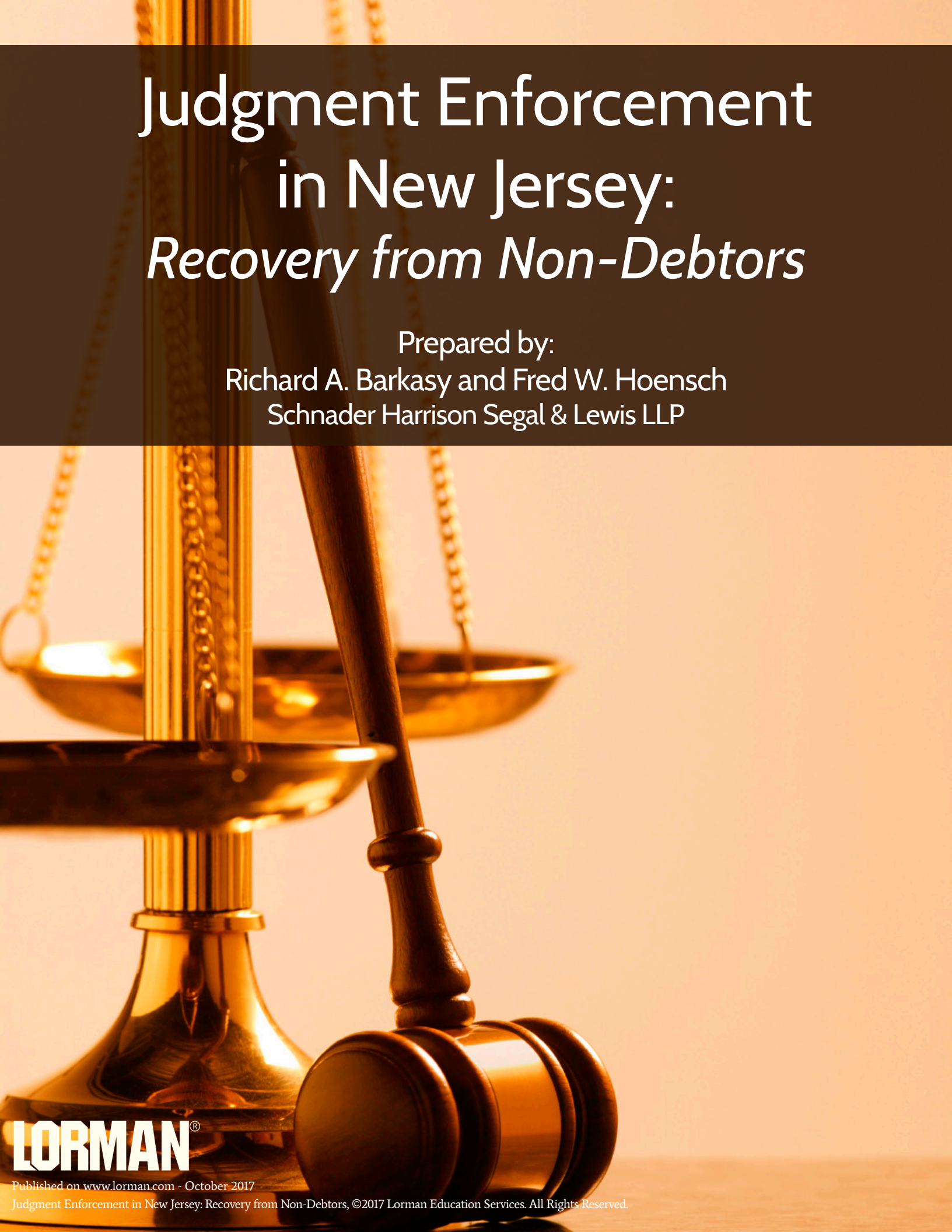

Judgment Enforcement in New Jersey: *Recovery from Non-Debtors*

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V. RECOVERY FROM NON-DEBTORS

A. Successor Liability

Generally, a business entity is deemed a successor in interest (and therefore liable for the obligations of its predecessor if: 1) it expressly or impliedly assumes such liability; 2) the two corporations were merged into one; 3) the successor corporation is a mere continuation of its predecessor; or 4) the transaction was fraudulently executed to escape such obligations. A fifth exception has been adopted in products liability cases where the successor corporation undertakes to manufacture essentially the same products as the predecessor.

