

# Table of Contents

<b>Chapter 1: Director and Officer Liability .....</b>	<b>1</b>
1-1 INTRODUCTION.....	1
1-2 FIDUCIARY DUTIES OF A DIRECTOR OR OFFICER.....	1
1-2:1 General Obligations of Directors and Officers.....	1
1-2:2 Reliance on Reports and Records by Third Parties .....	3
1-2:3 Shareholders’ Recourse.....	5
1-2:4 The Business Judgment Rule.....	6
1-3 USURPING CORPORATE OPPORTUNITIES .....	9
1-4 DIRECTORS’ PURCHASES OF CORPORATE STOCK .....	14
1-5 USE OF INSIDER INFORMATION .....	14
1-6 CORPORATE LIABILITY FOR THE ACTS OF A PRINCIPAL.....	15
1-7 INDIVIDUAL LIABILITY.....	15
1-7:1 Limitations on Liability Set Forth in the Certificate of Incorporation .....	21
1-7:2 Liability of Directors in Certain Cases .....	22
1-7:3 Presumption of Assent to Actions Taken at Meetings.....	24
1-8 INDEMNIFYING PARTIES .....	24
1-8:1 Indemnification of the Corporation.....	24
1-8:2 Indemnification of Directors, Officers and Employees.....	24
1-9 PIERCING THE CORPORATE VEIL .....	27
1-10 SHAREHOLDER DERIVATIVE SUITS .....	30
1-10:1 Derivative Suits Defined .....	30
1-10:2 “Special Injury” Exception to Derivative Suits.....	31
1-10:3 Standing .....	32
1-10:4 Derivative Versus Class Actions.....	34
1-11 SHAREHOLDER RIGHTS.....	35
1-12 CRIMINAL LIABILITY OF CORPORATIONS AND PERSONS ACTING, OR UNDER A DUTY TO ACT, ON THEIR BEHALF .....	37

## Table of Contents

1-13	CRIMINAL MISCONDUCT BY A CORPORATE OFFICIAL .....	37
1-14	DIRECTOR CONFLICTS OF INTEREST .....	38
1-15	RECEIVERS .....	39
1-16	FISCAL AGENTS .....	41
1-17	PROVISIONAL DIRECTORS AND CUSTODIANS .....	41
<b>Chapter 2: Partnership Liability .....</b>		<b>45</b>
2-1	INTRODUCTION .....	45
2-2	UNIFORM PARTNERSHIP LAW .....	45
2-3	LIABILITY AMONG PARTNERS .....	47
2-4	PARTNER'S INTEREST IN THE PARTNERSHIP .....	50
2-5	LIABILITY FOR PARTNERSHIP DEBTS .....	51
2-5:1	Acts That Bind the Partnership .....	52
2-5:2	Ratification .....	54
2-5:3	New Partners .....	54
2-5:4	Withdrawing Partners .....	55
2-5:5	Dissolution .....	58
2-6	FIDUCIARY DUTY OF PARTNERS UPON DISSOCIATION .....	59
2-7	MINORITY PARTNERS .....	60
2-8	APPOINTMENT OF A RECEIVER .....	60
2-9	EXISTENCE OF A PARTNERSHIP .....	61
2-10	PARTNERSHIP BY ESTOPPEL .....	63
2-11	PARTNERSHIP LIABILITY FOR TORTIOUS ACTS OF ITS PARTNERS .....	63
2-12	SUITS AMONG PARTNERS .....	66
2-13	LIMITED LIABILITY .....	67
2-13:1	Limited Liability Partnerships .....	67
2-14	LIMITED PARTNERS .....	68
2-15	DISSOLUTION .....	70
2-16	JOINT VENTURES .....	71
<b>Chapter 3: Oppressed Minority Shareholders .....</b>		<b>73</b>
3-1	INTRODUCTION .....	73
3-2	STANDING .....	74
3-2:1	Generally .....	74
3-2:2	Judicial Considerations .....	77
3-2:2.1	Corporate Conduct Toward the Minority Shareholder .....	77

## Table of Contents

	3-2:2.2	Vulnerability of the Minority Shareholder .....	77
	3-2:2.3	Balancing of Minority Shareholders’ Expectations .....	78
	3-2:2.4	Determining When Oppression Occurs.....	78
	3-2:2.5	Fraudulent and Illegal Acts by the Corporation.....	79
	3-2:2.6	Factors to Consider in Evaluating Allegations of Misconduct.....	80
3-3	<b>REMEDIES .....</b>		<b>82</b>
	3-3:1	In General.....	82
	3-3:2	Appointment of Provisional Directors or Custodians.....	83
	3-3:3	Dissolution .....	84
	3-3:4	Selling the Corporation’s Stock in Cases of Oppression .....	85
	3-3:5	Common Law Equitable Remedies .....	85
	3-3:6	Discretion over Remedies for Oppressed Minority Shareholders.....	88
		3-3:6.1 Buyouts.....	88
		3-3:6.2 Other Remedies .....	90
	3-3:7	Attorney’s Fees and Expenses .....	92
3-4	<b>THE VALUATION PROCESS.....</b>		<b>92</b>
	3-4:1	Valuation Techniques.....	93
	3-4:2	Determining Fair Value .....	96
	3-4:3	Marketability Discounts .....	98
	3-4:4	Minority Discounts .....	103

