or alternative liability of any party to any other party.

2A:50-26 When provisions of sections 2A:50-6 and 2A:50-7 applicable to action

Whenever the bringing of any action specified in section 2A:50-22 of this title shall revive the right to redeem the mortgaged premises and shall open the foreclosure and sale of the mortgaged premises, under section 2A:50-4 of this title, the provisions of sections 2A:50-6 and 2A:50-7 of this title shall be applicable to such

action.

2A:50-27 No provisions of chapter repealed or superseded by article
Nothing contained in this article shall be deemed to repeal or supersede any of the provisions of this chapter.

2A:50-28 Actions commenced before July 3, 1947
This article shall not apply to any action commenced prior to July 3, 1947.

2A:50-29 Allowance of set-offs
In any action for the foreclosure of a mortgage, just set-offs shall be allowed, whether the holder of the mortgage is a party plaintiff or defendant.

2A:50-30 Persons having unrecorded liens or claims not recorded or filed against property; effect of foreclosure judgment; coming in as parties
In any action for the foreclosure of a mortgage upon real or personal property in this state, all persons claiming an interest in or an encumbrance or lien upon such property, by or through any conveyance, mortgage, assignment, lien or any instrument which by any provision of law, could be recorded, registered, entered or filed in any public office in this state, and which shall not be so recorded, registered, entered or filed at the time of the filing of the complaint in such action shall be bound by the proceedings in the action so far as such property is concerned, in the same manner as if he had been made a party to and appeared in such action, and the judgment therein had been made against him as one of the defendants therein; but such person, upon causing such conveyance, mortgage, assignment, lien, claim or other instrument to be recorded, registered, entered or filed as provided by law, may apply to be made a party to such action.

2A:50-31 Sale pending foreclosure
When, in an action for the foreclosure or satisfaction of a mortgage covering real or personal property, or both, the property mortgaged is of such a character or so situated as to make it liable to deteriorate in value or to make its care or preservation difficult or expensive pending the determination of the action, the superior court may, before judgment, upon the application of any party to the action, order a sale of the mortgaged property to be made at public or private sale through a receiver, sheriff, or otherwise, as the court may direct. The proceeds of any such sale shall be brought into court, there to remain subject to the same liens and equities of the parties in interest as was the mortgaged property and to be disposed of as the court shall, by order or judgment, direct.

2A:50-32 Satisfaction of judgment for foreclosure and sale
When a judgment for the foreclosure and sale of mortgaged premises is paid and satisfied, other than by a sale of the premises, satisfaction thereof shall be entered by the clerk by virtue of a duly acknowledged or proved warrant or authority from the party receiving satisfaction, or from his attorney of record.

2A:50-33 Sale of entire premises when whole amount not due; disposition of proceeds

When, in cases where the whole sum secured by a mortgage is not due, a judgment of the court shall be made for the sale of the mortgaged premises, either for the nonpayment of any portion or installment of the debt or demand intended to be secured by the mortgage, or the nonpayment of interest due, or both, and it shall appear to the court that a part of the mortgaged premises cannot be sold to satisfy the amount due without material injury to the remaining part of the mortgaged premises, and that it is just and reasonable that the whole of the mortgaged premises should be sold together, the court may order a sale to be made of all of the mortgaged premises, the proceeds of such sale, or so much thereof as shall be necessary, to be applied, as well to the payment of the interest, installments or portions then due, and also the costs then due and payable, as to the payment of the whole or residue of the debt or demand not then due and payable; and the residue of the proceeds of such sale to be paid to the person or persons entitled to receive the same, or to be brought into court to abide the further order of the court, as the equity and circumstances of the case require. When, however, the residue of the debt or demand intended to be secured by the mortgage is payable at a future day without interest, and the mortgagee is willing to receive the same, the court shall deduct a rebate of legal interest for the amount the mortgagee shall receive on such debt or demand, to be computed from the time of the actual payment thereof to the time when such residue would have become due and payable.

2A:50-34 Gross sum in lieu of dower, curtesy, life estate or estate for years

If, upon the foreclosure of any mortgage and the sale of the premises therein described, there shall be paid into court moneys representing an estate in dower or for life or for years, or an estate by the curtesy in such premises or any part thereof, any person entitled to such estate may make application to the court for a sum in gross in lieu thereof, and the court shall direct the payment of such sum in gross out of the proceeds of the sale of the premises to the person entitled to such estate, as shall be deemed a just and reasonable satisfaction for such estate, and which the person so entitled shall consent in writing to accept in lieu thereof.

If no such consent shall be given before the distribution of the proceeds of the sale, the court shall ascertain and determine what proportion of such proceeds will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate, and shall order the same deposited with the court and under the direction and control of the court for the benefit of the parties entitled, the interest thereon to be paid to the parties entitled as the same may become due as compensation for and in lieu of such estate. At the termination of such estate the principal sum shall be paid to or distributed among the parties entitled thereto.

2A:50-35 Payment of surplus from sale to executor or administrator

When the mortgagor or the person owning the mortgaged premises is dead at the time of the sale thereof under foreclosure, the court may, if it deems it expedient

or necessary for the proper administration of the estate of the decedent, direct that the surplus arising from the proceeds of the sale be paid to the executor or administrator of the decedent, to be administered in the same manner as money arising from the sale of real estate by administrators or executors. The administrator or executor shall give bond as required by law upon an application for the sale of real estate.

2A:50-36 When sale under execution authorized; issue and record of writ

In any civil action for the foreclosure or satisfaction of any mortgage, the superior court may order a sale of the mortgaged premises, or such part thereof as shall be sufficient to discharge the mortgage or encumbrances on the mortgaged premises, besides costs by virtue of a writ of execution issued for that purpose. The writ of execution shall, before it is issued, be recorded by the clerk of the court in the book kept by him for recording executions against real estate.

2A:50-37 Sale and conveyance of premises; estate conveyed; disposition of proceeds; application for surplus

The sheriff or other officer to whom a writ of execution under section 2A:50-36 of this title shall be directed and delivered shall make sale pursuant to the command of such writ, and shall make and execute a deed or deeds for the premises sold, as the case may require; but no greater estate in the premises sold shall, at any time, be granted to a purchaser than would have been vested in the mortgagee had the equity of redemption been duly foreclosed.

The moneys arising from a sale pursuant to this section shall be applied to pay off and discharge the moneys ordered to be paid, and the surplus, if any, shall be deposited with the court and the same shall be paid to the person or persons entitled thereto, upon application therefor, as the court shall determine. Such surplus moneys may be invested at interest on such security as the court shall order pending application therefor by the person or persons entitled thereto. All charges in connection with applications for surplus moneys not exceeding $100, shall not exceed the sum of $5.

2A:50-38 Charges where amount due not in excess of $300

In any foreclosure of a mortgage and sale of the mortgaged premises, where the amount due does not exceed $300, the charges for official services shall be one-half the amount allowed by law where the amount due exceeds $300.

2A:50-39 Mortgages to which article applies

This article shall apply to any mortgage in force May 2, 1932, or thereafter executed and delivered, but it shall not affect any foreclosure proceeding commenced prior to said date.

2A:50-40 Foreclosure for unpaid interest authorized

The holder of a mortgage, under the terms of which the mortgagor has agreed to

pay the mortgagee a certain specified sum or sums of money at certain future time or times as therein specified, or as specified in the evidence of debt to secure which the mortgage was given, and also interest on the principal thereof during the term of the mortgage, at certain specified times at a rate not in excess of the legal annual rate, may, whenever the owner of the mortgaged premises defaults in making any such interest payment at the time when it has become due, or within such period of grace as is designated in the mortgage or the evidence of debt secured thereby, elect to foreclose the mortgage only to the extent that there is due and unpaid thereunder, upon the evidence of debt secured thereby any interest upon the principal sum secured thereby.

2A:50-41 Judgment on foreclosure for unpaid interest; no merger; lien of mortgage continued

The judgment entered in a foreclosure proceeding under authority of section 2A:50-40 of this title shall be only for the amount of unpaid interest due under the terms of the mortgage to the date of the judgment, and costs, and shall adjudge that the mortgage shall not be deemed to have merged in the judgment, but shall remain in full force and effect as security for the payment of the principal sum then remaining due thereon and secured thereby, and interest upon the principal sum to become due thereon from the date of the judgment.

2A:50-42 Sale on foreclosure for unpaid interest subject to lien of mortgage

The sale of the mortgaged premises under a foreclosure judgment under authority of sections 2A:50-40 and 2A:50-41 of this title shall be specifically made subject to the lien of the mortgage in the full principal sum then due thereon and the interest on the principal sum from the date of the judgment.

2A:50-43 Foreclosure for unpaid installment of principal authorized

Whenever, under the terms of a mortgage it is provided that there shall be paid on account of the principal sum secured thereby any payment on account thereof, due at a time or times therein specified, the holder of the mortgage may, whenever the owner of the mortgaged premises defaults in making any such payment on account of the principal sum, at the time when the same has become due, or within such period of grace as is designated in the mortgage or the evidence of debt secured thereby, elect to foreclose the mortgage only to the extent that there is due and unpaid thereunder any payment required to be made on account of the principal, either by the terms of the mortgage or the evidence of debt secured thereby.

2A:50-44 Judgment on foreclosure for unpaid installment of principal; no merger; lien of mortgage continued

The judgment entered in a foreclosure proceeding under authority of section 2A:50-43 of this title shall be only for the amount of the principal which would have been due as of the date of the filing of the complaint to foreclose, had there been no default, together with all interest accrued as of the date of the judgment, and costs, and shall adjudge that the mortgage shall not be deemed to have

merged in the judgment, but shall remain in full force and effect as security for the principal sum remaining due thereon, after deducting the principal sum to be paid because of such default, and interest upon such principal sum to become due thereon from the date of the judgment.

2A:50-45 Sale on foreclosure for unpaid installment of principal subject to lien of mortgage

The sale of the mortgaged premises under a foreclosure judgment entered under authority of sections 2A:50-43 and 2A:50-44 of this title shall be specifically made subject to the lien of the mortgage in the principal sum remaining due thereon as specified in the judgment, and interest on such principal sum from the date of the judgment.

2A:50-46 Foreclosure for unpaid municipal liens authorized

Whenever it is provided in a mortgage, or in the evidence of debt secured thereby, that the mortgagee may claim a default for the nonpayment of any municipal lien or liens on the mortgaged premises which shall have remained unpaid for a specified time, the holder of the mortgage, the municipal lien or liens not having been paid within the specified time, may pay or purchase the lien, taking an assignment thereof, and foreclose the mortgage only for the amount due for the municipal lien or liens.

2A:50-47 Judgment on foreclosure for unpaid municipal liens; no merger; lien of mortgage continued

The judgment entered in a foreclosure proceeding under authority of section 2A:50-48 of this title shall be only for the amount of the municipal lien or liens unpaid and paid or purchased by the holder of the mortgage, with interest on the amount of such lien or liens so paid or purchased by the holder of the mortgage from the date of such payment or purchase, and shall adjudge that the mortgage shall be deemed not to have merged therein, but shall remain in full force and effect as security for the principal sum due thereon, with accrued interest.

2A:50-48 Foreclosure for either unpaid interest or installment of principal and unpaid municipal liens

If, at the time of the commencement of a proceeding to foreclose a mortgage for the nonpayment of interest under authority of section 2A:50-40 of this title, or the nonpayment of an installment of the principal sum due upon the mortgage under authority of section 2A:50-43 of this title, there are any municipal liens upon the mortgaged premises due and unpaid, the holder of the mortgage may pay such lien or liens and secure a judgment, not only for the unpaid interest or defaulted portion of the principal sum, but also for the amount of the municipal lien or liens by him paid, together with interest thereon from the date of the payment thereof.

2A:50-49 Foreclosure for failure to procure insurance or pay insurance premiums authorized

Whenever it is provided in a mortgage that the owner of the mortgaged premises

shall keep the same insured for the benefit of the mortgagee and that, in default thereof, or upon the failure, neglect or refusal of the owner to pay any premium for such insurance protection, the mortgagee may either procure such insurance or pay any such defaulted premium in order to preserve the protection of his insurance, and add the cost of procuring such insurance or the amount paid by him for any such premium to the principal sum due on the mortgage, to be recovered upon demand or otherwise with interest from the date of such procurement or payment, or the mortgagee is given the option to declare the principal sum due on the mortgage whenever the owner fails to furnish proper insurance protection, the holder of the mortgage may, upon paying for or procuring such insurance, waive the demand for the payment of the principal sum due on the mortgage and foreclose the mortgage only for the amount paid by him to procure such insurance, with interest thereon from the date of such payment.

2A:50-50 Judgment on foreclosure for failure to procure insurance or pay insurance premiums; no merger; lien of mortgage continued

The judgment in a foreclosure proceeding under authority of section 2A:50-49 of this title shall adjudge that the mortgage shall not be deemed to be merged therein, but shall remain in full force and effect as security for the principal sum due thereon and accrued interest.

2A:50-51 No merger of fee and mortgage interest on purchase at sale by holder of mortgage; conveyance by purchaser; assignment of mortgage

The purchase by the holder of the mortgage of the real estate, or any interest therein, sold under a judgment in a foreclosure authorized by this article shall not result in a merger of the fee and the mortgage interest. The real estate so purchased may be held or conveyed subject to the lien of the mortgage as stated in the judgment, and the mortgage may be assigned as a valid and subsisting lien upon the real estate therein described.

2A:50-52 No deficiency judgment

Upon a foreclosure under authority of this article there shall be no deficiency judgment.

APPENDIX B-2

PROBATE RULES

PROBATE RULES

Rule 4:80 Application to Surrogate's Court for Probate or Administration

4:80-1 Application

(a) Contents. Unless a complaint for probate is filed with the Superior Court pursuant to *R.* 4:83, an application for the probate of a will, for letters testamentary, letters of administration of non-resident estates in which administration has not been sought in a decedent's state of residence, letters of administration, letters of administration with the will annexed, letters of administration ad prosequendum, letters of substitutionary administration and letters of substitutionary administration with the will annexed shall be filed with the Surrogate's Court stating: (1) the applicant's residence; (2) the name and date of death of the decedent, his or her domicile at date of death and date of the last will, if any, of decedent; (3) the names and addresses of the spouse, heirs, next of kin and other persons, if any, entitled to letters, and their relationships to decedent, and, to the best of the applicant's knowledge and belief, identifying any of them whose names or addresses are unknown and stating further that there are no other heirs and next of kin; (4) the ages of any minor heirs or minor next of kin; and in an application for probate of a will, whether the testator had issue living when the will was made, and whether he or she left any child born or adopted thereafter or any issue of such after-born or adopted child, and the names of after-born or adopted children since the date of the will, or their issue, if any. The applicant shall verify under oath that the statements are true to the best of the applicant's knowledge and belief.

(b) Certificates, Affidavits Accompanying the Application. Except in an application for substitutionary letters, the application shall be accompanied by a certificate of death or other competent proof thereof, unless for good cause dispensed with; and in all applications where a bond is required of the person applying for letters, the application shall be accompanied by an affidavit of the value of the personal estate.

(c) Filing. The application for the probate of a will or for letters of administration shall be filed with the Surrogate's Court of the county in which the decedent was domiciled at death, or if at that time the decedent was not domiciled in this State, then with the Surrogate's Court of any county in which the decedent left any property or into which any property belonging to the decedent's estate may have come.

(d) Recording. The application shall be recorded by the Surrogate's Court.

Note: Source—R.R. 4:99-1, 5:3-2; caption of rule, and text of paragraphs (a) and (b) amended, new paragraph (c) adopted, and former paragraph (c) redesignated as paragraph (d) and amended June 29, 1990 to be effective September 4, 1990; paragraph (a) amended June 28, 1996 to be effective September 1, 1996.

4:80-2 Proof of Will: Nonresident or Deceased Witnesses

(a) Depositions of Nonresident Witnesses. If any subscribing witness to a will of any person resident or nonresident in this State at death resides or is out of the State, the Surrogate's Court may issue a commission with a photocopy of the will attached authorizing the taking of the deposition of the witness in the form of a

witness-proof. The commission may be directed to any person before whom depositions may be taken under *R.* 4:12-2 and 4:12-3, or to the Surrogate or Deputy Surrogate of any county of this State, who shall take the proofs under oath and certify to the taking of the same.

(b) Deceased Witnesses. If all witnesses are deceased, the signature of each such witness may be proved by one person, and the same person may prove all signatures. Proof of death of the attesting witnesses may be made by affidavit without producing certified copies of death certificates.

Note: Source—R.R. 4:99-2, 5:4-2. Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended June 29, 1990 to be effective September 4, 1990.

4:80-3 Renunciation by or Notice to Next of Kin and Others

If the application for the letters specified in *R.* 4:80-1 (a) (except letters testamentary) is made to the Surrogate's Court by the person first entitled thereto, no renunciation or notice shall be required; but if the application is made by any other person, the applicant shall file:

(a) the renunciation, acknowledged before an officer qualified to take acknowledgements of deeds, of all competent adult persons whose right to the letters is prior or equal to that of the applicant, containing a request that the letters issue according to the application; or

(b) proof that at least 10 days' notice of the application has been given to all such persons residing in this State who have not renounced, and that at least 60 days' notice, or such notice (not less than 10 days in length) as the Surrogate's Court by order may have directed, has been given to all of them who reside outside this State. If in an application for letters of administration with the will annexed, it appears that the decedent left a will naming an executor who has not renounced, proof shall be submitted showing that like notice has been given to the executor. In any case the Surrogate's Court may require the applicant to give notice to interested persons other than those entitled to letters. Such notice may be served either as prescribed by *R.* 4:4-4 or by registered or certified mail return receipt requested to the person's last known address. If the name of address of any such person entitled to notice is not known, then an affidavit of inquiry as to such name or address, made as prescribed by R. 4:4-5(b), shall be filed in lieu of proof of notice.

(c) In addition to the proofs required in paragraphs (a) and (b) of this rule, if the application for letters of administration shows that there are no known next of kin or knowledge thereof, the applicant shall file proof that at least 20 days' notice of the application has been given to the Attorney General of this State.

(d) All renunciations shall be recorded by the Surrogate's Court.

Note: Source—R.R. 4;99-3 Amended July 26, 1984 to be effective September 10, 1984; former caption and text of R. 4:80-3 deleted, introductory text and paragraphs (a), (b) and (c) of former R. 4:80-4 amended, paragraph (d) adopted, and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 23, 2010 to be effective September 1, 2010.

4:80-4 Qualifications

Qualifications of executors and administrators shall be taken as provided in *R.* 4:96-1.

Note: New caption and text adopted June 29, 1990 to be effective September 4, 1990.

4:80-5 Residents Preferred Over Nonresidents

As between persons equally entitled, the Surrogate's Court in granting letters shall give preference to residents of this State over nonresidents, unless the best interest of the estate will not thereby be served.

Note: Source—R.R. 4:994. Amended July 26,1984 to be effective September 10,1984; amended June 29, 1990 to be effective September 4, 1990.

4:80-6 Notice of Probate of Will

Within 60 days after the date of the probate of a will, the personal representative shall cause to be mailed to all beneficiaries under the will and to all persons designated by *R.* 4:80-1(a)(3), at their last known addresses, a notice in writing that the will has been probated, the place and date of probate, the name and address of the personal representative and a statement that a copy of the will shall be furnished upon request. Proof of mailing shall be filed with the Surrogate within 10 days thereof. If the names or addresses of any of those persons are not known, or cannot by reasonable inquiry be determined, then a notice of probate of the will shall be published in a newspaper of general circulation in the county naming or identifying those persons as having a possible interest in the probate estate. If by the terms of the will property is devoted to a present or future charitable use or purpose, like notice and a copy of the will shall be mailed to the Attorney General.

Note: Source—R.R. 4:99-7; former R. 4:80-8 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:80-7 Use of Photostatic Copy Where Will Is Probated in Another State

If the will of a person resident in this State at death has been probated in another state or jurisdiction under the laws of which it cannot be removed therefrom or cannot remain in this State for permanent filing, a photocopy thereof attached and certified pursuant to Rule 902(d) of the Rules of Evidence (proof of official record) may be admitted to probate in lieu of the original will.

Note: Source—R.R. 4:99-10; former R. 4:80-11 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 10, 1998 to be effective September 1, 1998.

4:80-9 Testamentary Trustee

If a trustee is named in or pursuant to a will duly admitted to probate or a successor trustee under a will has been appointed, the trustee shall, before exercising the authority vested by the will or the appointment, accept the trusteeship as provided by *R.* 4:96-1. The acceptance shall recite the names and addresses of the trustees and the persons interested in the trust and shall identify their interests. Upon the filing of the acceptance and the power of attorney required by *N.J.S.A.* 3B:14-47, letters of trusteeship shall be issued by the Surrogate's Court. No application, judgment or order for the issuance of letters shall be required.

Note: Source—R.R. 4:100-1. Amended July 7,1971 to be effective September 13,1971; amended July 26, 1984 to be effective September 10, 1984; former R. 4:81 - 1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 5, 2000 to be effective September 5, 2000.

Rule 4:81 Application to Surrogate's Court for Guardianship of Minor

4:81-1 Application

(a) Contents. Unless a complaint is filed with the Superior Court pursuant to *R.* 4:83, an application for letters of guardianship of a minor shall be filed with the Surrogate's Court stating the minor's age and residence and the names and addresses of the minor's nearest of kin and of all persons who stand in loco parentis and of the persons with whom the minor resides.

(b) Affidavits. The application shall have annexed to it an affidavit made by a person with personal knowledge stating the value of the minor's real and personal estate and the amount of income from any real or personal estate belonging to the minor.

(c) Filing. The application shall be filed in the county where the minor is domiciled at the time or, if at that time the minor has no domicile in this State, then in any county in which the minor has any property.

(d) Recording. The application shall be recorded by the Surrogate's Court.

Note: Source—R.R. 4:101-1; caption of rule and paragraphs (a) and (b) of former R. 4:82-1 amended, former paragraph (c) amended and redesignated as paragraph (d), new caption and text of paragraph (c) adopted, and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:81-2 Renunciation or Notice

If the application is made by the minor's only living parent for letters of guardianship of the minor's estate, no renunciation or notice shall be required; but if made by any other person, there shall be filed either:

(a) A renunciation, made in accordance with *R.* 4:96-2, by (1) all adult persons whose right to the letters is prior or equal to that of the applicant, (2) the person or persons, if any, in loco parentis to the minor and (3) the persons with whom the minor resides. All such renunciations shall contain a request for the issuance of letters according to the application; or

(b) Proof of notice of the application or affidavit of inquiry as prescribed in *R.* 4:80-3(b). Such notice shall be given to the persons whose renunciations are required by paragraph (a) and such additional persons as the Surrogate may specify.

Note: Source—R.R. 4:101-2. Amended July 26,1984 to be effective September 10, 1984; introductory text and paragraphs (a) and (b) of former R. 4:82-2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:81-3 Signature to Application

If an application is made for letters of guardianship for a minor of the age of 14 years or more whose parent has absconded or has been absent from the State leaving the minor without sufficient provisions for maintenance or education, or for any minor desiring the appointment of a special guardian in order to enlist in the armed forces of the United States, the application shall be signed by the minor in the presence of any Surrogate or Deputy Surrogate. If the minor is outside this State, the application shall be signed by the minor and acknowledged in the manner provided for deeds, either in the presence of a judge of a court of record or, in a foreign country, in the presence of an officer authorized by the law of that country to take acknowledgements.

Note: Source—R.R. 4:101-3; caption and text of former R. 4:82-3 amended and rule redesignated June

29, 1990 to be effective September 4, 1990.

4:81-4 Residents Preferred Over Nonresidents

As between persons equally entitled, the Surrogate's Court in granting letters shall give preference to the resident of this State, unless the best interests of the minor will not thereby be served.

Note: Source—R.R. 4:1014. Amended July 26,1984 to be effective September 10,1984; former R. 4:8-24 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:81-5 Acceptance

Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with *R.* 4:96-1.

Note: Source—R.R. 4:103-3 (second sentence); former R. 4:82-5 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

Rule 4:82 Matters in which the Surrogate's Court may not Act

Unless specifically authorized by order or judgment of the Superior Court, and then only in accordance with such order or judgment, the Surrogate's Court shall not act in any matter in which (1) a caveat has been filed with it before the entry of its judgment; (2) a doubt arises on the face of a will or a will has been lost or destroyed; (3) the application is to admit to probate a writing intended as a will as defined by N.J.S.A. 3B:3-2(b) or N.J.S.A. 3B:3-3; (4) the application is to appoint an administrator pendent lite or other limited administrator; (5) a dispute arises before the Surrogate's Court as to any matter; or (6) the Surrogate certifies the case to be of doubt or difficulty.

Note: Source—R.R. 5:3-3(a). Former R. 4:84-1(d) amended July 22, 1983 to be effective September 12, 1983; amended and redesignated as R. 4:82 June 29, 1990 to be effective September 4, 1990; amended June 28, 1996 to be effective September 1, 1996; amended July 27, 2006 to be effective September 1, 2006.

Rule 4:83 Probate Actions in the Superior Court, Chancery Division, Probate Part: General Provisions

4:83-1 Method of Proceeding

Unless otherwise specified, all actions in the Superior Court, Chancery Division, Probate Part, shall be brought in a summary manner by the filing of a complaint and issuance of an order to show cause pursuant to *R.* 4:67. The Surrogate, as Deputy Clerk, may fix the return date of the order to show cause and execute the same unless the procedure in a particular case raises doubt or difficulty. Service shall be made and the action shall proceed thereafter in accordance with that rule.

