

Table of Contents

| | |
|---|----------|
| Chapter 1: Director and Officer Liability | 1 |
| 1-1 INTRODUCTION | 1 |
| 1-2 FIDUCIARY DUTIES OF A DIRECTOR OR OFFICER | 1 |
| 1-2:1 General Obligations of Directors and Officers | 1 |
| 1-2:2 Reliance on Reports and Records by Third Parties | 3 |
| 1-2:3 Shareholders' Recourse | 5 |
| 1-2:4 The Business Judgment Rule | 6 |
| 1-3 USURPING CORPORATE OPPORTUNITIES | 10 |
| 1-4 DIRECTORS' PURCHASES OF CORPORATE STOCK | 14 |
| 1-5 USE OF INSIDER INFORMATION | 15 |
| 1-6 CORPORATE LIABILITY FOR THE ACTS OF A PRINCIPAL | 15 |
| 1-7 INDIVIDUAL LIABILITY | 16 |
| 1-7:1 Limitations on Liability Set Forth in the Certificate of Incorporation | 21 |
| 1-7:2 Liability of Directors in Certain Cases | 22 |
| 1-7:3 Presumption of Assent to Actions Taken at Meetings | 24 |
| 1-8 INDEMNIFYING PARTIES | 24 |
| 1-8:1 Indemnification of the Corporation | 24 |
| 1-8:2 Indemnification of Directors, Officers and Employees | 25 |
| 1-9 PIERCING THE CORPORATE VEIL | 27 |
| 1-10 SHAREHOLDER DERIVATIVE SUITS | 31 |
| 1-10:1 Derivative Suits Defined | 31 |
| 1-10:2 "Special Injury" Exception to Derivative Suits | 31 |
| 1-10:3 Standing | 32 |
| 1-10:4 Derivative Versus Class Actions | 35 |
| 1-11 SHAREHOLDER RIGHTS | 35 |
| 1-12 CRIMINAL LIABILITY OF CORPORATIONS AND PERSONS ACTING, OR UNDER A DUTY TO ACT, ON THEIR BEHALF | 37 |

Table of Contents

| | | |
|---------|--|-----------|
| 1-13 | CRIMINAL MISCONDUCT BY A CORPORATE OFFICIAL..... | 37 |
| 1-14 | DIRECTOR CONFLICTS OF INTEREST..... | 39 |
| 1-15 | RECEIVERS..... | 39 |
| 1-16 | FISCAL AGENTS..... | 41 |
| 1-17 | PROVISIONAL DIRECTORS AND CUSTODIANS..... | 42 |
| | Chapter 2: Partnership Liability | 45 |
| 2-1 | INTRODUCTION..... | 45 |
| 2-2 | UNIFORM PARTNERSHIP LAW..... | 45 |
| 2-3 | LIABILITY AMONG PARTNERS..... | 47 |
| 2-4 | PARTNER'S INTEREST IN THE PARTNERSHIP..... | 50 |
| 2-5 | LIABILITY FOR PARTNERSHIP DEBTS..... | 51 |
| 2-5:1 | Acts That Bind the Partnership..... | 52 |
| 2-5:2 | Ratification..... | 54 |
| 2-5:3 | New Partners..... | 55 |
| 2-5:4 | Withdrawing Partners..... | 55 |
| 2-5:5 | Dissolution..... | 58 |
| 2-6 | FIDUCIARY DUTY OF PARTNERS UPON DISSOCIATION..... | 60 |
| 2-7 | MINORITY PARTNERS..... | 60 |
| 2-8 | APPOINTMENT OF A RECEIVER..... | 61 |
| 2-9 | EXISTENCE OF A PARTNERSHIP..... | 61 |
| 2-10 | PARTNERSHIP BY ESTOPPEL..... | 63 |
| 2-11 | PARTNERSHIP LIABILITY FOR TORTIOUS ACTS OF ITS PARTNERS..... | 64 |
| 2-12 | SUITS AMONG PARTNERS..... | 67 |
| 2-13 | LIMITED LIABILITY..... | 68 |
| 2-13:1 | Limited Liability Partnerships..... | 68 |
| 2-14 | LIMITED PARTNERS..... | 68 |
| 2-15 | DISSOLUTION..... | 71 |
| 2-16 | JOINT VENTURES..... | 71 |
| | Chapter 3: Oppressed Minority Shareholders..... | 73 |
| 3-1 | INTRODUCTION..... | 73 |
| 3-2 | STANDING..... | 74 |
| 3-2:1 | Generally..... | 74 |
| 3-2:2 | Judicial Considerations..... | 77 |
| 3-2:2.1 | Corporate Conduct Toward the Minority Shareholder..... | 77 |

Table of Contents

| | | | |
|-----|---------|---|-----|
| | 3-2:2.2 | Vulnerability of the Minority Shareholder | 77 |
| | 3-2:2.3 | Balancing of Minority Shareholders' Expectations | 78 |
| | 3-2:2.4 | Determining When Oppression Occurs..... | 79 |
| | 3-2:2.5 | Fraudulent and Illegal Acts by the Corporation..... | 80 |
| | 3-2:2.6 | Factors to Consider in Evaluating Allegations of Misconduct..... | 81 |
| 3-3 | | REMEDIES | 83 |
| | 3-3:1 | In General..... | 83 |
| | 3-3:2 | Appointment of Provisional Directors or Custodians..... | 83 |
| | 3-3:3 | Dissolution | 85 |
| | 3-3:4 | Selling the Corporation's Stock in Cases of Oppression | 86 |
| | 3-3:5 | Common Law Equitable Remedies | 86 |
| | 3-3:6 | Discretion over Remedies for Oppressed Minority Shareholders..... | 88 |
| | | 3-3:6.1 Buyouts..... | 89 |
| | | 3-3:6.2 Other Remedies | 91 |
| | 3-3:7 | Attorney's Fees and Expenses..... | 92 |
| 3-4 | | THE VALUATION PROCESS..... | 94 |
| | 3-4:1 | Valuation Techniques..... | 94 |
| | 3-4:2 | Determining Fair Value | 98 |
| | 3-4:3 | Marketability Discounts | 100 |
| | 3-4:4 | Minority Discounts | 104 |