### **Chapter 4: Rule 10b-5 and Section 10(b) of the**

		<b>Securities Exchange Act.....</b>	<b>105</b>
4-1	<b>INTRODUCTION.....</b>		<b>105</b>
4-2	<b>GENERAL REQUIREMENTS OF RULE 10B-5 .....</b>		<b>107</b>
4-3	<b>STANDING.....</b>		<b>108</b>
	4-3:1	Exceptions to Purchaser/Seller Designation.....	109
	4-3:2	Relationship Needed Between Plaintiff and Defendant.....	111
4-4	<b>PRIMARY VS. SECONDARY ACTORS.....</b>		<b>111</b>
4-5	<b>ELEMENT: IN CONNECTION WITH THE PURCHASE OR SALE .....</b>		<b>113</b>
4-6	<b>MANIPULATIVE, DECEPTIVE, OR FRAUDULENT CONDUCT.....</b>		<b>116</b>
	4-6:1	Mismanagement or Breach of Fiduciary Duty .....	117

## Table of Contents

4-6:2	Mergers, Reorganizations or Tender Offers.....	118
4-6:3	Misrepresentations.....	118
4-6:3.1	Prospectuses/Private Placement Memoranda .....	119
4-6:3.2	Puffery, Opinions, Forecasts, Predictions or Projections, and the PSLRA Safe Harbor for Forward Looking Statements .....	119
4-6:3.2a	Bespeaks Caution Doctrine...	122
4-6:3.2b	Disclosure Obligations .....	123
4-6:4	Nondisclosure/Omission Liability.....	124
4-6:4.1	Who Has a Duty to Disclose.....	125
4-6:4.1a	Insiders .....	125
4-6:4.1b	Noninsiders.....	126
4-6:4.2	Duty to Disclose: Substance and Timing .....	127
4-6:4.2a	Inside or Nonpublic Market Information .....	127
4-6:4.2b	Mergers, Acquisitions, Reorganizations or Tender Offers .....	128
4-6:4.2c	Correction or Confirmation of Prior Statements or Rumors.....	128
4-6:5	Release of Non-Public Market Information: Tipping.....	129
4-6:5.1	Conduct of Accountants, Attorneys and Other Professionals .....	130
4-6:5.2	Conduct of Brokers .....	132
4-7	ELEMENT: SCIENTER .....	132
4-7:1	Recklessness.....	133
4-7:2	Burden of Proof .....	134
4-7:2.1	Actual Intent .....	135
4-7:2.2	Recklessness.....	135
4-7:2.3	Pleading Scienter .....	136
4-8	ELEMENT: MATERIALITY .....	140
4-9	ELEMENTS: RELIANCE AND CAUSATION .....	141
4-9:1	Proving Reliance .....	141
4-9:1.1	Rebuttable Presumption of Reliance.....	142
4-9:1.2	Fraud-on-the-Market Theory .....	143
4-9:1.3	Fraud-Created-the-Market Theory .....	147
4-9:2	Proving Causation .....	148

## Table of Contents

4-10	REMEDIES .....	150
4-11	STATUTE OF LIMITATIONS .....	152
4-12	DEFENSES .....	155
 <b>Chapter 5: Antitrust.....</b>		 <b>157</b>
5-1	INTRODUCTION.....	157
5-2	THE PURPOSE OF THE ANTITRUST LAWS .....	158
5-2:1	Generally .....	158
5-2:2	Jurisdiction .....	159
5-2:3	Right to a Jury.....	160
5-3	SHERMAN ACT.....	161
5-3:1	Section 1 .....	161
5-3:1.1	General Application.....	161
5-3:1.2	Elements .....	162
5-3:1.3	Rule of Reason .....	164
5-3:1.4	<i>Per Se</i> Rule .....	167
5-3:2	Section 2.....	168
5-3:2.1	Monopolies.....	168
5-3:2.2	Actual Monopolization .....	169
5-3:2.3	Attempted Monopolization .....	170
5-3:3	Standing and Remedies.....	170
5-4	CLAYTON ACT .....	171
5-4:1	Acts Lessening Competition .....	171
5-4:2	Section 3—Tying Arrangements, Exclusive Dealings, and Requirements Contracts .....	171
5-4:2.1	Restrictive Distribution Methods.....	171
5-4:3	Elements .....	172
5-4:4	Tying Arrangements .....	172
5-4:5	Exclusive Dealings and Requirements Contracts .....	173
5-4:6	Group Boycott/Refusals to Deal.....	175
5-4:7	Section 7—Mergers and Acquisitions .....	175
5-4:7.1	Probability of Anticompetitive Effects.....	175
5-4:7.2	Rule of Reason .....	176
5-4:7.3	Elements .....	176
5-4:7.4	Economically Significant Geographic and Product Market.....	177
5-4:7.5	Exempt Mergers .....	179
5-4:7.6	Post-Acquisition Behavior .....	180
5-4:8	Relief .....	181
5-4:9	Section 4—Monetary Damages .....	181
5-4:9.1	Right of Contribution among Defendants .....	186

