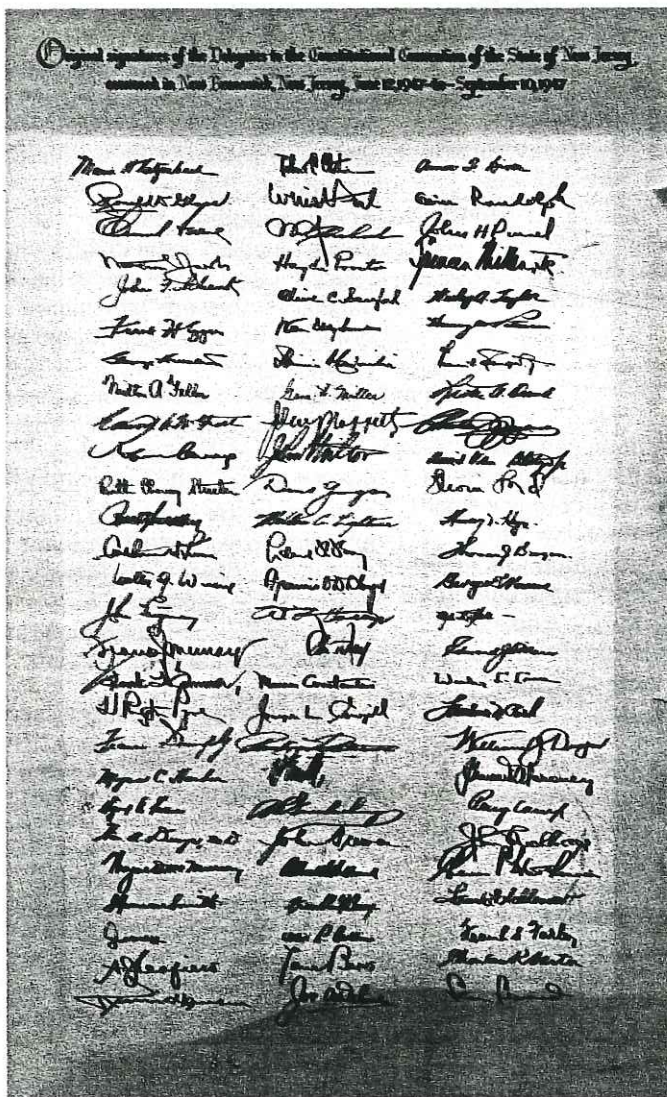


Civil Jury Trials Under the New Jersey Constitution

by Bruce D. Greenberg and Gary K. Wolinetz



The 1947 New Jersey Constitution provides that “[t]he right of trial by jury shall remain inviolate.”¹ The 1844 constitution contained similar language.² The 1776 New Jersey Constitution recognized that “the inestimable right of trial by jury shall remain confirmed, as part of the law of this colony, without repeal, forever.”³ Yet, despite this consistent constitutional mandate for jury trials, there has never been a right to a jury trial in all civil cases.⁴ In fact, New Jersey’s constitution has been construed to *preclude* jury trials in many civil cases.⁵

Two major features mark New Jersey's jury trial jurisprudence. First, New Jersey courts analyze the historical basis for the cause of action and the relief sought in order to determine whether or not the New Jersey Constitution calls for a jury trial in a particular case.⁶ Second, New Jersey's doctrine of ancillary equitable jurisdiction permits chancery courts, which historically have not employed juries, to adjudicate all germane claims, including purely legal claims that might otherwise be triable by jury, before a judge alone.⁷

This article provides an overview of those two constitutional doctrines. Finally, the New Jersey Supreme Court's recent decision to permit jury trials in marital tort cases, which represents a break from the historical reluctance to offer jury trials in the matrimonial context, will be discussed.⁸

Background

The Seventh Amendment to the United States Constitution preserves the right to trial by jury in federal court.⁹ That amendment, however, is not binding on the states.¹⁰ Accordingly, in New Jersey state courts, the right to trial by jury must arise either by statute or under the New Jersey Constitution.¹¹

