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ARTICLE AND COMMENT: A Brief Discussion of Charitable and Public Interest Standing in New Jersey

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Author: By ***Bruce*** I. ***Afran*** [1]

Text

[*144] The great standard for the right to litigate is nexus, the connection of the litigant to the subject at risk. In the commercial context, traditional standing demands true nexus, not one that arises out of interest, concern or public consciousness; nexus must connect factually to the remedy the plaintiff seeks, demonstrating concrete or discernible injury. [2]In the context of actions against public charities, or in matters of public importance, an emerging trend, led by New Jersey, recognizes broader standing, particularly where the public interest is paramount in the enterprise.

This article will discuss New Jersey's doctrine of liberal and broad standing in actions as to public charities or non-profits or in commercial contexts that invoke the public interest.

The first part of this article consists of a general discussion of commercial standing using the federal model. Parts II, III and IV address the emerging trend of broader standing in charitable enterprise actions, as reflected in New Jersey's liberal public policy. Part V addresses a corollary doctrine under which New Jersey will set aside private commercial exculpatory clauses that invoke issues of public concern.

I. A BRIEF SUMMARY OF COMMERCIAL STANDING DOCTRINE

Traditional standing doctrine serves the commercial economy by restricting the right to litigate to parties representing interests that focus the issues and allow a court to home in on a question of law cabined by a discernible factual record. A commercial litigant's interest ordinarily **[*145]** must connect empirically to the subject of the action; the commercial litigator may not reflect mere political, cultural or ideological commitment. Commercial standing is a lens that focuses the law, a stylus that sharpens the facts.

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[1] Adjunct Professor of Law, Rutgers Law School, where he teaches First Amendment law and the seminar in Political and Corporate Corruption Law, with a private practice focusing on public interest and constitutional litigation.

[2] *See* Flast v. Cohen, 392 U.S. 83, 102 (1968) (explaining how Nexus is generally understood as "a logical link" between the plaintiff and the claimed harm or infringement); *see also* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 287 (1992) (citing Sedima v. Imrex Co., 473 U.S. 479, 497 (1985)) (opining that "nexus" is "mandatory legalese for 'connection.'").

In a political and legal system comprised, in substantial part, of activists -- representatives of causes answerable to no external source of control -- weak standing doctrine would enable ideological and non-fact-based commercial litigation. In such a milieu, opponents of a corporation or industry could force adjudication of business practices and policies without any party claiming true injury or any direct interest in the business. A legal environment embracing weak commercial standing would empower such ideologically-motivated plaintiffs -- not traditional injured parties -- to seek judicial findings on policy questions left unfocused by the lens of nexus.

Lujan v. Defenders of Wildlife is perhaps the strongest example of the Supreme Court's reluctance to recognize ideologically-based standing. [3]As Circuit Judge McKeague in the Sixth Circuit has noted, [4] *Lujan* rejected abstract standing in the form of "ecosystem nexus" under which standing would be bestowed on "any person who uses *any part* of a 'contiguous ecosystem' adversely affected by' a challenged activity regardless of geographic remoteness" and rejected "animal" or "vocational nexus," that would have allowed "'anyone who has an interest in studying or seeing endangered animals' to sue over wrongdoing affecting those animals." [5] *Lujan* rejected ideological standing or standing directed to the resolution of broad cultural or political objectives, even in an environmental action against the government.

In this same way, in a commercial litigation environment with no ideological limits to judicial access, remedies would be virtually unbounded: the activist-litigant could sue Exxon-Mobil **[*146]** for a judgment that it contributes to global warming by its failure to invest adequately in electric vehicle technology; public companies could be sued to limit the earnings power of CEO's to reduce income inequality; technology companies such as Apple, Inc. could be judicially targeted to contribute to the cost of affordable housing in the San Francisco Bay Area. Each of these fields are represented by interest groups that can raise large legal defense funds privately or through crowd-funding, motivated by ideology -- not direct or redressable injury. Well-financed public interest advocates may certainly be able to counter the financial strength of the public corporation but this same power, unchained, will lead to arbitrary claims not focused by known or predictable injury. [6]Such cases would ask the court to adjudicate without the lens of nexus.

But why not broad commercial standing? Why not invest the court with the power of commercial policy determination rather than demanding the empiricism of redressable wrong? Why bar interest groups from the adjudicatory function simply because they represent ideological goals but not actual injury? Why not make use of the judicial skill (and power) to redress policy left unaddressed by the political branches? To ask these questions is to answer: redress without injury is, in its essence, an advisory ruling on policy questions, long barred under centuries-old doctrine. [7]One can readily imagine the enormity of a judicial caseload in a broad standing regimen within an activist society; we can infer the arbitrary nature of judicial attack on industries by

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3 *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)*.

4 *Mosley v. Kohl's Dep't Stores, Inc., 942 F.3d 752, 766 (6th Cir. 2019)* (McKeague, J., dissenting).

5 *Id.* (citing *Lujan, 504 U.S. at 565-66*).

6 *See Lujan, 504 U.S. at 580-81* (Kennedy, J., concurring). Justice Kennedy has noted the purpose of the "concrete injury" requirement is to identify, both for the court and the public, just who is seeking relief, a determination necessarily measured by the interest they claim in the matter under adjudication: "it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions." *Id.*

7 *See Princeton University v. Schmid, 455 U.S. 100, 102 (1982)* ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us.").

[*147] litigants without a stake in the action other than their generalized human interest. Legal uncertainty is the only wage of such standing. [8]

The leading example of the structural limitation that bars advisory rulings can be seen in *Flast v. Cohen* where the Supreme Court noted that the "case or controversy" requirement "embodies both the standing and political question doctrines". [9] *Flast* recognized taxpayer standing in the context of the plaintiff's particular grievance that the use of federal funds to support religious schools exceeded Congress's taxing and spending power; the plaintiffs in *Flast* were careful not to premise their standing on the claim that the governmental policy caused their taxes to increase. [10]

Schlesinger v. Reservist Committee to Stop the War later applied the distinction raised in *Flast* to bar a right of action by army reservists who challenged the right of members of Congress to hold commissions under the Incompatibility Clause. [11]Holding that the reservists were merely asserting a generalized grievance, the Court in *Schlesinger* dismissed their claims for want of an injury-in-fact. In other words, the reservists, who opposed the Vietnam War, were using the Incompatibility Clause to force a *policy*-based discussion, extending political dialogue into the judicial realm.