## Table of Contents

	5-4:9.2	Assignability .....	186
	5-4:10	Section 16—Injunctive Relief .....	186
5-5		STATUTE OF LIMITATIONS—SECTION 4B.....	188
5-6		ROBINSON-PATMAN ACT.....	189
	5-6:1	Generally .....	189
	5-6:2	Price Discrimination .....	189
	5-6:3	Competitive Injury.....	192
5-7		NEW JERSEY ANTITRUST ACT .....	196
	5-7:1	Generally .....	196
	5-7:2	Construction of the Act.....	197
	5-7:2.1	Federal Law .....	197
	5-7:2.2	Standing and Relief .....	198
	5-7:2.2a	Actual Business and More than De Minimis Injury .....	198
	5-7:2.2b	Money Damages and Injunctive Relief .....	199
	5-7:2.2c	Four-Year Statute of Limitations .....	199
<b>Chapter 6: Restrictive Covenants.....</b>			<b>201</b>
6-1		INTRODUCTION.....	201
6-2		COMMON LAW .....	202
	6-2:1	Common Law Duty of Loyalty .....	202
	6-2:2	Former Employees.....	203
	6-2:2.1	Divulging Confidential Information .....	204
	6-2:2.1a	Trade Secrets.....	204
	6-2:2.1b	Confidential Information .....	208
	6-2:2.1c	Raiding Employees .....	209
	6-2:2.1d	Customer Lists.....	211
6-3		OFFICERS, DIRECTORS AND HIGH-LEVEL EMPLOYEES .....	212
6-4		EXPRESS COVENANTS NOT TO COMPETE.....	212
6-5		ENFORCEABILITY .....	213
	6-5:1	Protectable Interest .....	214
	6-5:2	Durational Restriction .....	215
	6-5:3	Geographic Restrictions.....	216
	6-5:4	Employee’s Interest/Public Interest .....	217
	6-5:5	Adequate Consideration .....	218
6-6		PARTIAL ENFORCEABILITY.....	218
	6-6:1	New Jersey’s Blue Pencil Doctrine .....	218
	6-6:2	Conflicts of Law .....	220

## Table of Contents

6-7	REMEDIES AVAILABLE.....	221
6-7:1	Temporary Restraining Order/Preliminary Injunction .....	222
6-7:2	Permanent Injunction .....	223
6-8	COMPENSATORY DAMAGES .....	224
6-9	RESTRICTIVE COVENANTS IN SALE OF BUSINESS AND FRANCHISE AGREEMENTS.....	225
6-10	PROHIBITIONS AS TO RESTRICTIVE COVENANTS IN SPECIFIED PROFESSIONS .....	226
6-11	NO-HIRE AGREEMENTS.....	227
 <b>Chapter 7: RICO.....</b>		<b>229</b>
7-1	INTRODUCTION.....	229
7-2	FEDERAL RICO .....	230
7-2:1	Statutory Overview: 18 U.S.C. § 1962(a)-(d).....	230
7-2:2	Elements of RICO.....	230
7-2:2.1	Enterprise .....	230
7-2:3	Employed by or Associated with an Enterprise.....	232
7-2:3.1	Type of Association .....	232
7-2:3.2	Distinctiveness Requirement .....	232
7-2:4	Conducted or Participated in Conduct of Enterprise.....	233
7-2:4.1	Operation or Management Test .....	233
7-2:4.2	Knowingly Direct Affairs of Enterprise... ..	234
7-2:5	Pattern of Racketeering Activity.....	235
7-2:5.1	Types of Predicate Acts .....	235
7-2:5.2	Relatedness and Continuity .....	237
7-2:6	Standing .....	240
7-2:6.1	Violation of Section 1962.....	240
7-2:6.2	18 U.S.C. § 1962(a): Investment of Racketeering Income .....	242
7-2:6.3	18 U.S.C. § 1962(b): Acquire or Maintain Interest in or Control of Any Enterprise.....	243
7-2:6.4	18 U.S.C. § 1962(c): Conduct or Participate in the Enterprise’s Affairs.....	243
7-2:6.5	18 U.S.C. Section 1962(d): Conspiring to Violate Any of the Subsections .....	244
7-2:7	RICO Claims Against Professionals .....	248
7-2:8	Arbitration .....	249
7-2:9	Aiding and Abetting a RICO Violation .....	249
7-2:10	Criminal Penalties.....	249

## Table of Contents

	7-2:10.1	Imprisonment, Fine and Forfeiture.....	249
	7-2:11	Restraining Orders and Injunctions .....	249
	7-2:12	Intervention by Party with Interest in Property.....	250
	7-2:13	Petition Following Forfeiture .....	250
	7-2:14	Civil Remedies (Section 1964).....	250
	7-2:14.1	Injunctive Relief .....	250
	7-2:14.2	Treble Damages .....	251
	7-2:15	Statute of Limitations.....	252
	7-2:15.1	Four Years .....	252
	7-2:16	Rules of Accrual .....	253
	7-2:17	Fraudulent Concealment .....	254
7-3		STATE REGULATION .....	255
	7-3:1	Application and Comparison to Federal RICO .....	255
	7-3:2	Civil Remedies and Proceedings: N.J.S.A. 2C:41-4.....	255
	7-3:2.1	Treble Damages, Costs, and Attorneys' Fees .....	255
	7-3:2.2	No Private Injunctive Relief .....	257
	7-3:2.3	Estoppel.....	257
	7-3:2.4	Possible Penalties .....	257
	7-3:2.5	Four-Year Statute of Limitations.....	257
	7-3:2.6	Arbitration Award .....	258
	7-3:3	Criminal Remedies and Proceedings: N.J.S.A. 2C:41-3.....	258
	7-3:3.1	Degree of Crime .....	258
	7-3:3.2	Forfeiture.....	258
	7-3:3.3	Injunctive Relief .....	259
	7-3:3.4	Seizure .....	259
	7-3:4	Important Issues .....	259
	7-3:4.1	Existence of an Enterprise .....	259
	7-3:4.2	Defendant Participated in Conduct of Affairs of Enterprise .....	261
	7-3:4.2a	No Operation or Management Test.....	261
	7-3:4.3	Pattern of Racketeering Activity.....	262
	7-3:4.3a	No Continuity Sub-Element .....	262
	7-3:4.3b	Two Related Incidents Required .....	262
	7-3:4.4	Standing .....	263
	7-3:4.4a	Federal Standard .....	263