Throughout history, none of New Jersey's constitutions spelled out which civil claims were triable to a jury. Resolution of that issue "depends in large measure on the traditional difference between law and equity."¹² Accordingly, the entitlement to a jury trial in New Jersey must focus on the development of the law and chancery courts.¹³

Like many states, New Jersey's legal system was premised upon English common law and equity principles.¹⁴ In keeping with England's judicial structure, New Jersey created separate chancery and law courts.¹⁵ Claims for money damages were litigated in the law courts (the former Supreme Court and court of common pleas) and complaints seeking equitable relief were decided in the chancery court.¹⁶ There was generally no right to jury trial in chancery.¹⁷

This dual court system, however, permitted cases to shuttle back and forth on jurisdictional grounds, resulting in intolerable delays.¹⁸ Ultimately, following heated debate,¹⁹ the 1947 constitution ended the complete separation of law and chancery by creating a unified superior court.²⁰ While the unified court system enabled the newly created Law and Chancery divisions to grant both legal and equitable relief, chancery's jurisdiction over primarily equitable cases continued.²¹

At first glance, the 1947 constitution endorsed a contradiction by retaining a separate Chancery Division. While Article I, Section 9 of the constitution preserved jury trial rights as "inviolable,"²² the constitution also created a unified court system where jury trials are theoretically available in both the law and chancery divisions.²³ In reality, however, jury trials are "virtually non-existent" in the Chancery Division²⁴ even though Chancery Division judges routinely adjudicate legal claims involving significant sums of money.²⁵

The Historical/Remedy Test

In general, absent an express statutory right to a jury trial, a party is entitled to a trial by jury only if that right existed at common law when the New Jersey Constitution was adopted.²⁶ Specifically, courts analyze the *historical* basis for the cause of action and the relief sought to determine whether or not a particular claim is triable to a jury.²⁷ The source of the remedy, however, either legal or equitable, is the key factor.²⁸

New Jersey courts have applied the historical/remedy analysis to deny a jury trial in many civil actions.²⁹ Perhaps the most significant was *Boardwalk Properties v. BPHC*.³⁰ There, in direct contradiction to decisions under the federal antitrust laws, the Appellate Division held that there is no right to trial by jury under the New Jersey Antitrust Act.³¹ Applying the historical/remedy test, the Appellate Division rejected the idea that the act had roots in claims that had been tried to a jury at common law.³² The court observed that the remedies under the act were predominantly equitable despite the

availability of treble damages.³³ The Appellate Division emphasized that the absence of a jury trial right in the act was inconsistent with the "Legislature's practice of expressly providing for jury trials when such is intended."³⁴

Boardwalk makes clear that New Jersey will not hesitate to deny a party a jury trial, even in the face of contrary federal practice, when the New Jersey Constitution's historical/remedy test so dictates. The greatest impact on jury trial rights in the state, however, is through chancery's historic exercise of ancillary equitable jurisdiction.

Ancillary Equitable Jurisdiction

In 1793, our former Supreme Court noted that "[t]he Chancery, Prerogative and Spiritual courts have always proceeded without the intervention of a jury."³⁵ Even before the 1776 constitution, chancery could decide ancillary legal claims without a jury.³⁶ Legal issues are considered ancillary if they are "germane to or grow out of the subject matter of the equitable jurisdiction."³⁷

The 1947 constitution "was not intended as a grant, enlargement or restriction of the right of trial by jury."³⁸ Accordingly, the right to a jury trial is still subject to chancery's jurisdiction over ancillary legal claims.³⁹ In *Fleischer v. James Drug Stores*,⁴⁰ the Supreme Court explained the fundamental nature of ancillary equitable jurisdiction:

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 jurisdiction⁴¹

Despite the existence of counterclaims seeking substantial damages, New Jersey courts have repeatedly denied jury trials in primarily equitable cases under the doctrine of ancillary jurisdiction.⁴² Even where subsequent events have rendered

equitable relief unnecessary or inappropriate, New Jersey courts have consistently rejected attempts to divest the Chancery Division of the jurisdiction to decide the remaining legal claims without a jury.⁴³ Courts have also denied jury trials where parties have asserted that they were compelled under the entire controversy doctrine to bring traditional legal counterclaims normally triable to a jury in the Chancery Division where, under the doctrine of ancillary jurisdiction, they were not entitled to a jury.⁴⁴

