THE ENTIRE CONTROVERSY DOCTRINE: A NOVEL APPROACH TO JUDICIAL EFFICIENCY

INTRODUCTION

Although New Jersey enjoys a judiciary willing to address novel and difficult issues on their merits, her courts enforce an unusual procedural rule called the "entire controversy doctrine" that can bar litigants from a hearing. With the exception of Professor Morris M. Schnitzer[1] and Judge Sylvia B. Pressler,[2] few commentators have written on the rule. It has evolved through common law but has been incorporated into New Jersey's court rules only since 1979.[3] Unfamiliarity with the doctrine has resulted in surprising some legal practitioners and an occasional judge.

This comment attempts to clarify this important procedural doctrine and show that despite the hardships during its formulation, consistent, uniform use should effect significant judicial economies. It will examine the rule's early history in light of its original mission to facilitate the development of a unitary judicial system in New Jersey. Furthermore, the technical operation of the doctrine and its exceptions will be delineated. Finally, the growth in other jurisdictions of similar principles and their future will be explored.

SOURCES OF THE DOCTRINE

Single Court Policy

The modern entire controversy doctrine is comprised of two related but distinct branches. One generally prohibits the adjudication of disputes in more than one court. The other requires all parties to litigation to bring their claims and causes of action in one proceeding.[4]

The most direct antecedent of the first branch is the merger of New Jersey's law and equity courts in article VI of the New Jersey Constitution of 1947.[5] This article created a single court of "original

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[1] *See* 2 M. SCHNITZER & J. WILDSTEIN, NEW JERSEY RULES SERVICE A IV-933-41 (1954); Schnitzer, *Justice Nathan L. Jacobs—Architect of New Jersey's Court Structure and Judicial Exponent of Civil Procedure*, 28 RUTGERS L. REV. 226, 231-35 (1974); Schnitzer, *Civil Practice and Procedure*, 11 RUTGERS L. REV. 363, 382-84 (1956); Schnitzer, *Civil Practice and Procedure*, 10 RUTGERS L. REV. 351, 371-73 (1955); Schnitzer, *Civil Practice and Procedure*, 9 RUTGERS L. REV. 307, 334-35 (1954).

[2] N.J. CT. R. 4:27-1, Comment J.

[3] *Id.* 4:27-1(b).

[4] Although the term "claim" is broader than "cause of action," in this comment they are used interchangeably to avoid repetition.

[5] N.J. CONST. art. VI, § 3, para. 2.

general jurisdiction," the Superior Court of New Jersey, which included law and chancery divisions, out of a welter of specialized tribunals of limited jurisdiction that sometimes required a complainant to proceed in two or more forums to resolve a single case.[6] The new constitution clearly set forth the principle that each trial division should exercise all powers, whether equitable or legal, "so that all matters in controversy between the parties may be completely determined."[7] The late Chief Justice Arthur T. Vanderbilt, as well as other legal scholars, considered the primary motivation behind the court reformation to be the promotion of speed and efficiency in court administration.[8]

Another basis of the first branch of the entire controversy doctrine is the equitable principle that once a court of chancery has properly obtained jurisdiction, it can proceed to decide even purely legal aspects of a controversy.[9] This question specifically arose in *Carlisle v. Cooper*,[10] where the New Jersey court of last resort upheld the judgment of a chancery trial judge settling a legal issue. The court ruled that both law and equity courts had concurrent jurisdiction over

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[6] *Id.* Other specialized courts such as the court of oyer and terminer and the prerogative court were also consolidated. For a description of the functioning of the unconsolidated court system, see C. HARTSHORNE, COURTS AND PROCEDURE IN ENGLAND AND NEW JERSEY 5 (1905) (New Jersey's "system of courts at present is the most antiquated and intricate that exists in any considerable community of the English-speaking people"). Two cases requiring multiple litigation of the same controversy were: Delaware, Lackawanna & W. R.R. v. Breckenridge, 55 N.J. Eq. 141, 35 A. 756 (Ch. 1896), *aff'd per curiam*, 55 N.J. Eq. 593, 39 A. 1114 (1897) (suit for injunction held in abeyance pending action at law to decide land title) and Weber v. L. G. Trucking Corp., 140 N.J. Eq. 96, 52 A.2d 39 (1947) (counsel could not consent to litigate equitable matter in law courts).

The third division of the superior court, the appellate division, functions as an intermediate appeals court. *See* N.J. CONST. art. VI, § 5, para. 2; N.J. CT. R. 2:2-3(a). It has become customary in New Jersey to refer to the three superior court divisions without reference to "superior court." Unless otherwise indicated, that practice is followed here.

[7] N.J. CONST. art. VI, § 3, para. 4. *See also* 2 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, COMMITTEE ON THE JUDICIARY REPORT § II(J), at 1182 (1947). The report states that "the dual court structure [of law and equity] necessarily entails fractional and multiple litigation of the same controversy." *Id.* The report further asserted: "However, each controversy will be decided fully in all its aspects by the Judge before whom it comes, and no case will be shuttled between courts for piecemeal decision." *Id.* at 1187.

[8] *See, e.g.*, Vanderbilt, *The First Five Years of the New Jersey Courts under the Constitution of 1947*, 8 RUTGERS L. REV. 289, 289-95 (1954); Vanderbilt, *Judicial Administration in New Jersey Steps Ahead*, 30 MICH. ST. B.J., 24, 25-27 (1951); Vanderbilt, *The Modernization of the Law*, 36 CORNELL L.Q. 433, 440-41 (1951). *See also* note 7 *supra*.

[9] J. EATON, HANDBOOK OF EQUITY JURISPRUDENCE § 10, at 39 (1901). This principle was not limitless, for if an equity court were granted "special power" by the legislature to resolve an issue, the court could be held to be unable to go beyond the issue into the legal area. J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 233 (5th ed. 1941).

[10] 21 N.J. Eq. 576 (1870), *aff'g* 19 N.J. Eq. 256 (Ch. 1868).

these claims, and in dictum commented that the equity courts could interfere with nuisance actions brought in law courts "on the ground of restraining irreparable mischief, or of suppressing interminable litigation, or of preventing [a] multiplicity of suits."[11]

The newly constituted Supreme Court of New Jersey quickly commenced to eradicate the vestiges of the previous system. In the 1949 case of *Steiner v. Stein*,[12] an action was begun in the defunct court of chancery prior to the advent of the unified court structure and was automatically transferred to the chancery division of the new superior court.[13] Because all equitable aspects of the action had been resolved, the chancery division judge ordered transfer of the case to the law division.[14] The supreme court reversed, holding that once a case is properly brought in the chancery division it should remain there for final resolution even if all equitable issues have been settled.[15] The court reasoned that the equitable principle requiring full adjudication of even legal issues and the mandate of article VI of the 1947 Constitution prohibited such fragmented litigation.[16] The state high court explained that the attorney bringing a claim first must determine whether the action is primarily legal or equitable and then file his claim in the appropriate division.[17] Subsequently, the *Steiner* decision was extended to require consideration by the law division of a case in which all but equitable issues had been resolved.[18]

The concurrence of jurisdiction between lower courts and the superior court has engendered thorny procedural conflicts, and the

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[11] *Id.* at 579.

[12] 2 N.J. 367, 66 A.2d 719 (1949).

[13] *Id.* at 370-71, 66 A.2d at 720.

[14] *Id.* at 371, 66 A.2d at 621.

[15] *Id.* at 378, 66 A.2d at 724.

[16] *Id.* at 373-76, 378-80, 66 A.2d at 721-22, 724-25. The *Steiner* court in part relied upon Fleischer v. James Drug Stores, 1 N.J. 138, 150, 62 A.2d 383, 389 (1948), which had invoked the equitable principle that chancery courts may settle all issues if their jurisdiction were proper "and proceed to a final determination of the entire controversy."

[17] 2 N.J. at 377, 66 A.2d at 724.

[18] O'Neill v. Vreeland, 6 N.J. 158, 77 A.2d 899 (1951). Though the New Jersey courts consistently have applied the *Steiner* decision and its progeny, litigation over transfers between superior court trial divisions persists. Where a chancery division judge transferred the legal aspects of a controversy to the law division, the appellate division reversed, ordering the chancery division to decide all claims. Rego Indus., Inc. v. American Model Metals Corp., 94 N.J. Super. 447, 454, 221 A.2d 35, 39 (App. Div. 1966). Later, in Government Employees Ins. Co. v. Butler, 128 N.J. Super. 492, 320 A.2d 515 (Ch. Div. 1974), a chancery division judge employed the entire controversy doctrine to relieve his court of the burden of hearing all actions for declaratory relief in advance of trial, ruling that such requests be made in the division in which the main case is to be brought. *Id.* at 497, 320 A.2d at 518. *But see* The May Stores v. Hartz Mountain-Free Zone Center, 162 N.J. Super. 130, 392 A.2d 251 (Ch. Div. 1978) (*Steiner* did not absolutely require that an action stay in original division where brought).

entire controversy doctrine has been applied to require one level to hear the whole case. Sometimes, it has been held to bar superior court consideration of certain claims concomitant to those of a case pending before a lower court with concurrent jurisdiction. For example, in *Tumarkin v. Friedman*,[19] where a party sued for damages in the law division of a county court, and the defendant filed an interpleader action in the chancery division of the superior court to obtain an injunction prohibiting the plaintiff from prosecuting his county court case, Justice Nathan L. Jacobs, then of the appellate division, held that the county court was vested with full authority to hear the dispute. Justice Jacobs considered it inappropriate for the superior court to hear only a portion of a larger controversy,[20] since full relief could have been accorded in the lower forum.[21] Moreover, the power of lower courts with concurrent jurisdiction to hear a case in its entirety has been applied to probate matters,[22] actions in the nature of interpleader,[23] and certain statutorily-created causes of action with monetary amounts exceeding the jurisdictional limits of the court designated to hear such actions.[24]

At other times, however, the controversy has been consolidated from the lower to the superior court, such as in disputes between executors over the right to administer an estate.[25] Furthermore, if a counterclaim exceeds the jurisdictional maximum of a county district court, a transfer of the whole action to the superior court may be compelled to settle "at one time and place . . . all matters in controversy between the parties."[26]

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[19] 17 N.J. Super. 20, 27, 85 A.2d 304, 307 (App. Div. 1951).