## Table of Contents

	7-3:4.4b Harm Proximately Caused by the RICO Acts Alleged .....	263
	7-3:4.5 Where to Bring Suit: Federal or State Court .....	264
<b>Chapter 8:</b>	<b>Tortious Interference .....</b>	<b>267</b>
8-1	INTRODUCTION.....	267
8-2	THE DIFFERENCE BETWEEN THE INTERFERENCE TORTS .....	269
8-3	ELEMENTS OF INTERFERENCE WITH CONTRACT .....	269
8-3:1	There Is an Existing Contract .....	270
8-3:2	The Defendant Knew of the Contract .....	271
8-3:3	The Defendant Wrongfully Interfered with the Contract.....	275
8-3:4	Reasonable Probability That the Loss of the Contract Benefit Was a Result of the Interference .....	278
8-3:5	Damages Resulted From the Interference .....	279
8-4	INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE.....	279
8-4:1	A Reasonable Expectation of Economic Advantage.....	280
8-4:2	Interference Was Committed Intentionally and Without Justification or Excuse .....	281
8-4:3	Reasonable Probability That the Victim of the Interference Would Have Received the Economic Benefits but for the Interference.....	282
8-4:4	Damages Resulting From the Interference .....	283
8-5	PUNITIVE DAMAGES .....	283
8-6	INTERFERENCE IN THE REAL ESTATE INDUSTRY ....	284
8-6:1	Introduction .....	284
8-6:2	When Is a Broker’s Expectation Protectable? .....	285
8-6:3	A Broker’s Protectable Interest Under Tort Law .....	287
8-6:4	New Jersey’s Appellate Case Law.....	289
8-6:5	The Liability of the Buyer/Lessee .....	291
8-6:6	Interference Among Attorneys .....	292
8-7	EMPLOYMENT TERMINATIONS.....	293
8-7:1	Introduction .....	293
8-7:2	Employee’s Interference with Employment Relationship Between Co-Employee and Employer ...	294
8-7:3	Employee Piracy .....	294

**Table of Contents**

**Chapter 9: Business Fraud .....297**

9-1 TYPES OF COMMON LAW FRAUD .....297

    9-1:1 Legal Fraud .....297

        9-1:1.1 Scienter .....298

        9-1:1.2 Reliance .....299

        9-1:1.3 Statements of Future Performance or  
                Opinion .....303

    9-1:2 Equitable Fraud.....305

    9-1:3 Fraudulent Concealment .....306

    9-1:4 Constructive Fraud.....308

    9-1:5 Negligent Misrepresentation.....310

9-2 BURDENS OF PROOF AND PRESUMPTIONS.....312

9-3 DAMAGES AND REMEDIES.....314

    9-3:1 Choice of Legal or Equitable Remedies .....314

    9-3:2 Legal Remedies.....315

        9-3:2.1 Compensatory Damages.....315

        9-3:2.2 Punitive Damages .....316

    9-3:3 Equitable Remedies .....319

    9-3:4 Remedies Involving Third Parties .....320

9-4 DEFENSES .....320

    9-4:1 Defending a Claim of Fraud.....320

    9-4:2 Asserting Fraud as an Affirmative Defense.....321

9-5 PLEADING.....322

    9-5:1 Must Plead Fraud with Particularity .....322

    9-5:2 Statute of Limitations.....323

  

**Chapter 10: Consumer Fraud .....325**

10-1 INTRODUCTION.....325

    10-1:1 The New Jersey Consumer Fraud Act:  
        Statutory Purpose and Overview .....325

