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THE RIGHT TO A CIVIL JURY TRIAL IN NEW JERSEY

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NEW JERSEY DEVELOPMENTS

THE RIGHT TO A CIVIL JURY TRIAL IN NEW JERSEY

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I. INTRODUCTION

Article I, Section 9 of the New Jersey Constitution explicitly provides that "[t]he right of trial by jury shall remain inviolate."¹ Yet, this language has never been interpreted to require a jury trial in all civil cases.² In fact, contrary to federal practice, New Jersey has precluded jury trials in many civil cases.

This Article examines the restrictions on civil jury trials in New Jersey and contrasts those restrictions against the broader jury trial rights available in federal court. Chancery's historic role in adjudicating disputes without a jury is emphasized.³ The impact of more recent procedural developments, including compulsory joinder, the entire controversy doctrine and the "complexity" exception⁴ to the right to a jury trial are also considered.⁵

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1. N.J. CONST. art. I, § 9.

2. See, e.g., *Steiner v. Stein*, 2 N.J. 367, 377-78, 66 A.2d 718, 724 (1949); see generally Darin A. Pinto, Note, *Constitutional Law Right to Jury Trial is Not Conferred by the New Jersey Constitution to Claims Arising Under the New Jersey Law Against Discrimination*, 20 SETON HALL L. REV. 935 (1990).

3. See WILLIAM A. DREIER & PAUL A. ROWE, *GUIDEBOOK TO CHANCERY PRACTICE IN NEW JERSEY* 145-47 (1991); Thomas L. Yaccarino, *Chancery Division v. Law Division*, 80 BAR J. 17, 19 (1977).

4. See *Kenney v. Scientific, Inc.*, 213 N.J. Super. 372, 375, 517 A.2d 484, 485 (App. Div. 1986), discussed *infra* note 212 and accompanying

II. BACKGROUND

A. *Jury Trial Rights Under the New Jersey Constitution*

The Seventh Amendment to the United States Constitution⁶

text.

5. Of course, a party may waive its right to a jury trial by contract, *see, e.g.*, *Fairfield Leasing Corp. v. Techni-Graphics, Inc.*, 256 N.J. Super. 538, 539-45, 607 A.2d 703, 704-07 (Law Div. 1992), or by failing to pursue its jury demand, *see, e.g.*, *Guber v. Peters*, 149 N.J. Super. 138, 140, 373 A.2d 431, 431-32 (App. Div. 1987). However, those topics are beyond the scope of this article.

6. U.S. CONST. amend. VII. The Seventh Amendment provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Id.

As discussed *infra* notes 9-10 and accompanying text, after the American Revolution, New Jersey, like all of the former colonies, explicitly recognized the right to a civil jury trial in state constitutions, statutes, or common law. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 341 (1979) (Rehnquist, C.J., dissenting); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1973). In contrast, the United States Constitution did not mention the right to a jury trial in civil cases, even though England's limitation of jury trials in the colonies was a leading cause of the Revolution and was listed in the Declaration of Independence as a specific grievance against the Crown. *Id.* This omission may have resulted because the jury practice in each state was quite different. THE FEDERALIST No. 83, at 502-03 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton explained:

[I]t appears that there is a material diversity, as well as in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstance of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as it has been left, to legislative regulation.

Id. at 503; *see also* Wolfram, *supra*, at 665-66.

Anti-Federalists were not convinced, and they attacked the Federal Constitution because, among other things, it lacked a mechanism for civil jury trial. *Parklane*, 439 U.S. at 343 (Rehnquist, C.J., dissenting). Ulti-

is not binding on the states.⁷ Thus, the right to a jury trial in New Jersey must arise either by state statute or under the New Jersey Constitution.⁸

The first constitutional reference to jury trials appeared in Article XXII of the 1776 New Jersey Constitution,⁹ which provided "that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever."¹⁰

The adoption of Article I, Section 7 in the 1844 constitution modified the 1776 jury trial provision.¹¹ In the 1844 constitution, the framers explicitly recognized the Legislature's role in creating and limiting jury trial rights: "The right of trial by

mately, however, the Seventh Amendment was ratified by the states as part of the Bill of Rights in 1791.

7. See *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916) ("[T]he 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same."); *In re LiVolsi*, 85 N.J. 576, 587 n.7, 428 A.2d 1268, 1273 n.7 (1981).

8. See *Shaner v. Horizon Bancorp*, 116 N.J. 433, 435-36, 561 A.2d 1130, 1131 (1989); SCHNITZER & WILDSTEIN, *NEW JERSEY RULES SERVICE* 1254 (1958).

9. N.J. CONST. of 1776, art. XXII. The 1776 constitution was adopted by the Provincial Congress on July 2, 1776. RICHARD J. CONNORS, *THE CONSTITUTION OF 1776*, at 7 (1975). However, it was not submitted for popular ratification. See ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION 1* (1990); Edward B. McConnell, *A Brief History of the New Jersey Courts*, 7 N.J. DIG. 349, 350 (1954).

10. *State v. Ingenito*, 87 N.J. 204, 210, 432 A.2d 912, 915 (1981) (quoting N.J. CONST. of 1776, art. XXII). The public soon recognized the importance of this provision. In fact, one early contributor to the *New Jersey Gazette* noted that "[o]ur constitution guards the life, liberty and property of the subject, by the trial of a jury of his peers." A. Freeman, *NEW JERSEY GAZETTE*, October 4, 1780, quoted in CHARLES T. ERDMAN, JR., *THE NEW JERSEY CONSTITUTION OF 1776*, at 100 (1929). Nevertheless, commentators complained that between 1780 and 1790, "the Legislature by its Acts encroached upon the trial by jury in over fifty cases." ERDMAN, *supra*, at 102.

11. N.J. CONST. of 1844, art. I, § 7. Though slightly changed, the 1844 jury clause "was substantially the same" as the 1776 version, and "neither was intended to extend the right of trial by jury to cases to which it did not previously attach." *Howe v. Treasurer of Plainfield*, 37 N.J.L. 145, 147 (Sup. Ct. 1874).

jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men."¹²

The framers "carefully refrained from the adoption of the language of the Constitution of 1776, which . . . provided [that the right to trial by jury] should 'remain confirmed,' and in its stead dealt with 'the right of a trial by jury,' which it provided should 'remain inviolate.'"¹³ This may have been a distinction without a difference. However, courts have suggested that "inviolate" jury trial rights were something less than "confirmed" jury trial rights. The former New Jersey Supreme Court explained:

The question [of] whether the legislature, by increasing the jurisdiction of inferior tribunals, may lawfully take away the right of trial by a common law jury, or may hamper it with conditions that affect its usefulness, is evidently one of large importance in a constitutional point of view. The constitutional requirement that "the right to a trial by jury shall remain inviolate," guarantees the opportunity to submit common law rights to a tribunal that shall possess the attributes of the historical jury as it existed at the time of adoption of the organic law. *The language of that instrument, however, with respect to the right to this mode of trial, is that it shall remain inviolate, not that it shall be unalterable; so that the limits of legislative action are not so circumscribed as to preclude the exercise of some power over the jurisdiction and pro-*

12. See N.J. WRITERS' PROJECT, WORK PROJECTS ADMINISTRATION, PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844 171-72 (1942) ("[I]t was not worth while to require a jury of twelve men to try causes where the value in dispute was small; and if it was proper to extend the jurisdiction of the six man juries, and there was a difficulty in the way, it had better be obviated by the Convention.").

Previously, twelve jurors were required for a jury trial. *Holmes v. Walton* (1780), an unpublished decision, decided by the New Jersey Supreme Court during the Revolution, "struck down an act allowing six-man juries to decide cases involving traitorous trading with the enemy." CONNORS, *supra* note 9, at 24. The court noted that "lawmakers were constitutionally bound to respect the tenet of English common law that trial by jury meant twelve-man juries." *Id.* See also ERDMAN, *supra* note 10, at 91; Wolfram, *supra* note 6, at 724 n.247.

13. *State v. De Lorenzo*, 81 N.J. 613, 616, 79 A. 839, 840 (1911).

*cedure of inferior courts.*¹⁴

The right to a jury trial was further modified in Article I, Section 9 of the 1947 constitution:

The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons when the matter in dispute does not exceed \$50.00. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.¹⁵

The 1947 constitution was "not intended as a grant, enlargement or restriction of the right of trial by jury."¹⁶ Yet, as noted above, Article I, Section 9 provided that only five-sixths of a jury could render a verdict.¹⁷ This provision was included to avoid: unjust verdicts that resulted from one or two recalcitrant or dishonest jurors; costly retrials; and court congestion.¹⁸

14. *Clayton v. Clark*, 55 N.J.L. 539, 539, 26 A. 795, 795 (N.J. 1893) (emphasis added); see also *Humphrey v. Eakley*, 72 N.J.L. 424, 425, 60 A. 1097, 1098 (N.J. 1905) ("[W]ithout laying too much stress upon verbal definition, it must not be overlooked that the essential meaning of 'inviolate' is freedom from hurt, harm, defilement, profanation, or such other idea connoting partial destruction or substantial impairment, and that it in no sense imports immunity from all regulation.") (emphasis added). But see *State v. Doty*, 32 N.J.L. 403, 405 (1868) ("The Constitutional declaration is, that 'the right of a trial by jury shall remain inviolate,' and the effect of the clause is to establish the privilege by the highest of sanctions, but not to enlarge it. *The provision operates as a restraint upon the legislative power; the right is not to be impaired or diminished but is to remain as it existed at common law*, and according to the practice of the courts anterior to the establishment of the fundamental law.") (emphasis added).

15. N.J. CONST. art. I, § 9 (amended 1973). Pursuant to a 1973 Amendment, the phrase "when the matter in dispute does not exceed \$50.00" was deleted. N.J. CONST. art. I, § 9.

16. SCHNITZER & WILDSTEIN, *supra* note 8, at 1254.

17. See WILLIAMS, *supra* note 9, at 37 ("The 1947 convention changed the word 'men' to 'persons' and added the two additional authorizations to the Legislature to provide for five-sixths decisions in civil actions and mental incompetency cases without juries.")

18. *State v. M.*, 96 N.J. Super. 335, 342-43, 233 A.2d 65, 69 (App. Div.), *certif. denied*, 50 N.J. 300, 234 A.2d 406 (1967).

In sum, though the manner of jury trials may have changed, New Jersey has always recognized a constitutional right to a civil jury trial. However, neither the 1776, 1844, nor 1947 constitutions explained *which* civil claims are triable to a jury. That issue, as discussed *infra*, necessitates a historical analysis of the particular remedy and "depends in large measure on the traditional difference between law and equity."¹⁹

B. Law and Chancery Courts in New Jersey

Any analysis of the right to jury trial in New Jersey must focus on the evolution of the law and chancery courts.²⁰ Like many states, New Jersey's court system was based on English common law and equity principles.²¹ Pursuant to this practice, New Jersey established separate courts of law and chancery.²² Claims for money damages were litigated in the law courts (the former supreme court and the court of common pleas) and claims for equitable relief were heard in the chancery court.²³ There was generally no right to a jury trial in chancery.²⁴

19. *State v. Anderson*, 127 N.J. 191, 207, 603 A.2d 928, 936 (1992).

20. Pinto, *supra* note 2, at 957.

21. RICHARD N. BAISDEN, CHARTER FOR NEW JERSEY: THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947 43 (1952); McConnell, *supra* note 9, at 349.

22. McConnell, *supra* note 9, at 350-51.

23. See *Pridmore v. Steneck*, 122 N.J. Eq. 35, 37, 191 A. 861, 862 (N.J. 1937) ("[I]t is a principle now firmly embedded in our equity jurisprudence that where the primary right is legal, and the remedy invoked is likewise legal in character, and there is an adequate, certain, and complete remedy at law, equity will not exercise its jurisdiction"); BAISDEN, *supra* note 21, at 43 ("Damages can only be secured from law courts while [an] injunction can be issued exclusively by the Court of Chancery.").