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

| | | | |
|-----|-------|--|------------|
| | | Securities Exchange Act..... | 107 |
| 4-1 | | INTRODUCTION..... | 107 |
| 4-2 | | GENERAL REQUIREMENTS OF RULE 10B-5 | 109 |
| 4-3 | | STANDING..... | 110 |
| | 4-3:1 | Exceptions to Purchaser/Seller Designation | 111 |
| | 4-3:2 | Relationship Needed Between Plaintiff and Defendant..... | 112 |
| 4-4 | | PRIMARY VS. SECONDARY ACTORS..... | 113 |
| 4-5 | | ELEMENT: IN CONNECTION WITH THE PURCHASE OR SALE | 115 |
| 4-6 | | MANIPULATIVE, DECEPTIVE, OR FRAUDULENT CONDUCT..... | 118 |
| | 4-6:1 | Mismanagement or Breach of Fiduciary Duty | 119 |

Table of Contents

| | | |
|----------|---|-----|
| 4-6:2 | Mergers, Reorganizations or Tender Offers..... | 119 |
| 4-6:3 | Misrepresentations..... | 120 |
| 4-6:3.1 | Prospectuses/Private Placement Memoranda | 120 |
| 4-6:3.2 | Puffery, Opinions, Forecasts, Predictions or Projections, and the PSLRA Safe Harbor for Forward Looking Statements | 121 |
| 4-6:3.2a | Bespeaks Caution Doctrine... .. | 124 |
| 4-6:3.2b | Disclosure Obligations | 125 |
| 4-6:4 | Nondisclosure/Omission Liability..... | 126 |
| 4-6:4.1 | Who Has a Duty to Disclose..... | 127 |
| 4-6:4.1a | Insiders | 127 |
| 4-6:4.1b | Noninsiders..... | 128 |
| 4-6:4.2 | Duty to Disclose: Substance and Timing | 129 |
| 4-6:4.2a | Inside or Nonpublic Market Information | 129 |
| 4-6:4.2b | Mergers, Acquisitions, Reorganizations or Tender Offers | 130 |
| 4-6:4.2c | Correction or Confirmation of Prior Statements or Rumors..... | 130 |
| 4-6:5 | Release of Non-Public Market Information: Tipping..... | 131 |
| 4-6:5.1 | Conduct of Accountants, Attorneys and Other Professionals | 132 |
| 4-6:5.2 | Conduct of Brokers | 134 |
| 4-7 | ELEMENT: SCIENTER | 134 |
| 4-7:1 | Recklessness..... | 135 |
| 4-7:2 | Burden of Proof | 136 |
| 4-7:2.1 | Actual Intent | 136 |
| 4-7:2.2 | Recklessness..... | 137 |
| 4-7:2.3 | Pleading Scienter | 137 |
| 4-8 | ELEMENT: MATERIALITY | 141 |
| 4-9 | ELEMENTS: RELIANCE AND CAUSATION | 143 |
| 4-9:1 | Proving Reliance | 144 |
| 4-9:1.1 | Rebuttable Presumption of Reliance..... | 144 |
| 4-9:1.2 | Fraud-on-the-Market Theory | 146 |
| 4-9:1.3 | Fraud-Created-the-Market Theory | 150 |
| 4-9:2 | Proving Causation | 151 |

4-10 REMEDIES 153

4-11 STATUTE OF LIMITATIONS 155

4-12 DEFENSES 158

Chapter 5: Antitrust..... 159

5-1 INTRODUCTION..... 159

5-2 THE PURPOSE OF THE ANTITRUST LAWS 160

 5-2:1 Generally 160

 5-2:2 Jurisdiction 161

 5-2:3 Right to a Jury..... 162

5-3 SHERMAN ACT 163

 5-3:1 Section 1 163

 5-3:1.1 General Application..... 163

 5-3:1.2 Elements 164

 5-3:1.3 Rule of Reason 166

 5-3:1.4 *Per Se* Rule 169

 5-3:2 Section 2 171

 5-3:2.1 Monopolies..... 171

 5-3:2.2 Actual Monopolization 172

 5-3:2.3 Attempted Monopolization 173

 5-3:3 Standing and Remedies..... 174

5-4 CLAYTON ACT 174

 5-4:1 Acts Lessening Competition 174

 5-4:2 Section 3—Tying Arrangements, Exclusive Dealings, and Requirements Contracts 174

 5-4:2.1 Restrictive Distribution Methods..... 174

 5-4:3 Elements 175

 5-4:4 Tying Arrangements 176

 5-4:5 Exclusive Dealings and Requirements Contracts 177

 5-4:6 Group Boycott/Refusals to Deal 178

 5-4:7 Section 7—Mergers and Acquisitions 178

 5-4:7.1 Probability of Anticompetitive Effects..... 178

 5-4:7.2 Rule of Reason 179

 5-4:7.3 Elements 179

 5-4:7.4 Economically Significant Geographic and Product Market..... 180

 5-4:7.5 Exempt Mergers 182

 5-4:7.6 Post-Acquisition Behavior 183

 5-4:8 Relief 184

 5-4:9 Section 4—Monetary Damages 184

 5-4:9.1 Right of Contribution among Defendants 189

Table of Contents

| | | | |
|-----|----------|---|------------|
| | 5-4:9.2 | Assignability | 190 |
| | 5-4:10 | Section 16—Injunctive Relief | 190 |
| 5-5 | | STATUTE OF LIMITATIONS—SECTION 4B..... | 192 |
| 5-6 | | ROBINSON-PATMAN ACT..... | 192 |
| | 5-6:1 | Generally | 192 |
| | 5-6:2 | Price Discrimination | 193 |
| | 5-6:3 | Competitive Injury..... | 195 |
| 5-7 | | NEW JERSEY ANTITRUST ACT | 199 |
| | 5-7:1 | Generally | 199 |
| | 5-7:2 | Construction of the Act..... | 200 |
| | 5-7:2.1 | Federal Law | 200 |
| | 5-7:2.2 | Standing and Relief | 202 |
| | 5-7:2.2a | Actual Business and More than De Minimis Injury | 202 |
| | 5-7:2.2b | Money Damages and Injunctive Relief..... | 202 |
| | 5-7:2.2c | Four-Year Statute of Limitations | 203 |
| | | Chapter 6: Restrictive Covenants..... | 205 |
| 6-1 | | INTRODUCTION..... | 205 |
| 6-2 | | COMMON LAW | 206 |
| | 6-2:1 | Common Law Duty of Loyalty | 206 |
| | 6-2:2 | Former Employees..... | 207 |
| | 6-2:2.1 | Divulging Confidential Information | 208 |
| | 6-2:2.1a | Trade Secrets..... | 209 |
| | 6-2:2.1b | Confidential Information | 213 |
| | 6-2:2.1c | Raiding Employees | 213 |
| | 6-2:2.1d | Customer Lists..... | 215 |
| 6-3 | | OFFICERS, DIRECTORS AND HIGH-LEVEL EMPLOYEES | 216 |
| 6-4 | | EXPRESS COVENANTS NOT TO COMPETE..... | 217 |
| 6-5 | | ENFORCEABILITY | 218 |
| | 6-5:1 | Protectable Interest | 218 |
| | 6-5:2 | Durational Restriction | 220 |
| | 6-5:3 | Geographic Restrictions..... | 221 |
| | 6-5:4 | Employee’s Interest/Public Interest | 221 |
| | 6-5:5 | Adequate Consideration | 222 |
| 6-6 | | PARTIAL ENFORCEABILITY | 223 |
| | 6-6:1 | New Jersey’s Blue Pencil Doctrine | 223 |
| | 6-6:2 | Conflicts of Law | 225 |