The order to show cause may be in the form in Appendix XII-I to the extent applicable.

Note: Source—R.R. 4:105-3,4:117-1. Former R. 4:99-1 deleted and new R. 4:83-1 adopted June 29, 1990 to be effective September 4,1990; amended June 28, 1996 to be effective September 1, 1996; amended July 9, 2008 to be effective September 1, 2008.

4:83-2 Filing of Papers

In all matters relating to estates of decedents, trusts, guardianships and

custodianships, other than those set forth in *R.* 4:80 and *R.* 4:81, all papers shall be filed with the Surrogate of the county of venue as the deputy clerk of the Superior Court, Chancery Division, Probate Part, pursuant to *R.* 1:5-6.

Note: Source—R.R. 4:117-2. Former *R.* 4:99-2 deleted and new *R.* 4:83-2 adopted June 29, 1990 to be effective September 4, 1990; amended July 13, 1994 to be effective September 1, 1994.

4:83-3 Title of Action

In all actions for the probate of a will, for letters of administration or guardianship of a minor or mentally incapacitated person and other actions brought pursuant to these rules, every paper shall be entitled "In the Matter of the Estate of_____, Deceased" or "In the Matter of _____, a Minor" or the like.

Note: Source—R.R. 4:117-4; caption and text of former R. 4:99-3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002.

4:83-4 Venue

(a) Where the Surrogate's Court May Not Act. In an action brought because the Surrogate's Court is barred from acting by *R.* 4:82, venue shall be laid in that county.

(b) Guardianships and Conservatorship Actions. In an action for the appointment of a guardian for an alleged mentally incapacitated person or of a conservator, venue shall be laid in the county in which the alleged mentally incapacitated person or conservatee is domiciled at the commencement of the action, or if at that time the person has no domicile in this State, then in any county in which the person has any property.

(c) Actions By or Against a Fiduciary. In an action brought by or against a fiduciary who received letters of appointment in this State (1) to account for the estate, real or personal for which the fiduciary is chargeable, or (2) for the construction of the will or other instrument by which the fiduciary was appointed, or (3) for directions by the court as to the fiduciary's authority or duties, venue shall be laid in the county in which the fiduciary received the letters of appointment.

(d) To Appoint Inter Vivos or Substituted Trustee. In an action for the appointment of a trustee or substituted trustee of an inter vivos trust, venue shall be laid in the county in which there is any property of the trust estate at the commencement of the action or in the county in which a trustee is domiciled at the time the action is commenced. All subsequent proceedings affecting the trust including the appointment of an additional or substituted trustee, shall be brought in the original venue.

(e) Other Actions. In all other probate actions, venue shall be laid in accordance with *R.* 4:3-2(a).

Note: Source—R.R. 4:116-1 through 5. Former R. 4:98 deleted and new R. 4:83-4 adopted June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 12, 2002 to be effective September 3, 2002.

4:83-5 Verification

Unless otherwise provided by these rules, all complaints shall be verified by the plaintiff upon oath that the allegations thereof are true to the best of the plaintiff's

knowledge and belief. Every account shall be verified by the accountant upon oath that the account and the statements required to be annexed thereto are just and true to the best of the accountant's knowledge and belief.

Note: Source—R.R. 4:115-1; caption and text of former R. 4:97-1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

Rule 4:84. Complaints in Cases in which Surrogate's Court not Able to Act

4:84-1 In General

In any case in which, under *R.* 4:82, the Surrogate's Court may not act, any person in interest may file a complaint and apply for an order directed to all other interested parties to show cause why the relief sought should not be granted. Service shall be as provided by *R.* 4:67-3.

Note: Source—R.R. 4:103-1(c), 5:3-3(b), 5:3-5(b). Former R. 4:84-1(e) deleted and new R. 4:84-1 adopted June 29, 1990 to be effective September 4, 1990.

4:84-2 Probate in the Superior Court

If a will is sought to be proved in the Superior Court, proceedings for discovery shall be available pursuant to *R.* 4:10, *R.* 4:12 to 4:19 inclusive, *R.* 4:21 and *R.* 4:23. On the taking of a deposition, a photocopy of the will shall be marked for identification by the person before whom the deposition is taken. If the will is admitted to probate, the judgment of the Superior Court shall direct that the will be filed with and recorded by the Surrogate's Court. Letters of appointment shall then be issued by the Surrogate's Court.

Note: Source—R.R. 5:3-1 and 5:3-7. New R. 4:84-2, based on deleted second sentence of former R. 4:802(a), adopted June 29,1990 to be effective September 4, 1990.

4:84-3 Contested Administration

Where administration of an estate has been contested, the judgment of the Superior Court granting administration shall direct issuance and recording of letters of administration by the Surrogate's Court.

Note: Source—R.R. 4:1034; former R. 4:84-3 deleted, new caption and text adopted June 29,1990 to be effective September 4, 1990.

4:84-4 Appointment of Substituted Trustees

An action for the appointment of a substituted trustee of an inter vivos or testamentary trust shall be brought pursuant to *R.* 4:83. The complaint shall have attached a copy of the trust instrument and the acceptance by the person or persons seeking the appointment. The order to show cause shall be served upon all persons having an interest in the trust, vested or contingent, except as otherwise provided by *R.* 4:26-3 (virtual representation), and upon any trustees then serving. The judgment shall direct the issuance by the Surrogate's Court of letters of trusteeship.

Note: Source—R.R.4:100-2 and 4:100-3. Former R.4:81-2 and 4:81-3 deleted and new R.4:84-4 adopted June 29, 1990 to be effective September 4, 1990; amended July 5, 2000 to be effective September 5, 2000.

4:84-5 Appointment of Administrator Pendente Lite or Other Limited Administrator

No order appointing an administrator pendente lite or other limited administrator shall be entered by the Superior Court without either notice to the persons in interest or their written consent, unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable damage will result before notice can be served and a hearing had thereon. If an order is granted without notice, it shall give any person in interest leave to move for the discharge of the administrator on no more than 2 days' notice. This rule shall not apply to an administrator ad prosequendum in an action for wrongful death.

Note: Source—R.R. 4 ~ 8. Amended July 26,1984 to be effective September 10,1984; caption and text of former R. 4:80-9 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

Rule 4:85. Review by Superior Court of Actions by Surrogate's Court: General Provisions

4:85-1 Complaint; Time for Filing

If a will has been probated by the Surrogate's Court or letters testamentary or of administration, guardianship or trusteeship have been issued, any person aggrieved by that action may, upon the filing of a complaint setting forth the basis for the relief sought, obtain an order requiring the personal representative, guardian or trustee to show cause why the probate should not be set aside or modified or the grant of letters of appointment vacated, provided, however, the complaint is filed within four months after probate or of the grant of letters of appointment, as the case may be, or if the aggrieved person resided outside this State at the time of the grant of probate or grant of letters, within six months thereafter. If relief, however, is sought based upon *R.* 4:50-1(d), (e) or (f) or *R.* 4:50-3 (fraud upon the court) the complaint shall be filed within a reasonable time under the circumstances. The complaint and order to show cause shall be served as provided by *R.* 4:67-3. Other persons in interest may, on their own motion, apply to intervene in the action.

Note: Source—R.R. 4:99-6(a)(b), 5:34(a)(b), 5:3-5(a). Former R. 4:80-7 deleted and new R. 4:85-1 adopted June 29, 1990 to be effective September 4, 1990.

4:85-2 Enlargement of Time

The time periods prescribed by *R.* 4:85-1 may be extended for a period not exceeding 30 days by order of the court upon a showing of good cause and the absence of prejudice.

Note: Source—R.R. 1:27B(d). Former R. 4:80-7(d) deleted and new R. 4:85-2 adopted June 29, 1990 to be effective September 4, 1990.

4:85-3 After-discovered Will

(a) Order to Show Cause. Where administration has been granted and subsequently a will is offered for probate or where probate of a will has been granted and subsequently a later will is offered for probate, the person offering such will may, upon the filing of a complaint, move without notice for an order requiring all interested persons to show cause why probate of such will should not be granted. The complaint shall be filed in the county where the original

administration or probate was granted. If, on the return date or thereafter, new probate is granted, the court shall require the administrator or prior executor to make final settlement of his or her account and thereafter shall make such order respecting commissions as is appropriate.

(b) Probate by Surrogate. If, on the return date of the order to show cause, there is no objection to the offering of the after-discovered will for probate, the Surrogate may enter an order that it be lodged for probate and thereafter proceed with probate unless a caveat has been filed or doubt arises from the face of the will.

Note: Source—R.R. 4:99-5; caption and text of former R. 4:80-6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; first paragraph designated as (a) and paragraph (b) added June 28, 1996 to be effective September 1, 1996.

Rule 4:86 Action for Guardianship of a mentally incapacitated person or for the Appointment of a Conservator

4:86-1 Action; Records; Guardianship Monitoring Program

(a) Every action for the determination of incapacity of a person and for the appointment of a guardian of that person or of the person's estate or both, other than an action with respect to a veteran under N.J.S.A. 3B:13-1 *et seq.*, or with respect to a kinship legal guardianship under N.J.S.A. 3B:12A-1 *et seq.*, shall be brought pursuant to R. 4:86-1 through R. 4:86-8 for appointment of a general, limited or *pendente lite* temporary guardian.

(b) Judiciary records of all actions set forth in R. 4:86-1(a) shall be maintained by the Surrogate and shall be accessible pursuant to R. 1:38-3(e).

(c) Each vicinage shall operate a Guardianship Monitoring Program through the collaboration of the Superior Court, Chancery Division, Probate Part: the County Surrogates; and the Administrative Office of the Courts, Civil Practice Division.

(1) The functions of guardianship support and monitoring shall be established by the Administrative Director of the Courts. Such functions shall include guardianship training and review of inventories and periodic reports of financial accounting filed by guardians as required by R. 4:86-6(e).

(2) Post-adjudicated case issues identified through monitoring may be forwarded for further action by the Superior Court, Chancery Division, Probate Part and/or the Administrative Office of the Courts.

APPENDIX B-2 – PROBATE RULES

(3) Case monitoring issues referred to the attention of the Superior Court, Chancery Division, Probate Part shall be promptly reviewed and such further action taken as deemed appropriate in the discretion of the court.

(4) Quasi-judicial immunity shall be extended to Judiciary staff, County Surrogates, County Surrogate staff, and volunteers performing monitoring responsibilities in the Guardianship Monitoring Program.

Note: Source-R.R. 4:102-1. Amended July 22, 1983 to be effective September 12, 1983; former R. 4:83-1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; R. 4:86 caption amended, and text of R. 4:86-1 amended July 12, 2002 to be effective September 3, 2002; caption to Rule 4:86 amended, and text of Rule 4:86-1 amended July 9, 2008 to be effective September 1, 2008; caption amended, former text amended and designated as paragraph (a), and new paragraphs (b) and (c) added August 1, 2016 to be effective September 1, 2016.

4:86-2 Complaint; Accompanying Documents; Alternative Affidavits or Certifications.

(a) Complaint. The allegations of the complaint shall be verified as prescribed by R. 1:4-7. The complaint shall state:

(1) the name, age, domicile and address of the plaintiff, of the alleged incapacitated person and of the alleged incapacitated person's spouse, if any;

(2) the plaintiff's relationship to the alleged incapacitated person;

(3) the plaintiff's interest in the action;

(4) the names, addresses and ages of the alleged incapacitated person's children, if any, and the names and addresses of the alleged incapacitated person's parents and nearest of kin, meaning at a minimum all persons of the same degree of relationship to the alleged incapacitated person as the plaintiff;

(5) the name and address of the person or institution having the care and custody of the alleged incapacitated person;

(6) if the alleged incapacitated person has lived in an institution, the period or periods of time the alleged incapacitated person has lived therein, the date of the commitment or confinement, and by what authority committed or confined; and

(7) the name and address of any person named as attorney-in-fact in any power of attorney executed by the alleged incapacitated person, any person named as health care representative in any health care directive executed by the alleged incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged incapacitated person.

(b) Accompanying Documents. The complaint shall have annexed thereto:

(1) An affidavit or certification stating the nature, description, and fair market value of the following, in such form as promulgated by the Administrative Director of the Courts:

(A) all real estate in which the alleged incapacitated person has or may have a present or future interest, stating the interest, describing the real estate fully and stating the assessed valuation thereof;

(B) all the personal estate which he or she is, will or may in all probability become entitled to, including stocks, bonds, mutual funds, securities and investment accounts: money on hand, annuities, checking and savings accounts and certificates of deposit in banks and notes or other indebtedness due the alleged incapacitated person; pensions and retirement accounts, including annuities and profit sharing plans; miscellaneous personal property; and the nature and total monthly amount of any income which may be payable to the alleged incapacitated person; and

(C) the encumbrance amount of any debt including any secured associated debt related to the real estate or personal estate of the alleged incapacitated person.

(2) Affidavits or certifications of two physicians having qualifications set forth in N.J.S.A. 30:4-27.2t, or the affidavit or certification of one such physician and one licensed practicing psychologist as defined in N.J.S.A. 45:14B-2, in such form as promulgated by the Administrative Director of the Courts. Pursuant to N.J.S.A. 3B:12-24.1(d), the affidavits or certifications may make disclosures about the alleged incapacitated person. If an alleged incapacitated person has been committed to a public institution and is confined therein, one of the affidavits or certifications

shall be that of the chief executive officer, the medical director, or the chief of service providing that person is also the physician with overall responsibility for the professional program of care and treatment in the administrative unit of the institution. However, where an alleged incapacitated person is domiciled within this State but resident elsewhere, the affidavits or certifications required by this rule may be those of persons who are residents of the state or jurisdiction of the alleged incapacitated person's residence. Each affiant shall have made a personal examination of the alleged incapacitated person not more than 30 days prior to the filing of the complaint, but said time period may be relaxed by the court on an ex parte showing of good cause. To support the complaint, each affiant shall state:
(A) the date and place of the examination;
(B) whether the affiant has treated or merely examined the alleged incapacitated individual;
(C) whether the affiant is disqualified under R. 4:86-3;
(D) the diagnosis and prognosis and factual basis therefor;
(E) for purposes of ensuring that the alleged incapacitated person is the same individual who was examined, a physical description of the person examined, including but not limited to sex, age and weight;
(F) the affiant's opinion of the extent to which the alleged incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs and shall set forth with particularity the circumstances and conduct of the alleged incapacitated person upon which this opinion is based, including a history of the alleged incapacitated person's condition;
(G) if applicable, the extent to which the alleged incapacitated person retains sufficient capacity to retain the right to manage specific areas, such as residential, educational, medical, legal, vocational or financial decisions; and
(H) an opinion on whether the alleged incapacitated person is capable of attending or otherwise participating in the hearing and, if not, the reasons for the individual's inability; and
(3) A Case Information Statement in such form as promulgated by the Administrative Director of the Courts. Said Case Information Statement shall include the date of birth and Social Security number of the alleged incapacitated person.

(c) Alternative Affidavits or Certifications.

(1) If the plaintiff cannot secure the information required in paragraph (b)(1), the complaint shall so state and give the reasons therefor, and the affidavit or certification submitted shall in that case contain as much information as can be secured in the exercise of reasonable diligence.
(2) In lieu of the affidavits or certifications provided for in paragraph (b)(2), an affidavit or certification of one affiant having the qualifications as required therein shall be submitted, stating that he or she has endeavored to make a personal examination of the alleged incapacitated person not more than 30 days prior to the filing of the complaint but that the alleged incapacitated person or those in charge of him or her have refused or are unwilling to have the affiant make such an examination. The time period herein prescribed may be relaxed by the court on an ex parte showing of good cause.

Note: Source-R.R. 4:102-2; former R. 4:83-2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1,

1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a), (b), and (c) amended July 12, 2002 to be effective September 3, 2002; paragraphs (b) and (c) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a), (b) and (c) amended July 9, 2008 to be effective September 1, 2008; caption amended, and paragraphs (a), (b) and (c) amended and captions added August 1, 2016 to be effective September 1, 2016.

4:86-3 Disqualification of Affiant

No affidavit or certification shall be submitted by a physician or psychologist who is related, either through blood or marriage, to the alleged incapacitated person or to a proprietor, director or chief executive officer of any institution (except state, county or federal institutions) for the care and treatment of the ill in which the alleged incapacitated person is living, or in which it is proposed to place him or her, or who is professionally employed by the management thereof as a resident physician or psychologist, or who is financially interested therein.

Note: Source-R.R. 4:102-3; former R. 4:83-3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002; caption and text amended July 28, 2004 to be effective September 1, 2004; amended July 9, 2008 to be effective September 1, 2008; amended August 1, 2016 to be effective September 1, 2016.

4:86-4 Order for Hearing

(a) Contents of Order.

(1) If the court is satisfied with the sufficiency of the complaint and supporting affidavits and that further proceedings should be taken thereon, it shall enter an order fixing a date for hearing.

(2) The order shall require that at least 20 days' notice thereof be given to the alleged incapacitated person, any person named as attorney-in-fact in any power of attorney executed by the alleged incapacitated person, any person named as health care representative in any health care directive executed by the alleged incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged incapacitated person, the alleged incapacitated person's spouse, children 18 years of age or over, parents, the person having custody of the alleged incapacitated person, the attorney appointed pursuant to R. 4:86-4(b), and such other persons as the court directs. Notice shall be effected by service of a copy of the order, complaint and supporting affidavits upon the alleged incapacitated person personally and upon each of the other persons in such manner as the court directs.

(3) The order for hearing shall expressly provide that appointed counsel for the alleged incapacitated person is authorized to seek and obtain medical and psychiatric information from all health care providers.

(4) The court may allow shorter notice or waive notice upon a showing of good cause. In such case, the order shall recite the basis for shortening or waiving notice, and proof shall be submitted at the hearing that such basis continues to exist.

(5) A separate notice shall be personally served on the alleged incapacitated person stating that if he or she desires to oppose the action, he or she may appear either in person or by attorney, and may demand a trial by jury.

(6) The order for hearing shall require that any proposed guardian complete guardianship training as promulgated by the Administrative Director of the Courts: however, agencies authorized to act pursuant to P.L.1985, c. 298 (C.52:27G-20 *et seq.*), P.L.1985, c. 145 (C.30:6D-23 *et seq.*), P.L.1965, c. 59 (C.30:4-165.1 *et seq.*)

and P.L.1970, c. 289 (C.30:4-165.7 *et seq.*) and public officials appointed as limited guardians of the person for medical purposes for individuals in psychiatric facilities listed in R.S.30:1-7 shall be exempt from this requirement.

(7) If the alleged incapacitated person is not represented by counsel, the order shall include the appointment by the court of counsel for the alleged incapacitated person.

(b) Duties of Counsel.

(1) Counsel shall (i) personally interview the alleged incapacitated person; (ii) make inquiry of persons having knowledge of the alleged incapacitated person's circumstances, his or her physical and mental state and his or her property; (iii) make reasonable inquiry to locate any will, powers of attorney, or health care directives previously executed by the alleged incapacitated person or to discover any interests the alleged incapacitated person may have as beneficiary of a will or trust.

(2) At least ten days prior to the hearing date, counsel shall file a report with the court and serve a copy thereof on plaintiff's attorney and other parties who have formally appeared in the matter. The report shall include the following:

(i) the information developed by counsel's inquiry;

(ii) recommendations concerning the court's determination on the issue of incapacity;

(iii) any recommendations concerning the suitability of less restrictive alternatives such as a conservatorship or a delineation of those areas of decision-making that the alleged incapacitated person may be capable of exercising;

(iv) whether a case plan for the incapacitated person should thereafter be submitted to the court;

(v) whether the alleged incapacitated person has expressed dispositional preferences and, if so, counsel shall argue for their inclusion in the judgment of the court; and

(vi) recommendations concerning whether good cause exists for the court to order that any power of attorney, health care directive, or revocable trust created by the alleged incapacitated person be revoked or the authority of the person or persons acting thereunder be modified or restricted.

(3) If the alleged incapacitated person obtains other counsel, such counsel shall notify the court and appointed counsel at least ten days prior to the hearing date.

(c) Examination. If the affidavit or certification supporting the complaint is made pursuant to R. 4:86-2(c), the court may, on motion and upon notice to all persons entitled to notice of the hearing under paragraph (a), order the alleged incapacitated person to submit to an examination. The motion shall set forth the names and addresses of the physicians who will conduct the examination, and the order shall specify the time, place and conditions of the examination. Upon request, the report thereof shall be furnished to either the examined party or his or her attorney.

(d) Guardian *Ad Litem*. At any time prior to entry of judgment, where special circumstances come to the attention of the court by formal motion or otherwise, a guardian *ad litem* may, in addition to counsel, be appointed to evaluate the best interests of the alleged incapacitated person and to present that evaluation to the court.

(e) Compensation. The compensation of the attorney for the party seeking guardianship, appointed counsel, and of the guardian *ad litem*, if any, may be fixed by the court to be paid out of the estate of the alleged incapacitated person or in

such other manner as the court shall direct.

Note: Source-R.R. 4:102-4(a)(b). Paragraph (b) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; caption of former R. 4:83-4 amended, caption and text of paragraph (a) amended and in part redesignated as paragraph (b) and former paragraph (b) redesignated as paragraph (c) and amended, and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended and paragraphs (d) and (e) added June 28, 1996 to be effective September 1, 1996; paragraphs (a), (b), (c), (d), and (e) amended July 12, 2002 to be effective September 3, 2002; paragraph (e) amended July 27, 2006 to be effective September 1, 2006; paragraphs (a), (b), (c), (d) and (e) amended July 9, 2008 to be effective September 1, 2008; paragraph (a) amended, subparagraphs enumerated and paragraphs (a)(6) and (a)(7) adopted, paragraph (b) amended and subparagraphs enumerated, and paragraph (c) amended August 1, 2016 to be effective September 1, 2016.

4:86-5 Proof of Service; Appearance of Alleged Incapacitated Person at Hearing; Answer

(a) Not later than ten days prior to the hearing, the plaintiff shall file proof of service of the notice, order for hearing, complaint and affidavits or certifications and proof by affidavit that the alleged incapacitated person has been afforded the opportunity to appear personally or by attorney, and that he or she has been given or offered assistance to communicate with friends, relatives or attorneys.

(b) Prior to the hearing, unless good cause shown, but no later than prior to qualification, any proposed guardian must complete guardianship training as promulgated by the Administrative Director of the Courts. Agencies authorized to act pursuant to P.L.1985, c. 298 (C.52:27G-20 *et seq.*), P.L.1985, c. 145 (C.30:6D-23 *et seq.*), P.L.1965, c. 59 (C.30:4-165.1 *et seq.*) and P.L.1970, c. 289 (C.30:4-165.7 *et seq.*) and public officials appointed as limited guardians of the person for medical purposes for individuals in psychiatric facilities listed in R.S. 30:1-7 shall be exempt from this requirement.

(c) The plaintiff or appointed counsel shall produce the alleged incapacitated person at the hearing, unless the plaintiff and the court-appointed attorney certify that the alleged incapacitated person is unable to appear because of physical or mental incapacity.

(d) If the alleged incapacitated person or any person receiving notice of the hearing intends to appear by an attorney, such person shall not later than ten days before the hearing, serve and file an answer, affidavit or motion in response to the complaint.

Note: Source-R.R. 4:102-5; caption and text of former R. 4:83-5 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; caption and text amended July 12, 2002 to be effective September 3, 2002; caption and text amended July 9, 2008 to be effective September 1, 2008; text amended and designated as paragraph (a) and new paragraphs (b), (c), and (d) added August 1, 2016 to be effective September 1, 2016.

4:86-6 Hearing; Judgment

(a) Trial. Unless a trial by jury is demanded by or on behalf of the alleged incapacitated person, or is ordered by the court, the court shall, after taking testimony in open court, determine the issue of incapacity. The court, with the consent of counsel for the alleged incapacitated person, may take the testimony of a person who has filed an affidavit or certification pursuant to R. 4:86-2(b) by telephone or may dispense with oral testimony and rely on the affidavits or certifications submitted. Telephone testimony shall be recorded verbatim.