[*148] In *Elk Grove Unified School District* v. *Newdow*, the Court directly rejected "generalized" grievances against a political policy as a basis for standing. Dr. Newdow sought to bar his child's school district from using the Pledge of Allegiance with its references to "under God" as an infringement of the child's First Amendment rights. The Court rejected Newdow's right of action on the ground that Newdow (who was also an attorney) lacked standing because he did not have legal custody of his child. The Court in *Newdow* reasoned that because he was asserting the rights of another person, his cause of action breached the political/judicial barrier, i.e., "the rule barring adjudication of generalized grievances more appropriately addressed in the representative [i.e., political] branches..." [12]We can readily see from *Newdow* and *Schlesinger* that standing will not be recognized to further a political debate through the federal courts, whether it concerns a commercial or public interest matter.

But the *Flast* doctrine allows commercial standing where the issue touches upon national commercial policy if the plaintiff can identify a redressable harm. In *Association of Data Processing Organizations, Inc. v. Camp,* a consortium of data processors challenged the Comptroller of the Currency's decision to allow banking service

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8 *See* Sierra Club v. Morton, 405 U.S. 727 (1972). The Supreme Court has recognized the limitation of public interest standing to claims of discrete non-economic injuries is necessary to prevent such jurisdictional chaos. *Id.* In *Sierra Club*, the Court held that "palpable economic injuries", id. at 733, are traditionally cognizable in challenging federal agency action but as to "injury of a noneconomic nature", id. at 734, there must still be a clear relationship of the party, through some fact-based injury, to the challenged act, noting that mere public or "special interest" will not suffice: "if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so." Id. at 739-40.

9 *See* Flast v. Cohen, 392 U.S. 83, 95 (1968).

10 Id. at 102-03.

11 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

12 Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984). While *Newdow* could be criticized for allowing the Court to avoid an easy but controversial constitutional issue, a decision that would have challenged decades of public acceptance of the word "God" in the Pledge, the decision has the salutary benefit of enhancing the barrier between the judicial and political question. Since he had no status as the legal guardian of his child, Newdow was not asserting the rights of an aggrieved person but was, in reality, seeking to force his own political view into court. In one sense, of course, *Newdow* begged the question: had Dr. Newdow been the legal guardian of his child, the Court could not have avoided the claim on standing issues.

companies to offer data processing services to their bank clients. The Supreme Court held that the competitors, by their future loss of business from the Comptroller's administrative decision, demonstrated "injury in fact, economic or otherwise", satisfying the Article III demand, not merely a generalized **[*149]** grievance. [13] *Association of Data Processing Organizations* has emerged as a decision that limits standing to those plaintiffs whose injuries "fall within the zone of interests protected by the law invoked." [14]

As an analogue to the narrow standing of the public interest activist -- i.e., the litigant who would sue ExxonMobil on a "global warming" theory of action -- the business judgment rule limits another form of commercial attack: the business challenge by the activist shareholder. Generally under business judgment doctrine, decision making of a private corporation - whether publicly traded or not - is immune from judicial challenge. The activist shareholder who would challenge board or executive level commercial decisions runs up against the business judgment rule's doctrinal bar against interference in the affairs of private business *even from a shareholderowner of the company*. [15]

[*150] Shareholder and public interest activism certainly have a valued and storied role in corporate democracy. [16]As one commentator has noted, shareholder activism is on the rise and presents a formidable challenge to management. [17]But activist litigation against corporate interests has a dismal record of success, as should be the case under any conventional view of the business judgment rule. One commentator on activist litigation has noted, "All climate nuisance suits have been defeated, with courts finding no federal common law of nuisance in this area". [18]

A brief review of such cases demonstrates the prudential quality of the standing doctrine as to activist commercial litigation. [19]In *Comer v. Murphy Oil USA I*, [20]plaintiffs, a coalition of environmental activists sought damages against an array of oil producers on the ground that fossil fuel emissions contributed to the intensity of Hurricane Katrina, a claim that was eventually dismissed by the Fifth Circuit on standing grounds. In *Native Village*

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[13] *See* Ass'n of Data Processing Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970). In *Camp*, the Court recognized the commercial injury alleged from the Comptroller's decision to allow banks to provide the same type of data-processing services the plaintiffs' had been providing: "[t]he petitioners not only allege that competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners, they also allege that respondent American National Bank & Trust Company was performing or preparing to perform such services for two customers for whom petitioner Data Systems, Inc., had previously agreed or negotiated to perform such services." *Id.*

[14] *Cf.* Allen, 468 U.S. at 751 (noting that "generalized" standing is not available in cases where parents of black school children challenged IRS regulations as to tax exemption for private schools).

[15] *See, e.g.*, ***Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1162 (10th Cir. 2013)*** (quoting Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990)) ("[C]ourts generally apply the 'shareholder-standing rule,' which 'prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment.'"); *see also* Gladstone Realtors v. Bellwood, 441 U.S. 91, 100 (1979) (same); Warth v. Seldin, 422 U.S. 490, 499-500 (1975) (discussing how prudential considerations bar standing based on a third person's rights). Shareholder activist standing is generally barred both by the business judgment rule that prohibits interference in the ordinary business decisions of management and by the tautological construct that a shareholder seeking to endorse his own views is acting separately from the company and is, in essence, a third person who lacks commercial standing.

[16] Tauna M. Szymanski, *Regulatory Issues and Strategies Affecting the Multinational Company*, ROCKY MOUNTAIN MINERAL LAW FOUNDATION ANNUAL AND SPECIAL INSTITUTES, Jan. 2015, at No. 1 Part 11, 11-15 at n. 65-85 [hereinafter Szymanski, *Rocky Mountain*] (discussing recent history of shareholder pressure on corporate boards for fossil fuel divestment and related measures). Activist pressure on the corporate board *is* what shareholders are entitled to do, i.e., use their presence to force corporate change within the shareholders' meeting, albeit with limited success thus far.

of Kivalina v. ExxonMobil Corp., [21] an Innuit community similarly sought damages against oil producers on the theory that increasing global temperatures caused arctic sea ice losses that exposed their shorelines to future erosion creating an anticipated need for the tribal nation to relocate. The Kivalina community sued **[*151]** 24 energy, oil and utility companies on a nuisance claim but, here, again, the action was dismissed; this time on ground that the Clean Air Act supplanted any common law right of action. [22]

In rejecting these claims, the District Court had described the Tribal Nation's assertions in such broad terms that any judicial review would amount to pure policymaking:

> "Plaintiffs' global warming claim is based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere."* [23]

Yet, despite this fairly dismal record of success, climate change litigation has emerged into a growing field of international litigation and scholarly attention, [24] but still without any success in purely conventional litigation contexts.