Table of Contents

| | | |
|-----------------------------|--|------------|
| 6-7 | REMEDIES AVAILABLE..... | 225 |
| 6-7:1 | Temporary Restraining Order/Preliminary Injunction..... | 226 |
| 6-7:2 | Permanent Injunction..... | 228 |
| 6-8 | COMPENSATORY DAMAGES..... | 229 |
| 6-9 | RESTRICTIVE COVENANTS IN SALE OF BUSINESS AND FRANCHISE AGREEMENTS..... | 229 |
| 6-10 | PROHIBITIONS AS TO RESTRICTIVE COVENANTS IN SPECIFIED PROFESSIONS..... | 230 |
| 6-11 | NO-HIRE AGREEMENTS..... | 231 |
| 6-12 | THE FEDERAL TRADE COMMISSION BAN ON NON-COMPETES..... | 232 |
| Chapter 7: RICO..... | | 237 |
| 7-1 | INTRODUCTION..... | 237 |
| 7-2 | FEDERAL RICO..... | 238 |
| 7-2:1 | Statutory Overview: 18 U.S.C. § 1962(a)-(d)..... | 238 |
| 7-2:2 | Elements of RICO..... | 238 |
| 7-2:2.1 | Enterprise..... | 238 |
| 7-2:3 | Employed by or Associated with an Enterprise..... | 240 |
| 7-2:3.1 | Type of Association..... | 240 |
| 7-2:3.2 | Distinctiveness Requirement..... | 240 |
| 7-2:4 | Conducted or Participated in Conduct of Enterprise..... | 241 |
| 7-2:4.1 | Operation or Management Test..... | 241 |
| 7-2:4.2 | Knowingly Direct Affairs of Enterprise... .. | 242 |
| 7-2:5 | Pattern of Racketeering Activity..... | 243 |
| 7-2:5.1 | Types of Predicate Acts..... | 243 |
| 7-2:5.2 | Relatedness and Continuity..... | 245 |
| 7-2:6 | Standing..... | 248 |
| 7-2:6.1 | Violation of Section 1962..... | 248 |
| 7-2:6.2 | 18 U.S.C. § 1962(a): Investment of Racketeering Income..... | 250 |
| 7-2:6.3 | 18 U.S.C. § 1962(b): Acquire or Maintain Interest in or Control of Any Enterprise..... | 251 |
| 7-2:6.4 | 18 U.S.C. § 1962(c): Conduct or Participate in the Enterprise's Affairs..... | 251 |
| 7-2:6.5 | 18 U.S.C. Section 1962(d): Conspiring to Violate Any of the Subsections..... | 252 |
| 7-2:7 | RICO Claims Against Professionals..... | 255 |

Table of Contents

| | | |
|--------|---|-----|
| 7-2:8 | Arbitration | 256 |
| 7-2:9 | Aiding and Abetting a RICO Violation | 256 |
| 7-2:10 | Criminal Penalties..... | 257 |
| | 7-2:10.1 Imprisonment, Fine and Forfeiture..... | 257 |
| 7-2:11 | Restraining Orders and Injunctions | 257 |
| 7-2:12 | Intervention by Party with Interest in Property..... | 257 |
| 7-2:13 | Petition Following Forfeiture | 257 |
| 7-2:14 | Civil Remedies (Section 1964)..... | 258 |
| | 7-2:14.1 Injunctive Relief | 258 |
| | 7-2:14.2 Treble Damages | 258 |
| 7-2:15 | Statute of Limitations..... | 260 |
| | 7-2:15.1 Four Years | 260 |
| 7-2:16 | Rules of Accrual | 261 |
| 7-2:17 | Fraudulent Concealment | 262 |
| 7-3 | STATE REGULATION | 262 |
| 7-3:1 | Application and Comparison to Federal RICO | 262 |
| 7-3:2 | Civil Remedies and Proceedings: N.J.S.A. 2C:41-4..... | 263 |
| | 7-3:2.1 Treble Damages, Costs, and Attorneys' Fees | 263 |
| | 7-3:2.2 No Private Injunctive Relief | 264 |
| | 7-3:2.3 Estoppel..... | 264 |
| | 7-3:2.4 Possible Penalties | 264 |
| | 7-3:2.5 Four-Year Statute of Limitations..... | 265 |
| | 7-3:2.6 Arbitration Award | 265 |
| 7-3:3 | Criminal Remedies and Proceedings: N.J.S.A. 2C:41-3..... | 266 |
| | 7-3:3.1 Degree of Crime | 266 |
| | 7-3:3.2 Forfeiture..... | 266 |
| | 7-3:3.3 Injunctive Relief | 266 |
| | 7-3:3.4 Seizure | 266 |
| 7-3:4 | Important Issues..... | 266 |
| | 7-3:4.1 Existence of an Enterprise | 266 |
| | 7-3:4.2 Defendant Participated in Conduct of Affairs of Enterprise | 269 |
| | 7-3:4.2a No Operation or Management Test..... | 269 |
| | 7-3:4.3 Pattern of Racketeering Activity..... | 269 |
| | 7-3:4.3a No Continuity Sub-Element | 269 |
| | 7-3:4.3b Two Related Incidents Required | 270 |