(b) Motion for New Trial. A motion for a new trial shall be served not later than 30 days after the entry of the judgment.
(c) Appointment of General or Limited Guardian. If a general or limited guardian of the person or of the estate or of both the person and estate is to be appointed, the court shall appoint and letters shall be granted to any of the following:
(1) the incapacitated person's spouse, if the spouse was living with the incapacitated person as husband or wife at the time the incapacity arose;
(2) the incapacitated person's next of kin; or
(3) the Office of the Public Guardian for Elderly Adults within the statutory mandate of that office.
If none of them will accept the appointment, or if the court is satisfied that no appointment from among them will be in the best interests of the incapacitated person or estate, then the court shall appoint and letters shall be granted to such other person who will accept appointment as the court determines is in the best interests of the incapacitated person. Such persons may include registered professional guardians or surrogate decision-makers chosen by the incapacitated person before incapacity by way of a durable power of attorney, health care proxy, or advanced directive.
(d) Judgment.
(1) The judgment of legal incapacity and appointment of guardian shall be in such form and include all such provisions as promulgated by the Administrative Director of the Courts, except to the extent that the court explicitly directs otherwise.
(2) Unless expressly waived therein, the judgment appointing the guardian shall fix the amount of the bond. If there are extraordinary reasons justifying the waiver of a bond, that determination shall be set forth in a decision supported by appropriate factual findings.
(3) A proposed judgment of legal incapacity and appointment of guardian shall be filed with the Surrogate not later than ten days prior to the hearing.
(e) Duties of Guardian.
(1) Not later than 30 days after entry of the judgment of legal incapacity and appointment of guardian, the guardian shall qualify and accept the appointment in accordance with R. 4:96-1. The acceptance of appointment shall include an acknowledgment that the guardian has completed guardianship training as promulgated by the Administrative Director of the Courts in accordance with R. 4:86-5(b).
(2) Unless expressly waived in the judgment, the guardian of the estate shall file with the Surrogate, and serve on all interested parties, within 90 days of appointment an inventory in such form as promulgated by the Administrative Director of the Courts specifying all property and income of the incapacitated person's estate.
(3) Unless expressly waived in the judgment, the guardian of the estate shall file with the Surrogate reports of the financial accounting of the incapacitated person as required by N.J.S.A. 3B:12-42 and in such form as promulgated by the Administrative Director of the Courts. The report shall be filed annually unless otherwise specified in the judgment.
(4) Unless expressly waived in the judgment, the guardian of the person shall file with the Surrogate reports of the well-being of the incapacitated person as required

by N.J.S.A. 3B:12-42 and in such form as promulgated by the Administrative Director of the Courts. The report shall be filed annually unless otherwise specified in the judgment.

(5) The judgment shall also require the guardian to keep the Surrogate reasonably advised of the whereabouts and telephone number of the guardian and of the incapacitated person, and to advise the Surrogate within 30 days of the incapacitated person's death or of any major change in his or her status or health. As to the incapacitated person's death, the guardian shall provide written notification to the Surrogate and shall provide the Surrogate with a copy of the death certificate within seven days of the guardian's receipt of the death certificate.

(6) A guardian shall cooperate fully with any Court or Surrogate staff or volunteers until the guardianship is terminated by the death or return to capacity of the incapacitated person, or the guardian's death, removal or discharge.

(7) The guardian shall monitor the capacity of the incapacitated person over time and take such steps as are necessary to protect the interests of the incapacitated person, including but not limited to initiating an action for return to capacity as provided in N.J.S.A. 3B:12-28.

(f) Duties of Surrogate.

(1) The Surrogate shall provide the entire complete guardianship file to the court for review no later than seven days before the hearing.

(2) At the time of qualification and issuance of letters of guardianship, the Surrogate shall review the acceptance of appointment and letters of guardianship with the guardian in such form as promulgated by the Administrative Director of the Courts.

(3) The Surrogate shall issue letters of guardianship following the guardian's qualification. The Surrogate shall record issuance of all letters of guardianship. Letters of guardianship shall accurately reflect the provisions of the judgment.

(4) The Surrogate shall record receipt of all inventories, reports of financial accounting, and reports of well-being filed pursuant to paragraphs (e)(3) thru (e)(5) above.

(5) The Surrogate shall notify the court, and shall issue notices to the guardian in such form as promulgated by the Administrative Director of the Courts, in the event that:

(A) the guardian fails to qualify and accept the appointment within 30 days after entry of the judgment of legal incapacity and appointment of guardian in accordance with paragraph (e)(1) above; or

(B) the guardian fails to timely file inventories, reports of financial accounting, and/or reports of well-being filed in accordance with paragraphs (e)(3) thru (e)(5) above.

(6) The Surrogate shall immediately notify the court if they are informed through oral or written communication, or become aware by other means, of emergent allegations of substantial harm to the physical or mental health, safety and well-being, and/or the property or business affairs, of an alleged or adjudicated incapacitated person. However, the Surrogate shall have no obligation to review inventories, periodic reports of well-being, informal accountings, or other documents filed by guardians, except for formal accountings subject to audit by the Surrogate.

(7) The Surrogate shall record the death of the incapacitated person.

Note: Source-R.R. 4:102-6(a)(b)(c), 4:103-3 (second sentence). Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (c) of former R. 4:83-6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraph (a) amended, text of paragraph (c) redesignated as paragraphs (c) and (d) and amended, paragraph (c) caption amended, and paragraph (d) caption adopted July 9, 2008 to be effective September 1, 2008; paragraphs (a) and (c) amended, new paragraph (d) added, former paragraph (d) amended and redesignated as paragraph (e), and new paragraph (f) added August 1, 2016 to be effective September 1, 2016; by order dated August 25, 2016, effective date of paragraph (f)(5) extended to March 1, 2017.

4:86-7 Rights of an Incapacitated Person; Proceedings for Review of Guardianship

(a) An individual subject to a general or limited guardianship shall retain:

(1) The right to be treated with dignity and respect;

(2) The right to privacy;

(3) The right to equal treatment under the law;

(4) The right to have personal information kept confidential;

(5) The right to communicate privately with an attorney or other advocate;

(6) The right to petition the court to modify or terminate the guardianship, including the right to meet privately with an attorney or other advocate to assist with this legal procedure, as well as the right to petition for access to funds to cover legal fees and costs; and

(7) The right to request the court to review the guardian's actions, request removal and replacement of the guardian, and/or request that the court restore rights as provided in *N.J.S.A.* 3B:12-28.

(b) An incapacitated person, or an interested person on his or her behalf, may seek a return to full or partial capacity by commencing a separate summary action by verified complaint. The complaint shall be supported by affidavits or certifications as described in Rule 4:86-2(b)(2), and shall set forth facts evidencing that the previously incapacitated person no longer is incapacitated or has returned to partial capacity. The court shall, on notice to the persons who would be set forth in a complaint filed pursuant to Rule 4:86-1, set a date for hearing and take oral testimony in open court with or without a jury. The court may render judgment that the person no longer is fully or partially incapacitated, that his or her guardianship be modified or discharged subject to the duty to account, and that his or her person and estate be restored to his or her control, or may render judgment that the guardianship be modified but not terminated.

(c) An incapacitated person, or an interested person on his or her behalf, may seek review of a guardian's conduct and/or review of a guardianship by filing a motion setting forth the basis for the relief requested.

Note: Source-R.R. 4:102-7; former R. 4:83-7 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; caption and text amended July 12, 2002 to be effective September 3, 2002; caption and text amended July 9, 2008 to be effective September 1, 2008; caption and text of former rule deleted, new caption adopted, new paragraphs (a), (b), and (c) adopted August 1, 2016 to be effective September 1, 2016.

4:86-8 Appointment of Guardian for Nonresident Incapacitated Person

An action for the appointment of a guardian for a nonresident who has been or

shall be found to be an incapacitated person under the laws of the state or jurisdiction in which the incapacitated person resides shall be brought in the Superior Court pursuant to R. 4:67. The plaintiff shall exhibit and file with the court an exemplified copy of the proceedings or other evidence establishing the finding. If the plaintiff is the duly appointed guardian, trustee or committee of the incapacitated person in the state or jurisdiction in which the finding was made, and applies to be appointed guardian in this State, the court may forthwith appoint that person without issuing an order to show cause.

Note: Source-R.R. 4:102-8. Amended July 26, 1984 to be effective September 10, 1984; former R. 4:83-8 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; caption and text amended July 12, 2002 to be effective September 3, 2002; caption and text amended July 9, 2008 to be effective September 1, 2008.

4:86-9 Guardians for Incapacitated Persons Under Uniform Veterans Guardianship Law

(a) Complaint for Appointment. An action for the appointment of a guardian under N.J.S.A. 3B:13-1 *et seq.* for an alleged incapacitated person shall be brought in the Superior Court by any person entitled to priority of appointment. If there is no person so entitled or if the person so entitled fails or refuses to commence the action within 30 days after the mailing of notice by a federal agency to the last known address of such person entitled to priority of appointment, indicating the necessity for the appointment, the action may be brought by any person residing in this State, acting on the alleged incapacitated person's behalf.

(b) Complaint. The complaint shall state (1) the name, age and place of residence of the alleged incapacitated person; (2) the name and place of residence of the nearest relative, if known; (3) the name and address of the person or institution, if any, having custody of the alleged incapacitated person; (4) that such alleged incapacitated person is entitled to receive money payable by or through a federal agency; (5) the amount of money due and the amount of probable future payments; and (6) that the alleged incapacitated person has been rated an incapacitated person on examination by a federal agency in accordance with the laws regulating the same.

(c) Proof of Necessity for Guardian of Incapacitated Person. A certificate by the chief officer, or his or her representative, stating the fact that the alleged incapacitated person has been rated an incapacitated person by a federal agency on examination in accordance with the laws and regulations governing such agency and that appointment is a condition precedent to the payment of money due the alleged incapacitated person by such agency shall be prima facie evidence of the necessity for making an appointment under this rule.

(d) Determination of Incapacity. Incapacity may be determined on the certificates, without other evidence, of two medical officers of the military service, or of a federal agency, certifying that by reason of incapacity the alleged incapacitated person is incapable of managing his or her property, or certifying to such other facts as shall satisfy the court as to such incapacity.

(e) Appointment of Guardian; Bond. Upon proof of notice duly given and a determination of incapacity, the court may appoint a proper person to be the guardian and fix the amount of the bond. The bond shall be in an amount not less than that which will be due or become payable to the incapacitated person in the

ensuing year. The court may from time to time require additional security. Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with R. 4:96-1.

(f) Termination of Guardianship When Incapacitated Person Regains Capacity. If the court has appointed a guardian for the estate of an incapacitated person, it may subsequently, on due notice, declare the incapacitated person to have regained capacity on proof of a finding and determination to that effect by the medical authorities of the military service or federal agency or based on such other facts as shall satisfy the court as to the capacity of the incapacitated person. The court may thereupon discharge the guardian without further proceedings, subject to the settlement of his or her account.

(g) Complaint in Action to Have Guardian Receive Additional Personalty. The complaint in an action to authorize the guardian, pursuant to law, to receive personal property from any source other than the United States Government shall set forth the amount of such property and the name and address of the person or institution having actual custody of the incapacitated person.

(h) Definitions. Definitions contained in N.J.S.A. 3B:13-2 shall apply to the terms of this rule.

Note: Source—R.R. 4:102-9(a) (b) (c) (d) (e) (f) (g) (h), 4:103-3 (second sentence). Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a) through (f) and (h) of former R. 4:83-9 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; caption amended, paragraphs (a) and (b) amended, paragraphs (c) and (d) captions and text amended, paragraph (e) amended, and paragraph (f) caption and text amended July 12, 2002 to be effective September 3, 2002; paragraphs (a), (b), (e), and (g) amended, and paragraphs (c), (d), and (f) caption and text amended August 1, 2016 to be effective September 1, 2016.

4:86-10 Appointment of Guardian for Persons Eligible for and/or Receiving Services from the Division of Developmental Disabilities

An action pursuant to N.J.S.A. 30:4-165.7 *et seq.* for the appointment of a guardian for a person over the age of 18 who is eligible for and/or receiving services from the Division of Developmental Disabilities shall be brought pursuant to these rules insofar as applicable, except that:

(a) The complaint may be brought by the Commissioner of Human Services or a parent, spouse, relative or other party interested in the welfare of such person.

(b) In lieu of the affidavits or certifications prescribed by R. 4:86-2, the verified complaint shall have annexed thereto two documents. One document shall be an affidavit or certification submitted by a practicing physician or a psychologist licensed pursuant to P.L. 1966, c.282 (N.J.S.A. 45:14B-1 *et seq.*) who has made a personal examination of the alleged incapacitated person not more than six months prior to the filing of the verified complaint. The other document shall be one of the following: (1) an affidavit or certification from the chief executive officer, medical director or other officer having administrative control over a Division of Developmental Disabilities program from which the individual is receiving functional or other services; (2) an affidavit or certification from a designee of the Division of Developmental Disabilities having personal knowledge of the functional capacity of the individual who is the subject of the guardianship action; (3) a second affidavit or certification from a practicing physician or psychologist licensed pursuant to P.L. 1966, c.282 (N.J.S.A. 45:14B-1 *et seq.*); (4) a copy of the

Individualized Education Program, including any medical or other reports, for the individual who is subject to the guardianship action, which shall have been prepared no more than two years prior to the filing of the verified complaint; or (5) an affidavit or certification from a licensed care professional having personal knowledge of the functional capacity of the individual who is the subject of the guardianship action. The documents shall set forth with particularity the facts supporting the belief that the alleged incapacitated person suffers from a significant chronic functional impairment to such a degree that the person lacks the cognitive capacity either to make decisions or to communicate, in any way, decisions to others.

(c) If the petition seeks guardianship of the person only, the Division of Mental Health Advocacy, in the Office of the Public Defender, if available, shall be appointed as attorney for the alleged incapacitated person, as required by R. 4:86-4. If the Division of Mental Health Advocacy, in the Office of the Public Defender, is unavailable or if the petition seeks guardianship of the person and the estate, the court shall appoint an attorney to represent the alleged incapacitated person. The attorney for the alleged incapacitated person may where appropriate retain an independent expert to render an opinion respecting the incapacity of the alleged incapacitated person.

(d) The hearing shall be held pursuant to R. 4:86-6 except that a guardian may be summarily appointed if the attorney for the alleged incapacitated person, by affidavit or certification, does not dispute either the need for the guardianship or the fitness of the proposed guardian and if a plenary hearing is not requested either by the alleged incapacitated person or on his or her behalf.

Note: Adopted July 7, 1971 to be effective September 13, 1971; amended July 24, 1978 to be effective September 11, 1978. Former rule deleted and new rule adopted November 5, 1986 to be effective January 1, 1987; caption amended and paragraphs (b), (c) and (d) of former R. 4:83-10 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraphs (b), (c), and (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; paragraph (c) amended July 9, 2008 to be effective September 1, 2008; paragraph (c) amended July 22, 2014 to be effective September 1, 2014; caption amended, introductory paragraph and paragraphs (b), (c) and (d) amended August 1, 2016 to be effective September 1, 2016.

4:86-11 Appointment of Conservator

(a) Commencement of Action; Complaint. An action pursuant to *N.J.S.A.* 3B:13A-1, et seq. for the appointment of a conservator shall be brought by a conservatee or other person on his or her behalf on notice, as provided by *N.J.S.A.* 3B:13A-5 and 6 The complaint shall be filed in the Superior Court and shall state (1) the conservatee's age and residence, (2) the names and addresses of the conservatee's heirs and all other persons entitled to notice pursuant to *N.J.S.A.* 3B:13A-6 and (3) the nature, location and fair market value of all property, real and personal, in accordance with *R.* 4:86-2(a).

(b) Hearing. The court, without a jury, shall take testimony in open court to determine whether the conservatee, by reason of advanced age, illness or physical infirmity, is unable to care for or manage his or her property or has become unable to provide for himself or herself or others dependent upon him or her for support.

The court may appoint counsel for the conservatee if it concludes that counsel is necessary to protect his or her interests. If the conservatee is unable to attend the hearing by reason of physical or other disability, the court shall appoint a guardian ad litem to conduct an investigation to determine whether the conservatee objects to the conservatorship. If counsel for the conservatee has, however, been appointed, such counsel shall conduct the investigation and no separate guardian ad litem shall be appointed. In no case shall a conservator be appointed if the court finds that the conservatee objects thereto.

(c) Acceptance of Appointment. An acceptance of appointment as conservator may be taken before any person authorized by the laws of this State to administer an oath.

(d) Settlement of Conservator's Account. Where the court, for good cause shown, orders a full accounting by the conservator, the account shall be settled in the Superior Court in accordance with R. 4:87, insofar as applicable.

Note: Adopted July 26,1984 to be effective September 10, 1984; paragraphs (a), (b) and (c) of former R. 4:83-11 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:86-12 Special Medical Guardian in General Equity

(a) Standards. On the application of a hospital, nursing home, treating physician, relative or other appropriate person under the circumstances, the court may appoint a special guardian of the person of a patient to act for the patient respecting medical treatment consistent with the court's order, if it finds that:

(1) the patient is incapacitated, unconscious, underage or otherwise unable to consent to medical treatment;

(2) no general or natural guardian is immediately available who will consent to the rendering of medical treatment;

(3) the prompt rendering of medical treatment is necessary in order to deal with a substantial threat to the patient's life or health; and

(4) the patient has not designated a health care representative or executed a health care instruction directive pursuant to the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 to -78, determining the treatment question in issue.

(b) Venue. The application shall be made to the Superior Court judge assigned to general equity in the vicinage in which the patient is physically located when the application is made and, in the event of that judge's unavailability, to the Assignment Judge of the vicinage or the judge designated as the emergent judge, or if neither is available, any judge in the vicinage.

(c) Procedure. The procedure on the application shall conform as nearly as practicable to the requirements of R. 4:86-1 to R. 4:86-6, but the judge may, if the circumstances require, accept an oral complaint and oral testimony either by telephone, in court, or at any other suitable location. If the circumstances do not permit the making of a verbatim record, the judge shall make detailed notes of the allegations of the complaint and the supporting testimony. Whenever possible an attorney shall be appointed to represent the patient.

(d) Order. The order granting the application, if orally rendered, shall be reduced to writing as promptly as possible and shall recite the findings on which it is based.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraphs (a), (b) and (c) of former

R. 4:83-12 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a)(1) amended July 12, 2002 to be effective September 3, 2002; caption and paragraph (a)(1) amended July 9, 2008 to be effective September 1, 2008.

Rule 4:87 Actions for the Settlement of Accounts

4:87-1 Procedure

(a) Actions to settle the accounts of executors, administrators, testamentary trustees, nontestamentary trustees, guardians and assignees for the benefit of creditors shall be brought in the county where such fiduciaries received their appointment. The action shall be commenced by the filing of a complaint in the Superior Court, Chancery Division, and upon issuance of an order to show cause pursuant to *R.* 4:83. A non-testamentary trustee shall annex to the complaint a copy of the written instrument creating the trust and stating its terms. The order to show cause shall state the amount of commissions and attorney's fee, if any, which are applied for.

(b) An action may be commenced by an interested person to compel a fiduciary referred to in paragraph (a) of this rule to settle his or her account, and, in appropriate circumstances, to file an inventory and appraisement.

Note: Source—R.R. 4:105-1, 4:105-2, 4:105-4(a)(b), 5:3-6(a)(b). Former R. 4:86-1, 4:86-2 and 4:86-3 deleted and new R. 4:87-1 adopted June 29,1990 to be effective September 4, 1990.

4:87-2 Complaint

The complaint in an action for the settlement of an account

(a) shall contain the names and addresses of all persons interested in the account, including any surety on the bond of the fiduciary, specifying which of them, if any, are minors or mentally incapacitated persons, the names and addresses of their guardians, or if there is no guardian then the names and addresses of the parents or persons standing in loco parentis to the minors;

(b) shall specify the period of time covered by the account and contain a summary of the account. The summary shall state, all as shown by the account: (1) in the case of a first accounting, the amount for which the accountant was chargeable as of the date the trust or obligation devolved upon him or her, or where an inventory is on file, the amount of the inventory; or in the case of a second or later accounting, the balance remaining in the hands of the accountant as shown in the last previous account; (2) the amount for which the accountant became chargeable in addition thereto; (3) the total of the first two items; (4) the amount of the allowances claimed in the account; and (5) the balance in the accountant's hands. Charges and allowances sought on account of corpus and income shall be stated separately both in the summary and in the account;

(c) shall have annexed thereto the account which shall be dated;

(d) shall ask for the allowance of the account, and also for the allowance of commissions and a fee for the accountant's attorney, if accountant intends to apply therefor; and

(e) shall be filed 20 days prior to the day on which the account is to be settled.

Note: Source—R.R. 4:106-1. Paragraph (e) adopted June 29, 1973 to be effective September 10, 1973; former R. 4:87-1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990;

paragraph (a) amended July 12, 2002 to be effective September 3, 2002.

4:87-3 Form of Account; Statement of Assets to be Annexed to Account

(a) Form of Account. The charges and allowances as to principal and income and the statements required to be annexed to the account may be typed or in the form of computer or machine printouts; and, where appropriate, the accountant may use a single schedule for the presentation of portions of the account, but charges and allowances as to corpus and income shall be stated separately.

(b) Statement to be Annexed to Account. To all accounts shall be annexed:

(1) a full statement or list of the investments and assets composing the balance of the estate in the accountant's hands, setting forth the inventory value or the value when the accountant acquired them and the value as of the day the account is drawn, and also stating with particularity where the investments and assets are deposited or kept and in what name;

(2) a statement of all changes made in the investments and assets since they were acquired or since the day of the last account, together with the date the changes were made;

(3) a statement as to items apportioned between principal and income, showing the apportionments made;

(4) a statement as to apportionments made with respect to transfer inheritance or estate taxes;

(5) a statement of allocation if counsel fees, commissions and other administration expenses have been paid out of corpus, but the benefits of the deductions from corpus have been allocated in part or in whole to income beneficiaries for tax purposes; and

(6) a statement showing how the commissions requested, with respect to corpus, are computed, and in summary form the assets or property, if any, not appearing in the account on which said commissions are in part based.

Note: Source—R.R. 4:106-2. Paragraph (a) adopted and paragraphs (b) (c) (d) (e) and (f) redesignated June 29, 1973 to be effective September 10, 1973; paragraph (b) of former *R.* 4:87-2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:87-4 Service

(a) Process shall be the order to show cause. If the names and addresses of all parties interested in the account are known, the order to show cause together with a copy of the complaint, both certified by plaintiff's attorney to be true copies, shall be mailed by registered or certified mail, return receipt requested, as follows: to all such persons who reside in the State at least 20 days prior to the return date; to all such persons who reside outside this State but within a state of the United States or the District of Columbia, at least 30 days prior to the return date; and to all such persons who reside outside the United States at least 60 days prior to the return date. If any person interested is a minor or mentally incapacitated person and except as otherwise provided by R. 4:26-3 (virtual representation), service shall be made on the person or persons upon whom a summons would have to be served pursuant to R. 4:4-4(a)(2) and (3) unless a guardian ad litem is required under R. 4:26-2. A surety on the fiduciary's bond shall be deemed an interested person. Upon the request of any interested party a copy of the account shall be

furnished by the fiduciary prior to the date of hearing.

(b) If the names or addresses of any persons interested in the account are unknown, notice of the accounting shall be given to the Attorney General at least 45 days prior to the return date, and plaintiff shall file an affidavit of inquiry as to such names or addresses made in accordance with R. 4:4-5(b). The court may then enter such order for service of process as it deems proper including publication of a notice of the proceedings in accordance with R. 4:4-5(a)(3) at least 30 days before the return date.

(c) Proof of mailing, and of publication where ordered, shall be filed before the account is allowed.

Note: Source - R.R. 4:106-3. Former R. 4:87-3 deleted and new R. 4:87-4 adopted June 29, 1990 to be effective September 4, 1990; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 12, 2002 to be effective September 3, 2002; paragraph (b) amended July 23, 2010 to be effective September 1, 2010.

4:87-5 Vouchers

Vouchers in support of allowances claimed in an account shall be made available for inspection by an interested person during business hours at the office in this State of the accountant or of the accountant's attorney. They shall be presented to the court only if requested by the court or by an interested person, or, as to particular allowances, by the Surrogate auditing the account. Vouchers presented to the court or the Surrogate shall be returned to the accountant or the accountant's attorney after the settlement of the account.

Note: Source—R.R. 4:106-4 (first paragraph). Amended July 7, 1971 to be effective September 13, 1971; former rule deleted and new rule adopted June 29, 1973 to be effective September 10, 1973; former *R.* 4:87-4 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:87-6 Audit and Report on Accounts

The Surrogate as deputy clerk of the court shall audit the accounts of all fiduciaries unless otherwise ordered by the court pursuant to *R.* 4:53-7(b), shall place the same on file at least 20 days prior to its presentation to the court, and shall make a report to the court upon the audit not later than the day on which the account is settled. The report shall specify the derelictions, if any, and other matters that in the Surrogate's opinion should be brought to the court's attention.

Note: Source—R.R. 4:106-5; amended July 15,1982 to be effective September 13, 1982; former *R.* 4:875 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:87-7 Report of Guardian Ad Litem

A guardian ad litem for a minor or mentally incapacitated person shall file a written report with the court at least seven days prior to the day on which the account is settled. If the guardian applies for the allowance of a fee in excess of $1,000, the report shall include, or be accompanied by, an affidavit of services. Notice of all applications for allowances shall be given as provided by R. 4:26-2(c).

Note: Source—R.R. 4:106-5A; former R. 4:87-6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002.

4:87-8 Exceptions

In all actions for the settlement of accounts, other than plenary actions, any interested person may, at least five days before the return of the order to show cause or within such time as the court allows, serve the accountant with written exceptions, signed by that person or his or her attorney, to any item in or omission from the account, including any exceptions to the commissions or attorney's fees requested. The exceptions shall state particularly the item or omission excepted to, the modification sought in the account and the reasons for the modification. An exception may be stricken because of its insufficiency in law.

Note: Source—R.R. 4:106-6. Amended July 22, 1983 to be effective September 12, 1983; former R. 4:877 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:87-9 Dispensing with Accounting by Agreement

If all parties interested in any separable part of an account, such as income, are of full age and competent, and so agree in writing, there need be no accounting as to the same.

Note: Source—R.R. 4:1064 (second paragraph); former *R.* 4:86-4 redesignated June 29, 1990 to be effective September 4, 1990.