B. Fraudulent Transfers

The New Jersey Uniform Fraudulent Transfer Act (NJUFTA), adopted by the Legislature in 1988 (and effective as of January 1, 1989), replaced the Uniform Fraudulent Conveyance Act, N.J.S.A. 25:2-7 to -19, which had been in effect since 1919. *Flood v. Caro Corp*., 272 N.J. Super. 398, 403, 640 A.2d 306 (App. Div. 1994). Because an explicit purpose of N.J.S.A. 25:2-33 is "to make uniform the law with respect to the subject of this article among states enacting it," courts freely consider the decisional law of other states in their interpretation of the NJUFTA.

The UFTA modernized the law respecting the rights and remedies of creditors in cases of transfers of assets by debtors the design, or effect of which, is to prevent or impede satisfaction of claims out of the debtor's assets. It serves as a vehicle by which creditors can recover from debtors and others who impede their collection efforts. *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 177, 876 A.2d 253 (2005). In other words, the purpose of the NJUFTA is to prevent debtors from defrauding creditors by placing assets beyond their reach. Thus, one remedy of the NJUFTA is to allow a creditor to undo the wrongful transaction so as to permit the

creditor to collect. *See* N.J.S.A. 25:2-29(a)(1); *Gilchinsky v. Nat'l Westminster Bank N.J.*, 159 N.J. 463, 475, 732 A.2d 482 (1999).

A transfer of assets may be fraudulent under the NJUFTA if the transaction was completed

(1) with the actual intent to defraud the creditor, or

(2 through constructive fraud, where the debtor had no actual intent to commit fraud.

N.J.S.A. 25:2-25, which applies to present and future creditors, states:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or

b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Thus, transfers are fraudulent as to a present or future creditor if either the debtor made the transfer with intent to defraud, or the transfer was made without receiving a reasonably equivalent value in exchange for the transfer, and the debtor intended to incur, or believed or

reasonably should have believed that it would incur debts beyond its ability to pay as they became due.

Further, N.J.S.A. 25:2-27(a), which relates to present creditors only, states: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." Thus, the elements of a fraudulent transfer under this portion of the NJUFTA are (1) the creditor's claim must have existed prior to the asset transfer, (2) the transferee did not pay reasonable equivalent value for the asset, and (3) the transferor was insolvent at the time of the transfer, or became insolvent as a result of the transfer.

If the transfer is demonstrated to be fraudulent within the meaning of the NJUFTA, the creditor's remedies include (1) avoidance of the transfer, (2) invocation of a provisional remedy, (3) an injunction, (4) appointment of a receiver, or (5) "[a]ny other relief the circumstances may require." N.J.S.A. 25:2-29. However, the NJUFTA does not impose strict liability, because pursuant to N.J.S.A. 25:2-30, transferees are accorded several affirmative defenses, for which they bear the burden of proof. *N.J. Dep't of Envtl. Prot. v. Caldeira*, 338 N.J. Super. 203, 224, (App. Div. 2001), *rev'd on other grounds*, 171 N.J. 404, 409, 794 A.2d 156 (2002).

Statute of Limitations for NJUFTA Claims:

§ 25:2-31. Extinguishment of cause of action

A cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless action is brought:

a. Under subsection a. of R.S. 25:2-25, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was discovered by the claimant;

b. Under subsection b. of R.S. 25:2-25 or subsection a. of R.S. 25:2-27, within four years after the transfer was made or the obligation was incurred; or

c. Under subsection b. of R.S.25:2-27, within one year after the transfer was made or the obligation was incurred.

C. Liability of Partners and Members

A general partner is liable for the debts of a partnership:

NJ Uniform Partnership Act

§ 42:1A-18. Partnership obligations; liability of partners

a. Except as otherwise provided in subsections b. and c. of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

b. A person admitted as a partner into an existing partnership is not personally liable for any partnership obligation incurred before the person's admission as a partner.

c. An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or so acting as a

partner. This subsection applies notwithstanding anything inconsistent in the partnership agreement that existed immediately before the vote required to become a limited liability partnership under subsection b. of section 47 of this act

NJ Uniform Limited Partnership Act

§ 42:2A-27. Liability to third parties

a. Except as provided in subsection d., a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of, and reliance on, his participation in control.

b. A limited partner does not participate in the control of the business within the meaning of subsection a. solely by doing one or more of the following:

(1) Being a contractor for or an agent or employee of the limited partnership or being a contractor, agent, employee, corporate officer, corporate director, or shareholder of a general partner;

(2) Consulting with or advising a general partner with respect to any matter, including the business of the limited partnership;

(3) Acting as surety, guarantor, or endorser for the limited partnership or assuming one or more specific obligations of the limited partnership or providing collateral for the partnership;

(4) (Deleted by amendment, P.L. 1988, c. 130.)