Table of Contents

| | | |
|---|---|------------|
| 7-3:4.4 | Standing | 271 |
| 7-3:4.4a | Federal Standard | 271 |
| 7-3:4.4b | Harm Proximately Caused by the RICO Acts Alleged | 271 |
| 7-3:4.5 | Where to Bring Suit: Federal or State Court | 272 |
| Chapter 8: Tortious Interference | | 273 |
| 8-1 | INTRODUCTION..... | 273 |
| 8-2 | THE DIFFERENCE BETWEEN THE INTERFERENCE TORTS | 275 |
| 8-3 | ELEMENTS OF INTERFERENCE WITH CONTRACT | 275 |
| 8-3:1 | There Is an Existing Contract | 276 |
| 8-3:2 | The Defendant Knew of the Contract | 277 |
| 8-3:3 | The Defendant Wrongfully Interfered with the Contract..... | 281 |
| 8-3:4 | Reasonable Probability That the Loss of the Contract Benefit Was a Result of the Interference | 284 |
| 8-3:5 | Damages Resulted From the Interference | 285 |
| 8-4 | INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE..... | 285 |
| 8-4:1 | A Reasonable Expectation of Economic Advantage..... | 286 |
| 8-4:2 | Interference Was Committed Intentionally and Without Justification or Excuse | 288 |
| 8-4:3 | Reasonable Probability That the Victim of the Interference Would Have Received the Economic Benefits but for the Interference | 289 |
| 8-4:4 | Damages Resulting From the Interference | 290 |
| 8-5 | PUNITIVE DAMAGES | 290 |
| 8-6 | INTERFERENCE IN THE REAL ESTATE INDUSTRY ... | 291 |
| 8-6:1 | Introduction | 291 |
| 8-6:2 | When Is a Broker's Expectation Protectable? | 292 |
| 8-6:3 | A Broker's Protectable Interest Under Tort Law | 294 |
| 8-6:4 | New Jersey's Appellate Case Law..... | 295 |
| 8-6:5 | The Liability of the Buyer/Lessee | 298 |
| 8-6:6 | Interference Among Attorneys | 298 |
| 8-7 | EMPLOYMENT TERMINATIONS..... | 299 |
| 8-7:1 | Introduction | 299 |

Table of Contents

| | | |
|---|--|------------|
| 8-7:2 | Employee’s Interference with Employment Relationship Between Co-Employee and Employer ... | 300 |
| 8-7:3 | Employee Piracy | 301 |
| Chapter 9: Business Fraud | | 305 |
| 9-1 | TYPES OF COMMON LAW FRAUD | 305 |
| 9-1:1 | Legal Fraud | 305 |
| 9-1:1.1 | Scienter | 307 |
| 9-1:1.2 | Reliance | 308 |
| 9-1:1.3 | Statements of Future Performance or Opinion | 312 |
| 9-1:2 | Equitable Fraud..... | 314 |
| 9-1:3 | Fraudulent Concealment | 315 |
| 9-1:4 | Constructive Fraud..... | 317 |
| 9-1:5 | Negligent Misrepresentation..... | 319 |
| 9-2 | BURDENS OF PROOF AND PRESUMPTIONS..... | 321 |
| 9-3 | DAMAGES AND REMEDIES..... | 323 |
| 9-3:1 | Choice of Legal or Equitable Remedies..... | 323 |
| 9-3:2 | Legal Remedies..... | 324 |
| 9-3:2.1 | Compensatory Damages..... | 324 |
| 9-3:2.2 | Punitive Damages | 326 |
| 9-3:3 | Equitable Remedies | 328 |
| 9-3:4 | Remedies Involving Third Parties | 329 |
| 9-4 | DEFENSES | 330 |
| 9-4:1 | Defending a Claim of Fraud..... | 330 |
| 9-4:2 | Asserting Fraud as an Affirmative Defense..... | 330 |
| 9-5 | PLEADING..... | 331 |
| 9-5:1 | Must Plead Fraud with Particularity | 331 |
| 9-5:2 | Statute of Limitations..... | 332 |
| Chapter 10: Consumer Fraud | | 333 |
| 10-1 | INTRODUCTION..... | 333 |
| 10-1:1 | New Jersey Consumer Fraud Act: Statutory Purpose and Overview | 333 |
| 10-1:2 | Public and Private Causes of Action Under the CFA..... | 336 |
| 10-1:2.1 | Damages..... | 339 |
| 10-2 | PERSONS COVERED BY THE CFA..... | 347 |
| 10-3 | WHAT CONSTITUTES “MERCHANDISE” UNDER THE CFA? | 350 |
| 10-4 | CONDUCT PROHIBITED BY THE ACT | 353 |
| 10-4:1 | Affirmative Acts or Omissions | 355 |

Table of Contents

| | | |
|--|---|------------|
| 10-4:2 | Unconscionable Commercial Practice..... | 357 |
| 10-4:3 | Regulatory Violations..... | 359 |
| 10-4:4 | Individual Liability Under the CFA..... | 360 |
| 10-4:5 | Amendments..... | 361 |
| Chapter 11: Uniform Voidable Transactions Act | | 363 |
| 11-1 | INTRODUCTION..... | 363 |
| 11-2 | ELEMENTS OF VOIDABLE TRANSACTIONS | 366 |
| 11-3 | DEFINITIONS UNDER THE UVTA: “TRANSFER” AND “INSIDER” | 368 |
| 11-3:1 | Transfer | 368 |
| 11-3:2 | Insider | 368 |
| 11-4 | CONSIDERATION/REASONABLY EQUIVALENT VALUE..... | 370 |
| 11-4:1 | Preexisting Debt | 371 |
| 11-4:2 | Unfulfilled Promises/Third-Party Debts | 372 |
| 11-4:3 | Foreclosure Sales | 373 |
| 11-5 | VOIDABLE TRANSACTIONS: ACTUAL INTENT | 374 |
| 11-5:1 | Proving Actual Intent | 374 |
| 11-5:1.1 | Factors to Be Considered | 375 |
| 11-5:1.2 | Specific Situations Involving Actual Intent | 377 |
| 11-5:2 | Burden of Proof | 379 |
| 11-6 | VOIDABLE TRANSACTIONS: INSOLVENCY | 379 |
| 11-6:1 | Elements | 379 |
| 11-6:2 | What Constitutes “Insolvency”..... | 380 |
| 11-6:2.1 | Rebuttable Presumption of Insolvency | 381 |
| 11-6:2.2 | Burden of Proof | 381 |
| 11-6:2.3 | Proof of Voidable Transaction | 382 |
| 11-7 | VOIDABLE TRANSACTIONS: UNDER-CAPITALIZED BUSINESS..... | 382 |
| 11-7:1 | Elements | 382 |
| 11-7:2 | “Unreasonably Small Assets” | 383 |
| 11-8 | VOIDABLE TRANSACTIONS: INCURRENCE OF DEBTS BY DEBTOR..... | 383 |
| 11-8:1 | Elements of Incurrence of Debt | 384 |
| 11-8:2 | Burden of Proof | 384 |
| 11-9 | VOIDABLE TRANSACTIONS: TRANSACTIONS WITH INSIDERS..... | 385 |
| 11-10 | WHEN A CAUSE OF ACTION ARISES UNDER THE UVTA | 385 |

