SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

The legal picture in the State of New Jersey has undergone marked changes within the past year. Both the judiciary and the legislature have contributed to noted developments, particularly in such areas as Criminal Law and Procedure, Constitutional Law, and Family Law. In the interests of brevity and clarity, the Seton Hall Law Review *will attempt to present a convenient synopsis of some of these noteworthy developments. In so doing, we hope to aid and assist the legal community in keeping abreast of some of the more interesting changes in certain significant areas of practice.*

ADMINISTRATIVE LAW—1978 N.J. Laws ch. 67 (to be codified at N.J. STAT. ANN. §§ 52:14F-1 to -16 (West Cum. Supp. 1979-1980)).

The New Jersey State Legislature has established the Office of Administrative Law (Office), an independent arm of the executive branch of the state government. The legislation establishes for the first time in the state an Office of Administrative Law (Office). Functions which were previously in the domain of the state's Division of Administrative Procedure have been transferred to the Office. The Director of the Office is given the authority to develop uniform standards for administrative hearings, to coordinate the administration of the state's Administrative Procedure Act, N.J. STAT. ANN. §§ 52:14B-1 to -15 (West 1970 & Cum. Supp. 1978-1979) (APA), and to assist individual agencies in the implementation and interpretation of rules promulgated pursuant to the APA.

Although the office is allocated within the Department of State, the independent nature of the newly created Office is emphasized. The Director of the Office is vested with broad powers to facilitate the transition and continued operation of the office. One example of the type of function transferred to the Office is the provision that rules adopted by the individual state agencies become effective upon their filing with the Director. Previously, such rules had been required to be filed with the Secretary of State.

By providing for the appointment of a network of administrative law judges, the Act establishes a group of individuals competent to resolve contested cases that may arise before the individual agencies. In establishing an Office of Administrative Law, the New Jersey State

Legislature has taken cognizance of the need for an independent, central force to direct the implementation of the Administrative Procedure Act.

BANKS AND BANKING—*InfoComp Corp. v. Somerset Trust Co. and STC Corp.*, 165 N.J. Super. 382, 398 A.2d 557 (App. Div. 1979).

InfoComp, a New Jersey corporation whose principal business location is Mount Laurel, has provided various data processing services to governmental bodies and agencies in its area since its incorporation in 1969. These activities comprise ninety percent of InfoComp's business, and include the preparation of real property tax assessments, tax bills, water and sewer assessments, voter registration records and jury lists. Somerset Trust Company (Somerset), a New Jersey bank whose offices are wholly within Somerset County, has solicited data processing business and provided local governmental bodies with data processing services since 1966. These activities include essentially the same service as those marketed by InfoComp. Of the services provided by the respective parties, the compilation of real property tax assessment records is the primary source of competition, the contracts for which are awarded on the basis of bids.

InfoComp unsuccessfully attempted to persuade the federal comptroller of the currency to prevent a competitor bank from offering data processing services. InfoComp maintained that the data processing business of Somerset and other banking institutions were outside the parameters of permissible banking activity under N.J. STAT. ANN. § 17:9A-1 (West 1963 & Cum. Supp. 1978-1979). Nevertheless, the commissioner of banking also refused InfoComp's request to restrain Somerset's actions. Consequently, InfoComp sought a permanent injunction to prevent Somerset and its affiliate, STC Corporation, from engaging in the data processing business. Prior to trial, Somerset's motion for dismissal and InfoComp's summary judgment motion were both denied. Upon completion of the plaintiff's case, the court dismissed the complaint, holding that InfoComp had failed to prove a cause of action. The plaintiff appealed.

The pivotal issue involved was whether New Jersey law permits state chartered banks to engage in the data processing business. The resolution of this "important question of public policy" necessitated a definitive interpretation of N.J. STAT. ANN. § 17:9A-24(a) (West 1963 & Cum. Supp. 1978-1979). This section of the Banking Act (Act) con-

strues "bank services" to include the "preparation and mailing of checks, statements, notices, and similar items, or any other clerical, bookkeeping, accounting, statistical, or similar functions . . . ." *Id.* The appellate division, in an expansive construction of the Act, affirmed the chancery court's judgment. The court maintained that the electronic maintenance of real estate, water and sewer tax records is a "clerical," "bookkeeping" or "accounting" activity, and thus permissible under the Act. 165 N.J. Super. at 388, 398 A.2d at 560.