Narrow commercial standing thus seeks orderly maintenance of the judicial system, resolving business disputes efficiently and allowing the courts to adjudicate with reasonable and articulable standards, as noted in *Baker v. Carr's* second and third prongs that require the reviewing court to consider whether there is "a lack of judicially discoverable and manageable standards" and if a decision is impossible "without an initial policy determination of a kind clearly for nonjudicial discretion.'" [25] A "Bleak House" run of 30 years' litigation is antithetical to economic growth and wealth creation. [26]

Viewed in this way, standing doctrine promotes judicial efficiency that is fundamental to the modern industrial economy; by barring the non-nexus plaintiff from pursuing policy-based **[*152]** remedies in commercial settings,

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[17] Benjamin A. Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise, 62 ADMIN. L. REV. 1127, 1188 (2020)* ("Recently, shareholder activism has been on the rise. Activist investors, such as hedge funds and pension plans, have mobilized to exert even greater control, often to the chagrin of management, by initiating proxies on business direction initiatives--issues that are traditionally reserved for boards and managers. Few scholars dispute that shareholders have a right to use the proxy process, though controversy exists as to whether those rights should be expanded or limited.").

[18] Szymanski, *Rocky Mountain, supra* note 16, § II.

[19] *Id.*

[20] Comer v. Murphy Oil USA I, No. 05-436, 2007 WL 6942285, at *1 (S.D. Miss. Aug. 30, 2007), *rev'd, 585 F.3d 855 (5th Cir. 2009)*, *reh'g granted [denied], 598 F.3d 208 (5th Cir. 2010)*, *appeal dismissed, 607 F.3d 1049 (5th Cir. 2010)*.

[21] *Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012)*, *cert. denied*, ***133 S. Ct. 2390 (2013)***.

[22] The author acknowledges Tauna Szymanski of the *Rocky Mountain Mineral Law Foundation Annual and Special Institutes, supra,* note 16, for collating the cases referenced at supra, notes 20 and 21.

[23] *Native Village of Kivalina v. Exxon Mobil Corp., 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009)*.

[24] Jacqueline Peel and Jolene Lin, *Transnational Climate Litigation: The Contribution of The Global South, 113 A.J.I.L. 679, 686-700 (2019)*.

[25] *See Kivalina, 696 F.3d at 873* (citing *Wang v. Masaitis, 416 F.3d 992, 996 (9th Cir. 2005)* (quoting ***Goldwater v. Carter, 444 U.S. 996, 999 (1979))*** (quoting *Baker v. Carr, 369 U.S. 186, 210 (1962)))*.

[26] Charles Dickens's "Bleak House" famously centered around a fictional estate litigation, Jarndyce v. Jarndyce, that, after 30 years, was terminated when the Court concluded the estate assets had been consumed by legal fees. Dickens postulated amused and cynical barristers in the closing scene in court.

or governmental acts as to commercial interests, the judicial system enables the commercial economy to move forward with a minimum of legal instability.

In a very real sense, limited or narrow commercial standing enhances the capitalist system by enabling prompt resolution of business disputes by facilitating only cases where the parties have the interest and stake to focus the issues to a practical resolution. In a similar vein, the business judgment rule limits the power of activist shareholders for adjudication over garden variety internal disputes.

II. NEW JERSEY'S DOCTRINE OF LIBERALITY IN CHARITABLE AND PUBLIC STANDING.

Weighed against the narrow conception of commercial standing, is the broader question of standing in the charitable context led by New Jersey's liberal treatment of litigation challenges to charitable actions and public interest matters. In New Jersey, standing as to publicly regulated charities, or in matters of great public importance, is to be applied broadly and liberally. New Jersey has long recognized that standing to challenge an abandonment, wasting, mismanagement or loss of the charitable asset or a violation of the donative intent goes beyond those persons who are intended beneficiaries or who have a traditional "special interest" in a charity or its charitable purposes. This doctrine dispenses with the ordinary factual nexus or direct injury traditionally required for standing in commercial cases. Under the New Jersey doctrine such standing is an *independent* right under common law in matters of public concern and is to be applied broadly and liberally. [27]

[*153] For example, in *Crane v. Morristown School Foundation* [28] an alumni organization had standing to block a federal receiver's decision to use the school's endowment to pay creditors.

While alumni ordinarily would not have standing to object to the management of a private charity, *Crane* found that because management's diversion of the trust assets was not within the school's intended charitable purposes the interested alumni would have standing to object to the diversion or wastage even if they could not show direct nexus or injury. *Crane* holds that a court of equity has broad jurisdiction over a charitable trust:

> *"If a trust is contemplated and endowed with funds from any source, for a general public purpose, it will be regulated and controlled by a court of equity, upon proceedings instituted before it.*" Perry Trusts 1199. This is not a case where the trustees of the school had attempted to place property, by their own act, out of the reach of their creditors (*Magie v. German Evangelical Church, 13 N.J. Eq. 77*; affirmed, *15 N.J. Eq. 500*), *but is a case where donations received for the definite purpose of increasing the endowment fund were set aside for that very purpose* [i.e., to illegally pay creditors]. [29]

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[27] New Jersey's broad view is certainly at odds with that of many states' more restrictive policy as to charitable standing, most frequently brought out in the context of school and university challenges. *See, e.g., In re Milton Hershey School, 590 Pa. 35, 42 (2006)*. In *Hershey School*, former students of a private secondary school, organized into an alumni association, challenged the school's administration of trust funds. *Id.* In rejecting the alumni association's standing, the Pennsylvania court noted that standing as to a charitable enterprise will generally require a "'substantial, direct, and immediate interest' in the subject matter of the litigation," a standard vastly different from New Jersey's liberal view of public interest standing. *Id. See also Steeneck v. University of Bridgeport, 668 A.2d 688 (Conn. 1995)*. Steeneck presents the interesting circumstance in which the Unification Church, a religious organization then-operated by Rev. Moon, invested in a struggling university, gained seats on the board and later relinquished control, but was challenged by a life-trustee who objected to the injection of religious control. *Id.* Like its Pennsylvania counterpart, the Connecticut court rejected the challenge on the ground that a life-trustee, like alumni and donors, lacks capacity to challenge the administrations' management or business decisions; *Carl J. Herzog Foundation, Inc. v. University of Bridgeport, 699 A.2d 995, 998 (Conn. 1997)* (same); *Ad Hoc Comm of Baruch Black & Hispanic Ass'n v. Bernard M. Baruch Coll., 726 F. Supp. 522, 524, n. 4 (S.D.N.Y. 1989)* (discussing how alumni groups lack standing in action against their former college because they "lack a concrete interest in those administrative practices.").