Rule 4:88Commissions and Attorney's Fees

4:88-1 Affidavit of Accountant's Services

If the allowance of such commissions is within the discretion of the court, the applicant therefor shall, upon every application for commissions on corpus, at least 20 days prior to the day on which the account is settled, file an affidavit stating in detail the nature of the services rendered in administering the estate and specifying the amount of the commissions requested.

Note: Source—R.R. 4:107-1; amended June 29, 1990 to be effective September 4, 1990; amended July 10, 1998 to be effective September 1, 1998.

4:88-2 Commission Payments Before Settlement

Whether or not annual commissions are taken pursuant to *N.J.S.A.* 3B:18-17, a fiduciary may apply to the court to which he or she is accountable for an ex parte order supported by appropriate affidavits for payment to the fiduciary on account of commissions on corpus for services to date. Such order shall not be binding on the beneficiaries, and the payment so ordered shall be subject to approval and allowance or to disallowance by the court upon the settlement of the fiduciary's account.

Note: Amended June 29, 1973 to be effective September 10, 1973; amended July 22, 1983 to be effective September 12, 1983; amended June 29, 1990 to be effective September 4, 1990.

4:88-3 Notice as to Apportionment of Commissions

The court shall not apportion commissions among co-fiduciaries unless proof is made that five days' notice of the application for apportionment has been given to those of them who do not appear.

Note: Source—R.R. 4:107-2.

4:88-4 Affidavit of Attorney's Services

On every application for attorney's fees, the attorney shall file with the court at

least 20 days prior to the day on which the account is settled an affidavit stating, in addition to the information required by *R.* 4:42-9(b), whether any part of the requested fee is to be paid to or shared with an attorney or firm of attorneys of another state or jurisdiction and if so, the amount to be paid or the manner in which the fee is to be shared shall be set forth and shall be supported by an accompanying affidavit of the foreign attorney or attorneys stating in detail the nature of the services rendered. The allowance shall be payable to the New Jersey attorney, and shall state what part, if any, of said allowance is to be paid to or shared with the foreign attorney or attorneys.
Note: Source—R.R. 4:107-3; amended June 29, 1990 to be effective September 4, 1990.

Rule 4:89 Distribution

4:89-1 Where an Account is about to be Settled

If an account is to be settled, the plaintiff in the complaint may apply to the court for directions as to the distribution of the estate. If such an application is made, notice thereof shall be given either in the order to show cause for the settlement of the account or as the court orders.
Note: Source—R.R. 4:108-1; amended June 29, 1990 to be effective September 4, 1990.

4:89-2 Complaint

In actions for distribution the complaint shall state: (a) when letters, if any, were granted to a fiduciary; (b) the names and addresses of all persons interested, specifying which of them are minors or mentally incapacitated persons; and in actions for the distribution of an intestate's estate, the manner and degree in which the next of kin severally stand related to the intestate; (c) the balance in the fiduciary's hands for distribution, so far as the same may be known; and (d) shall have annexed to the complaint a copy of the will or other instrument, if any, pursuant to which distribution is to be made.
Note: Source—R.R. 4:108-2; amended June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002.

4:89-3 Inquiry for Unknown Distributees

If in an action for the distribution of personal property of a decedent who died intestate, proceedings are taken under N.J.S.A. 3B:23-19 to bar persons whose names or addresses are unknown from all right, title or claim to the estate, the court shall require an inquiry and affidavit to be made pursuant to R. 4:4-5(a)(3). Plaintiff's attorney shall also give notice of the proceedings to the Attorney General within 45 days of the date they are scheduled to commence and shall file an appropriate proof of said notice.
Note: Source - R.R. 4:108-3. Amended July 22, 1983 to be effective September 12, 1983; amended June 29, 1990 to be effective September 4, 1990; amended July 5, 2000 to be effective September 5, 2000; amended July 23, 2010 to be effective September 1, 2010.

Rule 4:90 Sale of Property Subject to Escheat to Pay Debts

4:90-1 Complaint by Personal Representative for Sale

The complaint in an action by a personal representative to sell real or personal property of an estate subject to escheat in order to pay debts shall state the description of all the real and personal estate whereof the decedent died seized, its location, its character, condition and value, as near as may be, and a true account of all of the debts as can be discovered.

Note: Source—R.R. 4:109-1, 4:109-8; caption and text amended June 29, 1990 to be effective September 4, 1990.

4:90-2 Complaint by Creditor for Sale

The complaint of a creditor in an action to sell real or personal property of an estate subject to escheat to pay debts, shall state that:

(a) the creditor has reduced the claim against the executor or administrator to judgment;

(b) the judgment remains partly or wholly unsatisfied for want of assets;

(c) there is property, specifying its description, location, character, condition and value, as near as may be; and

(d) the executor or administrator, notwithstanding that demand has been made upon him or her more than one month previously, has failed to commence an action for the sale of estate property.

Note: Source—R.R. 4:109-2, 4:109-8; caption and text amended June 29,1990 to be effective September 4, 1990.

4:90-3 Order to Show Cause

Upon filing of the complaint, and if the complaint is made by a creditor upon notice to the executor or administrator, the court may make an order requiring all persons interested in the decedent's real or personal estate, including the State Treasurer and the Attorney General, to show cause on a specified date not less than two months after the date of the order why so much of the real or personal estate should not be sold as will be sufficient to pay the decedent's debts or the residue thereof. A copy of the order to show cause together with a copy of the complaint shall be sent by registered or certified mail to the State Treasurer and the Attorney General and no further proceedings shall be taken unless a certificate, signed by the Attorney General and the State Treasurer certifying that the State will interpose no objection to the making of an Order authorizing the sale of such property, has been received by the Court. The order to show cause shall, one month prior to the date fixed in the order for the hearing, be published once in a newspaper of this State, as the court directs.

Note: Source—R.R. 4:1094, 4:109-8. Amended July 7, 1971 to be effective September 13, 1971; amended June 29, 1990 to be effective September 4, 1990.

4:90-4 Objections to Claim

An objection to any claim set forth in the complaint may be made in writing by the executor or administrator, any person interested in the real or personal estate, the State Treasurer, the Attorney General or any other person in interest. The claimant shall be given ten days' notice, in such manner as the court directs, that the objection will be brought on for hearing on the return day of the order to show cause.

Note: Source—R.R. 4:109-5, 4:109-8. Amended June 29. 1990 to be effective September 4, 1990.

4:90-5 Judgment for Sale

If only part of the real or personal estate of which the decedent died seized is to be sold, the judgment for sale shall specify the part to be sold.

Note: Source—R.R. 4:109-6, 4:109-7, 4:109-8. Amended July 22, 1983 to be effective September 12, 1983; caption and text amended June 29,1990 to be effective September 4,1990.

4:90-6 Notice of Application for Prosecution of Bonds of Heirs and Devisees

Upon the filing of a complaint to sell property subject to escheat to pay debts of an estate wherein heirs or devisees of the decedent have previously given bond to the executor or administrator, the court may provide in the order to show cause not only for the sale of the property but also for prosecution on the bonds. In such case the order to show cause shall provide for notice to be given to such heirs or devisees if they are still living and to their sureties or, if dead, to their personal representatives. Notice may be given to them by ordinary mail whether they reside within or outside this State.

Note: Source—R.R. 4:109-8, 4:109-9; former *R.* 4:90-7 amended and redesignated June 29, 1990 to be effective September 4, 1990.

Rule 4:91 Insolvent Estates

4:91-1 Proceedings When Estate is Insolvent

(a) Complaint; Order to Show Cause. At any time after nine months following the date of decedent's death, the executor or administrator may commence an action in the Chancery Division, Probate Part, by a complaint stating that to the best of the executor or administrator's knowledge and belief, the real and personal estate of the decedent is insufficient to pay debts. The action shall proceed by order to show cause, which shall require the executor or administrator to give notice of the proceedings to the persons specified by R. 4:91-2 and shall set the date by which answers to the complaint or exceptions pursuant to R. 4:91-3 must be filed.

(b) Report of Claims; Account. The executor or administrator shall file with the complaint a list of creditors who have presented claims within nine months following the date of decedent's death, or which the executor or administrator intends to allow without requiring the submission of a formal claim, stating the amount of each claim, whether it has been allowed or rejected, whether it is entitled to a statutory priority, and whether the claim is based on judgment, bond, note, book account, or otherwise. The executor or administrator shall also file with the complaint an account in the form required by R. 4:87-3.

(c) Judgment. The court may, on the presentation of the report of claims and the presentation of the account, adjudge the estate to be insolvent and determine the amount of each claim and its priority for payment.

Note: Source—R.R. 4:110-1, 4:110-2(a) (b). Paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a) and (b) amended June 29, 1990 to be effective September 4, 1990; caption amended, paragraphs (a) and (b) caption and text amended, and paragraph (c) amended July 27, 2006 to be effective September 1, 2006.

4:91-2 Service on Creditors and Other Interested Persons of Insolvent Estate

Service of the complaint together with the report of claims and account and order to show cause on creditors who have presented claims within nine months of the decedent's death and other interested persons shall be made in accordance with R. 4:87-4.

Note: Source—RR. 4:110-3 (first, second and third sentences); amended June 29, 1990 to be effective September 4, 1990; caption and text amended July 27, 2006 to be effective September 1, 2006.

4:91-3 Exceptions to Account, Inventory and Claims; Determination

A creditor or other interested person may take exceptions to the account of the executor or administrator in respect of the personal estate and the inventory of the real estate. The executor or administrator, or any other interested person, may take exceptions to any creditor's claim or part thereof. Such exceptions shall be served on or before the hearing in the action or within such time as the court on application allows. Any account and inventory not excepted to shall be allowed as true, and a claim not excepted to shall be deemed justly due. The court shall hear proofs on the exceptions and shall make such determination and final judgment with respect thereto as is just and lawful.

Note: Source—R.R. 4:110-4; amended June 29, 1990 to be effective September 4, 1990.

4:91-4 Excepted Claims; Plenary Action; Recovery

If a creditor to whose claim exception is made elects to proceed in a plenary civil action in preference to a determination by the court on the exception, he or she shall so proceed immediately. If an executor or administrator desires to have a claim determined in a plenary action, he or she shall, before filing the report, so notify the creditor who shall thereupon proceed to sue immediately. Such sum as the creditor recovers in such plenary action shall be the amount upon which a ratable portion shall be paid. The court in which the action is brought shall dispose thereof as quickly as possible.

Note: Source—R.R. 4:110-5; amended June 29, 1990 to be effective September 4, 1990.

4:91-5 Actions Pending May Proceed to Judgment

If an action by a creditor or other interested party is pending against the executor or administrator on the date of the filing of the complaint to adjudge the estate insolvent, the action may proceed to final judgment, but no execution shall issue until final judgment is entered in the insolvency proceeding. If the estate is adjudicated insolvent, the judgment creditor shall be entitled to receive the ratable portion determined by such final judgment.

Note: Source—R.R. 4:110-6; amended June 29,1990 to be effective September 4, 1990; amended July 27, 2006 to be effective September 1, 2006.

Rule 4:92. Proceedings to Apply toward Decedent's Debts Moneys Received o Foreclosure ad Partition Sales

4:92-1 Motion

A notice of motion supported by affidavit of an executor or administrator made for leave to apply to the payment of the decedent's debts the surplus moneys on a foreclosure sale or the moneys received on the sale of real estate sold in an action for partition shall be captioned in the action in which the moneys arose. The

motion and supporting affidavit shall state:
(a) the date of the decedent's death;
(b) the date of the sale under which the moneys were or will be received;
(c) whether any of the heirs or devisees have alienated or encumbered their estate in the lands sold, in whole or in part, or their interest in the proceeds of the sale thereof; and when, and what part and to whom; and
(d) whether any spouse has a right or estate of dower or curtesy in the moneys, or any part thereof.
Note: Source—R.R. 4:104-1; caption and text of former R. 4:85-1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:92-2 Statement of Assets and Liabilities

Except as other vise provided by *R.* 4:26-3 (virtual representation), the notice of motion shall be directed to all persons who may be entitled to the money, or any part thereof, if the money is not required for the payment of debts. With the motion and supporting affidavit there shall be served an account of the personal estate that has come into the hands or the knowledge of the personal representative; the debts, expenses and other items paid or for which allowance is claimed; the amount on hand; the debts claimed to be due from the decedent; and the debts disputed.
Note: Source—R.R. 4:104-2; caption and text of former R. 4:85-2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:92-3 Bond

No money shall be paid over pursuant to the order of the court until the party instituting the action shall have filed a bond as prescribed by the court.
Note: Source—R.R. 4:104-3; former R. 4:85-3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

Rule 4:93 Declaration Of Death

4:93-1 Complaint

An action under *N.J.S.A.* 3B:27-6 to declare dead an absentee, whether a resident or nonresident of this State, may be brought by a spouse, any next of kin, creditor, executor, administrator, beneficiary under an insurance policy on the absentee's life, or any other person interested in the estate. The complaint shall specify the facts as to the plaintiff's interest.
Note: Source—R.R. 4:111-1. Amended July 22, 1983 to be effective September 12, 1983; former R. 4:92-1 redesignated June 29, 1990 to be effective September 4, 1990.

4:93-2 Declaration of Death

The action may be brought in a summary manner in accordance with *R.* 4:83 on an order to show cause returnable not less than 30 days nor more than three months from the date of the order why judgment should not be entered declaring such person to be dead. Notice of the order shall be published once in a newspaper of general circulation in the county where the absentee was last domiciled and shall be served by mail or otherwise as the court directs.
Note: Source—R.R. 4:111-2. Amended July 7, 1971 to be effective September 13, 1971; former R. 4:92-

2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:93-3 Parties Defendant

The order to show cause shall be directed to all persons in interest, including (a) the persons who would have an interest, as executor or beneficiary under a will of the absentee, or as heir, next of kin or spouse of the absentee or otherwise, in any real or personal property by reason of the death of the absentee, testate or intestate; (b) the carrier and beneficiaries of any insurance known to the plaintiff which is payable on the death of the absentee; (c) those persons entitled, in a fiduciary or beneficial capacity, to any interest known to the plaintiff, which interest expires or is contingent upon the death of the absentee; and (d) such other persons as the court directs.

Note: Source—R.R. 4:111-3; former R. 4:92-3 redesignated June 29, 1990 to be effective September 4, 1990.

4:93-4 Hearing

Whether or not an answer or an answering affidavit is filed, the court shall hear the matter on oral testimony and shall not enter judgment declaring the absentee dead unless it is satisfied that the plaintiff has made reasonable effort to ascertain the facts necessary to maintain the action.

Note: Source—R.R. 4:111-4; former R. 4:92-4 redesignated June 29, 1990 to be effective September 4, 1990.

4:93-5 Letters Issued

After entry of the judgment, an application may be brought for the issuance of letters of administration upon the estate of the absentee as in the case of a deceased person, or for the probate of his will, or for the appointment of a testamentary guardian.

Note: Source—R.R 4:111-5; former R. 4:92-5 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

Rule 4:94. Sale or Mortgage of Minor's and Mentally Incapacitated Person's Lands

4:94-1 Action for Sale

A general guardian of the person or property of a minor or mentally incapacitated person or, if the general guardian shall fail to act or have an adverse interest or other good cause exists, a guardian ad litem appointed by the court after notice to the general guardian, or any person having a vested interest in lands in which a minor, mentally incapacitated person, or person not in being has an interest, may bring an action in the Superior Court for the sale or other disposition of the property of the minor, mentally incapacitated person or person not in being. Nothing in these rules shall be deemed to authorize the sale or other disposition of any property contrary to the provisions of any will or conveyance by which the same were bequeathed, devised or granted to or for the benefit of the minor or mentally incapacitated person.

Note: Source—R.R. 4:84-1 (first sentence), 4:84-2 (fifth sentence). Amended July 7,1971 to be effective September 13, 1971; amended July 22,1983 to be effective September 12, 1983; former R. 4:66-1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; R. 4:94 caption amended, and text of 4:94-1 amended July 12, 2002 to be effective September 3, 2002.

4:94-2 Complaint; Supporting Affidavits; Notice

The complaint shall state the age and residence of the ward, a description of the property proposed to be sold or otherwise disposed of, a statement of the encumbrances, if any, thereon, and the reasons why the sale or other disposition would be in the ward's best interests. The complaint shall be verified by affidavit made pursuant to R. 1:6-6 and have annexed thereto affidavits of at least two persons, stating the situation, assessed value, if any, and fair market value of the property proposed to be sold or otherwise disposed of, and if real estate, of each separate lot or parcel. If the property is real estate located in New Jersey, the affidavits shall be made by a certified real estate appraiser or licensed real estate appraiser as defined by N.J.S.A. 45:14f-5 and -6, respectively, and required by N.J.S.A. 45:14f-21(c). If the real estate is located outside this state, the affidavits shall be made by a real estate appraiser certified or licensed by the jurisdiction in which the property is located if that jurisdiction has a certification or licensing requirement. If the minor or mentally incapacitated person owns a fractional portion of real estate having a value not in excess of $10,000 as shown by one affidavit, the court may dispense with the requirement of a second affidavit as to value. Unless the court otherwise orders, no notice of the action need be given to the ward.

Note: Source—R.R. 4:84-1 (second and third sentences); former R. 4:66-2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002; amended July 28, 2004 to be effective September 1, 2004.

4:94-3 Order to Sell

Upon presentation of the complaint and affidavit to the court, it may in its discretion require proof by way of oral testimony or additional affidavits in support of the statements therein. If from the complaint, affidavits and oral proofs, if any, the court is satisfied that the best interests of the ward would thereby be substantially promoted and the rights of other persons interested in the property would not be harmed, it may order the guardian or guardian ad litem to sell or otherwise dispose of the property, or such part thereof, as it deems proper. The order may fix the terms and conditions of the sale or other disposition, and may establish a price below which the property shall not be sold.

Note: Source—R.R. 4:84-2 (first, second, third sentences). Amended July 7, 1971 to be effective September 13, 1971; amended July 14, 1972 to be effective September 5, 1972; amended July 22, 1983 to be effective September 12, 1983; former R. 4:66-3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:94-4 Bond

If sale or other disposition is made by a guardian ad litem, the proceeds thereof shall not be paid to him or her, but to the guardian who has filed a bond in an adequate amount. The court on directing the sale or other disposition of property shall examine the sufficiency of the bond previously given by the general guardian or the special guardian for real or personal property within this State of the nonresident minor or mentally incapacitated person, and if in the court's judgment the same is insufficient, or if no bond has been previously given, the court shall require the guardian or

special guardian to give an additional bond approved by it before the confirmation of the sale, or as it directs. If the guardian or special guardian was appointed by a court other than the Superior Court of New Jersey, then before the confirmation there shall be presented a certificate of such appointing court, certifying that a good and sufficient bond, of a stated amount, has been filed with it. **Note:** Source—R.R. 4:84-2 (fourth sentence), 4:84-3; former *R.* 4:66-4 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002.

4:94-5 Confirmation of Sale; Conveyance

The report, notice and order for the confirmation of a sale or other disposition of property shall be in accordance with *R.* 4:65-6 dealing with real estate, except that the order to sell may dispense with a confirmation of the sale in case of a private sale. If the report is filed within six months after the hearing or application under R. 4:94-3, it need not have annexed to it affidavits as to the value of the property sold. The conveyance to be made pursuant to the order confirming sale, when duly executed and delivered, shall vest in the purchaser as good an estate in the property as the minor or mentally incapacitated person could have conveyed if at the time of the conveyance such person were of full age and sound mind.

Note: Source—R.R. 4:84-4; former R 4:66-5 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002.

4:94-6. Mortgage of Lands

Actions in the Superior Court under any statute providing for the borrowing of money on the security of, or the exchange of, any real estate of a minor, mentally incapacitated person or other person, shall be commenced by filing a verified complaint of the guardian or other person authorized to proceed under the statute, and shall conform with the provisions of *R.* 4:94 insofar as they are applicable. If the action is to mortgage land, the court shall also ascertain the manner in which it is proposed to meet the interest to accrue upon the mortgage. If it appears that the best interests of the minor, mentally incapacitated person or other person would be promoted by selling the real estate rather than by mortgaging it, the court in its discretion may direct the guardian or other designated person to take such proceedings to sell the whole or any part of the same.

Note: Source—R.R. 4:84-5; amended July 26, 1984 to be effective September 10, 1984; former R. 4:66-6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002.

4:94-7 Costs and Expenses of Proceedings

The costs and expenses of proceedings under *R.* 4:94 shall be taxed and paid out of the proceeds of the sale or mortgage.

Note: Source—R.R. 4:84-6; former R. 4:66-7 amended and redesignated June 29, 1990 to be effective September 4, 1990.

Rule 4:95 Miscellaneous Actions

4:95-1 Order to Compel Production of Purported Will

A summary action pursuant to *R.* 4:83 for the discovery or production of any

paper purporting to be the will of any decedent, which has not been offered for probate, may be instituted by any person in interest by filing a complaint alleging a belief that any person has the paper in his or her possession or has knowledge of its existence or whereabouts. Upon the return of the order to show cause, the court may order such person to appear before it and make discovery as to his or her possession or knowledge of the same, by the examination of such person and other witnesses, and may order any such person possessing any such paper to lodge the same with the court for probate. If the will is produced on or prior to the return date of the order to show cause and no objection is received, the Surrogate may enter an order that it be lodged for probate and thereafter proceed with probate of the will unless a caveat thereto has been filed or doubt arises from the face of the will. If the will is not produced prior to or on the return date, the court may enter such order and take such further proceedings as deemed appropriate.

Note: Source—R.R. 4:114-2.. Amended July 26, 1984 to be effective September 10, 1984; former R. 4:96-2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended June 28, 1996 to be effective September 1, 1996.

4:95-2 Summary Action by Fiduciary for Instructions

A summary action pursuant to R. 4:83 may be brought by executors, administrators, guardians or trustees for instructions as to the exercise of any of their statutory powers as well as for advice and directions in making distributions from the estate.

Note: Source—R.R. 4:114-3. Caption and text amended July 22, 1983 to be effective September 12, 1983; caption and text of former R. 4:96-3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:95-3 Approval of Compromise

The complaint of the fiduciary in an action for the approval of a compromise of a claim shall state the nature of the claim and the circumstances justifying the compromise, and shall have annexed to it a copy of the writing setting forth the terms and conditions of the compromise. If, pending the action, the fiduciary applies to the court for approval either of a modification of the compromise, or of another compromise, agreed upon in writing, the court shall, if satisfied that it is in the interests of all persons interested, approve it, provided due notice of the application has been given to such persons.

Note: Source—R.R. 4:114-4; former R. 4:96-4 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:95-4 Certificate as to Further Security; Death Act, etc.

When a payment is to be made to an administrator for damages due under *N.J.S.A.* 2A:31-1 to 6, inclusive (death by wrongful act) or for damages sustained by the decedent prior to death, the administrator shall, prior to receiving payment, furnish to the person liable a certificate of the Surrogate setting forth the amount of the payment and certifying that the administrator has furnished adequate security in accordance with the statute.

Note: Source—R.R. 4:114-5; former R. 4:96-5 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

Rule 4:96 Miscellaneous

4:96-1 Qualifications; Acceptances

Qualifications of executors and administrators and acceptances of trusteeship and guardianship may be taken outside this State under oath by any person before whom depositions may be taken under *R.* 4:12-2 and *R.* 4:12-3, and when the qualification of an executor or an administrator with the will annexed is taken outside this State, the will need not be annexed to the qualification. Such qualifications and acceptances may be taken within this State before any person authorized by the laws of this State to administer oaths.

Note: Source—RR. 4:115-2; former R. 4:97-2 redesignated June 29, 1990 to be effective September 4, 1990.

4:96-2 Renunciations

A renunciation by any person named as a fiduciary in any will or other instrument or entitled to letters testamentary, of administration, guardianship or trusteeship, shall be acknowledged before an officer qualified to take acknowledgments of deeds, and shall be recorded by the Surrogate as the deputy clerk of the court.

Note: Source—R.R. 4:115-3; former R. 4:97-3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:96-3 Money Judgments in the Chancery Division, Probate Part

When a money judgment is rendered by the Superior Court, Chancery Division, Probate Part, the proponent of the judgment may transmit the original, together with the fee prescribed by *N.J.S.A.* 22A:2-7, to the Clerk of the Superior Court for entry in the Civil Judgment and Order Docket pursuant to *R.* 4:101.

Note: Adopted July 11, 1979 to be effective September 10, 1979; caption and text of former R. 4:99-4 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended June 28, 1996 to be effective September 1, 1996.

4:96-4 Notice to Surety

In any proceedings brought to review the conduct or performance of the duties of a bonded fiduciary, the party bringing the action shall give the surety notice of said motion or proceedings as in the case of an interested party.

Note: Adopted July 22, 1983 to be effective September 12, 1983; former R. 4:99-5 amended and rule redesignated June 29, 1990 to be effective September 4, 1990.

4:96-5 Bond from Corporate Fiduciary

No corporation appointed as fiduciary shall be required to give bond without surety or otherwise, except as provided by law.

Note: Source—R.R. 4:103-2; former R. 4:84-2 redesignated June 29, 1990 to be effective September 4, 1990.

N.J.S.A.:

3B:3-17 Probate of will and grant of letters

The surrogates of the several counties or the Superior Court may take depositions to wills, admit the same to probate, and grant thereon letters testamentary or letters of administration with the will annexed.

L.1981, c. 405. § 3B:3-17, eff. May 1, 1982. Amended by L.2004, c. 132 § 19, eff. Feb. 27, 2005.