InfoComp contended that the trial judge should have applied the *ejusdem generis* rule to the disputed language of the enactment. However, the court asserted that the rule's applicability was subordinate to a statutory construction consistent with legislative intent. *See* Union County Bd. of Freeholders v. Union County Park Comm'n, 41 N.J. 333, 337, 196 A.2d 781, 783 (1964); Salomon v. Jersey City, 12 N.J. 379, 389, 97 A.2d 405, 410 (1953). The court held that the language contained within the Act evinced a specific legislative desire to authorize banks to provide the disputed data processing services. 165 N.J. Super. at 389, 398 A.2d at 560. The court also averred that further evidence of the legislature's intent to allow for statutory flexibility was found in N.J. STAT. ANN. § 17:9A-24.4 (West Cum. Supp. 1978-1979) which affords the commissioner of banking discretion to fashion a broad definition of "bank services." Finally, the appellate court indicated that unlike the Federal Bank Services Corporation Act, 12 U.S.C. § 1861 (1976), the New Jersey statute lacks the provision that bank services be restricted to those performed for banking institutions. 165 N.J. Super. at 391, 398 A.2d at 561.

Although the *InfoComp* court has validly construed N.J. STAT. ANN. § 17:9A-24.1(a) to encompass data processing services, the legislation's nebulous language will undoubtedly prompt additional litigation in the area of acceptable bank activities. This broader problem has not been and cannot be resolved by the determination made here. Thus, reevaluation of this section by the state legislature may be necessary. As a matter of public policy, flexibility in the adaptation of technological advances in the banking industry should be encouraged. The *InfoComp* decision, however, goes well beyond this proposition and legitimately expands the scope of permissible banking activities. Unless the legislature takes the initiative to restrict the provision by employing more specific language, the *InfoComp* determination will certainly serve as the basis upon which future expansion of bank activities will be validated.

CASINO CONTROL—N.J. STAT. ANN. §§ 5:12-1 to -152 (West Cum. Supp. 1978–1979).

On March 17, 1978, the New Jersey legislature amended the Casino Control Act to further the aims of continuity and stability in casino gaming operations. The amendments allow the Casino Control Commission (Commission) to grant temporary casino permits and to appoint a conservator to control the property of a casino licensee under certain circumstances.

Section 5:12-95.1 authorizes the granting of temporary casino permits upon a formal request by the applicant. There must also be an affirmative finding by the Commission that, *inter alia*, the statements of compliance pursuant to section 5:12-81 have been issued to the applicant and that a voting trust agreement in accordance with N.J. STAT. ANN. § 14A:5-20 (West 1969) has been executed and deposited with the Commission. The voting trust agreement becomes effective at the discretion of the Commission based upon certain enumerated criteria. When a temporary casino permit is granted, it is effective for a period of six months. It is then renewable for one three-month period at the Commission's discretion. During the period that a temporary casino permit is in effect, the Commission and the Division of Gaming Enforcement shall conduct an investigation in order to make a final determination on the application for a casino license.

Section 5:12-130.1 provides for the institution of conservatorship and appointment of conservators in a summary manner by the Commission. This action is authorized where: (1) a casino license has been revoked; (2) in the discretion of the Commission, a license or operation certificate has been suspended for a period greater than 120 days; or (3) a casino license has not been renewed. Such a system which provides for the imposition of a conservatorship under the aforementioned circumstances serves both the economic and law enforcement interests involved in casino gaming operations.

CONDOMINIUM AND COOPERATIVE HOUSING—1978 N.J. Laws ch. 93 (to be codified at N.J. STAT. ANN. §§ 40:55C-58.1 to -67).

The amendments to the Urban Renewal Corporation and Association Law of 1961, N.J. STAT. ANN. §§ 40:55C-40 to -76 (West 1967

& Cum. Supp. 1978–1979), provide for condominium development in urban renewal areas. Although these developments will still be subject to the provisions of the old act, new requirements and tax exemption guidelines have been established by the recently enacted provisions.