Boardwalk and another recent case, *Lyn-Anna Properties Ltd. v. Harborview Development Corp.*,⁴⁵ highlight these principles. In *Boardwalk*, the plaintiffs filed suit for specific performance of several contracts requiring the defendants to convey certain properties in Atlantic City.⁴⁶ The defendants filed a counterclaim and third-party complaint seeking equitable relief and asserting numerous damage claims, including claims under the New Jersey Antitrust Act against both the plaintiffs and Donald Trump.⁴⁷ The defendants alleged that their antitrust damages totaled \$700 million.⁴⁸

The defendants demanded a jury trial, claiming, among other things, that the combination of ancillary jurisdiction and the entire controversy doctrine compelled them to bring their legal claims in the Chancery Division without a jury.⁴⁹ Judge L. Anthony Gibson rejected the jury demand, concluding that even a potential huge antitrust claim was ancillary to a prayer for specific performance and other equitable relief.⁵⁰ Thereafter, the defendants strategically amended their pleadings to strike all prayers for equitable relief, and consented to transfer the disputed properties to eliminate the plaintiffs' claims for specific performance.⁵¹ The defendants then asked for trial by jury or, in the alternative, transfer to the Law Division for a jury trial.⁵²

Though Judge Gibson acknowledged that the case had become primarily legal in nature, he again denied the defendants' motion.⁵³ Instead, he held that a party's right to a jury trial must be determined as of the beginning of the case, before

any procedural maneuvering during the litigation.⁵⁴

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 at 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.⁵⁵

The Appellate Division also rejected the defendants' argument that they were denied a jury trial because of the entire controversy doctrine.⁵⁶ According to the court, the entire controversy doctrine had existed prior to the 1947 constitution; thus, the framers were aware that it could have been applied in conjunction with the doctrine of ancillary equitable jurisdiction.⁵⁷

Boardwalk showed that a potentially large counterclaim may be considered ancillary to a prayer for equitable relief, even if the original basis for the equitable relief no longer exists. The New Jersey Supreme Court reaffirmed the continued vitality of ancillary equitable jurisdiction in its 1996 decision in *Lyn-Anna*.

In *Lyn-Anna*, the plaintiffs sued their partners in a failed real estate development project, seeking damages and equitable relief.⁵⁸ Though the plaintiffs had brought the case in the Chancery Division, thereby recognizing under the Court Rules that the case was primarily equitable,⁵⁹ they demanded a jury trial.⁶⁰ The defendants, compelled to do so by the entire controversy doctrine, filed a legal counterclaim, which included a claim for legal malpractice, and also demanded a jury.⁶¹

Judge Dorothea Wefing denied the defendants' motion for a jury trial.⁶² The Appellate Division affirmed, concluding that the counterclaim was ancillary to the plaintiff's equitable claims.⁶³

In a scholarly opinion by Justice Daniel J. O'Hern, which reviewed the history of ancillary equitable jurisdiction, the Supreme Court also affirmed.⁶⁴ The Court rejected the

defendants' argument that New Jersey should follow federal precedent that a party retains its right to a jury trial on the legal issues if legal and equitable issues are presented in a single case.⁶⁵ The Court explained that New Jersey had long recognized that chancery had jurisdiction to resolve legal counterclaims and, as a practical matter, principles of collateral estoppel would have compelled the defendants to assert their legal claims in the chancery action.⁶⁶

The Court also rebuffed the defendants' assertion that the doctrine of ancillary equitable jurisdiction should be reversed or modified in light of the evolving entire controversy doctrine.⁶⁷ The Court stated that ancillary equitable jurisdiction and entire controversy are really "two sides of the same coin" because they both require parties to litigate all claims in a single proceeding.⁶⁸ Analyzing the facts in *Lyn-Anna*, the Court concluded that the "initial core of the controversy centered on the fiduciary duties of the parties."⁶⁹ Because such issues had historically been the province of chancery, a jury trial was unnecessary.⁷⁰