[28] *Crane v. Morristown School Foundation, 120 N.J. Eq. 583 (E. & A. 1936)*.

[29] *Id. at 588* (emphasis added).

What is clear from *Crane* is that the charitable purpose flows *with the charitable asset*, remains with it and that parties interested generally in the charity *will* have standing to block its diversion, misuse or wastage.

[*154] In *Paterson v. Paterson General Hospital*, [30] the Chancery Division recognized that where the State chooses to regulate charities, as it does hospitals and colleges, a strong public interest arises in the disposition of the charitable property, giving rise to liberal and broad citizen standing, even where the Attorney General could impose administrative oversight:

> "Charities in this State, whether or not incorporated, are, in general, only subject to the supervision of the Attorney General. The manifold duties of this office make readily understandable the fact that such supervision is necessarily sporadic. In England the Board of Charity Commissioners, created pursuant to the Charitable Trusts Act of 1853, 16 and 17 *Vict., c.* 137, has exercised some semblance of control over such organizations, but even this method of supervision has proven inadequate. See *Keeton, The Modern Law of Charities*, 175-195 (1962). The Charities Act of 1960, 8 and 9 *Eliz* II, *c.* 58, has sought to remedy these inadequacies. The whole problem of the limited extent of supervision of charities throughout the United States, with recommendations for improvement, is carefully considered in Karst, "The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility," 73 *Harv. L. Rev.* 433 (1960). *While public supervision of the administration of charities remains inadequate, a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly in the public interest.*" [31]

Paterson is instructive on the liberality of New Jersey's standing doctrine in public interest and charitable actions. In *Paterson*, standing was vested in the plaintiff for no reason other than that he was presumptively intended to receive medical services from the institution because he lived in the same town. *Paterson* broadens standing as to charities in its absence of any requirement that the resident had to be designated by the original grantor as an intended beneficiary or that he had ever *actually* received medical services: simply because he resided in the vicinity of the hospital "it was understood. . ." he had an interest in receiving its services. [32] His mere presence in the vicinity and *potential* to receive medical treatment was sufficient to invest him with a **[*155]** "special interest" in the hospital's future to maintain standing to challenge the board's decision to move the facility. [33]

Paterson, though a trial court decision, is widely viewed as placing New Jersey among the most liberal jurisdictions in standing as to actions challenging management of public charities and has been widely cited by commentators as a key decision in the liberalization of standing in clams of charitable mismanagement. [34] As one commentator said citing *Paterson*, New Jersey leads the nation in the liberalization of standing in actions alleging charitable waste:

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30 Paterson v. Paterson General Hospital, 97 N.J. Super. 514 (Ch. Div. 1967).

31 *Id.* at 527-28 (emphasis added).

32 *Id.* at 519.

33 *Id.*

34 *See, e.g.*, Joseph A. Schumpeter, *Developments in the Law -- Nonprofit Corporations: II. The Fiduciary Duties of Directors*, 105 HARV. L. REV. 1590, 1597, n. 41 (1992); Jennifer L. White, Note, *When It's OK To Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art To Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1058, n. 85 (1996); Alison M. Cody, *Success in New Jersey: Using the Charitable Trust Doctrine to Preserve Women's Reproductive Services when Hospitals Become Catholic*, 57 N.Y.U. ANN. SURV. AM. L. 323, 351-52 (2000); Wendy A. Lee, Note: *Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions Through Expanded Use of Cy Pres*, 34 SUFFOLK U. L. REV. 173, 192 n.156 (2000); John T. Gaubitz, In Memoriam, *Standing To Enforce Trusts: Renewing and Expanding Professor Gaubatz's 1984 Discussion of Settlor Enforcement*, 62 U. MIAMI L. REV. 713, 722 n. 49 (2008); Alina S. Ball, S *ocial Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 941, n. 94 (2016) (citing Paterson, 235 A.2d at 495) (using *Paterson* as basis for citizens' standing despite Attorney General's oversight).

> New Jersey is an example of a state whose common law interprets "special interest" broadly. Over thirty years ago, a New Jersey case established this liberal standing rule." [35]

Also citing *Paterson*, Restatement of Trusts (Third) accepts that New Jersey is now among those states recognizing the most liberal standing in charitable cases:

> At the "liberal" end of the spectrum are cases granting specialinterest standing to members of quite broad groups in circumstances in which a serious breach of trust is threatened, especially when the attorney general declines to bring suit or supports the trustee's position. [36]

[*156] New Jersey's public interest doctrine opens the door for broad standing in any matter, charitable or commercial, that touches in some material way upon an important public interest. [37]*Paterson's* liberal approach is only the latest in the train of New Jersey case law building to a liberal standing doctrine. [38]*Mills v. Davison*, an early decision, held that a donor had standing to resist diversion of a charitable asset from its religious purposes to a commercial creditor:

> "The defendant Mills, as the founder of the charity, has a standing to appear in court to restrain the diversion of the property donated from the charitable uses for which it was given." [39]

Although the court in *Mills* observed the plaintiff was a "founder" of the church, the decision did not hinge on any status unique to him and he was, in fact, only one of several donors, as the court noted. [40] *Mills* was simply noting that plaintiff's status as a founder gave him a credible interest in the outcome; that loose nexus is the fundamental basis of New Jersey's "special interest" charitable **[*157]** standing doctrine as distinct from states that require direct claims of injury by the public interest plaintiff. [41]

In matters of public interest only a "slight private interest" above that of the general interest is necessary to accord standing under the New Jersey doctrine. [42]New Jersey law has thus evolved from *Mills* or *Crane* in that no

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[35] Alison M. Cody, *Success in New Jersey: Using the Charitable Trust Doctrine to Preserve Women's Reproductive Services When Hospitals Become Catholic*, 57 N.Y.U. ANN. SURV. AM. L. 323, 351-52 (2000).

[36] RESTATEMENT (THIRD) OF TRUSTS § 94, cmt. g(1) (AM. LAW INST. 2019) (citing Paterson, 97 N.J. Super. at 527-28). *Paterson* thus departs from an older line of New Jersey cases, *see, e.g.*, Ludlam v. Higbee, 11 N.J. Eq. 342 (Ch. Div. 1857), requiring a close factual nexus to enable standing in actions challenging management of public charities.