24. *Wood v. Tallman*, 1 N.J.L. 177, 183 (1793) ("The Chancery, Prerogative and Spiritual courts have always proceeded without the intervention of a jury."); COMMITTEE ON THE JUDICIARY REPORT, CONSTITUTIONAL CONVENTION OF 1947, at 1188 [hereinafter COMMITTEE REPORT] ("[J]uries are now very rarely empaneled in the Court of Chancery, although the practice was not unknown."); SCHNITZER & WILDSTEIN, *supra* note 8, at 1260 ("[T]he practice of hearing Chancery causes without a jury is almost as old and certainly as well established [as the right to trial by jury]."); See also THE FEDERALIST No. 83, at 505 (Alexander Hamilton) (Clinton

Unfortunately, as in England, this dual court system led to numerous jurisdictional problems and delay.²⁵ The Committee on the Judiciary for the 1947 Constitutional Convention explained:

Neither logic nor ordinary business experience would recommend the creation of two rival court systems to deal with the same cases. In point of fact, an independent Court of Chancery had its origin in the vicissitudes of English feudal history 800 years ago. It has since disappeared everywhere except in four American states and in the Dominion of New South Wales. Once discontinued by a jurisdiction as an independent court, it has never been revived.²⁶

Ultimately, the 1947 constitution eliminated the complete separation of law and chancery by merging them in a unified superior court.²⁷ However, although the post-1947 system gave the newly created law and chancery divisions concurrent jurisdiction to render both legal and equitable relief,²⁸ chancery's historic jurisdiction over primarily equitable cases continued.²⁹ Moreover, pursuant to its rulemaking powers,³⁰

Rossiter ed., 1961) ("[T]he circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate that they are incompatible with the genius of trials by jury."). Moreover, as detailed *infra*, the chancery court also had the ability to adjudicate ancillary legal claims without a jury and award damages. SCHNITZER & WILDSTEIN, *supra* note 8, at 1262; see also *Mantell v. International Plastic Harmonica Corp.*, 141 N.J. Eq. 379, 391-93, 55 A.2d 250, 258-59 (N.J. 1947); DREIER & ROWE, *supra* note 3, at 146.

25. *O'Neill v. Vreeland*, 6 N.J. 158, 169, 77 A.2d 899, 904 (1951) ("The shuttling of cases from law to equity and back again without affording a party a hearing on the merits of his case constituted one of the principal evils of our former judicial system . . ."); COMMITTEE REPORT, *supra* note 24, at 1184-86 (collecting cases involving jurisdictional disputes between the law and chancery courts); BAISDEN, *supra* note 21, at 43, 49-50.

26. COMMITTEE REPORT, *supra* note 24, at 1186.

27. N.J. CONST. art. VI, § 3, ¶ 3. An excellent discussion of the political battle between advocates and detractors of the chancery court and the compromise to retain a chancery division in a unified superior court is detailed in BAISDEN, *supra* note 21, at 43-56.

28. N.J. CONST. art. VI, § 3, ¶ 4.

29. *O'Neill*, 6 N.J. at 165, 77 A.2d at 902 (noting that N.J. Ct. R. 3:40-2 requires the filing of "primarily equitable" actions in chancery).

the New Jersey Supreme Court has promulgated rules that maintain the distinction between law and chancery to this day.³¹

New Jersey's various constitutions have consistently recognized the right to a civil jury trial. However, though establishing a unified court system, New Jersey, unlike many states, has elected to retain a distinct chancery division where, even today, jury trials are "virtually nonexistent."³² The impact of this seeming contradiction upon the right to trial by

Current N.J. CT. R. 4:3-1(a) states that "[a]ctions in which the plaintiff's primary right or the principal relief sought is equitable in nature . . . shall be brought in the Chancery Division, General Equity, even though legal relief is demanded in addition or alternative to equitable relief." *Id.*

One scholar of the 1947 constitution explained:

Of course, . . . [the pre-1947 court system] did not call for the abolition of either our courts of equity or our courts of law. Nor did it call for the abolition of specialist judges, whose advantages are obvious. It simply called for removing the barriers of separation between our courts of law and those of equity, so that they could be separately conducted, each by their specialist judges, as determined by the character of the main issue, but as parts of a single court, each part of which would be empowered to administer complete justice. This the 1947 Constitution accomplished, by providing simply for a Superior Court which "shall have original general jurisdiction throughout the State in all causes."

Richard Hartshorne, *Progress in New Jersey Judicial Administration*, 3 RUTGERS L. REV. 161, 162-63 (1949) (quoting N.J. CONST. art. VI, § 3, ¶ 2); *O'Neill*, 6 N.J. at 166, 77 A.2d at 902 (noting the benefits of specialized law and equity judges).

30. N.J. CONST. art. VI, § 3, ¶ 4.

31. See N.J. CT. R. 4:3-1(a); N.J. CT. R. 4:25-1 (pretrial conferences in contested actions in chancery division); N.J. CT. R. 1:6-4; N.J. CT. R. 1:6-5(b) (stipulating different procedures for filing briefs in chancery division); see also *Government Employees Ins. Co. v. Butler*, 128 N.J. Super. 492, 495, 320 A.2d 515, 517 (Ch. Div. 1974) ("Counsel bear a heavy measure of responsibility in maintaining the distinction between the chancery and law divisions."); Yaccarino, *supra* note 3, at 19-20 (discussing differences between chancery and law practice).

32. DREIER & ROWE, *supra* note 3, at 145. Theoretically, jury trials are available in the chancery division. *O'Neill*, 6 N.J. at 168, 77 A.2d at 903-04; see N.J. CT. R. 4:36-1 (by implication). However, other than the rare use of advisory juries, see N.J. CT. R. 4:35-2, no reported chancery division case was ever tried to a jury.

jury and other restrictions on civil jury trials is discussed in Section III.

III. RESTRICTIONS ON THE RIGHT TO A JURY TRIAL

A. *The Historical/Remedy Analysis*³³

Absent an express statutory right to a jury trial,³⁴ a party is entitled to a trial by jury only if that right existed at common law when the New Jersey Constitution was adopted.³⁵

33. See generally Pinto, *supra* note 2, *passim*.

34. See, e.g., N.J. STAT. ANN. § 2A:62-18 (West 1994) (directing a jury trial upon application of a party to settle quiet title disputes).

35. Shaner v. Horizon Bancorp., 116 N.J. 433, 447, 561 A.2d 1130, 1137 (1989). Accordingly, the first step in this analysis is to select the appropriate historical constitution. Unfortunately, the New Jersey Supreme Court has not held which constitution should be applied. See Weinisch v. Sawyer, 123 N.J. 33, 343, 587 A.2d 615, 620 (1991) (noting, but not resolving, the ambiguity over which constitution should be applied); *In re LiVolsi*, 85 N.J. 576, 587, 428 A.2d 1268, 1273 (1981) (applying the 1947 constitution); Steiner v. Stein, 2 N.J. 367, 378-79, 66 A.2d 719, 725 (1949) (applying the 1844 constitution); Montclair v. Stanoyevich, 6 N.J. 479, 485, 79 A.2d 288, 290-91 (1949) (applying the 1776 constitution). Recognizing this problem, the supreme court recently explained that the relevant version was "probably the 1776 Constitution, maybe the 1947 document, [and] possibly the 1844 version." State v. Anderson, 127 N.J. 191, 207, 603 A.2d 928, 936 (1992). In any event, the grant or denial of a jury trial has not turned on the application of one constitution over another.

Even if a jury trial right existed at common law for a particular cause of action, the Legislature may abrogate the entire cause of action and, with it, any corresponding right to a jury. Guy v. Petty, 275 N.J. Super. 536, 544-47, 646 A.2d 546, 550-51 (Law Div. 1993); Rybeck v. Rybeck, 141 N.J. Super. 481, 506-07, 358 A.2d 828, 842 (Law Div. 1976), *appeal dismissed*, 150 N.J. Super. 151, 375 A.2d 269 (App. Div.), *certif. denied*, 75 N.J. 30, 379 A.2d 261 (1977).

Of course, even if a right to jury trial did not exist at common law for a particular cause of action, the Legislature may always provide for one. New Jersey Supreme Court Chief Justice Wilentz explained:

If it is unseemly to decide a case in 1992 concerning the right to trial by jury on the basis of what happened before 1776, we should overrule those cases of this Court that define what the constitutional provisions mean. Further, if that reading of the Constitution, assuming it is correct, is out of joint with modern conceptions of policy or fairness the remedy in this case is sim-

Specifically, to determine whether common law or statutory claims are triable to a jury, courts look to the historical basis for the cause of action and focus on the requested relief.³⁶

The source of the remedy, legal or equitable, however, "remains the most persuasive factor."³⁷ New Jersey courts have applied the historical/remedy analysis to deny a jury trial in a variety of civil actions.³⁸ For example, in a departure from

ple: there is nothing in the Constitution that prevents the Legislature from reversing itself and affording a right to trial by jury of the issue of materiality. No constitutional amendment is needed.

Anderson, 127 N.J. at 218, 603 A.2d at 942 (Wilentz, C.J., dissenting).

36. *Shaner*, 116 N.J. at 447, 561 A.2d at 1137; see also *Ballard v. Schoenberg*, 224 N.J. Super. 661, 668, 541 A.2d 258, 262 (App. Div.) (rejecting the notion that existence of a contract was a jury issue in a suit seeking specific performance, an equitable remedy, because "[t]he right to a jury trial attaches to causes of action and not to issues"), *certif. denied*, 113 N.J. 367, 550 A.2d 473 (1988).

37. *Weinisch*, 123 N.J. at 343, 587 A.2d at 620.

38. See, e.g., *Weinisch*, 123 N.J. at 345, 587 A.2d at 620 (finding no right to a jury trial for an insured's suit against an insurer and agent for failure to inform the insured of available coverage); *Shaner*, 116 N.J. at 455, 561 A.2d at 1141 (maintaining that there is no right to a jury trial under the Law Against Discrimination) (superseded by N.J. STAT. ANN. § 10:5-13 (West 1994)); *LiVolsi*, 85 N.J. at 590-91, 428 A.2d at 1275 (holding that an attorney has no right to a jury trial in a fee dispute with a client if the client chooses to have the dispute resolved before the fee arbitration committee); *Boardwalk Properties, Inc. v. BPHC Acquisition, Inc.*, 253 N.J. Super. 515, 529, 602 A.2d 733, 740 (App. Div. 1991) (concluding that there is no right to a jury trial under the New Jersey Antitrust Act); *Abbamont v. Board of Educ.*, 238 N.J. Super. 603, 604-05, 570 A.2d 479, 480 (App. Div. 1990) (determining that there is no right to a jury trial under the New Jersey Conscientious Employee Protection Act), *rev'd in part*, 269 N.J. Super. 11, 634 A.2d 538 (App. Div. 1993), *aff'd*, 138 N.J. 405, 650 A.2d 958 (1994) (superseded by N.J. STAT. ANN. §§ 10:5-13 and 34:19-5 (West 1994)); *Manetti v. Prudential Property & Casualty Ins. Co.*, 196 N.J. Super. 317, 320, 482 A.2d 520, 521 (App. Div. 1984) (opining that there is no right to a jury trial for statutory "Personal Injury Protection" benefits); *Van Dissel v. Jersey Cent. Power & Light Co.*, 181 N.J. Super. 516, 525, 438 A.2d 563, 568 (App. Div. 1981) (noting that there is no right to a jury trial for condemnation action arising under the constitution and statutes), *certif. denied*, 99 N.J. 186, 491 A.2d 689 (1984), *vacated on other grounds*, 465 U.S. 1001 (1984); *Peterson v. Albano*, 158 N.J. Super. 503, 506-07, 386 A.2d 873, 875 (App. Div.) (stating that there exists "no right to a jury trial in

over seventy years of federal antitrust practice,³⁹ the New Jersey Appellate Division recognized in *Boardwalk Properties, Inc. v. BPHC Acquisitions, Inc.*⁴⁰ that there is no right to a jury trial under the New Jersey Antitrust Act ("Act").⁴¹ Applying the historical/remedy test, the appellate division emphasized that, even though treble damages are available under the Act,⁴² the remedies available to a private litigant and to the New Jersey Attorney General are "predominately equitable in nature."⁴³ Moreover, the court believed that the absence of an express right to a jury trial was inconsistent with "our

summary dispossess action"), *certif. denied*, 78 N.J. 337, 395 A.2d 205 (1978); *New Jersey Sports & Exposition Auth. v. Del Tufo*, 210 N.J. Super. 664, 668, 510 A.2d 329, 331 (Law. Div. 1986) (reaffirming that there is no right to a jury trial to appraise the fair value of stock-shares in a stockholders' action), *aff'd*, 230 N.J. Super. 616, 554 A.2d 878 (App. Div. 1989), *certif. denied*, 121 N.J. 611, 583 A.2d 312 (1990); *Quinchia v. Waddington*, 166 N.J. Super. 247, 249, 399 A.2d 679, 680 (Law Div. 1979) (finding no right to jury trial under Unsatisfied Claim and Judgment Fund); *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 120 N.J. Super. 572, 582, 295 A.2d 385, 390 (Ch. Div. 1972) (perceiving no right to a jury trial under the Consumer Fraud Act). *See generally* SYLVIA B. PRESSLER, RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY 1100-01 (1995).

