NAVIGATING ADVERSE POSSESSION IN NEW JERSEY

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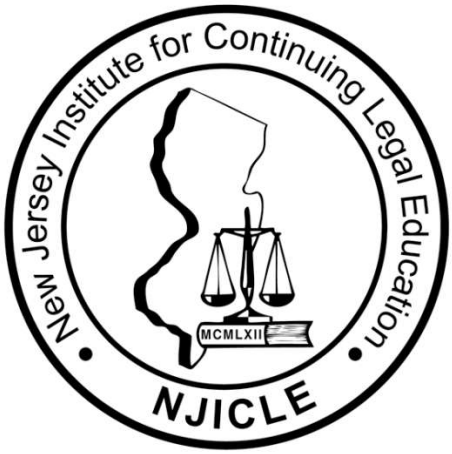

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NAVIGATING ADVERSE POSSESSION IN NEWJERSEY

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Navigating Adverse Possession In New Jersey

The history, the law, the overlapping legal rights and principles involved, and some practical advice for attorneys

Peter Cecinini, Esq.
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What is Adverse Possession?

It is a statute of limitations on an ejectment claim, which upon passage of the requisite time period acts to convert a possessory interest into a title interest.



History of Adverse Possession: English Common Law

At English common law, title by adverse possession was not fully recognized the way it is today. Taking title to land "without right" was seen as fundamentally unlawful:

> *"Neither fraud nor might can make a title where there wanteth right." Altham's Case, 1610*

Nonetheless the right existed in some cases where "colour of title" was asserted by the possessor. Before 1237 a claimant would have to prove possession going back to the date of death of King Henry I in 1135. It eventually moved to the coronation date of Richard 1 in 1189, and as of 1541 a claimant would have to prove over 300 years of possession in order to make a title claim.

History of Adverse Possession: English Statutory Law

The first statutes codifying the right to adverse possession and placing a clear statute of limitations on an ejectment claim were passed during the reign of Henry the Eighth in 1623. Per these statutes:

- The statute of limitations for an ejectment claim was 20 years
- Title could be gained through 30 years possession

Meaning an adverse possessor could not gain title for 30 years, but also theoretically could not be ejected from possession after 20 years.

History of Adverse Possession: Statutory Law In New Jersey

The English law on adverse possession controlled until 1787 when New Jersey passed its own adverse possession statute, granting title after either 30 or 60 years.

In 1799 an express statute of limitations was passed for ejectment actions in New Jersey, mirroring the English law at 20 years.

In 1877 a statute was passed expressly permitting a title owner of property who ejected an unlawful possessor to recover profits and damages from the possessor if it prevails.

History of Adverse Possession: Statutory Law In New Jersey

In 1922, the statute was clarified so that 30 years of possession was required for adverse possession of developed property, and 60 years was required for woodlands and uncultivated lands. The statute of limitations on an ejectment claim remained unchanged at 20 years.

In 1948 the Ejectment statute was modified to limit recovery on damages from a possessor to 6 years. However a set off was permitted for permanent improvements made by the possessor in good faith.

History of Adverse Possession: Tension Between the Statutes

The 20 year statute on limitations for ejectments, versus the 30 year requirement to obtain title, created great confusion. Some cases strictly interpreted the 20 year requirement as not permitting recovery of possession, but entitling the title holder to the reasonable market rental value of the land being possessed during that time period.

Other cases reasoned that a bar on recovery of possession after 20 years in fact creates a title right by the possessor, despite the 30 year statute's express language, because "[t]he law does not recognize a title which it will not protect."

History of Adverse Possession: Tension Between the Statutes

In 2001 the NJ Supreme Court decided that despite the tension in the statutes, 30/60 years of adverse possession gives title to the possessor, not 20 years. And a title holder may in fact eject a trespasser even if 20 years has run. The technical difference being that after 20 years the right to eject is at common law, instead of being statutory. This is the law of the land today.

Note that the *general* 20 year statute of limitations for an "action at law for real estate" (NJSA 2A:14-7) was not expressly overruled by the Court in this case, the case would only applies to adverse possession claims.