[37] *See, e.g.*, Associates in Radiation Oncology, P.A. v. Siegel, 272 N.J. Super. 208, 212-13 (App. Div. 1994) ("[W]hen a case involves a substantial public interest, 'but slight private interest, added to and harmonizing with the public interest' is sufficient to give standing."); Salorio v. Glaser, 82 N.J. 482, 491 (1980) ("We have consistently held that in cases of great public interest, any 'slight additional private interest' will be sufficient to afford standing."); Terwilliger v. Graceland Memorial Park Asso., 59 N.J. Super. 205 (Ch. Div. 1960) (same).

[38] One recent Chancery Division decision questions whether *Paterson* has been accepted as persuasive authority because the New Jersey Supreme Court has not yet adopted the formulation in RESTATEMENT (THIRD) OF TRUSTS (AM. LAW INST. 2019). In an action by alumni, faculty and students challenging a proposed sale or move of Westminster Choir College, Vazquez, et al. v. Rider University (No. C-80-19; renumbered No. C-69-18, March 2, 2020) (N.J. Super. Ct. Ch. Div.), the Hon. Robert T. Lougy, P.J. Ch. (Mercer), held that *Paterson* would not override a 1944 Appellate Division decision in First Camden Bank & Trust Co. v. Hiram Lodge No. 81, Free Masons, 134 N.J. Eq. 303, 308 (Ch. 1944), *aff'd,* 135 N.J Eq. 505 (E. & A. 1944). In *First Camden*, the court looked to what may be described as an older formulation in RESTATEMENT (SECOND) TRUSTS relying upon the more limited trustee/beneficiary designation for standing. The author is counsel in the *Vazquez* matter and represents the alumni, students and faculty in that action.

[39] Mills v. Davison, 54 N.J. Eq. 659, 667 (E. & A. 1896) (cited in Leeds v. Harrison, 7 N.J. Super. 558 (Ch. Div. 1950)).

[40] *Id.*

[41] *See* text accompanying cases, *supra* note 27.

connection as donor or executor is necessary to achieve standing as long as the matter touches upon issues of "public importance". *Associates in Radiation Oncology, P.A. v. Siegel* is a good example of expanded standing where the matter invokes the public interest. [43] *Associates* concerned a challenge by a competitor to the state's grant of a radiology license to another medical practice, a decision that ordinarily would not accord jurisdiction to a member of the public, competitor or otherwise. Under New Jersey's evolution of public interest standing, plaintiffs need only possess a " *slight* additional private interest...to afford standing", [44]not a traditional factual nexus. So long as the plaintiff's position is seen as "harmonizing with the public interest", [45]an unrelated plaintiff (one without any true nexus) will have standing to challenge the diversion, misuse or wastage of the charitable asset or even a commercial arrangement such as grant of a certificate of need to a radiology practice, as long as the matter involves the public interest. [46]

[*158] *Howard Savings Institution v. Peep* expanded standing to strangers to the trust where no other party would exist to defend its original charitable purpose. In *Howard Savings*, an executor was permitted to appeal a Chancery decision that struck the words "Protestant" and "Gentile" from a scholarship fund at Amherst College for "deserving American born Protestant-Gentile boys". [47]

While an executor normally would have no standing to defend the grantor's intent and is, effectively, a stranger to the trust, New Jersey's Supreme Court held that he could challenge the change in scholarship terms because there would otherwise be no party to represent the interests of the future class of Protestant-Gentile boys whom the testator had initially sought to benefit:

> The interests of Protestant-Gentile boys who might qualify for a scholarship loan under the terms of the trust have been diluted or adversely affected by the judgment below. Neither the next-of-kin nor the board represent those interests; for both have taken a position contrary thereto. . . *Since Protestant-Gentile boys who might qualify for loan aid have been adversely affected by the judgment below and would otherwise be unheard, the executor may appeal on their behalf*. [48]

Howard Savings also rejected the argument that the Attorney General's common law duty to regulate such enterprises preempts private standing to challenge mismanagement or wastage of a charitable trust. Calling such arguments an "unrealistic assertion", the Supreme Court declared that private parties are a necessary corollary to state oversight:

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[42] *See* cases cited, *supra* note 37.

[43] *See* Associates in Radiation Oncology, P.A. v. Siegel, 272 N.J. Super. 208, 212-13 (App. Div. 1994).

[44] *See* Salorio v. Glaser, 82 N.J. 482, 491 (1980); *accord, Id.* (emphasis added).

[45] *See* Associates, 272 N.J. Super. at 208.

[46] New Jersey's modern doctrine plainly departs from the early decision in Ludlam, 11 N.J. Eq. at 342, and MacKenzie v. Trustees of Presbytery of Jersey City, 67 N.J. Eq. 652, 685-86 (E. & A. 1905) (rejecting executor's challenge to the disposition of the charitable fund on the ground that he was neither a trustee nor a beneficiary). Both *Ludlam* and *MacKenzie* tended to limit standing to those with a direct interest in the charitable enterprise; though both recognized an early incarnation of "special interest" standing, the "public interest" element did not truly enter New Jersey law until the 1960's with the decision in Howard Savings Institution v. Peep, 34 N.J. 494 (1961). *Cf.* First Camden Nat'l Bank & Trust Co. v. Wilentz, 129 N.J. Eq. 333 (Ch. 1941) (recognizing the apparent shift in focus from direct nexus to a broader public interest doctrine but holding that the action in that case was premature in that no concrete steps had yet been taken to divert the charitable asset).

[47] Howard Savings, 34 N.J. at 497-99.

[48] Id. at 500 (emphasis added).

> *The board argues that all unknown persons who might benefit under the trust are represented by the Attorney General. This is an unrealistic assertion.* The Attorney General represents the public interest in a charitable trust rather than a particular class of potential beneficiaries. Indeed, in the present case, the Attorney General did not adopt any position as to how the doctrine of *cy pres* should be applied, and declined to appeal from the judgment below on the ground that the general charitable interest and the divergent views with regard to that interest are adequately represented by the other counsel. [49]

[*159] In *Howard Savings*, the Attorney General joined Amherst College in demanding that the trust be modified to a non-discriminatory basis demonstrating that the Attorney General *alone* is *not* sufficient to represent all interests in a charity as her *public* interest in the trust necessarily differs from the *private* interests of the future beneficiaries, requiring third party standing or those future interests would "be unheard" and unadjudicated. In New Jersey, state oversight no longer trumps private standing as to charitable mismanagement.