3B:3-24 Where a will of a resident is to be probated; effect of failure to probate

The will of any individual resident within any county of this State at his death may be admitted to probate in the surrogate's court of the county or in the Superior Court. If the will of any individual resident within the state at his death is probated outside the State, it shall be without effect unless or until probate is granted within the State.

L.1981, c. 405 § 3B:3-24, eff. May 1, 1982. Amended by L.2004, c. 132, § 22 eff. Feb. 27, 2005.

3B:12-25 Appointment of guardian

The Superior Court may determine the incapacity of an alleged incapacitated person and appoint a guardian for the person, guardian for the estate or guardian for the person and estate. Letters of guardianship shall be granted to the spouse or domestic partner as defined in section 3 of P.L.2003, c. 246 (C.26:8A-3), if the spouse is living with the incapacitated person as man and wife or as a domestic partner as defined in section 3 of P.L.2003, c. 246 (C.26:8A-3) at the time the incapacitation arose, or to the incapacitated person's heirs, or friends, or thereafter first consideration shall be given to the Office of the Public Guardian for Elderly Adults in the case of adults within the statutory mandate of the office, or if none of them will accept the letters or it is proven to the court that no appointment from among them will be to the best interest of the incapacitated person or the estate, then to any other proper person as will accept the same, and if applicable, in accordance with the professional guardianship requirements of P.L.2005, c. 370 (C.52:27G-32 et al.). Consideration may be given to surrogate decision-makers, if any, chosen by the incapacitated person before the person became incapacitated by way of a durable power of attorney pursuant to section 4 of P.L.2000, c. 109 (C.46:2B-8.4), health care proxy or advance directive. The Office of the Public Guardian for Elderly Adults shall have the authority to not accept guardianship in cases determined by the public guardian to be inappropriate or in conflict with the office.

L.1981, c. 405 § 3B:12-25, eff. May 1, 1982. Amended by L.2005, c.304, § 13, eff. Jan. 11, 2006; L.2005, c. 370, § 13, eff. July 11, 2006.

3B:12-28 Return to competency; restoration of estate

The Superior Court may, on summary action filed by the person adjudicated incapacitated or the guardian, adjudicate that the incapacitated person has returned to full or partial competency and restore to that person his civil rights and estate as it exists at the time of the return to competency if the court is satisfied that the person has recovered his sound reason and is fit to govern himself and manage his affairs, or, in the case of an incapacitated person determined to be incapacitated by reason of chronic alcoholism, that the person has reformed and become habitually sober and has continued so for one year next preceding the commencement of the action, and in the case of an incapacitated person determined to be incapacitated by reason of chronic use of drugs that the person has reformed and has not been a chronic user of drugs for one year next preceding the commencement of the action.

L.1981, c. 405, § 3B:12-28, eff. May 1, 1982. Amended by L.2005, c. 304, § 16, eff. Jan. 11, 2006.

3B:18-13 Income commissions

Commissions in the amount of 6% may be taken without court allowance on all income received by the fiduciary. For the purposes of this section, income which is withheld from payment to a fiduciary or fiduciaries pursuant to any law of this State, or of the United States, or any other state, country or sovereignty, or of any political subdivision or governmental unit of any of the foregoing, requiring the withholding for income tax or other tax purposes, shall be deemed to be income received by the fiduciary, and shall be subject to income commissions as if actually received by the fiduciary.

L.1981, c. 405, § 3B:12-28, eff. May 1, 1982. Amended by L.2005, c. 304, § 16, eff. Jan. 11, 2006.

3B:18-14 Corpus commissions

Commissions on all corpus received by the fiduciary may be taken as follows:

5% on the first $200,000 of all corpus received by the fiduciary;

3.5% on the excess over $200,000 up to $1,000,000;

2% on the excess over $1,000,000; and

1% of all corpus for each additional fiduciary provided that no one fiduciary shall be entitled to any greater commission than that which would be allowed if there were but one fiduciary involved.

Such commissions may be reduced by the court having jurisdiction over the estate only upon application by a beneficiary adversely affected upon an affirmative showing that the services rendered were materially deficient or that the actual pains, trouble and risk of the fiduciary in settling the estate were substantially less than generally required for estates of comparable size.

L.1981, c. 405 § 3B:18-14 eff. May 1, 1982. Amended by L.1983, c. 394, § 1, eff. Dec. 14, 1983; L.2000, c. 29, § 1, eff. June 16, 2000.

3B:18-17 Taking annual amounts on account of corpus commissions

Fiduciaries may annually, without court allowance, take sums as follows on account of corpus commissions: if there is but one fiduciary, the amount so taken may equal one-fifth of 1% of the value of the corpus and, if there are two or more fiduciaries, the amount so taken may equal the commissions which may be taken pursuant to this section when there is but one fiduciary, plus one-fifth of the commissions for each fiduciary more than one.

L.1981, c. 405, § 3B:18-17, eff. May 1, 1982.

3B:18-20 Corpus commissions taken annually subject to review.

Commissions taken as provided in N.J.S. 3B:18-17 shall be subject to review on intermediate and final accountings, and to the extent that aggregate commissions so taken exceed the commissions allowable under N.J.S. 3B:18-14 and N.J.S. 313:18-15, they may be disallowed.

L.1981, c. 405, § 3B:18-20, eff. May 1, 1982.

3B:18-24 Income commissions

Commissions in the amount of 6% may be taken without court allowance on all income received by the fiduciary. For the purposes of this section, income which is withheld from payment to the fiduciary pursuant to any law of this State, or of

the United States, or any other state, country or sovereignty or of any political subdivision or governmental unit of any of the foregoing, for income tax or other tax purposes, shall be deemed to be income received by the fiduciary, and shall be subject to income commissions as if actually received by the fiduciary.
L.1981, c. 405, § 3B:18-24, eff. May 1, 1982.

3B:18-25 Taking annual amounts on account of corpus commissions.

a. Fiduciaries may annually, without court allowance, take commissions on corpus (including accumulated income which has been invested by the fiduciary) in the amount of $5.00 per thousand dollars of corpus value on the first $400,000.00 of value of corpus and $3.00 per thousand dollars of the corpus value in excess of $400,000.00.

b. Notwithstanding the provisions of subsection a. of this section, if the fiduciary is a banking institution, foreign bank or savings and loan association authorized to exercise fiduciary powers, the fiduciary shall be entitled to such commissions as may be reasonable.

c. Notwithstanding the provisions of subsection a. of this section, a fiduciary may take a minimum commission of $100.00 annually.

d. The value of the corpus for the purpose of this section shall be the "presumptive value" as defined in N.J.S. 3B:18-18 or, at the option of the fiduciary, the value at the end of the period.

e. Upon application of a person interested in the trust or guardianship, a court may review the reasonableness of the commissions of the fiduciary, provided, however, the fiduciary shall be entitled to receive at least the compensation provided for all fiduciaries as set forth in subsections a. and c. of this section.
L.1981, c. 405, § 3B:18-25, eff. May 1, 1982. Amended by L.1988, c. 165, § 1, eff. Nov. 29, 1988; L.1999, c. 159, § 11.

3B:18-27 Commissions taken annually subject to review

Commissions taken as provided in N.J.S. 3B:18-25 shall be subject to review on intermediate and final accountings, and to the extent that aggregate commissions so taken exceed the commissions allowable under this article, they may be disallowed.
L.1981, c. 405, § 3B:18-27, eff. May 1, 1982.

3B:18-28 Corpus commissions on termination of trust, guardianship or upon distribution of assets

In addition to the annual commissions on corpus, upon termination of the trust or guardianship, or upon distribution of assets from the trust or guardianship, the fiduciary may take a commission on corpus distributed, including accumulated income which has been invested by the fiduciary. The value of the corpus for the purpose of computing the commissions shall be the "presumptive value" or, at the option of the fiduciary, the value at the time of distribution, as defined in N.J.S. 3B:18-18. The amount of the commissions to be taken are as follows:

a. If the distribution of corpus occurs within 5 years of the date when the corpus is received by the fiduciary, an amount equal to the annual commissions on corpus authorized pursuant to NJ.S. 3B:18-25, but not actually taken by the

fiduciary, plus an amount equal to 2% of the value of the corpus distributed;

b. If distribution of the corpus occurs between 5 and 10 years of the date when the corpus is received by the fiduciary, an amount equal to the annual commissions on corpus authorized pursuant to N.J.S. 3B:18-25, but not actually received by the fiduciary, plus an amount equal to 1-1/2% of the value of the corpus distributed;

c. If the distribution of corpus occurs more than 10 years after the date the corpus is received by the fiduciary, an amount equal to the annual commissions on corpus authorized pursuant to N.J.S. 3B:18-25, but not actually received by the fiduciary, plus an amount equal to 1% of the value of the corpus distributed; and

d. If there are two or more fiduciaries, their corpus commissions shall be the same as for a single fiduciary plus an additional amount of one-fifth of the commissions for each additional fiduciary.

L.1981, c. 405, § 3B:18-28, eff. May 1, 1982.

APPENDIX B-3

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TABLE OF SUMMARY PROCEEDINGS
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Conservatorship, casinos, 5:12-1301.1.

[3] Adapted from indexes of *New Jersey Statutes Annotated* (West Publishing Co.) and *New Jersey Rules of Court* (Gann Law Books)

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(by Court Rule)

APPENDIX C

SAMPLE FORMS FOR SELECTED CHANCERY ACTIONS AND PROCEDURES

The Law Firm of A. Lawyer, PC
Ann Lawyer, Esq. Id. _____
1 First Avenue
Anytown, New Jersey07000
(908) 555-1212
Attorneys for Plaintiff

JOHN DOE, INC.	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	CHANCERY DIVISION COUNTY
v.	:	
ROBERT SMITH and PRODUCT, INC., a New Jersey corporation,	:	Docket No.: CIVIL ACTION
Defendants.	:	VERIFIED COMPLAINT (TRADE SECRET)

Plaintiff, John Doe, Inc., (address), by way of verified complaint against defendants, says:

FIRST COUNT

1. Plaintiff is in the business of commercial cheese production.

2. Defendant, Robert Smith ("Smith"), was employed by plaintiff as its plant manager from on or about January, 1988 through on or about January, 20__. On information and belief, Robert Smith is the President and founder of Product, Inc. Defendants have an address of (address) .

3. In 1970, plaintiff commenced its business. Approximately three years of trial and error experimentation was required before plaintiff perfected its formulas and processes for the manufacture of special cheese. The process was one of daily testing and modification of the formulas in order to yield products unique in the marketplace.

4. Plaintiff's formulas are unique, and plaintiff's (product) differs from competitors' (product) of the same kind. Additionally, plaintiff's (product) has the unique and desirable quality of .

5. (Description of product).

6. Plaintiff has been marketing its products in their current form for approximately 15 years. Its business has grown substantially due to the uniqueness and superiority of its products.

7. Smith's resume was forwarded to plaintiff by one of its suppliers in mid-1986. His resume reflected that he had been educated in France, and had worked for companies in the United States and France, where he acquired some familiarity with [product]. He had no experience, however, with the types of [products] produced by plaintiff. Since plaintiff wished to expand its line of product into the production of [products] familiar to Smith, plaintiff determined to hire Smith, to give plaintiff that capacity. Since those products were not yet in production, Smith was also made production manager with the duty to oversee generally the production of plaintiff's [product]. It was contemplated that Smith would be employed in that capacity for a period of 36 months.

8. Since Smith was a citizen of and was, in 1986, residing in Canada, a visa was required before he could come to this country to work for plaintiff. Accordingly, plaintiff assisted Smith in obtaining the necessary visa to enter and work in this country.

9. Smith was exposed to plaintiff's trade secrets in his capacity as a supervisory employee, and had the opportunity to, and did, observe plaintiff's

processes. Smith also had access to the secret production reports that contained the exact formula for each batch of plaintiff's [product].

10. On or about July 15, 20__, Smith resigned from his employment with plaintiff.

11. In late March, 20__, plaintiff learned that defendants had been soliciting plaintiff's customers using a salesman, who was formerly employed by plaintiff. On information and belief, these solicitations on behalf of defendants included statements that defendants' [product] was exactly the same as the [product] manufactured by plaintiff except that it would cost less.

12. The entire thrust of defendants' marketing efforts has been to utilize the reputation of plaintiff and its products, which reputation has been developed over a period of years after much time, energy and expense on the part of plaintiff. Defendants attempted to lure away other employees of plaintiff, including plaintiff's sales staff, but plaintiff's employees refused to join defendants.

13. On information and belief, when Smith terminated his employment with plaintiff, he did not return to plaintiff all confidential materials in his possession, such as plaintiff's production reports, which materials contain proprietary information concerning plaintiff's [product].

14. On information and belief, defendants have been using and are unlawfully continuing to use plaintiff's formulas, processes and other trade secrets to manufacture defendants' [product]. These formulas and processes, which plaintiff developed over many years of costly and time-consuming daily testing, constitute a trade secret.

15. Plaintiff has not licensed nor consented to defendants' use, disclosure, possession or removal of plaintiff's formulas, processes or other trade secrets from plaintiff's offices.

16. By reason of Smith's breach of his duty of confidentiality and his misappropriation of plaintiff's trade secrets for the benefit of himself and defendant Product, Inc., plaintiff has been irreparably injured.

17. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendants for an order:

(1) preliminarily and permanently enjoining and restraining defendants from using, disclosing, conveying or disposing of in any manner, plaintiff's formulas or other trade secrets, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(2) preliminarily and permanently enjoining defendants from advertising, promoting, or soliciting sales of defendants' products based on representations that those products are identical to those of plaintiff, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(3) preliminarily and permanently enjoining defendants from manufacturing, distributing, selling or otherwise disposing of any products made using plaintiff's formulas and trade secrets, or assisting, aiding, or abetting any other person or entity in engaging in the aforesaid activities;

(4) requiring an accounting by defendants to plaintiff of the profits derived by defendants as a result of their misappropriation of plaintiff's trade secrets;

(5) granting compensatory damages, punitive damages, costs of suit and such other relief as the Court may deem equitable and just.

SECOND COUNT

1. Plaintiff repeats the allegations of the First Count as if set forth at length herein.

2. Smith's contract of employment contained an implied agreement not to disclose, misuse or appropriate to his own benefit any trade secrets of plaintiff.

3. By reason of the foregoing, Smith has breached the aforesaid agreement.

WHEREFORE, plaintiff demands judgment against defendants for an order:

(1) preliminarily and permanently enjoining and restraining defendants from using, disclosing, conveying or disposing of in any manner, plaintiff's formulas or other trade secrets, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(2) preliminarily and permanently enjoining defendants from advertising, promoting, or soliciting sales of defendants' products based on representations that those products are identical to those of plaintiff, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(3) preliminarily and permanently enjoining defendants from manufacturing, distributing, selling or otherwise disposing of any products made using plaintiff's formulas or other trade secrets, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(4) requiring an accounting by defendants to plaintiff of the

profits derived by defendants as a result of their misappropriation of plaintiff's formulas or other trade secrets;

(5) granting compensatory damages, costs of suit and such other relief as the Court may deem equitable and just.

THIRD COUNT

1. Plaintiff repeats the allegations of the First and Second Counts as if set forth at length herein.

2. By virtue of his supervisory position with plaintiff, Smith owed a fiduciary duty to plaintiff.

3. By virtue of the foregoing, Smith breached his fiduciary duty to plaintiff.

WHEREFORE, plaintiff demands judgment against defendants for an order:

(1) preliminarily and permanently enjoining and restraining defendants from using, disclosing, conveying or disposing of in any manner, plaintiff's formulas or other trade secrets, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(2) preliminarily and permanently enjoining and restraining defendants from advertising, promoting, or soliciting sales of defendants' products based on representations that those products are identical to those of plaintiff, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(3) preliminary and permanently enjoining and restraining defendants from manufacturing, distributing, selling or otherwise disposing of any products made using plaintiff's formula or other trade secrets, or assisting, aiding or abetting any

other persons or entity in engaging in the aforesaid activities;

(4) requiring an accounting by defendants to plaintiff of the profits derived by defendants as a result of their misappropriation of plaintiff's trade secrets;

(5) granting compensatory damages, costs of suit and such other relief as the Court may deem equitable and just.

FOURTH COUNT

1. Plaintiff repeats the allegations of the First through Third Counts as if set forth at length herein.

2. The foregoing acts constitute unfair competition by defendants against plaintiff, pursuant to a willful and malicious plan to mislead and confuse customers and unlawfully capture plaintiff's trade for the benefit of defendants.

3. As a direct and proximate result of defendants' aforesaid unfair competition, plaintiff has been and is continuing to be irreparably damaged.

WHEREFORE, plaintiff demands judgment against defendants for an order:

(1) preliminarily and permanently enjoining and restraining defendants from using, disclosing, conveying or disposing of in any manner, plaintiff's formulas or other trade secrets, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(2) preliminarily and permanently enjoining and restraining defendants from advertising, promoting, or soliciting sales of defendants' products based on representations that those products are identical to those of plaintiff, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(3) preliminarily and permanently enjoining and restraining defendants from manufacturing, distributing, selling or otherwise disposing of any products

made using plaintiff's formulas or trade secrets, or assisting, aiding or abetting any other person or entity in the aforesaid activities;

(4) requiring an accounting by defendants to plaintiff of the profits derived by defendants as a result of their misappropriation of plaintiff's trade secrets;

(5) granting compensatory damages, punitive damages, costs of suit and such other relief as the Court may deem equitable and just.

FIFTH COUNT

1. Plaintiff repeats the allegations of the First through Fourth Counts as if set forth at length herein.

2. Plaintiff had a reasonable expectation of economic advantage in its sales relations with its customers.

3. Defendants' aforesaid actions were taken intentionally, without justification, and with the knowledge and expectation that plaintiff's rights and expectations would be adversely affected.

4. By virtue of the foregoing, defendants have tortiously interfered with plaintiff's prospective economic advantage.

WHEREFORE, plaintiff demands judgment against defendants for an order:

(1) preliminarily and permanently enjoining and restraining defendants from using, disclosing, conveying or disposing of in any manner, plaintiff's formulas or other trade secrets, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(2) preliminarily and permanently enjoining and restraining defendants from advertising, promoting, or soliciting sales of defendants' products based on

representations that those products are identical to those of plaintiff, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(3) preliminarily and permanently enjoining and restraining defendants from manufacturing, distributing, selling or otherwise disposing of any products made using plaintiff's formulas or trade secrets, or assisting, aiding or abetting any other person or entity in engaging in the aforesaid activities;

(4) requiring an accounting by defendants to plaintiff of the profits derived by defendants as a result of their misappropriation of plaintiff's trade secrets;

(5) granting compensatory damages, punitive damages, costs of suit and such other relief as the Court may deem equitable and just.

The Law Firm of A. Lawyer, PC

By:_____

Dated: _____

CERTIFICATION

Pursuant to R. 4:5-1, plaintiff, by its attorneys, hereby certifies that the matter in controversy is not the subject of any pending or contemplated judicial or arbitration proceeding. Plaintiff is not aware of any other parties that should be joined in this action.

By:_____

Dated: _____

VERIFICATION

_____, of full age, upon his Certification, says:

1. I am the president of the plaintiff corporation in this action.

2. I have read the foregoing Verified Complaint, and I hereby certify that all allegations contained therein are true and correct, except those made on information and belief.

By:_____

Dated: _____

The Law Firm of A. Lawyer, PC
Ann Lawyer, Esq., Id. _____
1 First Avenue
Anytown, New Jersey 07000
(908) 555-1212
Attorneys for Plaintiffs

JOHN DOE, JANE DOE, THOMAS DOE, ROBERT DOE, RICHARD DOE, EDWARD DOE, and ABC, INC., a New Jersey Corporation,	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION _____ COUNTY
Plaintiffs,	:	
v.	:	
	:	Docket No.:
XYZ REALTY CORP., A Delaware Corporation, XYZ PLANNING CORPORATION, A Delaware Corporation, XYZ SECURITIES, A Delaware Corporation, JACK SMITH, INDIVIDUALLY and as past or present CHAIRMAN of the BOARD and DIRECTOR or OFFICER of XYZ REALTY CORP., XYZ PLANNING CORPORATION and XYZ SECURITIES, INC., XYZ HOLDINGS, N.V. A Corporation of the Netherlands-Antilles, XYZ FINANCE, A Corporation of the Netherlands and JOHN SMITH,	:	CIVIL ACTION COMPLAINT (Reformation, Rescission)
Defendants.	:	

Plaintiffs John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe, Edward Doe, and ABC, Inc., by way of complaint against the defendants, XYZ

Realty Corp., XYZ Planning Corporation, XYZ Securities, Inc., Jack Smith, XYZ Holdings, N.V., XYZ Finance, and John Smith, say:

FIRST COUNT

1. XYZ Realty Corp. ("XYZ Realty"), a Corporation organized and existing under the laws of the State of Delaware having an address at 000 Street, Red Bank, New Jersey, is the sole general partner of ABC Limited partnership.

2. Upon information and belief, XYZ Planning Corporation ("XYZ Planning") and XYZ Securities, Inc. ("XYZ Securities") are affiliates of XYZ Realty.

3. Upon information and belief, Jack Smith during some or all of the relevant times herein was Chairman of the Board and Director and/or an Officer of XYZ Realty, XYZ Planning and XYZ Securities and through his control of, relationship to and manipulation of XYZ Realty, XYZ Planning and XYZ Securities, caused said corporations to be alter egos of each other and has further established himself as an alter ego of said corporations.

4. XYZ Holdings, N.V. ("XYZ Holdings") is a corporation of the Netherlands-Antilles and XYZ Finance ("XYZ Finance") is a Corporation of the Netherlands and a wholly-owned subsidiary of XYZ Holdings.

5. Upon information and belief, Jack Smith by and through his control of, relationship to and manipulation of XYZ Realty, XYZ Planning, XYZ Securities, XYZ Holdings, N.V. and XYZ Finance is the alter ego of all said entities and all said entities are the alter egos of each other.

6. In or about December 1983, plaintiff ABC, Inc. entered into a certain Limited Partnership Agreement ("Agreement") under which plaintiff acquired units of a limited partnership interest in ABC Limited Partnership ("Partnership"), a limited partnership of the State of New Jersey.

7. In or about September, 1988, ABC, Inc., transferred part of its partnership interest to John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe and Edward Doe.

8. The Partnership was formed for the purpose of owning the beneficial interest in a 14 story, 100,000 net rentable square foot office building ("Property") previously owned by Joe Bancorp in South Bend, Indiana.

9. Under a purchase agreement dated as of December 15, 1983, XYZ Holdings purchased the Property from Joe Bancorp for a total purchase price of $5,171,000.

10. XYZ Finance, a wholly-owned subsidiary of XYZ Holdings, acquired the Property from XYZ Holdings for $5,171,000 in or about December, 1983.

11. The Partnership acquired the Property from XYZ Finance for a total purchase price of $5,945,000 in or about December, 1983. Upon information and belief, XYZ Finance realized a profit on this resale of $774,000. The purchase price paid by the Partnership was paid by a wraparound mortgage note in the amount of $5,945,000 given by the Partnership bearing interest at 17.5% with negative amortization. The loan matured on December 31, 1987 and had an outstanding balance of $7,043,376.

12. The Property was subject to a Master Lease for a twenty year term at a

fixed rental equal to $550,000 annually plus an additional percentage rental equal to 75% of the increase realized on new leases on the portion of the Property not occupied by Joe Bancorp.

13. Based upon an Information Circular prepared by the defendants to induce subscribers such as plaintiffs to enter into the Agreement, plaintiffs were led by defendants' representations and omissions to believe that they were purchasing an interest in a limited partnership which would have beneficial investment opportunities as well as beneficial tax consequences.

14. Upon information and belief, the representations and omissions were false and misleading in that the Partnership as of December, 2083 had no potential for beneficial investment opportunities. Notwithstanding this fact, defendants induced plaintiffs to pay $2,450,000 to participate in the Partnership.

15. Upon information and belief, defendants knew or had reason to know or acted recklessly and wantonly in failing to know that their representations and omissions were false and misleading.

16. Among the false and misleading representations and untrue statements and omissions of material facts made by the defendants were the following:

(a) A representation by XYZ Realty that it would commit to locate financing with an interest rate not to exceed 10.5% and a 50-year term to replace the wraparound mortgage note at its maturity on December 31, 1987;

(b) A representation that the Property was worth not less than $5,945,000 as of December, 1983;

(c) The omission of material information with respect to the impact of a certain Master Lease on the value of the Property; and

(d) The failure to advise of a material shortcoming in the building in that a major functional limitation is an inefficient HVAC system with 356 separate electrical wall units and separate electrical HVAC systems for each floor such that the cost for complete replacement of the HVAC system with a central system is estimated at approximately $2,200,000.

17. Upon information and belief, XYZ Realty, XYZ Planning and/or XYZ Securities obtained certain fees with respect to the Partnership and the Property, including, but not limited to, the following:

(a) $83,000 in connection with an alleged temporary financing commitment agreement;

(b) $83,000 in connection with an alleged permanent financing commitment agreement;

(c) $80,000 in connection with an alleged guaranty of temporary and permanent financing;

(d) $50,000 in connection with an alleged inspection of the Property and audit of the operating expenses and leases;

(e) $90,000 in connection with alleged supervision and administration of the Property;

(f) $275,000 in connection with alleged efforts and costs in negotiating the acquisition of the Property;

(g) $7,000 per year in connection with alleged accounting and managing

of the Partnership;

(h) $50,000 for alleged organizational expenses in establishing the Partnership;

(i) $20,000 for alleged expenses in preparing and printing the Information Circular and a tax opinion;

(j) $67,000 in alleged commissions in connection with the sale of plaintiffs' limited partnership interest; and

(k) Approximately $131,580 as its share of profits related to the purchase price for the Property.