Only a qualified "urban renewal corporation or association" is now entitled to undertake a condominium project upon application to and approval by the governing body of the particular locality. *Id.* §§ 40:55C-53, -55.1. A "project" is defined as "the undertaking and execution of the redevelopment of a blighted area" pursuant to the financial agreement executed between the corporation and municipality with respect to land and improvements. *Id.* § 40:55C-46. "Such agreement shall be prepared by the corporation or association and submitted as a separate part of its application for project approval." *Id.* § 40:55C-59. In addition, the agreement shall "contain detailed representations and covenants by the corporation or association as to the manner in which it proposes to manage or operate the project." *Id.* § 40:55C-62.

Tax exemption is extended to the "single condominium unit" as well as to "all improvements in the project to be constructed or acquired by the corporation or association." *Id.* §§ 40:55C-58, -59. However, unit exemption "shall continue in effect only during that time that an owner of such unit . . . personally resides therein." *Id.* § 40:55C-58.

The amended act now provides for tax exempt status for certain improvements made in the development of blighted areas. Such status will be for a period of not more than twenty years. *Id.* § 40:55C-65. However, where the development involves housing, the exemption period is extended to thirty-five years. *Id.* § 40:55C-65.

The new statute encourages improvement of blighted areas through the construction of condominiums. Such improvement is sorely needed in New Jersey's urban environments. Moreover, personal ownership of each condominium unit could lead to a greater sense of pride in and commitment to the project by the individual owners.

CRIMINAL RESPONSIBILITY—*State v. Stasio*, 78 N.J. 467, 396 A.2d 1129 (1979).

On October 7, 1975, at approximately 5:00 p.m., bartender Peter Klimek started his shift at the Silver Moon Tavern in Clifton, New

Jersey. Shortly thereafter, Thomas Stasio entered the tavern, approached the bartender and demanded some money. Klimek refused and the defendant pulled out a knife. Klimek and another patron then managed to wrestle Stasio to the ground.

At trial, after the conclusion of the state's case, the defendant elected not to take the stand. His decision was as a result of an earlier conference in chambers, at which time Stasio's attorney advised the court that his defense would be that the defendant had been so intoxicated that he was incapable of forming the intent to rob. The trial court responded by stating it would charge that "'voluntary intoxication was not a defense to any act by the defendant in this matter.'" 78 N.J. at 471, 396 A.2d at 1131. A jury found the defendant guilty of assault with the intent to rob, in violation of N.J. STAT. ANN. § 2A:90-2 (West 1969 & Cum. Supp. 1978–1979), and of assault while being armed with a dangerous knife, contrary to N.J. STAT. ANN. § 2A:151-5 (West 1969 & Cum. Supp. 1978–1979).

On appeal, the appellate division held that the trial court's declaration in view of the defendant's proffer of proof was erroneous, and thus reversed the convictions and ordered a new trial. 78 N.J. at 472, 396 A.2d at 1131. The court reasoned that specific intent is an essential element of the crime of assault with intent to rob and that voluntary intoxication may be shown to negate that element of the offense. The New Jersey supreme court subsequently granted certification. 75 N.J. 613, 384 A.2d 843 (1978).

In affirming the appellate division, the supreme court held that the trial judge's ruling on the admissibility of evidence of voluntary intoxication at an unrecorded conference in chambers was improper. 78 N.J. at 483, 396 A.2d at 1137. The trial court should have waited until the issue was reached at trial when evidence would have been offered. The court also held that the trial judge should have instructed the jury on possession of a knife in terms of inferences which may or may not be drawn rather than instructing that possession of a knife was prima facie evidence of defendant's intent to commit a crime with a dangerous instrument. *Id.* at 484–85, 396 A.2d at 1137.

The major issue addressed by the supreme court was whether voluntary intoxication constitutes a defense to a crime, one element of which is the defendant's intent. The court, speaking through Justice Schreiber, held that they would follow the rule set forth in State v. Maik, 60 N.J. 203, 287 A.2d 715 (1972), which held that criminal responsibility was not extinguished when the offender was under the influence of a drug or liquor. In *Maik*, Chief Justice Weintraub pronounced four exceptions to the general rule. First, criminal responsi-

bility is eliminated where drugs which are being taken for medication produce unexpected or bizarre results. Second, if intoxication so impairs a defendant's mental faculties that he does not possess the wilfulness, deliberation and premeditation necessary to prove first degree murder, a homicide cannot be raised to first degree murder. Third, a felony homicide will be reduced to second degree murder when intoxication precludes formation of the underlying felonious intent. Fourth, the defense of insanity is available when the voluntary use of the intoxicant or drug results in a fixed state of insanity after the influence of the intoxicant or drug has spent itself. For a more detailed discussion of State v. Maik, see Note, 4 SETON HALL L. REV. 295 (1972).