[20] *Id.* at 23, 85 A.2d at 306.

[21] *Id.* at 25, 26, 85 A.2d at 307. Justice Jacobs seemed impatient over the lack of complete acceptance of the entire controversy doctrine when he wrote: "It is said that lawyers and even great judges display reluctance 'to let the past go.'" *Id.* at 26, 85 A.2d at 307.

[22] *In re* Opper's Estate, 29 N.J. Super. 520, 524-25, 103 A.2d 19, 21 (App. Div. 1954) (absent "special circumstances" superior court should not interfere with county or surrogate's court).

[23] Sciarrotta v. Vitellaro, 43 N.J. Super. 32, 127 A.2d 574 (App. Div. 1956). After plaintiff sued in the county court, the defendant brought an action in the nature of interpleader in the superior court. *Id.* at 33, 127 A.2d at 575. The superior court dismissed the interpleader action on the original plaintiff's motion. *Id.* The appellate division affirmed, although it declared that transfer of the case was preferable to dismissal. *Id.* at 34, 127 A.2d at 575.

[24] Kingsley v. Wes Outdoor Advertising Co., 106 N.J. Super. 248, 252, 254 A.2d 824, 826 (Ocean County Ct. 1969), *aff'd*, 55 N.J. 336, 262 A.2d 193 (1970) (court with jurisdictional limit of $1,000 permitted itself to hear action by state to impose civil penalty totaling thousands of dollars). *See also* Kugler v. Romain, 110 N.J. Super. 470, 486-87, 266 A.2d 144, 153 (Ch. Div. 1970), *modified on other grounds*, 58 N.J. 522, 279 A.2d 640 (1971) (allowing superior court to order fines under statute granting jurisdiction to county district and municipal courts).

[25] Donnelly v. Ritzendollar, 14 N.J. 96, 101 A.2d 1 (1953) (transfer of probate action to chancery division after fraud complaint filed there upheld); *In re* McFeely's Estate, 8 N.J. 9, 83 A.2d 524 (1951) (according chancery division probate jurisdiction in certain circumstances).

[26] Ritepoint Co. v. Felt, 6 N.J. Super. 219, 222, 70 A.2d 886, 887 (App. Div. 1951). The *Ritepoint* court also invoked N.J. Ct. R. 7:6-1(b) (1948), currently N.J. Ct. R. 6:4-1(c), provid-

It is clear that the entire controversy doctrine bars concurrent consideration of the same controversy in both superior and lower courts; however, without direct precedent it is difficult to predict which court would be directed to hear all claims arising from the same controversy filed in the separate levels. Some insight, nevertheless, may be gleaned from *Curley v. Curley*,[27] which involved claims on the same matter brought in both the superior court and a juvenile and domestic relations court. A divorced couple cohabitated, and the erstwhile wife gave birth to a child. She sued for its support in the juvenile and domestic relations court. Despite a judgment in her favor, she subsequently brought an action in superior court for support for the child, two previous children of the marriage, and herself.[28] She won an order for support and her former husband appealed. The appellate division decided that the former wife's support claim could be heard only in the superior court, not a juvenile and domestic relations court, while the claim for the child born out-of-wedlock was cognizable only in juvenile and domestic relations court, not the superior court. The cause of action for the children born by the marriage could be determined in both courts.[29] Invoking the superior court's constitutional power to settle the entire controversy, the appellate division found that the support claim for the child born after the divorce should be determined in a single superior court proceeding.[30] Thus, under the entire controversy doctrine, a cause of action not normally within a court's jurisdiction can be attached to related actions constituting the major portion of the complaint. The entire controversy doctrine's first branch has recently been extended to require that the appellate division hear portions of a controversy normally adjudicated in the juvenile and domestic relations court[31]

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ing for removal to a superior court if the counterclaim exceeds the jurisdictional amount of the county district court.

[27] 37 N.J. Super. 351, 117 A.2d 407 (App. Div. 1955).

[28] *Id.* at 355-57, 117 A.2d at 409-10. The plaintiff apparently wanted more money than was awarded in the lower court. *See* Curley v. Curley, 34 N.J. Super. 257, 258, 112 A.2d 20, 21 (Ch. Div.), *modified on other grounds*, 37 N.J. Super. 351, 117 A.2d 407 (App. Div. 1955).

[29] 37 N.J. Super. at 356-57, 117 A.2d at 410-11. The court based its holding on Borawick v. Barba, 7 N.J. 393, 81 A.2d 766 (1951).

[30] 37 N.J. Super. at 361, 117 A.2d at 413.

[31] Pascucci v. Vagott, 71 N.J. 40, 361 A.2d 566 (1976). The New Jersey Supreme Court held that under the entire controversy doctrine and N.J. Ct. R. 2:10-5 (according to which appellate division has original jurisdiction necessary to completely determine matter), the appellate division should decide an issue normally heard in the juvenile and domestic relations court. *See also* Doe v. State, 165 N.J. Super. 392, 398 A.2d 562 (App. Div. 1979) (in addition to deciding validity of administrative regulation, appellate division should decide issue of parent's psychological fitness to care for child).

and to allow one chancery division judge to modify the alimony and support award of another.[32]

Joinder of Claims Rule

Although also rooted in the Constitution of 1947, the second branch of the entire controversy doctrine, requiring joinder of claims, is derived from additional precepts. First is the traditional rule against splitting a single cause of action. The principle is simple: if a party fails to assert all aspects of a single cause of action in a proceeding where there is a final determination on the merits, the doctrine of res judicata precludes him from raising any excluded claims later.[33] In *Stark v. Starr*,[34] the Supreme Court of the United States reasoned that if grounds for relief were allowed to be brought "piecemeal," "[t]here would be no end to litigation."[35] Other decisions concerning res judicata have emphasized the need for judicial economy to avoid protracted litigation[36] and the social aim of preventing strife among individuals by having a final adjudication.[37] Thus, in the narrow context of barring fragments of a cause of action from being relitigated, other courts had created much of the rationale for the entire controversy doctrine. Another basis for the joinder of claims aspect of the doctrine is the equitable rule that a chancery court could obtain jurisdiction to prevent a multiplicity of legal actions.[38]

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[32] Sabini v. Sabini, 159 N.J. Super. 93, 386 A.2d 1375 (App. Div. 1978). Curiously, the appellate division said that "all aspects of a controversy should be settled in a single legal proceeding." *Id.* at 99, 386 A.2d at 1377. Inasmuch as there was no contention by counsel that the litigation should be fragmented among counties or courts, or that suits to modify alimony and support judgments were finite, the *Sabini* court must have been suggesting that once a party choses a forum, the policy of avoiding multiple litigation in part precludes that party from attacking the validity of the forum.

[33] *See, e.g.*, A. VESTAL, RES JUDICATA/PRECLUSION V-43 (1969). In the language of the New Jersey Court of Errors and Appeals, "[n]o principle of law is more firmly established than that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon." Smith v. Red Top Taxicab Corp., 111 N.J.L. 439, 440-41, 168 A. 796, 797 (1933). *See also* Stark v. Starr, 94 U.S. 477, 485 (1877). Though easily stated, the rule is exceedingly difficult to apply, for it is impossible to finally define what constitutes a "single cause of action." *See* 2 A. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 678, at 1433 (5th ed., L. Tuttle rev. 1925); Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 28 S.C. L. Rev. 451, 453-54 (1977).

[34] 94 U.S. 477 (1876).

[35] *Id.* at 485.

[36] Commonwealth v. Kelly, 287 Pa. 139, 145, 134 A. 514, 516 (1926).

[37] State Hosp. v. Consolidated Water Supply Co., 267 Pa. 29, 38, 110 A. 281, 283 (1920).

[38] J. EATON, *supra* note 9, § 9, at 35. The language of the time was remarkably similar to that used by New Jersey courts when examining the entire controversy doctrine: "It is the inadequacy of the law to combine and adjust manifold and adverse claims and interests which gives rise to the jurisdiction of equity to settle and dispose of the whole controversy in a single proceeding, and thus prevent a multiplicity of suits." *Id.* at 36-37.

A further foundation for the joinder of claims rule is the simplification of pleading procedures by state codes commencing with the New York Code of 1848.[39] These codes consolidated the multiple forms of specialized actions into a single form—the civil action.[40] For New Jersey law courts, the Practice Act of 1912[41] contained many liberalized provisions, such as joinder of separate causes of action,[42] different parties,[43] and the creation of a single form of civil action.[44] Significantly, the Act permitted amendments to pleadings so "that the court may completely and finally hear and determine the whole matter in controversy between the parties."[45]

In 1920, in *Metropolitan Casualty Insurance Co. v. Lehigh Valley Railroad*,[46] the New Jersey Court of Errors and Appeals applied the Act to uphold a trial court's consolidation of twelve cases for injuries and damages arising from the mysterious 1916 "Black Tom Explosion" in Jersey City. The state high court cited the rules which required speedy and final determination of legal controversies and which permitted the joinder of several causes of action against single or multiple defendants if they "arose out of the same transaction or series of transactions."[47] By the 1950's, bringing separate claims against a party was incontrovertibly permissible.[48]

A final source for the entire controversy doctrine's joinder of claims rule may be found in an occasional out-of-state opinion alluding to the "controversy" as the fundamental unit of litigation. These

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[39] C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 24 (2d ed. 1947). The New York Code of 1848, 1848 N.Y. Laws, c. 379, is also known as the "Field Code" after one of its progenitors. C. CLARK, *supra* at 21-22.

[40] C. CLARK, *supra* note 39, at 81.

[41] 1912 N.J. Laws, c. 231.

[42] *Id.* paras. 6 & 11.

[43] *Id.* paras. 4-8.

[44] *Id.* para. 2. The courts also had made strides away from the technicalities of common law pleading. Price v. New Jersey R.R. & Transp. Co., 31 N.J.L. 229, 233 (1865), permitted amendments of pleadings to be liberally made, stating that "[t]he end of all legal proceedings is justice, and forms are the mere means to that end."

[45] 1912 N.J. Laws, c. 231, para. 23. The practice act in effect at the time of these changes, 1903 N.J. Laws, c. 247, contained none of these provisions.