In this remarkable set of decisions, New Jersey has evolved from a jurisdiction of narrow standing in charity or public interest litigation to recognizing broad citizen standing as an independent construct and as a direct supplement to the Attorney General's common law standing.

III. NEW JERSEY'S PUBLIC INTEREST KNOWLEDGE-BASED STANDING DOCTRINE

New Jersey has come to accept broad citizen standing where the private issue, commercial or charitable, reflects strongly upon an important public interest. *Associates in Radiation Oncology, P.A. v. Siegel* held that in a matter involving the public interest, as in authorizing a new radiation oncology facility without a certification of need, a competitor has standing to challenge the approval since otherwise no party would have the knowledge or interest to challenge a potential error by the State in authorizing the new facility:

> "[A] competitor may be the only entity with "'sufficient private interest in harmony with the public concern"' to bring errors in an administrative action to the court's attention. [50]Finally, we concluded that if a competitor did not have standing, no one would and "'the Commissioner's action . . . right or wrong, proper or arbitrary, [would take] on a conclusive character to the possible great detriment of the people as a whole."' [51]

[*160] In reaching this conclusion, *Associates* recognized the plaintiff's "'slight private interest, added to and harmonizing with the public interest' is sufficient to give standing."' [52]

Similarly, in *Terwilliger v. Graceland Memorial Park Asso.* a seller of cemetery markers was found to have standing to challenge a cemetery's sale of headstones in violation of its nonprofit charter even though the plaintiff was not a member or beneficiary of the cemetery association. *Terwilliger* reasoned that despite his lack of an interest in the charity, the plaintiff's standing would have to be recognized so a knowledgeable party could litigate the public question of an abuse of the charity's powers by entering the headstone business:

> The plaintiff here. . .occupies the position of a taxpayer and citizen and, as was said in *Hudson-Bergen County Retail Liquor Stores Ass'n v. Board of Com'rs of City of Hoboken, 135 N.J.L. 502 (E. & A. 1947)*, it takes but a slight private interest added to, and harmonizing with, the general public interest to warrant the

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[49] *Id.* (emphasis added).

[50] *Id. at 573* (quoting *Elizabeth Fed. Sav. and Loan Ass'n v. Howell, 24 N.J. 488, 501-02 (1957)*).

[51] *See Associates in Radiation Oncology, P.A. v. Siegel, 272 N.J. Super. 208, 212-13 (App. Div. 1994)*.

[52] *Id.* (quoting *Elizabeth Fed. Sav. and Loan Ass'n, 24 N.J. at 499*); *accord* Terwilliger v. Graceland Memorial Park Asso *., 59 N.J. Super. 205 (Ch. Div. 1960)*; *see also Salorio v. Glaser, 82 N.J. 482 (1980)*.

> retaining of a suit and the granting of appropriate relief, where matters of important public policy are involved. [53]

As these decisions show, even in commercial cases private parties with specialized knowledge -- the seller of headstones in *Terwilliger* or the competing oncology practice in *Associates* -- now have standing in matters of public importance; such standing is without *any* claim of injury or nexus. This innovation enables standing without a traditional claim of harm in matters of public importance so long as plaintiffs are not mere "interlopers or intermeddlers". [54]

People For Open Government v. Roberts expanded New Jersey law further, recognizing private party enforcement of an ordinance regulating campaign contributions. Plaintiffs in *People For Open Government* had no direct interest in the regulation, were not candidates for office, were **[*161]** not members of the governing body and could claim no injury from any political act by any person; the court held they could enforce the campaign finance rule simply because they had participated "in the successful effort to gather the signatures necessary to place the initiative petition on the ballot". [55]Not having been injured in any traditional manner, *People for Open Government* recognized the plaintiffs had "that slight additional private interest. . .coupled with the 'great public interest'" to enforce the law. [56]

Third parties *as a matter of law and independent right* in New Jersey have come to possess standing to challenge mismanagement, wastage or diversion of charitable assets or properties, particularly where these concern matters of substantial public importance. Standing in New Jersey is designed to provide the Court with ***adversarial*** parties -- not necessarily injured parties -- whose knowledge, interest and position can allow the Court to to get to the truth of the issues and maintain the integrity of the judicial process:

> "The 'essential purpose' of the standing doctrine in New Jersey is to 'assure that the invocation and exercise of judicial power in a given case are appropriate. Further, the relationship of plaintiffs to the subject matter of the litigation and to other parties must be such to generate confidence in the ability of the judicial process to get to the truth of the matter and in the integrity and soundness of the final adjudication. Also, the standing doctrine serves to fulfill the paramount judicial responsibility of a court to seek just and expeditious determinations on the ultimate merits of deserving controversies.'" [57]

What is required for standing in this liberalized jurisdictional world of public interest is not traditional harm or injury, but a party with the knowledge and familiarity with the charity and its mission, or the public interest at stake, to furnish the Court with the adversarial cast to reach the **[*162]** truth of the question of mismanagement, wastage or diversion of the charitable asset or the public interest question. [58]

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[53] *See* Terwilliger v. Graceland Memorial Park Asso., 59 N.J. Super. 205, 214-15 (Ch. Div. 1960); *see also* Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433 (1952).

[54] People For Open Government v. Roberts, 397 N.J. Super. 502, 511 (App. Div. 2008).

[55] Id. at 512.

[56] Id. at 511 (quoting Salorio, 82 N.J. 482 and N.J. Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 68 (1979)).

[57] Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 80 (App. Div. 2001) (quoting N.J. Chamber of Commerce, 82 N.J. 57 at 69).