In reaching this holding, the court rejected the approach adopted by the appellate division in State v. Del Vecchio, 142 N.J. Super. 359, 361 A.2d 579 (App. Div.), *certif. denied*, 71 N.J. 501, 366 A.2d 657 (1976). The court in *Del Vecchio* held that when specific intent was an element of an offense, voluntary intoxication may negate existence of that intent. *Del Vecchio* would permit the intoxication defense only when "specific" as distinguished from a "general" intent was an element of the crime.

The *Stasio* court rejected that dichotomy, believing that the difference between the two is not readily ascertainable. The court reasoned that the *Del Vecchio* approach may free defendants of specific intent offenses even though the harm caused may be greater than in an offense held to require only general intent. Thus, this would "undermine the criminal law's primary function of protecting society from the results of behavior that endangers the public safety." 78 N.J. at 477, 396 A.2d at 1134.

Technically, the impact of the holding in this case is minimal because the new Code of Criminal Justice adopts its own provision dealing with intoxication. Under that provision, proof of intoxication may negate the existence of the defendant's purpose or knowledge, when purpose or knowledge is an element of the crime. However, the court points out that the legislature would be requested to modify the provisions dealing with intoxication, so that the principle established in *Maik* would still be followed.

FAMILY LAW—ALIMONY—*Lynn v. Lynn*, 165 N.J. Super. 328, 398 A.2d 141 (App. Div. 1979).

Marilyn and Robert Lynn were married in 1963. They lived together as husband and wife with their three children until Robert

Lynn deserted their home in April 1975. At the time of his desertion, Dr. Lynn was a successful medical specialist conducting a practice devoted exclusively to the treatment of terminally ill cancer patients. Subsequent to her husband's desertion, Mrs. Lynn instituted an action for separate maintenance and child support. When Dr. Lynn counterclaimed for a divorce on grounds of adultery, Mrs. Lynn amended her claim and sought a divorce on grounds of adultery and desertion. In January 1976, the court entered a pendente lite support order. Prior to the trial, Dr. Lynn sold his lucrative medical practice and assumed a residency in a different specialty. He cited the depressing aspects of working in his original area of expertise as the reason for his change in practice.

The trial court granted a judgment of dual divorce to the parties on the grounds that Dr. Lynn had deserted the marital home and Mrs. Lynn had engaged in post-desertion adultery. 153 N.J. Super. 377, 379 A.2d 1046 (Ch. Div. 1977). The trial court noted that fault was an appropriate consideration in determining alimony under the statute, N.J. STAT. ANN. § 2A:34-23 (West 1952 & Cum. Supp. 1978–1979), and accordingly, denied Mrs. Lynn an alimony award because of her conduct. In response to the other relief sought by the parties to the action, the lower court entered a child support order against Dr. Lynn and a directive that the marital assets be equitably distributed.

Pursuant to the parties' cross-appeals, the appellate division considered the economic issues presented by the trial court's disposition of the case. The appellate division disagreed with the lower court that adulterous conduct was a per se bar to an award of alimony to the adulterous spouse, especially where the "guilty" conduct had occurred after separation. 165 N.J. Super. at 335, 398 A.2d at 144. In so doing, the court questioned the propriety of making adulterous conduct an absolute prohibition to a grant of alimony, where the behavior was not of an "outrageous" nature. *Id.* Additionally, the court justified its reluctance to support an automatic bar to alimony by a provision incorporated into the recently enacted New Jersey Code of Criminal Justice, N.J. STAT. ANN. §§ 2C:1-1 to :98-4 (West Cum. Supp. 1978–1979), which decriminalizes adultery and other consensual conduct between competent adults. The import of their analysis was that adulterous fault is only one factor to be considered in the alimony determination, and that an illicit affair should be viewed in the context of the entire marriage.