The Relevant Statutes: Adverse Possession

NJSA 2A:14-30. 30 years' possession of real estate, except woodlands or uncultivated tracts, and 60 years' possession of woodlands or uncultivated tracts however commenced or continued.

Thirty years' actual possession of any real estate excepting woodlands or uncultivated tracts, and 60 years' actual possession of woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance or otherwise, shall, in whatever way or manner such possession might have commenced or have been continued, vest a full and complete right and title in every actual possessor or occupier of such real estate, woodlands or uncultivated tracts, and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatsoever for the recovery of any such real estate, woodlands or uncultivated tracts.

The Relevant Statutes: Adverse Possession

NJSA 2A:14-31. 30 years' actual possession of any real estate under claim or color of title.

Thirty years' actual possession of any real estate, uninterruptedly continued by occupancy, descent, conveyance or otherwise, wherever such possession commenced or is founded upon a proprietary right duly laid thereon, and recorded in the office of the surveyor general of the division in which the location was made, or in the office of the secretary of state, pursuant to law, or wherever such possession was obtained by a fair bona fide purchase of such real estate from any person in possession thereof and supposed to have a legal right and title thereto, or from the agent of such person, shall be a good and sufficient bar to all prior locations, rights, titles, conveyances, or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such real estate.

The Relevant Statutes: Ejectment

NJSA 2A:35-1 (commonly referred to as the "Ejectment" statute):

> *Any person claiming the right of possession of real property **in the possession of another**, or claiming title to such real property, shall be entitled to have his rights determined in an action in the Superior Court.* ***(emphasis mine).***

If a party is NOT currently in possession of the land but wants to have its title rights determined, they must do so through an ejectment. If successful they will be able to remove the trespasser, and sue for damages of up to 6 years (NJSA 2A:14-1). Ejectments are expressly permitted to be filed as a summary manner in Special Civil division, however in the majority of cases involving adverse possession you will likely end up in Chancery and with full discovery.

The Relevant Statutes: Quiet Title



Must be "Peaceable"!
Image from "The Fair Haired Hare", Warner Brothers, 1951.

2A:62-1 (the "Quiet Title" statute):

*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. **(emphasis mine)***

If a party IS currently in "peaceable" possession of the land and wants its title rights determined it must file a Quiet Title claim. It is usually made in Chancery.

The Relevant Statutes: Writ of Possession

Upon receiving a judicial determination that a party has prevailed on an ejectment claim, the Court will issue an Order for Removal. The Clerk then prepares a Writ of Possession for signature by the judge. This signed writ must be forwarded by the litigant to the sheriff's office (not constable) for enforcement. This might take 30-45 days in most counties.

It's sometimes a good idea to attach a proposed writ to your motion, and/or to include it in subsequent court correspondence, and request that it be filed by the Clerk. Make sure it says the possessor's name followed by the words "and any other occupants". If the judge forgets to request the writ, or if there is some procedural issue with the court (common), you may need to remind court staff to ensure it gets to the the Judge's desk for signature. If necessary, cite and follow **R. 4:59-2(b)**.

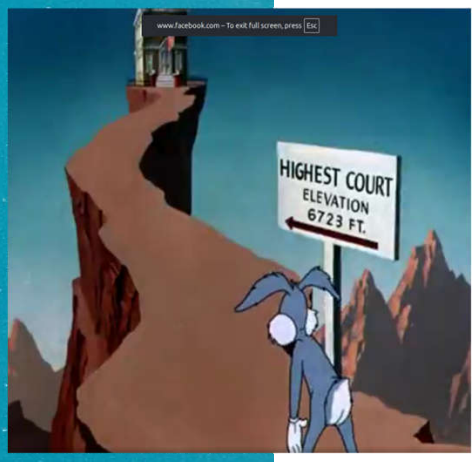


Image from "The Fair Haired Hare", Warner Brothers, 1951.

Making an Adverse Possession Claim: Elements, JD, Venue

The possession must be **"exclusive, continuous, uninterrupted, visible and notorious"** *Patton v. N. Jersey Dist. Water Supply Comm'n*, 93 NJ 180, 186 (1983).

Acts of dominion over the land must be so open and notorious as to put an ordinarily prudent person on notice that the land is in actual possession of another. *Mannillo v. Gorski*, 54 NJ 378, 387-388 (1969).