39. *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916) (holding that jury trials are required under the Sherman Antitrust Act where treble damages are sought).

40. 253 N.J. Super. 515, 529, 602 A.2d 733, 740 (App. Div. 1991).

41. N.J. STAT. ANN. §§ 56:9-1 to -18 (West 1994).

42. N.J. STAT. ANN. § 56:9-12 (West 1994).

43. *Boardwalk*, 253 N.J. Super. at 530, 602 A.2d at 741 (quoting *Shaner*, 116 N.J. at 453, 561 A.2d at 1140); *see* N.J. STAT. ANN. § 56:9-10(b) (West 1994) (allowing for injunctive relief against threatened injury to business or property and awarding reasonable attorney's fees, filing fees and reasonable costs of suit); N.J. STAT. ANN. § 56:9-12(a) (West 1994) (permitting the award of treble damages, reasonable attorney's fees, filing fees and reasonable costs of suit to persons injured by violations of the New Jersey Antitrust Act); N.J. STAT. ANN. § 56:9-7 (West 1994) (allowing for forfeiture of charter rights, franchises, privileges and powers, and dissolution of the corporation or association); N.J. STAT. ANN. § 56:9-8 (West 1994) (allowing for the suspension or revocation of foreign entity's right to do business within the state). Some of these remedies are available only to the Attorney General, who was not a party to *Boardwalk Properties*. Despite that, the court considered their availability in determining that the Act was primarily an equitable cause of action.

Legislature's practice of expressly providing for jury trials when such is intended.⁴⁴ Furthermore, that appellate division held that the Act did not replace common law causes of action that were triable to a jury.⁴⁵

Boardwalk Properties illustrates that, even in the face of contrary federal practice,⁴⁶ the traditional distinction between law and equity remains vital in determining the right to a jury trial in New Jersey.⁴⁷ Equity's greatest impact on jury trial rights is evidenced through its exercise of ancillary equitable jurisdiction.⁴⁸

B. *The Doctrine of Ancillary Equitable Jurisdiction*

A party has a right to a jury trial only if that right existed at common law before the adoption of the constitution.⁴⁹ Prior to the constitution (either the 1776, 1844, or 1947 version), chancery had the ability to adjudicate ancillary legal claims without a jury.⁵⁰ Accordingly, since the 1947 constitution did not alter this rule, the right to trial by jury is still subject to chancery's jurisdiction over ancillary legal claims.⁵¹

Two cases decided shortly after the 1947 constitution became effective confirmed chancery's continuing jurisdiction over ancillary, yet increasingly significant, legal claims. In *Ebling*

44. *Boardwalk*, 253 N.J. Super. at 529, 602 A.2d at 740 (quoting *Shaner*, 116 N.J. at 443, 561 A.2d at 1135).

45. *Id.*; see also *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940) (stating that at common law, "restraints of trade were not penalized and gave rise to no actionable wrong"); Thomas M. Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CAL. L. REV. 1, 57, 61-63 (1986) (stating that early English antitrust statutes were tried by jury).

46. See discussion *infra* Section IV.

47. See Pinto, *supra* note 2, at 957.

48. See discussion *infra* Section III.B.

49. *Anderson*, 127 N.J. at 207, 603 A.2d at 936.

50. *Mantell v. International Plastic Harmonica Corp.*, 141 N.J. Eq. 379, 393, 55 A.2d 250, 259 (N.J. 1947). Legal issues are ancillary if they are "germane to or grow out of the subject-matter of the equitable jurisdiction." *Fleischer v. James Drug Stores*, 1 N.J. 138, 150, 62 A.2d 383, 389 (1948).

51. *Fleischer*, 1 N.J. at 150, 62 A.2d at 389.

Brewing Co. v. Heirloom, Inc.,⁵² the defendant asserted legal counterclaims for damages several times the amount of the plaintiff's claim.⁵³ Nevertheless, the Supreme Court of New Jersey rejected the defendant's demand for a jury trial.⁵⁴ The view of the lone dissenting justice that the constitution required a jury trial of the counterclaim was expressly rejected.

Three weeks after *Ebling* was decided, the Supreme Court of New Jersey decided *Fleischer v. James Drug Stores*.⁵⁵ In *Fleischer*, the plaintiff sought specific performance of a contract, as well as damages for conspiracy, breach of contract and tortious interference.⁵⁶ Pursuant to the doctrine of ancillary jurisdiction, the New Jersey Supreme Court held that the legal issues must also be decided in chancery without a jury:

It is the settled rule that where equity has rightfully assumed jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of the entire controversy and, except where the jurisdiction of equity depends on the prior establishment of a right at law, settle purely legal rights and grant legal remedies. . . . *The constitutional right of trial by jury is, of course, subject to this inherent equitable jurisdiction* It suffices if the matters to be adjudicated be germane to or grow out of the subject-matter of the equitable jurisdiction.⁵⁷

New Jersey courts have continued to apply the doctrine of ancillary jurisdiction to deny jury trials in primarily equitable cases, despite the existence of potentially huge legal damage claims. For example, in *Eckerd Drugs of New Jersey v. S.R. 215, Rite-Aid*,⁵⁸ plaintiff claimed that it had a contract to purchase a drugstore from defendant;⁵⁹ however, defendant sold the business to Rite-Aid, plaintiff's competitor.⁶⁰ Plaintiff sought specific performance of the purported contract, and

52. 1 N.J. 71, 61 A.2d 885 (1948).

53. *Id.* at 83, 61 A.2d at 891 (Heher, J., dissenting).

54. *Id.* at 76, 61 A.2d at 887.

55. 1 N.J. 138, 62 A.2d 383 (1948).

56. *Id.* at 150, 62 A.2d at 389.

57. *Id.* (emphasis added).

58. 170 N.J. Super. 37, 405 A.2d 474 (Ch. Div. 1979).

59. *Id.* at 38, 405 A.2d at 475.

60. *Id.*

demanded a jury on various tort claims.⁶¹

The chancery division specifically declined to apply the rules governing jury trials in federal court to New Jersey's chancery practice.⁶² Despite the presence of significant legal claims, the court denied plaintiff's jury demand, since the case was "fundamentally equitable," and the legal claims were "so closely intertwined" with the equitable claims as to be merely ancillary.⁶³

Moreover, even where subsequent events render equitable relief unnecessary or inappropriate, New Jersey courts have consistently rejected attempts to divest chancery of the authority to adjudicate the remaining legal claims without a jury.⁶⁴ This principle is illustrated by *Boardwalk*, where, among other

61. *Id.* at 38-39, 405 A.2d at 475.

62. *Id.* at 40-43, 405 A.2d at 475-77. See *infra* Section IV for a discussion of federal practice.

63. *Eckerd Drugs*, 170 N.J. Super. at 43, 405 A.2d at 477; see also *Weintraub v. Krobatsch*, 317 N.J. 445, 455, 317 A.2d 68, 74 (1974) (declaring that damage claims for fraud are ancillary to an equitable action for rescission); *Garrou v. Teaneck Tryon Co.*, 11 N.J. 294, 300-01, 94 A.2d 332, 335-36 (1953) (stating that damages are ancillary to injunctive relief); *Crowell v. Shenouda*, 275 N.J. Super. 614, 630, 646 A.2d 1140, 1148 (Ch. Div. 1994) (deciding that the issue of paternity is ancillary to a domestic violence restraining order); *Apollo v. Kim Anh Pham*, 192 N.J. Super. 427, 432, 470 A.2d 934, 937 (Ch. Div. 1983) (finding wife's damage claims ancillary to husband's palimony suit), *aff'd*, 224 N.J. Super. 89, 539 A.2d 1222 (App. Div. 1987); *Davis v. Davis*, 182 N.J. Super. 397, 399, 442 A.2d 208, 209 (Ch. Div. 1981) (articulating that a marital tort claim is ancillary to the divorce action); *Beekwilder v. Beekwilder*, 29 N.J. Super. 351, 358, 102 A.2d 642, 645 (Ch. Div. 1953) (finding that money damages are ancillary to the posting of a bond in an equitable action); *DREIER & ROWE*, *supra* note 3, at 147 (enumerating cases). *But see Chiacchio v. Chiacchio*, 198 N.J. Super. 1, 6, 486 A.2d 335, 337 (App. Div. 1984) (holding that an insurance coverage dispute involving physical cruelty is not ancillary to the divorce action); *Tweedley v. Tweedley*, 277 N.J. Super. 246, 254, 649 A.2d 630, 634 (Ch. Div. 1994) (deciding that a marital tort counterclaim is not ancillary to the divorce action and therefore is triable to a jury).

64. See, e.g., *O'Neill v. Vreeland*, 6 N.J. 158, 166, 77 A.2d 899, 902-03 (1951); *Mantell*, 141 N.J. Eq. at 393, 55 A.2d at 258-59; *Kaplan v. Cavicchia*, 107 N.J. Super. 201, 205, 257 A.2d 739, 741-42 (App. Div. 1969); *Associated Metals & Minerals Corp. v. Dixon Chem.*, 82 N.J. Super. 281, 297-99, 197 A.2d 569, 577-79 (App. Div. 1963), *certif. denied*, 42 N.J. 501, 201 A.2d 580 (1964); *SCHNITZER & WILDSTEIN*, *supra* note 8, at 1386; *DREIER & ROWE*, *supra* note 3, at 147.

remedies, plaintiff Boardwalk Properties sought specific performance of several contracts requiring defendants to convey certain properties in Atlantic City.⁶⁵ Defendants filed a counterclaim seeking equitable relief, and also asserted numerous damage claims, including treble damage claims under the New Jersey Antitrust Act against Donald Trump.⁶⁶ Defendants alleged that their antitrust damages totalled approximately \$700 million.⁶⁷

Despite the doctrine of ancillary jurisdiction, defendants demanded a jury trial.⁶⁸ Defendants asserted that the heart of their case was their antitrust claims against Trump, and that the combination of ancillary equitable jurisdiction and New Jersey's entire controversy doctrine⁶⁹ forced them to bring their antitrust claims in the chancery division without a jury, even though those claims were classically legal ones that would ordinarily permit a jury trial.⁷⁰ Defendants contended that the entire controversy doctrine had not been in existence when the New Jersey Supreme Court held that ancillary equitable jurisdiction subsisted under the 1947 New Jersey Constitution,⁷¹ which, as noted above, created a unified court system. According to defendants, this deprived them of their constitutional right to a jury trial under the New Jersey Constitution.⁷²

The trial court rejected defendants' jury demand,⁷³ conclud-

65. *Boardwalk*, 253 N.J. Super. at 521-22, 602 A.2d at 736-37.

66. *Id.* at 523, 602 A.2d at 737.

67. *Id.* at 523-24, 602 A.2d at 737.

68. *Id.* at 521-22, 602 A.2d at 736.

69. The entire controversy doctrine ordinarily requires that all claims against any party to a lawsuit be brought in one case, to avoid multiplicity of litigation. *E.g.*, *Cogdell v. Hospital Ctr.*, 116 N.J. 7, 15-16, 560 A.2d 1169, 1173 (1989). In *Cogdell*, the doctrine was extended to require that all parties against whom a party might have a claim arising out of the same subject matter of the litigation be joined in that one case. *Id.* at 25-27, 560 A.2d at 1178. Thus, defendants contended that, were it not for *Cogdell*, they could have filed a separate antitrust case in the law division, and been granted a jury trial. *Boardwalk*, 253 N.J. Super. at 524, 602 A.2d at 737-38.

70. *Boardwalk*, 253 N.J. Super. at 523-24, 602 A.2d at 737-38.

71. *Id.*

72. *Id.* at 524, 602 A.2d at 737.