Dr. Lynn also contended that the child support order was excessive. The trial court had imposed a trust upon his share of the equi-

tably distributed marital assets, from which he was to fulfill his support obligation, and not upon his ex-wife's. The appellate division ruled that he should be allowed access to the principal and interest in the trust in excess of his child support obligation. 163 N.J. Super. at 342, 398 A.2d at 148. While the court did not hold that amount of the obligation to be excessive, in view of the limited duration and self-imposed aspect of Dr. Lynn's current reduction in income, the court did direct the trial level to consider Mrs. Lynn's co-equal obligation to support their children. *Id.* at 344, 398 A.2d at 148. This directive comported with the position of prior case law, that both parents have an obligation to support their children. Additionally the court rejected Dr. Lynn's contention that the trial level erred in including his interest in his former practice's accounts receivable and a year's worth of deferred compensation in the marital assets available for distribution. *Id.* Such amounts had accrued while the marital union was intact.

By its instructions in *Lynn*, the appellate division has reaffirmed recent trends in its family law decisions. The emphasis continues to move away from the common law punitive approach to the denial of alimony. Furthermore, the courts remain supportive of the proposition that child support is a coextensive responsibility of the parental unit. Lastly, the *Lynn* holding contributes to the ongoing definitional process of the parameters of the doctrine of equitable distribution considered in Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974), and Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974).

FAMILY LAW—ALIMONY AND MAINTENANCE—*Pascarella v. Pascarella*, 165 N.J. Super. 558, 398 A.2d 921 (App. Div. 1979).

The Pascarellas were married for eight and one-half years when Mrs. Pascarella sought and obtained a divorce on the ground of extreme cruelty. It was the second marriage for each party and although both had children from their previous marriage, no children were born of this marriage. The trial court awarded the equivalent of forty percent of the marital property at its then current market value as equitable distribution. In addition, the court awarded permanent alimony, and $8,800.00 in counsel fees. The husband appealed.

The appellate division held that the trial judge gave "undue weight to 'the education of the plaintiff, present non-employability, and her mental condition'" in awarding forty percent of the marital property while not considering other relevant criteria. 165 N.J. Super. at 562, 398 A.2d at 923. The court included among these the

fact that it was a second marriage, of short duration, from which no children were born. *Id.* In addition, the court noted that the wife had brought no property or money to the marriage. Accordingly, the court remanded on the issue of equitable distribution for reconsideration in light of the enumerated criteria. *Id.*

The court went on to hold that a debt of some $33,000.00 incurred by the husband during the marriage was a debt of the marriage and should be deducted from the total value of the marital property in assessing the net value of the marital assets subject to equitable distribution. *Id.* at 563, 398 A.2d at 923. The court upheld the trial court in utilizing the current market value of the marital home. It reasoned that although the husband had acquired the property prior to the marriage, his execution of a deed conveying it to himself and his wife as tenants by the entirety constituted a gift. *Id.* at 564, 398 A.2d at 924. Thus, it became marital property subject to equitable distribution. Finally, the court ordered a review of the award of alimony in light of the relation it may have borne to the vacated equitable distribution. *Id.* at 565, 398 A.2d at 924. The court also ordered review of the amount of counsel fees awarded in light of the substantial portion of the matrimonial estate awarded to the wife. *Id.*

The appellate division's opinion has significant implications for several areas of matrimonial law. It provides further evidence of the developing judicial trend to look at the totality of the circumstances in dealing with matrimonial matters. It reaffirms the development, and supports the conclusion, that the trial court must address the equities which adhere to the husband as well as those of the wife. The criteria thus proposed for reconsideration of the equitable distribution suggest that the mere fact of a marriage may no longer be considered as conveying an entitlement to a wife; it must be a situational determination.

Two of the more noteworthy aspects of the opinion involve the award of counsel fees and the valuation of the marital home. The court is correct in its suggestion that, as to the fees, the award demands examination of the total context and is not a matter of right. The logical inference to be drawn is that a lesser award may be warranted when a wife has been sufficiently compensated by the equitable distribution.