    10-1:2 Public and Private Causes of Action  
        under the CFA .....328

        10-1:2.1 Damages.....331

10-2 PERSONS COVERED BY THE CFA.....338

10-3 WHAT CONSTITUTES “MERCHANDISE”  
    UNDER THE CFA? .....342

10-4 CONDUCT PROHIBITED BY THE ACT .....344

    10-4:1 Affirmative Acts or Omissions .....346

    10-4:2 Unconscionable Commercial Practice.....348

    10-4:3 Regulatory Violations .....350

    10-4:4 Individual Liability under the CFA.....351

    10-4:5 Amendments.....352

**Table of Contents**

**Chapter 11: Uniform Voidable Transactions Act .....355**

11-1 INTRODUCTION..... 355

11-2 ELEMENTS OF VOIDABLE TRANSACTIONS ..... 358

11-3 DEFINITIONS UNDER THE UVTA:  
     “TRANSFER” AND “INSIDER” ..... 360

    11-3:1 Transfer ..... 360

    11-3:2 Insider ..... 360

11-4 CONSIDERATION/REASONABLY  
     EQUIVALENT VALUE..... 362

    11-4:1 Preexisting Debt ..... 363

    11-4:2 Unfulfilled Promises/Third-Party Debts ..... 364

    11-4:3 Foreclosure Sales ..... 364

11-5 VOIDABLE TRANSACTIONS: ACTUAL INTENT ..... 366

    11-5:1 Proving Actual Intent ..... 366

        11-5:1.1 Factors to Be Considered ..... 366

        11-5:1.2 Specific Situations Involving  
                 Actual Intent ..... 369

    11-5:2 Burden of Proof ..... 370

11-6 VOIDABLE TRANSACTIONS: INSOLVENCY ..... 370

    11-6:1 Elements ..... 371

    11-6:2 What Constitutes “Insolvency”..... 371

        11-6:2.1 Rebuttable Presumption of Insolvency .... 372

        11-6:2.2 Burden of Proof ..... 372

        11-6:2.3 Proof of Voidable Transaction ..... 373

11-7 VOIDABLE TRANSACTIONS: UNDER-CAPITALIZED  
     BUSINESS ..... 373

    11-7:1 Elements ..... 374

    11-7:2 “Unreasonably Small Assets” ..... 374

11-8 VOIDABLE TRANSACTIONS: INCURRENCE  
     OF DEBTS BY DEBTOR..... 375

    11-8:1 Elements ..... 375

    11-8:2 Burden of Proof ..... 376

11-9 VOIDABLE TRANSACTIONS: TRANSACTIONS  
     WITH INSIDERS..... 376

11-10 WHEN A CAUSE OF ACTION ARISES  
     UNDER THE UVTA ..... 377

    11-10:1 Occurrence of Voidable Transaction ..... 377

    11-10:2 Incurrence of Obligation ..... 378

11-11 TERMINATION OF CLAIMS  
     FOR RELIEF/STATUTE OF LIMITATIONS ..... 379

11-12 CREDITOR’S REMEDIES UNDER THE UVTA..... 380

    11-12:1 Primary Remedy: Setting Aside Transfer ..... 381

## Table of Contents

11-12:2	Remedies Against Transferees .....	382
11-12:3	Actual Judgment Not Needed to Sue .....	382
11-13	DEFENSES/REMEDIES OF TRANSFEREES .....	383
11-13:1	Transferees of “Actual Intent” Voidable Transactions .....	383
11-13:2	General Protection Available to Good Faith Transferee for Reasonably Equivalent Value Given to the Debtor .....	384
11-13:3	Additional Limited Protection Available .....	384
11-13:4	Defenses Available to Insiders .....	385
11-14	SUPPLEMENTARY PROVISIONS .....	386
<b>Chapter 12: The Federal Trade Commission Act .....</b>		<b>387</b>
12-1	INTRODUCTION .....	387
12-2	UNFAIR METHODS OF COMPETITION .....	389
12-3	UNFAIR OR DECEPTIVE ACTS OR PRACTICE .....	392
12-3:1	Unfair Acts or Practices .....	392
12-3:2	Deceptive Acts or Practices .....	394
12-4	DEFENSES .....	396
12-4:1	Exemption From FTCA .....	396
12-4:2	Honest Belief or Opinion .....	397
12-4:3	Permissible Puffing .....	397
12-5	RULEMAKING BY THE COMMISSION .....	397
12-6	INVESTIGATIONS BY THE COMMISSION .....	398
12-6:1	Enforcement Proceedings by the Commission .....	399
12-7	ADVISORY OPINIONS .....	400
<b>Chapter 13: Lanham Act: Unfair Competition .....</b>		<b>403</b>
13-1	INTRODUCTION .....	403
13-2	MARKS .....	404
13-2:1	Trademark .....	405
13-2:1.1	Arbitrary Mark .....	407
13-2:1.2	Suggestive Mark .....	408
13-2:1.3	Descriptive Mark .....	408
13-2:1.4	Generic Mark .....	409
13-2:2	Service Mark .....	410
13-2:3	Collective Mark .....	410
13-2:4	Certification Mark .....	410
13-2:5	Distinguishing Marks .....	411
13-2:5.1	Generic Versus Descriptive .....	412
13-2:5.1a	Secondary Meaning .....	412
13-2:5.2	Descriptive Versus Suggestive .....	414