73. *Id.* at 522, 602 A.2d at 737.

ing that even a potential \$2 billion antitrust claim was ancillary to a prayer for specific performance and other equitable relief.⁷⁴

The defendants then strategically amended their pleadings to strike all prayers for equitable relief.⁷⁵ Defendants also consented to a transfer of the properties sought in plaintiffs' complaint, thus eliminating plaintiffs' claims for specific performance.⁷⁶

Defendants then requested that the trial court reconsider its decision to deny defendants trial by jury or, in the alternative, to transfer the case to the law division for a jury trial.⁷⁷ Defendants argued that ancillary jurisdiction should not bar a jury trial on a sizeable antitrust claim merely because plaintiffs *originally*, but no longer, sought equitable relief.⁷⁸

The trial court denied defendants' motion for reconsideration, even though it acknowledged that the case was now primarily legal in nature.⁷⁹ Consistent with *Mantell*, the trial court held that a party's right to a jury trial must be determined at the beginning of a case, prior to any procedural maneuvering during the litigation.⁸⁰

The appellate division affirmed, stating:

It was clear prior to the 1947 Constitution that the ancillary power of the court of equity to adjudicate legal claims was tested by the facts existing at the inception of the suit. Thus, if the primary relief sought by the complainant was equitable in nature, equity had jurisdiction to settle all issues, even though purely legal in nature, where subsequent events made it impractical or unnecessary to award equitable relief. It had also been well established that a court of equity had the power to assess unliquidated damages even though it was acknowledged that such damages were "the peculiar function of a jury" once it was determined that the "case [was] other-

74. The trial court also concluded that defendants were not entitled to a jury trial under the New Jersey Antitrust Act. *Id.* at 528-29, 602 A.2d at 740.

75. *Id.* at 522, 602 A.2d at 737.

76. *Id.*

77. *Id.*

78. *Id.* at 523-24, 602 A.2d at 737.

79. *Id.* at 523, 602 A.2d at 737.

80. *Id.*

wise within its control and the interest of justice [would] be served by that course."⁸¹

Additionally, the appellate division rejected defendants' entire controversy doctrine argument.⁸² Specifically, the appellate division noted that, even before the expansion of the entire controversy doctrine to require joinder of parties as well as claims,⁸³ Trump would have been considered an indispensable party whom defendants would have needed to have joined in the case.⁸⁴ Thus, the court held that the entire controversy doctrine did not affect defendants in these circumstances.⁸⁵

Boardwalk confirms that even a potentially sizeable

81. *Id.* at 527-28, 602 A.2d at 739-40 (quoting *Middlesex Concrete Prods. Excavating Corp. v. Northern States Improvement Co.*, 129 N.J. Eq. 314, 316-17, 19 A.2d 48, 50 (N.J. 1941)).

82. *Id.* at 528, 602 A.2d at 740.

83. *See supra* note 69 and accompanying text.

84. *Boardwalk*, 253 N.J. Super. at 525, 602 A.2d at 738. Defendants also sought a jury trial on their legal counterclaims against plaintiffs, and therefore, made the same argument regarding the effect of the compulsory counterclaim provisions of the *New Jersey Court Rules*, which are analogous to FED. R. CIV. P. 13(a). *Boardwalk*, 253 N.J. at 526-27, 602 A.2d at 739. Since the effect of the compulsory counterclaim rules is quite similar to that of the entire controversy doctrine, the court did not deal separately with that contention. Cases from other states have split on whether mandatory counterclaim rules in comparable circumstances improperly deprive a party of a jury trial. *Compare* *Miller v. District Court*, 388 P.2d 763, 766 (Colo. 1964) and *First Nat'l Bank of Olathe v. Clark*, 602 P.2d 1299, 1302-03 (Kan. 1979) (noting that mandatory counterclaim rules do not effect unconstitutional deprivation of a jury trial) with *David Steed & Assoc., Inc. v. Young*, 766 P.2d 717, 720 (Idaho 1988) and *Higgins v. Barnes*, 530 A.2d 724, 728 (Md. 1987) (stating that a jury trial would be unconstitutionally deprived by mandatory counterclaim rules, so a jury would be afforded).

85. *Boardwalk*, 253 N.J. Super. at 525, 602 A.2d at 738. The appellate division also rejected defendants' underlying contention that because the entire controversy doctrine had not been in existence when the 1947 constitution was adopted, neither its framers nor the supreme court in cases immediately following its adoption, *see supra* notes 55-63 and accompanying text, could have contemplated its application together with ancillary equitable jurisdiction. The court noted that the entire controversy doctrine, in fact, had existed long before the 1947 constitution. *Boardwalk*, 253 N.J. Super. at 525, 602 A.2d at 738 (citing *Cogdell*, 116 N.J. at 16-17, 560 A.2d at 1173-74).

counterclaim may be ancillary to a prayer for equitable relief. This is true even if the original basis for equitable relief no longer exists.⁸⁶ In any event, this rule "prevent[s] 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."⁸⁷

The *Boardwalk* decision allows legal claims that arise out of the same controversy as the equitable issues to be eligible for jury trials, provided that they are "independent" of those issues.⁸⁸ Thus, although defendants' arguments in *Boardwalk* were properly rejected because their legal claims were not independent of the equitable claims,⁸⁹ parties with truly independent legal claims required by procedural rules to bring them in a primarily equitable action may still have the right to try those claims to a jury.⁹⁰

86. *But see* *Associated Metals & Minerals Corp. v. Dixon Chem. & Research, Inc.*, 52 N.J. Super. 143, 148-49, 145 A.2d 49, 52 (Ch. Div. 1958), *modified*, 82 N.J. Super. 281, 197 A.2d 569 (App. Div. 1963), *certif. denied*, 42 N.J. 501, 201 A.2d 580 (1964) (noting, in dicta, that if "the equitable relief prayed has become moot, [and] the Complaint is amended to eliminate the prayer for equitable relief, leaving only the claim for damages, a right of jury trial arises and may be demanded").

87. *DREIER & ROWE*, *supra* note 3, at 147.

88. *Boardwalk*, 253 N.J. Super. at 528, 602 A.2d at 740 (citing *New Jersey Highway Auth. v. Renner*, 18 N.J. 485, 494, 114 A.2d 555, 559 (1955)). In *Renner*, the plaintiff sought specific performance of a contract to sell property in connection with a condemnation, while the defendant's counterclaim demanded damages based on the plaintiff's alleged wrongful interference with the defendant's right to remove a building from the property. *Renner*, 18 N.J. at 488, 114 A.2d at 556. The counterclaim was deemed to be "independent" of the plaintiff's equitable claim. *Id.* at 494, 114 A.2d at 559. Thus, the non-jury adjudication of the specific performance claim did not deprive the defendant of her right to a jury trial on her counterclaim.

89. The court approved the finding of the trial judge that "both the [legal] issues and facts were so intertwined with the equitable issues that the legal issues fell within the court's power to adjudicate them without a jury." *Boardwalk*, 253 N.J. at 528, 602 A.2d at 740 (citing *Apollo*, 192 N.J. Super. at 432, 470 A.2d at 937).

90. *Id.* at 528-29, 602 A.2d at 740. A question remains as to whether the law division is permitted to exercise ancillary equitable jurisdiction, although the issue is unlikely to arise if the applicable venue rules are observed. As the *Boardwalk* court noted, if a primarily equitable action is

C. *Exceptions to Ancillary Equitable Jurisdiction*

While courts continue to adhere to ancillary equitable jurisdiction, there are certain narrow exceptions to the general prohibitions against jury trials in chancery. For example, cases involving the existence of easements and rights-of-way are always entitled to a jury trial even in the chancery division.⁹¹ Additionally, if the chancery division assumes jurisdiction over a legal claim that is "completely independent" of the equitable action, the legal claim may be heard by a jury.⁹² However, contrary to federal practice, the legal claim should be decided by a jury only *after* the equitable issues have been resolved.⁹³

filed in the law division, that court has the constitutional power to afford equitable as well as legal relief. *Id.* at 526-27, 602 A.2d at 739. Since the rules for jury trials apply equally to both trial court divisions, *O'Neill*, 6 N.J. at 168, 77 A.2d at 904, primarily equitable actions, even those litigated in the law division, are not triable to a jury, it should not matter that the case is before the law division rather than the chancery division. Therefore, the law division should be able to exercise ancillary "equitable" jurisdiction to decide the entire case, including any incidental legal issues, without a jury.

The closest reported case to this scenario is *O'Neill*, a case that was "equitable only." *Id.* In *O'Neill*, the case was erroneously transferred from chancery to law during the proceedings. *Id.* Since the court rules barred a re-transfer, N.J. CT. R. 3:40-3 (predecessor to current N.J. CT. R. 4:3-1(b)), in order to avoid the pre-1947 shuttling of cases between courts, the supreme court ordered a trial in the law division without a jury. *O'Neill*, 6 N.J. at 169-70, 77 A.2d at 904-05. Since legal issues were absent, there was no need to consider the issue of whether the law division could decide legal and equitable issues without a jury in a primarily equitable case. However, *O'Neill* seems to lead to the conclusion that all jury trial rules, including ancillary equitable jurisdiction, apply equally in both divisions. *Cf.* *Knecht v. Mandek Corp.*, 281 N.J. Super. 439, 446 n.2, 658 A.2d 317, 321 n.2 (App. Div. 1995)

91. *Weber v. L.G. Trucking Corp.*, 140 N.J. Eq. 98, 99, 52 A.2d 839, 841 (N.J. 1947); *O'Brien v. Baldwin*, 2 N.J. Super. 134, 137, 65 A.2d 65, 66 (App. Div. 1949); *Trzeciakewicz v. Zukowski*, 6 N.J. Super. 577, 579, 70 A.2d 199, 200 (Ch. Div. 1949); *DREIER & ROWE*, *supra* note 3, at 147; *SCHNITZER & WILDSTEIN*, *supra* note 8, at 1269. This is because such issues have long been considered legal and thus (prior to the unification of the law and chancery) formerly decided by a court of law. *Trzeciakewicz*, 6 N.J. Super. at 579, 70 A.2d at 200.

92. *Renner*, 18 N.J. at 494, 114 A.2d at 559; *Boardwalk*, 253 N.J. Super. at 528, 602 A.2d at 740.

93. *Renner*, 18 N.J. at 493, 114 A.2d at 559; *see also* *Asbestos Fibres*,

Despite the existence of the "independent claims" exception, courts should be wary of using it to undermine the constitutionally-based rule that legal issues encompassed within ancillary equitable jurisdiction are not to be tried to a jury. This temptation is especially strong in difficult factual circumstances, as is demonstrated by *Tweedley v. Tweedley*,⁹⁴ a recent marital tort case. In *Tweedley*, the defendant wife responded to a divorce complaint for extreme cruelty with a counterclaim that also demanded a divorce, and alleged physical assault, mental cruelty and emotional distress.⁹⁵ The defendant demanded a jury trial on the non-divorce claims.⁹⁶

Stating that "it seems inherently unfair to deny a party a [jury trial] right that would have been afforded but for marriage and, unfortunately, divorce,"⁹⁷ the court authorized a jury trial on the assault and emotional distress claims. The court distinguished its ruling from that in *Davis v. Davis*,⁹⁸ in which another trial court had held that a jury trial was impermissible for a marital tort claim because it is "so closely related to the subject matter of equitable distribution to be incidental and ancillary to the equitable issues."⁹⁹ The judge in *Tweedley* reasoned that the wife's amendment of her counterclaim for divorce to a no-fault, eighteen month separation, and the fact that the cruelty allegations of the husband's divorce complaint were limited, required the conclusion that there was no such close relationship between the marital tort and the equitable issues in the divorce proceeding.¹⁰⁰

Inc. v. Martin Labs., Inc., 12 N.J. 233, 240, 96 A.2d 395, 398-99 (1953) (stating the "settled" rule that courts "shall full[y] dispose of all equitable issues (or other issues not triable as of right by a jury) before or during the trial, leaving only purely legal issues for determination by the jury"). *But see* N.J. Ct. R. 4:35-3 (stating that trial courts may determine the order in which to dispose of the equitable and legal issues at trial).

94. 277 N.J. Super. 246, 649 A.2d 630 (Ch. Div. 1994).

95. *Id.*

96. *Id.* at 249, 649 A.2d at 631.

97. *Id.* at 254, 649 A.2d at 634.

98. 182 N.J. Super. 397, 442 A.2d 208 (Ch. Div. 1981).

99. *Id.* at 399, 442 A.2d at 209.