Table of Contents

| | | |
|---|---|------------|
| 11-10:1 | Occurrence of Voidable Transaction | 385 |
| 11-10:2 | Incurrence of Obligation | 387 |
| 11-11 | TERMINATION OF CLAIMS FOR RELIEF/STATUTE OF LIMITATIONS | 387 |
| 11-12 | CREDITOR'S REMEDIES UNDER THE UVTA..... | 389 |
| 11-12:1 | Primary Remedy: Setting Aside Transfer | 390 |
| 11-12:2 | Remedies Against Transferees | 391 |
| 11-12:3 | Actual Judgment Not Needed to Sue | 391 |
| 11-13 | DEFENSES/REMEDIES OF TRANSFEREES..... | 392 |
| 11-13:1 | Transferees of "Actual Intent" Voidable Transactions..... | 392 |
| 11-13:2 | General Protection Available to Good Faith Transferee for Reasonably Equivalent Value Given to the Debtor | 393 |
| 11-13:3 | Additional Limited Protection Available | 393 |
| 11-13:4 | Defenses Available to Insiders | 394 |
| 11-14 | SUPPLEMENTARY PROVISIONS..... | 395 |
| Chapter 12: The Federal Trade Commission Act | | 397 |
| 12-1 | INTRODUCTION..... | 397 |
| 12-2 | UNFAIR METHODS OF COMPETITION | 399 |
| 12-3 | UNFAIR OR DECEPTIVE ACTS OR PRACTICE | 402 |
| 12-3:1 | Unfair Acts or Practices..... | 403 |
| 12-3:2 | Deceptive Acts or Practices..... | 404 |
| 12-4 | DEFENSES | 407 |
| 12-4:1 | Exemption From FTCA | 407 |
| 12-4:2 | Honest Belief or Opinion..... | 407 |
| 12-4:3 | Permissible Puffing | 407 |
| 12-5 | RULEMAKING BY THE COMMISSION | 408 |
| 12-6 | INVESTIGATIONS BY THE COMMISSION | 408 |
| 12-6:1 | Enforcement Proceedings by the Commission | 409 |
| 12-7 | ADVISORY OPINIONS..... | 410 |
| Chapter 13: Lanham Act: Unfair Competition | | 413 |
| 13-1 | INTRODUCTION..... | 413 |
| 13-2 | MARKS..... | 414 |
| 13-2:1 | Trademark | 415 |
| 13-2:1.1 | Arbitrary Mark..... | 417 |
| 13-2:1.2 | Suggestive Mark | 418 |
| 13-2:1.3 | Descriptive Mark..... | 418 |
| 13-2:1.4 | Generic Mark | 419 |

Table of Contents

| | | |
|---------|---|-----|
| 13-2:2 | Service Mark | 420 |
| 13-2:3 | Collective Mark | 420 |
| 13-2:4 | Certification Mark | 420 |
| 13-2:5 | Distinguishing Marks | 421 |
| | 13-2:5.1 Generic Versus Descriptive | 422 |
| | 13-2:5.1a Secondary Meaning | 422 |
| | 13-2:5.2 Descriptive Versus Suggestive | 424 |
| 13-3 | TRADE DRESS | 425 |
| 13-4 | TRADE NAMES | 426 |
| 13-5 | TRADEMARK PROTECTION/INFRINGEMENT | 427 |
| 13-5:1 | Mark Ownership/Priority of Rights..... | 429 |
| 13-5:2 | Infringement | 431 |
| | 13-5:2.1 Likelihood of Confusion Test | 432 |
| 13-5:3 | Losing Protection | 436 |
| | 13-5:3.1 Cancellation..... | 436 |
| | 13-5:3.2 Abandonment..... | 437 |
| 13-6 | CYBERSQUATTING..... | 438 |
| 13-7 | OTHER UNFAIR COMPETITION | 441 |
| 13-8 | FALSE DESIGNATION OF ORIGIN..... | 443 |
| 13-8:1 | Passing Off | 444 |
| 13-8:2 | Unprivileged Imitation/Trade Dress Infringement ... | 445 |
| | 13-8:2.1 Elements | 446 |
| | 13-8:2.1a Distinctiveness | 446 |
| | 13-8:2.1b Likelihood of Confusion..... | 448 |
| | 13-8:2.1c Functionality | 448 |
| 13-8:3 | Color | 450 |
| 13-8:4 | False Advertising | 451 |
| | 13-8:4.1 False or Misleading Statement | 453 |
| | 13-8:4.2 Tendency to Deceive | 454 |
| | 13-8:4.3 Materiality | 455 |
| 13-8:5 | Dilution | 456 |
| 13-9 | DEFENSES | 458 |
| 13-9:1 | Fair Use | 458 |
| 13-9:2 | Laches | 459 |
| 13-9:3 | Unclean Hands | 460 |
| 13-9:4 | Abandonment..... | 461 |
| 13-10 | DAMAGES/REMEDIES..... | 461 |
| 13-10:1 | Injunctions..... | 461 |
| 13-10:2 | Monetary Relief | 463 |
| | 13-10:2.1 Attorneys' Fees..... | 464 |

Table of Contents

| | |
|--|----------------|
| Chapter 14: Invasion of Privacy | 467 |
| 14-1 INTRODUCTION..... | 467 |
| 14-2 INTRUSION ON A PERSON’S SOLITUDE..... | 469 |
| 14-2:1 Media Intrusion..... | 471 |
| 14-2:2 Employee Testing..... | 473 |
| 14-2:3 Surveillance..... | 475 |
| 14-2:3.1 Wiretapping..... | 476 |
| 14-2:4 Unsolicited Advertising..... | 479 |
| 14-2:4.1 Telephone Calls..... | 479 |
| 14-2:4.2 Junk Mail..... | 480 |
| 14-3 DEBT COLLECTION..... | 480 |
| 14-3:1 Public Interest..... | 481 |
| 14-4 PUBLIC DISCLOSURE OF PRIVATE FACTS..... | 482 |
| 14-4:1 Public Records..... | 483 |
| 14-4:2 Public Area..... | 484 |
| 14-4:3 Conflict with First Amendment..... | 484 |
| 14-4:3.1 Newsworthiness Privilege..... | 484 |
| 14-4:4 Exposure of Debt..... | 486 |
| 14-5 FALSE LIGHT..... | 487 |
| 14-5:1 Elements of a False Light Claim..... | 490 |
| 14-5:1.1 Falsity..... | 490 |
| 14-5:1.2 Highly Offensive Standard..... | 491 |
| 14-6 APPROPRIATION OF THE PLAINTIFF’S NAME OR LIKENESS..... | 492 |
| 14-6:1 Commercial Appropriation of a Public Figure..... | 494 |
| 14-6:2 Newsworthy Event..... | 495 |
| 14-6:3 Commercial Purpose..... | 496 |
| 14-7 DEFENSES..... | 498 |
| 14-7:1 Consent..... | 498 |
| 14-7:2 Privilege..... | 499 |
| Chapter 15: Franchise Litigation | 501 |
| 15-1 FRANCHISE PRACTICES ACT..... | 501 |
| 15-1:1 Definitions..... | 502 |
| 15-1:2 Coverage..... | 505 |
| 15-1:2.1 Pre-FPA..... | 505 |
| 15-1:2.2 Criteria for Application of the FPA..... | 506 |
| 15-1:2.3 Definition of Place of Business..... | 507 |
| 15-1:3 Termination of Franchise Agreement..... | 509 |
| 15-1:3.1 Notice..... | 509 |
| 15-1:3.2 Permissible Termination..... | 509 |
| 15-1:3.3 Criteria for Good Cause..... | 510 |