Most claims will be in Chancery, though Law Division and Special Civil are also permitted to hear such claims if they are not the primary relief being sought. Venue is usually the county the real property is located in.

Making an Adverse Possession Claim: The Burden

Unlike most states, the **preponderance of the evidence** standard applies in New Jersey. The initial burden is on the adverse possessor however:

> After a party introduces evidence of an open, continuous, uninterrupted exclusive use for the prescriptive period with the acquiescence of the owner, a presumption arises that the use was adverse except when the land is vacant, unimproved, unenclosed, and the use is casual rather than customary. *Patton v. N. Jersey Dist. Water Supply Comm'n*, 93 N.J. 180, 187 (1983).

Making an Adverse Possession Claim: The Burden

At least since *Mannillo v. Gorski*, 54 NJ 378 (1969), the character of possession generally need not be "hostile". A property can be *inadvertently* adversely possessed. Even if the adverse possessor mistakenly believed it was in possession of its own land, that is no bar to its claim so long as it meets the other requisite elements.

Subsequent caselaw has vacillated a bit on how to define "hostility" when interpreting Mannillo, but the general holding of the cases is that so long as the possessor uses the property under a claim of right then that will make it "hostile" enough to allow adverse possession. Even if the possessor didn't know he was possessing someone else's property, so long as that person was asserting possessory rights then they probably have a "claim of right" sufficient for claiming adverse possession.

Making an Adverse Possession Claim: "Tacking" the Time

An adverse possessor may "tack" the time their predecessor in possession was adversely possessing. *Stump v. Whibco*, 314 N.J. Super. 560 (App. Div. 1998). Note that **continuity of possession is still required**.

Making an Adverse Possession Claim: Public Entities

Generally speaking, for public policy reasons it is not permitted to adversely possess public land. For example a house that abuts a public park and whose fence is over the property line could never create a title interest in that fenced-in portion.

Exception is if the land was not "dedicated to or used for a public purpose". *Devins v. Borough of Bogota*, 124 NJ 570 (1991). Note that this case applies prospectively.

Making an Adverse Possession Claim: Fences

Case law nationwide shows there is a virtual per se rule that fences constitute open and notorious possession. *Stump v. Whibco*, 314 N.J. Super. 560, 578 (App. Div. 1998)



Making an Adverse Possession Claim: What Lies Beneath

Sewers and other underground utilities pose their own questions. Issues here are often framed as matters involving easements and can be either express, by implication or by prescription. *Wolek v. Di Feo*, 60 N.J. Super. 324 (App. Div. 1960). Review of title as far back as is available is a starting point to determine if there is reference to the utility in older deeds. Failing that, the next best proof is an implied easement. That is so because an easement by prescription uses the same elements as adverse possession including visible proof of use for the prescriptive period of 20 years. *Baker v. Normanoch Ass'n., Inc.*, 25 N.J. 407, 419 (1957). In the case of an underground utility such proof is unlikely. *See Wolek v. Di Feo, supra.* What you are left with is proving by implication which is going to turn on notice such as an oddly located sewer cleanout, or water shut off valve or some other item which creates actual notice, inquiry notice or constructive notice. *Id*. On that point the analysis is whether the one to be charged has "knowledge of whatever such an inquiry would uncover where facts are brought to his attention, 'sufficient to apprise him of the existence of an outstanding title or claim, or the surrounding circumstances are suspicious, and the party purposefully or knowingly avoids further inquiry.'" *Friendship Manor, Inc. v. Greiman*, 244 N.J. Super. 104, 108 (App. Div. 1990).

Making an Adverse Possession Claim: What Lies Above

New Jersey has long since rejected the English rule rights to light and air may be obtained by adverse users. *Hayden v. Dutcher*, 31 N.J. Eq. 217, 222-23 (Ch. 1879). However, air rights may be subject to a claim of an easement by implication or necessity. *Engel v. Siderides*, 112 N.J. Eq. 431, 433 (E. & A. 1933). That rule is subject to strict construction. *Blumberg v. Weiss*, 129 N.J. Eq. 34 (E. & A. 1941). To succeed there must be common ownership during which there was a long, continued, and obvious use showing it meant to be permanent, followed by separation of title, and the easement is necessary for beneficial enjoyment of the land granted or retained. *Engel v. Siderides*, *supra*. All of this yields the simple proposition that "in the absence of a restrictive covenant, a property owner has no right to an unobstructed view across a neighbor's property." *Bubis v. Kassin*, 323 N.J. Super. 601, 616 (App. Div.1999), *modified on other grds*. 184 NJ 612 (2005) (citation omitted).