[46] 94 N.J.L. 236, 109 A.2d 743, *cert. denied*, 253 U.S. 483 (1920). In the early morning hours of July 30, 1916, on Black Tom Island near Jersey City, fourteen barges filled with munitions exploded, sending shock waves as far away as Philadelphia. N.Y. Times, July 30, 1916, § 1, at 1, col. 1. Although charges of sabotage were made, there was no definitive cause found.

[47] 94 N.J.L. at 238, 109 A.2d at 744. The rule is found at 1912 N.J. Laws, c. 231, paras. 4 & 6.

[48] Garrou v. Teaneck Tryon Co., 11 N.J. 294, 297-98, 94 A.2d 332, 333-34 (1953) (complaint requesting disparate relief of injunction against two private municipal officials and order to amend certificate of occupancy held valid).

cases had no direct bearing on New Jersey's implementation of the rule, but it would not be precipitous to assert that they created an intellectual ambiance favoring the development of the doctrine. An early example is *High Point Casket Co. v. Wheeler*.[49] There, a casket company sued one of its employees for a debt and obtained a favorable judgment. In a later proceeding between the parties, the former attorneys for the company intervened to demand payment from their client.[50] The Supreme Court of North Carolina allowed this procedure, stating: "[u]nder our Code, it is one of its cardinal rules and of its most commendable provisions that all controversies relating to the same matters should be settled in one action . . . ."[51]

Williamson v. Columbia Gas & Electric Corp.[52] is indicative of the judicial atmosphere prevalent in the federal courts at the time of development of the joinder of claims rule. The plaintiff brought suit in federal district court against a company alleging a conspiracy to violate the antitrust statutes. Later, he filed a complaint charging individuals with actions in derogation of the same provisions. The second suit was dismissed on substantive grounds and on defendant's motion. Then the conspiracy suit was dismissed on grounds of res judicata.[53] The court of appeals upheld this action, stating that whether the two claims comprised the same cause of action was not controlling; moreover, the court opined, the meaning of the term had broadened in recent years.[54] Capsulizing the dominant perspective, the court wrote:

> The principle which pervades the modern systems of pleading, especially the federal system, as exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action.[55]

Even though this decision did not reject the cause of action, or claim, as being the basic unit of litigation, the opinion pealed the message that splitting of controversies would be disfavored.

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[49] 182 N.C. 459, 109 S.E. 378 (1921).
[50] *Id.* at 460-61, 109 S.E. at 379-80.
[51] *Id.* at 468, 109 S.E. at 383.
[52] 186 F.2d 464 (3d Cir. 1950).
[53] *Id.* at 465-66.
[54] *Id.* at 469.
[55] *Id.* at 470.

APPLICATION OF THE JOINDER OF CLAIMS RULE

The cases under the first branch of the entire controversy doctrine attempted to inculcate the unified court system into the bar and bench and at most required practitioners to reform their pleadings. The principles of the second branch of the doctrine—the mandatory joinder of claims rule—were applied much more stringently. In *Massari v. Einsiedler*,[56] the Massaris successfully sued in the law division to recover monies under a contract.[57] The defendant, Einsiedler, filed a petition and later a supplement against the Massaris, which the law division dismissed.[58] The dismissal was upheld on appeal.[59] Einsiedler, dissatisfied with this outcome, brought complaints in both the law and chancery divisions seeking reformation of the contract and other relief.[60] These actions were consolidated in the law division and dismissed.[61] The New Jersey Supreme Court upheld this result, finding that despite the former rule that reformation could later be separately pleaded in chancery after a loss in a law court,[62] it was a remedy for mistake or fraud, equitable defenses which had to be pleaded in the original case to avoid the preclusive effects of res judicata.[63] The court concluded that "[i]t is the cornerstone of our present court structure that all matters, whether legal or equitable, in a controversy be disposed of in one suit in one court to the end that a multiplicity of suits may be obviated."[64]

The Supreme Court of New Jersey for the first time fully enunciated and applied the entire controversy doctrine in the seminal case *Ajamian v. Schlanger*.[65] Ajamian contracted to purchase a business. Soon after taking possession, he discovered what he thought were fraudulent representations by the seller.[66] For several months thereafter, Ajamian continued to work the business and make payments on an installment contract but finally vacated the premises and filed a bill for recission in the former court of chancery. The case was delayed and automatically transferred to the superior court when the

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[56] 6 N.J. 303, 78 A.2d 572 (1951).
[57] *Id.* at 306, 78 A.2d at 573.
[58] *Id.*
[59] 3 N.J. Super. 40, 65 A.2d 538 (App. Div.), *certif. denied*, 1 N.J. 604 (1949).
[60] 6 N.J. at 307, 78 A.2d at 573.
[61] *Id.*
[62] *Id.* at 308-09, 78 A.2d at 574-75.
[63] *Id.* at 313, 78 A.2d at 577.
[64] *Id. See also* Mechanical Devices Co. v. General Builders, 15 N.J. 566, 104 A.2d 673 (1954) (failure to assert defense in prior action deemed to be waiver).
[65] 14 N.J. 483, 103 A.2d 9, *cert. denied*, 348 U.S. 835 (1954).
[66] *Id.* at 486, 103 A.2d at 10.

new judicial system took effect.[67] Ajamian lost on the recission issue and during a pre-trial conference failed to avail himself of an opportunity to reform his pleadings to include a count for damages at law for deceit. He subsequently appealed. During the appeal's pendency, Ajamian assigned the cause of action to his brother, who filed suit in the law division seeking both remedies.[68]

The Supreme Court of New Jersey, per Justice Brennan, conceded that under the former practice, the loser of a recission action in equity probably would not be barred from filing a subsequent deceit action in a law court.[69] With the merger of law and equity, however, there was no such need for separate actions. In the court's view, Ajamian should have taken advantage of the liberality of reforming his pleadings at the pre-trial conference in the superior court. His failure to do so was deemed a waiver of his cause of action.[70] Thus, "to avoid the delays and wasteful expense of the multiplicity of litigation which results from the splitting of a controversy,"[71] the litigant who fails to assert even a "new and independent action for damages"[72] is precluded from bringing them in a subsequent lawsuit.

Despite *Ajamian*'s recognized importance as the landmark decision on the entire controversy doctrine, its language does not differ dramatically from that of *Massari*. Nevertheless, there appear to be distinguishing points. While arguably *Massari* focused on the requirement that all equitable *defenses* be pleaded in the initial proceedings,[73] *Ajamian* stressed the need for all remedial claims[74] to be brought in before trial. Furthermore, though *Massari* involved a bar against further proceedings on the part of the *defendant*,[75] *Ajamian* precluded such proceedings on the part of the *plaintiff*.[76] This lends credence to the interpretation that *Ajamian* requires mandatory joinder of claims of all parties to the controversy.

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[67] *Id.*

[68] *Id.* at 487, 103 A.2d at 11.

[69] *Id.* at 487-88, 103 A.2d at 11.

[70] *Id.* at 485, 488, 103 A.2d at 10, 12.

[71] *Id.* at 485, 103 A.2d at 10.

[72] *Id.* at 488, 103 A.2d at 12.

[73] In *Massari*, the New Jersey Supreme Court held that under these circumstances reformation was a remedy resulting from an equitable defense and not a separate cause of action. 6 N.J. at 311, 78 A.2d at 575-76.

[74] Justice Brennan broadly pronounced that in the new practice a litigant "should initially plead any legal and equitable claims or defenses, whether or not consistent." 14 N.J. at 485, 103 A.2d at 10.

[75] *See* notes 56-64 *supra* and accompanying text.

[76] *See* notes 67 & 68 *supra* and accompanying text.

The *Ajamian* decision soon was cited to reinforce the new pleadings system that allowed contradictory allegations,[77] to consolidate a multi-court lawsuit,[78] and to require a plaintiff seeking a prerogative writ to allege other claims.[79] A significant post-*Ajamian* decision, *Falcone v. Middlesex County Medical Society*,[80] resulted in a litigant losing a damages claim filed subsequently to his securing injunctive relief.[81] The action arose when a medical doctor sued a county medical society for failing to admit him. The doctor was awarded a judgment, later affirmed by the New Jersey Supreme Court, which ordered the medical society to accord him membership.[82] Dissatisfied with this victory, the physician instituted a second action against the medical society and two local hospitals, charging conspiracy and demanding a monetary remedy.[83] The courts held that the prior suit barred the subsequent one for damages.[84] The two actions were technically separate causes of action. Nevertheless, the courts ruled that the suits were part of a single controversy and merely were different remedies because all the facts secondarily raised were known at the time of the original proceeding.[85]

The pervasive reach of the entire controversy doctrine was dramatized in *Tevis v. Tevis*,[86] which required tort claims to be brought within matrimonial actions on the same controversy. In 1973, the plaintiff, Mrs. Tevis, was beaten by her husband. Although criminal charges were dismissed, the court later granted Mrs. Tevis a divorce. About six weeks after the divorce, she sued her former husband for

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[77] In City of Jersey City v. Hague, 18 N.J. 584, 587-88, 115 A.2d 8, 9-10 (1955), a municipality brought a civil action on counts of extortion and misappropriation of funds, demanding their return, against a former mayor, Frank Hague, and some of his compatriots who operated a centralized political apparatus for three decades. The trial court, nonetheless, granted the defendants' motion to dismiss on many theories, among them ambiguity and inconsistency. *Id.* at 600-01, 115 A.2d at 9-10. The supreme court held that the pleading of contradictory and alternative claims was valid and that a party may await the close of evidence introduced at trial to choose among remedies. *Id.* at 603-04, 115 A.2d at 19-20 (citing *Ajamian*, 14 N.J. at 490, 103 A.2d at 12).

[78] Silverstein v. Abco Vending Serv., 37 N.J. Super. 439, 117 A.2d 527 (App. Div. 1955) (consolidation of plaintiff's damages suits in county court and county district court with equitable action in the chancery division).

[79] Vacca v. Stika, 21 N.J. 471, 122 A.2d 619 (1956).

[80] 82 N.J. Super. 133, 196 A.2d 808 (Law Div. 1964), *aff'd*, 87 N.J. Super. 486, 210 A.2d 78 (App. Div. 1965), *modified*, 47 N.J. 92, 219 A.2d 505 (1966).