Ultimately, the lesson of *Lyn-Anna* and *Boardwalk* is "if it ain't broke, don't fix it." Under our system of federalism, New Jersey is free to chart its own course regarding jury trials under its constitution. New Jersey has done so by maintaining a thriving Chancery Division where the doctrine of ancillary jurisdiction effectively precludes jury trials. As the Supreme Court summarized it in *Lyn-Anna*:

The nearly fifty years of experience since the adoption of the Constitution of 1947 convince us that the historic doctrine of ancillary jurisdiction has been working well and that this discretionary jurisdiction can continue to be reposed in our chancellors. Those "courts of conscience" guard at once the right to trial by jury and the right to an equitable action when a remedy at law might be inadequate.⁷¹

Marital Torts

The Supreme Court recently created a partial exception to the doctrine of ancillary equitable jurisdiction. On the same day that it decided *Lyn-Anna*, the Court ruled in

*Brennan v. Orban*⁷² that a marital tort case (in which a spouse joins a tort claim against his or her spouse with a divorce claim as required by the entire controversy doctrine) could be tried to a jury despite the effect of ancillary equitable jurisdiction.

Brennan reiterated that parties were required to assert marital tort claims in divorce cases rather than in separate actions.⁷³

The Supreme Court directed trial courts to consider whether “issues of child welfare, child support and child parenting are intertwined with dissolution of the marriage and the necessary resolution of the marital tort,”⁷⁴ or whether “society’s interest in vindicating a marital tort through the jury process is the dominant interest in the matter.”⁷⁵ If the former is true, no jury trial will be provided, but if the latter is true, then those cases will be tried to a jury. It remains to be seen, however, how *Brennan* will affect marital torts or jury trial rights outside that limited context.

Conclusion

The New Jersey Constitution embodies jury trial rules that are unique to this state. Practitioners who wish to invoke or avoid jury trials should become familiar with New Jersey’s special rules. ☺