In everyday situations these points can be used. They were informative in the court decision in *Slotoroff v. Nassau Associates*, 178 N.J. Super. 292 (Ch. Div. 1980) where an injunction was refused by a property owner complaining the neighbor hung scaffolding over his building. The injunction was refused primarily because there were no air rights entitled to protection against the alleged temporary trespass.

Proving an Adverse Possession Claim: Evidence

If it's not in writing it didn't happen… how to prove your client's claim to the Court?

- Certifications from Relatives
- Evidence from Predecessors in Title – If Available
- Aerial Photographs https://njgin.nj.gov/njgin/edata/imagery/index.html
- Expert Witnesses as applicable (geneologist, engineer, surveyor, etc)
- Property Tax Maps
- Property Tax Records (especially if the possessor has been paying the taxes)
- Property Tax PRC's
- Zoning Board Records
- OPRA Requests
- Title Searches
- Old Family Pictures, Cute Kids a Plus



- Have Clients Ask the Neighbors
- Surveys
- Old Invoices, Tax Returns, Bank Statements
- Ask Your Client (Go Over Timeline)

Making an Adverse Possession Claim: Contents of Complaint, When to Get Survey?

R 4:62-1: *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 or 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.*



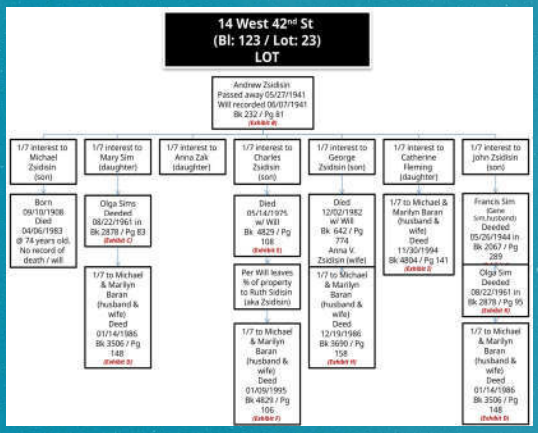
Include the block and lot of the properties in question. Describe the adversely possessed area as well as possible. A picture can be worth a thousand words. A tax map can sometimes suffice if you don't have a survey yet, for example on an emergent OTSC. A metes and bounds description of the adversely possessed area is ideal but in many cases would require the client to pay for a survey before they know if they will prevail on their claim.

Making an Adverse Possession Claim: You Are In Equity – Plead With Specificity

Adverse Possession claims are heard under the equitable powers of the Court. If you don't regularly practice in Chancery you should make yourself familiar with the equitable maxims. Judges have some leeway in their interpretation of the facts and the application of the law thereto. "Equity follows the law" but a Judge in equity may decide that a minor variance therefrom was not material, or not serving the intention of the law, under the totality of the circumstances. Make your clients sympathetic. Don't file a bare bones complaint or counter-claim, it's the first thing the judge will read when reviewing your summary judgment motion when the time comes. Primacy recency.

It's not a common cause of action and chain of title can be time consuming to review. Help make it easy for the judge. Use flow charts to show title history. Cite all the applicable statues and court rules, give them a sample writ in the papers and make sure the proposed order has language regarding the writ, call or e-mail chambers a reminder as well. The certified order is now requested on e-courts but often requires follow up.

Making an Adverse Possession Claim: Make It Easy For The Judge



It's not a common cause of action. Help make it easy for the judge. Title can be time consuming to review, often it's a good idea to **use flow charts, including book & page,** so the judge can quickly reference and understand the relevant title and/or family history as applicable.

Cite all the applicable statues and court rules and make sure the proposed order has language regarding the writ. Call or e-mail chambers a reminder as well. The certified order is now requested on e-courts but often requires follow up.