## Table of Contents

13-3	TRADE DRESS .....	415
13-4	TRADE NAMES .....	416
13-5	TRADEMARK PROTECTION/INFRINGEMENT .....	417
13-5:1	Mark Ownership/Priority of Rights.....	419
13-5:2	Infringement .....	420
13-5:2.1	Likelihood of Confusion Test .....	422
13-5:3	Losing Protection .....	426
13-5:3.1	Cancellation.....	426
13-5:3.2	Abandonment.....	427
13-6	CYBERSQUATTING.....	428
13-7	OTHER UNFAIR COMPETITION .....	431
13-8	FALSE DESIGNATION OF ORIGIN.....	433
13-8:1	Passing Off .....	434
13-8:2	Unprivileged Imitation/Trade Dress Infringement ....	435
13-8:2.1	Elements .....	435
13-8:2.1a	Distinctiveness .....	436
13-8:2.1b	Likelihood of Confusion.....	438
13-8:2.1c	Functionality .....	438
13-8:3	Color .....	440
13-8:4	False Advertising .....	441
13-8:4.1	False or Misleading Statement .....	443
13-8:4.2	Tendency to Deceive .....	443
13-8:4.3	Materiality.....	445
13-8:5	Dilution .....	446
13-9	DEFENSES .....	448
13-9:1	Fair Use .....	448
13-9:2	Laches .....	449
13-9:3	Unclean Hands.....	450
13-9:4	Abandonment.....	450
13-10	DAMAGES/REMEDIES.....	450
13-10:1	Injunctions.....	451
13-10:2	Monetary Relief .....	452
13-10:2.1	Attorneys' Fees.....	454
 <b>Chapter 14: Privacy Torts.....</b>		 <b>455</b>
14-1	INTRODUCTION.....	455
14-2	INTRUSION ON A PERSON'S SOLITUDE .....	457
14-2:1	Media Intrusion.....	459
14-2:2	Employee Testing.....	460
14-2:3	Surveillance .....	463
14-2:3.1	Wiretapping.....	464
14-2:4	Unsolicited Advertising .....	466

## Table of Contents

	14-2:4.1 Telephone Calls .....	466
	14-2:4.2 Junk Mail .....	467
14-3	DEBT COLLECTION .....	467
	14-3:1 Public Interest .....	468
14-4	PUBLIC DISCLOSURE OF PRIVATE FACTS .....	469
	14-4:1 Public Records .....	470
	14-4:2 Public Area .....	470
	14-4:3 Conflict with First Amendment .....	471
	14-4:3.1 Newsworthiness Privilege .....	471
	14-4:4 Exposure of Debt .....	473
14-5	FALSE LIGHT .....	474
	14-5:1 Elements of a False Light Claim .....	476
	14-5:1.1 Falsity .....	477
	14-5:1.2 Highly Offensive Standard .....	478
14-6	APPROPRIATION OF THE PLAINTIFF’S NAME OR LIKENESS .....	479
	14-6:1 Commercial Appropriation of a Public Figure .....	481
	14-6:2 Newsworthy Event .....	482
	14-6:3 Commercial Purpose .....	483
14-7	DEFENSES .....	485
	14-7:1 Consent .....	485
	14-7:2 Privilege .....	485
<b>Chapter 15: Franchise Litigation.....</b>		<b>487</b>
15-1	FRANCHISE PRACTICES ACT .....	487
	15-1:1 Definitions .....	488
	15-1:2 Coverage .....	491
	15-1:2.1 Pre FPA .....	491
	15-1:2.2 Criteria for Application of the FPA .....	492
	15-1:2.3 Definition of Place of Business .....	492
	15-1:3 Termination of Franchise Agreement .....	495
	15-1:3.1 Notice .....	495
	15-1:3.2 Permissible Termination .....	495
	15-1:3.3 Criteria for Good Cause .....	496
	15-1:4 Transfer of Franchise .....	499
	15-1:4.1 Notice .....	499
	15-1:4.2 Written Response Requirement .....	499
	15-1:4.3 Good Faith Requirement for Refusing Transfer .....	500
	15-1:4.4 Transferee’s Acceptance of Franchise Requirements .....	501
	15-1:5 Prohibited Practices for Franchisors .....	501

## Table of Contents

15-1:5.1	Forum Selection, Choice of Law and Arbitration Clauses in Franchise Agreements .....	502
15-1:6	Remedies .....	505
15-1:6.1	Damages .....	505
15-1:6.2	Punitive Damages .....	506
15-1:6.3	Injunctive Relief .....	506
15-1:6.4	Attorneys' Fees and Court Costs .....	507
15-2	MOTOR VEHICLE FRANCHISES ACT .....	508
15-2:1	Definitions .....	509
15-2:2	Grant, Relocation or Reactivation of Franchise .....	510
15-2:2.1	Procedure.....	510
15-2:2.2	Injurious Grant, Relocation or Reactivation of a Motor Vehicle Franchise .....	511
15-2:2.3	Permissible Relocation, Reopening or Reactivation of a Motor Vehicle Franchise .....	514
15-2:3	Prohibited Practices by Motor Vehicle Franchisor ....	515
15-2:4	Remedies .....	516
15-3	PETROLEUM MARKETING PRACTICE ACT.....	517
15-3:1	Extent of the PMPA's Preemption .....	518
15-3:2	Coverage.....	520
15-3:2.1	Definitions.....	521
15-3:3	Termination of Franchise Agreement .....	523
15-3:3.1	Notice.....	523
15-3:3.2	Permissible Termination and Nonrenewal .....	524
15-3:3.3	Additional Grounds for Permissible Nonrenewal .....	531
15-3:4	Standing and Remedies.....	533
15-3:4.1	Equitable Relief .....	534
15-3:4.2	Damages.....	536
 <b>Chapter 16: Computer Litigation .....</b>		<b>537</b>
16-1	INTRODUCTION.....	537
16-2	PERSONAL JURISDICTION AND THE INTERNET.....	538
16-2:1	Introduction .....	538
16-2:2	Analysis of Personal Jurisdiction in New Jersey .....	538
16-2:2.1	Broad Interpretation of Personal Jurisdiction.....	543