[58] The doctrine really originates with the earlier decision in *Howard Savings* where the court accepted the executor's standing since otherwise no one would exist to make such a challenge and represent the interest of the future students. *See* Howard Savings Institution v. Peep, 34 N.J. 494, 500 (1961); *see also* First Camden Bank & Trust Co. v. Hiram Lodge No. 81, Free Masons, 134 N.J. Eq. 303, 308 (Ch. 1944); Hagaman v. Bd. of Woodbridge, 117 N.J. Super. 446 (App. Div. 1971)

While decisional law in the field is somewhat infrequently encountered, a growing trend recognizes the New Jersey doctrine, epitomized by *Paterson,* as leading the path towards more liberal standing in charitable or public interest litigation. In *Jones v. Grant*, citing *Paterson*, the Alabama Supreme Court held that students, faculty and staff of a charitable educational establishment were persons with "special interest" in the charity to have standing to institute a class complaint suing the institution, its president and board of directors for misuse of federal and church funds. [59]Similarly, the Michigan Court of Appeals recognizes *Paterson* as leading the trend towards liberalizing standing in cases concerning charities and matters of substantial public interest:

> Thus, we concur in the trend, recognized by this Court, toward "substantially liberaliz[ing] the concept of standing so as to greatly reduce standing as a bar to litigation." [60]

IV. RECENT APPLICATION OF NEW JERSEY'S LIBERAL STANDING DOCTRINE TO A NON-PROFIT LITIGATION

In a recent decision applying New Jersey's standing doctrine to a public interest litigation, the Chancery Division, in a decision in which this writer represented the plaintiffs, held that a college's current students have the "slight private interest" in its future to have standing to seek to **[*163]** bar the sale or move of the institution. In *Vazquez, et al. v. Rider University*[61]the Chancery court held that because of the "public importance" of higher education, students faced with the potential sale or loss of a school or its educational program, had sufficient interest to maintain standing, particularly in light of New Jersey's "liberal. . .threshold":

> "Given the liberal and low threshold to satisfy standing requirements, this Court concludes that the student Plaintiffs have standing to bring suit. . .Higher education is a matter of public importance. See *Shelton College v. State Bd. Of Educ., 48 N.J. 6501, 509 (1967)*, in which Plaintiffs, as students, have a 'slight private interest.' Plaintiffs are not 'interlopers or intermeddlers in this endeavor". [62]

Notably, the Chancery Division rejected arguments by the college that its students were "strangers" to the transaction and recognized that the loss of the educational program, the reason the students came to the institution, provided the "slight private interest" in a matter of "public importance" to invest the students with standing to challenge the non-profit's alleged deviation from its academic mission.

Judge Lougy's recognition in *Vazquez* of the students' standing, [63]based in large part on the reasoning in *People for Open Government* and the cases that followed, embraced the liberal standing doctrine in matters of public importance in which New Jersey has become a national leader. [64]

(recognizing standing to challenge mismanagement or wastage where the plaintiff has some "special interest" in the charitable foundation).

[59] *See* Jones v. Grant, 344 So. 2d 1210, 1211-12 (Ala. 1977) (citing Paterson v. Paterson General Hospital, 97 N.J. Super. 514 (Ch. Div. 1967)); *see also* Rhone v. Adams, 986 So. 2d 374 (Ala. 2007).

[60] Cent. United Methodist Church v. Estes-Palmer Found. (*In* Re Estes Estate), 207 Mich. App. 194, 204 (Mich. Ct. App. 1994) (citing Paterson, 97 N.J. Super. 514).

[61] *See* cases cited and accompanying text, *supra* note 38.

[62] *Id.; see also* Vazquez, et al. v. Rider University, No. C-80-19 (N.J. Super. Ct. Ch. Div.) (renumbered No. C-69-18, March 2, 2020). In the same decision, and for similar reasons, the trial judge also held that the current faculty had standing.

[63] *Vazquez*, No. C-29-18 at 19-20 (finding that the faculty had standing to pursue their claims).

[64] Judge Lougy declined to find for the students and faculty on the merits of their challenge, a matter that is on appeal, but the decision's recognition of New Jersey's liberal standing doctrine is directly in line with the emergence of a new standing construct for litigation against non-profits or commercial entities in matters of intense public importance, such as higher education. ***Shelton College v. State Bd. Of Educ., 48 N.J. 6501, 6509 (1967)***. Some cases address the importance of higher education as a matter of public policy. *See* Clayton v. Kervick, 59 N.J. 583, 596 (1971) (recognizing the need for "protection of the public interest in baccalaureate degrees."); Shelton College v. State Board of Education (Shelton I), 48 N.J. 501, 509

[*164] V. NEW JERSEY'S BAN ON PRIVATE EXCULPATORY CLAUSES THAT INVOKE PUBLIC INTEREST CONCERNS

As a corollary to its liberalizing policy on standing in charitable or commercial matters that touch on the public interest, New Jersey bars private commercial contractual provisions that exculpate a party from liability where such violate public policy or are contrary to the public interest. [65]Two decisions, *Chemical Bank of New Jersey Nat. Ass'n v. Bailey and McCarthy v. National Asso. for Stock Car Auto Racing, Inc.*, have made clear that private contracts will not be enforced where they are designed to shield a party from its own failure to perform a "positive duty" that "would adversely affect the public interest". [66]As one federal court has recognized, citing New Jersey caselaw, private contracts are disfavored where they "relieve one from liability for his own fault or wrong." [67]

[*165] Echoing the policy on charitable and public interest standing, no party may invoke its own private contract to shield itself from the effect of its own wrongdoing in a matter of public concern. [68]As with New Jersey's broad public standing doctrine, the critical factor is that private commercial clauses will *not* be enforced that "would adversely affect the public interest" [69]or shield a private party from responsibility for "a public duty". [70]

The principle has been applied in a wide variety of public interest matters where private clauses shielding liability have been held unenforceable. [71]Such doctrine has also been applied in cases in which a public charity seeks to shield itself from liability. [72]A private party's commercial rights, though fairly bargained for, will be preempted where their effect is "inconsistent with the public interest or detrimental to the common good." [73]

(1967) ("The public interest in higher education has been evident since medieval times.") (citing *Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 634, 4 L. Ed. 629, 658 (1819)* ("That education is an object of national concern, and a proper object of legislation, all admit.")); *Dixon v. Rutgers, 110 N.J. 432, 451 (1988)* (noting that "the public interest in maintaining a confidential peer review process that protects the university's academic freedom..."); *Association of New Jersey State College Faculties, Inc. v. Board of Higher Education, 112 N.J. Super. 237, 252 (Law Div. 1970)* (noting the public interest inherent in resolving a salary dispute between the public colleges and its faculty); *N.J. State Bd. of Higher Educ. v. Bd. of Dirs. of Shelton College (Shelton II), 90 N.J. 470, 484 (1982)* (noting that "the State's interest in ensuring educational standards and maintaining the integrity of the baccalaureate degree..."; *cf., Dixon*, 1210 N.J. at 448 (citing *State v. Schmid, 84 N.J. 535, 565-566 (1980))* ("The public interest in promoting higher education reflects the view that it 'perform[s] an essential social function . . .,' by promoting "the pursuit of truth, the discovery of new knowledge through scholarship and research, teaching and general development of students, and the transmission of knowledge and learning to society at large."); *In re Univ. of Med. & Dentistry of N.J., 144 N.J. 511, 533-35 (1996)* (recognizing that collective bargaining interests of union fall to greater need to protect academic freedom).