18. Pursuant to the Agreement by and between each of the plaintiffs and the defendants, defendants were charged with the responsibility, obligation and duty to perform and operate in good faith for the benefit of the plaintiffs.

19. On or about December, 1987 to July, 1988 the plaintiffs learned that as a result of the Property being burdened by the Master Lease, the Property would not support the refinancing of the $7,043,376 mortgage. At or about that time, plaintiffs learned that due to the severe limitations imposed upon the Property by the Master Lease, among other things, the building had a value of substantially less than $6,000,000.

20. On or about December, 1987 to July, 1988 plaintiffs learned that defendants had no intention to honor their commitments to locate financing to replace the $7,043,376 mortgage at its maturity on December 31, 1987.

21. At all times plaintiffs were lead to believe that the relevant transaction was

for the benefit of plaintiffs and that the plaintiffs were paying a fair price for their interest in the Property and that defendants would provide financing to replace the wraparound mortgage note which matured on December 31, 1987 and that such replacement would be routine with an interest rate not to exceed 10.5%, when in fact defendants defrauded plaintiffs by their false and misleading representations to plaintiffs as aforesaid.

22. Plaintiffs relied upon the representations of defendants with regard to their purchase of the units in the Partnership, with regard to the purchase of the Property, with regard to the value of the Property and with regard to the commitment to refinance the wraparound mortgage note which matured on December 31, 1987, and other acts as aforesaid.

23. As a direct and proximate result of said fraud, plaintiffs have been damaged.

WHEREFORE, the plaintiffs, John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe, Edward Doe and ABC, Inc., demand judgment against the defendants, XYZ Realty Corp., XYZ Planning Corporation, XYZ Securities, Inc., Jack Smith, XYZ Holdings, N.V., and XYZ Finance, for the following relief:

(1) Reformation or rescission of the wraparound mortgage note or declaration that same is null and void;

(2) That defendants be ordered to disgorge all profits and fees;

(3) Compensatory damages;

(4) Punitive damages;

(5) Interest;

(6) Attorneys' fees;

(7) Costs of suit; and

(8) Such other and further relief as the Court deems equitable and just.

SECOND COUNT

1. Plaintiffs repeat and re-allege each of the allegations contained in the First Count as if set forth at length herein.

2. Defendants Jack Smith, XYZ Realty, XYZ Planning and XYZ Securities had a fiduciary duty to plaintiffs to act in the best interest of plaintiffs, as partners, with regard to the Partnership.

3. As part of the fiduciary duty, defendants Jack Smith, XYZ Realty, XYZ Planning and XYZ Securities had the obligation to act prudently and in a commercially reasonable manner, and to maximize profits.

4. Defendants Jack Smith, XYZ Realty, XYZ Planning and XYZ Securities, breached their fiduciary duty to plaintiff by arranging for and causing the Partnership to enter into the Master Lease.

5. As a direct and proximate result of this conduct the plaintiffs have been damaged.

WHEREFORE, the plaintiffs, John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe, Edward Doe and ABC, Inc., demand judgment against the defendants, XYZ Realty Corp., XYZ Planning Corporation, XYZ Securities, Inc., and Jack Smith for the following relief:

(1) Reformation or rescission of the wraparound mortgage note or

declaration that same is null and void;

(2) That defendants be ordered to disgorge all profits and fees;

(3) Compensatory damages;

(4) Punitive damages;

(5) Interest;

(6) Attorneys' fees;

(7) Costs of suit; and

(8) Such other and further relief as the Court deems equitable and just.

THIRD COUNT

1. Plaintiffs repeat and re-allege each of the allegations contained in the First and Second Counts as if set forth at length herein.

2. Defendants Jack Smith, XYZ Realty, XYZ Planning and XYZ Securities, breached their fiduciary duty to plaintiff by arranging for and causing the intervening sale of the Property to XYZ Holdings and XYZ Finance at a substantial profit to XYZ Finance.

3. As a direct and proximate result of this conduct the plaintiffs have been damaged.

WHEREFORE, the plaintiffs, John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe, Edward Doe and ABC, Inc., demand judgment against the defendants, XYZ Realty Corp., XYZ Planning Corporation, XYZ Securities, Inc., and Jack Smith for the following relief:

(1) Reformation or rescission of the wraparound mortgage note or

declaration that same is null and void;

(2) That defendants be ordered to disgorge all profits and fees;

(3) Compensatory damages;

(4) Punitive damages;

(5) Interest;

(6) Attorneys' fees;

(7) Costs of suit; and

(8) Such other and further relief as the Court deems equitable and just.

FOURTH COUNT

1. Plaintiffs repeat and re-allege each of the allegations contained in the First through Third Counts as if set forth at length herein.

2. As of December, 1983 defendant John Smith was an employee of ABC, Inc., as well as an advisor to all plaintiffs herein.

3. Upon information and belief John Smith, while in the employ of ABC, Inc., was retained by XYZ Realty, XYZ Planning and/or XYZ Securities in or about December, 1983 to obtain subscribers for the Partnership and was paid $17,500 for such services. In reliance on John Smith's relationship of trust and confidence with the plaintiffs, plaintiffs were induced by him to enter into the Agreement.

4. Upon information and belief, John Smith intentionally, and with the aid and assistance of Jack Smith, XYZ Realty, XYZ Planning and/or XYZ Securities, concealed his relationship with the defendants from plaintiffs.

5. Such conduct was fraudulent and constituted a breach of trust.

6. As a direct and proximate result of such conduct, plaintiffs have been damaged.

WHEREFORE, the plaintiffs, John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe, Edward Doe and ABC, Inc., demand judgment against the defendants, XYZ Realty Corp., XYZ Planning Corporation, XYZ Securities, Inc., and John Smith for the following relief:

(1) Reformation or rescission of the wraparound mortgage note or declaration that same is null and void;

(2) That defendants be ordered to disgorge all profits and fees;

(3) Compensatory damages;

(4) Punitive damages;

(5) Interest;

(6) Attorneys' fees;

(7) Costs of suit; and

(8) Such other and further relief as the Court deems equitable and just.

FIFTH COUNT

1. Plaintiffs repeat and re-allege each of the allegations contained in the First through Fourth Counts as if set forth at length herein.

2. Defendants Jack Smith, XYZ Realty, XYZ Planning and XYZ Securities had a fiduciary duty to plaintiffs to act in the best interest of plaintiffs, as partners, with regard to the Partnership.

3. As part of said fiduciary duty, defendants Jack Smith, XYZ Realty, XYZ Planning and XYZ Securities had the obligation to inform plaintiffs of the retention and services performed on behalf of defendants by John Smith.

4. Defendants Jack Smith, XYZ Realty, XYZ Planning and XYZ Securities, breached their fiduciary duty to plaintiff by failing to advise plaintiffs of their relationship with John Smith as well as their other conduct as aforesaid.

5. As a direct and proximate result of such conduct the plaintiffs have been damaged.

WHEREFORE, the plaintiffs, John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe, Edward Doe and ABC, Inc., demand judgment against the defendants, XYZ Realty Corp., XYZ Planning Corporation, XYZ Securities, Inc., and Jack Smith for the following relief:

(1) Reformation or rescission of the wraparound mortgage note or declaration that same is null and void;

(2) That defendants be ordered to disgorge all profits and fees;

(3) Compensatory damages;

(4) Punitive damages;

(5) Interest;

(6) Attorneys' fees;

(7) Costs of suit; and

(8) Such other and further relief as the Court deems equitable and just.

SIXTH COUNT

1. Plaintiffs repeat and re-allege each of the allegations contained in the First through Fifth Counts as if set forth at length herein.

2. Defendants Jack Smith, XYZ Realty, XYZ Planning and XYZ Securities, had a contractual obligation to obtain financing to replace the wraparound mortgage note at its maturity on December 31, 1987.

3. Plaintiffs have made repeated demands upon defendants to fulfill their contractual obligations. Defendants have repeatedly failed to fulfill their contractual obligations and have breached their obligations.

4. As a result of such conduct, plaintiffs have been damaged.

WHEREFORE, the plaintiffs, John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe, Edward Doe and ABC, Inc., demand judgment against the defendants, XYZ Realty Corp., XYZ Planning Corporation, XYZ Securities, Inc., and Jack Smith for the following relief:

(1) Compensatory damages;

(2) Interest;

(3) Attorneys' fees;

(4) Costs of suit; and

(5) Such other and further relief as the Court deems equitable and just.

SEVENTH COUNT

1. Plaintiffs repeat and re-allege each of the allegations contained in the First through Sixth Counts as if set forth at length herein.

2. Defendants had a duty to exercise reasonable care in obtaining and/or communicating information with respect to the Partnership and the Property.

3. Contrary to such duty, defendants negligently obtained and/or communicated false and misleading information for the guidance of plaintiffs with respect to the Partnership and the Property.

4. Plaintiffs were justified in relying upon, and did rely upon, the information provided by the defendants.

5. As a direct and proximate result of defendant's negligence as aforesaid, plaintiffs have been damaged.

WHEREFORE, the plaintiffs, John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe, Edward Doe and ABC, Inc., demand judgment against the defendants, XYZ Realty Corp., XYZ Planning Corporation, XYZ Securities, Inc., and Jack Smith for the following relief:

(1) Compensatory damages;

(2) Interest;

(3) Attorneys' fees;

(4) Costs of suit; and

(5) Such other and further relief as the Court deems equitable and just.

EIGHTH COUNT

1. Plaintiffs repeat and re-allege each of the allegations contained in the First through Seventh Counts as if set forth at length herein.

2. The defendants by their actions as aforesaid have been unjustly enriched.

WHEREFORE, the plaintiffs, John Doe, Jane Doe, Thomas Doe, Robert Doe, Richard Doe, Edward Doe and ABC, Inc., demand judgment against the defendants, XYZ Realty Corp., XYZ Planning Corporation, XYZ Securities, Inc., and Jack Smith for the following relief:

(1) Reformation or rescission of the wraparound mortgage note or declaration that same is null and void;

(2) That defendants be ordered to disgorge all profits and fees;

(3) Compensatory damages;

(4) Interest;

(5) Attorneys' fees;

(6) Costs of suit; and

(7) Such other and further relief as the Court deems equitable and just.

The Law Firm of A. Lawyer, PC
Attorneys for Plaintiffs

By:_____

Dated: _____

The Law Firm of A. Lawyer, PC
Ann Lawyer, Esq., Id. _____
1 First Avenue
Anytown, New Jersey 07000
(908) 555-1212
Attorneys for Plaintiff

DOE MANAGEMENT CO.,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	CHANCERY DIVISION
	:	_____ COUNTY
v.	:	
	:	Docket No.:
JOHN SMITH, MARY SMITH, and JOHN JONES,	:	
	:	CIVIL ACTION
Defendants.	:	
	:	COMPLAINT
	:	(Equitable Liens)

Doe Management Co., a New Jersey corporation, with offices located at Doe Street, Woodbridge, New Jersey, by way of complaint against defendants, says:

FIRST COUNT

1. Plaintiff, Doe Management Co. ("Doe"), is a management firm and represents GECC ("GECC"), the owner of a high rise condominium in the Borough of Anywhere, County of Middlesex and State of New Jersey.

2. On or about June 1, 1986, defendants John Smith and Mary Smith, his wife ("the Smiths"), executed a Purchase Agreement ("Purchase Agreement") to purchase certain real property premises ("the Unit") located in the Borough of Anywhere, Middlesex County and State of New Jersey, and described as follows:

> Being Apartment Unit No. 000 in Condominium, together with an undivided .7ll9% interest in the general common elements thereof, all as more particularly described in a certain Master Deed dated July 8, 1984, recorded in the Middlesex County Clerk's Office on in Deed Book , at page ____, and as amended by First Amended Master Deed for , a Condominium, dated and recorded in the Middlesex County Clerk's Office on in Deed Book , at page et. seq., as same may now or hereafter be lawfully amended.

3. Upon information and belief, on or about (date), the Smiths conveyed certain real property premises owned by them ("the Second Unit") to John Jones ("Jones"), which premises are located in the Borough of Spring Lake Heights, County of Monmouth, State of New Jersey, and described as follows:

> Unit , building , in , a Condominium, Phase I, Section I, and other appurtenances to said Unit, which Unit and appurtenances have been more specifically defined in the Master Deed of , a Condominium, Phase I, Section I, dated and recorded in the Office of the Clerk of Monmouth County as Instrument No. , and including the fee in an undivided 4.4315% interest in the general common elements of said Condominium appurtenant to said Units, pursuant to said Master Deed."

4. Upon information and belief, Jones, as part of the consideration for conveyance by the Smiths of the Jones Unit, endorsed to the Smiths, Cashier's Check No. 000000 of First National Bank, of St. Georges, Grenada, W.I. ("First National of Grenada") dated ("the Jones Check") in the amount of $10,000.00 and made payable to Mr. John Jones.

5. On (date), GECC conveyed the Unit to the Smiths for the purchase price of $61,500.00, plus $1,858.74 for extras installed by GECC at the request of the Smiths, plus $2,287.71 for the costs of closing.

6. As part of the consideration for the conveyance of the Unit, the Smiths

endorsed the Jones Check and made it payable to the plaintiff and delivered the Jones check to the plaintiff as agent for GECC.

7. The Smiths did represent to the plaintiff, in order to induce them, as agent for GECC, to convey the deed to the Unit to the Smiths that there were sufficient funds on deposit at the drawee bank and that the drawee bank would honor the check and pay the amount in full upon presentation.

8. At the time the representations were made by the Smiths, the representations were false.

9. Plaintiff, as agent for GECC, did rely on the aforesaid representations and delivered to the Smiths the deed to the Unit, all to the damage of plaintiff who transmitted and paid to GECC all of the monies due and owing to it as consideration for the conveyance of the Smith Unit including the sum of $10,000.00.

10. On (date), plaintiff deposited the Jones Check for collection in its account located at the First National State Bank of New Jersey (hereinafter referred to as "FNSB"). On (date), FNSB notified plaintiff that the Jones Check was returned "not payable in continental USA" and that the Jones Check "is being entered for collection".

11. On or about (date), FNSB notified plaintiff that the Jones check was not being honored by First National of Grenada and that no part of the Jones Check had been paid.

12. As of the date of the filing of this Complaint, neither Jones nor the

Smiths have paid the $10,000.00 to plaintiff.

13. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendants, John Smith and Mary Smith, his wife, jointly and severally, for:

(1) Damages in the amount of $10,000.00 plus interest;

(2) Recognition and declaration by the Court that plaintiff has an equitable lien in the Unit;

(3) Enforcement of an equitable lien in the Unit by sale of the real property, if necessary;

(4) Restraining and enjoining the Smiths from disposing, mortgaging, pledging or in any other way interfering with the equitable lien of plaintiff in the Unit;

(5) Costs of suit; and

(6) Such other relief as the Court may deem just and equitable under the circumstances.

SECOND COUNT

1. The allegations of the First Count are incorporated herein as if more fully set forth.

2. Upon information and belief, Jones did represent to the Smiths, and future endorsers, in order to induce the Smiths to convey the deed to the Second Unit to Jones, that there were sufficient funds on deposit at the drawee bank and that the drawee bank would honor the check and pay the amount to the Smiths or

any future endorser in full upon presentment.

3. At the time the representations were made by Jones the representations were false.

4. Plaintiff, as agent for GECC, did rely on the aforesaid representations of Jones and delivered to the Smiths the deed for the Unit, all to the damage of plaintiff who transmitted and paid to GECC all of the monies due and owing to it as consideration for the conveyance of the Smith Unit including the sum of $10,000.00.

5. The Jones Check was not honored at the time of its presentment and the amount has not been paid by Jones to the date of the filing of this Complaint.

6. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant, John Jones, for:

(1) Damages in the amount of $10,000.00 plus interest;

(2) Recognition and declaration by the Court that plaintiff has an equitable lien in the Second Unit;

(3) Enforcement of an equitable lien in the Second Unit by sale of the real property, if necessary;

(4) Restraining and enjoining Jones from disposing, mortgaging, pledging or in any other way interfering with the equitable lien of plaintiff in the Jones Unit;

(5) Costs of suit; and

(6) Such other relief as the Court may deem just and equitable under the circumstances.

THIRD COUNT

1. The allegations of the First and Second Counts are incorporated herein as if more fully set forth.

2. By virtue of the conduct of the defendants, the defendants have been unjustly enriched in the amount of $10,000.00, all at the cost and expense and to the financial loss and detriment of the plaintiff.

3. Plaintiff is entitled to the imposition of an equitable lien upon the Unit and the Second Unit, said premises representing the amount by which defendants have been unjustly enriched to the loss and detriment of plaintiff.

WHEREFORE, plaintiff demands judgment against defendants, John Smith, Mary Smith, his wife, and John Jones, jointly and severally:

(1) Compensatory damages in the amount of $10,000.00 together with interest;

(2) Recognizing and declaring the existence and validity of the equitable lien of plaintiff in the Unit;

(3) Enforcing the equitable lien of plaintiff in the Unit, by sale of the real property, if necessary;

(4) Restraining and enjoining the Smiths from disposing, mortgaging, pledging or in any other way interfering with the equitable lien of plaintiff in the Unit;

(5) Recognizing and declaring the existence and validity of the equitable lien of plaintiff in the Second Unit;

(6) Enforcing the equitable lien of plaintiff in the Second Unit by sale of the real property, if necessary;

(7) Restraining and enjoining Jones from disposing, mortgaging, pledging or in any other way interfering with the equitable lien of plaintiff in the Jones Unit;

(8) Granting such other relief as may be deemed just and equitable under the circumstances; and

(9) Directing the defendants to pay costs of suit.

FOURTH COUNT

1. The allegations of the First, Second and Third Counts are incorporated herein as if more fully set forth.

2. Upon information and belief, Jones endorsed the Jones Check and delivered same to the Smiths who, thereafter, endorsed the check made payable to the plaintiff and delivered same to plaintiff on (date). Plaintiff thereby became the legal holder and bearer thereof.

3. By the endorsement and delivery, Jones directed and required First National of Grenada to pay to the Smiths, or any subsequent endorser, the sum of $10,000.00 for value received.

4, By the endorsement and delivery, the Smiths directed and required First National of Grenada to pay to plaintiff, the sum of $10,000.00 for value received.

5. The Jones Check was deposited for collection on (date) and thereafter, FNSB, on behalf of plaintiff, used reasonable diligence to locate and obtain payment from First National of Grenada, the maker of the check, but the maker has failed to honor the check and no part of the check has been paid.

6. There is now due and owing from Jones and the Smiths to plaintiff, the sum of $10,000.00, plus interest.

WHEREFORE, plaintiff demands judgment against the defendants, John Smith, Mary Smith, his wife, and John Jones, jointly and severally, for $10,000.00, together with interest and costs of suit.

The Law Firm of A. Lawyer, PC
Attorneys for Plaintiff

By:_____

Dated:_____

The Law Firm of A. Lawyer, PC
Ann Lawyer, Esq., Id. _____
1 First Avenue
Anytown, New Jersey07000
(908) 555-1212
Attorneys for Plaintiff

JOHN DOE and XYZ CORPORATION,	:	SUPERIOR COURT OF
	:	NEW JERSEY
Plaintiffs,	:	CHANCERY DIVISION
	:	_____ COUNTY
v.	:	
	:	Docket No.:
ABC CORPORATION,	:	
	:	
Defendant.	:	CIVIL ACTION
.	:	COMPLAINT
	:	(Quiet Title)

Plaintiff John Doe, residing at Some Street, Some Township, Some County, State of New Jersey and XYZ Corporation, a New Jersey corporation, with its principal office at 000 Some Place, Some Township, Some County, State of New Jersey, by way of Complaint against Defendant, say:

FIRST COUNT

1. By quitclaim deed dated June 10, 1843, and recorded in Deed Book , page , on April 12, 1853 at the _____ County Clerk's Office, Andrew Smith conveyed to John Jones for good consideration "all my right and title to the north fork of Shrimp Creek and the north side down to the mouth thereof, with the appurtances" (the "Property"), situated in _____ County, New Jersey.

2. John Jones died intestate on March 25, 1850, seized of the Property. His next of kin and heirs at law, including his son, Leeds Jones, succeeded to his interest in the property.

3. Leeds Jones died intestate on March 8, 1867, seized of the Property. His next of kin and heirs at law, Maria Jones, Alfred Jones, Judith Roe, Sarah Jones, Elizabeth Johnson and Hannah Wolf succeeded to his interest in the Property.

4. Maria Jones died intestate on March 8, 1867.

5. Judith Roe died intestate on August 1, 1897. Her next of kin and heirs at law, Alfred Roe and Jennie Roe, succeeded to her interest in the Property.

6. Sarah Jones married John Wolf on March 29, 1868.

7. Hannah Wolf died intestate on July 6, 1872. Her next of kin and heir at law, Florence Wolf, succeeded to her interest in the Property.

8. Florence Wolf later married George Fox.

9. By special warranty deed dated May 1, 1902, and recorded in Deed Book _____, page ____, on February 11, 1903 in the _____County Clerk's Office, Alfred Jones, Eleanor Jones, his wife, Jacob Johnson, husband of Elizabeth Johnson, Alfred Roe, Eleanor Roe, his wife, Jennie Roe, G.M. Roe, her husband, Florence Fox and George Fox conveyed to William Pear for good consideration all of John Jones "right, title and interest to the north fork of Shrimp Creek and the north side down to the mouth thereof, with the appurtances." Elizabeth Johnson and Sarah Wolf were listed as grantors, but they did not sign the deed.

10. By warranty deed dated December 16, 1902 and recorded in Deed Book _____, page ____, on February 11, 1903 in the _____County Clerk's Office, William Pear conveyed to Experience Jones an undivided one-half interest in the Property.

11. By deeds dated March 31, 1849 and recorded on June 8, 1851, in the _____ Clerk's Office in Deed Book _____, page _____, Andrew Smith conveyed to James Smith, Steelman Smith, and John Smith, respectively, for good consideration one-third undivided interests in several tracts of land in _____County, one of which was "all of the salt marsh belonging to the said party of the first part situate, lying and being north of the fourth line of the aforesaid 347 acres [land set off to Andrew Smith by Janet Smith, Joseph Name and John Name, Commissioners appointed by the Orphan's Court, _____ County, to divide the land belonging to the father of Andrew Smith] and extending to the thoroughfare."

12. By deed dated June 7, 1883, and recorded on August 20, 1883, in the _____ County Clerk's Office in Deed Book ____, page ____, James Smith, Steelman Smith and John Smith conveyed to Richard Pen for good consideration, a tract of land in _____, _____ County, described in Schedule A attached hereto and made a part hereof.

13. On May 20, 1903, William Pear, Experience Jones and Alfred Jones brought suits in ejectment against Richard Pen regarding the property and another tract.

14. In April 1905, the Supreme Court nonsuited plaintiffs in these

ejectment suits, but that decision did not fix title in anyone.

15. On March 20, 1909, the Court of Errors and Appeals dismissed plaintiffs' appeals in the ejectment suits for lack of prosecution.

16. By warranty deed dated June 7, 1906 and recorded on July 23, 1906 in the _____County Clerk's Office in Deed Book _____ , page _____, Experience Jones and Alfred Jones conveyed to Marion Owl for good consideration all their right, title and interest in the property.

17. By quitclaim deed dated April 14, 1910 and recorded on June 6, 2010 in the _____Clerk's Office in Deed Book _____, page ____, William Pear conveyed to Marion Owl for good consideration all his right, title and interest in the property.

18. By special warranty deed dated April 20, 1913 and recorded on April 22, 1913 in the _____County Clerk's Office in Deed Book _____, page _____, Marion Owl and his wife, Elizabeth Owl, conveyed to Land Co. for good consideration, the land situated in _____, _____ County and State of New Jersey, as described in Schedule B attached hereto and made a part hereof.

19. A Declaration of Trust encompassing the property dated April 28, 1913 and recorded on November 16, 1915 in the _____County Clerk's Office in Deed Book _____, page _____, executed from Land Co. to Marion Owl.

20. By special warranty deed dated November 5, 1915 and recorded on November 6, 1915 in the County Clerk's Office in Deed Book , page , Land

Co. conveyed to Marion Owl Estates for good consideration the land described in Paragraph 21 and encompassing the property.

21. By special warranty deed dated May 29, 1900 and recorded on February 14, 1902 in the _____County Clerk's Office in Deed Book _____, page ____, Richard Pen conveyed to Charles Pen for good consideration the premises described in Paragraph 15, excepting certain lots previously conveyed to others.

22. On March 17, 1916, Charles Pen brought an action against Land Co., Marion Owl and Marion Owl Estates to quiet his title to lands encompassing the property.

23. On October 3, 1916, the Chancery Court decided that quiet title action in favor of Charles Pen.

24. On March 6, 1917, the Court of Errors and Appeals dismissed the appeals of Land Co., Marion Owl and Marion Owl Estates.

25. On July 22, 1920, Charles Pen filed an action against Land Co., Marion Owl, Marion Owl Estates and Salina Chart to quiet his title to lands encompassing the property.