The other point of note, however, causes some concern. The court was correct, as a matter of black letter law, in holding that the husband's conveyance of the property to himself and his wife made it marital property subject to equitable distribution. Such an interpreta-

tion is questionable when considering the fact that the conveyance was made presumptively during a happier period of the marital relationship. One may also presume that its reference was to estate and not divorce considerations. The holding as to this issue, it seems, may inhibit those persons involved in a marriage who are concerned with minimizing the tax impact for their spouse upon their death. This would be an unfortunate result, and hopefully, a line of case law will not develop supporting it.

FAMILY LAW—STANDING—*Doe v. State*, 165 N.J. Super. 392, 398 A.2d 562 (App. Div. 1979).

John and Jane Doe were the foster parents of five-year-old D.W. who was brought into their custody at the age of eight months when D.W.'s natural mother attempted to murder her. Three years after obtaining custody, the Does filed suit to restrain increased visitation of D.W. by her natural parents, and to terminate their parental rights. Additionally, the foster parents sought to adopt D.W. or in the alternative, to obtain guardianship of the child. The Division of Youth and Family Services (DYFS) determined unilaterally that D.W. should be removed from the custody of the plaintiffs and returned to her natural parents. The action was dismissed and the matter was appealed to the appellate division which has exclusive jurisdiction to consider an attack on a final administrative determination. N.J.R. 2:2-3(a)(2).

DYFS contended that foster parents lacked standing to contest the decision. However, the court determined that prior case law did not stand for the proposition "that foster parents lack[ed] standing or a protected interest whereby they are not entitled to be heard prior to an administrative determination concerning the removal of a foster child." 165 N.J. Super. at 403, 398 A.2d at 567. Rather, the prior cases denied the hearing based on the facts of the specific case. The court noted that the purpose of the recent enactment of the Child Placement Review Act, N.J. STAT. ANN. §§ 30:4C-50 to -65 (West Cum. Supp. 1978–1979), was to "provide for both administrative and judicial review of each child's placement outside its home by DYFS in order to ensure that each placement is in the best interests of the child." 165 N.J. Super. at 404, 398 A.2d at 568. The court further indicated that notice of the hearing as contemplated by the act included notice to the foster parents.

The appellate division, recognizing the state's liberal view on standing, held that there was no reason why the standing of foster

parents should be treated more restrictively. Furthermore, the court held that where a bona fide dispute exists between the two sets of parents, it is in the best interests of the child to grant foster parents adversary standing "with all the rights which that status implies." *Id.* As part of their standing, the plaintiffs have the right to discovery, to present witnesses on their behalf, and to confront and cross-examine opposing witnesses. Since DYFS was the agency whose decision was being challenged, DYFS should not represent the child, but rather, independent representation would be required. Furthermore, while the hearing would normally be conducted by DYFS, the division has become "so enmeshed in the proceeding" that it could not remain impartial. *Id.* at 409, 398 A.2d at 570. Thus, pursuant to N.J. STAT. ANN. § 30:4C-61 (West Cum. Supp. 1978–1979), the juvenile and domestic relations court would hold the hearing. *Id.*

The decision of the court further advances the position that the best interests of the child should be paramount in custody and placement proceedings. By allowing the foster parents to have standing in the juvenile and domestic relations court, the state is insuring that the placement will be the best possible for the child. For a general discussion of standing of foster parents and the best interests of the child, see Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL L. REV. 1 (1978).

FOOD, DRUG & COSMETIC LAW—ADVERTISING—SAFETY LAWS—N.J. ADMIN. CODE §§ 8:70-1.1 to -1.4 (1979).

The Prescription Drug Price and Quality Stabilization Act (Act), N.J. STAT. ANN. §§ 24:6E-1 to -13 (West Cum. Supp.1978-1979), permits the advertising of prescription drug prices and creates a Drug Utilization Review Council (Council) to prepare a list of interchangeable drug products. The Act's purpose is to encourage the substitution of less expensive, but therapeutically equivalent, "generic" drugs for more expensive brand name drugs.

The Review Council "Formulary," as the list is to be known, will be made public through free distribution to physicians, authorized drug prescribers and licensed pharmacists. Upon request, the Formulary will be made available to the general public at cost.