[81] *Id.* at 141, 196 A.2d at 813.

[82] Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 140 A.2d 791 (1961), *aff'g* 62 N.J. Super. 184, 162 A.2d 324 (Law Div. 1960).

[83] 82 N.J. Super. at 133, 196 A.2d at 808.

[84] *Id.* at 141, 196 A.2d at 813.

[85] *Id.* at 139, 196 A.2d at 812.

[86] 79 N.J. 422, 400 A.2d 1189 (1979).

assault and battery.[87] The trial court rejected a motion to dismiss and the jury granted Mrs. Tevis a monetary award for compensatory and punitive damages.[88] The appellate division approved the judgment, except for the punitive damages.[89] The Supreme Court of New Jersey, nevertheless, reversed.[90] In assessing the factors to ascertain whether the statute of limitations should bar Mrs. Tevis's lawsuit, the justices concluded that the entire controversy doctrine necessitated that she should have brought her tort claim along with the divorce action.[91] The assault and battery by Mr. Tevis was part of the overall dispute between the parties, the court reasoned, and the policy against fractionalized litigation mandated overturning the jury award.[92]

The ramifications of the *Tevis* decision extend far beyond the litigants themselves. It may have been more appropriate for the court to except matrimonial litigation from the purview of the entire controversy doctrine. The relationship between the parties in tort suits is much more adversarial than in divorce actions, which often are uncontested.[93] With the advent of no-fault divorce in New Jersey, less divorce litigation can be expected than before.[94] Nonetheless, if tort claims are tried in matrimonial actions, the court time spent on these cases probably would increase. Additionally, legal issues often are decided by juries, and there is a constitutional right to one in New Jersey.[95] Divorce actions, on the contrary, are usually litigated in the chancery division by judges sitting without a jury.[96] If a grievant must bring the tort case with the divorce, the New Jersey judiciary must either empanel chancery juries or grapple with the problem of overcoming the right to a jury.[97] Without doubt, the practical consequences of the *Tevis* decision are considerable.

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[87] *Id.* at 425, 400 A.2d at 1191.

[88] *Id.* at 424, 400 A.2d at 1191.

[89] Tevis v. Tevis, 155 N.J. Super. 273, 382 A.2d 697 (App. Div. 1978), *rev'd*, 79 N.J. 422, 400 A.2d 1189 (1979).

[90] 79 N.J. at 435, 400 A.2d at 1196.

[91] *Id.* at 434, 400 A.2d at 1196.

[92] *Id.* Justice Handler recognized "an understandable sympathy for plaintiff's plight and a pardonable repugnance toward defendant's conduct." *Id.* at 433, 400 A.2d at 1195.

[93] H. FOSTER & D. FREED, LAW AND THE FAMILY § 6:1, at 251-52 (1972). *See also* Hnath v. Hnath, 47 N.J. Super. 461, 136 A.2d 286 (App. Div. 1957) (allowing suit for accounting by spouse after series of matrimonial actions).

[94] N.J. STAT. ANN. § 2A:34-2(d) (West Cum. Supp. 1980).

[95] N.J. CONST., art. I, para. 9.

[96] N.J. CT. R. 4:75.

[97] *See, e.g.*, Fleischer v. James Drug Stores, Inc., 1 N.J. 138, 62 A.2d 383 (1948) (constitutional right to jury trial subject to equitable right to determine whole controversy between parties).

MANDATORY COUNTERCLAIM AND CROSSCLAIM RULE

The second branch of the entire controversy doctrine is a useful weapon for a defendant to curtail claims which a plaintiff brings after initial resolution of the controversy.[98] Nevertheless, the doctrine cuts in both directions: it is now effectively a mandatory counterclaim and crossclaim rule which may bar the defendant from bringing actions withheld for later adjudication.

As with the principles culminating in the *Ajamian* decision, this rule evolved gradually. Pleading practices in the nineteenth century or earlier required the litigant to bring separate suits on each action, such as bringing a tort action separately from the related contract action.[99] Over time, courts came to permit parties to combine the separate actions into one suit.[100] The *Massari* case represented a fundamental shift in the pleading system, for it found an action which the defendant formerly could maintain as a separate cause at a later proceeding to be merely an equitable defense that had to be pleaded to remain vital.[101] Scholarly opinion on this decision concluded that the earlier permissive counterclaim rule had become insecure.[102] The courts moved closer to a mandatory counterclaim and crossclaim rule in *New Jersey Highway Authority v. Renner*,[103] which affirmed the defendant's right to trial on a legal counterclaim to the plaintiff's action in equity.[104] Justice Nathan L. Jacobs wrote for the majority:

> [W]e have sought to encourage defendants to assert such affirmative claims as they may have in the form of counterclaims rather

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[98] *See* notes 56-97 *supra* and accompanying text.

[99] *See* Galler v. Slurzberg, 22 N.J. Super. 477, 483-84, 92 A.2d 89, 91-92 (App. Div. 1952). In fact, for actions at law, the whole purpose of the complex system of common law pleading was to reduce the trial to a single issue. C. CLARK, *supra* note 39, at 12-13. An excellent example of this principle was set forth in McFaul v. Ramsey, 61 U.S. (20 How.) 523 (1858). Here, a grievant in federal court attempted to frame a pleading according to a state code that simplified the procedural rules, "abolishing 'all technical forms of actions.'" *Id.* at 524. The Court scorned this practice of code pleading, deriding any suggestion "of deciding absolutely and finally all matters in controversy between suitors . . . [in a] . . . single tribunal." *Id.*

[100] The predominant outlook by the early 1950's, even in New Jersey, was expressed in Kelleher v. Lozzi, 7 N.J. 17, 23, 80 A.2d 196, 199 (1951), in which the court wrote, "[Defendant's] omission in filing a counterclaim in her adversary's suit would not have shut her off because the filing of such a pleading was a privilege and not a duty."

[101] 6 N.J. 303, 78 A.2d 572 (1951); *see* notes 56-64 *supra* and accompanying text.

[102] Professor David Stoffer, although analyzing the case primarily as one unifying all claims in the trial division in which it was brought, noted that "[t]he bar will in the future very likely resolve doubts by pleading all available issues at the core or on the periphery of the subject matter of litigation." Stoffer, *The Work of the Judicial System*, 6 RUTGERS L. REV. 1, 2 (1951).

[103] 18 N.J. 485, 114 A.2d 555 (1955).

[104] *Id.* at 495, 114 A.2d at 560.

> than independent actions; indeed, the line between the defensive and other matter may be indistinct and the safer course generally will be to set it all forth by way of answer and counterclaim.[105]

In 1956, the movement toward mandatory claims gained further momentum in the case of *Korff v. G. & G. Corp.*[106] Here, the New Jersey Supreme Court held that a counterclaim properly could be litigated against nonresidents. The court relied partially on the expanding entire controversy doctrine and asserted that the nonresidents reasonably should have anticipated that once involved in litigation in New Jersey, other claims might be brought against them.[107]

The next significant development in this area occurred in 1975 in *Leisure Technology-Northeast, Inc. v. Klingbeil Holding Co.*[108] There, the appellate division overturned a chancery judge's order to sever a legal counterclaim of fraud from an equitable foreclosure proceeding. Citing the policy behind the entire controversy doctrine, the judge required one trial for all claims despite a court rule provision for consolidation of only "germane" counterclaims.[109]

The full force of the entire controversy doctrine finally was imposed upon defendants in the case of *William Blanchard Co. v. Beach Concrete Co.*[110] A protracted legal struggle over the erection of an office building commenced in 1970. Two of the litigants waited until 1975 to assert some of their claims, which came in the form of a counterclaim, crossclaim, amended third-party complaint, and a separate action.[111] In granting a motion to dismiss, the trial court found that the entire controversy doctrine barred these claims.[112]

On appeal, the two precluded parties contended, in addition to other theories, that they did not assert their claims earlier because of

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[105] *Id.* at 492, 114 A.2d at 558.

[106] 21 N.J. 558, 122 A.2d 889 (1956).

[107] *Id.* at 567-68, 122 A.2d at 894.

[108] 137 N.J. Super. 353, 349 A.2d 96 (App. Div. 1975).

[109] *Id.* at 357-58, 349 A.2d at 98. The rule provided that:

> Except as otherwise provided by R. 4:67-4 (summary actions) and except in foreclosure actions (in which only germane counterclaims may be pleaded), a pleading may state as a counterclaim any claim against the opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. A defendant, however, either failing to comply with R. 4:27-1(b) (mandatory joinder of claims) or failing to set off a liquidated debt or demand or a debt or demand capable of being ascertained by calculation, shall thereafter be precluded from bringing any action for such claim or for such debt or demand which might have been so set off.

N.J. Ct. R. 4:7-1.

[110] 150 N.J. Super. 277, 375 A.2d 675 (App. Div.), *certif. denied*, 75 N.J. 528, 384 A.2d 507 (1977).

[111] *Id.* at 287, 375 A.2d at 680.

[112] *Id.* at 290-91, 375 A.2d at 682.

the necessity to present a "united front" against common opponents.[113] The appellate division was unmoved and affirmed the dismissal. Speaking through Judge Pressler, the court observed that the entire controversy doctrine was "significantly broader" than the mandatory counterclaim requirement set forth in the court rules.[114] The judge explained that the doctrine cannot be applied without considering the specific components of the litigation.[115] In particular, the court must assess the possible effects of a party's withholding one component from the action to reserve it for later litigation.[116] In a frequently cited passage, Judge Pressler then stated:

> If those consequences are likely to mean that the litigants in the action as framed will, after final judgment therein is entered, be likely to have to engage in additional litigation in order to conclusively dispose of their respective bundles of rights and liabilities which derive from a single transaction or related series of transactions, then the omitted component must be regarded as constituting an element of the minimum mandatory unit of litigation. That result must obtain whether or not that component constitutes either an independent cause of action by technical common-law definition or an independent claim which, in the abstract, is separately adjudicable.[117]

In applying these principles to the litigants' claims, Judge Pressler found that they were part of a single transaction; additionally, if all issues had been aired initially, the dispute would have been settled long ago.[118] The corporations' dilatory action, the judge said, wrongly burdened the litigants, the courts, and the entire system of

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[113] *Id.* at 287, 291, 375 A.2d at 680, 682.