## Table of Contents

	16-2:2.2	Restrictive Interpretation of Personal Jurisdiction.....	544
16-2:3		Internet Domain Name Disputes.....	545
	16-2:3.1	Use of .com in Name.....	545
	16-2:3.2	Cybersquatting .....	546
	16-2:3.3	Alternative Dispute Resolution.....	548
16-2:4		Legal Tactics to Combat Internet Inventions .....	549
	16-2:4.1	Spamming.....	549
	16-2:4.2	Spyware and Phishing.....	552
	16-2:4.3	Blogs, Bulletin Boards and Social Media .....	553
	16-2:4.4	Pop-Up Ads.....	556
16-3		COMPUTERS AND COPYRIGHT INFRINGEMENT .....	557
	16-3:1	Direct Infringement Enabled by Computers .....	557
	16-3:2	Digital Millennium Copyright Act of 1998.....	558
	16-3:3	Secondary Liability for Copyright Infringement .....	559
16-4		STATUTES ADDRESSING UNAUTHORIZED COMPUTER ACCESS.....	561
	16-4:1	Federal Statutes .....	561
		16-4:1.1 Computer Fraud and Abuse Act.....	561
		16-4:1.2 Electronic Communications Privacy Act .....	565
	16-4:2	New Jersey Statutory Law.....	566
		16-4:2.1 Civil Liability for Computer-Related Offenses .....	567
		16-4:2.2 New Jersey Wiretapping and Electronic Surveillance Control Act.....	568
16-5		TORTS IN THE COMPUTER CONTEXT .....	569
	16-5:1	Misrepresentation .....	569
	16-5:2	Trespass to Chattels .....	570
		16-5:2.1 Elements .....	571
		16-5:2.2 Trespass Claims Brought in Computer Context.....	571
	16-5:3	Consumer Fraud Act.....	572
	16-5:4	Product Liability.....	574
	16-5:5	Malpractice.....	574
	16-5:6	Insurance Coverage Disputes.....	576
16-6		ELECTRONIC DISCOVERY .....	577
		<b>Chapter 17: Lender Liability.....</b>	<b>585</b>
	17-1	INTRODUCTION.....	585
	17-2	BREACH OF FIDUCIARY DUTY .....	586



**Table of Contents**

17-2:1	General Rule.....	586
17-2:2	Fiduciary Duty Based on Control.....	588
17-2:3	Fiduciary Duty Based on “Special Circumstances” .....	589
17-3	<b>COMMON LAW THEORIES OF TORTIOUS LIABILITY .....</b>	<b>592</b>
17-3:1	Fraud and Misrepresentation.....	593
17-3:1.1	Elements .....	593
17-3:1.2	Fraud/Misrepresentation in Lender Liability Actions .....	595
17-3:1.3	Punitive Damages .....	595
17-3:2	Duress.....	596
17-3:3	Tortious Interference in Lender Liability Actions .....	598
17-3:4	Negligence .....	599
17-4	<b>IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING .....</b>	<b>601</b>
17-5	<b>LENDER LIABILITY FOR CONTAMINATED PROPERTY .....</b>	<b>604</b>
17-5:1	CERCLA.....	604
17-5:1.1	Classes of “Potentially Responsible Parties” .....	605
17-5:1.2	“Owner and Operator”/Secured Creditor Exemption.....	605
17-5:1.3	“Participation in Management” .....	606
17-5:2	Resource Conservation and Recovery Act .....	607
17-5:3	New Jersey Spill Act .....	608
17-5:3.1	Secured Creditor Exemption.....	608
17-5:3.2	“Participation in Management” .....	609
<b>Chapter 18: Arbitration .....</b>		<b>611</b>
18-1	INTRODUCTION.....	611
18-2	<b>ADVANTAGES AND DISADVANTAGES OF ARBITRATION .....</b>	<b>612</b>
18-2:1	Potential Advantages of Arbitration.....	613
18-2:2	Potential Disadvantages of Arbitration .....	614
18-2:3	The Nonapplicability of the Rules of Evidence .....	614
18-3	<b>THE ARBITRATION AGREEMENT AND ITS ENFORCEABILITY UNDER NEW JERSEY’S REVISED ACT .....</b>	<b>615</b>
18-4	<b>DISPUTES REGARDING ARBITRABILITY UNDER NEW JERSEY’S REVISED ACT .....</b>	<b>617</b>
18-5	<b>THE ARBITRATION PROCESS.....</b>	<b>620</b>