100. *Tweedley*, 277 N.J. Super. at 252, 649 A.2d at 632-34. In relying on the amended version of the counterclaim, the court in *Tweedley* apparently overlooked the rule of *Mantell* and *Boardwalk* that jury trial deci-

In fact, as the *Tweedley* court noted,¹⁰¹ the Supreme Court of New Jersey had earlier held that marital torts were required to be joined to the divorce proceeding under New Jersey's entire controversy doctrine.¹⁰² The reason for that was the court's finding that the tort claims and the husband's contingent liability on those claims were relevant to the parties' financial status in the context of a divorce action.¹⁰³ Although *Tevis* had not addressed the issue of jury trials, the holding of *Tevis* was that marital torts, as a class, are to be considered as related to, not "independent" of, divorce suits.¹⁰⁴ Just as that fact requires that marital tort claims be brought in the same action as a divorce complaint, as *Tevis* held, it also mandates a trial be held without a jury as dictated by ancillary equitable jurisdiction.¹⁰⁵

Despite the apparent flaws of *Tweedley*, the appellate division recently endorsed that ruling in *Giovine v. Giovine*.¹⁰⁶ There, in a two-to-one decision, the court permitted the wife to assert a marital tort claim for beatings that occurred many years earlier, provided that she could show that "battered woman's syndrome" had caused her to have an "inability to take any action to improve or alter the situation unilaterally," so as to toll the statute of limitations.¹⁰⁷

The court then turned to the issue of jury trial. After dis-

sions are to be made based on the pleadings as originally filed. *See supra* notes 64-85 and accompanying text.

101. *Tweedley*, 277 N.J. Super. at 248, 649 A.2d at 630-31.

102. *Id.*, 649 A.2d at 631 (citing *Tevis v. Tevis*, 79 N.J. 422, 400 A.2d 1189 (1979)); *see supra* note 69 and accompanying text (discussing the entire controversy doctrine).

103. *Tevis*, 79 N.J. at 433-34, 400 A.2d at 1195-96.

104. *Id.*

105. The *Tevis* court did not reach the issue of jury trial, since it held that the marital tort claim was barred by the statute of limitations. *Id.* It is difficult to see, however, how marital tort claims could be considered so integral to the divorce action that they must be brought in that divorce case, while simultaneously being "independent" of the divorce so that a jury trial is appropriate.

106. No. A-2134-94T5, 1995 WL 495116 (N.J. Super. Ct. App. Div. Aug. 11, 1995).

107. *Id.* at *4 (quoting *Cusseaux v. Pickett*, 279 N.J. Super. 335, 344, 652 A.2d. 789, 794 (Law. Div. 1994)).

cussing *Davis* and *Tweedley*,¹⁰⁸ the court concluded that marital tort claims that encompass complex medical issues or substantial claims of permanent physical or psychological disability may warrant a jury trial, while tort claims that are not the permanent cause of serious and significant psychological or physical injuries do not.¹⁰⁹ The court then announced that a marital tort plaintiff who demands a jury trial may obtain one only by establishing either that trial proofs will show a serious and significant injury resulting in permanent physical or psychological injury, or that the nature of the alleged injury requires complex medical evidence.¹¹⁰ The court contemplated that those standards would have to be met in response to a motion to strike the jury demand after all discovery had been completed.¹¹¹

Though the *Giovine* majority held out the possibility of a jury trial for marital torts, it reconfirmed that a jury trial was unavailable for the plaintiff's other "clearly equitable" claims.¹¹² The dissenting judge joined in that ruling,¹¹³ but would simply have upheld the determination of the trial judge that the marital tort claims in *Giovine* were ancillary and incidental to the divorce claims, rather than addressing the issue of whether marital tort claims could ever be sufficiently "independent" to preserve a jury trial right.¹¹⁴

In addition to overlooking the effect of *Tevis* on jury trial rights,¹¹⁵ the *Giovine* majority replaced the legal/equitable basis for the jury trial decision with a serious/non-serious injury criterion that finds no basis in the New Jersey Constitution, New Jersey Court Rules, or case law. While that decision has appeal, based on the unhappy facts of marital torts, the New Jersey Supreme Court will have to, at a minimum, revise *Tevis* if it is to uphold the ruling of *Giovine*.

108. *Id.* at *12-14; see *supra* notes 94-105 and accompanying text.

109. *Giovine*, 1995 WL 495116, at *14.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at *19 (Skillman, J., concurring and dissenting).

114. *Id.*

115. See *supra* notes 102-05 and accompanying text.

D. Preventing Abuses of Ancillary Equitable Jurisdiction

Ancillary equitable jurisdiction could allow plaintiffs to manipulate venue where counterclaims are expected to be filed.¹¹⁶ Parties sometimes prefer venue in a chancery court because a single judge case-manages the matter throughout, the chancery docket is normally less crowded,¹¹⁷ chancery judges are usually more experienced and chancery has a tradition of non-jury trials. For any of these reasons, or others, a party may have an incentive to manipulate venue by being the first one to file a complaint.

For example, A might file a complaint with a tenuous or marginal equity component in chancery and then try to invoke ancillary equitable jurisdiction to preclude B from obtaining a jury trial on a purely legal counterclaim that grows out of the subject matter of the complaint. Yet, if the order of filing had been reversed, B would have filed the primarily legal pleading first in the law division, and received a jury trial on all issues other than the limited equitable issues of A's putative counterclaim.¹¹⁸

The mode of trial should not depend on who filed first.¹¹⁹ Rather the court should focus on whether the entire matter, based on the originally-filed pleadings, is primarily legal or equitable.¹²⁰

One tipoff that a plaintiff has improperly sought a tactical

116. See *Government Employees Ins. Co. v. Butler*, 128 N.J. Super. 492, 495, 320 A.2d 515, 517 (Ch. Div. 1974) (noting that plaintiffs' counsel have responsibility for selecting the proper division in which to file a complaint, and that "[e]xtraneous considerations should not govern the choice of division").

117. See *id.*; DREIER & ROWE, *supra* note 3, at 149.

118. See *infra* note 142.

119. Cf. *Rodio v. Smith*, 123 N.J. 345, 351, 587 A.2d 621, 623-24 (1991) ("The constitutional right to a jury trial, however, does not hinge on artful pleading or non-joinder of parties.").

120. In *Boardwalk*, the defendants argued that they were victims of the plaintiffs' "race to the courthouse." *Boardwalk*, 253 N.J. Super. at 524, 602 A.2d at 737. The court properly rejected that argument, since "the complaint, the counterclaim and third-party complaint were essentially equitable in nature." *Id.* at 528, 602 A.2d at 740. The fact that each party's pleading was primarily equitable meant that chancery was the only proper venue regardless of the order of filing.

advantage in obtaining chancery venue is when that plaintiff, despite filing in chancery, makes a jury demand in the complaint. Only those cases in which "the plaintiff's primary right or the principal relief sought is equitable in nature"¹²¹ are properly venued in chancery. Yet, those same cases are not entitled to a jury trial.¹²² A plaintiff therefore cannot simultaneously invoke chancery jurisdiction with the assertion that his claim is primarily equitable and demand a jury trial on the grounds that his complaint is not primarily equitable.

A jury demand in a chancery complaint should be treated as an admission that the claims contained in that pleading are primarily legal, even if some portion of the complaint might be considered equitable.¹²³ Such a plaintiff should not then be permitted to argue that a defendant who files a primarily legal counterclaim should not be entitled to a jury trial because the plaintiff invoked the jurisdiction of chancery first. Instead, the case should be considered primarily legal and transferred to the law division for a jury trial.¹²⁴ A contrary rule would

121. N.J. Ct. R. 4:3-1(a).

122. See *supra* note 38 and accompanying text.

123. For example, a predominantly legal complaint that contains a demand for preliminary or permanent injunctive relief is still primarily legal. See DREIER & ROWE, *supra* note 3, at 138 ("[I]f 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.").

124. On June 21, 1995, the New Jersey Supreme Court granted certification in *Lyn-Anna Properties v. Harborview Dev. Corp.*, Docket No. A-5081-92T3 (N.J. Super. Ct. App. Div., Mar. 31, 1995). In that case, filed in the chancery division, both parties requested a jury trial in their initial pleadings. The plaintiffs made numerous claims for damages and sought certain preliminary and permanent injunctive relief. The defendants responded with an entirely legal counterclaim, along with certain equitable defenses, such as unclean hands and fraud. Neither party sought to transfer the matter to the law division. The chancery judge denied a jury trial on the grounds that the plaintiffs had properly invoked chancery jurisdiction and the counterclaim was sufficiently inter-related with the complaint so that ancillary equitable jurisdiction required a bench trial of the counterclaim as well as the complaint. *Lyn-Anna Properties v. Harborview Dev. Corp.*, No. C-469-90, slip op. at 6-7 (N.J. Super. Ct. Ch. Div. Feb. 17, 1993). The appellate division affirmed substantially on the decision below. *Lyn-Anna*, No. A-5081-92T3, slip op., at 7. Applying the analysis set forth in text would suggest that the

make a "race to the courthouse" dispositive, and encourage improper forum-shopping. Ancillary equitable jurisdiction should not be permitted to be abused for tactical gain.

IV. A COMPARISON OF NEW JERSEY AND FEDERAL JURY RULES

The federal courts abolished, for most purposes, the distinction between law and chancery with the adoption of the *Federal Rules of Civil Procedure* in 1938,¹²⁵ although the distinction still has certain limited relevance.¹²⁶ The federal courts' action proceeds from the premise that the Seventh Amendment to the United States Constitution guarantees a jury trial whenever legal rights are implicated, even if those rights are merely incidental to equitable claims.¹²⁷

The United States Supreme Court made this clear in *Beacon Theatres, Inc. v. Westover*,¹²⁸ a case involving a dispute over contractual limitations on Theatres' ability to show first-run films. Fox West Coast Theatres, Inc. filed a declaratory judgment action to preempt an antitrust complaint by Beacon Theatres arising out of those limitations.¹²⁹ Beacon then filed its antitrust claims as a counterclaim and demanded a jury trial.¹³⁰

The district court found that Fox's complaint raised equita-

case should have been transferred to the law division and a jury trial afforded, since even the plaintiffs, by requesting a jury in their complaint, recognized that their own pleadings were primarily legal.

125. See FED. R. CIV. P. 2 (providing for one form of action only). Previously, as in pre-1947 New Jersey practice, separate actions on the "law side" and "chancery side" of the federal courts were required if a party presented both legal and equitable claims, or sought both types of remedies. *E.g.*, *Scott v. Neely*, 140 U.S. 106 (1891); see also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-73 (1962) (describing the historical separation between law and equity).

126. For example, jury trials are still unavailable in federal court where the entire matter presents only equitable issues. See *supra* note 120 and accompanying text.

127. The cases that are the fount of this doctrine are *Dairy Queen*, 369 U.S. at 473, and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959). See *supra* notes 119-24 and accompanying text.

128. 359 U.S. 500 (1959).

129. *Id.* at 502.

130. *Id.* at 502-04.

ble issues and was to be tried without a jury before Beacon's counterclaim.¹³¹ The Supreme Court disagreed with the lower courts, noting that the Court had "long emphasized the importance of the jury trial."¹³² The Court also noted that the *Federal Rules of Civil Procedure* allow both legal and equitable issues in one action to be tried before a jury, regardless of the order of filing.¹³³

Beacon Theatres granted trial courts the discretion to decide which issues should be tried first. However, the Court cautioned that:

Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. . . . [O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.¹³⁴

In *Dairy Queen, Inc. v. Wood*,¹³⁵ the Supreme Court reaffirmed *Beacon Theatres* and made clear that the availability of a jury trial would not turn on the strength of any legal claims asserted in comparison to the equitable ones.¹³⁶ The Court

131. *Id.* at 503. The court of appeals affirmed. *See id.* at 504-05.

132. *Id.* at 510 n.18.

133. *See id.* at 509-10 (citing FED. R. CIV. P. 1, 2, 18).

134. *Id.* at 510-11 (footnotes omitted). This was a significant ruling because, "[a]t common law, a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979) (citations omitted). *Beacon Theaters* effectively eliminated the need for seeking such a redetermination since, in virtually all cases, the jury trial will occur first. However, where the facts have properly been determined without a jury, collateral estoppel effect will be given to those determinations in later proceedings. *Compare id.* at 333-37 with *Lytle v. Household Mfg. Co.*, 494 U.S. 545, 552-53 (1990) (holding that where the trial court had erroneously dismissed the legal claims, which were subsequently remanded, relitigation of the same claims is not collaterally estopped).

135. 369 U.S. 469 (1962).