Making an Adverse Possession Claim: You Won – Now What?

Think through the final proposed order carefully. Should you ask the Court to equitably consolidate/merge/subdivide the original lots as applicable?

You will be recording the order once it is executed so make sure it has the block and lot, the *prior* block and lot if available, and ideally a metes and bounds description of the land which now belongs to your client. It is essentially the same as recording a deed and should meet the recording requirements of **NJSA 46:26A-2(h)**. Consider having a title company review the order to ensure it will be acceptable to title companies generally in the future. The title record should be perfected to ensure the property is fungible in the future. Once the Order is signed by the judge, the final step is to request a **certified copy** of the final Order and physically record that at the County.

If the goal is to sell the property, title may not be insurable by most title companies until one year after the date of the Order due to R. 4:50-1 (relief from judgment or order).

Defending an Adverse Possession Claim: Stopping the Clock

A strongly worded letter doesn't cut it. To stop the time running the title holder should file an ejectment action. See *Cozy Cove Marina, Inc. v. Nelson Properties Partnership*, 2024 WL 4404027 (Unpublished Appellate Division Opinion).

Again, adverse possession is essentially a statute of limitations on an ejectment action. Thus generally speaking only the filing of an action for possession (usually ejectment) can safely stop the statute from running.

Defending an Adverse Possession Claim: Common Defences & Suggestions

"[W]hen a use of property is permissive, by definition it is not adverse." *Mandia v. Applegate*, 310 N.J. Super. 435, 444 (App. Div. 1998). Was there ever an agreement? Is there an easement or implied easement in title (such as after a subdivision or sale of commonly owned property)? Were there actions by the parties which amounted to implicit permission?

Was the land ever put to public use during the statutory time period?

Can you disprove continuity?

It is usually advisable for the title holder to initiate an ejectment action sooner rather than later. The longer the title holder waits is the more likely the adverse possessor will meet the required time period. But in *some* cases, if an adverse possession counter-claim is a risk, the title holder may be better off waiting before filing an action under the totality of the circumstances.

Be careful not to inadvertently create a tenancy. Refer to the possessor as the "occupant".

Adverse Possession: Some Practical Considerations

Writs of possession often take longer than expected to enforce, and you could end up with OTSC's from other parties later. Manage the client's expectations.

Make sure the client advises their property liability insurance company about any changes to title.

An added property tax assessment is possible.

While not technically required in some cases, it is generally best practice to get a survey anyway. You should include a proper metes and bounds description of the easement area within the language of the final order, and/or in some cases attach the survey as an exhibit to it.

Adverse Possession: Also Consider

The elements of adverse possession are discrete and give rise to several issues to examine. For example, can a shareholder, officer or director assert adverse possession against the corporation? In *Leigh v. Howard*, 87 N.J.L. 113, 114 (Sup. Ct.1915) the Court held an officer can only possess adversely against the corporation where express notice to the directors is given: "Mere open notorious possession in such a case is not adverse; since it must be presumed that the president is holding for the company, to which he stands in the position of trustee." Essentially in that context use is with permission or a license. This gives rise to a question in the area of condominiums. By owing a unit the owner is also part of the condominium association. N.J.S.A. 46:8b-12.1; N.J.S.A. 46:8b-13. As being part of the association does the rule in *Leigh v. Howard*, *supra*, mean adverse possession is not available? Likewise, condominium unit ownership creates a vested interest in common elements. *See Siller v. Hartz Mountain Assoc.*, 93 N.J. 370, 375, *cert. denied*, 464 U.S. 961, 104 S. Ct. 395, 78 L.Ed.2d 337 (1983) ["(A) unit owner has a fee simple title to and enjoys exclusive ownership of his or her individual unit while retaining an undivided interest as a tenant in common in the facilities (i.e. common elements) used by all of the other unit owners."] Does this mean that adverse possession of a common element cannot occur by a unit owner since ownership creates a right, license or permission to use the common elements?

Quasi Adverse Possession/Ejectment Actions

Prescriptive easements have the same essential requirements as adverse possession. They can apply for access only, even if it's not completely exclusive access to the possessor. *Bioletti v. Sindoni*, 135 N.J. Eq. 609, 616 (Ch. 1944) ("the requirement of 'exclusive' as regards acquirement of an easement of way by prescription does not mean that the complainants shall have been the sole users").