[114] *Id.* at 293, 375 A.2d at 683. The rule at the time dealt only with liquidated debts. *See* note 109 *supra*.

[115] 150 N.J. Super. at 293, 375 A.2d at 683.

[116] *Id.*

[117] *Id.* at 293-94, 375 A.2d at 683-84. Judge Pressler's cited language embodies the "transactional approach" common to civil and criminal procedure theory. It should be observed that the judge was the first in New Jersey to utilize this approach to define the bounds of the term "controversy" and to refine judicial understanding of the application of the entire controversy doctrine. The transactional approach is not new to procedure in New Jersey or other jurisdictions. For example, the Practice Act of 1912, 1912 N.J. Laws, c. 231, para. 6, allowed but did not require joinder of separate causes of action if arising "out of the same transaction or series of transactions." *See* notes 41-45 *supra* and accompanying text. This same phrase appears in N.J. Ct. R. 4:38-1, which deals with consolidation of cases with common legal and factual questions. *See also* United States v. Satterfield, 548 F.2d 1341 (9th Cir. 1977), interpreting Fed. R. Crim. P. 8(b), which allows for joinder of defendants who "have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

[118] 150 N.J. Super. at 294-95, 375 A.2d at 684.

justice.[119] Hence, the trial court properly barred these later claims.[120] This case provided a singular opportunity for application of the entire controversy doctrine, for conscious tactics of delay were precisely what the new practice was designed to preclude.

In a subsequent case, *Malaker Corp. Stockholders Protective Committee v. First Jersey National Bank*,[121] the court applied the doctrine's strong policy against delay. A corporation lost a lawsuit to its creditor bank.[122] Two years later some shareholders brought an action against the bank alleging that it breached an oral agreement to lend the company money.[123] Despite the fact that the stockholders were not parties to the corporation's defeated action, the court concluded that a court rule requiring mandatory counterclaims on liquidated damages, certain substantive rules, and the entire controversy doctrine barred the second action.[124]

After the *Blanchard* and *Malaker* decisions, the New Jersey court rules were amended to incorporate the entire controversy doctrine, requiring that "[e]ach party to an action shall assert therein all claims which he may have against any other party thereto insofar as may be required by application of the entire controversy doctrine."[125] The codification of the doctrine into the court rules unquestionably has made it the law of the state. Nevertheless, equity might be invoked to prevent harsh results for some litigants. Complex matrimonial[126] and corporate[127] cases, for example, are common in modern judicial proceedings. Rigid application of the doctrine's strictures in such cases may unfairly subordinate substance to form and yield unjust results. Equities aside, the defense attorney would be prudent to vigilantly prosecute all claims, even those he considers only marginally related to the controversy.

Expansion of the Doctrine

The entire controversy doctrine has been invoked in other procedural circumstances, notably to bolster mandatory joinder of essential

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[119] *Id.*

[120] The appellate court, moreover, invoked New Jersey's mandatory counterclaim rule, N.J. Ct. R. 4:7-1. 150 N.J. Super. at 295-97, 375 A.2d at 684-85.

[121] 163 N.J. Super. 463, 395 A.2d 222 (App. Div. 1978), *certif. denied*, 79 N.J. 488, 401 A.2d 243 (1979).

[122] 163 N.J. Super. at 492, 395 A.2d at 236.

[123] *Id.* at 468, 395 A.2d at 224.

[124] *Id.* at 496-500, 395 A.2d at 239-41.

[125] N.J. Ct. R. 4:27-1(b).

[126] *See* notes 86-97 *supra* and accompanying text.

[127] *See* notes 110-20 *supra* and accompanying text.

parties,[128] to require use of post-trial relief before appeal,[129] to strengthen the equitable power to enjoin litigants from using other courts,[130] and apparently to compel the raising of state claims in federal courts.[131]

Essential Parties

In *Thatcher v. Jerry O'Mahony, Inc.*,[132] the appellate division employed the entire controversy doctrine to compel joinder of indispensable or necessary parties.[133] There, a minority shareholder brought an action aimed at overturning an amended loan agreement.[134] The plaintiff sued to invalidate a stockholders' meeting ratifying the amended agreement and to obtain inspection of corporate books and records.[135] The chancery division dismissed the plaintiff's claim to invalidate the meeting for failure to join, as necessary parties, beneficiaries to a loan and stock option agreement.[136] Defendant then moved in the law division to strike the remainder of the complaint. The court granted the motion on the basis that inspection of the corporate books had been rendered meaningless in light of the earlier dismissal of plaintiff's demand to invalidate the meeting, which was the primary remedy requested.[137]

In affirming the lower court action, the appellate division found that the suit over the shareholders' meeting was simply part of a larger controversy designed to have the loan and stock option agreement set aside.[138] Agreeing with the chancery division's ruling on plaintiff's failure to join beneficiaries to the loan agreement, the appellate court affirmed that joinder was required because the beneficiaries would have a substantial interest in the matter and would be adversely affected.[139] The court held that the *Ajamian* principle precluded the fragmenting of this controversy, and as a consequence the plaintiff

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[128] *See* notes 132-43 *infra* and accompanying text.

[129] *See* notes 144-51 *infra* and accompanying text.

[130] *See* notes 152-59 *infra* and accompanying text.

[131] *See* notes 160-65 *infra* and accompanying text.

[132] 39 N.J. Super. 330, 121 A.2d 50 (App. Div. 1956).

[133] *Id.* at 335-36, 121 A.2d at 53. It should be noted that a new rule entitled "Joinder of Persons Needed for Just Adjudication," N.J. Ct. R. 4:28-1, has displaced the "indispensable party" rule, N.J. Ct. R. 4:32-1 (1953), which was in effect in 1956 at the time of this case.

[134] 39 N.J. Super. at 331-32, 121 A.2d at 51.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 332, 121 A.2d at 51.

[138] *Id.* at 335, 121 A.2d at 51.

[139] *Id.* at 335-36, 121 A.2d at 53.

shareholder could not maintain the suit.[140] In two later cases, both the New Jersey appellate division[141] and the supreme court[142] rejected attempts to expand *Thatcher* to require joinder of parties other than those deemed "necessary or indispensable."[143]

Mandatory Use of Post-Trial Relief

New Jersey court rules provide for vacating a judgment or staying its execution for the extraordinary reason of the discovery of new evidence.[144] Nevertheless, the entire controversy doctrine may bar relief for the litigant who fails to adduce new evidence in a post-trial motion and who instead relies upon the appellate courts.[145] The chancery division established such application of the doctrine in *City of Newark v. North Jersey Water Supply Commission*.[146] In this case, Newark lost a contractual suit, but afterward found evidence to support its position.[147] On appeal, it presented its new evidence, but the reviewing court failed to consider it.[148] The city then filed a recission action in the chancery division.[149] The court held that the new facts should have been raised in a post-trial motion to have the judgment stayed and vacated.[150] The entire controversy doctrine, with its aim of settling all matters in a single proceeding, precluded the plaintiff

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[140] *Id.*

[141] McFadden v. Turner, 159 N.J. Super. 360, 388 A.2d 244 (App. Div. 1956). The majority opinion in *McFadden* explained *Thatcher* as requiring mandatory joinder of only "indispensable" parties. *Id.* at 371 n.2, 388 A.2d at 249 n.2. The dissent found that *Thatcher* required compulsory joinder of only "necessary" parties. *Id.* at 373, 388 A.2d at 250 (Bilder, J., dissenting).

[142] The Supreme Court of New Jersey agreed with the *McFadden* majority. Aetna Ins. Co. v. Gilchrist Bros. Inc., 85 N.J. 550, 559, 428 A.2d 1254, 1258-59 (1981).

[143] Although the courts continue to distinguish between the terms "indispensable" and "necessary" parties, perhaps the distinction no longer should be made since the current rules no longer employ these words. *See* notes 133 *supra* & 204 *infra* and accompanying text.

[144] N.J. Ct. R. 4:62-2 (1953), currently N.J. Ct. R. 4:50 (relief from judgment or order); N.J. Ct. R. 4:62-2 (1953) and N.J. Ct. R. 1:4-6, -7 (1953) currently N.J. Ct. R. 2:9-5 (stay of judgment in civil actions and in contempts).

[145] City of Newark v. North Jersey Water Supply Comm'n, 106 N.J. Super. 88, 254 A.2d 313 (Ch. Div. 1968), *aff'd per curiam*, 54 N.J. 258, 255 A.2d 193 (1969).

[146] 106 N.J. Super. 88, 254 A.2d 313 (Ch. Div. 1968), *aff'd per curiam*, 54 N.J. 258, 255 A.2d 193 (1969).

[147] *Id.* at 94, 254 A.2d at 316.

[148] *Id.* at 97, 254 A.2d at 317. The decision on appeal is North Jersey Water Supply Comm'n, 52 N.J. 134, 244 A.2d 113 (1968).

[149] 106 N.J. Super. at 88, 254 A.2d at 313. The chancery division noted that the supreme court did not address this new data. *Id.* at 97, 254 A.2d at 317.

[150] *Id.* at 98, 254 A.2d at 318 (citing N.J. Ct. R. 1:4-6, :4-7 and 4:62-2 (1953), currently N.J. Ct. R. 2:9-5(a), (b) and 4:50, respectively).

from raising the new facts, and summary judgment for the water commission was entered.[151] Thus, litigants who obtain new evidence should apply to the trial court for relief and not present it for first hearing to an appellate tribunal. One can infer that the holding would be extended to all situations where post-trial relief is possible.

Barring Out-of-State Litigation

The entire controversy doctrine has also been applied to support the equitable power to enjoin parties from suing in out-of-state forums. *Hammer v. Hammer*[152] involved a wife and husband race to the courthouse. Mrs. Hammer brought an action in New Jersey for an accounting of partnership assets, and later amended the complaint to include cruelty.[153] Her husband, Dr. Hammer, then sued for divorce in another New Jersey court.[154] Mrs. Hammer answered but also filed a complaint in New York on essentially the same issues raised in the New Jersey litigation.[155] Dr. Hammer obtained an order enjoining his wife from prosecuting any litigation outside of the state. Mrs. Hammer appealed.[156] In upholding most of the lower court ruling, the appellate division said that the New Jersey action had priority over the one in New York.[157] Relying on *New Jersey Highway Authority v. Renner*,[158] and on a court rule authorizing consolidation of actions involving common questions of law or fact, the appellate court ascertained that the trial judge had acted within his discretion to avoid fragmented litigation.[159]

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[151] 106 N.J. Super. at 99, 254 A.2d at 318. The court relied on the supreme court's opinion in *Falcone*, 47 N.J. at 92, 219 A.2d at 505. Additionally, the court found that the water commission prevailed on the merits, for Newark had raised no new genuine issues of fact. 106 N.J. Super. at 100, 254 A.2d at 319.