136. *See id.* at 473 & n.8 (quoting *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961)).

emphasized that the Seventh Amendment applied whenever legal remedies were sought, regardless of the words used in the pleadings.¹³⁷

The Seventh Amendment has not, however, been made applicable to the states.¹³⁸ Thus, New Jersey has exercised its right to follow a different path under its own constitution by maintaining a distinction between law and chancery, even though the 1947 constitution merged the two into a single superior court.¹³⁹

The distinction between law and chancery, together with the doctrine of ancillary equitable jurisdiction,¹⁴⁰ has resulted in a number of situations in which jury trial rights in New Jersey are different from those in the federal system.¹⁴¹ In general, New Jersey gives primacy to equitable claims, even at the expense of jury trial rights, while the federal system is more concerned with legal claims and providing a broader scope for jury trials.¹⁴²

Both New Jersey and federal law hold that no jury trial is available where *only* equitable relief is being sought.¹⁴³ In deciding which claims are equitable and which legal, however, New Jersey courts use a different test from the one used by the federal courts.¹⁴⁴ Additionally, once a case presents a mixture of legal and equitable claims, the two systems employ different rules in deciding which claims are entitled to a jury trial.¹⁴⁵ Thus, parties with a particular interest in a jury (or non-jury) trial should consider forum-shopping to obtain their preferred mode of trial. For example, antitrust plaintiffs in

137. *See id.* at 477-78.

138. *See supra* note 7 and accompanying text.

139. N.J. CONST. art. VI, § 3, ¶¶ 3, 4 (amended 1978, 1983). *See supra* notes 27-32 and accompanying text.

140. *See* discussion *supra* Section III.B.

141. *See infra* notes 144-47 and accompanying text.

142. *See* *Fleischer v. James Drug Stores*, 1 N.J. 138, 150, 62 A.2d 383, 389 (1948).

143. *E.g.*, *United States v. Louisiana*, 339 U.S. 699, 706 (1950); *Weinisch v. Sawyer*, 123 N.J. 333, 343-45, 587 A.2d 615, 619-20 (1991) (superseded by statute as stated in *Strube v. Travelers Indemnity Co.*, 277 N.J. Super. 236, 649 A.2d 624 (App. Div. 1994)).

144. *See* notes 125-64 and accompanying text.

145. *See* discussion Section IV.

New Jersey who want a jury trial should bring their claims under a federal antitrust statute in federal court,¹⁴⁶ because jury trials are available under the federal antitrust statutes but are not available under New Jersey's antitrust law.¹⁴⁷

The appellate court in *Boardwalk Properties, Inc. v. BPHC Acquisition, Inc.*,¹⁴⁸ held that the purposes of and remedies afforded by the New Jersey Antitrust Act¹⁴⁹ are "predominately equitable in nature,"¹⁵⁰ thereby rendering jury trials unavailable under that statute.¹⁵¹ Thus, a critical difference

146. Federal courts have exclusive jurisdiction over antitrust claims arising out of federal statutes. *E.g.*, *Blumenstock Bros. v. Curtis Publishing Co.*, 252 U.S. 436, 440 (1920); *Glasofer Motors v. Osterlund, Inc.*, 180 N.J. Super. 6, 20, 433 A.2d 780, 787 (App. Div. 1981). Thus, such claims cannot be brought in state courts. Antitrust plaintiffs must be sure, however, that their claims involve "a sufficient nexus with interstate commerce" to warrant the federal route. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991). *See also* *McLain v. Real Estate Bd.*, 444 U.S. 232, 242 (1980). If not, the New Jersey Antitrust Act, N.J. STAT. ANN. §§ 56:9-1 to -18 (West 1994), remains available. For a discussion of jury trial rights under the New Jersey Antitrust act, see *infra* note 151 and accompanying text.

147. The rationale for the availability of a jury trial is disputed. *Compare* *Beacon Theaters*, 359 U.S. at 504 (stating that the jury trial right arises from statute, since such right is "an essential part of the congressional plan" in enacting the antitrust laws) *with* *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1078 (3d Cir. 1980) *and* *Standard Oil Co. of California v. Arizona*, 738 F.2d 1021, 1025 (9th Cir. 1984) (stating that the jury trial right arises from the Seventh Amendment itself, not from the antitrust laws), *cert. denied*, 469 U.S. 1132 (1985).

148. 253 N.J. Super. 515, 602 A.2d 733 (App. Div. 1991).

149. N.J. STAT. ANN. §§ 56:9-1 to -18.

150. *Boardwalk*, 253 N.J. Super. at 530, 602 A.2d at 741 (citing statutes).

151. A party who cannot satisfy the requirements for proceeding under a federal antitrust statute, such as the necessity for an effect on interstate commerce, might still maneuver the case into federal court and obtain a jury trial under the New Jersey Antitrust Act. For example, if there is diversity of citizenship, a New Jersey Antitrust Act claim could presumably be brought directly in federal court. Alternatively, even without diversity, if there are other federal claims in the case, the New Jersey Antitrust Act claim could be asserted on the basis of pendent or ancillary jurisdiction doctrine. For a discussion of this doctrine, now codified at 28 U.S.C. § 1367 (Supp. 1993), see David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial*

regarding the right to a jury trial arises in an antitrust case, depending on whether federal or New Jersey statutes are utilized.¹⁵²

In most instances, a court will require an analysis of the parties' claims before it decides whether they are triable to a jury. Any legal issues in a federal case will be tried before a jury.¹⁵³ In contrast, at least where all the issues arise out of or are germane to the same controversy, a New Jersey court determines whether the overall nature of the action is legal or equitable and tries either all issues or none to a jury. If it is primarily equitable, ancillary equitable jurisdiction swallows the legal issues, and the entire case is tried by a judge alone.¹⁵⁴ If it is primarily legal, the legal issues are tried by a jury, but equitable claims are reserved for a judge.¹⁵⁵ Because New Jersey's courts' method of analysis is different from

Improvements Act, 133 F.R.D. 61, 65 (1991).

152. Another example of when forum-shopping would have affected jury trial rights was, for a short time, in cases under New Jersey's Law Against Discrimination ("LAD"), N.J. STAT. ANN. §§ 10:5-1 to -42 (West 1993). The New Jersey Supreme Court held in *Shaner v. Horizon Bancorp.* that no jury trial was available under that statute. *Shaner v. Horizon Bancorp.*, 116 N.J. 433, 457, 561 A.2d 1130, 1142 (1989). *See id.* at 442-43, 561 A.2d at 1134-35 (stating that the legislative history of the LAD does not support the jury trial right); *id.* at 455, 561 A.2d at 1141 (explaining why a LAD plaintiff is not entitled to a jury trial). Yet, in 1990, the Federal District Court for the District of New Jersey ruled that a jury trial would be afforded on a claim under the same statute. *Reiner v. State*, 732 F. Supp. 530 (D.N.J. 1990). In parting company with *Shaner*, the *Reiner* court relied on the differing federal views of jury trial rights. *Id.* at 531-34. Since the Legislature overturned *Shaner* by amending the Law Against Discrimination, ch. 12, 1990 N.J. Laws 115 (codified as amended at N.J. STAT. ANN. §§ 10:5-1 to -42 (West 1993)), the views of the two systems in a LAD action are now congruent. However, *Reiner* seems to indicate that plaintiffs may obtain a jury trial in federal court (if there is a basis for jurisdiction there) on the same claim as to which state courts would not afford such a right.

153. *E.g.*, *Lytle*, 494 U.S. at 550 (stating that the jury trial right includes all issues common to both legal and equitable claims); *Beacon Theaters*, 359 U.S. at 510.

154. *See, e.g.*, *Boardwalk*, 253 N.J. Super. at 527-28, 602 A.2d at 739-40.

155. *See, e.g.*, *Asbestos Fibres*, 12 N.J. at 239-40, 96 A.2d at 398-99. As to the order of trial, see *supra* note 93 and accompanying text.

the federal courts', understanding the differences is crucial to the jury trial determination.

In *Ross v. Bernhard*,¹⁵⁶ the United States Supreme Court stated that the decision of whether a claim is legal or equitable will be based on: how the claim was treated prior to the merger of law and equity in the federal courts; the remedy sought; and the practical limitations of juries.¹⁵⁷ However, the final prong of that test seems to have been abandoned.¹⁵⁸

Moreover, subsequent cases have cast doubt on whether the historical component of the test is still viable. These cases have repeatedly stated that the nature of the remedy is more important.¹⁵⁹ A concurrence by Justice Brennan in *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*¹⁶⁰ advocated severing the historical test altogether.¹⁶¹

156. 396 U.S. 531 (1970).

157. *Id.* at 538 n.10.

158. David M. Nocenti, *Complex Jury Trials, Due Process, and the Doctrine of Unconstitutional Complexity*, 18 COLUM. J.L. & SOC. PROBS. 1, 17 (1983). Even in *Ross* itself, the Court did not apply that prong of its test. *Id.* For a number of years after *Ross*, the Supreme Court did not address that component. See *Phillips v. Kaplus*, 764 F.2d 807, 814 & n.6 (11th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). In *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), however, the Court seemed to reinterpret that criterion as one calling for a "distinct inquiry into whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme . . ." *Id.* at 42 n.4. This recharacterization of the "practical limitations of juries" prong, following its long absence from the cases, has essentially read the inquiry out of the test. Even if *Granfinanciera* were taken at face value, this prong would have relevance only in cases involving newly-created statutory causes of action that are committed to an agency or specialized court (such as the Bankruptcy Court, as in *Granfinanciera*), rather than to the federal district court.

159. *Wooddell v. Electrical Workers*, 502 U.S. 93, 97 (1991); *Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990); *Granfinanciera*, 492 U.S. at 42; *Tull v. United States*, 481 U.S. 412, 421 (1987).

160. 494 U.S. 558.

161. *Id.* at 574-81 (Brennan, J., concurring). See *infra* notes 187-93 and accompanying text. A New Jersey federal district court seems ready to do just that. See *Garcia v. PPG Indus., Inc.*, 139 F.R.D. 63, 66 n.1 (D.N.J. 1991).

Yet, the historical component has not been fully abandoned. Thus, though the federal test may be in flux to a certain extent, it clearly involves an examination of the nature of the remedy sought and the historical treatment of the claim.

In contrast, New Jersey looks to "the nature of the underlying controversy as well as the remedial relief sought in determining whether the cause of action has been historically primarily equitable or legal in nature."¹⁶² In stating that test, the New Jersey Supreme Court distinguished the federal view, under which "the remedy rather than the central cause of action is primarily, if not exclusively, determinative of entitlement to a jury trial."¹⁶³

There are significant differences in the historical components of the tests used in the two systems. In New Jersey, under *Shaner*, only when "the type of action was known at common law as one that would involve a jury trial" is a jury trial permitted.¹⁶⁴ That is a stricter view than the one taken by the federal courts,¹⁶⁵ which look only for an *analogous* cause of action at common law.¹⁶⁶

The stringency of the *Shaner* test is likely to lead to the seemingly incongruous result that state statutes do not confer jury trial rights even though their parallel federal counterparts have been held to do so.¹⁶⁷ This would be so even where the

162. *Shaner*, 116 N.J. at 450-51, 561 A.2d at 1139 (citations omitted). See also *Weinisch*, 123 N.J. at 343, 587 A.2d at 620 ("In determining whether a case is primarily legal or equitable, we look to the historical basis for the cause of action and focus on the requested relief.").

163. *Shaner*, 116 N.J. at 449, 561 A.2d at 1138. The court went on to discuss *Curtis v. Loether*, 415 U.S. 189 (1974), and *Lorillard v. Pons*, 434 U.S. 575 (1978), as examples of United States Supreme Court cases using that approach. *Shaner*, 116 N.J. at 449-50, 561 A.2d at 1138-39.

164. *Shaner*, 116 N.J. at 456-57, 561 A.2d at 1142. But see *Guy v. Petty*, 275 N.J. Super. 536, 544, 646 A.2d 546, 550 (Law Div. 1993) ("[A] civil litigant may demand a jury trial if the same or highly analogous action entitled one to a jury trial when the people adopted their constitution.") (emphasis added).

165. One commentator has uncharitably characterized the New Jersey test as "rigid," and criticized the New Jersey Supreme Court's continued adherence to it as "an oxymoron when reconciled with its past record." Pinto, *supra* note 2, at 957-58 (citing G. ALAN TARR & MARY C. POINTER, STATE SUPREME COURTS IN STATE AND NATION (1988)).

166. *E.g.*, *Terry*, 494 U.S. at 566.