Table of Contents

| | | |
|----------|--|-----|
| 15-1:4 | Transfer of Franchise..... | 514 |
| 15-1:4.1 | Notice..... | 514 |
| 15-1:4.2 | Written Response Requirement..... | 514 |
| 15-1:4.3 | Good Faith Requirement for Refusing Transfer | 515 |
| 15-1:4.4 | Transferee's Acceptance of Franchise Requirements..... | 516 |
| 15-1:5 | Prohibited Practices for Franchisors | 516 |
| 15-1:5.1 | Forum Selection, Choice of Law and Arbitration Clauses in Franchise Agreements | 517 |
| 15-1:6 | Remedies | 520 |
| 15-1:6.1 | Damages..... | 520 |
| 15-1:6.2 | Punitive Damages | 520 |
| 15-1:6.3 | Injunctive Relief | 521 |
| 15-1:6.4 | Attorneys' Fees and Court Costs | 522 |
| 15-2 | MOTOR VEHICLE FRANCHISES ACT | 523 |
| 15-2:1 | Definitions | 524 |
| 15-2:2 | Grant, Relocation or Reactivation of Franchise | 525 |
| 15-2:2.1 | Procedure..... | 525 |
| 15-2:2.2 | Injurious Grant, Relocation or Reactivation of a Motor Vehicle Franchise | 526 |
| 15-2:2.3 | Permissible Relocation, Reopening or Reactivation of a Motor Vehicle Franchise | 529 |
| 15-2:3 | Prohibited Practices by Motor Vehicle Franchisor.... | 530 |
| 15-2:4 | Remedies | 531 |
| 15-3 | PETROLEUM MARKETING PRACTICE ACT..... | 532 |
| 15-3:1 | Extent of the PMPA's Preemption | 533 |
| 15-3:2 | Coverage..... | 535 |
| 15-3:2.1 | Definitions..... | 536 |
| 15-3:3 | Termination of Franchise Agreement | 538 |
| 15-3:3.1 | Notice..... | 538 |
| 15-3:3.2 | Permissible Termination and Nonrenewal | 540 |
| 15-3:3.3 | Additional Grounds for Permissible Nonrenewal | 546 |
| 15-3:4 | Standing and Remedies..... | 548 |
| 15-3:4.1 | Equitable Relief | 549 |
| 15-3:4.2 | Damages..... | 551 |

Table of Contents

| | |
|---|------------|
| Chapter 16: Computer Litigation | 553 |
| 16-1 INTRODUCTION..... | 553 |
| 16-2 PERSONAL JURISDICTION AND THE INTERNET..... | 554 |
| 16-2:1 Introduction | 554 |
| 16-2:2 Analysis of Personal Jurisdiction in New Jersey | 554 |
| 16-2:2.1 Broad Interpretation of Personal Jurisdiction..... | 559 |
| 16-2:2.2 Restrictive Interpretation of Personal Jurisdiction..... | 560 |
| 16-2:3 Internet Domain Name Disputes..... | 561 |
| 16-2:3.1 Use of .com in Name..... | 561 |
| 16-2:3.2 Cybersquatting | 562 |
| 16-2:3.3 Alternative Dispute Resolution..... | 564 |
| 16-2:4 Legal Tactics to Combat Internet Inventions | 565 |
| 16-2:4.1 Spamming..... | 565 |
| 16-2:4.2 Spyware and Phishing..... | 568 |
| 16-2:4.3 Blogs, Bulletin Boards and Social Media | 569 |
| 16-2:4.4 Pop-Up Ads..... | 572 |
| 16-3 COMPUTERS AND COPYRIGHT INFRINGEMENT | 573 |
| 16-3:1 Direct Infringement Enabled by Computers | 573 |
| 16-3:2 Digital Millennium Copyright Act of 1998..... | 574 |
| 16-3:3 Secondary Liability for Copyright Infringement..... | 575 |
| 16-4 STATUTES ADDRESSING UNAUTHORIZED COMPUTER ACCESS..... | 577 |
| 16-4:1 Federal Statutes | 577 |
| 16-4:1.1 Computer Fraud and Abuse Act..... | 577 |
| 16-4:1.2 Electronic Communications Privacy Act | 581 |
| 16-4:2 New Jersey Statutory Law..... | 582 |
| 16-4:2.1 Civil Liability for Computer-Related Offenses | 583 |
| 16-4:2.2 New Jersey Wiretapping and Electronic Surveillance Control Act..... | 584 |
| 16-5 TORTS IN THE COMPUTER CONTEXT | 587 |
| 16-5:1 Misrepresentation | 587 |
| 16-5:2 Trespass to Chattels | 588 |
| 16-5:2.1 Elements | 589 |
| 16-5:2.2 Trespass Claims Brought in Computer Context..... | 589 |
| 16-5:3 Consumer Fraud Act..... | 590 |