[152] 36 N.J. Super. 265, 115 A.2d 614 (App. Div. 1955).

[153] *Id.* at 268, 115 A.2d at 615.

[154] *Id.*

[155] *Id.* at 268-69, 115 A.2d at 615-16.

[156] *Id.*

[157] *Id.* at 271, 115 A.2d at 617. The appellate division did not affirm a portion of the order enjoining Mrs. Hammer from pursuing even unrelated litigation. *Id.* at 274, 115 A.2d at 618.

[158] 18 N.J. 485, 114 A.2d 555 (1955). *See* notes 103-05 *supra* and accompanying text.

[159] 36 N.J. Super. at 273, 115 A.2d at 618 (citing N.J. Ct. R. 4:43-1 (1953), currently N.J. Ct. R. 4:38-1). New Jersey Highway Auth. v. Renner, 18 N.J. 485, 114 A.2d 555 (1955) is examined at notes 103-05 *supra* and accompanying text. *See also* Applestein v. United Board & Carton Corp., 35 N.J. 343, 173 A.2d 225 (1961) (enjoining prosecution of out-of-state action) and S.D. Sales Corp. v. Doltex Fabric Corp., 92 N.J. Super. 586, 224 A.2d 345 (Law Div. 1966), *aff'd*, 96 N.J. Super. 345, 233 A.2d 70 (App. Div. 1967) (using both entire controversy doctrine and *forum non conveniens* to consolidate case).

Pendent and Ancillary Federal Jurisdiction

The case of *Ferger v. Local 483*[160] implicitly holds that New Jersey courts will invoke the entire controversy doctrine to bar a party from bringing state claims if he failed to proffer them under pendent or ancillary jurisdiction in federal court. Members of a union attempted to be transferred to a local that covered the area in which they lived. The local refused.[161] The members then tried to obtain a federal district court order compelling the transfer. The court decided some federal issues but held that the transfer was a state matter and refused pendent jurisdiction.[162] Following this defeat at the federal level, the members brought an action in the Superior Court of New Jersey seeking specific performance of the transfer clause in the union's constitution.[163] The defendant argued that the federal court judgment adjudicated the entire controversy and barred further litigation under res judicata.[164] The superior court held, however, that because the plaintiffs had raised their claims in federal court and were rebuffed, the state court would hear them.[165] Thus, the decision implies a corollary: the entire controversy doctrine requires litigants to raise related state claims in federal court or risk having them precluded subsequently in state court in New Jersey.

The entire controversy doctrine further has been used to simplify the procedure for attacking the validity of wills,[166] to reinforce the use of third-party complaints,[167] to affirm the single publication rule in libel actions,[168] and as a factor a court should weigh when deciding whether to render declaratory judgment.[169] Clearly, the policy of expediting litigation extends to areas beyond fragmented forums and claims.

LIMITATIONS AND EXCEPTIONS

The "Different Party" Exception

Notwithstanding that the entire controversy doctrine presents a formidable procedural barrier, it is not limitless in its scope. The most

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[160] 94 N.J. Super. 554, 229 A.2d 532 (Ch. Div.), *aff'd per curiam*, 97 N.J. Super. 505, 235 A.2d 482 (App. Div. 1967), *certif. denied*, 51 N.J. 181, 238 A.2d 468 (1968).

[161] *Id.* at 557, 229 A.2d at 534.

[162] Ferger v. Local 483, 238 F. Supp. 1016 (D.N.J. 1964), *aff'd*, 342 F.2d 430 (3d Cir. 1965).

[163] 94 N.J. Super. at 561, 229 A.2d at 536.

[164] *Id.*

Id. at 569-70, 229 A.2d at 541.

[166] *In re* Hand's Will, 94 N.J. Super. 182, 230 A.2d 408 (App. Div. 1967).

[167] Ebert v. Balter, 74 N.J. Super. 466, 181 A.2d 532 (App. Div. 1962).

[168] Barres v. Holt, Rhinehart & Winston, Inc., 74 N.J. 461, 378 A.2d 1148 (1977) (Schreiber, J., dissenting).

[169] National Ben Franklin Fire Ins. Co. v. Camden Trust Co., 71 N.J. 16, 120 A.2d 754 (1956).

important limitation is the rule that even for claims arising out of the same events, a litigant is not barred from subsequently suing a different party.[170] Other exceptions have been found for parties ignorant of their claim,[171] interpleader,[172] summary dispossess actions,[173] and for claims yet to accrue.[174]

The "different party" exception to the doctrine was first enunciated in *Moss v. Jones*.[175] There, the issue arose whether a party who successfully sued a driver could maintain a subsequent action against the owner as principal.[176] The appellate division, per Judge Kilkenny, held that the entire controversy doctrine required only "that a plaintiff should seek all of his relief against the same defendant."[177] Thus, a second action against a different party was not barred, and the plaintiff was allowed to proceed.[178]

Interestingly, Judge Pressler, who had been instrumental in expanding the scope of the entire controversy doctrine,[179] limited its application in *McFadden v. Turner*[180] by holding that it is "a rule of mandatory joinder of *claims*, not of *parties*."[181] In this case, a severely injured patient won a jury verdict against a hospital on the theory of respondeat superior.[182] The patient settled out of court for the low sum of $9,500, apparently because of a statutory limitation on hospital liability.[183] The settlement agreement was mute on the issue of the liability of certain hospital employees, and the injured plaintiff subsequently sued the nurses allegedly responsible for the mishap.[184] In reliance upon the entire controversy doctrine, the defendants moved for summary judgment based on the theory that the controversy had been previously settled, but the trial court rebuffed them.[185] The nurses appealed to the appellate division.[186] After

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[170] *See* notes 175-211 *infra* and accompanying text.
[171] *See* notes 212-18 *infra* and accompanying text.
[172] *See* notes 219-26 *infra* and accompanying text.
[173] *See* notes 227-36 *infra* and accompanying text.
[174] *See* notes 237-40 *infra* and accompanying text.
[175] 93 N.J. Super. 179, 225 A.2d 369 (App. Div. 1966).
[176] *Id.* at 181, 225 A.2d at 370.
[177] *Id.* at 185, 225 A.2d at 372.
[178] *Id.*
[179] William Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277, 375 A.2d 675 (App. Div.), *certif. denied*, 75 N.J. 528, 384 A.2d 509 (1977). *See* notes 110-20 *supra* and accompanying text.
[180] 159 N.J. Super. 360, 388 A.2d 244 (App. Div. 1978).
[181] *Id.* at 369, 388 A.2d at 248 (emphasis added).
[182] *Id.* at 363, 388 A.2d at 245.
[183] *Id.* The statute was N.J. STAT. ANN. § 2A:53A-8 (West Cum. Supp. 1980).
[184] 159 N.J. Super. at 364, 388 A.2d at 245.
[185] *Id.*
[186] *Id.* at 364, 388 A.2d at 242.

examining the issues of vicarious liability and release of tortfeasors from responsibility,[187] Judge Pressler held that in keeping with *Moss*, the plaintiff should not be barred from suing the negligent nurses since the doctrine merely required joinder of claims, rather than of parties.[188] Here, the plaintiff properly had brought all requisite claims, and the action was directed against a different party.[189] The court affirmed the decision below and allowed the trial to proceed.[190] The appellate division applied this rule later in the same year in *Gareeb v. Weinstein*,[191] a case involving similar facts.

The New Jersey Supreme Court embraced the "different party" exception in the complex case of *Aetna Insurance Co. v. Gilbert Bros.*[192] The court applied the familiar principle which Judge Pressler enunciated in *McFadden* that there is a fundamental distinction between mandatory joinder of claims and mandatory joinder of parties.[193] The *Aetna* court wrote: "[t]he most significant distinguishing feature is that application of the [entire controversy doctrine] would prevent a non-party from prosecuting its claim or presenting its defense."[194]

In *Aetna*, the wife of a deceased motorist received a settlement in an action against a trucking firm responsible for her husband's death.[195] The firm's insurance company, Home Indemnity Company, paid the widow the award.[196] Aetna Insurance Company, the plaintiff, was the deceased motorist's insuror and had paid medical

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[187] Judge Pressler found that the release by the hospital did not operate in favor of the employees. *Id.* at 366-67, 388 A.2d at 246-47.

[188] *Id.* at 369, 388 A.2d at 248.

[189] *Id.* at 370, 388 A.2d at 248. Furthermore, in this case the defendant nurses actually benefited, for if the plaintiff had lost the first trial, she would have been precluded from raising these issues anew. *Id.*

[190] *Id.* at 370, 388 A.2d at 248-49.

[191] 161 N.J. Super. 1, 390 A.2d 706 (App. Div. 1978). A doctor sued a hospital's credentials committee which denied his reappointment. The reviewing court found sufficient evidence to support the committee's decision and denied the plaintiff relief. *Id.* at 8, 390 A.2d at 709-10. The doctor then sued another physician and the committee members individually, alleging their involvement in a tortious conspiracy. *Id.* The defense of the entire controversy doctrine was sustained at trial, and once again the doctor appealed. The appellate division, speaking through Judge Lynch, affirmed the rule that there is no bar where the defendants in the second action differ from those in the first. The *Falcone* case, 47 N.J. at 95, 219 A.2d at 507, was distinguished on the basis that the litigant there was prevented only from having a second chance at the same defendant and was permitted to proceed against new parties. 161 N.J. Super. at 10-11, 390 A.2d at 710-11.

[192] 85 N.J. 550, 428 A.2d 1254 (1981).

[193] *Id.* at 558, 428 A.2d at 1258.

[194] *Id.*

[195] *Id.* at 554, 428 A.2d at 1256.