167. An example of this is the antitrust arena, discussed *supra* notes

state statute explicitly recognizes its lineage by stating that decisions under the parallel federal statute are to be considered persuasive. Such provisions incorporate only federal decisions on *substantive* matters.¹⁶⁸ Since jury trial rights are considered to be procedural rather than substantive, they are to be decided under the *Shaner* test, irrespective of the result of the more liberal federal test in the context of a parallel federal statute.¹⁶⁹ New Jersey is thus free to apply its apparent policy of strictly limiting jury trials, within the bounds of constitutional law, since each state is permitted to go its own way in this area.¹⁷⁰

New Jersey's approach has the advantage of being relatively easy to apply, while the federal scheme can result in "wasteful wrangling over the identity of the entity that is to determine the facts,"¹⁷¹ as the parties engage in the often unrealistic struggle to find "a single historical analog, taking into consideration the nature of the cause of action and the remedy as two important factors."¹⁷² *Chauffeurs, Teamsters, and Helpers, Local No. 391 v. Terry*¹⁷³ provides an example.

In *Terry*, which involved employees' claims against their union for breach of its duty of fair representation, the union

128-34 and accompanying text.

168. *Boardwalk*, 253 N.J. Super. at 529, 602 A.2d at 740.

169. *E.g.*, *Ettelson v. Metropolitan Life Ins. Co.*, 137 F.2d 62, 64 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943), *cited in Boardwalk*, 253 N.J. Super. at 529, 602 A.2d at 740.

170. *See Van Dissel v. Jersey Cent. Power & Light Co.*, 181 N.J. Super. 516, 524-25, 438 A.2d 563, 568 (App. Div. 1981) (rejecting out-of-state authorities on jury trial issue on grounds that the question "is one that is decided by the individual states because the issue is related to the constitution, statutes and rules of procedure of the individual State"); *State v. Hamm*, 121 N.J. 109, 127-28, 577 A.2d 1259, 1268 (1990) (noting that the fact that the majority of other states provide jury trials for driving while intoxicated does not suggest the same result in New Jersey), *cert. denied*, 499 U.S. 947 (1991).

171. *Weinisch*, 123 N.J. at 345, 587 A.2d at 620.

172. *Tull*, 481 U.S. at 421 n.6. In a decision criticized by Justice Scalia in partial dissent as "a form of civil adjudication I have never encountered," *id.* at 428 (Scalia, J., dissenting), *Tull* required that the liability phase of an environmental penalty proceeding be tried to a jury, but that a judge alone then assess the amount of any penalty. *Id.* at 427.

173. 494 U.S. 558 (1990).

analogized the action to a suit to vacate an arbitration award because the employees sought to set aside the result of the grievance process.¹⁷⁴ Alternatively, the union compared the case to an action for breach of fiduciary duty by a trust beneficiary against the trustees.¹⁷⁵ The employees retorted with an analogy to attorney malpractice claims, which were historically legal.¹⁷⁶ A majority of the United States Supreme Court found the trust analogy more persuasive than the others, though they split on the ultimate result.¹⁷⁷ The plurality, however, declined to characterize the matter as equitable, noting that the critical determinant in the jury trial context is "the nature of the *issue* to be tried rather than the character of the overall action."¹⁷⁸ Since a breach of the duty of fair representation requires a predicate showing of a violation of § 301 of the Labor Management Relations Act,¹⁷⁹ which the plurality found comparable to a legal action for breach of contract, they held that the historical inquiry left the matter of a jury trial "in equipoise."¹⁸⁰ The plurality then went on to hold, under

174. *Id.* at 566.

175. *Id.* at 567.

176. *Id.* at 568.

177. *See id.* at 569; *id.* at 584 (Kennedy, J., dissenting). The dissent differed from the plurality's decision to go beyond endorsing the trust analogy and to conclude, despite its acceptance of the trust analogy, that the action was legal rather than equitable. *Id.* at 584, 588-91.

The plurality rejected the arbitration analogy because no grievance committee or other "arbitrator" had considered the employees' claim of breach of the duty of fair representation. *Id.* at 566. The malpractice analogy was found inapposite because, unlike a lawyer's client, the employees had no control over significant decisions affecting their representation, and could not discharge the union as a client can discharge his attorney. *Id.* at 568-69.

178. *Id.* at 569 (quoting *Ross*, 396 U.S. at 538).

179. 29 U.S.C. § 185 (1988).

180. *Terry*, 494 U.S. at 570. The plurality distinguished *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), in which the Court had "found a § 301 action more analogous to a suit to set aside an arbitration award." *Terry*, 494 U.S. at 570 n.7. The plurality contended that the Court had analyzed the action in *Mitchell* as a whole, while the Seventh Amendment compelled a separate treatment of each issue, and that, by itself, the § 301 issue resembled a breach of contract claim. *Id.* Whatever the validity of that fine distinction, it makes the already intricate historical component of the federal jury trial inquiry still more difficult.

the "nature of the remedy" prong, that the action was a legal one.¹⁸¹

Justice Stevens, in a separate concurring opinion, argued that the action most resembled a legal malpractice action, and criticized the plurality's acceptance of the trust analogy.¹⁸² The three dissenters, in an opinion by Justice Kennedy, agreed with the plurality that the trust analogy was preferable to the malpractice model.¹⁸³ However, the dissenters criticized the plurality for "pars[ing] legal elements out of equitable claims absent specific procedural justifications," so as to find the action legal despite the applicability of the trust analogy.¹⁸⁴ Thus, the dissent appeared to suggest that the historical test should receive more weight than the plurality, which suggested that component yields results that are "only preliminary,"¹⁸⁵ gave it.¹⁸⁶

Justice Brennan, though concurring in the judgment, also parted company with the plurality on the historical analysis. Noting that the Court had "repeatedly discounted the significance of the analogous form of action for deciding where the Seventh Amendment applies," he advocated that the Court "dispense with it altogether."¹⁸⁷ He criticized the historical analysis as "rattling through dusty attics of ancient writs" that

181. *Terry*, 494 U.S. at 570-73.

182. *Id.* at 582 (Stevens, J., concurring in part and concurring in the judgment) (citing *Mitchell*, 451 U.S. at 74 (Stevens, J., concurring)). In his view, any dissimilarity between the legal malpractice action and the breach of duty of fair representation claim was explained by the fact that there could be no "precise analogue" in old English law, or else the new form of action would not be "recently recognized." *Id.* Justice Stevens criticized the plurality's adoption of the trust analogy, since collective bargaining does not involve a settlor, trust corpus, or trust instrument, while "[u]nion members, as a group, accordingly have the power to hire, fire and direct the actions of their representatives — prerogatives anathema to the paternalistic forms of the equitable trust." *Id.*

183. *Id.* at 584 (Kennedy, J., dissenting).

184. *Id.* at 590.

185. *Id.* at 570.

186. The dissenters went on to argue that the Court must adhere to the historical test because the Seventh Amendment "preserves" jury trial rights, thereby necessitating the historical inquiry. *Id.* at 592-93.

187. *Id.* at 574 (Brennan, J., concurring in part and concurring in the judgment).

"needlessly convolutes our Seventh Amendment jurisprudence."¹⁸⁸ Furthermore, he noted that in *Granfinanciera, S.A. v. Nordberg*,¹⁸⁹ the Justices had reviewed the identical history and reached opposing results, thus underscoring the lack of expertise of the courts in doing historical, rather than purely legal, research.¹⁹⁰

Asserting that "the comparison of a contemporary statutory action unheard of in the eighteenth century to some ill-fitting ancient writ is too shaky a basis for the resolution of an issue as significant as the availability of trial by jury,"¹⁹¹ Justice Brennan advocated that the jury trial determination be based on whether the relief sought was historically available from courts of law.¹⁹² This frustration with the "scholasticist debates"¹⁹³ of the existing federal test, based on two of the most recent cases applying it in the United States Supreme Court, may furnish a good argument for New Jersey's rule, which draws a somewhat brighter line.

The two systems also differ in the way they evaluate whether the remedy is legal or equitable. The United States Supreme Court has, at times, appeared ready to hold that every action seeking monetary damages is a legal one triable to a jury.¹⁹⁴ In *Tull v. United States*,¹⁹⁵ however, the Court ruled

188. *Id.* at 575.

189. 492 U.S. 33 (1989).

190. *Terry*, 494 U.S. at 576-77 (Brennan, J., concurring in part and concurring in the judgment). The same was true, of course, of *Terry* itself. *See id.* at 578 n.7 ("That three learned Justices of the Supreme Court cannot arrive at the same conclusion in this very case, on what is essentially a question of fact, does not speak well for the judicial solvency of the current test.").

191. *Id.* at 580. Justice Brennan also noted that since "modern statutory rights did not exist in the 18th century . . . even the most exacting historical research may not elicit a clear historical analog." *Id.* at 577.

192. *Id.* at 574, 578. Justice Brennan contended that such a test remained true to the Seventh Amendment, since, "historically, [j]urisdictional lines between law and equity were primarily a matter of remedy." *Id.* at 578 (quoting John C. McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967)) (internal quotation marks and brackets omitted).

193. *Id.* at 578. Justice Brennan also criticized the federal test as "less the discovery of a historical analog than the manufacture of a historical fiction." *Id.* at 578 n.7.

194. *E.g.*, *Ross*, 396 U.S. at 542; *Dairy Queen*, 369 U.S. at 476.

that damages that were incidental to, or intertwined with, equitable relief, or analogous to restitution, an equitable remedy, would be considered equitable rather than legal.¹⁹⁶ The finding that damages were equitable has since been characterized by the Court as "an exception to the general rule."¹⁹⁷

New Jersey, however, looks not at the fact that damages are an available remedy, but at the entire panoply of remedies in determining whether a claim is legal or equitable. Where a damage award is but one means, along with non-monetary remedies, of an overarching goal to protect classes of persons, New Jersey will be more likely to find the cause of action to be equitable.¹⁹⁸ The courts have even included in their review equitable remedies available only to the state, even though a private party to whom those remedies were not available was the one seeking a jury trial.¹⁹⁹

A number of other scenarios have demonstrated that New Jersey is more leery about affording jury trials than the federal courts. For example, in the federal system, jury trial rights are reexamined if the pleadings change during the pendency of the case, and thus, a jury trial may become available even when it was not a possibility based on the initial pleadings.²⁰⁰ New Jersey, in contrast, looks only at the initial pleadings, so subsequent amendments to delete claims are irrelevant to jury

195. 481 U.S. 412 (1987).

196. *Id.* at 424; *see also* *Curtis v. Loether*, 415 U.S. 189, 196-97 (1974).

197. *Terry*, 494 U.S. at 570.

198. *Shaner*, 116 N.J. at 441-46, 561 A.2d at 1134-37 (stating that a LAD cause of action was primarily equitable, since the statute conferred broad and extensive remedial powers similar to those of enforcing administrative agency that went beyond damages, and were analogous to equity powers of courts); *Boardwalk*, 253 N.J. Super. at 530, 602 A.2d at 741 (noting that the New Jersey Antitrust Act was intended to protect competition, not just aggrieved parties, and that the panoply of remedies that went far beyond monetary damages demonstrated the primarily equitable nature of the cause of action under that statute).

199. *Boardwalk*, 253 N.J. Super. at 530, 602 A.2d at 741.

200. *E.g.*, *Canister Co. v. Leahy*, 191 F.2d 255, 259 (3d Cir.), *cert. denied*, 342 U.S. 893 (1951); 5 MOORE'S FEDERAL PRACTICE 38-167 to -168 (1995). *But see* *Curtis*, 415 U.S. at 195 n.10 (noting that the court of appeals had concluded that the "right to jury trial was properly tested by the relief sought in the complaint and not by the claims remaining at the time of trial," and expressing no opinion on that issue).

trial rights.²⁰¹

Since 1959, federal courts have followed a virtually absolute rule of first trying legal issues before a jury and then hearing equitable issues.²⁰² There are New Jersey cases, however, that refer to a "settled rule" that, in New Jersey, equitable issues are tried prior to legal issues.²⁰³ The *New Jersey Court Rules* provide trial judges with the discretion to decide the order of trial.²⁰⁴ While the issue may not be clear, New Jersey differs from the federal system's strong presumption in favor of trying the legal issues first.²⁰⁵

One gray area, in which New Jersey may again be more restrictive than the federal courts, is the case where the parties agree to a jury trial, when a jury trial is normally not available. FED. R. CIV. P. 39(c) permits a court to order a jury trial if the parties consent, except where the United States is a party or a federal statute expressly forbids a jury trial. Although the *New Jersey Court Rules* have a comparable provision,²⁰⁶ the New Jersey Supreme Court noted in dictum in *In*

201. See *supra* notes 79-81 and accompanying text (discussing *Mantell* and *Boardwalk*). Presumably a jury trial would be available if the amended pleading added legal claims, rather than deleting equitable ones, at least where there is no question about the pleader's good faith. See *Associated Metals*, 52 N.J. Super. at 148, 145 A.2d at 51-52 (referring to fact that plaintiff's good faith in invoking equitable jurisdiction was not open to doubt). Thus, a supplemental complaint that raises legal causes of action, for example, should receive a jury trial, while a new pleading that presents legal claims that were deliberately withheld should not.