[65] *Chemical Bank of New Jersey Nat. Ass'n v. Bailey, 296 N.J. Super. 515, 527 (App. Div. 1997)* ("Courts. . . will not enforce an exculpatory clause if the party benefiting from exculpation is subject to a positive duty imposed by law or is imbued with a public trust, or if exculpation of the party would adversely affect the public interest."); *McCarthy v. National Asso. for Stock Car Auto Racing, Inc., 48 N.J. 539, 543 (1967)* (holding that a private racing contract waiving auto racing safety regulations violates public policy in a matter of public concern).

[66] *Chemical Bank, 296 N.J. Super. at 527*.

[67] Hallman v. Dover Downs, Inc., No. 85-*618 CMW, 1986 U.S. Dist. LEXIS 15708, *14 n.7 (D. Del. 1986)* (citing *McCarthy, 296 N.J. Super. at 543*).

[68] Multiple courts in New Jersey have recognized that no party can insulate itself from its own negligence or wrongdoing in matters of public concern or public regulation. In New Jersey, an exculpatory release will be enforced if (1) it does not adversely affect the public interest; (2) the exculpated party is not under a legal duty to perform; (3) it does not involve a public utility or common carrier; or (4) the contract does not grow out of unequal bargaining power or is otherwise unconscionable. *See Chemical Bank, 296 N.J. Super. 515 at 527*; *Tessler & Son, Inc. v. Sonitrol Sec. Sys. of N. New Jersey, Inc., 203 N.J. Super. 477, 482-83, 497 (App. Div. 1985)*; *Gershon v. Regency Diving Center, Inc., 368 N.J. Super. 237, 248 (App. Div. 2004)*.

[69] *See Chemical Bank, 296 N.J. Super. 515 at 527*.

[*166] New Jersey public policy is thus moving toward open standing in matters of public interest or charitable mismanagement or waste, or challenge to private commercial contracts that invoke matters of public importance while shielding a party's wrongdoing. In this way, even commercial contracts are cabined by public policy notions of fundamental fairness even where bargained for between equals.

CONCLUSION

New Jersey has emerged as the leading voice toward liberalization of standing in charitable and public interest litigation, particularly as to charitable enterprises and commercial actions that touch upon the public interest. In New Jersey, public policy now holds that any person or entity with such "special interest" or a "slight additional private interest" *will* have standing to challenge a charity's actions or a commercial enterprise's activities in matters of public importance *as a matter of independent right*. As this large body of case law shows, [74] third parties as a matter of law have standing to challenge mismanagement or diversion of charitable assets or properties, particularly where these concerns matters of public interest or commercial entities, such as in *Associates*, whose private acts touch heavily upon the public interest. In New Jersey such parties *will* have standing as a matter of independent right under common law, dispensing with the ordinary factual nexus or direct injury traditionally required for standing.

[*167] In other words, in cases invoking the public interest, standing in New Jersey has evolved from a doctrine of limitation to a doctrine of inclusion and empowerment. In this way innovation enters law, not at the back end, but at the threshold.

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[70] *Hy-Grade Oil Co. v. New Jersey Bank, 138 N.J. Super. 112, 116-17 (App. Div. 1975)*.

[71] *See McCarthy*, 296 N.J. 539 (discussing how clauses shielding NASCAR from liability are void against public policy where auto racing safety regulations are a matter of great public importance); *Briarglen II Condominium Ass'n, Inc. v. Township of Freehold, 330 N.J. Super. 345, 355-56 (App. Div. 2000)* (holding that a municipality may not invoke its private developer's agreement to avoid duty to provide public services to residents of community association); *Hy-Grade Oil Co., 138 N.J. Super. at 116-17* (finding that a bank cannot use its private contract to shield itself from neglect in protecting deposits, "an important and necessary public service."); *Henningsen v. Bloomfield Motors, 32 N.J. 358, 397 (1960)* (holding a car dealer's private contract waiving liability for breach of implied warranties unenforceable as a matter of public policy); Collins v. Uniroyal, 126 N.J. Super *. 401, 406 (App. Div. 1973)*, *aff'd*, *64 N.J. 260 (1974)* (concluding that a clause limiting a seller of consumer good's liability solely to damages to the plaintiff was unconscionable); *Kuzmiak v. Brookchester, 33 N.J. Super. 575 (App. Div. 1955)* (determining that lease provisions that immunize against affirmative acts of negligence and violations of positive statutory duty void as against public policy).

[72] Tunkl v. Regents of University of Cal *., 60 Cal. 2d 92, 383 P.2d 441, 1963 Cal. LEXIS 226 (1963)*; *Mayfair Fabrics v. Henley, 48 N.J. 483, 487-88 (1967)* (citing *Tunkl, 60 Cal 2d at 92*).

[73] *See Sacks Realty Co., Inc. v. Shore, 317 N.J. Super. 258, 269 (App. Div. 1998)*; *see also* Saxon Constr. & Management Corp. v. Masterclean of N.C., Inc *., 273 N.J. Super. 374, 377 (Law Div.1992)*, *aff'd, 273 N.J. Super. 231 (App. Div. 1992)* (finding a contractual provision unconscionable where it would reward the contractor for its own breach).

[74] *See People For Open Government v. Roberts, 397 N.J. Super. 502, 511 (App. Div. 2008)*; *Associates in Radiation Oncology, P.A. v. Siegel, 272 N.J. Super. 208, 212-13 (App. Div. 1994)*; *Paterson v. Paterson General Hospital, 97 N.J. Super. 514, 528 (Ch. Div. 1967)* (holding that a resident in a municipality where a hospital is located had standing to bring action challenging alleged illegal diversion of the hospital asset); *Mills v. Davison, 54 N.J. Eq. 659, 667 (E. & A. 1896)* (finding that a donor to charity had standing to assert that assets were to be illegally diverted to pay creditors instead of for the intended religious purpose); *cf*. *Leeds v. Harrison, 7 N.J. Super. 558 (Ch. Div. 1950)* (recognizing that a private citizen with a "special interest" will have a right to enforce public interests in a charity); *Howard Savings Institution v. Peep, 34 N.J. 494, 500 (1961)* (recognizing standing where executor was the only party available to challenge the administration by a university of trust funds).

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