Replevin is to personal property what Adverse Possession is to real property. Replevin places a 6 year statute of limitations on the recovery of lost or stolen goods but the "discovery rule" applies. *O'Keeffe v. Snyder*, 83 N.J. 478 (1980).

If you set the property line wrong yourself and thus induce the neighbor to build over the lot line, you can be barred from ejecting the neighbor even if it's less than the time required by adverse possession. *Keilt v. Lozier*, 146 A. 786 (N.J. Sup. Ct. 1929).

Exceptions

Extensive improvements made over the property line in good faith, by a possessor using ordinary prudence, can result in the Court forcing the title holder to convey title to the possessor for its fair market value. *Riggle v. Skill*, 9 NJ Super 372 (Ch. Div. 1950). Similar equitable relief can be granted in situations where the title holder actually knew or should have known the possessor was building over the lot line by accident, but did not advise the possessor until after the construction was complete. *McKelway v. Armour*, 10 N.J.Eq. 115 (Ch. 1854)

Minor encroachments do not have the presumption of being open and notorious. "[T]o permit a presumption of notice to arise in the case of minor border encroachments not exceeding several feet would fly in the face of reality and require the true owner to be on constant alert for possible small encroachments. The only method of certain determination *389 would be by obtaining a survey each time the adjacent owner undertook any improvement at or near the boundary, and this would place an undue and inequitable burden upon the true owner. Accordingly we hereby hold that no presumption of knowledge arises from a minor encroachment along a common boundary. In such a case, only where the true owner has actual knowledge thereof may it be said that the possession is open and notorious. *Mannillo v Gorski,* 54 NJ 378, 388-389 (1969). Note that what is "minor" is within the reasonable discretion of the Court, and will depend on the totality of the circumstances.

Quasi Adverse Possession/Ejectment Actions

Equitable remedies. Extensive improvements made over the property line in good faith, by a possessor using ordinary prudence, can result in the Court forcing the title holder to convey title to the possessor for its fair market value. *Riggle v. Skill*, 9 NJ Super 372 (Ch. Div. 1950). Similar equitable relief can be granted in situations where the title holder actually knew or should have known the possessor was building over the lot line by accident, but did not advise the possessor until after the construction was complete. *McKelway v. Armour*, 10 N.J.Eq. 115 (Ch. 1854).

Unlawful detainer. NJSA 2A:39-1. *No person shall enter upon or into any real property or estate therein and detain and hold the same, except where entry is given by law, and then only in a peaceable manner.* Very similar claim to ejectment but 3 years peaceable possession is a defense.

Commonlaw Trespass aka Civil Trespass.

Nuisance (if possessor's use interferes with quiet enjoyment).

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About the Panelists…

Peter Cecinini, Cecinini Law Group, LLC in Bayonne, New Jersey, concentrates his practice in real estate and estates law, including Chancery Court litigation, closings, tax appeals, landlord-tenant and land use/zoning matters.

Mr. Cecinini was formerly Assistant Corporation Counsel for the City of Bayonne, where he represented the City in property taxation, civil litigation and municipal law matters. He is a member of the Hudson County Bar Association and has lectured at the Association's annual Property Tax Appeals CLE course.

Mr. Cecinini received his undergraduate degree from Rutgers University and his law degree from Rutgers Law School.

Richard W. Mackiewicz, Jr., Mackiewicz Law, LLC in Hoboken, New Jersey, concentrates his practice in a range of commercial legal matters, including business and commercial law, and civil practice and procedure in New Jersey and New York.

Mr. Mackiewicz is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York, and the Third Circuit Court of Appeals. President of the Hoboken Chamber of Commerce, he is a member of the New Jersey State and Hudson County Bar Associations, and a former member of the District Ethics Committee. He also serves on the Board of Directors of the Hudson County Community College Foundation.

Mr. Mackiewicz received his B.A. from Saint Michael's College and his J.D., *cum laude*, from New York Law School, where he was Research Editor of the *Human Rights Journal* and a member of the Order of the Barrister.

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