26. On September 21, 1920, the Chancery Court entered judgment for Charles Pen, on the grounds that the decision in the 1905 ejectment action and the 1916 quiet title action rendered the matter res judicata.

27. On March 5, 1923, the Court of Errors and Appeals reversed the decision of the Chancery Court and remanded the matter for hearing.

28. By deed dated May 18, 1923 and recorded on September 10, 1923 in the _____ County Clerk's Office in Deed Book _____, page _____, Marion Owl Estates conveyed to Park Co. for good consideration all its right, title and interest in the land "bounded on the south by Lake Avenue, on the west by State Avenue, on the north by Shrimp Thoroughfare and on the east by Beach Thoroughfare."

29. By deed dated August 24, 1923 and recorded on September 13, 2023 in the _____County Clerk's Office in Deed Book _____, page _____, Charles Pen conveyed to Park Co. all that tract of land described in Paragraph 28, excepting certain described premises.

30. By agreement dated July 5, 1923 and recorded on April 9, 1924 in the _____County Clerk's Office in Deed Book _____, page _____, Marion Owl and Marion Owl Estates agreed to convey to Jacob Tale for good consideration all that tract of land described in Paragraph 28, free of all encumbrances.

31. On July 7, 1923, Jacob Tale assigned all his right, title and interest in the agreement of July 5, 1923 for good consideration to Milton Feet.

32. On March 20, 1924, Milton Feet assigned all his right, title and interest in the agreement of July 5, 1923 for good consideration to Marion Owl Estates.

33. Thereafter, by a series of conveyances defendant acquired whatever interests existed under the Pen chain of title, but only 23/25 of the interests existing under the Jones-Pear chain.

34. Plaintiff John Doe is a direct descendant of Elizabeth Johnson and Sarah Jones, and has succeeded to their undivided 2/25 interest in the property.

35. Plaintiff XYZ Corporation is an assignee of 50% of the interests of plaintiff, John Doe in the property.

36. Plaintiffs are not in possession of the property at present.

37. Defendant is in actual possession of the property at present.

38. Under N.J.S.A. 2A:25-1, et seq., plaintiffs are entitled to an adjudication of their rights in the property.

WHEREFORE, plaintiffs demand judgment against defendant finding that plaintiffs have a valid interest in the property, together with attorneys' fees and costs of suit.

SECOND COUNT

1. Plaintiffs repeat the allegations of the First Count as if set forth at length herein.

2. Under N.J.S.A. 2A:16-50, et seq., plaintiffs are entitled to a declaratory judgment adjudicating their rights in the property.

WHEREFORE, plaintiffs demand judgment against defendant finding that plaintiffs have a valid interest in the property, together with attorneys' fees and costs of suit.

THIRD COUNT

1. Plaintiffs repeat the allegations of the First and Second Counts as if set forth at length herein.

2. Plaintiffs fear probable future harm to their interests in the property as a result of defendant's use and possession of the property.

3. Due to the presence of fraud, accident or mistake that may necessitate the reformation or setting aside of deeds or instruments of conveyance, plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgment against defendant finding that plaintiffs have a valid interest in the property, together with attorneys' fees and costs of suit.

FOURTH COUNT

1. Plaintiffs repeat the allegations of the First, Second and Third Counts as if set forth at length herein.

2. N.J.S.A. 2A:56-1, et seq., provides that a tenant in common has a right to a partition of the property in which it has an interest in common. R. 4:63-1 and N.J.S.A. 2A:56-2 provide that unless it can be shown that a division of the property can be made without great prejudice, partition may be though a sale of the property.

3. A division of the property among the co-tenants cannot be made without great prejudice to the interests of the plaintiffs.

WHEREFORE, plaintiffs demand judgment against defendants:

(A) Ordering a sale of the property in accordance with applicable statutes and under such terms and conditions as the Court deems just and equitable;

(B) Ordering the costs and fees incurred in connection with any such sale to be paid out of the proceeds of the sale;

(C) Ordering any and all liens and encumbrances on the property to be paid out of the proceeds of the sale;

(D) Ordering the remainder of the proceeds to be divided among the parties hereto in accordance with their respective interests; and

(E) Granting such other relief as the Court deems just and equitable.

The Law Firm of Larry Lawyer, PC
Attorneys for Plaintiff

By:_____

Dated: _____

SCHEDULE A

[Description]

SCHEDULE B

[Description]

The Law Firm of Larry Lawyer, PC
Larry Lawyer, Esq.
1 First Avenue
Anytown, New Jersey 07000
(908) 555-1212
Attorneys for Plaintiff

ABC COMPANY LIMITED PARTNERSHIP,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	CHANCERY DIVISION
	:	_____ COUNTY
v.	:	
	:	Docket No.:
JOHN DOE,	:	
	:	CIVIL ACTION
Defendant.	:	COMPLAINT
	:	(Specific Performance)

1. Plaintiff, ABC Company Limited Partnership ("ABC"), with offices located at Doe Street, Borough of Doe, County of Doe, State of New Jersey, is a New Jersey limited partnership.

2. Defendant, John Doe, resides at 0000 Doe Lane in the City of Doe, County of Doe, State of New Jersey.

3. Defendant is, and at all times relevant hereto was, the owner in fee of certain lands, improvements and leases situated in the city of New Brunswick, County of Middlesex, State of New Jersey ("the Complex").

4. By written contract dated May 4, 2000, plaintiff and defendant entered into an agreement of sale in which defendant agreed to sell and plaintiff agreed to purchase the Complex. A true and correct copy of the contract signed by the parties is attached hereto, marked Exhibit A and by reference made a part

hereof.

5. Defendant entered into the May 4, 2000 contract with full knowledge that plaintiff's present commercial space was no longer suitable for its needs and that plaintiff required, by a date certain, additional commercial space in order to conduct its business.

6. On August 17, 2000, plaintiff's attorney sent to defendant's attorney a letter, together with a mortgage loan commitment from plaintiff in connection with the conveyance of the Complex, thus satisfying the financing contingency.

7. In accordance with the contract, time was declared to be of the essence and a closing was scheduled for April 5, 2001.

8. On March 25, 2001, attorney for defendant confirmed that his client would not close title on April 5, 2001 and that plaintiff need not prepare for execution an exchange of documents at a closing on April 5, 2001. This conversation was confirmed in a March 26, 2001 letter from plaintiff's attorney to defendant's attorney, a true copy of which is annexed hereto as Exhibit B. In this letter, plaintiff also declared defendant to be in breach of his contract.

9. Thereafter, attorneys for defendant and plaintiff spoke and, without waiving previous positions, a new time of the essence date was declared for May 6, 2001.

10. On or about May 2, 2001, the principals of the parties met to discuss the transaction. At the same time, the attorneys conferred and agreed that if the parties were unable to achieve a new understanding upon which a closing could occur, there would be no necessity for plaintiff's attorney to appear for the closing on May 6, 2001.

11. Despite subsequent negotiations, the transaction was not

consummated.

12. Thereafter, and continuing to the present time, plaintiff has made repeated demands to defendant and defendant's counsel to consummate the transaction, but defendant and defendant's counsel have failed, neglected, and refused, and still fail, neglect, and refuse to consummate the transaction.

13. Plaintiff is now and at all times relevant hereto has been ready, willing and able to close the transaction.

14. Plaintiff's remedy at law is inadequate because money damages cannot compensate plaintiff for defendant's refusal to consummate the transaction.

WHEREFORE, plaintiff prays:

(1) For a decree of specific performance directing that defendant convey to plaintiff, in the performance of the contract, by good and sufficient deed, the Complex;

(2) For compensatory damages;

(3) For costs of suit; and

(4) For such other and further relief that the court deems equitable and just.

The Law Firm of Larry Lawyer, PC
Attorneys for Plaintiff

By:_____

Dated:_____

The Law Firm of Larry Lawyer, PC
Larry Lawyer, Esq.
1 First Avenue
Anytown, New Jersey 07000
(908) 555-1212
Attorneys for Plaintiff

THE BANK OF DOE,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	CHANCERY DIVISION
	:	_____ COUNTY
v.	:	
	:	DOCKET NO. F-
ROE & SON, INC., ISAAC ROE, FORTUNATE ROE, DAVID ROE, and STATE OF NEW JERSEY,	:	Civil Action
	:	COMPLAINT IN FORECLOSURE
Defendants.	:	

Plaintiff, The Bank of Doe ("Bank"), having principal offices at 000 Fifth Avenue, Newark, New Jersey, by way of Complaint against the defendants, says:

FIRST COUNT

1. On or about February 14, 2000, defendant Roe & Sons executed and delivered to Bank a certain note (the "Note"), in the face amount of $70,500.00 with interest thereon at the rate of twelve (12%) percent per annum.

2. The Note was due and payable in full on or before March 16, 2000.

3. On March 16, 2000, Roe & Son failed to make the payment due under

the Note.

4. Pursuant to the terms of the Note, an Event of Default is defined as follows:

(a) a breach by any of the undersigned of any promise, term, covenant, obligation, representation or warranty arising under this note or any present or future agreement with the Bank, including the failure to make any payment of principal or interest, when due....

5. Defendants I. Roe, F. Roe and D. Roe are upon information and belief, the principals of Roe & Son.

6. On or about August 3, 2000, defendants Roe & Son, I. Roe, F. Roe and D. Roe entered into a certain agreement (the "Forbearance Agreement"), with Bank pursuant to which Bank agreed, in part, to forebear from exercising legal action against Roe & Son with respect to its remedies under the Note.

7. In exchange for Bank's agreement to forebear, Roe & Son agreed to pay the sum of $70,500.00 due under the Note as follows:

1. $15,000.00 simultaneously with the execution of this agreement; $1,500.00 on or before October 30, 2000, and $1,500.00 on the last day of each month thereafter until and including the last day of May 2001; $2,500.00 on the last day of May 2001 and $2,500.00 on the last day of each month thereafter until the full sum of $70,500.00 is paid.

8. In consideration of the agreement by plaintiff to forebear pursuant to the Forbearance Agreement, defendants I. Roe and F. Roe did execute a mortgage

(the "Mortgage") in favor of Bank in the face amount of $70,5000.00 dated September 5, 2000 and recorded in the Office of the Clerk of (name) County in Mortgage Book 0000, Page 000. The Mortgage encumbers certain real property and improvements located in the Township of (name), County of (name) and State of New Jersey described in Exhibit "A" annexed hereto (the "Mortgaged Premises").

9. As of January 1, 2001, there is presently outstanding under the Note as modified by the Forbearance Agreement, the principal sum of $55,500, together with interest accrued and in arrears in the approximate amount of $5,920.00. Interest continues to accrue at the rate set forth in the Note as modified by the Forbearance Agreement.

10. The Note, Forbearance Agreement and the Mortgage are in default, in part, by failure to repay principal and interest in accordance with the terms of the Note as modified by the Forbearance Agreement.

11. The Forbearance Agreement provides in part, as follows:

[T]he parties hereby agree that lender shall not have an obligation to forebear from legal action or the exercise of any of its remedies (including but not limited to entry of judgment... and foreclosure of the collateral mortgage) upon the occurrence of any event of default under the Note or Security Agreement....

12. The Mortgage provides with respect to default thereunder, in part, as follows:

DEFAULT: The mortgagor further covenants with Bank that the entire indebtedness secured by this mortgage shall become due and payable at the option

of Bank upon the occurrence of any one or more of the following events ("Events of Default"):

(a) a breach by any of the undersigned, which term shall hereinafter be deemed to include Roe & Son and or any indorser, surety or guarantor of the indebtedness of Roe & Son, of any promise, term, covenant, obligation, representation or warranty arising under this mortgage or any present or future agreement with Bank, including a certain agreement dated August 3, 2000, providing for the repayment of an indebtedness of $70,500.00 plus interest, including the failure to make any payment of principal or interest, when due;

13. The Mortgage further provides with respect to plaintiff's remedies upon an Event of Default thereunder, as follows:

REMEDIES UPON AN EVENT OF DEFAULT: Upon the event of default under this mortgage or any of the obligations secured hereby (a) Bank may declare all the Obligations secured by this Mortgage to be immediately due and payable; (b) Bank may enter and take possession of the Premises and rent the same...; (c) Bank may foreclose this Mortgage; (d) upon the filing of a complaint in foreclosure, Bank shall be entitled to the appointment of a receiver of the rents of the Premises without the necessity of proving either inadequacy of the security or insolvency of the Mortgagor....

14. The Mortgage further provides in part:

ATTORNEY'S FEES: If the mortgagee or its successors or assigns retains attorneys to foreclose this mortgager to collect the debt, the mortgagor shall pay the reasonable fees of the attorneys and all disbursements incurred by them.

15. By reason of the default alleged, Bank has elected to declare such an Event of Default and to pursue its remedies as provided in the Note, Mortgage and Forbearance Agreement including the commencement of this foreclosure action.

16. During the course of this foreclosure action, plaintiff may from time to time advance funds as may be necessary for the preservation and maintenance of its security. Any such funds so advanced shall be added to the debt secured by the Mortgage as a first and paramount lien upon the Mortgaged Premises.

17. Defendants Isaac Roe and Fortunate Roe are joined as parties herein because they are Mortgagors and the fee owners of the Mortgaged Premises. Any interest which said defendants Isaac Roe and Fortunate Roe may have or claim to have in or upon the Mortgaged Premises or any part thereof is subject to the lien of plaintiff's Mortgage and is subordinate thereto.

18. Defendants Isaac Roe, Fortunate Roe and David Roe are joined as party defendants herein because they have executed certain guarantees ("Guarantees"), dated December 8, 1987, therein guaranteeing any and all indebtedness of Roe & Son to Bank. Any interest which defendants Isaac Roe, Fortunate Roe and David Roe have or claim to have in or upon the Mortgaged Premises or any part thereof is subject to the lien of plaintiff's Mortgage and is subordinate thereto.

19. Defendant State of New Jersey is joined as a party herein because defendants may be subject to employment, income or other taxes or charges due to the State of New Jersey, together with interest and penalties, which taxes may be a lien upon the Mortgaged Premises. Any interest which said defendant State of

New Jersey has or may claim to have in or upon the Mortgaged Premises or any part thereof is subject to the lien of plaintiff's Mortgage and is subordinate thereto.

WHEREFORE, plaintiff Bank demands judgment against defendants as follows:

(a) Fixing the amount due on the Note as modified by the Forbearance Agreement and secured by the Mortgage;

(b) Barring and foreclosing defendants and all of them from all equity of redemption in and to the Mortgaged Premises described in Exhibit "A" annexed hereto;

(c) Directing the plaintiff be paid the amount due under the Note as modified by the Forbearance Agreement together with interest as set forth in the Note as modified by the Forbearance Agreement to date of payment plus costs of suit and reasonable counsel fees;

(d) Directing that the Mortgaged Premises be sold in bulk and as one parcel according to law to satisfy the amount due plaintiff;

(e) Directing that a receiver be appointed to take immediate possession of the Mortgaged Premises; and

(f) Such other relief as the Court shall deem equitable.

SECOND COUNT

1. Plaintiff Bank repeats each and every allegation set forth in the First Count and expressly makes same part of this Second Count as if more fully set forth herein.

2. Plaintiff demands of defendants possession of the Mortgaged Premises with the appurtenances described in Exhibit "A" annexed hereto.

3. Plaintiff states that its right to possession to said Mortgaged Premises occurred on the date of default as provided in the Loan Documents.

4. Defendants have wrongfully deprived plaintiff of possession of said Mortgaged Premises and appurtenances thereto since said date.

WHEREFORE, plaintiff Bank demands judgment against defendants Roe and son granting:

(a) Possession of the Mortgaged Premises and appurtenances described in Exhibit "A" annexed hereto;

(b) Damages for mesne profits; and

(c) Costs of suit, including reasonable counsel fees.

THIRD COUNT

1. Plaintiff Bank repeats each and every allegation set forth in the First and Second Counts and expressly makes same part of this Third Count as if more fully set forth herein.

2. On or about December 8, 1987, in order to reflect and secure all of its monetary obligations to Bank, Defendants Roe and Son executed and delivered to Bank a certain security agreement ("Security Agreement"), granting Bank a first lien security interest in certain property of Roe & Son (the "Collateral"), described therein.

3. The first lien security interest in the Collateral was perfected by the execution, delivery and filing of a UCC-1 financing statement ("Financing

Statement"), a true copy of which is annexed hereto as Exhibit "B".

4. By virtue of the execution by defendant Roe & Son of the Financing Statement filed by plaintiff, all of the Collateral as set forth therein and as set forth on Exhibit "B" annexed hereto are encumbered by the lien of the plaintiff.

5. By virtue of its default under the Note and Forbearance Agreement, Roe & Son is in default under the Security Agreement.

6. The Security Agreement provides, in part, with respect to Bank remedies in the event of default, as follows:

REMEDIES ON DEFAULT: Debtor agrees that whenever a default shall be existing, Secured Party shall have the following rights and remedies ... (a) to declare the Note and all Obligations due and payable, at the option of Secured Party, without notice or demand; (b) to enter the foregoing premises or such place or places where any of the Collateral may be located and take and carry away the same, by any of its representatives, with or without legal process, to Secured Party's place of storage; (c) to sell the Collateral at public or private sale ...; (d) to be the purchaser at any such sale; (e) to require debtor to pay all expenses of such sale, taking, keeping and storage of the Collateral, including reasonable attorneys fees; (f) to apply the proceeds of such sale to all expenses in connection with the taking and sale of the Collateral, and any balance of such proceeds toward the payment of the Obligations in such order of application as Secured Party may from time to time elect; (g) to require Debtor to assemble the collateral upon Secured Party's demand, at Debtor's expense and make it available to Secured Party at

place designated by Secured party...; (h) to exercise any one or more rights or remedies accorded by the Uniform Commercial Code.

WHEREFORE, plaintiff Bank demands judgment against defendants as follows:

(a) Foreclosing Bank's security interest in the Collateral;

(b) Ordering Roe & Son to immediately turn over and surrender the Collateral to Bank or, in default thereof, permitting Bank or its agents and/or assigns to take possession of the Collateral;

(c) Permitting Bank to sell, lease or otherwise dispose of the Collateral in accordance with the terms of the Security Agreement and applicable law, and to apply the amount realized from such sale or other disposition to Roe & Son's obligations to Bank, together with costs, charges and disbursements incurred by Bank by reason of such disposition of the Collateral; and

(d) Such other relief as this Court deems equitable and just.

The Law Firm of Larry Lawyer, PC
Attorneys for Plaintiff

BY:_____

DATED: _____

CHECKLIST FOR FILING AN ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

It should be noted that the Order to Show Cause procedure may only be used where authorized by rule or statute or where there is alleged to be some immediate and irreparable harm that must be addressed by a restraining order. Counsel should review *Crowe v. DeGioia*, 90 N.J. 126 (1982) and *R.* 4:52 and *R.* 4:67. The Court's scheduling of the return date will depend on how emergent the matter is.

1. The attorney selects the venue, pursuant to Court Rules, in which to bring the Order to Show Cause.

2. The attorney contacts the Judge's chambers beforehand and advises the Law Clerk of counsel's intent to file the Order to Show Cause with temporary restraints and the nature of the emergency. Counsel may request permission to fax a letter to the Court describing the nature of the emergent matter. Depending on the nature of the emergency, the Law Clerk will either give a date and time for the application to be heard or will advise the attorney to file the papers and obtain a docket number, after which the Judge will review the papers and set a date and time for the application for temporary restraints.

3. Counsel for plaintiff contacts defendant(s) (or their counsel) and advises them of the application for temporary restraints (except in the rarest of circumstances, the Court will only hear the application with notice to the adversary). If there is a date set for the application for the temporary restraints, counsel must advise the adversary of the date and time.

4. Plaintiff is to deliver a copy of their papers to the Court and absent extraordinary circumstances, to the defendant(s).

5. Counsel files with the County Superior Court Clerk:

    a. the Order to Show Cause with temporary restraints,
    b. Verified Complaint,
    c. brief,
    d. any accompanying affidavits, and
    e. $300 ($250 for the complaint and $50 for the order to Show Cause)

6. Counsel waits for the application to be docketed and brings a copy of the docketed papers to the Judge's chambers.

7. The Court hears the application for temporary restraints, enters the appropriate order and sets a return date on the Order to Show Cause.

8. Service on Defendant(s):

    a. Plaintiff must serve the order to show cause on defendants in accordance with *R.* 4:4-3 and *R.* 4:4-4. Note: a temporary restraining order entered ex parte must include provisions allowing the adversary to move, on two (2) days notice, to revoke or modify the provisions.

9. Plaintiff's attorney files proof of service of the Order to Show Cause with the Court on or before the return date.

CHECKLIST FOR FILING AN ORDER TO SHOW CAUSE DURING PENDING LITIGATION

Pursuant to *R.* 4:52-2, a party may bring an Order to Show Cause while there is pending litigation on a matter in order to obtain temporary restraints or an interlocutory injunction. This Order to Show Cause procedure may only be used where there is alleged to be some immediate and irreparable harm that must be addressed by injunctive relief. Counsel should review *Crowe v. DeGioia*, 90 N.J. 126 (1982) and *R.* 4:52.

1. Counsel contacts the judge's chambers and advises the law clerk of counsel's intent to file the Order to Show Cause. Counsel may request permission to fax a letter to the Court describing the nature of the emergent matter. Depending on the nature of the emergency, the Law Clerk will either give a date and time for the application to be heard or will advise the attorney to file the papers, after which the Judge will review the papers and set a date and time for the application for temporary restraints.

2. Counsel for the moving party contacts the adversary's counsel or the pro se adversary and advises them of the intent to file the order to Show Cause (except in the rarest of circumstances, the Court will only hear the application with notice to the adversary). If temporary restraints are sought, immediately upon being advised of a date and time for the application for temporary restraints, counsel is to advice the adversary of the date and time.

3. The moving party is to deliver a copy of their papers to the Court and absent extraordinary circumstances, to the adversary(s).

4. Counsel files with the County Superior Court Clerk:
    a. the Order to Show Cause,
    b. any supporting affidavits,
    c. brief, and
    d. $50

5. The Court reviews the Order to Show Cause and accompanying documents.

6. If temporary restraints are sought, the Court hears the application for temporary restraints and sets a return date on the Order to Show Cause. If no temporary restraints and sough, the Court sets the return date for the Order to Show Cause.

7. Service on adversary(s):

a. If the adversary(s) were not present during the application for temporary restraints, the moving party must serve the Order to Show Cause and supporting papers on adversary(s). Note: a temporary restraining order entered ex parte must include provisions allowing the adversary to move, on two (2) days notice, to revoke or modify the provisions.

CHECKLIST FOR FILING AN ORDER TO SHOW CAUSE WITH VERIFIED COMPLAINT – NOT SEEKING TEMPORARY RESTRAINTS

It should be noted that the Order to Show Cause procedure may only be used where authorized by rule or statute or where there is alleged to be some immediate and irreparable harm that must be addressed by a restraining order. Counsel should review *Crowe v. DeGioia*, 90 N.J. 126 (1982) and *R.* 4:52 and *R.* 4:67.

1. Counsel files with the County Superior Court Clerk:

    a. the Order to Show Cause,
    b. Verified Complaint,
    c. any supporting affidavits, and
    d. $300 ($250 for the Complaint and $50 for the Order to Show Cause)

2. The clerk assigns a docket number to the case. The file is then forwarded to the Court. It is suggested that counsel submit a brief setting forth the circumstances that suggest a need for a preliminary injunction at the return date and the time constraints to be considered in setting a return date.

3. The Court reviews the complaint and accompanying documents, marks up the Order to Show Cause and sets the return date for plaintiff's application.

4. The Court returns the completed Order to Show Cause to the plaintiff's attorney by mail.

5. Plaintiff's attorney serves the Order to Show Cause and supporting papers on defendant(s) and/or their counsel pursuant to *R.* 4:4-3 and *R.* 4:4-4 (no summons is necessary, the Order to Show Cause replaces the summons).

6. Plaintiff's attorney files proof of service upon the defendant(s) with the Court on or before the return date of the Order to Show Cause.

OSC SUBMITTED DURING PENDING LITIGATION SEEKING TEMPORARY RESTRAINING ORDER

This model OSC sets out characteristic language that should be incorporated into an Order to Show Cause seeking temporary restraints being brought during pending litigation. The use of any specific provision must be tailored to the nature of the application.