Table of Contents

| | | |
|---|--|------------|
| 16-5:4 | Product Liability..... | 592 |
| 16-5:5 | Malpractice..... | 592 |
| 16-5:6 | Insurance Coverage Disputes..... | 594 |
| 16-6 | ELECTRONIC DISCOVERY | 595 |
| Chapter 17: Construction Litigation..... | | 603 |
| 17-1 | INTRODUCTION..... | 603 |
| 17-2 | CONTRACT DOCUMENTS..... | 604 |
| 17-2:1 | Project Delivery Systems and Contract Documents | 604 |
| 17-2:2 | Project Delivery Systems..... | 604 |
| 17-2:3 | Design-Bid-Build | 604 |
| 17-2:4 | Design-Build Contracts | 605 |
| 17-2:5 | Construction Manager at Risk | 605 |
| 17-2:6 | Integrated Project Delivery | 606 |
| 17-2:7 | Engineer-Procurement-Construction | 606 |
| 17-2:8 | Standard Industry Contracts | 606 |
| 17-2:9 | Default/Termination | 607 |
| 17-2:10 | Termination | 607 |
| 17-3 | WARRANTIES | 609 |
| 17-3:1 | Express Warranties | 609 |
| 17-3:2 | Implied Warranties | 610 |
| 17-4 | ALTERNATIVE DISPUTE RESOLUTION (ADR) | 612 |
| 17-4:1 | Initial Decision Maker..... | 612 |
| 17-4:2 | Mediation | 613 |
| 17-4:3 | Arbitration | 613 |
| 17-4:4 | Change Orders..... | 614 |
| 17-4:5 | Construction Change Directives | 615 |
| 17-4:6 | Shop Drawings / Submittals..... | 615 |
| 17-5 | PAYMENTS..... | 616 |
| 17-5:1 | Payment Applications..... | 616 |
| 17-5:2 | Lien Waivers | 616 |
| 17-5:3 | No Damage for Delay Clause | 617 |
| 17-5:4 | Liquidated Damages..... | 617 |
| 17-5:5 | Pay-When-Paid vs. Pay-If-Paid | 618 |
| 17-5:6 | Prompt Payment Act | 619 |
| 17-5:7 | Construction Lien Claims – Residential / Commercial | 619 |
| 17-6 | PUBLIC WORKS CONTRACTING | 621 |
| 17-6:1 | Bidding and Bid Protests | 621 |
| 17-6:2 | Municipal Mechanics’ Liens | 623 |
| 17-6:3 | Bond Claims / Suretyship | 624 |

Table of Contents

| | | |
|--------|---|-----|
| 17-6:4 | “Little Miller” Act | 626 |
| 17-6:5 | Cardinal Change..... | 627 |
| 17-6:6 | Differing Site Conditions..... | 627 |
| 17-7 | EXPERTS / CLAIMS / DEFENSES / DAMAGES | 628 |
| 17-7:1 | Experts – Testifying | 628 |
| 17-7:2 | <i>Daubert v. Frye</i> | 629 |
| 17-7:3 | Non-Testifying Experts..... | 630 |
| 17-7:4 | Common Claims and Defenses | 631 |
| 17-7:5 | Violation of the New Jersey Consumer Fraud Act | 633 |
| 17-7:6 | Damages, Consequential, Compensatory, <i>525 Main St. Corp. v. Eagle Roofing Co.</i> | 634 |
| 17-7:7 | Affidavit of Merit / Ferreira Conference | 635 |
| 17-7:8 | Statute of Limitations and Statute of Repose | 636 |
| | 17-7:8.1 Statute of Limitations..... | 637 |
| | 17-7:8.2 Statute of Repose..... | 637 |
| 17-8 | INDEMNIFICATION AND INSURANCE | 638 |
| 17-8:1 | Indemnification..... | 638 |
| 17-8:2 | Evidence | 639 |
| 17-8:3 | Preservation and Spoliation | 640 |
| 17-8:4 | Artificial Intelligence and ChatGPT | 641 |
| 17-9 | RIGHTS AND OBLIGATIONS OF CONSTRUCTION PROFESSIONALS | 642 |
| 17-9:1 | The Construction Players..... | 642 |
| 17-9:2 | Relief For Contractual Breaches Is Generally Limited to Those in Privity | 643 |
| 17-9:3 | <i>Spearin</i> Doctrine..... | 645 |
| 17-9:4 | Economic Loss Doctrine | 646 |
| 17-9:5 | Regulatory Requirements – Architects and Engineers | 647 |
| | 17-9:5.1 Architects | 647 |
| | 17-9:5.2 Engineers | 648 |
| 17-9:6 | Building Codes | 649 |
| | 17-9:6.1 Code Violations and Construction Boards of Appeals | 650 |
| 17-9:7 | New Home Warranty and Builders’ Registration Act and Election of Remedies..... | 651 |
| 17-9:8 | Conclusion..... | 655 |

| | |
|---|----------------|
| Chapter 18: Arbitration | 657 |
| 18-1 INTRODUCTION..... | 657 |
| 18-2 ADVANTAGES AND DISADVANTAGES OF ARBITRATION..... | 658 |
| 18-2:1 Potential Advantages of Arbitration..... | 659 |
| 18-2:2 Potential Disadvantages of Arbitration | 660 |
| 18-2:3 The Nonapplicability of the Rules of Evidence | 660 |
| 18-3 THE ARBITRATION AGREEMENT AND ITS ENFORCEABILITY UNDER NEW JERSEY’S REVISED ACT..... | 661 |
| 18-4 DISPUTES REGARDING ARBITRABILITY UNDER NEW JERSEY’S REVISED ACT | 663 |
| 18-5 THE ARBITRATION PROCESS..... | 667 |
| 18-6 JUDICIAL REVIEW OF ARBITRATION AWARDS UNDER THE REVISED ACT..... | 672 |
| 18-6:1 Confirmation of Arbitration Awards..... | 672 |
| 18-6:2 Modification or Correction of Arbitration Awards | 673 |
| 18-6:3 Vacation of Arbitration Awards | 674 |
| 18-6:3.1 Standard of Review | 675 |
| 18-6:3.2 Arbitrators Exceeding their Authority | 677 |
| 18-6:4 Appellate Review From Trial Court Rulings | 678 |
| 18-7 THE FEDERAL ARBITRATION ACT | 678 |
| 18-7:1 Jurisdiction | 679 |
| 18-7:2 Arbitrability Determinations in Federal and State Court Under the Federal Arbitration Act | 681 |
| 18-7:3 Judicial Review of Arbitration Awards | 684 |
| Chapter 19: Employment Law Litigation | 687 |
| 19-1 INTRODUCTION..... | 687 |
| 19-2 THE NEW JERSEY LAW AGAINST DISCRIMINATION..... | 687 |
| 19-2:1 Overview..... | 687 |
| 19-2:2 Forms of Discrimination; Elements and Burdens of Proof | 689 |
| 19-2:2.1 Disparate Treatment | 689 |
| 19-2:2.2 Disparate Impact | 693 |
| 19-2:2.3 Unlawful Harassment | 695 |
| 19-2:2.4 Unlawful Retaliation..... | 698 |
| 19-2:2.5 Failure to Reasonably Accommodate | 699 |