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Endnotes

1. N.J. Const. Art. I, sec. 9.
2. N.J. Const. of 1844, Art. I, sec. 7.
3. N.J. Const. of 1776, Art. XXII.
4. *Lyn-Anna Properties, Ltd. v. Harborview Development Corp.*, 145 N.J. 313, 318-33 (1996).
5. See generally, Bruce D. Greenberg and Gary K. Wolinetz, *The Right to a Civil Jury Trial in New Jersey*, 47 Rutgers L. Rev. 1461 (1995) (“Greenberg and Wolinetz”).
6. *Shaner v. Horizon Bancorp.*, 116 N.J. 433, 447, 450-51 (1989).
7. *Boardwalk Properties v. BPHC*, 253 N.J. Super. 515, 526-28 (App. Div. 1991).
8. *Brennan v. Orban*, 145 N.J. 282 (1996).
9. U.S. Const. amend. VII.
10. *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916); *In re Livolsi*, 85 N.J. 576, 587 n.7 (1981).
11. *Brennan*, at 291-92.
12. *State v. Anderson*, 127 N.J. 191, 207 (1992).
13. *Supra* note 5, at 1466-69.
14. Richard N. Baisden, *Charter for New Jersey: The New Jersey Constitutional Convention of 1947*, 43 (1952).
15. Edward B. McConnell, *A Brief History of the New Jersey Courts*, 7 N.J. Dig. 349, 350-51 (1954).
16. *Pridmore v. Steneck*, 122 N.J. Eq. 35, 37 (E. & A. 1937); Baisden, *supra* note 14, at 43.
17. *Wood v. Tallman*, 1 N.J.L. 177, 183 (Sup. 1793) (“The Chancery, Prerogative and Spiritual courts have always proceeded without the intervention of a jury”); Schnitzer & Wildstein, *New Jersey Rules Service 1260* (1958) (“The practice of hearing Chancery causes without a jury is almost as old and certainly as well established [as the right to trial by jury]”).
18. *O’Neill v. Vreeland*, 6 N.J. 158, 169 (1951); Committee on the Judiciary Report. Constitutional Convention of 1947 1184-86 (collecting cases involving jurisdictional disputes between Law and Chancery).
19. *Lyn-Anna*, at 326-28; Baisden, *supra* note 14, at 43-56.
20. N.J. Const. Art. VI, sec. 3, para. 3; *Lyn-Anna*, at 326-28.
21. *O’Neill*, at 165.
22. N.J. Const. Art. I, sec. 9.
23. N.J. Const. Art. VI, sec. 3, para. 3; *O’Neill*, at 168.
24. William A. Dreier and Paul A. Rowe, *Guidebook to Chancery Practice in New Jersey 151* (1997). Other than the rare use of advisory juries, see B. 4:35-2, no reported case in the Chancery Division was ever tried to a jury.
25. See, e.g., *Boardwalk*, 253 N.J. Super. at 523-24 (antitrust/RICO counterclaim seeking two billion dollars in damages).
26. *Shaner v. Horizon Bancorp.*, *supra* note 6, at 447. While the Supreme Court of New Jersey has not held which constitution serves as the benchmark for this inquiry, the grant or denial of a jury trial has not turned on the application of one constitution over another. Greenberg and Wolinetz at 1469 n.34.
27. *Id.* at 447, 450-51.
28. *Weinisch v. Sawyer*, 123 N.J. 333, 343 (1991).
29. *Supra* note 5, at 1470 n.38 (citing cases).
30. 253 N.J. Super. 515 (App. Div. 1991).
31. N.J.S.A. 56:9-1 *et seq.*
32. *Boardwalk*, *supra* note 7, at 530.
33. *Id.*
34. *Id.* at 529
35. *Wood*, *supra* note 17, at 183.
36. *Mantell v. International Plastic Harmonica Corp.*, 141 N.J. Eq. 379, 393 (E. & A. 1947).
37. *Fleischer v. James Drug Stores*, 1 N.J. 138, 150 (1948).
38. *Lyn-Anna*, *supra* note 4, at 328, quoting *Kugler v. Banner Pontiac-Buick Opel, Inc.*, 120 N.J. Super. 572, 581 (Ch. Div. 1972).
39. *Fleischer*, 1 N.J. at 150.
40. 1 N.J. 138 (1948).
41. *Id.* at 150.
42. *Supra* at 1473-78.
43. See, e.g., *O’Neill*, at 166; *Mantell*, at 393.
44. *Lyn-Anna*, at 332-33; *Boardwalk*, 253 N.J. Super. at 524-25.
45. 145 N.J. 313 (1996).
46. *Boardwalk*, at 521-22.
47. *Id.* at 523.
48. *Id.* at 523-24.
49. *Id.*
50. Judge Gibson also concluded that the defendants were not entitled to a jury trial under the New Jersey Antitrust Act. *Id.* at 528-29. For further discussion of that issue, see Bruce D. Greenberg and Gary K. Wolinetz, “25 Years of the New Jersey Antitrust Act,” 26 *Seton Hall L. Rev.* 637, 664-65 (1996).
51. *Boardwalk*, at 522
52. *Id.*
53. *Id.* at 523.
54. *Id.*
55. *Id.* at 527-28, quoting *Middlesex Concrete Prods. Excavating Corp. v. Northern State Improvement Co.*, 129 N.J. Eq. 314, 316-17 (E. & A. 1940).
56. *Id.* at 528.
57. *Id.* at 525.
58. *Lyn-Anna*, *supra* note 4, at 317.
59. R. 4:3-1.
60. *Lyn-Anna*, 145 N.J. at 317.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 318-33.
65. *Id.* at 324-33. For the federal rule, see *Dairy Queen v. Wood*, 369 U.S. 469, 470 (1962); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 508-09 (1959).
66. *Id.* at 32.
67. *Id.* at 329-33.
68. *Id.* at 329, quoting *National Bank v. Stonebridge Ltd.*, 185 N.J. Super. 289, 312 (Ch. Div. 1982).
69. *Id.* at 329.
70. *Id.* at 328.
71. *Id.* at 333.
72. 145 N.J. 282 (1996).
73. *Id.* at 290-91.
74. *Id.* at 301.
75. *Id.* at 302.