(5) (Deleted by amendment, P.L. 1988, c. 130.)

(6) Serving as an officer, director or shareholder of a corporate general partner; or

(7) Approving or disapproving matters related to the business of the partnership as shall be stated in the certificate and partnership agreement;

(8) Calling, requesting, attending or participating at a meeting of the partners or the limited partners;

(9) Winding up a limited partnership pursuant to section 52 of P.L. 1983, c. 489 (C. 42:2A-53);

(10) Taking any action required or permitted by law to bring or pursue a derivative action in the right of the limited partnership;

(11) Serving on a committee of the limited partnership or the limited partners;

(12) Proposing, approving or disapproving, by voting (by number, financial interest, class, group or as otherwise provided in the partnership agreement) or otherwise, on one or more of the following matters:

(a) The dissolution and winding up of the limited partnership;

(b) The sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all the assets of the limited partnership other than in the ordinary course of its business;

(c) The incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;

(d) A change in the nature of the business;

(e) The admission, removal or retention of a partner;

(f) A transaction or other matter involving an actual or potential conflict of interest;

(g) An amendment to the partnership agreement or certificate of limited partnership; or

(13) Exercising any right or power granted or permitted to limited partners under this chapter and not specifically enumerated in this subsection.

c. The enumeration in subsection b. does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him in the business of the limited partnership.

d. A limited partner who knowingly permits his name to be used in the name of the limited partnership, except under circumstances permitted by subsection a. (2) of section 6 of P.L. 1983, c. 489 (C. 42:2A-6), is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.

New Jersey Limited Liability Company Act

§ 42:2B-23. Debts, obligations, liabilities

Except as otherwise provided by this act, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member, manager, employee or agent of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company, or for any debt, obligation or liability of any other member, manager, employee or agent of the limited liability company, by reason of being a member, or acting as a manager, employee or agent of the limited liability company.

D. Personal Liability of Corporate Officers and Directors

Corporate officers and directors are liable for their own torts. *Van Dam Egg Co. v. Allendale Farms, Inc.*, 489 A.2d 1209 (NJ Super. 1985). As a result, they may be held liable for any fraudulent misrepresentations they make in connection with debts of the corporation. A corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort. *Saltiel v. GSI Consultants, Inc.,* 170 N.J. 297 (2002). A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct. *Id.*

In addition, to the extent that corporate officers and directors misrepresent the corporation's present intention to repay a debt, they may be individually liable for fraud. *Van Dam Egg Co. v. Allendale Farms, Inc.*, 489 A.2d 1209 (NJ Super. 1985).

E. Piercing the Corporate Veil

"A corporation is a separate entity from its shareholders, *Lyon v. Barrett*, 89 N.J. 294, 300 (1982), and [] a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." *Dept. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 500-01 (NJ 1983). "Even in the case of a parent corporation and its wholly-owned subsidiary, limited liability normally will not be abrogated." *Id*. citing *Muller v. Seaboard Commercial Corp.*, 5 *N.J.* 28, 34 (1950).

Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil. Id. The purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, *Telis v. Telis*, 132 *N.J.Eq.* 25 (E. & A.1942), to perpetrate fraud, to accomplish a crime, or otherwise to evade the law, *Trachman v. Trugman*, 117 *N.J.Eq.* 167, 170 (Ch.1934).

Under certain circumstances, courts may pierce the corporate veil by finding that a subsidiary was "a mere instrumentality of the parent corporation." *Mueller v. Seaboard Commercial Corp.*, 5 *N.J.* at 34-35; Application of this principle depends on a finding that the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent. Even in the presence of corporate dominance, liability generally is imposed only when the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law.