202. *Beacon Theaters*, 359 U.S. at 510-11. See *supra* note 91 and accompanying text. For an exception to the rule that legal claims are to be tried first, see *Katchen v. Landy*, 382 U.S. 323, 338-40 (1966) (relying on the equitable purposes of the Bankruptcy Act).

203. *Renner*, 18 N.J. at 494, 114 A.2d at 559-60; *Asbestos Fibres*, 12 N.J. at 240, 96 A.2d at 398-99. See *supra* note 93 and accompanying text.

204. N.J. CT. R. 4:35-3.

205. This is not often an issue in New Jersey, since only cases in which legal and equitable claims are "independent" of each other would require separate adjudication of each type. See *supra* note 92 (discussing *Renner*). Normally, cases are considered either primarily legal or primarily equitable, and the jury decision is made accordingly.

206. N.J. CT. R. 4:35-2 tracks FED. R. CIV. P. 39(c), but omits the exceptions described in the text. In light of that difference, a party proceeding in state court under a federal statute that purports to bar a jury

re LiVolsi,²⁰⁷ without any reference to the New Jersey Court Rule, that the parties have no right to a jury trial in purely equitable cases even if both sides desire one.²⁰⁸ The *LiVolsi* dictum presumably is reconcilable with the rule, since parties may not compel a judge to exercise the discretion to order a jury trial.²⁰⁹ Based on *LiVolsi*, New Jersey could once again be more restrictive than the federal courts if there is any difference between the federal and *New Jersey Court Rules* regarding jury trials.

In one respect, however, New Jersey may be more protective of jury trials than the federal system. Some federal cases have invoked a complexity exception to deny jury trials in antitrust or other intensely complex types of matters on the ground that due process is not lacking when a jury cannot fathom the issues.²¹⁰ Other federal courts have refused to apply the complexity exception.²¹¹ New Jersey, however, has categorically refused to adopt a "complexity exception" to the constitutional jury trial right.²¹² With the apparent demise of the "practical

trial but affords state court's concurrent jurisdiction might have a basis for demanding a jury trial despite the statutory text, given the procedural nature of the jury trial right. See *supra* notes 168-69 and accompanying text.

207. 85 N.J. 576, 428 A.2d 1268 (1981).

208. *Id.* at 590 n.12, 428 A.2d at 1275 n.12.

209. See N.J. Ct. R. 6:5-3(c) (stating that in its discretion, a court may order a jury trial even where no party demands one).

210. See cases cited in Nocenti, *supra* note 158, at 17 n.110.

211. *E.g.*, *Japanese Elec. Prods.*, 631 F.2d at 1079-80; *In re U.S. Financial Sec. Litigation*, 609 F.2d 411, 424-26 (9th Cir. 1979).

212. *Kenney v. Scientific, Inc.*, 213 N.J. Super. 372, 375-76, 517 A.2d 484, 485-86 (App. Div. 1986). In *Kenney*, the trial court accepted the due process rationale of those federal courts that accepted the complexity argument. *Kenney v. Scientific, Inc.*, 212 N.J. Super. 6, 16-23, 512 A.2d 1142, 1147-51 (Law. Div. 1986). The appellate division reversed, holding that since the issues were of a type frequently decided by juries, "good case management and organized and coherent presentation of the case by the attorneys can assist the jury in dealing effectively with the complexity engendered by multiple litigants." *Kenney*, 213 N.J. Super. at 375, 517 A.2d at 485. Other cases prior to *Kenney* rejected the notion of a complexity exception to the jury trial right. *Van Dissel*, 181 N.J. Super. at 524, 438 A.2d at 567; *Keiffer v. Food Products Trucking Co.*, 73 N.J. Super. 285, 297, 179 A.2d 754, 760 (App. Div. 1962), *certif. denied*, 37 N.J. 524, 181 A.2d 784 (1962); *Longo v. Reilly*, 35 N.J. Super. 405, 410,

limitations of juries" prong of *Ross v. Bernhard*,²¹³ the complexity exception in the federal courts may have been eliminated as well. However, to the extent any argument for such an exception still exists in the federal courts,²¹⁴ New Jersey is more zealous of jury trial rights in this respect than the federal system.

A second way in which jury trials are potentially less available in the federal system than in New Jersey arises from the different forums within each respective system. In New Jersey, the same rules apply to both the law and chancery divisions.²¹⁵ In the federal system, however, jury trials are less available in bankruptcy court than in the district courts because of the equitable nature of the bankruptcy court.²¹⁶ Additionally, the United States Supreme Court has held that Congress is free to assign the responsibility for the adjudication of new causes of action to administrative agencies and other non-Article III forums with regard to "public rights."²¹⁷ If Congress commits claims to a non-Article III forum, which lacks "the essential attributes of the judicial power,"²¹⁸ and customarily acts without a jury, no jury trial will be available.²¹⁹

114 A.2d 302, 305 (App. Div. 1955), *certif. denied*, 25 N.J. 45, 134 A.2d 540 (1957).

213. 396 U.S. 531 (1970). *See supra* note 157 and accompanying text.

214. While the high water mark of the complexity exception in federal court seems to have passed, the cases endorsing such an exception have not been explicitly overruled and apparently remain viable. *See Contini v. Hyundai Motor Co.*, 149 F.R.D. 41, 42 n.2 (S.D.N.Y. 1993).

215. As to the largely identical nature of the rules for law and chancery, see *supra* notes 27-31 and accompanying text. The special civil part and small claims section of the law division have a jury trial rule that is only slightly different than that for the cases in chancery or the regular law division. N.J. CT. R. 6:5-3.

216. Compare *Granfinanciera*, 492 U.S. 33 (allowing jury trial) with *Langenkamp v. Culp*, 498 U.S. 42 (denying jury trial). *See also Katchen*, 382 U.S. 323 (1966).

217. *Granfinanciera*, 492 U.S. at 51; *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977).

218. *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

219. *Granfinanciera*, 492 U.S. at 52-54; *Atlas*, 430 U.S. at 455. In this respect, the federal system is no different than that of New Jersey. *See LiVolsi*, 85 N.J. at 590, 428 A.2d at 1275 (stating that no jury trial is available in fee arbitration, to which the supreme court, acting under its

The question of what a "public right" is has itself spawned controversy within the Supreme Court. In *Granfinanciera S.A. v. Nordberg*,²²⁰ a majority of the Court held that "public rights" include not only cases to which the government is a party, or in which rights belong to or may be asserted against the government, but also to cases not involving the government in which "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."²²¹ Thus, there is yet another level of potential litigation lurking in federal cases where Congress has committed a new cause of action to a tribunal in which jury trials are not available.²²² This factor must be considered to the extent that

power to regulate practice of law, committed attorney fee disputes). The general principle, apparently applicable in New Jersey as well as in the federal courts, that administrative agencies act without a jury is premised on the fact that "the concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder." See *Curtis*, 415 U.S. at 194 (quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 90 (1965)). New Jersey apparently has not, however, developed the successive layers of complexity that the federal system has created. See *supra* notes 210-212 and accompanying text.

220. 492 U.S. 33.

221. *Id.* at 54 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593-94 (1985)).

222. The question of what is "new" becomes an intricate satellite inquiry under *Granfinanciera* as well. Citing *Atlas*, 430 U.S. at 457-58, the Court stated that it would not "permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forbears." *Granfinanciera*, 492 U.S. at 52. Yet, the Court went on to say that, "[i]n certain situations, of course, Congress may fashion causes of action that are closely *analogous* to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable." *Id.* Even in the light shed by the citations following that sentence, it would be difficult to see the difference between a cause of action that has sufficient "common-law forbears" (requiring a jury trial) or that is merely "closely analogous" to common law claims (not requiring one) even

parties have a choice of forum within the federal system, if a jury or non-jury trial is important.

The differences in jury trial rights between New Jersey and the federal courts can be significant. In many instances, New Jersey's special history of affording power to equitable courts has created a more restrictive view of jury trial rights than that of the federal courts.

V. CONCLUSION

New Jersey, like all states, is free to determine jury trial rights.²²³ Although the majority of the states follow the federal approach, a respectable minority of other states, in addition to New Jersey, have maintained a distinction between law and chancery courts, with concomitant effects on jury trials.²²⁴

New Jersey courts have properly recognized that there can be drawbacks to jury trials.²²⁵ Thus, New Jersey's policy de-

if the historical inquiry were not as difficult as it is, *see supra* notes 159-62 and accompanying text, and getting still becoming more difficult with time. *Terry*, 494 U.S. at 546 (Kennedy, J., dissenting). Moreover, if a common law analog is normally enough to require a jury trial in an Article III court, *see supra* note 152 and accompanying text, it is not clear how Congress may abrogate the jury trial right by committing the same "closely analogous" claim to a different tribunal.

223. *See supra* note 7.

224. *See* *Coclosure v. Kansas City Life Ins. Co.*, 720 S.W.2d 916, 918 (Ark. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Miller v. District Court*, 388 P.2d 763 (Colo. 1964); *First National Bank of Olathe v. Clark*, 602 P.2d 1299, 1302-03 (Kan. 1979); *First National Bank of Vicksburg v. Middleton*, 480 So.2d 1153, 1156 (Miss. 1985); *Hiatt v. Yergin*, 284 N.E.2d 834, 841-50 (Ind. Ct. App. 1972), *overruled on other grounds*, *Erdman v. White*, 411 N.E.2d 653 (Ind. Ct. App. 1980); *Linville v. Wilson*, 628 S.W.2d 422, 425 (Mo. App. 1982). The majority of states have adopted the federal approach, embodied by *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), though largely without analysis, or consideration of whether their state constitutions or other factors might require a different result. *E.g.*, *Shope v. Simms*, 658 P.2d 1336, 1340 (Alaska 1983); *Hightower v. Bigoney*, 156 So. 2d 501, 507 (Fla. 1963); *David Steed & Assoc., Inc. v. Young*, 766 P.2d 717, 720 (Idaho 1988); *Higgins v. Barnes*, 530 A.2d 724, 728 (Md. 1987); *Rowell v. Kaplan*, 235 A.2d 91, 96 (R.I. 1967); *C & S Real Estate Servs., Inc. v. Massengale*, 350 S.E.2d 191, 193 (S.C. 1986).

225. *E.g.*, *Shaner v. Horizon Bancorp*, 116 N.J. 433, 442, 561 A.2d 1130, 1135 (1981) (noting the "attendant delays" of jury trials); *O'Neill v.*

cision, enshrined in its constitution,²²⁶ to enforce some limits on jury trials that other states and the federal system do not impose, is a valid choice. The maintenance of separate law and chancery courts have given rise to "specialist judges"²²⁷ whose expertise in complex chancery matters results in better decision-making.²²⁸ Parties who desire a particular form of trial should carefully scrutinize New Jersey's special jury trial rules.

Vreeland, 6 N.J. 158, 167, 77 A.2d 899, 903 (1951) (referring to the unnecessary exposure of parties to "the hazards of a jury trial"). Although scholars are divided, many agree that jury trials are not necessarily a good thing. *E.g.*, JEROME FRANK, COURTS ON TRIAL 132 (1949) ("[T]he jury is the worst possible enemy of that ideal of 'supremacy of law.' For jury made law is par excellence, capricious and arbitrary, yielding to maximum in way of lack of uniformity, and unknowability."); 5 MOORE'S FEDERAL PRACTICE 38-122 (1995) ("[T]he question remains as to why the Court has chosen to take an expansive view of the right to jury trial at a time at which the pressure of crowded dockets and long delay in trial have prompted a reappraisal of the usefulness of jury trials in civil cases as an instrument of justice.").

226. N.J. CONST. art. I, § 9, art. VI, § 3, ¶¶ 2-4.

227. Hartshorne, *supra* note 29, at 162.

228. See O'Neill, 6 N.J. at 166, 77 A.2d at 902-03; Hawthorne, *supra* note 29, at 162.