The newly created Council has proposed rules, governing drug evaluation, and acceptance criteria in order to assemble the Formulary. For a drug product to be included in the interchangeable list, it must meet both the minimum standards of the Food and Drug Administration or other national, non-governmental drug clearing

houses, as well as the "equivalence" guidelines of the new rules. N.J. A.C. §§ 8:70-1.1 to -1.4. Additionally, the active and inactive components of the drug, together with their specific purpose and source must be identified. *Id.* § 8:70-1.4(a). The product's ingredients, sources and final dosage form are to be approved by either the Food and Drug Administration, Drug Utilization Review Council or New Jersey Department of Health before the drug can be accepted into the Formulary. *Id.* If such information is not given, the drug will not be approved. *Id.*

The manufacturer must also comply with the rules by identifying itself and certifying that the product conforms to applicable standards. The Council's rules attempt to ensure that the manufacturer, labeler or distributor of the drug will be responsible by requiring compliance with the "Good Manufacturing Practices" of title 21 of the United States Code. The manufacturer's production facilities "must be inspected not less than every two years by an appropriate Federal or State agency . . ." N.J.A.C. § 8:70-1.4(c)(1). Any violations discovered by post inspection are to be made available to the Council, together with records of previous product recalls. *Id.* § 8:70-1.4(c)(2). The manufacturer must place an identification mark on its labels, inserts and catalogues, be prepared to adequately handle returned products if a recall is necessary, and have sufficient capabilities to ensure the statewide availability of its product. N.J.A.C. § 8:70-1.4(d), (e), (g).

These rules provide an essential framework for the implementation of consumer-oriented legislation. The spiralling costs of health and medical care can be obviated through the use of "generic" products if the public is satisfied that the safety and quality of such products is equivalent to name brand goods.

HOUSING—CONTRACTS—CONSTITUTIONAL LAW—1978 N.J. Laws ch. 139 (to be codified at N.J. STAT. ANN. § 2A: 18-61.13).

As a direct consequence of the enactment of the Casino Control Act, N.J. STAT. ANN. § 5:12-1 to -152 (West Cum. Supp. 1978-1979), and the introduction of casino gambling in Atlantic City, property located in Atlantic City has increased markedly in value. In an attempt to capitalize on this windfall, many landlords are in the process of converting their properties to vacation-oriented structures such as hotels and motels. The immediate impact of this metamorphosis has been an acute housing shortage, as well as the dislocation of senior citizens and persons of moderate and low income. In an attempt to provide for this potential dilemma, the New Jersey legislature estab-

lished grounds for evicting tenants and lessees of certain residential property in the Atlantic City area. 1978 N.J. Laws ch. 139 (to be codified at N.J. STAT. ANN. § 2A:18-61.13).

Primarily, the statute's objective is to protect the common good. The legislature fears that the displacement of Atlantic City residents "will force many of them into substandard housing, . . . and encourage overcrowding and the blighting of residential neighborhoods." 1979 N.J. Laws ch. 139, § 1(g). It has thus established a scheme by which adequate relocation assistance is provided by the landlord. In the event comparable housing is unavailable, the landlord is required to tender the equivalent of five months rent to the tenant or allow the lessee to remain in the building rent-free for a period of five months beyond the initial notice of permanent retirement, which notice must be afforded a tenant one year prior to eviction.

The legislature has expressed an intent to combat a social problem expansive in scope. Although the concerns manifested in this enactment are undoubtedly real, a question remains as to the constitutionality of the means adopted to accomplish its end—housing stability. The relocation assistance provision must be evaluated in light of the due process clause of the federal constitution, as well as the contracts clause, which has been the subject of two recent decisions of the United States Supreme Court. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977). Under article I, section 10, the state is prevented from impairing contractual obligations. Since the New Jersey enactment requires landlords to provide notice of retirement and relocation assistance, as well as rent free residence or specified payments to the tenant, the lease agreement terms have been altered. Whether this modification rises to the point of unconstitutional impairment should be the subject of judicial scrutiny. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244–45 (1978).