Larry Lawyer, Esq.
1234 First Street
Somewhere, New Jersey 08625
Telephone: 609-555-1212
Attorney for

	:	Superior Court of New Jersey
ABC,	:	_____ Division____ Part
	:	_____ County
Plaintiff(s),	:	
	:	Docket No.
v.	:	
	:	CIVIL ACTION
XYZ,	:	
	:	
Defendant(s).	:	ORDER TO SHOW CAUSE
.	:	WITH TEMPORARY RESTRAINTS

THIS MATTER being brought before the Court by Larry lawyer, Esq., attorney for plaintiff/defendant seeking relief by way of **temporary restraints** pursuant to *R.* 4:52, based upon the facts set forth in the verified supporting affidavits or certifications filed herewith and it appearing that *[choose one][ ] [plaintiff or defendant] has notice of this application; [ ] [plaintiff or defendant] consents to [plaintiff's or defendant's] application; [ ] that immediate and irreparable damage will probably result before notice can be given* and a hearing held and for good cause shown:

IT IS on this _____day of _____, 20___*ORDERED* that *[plaintiff or defendant]* appear at the _____County Superior Court in _____, New Jersey at _____o'clock in the noon or as soon thereafter as

counsel can be heard, on the day of _____, 20___ to show cause why an Order should not be issued enjoining and restraining *[plaintiff or defendant]* from

1. _____
2. _____
3. _____ and
4. granting such other and further relief as the Court deems equitable and just;

And it is further ORDERED that pending the return date herein *[plaintiff or defendant]* is enjoined and restrained from

1. _____
2. _____
3. _____

And it is further ORDERED that:

a. A copy of this order to show cause, legal memorandum and all supporting affidavits or certifications submitted in support of this application be served upon the *[plaintiff or defendant]* personally or _____within days of the date this Order.

b. *[plaintiff or defendant]* must file proof of service of the pleadings on the *[plaintiff or defendant]* no later than three (3) days before the return date.

c. *[plaintiff or defendant]* must file a written response to this order to show cause and request for injunctive relief and proof of service by _____, 20___. The original documents must be filed with the Clerk of the Superior Court in the county listed above. A list of these offices is provided. You must send a copy of your opposition papers directly to Judge _____, whose address is _____, New Jersey. You must also send a copy of your opposition papers to the plaintiff's defendant's attorney whose name and address appears above, or to the plaintiff/defendant if no attorney is named above. A telephone call will not protect your rights; you must file your opposition and serve your opposition on

your adversary if you want the Court to hear your opposition to the relief the *[plaintiff or defendant]* is seeking.

d. *[plaintiff or defendant]* must file and serve any written reply to the *[plaintiff's or defendant's]* opposition by _____, 20___. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge _____.

e. *[plaintiff or defendant]* may move to dissolve the restraints contained herein on two (2) days notice to *[plaintiff's or defendant's]* attorney or *[plaintiff or defendant]*.

f. If *[plaintiff or defendant]* does not file and serve opposition to this Order to Show Cause, the application may be decided on the papers on the return date and relief may be granted by default, provided that the *[plaintiff or defendant]* files a proof of service and a proposed form of order at least three days prior to the return date.

g. If *[plaintiff or defendant]* has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed stamped envelope with return address and postage) must be submitted to the Court no later than three (3) days before the return date.

The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the Court and parties are advised to the contrary no later than ____days before the return date.

OTSC AS ORIGINAL PROCESS –
SUBMITTED WITH NEW COMPLAINT
PRELIMINARY INJUNCTIVE RELIEF
PURSUANT TO RULE 4:52-1 – NO TRO

	Superior Court of New Jersey _____ Division County _____ Part
_____, [I*nsert the plaintiff's name*], Plaintiff(s), v. _____, [I*nsert the defendant's name*], Defendant(s).	Docket No.: _____ CIVIL ACTION ORDER TO SHOW CAUSE PRELIMINARY INJUNCTION PURSUANT TO *RULE* 4:52

THIS MATTER being brought before the court by _____, attorney for plaintiff, (*insert the plaintiff's name)*, seeking relief by way of preliminary injunction at the return date set forth below pursuant to *R.* 4:52, based upon the facts set forth in the verified complaint filed herewith and for good cause shown.

It is on this ____ day of _____ ORDERED that defendant(s), *(insert the defendant's name)*, appear and show cause before the Superior Court at the _____ County Courthouse in _____, New Jersey at _____ o'clock in the _____ noon or as soon thereafter as counsel can be heard, on the _____day of _____, 20 __ why an order should not be issued preliminarily enjoining and restraining [insert the defendant's name] from

A. (*Set forth with specificity the return date relief that the plaintiff is seeking)*;

B. _____;

C. _____;

D. Granting such other relief as the court deems equitable and just.

And it is further ORDERED that:

1. A copy of this order to show cause, verified complaint, legal memorandum and any supporting affidavits or certifications submitted in support of this application be served upon the defendant(s) [personally or alternate: describe form of substituted service] within ____ days of the date hereof, in accordance with *R.* 4:4-3 and *R.* 4:4-4, this being original process.

2. The plaintiff must file with the court his/her/its proof of service of the pleadings on the defendant no later than three (3) days before the return date.

3. Defendant(s) shall file and serve a written response to this order to show cause and the request for entry of injunctive relief and proof of service by _____, 20__. The original documents must be filed with the clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at njcourts.gov/forms/10153_deptyclerklawref.pdf. You must send a copy of your opposition papers directly to Judge _____, whose address is _____, New Jersey. You must also send a copy of your opposition papers to the plaintiff's attorney whose name and address appears above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file your opposition and pay the required fee of $ _____ and serve your opposition on your adversary, if you want the court to hear your opposition to the injunctive relief the plaintiff is seeking.

4. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by _____, 20__. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge _____.

5. If the defendant does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

6. If the plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date.

7. Defendant takes notice that the plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer to the complaint and proof of service within 35 days from the day of service of this order to show cause; not counting the day you received it.

These documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at njcourts.gov/forms/10153_deptyclerklawref.pdf. Include a $_____ filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your Answer to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your Answer (with the fee) or judgment may be entered against you by default.

Please note: Opposition to the order to show cause is not an Answer and you must file both. Please note further: if you do not file and serve an Answer within 35 days of this Order, the court may enter a default against you for the relief plaintiff demands.

8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJLAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is

available in the Civil Division Management Office in the county listed above and online at njcourts.gov/forms/10153_deptyclerklawref.pdf.

9. The court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than _____ days before the return date.

_____

J.S.C.

OSC AS ORIGINAL PROCESS – SUMMARY ACTION
PURSUANT TO *R* 4:67-1(A)
FAMILY PART *R.* 5:4-3(b)
SUBMITTED WITH NEW COMPLAINT

_____, [*Insert the plaintiff's name*], Plaintiff(s), v. _____, [*Insert the defendant's name*], Defendant(s).	Superior Court of New Jersey _____ Division _____ County _____ Part Docket No.: _____ CIVIL ACTION ORDER TO SHOW CAUSE SUMMARY ACTION

THIS MATTER being brought before the court by _____, attorney for plaintiff, [*insert the plaintiff's name*], seeking relief by way of summary action pursuant to R. 4:671(a), based upon the facts set forth in the verified complaint filed herewith; and the court having determined that this matter may be commenced by order to show cause as a summary proceeding pursuant to [*insert the statute or court rule that permits the matter to be brought as a summary action*] and for good cause shown.

IT IS on this _____ day of _____, 20__, *ORDERED* that the defendant(s), [*insert defendant's name(s)*], appear and show cause on the _____day of _____, 20___ before the Superior Court at the ____ County Courthouse in _____, New Jersey at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why judgment should not be entered for:

A. [*Set forth with specificity the return date relief that the plaintiff is seeking.*];

B. _____;

C. _____;

D. Granting such other relief as the court deems equitable and just. And it is further ORDERED that:

1. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications submitted in support of this application be served upon the defendant(s), [personally *or alternate: describe form of substituted service*] within ____ days of the date hereof, in accordance with *R*. 4:4-3 and *R*. 4:4-4, this being original process.

2. The plaintiff must file with the court his/her/its proof of service of the pleadings on the defendant(s) no later than three (3) days before the return date.

3. Defendant(s) shall file and serve a written answer, an answering affidavit or a motion returnable on the return date *[Family Part alternate:* appearance or response] to this order to show cause and the relief requested in the verified complaint and proof of service of the same by _____, 20__. The answer, answering affidavit or a motion [*Family Part alternate:* appearance, response], as the case may be, must be filed with the Clerk of the Superior Court in the county listed above and a copy of the papers must be sent directly to the chambers of Judge _____.

4. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by _____, 20__. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge _____.

5. If the defendant(s) do/does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

6. If the plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date.

7. Defendant(s) take notice that the plaintiff has filed a lawsuit [*Family Part alternate:* divorce action] against you in the Superior Court of New

Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer, an answering affidavit or a motion returnable on the return date to the order to show cause [*Family Part alternate*: appearance or response] and proof of service before the return date of the order to show cause.

These documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at njcourts.gov/forms/10153_deptyclerklawref.pdf. Include a $ _____ filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your answer, answering affidavit or motion [*Family Part alternate*: appearance or response] to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your answer, answering affidavit or motion [*Family Part alternate*: appearance or response] with the fee or judgment may be entered against you by default.

8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJLAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at njcourts.gov/forms/10153_deptyclerklawref.pdf.

9. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than _____ days before the return date.

_____

J.S.C.

OSC AS ORIGINAL PROCESS –
SUBMITTED WITH NEW COMPLAINT
PRELIMINARY INJUNCTIVE RELIEF AND
TEMPORARY RESTRAINING ORDER
PURSUANT TO RULE 4:52

_____, [I*nsert the plaintiff's name*], Plaintiff(s), v. _____, [I*nsert the defendant's name*], Defendant(s).	Superior Court of New Jersey _____ Division _____ County _____ Part Docket No.: _____ CIVIL ACTION ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS PURSUANT TO RULE 4:52

THIS MATTER being brought before the court by _____, attorney for plaintiff, [*insert the plaintiff's name*], seeking relief by way of temporary restraints pursuant to *R.* 4:52, based upon the facts set forth in the verified complaint filed herewith; and it appearing that [the defendant has notice of this application] *or* [defendant consent's to plaintiff's application] *or* [immediate and irreparable damage will probably result before notice can be given and a hearing held] and for good cause shown.

It is on this ____ day of _____ *ORDERED* that defendant, [*insert the defendant's name*], appear and show cause before the Superior Court at the _____ County Courthouse in _____, New Jersey at _____ o'clock in the _____ noon or as soon thereafter as counsel can be heard, on the _____day of _____, 20 __ why an order should not be issued preliminarily enjoining and restraining defendant, [*insert the defendant's name*], from

A. [*Set forth with specificity the return date relief that the plaintiff is seeking.*];

B. _____;

C. _____;

D. Granting such other relief as the court deems equitable and just.

And it is further *ORDERED* that pending the return date herein, the defendant is [*temporarily*] enjoined and restrained from:

A. [S*et forth with specificity the temporary restraints that the plaintiff is seeking.*];

B. _____;

C. _____.

And it is further *ORDERED* that:

1. The defendant may move to dissolve or modify the temporary restraints herein contained on two (2) days notice to the [plaintiff's attorney *or alternate:* plaintiff].

2. A copy of this order to show cause, verified complaint, legal memorandum and any supporting affidavits or certifications submitted in support of this application be served upon the defendant [personally *or alternate: describe form of substituted service*] within ____ days of the date hereof, in accordance with *R.* 4:4-3 and *R.* 4:4-4, this being original process.

3. The plaintiff must file with the court his/her/its proof of service of the pleadings on the defendant no later than three (3) days before the return date.

4. Defendant shall file and serve a written response to this order to show cause and the request for entry of injunctive relief and proof of service by _____, 20__. The original documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.njcourts.gov/forms/10153_deptyclerklawref.pdf. You must

send a copy of your opposition papers directly to Judge _____, whose address is _____, New Jersey. You must also send a copy of your opposition papers to the plaintiff's attorney whose name and address appears above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file your opposition and pay the required fee of $ _____ and serve your opposition on your adversary, if you want the court to hear your opposition to the injunctive relief the plaintiff is seeking.

5. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by _____, 20__. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge _____.

6. If the defendant does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

7. If the plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date.

8. Defendant take notice that the plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer to the complaint and proof of service within 35 days from the date of service of this order to show cause; not counting the day you received it.

These documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.njcourts.gov/forms/10153_deptyclerklawref.pdf. Include a $_____ filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your Answer to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your Answer (with the fee) or judgment may be entered against you by default. Please note: Opposition to the order to show cause is not an Answer and you must file both. Please note further: if you do not file and serve an Answer within 35 days of this Order, the Court may enter a default against you for the relief plaintiff demands.

9. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJLAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.njcourts.gov/forms/10153_deptyclerklawref.pdf.

10. The court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than ___ days before the return date.

_____

J.S.C.

OUTLINE OF AN ORDER APPOINTING A SPECIAL MEDICAL GUARDIAN

[CAPTION]

ORDER APPOINTING SPECIAL MEDICAL GUARDIAN

This matter being opened to the court by [Attorney for Plaintiff], Esq., attorney for [Plaintiff], upon the plaintiff's application for the appointment of a special medical guardian for [Patient] pursuant to *Rule* 4:86-12; in the presence of [Attorney for Patient] Esq., the court-appointed attorney for [Patient] and [Attorney for Plaintiff] having met ***[and consulted]***[4] with [Patient] and the attorney for [Patient] having reported and having [*not objected to] [opposed]*] the proposed medical/surgical procedure and the appointment of a special medical guardian.

The court having considered the verified complaint and affidavits/certifications in support of the application and having conducted a *[telephonic]/ [in person]* hearing where Dr. _____ , Dr. _____ and _____ testified concerning the medical necessity of [*describe medical/surgical intervention*].

[If the patient is competent] The Court having taken the testimony of [Patient] as to *[his] [her]* grounds for refusing to consent to the medical/ surgical procedure.

It further appearing that [Patient] is in need of [*describe medical/surgical intervention*] to [*describe the purpose of the medical/surgical intervention*] and the prompt rendering of the medical/surgical treatment is necessary to deal with a substantial threat to the patient's life or health.

The standards for appointment of special medical guardian, as set forth in *Rule* 4:86-12, have been met.

It further appearing that [*insert SMG's name*] consents to serve as special medical guardian, and good cause appearing.

It is on this ____ day of _____, 20___ [*ORDERED and ADJUDGED]/ [nunc pro tunc to the __ day of _____, 20__]*[5] that:

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[4] Insert "consulted" if the patient is competent.

[5] Insert *nunc pro tunc* if the judgment documents a prior oral judgment appointing a special medical guardian.

1. [Patient] is [incompetent/ unconscious/ underage] or otherwise unable to give or withhold *[his][her]* informed consent to the emergency medical/ surgical treatment based upon the affidavits/ certifications and testimony of Dr. _____ and Dr. _____ and the [*written][oral*] report of the court appointed attorney, _____.

OR

1A. [Patient] is an adult and competent and based upon the affidavits/ certifications and testimony of Dr. _____ and Dr. _____, the [*written][oral*] report of the court appointed attorney, _____ and the testimony of [Patient], [Patient]'s election to refuse the medical/ surgical procedure is outweighed by the State's interest to [(1) preserve life, (2) prevent suicide, (3) safeguard the integrity of the medical profession, (4) protect innocent third parties [*choose the appropriate rationale(s)]*.

OR

1B. [If PATIENT'S prior instructions are now determined to be no longer operable, then state basis, *e.g., patient's treatment instructions are NOT clear and unequivocal; DNR orders NOT clearly documented, reviewed, and updated periodically to reflect changes in the patient's condition; current condition/circumstances were NOT explicitly discussed with patient; including a balancing of benefits and burdens to patients and therapeutic goals; the advanced directive is not specific enough to cover a particular treatment decision.]*

THEN
substitute judgment
best interest

If medical or surgical treatment is denied, then consider ordering necessary palliative care to reduce suffering.

2. [SMG's Name] be and hereby is appointed special medical guardian for and on behalf of [Patient].

3. The special medical guardian be and hereby is directed to execute a consent for *[describe medical/surgical intervention]*.

4. [*Until the patient recovers decision making capacity or the patient is discharged from the hospital, whichever first occurs]* the special medical guardian be and hereby is further empowered to make *[subsequent] [immediately ancillary]* medical/surgical decisions on behalf of [Patient] related to *[describe medical/surgical intervention* as

the [Patient]'s treating physician/surgeon deems necessary and, accordingly, is authorized to execute all consents or documents necessary to accomplish the same. [6]

5. The special medical guardian shall not sign any order or instruction not to resuscitate [Patient] without further order of the court following a hearing on the matter.

6. This judgment shall be effective from the aforementioned date and the special medical guardian shall be discharged *[by further order of the court] [after the prompt] [within 10 days]* of the procedure's completion filing of a brief report with the court concerning the *[outcome of the medical/surgical procedure] [patient's post-procedure status]*.

7. *[If Patient is solvent]* Attorney _____, Esq. having submitted an affidavit/certification of services, is awarded a fee of $ _____ which shall be paid from [Patient]'s assets.

7A. **OR** *[If PATIENT is solvent]* Attorney _____, Esq. having submitted an affidavit/certification of services, is awarded a fee of $ _____ which shall be advanced by the plaintiff, subject to reimbursement out of the estate of [Patient] to the extent that an estate exists and has funds available for this purpose.

7B. **OR** *[If PATIENT is indigent]* Attorney _____, Esq. having submitted an affidavit/certification of services, is awarded a fee of $ _____ which shall be paid from the plaintiff's assets.

7C. **OR** *[If PATIENT is indigent]* Attorney _____, Esq.'s activities shall be registered as a *pro bono* assignment.

8. Physician _____ shall be paid $_____ for reports in support of application from _____. Physician _____ shall be paid $_____ for reports in support of application from _____.

9. Applicant's/ Plaintiff's cost and fees shall be paid from _____ in an amount not to exceed $_____.

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[6] Authorization may be limited to a specific procedure, or to a specific procedure and its sequelae, whether expected or unexpected. Generally, however, any consent should not be so limited that a physician should be placed in the position of not being able to provide a needed procedure, *e.g.*, a transfusion to save the patient's life during the course of that surgery.

10. *[Additional Case-Specific Provisions]*

11. **IT IS FURTHER** Ordered that a copy of this judgment be served on all interested parties and attorneys of record by the plaintiff's attorney within seven (7) days of the date hereof.

_____

P.J. Ch./ J.S.C.

COURT DIRECTORY

Atlantic County Criminal Court House
4997 Unami Boulevard
Mays Landing, NJ 08330
(609) 909-8214

Bergen County Justice Center
10 Main Street
Hackensack, NJ 07601
(201) 527-2700

Burlington County Court Facility
49 Rancocas Road
Mount Holly, NJ 08060
(609) 518-2500

Camden County Hall of Justice
101 South Fifth Street
Camden, NJ 08103-4001
(856) 379-2200

Cape May County Courthouse
9 North Main Street
Cape May Courthouse, NJ 08210
(609) 465-1000

Cumberland County Courthouse
Broad & Fayette Streets
Bridgeton, NJ 08302
(856) 451-8000

Essex County Courts Building
50 West Market Street
Newark, NJ 07102
(973) 693-5701

Gloucester County Courthouse
1 North Broad Street
Woodbury, NJ 08096
(856) 853-3200

Hudson County Administration Building
595 Newark Avenue
Jersey City, NJ 07306
(201) 795-6000

Hunterdon County Courthouse
65 Park Avenue
Flemington, NJ 08822
(908) 788-1589

Mercer County Courthouse
209 South Broad Street
Trenton, NJ 08650-0068
(609) 571-4343

Middlesex County Courthouse
1 Kennedy Square
New Brunswick, NJ 08903-0964
(732) 981-3200

Monmouth County Courthouse
71 Monmouth Park
Freehold, NJ 07728-1266
(732) 677-4210

Morris County Courthouse
Washington & Court Sts.
Morristown, NJ 07963-0910
(973) 656-4000

Ocean County Courthouse
118 Washington Street
Toms River, NJ 08754
(732) 244-2121

Passaic County Court House
77 Hamilton Street
Paterson, NJ 07505-2017
(973) 247-8000

Salem County Courthouse
92 Market Street
Salem, NJ 08079
(856) 935-7510

Somerset County Courthouse
North Bridge Street
Somerville, NJ 08876-1262
(908) 231-7191

Sussex County Judicial Center
43-4-7 High Street
Newton, NJ 07860
(973) 579-0675

Union County Courthouse
2 Broad Street
Elizabeth, NJ 07207
(908) 659-4100

Warren County Courthouse
Second and Hardwick Streets
Belvidere, NJ 07823
(908) 475-6161

SUPERIOR COURT DIRECTORY

ATLANTIC COUNTY:
Deputy Clerk of the Superior Court
Civil Division, Direct Filing
1201 Bacharach Blvd., First Fl.
Atlantic City, NJ08401

LAWYER REFERRAL
(609) 345-3444
LEGAL SERVICES
(609) 348-4200

BERGEN COUNTY:
Deputy Clerk of the Superior Court
Case Processing Section, Room 119
Justice Center, 10 Main St.
Hackensack, NJ 07601-0769

LAWYER REFERRAL
(201) 488-0044
LEGAL SERVICES
(201) 487-2166

BURLINGTON COUNTY:
Deputy Clerk of the Superior Court
Central Processing Office
Attn: Judicial Intake
First Fl., Courts Facility
49 Rancocas Rd.
Mt. Holly, NJ 08060

LAWYER REFERRAL
(609) 261-4862
LEGAL SERVICES
(609) 261-1088

CAMDEN COUNTY:
Deputy Clerk of the Superior Court
Civil Processing Office
1st Fl., Hall of Records
101 S. Fifth St.
Camden, NJ08103

LAWYER REFERRAL
(856) 964-4520
LEGAL SERVICES
(856) 964-2010

CAPE MAY COUNTY:
Deputy Clerk of the Superior Court
9 N. Main Street
Box DN-209
Cape May CourtHouse, NJ08210

LAWYER REFERRAL
(609) 463-0313
LEGAL SERVICES
(609) 465-3001

CUMBERLAND COUNTY:
Deputy Clerk of the Superior Court
Civil Case Management Office

LAWYER REFERRAL
(856) 692-6207

Broad & Fayette Sts., P.O. Box 615
Bridgeton, NJ08302

LEGAL SERVICES
(856) 451-0003

ESSEX COUNTY:
Deputy Clerk of the Superior Court
50 West Market Street
Room 131
Newark, NJ07102

LAWYER REFERRAL
(973) 622-6207
LEGAL SERVICES
(973) 624-4500

GLOUCESTER COUNTY:
Deputy Clerk of the Superior Court
Civil Case Management Office
Attn: Intake
First Fl., Court House
1 North Broad Street, P.O. Box 129
Woodbury, NJ08096

LAWYER REFERRAL
(856) 848-4589
LEGAL SERVICES
(856) 848-5360

HUDSON COUNTY:
Deputy Clerk of the Superior Court
Superior Court, Civil Records Dept.
Brennan Court House-- 1st Floor
583 Newark Ave.
Jersey City, NJ07306

LAWYER REFERRAL
(201) 798-2727
LEGAL SERVICES
(201) 792-6363

HUNTERDON COUNTY:
Deputy Clerk of the Superior Court
Civil Division
65 Park Avenue
Flemington, NJ08822

LAWYER REFERRAL
(908) 735-2611
LEGAL SERVICES
(908) 782-7979

MERCER COUNTY:
Deputy Clerk of the Superior Court
Local Filing Office, Courthouse
175 S. Broad Street, P.O. Box 8068
Trenton, NJ08650

LAWYER REFERRAL
(609) 585-6200
LEGAL SERVICES
(609) 695-6249

MIDDLESEX COUNTY:
Deputy Clerk of the Superior Court
Administration Building
Third Floor
1 Kennedy Sq., P.O. Box 2633
New Brunswick, NJ 08903-2633

LAWYER REFERRAL
(732) 828-0053
LEGAL SERVICES
(732) 249-7600

MONMOUTH COUNTY:
Deputy Clerk of the Superior Court
Court House
71 Monument Park
P.O. Box 1269
Freehold, NJ 07728-1269

LAWYER REFERRAL
(732) 431-5544
LEGAL SERVICES
(732) 866-0020

MORRIS COUNTY:
Deputy Clerk of the Superior Court
Civil Division
30 Schuyler Pl., P.O. Box 910
Morristown, NJ 07960-0910

LAWYER REFERRAL
(973) 267-5882
LEGAL SERVICES
(973) 285-6911

OCEAN COUNTY:
Deputy Clerk of the Superior Court
Court House, Room 119
118 Washington Street
Toms River, NJ08754

LAWYER REFERRAL
(732) 240-3666
LEGAL SERVICES
(732) 341-2727

PASSAIC COUNTY:
Deputy Clerk of the Superior Court
Civil Division
Court House
77 Hamilton St.
Paterson, NJ07505

LAWYER REFERRAL
(973) 278-9223
LEGAL SERVICES
(973) 345-7171

SALEM COUNTY:
Deputy Clerk of the Superior Court
92 Market St., P.O. Box 18
Salem, NJ08079

LAWYER REFERRAL
(856) 935-5628
LEGAL SERVICES
(856) 451-0003

SOMERSET COUNTY:
Deputy Clerk of the Superior Court
Civil Division Office
New Court House, 3rd Fl.
P.O. Box 3000
Somerville, NJ08876

LAWYER REFERRAL
(908) 685-2323
LEGAL SERVICES
(908) 231-0840

SUSSEX COUNTY:
Deputy Clerk of the Superior Court
Sussex County Judicial Center
43-47 High Street
Newton, NJ07860

LAWYER REFERRAL
(973) 267-5882
LEGAL SERVICES
(973) 383-7400

UNION COUNTY:
Deputy Clerk of the Superior Court
1st Fl., Court House
2 Broad Street
Elizabeth, NJ 07207-6073

LAWYER REFERRAL
(908) 353-4715
LEGAL SERVICES
(908) 354-4340

WARREN COUNTY:
Deputy Clerk of the Superior Court
Civil Division Office
Court House
413 Second Street
Belvidere, NJ 07823-1500

LAWYER REFERRAL
(973) 267-5882
LEGAL SERVICES
(973) 475-2010

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