Table of Contents

| | | |
|----------|---|-----|
| 19-2:3 | Enforcement | 703 |
| 19-2:3.1 | Procedure..... | 703 |
| 19-2:3.2 | Statute of Limitations..... | 705 |
| 19-2:4 | Remedies | 707 |
| 19-2:4.1 | Equitable Remedies..... | 707 |
| 19-2:4.2 | Damages..... | 708 |
| 19-2:4.3 | Mitigation of Damages..... | 710 |
| 19-2:4.4 | After-Acquired Evidence | 711 |
| 19-2:4.5 | Punitive Damages; Penalties | 711 |
| 19-2:4.6 | Attorney's Fees | 712 |
| 19-2:5 | Related Federal Laws..... | 713 |
| 19-2:5.1 | Title VII of the Civil Rights Act of 1964..... | 714 |
| 19-2:5.2 | Age Discrimination in Employment Act..... | 715 |
| 19-2:5.3 | Americans with Disabilities Act..... | 716 |
| 19-3 | CONSCIENTIOUS EMPLOYEE PROTECTION ACT | 718 |
| 19-3:1 | Overview..... | 718 |
| 19-3:2 | Elements of Claims; Burdens of Proof; Defenses..... | 720 |
| 19-3:3 | Enforcement | 724 |
| 19-3:3.1 | Statute of Limitations..... | 724 |
| 19-3:3.2 | The CEPA Waiver Provision | 724 |
| 19-3:4 | Remedies | 725 |
| 19-4 | FAMILY LEAVE LAWS | 727 |
| 19-4:1 | The New Jersey Family Leave Act | 727 |
| 19-4:2 | Paid Sick Leave Law | 728 |
| 19-4:3 | The Federal Family and Medical Leave Act..... | 728 |
| 19-4:4 | New Jersey Security and Financial Empowerment Act..... | 729 |
| 19-5 | COMMON LAW PUBLIC POLICY CLAIMS | 730 |
| 19-6 | EMPLOYMENT CONTRACTS | 732 |
| 19-6:1 | Overview..... | 732 |
| 19-6:2 | Express Contracts..... | 732 |
| 19-6:3 | Employee Handbooks..... | 733 |
| 19-6:4 | The Implied Covenant of Good Faith and Fair Dealing..... | 734 |
| 19-6:5 | Just Cause | 735 |
| 19-6:6 | Remedies | 736 |
| 19-6:7 | Nondisclosure Agreements | 736 |
| 19-7 | INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS | 737 |
| 19-7:1 | Overview..... | 737 |

Table of Contents

| | | |
|---|---|------------|
| 19-7:2 | Elements; Defenses | 737 |
| 19-7:3 | Damages | 739 |
| 19-8 | ARBITRATION OF EMPLOYMENT CLAIMS | 739 |
| Chapter 20: Limited Liability Companies..... | | 743 |
| 20-1 | INTRODUCTION..... | 743 |
| 20-2 | GOVERNING LAW | 744 |
| 20-2:1 | The Revised Uniform Limited Liability Company Act | 744 |
| 20-2:2 | The Operating Agreement..... | 745 |
| 20-3 | LIABILITY TO THIRD PARTIES | 747 |
| 20-3:1 | Liability of Members and Managers to Third Parties..... | 747 |
| 20-3:1.1 | Claims by Creditors for a Member's Failure to Make Promised Capital Contributions | 748 |
| 20-3:1.2 | Liability for Participation in Torts Committed by the Company..... | 749 |
| 20-3:1.3 | Piercing the Veil | 750 |
| 20-3:2 | Member's Ability to Bind LLC as Agent | 752 |
| 20-4 | MEMBER AND MANAGER LIABILITY | 753 |
| 20-4:1 | Fiduciary Duties..... | 753 |
| 20-4:1.1 | Member's Right to Information..... | 753 |
| 20-4:1.2 | Duty of Care | 755 |
| 20-4:1.3 | Duty of Loyalty..... | 756 |
| 20-4:1.4 | Members Owe Duties to LLC and to One Another | 757 |
| 20-4:2 | Liability for Improper Distributions | 758 |
| 20-4:3 | Derivative Actions | 759 |
| 20-4:4 | Indemnification..... | 760 |
| 20-5 | STATUS OF TRANSFEREES | 761 |
| 20-6 | DISSOCIATION AND DISSOLUTION | 763 |
| 20-6:1 | Events of Dissociation and Dissolution, Generally | 763 |
| 20-6:2 | Judicial Dissociation and Dissolution..... | 764 |
| 20-6:3 | Remedies Other Than Dissolution..... | 768 |
| 20-6:4 | Wrongful Dissociation | 769 |
| 20-6:5 | Rights of Dissociated Member | 770 |
| 20-7 | FOREIGN LLCs..... | 770 |
| 20-8 | CONVERSION OF LLCs INTO CORPORATIONS..... | 771 |

Table of Contents

| | |
|--|------------|
| Chapter 21: Lender Liability | 773 |
| 21-1 INTRODUCTION..... | 773 |
| 21-2 BREACH OF FIDUCIARY DUTY..... | 774 |
| 21-2:1 General Rule..... | 774 |
| 21-2:2 Fiduciary Duty Based on Control..... | 776 |
| 21-2:3 Fiduciary Duty Based on “Special Circumstances”..... | 777 |
| 21-3 COMMON LAW THEORIES OF TORTIOUS LIABILITY..... | 780 |
| 21-3:1 Fraud and Misrepresentation..... | 781 |
| 21-3:1.1 Elements..... | 781 |
| 21-3:1.2 Fraud/Misrepresentation in Lender Liability Actions..... | 783 |
| 21-3:1.3 Punitive Damages..... | 783 |
| 21-3:2 Duress..... | 784 |
| 21-3:3 Tortious Interference in Lender Liability Actions..... | 786 |
| 21-3:4 Negligence..... | 787 |
| 21-4 IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING..... | 790 |
| 21-5 LENDER LIABILITY FOR CONTAMINATED PROPERTY..... | 792 |
| 21-5:1 CERCLA..... | 793 |
| 21-5:1.1 Classes of “Potentially Responsible Parties”..... | 793 |
| 21-5:1.2 “Owner and Operator”/Secured Creditor Exemption..... | 794 |
| 21-5:1.3 “Participation in Management”..... | 794 |
| 21-5:2 Resource Conservation and Recovery Act..... | 796 |
| 21-5:3 New Jersey Spill Act..... | 796 |
| 21-5:3.1 Secured Creditor Exemption..... | 797 |
| 21-5:3.2 “Participation in Management”..... | 797 |
| Table of Cases | 801 |
| Index | 919 |