[196] *Id.*

bills prior to his death.[197] On this basis, Aetna contended that it was the subrogee for the motorist and, as such, demanded reimbursement from Home.[198] Home rejected the demand, and Aetna decided to bring a lawsuit directly against the trucking firm.[199] On the ground that the second action offended the entire controversy doctrine, the appellate division upheld the trial court's summary judgment for the defendant.[200] The supreme court reversed. After recounting the leading entire controversy doctrine cases and noting that the primary purpose of the doctrine is to avoid delay, harassment, judicial overload, and unfairness, the court, through Justice Schreiber, held that Aetna, the subrogee, could sue the trucking company even though Aetna's insured party, the subrogor, had done this already.[201] *Ajamian* principles could not "automatically" be applied to compel joinder of parties.[202] The court distinguished the facts in *Aetna* from those in *Thatcher*,[203] arguing that the latter involved a failure to join "indispensable parties."[204] Application of the doctrine here, it said, would have required Aetna to intervene in the suit which the insured motorist initiated.[205] The entire controversy doctrine required no such intervention, and the second suit was permitted.[206]

It may be concluded that the rules of *Moss*, *McFadden*, *Gareeb*, and *Aetna* firmly establish that a litigant is required only to assert everything against his opponent and any essential party,[207] not search out all possible parties who may have an interest in the controversy. Because of the close connection among the parties in the first and second suits in all four cases and the strong policy of single litigation encompassed within the entire controversy doctrine, these cases could easily have been decided differently.[208] Moreover, in *McFadden*,

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[197] *Id.* at 554-55, 428 A.2d at 1256.

[198] *Id.*

[199] *Id.* at 555, 428 A.2d at 1256.

[200] *Id.* at 554-55, 428 A.2d at 1256.

[201] *Id.* at 556-58, 482 A.2d at 1256-57.

[202] *Id.* at 558, 482 A.2d at 1258.

[203] 39 N.J. Super. at 330, 121 A.2d at 50.

[204] 85 N.J. Super. at 559, 428 A.2d at 1258-59. The term, "indispensable parties," is not currently used and the parties in *Thatcher* were merely "necessary." 39 N.J. Super. at 333, 121 A.2d at 51. *See also* notes 132-43 *supra* and accompanying text. The term, however, was in the rules in effect at the time *Thatcher* was decided. *See* N.J. Ct. R. 4:32-1 (1953).

[205] 85 N.J. at 559-60, 482 A.2d at 1259.

[206] *Id.*

[207] *See* notes 141, 143 & 204 *supra*.

[208] Judge Bilder, dissenting in *McFadden*, would have extended the doctrine to bar the second suit, finding the situation analogous to that of *Thatcher*. 159 N.J. Super. at 372-73, 388 A.2d at 249-50 (Bilder, J., dissenting). In *Aetna*, Justice Pashman, partially dissenting, argued that

Judge Pressler was aware of the deviation from the *Ajamian* fundamentals of expediting litigation.[209] She held, however, that prejudice to the party whose claims were barred outweighed this consideration.[210] Interestingly, the New Jersey Supreme Court in *Aetna* commented on the "unfairness" of announcing novel procedural rules that preclude litigants from a hearing.[211]

Unknown Claims

In *Zaromb v. Boruka*,[212] the appellate division implied that the entire controversy doctrine does not bar a second suit on a "related claim" if the party were unaware of it.[213] Two scientists decided to settle a business dispute in court without legal counsel. Boruka sued Zaromb for several claims, including slander.[214] Zaromb filed a counterclaim and moved twice to amend it to include slander, but the trial court denied both, assuring Zaromb that he could commence a separate action later on.[215] Zaromb duly filed a separate slander lawsuit, but it was dismissed as already having been adjudicated.[216] The appellate division found that the slander allegation "was not encompassed within the bundle of rights and liabilities adjudicated in the prior suit" because it was unknown at that time.[217] Thus, the court allowed the slander claim to proceed.[218] The *Zaromb* exception for lack of knowledge of a claim may not be consistent with a mechanical understanding of the doctrine. Nonetheless, it comports with an underlying goal of article VI of the 1947 Constitution—resolution of issues on their merits.

Interpleader

The exception that the entire controversy doctrine is inapplicable to interpleader actions was formulated in *M. N. Axinn Co. v. Gibral-*

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generally the rights of the subrogee are no higher than those of his subrogor. 85 N.J. at 572-73, 428 A.2d at 1266 (Pashman, J., dissenting). Those defending the subrogee's claim should be allowed all the defenses they would have against the subrogor. *Id.* at 573, 428 A.2d at 1266 (Pashman, J., dissenting).

[209] 159 N.J. Super. at 371-72, 388 A.2d at 249.

[210] *Id.* at 371, 388 A.2d at 249.

[211] 85 N.J. at 560, 428 A.2d at 1259.

[212] 166 N.J. Super. 22, 398 A.2d 1308 (App. Div. 1979).

[213] *Id.* at 27, 398 A.2d at 1311.

[214] *Id.* at 24-25, 398 A.2d at 1309-10.

[215] *Id.* at 25, 398 A.2d at 1309. The judge denied the amendments both times on the ground that the trial was too imminent.

[216] *Id.* at 25-26, 398 A.2d at 1309-10.

[217] *Id.* at 27, 398 A.2d at 1311. Zaromb was unaware of the slander claim when he filed his counterclaim.

[218] *Id.* at 27-28, 398 A.2d at 1311.

tar Development, Inc.[219] In a quarrel over monies owed, the Chad-Mal Corporation sued Gibraltar Development, Inc.[220] and filed an interpleader to ascertain all of Gibraltar's debts. M. N. Axinn Company received some money from this action, but sued Gibraltar to recover additional sums allegedly due.[221]

The defendant contended that the interpleader judgment barred Axinn's second suit under res judicata.[222] The trial court struck the defense and held for the plaintiff.[223] The appellate division affirmed, holding that despite the policy of the entire controversy doctrine to avoid piecemeal litigation, it should not be applied to interpleader actions.[224] In interpreting the limited mandatory counterclaim court rule, the court stated that when the interpleader action was brought, Axinn was not yet an "opposing party," as required by the rule, and as a result, Axinn had no duty to bring forth its claims.[225] This rationale is consistent with the "different party exception," implying that parties not fully able to litigate will not be precluded from a later lawsuit.[226]

Summary Dispossess Actions

Failing to assert claims in a summary dispossess proceeding under landlord-tenant law will not be a bar to pursuing them later.[227] So held the New Jersey appellate court in *C. F. Seabrook Co. v. Beck*,[228] where a tenant stopped paying his rent to protest alleged uninhabitable conditions.[229] After several months the landlord sued for statutory summary possession in a county district court.[230] The trial court found for the tenant on the defense of uninhabitability for the whole period of occupancy, even for the period for which rent was paid, and ordered a rent reduction until the problems were cured.[231] On appeal, the appellate division rejected the tenant's assertion that the

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[219] 45 N.J. Super. 523, 133 A.2d 341 (App. Div. 1957).
[220] *Id.* at 528, 133 A.2d at 343.
[221] *Id.*
[222] *Id.*
[223] *Id.* at 529, 133 A.2d at 343.
[224] *Id.* at 531, 133 A.2d at 345.
[225] *Id.* at 531-32, 133 A.2d at 345. The mandatory counterclaim rule for debt was N.J. Ct. R. 4:13-1 (1958), currently N.J. Ct. R. 4:7-1. *See* note 109 *supra*.
[226] *See* notes 175-211 *supra* and accompanying text.
[227] C. F. Seabrook Co. v. Beck, 174 N.J. Super. 577, 417 A.2d 89 (App. Div. 1980).
[228] 174 N.J. Super. 577, 417 A.2d 89 (App. Div. 1980).
[229] *Id.* at 582, 417 A.2d at 91.
[230] The statute was N.J. Stat. Ann. §§ 2A:18-53 to -61 (West Cum. Supp. 1980).
[231] 174 N.J. Super. at 583-84, 417 A.2d at 92.

policy of judicial economy set forth in *Blanchard*[232] required the hearing of the whole range of claims arising out of the dispute. The court held that the jurisdiction of the county district court in summary dispossess procedures did not extend to periods of uninhabitability outside those the landlord was suing for, that is, times when rent had been fully paid.[233] Consequently, dispositions under this procedure were not res judicata as to later actions, even on the same subject.[234] The appellate division clearly was fearful that controversies presented in the summary proceeding would not be fully and fairly litigated. For example, the defendant has no right to file an answer.[235] The policy behind this exception to the entire controversy doctrine, thus, is similar to that of *Axinn*.[236]

Unanticipated Future Claims

9W Contractors, Inc. v. Englewood Cliffs[237] enunciated the last major exception: the entire controversy doctrine does not demand that parties anticipate future claims. A corporation won a judgment for tax refund from a municipality, but sued for pre-judgment interest in a second action.[238] The defendant raised the entire controversy rule. Relying on *Blanchard*'s policy of avoiding unfairness, the tax court allowed the subsequent litigation.[239] The court further noted that the claim for interest did not accrue until after the first judgment and to hold otherwise would require the tax petitioner to hypothesize future events to too great an extent.[240] The court applied a dual approach: the second claim was not part of the original controversy, and even if it were, it was not unfairly withheld. A broad reading of this opinion would lead to the conclusion that the entire controversy doctrine does not demand that parties anticipate future claims. Since one could, however, easily anticipate desiring interest if successful in a tax suit, the court in *9W Contractors* may have been lenient. To avoid possible preclusion, some foresight as to future claims should be exercised.