**Table of Contents**

- 18-6 JUDICIAL REVIEW OF ARBITRATION AWARDS UNDER THE REVISED ACT..... 624
  - 18-6:1 Confirmation of Arbitration Awards ..... 624
  - 18-6:2 Modification or Correction of Arbitration Awards ..... 625
  - 18-6:3 Vacation of Arbitration Awards ..... 626
    - 18-6:3.1 Standard of Review ..... 627
    - 18-6:3.2 Arbitrators Exceeding their Authority ..... 629
  - 18-6:4 Appellate Review From Trial Court Rulings ..... 630
- 18-7 THE FEDERAL ARBITRATION ACT ..... 630
  - 18-7:1 Jurisdiction ..... 631
  - 18-7:2 Arbitrability Determinations in Federal and State Court Under the Federal Arbitration Act ..... 634
  - 18-7:3 Judicial Review of Arbitration Awards ..... 636
- Chapter 19: Employment Law Litigation ..... 639**
- 19-1 INTRODUCTION..... 639
- 19-2 THE NEW JERSEY LAW AGAINST DISCRIMINATION..... 639
  - 19-2:1 Overview..... 639
  - 19-2:2 Forms of Discrimination; Elements and Burdens of Proof ..... 641
    - 19-2:2.1 Disparate Treatment ..... 641
    - 19-2:2.2 Disparate Impact ..... 645
    - 19-2:2.3 Unlawful Harassment ..... 647
    - 19-2:2.4 Unlawful Retaliation..... 650
    - 19-2:2.5 Failure to Reasonably Accommodate ..... 651
  - 19-2:3 Enforcement ..... 655
    - 19-2:3.1 Procedure..... 655
    - 19-2:3.2 Statute of Limitations..... 657
  - 19-2:4 Remedies ..... 659
    - 19-2:4.1 Equitable Remedies..... 659
    - 19-2:4.2 Damages ..... 660
    - 19-2:4.3 Mitigation of Damages..... 662
    - 19-2:4.4 After-Acquired Evidence ..... 663
    - 19-2:4.5 Punitive Damages; Penalties ..... 663
    - 19-2:4.6 Attorney’s Fees ..... 664
  - 19-2:5 Related Federal Laws..... 665
    - 19-2:5.1 Title VII of the Civil Rights Act of 1964..... 666
    - 19-2:5.2 Age Discrimination in Employment Act..... 667

## Table of Contents

	19-2:5.3	Americans with Disabilities Act .....	668
19-3		CONSCIENTIOUS EMPLOYEE PROTECTION ACT .....	670
	19-3:1	Overview .....	670
	19-3:2	Elements of Claims; Burdens of Proof; Defenses.....	672
	19-3:3	Enforcement .....	676
		19-3:3.1 Statute of Limitations.....	676
		19-3:3.2 The CEPA Waiver Provision .....	676
	19-3:4	Remedies .....	677
19-4		FAMILY LEAVE LAWS .....	679
	19-4:1	The New Jersey Family Leave Act .....	679
	19-4:2	Paid Sick Leave Law .....	680
	19-4:3	The Federal Family and Medical Leave Act.....	680
	19-4:4	New Jersey Security and Financial Empowerment Act.....	681
19-5		COMMON LAW PUBLIC POLICY CLAIMS.....	682
19-6		EMPLOYMENT CONTRACTS .....	684
	19-6:1	Overview.....	684
	19-6:2	Express Contracts.....	684
	19-6:3	Employee Handbooks.....	685
	19-6:4	The Implied Covenant of Good Faith and Fair Dealing.....	686
	19-6:5	Just Cause .....	687
	19-6:6	Remedies .....	688
	19-6:7	Nondisclosure Agreements .....	688
19-7		INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS .....	689
	19-7:1	Overview.....	689
	19-7:2	Elements; Defenses .....	689
	19-7:3	Damages.....	691
19-8		ARBITRATION OF EMPLOYMENT CLAIMS .....	691
		<b>Chapter 20: Limited Liability Companies.....</b>	<b>695</b>
20-1		INTRODUCTION.....	695
20-2		GOVERNING LAW .....	696
	20-2:1	The Revised Uniform Limited Liability Company Act .....	696
	20-2:2	The Operating Agreement.....	697
20-3		LIABILITY TO THIRD PARTIES .....	699
	20-3:1	Liability of Members and Managers to Third Parties.....	699

## Table of Contents

	20-3:1.1	Claims by Creditors for a Member’s Failure to Make Promised Capital Contributions .....	700
	20-3:1.2	Liability for Participation in Torts Committed by the Company .....	700
	20-3:1.3	Piercing the Veil .....	701
	20-3:2	Member’s Ability to Bind LLC as Agent .....	703
20-4		<b>MEMBER AND MANAGER LIABILITY .....</b>	<b>704</b>
	20-4:1	Fiduciary Duties .....	704
	20-4:1.1	Member’s Right to Information .....	704
	20-4:1.2	Duty of Care .....	706
	20-4:1.3	Duty of Loyalty .....	707
	20-4:1.4	Members Owe Duties to LLC and to One Another .....	708
	20-4:2	Liability for Improper Distributions .....	709
	20-4:3	Derivative Actions .....	710
	20-4:4	Indemnification .....	712
20-5		<b>STATUS OF TRANSFEREES .....</b>	<b>712</b>
20-6		<b>DISSOCIATION AND DISSOLUTION .....</b>	<b>714</b>
	20-6:1	Events of Dissociation and Dissolution, Generally .....	714
	20-6:2	Judicial Dissociation and Dissolution .....	715
	20-6:3	Remedies Other Than Dissolution .....	719
	20-6:4	Wrongful Dissociation .....	720
	20-6:5	Rights of Dissociated Member .....	721
20-7		<b>FOREIGN LLCs .....</b>	<b>721</b>
		<b>Table of Cases .....</b>	<b>723</b>
		<b>Index .....</b>	<b>831</b>