Facially, the current enactment appears to effect a severe, substantial and unreasonable alteration of the landlord-tenant agreement. Its validity, however, will depend upon the standard against which the enactment is assessed. Under United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977), the legislation would have to satisfy the reasonable and necessary construct articulated therein, although deference to a legislative assessment of reasonableness and necessity might be allowed. *Id.* at 23–25. The more recent *Allied* decision, however, avoided the *United* test in sustaining a contract clause challenge. 438 U.S. at 250. Consequently, it is uncertain which approach the courts would invoke. It is for this reason that the question of the enactment's constitutionality with regard to the contract

clause is currently unanswerable. For a more detailed discussion of the *Allied* and *United* cases and their effect upon the contract clause, see Note 9 SETON HALL L. REV. 784 (1978).

Another constitutional safeguard encroached upon by the relocation assistance measure is the due process clause. Pursuant to the fifth and fourteenth amendments, the state is prohibited from depriving an individual of his property without due process of law. The denial by the state of the landlord's freedom to dispose of his building as he sees fit seems to suggest an infringement of this fundamental liberty. Additionally, the lack of a procedural mechanism by which the landlord can challenge the unilateral imposition of the relocation assistance provisions also smacks of a procedural due process violation.

VICARIOUS LIABILITY—NEGLIGENCE—*Donch v. Delta Inspection Servs., Inc.*, 165 N.J. Super. 567, 398 A.2d 925 (Law Div. 1979).

Kenneth Donch was employed by Delta Inspection Services (Delta), an independent contractor hired by Exxon Corporation (Exxon) to inspect suction lines and underwater pipes at an Exxon salt water pumping station. Delta received from Exxon general safety instructions which were routinely issued to independent contractors. However, Exxon provided no specific instructions regarding diving operations. Donch was wearing complete diving gear when he drowned while working underwater on December 18, 1976.

Margaret Donch brought suit individually and as administratrix of her son's estate. She claimed Exxon had primary liability for the wrongful death by not providing Kenneth Donch with a reasonably safe place to work, for negligently failing to supervise Donch, and for negligently employing an independent contractor who failed to adequately supervise the underwater inspection. Plaintiff also asserted the vicarious liability of Exxon for the negligence of Delta in carrying on an inherently dangerous activity. Since Mrs. Donch failed to introduce evidence to support her allegations of the defendant's primary liability, the court addressed the vicarious liability issue.

In Majestic Realty Associates, Inc. v. Toti Construction Co., 30 N.J. 425, 149 A.2d 288 (1959), the supreme court stated the general rule that one who hires an independent contractor is not liable for the contractor's negligence. An exception exists when the work is inherently dangerous, can be "carried on safely only by the exercise of special skill and care, and which involves grave risk of danger to persons or property if negligently done." *Id.* at 435, 149 A.2d at 293

(quoting from RESTATEMENT OF TORTS § 835(b)). In such a case, the employer may not absolve himself of liability for the independent contractor's negligence. *Majestic Realty* had been concerned with the vicarious liability of a landowner whose contractor's negligent excavation work resulted in damage to adjacent property. The court recognized the inherent danger exception where there existed a high degree of harm to members of the public, adjoining proprietors of land, or other third parties.

Donch presented an issue of first impression in the state—whether the employee of an independent contractor can be included as an injured "member of the public" or "third party" in a vicarious liability suit based on the inherent danger exception. 165 N.J. Super. at 571, 398 A.2d at 927. The court held that the inherent danger exception cannot be extended to employees of an independent contractor. *Id.* at 575, 398 A.2d at 929. A general contractor who sublets work relinquishes the right of control and direction over the manner in which the work shall be done, and exercises supervisory powers only to the extent that the subcontractor's performance is ensured. The court went on to say that only the subcontractor has the duty to protect its employees from the very hazards that arise from performance of the contracted work. *Id.* at 573–74, 398 A.2d at 928. The general contractor can safely assume that the subcontractor and its employees are possessed of sufficient skill to recognize the degree of danger involved and to adjust their methods of work accordingly.

An extension of the inherent danger exception would also frustrate the intended operation of the workers' compensation system by allowing the injured employee both a compensation award and a right of action based on vicarious liability. The legislature, in creating the compensation system, assured a single and sufficient employee remedy. Since the insurance policy out of which the compensation is to be paid is carried by the worker's own employer, it is unnecessary to hold the general contractor liable because insurance costs will be included by the subcontractor in its contract price. The compensation is ultimately borne by the general contractor.

R.J.K.	E.S.N.	B.D.S.
J.A.K.	D.J.O.	S.A.T.