It is important to observe that there are some cases creating exceptions to the entire controversy doctrine without a thorough

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[232] 150 N.J. Super. at 277, 375 A.2d at 675.
[233] 174 N.J. Super. at 590, 375 A.2d at 96.
[234] *Id.* at 589-90, 375 A.2d at 95-96.
[235] *Id.* at 590, 375 A.2d at 96.
[236] *See* notes 219-25 *supra* and accompanying text.
[237] 176 N.J. Super. 603, 1 N.J. Tax 475, 424 A.2d 461 (1980).
[238] *Id.* at 606-07, 1 N.J. Tax at 469, 424 A.2d at 462.
[239] *Id.* at 609, 1 N.J. Tax at 471, 424 A.2d at 464.
[240] *Id.*

analysis of its ramifications. For example, some lower courts as recently as 1979 have allowed separate suits for property damage and personal injury.[241] The appellate division permitted a later injunction on a judgment to set aside a zoning ordinance.[242] Finally, the law division actually ordered severance of a tort claim from one in lieu of prerogative writ.[243] Occasionally, sweeping assertions contradicting the entire controversy doctrine are made in cases otherwise supportable.[244]

Too much reliance should not be placed on these opinions holding that the entire controversy doctrine was inapplicable, for they contravene the policy of preserving judicial resources.[245] Furthermore, the "different-party exception" set forth in the cases culminating with *Aetna* does not apply to essential parties under the holding in *Thatcher*. Thus, these limitations are narrow; careful litigants should sue all parties from whom they may possibly recover to avoid any possibility of later preclusion.

Future of the Entire Controversy Doctrine

The law of res judicata and the contours of the "cause of action" or "claim" have been difficult to define. Even though the basic pre-

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[241] In Shubeck v. Ondek, 167 N.J. Super. 121, 400 A.2d 544 (Law Div. 1979), an automobile passenger was allowed to bring an action against the drivers of both vehicles involved even after they had already litigated property damage among themselves. This principle was also applied to allow an owner of a motor vehicle to sue for personal injury after his insurance carrier had obtained a judgment for property damages in Reardon v. Allen, 88 N.J. Super. 560, 213 A.2d 26 (Law Div. 1965).

In another case, Humble Oil & Refining Co. v. Church, 100 N.J. Super. 495, 500, 242 A.2d 652, 654 (App. Div. 1968), the court made the sweeping assertion that the joinder of claims for property damage, personal injury, and contribution from joint tortfeasors were only permissive. This contention is in discord with *Ajamian* and its progeny. However, it involved a settlement procured by the litigant's insurance carrier under a contract arrangement where there was apparently little incentive to vigorously pursue the client's interests. *Id.* at 498, 242 A.2d at 653-54.

[242] Hochberg v. Board of Adjustment, 40 N.J. Super. 271, 123 A.2d 53 (App. Div. 1956).

[243] Aldrich Water Co. v. Sprinkle, 70 N.J. Super. 134, 174 A.2d 913 (Law Div. 1961). In *Falcone*, 82 N.J. Super. at 139, 196 A.2d at 812, the court emphasized that *Aldrich* was merely a severance for purposes of trial and not a ruling that two separate causes of action could not be joined.

[244] In both Hnath v. Hnath, 47 N.J. Super. 461, 136 A.2d 286 (App. Div. 1957) and Hobson Constr. Co. v. Max Drill, Inc., 158 N.J. Super. 263, 385 A.2d 1256 (App. Div. 1978), the court made sweeping assertions that joinder of claims against the same party was not required. The court could have found the claims in each suit to be part of different controversies.

[245] *Cf.* Newmark v. Gimbel's, Inc., 54 N.J. 585, 600-01, 258 A.2d 697, 705 (1969) ("Considering the overall problem of prosecuting products liability cases, it would seem to make sense procedurally to have the plaintiff's cause of action whenever possible adjudicated in one action against manufacturer and retailer").

cepts are easy to state, applying them to specific facts has produced divergent case law.[246] At one end of the spectrum is the traditional rule that the single cause of action is the basic unit of litigation.[247] At the other end is the New Jersey rule which contemplates the entire controversy to be the fundamental litigous unit. There is, nevertheless, a middle approach set forth in the tentative drafts of the *Restatement (Second) of Judgments*,[248] expanding the term "claim" to encompass more than a traditional "cause of action" but not adhering to New Jersey's highly preclusive approach.

Comment (a) of the tentative draft states that previously the word "claim" was defined narrowly as a single theory of recovery and notes the classic example that in some jurisdictions separate suits could be maintained for property damage and personal injury arising from a single accident.[249] However, the current trend, in the tentative draft's view, is to define "claim" as being the "transaction," making it the fundamental unit of litigation.[250] The draft initially asserts that "[t]he law of res judicata now reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so."[251] Furthermore, the drafters of the tentative *Restatement* argue in favor of defining a claim as embracing all the substantive theories of recovery and all the variant types of relief derived from these theories that arise out of a transaction or connected series of transactions.[252]

This language would substantiate New Jersey's entire controversy doctrine were it not for a later declaration:

> [T]he plaintiff is under some compulsion not to split a claim. There is no like compulsion on a plaintiff who has a number of claims against a defendant to join them in a single action; he may join them if he wishes, but he is not obliged to do so out of fear that he will lose any claims that he omits to join. Joinder of multiple claims is permissive, not compulsory.[253]

Thus, while the tentative draft of the *Restatement* clearly rejects the traditional cause of action as the basic unit of litigation, what the new

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[246] *See* note 33 *supra*.

[247] *See* RESTATEMENT OF JUDGMENTS § 62 (1942) and note 33 *supra*.

[248] RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft, 1973). *Accord, id.* (Tent. Draft No. 5, 1978).

[249] RESTATEMENT (SECOND) OF JUDGMENTS § 61, Comment a, at 78-79 (Tent. Draft, 1973). For New Jersey's rule, see note 241 *supra*.

[250] RESTATEMENT (SECOND) OF JUDGMENTS § 61, Comment a, at 80 (Tent. Draft, 1973).

[251] *Id.*, Comment a, at 80-81.

[252] *Id.*, Comment a, at 78, 80.

[253] *Id.*, Comment h, at 90.

unit is to be is ambiguous. The two passages can be reconciled only if "controversy" is equated with a "claim."

Decisions in other jurisdictions reflect this ambiguity, and several cases have utilized the middle approach. In *Ramaseyer v. Ramaseyer*,[254] the Supreme Court of Idaho held that a judgment for dissolution and accounting of a partnership of a ranching operation precluded a later action for quiet title, partition, and mesne profits. The court quoted the aforementioned tentative draft of the *Restatement* to rule that the dictates of res judicata required "that entire controversies will be presented and that all relevant material will be produced."[255] The same court, nevertheless, declined to apply the rule to a subsequent case involving an action for damages that followed one for mandamus.[256]

A Delaware court adopted the transactional approach of the tentative *Restatement* in *Maldonado v. Flynn*.[257] A stockholder brought a derivative suit in the Delaware Court of Chancery and later filed a similar one alleging securities act violations in federal district court.[258] The district court dismissed the case and the plaintiff appealed. The court of chancery held that the theories of recovery raised in both the state and federal courts arose out of the same transaction and as such constituted only one claim.[259] Since the claim had been adjudicated, the doctrine of res judicata barred its rehearing in state court.[260]

The federal courts have also occasionally employed language representing the middle approach. For example, in *United States v. California & Oregon Land Co.*,[261] the Supreme Court of the United States asserted that "the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time."[262] Other federal courts have echoed this view.[263]

The entire controversy doctrine has a major advantage over the traditional cause of action approach. By making the fundamental unit

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[254] 98 Idaho 554, 569 P.2d 358 (1977).

[255] *Id.* at 556, 569 P.2d at 360 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 61, Comment a, at 80-81 (Tent. Draft, 1973)).

[256] Heaney v. Board of Trustees, 98 Idaho 900, 565 P.2d 498 (1978).

[257] 417 A.2d 378 (Del. Ch. 1980).

[258] *Id.* at 380.

[259] *Id.* at 381 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 61, Comment h & l (Tent. Draft No. 5, 1978)).

[260] *Id.* at 382.

[261] 192 U.S. 355 (1904).

[262] *Id.* at 358.

[263] *See also* Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961); Williamson v. Columbia Gas & Elec. Ass'n, 186 F.2d 464 (3d Cir. 1950) (*see* notes 52-55 *supra* and accompanying text); Singleton v. Airco, Inc., 80 F.R.D. 467 (D. Ga. 1978).

of litigation the "transaction" or "controversy," it is assumed that all that has transpired among the parties, with a few exceptions, will be brought into suit. This is a much easier measure than the abstract set of cause of action rules used in the traditional analysis. Hence, the amount of litigation should be narrowed because the boundaries of what must be adjudicated have been reduced to encompass all the events which have occurred between the parties connected to the controversy. This creates a built-in circumscription on litigation.

In New Jersey, frustration over the highly fragmented court structure and the strong desire to unify it created a momentum that carried over into the claims areas. In jurisdictions with a long history of a fused judicial apparatus, there was no such pressure. It is likely, therefore, that the transition toward the entire controversy doctrine on a nationwide basis will come not by a spate of judicial fiats or changes in civil procedure rules, but rather by a gradual expansion of the word "claim" to mean the "entire controversy" between the parties.

CONCLUSION

The entire controversy doctrine, originally designed to bar litigation fragmented among courts, now constitutes a requirement that all claims out of a single controversy be litigated in one forum. It has been applied to other areas, notably to require joinder of essential parties,[264] to utilize post-trial relief,[265] to bolster the equitable power to enjoin parties from pursuing out of state litigation,[266] and to imply that state claims must be proffered for adjudication in federal courts.[267]

There are a number of exceptions to the doctrine. Foremost is that litigants may subsequently sue a party to a controversy not involved in a previous action.[268] Moreover, also not barred from a second lawsuit are parties ignorant of claims at the time of the first action,[269] litigants to interpleader and summary dispossess proceedings,[270] and suitors whose claims arise after the settling of the first action.[271]

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[264] *See* notes 132-243 *supra* and accompanying text.
[265] *See* notes 144-51 *supra* and accompanying text.
[266] *See* notes 152-59 *supra* and accompanying text.
[267] *See* notes 160-65 *supra* and accompanying text.
[268] *See* notes 175-211 *supra* and accompanying text.
[269] *See* notes 212-18 *supra* and accompanying text.
[270] *See* notes 219-36 *supra* and accompanying text.
[271] *See* notes 237-40 *supra* and accompanying text.

Finally, while the entire controversy doctrine is most strictly enforced in New Jersey, other jurisdictions increasingly appear to adhere to its precepts.[272] Thus, those in jurisdictions that employ the traditional approach would be well-advised to bring all claims in the first proceeding, barring important countervailing tactical considerations.

William J. Volonte

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[272] *See* notes 246-63 *supra* and accompanying text.